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Pathological Racism, Chronic Racism & Targeted Universalism

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Pathological Racism, Chronic Racism & Targeted Universalism

Guy-Uriel E. Charles* & Luis Fuentes-Rohwer**

Race and law scholars almost uniformly prefer antisubordination to anticlassification as the best way to understand and adjudicate racism. In this short Essay, we explore whether the antisubordination framework is sufficiently capacious to meet our present demands for racial justice. We argue that the antisubordination approach relies on a particular conception of racism, which we call pathological racism, that limits its capacity for addressing the fundamental restructuring that racial justice requires. We suggest, in a manner that might be viewed as counterintuitive, that targeted universalist remedies might be more effective to address long term racial inequality but might also be the more radical approach to addressing racial discrimination.

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INTRODUCTION

More than ten years ago, in a pathbreaking article, the iconic equality scholar, John Powell—in a tribute to another legendary equality scholar, John Calmore—observed in the course of reviewing the state of the racial justice scholarship, “we arrive at a vista within which race remains a central organizing theme of American society, but in which our understanding of racism is inadequate to the task of addressing it.”¹ Professor Powell used the occasion and the insights that he derived from Professor Calmore’s work to express the inadequacies of the then-dominant theories of racism in the academy. “The older notions of individual and institutional racism,” Professor Powell noted, “while still relevant, cannot capture the important structural dynamics that shape the lives of people of color today.”² Professor Powell went on to propose “a structural model for conceptualizing racism in its advanced, contemporary form that will help us to realize both an economically and racially just society.”³

Professor Powell is among an impressive group of racial justice scholars who have contributed to a robust legal literature that has pushed back against what these scholars view as the fundamental failures of the Supreme Court’s race jurisprudence, a jurisprudence that is often described as using an anticlassification framework to resolve racial equality claims. The anticlassification framework essentially defines racism as government behavior—often referred to as state action—that categorizes individuals on the basis of race, or state action that is motivated by race.⁴ Racial justice scholars have argued that this anticlassification approach is ill-suited to identify racism as it manifests itself in our society because the anticlassification approach is too individualistic, too attentive to the search for discriminatory intent, too preoccupied by colorblindness as a prescriptive and normative telos.⁵ Racial justice scholars have sought to reorient equality law and the Court’s racial justice jurisprudence away from anticlassification toward an approach that scholars have generally referred to as antisubordination.⁶

1. John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 793 (2008).

2. *Id.*

3. *Id.*

4. See *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993) (“Express racial classifications are immediately suspect because, [a]bsent searching judicial inquiry . . . , there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion))).

5. See Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477 (2006); Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 14 (2013).

6. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1403, 1404–05 (1991) (“[T]he antisubordination principle . . . can inform our law in a way

To the extent that there is a consensus, what we will refer to here as the racial equality consensus among racial justice scholars is the rejection of anticlassification—and its constituent parts: individualism, discriminatory intent, and raceblindness—as a way of understanding racism. At the same time, it is a wholehearted embrace of antistatutoryism—and its constituent parts: structuralism/institutionalism, discriminatory impact, and raceconsciousness—as the proper frame for adjudicating racial equality disputes. The racial equality consensus presupposes that if the Court’s racial justice jurisprudence eschewed anticlassification (and its individualism, discriminatory intent, and raceblindness) as an approach to racial equality in favor of antistatutoryism (and therefore structuralism/institutionalism, discriminatory impact, and raceconsciousness), the doctrine could more accurately address the manner in which racism manifests itself in our society. More specifically, and as we explain in Part I, racial justice scholars have generally viewed a structural/institutional approach as critical to the racial equality agenda and the pivotal component of the antistatutoryism approach. Consequently, racial justice scholars have called upon the Court to embrace a structural/institutional understanding of racism.

In this short Essay, building on the work of racial justice scholars and leveraging our expertise as scholars of both voting rights and race, we suggest that the current racial equality consensus, particularly its reliance on an antistatutoryism approach, is still incapable of meeting current demands for racial justice. The antistatutoryism approach owes too much to a particular conception of racism—what we call pathological racism—to do the work that racial justice scholars and activists demand in the twenty-first century. We will contend that pathological racism no longer describes the modal expression of racism in the twenty-first century. Racism is best understood as chronic and not pathological.⁷

A core animating assumption of pathological racism—therefore, of the antistatutoryism framework—is the evanescence of racism and the faith that racism can be eradicated with sufficient efforts. Racism is an abnormality, a deviation that can be fixed or cured. The antistatutoryism approach is therefore always haunted by an existential question: whether current remediation approaches, which are always viewed as a deviation from a moral or constitutional baseline, have fixed the problem and if they have not fixed the problem, how much longer will it take so that we can return to the proper moral or constitutional baseline.

By contrast, chronic racism operates on the assumption that racism is permanent. If racism is permanent, it is not sensible to ask whether current remedial efforts have eradicated racial discrimination. It is only sensible to ask

that is as principled and as disciplined as the ideas of property, equality, and due process that are our constitutional legacy.”).

7. For an extremely thoughtful approach advancing a similar argument, see Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235 (2016).

whether current remedial efforts represent the best that we can do to minimize racism's impact on our society.

Chronic racism, as a conception of racism, is not without its faults. It raises epistemic questions about particular manifestations of racism and it raises doubts about the futility of remedial efforts. In particular, if racism is permanent, why bother trying to contain it?⁸

But facing up to chronic racism also opens up new possibilities. Specifically, we suggest that racial justice scholars ought to consider, with renewed vigor, the possibilities for addressing racial inequality presented by universal remedies, particularly targeted universal remedies.⁹

We make two fundamental points in this Essay. First, we suggest that racial justice scholars should abandon the antistatutory approach; it has run its course. Instead, scholars should focus on the implications for policy, racial justice scholarship, and the Court's jurisprudence if we take seriously the claim that racism is chronic and permanent. Second, if racial justice scholars adopt chronic racism as the dominant conception of racism, we will also have to explore, with a renascent seriousness, the utility of universal remedies for addressing racial justice problems.

The Essay develops over six parts. Part I reviews the scholarship on structural/institutional racism and its call that the Court should employ a structural/institutional frame to address claims of racial justice. Part II uses the landmark voting rights case of *South Carolina v. Katzenbach* to show that the Court has in fact employed an antistatutory and structural approach in its Voting Rights Act (VRA) jurisprudence. Part III argues that *Katzenbach's* structural/institutional approach was justified under a particular conception of racism that we call pathological racism. Part IV uses *Shelby County v. Holder* to argue that the Court abandoned the structural/institutional approach because pathological racism has become a less compelling way to understand how racism manifests itself in American society. Part V explores a different way of thinking about racism, which we call chronic racism. This part also explains why a structural/institutional approach is hard to justify if chronic racism is the underlying conception of racism. Finally, Part VI suggests that racial justice scholars might alternatively consider universalist remedies to structural and institutional racism, particularly if they agree with us that chronic racism is the most accurate description of how racism operates in the American context. This

8. See *id.* at 1302–04 (arguing that “[e]xisting constitutional doctrine demands that we see racial discrimination as narrow, siloed, and time limited,” which leads to the question “whether law *can* do anything”).

9. Here, too, Professor John A. Powell has been at the forefront of this new approach. See, e.g., John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 685 (2009); John A. Powell, Stephen Menendian & Jason Reece, *The Importance of Targeted Universalism*, POVERTY & RACE, Mar.–Apr. 2009, <http://ceelo.org/wp-content/uploads/2018/08/The-Importance-of-Targeted-Universalism.pdf> [https://perma.cc/W9WZ-YMH8].

Part also suggests that universalist remedies are sometimes both the more radical and the more effective solution to structural and institutional racial harm.

I.

ANTICLASSIFICATION & ANTISUBORDINATION

This Part provides a brief overview of the two dominant approaches to racial justice: anticlassification and antisubordination. Racial justice scholars have long viewed the Court's traditional racial justice jurisprudence, which scholars have dubbed anticlassification jurisprudence, as too individualistic,¹⁰ too committed to colorblindness,¹¹ and too bound by the rigid ideology of formal equality to meet the needs of racial justice¹²—at least as most scholars of color understood the aims of racial justice.

In the standard doctrinal account of the anticlassification model, the government, which is the only actor of consequence in the model, cannot favor or disfavor an individual because of the individual's race. The government cannot classify on the basis of race, nor, according to the pathbreaking 1976 case of *Washington v. Davis* and the line of cases that followed in its wake, can the government's regulation be motivated by a purpose to engage in racial discrimination, even if the government's classification is racially neutral on its face.¹³

The anticlassification framework reflects a deep skepticism of race-based decision-making by the government because race is almost always an irrelevant criterion for choosing an individual for advantage or disadvantage. There is very little to gain and much to lose if the government is allowed to classify individuals by race or use race as a basis for decision-making. Race-based decision-making by the government is more than likely an expression of racial animus, which is prohibited by the Constitution's equality norms. If race-based decision-making by the government is more often than not illegitimate, it therefore follows that the solution, almost by definition, is to compel the government to ignore race when doling out benefits and burdens.

10. See, e.g., Sergio J. Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 588 (2008).

11. See, e.g., Lauren Sudeall Lucas, *Undoing Race? Reconciling Multiracial Identity with Equal Protection*, 102 CALIF. L. REV. 1243, 1272–73 (2014) (entirely removing race as a consideration and, as a result, “impugn[ing] affirmative action policies, . . . [while] legitimat[ing] facially neutral laws that have a disparate racial impact”).

12. See Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 541 (2018) (“An anticlassification approach (also known as antidifferentiation) focuses on formal equality and equal treatment of individuals.”); see also Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 963 (2012) (analyzing the limitations of anticlassification's emphasis on formal equality).

13. *Washington v. Davis*, 426 U.S. 229, 241 (1976); see *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979).

The anticlassification framework owes its relevance, and arguably its existence, to the Court's decision in *Brown v. Board of Education*.¹⁴ Antisubordination, by contrast is of later vintage. Between the late 1960s and mid-'70s, scholars began to articulate the distinction between what would eventually be identified as the anticlassification and antisubordination approaches. In 1967, political activist Stokely Carmichael, later known as Kwame Ture, and sociologist Charles Hamilton coined the term "institutional racism" to identify acts by the total white community against the Black community.¹⁵ In contrast, "individual racism" referenced acts by "individual [W]hites acting against individual [B]lacks."¹⁶ Thus, Ture and Hamilton not only juxtaposed the concept of individual racism against that of institutional racism, they also added another binary—overt versus covert.¹⁷

In 1976, legal scholar Owen Fiss more thoroughly developed the antisubordination theory of antidiscrimination in his influential article "Groups and the Equal Protection Clause."¹⁸ The article "inaugurated the antisubordination tradition in legal scholarship of the Second Reconstruction."¹⁹ The article also inaugurated the standard critiques of the Court's anticlassification doctrine. Fiss offered two major objections. First, he argued that the Court's traditional approach to interpreting the Equal Protection Clause "embodies a very limited conception of equality, one that is highly individualistic and confined to assessing the rationality of means."²⁰ Second, Fiss advanced a principle of equality "that takes a fuller account of social reality, and one that more clearly focuses the issues that must be decided in equal protection cases."²¹ Fiss then went on to articulate a theory that he called antidiscrimination but that scholars later identified as antisubordination:²² the Equal Protection Clause is violated when the government classifies in a manner that "aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group."²³ Fiss argued that "[i]t is from this perspective—one of a proscription against status-harm—that discriminatory state action should be viewed."²⁴

14. 347 U.S. 483 (1954). For an argument about the development of the anticlassification framework, its relationship to *Brown*, and how anticlassification is sometimes at peace and sometimes at war with antisubordination, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

15. KWAME TURE & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION* 4 (Vintage ed. 1992) (1967).

16. *Id.* at 4.

17. *Id.*

18. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 107 (1976).

19. Balkin & Siegel, *supra* note 6, at 9.

20. Fiss, *supra* note 18, at 108.

21. *Id.*

22. *See id.*

23. *Id.* at 157.

24. *Id.*

A few weeks after Fiss published his theory of equality that emphasized group disadvantage, the Court decided the case of *Washington v. Davis*.²⁵ If there is a poster child of the anticlassification model, it is certainly *Washington v. Davis*. For racial justice scholars, *Davis* is the poster child for much of what is wrong with the Court's race jurisprudence.²⁶ Indeed, one can think of the antidiscrimination project of the post-Civil Rights era as an extensive campaign against the standard of constitutional equality that the Court defined in *Davis*.

In *Davis*, Black plaintiffs filed suit alleging that a qualifying test administered to individuals applying for jobs as police officers in the District of Columbia was racially discriminatory in violation of the Due Process Clause of the Fifth Amendment.²⁷ The fundamental question in the case was whether administering a screening test that had a disproportionate negative impact on Black applicants violated constitutional norms of equality.²⁸

In an opinion for the Court, Justice White exclaimed that the “central purpose” of the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment “is the prevention of official conduct discriminating on the basis of race.”²⁹ White went on to declare “the basic equal protection principle,” which is “that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”³⁰ A law that is neutral on its face—that is a law that does not explicitly classify on the basis of race—is not unconstitutional even though it might have a disproportionate racial impact, unless the law was motivated by a discriminatory purpose. Justice White granted that disproportionate impact is relevant to the discriminatory purpose inquiry; disparate impact might be evidence of discriminatory purpose. But discriminatory impact standing alone is not unconstitutional; discriminatory purpose is the *sine qua non* of the constitutional inquiry.³¹

Starting with Fiss and in the wake of *Davis*, scholars of law and equality have generally understood that the American legal system generally reflects two primary understandings of equality: anticlassification and antisubordination, two

25. 426 U.S. 229 (1976).

26. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (asserting that “[m]inorities and civil rights advocates have been virtually unanimous in condemning *Davis* and its progeny” and siding with the critics); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 953 (1989) (calling the Court's holding in *Washington v. Davis* “problematic”).

27. *Davis*, 426 U.S. at 229.

28. See *id.*

29. *Id.* at 239.

30. *Id.* at 240.

31. See *id.* at 242.

theories that sometimes are in tension³² and sometimes operate symbiotically.³³ To some extent, anticlassification is an umbrella term that subsumes three particular elements: individualism, discriminatory intent, and raceblindness. Likewise, antisubordination also serves as a shorthand for three factors: structuralism/institutionalism, discriminatory impact, and raceconsciousness. These two understandings of equality is what Professor Khiara Bridges has aptly described as the “racial discrimination binary,”³⁴ in which antisubordination or anticlassification “constitute the universe of” possibilities.³⁵ This is true not just of the anticlassification and antisubordination binaries but of their constituent parts. Thus, individualism is positioned against structuralism/institutionalism. Discriminatory intent is pitted against discriminatory impact. And raceconsciousness is aligned against raceblindness.³⁶

II.

ANTISUBORDINATION & THE VOTING RIGHTS ACT

As a general matter, racial justice scholars characterize the Court’s racial justice jurisprudence as furthering the aims of either anticlassification or antisubordination. Between these two theories that form the racial discrimination binary, racial justice scholars have a clear preference for antisubordination over anticlassification. There is near-universal agreement among racial justice scholars that the anticlassification approach both misunderstands the manner in which racism operates in American society and is incapable of achieving the aims of racial justice. The plaint of racial justice scholars has been that the Court should abandon the anticlassification model in favor of antisubordination. For racial justice scholars, the only way for the Court’s jurisprudence to attack the White supremacist racial structure at its roots is for the Court to adopt an antisubordination approach.

Using the Voting Rights Act and *South Carolina v. Katzenbach* as an example, however, we show in this Part that the problem with the Court’s racial justice jurisprudence is not its failure to apply an antisubordination approach to achieving racial equality. It has been willing to do so. As we will argue elsewhere in this Essay, the problem is inherent in the theory of antisubordination itself.

32. Samuel R. Bagenstos, *Bottlenecks and Antidiscrimination Theory*, 93 TEX. L. REV. 415, 415 (2014) (reviewing JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014)) (“In American antidiscrimination theory, two positions [anticlassification and antisubordination] have competed for primacy.”).

33. Balkin & Siegel, *supra* note 6, at 10–11 (noting that “American civil rights jurisprudence vindicates both anticlassification and antisubordination commitments”).

34. Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65, 85 (2018).

35. *Id.*

36. See, e.g., Peter Edelman, *Where Race Meets Class: The 21st Century Civil Rights Agenda*, 12 GEO. J. POVERTY L. & POL’Y 1, 1 (2005).

The Voting Rights Act of 1965³⁷ is widely regarded as one of the most, if not the most, consequential civil rights statute ever passed by Congress. The Act was designed to address the Nation’s history of racial discrimination, particularly as it manifested itself in the South. The Act attempted to remedy racial discrimination—not from a traditional anticlassification approach but from an antistatutory one. As it was enacted in 1965, the Act contained a number of provisions, but four were particularly controversial.

First, the Act employed what its advocates referred to as a coverage formula to identify the jurisdictions with some of the worst history of racial discrimination. Under section 4(b) of the Act, the coverage formula, a jurisdiction would be subject to certain provisions of the Act if (a) it used a literacy test or similar test or device as a voting qualification and (b) less than 50 percent of its eligible voters were either registered to vote or voted in the 1964 presidential election.³⁸ Supporters of the Act referred to jurisdictions that met both of the section 4(b) criteria as “covered jurisdictions.” Second, section 4(a) of the Act prohibited covered jurisdictions from using literacy tests and similar devices as voting qualifications for a period of five years.³⁹

Third, under section 5 of the Act, covered jurisdictions were not allowed to implement new voting rules unless those rules were reviewed by federal authorities and federal authorities concluded that the new rules would not maintain racial discrimination.⁴⁰ Fourth, the VRA provided for federal examiners, both in covered and non-covered jurisdictions to prepare and maintain voting lists when the Attorney General had reasons to believe that these jurisdictions were engaged in racial discrimination in voting.⁴¹

In *South Carolina v. Katzenbach*,⁴² South Carolina argued that Congress did not have the constitutional authority to pass these most controversial provisions of the Act. In particular, South Carolina objected strongly to section 4(a) of the Act, which enjoined the State from enforcing its requirement that voters pass a literacy test as a precondition to voting.⁴³ South Carolina and its allies offered a number of constitutional arguments. But their main argument was that the Constitution granted the authority to the States to set voter qualifications, such as literacy tests, and not to Congress.⁴⁴ Therefore, they argued, Congress exceeded its authority by trying to stop the states from doing something they had a constitutional right to do.⁴⁵ South Carolina and its allies, by necessity, also

37. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

38. § 4(b), 79 Stat. at 438.

39. § 4(a), 79 Stat. at 438.

40. § 5, 79 Stat. at 439.

41. § 3(a), 79 Stat. at 437; § 7, 79 Stat. at 440.

42. 383 U.S. 301 (1966).

43. *Id.*

44. *Id.* at 323.

45. See Oral Argument at 00:05:06, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (No. 22-orig), https://www.oyez.org/cases/1965/22_orig [<https://perma.cc/F8WN-K25G>] (stating that “the

attacked the coverage formula on the ground that a jurisdiction's use of a prerequisite to voting or its low voter registration or turnout did not necessarily mean that a jurisdiction had engaged in racial discrimination.⁴⁶ South Carolina argued that Congress did not have proof that the State had engaged in racial discrimination and even if it did, Congress did not have the power to enact the coverage formula.⁴⁷ This is because, South Carolina argued, Congress has the power only to remedy violations of the Constitution, not to determine whether the Constitution has been violated. To the extent that the formula identified jurisdictions that were engaged in racial discrimination, Congress did not have the power to preclude those jurisdictions from using a test or device as prerequisite to voting because only courts have the constitutional authority to adjudicate constitutional violations.⁴⁸ Congress can only impose a remedy once a court has made a finding that the Constitution has been violated.⁴⁹

South Carolina's constitutional arguments were not frivolous, at least not *in toto*. In particular, South Carolina's objection that Congress was regulating in an area, voting qualifications, which the Constitution reserves to the states is supported by a long line of Supreme Court precedent. For example, just a few years before its decision in *Katzenbach*, in 1959, the Court decided *Lassiter v. Northampton County Board of Elections*,⁵⁰ in which it (rather easily) upheld North Carolina's literacy test against constitutional challenge. Quoting from *Guinn v. United States*,⁵¹ a case better known for striking down Oklahoma's grandfather clause but also upholding that State's literacy requirement, the Court stated that a literacy test is "but the exercise by the State of a lawful power vested in it not subject to our supervision."⁵² The Court in *Lassiter* then declared: "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised."⁵³ The Court cited two early twentieth-century cases and various provisions of the Constitution in support of the proposition that reasonable voting qualifications are completely within the bailiwick of the States.⁵⁴

Fifteenth Amendment gives Congress no power to suspend lawful reasonable voter qualification proscriptions of the States").

46. See *id.* at 00:23:52 ("What Congress has really said by picking these factors is that, South Carolina, if you have a literacy test, if you have a lot of illiterates, you're bound to be guilty of racial discrimination.").

47. See Brief of the Plaintiff, *Katzenbach*, 383 U.S. 301 (1965) (No. 22), 1965 WL 130083.

48. *Id.* at 325.

49. See Oral Argument, *supra* note 45, at 00:41:36 ("The Fifteenth Amendment power is the power to enforce by legislature. We submit that this section constitute [*sic*] a congressional adjudication . . .").

50. 360 U.S. 45, 54 (1959).

51. 238 U.S. 347 (1915).

52. *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 50 (1959) (quoting *Guinn v. United States*, 238 U.S. 347, 366 (1915)).

53. *Id.*

54. *Id.* at 50–51.

Though the *Lassiter* majority conceded that a State may not require its voters to comply with “any standard” the State desires, it nevertheless reasoned that “there is wide scope for exercise of its jurisdiction.”⁵⁵ The Court explicitly noted that literacy tests, residency requirements, age restrictions, and exclusions for criminal convictions are easily within a State’s purview.⁵⁶ The Court was, however, very clear that literacy tests are unconstitutional if they are used to engage in racial discrimination or if they are designed to facilitate racial discrimination.⁵⁷ But where literacy tests are employed simply “to promote intelligent use of the ballot,” they are fully within the State’s discretion.⁵⁸ The Court then upheld North Carolina’s literacy test, concluding that there was no evidence that it was used to discriminate on the basis of race.⁵⁹

Relying upon *Lassiter*, among many other cases, South Carolina was on firm ground in *Katzenbach* when it argued that it was well within its rights to implement a literacy test as prerequisite to voting. Of course, South Carolina conceded that it did not have a right to use literacy tests to discriminate against Black voters and it objected strenuously that it did so.⁶⁰ It argued that voter turnout was low in the State because 20 percent of citizens are illiterate.⁶¹ Moreover, it continued to stress that Congress did not have any evidence that it had used its literacy test to discriminate. When the Justices asked Attorney General Katzenbach at oral argument whether the federal government had contemporary evidence that South Carolina was using its literacy test to discriminate, Katzenbach conceded that the federal government did not have any such direct evidence.⁶²

In the dialect of racial justice scholars, South Carolina was objecting to the anticlassification orientation of the VRA. From the standpoint of formalism and separation of powers, the VRA was in fact unusual. South Carolina was not off base when it complained that Congress usurped the judiciary’s function through the coverage formula, which conclusively determined that certain jurisdictions were violating the Constitution.⁶³

55. *Id.* at 51.

56. *Id.* at 50–51.

57. *See id.* at 53.

58. *Id.* at 51.

59. *Id.* at 53–54.

60. *See* Oral Argument, *supra* note 45, at 00:01:25 (“We believe that every man, white or black, . . . who possesses the reasonable qualifications proscribed by State should be permitted to vote.”).

61. *See id.* at 00:22:39–23:19 (“20% of our adult population is illiterate. . . . [A]ny state that has a large percent of illiterates and the literacy test that keeps them from voting, is always going to have a smaller percent of its population registered and a smaller percent that can vote . . . than a state either which has no literacy test or which has a small percent of illiterates.”).

62. *See id.* at 00:34:02 (with respect to Virginia); *id.* at 00:45:07 (arguing that one could concede at least of the possibility of discrimination in voting if you had problems as Virginia’s had and South Carolina has had with respect to schools, with respect to public accommodations, with respect to other matters over the past years”).

63. *See id.* at 00:41:43–41:54 (arguing that under “the constitutional separation of powers,” parts of the Act “constitute . . . congressional adjudication” not legislation).

A Court employing a method of interpretation akin to or consistent with the anticlassification approach—as the Supreme Court would later do in *Shelby County v. Holder*—would have taken South Carolina’s constitutional objections very seriously, and those objections would likely have been fatal to the constitutionality of the statute. But the Court in *Katzenbach* ignored all of South Carolina’s constitutional arguments, it rejected the traditional approach to addressing racial discrimination, and it embraced the VRA’s antisubordination design: a raceconscious statute that emphasized a structural-institutional approach and placed disparate impact at its core through use of the coverage formula.

In an opinion by Justice Warren, the Court recognized that Congress adopted a non-traditional framework for addressing racial discrimination, and in doing so “Congress exercised its authority under the Fifteenth Amendment in an inventive manner when it enacted the Voting Rights Act of 1965.”⁶⁴ Warren also conceded that some of the Act’s remedial provisions reflected “an uncommon exercise of congressional power.”⁶⁵

Warren argued that Congress had tried the traditional approach to addressing racial discrimination and it had been woefully inadequate.⁶⁶ Despite the federal government’s best efforts, the traditional approach was insufficient to root out systematic racial discrimination.⁶⁷ “Congress concluded,” Warren explained, “that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.”⁶⁸ Consequently, “[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”⁶⁹

Warren’s opinion in *Katzenbach* is an instrumentalist account of constitutional interpretation. Warren justified the exercise of national power as necessary to repudiate and eradicate the South’s discriminatory practices. Ignoring altogether the standard account of constitutional interpretation, Warren argued in *Katzenbach* that the best way to understand Congress’s powers to enact the VRA and the best way to analyze the “constitutional propriety of the Voting Rights Act of 1965” is “with reference to the historical experience which it reflects.”⁷⁰ In other words, in *Katzenbach*, Warren essentially argued that we must judge the constitutional power of Congress to enact the VRA not against

64. *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966).

65. *Id.* at 334.

66. *See id.* at 313 (“In recent years, Congress repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination.”).

67. *See id.* at 328 (“Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.”).

68. *Id.* at 309.

69. *Id.* at 328.

70. *Id.* at 308.

the traditional methods of constitutional interpretation—such as the text, the intent of the framers, or the structural values reflected in the Constitution—but against the very problem that Congress was trying to resolve.

From the perspective of constitutional interpretation and constitutional theory, Warren’s reference to historical experience is a stunning statement from the Court. As every first-year constitutional law student is taught, constitutional interpreters derive constitutional meaning—that is, they try to determine how to understand the Constitution, by using a series of interpretive devices—what legal theorist Philip Bobbitt calls “modalities” of interpretation.⁷¹ But instead of adopting one or more of these usual methods, Warren asserts that we must understand the scope of Congress’s powers against the backdrop of the problem that Congress is trying to solve. Broad congressional power, from the point of view of Warren and the majority, is necessary to enable “millions of non-[W]hite Americans . . . to participate . . . on an equal basis in the government under which they live.”⁷² This is an admission by the Court that the Fifteenth Amendment—and likely the Fourteenth as well—was not a self-fulfilling constitutional provision. Accordingly, realizing the promise of the Fifteenth Amendment would depend on more than judicial enforcement and the traditional approach. After all, the necessity of the VRA is *ipso facto* evidence of the failure of the standard, court-exclusive model of voting rights enforcement. *Katzenbach* represented the Court’s early statement of support and cooperation with Congress on what the *Katzenbach* Court surely viewed as a joint mission to accomplish the dictates of the Reconstruction Amendments.⁷³

Just as importantly, Warren followed such an untraditional interpretive approach while applying the Court’s most deferential standard of review. The Court held, “the sections of the Act which are properly before us are an appropriate means for carrying out Congress’ constitutional responsibilities and are consonant with all other provisions of the Constitution.”⁷⁴ Stating unequivocally and forcefully: “The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the

71. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991). These modalities or interpretive devices include textualism, arguments from the text of the Constitution; arguments from the structure of the Constitution such as federalism, separation of powers, or even equal dignity of the states; arguments from the purpose of the Constitution, the purpose of the drafters, or their original intent; arguments from the Supreme Court’s prior precedents or doctrine; arguments from history or historical practices; and arguments from tradition, the way we have always done things. This list is not by any means exhaustive. For example, Bobbitt includes arguments from prudence and ethos as modalities of constitutional interpretation, and legal scholar Jack Balkin views arguments from consequences, natural law, and honored authorities as legitimate methods for understanding constitutional meaning. But the list includes the most common devices used, especially by courts, for deriving constitutional meaning. See Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 *CONST. COMMENT.* 145, 183–85 (2018).

72. *Katzenbach*, 383 U.S. at 337.

73. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 *IOWA L. REV.* 1389, 1403–04, 1404 n.67 (2015).

74. *Katzenbach*, 383 U.S. at 308.

general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”⁷⁵ Put differently, as long as Congress is enforcing the Fifteenth Amendment by addressing the problem of racial discrimination in voting, it can use any method that is rationally related to that end.

By applying such a deferential standard, Warren made clear that the Court was on Congress’s side and would not second-guess Congress’s judgment. In the opinion, Warren stated that what matters—perhaps all that matters—in assessing whether the Constitution permits Congress to create the VRA is Congress’s experience of trying to resolve the country’s long-standing problem of racial discrimination in voting. Warren states this emphatically, almost self-evidently: “The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”⁷⁶ What powers does Congress have to “effectuate the constitutional prohibition against racial discrimination”?⁷⁷ His answer: whatever powers are necessary to eradicate racism. Chief Justice Marshall (via *McCulloch v. Maryland*) meets Malcom X: by any means necessary.⁷⁸

In addition, by deferring to Congress’s approach in the VRA, Warren summarily dismissed the argument from the covered states that Congress treated them unequally by respecting the sovereignty of some states and not the sovereignty of others. From Warren’s perspective, Congress had a clear basis for distinguishing among the states, because it “had learned that substantial voting discrimination presently occurs in certain sections of the country.”⁷⁹ Some states had a worse history of racial discrimination than others, so Congress rationally “chose to limit its attention to the geographic areas where immediate action seemed necessary.”⁸⁰ In other words, the South was different. And it was different because it insisted on maintaining a system of political apartheid. And importantly, the Constitution did not prevent Congress from taking the South’s peculiarities into account.⁸¹

Warren thus penned a sweeping endorsement of federal power deployed to address racial discrimination. This endorsement of federal power was accompanied by a healthy dose of epistemic deference to Congress’s judgment with respect to both its end and its means.⁸² The South’s history of racial discrimination demanded a non-traditional but structural solution to addressing

75. *Id.* at 324.

76. *Id.* at 308.

77. *Id.* at 326.

78. *McCulloch v. Maryland*, 17 U.S. 316, 413-14 (1819).

79. *Id.* at 328.

80. *Id.*

81. *Id.* at 329–31.

82. *Id.* at 324 (“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”).

the problem of racism. The message of *Katzenbach* could not be clearer. For Warren and the Court, Congress had as much constitutional authority as it needed not just to address the problem of racial discrimination in voting but to eradicate it.

Finally, Warren also does not shy away from retelling the country's history of voting discrimination against Black Americans in particular.⁸³ And that historical experience is one in which the Southern states, starting in 1890 and led by South Carolina,⁸⁴ held constitutional conventions for the express purpose of disenfranchising their Black citizens. That historical experience also included the fact that the Southern states persisted for almost one hundred years in excluding Black voters from the franchise and therefore from governance and self-determination. And that historical experience reflected the futility of Congress's repeated efforts, once it decided to once again enforce the promises of the Fifteenth Amendment, against the recalcitrance of the states.

III.

KATZENBACH AND PATHOLOGICAL RACISM

If one were looking for a case to represent pathological racism and the antistatist approach, one could do no better than *South Carolina v. Katzenbach*, one of the most important voting rights cases ever decided by the Supreme Court. *South Carolina v. Katzenbach* is well recognized as an important case in the constitutional law and voting rights canons. But *Katzenbach* is also an important race case and ought to have pride of place in the race canon as well. The Court sanctioned and adopted Congress's structural/institutional approach to addressing racial discrimination, which is remarkable enough and not sufficiently recognized by racial justice scholars.

More importantly, the *Katzenbach* Court adopted the antistatist approach—with its emphasis on structuralism/institutionalism, disparate impact, and raceconsciousness—to remedy racial discrimination not necessarily because it found that approach inherently compelling but because the antistatist approach was the best way to get at pathological racism, the way in which the Court thought that racism manifested itself in American society. As a result of the historical and violent events that gave rise to the Civil Rights Movement, voting rights law and policy (beginning with *Katzenbach*) came to understand and define racism a pathogen or virus. It was exceptional. It was both irrational and evil. Voting rights law and policy understood racism in binary terms: it existed or it didn't. Furthermore, racial progress was linear. Racism was an insidious act by the state and it could be eradicated with sufficient effort and

83. *Id.* at 308–13.

84. *Id.* at 310 & n.9 (“The South Carolina Constitutional Convention in 1895 was a leader in the widespread movement to disenfranchise Negroes.”).

strong medicine. Moreover, racism had a specific perpetrator; it did not exist in the ether. Racism was an evil executed by specific bad actors.⁸⁵

What made the South's racism deserving of the moniker "pathological" was its particular virulence.⁸⁶ These were the worsts of the worst and eradicating the evil that they perpetuated upon the body politic required departures from traditional constitutional principles. But there was always an assumption and expectation that society would vanquish racism and society would return to the proper constitutional baselines. We call this understanding of racism pathological racism. Constitutional law, whether the jurisprudence is framed as anticlassification or antisubordination, is quite responsive to pathological racism.

In *Katzenbach*, the Court conceived of racism as a blight, a virus. Early in the opinion, within the third paragraph, Warren explains that the VRA "was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."⁸⁷ Interestingly, in the Moynihan Report, written by Daniel Patrick Moynihan in 1965, a year before the Court's decision in *Katzenbach*, Moynihan describes racism as a "virus in the American blood stream [that] still afflicts us."⁸⁸ Racism is not just a "blight," according to *Katzenbach*; it is also evil. Recall Warren's observation in *Katzenbach* that Congress "felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."⁸⁹

85. For commentators criticizing the Supreme Court's jurisprudence for adopting this view of racism, see, for example, Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1599 (2019) ("For the Supreme Court, the only thing that could count as racism is the cinematic villain, the cop who wakes up intending to ticket, arrest or shoot a citizen precisely and only because he is Black. Whatever the right view of racism in our society, if there is such a thing as a right view, it surely cannot be such a simplistic one. While such racism remains, it is only a purposefully obtuse view that limits all discrimination to such hostility."); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. L. REV. 329, 344-45 (2006) ("As such, antidiscrimination law outlawed the obvious and explicit manifestations of racism (the '[W]hite only' signs of the Jim Crow era) and thereby provided credible evidence that the law and the basic structure of society were fair, without disturbing the structural and systemic manifestations, including the maldistribution of resources, of that same deeply embedded racism."); Richard Delgado, *Recasting the American Race Problem*, 79 CALIF. L. REV. 1389, 1393 (1991) (reviewing ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* (1990)) ("Formal conceptions of equality treat racism as an anomaly, an illness, a sort of cancer on an otherwise healthy body. They are aimed at deviations from a status quo or baseline assumed to represent equality. If we spot such a deviation, we punish it. But most racism is not a deviation.")

86. This is one of the reasons that the Court in *Katzenbach* continually referred to the type of racial discrimination that characterized the South as "evil." See, e.g., *Katzenbach*, 383 U.S. at 309. It was not just evil; it was also violent. See, e.g., Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 96 (2001) ("One of the most formidable obstacles to [B]lack voting in the rural South remained the threat and reality of physical violence.")

87. *Katzenbach*, 383 U.S. at 308.

88. DANIEL P. MOYNIHAN, U.S. DEP'T OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), <https://www.dol.gov/general/aboutdol/history/webid-moynihan> [<https://perma.cc/LV7W-65UE>].

89. *Katzenbach*, 383 U.S. at 309.

Warren used the word “evil” ten times in the opinion.⁹⁰ It is very clear that when he used the word evil (and its plural, which he did once), he used it as a synonym for racism.⁹¹ The message here, whether articulated as a “blight” or as “evil,” is that racism is a particularly bad thing. Few words are better than “evil” and “blight” in the English language to communicate that a thing is particularly bad.

Warren linked his constitutional analysis with Congress’s attempt to eradicate racial discrimination in voting. Warren was very clear and unflinching that racism, or perhaps more precisely racial discrimination in voting, was the “historical experience” that “confronted” Congress.⁹² Though Warren often uses the passive voice when describing how this virus infected the body politic, *Katzenbach* is fairly clear that the Southern states are the primary culprit. Warren does not shy away from retelling the country’s history of racial discrimination in voting against Black Americans in particular. It is noteworthy that Warren begins the history lesson in 1870, after the ratification of the Fifteenth Amendment and not in 1787 when the Constitution was written and ratified.⁹³ The passage of the Fifteenth Amendment, of course, indisputably marks the Constitution’s commitment to racial equality in voting. But the story that Warren unfolds over many pages in *Katzenbach* is one of failure of the Fifteenth Amendment, not success. Twenty years after the ratification of the Fifteenth Amendment, in 1890, the Southern states, including South Carolina, “enacted tests still in use which were specifically designed to prevent Negroes from voting.”⁹⁴ Additionally, led by South Carolina, these states convened constitutional conventions for the express purpose of amending their respective state constitutions to disfranchise their Black citizens and sometimes, either intentionally or incidentally, their poor White citizens as well.

As Warren describes, the reality of racial discrimination in voting almost one hundred years after the ratification of the Fifteenth Amendment was not an indication of a lack of will by the Court or by Congress. Both institutions have tried over the years to address the problem. The Court’s initial efforts came in 1915 in *Guinn v. United States*⁹⁵ and *Myers v. Anderson*,⁹⁶ which struck down grandfather clauses. Slightly more than a decade later, it opened up another front,

90. *Id.*; *id.* at 326; *id.* at 328; *id.*; *id.* at 329; *id.*; *id.* at 330 (“In identifying past evils, Congress obviously may avail itself of information from any probative source.”); *id.*; *id.* at 331.

91. For example, the implication is clear from the following passage: “Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.” *Id.* at 328.

92. *Id.* at 308–09.

93. *Id.* at 310.

94. *Id.* at 310 & n.9 (“The South Carolina Constitutional Convention in 1895 was a leader in the widespread movement to disenfranchise Negroes.”).

95. 238 U.S. 347 (1915).

96. 238 U.S. 368 (1915).

in *Nixon v. Herndon*, by holding that White primaries were unconstitutional.⁹⁷ Its next major move was in *Lane v. Wilson*, which confronted discriminatory voter registration.⁹⁸ Finally, in *Gomillion v. Lightfoot*, the Court addressed racial gerrymandering.⁹⁹ Warren remarked that the Southern states had long frustrated congressional and judicial sporadic attempts to enforce the promises of the Fifteenth Amendment. “Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.”¹⁰⁰

Turning to South Carolina’s efforts to frustrate voting rights, Warren highlights the views of South Carolina’s Senator Ben Tillman, whom Warren called “the dominant political figure in the state convention.”¹⁰¹ In justifying his State’s literacy test, Tillman said, “the only thing we can do as patriots and as statesmen is to take from [the ‘ignorant [B]lacks’] every ballot that we can under the laws of our national government.”¹⁰² With respect to the poll tax, Tillman bragged: “By means of the \$300 clause you simply reach out and take in some more [W]hite men and a few more colored men.”¹⁰³ Tillman illustrates both the racial order and its political oligarchy. Warren emphasized that the states made literacy a voting qualification and voter registration a prerequisite to voting. Making the connection that the Court refused to make in *Lassiter*, Warren explained almost matter-of-factly that the literacy device was effective because of the gap between White and Black literacy. States used various devices, such as “grandfather clauses, property qualifications, ‘good character’ tests and the requirement that registrants ‘understand’ or ‘interpret’ certain matter” to make it easier for illiterate White voters to vote.¹⁰⁴ For almost one hundred years, the Southern states persisted in excluding Black voters from the franchise and therefore from governance and self-determination.

Warren’s retelling of racial discrimination in the South and the VRA’s ability to address it illustrates his understanding of the nature of racism. Racism was not just an extreme irrational evil perpetrated in particular by the worst states; it was also curable. It could be eliminated or banished from the polity. By curing racism, we could cleanse the body politic and return it to its otherwise healthy state. Though racism was defeasible, it would only be so if we were willing to attack it with vigorous effort and strong medicine. This is precisely how the Court understood the VRA. Warren ended the opinion by expressing the hope that “millions of non-[W]hite Americans will now be able to participate for

97. *Nixon v. Herndon*, 273 U.S. 536 (1927).

98. *Lane v. Wilson*, 307 U.S. 268 (1939).

99. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

100. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

101. *Id.* at 310–11 n.9.

102. *Id.* at 310 n.9.

103. *Id.* at 310–11 n.9.

104. *Id.* at 311.

the first time on an equal basis in the government under which they live.”¹⁰⁵ He then went on to quote the Fifteenth Amendment, stating: “We may finally look forward to the day when truly ‘[t]he 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.’”¹⁰⁶

This was also a point that Attorney General Katzenbach made often. “We can draw only one conclusion from the story of Selma,” he told the House Judiciary Committee on March 18.¹⁰⁷ “The 15th Amendment expressly commanded that the right to vote should not be denied or abridged because of race. It was ratified 95 years ago. Yet, we are still forced to vindicate that right anew, in suit after suit, in county after county.”¹⁰⁸ Senator Dirksen made the point more clearly. “[I]t was 5 years after the conflict was over that the 15th amendment to the Constitution was approved,” he told his colleagues, “and it is a rather curious thing to see that 95 years later we have the problem of what was reassured in the 15th amendment in our laps all over again.”¹⁰⁹ This was “a curious commentary upon history,” Dirksen reasoned, “that it has taken us so long to get this job done when the language of the 15th amendment is so very specific, that the right to vote shall not be denied or abridged by the United States or any State because of race or color and Congress in the second section of that amendment was given the power by appropriate means to effectuate it, the purposes and objectives of that article of amendment.”¹¹⁰

The Court’s response to South Carolina’s specific objections to the Act also illustrate its reliance on pathological racism. Warren similarly and summarily dismissed the argument from the covered states that Congress treated them unequally by respecting the sovereignty of some states and not the sovereignty of others. From Warren’s perspective, Congress had a clear basis for distinguishing among the states: “Congress had learned that substantial voting discrimination presently occurs in certain sections of the country.”¹¹¹ Some states had a worse history of racial discrimination than others. Congress rationally “chose to limit its attention to the geographic areas where immediate action seemed necessary.”¹¹² In other words, the South was different. And it was different because it insisted on maintaining a system of political apartheid.

105. *Id.* at 337.

106. *Id.*

107. *Voting Rights Act of 1965: Hearing on H.R. 6400 Before the H. Comm. on the Judiciary*, 89th Cong. 9 (1965) (statement of Nicholas deB. Katzenbach, Attorney General of the United States), <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/03-18-1965.pdf> [<https://perma.cc/J7PC-JD8H>].

108. *Id.*

109. *Voting Rights: Hearing on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 127 (1965) (statement of Senator Everett Dirksen of Illinois).

110. *Id.*

111. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

112. *Id.*

The linchpin of South Carolina's objection to the VRA was its contention that the coverage formula was unconstitutionally over- and underinclusive. South Carolina argued that the formula covered jurisdictions for which Congress did not have evidence of racial discrimination and did not cover jurisdictions that were known discriminators.¹¹³ In rejecting that argument, Warren noted that "in a great majority of the States and political subdivisions" subject to the coverage formula, specifically Alabama, Louisiana, and Mississippi, Congress possessed "reliable evidence of actual voting discrimination."¹¹⁴ The reliable evidence that Warren refers to is Katzenbach's testimony before the House and Senate committees narrating the DOJ's lawsuits in those three states, in which federal courts found that election officials were engaged in voting discrimination against Black voters, and also the inadequacy of litigation as a remedy for racial discrimination in voting.

In other jurisdictions, Warren explained, namely, "Georgia and South Carolina—plus large portions of a third State—North Carolina— . . . there was more fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission."¹¹⁵ Once again, Warren cited Katzenbach's congressional testimony as supporting evidence. From Warren's perspective, this "more fragmentary evidence" was sufficient to justify coverage.¹¹⁶ To the extent other jurisdictions were swept into the coverage provision even though Congress did not have direct evidence that those jurisdictions were engaged in racial discrimination, Congress was "entitled to infer a significant danger" of racial discrimination in those jurisdictions based upon the fact that those jurisdictions shared two characteristics with jurisdictions for which Congress did have evidence of racial discrimination: they required a test or device as a prerequisite to voting and they have a voting rate below the national average.¹¹⁷ This was the key to the Court's opinion.

For example, in discussing why the suspension of literacy tests was not unconstitutional, the Court stated, "The record shows that in most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years."¹¹⁸ The requirement that covered jurisdictions had to get federal permission before they could implement their voting laws was constitutional because it was the only effective way to prevent

113. See Oral Argument, *supra* note 45, at 00:36:07–36:18 (arguing that the "sections are not tailored to the known problem here; it doesn't cover States where Congress was told of a massive discrimination. It does cover States where there was no discrimination").

114. *Katzenbach*, 383 U.S. at 329.

115. *Id.* at 329–30.

116. *Id.*; see also *id.* at 330 ("All of these areas were appropriately subjected to the new remedies.").

117. *Id.* at 329–30.

118. *Id.* at 333–34.

states with a history of discrimination from discriminating in the future. And if Congress overshot by covering states and localities that were not engaged in systematic racial discrimination, the Act “provides for termination of special statutory coverage at the behest of States and political subdivisions.”¹¹⁹ Lastly, with respect to underinclusiveness, Congress did not need to cover states and localities that discriminated by means other than tests or devices. “It is irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination by other means.”¹²⁰ Congress could address those states later or in a different way. Thus, Warren concluded, “the coverage formula is rational in both practice and theory.”¹²¹

South Carolina v. Katzenbach made clear that Congress may treat states unequally on the basis of past racist actions. In so doing, the Court seemed to have interred the theory of state sovereignty, at least when deployed against Congressional regulation to enforce the Fifteenth Amendment and perhaps even against any federal statute enacted to enforce any of the Reconstruction Amendments. At the very least, *Katzenbach* seemed to have settled, once and for all, all constitutional controversies over the power of Congress to promulgate the most controversial provisions of the VRA. Warren also appeared to have unceremoniously entombed the objection that Congress must treat the states equally when it is trying to enforce the Reconstruction Amendments. The Court’s answer to South Carolina’s complaint that Congress violated the Constitution by treating the Southern states as conquered provinces was not even to dignify the inquiry with a rebuttal; Warren simply justified the treatment on the fact that the South deserved to be treated differently. *Katzenbach* looked like a “super-precedent,” an iconic Supreme Court case that established fundamental constitutional principles, like *Marbury v. Madison* or *Brown v. Board of Education*, both of which are dyed within the fabric of American law and society.¹²² Though *Katzenbach* was not on the order of *Brown*, it certainly looked like it was the next level down.

In sum, Congress (through the VRA) and the Court (through *Katzenbach*) instinctually justified the antisubordination orientation of the VRA, and thus its constitutionality, on the basis of pathological racism. *Katzenbach* and the Court’s voting rights jurisprudence justified the VRA as necessary to address a

119. *Id.* at 331.

120. *Id.* at 330–31.

121. *Id.* at 330.

122. See, e.g., Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006). As Gerhardt explains: “Super precedents are the constitutional decisions whose correctness is no longer a viable issue for courts to decide; it is no longer a matter on which courts will expend their limited resources. Super precedents are the clearest instances in which the institutional values promoted by fidelity to precedent—consistency, stability, predictability, and social reliance—have become irredeemably compelling. Thus, super precedents take on a special status in constitutional law as landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.” *Id.* at 1205–06.

particularly virulent disease, racism—the pathogen that attacked an otherwise healthy body politic. Remedying this disease would require strong medicine. The VRA was the strong medicine and the expectation was that it would cure the disease, and afterward the cure—the VRA—would no longer be necessary. Once cured, the body could return to its normal functioning. This was the Court’s understanding of racism.

Pathological racism anchored the Court’s voting rights jurisprudence. It justified the Court’s approach to federalism, state sovereignty, sectionalism, and the Act’s disparate treatment of the states. The VRA model worked as long as the conception of racism that supported the VRA was sufficiently explanatory of how racism operated in the world. Pathological racism was the lever that turned everything: the Court’s institutional support for the Act; the Court’s understanding of federal power, state sovereignty, and sectionalism; and the Court’s approval of Congress’s differential treatment of the states. Once pathological racism lost its explanatory power, the structural/institutional underpinnings of the VRA would also be imperiled.

IV.

THE DEMISE OF PATHOLOGICAL RACISM

Though he would likely be horrified, Chief Justice Warren’s opinion in *Katzenbach*, which upheld the challenged provisions of the VRA in broad and strong terms, provided the blueprint for Chief Justice Roberts’s opinion in *Shelby County*, which struck a critical blow to the VRA and will likely lead to the Act’s demise. Roberts draws his conception of racism directly from *Katzenbach*, the case that best demonstrates the theory of pathological racism.

To the extent that voting rights lawyers and legal academics assumed *Katzenbach* conclusively resolved the question of federal power to address voting discrimination in favor of the federal government and against the states, that assumption turned out to be incorrect. Additionally, to the extent that voting rights scholars assumed that *Katzenbach* irrefutably and permanently ratified the structural/institutionalist orientation of the VRA, that assumption also turned out to be mistaken. In *Shelby County v. Holder*, almost fifty years later, Chief Justice Roberts resurrected the arguments that seemed buried, almost unceremoniously so, in *Katzenbach* and held that the coverage formula was unconstitutional.¹²³ While voting rights activists have criticized *Shelby v. Holder*, they should also see it as proof that the conception of pathological racism in the VRA no longer mirrors today’s understanding of racism.

123. See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (recounting the history of the Fifteenth Amendment and later concluding, “Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.”).

In *Shelby County v. Holder*,¹²⁴ Chief Justice John Roberts authored an opinion, in which Justices Scalia, Kennedy, Thomas, and Alito joined, concluding that the coverage formula in section 4(b) of the Voting Rights Act is unconstitutional. The coverage formula identifies the jurisdictions that Congress thought needed federal oversight—covered jurisdictions—because those jurisdictions were relentlessly engaged in racial discrimination in voting. The coverage formula singled out jurisdictions for federal oversight pursuant to two criteria.¹²⁵ Covered jurisdictions were those that used a literacy test as a prerequisite to voting and in which less than 50 percent of the voters in that jurisdiction were registered to vote or turned out to vote in the presidential election in 1964.¹²⁶ If a jurisdiction met both criteria, under section 4 of the Act, Congress suspended its literacy test—or any test or device used by the jurisdiction as a prerequisite to voting.¹²⁷ Additionally, under section 5 of the Act, the jurisdiction was required to “preclear” or get permission from either the Attorney General or the United States District Court for the District of Columbia¹²⁸ for any new changes—changes made after November 1, 1964—to its voting laws.

Congress has periodically reconsidered the coverage formula, and other than minor changes made in 1970 and in 1975, the content of the coverage formula has been the same since 1975 and its basic structure has not significantly changed since 1965. Congress revisited the formula in 1982 and 2006 and decided to maintain the status quo for twenty-five years each time.¹²⁹ Writing for the majority, Chief Justice John Roberts declared that the VRA was an extraordinary remedy that “employed extraordinary measures to address an extraordinary problem.”¹³⁰ Roberts explained that the coverage formula and preclearance provisions of the VRA “depart[]” from “basic principles” of federalism, sovereignty, and equal state doctrine.¹³¹ In other words, the VRA allocates to Congress power over elections that belongs to the states—the federalism problem. Roberts writes: “Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing their legislative objectives.”¹³² Federalism—the balance of power between the federal government and the states—“preserves the . . . residual sovereignty of the States” and thereby “secures to citizens the liberties that derive from the diffusion of sovereign power.”¹³³

124. 570 U.S. 529 (2013).

125. See Voting Rights Act § 4(b), 79 Stat. at 438.

126. *Id.*

127. See *id.*

128. The jurisdiction could get permission from both if it wanted to. Voting Rights Act § 5.

129. See *Shelby County v. Holder*, 570 U.S. 529, 538–39 (2013).

130. *Id.* at 534.

131. See *id.* at 535.

132. *Id.* at 543.

133. *Id.* (quoting *Bond v. United States*, 564 U.S. 211, 221 (2011)).

In addition to issues of federalism, the VRA treats the states differently by requiring some to preclear their voting changes but not others. This is the equal sovereignty problem. “Not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of *equal sovereignty*’ among the states.”¹³⁴ Equal sovereignty among the States is a fundamental tenet of the constitutional compact and necessary to the proper functioning of the Republic.

Roberts argued that the VRA “sharply departs from these basic principles.”¹³⁵ It allocates to the federal government responsibilities that belong to the States.¹³⁶ And, it treats the States differently. “While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.”¹³⁷ Roberts explained that these departures from fundamental principles were justifiable in 1965, when Congress enacted the Act, and in 1966, when the Court first considered its constitutionality in *South Carolina v. Katzenbach*.¹³⁸ Quoting *Katzenbach*, Roberts implies that the VRA was justified when enacted because the “‘blight of racial discrimination in voting’ had ‘infected the electoral process in parts of our country for nearly a century.’”¹³⁹ The covered jurisdictions enacted laws specifically designed to make it harder for African Americans to vote. Moreover, the federal government did not have any useful tools at its disposal to combat racial discrimination in voting. At best, the federal government could sue the States. But litigation took time and it was very inefficient.

In other words, Roberts argued that the coverage formula, and by extension the preclearance requirement, “made sense” in 1965 and in 1966 because Congress targeted the jurisdictions most likely to engage in racial discrimination.¹⁴⁰ Specifically, the Southern states, could only be trusted to disenfranchise their citizens of color. Shifting power to the federal government and treating the states unequally was necessary, then, to address the entrenched scourge of racial discrimination. Further, Congress also targeted the devices that these discriminators used most often, specifically, the literacy test. The coverage formula was “‘rational in both practice and theory’” because it “‘accurately reflected those jurisdictions uniquely characterized by voting discrimination ‘on a pervasive scale,’ linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement.’”¹⁴¹

134. *Id.* at 544.

135. *Id.*

136. *See id.* (“States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own.”).

137. *Id.* at 544–45.

138. *Id.* at 545 (“In 1966, we found these departures from the basic features of our system of government justified.”).

139. *Id.*

140. *See id.* at 546.

141. *Id.*

Though the VRA was necessary in 1965, however, Roberts reasoned that “[n]early 50 years later, things have changed dramatically.”¹⁴² The imprecision resulting from the colloquial expression “things” is undoubtedly intended by the Chief Justice, who is otherwise particular, precise, and pellucid when he chooses to be. Gesturing toward his target, euphemistically and once again with presumably deliberate imprecision, he noted, “the conditions that originally justified these measures”—the coverage-preclearance tandem—“no longer characterize voting in the covered jurisdictions.”¹⁴³ Leaving aside the perhaps intentional and frequent obliqueness, the “things” and “conditions” that have changed undoubtedly refer to racial discrimination in voting, though the phrase “racial discrimination” is infrequently invoked.¹⁴⁴ Shuttling between divagation and directness, Roberts reflected toward the end of the opinion, “[o]ur 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.”¹⁴⁵ Similarly, this time toward the beginning, he observed, conceding and parrying, that “voting discrimination still exists, no one doubts that. The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements.”¹⁴⁶

From the perspective of the majority in *Shelby County*, the Act’s broad measures were no longer constitutionally sound, because racial discrimination in voting is no longer reflective of the modal experience of voters of color engaging the political process. Roberts noted that when Congress first enacted the VRA, it was “strong medicine,” which “Congress determined . . . was needed to address entrenched racial discrimination in voting.”¹⁴⁷ He remarked that the VRA’s provisions were “unprecedented” and because they were unprecedented, they were intended to be temporary.¹⁴⁸ As soon as Congress solved the problem of racial discrimination in voting, we would return to a traditional understanding of the powers of Congress and the division of responsibility between the federal government and the States.

Accordingly, in one fell swoop, *Shelby County* removed two significant pillars of the VRA, leaving mainly section 2 of the Act. As a result, the VRA is unable to prevent, as it did in its heyday, many state and local laws that negatively impact voters of color. *Shelby County* functionally neutered what former Solicitor General Donald Verrilli called an “iconic statute and an

142. *Id.* at 547.

143. *See id.* at 535.

144. *See id.* at 535, 545, 548, 557 (Chief Justice Roberts used the phrase “racial discrimination” only six times in the entire opinion).

145. *See id.* at 557.

146. *Id.* at 536.

147. *Id.* at 535.

148. *See id.* (“Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years.”).

important part of American history.”¹⁴⁹ Verrilli, who argued and lost the case before the Supreme Court, remarked ruefully that *Shelby County* is “the loss he most regrets” because of the “powerful real-world consequences that followed very quickly from that decision.”¹⁵⁰ Verrilli was of course not the only one to lament the outcome in *Shelby County*. The NAACP Legal Defense Fund similarly protested that *Shelby County* “has left millions of minority voters vulnerable to voter suppression schemes in towns, counties and states across the country.”¹⁵¹

Since the case was decided, *Shelby County* has become a symbolic rallying cry for voting rights activists—in the same manner that the Supreme Court’s campaign finance decision of *Citizens United* has been both a point of anguish and a rallying cry for advocacy groups concerned about the role of money in politics. It is now reflexive to cite *Shelby County* for the ills of voting rights law and practice. Additionally, *Shelby County*’s impact has taken on added significance as Congress has been unable to accept the Court’s “invitation” to fix the part of the statute struck down by the case. The promise of a “*Shelby* fix” is at best remote and most likely a hollow hope.

The Court’s decision and reasoning in *Shelby County* have been widely criticized by many voting rights scholars, including us.¹⁵² Voting rights activists but also some scholars see *Shelby County* as directly responsible for the significant demise of the VRA as an effective regulatory regime. These, and similar criticisms of *Shelby County* are understandable. After all, the Court struck down an important provision of the statute, the coverage formula, and by so doing, sidelined another important provision, the preclearance requirement, which is designed to assure that covered jurisdictions will not discriminate in the future. Furthermore, based on the Court’s reasoning in *Shelby County*, section 2 of the statute, its last remaining significant provision, is more vulnerable than ever.¹⁵³ Thus, it would surprise no one if the Court, relying largely on the

149. Adam Liptak, *America’s Appellate Lawyer Recaps 5 Years of Legal ‘High Drama,’* N.Y. TIMES (June 11, 2016), <https://www.nytimes.com/2016/06/12/us/politics/americas-appellate-lawyer-recaps-5-years-of-legal-high-drama.html> [https://perma.cc/Y6RB-MJ88].

150. *Id.*

151. *Democracy Diminished: LDF Releases Report on State and Local Threats to Voting Rights Three Years After Landmark Shelby County Decision*, NAACP LEGAL DEF. FUND (June 9, 2016), <http://www.naacpldf.org/press-release/democracy-diminished-ldf-releases-report-state-and-local-threats-voting-rights> [https://perma.cc/YW2W-857D].

152. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113; Charles & Fuentes-Rohwer, *supra* note 73; James J. Sample, *The Decade of Democracy’s Demise*, 69 AM. U. L. REV. 1559 (2020); Bridgette Baldwin, *Backsliding: The United States Supreme Court, Shelby County v. Holder and the Dismantling of the Voting Rights Act of 1965*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 251 & 7 J. RACE, GENDER & ETHNICITY 251 (2015); Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159 (2014); Ellen D. Katz, *Election Law’s Lochnerian Turn*, 94 B.U. L. REV. 697 (2014); Eric Berger, *When Facts Don’t Matter*, 2017 BYU L. REV. 525 (2017).

153. See, e.g., Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL’Y 125, 140–42 (2010) (noting the vulnerability of section 2 in part because of the conservative justices’ antipathy toward the provision).

reasoning of its *Shelby County* opinion, struck it down. Unquestionably, the decision has had a tremendous impact on the voting rights landscape. The Court's decision in *Shelby County* has shrunk the footprint of a statute scholars once regarded as a super-statute and what some have described as the most substantial voting rights statute enacted by Congress.

Nevertheless, and notwithstanding the potentially destabilizing effects of the Court's decision in *Shelby County*, the slow unravelling of our modern voting rights framework goes well beyond *Shelby County*. To blame *Shelby County* misses the deeper problem with our current statutory and constitutional approach to voting rights enforcement.

A new time has come. State officials no longer disregard judicial decrees. Registration rates in the South have reached near parity between Black and White voters.¹⁵⁴ Congress banned literacy tests nationwide for nearly forty years and thus the States' primary discriminatory tool has been banished from the political landscape for nearly a century. Things have changed.

Pathological racism no longer defines American voting practices. Black voters register and vote at similar rates as White voters in the covered jurisdictions. Black candidates are electable—and elected—to federal, state, and local offices. State officials, in the South and elsewhere, can no longer be branded by their singular desire to deprive Black people of political power because of racial animus. This is largely due to the fact that “[t]he tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.”¹⁵⁵ Just as importantly for Chief Justice Roberts and the majority, the North and the non-covered jurisdictions are, by and large, not exempt from voting problems; some of the current voting problems manifest themselves in the North as well as the South. And yet, notwithstanding the diminution if not eradication of racial discrimination in voting and the evolution of voting problems, Congress has failed to update the coverage formula to account for these changes. Consequently, the VRA can no longer justify the federalism and equal sovereignty “costs” of its coverage formula and preclearance provision that led the Court to reject these provisions as unconstitutional.¹⁵⁶

Shelby County thus reflects the fact that the moral, political, and ultimately constitutional consensus over a particular understanding of racism, pathological racism, has dissipated. When the VRA was enacted in 1965, we knew what the problem was and who the bad actors were—the Southern states in particular. Consequently, we successfully managed to avoid a fight over identifying and defining racial discrimination in voting rights law and policy. With the dissolution of that collective understanding, the issue of race and racism is back

154. See *Voting and Registration in the Election of November 2018: Table 2*, U.S. CENSUS BUREAU (Apr. 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html> [<https://perma.cc/L98F-775F>].

155. *Shelby County v. Holder*, 570 U.S. 529, 547 (2013).

156. See *id.* at 549–51.

on the drawing board. *Shelby County* is the most expressive and visible manifestation of that unraveling. Pathological racism no longer drives voting rights law and policy. *Shelby County* is a clear indication that pathological racism no longer provides the constitutional and conceptual for voting rights law and policy. What accounts for the majority's argument that that racism is no longer the central driving concern in the domain of voting? Roberts's understanding of racism reflects a conception of racism that we call pathological racism. However, as explored above, this conception no longer mirrors today's understanding of racism.

V.

CHRONIC RACISM

Roberts's opinion in *Shelby County* prompted a sharp rebuke from Justice Ruth Bader Ginsburg, in a dissent joined by Justices Breyer, Sotomayor, and Kagan. Justice Ginsburg took issue with Roberts's argument that racism no longer characterizes the modal voting experience of Black voters. "In the Court's view," she declared, firing her first opening salvo, "the very success of § 5 of the Voting Rights Act demands its dormancy."¹⁵⁷ The question for Justice Ginsburg was whether the Court ought to defer to the judgment of Congress on the continued need for the coverage formula-preclearance regime or whether the Court was entitled to make its own judgment.¹⁵⁸ This was more or less a rhetorical inquiry. Justice Ginsburg more than tipped her hand when she characterized Congress as the entity "charged with the obligation to enforce the post-Civil War Amendments 'by appropriate legislation.'"¹⁵⁹

Justice Ginsburg argued that Congress had two reasons for maintaining the current coverage formula. These reasons also justify judicial deference to the judgment of Congress. First, the coverage-preclearance tandem is "the remedy that proved to be best suited to block . . . discrimination."¹⁶⁰ And it remains necessary because racial discrimination continues to be a problem in voting. Ginsburg reviewed the evidence of contemporary instances of racial discrimination before Congress. She noted that between 1982 and 2006, the preclearance mechanism allowed the DOJ to stop "over 700 voting changes" from going into effect "based on a determination that the changes were discriminatory."¹⁶¹ Moreover, a significant portion of those changes reflected an intent to discriminate. Thus, "[a]lthough the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not

157. *Id.* at 559 (Ginsburg, J., dissenting).

158. *See id.* at 566 ("In answering this question, the Court does not write on a clean slate. It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference.").

159. *Id.* at 559.

160. *Id.* at 560.

161. *Id.* at 571 (citing H.R. REP. NO. 109-478, at 21 (2006)).

eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens.”¹⁶²

Second, coverage and preclearance are necessary to “guard against backsliding.”¹⁶³ Ginsburg argued that coverage and preclearance are responsible for the progress against voting discrimination for which the VRA is lauded. Congress designed the coverage formula and the preclearance process “to catch discrimination before it causes harm, and to guard against return to old ways.”¹⁶⁴ Ginsburg explained, “Volumes of evidence supported Congress’ determination that the prospect of retrogression was real.”¹⁶⁵ Ginsburg then deployed the analogy that has made her *Shelby County* dissent immediately iconic. “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”¹⁶⁶ She explained that the VRA was designed to address the “persistence” of racial discrimination in voting.¹⁶⁷

In contrast to Chief Justice Roberts, whose conception of racism was informed by pathological racism, Justice Ginsburg was searching for a different conception of racism, one that is more reflective of how racism operates in our society. Racial justice and antidiscrimination scholars have long wrestled with Justice Ginsburg’s task, which is how to articulate a conception of racism that reflects the reality of our country’s racial hierarchy. Justice Ginsburg’s dissent is more consistent with an approach that we call chronic racism. Chronic racism conceptualizes racism as ever present, routine, permanent, mundane, rational, and deeply woven within the cultural, socioeconomic, and legal fabric of our nation.¹⁶⁸ From this frame, racism is continuous; it exists on a spectrum of *more* or *less* as opposed to in a binary of *is* or *isn’t*. It waxes and wanes; it can manifest itself in extreme ways or in more subtle and insidious ways. It embeds itself within its host, opportunistically, and it is not always easily identifiable.¹⁶⁹

While Roberts’s opinion shows the downsides of pathological racism, Ginsburg’s dissent illustrates the difficulty of using chronic racism as the justification for structural racism. Structural/institutional remedies are hard to justify without an endpoint. Put differently, though chronic racism is a more accurate description of how racism operates in American society, it is a less compelling justification compared to pathological racism, for the structural and institutional approaches. This is because chronic racism is hard to prove and, by

162. *Id.* at 563.

163. *Id.* at 560.

164. *Id.* at 590.

165. *Id.*

166. *Id.*

167. *Id.* at 593.

168. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

169. Cf. Boddie, *supra* note 7, at 1240 (“Conceptualizing racial discrimination as adaptive—rather than as piecemeal, static, and aberrational—allows us to see it for what it is: a living, metastatic disease.”).

definition, chronic racism is not solvable. Consequently, the structural and institutional remedies designed to cabin it are arguably without an endpoint.

Ginsburg responded to these difficulties in two ways. Responding to the first difficulty, she repaired to epistemic deference. Ginsburg chastised the majority for its failure to simply defer to the judgment of Congress that the structural remedies of the VRA remained necessary.¹⁷⁰ In a move that's reminiscent of Warren in *Katzenbach*, she underscored the record that Congress compiled when Congress reauthorized the coverage-preclearance regime in 2006.¹⁷¹ She could have added that the record Congress compiled in 2006 was more extensive than the record that it compiled in 1965. This suggests that *Katzenbach* did not turn entirely on the record but on the fact that pathological racism was an undeniable reality of the American landscape in 1965.

Roberts's response to the argument that the Court should have deferred to the substantial record compiled by Congress again illustrates the point that the doctrinal fight is really about pathological racism. Whatever one might say about how voluminous the record was, Roberts maintained, "no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time."¹⁷² In other words, whatever one might say about the record compiled by Congress, it does not show pathological racism.

Ginsburg responded to the second challenge, that chronic racism is endemic and a permanent feature of our body politic, by facing it head on. Structural remedies are necessary, she argued, because of the way that racism evolves and morphs.¹⁷³ It is true, she conceded, that "conditions in the South have impressively improved since the passage of the Voting Rights Act."¹⁷⁴ But she noted that racism does not present itself in the same way at all times: "[c]ongress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had

170. See *Shelby County*, 570 U.S. at 568–69 (Ginsburg, J., dissenting) ("Until today, in considering the constitutionality of the VRA, the Court has accorded Congress the full measure of respect its judgments in this domain should garner. . . . Today's Court does not purport to alter settled precedent establishing that the dispositive question is whether Congress has employed 'rational means.'").

171. Compare *id.* at 564–65 (Ginsburg, J., dissenting) ("In the long course of the legislative process, Congress amassed a sizable record. . . . In all, the legislative record Congress compiled filled more than 15,000 pages." (citing H.R. REP. NO. 109-478, at 5, 11–12 (2006); S. REP. NO. 109-295, at 2–4, 15(2006))), with *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09 (1966) (describing the VRA's legislative history as "voluminous" and noting, "[b]efore enacting the measure, Congress explored with great care the problem of racial discrimination in voting").

172. *Shelby County*, 570 U.S. at 554.

173. See *id.* at 575–76 (Ginsburg J., dissenting) ("Congress also found that voting discrimination had evolved into subtler second-generation barriers, and that eliminating preclearance would risk loss of the gains that had been made.").

174. *Id.* at 575 (Ginsburg J., dissenting).

been made.”¹⁷⁵ And seemingly bringing home the point of the chameleon-like aspect of racism, she remarked that “[s]econd-generation barriers come in various forms.”¹⁷⁶ Because racism maintains this chameleon-like characteristic—“the evolution of voting discrimination into more subtle second-generation barriers”—structural and institutional approaches are necessary to respond to the various manners in which racism might present itself.¹⁷⁷

Roberts refuted Ginsburg’s argument simply by pointing to the fact that Congress did not design the coverage formula and preclearance to address second-generation barriers. “[A] more fundamental problem remains,” he contended, “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day.”¹⁷⁸ If Congress had used the record and evidence of second-generation barriers, Roberts argued, it would have covered a different configuration of jurisdictions than those covered by the extant formula.

Roberts’s rejoinder makes clear how difficult it is, in fact, to design structural remedies that are capable of recognizing and classifying a problem that can be so subtle and so protean. We noted earlier how difficult it was for Congress to prove racism even in a world of pathological racism. For example, recall that both Attorney General Katzenbach and the Court through Chief Justice Warren in *South Carolina v. Katzenbach* conceded that Congress had at best fragmentary evidence that South Carolina used its literacy test to discriminate.¹⁷⁹ If identifying and proving racism is surprisingly difficult in a world of pathological racism, identifying and proving racism is almost an impossible task in a world of chronic racism.

Our most popular or modal model of racism remains pathological racism. One can try to explain how structural and institutional racism contribute to the overrepresentation of Black people in the criminal legal system or how policing might be harmful to the Black community, but it is not as convincing as seeing a police officer with his knee on a Black man’s neck until the man can no longer breathe. This is one of the reasons contemporary scholars of racial justice use the phrase “Jim Crow” (or Jane Crow, its gendered equivalent) as both metaphor and

175. *Id.* at 575–76.

176. *Id.* at 563.

177. *Id.* at 592–93 (“In truth, the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and to prevent backsliding.”).

178. *Id.* at 554 (majority opinion).

179. *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 329–30 (1966) (“To be specific, the new remedies of the Act are imposed on three States—Alabama, Louisiana, and Mississippi—in which federal courts have repeatedly found substantial voting discrimination. Section 4(b) of the Act also embraces two other States—Georgia and South Carolina—plus large portions of a third State—North Carolina—for which *there was more fragmentary evidence of recent voting discrimination* mainly adduced by the Justice Department and the Civil Rights Commission. All of these areas were appropriately subjected to the new remedies.”) (emphasis added).

description.¹⁸⁰ The concept of Jim Crow is not just evocative—it is also intended to resolve an epistemic dilemma by indicating to us that we have identified something that can be appropriately labeled racism. However, notwithstanding the evocative power of the Jim or Jane Crow metaphor, it fails utterly as a descriptor.

VI.

THE TURN TOWARD (TARGETED) UNIVERSALISM

We have argued so far that the problem with the Supreme Court’s racial justice jurisprudence is not its unwillingness to adopt structural or institutional approaches to destabilizing the racial hierarchy. The problem is the Court’s conception of racism. Racial justice scholars have three possible strategies for advocating for structural/institutional remedies. First, they can operate as if we live in a world of pathological racism and demand structural and institutional remedies to address contemporary manifestations of racism. To the extent that this strategy works at all—it might be a nonstarter because of skepticism about pathological racism—support for structural and institutional remedies collapse once skepticism about pathological racism takes hold. This is the clear lesson of the VRA and the *Katzenbach* case.

Second, racial justice scholars can advocate for structural and institutional remedies using chronic racism as a justification. However, as we showed in the previous part, this path is also likely to lead to a dead end. To rehearse, this is for two reasons. First, identifying and proving racism when its manifestation is subtle and when it is constantly morphing turns out to be quite hard. Second, because it is really hard to identify and prove racism in a world of chronic racism, the temptation is to analogize and equate contemporary manifestations of racism to its pathological equivalents. But this takes us right back to the problems of pathological racism.

There is, however, a third option that racial justice scholars have not explicitly probed but should. They should explore universalist solutions as remedies for structural and institutional racism. Universal policies are public policies or public benefits provided by the state that are open to all.¹⁸¹ Examples include public education or health care or a universal basic income.¹⁸² An approach toward universalism focuses on the structural underpinning of racial

180. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 *YALE J.L. & HUMAN.* 187 (2006).

181. See, e.g., *Racism Tests France’s Colour-Blind Model*, *ECONOMIST* (Jan. 16, 2021), <https://www.economist.com/europe/2021/01/16/racism-tests-frances-colour-blind-model> [<https://perma.cc/ST6Z-62V8>] (describing that a “universalist model assumes that all citizens have equal rights as individuals, not groups”).

182. See generally JOHN A. POWELL, STEPHAN MENENDIAN & WENDY AKE, HAAS INST. FOR A FAIR & INCLUSIVE SOC’Y, *TARGETED UNIVERSALISM: POLICY & PRACTICE* 7 (2019) (“Universal policies are those that aspire to serve everyone without regard to group membership, status, or income. They often establish a goal or minimum protection for the general population.”).

inequality instead of ameliorating its effects.¹⁸³ Consider race-based affirmative action in higher education as one example. One could view affirmative action as an attempt to remedy the effects of an unjust and unequal educational system.¹⁸⁴ Instead of pursuing racial justice in education primarily by defending affirmative action efforts, racial justice advocates could instead try to realize a true right to education in which human flourishing is not constrained by race, class, geography, or other arbitrary characteristic. The government ought to be obligated to provide a quality education to all of its citizens who endeavor to acquire one.

There are many reasons that racial justice scholars may be reluctant to explore universalist solutions. For example, one could argue that pursuing a universalist solution might be viewed as denying racism's causal role in creating and maintaining America's caste system. Universalist solutions might be viewed as conceding the terrain to those who think that racism plays a minimal role in unequal outcomes. Additionally, universalist solutions might be viewed as too blunt of an instrument to be effective. For example, they might counter antidiscrimination efforts.¹⁸⁵ If the problem is racism, the solution ought to fit the problem. A one-size-fits-all universal approach is a satisficing move but fails to implement the types of targeted changes that would have the most impact on people of color. Indeed, one might legitimately worry that a blunt universal approach might exacerbate racial inequality.

While we think there is merit to those objections, they are not without answers. We do not deny that some universalist solutions might be advocated and implemented in a manner that is inconsistent with the racial justice agenda. The same could be said for race-based solutions as well. Nor do we deny that universalist solutions might paint with too broad of brush to be effective. But universalist solutions and approaches are not all alike. For example, Professor John A. Powell has called for universal approaches that are targeted to address structural and racial inequality.¹⁸⁶ Moreover, sometimes universalist solutions are the most radical solutions on the table and the best answers for addressing deep structural and institutional racial inequalities.

As importantly, critiques of universalist approaches miss an important insight. In some cases, universalist solutions are necessary precisely because we are operating in a world of chronic racism and targeted racial solutions are either difficult to identify or they can never be effective. Put differently, a turn toward

183. See *Racism Tests France's Colour-Blind Model*, *supra* note 181 (discussing President Macron's efforts to "raise awareness of discrimination, and supply tools to fight it" within a universalist system).

184. See, e.g., ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 135 (2010) (arguing for affirmative action as a means of advancing racial integration).

185. For an insightful critique of universalism in the context of gender justice, see Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 *IND. L.J.* 1219 (2011) (cautioning against a universalist, as opposed to explicitly gendered, approach to workplace protections).

186. See Powell, *supra* note 1.

universalism forces us to ask what the state owes its citizens, all of them, and demands the provision of social services adequate to meet the needs of all of its citizens.¹⁸⁷ Race sometimes obscures the urgency and necessity of the demand.

Consider for example the calls to defund the police or to abolish the prison system. These are radical and universalist solutions. They reflect a worry that even the best targeted racial solutions will be unable to contain the insidious ways in which chronic racism has embedded its itself into the very fabric of those institutions and the concern that there are no targeted race solutions that can reform those institutions. In the same vein, we have called for universalist solutions to structural and institutional racial discrimination in voting.¹⁸⁸ This is not because we think racial discrimination is no longer a problem in voting, in fact the opposite. Though racism is not the only problem in voting, we understand chronic racism to be the best description for how racism operates in voting and in American society.

In our view, universal solutions to voting problems have always been the radical solution. Abolitionists, such as Frederick Douglass, advocated for a universal solution to voting.¹⁸⁹ The suffragettes did as well.¹⁹⁰ Interestingly, today we regard the VRA as radical—and many voting rights advocates are willing to defend a very narrow version of the VRA, simply because it deploys racially-targeted solutions. But civil rights advocates in the 1960s viewed the VRA as mild, in part because it did not sufficiently deploy what we would today regard as universalist solutions.¹⁹¹

187. See, e.g., Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 829–31 (2020) (advocating a targeted but universalist approach to solving health inequity).

188. See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation*, 62 HOW. L.J. 809 (2019).

189. See Frederick Douglass, *An Appeal to Congress for Impartial Suffrage*, ATLANTIC (Jan. 1867), <https://www.theatlantic.com/magazine/archive/1867/01/an-appeal-to-congress-for-impartial-suffrage/306547/> [<https://perma.cc/7S79-VFJY>]; Imaan Yousuf, *What Was Frederick Douglass's Position on Women's Rights?*, ENCYC. BRITANNICA (2021), <https://www.britannica.com/story/what-was-frederick-douglass-position-on-womens-rights> [<https://perma.cc/9E4B-V9B8>].

190. See Yousuf, *supra* note 189 (“[T]he issue of women’s suffrage gained traction in conjunction with calls for African American suffrage.”). But see Rachel Hartigan, *A Century After Women’s Suffrage, the Fight For Equality Isn’t Over*, NAT’L GEOGRAPHIC (July 21, 2020), <https://www.nationalgeographic.com/magazine/2020/08/a-century-after-womens-suffrage-the-fight-for-equality-isnt-over-feature/> [<https://perma.cc/FJ2S-ZRFA>] (noting prominent White suffragettes’ opposition to the Fifteenth amendment and their anger at non-White citizens receiving the right to vote).

191. See Memorandum from James Farmer, Cong. on Racial Equality, James Forman, Student Nonviolent Coordinating Comm., Dr. Martin Luther King, S. Christian Leadership Conf. & Lawrence Guyot, Miss. Freedom Democratic Party to All Participating Members of the American Civil Rights Movement (Feb. 27, 1965) (on file with the John F. Kennedy Presidential Library) (“[W]e see it as the duty and responsibility of the Civil Rights Movement to militate against any maneuver [*sic*] that would dissipate our energies by the tokenism of still another fraudulently ineffectual piece of legislation.”).

CONCLUSION

Racial justice scholars have spent the better part of the last fifty years or so building a case for an antisubordination approach for antidiscrimination law. In our view, the antisubordination paradigm is fatally flawed because it depends upon a pathological view of racism that is not reflective of the chronic manifestation of racism in our polity. Racial justice scholars, in particular critical race theorists, have long recognized, as Professor Athena Mutua nicely put it, that racism is “endemic to the American normative order and a pillar of American institutional and community life.”¹⁹² A central, if not the central, lesson from Derrick Bell’s work is that racism is a permanent feature of the American landscape.¹⁹³ Indeed, it is because racial justice scholars believe that racism is permanent or endemic to the American socio-political order that racial justice scholars have advanced a structural/institutional approach addressing the problem of racism in American life.

If racism is best viewed as chronic, as we believe it is, the question is whether we can expect the state to provide race-specific remedies for the long term and whether even if the government did so, whether we can expect the Court’s antidiscrimination jurisprudence to uphold such remedies. In our view, both outcomes are unrealistic. In order to address racial inequality, racial justice ought to be more willing to explore universalist solutions to chronic racism. We ought to make the case for what the state owes its citizens, all of them, to allow them to flourish.

192. Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 333 (2006).

193. See BELL, *supra* note 168.