

# An Academic Elegy: Comment on *The Voting Rights Act in Winter: The Death of a Superstatute*

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## I. INTRODUCTION

It feels like a moment. I know I’m supposed to analyze this piece from a purely academic perspective, but first I want to mark the occasion. Guy-Uriel Charles and Luis Fuentes-Rohwer, two of the most astute commentators on the intersection of election law and civil rights, think it’s time to give up on section 5 of the Voting Rights Act (“VRA”), perhaps it’s even time to give up on the civil rights paradigm altogether.<sup>1</sup> When I assigned this paper to my class, one of the students said that she realized it’s time for her to start mourning the VRA because it’s never coming back.

For me, the mourning process began when *Shelby County v. Holder*<sup>2</sup> came down.<sup>3</sup> But until I’d read *The Voting Rights Act in Winter: The Death of a*

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1. See generally Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389 (2015).

2. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

3. As I wrote on the day of the decision:

But for now—for just one moment—a bit of simple mourning is in order. I don’t want to end this column with a punch line or a what-comes-next paragraph. It seems disrespectful, somehow. People fought and died for this one. It made a difference—a huge difference—in the lives of a lot of people. That’s reason enough to mourn its passing.

*Superstatute*,<sup>4</sup> I'd been a naïve cynic (or a cynical naïf). I'd hoped that I wasn't being hopeful enough. But when the always-wise and ever-optimistic Guy Charles—the academic who insisted in 2006 that the civil rights community should reject the renewal act and try for better<sup>5</sup>—tells us that something is over, it's probably over. When the duo that valiantly tried to lay the groundwork for rebuilding section 5 tells you it's time to chart a different course, it's probably time to chart a different course.<sup>6</sup>

None of this will be easy to hear if you still subscribe to the political consensus that animated the VRA, if you believe that section 5 was the crown jewel of the VRA, if you think that we still need an administrative alternative to costly litigation for race-based voting claims. Now feels like an especially hard time to hear that we must set aside the race-discrimination model given how large Ferguson and Garner loom. Which is why it takes a certain kind of courage to write what Charles and Fuentes-Rohwer have written here. If you think it's hard to hear these things, just imagine how hard it is to write them, at least for people who haven't spent their careers playing the studied contrarian.

Academic articles are strange creatures, and they aren't well suited for elegies. Yet this feels like one to me. Academics are strange creatures themselves. Perhaps, then, it's not surprising that an elegy by two scholars would come in the form this one does: the systematic, clear-eyed, and relentless documenting of the death of a superstatute. It feels like the scholarly equivalent of a doctor calling it when the patient's heart has stopped.

Perhaps because this is an elegy wrapped in a piece of scholarship, some readers will offer the conventional academic critique and say that there are really two articles here. The first half of the Article charts the death of a superstatute,<sup>7</sup> and the second imagines a new future for voting rights.<sup>8</sup>

At first glance, the two subjects seem unrelated. The first half enters into a conversation (carried on mostly by my colleagues at Yale<sup>9</sup>) about what Ernie

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Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement: People Died to Pass Section 5 of the Voting Rights Act, but That Didn't Save It at the Supreme Court*, SLATE (June 25, 2013, 3:50 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/06/supreme\\_court\\_and\\_the\\_voting\\_rights\\_act\\_goodbye\\_to\\_section\\_5.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html).

4. Charles & Fuentes-Rowher, *supra* note 1.

5. Guy Charles, *No Deal!*, ELECTION L. BLOG (May 15, 2006, 10:20 AM), <http://electionlawblog.org/archives/005622.html>.

6. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Rethinking Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 38–60 (David L. Epstein et al. eds., 2006).

7. See Charles & Fuentes-Rowher, *supra* note 1, at 1394–1430.

8. *Id.* at 1430–38.

9. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, FOUNDATIONS]; BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) [hereinafter ACKERMAN, CIVIL RIGHTS]; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter

Young has called “the constitution outside the constitution”<sup>10</sup>—those sturdy, stable programs and principles that *constitute* our society even if they are not enshrined in our Constitution’s text. The death of a superstatute is an understudied topic precisely because superstatutes aren’t supposed to die.<sup>11</sup> The second half of the Article, meanwhile, continues a conversation that the field of election law had been having ever since the oral argument in *Northwest Austin Municipal District No. One v. Holder* (“*Northwest Austin*”),<sup>12</sup> one that is more pragmatically focused on identifying a framework for resolving elections claims. That conversation is not nearly as wide-ranging or theoretically oriented as the one on superstatutes. Election law scholars, after all, are trying to come up with a regulatory scheme at the intersection of what Congress can pass and what the Court can accept, and it may well be a null set. These are different conversations, and it’s no wonder that the two halves of the Article read so differently.

While I have something to say about each part of the Article, I think the two pieces are much more closely related than that. To be sure, the effort to chart the death of a superstatute is interesting standing alone and generates its own cache of insights, as I note below. But this argument serves a larger purpose here: It reminds you how much work it takes to maintain a superstatute in the first place. Those who resist the premise of the second half of the Article—that it’s time to chart a new course—must first grapple with the truths in the first half of the Article. As the authors show, it was a huge lift to get three branches of government to work in conjunction with one another to support section 5.<sup>13</sup> For those who think that all we need is a fifth vote on the Supreme Court to restore section 5 to her old glory, Charles and Fuentes-Rohwer remind us just how many times the Court and Congress and the Executive Branch had to bend over backwards not just to keep the old girl alive, but to maintain section 5 as a vibrant regulatory framework.<sup>14</sup> This analysis will be sobering to those who want to cast *Shelby County* simply as a 5–4 ruling rather than part of a political sea change. Indeed, the first half of the Article makes clear just how far these tides have receded. While the two halves of the Article are quite different, then, they plainly work in tandem and deepen the authors’ argument along almost every dimension. I’ll address each part in turn before turning to the larger themes of the piece.

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ACKERMAN, TRANSFORMATIONS]; WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); William N. Eskridge, Jr. & John Ferrejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

10. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

11. Eskridge and Ferrejohn, however, have given us an in-depth analysis of “cycles of constitutional entrenchment and dis-entrenchment.” See ESKRIDGE, JR. & FERREJOHN, *supra* note 9, at 303–430.

12. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

13. Charles & Fuentes-Rowher, *supra* note 1, at 1403–20.

14. *Id.*

## II. KEEPING A SUPERSTATUTE ALIVE

One of *The Voting Rights Act in Winter's* noteworthy contributions is its painstaking effort to document how superstatutes are maintained in the first place. Some—but decidedly not all—of the work on superstatutes tends to dwell on the triumphalist part of the story.<sup>15</sup> We know a great deal about how superstatutes are created, but much less about how they are maintained day-to-day.

What's so engaging about Charles and Fuentes-Rohwer's project is that they are able to identify how we know a superstatute is "super" after it's been passed. Much of the work on the "rule of recognition" for constitutional moments and superstatutes has focused on what *precedes* passage of the statute.<sup>16</sup> The authors, in contrast, provide a diagnostic test that can be applied *ex post*. As they note, if a statute is, indeed, "super," we should see "the branches view[ing] one another as partners in a joint enterprise" precisely because the undertaking is both substantial and mandated by a high level of political consensus.<sup>17</sup>

What makes Charles and Fuentes-Rohwer's analysis particularly arresting is their juxtaposition of decisions from three institutions—Congress, the Court, and the Department of Justice—next to one another. Because we have mostly taught these materials in their own silos, it's easy to forget the remarkable amount of teamwork that was necessary to get section 5 off the ground in the first place. I particularly appreciated the authors' inclusion of *Georgia v. United States*<sup>18</sup> and their analysis of its import.<sup>19</sup> Most election law professors, I suspect, didn't teach *Georgia* when we taught section 5, and it was clearly a mistake on our part.

Moreover, it's easy to forget just how big a reach *Allen v. State Board of Elections*<sup>20</sup> was, another truth the Article excavates. We're so accustomed to the Warren Court's expansive decisions that we forget how "elastically,"<sup>21</sup> to use the authors' euphemism, the Court interpreted the VRA. The authors' use of earlier judicial decisions on similar questions—*Guinn v. United States*,<sup>22</sup> *Giles v. Harris*,<sup>23</sup> the *Civil Rights Cases*<sup>24</sup>—provides an effective contrast here.<sup>25</sup>

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15. Eskridge and Ferejohn discuss the post-enactment fate of several superstatutes. See, e.g., ESKRIDGE, JR. & FEREJOHN, *supra* note 9, at 135–302. Ackerman discusses the implementation of the Civil Rights Act and VRA. See generally ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 9.

16. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 9, at 91; Eskridge, Jr. & Ferejohn, *supra* note 9, at 1266, 1275–76.

17. Charles & Fuentes-Rohwer, *supra* note 1, at 1403.

18. *Georgia v. United States*, 411 U.S. 526 (1973).

19. Charles & Fuentes-Rohwer, *supra* note 1, at 1407–08.

20. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

21. Charles & Fuentes-Rohwer, *supra* note 1, at 1391.

22. *Guinn v. United States*, 238 U.S. 347 (1915).

23. *Giles v. Harris*, 189 U.S. 475 (1903).

24. *The Civil Rights Cases*, 109 U.S. 3 (1883).

Still, there are limits to the utility of such comparisons given that these are multi-member bodies acting in very different periods. The White Primary cases<sup>26</sup>—*Terry v. Adams*,<sup>27</sup> at least—are also quite “elastic[]” in conceptualizing state action, but they preceded the passage of the VRA by several decades.<sup>28</sup>

I’m less convinced by the authors’ efforts to fold *Northwest Austin* into their story, however. It’s certainly a novel and imaginative reading, one that doesn’t recycle the same, tired complaints about the case. Maybe Charles and Fuentes-Rohwer are right to argue that the Justices imagined themselves at the end of a “chain letter.”<sup>29</sup> Maybe this is why the Justices felt licensed to depart from the statutory text in the implausible fashion they did, given the regularity with which the Court had previously departed from the statutory text.<sup>30</sup> But it’s hard not to see *Northwest Austin* as the beginning of the end, the clearest sign that the consensus was in the midst of unraveling. Given *Northwest Austin*’s strong dictum casting doubt on the constitutionality of section 5,<sup>31</sup> I can’t see why those who still subscribed to the prior consensus—the Court’s four “liberals”—would sign onto *Northwest Austin*, save for an act of desperation. Nor can I see why Chief Justice Roberts, who clearly believed the consensus had already unraveled, would have held his fire out of respect for a chain letter written by the Warren Court in a fashion sure to irk him. Either the Justices made a deal or the Chief Justice was engaged in what appears to be a bit of a pattern for him—sending a shot across Congress’s bow before sinking a statute in a subsequent case.<sup>32</sup>

To be sure, my take on *Northwest Austin* just rehashes the conventional wisdom. But sometimes views are conventional with good reason. Moreover, if we *are* going to compare cases to one another, the departure from the unambiguous text of the statute in *Northwest Austin* doesn’t seem all that different from the Court’s recent departure from the unambiguous text in *Bond v. United States*, a federalism case.<sup>33</sup> In both cases, “other considerations trump[ed]”<sup>34</sup> the plain text in Roberts’s view.<sup>35</sup> And, in both cases, one

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25. See *id.* at 1398–1405.

26. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Grove v. Townsend*, 295 U.S. 45 (1935); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

27. *Terry*, 345 U.S. 461.

28. Charles & Fuentes-Rohwer, *supra* note 1, at 1391. Though, to be fair to the authors, those cases were not accompanied by a similar level of congressional and executive activity.

29. *Id.* at 1410.

30. See *id.* at 1419.

31. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202–04 (2009).

32. See generally, e.g., Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181; Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173 (2014).

33. *Bond v. United States*, 134 S. Ct. 2077 (2014).

34. Charles & Fuentes-Rohwer, *supra* note 1, at 1411.

suspects that those “other considerations” might have included the fact that the Court was punting on a question it discovered it wasn’t ready to answer.<sup>36</sup>

To be fair to Charles and Fuentes-Rohwer, I suppose one could read *Northwest Austin* as the Court’s own effort to ascertain whether the political consensus had in fact unraveled. On this view, the Court was inviting Congress to step in—just as it had stepped in before—to maintain its commitment to the VRA. Congress’s silence on this front, then, was as much of a sign of dissensus as its inability to do anything but maintain the status quo during the 2006 renewal, as the authors so ably demonstrate.<sup>37</sup>

### III. THE WAY FORWARD

However you read *Northwest Austin*, Charles and Fuentes-Rohwer are correct to cast *Shelby County* as an effort to declare an end to the civil rights consensus.<sup>38</sup> While civil rights supporters are likely to balk at that conclusion—how can a 5-4, hotly contested case declare an end to anything?—they should at least find the first half of the authors’ Article sobering. It’s not hard to imagine one vote on the Supreme Court flipping. But, as the authors make clear, for the VRA to play the vibrant role section 5 has played in the past, we need a substantial amount of cooperation from Congress and the Presidency. Congress, of course, seems likely to be paralyzed in the near future, and it’s too soon for anyone to start counting his or her chickens with regard to the Presidency. It’s thus hard to disagree with the authors’ declaration that “[t]he era of cooperation is over.”<sup>39</sup> They’ve levied a powerful challenge here, one that must be addressed by anyone engaged with these issues going forward.

There’s still room for pushback here, however. To be sure, if future civil rights statutes in the elections arena are to function as superstatutes over many decades, the authors’ claims are sound. It’s hard to imagine anything like the level of inter-branch cooperation we’ve witnessed in the past on the civil rights front. But it’s not clear to me that that level of cooperation is necessary for *some* version of a civil rights statute to succeed. Section 5, after all, spanned many decades and had to come to grips with a fundamental reordering of the political sphere. The provision was enacted to ensure that the federal government could keep up with the ever-changing strategies for discrimination occurring in the covered jurisdictions. The irony, of course, is that the statutory scheme itself couldn’t keep up, which is precisely why we

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35. In *Bond*, Roberts seemed to conclude that federalism concerns rendered a clear text ambiguous. See *Bond*, 134 S. Ct. at 2090. For an analysis of the *Bond* decision, see *Bond*, 134 S. Ct. at 2095–97 (Scalia, J., concurring); Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 89–90 (2014).

36. Gerken, *supra* note 35, at 93–94, 112–13.

37. See Charles & Fuentes-Rohwer, *supra* note 1, at 1430–31.

38. See *id.* at 1422.

39. *Id.* at 1438.

saw such “elastic[]” efforts to interpret and implement section 5 over time.<sup>40</sup> Section 5 *had* to be a superstatute to succeed during the period in which it was implemented.

The question is whether a civil rights statute has to be “super” to succeed in this day and age. While I have trouble imagining another civil rights superstatute coming along anytime soon, I have less trouble imagining a civil rights scheme that springs from what Bruce Ackerman would term a period of “normal politics.”<sup>41</sup> Regulatory schemes have a funny habit of surviving, in large part because they become normalized after a few years. I have little doubt that a civil rights statute would be trimmed by this Court and subject to inconsistent levels of enforcement, depending on the administration. But if it were possible to pass a new statute—and that’s an enormous “if” in an era in which Congress is all but sclerotic—it’s not clear to me that it would be destined for failure. The Department of Justice has administered the VRA under executives of all sorts, and the federal courts include many a judge willing to apply the law as-is. A new civil rights-oriented statute might limp along at times, but the game might still be worth the candle. To be sure, the Roberts Court could at some point decide to decimate all civil rights statutes by insisting that Congress can regulate only intentional discrimination, narrowly defined. But that would require a sea change of its own.

Because the authors have oriented their analysis around the superstatute baseline, however, they don’t take into account this possibility. It’s clear they think that the effort to restore section 5 as a superstatute is over, but it’s not clear whether they think the civil rights game would be worth the candle even in the absence of a political moment powerful enough to pull all three branches into a civil rights project. I, for one, would be curious as to what they would say, in large part because I find them to be such thoughtful commentators on all things elections. That’s a discussion for another day, however.

Whether or not you ultimately agree with the authors’ bleak assessment of the future of the civil rights paradigm, there’s much to admire about their assessment of the alternative paths available to those of us who care about voting rights. I was particularly struck by the authors’ efforts to press on whether section 5 is really the paradigm we want going forward. Those who remain nostalgic about the section 5 model will find the authors’ counters bracing. Charles and Fuentes-Rohwer, for instance, insist on knowing “what is the justification for protecting voters of color when they are in North Carolina but not in Pennsylvania” or “[i]n Virginia but not in Wisconsin.”<sup>42</sup> They wonder why we should be “more disturbed when an African American man is denied the right to vote in a state because of [a] prior criminal conviction than

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40. Charles & Fuentes-Rohwer, *supra* note 1, at 1391.

41. ACKERMAN, FOUNDATIONS, *supra* note 9, at 302.

42. Charles & Fuentes-Rohwer, *supra* note 1, at 1425.

when a white woman is denied the same right for the same reason.”<sup>43</sup> Following on the work of Rick Pildes, Sam Issacharoff, and Rick Hasen,<sup>44</sup> they ask whether partisanship rather than racial discrimination now “best defines the current voting rights space.”<sup>45</sup> They mourn the fact that the “substantive goals of the Reauthorization Act [were] backward-looking and only sought to restore the *status quo ante*.”<sup>46</sup>

#### IV. CONCLUSION: THE SUM OF ITS PARTS

When you lay these seemingly disparate pieces of *The Voting Rights Act in Winter* alongside one another, you see not just two independently interesting lines of analysis, but two arguments that twist around one another and fortify the argument as a whole. Charles and Fuentes-Rohwer aren’t just mapping the future of voting rights; they are also doing everything they can to show that we cannot return to a superstatute’s past.

These two academics, in short, are determined to move forward, and they are determined to bring supporters of the civil rights model along with them. They recognize there is more than one path to take, but they are adamant that we cannot retrace our steps. When you finish their Article, you will be haunted by the same question that haunts these authors in their scholarly elegy to section 5. A new train is a-comin’. Are you ready to get on board?

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43. *Id.* at 1434.

44. Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58 (2014); Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013); Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741 (2006).

45. Charles & Fuentes-Rohwer, *supra* note 1, at 1426.

46. *Id.* at 1430.