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## The Dignity of the South

*The plaintiffs in Shelby County v. Holder argue that section 5 of the Voting Rights Act offends the “equal dignity” of the states. In this Essay, written in advance of the decision, Professor Joseph Fishkin situates this claim in a larger context. Americans have been fighting since the Civil War and Reconstruction about the structural implications of the events of 1861-1870 for the sovereignty, dignity, and equality of the states – especially the Southern states. The implications of adopting the “equal dignity” of the covered states as a constraint on Congress’s Reconstruction Power are deeply problematic and profound.*

CHIEF JUSTICE ROBERTS: General, is it—is it the government’s submission that the citizens in the South are more racist than citizens in the North?<sup>1</sup>

At oral argument in *Shelby County v. Holder*, at least four (and probably five) Justices sounded ready to hold that section 5 of the Voting Rights Act (VRA) – which applies special scrutiny to changes in the election procedures of certain states and counties, mainly in the South – exceeds Congress’s enforcement power under the Reconstruction Amendments. According to the argument advanced by Shelby County, Alabama, the heart of the problem with the Act is that its differential treatment of covered and non-covered states offends the “equal dignity”<sup>2</sup> of the covered states.<sup>3</sup>

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1. Transcript of Oral Argument at 41-42, *Shelby County v. Holder*, No. 12-96 (U.S. argued Feb. 27, 2013) [hereinafter *Shelby County* Transcript].
  2. *Id.* at 22-23 (statement of Bert Rein, counsel for petitioner Shelby County); see also Brief for Petitioner at 49, *Shelby County*, No 12-96, 2012 WL 6755130 (arguing that the VRA denies states’ “equal dignity”).

The equal dignity of the states, this argument runs, obligates Congress either to treat all states equally, or to have a strong justification for doing otherwise. As for the justification in the case of section 5, the conservative Justices sounded skeptical. As Chief Justice Roberts demonstrated in a dramatic set-piece at oral argument,<sup>4</sup> the formula for deciding which jurisdictions are covered and which are not does not turn on contemporary voter registration figures or current discriminatory laws. Instead, the formula is about history. The covered jurisdictions are those that disenfranchised many or most of their minority citizens under Jim Crow, using devices such as literacy tests that the VRA itself long ago consigned to the history books.

This argument from the equal dignity of the states is both more and less novel than it might seem. The idea that states have dignity, and that this dignity has some constitutional force—although not, to be sure, because of any specific piece of constitutional text—emerged as an important theme in the “new” federalism jurisprudence of the 1990s. In a series of sovereign immunity cases, most prominently *Alden v. Maine*,<sup>5</sup> conservative Supreme Court majorities held that it would violate states’ “dignity” if Congress could use its Article I powers to make states subject to lawsuits for money damages without their consent.<sup>6</sup> In those cases, dignity enters the picture in a hierarchical way: it is one state versus the federal government. The invocation of dignity is meant to evoke a pre-democratic idea of the dignity of the sovereign, an idea that predates the modern conceptions of human dignity that are now so central to the constitutional law and jurisprudence of many nations and international bodies.<sup>7</sup> In other words, the dignity claim here is about the sovereignty of a state—any state. Maine will do as well as South Carolina. What seems novel, in the *Shelby County* variant of the dignity-of-states argument, is the comparative

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3. Presumably, the argument must be that this differential treatment also offends the dignity of the covered political subdivisions smaller than states; if not, then section 5 could continue to apply to counties and other subdivisions, just not to states. But it is unclear exactly what dignity, equal or otherwise, those smaller jurisdictions are supposed to possess.
  4. In a series of Socratic questions to the Solicitor General, the Chief Justice argued that today, the worst ratio of black turnout to white turnout can be found in Massachusetts, whereas in Mississippi, black turnout actually exceeds white turnout. See *Shelby County* Transcript, *supra* note 1, at 32.
  5. 527 U.S. 706 (1999).
  6. *Id.* at 715; see *infra* Part II.
  7. See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning The Role Of Dignity In Conceptions Of Sovereignty*, 55 STAN. L. REV. 1921, 1933-58 (2003) (discussing this sovereign conception of state dignity and contrasting it with other conceptions of dignity operative in our law); see also Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 192-99 (2011) (same).

element: here, what is supposed to be undignified is the federal government treating some states differently from others.

Four years ago, in *Northwest Austin Municipal Utility District Number One v. Holder* (NAMUDNO),<sup>8</sup> the Court heard a challenge to the constitutionality of section 5 that was more or less parallel to *Shelby County*. In that case, the Court stopped at the water's edge, declining to plunge into the depths of striking down the statute. But in dicta, the Court strongly signaled that this comparative state equality element was at the heart of the case against section 5. The Court invoked what it called a “fundamental principle of equal sovereignty” of the states.<sup>9</sup> This principle has a nice ring to it. But as a constraint on the federal government's power to treat states unequally, it has no basis either in constitutional text or in existing constitutional doctrine.<sup>10</sup> In *South Carolina v. Katzenbach*, in 1966, the Court actually considered and rejected this same argument against section 5 of the VRA, holding that South Carolina's invocation of a “doctrine of the equality of the states” posed no problem because “that doctrine applies only to the terms upon which States are admitted to the Union,” not to a statutory provision like section 5.<sup>11</sup> Rather audaciously, the NAMUDNO Court quoted this very sentence from *Katzenbach* as support for the idea that a “doctrine of the equality of the states” exists—concealing the part about how “that doctrine applies only to the terms upon which States are admitted to the Union” behind a strategically placed ellipsis.<sup>12</sup>

Leaving aside the murky provenance of this principle, to which I will return below, something remains mysterious about the shape of it. Objecting to differential treatment sounds like a claim about equality. That is apparently the way South Carolina tried and failed to sell it to the Court in 1966. But where does *dignity* come into the picture? Why argue that a difference in treatment—as between, say, Massachusetts and Mississippi, or Maine and South Carolina—violates the Southern states' *dignity*?

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8. 557 U.S. 193 (2009).

9. *Id.* at 203.

10. See Zachary Price, *NAMUDNO's Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24 (2013).

11. 383 U.S. 301, 328-29 (1966). In fact, even the process by which states are admitted to the Union has hardly followed a consistent principle of state equality: most states have had some special conditions imposed upon them (and not upon other states) as the price of admission. See Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004).

12. *NAMUDNO*, 557 U.S. at 203; see Price, *supra* note 10, at 30-31. Lest I be accused of a similar elision here, the full sentence reads as follows: “The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.” *Katzenbach*, 383 U.S. at 328-29.

The answer is staring us in the face. It is deeply intertwined with section 5's regional focus and its history-driven trigger. The dignitary harm here lies in treating the South—the former Confederacy—differently from most of the rest of the nation in a particular way that carries with it an implication that the past is not dead.<sup>13</sup> Section 5 holds that the states with the worst histories of Jim Crow disenfranchisement from the middle part of the twentieth century remain, even today, under a cloud of suspicion that other states are not under, a cloud that can be lifted only through a formal judicial bailout process.<sup>14</sup> Section 5 thus places the Southern states under a regime of regional federal oversight that is a faint echo, especially in its geographic outline, of Reconstruction itself.<sup>15</sup> The chief indignity of this regime, for the Southern states, is its implication, which Chief Justice Roberts so forthrightly brought to the surface at oral argument: “General,” he asked, “is it the government’s submission that the citizens in the South are more racist than citizens in the North?”<sup>16</sup>

In comparison with the recent sovereign immunity cases in which the Court has invoked the dignity of the states, much seems novel here. Beyond the sovereign dignity of an individual state, we have the suggestion of comparative “equal dignity” or “equal sovereignty” between states, a regional South-versus-North assertion of the equality or dignity of the South as a

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13. Cf. Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81 (2001) (arguing that the Court’s jurisprudence of state dignity is essentially concerned with expressive harms); Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309 (2000) (arguing that the Court’s anti-commandeering jurisprudence is similarly aimed at expressive harms).
  14. Under the statute, any covered jurisdiction can remove itself from section 5 coverage by demonstrating to a federal court that for ten years it has drawn no objections under section 5, and it has “engaged in constructive efforts to eliminate intimidation and harassment of voters,” among other statutory requirements. 42 U.S.C. § 1973b(a) (2006). This process is called “bailout.” See *NAMUDNO*, 557 U.S. at 193 (discussing the bailout provision and interpreting it in a newly expansive way, to allow smaller jurisdictions within larger covered jurisdictions to bail out).
  15. To be sure, it is not an exact match, primarily because of the protection of Latino and Native American voters and other language-minority voters. Those protections rope in not only Texas—a former Confederate state, but only sort of a Southern state—but also a number of jurisdictions that are neither Southern nor ex-Confederate such as Arizona and Alaska and a few counties and townships in South Dakota, New York, California, and Michigan. See *Section 5 Covered Jurisdictions*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php) (last visited June 3, 2013). Meanwhile, Southern ex-Confederate states such as Florida and North Carolina are covered only in part. Tennessee and Arkansas are not covered at all (although Arkansas was bailed in later, see *Jeffers v. Clinton*, 740 F. Supp. 585, 601-02 (E.D. Ark. 1990)). But the Deep South is entirely covered; the South accounts for most of the covered states. It is just close enough for discomfort.
  16. *Shelby County* Transcript, *supra* note 1, at 41-42.

region, the indignity of the suggestion that the past is not even past, and perhaps even—getting a bit personal—the suggestion that the *citizens* of the South might even today be “more racist” than those of the North. (The Solicitor General wisely demurred on that point at oral argument.<sup>17</sup>)

However, in a different and more important sense, none of this is new at all. These seemingly novel elements themselves have a history—and a life outside the courts. They are linked to an important set of sharply contested claims about the meaning of the Civil War and the meaning of Reconstruction that Americans have been fighting about for the past 150 years. The legal significance of these contested claims is that they affect how we understand, even today, state sovereignty and the balance of federal and state power.

This Essay is short, so I will be blunt. A historical memory of a “War Between the States,” followed by a reunion between noble blue and gray on equal terms—with Reconstruction a best-forgotten corrupt interregnum in between—might well yield the conclusion that antebellum understandings of state sovereignty remain largely intact, even today. However, such a conclusion cannot be sustained if we instead remember the Civil War and Reconstruction as a radical transformation of the South through federal military and civilian power, with a series of amendments specifically ratifying the use of that federal power to establish the equal citizenship of Southern blacks.

The latter story is not as kind to the Southern states. It is not as protective of their dignity. To remember what actually happened between 1861 and 1870 is to remember a shattered nation reconstructed on new foundations,<sup>18</sup> where the terms of readmission of the conquered South were based, fundamentally, not on principles of equal sovereignty, but on military conquest, surrender, and occupation. It is to remember a series of amendments that remade the Constitution, shifting weighty new powers to the federal government, above all in the enforcement of the rights of racial minorities. Indeed, as Akhil Amar has recently argued, the process of ratification of the Reconstruction Amendments itself put the lie to any semblance of a claim that the conquered Southern states reentered the Union as equal sovereigns.<sup>19</sup> Those states alone were forced to adopt the Fourteenth Amendment as a condition of

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17. *Id.*

18. This critical nine-year period spanned the outbreak of the War, its conclusion, the readmission of all the Confederate states, and the ratification of the Reconstruction Amendments.

19. Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109 (2013); see also BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99–119 (1998) (exposing the ways in which the ratification of the Reconstruction Amendments did not conform to the process prescribed by Article V, with all the states as equal participants, but rather represented a distinct moment of higher lawmaking).

readmission, remaking the constitutional order on new terms far less amenable to claims of either the sovereign dignity or the equality of the Southern states.

But even before the bodies were buried on the battlefields of the Civil War, a counter-narrative began to emerge to challenge the story just outlined.<sup>20</sup> A remnant of the defeated South began to tell a different story of the War and, later, of Reconstruction—a story that over the next 150 years would become incalculably influential in American political life and historical memory. According to this counter-narrative, the North and the South were equally to blame for the War, which was not about slavery but rather about state sovereignty, a noble cause which history somehow vindicated despite the South’s defeat. Moreover, according to this counter-narrative, the North is equally as racist as the South and probably always was; to claim otherwise is a kind of regional libel, an insult to Southern dignity. Finally, and perhaps in tension with these other elements, as this counter-narrative developed it came to include an idea that the “New” South sloughed off any racist past long ago—and thus, any *present-day* implication that the South is more racist than the North is an insult, an indignity, to the region and its people.<sup>21</sup>

Recent judicial invocations of the dignity of states in the sovereign immunity and anti-commandeering cases bore only an oblique, ambiguous relationship to these claims of historical memory. In *Shelby County*, the relationship is much more direct. Here, state “equal dignity” is colliding with congressional power not under the Commerce Clause but under the Reconstruction Amendments themselves. The subject matter of the conflict is the very heart of the Reconstruction Power: the federal enforcement of minority rights.<sup>22</sup> In this context, it is hard to avoid the larger historical import of asserting the equal dignity of the states—and in particular, the equal dignity of the Southern states—as a constraint on the exercise of federal power. In this light we should not be surprised to see “equal dignity” claims yoked to claims that the South is not “more racist” than the North, and claims that it is an indignity to the South to assert that history leaves the region under any continuing cloud.

The North—the Union—won the War. But to a remarkable extent, the South’s twentieth-century apologists won the peace. That is why we are having

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20. See DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 31-84 (2001).

21. Cf. *NAMUDNO*, 557 U.S. 193, 202 (2009) (“Things have changed in the South.”).

22. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808-10 (2010).

a conversation right now about the equal dignity of the Southern states rather than the equal dignity of Southern black voters.<sup>23</sup>

### I. SOUTHERN DIGNITY AND HISTORICAL MEMORY

For many American Civil War buffs even today, the dominant memory and imagery of the Civil War is of a series of heroic battles between noble soldiers in uniforms of blue and gray, enlisting and fighting, brother against brother, “in obedience to a blindly accepted duty,” as Oliver Wendell Holmes, Jr. put it in “The Soldier’s Faith,” his famous 1895 speech to Harvard’s graduating class.<sup>24</sup> For Holmes, the manly virtues of ordinary soldiers on both sides transcended the substance of any causes for which they may have fought. This imagery places North and South on an equal footing: all war aims aside, North and South were the banners under which great men marched and died.

The early stirrings of this way of remembering the War were in part a story of Northern and Southern white veterans coming to terms with a common experience of horrific slaughter, suffering, and loss. But the dominance of this view in the twentieth century was ultimately the product of an organized campaign by the losers of the War to win the peace—a campaign that David Blight, in his remarkable history of the War and Reconstruction in American memory, calls “one of the most highly orchestrated grassroots partisan histories ever conceived.”<sup>25</sup> This campaign reshaped the terms of reunion in the decades following Reconstruction in a way calculated to restore the lost dignity of the South.

Reconstruction was a powerful indignity to Southern whites, one that piled an inversion of the racial political order on top of humiliating military defeat and economic desolation. In opposition to Reconstruction, Southerners began to forge a combination of themes into a powerful ideology: Southern honor and virtue, the perfidious and dishonorable character of the federal occupation, principles of state sovereignty and the equal treatment of the states, and opposition to racial equality.<sup>26</sup> Benjamin H. Hill, a former Confederate senator from Georgia, argued in 1868 that the Northern occupiers aimed to “dishonor” the South, and that the presidential election of that year turned “upon the

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23. Cf. Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1129 (2000) (describing the “personification follies” of the Court’s efforts to imbue states with the rights and attributes of human people).

24. Oliver Wendell Holmes, Jr., *The Soldier’s Faith*, in *THE ESSENTIAL HOLMES* 87, 89 (Richard A. Posner ed., 1992).

25. BLIGHT, *supra* note 20, at 259.

26. *Id.* at 98-139.

glorious ancestral doctrine that the States are equal and that white blood is superior.”<sup>27</sup> (This glorious doctrine did not carry the day; Ulysses S. Grant and the Republicans won, leading to the passage of the Fifteenth Amendment.)

One of the great scenes in Blight’s book is an event that turned out to be a preview of reunion on the South’s terms: the unveiling, in 1875, of a statue of Confederate General Stonewall Jackson in Richmond. The recently elected Democratic Governor of Virginia, James Kemper, declared the event a reminder of the “respect” due the South, and a harbinger of “actual reconciliation,” which would mean the “equal honor and equal liberties of each section.”<sup>28</sup> There would be decorations by the Ku Klux Klan along the parade route, but there was a dispute about whether to allow black marchers in the parade. Some argued that this would be “an indignity to the memory of Jackson and an insult to the Confederates.”<sup>29</sup> In the end, the black marchers did not march.<sup>30</sup> The moment encapsulates Blight’s story: it illustrates the disastrous implications of reconciliation for black civil rights. For Northern and Southern whites to “clasp hands across the bloody chasm”<sup>31</sup> with equal dignity and equal moral standing, it was necessary to submerge or forget much of what the War was about—specifically, that one side fought to keep black people enslaved, and the other side, by the end of the War, fought for their freedom. In a nation that has repudiated slavery, this means the Civil War has a right side and a wrong side. Forgetting that took effort and determination.

That effort began with high-ranking ex-Confederate officials, who after the War turned to historical research and memoir and created historical societies to set the record straight and undermine Northern historians’ narratives of the War’s meaning.<sup>32</sup> Meanwhile, an emerging genre of Southern sentimental literature, which won tremendous nationwide popularity, aimed to “model the pathos of *Uncle Tom’s Cabin*, but in reverse,” portraying “Southern martyrdom under ruthless abolition outrages.”<sup>33</sup> Women’s organizations such as the

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27. *Id.* at 102 (quoting a July 23, 1868 speech by Benjamin H. Hill in Atlanta).

28. *Id.* at 81-84 (quoting James Kemper).

29. *Id.* at 81 (quoting Jubal Early).

30. *Id.* at 83.

31. *Id.* at 126. This famous phrase is from Horace Greeley, the New York newspaper editor and former abolitionist who became a key Northern figure in the drama of reconciliation, eventually running for president against Grant in 1872 on a third-party “Liberal Republican” ticket. Greeley’s reconciliationist campaign won the support of Southern Democrats, but Grant supporters like Frederick Douglass were “[s]ickened by the ‘hand clasping across the bloody chasm business.’” *Id.* at 124-27. Greeley lost decisively.

32. *Id.* at 260-91.

33. *Id.* at 263. The first phrase is Blight’s, and the second is from Robert Dabney, an ex-Confederate and key partisan in this battle.



United Daughters of the Confederacy, along with confederate veterans' groups, elaborately ranked, condemned, and promoted school history textbooks as well as history books in libraries, with the aim of "vindicating the South."<sup>34</sup> At Columbia University, the historian William Dunning, along with political scientist and law professor John W. Burgess and their students, created what came to be known as the Dunning School of the scholarship of Reconstruction.<sup>35</sup> According to the Dunning School, the Radical Republicans in Congress, "[m]otivated by an irrational hatred of Southern 'rebels'" and a partisan desire to consolidate power, forced black suffrage on the defeated South, leading to a "sordid period" of gross misrule by Northern "carpetbaggers," the "scalawags" who aided them, and black Southerners fundamentally "incapable" of self-government.<sup>36</sup> Justice, on this view, was on the side of the Southerners who rebelled successfully against Reconstruction through legal and extralegal means, including Klan violence, throwing off the yoke of federal power by 1877 and restoring states' sovereignty and "home rule."<sup>37</sup> The assault on federal authority and the veneration for the Klan were encapsulated in D.W. Griffith's 1915 movie *The Birth of a Nation*, a blockbuster in the North as well as the South.

The Dunning School's story of Reconstruction dominated American textbooks and popular understandings for the first half of the twentieth century, where it undoubtedly helped justify Jim Crow. In 1935, W.E.B. Du Bois published a monumental challenge to this story in *Black Reconstruction in America*, but few whites were ready to listen.<sup>38</sup> However, by the time of *South Carolina v. Katzenbach* in the mid-1960s, the opinions of both historians and ordinary Americans were turning against the Dunning School narrative. The civil rights movement was shifting the ground from which the Civil War and Reconstruction were viewed; the narratives that had preserved the equal dignity of the South began to be perceived not as authoritative history but as regional special pleading. As Eric Foner explains, it required "not simply the evolution of scholarship but a profound change in the nation's politics and

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34. *Id.* at 282; *see also id.* at 278-84.

35. *See* W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860-1880*, at 718-20 (The Free Press 1998) (1935); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877*, at xix-xxi (1988).

36. FONER, *supra* note 35, at xix-xxii.

37. *Id.* at xix.

38. DU BOIS, *supra* note 35. Du Bois's project was historiography as well as history. Prefiguring much later work, he explained in a chapter called "The Propaganda of History" how it came to be that "[t]here is scarce a child in the street that cannot tell you that the whole effort [of Reconstruction] was a hideous mistake." *Id.* at 717.

racial attitudes to deal the final blow to the Dunning School.”<sup>39</sup> When Southern opponents of school integration made claims on states’ rights, even reviving versions of Calhoun’s antebellum concepts of nullification and interposition, this ultimately convinced few outside the South. Claims that the North and the South were equal or similarly situated in terms of racial history (for instance, the Southern Manifesto’s claim that separate but equal “began in the North – not in the South”<sup>40</sup>) did not convince the rest of the nation. In the 1960s, claims of the “equal dignity” of the Southern states would have been too redolent of massive resistance and opposition to civil rights to be taken seriously as legal arguments outside the South.

Back in 1888, William Dunning himself wrote an early article exploring the idea of a principle of the equality of the states and whether that principle survived the Civil War and Reconstruction.<sup>41</sup> His focus was the terms of admission of new states to the union. He concluded that as a matter of positive law, “the theory of equal states” is “finally defunct,” although it could still perhaps be “galvanized into life by a powerful act of judicial construction.”<sup>42</sup> In other words, even Dunning, the principal figure in the movement to refashion the history of Reconstruction in terms that preserved the South’s dignity, acknowledged that the Civil War had altered the balance of federal and state power in a way that rendered obsolete a whole range of antebellum arguments that the sovereignty or dignity of the states constrained federal power. The article opens with these sentences: “In respect to the question of ultimate political supremacy under the constitution of the United States, the result of the civil war gave an answer that was decisive. *No argument based in any particular upon the principle of state-sovereignty can ever again be tolerated in the arena of constitutional debate.*”<sup>43</sup> I make no claim here about the precise range of arguments Dunning imagined the War took off the table. But notice that Dunning was making no claim in these sentences about the Reconstruction

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39. FONER, *supra* note 35, at xxi.

40. These claims of regional equality were intimately linked with the Manifesto’s claims about state sovereignty—claims that all Americans respect the “dual system of Government” and the “reserved rights of the State.” Declaration of Constitutional Principles (“Southern Manifesto”), 102 CONG. REC. 4516 (1956).

41. William A. Dunning, *Are the States Equal Under the Constitution?*, 3 POL. SCI. Q. 425 (1888). See also Biber, *supra* note 11.

42. Dunning, *supra* note 41, at 452. The readmitted states of Virginia, Mississippi, and Texas, for instance, not only were barred from placing racial restrictions on office-holding, but also were barred from ever amending their constitutions to deprive U.S. citizens of the equal rights to education guaranteed in those states’ constitutions. Dunning thought both permanent restraints went beyond the Reconstruction Amendments’ nationwide prohibitions. *Id.* at 450-51.

43. *Id.* at 425 (emphasis added).

Amendments. He was stating what was, at the time, obvious: that the War itself had worked a decisive structural change in the balance of federal and state sovereignty, one that entailed “the sweeping invasion by national legislation of the region hitherto deemed sacred to state rights” and “an enormous increase of the central government’s dignity and power.”<sup>44</sup> This change would have occurred even if the Reconstruction Amendments had never existed.<sup>45</sup> It was an outcome of the War itself.

## II. A REVIVAL OF STATE DIGNITY

A century after the War’s conclusion, mainstream Americans had come to view the War not as a “War Between the States”—a phrase that carries an implication of a fight among equally sovereign states—but as the “Civil War,” a conflict wholly within a single sovereign nation.<sup>46</sup> The United States had become a singular noun (“The United States is . . .”) rather than a plural one (“The United States are . . .”).<sup>47</sup> This modern understanding is compatible with some range of residual conceptions of state sovereignty. For instance, states are sovereign in that they possess the power to make law. However, on this modern understanding, there is no room for claims that our constitutional order requires new limits on federal power as a way of respecting the dignity of the states as independent sovereigns.<sup>48</sup> In the 1950s and 1960s, when Southern leaders invoked “the dual system of Government” and states’ “rights,” it was plain that this was just sectional talk, Southern opposition to the Second Reconstruction echoing Southern opposition to the first.<sup>49</sup>

Nonetheless, for Americans growing up and going to school in, say, the 1950s, the Dunning School history of Reconstruction left a deep mark. In 1961, an article surveying the landscape of U.S. history textbooks then in wide use

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44. *Id.* at 425, 427.

45. Cf. Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1149 (2001) (“The Court is mistaken if it believes that the constitutional consequences of the Civil War can be cabined in the Civil War Amendments.”). Dunning’s own view was that the Reconstruction Amendments were not necessary to effectuate these changes initially, but ensured their “permanence.” Dunning, *supra* note 41, at 425.

46. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429 n.19 (1987) (explaining how the fight about the label reflects, in microcosm, a central constitutional issue of the war itself).

47. The turning point was the War, but the change in usage took decades to complete. Minor Myers, *Supreme Court Usage & the Making of an ‘Is,’* 11 GREEN BAG 2d. 457, 458 (2008).

48. See, e.g., Amar, *supra* note 46, at 1466 (explaining that state sovereignty is ultimately “derivative” of the sovereignty of the people of the United States as a whole).

49. See Southern Manifesto, *supra* note 40, at 4516.

found that the books told a story of Reconstruction that today seems incredible—an “uncomplicated tale” of good and evil, in which hateful Radical Republicans imposed corrupt misrule on the South and “[t]he oppressed whites turned naturally to the Ku Klux Klan for help to restore the government to the people” and throw off the yoke of federal power.<sup>50</sup> In the 1960s and 1970s, even as most non-Southern politicians rejected the hard “states’ rights” talk associated with massive resistance, a softer, gentler rhetoric of states’ rights and state sovereignty, as a constraint on federal power, found its way into the political mainstream. This rhetoric was not exclusive to the Republican Party, but it was especially strong there, as that party staked a new, and wildly successful, claim on the allegiance of Southern whites, including those sympathetic to massive resistance.<sup>51</sup> In the 1970s, William Rehnquist joined the Court and began to give voice to the idea of “the sovereignty of the States” as a constraint on federal power.<sup>52</sup>

Beginning in the mid-1990s, the Rehnquist Court upended prevailing understandings of federal and state power and sovereignty in what some have called the “Rehnquist Revolution.”<sup>53</sup> In a series of mostly 5-4 decisions, the Court imposed new restrictions on Congress’s powers under both the Commerce Clause<sup>54</sup> and the Reconstruction Power.<sup>55</sup> Those changes need not

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50. Mark M. Krug, *On Rewriting of the Story of Reconstruction in the U.S. History Textbooks*, 46 J. NEGRO HIST. 133, 135 (1961). For instance, a textbook published in 1960 illustrated Reconstruction with a portrait of Thaddeus Stevens with this caption: “Thaddeus Stevens shows in his hard and unforgiving face the implacable hatred of the South which made Reconstruction so bitter.” *Id.* at 137 (citing HENRY W. BRAGDON & SAMUEL P. MCCUTCHEN, HISTORY OF A FREE PEOPLE 346 (1960)). “[T]he textbooks scrupulously avoid any expression of disapproval or condemnation of K.K.K. terror.” *Id.* at 152.
51. See, e.g., Ronald Reagan, Speech at the Neshoba County Fair, August 3, 1980, available at <http://neshobademocrat.com/main.asp?SectionID=2&SubSectionID=297&ArticleID=15599> (“I believe in states’ rights; I believe in people doing as much as they can for themselves at the community level and at the private level.”). Fudging the distinction between states’ rights and local communitarianism in this way contributed to a broad, vague association of federalism with community and with patriotic American values. See, e.g., Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 906 (1994) (suggesting that federalism “conjures up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard”).
52. See *Nat’l League of Cities v. Usery*, 426 U.S. 833, 845 (1976) (Rehnquist, J.), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (invoking this sovereignty as a limit on Congress’s power, under the Commerce Clause, to require states to pay a federal minimum wage).
53. See, e.g., Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004).
54. See *United States v. Morrison*, 529 U.S. 598, 607-19 (2000); *United States v. Lopez*, 514 U.S. 549, 561-62 (1995). Perhaps the culmination of this line is the Commerce Clause

have invoked any claims about the sovereignty or dignity of the states; for instance, the Court could have relied on arguments about enumerated powers. But in fact the Rehnquist Court gave state dignity claims a starring role. At the center of the Rehnquist Revolution was a doctrine of sovereign immunity, whose “preeminent purpose,” as Justice Thomas explained for one of those 5-4 majorities, “is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>56</sup> Although sometimes styled as a (frankly rather convoluted) interpretation of the Eleventh Amendment, this principle of state dignity was really derived “not from the Eleventh Amendment but from the structure of the original Constitution itself.”<sup>57</sup> The Court similarly held that the federal government’s “commandeering” of state officials was “fundamentally incompatible with our constitutional system of dual sovereignty” as established in 1789.<sup>58</sup> A basic question looms behind these holdings. How did the Rehnquist Court understand their relationship to structural changes *after* the original Constitution was written—in particular, the fundamental changes wrought by the events of 1861-70? The Court did not say. In dissent in one of the anti-commandeering cases, Justice White put it bluntly. “One would not know from reading the majority’s account,” he wrote, “that the nature of federal-state relations changed fundamentally after the Civil War.”<sup>59</sup>

We have little access to the views of most of the Justices of the Rehnquist Court about the meaning of the Civil War and Reconstruction. But in the case of Chief Justice Rehnquist, we know quite a bit, because the Chief Justice wrote a book-length history of a pivotal moment in Reconstruction, *Centennial*

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holding of *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2585-92 (2012).

55. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997); *Morrison*, 529 U.S. at 619-27 (2000).
56. *Fed. Mar. Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002). This doctrine came to mean that states could not be sued for money damages without their consent, absent a valid exercise of Congress’ power under the Reconstruction Amendments. In tandem with the Court’s paring back of that Reconstruction Power, this meant that Americans lost the ability to sue states for damages for violations of federal laws such as the Fair Labor Standards Act, see *Alden v. Maine*, 527 U.S. 706 (1999), the Age Discrimination in Employment Act, see *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), and Title I of the Americans with Disabilities Act, see *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).
57. *Alden*, 527 U.S. at 728.
58. *Printz v. United States*, 521 U.S. 898, 935 (1997).
59. *New York v. United States*, 505 U.S. 144, 207 n.3 (1992) (White, J., dissenting). This rather pointed observation went unanswered by the majority. (Justice White also went on to note that the majority “fails to mention the New Deal era, in which the Court recognized the enormous growth in Congress’ power under the Commerce Clause.” *Id.*)

*Crisis: The Disputed Election of 1876*.<sup>60</sup> *Centennial Crisis* is an odd book, remarkable as much for what it does not contain as for what it does. At the time of its publication in 2004, the book was viewed by many readers as “an allegory, and apologia, for the Supreme Court’s ruling in *Bush v. Gore*.”<sup>61</sup> And fair enough: as told by Rehnquist, *Centennial Crisis* is the story of a heroic Supreme Court Justice who braves partisan criticism to cast the decisive vote to resolve a disputed election that might otherwise have torn the nation apart.<sup>62</sup> But Rehnquist’s book may be more interesting as a window into his view of the meaning of Reconstruction and the Civil War. As Eric Foner delicately explained in a critical review, “Rehnquist remains locked into an antiquated view of the Reconstruction era long abandoned by scholars,” a view extremely reminiscent of the Dunning School.<sup>63</sup> As Foner explains, Rehnquist describes Reconstruction by the Radical Republicans in Congress as a “‘Carthaginian Peace’ (that is, the total subjugation of the defeated party by the victor after a war);”<sup>64</sup> Rehnquist sees “racial hostility”<sup>65</sup> in the South but misses the “reign of terror aimed at overturning Reconstruction and restoring white supremacy.”<sup>66</sup> In short, Rehnquist misses the true stakes and the key result of the 1876 crisis—the rollback of Reconstruction and federal power, with

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60. WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004).

61. Adam Cohen, *Justice Rehnquist Writes on Hayes vs. Tilden, With His Mind on Bush v. Gore*, N.Y. TIMES, Mar. 21, 2004, <http://www.nytimes.com/2004/03/21/opinion/editorial-observer-justice-rehnquist-writes-hayes-vs-tilden-with-his-mind-bush-v.html>; see also Eric Foner, *The Deciding Vote*, THE NATION, Mar. 29, 2004, <http://www.thenation.com/article/deciding-vote> (“[E]ssentially, the book is an elaborate, although indirect, apologia for the Court’s decision in *Bush v. Gore* and a defense of Supreme Court justices who help to resolve extrajudicial controversies.”); Mahinder Kingra, *Centennial Crisis: The Disputed Election of 1876*, CITY PAPER (Baltimore), Mar. 24, 2004, <http://www2.citypaper.com/arts/review.asp?rid=7329> (reviewing REHNQUIST, *supra* note 60).

62. Rehnquist acknowledges the connection in the book’s first sentence, which invokes the 2000 election. REHNQUIST, *supra* note 60, at 3. The book’s last sentences conclude that the Justices in 1876 “did the right thing”: they “may have tarnished the reputation of the Court, but they may also have saved the nation from, if not widespread violence, a situation fraught with combustible uncertainty.” *Id.* at 248.

63. Foner, *supra* note 61.

64. *Id.*; see REHNQUIST, *supra* note 60, at 44-45.

65. REHNQUIST, *supra* note 60, at 108.

66. Foner, *supra* note 61. One paragraph in the book talks about Klan violence and intimidation, REHNQUIST, *supra* note 60, at 18, with passing references later in the text, e.g., *id.* at 81, 184. Half of that lonely paragraph concerns opposition in Congress to the Ku Klux Klan Act on the grounds that “[f]ederal supervision of local affairs in the South was losing its appeal in the North.” *Id.* at 18. (The later passing references all focus on the possible effect of violence on the vote count in 1876, not the effect of what happened in 1876 on the subsequent violent disenfranchisement of Southern blacks.)

disastrous consequences for black civil rights in the South that would take a century to undo—because he has embraced a different story of the War and Reconstruction, one far more preoccupied with the excesses and corruption of the Northern occupiers.<sup>67</sup> Relying primarily on secondary sources from an era when Dunning School narratives were dominant, rather than on modern historians, Rehnquist did his part to help revive for a contemporary audience a view of Reconstruction and its ending that restores some of the dignity of the South.<sup>68</sup>

Today, going well beyond the invocations of dignity in the sovereign immunity cases, Justice Scalia is apparently ready to make novel claims on structural principles of state sovereignty as though the Civil War never occurred. Last Term, Justice Scalia opened his blistering dissent in *Arizona v. United States*, which he read from the bench, with these words: “The United States is an indivisible ‘Union of sovereign States.’”<sup>69</sup> He proceeded to excoriate the majority for depriving Arizona of “the defining characteristic of sovereignty: the power to exclude from the sovereign’s territory people who have no right to be there.”<sup>70</sup> In the ensuing discussion of Arizona’s sovereignty, Justice Scalia cites Madison; the Kentucky and Virginia Resolutions; the Massachusetts Resolutions in Reply to Virginia; a 1758 treatise on the Law of Nations; and a case from 1837.<sup>71</sup> The Civil War is nowhere to be found. It is as though the War did nothing at all to alter the valence and viability of arguments based “upon the principle of state-sovereignty.”<sup>72</sup> Which is to say, it

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67. For instance, Rehnquist devotes more space to the *Crédit Mobilier* scandal and corruption in the Grant administration than to Klan violence in the South. See, e.g., REHNQUIST, *supra* note 60, at 24-25, 28-31.

68. See Foner, *supra* note 61.

69. *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., dissenting). The internal quote was from a marginally related 1938 case about interstate compacts. Justice Scalia’s formulation does, at least, acknowledge that the Civil War occurred. What the War resolved, on the view implied here, is that the Union is now “indivisible”—an important but limited point of law entirely consistent with the ideology of reunion on the South’s terms.

70. *Id.*; see also *id.* at 2522 (“If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State.”).

71. *Id.* at 2511-13. Here Justice Scalia seems to be providing after-the-fact support for the argument of Peter J. Smith, who attempted to make sense of the Court’s “increasingly odd focus on the dignitary interests of the states” in sovereign immunity cases by suggesting that the Court was analogizing U.S. states to foreign nations. Peter J. Smith, *States As Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 5 (2003). Justice Scalia seems to be edging beyond analogy toward equivalence.

72. The quote is from Dunning, *supra* note 41, at 425. The anti-commandeering case *Printz v. United States*, 521 U.S. 898, 918-25 (1997), offers another elaborate account of our “system of dual sovereignty” that similarly begins with the Articles of Confederation and ends around 1789.

is as though the War's meaning were its narrowest possible meaning—the one most protective of the dignity of the South.

### III. SOUTHERN DIGNITY AND SECTION 5

At trial in *Shelby County*, section 5's defenders offered evidence that even though the coverage formula has not been altered in decades, it continues to do a rather effective job of covering those jurisdictions that have the worst ongoing (post-1982) records of violations of the VRA.<sup>73</sup> To the dissenting judge on the panel below, Judge Stephen Williams, this seemed surprising and improbable. How could a formula based only on decades-old history accurately predict where discrimination, racially polarized voting, and so on, would be the most prevalent today? “[S]ometimes a skilled dart-thrower can hit the bull’s eye throwing a dart backwards over his shoulder,”<sup>74</sup> he allowed, but in this case he thought Congress had not.

The question of how near or far the present trigger formula might be from some imagined “bull’s eye” is not my subject here. It is surely true that a different trigger formula might have covered even more of the present violations of the VRA across the United States—and that Congress declined to debate such a formula in part because it did not want to have a debate about which Members’ present-day districts are more racist than others.<sup>75</sup> Nonetheless, it is illuminating to think through the assumptions built into Judge Williams’s memorable image, especially in light of the panel majority’s conclusion that Congress indeed hit its target.

It seems that Judge Williams’s expectation is that history would not predict present discrimination—that is, his expectation is that the geographic distribution of voting rights violations today would likely *not* match the old contours of the Confederate or Jim Crow South. That is why he analogizes the congressional trigger formula to a dart-thrower “throwing a dart backwards

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73. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School* 39 U. MICH. J.L. REFORM 643 (2005); see *Shelby County v. Holder*, 679 F.3d 848, 874 (D.C. Cir. 2012) (citing the Katz et al. data for, inter alia, the proposition that “although covered jurisdictions account for less than 25 percent of the country’s population, they accounted for 56 percent of successful section 2 litigation since 1982”).

74. *Shelby County*, 679 F.3d at 885 (Williams, J., dissenting).

75. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 179–87, 209–11 (2007); Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148 (2007), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/election-law/political-avoidance,-constitutional-theory,-and-the-vra>.



over his shoulder.”<sup>76</sup> But is that really what is going on? Perhaps a better analogy, instead of throwing darts, would be that we are searching for an old house that used to be in a certain neighborhood. We discover that despite many renovations and transformations, the house is still there, in the same location where it always was. Perhaps this is unexpected, but it is surely not a shock. History shifts, and memory changes, but rarely, if ever, is the past entirely erased. As William Faulkner, the great novelist of the South who spent a lifetime exploring this theme, famously wrote: “The past is never dead. It’s not even past.”<sup>77</sup>

After the oral argument in *Shelby County*, one enterprising pair of researchers actually decided to try to answer the Chief Justice’s question with which this Essay began. They took a look at some explicit measures of racial attitudes and found that, using their preferred statistical technique, “the six fully covered states in the South are, by our measure, six of the seven most prejudiced in the nation.”<sup>78</sup> I do not think Chief Justice Roberts would be at all impressed with this evidence if it were before him. Indeed, I am not even sure which way its inclusion would cut. The reason is that the Chief Justice’s question was not empirical. He was not asking whether the citizens of the South are, as a factual matter, “more racist” than the citizens of the North. Rather, he was asking whether the United States was making a *claim* that would amount to an insult, a dignitary harm, to the South as a region and to its people. Underneath his question was the suggestion that section 5’s trigger formula itself might amount to such a dignitary harm.

This is why Justice Kennedy, at oral argument, mused openly about the possibility of replacing the trigger formula with some mechanism of individualized, state-by-state judicial decisionmaking. In that event, a judge, not a formula, would decide whether extra oversight in the form of preclearance is required in a given jurisdiction.<sup>79</sup> This approach, relying

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76. See *supra* note 74.

77. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).

78. See Christopher S. Elmendorf & Douglas M. Spencer, *Are the Covered States “More Racist” than Other States?*, *ELECTION L. BLOG* (Mar. 4, 2013, 8:06 AM), <http://electionlawblog.org/?p=48009>. The remaining state in their top seven, Arkansas, was not covered by the formula. However, Arkansas is one of only two states ever to have been “bailed in” to statewide coverage under the Act, a process in which a federal court imposes a temporary preclearance regime (for a decade in the 1990s, in Arkansas’s case) in response to ongoing voting rights violations. See *Jeffers v. Clinton*, 740 F. Supp. 585, 601-02 (E.D. Ark. 1990); Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 *YALE L.J.* 1992, 2010 (2010).

79. See *Shelby County* Transcript, *supra* note 1, at 24-25, 54.

entirely on a so-called “pocket trigger” or “bail-in” mechanism,<sup>80</sup> with no statutory formula, has a number of drawbacks, but one great virtue: it elides questions of regional dignity and historical memory. It facilitates an exclusive focus on present violations, and an end to the uncomfortable suggestion, currently inscribed in the United States Code, that some states have a long history of discrimination more intense than that of other states—and that this history lingers, in certain respects relevant to voting rights enforcement, up to the present day.

#### IV. THE PRESENT

There are a variety of options open to the Court in reconciling the VRA with its “new” federalism. The simplest solution is to uphold section 5 based on the record of post-1982 violations explored in detail by the court below, and to continue to allow jurisdictions to bail out of section 5 coverage<sup>81</sup> if and when they wish to show that the past is dead. However, regardless of the outcome it reaches in *Shelby County*, the Court should find a way to reason about the case that avoids inscribing into the Constitution a principle of the equality, dignity, or “equal dignity” of the states. In post-1865 America, the roots of such a principle are to be found in the losing arguments of Reconstruction’s opponents. They saw outrageous regional insult and indignity and outrageous violations of state sovereignty in the federal statutes that began the work the VRA continues—and, indeed, in the very Reconstruction Amendments the Court is now interpreting, which they bitterly opposed. Particular Justices of the Court may well be unaware of either the roots or the implications of a principle of the equal dignity of the states—but that does little to alter either the roots or the implications, which are profound. To elevate a principle of the equal dignity of the states to the status of a constitutional constraint on the Reconstruction Power, in a case about federal protection for minority voting rights, would be to inscribe into the Constitution some of the core constitutional claims, unsuccessful even in their own time, of the defeated Confederacy and its apologists.

I doubt very much that the Justices’ motives match those of past advocates for the “dignity” of the South from either the end of Reconstruction or the era of massive resistance to civil rights. Instead, it seems likelier that some claims of both of those groups are finding their way into the law by a more circuitous route—a route that is a testament to those groups’ success in injecting their views of the Civil War, Reconstruction, and the dignity of the South into

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80. See *supra* note 78.

81. See *supra* note 14.

mainstream American historical memory. When most of the Rehnquist Court, and much of the present Court, encountered Reconstruction as schoolchildren in the 1940s, 50s, and early 60s, Dunning School narratives were utterly dominant; reunion between North and South on equal terms was framed as an unalloyed good.<sup>82</sup> The conservative Justices then spent many politically formative years in a period in which a soft rhetoric of states' rights and state sovereignty was part of the atmosphere of conservative politics, a highly successful accommodation of the politics of Southern whites.<sup>83</sup> It is not surprising, in this light, that ideas of state dignity or sovereignty might hold some appeal for some Justices; nor is it surprising that they might be uncomfortable with federal legislation—section 5—that singles out the South for special federal oversight in a way that recalls Reconstruction and explicitly holds that the Jim Crow past is relevant in the present. None of this alters the valence, or the implications, of the step the Court seems poised to take. Even if they are not doing it intentionally or knowingly, constraining Congress's Reconstruction Power with a principle of the equal dignity of the states—and most pointedly, the Southern states—would substantially advance the grand historical project of the original advocates of the equal dignity of the South.

This particular way of paring back Congress's Reconstruction Power is all the more pointed because, in fact, federal law routinely treats one state differently from another in ways large and small, because states differ in their circumstances in innumerable respects. Compared to its neighbors, one state might have more military bases, more native Alaskans, more citizens without health insurance, or a more congenial mountain redoubt for the permanent storage of the nation's radioactive waste.<sup>84</sup> An equal dignity of the states principle would presumably continue to allow such differences in treatment where circumstances warrant. Therefore, to apply an equal dignity of the states principle in *Shelby County* to strike down section 5 would be to assert that the *one* salient difference in circumstances among the states that the Constitution requires Congress to ignore is the fact that certain states recently spent most of a century openly defying the Reconstruction Amendments by denying their minority citizens the right to vote.

## CONCLUSION

The great constitutional theorist Charles Black observed that one of the profound effects of the Fourteenth Amendment was to deny each state the

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82. See *supra* note 50.

83. See *supra* note 51.

84. For that last example, see Price, *supra* note 10, at 28.

right to decide who is a citizen of the state and who is not: federal law is now the exclusive arbiter of who is a citizen of either Massachusetts or Mississippi.<sup>85</sup> This, Black argued, is “another nail in the coffin of the theory that our States are ‘sovereign.’”<sup>86</sup> He added: “That coffin can use all the nails it can get, because it yawns every now and then, on some inauspicious midnight, to give up its undead, clad perhaps in the senatorial toga of Calhoun.”<sup>87</sup>

Black’s writing aims for the universal and the transcendent in our Constitution. He also writes from the particular point of view of a person born in Texas in 1915, who attended the university where I now teach in a world before *Sweatt v. Painter*.<sup>88</sup> Then as now, the Fourteenth Amendment was the law. But the University of Texas in those segregated days had prominent statues of four leaders of the Confederacy situated along its grassy south mall, at the bottom of which an impressive fountain was dedicated to a certain conception of the dignity of the South: “To the men and women of the Confederacy who fought with valor and suffered with fortitude that states rights be maintained and who not dismayed by defeat nor discouraged by misrule builded from the ruins of a devastating war a greater South.”<sup>89</sup> Today, those Confederate statues, that fountain, and its bold dedication, are still here.<sup>90</sup> Today they are joined on the campus by a number of competing monuments and inscriptions, such as a statue of the Rev. Martin Luther King, Jr., erected in a different era with a different message. However, *pace* Judge Williams and his memorable dart-thrower, the Confederate statues have not

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85. CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 23-24 (1997). The citizens of Mississippi now consist of (and only of) those U.S. citizens, as defined in Section One of the Fourteenth Amendment, who choose to reside in Mississippi. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the state wherein they reside.*”) (emphasis added).

86. BLACK, *supra* note 85, at 24.

87. *Id.* at 24-25.

88. 339 U.S. 629 (1950) (beginning the process of desegregating the University of Texas and the nation); cf. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960) (explaining in the first person, as a starting point in this important essay, “I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed.”).

89. See Brief for Amici Curiae Former Student Body Presidents of University of Texas at Austin in Support of Respondents at 18 n.9, *Fisher v. Univ. of Texas at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012) (quoting this text in part).

90. On the grounds of the Texas capitol, a few hundred yards further south, an even more impressive Confederate monument stands, as richly described and interrogated in SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 53-62 (1998); and Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1090-94 (1995).

scattered—they have not wandered off to a random assortment of locales such as Massachusetts and Maine. They remain right where they were built. They run with the land.

For citizens of the states and covered jurisdictions of the former Confederacy, there is a certain honesty, even a certain dignity—albeit not the kind of dignity this Essay has heretofore discussed—in facing the past dead on. It is no small thing to acknowledge squarely and repudiate the full century of resistance after 1865 to the Constitution that was forged in the War—and all the continuing reverberations of that resistance in politics, economics, and law. The past is never dead. It's not even past. And some of the ideas that animated apologists for the Confederacy during that long, dark chapter, from the death of Reconstruction through the resistance to the VRA, refuse to die. “States’ rights” may finally rest in peace, but now the sovereign “equal dignity” of the states seems poised to rise, zombie-like, in clothes just new enough to avoid any obvious shades of the “senatorial toga of Calhoun.”

It is time, long past time, to inter these concepts for good and let them rest with the Confederate dead.

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