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RESEARCH ARTICLE

FEDERALISM, SUBSIDIARITY, AND VOTING RIGHTS: CRITIQUING THE *SHELBY COUNTY* DECISION THROUGH JOHANNES ALTHUSIUS AND CATHOLIC SOCIAL TEACHING

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ABSTRACT

This article develops a legal and theological critique of the *Shelby County, Alabama v. Holder* decision that dismantled portions of the Voting Rights Act. Defending the Voting Rights Act in light of four basic features of voting rights—access, participation, empowerment, and expression of conscience—I refute the *Shelby* decision in terms of its oversimplified notions of discrimination and its overly narrow construal of federalism as state sovereignty and equality. I draw upon Catholic social teaching's subsidiarity and Johannes Althusius's federalism to defend the individual and communal dimensions of voting rights. I examine post-*Shelby* developments, including voter-identification laws, and I argue that such laws are unfounded and have deleterious effects. I conclude by offering modest recommendations for a post-*Shelby* world, including continued roles for Congress and the Department of Justice, the use of intermediary organizations, and the rescinding of felon disenfranchisement laws.

KEYWORDS: Voting Rights Act, voting rights and discrimination, federalism, subsidiarity

Despite upholding previous reauthorizations against constitutional challenges, the United States Supreme Court in its June 2013 decision in *Shelby County, Alabama v. Holder* struck down central portions of the 1965 Voting Rights Act, essentially dismantling one of the most effective pieces of civil rights legislation. The 1965 Voting Rights Act reflected a milestone achievement that politically and legally redressed historic inequalities in African American voter registration and turnout, disrupted state- and political party-created disenfranchisement strategies, and provided concrete enforcement mechanisms for protecting Fifteenth Amendment rights. In subsequent years, the Voting Rights Act has been subject to intense judicial and political scrutiny and debate. On the one hand, the Voting Rights Act has been valorized for fundamentally altering the political landscape by ameliorating significantly disproportionately low African American voter registration rates, voter turnout rates, and elected representation rates, particularly in the Deep South. On the other hand, the Voting Rights Act has been vilified as unnecessarily burdensome and unfair for "covered" states, principally in the Deep South, as well as an unwarranted and intrusive oversight by the federal government given these improved conditions. The Voting Rights Act was reauthorized by Congress in 1970, 1975, 1982, and, by a vote of 390 to 33 in the House and unanimously in the Senate, in 2006 for twenty-five more years.[1]

1 The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendment Act of 2006, Pub. L. No. 109–246, 120 Stat. 577 (2006).

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The *Shelby County* case considered two sections of the Voting Rights Act: Section 5, which requires certain states and local governments to obtain federal preclearance before implementing any changes to their voting laws or practices; and Section 4(b), which contains the coverage formula that determines which jurisdictions are subjected to preclearance based on their histories of discrimination in voting. The Court held that Section 4's preclearance formula imposes current burdens on states that are no longer necessitated by current conditions related to voter access and turnout; it is therefore unconstitutional because it violates the power to regulate elections that the Constitution reserved for states. As I argue here, the Court's decision is legally problematic and ethically incompatible with normative visions of shared participation and the common good.

Given the implications of the decision, it is difficult not to concur with E. J. Dionne's observation: "Chief Justice John Roberts' opinion in the case will become a Magna Carta for voter suppression."[2] One of the primary grounds for Chief Justice Roberts's opinion was a plea for federalism and the equality and sovereignty of states. The purpose of this article is to retrieve the concepts of federalism and subsidiarity as respectively developed by the early modern German jurist and Calvinist philosopher Johannes Althusius (1557–1638) and modern Catholic social teaching[3] and to apply them critically to the *Shelby County* decision. Though they differ in certain aspects,[4] both Althusius and Catholic social teaching offer accounts of communal and political life as interconnected cooperation that mediates between models of politics informed primarily by state rights and interests and those defined by individual rights and interests. By supporting a relational anthropology and individual and communal self-determination, integrating public and private as well as individual rights and the common good, promoting non-adversarial power sharing, and affirming plurality, participation, communication, and solidarity, their respective accounts of federalism and subsidiarity, I contend, provide more compelling versions of social order, political life, and legal rights than the states' rights federalism appropriated in the *Shelby County* decision.[5] States' rights federalism privileges procedures and state interests at the expense of individual rights, construes state interests as seemingly in tension with the autonomy of local and intermediate associations, and obviates the interconnections between individuals, groups, and state duties. The perspectives of Althusius and Catholic social teaching are relevant here because they resonate with recent proposals for a federalism "all the way down"[6] and offer instructive ways to navigate a post-*Shelby County* world. I maintain that a critical conversation between Johannes Althusius, Catholic social

2 E. J. Dionne, "The Fight for Voting Rights," *Philadelphia Inquirer*, July 30, 2013.

3 Though I consistently use the term "Catholic social teaching" to convey general sets of principles found primarily in several papal encyclicals, I recognize the rich diversity of the Catholic intellectual tradition that includes a multiplicity of theological (lay, ecclesial, and clerical) perspectives that cannot be reduced into one generic category.

4 Exploring fully the differences between Althusius (and later Calvinist thinkers such as Abraham Kuyper [1837–1920] and ideas about sphere sovereignty) and subsidiarity in Catholic social teaching is beyond the scope of the article. For analysis of their differences, see M. R. R. Ossewaarde, "The Rival Versions of Political Enquiry: Althusius and the Concept of Sphere Sovereignty," *Monist* 90, no. 1 (2007): 106–25; Lael Daniel Weinberger, "The Relationship between Sphere Sovereignty and Subsidiarity," in *Global Perspectives on Subsidiarity*, ed. Michelle Evans and Augusto Zimmerman (Dordrecht: Springer, 2014), 49–63; David Golemboski, "Federalism and the Catholic Principle of Subsidiarity," *Publius: The Journal of Federalism* 45, no. 4 (2015): 526–52; and Kent A. Van Til, "Subsidiarity and Sphere-Sovereignty: A Match Made in … ?" *Theological Studies* 69, no. 3 (2008): 610–36.

5 For an insightful perspective on the pedagogical function of law and its relation to autonomy and solidarity in the US context, see M. Cathleen Kaveny, *Law's Virtues: Fostering Autonomy and Solidarity in American Society* (Washington, DC: Georgetown University Press, 2012).

6 See Heather Gerken, "Foreword: Federalism All the Way Down," in "The Supreme Court 2009 Term," special issue, *Harvard Law Review* 124, no. 1 (2010): 4–74.

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teaching, and the *Shelby County* decision reveals constructive possibilities for scholarly discussion of federalism as well as dialogue between law and religion.[7]

The article has three parts. I begin the first with an exploration of the basic themes and concepts developed by Johannes Althusius and Catholic social teaching. I note similarities in their approaches (such as relational anthropology, localized autonomy, a balance of individual rights and social participation and responsibilities, and the common good) and put them in dialogue with contemporary thinkers. I examine the ways in which they advocate for noninterference by the state within multilayered associations, and yet they assert that the state must intervene to support and sustain fundamental civil rights. I argue that their approaches militate against what I call "negating subsidiarity," where localized power is manipulated or constrained to disempower and deny communities participation in political structures. In the second part, I address the grounds for the *Shelby County* decision, including Chief Justice Roberts's interpretation of racial discrimination and defense of federalism in terms of state sovereignty and equality. According to Chief Justice Roberts, the extraordinary conditions that justified the Voting Rights Act have dramatically changed, thereby rendering the act's preclearance formula superfluous and onerous today. I refute the notion that racial discrimination has disappeared in the United States; I highlight the continued obstacles to the ballot experienced by communities of color that necessitate continued protections through the Voting Rights Act's preclearance provisions. I also contest the defense of federalism that prioritizes fair procedure, equal sovereignty, and minimized state burdens at the expense of individual rights and communal participation in basic social goods. I hold that the federalism of Althusius and the subsidiarity of Catholic social teaching more justly integrate individual rights and the common good. In the third part, I articulate concrete recommendations for a post-*Shelby County* world, drawing upon the insights from Althusius and Catholic social teaching. I first critique the proliferation of voter-identification laws and the Supreme Court's defense of them. I then address changes to the preclearance formula and the potential roles for the courts, Congress, and wider community organizations in preserving the Voting Rights Act.

FEDERALISM AND SUBSIDIARITY: ALTHUSIUS AND CATHOLIC SOCIAL TEACHING

Johannes Althusius's Multitiered Federalism

Writing in the early seventeenth century context of the Dutch revolt and the founding of the Dutch Republic, Calvinist jurist, philosopher, and political leader Johannes Althusius recognized a separation of church and state as separate legal entities "but conjoined in function [where] families, churches, and states alike must protect the rights and liberties of the people."[8] Althusius identified this conjoining of public and private as a form of federalism, which derives linguistically, conceptually, and theologically from *foedus*, or covenant and the political perspective of John Calvin. Althusius introduced revolutionary ideas about federalism that "sought to preserve the internal

7 See, for example, M. Cathleen Kaveny, "Law and Christian Ethics: Signposts for a Fruitful Conversation," *Journal of the Society of Christian Ethics* 35, no. 2 (Fall/Winter 2015): 3–32; Jonathan Rothchild, "Law, Religion, and Culture: The Function of System in Niklas Luhmann and Kathryn Tanner," *Journal of Law and Religion* 14, no. 2 (2009): 475–506; and M. Cathleen Kaveny, *A Culture of Engagement: Law, Religion, and Morality* (Washington, DC: Georgetown University Press, 2016).

8 John Witte, Jr., "Rights and Liberties in Early Modern Protestantism: The Example of Calvinism," in *Christianity and Human Rights: An Introduction*, ed. John Witte, Jr. and Frank S. Alexander (Cambridge: Cambridge University Press, 2010), 135–55, at 147.

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plurality of rule, constitutionally stabilizing it into an organized process of power sharing and conflict management (rather than resolution) based on consent and solidarity. This is what arguably makes him the first modern theorist of federalism."[9] He envisioned federalism as a multitiered constitutional system, where numerous communities retain their particular forms of self-governance and autonomy but are unified by universal ideas of association, solidarity, and sovereignty. Politics is the broad umbrella under which we cultivate our shared life, or an "association (*consociatio*), in which the symbiotes pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life."[10] This "useful and necessary" communication is not a simple utilitarian arrangement, but one that reflects the deeply relational dimensions of human anthropology and social solidarity. Mutual communication also expresses one of the essential features of voting rights.

Symbiotic Relations and the Common Good

Althusius described the good, or end, of an individual life as one dependent on relations with others: "The end of political 'symbiotic' man is holy, just, comfortable, and happy symbiosis, a life lacking nothing either necessary or useful. Truly, in living this life no man is self-sufficient."[11] This repudiation of self-sufficiency, which contrasts sharply with the rationally self-interested agent (for example, the atomistic agent of liberalism), derives from two of Althusius's sources: Calvin and Aristotle. Affirming the sovereignty of God and the fallenness of humanity, Althusius interprets the social and political as created by God's providential guidance:

> For this reason God willed to train and teach men not by angels, but by men. For the same reason God distributed his gifts unevenly among men. He did not give all things to one person, but some to one and some to others, so that you have need for my gifts, and I for yours. And so was born, as it were, the need for communicating necessary and useful things, which communication was not possible except for social and political life.[12]

In this way, politics arises out of a theological framework: politics functions as a mechanism for sharing our God-given gifts and communicating the meaning of those gifts, that is, honoring the glory of God, promoting the welfare of the neighbor,[13] and undertaking our pursuit of "a common life of justice together."[14] Incorporating aspects of his study of Aristotle,[15] Althusius also sees the lack of self-sufficiency as a feature of human beings as social and political animals who desire a

9 Thomas O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Waterloo: Wilfrid Laurier University Press, 1999), 5. Hueglin does caution that "Althusius did not develop a theory of the modern federal state, and he did not even use the term 'federal' or 'federation' exception in a brief section." Ibid., 2.

10 Johannes Althusius, *The Politics of Johannes Althusius*, trans. Frederick Carney (Boston: Beacon Press, 1964), 12.

11 Ibid.

12 Ibid., 18.

13 See, for example, ibid., 75.

14 Ibid., 74; see chapters 10–17. As Calvin notes, civil government is intended to protect worship of God, piety, and the church, "to form our social behavior to civil righteousness, to reconcile us with another, and to promote general peace and tranquility." John Calvin, *Calvin: Institutes of the Christian Religion*, ed. John McNeill, 2 vol. Library of Christian Classics 21 (Philadelphia: The Westminster Press, 1960), 2:1487 (book 4, chapter 20, section 2).

15 This appeal to Aristotle resonates with Thomistic thought, which, as I explore below, has significant import for Catholic social teaching.

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common social life and mutual giving.[16] In *The Politics*, Aristotle conceives of the self-sufficient person as disconnected from the city and, by extension, from humanity: "One who is incapable of participating or who is in need of nothing through being self-sufficient is no part of a city, and so is either a beast or a god."[17] Drawing upon these theological and philosophical sources, Althusius expresses a vision of political life characterized by symbiotic interactions between dependent individuals and groups who are "participants or partners in a common life,"[18] equivalent to the common good language used in Catholic social teaching.

Symbiotic life is not exhausted by political activities and relations; for Althusius, the family lies at the center of this common life. Though some of Althusius's ideas reflect his social and historical context and are problematic,[19] he creatively affirms that features of family life, namely, conjugal and kinship associations, "are the seedbed of all private and public associational life."[20] Similar to Catholic social teaching, Althusius denominates the family as the basic unit of society and as a political entity in order to bridge private and public life. As Thomas Hueglin observes, Althusius departs from Aristotle on this point: "For Aristotle, the basic political principle is not living together, but living together in a polis. Family life takes place within the polis, but has no part of it. For Althusius, all forms of social life are guided by the same political principle of living together—what is different are only the specific rules appropriate to each."[21] "Appropriate to each" resonates with—as we see below—the idea of proper and competent duties employed in Catholic social teaching's accounts of subsidiarity. As larger groups, what Althusius refers to as *collegia*, develop beyond the family, the idea of commonality or common form is maintained amidst the plurality necessitated by contexts. Althusius describes the collegium, where "[t]he common purpose requires that all colleagues be considered participants within a common legal structure, not as separate individuals but as one body."[22] Within the collegium, colleagues are free to develop their own statutes in accordance with their specific goods, professions, and business.[23] As these associations become conjoined, they constitute "an inclusive political order (*politeuma*),"[24] or what Althusius refers to as a community or the city. Althusius insists that members of the community "are private and diverse associations of families and collegia, not the individual members of private associations."[25] In this way, all citizens remain diverse but united in one community.

Community, Participation, and the Corporative State

Here a critical interpretive question emerges regarding Althusius's sense of the unity of the community: is it tantamount to a corporative state that sublates the individual? Carl Friedrich, for example, observes that in Althusius's model "participation of the individual persons (*singuli*) occurs only

16 Althusius, *The Politics of Johannes Althusius*, 19.

17 Aristotle, *The Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984), 21.

18 Althusius, *The Politics of Johannes Althusius*, 14.

19 For example, Althusius makes such assertions as, "So the male, because the more outstanding, rules the female, who as the weaker obeys." Ibid., 21; "The wife and family are obedient, and do what is commanded." Ibid., 24.

20 Ibid., 26.

21 Hueglin, *Early Modern Concepts for a Late Modern World*, 80. See also Bettina Koch, "Johannes Althusius: Between Secular Federalism and the Religious State," in *The Ashgate Research Companion to Federalism*, ed. Lee Ward and Ann Ward (Burlington: Ashgate, 2009), 74–90, at 72.

22 Althusius, *The Politics of Johannes Althusius*, 30.

23 Ibid., 31.

24 Ibid., 34.

25 Ibid., 35.

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indirectly through the lower corporate entities to which they belong."[26] To be sure, Althusius's federalism gainsays overly individualistic accounts of social and political life. He asserts that members of a community coming together do not do so "as spouses, kinsmen, and colleagues, but [as] citizens of the same community. Thus passing from the private symbiotic relationship, they unite in the one body of a community."[27] However, Althusius also takes care to protect the individual. For example, he resists the potential tyranny of the majority by differentiating between use of consensus pertaining to persons as a group and its use pertaining to persons as individuals: "a consensus of the majority is not sufficient in those matters that are done by the many as individuals."[28] Furthermore, his accounts of symbiotic rights and representation—coupled with his emphasis on a relational anthropology and the embeddedness of individuals within community structures[29]—preserve individuals and individual rights within communal associations. As I discuss in the next part, these considerations relate to voting rights and the importance of the Voting Rights Act. Althusius identifies the final cause of political association as "the engagement of a comfortable, useful, and happy life, and of the common welfare,"[30] and he insists that magistrates and citizens can "neither neglect nor despise anyone who can be helpful to the commonwealth."[31] The Voting Rights Act was originally intended to protect individual rights and the common welfare, and I will argue that this crucial function is still needed today.

Sovereignty, for Althusius *pace* the later Hobbesian *Leviathan*, is a popular sovereignty that is cultivated through a "bottom up" approach critical for inviting and sustaining participation. As we will discuss, a bottom-up approach resonates with Catholic social teaching and requirements for meaningful voting rights. In the preface to the first edition of his *Politica* (1603), Althusius writes, "I concede that the prince or supreme magistrate is the steward, administration, and overseer of these rights. But I maintain that their ownership and usufruct properly belong to the total realm or people."[32] He reiterated the same point in the preface to the third edition (1614): "I have attributed the rights of sovereignty, as they are called, not to the supreme magistrate, but to the commonwealth or universal association"[33] Locating the right of sovereignty in the universal association enabled Althusius to repudiate the territorial absolutism of his day and to protect particular rights undergirded by the universal association and common life. Obligations to uphold the covenant—illuminative of the double covenant in Calvinist theology—are equally binding on the magistrate and the subjects.[34] Covenant organizes political and social life and communal deliberation about moral obligations and shared values, which again connect to contemporary concerns about voting access and participation.

This collective deliberation, according to Althusius, is guided by natural law. This appeal to natural law is significant given the theological disagreements historically between Catholic and Protestant theologians. Recent retrievals of natural law by Protestant theologians in the United States challenge bifurcated views of natural law and underscore the importance of Althusius for

26 Carl Friedrich, preface to *The Politics of Johannes Althusius*, xi.

27 Althusius, *The Politics of Johannes Althusius*, 35.

28 Ibid., 40.

29 See Hueglin, *Early Modern Concepts for a Late Modern World*, 67, 108.

30 Althusius, *The Politics of Johannes Althusius*, 19.

31 Ibid., 17.

32 Althusius, preface (1st edition, 1603), *The Politics of Johannes Althusius*, 5.

33 Ibid., preface (3rd edition, 1614), 10. Later he submits that the right of sovereignty "does not belong to individual members, but to all members joined together and to the entire associated body of the realm." Althusius, *The Politics of Johannes Althusius*, 65.

34 Ibid., 116.

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an American context.[35] Given that the theological and secular aspects of Althusius's federalism function interdependently,[36] the Decalogue underpins this collective expression by "direct[ing] symbiotic life and prescrib[ing] what ought to be done therein."[37] As Stephen Grabill argues in contrast with Carney and others, the Decalogue for Althusius—consistent with thinkers in the Reformed tradition such as Jerome Zanchi (1516–1590) and Calvin[38]—is "a renewed and re-enforced form of the logically prior *lex naturalis*, the universal knowledge of morality God originally implanted in the mind of creation but which has become obscure after the fall."[39] As in Catholic social teaching, the natural law is not limited to an abstractly theological or moral dimension; rather it is also political and has distinctively practical implications.[40] Althusius concludes that the natural law implanted in humanity creates the conditions for "the free power of constituting princes, kings, and magistrates for themselves."[41] Furthermore, adherence to the natural law and the Decalogue helps cultivate a close affinity between natural, divine, and civil law: "civil laws that depart from these strictures [of natural and divine immutable equity] relinquish the moral authority that stands behind all duly enacted law."[42] As Althusius notes, "if [civil law] departs entirely from the judgment of natural and divine law (jus naturale et divinum), it is not to be called law (*lex*)."[43]

Althusius's notion of representation sheds further light on the ways federalism promotes individual and communal association. Althusius maintains that "each of us has been ordained to his [or

35 Recent works in Protestant theology that appeal to natural law include David VanDrunen, *Divine Covenants and Moral Order: A Biblical Theology of Natural Law* (Grand Rapids: William B. Eerdmans, 2014), arguing for the convergence between the *imago Dei*, covenant, and natural law; J. Daryl Charles, *Retrieving the Natural Law: A Return to Moral First Things* (Grand Rapids: William B. Eerdmans, 2008), arguing that natural law is affirmed in the writings of the Protestant reformers; David VanDrunen, "The Context of Natural Law: John Calvin's Doctrine of the Two Kingdoms," *Journal of Church and State* 46, no. 3 (2004): 503–25, arguing that scholars frequently concentrate on Calvin's notions of sin and grace and neglect the important place of natural law in his notion of the civil kingdom; and Don S. Browning, "A Natural Law Theory of Marriage," *Zygon* 46, no. 3 (2011): 733–60, arguing that natural law provides a coherent framework for conceptualizing the premoral goods of marriage.

36 For example, Althusius writes, "Universal symbiotic communion is both ecclesiastical and secular. Corresponding to the former as religion and piety, which pertain to the welfare and eternal life of the soul, the entire first table of the Decalogue. Corresponding to the latter is justice, which concerns the use of the body and of this life, and rendering to each his due, the second table of the Decalogue." Althusius, *The Politics of Johannes Althusius*, 70. See also Koch, "Johannes Althusius," 71.

37 Althusius, *The Politics of Johannes Althusius*, 142.

38 Calvin writes, "It is a fact that the law of God which we call the moral law is nothing else than a testimony of natural law and of that conscience which God has engraved upon the minds of men." Calvin, *Calvin: Institutes of the Christian Religion*, 2:1504 (book 4, chapter 20, section 16).

39 Stephen Grabill, *Rediscovering the Natural Law in Reformed Theological Ethics* (Grand Rapids: William B. Eerdmans, 2006), 131; see also John Witte, Jr., "A Demonstrative Theory of Natural Law: The Original Contribution of Johannes Althusius," in *Public Theology for a Global Society: Essays in Honor of Max L. Stackhouse*, ed. Deirdre King Hainsworth and Scott R. Paeth (Grand Rapids: William. B. Eerdmans, 2009), 21–36, at 28.

40 John Witte observes that Althusius's appeal to natural law had practical import within his politically fragmented context: "[Althusius's] natural law theory was designed to produce a new concordance of discordant canons that transcended differences of creed, country, and custom." John Witte, Jr., "A Demonstrative Theory of Natural Law: Johannes Althusius and the Rise of Calvinist Jurisprudence," *Ecclesiastical Law Journal* 11, no. 3 (2009): 248–65, at 264.

41 Althusius, *The Politics of Johannes Althusius*, 91.

42 Grabill, *Rediscovering the Natural Law*, 149.

43 Althusius, *The Politics of Johannes Althusius*, 67.

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her] proper and individual role in life,"[44] or "special right"[45] that varies according to context but is universally enjoyed. Universal enjoyment of this right unfolds through consent and communication between consociations, where, as Bettina Koch notes, "communication with other consociations and within larger consociations composed out of different communities works through representation. Consequently, political participation is only possible through the organization of and within groups."[46] This political participation involves individual consent from members of associations, group interactions, privileges of local leaders, and universal jurisdiction of the supreme prince.[47] This configuration protects the autonomy of subnational units while maintaining universal enjoyment of things, services, and common rights. Hence, current critiques regarding, for example, the inability of Althusius's model to protect the civil rights of a minority against the preferences of a majority, are misplaced. Philosopher Andreas Føllesdal contends that "Althusian, con-federal, and fiscal federalist arguments seem unable to address such concerns, since they tend to proscribe intervention by the center."[48] Such critiques fail to appreciate the nuance of Althusius's symbiotic law, which consistently maintains that justice requires the protection and promotion of the good of the neighbor individually and collectively.[49]

Plural Associations and Collective Deliberation

Althusius respects diversity in legislation (for example, "Every city is able to establish statutes concerning those things that pertain to the administration of its own masters"[50]) and governance (for example, "the form and manner by which the city is ruled and governed according to laws it approves and a magistrate that it constitutes with the consent of the citizens"[51]). Common laws, for example, reflect the unique histories and practices of a given community. However, he submits that such legislation and governance must affirm the common rights of the community, which, when "alienated, the community ceases to exist."[52] Althusius anticipates contemporary versions of constitutional federalism that embrace plurality without abandoning the primacy of individual and communal rights. Legal theorists Steven G. Calabresi and Lucy D. Bickford hold a similar perspective, where federalism "tends to support some degree of variation in national individual rights from state to state, but no variation as to fundamental civil rights, especially rights of political participation and rights against discrimination on the basis of race, religion, or sex."[53]

Althusius's defense of group associations underscores the ways in which his federalism integrates individual rights and communal life. Unlike Jean Bodin[54] (1520–1596) and Thomas Hobbes

44 Ibid., 79, 139. Althusius later notes that "proper law (*jus proprium*) is nothing other than the practice of this common natural law (*jus naturale*) as adapted to a particular polity." Ibid., 139.

45 Ibid., 79.

46 Koch, "Johannes Althusius," 73.

47 Althusius, *The Politics of Johannes Althusius*, 57–58.

48 Andreas Føllesdal, "Competing Conceptions of Subsidiarity," in *Federalism and Subsidiarity*, ed. James E. Fleming and Jacob T. Levy (New York: New York University Press, 2014), 214–30, at 223.

49 See, for example, passages from Althusius's *Politics* such as the following: "An administration is said to be just, legitimate, and salutary that seeks and obtains the prosperity and advantages of the members of the realm, both individually and collectively." Althusius, *The Politics of Johannes Althusius*, 92.

50 Ibid., 43.

51 Ibid., 44.

52 Ibid.

53 Steven G. Calabresi and Lucy D. Bickford, "Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law," in Fleming and Levy, *Federalism and Subsidiarity*, 123–89, at 162.

54 See, for example, Althusius, *The Politics of Johannes Althusius*, 66–68.

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(1588–1679), Althusius affirms that a federal covenant invites plurality and unity. Thomas Hueglin notes a significant contrast between Althusius and Hobbes: for Hobbes, the formation of groups risks "exercising factitious power,"[55] threatens "hegemonic control over thought and action,"[56] and unsettles "the contractual surrender of all political wills."[57] By contrast, Althusius viewed sovereignty and the fundamental law as the collective expression of the covenants (*pacta*) of cities and provinces. He encouraged the provincial—because, as noted above, no one is self-sufficient—to "avail himself of skilled, wise, and brave persons *from each class of men*."[58] Sovereignty is the exercise of collective deliberation, not a bulwark against a state of war.

Althusian Federalism Today

Finally, it is interesting to note resonances between Althusius's conceptions of federalism and those envisioned by contemporary legal specialists in federalism such as Heather Gerken and Judith Resnik. Similar to Althusius, Gerken seeks to disembed federalism exclusively from state sovereignty concerns. Gerken develops a federalism whereby "minorities are insiders" who "exercise 'voice' in an exceedingly muscular form."[59] She characterizes this form of federalism as "federalism all the way down," including attention to local institutions and arrangements such as juries, school committees, zoning boards, and local prosecutors' offices. In a related way, Althusius notes that "all symbiotic association and life is essentially, authentically, and generically political. But not every symbiotic association is political.… And these are the seedbeds of the public association."[60] Federalism all the way down promotes voter access, meaningful communication and participation, and individual and communal empowerment, all goals shared by Althusius.

Judith Resnik similarly speaks of federalism(s), by which she

> seek[s] to dislodge state-centered federalism by discussing the degree to which geographic boundaries have become porous, requiring an accounting of different configurations of power that do not match territorial borders. The units of analyses need to focus beyond the subunit and the federation so as to include their translocalism and the internationalism that alter the meaning of power, participation, voice, jurisdiction, rights, and exit in domestic settings.[61]

While Resnik's ideas about translocalism and internationalism challenge an Althusian model to stretch beyond the confederation, I see important connections between the two approaches. In asserting that "[r]ather than lawmaking authority that is 'truly local' or 'truly national' … norms travel horizontally, vertically, diagonally and diffuse irregularly, with subunits and their officials often functioning as co-venturers rather than as solo actors,"[62] Resnik decouples federalism from both a top-down, state-centric model—akin to what we will see in Chief Justice Roberts's federalism—and an atomistic individualism. It also gainsays a federalism focused simply on the devolution of power to the local. Resnik's perspective resonates with Althusius's multilevel

55 Hueglin, *Early Modern Concepts for a Late Modern World*, 51.

56 Ibid., 53.

57 Ibid., 95.

58 Althusius, *The Politics of Johannes Althusius*, 49 (emphasis added).

59 Gerken, "Foreword: Federalism All the Way Down," 14.

60 Althusius, *The Politics of Johannes Althusius*, 27.

61 Judith Resnik, "Federalism(s)' Forms and Norms: Contesting Rights, De-essentializing Jurisdictional Divides, and Temporizing Accommodations" in Fleming and Levy, *Federalism and Subsidiarity*, 363–435, at 369.

62 Ibid., 370.

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understanding of federalism, where some local units are capable of exercising sovereignty and autonomy but also where higher orders are necessary to achieve certain social goods. As I argue below in the second section of this article, the Voting Rights Act helped to ensure that this multi-dimensional balance was achieved.

Subsidiarity in Catholic Social Teaching

Though often identified with the encyclicals that emerged in the late nineteenth century in response to the modern liberal state,[63] the origins of subsidiarity are found in the early church fathers and in the natural law tradition of Thomas Aquinas.[64] Thomas Aquinas (1225–1274) discussed a broad range of political bodies, intermediate corporations, and ecclesiastical, political, and social communities. Aquinas established a foundation for federalism through principles of natural law (and its relation to human law), public society, and the common good. As such, attention to Aquinas's analysis of the plurality of communities "is thus a necessary prerequisite to an accurate understanding of the origin and development of federal ideas, as well as the distinctively Roman Catholic doctrine of subsidiarity."[65] As the Catholic doctrine of subsidiarity evolved (toward, for example, appropriations of modern notions of individual rights), the goals for subsidiary expanded to include the promotion of individual self-determination, advancement of networks of relationships and the common good, and the use of intermediaries (that offer *subsidium* or help). Subsidiarity is rooted in claims about human dignity, autonomy, responsibility, and relationality that emerge out of—as we observed with respect to Althusius's Calvinist framework—the anthropological and moral demands of humanity as created as the *imago Dei*. The state must intervene when necessary (for example, to confront simple devolution of power and to "create conditions of greater equality, justice, and peace"),[66] and its roles are principally that of support, solidarity, and collaboration (with civil society) and protection of individual and group freedoms and integrity of action, as in the United States Voting Rights Act.

Subsidiarity in Papal Encyclicals

In his 1931 encyclical *Quadragesimo Anno*, Pope Pius XI affirmed that states cannot usurp lower organizations because "it is an injustice and at the same time a grave evil and a disturbance of right order to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies."[67] This form of subsidiarity, where a larger state or community organization avoids usurping a small one by performing its duties, is characterized as negative subsidiarity (as it limits state intervention).[68] Yet I find the term *negative* here to be

63 The most prominent is Leo XIII's *Rerum Novarum* in 1891. Joseph Komonchak recognizes various perspectives on the emergence of subsidiarity. He favors views on subsidiarity as a modern development (such as Arthur-Fridolin Utz's in *Das Subsidiaritätsprinzip*). Joseph Komonchak, "Subsidiarity in the Church: The State of the Question," *Jurist* 48, no. 1 (1988): 298–349, at 298.

64 Van Til, "Subsidiarity and Sphere-Sovereignty," 614.

65 Nicholas Aroney, "Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire," *Law and Philosophy* 26, no. 2 (2007): 161–228, at 166.

66 Pontifical Council for Justice and Peace, *Compendium on the Social Doctrine of the Church* (Washington, DC: United States Conference of Catholic Bishops, 2004), 82.

67 Pius XI, *Quadragesimo Anno*, in *Catholic Social Thought: The Documentary Heritage*, eds. David J. O'Brien and Thomas A. Shannon (Maryknoll: Orbis Books, 1992), 60.

68 See, for example, Ken Endo, "The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors," *Hokkaido Law Review* 44, no. 6 (1994): 652–553.

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potentially underdeveloped in that it does not account fully for Catholic social teaching's recognition of and caution against the effects of unwarranted and overly restrictive state intervention. I employ the term *negating subsidiarity* in cases where a larger organization such as the state deliberately uses power: (1) to displace the role of the community through manipulation of localized control (for example, as I discuss below, voter-identification laws); (2) to disempower communities and individuals by denying participation of the community in wider political and economic structures; and (3) to create cycles of inequality and diminished autonomy through pervasive obstacles to individual and communal self-determination through ongoing institutional interference in local decision-making.

In envisaging social activity and proactive support from the state in support of individual and community autonomy, Pope Pius XI responds to the perils of multiple negative subsidiarity by asserting the positive duties constitutive of subsidiarity. This assertion is similar to Althusius, whom Thomas Hueglin suggests "clearly moves from the formulation of a negative or minimum consent requirement to a positive postulation of joint tasks and obligations."[69] Influenced by Thomism and the conception of overlapping societies developed by the Jesuit Luigi Taparelli D'Azeglio, Pope Pius XI views subsidiarity as interlocking state, community, and individual activity, whereby unique constituencies with distinctive competencies and responsibilities work collaboratively toward common ends. Catholic moral theologian Kenneth R. Himes holds that the positive duties of subsidiarity promote pluralism (including nongovernmental associations, or, as noted, what Althusius referred to as *collegia*) and participation (including the enjoyment of rights and sharing in the common good, or what Althusius referred to as the universal association), not the rejection of state intervention: "Subsidiarity serves these twin aims of pluralism and participation not by being interpreted as anti-state but by being understood as pro-involvement in the diverse richness of society."[70] Similar to Althusius, Catholic social teaching insists that power is not absolutely held by the state (and simply devolves from above); rather many layers of diverse associations, groups, and other entities possess authority by exercising autonomously their proper ends in support of the common good. These autonomous exercises in support of specific ends and the common good include voting rights.

Pope Pius XI identified various aspects of subsidiarity, including individual freedom of action and the common good,[71] the important roles of associations such as trade unions,[72] the dangers of individualism and collectivism,[73] and justified state invention.[74] Christian ethicist Kent A. Van Til characterizes Pius's goal for subsidiarity as "the full development of the human persons within a system in which the individual can flourish."[75] In this way, subsidiarity enjoins a positive obligation and counteracts the purely deontological focus on some forms of federalism, as we will discuss below, privileging fair procedure and equal sovereignty and minimizing undue and disproportionate burdens. Catholic subsidiarity upholds deontological concerns such as equality as measured by dignity and localized responsibility, but it also incorporates a strong teleological aspect in terms of creating substantive opportunities for the enjoyment of diverse goods among individuals,

69 Hueglin, *Early Modern Concepts for a Late Modern World*, 159.

70 Kenneth R. Himes, *Christianity and the Political Order: Conflict, Cooptation, and Cooperation*, Theology in Global Perspectives Series (Maryknoll: Orbis Books, 2013), 213.

71 Pius XI, *Quadragesimo Anno*, 47.

72 Ibid., 49, 61.

73 Ibid., 52.

74 Ibid., 60.

75 Van Til, "Subsidiarity and Sphere-Sovereignty," 615.

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families, associations, and voluntary associations.[76] As noted above, Althusius shares this conception of political life as focused on the enjoyment of the good in a just and peaceful community.

Pope John XXIII further clarifies in *Mater et Magistra* (1961) that public authorities should attempt "to increase output of goods and to further social progress for the benefit of all citizens."[77] The goals of subsidiarity are to encourage private initiatives (to avoid political tyranny[78]) and to limit appropriate activity of the State (to prevent exploitation of the weak[79]), thereby uniting individual interests and the common good. In *Octogesimo Adveniens* (1971), Pope Paul VI calls for shared responsibility through the constructive engagements of individual freedom and collaborative cultural, political, and religious partnerships. Subsidiarity recognizes a broad range of goods and perspectives, yet it also facilitates the communal recognition (and communication, as Althusius asserts) of individual and collective needs and supports communal discernment on and deliberation about the best ways to meet those needs. Subsidiarity considers and evaluates the substantive opportunities for individual and communal exercise of authentic freedom and contributory participation. This participation, rooted in a relational anthropology, rights, natural law, and human dignity, cannot be de-historicized or dis-embodied (which, as I engage below, appears to be the methodology of Chief Justice Roberts).

Moreover, though below I discuss that the Court privileges concerns for state harms over individual harms in allowing voter-identification laws, I note here that subsidiarity offers a non (hyper-) procedural mechanism for accounting for private and public goods within a non-reductive framework. Similar to Althusius's multilayered federalism, subsidiarity supports a natural law pluralist view that "is defined not by the two poles of individual and state, but rather by a diverse landscape of natural and purpose-laden societies within society."[80] This view sharply contrasts with Chief Justice Roberts's dual federalism[81] and its assumptions about an individual rights-states' rights dichotomy. Subsidiarity seeks to cultivate these goods through organic interactions and responsible participation in political, economic, and social realities.[82] Subsidiarity, particularly as it developed in these encyclicals and more broadly in Catholic social teaching, moves beyond Chief Justice Roberts's narrow federalism because it attends to universal claims (such as inviolable rights of the individual) and particular contexts and perspectives (for example, alternative and negotiated—from the bottom up—conceptions of the good).[83]

Undertaking a "re-reading of Pope Leo's encyclical"[84] on the hundredth anniversary of Pope Leo XIII's *Rerum Novarum*, Pope John Paul II in 1991 carries forward the emphasis on subsidiarity in light of political, social, and economic developments or the signs of the times. Affirming, as in Althusius's multidimensional federalism, individual participation in various intermediary groups

76 Examples of the goods described in Catholic social teaching include "*teloi*" (Van Til, "Subsidiarity and Sphere-Sovereignty," 619) and "munera" (Russell Hittinger, "Social Pluralism and Subsidiarity in Catholic Social Doctrine," *Annales Theologici* 16 (2002): 385–408; Patrick McKinley Brennan, "Subsidiarity in the Tradition of Catholic Doctrine," in *Evans and Zimmerman*, 29–47, at 37–40.

77 Pope John XXIII, *Mater et Magistra*, *Catholic Social Thought*, 92.

78 Ibid., 93.

79 Ibid.

80 Golemboski, "Federalism and the Catholic Principle of Subsidiarity," 541.

81 For a broader critique of dual federalism, see Sotirios A. Barber, "Defending Dual Federalism: A Self-Defeating Act," in Fleming and Levy, *Federalism and Subsidiarity*, 3–21.

82 Pontifical Council for Justice and Peace, *Compendium on the Social Doctrine of the Church*, 82.

83 For further discussion, see Robert K. Vischer, "Subsidiarity as Subversion," *Journal of Catholic Social Thought* 2, no. 2 (2005): 277–311.

84 Pope John Paul II, "Centesimus Annus: On the Hundredth Anniversary of *Rerum Novarum*," in *Catholic Social Thought*, 440.

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"which stem from human nature itself and have their own autonomy, always with a view to common good,"[85] Pope John Paul II refutes socialism[86] that erodes free choice and personal responsibility and reduces humans "to a series of social relationships."[87] This mediating position—one that, similar to that of Althusius, dialectically protects individual and communal autonomy but also affirms universal principles of solidarity—works to defend and preserve the common good, not simply private benefit.[88] As Catholic ecclesiologist Joseph Komonchak notes, subsidium is intended to encourage individuals to assume "responsibility for their own self-realization" and to "exercise their own self-responsibility,"[89] which are essential components of voting rights, citizenship, and participation.

Althusian Federalism, Catholic Subsidiarity, and Voting Rights

Similar to Althusius's model of federalism that emerges out of his relational anthropology, consent, and popular sovereignty, Catholic social teaching views subsidiarity and political life through an anthropological lens (that is, focused on issues pertaining to what it means to be human, such as relationality, freedom, responsibility, and horizontal or interpersonal interactions).[90] As Althusius argued, humans are fundamentally relational, where their pursuit of individual goods is always interconnected with others and the common good. Catholic ethicist Margaret Farley expresses anthropology in terms of autonomy and relationality, which are obligating features of personhood that mandate respect for persons as ends in themselves.[91] Subsidiarity affirms what it means to be human in terms of autonomy and relationality (as Althusius does), or, more specifically, in terms of individual agency, contributive justice, and participation in wider economic, political, and social structures; when individuals are respected and empowered to pursue basic goods, they contribute to the well-being of the community and the common good. Subsidiarity promotes in non-reductive and non-instrumentalized ways what it means to be a human: "Subsidiarity springs from the Church's recognition that [humans] cannot be adequately understood simply by [their] market function or political status."[92] In this way, subsidiarity protects individual freedom and dignity independent of social capital and status. Yet, subsidiarity also requires individual

85 Ibid., 449.

86 Althusius does not share a commitment to strict equality, which he believes is a source of social conflict: "Contrary to this fairness is equality (*aequalitas*), by which individual citizens are levelled among themselves in all those things I have discussed. From this arises the most certain disorder and disturbance of matters." Althusius, *The Politics of Johannes Althusius*, 44. Strict equality would interfere with his model of divine sovereignty and God's providential dispersal of gifts.

87 Pope John Paul II, "Centesimus Annus," 448.

88 Ibid., 469; Pope Francis, *Laudato Si'* [Encyclical on care of our common home] (May 14, 2015), http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

89 Komonchak, "Subsidiarity in the Church," 301–2.

90 I disagree with those, such as Ken Endo, who assert that the church's hierarchical and corporative perspective restricts solidarity to only vertical interactions. See Endo, "The Principle of Subsidiarity," 638.

91 Margaret A. Farley, *Just Love: A Framework for Christian Sexual Ethics* (New York: Continuum, 2006), 212. David Hollenbach prefers "freedom" rather than "autonomy" and adds "basic needs" as a third obligating feature of personhood. See David Hollenbach, "Human Dignity: Experience and History, Practical Reason and Faith," in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press, 2013), chapter 6, at 129–30.

92 Robert K. Vischer, "Solidarity, Subsidiarity, and the Consumerist Impetus of American Law," in *Catholic Perspectives on American Law*, ed. Michael Scaperlanda and Teresa Stanton Collett (Washington, DC: The Catholic University of America Press, 2007), 85–103, at 97–98.

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responsibility to neighbors and communities; localized self-determination empowers and "reconfigures the modern citizen as a proactive moral agent."[93] Subsidiarity extends moral agency and the relational aspect of humans by further recognizing that—in addition to the basic cell of society, the family—groups, associations, and community generate "specific networks of solidarity."[94] Though impacted by the reality of social sin, such networks of solidarity can be viewed as working toward shared ends and not competing over power and resources. In the article's next section, I consider the ways in which the *Shelby County* decision rests on specious or distorted assumptions, including the rationales proffered by Chief Justice Roberts in his majority opinion, namely, the changed racial context and federalism as states' rights.

THE *SHELBY COUNTY* DECISION AND ITS APPEAL TO FEDERALISM

My objective in this second part of the article is to examine the rationale for the Court's *Shelby County* decision and to continue to apply the insights from Althusius and Catholic social teaching, namely, the common foci of their respective models of federalism and subsidiarity—relational anthropology, localized autonomy, participation, and the common good. In order to apply my critiques fairly, I attempt first to unpack some of the legal aspects of the *Shelby County* decision.

Before analyzing the *Shelby County* decision, we can first note that this decision was not unanticipated among students of the Roberts court. That decision was prefigured in the 2009 case of *Northwest Austin Municipal Utility District Number One v. Holder*,[95] which the *Shelby County* decision cites no fewer than twenty times. In the *Northwest Austin* case, a Chief Justice Roberts's authored majority ruled on a more technical statutory point—whether the utility district as a political subdivision is eligible for bailout from preclearance[96]—but the Court registered more fundamental concerns by "express[ing] serious doubts" about the continued constitutionality of preclearance and the preclearance coverage formula.[97] In *Northwest Austin*, Chief Justice Roberts laid out two principles that would underpin the *Shelby County* decision: the "current burdens versus current needs" test and equal sovereignty among states. Relying on these principles, he signals his skepticism about the continuation of the Voting Rights Act's preclearance formula: "Past success alone, however, is not adequate justification to retain the preclearance requirements."[98] More significantly, the decision challenged Congress to redesign the Section 4(b) coverage formula. The decision affirmed that the Fifteenth Amendment empowers Congress, not the Court, to determine what is needed to enforce it, yet the decision also insisted that Section 5 exceeds such powers by suspending all changes to state election law until they have received preclearance.

93 Ibid., 99.

94 Pope John Paul II, "Centesimus Annus," 477.

95 557 U.S. 193 (2009).

96 Based on this emphasis on the statute, some predicted that the Roberts court would continue to privilege statutory instead of constitutional claims; see Christopher P. Banks and John C. Blakeman, *The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Court* (Lanham: Rowman and Littlefield Publishers, 2012), 136, 275. Others observe tensions in the emphasis on the statutory point. As Luis Fuentes-Rohwer wonders in light of the *Northwest Austin* decision, "why is the Court uncharacteristically deferential to Congress on the question of congressional powers, yet unduly aggressive when interpreting the language of the statute?" Luis Fuentes-Rohwer, "Understanding the Paradoxical Case of the Voting Rights Act," *Florida State University Law Review* 36, no. 4 (2009): 697–763, at 702.

97 *Northwest Austin*, 557 U.S. at 202.

98 Ibid.

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Chief Justice Roberts carries this concern for the constitutionality of the preclearance provision forward into the *Shelby County* decision. Reasserting the authority of *Northwest Austin*, Chief Justice Roberts reports with almost mechanical resignation—what Justice Ginsburg characterizes as "hubris"—that Congress's failure to adhere to the *Northwest Austin* mandate forced the Court's hand: "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 Section 4(b) unconstitutional."[99] In declaring the Voting Rights Act's section 4(b) preclearance formula to be unconstitutional in the five justice majority opinion in *Shelby County*, Chief Justice Roberts characterizes the Voting Rights Act as having in 1965 "employed extraordinary measures to address an extraordinary problem."[100] This framing of the Act ascribes a definitively contextual meaning to it: in the face of sustained evidence of deliberately discriminatory exclusion of African Americans from the ballot, Congress in 1965 took action and provided a temporary (even emergency) remedy. The act was justified in this context because it addressed "exceptional conditions."[101] Section 4 of the Act governed when and where to apply Section 5's coverage, whereby six southern states—Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia—as well as twenty-six counties in North Carolina[102] and one in Arizona, were designated as covered jurisdictions and were required to seek preclearance from the Department of Justice or a three-judge federal court before modifying any election requirement or redistricting.

Section 4 made sense in the 1960s context, according to Chief Justice Roberts, because it rationally responded to pervasive discriminatory practices such as literacy tests and other prerequisites for voting. The act encouraged minority voting in the covered states that had less than 50 percent of the total voting age population registered or voting in the election of 1964; for example, in 1964, 6.7 percent of black Mississippians were registered to vote, whereas in 1967 59.8 percent were.[103] In its 1970 reauthorization, Congress expanded coverage.[104] The Supreme Court had consistently recognized the constitutionality of these expanded coverage jurisdictions. Nevertheless, in evaluating these practices in relation to the current context, Chief Justice Roberts opines, "There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[105] Attributable, in part, to the success of the Voting Rights Act, the United States has experienced remarkable legal, political, and cultural shifts where things "have changed dramatically" from the 1965 world. In other words, it is precisely the tremendous success of the Voting Rights Act in effectuating change that, in Chief Justice Roberts's perspective, rendered it superfluous and onerous today.[106]

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99 Shelby County, Alabama v. Holder, 133 S. Ct. 2612 (2013), 2631.

100 Ibid.

101 Ibid., quoting South Carolina v. Katzenbach, 383 U.S. 301 (1966).

102 See Kent Redding, *Making Race, Making Power: North Carolina's Road to Disenfranchisement* (Urbana: University of Illinois Press, 2003).

103 Ronald W. Walters, *Freedom Is Not Enough: Black Voters, Black Candidates, and American Presidential Politics* (Lanham: Rowman & Littlefield, 2005), 18.

104 The expanded coverage in 1970 included boroughs in New York, one county in Wyoming, two in California, and five in Arizona. In its 1975 reauthorization, Congress extended voting rights protections to "language minorities" and applied the new formula to include, additionally, Alaska, Arizona, and Texas and parts of California, Colorado, Florida, Michigan, New Mexico, New York, North Carolina, Oklahoma, and South Dakota. In 2013, nine states and parts of seven others were subject to Section 5 preclearance, and twenty-eight states were subject to the "language minority" provisions.

105 *Shelby County*, 133 S. Ct. at 2631.

106 Others point to the success of the Voting Rights Act as a contributing factor to the collapse of the New Deal coalition that underpinned congressional Democratic power. See Pamela Karlan, "Loss and Redemption: Voting Rights at the Turn of the Century," *Vanderbilt Law Review* 50, no. 2 (1997): 291–326, at 314.

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Necessary and Sufficient Metrics?

Is the Voting Rights Act therefore still needed to allow access to the ballot and participation in a fair voting process? Could one argue, for example, that Chief Justice Roberts is simply identifying what is required by the signs of the times? There is some empirical evidence indicating increased African American voter registration numbers and elected African American politicians. For example, the number of black members in Congress went from five members in 1965 to forty-four in 2011; Mississippi, one of the original covered states, now has the highest numbers of African Americans holding public office.[107] However, other data, such as the absence of any black serving as governor in a southern state since Reconstruction,[108] provide a counter-narrative of continued disparities. Chief Justice Roberts's decision neglects instructive lessons of history, where political ratification of basic rights does not always translate into enjoyment of these rights. Congress prohibited the racial classification of voters in passing the Fifteenth Amendment in 1870, yet, by 1877 southern white democrats had established new state constitutions, which included literacy and understanding tests, poll taxes, and property requirements that all but eradicated the political rights of African Americans.[109]

Though Chief Justice Roberts acknowledges that "voting discrimination still exists" and that "[p]roblems remain,"[110] his reading of the history of racial politics is flawed. He cites the positive developments in minority voting that have occurred in the wake of the Voting Rights Act because "history did not end in 1965;"[111] yet, when confronting continued discrimination and its effect on Fifteenth Amendment rights, Chief Justice Roberts asserts that "[Congress] cannot rely simply on the past."[112] In contrast to the perspectives of Althusian federalism and Catholic subsidiarity that hold relationality, autonomy, and participation as constitutive features of being human, he attempts to de-historicize the challenges to full enfranchisement and participation of African Americans. The evidentiary record of this discrimination is not limited to the past; Congress probed the present realities of discrimination and continued obstacles to the ballot in undertaking its 2006 reauthorization.[113] Both Althusius and Catholic social teaching would view these forms of discrimination as impediments to individual participation in intermediate associations and enjoyment of the common good.

In 2005–6, the House Judiciary Subcommittee and Senate Committee on the Judiciary held hearings to gather evidence for considering reauthorization of the Voting Rights Act. As had been the case during congressional hearings when Congress extended the Act in 1982, testimony by experts revealed continued racial and ethnic voter discrimination in covered jurisdictions, perduring patterns of racially polarized or racial bloc voting, a lack of language assistance for specified language minorities, and the proliferation of "second generation" voter discrimination practices that subtly

107 Gary May, *Bending toward Justice: The Voting Rights and the Transformation of American Democracy* (New York: Basic Books, 2013), 238.

108 Ibid., 239.

109 Ibid., xi.

110 *Shelby County*, 133 S. Ct. at 2619, 2626.

111 Ibid., 2628.

112 Ibid.

113 Though writing before he participated in the *Shelby County* dissent, Justice Breyer's conception of federalism ("Legislators are better able than courts to gather empirical information, to make fact-based predictions, and to exercise informed policy judgment. Hence the Court should often hesitate before substituting its own judgment for that of Congress") likely influenced his dissent. See Stephen Breyer, *Making Our Democracy Work: A Judge's View* (New York: Alfred A. Knopf, 2010), 126.

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diluted or diminished minority voting strength.[114] A major piece of evidence included a comprehensive report, known as the Katz study, which documented a myriad of discriminatory practices against African American and Latino voters.[115] Despite claims about the ineffectual implications of second generation barriers and the overstated differences between covered and non-covered jurisdictions,[116] the Katz study found disproportionate numbers of discriminatory voter practices in covered jurisdictions. These barriers to the ballot and discriminatory practices convinced Congress to extend the Voting Rights Act by a vote of 390–33 and disabused any notion that "Bull Connor is dead."[117] Congress's reauthorization also forestalled what I describe above as "negating subsidiarity," or the coerced misuse of localized control to disempower individuals and communities.

In her dissent in the *Shelby County* case, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, highlights examples of these second generation barriers, including racial gerrymandering, switches to a system of at-large voting in lieu of district-by-district voting, and other devices. Justice Ginsburg observes that such barriers are as harmful as the first generation disenfranchisement devices employed prior to the Voting Rights Act: "this Court has long recognized that vote dilution, when adopted with a discriminatory purpose, cuts down the right to vote as certainly as denial of access to the ballot."[118] Attention to these complex variables allows for more nuanced analysis than does Chief Justice Roberts's concentration upon mere increases in voter registration and turnout. Justice Ginsburg's reading of history, in my judgment, is more accurate than is that of Chief Justice Roberts: whereas he views the past as linear and compartmentalized from the present, she appreciates the intersections of past and present, where "this long history, [is] still in living memory."[119] Justice Ginsburg's view underpins her endorsement of Congress's 2006 reauthorization of the Voting Rights Act, where Congress "was especially mindful of the need to reinforce the gains already made and to prevent backsliding."[120] As such, despite Chief Justice Roberts's perspective to the contrary, in reauthorizing the Act, Congress did, in fact, employ the current needs "test" as it relates to sustained access to the ballot.

Post-racial Nullification

Having established that the Voting Rights Act is still needed to protect access to the ballot, we can turn to participation, an important dimension of Althusius's federalism and Catholic social

114 Steven Andrew Light, *"The Law Is Good:" The Voting Rights Act, Redistricting, and Black Regime Politics* (Durham: Carolina Academic Press, 2010), 8.

115 See 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," *University of Michigan Journal of Law Reform* 39, no. 4 (2006): 643–772. In a focused study of Department of Justice objections in South Carolina between 1970 and 2005, Guy-Uriel E. Charles and Luis Fuentes-Rohwer affirm that the preclearance process continues to have validity. Guy-Uriel E. Charles and Luis Fuentes-Rohwer, "Rethinking Section 5," in *The Future of the Voting Rights Act*, ed. David L. Epstein et al. (New York: The Russell Sage Foundation, 2006), 38–60, at 48.

116 Charles S. Bullock III and Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* (Norman: University of Oklahoma Press, 2009).

117 See Laughlin McDonald, "The Bull Connor Is Dead Myth: Or Why We Need Strong, Effectively Enforced Voting Rights Laws," in *Most Fundamental Right: Contrasting Perspectives on the Voting Rights Act*, ed. Daniel McCool (Bloomington: Indiana University Press, 2012), 123–56.

118 *Shelby County*, 133 S. Ct. at 2635 (Ginsburg, J., dissenting).

119 Ibid., 2642.

120 Ibid.

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teaching's subsidiarity. There are other metrics that reveal continued problems related to lack of meaningful participation in the democratic process. Despite Chief Justice Roberts's assumptions about colorblindness[121] and a post-racial context, racial polarization remains a major obstacle to meaningful enfranchisement as well as an affront to the common good. Political scientists Bernard Grofman and Thomas Brunell caution that election victories for minorities do not disprove racial polarization.[122] For example, in the 2008 election Barack Obama received 10 percent of the white vote and 98 percent of the black vote in Alabama. This racial polarization underpins the social construction and disempowerment of the roles and identities of individuals and communities of color.

Racial polarization is only one symptom of the entrenched challenges involving race in the United States; incarceration reduces voting rates and participation among disproportionately incarcerated communities of color. Whereas political scientists like Anthony Peacock[123] concur with Chief Justice Roberts's belief that the Jim Crow era has ended (and hence those "exceptional conditions" no longer apply), Michelle Alexander charts the trajectory in the United States "from a racial caste system based entirely on exploitation (slavery), to one based largely on subordination (Jim Crow), to one defined by marginalization (mass incarceration)."[124] Progress in terms of constitutional protections has not removed the specter of racial prejudice within the New Jim Crow that has proliferated a racial undercaste. One of the catalysts for this racial undercaste has been shifts in the law that ignore more subtle—but equally pernicious—forms of discrimination. Alexander points to the example of the 1987 United States Supreme Court decision *McCleskey v. Kemp*, which held that racial discrimination "simply must be tolerated in the criminal justice system, provided no one admits to racial bias."[125] Within this system that tolerates forms of discrimination, Alexander sees the "virtual bars and virtual walls" that impose upon people of color "a permanent second-class citizenship,"[126] as well as the policies and customs that inhospitably greet released prisoners with "a hidden underworld of legalized discrimination and permanent social exclusion."[127] Consideration of racial bias and its impact on voting rights needs to be more sophisticated than what Chief Justice Robert proposes.

Federalism as Equal and Sovereign States

As a principal rationale supporting the argument against federal oversight of state elections and redistricting, Chief Justice Roberts in the *Shelby County* decision appeals to principles of federalism[128] and the idea that states enjoy equal sovereignty. These appeals to federalism are a reflection,

121 As Richard L. Hasen notes, "[c]olorblindness is fast becoming his signature issue." Richard Hasen, "The Chief Justice's Long Game." *New York Times*, June 26, 2013, http://www.nytimes.com/2013/06/26/opinion/the-chief-justices-long-game.html.

122 Bernard Grofman and Thomas Brunell, "Extending Section 5 of the Voting Rights Act: The Complex Interaction between Law and Politics," in Epstein et al., *The Future of the Voting Rights Act*, 311–39, at 317.

123 Anthony A. Peacock, *Deconstructing the Republic: Voting Rights, the Supreme Court, and the Founders' Republicanism Reconsidered* (Washington, DC: American Enterprise Press, 2008), 21.

124 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012), 219.

125 Ibid., 115.

126 Ibid., 12–13.

127 Ibid., 13.

128 To be sure, Chief Justice Roberts is not the only justice to defend federalism with respect to voting rights. The dissenting opinions of Justice Powell and Justice Rehnquist in *City of Rome v. United States*, 446 U.S. 156 (1980), offer another example. I am mindful that there are differing interpretations of the meaning of federalism,

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in part, of the "federalism revolution in the Supreme Court"[129] initiated during the Rehnquist Court (with the "federalism five"[130] majority of Justices O'Connor, Rehnquist, Scalia, Kennedy, and Thomas). This trend toward jurisprudence rooted in federalism to invalidate congressional powers includes cases such as *United States v. Morrison*[131] (where the Court ruled that Congress lacked authority—either in terms of commerce clause or powers under the Fourteenth Amendment—vis-à-vis the civil damages provision of the federal Violence Against Women Act).

I concur with commentators who object that such rulings interfere with civil rights,[132] become rights regressive,[133] and rely upon "a federalism discourse that invokes the Court's own prior interpretations … [and presupposes] that it could identify certain activities as 'essential' state functions, immune from federal regulation."[134] Citing the Tenth Amendment's provision that states have the power to regulate elections, as well as relatively unrelated[135] Supreme Court decisions, Chief Justice Roberts opines that the coverage formula's application to nine states and several additional counties creates unequal neighbors.[136] His understanding of federalism is therefore rooted in a fundamental claim about equal state autonomy.

Recall that Althusius and Catholic social teaching did not view state sovereignty and power as absolute but rather predicated on dutiful intervention to support and sustain individual rights and communal activities with an eye toward common life and the common good. The Fifteenth Amendment restricts states from allowing racial discrimination in voting rights, thereby delimiting state sovereignty for the good of basic rights and the common good. In an important pre-Voting Rights Act Supreme Court case, *Smith v. Allwright*,[137] Justice Reed affirmed in the majority decision that "Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution."[138] As Althusius and Catholic social teaching demonstrated by interconnecting local autonomy, multi-tiered communication and collaboration, and proper state intervention, federalism cannot obviate

including the idea that "it is an oversimplification to view the Court's work as simply favoring centralization or states' rights in one period or another." Christopher P. Banks and John C. Blakeman, *The U.S. Supreme Court and the New Federalism: From the Rehnquist to the Roberts Court* (Lanham: Rowman & Littlefield, 2012), 50.

129 Richard Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (New York: New York University Press, 2003), 125.

130 The origin of the term "federalism five" is likely found in James L. Kilpatrick, "The Court's Three Cheers for States' Rights," *News and Observer*, July 1, 1999, A19. See John Q. Barrett, "The 'Federalism Five' as Supreme Court Nominees, 1971–1991," *St. John's Journal of Legal Commentary* 21, no. 2 (2007): 485–96.

131 529 U.S. 598 (2000).

132 See, for example, Calabresi and Bickford, "Federalism and Subsidiarity," 149.

133 Erwin Chemerinsky, *Enhancing Government: Federalism for the 21st Century* (Stanford: Stanford University Press, 2008), 112.

134 Judith Resnik, "Federalism(s)' Forms and Norms," 380–81.

135 For a trenchant critique of Chief Justice Roberts's legal reasoning here, see Eric Posner, "John Roberts' Opinion on the Voting Rights Act is Really Lame," *Slate*, June 25, 2013, http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_on_the_voting_rights_act_chief_justice_john_roberts_struck.html.

136 Chief Justice Roberts discounts the fact that many individuals themselves felt like an "unequal neighbor" when confronted with disenfranchisement. Gary May discusses the example of Annie Lee Cooper who had no trouble voting as a resident of Kentucky, Pennsylvania, and Ohio but who "became a second class citizen" when she returned to Alabama in 1962. May, *Bending toward Justice*, 64.

137 321 U.S. 649 (1944).

138 Banks and Blakeman, *The U.S. Supreme Court and the New Federalism*, 50.

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federal authority and individual rights solely on the grounds of state sovereignty.[139] Moreover, the Fifteenth Amendment empowers Congress to protect individual rights and to enforce this article by appropriate legislation. In establishing, developing, and refining laws to protect enfranchisement rights, Congress attempts to mediate between states' rights and interests, federal oversight, and individual liberties. This mediation was preserved in the Voting Rights Act in and through a judicious combination of proactive measures (designed to prevent discrimination against individual) and bailout measures (designed to minimize unnecessary federal intervention and to protect states' rights). As Justice Ginsburg notes in her dissent, between 1982 and 2006 the Department of Justice blocked more than seven hundred voting changes based on a determination that the changes were discriminatory, thereby protecting individual rights. She also observes that nearly two hundred jurisdictions have successfully bailed out of the preclearance requirement since 1984, thereby also protecting the rights of states. Chief Justice Roberts's concerns about the restrictive and narrow scope of the preclearance formula as unconstitutional are therefore unfounded.

Chief Justice Roberts's use of federalism delimits the authority of both Congress and the Court, which, it could be argued, represents a basic value of federalism in limiting tyranny and intervention by the government. However, I contend that Chief Justice Roberts's version of federalism commits what I earlier identified as a negating subsidiarity: under the banner of equal states' rights, this federalism potentially restricts access to the ballot, denies local communities from participating in political structures, and creates cycles of inequality and diminished autonomy. Chief Justice Roberts's federalism seemingly views state burdens and protections for individual rights polemically; whereas conditions in the 1960s warranted a balance in favor of individual civil rights, the current context tips the scale in favor of relinquishing states from undue burdens. Having problematized the Court's argument about changed conditions and the absence of discrimination, can this view of federalism ensure, as Althusius put it, enjoyment of basic goods in a just society? In order to accomplish these ends, federalism should seek—as Althusius and Catholic social teaching do—to preserve federal and state intervention and enforcement; to promote individual and communal empowerment and self-determination; to protect the common good; and to deconstruct the dyad of state-individual by accounting for the roles of associations and groups.

RECOMMENDATIONS FOR A POST-*SHELBY COUNTY* WORLD

Elections Process Integrity and Voter-Identification Laws

In the days (literally) following the Court's *Shelby County* decision, several covered states, including Texas and North Carolina, indicated that they would pursue voter-identification laws, limit early voting hours, restrict voter-registration drives, and retrieve devices previously denied under Section 5's preclearance provisions. Photo-identification voter laws started to proliferate across the country even before the *Shelby County* decision.[140] Though voter-identification laws go beyond the mandate of all state constitutions,[141] the Supreme Court has defended state voter-identification

139 See Franita T. Olson, "Reinventing Sovereignty? Federalism as a Constraint on the Voting Rights Act," *Vanderbilt Law Review* 65, no. 4 (2012): 1195–259.

140 May, *Bending toward Justice*, 244.

141 See Joshua Douglas, "The Right to Vote under State Constitutions," *Vanderbilt Law Review* 67, no. 1 (2014): 89–149, at 142–43.

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laws[142] and delays to early voting[143] on the grounds of compelling state interests of the integrity and reliability of the electoral process. In such decisions, the Court continues to privilege concerns for procedural irregularities over individual and communal harms. In other words, although integrity of the voting process is clearly a widely held expectation, the Court pursues such integrity in ways that marginalize certain populations and therefore attenuate individual rights and the common good.

I find the Supreme Court's defense of voter-identification laws to be problematic for two central reasons. First, the protection of state interests comes at too high of a cost; it violates subsidiarity (imposing features of negating subsidiarity noted above) and further privileges a version of states' rights federalism. These laws do not, as Althusius advocated that laws should, promote the prosperity and advantages of individuals and "avert all evil and disadvantages to them."[144] The putative motivation is that voter-identification laws will safeguard against voter fraud, though such laws have disproportionate impact on the fundamental rights of millions of persons of color, the disabled, the poor, and the elderly.[145] Some extend the criticism by insisting that ballot security programs have been masking politically motivated limits to minority voter participation since 1954.[146] Pamela Karlan laments that pursuit of electoral integrity, despite the fact that incidences of fraud have been exceedingly rare,[147] will have adverse effects on enfranchisement rights: "Laws that are designed to deal with a non-existent problem operate to disenfranchise real voters."[148] The laws also disenfranchise in broader communal ways, by limiting voting registration drives run by grassroots organizations such as the League of Women Voters and Rock the Vote. This disenfranchisement compromises aspects of plurality, participation, and localized autonomy embraced by Althusius and Catholic social teaching.

To develop this point further: voter-identification laws betray what is fundamental to voting rights. Voting rights are best exercised in a local context because they express individual and local communal preferences for priorities, basic values, and social goods; yet these rights are enjoyed as duties that—in virtue of institutional interconnectedness and shared lives together—have implications for state and national interests and legal and social order. Attention to the local and the national and their interrelationship is precisely what Althusian federalism and Catholic subsidiarity called for and what the Voting Rights Act preclearance provisions sought to preserve. Voter-identification laws display a hermeneutics of distrust and fear that eviscerates solidarity and further marginalizes those on the fringes of the community; they effectuate a negating subsidiarity because they employ local mechanisms to dictate and control entry into the political community. Though Cathleen Kaveny notes that voting may be "a crude instrument for setting

142 See, Crawford v. Marion County Election Board, 553 U.S. 181 (2008).

143 See, for example, Randy Ludlow and Jack Torry, "U.S. Supreme Court Delays Start of Ohio Early Voting," *Columbus Dispatch*, September 30, 2014, http://www.dispatch.com/content/stories/local/2014/09/29/early-voting-in-ohio.

144 Althusius, *The Politics of Johannes Althusius*, 92.

145 May, *Bending toward Justice*, 242–44; Michael Muskal, "U.S. Sues North Carolina over Voting Law; The Attorney General Says New Restrictions to Prevent Fraud Will Disproportionately Affect Minority Voters," *Los Angeles Times*, October 1, 2013.

146 Frances Fox Piven, Lorraine C. Minnite, and Margaret Groarke, *Keeping Down the Black Vote: Race and the Demobilization of American Voters* (New York: The New Press, 2009), 42, 164.

147 Joel A. Heller, "Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote," *Vanderbilt Law Review* 62, no. 6 (2009): 1871–911, at 1887. See also Alec C. Ewald, *The Way We Vote: The Local Dimension of American Suffrage* (Nashville: Vanderbilt University Press, 2009), 136.

148 Pamela Karlan, "Lessons Learned: Voting Rights and the Bush Administration," *Duke Journal of Constitutional Law and Public Policy* 4, no. 1 (2009): 17–29, at 23.

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a community's social and political direction," she also holds that "voting is an act of political solidarity with one's community."[149] Our earlier discussion of Althusius's and Catholic social teaching's appeal to relational anthropology and its import for social and political life becomes relevant here. Decisions about one's life (and, as an extension, one's vote) reflect an individual's own sense of his or her values but also considerations for an authentically lived, good life that collaborates with and depends on others. Therefore, ensuring that citizens can enjoy the right to vote without imposing unwarranted obstacles protects conscience in its individual and relational dimensions. Opportunities to vote are opportunities to exercise one's conscience and to participate in communal deliberations about basic values. Drawing on some of the features of Catholic social teaching, legal scholar Robert K. Vischer writes, "It is not just the maximization of individual choice that we aim to protect through a framework of rights, but the promotion of meaningful social interactions over questions of the good."[150]

Second, the Supreme Court contradicts its own principles regarding the integrity of electrical processes (protecting state interests over individual rights) in its recent decision about another aspect of voter participation, namely, individual campaign contributions. In *Buckley v. Valeo*,[151] the Court had pursued a logic similar to the one used in recent voter-identification decisions: government interest in preventing corruption and the appearance of corruption justified limits on campaign contributions. However, in *McCutcheon et al v. Federal Election Commission*,[152] a Chief Justice Roberts-led majority decision reversed course and held that placing aggregate limits on individual campaign contributions is disproportionate to state interests in preventing corruption, restricts participation in the democratic process, and denies First Amendment freedom of speech. In my judgment, the dissenting opinion (written by Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan) is correct in noting that the decision's primary impact is to create a loophole rather than to protect freedom of conscience and First Amendment rights. The Court distorts a sense of democracy and justice when it, on the one hand, endorses a form of voter limitation (voter-identification laws) putatively to protect electoral integrity and, on the other, endorses essentially unfettered voter influence to preserve voter freedom of speech. The fact that voter-identification laws disproportionately disempower the poor and laws on campaign contributions disproportionately protect the wealthy violates Althusius's symbiotic rights and offends ideas about the preferential option for the poor and the common good in Catholic social teaching.

In the face of these immediate and likely long-term challenges, I submit that discussions of federalism should consider the basic features of Althusius's federalism and Catholic social teaching's subsidiarity because they provide compelling accounts of political life and the collaborative possibilities between individuals, community, and governmental agencies. As I have argued, neither approach endorses a devolution norm; rather, each recognizes that individuals, communities, and the state have their proper duties and rights with respect to their own integrity and the common good. I have further argued that Chief Justice Roberts's states' rights federalism and dismantling of the preclearance coverage formula are neither legally justified nor ethically persuasive, particularly with respect to the historical and present realities of discrimination and marginalization. Congress interrogated the ongoing causes and effects of disenfranchisement in its 2006 reauthorization of the Voting Rights Act and therefore adequately met Chief Justice Roberts's "current needs" test.

149 Kaveny, *Law's Virtues*, 200, 198.

150 Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space between Person and State* (Cambridge: Cambridge University Press, 2010), 104.

151 424 U.S. 1 (1976).

152 134 S. Ct. 1434 (2014).

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However, I concur with those—including Chief Justice Roberts—who hold that the Voting Rights Act could be updated to address better these needs. These updates could be modest, even as Congress must remain the central agent in reforming the Voting Rights Act.[153]

*Recommendations for a post-*Shelby County *World*

In order to respond to the *Shelby County* decision and to maintain the importance of the Voting Rights Act, I offer a few recommendations. First, Congress should update the preclearance coverage formula. I held above that assumptions regarding definitive breaks from the past are disingenuous and dangerous, yet there also needs to be a dynamic framework that adjusts to present realities and particular contexts as advocated by Althusius and the encyclical documents (in applying principles of natural law and the Decalogue to concrete circumstances). In seeking to protect minority participation and influence, Congress should redesign the old coverage formula to prevent, as Justice Ginsburg put it, backsliding, or, as Althusius notes, the loss of community rights in a way that eliminates the community itself. Congress should attend to the processes outlined in Section 5, focusing on transparency, wider public input, and participation as encouraged by Althusius and Catholic social teaching and as mandated by the often subtle and evolving nature of discrimination.[154] Among these processes, Congress should develop more nationwide preclearance measures that could accommodate non-covered states like Pennsylvania and its history of racial conflict.[155] This would attend to the thick history of discrimination noted by Justice Ginsberg and oversimplified by Chief Justice Roberts. Other changes could address bailout and opt-in strategies. I agree with Carol Swain, who argues that bailout procedures should become easier for those districts that have records of compliance.[156]

Second, also to promote the access to and participation in voting procedures and deliberations, the Department of Justice must continue to play a proactive role in being vigilant against the more subtle forms of disenfranchisement, where partisan politics can mask racial disadvantages. In confronting these disadvantages, the Voting Rights Act "sought to transform black Southerners into active participants in the governance process,"[157] in ways consistent with those envisioned in Catholic social teaching (where the common good is "the good that comes into existence in a community of solidarity among active, equal agents"[158]) and Althusius (such as the goods and advantages vouchsafed to our neighbor[159]). Pursuant to Section 3 of the Voting Rights Act, which remained intact after the *Shelby County* decision, then attorney general Eric Holder and civil rights groups filed lawsuits to require states to seek preclearance from federal courts.[160] Despite calls for a viable Voting Rights Act that leverages Section 3's trigger mechanism for dynamically redressing

153 Tyson D. Kings-Meadows, *When the Letter Betrays the Spirit: Voting Rights Enforcement and African American Participation from Lyndon Johnson to Barack Obama* (Lanham: Lexington Books, 2011), 289–97.

154 See Enbar Toledano, "Section 5 of the Voting Rights Act and Its Place in 'Post-Racial' America," *Emory Law Journal* 61, no. 2 (2011): 391–434.

155 See May, *Bending toward Justice*, 251.

156 Carol M. Swain, "Reauthorization of the Voting Rights Act: How Politics and Symbolism Failed America," *Georgetown Journal of Law and Public Policy* 5, no. 1 (2007): 29–39, at 31.

157 Karlan, "Loss and Redemption," 316.

158 David Hollenbach, *The Common Good and Christian Ethics* (Cambridge: Cambridge University Press, 2002), 189.

159 Althusius, *The Politics of Johannes Althusius*, 75.

160 Stephan Dinan, "Holder Sues Texas over State's Own Voter Laws; Arizona, Kansas also Fighting Federal Rules," *Washington Times*, August 23, 2013; Richard Wolf, "On March's 50 Anniversary, Voting Rights Still an Issue; High Court Decision Gives Imprimatur to Tough New Laws," *USA Today*, August 26, 2013.

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pockets of discrimination,[161] a major limitation of reliance upon Section 3 is that it requires a finding of intentional discrimination. Above I critically juxtaposed Chief Justice Roberts and Michelle Alexander on the threshold of intentional discrimination. The development, implementation, evaluation, and revision of laws must be grounded in objective criteria; however, at each of these stages, the law must be nimble enough to identify and attend to more subjective factors such as subtle forms of discrimination. Thus, even as it seeks to update the formula, Congress should recognize the Voting Rights Act's own history. Justice Ginsburg writes that "Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions."[162] In *Allen v. State Board of Elections*,[163] the Supreme Court supported the use of Section 5's preclearance measures to combat voter denial and dilution. Chief Justice Warren affirmed, "The Voting Rights Act was aimed at the subtle, as well as the obvious state regulations which have the effect of denying citizens their right to vote because of their race."[164] Litigation alone lacks this nimbleness and does not provide an efficacious method for protecting enfranchisement rights. As Justice Ginsburg observes in her dissent in *Shelby County*, "[l]itigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency."[165] Althusius and Catholic social teaching have already laid out a compelling case in favor of legitimate state intervention to protect individual rights without eviscerating localized autonomy.

Third, courts should also continue to intervene to protect individual voting rights. Richard Hasen differentiates between what he calls core political equality rights (such as nondiscrimination in voting on the basis of race) and contested political equality rights (such as roughly proportional representation in legislative bodies);[166] he contends that the Court should protect the former and be deferential to political branches with respect to the latter. Courts cannot overdetermine the intent and implementation of laws, but they can pursue jurisprudential analysis that is both unchanging (in cases involving inalienable rights) and dynamic (in cases involving negotiated and contested spheres of rights). One example involving voting rights and the Voting Rights Act is *Georgia v. Ashcroft*.[167] While adhering to the Act's preclearance provisions, *Ashcroft* did not rely upon a simplistic formula; rather, it "allowed for the creation of more opportunities for minorities to form coalitions and exert influence on politicians outside their own racial and ethnic groups."[168] Decisions like this will be needed in a post-*Shelby County* world to address procedural concerns without subverting individual and communal empowerment.

Given that we can be, at best, cautiously optimistic regarding a polemical Congress's ability to work collaboratively to redefine the Voting Rights Act, I would extend the idea of communal involvement into a fourth recommendation. A potentially effective strategy comes in the forms of collaboration that occur between elected officials, political institutions, collective associations, civil rights groups, and ordinary citizens. Such a strategy resonates with the insights of Catholic social teaching, Althusius's federalism, and Gerken's federalism all the way down. The objective is not to achieve pure numbers (though this may certainly be a positive effect), but rather to reverse

161 See, for example, Travis Crum, "The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance," *Yale Law Journal* 119, no. 8 (2010): 1992–2038.

162 *Shelby County*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting).

163 393 U.S. 544 (1969).

164 Ibid., 565.

165 *Shelby County*, 133 S. Ct. at 2640 (Ginsburg, J., dissenting).

166 Richard Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (New York: New York University Press, 2003), 7.

167 539 U.S. 461 (2003).

168 Swain, "Focus on the Voting Rights Act," 35.

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negating subsidiarity and to provide for meaningful interactions between voters, communities, and local, state, and federal institutions. Similar to Althusius's support for group associations, legal theorists Guy-Uriel Charles and Luis Fuentes-Rohwer differentiate between a public protection model, which is focused on a centralized regulatory structure, institutional actors, and the prevention of violations, and a private protection model, which includes private entities, organized interest groups, and institutional intermediaries.[169] Whereas the *Shelby County* decision privileges the former model, they perceive the need for both models in order to support the goals and protections of the Voting Rights Act. Support for such coordination and integration—conceived of as "a proper equilibrium between private freedom and public action"[170]—is found in the principles of the solidarity and the common good advocated by Althusius and Catholic social teaching. Charles and Fuentes-Rohwer assert that the private protection model contributes to democratic involvement by "mobiliz[ing] voters to become more engaged citizens"[171] and by introducing dynamic features that can help enliven the Voting Rights Act. They cite the grassroots efforts within the Latino and African American communities that helped make the 2012 electorate the most diverse in American history.[172] Effectively done, grassroots efforts promote the access, participation, empowerment, and expression of conscience dimensions of voting rights.

The reverberations from the *Shelby County* decision will be felt for quite some time. The burgeoning numbers of voter-identification laws in the wake of the decision lead some to anticipate that Jim Crow literacy tests and property requirements will soon follow. The Voting Rights Act still stands, but its scope and depth have been gutted in favor of federalism and equal sovereignty for the states. I have attempted to problematize the rationale underlying Chief Justice Roberts's argument, to appeal to legal and theological resources for rethinking federalism and defending voting rights, and to underscore the potential effects of the *Shelby County* decision. It is incumbent upon Congress, but also, as I have encouraged, citizens, communities, and organizations, to think deeply about what they value and what sorts of mechanisms will help achieve these values. I have appealed to Althusius and Catholic social teaching to argue that meaningful voting rights, as a basic right to be protected by the state and enjoyed in community with others, should involve access, participation, empowerment, and collaboration. Althusius and Catholic social teaching provide a descriptive and normative pathway for securing access to ballots and creating real opportunities for people to participate in and transform their societies.

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169 Guy-Uriel E. Charles and Luis Fuentes-Rohwer, "Mapping a Post-*Shelby County* Contingency Strategy," *Yale Law Journal Online* 123 (2013): 131–50, June 7, 2013, http://www.yalelawjournal.org/forum/mapping-a-post-shelby-county-contingency-strategy.

170 Pontifical Council for Justice and Peace, *Compendium on the Social Doctrine of the Church*, 153.

171 Charles and Fuentes-Rohwer, "Mapping a Post-*Shelby County* Contingency Strategy," 135.

172 Ibid., 144. See also May, *Bending toward Justice*, 247.

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