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Response

Proceed with Great Caution: Shared Skepticism About *Shelby*'s Constitutional Shelf Life

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> Come gather 'round people wherever you roam; And admit that the waters around you have grown; And accept it that soon you'll be drenched to the bone; If your time to you is worth savin'; Then you better start swimmin' or you'll sink like a stone; For the times they are a-changin'.[1]
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> —Bob Dylan

I. Introduction

There can be no doubt that "times change," as Justice Kennedy noted at oral argument in *Shelby County v. Holder*.[2] But do changing times give the Supreme Court license to invalidate congressional statutes when, in its view, the times have changed so dramatically that the justification for a given law no longer stands? In *Shelby County*, the Court arguably suggested as much, invalidating a key component of the Voting Rights Act on the ground that it

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1. BOB DYLAN, THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

2. Transcript of Oral Argument at 35, Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 6908203, at *35.

was based on, in Chief Justice Roberts's words, "decades-old data" and "eradicated practices" and thus could not stand as written.[3]

In her excellent new article in the *Texas Law Review*, Professor Allison Orr Larsen highlights this important aspect of the Court's decision in *Shelby County* and persuasively argues that this concept of a "constitutional shelf life," as she calls it, may well "reverberate way beyond the Voting Rights Act."[4] She also makes a compelling case that we should generally be skeptical of the Court's efforts to identify when a law's constitutional shelf life has expired, noting that "[g]ranting courts this power to review statutes for staleness is a very risky endeavor in a world where facts are so easy to access and manipulate."[5] "*Shelby County*," she writes, "purports to be modest, but is anything but."[6] I share Professor Larsen's skepticism that courts—and the Supreme Court, in particular—should be in the business of declaring laws unconstitutional that were once constitutional on the ground that the relevant facts have changed, and I elaborate on some of the reasons for that skepticism in this Response.

Notwithstanding that skepticism, I (like Professor Larsen) assume that courts might follow the lead offered by *Shelby County* and sometimes engage in this practice. The question then is when and how courts should apply the constitutional shelf-life concept. Professor Larsen offers some illuminating thoughts on the *when*, arguing that "a court is authorized to find a shelf life only when employing a heightened form of review," and that courts considering whether to apply a shelf life should consider whether the Executive Branch has spoken to the question and whether there is ongoing dialogue in the political branches.[7] In this Response, I offer some preliminary thoughts on the *how*, that is, ways in which the Court can be more sensitive to its institutional limitations when it declares laws unconstitutional on constitutional shelf-life grounds.

II. Skepticism of the Constitutional Shelf Life

A. Congress Versus the Court and Legislative Facts

Times may change, but that generic observation is never sufficient to invalidate a validly enacted law. Rather, to invalidate a law on constitutional shelf-life grounds, the Court must identify in what precise ways the times have changed and why those changes are relevant to the constitutionality of

3. *Shelby Cty.*, 133 S. Ct. at 2627.

4. Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEXAS L. REV. 59, 114 (2015).

5. *Id.* at 113.

6. *Id.* at 113–14.

7. *Id.* at 65.

the law.[8] Such a task could be challenging for anyone, but it can be an especially challenging task for a body like the Supreme Court that is not an expert in the relevant field and has virtually no ability to hold hearings or gather evidence in a systematic manner.[9]

This does not mean that the Supreme Court doesn't try to engage in such fact-finding, of course. As Professor Larsen and I have both discussed in previous works, extra-record fact-finding at the Supreme Court is pervasive and seemingly on the rise.[10] But the fact that the Court does it a lot doesn't mean it does it well. The facts that are generally most critical in this context are, as Professor Larsen discusses, general facts about the way the world works—what are commonly called "legislative facts."[11] As I have previously discussed, there are virtually no rules and regulations in place to govern courts' consideration of legislative facts, leaving the question of how courts should engage in such fact-finding the "subject of considerable confusion."[12] And in the absence of any rules and regulations, there is real reason to question the quality of judicial fact-finding engaged in by the Supreme Court.[13] Professor Larsen usefully highlights the dangers of Supreme Court justices engaging in such fact-finding when she describes statistics expert Nate Silver's criticism of Chief Justice Roberts's reliance on statistics at the *Shelby County* argument: "[T]he act of citing statistical factoids is not the same thing as drawing sound inferences from them," Silver observed.[14]

While Professor Larsen rightly notes the challenges the Supreme Court faces when it tries to engage in fact-finding, I think she understates the significance of this issue, in part because she does not focus on how many cases in this context will involve explicit legislative findings.[15] In theory, of course, all laws are grounded in some idea about the way the world works;

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8. *Id.* at 70–71 ("Invalidating a law because it is outdated requires a judicial certainty that the world against which the old legislators acted has changed in a significant and relevant way.").

9. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221 & n.10 (1974) (contrasting Congress's power to engage in "inquiry and action, define issues and objectives, and exercise virtually unlimited power by way of hearings and reports" with the courts' reliance on "the parties' treatment of the facts and claims before it to develop its rules of law").

10. *See* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 27 (2011); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1260–61 (2012).

11. Larsen, *supra* note 4, at 66; Gorod, *supra* note 10, at 39–43.

12. Gorod, *supra* note 10, at 43.

13. *See id.* at 43–44.

14. Larsen, *supra* note 4, at 71 (quoting Nate Silver, *In Supreme Court Debate on Voting Rights Act, a Dubious Use of Statistics*, N.Y. TIMES: FIVETHIRTYEIGHT (Mar. 7, 2013, 9:02 AM), http://fivethirtyeight.blogs.nytimes.com/2013/03/07/in-supreme-court-debate-on-voting-rights-act-a-dubious-use-of-statistics/ [http://perma.cc/EX3Z-WPAG]).

15. Larsen, *supra* note 4, at 64.

there must, after all, be a rational basis for all laws.[16] But for many laws, Congress need not—and does not—make explicit its justification for the law or, more importantly, the factual premises underlying the law.[17]

In many other cases, however, Congress does—often (though certainly not always) following legislative hearings investigating the subject of the legislation.[18] And when the Supreme Court concludes that times have changed so dramatically that a law's constitutional shelf life has expired, it is necessarily saying that Congress's explicit factual findings are currently wrong. Perhaps that is because times have changed, but in a world in which facts are often contested, it's also possible that the Court and Congress simply have come to different conclusions about the way the world works and how laws should be written in response to that world. After all, in the case of *Shelby County*, the law was reauthorized less than a decade before the Court acted;[19] the problem was not that times had changed since Congress acted, but that the Court concluded that Congress did not act appropriately in light of changes that occurred before the reauthorization. In the case of such conflict, there is at least reason to question whether we should so readily assume that the Court, with its limited ability to engage in factual investigation, got it right. Indeed, the Court itself has often acknowledged that Congress is "'far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon legislative questions.'"[20]

This is not to say, of course, that the Court shouldn't review factual findings made by Congress; it can and should do so to ensure that the Constitution is being followed. But it should also acknowledge that there are meaningful limitations on its ability to engage in fact-finding, and it should

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16. *See, e.g.*, FCC. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (noting that "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

17. *See, e.g.*, *id.* at 315 (observing that "we never require a legislature to articulate its reasons for enacting a statute").

18. *See, e.g.*, Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1, 25–26 (2009) (discussing one example of a law passed after extensive legislative hearings that provided the purportedly factual premise underlying the law).

19. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2621 (2013); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

20. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 195 (1997) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994)). This assessment is not, of course, without its critics. *See, e.g.*, Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178 (2000) (arguing that the answer to the question of "which branch does a better job" of fact-finding is "highly contextual—Congress does a better job when it has the incentive to get the facts right while the courts may do a better job when the litigants skillfully present conflicting social science data"); Borgmann, *supra* note 18, at 18–21; John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 70–71 (2008).

be sensitive to those limitations. Needless to say, Congress isn't perfect—the evidence on that score is abundant—but at least it has the means to engage in real fact-finding. The Supreme Court does not.

B. Collateral Consequences

In her article, Professor Larsen notes that "[t]here is something very intuitive about asking courts to police the effect of time on legal restrictions. Lawmakers are not fortune-tellers, and it seems quite likely that laws will outlast the conditions they were meant to address."[21] This is no doubt true but raises the question of whether the Supreme Court or Congress is better equipped to update laws in light of changing circumstances. After all, if the Supreme Court strikes down one provision of law on the ground that it no longer makes sense in light of changed circumstances, that judicial action will inevitably produce other disruptions (ones that are not constitutionally required) to the larger statutory scheme of which that one provision was a part.

I have elsewhere referred to these disruptions as the "collateral consequences" of judicial review.[22] To understand why judicial review produces these collateral consequences, remember that policymakers enact laws against the background of all of the laws that are already on the books.[23] Thus, a group of lawmakers will not enact law *Y* because existing law *Z* accomplishes the same goal. But what happens when the Supreme Court strikes down law *Z* on the ground that the factual premises underlying the law have changed? Now there is not only no law *Z*, there is also no law *Y* even though law *Y* might be entirely constitutional. And while policymakers could in theory respond to these collateral consequences, response is often difficult, if not impossible, on a practical level.[24] If nothing else, the response is likely to be slow for institutional reasons inherent to the way the legislature works.[25]

These collateral consequences do not mean the Court should never engage in judicial review; to the contrary, as I have previously argued,

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21. Larsen, *supra* note 4, at 64.

22. Brianne J. Gorod, *The Collateral Consequences of Ex Post Judicial Review*, 88 WASH. L. REV. 903, 903 (2013).

23. *Id.* at 904.

24. *Id.* at 921. Among other things, the policymakers who enacted law *Z* and would have enacted law *Y* are no longer in office, and the policymakers currently in office might be unwilling to respond. While this might seem superficially unproblematic because the new status quo might reflect the wishes of current legislators, it is troubling that legislators have achieved that result without any affirmative action. Normally, when policymakers enact a policy, that policy remains law until subsequent policymakers take affirmative steps to repeal it. But that is not always the case due to the collateral consequences of judicial review. *Id.* at 924–26.

25. *Id.* at 908.

judicial review is an "essential part of our constitutional structure."[26] But it does provide reason to be cautious about the Court assuming that it is better positioned to assess factual changes on the ground and to update statutory schemes based on its assessment of those factual changes.

C. Is Shelby the Best You've Got?

As Professor Larsen notes, the idea of the constitutional shelf life has a long pedigree, but the actual application of the idea is exceedingly limited—*Shelby County* is the only case in which the Court has invalidated a law on that basis.[27] She acknowledges that "[a] skeptical reader may be tempted to assume the idea was used opportunistically for one case and one case only," but notes that *Shelby County* comes at a time of "real change at work in Supreme Court opinions."[28]

While Larsen is likely right that the greater emphasis on facts in Supreme Court opinions is one explanation for the Court's belated embrace of the constitutional shelf-life theory,[29] it's difficult not to be more than a little skeptical of the Court's motivation in *Shelby County* and to wonder if the Court was simply, as Larsen suggests, trying to make its decision appear more modest than it actually was.[30] Professor Larsen offers some reasons for skepticism when she notes that all of the criteria that should govern when a shelf life has expired "pointed [in] the other direction" in *Shelby County*, but there are others, as well.[31]

To start, in laying out the constitutional foundation for the Court's analysis, the Court gave incredibly short shrift to the Fifteenth Amendment, the amendment that gave Congress the authority to enact the Voting Rights Act in the first place.[32] Indeed, after all of the Court's discussion of state sovereignty, there was virtually no acknowledgment that the adoption of the Reconstruction Amendments is a critical part of our constitutional story, an

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26. *Id.*

27. Larsen, *supra* note 4, at 70.

28. *Id.*; *see also id.* (discussing why facts matter more in contemporary constitutional jurisprudence).

29. Perhaps another explanation is that it is easier for the Court to question Congress's fact-finding and its ability to determine whether statutory updating is necessary when Congress's public approval ratings are so low.

30. Larsen, *supra* note 4, at 97–98.

31. *Id.* at 65.

32. U.S. CONST. amend. XV; *see* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) ("Congress assumed the power to prescribe these remedies [in the Voting Rights Act] from § 2 of the Fifteenth Amendment . . . ."); Larsen, *supra* note 4, at 98 ("The majority spends very little time discussing the Fifteenth Amendment and its history or modern significance.").

act that revolutionized the relationship between the federal government and the states.[33]

The Court also premised its opinion on the idea that states enjoy equal sovereignty under the Constitution.[34] But the Court offered, remarkably, no justification for that foundational principle, as even one proponent of the principle has acknowledged.[35] And it is a principle that has been rightly and soundly criticized for the absence of any justification in either the Constitution's text or history.[36] As Judge Richard Posner put it simply: "[T]here is no doctrine of equal sovereignty. The opinion rests on air."[37]

Finally, the Court invested very little effort into explaining why the times had sufficiently changed to undermine the Voting Rights Act's constitutional footing. To be sure, the Court rightly pointed out that the law's coverage formula had not been changed, but it failed to meaningfully engage with the voluminous record prepared by Congress in support of its conclusion that the existing coverage formula was constitutionally justified.[38]

All of these different problems with *Shelby County* perhaps say nothing more than that the case was wrongly decided. But the fact that the decision was so poorly reasoned overall—and that this is the only time the Court has applied a constitutional shelf life—provides some reason to be skeptical of the constitutional shelf-life rationale as well.

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There are thus several reasons to be skeptical of *Shelby County*'s embrace of the constitutional shelf-life concept. But that does not mean that the Supreme Court will not do it again, or that lower courts will not take up the Supreme Court's invitation to strike down laws on this ground. In the

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33. Shelby Cty. v. Holder, 133 S. Ct. 2612, 2637 (2013) (Ginsburg, J., dissenting) ("Nowhere in today's opinion . . . is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve.").

34. *Id.* at 2622.

35. Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. (forthcoming 2016) (acknowledging that *Shelby County*'s "critics are correct that the Court seemingly pulled the equal sovereignty principle out of thin air," even as he argues that "there is indeed a deep structural principle of equal sovereignty that runs through the Constitution").

36. *See, e.g.*, David Gans, *The Roberts Court v. the Constitution*, USA TODAY (June 26, 2013, 11:23 AM), http://www.usatoday.com/story/opinion/2013/06/25/supreme-court-justice-roberts-column/2456969/ [http://perma.cc/W3H2-ANYN].

37. Richard A. Posner, *The Voting Rights Act Ruling Is About the Conservative Imagination*, SLATE: BREAKFAST TABLE (June 26, 2013, 12:16 AM) http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html [http://perma.cc/VH7J-GP9R].

38. *Shelby Cty.*, 133 S. Ct. at 2620.

next Part, I offer some preliminary thoughts on *how* courts should strike down laws on this ground if they are going to do it.

III. Operationalizing the Constitutional Shelf Life

A. "Sunlight Is Said to Be the Best of Disinfectants"[39]

As noted, there is considerable reason to be skeptical of a court's decision to invalidate a law on constitutional shelf-life grounds, and that means commentators should engage in special scrutiny of such decisions. To facilitate that scrutiny (and as a show of good faith), any court engaging in such action should be as transparent as possible.

To start, it should state explicitly that changed times are the basis for its decision, so there can be no question about the critical role that its assessment of the relevant facts is playing in its decision. It should also make clear exactly *how* the times have changed; that is, what facts are different and how it has reached the conclusion that those facts are different—whether the basis for that determination is *amicus* briefs, the court's own research, or the record below.

Such transparency will facilitate the ability of outside observers to understand why the court did what it did and critically evaluate the court's actions. Moreover, if the court follows Professor Larsen's advice that it should defer to executive-branch assessments and ongoing political dialogue,[40] explicit recognition of those factors in the court's decision should enhance both respect between the branches and the legitimacy of the court's actions.

B. Remand

As discussed above, while courts in general may not be well-positioned to engage in legislative fact-finding, the Supreme Court and appellate courts are particularly ill-equipped to engage in such factual investigation. Thus, when an appellate court or the Supreme Court is considering concluding that a law's constitutional shelf life has expired, it should remand to the trial court for factual investigation unless the relevant facts have already been developed in the record. As I have previously discussed, "[t]rial courts may not be the perfect forums for resolving legislative fact disputes, but at present they are the only judicial bodies with formal experience making factual findings."[41]

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39. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf [http://perma.cc/Y4WN-CJQS].

40. Larsen, *supra* note 4, at 65.

41. Gorod, *supra* note 10, at 75. Conversely, if appellate courts should start striking down laws on constitutional shelf-life grounds *without* remanding to trial courts, that simply underscores the

There is precedent to support this approach. As Professor Larsen discusses in her article, remand was the approach adopted by the Supreme Court in one of the earliest cases that acknowledged the possibility that statutes might outlive their usefulness, the 1924 case *Chastleton Corp. v. Sinclair*.[42] Although Justice Holmes explained that the "Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law," he concluded that "it is material to know the condition of Washington at different dates in the past. Obviously the facts should be accurately ascertained and carefully weighed, and this can be done more conveniently in the Supreme Court of the District than here."[43]

More generally, the Court has done the same thing in cases that do not involve the constitutional shelf-life question. In *Turner Broadcasting System, Inc. v. FCC*,[44] for example, the Court was considering whether Congress may "require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations."[45] The Court ultimately concluded that

> [b]ecause of the unresolved factual questions . . . and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented, we think it necessary to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions.[46]

Remand to the district court not only enhances the likelihood that the relevant legislative facts will be accurately found because district courts are better equipped to facilitate the adversarial testing of factual disputes, it also ensures that there will be multiple levels of review before the Supreme Court ultimately decides the legal question at issue. Moreover, it would be a show of deference and restraint on the part of the Court to delegate responsibility for the relevant factfinding to the lower court that is better equipped to do it before striking down a law of Congress. Finally, the decision to remand would also provide a signal to Congress that it might want to revisit the issue and assess whether it still thinks the relevant facts support the legislation.

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need for institutional reforms at the appellate level to ensure that the Supreme Court and appellate courts can better engage in the fact-finding necessary to reach such decisions. *See id.* at 72–73.

42. 264 U.S. 543 (1924); Larsen, *supra* note 4, at 67.

43. *Chastleton Corp.*, 264 U.S. at 548–49.

44. 512 U.S. 622 (1994).

45. *Id.* at 626.

46. *Id.* at 668.

C. Collateral Consequences

As I discussed earlier, one reason to be cautious about the Court's aggressive use of the constitutional shelf life are the collateral consequences such decisions can produce.[47] If the Court nonetheless decides that it is appropriate to strike down a law on constitutional shelf-life grounds, it should at least try to do so in ways that minimize, as much as possible, those disruptions.

I have elsewhere provided some thoughts on ways in which the Supreme Court can be sensitive to the collateral consequences its decisions can produce, and while I will only discuss one of those proposals here, all are potentially relevant.[48] One possibility is that the Court could stay its judgment for some defined period of time to allow policymakers to respond to the Court's action, whether by passing new legislation supported by new legislative findings sufficient in its view to uphold the law or by making some other change in the law to address the collateral consequences of the Court's decision.

The Court has occasionally done exactly this—in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[49] for example. There, the Court held that the bankruptcy laws were unconstitutional insofar as they placed bankruptcy jurisdiction with non-Article III judges.[50] Recognizing that wholesale invalidation of the nation's bankruptcy courts could cause major disruption, but also recognizing that it could not restructure the bankruptcy laws itself, the Court imposed a "limited stay" of its decision to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."[51]

While there might be instances in which the continued enforcement of an unconstitutional law seems too problematic to permit this solution, it should be something the Court considers, especially where, as will always be the case in this context, the question of constitutionality turns on disputes of contested fact, not just law.

IV. Conclusion

In Bob Dylan's anthem about changing times, he called on "senators, congressmen"—not the Supreme Court—to "[p]lease heed the call."[52] There may be something to this. Members of Congress will often be better situated

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47. *See supra* note 22 and accompanying text.
48. *See supra* subpart II(B).
49. 458 U.S. 50 (1982).
50. *Id.* at 87.
51. *Id.* at 88.
52. DYLAN, *supra* note 1.

to address changing times than the Supreme Court is, which is why the idea of a constitutional shelf life should be approached with great caution. Professor Larsen may well be right that the "consequences of *Shelby County* . . . will reverberate way beyond the Voting Rights Act,"[53] but let's also hope that courts heed her admonition that striking down laws on constitutional shelf-life grounds is anything but modest and should only be done in "limited circumstances."[54]

53. Larsen, *supra* note 4, at 114.
54. *Id.* at 113.