A LOCALIST CRITIQUE OF
SHELBY COUNTY v. HOLDER

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In Shelby County v. Holder, the Supreme Court permitted a local
government, Shelby County, to challenge the constitutionality of sections 4(b) and 5 of the Voting Rights Act on state sovereignty grounds. It did so without explaining why Shelby County deserved state sovereignty protection from federal intrusion. The conventional explanation—that local governments are administrative arms of the state—fails to grapple with the reality of diverse state-local relationships in election law. In fact, local governments maintain significant independence from states in the context of elections. Local governments fund elections, train poll workers, and perform many of the core functions of election administration. Furthermore, states and their local governments are often at odds in election law litigation and come into conflict over controversial election laws like voter identification and early voting. This Essay thus critiques Shelby County from a localist perspective and argues that the opinion reveals a blind spot about local government, even as local government lies at the heart of election law and the Shelby County case itself.

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INTRODUCTION

Something is missing from \textit{Shelby County v. Holder}.\textsuperscript{1} \textit{Shelby County} dismantled a federal statute—section 5 of the Voting Rights Act—based on state sovereignty concerns raised by a county. It did so without considering the sometimes contentious state-local relationships in election law. \textit{Shelby County} thus reveals a blind spot about local government in the Supreme Court’s treatment of election law that may have unintended spillover effects.

In \textit{Shelby County}, an Alabama county made a successful facial challenge to the constitutionality of sections 4(b) and 5 of the Voting Rights Act (Act).\textsuperscript{2} The Supreme Court held that section 4(b) of the Act—the coverage formula that determined whether a state or local government was covered by the preclearance regime set out in section 5 of the Act\textsuperscript{3}—was unconstitutional.\textsuperscript{4} In so doing, the Court disabled section 5’s preclearance regime,\textsuperscript{5} perhaps the single most effective civil rights statute in history.\textsuperscript{6}

Although the plaintiff in the case was a county and not a state, the \textit{Shelby County} Court was motivated by concerns about state sovereignty.\textsuperscript{7} First, the Court was guided by the general idea that the Constitution intended for “the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.”\textsuperscript{8} The Fourteenth and Fifteenth Amendments permit the federal government to intrude upon that grant of state authority, but only when “current needs” justify the “current burdens” of intruding.\textsuperscript{9}

Second, the Court articulated a new principle of “equal sovereignty”\textsuperscript{10} whereby all states are “equal in power, dignity and authority.”\textsuperscript{11} Departing from

\begin{enumerate}
\item 133 S. Ct. 2612 (2013).
\item \textit{See} 52 U.S.C. § 10303(b) (Supp. II 2012).
\item \textit{Shelby Cnty.}, 133 S. Ct. at 2631.
\item Section 5 of the Voting Rights Act is codified at 52 U.S.C. § 10304 (Supp. II 2012).
\item \textit{See Samuel Issacharoff, Beyond the Discrimination Model on Voting}, 127 HARV. L. REV. 95, 100 (2013) (observing that \textit{Shelby County} rests on “two sources of constitutional doctrine, each more than a little odd”).
\item \textit{Shelby Cnty.}, 133 S. Ct. at 2623 (quoting Gregory v. Ashcroft, 501 U.S. 452, 461-62 (1991)); \textit{see also id.} (“States retain broad autonomy in structuring their governments and pursuing legislative objectives.”).
\item \textit{Id.} at 2623 (emphasis omitted) (quoting \textit{Nw. Austin}, 557 U.S. at 203) (internal quotation mark omitted).
\item \textit{Id.} (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)) (internal quotation mark omitted). The Court derived this principle from a 1911 case that considered whether the federal statute admitting Oklahoma to the Union could restrict the location of Oklahoma’s
\end{enumerate}
that baseline “requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” According to the Court, sections 4(b) and 5 of the Voting Rights Act violated the Constitution by placing the states on unequal footing without making the requisite showing.

Both of these arguments sound in state sovereignty. But what the opinion fails to address is why the plaintiff, Shelby County, deserves any of the sovereignty—and the protection from federal intrusion that sovereignty confers—granted by the Court. Both of the Court’s constitutional concerns are grounded in the idea that the Constitution confers sovereignty upon the states, restricting federal intrusion. It is not at all obvious why Shelby County stands to benefit from those federalism principles. The issue was never raised in the litigation or addressed by the courts.

state capital. The Court held that it could not: doing so would place Oklahoma on unequal footing with other states, which are able to choose the location of their capital. See Coyle, 221 U.S. at 579-80.

12. Shelby Cnty., 133 S. Ct. at 2622 (quoting Nw. Austin, 557 U.S. at 203) (internal quotation mark omitted).

13. Id. at 2624. For concerns about applying the equal sovereignty principle to the Voting Rights Act, see Justice Ginsburg’s dissent. Id. at 2648-50 (Ginsburg, J., dissenting) (observing that the equal sovereignty principle “applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared” (quoting South Carolina v. Katzenbach, 383 U.S. 301, 328-29 (1966)) (internal quotation marks omitted)).

14. Early in the case, the Attorney General sought discovery on the distinct issue of whether Shelby County had standing to bring suit at all. See Memorandum in Support of the Attorney General’s Opposition to Plaintiff’s Motion for Summary Judgment at 11, Shelby Cnty. v. Holder, 270 F.R.D. 16 (D.D.C. 2010), 2010 WL 2567838. The court denied that request and found standing based on Shelby County’s required participation in section 5’s preclearance regime. See Shelby Cnty., 270 F.R.D. at 18-19 (observing that neither the government nor defendant-intervenors had offered any “specified reasons” for why discovery was necessary to evaluate standing (internal quotation marks omitted)); see also Shelby Cnty. v. Holder, 811 F. Supp. 2d 424, 445-46 (D.D.C. 2011) (holding that Shelby County satisfied standing requirements because complying with section 5 came with significant monetary cost, and therefore it alleged a “credible and immediate” injury (quoting Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997) (internal quotation mark omitted)), aff’d, 679 F.3d 848 (D.C. Cir. 2012), rev’d, 133 S. Ct. 2612 (2013).

Intervenors and amici argued that Shelby County should not be able to challenge sections 4(b) and 5 facially because of the County’s own checkered history of civil rights violations. See Brief for Respondent-Intervenors Earl Cunningham et al. at 47-51, Shelby Cnty., 133 S. Ct. 2612 (No. 12-96), 2013 WL 315241. Justice Ginsburg, in dissent, adopted this argument. See Shelby Cnty., 133 S. Ct. at 2644-48 (“[A]s applied to Shelby County, the VRA’s preclearance requirement is hardly contestable.”).

Other amici argued that a facial challenge was inappropriate for separate reasons. See Brief of Dick Thornburgh et al. as Amici Curiae in Support of Respondents at 7-8, Shelby Cnty., 133 S. Ct. 2612 (No. 12-96), 2013 WL 417740 (arguing that a facial challenge was inappropriate because it relied on hypothetical cases rather than the record of enforcement); Brief of Gabriel Chin et al. as Amici Curiae in Support of Respondents at 24-27, Shelby Cnty., 133 S. Ct. 2612 (No. 12-96), 2013 WL 417743 (contending that the Elections Clause of the Constitution necessarily defeats a facial challenge to sections 4(b) and 5); Amici
Furthermore, the *Shelby County* litigation could have accounted for the constitutional differences between states and local governments. The Court could have crafted a solution whereby states were excluded from section 4(b)’s coverage formula but some political subdivisions remained. Crafting a solution that kept most local governments covered but exempted their states would have required some creativity, but the Court is not above creative measures that preserve a statute’s constitutionality. As Justice Ginsburg noted, the Voting Rights Act contains a broad severability provision stating that if any part of the Voting Rights Act “or the application thereof to any person or circumstances” is struck down, the remainder of the Act “and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.” At the very least, this provision requires discussion about the possibility of severing the Act as it applied to states and keeping the remainder.

The difference between striking down section 4(b) as applied only to states and striking it down as applied to states and their political subdivisions would not be trivial. Before *Shelby County*, the bulk of the Department of Justice’s section 5 objections were against counties and local governments, not states.

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Curiae Brief of the Alaska Federation of Natives, Alaska Native Voters and Tribes in Support of Respondents at 4-7, *Shelby Cnty.*, 133 S. Ct. 2612 (No. 12-96), 2013 WL 476708 (arguing that a facial challenge was inappropriate because the constitutional analysis hinged on an examination of local conditions).

15. Most local governments were covered by section 5 not because the Act lists them independently but because for every state listed by the Act, section 5 covered “any political subdivision of [that] State.” 52 U.S.C. § 10303(b) (Supp. II 2012). The preclearance regime in sections 4(b) and 5 of the Act covered states like Alabama and Mississippi as well as individual counties. See 28 C.F.R. pt. 51 app. at 103-05 (2014) (listing covered jurisdictions). For every state listed by the Act, the preclearance regime covered that state’s political subdivisions. See United States v. Bd. of Comm’rs, 435 U.S. 110, 127 (1978) (“[I]t is clear that once a State is designated for coverage the Act’s remedial provisions apply to actions that are not formally those of the State.”); id. at 135 (“[T]he legislative background of the enactment and re-enactments compels the conclusion that, as the purposes of the Act and its terms suggest, § 5 of the Act covers all political units within designated jurisdictions like Alabama.”); H.R. Rep. No. 89-439, at 2456 (1965) (“Where an entire State falls within [subsection 4(b)], so does each and every political subdivision within that State.”).

16. For example, in an earlier challenge to section 5, *Northwest Austin Municipal Utility District Number One v. Holder*, the Court expanded (beyond the text) the provision of the Voting Rights Act that permits jurisdictions to “bail out” from coverage in order to avoid considering the Act’s constitutionality. See 557 U.S. 193, 204-11 (2009).


18. *Shelby Cnty.*, 133 S. Ct. at 2648 (Ginsburg, J., dissenting) (“[E]ven if the VRA could not constitutionally be applied to certain States—e.g., Arizona and Alaska . . . — § 1973p calls for those unconstitutional applications to be severed, leaving the Act in place for jurisdictions as to which its application does not transgress constitutional limits.”).

Retaining the preclearance regime as applied only to local governments would therefore cover the governmental bodies that have most commonly required federal oversight.

Had the Shelby County Court justified why Shelby County deserved protection from Alabama's sovereignty, it might have held that local governments are administrative arms of the states. It has said so before. In the elections context, the Court has held that “[t]he actions of local government are the actions of the State.” It might have extended that rule to find that any federalism burdens imposed upon local governments—such as section 5—are implicitly burdens upon the state. Indeed, the idea that states and local governments take a principal-agent relationship is commonplace.

This Essay describes how this understanding is not the only way to think about local governments, nor is it the most intuitive way given the election ecosystem. A theory of local governments as administrative arms of the state conflicts with how elections are actually administered. As Part I describes, states delegate tremendous election administration responsibility to their local governments. Local governments are responsible for funding elections, for choosing polling place locations, for managing voter rolls, and for other important administrative tasks. Furthermore, as Part II describes, local governments often spar with states over elections. This Essay describes how states and local governments can butt heads during election law litigation: states often responsibility for the actions of their counties, and counties, on the other hand, fight to retain their election administration responsibilities. The Essay also uses two of the most hotly contested areas of election law—early voting and voter identification (ID)—to demonstrate that outside of litigation,

20. See generally Hunter v. City of Pittsburgh, 207 U.S. 161, 177-78 (1907) (“This court has many times had occasion to consider and decide the nature of municipal corporations . . . . [They] are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”).
22. Cf. Nat’l League of Cities v. Usery, 426 U.S. 833, 855 n.20 (1976) (“As the denomination ‘political subdivision’ implies, the local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself.” (emphasis added)), overruled on other grounds, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
local governments can act independently from states. In the context of elections more so than most, local governments are not merely state creatures: they are autonomous governmental bodies with discretion that can work against state interests.

Part III describes the constitutional status of local governments before *Shelby County*, especially in the context of elections. Local governments hold no special place in the Constitution, and their treatment by courts has been inconsistent at best. This inconsistency makes it difficult to determine whether and how local governments should benefit from the protection of state sovereignty. The Essay concludes by returning to *Shelby County*, contextualizing its place in the study of local government, and predicting its implications for state-local relationships in the future.

I. LOCAL GOVERNMENT IS AT THE HEART OF ELECTION LAW

This Essay presents a tension. Local governments are at the heart of election law because states delegate substantial election administration responsibilities to them. However, local governments also exercise independent discretion and can clash with their parent states. States themselves often disclaim responsibility for the actions of their local governments. Those relationships present complications for regulating and enforcing election laws. This Part and the next describe that tension.

The Elections Clause of the Constitution splits responsibility for elections between the federal and state governments. It states that the “Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof” but that “Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”

States have delegated most of their own election responsibilities to local governments. American elections are therefore “hyperfederalized.” Many key election decisions are pushed down to the local level. The degree and kind of decentralization varies by state, but nearly all aspects of election administration are delegated to local governments by at least some states. These responsibilities include the nuts and bolts of managing voter rolls, selecting polling place locations, and setting standards for election observers.

Although a small handful of states exercise close control over their elections—Alaska, Delaware, and Rhode Island are the only states that

25. See infra note 83 and accompanying text.
29. Id. at 3-4.
essentially administer elections at the state level—far more states take a hands-off approach. A recent study found that of the twenty-nine states where the Secretary of State has authority over elections, for instance, Secretaries in only one-third of those states have actual rulemaking authority. In the rest of the states, that authority lies with local governments. The study examined three core election administration activities—funding elections, training poll workers, and selecting voting systems—and found that local governments played a significant role in each category. With respect to funding elections, the report found that nineteen states provided no funding at all for the administration of elections. In those states, local governments shouldered the full burden of funding elections. Twenty-two states reimbursed local governments for parts of the election administration process. Only nine states paid for the majority of election costs. With respect to poll worker training, fewer than half of states provide mandatory training. Only seven states require local poll workers to be trained according to state requirements. The remaining states either provide optional training to local poll workers or no training at all.

Indeed, some states delegate so much power to local governments that state officials can feel powerless to discipline local election officials who violate state or federal law. In twenty-three states, for example, local election officials are either elected or selected exclusively by other local officials, minimizing the power state officials can exert over local election administration. One Michigan local elections official stated that she had learned “through [her] years serving as a local clerk that there are really no consequences for the local clerk, or county clerk, who thinks they know better
than to follow the statute.\footnote{37}{Id. at 3 (internal quotation mark omitted).}

Overall, states retain inconsistent oversight of their local governments. One study categorized state supervision of election activities in five different ways: 1) states with direct responsibility for performing election activities; 2) states that supervise local administration of election activities; 3) states that participate in local decision making; 4) states that can select and remove local officials; and 5) states that fund election costs locally incurred.\footnote{38}{Jeanne Richman & Robert Outis, Nat’l Mun. League, \textit{State Control of Election Administration, in Issues of Electoral Reform} 117, 118 (Richard J. Carlson ed., 1974).} According to this study, states in the first category appoint precinct officials themselves and either maintain control over voting rolls or closely monitor local management.\footnote{39}{Id. at 119-20.} States in the second category issue enforceable guidelines, rules, regulations, or instructions that require local governments to administer election activities in specific ways. States enforce those guidelines judicially or through training or reporting requirements.\footnote{40}{Id. at 120-22.} Other states actually participate in the local decision-making process by installing state elections officials on local election boards.\footnote{41}{Id. at 122.} Still other states influence local elections decisions by retaining for themselves the power to appoint and remove local election officials.\footnote{42}{Id. at 122-23.} In Kentucky, for example, the State Board of Elections appoints two of four officials on each local elections commission.\footnote{43}{See KY. REV. STAT. ANN. § 117.035 (West 2014) (effective Jan. 1, 2015).} Finally, states can influence local election activities with the power of the purse.\footnote{44}{Richman & Outis, supra note 38, at 123-25.}

States delegate election administration responsibilities to local governments and, as a matter of state law, state officials are often unable to exert much influence over those local governments. As a consequence, local governments can play a semiautonomous role administering elections.

\section*{II. State-Local Conflict in Election Law}

Not only do local governments enjoy tremendous flexibility in administering elections, but they also often assert their independence by resisting state control over elections. They do so in litigation and through enforcement of state law. States, conversely, distance themselves in litigation from decisions their subdivisions make when conducting elections.\footnote{45}{I use voter ID and early voting as examples of state-local conflict, but they are only two examples of the many sites of state-local cooperation and conflict in election law. These relationships provide a rich area of study that I will flesh out more fully in future work.}
A. In Litigation

States and counties are often at odds in voting rights litigation in ways that demonstrate their independence as election administrators. Litigation reveals this independence in at least three ways. First, when states are sued by the federal government or private parties for violating an election law statute, states disclaim responsibility by placing the blame on local governments or hiding behind limitations of state law. Second, counties sometimes oppose state attempts to limit local election administration powers and responsibilities. Finally, counties explicitly argue, in litigation, that they are not well represented by their states.

As I have written elsewhere, states commonly argue in litigation that they cannot be liable for the election administration actions of their counties. These positions typically arise from lawsuits pursuant to election law statutes like the National Voter Registration Act of 1993 (NVRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and the Help America Vote Act of 2002 (HAVA). Each of these statutes holds states liable for election administration responsibilities that states have generally delegated to local governments under state law.

When sued for noncompliance with these statutes, states distance themselves from their counties. That is, they argue that their counties are so independent that the counties, and not the states themselves, should be legally responsible for compliance. When the United States sued Alabama for failing to comply with UOCAVA, for example, Alabama argued that it was powerless to force its counties to comply with the statute. Alabama could not “fire an elected Probate Judge, or an Absentee Election Manager” who was out of compliance with UOCAVA. Alabama stated that “while [it] can inform and train local election officials . . . [it] cannot perform the duties of local election officials.” When the United States sued New York state agencies for failing to provide voter registration opportunities as required by the NVRA, the state agencies argued that they could not be liable for violations of the NVRA because their local offices were administered by local governments, not state

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50. These responsibilities include voter registration (NVRA and HAVA), absentee ballots (UOCAVA), and voting system technology (HAVA).
52. Id.
53. Id.
officials. Arguments like these are common, and largely unsuccessful.

Counties themselves seek to administer elections independently from states. In Ohio, for instance, the State sought to comply with HAVA by selecting the type of voting system to be used throughout the State. Multiple lawsuits, including one by a county government, were filed on the ground that counties, and not the State, held the authority to choose voting systems. Similarly, Alabama officials sought to bring the State into compliance with HAVA but faced an opinion from its Attorney General stating that the Alabama Secretary of State lacked the authority to choose voting systems that would bring the State into compliance. That authority rested with the counties. To achieve compliance, Alabama proposed a law giving the Secretary of State that power; county officials objected to surrendering the authority that they had long possessed.

Finally, state-local conflict in election administration is illustrated through statements, made by counties in litigation, that they are not well represented by their states. When the United States sued New York for violating HAVA, for example, New York counties attempted to intervene in the lawsuit because they felt badly represented by the State. Suffolk County, for example, contended that the State imposed unrealistic compliance deadlines on counties. Putnam and Nassau Counties attempted to intervene because they felt that they, and not just the State, were ultimately the entities “which must actually implement, at the ground level, the HAVA mandates.”

55. See Weinstein-Tull, supra note 46 (manuscript at 36).
60. Memorandum of Law in Support of Intervention at 5, United States v. N.Y. State Bd. of Elections, No. 06-CV-0263 (N.D.N.Y. Mar. 30, 2007) (“The unrealistic and ever-changing timelines developed by the State make compliance by the County Boards of Elections impossible.”).
61. Memorandum of Law in Support of Intervention at 1, United States v. N.Y. State Bd. of Elections, No. 06-CV-0263 (N.D.N.Y. July 25, 2007) (“Under New York State law, it is the counties, through their local boards of elections, that are responsible for compliance with this deadline.”); see also Answer of Defendants-Intervenors Nassau County Board of Elections and Nassau County Legislature at 2, United States v. N.Y. State Bd. of Elections, No. 06-CV-0263 (N.D.N.Y. Dec. 21, 2006) (“[T]he New York Election Law also vests responsibility for compliance with [HAVA] with local boards of elections in addition to New York State.”).
These frequent conflicts between states and local governments underscore the independence that local governments possess in the context of election administration.

B. Voter Identification and Early Voting

Local governments do not merely exercise independence from states in administering elections; they can also actively resist state law.

In the last ten years, states have enacted laws intended to either increase or decrease voter participation. As soon as the Court decided *Shelby County*, a number of southern states exercised their newfound freedom from section 5 by enacting laws that restricted early voting and required poll workers to check the photo identifications of voters. Early voting and voter ID laws have become touchstones of social movements about voter access and voter fraud. Rick Hasen has characterized the political fights over these policies (and others) as the “Voting Wars.” Because states have delegated most election responsibilities to local governments, local governments partially control how these controversial laws get executed. Examining the experience of local governments with these policies therefore demonstrates how local governments remain independent from states in administering elections.

In the voter ID context, counties—or county-employed poll workers—can resist state law in a number of ways. They can be more lenient than state law permits—i.e., they can allow people to vote without checking for ID. Or they can be stricter than state law requires—i.e., poll workers can require voter ID in states that do not require it. Both have happened in the recent past.

For example, local officials sometimes refuse to enforce state law. In 2012, Pennsylvania enacted a law that required photographic identification for in-person voting. During the 2012 elections, however, multiple county officials stated publicly that they would not follow the law. One county official stated to media: “[A]s judge of elections in Precinct 1 of Colwyn Borough . . . I will not comply with the new voting laws as they are unconstitutional.” A Pittsburgh poll worker also told the media that he would not request photo ID from voters he knew.

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62. See Tomas Lopez, *‘Shelby County’: One Year Later*, BRENnan CTR. FOR JUSTICE (June 24, 2014), https://www.brennancenter.org/analysis/shelby-county-one-year-later (describing the actions states took immediately after *Shelby County*).


Texas county officials have also inconsistently enforced Texas’s photo ID requirement. Staff at two polling places in Jefferson County, a Democratic county in Texas, did not require voters to provide acceptable forms of photo identification during the 2014 elections. Similarly in 2013, enforcement of the law was inconsistent in Harris County, Texas. Even when local officials do not refuse to implement state law, they can challenge state ID laws in other ways, like litigation.

Inconsistent local enforcement of state photo ID laws can go in the opposite direction as well. That is, local officials can be stricter with voting requirements than state law requires. Arkansas enacted a photo ID law in 2013 that was later struck down by the Arkansas Supreme Court. The law was in effect during the May 2014 primary, and reports emerged that some polling places enforced the law too strictly. Some local poll workers used barcode scanners to verify driver’s licenses; other poll workers “quizzed voters” about their driver’s licenses. Neither was required by the law. During the November 2014 general election, after the law had been struck down, the Arkansas Times reported a “steady stream of complaints . . . from voters who say election officials around Arkansas demanded a photo ID before they could vote.”

Similarly in Michigan, which has a photo identification voter ID law, reports emerged that poll workers in various counties turned away voters without identification in violation of state law, which permits those without photo ID...
identification to vote as long as they sign an affidavit.76

Experiences with early voting demonstrate a similar push and pull between state and local governments. After North Carolina limited early voting hours as a matter of state law, for example, at least one of its counties considered whether to extend its hours “to balance changes in state election laws.”77 In 2008, North Carolina required its counties to extend their early voting hours, unless local officials unanimously agreed it was unnecessary, giving discretion to counties.78 And in states where counties are able to extend early voting on their own, they often do.79

Early voting has also been the source of state-local conflict. In North Carolina in 2008, for instance, the North Carolina State Board of Elections did not permit the Guilford County Board of Elections to extend early voting hours.80 In Ohio in 2012, the Republican Secretary of State John Hunsted fired two local elections officials for voting to extend early voting hours, allegedly in violation of state law.81 Hunsted was only able to remove those officials because Ohio law gave him the authority to do so.82

These examples from early voting and voter ID unsettle the conventional wisdom that local governments are merely administrative arms of the state with respect to elections. State and local governments are closely connected, of course; state law can direct how local governments administer elections. Nevertheless, state and local governments are often at odds with one another.

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82. Not all Secretaries of State have the authority to fire local elections officials. See supra note 35.
and a tremendous variety of state-local relationships exist.

III. THE UNCERTAIN CONSTITUTIONAL STATUS OF LOCAL GOVERNMENTS BEFORE AND AFTER SHELBY COUNTY

If the reality of election administration is that states explicitly disclaim responsibility for local government action and local governments maintain independence from and engage in conflict with state governments, why do local governments deserve the protection of state sovereignty? The question implicates the long tradition of treating local governments as administrative arms of the state. But as the above Part demonstrates, local governments do not always function as merely administrative units in the context of elections. Courts have, on occasion, acknowledged that independence.

This Part describes two narratives about local governments—that local governments are subordinate to states and that local governments are autonomous entities—and particularly how those narratives apply in election law jurisprudence. It then concludes with some thoughts and questions about how we should view the Shelby County decision in light of these traditions.

A. Inconsistent Treatment of Local Government

Unlike the federal and state governments, local governments have no clear place in the Constitution.83 As a legal matter, local governments are creations of state law.84 Perhaps because of their indeterminate constitutional place, local governments have been treated inconsistently by courts.85

Commentators have described competing stories about local government. The prevailing legal narrative is that local governments are “creatures” of state government, “created as convenient agencies for exercising such of the


84. See, e.g., Avery v. Midland Cnty., 390 U.S. 474, 480 (1968) (“[T]he forms and functions of local government and the relationships among the various units are matters of state concern . . . .”); City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) (“A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit.”).

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governmental powers of the state as may be entrusted to them."86 Scholars partly attribute this view to John Dillon, a nineteenth century justice of the Iowa Supreme Court.87 This narrative crystallized in a line of Supreme Court cases, most notably Hunter v. City of Pittsburgh, which considered whether Pennsylvania’s move to consolidate two cities, although opposed by one of the cities, violated the federal constitutional rights of the unwilling city and its inhabitants.88 The Court held that “[t]he number, nature and duration of the powers conferred upon [cities] ... rests in the absolute discretion of the State.”89 The State “may modify or withdraw all such powers . . . conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme ...”90

A counternarrative of local governments also exists.91 In that telling, local governments are more than administrative arms of the state. They are “little republics which can serve as fora for citizen deliberation and participation in public decision making over a broad range of issues of community concern.”92 The roots of this counternarrative are the writings of Thomas Jefferson, Alexis de Tocqueville, and Thomas Cooley, a nineteenth century justice of the Michigan Supreme Court.93 Cooley believed that the people delegated only some of their sovereign power to states and reserved some for themselves, which they exercised through local government.94

This view emerges subtly in a line of cases that privilege the rights of local governments over those of their states.95 In Milliken v. Bradley, for example,

87. And later, Eighth Circuit judge. See Williams, supra note 83, at 84, 91 (referring to a number of historical sources).
88. 207 U.S. at 174-76.
89. Id. at 178.
90. Id. at 178-79.
91. See Richard C. Schragger, Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government, 50 BUFF. L. REV. 393, 395-96 (2002) (“The result [of local governments’ ambiguous status] has been a constitutional ‘doctrine’ that treats localities as mere creatures of the state with no independent federal constitutional role, and an alternative ‘shadow doctrine’ that treats localities as sovereign political entities entitled to constitutional protection.”).
92. Richard Briffault, Who Rules at Home?: One Person/One Vote and Local Governments, 60 U. CHI. L. REV. 339, 419 (1993) (footnote omitted) (attributing the phrase “little republics” to Thomas Jefferson); see also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 577 (1985) (Powell, J., dissenting) (“It is at these state and local levels—not in Washington as the Court so mistakenly thinks—that ‘democratic self-government’ is best exemplified.”).
93. See Williams, supra note 83, at 88 & n.37.
95. See Briffault, supra note 92, at 339-40 (“Has the model of local governments as locally representative democracies supplanted the traditional view of local governments as administrative arms of the state?”).
the Court overturned a federal district court’s order imposing a multidistrict busing desegregation scheme. 96 The Court rejected the district court’s treatment of school district lines as arbitrary and reasoned that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.” 97 The Court thus concluded that the value of local control over school district lines prevented the federal district court from crafting a remedy to a constitutional violation. 98 Local autonomy served as a limit on federal power.

Courts have employed both of these local government narratives in the context of elections as well. Michelle Anderson has told a version of this story in the context of “municipal underbounding”: a practice where cities use annexation to exclude minority communities from voting rights and municipal services. 99 Anderson documents a shift in understanding local government autonomy and protection from federal intrusion. 100 The story begins with Hunter and a federal acknowledgment of local government borders as purely at the discretion of states. 101 During the civil rights movement, the Court began to hold that local government annexations might infringe individual constitutional rights and that the role of local governments as instrumentalties of the state made local governments “inheritors of constitutional constraints on state action.” 102 In the 1970s, the Court began to uphold local government city border decisions on the ground that local governments were themselves protected autonomous units. 103

One person, one vote cases have drawn from similar principles of local government autonomy. In Avery v. Midland County, the Court extended the one person, one vote principle to local governments. 104 Although the Court acknowledged that “the forms and functions of local government and the relationships among the various units are matters of state concern,” 105 it rejected the dissent’s argument that because the County lacked “autonomy,” the one person, one vote principle should not strictly apply. 106 Instead, it reasoned

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97. Id. at 741-42.
98. See id. For other examples of how this local government narrative appears in the case law, see Schragger, supra note 91, at 408-11.
100. See id. at 964-78.
101. Id. at 964 & n.118, 965.
102. Id. at 965-67 (citing Gomillion v. Lightfoot, 364 U.S. 339, 342-43 (1960)).
105. Id.
106. See id. at 502 (Fortas, J., dissenting).
that “[s]tates universally leave much policy and decision making to their governmental subdivisions” in the form of local “representative government[s].” 107 Those individual representative democracies—local though they may be—were sufficiently independent, legislative, and functional to implicate one person, one vote, as required by the Fourteenth Amendment. 108 Relatedly, the Supreme Court has declined to extend Fourteenth Amendment voting protections to residents of certain local governments created as special limited purpose voting districts. In Salyer Land Co. v. Tulare Lake Basin Water Storage District, for instance, the Court considered whether a state law permitting only landowners to vote for representatives of special purpose water districts violated the Fourteenth Amendment. 109 The Court found that because the district provided no “general public services” and exercised few “typical governmental powers,” 110 the state law setting forth voter qualifications was not subject to heightened scrutiny. 111 That is, because the state had not delegated sufficient power to the water district, the one person, one vote requirement that would normally attach to state legislative apportionment did not attach to apportionment of the water district. 112

Bush v. Gore, 113 the last election law case to generate national attention, presents another example of the Court’s mixed feelings about local governments. In Bush v. Gore, the Court held that the Florida Supreme Court’s direction to county canvassing boards to discern the “intent of the voter” violated the Equal Protection Clause. 114 Richard Schragger has argued that Bush v. Gore invokes both narratives of local government. 115 On one hand, the opinion treats local canvassing boards as instrumentalities of the state by focusing its constitutional analysis on the state and its adopted standard. 116 On the other hand, the Court treated the canvassing boards as minisovereigns by accepting the varied practices of election administration employed by the boards themselves. The Court did not understand the different kinds of voting machines used and selected by local governments to violate equal protection. 117 To the contrary, the Court specifically reserved for the local canvassing boards “the exercise of their expertise” in “develop[ing] different systems for

107. Id. at 481 (majority opinion).
108. Id. at 482-86.
110. Id. at 728-29.
111. See id. at 730.
112. See id. at 728-30. For a longer discussion of the contours of the “one person, one vote” doctrine in the context of local government autonomy, see generally Briffault, supra note 85, 1329-30, 1335.
114. Id. at 105-10.
115. See Schragger, supra note 91, at 412 (“Both the formal doctrine of constitutional distrust and the shadow doctrine of constitutional trust are at work in Bush v. Gore.”).
116. See id.
117. See, e.g., Bush, 531 U.S. at 126 (Stevens, J., dissenting).
implementing elections.” Because local control over elections is “a long-standing tradition,” the Court assigned it “independent constitutional value.”

As I have shown in this Subpart, the Court has deployed a number of different theories of local government: local government as administrative arm of the state (Dillon, Hunter); local government as recipient of lawmaking power and state constitutional obligations (Avery, Salyer); local government as independent sovereign (Cooley, Milliken); and local government as sovereign entity in some policy realms but not in others (Bush v. Gore). In the next Subpart, I attempt to make sense of these theories in the context of Shelby County.

B. After Shelby County

The Shelby County Court stepped into a discussion about the theory of local government, perhaps without realizing it. The cases described above suggest that local governments can earn sovereignty protection from federal intrusion in two distinct ways. First, local governments benefit from state sovereignty when they closely align themselves with their states and administer state law. Similarly, the one person, one vote and annexation cases demonstrate that local governments expose themselves to constitutional liability when they exercise state power. Second, local governments may possess sovereign protection from federal intrusion when they act in an area of traditional local autonomy, like education.

By permitting Shelby County to cloak itself in Alabama’s state sovereignty, the Court implicitly took a position on local government sovereignty as it fits into the federal system. That position may have important and unexpected spillover effects for election law. However, the Court also missed an opportunity to have a productive conversation about how local election administration interacts with federal election law.

The local government narratives described in the previous Subpart do not cut cleanly in the context of Shelby County. Dillon’s Rule and Hunter suggest that local governments, serving any function, are proxies for the state itself. As a consequence, local governments may enjoy the federalism protections more commonly conferred upon states. This approach could explain Shelby

118. See id. at 109; see also Schragger, supra note 91, at 416 (“A locality ‘acting on its own’ has some discretion to exercise its expertise in implementing elections. A locality acting, however, on the instructions of the state is subject to federal oversight. The Court’s skepticism—its distrust—is reserved for the institutions of the state, namely the Florida Supreme Court.”).

119. Schragger, supra note 91, at 414; see also id. at 416 (“Moreover, by treating the counties and their canvassing boards as instrumentalities when ordered by the state’s highest court to engage in a recount, and as sovereigns for purposes of implementing election regimes, the Court’s opinion protects a limited sphere of local authority.”).

120. Although Shelby County was not an Eleventh Amendment case, Eleventh Amendment immunity provides an analogue. In Monell v. Department of Social Services, the
County’s grant of state sovereignty to local governments and resonates with comments made by Justice Rehnquist in two other federalism cases. In National League of Cities v. Usery, the Court struck down provisions of the Fair Labor Standards Act which applied a federally mandated minimum wage to states and their political subdivisions.121 The Court reasoned that the political subdivisions affected by the statute “derive[d] their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself.”122 Similarly in Rizzo v. Goode, the Court held that federal injunctive relief was inappropriate where the injunction intruded upon state and local criminal law.123 The Court reasoned that the federalism principles that constrain federal power “have applicability where injunctive relief is sought . . . against those in charge of an executive branch of an agency of state or local governments such as petitioners here.”124 The opinion gained attention “because it seemed to imply that federal courts had no authority to enjoin allegedly unconstitutional police conduct since principles of federalism precluded intervention in delicate local policy matters best left to local control.”125

The one person, one vote and annexation cases—Avery, Salyer, and Gomillion—present the flip side to this principle: local governments inherit the constitutional obligations of their states, but only when states delegate sufficiently legislative responsibilities to local governments.126 For the purposes of liability for constitutional violations, “[t]he actions of local government are the actions of the State.”127 As applied to Shelby County, if the actions of local governments are the actions of the state, then perhaps the federalism burdens on local government also burden the states. Whereas Hunter and Dillon potentially justify Shelby County by suggesting that local governments cloak

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122. Id. at 855 n.20.
124. Id. at 380 (emphasis added).
125. Williams, supra note 83, at 117.
126. See, e.g., Avery v. Midland Cnty., 390 U.S. 474, 480 (1968) (“[W]hen the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process.”).
127. See id.
themselves with state sovereignty. Avery and Gomillion potentially justify Shelby County by suggesting that the federalism burden on Shelby County is really a burden on Alabama.

Cooley, Milliken, and the counternarrative of local government present an alternate reading of Shelby County by suggesting that local governments may possess sufficient autonomy in certain policy areas traditionally controlled by local governments—like education and elections—to justify federalism protection from the federal government of their own, not inherited from the state. Indeed, Milliken’s logic is not limited to education specifically, and was later in fact extended to other areas where strong local autonomy exists, like housing.128

If Bush v. Gore contains strands of both local-government-as-instrumentality and local-government-as-sovereign narratives, as Professor Schragger suggests, then Shelby County marks a return to the idea that local governments achieve sovereignty as instrumentalities of their states. The Shelby County decision is grounded in state sovereignty, not in the particularly local sovereignty set out in Milliken. Specifically, the opinion’s brief analysis references: 1) the states’ Tenth Amendment power to regulate elections; 2) the “current burdens” and “current needs” test, which is grounded in state sovereignty; and 3) the principle of equal sovereignty between states.129 The opinion never mentions a local government right to administer elections free from federal intrusion. The unstated assumption is that local governments like Shelby County are cloaked in their state’s sovereignty. And yet, the idea that local governments may wield their states’ sovereignty is out of joint with the reality of elections in this country. As described above, states regularly emphasize their local governments’ independence to evade liability for noncompliance with various voting rights laws.130 States also emphasize their own powerlessness to bring local governments into compliance with those statutes.131 Local governments assert their own independence against states that attempt to retrieve some of their authority in the realm of election administration.132 And local governments are not always reliable administrators of state election law.133

The local government narrative implicitly employed by the Shelby County Court, therefore, seems particularly unsuited to the realities of elections. As a preliminary matter, the Court should have considered whether local governments

130. See supra notes 46-55 and accompanying text.
131. See supra notes 51-53 and accompanying text.
133. See supra Part II.B.
governments deserve to wield state sovereignty at all. I do not claim that sections 4(b) and 5 would have survived had the Court considered the argument, but failing even to engage with the question demonstrates a failure to grapple with the election system as it exists. If the Court wanted to find sovereignty sufficient to prevent federal intrusion into local government function, it should have considered the Cooley-Milliken approach instead, which emphasizes local sovereignty in areas of traditional local action and might better describe the realities of election administration. At the very least, the Shelby County Court missed an opportunity for a discussion about local government autonomy and the federal, state, and local relationships that animate election law.

Furthermore, the Supreme Court’s decision may have unintended spillover effects. For instance, section 2 of the Voting Rights Act prohibits voting discrimination on the basis of race or color and applies to all jurisdictions—both state and local governments.134 Unlike section 5, local governments are not subject to section 2 because of their parent states. Further, the constitutionality of section 2 is recently under attack.135 Shelby County may make it more likely that a local government could challenge section 2 on state sovereignty grounds, even though it does not possess that sovereignty itself.

Or consider litigation over election administration. When states and state officials are sued pursuant to an election law statute, they frequently argue in litigation that state law does not empower them to regulate local government election administration.136 Shelby County, however, suggests that for the purposes of election administration, as a legal matter, local governments clearly come under the aegis of the state. Consequently, the case may be read as an endorsement of strong state regulation of elections, and perhaps a rebuttal to those state arguments.

In fact, fortifying the state-local relationship in election law may be one helpful, unintended consequence of Shelby County. Shelby County liberated many local governments from the bonds of close federal oversight required by section 5. In so doing, Shelby County refocused the lens of election law compliance from the federal-local relationship to the state-local relationship. Strengthening the state-local relationship in election law may be one way to continue ensuring that local governments comply with federal law, even without direct federal oversight.

134. See, e.g., 52 U.S.C. § 10301(a) (Supp. II 2012) (prohibiting “denial or abridgement of the right of any citizen of the United States to vote on account of race or color”).
136. See supra notes 46-61 and accompanying text.
CONCLUSION

States delegate numerous election responsibilities to their local governments. Local governments take those responsibilities and assert their independence from states through litigation and election administration. These state-local relationships are badly represented in Shelby County v. Holder, which takes for granted that local governments are state creatures for the purposes of the Voting Rights Act. In future elections cases, the Court should more fully grapple both with the details of state-local relationships in the context of voting and how those relationships matter to enforcement of federal voting laws.