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Voting Rights and America's Racial Policy Alliances

1 The U.S. Supreme Court's 5-4 decision in *Shelby County v. Holder* finding Section 4(b) of the Voting Rights Act (VRA)[1] unconstitutional is the most transformative of the important opinions issued in the final week of the Court's 2012-13 term.[2] The decision attacks the core of the VRA and threatens to end the most interventionist egalitarian power given to the federal government in the twentieth century: the requirement of federal pre-clearance of changes in voting rules in certain jurisdictions. Under the VRA's Section 5, a number of states identified by the formula in Section 4(b) as having operated voting systems with unjustifiable barriers to full and equal participation are required to obtain permission from the U.S. Department of Justice or a federal court before making any changes to state or local laws which impact voting. The invalidation of Section 4(b) powers marks a critical battle site in the struggle between those favoring and those opposing policies to reduce material racial inequality in the US, furthering the ascendancy of opponents.

2 The formula used in Section 4(b) to determine if states or local governments violate the VRA was set in 1965: whether less than 50% of persons of voting age were registered to vote in 1964, or whether less than 50% actually voted in the 1964 presidential election. The Court held this formula to be no longer valid. Critics fairly fault Congress for not updating the formula in the last half century.[3] However, simply finding Section 4(b) unconstitutional, as the majority justices have done, renders the VRA's Section 5 preclearance powers toothless. The majority justices must have known that pressing Congress to amend the law would make the VRA infirm. Furthermore the heightened partisan and ideological polarization in contemporary US politics means that legislative efforts to enact a bill to restore preclearance requirements for states and cities that

have histories of voting rights violations in the last 15 years, are unlikely to reach a vote on the House floor in the foreseeable future.[4]

3 The Court's decision changes the process for addressing voting discrimination. Now under these new procedures any arguably discriminatory changes in the covered states, including new voter ID laws, restrictions on early voting times, or redistricting, can only be legally challenged retrospectively, after an election has occurred. This shift to after-the-fact litigation erodes the legal resources available to minority voters prior to an election, weakens anti-discrimination law, and is succor to recently revivified voter suppression activities (Piven, Minnite and Groarke 2009, 164-203).[5]

4 These political realities are widely recognized. Of equal importance, this abolition of pre-clearance approval is a triumph for what we call the "color blind racial policy alliance" in American politics (King and Smith 2011, 9-10). The ruling signals the U.S. Supreme Court as the most aggressive government institution in this alliance today.

5 We have argued that American racial politics has historically been structured by opposed policy alliances (or "racial orders") that include movement activists, political parties, and governing institutions, held together by views on how to resolve the central racial policy issue of their eras—first slavery, then *de jure* segregation, and in the modern day, whether material racial equality is best realized by insisting that public policies eschew racial categories, the view of the color blind policy alliance, or by consciously constructing measures to reduce material racial inequalities, the view of the rival "race conscious" policy alliance. The bulk of the American voting public favors color blind policies. Most Americans also oppose any measures that appear to retreat from the accomplishments of the 1960s civil rights era (King and Smith 2011, 285-286). As a result, elected officials of both parties often prefer to leave controversial racial questions to less visible administrative agencies or the politically insulated courts than to engage with these issues in election campaigns.[6] And the fact that the nation has had a preponderance of Republican presidents since the 1970s means that the Supreme Court has achieved a firm majority that has moved toward rigid insistence on color blind views of constitutional equality (King and Smith 2011, 130-131, 291-292).

6 Since it was enacted the Voting Rights Act has been challenged by many conservative political leaders. But the VRA's wider popularity means that probably only the Supreme Court could have openly sought to curtail its powers and reach. Enacted by Congress initially to be a temporary measure, the VRA soon proved the most successful act of the civil rights era, measured in policy and political terms. It has enfranchised millions of largely non-white voters and promoted office holding by hundreds of non-white candidates, vindicating America's claims to be a democracy in the eyes of all Americans. As a result, successive Congresses have renewed the VRA with overwhelming bipartisan approval in final roll call votes—though conservatives consistently sought to weaken the law at earlier stages in legislative renewal processes (King and Smith 2011, 170-179).

7 Color blind advocates are the most outspoken critics of the modern VRA. They contend the law has been turned into a vehicle for race conscious policymaking, which they view as immoral and unconstitutional. They and conservatives more broadly have also correctly seen the law as aiding the voting power of supporters of liberal policies across a range of issues. The amendments to the VRA enacted in 1975 extended the law's protections to many Latinos by adding language-based triggers for federal monitoring and pre-clearance requirements, and in 1982, further amendments authorized the

creation of minority majority districts as solutions to proven patterns of discrimination, overriding contrary judicial rulings (King and Smith 2011, 174-176).

8 In partisan terms, those non-white voters who secured the right to to register and to vote under the VRA and its amendments have overwhelmingly favored Democrats in the 21st century. In 2012, for example, while Romney carried the 72% of the electorate that identified as white by 59%-39%, Obama carried the 13% of the electorate who identified as African American 93% to 6%; the 10% of the electorate who classified as Latinos, voted 71% to 27% for Obama; and the 3% of the electorate who were Asian American, voted 73% to 26% for Obama (CNN 2012). Non-white voters remain far more favorable to race conscious measures and many other liberal positions than do most white voters (King and Smith 2011, 98, 127, 257; Ethnic Majority 2012). Because of this pattern of policy preferences, Republicans, particularly the great bulk of Republicans who now identify as conservatives, have had strong reasons to discourage rather than encourage voting by these groups, thereby maintaining a disproportionate predominance of whites in America's active electorate.

9 Since the mid-1990s, Republican legislators have worked to enact new barriers to likely Democratic and non-white voters. These restrictive efforts accelerated in the wake of the *Shelby v. Holder* decision. Since the Court ruling, of states covered by the 4(b) formula, eight have moved to adopt new voter ID laws or other voter validation checks or to implement their recent voter ID laws, including Texas which previously had its law rejected by the Justice Department when it sought pre-clearance. Six states not covered by 4(b) have adopted similar measures.[7] This set of initiatives to restrict voting has prompted VRA Section 2 lawsuits, used to challenge voting qualifications, practices and procedures that deny or abridge voting rights on account of race or color, against the state governments..[8]

10 The judicial ruling in *Shelby* garnered national attention. President Obama called it "deeply disappointing." Advocacy groups representing minority voters such as the NAACP and the NAACP LDF described the decision as unjustified. They argued that continuing problems of voter discrimination – a reality the majority justices acknowledged – made abolition of 4(b) premature. Equally from the opposite side, the Court's decision has support from conservative legislators, proponents of states' rights, champions of tighter voter restrictions, and critics of the efficacy and justice of public policy interventions that seek to promote material equality. These pro-*Shelby* groups argue that the empirical evidence about recent voting turnout for minority compared with white voters means the need for VRA preclearance in the jurisdictions covered in 1964 has evaporated. This contemporary American political battle has very high stakes.

The Racial Alliances Framework

11 In large part because European-descended Americans acquired land in North America through extensive forcible displacement of indigenous tribes, and their newly independent United States then built its economy through substantial reliance on the plantation labor of enslaved workers from Africa, from early on in their history Americans elaborated ideologies and laws privileging those labeled "whites" over most non-whites and particularly those labeled "black" (though just where these racial lines were drawn was always contested and often shifted). The specification and defence of "white supremacy" justifications for Native American removal, the Mexican American

War, and above all chattel slavery created material and psychological investments in racially inegalitarian institutions and practices for many whites, but other Americans of all races also always condemned slavery as morally wrong, economically inefficient, and politically corrupting. Yet even after the nation ended slavery at the fearsome price of a massive civil war, commitments to white supremacy remained so powerful that their proponents eventually succeeded in defeating racially egalitarian Reconstruction programs and creating a new white supremacist racial order, the Jim Crow segregation system, that prevailed in American life and U.S. politics from the 1880s to the 1960s.[9]

12 This familiar history is highly germane to current controversies not just about voting but also about how best to address enduring material inequalities, discrimination and injustices. The political, economic, and social systems advantaging whites built up during that long history persist in many forms despite Americans' formal repudiation of legalized white supremacy.

13 Although the Voting Rights Act, along with the 1964 Civil Rights Act are the core of that formal repudiation, they only began processes of building institutions and practices that would be genuinely racially inclusive and egalitarian in fact. Controversies over how far and in what ways to pursue those goals in many areas still divide Americans today. In many ways no dispute is more crucial than those over voting rights, the key democratic mechanism giving access to political power. Though most white Americans no longer believe their nation should be one that explicitly gives special de jure privileges to whites, many appear anxious by the prospect that whites might soon no longer have anything approaching the disproportionate political power and economic status they have enjoyed throughout U.S. history (King and Smith 2011, 168-191, 253-284).

14 White Americans accepted repudiation of their de jure privileges in the 1960s only under extraordinary circumstances. These conditions included the heightening of many decades of protesting, marching, organizing and litigating by what became known as the civil rights movement; the pressures of the Cold War; the shocking assassination of President John F. Kennedy in Texas soon after he proposed what became the 1964 Civil Rights Act; and the consequent rise to the heights of power of a politician determined to be a towering figure in the history of American democracy (Morris 1984; Packard 2002). The Voting Rights Act was enacted by Congress in 1965 after an exceptional exercise of presidential persuasion by that man, President Lyndon B. Johnson, a reformed segregationist southern Democrat who had won a landslide election after Kennedy's death and then the passage of the Civil Rights Act in the previous year. Together the VRA and the CRA extended equal rights of citizenship to African Americans and other discriminated against minorities. The new laws restored the unfulfilled promise of the post-Civil War amendments and civil rights statutes. As we show in our book *Still A House Divided*, these momentous legislative changes in the 1960s spurred further battles in racial policy and politics. Initially these struggles prompted discussions of a range of policy instruments about how best to address racial inequality (Ackerman 2014, Tarrow 2015). But remarkably within the space of a decade this range of options had collapsed and coalesced into two mutually exclusive approaches.

15 First is the color blind policy alliance whose members vigorously oppose government action to reduce the many persisting racial inequalities that advantage whites,

especially if those actions come in the form of direct, race-targeted measures—though many color blind advocates condemn all race conscious policy making as equally immoral, whether or not explicit racial classifications are used. They have mobilized against affirmative action and integration initiatives in education and employment (including seeking to truncate the impact of the Equal Employment Opportunity Commission and pursuing Supreme Court cases which in piecemeal fashion have banned or discouraged minority set-aside and federal contract compliance programs, and school district powers to foster racially integrated schools); they have opposed efforts to promote integrated affordable housing and environmental justice efforts focused on minority communities; and they campaigned first to prevent the VRA from being extended and, when extended, then to dilute the voting law's efficacy. As measured by voting choices and in public opinion attitudes, this color blind racial policy alliance has gained great acceptance amongst white voters, and it continues to shape white voter opinion on a wide range of issues. One scholar shows, for example, how this racial policy outlook amongst white voters influenced attitudes toward the Affordable Health Care Act (Tesler 2012, 2013). The influence of color-blind stances converges with a rightward shift amongst many, though not all voters, expressed in America's sharp polarization. The U.S. electorate's partisan polarization was higher in 2012 than at any point in the previous twenty-five years according to the Pew Center (Pew Research Center, 2012). These voters or conservative color blind activists do not favour of course white supremacy. But equally there is little doubt that most think it unwise and unjust for public policies to seek aggressively to transform further the political, economic, and social institutions and practices built up under centuries of white supremacist policies--institutions and practices in which whites continue to hold advantaged places, in practice if not in law.

16 Opposing these proponents of color blindness is the race conscious policy alliance. Members of this loose alliance champion positive, sometimes explicitly race-targeted policy instruments to address racial inequalities, including voting discrimination. The race conscious policy alliance programs – such as affirmative action (focused both on legacies of the Jim Crow era and more recent barriers to equality), enforcing anti-discrimination laws in housing, multicultural education initiatives, expanded EEOC regulatory powers in labor markets to counter discrimination, criminal justice reforms aimed at ending the disproportionate incarceration of non-whites, and more – have all been under multiple political challenges since the 1970s, with declining congressional and judicial support even after the election of America's first African American president. But for many decades most opponents of race-conscious policies chose to identify with, rather than to oppose openly, the now widely admired major civil rights laws of the 1960s. Consequently, it has generally proven possible for race conscious proponents to sustain and sometimes to extend those original measures over muted color blind opposition.

17 One success came in 2006, when the VRA was renewed after Congress spent 10 months reviewing the act, holding 21 hearings attended by over 90 witnesses and examining over 15,000 pages of evidence in addition to looking at the voting patterns in and outside the 16 Section 5 covered jurisdictions. The review and associated deliberations acknowledged post 1965 advances but concluded that entrenched voting discrimination in the areas singled out by the 4(b) formula endured.[10] In economic arenas, race conscious alliance supporters point to the documented erosion of effective regulatory

agency efforts to root out labor market discrimination. This leads them to argue that efforts to aid racial minorities continue to be needed (de Burca 2012).

18 Advocates of race conscious reform policies insist that whether or not the proponents of color blind measures explicitly desire to maintain white privileges, adoption of their stance inevitably means that many longstanding forms of white advantage will persist for at least the near to middle term future. One of those advantages is the disproportionate electoral political power of whites, the specific racial inequality that the Voting Rights Act sought to end.

The *Shelby* Decision

19 In the eyes of the majority of the Supreme Court, the VRA has succeeded so well that its most significant original provisions have become obsolete. *Shelby County v. Holder* fundamentally undercuts the federal government's powers to intervene in state and local cases of voting discrimination. To be sure, the decision leaves intact the VRA's Section 3 powers. These powers enable the Justice Department to bring states, cities, and other political subdivisions under its 15th Amendment voting rights jurisdiction. But to do so, the federal government must demonstrate that state legislators or the public officeholders responsible for compiling and monitoring electoral rolls' accuracy or other aspects of electoral systems have intentionally engaged in racial discrimination. This criterion of discriminatory intent is difficult to demonstrate. And in fact a significant reason why the VRA's Section 4(b) formula was enacted in the first place was to overcome this difficulty. Section 4(b) empowered the Justice Department to act if a political subdivision was simply failing to register or turn out half its voters.

20 The distinction between including the need to demonstrate intentional racial discrimination versus showing a pattern of disparate impact on parts of the citizenry is a general one in all civil rights enforcement strategies. Deciding to employ the former approach means opting for the weaker measure.

21 The majority of the *Shelby* justices concluded that the low registration rates and voting tests that plagued southern states in the 1960s are gone. The majority opinion noted that "nearly 50 years [after the VRA], things have changed dramatically.... The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years." The justices recorded that "there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act" (pp13,14). Perhaps most importantly for them, the gap between white and black registration and voting rates in the covered areas is no longer significant (and in some cases even favors blacks). They cited white-black voting gaps of, for example, 49.9% in Alabama and 63.2% in Mississippi in 1965, compared with 2004 gaps of 0.9% in Alabama and -3.8% in Mississippi (p15).

22 Impressive and important as that progress in increasing black voter turnout is, both the oral hearing for *Shelby* and the judgment demonstrate how the five majority justices construed their decision about VRA in *Shelby* as a means to advance the color blind agenda of ending race conscious assistance measures. After listening to the Justice Department defence of the VRA, Justice Antonio Scalia suggested that members of the US Senate who supported the Section 5 preclearance provisions did so for political reasons only, contending that such elected officials feared being criticized for opposing it. It should be noted that the 4(b) formula was clearly race conscious,

concerned with obstacles to minority voters, but it was not explicitly race targeted. It focused only on percentages of registered and actual voters, not the race of voters per se. Nonetheless Scalia still excoriated congressional renewal of the VRA as being part of a "phenomenon that is called perpetuation of racial entitlement."[11] The majority opinion was more temperate. The majority justices contended that "there is no doubt that these improvements [in registration and voting] are in large part *because* of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process," (p15, emphasis in original).

23 However, Scalia's comments during the oral hearings capture one of the two beliefs underlying the Court's majority opinion: the notion that because preclearance no longer seems required to protect voters against discrimination, it operates instead as an unjust legal privilege for non-white southern voters and so amounts to racism in a new form. The other element is the belief that the old form, white racism, is no longer sufficiently entrenched in the covered jurisdictions to warrant an interventionist preclearance power (even though the justices conceded that "voting discrimination still exists"[12]). The justices reported that both Philadelphia, Mississippi and Selma, Alabama "are governed by African-American mayors. Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides" p16). Beyond the Court's deliberations, color blind proponent and Republican Senator Rand Paul went further, asserting that in fact no "objective evidence" of voting discrimination against African Americans exists today in the covered states, much less in America as a whole.[13]

24 Certainly sufficient has changed to make a strong case that Section 4(b)'s formula needs to be updated. However, it is at best naïve and at worse burying one's head in the sand to think that high voting rates by themselves equate with an absence of discrimination. Since the passage of the VRA, many of the covered jurisdictions (and others) have exhibited repeated efforts to establish new districting or at-large voting systems that would *reduce* chances for minority voters to elect a proportionate number of officeholders, even when they turn out in significant numbers. These efforts often appear aimed at just such vote dilution. In Texas, for example, a three judge federal court found in 2012 that the Republican-controlled legislature's proposed redistricting plan would discriminate against African American and other minority voters. The judges also concluded that the plan's designers intended this outcome. The lawyers challenging the districting scheme had provided more "evidence of discriminatory intent than we have space, or need, to address here,"[14] in the view of the Texas justices.

25 Again, it is far more effective to protect minority voting rights through preclearance rejection of such schemes than it is to sue after the elections in which they have been employed. Contrary to Senator Paul and the Court's majority, the need for such preclearance remains substantial, because there is abundant evidence of continuing discriminatory initiatives of these sorts. Between 2006 when the VRA was last reauthorized and 2012, 31 proposed changes to elections failed to win the Justice Department's approval, and in the period 1999 to 2005, 153 proposed changes were abandoned by their proposers after questions were raised about them by the Department of Justice.[15] Shelby County itself had pursued redistricting plans that the Justice Department assessed as limiting the influence of black voters, precipitating the County's legal attack on VRA preclearance requirements.

26 This record animated Justice Ruth Bader Ginsburg's robust dissent in *Shelby County* and her assessment that "the scourge of discrimination has not yet extirpated." Ginsburg reported: "all told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory."[16] In a meticulously documented opinion, Ginsburg cited Congress's 2006 decision to reauthorize the VRA because of its continuing efficacy as an instrument against discrimination against non-white voters in many parts of the country, including the covered regions, and she contended:

27 "But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights."[17]

28 The dissent ended with a pointed metaphor. Ginsburg concluded that "throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[18]

29 In sum, the majority Court decision in *Shelby County v. Holder*, to strike down an effective and prestigious law, affirms that the majority Republican-appointed Supreme Court is now the most aggressive member of the modern racial political alliance favoring color blindness. The opinion sits with and complements the Court's steadfast erosion of affirmative action, set asides, school integration programs, and federal contract compliance measures since the early 1980s.

The Color Blind Policy Alliance's Upward March

30 The political significance of this decision was wide ranging, *Shelby County v. Holder* was in part another victory delivered by the Court to the modern color blind policy alliance. But it was also a major advance on what is perhaps *the* central battleground upon which the two modern racial policy alliances have been battling for nearly three decades: the structuring of access to electoral power (Piven, Minnite and Groarke 2009: 1-6).

31 The pertinent history of this battle extends well back into America's past.. It is a commonplace in political struggles for political forces to seek to disfranchise or dilute the voting power of their opponents. Disfranchisement through a great variety of mechanisms was a cornerstone of the subjugation of black Americans during the Jim Crow era (Tuck 2009; Valelly 2005). And as the two parties have become identified with the rival modern racial policy alliances (a reality manifested in the party line division between the 5 Republican-nominated majority versus the 4 Democratic-nominated dissenting justices in *Shelby*), the modern GOP began to pursue a variety of means of minimizing voting by likely Democrats, often poorer non-white voters.

32 That pattern began when, twelve years into the "Reagan Revolution," the Democrats briefly won control of both houses of Congress in 1992, and the presidency.. Democrats quickly passed the National Voter Registration Act of 1993, designed to achieve near-universal registration of eligible voters, in part by allowing persons to register as they applied for driver licenses or various social services (hence its nickname, the "Motor Voter" law). Republicans attacked the bill as an unconstitutional infringement on state

powers to define voter qualifications and as likely to unleash voter fraud (Minnite 2010, 136). Once the bill, which did not go into effect until 1995, began to add millions of disproportionately less affluent and disproportionately minority voters to the rolls, Republicans and conservative advocacy groups and pundits began to stress more and more vociferously that voter fraud was a serious national problem; *but* no evidence of fraud was ever found convincing by the courts that considered challenges to the law (Minnite 2010, 136-139).

33 Republicans had by and large championed immigrant workers and courted Latino voters in the Reagan years. But they now found a new issue in public anxieties stirred by the rising number of unauthorized, primarily Mexican and Central American immigrants in the wake of the 1986 Immigration Reform and Control Act (IRCA) and the 1990 North American Free Trade Agreement (NAFTA) (Zolberg 2006, 403-423; King and Smith 2011, 241-245). At both the state and national levels, Republicans enacted measures restricting the rights of documented and undocumented immigrants during the 1990s. Ironically, these measures accelerated naturalization rates for legal Latino immigrants. The restrictive measures championed by Republicans heightened the already strong tendencies of new Latino citizens to vote Democratic (Zolberg 2006, 409, 424). Consequently, Republicans became still more concerned that the fast-growing non-white segment of the American electorate posed a rising threat to their electoral prospects, especially in immigrant-receiving states, which new, more diffuse immigration patterns were making far more numerous.

34 But the political battle over voting rights and registration rolls assumed new dimensions at the turn of the century. In 2000, the Bush-Gore election debacle dramatized the many other inadequacies of America's decentralized, partisan-operated system of conducting elections. In response, Congress passed the 2002 "Help America Vote Act" (HAVA). HAVA was intended in part to address the voting problems exposed in 2000 in Florida. But Republicans also included in the act a requirement that states collect official identifying information from citizens when they registered to vote, measures already in place in Florida (Minnite 2010, 134-135). From that point on, GOP state legislators began pushing for more and more demanding Voter ID requirements, all in the name of combating vote fraud. They gave new emphasis, bolstered in the aftermath of the 9/11 attacks, to the danger of voting by illegal immigrants who supposedly could register when applying for a driver's licenses, despite their lack of citizenship. These arguments were still advanced without any firm evidence that any such fraud was occurring (Minnite 2010, 8-14). But these claims formed a piece with mounting Republican-led state and local efforts throughout the first decade of the 21st century to enact a range of restrictive laws that might persuade immigrants to return home, instead of seeking citizenship—an approach immigration opponents referred to as "attrition through enforcement," aimed at encouraging "self-deportation" (Smith 2013).

35 These joint GOP efforts to make voting more difficult and to deter immigrants from becoming citizens expressed partisan concerns to hold on to power. But the measures were more than that. They represented a choice to identify the Republican Party with the concerns of those white Americans who for whatever reasons felt threatened by the rising numbers and political power of non-white voters. This choice was not ineluctable. President George W. Bush, like Ronald Reagan before him, favored comprehensive immigration reform in part because he believed Republicans could and

should compete successfully for Latino votes. But Bush failed to persuade the increasingly powerful right wing of his party of the value of such a strategy. Instead, Republican efforts perceived as hostile to non-whites, including restrictive voting laws and anti-immigrant initiatives, continued to mount through the 2000s, and they expanded further after the election of Barack Obama. Keith Bentele and Erin O'Brien have documented the rising trend of bills proposed in virtually every state to pose new barriers to voting after 2006, as well as the rising number that were enacted from 2010 on (Bentele and O'Brien 2013, 1088-1090). Bentele and O'Brien contend that "the Republican party has engaged in strategic demobilization efforts in response to changing demographics, shifting electoral fortunes, and an internal rightward ideological drift" that has been "heavily shaped by racial considerations" (1089). Specifically, the two scholars find such legislative initiatives occurring and succeeding more often "*where African-Americans and poor people vote more frequently, and there are larger numbers of non-citizens*" (1098, 1102, italics in original). Again, though these efforts were stalled by various state judicial decisions up through 2012, they instantly accelerated after the Supreme Court's *Shelby County* decision (Brennan Center http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup).[19] Recent political science research also indicates that not only are Democrats right to think that restrictive voter laws take "*aim along racial lines with strategic partisan intent,*" but these laws have racial consequences (Bentele and O'Brien 2013, 1104). One experimental study finds that when voter ID laws are implemented, African American and Latino voters are asked for IDs at significantly higher rate than white voters (Cobb, Greiner, and Quinn 2012, 2).[20]

36 GOP support for restricting voting laws was not inevitable. Many expected that the Republicans would change course after Obama was re-elected in 2012 with a larger share of the Latino and Asian-American votes than in 2008 (and only a slightly smaller share of the African American vote). At first, many GOP leaders seemed to agree. The Republican National Committee's post-election "Growth and Opportunity" internal review commission argued that in light of the nation's "demographic changes", unless the Republicans begin to strengthen their appeal to Latinos, in part by revising their positions on immigration, "we will lose future elections."[21] This proposition fits with the arguments of scholars such as Hochschild, Weaver and Burch, who anticipate transformations in American politics to accommodate the growing diversity of its population across race, ethnicity and income, driven by long term immigration trends and the liberalizing effects of civil rights reforms.

37 But as journalists including Ronald Brownstein and Thomas Edsall have reported, very quickly over the spring and summer of 2013, "the sense of demographic urgency . . . palpably dissipated" for many other Republicans.[22] A number of conservative analysts, notably Sean Trende, a writer for *RealClearPolitics* who has sometimes been employed as a GOP strategist, contended that it is a viable strategy for Republicans to win in 2014 (which they did in the mid-terms) and 2016, and perhaps beyond, by increasing turnout and winning still larger margins of support from white voters, especially "downscale, Northern, rural whites." This prediction was affirmed in the 2014 midterms, though on a historically low voter turnout rate. Trende has contended that GOP support among whites can realistically reach as high as 70%, which with high turnout would be enough to produce victories despite Democrats winning over 70% of Latino and Asian voters

and well over 90% of black voters. He doubts that high African American, Latino, and Asian American voter turnout will continue when Barack Obama is not on the ballot.[23]

38 These estimates are disputed vigorously by other analysts.But the thrust of Trende's thesis has been reinforced by other Republican strategists and many political scientists and above all by GOP victory in the 2014 mid-terms. They may win the Presidency in 2016. Some Republicans believe that their efforts to restrict voting, especially voting by poorer and non-white Americans, through Voter ID laws and related initiatives helped to enhance these prospects. Harvard political scientist Steve Ansolabehere has estimated Republicans' chances to win the White House in 2016 as better than 50-50, since Americans rarely award the presidency to the same party three elections in a row-- though others contend that the GOP must break from the Tea Party in order to produce that victory.[24]

39 The pertinent point here is not to assess the accuracy of predictions about probable future voting trends. Rather the upshot of these debates has been to strengthen Republicans and conservatives in the belief that they do not need to modify their positions to appeal to non-white voters in order to be politically successful in the years ahead.

40 And they need not, fundamentally, because they believe they can further improve their already strong position among white voters, who have voted against every Democratic presidential candidate, albeit sometimes narrowly, since Lyndon Johnson in 1964. There can be little doubt that their strategy depends on the belief that many white Americans believe that contemporary America is in danger of a catastrophic fall from the far better America of the past, one in which whites held hegemonic power.

41 Republicans are seeking power by identifying their party with the preferences of white voters.[25] Most of those voters do not support any strong measures to ameliorate America's racial inequalities, the patterns of white's relatively advantaged status that can be found in most of the main arenas of American life. Although those advantages can be forfeited by modern individual whites who act improvidently, they are available to whites more than blacks as legacies of the economic, educational, political and social privileging of whites that American white supremacists established in the not so distant past. When Republicans seek to suppress the votes of non-whites who generally support policies that would work against preserving those advantages, and instead court the votes of whites who generally support policies that sustain privilege, then in effect if not in conscious intent, they are seeking to preserve much of what survives of the older white supremacist institutional ordering of America.[26] This view is borne out in the Pew Center survey: "while an 86 %-majority says that society should do what is necessary to ensure everyone has an equal opportunity to succeed, there is little support for making every possible effort to improve the position of minorities even if it means preferential treatment. Whites and blacks and partisan groups hold starkly different opinions on the use of preferential treatment to improve the position of minorities" (Pew Research Center 2012: 87).

The Prospects for America's Racial and Political Future

42 It is improbable that defenses of the old racial ordering can prevail in the 21st century. Not only is the Justice Department seeking to use the VRA's section 2 to "bail in" jurisdictions, including Texas, by showing that they are seeking to abridge voting rights on account of race or color. In many states, a variety of the civil rights advocacy and litigation groups active in the race conscious policy alliance are challenging voter ID laws and other restrictive initiatives, with some striking successes. A federal judge invoked the VRA's Section 3 to reinstate oversight of voting practices in Mobile, Alabama; another invalidated Pennsylvania's ID law for burdening voting rights without any evidence that the law aided accurate voting; and in Wisconsin, litigants are challenging the state's voter ID law for racially discriminatory effects.[27] Eventually bi-partisan sponsors in Congress will take up the Court's invitation to amend the Voting Rights Act, including a new coverage formula (though not in the foreseeable future). Whether the U.S. Supreme Court will uphold the lower court rulings against vote restriction initiatives is not known. It is only clear that this crucial battleground for political power, and the propriety of policies designed to aid non-white Americans against traditional forms of white privilege, will continue to be a scene of intense contests.[28]

43 It is doubtful that, in the long run, efforts at vote suppression can successfully prevent the growing numbers of non-white Americans from gaining voting power more proportionate with their percentages of the national population. Unless current voting patterns are sharply altered, these trends probably mean that the Republicans will have great difficulty winning presidential elections from 2020. But political scientists and GOP strategists are right to argue that they have real prospects of success in 2016, and that they have the potential to control congressional and state districts gerrymandered in their favor for years after that.

44 Current conservative efforts to restrict voting rights in ways that disproportionately affect non-whites, like the accompanying efforts to restrict disproportionately non-white immigration, will continue. But these efforts will ultimately prove to be the final stand of such initiatives to preserve American institutions and practices in ways most of which advantage whites. In the near term conflicts generated by these restrictive efforts will be intense because the stakes are so high for both racial policy alliances. Americans face battles over voting rights in their electoral campaigns, in their legislatures, in their law enforcement agencies' operations, and in their courts that will be costly and time-consuming. In some instances they will throw the results of elections into doubt, delaying much of the work of the affected governments. Only if most Republicans and conservatives decide these are fights they don't want to have or can't win will these outcomes be avoided. And only then will America, in regard to voting rights, cease to be a "house divided."

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NOTES

1. Voting Rights Act of 1965 Public Law 89-110, 79 Stat. 437. As Amended Through PL 110-258, Enacted July 1, 2008.
2. *Shelby County v. Holder*, http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf
3. For a view that Congress ignored hard questions about the VRA's retained criteria for determining preclearance view, see Pildes (2006). He advocates a national uniform standard policy rather than the pre-existing covered jurisdictions framework.
4. The Editorial Board, "A Step toward Restoring Voting Rights," *New York Times*, January 18, 2014, SR10.
5. Piven, Minnite and Groarke provide a comprehensive typology of the current methods of vote suppression, or what they call "keeping the voters down," including misinformation campaigns, "caging" and challenging voters, and manipulation of registration records and lists (2009, 167-186).
6. An illustration of this electoral silence is the non-discussion of segregation in the last Chicago mayoral election campaign: Steve Bogira "Separate, Unequal and Ignored: Racial segregation remains Chicago's most fundamental problem. Why isn't it an issue in the mayor's race?" *Chicago Reader* February 10, 2011; accessed at: http://www.chicagoreader.com/chicago/chicago-politics-segregation-african-american-black-white-hispanic-latino-population-census-community/Content?oid=3221712
7. "Everything That's Happened Since Supreme Court Ruled on Voting Rights Act," http://www.propublica.org/article/voting-rights-by-state-map.
8. Ibid. and "Justice Dept Poised to File Lawsuit Over Voter ID Law," *New York Times* 30 September 2013.
9. For a classic overview of these developments, see John Hope Franklin and Evelyn Brooks Higginbotham, *From Slavery to Freedom: A History of African Americans*, 9th ed. (New York: McGraw Hill, 2010). For an analysis of the factors driving racial change, see Philip A. Klinkner with Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (Chicago: University of Chicago Press, 1999).
10. Congressman John Lewis "Why we still need the Voting Rights Act," *Washington Post*, February 25 2013.
11. Reported in Robert Barnes "Supreme Court conservatives express scepticism over voting law provision," *Washington Post* February 27 2013.
12. *Shelby v. Holder* at 2.

13. See news report of his August 2013 speech: http://tv.msnbc.com/2013/08/15/rand-paul-no-objective-evidence-of-racial-discrimination-in-elections/; Aaron Blake "Rand Paul: No 'objective evidence' African Americans are prevented from voting," *Washington Post* August 14, 2013.

14. US District Court for the District of Columbia, *State of Texas v. USA & Eric Holder*, Civil Action No 11-1303.

15. Myrna Perez and Vishal Agraharkar, *If Section 5 Fails: New Voting Implications*. Brennan Center for Justice, http://www.scribd.com/doc/147170166/If-Section-5-Falls-New-Voting-Implications, 2.

16. *Shelby County v. Holder*, Ginsburg, Breyer, Sotomayor and Kagan dissenting, 13.

17. *Shelby County v. Holder*, Ginsburg et al., 1,2 .

18. *Shelby County v. Holder*, ibid., 33.

19. Myrna Perez and Vishal Agraharkar *If Section 5 Fails: New Voting Implications*. Brennan Center for Justice, 2.

20. The aim of the Cobb et al study is to determine whether in fact voter ID laws can be administered in race neutral ways. Methodologically they strove to design their study and to test the data in ways that avoided biases – dealing with such problems as non-response and the likelihood of clustering by voting location of ID requests. A sensitivity analysis was designed to take account of which voters under federal or state law are legally required to provide an ID. The study used the jurisdiction of the City of Boston in the 2008 election, when they expected that "voter ID laws were unlikely to pose issues of racial difference" (3). Their findings are alarming. Despite their acknowledgment of methodological impediments to eliminating all sources of bias in their study, the authors report "strong evidence that Hispanic and black voters were asked for IDs at higher rates than similarly situated white voters" (3). Nor do they see any easy remedy to the input of discretion employed by poll workers: "to the extent that one hypothesizes, as we do, that our results may be due to unconscious assumptions on the part of poll workers paid less than minimum wage to work 15-hour days" their evidence suggests "such assumption may resist remediation via simple training programs" (3). This last point suggests that merely training poll workers in neutral and impartial law administration will not overcome the prejudices the researchers found in practice.

21. Cited in Ronald Brownstein, "Republicans Can't Win With White Voters Alone," *The Atlantic*, http://www.theatlantic.com/politics/print/2013/098/repulbicans-cant-win-with-white-voters-alone.

22. *Ibid*.; Thomas B. Edsall, "Can Republicans Paint the White House Red?", *New York Times Opinionator*, August 28, 2013.

23. *Ibid*.

24. Edsall, *ibid*.

25. As some political columnists seem to recognize: John Harwood, "Behind the Roar of Political Debates, Whispers of Race Persist," *New York Times* 31 October 2013; and see Paul Krugman "A War on the Poor," *New York Times* 1 November 2013.

26. The notion that many whites find it difficult to support transformations in their entrenched privileges is supported by a range of evidence beyond the straightforward survey data showing that whites are less favorable to race conscious policies than non-whites. In a study of attitudes amongst whites living in Southern counties that had high shares of slave populations at the time of the Civil War, three researchers find that voters there now evince more conservative attitudes than in other counties. Using statistical controls and analysis, Acharya, Blackwell and Sen (forthcoming) find that in these slave heavy legacy counties, whites' hostility to such egalitarian measures as affirmative action is high, and they find greater prevalence of expressed racial resentment toward African Americans. Testing various explanations for this pattern, the authors demonstrate how tenacious historically formed racial attitudes (privileged in institutions) are in these counties and how they are passed on intergenerationally.

27. For stories detailing these efforts, see http://topics.nytimes.com/top/reference/timestopics/subjects/v/voter_registration_and_requirements/index.html

28. While our stress has been upon African American voters, a recent study draws attention to the barriers facing many American Indians to exercising their vote, often in jurisdictions where they can make a difference. Schroedel (forthcoming) argues that blocs of Native American voters have been crucial to the success of Democrats on numerous occasions in certain Western state districts and senate races, and that these same constituencies have experienced dramatic rises in voter suppression measures and initiatives. Schroedel finds that Native American voters' challenges remain of a "first generation" type – basic obstructions to the act of voting – as much as "second generation" barriers of the sort voter suppression laws symbolize. Examples of the latter are new state laws proscribing tribal identification as acceptable forms of ID, the absence of street addresses and utility bills on reservations which are often required as sources of identification, and the issuing of provisional ballot papers which are accepted as legal only on return of the voter with a requisite form of identification. As in the application and justification of stringent voter ID laws elsewhere in the country the claim that voter fraud needs tackling is not supported by evidence of widespread fraud or voter impersonation (Schroedel forthcoming: 41-42).

RÉSUMÉS

La décision de la Cour suprême dans l'arrêt *Comté de Shelby c. Holder*, invalidant la Section 4 (b) de la Loi sur les droits de vote de 1965, est en partie le produit d'une volonté de maintenir les avantages particulièrement disproportionnée des Blancs en matière de pouvoir politique et de résister à toutes les nouvelles tentatives transformation des arrangements institutionnels américains traditionnels. Ces efforts de résistance ne sont pas susceptibles de réussir sur le long terme. Mais ils peuvent entrainer les élections américaines et la gouvernance américaine dans des conflits paralysants pour les années à venir.

The Supreme Court's *Shelby County v. Holder* ruling invalidating Section 4(b) of the Voting Rights Act of 1965 is in part a product of efforts to resist further transformations to the traditional American institutional arrangements that have conferred advantages on whites, especially disproportionate political power. Those efforts in resistance are not likely to succeed in the long run. But they may embroil American elections and American governance in paralyzing conflicts for years to come.