

[Note to Schmoozers: This is a draft of a paper that Des King and I are doing for a French journal's special issue on the Shelby County decision. It is written for a European audience so includes material superfluous for this audience. But haven't had time to produce an appropriately abridged version for you – sorry! Hope it's not too much trouble to skip over all that is very, very familiar.](#)

[Rogers Smith](#)

### The Last Stand:

#### Restricting Voting Rights and Sustaining White Power in Modern America

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Abstract: [The Supreme Court's \*Shelby County v. Holder\* ruling invalidating Section 4\(b\) of the Voting Rights Act of 1965 should be understood as in part a product of efforts to resist further transformations in traditional American institutional arrangements that have conferred advantages on whites, especially disproportionate political power. Those efforts 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.](#)

#### 1. Voting Rights and America's racial policy alliances.

The U.S. Supreme Court's 5-4 decision in *Shelby County v. Holder* finding Section 4(b) of the Voting Rights Act (VRA)<sup>1</sup> unconstitutional is the most transformative of the important opinions issued in the final week of the [Court's 2012-13 term](#).<sup>2</sup> The decision attacks the core of the VRA. It 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 4(b) as having operated voting systems with inappropriate 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 obliteration of Section 4\(b\)](#)

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<sup>1</sup> Voting Rights Act of 1965 Public Law 89-110, 79 Stat. 437. As Amended Through PL 110-258, Enacted July 1, 2008.

<sup>2</sup> *Shelby County v. Holder*, [http://www.supremecourt.gov/opinions/12pdf/12-96\\_6k47.pdf](http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf)

[powers marks a critical battle site in the struggle between those favoring and those opposing amelioration of material racial inequality in the US, furthering since it signals the ascendancy of the latter.](#)

The Court ruled that the formula used in Section 4(b) to determine if states or local governments violate the VRA—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—is no longer valid. There are, indeed, reasons to fault Congress for not updating the formula in the last half century.<sup>3</sup> But simply finding Section 4(b) unconstitutional renders the VRA’s Section 5 preclearance powers toothless. The majority justices must have known that pressing Congress to amend the law would probably cripple the VRA. Although at this writing, Wisconsin Republican Jim Sensenbrenner in the House and Vermont Democrat Patrick Leahy in the Senate are promoting a bill that would restore preclearance requirements for states and cities that have histories of voting rights violations in the last 15 years, it is [improbable](#) that the House, heavily influenced by a conservative Republican faction, will even vote on it.<sup>4</sup>

The end of pre-clearance approval for changes to voting rules or procedures in the currently covered states means that any arguably discriminatory changes, including new voter ID laws, restrictions on early voting times, or redistricting, can only be legally challenged retrospectively, after an election has occurred under these new procedures. This shift to after-the-fact litigation is a sharp reversal in the legal resources available to minority voters prior to an election, a weakening of anti-discrimination law, [and succour to recently revived voter suppression activists \(Piven, Minnite and Groarke 2009, 164-203\).](#)<sup>5</sup>

These realities are widely recognized. Less obviously but just as importantly, this [abolition of pre-clearance approval](#) should be seen as, among other things, a triumph for what we call the “color blind racial policy alliance” in American politics (King and Smith 2011, 9-10). The ruling also affirms that the U.S. Supreme Court is the most aggressive government institution in this alliance today.

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

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<sup>3</sup> [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.](#)

<sup>4</sup> The Editorial Board, “A Step Toward Restoring Voting Rights,” *New York Times*, January 18, 2014, SR10.

<sup>5</sup> [Piven, Minnete 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 \(2009, 167-186\).](#)

modern day, whether 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 public [favors](#) color blind policies, but 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 them in election campaigns](#).<sup>6</sup> And the fact that the nation has had a preponderance of Republican Presidents since 1968 means that the Supreme Court has had in the post-1960s decades a majority that has increasingly moved toward rigid insistence on color blind views of constitutional equality (King and Smith 2011, 130-131, 291-292).

As the efforts of some moderate Republicans to show themselves champions of minority voting rights indicates, although many conservative political leaders have objected to the Voting Rights Act throughout its history, its popularity means that probably only the Supreme Court could have openly sought to limit its reach. [Enacted by Congress initially to be a temporary measure](#), the VRA soon proved the most successful act of the civil rights era, in both policy and political terms. It has enfranchised millions of largely non-white voters and promoted non-white office holding, vindicating America’s claims to be a democracy in the eyes of all Americans. As a result, Congress has repeatedly 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).

Color blind advocates have been the most outspoken critics of the modern VRA, contending it 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 VRA’s 1975 amendments extended its 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). In partisan terms, the non-

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<sup>6</sup> [AnFor a valuable illustration of this electoral silence is see the discussion of 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>](#)

white voters the VRA [helped secure the right to register and to vote](#) have overwhelmingly [favored](#) Democrats in the 21<sup>st</sup> century. [In 2013, 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, 71% to 27%; and the 3% of the electorate who were Asian American, 73% to 26% \(CNN 2012\).](#) And in regard to policies, [non-white voters](#) remain far more [favorable](#) to race conscious measures and many other liberal positions than most whites [\(King and Smith 2011, 98, 127, 257; Ethnic Majority 2012\)](#). Consequently, Republicans, particularly the great bulk of Republicans who now identify as conservatives, have had strong reasons to discourage instead of encourage voting by these groups, thereby maintaining a disproportionate predominance of whites in America's active electorate.

For years, Republican legislators have aggressively sought to enact new barriers to likely Democratic and non-white voters, and those 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.<sup>7</sup> These efforts have 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. The Justice Department is suing North Carolina to challenge four provisions in the state's new voting law, including one which requires photo identification, and to seek a reinstatement of pre-clearance obligation on the state; and it is challenging Texas's photo ID requirements and its redistricting plans.<sup>8</sup>

President Obama described the Court's decision as "deeply disappointing," and groups representing minority voters such as the NAACP [and the NAACP LDF](#) condemned the decision as unjustified because of continuing problems of voter discrimination – a [reality problem](#) the majority justices acknowledged. But supporters of the Court's decision - 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 – 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. Few contemporary American political battles are seen as having higher stakes.

(a) The racial alliances framework.

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<sup>7</sup> "Everything That's Happened Since Supreme Court Ruled on Voting Rights Act," <http://www.propublica.org/article/voting-rights-by-state-map>.

<sup>8</sup> Ibid. and "Justice Dept Poised to File Lawsuit Over Voter ID Law," *New York Times* 30 September 2013.

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 African slaves, from early on in their history Americans elaborated ideologies and laws privileging those labelled “whites” over most non-whites and particularly those labelled “black” (though just where these racial lines were drawn was always contested and often shifted). The elaboration of “white supremacy” defences of Native American removal, the Mexican American War, and above all chattel slavery created deep material and psychological investments in racially inegalitarian institutions and practices for many whites, but many 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.<sup>9</sup>

It is vital to bear this familiar history in mind to understand current controversies--for the reality is that the political, economic, and social systems advantaging whites built up during that long history have persisted in many forms despite Americans’ formal repudiation of legalized white supremacy.

The Voting Rights Act, along with the 1964 Civil Rights Act, constituted the core of that formal repudiation, but 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 arenas still divide Americans today and no disputes are more crucial than voting rights. Though most white Americans no longer believe their nation should be one that explicitly gives special de jure privileges to whites, many [appearare made](#) 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](#)).

Indeed, white Americans accepted repudiation of their de jure privileges in the 1960s only under extraordinary circumstances, including 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 man determined to be a towering figure

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<sup>9</sup> [For a classic overview of these developments, see John Hope Franklin and Evelyn Brooks Higginbotham, \*From Slavery to Freedom: A History of African Americans\*, 9<sup>th</sup> 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\* \(Chicago: University of Chicago Press, 1999\).](#)

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, restoring 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 spurred further battles in racial policy and politics from the 1960s. [At first these struggles prompted discussions of](#) a range of policy instruments about how [best](#) to address racial inequality (Ackerman 2014), but [within the space of a decade this range had collapsed and coalesced into](#) two [mutually exclusive](#) approaches.

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 justices efforts focused on minority communities; and they campaigned first to prevent the VRA being made permanent and, once made permanent, then to water down the voting law's efficacy. This color blind racial policy alliance has gained great acceptance amongst white voters, as measured by voting and in public opinion attitudes, 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 strongly influenced attitudes toward the Affordable Health Care Act](#) (Tesler 2012, 2013). The influence of [color-blind stances](#) converges [more generally with a rightward shift amongst many, though not all voters that has heightened](#) America's sharp polarization. [Partly as a result, one](#) political scientist finds that [overall](#) the U.S. voting population in 2012 expressed conservative attitudes to an extent not recorded since 1952 (Stimson 2013). There is little doubt that many, probably most, of these American voters, conservative activists, and [color](#) blind proponents do not consciously [favor](#) white supremacy. But there is also 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](#).

Opposing these proponents of [color](#) blindness is the race conscious policy alliance, which champions 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](#)), anti-discrimination 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.

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. These deliberations welcomed post 1965 advances but concluded that entrenched voting discrimination in the areas singled out by the 4(b) formula endured.<sup>10</sup>

In economic arenas, race conscious alliance supporters point to the documented erosion of effective regulatory agency efforts to root out [labor](#) market discrimination to argue that efforts to aid racial minorities continue to be needed (de Burca 2012).

[Advocates of race conscious reform policies](#) They insist that whether or not the proponents of [color](#) blind measures explicitly desire to maintain white privileges, [adoption of their stance inevitably means failure to pursue race-conscious reform policies aggressively 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.

(b) The *Shelby* decision.

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 15<sup>th</sup> 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

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<sup>10</sup> Congressman John Lewis “Why we still need the Voting Rights Act,” *Washington Post*, February 25 2013.

or other aspects of electoral systems have intentionally engaged in racial discrimination. This criterion of discriminatory intent is notoriously slippery, and one major reason why the VRA's [Section 4\(b\)](#) formula was enacted in the first place. It enabled the Justice Department to act if a political subdivision was simply failing to register or turn out half its voters.

The choice 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. Opting for the former always means opting for the weaker measure.

The majority of the *Shelby* justices concluded that the low registration rates and voting tests that plagued southern states in the 1960s have gone, and that 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 per cent in Alabama and 63.2 in Mississippi in 1965, compared with 2004 gaps of 0.9 per cent in Alabama and -3.8 per cent in Mississippi (p15).

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. Note 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 percentage 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."<sup>11</sup>

Scalia's characterization expresses 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 [some discrimination continues](#) ("voting discrimination still exists."<sup>12</sup> p2). Outside the Court's [deliberations](#), [color](#) blind proponent and Republican Senator Rand Paul went further, contending that in fact no "objective evidence" of

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<sup>11</sup> Reported in Robert Barnes "Supreme Court conservatives express scepticism over voting law provision," *Washington Post* February 27 2013.

<sup>12</sup> [Shelby v. Holder at 2.](#)

voting discrimination against African Americans exists today in the covered states, much less in America as a whole.<sup>13</sup>

Although we believe enough has changed to make a strong case that Section 4(b)'s formula needs to be updated, it is at best naïve 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. The Justice Department has often scrutinized and rejected such changes in voting systems in these areas, deciding they were in fact~~ aimed at just such vote dilution. ~~And 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. They observed that the lawyers challenging the districting scheme had provided more "evidence of discriminatory intent than we have space, or need, to address here."<sup>14</sup>

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 fell foul of the Justice Department's approval, and in the period 1999 to 2005, 153 proposed changes were dropped after questions were raised about them by the Department of Justice.<sup>15</sup> 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.

This record animated Justice Ruth Bader Ginsburg's stern dissent into *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

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<sup>13</sup> 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.

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

<sup>15</sup> Myrna Perez and Vishal Agraharkar, *If Section 5 Fails: New Voting Implications*. Brennan Center for Justice, [NYU Law School](http://www.scribd.com/doc/147170166/If-Section-5-Fails-New-Voting-Implications), p2. <http://www.scribd.com/doc/147170166/If-Section-5-Fails-New-Voting-Implications>, 2.

changes based on a determination that the changes were discriminatory.”<sup>16</sup> In a highly detailed [opinion dissent](#), Ginsburg cited Congress’s 2006 decision to reauthorize because of the VRA’s continuing efficacy as an instrument against discrimination against non-white voters in many parts of the country, including the covered regions, and she contended:

“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.”<sup>17</sup>

The dissenting [opinion ended with a pointed metaphor, as 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.”<sup>18</sup>

In sum, the majority Court decision in *Shelby County v. Holder*, striking down an effective and prestigious law, affirms that the politically insulated and largely 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.

## 2. The [color blind policy alliance’s upward march](#).

*Shelby County v. Holder* was not, however, simply [just another one more important victory decision](#) delivered by the Court to the modern [color](#) blind policy alliance. It was 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, Minnette and Graoake 2009: 1-6](#)).

Of course, the pertinent history could be extended much further back. 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; Vallery 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](#)

<sup>16</sup> *Shelby County v. Holder*, Ginsburg, [Breyer, Sotomayor and Kagan et al](#) dissenting, p13.

<sup>17</sup> *Shelby County v. Holder*, Ginsburg [et al, Breyer, Sotomayor and Kagan dissenting](#), pp1,2 .

<sup>18</sup> *Shelby County v. Holder*, [ibid.](#) ~~ibid~~ p33.

means of minimizing voting by likely Democrats, often poorer non-white voters, ~~with a variety of means.~~

That pattern began when, twelve years into the “Reagan Revolution,” the Democrats briefly gained control of both houses of Congress as well as the White House after the 1992 elections. They 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).

In the same years Republicans, who had by and large championed immigrant workers and courted Latino voters in the Reagan years, 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. But ironically, these measures accelerated naturalization rates for legal Latino immigrants. ~~They also and~~ heightened their 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.

Then ~~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), 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 concrete evidence that any such fraud was occurring (Minnite 2010, 8-14). But

[thesesuch claims](#) formed a piece with mounting Republican-led state and local efforts throughout the first decade of the 21<sup>st</sup> 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).

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 they 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 inevitable. President George W. Bush, like Ronald Reagan before him, [favor](#)ed 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 recently 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). They 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, they 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>).<sup>19</sup> 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*,” they have racial consequences (Bentele and O’Brien 2013, 1104). Rachael Cobb and her colleagues find 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).<sup>20</sup>

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<sup>19</sup> Myrna Perez and Vishal Agraharkar *If Section 5 Fails: New Voting Implications*. Brennan Center for Justice, [NYU Law School, p2](#).

<http://www.scribd.com/doc/147170166/If-Section-5-Fails-New-Voting-Implications>

<sup>20</sup> [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](#)

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."<sup>21</sup> [This proposition fits with the arguments of scholars such as Hochschild, Weaver and Burch, who anticipate transformations point to the likely emergence of a 'new racial order' in American politics to accommodate reflecting 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. Certainly in respect to immigrants the historical pattern of initial hostility has been replaced with acceptance as the new members earned their 'whiteness' \(Roediger 2005\). Even if no longer relying upon such ideologies the modern scenario of immigrants as sources of transformation makes hypothetical sense.](#)

But soon, as journalists including Ronald Brownstein and Thomas Edsall have reported, over the spring and summer of 2013, for many other Republicans, "the sense of demographic urgency...palpably dissipated."<sup>22</sup> A number of conservative analysts, especially 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 and 2016, and perhaps beyond, by increasing turnout and winning still larger margins of support from white voters, especially "downscale, Northern, rural whites." 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

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[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.](#)

<sup>21</sup> 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>.

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

voters. He doubts that high African American, Latino, and Asian American voter turnout will continue when Barack Obama is not on the ballot.<sup>23</sup>

Other analysts have vigorously debated the realism of Trende's estimates, but his arguments have effectively been reinforced by other Republican strategists and many political scientists who contend that for a number of reasons, Republicans have good chances to win in the next two elections, perhaps recapturing full control of Congress and the Presidency. Some Republicans believe that their efforts to restrict voting, especially voting by poorer and non-white Americans, through Voter ID laws and related initiatives ~~that have exploded since the Supreme Court struck down Section 4 of the Voting Rights Act~~ make their prospects all the more viable. Even apart from the impact of those efforts, [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.<sup>24</sup>

The pertinent point here is not who is right or wrong in these political analyses [of likely future voting trends](#). It is that 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.

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.

In so arguing, we should clarify that Trende did not argue Republicans should make white racial appeals. He urged adoption of "economic populist" positions, even at the risk of alienating the GOP's big business supporters. And in characterizing vote suppression efforts as well as "white voter" electoral strategies as part of the "last stand" of America's historical systems of white power, we do not mean to suggest that proponents of these approaches embrace traditional white supremacist ideologies. Many, probably most, are simply partisans seeking to gain power.

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<sup>23</sup> Ibid.

<sup>24</sup> Edsall, *ibid.*

The fact remains, however, that they are seeking power by identifying their party with the preferences of white voters.<sup>25</sup> 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. They prefer to see the world they see as traditional and right preserved, with their traditional relative advantages left intact. Although those advantages can be forfeited by modern individual whites who act improvidently, they are available to whites more than blacks largely 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.<sup>26</sup>

This preservation effort fits with historical differences in political attitudes expressed in contemporary America. In a study of attitudes amongst whites living in Southern counties which 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.

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<sup>25</sup> 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.

<sup>26</sup> 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.

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### 3. The Prospects for America's Racial and Political Future.

As we have already noted, ~~preservers of the old racial ordering of America~~<sup>they</sup> face substantial obstacles in ~~maintaining it in the 21<sup>st</sup> century~~<sup>doing so</sup>. Indeed, we do not believe in the long run they can prevail. 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 signal 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.<sup>27</sup> And as noted, bi-partisan sponsors in Congress are seeking to take up the Court's invitation to amend the Voting Rights Act, including a new coverage formula. It is not clear whether the U.S. Supreme Court will uphold the lower court rulings against vote restriction initiatives, just as it is not clear whether any legislative action on the VRA will occur. 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.<sup>28</sup> ~~And importantly 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. 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 seen dramatic rises in voter suppression measures and initiatives. In fact, Schroedel finds that Native American~~

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<sup>27</sup> For stories detailing these efforts, see

[http://topics.nytimes.com/top/reference/timestopics/subjects/v/voter\\_registration\\_and\\_requirements/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/v/voter_registration_and_requirements/index.html)

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<sup>28</sup> ~~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).~~

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~~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, [WE can add more details here perhaps]Piven, Minnete and Groarke provide a comprehensive typology of the current methods of voters' 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).~~

We think it doubtful, however, 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 by 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 ~~favour~~favor for years after that.

These facts mean that, though it is likely that 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 ultimately prove ~~to be~~ the "last stand" of efforts to preserve American institutions and practices ordered in ways that ~~have long~~most advantaged whites, the near term forecast is for stormy weather indeed. 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~~may well 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. Only then will America, in regard to voting rights, cease to be a "house divided." In the poignant words of Langston Hughes wrote, that remains an America that "never has been yet--and yet must be."<sup>29</sup>

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<sup>29</sup> Langston Hughes, "Let America Be America Again," <http://www.poets.org/viewmedia.php/prmMID/15609>.

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