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## Demography and Democracy

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## DEMOGRAPHY AND DEMOCRACY

PHYLLIS GOLDFARB\*

### Introduction

During oral arguments in *Shelby County v. Holder*,<sup>1</sup> Justice Antonin Scalia provoked audible gasps from the audience when he observed that in 2006 Congress had no choice but to reauthorize the Voting Rights Act, because it had become “a racial entitlement.”<sup>2</sup> Later in the argument, Justice Sonia Sotomayor obliquely challenged Scalia’s surprise comment, eliciting a negative answer from the attorney for Shelby County to a question about whether “the right to vote” was “a racial entitlement.”<sup>3</sup> As revealed by these dueling remarks from the highest bench in the land, demography and democracy are linked in the public consciousness of Americans, but in dramatically different ways.

Minority voters have learned from decades of experience that in a number of jurisdictions, the Voting Rights Act is nearly synonymous with their unfettered ability to vote.<sup>4</sup> Without the Act, their right to vote, American democracy’s fundamental precept, would be compromised to a far greater degree.<sup>5</sup> So although Justice Scalia stated that, in his view, the Voting Rights Act had become a racial entitlement, that could only be because minority voters knew—as Congressional findings confirmed—that it was necessary to protect their access to the ballot.<sup>6</sup> The powerful evidence of the Act’s indispensability in

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<sup>1</sup> 133 S. Ct. 2612 (2013).

<sup>2</sup> Oral Argument at 51:57, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), available at [http://www.oyez.org/cases/2010/2019/2012/2012\\_12\\_96](http://www.oyez.org/cases/2010/2019/2012/2012_12_96)[http://www.oyez.org/cases/2010-2019/2012/2012\\_12\\_96#argument](http://www.oyez.org/cases/2010-2019/2012/2012_12_96#argument).

<sup>3</sup> *Id.* at 70:01.

<sup>4</sup> See, e.g., *Shelby County v. Holder*, 133 S. Ct. at 2634 (2013) (Ginsburg, J. dissenting) (asserting that the Voting Rights Act “wrought dramatic changes in the realization of minority voting rights”).

<sup>5</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the “political franchise of voting” is a “fundamental political right, because [it is] preservative of all rights”). See also Joshua Field, *Creating a Federal Right to Vote*, Center for American Progress (June 25, 2013), <http://www.americanprogress.org/issues/civil-liberties/report/2013/06/25/67895/creating-a-federal-right-to-vote/> (explaining how gutting the Voting Rights Act cripples minorities’ right to vote).

<sup>6</sup> H. R. Rep. No. 109-478, at 6 (2006) (“Discrimination today is more subtle than the visible methods used in 1965...the effect and results are the same, namely a diminishing of the minority

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protecting racial minorities' voting rights explains why Justice Sotomayor may have understood Scalia's comment to refer to voting, rather than the Voting Rights Act, as "a racial entitlement."<sup>7</sup> Given this understanding, her implicit rejoinder, which suggested that the essence of democracy depended on voting not varying by demography, was not in any way a non-sequitur.

This unusual, though indirect, colloquy from the bench between two Supreme Court justices will frame this essay. In Part I, I give context to the perspectives that underlie Scalia's assertion and Sotomayor's implied reply.<sup>8</sup> In Part II, I look at how the Supreme Court majority's rhetoric in its *Shelby County* opinion reflects perspectives consistent with Scalia's.<sup>9</sup> In Part III, I explore the meaning of these perspectives for Supreme Court justices who preside over cases in an America riven by a vehement partisan divide.<sup>10</sup>

The essay concludes with observations about the fragility of democracy in a world where changing demographics heighten the role of partisanship.<sup>11</sup> My hope is that efforts to diagnose the nature of the impediments to voting rights will help generate ideas for bolstering our teetering democracy, now that the Supreme Court has dashed the most effective part of the most effective piece of civil rights legislation that Congress ever enacted.<sup>12</sup>

### I. CONTEXT

Journalists reporting on the oral arguments in *Shelby County v. Holder* typically described Justice Scalia's comment as but one more example of the self-appointed provocateur at work, as Scalia being Scalia.<sup>13</sup> Whether or not this adequately characterizes the *Shelby County* oral argument's gasp-inducing moment, the news accounts shed little light on how to understand the substance of Scalia's remark. If minority voters expected Congress in

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community's ability to fully participate in the electoral process and to elect their preferred candidates.").

<sup>7</sup> See *supra* note 3 and accompanying text.

<sup>8</sup> See *infra* notes 13 - 42 and accompanying text.

<sup>9</sup> See *infra* notes 43 - 73 and accompanying text.

<sup>10</sup> See *infra* notes 74 - 93 and accompanying text.

<sup>11</sup> See *infra* notes 78 - 95 and accompanying text.

<sup>12</sup> In his majority opinion, Justice Roberts admits that race discrimination in voting has been significantly reduced due to enforcement of the Voting Rights Act. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2626 (2013) ("The Act has proved immensely successful at redressing racial discrimination and integrating the voting process."). In her dissenting opinion, Justice Ginsburg refers to the Voting Rights Act as "one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation's history." *Id.* at 2634 (Ginsburg, J. dissenting).

<sup>13</sup> See, e.g., Ryan J. Reilly, *Voting Rights Act Supreme Court Case: Scalia Condemns The 'Perpetuation Of Racial Entitlement'*, HUFFINGTON POST (Feb. 27 2013),

[http://www.huffingtonpost.com/2013/02/27/voting-rights-act-supreme-curt\\_n\\_2768942.html](http://www.huffingtonpost.com/2013/02/27/voting-rights-act-supreme-curt_n_2768942.html).

2006 to reauthorize the Voting Rights Act of 1965, it was because minority voters knew that race-based inequities persisted in voting processes.<sup>14</sup> They also knew that Congress, compelled by the gruesome acts of those who sought to maintain a Jim Crow system of elections, had committed itself more than forty years earlier to ameliorating these inequities<sup>15</sup> by “appropriate legislation,” as it had been authorized to do a century earlier in the language of the Fifteenth Amendment.<sup>16</sup> Accordingly, these expectations of minority voters, were not, as Scalia implied, grounded in a desire to accumulate undeserved benefits, but in an awareness of the continuing need, confirmed by abundant evidence and experience, to secure the most basic rights of citizenship.<sup>17</sup>

### A. Protecting Democratic Values

Were there no race-based discrimination in voting, no connection between demography and democracy, the Voting Rights Act would be obsolete. In 2006, after studying the issue at length, hearing extensive testimony, and producing a voluminous record, Congress determined that voting—the essential building block of a democratic system—was still being manipulated in a racialized manner.<sup>18</sup> As a result of the evidence presented, Congress concluded that the Voting Rights Act had been a useful tool in protecting Fifteenth Amendment rights, and that due to ongoing efforts to undermine these hard-won rights, reauthorization of the Voting Rights Act remained necessary to protect the basic democratic principle that each person, regardless of his or her demographic group, has an equal right to vote.<sup>19</sup>

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<sup>14</sup> See *supra* notes 4-6 and accompanying text.

<sup>15</sup> See *Shelby County v. Holder*, 133 S Ct. 2612, 2628 (2013) (explaining that Congress drafted and maintained the Voting Rights Act because “the reign of Jim Crow denied African-Americans the most basic freedoms,” and “state and local governments worked tirelessly to disenfranchise citizens on the basis of race”).

<sup>16</sup> See U.S. CONST. amend. XV (“The Congress shall have power to enforce this article by appropriate legislation.”).

<sup>17</sup> The imagery of undeserved benefits accruing to African-Americans has become a familiar trope in the backlash to periods of African-American progress. This is one way to understand the racialized resistance to affirmative action and welfare that followed civil rights victories. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 48-49 (2010). Scalia’s comment seems to suggest that voting rights legislation is like busing, affirmative action, and government entitlements programs that, in recent decades, conservatives have portrayed as liberal largesse unduly granting special preferences to African-Americans at the expense of an innocent and more deserving white majority. See generally THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991) (describing how the civil rights movement led to conservatives’ organized advocacy in opposition to federal programs that benefitted African-Americans).

<sup>18</sup> See H. R. Rep. No. 109-478, p. 56 (2006) (“Forty years has been an insufficient amount of time to address the century during which racial minorities were denied the full rights of citizenship.”).

<sup>19</sup> See *id.* at 117-18 (“Discrimination in the electoral process continues to exist and threatens to undermine the progress that has been made over the last 40 years.”).

Commentators have widely praised the Voting Rights Act as the high water mark of meaningful Congressional action on behalf of civil rights.<sup>20</sup> While these commentators are praising the substance of the legislation, and its positive impact on American democracy, it is also worth noting that the Voting Rights Act represents a democratic model in another sense as well. The initial passage and reauthorization process of the Voting Rights Act is an exemplar of a responsible legislative process.<sup>21</sup> The image of a bipartisan Congress carefully studying a social problem, and enacting, then re-enacting, bipartisan legislation that can productively address it, eludes us in 2015.<sup>22</sup> In process terms too, the Voting Rights Act represents a contemporary value that we now know we cannot take for granted.

### **B. Whose Racial Entitlement?**

Why would a piece of legislation as successful as the Voting Rights Act in promoting our principal democratic values, both substantively and procedurally, provoke opposition? An effort to respond to this inquiry begins by turning Justice Scalia's observation around. The lesson of the century between the adoption of the Fifteenth Amendment and the passage of the Voting Rights Act was that voting, like the best schools, neighborhoods, and public accommodations, had indeed become a racial entitlement—for white majorities alone.<sup>23</sup> Because of its efficacy, the Voting Rights Act threatened the white majority's racial entitlement to exclude communities of color by controlling access to the ballot.<sup>24</sup>

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<sup>20</sup> See, e.g., Jared Ellias, *The Voting Rights Act and Its Foreign Counterparts*, 41 COLUM. J.L. & SOC. PROBS. 317 (Spring 2008) (stating “[t]he Voting Rights Act is one of the seminal pieces of America's civil rights legislation”). See also *Shelby County v. Holder*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting) (calling the Voting Rights Act “the Nation’s signal piece of civil-rights legislation”).

<sup>21</sup> See *id.* at 2636 (noting that Congress made findings that supported its reauthorization of the Voting Rights Act and the coverage formula after it “held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions”). Justice Ginsburg described Congress as approaching the 2006 reauthorization “with great care and seriousness.” *Id.* at 2644.

<sup>22</sup> *Id.* at 2652 (“After exhaustive evidence-gathering and deliberative process, Congress reauthorized the VRA, including the coverage provision, with overwhelming bipartisan support.”).

<sup>23</sup> In the South, this was largely the century of Jim Crow. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955). See also Alexander, *supra* note 17, at 20-57 (describing the evolving forms of racial caste in America, from its founding to the present, designed to preserve white supremacy); Sameer M. Ashar & Lisa F. Opoku, *Justice O'Connor's Blind Rationalization of Affirmative Action Jurisprudence--Adarand Constructors, Inc. V. Pena* (1995), 31 HARV. C.R.-C.L. L. REV. 223, 223, 240 (1996) (describing how “the current distribution of power” is “skewed substantially by race and ethnicity,” and “in favor of the white majority”).

<sup>24</sup> See *Shelby County v. Holder*, 133 S Ct. at 2636 (Ginsburg, J. dissenting) (Congress found that “[t]he VRA has directly caused significant progress in eliminating first-generation barriers to ballot access, leading to a marked increase in minority voter registration and turnout and the number of minority elected officials.”).

Founded while enslaving Africans and vanquishing Native peoples, America has always connected demography to democracy.<sup>25</sup> In the past century, especially in the Jim Crow South, the democratic process was profoundly undemocratic. Potential black voters—and, even more so, those who sought to register and organize them—risked lethal violence if they exercised the franchise.<sup>26</sup> By enabling and supporting greater minority participation in the electoral process, formerly the exclusive province of white majorities, the Voting Rights Act undermined one of the strongholds of white supremacy. The supremacist fortress, designed to elect government officials who would maintain it, was left standing, but its ramparts were weakened by the legislation.<sup>27</sup>

For this reason, some among the white majorities may well have experienced the Voting Rights Act as an assault on their ability to retain their unquestioned hold on the reins of power. In regions with large minority populations who had significant, experience-based reasons to mistrust the status quo power structure, equal voting rights held the potential to reduce the power of white majorities. Those whose power is supported by illegitimate means rarely give it up graciously.

The history of America—where demography and democracy have always been intertwined—strongly supports the notion of voting as a racial entitlement, but, more than for anyone else, as a racial entitlement for white majorities. Although this was not the point made by Justice Sotomayor in her oblique reply to Scalia,<sup>28</sup> she likely intended her remark to convey another message: that cultural norms have changed. Behind her observation that voting cannot be understood today as a racial entitlement is the

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<sup>25</sup> See Alexander, *supra* note 17, at 23 (“[T]he idea of race emerged as a means of reconciling chattel slavery—as well as the extermination of American Indians—with the ideals of freedom preached by whites in the new colonies.”).

<sup>26</sup> Justice Roberts’ majority opinion recognizes two of these violent episodes among many: the bloody 1965 police assault in Selma, Alabama, on marchers supporting voter registration and the 1964 murder in Philadelphia, Mississippi of three civil rights workers who were registering African-American voters. See *Shelby County v. Holder*, 133 S. Ct. at 2626. When Ronald Reagan launched his 1980 Presidential campaign near Philadelphia, Mississippi, he explicitly asserted his support for state’s rights, implying his support for a return to the pre-civil rights era, in the very area where civil rights workers Chaney, Goodman, and Schwerner had been murdered in 1964. See Bob Herbert, *Righting Reagan’s Wrongs*, N.Y. TIMES (Nov. 13, 2007).

<sup>27</sup> See, e.g., Jamin B. Raskin, *The Supreme Court’s Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship That Defends It*, 14 J. L. & POLITICS 591, 593, 597 (1998) (describing “the self-replicating political patterns of white supremacy,” reinforced by “legal doctrines” which “change shape and form” as “the deep social and juridical reality of white supremacy endures”).

<sup>28</sup> Presumably, Justice Sotomayor objected to the implication in Justice Scalia’s comment that Congress was ceding to minorities’ unwarranted demands. See Oral Argument at 70:01, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

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awareness that to enable America to overcome its profoundly racialized history and realize its democratic promise, Congress was moved by historical events to enact the Voting Rights Act.<sup>29</sup> The purpose of the Voting Rights Act, and its continued reauthorization, was to make voting an equal opportunity enterprise, to weaken the link between demography and democracy that had entrusted the electoral process to nearly exclusive white control for centuries.<sup>30</sup>

More than two hundred years of living with the ideology of slavery had certainly entrenched racial hierarchy as an American norm.<sup>31</sup> The hundred years of post-slavery that separated the Fifteenth Amendment and the Voting Rights Act were filled with the sort of opposition to equality that may seem justified to those who are fighting to protect a norm that had always organized their lives but was now being questioned and modified.<sup>32</sup> When a hierarchical status quo has become the normative structure of power, a move toward greater equality is genuinely experienced as a loss of entitlement, a taking, a threat to a known way of life.<sup>33</sup> Consequently, reducing in the name of equality the power of those who had always controlled power, and had reason to presume their continued control, in order to share power with those who had been denied it, was a step that some understood as an act of fairness and others as an affront. These disparate reactions set up the war of perceptions that pervaded the Civil Rights era.<sup>34</sup> A corresponding war of perceptions—echoing in the exchange between Justices Scalia and Sotomayor, as well as between Justice Roberts in his majority opinion and Justice

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<sup>29</sup> See H. R. Rep. No. 109-478, p. 6 (2006) (“Prior to the enactment of the VRA, parts of the United States condoned the unequal treatment of certain citizens, including denying the most fundamental right of citizenship—the right to vote.”). See also *Shelby County v. Holder*, 133 S. Ct. at 2651-52 (Ginsburg, J., dissenting) (“Beyond question, the VRA is no ordinary legislation...because Congress embarked on a mission long delayed and of extraordinary importance: to realize the purpose and promise of the Fifteenth Amendment.”).

<sup>30</sup> See *id.* at 2651 (“The grand aim of the Act is to secure to all in our polity equal citizenship stature, a voice in our democracy undiluted by race.”).

<sup>31</sup> See, e.g., Miri Song, *Introduction: Who’s At the Bottom? Examining Claims about Racial Hierarchy*, 27 *ETHNIC AND RACIAL STUDIES* 859 (Nov. 2004) (asserting that there is a recognized racial hierarchy in America with whites at the top and African-Americans at the bottom).

<sup>32</sup> See Alexander, *supra* note 17, at 26-40 (describing how the Jim Crow system restored white supremacy after Reconstruction, and how conservative movements to rollback racial progress followed the civil rights movement’s challenge to Jim Crow).

<sup>33</sup> See, e.g., Cleo Fields & A. Leon Higginbotham, Jr., *Why the Anxiety When Blacks Seek Political Power?*, *NEW ORLEANS TIME-PICAYUNE*, July 23, 1996, at B5.

<sup>34</sup> See Alexander, *supra* note 17, at 36-37 (“A mood of outrage and defiance swept the South [after *Brown v. Board of Education* was decided], not unlike the reaction to emancipation and Reconstruction following the Civil War. Again, racial equality was being forced upon the South by the federal government).

Ginsburg in her dissenting opinion—holds the fate of the Voting Rights Act in its balance.<sup>35</sup>

### C. Federalism Issues

Generally, the war of perceptions maps directly onto principles of federalism. The Civil War underscored a longstanding American view of federal power as the source of the threat to the prerogatives of states.<sup>36</sup> Included among the prized prerogatives in many states were laws and practices that enshrined racial hierarchy.<sup>37</sup> Federal troops enforcing evolving norms of racial equality were deployed, and met resistance, during infamous Civil Rights era incidents that unfolded in Arkansas, Mississippi, Alabama, and other jurisdictions.<sup>38</sup> Principles of federalism, which may hold a legitimate place in the design of our nation, are also abstractions that can mask the war of perceptions about power, inequality, and how they are distributed.

The Voting Rights Act fits conveniently into the federalism debate.<sup>39</sup> The provision of the Voting Rights Act that the Supreme Court struck down was the coverage formula that required the states with the most virulent history of racialized inequality in electoral processes to seek the federal government's approval before changing their voting practices.<sup>40</sup> Although the purpose of focusing only on these states in the coverage formula was to limit the extent of the incursion into federalist principles by focusing only on those jurisdictions where the use of federal power was most justified, the prudent effort to protect federalism norms to the extent consistent with equality norms resulted in disparate treatment of jurisdictions.<sup>41</sup> In *Shelby County*, this prudential course earned the disapproval of a majority of the Court.<sup>42</sup>

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<sup>35</sup> See *Shelby County v. Holder*, 133 S. Ct. at 2637 (Ginsburg, J., dissenting) (“It cannot tenably be maintained that the VRA, an Act of Congress adopted to shield the right to vote from racial discrimination, is inconsistent with the letter or spirit of the Fifteenth Amendment, or any provision of the Constitution read in light of the Civil War Amendments. Nowhere in today’s opinion....is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve.”).

<sup>36</sup> See Alfred L. Brophy, *Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in Scott v. Sandford*, 90 COLUM. L. REV. 192, 225 (1990) (noting that before the Civil War, the “Southern constitutional theory” was that states were coequal sovereigns with the federal government).

<sup>37</sup> See Alexander, *supra* note 17, at 26 (“Federalism—the division of power between the states and the federal government—was the device employed to protect the institution of slavery and the political power of slaveholding states.”).

<sup>38</sup> See Anthony J. Lewis, *Eisenhower On Air, Says School Defiance Has Gravely Harmed Prestige of U.S.*, N.Y. TIMES, Sept. 24, 1957, at A1.

<sup>39</sup> See Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012).

<sup>40</sup> Section 4 is codified at 42 U.S.C. § 1973b(b)(2006).

<sup>41</sup> See, e.g., *Shelby County v. Holder*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting) (“[Congress] had every reason to believe that the Act’s limited geographical scope would weigh in favor of, not

## II. THE MAJORITY'S RHETORIC: PARITY'S PARODY

### A. Protecting Sovereignty and Federalism

Part I provides a backdrop for evaluating the rhetoric of *Shelby County*. After reiterating the principle of state sovereignty, the power of states to “retain broad autonomy in structuring their governments,” Justice Roberts underlined the fundamental principle of equal sovereignty among the states, which—although legally contestable when applied to circumstances like these—“remains highly pertinent in assessing subsequent disparate treatment of States.”<sup>43</sup> Finding that Section 4 of the Voting Rights Act “sharply departs from these basic principles” by requiring some states, but not all states, to preclear their proposed electoral changes with federal officials, Roberts indicated that the resulting costs to the principles of federalism and the equal sovereignty of states were no longer sufficiently justified in light of the improvements that Congress noted in the current condition of the franchise in the covered jurisdictions.<sup>44</sup> “If [Congress] is to divide the States,” he asserted, it must do so “on a basis that makes sense in light of current conditions. It cannot rely simply on the past.”<sup>45</sup>

In light of the particularly violent history of race-based voter suppression that led to the Voting Rights Act—a history the majority briefly acknowledges<sup>46</sup>—the indelicacy of the majority’s expressions of greater concern for equality between states than for equality between people of different races living in those states is startling. Because Southern states, which fought to preserve their unequal voting practices, divided the electorate on the basis of race, the Voting Rights Act divided the states into those that sought to maintain obviously discriminatory race-based voting practices and those that did not.<sup>47</sup> For people who suffered from a long history of race-based voter suppression in those states, and despite

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against, the Act’s constitutionality.”). Additional support for this proposition is found in *United States v. Morrison*, 529 U.S. 598, 626-27 (2000) (holding unconstitutional a remedial section of the Violence Against Women Act, in part because, unlike the VRA, it imposed uniform national remedies rather than remedies tied to a particular history of discriminatory treatment).

<sup>42</sup> See *Shelby County v. Holder*, 133 S. Ct. at 2624 (“[D]espite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties).”).

<sup>43</sup> *Id.* at 2616.

<sup>44</sup> *Id.* at 2617-2621.

<sup>45</sup> *Id.* at 2622.

<sup>46</sup> *Id.* at 2624 (The “blight of racial discrimination in voting” had “infected the electoral process in parts of our country for nearly a century”) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

<sup>47</sup> See Raskin, *supra* note 27, at 646-47 (observing that the Voting Rights Act “requires Congress and the courts to take cognizance” of “racist practices by states” in order “to end racial vote dilution by racist white legislatures”).

improvements, continued to experience official actions that promoted racialized inequality among voters, the majority's hierarchy of equality concerns may bear a special sting.<sup>48</sup>

What skews the majority's sense of equality—and their sense of irony—to the extent that the unequal treatment of state entities disturbs them more than the unequal treatment of minority voters? Why is the Act's division of the states according to the violations of democracy and equality that they were shown to have committed considered to be a greater harm than the states' division of their electorate according to race and their maintenance of unequal election laws and practices for different racial groups?

When a majority of the Court in *Bush v. Gore*<sup>49</sup> invalidated Florida's recount of ballots in the contested Presidential election of 2000, it was because there was no statewide uniform standard for accepting or rejecting ambiguous ballots.<sup>50</sup> Under the Equal Protection Clause, five Justices halted the recount based on the principle that all votes must count equally, such that their validity could not be judged by potentially different county-by-county standards.<sup>51</sup> Why did a Court, which had found equality concerns in the potential dilution of some votes, abandon such equality concerns in *Shelby County*?

It is also fair to ask why the majority's fealty to abstract principles of federalism trumps their fealty to competing constitutional norms of equal protection, especially when applied to voting—the foundation for protecting all other rights. Congress took pains to document the covered jurisdictions' long history of impeding equal exercise of the franchise, especially but not exclusively for African-American voters, and their continuing efforts to do

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<sup>48</sup> See, e.g., Campbell Robertson, *A Divide on Voting Rights in a Town Where Blood Spilled*, N.Y. TIMES, Mar. 9, 2013, [http://www.nytimes.com/2013/03/02/us/politics/a-divide-on-voting-rights-where-blood-spilled.html?\\_r=0](http://www.nytimes.com/2013/03/02/us/politics/a-divide-on-voting-rights-where-blood-spilled.html?_r=0) (for a Mississippi County with a history of beatings, shootings, and fire-bombings to keep African-Americans from the polls, support for the Voting Rights Act divides along racial lines, with reports of descriptions of continuing “camouflaging” problems, such as “long lines in certain neighborhoods” and “voter ID requirements” and over 100 DOJ objections since 1982 in proposed changes to its voting practices).

<sup>49</sup> 531 U.S. 98 (2000) (per curiam).

<sup>50</sup> *Id.* at 105 (“The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right.”).

<sup>51</sup> *Id.* at 111 (“Seven Justices of the Court agree that there are constitutional problems with the recount” under the Equal Protection Clause, although two of those Justices, Souter and Breyer, felt that the case should be remanded to the Florida Supreme Court to craft guidelines under which the recount could proceed).

so.<sup>52</sup> Yet once again the majority's hierarchy of concern focused more on harms to federalist structures than on harms to democratic structures.<sup>53</sup> While this constitutional ranking system has a long and unfortunate pedigree, many had hoped that one legacy of the civil rights movement—not to mention the Civil War—was its modification of this normative history.<sup>54</sup> Those harboring this desire were devastated by the outcome of *Shelby County*.

## **B. The Use of History**

The majority's hierarchy of concerns that elevated state sovereignty and federalism over equality and democracy was asserted even in the face of its recognition that “no one doubts” that “voting discrimination still exists”<sup>55</sup> and that “any racial discrimination in voting is too much.”<sup>56</sup> But according to the majority, voter discrimination was no longer sufficiently “pervasive,” “flagrant,” “widespread,” and “rampant” to justify such an uncommon legislative response as the Voting Rights Act.<sup>57</sup> As Justice Roberts' chided Congress and the dissenters, “history did not end in 1965.”<sup>58</sup>

Like his peculiarly ranked concerns about the equality of states rather than people, Roberts' distress about inequalities and divisions between states rather than those between citizens can read as unconscious parody. Even the statement that “history did not end in 1965” can sound parodic, as it has an obvious alternate meaning.<sup>59</sup> Roberts intended to highlight the fact that,

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<sup>52</sup> See H. R. Rep. No. 109-478, p. 11 (2006)(reviewing evidence that in addition to African-Americans, many language minorities—including Asian Americans, Alaskan Natives, Hispanics, and American Indians—suffer from lack of voter participation).

<sup>53</sup> See *Shelby County v. Holder*, 133 S. Ct. at 2624 (“[T]he fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States....The Voting Rights Act sharply departs from these basic principles.”).

<sup>54</sup> See Alexander, *supra* note 17, at 17 (noting that during the civil rights era, as during Reconstruction, “federal troops were sent to the South to provide protection for blacks attempting to exercise their civil rights”).

<sup>55</sup> *Shelby County v. Holder*, 133 S. Ct. at 2619.

<sup>56</sup> *Id.* at 2631.

<sup>57</sup> *Id.* at 2629.

<sup>58</sup> *Id.* at 2628.

<sup>59</sup> See *id.* Twice the majority opinion quotes *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193 (2009)—a case forewarning of the Court's distaste for the Voting Rights Act's coverage formula—for the proposition that in the covered jurisdictions minority turnout and voter registration rates “now approach parity.” *Id.* at 2621, 2625. Because the majority ignores Congressional findings of current discriminatory practices that dilute minority voting, see H.R. Rep. No. 109-478, p. 6, the assertion that voting in the covered jurisdictions “approach[es] parity” comes close, in my view, to approaching parody. Also, as Anthony Farley observes, satisfaction with “approach[ing] parity,” rather than parity itself, suggests complacency about the voting inequality that remains. See Anthony Paul Farley, *Jackals, Tall Ships, and the Endless Forest of*

despite improvements in the covered states over the previous four decades, Congress chose to retain the preclearance formula that was designed in 1965.<sup>60</sup> But the words “history did not end in 1965” can just as readily highlight the fact, which Congress and the dissenters advanced, that the history which led to the Voting Rights Act in 1965 remains with us, that although the forms of discrimination have changed—primarily due to the proscriptions of the Voting Rights Act—discrimination in voting remains.<sup>61</sup> As Justice Ginsburg notes, Congress identified second-generation inequities in voting practices, which have replaced the first generation inequities that animated the Voting Rights Act in 1965.<sup>62</sup>

Of course, Justice Roberts intended his reference to history to mean that the unusual remedial structure of Section 4 of the Voting Rights Act—designed to avoid the costs and burdens of litigation—was no longer responsive to current conditions, but was stuck in the conditions that existed in 1965.<sup>63</sup> To maintain this perspective, however, the five justices who joined the majority needed to ignore the fact that the Voting Rights Act provided for the updating of its coverage formula by allowing states to “bailout” of its strictures, if they could demonstrate “clean hands” for a ten-year period.<sup>64</sup> Although the structure of the 1965 Act’s preclearance provision remained intact, the existence of the bailout provision undercuts the argument that the Voting Rights Act was stuck in 1965.<sup>65</sup>

Moreover, while the Act’s original selection formula was based on racial disparities in the covered jurisdictions’ voter registration, election

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*Lies: Foreward to Symposium on Voting Rights in the Wake of Shelby County v. Holder*, TOURO JOURNAL OF RACE, GENDER, AND ETHNICITY 1 (2015).

<sup>60</sup> *Shelby County v. Holder*, 133 S. Ct. at 2618 (stating that Congress reauthorized its original coverage formula, even though “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions”).

<sup>61</sup> Justice Ginsburg’s dissent provides a litany of recent examples of discriminatory efforts to impede racial equality in voting in the covered jurisdictions, offering vivid evidence that the notorious history of racialized voter suppression remains with us. *See id.* at 2640-41 (Ginsburg, J., dissenting).

<sup>62</sup> Justice Ginsburg gives examples of second-generation barriers such as racial gerrymandering of legislative districts, and switching from district-by-district to at-large voting for the purpose of diluting the impact of minority votes. *Id.* at 2635.

<sup>63</sup> *Id.* at 2619 (majority opinion) (stating that “the Act imposes current burdens and must be justified by current needs”) (citing *Northwest Austin*, 557 U.S. at 203).

<sup>64</sup> *See* 42 U.S.C. § 1973b(a) (2006); H. R. Rep. No. 109-478, p. 11, 25 (2006).

<sup>65</sup> The Voting Rights Act also contains a bail-in provision, permitting a court, upon findings of voting rights violations, to add jurisdictions to the list of those that require federal preclearance. *See* 42 U.S.C. § 1973a(c) (2006). *See also* *Shelby County v. Holder*, 133 S. Ct. 2644 (Ginsburg, J., dissenting) (after noting the number of jurisdictions that have bailed out and those that have bailed in by court order—Arkansas and New Mexico—Justice Ginsburg observes that “[t]his experience exposes the inaccuracy of the Court’s portrayal of the Act as static, unchanged since 1965. Congress designed the VRA to be a dynamic statute, capable of adjusting to changing conditions.”).

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turnout, and numbers of elected officials, the Congressional record documents the findings of the reauthorization process that, while it has assumed new guises, discrimination in voting practices was concentrated in the same states that Section 4 initially selected for coverage.<sup>66</sup> Even if other deserving jurisdictions were excluded from coverage, continued inclusion of the covered jurisdictions was fully justified by the evidence of their different but continuing discriminatory practices.<sup>67</sup> By insisting that Section 4 of the Voting Rights Act had become antiquated by virtue of improvements in voter registration, election turnout, and numbers of elected officials, despite Congressional findings that discrimination against minority voters now took other forms, the majority demonstrated only that its interpretations, not Congress' actions, were mired in the past. It was the Court, not Congress, that refused to update its thinking about what voter discrimination looks like today.

### C. Quarreling with Success

The majority failed to engage the thousands of pages of the Congressional record as it overturned what it recognized as the country's premier civil rights achievement.<sup>68</sup> When the majority acknowledged that the Voting Rights Act had an exceptional record of success, the Act's efficacy in reducing racially discriminatory voting practices in the South became part of the rationale for abandoning it.<sup>69</sup> Notwithstanding Congressional findings to the contrary and evidence of the continuing need for federal oversight,<sup>70</sup> the majority expressed its opinion that the Act was one of the reasons that the covered jurisdictions had changed and therefore its precautionary measures were no longer necessary.<sup>71</sup>

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<sup>66</sup> See H. R. Rep. No. 109-478 (2006).

<sup>67</sup> See *Shelby County v. Holder*, 133 S. Ct. 2642-43 (Ginsburg, J., dissenting) (evidence of "preclearance's continuing efficacy in blocking constitutional violations in the covered jurisdictions" served to ground "Congress' conclusion that the remedy should be retained for those jurisdictions....Congress reasonably concluded that the coverage formula continues to identify the jurisdictions of greatest concern.").

<sup>68</sup> *Id.* at 2644 ("The Court makes no genuine attempt to engage with the massive legislative record that Congress assembled. Instead, it relies on increases in voter registration and turnout as if that were the whole story.").

<sup>69</sup> See *id.* at 2626 (majority opinion) ("There is no doubt that these improvements are in large part because of the Voting Rights Act.") (emphasis in original).

<sup>70</sup> See H. R. Rep. No. 109-478, p. 32, 44 (2006) (finding that there are still "indicia of discrimination" and a need for federal oversight of voting practices in the states).

<sup>71</sup> See *Shelby County v. Holder*, 133 S. Ct. at 2627, 2629 ("[T]he bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved....Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions.").

According to Justice Roberts, the particular precautionary measures of the Voting Rights Act were “strong medicine.”<sup>72</sup> Extending the metaphor, why did the majority believe that the medicine had cured the patient, when Congress had amassed considerable evidence supporting the view that it was the Act itself that was suppressing the worst symptoms of the democracy-disfiguring disease?<sup>73</sup> As with many treatments, discontinuing medicine generally risks bringing pernicious systemic symptoms back to the fore. Apparently, the majority saw the renewed risk of racially discriminatory voting practices as less noxious than the continued prescription of bad-tasting medicine.

### III. DEMOGRAPHY AND DEMOCRACY IN THE 21<sup>ST</sup> CENTURY

*Shelby County* undermines democratic values fundamental to our legal system. In the name of a perverse brand of equality, a bare majority of a court undid the unusually exhaustive and effective work of a bipartisan legislature, which reauthorized the Voting Rights Act by an overwhelming margin, in part because it was so successfully combating the racially discriminatory voting practices that impede democracy.<sup>74</sup> How can we understand this? Why did the Court strike at the heart of one of the most democracy-enhancing things that Congress has ever done?

#### A. Racial Polarization

One possible hint may lie in a portion of the Congressional record quoted in Justice Ginsburg’s dissent. Evidence presented to Congress indicated “voting in the covered jurisdictions was more racially polarized than elsewhere in the country.”<sup>75</sup> Where racially polarized voting exists, racially discriminatory changes in voting laws have the capacity to influence electoral outcomes.<sup>76</sup> When it is easy to predict that particular candidates and parties will be favored or disfavored by minority groups, partisan reasons emerge for adopting and sustaining racially discriminatory voting practices.<sup>77</sup>

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<sup>72</sup> *Id.* at 2618.

<sup>73</sup> See H.R. Rep. No. 104-478 (2006).

<sup>74</sup> See Ari Berman, *Destroying the Voting Rights Act*, THE NATION (Feb. 8, 2013), [http://www.nationinstitute.org/featuredwork/fellows/3144/destroying\\_the\\_voting\\_rights\\_act/?page=entire](http://www.nationinstitute.org/featuredwork/fellows/3144/destroying_the_voting_rights_act/?page=entire) (discussing Congressional findings on the efficacy and the need for the Voting Rights Act, which led the Senate to vote 98-0 and the House of Representatives to vote 390-33 for its 2006 reauthorization).

<sup>75</sup> *Shelby County v. Holder*, 133 S.Ct. at 2643 (Ginsburg, J., dissenting) (citing H.R.Rep. No. 109-478, at 34-35).

<sup>76</sup> See Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. FORUM 205, 209 (2013) (describing the correlation between political advantage and race-specific disadvantage).

<sup>77</sup> See *Shelby County v. Holder*, 133 S.Ct. at 2643 (Ginsburg, J., dissenting) (“[A] governing political coalition has an incentive to prevent changes in the existing balance of voting power.”)

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One thing we know about our political culture today is that it features a bitter partisan divide.<sup>78</sup> When the racial and ethnic identity of voters is seen to correlate strongly with the casting of specific votes, partisan incentives for empowered opponents to adopt discriminatory techniques that will change election results may become too powerful to resist. Congress considered evidence of this reality as a basis for its reauthorization of the Voting Rights Act.<sup>79</sup> They were attuned to the fact that democracy becomes even more vulnerable in an electorate that is demographically divided.

The Supreme Court is attuned to this fact as well. In 2001, in the case of *Easley v. Cromartie*,<sup>80</sup> the Supreme Court recognized that because African-Americans vote primarily for Democrats, redistricting to protect an incumbent in a minority district was constitutional when grounded in political reasons rather than reasons of minority empowerment.<sup>81</sup> This holding has resurfaced in an inverted form in Texas' answer to the Department of Justice's 2013 complaint under Section 2 of the Voting Rights Act—the litigation provision not at issue in *Shelby County*—which acknowledged that its Republican legislature redistricted in a way that supported Republican candidates, claiming that any disadvantage experienced by the candidates supported by minority voters was “incidental.”<sup>82</sup> Because there is reason to fear that a majority of the Supreme Court—the same five Justices as the *Shelby County* majority—will insist on proving intentional race discrimination under Section 2, the profound

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When voting is racially polarized, efforts by the ruling party to pursue that incentive ‘will inevitably discriminate against a racial group.’”) (citing Ansolabehere, Persily & Stewart, *supra* note 76).

<sup>78</sup> See, e.g., Dante Chinni, *Politics Count: Big Wins and Partisan Divides*, THE WALL STREET JOURNAL (Oct 4, 2013), <http://blogs.wsj.com/washwire/2013/10/04/politics-counts-big-wins-and-partisan-divides/>. See also Zachary Roth, *How Section 5 blocked a GOP power grab in Texas*, MSNBC (June 6, 2013, 12:01 AM), <http://www.msnbc.com/msnbc/how-section-5-blocked-gop-power-grab-tex> (describing how the GOP attempted to redraw district lines after losing a state senate seat due to Democratic minority voters).

<sup>79</sup> See H. R. Rep. No. 109-478 (2006), at 2 (“The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.”).

<sup>80</sup> 532 U.S. 234 (2001).

<sup>81</sup> *Id.* (upholding redistricting against an Equal Protection challenge because the redistricting was due to voting behavior, not racial characteristics).

<sup>82</sup> See Jeffrey Rosen, *Eric Holder's Suit Against Texas Gives the Supreme Court a Chance to Gut Even More of the Voting Rights Act*, NEW REPUBLIC (Sept. 1, 2013), <http://www.newrepublic.com/article/114524/eric-holder-texas-suit-supreme-court-might-gut-more-voting-rights>.

racialized effects of discriminating in a highly partisan manner may well be held constitutional.<sup>83</sup>

### B. *Bush v. Gore* Redux

The *Bush v. Gore* majority was roundly critiqued for its appearance of partisanship when five justices appointed by Republican Presidents decided the case in a way that handed the 2000 Presidential election to George W. Bush.<sup>84</sup> In reaching this result, the majority articulated a constitutional requirement that all votes must count equally.<sup>85</sup> Yet when racially discriminatory voting practices were at issue in *Shelby County*, five justices appointed by Republican Presidents, three of whom were in the majority that decided *Bush v. Gore*, lent no support to the view that all votes must count equally.<sup>86</sup> Why? An uncomfortable possibility that reconciles the seeming inconsistency between the two decisions is this: The Supreme Court's constitutionally rooted concern for the equality of all votes is turned on and off in the interests of partisan ends.

Are partisan interests at work in the Supreme Court's voting rights jurisprudence? The reality is that supporters of conservative candidates often know that they can benefit from the suppression of minority votes. Because demography and democracy are dynamically interrelated, partisan reasons to dilute minority voting strength may fuse with, and become inseparable from, racial animus and disregard for racial equality. Racial gerrymandering can be supported on the basis of both racial animus and partisanship.<sup>87</sup> Voter identification laws can also be supported for these reasons.<sup>88</sup> Challenging voters at the polls on the grounds of suspected felony disqualification is a method for suppressing minority votes and influencing

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<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., Jesse H. Choper, *Why The Supreme Court Should Not Have Decided The Presidential Election of 2000*, 18 CONST. COMMENT. 335, 345-52 (2001) (discussing how the partisan decision could be destructive and discrediting). See also ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001); Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L. J. 1407 (2001).

<sup>85</sup> *Bush v. Gore*, 531 U.S. 98, 105 (2000) (holding that each vote must count equally across counties).

<sup>86</sup> The five-member majority in *Shelby County*—which included Scalia, Thomas, and Kennedy from the majority of *Bush v. Gore*—stated that impediments “that affect the weight of minority votes” were not the focus of the preclearance provisions of the Voting Rights Act, such that vote dilution concerns were not constitutionally addressable by Section 4. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2629 (2013).

<sup>87</sup> See Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575, 1616-22 (2010) (discussing the evidence of animus and partisanship in racial gerrymandering).

<sup>88</sup> See Nihal S. Patel, *Weighty Considerations: Facial Challenges and the Right To Vote*, 104 NW. U. L. REV. 741, 765-66 (2010) (acknowledging the partisanship and disproportionate exclusionary impact of voter identification laws).

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election results.<sup>89</sup> Reducing or eliminating early voting, locating older voting machinery in minority districts, and placing a limited number of inconveniently located polling places there are all tactics for minority voter suppression that can change electoral outcomes in predictable ways.<sup>90</sup> Even though it was sometimes inadequate to the demands of the task, for more than forty years, the Voting Rights Act was the best available remedy we had for reaching these discriminatory practices, until it was undermined by the ruling in *Shelby County*.

No longer is the preventive aspect of preclearance available in any state to combat discriminatory election laws and practices that corrupt democracy. When *Shelby County* invalidated the federal oversight provided by the administrative processes of Section 4 of the Voting Rights Act, the explicit question about partisanship that scandalized the Court in *Bush v. Gore* raised its ugly head once again.<sup>91</sup> Did a Republican-appointed conservative majority of the Supreme Court disregard the considerable benefits of the Voting Rights Act's administrative review provisions because it is too identified with, and too beholden to, partisans who operate on one side of a political divide and gain advantage from the suppression of minority votes? When the opportunity arises, will they gut Section 2 of the Act as well, eliminating both the administrative and the litigation remedies that for the past generation minority voters have relied upon?<sup>92</sup> When they do so, who will argue that, despite its repeated resistance to Congress' attempts to protect voters of color, the Supreme Court is an impartial body of umpires interpreting constitutional provisions in a principled, non-partisan manner?

The importance of these answers intensifies with the changing demographics of America. At some point in the 21<sup>st</sup> century, for the first time

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<sup>89</sup> In a unanimous 1985 opinion in *Hunter v. Underwood*, the Supreme Court invalidated a provision in Alabama's Constitution that denied the right to vote to people convicted of crimes involving "moral turpitude," finding that this disqualification based on a criminal conviction had been used, as intended, to discriminate against blacks). See *Hunter v. Underwood*, 471 U.S. 222 (1985).

<sup>90</sup> See, e.g., Dan Froomkin, *Republican Voter Suppression Campaign Rolls Back Early Voting*, HUFFINGTON POST (Nov. 12, 2012), [http://www.huffingtonpost.com/2012/08/18/republican-voter-suppression-early-voting\\_n\\_1766172.html](http://www.huffingtonpost.com/2012/08/18/republican-voter-suppression-early-voting_n_1766172.html); Tom Jacobs, *How Polling Places Can Affect Your Vote*, PACIFIC STANDARD (Aug. 19, 2010), <http://www.psmag.com/navigation/politics-and-law/how-polling-places-can-affect-your-vote-20318/> (showing the profound impact on voter turnout of even small increased distances to the polls).

<sup>91</sup> See, e.g., Atiba R. Ellis, *Shelby County. v. Holder: The Crippling of the Voting Rights Act*, ACSblog (June 27, 2013) <http://www.acslaw.org/acsblog/shelby-co-v-holder-the-crippling-of-the-voting-rights-act> (stating that the decision divided along party lines).

<sup>92</sup> See Rosen, *supra* note 82 (based on the conservative majority's history of judicial activism on voting rights issues, predicting that the Court will set an impossibly high threshold for proving intentional discrimination under Section 2).

in American history, whites will no longer comprise a majority of Americans.<sup>93</sup> Under these conditions, racially polarized voting will become an even greater threat to the current majority, and partisan pressures to allow and engage in antidemocratic practices with racially discriminatory effects are likely to increase. Predictably, these demographic shifts will serve to heighten the trend toward disfigured democracy that our culture has already experienced.

#### IV. CONCLUSION

As highlighted by the disparate perspectives revealed by Justice Scalia and Justice Sotomayor during the oral argument in *Shelby County v. Holder* on the link between voting and “racial entitlement,” demography and democracy remain intertwined. If a predictably divided Court continues to decide racially and politically charged cases like *Shelby County* in the way that it has, questions about the role of the Court’s partisanship will remain. America’s shifting demographics make the question an increasingly important one.

Damning circumstantial evidence suggests that, consciously or unconsciously, partisan loyalty may be influencing not just election outcomes but Supreme Court outcomes.<sup>94</sup> While circumstantial evidence is not proof, perceptions of the Court’s political partisanship are understandable and supportable. These perceptions erode the Court’s moral authority and cast a dark shadow on our system of justice under law.

In a case like *Shelby County*, if the Court had advanced rather than assaulted democratic values, regardless of the demographic implications, these corrosive perceptions might have diminished to some degree. Instead, they have grown, and belief in the integrity of our nation’s constitutional design has plummeted.<sup>95</sup> Halting this downward spiral and restoring faith in

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<sup>93</sup> United States Census Bureau, *U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now*, (Dec. 12, 2012), <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html> (projecting that by 2043, there will be no white majority).

<sup>94</sup> See, e.g., Linda Greenhouse, *Law in the Raw*, N.Y. TIMES (Nov. 12, 2014) (in another context, reluctantly concluding that the Supreme Court’s recent decision to hear *King v. Burwell*, despite its pre-empting of an imminent rehearing by the Court of Appeals for the District of Columbia and the absence of a circuit split, is “a naked power grab by the conservative justices who two years ago just missed killing the Affordable Care Act in its cradle...There is simply no way to describe [the decision to grant *certiorari*] as a neutral act.”).

<sup>95</sup> See, e.g., Rosen, *supra* note 82 (suggesting that even if Congress fixes the Voting Rights Act, conservative Supreme Court majorities will likely thwart Congress’ intent again). See also Richard L. Hasen, *Supreme Error: North Carolina’s New Voter Suppression Law Shows Why the Voting Rights Act is Still Necessary*, SLATE (August 13, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/08/north\\_carolina\\_s\\_speedy\\_vote\\_suppression\\_tactics\\_show\\_exactly\\_why\\_the\\_voting.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/north_carolina_s_speedy_vote_suppression_tactics_show_exactly_why_the_voting.html) (asking whether the Court’s majority

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our constitutional order may well require a Court of a different sort. Climbing out of these cynical depths will be an extended process, but an opportunity to begin will arise with the next Supreme Court opening.

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anticipated that the *Shelby County* decision would deprive minority voters of effective means to fight discrimination).