

Has the South Changed? *Shelby County* and the Expansion of the Voter ID Battlefield

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ABSTRACT

In June 2013, a sharply divided United States Supreme Court struck down the preclearance formula of Section 4(b) of the Voting Rights Act (VRA), a provision that placed the South and other jurisdictions with a history of racial discrimination in voting under special federal scrutiny. The immediate effect of the Court's ruling in Shelby County v. Holder is an expansion of the voter identification (Voter ID) battlefield to the South. In the four years before the ruling, the United States Department of Justice (DOJ) used the VRA's Section 5 preclearance provisions to block Voter ID laws in southern states. But with the preclearance requirements effectively voided by Shelby County, election officials across the South have resumed efforts to implement Voter ID laws.

A very real fear now exists that the expansion of Voter ID laws to the South will lead to minority disenfranchisement and a retreat from the historic progress achieved by the VRA. The long history of election law "reforms" leading to minority disenfranchisement makes such fears quite reasonable. Moreover, the fact that Voter ID laws have been enacted by legislatures across the country in highly divisive fashion through party-line votes deepens the suspicion that malignant motives lurk behind such laws. If the spread of Voter ID laws results in minority disenfranchisement in the South, Shelby County will go down in history as one of the Supreme Court's worst decisions.

This Article contends, however, that there is reason for cautious optimism that the post-Shelby County expansion of Voter ID laws will not undermine minority voting rights in the South in the long run. First, Section 2 of the VRA—which prohibits racially-discriminatory election

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laws—was unaffected by the Shelby County ruling and thus remains in full force. Second, the South already has experience with Voter ID laws, and in the years since implementation, minority turnout in southern Voter ID states has gone up, not down. That paradoxical outcome is the direct result of the controversy that surrounds such laws. Indeed, Voter ID laws have the unintentionally progressive effect of provoking a backlash among minority voters that consistently leads to higher minority turnout rates. Moreover, although racism clearly remains present in the South as well as in the nation as a whole, truly historic change is underway in the racial dynamics of southern politics. The South’s demographics are changing at such an accelerating rate that politicians who appear hostile to minority voting rights will increasingly find themselves in political jeopardy as minorities make up an ever larger share of the southern electorate. For all of these reasons, there is reason for cautious optimism that Voter ID laws will not represent a long-term setback to the cause of minority voting rights in the South.

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I. INTRODUCTION

In the June 2013 case of *Shelby County v. Holder*,¹ the United States Supreme Court struck down the preclearance formula of the Voting Rights Act of 1965 (VRA).² The Court’s ruling will have a major

¹ *Shelby Cnty. v. Holder*, 133 S.Ct. 2612 (2013).

² *Id.* at 2632; see also Voting Rights Act of 1965, § 4(b), 42 U.S.C. § 1971 (2006) (creating a formula to determine which states and political subdivisions fall under the preclearance provision); *id.* § 1973b(b) (describing the preclearance formula).

impact on election procedures in the South.³ Section 5 of the VRA bars states and political subdivisions with a history of racial discrimination in elections from changing voting procedures without prior approval by the United States Department of Justice (DOJ) or the United States District Court for the District of Columbia.⁴ Section 4(b) creates a formula to determine which states and political subdivisions fall under the preclearance provision.⁵ Since the VRA's adoption in 1965, the preclearance formula had placed most southern states under special federal scrutiny for all election law changes.⁶

The Supreme Court's ruling in *Shelby County*, however, brings the preclearance era to an end. By invalidating the formula in Section 4(b), the Court rendered the preclearance provisions of Section 5 unenforceable.⁷

The case turned on a single question: Have the racial dynamics of southern politics fundamentally changed for the better since the VRA's adoption in 1965? The justices split 5–4 on that question.⁸ The majority held that that the preclearance formula of Section 4(b) no longer accurately reflected the state of race relations in the covered jurisdictions—most of which were in the South—and was therefore unconstitutional.⁹ Writing for the majority, Justice Roberts observed that since the VRA's adoption, “voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African Americans attained political office in record numbers.”¹⁰ The majority concluded, “Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”¹¹

The immediate effect of the Court's ruling in *Shelby County* is an expansion of the voter identification (Voter ID) battlefield to the South and other jurisdictions with a past history of racial discrimination in

³ For purposes of this article, the term “South” refers to the 11 former Confederate states. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia were the 11 former Confederate states. *The Civil War*, PBS, <http://www.pbs.org/civilwar/war/map1.html>, <<http://perma.cc/P64V-5SUR>>.

⁴ 42 U.S.C. § 1973c(a).

⁵ *Id.* § 1973b(b).

⁶ See *Civil Rights Division Section 5 Resource Guide*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_5/about.php, <<http://perma.cc/ZX9J-2FAL>> (“Application of [the preclearance] formula resulted in the following states becoming, in their entirety, ‘covered jurisdictions’: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia . . . In addition, certain political subdivisions (usually counties) in four other states (Arizona, Hawaii, Idaho, and North Carolina[])] were covered.”).

⁷ Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES, June 25, 2013, <http://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html>, <<http://perma.cc/D46L-3ABL>>.

⁸ *Shelby Cnty.*, 133 S.Ct. at 2617–18, 2631–32.

⁹ *Id.* at 2631.

¹⁰ *Id.* at 2628–29.

¹¹ *Id.* at 2631.

voting.¹² Voter ID laws impose strict voter registration rules that require voters to produce proof of their identity, citizenship, and residency.¹³ Thus far, over thirty states across the country have passed some form of Voter ID laws, and several require voters to display photo identification in order to cast a valid ballot.¹⁴ Since 2010, the DOJ has used the VRA's Section 5 preclearance provisions to challenge several southern states' voting laws—including those of South Carolina, North Carolina, Mississippi, Georgia, Texas, and Louisiana.¹⁵ But with the preclearance formula voided by *Shelby County*, election officials across the South have now resumed efforts to implement Voter ID laws.¹⁶

This Article examines the consequences of the Voter ID controversy's return to the South. A very real fear exists that the spread of Voter ID laws across the region will lead to minority disenfranchisement and a retreat from the historic progress achieved by the VRA. The long history of election law “reforms” that led to minority disenfranchisement makes such fears quite reasonable. Moreover, the fact that Voter ID laws have been enacted by legislatures across the country in highly divisive fashion by party-line votes deepens the suspicion that malignant motives lurk behind such laws. If the spread of Voter ID laws results in minority disenfranchisement in the South, *Shelby County* will go down in history as one of the Supreme Court's worst decisions.

This Article contends, however, that there is reason for cautious optimism that the post-*Shelby County* expansion of Voter ID laws will not undermine minority voting rights or political participation in the South in the long run. First, Section 2 of the VRA—which prohibits racially-discriminatory election laws—was unaffected by the *Shelby*

¹² See Devlin Bartlett, *Holder Targets Texas in New Voting-Rights Push*, WALL ST. J., July 25, 2013, <http://online.wsj.com/article/SB10001424127887324110404578627692123727574.html?KEYWORDS=shelby+county>, <<http://perma.cc/DL84-MCP7>> (stating that the DOJ will likely target the historically covered jurisdictions of South Carolina, North Carolina, Texas, and Alaska in legal strategy); Sari Horwitz, *Justice Department to Challenge States' Voting Laws*, WASH. POST, July 25, 2013, http://articles.washingtonpost.com/2013-07-25/politics/40861557_1_voting-rights-act-voting-laws-civil-rights-groups, <<http://perma.cc/YW2W-2DBJ>> (noting that the DOJ will likely sue North Carolina if the state passes a new Voter ID law).

¹³ Elspeth Reeve, *As States Rush to Restrict Voting Rights, Justice Ginsburg Says I Told You So*, ATLANTIC WIRE, July 26, 2013, <http://www.theatlanticwire.com/politics/2013/07/ginsburg-says-i-told-you-so-voting-rights-act/67655/>, <<http://perma.cc/8U4D-6NTH>> (detailing new voter registration and voting requirements in Florida, North Carolina, and Texas); see Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, N.Y. TIMES, July 5, 2013, <http://www.nytimes.com/2013/07/06/us/politics/after-supreme-court-ruling-states-rush-to-enact-voting-laws.html>, <<http://perma.cc/5NWP-L9BN>> (noting state passage of “laws requiring voters to show photo identification, reducing early voting and making registration more difficult.”).

¹⁴ *Voter ID: State Requirements*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#Legislation>, <<http://perma.cc/PX49-ZFD3>>.

¹⁵ *Timeline: A History of the Voting Rights Act, 2010 to Present*, ACLU, <https://www.aclu.org/timeline-history-voting-rights-act>, <<http://perma.cc/AE9K-U6DL>>.

¹⁶ See, e.g., *Justice Department to Sue Texas Over Voter ID Law*, CBS NEWS, Aug. 22, 2013, http://www.cbsnews.com/8301-250_162-57599728/justice-department-to-sue-texas-over-voter-id-law/, <<http://perma.cc/A83E-3ZK6>> (stating that after the passage of new voter ID laws, Governor of Texas Rick Perry stated that, “we will continue to defend the integrity of our elections” against the Justice Department).

County ruling and thus remains in full force. Second, the South already has experience with Voter ID laws, and in the years since implementation, minority turnout in southern Voter ID states has gone up, not down. That paradoxical outcome is the direct result of the controversy that surrounds such laws. Indeed, Voter ID laws have the unintentionally progressive effect of provoking a backlash among minority voters that consistently leads to higher minority turnout rates. Moreover, although racism clearly remains present in the South as well as in the nation as a whole, truly historic change is underway in the racial dynamics of southern politics. The South's demographics are changing at such an accelerating rate that politicians who appear hostile to minority voting rights will increasingly find themselves in political jeopardy as minorities make up an ever larger share of the southern electorate. For all of these reasons, there is reason for cautious optimism that Voter ID laws will not represent a long-term setback to the cause of minority voting rights in the South.

II. THE VOTING RIGHTS ACT OF 1965

Congress first enacted the VRA in 1965.¹⁷ The VRA sought to enforce in the South the Fifteenth Amendment to the Constitution, an amendment that white southerners had systematically violated for nearly a century.¹⁸ Adopted in 1870, the Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹⁹ The Amendment expressly grants Congress the “power to enforce this article by appropriate legislation.”²⁰

The Fifteenth Amendment was part of a trilogy of Civil War and Reconstruction amendments that transformed the constitutional landscape of American race relations.²¹ The Thirteenth Amendment abolished slavery, and the Fourteenth Amendment enshrined civil rights in the Constitution, declaring, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

¹⁷ ROBERT MANN, *THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS* 475 (1996).

¹⁸ Daniel McCool, *Meaningful Votes*, in *THE MOST FUNDAMENTAL RIGHT: CONTRASTING PERSPECTIVES ON THE VOTING RIGHTS ACT* 3, 3–4 (Daniel McCool ed., 2012).

¹⁹ U.S. CONST. amend. XV, § 1.

²⁰ *Id.* § 2.

²¹ *See generally*, e.g., GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2006); WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* (1965); MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* (2001).

the equal protection of the laws.”²²

But the federal government’s efforts to enforce the Fifteenth Amendment in the post-Civil War South quickly came under ferocious assault by southern whites.²³ For generations after the Civil War, the vast majority of African Americans were Republicans, while the Democratic Party held sway among the great majority of southern whites.²⁴ White southerners viewed African-American civil rights as a dual threat to the region’s white supremacist racial order and its Democrat-dominated political order.²⁵ To preserve their power, white southerners launched a murderous onslaught against black southerners. As the historian Alexander Keyssar explains, “Acting as the military, or paramilitary, arm of the Democratic Party, organizations such as the Ku Klux Klan mounted violent campaigns against blacks who sought to vote or hold office, as well as their white Republican allies.”²⁶ For example, in Colfax, Louisiana in April 1873, a disputed county election resulted in the murder of seventy-one black Republicans by white Democrats.²⁷

In addition to employing terroristic violence, white southerners also waged a relentless campaign of election fraud and disenfranchisement to subvert the democratic process and ensure Democratic control over the region’s political order.²⁸ Democratic-controlled legislatures across the former Confederate states enacted poll taxes, literacy tests, and other fraudulent election laws specifically designed to disenfranchise black voters and keep the Republican Party out of power in the South.²⁹ As the historian William Gillette has observed, “What the southern Democrats could not accomplish by means of the rifle, the whip, the rope, the torch, and the knife, they attempted by means of [election] fraud, threat,

²² U.S. CONST. amend. XIII; U.S. CONST. XIV, § 1.

²³ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, 590 (1988) (“[I]n the Deep South, where electoral fraud was widespread and the threat of violence hung most heavily over the black community, the Republican party crumbled after 1877. Here . . . blacks saw their political rights progressively eroded.”); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 106 (2000) (White supremacists “sought to drive the Republicans from power and elect Democrats. . . . Limiting black voting therefore was a means to a precise end.”); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 11–12 (2004).

²⁴ MICHAEL K. FAUNTROY, REPUBLICANS AND THE BLACK VOTE 25, 45, 48 (2007) (“Within a century, the Republicans went from near monopoly support from African Americans to near unanimous rejection.”); DEWEY W. GRANTHAM, THE LIFE AND DEATH OF THE SOLID SOUTH: A POLITICAL HISTORY xi–xii, 2, 9 tbl.1, 23, 76 grph.2, 152 tbl.4 (1988); KLARMAN, *supra* note 23, at 111 (“In the 1934 congressional elections, a majority of blacks voted Democratic for the first time.”).

²⁵ FONER, *supra* note 23, at 603 (“the Civil War generation of white Southerners was always likely to view the Republican party as an alien embodiment of wartime defeat and black equality”).

²⁶ KEYSSAR, *supra* note 23, at 105–06.

²⁷ WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869–1879, 115–16 (1982).

²⁸ *Id.* at 37–48; KEYSSAR, *supra* note 23, at 105–06.

²⁹ GRANTHAM, *supra* note 24, at 10–11 (“Republicans also encountered fraud and intimidation, as well as discriminatory election officials and harshly punitive election laws”); MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, 1–2 (2001) (“[E]ach state in the former Confederacy set in motion complicated and hazardous electoral movements aimed at removing large numbers of its eligible voters”); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 132 (2010).

bribery, or trickery.”³⁰ Although the United States Supreme Court began to strike down segregationist election laws in the 1920s, southern Democrats manufactured new election laws to undermine the Court’s rulings and defy the Fifteenth Amendment.³¹ In the early 1960s, African-American voter registration trailed white voter registration by approximately 50% in Alabama, Mississippi, and Louisiana.³² Accordingly, the Civil Rights Movement demanded that the federal government enforce the voting rights of African Americans in the South.³³

In 1965, Congress finally acted. The VRA represented Congress’s belated effort to end racially-discriminatory election laws.³⁴ As the Supreme Court in *Shelby County* noted, the VRA was enacted “to address entrenched racial discrimination in voting, ‘an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.’”³⁵ The VRA established a comprehensive strategy for ending and preventing racial discrimination in voting. Section 2 bars the states from imposing election laws that “deny or abridge the right of any citizen of the United States to vote on account of race or color.”³⁶ Section 3 authorized the Attorney General to “enforce the guarantees of the [F]ifteenth [A]mendment” by filing suit in federal court to block racially discriminatory election laws.³⁷ The VRA also expressly prohibited poll taxes, literacy tests, and other tactics that white southerners historically used to disenfranchise black voters.³⁸

The cornerstone of the VRA is the preclearance formula of Section 4(b) and the prior approval requirement of Section 5. The two sections work in tandem. Section 4(b) creates a formula to identify jurisdictions that engage in racial discrimination in voting.³⁹ If there is discrimination under the 4(b) formula, then Section 5 requires election officials in the affected jurisdiction to secure prior approval from the DOJ before

³⁰ GILLETTE, *supra* note 27, at 37–38.

³¹ KEYSSAR, *supra* note 23, at 247–49; *see, e.g.*, *S. C. v. Katzenbach*, 383 U.S. 301, 310–12 (1966) (outlining discriminatory administration of voting qualifications); *Terry v. Adams*, 345 U.S. 461, 469 (1953) (striking down all-white primary); *Smith v. Allwright*, 321 U.S. 649, 658 (1944) (describing history of *Nixon v. Herndon*); *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (discussing that color cannot be made the basis of a statutory classification affecting the right to vote).

³² *Shelby Cty. v. Holder*, 133 S.Ct. 2612, 2624–25 (2013).

³³ ROBERT WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA’S CIVIL RIGHTS MOVEMENT* 136 (1990) (“It remained for civil rights leaders to solidify popular opinion in favor of rapid federal action on the voting rights issue”).

³⁴ *See* Voting Rights Act of 1965, Pub. L. No. 89-110, available at http://library.clerk.house.gov/reference-files/PPL_089_110_VotingRightsAct_1965.pdf, <<http://perma.cc/DP8R-L5SB>> (stating in the title of the VRA that it is an “Act to enforce the fifteenth amendment to the Constitution of the United States.”).

³⁵ *Shelby Cty.*, 133 S.Ct. at 2618 (quoting *Katzenbach*, 383 U.S. at 309).

³⁶ Voting Rights Act of 1965 § 2.

³⁷ *Id.* § 3.

³⁸ *Id.* §§ 4(b), 4(c).

³⁹ *Id.* § 4(b).

making any changes to voting procedures.⁴⁰ Historically, the covered jurisdictions included all or part of nine southern states, plus Alaska, Arizona, and certain jurisdictions in California, New York, South Dakota, and Michigan.⁴¹ The preclearance formula was designed to focus on jurisdictions in which less than 50% of eligible racial minorities were registered to vote in 1964.⁴²

Under the leadership of President Lyndon B. Johnson, the VRA passed the House and Senate in 1965 with large bipartisan majorities.⁴³ Senate Republicans voted 30–2 in favor of the VRA, and House Republicans voted 111–23 in favor.⁴⁴ Senate Democrats voted 47–16 in favor of the VRA, and House Democrats voted 221–62 in favor.⁴⁵ The bipartisan nature of the VRA reflected a national commitment to ending white southerners' long history of racial discrimination in voting.⁴⁶

The VRA was immediately successful. Under the preclearance formula, the VRA covered all or part of nine southern states: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia.⁴⁷ Mississippi, the state in which three civil rights workers were brutally murdered in 1964, provided a striking example.⁴⁸ In a span of twenty-four months, African-American voter registration in Mississippi rose from 7% in 1964 to approximately 60% in 1966.⁴⁹ Similar gains occurred throughout the region.⁵⁰ As the historian James Patterson observed, the VRA achieved its goal “to guarantee long-disfranchised black Americans the rights to register and vote. This end the law accomplished brilliantly, thanks in large part to vigorous and

⁴⁰ *Id.* § 5.

⁴¹ *Civil Rights Division Section 5 Resource Guide*, *supra* note 6; see also Chris Cillizza, *What the Supreme Court's Voting Rights Act Decision Means for Politics*, WASH. POST (June 25, 2013, 11:51 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/25/what-the-voting-rights-act-decision-means-for-politics/>, <<http://perma.cc/ZX69-G46C>> (showing a map of covered and partially covered jurisdictions).

⁴² 42 U.S.C. § 1973b(b) (2006).

⁴³ ROBERT DALLEK, *FLAWED GIANT: LYNDON JOHNSON AND HIS TIMES* 220–21 (1998); see MANN, *supra* note 17, at 462–63 (“Thirty Republicans joined forty-seven Democrats in support of the bill . . .” and “the House overwhelmingly passed the voting rights bill . . . By a vote of 333-85.”).

⁴⁴ *To Pass H.R. 6400, The 1965 Voting Rights Act*, GOVTRACK.US, <http://www.govtrack.us/congress/votes/89-1965/h87>, <<http://perma.cc/443-GWGY>>; *To Pass S. 1564, The Voting Rights Act of 1965*, GOVTRACK.US, <http://www.govtrack.us/congress/votes/89-1965/s78>, <<http://perma.cc/HL7B-TU95>>.

⁴⁵ *Id.*

⁴⁶ Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960–1990*, 5 U. PA. J. CONST. L. 665, 665 (2003).

⁴⁷ *Civil Rights Division Section 5 Resource Guide*, *supra* note 6 (Section 5 did not cover two southern states: Arkansas and Tennessee); see Cillizza, *supra* note 41 (showing a map of covered jurisdictions that excludes Tennessee and Arkansas).

⁴⁸ BRUCE WATSON, *FREEDOM SUMMER: THE SAVAGE SEASON OF 1964 THAT MADE MISSISSIPPI BURN AND MADE AMERICA A DEMOCRACY* 270–71 (2011).

⁴⁹ ABIGAIL THERNSTROM, *VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS* 6 (2009); see also David C. Colby, *The Voting Rights Act and Black Registration in Mississippi*, 16 PUBLIUS 123, 129–30 (1986) (providing similar statistics for 1965 and 1968 in Mississippi).

⁵⁰ *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2634 (2013) (Ginsburg, J., dissenting); DALLEK, *supra* note 43, at 220.

unyielding federal oversight.”⁵¹

III. CHALLENGES TO THE VOTING RIGHTS ACT: FROM *KATZENBACH* TO *SHELBY COUNTY*

For over forty-five years, the VRA withstood the numerous legal challenges brought against it.⁵² For example, one year after the VRA’s adoption, South Carolina challenged the VRA’s constitutionality in the Supreme Court case of *South Carolina v. Katzenbach*.⁵³ South Carolina claimed, *inter alia*, that the VRA violated a constitutional principle of state equality by singling out certain states for special federal supervision.⁵⁴ South Carolina also claimed that the Act impaired the separation of powers by using legislation to deem southern states in violation of the Fifteenth Amendment, rather than allowing the federal courts to make that determination.⁵⁵

In an 8–1 decision, the Supreme Court decisively rejected South Carolina’s arguments, ruling that the VRA’s provisions were a constitutionally “valid means for carrying out the commands of the Fifteenth Amendment.”⁵⁶ The Court noted that the VRA’s coverage formula focused on jurisdictions with minority voter registration rates far below the national average.⁵⁷ The coverage formula’s approach impressed the Court as “rational in both practice and theory.”⁵⁸ Writing for the majority, Chief Justice Warren concluded, “[h]opefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live.”⁵⁹

One of the most telling aspects of *Katzenbach* was the regional identity of the states that chose to file amicus briefs in support of South Carolina. Reflecting the national importance of the issue, the Supreme Court invited all states to file friend of the court briefs, and twenty-six did so.⁶⁰ Twenty-one northern and western states filed in support of the VRA, and five southern states filed in opposition to it: Alabama, Georgia, Louisiana, Mississippi, and Virginia.⁶¹ The amicus briefs revealed that opposition to the VRA was concentrated exclusively among

⁵¹ JAMES T. PATTERSON, *GRANT EXPECTATIONS: THE UNITED STATES, 1945–1974*, 587 (1996).

⁵² See McCrary, *supra* note 46, at 691 (noting that “[t]he Department [of Justice’s] procedures for enforcing Section 5 were also the subject of numerous unsuccessful court challenges during the 1970s”).

⁵³ *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

⁵⁴ *Id.* at 323.

⁵⁵ *Id.* at 323.

⁵⁶ *Id.* at 338.

⁵⁷ *Id.* at 330.

⁵⁸ *Id.*

⁵⁹ *Id.* at 337.

⁶⁰ *Id.* at 307 n.2.

⁶¹ *Id.* at 308 n.2.

attorneys general from former Confederate states. The uniquely southern nature of state government opposition to the VRA could hardly have been more apparent.

Four decades later, a huge bipartisan majority in both the House and the Senate reauthorized the VRA in 2006.⁶² The House passed the reauthorization by a margin of 390–33 and the Senate passed it 98–0.⁶³ Every southern senator voted in favor of the VRA’s reauthorization.⁶⁴ President George W. Bush, a Texas Republican, signed the reauthorization into law in July 2006.⁶⁵ In signing the VRA’s reauthorization, President Bush declared, “[m]y administration will vigorously enforce the provisions of this law, and we will defend it in court.”⁶⁶

But the executive and legislative branches’ bipartisan endorsement of the VRA no longer impressed the Supreme Court. The first sign of trouble came in 2009; in the case of *Northwest Austin Municipal Utility District No. One v. Holder (NAMUDO)*,⁶⁷ a Texas municipal utility district sought a “bail out” exemption from Section 5.⁶⁸ The district was subject to Section 5 despite the lack of evidence of racial discrimination in the district’s elections.⁶⁹ In the process of seeking the exemption, the district also challenged the constitutionality of Section 5.⁷⁰ Although the Supreme Court declined to hear the constitutional challenge, it made a point of noting that the “evil that [Section] 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than [thirty-five] years old, and there is considerable evidence that it fails to account for current political conditions.”⁷¹

In *Shelby County v. Holder*, the majority made good on its warning in *NAMUDO*. The June 2013 decision, however, was far from unanimous. *Shelby County* divided the justices 5–4 and revealed two sharply conflicting perspectives as to how much the South has changed since 1965.⁷² In the majority’s view, the VRA’s preclearance formula no

⁶² J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEXAS L. REV. 667, 761–63 (2008).

⁶³ Sarah A. Binder, *Reading Congressional Tea Leaves from the 2006 Renewal of the Voting Rights Act*, BROOKINGS INST. (July 1, 2013), <http://www.brookings.edu/research/opinions/2013/07/01-2006-renewal-voting-rights-act-binder>, <<http://perma.cc/Z7RB-QEPA>>.

⁶⁴ *U.S. Senate Roll Call Votes 109th Congress—2nd Session*, U.S. SENATE (July 20, 2006), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212, <<http://perma.cc/DE29-WNQT>>.

⁶⁵ *President Bush Signs Voting Rights Act Reauthorization and Amendments Act of 2006*, WHITE HOUSE (July 27, 2006, 9:34 AM), <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727.html>, <<http://perma.cc/CM5T-SEY3>>.

⁶⁶ *Id.*

⁶⁷ 557 U.S. 193 (2009).

⁶⁸ *Id.* at 196–97 (describing the bailout as a “provision [that] allows the release of a ‘political subdivision’ from the preclearance requirements if certain rigorous conditions are met.”).

⁶⁹ *Id.* at 200.

⁷⁰ *Id.* at 197.

⁷¹ *Id.* at 203.

⁷² See *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2531 (2013) (“today’s statistics tell an entirely

longer reflected “current political conditions” in the South and other covered jurisdictions.⁷³ Writing for the majority, Chief Justice Roberts observed that the 4(b) preclearance formula was “based on decades-old data and eradicated practices.”⁷⁴ He noted that minority “voter registration and turnout numbers in the covered States have risen dramatically in the years since” the VRA’s adoption.⁷⁵ The majority concluded that the record failed to show “anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.”⁷⁶

The majority acknowledged that the South’s history of slavery, segregation, and disenfranchisement justified the enactment of the VRA in 1965.⁷⁷ But Chief Justice Roberts rejected the notion that the divergent histories of the North and South continued to be relevant in 2013.⁷⁸ “Today,” he emphasized, “the Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were.”⁷⁹ Roberts cited two small towns as examples of southern racial progress: Selma, Alabama, and Philadelphia, Mississippi.⁸⁰ Both have a grim history of white supremacist violence and oppression.⁸¹ Alabama state troopers brutalized civil rights marchers in Selma in 1965, and local whites murdered three civil rights workers in Philadelphia in 1964.⁸² The Chief Justice noted, however, that today both cities have African-American mayors.⁸³ In the majority’s view, the lesson was clear: “Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.”⁸⁴ The majority asserted that it was “irrational for Congress to distinguish between States in such a fundamental way based on [forty]-year-old data, when today’s statistics tell an entirely different story.”⁸⁵

Accordingly, the Court held that the outdated nature of the preclearance formula rendered Section 4(b) unconstitutional. Chief

different story”); *see id.* at 2651 (Ginsburg, J., dissenting) (suggesting that VRA’s success was a result of the preclearance formula while arguing that new voting barriers exist).

⁷³ *Id.* at 2628 (majority opinion).

⁷⁴ *Id.* at 2627.

⁷⁵ *Id.*

⁷⁶ *Id.* at 2629.

⁷⁷ *Id.* at 2628 (“The Court invoked that history—rightly so—in sustaining the disparate coverage of the Voting Rights Act in 1966.”).

⁷⁸ *Id.* at 2628 (observing that the “comparison between the States in 1965 . . . reflected the different histories of the North and South. It was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race. . . . But history did not end in 1965.”).

⁷⁹ *Id.*

⁸⁰ *Id.* at 2626.

⁸¹ *Id.*

⁸² WEISBROT, *supra* note 33, at 113, 136–39.

⁸³ *Shelby Cnty.*, 133 S.Ct. at 2626.

⁸⁴ *Id.* at 2626.

⁸⁵ *Id.* at 2630–31.

Justice Roberts declared that Congress's "failure to act leaves us today with no choice but to declare [Section] 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance."⁸⁶ The Fifteenth Amendment, he added, "is not designed to punish for the past; its purpose is to ensure a better future."⁸⁷ The majority concluded that if Congress "is to divide the States[,]" it "must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions."⁸⁸

The four dissenting Justices viewed the South in strikingly different terms than the majority. Writing for the dissent, Justice Ginsburg noted that when Congress reauthorized the VRA in 2006, it concluded that "the scourge of discrimination was not yet extirpated" in the covered jurisdictions.⁸⁹ The dissenters focused on two issues in particular: the risk of "backsliding" from the VRA's gains, and the persistence of racial discrimination.⁹⁰ The South's history of racism particularly concerned the dissenters.⁹¹ Justice Ginsburg emphasized that "[c]onsideration of this long history, still in living memory, was altogether appropriate."⁹²

Although the dissenting Justices conceded that "conditions in the South have impressively improved since passage of the Voting Rights Act," they warned that "eliminating preclearance would risk loss of the gains that had been made."⁹³ The dissent rejected the notion that increases in voter registration and turnout represented a sufficient standard by which to judge the South's progress.⁹⁴ They placed particular importance on the fact that the DOJ had blocked over 700 proposed election law changes in the covered jurisdictions during the twenty-four years preceding the 2006 VRA reauthorization.⁹⁵ In her dissent, Justice Ginsburg also noted that a 2006 report to Congress determined that "racial discrimination in voting remains 'concentrated in the jurisdictions singled out for preclearance.'"⁹⁶ Finally, the dissenting Justices pointed out that a 2010 FBI investigation revealed that some white state legislators in Alabama had sought to discourage African-American voter turnout in a statewide gambling referendum.⁹⁷

Shelby County divided the nation just as it did the Justices. Many Democratic congressional leaders condemned the decision, while

⁸⁶ *Id.* at 2631.

⁸⁷ *Id.* at 2629.

⁸⁸ *Id.*

⁸⁹ *Id.* at 2632 (Ginsburg, J., dissenting).

⁹⁰ *Id.* at 2632–34.

⁹¹ *Id.* at 2642 (stating that "there is no question, moreover, that the covered jurisdictions have a unique history of problems with racial discrimination in voting.")

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.* at 2644 (criticizing the majority for relying "on increases in voter registration and turnout as if that were the whole story").

⁹⁵ *Id.* at 2639.

⁹⁶ *Id.* at 2643.

⁹⁷ *Id.* at 2647.

Republican officials either praised it or were silent in response to the Shelby County decision.⁹⁸ John Lewis, a Georgia congressman and a leading figure in the Civil Rights Movement, declared, “What the Supreme Court did was to put a dagger in the very heart of the Voting Rights Act of 1965.”⁹⁹ President Barack Obama observed that he was “deeply disappointed” with the Court’s decision, which he described as a setback for “efforts to end voting discrimination.”¹⁰⁰ In contrast, Mike Hubbard, the Republican Speaker of the Alabama House of Representatives, hailed the ruling: “Today’s ruling clearly states that our constitutional rights as Alabamians take precedence over the wants and whims of liberal Justice Department bureaucrats in Washington, D.C.”¹⁰¹

The controversy was not limited to elected officials. Andrew Cohen of the *Atlantic Monthly* magazine lamented,

The primary winners [of the *Shelby County* ruling] are vote suppressors in those many jurisdictions covered by Section 5, the politicians, lobbyists and activists who have in the past few years endorsed and enacted restrictive new voting laws in dozens of states. The legal burden now will be shifted from these partisans to the people whose votes they seek to suppress.¹⁰²

Conversely, the political scientist Abigail Thernstrom asserted, “[Chief] Justice Roberts’s opinion for the court is a celebration of the Voting Rights Act—and of a nation that made it work and outgrew its most-radical provisions.”¹⁰³

IV. THE BATTLE OVER VOTER ID LAWS

Thus, as a direct consequence of *Shelby County*, the battle over

⁹⁸ Julie Hirschfeld Davis, *Congress Split Leaves Voting Rights Law Future Uncertain*, BLOOMBERG NEWS, June 25, 2013, <http://www.bloomberg.com/news/2013-06-25/leahy-plans-immediate-action-on-voting-rights-ruling.html>, <<http://perma.cc/D5VR-2CTE>>.

⁹⁹ Jeff Zeleny, *John Lewis: Court’s Decision Puts ‘Dagger in Heart of Voting Rights Act,’* ABC NEWS (June 25, 2013, 12:16 PM), <http://abcnews.go.com/blogs/politics/2013/06/courts-decision-puts-dagger-in-heart-of-voting-rights-act/>, <<http://perma.cc/F2CB-XTVL>>.

¹⁰⁰ *Statement by the President on the Supreme Court Ruling on Shelby County v. Holder*, WHITE HOUSE, June 25, 2013, <http://www.whitehouse.gov/the-press-office/2013/06/25/statement-president-supreme-court-ruling-shelby-county-v-holder>, <<http://perma.cc/NME9-EPNH>>.

¹⁰¹ Brandon Moseley, *Alabama Republican Leaders Respond to Supreme Court Decision*, ALA. POL. REP., Aug. 21, 2013, <http://www.alreporter.com/archives/2013-june.html?start=15>, <<http://perma.cc/J5P7-N42U>>.

¹⁰² Andrew Cohen, *On Voting Rights, a Decision as Lamentable as Plessy or Dred Scott*, ATLANTIC MONTHLY (June 25, 2013, 1:05 PM), <http://www.theatlantic.com/national/archive/2013/06/on-voting-rights-a-decision-as-lamentable-as-plessy-or-dred-scott/276455/>, <<http://perma.cc/6YCB-N7DP>>.

¹⁰³ Abigail Thernstrom, *A Vindication of the Voting Rights Act*, WALL ST. J., June 26, 2013, <http://online.wsj.com/article/SB10001424127887323873904578569453308090298.html?KEYWORDS=abigail+thernstrom>, <<http://perma.cc/9Q2U-HAAT>>.

Voter ID laws has now returned to the South, a region with a long and painful history of racial discrimination in voting.

However, the Voter ID phenomenon is national, not regional, in nature.¹⁰⁴ Polls consistently find that a large majority of Americans nationwide support Voter ID laws, including those that require voters to show photo identification.¹⁰⁵ For example, a July 2012 *Washington Post* poll found that 74% of Americans support a requirement that all voters show photo identification.¹⁰⁶ At present, over thirty states across the nation have Voter ID laws, and three states have enacted but not implemented Voter ID laws.¹⁰⁷ Four states strictly require voters to produce photo identification before casting a valid ballot: Indiana, Kansas, Tennessee, and Georgia.¹⁰⁸ In those four states, if a voter fails to arrive at the polls with photo identification, the voter may cast a provisional ballot but must return later with photo identification so that the ballot may be counted.¹⁰⁹

The Supreme Court has upheld the constitutionality of Voter ID laws, including those that require voters to produce photo identification.¹¹⁰ In the 2008 case of *Crawford v. Marion County Election Board*,¹¹¹ the Supreme Court affirmed the constitutionality of an Indiana state law that, among other things, required voters to show photo identification before casting a valid ballot.¹¹² Writing for the majority, Justice Stevens held that Indiana had a “valid interest in protecting ‘the integrity and reliability of the electoral process.’”¹¹³

The overall popularity of Voter ID laws, and the Supreme Court’s support for them, should not obscure the partisan and racial divisions the laws engender. Views of the Voter ID issue correlate directly with partisan affiliation.¹¹⁴ The best example is found in the state legislatures that have enacted Voter ID laws in party-line votes. For example, in the ten states that adopted Voter ID laws in the 2005–07 period, more than 95% of Republican legislators overall voted for the laws, whereas barely

¹⁰⁴ *Voter ID: State Requirements*, *supra* note 14.

¹⁰⁵ Tim Mak, *Poll: 70% Back Voter ID Laws*, POLITICO (Apr. 18, 2012), <http://www.politico.com/news/stories/0412/75300.html>, <<http://perma.cc/DUY8-J233>>.

¹⁰⁶ Michael Brandon & Jon Cohen, *Poll: Voter ID Laws Have Support of a Majority of Americans*, WASH. POST, Aug. 11, 2012, http://articles.washingtonpost.com/2012-08-11/politics/35492005_1_voter-id-laws-voter-suppression-voter-fraud, <<http://perma.cc/X87C-RAG4>>; *Poll Results*, WASH. POST, Aug. 13, 2012, http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/08/12/National-Politics/Polling/question_6226.xml?uuiid=Nd4PSOTWEeGXOc75nF-yhQ, <<http://perma.cc/Z78Y-AXV3>>.

¹⁰⁷ *Voter ID: State Requirements*, *supra* note 14.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185–86, 204 (2008).

¹¹¹ 553 U.S. 181 (2008).

¹¹² *Id.*

¹¹³ *Id.* at 204 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

¹¹⁴ See Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL’Y REV. 185, 187 (2009) (“The debate over voter ID laws is highly partisan. Many Democrats argue against the laws on the grounds of voter access, while many Republicans raise the issue of voter fraud and ‘ballot integrity.’”)

2% of Democratic legislators voted for them.¹¹⁵ The Indiana Voter ID law that the Supreme Court ruled on in *Crawford* was passed with the support of 100% of Republicans and no Democrats in the state legislature.¹¹⁶

Indiana's experience is not unusual. At the national level, the two parties have diametrically opposing views of the issue. Republicans advocate Voter ID laws as necessary to protect the integrity of the state and federal election process.¹¹⁷ The 2012 Republican National Committee Platform endorsed "legislation to require photo identification for voting and to prevent election fraud, particularly with regard to registration and absentee ballots."¹¹⁸ The RNC platform defended Voter ID laws as a necessary measure to protect "against a significant and growing form of voter fraud."¹¹⁹ In contrast, Democrats deride Voter ID laws as thinly veiled attempts at voter suppression.¹²⁰ The 2012 Democratic National Committee Platform warned that Voter ID laws "disproportionately burden young voters, people of color, low-income families, people with disabilities, and the elderly," and further declared that "we refuse to allow the use of political pretexts to disenfranchise American citizens."¹²¹

The Voter ID controversy also gives rise to a racial divide. Today, America's two major political parties are increasingly polarized along racial lines.¹²² The 2012 presidential election starkly illustrated the extent of that polarization. According to the Roper Center for Public Opinion Research at the University of Connecticut, 59% of white Americans voted for Mitt Romney, the Republican candidate, whereas 93% of African Americans, 71% of Latino Americans, and 73% of Asian Americans voted for President Barack Obama, the Democratic

¹¹⁵ RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 43 (2012).

¹¹⁶ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203 (2008).

¹¹⁷ Charlie Savage, *U.S. Is Suing in Texas Cases Over Voting by Minorities*, N.Y. TIMES, Aug. 22, 2013, <http://www.nytimes.com/2013/08/23/us/politics/justice-dept-moves-to-protect-minority-voters-in-texas.html>, <<http://perma.cc/7ELA-9M4W>>.

¹¹⁸ COMM. ON ARRANGEMENTS FOR THE 2012 REPUBLICAN NAT'L COMM., 2012 WE BELIEVE IN AMERICA: REPUBLICAN PLATFORM 11 (2012), available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf>, <<http://perma.cc/WBJ2-ZB8X>>.

¹¹⁹ *Id.*

¹²⁰ Savage, *supra* note 117 (stating "Democrats say the restrictions on voting are intended to reduce turnout by legitimate voters who are minorities, students, poor or members of other heavily Democratic groups."); Ian Urbina, *Panel Said to Alter Finding on Voter Fraud*, N.Y. TIMES, Apr. 11, 2007, <http://www.nytimes.com/2007/04/11/washington/11voters.html>, <<http://perma.cc/RGW7-L2DJ>>; see also Jamie Self, *U.S. Rep. Clyburn Calls for Sweeping Election Reforms*, STATE, Jan. 29, 2013, <http://www.thestate.com/2013/01/29/2609113/us-rep-clyburn-calls-for-sweeping.html>, <<http://perma.cc/ELX3-9FTN>> (noting individual congressional Democrats' criticisms of Voter ID laws).

¹²¹ MOVING AMERICA FORWARD, DEMOCRATIC NATIONAL COMMITTEE PLATFORM 18 (2012), available at <http://assets.dstatic.org/dnc-platform/2012-National-Platform.pdf>, <<http://perma.cc/7PQD-H6TP>>.

¹²² Ronald Brownstein, *Americans Are Once Again Divided by Race*, NAT'L J., July 25, 2013, <http://www.nationaljournal.com/columns/political-connections/americans-are-once-again-divided-by-race-20130725>.

candidate.¹²³ Moreover, the 2012 results reflected a growing trend in American presidential elections. Republican presidential candidates won a majority of white voters in 2000, 2004, and 2008, whereas Democratic presidential candidates won a majority of minority voters in each of those elections.¹²⁴ The last time a presidential candidate carried the support of both white voters and minority voters was Bill Clinton in 1996.¹²⁵

Congressional elections also reflect the growing trend of racial polarization in partisan affiliations. A study by David Wasserman of the Cook Political Report concluded that although the nation's white population has declined from 69% to 64% since 2000, the average percentage of whites in Republican House districts has grown from 73% to 75%.¹²⁶ Conversely, the average percentage of whites in Democratic House districts has dropped to 51%.¹²⁷ As the political analyst Charlie Cook notes, "while the country continues to grow more racially diverse, the average Republican district continues to get even whiter."¹²⁸ Likewise, a 2013 study by *National Journal* concluded that 80% of House Republicans represent districts in which the percentage of white voters exceeds the national average, whereas 64% of House Democrats represent districts in which the percentage of non-white voters exceeds the national average.¹²⁹ The authors of the *National Journal* study concluded,

In Congress, as in the presidential race, the two parties are supported by electoral coalitions increasingly divided not only by ideology but also by race. Each side's congressional caucus is now rooted in places that differ enormously from the other side's, in their demographic composition, cultural values, and attitudes toward government. It's becoming more difficult to bridge those differences.¹³⁰

Voter ID laws thus engender profound suspicion and distrust among many Democrats and minority voters. Studies indicate that Voter ID laws run a risk of disproportionately impacting minority and Democratic voters.¹³¹ For example, one study found that in the thirty

¹²³ *US Elections: How Groups Voted in 2012*, ROPER CTR. FOR PUB. OP. RES., http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_12.html, <<http://perma.cc/PC8P-5ZBY>>.

¹²⁴ *U.S. Presidential Election Center: 2012 Demographics*, GALLUP, <http://www.gallup.com/poll/154559/us-presidential-election-center.aspx>, <<http://perma.cc/QH2-66XG>>.

¹²⁵ *Id.*

¹²⁶ Charlie Cook, *The GOP Keeps Getting Whiter*, NAT'L J., March 14, 2013, <http://www.nationaljournal.com/columns/cook-report/the-gop-keeps-getting-whiter-20130314>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Ronald Brownstein & Scott Bland, *It's Not Just Partisanship That Divides Congress*, NAT'L J., May 30, 2013, <http://www.nationaljournal.com/magazine/it-s-not-just-partisanship-that-divides-congress-20130110>.

¹³⁰ *Id.*

¹³¹ See Matt A. Barreto et al., *The Disproportionate Impacts of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: POLITICAL SCIENCE & POLITICS 111, 114 (2009),

states that had voter ID laws in effect in the 2012 election, 65.2% of minority youth were asked to show identification, compared to 50.8% of white youth.¹³² Historical experience confirms such fears. Throughout American history, voter registration “reforms” have often had a disfranchising effect for some voters.¹³³ As the historian Alexander Keyssar points out, there are many instances in American history in which

particular groups lost political rights that they once had possessed: women in New Jersey in the early nineteenth century; blacks in the mid-Atlantic states before 1860 and in the South after 1890; naturalized Irish immigrants during the Know-Nothing period; aliens in some states in the late nineteenth century; men and women who were on public relief in Maine in the 1930s; prison inmates in Massachusetts in 2000; and countless citizens who suddenly found themselves confronted with new residency requirements or registration rules.¹³⁴

Most important of all, Republican legislatures have adopted Voter ID laws in straight party-line votes at a time when Republicans increasingly depend on a shrinking base of white voters.¹³⁵ Thus, the *New York Times* reflected the view of many critics when it claimed that Voter ID laws are “supported by Republican lawmakers trying to suppress Democratic votes.”¹³⁶

Amid this tense atmosphere of partisan distrust and racial polarization, the *Shelby County* ruling thrusts the South—a region with a

available at http://faculty.washington.edu/mbarreto/papers/PS_VoterID.pdf, <<http://perma.cc/QD59-5ME9>> (finding that “[r]egistered voters in Indiana who identify as Republicans were more likely to have proper ID credentials than those who identified as Democrats.”); Cathy J. Cohen & John C. Rogowski, *Black and Latino Youth Disproportionately Affected by Voter Identification Laws in the 2012 Election*, BLACK YOUTH PROJECT (Feb. 28, 2013), <http://research.blackyouthproject.com/files/2013/03/voter-ID-laws-feb28.pdf>, <<http://perma.cc/UH5Z-BE77>> (finding that young minorities were disproportionately affected by voter ID laws); Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification*, BRENNAN CTR. FOR JUST. (July 18, 2012), <http://www.brennancenter.org/publication/challenge-obtaining-voter-identification>, <<http://perma.cc/9W95-UUAK>> (finding that “1.2 million eligible black voters and 500,000 eligible Hispanic voters live more than 10 miles from their nearest ID-issuing office open more than two days a week. People of color are more likely to be disenfranchised by these laws since they are less likely to have photo ID than the general population.”).

¹³² Cohen & Rogowski, *supra* note 131 (also finding that Latino youths were significantly more affected by voter ID laws than white youths).

¹³³ KEYSSAR, *supra* note 23, at 103–04, 297.

¹³⁴ *Id.* at 297.

¹³⁵ See Andrew Cohen, *How Voter ID Laws Are Being Used to Disenfranchise Minorities and the Poor*, ATLANTIC, Mar. 16, 2012, <http://www.theatlantic.com/politics/archive/2012/03/how-voter-id-laws-are-being-used-to-disenfranchise-minorities-and-the-poor/254572/>, <<http://perma.cc/3R7V-3ZRZ>> (noting that in thirty years, nonwhite voters will outnumber white voters); Cook, *supra* note 126 (“In 2000, House Republicans represented 59[%] of all white U.S. residents and 40[%] of all nonwhite residents. But today, they represent 63[%] of all whites and just 38[%] of all nonwhites.”).

¹³⁶ Editorial, *The Fight for Voting Rights, 50 Years Later*, N.Y. TIMES, Aug. 27, 2013, <http://www.nytimes.com/2013/08/28/opinion/the-fight-for-voting-rights-50-years-later.html>, <<http://perma.cc/PWP6-GDVC>>.

notorious history of racial discrimination in voting—into the center of the Voter ID storm. The South’s own recent experience with Voter ID laws underscores the partisan nature of the Voter ID battle. In 2005, the Republican Bush Administration approved a Voter ID law in Georgia, a jurisdiction covered by Section 5.¹³⁷ Three other southern states—Florida, Louisiana, and Tennessee—have also passed and implemented Voter ID laws that require photo identification.¹³⁸ But after the Democratic Obama Administration took office in 2009, it refused to approve new Voter ID laws in southern states and other covered jurisdictions.¹³⁹

The *Shelby County* ruling has brought the Voter ID battle back to the South. Within twenty-four hours of the Court’s decision in *Shelby County*, elections officials in five southern states—Texas, Mississippi, Virginia, South Carolina, and Alabama—indicated that they would move forward with Voter ID laws previously blocked by the DOJ.¹⁴⁰ North Carolina soon joined them by passing a Voter ID law of its own.¹⁴¹ In celebration of the Court’s ruling in *Shelby County*, Texas Attorney General Greg Abbott proclaimed that ““(U.S. Attorney General) Eric Holder can no longer deny Voter ID in Texas.””¹⁴²

The Texas Attorney General spoke too soon. In July 2013, Attorney General Holder condemned *Shelby County* as a “deeply disappointing—and flawed—decision” and announced that the DOJ would use other VRA provisions in an effort to block jurisdictions around the country from implementing laws “that may hamper . . . voting rights.”¹⁴³ The DOJ is expected to look closely at voting procedures in North Carolina and South Carolina, in addition to its actions in Texas.¹⁴⁴ In August 2013, the DOJ filed suit to block Texas from implementing Voter ID.¹⁴⁵ The

¹³⁷ Ralph K.M. Haurwitz, *Rejection of South Carolina Voter ID Law May Put Texas’ Law on Shakier Ground*, AUSTIN AM.-STATESMAN, Dec. 24, 2011, <http://www.statesman.com/news/news/state-regional-govt-politics/rejection-of-south-carolina-voter-id-law-may-put-t/nRjFr/>, <<http://perma.cc/Z5D-LJZ8>> (“Georgia’s law was approved by President George W. Bush’s Justice Department”); Ryan J. Reilly, *Breaking: Justice Department Blocks South Carolina’s Voter ID Law*, TALKING POINTS MEMO (Dec. 23, 2011), <http://talkingpointsmemo.com/muckraker/breaking-justice-department-blocks-south-carolina-s-voter-id-law?ref=fpa>, <<http://perma.cc/P4Q5-4KN9>>.

¹³⁸ *Voter ID: State Requirements*, *supra* note 14.

¹³⁹ *Civil Rights Division Section 5 Resource Guide*, *supra* note 6.

¹⁴⁰ Sarah Childress, *With Voting Rights Act Out, States Push Voter ID Laws*, PBS (June 26, 2013, 2:58 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/with-voting-rights-act-out-states-push-voter-id-laws/>, <<http://perma.cc/KKC8-FBFA>>; Cooper, *supra* note 13.

¹⁴¹ Dahlia Lithwick, *What’s the Matter With North Carolina?*, SLATE (July 24, 2013, 11:20AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/north_carolina_s_voter_id_law_is_the_worst_in_the_country.html, <<http://perma.cc/7KNV-XDLK>>.

¹⁴² Bill Barrow, *Southern States Promise Quick Action on Election Laws*, SEATTLE TIMES (June 26, 2013, 2:00 PM), http://seattletimes.com/html/politics/2021269221_apusvotingrightsthesouth.html, <<http://perma.cc/U3UJ-5VT9>>.

¹⁴³ Eric Holder, Attorney General, Remarks at the National Urban League Annual Conference (July 25, 2013), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130725.html>, <<http://perma.cc/45TX-YG6U>>.

¹⁴⁴ Bartlett, *supra* note 12; *see* Horwitz, *supra* note 12 (noting that the DOJ may sue North Carolina if it passes a new Voter ID law).

¹⁴⁵ *Justice Department to File New Lawsuit Against State of Texas Over Voter I.D. Law*, U.S. DEP’T

DOJ's lawsuit invokes VRA Section 2, which prohibits laws intended to "deny[] or abridge[] the right to vote on account of race, color, or membership in a language minority group."¹⁴⁶ In explaining the DOJ's action, Attorney General Holder declared that it would be the department's first action of many in response to the Shelby County decision: "My colleagues and I are determined to use every tool at our disposal," he said, "to stand against such discrimination wherever it is found."¹⁴⁷

The fate of the DOJ's efforts to block the spread of Voter ID laws remains to be seen. In light of the national prominence of the issue and the high stakes involved, the DOJ's campaign to block Voter ID laws in Texas and other southern states seems certain to end in the U.S. Supreme Court. In response to the DOJ's August 2013 suit, Texas Attorney General Greg Abbott struck a defiant note, declaring, "Eric Holder's outrageous claim that voter ID is a racist plot to disenfranchise minority voters is gutter politics and is offensive to the overwhelming majority of Texans of all races who support this ballot integrity measure."¹⁴⁸

The Supreme Court's 2008 decision upholding Voter ID laws in the *Crawford* case—as well as the *Shelby County* decision itself—indicate that a narrow majority of the Court does not believe that Voter ID laws violate the VRA. Consequently, it seems reasonable to assume that Attorney General Holder's efforts to block Voter ID laws in the South likely face an uphill battle in the Supreme Court.

If the DOJ's efforts fail, *Shelby County* has cleared the way for Voter ID laws to spread across the South. The critical question, therefore, is the impact of such laws on minority voting rights in the South. Will the VRA's tremendous gains be lost? The answer to that question ultimately rests on a closely related question: Has the South really changed?

V. THE CASE FOR CAUTIOUS OPTIMISM

Any assessment of the future of minority voting rights in the South in a post-*Shelby County* world should begin with three points.

JUST. (Aug. 22, 2013), <http://www.justice.gov/opa/pr/2013/August/13-ag-952.html>, <<http://perma.cc/6XU5-QER7>>.

¹⁴⁶ *Id.*

¹⁴⁷ Adam Liptak & Charles Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. TIMES, July 25, 2013, <http://www.nytimes.com/2013/07/26/us/holder-wants-texas-to-clear-voting-changes-with-the-us.html?hp>, <<http://perma.cc/577X-WNXX>>.

¹⁴⁸ *Attorney General Abbott Statement on DOJ Lawsuits Challenging Texas Voter ID and Redistricting Laws*, TEX. OFF. ATT'Y GEN., Aug. 22, 2013, <https://www.oag.state.tx.us/oagnews/release.php?id=4507>, <<http://perma.cc/9XUR-Q2NK>>; see also Gromer Jeffers, Jr., *Dallas County Taxpayers Funding Both Sides in Voter ID Fight*, DALL. MORNING NEWS, Aug. 27, 2013, <http://www.dallasnews.com/news/columnists/gromer-jeffers-jr/20130826-dallas-county-taxpayers-funding-both-sides-in-texas-voter-id-fight.ece>, <<http://perma.cc/7A92-QCA8>> (detailing Abbott's public response to the *Shelby* ruling).

First, the Supreme Court's *Shelby County* ruling only affects the VRA's preclearance provisions. It does not affect the Act's other provisions. Consequently, Section 2, which prohibits racially discriminatory election laws, remains in full force.¹⁴⁹ Section 2 of the VRA provides:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.¹⁵⁰

The Supreme Court in *Shelby County* expressly emphasized the continuing vitality of Section 2. In the majority opinion, Chief Justice Roberts declared: "Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2 [of the VRA]."¹⁵¹

Furthermore, Section 2 serves as the basis of the DOJ's efforts to block implementation of the Texas and North Carolina Voter ID laws.¹⁵² Some observers have expressed skepticism that Section 2 will be an effective means to preemptively block Voter ID laws, since the text of such laws make no mention of race.¹⁵³ That may well be the case, but Section 2 at least provides the DOJ with an additional tool to battle efforts to undermine minority voting rights.¹⁵⁴

Second, regardless of what one thinks of Voter ID laws, racial discrimination clearly remains a significant factor in southern states, and some manifestations of that discrimination remain distinctive to the region. For example, until July 2000, South Carolina flew the Confederate battle flag above its state capitol dome, and today continues to display the flag in a position of honor on the state capitol grounds.¹⁵⁵

¹⁴⁹ *Section 2 of the Voting Rights Act*, U.S. DEP'T JUST., http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php, <<http://perma.cc/5VYQ-9KAF>>.

¹⁵⁰ 42 U.S.C. § 1973(a) (2006).

¹⁵¹ *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2631 (2013).

¹⁵² Reid J. Epstein, *DOJ to File Suit Against Texas over Voter ID Law*, POLITICO (Aug. 23, 2013, 8:51 AM), <http://www.politico.com/story/2013/08/justice-department-voting-rights-act-texas-95804.html>, <<http://perma.cc/X2G4-AF5C>>; Nicholas Stephanopoulos, *The Future of the Voting Rights Act*, SLATE (Oct. 22, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/10/section_2_of_the_voting_rights_act_is_more_effective_than_expected_new_research.html, <<http://perma.cc/L2H8-F3HK>>.

¹⁵³ Richard L. Hasen, *Supreme Error*, SLATE (Aug. 19, 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://perma.cc/CB8A-787L>>.

¹⁵⁴ Eric Posner & Nicholas Stephanopoulos, *Don't Worry About the Voting Rights Act: If the Supreme Court Strikes Down Part of It, Black and Hispanic Voters Will Be Just Fine*, SLATE (Nov. 20, 2012), http://www.slate.com/articles/news_and_politics/view_from_chicago/2012/11/supreme-court_and_section_5_of_the_voting_rights_act_it_s_ok_to_strike_it.html, <<http://perma.cc/E6LP-6GCW>>.

¹⁵⁵ David Slade & Jeff Hartsell, *Confederate Flag Controversy and NAACP Boycott Resurface Amid Talk of Football Bowl Game in Charleston*, POST & COURIER (Aug. 11, 2013, 2:00 PM), <http://www.postandcourier.com/article/20130810/PC16130819917>, <<http://perma.cc/9C24-ZR4L>>.

South Carolina is not alone. The Mississippi state flag still includes the Confederate battle emblem.¹⁵⁶ As Carol Moseley Braun, the first African-American female U.S. Senator, observed in 1993, “Everybody knows what the Confederacy stands for . . . when we see the Confederate symbols hauled out, everybody knows what that means.”¹⁵⁷ Senator Moseley’s words remain just as true today, twenty years later. The fact that two southern state governments—both of which are funded in no small part by the tax dollars of African Americans—would continue to display prominently the Confederate battle flag in the year 2013 demonstrates that some aspects of racial discrimination in America still have distinctly southern features.

Third, it is equally true that racial discrimination remains disturbingly prevalent in the nation as a whole. It may take more subtle forms than flying the Confederate battle flag, but the discriminatory effects of racism outside the South are just as tangible. For example, a 2004 study of employers in Boston and Chicago found that job applicants with “African-American sounding” names received 50% fewer interviews than applicants with identical credentials but “white-sounding” names.¹⁵⁸ Boston and Chicago, it should be noted, are major *northern* cities, not southern cities. The economic implications of such discrimination are enormous. According to the Pew Research Center, since the 1950s the unemployment rate among blacks has consistently been doubled that of whites.¹⁵⁹ For example, as of July 2013, the unemployment rate among white Americans was 6.6%, whereas it was 12.6% among black Americans.¹⁶⁰ The employer study results, which implied that employers use race as a factor when reviewing resumes, suggest racism is a significant factor in the divergent unemployment rates nationwide.¹⁶¹ Moreover, as the study shows, the problem of racial discrimination is a national issue, one that adversely affects minorities in major northern cities as well as southern cities.

Ultimately, therefore, the question is not whether the South has put racial discrimination behind it. Clearly, neither the South, nor the nation as a whole, has erased the scourge of racism. But in the context of *Shelby County*, the critical question is whether the expansion of Voter ID laws will lead to minority disenfranchisement, as has so often occurred in the

¹⁵⁶ *Mississippi’s Flag: Not As Simple As It Looks*, ECONOMIST, Apr. 19, 2001, <http://www.economist.com/node/581584>, <<http://perma.cc/QWN9-E4H5>>.

¹⁵⁷ JOHN M. COSKI, *THE CONFEDERATE BATTLE FLAG: AMERICA’S MOST EMBATTLED EMBLEM*, vii. (2005).

¹⁵⁸ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

¹⁵⁹ Drew DeSilver, *Black Unemployment Rate Is Consistently Twice That of Whites*, PEW RES. CTR. (Aug. 21, 2013), <http://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/>, <<http://perma.cc/NHV9-BDZH>>.

¹⁶⁰ *Id.*

¹⁶¹ Bertrand & Mullainathan, *supra* note 158, at 1006 (stating, “[s]o our results must imply that employers use race as a factor when reviewing resumes, which matches the legal definition of discrimination.”).

region's past. The South's long history of racism, combined with the ongoing racial polarization of the nation's politics as a whole, provide cause for serious concern.

Nevertheless, recent developments provide support for cautious optimism regarding the future of minority voting rights and political participation in the South, even in a post-*Shelby County* world. The South's recent history shows that it is far from a foregone conclusion that Voter ID laws will lead to minority disenfranchisement. In fact, the South has paradoxically experienced an *increase* in minority turnout in states with Voter ID laws.¹⁶² Moreover, when Voter ID laws are viewed in the broader context of southern race relations as whole, there is compelling empirical data that indicates a major change in the racial dynamics of southern politics is well underway.¹⁶³ Indeed, the evidence strongly suggests that the South is changing for the better. Consequently, as explained in greater detail below, there is reason for optimism that the rapid increase in the South's minority population and a growing trend toward improved race relations will, in the long run, overcome the negative effects that Voter ID laws have in the short run.

A. The Effect of Voter ID Laws on Voter Turnout Before *Shelby County*

To assess the potential impact of Voter ID laws post-*Shelby County*, it is critical to examine the experience of Voter ID laws in the South pre-*Shelby County*. Empirical data reveals that Voter ID laws in the South have thus far not had the negative impact on minority voter turnout that many opponents feared. In fact, the 2012 presidential election provided striking evidence that Voter ID laws have provoked a backlash against such laws. That backlash has led directly to increased minority voter turnout. Ironically, therefore, the controversy over Voter ID laws ultimately had a paradoxically beneficial impact on minority political participation in 2012. Although the authors of Voter ID laws certainly do not deserve credit for that development, it is worth keeping in mind when assessing the future of minority voter participation in the South in an age of Voter ID laws.

1. *The Experience of Voter ID Laws in the South*

Lost in the controversy over *Shelby County* is the fact that four

¹⁶² See *infra* Part V.A.

¹⁶³ See *infra* Part V.B.

southern states already have Voter ID laws.¹⁶⁴ Florida, Georgia, Louisiana, and Tennessee adopted Voter ID laws prior to 2009, before the Obama administration began using Section 5 to block such laws.¹⁶⁵ Accordingly, there is already a significant body of empirical data regarding the impact of Voter ID laws on minority political participation in the South. Florida, Georgia, and Tennessee require voters to produce photo identification before casting a valid ballot.¹⁶⁶ Louisiana requires voters without photo identification to sign an affidavit and provide other forms of identification that confirm the voter's identity.¹⁶⁷

The experience of those four states is highly instructive. Despite the photo identification requirement, Florida, Georgia, Louisiana, and Tennessee experienced high minority voter turnout rates in 2012.¹⁶⁸ According to the Census Bureau, during the 2012 election, Latinos led Florida with a 62.2% turnout rate, followed by a turnout rate of 61.9% among white voters and 57.6% among black voters.¹⁶⁹ In the 2012 elections in Georgia, African Americans led the state with a 65% turnout rate, followed by 62% of whites and 47.8% of Latino voters.¹⁷⁰ In Louisiana, black voter turnout in 2012 was 69.5%, while white voter turnout was 65.2%.¹⁷¹ Finally, in Tennessee, the Latino voter turnout rate was 62.3%, the black voter turnout rate was 61.1%, and the white voter turnout rate was 54.7%.¹⁷² The overall trend in the four states was clear: black and/or Latino voter turnout exceeded white voter turnout in each of the four southern Voter ID states in 2012.¹⁷³

The 2012 results are consistent with other recent elections in the South. Georgia provides a case in point. In 2005, Georgia adopted its strict Voter ID law, which requires voters to present photo identification

¹⁶⁴ On the use of Section 5 prior to the Obama Administration, see Rick Pildes & Dan Tokaji, *What Did VRA Preclearance Actually Do? The Gap Between Perception and Reality*, ELECTION L. BLOG (Aug. 19, 2013, 4:39 AM), <http://electionlawblog.org/?p=54521>, <<http://perma.cc/XW82-BKV4>>.

¹⁶⁵ Alth, *supra* note 114, at 187 n.17, 195 n.94 (detailing Voter ID laws in Georgia and Louisiana); Linda Greenhouse, *In a 6-to-3 Vote, Justices Uphold a Voter ID Law*, N.Y. TIMES, Apr. 29, 2008, <http://www.nytimes.com/2008/04/29/washington/29scotus.html>, <<http://perma.cc/6FFR-RN9A>> (noting that as of 2008, seven states, including Florida and Georgia, required photo identification to vote); Aviva Shen, *Study: In 2008, Voter ID Laws Blocked 1200 Votes in Two States Alone*, THINK PROGRESS (July 9, 2012), <http://thinkprogress.org/justice/2012/07/09/512656/study-in-2008-voter-id-laws-blocked-1200-votes-in-two-states-alone/>, <<http://perma.cc/A8S6-WGLV>> (noting the effect of voter ID laws in Tennessee during the 2008 election).

¹⁶⁶ *Voter ID: State Requirements*, *supra* note 14.

¹⁶⁷ *Id.*

¹⁶⁸ *Voting and Registration in the Election of November 2012, Table 4b (Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2012)*, BUREAU OF THE CENSUS, U.S. DEP'T COM., <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html>, <<http://perma.cc/S7ZT-R9ZR>> [hereinafter *Voting and Registration in The Election of November 2012*].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* The Census Bureau lacked data regarding the voter turnout rate among Latino citizens in Louisiana.

¹⁷² *Id.*

¹⁷³ *Id.*

before casting a valid ballot.¹⁷⁴ Yet, following the law's implementation, African-American voter turnout *increased* by over 40%, whereas white turnout increased by only 12%.¹⁷⁵ Moreover, the Voter ID law resulted in only a small percentage of discounted ballots. A 2012 *Atlanta Journal Constitution* investigation of statewide voting patterns concluded that out of 13.6 million votes cast in Georgia since November 2008, the state's new Voter ID law only disqualified 1,586 Georgians for failure to produce a photo ID after casting a provisional ballot.¹⁷⁶ The *Journal Constitution* concluded that claims made both by supporters and opponents of the state's Voter ID law were "overblown."¹⁷⁷

Likewise, an academic study of Georgia's experience with Voter ID regulations found that the law had no disproportionate impact on racial minorities.¹⁷⁸ In 2012, M.V. Hood and Charles S. Bullock, political scientists at the University of Georgia, examined the impact of Georgia's 2006 Voter ID law on turnout by comparing the state's 2004 and 2008 elections.¹⁷⁹ Importantly, Hood and Bullock did find a suppressive effect for voters lacking photo identification, but it was quite small.¹⁸⁰ They concluded that only 0.4% of voters were disqualified by the Voter ID law.¹⁸¹ Most remarkable of all, the study revealed that to the extent the law suppressed any voters, it had a larger suppressive effect on white voters than minority voters.¹⁸² The Hood-Bullock study concluded that the state's Voter ID law did not "disproportionately affect racial or ethnic minority groups;" instead, "white Georgians were actually the most likely to be affected by the new law."¹⁸³

As a cautionary note, it must be observed that studies of elections outside the South have found different results. For example, a study of the Indiana Voter ID law's impact on the 2008 election did find a suppressive effect on minority voter turnout in Indiana.¹⁸⁴ Other studies of the 2004 and 2008 elections have reached inconsistent and

¹⁷⁴ M.V. Hood, III & Charles S. Bullock, III, *Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, 12 ST. POL. & POL. Q. 394, 394 (2012).

¹⁷⁵ Shannon McCaffrey, *Despite Voter ID Law, Minority Turnout Up in Georgia*, ATLANTA J. CONST., Sept. 3, 2012, <http://www.ajc.com/news/news/despite-voter-id-law-minority-turnout-up-in-georgia/nR2bx/>, <<http://perma.cc/HNN2-LNCF>>; see also Michael Barone, *A Key to Obama's Victory: Increasing Turnout in Previously Noncontested States*, U.S. NEWS, Dec. 9, 2008, <http://www.usnews.com/opinion/blogs/barone/2008/12/09/a-key-to-obamas-victory-increasing-turnout-in-previously-noncontested-states>, <<http://perma.cc/Y5A9-KBQM>> (noting black voter turnout has increased despite Voter ID laws); Hans A. von Spakovsky, *Lessons from the Voter ID Experience in Georgia*, HERITAGE FOUND. (Mar. 19, 2012), <http://www.heritage.org/research/reports/2012/03/lessons-from-the-voter-id-experience-in-georgia>, <<http://perma.cc/8U5Z-9ZWA>> (noting black voter turnout has increased despite Voter ID laws).

¹⁷⁶ McCaffrey, *supra* note 175.

¹⁷⁷ *Id.*

¹⁷⁸ Hood & Bullock, *supra* note 174, at 399, 409.

¹⁷⁹ *Id.* at 399–400.

¹⁸⁰ *Id.* at 409.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Baretto et al., *supra* note 131, at 114.

contradictory results, some finding a suppressive effect on minority turnout and some finding no suppressive effect.¹⁸⁵ At best, the impact of Voter ID laws on the 2004, 2006, and 2008 elections remains inconclusive. As the political scientists Jason Mycoff, Michael Wagner, and David Wilson have observed, “The early evidence paints an incomplete picture, consisting of some qualified claims that states with stricter voter identification laws negatively, albeit marginally, affect turnout, while other reports find that these effects are too small to be of practical concern.”¹⁸⁶

The additional data provided by the 2012 election results will undoubtedly be scrutinized for years to come by political scientists and election law specialists. But, in the meantime, it seems reasonable to draw two tentative conclusions, at least in the context of the *Shelby County* decision. First, whatever scholars ultimately determine about the impact of Voter ID laws on jurisdictions outside the South, the Hood-Bullock study would certainly suggest that Georgia—a state highly representative of the region as a whole¹⁸⁷—seems to have escaped the feared negative impact of Voter ID laws on minority turnout. Indeed, Georgia’s 2012 voter turnout strongly confirms the Hood-Bullock findings regarding the 2004–2008 period. Black voter registration in Georgia increased in 2012 by 6% from 2008 and Latino registration increased by 36%.¹⁸⁸ Meanwhile, white voter registration *fell* during the same time period.¹⁸⁹

¹⁸⁵ See, e.g., DAVID B. MUHLHAUSEN & KERI WEBER SIKICH, NEW ANALYSIS SHOWS VOTER IDENTIFICATION LAWS DO NOT REDUCE TURNOUT 2 (Heritage Ctr. for Data Analysis ed., 2007), available at <http://www.heritage.org/research/reports/2007/09/new-analysis-shows-voter-identification-laws-do-not-reduce-turnout>, <<http://perma.cc/7LCX-BS3L>> (finding that “[c]ontrolling for factors that influence voter turn-out, voter identification laws largely do not have the claimed negative impact on voter turnout based on state-to-state comparisons.”); Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 PS: POL. SCI. & POL. 127, 129 (2009) (finding that “Voter ID does not appear to present a significant barrier to voting.”); Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION LAW J. 85, 85 (2009) (concluding that the study’s “data and tools are not up to the task of making a compelling statistical argument for an effect” of Voter ID laws on voter suppression); Timothy Vercellotti & David Anderson, *Voter-Identification Requirements and the Learning Curve*; 42 PS: POL. SCI. & POL. 117, 117 (2009) (finding evidence of a “possible learning curve” for “only one group of voters—Hispanics”); R. Michael Alvarez et al., *The Effect of Voter Identification Laws on Turnout 19–20* (CalTech/MIT Voting Technology Project, VTP Working Paper No. 57, 2007), available at http://vote.caltech.edu/sites/default/files/vtp_wp57.pdf, <<http://perma.cc/8HUP-MSLG>> (finding that “there is evidence to support the claim that the most restrictive forms of voter identification requirements do lead to lower levels of participation by registered voters[, but] no evidence to support the hypothesis that this effect is more profound for nonwhite registered voters, controlling for other variables.”).

¹⁸⁶ Jason D. Mycoff et al., *The Empirical Effects of Voter-ID Laws: Present or Absent?* 42 PS: POL. SCI. & POL. 121, 121 (2009).

¹⁸⁷ See Karen Cox, *A New Southern Strategy*, N.Y. TIMES, Nov. 17, 2012, http://www.nytimes.com/2012/11/18/opinion/sunday/a-new-southern-strategy.html?_r=0, <<http://perma.cc/3M33-DU2N>> (describing how Georgia and other Southern states are being electorally transformed).

¹⁸⁸ Douglas A. Blackmon, *Republicans Face Unexpected Challenges in Coastal South Amid Shrinking White Vote*, WASH. POST, Nov. 24, 2012, http://articles.washingtonpost.com/2012-11-24/politics/35511999_1_white-students-white-voters-black-voters, <<http://perma.cc/F456-5V7J>>.

¹⁸⁹ *Id.*

Second, the remarkably high 2012 minority turnout levels in all four southern Voter ID states—Florida, Georgia, Louisiana, and Tennessee—would preliminarily suggest that the Hood-Bullock study’s findings may apply generally to Voter ID’s impact on minority turnout in the South as a whole.¹⁹⁰ The fact that black turnout, Latino turnout, or both exceeded white turnout in each of the four Voter ID states in the South is a very promising sign that the fears of a disproportionate and negative impact on minority voter turnout will not materialize.

2. *The Backlash Against Voter ID Laws Nationally*

Another reason for optimism is less measurable, but no less important. There is circumstantial evidence that a backlash against Voter ID laws at least partially accounts for the significant increase in African-American and Latino voter turnout.¹⁹¹

The implementation of Voter ID laws is a fairly recent phenomenon.¹⁹² The Voter ID wave began in 2001, following the controversial 2000 presidential election.¹⁹³ By 2012, twenty-four state legislatures had adopted Voter ID laws.¹⁹⁴ Nevertheless, African-American voter turnout rates have risen from 53% in 1996 to 66% in 2012.¹⁹⁵ This creates a fascinating paradox: the remarkable increase in black voter turnout occurred during the era of Voter ID laws, which critics claim seek to suppress minority votes. What explains this paradox?

Although the evidence is far from conclusive and much work remains to be done on the question, there is reason to believe that the controversy over Voter ID laws has produced a backlash effect. Polling expert Nate Silver predicted the possibility of just such an effect prior to the 2012 election. In July 2012, Silver observed that Voter ID laws can “serve as a rallying point for the party bases. So although the direct effects of these laws are likely negative for Democrats, it wouldn’t take that much in terms of increased base voter engagement—and increased voter conscientiousness about their registration status—to mitigate

¹⁹⁰ *Voting and Registration in the Election of November 2012*, *supra* note 168.

¹⁹¹ Ari Berman, *How the GOP’s War on Voting Backfired*, NATION (Nov. 8, 2012, 2:24 PM), <http://www.thenation.com/blog/171146/gops-failed-voter-suppression-strategy#>, <<http://perma.cc/5AN7-KJFL>>.

¹⁹² *Voter ID: State Requirements*, *supra* note 14.

¹⁹³ *Id.*; see, e.g., Patricia Zengerle, *Will Election 2012 Be Another Florida 2000?*, REUTERS, June 8, 2012, <http://blogs.reuters.com/talesfromthetrail/2012/06/08/will-election-2012-be-another-florida-2000/>, <<http://perma.cc/XYK5-7QXS>> (stating that controversies surrounded the 2000 election).

¹⁹⁴ *Voter ID: State Requirements*, *supra* note 14.

¹⁹⁵ David Lauter, *Census Illustrates U.S. Electoral Shift; In November, Black Voters Turned Out At a Higher Rate than White Voters, Data Show. It’s a First.*, L.A. TIMES, May 9, 2013, at A10, available at 2013 WLNR 11346083.

them.”¹⁹⁶

The results on Election Day 2012 confirmed Silver’s hypothesis. For the first time in American history, black voter turnout exceeded white voter turnout; black voter turnout was 66.2% in 2012, and white voter turnout was 64.1%.¹⁹⁷ While African-American support for President Obama unquestionably contributed to the historic result,¹⁹⁸ President Obama was also on the ballot in 2008, when the black turnout rate was 65%, slightly lower than the 66.2% black turnout rate of 2012.¹⁹⁹

A crucial difference between the two presidential elections was the prominence of the Voter ID issue in 2012.²⁰⁰ Indeed, according to those directly involved in minority voter turnout efforts, the backlash that Nate Silver forecasted clearly played a significant role in the 2012 turnout numbers. NAACP President Benjamin Todd Jealous—a sharp critic of Voter ID laws—observed of the 2012 election, “Black turnout set records this year despite record attempts to suppress the black vote.”²⁰¹ He credited the Obama campaign’s get-out-the-vote drive for the high rate of minority voter turnout in 2012.²⁰² Likewise, Jotaka Eaddy, the senior director of voting rights at the NAACP, concluded that a backlash against Voter ID laws contributed to the historic level of minority voter turnout in the 2012 elections.²⁰³ Eaddy predicted that the backlash against Voter ID laws would continue to drive minority turnout, noting that “[a] lot of people will go to the polls with this issue in the forefront

¹⁹⁶ Nate Silver, *Measuring the Effects of Voter Identification Laws*, N.Y. TIMES (July 15, 2012, 9:28 AM), http://fivethirtyeight.blogs.nytimes.com/2012/07/15/measuring-the-effects-of-voter-identification-laws/?_r=0, <<http://perma.cc/55Y8-Q4LR>>.

¹⁹⁷ Lauter, *supra* note 195.

¹⁹⁸ *2008 Election Turnout Hit 40-Year High*, CBSNEWS.COM (June 18, 2009, 4:33 PM), http://www.cbsnews.com/2100-250_162-4670319.html, <<http://perma.cc/4D5S-2W8A>>; Mary McGuirt, *Young Black Turnout a Record in 2008 Election*, ABC NEWS, July 21, 2009, <http://abcnews.go.com/Politics/story?id=8140030>, <<http://perma.cc/W98E-NU5K>>.

¹⁹⁹ Carol Morello, *Higher Black Voting Rates in 2008 Mostly Occurred in South, Report Says*, WASH. POST, May 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/12/AR2010051204687.html>, <<http://perma.cc/YV8J-ZNP5>>; Jason L. Riley, *Blacks, Voter ID and the Census*, WALL ST. J., May 9, 2013, <http://online.wsj.com/article/SB10001424127887323744604578473133787967750.html>, <<http://perma.cc/X4G9-E5LV>>; Allison Terry, *In a First, Black Voter Turnout Surpassed White Turnout in 2012*, CHRISTIAN SCI. MONITOR, Apr. 29, 2013, <http://www.csmonitor.com/USA/USA-Update/2013/0429/In-a-first-black-voter-turnout-surpassed-white-turnout-in-2012>, <<http://perma.cc/6CR7-C3JR>>.

²⁰⁰ Halimah Abdullah, *As Election Day Nears, Voter ID Laws Still Worry Some, Encourage Others*, CNN (Oct. 12, 2012, 5:51 PM), <http://www.cnn.com/2012/10/12/politics/voter-laws-update>, <<http://perma.cc/EA2H-UD82>>.

²⁰¹ Terry, *supra* note 199.

²⁰² Maxime Fischer-Zermin, *Voter ID Laws: GOP Voter Suppression Efforts Drove High Black Turnout Rates Against Them*, POLICYMIC, May 31, 2013, <http://www.policymic.com/articles/45345/voter-id-laws-gop-voter-suppression-efforts-drove-high-black-turnout-rates-against-them>, <<http://perma.cc/6CYJ-KZMG>> (stating that “[m]any are suggesting that this groundbreaking black representation in the election comes not despite, but rather because of GOP efforts to increase voter restrictions leading up to the 2012 election”).

²⁰³ Beth Reinhard, *Democrats Using Voting Rights Issues to Protect Senate Majority*, NAT’L J., Aug. 1, 2013, <http://www.nationaljournal.com/politics/democrats-using-voting-rights-issues-to-protect-senate-majority-20130801>.

of their minds.”²⁰⁴

Many political analysts agree. As John Nichols of *The Nation* observed, a backlash against Voter ID spurred minority voter registration drives in battleground states across the country, including the Midwest and the South.²⁰⁵ Similarly, MSNBC political commentator and minority voting rights activist Al Sharpton observed:

From the tours we did in [twenty-two] states, it became clear to us that many blacks that were apathetic and indifferent became outraged and energized when they realized that [Republicans] were changing the rules in the middle of the game, in terms of voter ID laws, ending ‘souls to the polls.’ So what was just another election, even though it dealt with the re-election of the first black president, took on a new dimension when they realized that they were implementing the disenfranchisement of black voters.²⁰⁶

As *The National Journal* has observed, the backlash will continue to have effects in future elections, noting: “Without President Obama’s name on the ballot, Democrats and civil rights leaders increasingly view voting rights as a rallying cry that could boost minority participation in key midterm Senate races in 2014.”²⁰⁷ In short, the backlash against Voter ID laws demonstrates that minority voter turnout has proven to be highly resilient at both the national and regional levels. In the nation as a whole, as well as within the South, minority voters exceeded white turnout in 2012 despite the fact that over half the states had adopted Voter ID laws. That provides significant grounds for optimism about the future of minority political participation in the post-*Shelby County* South.

But there is still more reason for cautious optimism. A region long dominated by the white majority population is rapidly becoming the most diverse part of the United States, and at the same time, the South is showing clear signs of major racial progress. Accordingly, there is more cause for hope about the South’s future than at any time in the region’s history.

B. Evidence of Social Change in the South

The South is in the middle of historic change. A growing body of

²⁰⁴ *Id.*

²⁰⁵ John Nichols, *How Voter Backlash Against Voter Suppression Is Changing Our Politics*, NATION (April 29, 2013, 3:16 PM), <http://www.thenation.com/blog/174095/how-voter-backlash-against-voter-suppression-changing-our-politics#>, <<http://perma.cc/796K-UFZS>>.

²⁰⁶ Joy Ann-Reid, *How Voter Suppression Backfired on the GOP*, GRIO, (Nov. 8, 2012, 5:27 PM), <http://thegrio.com/2012/11/08/how-voter-suppression-backfired-on-the-gop/2/>, <<http://perma.cc/BU6M-MFQ9>>.

²⁰⁷ Reinhard, *supra* note 203.

empirical evidence and academic studies demonstrate that southern race relations have now moved well within the national mainstream. As will be discussed below, in several areas, including minority voter turnout, urban desegregation, and minority educational attainment, the South leads the nation.²⁰⁸ Equally important, the South is rapidly becoming more diverse than the rest of the United States. In fact, the South today has the fastest-growing African-American and Latino populations in the United States.²⁰⁹

Therefore, there is compelling support for the idea that that the diversification of southern racial demographics will further accelerate social change and racial progress in the South. As the South grows more diverse, minority political participation will likely become an even larger feature of the southern political landscape. Indeed, the positive social change underway in the region today is likely to prove far more important and far more lasting than the short-term impact of Voter ID laws.

1. The Improved Racial Dynamics of the South

The voter registration numbers that the majority relied upon in *Shelby County* are a good place to start the discussion of the future impact of voter ID laws. In the nation as a whole, overall voter turnout was 61.8% in 2012.²¹⁰ African-American turnout reached 66.2%, exceeding the national average by more than four percentage points.²¹¹ The gap between white and black turnout was most pronounced in the South. In the 2012 elections, African-American turnout exceeded white turnout in eight of the eleven former Confederate states.²¹² Along with the mid-western state of Wisconsin, the southern states of Mississippi and North Carolina led the nation in African-American voter turnout in 2012.²¹³ Most remarkable of all, African-American turnout in VRA states *exceeded* African-American turnout in the rest of the nation.²¹⁴

The results in 2012 represented the culmination of years of increased African-American turnout in the South. In 2000, 56% of

²⁰⁸ See *infra* Part V.B.1.

²⁰⁹ See *infra* Part V.B.2.

²¹⁰ BUREAU OF THE CENSUS, U.S. DEP'T OF COM., THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) 1 (2013), <http://www.census.gov/prod/2013pubs/p20-568.pdf>, <<http://perma.cc/F3AL-UMDS>>.

²¹¹ *Id.* at 3.

²¹² *Id.* at 9 (noting that the former confederate states that had African-American turnout that exceeded white turnout were: South Carolina, Mississippi, Florida, Alabama, Georgia, Virginia, Tennessee, and North Carolina. The three that did not were Texas, Arkansas, and Louisiana.)

²¹³ Philip Bump, *A State by State Look at the Record Black Turnout in 2012*, ATLANTIC WIRE, May 9, 2012, <http://www.theatlanticwire.com/politics/2013/05/black-turnout-2012-state-by-state-maps/65053/>, <<http://perma.cc/U43K-XS42>>.

²¹⁴ *Id.*

African Americans voted in southern states;²¹⁵ that figure rose to 59% in 2004 and 66% in 2008.²¹⁶ The growth in African-American turnout in the South was the largest in the nation.²¹⁷ Enthusiasm for Barack Obama, the nation's first African-American president, spurred an increase in African-American voter turnout in 2008—in fact, African Americans had the highest voter turnout in the 18–24 age category that year.²¹⁸ But it is noteworthy that the trend of increasing African-American turnout in the South began in the years prior to Obama's first presidential campaign. This trend mirrored a nationwide development, as a 2013 Census Bureau report revealed, "The 2012 increase in voting among blacks continues what has been a long-term trend: since 1996, turnout rates have risen 13 percentage points to the highest levels of any recent presidential election."²¹⁹

But will these changes endure in a post-*Shelby County* world, particularly one in which Voter ID laws spread across the South? There are reasons to believe the answer is yes.

Along with high minority voter turnout rates, the voting behavior of white southerners shows signs of a significant change. Indeed, recent elections suggest white southern voters, even in the Deep South, will now vote for minority candidates, something unthinkable just a generation ago.

Nationwide white voters have shown far more willingness to vote for minority candidates than at any time before in the nation's history. President Barack Obama is of course the foremost example of that development. But, so too are a growing number of governors and senators who have won election in states with overwhelmingly white majority populations. For example, in 2006 Deval Patrick became the first African American ever elected governor of Massachusetts, a state that is over 80% white.²²⁰ In October 2013 Cory Booker became New Jersey's first African-American senator.²²¹ New Jersey's population is 69% white.²²²

The South is following that trend. For example, today Louisiana and South Carolina have governors of South Asian heritage, Bobby Jindal and Nikki Haley, both of whom are Republicans, which means

²¹⁵ BUREAU OF THE CENSUS, U.S. DEP'T OF COM., VOTING AND REGISTRATION IN THE ELECTION OF 2000, at 7 tbl.B (2002), <http://www.census.gov/prod/2002pubs/p20-542.pdf>, <<http://perma.cc/N8U-PCHG>>.

²¹⁶ Morello, *supra* note 199.

²¹⁷ *Id.*

²¹⁸ 2008 Election Turnout Hit 40-Year High, *supra* note 198; McGuirt, *supra* note 198.

²¹⁹ Blacks Voted at a Higher Rate Than Whites in 2012 Election — A First, Census Bureau Reports, BUREAU OF THE CENSUS, U.S. DEP'T COM. (May 8, 2013), <http://www.census.gov/newsroom/releases/archives/voting/cb13-84.html>, <<http://perma.cc/Y7PT-NU44>>.

²²⁰ MICHAEL BARONE & CHUCK MCCUTCHEON, THE ALMANAC OF AMERICAN POLITICS 2014: THE SENATORS, THE REPRESENTATIVES, AND THE GOVERNORS 810, 807 (2013).

²²¹ Sean Sullivan, *Cory Booker Wins Senate Race*, WASH. POST, (Oct. 16, 2013, 9:41 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/10/16/cory-booker-wins-new-jersey-senate-race/>, <<http://perma.cc/55QX-ELTL>>.

²²² BARONE & MCCUTCHEON, *supra* note 220, at 1070.

their base of support is overwhelmingly found among southern white voters.²²³ Jindal, in particular, has received strong support at the ballot box. In his reelection bid in 2011, Jindal won with 66% of the vote.²²⁴ Moreover, in 2012, South Carolinian Tim Scott became the seventh African American ever to serve in the United States Senate.²²⁵ Although Scott was appointed to the Senate to fill a vacancy, the year prior, he was the first African American elected as a congressman from South Carolina in over 100 years.²²⁶ Of Scott's election to the House, *National Journal* observed, "His race appeared to be a non-issue for the district's voters, about 70% of whom are white."²²⁷ In the 2010 Republican House primary election, Scott defeated fellow Republican Paul Thurmond, the son of former South Carolina segregationist Senator Strom Thurmond, in a 68% to 32% landslide.²²⁸ Two years later, Scott won reelection to the House with 62% of the vote.²²⁹ Furthermore, Latino candidates have also had recent success winning statewide elections in ex-Confederate states. In 2010, Marco Rubio, the son of Cuban immigrants, was elected to the United States Senate from Florida.²³⁰ In 2012, Ted Cruz, also the son of a Cuban immigrant, was elected to the United States Senate from Texas.²³¹

Recent presidential elections also provide evidence of a historic change in the region's political dynamics. For example, in 2008, Barack Obama, the nation's first African-American president, won the popular vote in Florida, Virginia, and North Carolina.²³² He became the first Democratic candidate to win Virginia since 1964, North Carolina since

²²³ Kasie Hunt, *Nikki Haley Makes History*, POLITICO, June 23, 2010, <http://www.politico.com/news/stories/0610/38893.html>, <<http://perma.cc/K7DH-64PU>> (noting Haley's primary win against a fellow Republican, given South Carolina's "conservative heritage"); Andrew Walden, *Bobby Jindal and the 'Southern Strategy'*, AM.THINKER, Oct. 29, 2007, http://www.americanthinker.com/2007/10/bobby_jindal_and_the_southern.html, <<http://perma.cc/5KV7-BQXX>> (noting that Jindal's election was the first time the support of white Southern voters had propelled a non-white governor into office).

²²⁴ Associated Press, *La. Gov. Bobby Jindal Wins Re-election*, USA TODAY, Oct. 23, 2011, <http://usatoday30.usatoday.com/news/washington/story/2011-10-23/bobby-jindal-reelected/50875244/1>, <<http://perma.cc/93FG-MLYX>>.

²²⁵ Robert Behre, *U.S. Sen. Tim Scott Makes First Speech on Senate Floor*, POST & COURIER, July 8, 2013, <http://www.postandcourier.com/article/20130708/PC16/130709530/1009/us-sen-tim-scott-makes-maiden-senate-speech-today&source=RSS>, <<http://perma.cc/6UXL-5F49>>.

²²⁶ Katharine Seeyle, *S. Carolina Candidate Shrugs Off History's Lure*, N.Y. TIMES, June 25, 2010, <http://www.nytimes.com/2010/06/26/us/politics/26scott.html>, <<http://perma.cc/7U8Q-2EEF>>; Ben Terris, *House GOP Favorite Tim Scott Is Ready For What Comes Next*, NAT'L J., May 29, 2013, <http://www.nationaljournal.com/magazine/house-gop-favorite-tim-scott-is-ready-for-what-comes-next-20120329>, <<http://perma.cc/YA68-N5F8>>.

²²⁷ *Who is Tim Scott?*, NAT'L J., Dec. 17, 2012, <http://www.nationaljournal.com/thenextamerica/politics/who-is-tim-scott-20121217>.

²²⁸ Scott Wong, *Tim Scott to Succeed Jim DeMint in Senate*, POLITICO, Dec. 17, 2012, <http://www.politico.com/story/2012/12/tim-scott-to-succeed-demint-in-senate-85169.html>, <<http://perma.cc/8UQG-KVDH>>.

²²⁹ *Statewide Results*, S.C. STATE ELECTION COMM'N, <http://www.enr-scvotes.org/SC/42513/116143/en/summary.html>, <<http://perma.cc/AGN-4B5S>>.

²³⁰ BARONE & MCCUTCHEON, *supra* note 220, at 376.

²³¹ *Id.* at 1575.

²³² Laurence W. Moreland & Robert P. Steed, *The South and Presidential Elections*, in THE OXFORD HANDBOOK OF SOUTHERN POLITICS 470, 480 (Charles S. Bullock III & Mark J. Rozell eds., 2012).

1976, and Florida since 1996.²³³

It is important to note that Obama carried a smaller percentage of the white vote in the South than he did in the rest of the country. In 2008, Obama won the support of less than one-third of white southerners, whereas he carried about 43% of white voters nationwide.²³⁴ However, the same has been true of every Democratic presidential candidate for the last generation.²³⁵ What is more remarkable is the fact that Obama won more support from white southerners than did the white Democratic candidate who ran for president four years before him: John Kerry.²³⁶ For example, in all but three of the ex-Confederate states, Obama won a larger share of the white vote than Democratic presidential candidate John Kerry did in 2004.²³⁷ Obama was also the first non-southern Democratic presidential candidate to carry a southern state since 1960.²³⁸

The 2008 Democratic presidential primaries offered further evidence of southern progress. As the historian James Cobb notes, “generally Obama ran at or slightly better than his poll-based projections among white Democrats in the South, while frequently falling short of those numbers in primaries outside the region.”²³⁹ For example, in the 2008 Democratic primaries, Obama carried 44% of white Democrats in Texas and 43% in Georgia, but only 37% in Pennsylvania.²⁴⁰

Notably, in the 2012 elections, President Obama once again carried Virginia and Florida, and only narrowly lost North Carolina, 50.6% to 48.4%.²⁴¹ Moreover, in 2012 Obama became the first Democratic presidential candidate since Franklin Roosevelt in the 1940s to win Virginia in consecutive presidential elections.²⁴² Obama also had a stronger showing in the southeastern coastal states than any Democratic presidential candidate since Jimmy Carter in 1976.²⁴³ As the *Washington Post* observed, in the 2012 election “[t]he nation’s first black president

²³³ *Presidential Elections Data*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/elections.php>, <<http://perma.cc/6FAA-7CUN>>; see also Bob Moser, *The End of the Solid South*, AM. PROSPECT (June 4, 2013), <http://prospect.org/article/end-solid-south>, <<http://perma.cc/4YZZ-ALEM>> (discussing impacts of the voter shifts in Virginia and North Carolina).

²³⁴ JAMES C. COBB, *THE SOUTH AND AMERICA SINCE WORLD WAR II* 308 (2011).

²³⁵ DAVID LUBLIN, *THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE* 35 (2004); Campbell Robertson, *White Democrats Lose More Ground in South*, N.Y. TIMES, Nov. 6, 2010, http://www.nytimes.com/2010/11/07/us/07south.html?pagewanted=all&_r=0, <<http://perma.cc/6UCU-NPG2>>.

²³⁶ COBB, *supra* note 234, at 304–305.

²³⁷ *Id.* at 304.

²³⁸ Charles S. Bullock III, *Introduction: Southern Politics in the Twenty-first Century*, in *THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS* 1, 4 (Charles S. Bullock III & Mark J. Rozell eds., 4th ed. 2010).

²³⁹ COBB, *supra* note 234, at 303.

²⁴⁰ *Id.*

²⁴¹ *2012 Presidential Election*, POLITICO (Nov. 29, 2012, 3:59 PM), <http://www.politico.com/2012-election/map/#/President/2012>, <<http://perma.cc/9EVS-PZL4>>.

²⁴² *Obama Wins Presidential Vote in Va., Md., DC*, NBC4 WASH. (Nov. 7, 2012, 11:22 AM), <http://www.nbcwashington.com/news/local/Election-Day-Polling-Places-2012.html>, <<http://perma.cc/V3FB-ZJLJ>>.

²⁴³ Blackmon, *supra* note 188.

finished more strongly in the [southeast] region than any other Democratic nominee in three decades, underscoring a fresh challenge for Republicans who rely on southern whites as their base of national support.”²⁴⁴

The South’s political transformation finds further confirmation from sweeping social changes in the region. One of the most noteworthy changes is demographic in nature: African Americans are returning to the South. In the first half of the twentieth century, approximately five million African Americans migrated to the North from the South.²⁴⁵ But in the 1970s the trend slowly began to reverse itself and, in recent decades, African-American migration to the South has far exceeded that of any other region.²⁴⁶ As the *New York Times* noted in 2011, “[t]he percentage of blacks leaving big cities in the East and in the Midwest and heading to the South is now at the highest levels in decades.”²⁴⁷ In fact, according to federal census data, 17% of African-American migrants to the South came from New York State alone.²⁴⁸ As a percentage of the African-American population nationwide, the South’s black population today is at its highest level in half a century.²⁴⁹ The trend is accelerating: the South’s share of African-American population growth rose from 50% in the 1970s to 75% by 2010.²⁵⁰ Moreover, the demographics of the population returning to the South tend toward financially successful black retirees and well-educated young people, with one in four recent black migrants to the South holding a college degree.²⁵¹ In short, these migrants have the financial and educational opportunities to choose where to live, and they are increasingly choosing to live in the South.

One reason may be the South today is now less racially segregated than the North. Since the 1990s, national studies have shown that many southern cities are less segregated than northern cities.²⁵² The University of Michigan’s Population Studies Center found that the ten most segregated cities in the United States were all located in the North.²⁵³

²⁴⁴ *Id.*

²⁴⁵ Alferdteen Harrison, *Preface, in* BLACK EXODUS: THE GREAT MIGRATION FROM THE AMERICAN SOUTH vii, vii (Alferdteen Harrison ed. 1991).

²⁴⁶ COBB, *supra* note 234, at 190–91.

²⁴⁷ Dan Bilefsky, *For New Life, Blacks in City Head to South*, N.Y. TIMES, June 21, 2011, <http://www.nytimes.com/2011/06/22/nyregion/many-black-new-yorkers-are-moving-to-the-south.html?pagewanted=all>, <<http://perma.cc/9LK3-DFPS>>.

²⁴⁸ *Id.*

²⁴⁹ Associated Press, *Census Estimates Show More U.S. Blacks Moving South*, USA TODAY, Feb. 15, 2011, http://usatoday30.usatoday.com/news/nation/census/2011-02-15-census-black-migration_N.htm, <<http://perma.cc/4VTG-PBQB>>; Sabrina Tavernise & Robert Gobeloff, *Many U.S. Blacks Moving to South, Reversing Trend*, N.Y. TIMES, Mar. 24, 2011, http://www.nytimes.com/2011/03/25/us/25south.html?pagewanted=all&_r=0_, <<http://perma.cc/YX4G-25PJ>>.

²⁵⁰ Tavernise & Gobeloff, *supra* note 249.

²⁵¹ *Id.*; Blackmon, *supra* note 188.

²⁵² COBB, *supra* note 234, at 193.

²⁵³ WILLIAM H. FREY & DOWELL MYERS, RACIAL SEGREGATION IN U.S. METROPOLITAN AREAS AND CITIES, 1990–2000, at 39 (Univ. of Mich., Population Stud. Ctr. 2005), *available at* http://www.frey-demographer.org/reports/R-2005-2_RacialSegregationTrends.pdf (noting that the ten cities are: Gary, Detroit, New York, Milwaukee-Waukesha, Chicago, Newark, Flint, Buffalo-

Direct comparisons of northern and southern cities are even more striking. For example, 40% of Virginia Beach's population lives in integrated neighborhoods, whereas only 13% of Boston's population lives in integrated neighborhoods.²⁵⁴

Educational disparities are also decreasing in southern states when compared to northern ones.²⁵⁵ In 2009, a United States Department of Education study revealed "that black students in all but two southern states now posted higher scores on standardized math and reading tests than black students in either Wisconsin or California."²⁵⁶ Moreover, as Professor James Cobb has noted, "The gap between black and white students' scores was smaller in Alabama and Mississippi than in Connecticut or Illinois and well below the national average across the region."²⁵⁷ What makes such studies even more remarkable is the fact that only fifty years ago segregated schools dominated the southern landscape.

Equally noteworthy is the increasingly favorable view of the South among African Americans who live in the region.²⁵⁸ In the mid-1960s, surveys indicated that only 55% of southern blacks had a "warm" view of the South; in the years since, that figure has steadily risen.²⁵⁹ A University of North Carolina study of polling data from the 1991–2001 period found that black southerners self-identify as "southern" at rates equal to or greater than southern whites.²⁶⁰

Most striking of all, a 2007 nationwide survey by the Pew Research Center and National Public Radio found that 69% of southern blacks reported being "very satisfied" with their current circumstances, which was more than 10% higher than African Americans in the rest of the country.²⁶¹ The study's authors concluded, "In general, blacks who live in southern states are more satisfied with their lives than are blacks who live in other regions."²⁶²

Even the Confederate battle flag is under increasing criticism by

Niagara Falls, Cleveland-Lorain-Elyria, and Nassau-Suffolk).

²⁵⁴ COBB, *supra* note 234, at 193 (stating that "nearly a third of [the population of] Charlotte, Nashville, Jacksonville, and Memphis fell into the 25-30 percent range" of living in integrated neighborhoods. This is compared with "14 percent in Philadelphia and 13% in Boston, not to speak of New York City at 4 percent. Not all southern cities came out so well; two-thirds of white Atlantans lived on blocks that were more than 80 percent white, but then so did 93 percent of whites in Pittsburgh and 87 percent in Providence, Rhode Island.").

²⁵⁵ *Id.* at 193–94.

²⁵⁶ *Id.* at 193.

²⁵⁷ *Id.* at 193–94.

²⁵⁸ *Id.* at 262.

²⁵⁹ *Id.* at 261; Merle Black & John Shelton Reed, *Blacks and Southerners: A Research Note*, 44 J. POL. 165, 166 (1982).

²⁶⁰ Jay Reeves, *Southern Identity; Many Blacks Proud to be Southerners, Despite Region's Racist History*, FLA. TIMES UNION, Nov. 24, 2005, <http://jacksonville.com/apnews/stories/112405/D8E2K1307.shtml>, <<http://perma.cc/U4V2-E2WF>>.

²⁶¹ COBB, *supra* note 234, at 272.

²⁶² PEW RES. CTR., BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS 26 (2007), <http://www.pewsocialtrends.org/files/2010/10/Race-2007.pdf>, <<http://perma.cc/ZZF9-44S2>>.

southern whites. The University of Mississippi has banned the display of the Confederate battle flag—once a staple at football games—at all university-sponsored athletic events.²⁶³ Georgia removed the Confederate emblem from its state flag in 2003.²⁶⁴ South Carolina head football coach Steve Spurrier has called on the state legislature to remove the battle flag from the state capitol grounds.²⁶⁵ Spurrier explained that waving the Confederate battle flag “was embarrassing to me and I know embarrassing to our state.”²⁶⁶ He added, “I realize I’m not supposed to get in the political arena as a football coach, but if anybody were ever to ask me about that damn Confederate flag, I would say we need to get rid of it.”²⁶⁷

All of this evidence suggests improvements in the state of race relations in the South, as well as the tremendous progress made in minority voting rights and minority political participation in the region. But that evidence, in turn, leads to the next crucial question: Will Voter ID laws unravel the progress the South has made? As it happens, there is evidence that is directly responsive to that question: the South’s changing racial demographics.

2. *The South’s Changing Racial Demographics*

The final reason for optimism is demographics. At a time when minorities represent a growing percentage of the electorate nationwide, any party or candidate who appears hostile to minority voting rights will face growing political peril. Nowhere is that more true than in the eleven states of the old Confederacy.

Indeed, the most dramatic change in American politics today is demographic in nature. As the *Los Angeles Times* recently observed, “The Latino and Asian share of the U.S. electorate is all but certain to continue to grow because of the rising number of voting-age citizens in those groups.”²⁶⁸ For instance, a 2013 Pew Research Center study revealed that Latinos currently make up 17% of the nation’s population as whole, but they constitute 24% of the population under age

²⁶³ Associated Press, *Chancellor Wants Song Halted*, ESPN.com (Nov. 10, 2009, 8:52 PM), <http://sports.espn.go.com/ncf/news/story?id=4643111>, <<http://perma.cc/WFZ5-QDTW>> (referring to the “decades-long practice of fans’ carrying the flag” at Ole Miss athletic games); *Court Upholds Ban On Confederate Flag*, N.Y. TIMES, Aug. 20, 2000, <http://www.nytimes.com/2000/08/20/us/national-news-briefs-court-upholds-ban-on-confederate-flag.html>, <<http://perma.cc/B3EV-9V7Z>>.

²⁶⁴ ARNOLD FLEISCHMANN & CAROL PIERANNUNZIT, *POLITICS IN GEORGIA* 96 (2d ed. 2007).

²⁶⁵ *Spurrier Says It’s Time to Lower the Flag*, WASH. POST, Apr. 15, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/14/AR2007041401304.html>, <<http://perma.cc/55KJ-SECV>>.

²⁶⁶ Associated Press, *Spurrier: Flag should come down from S.C. Statehouse*, ESPN.com, Apr. 16, 2007, <http://sports.espn.go.com/ncf/news/story?id=2837735>, <<http://perma.cc/KZ4C-F6GM>>.

²⁶⁷ *Id.*

²⁶⁸ Lauter, *supra* note 195.

eighteen.²⁶⁹ The political implications are sweeping. According to the Pew study, minorities made up 26% of the electorate in 2012, but they will constitute 37% of the electorate by 2020.²⁷⁰

The change is happening even faster in the South than it is in the rest of the country.²⁷¹ The South has the fastest growing African-American and Latino populations in the country.²⁷² In fact, the black population of the South has grown faster than the white population in ten of the eleven southern states over the last ten years.²⁷³ Likewise, in Texas, Latinos constituted 49% of newborn children in 2010, according to the 2010 federal census.²⁷⁴ The 2010 census also revealed that Georgia's Latino population "nearly doubled between 2000 and 2010."²⁷⁵ Furthermore, Virginia and North Carolina provide two examples of this demographic change. According to the 2010 census, Virginia and North Carolina both saw their white population decline from 72% to 65%, while the overall population of both states increased by 1 million and 1.5 million, respectively, during the first decade of the twenty-first century as a result of migration from other states and a high minority birthrate.²⁷⁶

The South's changing racial dynamics are particularly dangerous for the Republican Party, which advocates the very Voter ID laws that so deeply alienate minority voters.²⁷⁷ According to Scott Keeter, the chief pollster at the Pew Research Center, changing racial dynamics in the South have made the region "a ticking time bomb for Republicans."²⁷⁸ Indeed, the growing minority population in the South is beginning to move many states toward the Democratic column for the first time in decades.²⁷⁹ Some predict that the political changes will be even more sweeping in the years ahead, as a growing minority population

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Jonathan Martin, *Beyond Black and White, New Force Reshapes the South*, N.Y. TIMES, June 25, 2013, <http://www.nytimes.com/2013/06/26/us/politics/new-face-of-south-rises-as-an-extralegal-force.html>, <<http://perma.cc/9592-H7YU>>.

²⁷² *Id.* (finding that "[t]he states with the highest growth in the Latino population over the last decade are in the South, which is also absorbing an influx of people of all races moving in from other parts of the country"); see Haya El Nasser, *Census: Hispanic, Asian Populations Soar*, USA TODAY, Mar. 25, 2011, http://usatoday30.usatoday.com/news/nation/census/2011-03-24-hispanics-census_N.htm, <<http://perma.cc/TA74-HUQH>> (stating that the census indicates that "For the first time, [Hispanics] increased faster than blacks and whites in the South. Hispanics doubled in South Carolina, North Carolina, Kentucky, Tennessee, Alabama, Mississippi and Arkansas").

²⁷³ Blackmon, *supra* note 188 (noting that "[i]n every Southern state except Louisiana, the population of African Americans grew substantially faster than that of whites over the past decade").

²⁷⁴ Moser, *supra* note 233.

²⁷⁵ Martin, *supra* note 271.

²⁷⁶ Bill Barrow, *As Demographics Change, an End to the Solid South*, HUFFINGTON POST (Aug. 20, 2012, 3:07 AM), http://www.huffingtonpost.com/2012/08/20/no-longer-a-solid-south_n_1810536.html, <<http://perma.cc/38EA-72R9>>.

²⁷⁷ See HASEN, *supra* note 115 (describing overwhelming Republican legislator support for Voter ID laws).

²⁷⁸ Moser, *supra* note 233.

²⁷⁹ Barrow, *supra* note 276 (describing the changing demographics of the South and noting that, for example, Virginia, whose population is now half transient or immigrant, went Democratic in the 2008 presidential election for the first time since 1964).

transforms the politics of once solidly-Republican states such as Georgia and Texas.²⁸⁰

In August 2013, retired General Colin Powell, a Republican who served as the first black chairman of the Joint Chiefs of Staff, bluntly warned the GOP that Voter ID laws have backfired. In a speech in North Carolina, Powell observed that Voter ID laws profoundly alienate and offend minority voters, and thus “immediately turn off a voting block the Republican Party needs.”²⁸¹ He emphasized the point that Voter ID laws and similar policies “do not build on the base”; they “just turn[] people away.”²⁸²

Consequently, as Congressman David Price of North Carolina—a former political science professor at Duke University—recently observed, “All the voter suppression measures in the world aren’t going to be enough to eventually stem this rising tide [of minority voters].”²⁸³ Similarly, Georgia Democratic State Representative Stacey Abrams has warned that southern politicians who seek to restrict minority voting rights “risk permanently alienating a population that will eventually be able to take its revenge” as minority voters represent a rapidly growing share of the Georgia electorate.²⁸⁴

The Republican Party is beginning to take notice. In a remarkable report issued by the Republican National Committee after the 2012 election, the party leaders warned, “If we want ethnic minority voters to support Republicans, we have to engage them and show our sincerity.”²⁸⁵ Under the caption “America Looks Different,” the report warned Republicans that the white share of the national electorate fell from 88% in 1980 to 72% in 2012.²⁸⁶ The report concluded: “The pervasive mentality of writing off blocks of states or demographic votes for the

²⁸⁰ Robert Schlesinger, Opinion, *The Next Swing States: Arizona, Georgia, and Texas*, U.S. NEWS, Apr. 12, 2012, <http://www.usnews.com/opinion/blogs/robert-schlesinger/2012/04/12/the-next-swing-states-arizona-georgia-and-texas>, <<http://perma.cc/M47R-5JVJ>>; see *America’s Minorities Becoming A Majority*, CBS MIAMI, June 13, 2013, <http://miami.cbslocal.com/2013/06/13/americas-minorities-becoming-a-majority/>, <<http://perma.cc/G9JD-U259>> (noting that six counties became majority-minority in 2012: four in Texas, one in Oklahoma, and one in North Carolina); Micah Cohen, *Can Democrats Turn Texas and Arizona Blue?*, N.Y. TIMES, Mar. 1, 2013, <http://fivethirtyeight.blogs.nytimes.com/2013/03/01/can-democrats-turn-texas-and-arizona-blue-by-2016/>, <<http://perma.cc/WMG5-S2FG>> (noting that “Obama won re-election comfortably in 2012 without Texas and Arizona, and in many critical swing states, the demographic trend is still moving—slowly—away from the G.O.P.”).

²⁸¹ *Powell: Voter ID Law Punishes Minorities, Hurts Republicans*, UNITED PRESS INT’L (Aug. 23, 2013, 1:10 PM), http://www.upi.com/Top_News/US/2013/08/22/Powell-Voter-ID-law-punishes-minorities-hurts-Republicans/UPI-13891377191454/, <<http://perma.cc/P7LL-L6F3>>.

²⁸² John Murawski & John Frank, *Colin Powell Slams NC’s New Voting Law in Speech*, NEWS OBSERVER, Aug. 22, 2013, <http://www.newsobserver.com/2013/08/22/3128072/colin-powell-slams-ncs-new-voting.html>, <<http://perma.cc/N26L-5VEU>>.

²⁸³ Martin, *supra* note 271; *Congressman David E. Price: About David*, U.S. HOUSE OF REPRESENTATIVES, <http://price.house.gov/about-david/>, <<http://perma.cc/YQ3P-3X3P>>.

²⁸⁴ Martin, *supra* note 271.

²⁸⁵ REPUBLICAN NAT’L COMM., GROWTH AND OPPORTUNITY PROJECT 7 (2013), available at http://growthopp.gop.com/RNC_Growth_Opportunity_Book_2013.pdf, <<http://perma.cc/STV6-V6HP>>.

²⁸⁶ *Id.* at 7.

Republican Party must be completely forgotten. The Republican Party must compete on every playing field.”²⁸⁷

The growing influence of minority voters has already changed the South, and will change it even more dramatically in the years ahead. By any measure, the South is in the middle of a historic demographic shift and the political ramifications are immense. As Arturo Vargas, executive director of the National Association of Latino Elected and Appointed Officials, points out: “The South is going to start looking more like California eventually.”²⁸⁸

VI. CONCLUSION

In 1965 Congress enacted the Voting Rights Act to ensure that African Americans and other minorities could exercise their constitutional right to vote. In the years since the VRA’s adoption, major advances have been made in minority political participation across the nation. Nothing demonstrated that fact more clearly than the 2012 presidential election, which marked the first time in history that African-American turnout exceeded white turnout.²⁸⁹

The 2012 election also reflected the remarkable changes that have occurred in the racial dynamics of southern politics. In 1965, the VRA specifically targeted the South because of the extraordinarily low level of African-American voter registration in southern states. However, by 2012, black turnout in the South exceeded white turnout in eight of the eleven ex-Confederate states.²⁹⁰

Understandably, therefore, the Supreme Court’s decision in *Shelby County* has raised serious concern that the progress made in the South since 1965 could be lost. In particular, *Shelby County* has thrust the South into the forefront of the national debate over Voter ID laws.

Nevertheless, for the reasons outlined in this article, there is a basis for cautious optimism that the expansion of Voter ID laws across the South will not result in widespread minority disenfranchisement in the long run. Voter ID laws will not stop the historic demographic and social changes underway in the South that are transforming the racial dynamics of the region’s politics. Consequently, the evidence suggests that the influence of minority voters on southern elections will grow, not recede, in the years ahead, notwithstanding the adoption of Voter ID laws. Indeed, there is compelling reason to conclude that demographic and social change will ultimately play a far larger role in shaping the southern political landscape than Voter ID laws ever will.

²⁸⁷ *Id.* at 12.

²⁸⁸ Martin, *supra* note 271.

²⁸⁹ Lauter, *supra* note 195.

²⁹⁰ BUREAU OF THE CENSUS, *supra* note 210, at 9.