WHEN POLITICAL DOMINATION BECOMES RACIAL DISCRIMINATION: *NAACP V. MCCRORY* AND THE INEXTRICABLE PROBLEM OF RACE IN POLITICS

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I. INTRODUCTION

In *North Carolina State Conference of the NAACP v. McCrory*,[1] the United States Court of Appeals for the Fourth Circuit struck down the State of North Carolina's omnibus voting law passed in 2013. The court held that the law violated the Fourteenth and Fifteenth Amendments to the U.S. Constitution and Section 2 of the Voting Rights Act of 1965.[2] In reversing the decision of the United States District Court for the Middle District of North Carolina upholding the omnibus voting law,[3] this panel held that North Carolina's election changes were passed with a discriminatory effect.[4] Moreover, the Fourth Circuit held that North Carolina's electoral changes were passed with an intent to abridge the ability for African Americans to vote.[5] While as of this writing, North Carolina has filed a petition for

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1. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).
2. *Id.* at 219.
3. N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 423 (M.D.N.C. 2016).
4. *McCrory*, 831 F.3d at 229.
5. *Id.* at 225.

certiorari from the United States Supreme Court to review the Fourth Circuit's opinion,[6] the ruling in this case represents a landmark victory for voting rights advocates against strict voter identification laws and other similar regulations that foster voter suppression in the political process. It also represents a remarkable and extraordinary use of the Fourteenth and Fifteenth Amendments specifically to find discriminatory intent on the basis of race.

These issues, however, remain contentious across the country. The Fourth Circuit's ruling stands in contrast with rulings from other jurisdictions that have, on similar evidence, tended to find evidence of intention less than fully persuasive and thus constitutional penalties did not accrue.[7] The Fourth Circuit's ruling stands out as an effort for a three-judge court, in the face of a shifting political scene as well as a changing legal and jurisprudential landscape, to articulate a standard for understanding where political manipulation translates into racial discrimination—a standard described in this Article as required due care in the analysis of race. This Article begins, in Part II, with a description of the background to this case. Then in Part III, this Article will examine the *McCrory* decision with an eye towards parsing out how the court arrived at this due care approach. Part IV then confronts the uncertain future of *McCrory* in light of its possible review by the Supreme Court, the uncertain present around the Voting Rights Act, and the disfavored academic and judicial literature around race-conscious remedies. In particular, it will compare *McCrory* with *Abbot*, the Fifth Circuit's fractured opinion considering claims of disparate impact and intentional discrimination in Texas's voter identification law, another voter qualification regulation passed in the wake of *Shelby County v. Holder*.[8]

This Article concludes optimistically by noting that whether *McCrory* represents a momentary victory in the larger attack against the Voting Rights Act or whether it stands as good law for the foreseeable future, the opinion offers a well-reasoned approach that accomplishes the ends of the Voting Rights Act through offering a race-conscious intersectional approach grounded in the reality of voter suppression in North Carolina. And it is to that history that this Article now turns.

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6. Harris v. McCrory, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *argued* Dec. 5, 2016.

7. In particular, as will be discussed in this Article, the Fifth Circuit, in considering the recently passed voter identification law in Texas, found that the regulation had a disparate racial impact but fractured on whether the voter ID law had been passed with an intent to abridge the right to vote on the basis of race. *See* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016).

8. 133 S. Ct. 2612 (2013).

II. BACKGROUND OF *MCCRORY* CASE

In 2010, the Republican Party came to dominate North Carolina's state legislature.[9] Shortly thereafter, in 2012, Pat McCrory, a Republican, was elected governor of North Carolina thus unifying legislative and executive control of the legislature under one political party.[10] This Republican legislature sought to implement a number of legislative priorities that it felt had been neglected under the prior period of political control divided between the Democratic Party and the Republican Party.

One of the Republican Party's political priorities was the institution of voter identification laws and limitation of voter inclusiveness laws that were designed to foster further participation in the electoral process.[11] The Republican legislature sought to implement these more "strict" voter participation laws to enhance election integrity and to enhance their opportunities to win elections.[12]

Yet these goals did not stand in isolation. North Carolina's efforts to transform voting regulations must be read against the history of the state regarding race and politics. From the passage of the Voting Rights Act in 1965 to 2013, North Carolina (or portions of the state) had to negotiate with the federal government concerning its voting laws prior to implementing them.[13] This had the effect of allowing the federal government to shape the direction of any change in voting. The leverage that the federal government had in order to negotiate these laws was based on Section 5 of the Voting Rights Act of 1965. Congress determined that Section 5 of the Voting Rights Act required that certain jurisdictions, which had a history of discriminating on the basis of race when it comes to political participation and had a continuing disparate impact regarding race when it comes to actual

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9. *GOP Takes Control of State Legislature*, WRAL.COM (Nov. 2, 2010), http://www.wral.com/news/local/politics/story/8556651/.

10. *North Carolina Election Results 2012: McCrory Wins Governor's Race; Hudson Tops Kissell for House Seat; Romney Gets Narrow Victory*, WASH. POST (Nov. 7, 2012), https://www.washingtonpost.com/politics/decision2012/north-carolina-election-results-2012-mccrory-wins-governors-race-hudson-tops-kissell-for-house-seat-romney-gets-narrow-victory/2012/11/07/201e8c1c-23a8-11e2-ac85-e669876c6a24_story.html?utm_term=.72d827438331.

11. Aaron Blake, *North Carolina Governor Signs Extensive Voter ID Law*, WASH. POST (Aug. 12, 2013), https://www.washingtonpost.com/news/post-politics/wp/2013/08/12/north-carolina-governor-signs-extensive-voter-id-law/?utm_term=.ef4a109b1cf4.

12. *Id.*

13. *See* Richard L. Hasen, *This is Why the Voting Rights Act is on Trial in North Carolina*, WASH. POST (July 31, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/07/31/this-is-why-the-voting-rights-act-is-on-trial-in-north-carolina/?utm_term=.4023b5804c41.

participation in the political process, had to have their voting rights laws subjected to approval by the United States Department of Justice.[14] During the most immediate time Section 5 preclearance was in effect, as the Fourth Circuit observed, "African-American voter registration swelled by 51.1% (compared to an increase of 15.8% for white voters). African-American turnout similarly surged, from 41.9% in 2000 to 71.5% in 2008 and 68.5% in 2012."[15]

As a result, North Carolina, like many other states including Texas and Virginia and a number of other jurisdictions across the country,[16] had to negotiate with the Department of Justice in order to get pre-clearance or pre-approval regarding any voting rights change that would have an effect on minority citizens. Within this context, North Carolina, like South Carolina and other jurisdictions at the time, negotiated with the Department in order to implement a voter identification regime and other voter participation rules changes in line with the political interest of the Republican Party but, at the same time, to avoid claims of racial discrimination.

The Supreme Court's 2013 decision in *Shelby County v. Holder*[17] changed all of this. In *Shelby County*, the Supreme Court struck down Section 4(b) of the Voting Rights Act.[18] Section 4(b) contained the formula by which the federal government determined which jurisdictions in the United States would be considered covered jurisdictions and as a result would have to be subjected to pre-clearance.[19] The opinion of Chief Justice John Roberts for the *Shelby County* majority found that Congress, in reauthorizing the Voting Rights Act, had not taken into account changes in the rates of participation in voting in the South nor had Congress taken into account the concept of equal sovereignty among the states when it came to the federal government's power to regulate areas that were traditionally considered provinces of state authority.[20] On this basis, the Court struck

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14. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2619 (2013).

15. *McCrory*, 831 F.3d at 215. It is also worth noting that in 2008 and 2012, Barack Obama, the first candidate for the presidency of African descent, was running for office. His candidacy led to tremendous African American turnout. It was precisely this turnout that created significant opportunities for the Democrats to be competitive in close jurisdictions. *See* Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. L. REV. 1023, 1023 n.2 (2009). This is certainly true for North Carolina, which has, over the late twentieth and early twenty-first centuries, emerged as a quintessential swing state in presidential elections.

16. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2620 (2013).

17. *Id.*

18. *Id.*

19. 42 U.S.C. § 1973(b) (2012), *transferred to* 52 U.S.C. § 10303(b) (2012).

20. *Shelby Cnty.*, 133 S. Ct. at 2623–24.

down Section 4(b), which had the effect of leaving the Section 5 preclearance regime inoperative while leaving open the opportunity for Congress to pass a new Section 4(b) that took into account the changes in political culture on which the Court relied.[21]

In the wake of *Shelby County*, North Carolina no longer needed to preclear its election regulation changes. Indeed, the state took the opportunity to pass voting regulations that fully comported to their particular political ends.[22] Accordingly, during a special session in July and August of 2013, North Carolina reconsidered all of the political measures that it deemed necessary to pass and focused on establishing a "strict" voter identification provision, limiting same-day voting registration, limiting early voting opportunities, eliminating Sunday voter registration opportunities, and other provisions.[23]

In reaching this decision, the legislature specifically "requested and received racial data as to usages of the practices changed by the proposed law."[24] The data the legislature received showed that African Americans disproportionately did not possess the voter identification credentials that would be required under its act, that African Americans disproportionately used early voting in both 2008 and 2012, and that African Americans disproportionately used the first seven days of early voting.[25] The data also showed that African Americans disproportionately used same-day registration and provisional voting.[26] Further, the legislature had data that showed that African Americans disproportionately used preregistration (the practice of allowing sixteen and seventeen-year-olds to register to vote prior to turning eighteen, so long as they would be eligible to vote by the next election.)[27]

The Fourth Circuit observed that after receipt of this data, the legislature eliminated or restricted all of these voting practices so that they impacted African-American preferences.[28] Thus, at the end of this session, the

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21. *Id.* at 2631.

22. The Fourth Circuit pointed to a statement by the Republican Chairman of the North Carolina Senate Rules committee issued the day after the *Shelby County* decision: "I think we'll have an omnibus bill coming out" and that the Senate would pass the "full bill." N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 339 (M.D.N.C. 2016).

23. *See Q&A: Changes to NC Election Laws*, WRAL.COM (Aug. 12, 2013), http://www.wral.com/election-changes-coming-in-2014-2016/12750290/.

24. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016).

25. *Id.*

26. *Id.*

27. *Id.* at 217–18.

28. Indeed, the Fourth Circuit noted that the district court had observed the following:

legislature, over objections from Democrats and civil rights groups, passed new rules regarding election regulations.[29] These rules included passage of a voter identification provision limiting same-day registration opportunities, limiting early voting opportunities, and other related provisions.[30] The General Assembly passed those rules to take effect during the 2014 election cycle. Yet, civil rights groups sued and obtained a stay of several of those regulations.[31] The district court denied the stay, but the Fourth Circuit order stayed the elimination of the same-day registration and out-of-precinct voting changes.[32] The Supreme Court lifted the Fourth Circuit's stay pending its decision on certiorari, but then denied certiorari, which then reinstituted the Fourth Circuit's stay.[33] The other rules from the omnibus voting law were implemented in 2014.[34]

This underlying lawsuit nonetheless proceeded and, at trial, the State of North Carolina defended the omnibus voting bill against claims made by the NAACP and other civil rights groups that these rules had a disparate effect on the basis of race.[35] The state ultimately argued that the voting laws were neutral and reasonable and necessary to protect election integrity.[36] The state also argued that the laws were not intended to disenfranchise on the basis of race.[37]

> The district court found that not only did [the omnibus voting law] eliminate or restrict these voting mechanisms used disproportionately by African Americans, and require IDs that African Americans disproportionately lacked, but also that African Americans were more likely to "experience socioeconomic factors that may hinder their political participation." This is so, the district court explained, because in North Carolina, African Americans are "disproportionately likely to move, be poor, less educated, have less access to transportation, and experience poor health." *Id.* at 218.

29. *See* H.B. 589, 2013 Gen. Assemb. (N.C. 2013); 2013 N.C. Sess. Laws 381. SL 2013-381 "eliminated one of two 'souls-to-the-polls' Sundays in which African American churches provided transportation to voters. *McCrory*, 831 F.3d at 217. SL 2013-381 eliminated same-day voter registration, and the bill "retained only the kind of IDs that white North Carolinians were more likely to possess." *Id.* at 216.

30. 2013 N.C. Sess. Laws 381.

31. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 248–49 (4th Cir. 2014).

32. *Id.* at 238.

33. *Id.*

34. North Carolina v. League of Women Voters of N.C., 135 S. Ct. 6 (2014) (Mem.).

35. N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 331 (M.D.N.C. 2016).

36. *Id.* at 459.

37. *Id.*

However, in advance of the trial, the state ratified House Bill 836.[38] This law amended the photo ID by providing a reasonable impediment exception to the photo ID requirement.[39] A voter could under this provision cast a provisional ballot if she filed a written declaration stating that she had "a reasonable impediment that prevents the voter from obtaining photo identification."[40] In light of this, the district court bifurcated the trial so that all the other provisions of the omnibus voting law were tried first, and then a separate trial took place regarding the photo ID requirement.

After the bifurcated trial, the district court agreed with the state's provisions and upheld the omnibus voting law.[41] In agreeing with the state's position, the trial court wrote an in-depth opinion of over one-hundred pages which went item by item and ultimately justified each individual voting change provision.[42] The district court found no discriminatory results under Section 2, no discriminatory intent under either Section 2, the Fourteenth Amendment, or the Fifteenth Amendment, and no violation of the Twenty-Sixth Amendment.[43] Consequently, the plaintiffs appealed this decision to the United States Court of Appeals for the Fourth Circuit.[44]

III. THE *MCCRORY* DECISION AND THE DUE CARE APPROACH

On appeal before the Fourth Circuit, the plaintiffs renewed their arguments that the laws were passed with discriminatory intent and had a discriminatory effect.[45] A three-judge panel of the Fourth Circuit heard these claims and agreed with the plaintiffs that the North Carolina omnibus voting bill had been passed with discriminatory intent in violation of the Equal Protection Clause of the Fourteenth Amendment.[46]

In short, the Fourth Circuit determined that the district court was myopic in its analysis.[47] The opinion, which was unanimous in all respects except the scope of the prospective remedy, was authored by Judge Diana Gribbon Motz.[48] The opinion opens by criticizing the methodology of the district

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38. H.B. 836, Gen. Assemb., Reg. Sess. (N.C. 2015).
39. *Id.*
40. *Id.*
41. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016).
42. *Id.*
43. *Id.*
44. *McCrory*, 831 F.3d at 219.
45. *Id.*
46. *Id.* at 235.
47. *Id.* at 214.
48. *Id.*

court in as much as the district court "missed the forest in carefully surveying the many trees."[49] In other words, the Fourth Circuit criticized the district court's methodology of examining each particular legal change in isolation and thus finding that the vast majority of the individual rules passed had a neutral, rational basis and therefore ought to be considered legal.[50] The Fourth Circuit opined that the district court had ultimately ignored the import of the underlying totality of the circumstances analysis required under the Voting Rights Act.[51]

The Fourth Circuit ultimately found that the district court's narrow-sighted approach to analyzing the North Carolina omnibus voting bill ignored the overall total impact that the laws had in terms of their ability to dissuade African-American voters from voting.[52] The district court ignored the true totality of the circumstances by focusing on the proffered reasons for the changes in law without actually exploring the overall atmosphere in which the laws were created and thus leaving out the circumstantial evidence of discriminatory animus regarding these provisions.[53] In particular, the Fourth Circuit's opinion articulated a legal standard in terms of assessing the totality of circumstances regarding impact under Section 2 of the Voting Rights Act.[54]

In reaching this conclusion, the panel framed the legal principle as a question of understanding intentional racial discrimination within the context of legislative decision-making regarding the law governing politics.[55] The court began with an explication of the test for discriminatory intent set forth in in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*[56] The panel explained that this test examines the

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49. *Id.*

50. *Id.*

51. *Id.* at 233.

52. *Id.*

53. *Id. See also id.* at 215 ("Although the Fourteenth and Fifteenth Amendments to the United States Constitution prohibit racial discrimination in the regulation of elections, state legislatures have too often found facially race-neutral ways to deny African Americans access to the franchise.").

54. *Id.* The Fourth Circuit stressed that "any individual piece of evidence can seem innocuous when viewed alone, but gains an entirely different meaning when considered in context," thus finding that a totality of the circumstances approach, as required by *Arlington Heights*, is necessary to uncover discriminatory racial intent. *Id.* at 233.

55. *Id.* at 234–35.

56. 429 U.S. 252 (1977). This "sensitive inquiry" test includes "the historical background of the [challenged] decision"; "the specific sequence of events leading up to the challenged decision"; "[d]epartures from normal procedural sequence"; "the legislative history of the decision"; and the disproportionate "impact of the official action, whether it bears more

circumstantial evidence around a decision to determine whether a discriminatory purpose was "a motivating factor," or a "because of" factor in making the decision.[57] To analyze this, the court correctly noted that this inquiry must necessarily be circumstantial since explicit evidence regarding the decision would be difficult to find.[58] Moreover, the court noted that this circumstantial evaluation is particularly pertinent to vote denial cases, in as much as "discrimination today is more subtle than the visible methods used in 1965."[59] Further, in acknowledging that the circumstantial evidence may be rebutted by a demonstration by the government that the non-discriminatory purposes alone justify the law, the court noted its role as not to be deferential to the views of the legislators.[60]

While this serves to frame the *Arlington Heights* analysis generally, the most controversial part of the court's framing of these issues is its reliance on racially polarized voting doctrine to explain incentives for racial discrimination. The court reasoned that racial polarization in voting—that is, the strong correlation between the race of a group of voters and a strong preference for a particular candidate—both exists in North Carolina and thus provides incentives for legislators to discriminate on the basis of race.[61] In other words, the "political cohesiveness of the minority groups . . . provides the political payoff for legislators who seek to dilute or limit the minority vote."[62] In other words, politicians who see a racially polarized electorate may be motivated to target that particular minority group in ways that diminish their voting power so that the group may entrench itself through discriminatory election laws.[63]

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heavily on one race than another." *McCrory*, 831 F.3d at 220–21 (quoting *Arlington Heights*, 429 U.S. at 266–67).

57. *McCrory*, 831 F.3d at 220.

58. This circumstantial evidence test includes an inquiry into the following factors: the historical background to the decision, the sequence of events related to the decision, departures from normal procedural sequence, the legislative history of the decision, and the disproportionate impact of the official action with particular regard as to whether it weighs more heavily on one race or another. *Arlington Heights*, 429 U.S. at 226–27.

59. *McCrory*, 831 F.3d at 221.

60. *Id.* at 226–27.

61. *Id.* at 222.

62. *Id.* at 222.

63. This theory necessarily relies on vote dilution cases to establish its history. In particular, the Fourth Circuit relied on *LULAC v. Perry*, 548 U.S. 399 (2006), for this analysis to demonstrate that such discrimination may take place. In effect, this opinion extends the theory to the vote denial realm through reasoning that such behavior by legislatures is impermissible as it constitutes an intentional targeting on the basis of race. *McCrory*, 831 F.3d at 222–23 (reasoning that racially polarized voting may motivate politicians impermissibly applies to the vote denial context because "legislatures cannot restrict voting access on the basis of race. (Nor, we note, can legislatures restrict access to the franchise based on the desire

Indeed, the Fourth Circuit goes so far as to observe: "Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose."[64]

In making this examination under *Arlington Heights*, as modified by the racial polarization principle, the Fourth Circuit made an effort to understand the legislative direction and the facts and circumstances around the legislature's actions.[65] It also added the context of North Carolina's history and the present statements that could have been read as animus regarding the ability for black voters in North Carolina to participate in the political process.[66] In particular, the Fourth Circuit recognized that race and politics were inextricably linked[67] and that both conventional wisdom and data regarding voting patterns in North Carolina demonstrated that racial bloc voting continues to be a particular phenomenon in North Carolina's electoral process.[68]

This historical and modern day framing of North Carolina's status as a racially polarized electorate framed the *Arlington Heights* analysis for the Fourth Circuit. It went to great lengths to criticize the district court for failing to reconcile the history of racial discrimination with the evidence of racial impact and the claims of discriminatory intent.[69] This was a recurring theme. It examined the former of these issues through exploring in detail North Carolina's history regarding racial discrimination under its Section 5 experience and pending lawsuits regarding racial gerrymandering.[70]

The panel then examined the latter issue through a detailed parsing of the history of the passage of the omnibus voting regulations bill.[71] It noted that the effort to pass the bill took place almost immediately after the decision in *Shelby County*, suggesting a discriminatory motivation to pass the law.[72] The court then emphasized that the bill was considered in special session and that the rules and practices which took place during the special session deviated from the basic practices of the legislature in such a way as

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to benefit a certain political party.)") (citing Anderson v. Celebrezze, 460 U.S. 780, 792–93 (1983)).

64. *McCrory*, 831 F.3d at 222.
65. *Id.* at 225.
66. *Id.*
67. *Id.*
68. *See id.* at 229–30.
69. *Id.* at 214.
70. *Id.* at 214–19.
71. *Id.* at 230.
72. *Id.* at 229.

one could read the context as a decision being made in a fly by night manner.[73] While there were no particular rule changes, the deviations from the rules were deemed to be extraordinary in terms of the procedures used to pass these laws and that the ultimate presentment and approval of these laws by the governor took place in such a way that it raised the concern whether there was adequate debate around these laws or adequate knowledge by the public in order to make public opinion known on whether or not passage of these laws was in line with the people's political interest.[74]

In addition to these procedural concerns, the court found that in considering the substance of the deliberations, there was sufficient evidence from which to infer targeting of African Americans in its deliberations.[75] It noted that the district court had acknowledged that one of the stated purposes of the bill was to move the voter qualification laws "back to the way it was" prior to when the Republicans had control of the legislature.[76] But rather than allowing this reason to serve as sufficient justification, the panel went on to explain that this political gamesmanship explicitly targeted the means to register and vote upon which African Americans most clearly relied.[77] The opinion explained that the proffered reasons for the election law changes—particularly the Sunday voting changes—hinged on the discrepancies in hours and the fact that the counties with more Sunday voting were predominantly African American.[78] This led Judge Motz to conclude that "the State's very justification for a challenged statute hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise."[79]

In looking at that pattern, the Fourth Circuit found that there was enough circumstantial evidence to suggest that several of the *Arlington Heights* factors were met.[80] The court noted that the radical change in positions between the efforts regarding voting in the preclearance regime and those efforts post-*Shelby County* raised concern.[81] In addition to the enormity and sweeping nature of the bill, the court looked at commentary in the press regarding attitudes of political leaders regarding race.[82] Notably, the Fourth

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73. *Id.*
74. *Id.* at 228.
75. *Id.* at 225–26.
76. *Id.* at 226.
77. *Id.*
78. *Id.*
79. *Id.* at 226 (emphasis in original).
80. *Id.* at 231.
81. *Id.* at 215–20.
82. *Id.* at 229 n.7.

Circuit quoted at length the comments of Don Yelton, former Republican Party chair for Buncombe County, North Carolina, where Mr. Yelton expressed what could be called animus regarding the ability for African Americans to vote and the need for passage of voter identification laws.[83]

These circumstances taken as a whole led the Fourth Circuit to find that there was adequate evidence of discriminatory intent in the passage of the 2013 omnibus voting regulations bill. And the Fourth Circuit criticized the district court for noting in significant places the fact that there were disparities regarding access because of socioeconomic factors, but failing to bring that analysis to bear in finding that there is an inference of discrimination.[84]

The Fourth Circuit also dismissed the government's proffered interest in preventing fraud and ensuring election integrity.[85] The Fourth Circuit, as other courts have similarly found, had concluded that there was no actual evidence on the record of threats to election integrity or substance regarding the idea of voter fraud, and moreover, there was actual evidence of racial animus, thus distinguishing *Crawford v. Marion County* from this case.[86] Moreover, the court analyzed the voter identification requirement as both over-broad and under restrictive in relation to its proffered goal.[87] Additionally, the court rejected arguments regarding the legitimacy of restrictions on early voting and same-day registration because the General Assembly had rejected the policy-driven advice of the State Board of

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83. *See* Joe Coscarelli, *Don Yelton, GOP Precinct Chair, Delivers Most Baldly Racist Daily Show Interview of All Time*, N.Y. MAG. (Oct. 24, 2013), http://nymag.com/daily/intelligencer/2013/10/don-yelton-racist-daily-show-interview.html. Mr. Yelton testified before the North Carolina House Rules Committee that the ID requirement would "disenfranchise some of [Democrats'] special voting blocks [sic]," and that "that within itself is the reason for the photo voter ID, period, end of discussion." *McCrory*, 831 F.3d at 229 n.7. The Fourth Circuit also noted that Mr. Yelton said, "If [SL 2013-381] hurts the whites so be it. If it hurts a bunch of lazy blacks that want to government to give them everything, so be it." *Id.*

84. *McCrory*, 831 F.3d at 232 ("In sum, while the district court recognized the undisputed facts as to the impact of the challenged provisions . . . it simply refused to acknowledge their import."). In particular, this analysis relies on the district court's acknowledgement of disparate socioeconomic status for African Americans but its dismissal of this disparate status as having created a vulnerability for such African Americans. I have argued that this precise kind of political vulnerability, and the discrimination to which it may lead, ought to be a particular situs of civil rights enforcement. *See* Atiba R. Ellis, *Race, Class, and Structural Discrimination: On Vulnerability Within the Political Process*, 28 J. OF CIVIL RIGHTS ECON. DEVELOPMENT 33 (2015).

85. *McCrory*, 831 F.3d at 235–36.

86. *Id.* at 231.

87. *Id.* at 234–36.

Elections.[88] Ultimately, the court found that "the challenged provisions in SL 2013-381 constitute solutions in search of a problem."[89] Accordingly, the panel struck down the law.[90]

IV. THE UNCERTAIN FUTURE OF *MCCRORY* AND POSSIBLE SUPREME COURT REVIEW

The future of this case remains to be seen. The immediate effect of the ruling was to enjoin moot the voter identification provision's early voting provisions and limits on registration provisions for the 2016 election, even though some argued that the voter suppression nonetheless occurred even with the Fourth Circuit's injunction in force.[91] This finding survived a petition for a stay of the injunction because a divided Supreme Court declined to stay the Fourth Circuit's order prior to the 2016 general election.[92] Thus, at the time of this Article, the appeal of the decision by the State of North Carolina is currently pending. However, the election of 2016 gave the Democrat Roy Cooper the governorship and Democrat Josh Stein the office of Attorney General.[93] It is conceivable that the Governor and Attorney General may choose to rescind Governor McCrory's appeal of this decision.[94] While this would conceivably end this litigation, it is also possible that the Republican-controlled legislature itself may continue the appeal before the Supreme Court.[95] It is simply unclear at this point whether the petition for certiorari currently before the Supreme Court will go forward.

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88. *Id.* at 237.

89. *Id.* at 238.

90. To the extent that there was a dissent in the opinion, it revolved around what the appropriate remedy. The majority of the panel determined that the omnibus voting law ought to be immediately enjoined. Judges Wynn and Floyd determined that the constitutional infirmity ought to be remedied immediately because the fact that it had been done with discriminatory intent made it infirm *ab initio*. Accordingly, the mandate regarding the law was put into immediate effect. Judge Motz dissented on the basis that an immediate disablement of the law would be inappropriate within several months of the actual election.

91. Editorial, *Voter Suppression in North Carolina*, N.Y. TIMES (Sept. 8, 2016), https://www.nytimes.com/2016/09/08/opinion/voter-suppression-in-north-carolina.html?_r=0.

92. North Carolina v. N.C. State Conference of the NAACP, 137 S. Ct. 27 (2016).

93. North Carolina 2016 Elections, BALLOTPEDIA (Nov. 8, 2016), https://ballotpedia.org/North_Carolina_Attorney_General_election,_2016.

94. Mark Binker, *Cooper Not Tipping Hand on Whether He'll Withdraw NC Voter ID Appeal*, WRAL.COM (Feb. 2, 2017), http://www.wral.com/cooper-not-tipping-hand-on-whether-he-ll-withdraw-nc-voter-id-appeal/16495766/.

95. *Id.*

Nonetheless, this was a clear victory for voting rights advocates during the 2016 election cycle. And even though this case may or may not be reconsidered by the Supreme Court, the principles it articulated will give policymakers and analysts of the law of politics much to consider in the future. Probably the key idea that will influence voting rights policy going forward is the Fourth Circuit's analysis of discriminatory intent.

Certainly, the North Carolina legislature left itself open to critique by its fly-by-night approach to the passage of the omnibus voting bill. The court made clear its substantial concern for the procedural irregularity that underlies the North Carolina General Assembly's actions.[96] But even more telling was the court's approach in determining whether race was an impermissible motivating factor in passage of the law.

This problem has dominated not only the time of the courts but the time of scholars as well. Of course, Section 2 of the Voting Rights Act was designed to offer a broad remedy against racial discrimination in voting. The end goal, as has been stated by many, has been to eliminate racial bias in the administration of the voting process (on both a structural and an individual level). But even from its beginning, Section 2 has been critiqued, as Christopher Elmendorf has explained, as "utterly opaque, likely to worsen racial conflict, and probably unconstitutional (because inadequately tethered to the prevention or remediation of actual constitutional violations)."[97] These critiques have had the effect of, among other things, squarely raising the question for scholars and courts as to what, exactly, constitutes discrimination on the basis of race.[98] Indeed, in Elmendorf's account of Section 2, the ultimate focus is to ferret out impermissible race-based decision-making by the majority in a particular jurisdiction.[99]

NAACP v. McCrory focuses us on a particular aspect of this problem: how to determine whether racial discrimination that correlates with party ambition ought to be actionable under Section 2. This race-or-party dilemma

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96. *McCrory*, 831 F.3d at 214–30.

97. Christopher S. Elmendorf, *What Kind of Discrimination Does the Voting Rights Act Target?*, 160 U. PA. L. REV. PENNUMBRA 357, 357 (2012) [hereinafter Elmendorf, *What Kind of Discrimination*]. *See also* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377 (2012).

98. Guy-Uriel E. Charles, Response, *Section 2 is Dead: Long Live Section 2*, 160 U. PA. L. REV. PENNUMBRA 219 (2012); Elmendorf, *What Kind of Discrimination*, *supra* note 97, at 377. For more dialogue between Elmendorf, Charles, and Luis Fuentes-Rohwer, see Luis Fuentes-Rohwer, Response, *Justice Kennedy to the Rescue?*, 160 U. PA. L. REV. PENNUMBRA 209 (2012), which raises a number of substantial questions about how Section 2 should be properly understood. These questions take heightened relevance today in light of litigation like that in *McCrory*.

99. *See* Elmendorf, *What Kind of Discrimination*, *supra* note 97, at 363.

lies at the heart of the court's reasoning, and, as I will argue, will become a focal point for future Supreme Court jurisprudence in this area.

When substantial blocs of voters who are all of the same race end up almost uniformly voting for the same political party, is it a question of whether a particular racial intent informed the making of the particular political choice, or is it that the political choice was the means to effect a racially motivated end? This dilemma had been forecasted several years before by scholar Richard Hasen.[100] He helpfully contrasts the period of backlash against African American voting success in the late 1890s with the trajectory that this litigation took.[101] In this comparison, he sketches out how the framing of the consideration of such a law like North Carolina's voting qualifications statute as one that is about "party competition" or otherwise not related to race, the regulation may be given deference.[102] But if such a law is framed as one that is about "race", it will not be given deference.[103] Hasen argues that this dichotomy fails to take into account the inherent comingling of race and party given the behavior of voting blocks.[104] As such, Hasen argues for an abolition of the dichotomy and instead he advocates for "an equal protection standard which requires substantial evidence justifying a burden on voters before a law would be considered constitutional."[105]

While Hasen's solution would have the benefits of desiring substantial evidence-based justifications for election law changes that disenfranchise, a concern shared by a number of election law scholars,[106] Hasen's solution falls within the ambit of discouraging discussions about the interrelationship

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100. *See* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 58–62 (2014).

101. *Id.*

102. *Id.* at 61. We have seen such effects, as Hasen has pointed out, in the race-neutral considerations of voter identification laws under the *Crawford v. Marion Co.*, 553 U.S. 181 (2008), standard under the Fourteenth Amendment. *See, e.g.*, Atiba R. Ellis, *A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship*, 43 SW. L. REV. 549 (2014) (describing a deferential utilitarian balancing that prioritizes states interests over generalized voters' interests in participation).

103. Hasen, *supra* note 100, at 61.

104. *Id.* at 69.

105. *Id.* at 72.

106. *See, e.g.*, Heather K. Gerken, *The Invisible Election: Making Policy in a World Without Data*, 35 OHIO N.U. L. REV. 1013 (2009); JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD (2007); SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2006). *See also generally*, Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879 (2014) (reviewing the consequences of detachment from an evidence-based analysis).

between race and politics in a way that falls within a post-racialism fallacy by acknowledging the existence of the interrelationship of race and politics but failing to address it in its own terms due to a desire to frame the terms of the discussion in race-neutral ways. I explore this in my own work and raise the concern that this period of the modulation of race-conscious equality has occurred precisely because we decline to recognize race as a measuring point for equality—particularly political equality—in modern society.[107] Put another way, it is the normative aspiration of colorblindness coupled with the belief that the race-conscious ends of integration and formal equality have been achieved that is the driver for the current period of retrenchment by the Court.

The Fourth Circuit's view as illustrated by *McCrory* is to work within existing doctrine and explicitly view the existence of racialized voting and its consequences as a given. It is arguable that the Fourth Circuit's analysis and its pointer that race and party are inextricably linked is an effort to fix that analysis by drawing a bright line by which partisans cannot unduly manipulate the political process given the scope of the effects that that manipulation might have. By that, I mean the Fourth Circuit seems to be sending the message that manipulation of particular racial groups in order to effect a political end can only go so far and with knowledge of that particular end then one must then be subject to the further regulation demanded by the Voting Rights Act. Race ought to remain the third rail of the law of politics.

As we saw in the facts in *McCrory*, the court was strongly persuaded by the fact that the general assembly, in analyzing the impact of its proposed voting changes, asked specifically for evidence regarding African American voting patterns. By focusing on such voting patterns, the general assembly was apparently informed that those voting patterns were implicated by the desire for early voting and the disparate impact on African Americans regarding voter ID. The Fourth Circuit focused very much on the fact that

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107. Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789, 838 (2015). In this piece, I offer an account of *Shelby County* that reads the case as a post-racialist narrative that is at odds with the reality of voter suppression, as *McCrory* illustrates. *See id.* at 839–42. While Hasen and other scholars tend towards a universalist view in part to persuade the Court that has shown disdain for race-conscious voting rights remedies, *see, e.g.*, Charles, *supra* note 98, at 226 ("Conceptually, I am increasingly attracted to a universal, as opposed to a race-based, approach to thinking about electoral inequality."), this runs the risk of normalizing racial hegemony rather than seeking a more nuanced account that locates racial oppression along with other forms of oppression that are historically grounded and continue to have operative influence. Indeed, *McCrory's* focus on race combined with the socioeconomic effects that make possible the voter suppression at question here illustrate my point.

with this data in mind, all of the vulnerable areas demonstrated by the report were areas that the law passed by North Carolina General Assembly focused on. The Fourth Circuit noticed that North Carolina, "with surgical precision", changed the law to target African American voting practices.[108]

Thus, when one puts together the notion that race and voting are inextricably linked and the fact that when it came to voting practices as analyzed by race, the North Carolina General Assembly focused on African American voting practices. The underlying policy message is that legislatures must take significantly greater care when it comes to analyzing these types of laws and that legislatures implementing these types of laws had to take such due care is the ultimate thrust of the opinion. This analysis rejects the race and party dichotomy given the evidence placed on the record. The case thus illustrates what a lack of due care standard is in relation to the unavoidable racial components of voting practices. A knowing disregard of such due care is the ultimate violation of the Voting Rights Act and of the Fourteenth Amendment. And this kind of disregard can exist even if an expressly racist attitude is not announced on the record.

This sort of analysis would seem consistent with cases like *Gomillion v. Lightfoot*[109] where the practices accompanied with the district's intent and this notion of lack of due care seemed to dominate what the political process set out to do. This transitive intent would seem to be problematic, however, in cases where the proof of motivation is less than clear, even by a circumstantial measure. This can be seen by comparing *McCrory* with Fifth Circuit's recent decision in *Veasey v. Abbott*.[110] That case addressed the 2014 Texas voter identification provision passed in the wake of *Shelby County*.[111] There, a majority of the Fifth Circuit *en banc* agreed with the district court that a disparate impact on the basis of race existed in regards to Texas voting changes, but this majority fractured in regards to whether discriminatory intent was findable on the evidence presented.[112]

The Fifth Circuit majority fractured around the question of whether the evidence that was presented was actually viable.[113] The majority fractured as to whether the evidence was sufficient to support a finding of discriminatory intent.[114] A unified dissent of the Fifth Circuit demanded that evidence be

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108. *McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).
109. 364 U.S. 339 (1960).
110. 830 F.3d 216 (5th Cir. 2016).
111. *Id.*
112. *Id.* at 225 n.1.
113. *Id.*
114. *Id.*

more in depth in regards to the Texas voter ID litigation.[115] The various dissents demanded that there effectively be proof of some sort of agreement or motivation that ranged towards what would be tantamount to a conspiracy geared towards disenfranchising African American and Latino voters in Texas.[116]

The Fourth Circuit's opinion does not suffer from such similar coherence concerns regarding evidentiary standards. More telling is a comparison of the two premises of the opinion. Obviously, the Fourth Circuit began from the concept that race and voting were inextricably linked and that this inextricable linked-ness defined how to view the issues, where the Fifth Circuit, in contrast, did not agree on this beginning premise. Indeed, some judges took this as a beginning but the dissent vociferously argued that the danger of accusing government entities of acting on the basis of race in violation of the constitution was highly dangerous and violated democratic norms.[117] This type of analysis would eviscerate the ability for courts to mediate claims regarding race, which in and of itself would be quite problematic. Thus the Fifth Circuit's precedent would seem to reveal the tension between notions of colorblind jurisprudence and notions of carrying out the Fifteenth Amendment's command to prevent discrimination on the basis of race.

It is difficult (or impossible) to analyze discrimination on the basis of race if such claims are so dangerous that they should not be made lightly and if moreover that such claims ought to and can only be brought if there is open and outright proof of a conspiracy to discriminate on the basis of race. The problem then with the dissenting Fifth Circuit opinions is that it raises the standard too high for bringing such claims. In contrast, the Fourth Circuit's opinion on the exact same type of issue and its beginning premise would seem to be in line with where current reality (and the law) regarding race and democracy is. For example, the Supreme Court had recently in *Alabama Legislative Black Caucus v. Alabama*[118] reiterated that the *Shaw v. Reno*[119] line of cases that subject heightened scrutiny to changes regarding electoral districts made solely on the basis of race was still a viable line of

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115. *Id.* at 280.

116. *Id.* at 281 (Jones, J. dissenting) (by allowing the discriminatory intent claim to go forward, "the majority fans the flames of perniciously irresponsible racial name-calling"); *Id.* at 325 (Clement, J., dissenting) ("The plurality also overlooks the total absence of direct evidence of a discriminatory purpose and the effect of plaintiffs' failure to unearth such evidence—despite repeated assertions that such evidence exists.").

117. *See* text accompanying n. 116.

118. 135 S. Ct. 1257 (2015).

119. 509 U.S. 630 (1993).

precedent.[120] This would suggest that the heightened scrutiny where race is effected is still viable. Moreover, against this context, Section 2 of the Voting Rights Act and its underlying doctrine would also seem to be in effect—at least until the next iteration of the Roberts Court considers these issues.

V. CONCLUSION

Given all of these principles, then, the Fourth Circuit's decision in *McCrory* is in line with the ultimate intent of Voting Rights Act jurisprudence. It is fair to say, however, that there are those parties who think that even this jurisprudence is out of line and does more damage to the law than good for the law. As I have discussed above, commentators have critiqued the entire enterprise of using race conscious remedies in order to effect change in regard of the law of politics.

Certainly a number of voices on the Court who have until this point been in the minority have sought to limit voting rights jurisprudence to open an outright denials of the right to vote and not to claims which, by their disparate impact, would serve to abridge the right to vote or premise denials based on disparate impact.[121] Others have argued that in light of *Crawford v.*

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120. *Alabama Legislative Black Caucus*, 135 S. Ct. at 1260.

121. This is to say that a majority of the Court has consistently ruled to constrain the scope of congressional authority under the Voting Rights Act, but at least two justices have openly argued in the recent past that such constraint does not go far enough. This is clearly illustrated in *Shelby County*. Chief Justice Roberts, in striking down Section 4(b) of the Act, premised this action on the view that congressional action regarding the coverage formula had failed to calibrate the coverage of Section 5 for current needs for voting rights enforcement, thus refuting Congress's judgment that the full scope of Section 5 was necessary. *See* Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) ("Congress could have updated the coverage formula [in 2009], but did not do so. Its failure to act leaves us today with no choice but to declare [Section] 4(b) unconstitutional."). This minimalist position in and of itself disrupted Congress's power in legislating around voting rights as described above in this Article. However, in concurring with this judgment, Justice Thomas offered a broader rejection of the Voting Rights Act. He argued that by merely limiting this finding to the constitutionality of the coverage formula, the Court had avoided ruling on what he views as the need to find Section 5 unconstitutional. *See id.* at 2631 (Thomas, J. concurring). *See also* Northwest Austin Municipal Dist. No. 1 v. Holder, 557 U.S. 193, 212 (2009) (Thomas, J., concurring). Moreover, Justice Thomas's longstanding view that the Voting Rights Act as currently interpreted is unconstitutional reaches beyond the scope of Section 2. *See, e.g.*, Holder v. Hall, 512 U.S. 874, 891 (1994) (Thomas, J., concurring) (joined by Scalia, J.). As I argue below, it is foreseeable that this view could receive a majority of votes from the Court.

Compare this with the view of Justice Ginsberg (joined by Justices Souter, Kagan, and Sotomayor) that heightened voting rights regulation by the federal government is needed to thwart state-level efforts at voter suppression. See *Shelby County*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting). Moreover, she argued that this was well within the authority granted

Marion County,[122] that provisions regarding heightened regulations ought to be subject to the equivalent of purely rational basis treatment, and because of that use of regulations like the Voting Rights Act tend to stymie the ability for protecting election integrity.[123]

This view—that election integrity is endangered by race-conscious rules—is specious. It is as specious as the existence of evidence of dangers to election integrity based on non-existent voter fraud. They serve to misdirect our concern from actual threats to election integrity including problems of voter registration, problems with election administration regulation and the problems that come from interference by parties outside of the American political community. But as this Article has acknowledged, the former concern about the underlying policy regarding race conscious election law remedies is currently an open question that awaits a ninth Justice to resolve it for the foreseeable future.

Indeed, the decision in *McCrory*, in and of itself, is a product of the tied Supreme Court's inability to resolve deeply divisive issues due to its lack of a ninth Justice. However, with the election of Donald J. Trump as President of the United States and the Senate continuing to be controlled by the Republican Party, a Justice of Scalia's ilk will likely be appointed as the next Associate Justice of the United States. This reconstituted Roberts Court may well be disposed to being skeptical of the use of race conscious remedies in election law and thus *McCrory*, if it is appealed and argued before the Supreme Court on its merits, or similar cases, may end up being delimited in a way that would tend to be more conservative. What is more likely is that *Veasey v. Abbott*, once it's resolved and right for merits adjudication by a newly constituted Supreme Court, will delimit this analysis regarding intentional discrimination in election law.

However, there is a plausible theory for a different approach given that Justice Kennedy and the liberal justices did agree in other cases regarding race conscious remedies that the law should be treated as correct in regards to affirmative action and that considerations for reversing such law ought not to prevail. Thus, there is the potential that the five justice majority that coalesced in *Fisher* too may very well see that the same sort of rationale

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to Congress by the Fifteenth Amendment, and thus to strike down Section 4(b), and thus nullify Section 5, was beyond the scope of the Court. *Id.* at 2636–39.

122. 553 U.S. 181 (2008).

123. Justice Scalia (joined by Justices Thomas and Alito) in *Crawford* argued that under the Fourteenth Amendment, voting regulations that do not significantly increase the burden of voting should be presumed to be constitutional, suggesting a rational basis level of deference to such regulations. *See id.* at 209 (Scalia, J. concurring).

ought to apply in race conscious law of democracy cases.[124] Thus, the only way that a ruling like *McCrory* would continue to stand is if the law it is based on is deemed well settled and as a modest extension of *Arlington Heights* within the Section 2 context. It would then be up to litigators arguing this case before the Court and arguing future cases like it to find this zone of settled law as a means by which to determine what arguments would persuade Justice Kennedy and ensure that he, along with the liberal justices, would uphold a decision in this regard.[125]

The reality is that short of the Governor of North Carolina withdrawing the case, the risk of reversal of *McCrory* remains high. This opinion may very well be remembered as the high water mark of an interregnum created by the deadlock of the Supreme Court lacking a functional majority. History may reveal that a decision like *McCrory* may ultimately be an aberration in the otherwise conservative approach that courts tend to take in imputing bad legislative intent to brace conscious action. On the other hand, the decision may ultimately serve as a roadmap in terms of how to find and combat such legislative intent in election law.

At the end, I remain an optimist. If the notion of heightened concern in regards to race as informed by the enduring existence of racialized socioeconomic disadvantage as articulated in *McCrory* takes purchase, it will give legislatures and judges everywhere that are considering electoral systems or other policies that have a racial component great pause in considering how to go forward with those changes. Such policymakers will have to balance the political motivations with the concern for not running afoul of the constitution in regards to its race conscious rules regarding election law. In an increasingly diversifying America where today's majority will not last for longer than this generation, the need for attention to this concern is becoming more and more necessary.

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124. See Fisher v. University of Texas, 136 S. Ct. 2198 (2016), where a five-justice majority in an opinion authored by Justice Anthony Kennedy and joined by the liberal justices upheld race-conscious affirmative action policies in higher education against Fourteenth Amendment challenge.

125. *Cf.* Fuentes-Rohwer, *supra* note 98 (arguing that the ultimate course of Section 2 jurisprudence will rely on shaping arguments that would appeal to Justice Kennedy as the "swing" justice of the Court).

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