

EVISCERATING THE VOTING RIGHTS ACT AND MORAL AUTHORITY: FREEDOM TO DISCRIMINATE COMES WITH A PRICE

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INTRODUCTION

World power shifted after World War II. Europe, the former epicenter of world power had suffered severe economic trauma, with many countries finding both their infrastructures and financial institutions in dire straits.¹ The powerful nations of the United Kingdom, France and the Soviet Union suffered tremendous human and economic devastation.² However, in spite of the loss of lives on the battlefield, one nation seemed to emerge unscathed from the war and that was the United States of America. Post World War II found an America where business was booming. Both science and technology were on the rise, and the developing nation was on its way to becoming a world super power.³ Spreading democracy and the freedoms implicit therein,

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¹ Rudiger Dornbusch, Wilhelm Nolling and Richard Layard, *POSTWAR ECONOMIC RECONSTRUCTION AND LESSONS FOR THE EAST TODAY*, 197-199 (MIT Press, 1993).

“When World War II ended, more than 40 million people in Europe were dead by violence or starvation.” *Id.* 197.

Economic disaster and extreme poverty reigned in Europe by the close of World War II in 1945. Industrial production was low, huge numbers of people were unemployed and thousands were homeless. In Germany alone, around 25 percent of all urban housing had been destroyed, and gross domestic product was down by a staggering 70 percent. Millions were starving. Communist parties, encouraged by the poverty and desperation of most European citizens, had become a significant presence in the governments of Italy and France by 1947. <http://curiosity.discovery.com/question/european-economic-conditions-after-wwii>. *See also* World History from Discovery

² James Ciment, Kenneth Hill, *ENCYCLOPEDIA OF CONFLICT SINCE WORLD WAR II*, 5 (Routledge, 2012).

³ Richard R. Nelson, Gavin Wright, *The Rise and Fall of American Technological Leadership: The Postwar Era in Historical Perspective*, *JOURNAL OF ECONOMIC LITERATURE*, Vol 30, No. 4 p. 1931 (Dec. 1992).

EVISCERATING THE VOTING RIGHTS ACT AND MORAL AUTHORITY: FREEDOM TO DISCRIMINATE COMES WITH A PRICE

became the hue and cry of American leaders.⁴ Thomas Carothers, in his book entitled *Aiding Democracy Abroad: The Learning Curve* stated, “United States officials of the postwar period emphasized democracy promotion as they formulated a policy toward a vanquished Japan and Germany and then framed the emerging cold war as a struggle to preserve ‘the Free World.’”⁵ The concept of American exceptionalism was once again on the rise and the country was touted as the model for a vibrant society where capitalism and expanded freedoms co-existed with a synergy to be emulated and replicated by societies worldwide.⁶ It was time to ramp up the exportation of America’s most valuable asset, democracy. However, there was a glaring problem with this exceptional nation which interfered with the notion of America as a democratic utopia and a world super power, the United States was actively engaged in de facto and de jure segregation with a form of racial apartheid.⁷ Black citizens who had been born in the United States and had lived there, in some cases for centuries, were not afforded the same brand of democracy that the country hoped to export to other nations. A system of racial chattel slavery had morphed into a system of Jim Crow and a “separate but equal” society for Blacks across the nation. Because of this glaring blemish on the country, the United States lacked the moral authority to criticize the forms of government abroad which were dictatorial, oppressive, and even sometimes brutal to its citizens when she, herself, condoned a dual system of citizenship within the confines of its constitutional structure.⁸ This phenomenon is commonly called hypocrisy.

But in 1954, the country’s reputation was saved by the NAACP Legal Defense Fund, Thurgood Marshall, and countless other civil and human

⁴ THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE*, 3 (Carnegie Endowment for International Peace, Dec. 1999).

⁵ *Id.*

⁶ CHARLES MURRAY, *AMERICAN EXCEPTIONALISM: AN EXPERIMENT IN HISTORY*, 7-9, (Aei Press 2013). See also Ed Kilgore, *American Exceptionalism*, http://www.washingtonmonthly.com/political-animal-a/2013_07/american_exceptionalism045655.php. Kilgore wrote:

An unavoidable subject on every Independence Day is the extent to which patriotic Americans are expected to proclaim that the United States isn’t just our beloved homeland, or a rich and highly accomplished society, or a wonderfully diverse culture, or the site of vast natural beauty, or a polity that has long promoted values like freedom, equality and opportunity—no, it is also *uniquely* worthy of love and loyalty, and possessed of *unique* characteristics that give it a *unique* responsibility to make over the whole world in its image to the maximum extent possible. *Id.*

⁷ JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM*, 470, (2003).

⁸ *Id.* at 336. “One of the most salient features of the American imperial problem was that the United States had a color problem at home and therefore had to pursue a policy with regard to race that would not upset the racial equilibrium within the United States.”

**TOURO LAW JOURNAL OF RACE, GENDER, & ETHNICITY &
BERKELEY JOURNAL OF AFRICAN-AMERICAN LAW & POLICY**

rights activists who pushed the envelope and brought the case of *Brown v. Board of Education*⁹ before the Court just in time to restore the nation's newly enhanced world superpower credentials. *Brown purportedly* ended racial segregation in the field of education and set in motion a domino effect to end segregation in all aspects of American life. Black citizens were pulled into the embrace of the nation's bosom and once again elevated to the heights of personhood within the four corners of the United States Constitution.¹⁰ However, in reality, the true beneficiary of *Brown* was the U.S. government because *Brown* repaired the international reputation of the country as a place where all citizens could thrive and excel. In addition, it gave the U. S. the moral authority it needed to spread American-style democracy around the globe. The timing of this case was propitious for the country and the unanimous decision had more to do with image than morality. And although many jurisdictions did little or nothing to implement the decision in *Brown* for over twenty years, the case went a long way in rehabilitating the image of America and providing it the cover necessary to spread democracy. This is not to say that Black people did not and have not benefitted from *Brown*, but it does contend that those benefits were incidental to the huge benefits that inured to the country and positioned it to be deemed a global superpower.¹¹

The point of this essay is that on June 25, 2013, the United States Supreme Court unwittingly returned the United States to its post-World War II pre- *Brown* position of actively displaying social hypocrisy with its decision in *Shelby County v. Holder*.¹² Justice Roberts wrote the opinion and stated that key provisions of the Voting Rights Act were outdated and no longer needed and therefore, should be struck down. He added that Congress had not provided sufficient information to justify subjecting the states to certain provisions of the Act and that the country had changed.¹³ Although the Voting Rights Act only covers a relatively few states, the Court sent the message to states, both covered and uncovered by the Act, as well as to the entire world that you can suppress minority votes with impunity. This gutting of what has been called the most important piece of American legislation has tarnished the view of American democracy because the country, by failing to protect its electorate, once again lacks the moral

⁹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁰ The use of the phrase "once again" is purposeful since the Emancipation Proclamation and 13th, 14th, and 15th Amendments had previously done so.

¹¹ Franklin, *supra* note 7. Arguably, *Brown* went a long way to ameliorate the problem caused by the "color problem at home."

¹² *Shelby Cnty v. Holder*, 133 S.Ct. 2612 (2013).

¹³ *Id.*

EVISцерATING THE VOTING RIGHTS ACT AND MORAL AUTHORITY: FREEDOM TO DISCRIMINATE COMES WITH A PRICE

authority to criticize governments, which are dictatorial, oppressive, and even sometimes brutal to its citizens concerning the right to vote. If there are any doubts regarding this assertion, it is only necessary to read the words of Ecuador's President Rafael Correa in response to a telephone conversation with Vice-President Joe Biden on granting a request for asylum for Edward Snowden. President Correa responded:

Don't come lecturing us about liberty. You need a reality check. Don't act like a spoiled rude child. Here you will only find dignity and sovereignty. Here we haven't invaded anyone. Here we don't torture like in Guantanamo. Here we don't have drones killing alleged terrorist without any due trial, killing also the women and children of those supposed terrorists. So don't come lecturing us about life, law, dignity, or liberty. You don't have the moral right to do so.¹⁴

He could have added, "and we don't disenfranchise our citizens" to Correa's railing against the United States and the list would be complete. If Ecuador, which has not been a model of democracy itself, feels comfortable in lecturing the United States on democracy, the rest of the liberty-loving world has probably done a collective eye roll at the social implications of *Shelby County v. Holder*.

It is necessary to connect the dots between *Shelby County v. Holder* and the troubling history of voting in the United States to make the point that democracy and exceptionalism comes with a high price tag and the country must demonstrate that it has the moral authority to sell them around the globe. By eviscerating one of the most powerful laws enacted to insure and preserve the right to vote for minorities, the United States has not only sent a message to Blacks and other minorities about the value of their citizenship, but it has sent a message to the entire world about holding itself to the same high standards that it requires of other nations, and most importantly, it has sent a message on American-style democracy that might be distasteful to most and certainly not to be emulated.

¹⁴ The RealNews.com, May 21, 2013, *available at* http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=10225.

The Historical Treatment of the “Right” to Vote

The right to vote is the linchpin in assuring that the Constitution has meaning. The preamble proclaims, “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility...to ourselves...do ordain and establish this Constitution.” Those words are given meaning primarily through the electoral process. Voting is the primary way that we, as citizens of the United States, participate in forming that more perfect union, because it is the process in which representation is chosen.¹⁵

The right to vote is clearly the currency of a democracy, yet the United States, the putative paradigm for democracy has shortchanged many groups since the country’s inception. However, the disenfranchisement of the right to vote has been the longest lasting and the most invidious against Blacks and other minorities. The Founding Fathers, who along with their ancestors, had survived centuries of monarchs and fully understood the importance of a representative government formed on the basis of one man, one vote. They understood that voting bestowed upon citizens the political liberty to select those who would represent them in this “more perfect union.”¹⁶ Most importantly, they understood that the power of the vote was so determinative to shaping the fledging nation that they immediately proceeded to place parameters and limitations on this right. One needs only to look at the very first presidential election to substantiate this claim.

According to the 1790 census, the population of the United States was approximately 4 million.¹⁷ There were 2.3 million free persons and 700,000 slaves.¹⁸ Native Americans were not counted in the census, but numbered around 150,000 persons.¹⁹ In 1789, during the first presidential election,

¹⁵ Patricia A. Broussard, Amicus Brief in Support of Respondent in *Shelby Cnty v. Holder* at 7 (No. 12-96, 2013).

¹⁶ U.S. Const. pmb.

¹⁷ U.S. Census, available at <http://www.census.gov/population/censusdata/table-4.pdf>.

¹⁸ W. S. Rossiter, *A Century of Population Growth, From the First Census of the United States to the Twelfth, 1790-1900*, U.S. Census, available at <http://www2.census.gov/prod2/decennial/documents/00165897ch14.pdf>.

¹⁹ National Archives, *American Indians in the Federal Decennial Census, 1790-1930*. Available at <http://www.archives.gov/research/census/native-americans/1790-1930.html>.

Prior to 1900 few Indians are included in the decennial Federal census. Indians are not identified in the 1790-1840 censuses. In 1860, Indians living in the general population are identified for the first time. Nearly all of the 1890 census schedules were destroyed as the result of the fire at the Department of Commerce in 1921.

EVISCERATING THE VOTING RIGHTS ACT AND MORAL AUTHORITY: FREEDOM TO DISCRIMINATE COMES WITH A PRICE

38,818 Americans voted to select 69 electors who cast two votes each for one of the 5 candidates. It took 35 elector votes to win a majority. 38,818 was 1.3% of the counted population.²⁰ Although the 1789 election was prior to the enactment of the 12th Amendment which set out the Electoral College, the process of voting still relied upon the popular vote; thus, an extremely small percentage of the population single-handedly elected the first president under this much lauded Constitution. So much for "We the People." George Washington was able to win the presidential election with such small numbers because the pool of eligible voters was limited to White men with property.²¹ Catholics, Jews, Quakers, African American slaves, women, and Native Americans could not vote.²² Along with the requirement of owning property, there were poll taxes and also test on religion and literacy.²³ By 1840 property laws, poll taxes, literacy and religion tests are removed from the books, but still only White men could vote.²⁴ All of this is to say that the concept of disenfranchisement is one which is solidly present in early American voting and elections and the significance of these facts is to establish the idea that the right to vote has been both coveted and limited since the ratification of the Constitution.

At the end of the Civil War, the Civil Rights Act of 1866 granted citizenship to native-born Americans (but ironically excludes Native Americans) widening the circle of those who could vote and in 1870, the 15th Amendment established the right of Black male former slaves the right to

²⁰ United States Presidential Election Results, *available at* <http://uselectionatlas.org/RESULTS/>.

²¹ ALEXANDER KEYSSAR, *THE RIGHT TO VOTE, THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES*, 2 (2009).

²² CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY* (Princeton U. Press, 1968). *See also* *VOTING RIGHTS HISTORY, TWO CENTURIES OF STRUGGLE*, <http://www.crmvet.org/info/votehist.htm>.

Between the first Continental Congress in 1776 and adoption of the U.S. Constitution in 1787 the former colonies evolved into states, some of which barred Jews, Quakers, Catholics, and other "heretics," from voting or holding office. The 1778 Constitution of South Carolina, for example, stated, "No person shall be eligible to sit in the House of Representatives unless he be of the Protestant religion." The Delaware Constitution of 1776 stated that: "Every person who shall be chosen a member of either house, or appointed to any office or place of trust, before taking his seat, or entering upon the execution of his office, shall ... also make and subscribe the following declaration, to wit: *I, A B. do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.*"

²³ Congress Base, *Voting Guide: How To Cast Your Vote, Participate In Government And Have Your Voice Heard* (Jan 25, 2011), *available at* <http://congressbase.com/40/voting-guide-how-to-cast-your-vote-participate-in-government-and-have-your-voice-heard/>.

²⁴ KEYSSAR, *supra* note 21 at 24.

**TOURO LAW JOURNAL OF RACE, GENDER, & ETHNICITY &
BERKELEY JOURNAL OF AFRICAN-AMERICAN LAW & POLICY**

vote.²⁵ This era of post-Civil War Reconstruction is of vital importance because it is during this time that Whites in the South understood the full import of the right to vote and how politically dangerous the Blacks vote could be.²⁶ White Southerners quickly learned that Blacks would vote, that they would vote in a bloc, and that they would support each other, even when they disagreed. White Southerners were well aware of the fact that voting power in the hands of Blacks meant that White politicians would have to be responsive to an element of society which they despised. This was a period, which can be accurately depicted as Black Power Part 1. During this period, one-third of the delegates to the 1867 and 1868 constitutional conventions were Black.²⁷ In several states, Blacks were elected sheriffs, mayors, and prosecuting attorneys. They also filled many local posts and held many other jobs such as justice of the peace and superintendent of education.²⁸ However, the Hayes Tilden compromise led to a withdrawal of Union troops from the South and signaled the end of Reconstruction and many of the great strides that former slaves had made were lost.²⁹ What the South saw was that Blacks would use the power of the vote to empower themselves and to shape their political environments. Thus began one 11/2 centuries of voter disenfranchisement and intimidation, which provided the data and anecdotal history, which Congress used in initially enacting the Voting Rights Act.

After Reconstruction primarily in the South, but not limited to the South, Jim Crow laws were enacted and utilized to keep African-Americans from voting. These laws included, but were not limited to, poll taxes, literacy tests, fraud, all-white primaries and restrictive registration requirements.³⁰ There was also a great deal of physical violence, property destruction, and other economic pressures which were applied under the color of state law. The Ku Klux Klan became a major player in the commission of the violence

²⁵ U.S. Const. Amend. XV, § 1. The 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.

²⁶ Franklin, *supra* note 7, at 264.

The Reconstruction Act of 1867 imposed on the White South a regime more difficult to bear than defeat. Vast numbers of White Southerners were to be disenfranchised; Blacks and their allies, loyal Whites and those from the North who had apparently come to stay, were to enjoy the ballot...From the White Southerners' point of view, all power was to be placed in the hands of those least qualified to control their destiny.

²⁷ *Id.*

²⁸ *Id.* at 264-268.

²⁹ *Id.* at 281-286.

³⁰ *Id.* at 287.

EVISCERATING THE VOTING RIGHTS ACT AND MORAL AUTHORITY: FREEDOM TO DISCRIMINATE COMES WITH A PRICE

and intimidation used to keep African-Americans from voting.³¹ This voter intimidation continued under the color of law until and after the passage of the Voting Rights Act of 1965.

This truncated historical analysis of the total voting disenfranchisement that Blacks suffered between the end of Reconstruction and the enactment of the Voting Rights Act cannot adequately convey the depths of the disenfranchisement and injustice suffered by Blacks attempting to participate in the democracy with the political liberty afforded to their fellow countrymen and women. However, space will only allow for an overview of the circumstances, which dictated that a voting rights act be passed.

In a direct response to the Civil Rights movement led by Dr. Martin Luther King Jr. and others, The Voting Rights Act of 1965 was enacted.³² This Act, and all of its subsequent iterations, implemented the 15th Amendment by generally prohibiting discrimination in voting and thereby, protected the rights of millions to vote. The United States was once again rehabilitated and maintained its position as the land of the free and the home of the brave. The nation had come full circle and the world was sent the message that Black citizens are Americans with all of the rights and privileges of their white counterparts and the nation would use the full force of the legislative and judicial branches of the government to insure that “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”³³ The Act saw immediate results; in Mississippi, voter turnout among blacks increased from 6 percent in 1964 to 59 percent in 1969. Moreover, the full impact of the Act was felt when key provisions were added which gave pre-enforcement powers to the Department of Justice or a three-judge panel of the Federal District Court in the District of Columbia.³⁴ Since the United States had finally enacted laws and put in place processes and procedures to deal with the nagging baggage of voter disenfranchisement, it earned the moral authority to proceed to monitor democracy and voting in

³¹ Franklin, *supra* note 7, at 345-350. “Reconstruction left them no alternative but to submit to their old masters, a submission that made easier the efforts of Southern Whites to overthrow Reconstruction and restore a system based on White supremacy.” *Id.* at 271.

³² Pub. L. No. 89-110, 79 Stat. 437 (1965).

³³ *Id.* at § 2.

³⁴ The latter was designed to prevent presumed political bias by the presidential party in power.

**TOURO LAW JOURNAL OF RACE, GENDER, & ETHNICITY &
BERKELEY JOURNAL OF AFRICAN-AMERICAN LAW & POLICY**

the less enlightened nations of the world. This is not to say that the intimidation and disenfranchisement ended; clearly, it did not.

The Act was successful and, as evidenced by the legions of Section 5 pre-clearance actions prosecuted by the Department of Justice and the D.C. Federal Court, necessary to stop disenfranchisement which had gone unabated for centuries and has continued in many places. It has been touted by many as the one of the most effective pieces of civil rights legislation ever passed by Congress. Prior to the 2007 reissuance the Voting Rights Act, Wade Henderson, the former Washington Bureau director of the NAACP wrote:

The VRA has become one of the most successful civil rights laws in American history. In the 40 years since its passage, it has guaranteed millions of minority voters the equal opportunity to participate in elections and have their voices heard.... And the end of deliberately discriminatory at-large elections, as well as the creation of majority minority legislative districts, has created tremendous opportunities for racial and ethnic minorities to elect candidates of choice to thousands of federal, state, and local offices in all parts of the country.³⁵

Progress was being made under the Act, and then in June 2013, the United State Supreme Court rendered its decision in *Shelby County v. Holder* and struck a devastating blow against civil rights in the U.S. and against its own image abroad.

A Post *Shelby County v. Holder* World

The ink had barely dried on the Shelby County opinion, when jurisdictions, which have been covered by the Act, and thus prohibited from voter disenfranchisement and intimidation, enacted new restrictive voting laws and started enforcing legislation, which had been on hold.³⁶ Greg Abbott, the Attorney General of Texas, announced, “With today’s decision, the State’s voter ID law will take effect immediately. Redistricting maps passed by the Legislature may also take effect without approval from the federal

³⁵ Wade Henderson, *The Voting Rights Act of 1965: 40 Years After 'Bloody Sunday,' A Promise Still Unfulfilled* <http://www.civilrights.org/voting-rights/vra/2006/the-voting-rights-act-of-1965-40-years-after-bloody-sunday-a-promise-still-unfulfilled.html>.

³⁶ Michael Cooper, *After Ruling, States Rush to Enact Voting Laws*, New York Times, p. A9 (July 5, 2013). Cooper wrote:

Within hours, Texas officials said that they would begin enforcing a strict photo identification requirement for voters, which had been blocked by a federal court on the ground that it would disproportionately affect black and Hispanic voters.

EVISCERATING THE VOTING RIGHTS ACT AND MORAL AUTHORITY: FREEDOM TO DISCRIMINATE COMES WITH A PRICE

government.”³⁷ Both Mississippi and Alabama announced that they would begin enforcing voter ID laws, which were awaiting the approval of the federal government.³⁸ On July 26, 2013, North Carolina enacted the most restrictive voter suppression law in the country.³⁹ The Shelby decision has allowed many of the offending states with a history of discrimination to freely enact regressive voting rights laws, which dismiss the capacity to vote and therefore, abrogate the right to vote. Such actions were predicted in an amicus brief submitted to the Court:

If Shelby County’s challenge is successful, the discouragement and suppression of the individual political liberty embodied in the right to vote will be proliferated and unabated by those who forcibly and discriminatorily place their own political and personal gains above those of others, specifically minorities. The sentiment that we have arrived at a post-racial society ignores contemporary realities that prove otherwise.⁴⁰

It is both this rush to enact legislations, which limits the right to vote for Blacks and minorities, and Congress’s willingness to acquiesce to this abrogation that places the country in a pre-*Brown* posture.

Lo and behold, despite Justice Roberts’s claim that the country had changed, Blacks clearly continued to face voting barriers in the states covered by the Act as well as states not covered by the Act.⁴¹ One of the solutions to reinstating viable voting protection laws lies within the purview of the U.S. Congress. Another is for the Justice Department to try and salvage the benefits of the eviscerated Act by suing under the remaining sections of the Act. Neither of these solutions can be utilized with immediate results and

³⁷ June 23, 2013 Statement of Attorney General Greg Abbott, *available at* official website. <https://www.oag.state.tx.us/oagnews/release.php?id=4435>

³⁸ Cooper, *supra* at note 36.

³⁹ HB 589 - an act to restore confidence in government by establishing the 2 voter information verification act to promote the electoral 3 process through education and increased registration of 4 voters and by requiring voters to provide photo identification 5 before voting to protect the right of each registered voter to 6 cast a secure vote with reasonable security measures that 7 confirm voter identity as accurately as possible. *See also* David Zucchini, *North Carolina Lawmakers Approve Sweeping Voter ID Bill* Los Angeles Times, *available at* <http://www.latimes.com/news/nationworld/nation/la-na-north-carolina-voting-20130727,0,2299545.story>.

⁴⁰ Amicus brief p. 21.

⁴¹ Trip Gabriel, *Pennsylvania Defends Law on ID for Voters*, NYT p. A10 (July 16, 2013). Pennsylvania is not covered by the Act, but has enacted a stringent Voter ID law and can justify doing so under the *Shelby County* decision.

**TOURO LAW JOURNAL OF RACE, GENDER, & ETHNICITY &
BERKELEY JOURNAL OF AFRICAN-AMERICAN LAW & POLICY**

will take political maneuvering to accomplish. In the meantime, the rest of the world is watching how the United States will handle this major setback to voting rights and democracy. Failure to act will certainly make the country more vulnerable to verbal lashings like the one that was given by Ecuador's President Correa.⁴² With the issues in Syria, Egypt and other nations where one of the key issues is democracy and the right to vote, does the U.S. government have the high ground to require nations to hold fair and democratic elections? When Texas, Alabama, North Carolina, Mississippi, Pennsylvania, and countless other states have enacted repressive voting legislation that has the purpose and effect of impeding the right of Blacks and minorities does the U.S. have the moral authority to be the putative world monitor of voting. Or, does America once again have a "Colored problem" as articulated by John Hope Franklin? ⁴³Just as the decision in *Brown* rehabilitated the image of the United States, *Shelby County v. Holder* has sent a loud and clear message to the rest of the world that the U.S. does not practice what it preaches. And just as the U.S. Government was the greatest beneficiary of the *Brown* decision, it is the biggest loser in *Shelby County v. Holder* because the country has proven itself to be exceptional, but not in a good way.

⁴² See Black Agenda Report, The US Cuba and Moral Authority, *available at* <http://www.blackagendareport.com/content/us-cuba-and-moral-authority>.

**EVISCERATING THE VOTING RIGHTS ACT AND MORAL AUTHORITY:
FREEDOM TO DISCRIMINATE COMES WITH A PRICE**

⁴³ Franklin, *supra* note 7.