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# THE PAST AS PROLOGUE: *SHELBY COUNTY V. HOLDER* AND THE RISKS AHEAD

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## Introduction

The Supreme Court's decision in *Shelby County v. Holder*[1] is a classic example of strict constructionist interpretation[2] used as an interpretative tool to strike down the integral component that many, not only those on the political left, view as the corner stone of the Voting Rights Act of 1965 (the "Act").[3] The crux of the majority ruling rests on the presupposition that the coverage formula in Section 4 applied against those covered jurisdictions in Section 5 of the Act was an antiquated formula.[4] However, the dissent

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[1] 133 S. Ct. 2612 (2013).

[2] The concept of Originalism became a part of national political consciousness because of Richard Nixon's campaign promise to appoint only "strict constructionists" to the Supreme Court. Bret Boyce, *Originalism and the Fourteenth Amendment,* 33 WAKE FOREST L. REV. 909, 910 at Footnote 2 1998(2009).

[3] 42 U.S.C. §§ 1973–1973aa-6 as amended by the Voting Rights Act Amendments of 1970 Public Law 91–285; Voting Rights Act Amendments of 1975 Public Law 94–73; Voting Rights Act Amendments of 1982 Public Law 97–205; Voting Rights Act Amendments of 2006 Public Law 109–246.

[4] 42 U.S.C. § 1973b. The Coverage formula states, "(b) Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register. The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the

criticized the majority in their wholesale disregard of Congressional fact-finding and research into continuing racial discrimination of the type the Act was drafted, and subsequently amended by Congress, to prevent.[5] The shift in the Court's deference away from the Congressional Record in Shelby stood a direct contradiction to the court's reasoning in *South Carolina v. Katzenbach* leaving many civil rights and social justice advocates bewildered.[6] The sense of foreboding is palpable and familiar in American legal history. For Shelby County, Alabama, the State of Alabama, and the covered jurisdictions where pre-clearance was initially mandated—this ruling was a long time in the making.[7] The legitimate fear, as posited by this article, is that *Shelby County* is the signal of a coming shift in the Supreme Court that will allow the strategic opening for the Deep South and other previously designated covered jurisdictions to roll back the progress made over the last 48 years in spite of (or because of) the more than 300 years that Blacks faced *de facto* and *de jure* barriers preventing the exercise of constitutionally guaranteed voting rights. In Part I, this article will explore the long standing historical tension about how to integrate freed slaves into American society. Part II will delve into Blacks' ability to vote and racial tension surrounding

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presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register."
http://www.justice.gov/crt/about/vot/42usc/subch_ia.php#anchor_1973b

[5] The Fifteenth Amendment States:

"Section 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.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Congress, whose power to enforce the Fifteenth Amendment has repeatedly been upheld in the past, is free to use whatever means are appropriate to carry out the objects of the Constitution." http://www.law.cornell.edu/constitution/amendmentxv. The Supreme Court has long established the principal that Congress has the authority to enact "all laws necessary and proper… in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 1, 18. In McCulloch v. Maryland, the principle that the Constitution granted Congress implied powers to implement the express powers of the Constitution and that State action should not bar the valid exercise of Constitutional authority at the Federal level, *See* 17 U.S. 316, 421 (1819).

[6] 383 U.S. 301, 303,309 (1966) (parenthetical needed).

[7] *See generally* http://www.justice.gov/crt/about/vot/sec_5/covered.php

this right in America. Part III will connect the transient nature of Black voting rights to racial minority status and posits that *Shelby County*, in the context of Supreme Court jurisprudence, is an expected outcome given the Court's inclination to revert to its jurisprudential mean viz-a-viz the state's rights doctrine[8] and this jurisprudential historical tradition is inherently both status quo oriented and predisposed towards the oppression of racial and ethnic minorities.[9] Part IV serves as a foreshadowing of the future should public opinion revert back to its historical central tendency.[10]

The Constitution of the United States was not drafted to protect all people within the geographical borders of the states.[11] Only land owning white males were the intended grantees of full Constitutional protection.[12] All other peoples were literally *Others* to be included begrudgingly under the penumbra of Constitutional protection via war, Constitutional amendments,

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[8] The Tenth Amendment of the U.S. Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" U.S.CONST. amend. X.

[9] Jefferson Davis, the President of the Confederate States of America, expressed the fundamental argument for States Rights and the subjugation of Black people when he said, "Resolved, That the union of these States rests on the equality of rights and privileges among its members, and that it is especially the duty of the Senate, which represents the States in their sovereign capacity, to resist all attempts to discriminate either in relation to person or property, so as, in the Territories--which are the common possession of the United States--to give advantages to the citizens of one State which are not equally secured to those of every other State." The Papers of Jefferson Davis, Volume 6, pp. 273-76. Transcribed from the Congressional Globe, 36th Congress, 1st Session, pp. 658-59 *available online at* http://jeffersondavis.rice.edu/Content.aspx?id=81. The argument Jefferson Davis articulated served as the basis for southern states to challenge federal laws that attempted to force state compliance.

[10] In statistical analysis, the central tendency refers to the degree of clustering of values in a distribution. Here, I am referring to the clustering of white public sentiment around a mean that defaults to its historical position, which has been one that marginalized Blacks and all Others. *See also* Eric Holder, *Transcript: Attorney general Eric Holder's speech to Morgan State University graduates*, *available at* http://www.washingtonpost.com/politics/transcript-attorney-general-eric-holders-speech-to-morgan-state-university-graduates/2014/05/17/d6b72284-ddd0-11e3-b745-87d39690c5c0_story.html ("Chief Justice John Roberts has argued that the path to ending racial discrimination is to give less consideration to the issue of race altogether. This presupposes that racial discrimination is at a sufficiently low ebb that it doesn't need to be actively confronted. In its most obvious forms, it might be. But discrimination does not always come in the form of a hateful epithet or a Jim Crow-like statute. And so we must continue to take account of racial inequality, especially in its less obvious forms, and actively discuss ways to combat it.").

[11] Prior to the adoption of the Thirteenth Amendment in 1865 slavery was constitutional. Further, there was no constitutional guarantee of equal protection under the law nor judicial limit on discrimination prior to the Fourteenth Amendment in 1868. *See e.g.*, State v. Post, 20 N.J.L. 368, 376 (1845) (The court found, "it has been often adjudged, both by the State and Federal courts, that slavery still exists; that the master's right of property in the slave has not been affected either by the declaration of independence, or the constitution of the United States.").

[12] ALEXANDER KEYSSAR, THE RIGHT TO VOTE THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 29-30 (2011) (Chronicling the national expansion of white male suffrage from with land owning and moving towards taxpayer or white males voting process).

political back room dealing, and judicial interpretations.[13] The inclusion of *Others* into the fold of legal protection under the Constitution has long been a reflection of the struggle with racial prejudice that United States civil society, political institutions, and subsequently the judicial system was forced to deal with to the detriment of anyone other than Anglo-Saxon white landowning males.[14] This battle began with the nation's earliest legal precedent[15] and the country continues to grapple with varying degrees of progress followed by political, then legal, retrenchment.[16] The progress and retrenchment seen via Supreme Court precedent can best be understood through the lens of the Court as the facilitator and conduit for the tensions that have existed in broad swaths of the country since its inception.[17] Legal scholarship has successfully categorized the decisions of the Supreme Court into manageable buckets of "Strict Construction" versus "Judicial Activist" interpretations.[18] This article posits that an additional explanation of the Court's action can be found outside of purely jurisprudential precedent and can be framed in the context of changing political moods across the country. [19] Future works will

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[13] *See* IAN LOPEZ HANEY WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 149, 156-57 (1996).

[14] *See id.*

[15] U.S. CONST. art. I, § 2, cl. 3. Congress was forbidden to end the slave trade before 1808. U.S. CONST. art. II, § 9, cl. 1. *See generally*, PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON (2d ed. 2001); Paul Finkelman, *How The Proslavery Constitution Led To The Civil War*, 43 RUTGERS L. J. 405 (2013); Albany Law School Research Paper No. 2012-2013. Available at SSRN: http://papers.ssrn.com/abstract=2243060.

[16] The history of the legal and political battle for Blacks to gain equal treatment via the law and such gains being subsequently systematically dismantled over time in favor of a color blind legal approach that has the effect of placing Blacks in the excluded, denied or underprivileged category that their original legal battle was designed to remedy. *See generally* Korematsu v. United States, 323 U.S. 144 (1938) (adopting of strict scrutiny for the government singling out and internment of Japanese, as a racial group, following the bombing of Pearl Harbor); Loving v. Virginia, 388 U.S. 9 (1967) (applying strict scrutiny to strike the Virginia law barring marriage between Black and white); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (applying strict scrutiny regardless of the racial context of the law); Grutter v. Bollinger, 539 U.S. 306 (2003) (ruling 5 to 4 in favor of the admission program at University of Michigan which used race as an admission factor); Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007) (ruling that any racial classification must be viewed using strict scrutiny). Since strict scrutiny is the most stringent form of review, a law will be upheld only "if it is necessary to achieve a compelling government purpose." *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) ("Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly tailored to accomplish that purpose.")

[17] *See generally,* Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform* (U of Chicago Law & Economics, Olin Working Paper No. 377, 2008), *available at* http://ssrn.com/abstract=1082055; Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

[18] *See generally*, Boyce, *supra* note 2.

[19] For example in discussing the Fourteenth Amendment, in *Plessy v. Ferguson*, Justice Brown, writing for the majority, said, "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have

seek to apply the analytical framework presented here beyond the realm of voting rights.

## I. The Perennial Debate Of Our Union

### A. The Political and Legal Status of Slaves and Their Descendants

> "One source of weakness is their members, the fact that they are a numerical minority; the second is their economic status, their position as the perpetual under-class; and the third is that, as a "discrete and insular" minority, they are the object of "prejudice"—that is, the subject of fear, hatred, and distaste that make it particularly difficult for them to form coalitions with others (such as the white poor) and that make it advantageous for the dominant political parties to hurt them—to use them as a scapegoat."[20]

The issue of race in the United States has been appropriately framed in the context of white over Black, or white over brown.[21] An institutionalized power dynamic cannot hope to be obfuscated in one swoop, it must be systematically and diligently targeted for dismantling. The Voting Rights Act of 1965 was, at the time, the latest in a string of attempts undertaken at the federal level to come to grips with the institutionalized oppression of Black people, as the perennial racial minority across the United States. The Act, as amended, in 1970, 1975, 1982, and most recently in 2006 has an overarching common thread, to wit, Congress going to great lengths to establish a congressional record of their review, deliberations and adjustments to the Act.[22] The deliberate preservation of the Congressional Record served as a key piece of the Supreme Court's analysis when challenges to the Act were mounted and the Court relied on the meticulous and deliberate process of Congress as a part of its reasoning for upholding the Act.[23] However, on June 25, 2013 something changed; neither the extensive

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been intended to abolish distinctions based upon color, or to enforce social, as distinguish d (sic) from political, equality, or a commingling of the two races upon terms unsatisfactory to either." [emphasis is the author's] 163 U.S. 537, 544 (1896). The Court is conveying its understanding of the Fourteenth Amendment within the context of the public sentiment of the day. *See generally*, Roberts v. City of Boston, 5 Cush. 198 (1850). (Massachusetts Supreme Judicial Court held that the school committee of Boston could provide for the instruction of colored children in separate schools).

[20] Owen Fiss, *Groups and the Equal Protection Clause,* 5 PHILOSOPHY & PUB. AFF. 107,152 (1976).

[21] *See* Harris *infra* note 70, at 122-24.

[22] *See* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006,* 33 J. LEGIS. 205 (2007).

[23] *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2635-37 (2013) (Ginsburg, J., dissenting) (noting

nature of the Congressional Record nor prior legal precedent mattered as the Supreme Court struck down the pre-clearance formula used to implement Section 5 of the Act while leaving the remainder of the Act in place.[24] The Courts ruling was a deft surgical strike upon the Act—a hallmark of the Court.[25] The technical basis of the Court's decision in striking down the coverage formula in Section 4(b) of the Act was on the basis that the Section violated the principal of equal sovereignty between the states.[26] The ruling was a complete and total defeat for those who have fought to gain and then preserve the protection of the right to vote.[27]

In her dissenting opinion, Justice Ginsburg expressed bewilderment at the Court's strict constructionist interpretation of the narrow question raised by *Shelby County* and the seeming eagerness of the Court to move away from its own majority reasoning in *South Carolina v. Katzenbach*.[28]

In *Katzenbach*, the Act prevented states' use of a "test or device" to impair a citizen's voting rights and gave the U.S. Department of Justice the ability to intervene into a covered state to investigate. The core question the court faced was whether the Act violated states' rights to implement and control their political election process. The Court upheld the Act and found that the enforcement clause of the 15th Amendment gave Congress "full remedial powers" to prevent racial discrimination in voting. The Court held also that the Act was a "legitimate response" to the "insidious and pervasive evil" which had denied Blacks the right to vote since the 15th Amendment's adoption in 1870.[29] Further, the Court specifically noted in its holding that each of the states that submitted briefs supporting the challenge of the Act's constitutionality had instituted a test or device by 1890 that was still in effect on the date of the ruling in 1966 and specifically designed to prevent Blacks

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the extent to which Congress reviewed the incidents of various devices used to reduce or deny voting access as a part of their reauthorization process).

[24] *Id.* at 22; *see also* note 1, *supra*.

[25] Indeed the Court often chooses to ignore certain legal challenges as unripe or to ignore legal questions presented altogether and answer those questions it sees fit; this article does not take issue with the Court's discretion. However, the fact that the Court has such authority is emphasized.

[26] *Shelby Cnty.*, 133 S. Ct. at 2630 (The court noted that nation has changed since *Katzenbach* was decided and noted that the dissent "refuses to consider the principle of equal sovereignty, despite the *Northwest Austin* Court's emphasis on its significance.").

[27] I draw an analogy to Maria Grahn-Farley's assertion that "For black people, the memory of slavery in the United States is a disempowering memory, even if the person in the present lives under circumstances above a white person. The memory of slavery for Black people is always proof that total and complete defeat is possible based on the color of the skin.", 53 DEPAUL L. REV. 1215, 1221 (2004). Here, the Court's ruling serves as a similar reminder that no gain by Blacks under the law can truly be considered permanent.

[28] 383 U.S. 301 (1966).

[29] *Id.* at 309.

from voting while permitting white persons to vote.[30]

Many in the social justice community have been left wondering why the Court has forsaken them, on "the edge of hell in Harlem".[31] This article will offer a socio-historical perspective or analytical construct within which to frame the Court's majority decision.

## B. The Importance of *Plessy v. Ferguson* in Maintaining the Legal Structure of Bondage

The seminal case, *Plessy v. Ferguson* serves as a unique historical perspective from which to view American jurisprudence.[32] Plessy was seven-eighths white and one-eighth Black.[33] In this case, the Court upheld a Louisiana law requiring racial segregation in public facilities under the doctrine of separate but equal.[34] Moreover, the Court rejected the argument that the Louisiana law implied inferiority of Blacks in violation of the Fourteenth Amendment, finding instead that the law separated the two races as a matter of public policy.[35] After *Plessy*, on the issue of race, the Court signaled that States—in particular those States in the Deep South—would have free reign to oppress their Black populations as they saw fit.[36] Plessy served as the legal codification and validation of "Jim Crow" laws as federally supported national social policy[37] and meant that terror against Blacks, a single group of people, would be sanctioned by the highest court in America.[38] The Supreme Court would not get involved in matters that were deemed political questions and within the power of states to address as they saw fit.[39] The aforementioned line of reasoning represents the school of analysis based

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[30] *Id.* at 310-11.
[31] DERRICK BELL, FACES FROM THE BOTTOM OF THE WELL 15 (1992). The text above makes reference to a line in the reprinting, untitled poem from Langston Hughes.
[32] Plessy v. Ferguson, 163 U.S. 537 (1896).
[33] *Id.* at 538.
[34] *Id.* at 552.
[35] *See id.* at 551.
[36] E. M. Beck and Stewart E. Tolnaym, *The Killing Fields of the Deep South: The Market for Cotton and the Lynching of Blacks, 1882-1930*, 55 AM. SOCIOLOGICAL REV., 526, 529 n.1 (Aug., 1990) (defining the Deep South to mean Alabama, Arkansas, Georgia, Louisiana, Mississippi, and South Carolina). For a broader understanding of the socio-economic environment in Louisiana during the time period when *Plessy* was decided please see the article generally.
[37] For a history of the origins and use of the term "Jim Crow" *see generally*, Hugh H. Smythe, *The Concept "Jim Crow"*, 27 SOCIAL FORCES 45 (OCT. 1948).
[38] *See generally*, Luigi Bonanate, *Some Unanticipated Consequences of Terrorism*, 16 J. OF PEACE RESEARCH 197 (1979) (exploring the history of the word terrorism and arguing that it is an indication that a society subject to terrorism is only apparently democratic).
[39] Robert J. Harris, *States' Rights and Vested Interests*, 15 J. OF POLITICS 457, 460 (Nov., 1953) (noting that under the Taney Court, "states' rights were synonymous with the power and the duty of the states to regulate the vested interests of property, private or corporate, in the interest of the welfare of the whole people of the state").

on states rights; those powers not expressly granted to the federal government belong to the states.[40] In spite of the fact that the decision was deemed just at the time, with the Court subsequently reversing its *Plessy* precedent fifty-eight years later, the decision can be understood in the context of preservation of the status quo based on broader public sentiment at the time.[41] As such, I posit that looking at the Court's rulings on matters of race, racial discrimination, and equal protection as impacted by race; the line of cases is best understood under the rubric of public sentiment.[42]

## II. Voting and Race in America

### A. Race as a Replacement for Socio-Economic Exclusion of White America

Throughout the legal history of the United States, voting and indeed any

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[40] Specifically, I argue that Taney Court serves as the foundation upon which the struggle of modern civil rights began. *See generally* the cases decided by the Taney Court in support of states' rights; United States v. Segui, 35 U.S. 306 (1836); Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837); The Amistad 40 U.S. 518 (1841); Swift v. Tyson, 41 U.S. 1 (1842) (while the Court ruled against States Rights in this case it is, nevertheless, included for its rationale which the author believes can be reconciled with the later Dred Scott decision. Specifically, the Court's decision in this case can be understood as an issue of "private law" as opposed to an "amoral public law framework" as discussed by Austin Allen in *Rethinking Dredd Scott: New Context for an Old Case*, 82 Chi-Kent. Rev. 141, 155 (2007). As Allen writes, "[t]he decisions significance for the Taney Court lay in its assertion that under the Judiciary Act of 1789, judicial decisions did not constitute law…One cannot understate the importance of this formulation….[t]reating court rulings as law in effect endowed courts with a legislative authority and conferred on judges an elite role of guiding and ruling the social order. Placing judicial decisions outside the definition of law, however, permitted courts to "reexamine[], reverse[], and qualif[y]" decisions as the need arose and that definition thus permitted the Taney Court to pursue aggressively a policy-oriented common law agenda while simultaneously presenting itself as an institution that merely applied, and certainly did not make, law" *Id.* at 156; Prigg v. Pennsylvania, 41 U.S. 539 (1842); Luther v. Borden, 48 U.S. 1 (1849); Passenger Cases, 48 U.S. 283 (1849); Sheldon v. Sill, 49 U.S. 441 (1850); Hotchkiss v. Greenwood, 52 U.S. 248 (1850); Strader v. Graham, 51 U.S. 82 (1851); Cooley v. Board of Wardens, 53 U.S. 299 (1852); Dred Scott v. Sandford, 60 U.S. 393 (1857); Ableman v. Booth, 62 U.S. 506 (1859); Prize Cases; 67 U.S. 635 (1863).

[41] The Taney line of cases in note 41, *supra*, show the Court's analytical lens for viewing the issues of the treatment of Blacks via states' rights reasoning. Subsequently, *Brown v. Board of Education*, 347 U.S. 483 (1954) [herein after *Brown*] represents a shift in the view of the treatment of Blacks as solely a prerogative of individual states under the protection of Federal law.

[42] *See generally* Ralph J. Bunche, *A Critical Analysis of the Tactics and Programs of Minority Groups*, 4 J. of Negro Ed. 308, Vol. 4, No. 3, *The Courts and the Negro Separate School* (Jul., 1935), pp. 308-320 [herein after Bunche]. cf., Sandra Day O' Connor, The Majesty of the Law: Reflections of a Supreme Court Justice, 166 (2003), Anthony Paul Farley, *Lacan & Voting Rights*, YALE J.L. & HUMAN. 283, 288-90 (2001) (noting the connection between the future and the past regarding Black voting rights and the definitions of race used by Justice O' Connor, citing Jayne Chong-Soon Lee at note 22) [hereinafter Farley, *Lacan*]

rights under the Constitution were tied to race.[43] Principally, the privilege of voting was only afforded to white, land owning males.[44] This classification excluded white women and non-land owing white males.[45]

After Reconstruction, poor white non-land owning men were afforded the right to vote and later women, though, in effect, only white women were given the right to vote, via the 19th amendment.[46] Subsequent to the right to vote being given to poor white men and all white women—there has been very little jurisprudence for these two groups.[47] In the immediate aftermath of the Civil War, during the Post Reconstruction era, all citizens of the United States—specifically Black males—were afforded the right to vote. However, individual states, cities, and towns quickly instituted laws to bar or severely restrict Blacks from exercising their right to vote and segregate the races.[48]

Historically only Blacks and non-whites have been systematically forced to use the legal process to secure their constitutionally protected voting rights.[49] Blacks after the end of chattel slavery in the United States have been the principal arbiters for securing rights for the benefit of all racial minorities[50]; such gains have always been of a transient nature and have never been truly secure in the same sense that non-land owning white male's rights or even the rights of white women are secure.[51]

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[43] The Supreme Court has refused to acknowledge, in a sustained manner, the reality of race in America and maintains a race neutral stance to the detriment of racial minorities. Neil Gotanda, *A Critique of Our Constitution is Colorblind*, 44 STAN. L. REV. 1, 3 (1991) (arguing that a color-blind analytical approach to the constitution provides maintenance and legitimacy of the advantages held by whites "by examining the opinions exemplary of the assertion "our Constitution is color-blind" "); *see generally*, Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

[44] *Supra* note 11.

[45] *See id.*

[46] U.S.CONST. amend. IX. Jim Crow laws as noted in note 47, *supra,* barred non-white woman from exercising their voting rights.

[47] The scope of this statement is limit to voting; however, *inter-alia*, reproductive rights, workplace equality, employment discrimination based on sex etc all remain important issues outside the scope of this article.

[48] *See id.* at 36, 47 note 34.

[49] *See id.* at 41.

[50] For example, the Voting Rights Act of 1965, as amended, has benefited racial minorities in general and not simply Black people.

[51] As members of the dominant racial group their suffrage has been recognized by the courts and via constitutional amendment without subsequent controversy. Indeed, as Bunche noted, "The determination of the ruling class of large land-holders in the South to perpetuate in law and custom the doctrine of the racial inferiority of the Negro was made possible only because this numerically preponderant poor-white population feared the economic competition and the social and political power of the large black population. The cultural, political and economic degradation of the Negro also gave the poor-whites their sole chance for " status."" Bunche *supra* note 42 at

## B. Post-Racialism as Fictional Sub-Text in *Shelby*?

The United States during Barack Obama's presidency is often referred to as a post racial society.[52] Even in the face of more than 300 years of racial discrimination facilitated by the legal system, the Court seems eager to recognize racial discrimination as a historical artifact; thus, by that logic, things have improved and historically bad actors should no longer face the pre-clearance process unless the formula used to effect the process is updated to reflect the new nominal equality of Blacks' ability to vote relative to whites.[53]

The majority opinion for the Court states,

> "[H]istory did not end in 1965. By the time the Act was reauthorized in 2006, there had been 40 more years of it. In assessing the "current need[ ]" for a preclearance system that treats States differently from one another today, that history cannot be ignored. During that time, largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs."[54]

The rationale above poses a number of concerns for those interested in the future of jurisprudence enacted to remedy past racial discrimination.
Specifically, in each instance where the Court has had to force state action there is a tendency, with a jaundiced eye towards the presumption of being justified, to extricate itself as quickly as possible from such rulings. However, the flaw in this desire is the mistaken utopian belief that the discrimination and racism that have plagued this country in general, and Black people in particular, for over 300 years can be remedied and forgotten

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309-310.

[52] Matt Bai, *Is Obama the End of Black Politics?*, N.Y. TIMES, August 10, 2008 *available at* http://www.nytimes.com/2008/08/10/magazine/10politics-t.html?pagewanted=all (arguing that an Obama presidency would represent a milestone by which to separate from the past and frame the next 50 years in stating, "black politics might now be disappearing into American politics in the same way that the Irish and Italian machines long ago joined the political mainstream.")

[53] S*upra* note 1, at 15 (noting via chart voter turnout from 2004 compared to 1965 and that the nominal increase is at least in part due to the Voting Rights Act).

[54] *Id.* at 20.

as quickly as possible[55] as if prejudice does not lie within the very soul of those that constitute the power structure of the majority.[56] Time and time again in the United States, once judicial oversight had been removed, prejudicial actors quickly return to their prejudicial ways and entrench themselves in a new and improved insidious manner just as weeds adapt and mutate to take over neglected land. A renewed dystopia for Blacks unleashed to begin anew. The Court is abandoning the spirit of the Act, without striking down the law, by placing the revision of the coverage formula used in Section 4(b) at the doorstep of Congress irrespective of the extensive Congressional Record established during the re-authorizing of the Act.

## III. Transient Versus Concrete Judicial Equality for Blacks.

### A. Static Versus Dynamic Legal Considerations

The role of race as a social construct and as a tool used to exclude and subjugate minority groups—as *Other*— is an area of scholarship with a long history spanning the globe.[57] Article 1, Section 2, Paragraph 3 of the United States Constitution enshrines the original intent of the founding fathers to specifically exclude Blacks from the benefits, but not the burdens, imposed on them.[58]

#### 1. Whiteness as an Enduring Legal Consideration

Historically, courts have accepted the notion that whiteness was a valuable commodity.[59] In *Whiteness as Property,* Cheryl Harris notes:

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[55] *See generally*, Robert B. McKay, *"With All Deliberate Speed": Legislative Reaction and Judicial Development 1956-1957*, VA. L. REV. 1205 (1957).

[56] *Id.* at 1207 (noting that "[t]he fact remains, however, that the forces which oppose extension of the principle or the fact of desegregation have by no means exhausted their weapons of resistance.); *see also*, SIDDARTHA MUKHERJEE, THE EMPEROR OF ALL MALADIES: A BIOGRAPHY OF CANCER (New York: Scribner 2010.) The author chronicles the centuries long battle again cancer and details how it constantly adapts to treatment. I argue racial prejudice is equally as insidious and requires a vigor matching to combat it.

[57] *See generally*, Charles F. Wilkinson & John M. Volman, *Judicial Review of Indian Treaty Abrogration: "As long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601 (1975); Justus Weiner, *The Palestinian Refugees' "Right to Return" and the Peace Process*, 20 B.C. INT'L & COMP. L. REV. 1 (1997); People v. Hall, 4 Cal. 399 (1854); United Nations: General Assembly Resolution on Apartheid in South Africa International Legal Materials , Vol. 5, No. 2 (March 1966), pp. 369-373.

[58] *See* US Constitution art. I, sec. 2; *See also*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 34 (1987).

[59] People v Dean, 14 Mich. 406 (1886). The court interpreted "white" to determine whether the defendant's vote was against the law and criticized the proposition that "a preponderance of mixed blood, on one side or the other of any given standard, has the remotest bearing upon personal fitness or unfitness to possess political privileges," *Id.* at 417. In the same opinion,

> "the courts universally accepted the notion that white status was something of value that could be accorded only to those persons whose proofs established their whiteness as defined by the law."[60]

Further, because the Court is falsely presumed to be race neutral it has criticized the idea of defining whiteness while at the same time, upholding whiteness as a legal standard used to deny Blacks the right to vote.[61] Whiteness has been protected because the foundation of the nation depended upon it—a foundation built literally by the hands of slaves, the unprotected.[62] Citizenship was intertwined with whiteness. The Naturalization Act of 1790 restricted citizenship to free whites, with good moral character who had resided in the United States for two years and had one year of residence in a state before applying for citizenship.[63] By tying whiteness to citizenship, given that citizenship is a prerequisite to Constitutional protection—any non-white becomes *Other*.[64] As Harris posits, the expansion of democratic rights for whites came at the expense of worsening Blacks' oppressed status.[65] *Shelby County* should be feared and fought against because of its foreboding embodiment of a return to marginalization—*Otherness*—not as a representation of numerical progress as narrowly measured against the coverage formula.

### 2. Dynamic Legal Considerations

Post-Civil War and Reconstruction, the Court—via the historical ebb and flow of its intellectual composition—and indeed white America has been involved in a public relations battle for more than a century with itself to prove that American society is not fundamentally racist at its core.[66] Yet, in

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however, the court held that the electorate that had the right to determine voting privileges, including exclusion on racial grounds, thereby placing a value on race as conferring the power to vote. *See id.* at 416.

[60] Cheryl Harris, *Whiteness as Property*, HARV. L. REV. 1709, 1741 (1993).

[61] *See generally* Gotanda, *supra* note 44.

[62] *See generally* Bell, *supra* note 59.

[63] 1 Stat. 103 (superseded 1795).

[64] *See id.*

[65] *See* Bell, *supra* note 59, at 1744; *see also* Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 262 (1983).

[66] Nancy Leong, *Racial Capitalism*, HARV. L. REV. 2151, 2175 (2013) (discussing the way racial identity is commoditized to derive value from non-whites for the benefit of whites and white institutions and citing Kristen Warner, *Having Black Friends*, STUFF WHITE PEOPLE LIKE (Jan. 21, 2008), http://stuffwhitepeoplelike.com/2008/01/21/14-having-black-friends.). For further examples *see generally*, Crenshaw, *supra* note 44.

spite of the overt actions of broader American society and the courts to prove their race neutrality and lack of discrimination—the Justice Department found hundreds of cases of violations of the Voting Rights Act because it would infringe on the rights or representation of Blacks and other non-white minorities.[67] The minimization and de-emphasis by the Roberts' Court of Voting Rights Act violations is emblematic of the continued internal socio-political and legal struggle this country continues to have with racial minorities in a "post-racial" Obama presidential era. The Court further embodies this struggle by its movement away from the rationale expressed by Justice Ginsberg's dissent and toward a narrow reading by the majority on the Court. The Court, through legal rationale, is an extension of the shift in public sentiment on the ability of those designated as *Other* to maintain their legal protections under the Act.

American civil society and political institutions plan to *contain* a majority-minority nation in a manner analogous to that by which property rights were maintained historically—with similar effect. [68]

At its core, the issue of voting rights is emblematic of the larger struggle that Blacks have faced since they arrived in North America via chattel slavery—the struggle for access and opportunity. In this article "access" refers to the right to been seen under the law as a citizen equally protected by the law regardless of race. The "opportunity" is the ability to use the aforementioned access to secure opportunity by voting for those officials that best represent the values of Black people. While this might appear to be a simple and easily attainable goal, this article, along with reams of legal briefs and scholarship, tries to parse the answer to one fundamental question: Does the plight of Black people and indeed all underrepresented minorities in America matter? The pernicious nature of racial oppression and subjugation through the law continues to make its presence felt upon the lives of those who have to systemically and continuously fight against being marginalized as *Other* through ever-changing methods.

Blacks and non-whites have been the recipients of oppression through violence both literally and figuratively with the systematic abrogation of the protection of the rule of law.[69]

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[67] Appendix to the Senate Committee Report, S. REP. No. 109-295 apps. I-III, at 65-363 (2006).
[68] Derrick Bell, *Xerce and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1602, 1608 (1989) (noting affirmative action policies were viewed as a threat to "property interests of identifiable whites"). The original containment strategy however, has always been death. As Stalin phrased it forebodingly, "Death solves all problems"; "No man, no problem" SIMON SEBAG MONTEFIORE, STALIN: THE COURT OF THE RED TSAR 33 (2005).
[69] J. Corey Harris, *Essay: Oppression Through Violence: The Case Of Colombia – An Expansion Of*

## IV. A Window into the Future?

*"It is simply that their [blacks] gains are almost always the gratuitous dividends of policies favored by a controlling white interest or group. When no such fortuitous arrangements are possible, blacks have found political participation quite difficult and unrewarding."*[70]

The post reconstruction era reforms of the Thirteenth, Fourteenth, and Fifteenth Constitutional amendments in the United States granted freedom to slaves, equal protection, and the right to vote under the Constitution.[71] However, subsequent to the those Constitutional amendments being ratified, the former Confederate South set about dismantling the gains that new Black citizens of America fought, bled, and died to have access to. The judicial history of this time period paints a picture that society seems too eager to forget. Over a twenty-five year period from 1865 to 1890 the Deep South succeeded in dismantling the protections of the Constitution as applied to Blacks, and re-instituted a legally sanctioned race and caste system in which Black Americans did not have the right to vote nor the ability to challenge injustice without the presage and guarantee of a lynch mob.[72]

Alexis de Tocqueville, in *Democracy in America: Volume 1*, articulates the danger of turning a blind eye to prejudicial practices and the seemingly limitless capacity of the majority to oppress others where the proper safeguards are not in place:

I said one day to an inhabitant of Pennsylvania: "Be so good as to explain to me how it happens that in a state founded by Quakers, and celebrated for its toleration, free blacks are not allowed to exercise civil rights. They pay taxes; is it not fair that they should vote?"
"You insult us" replied my informant, "if you imagine that our legislators could have committed so gross an act of injustice and intolerance."
"Then the blacks possess the right of voting in this country?"
"Without a doubt"

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*The Fetish Object?*, 29 N.C. CENT. L.J. 98, 123 (2006) [hereinafter, Harris Fetish Object]; Anthony Paul Farley, Perfecting Slavery, 36 LOY. U. CHI. L.J. 225, 235 (2004) [hereinafter, Farley Perfecting]; Anthony Paul Farley, *BlackBody as Fetish Object*, 76 OR. L. REV. 457, 492-93 (1997) [hereinafter, Farley BlackBody].

[70] DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 96 (1987).

[71] U.S.CONST. amends. XIII, IV, XV.

[72] *See* note 36, *supra.*

"How come it, then, that at the polling-booth this morning I did not perceive a single Negro?"
"That is not the fault of the law. The Negroes have an undisputed right of voting, but they voluntarily abstain from making their appearance."
"A very pretty piece of modesty on their part" rejoined I.
"Why, the truth is that they are not disinclined to vote, but they are afraid of being maltreated; in this country the law is sometimes unable to maintain its authority without the support of the majority. But in this case the majority entertains very strong prejudices against the blacks, and the magistrates are unable to protect them in the exercise of their legal rights."
"Then the majority claims the right not only of making laws, but of breaking the laws it has made?"[73]

## Conclusion

The risk that *Shelby County* poses to voting rights jurisprudence and enforcement is not that American jurisprudence will be transported back to the 19th century. In the interim between the Court invalidating the coverage formula for covered jurisdictions and the United States Congress' ability to revise the formula in a way that will satisfy judicial review, the right to vote is in a precarious, albeit dangerous, position—especially in jurisdictions subject to the coverage formula pre-Shelby. If history is a guide, those most at risk in a post-Shelby jurisprudential environment are Blacks and other racial minorities. The Court's desire to extricate itself from the Act's additional requirements for covered jurisdictions risks reigniting a 21st century version of the subversive state and local tactics of the past which were designed to eliminate the Black vote. The Court's striking down of the coverage formula in *Shelby County has* created fertile ground for the right to vote to be impeded and curtailed by those who seek to retain and expand their grip on the ballot box. William Faulkner was indeed correct in saying that "The past is never past. It's not even dead".[74]

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[73] DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 345 (6th ed., 2008) (citing Alexis de Tocqueville, I Democracy in America 261 (Anchor Books ed. 1969), reprinted by Judge Rives in United States ex rel. Goldsby v. Harpole, 263 F.2d 71, 79 n.21 (5th Cir. 1959).
[74] WILLIAM FAULKNER, REQUIEM FOR A NUN 73 (1950).