

***SHELBY COUNTY V. HOLDER: A CRITICAL ANALYSIS OF
THE POST-RACIAL MOVEMENT'S RELATIONSHIP TO
BYSTANDER DENIAL AND ITS EFFECT ON PERCEPTIONS
OF ONGOING DISCRIMINATION IN VOTING***

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I. Introduction

Shelby County v. Holder, the latest Supreme Court decision on voting rights, is the product of the post-racial movement.¹ As Professor Gilda R. Daniels has explained, the post-racial movement is founded on the belief that President Obama's election in 2008 symbolized the fact that "we have reached a place in our society where race has lessened in significance, declaring the country officially post-racial, where race bears little significance or consequence."² However, from the onset of the post-racial movement, critics have consistently argued that it would be used to minimize the ongoing existence, significance, and effect of racism. As noted by Tukufu Zuberi, a renowned critical race theorist and social scientist:

[T]he conservative project of associating colorblindness with racial enlightenment and racial justice advocacy with grievance politics is a blatant right-wing move, however, the so-called universal programs and universal politics advocated by liberals and many progressives alike are equally conservative. A more radical perspective views race as a problem to be overcome.³

Post-racialism is a result-oriented movement that fails to acknowledge the reality of ongoing racial disparities in an effort to reestablish white supremacy. Accordingly, the post-racial movement absolves those privileged

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¹ *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2620 (2013).

² Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 *CARDOZO L. REV.* 947, 949-950 (2011).

³ Tukufu Zuberi, *Critical Race Theory: A Commemoration: Response: Critical Race Theory of Society*, 43 *CONN. L. REV.* 1573, 1588 (2011)(internal quotation marks omitted).

by racial disparities without requiring them to fully acknowledge its enduring existence.

In 2011, Professor Daniels, asked whether “with the Supreme Court’s construed admonitions against race-conscious redistricting, and its endorsement of influence districts as a post-racial panacea, how can we preserve minority electoral opportunities...?”⁴ After the Supreme Court’s decision in *Shelby County*, we can answer Professor Daniels’ question by affirmatively stating that minority electoral opportunities can no longer be preserved with any statute that requires whites to acknowledge racial inequity in voting. Although white Americans have primarily perpetuated racism in this nation, they are bystanders to racial oppression, in the sense that they are unaware of their own complicity, and therefore, struggle to reconcile it with their racially privileged experience in this nation.⁵ The post-racial movement has provided an opportunity for white America to avoid the uncomfortable experience of acknowledging racial oppression, because it shifts the focus to reconciliation. As demonstrated by the Supreme Court, evidence of discrimination in voting will continuously be trivialized in a purportedly post-racial world, where the fundamental presumption is the declining significance of race.

This Article will examine the post-racial movement’s perpetuation of racial disparities in voting by means of this denial of the ongoing existence, significance, and effects of race in this nation. In particular, the post-racial movement’s effect on the bystander mentality of white America will be analyzed. Further, this Article argues that *Shelby County* is an example of such denial and proposes an amendment to the Voting Rights Act (VRA)⁶, which shifts the burden of protecting equal opportunity to the voting district as a proactive measure. By not requiring any recognition of ongoing racism, this approach can be implemented successfully in American society where acknowledgement has not occurred.

II. Section 4 and 5 of VRA.

In 1965, Congress enacted the VRA to prevent and remedy racial discrimination in voting. In particular, the Voting Rights Act states that no:

[V]oting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or

⁴ Daniels, *supra* note 2, at 949 (2011).

⁵ Susan J. Brison, *Surviving Sexual Violence: A Philosophical Perspective in VIOLENCE AGAINST WOMEN: PHILOSOPHICAL PERSPECTIVE* 11, 17 (Stanley G. French, et al. Eds., 1998).

⁶ 42 U.S.C. §§ 1973 *et seq.*

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applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).⁷

In addition, section 5 of the Voting Rights Act prevents “jurisdictions that had a voting test and less than 50 percent voter registration or turnout in the 1964 Presidential election” from making changes in their voting procedures without the approval of either the Attorney General or a court of three judges.⁸ In 1965, the covered jurisdictions included Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 39 counties in North Carolina, and 1 county in Arizona.⁹ As noted by Professor Daniels, “[s]ection 5’s preclearance requirement is preemptive because it mandates that a covered jurisdiction demonstrate prior to the enactment of legislation that its proposed change is free from a discriminatory purpose or effect.”¹⁰

In 2010, Shelby County, Alabama sued the Attorney General in Federal District Court, seeking a declaratory judgment that sections 4(b) and 5 of the Voting Rights Act are facially unconstitutional and a permanent injunction against their enforcement.¹¹ The Federal District Court ruled against Shelby County, finding that “the evidence before Congress in 2006 was sufficient to justify the reauthorizing §5 and continuing the §4(b) coverage formula.”¹² The U.S. Court of Appeals for the District of Columbia Circuit (U.S. Court of Appeals) affirmed the decision of the Federal District Court.¹³ In 2012, the U.S. Supreme Court granted the petition for writ of *certiorari* to review the decision of the U.S. Court of Appeals, finding section 4(b) of the Voting Rights Act unconstitutional.¹⁴

III. Critical Analysis of *Shelby County* and Bystander Denial.

The Supreme Court in a five-four decision reversed the decision of the U.S. Court of Appeals. Chief Justice Roberts in the opinion of the court held that the only compelling interest justifying the preclearance remedy and coverage formula was the existence of gross voting disparities defined by race

⁷ Enforcement of Voting Rights, 42 U.S.C.A. § 1973(a) (1965).

⁸ *Shelby Cnty.*, 133 S. Ct. at 2620.

⁹ *Id.* at 2620 (noting that the Voting Rights Act was reauthorized for an additional 5 years in 1970; 7 years in 1975; 25 years in 1982; and 25 years in 2006).

¹⁰ Daniels, *supra* note 2, at 955.

¹¹ *Shelby Cnty.*, 133 S.Ct. at 2621- 2622.

¹² *Id.* at 2622.

¹³ *Id.*

¹⁴ *Shelby Cnty.*, 133 S.Ct. at 2631 (2013).

in the covered states.¹⁵ Despite the Justice Department's explanation of the deterrent effect of section 5 of the Voting Rights Act and its contention that "there need not be any logical relationship between the criteria in the formula and the reason for coverage," the Supreme Court's apparent reason for finding section 4(b) of the Voting Rights Act unconstitutional is their belief that:

Coverage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years. And voter registration and turnout numbers in the covered States have risen dramatically in the years alone.¹⁶

In particular, the Supreme Court noted that over the course of the nearly 50 years since the VRA was enacted "things have changed dramatically."¹⁷

The Supreme Court ignored substantial evidence of ongoing discrimination in the covered jurisdictions.¹⁸ Congress found that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process."¹⁹ Specifically, Congress explained that the term first generation barriers, "describes barriers to registration and the ability to cast a vote," while the term second-generation barriers:

Refers to other means of depriving minority voters of the opportunity to participate in the democratic process on an equal basis--means such as discriminatory management of district lines, the adoption of at-large election schemes, and other dilutive techniques.²⁰

In its brief, the Justice Department cited several instances where states or municipalities took actions that impaired or limited the voting

¹⁵ *Shelby Cnty.*, 133 S.Ct. at 2617.

¹⁶ *Id.* at 2627- 2628.

¹⁷ *Id.* at 2625.

¹⁸ Brief of Respondent at 21, *Shelby Cnty. v. Holder*, 133 S.Ct. 2612 (2013) (No. 12-96), 2012 U.S. Briefs 96, at 21.

¹⁹ *Id.* at 21.

²⁰ *Id.*

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power of blacks. In one case, the “all-white incumbent town governance in Kilmichael, Mississippi, attempted to cancel an election shortly after black citizens had become a majority of the registered voters.”²¹ In another case, the location of the polling place was changed and the Attorney General objected to the relocation of a polling place in Johnson County, Georgia, from the county courthouse to the American Legion, noting that “the American Legion in [that county] has a wide-spread reputation as an all-white club with a history of refusing membership to black applicants” and was “used for functions to which only whites are welcome.”²²

Shelby County itself had been a defendant in a suit brought to enforce Section 2 of the VRA.²³ The result of that suit was a finding that the Alabama legislature had intentionally discriminated against African-American voters by authorizing counties to switch from single-member districts to at-large voting, prohibiting single-shot voting in at-large elections, and requiring numbered posts in at-large elections.²⁴ Moreover, in 2006, “Congress also gathered thousands of pages of testimony and documents chronicling ongoing problems of vote suppression, voter intimidation, and vote dilution throughout covered jurisdictions.”²⁵

In reviewing *Shelby*, the Supreme Court intentionally departed from the standard it articulated in *South Carolina v. Katzenbach*, “Congress may use ‘any rational means’ to effectuate the constitutional prohibition of racial discrimination in voting.”²⁶ In particular, the Supreme Court deviated from 47 years of precedent with respect to the VRA in *Shelby*, and relied on the less deferential standard explained in *City of Boerne v. Flores*, which required that enforcement legislation be based on a congruent and proportional relationship between a constitutional injury and the means adopted to prevent that injury.²⁷ However, the standard established in *City of Boerne* was a particularly inappropriate vehicle for reviewing the VRA, because the

²¹ *Id.* at 24.

²² Brief of Respondent at 27, *Shelby Cnty.*, 133 S.Ct. 2612 (2013) (No. 12-96), 2012 U.S. Briefs 96, at 27.

²³ *See Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1356-1360 (M.D. Ala. 1986).

²⁴ Brief of Respondent at 27, *Shelby Cnty.*, 133 S.Ct. 2612 (2013) (No. 12-96), 2012 U.S. Briefs 96, at 38.

²⁵ *Id.* at 33.

²⁶ Jason J. Kelly, *Section 5 of the Voting Rights Act is No Longer Tailored to Remedy Current Patterns of Voting Discrimination: The State of Section 5 after Northwest Austin Utility District No. 1 v. Holder*, 48 DUQ. L. REV. 67, 75 (2011) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966)).

²⁷ *See id.* at 77 (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1977)).

case involved a challenge to a local historical preservation ordinance on the basis of the Religious Freedom Restoration Act.²⁸

One possible explanation for the majority's opinion in *Shelby County* is bystander denial. In *Surviving Sexual Violence: A Philosophical Perspective*, Susan J. Brinson articulates her theory that bystanders in cases of sexual violence have to struggle to identify with victims because of their inability to reconcile such acts with their perception of the world.²⁹ Specifically, Professor Brinson explains that:

Where the facts would appear to be incontrovertible, denial takes shape of attempts to explain the assault in ways that leave the observers' worldview unscathed. Even those who are able to acknowledge the existence of violence try to protect themselves from the realization that the world in which it occurs is their world and so they find it hard to identify with the victim. They cannot allow themselves to imagine the victim's shattered life, or else their illusions about their own safety and control over their lives might begin to crumble.³⁰

Bystander denial is not limited to incidents of sexual violence. It occurs in all sociopolitical contexts in which there is a victim of any form of oppression. White Americans, in particular, suffer from profound bystander denial with respect to racial oppression. Furthermore, white Americans are unable to fully absorb the magnitude of racism in this country because they are unaware of their bystander denial. It is impossible for them to recognize that their understanding of the world is a consequence of racial privilege, not an objective reality. As explained by Paulo Freire:

To the oppressor consciousness, the humanization of the 'others,' of the people, appears not as the pursuit of full humanity, but as subversion. The oppressors do not perceive their monopoly on having more as a privilege, which dehumanizes others and themselves. They cannot see that, in the egoistic pursuit of having as a possessing class,

²⁸ Kelly, *supra* note 26, at 77.

²⁹ Brinson, *supra* note 5, at 17.

³⁰ *Id.*

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they suffocate in their own possessions and no longer are; they merely have. For them, having more is an inalienable right, a right they acquired through their own 'effort,' with their 'courage to take risks.'³¹

Paulo Freire describes the blindness and self-delusion, born of self-interest that privilege creates. The acquisition of power, a monopoly on the voting franchise is one more "possession" and privilege to which they are entitled.

This distorted reality of white Americans undermines their ability to appreciate the severity of all forms of voting discrimination and to relegate it to the past, to the first generation barriers. As noted by Joel Heller, a voting rights scholar, the likelihood of denial increases when "the potential abridgement does not take the form of an explicit denial of access to the ballot box but instead stems from structural choices like the location of polling sites (...), or a practice that dilutes the value of a vote, such as redistricting or annexation."³² Under these circumstances, policymakers may try to escape the shame or the aggravation of reminders of the era of rampant racial discrimination by claiming those problems no longer exist.³³ Within the context of racial discrimination, the media has captured elected officials making innumerable attempts to rationalize widespread racism within "their world" context.

For example, on August 14, 2013, Senator Rand Paul (R-Ky.) stated "[s]o really, I don't think there is objective evidence that we're precluding African-Americans from voting any longer."³⁴ Likewise, on the July 25, 2013 edition of Fox News' America Live conservative Washington Post columnist Marc Thiessen, he contended: "voter ID laws do not disenfranchise anybody."³⁵ To racially oppressed populations, these statements seem absurd, but to white Americans with bystander denial, such propositions support their understanding of the world. The only facts that registered with these speakers might have been the election of a black president, Barack Obama, and the size of the turn-out of black and latino voters, which was

³¹ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 58-59 (2005).

³² Joel Heller, *Falkner's Voting Rights Act: The Sound and Fury of Section Five*, 40 HOFSTRA L. REV. 929, 952-53 (2012).

³³ *Id.*

³⁴ Paige Lavender, *Rand Paul: There's No "Objective Evidence" Of Racial Discrimination in Elections*, HUFFINGTON POST (August 14, 2013), http://www.huffingtonpost.com/2013/08/14/rand-paul-racial-discrimination_n_3758035.html.

³⁵ Sergio Munoz, *Fox Uses Bogus Arguments to Attack DOJ Voting Rights Action against Texas*, MEDIA MATTERS (July 25, 2013), <http://mediamatters.org/tags/marc-thiessen>.

thought to propel his election. The reports of the strategies used to suppress that vote and the strategies used to deter voters are dismissed out of hand.

Studies of bystander denial support the conclusion that many white Americans, like bystanders to sexual violence, find it less challenging to acknowledge racism and discrimination remote historical incidents which are thought to be outside of “their world” context. The limited contexts in which the Supreme Court has found there to be a compelling interest for race-based decision making is evidence of the resistance on the part of a majority of the justices to the idea that racism and discrimination are contemporary problems. For example in *Fullilove v. Klutznick*, the Supreme Court “upheld a congressional preference for minority contractors because the measure was legitimately designed to ameliorate the present effects of past discrimination.”³⁶ Likewise in *University of California Regents v. Bakke*,

Four Members of the Court concluded that, while racial distinctions are irrelevant to nearly all legitimate state objectives and are properly subjected to the most rigorous judicial scrutiny in most instances, they are highly relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination.³⁷

Nonetheless, the compelling interest that the Supreme Court has found in eliminating the current effects of past discrimination has never extended the diversity paradigm or principle outside the educational context.³⁸ As explained by Vicki Lens, a social policy scholar:

An important rationale for upholding the plan in *Johnson* was that it was designed to ‘attain a balanced work force, not to maintain one.’ This distinction between ‘attaining’ and ‘maintaining’ was crucial to the Court’s narrative of substantive equality. It reiterated it several times, thus making it clear that affirmative action was intended as a temporary measure to compensate for past exclusions and not to assure diversity for diversity’s

³⁶ *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 301 (1986) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980)).

³⁷ *Wygant*, 476 U.S. at 302, citing *Bakke*, 438 U.S. 265, 362.

³⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); see also Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 CARDOZO WOMEN’S L.J. 501, 541-42 (2004).

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sake. Thus, the Court rejected a difference theory approach that would legitimize diversity as an end in itself.³⁹

The majority opinion in *Shelby County*, exhibits the Supreme Court's enduring reluctance to sustain racial diversity in voting "for diversity's sake." However, this creates a potentially untenable predicament where the Supreme Court is unwilling to acknowledge the existence of voting discrimination, in part because their understanding of racism is "shaped by the most extreme expressions of individual bigotry," but also unwilling to uphold proactive programs to prevent discrimination.⁴⁰ What is the future of voting rights in this country where the Supreme Court has ruled that the coverage formula identified in section 4(b) of the Voting Rights Act is unconstitutional because occurrences of voting discrimination in the covered jurisdictions have declined but are not obsolete?

IV. Equal Opportunity in Voting: a New Method of Preventing Discrimination.

In this social climate, the VRA must be amended to establish an affirmative program that does not explicitly or implicitly rely on recognition of ongoing discrimination in voting. Although the coverage formula set out in sections 4(b) and the preclearance requirement of section 5 of the VRA effectively prevented discrimination before *Shelby County*, these tools may not be useful in the future given the Supreme Court's acknowledgement that it recognizes only the most overt or explicit forms of voter suppression as enforceable discrimination.⁴¹

Title VII of the Title VII of the Civil Rights Act of 1964 ("Title VII") offers a plausible solution to this predicament. Section 717 of Title VII states that the U.S. Equal Employment Opportunity Commission is responsible for the annual review and approval of a national and regional equal employment opportunity plan submitted by all federal agencies.⁴² Pursuant to Management Directive 715, "[a]gencies have an ongoing obligation to eliminate barriers that impede free and open competition in the workplace and prevent individuals of any racial or national origin group or either sex

³⁹ Lens, *supra* note 38, at 541-42 (citing *Johnson v. Transportation Agency*, 480 U.S. 616 (1987)).

⁴⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW* 183-84 (2012).

⁴¹ See *Shelby Cnty.*, 133 S.Ct. at 2629 ("no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.").

⁴² Employment by Federal Government, 42 U.S.C.A. § 2000e-16(b) (1964).

from realizing their full potential.”⁴³ Agencies are required to conduct a self-assessment of their workforce, in which they identify potential barriers to equal employment based on lower than anticipated demographic data.⁴⁴

Specifically, agencies must analyze their new hire, promotion, and senior grades data categorized by major job series and race/national origin/sex at every stage of personnel transaction (i.e. relevant civilian labor force, application, qualification, and selection rates) to determine if there is a barrier to equal employment opportunity. For example, the U.S. Equal Employment Opportunity Commission advises that a race/national origin/sex group’s application rate in a particular job series that is lower than the groups representation in the relevant civilian labor force is problematic and requires an agency to investigate whether there is a barrier to equal employment opportunity by planning activities that address the representational disparity.⁴⁵

In light of the Supreme Court’s finding that section 4(b) of the Voting Rights Act is unconstitutional, the VRA should be amended to include an affirmative process that is analogous to the one described in Section 717 of Title VII of the Civil Rights Act. Annual reporting requirements that mandate that each voting district compare the race/national origin/sex demographic data of the potential voter pool to the voter participation rate. Guidance can be issued that requires a voting district to determine if there is a barrier to equal opportunity in voting if the voter participation rate of a particular race/national origin/sex demographic group is less than their representation in the potential voting pool. In such situations, voting districts, like federal agencies, should be required to create and implement programs that facilitate voting by underrepresented race/national origin/sex demographic groups. Voting districts should be required to submit annual compliance reports to the U.S. Department of Justice, which would maintain federal oversight over voting discrimination.

V. Conclusion

The Supreme Court’s failure to recognize the enduring significance of discrimination in voting is misguided. However, their reasoning in *Shelby County* is embraced by many members of white America and is not limited to

⁴³ Memorandum to Heads of Federal Agencies, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (October 1, 2003), <http://www.eeoc.gov/federal/directives/md715.cfm>.

⁴⁴ *Id.*

⁴⁵ Memorandum to Heads of Federal Agencies, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (October 1, 2003), <http://www.eeoc.gov/federal/directives/md715.cfm>.

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voting discrimination. The ongoing marginalization of oppressed populations has effectively precluded white America from understanding the existence, significance, and effect of race in this nation. Furthermore, the perpetuation of the post-racial movement coupled with bystander denial has exacerbated white America's inability to recognize and appreciate modern-day racial oppression. Accordingly, the VRA must be amended to create an affirmative program that ensures equal opportunity in voting that avoids the use of discretion, which will undoubtedly minimize the severity of discrimination.