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# The Blinding Color of Race: Elections and Democracy in the Post-Shelby County Era

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## The Blinding Color of Race: Elections and Democracy in the Post-*Shelby County* Era

SAHAR F. AZIZ

Decades after passage of the historic Voting Rights Act (VRA), so much has changed. And yet, so much remains the same.

Racial minorities are registering to vote and turning out at the ballot box in record numbers.<sup>1</sup> Nevertheless, they remain under-represented in local elected positions and virtually excluded from national and state political positions.<sup>2</sup> Latinos, for example, are the largest racial minority in the U.S. at approximately 17% of the population,<sup>3</sup> but only 3.3% of elected political positions are held by Latinos.<sup>4</sup> In states that the VRA until recently covered, such as Texas, Alabama, Mississippi, and Louisiana, African Americans held 11 %, 25%, 30%, and 18%<sup>5</sup> of elected positions, respectively; although the

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<sup>1</sup> See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Mapping a Post-Shelby County Contingency Strategy*, 123 YALE L.J. ONLINE 131 (2013), <http://yalelawjournal.org/2013/06/07/charlesfuentesrohwer.html>; NAACP LEGAL DEFENSE FUND, INC. & THE NAACP, DEFENDING DEMOCRACY: CONFRONTING MODERN BARRIERS TO VOTING RIGHTS IN AMERICA 7 (2012), <http://www.naacpldf.org/files/publications/Defending%20Democracy%2012-5-11.pdf> [hereinafter *Defending Democracy*].

<sup>2</sup> Adrian Castañeda, *UCSB Study Indicates Minorities Underrepresented in Government*, SANTA BARBARA INDEPENDENT (Nov. 15, 2007), <http://www.independent.com/news/2007/nov/15/ucsb-study-indicates-minorities-underrepresented-g/>.

<sup>3</sup> U.S. CENSUS BUREAU NEWS, PROFILE AMERICA—FACTS FOR FEATURES: HISPANIC HERITAGE MONTH 2013: SEPT. 15-OCT. 15 (July 30, 2013), [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb13-ff19.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb13-ff19.html).

<sup>4</sup> VANESSA CÁRDENAS & SOPHIA KERBY, *The State of Latinos in the United States*, CTR. FOR AM. PROGRESS (Aug. 8, 2012), <http://www.americanprogress.org/issues/race/report/2012/08/08/11984/the-state-of-latinos-in-the-united-states/>.

<sup>5</sup> DAVID A. BOSITIS, *Resegregation in Southern Politics?*, JOINT CTR. FOR POLITICAL & ECON. STUDIES (Nov. 2011), <http://www.jointcenter.org/sites/default/files/upload/research/files/Resegregation%20in%20Southern%20Politics.pdf>.

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proportion of their state populations are higher at 12.3%,<sup>6</sup> 26.5%,<sup>7</sup> 37.4%,<sup>8</sup> and 32.4%,<sup>9</sup> respectively.

African Americans are also graduating from college at higher rates now than ever before.<sup>10</sup> Nevertheless, the socio-economic disparities between blacks and whites are alarmingly stagnant when compared to the 1960s.<sup>11</sup> Black workers earn on average half as much as their similarly situated white counterparts.<sup>12</sup> The average wealth of a black family is one sixth that of a white family.<sup>13</sup> 77.4% of those living in poverty in the United States are racial minorities compared to 22.6% who are white.<sup>14</sup> Also, 54% of the prison population is non-white<sup>15</sup> even though racial minorities comprise only 37% of the total U.S. population.<sup>16</sup> While some Americans may still harbor racially-biased explanations for such disparities, ranging from inferior abilities, laziness, to genetic propensities to violence; open expressions of such biases have become more taboo now than fifty years ago.<sup>17</sup>

When presiding over cases involving explicit forms of racism, courts consistently strike down the attributable policies and practices. However, many judges fail to recognize more stealth and subtle expressions of

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<sup>6</sup> *State & County QuickFacts: Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last updated Jan. 6, 2014).

<sup>7</sup> *State & County QuickFacts: Alabama*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/01000.html> (last updated Jan. 6, 2014).

<sup>8</sup> *State & County QuickFacts: Mississippi*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/28000.html> (last updated Jan. 6, 2014).

<sup>9</sup> *State & County QuickFacts: Louisiana*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/22000.html> (last updated Jan. 6, 2014).

<sup>10</sup> PEW RESEARCH CTR., KING'S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES 26 (Aug. 22, 2103), [http://www.pewsocialtrends.org/files/2013/08/final\\_full\\_report\\_racial\\_disparities.pdf](http://www.pewsocialtrends.org/files/2013/08/final_full_report_racial_disparities.pdf) (citing an increase from only 4% of black adults ages 25 and older had graduated college in 1964 to 21% in 2012).

<sup>11</sup> *Id. passim*.

<sup>12</sup> URBAN INST., RACIAL WEALTH DIVIDE IS 3 TIMES WIDER THAN INCOME GAP, THREATENING ECONOMIC OPPORTUNITY INTEGRITY (Apr. 29, 2013), <http://www.urban.org/publications/904582.html>.

<sup>13</sup> *Id.*

<sup>14</sup> *People in Poverty by Selected Characteristics: 2010 and 2011*, U.S. CENSUS BUREAU, <https://www.census.gov/hhes/www/poverty/data/incpovhlth/2011/table3.pdf> (last visited March 16, 2014)

<sup>15</sup> Todd D. Minton, *Jail Inmates at Midyear 2012-Statistical Tables*, U.S. DEP'T OF JUSTICE, (May 2013), <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>.

<sup>16</sup> *State & County QuickFacts: USA*, U.S. CENSUS BUREAU (Jan. 7, 2014), <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>17</sup> Shanto Iyengar et al., *Explicit and Implicit Racial Attitudes: A Test of their Convergent and Predictive Validity 2* (unpublished APSA 2011 Annual Meeting Paper), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1901991](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1901991) (last visited March 17, 2014).

underlying racial prejudices.<sup>18</sup> Negative stereotypes of racial minorities as lazy, ungrateful, incompetent, violent, dishonest, or inassimilable infiltrate decision making processes in schools, workplaces, media, and politics.<sup>19</sup> Collectively, this produces institutional racism that keeps many racial minorities in perpetual poverty.<sup>20</sup> The social problems that arise from poverty serve to reinforce the negative stereotypes, which in turn perpetuate the socio-economic racial disparities.<sup>21</sup> And thus, the cycle continues, leaving racial minorities, as a group, noticeably worse off than their white counterparts nearly fifty years after the passage of the VRA.<sup>22</sup>

Modern-day tactics and mechanisms intended to keep certain races politically marginalized, arising either from partisan interests or negative stereotypes, contribute to minorities' continual electoral disenfranchisement.<sup>23</sup> For if racial minorities have meaningful access to the ballot box, such that they are collectively able to select those elected to office, then they may change the laws, policies, and practices that produce systemic racial disparities in wealth, education, employment opportunities, and a host of other contexts.<sup>24</sup> Fully cognizant of the relationship between political empowerment and material disparities among races, the drafters of the VRA sought to leverage the power of the federal government to level the electoral playing field at the local and state level.<sup>25</sup> Furthermore, the VRA was not merely about protecting the mechanics of voting, but rather an acknowledgement that certain privileged groups, i.e., powerful whites at the time, would continue to attempt to disempower other groups, particularly blacks during the 1960s, through various techniques that would evolve with time and changing circumstances.<sup>26</sup>

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<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See* Heather Bullock, *Justifying Inequality: A Social Psychological Analysis of Beliefs about Poverty and the Poor* (Nat'l Poverty Ctr., Working Paper No. 06-08, 2006), [http://www.npc.umich.edu/publications/workingpaper06/paper08/working\\_paper06-08.pdf](http://www.npc.umich.edu/publications/workingpaper06/paper08/working_paper06-08.pdf).

<sup>21</sup> *See, e.g.*, Michael Holzman, *Ending the Black Poverty Cycle*, DAILY KOS (Jan. 29, 2013, 10:12 AM), <http://www.dailykos.com/story/2013/01/29/1183050/-Ending-the-Black-Poverty-Cycle#>.

<sup>22</sup> *See* discussion *supra* at 2.

<sup>23</sup> *See, e.g.*, NAACP, *supra* note 2.

<sup>24</sup> *See* Denise Lieberman, *Barriers to the Ballot Box New Restrictions Underscore the Need for Voting Laws Enforcement*, HUMAN RIGHTS (2012), [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/2012\\_vol\\_39/\\_winter\\_2012\\_-\\_vote/barriers\\_to\\_the\\_ballotboxnewrestrictionsunderscoretheneedforvoti.html](http://www.americanbar.org/publications/human_rights_magazine_home/2012_vol_39/_winter_2012_-_vote/barriers_to_the_ballotboxnewrestrictionsunderscoretheneedforvoti.html).

<sup>25</sup> *See The Voting Rights Act of 1965*, DEP'T OF JUST. C.R. DIV., [http://www.justice.gov/crt/about/vot/intro/intro\\_b.php](http://www.justice.gov/crt/about/vot/intro/intro_b.php) (last visited Mar. 7, 2014).

<sup>26</sup> *See id.*

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Notwithstanding significant progress made in decreasing overt discrimination, discriminatory tactics aimed at disempowering minority voters continue to plague the American electoral process. From unnecessarily stringent voter identification laws, restrictions on early voting, and limits to same day registration to redrawing legislative districts for purposes of segregating races; the problems the VRA originally aimed to address are still pertinent today.<sup>27</sup> While the explanations provided for adopting such practices may appear race-neutral, the underlying objectives are far from it.<sup>28</sup> In fact, the state legislatures' claims that voter ID laws prevent election fraud, which rarely occurs. Moreover, election fraud is already criminalized. All the while, these adopted measures seem to consistently have a negative impact on minority voter turnout. Nueces County, Texas, provides a recent example for gerrymandering that negatively impacts minorities other than African-Americans. After the rapidly growing Latino community surpassed 56% of its population, the county changed local election districts to dilute the strength of Latino votes.<sup>29</sup> In the end,

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<sup>27</sup> NAACP, *supra* note 2, *passim*.

<sup>28</sup> See *United States v. McGregor*, 824 F. Supp.2d 1339, 1344-48 (M.D. Ala. 2011) (while trying to prevent a pro-gambling bill, the lawmakers shared following exchanges in private conversations recorded by the FBI: "Just keep in mind if [a pro-gambling] bill passes and we have a referendum in November, every black in this state will be bused to the polls. And that ain't gonna help.", "Every black, every illiterate" would be "bused on HUD financed buses." In a separate conversation one legislator asked whether the predominantly black residents of Greene County were "y'all's Indians?," and referred to blacks as "Aborigines."). See also Padna Hair and Spencer Overton discussing North Carolina's new, restrictive voter laws passed in order to "compact the calendar" Spencer Overton, *NC Voting with MSNBC's Karen Finney & Pendra Hair*, BLOG (Dec. 15, 2013) <http://spenceroverton.com/>, also available at: <http://www.msnbc.com/disrupt/watch/fighting-back-on-restrictive-voter-laws-92210243626>. See also Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 26 (2013) (describing recent cases of gerrymandering negatively impacting racial minorities); see also Kathleen M. Stoughton, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292, 298-99 (2013) (describing negative impact of voter ID laws on voter turnout for African-Americans, 25% of whom do not have a photo ID, compared to just 8% of white citizens); see also *Post-Crawford: Were Recent Changes to Voter ID Law Really Necessary to Prevent Voter Fraud And Protect Electoral Process?*, 12 CONN. PUB. INT. L.J 283, 322-23 (2013) (claiming that strict voter photo ID requirements are not necessary to protect the electoral process, as the research has found very few cases of the kind of voter fraud photo ID laws would prevent, and voter impersonation already is punishable by up to five years in prison and \$10,000 in fines under federal law.) See also E. Earl Parson and Monique McLaughlin, *Citizenship in Name Only: The Coloring of Democracy While Redefining Rights, Liberties and Self Determination for the 21<sup>st</sup> Century*, 3 COLUM. J. RACE & L. 103, 110-11 (2013) ("Recent efforts to prevent citizens from voting must be looked at through the prism of the long history of the United States in its attempts to preclude and disqualify minorities, particularly African Americans from voting, and thus, to dilute the African American's electorate and, in effect, to make African Americans second tier citizens in their own country. Without the vote, African Americans cannot participate in exercising their full citizenry or effect change to ensure their own prosperity.")

<sup>29</sup> Overton, *supra* note 28, at 21.

predominantly white decision makers are rewriting election rules to dilute the votes of racial minorities.<sup>30</sup>

The result is minority voters' inability to collectively elect representatives whom they can hold accountable if they fail to incorporate minority communities' needs into the political agenda. And yet when presiding over voting rights cases, judges appear to lack understanding of the discriminatory effect of pretextual attempts to disenfranchise entire communities. Indeed, Judge Posner, who played a role in drafting the opinion in *Crawford v. Marion County Election Board* in 2007 that upheld the Indiana voter ID law, admitted that he was "one of the judges who doesn't understand the electoral process sufficiently well to be able to gauge the consequences of decisions dealing with that process."<sup>31</sup> As a result, he clarified that in light of new evidence demonstrating discriminatory impact, he could no longer be confident that the decision was correct.<sup>32</sup>

Rather than acknowledge the plethora of evidence that shows a continuation of pervasive discriminatory electoral processes, albeit in different forms than five decades ago, the U.S. Supreme Court in *Shelby County v. Holder* adopted the flawed colorblind narrative that focuses on form over substance.<sup>33</sup> That is, so long as racial bias is not overt or egregious, the

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<sup>30</sup> See NAACP, *supra* note 2, *passim*.

<sup>31</sup> Richard A. Posner, *I Did Not 'Recant' on Voter ID Laws*, NEW REPUBLIC (Oct. 27, 2013), <http://www.newrepublic.com/article/115363/richard-posner-i-did-not-recant-my-opinion-voter-id>.

<sup>32</sup> See Sherrilyn Iffill, *Discrimination Through the Judge's Lens*, NAT'L L. J. (Nov. 4, 2013) Available at: [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202626312973&Iffill\\_Discrimination\\_Through\\_the\\_Judges\\_Lens&slreturn=20131004105500](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202626312973&Iffill_Discrimination_Through_the_Judges_Lens&slreturn=20131004105500).

<sup>33</sup> See 133 S. Ct. at 2629 (the majority established that conditions that justified VRA stopped to characterize voting in the covered jurisdictions because the racial gap in voter registration and turnout was by the year 2009 lower in the covered states than it was nationwide 133 S.Ct. at 2618. Also, the majority emphasized that 50 years after enacting VRA, things have changed dramatically and the voter turnout and registration rates approach parity while blatant discriminatory evasions of federal decrees are rare. The Supreme Court pointed out that minority candidates hold offices at unprecedented levels 133 S.Ct. at 2625. The majority opinion points to Congress's words in the reauthorization act that "significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. The Court also found that the Census Bureau Data from most recent election indicate that African-American voter turnout exceeded white voter turnout in five of six States originally covered by §5, with a gap in the sixth State of less than one half of one percent 133 S.Ct. at 2626. The Court pointed to the decreasing number of DOJ's objections to proposed voting changes and stated that the Act proved immensely successful in redressing racial discrimination, and although problems remain in the covered States and others, there is no denying that, due to VRA, the Nation has made great progress 133 S.Ct. at 2626. At the same time, the majority admits that voting discrimination still exists 133 S.Ct. at 2619. This approach is an example of the colorblind narrative which dominant feature is the belief that

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Court seems to treat it as non-existent.<sup>34</sup> One is thus left questioning whether the Court's refusal to acknowledge racism causes it to believe that racism will somehow disappear. Minimal effort need be made to scratch beneath the illusive race-neutral surface to inquire into the purposes of policies that systematically produce racially disparate outcomes. Similarly, the Court does not feel obligated to inquire why economic, educational, and economic disparities continue to prevail along racial lines five decades after the civil rights movement. To the extent Justice Roberts acknowledges discrimination exists, he mistakenly does not deem it sufficiently severe to warrant a continuation of the preclearance regime.<sup>35</sup> However, the facts from various states show otherwise, as shown in Justice Ginsburg's dissent in *Shelby*.<sup>36</sup>

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racism is a "thing of the past," that ameliorated during the gains of the Civil Rights Movement with the specific policies of integration, affirmative action, and the creation of governmental agencies to enforce antidiscrimination legislation, and that after nearly forty years of real and imagined gains for a substantial number of people of color, whites often assert that racism is no longer a persistent or significant. Such view limits racism to actions of individuals against other individuals. See Margaret M. Zamudio and Francis Rios, *From Traditional to Liberal Racism: Living Racism in the Everyday*, 49 SOC. PERSPECTIVES No. 4, 483-485 (Winter 2006). See also Charles A. Gallagher, *Color-Blind Privilege: The Social and Political Functions of Erasing the Color Line in Post Race America*, 10 RACE GENDER & CLASS No. 4, 22 (2003) (explaining that the colorblind perspective allows whites to imagine that being white or black or brown has no bearing on an individual's or a group's relative place in the socio-economic hierarchy. Starting with the deeply held belief that America is now a meritocracy, whites are able to imagine that the material success they enjoy relative to racial minorities is a function only of individual hard work, determination, thrift and investments in education. The color-blind perspective removes from personal thought and public discussion any taint or suggestion of white supremacy or white guilt while legitimating the existing social, political and economic arrangements which privilege white.").

<sup>34</sup> *Shelby Cnty.*, 133 S. Ct. at 2629.

<sup>35</sup> See *id.* at 2619.

<sup>36</sup> See *id.* at 2640-42 (In 1995, Mississippi sought to re-enact a dual voter registration system, "which was initially enacted in 1892 to disenfranchise Black voters," and for that reason, was struck down by a federal court in 1987 after the 2000 census, the City of Albany, Georgia, proposed a redistricting plan that DOJ found to be "designed with the purpose to limit and regress the increased black voting strength in 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi, abruptly canceled the town's election after "an unprecedented number" of African-American candidates announced they were running for office; in 2006, the Supreme Court found that Texas' attempt to redraw a congressional district to reduce the strength of Latino voters bore "the mark of intentional discrimination that could give rise to an equal protection violation," and ordered the district redrawn in compliance with the VRA; in 2003, after African-Americans won a majority of the seats on the school board for the first time in history, Charleston County, South Carolina, proposed an at-large voting mechanism for the board. The proposal, made without consulting any of the African-American members of the school board, was found to be an "exact replica" of an earlier voting scheme that, a federal court had determined, violated the VRA; in 1993, the City of Millen, Georgia, proposed to delay the election in a majority-black district by two years, leaving that district without representation on the city council while the neighboring majority-white district would have three representatives; in 2004,

But all of this begs the question: why do electoral processes matter so much that over 48 amici briefs were filed in *Shelby*,<sup>37</sup> a plethora of news articles were written about the case, and civil society organizations mobilized across the country to defend the VRA? Are the stakes at issue in *Shelby* merely about abstract notions of state sovereignty, the mechanics of voting, or something much larger that implicates every person in the United States and defines the character of the nation? In answering these questions, Americans as a collective have a mutual interest in seeing the forest from the trees. Failure to do so could risk falling into the treacherous pitfalls experienced by other nations who face insurmountable obstacles in achieving democracy due to electoral processes deemed illegitimate by their populace.<sup>38</sup>

### **Election Processes Define the Character of a Nation**

Democracy is as much about process as it is about results. In all nations, scarcity of resources, albeit in varying degrees, creates a competition for control over their allocation.<sup>39</sup> In turn, this creates inevitable disputes among the members of a polity as to whom should receive how much of any particular resource. The means by which such perennial disputes are resolved defines the character of a nation and ultimately the prospect of a fair and just society.<sup>40</sup>

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Waller County, Texas, threatened to prosecute two black students after they announced their intention to run for office.

<sup>37</sup> See Preview of United States Supreme Court Cases, *Shelby County, Alabama, Petitioner v. Eric H. Holder, Jr., Attorney General, et al.*, A.B.A., [http://www.americanbar.org/publications/preview\\_home/12-96.html](http://www.americanbar.org/publications/preview_home/12-96.html) (last visited Mar. 7, 2014).

<sup>38</sup> See Sahar F. Aziz, *Revolution Without Reform? A Critique of Egypt's Election Laws*, 45 GEO. WASH. INT'L L. REV. 1 (2013); FOUTOUH EL CHAZLI & KARIM EL CHAZLI, EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK, EGYPT: THE INDEPENDENCE OF THE JUDICIARY 27–29 (Susan Sharpe trans., 2010) (noting some reform-minded judges' fears prior to the revolution that the falsification of electoral results would make people lose confidence in the judiciary if the judges were constitutionally obliged to oversee the electoral process); Khalil Al-Anani, *Egypt's Souring Transition*, OPEN DEMOCRACY (Oct. 19, 2011), <http://www.opendemocracy.net/khalil-al-anany/egypt%E2%80%99s-souring-transition>; see also James Feuille, *Reforming Egypt's Constitution: Hope for Egypt's Democracy?*, 47 TEX. INT'L L.J. 237, 258-59 (2011); Ozan O. Varol, *The Democratic Coup D'Etat*, 53 HARV. INT'L L.J. 291, 356 (2012); Abdel-Fattah Mady, *Popular Discontent, Revolution, and Democratization in Egypt In A Globalizing World*, 20 IND. J. GLOBAL LEGAL STUD. 313, 329 (2013).

<sup>39</sup> For a discussion of armed conflict over natural resources, see Phillippe Le Billon, *The Political Ecology of War: Natural Resources and Armed Conflicts*, 20 POL. GEOGRAPHY 561–84 (2001).

<sup>40</sup> *Id.*



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Without transparent and procedurally just processes, people are more likely to use the power of their fists and guns to forcibly control essential as well as non-essential resources for themselves, their families, clans, or tribes.<sup>41</sup> With that comes an increased risk of violence and bloodshed. The struggle for power becomes a zero sum, winner-takes-all game where the strongest and fiercest survive while the meek die—not much different than the rules of the jungle. History has shown that most humans find this an undesirable way of life, as societies have collectively gravitated toward more non-violent means of settling conflicts, with some more successful than others.<sup>42</sup>

This is where elections come into play. While elections are no panacea for resolving perpetual, and sometimes existential, competition for resources; they offer long-term, nonviolent means of selecting winners based on criteria other than sheer force.<sup>43</sup> And winners do not receive a *carte blanche* to starve losers of resources. Instead, elections channel anxieties arising from resource scarcity toward political campaigning, civil debate, negotiation, and ultimately the ballot box to determine who will have the privilege of allocating resources fairly and equitably among the citizenry. Failure to do so results in replacing the representative in exchange for another who heeds the demands of the voting public. Under a legitimate electoral process, today's winners may become tomorrow's losers as governments evolve based on public will rather than a dictator's whims. Elections, therefore, allow societies to evolve like a swinging pendulum attracted to a middle ground where everyone has to forego something for the sake of the collective.<sup>44</sup> In the end, elections empower citizens to shape their destinies as a collective with common interests.<sup>45</sup>

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<sup>41</sup> *E.g.*, Michelle Maiese, *Distributive Justice*, BEYOND INTRACTABILITY (Guy Burgess & Heidi Burgess eds., 2003), <http://www.beyondintractability.org/essay/distributive-justice> (last updated June 2013).

<sup>42</sup> Seth Borenstein, *World Becoming Less Violent: Despite Global Conflict, Statistics Show Violence in Steady Decline*, WORLD POST (Oct. 22, 2011, 3:31 P.M.), [http://www.huffingtonpost.com/2011/10/22/world-less-violent-stats\\_n\\_1026723.html](http://www.huffingtonpost.com/2011/10/22/world-less-violent-stats_n_1026723.html).

<sup>43</sup> *Electoral Processes & Political Parties: Elections, Political Parties, Democracy & Peacebuilding*, PEACEBUILDING INITIATIVE, <http://www.peacebuildinginitiative.org/index.cfm?pageId=1943>; The Secretary-General, *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, 30, U.N. Doc. A/55/489 (Oct. 13, 2000), available at <http://www.un.org/documents/ga/docs/55/a55489.pdf>.

<sup>44</sup> Amy Gutmann & Dennis Thompson, *The Case for Compromise*, HARV. MAG., July-Aug. 2012, at 24, *passim*, <http://harvardmag.com/pdf/2012/07-pdfs/0712-24.pdf>.

<sup>45</sup> See *id. passim* for a discussion of how campaigning and political polarization in our American democratic system has negatively impacted elected officials' ability to compromise for the public good.

In an age where democracy has become a hollow cliché employed by some of the most authoritarian regimes, simply holding elections does not guarantee meaningful empowerment, equality, and justice. There is no shortage of nations who mechanically hold elections that are meaningless to a disaffected populace.<sup>46</sup> Corruption and fraud skew election results in favor of authoritarian regimes who win every election by a landslide notwithstanding deeply rooted discontent.<sup>47</sup> Incumbents manipulate electoral processes to disempower certain groups, guarantee a monopoly over resources to other groups, and close the avenues for reforming the system.<sup>48</sup> Coupled with an iron-fisted security apparatus, the populace is frightened into a life of submission and poverty while a small, corrupt class enriches itself with state resources.<sup>49</sup> These societies are analogous to a pressure cooker ready to explode, leaving violence as the only means to attain justice.

The Middle East is a case in point. Multiple revolutions across the region in 2010 and 2011 were a culmination of decades of oppressive and impoverishing policies implemented under the guise of elections.<sup>50</sup> Authoritarian regimes in Egypt, Tunisia, Yemen, and Syria claimed legitimacy based on their purported electoral success.<sup>51</sup> To the citizenry, the

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<sup>46</sup> Shadi Hamid, *Arab Elections: Free, Sort of Fair . . . and Meaningless*, FOREIGN POL'Y (Oct. 27, 2010), [http://mideast.foreignpolicy.com/posts/2010/10/27/arab\\_elections\\_free\\_sort\\_of\\_fair\\_and\\_meaningless](http://mideast.foreignpolicy.com/posts/2010/10/27/arab_elections_free_sort_of_fair_and_meaningless); See Sahar F. Aziz, *Revolution Without Reform? A Critique of Egypt's Election Laws*, 45 GEO. WASH. INT'L L. REV. 101 (2012).

<sup>47</sup> E.g., *Egyptian Elections: Opposition Alleges Fraud*, GUARDIAN (Nov. 29, 2010, 12:05 P.M.), <http://www.theguardian.com/world/2010/nov/29/egyptian-opposition-alleges-election-fraud>; Ellen Barry & Michael Schwartz, *After Election, Putin Faces Challenges to Legitimacy*, N.Y. TIMES (Mar. 5, 2012), [http://www.nytimes.com/2012/03/06/world/europe/observers-detail-flaws-in-russian-election.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/03/06/world/europe/observers-detail-flaws-in-russian-election.html?pagewanted=all&_r=0).

<sup>48</sup> See e.g., Andrea Teti & Gennaro Gervasio, *Egypt's Post-Democratic Elections: Political Meaning Beyond the Menu of Manipulation*, OPEN DEMOCRACY (Jan. 14, 2011), <http://www.opendemocracy.net/andrea-teti-gennaro-gervasio/egypts-post-democratic-elections-political-meaning-beyond-menu-of-manip>.

<sup>49</sup> Cara Parks, *What's Going on in Egypt?*, WORLD POST (Jan. 28, 2011, 11:52 P.M.), [http://www.huffingtonpost.com/2011/01/28/whats-going-on-in-egypt\\_n\\_815734.html](http://www.huffingtonpost.com/2011/01/28/whats-going-on-in-egypt_n_815734.html) (last updated May 25, 2011 7:30 P.M.); Eric Andrew-Gee, *Making Sense of Tunisia*, NEW REPUBLIC (Jan. 17, 2011), <http://www.newrepublic.com/article/world/81611/making-sense-tunisia>.

<sup>50</sup> Adel El-Adawy, *The Future of Egypt's Electoral System*, WASH. INST. (Sept. 16, 2013), <http://www.washingtoninstitute.org/policy-analysis/view/the-future-of-egypts-electoral-system>; Wendell Steavenson, *Pessoptimism*, NEW YORKER (Mar. 14, 2011), [http://www.newyorker.com/talk/comment/2011/03/14/110314taco\\_talk\\_steavenson](http://www.newyorker.com/talk/comment/2011/03/14/110314taco_talk_steavenson).

<sup>51</sup> Ian Johnston, *Egypt's Morsi Says He Won't Step Down, Vows to Protect His Legitimacy*, NBC NEWS (July 2, 2013, 10:50 P.M.), [http://worldnews.nbcnews.com/\\_news/2013/07/02/19246354-egypts-morsi-says-he-wont-step-down-vows-to-protect-his-legitimacy?lite](http://worldnews.nbcnews.com/_news/2013/07/02/19246354-egypts-morsi-says-he-wont-step-down-vows-to-protect-his-legitimacy?lite); Danya Greenfield, *Yemen's Democratic Revolution, One Year Later*, ATLANTIC (Nov. 29, 2012, 10:31 A.M.), <http://www.theatlantic.com/international/archive/2012/11/yemens-democratic-revolution-one-year->

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elections were a meaningless fraud. Elections had been co-opted by a corrupt regime intent on hoarding resources for a select business, political, and military elite in return for its political loyalty, and all at the expense of the deprived masses. Hence, few citizens bothered to vote, making the ballot box irrelevant to the notion of justice.<sup>52</sup>

The resulting skewed distribution of resources balkanized citizens along ethnic, tribal, or sectarian lines. A small privileged class used various techniques, including fraudulent elections, to marginalize a large group of have-nots, resulting in festering resentment.<sup>53</sup> The pressure cooker exploded in 2010 and 2011 when a vast underclass had no other option but to resort to a physical overthrow of the government. While the revolutions were remarkably nonviolent when they began, they have become increasingly violent as attention has shifted to who will control the nation's resources, how such leaders are to be selected, and how resources will be allocated among the citizenry.<sup>54</sup> The absence of a tradition of fair elections and a consequent distrust of election outcomes is contributing toward a regression to pre-revolutionary authoritarian practices in some Middle East countries.<sup>55</sup> Meanwhile, the long history of zero-sum, winner-takes-all politics tenaciously grips the citizenry's psyche such that even democratically elected officials are prematurely kicked out of power at the slightest indication of abusive practices.<sup>56</sup> All of this leads to a perpetual state of political insecurity and

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later/265699/; Elizabeth A. Kennedy, *Riad Farid Hijab Appointed Syrian Prime Minister*, WORLD POST (June 6, 2012, 8:00 A.M.), [http://www.huffingtonpost.com/2012/06/06/riad-farid-hijab-appointe\\_n\\_1573370.html](http://www.huffingtonpost.com/2012/06/06/riad-farid-hijab-appointe_n_1573370.html); Hamadi Redissi, *Do Elections in Tunisia Have Meaning?*, SADA (Oct. 6, 2009), <http://carnegieendowment.org/2009/10/06/do-elections-in-tunisia-have-meaning/b3yz>.

<sup>52</sup> E.g., *Egypt Elections: Shafiq v Morsi-Sunday 18 June 2012*, GUARDIAN (June 18, 2012), <http://www.theguardian.com/world/middle-east-live/2012/jun/17/egypt-elections-shafiq-morsi-live>.

<sup>53</sup> Michael Volkov, *Corruption Risks in the Middle East*, JDSUPRA BUSINESS ADVISOR (May 23, 2012), <http://www.jdsupra.com/legalnews/corruption-risks-in-the-middle-east-70471/>; Stephen Zunes, *Fraudulent Egyptian Election*, FOREIGN POL'Y IN FOCUS (Dec. 7, 2010), [http://fpif.org/fraudulent\\_egyptian\\_election/](http://fpif.org/fraudulent_egyptian_election/).

<sup>54</sup> E.g., Ursula Lindsey, *Egypt Back at Square One*, N.Y. TIMES (Oct. 3, 2013, 10:44 A.M.), [http://latitude.blogs.nytimes.com/2013/10/03/egypt-back-at-square-one/?ref=egypt&\\_r=0](http://latitude.blogs.nytimes.com/2013/10/03/egypt-back-at-square-one/?ref=egypt&_r=0); Kevin Sullivan, *In Tunisia, Islamist Government Paralyzed by Middle Class Backlash and Extremist Violence*, WASH. POST (Sept. 17, 2013), [http://www.washingtonpost.com/world/in-tunisia-islamist-government-paralyzed-by-middle-class-backlash-and-extremist-violence/2013/09/17/d3855b1e-1bcd-11e3-82ef-a059e54c49d0\\_story.html](http://www.washingtonpost.com/world/in-tunisia-islamist-government-paralyzed-by-middle-class-backlash-and-extremist-violence/2013/09/17/d3855b1e-1bcd-11e3-82ef-a059e54c49d0_story.html).

<sup>55</sup> E.g., *Egypt: Return to a Generals' Republic?*, BBC (Aug. 21, 2013, 4:48 P.M.), <http://www.bbc.co.uk/news/world-middle-east-23780839?print=true>.

<sup>56</sup> *Egypt's President Mohammed Morsi Out as Military Presents Roadmap*, WORLD POST (JULY 3, 2013, 3:11 PM), [http://www.huffingtonpost.com/2013/07/03/egypt-morsi-out-army-roadmap\\_n\\_3540700.html](http://www.huffingtonpost.com/2013/07/03/egypt-morsi-out-army-roadmap_n_3540700.html); Sarah Lynch, *'I Want My Country Back': Egyptians Rally Against Morsi*, USA TODAY (June 30, 2013, 1:28 PM), <http://www.usatoday.com/story/news/world/2013/06/30/egypt-protests/2476559/>.

the same socio-economic disparities that led to the revolutions in the first place.

While the historical, economic, and social circumstances in the Middle East differ significantly from those of the U.S., an important lesson can be learned by Americans. That is, elections viewed as legitimate by the electorate are an invaluable component of democracy that takes decades to develop. Without them, a nation faces a perpetual risk of violence, corruption, and widespread discontent. Thus, blithely taking for granted the importance of legitimate elections jeopardizes the wellbeing of an entire society. And that may very well be what the *Shelby County* Court did when it effectively legalized “second generation barriers” to voting by racial minorities.

### Preserving the Value of Citizenship

Citizenship is a prerequisite for exercising political rights.<sup>57</sup> In exchange for the responsibility of adhering to laws imposed by government, citizenship accords certain rights that empower individuals to meaningfully shape the laws to which they are bound.<sup>58</sup> As a result, law and the attendant enforcement mechanisms attain the legitimacy necessary to manage human affairs.<sup>59</sup> Otherwise, law is viewed as merely a tool of the powerful to hoard resources from and exploit the labor of the weak. Law becomes a tool of oppression and violence rather than a tool of justice and peace.<sup>60</sup>

The meaningful right to vote lies at the heart of a representative democracy.<sup>61</sup> The procedures that govern voting directly contribute to whether the consequent government and its laws are imbued with legitimacy. Should procedures advantage particular citizens over others in terms of their eligibility to vote, access to voting, and the weight of their votes, classes of citizens arise whose influence over their material and political lives differ

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<sup>57</sup> See *Citizenship Rights and Responsibilities*, U.S. DEP'T OF HOMELAND SECURITY, <http://www.uscis.gov/portal/site/uscis/menuitem.749cabd81f5ffc8fba713d10526e0aa0?vgnextoid=39d2df6bdd42a210VgnVCM100000b92ca60aRCRD&vgnnextchannel=39d2df6bdd42a210VgnVCM100000b92ca60aRCRD> (last visited Mar. 12, 2014).

<sup>58</sup> *Id.*

<sup>59</sup> See *id.*

<sup>60</sup> E.g., Alex Rodriguez, *Pakistan's Blasphemy Law Seen as Tool of Oppression*, L.A. TIMES (Dec. 27, 2010), <http://articles.latimes.com/2010/dec/27/world/la-fg-pakistan-blasphemy-20101227>; Anna Borshchevskaya, *Sponsored Corruption and Neglected Reform in Syria*, 17 MIDDLE E.Q. 41 *passim* (2010).

<sup>61</sup> *Voting Rights & Elections*, BRENNAN CTR. FOR JUST., <http://www.brennancenter.org/issues/voting-rights-elections> (last visited Mar. 12, 2014).

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dramatically. Those disadvantaged by voting procedures are at risk of being denied access to various resources and excluded from changing society to alleviate such disparities. In turn, they are more likely to question the legitimacy and relevance of the voting process for resolving grievances in what they view as an unjust society.<sup>62</sup>

Inequities in voting processes also degrade the value of citizenship. Different classes of citizens, wherein only some citizens are able to control the levers of power and set rules, produce strife and marginalize the relevance of citizenship. One's membership in the advantaged class matters more than one's citizenship status. In racial, ethnically, or religiously diverse societies, this is a recipe for balkanization, political instability, and violence.<sup>63</sup>

Hence it is no coincidence that when the VRA was passed in 1965, it was to secure to all in the polity equal citizenship status.<sup>64</sup> The drafters of the VRA recognized that racial minorities in certain jurisdictions suffered substantially from socio-economic disparities that effectively hindered their ability to participate in the political process.<sup>65</sup> Equality in the weight of one's vote was viewed as being as much a component of one's citizenship status as equal access to the ballot box.<sup>66</sup> Because without equal access and equal weight the high rates of poverty, unemployment, and diminished educational opportunities among racial minorities would remain a product of white political leaders that did not prioritize the needs and harsh material realities of minority communities.<sup>67</sup> Without legal reforms, a permanent underclass of citizens would persist, ultimately undermining the legitimacy of a purportedly democratic society comprised of citizens with equal rights.

## **The Blinding Color of Race**

While the VRA has been a remarkable success in eliminating specific tools and devices used in the 1960s to impede racial minorities' voter eligibility and physical access to the voting booths, new barriers have sprung up in their place.<sup>68</sup> Over time, groups apprehensive at the repercussions of

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<sup>62</sup> *E.g.*, Daniel Carawan, *Voting Irregularities Leave a Lingering Distrust of the Voting Process in VA*, EXAMINER (Nov. 12, 2011), <http://www.examiner.com/article/voting-irregularities-leave-a-lingering-distrust-of-the-voting-process-va>.

<sup>63</sup> *See e.g.*, Kursad Turan, *Political Change in Ethnically Diverse Societies: Democratization and Ethnic Violence 2–3* (Dec. 1, 2004) (unpublished Ph.D. dissertation, Florida State University), <http://diginole.lib.fsu.edu/etd/1483/>.

<sup>64</sup> *Shelby Cnty.*, 133 S. Ct. at 2651.

<sup>65</sup> *Id.* at 2618.

<sup>66</sup> DEFENDING DEMOCRACY, *supra* note 1, at 5.

<sup>67</sup> DEFENDING DEMOCRACY, *supra* note 1, at 4.

<sup>68</sup> *E.g.*, DEFENDING DEMOCRACY, *supra* note 1, *passim*.

increased political empowerment of racial minorities developed more creative means of keeping minorities at the margins of the polity.

Exploiting socio-economic disparities, lawmakers pass voter identification laws and eliminate voter registration on Election Day that are disproportionately onerous to minority communities.<sup>69</sup> And when that does not sufficiently decrease the voter turnout, legislative districts are redrawn to purposely segregate races for the purpose of skewing election outcomes.<sup>70</sup> Latinos or blacks are placed into one district, especially as they reach a critical mass in a predominantly white district, to restrict their ability to play a determinative role in choosing elected officials.<sup>71</sup> Similarly, cities with growing racial minority populations incorporate majority white areas into the city limits or switch to at-large voting for the purpose of diluting minority votes.<sup>72</sup> When racial minorities register to vote in record numbers due to efforts of third parties conducting aggressive voter registration drives, there are attempts to hamper such efforts.<sup>73</sup> While partisan interests partially

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<sup>69</sup> DEFENDING DEMOCRACY, *supra* note 1, at 11.

<sup>70</sup> Heddy Nam, *Vote 2012: Racial Gerrymandering Resegregates the U.S. South*, OPEN SOCIETY FOUND. (Feb. 15, 2012), <http://www.opensocietyfoundations.org/voices/racial-gerrymandering-resegregates-the-u-s-south>; Nathan Jaco, *Judicial Review of Racial Gerrymandering: A Problem for Democrats*, DAILY KOS (Dec. 17, 2011, 8:09 A.M.), <http://www.dailykos.com/story/2011/12/17/1046355/-Judicial-Review-of-Racial-Gerrymandering-A-Problem-for-Democrats>.

<sup>71</sup> Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance after Shelby County*, 102 CALIF. L. REV. (forthcoming 2014) (manuscript at 12) (on file with author).

<sup>72</sup> Abigail Thernstrom, *Redistricting, Race, and the Voting Rights Act*, 3 NAT'L AFF. 52, 55 (2010), available at <http://www.nationalaffairs.com/publications/detail/redistricting-race-and-the-voting-rights-act>; Defending Democracy, *supra* note 1, at 6.

<sup>73</sup> Defending Democracy, *supra* note 1, at 11–38. See also E. Earl Parson & Monique McLaughlin, *Citizenship in Name Only: The Coloring of Democracy While Redefining Rights, Liberties and Self Determination for the 21<sup>st</sup> Century*, 3 COLUM. J. RACE & L. 103, 113-14 (2013) (“During the 2004 elections in Allegheny County, Pennsylvania, fake fliers were distributed on official-looking paper telling Republicans to vote on Tuesday, November 2, 2004, and Democrats the next day. In Ohio, a memo also distributed on official looking Board of Election stationery, told voters they could not vote if registered by a NAACP voter drive. A fake letter purporting to come from the NAACP instructed voters in Charleston, South Carolina that they would be arrested if they voted with past due child support payments and unpaid parking tickets. A candidate for office in Orange County, California sent fliers in Spanish to the Latino community prior to the November 2006 election stating: “You are advised that if your residence in this country is illegal or you are an immigrant, voting in a federal election is a crime that could result in jail time.” In response to the flier, California’s Secretary of State, Bruce McPherson, mailed letters to the Latino community informing them that all U.S. citizens have a right to vote and stated that “voter intimidation in any form is completely unacceptable.” A federal judge in East Texas issued an order during the November 2006 elections stopping the Attorney General and Texas election officials from prosecuting people of color for helping the elderly, the disabled and other minorities cast their vote. The Lone Star Project called this behavior “a voter suppression scheme” designed to impart

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animate these tactics, it does not detract from the discriminatory effects that the VRA aims to protect against. Indeed, what is remarkable about these tactics is their blatant purpose to secure partisan advantage through race-based moves in an era where overt forms of discrimination have been largely replaced with covert or implicit biases.<sup>74</sup>

As social norms have changed, partially in response to the deterrent effect of civil rights laws, many Americans reject explicit expressions of racism.<sup>75</sup> In current times, expressions of overt racism carry adverse employment and reputational consequences.<sup>76</sup> This has pushed racism underground wherein it is openly expressed in private settings or among confidants and acted on in covert ways under pretext.<sup>77</sup> And it has also pushed bias into the subconscious as pervasive stereotypes of particular races affect our interpretation of events, people's behavior, and underlying assumptions in institutional decision making processes.<sup>78</sup>

Thus, voter discrimination stands out as one of the few areas in which intentional discrimination drives electoral processes in some jurisdictions. So much so that between 1982 and 2006 the U.S. Department of Justice (DOJ) blocked over 700 voting changes based on evidence of discriminatory intent or discriminatory effect.<sup>79</sup> Similarly, government officials altered or withdrew over 800 proposed changes to electoral laws.<sup>80</sup> And yet the U.S. Supreme Court still questioned the need for the VRA.

Implicit in the Court's reasoning is the so-called post-racial, colorblind narrative of American race relations in the twenty-first century wherein race is purportedly no longer a factor in shaping societal norms.<sup>81</sup> Examples of

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fear and intimidation. During the November 2006 elections, Latinos in Virginia and Colorado were told that their ancestry would make them ineligible to vote. In 1988, Republican Assembly candidate Curt Pringle settled a civil rights suit for voter intimidations. Pringle posted "security guards" at predominately Latino voting stations in Orange County, California to prevent non-citizens from casting ballots. In 2006, Republicans in New York challenged late registered voters by using a check challenge of sending police officers out to check listed addresses." See also *United States v. McGregor*, 824 F. Supp.2d 1339, 1344-48 (M.D. Ala. 2011).

<sup>74</sup> See, e.g., Sahar Aziz, *Veiled Discrimination: Coercive Assimilationism in the Workplace*, MICHIGAN JOURNAL OF RACE AND LAW (forthcoming Fall 2014) (providing a summary of the social psychology literature documenting the prevalence of implicit bias).

<sup>75</sup> Shanto, Iyengar, et al., *supra* note 17, at 2.

<sup>76</sup> See *id.* at 2.

<sup>77</sup> See *id.* at 2.

<sup>78</sup> *Id.* at 2.

<sup>79</sup> *Shelby Cnty.*, 133 S. Ct. at 2639 (citing H.R. Rep. No. 109-478, at 21 (2006)).

<sup>80</sup> *Id.* at 2639.

<sup>81</sup> See generally Charles A. Gallagher, *Color-Blind Privilege: The Social and Political Functions of Erasing the Color Line in Post Race America*, 10 RACE, GENDER, & CLASS 575 (2003); Ian F. Haney

individual success are over-emphasized while collective disparities along racial lines are ignored to justify the elimination of civil rights legislation, affirmative action programs, and diversity initiatives. So long as there are a few minority movie stars, professional athletes, talk show hosts, corporate executives, and a Black President, then one's race no longer poses any challenges to equal opportunity and equal access to employment, quality education, public safety, and other resources. Overt expressions of racial or ethnic bias are viewed as anomalies, with little regard for how negative stereotypes pervert private and public decision making. These perceptions are belied by statistics showing systemic inequities along racial lines. In the end, focusing solely on individuals myopically overlooks the impact of families, communities, schools, and other collectives on the fate of an individual's prospects for achievement.<sup>82</sup> The individualistic framing of civil rights leaves minority communities collectively worse off as socio-economic disparities are attributed to individual failures rather than systemic inequities.

### **Formalism and its Discontents**

In adopting the specious colorblind narrative, the majority in *Shelby County* set up two straw men to justify its decision to strike down Section 4. First, it arbitrarily distinguished between the tests and tactics used in the 1960s to impede racial minorities' ability to equally partake in the political process and the more recent tactics used for the same purpose.<sup>83</sup> Losing sight of the VRA's original objective to grant equal citizenship rights to all Americans, especially politically vulnerable racial minorities, the Supreme Court myopically focused on the differences in tactics instead of the same underlying discriminatory purposes.<sup>84</sup> Taking a narrow view of the VRA's objective, the Court triumphantly announced that literacy tests, poll taxes, and property ownership qualifications were no longer in use, and thus the VRA's usefulness had expired.<sup>85</sup> Despite acknowledging that they had been replaced with racial gerrymandering, stringent voter identification laws, and restrictions on early voting, all of which target and disparately impact racial minorities; the Court dismissed such tactics as sufficiently dissimilar as to

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López, *Is the "Post" in Post-Racial the "Blind" in Colorblind*, 32 CARDOZO L. REV. 807, 811-12 (2011) (explaining that contemporary colorblindness arose in opposition to demands for meaningful structural reform.); Darren Leonard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination?* 13-17 (forthcoming, copy on file with author)

<sup>82</sup> See Christopher S. Elmendorf & Douglas M. Spencer, *supra* note 71.

<sup>83</sup> *Shelby Cnty.*, 133 S. Ct. at 2629.

<sup>84</sup> See, e.g., *id.* at 2627.

<sup>85</sup> *Id.* at 2627-28.



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fall outside of the VRA's purview.<sup>86</sup> That such modern-day tactics are driven by the same racially discriminatory intentions and produce the same racially disparate outcomes were erroneously deemed by the Court as beyond the goals of the VRA.<sup>87</sup>

Second, the Court apparently dismissed discriminatory practices of covered jurisdictions as acceptable because non-covered jurisdictions had similar practices.<sup>88</sup> If that is indeed the case and the Court is serious about its commitment to equal voter rights, then the Court should have called for the expansion, rather than retraction, of coverage. To be sure, the Court's reasoning encourages a race to the bottom where jurisdictions are incentivized to adopt electoral processes that are as discriminatory as other jurisdictions but not so discriminatory as to trigger preclearance.

But even the Court's finding that covered jurisdictions' racial climates, and consequent effect on electoral processes, are similar to non-covered jurisdictions is contradicted by empirical studies showing otherwise.<sup>89</sup> The highly regarded Katz study found that 56% of all successful Section 2 litigation occurred in covered jurisdictions, although they represented less than 25% of the nation's population.<sup>90</sup> And when unpublished opinions are considered, the number increases to 81% of all successful litigation.<sup>91</sup> Likewise, an empirical sociological study on the geography of voter discrimination found that covered jurisdictions have higher rates of negative stereotypes of blacks and racially polarized voting than non-covered jurisdictions.<sup>92</sup> When these factors are coupled with a high population of blacks, the likelihood of adopting voter denial and suppression methods increases significantly.<sup>93</sup> Specifically, when large numbers of voters form preferences and make choices based on negative stereotypes about minorities, then the electorate will either elect a politician who shares their negative stereotypes or pressure their representative to adopt discriminatory policies

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<sup>86</sup> *Id.* at 2629.

<sup>87</sup> *See id.*; see also Ellen Katz, *What Was Wrong with the Record?* ELECTION L. J. 329, 331 (2013) (pointing out that "second generation" practices, like gerrymandering or vote dilution, are not unrelated to the concerns that animated Congress to enact VRA, and that they are a part and parcel of practices targeted by the original statute).

<sup>88</sup> Brief for States of Arizona, Georgia, South Carolina, and South Dakota as Amicus Curiae Supporting Respondents, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 U.S. S. Ct. Briefs LEXIS 661, [http://www.lawyerscommittee.org/admin/voting\\_rights/documents/files/12-96-tsac-Arizona-et-al.pdf](http://www.lawyerscommittee.org/admin/voting_rights/documents/files/12-96-tsac-Arizona-et-al.pdf).

<sup>89</sup> *See, e.g.*, Elmendorf & Spencer, *supra* note 71, *passim*.

<sup>90</sup> *Shelby Cnty.*, 133 S. Ct. at 2643.

<sup>91</sup> Brief for Respondents at 13–14, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

<sup>92</sup> Elmendorf & Spencer, *supra* note 71, at 45.

<sup>93</sup> *Id.* at 43.

and practices that perpetuate negative racial stereotypes.<sup>94</sup> As a result, covered jurisdictions with this noxious combination of factors pose much higher risks of political marginalization to their minority electorate than non-covered jurisdictions.

Lest it become too obvious that minority voters' rights are no longer its concern, the Court flippantly highlights its limited ruling to striking down only Section 4, the coverage provision, while leaving in place Section 5, the enforcement provision. This leaves Section 2 private party litigation as the sole enforcement mechanism.<sup>95</sup> But Section 2 litigation imposes significant and costly burdens on minority voters from communities with insufficient resources to sue a local or state government.<sup>96</sup> In contrast, preclearance shifts the cost of ensuring fair voting practices to a better resourced federal government.<sup>97</sup>

Tellingly, the majority's opinion bemoans the burdens on jurisdictions caused by the VRA with little regard for the burdens on racial minorities that will arise in the absence of an enforceable VRA. Racial and ethnic minorities are protected by the VRA, as well as other civil rights laws, precisely because of their numerical minority status vis-à-vis the white majority. Collectively, they have fewer resources and less political clout to overcome the electoral processes that contribute toward their politically vulnerable condition,<sup>98</sup> and thus the cycle of disempowerment is perpetuated.

American society, therefore, remains at risk of invidious division and balkanization that lead to long term political instability and a resort to extra-legal means for seeking justice. As government officials who set the rules rebuke efforts to reform the legal system, the law loses its legitimacy among portions of the populace disparately impacted by the system. As witnessed during the civil rights movement of the 1960s, the black power movement of the 1970s, and the race riots of the 1980s and early 1990s, the streets become the chosen alternative when courts are incapable of or uninterested in remedying injustice in society.<sup>99</sup> While mass mobilization efforts are an

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<sup>94</sup> *Id.* at 14.

<sup>95</sup> Brief for American Bar Association as Amicus Curiae Supporting Respondents, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 U.S. S. Ct. Briefs LEXIS 661, at \*8.

<sup>96</sup> *Id.* at \*23–24.

<sup>97</sup> *See id.*

<sup>98</sup> *Defending Democracy: supra* note 1, at 4.

<sup>99</sup> *Civil Rights Movement*, HIST., <http://www.history.com/topics/civil-rights-movement> (last visited Mar. 12, 2014); Patrick Range McDonald, *Then & Now: Images from the Same Spot as the L.A. Riots, 20 Years Later*, LA WEEKLY, <http://www.laweekly.com/microsites/la-riots/> (last visited Mar. 12, 2014); *In Search of African America: One Collector's Experience—The Black Power Movement*

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integral component of a democratic society, they can quickly turn violent when the underlying grievances cannot be channeled through the electoral process into substantive change.

Ultimately, the majority in *Shelby County* lost sight of the objective of the VRA. This historic law was not merely about preventing the most extreme levels or forms of discrimination, but rather having in place a regime that is preventative in nature so as to ensure discrimination continues to decrease and eliminate the possibility of returning to a period of systemic disenfranchisement.<sup>100</sup> The VRA served the nation's existential need to equalize every citizen's ability to shape the rules governing her society through elections.

By dismantling a vital mechanism that propelled our nation toward achieving the cardinal democratic principle of equal citizenship for all Americans, the *Shelby County* Court set our nation back.

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1968-1980, HERBERT HOOVER PRESIDENTIAL LIBR.,  
<http://www.hoover.archives.gov/exhibits/africanamerican/blackpower/> (last visited Mar. 12, 2014);  
*McDuffie Riots: Eerie Scene from Miami Race Riot of 1980*, HUFFPOST MIAMI (May 29, 2013, 1:24  
P.M.), [http://www.huffingtonpost.com/2013/05/29/mcduffie-riots-miami\\_n\\_3353719.html](http://www.huffingtonpost.com/2013/05/29/mcduffie-riots-miami_n_3353719.html).

<sup>100</sup> Brief for Historians and Social Scientists as Amicus Curiae Supporting Respondents, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 U.S. S. Ct. Briefs LEXIS 759, at \*13-14.