

Ralph Bunche Journal of Public Affairs

Volume 4

Issue 1 2013 Supreme Court's adjudication on Section
IV of the Voting Rights Act of 1965


Article 4

Spring 2015

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Recommended Citation

Samuels, Albert L. (2015) "Shelby County v. Holder: Nullification, Racial Entitlement, and the Civil Rights Counterrevolution," *Ralph Bunche Journal of Public Affairs*: Vol. 4: Iss. 1, Article 4.
Available at: <http://digitalscholarship.tsu.edu/rbjpa/vol4/iss1/4>

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Shelby County v. Holder: Nullification, Racial Entitlement, and the Civil Rights Counterrevolution

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The Supreme Court's recent decision in Shelby County v. Holder (2013) which invalidated the "coverage formula" of Section 4 of the Voting Rights Act of 1965 bears an eerie resemblance to the spirit of the Civil Rights Cases (1883). In a tone similar to the one exhibited by the Supreme Court in The Civil Rights Cases, Chief Justice Roberts cited progress achieved in electoral participation and office holding by African Americans as evidence that the special protections that the Voting Rights Act of 1965 affords to Blacks are no longer needed. With the use of similar arguments, the Supreme Court has limited both the reach and effectiveness of school desegregation, employment and housing discrimination laws, and affirmative action. This article conceives of the Supreme Court's decision in Shelby County v. Holder as an illustration of the doctrine of nullification – an ideology that states have the right of declaring federal statutes and constitutional amendments "null and void" despite the fact that these enactments are technically the "supreme law of the land." Using Shelby County as a case study, this article argues that nullification is the "norm," not the exception, when it comes to America's treatment of African Americans.

The Supreme Court's recent decision in *Shelby County v. Holder* (2013) striking a key provision of the Voting Rights Act of 1965 (hereinafter referred to as "VRA") bears an uncomfortable resemblance to the spirit of *The Civil Rights Cases* (1883). In this case, the Court held that the Civil Rights Act of 1875 which banned racial discrimination in public accommodations exceeded Congress' power under the Fourteenth Amendment. Congress had already done enough for the freed slaves, the Court said in *The Civil Rights Cases*; now it was time for the Negro to stand on his own. Justice Antonin Scalia expresses an eerie echo of this same sentiment during the oral arguments in *Shelby County* when he referred to the Voting Rights Act as a "racial entitlement"-- implying that it unfairly privileges African

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American voters in the political process at the expense of Whites. Indeed, the thrust of Chief Justice Roberts' majority opinion argues that the special protections afforded by the VRA are no longer necessary because of the great strides the nation has made toward full equality since the 1960s. This progress, according to his reasoning, renders the "coverage formula" of Section 4 of the act unconstitutional because it is "outdated" and does not conform to modern conditions. Justice Ruth Bader Ginsburg issued a blistering dissenting opinion in which she chastised the majority for, in her view, ignoring ample evidence of "second generation" types of racial discrimination that still prevail throughout the United States, including blatant efforts to suppress minority voting rights leading up to, and during, the 2012 presidential election (Berman, 2011; Knafo, 2013; Chait, 2013; Bouie, 2013).

State and local jurisdictions which meet the criteria of this formula were required to seek preclearance from the federal government (either from the Department of Justice or the U.S. District Court for the Federal District) before they can make any significant changes to electoral rules or procedures. The preclearance requirement, which is found in Section 5 of the VRA, applies to state and local governments with a demonstrated record of racial discrimination in voting. As applied, it affects all or parts of fifteen states, mostly concentrated in the states of the old Confederacy where discriminatory legislation prohibiting African Americans from both registering to vote and actually exercising the right was most egregious.¹ The laws and procedures subject to preclearance range from changes as seemingly mundane as polling place or precinct changes to the redrawing of congressional districts. The VRA is widely credited with effecting a dramatic transformation in the nation's politics: as Black Americans began to participate in politics in vastly greater numbers, they changed the complexion (both literally and figuratively) of municipal bodies, mayoralities, state legislatures, governorships, Congress, and even the White House (Preston, Henderson, and Puryear, 1987; Tate, 1994; Davidson and Grofman, 1994; Perry and Parent, 1995; Smith, 1995; Pohlman, 1999; Barker and Jones, 2000; Walton and Smith, 2012; Gillespie, 2010; Waldschmidt-Nelson, 2012).

But more worrisome for many in the civil rights community is that *Shelby County* is not an isolated case; it is symptomatic of a concerted effort in recent decades to roll back the landmark legislative, judicial, and administrative triumphs of the civil rights era. Similar attacks have limited both the reach and effectiveness of school desegregation efforts, affirmative action policies, and employment discrimination laws. A common theme in all of these civil rights controversies is the notion that the reliance on government intervention, especially at the federal level, in order to secure the rights of Black Americans is no longer necessary or even desirable. Consequently, these policies need to be eliminated to prevent Blacks from being "the special favorite of the laws" entitled to more legal protections than other citizens.

However, there is one critical difference between the Supreme Court's holding in *The Civil Rights Cases* and *Shelby County v. Holder*. In *The Civil Rights Cases*, the Supreme Court overturned the Civil Rights Act of 1875² outright. However, in *Shelby County v. Holder*, the Court stopped short of declaring the VRA and/or its key enforcement provision unconstitutional: instead, by striking the formula³ that determines which states and municipalities are required to get preclearance before any changes to their election laws or procedures can take effect, it renders Section 5 inoperative. This essay argues that the Court's ruling in *Shelby County v. Holder* (2013) represents a vivid illustration of the doctrine of nullification—an ideology that asserts the prerogatives of states to resist the perceived unconstitutional encroachments of federal power. It has the effect of allowing

constitutional amendments and federal statutes to remain on the books while simultaneously divesting them of any practical benefit to Black Americans.

I argue that the doctrine of nullification—far from being an historical artifact of the antebellum period, not only persists, but represents the “tool of choice” for those who have resisted the ideal of full racial equality for Black Americans. In other words, rather than directly abolishing civil rights legislation or constitutional amendments designed to benefit Blacks, this stratagem allows them to remain technically “the law of the land” while emptying them of any substantive impact on the lives of the very people these enactments were ostensibly designed to help. Stated another way, *Shelby County v. Holder*’s significance cannot be reduced to the familiar trench warfare between liberals and conservatives that has characterized debates over civil rights issues since the demise of *de jure* racial segregation in the middle 1960s. Rather, nullification represents the *norm* with respect to how America deals with the rights of African Americans. The implications of this thesis not only puts the *Shelby County* decision in a different context, but it forces a reexamination of the significance of other recent attacks on the landmark achievements of the civil rights era of the 1960s.

Methodology

To test this assertion, I examine the Supreme Court’s opinion in *Shelby County v. Holder*, including the concurring opinion of Justice Clarence Thomas and the dissenting opinion of Justice Ruth Bader Ginsburg. Also, the text of the 2006 amendments to the Voting Rights Act and *Documenting Discrimination in Voting: Section 2 Judicial Findings since 1982* (a report produced by the University of Michigan Law School that was entered into the congressional record during the reauthorization debates) are examined. Secondly, I return to the political context of the Nullification Crisis of 1832-1833 by relying on secondary historical sources. Thirdly, this essay examines the significance of several Supreme Court decisions in the post-Reconstruction period and more recent rulings to look for evidence of the principle of nullification rearing its heads in those cases. Specifically, in considering these cases, I employ two forms of legal analysis that have frequently been relied upon by conservative jurists in cases involving claims of racial discrimination: first, a literal interpretation of the text (which can have the perverse effect of shielding alleged actions from judicial remedy that are held not to be included within the technical wording of the constitutional provision or legal statute in question) and second, the tendency to define racial discrimination solely as the purposeful actions or statements of individuals, thus requiring proof of malice in order for those alleging disparate treatment to prevail.

A Brief History of *Shelby County v. Holder*

Shelby County in Alabama filed suit against Eric Holder, Attorney General of the United States, in the United States District Court for the Federal District in Washington, D.C. seeking a declaratory judgment that Sections 4 and 5 of the VRA are facially unconstitutional,⁴ as well as a permanent injunction against their enforcement. This litigation is on the heels of the recent decision by Congress to reauthorize the VRA in 2006: of particular note, Sections 4 and 5, which are temporary provisions that subject districts with a history of racial discrimination in voting to preclearance based on the law’s coverage formula, were renewed. During the congressional hearings concerning the reauthorization of the Voting Rights Act, Congress amassed over 15,000 pages of testimony documenting continuing instances of racial discrimination in voting in the covered jurisdictions since

1982, the last time the law was renewed. Both the district court and the U.S. Court of Appeals for the District of Columbia rejected Shelby County's claim, upholding the validity of the law. They held that Congress had more than sufficient evidence before it in 2006 when it voted to keep in place the requirements of Section 4 and 5 of the act that subjected the election rules and procedures of states and local governments in the covered jurisdictions to special federal scrutiny.⁵

In mounting a frontal assault of the constitutionality of Sections 4 and 5 of the VRA, the petitioners essentially declared war on the symbol of what many Americans consider the greatest achievement of the civil rights movement. The VRA is easily the most successful piece of legislation in American history when it comes to combating the scourge of racial discrimination in voting. It outlawed blatant and intentionally racist laws and subterfuges that White Southerners had ingeniously devised to prevent masses of Blacks from voting for generations. Since 1965, the law's temporary provisions have been extended four times -- in 1970, 1975, 1982, and 2006. The 1975 reauthorization included "language minorities" within the rubric of the law's protection; these provisions have primarily benefited Latino Americans. Armed with the franchise, Blacks began to vote in large numbers for the first time since the Reconstruction period after the Civil War (Franklin and Moss, 1987; Foner, 1988; Carmines and Stimson, 1989; Preston, Henderson, and Puryear, 1987; Tate, 1994; Davidson and Grofman, 1994; Perry and Parent, 1995; Smith, 1995; Pohlman, 1999; Barker and Jones, 2000; Walton and Smith, 2000; Gillespie, 2010; Waldschmidt-Nelson, 2012). Britta Waldschmidt-Nelson summarizes the political impact of the Voting Rights Act on Black political representation:

. . . . Within a few years after its passage, Black voter registration and Black political representation all over southern states increased rapidly; between 1965 and 1970 the number of eligible Blacks who were registered to vote in the deep South more than doubled (in some states the gains were higher; in Mississippi, for example, the increase jumped from 6 to 67 percent). On the whole, the participation of African Americans today is only slightly lower than that of White Americans. In many cases, the Black vote has become an important factor in close elections. For example, it provided the winning margin for President Carter's election in 1976 and was essential to Clinton's victory in the 1992 Democratic primaries.

The number of Black elected officials has increased tremendously since the 1960s. In the South their number climbed from 72 in 1965 to more than 5,000 today, and during the same time in all of the United States the number has risen from less than 300 to over 9,000. Many major American cities -- among them New York, Washington, D.C., Atlanta, Chicago, Philadelphia, New Orleans, and Los Angeles -- have had or still have Black mayors, and in 1989 the voters of Virginia elected Douglas Wilder as the first African American governor in U.S. history. (Since then two other Black governors have taken office: Duval Patrick in Massachusetts in 2007 and David Paterson in New York in 2008.) There has also been a great increase in the number of Black members of Congress--from 7 in 1965 to 43 today. This means that African Americans, who constitute about 12.6 percent of the American

population, hold 8 percent of the congressional seats, which enables them to exert some influence on the national political decision-making process. Last but, of course, not least, the election of Barack Obama as the first African American president of the United States in November of 2008 signified a tremendous step forward in overcoming racial barriers in American politics (2012, 167-168).

In fact, it is because of the success of the VRA in dramatically increasing Black voter registration and the number of Black elected officials that contemporary critics of the law question its continued relevance. They basically argue that tremendous civil rights progress has been made in the nation—but especially in the South where mass disenfranchisement was most prevalent—in the five decades since the original adoption of the Voting Rights Act. The situation in the South prior to the passage of the act was characterized by a degree of massive evasion and defiance of the intent of the Fifteenth Amendment that necessitated the extraordinary intervention of the federal government to protect the voting rights of African Americans. However, the situation today is much different than it was in 1965. Blacks do not face anything approaching the level of obstruction and obfuscation in exercising the right to vote. Some point to Barack Obama’s election as a powerful symbol of the degree of racial progress America has made since the civil rights movement: for them, it underscores the degree to which the special protections that the Voting Rights Act affords to minority citizens are no longer necessary.⁶

Consequently, the requirement that state and local governments obtain preclearance for any and all changes to their electoral rules and procedures imposes current “federalism costs” on them that require a compelling justification in order to be sustained. While not denying the existence of *any* racial discrimination in the electoral process, critics consider such instances merely episodic and anecdotal—certainly falling short of the “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁷ They point out that Section 2 of the act (which is permanent) provides the federal government with the right to initiate lawsuits challenging racially discriminatory practices nationwide; moreover, private litigants also have the right to bring legal challenges to practices that they believe violate their rights. Therefore, given the dramatic degree to which the prevalence of racial discrimination has diminished in America, the argument goes, Section 2 suffices as a tool to combat the kind of voting discrimination that predominates today (Toledano, 2011; King-Meadows, 2011; Tolson, 2012; Yoo, 2013).

Supporters of keeping Sections 4 and 5 intact take strong exception to this interpretation. Like their opponents, they credit the VRA with dramatically increasing Black voter registration, participation, and Black office holding. But, they argue that those states and local jurisdictions that have in the past prohibited minorities to vote en masse have resorted to “second generation barriers” designed to minimize the political impact of minority votes. These include, but are not limited to, tactics such as polling or precinct changes, racial gerrymandering,⁸ changing from district based electoral systems to at-large election systems,⁹ annexations, majority vote requirements in primary elections (especially when they were previously not required), and, more recently, laws commanding voters to produce state-issued photo identifications (Katz, 2005; Clarke, 2008; Teledano, 2011; Tolson, 2012). They contend that it is precisely because of the effectiveness of Sections 4 and 5 of the VRA in dislodging overt racially discriminatory voting laws and procedures that recalcitrant jurisdictions have resorted to these methods. They argue that, in the absence of these provisions, these states and local governments will be emboldened to enact new,

more brazen barriers to the effective exercise of the franchise.

In enacting the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Congress acknowledged tremendous progress in eliminating overt, racially discriminatory devices to deny minority voting rights. However, lawmakers concluded that second generation barriers remain pervasive, and continue to obstruct the efforts of minorities to fully participate in the political process. Specifically Congress found

(3) The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.

(4) Evidence of continued discrimination includes:

(A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and Section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength;

(B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;

(C) the continued filing of Section 2 cases that originated in covered Jurisdictions; and

(D) the litigation pursued by the Department of Justice since 1982 to enforce Section 4(e), 4(f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process.¹⁰

Consequently, Congress voted to extend the expiring provisions of the VRA. The bill passed in the House of Representatives by a 390 to 33 margin; in the Senate, the measure passed 98 to 0 (King-Meadows, 2011).

When the Supreme Court considered *Shelby County, Alabama's* challenge to the VRA, it zeroed in on the coverage formula in Section 4. Chief Justice John Roberts, writing for the majority, writes that the coverage formula was based on data from the 1960's and early 1970s in terms of election practices and voter turnout. Given the history of pervasive discrimination in that era, the decision of Congress to depart from its normal deference to state and local prerogative in running elections in their jurisdictions was rational. Additionally, the justices praise the VRA for largely eliminating blatant patterns of discrimination at the ballot box.

However, they reject the notion that the level of federal oversight over state and local elections provided for by the 2006 reauthorization is still required. They cite statistics that indicate that Black voter registration in many of the covered jurisdictions has reached virtual parity with Whites; the majority even pointed out that African Americans had actually voted in larger percentages than Whites in the 2012 presidential election. Moreover, the Chief Justice chides Congress for reauthorizing the VRA while keeping in place a coverage formula based on data from the 1960s and 1970s. In his view, this data is outdated and does not take into account the enormous progress that has taken place since the VRA's original enactment in 1965:

[But] history 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 largely abolished, disparities in voter registration and turnout due to race were erased, and African American 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. . . . Regardless of how to look at the record, however, 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 the time.¹¹

By failing to update the coverage formula, the majority continues, the VRA punishes the South and other non-South covered jurisdictions for past sins. The Roberts majority specifically rejects the Attorney General’s argument that the range of voter dilution tactics targeted by the 2006 reauthorization justify the level of federal intrusion in the affairs of the states that compliance with Section 5 entails. If Congress still believes that the problem of racial discrimination in voting remains robust enough to justify federal oversight, then it should rewrite the coverage formula based on current data. But they held that the formula currently found in Section 4 cannot be constitutionally applied to the states. With no formula in place, their decision effectively makes Section 5’s preclearance requirement for all covered jurisdictions moot.

Justice Ginsburg bitterly dissented, excoriating the majority for, in her view, ignoring the voluminous record Congress had amassed in the hearings preceding the vote on reauthorization. She cited evidence derived from congressional testimony that the U.S. Department of Justice (DOP) blocked over 700 voting changes that were discriminatory between 1982 and 2006; of that number, Congress found that the majority of these changes were determined to result from discriminatory intent.¹² In addition, Congress found that more than 800 proposed changes in the states were either withdrawn or modified after requests for additional information by DOP; this fact, Ginsburg urges, attests to the deterrent value of Section 5. In other words, Congress based its decision to reauthorize Sections 4 and 5 on a history of more recent discrimination, not what had transpired prior to 1965. While Congress perhaps could have updated the formula, the enforcement record since 1982 reveals that the covered jurisdictions still remain the almost exclusive source for violations of the provisions of the VRA. Thus, though the data may be decades-old, it still conforms rather precisely to the regions of the country where the overwhelming percentage of violations of the voting rights of minority citizens are taking place.

But for Ginsburg, the most disturbing fact about the majority’s opinion is their “utter failure” to understand why the VRA has succeeded. VRA has succeeded, she argued, precisely because states with a demonstrated record of constitutional violations were denied the presumption of “good faith” whenever they promulgated changes to their election laws and procedures. As a result, they were denied the power to discriminate against minorities wholesale; that is the very reason that these state and local officials resorted to an array of second generation tactics to blunt the impact of minority political participation. She

criticized the Court for its narrow construction of the nature of discrimination, accusing them of reducing a complex phenomenon to specific devices like literacy tests, poll taxes, and other measures that are now expressly forbidden by law. This view ignores the history of Southern states constantly adjusting to legal challenges to voting restrictions by simply devising new methods to either defy the law outright or to circumvent any unfavorable judgments against them. Meanwhile, private petitioners found themselves bogged down in long, protracted litigation to uproot each specific device. It is because of the demonstrated failure of the case-by-case approach in combating voting discrimination that Congress required these states to undergo preclearance (570 U.S. _ [J. Ginsburg, dissenting] [2013]). For this reason, she maintains that Section 2 remains a grossly inadequate substitute for Section 5, because it returns the law to the situation prior to the VRA where the challenging party (either the federal government or private petitioners) bears the burden to prove discrimination through costly, time-consuming legal processes.

Those observers sympathetic to Ginsburg's viewpoint could take comfort in one fact: the decision in *Shelby County v. Holder* could have been worse. Had Justice Clarence Thomas gotten his way, the Court may very well have overturned Section 5 as well. He writes separately to concur with the majority's findings, reasoning that "Congress failed to justify "current burdens" with a record demonstrating " current needs." For him, the Court should have moved to the next logical question: Section 5's constitutionality. The majority's failure to do so "needlessly prolongs the demise of that provision" (570 U.S. _, 3 [J. Thomas, concurring] [2013]).

The effect of the *Shelby County* decision preserves the VRA on the federal statutes' books while removing its demonstrably most effective enforcement mechanism. True, DOJ maintains the ability to bring lawsuits under Section 2 of the act. However, by rendering preclearance null and void, state and local practices deemed objectionable by the federal government are now presumed permissible unless shown otherwise in court, a process that can take years. Whereas under the preclearance regime courts might enjoin challenged policies until they are adjudicated or settled out of court, litigants challenging practices they perceive to be discriminatory cannot count on injunctions or stays until their cases are heard. Because of this ruling, state and local officials are not necessarily barred from implementing the challenged practices. Consequently, the effects could be felt for years before any court addresses the harms caused by the changes.

Hours after the decision in *Shelby County* was revealed, Texas announced that it was implementing a photo identification law that had previously been blocked by DOJ because of Section 5 objections.¹³ Other states quickly followed Texas' lead: these jurisdictions legalized a plethora of laws designed to make it harder to vote.¹⁴ The Justice Department immediately sued under its Section 2 powers to challenge Texas' voter ID law. However, many legal experts argue that DOJ will have a difficult time proving its case. The federal government will be required to prove that Texas enacted the voter ID law with *purposeful intent* to discriminate against minorities—a difficult legal standard to satisfy (Seidenberg, 2014).

By "gutting the teeth" of DOJ's enforcement power under the VRA, the Supreme Court's decision in *Shelby County v. Holder* effectively nullifies the law: it keeps the statute in the books while shielding the states and local jurisdictions most guilty of violating the Constitution from the brunt of the law's intent. I argue that the Supreme Court's decision represents a familiar pattern of nullification when the issue of protecting the rights of African Americans is concerned. The next section turns to the Nullification Crisis of 1832-

1833 and the historical examples of how this principle has asserted itself over and over to deny African Americans full civil and political equality throughout American history.

Race and the Doctrine of Nullification

John C. Calhoun, one of the South's most eloquent defenders of the principle of states' rights, pens the following words in a letter to a personal friend during the heat of the Nullification Crisis in 1830:

I consider the tariff act as the occasion, rather than the real cause of the present unhappy state of things. The truth can no longer be disguised, that the peculiar domestick [sic] institution of the Southern States [slavery] and the consequent direction which that and her soil have given to her industry, has placed them in regard to taxation and appropriations in opposite relation to the majority of the Union, against the danger of which, if there be no protective power in the reserved rights of the states they must in the end be forced to rebel, or submit to have their paramount interests sacrificed, their domestic institutions subordinated by Colonization and other schemes, and themselves and children reduced to wretchedness (Kessler, 2013).

The Nullification Crisis of 1832-1833 starkly illustrates the degree to which the United States had evolved into two distinct, separate societies with fundamentally opposite economic interests. The North, as a rapidly growing commercial and manufacturing region, depended on high protective tariffs to shield its budding industries from being undersold by foreign competition (chiefly from the British). The South, by contrast, produced primary agricultural products on the backs of slave labor for the world market. As a result, they relied on finished goods manufactured elsewhere. Higher tariffs meant significantly higher consumer prices for Southerners (Tocqueville, 1837; Hartz, 1955; Rogers, 1970; Ericson, 1995).

In response to the Tariffs of 1828 and 1832 which substantially raised import duties on foreign goods that the South's economy relied heavily upon, South Carolina responds by asserting that these laws are not only unconstitutional, but that the state has the right to nullify them within their borders. South Carolina's passage of the Ordinance of Nullification in 1832 did not, despite their assertions to the contrary, make those tariffs unconstitutional—they merely proclaim the state's belief that it had the right to make them null and void within the borders of the Palmetto State. Stated differently, it means that, regardless of the fact that their proclamation does not remove one letter from the federal statutes, the state declares that as a practical matter, the Tariffs of 1828 and 1832 are dead letters as far as the everyday lives of South Carolina citizens are concerned.

However, Calhoun's words cited above reveal that the tariff controversy was not the real issue—what mattered to South Carolinians was defending the institution of slavery. Calhoun fears that if Southerners fail to resist what he considers to be onerous tariffs, a precedent encouraging more “federal encroachments” on the sovereignty of the states will be established. Once entrenched, the precedent set by the Tariffs of 1828 and 1832 will not content themselves to restrict their application to these specific endeavors: following the logic of Calhoun's argument, it inevitably follows that at some point the national government will arrogate for itself the power to legislate slavery itself out of existence. Thus, in the Southern states, fear of a strong national government was never merely an abstract issue of political philosophy: rather, it became synonymous with trepidation of

outside interference with their perceived inalienable right to perpetuate their peculiar institution.

Further, Calhoun invokes the names of Thomas Jefferson and James Madison, authors of the Virginia and Kentucky Resolutions of 1798 that were penned in response to the hated Alien and Sedition Acts. The aim of Calhoun and his compatriots goes beyond the desire to give their contemporary act of defiance more respectability. Rather, they assert that the Union constitutes a “compact” in which sovereign states had combined in order to establish a national government. All powers other than those specifically delegated to the national government in the Constitution remain within the sovereignty of the separate states. Accordingly, these sovereign states retain the power to declare null and void the exercise of powers by the central government that were not specifically authorized by the compact, a theory when, taken to its logical conclusion, provides a rationale for secession.¹⁵ By claiming the authority of Jefferson and Madison for his crusade, Calhoun claims that it is the nullifiers—rather than their political opponents—who are the true carriers of the spirit of the American Revolution.¹⁶ As the Nullification Crisis fades but sectional disputes over slavery continue to deepen, Southerners would continue to repeat these claims.

This oft-forgotten episode sets the template for future conflicts involving federalism—particularly those that involve the rights of African Americans. Though the doctrine of nullification emerges in the context of the South’s defense of slavery as an institution, the nullifiers do not rely on appeals to White supremacy and naked economic self-interest alone to justify their cause. They craft a constitutional doctrine that lays claim to the legacy of the Founders by proclaiming the sacrosanct character of the principles of state sovereignty, a limited federal government, and the inalienable right to property as the essential meaning of the Revolution itself. These principles are “self-evident” to Southerners to the point where they were willing to fight to defend them, even if that means taking up arms against their own government. Southerners find themselves increasingly on the defensive for their treatment of Blacks by the righteous indignation of the abolitionist movement. In response, Calhoun and his contemporaries must preserve the sense that their region, though embattled, nevertheless occupies the “moral higher ground” in its struggle to preserve its way of life (Davis, 1966; Rogers, 1970).

Thus, nullification sows the seed for the tendency of Americans to mask defenses of unchallenged White privilege in the guise of ostensibly race-neutral language with terms like “federalism,” “states’ rights” “local control,” “individual rights,” and “personal responsibility.” Repetitive, systematic appeals to these core values of the so-called “American Creed” preserve the sense of moral self-righteousness in a people who otherwise might be deeply troubled by their failure to live up to their abstract ideals of equality enshrined in the Declaration of Independence with respect to African Americans. Preserving the sense of White moral supremacy over Blacks represents an essential element in facilitating the success of nullification as a stratagem to deny Blacks substantive equality with Whites. The next section details the extent to which nullification has blocked Black America’s access to the plane of equality in America.

Nullification as a Recurring Theme in African American History

Because the South lost the war, Americans too readily regard nullification as a discredited doctrine that has been cast to the “trash bins of history.” But examples of this doctrine in practice litter the pages of African American history. For example, the Thirteenth Amendment, enacted in 1865, abolished slavery—or so Americans are told. The text of

Section 1 of the amendment reads:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted [author's emphasis], shall exist within the United States, or any place subject to their jurisdiction.

The Thirteenth Amendment cements the military settlement on the battlefield. A literal interpretation of the text of the amendment denies Southern states the right to hold Black men and women in bondage simply because of their skin color. But if Blacks commit crimes and are “duly convicted” by state and local authorities, then the Thirteenth Amendment’s prohibition against slavery and involuntary servitude do not apply to them. Thus, the Thirteenth Amendment, in the hands of racist Southern officials, empowered them to use massive incarceration of African Americans to accomplish essentially the very objective that a literal reading of the amendment purports to forbid. As a consequence, scores of Blacks are rounded up for relatively minor offenses and sold as forced laborers to coal mines, lumber yards, railroads, and farm plantations until they can “repay their debts” to society (Blackmon, 2008). As long as Blacks were being punished specifically for their “criminal behavior” and not their race, Southern officials had not technically violated their rights under the Constitution: rather, the Negro was “getting what he deserved.”¹⁷ This system of forced labor, which (perhaps even more so than the doctrine of nullification has gone largely unmentioned in the nation’s history textbooks), endures from the end of the Civil War to the outbreak of World War II.¹⁸

Similarly, literal interpretations of both the Fourteenth and Fifteenth Amendments have had the effect of nullifying their impact on the lives of African American citizens. For example, the first sentence of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

But the Supreme Court in the *Slaughterhouse Cases*¹⁹ chose to use the literal wording of the text to draw a sharp distinction between the rights of national citizenship and the rights of state citizenship in a fashion that would set the precedent for future decisions that would nullify the impact of the Civil War Amendments. Justice Miller, writing for a 5-4 majority, declared that the fundamental rights of American citizenship (the very natural rights which democratic theory claims are those for which governments are constituted to secure) remain under the security and protection of state governments, *as opposed* to the federal government. However, the Court declined to state which of the rights of national citizenship that the provisions of this amendment afforded protection to individuals against the encroachment of states: the justices did not think it necessary “until some case involving those privileges make it necessary for us to do so.”²⁰

The cases of *United States v. Reese*²¹ and *United States v. Cruikshank*,²² decided three years later, made it clear that the right to vote was not one of the rights of African Americans that the Supreme Court meant to protect against the encroachments of the states. In *Reese*, the Supreme Court held that the Fifteenth Amendment did not confer to the Negro—or anyone else for that matter—the right of suffrage. Only the states could grant

that right: the Fifteenth Amendment only applied to state action that denied the right to vote on the basis of race. Federal authorities had indicted Kentucky election officials for denying a Black man the right to vote pursuant to the Enforcement Act of 1870. Congress passed the law in an effort to enforce the Fifteenth Amendment. The Court, however, invalidated the indictment, holding that the prosecutions authorized by this congressional act exceeded their powers under the Constitution. The justices declared that the broad language of the enforcement provisions gave federal officials power to punish local officials for denying the vote for reasons other than race. However, the plain language of the Fifteenth Amendment only limited the power of states to deny the right to vote on the basis of race. In other words, the literal meaning of the Fifteenth Amendment implied that if states offered “non-racial” justifications for prohibiting African Americans to vote, that would be perfectly fine with the U.S. Supreme Court.²³ In *Cruikshank*, the Court relied on another literal reading of the Fourteenth and Fifteenth Amendments by holding that they only applied to actions by state officials to deny the right to vote to Blacks: on the other hand, actions by private individuals to accomplish the same end were not within the legitimate powers of Congress to remedy. Worse yet, the Court in *Cruikshank* proclaimed that the right to vote is not a “necessary attribute” of national citizenship.²⁴

None of these Supreme Court decisions occurred in a vacuum -- they reflected a public mood not only in the South but in the North characterized by the notion that the nation had done all it should do for Blacks. Now the former slaves must fend for themselves (Kluger, 1975; Foner, 1988; Kousser, 1990; Lofgren, 1992). The sense that federal civil rights legislation afforded the former slaves a “special, unmerited” status finds expression in The Civil Rights Cases when the Supreme Court held the Civil Rights Act of 1875 outlawing racial discrimination in public accommodations as unconstitutional. Justice Bradley captured the general mood of the Court when he penned the following words:

When a man emerges from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws (emphasis added), and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.²⁶

The Court's ruling implied that the continuation of civil rights legislation aimed specifically to aid the former slaves and their descendants posed an unfair burden on innocent Whites which can no longer be tolerated or encouraged by the nation's highest court or its leading national political institutions. The precedents of these four cases ultimately led to *Plessy v. Ferguson*,²⁷ which formed the legal cornerstone of the South's system of racial segregation for more than half a century.

The pattern of nullification persists with respect to the policy achievements of the civil rights achievements of the 1950s and 1960s. Once again, conservative jurists and political leaders have narrowly interpreted the remedial powers of Congress and the courts afforded by civil rights legislation and judicial pronouncements by offering a definition of racism that only manifests itself in discrete, intentional actions or words by individuals (Lopez, 2014). This conceptualization of race virtually discounts any and all claims that widespread, systemic racial discrimination remains a significant barrier hindering the progress of African Americans. This view requires those alleging discrimination on the basis of race to prove that their perpetrators acted with malicious intent, a nearly impossible

standard to prove.²⁸ As long as defendants can offer a plausible, “race-neutral” explanation for their alleged actions, they can escape liability from the consequences of racial discrimination. Meanwhile, no constitutionally legitimate remedies exist for the economic and social disadvantages heaped on African Americans rooted in institutional and structural causes in this narrow conception of race.

The Supreme Court’s landmark decision in *Brown v. Board of Education* represents the quintessential example of the use of the intent standard to empty the *Brown* mandate of any remedial power to address the continuation of inequities in public education in a manner that is consistent with the doctrine of nullification. Sixty years removed from the *Brown* decision, Black and Latino students find themselves disproportionately trapped in separate and unequal schools all across the nation (Kozol, 2006; Orfield, et. al., 2012; Ravitch, 2013). The increasing reliance on discriminatory intent as the legal standard for proof of constitutional violations allows local school districts to argue that the persistence of racial imbalances within their schools are not their fault. Rather, larger forces beyond their control (such as economic trends in locating factories and White-collar employment in suburbs and Whites increasingly choosing to live there instead of older, urban centers) are to blame. Courts in the last two decades have been more and more willing to accept these arguments and have thus released scores of school districts across the country from further judicial oversight. Thus, federal judges are entrusting the educational futures of minority children to the very state and local authorities who were guilty of denying equal educational opportunity to them in the first place.

Finally, the recent retrenchment in civil rights enforcement shares an additional characteristic with the post-Reconstruction period in the nineteenth century: opponents of civil rights landmarks of the civil rights era are morally justified in their cause because these laws unfairly privilege Blacks at the expense of Whites. Few contemporary issues more clearly symbolize the notion of Blacks receiving “preferential treatment” while Whites unjustly suffer “reverse discrimination” than affirmative action. Affirmative action represents another policy arena where the principle of nullification manifests itself. In fact, it is the Regents of *University of California v. Bakke*²⁹ case where the term “reverse discrimination” was coined. In 2003, the Supreme Court in *Grutter v. Bollinger*,³⁰ declared that state universities can take race into account for purposes of creating diversity within the classroom as long as such programs are narrowly tailored to meet a compelling interest. However, more recent decisions since the appointments of Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006 have weakened the *Grutter* ruling.³¹ Most notably, in *Shuette v. Coalition to Defend Affirmative Action*,³² decided this year, the Court let stand a 2006 state constitutional amendment approved by Michigan voters that outlawed the use of racial preferences by publicly funded institutions in hiring, college admissions, and the awarding of state contracts. The referendum in question originated in response to the *Grutter* decision upholding the use of race in the admissions process at the University of Michigan Law School. Supporters of the measure insist that it is a “civil rights initiative” because it requires that all citizens, regardless of race, are treated the same as required by the Equal Protection Clause.³³ A plurality of the justices in *Shuette* insist that the key issue in the case is not the constitutionality of affirmative action itself; rather, the issue is whether voters in a state possess the right to decide whether or not to allow affirmative action. However, by allowing Michigan’s constitutional ban to stand, essentially the Court acquiesced to the nullification of one of its own precedents.

It is the sense that current civil rights laws unfairly privilege Blacks that Justice

Antonin Scalia is referring to during the arguments in *Shelby County v. Holder*:

The problem here, however is. . . . a phenomenon that is called perpetuation of racial entitlement. . . . Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes. I don't think there is anything to be gained by any senator to vote against the continuing of this act [reauthorization of the Voting Rights Act of 1965]. And I am fairly confident that it will be reenacted into perpetuity unless a court can say it does not comport with the Constitution. You have to show, when you are treating different states differently, that there's a good reason for it. . . . *this is not the kind of a question you can leave to Congress* [author's emphasis].³⁴

In order to justify the Court's decision to second-guess the judgment of an overwhelming majority of Congress to reauthorize the VRA in 2006, Scalia calls the law a "racial entitlement" that most senators and representatives dared not to vote against for fear of being savagely criticized as racists. Because of the "racially explosive" nature of the issue, Scalia opines that members of Congress are simply incapable of considering the question of whether to continue the extraordinary protections that Sections 4 and 5 of the act provide on their merits. Since Congress cannot be trusted to examine these issues objectively, Scalia concludes, the Court must do it for them. Thus, the power of the principle of nullification to render void the rights of African Americans inheres with its alliance with the sense of Black racial entitlement. It allows the nullifiers to occupy the moral high ground by "correcting" what they view to be an unjust legal status quo that creates Black winners and White victims.

In summary, other than making a brief "cameo appearance" in the massive resistance campaigns of the 1950s against the Supreme Court's decision in *Brown v. Board of Education*, history textbooks in American schools either scarcely mention the doctrine of nullification or discuss it only in passing if at all (Bartley, 1969; Wilkinson, 1979; Samuels, 2004; Ogletree, 2004). As this essay argues, it is simply not the case that the Nullification Crisis of 1832-1833 merely foreshadows the outbreak of the Civil War. The *principle of nullification* becomes the status quo with respect to how the nation deals with the paradox between its assertion of the universal rights of equality of all men and what Carter G. Woodson calls the "qualified citizenship" of African Americans (Woodson, 1921). Nullification, rather than dying in the embers of the "Irrepressible Conflict," instead resurfaces again and again throughout American history. The final section of the essay briefly explores the implications of this thesis for consideration of the state of civil rights progress in the United States for African Americans.

Implications

Viewed from this perspective, the Supreme Court's ruling in *Shelby County v. Holder* fits the larger pattern of nullification when it comes to the rights of African Americans. The Supreme Court left the VRA in the federal statute books, but eviscerates its most efficacious enforcement mechanisms in Sections 4 and 5. Thus, this decision repeats an all too familiar pattern. Whether by outright defiance to obey the law, lack of political will, and/or court decisions that narrowly construe constitutional rights or federal enforcement powers, the effect is the same: Blacks are denied the rights in reality that they are proclaimed to possess in theory. To be sure, *Shelby County* does not preclude Congress from opting to rewrite the law by using updated data to devise a new coverage formula in order to answer the Supreme

Court's objections. But given the present political gridlock in Washington that has turned the passage of what were previously considered routine pieces of legislation, the likelihood of Congress in the near future surmounting such a herculean task appears remote for the foreseeable future.

The evidence suggests that the problem African Americans confront cuts much deeper than the current political climate of conservatism. Rather, Blacks have traditionally (though not universally) grounded their liberation struggles in the values of the nation's founding documents and America's failure to live up to them. The inconsistency between these ideals and the actual treatment of African Americans has often provoked Whites to feel guiltier about racism than they otherwise might feel (Myrdal, 1944; Davis, 1966; McCloskey and Zaller, 1984; Samuels, 2004). However, at the same time, many Americans view the "American Creed" as testament to the "self-evident" truth about the virtue of limited government (often defined as conservative, preference for states' rights, local autonomy, and laissez-faire economics). Remedying racial discrimination often requires employing the very types of intrusive federal measures that the American political system is structurally biased against. Moreover, these aforementioned deductions from the American Creed couple with the sense of the superior virtue of its political institutions to those the world over. This combination powers the crusading spirit of those Americans who relentlessly assail what they perceive to be racial entitlements that unfairly benefit African Americans at the expense of more deserving Whites with a zeal that is akin to religious fanaticism. The principle of nullification dovetails with the nation's systematic bias against remedying racial wrongs by preserving the *forms* of democratic inclusion of minority groups while denying the *substance* of actual power sharing. This state of affairs seems preferable to pursuing the more difficult course of confronting White supremacy head-on.

Therefore, a more daunting challenge for African Americans than the political obstacles standing in the way of a rewritten VRA is the realization that the doctrine of nullification represents much more than a strategy to contain the economic, social, and political gains of African Americans: it inhabits the very foundations of American political culture and the implicit assumptions underlying the nation's public discourse as well as much of its legal jurisprudence. Nullification strikes at the very heart of the idea that a multiracial democracy based on equal opportunity for all is not only possible, but desirable. It is rooted in the ancient skepticism that the descendants of African slaves could (or should) never be truly and fully incorporated within the American republic. Overturning this theory will require more than merely replacing conservative judges with more liberal ones. It will require a frontal assault on what has historically been—and still remains—the greatest threat to the American experiment in democracy: its determination to preserve White supremacy and White privilege, even while proclaiming that the United States provides equal opportunity and access to all. Taking on this foe remains the task that the foot soldiers of freedom must continue to take on.

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Notes

¹ Section 5 of the Voting Rights Act, prior to the *Shelby County* decision, covers all of the following states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and parts of California, Florida, New York, North Carolina, and South Dakota. Civil Rights Division Resource Guide, Section 5 Guide, www.justice.gov, retrieved May 7, 2014.

² After passing the Civil Rights Act of 1875, more than 80 years would pass before Congress would pass another piece of civil rights legislation. Because of this reality, the Supreme Court in *Brown* was hesitant about issuing a decree that was too forceful in demanding immediate integration: they feared Southern congressmen and senators would block any effort by Congress to back up their decree with appropriate legislation (Wilkinson, 1979; Samuels, 2004).

³ The original Voting Rights Act covered those states and local jurisdictions which maintained a test or device as a prerequisite to voting as of November 1, 1964 and had less than 50 percent turnout in the 1964 presidential election. The 1970 amendments kept the voter turnout threshold in place and extended forward the applicable deadline to the 1968 presidential election. The 1975 amendments extended the applicable deadline to 1972 and expanded the definition of a “test or device” to include the practice of providing English-only voting materials in places where over five percent of the population spoke a single language other than English. As a consequence, the states of Texas, Alaska, Arizona, and several counties of California, North Carolina, New York, Michigan, Florida, and South Dakota became covered jurisdictions (*Shelby County v. Holder*, 570 U.S. ___, 4-5 [slip opinion] (2013)).

⁴A “facial challenge” to a statute argues that a law is unconstitutional, no matter what circumstance to which it is applied. This differs from an “as applied” challenge to a law, which alleges that the manner in which a law is applied or the circumstances to which the law is applied is unconstitutional.

⁵ *Shelby County v. Holder*, 811 F. Supp. 2d 424 (2011); *aff’d*, 679 F. 3d. 848 (2012).

⁶ The fact of Barack Obama’s election was cited specifically as a reason why Sections 4 and 5 of the Voting Rights Act are no longer constitutionally permissible by petitioners in *Northwest Austin Municipal Utility District No. 1 v. Holder* 557 U.S. 193 (2009). The Court sidestepped the constitutional question and allowed the local utility district to take advantage of the “bailout” provision of the law. But the Court did say that Sections 4 and 5, which were renewed by Congress in 2006, are constitutionally suspect.

⁷ The “congruence and proportionality” standard used by current critics of the Voting Rights Act of 1965 is taken from the Supreme Court’s ruling in *City of Boerne v. Flores* (521 U.S. 507 (1997) in which the Supreme Court struck down the Religious Freedom Restoration Act of 1993 because it imposed sweeping burdens on state and local government officials without a showing of widespread pattern of discriminatory legislation targeting religious groups.

⁸ Gerrymandering can dilute minority voting strength in two ways – by “cracking” and “packing.” “Cracking” refers to drawing political boundaries that split minority communities in several districts: such districts insure that Blacks are always numerical minorities in their jurisdictions and thus unable to elect candidates of their choice without substantial White crossover support. “Packing” is the practice of putting excessive numbers of Blacks and/or other minorities within districts (e.g. 70-75 percent or higher). Because minorities vote heavily for Democrats and comprise a disproportionate share of the Democratic party coalition, the surrounding districts become much more difficult for Democrats to win. Minority politicians win in the racially polarized districts created in this manner; meanwhile, White, moderate Democrats increasingly find it difficult to win elections. Ellen Katz, et. al.

⁹ Many local jurisdictions that previously elected office holders in district based systems switched to at-large systems when the VRA created the possibility that Black candidates might prevail in future elections under the old rules. Because of patterns of racial segregation in housing, Blacks are frequently concentrated in particular sections of cities and towns; consequently, district based systems (depending on how the political boundaries are drawn) increase the likelihood of the existence of majority-minority districts where minority candidates should win. At large election systems require candidates to run citywide or countywide to get elected: in communities with histories of White voters not supporting Black candidates, the chances of electoral success for Blacks are seriously diminished.

¹⁰ Public Law 109-246, 120 Stat. 577 (July 26, 2006).

¹¹ 570 U.S. ___, 20 [slip opinion] (2013).

¹² The significance here is that modern conservative jurisprudence with respect to the Equal Protection Clause posits that only policies enacted with a “discriminatory intent or purpose” (as opposed to a “discriminatory effect” apart from its intent) violate the Fourteenth Amendment to the U.S. Constitution. See *Washington v. Davis* 426 U.S. 424 (1976). This standard has applied to several areas of civil rights litigation (e.g. employment discrimination, school desegregation, rights of the criminally accused) and made it difficult for petitioners alleging racial discrimination to prove their cases. The Supreme Court applied the “discriminatory intent” standard to voting laws and procedures in *City of Rome*

v. *United States* 446 U.S. 156 (1980). They held that an at-large election system that resulting in Black candidates not being successful in running for office despite the fact that constituted a large share of the city's population, did not violate the Constitution because it was not created with discriminatory intent. Congress, in reauthorizing the VRA in 1980, specifically overruled the *City of Rome* standard by inserting a "results" based test with which to determine whether racial discriminatory voter dilution has taken place within a jurisdiction.

¹³ Among the features of the Texas voter ID law, it authorizes some forms of identification while disallowing others. For example, a college student ID is specifically not considered a valid form of identification under the law. But a hunting or fishing license is perfectly acceptable. DOJ objected to law because it concluded that it appeared aimed to target forms of identification that Democratic voters (who are overwhelmingly minority) are less likely to have, while leaving forms of identification that White (and presumably, more likely Republican) voters are likely to possess.

¹⁴ For example, Mississippi and Virginia implemented tougher voter ID requirements. Florida dramatically cut early voting and resumed a purge of its voter rolls. North Carolina passed a law that, among other things, eliminated same-day registration, wiped out a school program that registered tens of thousands of students annually, reduced the early voting period by more than 40 percent, and enacted a voter ID law requirement that some analysts say is harsher than Texas. Steven Seidenberg, "With the Supreme Court's OK, States Begin Imposing New Laws to Limit the Vote," 100 *ABA Journal* 1,3 (Jan. 2014).

¹⁵ Justice Clarence Thomas revives a version of this theory in his dissent in *U.S. Term Limits v. Thornton* (514 U.S. 779, 845 [J. Thomas, dissenting] [1995] (1995) when the Supreme Court invalidated an amendment to the Arkansas state constitution that placed term limits on the state's members of Congress. Justice Thomas conceived of the Union as a compact of sovereign states which retained the authority to limit the terms of their congressional representatives. The majority disagreed, in part by countering with the traditional counterargument to the compact theory of the Constitution: the idea that it is the people, and not the states, that are responsible for forming the Union.

¹⁶ Thomas Jefferson died in 1826; therefore, when John C. Calhoun invoked Jefferson's name in support of the doctrine of nullification, Jefferson was not around to either confirm or deny Calhoun's claim. But James Madison had yet to pass on: he strongly denounced Calhoun's views. Madison rejected the notion that the states, as sovereign entities, created the Union. Rather, he held that the "the undisputed fact is, that the Constitution was made by the *people*. ... *as embodied into the several States*. . ." He worried that Calhoun's ideas, taken to their logical conclusion, could not help but promote anarchy and disunion. Fritz, Christian G. "Interposition and the Heresy of Nullification: James Madison and the Exercise of Sovereign Constitutional Power" (www.heritage.org, posted February 21, 2012. Retrieved May 4, 2014).

¹⁷ The convict-lease system, which reinstated slavery for untold numbers of African Americans, has largely escaped notice in history textbooks because of our greater familiarity with the system of sharecropping. Writing about the convict-lease system, legal scholar Ian Haney Lopez writes:

The system's ubiquity and caprice assured that virtually no African American man was safe unless under the protection and control of a White landowner or employer. If you wanted to be sure you would make it home from town—rather than being swept up, imprisoned under spurious

charges, and sold into the convict lease system – you needed the surety provided by a powerful White man. *Blacks went into sharecropping, a relationship itself akin to slavery, partly because they needed White bosses to protect them from the lethal convict labor system* [my emphasis]. Ian Haney Lopez, *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class*. New York: Oxford University Press, 2014.

¹⁸ In her celebrated work on mass incarceration in the post-civil rights era, Michelle Alexander treats the phenomenon as if it is the product of the more recent “War on Drugs” which began in the 1970’s and accelerated into the 1980’s (Alexander, 2010). *But the War on Drugs represents the continuation, not the commencement, of the mass incarceration of African Americans*. In other ways, mass incarceration symbolizes the *re-enslavement of Black Americans* while at the same time proclaiming to the nation and to the world that the peculiar institution no longer exists.

¹⁹ 83 U.S. 36 (1873). On the surface, this case had nothing to do with the rights of Blacks. This suit was brought on behalf of a group of slaughterhouse owners in response to the decision of the Louisiana legislature to grant a 25 year monopoly to one company in three of the state’s parishes. The competitor firms who were excluded from this arrangement filed suit, claiming that the legislature’s decision denied them the right to practice their chosen profession and threw them “into a state akin to slavery” in violation of both the Thirteenth and Fourteenth Amendments to the U.S. Constitution.

²⁰ 83 U.S. 36, 80 (1873). However, in response to the charge that the Court’s definition of national citizenship was unacceptably vague, Justice Miller’s opinion cited some examples of the rights guaranteed by national citizenship: the right to come to the seat of government to assert any claim, freedom of access to the nation’s seaports, protection on the high seas, and the right to use the navigable waters of the United States, the right to peaceably assemble and petition the government for a redress of grievances, and the privilege of a writ of habeas corpus. Richard Kluger in *Simple Justice: A History of Brown v. Board of Education* wondered incredulously: “Was it possible that Congress and the nation had fought a great war and undergone agonizing recuperation with force-fed medicine to establish such rights as these – rights that were implicit in the supremacy clause of the original Constitution? So the Court held.” Richard Kluger, *Simple Justice: A History of Brown v. Board of Education*. New York: Alfred A. Knopf, 1975, p. 58.

²¹ 92 U.S. 214 (1876). This case was brought by William Garner, a Black man from Kentucky, who was denied in his efforts to register to vote. When he offered to pay the compulsory “head tax” (as a state condition for the right to vote), Kentucky election officials refused to accept his payment. Rebuffed by state authorities, Garner appealed to federal officials; consequently, the local election officials were indicted. The Court held that state officials can only be held liable for violating the rights of African Americans to vote if the basis for their denial is their race. Garner would be required, according to the Court, to prove that he was denied the right to vote solely because of his race and not some other factor.

²² 92 U.S. 542 (1876).

²³ This interpretation of the Fifteenth Amendment paved the path for the massive disenfranchisement of Black voters in Southern states during the 1890’s. States relied on “race neutral” justifications for devices such as the grandfather clause, literacy tests, poll taxes, and White primaries to prevent Blacks from exercising the franchise. For the most

part, they got away with it. Even when these “race neutral” measures were found lawful, Southern jurisdictions simply replaced with newer methods to prevent Blacks from voting.

²⁴ In 1874, a riotous mob of about 100 Whites violently broke up a political rally held by Black Republicans in Colfax, Louisiana. While the total number of deaths has never been definitively determined, the overwhelming majority of the fatalities were Black. The eminent historian Eric Foner calls the Colfax massacre the worst instance of racial violence during the entire Reconstruction period. Federal officials prosecuted two individuals for their roles in the incident, but the Supreme Court held that the Fourteenth and Fifteenth Amendments were only enforceable against the actions of state officials. Apparently, states could not be held liable for failing to protect its Black citizens from a murderous White mob bent on denying them the right to peaceably assemble and exercise their right to vote.

Eric Foner, *Reconstruction: America's Unfinished Revolution. 1863-1877*. New York: Harper Collins, 1988, p. 437.

²⁵ 109 U.S. 3 (1883).

²⁶ *Ibid*, at 24.

²⁷ 163 U.S. 537 (1896).

²⁸ The Supreme Court's decision in *Washington v. Davis* (426 U.S. 229 [1976]) gave judicial license to this narrow interpretation of racial discrimination. The Court invalidated an employment discrimination lawsuit filed by Black police officers in Washington D.C. who objected to the use of a test that Blacks in the department disproportionately failed as the basis for determining promotions. The Black officers claimed the test measured skills wholly irrelevant to their jobs as policemen. A 5-4 majority held that the officers were required to prove that the police department acted with discriminatory *intent* when they instituted the promotion examinations; merely proving that the administration of the exams had a discriminatory *impact* on minority officers was insufficient to establish a violation of Equal Protection under the Fourteenth Amendment. The consequence of this ruling has eviscerated Title VII of the Civil Rights Act's prohibition against racial discrimination in employment. By increasing the legal burdens on those alleging discrimination, race cases have become more difficult to win and often are not even filed. The *Davis* standard has been applied to other civil rights policy domains, increasing the legal burdens on litigants alleging disparate treatment based on race, ranging from criminal justice to school desegregation. See for example *McClesky v. Kemp* (481 U.S. 279 [1987]) involving the rights of the criminally accused and *Freeman v. Pitts* (503 U.S. 467 [1992]) involving school desegregation for evidence of how the requirement that Black litigants prove discriminatory intent on the part of state and local officials hampered their ability to prevail in their cases.

²⁹ 438 U.S. 265 (1978).

³⁰ 539 U.S. 306 (2003). This case upheld the affirmative action program at the University of Michigan Law School. However, in a companion case, the Court struck down the affirmative action program at the undergraduate level, holding that it was not narrowly tailored. See *Gratz v. Bollinger* 539 U.S. 244 (2003).

³¹ *Parents Involved in Community Schools v. Seattle School District No. 1* 551 U.S. 704 (2007). Once concern arising from that ruling is the concern that the Court's ruling exacerbates the “pipeline problem” in which, because of unequal educational opportunities for minorities at the K-12 level, there exists a shortage of minority candidates who can take advantage of affirmative action opportunities at the collegiate level. More recently, the Supreme Court heard the case of *Fisher v. University of Texas* (133 S. Ct. 2411 [2013]). in which Abigail Fisher, a White student, challenged the decision of the university to deny her

admission application. The university argued that after years of using the “10 Percent Plan” (which grants automatic admission to any Texas university to high school graduates who finish in the top 10 percent of their classes) failed to yield the “critical mass” of minority students sufficient to best to leverage the optimal educational benefits of diversity. Thus, pursuant to *Grutter*, the university added race as a factor for consideration in the admission process to supplement the Ten Percent Plan. The Court sidestepped the constitutional question and instead remanded the case to the lower courts, holding that the Fifth Circuit Court of Appeals had applied the wrong legal standard. While relieved that the Court did not strike down affirmative completely, many observers who believe that the University of Texas presented a pretty good defense of its program wonder if any affirmative action program, no matter how narrowly tailored, can get five votes from the current Supreme Court.

³² The ruling was issued on April 22, 2014.

³³ Notably, Jennifer Gratz, the White student whose denied application to the University of Michigan in 1995 sparked the original challenge to affirmative action policies, has been one of the leading figures in the movement to outlaw affirmative action in the state. Maggie Severns, “The Woman Who Killed Affirmative Action. Twice,” *Politico*, April 22, 2014, retrieved May 8, 2014.

³⁴ Oral Arguments in *Shelby County v. Holder* (U.S. Supreme Court, February 27, 2013), p. 47.

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