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Post Oppression

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The Supreme Court's recent term decisions embody a troubling cultural shift in the way in which society views issues of inequality and discrimination. The very existence of identity-based inequality and bias is questioned under this burgeoning post-oppression *weltanschauung*, which posits that modern society has moved beyond matters of racial, gender, sexual orientation, and class justice. Under the *post-oppression* socio-political view, systemic and explicit discrimination is disregarded as aberrational in nature, while existing inequality is rationalized as reflecting natural outcomes.[1] The "normalization" of social inequality provides substantial legal, social, economic and cognitive benefits for holders of privilege.[2]

And yet our society continues to struggle with issues of difference while disparities along racial, gender, and class lines endure and deepen.[3] The persistence of identity-based inequality and discrimination poses a cognitive-moral dilemma for those who hold the *post-oppression* worldview. The post-oppressionist's belief that society has achieved a state of democratic equality of opportunity is disrupted by evidence of growing social inequality and discrimination.[4] The artifice of race first developed as one socio-political tool to mediate this tension, by separating persons into categories legally sanctioned for discrimination and unequal treatment.[5] Gender difference has also long been used to rationalize the unequal treatment of women,[6] as have differences in sexual orientation[7] and class status.[8] The creation of the "other," therefore, has historically been vital to attempts to rationalize the persistence of inequality.[9]

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[1] *See generally* Christian B. Sundquist, *Equal Opportunity, Individual Liberty and Meritocracy in Education: Reinforcing Structures of Privilege and Inequality,* 9 GEO. J. ON POVERTY L. & INEQUALITY 227 (2002).
[2] *See* Adrienne D. Davis & Stephanie Wildman, *Language & Silence: Making Systems of Privilege Visible,* 35 SANTA CLARA L. REV. 881 (1995).
[3] *See* Christian B. Sundquist, *Genetics, Race and Substantive Due Process,* 20 WASH. & LEE J. OF CIVIL RIGHTS & SOC. JUSTICE 341 (2014) (manuscript on file with author).
[4] *Id.*
[5] *Id.*
[6] *See* Donna Young, *Working Across Borders: Global Restructuring and Women's Work,* 2001 UTAH L. REV. 1, 4-5 (2001).
[7] *See generally* Nancy Ota, *Flying Buttresses,* 49 DEPAUL L. REV. 693 (2000).
[8] *See generally* Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights,* 81 Iowa L. Rev. 1331 (1996).
[9] *See* Anthony Paul Farley, *The Apogee of the Commodity,* 53 DEPAUL L. REV. 1229, 1231-32 (2004).

Various conceptual vehicles have been utilized over time to perform the "normalization" function, including culture of poverty theories, classic market theories, equal opportunity doctrine, and familial ideology.[10] The post-racial perspective is a more recent manifestation of the attempt to argue that this nation has moved beyond oppression.[11] And yet the cognitive and moral desire felt by privilege holders to normalize inequality is not limited to matters of race. Rather, the modern socio-judicial trend to normalize inequality is characterized by a spurious belief that society has altogether moved beyond matters of oppression- racial, economic, gender or otherwise.[12]

The Court's decisions during the most recent term embody this move beyond oppression. During the summer of 2013, the Court rolled back critical civil rights advances in the voting rights,[13] affirmative action,[14] employer discrimination[15] and criminal justice contexts.[16] In *Fisher v. Texas* the Court made it much more difficult for educational institutions to consider race in admissions,[17] despite disturbing patterns of re-segregation and increasing racial disparities in higher education.[18] In a pair of Title VII cases, the Court issued rulings that made it more difficult for plaintiffs to prevail in employment discrimination cases, speculating that heightened causation standards were necessary to reduce the "tempt[ation]" of racial minorities and women of making "unfounded charge[s] of… discrimination." [19] The Court in *Maryland v. King* also held constitutional the forcible collection of DNA samples for persons merely arrested on suspicion of committing a crime, despite the fact that such collection disparately impacts racial minorities.[20]

The Court's decision in *Shelby County v. Holder,* however, is perhaps the most telling example of a judicial worldview that society has transcended

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[10] *See e.g.,* Brenda Grossman, *Turning the Gaze Back on Itself, in* ADRIEN WING GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (2000), at 31 (discussing "familial ideology" and the ways in which law attempts to normalize gendered roles in the family).
[11] *See generally* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).
[12] *See* Farley, *supra* note 9, at 1240 ("equality is the most covert hiding place for, and the most effective mask of, oppression").
[13] Shelby Cnty. v. Holder, 133 S.Ct. 2612 (2013) (striking down Section 4 of the Voting Rights Act of 1965 on Fifteenth Amendment and federalism grounds).
[14] Fisher v. Texas*,* 133 S.Ct. 2411 (2013) (holding that educational institutions should receive no judicial deference concerning whether "the means chosen.to attain diversity are narrowly tailored").
[15] Vance v. Ball, 133 S.Ct. 2434 (2013) and University of Texas v. Nassar, 133 S.Ct. 2517 (2013).
[16] Maryland v. King, 133 S.Ct. 1958 (2013).
[17] Fisher v. Texas. 133 S.Ct. 2411.
[18] *See generally* Derek Black, *Voluntary Desegregation, Resegregation, and the Hope for Equal Educational Opportunity,* Hum. Rts., Vol. 38, Fall (2011).
[19] Nassar, 133 S.Ct. at 2532; s*ee also* Vance, 133 S. Ct. at 2434.
[20] *See* Maryland v. King, 133 S.Ct. at 1970. *See also* Sundquist, *supra* note 3.

structural problems of social inequality. In *Shelby County,* the Court rendered the most vital section of the Voting Rights Act unconstitutional.[21] Declaring that "[o]ur country has changed," the majority deployed the post-racial trope of "racial progress" to invalidate the centerpiece legislation of the Civil Rights Era.[22] The Court's use of post-racial language and reasoning abounds in this classic Roberts opinion:

- "[t]here is no denying…that the conditions that originally justified the [Voting Rights Act] measures no longer characterize voting [conditions]";[23]
- "[n[early 50 years later, things have changed dramatically";[24]
- "[b]latantly discriminatory evasions of federal decrees are rare";[25]
- Reauthorization of the Act occurred "as if nothing had changed";[26]
- "the conditions justifying [the Voting Rights Act's requirements] have dramatically improved";[27]
- "[t]here is no longer such a [racial] disparity" "justifying the preclearance remedy":[28]
- "[t]oday the Nation is no longer divided along those lines" (in terms of racial disparities in voting registration);[29]
- "[t]he [Fifteenth] Amendment is not designed to punish for the past";[30]
- "[Congress] cannot rely simply on the past" (history of racial discrimination);[31]
- "no one can fairly say that [the record] shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965";[32]
- "40-year-old facts hav[e] no logical relationship to the present day";[33] and

[21] Shelby Cnty., 133 S. Ct. 2612.
[22] *Id.*
[23] *Id.* at 2.
[24] *Id.* at 13.
[25] *Id.* at 14.
[26] *Id.* at 16.
[27] *Id.* at 16-17.
[28] *Id.* at 18.
[29] *Id.*
[30] *Id.* at 20.
[31] *Id.*
[32] *Id.* at 21.
[33] *Id.*

- "[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[34]

As a result of the *Shelby County* decision, as well as the Court's embrace of the post-racial narrative, states previously under federal review have begun to implement rigid voting requirements that likely will have the effect of disenfranchising scores of minority voters.[35] As a result of the *Fisher* and *Parents Involved* decisions, educational institutions have found it increasingly difficult to respond to disturbing patterns of re-segregation. As a result of the *Maryland* decision, racial disparities in criminal justice will likely increase as DNA samples can now be obtained upon mere arrest. As a result of the *Vance* and *Nassar* cases, employees find it more difficult to redress racial and gender based discrimination. Put simply, the Court's recent term is emblematic of a broader trend to disregard the reality of continuing discrimination while adopting a worldview that has the effect of exacerbating identity-based disparities.

How can we disrupt this burgeoning post-oppression and post-race worldview? The essays contained in this special *Shelby County* volume of the *Touro Journal of Race, Gender and Ethnicity* may well point justice advocates in the right direction.

[34] *Id.* at 24.
[35] *See* Jerry H. Goldfeder, *After 'Shelby County' Ruling, Are Voting Rights Endangered?,* Brennan Center for Justice (Sept. 23, 2013), *available at* http://www.brennancenter.org/analysis/after-shelby-county-ruling-are-voting-rights-endangered) (last visited Oct. 9, 2013).