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ON THE REPEAL OF THE VOTING RIGHTS ACT AND THE BREADTH OF THE LONG COUNTER REVOLUTION

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"We had no alternative except to prepare for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and the national community."

-Dr. Martin Luther King Jr., Letter from a Birmingham Jail 1963

It is a point of interest that the recent repeal of the Voting Rights Act was conferred on the 50th anniversary year of the *Letter from a Birmingham Jail;*[1] eloquently crafted by Dr. Martin Luther King Jr. during the thick of the Civil Rights resistance struggle. As we remember Dr. King behind bars in Alabama for organizing against racial injustice, this very state, 50 years later, has made an appeal to the Supreme Court, reporting that federal oversight to ward off voter discrimination is not only unconstitutional, it is unjustified.[2] An appeal for 'fairness' is ironically underscored by the fact that of the states covered by sections 4(b) and 5 of the Voting Rights Act (VRA), Alabama is pursuing the repeal if we consider its violent history against the Civil Rights Movement [whereby the Voting Rights Act emerged]. Similar to Shelby County's resentment of federal oversight impacting the state of Alabama by way of the VRA, a collective of clergymen in Birmingham wrote Dr. King while he was jailed in 1963 stating their dissatisfaction with the nonviolent demonstrations King had brought to their city. King responds in his *Letter from a Birmingham Jail*,

> You deplore the demonstrations taking place in Birmingham. But your statement, I am sorry to say, fails to express a similar concern for the conditions that brought about the demonstrations. I am sure that none of you would want to rest content with the superficial type of social analysis that deals merely with effects and does not grapple with underlying causes. It is unfortunate that demonstrations are taking place in Birmingham, but it is even more unfortunate that the city's white power structure left the Negro community with no alternative.[3]

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[1] *See* Dr. Martin Luther King, Jr., "Letter from a Birmingham Jail" (letter published for the public, Birmingham, Alabama, April 16, 1963), http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.
[2] Shelby Cnty.,Ala. v. Holder, 133 S.Ct. 2612 (2013).
[3] King, *supra* note 1.

Now 50 years later, King's critique of white dissatisfaction with social and federal pressure to shield the rights of Black citizens' remains relevant. The "underlying causes" King references are predicated on an old system of social relationships; they have been wrought from a long American trajectory of federal compromises that have been morally trapped by the *logic of the Southern slave system*.

Herein, the point of this essay is not to debate the constitutionality of the Voting Rights Act, in which that process has already been undertaken by intelligent persons. Rather, this essay explores the formulaic structure of counter-revolution insistent on the logic of the Southern slave system, which ultimately necessitated the most recent national issue- the repeal of the 1965 Voting Rights Act.

The Logic of the Southern Slave System

I assert that the *logic of the Southern slave system* follows a history of engaging in political negotiations with Congress to protect the power structure of white dominance in the South. This power structure is consciously linked and dependent on the subjugation of the Black population in the Southern region of America. The logic of the Southern slave system can be defined as a development of "counter revolution", particularly in the post Reconstruction Era, during which a majority of politically active whites saw themselves as maintaining the control of Blacks and Black interests in order to defend White interests at all cost. The ideal of creating a "more perfect Union"[4] was tainted by Congressional promises to protect "state sovereignty."[5]

Northern and Southern states have historically assumed polarized ideological positions ideologically on what constitutes social 'progresses.'[6] Some of the most infamous examples of Congressional powers appropriating the logic of the Southern slave system to create a bridge for national cohesion, which consistently produces negative effects for Blacks, can be observed in the following litigations: 3/5 Compromise,[7] Missouri Compromise,[8] the *Dred Scott* case,[9] the demise of the Reconstruction Era,[10] *Plessy v. Ferguson,*[11] Jim Crow fomentation,[12] the reluctant

[4] See Abraham Lincoln, First Inaugural Address (speech presented as first presidential address, Washington, D.C., March 4, 1861).
[5] 133 S.Ct. 2612.
[6] RONALD W. WALTERS, WHITE NATIONALISM BLACK INTEREST: CONSERVATIVE PUBLIC POLICY AND BLACK COMMUNITY (2003). *See also* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA, *1860-1880* (1935).
[7] Bill E. Lawson, "Property or Persons: On a "Plain Reading" of the United States Constitution", THE JOURNAL OF ETHICS, VOL. 1, NO. 3 (1997), pp. 291-303.
[8] Missouri Compromise, THE WILLIAM AND MARY QUARTERLY, Vol. 10, No. 1 (Jul., 1901) pp. 5-24.
[9] JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991).
[10] W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA *1860-1880* (1992).
[11] WILLIAM JAMES HULL HOFFER, PLESSY V. FERGUSON: RACE AND INEQUALITY IN JIM CROW AMERICA (2012).
[12] JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS (2010).

implementation of the *Brown v. Board of Education* mandate,[13] and most recently- the repeal of the Voting Rights Act.[14] The track record of these persistent national compromises provides context for why the repeal of the Voting Rights Act can be understood as predictable and perhaps even inevitable. The breadth of long counter revolutionary appeals to state and federal authorities breeds a dark cloud over the perseverance of Black citizens to craft some semblance of racial equity in America.

Patricia Hill Collins lends a similar observation in outlining an investigation of American citizenship through the framework of the social intersections of race, ethnicity, and national identity. She posits that Blacks hold second-class citizenship due to racism within the American national identity. Internal racism is described as the subjugation of one racial group by another powerful racial group when the subjugated race is needed to maintain the standard of living for the powerful racial group.[15] Under this type of binding social structure, a consistent measure of racial tension, hence revolutionary action followed by counter-revolution, exists.

As a race and social philosopher of his time, James Baldwin more specifically describes the psychological dissonance white Southerners are faced with-, which seems to undergird the longtime maintenance of the logic of the Southern slave system. He writes,

> Any real change implies the breakup of the world as one has always known it, the loss of all that gave one an identity, the end of safety. And at such a moment, unable to see and not daring to imagine what the future will now bring forth, one clings to what one knew, or thought one knew; to what one possessed or dreamed that one possessed. Yet, it is only when a man is able, without bitterness or self-pity, to surrender a dream he has long cherished or a privilege he has longed possessed that he is set free- he has set himself free- for higher dreams, for greater privileges. All men have gone through this, go through it, each according to his degree, throughout their lives. It is one of the irreducible facts of life. And remembering this, especially since I am a Negro, affords me almost my only means of understanding what is happening in the minds and hearts of white Southerners today.[16]

Within this single statement, Baldwin has described and challenged the social realities of persons who are debilitated by unwarranted privilege, in particular, Southern Whites. White racial identity has granted possessions to those who have

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[13] RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO (1954). *See also* DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004).
[14] CHANDLER DAVIDSON AND BERNARD GROFMAN, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (1994).
[15] PATRICIA HILL COLLINS, "*Like One Of The Family*: *Race, Ethnicity, And The Paradox Of US National Identity,*" 6 *ETHNIC AND RACIAL STUDIES* 24 (2001).
[16] JAMES BALDWIN, COLLECTED ESSAYS 209 (1998).

surrendered freedom and greater humanity for "safety;" an unimaginative way of life. Only by this calculation of consumption, Baldwin explains, can "a Negro… understan[d] what is happening in the minds and hearts of White Southerners today."[17]

This reality is more complicated by way of systematic racial slavery in America, whereby whiteness itself becomes both an identity and a form of capital to be exchanged for societal privilege. Legal analyst, Cheryl Harris, argues that in addition to 'Whiteness' defining the legal status of a person as slave or free before emancipation, "…White identity conferred tangible and economically valuable benefits… [and was] central to national identity and to the republican project."[18] She analyzes the changing definitions of citizenship introduced in the Naturalization Act of 1790; considering, "The franchise, for example, was broadened to extend voting rights to unpropertied White men at the same time that Black voters were specifically disenfranchised, arguably shifting the property required for voting from land to Whiteness."[19]

While the tradition of white skin privilege in America has not been exploited by White Southerners alone, the peculiarities of southern slave culture and vestiges in racial interface generates more than a racially bound heritage- it constructs a logic. The Southern slave system as 'logic,' as opposed to basic social law, likewise allows for other persons who are not natively Southern and White to participate in and rationalize racisms, principally targeted at Black Americans. Similarly, Derrick Bell suggests that there are "silent covenants" among White Americans which manifests as symbolic and unspoken agreements between political actors and the general white American population to amend their differences through compromises, which has always sacrificed the rights and interest of Black Americans.[20] Embargoes against Black Americans serve to protect national privileges and resources reserved for the intended natives of the state- Whites. Consequently, this logic is a 'slave logic' because it can never rationalize Blacks as deserving benefactors of American privileges.

Scholar of the 20th century, W.E.B Du Bois, concluded that citizenship posed a specific dilemma in the race attitudes of Negro Americans. He writes, "The fruitless hope of Negroes…lies in being able to lose our race identity in the commingling of races within the nation to reduce the friction and race prejudice we have fought against for so long."[21] This analysis is mounted from the contradictions in being both Black and American based on the historical discontinuity of these

[17] *Id.*
[18] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1743 (1993).
[19] *Id.* at 1744.
[20] DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004).
[21] W.E.B Du Bois, *Conservation of the Races, THE AMERICAN NEGRO ACADEMY OCCASIONAL PAPERS, NO.2*, (1897).

identities. If it is normative to conscientiously reduce Black populations to antagonistic "outsiders" in relation to the national identity, then it becomes illogical to identify advances in Black political power as social "progress".

The logic of the Southern slave system only produces rationalities through fixed dialectics, wherein, sources of power have a unidirectional currency. This epistemological entry predicts the surfacing of counter-revolution when political advances, which are perceived as gains for Black citizens, are institutionalized. In the case of the Voting Rights Act, systematic white dominance over electorate power in Southern states was diffused. Thus, through the logic of the Southern slave system, this federal addendum is quoted as an "irrational"[22] imposition (against an otherwise normative assumption- white possession of Southern governance).

On the Repeal of the Voting Rights Act

The recent repeal of the 1965 Voting Rights Act, the counter-revolution supported by Alabama, Mississippi, Georgia, North Carolina, South Carolina, Louisiana, and Virginia, employs the logic of the Southern slave system. The central tenants of the case Shelby County presents to the Supreme Court are: 1) the VRA is unconstitutional in respects to the preservation of state sovereignty, 2) even considering federal intervention for "extreme circumstances," Shelby County has made progress and has approached "parity" in minority voter registration and voter turnout, and 3) thus the VRA is based on old data and does not apply to "current conditions."[23] This theory of justification may presume the following flawed assumptions based on the logic of the Southern slave system.

To the first point, the reservation of state power in relation to federal power is the fault line debate between the Northern and Southern republic of the United States pre- and post- Civil War.[24] Prior to the onset of the Civil War, the South was invested in expanding slave territory in new states; subsequent to the Reconstruction Era, the greatest compromise of the Union was to allow the restoration of an aggressive logic of the Southern slave system by allocating states more power to self-regulate. A departure from federal regulation has historically resulted in the most oppressive conditions for Black populations. As identified by Justice Ginsburg in the *Shelby County v. Holder* case, "The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States."[25] To protect and execute the rights of Blacks, particularly in the South, the federal

[22] Shelby Cnty., 133 S.Ct. 2612 (2013).
[23] *Id.*
[24] DON E. FEHRENBACKER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978).
[25] Shelby Cnty., 133 S.Ct. 2612 (2013).

government has historically been forced to implement oversight on state laws and practice. Therefore, the first point of logic rationalizes counter-revolution by transitioning power back to states. Protection of state sovereignty represents an immediate threat of vulnerability to Black communities. By way of this logic, iconic figures such as Fannie Lou Hamer had reached the limits of the Southern form of democracy. She stated to the Democratic Convention in 1964 (representing the Mississippi Freedom Democratic Party), "If the Democratic Party is not seated now, I question America…Is this America? The land of the free and the home of the brave? Where we [Blacks] have to sleep with our telephone off the hook, because our lives be threatened daily."[26] Just as King would defend social disobedience to disrupt the logic of the Southern slave system, as a voting rights activist, Fannie Lou Hamer portrayed the lived realities of Blacks who had been oppressed by state power.

> Constitutional law scholar, Ronald Fiscus, the failure of courts to confront embedded racial discrimination in law and practice. He writes,
> The Court has steadfastly adopted the right assumption about inherent racial equality, the only assumption that makes sense of the overall equal protection project. But it has accepted the wrong assumption about the causes of subsequent racial disparities in society. That assumption- that there are reasons for black underachievement in society that are essentially natural and nonindividuous-effectively negates the proportionality argument, that is, that blacks would attain proportional success in all society's endeavors if they were not disproportionally hindered.[27]

Fiscus, like King, begs the question of the causes underlying racial discrimination which are embedded within a social system of assumptions. If one is not assuming a "slave logic" of Black racial inferiority, then the measure of disproportionate success Whites have attained over Blacks should assume that there is an existing barrier. While supporters of the repeal of the VRA may argue federal oversight is unconstitutional, it would be more difficult to argue that the VRA is unfounded.

Within the second and third premises, Shelby County argues that they have reached "parity" in minority voting and therefore the VRA is no longer a necessary apparatus. However, this outcome has not been reached merely by a change of morality in Southern politics and sensibilities. Justice Ginsburg cites in her review of the *Shelby County, Alabama v. Holder* case, "The number of discriminatory changes blocked or deterred by the preclearance requirement suggests that the state of voting rights in the covered jurisdictions would have been significantly different absent this remedy."[28] Her conclusion argues that the section 5

[26] VICKI L. CRAWFORD ET. AL., WOMEN IN THE CIVIL RIGHTS MOVEMENT: TRAILBLAZERS & TORCHBEARERS *1941-1965,* 32 (1990).
[27] RONALD FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 28 (1992).
[28] Shelby Cnty., 133 S.Ct. 2612 (2013).

preclearance procedures have served to protect minority voting and have blocked years of attempts by covered districts, as late as 2006, to alter voting practices that would specifically disenfranchise minority votes. The states covered by section 5 of the VRA have not reached "parity" by their own merit and had there not been a federal mandate in place, racial discrimination in voting would remain a pervasive issue.

Furthermore one may ruminate, is the semblance of "parity" in a racial count of voter participation an equivocal measure of the protection of the right to vote? Who are those who are empowered in the Southern political spheres? The logic of the Southern slave system is fervently precarious in projecting an image of racial harmony even under the gravest conditions of white racial dominance. In, *The Debt: What America Owes to Blacks*, Randal Robinson writes,

> …if our political leaders show little inclination or capacity to solve a problem that the majority of white Americans want desperately to solve, one cannot realistically be very optimistic about the chances the same leaders would confront forcefully racial problems that they have not yet even discomforted themselves to see…Once and for all, America must face its past, open itself to a fair telling of all its peoples' histories, and accept full responsibility for the hardships it has occasioned for so many. It must come to grips with the increasingly indisputable reality that this is *not* a white nation.[29]

If not with the vote, what is the mechanism through which America truly adopts its sea of immigrants? Robinson's challenge to American political leaders is to resolve within themselves that America "is not a white nation." While this may seem an obvious observation in passing, it is profound, juxtapose to the logic of order in America. In the wake of the repeal of the Voting Rights Act, political actors are faced with the dilemma of conceding to the logic of the Southern slave system- a logic that fears the loss of Whiteness as a possession. This type of social logic can only foresee a calamity if the political rights of Blacks actually led to political power. The breadth of counter-revolution is long because the relic of White racial order, hidden behind liberal democracy, is a ghost unwilling to rest.

The repeal of the 1965 Voting Rights Act represents another congressional compromise that is morally weakened by the decision to preserve Whiteness as a binding national identity. The "preservation of the Union" has been an imagined cooperative between Northern and Southern Whites. The "others" are still awaiting a stable entry.

[29] RANDAL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 172-73 (2001).

For segregation has worked brilliantly in the South, and, in fact, in the nation, to this extent: it has allowed white people, with scarcely any pangs of conscience whatever, to create, in every generation, only the Negro they wish to see.
-James Baldwin, 1961

Injustice anywhere is a threat to justice everywhere…Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives in the United States can never be considered as outsider anywhere within its bounds.
-Dr. Martin Luther King, 1963

We want ours and we want ours now. I question sometime, actually, has any of these people that hate so—which is the white—read anything about the Constitution? Eighteen hundred and seventy, the Fifteenth Amendment was added on to the Constitution of the United States that gave every man a chance to vote for what he thinks to be the right way. And now this is '64 and they still trying to keep us away from the ballot.
-Fannie Lou Hamer, 1964

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