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ANY IS TOO MUCH: SHELBY COUNTY V. HOLDER AND DIMINISHED CITIZENSHIP

PETER HALEWOOD*

“The point is that voter fraud--just barely--exists, while racism, according to the Supreme Court, is a thing of the past,” says Jon Stewart’s Daily Show reporter, sarcastically summing up¹ voter ID laws and the U.S. Supreme Court’s majority opinion in *Shelby County v. Holder*.² Chief Justice Roberts’ majority opinion is no laughing matter, unfortunately. Behind the neutral-sounding but dubious constitutional principle of state “equal sovereignty”³ which it asserts to protect Alabama (and woeful Shelby County) from the indignity of federal preclearance⁴ of its voting laws under the Voting Rights Act,⁵ there may be another inchoate logic. The majority dismisses or overlooks a carefully documented Justice Department and Congressional record of recent and ongoing discrimination against minority voters in jurisdictions covered under the Voting Rights Act section 4 preclearance “coverage formula” that the majority declares unconstitutional. Why? How? Justice Ginsberg writes in her powerful dissent,

Jurisdictions covered by the preclearance requirement continued to submit, in large numbers, proposed changes to voting laws that the Attorney General declined to approve, auguring that barriers to minority voting would quickly resurface were the preclearance remedy eliminated....In all, the legislative record Congress compiled filled more than 15,000 pages. H. R. Rep. 109-478, at 5, 11-12; *S. Rep. 109-295*, at 2-4, 15. The compilation presents countless "examples of flagrant racial discrimination" since the last reauthorization; Congress also brought to light systematic evidence that "intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed....The overall record demonstrated

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¹ *Suppressing the Vote*, THE DAILY SHOW, September 13, 2013, <http://thedailyshow.cc.com/videos/dxhtvk/suppressing-the-vote>, last visited March 19, 2014.

² *Shelby Cnty, Ala. v. Holder*, 133 S.Ct. 2612 (2013).

³ *Id.* at 2623.

⁴ The Voting Rights Act, sections 4 and 5, required Department of Justice preclearance whenever jurisdictions identified under the s.4 “coverage formula” as states with a history of racially discriminatory voting practices made changes to voting laws.

⁵ 42 U.S.C. §§ 1973 to 1973aa-6.

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to the federal lawmakers that, "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.

Shelby County v. Holder, 133 S.Ct. at 2634-2636.

Those are powerful and sobering facts. But the majority opinion's response amounts to little more than an assertion that there may be such vote suppression today but it is so much less egregious than it was 50 years ago (when Selma's "Bloody Sunday" police beatings of civil rights marchers took place, and only 7% of Mississippi's black population was registered to vote!)⁶ that it is unconstitutional to subject the same jurisdictions to continued s.4 mandated preclearance.⁷ "Our country has changed,"⁸ writes the majority, unconcerned about the unique place that many of the jurisdictions identified in the coverage formula have in the history of Jim Crow and racism, and unconcerned that some of them continue to violate voter equality today. State "equal sovereignty" does not explain this indifference to historical struggle and current inequality.⁹ The principle of "colorblindness" and white privilege may help to illuminate it.¹⁰

Colorblindness as a jurisprudential principle¹¹ requires that no legal classification be adopted upon the basis of race or color. It is highly skeptical of any legislative use of race or color, in any context, and has become the operating principle of the conservative majority on the Supreme Court. Colorblindness is of course also an ideological mechanism by which courts can recast attempts to redress racial prejudice as themselves forms of racism: where race is taken notice of, even to remediate past racism, this is itself racist because such notice is not colorblind. Whiteness is characterized by colorlessness: whiteness as a political position of advantage is defined by its lack of color, the "irrelevance" of color.¹² Whites do not experience whiteness in racial terms: whites take for granted the absence of race in their own social and political experiences. People of color, of course, are imminently and permanently aware of color, their own and others', in their social and political

⁶ *Id.* at 2626.

⁷ *Id.* at 2631.

⁸ *Id.*

⁹ For a critique of the Court's "equal sovereignty" argument, see James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 39 (2014).

¹⁰ There is a sustained critique of constitutional colorblindness in legal scholarship. see e.g., Henry L Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397 (2002).

¹¹ See generally Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1 (2013).

¹² See e.g., Peter Halewood, *Whiteness*, in THE ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1896 TO THE PRESENT, FROM THE AGE OF SEGREGATION TO THE TWENTY-FIRST CENTURY 121 (Paul Finkelman ed., 2009).

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experiences. Citizenship itself is racially constructed, and reflects the accumulation of white racial capital at the expense of people of color.¹³ Colorblindness as jurisprudential principle thus constitutes and replicates whiteness as social and political advantage enjoyed by white citizens and not those of color. Colorblindness is to whiteness as freedom of contract is to class privilege: in both cases the former term renders unintelligible any critique of the latter. Whiteness demands colorblindness when assessing measures designed to ensure racial justice so as to erase the reality of continuing racism. Preclearance under the Voting Rights Act coverage formula was an affront to whiteness and its colorblind vision and thus had to go, despite the continuing reality of racist voter suppression laws in a number of states. As the majority wrote, "any racial discrimination in voting is too much"¹⁴ and thus rather than substantively confront that discrimination, its existence had to be downplayed, its significance minimized.

Voting rights are at the core of citizenship. The failure to protect them and to recognize the unique significance and continuing threat posed to racially inclusive citizenship by the practices of the jurisdictions identified under the Voting Rights Act coverage formula is an epiphenomenon of whiteness and colorblindness. Citizenship itself is put at risk by empty promises of an imminent post-racial equality. Let us hope that progressives find a way to undermine the false appeal of colorblindness with its promise of a nowhere-land where racism and color are the same and law shall speak of neither.

¹³ See generally Peter Halewood, *Citizenship as Accumulated Racial Capital*, 1 COLUM. J. RACE & L. 313 (2012).

¹⁴ *Shelby County v. Holder*, 133 S.Ct. at 2631 (2013).