Race, Class, and Structural Discrimination: On Vulnerability within the Political Process

Atiba R. Ellis

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RACE, CLASS, AND STRUCTURAL DISCRIMINATION: ON VULNERABILITY WITHIN THE POLITICAL PROCESS

ATIBA R. ELLIS†

I. INTRODUCTION

A number of recent judicial and legislative transformations have defined the modern scope of the right to vote. These transformations have arguably narrowed African-Americans’ ability to exercise the franchise. These changes include the decision in Shelby County v. Holder1 to limit the effectiveness of the Voting Rights Act of 1965, the seeming consensus around the propriety of heightened regulation of the right to vote through implementing voter identification laws, and the long-standing consensus around felon disenfranchisement laws. All three of these issues implicate the African-American community in particular as some have argued that these are the enduring legacies of—and the imposition of—a new era of Jim Crow.2

Yet, another more recent event must refocus our attention on the issue of the African Americans and the franchise. Specifically, the events in

1 Professor of Law, West Virginia University College of Law. The author would like to thank Dr. Kareem Crayton for his invitation to this symposium and the National Bar Association and the St. John’s Journal of Civil Rights and Social Justice for sponsoring and publishing this symposium. Versions of this thesis have been presented at the 2014 Mid-Atlantic People of Color Legal Scholarship Conference, the New Scholars Forum of West Virginia University College of Law, the Tulane Law School 2014 Forum on the Future of Law and Inequality, and the American Constitution Society 2014 Scholar’s Gaggle. The author is appreciative of the feedback given at these various gatherings, and he wishes to thank in particular Spencer Overton, Daniel Tokaji, M. Isabel Medina, Matthew Titolo, Shine Tu, Saru Matambanadzo, and Kendra Fershee. The author would also like to acknowledge the support of the WVU College of Law Bloom/Hodges Faculty Scholarship Fund for support of this research. Finally, the author would like to acknowledge the research support of Richard Morris and Jason Turner. All errors are the responsibility of the author. Comments may be directed to atiba.ellis@mail.wvu.edu.

2 See Atiba R. Ellis, The Meme of Voter Fraud, 63 CATHOLIC U. L. REV. 879, 909 (2014) (“Prominent Democratic officials, activist voting rights groups, and left-leaning political organizations back the assertion that recent voter regulations replicate Jim Crow-era policies of wholesale exclusion of people of color through regulations that overly burden the exercise of their right to vote.”) and id. at n. 222 (collecting examples).
Ferguson, Missouri³ in the summer of 2014 revealed police abuse in both the killing of Michael Brown and the militarized siege of policing in the wake of subsequent protests. The examination of Ferguson that followed the unrest of that summer and fall revealed a structure built on the poverty of the St. Louis suburb’s African-American residents.⁴ The media also discovered that these same residents of Ferguson were effectively locked out of the political process.⁵

At the time, I argued in a blog post that this appeared to be the result of the phenomenon of structural racism and exposed the vulnerability of such communities to political domination.⁶ Indeed, this paper seeks to extend that discussion and to give initial thoughts about the key issues that lie at the intersection of race and class within the American political process. From it, it is plausible to conclude that a lockout dynamic within the political process exists at a level that is far removed from concerns of typical high theory law-of-politics jurisprudence.⁷ As will be discussed below, this lockout problem has been examined on the levels of partisans and political process, with an accompanying disdain for the race-conscious vulnerabilities that seem to undergird the political problems that the Ferguson situation illustrates.

The goal of this paper is to illustrate this racially intersecting lockout problem and to argue for the importance of attending to this problem within the context of the law of democracy. Specifically, this paper will illuminate the heart of this problem: the intersecting vulnerabilities that poor people of color suffer from within the political and economic process. Such vulnerability lies at the heart of both the historical and present-day discrimination within the franchise (and the structures that affect it). This paper focuses on the idea that vulnerability to the majoritarian forces and

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⁴ Id. (collecting sources).

⁵ Additionally, the American Civil Liberties Union ("ACLU") recently filed a suit alleging discrimination in the process of school board elections. ACLU Sues Ferguson-Florissant School District, Charging Electoral System Undermines African-American Vote, ACLU.ORG (Dec. 18, 2014), https://www.aclu.org/racial-justice/voting-rights/aclu-sues-ferguson-florissant-school-district-charging-electoral-system.


⁷ Id.
inequities in the political process ought to serve as a factor in defining the harms that minority populations suffer within the political process. The contention here is that such vulnerability premised on the confluence of historical factors such as race and socioeconomic status creates a particular risk that the interests of such groups will not be met and that the people within these groups will not be able to participate fully within the political process.

To offer this perspective, Part II of this paper discusses a historical perspective on the long history of voting rights to demonstrate the core reasons why, and the evolution of, race-conscious remedies to insure inclusion of minorities in the franchise. This background then serves to situate the doctrinal and ideological shift away from race-conscious remedies illustrated by the Court's decision in *Shelby County*. By using that case as a lens, the paper demonstrates that despite their continued salience, the Court deems traditional race-conscious remedies suspect for primarily ideological reasons. Part III re-imagines these remedies through the lens of what this paper calls political vulnerability. This idea, synthesized from sources in the literatures of political inequality, intersectionality of racism and economic inequality, and structural racism, argues that irrational marginalization due to one's status as a member of the political underclass can yet should not exclude one from the political process. This Part will further define this problem and tease out considerations for a framework based upon this intersectionality analysis.

Part IV concludes this paper by offering some initial thoughts on how to create legal interventions to address the problems faced by the communities that lie at the intersection of race and class within the political process. It will advocate for engraining this lens into our voting rights jurisprudence by recommending possible policy and legal alternatives to the incomplete scheme we currently have.

II. RACIAL HIERARCHIES AND THE EVOLUTION OF VOTING RIGHTS

To start with the obvious: racial hierarchies that condition full status on the possession of characteristics of characteristics of "whiteness" have

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8 By whiteness, I mean what scholars in the critical race studies literature have meant: a status that is based upon "white" racial appearance, which entitles the possessor to full legal status and privilege in relation to the rights within society. *See*, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1734-36 (1993). This status is defined in relation to who is "white" as well as who is not white, and thus relies upon a mechanism of subordination to achieve. *See generally*, Ediberto Román, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique* 83-118 (2010) (examining the *de jure* subordinate status of minorities and women in nineteenth century
dominated, and as many have argued, still dominate American society. Despite claims of a post-racial America where minorities are presumed welcome throughout American civic life, this state of affairs continues to define and condition our understandings and the privileges that derive from this ideologically driven hierarchy affect the modern political process still. This thesis explains why societal conflict continues to exist due to the inherent hierarchies that racial subordination creates and imposes.

Acknowledging this lens at the outset and the enormity of the historical and modern evidence that support this conclusion is necessary to thoroughly assess the modern state of politics in the United States. Seen as a battle against majoritarian racial tyranny on the one hand and the imposition of a civil rights model imposing a norm of political equality through the effective use of the right to vote on the other, what becomes clear is that this battle has been a seesaw effort to counteract majoritarian exclusionary structures with rights-enabling legal mechanisms. This subsection seeks to briefly provide the necessary historical frame to illustrate this thesis and illustrate the problem of continued and evolved racial subordination within the political process. However, to illustrate this, we must begin from the premise that racial subordination has dominated the political process.

A. The History of Disenfranchisement

To state the problem briefly: in each era of the American experiment, racial subordination spurred by majoritarian domination has created conflict despite the fact that the scope of rights for racial minorities expanded in each era. At each time that the pallet of rights expanded, such change was eventually followed by contraction that curtailed and limited
the effectiveness of the right to vote. However, prior to the Civil War, direction and control of the electoral process was largely given over to the control of state governments. Accordingly, the rationales that states provided to include—or exclude—persons from the franchise were given great deference. This deference, most clearly expressed in the few structural provisions in the 1789 Constitution regarding elections, allowed states to choose to include or exclude whichever of the persons in its jurisdiction that it deemed fit. This tended to benefit white, male property owners in following with the political theory of the time—that one must own a stake in the political community to usefully participate in its governance. This also facilitated and replicated the belief that white males were morally and intellectually superior and thus should be given deference in the process. This is the foundational structure of the American democratic process.

The idea of equality between racial groups, and thus an entitlement to political equality of all male citizens did not exist as a matter of constitutional law until Reconstruction. The Reconstruction Amendments and the laws put in place to enforce those laws were designed to establish and facilitate a norm of economic and political equality so that


13 Probably most significant of these provisions is the Elections Clause, U.S. Const. art I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators.”). It has been subject of recent litigation regarding the extent to which individual states may place additional qualifications (such as proof of citizenship requirements) in federal elections. See Arizona v. Inter Tribal Council of Ariz., Inc., supra n. 12. Additionally, the Electors Clause also delegates power to choose electors to state legislatures. U.S. Const. art I sec. 2, cl.1.

14 The rationale for this was that property owners were deemed to have a sufficient stake in the community and could be considered to represent the interests of the property-less. See Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 9 (2000 rev. ed. 2009). In this sense, the right to vote could be considered a form of property that then could be subject to privileging and exclusion based upon notions of whiteness. Cf. generally Harris, supra n. 8 (defining whiteness as a status that defines access to various property rights).

15 Put another way, this facilitated the creation of white supremacy. By white supremacy, I mean “a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.” Frances Lee Ansley, Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship, 74 Cornell L. Rev. 993, 1024 n. 129 (1989).

16 Ellis, Reviving the Dream, supra n. 11 at 792 and n.5 (acknowledging that no notion of equality existed in the American constitution until the drafting of the Thirteenth and Fourteenth Amendments).
freed slaves could have the opportunity for equal treatment under the law.\textsuperscript{17} They served to define citizens as those who were born or naturalized in the United States.\textsuperscript{18} The Equal Protection Clause then sought to insure that the state provide equal protection of the laws for all persons under the government of the United States\textsuperscript{19} and the Due Process Clause was intended to insure that each person who suffered a deprivation of life, liberty, or property would be protected from overreach by the state.\textsuperscript{20}

Indeed, this concern for counteracting the structures of the state to insured that freed slaves would be able to participate fully in the democratic process. Section Two of the Fourteenth Amendment, in particular, sets for a penalty provision designed to insure that states would not discriminate against minorities in the political process.\textsuperscript{21} With an exception for persons who committed “treason or other crimes,” the section penalized disenfranchisement undertaken by the state through eliminating that state’s representation in congress in proportion to the amount of disenfranchisement the state undertook.\textsuperscript{22} Yet even this was not seen as sufficient. The Fifteenth Amendment was established to provide that no state would discriminate on the basis of race when it came to the right to vote.\textsuperscript{23} These two structural protections provided the means by which the federal government would protect against majoritarian efforts to diminish the political equality of African-Americans.

And yet, this effort towards political equality was betrayed by retrenchment in the period following Reconstruction. The Supreme Court in particular narrowed the underpinnings of the laws designed to protect the political process through narrowly construing those provisions, preventing \textit{de jure} discrimination on the basis of race but allowing \textit{de facto} discrimination that only had a disparate impact on the basis of race.\textsuperscript{24} As a

\begin{itemize}
  \item \textsuperscript{17} Id. at 819-25 (describing the aims of the Reconstruction Amendments and attendant legislation).
  \item \textsuperscript{18} U.S. CONST. amend XIV § 1 cl. 1.
  \item \textsuperscript{19} U.S. CONST. amend XIV § 1 cl. 4.
  \item \textsuperscript{20} Id. at cl. 2.
  \item \textsuperscript{21} Id. at § 2 cl. 2.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} U.S. CONST. amend XV § 1.
  \item \textsuperscript{24} Atiba R. Ellis, \textit{A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship}, 43 SOUTHWESTERN L. REV. 549, 552-53 (2014). In a line of jurisprudence that endured as a cornerstone of Jim Crow politics, the Court made clear that it would interpret the Fifteenth Amendment narrowly despite disparate treatment by state governments that had the result of disenfranchising African Americans. So long as the formal command of not discriminating on the basis of race as upheld, the Supreme Court would uphold any other “rational” voting regulation. This was made clear in Williams v. Mississippi, where the use of poll taxes and literacy tests was upheld because there was no overt discriminatory administration of the suffrage provisions. \textit{See also} Minor v. Happersett (upholding state provisions that denied women the franchise on the basis that no provision existed to protect a woman’s right to vote). Williams and Guinn shows that the Court saw its role in
result, mass disenfranchisement through felon disenfranchisement laws, poll taxes, literacy tests, and other mechanisms of Jim Crow defined the first generation of vote suppression. African-American voters were effectively excluded throughout large swaths of the United States, thus facilitating a second period—the first, slavery—of white majoritarian domination.

The civil rights revolution was predicated on the idea that these structures ought to be eliminated. In particular, the passage of the Voting Rights Act of 1965 sought to insure that the command of the Fifteenth Amendment would be enforced. The VRA gave the federal government the ability to enforce voting rights through insuring that minority citizens would not be excluded from voting on the basis of outright racial discrimination or laws that would substantially disadvantage their participation in the political process. In other words, the VRA was designed to specifically address vote denial claims and vote dilution claims. Additionally, the VRA nationalized election laws through both its national enforcement provision in Section 2 that forbade racial discrimination and the preclearance provisions set forth in Section 5, which required that states that had a history of discrimination in voting and evidence of disparate rates of participation between whites and minorities were required to submit their voting rights changes for approval by the U.S. Department of Justice prior to implementing those changes.

Statutory transformation was coupled with judicial intervention and innovation. Reynolds v. Sims and its progeny established the principle of "one person, one vote." The Court then held in Harper v. Virginia State

enforcing the strictures of the Constitution while at the time allowing broad latitude to state regulation that did not run afoul of the Constitution. This rationale became the basis of the "Mississippi Plan" which was adopted by states across the South to disenfranchise African-Americans. See Atiba R. Ellis, The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy, 86 Denver U. L. Rev. 1023, 1043 (2009).

See Ellis, Cost of the Vote, supra n. 24 at 1043.

As the reader may observe at this point, this transformation came about because of the persuasiveness of movement politics during the 1950s and 1960s rather than any sudden evolution in the thinking of the courts or the legislature. The long scope of efforts by activists throughout the United States created political and moral pressure that transformed the thinking of the men in the elected and unelected branches of government. See generally Gary May, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY (2013).


52 U.S.C. 52 U.S.C.A. § 10303(a). As will be discussed below, this provision is currently inoperative in light of the Shelby County decision.

Board of Elections that poll taxes in federal elections violated the Fourteenth Amendment’s Equal Protection and Due Process Clauses.  

There, the Court reaffirmed its often-pronounced view that the right to vote was a fundamental right, and that the ability to pay a tax ran contrary to the nature of this right. Taken together, these provisions transformed the structure of election law by subjecting voting rights claims to strict scrutiny and requiring that the underlying structure of state and federal elections to guarantee an equal vote that represented the crowning achievement of ending de jure white political domination. The effect was to create an electorate where all have access to participation, and that protection was guaranteed on a constitutional and statutory basis.

However, the domination that had been eliminated from statutory and constitutional law was facilitated by other means. And the Court in particular played a role in attempting to evolve this jurisprudence to address evolving forms of discrimination through the manipulation of the structures of political participation. This role can be traced back to the Court’s effort to transform the meaning of the Fifteenth Amendment through narrowing its interpretation. In City of Mobile v. Bolden, the Court held that the Fifteenth Amendment could only be invoked to pursue claims where intentional discrimination had been demonstrated; in response Congress amended the VRA to insure that Section 2 claims could also be brought under a disparate impact theory. Additionally, when it comes to constitutional vote denial claims based on a harm suffered due to a regulatory impact—as opposed to a claim based on express discrimination on the basis of race—the Court has required a balancing of the state’s interests with the interests that the voter claims to have been harmed.

These few, yet significant, data points illustrate the overarching concern, that through efforts to insure that access to the vote not be dominated through the creation of a rights structure, that structure has steadily eroded since the passage of the VRA. Put another way, this doctrinal re-crafting and limitation represents a substantial impairment of the opportunity to accomplish the goal of preventing majoritarian tyranny. In essence, the race-conscious remedies that have been allowed have steadily eroded

32 Id. at 669-70.
33 446 U.S. 55 (1980).
34 The Court noted that this “totality of the circumstances” approach designed to overrule Bolden was authoritative in light of the amendments to the VRA. See Thornburg v. Gingles, 478 U.S. 30, 44 (1986).
through doctrinal narrowing.

B. Shelby County and the Undoing of Section 5 of the Voting Rights Act

*Shelby County* represents the latest of these efforts and a true curtailment of the ability to utilize race conscious remedies. Yet, unlike the narrowing based on doctrinal interpretation, Shelby County represents a choice to constrict the ultimate goal of race-conscious remedies in election law. Indeed, *Shelby County* differs from the aforementioned cases in that the Court expressly disavowed Congress’s judgment concerning the effectiveness of race-conscious remedies and, in effect, declared that progress concerning improvement in race relations was sufficient to merit overriding congressional judgment.

In *Shelby County*, the Court declared Section 4(b) of the Voting Rights Act unconstitutional, thus ending nearly half a century of preclearance approvals under Section 5. The Court’s opinion reached the conclusion that the current scope of 4(b) preclearance failed constitutional muster because it offended the “equal sovereignty” due each state in voting regulation. Chief Justice Roberts reached this conclusion because “the conditions that originally justified [the preclearance measures that justified differing treatment of states] no longer characterize voting in the covered jurisdictions.” Roberts pointed to the growth in voter participation and to the increased numbers of minority elected officials over the life of the VRA. Based on this, Roberts found that “[c]overage [under section 4(b)] is based on decades-old data and eradicated practices.” According to Roberts, “[r]acial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.”

In her dissent, Justice Ginsburg disagreed with Roberts’ conclusions. Ginsburg opined that the Court failed to allow deference to Congress’s

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36 See Atiba R. Ellis, *Shelby Co. v. Holder: The Crippling of the Voting Rights Act*, ACS BLOG (June 27, 2013) https://www.aclaw.org/acsblog/shelby-co-v-holder-the-crippling-of-the-voting-rights-act (drawing from the author’s opinion on *Shelby County* on the ACS blog); See also generally Ellis, *Reviving the Dream*, supra n.11 (author’s recent and more detailed discussion of these issues). This subsection and the subsection that follow draw on and extend ideas contained in the aforementioned locations.
38 Id. at 2618.
39 Id. at 2619.
40 Id. at 2617.
41 Id. at 2627-28.
authority to legislate under the Fifteenth Amendment.\textsuperscript{42} She also rejected the Court’s “equal sovereignty” argument, stating that the principle is only applicable to the conditions on States for admission to the union.\textsuperscript{43} Ginsburg also dissented from the majority’s view that Congress lacked sufficient evidence upon which to authorize Section 4(b). She pointed to the record Congress had amassed on twenty-first century voting discrimination.\textsuperscript{44} She concluded that with the preclearance provision effectively gutted, the country now faces the possibility of the erosion of voting rights.\textsuperscript{45}

By declaring the coverage provisions of Section 4 unconstitutional, the preclearance provisions of Section 5 are unenforceable. This represents a victory for those who wish to see less federal involvement in elections. The majority opinion left it up to Congress to create a new coverage formula, but it is unlikely to occur in the foreseeable future.\textsuperscript{46} Moreover, this decision limits the ability to remedy voting rights violations to plaintiff’s lawsuits to Section 2 of the Act. In comparison to the government’s ability to proactively supervise election laws under Section 5, Section 2 private litigation will prove costly and time consuming to plaintiffs and will rely on retroactive court decisions that come long after the harm. Effectively, voting rights enforcement has now become more costly.

While framed as a matter of statutory interpretation, the \textit{Shelby County} opinion held in essence that the covered jurisdictions, mainly in the ex-Confederate South, have changed sufficiently enough to warrant the reconsideration of selective preclearance enforcement. In this view, coverage formulas rooted to a past of racial discrimination in voting ignores racial progress. Indeed, Roberts implied that to hold to such formulas amounts to punishment of the states covered for their racial

\textsuperscript{42} Id. at 2638 (Ginsberg, J., dissenting).

\textsuperscript{43} Id. at 2649.

\textsuperscript{44} Id. at 2642-44, 2652.

\textsuperscript{45} Id. at 2651 (“The sad irony of today’s decision lies in its utter failure to grasp why the VRA has proven effective. The Court appears to believe that the VRA’s success in eliminating the specific devises extant in 1965 means that preclearance is no longer needed. With that belief, and the argument derived from it, history repeats itself”).

\textsuperscript{46} In commenting in the immediate aftermath of \textit{Shelby County}, I opined that because of “the hyper-partisan nature of national politics, it is difficult to imagine how the current Congress or any Congress elected in the foreseeable future would agree on a new coverage formula.” See Atiba R. Ellis, \textit{Shelby County, AL v. Holder, The Crippling of the Voting Rights Act, WEST VIRGINIA UNIVERSITY SCHOOL OF LAW NEWS} (June 28, 2013), available at http://law.wvu.edu/news/2013/6/28/ShelbyCounty-vs-Holder (June 28, 2013). While advocates continue to seek a revised and robust form of Section 4(b) to revive Section 5 preclearance, the political realities make this highly unlikely.
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This facile analysis sidesteps the arguments on the record about the degree of progress made by the covered jurisdictions and the ultimate question of whether racial political equality has been achieved. Instead, the majority simply asserted that Congress exceeded its basis in relying on the 2006 coverage formula. Rather than account for the varied forms of second-generation voter intimidation as evidence on which Congress could have based its findings, the majority suggests that increased voter participation demonstrates enough progress towards racial political equality to effectively scuttle Section 5.

C. Shelby County and Judicial Retrenchment Concerning Race-Conscious Remedies

In this sense, Shelby County seeks to craft a narrative of the post-racial success of the Voting Rights Act, thus justifying its curtailment. Relying on this ideological view causes the majority to fall into the trap of wanting to believe that the markers of progress represent a wide-ranging success rather than confronting the far more complex reality of contemporary vote denial. It is important to note the broader context, though. The Shelby County account of the veritable end-of-history of racial domination in politics is actually part of a larger post-racial project of the Court. This project is divorced from, and ultimately blind to, the reality of racial conflict concerning civil rights issues generally, and voting rights conflicts in particular.

This ideology of racial progressivity, coupled with the disfavor the conservative majority has shown towards race conscious governmental intervention, suggest that the Court believes that race conscious election law doctrine must be moderated so as to not interfere with this progress. This is a prime driver of the Court’s jurisprudence in shaping contemporary voting rights law and could lead to the abolition of all but the bare minimum of race-based protections in right to vote jurisprudence.

Two principle and interrelated frameworks have been deployed through the Court’s recent jurisprudence to implement this trend. The first is “colorblindness,” the view that by force of societal change, race will

47 See Shelby Cnty., 133 S.Ct. at 2629.
48 See id. at 2632.
49 See id. at 2629.
50 See id. at 2618-19.
become irrelevant throughout society. In essence, by functioning as a society that does not make judgments on the basis of race, race will ultimately become irrelevant in society.

In the election law context, Professor Spencer Overton has critiqued the adoption of a colorblindness framework by the Court and by scholars and reformers. Professor Overton argues that race ought to be considered as "one analytical tool to be considered in conjunction with other factors" when analyzing election law policies. Indeed, Professor Overton points out that "[a] consideration of race allows scholars and legal decision makers to avoid the pitfalls of the 'color-blind card,' an ideological extreme that mechanically trumps historical considerations, silences discussion, removes relevant issues from the table, and ignores important problems." His recognition of the affects of colorblindness ideology aptly illustrates what has happened in Shelby County.

The second principle at play in these decisions is post-racialism. This ideology shapes how people view the world in terms of race. The idea of a "post-racial" society relies on the premise that American society has concluded its struggle with race. As a result, this country has no further need to discuss issues of race when it comes to the structuring of our laws. It is the ideology that claims that America has moved beyond race and that there is thus no need to discuss race as a salient issue.

Scholars have explained that post-racialism works as an ideology—it offers a point of view about the world and, thus, allows the adherent to consider and reflect on various issues through this particular lens. In particular, Professor Sumi Cho points out that the power of post-racialism is that of making conversations about race irrelevant to the adherent of the

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53 Id. at 473.


56 Cho, Post-Racialism, 94 IOWA L. REV. at 1589, 1594–95.

57 Id. at 1594.
ideology. Conversations about race become irrelevant, and those who wish to discuss race are seen as divisive and destructive.

From the point of view of a post-racial ideology, Section 5 preclearance represents a bludgeon that crushes the ability of the covered jurisdictions to legislate freely concerning the electoral process because it excessively inserts considerations of race within a context that achieved triumph over racism. It contradicts the notion that by force of societal change through ignoring race, race will become less of a factor precisely because it is a race-conscious mechanism that requires the government to mediate the ongoing tension between majoritarian racial dominance and the rights of the minority. Moreover, the philosophy claims we live in a post-racial world, and a Congress that fails to recognize this has overstepped its constitutional role. In essence, the premise behind Shelby County is that we now no longer live in a racialized world, or at least in a significantly less racialized world, and thus Congress exceeded its power in legislating on the basis of race when the terms of the debate of race have changed. The confluence of post-racial aspirations and colorblindness philosophy licensed the Court to constrain the race-conscious remedy that is the Voting Rights Act.

This post-racial view forms a lens larger than just voting rights by itself, and is directed at the larger civil rights project. This idea is made clear when one looks not just at Shelby County, but also at the larger arguments made in the cases concerning race conscious governmental policies. Certain commentators opposing Section 5 and the Justices most vocal about its abolition share this post-racial view. When we expand our lens beyond voting to other race-related issues of the term, the scope of this post-racialist view becomes clearer.

For example, in Fisher v. University of Texas, the issue ultimately raised by the opponents of the University of Texas’ policy was the very constitutionality of race-based affirmative action. At its heart of this

58 Id. at 1594–95.
59 Id. at 1595, 1601–02.
61 See Northwest Austin v. Holder, 557 U.S. 193, 212 (2009) (Thomas, J. concurring in judgment and dissenting in part); Shelby Cnty., 133 S.Ct. at 2631–32 (referring to Justice Clarence Thomas, who has repeatedly articulated the view that the Voting Rights Act exceeds the powers of Congress to enforce the Fifteenth Amendment, and therefore should be struck down in its entirety).
argument is the propriety of maintaining a system of race conscious remedies in the face of arguments that suggest that these remedies work a morally equivalent harm upon members of the majority who view themselves as deprived by the imposition of affirmative action due to a supposed loss of an opportunity.63

The Court has resisted entertaining this claim directly, remanding the case for further proceedings to address the appropriate standard of strict scrutiny the lower court applied. The Court at the same time affirmed its holding on the constitutionality of affirmative action in Regents of the University of California v. Bakke64, and again in Grutter v. Bollinger,65 Gratz v. Bollinger,66 and Parents Involved in Community Schools v. Seattle School District No. 1.67 While affirmative action has been upheld in these cases, as a doctrinal and ideological matter, the conservative-leaning majority of the Court has expressed growing skepticism about its underlying rationale.68 These cases represent components of the Court's view that race as grounds for governmental action is disfavored as a practical and a moral consideration; this analysis tracks the colorblindness and post-racialism narratives.69

63 This equivalent harm rationale illustrates the harm done by the colorblindness rationale. It allows for an equating of harms done to white people to those done by black people without reference to the history of political, economic, and social domination imposed by the system of white privilege. Further, it narrows the consideration of harm to solely intentional racial actions. This reflects the ahistorical, moralistic, denial-driven nature of colorblind ideology. As Professor Ruthann Robson put it:

The Supreme Court has created a culture that ignores racism unless it is the product of a particular individual with a bad motive. It then equated erosions of white privilege with racial injustice. Its rhetoric proclaimed that affirmative action is un-American and relegated racism to "an unfortunate past."


68 Indeed, the Court has chosen to take up Fisher again and will likely rule on the underlying merits of affirmative action in the coming term. See Fisher v. University of Texas, No 14-981, 576 U.S. (June 29, 2015) (order granting certiorari).
69 Parents Involved, supra n. 72 at 748. Though this has been analyzed in a number of law review articles, and space constraints prevent a detailed analysis here, and the language of these decisions is familiar to the reader, it is worth quoting Chief Justice Roberts from Parents Involved as it encapsulates the scope of the colorblindness narrative: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Id. This pronouncement is contrasted by Justice Sonia Sotomayor's statements in her dissent in Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1676 (2014) (Sotomayer, dissenting): "As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race does matter."
The essence of this analysis is that the Court has approached these issues with an underlying post-racial narrative: regulating the democratic process to protect minorities is no longer necessary because, as the Court said in *Northwest Austin v. Holder*, the case that directly foreshadowed *Shelby County*, "[t]hings have changed in the South."\(^70\) Moreover, as the narrative goes, race-conscious considerations in admissions are not only unnecessary, but also repugnant to the moral philosophy of the Constitution (that itself apparently espouses colorblind equality). Read together, the message is that we are past race.

**D. Twenty-First Century Vote Suppression and the Salience of Class**

The evidence suggests, however, that our struggles concerning race and voting are far from over. As noted above, in reauthorizing Section 5, Congress pointed to substantial evidence of continuing racial disparities in voting.\(^71\) Moreover, in the 2012 elections, and prior to *Shelby County*, Section 5 was the primary means by which the courts utilized to remedy the racially disparate effects of election policies that would impact minority voters.\(^72\)

What is important to note about these forms of voter suppression is that they revolve largely around the problems of political control of the mechanisms of voting and the impact of voting within political districts. This present litigation issue ultimately revolves around the question of whether demonstrated disparate impact upon a minority group without direct evidence of disparate treatment ought to be sufficient to win Section 2 claims.

What lies under the surface of these claims is the idea that these types of mechanisms not only have an impact on the basis of race, but they affect the minority group due to their socioeconomic status. To take a clear look at vote suppression laws, one realizes that they are not just about race. Forms of voter suppression laws like voter identification laws, the narrowing of

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70 *Northwest Austin*, 557 U.S. at 202.
71 *Shelby Cnty.*, 133 S.Ct. at 2641-2.
72 Crawford v. Marion Cnty. Election Bd., 128 S. Ct. 1610 (2008); *Shelby Cnty.*, 133 S.Ct. at 2612. Salient to this discussion is the fact that in 2012, in both Texas and South Carolina, voters brought claims under section 5 of the VRA that the voter identification laws created in those states imposed discriminatory effects on poor minority voters. In both of these situations, federal district courts enforcing section 5 used the VRA to block implementation of these voter identification laws due to their potential disparate racial impact on minorities. *See* Texas v. Holder, 888 F.Supp.2d 113 (D.D.C. 2012) (declaring that the Texas voter id law violated Section 5), *vacated and remanded*, 133 S.Ct. 2886 (2013); South Carolina v. United States, 898 F.Supp.2d 30 (D.D.C. 2012) (postponing implementation of the South Carolina voter id law for the 2012 election). Of course, after *Shelby County*, these injunctions lack force and these states are free to pursue implementation of the law.
early voting windows, felon disenfranchisement, and other ways minorities are excluded from the political process focus expressly on the treatment of poor people of color within the political process.

For example, voter identification laws, in their strictest form, require government-issued photographic identification at both the point of registration and the point of exercising the franchise.\textsuperscript{73} While facially neutral, and thus constitutionally valid under \textit{Crawford}, these laws essentially raise the cost of access to the vote for the minority of people who would otherwise not have to face the burden of obtaining such identification in order to register and vote. I have previously argued that this amounts to an \textit{indirect} cost of voting on the voter through the imposition of logistical and documentary efforts that must be achieved to obtain the proper support for the identification.\textsuperscript{74} Political science research suggests that these indirect costs form a strong disincentive to political participation for those who are socioeconomically disadvantaged.\textsuperscript{75} According to the Brennan Center for Justice, these stringent voter identification requirements will disenfranchise thousands, including low-income citizens, minorities, and the elderly. Indeed, over 21 million citizens do not possess appropriate government-issued photo ID.\textsuperscript{76}

Moreover, to take another example, felon disenfranchisement laws expressly exclude voters who would otherwise be eligible to vote on the basis of a prior conviction. A general consensus has existed since early in

\begin{thebibliography}{9}
\item \bibitem{Ellis} See Ellis, \textit{The Cost of the Vote}, supra n. 24 at 1034-36 (2009). There, I explain that indirect costs are the costs a voter has to expend to become eligible to vote. However, these costs are not paid directly to the government or otherwise related to the actual casting of a ballot. Those costs include the cost related to a person identifying him or herself, whether through obtaining a government-issued photographic identification card such as a driver’s license, passport, employment card, or some other related type of card; proving one’s citizenship; proving one’s current address; proving one’s location of birth; or other requirements that relate to this proof. These costs are imposed not by the state directly, but by the structure created around voting. \textit{Id.} Indeed, a 2012 study by the Brennan Center for Justice at New York University further documented the cost imposed by voter identification laws. See Keesha Gaskins and Sundeep Iyer, “The Challenge of Obtaining Voter Identification,” \textit{Brennan Center for Justice}, http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf (last visited June 30, 2015). It documented the cumulative burdens suffered by poor voters in regards to finding transportation to ID-issuing offices, the lack of availability of such offices during working hours, and how those particular challenges significantly impact the rural poor and people of color. \textit{Id.} In Gaskins and Iyer’s words, “More than 1 million eligible voters in these states fall below the federal poverty line and live more than 10 miles from their nearest ID-issuing office open more than two days a week. These voters may be particularly affected by the significant costs of the documentation required to obtain a photo ID.” \textit{Id.} at 1.
\item \bibitem{Ellis75} Ellis, \textit{Cost of the Vote}, supra n. 24. at 1032-34.
\item \bibitem{Gaskins} See Gaskins & Iyer, \textit{The Challenge of Obtaining Voter Identification}, supra n. 78 (detailing the economic and racial difficulties in obtaining voter identification).
\end{thebibliography}
the eighteenth century about the propriety of felon disenfranchisement laws, including the Court’s upholding the laws in Richardson v. Ramirez.\textsuperscript{77} Yet, their greater effect as been to disenfranchise African-Americans through targeting felonies at crimes that some largely poor African-Americans committed, and then using felon disenfranchisement as a post-conviction, post-incarceration punishment to exclude them from the franchise. This specific intent was illustrated in Hunter v. Underwood,\textsuperscript{78} where the Court struck down the felon disenfranchisement provision of the Alabama constitution on the grounds of its specific intent to target minorities. Yet, beyond this express targeting of minorities, felon disenfranchisement laws are constitutional under the Fourteenth Amendment equal protection clause and the Voting Rights Act, despite their impact on an estimated 5.8 million people, and specifically 1 out of every 13 African-Americans.\textsuperscript{79}

These examples demonstrate the kinds of impact that lie at the intersection of race and class. These kinds of impact ultimately might be ignored when one attaches to a view that racial impact is irrelevant because express disparate treatment has been virtually eliminated. This is the ultimate blindness created by the ideological trap of post-racial thinking.

Rather than fall prey to the ideological trap that is post-racial thinking, which allows us to give a blind eye to these issues of structural disenfranchisement, what is necessary is to tailor race conscious remedies to respond to the complexities of race and class within the voting context. The ideological trap of post racialism has the potential to force the political system (and those of us who theorize about the constitutional regulation of the political process) to ignore the probability that racial balkanization may increase rather than decrease in the decades ahead (in contrast to the narrative of Shelby County). It represents a gap in the way the Court theorizes about election law (and about civil rights generally), and in the next part of this paper, I will suggest how the present and future of American democracy require us to pay attention to not just race or class, but to race, class, and the particular impact that occurs at the intersection of race and class.

\textsuperscript{77} Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that states’ disenfranchisement of convicted felons is consistent with the Fourteenth Amendment).
\textsuperscript{78} Hunter v. Underwood, 471 U.S. 222 (1985). This echoes the narrow interpretation of the Fifteenth Amendment discussed infra.
III. POLITICAL VULNERABILITY AND THE RACE-CLASS NEXUS

The Court has often avoided this problem of the particular intersectional harms suffered by those impacted by both race and class. On the one hand, it is clear that the command against racial discrimination is well embedded within the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment’s racial anti-discrimination command regarding the right to vote. As we have seen, these remedies in the election law context have been narrowed significantly. Yet it is well settled that discrimination on the basis of race is unconstitutional and illegal as it pertains to participation in the political process, and the ideological narrative to date is to limit those remedies to the narrowest conception of such racial discrimination claims.

This misses the question of vulnerability created by the compounding of racial discrimination and socioeconomic oppression. It is the contention of this paper that to go beyond the blind spot created be a narrow focus on race, these problems should be analyzed within the context of the concept of political vulnerability and specifically that vulnerability that exists at the intersection of race and class. This section will begin by offering a framework for political vulnerability within the context of understanding this intersection. It will then further inform this view through the added intellectual framework of structural racism.

A. Class and Conceptions of Political Vulnerability

As we have just seen with voter identification laws, states may regulate their elections through requiring identification that may impose a barrier on a significant number of potential voters. The Court’s analysis of this issue deferred to the states purported interest, and it ignored the claim that these laws can create burdens on those who are least suited to bear them.

This bias on the basis of socioeconomic status failed to sway a majority of the Court in Crawford, and it is illustrative of how discrimination based on socioeconomic status can escape analysis.\footnote{Indeed, in previous work, I have argued that the long trajectory of the civil rights project has been one where oppression through means of socioeconomic status has served as a proxy for racial discrimination and that remedies. See generally, Ellis, Reviving the Dream, supra n. 11 (analyzing civil rights history to illustrate how the civil rights project was attuned to remediying race-based exclusion and providing economic opportunity).} Indeed, as I will discuss momentarily, the Supreme Court has eschewed finding constitutional protections on the basis of low economic status. This fact points to two important concerns. First, that there are those who are especially...
vulnerable within the political process, and second, that such vulnerability creates a concern within the context of the political process when it comes to not only race, but also issues of poverty.

As a general matter, this concept of vulnerability is a defining fundamental of antidiscrimination law. In the revolutionary footnote 4 of *United States v. Caroline Products*, the Court there identified a history of vulnerability as a defining trait. The recognition in this footnote that deference to laws that discriminated against “discrete and insular minorities” in the political process led to a constitutional revolution. This recognition is the beginning of our doctrines of strict scrutiny and undergirds this area of law as well as the broader civil rights project.

However, where such Court doctrine has led to the protection of minority rights of various sorts under the Fourteenth Amendment, the protection of the poor has been virtually nonexistent. In their essay, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, Mario Barnes and Erwin Chemerensky recognize that the Court “has not been predisposed to consider class as a suspect category that can or should be specially protected.” They go on to demonstrate that the Court has expressed reluctance to find that the status of poverty should receive deference in cases such as *San Antonio Independent School District v. Rodriguez*, and in other cases where socioeconomic status was relevant to constitutional analysis, Barnes and Chemerensky note that such analysis was not central to the Court’s concern.

It is safe to say that the status of poverty is given little deference in constitutional law.

Yet, critiques of the Court’s jurisprudence concerning poverty have led some scholars to seeing a concept of vulnerability that ought to be embraced in the law. Professor Julie Nice, in criticizing the Court in *Dandridge v. Williams*, pointed to several factors that, for her, showed vulnerability: (1) historical discrimination; (2) ongoing societal disapproval; (3) political powerlessness; (4) negative societal misperception of the group; and (5) the extreme difficulty or impossibility of changing the traits that define the group. These facts seem to align with the concern expressed in *Carolene Products* and would speak to the concern this paper notes in regards to political vulnerability in particular.

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81 304 U.S. 144 (1938).
83 Id. at 113-17.
Indeed, this type of vulnerability—that I will rephrase as susceptibility to majoritarian domination due to one’s status as a historically and currently marginalized group—is particularly acute when it correlates with subordinated racial status. Trina Jones has explained in the employment law context how the intersection of race and class creates a “state of frightening vulnerability” for minorities in the United States. She has shown that the staggering state of income inequality has grown significantly so that more and more people, and particularly people of color, exist in a state of true economic risk. Bertrall Ross and Terry Smith focus on how the poor are generally not responded to by political parties, thus compounding their status.

Scholar John a. powell goes further in naming the extremely poor as vulnerable. Professor powell points to research showing that people’s perceptions of others as worthy of human concern is affected by social categories. Among these categories are the extreme poor, which Powell recognizes as “the vulnerable in our society” who have been pushed out of “the circle of human concern.” As such, he argues, they deserve recognition as discrete and insular minorities. It follows that such exclusion and lowered status impacts the ability of the extreme poor, and particularly the poor of color, to participate fully in the political system. This is true in both a political theory sense as well as a practical sense.

Political theorist Robert Dahl in his work, On Political Equality, has demonstrated how large-scale representative democracy can—and does—marginalize the extreme poor while at the same time putting at risk the larger project of political equality generally. Dahl premised his work on the idea that political equality, that is, equality among all citizens of a community within the civic and political spheres of life, is a worthwhile goal. Dahl then recognized that majority rule is validated as a means of achieving that equality and that a democratic system accompanied by certain fundamental rights is necessary for achieving that system.
these assumptions, Dahl theorized that the fundamental rights necessary to
democracy itself cannot legitimately be infringed by majorities whose
actions are justified only by the principle of political equality.94 Put
another way, at the heart of a system whose goal is achieving political
equality for all its citizens, majorities should not deny the fundamental
rights that minorities possess because those denials would harm the
democratic system itself.

Dahl further recognizes that even if the vast majority believes that all
citizens should be entitled fundamental rights, this majority may
nonetheless fail to act to preserve those rights from infringement by
political leaders who possess greater resources for gaining their own
political ends.95 In this sense, there is little incentive for the majority to
protect politically vulnerable minorities due to the fact that those in the
establishment may not have an interest in protecting the minority’s rights
since it would not serve their own interests.

Dahl further recognizes that the political vulnerability generated by the
unequal distribution of wealth runs counter to the goal of political equality.
Specifically, he asserts that the unequal distribution of “political resources,
knowledge, skills, and incentives” runs “directly counter to political
equality.”96 These unequally distributed political resources include money
and social standing.97 Dahl also discusses how the presence of a market
economy as a barrier to political equality makes political vulnerability
inherent: “A market economy inevitably and frequently inflicts serious
harm on some citizens. By producing great inequalities in resources among
citizens, market capitalism inevitably also fosters political inequality
among citizens of a democratic county. Yet a modern democracy has no
feasible alternative to an economy of market capitalism.”98

Dahl later draws an explicit connection between unequal resources and
increasing political inequality. He states that as income disparity has
increased, social mobility and educational equality have declined.99 These
facts have led to the “ominous possibility” that “cumulative advantages in
power, influence, and authority of the more privileged strata may become
so great” that less privileged citizens may be “simply unable . . . to make
the effort it would require to overcome the forces of inequality arrayed

94 Id. at 16.
95 Id. at 17-18.
96 Id. at 51.
97 Id.
98 Id. at 67.
99 Id. at 84.
against them."100

B. Race, and the Lock-Out Phenomenon

This domination not only reaches those in extreme poverty; it affects those who suffer racial domination. Indeed, the dual effects of economic impoverishment and racial domination compound the subordination effect. As we have seen, one of the dominant forces arrayed against African-Americans is the structural force of racial oppression in the political process. In each period of American history where minorities were given more political rights, and thus more minorities ended up participating in the political process, that increase in participation was sustained for a time, but then as those who sought to maintain the power of the majority felt threatened, they transformed the law (or its enforcement) to maintain their control and suppress the minority.101 It is the pattern that history showed us in the era after the First Reconstruction, and it is arguably the period we are in now at the end of the Second Reconstruction.102

And yet, unlike the period between Reconstruction and Jim Crow, where white Americans suppressed the vote of African-Americans through explicit and implicit barriers to voting, the political strength of minority populations in the United States will increase as America diversifies. Additionally, if history is any indicator, the diversification of America and the creation of a majority-minority country will increase, rather than decrease, racial balkanization and political conflict.103

This state of affairs will create perverse incentives by current majorities to deny and dilute the power of minorities via political competition and

100 Id. at 85.

101 See generally Reva B. Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 STAN. L. REV. 1111 (1997) (explaining that the legal system evolves to continue to enforce social stratification while the legal system is premised on a static notion of discrimination).


103 Recent demographic projections demonstrate that the number of minorities relative to the current majority is increasing. U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now (Dec. 12, 2012), http://www.census.gov/newsroom/releases/archives/population/cb12-243.html. According to U.S. Census Data, by 2043 the majority of the population in the United States will be people of color. Id. Indeed, in Texas and other states in the southwest, minority majorities are forming and obtaining political power due to their numerical majority, which will increase as populations increase and minority group power will necessarily compete with the traditional majority that currently enjoys power; William H. Frey, Shift to a Majority-Minority Population in the U.S. Happening Faster than Expected, BROOKINGS.EDU (Jun. 19, 2013 2:30 PM), http://www.brookings.edu/blogs/up-front/posts/2013/06/19-us-majority-minority-population-census-frey.
structural change. According to Brookings Institution analysis, three states are already majority-minority: California, Texas, and New Mexico.104 Indeed, we have seen what are arguably the first aspects of this kind of minority power discrimination in the recent, ongoing Texas voting rights litigation.

At the heart of this problem is the use of facially neutral voting structure changes, e.g., redistricting and voter identification laws, as a means to control the market for political competition through what may be considered actions akin to cartel behavior.105 Moreover, arguments that voter integrity concerns may be mere pretext for the desire to control the political marketplace, and thus impact the rights of either collective minorities or individuals exercising their right to vote.106

This is compounded by the fact that many of the immigrant minority communities of color in the United States, as well as the long-existing historical communities of color in urban inner cities suffer a wide range of political and economic disadvantages. Scholars like William Julius Wilson have demonstrated that effectively these groups ought to be correctly considered the underclass of the United States.107 Moreover, scholarship has developed to demonstrate that these groups suffer substantial disadvantages due to residential segregation, educational opportunities, and the ability to participate meaningfully in economic opportunities in American society. Indeed, this is, as Daria Roithmayr has argued, due to the structural racism that has continued and evolved over time in the United States.108 These structural problems impact the ability of poor persons of color to fully and meaningfully participate in the political process. These structural problems also create openings for the perverse incentives of majority policymakers who may become minorities in the foreseeable future to exercise their power in such a way as to limit and marginalize

104 See Frey, supra note 103.
105 This argument, based on an analogy of looking at racist institutional behavior as driven by cartel-like behavior. See Roithmayr, supra note 10 at 49-54. There, she explores the Texas white primary cases of the early twentieth century and posits that this is an example of cartel behavior that both explicitly discriminated, yet at the same time laid the groundwork for longer-term structural discrimination. Id. It is this kind of structural, enduring discrimination that lies at the heart of the intersection of race and class that this paper is attempting to explain. Id. Indeed, it is another way to conceptualize the discussion in Part II and III.
106 In addition to conflict between whites and minority groups generally, there may also be conflict between particular groups of people of color. Depending on the factual context, those conflicts may represent either disputes between entrenched minorities who possess power, and minority groups who do not feel the political establishment adequately represents them.
108 See generally Roithmayr, supra note 10, at 27-36.
these persons of color.

The VRA, as it currently stands post-Shelby County, is of limited use to address these claims. Moreover, the VRA as it is currently structured does not even anticipate these future-looking problems. This paper, in the space it has remaining, will speculate as to how to structure future legislation to address these problems.

IV. REFOCUSING ON VULNERABILITY FROM THE RACE-PLUS-CLASS VANTAGE POINT

Implicit throughout this paper is the idea that the retreat from race conscious voting rights remedies may result in a resurgence of race-neutral voting rights laws that actually end up discriminating. These laws may, under the guise of neutrality, replicate the kinds of racial balkanization that the VRA was meant to remedy. The curtailing of the federal constitutional and statutory role in regulating voting, coupled with the perverse incentives that come from fears of loss of power, may force an evolution in voting rights that, to poor minorities, may create a new form of subjugation due to a targeting based upon their race or ethnicity and the lack of economic power to protect themselves from the domination. This may represent the ultimate end of the Second Reconstruction and the beginning of a new racial balkanization.

Although this is just an idea—which may prove to be wrong, despite history suggesting otherwise—it nonetheless suggests that there remains a role to play for Congress and the courts in maintaining and creating checks on racial majorities to use their dominance to manipulate election rules to diminish the political power of minority racial groups. Countering these perverse incentives and managing conflict between majorities and minorities and, eventually, racial pluralities, will be the necessary work of a race conscious voting rights jurisprudence both today in the decades to come.

Moreover, such race-conscious remedies should focus on the specific intersections where voters tend to be affected because of their race within the political process. As discussed earlier, voter identification laws and the curtailing of expanded voting disproportionately affect those voters who may find it difficult to absorb the indirect economic costs of voting; arguably, these costs are increased by narrowing opportunities to vote through more stringent identification requirements and narrow voting windows. Similarly, the barriers of felon disenfranchisement affect poor African Americans and Hispanics for similar reasons.
This would suggest that electoral vulnerabilities that affect class and race ought to be subjected to more significant judicial scrutiny. A jurisprudence that focuses solely on race is susceptible to being ignored and ultimately marginalized (though as this paper makes clear, this would be wholly misguided in and of itself). The current majority analysis of the Court and the debates concerning the most appropriate structure for courts to manage the democratic process do not expressly take the intersection of class and race into account. The central view of this paper is that this should be corrected.

As a doctrinal matter, rooted in the first principle contained in footnote 4 of Carolene Products, our constitutional and policy structures should focus on the susceptibility of discrete and insular groups to majoritarian domination due to one’s status as a historically and currently subordinated community. I agree with John Powell that this is the proper view concerning these issues.109

On another level, this is an intellectual shift since there is, in my opinion, great hesitancy to see the status of poverty as meriting substantial protection, and as I have expressed above, a number of ideological blinders interfere with considering the structural problems imposed by race. Yet to focus on this intersection is to recognize the underlying theme that dominates the history and contemporary reality of vote suppression.

The dynamic of exclusion has shifted from express exclusion of certain groups of people due to express white supremacy to relying on the remnants of cartel structures that still have the policies and core premises of exclusion and preference for those of property and of highest status. From the beginning of the republic, and through the evolving forms of poll taxes, felon disenfranchisement laws, literacy tests, and now voter identification laws, the vulnerability of the poorest minority has been the mechanism by which discrimination has been sanctioned. Attention to race is correct, as Professor Overton explained, but the practice of majoritarian domination of eligible voters has consistently focused on the intersection of race and class. What was Jim Crow in the nineteenth and twentieth centuries is Ferguson, MO, in the twenty-first century.

One way to address this immediately is through the process to amend the Voting Rights Act in the aftermath of Shelby County. The amendments

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109 Powell in his essay explicitly equates the “discrete and insular minority” of central concern in Carlene Products with the poor and extreme poor. Powell, supra n. 88 at 1076. This basic recognition may be the doctrinal groundwork for a law of democracy jurisprudence concerning the law of politics that provides protection for the poor, as is suggested by Harper. I hope to further this work in subsequent articles.
should focus on structural barriers created by issues like voter identification laws, felon disenfranchisement laws, and other impediments that as a matter of practice disproportionately affect the most vulnerable at the intersection of race and class.

Indeed, these remedies may be focused on in various ways. First, in analyzing the nature of the burden when it comes to calculating the burden that may be placed upon voters with policies like voter identification laws, the economic impact of such burdens should be considered. Rather than assume that there are no transaction costs to a change, a state attempting to create such laws should be required to create an economic impact statement to calculate the various indirect cost that a regulation would require the voter to meet, and that cost should be analyzed in a manner consistent with an assessment of the burden on the voter. Thus, a projected burden of a regulation on the voter could be calculated for consideration by a court analyzing such claims.

Practices like felon disenfranchisement would require a different type of consideration. I would propose a holistic consideration that considers not only the constitutionality of such policies, but also the structural nature and lockout effect of such policies should be implemented. As Professor Rothmayr demonstrated with the white primary, felon disenfranchisement laws also represent a type of cartel-like behavior through broad consensus to effectively eliminate a group of voters from the electorate. It is the kind of structural barrier that can only be addressed through wholesale political change (given the utter abandonment of the doctrinal remedies for such laws in Section 2 of the Voting Rights Act). But that change should be grounded in political and judicial considerations of the broader structural impact of these laws and how they replicate cycles of poverty and subjugation.

This type of focus on political vulnerability due to the structural impact of voter access laws goes far to address the deep structural barriers that dissuade African-American voters on the basis of their race as well as can, to a certain extent, be seen as having an impact without regard to race. This dual awareness would have the potential of mollifying critics who might attack such change on a post-racial basis, i.e., on the claim that race conscious remedial steps are morally offensive or inherently problematic.

Ultimately, by focusing the use of race conscious remedies on the dual concern regarding race and class, the law of the democratic process can ultimately benefit racial progress while being conscious of the vulnerabilities that may most create disparate racial treatment within the democratic process. This kind of attention to the intersection of race and
class will ultimately target the structural inequities in our society and insure that each vote will be counted, without regard to the statuses that have historically locked out our citizens from the electorate.