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## Normalizing Domination

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## Normalizing Domination

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## NORMALIZING DOMINATION\*

Atiba R. Ellis†

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### I. MAKING THE ABSURD COMMONPLACE

The 2016 election season has revealed the complicity that many Americans have with racist, sexist, homophobic, and xenophobic rhetoric (and, arguably, beliefs).<sup>1</sup> The discriminatory rhetoric of now-President Donald J. Trump and some of his followers—which included claims of Mexico sending the United States felons, Islam as inherently violent, and a knowing disregard of sexually predatory behavior—helped to define his campaign.<sup>2</sup> The broad support of white men and particularly white women in key battleground states (specifically, Michigan, Wisconsin, and Pennsylvania) granted Mr. Trump an Electoral College victory, despite losing the popular vote by nearly three million ballots.<sup>3</sup>

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\* This article is one of six written for CUNY Law Review's inaugural cross-textual dialogue. The author was invited to write a short piece in response to the following quotation: "When you say racism, they say: it could have been something else. Sometimes you just know when it is racism. It is as tangible as hitting a wall, that the problem is you; that part of you that makes you the person they do not want or expect, the part of you than makes you stand out from the sea of whiteness. Sometimes you are not sure. And you begin to feel paranoid. That is what racism does: it makes you question everything, the whole world, the world to which you exist in relation. Heterosexism and sexism are like that too: are they looking at me like that because of that? Is that why they are passing us over, two women at the table? You are not sure." Sara Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [<https://perma.cc/T39A-28S3>].

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<sup>1</sup> Dana Milbank, Opinion, *Yes, Half of Trump Supporters Are Racist*, WASH. POST (Sept. 12, 2016), [https://www.washingtonpost.com/opinions/clinton-wasnt-wrong-about-the-deplorables-among-trumps-supporters/2016/09/12/93720264-7932-11e6-beac-57a4a412e93a\\_story.html](https://www.washingtonpost.com/opinions/clinton-wasnt-wrong-about-the-deplorables-among-trumps-supporters/2016/09/12/93720264-7932-11e6-beac-57a4a412e93a_story.html) [<https://perma.cc/32VK-AG8Y>].

<sup>2</sup> *Id.*

<sup>3</sup> Eric Sasson, *Blame Trump's Victory on College-Educated Whites, Not the Working Class*, NEW REPUBLIC (Nov. 15, 2016), <https://newrepublic.com/article/138754/blame-trumps-victory-college-educated-whites-not-working-class> [<https://perma.cc/T2EP->

One interpretation of Trump's victory is that his voters agreed with this discriminatory rhetoric.<sup>4</sup> The notion of "Make America Great Again" could imply an America that once again embraces the idea that white supremacy made America great.<sup>5</sup> His avowedly white supremacist voters follow this idea. While it is impossible to know whether Trump voters who are not avowed white supremacists believed this generally, or whether their racist beliefs correlated with their vote at the time they voted, polling data does show that this demographic of voters favors policies that some call racist.<sup>6</sup>

Another inference that could be drawn from Trump's rhetoric and the support it garnered is that these voters considered this racist, sexist, xenophobic, and homophobic rhetoric and decided to ignore it or deem it irrelevant to their decision.<sup>7</sup> Defenders of Trump voters have made it their business to argue that ignoring it is precisely what the voters did.<sup>8</sup> While it's impossible to know whether Trump voters condoned or ignored his rhetoric, what we can say is that the rhetoric was a significant part of the political discourse around Trump, that these voters presumably considered it, and, by their votes in support of Trump, gave him significant political support.

In either case, Trump voters undertook an act of what I will call in this essay "normalizing domination." Normalization for this purpose means making the absurd or incendiary commonplace and acceptable. Specifically, normalization de-stigmatizes the abusive and subordinationist nature of white supremacy and at the same time embraces the benefits of that same hegemony. It makes invisible the ideology of white supremacy by camouflaging it with other normative values while at the same time allowing it to flourish and reinvent itself. It asserts an epistemology of failing to know

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USQ4]; Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN POLITICS (Dec. 22, 2016, 5:34 AM), <http://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/> [https://perma.cc/QCJ7-MRBB].

<sup>4</sup> Milbank, *supra* note 1; Ronald Brownstein, *Trump's Rhetoric of White Nostalgia*, ATLANTIC (June 2, 2016), <https://www.theatlantic.com/politics/archive/2016/06/trumps-rhetoric-of-white-nostalgia/485192/> [https://perma.cc/4PFB-BW7Z].

<sup>5</sup> Charles M. Blow, Opinion, *Trump: Making America White Again*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/opinion/trump-making-america-white-again.html> [https://perma.cc/CPY6-XD42].

<sup>6</sup> Milbank, *supra* note 1.

<sup>7</sup> *See id.*

<sup>8</sup> *See* Jamelle Bouie, *There's No Such Thing as a Good Trump Voter*, SLATE (Nov. 15, 2016, 12:00 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/11/there\\_is\\_no\\_such\\_thing\\_as\\_a\\_good\\_trump\\_voter.html](http://www.slate.com/articles/news_and_politics/politics/2016/11/there_is_no_such_thing_as_a_good_trump_voter.html) [https://perma.cc/9DE4-2FKJ].

racism – a key component of what scholars know as post-racialism – as a means of achieving colorblindness. In this sense, it evokes Professor Ahmed’s insight.<sup>9</sup> And yet, as the original jurisprudential assertion of colorblindness in Justice Harlan’s jeremiad against separate but equal in *Plessy v. Ferguson* shows, that assertion is nonetheless built on the belief in the supremacy of whiteness.<sup>10</sup>

Despite this willful not-knowing, racial domination, especially in our political life, is nothing new. The late great Derrick Bell recognized how the underlying structure of American politics is defined by domination that embraces white identity politics as central, and thus, as a component of it, sought to organize the American political and legal structure to protect such domination.<sup>11</sup> This short essay will focus on this problem of the law of politics as a means to the end of racial domination. It will provide a brief overview of the history of how racial domination reinvents itself despite the coming of an insistence on equality, elaborate on Professor Ahmed’s insight<sup>12</sup> about how the shifting of blame from racism leads to paranoia by showing how it is coupled with the willful ignorance of those who benefit, and then speculate briefly about how to break this pattern.

## II. IT ISN’T RAINING

Racial domination under the guise of white supremacy has been the cornerstone fact of America.<sup>13</sup> Our central debates concerning how America ought to know itself have centered around whether and to what extent we have set aside the legacy of slavery.<sup>14</sup> I believe we have not.<sup>15</sup> While it is beyond this essay to offer a

<sup>9</sup> Sarah Ahmed, *Evidence*, FEMINISTKILLJOYS (July 12, 2016, 2:00 PM), <https://feministkilljoys.com/2016/07/12/evidence/> [https://perma.cc/T39A-28S3].

<sup>10</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. . . . But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”); cf. Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1, 28-30 (1991).

<sup>11</sup> DERRICK A. BELL, *RACE, RACISM, AND AMERICAN LAW* §§6.1- 6.17 (6th ed. 2008).

<sup>12</sup> Ahmed, *supra* note 9.

<sup>13</sup> Lindsay Pérez Huber, “*Make America Great Again!*”: *Donald Trump, Racist Nativism and the Virulent Adherence to White Supremacy Amid U.S. Demographic Change*, 10 CHARLESTON L. REV. 215, 215-18 (2016).

<sup>14</sup> See generally Darren Lenard Hutchinson, “*Continually Reminded of Their Inferior Position*”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23 (2014).

<sup>15</sup> See Atiba R. Ellis, *Tiered Personhood and the Excluded Voter*, 90 CHI.-KENT L. REV. 463 (2015) [hereinafter Ellis, *Tiered Personhood*]; Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789

full history of white supremacy in America,<sup>16</sup> any consideration of normalizing domination must start with this core truth.

This history informs how law was shaped in the United States and why the Constitution of the United States took its particular form.<sup>17</sup> The Constitution was designed to reinforce and reinvigorate the structure of slavery, allowing the expressly slaveholding states of the South to continue the political economy that slavery had created.<sup>18</sup> Only after the Civil War and the Reconstruction Amendments did we seek to transform the United States from a political economy based upon slavery to one that aspired to equality.<sup>19</sup> The political domination that came from an African American being considered only three-fifths of a person and seen as property was reversed, for a time, during Reconstruction. Even during this time, this moment of equality proved fleeting.<sup>20</sup> The Court and the cultural and political reassertion of white supremacy made this aspiration towards equality mean something wholly different than what was originally sought.<sup>21</sup>

By 1896, constitutional equality was transformed to “separate but equal.”<sup>22</sup> This transformation evoked the notion of equality, but in actuality it reinvented racial hierarchy as an organizing legal principle.<sup>23</sup> This transformed American life through implementing second-class status for African Americans and, for incarcerated Black men, effectively reinstated slavery.<sup>24</sup> Along with it came outright political domination through exclusion from the vote through poll taxes, grandfather clauses, and felon disenfranchisement.<sup>25</sup>

From this, then, we can think of the third age of the American experiment as one that paid attention to actually implementing the ideas of political equality in what is often referred to as the Civil

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[hereinafter Ellis, *Reviving the Dream*]; Atiba R. Ellis, Polley v. Ratcliff: *A New Way to Address an Original Sin?*, 115 W. VA. L. REV. 777 (2012) [hereinafter Ellis, *Polley v. Ratcliff*].

<sup>16</sup> See generally Ellis, *Reviving the Dream*, *supra* note 15, at 813-20 (offering a relevant overview discussion on this issue).

<sup>17</sup> *Id.* at 814, nn.111-12.

<sup>18</sup> See BELL, *supra* note 11, at §§ 2.4-2.7 (describing the general background of slavery in the United States and the role of slavery at the Constitutional Convention).

<sup>19</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 819-20.

<sup>20</sup> *Id.* at 825.

<sup>21</sup> *Id.* at 826 (discussing the Court’s treatment of the Equal Protection Clause regarding private conduct).

<sup>22</sup> *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

<sup>23</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 826-28.

<sup>24</sup> See generally Ellis, *Tiered Personhood*, *supra* note 15.

<sup>25</sup> *Id.*

Rights period.<sup>26</sup> Certainly, with passage of the Civil Rights Act of 1964,<sup>27</sup> the Voting Rights Act of 1965,<sup>28</sup> the Federal Fair Housing Act of 1968,<sup>29</sup> and other legal mechanisms designed to ultimately implement the original intention of Reconstruction, the Civil Rights period came the closest it had ever been to full effect.<sup>30</sup>

In this era, the Warren Court sought to realize Reconstruction's promise of equality through transforming politics and social relations.<sup>31</sup> *Reynolds v. Sims*<sup>32</sup> and *Harper v. Virginia State Board of Elections*<sup>33</sup> certainly brought to bear the idea that underlies the notion of equality in the American constitutional context. But even the civil rights-era transformations were again recalibrated in order to reassert political and racial hierarchies.<sup>34</sup> Where the Voting Rights Act of 1965 transformed black racial politics in the South over the course of the 20th century, legal change limited those transformations.<sup>35</sup>

Specifically, the Court limited the scope of the constitutional and statutory theories against racial political domination. In *Washington v. Davis*,<sup>36</sup> the Court held that intentional discrimination was the only discrimination on the basis of race that was actionable under the Fourteenth Amendment. Governmental action that had an unintentional disparate impact on the basis of race could not be the basis of a constitutional claim.<sup>37</sup> The Court then adopted this principle within Fifteenth Amendment jurisprudence in *City of Mobile v. Bolden*.<sup>38</sup> This rationale has been further extended to Voting Rights Act litigation regarding felon disenfranchisement and other forms of expressed voter suppression that provide evidence of intentional discrimination.<sup>39</sup> Thus, the lens through which the Court looks at constitutional claims of voter suppression was limited to

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<sup>26</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 831-35.

<sup>27</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>28</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

<sup>29</sup> Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

<sup>30</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 831-35.

<sup>31</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); see also Ellis, *Reviving the Dream*, *supra* note 15, at 800.

<sup>32</sup> 377 U.S. 533, 562-63 (1964).

<sup>33</sup> 383 U.S. 663, 666-68 (1966).

<sup>34</sup> Ellis, *Tiered Personhood*, *supra* note 15, at 482-85.

<sup>35</sup> *Id.*

<sup>36</sup> 426 U.S. 229, 239 (1976).

<sup>37</sup> *Id.* at 246-48.

<sup>38</sup> 446 U.S. 55, 66 (1980).

<sup>39</sup> See, e.g., *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc); *Simmons v. Galvin*, 575 F.3d 24, 41 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305, 322-23 (2d Cir. 2006) (en banc); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1233-34 (11th Cir. 2005) (en banc). Cf. Ellis, *Tiered Personhood*, *supra* note 15, at 475 ("Thus,

instances where legislatures expressly stated their intention to achieve racial domination.<sup>40</sup> This we saw in *Hunter v. Underwood*, which concerned the Alabama felon disenfranchisement statute expressly intended to suppress African-American voters.<sup>41</sup>

The lack of express racial animus becomes the ground on which the court's attempts to erase considerations of race fail.<sup>42</sup> The failure of legislatures to be explicit in their discrimination thus results in the upholding of such laws despite their ongoing tremendous racial impact.<sup>43</sup> We see from this brief sketch of history that the racial domination that underlies the American experiment is in large part a reaction to and a grappling with the idea of equality.

Certainly another important example of this recalibration of equality through the constriction of legal means to prevent racialized political domination is through the recent interpretations of the Voting Rights Act of 1965.<sup>44</sup> Of particular note is the Supreme Court's delimitation of Section 5 of the Voting Rights Act vis-à-vis Section 4(b) of the Act in order to make Section 5 ineffective for purposes of controlling the voting laws of jurisdictions with a clear history of racial domination.<sup>45</sup> This provision of the Act prevented racialized majoritarian domination by forcing covered jurisdictions to receive federal approval of their laws.<sup>46</sup> The goal of this was to prevent retrogressive effects of such laws in the sense that voting laws could be used as tools to aid and abet political majorities from dominating racial minorities through the implementation of laws geared to suppress voting.<sup>47</sup>

Even though Congress approved of continuing this check against racial domination, the Court in *Shelby County v. Holder* ren-

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where distinctions on the basis of race, gender, national origin, or age may serve to violate the Equal Protection Clause, distinctions based upon felon status do not.”).

<sup>40</sup> See N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016).

<sup>41</sup> *Id.*; see also *Hunter v. Underwood*, 471 U.S. 222, 224 (1985).

<sup>42</sup> *McCrory*, 831 F.3d at 233. See also *id.* at 215 (“Although the Fourteenth and Fifteenth Amendments to the United States Constitution prohibit racial discrimination in the regulation of elections, state legislatures have too often found facially race-neutral ways to deny African Americans access to the franchise.”).

<sup>43</sup> See generally Atiba R. Ellis, *When Political Domination Becomes Racial Discrimination: NAACP v. McCrory and the Inextricable Problem of Race in Politics*, 68 S.C. L. REV. (forthcoming 2017).

<sup>44</sup> See generally *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1283 (2015); *Veasey v. Perry*, 135 S. Ct. 9, 12 (2014) (Mem.); *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (Mem.); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>45</sup> *Shelby Cty.*, 133 S. Ct. at 2645-46 (Ginsburg, J., dissenting).

<sup>46</sup> See generally *id.*

<sup>47</sup> *Id.*



dered Section 5 ineffective by invalidating the formula in Section 4(b) that determines which states are required to undergo Section 5 preclearance.<sup>48</sup> Chief Justice Roberts argued that this reinvention was necessary in light of the burdens disproportionately imposed on the states formally covered under Section 5.<sup>49</sup> He crafted a narrative that was based on the idea that “things have changed in the South” regarding minority voting rates and the number of minority officeholders.<sup>50</sup> Justice Ruth Bader Ginsburg in dissent rejected this premise as derisive of congressional authority and disconnected from the realities of racially discriminatory voter suppression.<sup>51</sup>

Justice Ginsburg used a famous simile in making her argument—that abandoning the protections of preclearance in the face of the evidence of vote suppression amassed by Congress was like deciding that one no longer needed an umbrella during a pouring rainstorm because the umbrella itself kept its holder dry.<sup>52</sup> This irony, of course points to Professor Ahmed’s insight.<sup>53</sup> In *Shelby County*, we see a reinventing of the narrative of political domination through pointing to something else—that the racism you think is there is actually racial improvement.<sup>54</sup> It is as if the majority’s opinion in *Shelby County* seeks to convince us that despite being in a hurricane, it isn’t raining.

### III. THE ERASING OF RACE AS A MORAL COMPASS

The narrative of domination shapes our consciousness as Americans.<sup>55</sup> It is a compass by which we understand ourselves.<sup>56</sup> It affects the lens we use to understand the history I’ve just discussed. As I have discussed elsewhere regarding *Polley v. Ratcliff*,<sup>57</sup> there is a range of political investment when it comes to thinking about our

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<sup>48</sup> *Id.* at 2626-27 (majority opinion).

<sup>49</sup> *See id.* at 2623-27.

<sup>50</sup> *Id.* at 2621 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (alteration omitted)). *See also id.* at 2642 (Ginsburg, J., dissenting) (“True, conditions in the South have impressively improved since passage of the Voting Rights Act.”).

<sup>51</sup> *Shelby Cty.*, 133 S. Ct. at 2642.

<sup>52</sup> *Id.* at 2635-36.

<sup>53</sup> Ahmed, *supra* note 9.

<sup>54</sup> *See Shelby Cty.*, 133 S. Ct. at 2635-36.

<sup>55</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 814-15; *see also* G. William Domhoff, *The Class-Domination Theory of Power, WHO RULES AMERICA?* (Feb. 2012), [http://www2.ucsc.edu/whorulesamerica/power/class\\_domination.html](http://www2.ucsc.edu/whorulesamerica/power/class_domination.html) [<https://perma.cc/8GS7-5NP9>].

<sup>56</sup> Ellis, *Reviving the Dream*, *supra* note 15.

<sup>57</sup> Ellis, *Polley v. Ratcliff*, *supra* note 15.

history and our current understandings regarding race. In that essay, I describe race consciousness<sup>58</sup> and post-racialism.<sup>59</sup>

Race consciousness relies on the idea that one is actively and willingly aware of how racism is an organizing force in society.<sup>60</sup> Yet one may approach such race consciousness as oriented towards a reassertion of white supremacy (or the supremacy of some other racial group) or such race consciousness can be the grounds for rejecting racial hierarchies for purposes of achieving equality.<sup>61</sup> One may have a subordinationist race consciousness<sup>62</sup> or an egalitarian race consciousness.<sup>63</sup>

Then, there is the notion of post-racialism.<sup>64</sup> This idea espouses the view that America is no longer organized on the basis of race and that having conversations about race is unproductive and demeaning.<sup>65</sup> The notions of erasure of race are often about how racism is a fact and how that fact is veiled behind the particular ideology of race consciousness or anti-race consciousness that one holds.<sup>66</sup>

With this lens in mind, we can look back at *Shelby County*<sup>67</sup> and contemplate the ideological effect of redirecting our attention regarding this transformation in antidiscrimination law. The rationale of *Shelby County* relied upon the notion that the South not only has changed but has changed enough that the federal government's intrusion in voting administration matters became unnecessary.<sup>68</sup>

Here, two particular moves are worth noting. First, the federal government's intervention is deemed a negative intrusion. The federal government's implementation of the Fifteenth Amend-

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<sup>58</sup> See generally *id.*

<sup>59</sup> See generally *id.*

<sup>60</sup> *Id.* at 796.

<sup>61</sup> *Id.* at 795.

<sup>62</sup> Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1273-74 (2011).

<sup>63</sup> *Id.* at 1314.

<sup>64</sup> Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Deborah N. Archer, *Is Post-Racialism an Implicit Bias?*, HUFFINGTON POST (May 15, 2015, 9:44 PM), [http://www.huffingtonpost.com/deborah-n-archer/is-postracialism-an-implicit-bias\\_b\\_6874788.html](http://www.huffingtonpost.com/deborah-n-archer/is-postracialism-an-implicit-bias_b_6874788.html) [<https://perma.cc/3WXL-DTMN>].

<sup>65</sup> See Rinku Sen, *Millennials Don't Know How to Talk About Race, and That's a Problem*, PBS NEWSHOUR (Mar. 25, 2015, 2:08 PM), <http://www.pbs.org/newshour/updates/redefining-racism-systemic-unconscious-hidden/> [<https://perma.cc/4FBT-8D9S>].

<sup>66</sup> Parul Sehgal, *Fighting 'Erasure'*, N.Y. TIMES MAG. (Feb. 2, 2016), <https://www.nytimes.com/2016/02/07/magazine/the-painful-consequences-of-erasure.html> [<https://perma.cc/933U-SERU>].

<sup>67</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>68</sup> See *id.* at 2621.

ment, rather than being seen as fortifying the Constitutional right to vote, is framed as an intrusion that offends fundamental notions of federalism.<sup>69</sup> This shifts blame to the structure.

Second, the Court asserts with scant proof that the racial politics of the South have changed.<sup>70</sup> That narrative focuses on the narrowest measures for that claim: the rate that blacks held political office and the increase in rates in voter participation.<sup>71</sup> It ignores broader discussions about both explicit (felon disenfranchisement)<sup>72</sup> and implicit (heightened voter regulation) voter suppression.<sup>73</sup> This narrative implicitly asserts triumphalism. And this effectively offers us a different explanation—the element of perceived triumph over racism somehow trumps the larger lived experience of black people in the South. Accordingly, it is no longer necessary to be concerned with race.<sup>74</sup> This triumphalism, coupled with damaged federalism, represents the key elements of post-racialism. In other words, in explaining the “something else,” the Court’s opinion turned the racism-as-cause theory inside out.<sup>75</sup>

In the wake of *Shelby County*, legislatures have returned to the old ways of asserting racial majoritarian domination.<sup>76</sup> The states overburdened by preclearance sought to implement rules that targeted minority voting strength.<sup>77</sup> We saw this in North Carolina where the Fourth Circuit found the legislature to have targeted African Americans’ voting rights with “almost surgical precision.”<sup>78</sup> Similarly, in Texas, the Fifth Circuit found that Texas’s voter iden-

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<sup>69</sup> See *id.* at 2622-24.

<sup>70</sup> *Id.* at 2621; *id.* at 2642 (Ginsburg, J., dissenting).

<sup>71</sup> *Id.* at 2628 (majority opinion).

<sup>72</sup> Brent Staples, Opinion, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES (Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html> [<https://perma.cc/9RB9-RGUW>].

<sup>73</sup> Atiba R. Ellis, *A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship*, 43 SW. L. REV. 549, 549 (2014).

<sup>74</sup> *Shelby Cty.*, 133 S. Ct. at 2625-27.

<sup>75</sup> *Id.* at 2618-31.

<sup>76</sup> Ryan Eric Emenaker, Voting Rights after *Shelby County*: Starting to Evaluate a Continuing Dialogue, (Apr. 2014) (paper presented at the Western Political Science Association Annual Conference, Apr. 17-19, 2014), <https://wpsa.research.pdx.edu/papers/docs/Emenaker-Voting%20Rights%20After%20Shelby%20County-WPSA%202014.pdf> [<https://perma.cc/R2PF-6AK7>].

<sup>77</sup> Christopher Ingraham, *The ‘Smoking Gun’ Proving North Carolina Republicans Tried to Disenfranchise Black Voters*, WASH. POST: WONKBLOG (July 29, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/07/29/the-smoking-gun-proving-north-carolina-republicans-tried-to-disenfranchise-black-voters/> [<https://perma.cc/WNH2-AAYN>].

<sup>78</sup> *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016); *N.C. State Conf. of NAACP v. McCrory*, 831 F. 3d 204, 214 (4th Cir. 2016) (“Although the new provisions target African Americans with almost surgical precision, they constitute inapt

tification law had a disparate impact against African Americans and Latinos, but only a plurality of the court *en banc* found that this discrimination was intentional.<sup>79</sup> Indeed, the *Veasey v. Abbott* opinion is rife with hesitance to blame discrimination on the basis of race.<sup>80</sup>

I would argue that this consternation is revealing of the core question in this dialogue: is it race? The restrictive voter identification laws introduced post-*Shelby County* reveal the lengths to which legislatures may seek to accomplish the goal of political power through racial domination, but courts may sometimes refuse to believe what is before them by substituting other explanations for racial discrimination.<sup>81</sup> The court may question whether legislation is actually racially discriminatory despite the evidence of racial effect and strong inferences of racist motive.<sup>82</sup> There is an ongoing debate regarding whether the actions that the North Carolina and Texas legislatures took, among others, were simply political in nature.<sup>83</sup>

This argument is believable only if we countenance the notion that political motives can somehow eradicate the moral concern that comes with addressing questions of race in the political context.<sup>84</sup> Even though the inquiries as to the effects might differ, the ultimate concern here is one of placing the professed motive of the

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remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist.”).

<sup>79</sup> *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016).

<sup>80</sup> *Id.* at 281 (Jones, J., dissenting) (by allowing the discriminatory intent claim to go forward, “the majority fans the flames of perniciously irresponsible racial name-calling”); *id.* at 325 (Clement, J., dissenting) (“The plurality also overlooks the total absence of direct evidence of a discriminatory purpose and the effect of plaintiffs’ failure to unearth such evidence—despite repeated assertions that such evidence exists.”). However, upon reconsideration of the case, the district court reaffirmed its finding that the Texas legislature engaged in intentional discrimination in passing the voter identification law. *Veasey v. Abbott*, No. 2:13-CV-193, 2017 WL 1315593 (S.D. Tex. Apr. 10, 2017).

<sup>81</sup> Nina Totenberg, *Supreme Court Considers Race, Politics and Redistricting in 2 Cases*, NPR (Dec. 5, 2016, 4:37 PM), <http://www.npr.org/2016/12/05/504467218/supreme-court-considers-racial-gerrymandering-in-separate-cases> [https://perma.cc/8SBN-BZEH].

<sup>82</sup> *Id.*

<sup>83</sup> Editorial, *Ballot Integrity Is Not Racist*, NAT’L REV. (Nov. 7, 2016, 8:30 PM), <http://www.nationalreview.com/article/441906/north-carolina-voting-rules-not-racist> [https://perma.cc/B7MN-BY66].

<sup>84</sup> William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law*, WASH. POST (Sept. 2, 2016), [https://www.washingtonpost.com/politics/courts-law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc\\_story.html](https://www.washingtonpost.com/politics/courts-law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html) [https://perma.cc/D4H3-F5WT].

legislatures above the motive implied from the facts and circumstances accompanying this sort of political change.<sup>85</sup> This in and of itself illustrates arguably another form of erasure of a race consciousness-framed concern.

Arguably, if the Supreme Court chooses to strike down these recent voting rights judicial decisions, it would represent a diminution or maybe a complete denial of the salience of race consciousness within the political and legal landscapes.<sup>86</sup> Yet, it allows the ideology of white supremacy to continue without a name. In the concluding part of this essay, I will speculate briefly as to what we are to think of and how we are to deal with this.

#### IV. A NEW RACE CONSCIOUSNESS

This essay has sought to this point to demonstrate that the erasure of race consciousness-based litigation approaches is an old pattern in American politics. White supremacy continues to transform and reinvent itself so it can continue to exist in connection to political domination.<sup>87</sup> Explaining away its racial effects makes those effects, and their (quite possibly and plausibly) racial intent, invisible.

What is at stake in this is the idea that race can be used as a compass to understand the structure of political domination and thus subvert such domination to create an egalitarian society.<sup>88</sup> To me, the only way to be able to maintain this notion of race consciousness is to make a concerted moral choice that this ought to continue to be an important component of the way our democracy runs. Reconstruction ultimately stands for the notion that race neutrality that seeks to remedy the open racial subordination of slavery is an important democratic value to be implemented within our Republican form of government, as it is a path to freedom for all citizens.<sup>89</sup> But the history that has followed from then to now has been, in the words of this essay, an effort at race erasure that masks racial domination.

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<sup>85</sup> Danielle Lang & J. Gerald Hebert, *Courts Are Finally Pointing Out the Racism Behind Voter ID Laws*, WASH. POST (Aug. 3, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/08/03/courts-are-finally-pointing-out-the-racism-behind-voter-id-laws/> [https://perma.cc/5V7Z-YX57].

<sup>86</sup> Ariane de Vogue & Dan Berman, *Supreme Court Won't Reinstate North Carolina Voter ID Law*, CNN (Aug. 31, 2016, 6:11 PM), <http://www.cnn.com/2016/08/31/politics/supreme-court-north-carolina-voter-id/> [https://perma.cc/C3SV-SS2A].

<sup>87</sup> See Ellis, *Reviving the Dream*, *supra* note 15, at 836-43.

<sup>88</sup> *Id.* at 798-99.

<sup>89</sup> *Id.* at 825-26.

The question becomes, what ideological brand of race neutrality ought the American political system adopt: a race neutrality that seeks racial equity through the erasure of race consciousness or a race neutrality that consciously considers the risk of racial subordination and therefore acts to subvert that kind of racial subordination? To choose a race neutrality through erasure—to buy into the post-racialism premise—is to ignore the pervasive nature of racism.<sup>90</sup> White supremacy is endemic and continues to reinvent itself.<sup>91</sup> Mere legal change in a new era is insufficient to subvert the re-inventive nature of racism, and therefore race will continue to permeate the ongoing drive of partisans to gain political domination. This will be true even if, in the name of avoiding racial domination, the legal tools designed to subvert racial domination are further limited or declared wholly unconstitutional. Indeed, as the history recited above shows, the choice of ending the doctrinal and jurisprudential foundations of race-conscious antidiscrimination law would result in an irony of constitutional magnitude that would decimate the vision of Reconstruction.

Instead, there ought to be a reinvigoration of what race consciousness means, even if that meaning forces us to stand contrary to the majoritarian view that we live in a post-racial society.<sup>92</sup> This requires the reconsideration of history and the realization that this move to erase, to consciously not know racism, is a continuing force in society. And instead of avoiding conversations about race, even if for apparently benign or beneficial reasons, this requires us to reach an open and explicit consensus about what kind of race-conscious concerns ought to be raised in a society that continues to become more diverse rather than less. This requires, in particular, a reconsideration of the competing values of race consciousness and federalism.

Race consciousness, as subordinationist and as affirmative force, will play a formative role in American society through the twenty-first century. Race consciousness can be constructive or destructive, and it is our choice as to whether to be complicit with an erasure of race consciousness that facilitates a new racial domination, or by our consciousness to work to articulate a racial awareness that bolsters our democratic values.

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<sup>90</sup> John Blake, *The New Threat: 'Racism Without Racists'*, CNN (Nov. 27, 2014, 9:32 AM), <http://www.cnn.com/2014/11/26/us/ferguson-racism-or-racial-bias/> [<https://perma.cc/XT4Y-HRGU>].

<sup>91</sup> Ellis, *Reviving the Dream*, *supra* note 15, at 815.

<sup>92</sup> *Id.* at 838.