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The Shaw Claim: The Rise and Fall of Colorblind Jurisprudence

Molly P. Matter*

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.¹

—Amendment XV, Section 1, United States Constitution

INTRODUCTION:

Justice is not blind, nor should it aspire to be. Our training as legal professionals demands that we apply the law to the facts and produce the decision. However, facts come in the form of narrative, of storytelling—framed, clothed, dressed in skin.

Jurisprudence is never objective, nor does it stand isolated from cultural and politico-economic influences of the day. In *Shaw v. Reno*, the Supreme Court used colorblind theory to allow white voters Article III standing to allege a voting rights claim under the Fourteenth Amendment’s Equal

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¹ U.S. CONST. amend. XV, § 1. This article is in tribute to Joaquin G. Avila, who envisioned and laid out an extensive roadmap—for Congress, the judiciary, local jurisdictions, voting rights advocates and the general body politic—for the next Reconstruction. Our path forward begins with the Guarantee Clause, and its express guarantee of a Republic, as well as with the Klu Klux Klan Act of 1871 and Civil Rights Act of 1875. Joaquin Avila’s prophetic knowledge guides three generations of voting rights lawyers, and I was honored to become one of them. He believed in liberty as the ability of anyone and everyone to reach their fullest human potential within a politically integrated society. I also want to acknowledge Joanna Cuevas Ingram for her valuable critique in drafting and guidance in research.

Protection Clause.² The basic facts that prompted *Shaw v. Reno* are simple: after the 1990 census, North Carolina had redistricted and created majority-minority districts in an effort to comply with the federal Voting Rights Act (VRA).³ White voters, backed by strong partisan support, challenged the very districts that were created to give black voters an equal opportunity to elect their preferred candidate.

² See *Shaw v. Reno* (Shaw I), 509 U.S. 630, 657 (1993) (“Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.”).

³ North Carolina was responding to the 1982 amendments to the federal Voting Rights Act (VRA) that changed the standard of proof for a voting rights violation. Congress passed the 1982 amendments in response to *Mobile v. Bolden*, 446 U.S. 55 (1980), a decision that required proof of discriminatory intent. After the 1982 VRA amendments, voters could prove a violation of their right to vote based on impact rather than intent alone. See 1982-Pub. L. 97–205. Section 2 is permanent and has no expiration date:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Voting Rights Act of 1965, Pub. L. 89-110, § 5, 79 Stat. 439 (1965). Post *Shelby County v. Holder*, 570 U.S. 529 (2013), the Voting Rights Act of 1965 was codified at 52 U.S.C. § 10301.

Shaw v. Reno was born in North Carolina at the time when white voters held voting majorities in 83% of congressional districts, when ten out of twelve districts were majority-white districts.⁴ Since 1898, during Reconstruction, North Carolina had failed to elect a single African American representative to Congress, although 22% percent of its population was of African descent.⁵

After the 1990 Census, North Carolina gained a seat in Congress, and in response, the state packed a district with majority African American constituents in hopes of complying with the VRA. Since North Carolina was covered under federal preclearance⁶ due to its history of racial violence and voting rights discrimination, the Department of Justice (DOJ) reviewed the redistricting map. The DOJ rejected the map, finding that two districts, not just one, could be majority-minority districts to ensure African Americans would have an equal opportunity to participate in the political process and to elect a representative of their choice.⁷ North Carolina then created two

⁴ See Frank R. Parker, *Shaw v. Reno: A Constitutional Setback for Minority Representation*, 28 PS: POL. SCI. & POL. 47 (1995).

⁵ Parker, *supra* note 4, at 47.

⁶ Between 1965-2013, states and jurisdictions found to have a history of racially discriminatory voting practices and laws were under federal preclearance/coverage: before such covered jurisdictions could renew existing law or implement any change related to voting, they had the burden to prove 1) that the change would not disparately impact members of a protected class and 2) that the change was not enacted with discriminatory intent or purpose. This coverage triggering formula was struck down in *Shelby County v. Holder*, 570 U.S. 529 (2013). Currently, H.R. 4, 116th Cong. (2019), proposes a new triggering coverage formula and is before the House of Representatives with 225 cosponsors, *available at* <https://www.congress.gov/bill/116th-congress/house-bill/4/text> [<https://perma.cc/7XSX-VFS6>].

⁷ The terms “minorities” and “communities of color” as well as “race” and “color” are used interchangeably although this article focuses predominantly on impacted African American and Latinx voters. The terms “black” and “African American” are also used interchangeably to describe people of African descent. The terms “Minority,” “Race,” and “Color” are common usage in federal case law. For a definition of race, see DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011). Roberts explains the social construct of race is a European invention to create and enforce a social hierarchy that has no biological basis; see also Mark Leviton, *Not So Black and White: Dorothy Roberts on the Myth of*

majority-minority districts, First and Twelfth Districts, to comply with the VRA. The DOJ accepted that district map.⁸

The General Assembly shaped the Twelfth District like a massive winding snake basking 160 miles along the state highway, intersecting ten counties in an industrialized corridor connecting North Carolina's largest cities of Durham, Greensboro, Winston-Salem, and Charlotte. The record of the General Assembly map drawers suggested it was designed to protect Democratic incumbents.⁹ The district was 53% African American. With two majority-minority districts, black legislators Eva M. Clayton and Melvin L. Watt were elected to Congress. White voters reacted to the election of the first black representatives in nearly a century by filing a federal lawsuit attacking the Twelfth District that elected Representative Melvin Watt.

Why return to *Shaw v. Reno* in 2020? For the past three decades, the principles of *Shaw v. Reno* have supported a movement to dismantle our most revered human rights legislation, the federal Voting Rights Act and the Fourteenth and Fifteenth Amendments. This movement was foreseen by a watershed of scholarship proceeding *Shaw v. Reno* on its absence of a coherent legal theory of injury to justify standing, its unprecedented factual vacuum, and its perverse distortion of the Equal Protection Clause.¹⁰

Race, THE SUN MAGAZINE (Apr. 2019), <https://www.thesunmagazine.org/issues/520/not-so-black-and-white> [<https://perma.cc/9D5L-CTBT>].

⁸ Parker, *supra* note 4, at 49.

⁹ Richard H. Pildes & Richard G. Neimi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483, 491–92 (1993) (hereafter *Expressive Harms*).

¹⁰ See, e.g., J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation* (California Institute of Technology, Social Science Working Paper No. 915, 1995) [hereafter Kousser, *Real World*]; Conference, *The Supreme Court, Racial Politics and The Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 44 AMER. U. L. REV. 1 (1994); Frank R. Parker, *Shaw v. Reno: A Constitutional Setback for Minority Representation*, 28 PS: POL. SCI. & POL. 47 (1995); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276–2292 (1998); Brenda Wright & Bruce Fein, *Voting Rights: Is race-conscious districting to achieve minority representation constitutional?*, 79 ABA J., 44–45 (1993); Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45

With the rise of presidential lawlessness;¹¹ a surge of voter suppression laws;¹² a sharp increase in hate crimes against communities of color,

(1995); Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205 (1995); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245 (1993); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731 (1998); Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287 (1996); T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1993); Shavar Jeffries, *Colorblind Faith: Process Theory, Ely and Standing for White Voters in Shaw v. Reno*, 16 NAT'L BLACK L. J. 169 (1998); KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (University of North Carolina Press, 1999) at 385.

¹¹ Robert S. Muller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, U.S. Dep't of Justice, Mar. 2019, available at <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/RS93-W55Z>]; see also Andrew Kent, Ethan J. Leib, and Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. (2019); Chairman Jerrold Nadler, *Nadler Floor Statement in Support of Resolution Authorizing Next Steps in House Impeachment Inquiry*, Press Release, U.S. H. Comm. on the Judiciary, 116th Cong. (Oct. 31, 2019).

¹² Data from the federal Elections Assistance Commission reveal that 17 million voters have been purged between 2016-2018, all from jurisdictions that have a history of voter discrimination. Kevin Morris, *Voter Purge Rates Remain High: Analysis Finds*, Opinion and Analysis, BRENNAN CTR. FOR JUSTICE, available at <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds> [<https://perma.cc/LND5-TJXP>]; see also Evidence of Current and Ongoing Voting Discrimination: Hearing Before the Comm. On the Judiciary, 116th Congress (September 10, 2019) (statements of Derrick Johnson, Vanita Gupta, J. Christian Adams, Dale Ho, Myrna Perez, Natalie A. Landreth), available at <https://judiciary.house.gov/legislation/hearings/evidence-current-and-ongoing-voting-discrimination> [<https://perma.cc/4WUT-LBDY>]; see NAACP v. Hargett – 3:19-cv-00365 (filed 2019), LWV AZ v. Reagan – 2:18-cv-02620 (filed 2018); MOVE v. Whitley – 5:19-cv-000743 and 3:19-cv-00041 (filed 2019); CCNY v. Brehm – 1:17-06770 (filed 2017); Curling v. Raffensperger – 1:17-cv-02989 (filed 2017); O'Neil v. Hosemann – 3:18-cv-00815 (filed 2018); Jones v. Torres (2018); LA State Conf. of the NAACP v. LA – 3:19-cv-00479 (filed 2019); Thomas v. Bryant – 3:18-cv-00441 (filed 2018); Alabama State Conference of the NAACP v. State of Alabama – 2:16-cv-00731 (filed 2016, awaiting decision); PACEI – LC v. DHS and DOJ – 1:18-cv-00167 (filed 2018); City of San Jose v Ross – 3:18-cv-02279 (filed 2018); Brooks v. Dept. of Commerce – 2:18-cv-00772 (filed 2018). Since 2010, 25 states have passed voting restrictions. Fourteen states had new voting restrictions in place for the first time in the 2016 presidential election: Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. Of those fourteen states, seven were formerly covered by Section 5 of the VRA.

immigrants, and sexual minorities;¹³ human rights abuses against refugee children;¹⁴ and the ever-present reckoning of climate change and

See Brennan Ctr. for Justice, *New Voting Restrictions in America* (Oct. 1, 2019), available at <https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf> [https://perma.cc/BR68-RPLY].

¹³ Hate Crimes and the Rise of White Nationalism: Hearing Before the Comm. on the Judiciary, 116th Cong. (2019), available at <https://judiciary.house.gov/legislation/hearings/hate-crimes-and-rise-white-nationalism> [https://perma.cc/38UA-MN9L] (statement of Witness, Kristen Clarke, President and Executive Director, Lawyers' Committee for Civil Rights Under Law, available at <https://docs.house.gov/meetings/JU/JU00/20190409/109266/HHRG-116-JU00-Wstate-ClarkeK-20190409.pdf>) [https://perma.cc/8TM8-7HKP]; see HUM. RTS. WATCH, WORLD REPORT 2019, at 619 (2019), available at https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf [https://perma.cc/2XST-RUHQ]; see Simon Romero, Caitlin Dickerson, Miriam Jordan and Patricia Mazzei, *'It Feels Like Being Hunted': Latinos Across U.S. in Fear After El Paso Massacre*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/el-paso-shooting-latino-anxiety.html> [https://perma.cc/JZ27-TU8G].

¹⁴ The Trump Administration ordered the United States to withdraw from the forty-seven member UN Human Rights Council, the first country ever to do so. See Nick Cummings-Bruce, *U.N. Rights Chief Tells U.S. to Stop Taking Migrant Children From Parents*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/world/europe/trump-migrant-children-un.html> [https://perma.cc/H2ZE-J9SR]; see Letter from the United Nations Human Rights Office of the High Commissioner, *UN experts to US: "Release migrant children from detention and stop using them to deter irregular migration,"* (Geneva, June 22, 2018) available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E> [https://perma.cc/2SFB-VA57]; see Colleen Kraft, President, American Academy of Pediatrics, *APP Statement on Executive Order on Family Separation*, June 20, 2018, available at <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAP-Statement-on-Executive-Order-on-Family-Separation.aspx> [https://perma.cc/8FMY-75FA]; see Chantal Da Silva, *Trump Administration Accused of Ignoring U.N. Requests for Access to U.S.-Mexico Border*, NEWSWEEK (Mar. 18, 2019), <https://www.newsweek.com/trump-administration-accused-denying-united-nations-migrants-human-rights-1366084> [https://perma.cc/UE9U-5AGU]; see Steven Wagner, Acting Assistant Secretary Administration for Children and Families, U.S. Dept. of Health and Human Services, Statement Before Permanent Subcomm. on Investigations Comm. on Homeland Security and Governmental Affairs, U.S. Senate (April 26, 2018); see also Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in Immigration Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> [https://perma.cc/2GEU-HAGX].

capitalism¹⁵—now, more than ever—it’s time to examine the causes and conditions that got us here. To do so, we must first acknowledge and then re-evaluate the underlying judicial principles that no longer serve us and actively work injustice—one of which is colorblind theory.

This article reconsiders colorblind theory’s efficacy and demands further reformulation and reexamination. Section I of this article addresses *Shaw v. Reno*’s historical, political, and economic context. Section II examines how the legal strategy of a deracialized narrative and colorblind theory captured the unexamined minds of the judiciary. Section III challenges the premise that using race and color to determine election methods and district lines “threatens to carry us further from the goal of a political system in which race no longer matters”¹⁶ and explores the Supreme Court’s theory of political integration. Section III presents *Shaw v. Reno*’s factual vacuum and aspirational colorblind narrative juxtaposed with the massive factual investigations required of federal voting rights claims. Section IV draws a line from *Plessy v. Ferguson*¹⁷ to *Shaw v. Reno* to present-day litigation that advances colorblind theory. Section IV also examines jurisprudence severed from the hallowed ground of data. Section V lays a foundation for color-conscious jurisprudence offered by Supreme Court dissents of Justices Brennan, White, Blackmun, Stevens, Marshall, and Souter, which envision a

¹⁵ See Noam Chomsky, *The Economics of Climate Change*, Climate Change: Catalyst or Catastrophe?, 16 RP&E JOURNAL 12, (2009)

<https://www.reimaginerpe.org/files/Chomsky.Climate.16-2-2.pdf>

[<https://perma.cc/3EVU-HVEF>]; Nathaniel Rich, *The Next Reckoning: Capitalism and Climate Change*, N.Y. TIMES MAG., The Climate Issue (Apr. 9, 2019),

[https://www.nytimes.com/interactive/2019/04/09/magazine/climate-change-](https://www.nytimes.com/interactive/2019/04/09/magazine/climate-change-capitalism.html)

[capitalism.html \[https://perma.cc/FQB3-VZ2M\]](https://perma.cc/FQB3-VZ2M); Coral Davenport, *Major Climate Report Describes a Strong Risk of Crisis as Early as 2040*, N.Y. TIMES (Oct. 7, 2018),

<https://www.nytimes.com/2018/10/07/climate/ipcc-climate-report-2040.html>

[<https://perma.cc/HYB7-USD6>]; Maggie Astor, *Environmental Justice Was a Climate Forum Theme. Here’s Why*, N.Y. TIMES (Sep. 5, 2019),

<https://www.nytimes.com/2019/09/05/us/politics/environmental-justice-climate-town-hall.html> [<https://perma.cc/9MY6-HBFA>].

¹⁶ *Shaw*, 509 U.S. at 657.

¹⁷ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

judicial evolution to reformulate the unfit principles of colorblind theory. That section demands the critical need to raise the judicial level of consciousness, and develop new jurisprudence founded in strengthening the body politic and advancing democratic principles through race-conscious remedies. Given the 2016-2020 political climate that has emboldened white nationalism, these important dissents can provide a roadmap back to the original intent, purpose, and application of the Fourteenth Amendment.

I: THE ORIGINS OF SHAW

“The price one pays for pursuing any profession or calling is an intimate knowledge of its ugly side.”

–James Baldwin

1982 Senate Hearings Changed the Standard of Proof for Vote Dilution

Shaw was decided at a time when Congress was grappling with how to deal with one of the many vestiges of slavery and white supremacy:¹⁸ vote dilution. A common tactic of political warfare for incumbents, particularly white Southerners before and after the enactment of the Voting Rights Act (VRA) in 1965 was diluting a community’s electoral power through packing (*i.e.*, concentrating minority voters into a single district) or cracking (*i.e.*, dividing minority voters into several districts).¹⁹

¹⁸ See ROBIN DIANGELO, *WHAT DOES IT MEAN TO BE WHITE: DEVELOPING WHITE RACIAL LITERACY* 146 (New York, Peter Lang Publishing, Inc. 2016). White supremacy is the term “used to capture the all-encompassing centrality and assumed superiority of people defined as white, and the practices based on this assumption,” independent of personal intentionality and will. See Demerris R. Brook-Immel & Susan B. Murray, *Color-Blind Contradictions and Black/White Binaries: White Academics Upholding Whiteness*, 39 HUMBOLDT J. SOC. RELATIONS 315, 316 (2017) (“White supremacy... exists as institutional structure-in-process, the effects of which are experienced by both victims and benefactors of that supremacy.... As an ideological and institutional structure, it is a complex web of discourses and processes that sustain racial domination.”).

¹⁹ See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF THE DEMOCRACY IN THE UNITED STATES* 233-234 (Basic Books, 2009) (“If the federal government insisted on black enfranchisement, conservative southerners would attempt to vitiate its consequences by altering the structures of representation.”). *Gomillion v.*

The use of “at large” rather than single-district election methods (e.g., in city council or school board elections) has also been an effective strategy to monopolize political power and dilute the minority vote.²⁰ Once terrorism through mob-controlled public lynching and suppression through voter registration requirements—i.e., poll taxes, literacy tests, residency requirements—were officially outlawed and the Department of Justice was authorized to enforce the VRA under Section 2 of the Fifteenth Amendment, the wealthiest could still win playing by race-neutral rules through the art of vote dilution.²¹ However, when the effects of vote dilution were expounded upon in Senate hearings during the 1982 VRA reauthorization and states had to heed the call to comply with new standards of enforcement, white voters in *Shaw* devised a narrative strategy to challenge the Court’s interpretation of the Fourteenth Amendment as it related to the fundamental right to vote.

Lightfoot, 364 U.S. 339 (1960), exemplified white supremacist tactics to dilute the vote of African American voters. In *Gomillion*, “the state legislature completely redrew the city’s [Tuskegee, Alabama] boundaries, creating a bizarre twenty-eight-sided municipality with an almost entirely white population: blacks found themselves consigned to surrounded counties, where they lacked the numbers to wield much influence.”); *Id* at 233.

²⁰ *Id*. “Whites could maintain a monopoly of political power by having all city council members elected “at-large” rather than from single-member districts.” See *Allen v. State Board of Elections*, 393 U.S. 544 (1969), which consolidated several cases that originated in Mississippi and Virginia, one of which involved a shift to at-large elections in order to dilute the black vote.

²¹ Two forms of commonly used vote dilution tactics were underpopulating state legislative districts to dilute the strength of communities of color in Congress and changing to at-large election methods. See *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Whitcomb v. Chavis*, 403 U.S. 124, 142-144 (1971); *Zimmer v. McKeithen*, 485 F.2d 1297 (1973) (involving the dilution of Latinx and black voters through the use of at-large elections in Georgia, Hawaii, Indiana, and Texas). These decisions rendered at-large elections constitutionally suspect. *Reynolds v. Sims*, 377 U.S. 533 (1964), and *White v. Register*, 412 U.S. 755 (1973), were based on population deviation within legislative districts. To emphasize the point of equally populated legislative districts, the Supreme Court stated, “people, not land or trees or pastures, vote.” *Reynolds*, 377 U.S. at 580. *White v. Register* explored a standard for population deviation: the state would have to justify reason for deviation if it was greater than 10%.

***Mobile v. Bolden* to *Thornburg v. Gingles*: From the Impossible Task of Proving Purposeful Discrimination to Legislative Transformation**

After the federal Voting Rights Act passed in 1965, the federal circuit courts and the Supreme Court began to hear cases based on overt and subtle racial discrimination.²² However, as voting rights cases increased, so did the perpetrator’s tactics on defending corporate white supremacy. In *Mobile v. Bolden*,²³ the Court created an unbearable threshold to access the Voting Rights Act: plaintiffs would need to prove deliberate racially discriminatory intent.²⁴ The inability to prove “racism” was a death knell for the Voting Rights Act, and states under federal preclearance were relieved by the decision in *Mobile*.²⁵ In response, a team of voting rights litigators and scholars fled to Washington, D.C. to educate legislators on the unbearable burden of *Mobile* and successfully amended the federal VRA.²⁶ The 1982 Amendment to the VRA established that a plaintiff could also prove a violation by discriminatory impact or effect, similar to *Griggs v. Power Co.*²⁷ The federal Voting Rights Act was successfully defended by the heroism of a small but fierce group of voting rights attorneys.²⁸ The first case to apply the new standard was *Thornburg v. Gingles*,²⁹ the pinnacle voting rights case

²² See, e.g., *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

²³ 446 U.S. 55, 74 (1980).

²⁴ *Id.*

²⁵ Federal preclearance covered the entire states of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, Virginia, two townships in Michigan, two counties within South Dakota, four counties within California, five counties within Florida, five counties within New York, and 40 counties within North Carolina. *Thornburg v. Gingles*, 478 U.S. 30 (1985).

²⁶ Author interview with Barbara Phillips, Apr. 2, 2019. See S. Rep. No. 97-417, p. 58, 63, 106-7, 193, 196, 221, 223, 226-27, 235-37, 239-40, 248, 253-55, 258, 262, 267-8, 272, 274, 279-280 (1982) [hereinafter S. Rep].

²⁷ 401 U.S. 424, 431 (1971) (holding that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”).

²⁸ See, e.g., the works of Joaquin G. Avila, Frank Parker, Barbara Phillips, Lani Guinier, Armand Derfner, Laughlin McDonald, Vilma Martinez, Antonia Hernandez and others; Phillips *supra* note 26.

²⁹ *Thornburg*, 478 U.S. at 30.

to this day that provides a pragmatic approach to applying the effects test.³⁰ In *Gingles*, “the intent test was repudiated for three principal reasons—it [was] ‘unnecessarily divisive because it involve[d] charges of racism on the part of individual officials or entire communities,’ it place[d] an ‘inordinately difficult’ burden of proof on plaintiffs, and it ‘ask[ed] the wrong question.’”³¹ On the horizon, redistricting after the 1990 Census would be the testing ground of the new threshold. For the first time, covered jurisdictions would have to answer to the 1982 Amendment that allowed plaintiffs to bring claims based on discriminatory effect or impact. Defending jurisdictions would have to apply the *Gingles* doctrine.³² The stakes were high.

Redistricting after the 1990 Census resulted in a sea change to the racial composition of the local and federal government as covered states sought to comply with the VRA. Majority-minority legislative districts between 1990 and 1993 doubled nationwide, which resulted in a 50% increase in the number of African American representatives and a 38% increase of Latinx

³⁰ See *id.*, at 44.

³¹ *Id.*; see, e.g., S. Rep., *supra* note 26, at 2, 15-16, 27-29, 36 (“The ‘right’ question, as the Report emphasizes repeatedly, is whether ‘as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.’”).

The Senate Committee found that ‘voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination... As the Senate Report notes, the purpose of the Voting Rights Act was ‘not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination.’

Id. at 9 (quoting 111 Cong. Rec. 8295 (1965) (remarks of Sen. Javits)).

³² See *Gingles*, 478 U.S. at 48, n.15:

“Under a ‘functional’ view of the political process mandated by § 2, S.Rep., at 30, n. 120, the most important Senate Report factors bearing on § 2 challenges to multimember districts are the ‘extent to which minority group members have been elected to public office in the jurisdiction’ and the ‘extent to which voting in the elections of the state or political subdivision is racially polarized.’”

Id. at 28-29.

representatives in Congress.³³ In 1992, seventeen black legislators were elected to Congress, more than in any previous decade in congressional history and the most ever in any single election.³⁴ State legislatures also transformed with an increase in majority-minority redistricting—most notably in Louisiana where African American legislators increased by 60%, from nineteen to thirty-one representatives.³⁵

The advancement of legislators of color representing communities of color within the United States Congress (though nowhere near proportional representation) resulted in a white supremacist backlash. White voters filed federal lawsuits in North Carolina, Georgia, Florida, Texas, and Louisiana, alleging that the creation of majority-minority districts violated the Equal Protection Clause of the Fourteenth Amendment.³⁶ This historical and political context was the birthplace of *Shaw*.

II: THE VALUE AND CURRENCY OF COLORBLINDNESS

“Racism is really just a mask for greed.”

—Alice Walker

White plaintiffs in *Shaw* were not injured, not racially discriminated against, not denied their right to vote, and their vote was not diluted. Therefore, they would have to bypass Article III standing requirements to pursue an Equal Protection claim and upend Supreme Court precedent to pursue a Section 2 Voting Rights Act claim. White voters first filed a partisan gerrymandering claim, but this claim was dismissed by a 12(b)(6) motion for failure to state a claim because the white voters could not prove that the plan

³³ See Frank R. Parker, *Shaw v. Reno: A Constitutional Setback for Minority Representation*, 28 POL. SCI. & POL. 47, 47 (1995); see also U.S. Bureau of the Census, 1993.

³⁴ *The Historiography of Black Americans in Congress*, History, Art and Archives, U.S. House of Rep., available at <https://history.house.gov/historiography.aspx> [<https://perma.cc/E9BN-EMNK>].

³⁵ *Id.*

³⁶ *Id.*

had a requisite discriminatory effect on a political group.³⁷ Without any viable arguments remaining, how could white plaintiffs in *Shaw* win? *Shaw* plaintiffs went back to the drawing board to invent a different legal theory: that by factoring race in redistricting, North Carolina had violated their “aspiration of the Fourteenth Amendment” which they touted to be the principle of colorblindness.³⁸ The plaintiffs also claimed to speak for all North Carolinians of every race.³⁹ To be clear, there was no injury in fact, no causal link, and therefore, no means to redress the phantom injury.

Only one year prior to *Shaw*, the Supreme Court ruled in *Lujan v. Defenders of Wildlife*⁴⁰ that appellants must prove an actual or imminent concrete and particularized injury that affects them in a personal and individual way.⁴¹ Such injury could not be hypothetical or abstract or a

³⁷ White Republican voters first filed a partisan gerrymandering claim because District 12 was initially drawn to protect Democratic incumbents and pack African Americans. See Kousser, *Real World*, *supra* note 9, at 56-57.

³⁸ See *id.* Plaintiffs alleged North Carolina had infringed their right “to participate in a process for electing members of the House of Representatives which is color-blind and wherein the right to vote is not abridged on account of the race or color of the voters.” *Id.* Amicus briefs in support of white plaintiffs filed by North Carolina Senator Jesse Helms, Washington Legal Foundation, and the Equal Opportunity Foundation declared that whites were disenfranchised since the number of legislative districts controlled by whites at the time decreased – from twelve out of twelve to ten out of twelve districts. Jesse Helm’s ran on an anti-affirmative action platform with infamous television ads advancing colorblind theory. The “white hands” ad showed a white man crumpling up a rejection letter that stated a minority had been offered the job instead. See *Jesse Helms “Hands” ad*, YOUTUBE (Oct. 16, 2006), <https://www.youtube.com/watch?v=KlyewCdXMzk> [<https://perma.cc/4GMP-7FPL>]; In another campaign ad, Helms stated, “[r]acial gerrymandering by placing the state’s stamp of approval on the notion that people of different races are inherently different from one another – is a giant step backward from our goal of a color-blind society.” KOUSSER, *supra* note 10, at 382.

³⁹ KOUSSER, *supra* note 10, at 380-383. White plaintiffs’ lawyer, Robinson Everett, argued that he also represented black voters and that black voters would receive no benefit from a majority-minority district because such a district would imply that black voters as a group could not look beyond race when considering its preferred candidate.

⁴⁰ 504 U.S. 555 (1992).

⁴¹ *Lujan*, 504 U.S. at 560-61.

“Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have

generalized grievance. *Lujan*, to this day, is the model standard for Article III standing for individual plaintiffs and appellants.⁴² To bypass judicial standing precedent, white voters intentionally left out the fact that they were white and argued they had a constitutionally cognizable injury, one that resulted from the ideas expressed through a governmental action.⁴³ The District Court for the District of Columbia had to take judicial notice of the fact that voters were white, alleging a Fourteenth Amendment Equal Protection injury, because nowhere in their complaint did they state their racial identity.⁴⁴ Plaintiffs argued that by focusing on race in drawing the Twelfth District, the General Assembly had harmed white voters' conjectural aspirations of what the Fourteenth Amendment should stand for. Scholars grappling to find a coherent and cognizable legal theory to justify *Shaw* have used the term "expressive" injury or "non-instrumental" injury to explain their injury: how a "government action [that] expresses disrespect for relevant public values can violate the Constitution."⁴⁵ Which values did North Carolina disrespect

suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized...and (b) 'actual or imminent, not 'conjectural' or 'hypothetical'... Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly... trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'... Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

Id.

⁴² Standing jurisprudence has, however, expanded in the realm of state injury (versus personal injury) to account for the imminent harm of global climate change. See *Massachusetts v. Env'tl. Protection Agency*, 549 U.S. 497 (2007).

⁴³ See, e.g., Pildes & Niemi, *supra* note 8, at 506-07.

⁴⁴ *Shaw*, 509 U.S. at 638. Similarly, *Higginson v. Beccera* involves a white voter who also omitted his racial identity and based his complaint on colorblind theory to allege an injury. No. 17cv2032-WQH-MSB (Feb. 4, 2019).

⁴⁵ See Pildes & Niemi, *supra* note 8, at 506-07 ("One can only understand *Shaw*, we believe, in terms of a view that what we call expressive harms are constitutionally cognizable. An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material

by attempting to comply with the federal Voting Rights Act? The values the General Assembly disrespected when it used race as a predominant factor in redistricting was the value of an ahistorical colorblind society. It was not the value of racial equality.

When Justice Harlan delivered his famous dissent in *Plessy v. Ferguson*, “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law,” Harlan spoke to oppose the majority decision legalizing segregation and to expose the lie of separate but equal.⁴⁶ He used the term “colorblind” to demand color-conscious justice to the inhumane vestiges of slavery. One hundred years later, when white plaintiffs appealed to the judiciary’s desire for colorblind principles, it was not to demand racial equality but to subvert the values of equality and fight to hold onto the status quo of a white ruling meritocracy.⁴⁷

consequences the action brings about. On this view, the meaning of a governmental action is just as important as what that action does. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values. On this unusual conception of constitutional harm, when a governmental action expresses disrespect for such values, it can violate the Constitution.”)

⁴⁶ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan J. dissenting).

⁴⁷ K. SUE JEWELL, FROM MAMMY TO MISS AMERICA AND BEYOND: CULTURAL IMAGES AND THE SHAPING OF US SOCIAL POLICY 7-8 (1993). Jewell states that it was not until dire poverty became more visible among the classes during the late 19th century with industrialization that the idea of meritocracy came into power. “Those who were benefiting immensely from an inequitable distribution of society’s resources, through the exploitation of the labor and the poverty class, realized that it was imperative to develop explanations for their wealth and the poverty of the masses...The privileged argued that their material and monetary advantage was attributable to higher levels of intelligence, based on merit, and to virtues that were absent among the lower classes and non-European people...” To advance this premise, wealthy think tanks developed instruments such as standardized tests, by design, to validate this assumption; see also D. Gersh, *The Corporate Elite and the Introduction of IQ Testing in American Public Schools*, in *THE STRUCTURE OF POWER IN AMERICA*, NEW YORK: HOLMES AND MEIER PUBLISHERS 163-64 (M. Schwartz ed., 1987).

The Psychological Comfort of Colorblindness

At first glance, colorblind theory blended multiculturalism and tolerance, concepts introduced into late 1980s educational discourse to evolve school curricula and recognize the achievements of historically unrepresented groups, namely, immigrants and people of color.⁴⁸ Upon critical analysis, colorblind theory in this context was a retrogression in racial equality because it denied the very existence of color and, therefore, dismissed the science, data, and sociology of how race factored into all aspects of society.⁴⁹

In the 1990s, colorblindness was a politically expedient theory developed to allow one to pretend not to see color. If we could suspend disbelief, then we could all be done with this “entire messy, disheartening business of redressing the legacies of racial exclusion and exploitation.”⁵⁰ If we could pretend there was a level playing field and pretend to transcend color, we could get back to business as usual. We wouldn’t have to open our eyes to the fact that the “architects [of the American State] decided the concept of property was more important—more real—than the possibilities of the human being.”⁵¹ This American value of profit over human potential is clearly demonstrated through the economic design of slave, indentured and migrant labor and currently visible in the prison and immigrant detention

⁴⁸ See Caitlin L. Ryan & Adrienne D. Dixon, *Rethinking Pedagogy to Re-center Race: Some Reflections*, 84 LANGUAGE ARTS 175 (2006).

⁴⁹ See *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). The Court relied heavily on social science data to show the psychological impact of segregation. Segregation and color-blind theory both aspire to an ahistorical political reality where the fiction of equality narrates. Both policies fail to examine the social construction of race itself, individual and group racial identity development, and the harmful psychological effects that result when people’s ancestral cultural identity is denied and silenced); see also Subini Ancy Annamma, *Conceptualizing Color-Evasiveness: Using Dis/Ability Critical Race Theory To Expand A Colorblind Racial Ideology In Education And Society*, 20 RACE ETHNICITY & EDU. 147 (2017).

⁵⁰ Kimberlé Williams Crenshaw, *Race To the Bottom: How the Post-Racial Revolution Became A Whitewash*, THE BAFFLER, Jun. 7, 2017, at 40.

⁵¹ JAMES BALDWIN, COLLECTED ESSAYS, PRICE OF THE TICKET 841 (4th ed. 1998).

economy,⁵² the philanthropic sector,⁵³ as well as in the halls of the United Nations' summits on the climate crisis.⁵⁴

Most importantly, colorblind theory allowed recipients of white privilege and social capital to blindly maneuver through America's racial hierarchy on the fantasy of meritocracy. It saved those of us who identify as white the hard labor and anguish of retracing European immigration into white assimilation⁵⁵ and recognizing the full breadth of white privilege and white

⁵² See Ruth Wilson Gilmore, *Race, Prisons And War: Scenes from The History Of US Violence*, 45 SOCIALIST REG. 73-87 (2009) ("What can be said about a political culture in search of 'infinite prosperity' that is dependent on a perpetual enemy who must always be fought but can never be vanquished?") Wilson Gilmore, an abolitionist scholar, addresses how the public sector, such as state agencies (e.g., Departments of Correction), compete for revenue and investment in the prison economy; see also YUKI NOGUCHI, *Under Siege And Largely Secret: Businesses That Serve Immigration Detention*. NAT'L. PUB. RADIO, <https://www.npr.org/2019/06/30/736940431/under-siege-and-largely-secret-businesses-that-serve-immigration-detention>, [https://perma.cc/PPK7-GCH7]; Two private prison corporations, CoreCivic and GEO Group, run the majority of detention centers for refugees, and one quarter of their profits are attributed to detention economy, with a combined revenue of \$4.1 billion in 2018. Their new contracts with the federal government for detention centers have offset their declining profits in the prison industry. Southwest Keys, another private detention corporation that houses the majority of refugee children in the American Southwest, revenued \$450 million; Juan Sanchez, its CEO, receives an annual salary of \$1.5 million; and he personally owns 33% of the SW Key property; Shannon Najmabadi & Jay Root, *Southwest Key CEO has Financial Stake in Property Leased by Migrant Shelter Operator*, TEX. TRIB., (Sept. 29, 2018), <https://www.texastribune.org/2018/09/29/sanchez-part-owner-property-leased-southwest-key-programs-eller-said-a/> [https://perma.cc/GH8Z-AXG7].

⁵³ Villanueva demonstrates how wealth causes further harm even in the field of philanthropy and guides managers of financial services and venture capitalists to transform their relationship with money to heal and foster human potential. See Edgar Villanueva, *Decolonizing Wealth: Indigenous Wisdom to Heal Divides and Restore Balance* (Berrett-Koehler, 2018)

⁵⁴ Greta Thunberg's speech at the United Nations Climate Action Summit addressed this very concept of profit over human potential and survival: "We are at the beginning of a mass extinction, and all you can talk about is money and fairy tales of eternal economic growth. How dare you!" *Greta Thunberg's Speech At The U.N. Climate Action Summit*, NAT'L. PUB. RADIO (Sept. 23, 2019) <https://www.npr.org/2019/09/23/763452863/transcript-greta-thunbergs-speech-at-the-un-climate-action-summit> [https://perma.cc/LTB9-2DX5].

⁵⁵ TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 37 (Harv. U. Press 1992). Nobel Prize in Literature winner, Toni Morrison,

dominance. For many European immigrants, “power - control of one’s own destiny - would replace the powerless felt before the gates of class, caste, and cunning persecution [in the Old World]. [In the New World], one could move from discipline and punishment to disciplining and punishing.”⁵⁶ Kimberlé Williams Crenshaw in her critique of colorblind theory and the myth of the post-racial world we inhabited after the election of President Obama, states, “[c]olorblind theory not only undermines law and social policy that rely on race-conscious analysis, but also soothes anxiety about the stubborn endurance of the structures of white dominance.”⁵⁷ In America’s racialized society, the combination of colorblind theory and meritocracy licenses the wealthy to view themselves as “productive geniuses.”⁵⁸ What is more enticing to the judiciary, many of whom come from the womb of meritocracy,

has examined how the European imagination imprinted itself on the literary canon by expressing its:

“understandably human fears: Americans’ fears of being outcast, of failing, of powerlessness; their fear of boundarylessness, of Nature unbridled and crouched for the attack; their fear of the absence of so-called civilization; their fear of loneliness, of aggression both external and internal.”

“What passes for identity in America is a series of myths about one’s heroic ancestors. It’s astounding to me, for example, that so many people really appear to believe that the country was founded by a band of heroes who wanted to be free. That happens not be true. What happened was that some people left Europe because they couldn’t stay there any longer and had to go someplace else to make it. That’s all. They were hungry, they were poor, they were convicts. Those who were making it in England, for example, did not get on the *Mayflower*.”

See *supra* note 50, at 684.

⁵⁶ *Id.*, Morrison, *supra* note 55, at 35.

⁵⁷ Crenshaw, *supra* note 50, at 52.

⁵⁸ Peter Baker & Maggie Haberman, *Trump, Defending his Mental Fitness, Says He’s a “Very Stable Genius”*, N.Y. TIMES, (Jun. 6, 2018), at <https://www.nytimes.com/2018/01/06/us/politics/trump-genius-mental-health.html> [<https://perma.cc/2MBR-F3KD>].

than an ideology that justifies positionality within the social hierarchy and justifies the status quo?

III: THEORY MEETS REALITY, DATA OF POLITICAL EXCLUSION

“It’s almost like we are in a state of denial. We often point to these very eloquently stated principles of equality but yet we have a very difficult time applying them to contemporary times.”⁵⁹

–Joaquin G. Avila

Colorblind theory has no factual basis. It is pure conjecture based on narrative. Facts can arrive through narrative, but they also arrive as raw data. The purest fact exists as a number, a data point. From data, we derive predictions through pattern recognition, statistical inference, and probabilistic modeling. Marketers market, candidates target campaigns, maps are drawn, legislators draft legislation—from data.

Five years before *Shaw*, the Supreme Court in *Gingles* established a data-driven analysis to assess voting rights violation by effect or impact: the totality of circumstances test. The totality of circumstances test examines a list of socio-economic and political factors, known as the Senate Factors, to determine the extent to which racial discrimination impacted the opportunity for voters to participate in the electoral process equally. The factors include: 1) the history of official discrimination such as segregation; 2) effects of discrimination in education, employment, health that hinder the ability to participate; 3) racially polarized voting; 4) mechanisms that may enhance opportunity for discrimination such as at-large election districts; 5) candidate slating process where members can be denied access if they are not nominated by a political group; 6) political campaigns characterized by subtle or overt racial appeals; 7) the extent to which minority groups have been elected to public office; 8) lack of responsiveness on the part of elected

⁵⁹ Network X, *The National Election and the Future of American Democracy*, Guest - Joaquin Avila, *Visiting Assistant Prof. of Law MacArthur Fellow*, YOUTUBE (Jan. 24, 2009), <https://www.youtube.com/watch?v=Hns6e-rQypI> [<https://perma.cc/UVU6-BZS9>].

officials to needs of minority community; and 9) the tenuousness of the underlying policy and justification for voting measures (e.g., the policy of cleaning up voter rolls or deterring voter fraud to justify targeting and expunging registrations of minority voters).⁶⁰ Data on the above factors inform the Court as they consider, given the totality of circumstances, whether voters' political rights are infringed upon. The Senate Factors recognize that inequity and inequality take many forms, that each case is fact-sensitive, and that various factors impact access to practice democratic and political rights.

The totality of circumstances test established by *Gingles* overruled *Mobile* and acknowledged the impossible burden of proof set by *Mobile*, which required plaintiffs to have a smoking gun of racially discriminatory intent based on raw data. Had *Mobile* not been overturned, it is hypothesized that no Section 2 VRA cases would have been filed after 1982.⁶¹

NAACP v. McCrory is a perfect example of the burden of proving discriminatory intent. In July 2016, in *NAACP*, the 4th Circuit found racial data as the linchpin to yet another North Carolina voting rights discrimination case. Immediately upon the gutting of the federal Voting Rights Act in *Shelby County*, North Carolina's General Assembly enacted HB 589, a state law limiting early voting, requiring voter identification, reducing polling sites, and eliminating sites on college campuses, in minority neighborhoods and near churches.⁶² The 4th circuit ruled the law was enacted with racially

⁶⁰ *Thornburg*, 478 U.S. at 36-37.

⁶¹ Had *Mobile* not been overturned, the unbearable standard of discriminatory intent would have decreased all voting rights actions between 1982-2006 by 62%. *Legislative Proposals to Strengthen the Voting Rights Act: Hearing Before the Comm. on the Judiciary*, 116th Cong. (2019) (statement of Witness, J.M. Kousser, California Institute of Technology).

⁶² *N.C. State Conf. of the NAACP v McCrory*, 831 F.3d 204, 214 (2016). ("On the day after the Supreme Court issued *Shelby County v. Holder*, eliminating preclearance obligations, a leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced an intention to enact what he characterized as an "omnibus" election law. Before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the

discriminatory intent to suppress black voters because state legislators had requested racial data on every voting provision that produced higher turn-outs for black voters and then drafted legislation to eliminate those very provisions. The 4th Circuit stated the discrimination was done with “surgical precision.”⁶³ The opinion states, “Indeed, neither this legislature—nor, as far as we can tell, any other legislature in the Country—has ever done so much, so fast, to restrict access to the franchise.”⁶⁴ But a smoking gun of racially discriminatory intent is rarely if ever available, which is why the Voting Rights Act allows for complaints based on discriminatory impact and effects and uses the data-driven totality of circumstances test.

However, the district court and the Supreme Court in *Shaw* did not interrogate facts, data, or factor in historical discrimination and its effect on the electorate. Morgan Kousser, nationally renowned historian and voting rights expert witness, declared,

The three-judge panel of the Eastern District of North Carolina held no hearing on the facts of North Carolina politics or redistricting, the Shaw appellants were free to construct a fictitious, false, ‘colorblind’ picture of the state’s past and present, and to make utterly unevicenced assertions about social psychology, and the Supreme Court had no concrete reason to doubt any of it.⁶⁵

The appellants’ brief went so far to state,

No court or agency has determined that racial discrimination has ever occurred in the creation of congressional districts in North Carolina. Indeed, it is clear that none has taken place; and so, there

race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.”)

⁶³ *Id.*

⁶⁴ *Id.* at 228; see also Vann R. Newkirk II, *The Battle for North Carolina: Political, Social, and Demographic Forces in the Battleground of North Carolina Promise a Reckoning with its Jim Crow Past*, THE ATLANTIC (Oct. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/10/the-battle-for-north-carolina/501257/> [https://perma.cc/GR37-93BD].

⁶⁵ Kousser, *supra* note 10, at 7.

was no constitutional violation to be remedied by establishing two majority-minority districts.⁶⁶

These statements were obviously false given the fact that North Carolina had a well-documented and sordid past of racially discriminatory voting measures intended to impact, dilute and disenfranchise the black electorate. For these reasons, 40 counties in North Carolina had been under federal preclearance by the Department of Justice since 1965. However, instead of conducting a factual investigation required of typical voting rights or equal protection claims, the Court rested on a colorblind narrative.

Once again, white voters in *Shaw* were not claiming that they had been racially discriminated against or that their vote had been diluted or infringed upon. White voters put forward an entirely unrecognized claim of action by alleging that North Carolina's General Assembly had injured a public value, the value of an electoral and judicial system that should be blind to color. If race-conscious districting occurred and voters were placed within or without a district based on their race, even for remedial purposes, and the district lines appeared "bizarre," then race was deemed the predominant factor.⁶⁷

Strict Scrutiny: The Invention Of "Traditional Redistricting Principles" and Redefining Narrowly Tailored

Although the Supreme Court had not yet developed a clear line of case law regarding whether intermediate or strict scrutiny applied within this context,⁶⁸ the Court applied strict scrutiny, subjecting compliance to the Voting Rights Act to heightened scrutiny for the first time. Strict scrutiny required North Carolina to prove it had a compelling state interest to use race

⁶⁶ *Id.* at 8.

⁶⁷ *Shaw*, 509 U.S. at 650-651. The term "race as a predominant factor" was established in *Miller v Johnson*, 515 U.S. 900 (1995). *Miller* recognized and applied the colorblind Equal Protection principles of *Shaw*.

⁶⁸ See *Metro Broad., Inc. v. Federal Comm'n Comm'n* 497 U.S. 547 (1990); *Richmond v. J.A. Croson Co.*, 448 U.S. 469 (1989); *United States v. Paradise*, 480 U.S. 149 (1987); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *California v. Bakke*, 438 U.S. 265 (1978).

in drawing the Twelfth District to comply with the Voting Rights Act and prove that *how* it used race was narrowly tailored.

If race was found to be the predominant factor in drawing district lines, then strict scrutiny applied. Race, the Court concluded, *could* be one factor in redistricting but *could not* be the predominant factor, meaning race could not be used above “traditional redistricting principles,” a newly invented term by the *Shaw* majority to justify colorblind principles.⁶⁹ To clarify, the *Shaw* majority *invented* this term to create a criterion to weigh race-consciousness. This criterion placed race-consciousness on a scale to determine what amount of race-consciousness would tip the scales into strict scrutiny. According to Justice O’Conner, traditional redistricting principles included “compactness, contiguity, and respect for political subdivisions.”⁷⁰ Justice O’Conner further opined that the newly invented criterion, “traditional redistricting principles”, was not, however, required by the Constitution.⁷¹ Conveniently, this saved white-majority districts from a compactness standard.

The *Shaw* plurality then came up with its own test for “narrowly-tailored.” They decided a measure of geographical compactness would determine whether or not the law was narrowly tailored. The irregular shape of the Twelfth District was not compact enough to the naked eye and, therefore, not

⁶⁹ J. Morgan Kousser, *Injustice and Scholarship*, 24 SOC. SCI. HIST. 415, (2000), at 415-421. (“Throughout the series of cases, the *Shaw* justices have invented what they have termed ‘traditional districting principles’ at will, in a wholly unsystematic fashion, with no factual or logical justifications, in transparent efforts to justify outcomes that they prefer for other reasons. In the same decisions, they have twisted words - for instance, terming the most integrated congressional districts in the history of North Carolina ‘segregated’ and reminiscent of ‘apartheid’ -and they have distorted history, confusing acts intended to harm minorities with electoral structures designed to give minorities in racially polarized politics only an equal, not a disproportionate, chance to elect candidates of their choice. From decision to decision, the Shaw Five have adopted a set of ad hoc principles that have almost always carefully protected the interests of the Republican party to which they belong and have undermined the Democratic party to which African Americans and Latinos overwhelmingly adhere.”)

⁷⁰ *Shaw*, 509 U.S. at 647.

⁷¹ *Id.* at 677 (J. Stevens dissent).

narrowly-tailored.⁷² However, Justice O'Connor did find that an alternative map was reasonably compact: a Republican-dominated area that was “thirty miles longer and much more difficult to traverse” than the majority-minority Twelfth District.⁷³ Compactness was in the eye of the beholder. Different standards applied to majority-white districts and majority-minority districts.

Furthering a Compelling Government Interest

North Carolina had sufficient evidence to prove a compelling state interest as it was under federal preclearance and the Department of Justice had rejected its first map which created only one majority-minority district. To comply with the Voting Rights Act and pass federal preclearance, North Carolina created two majority-minority districts. Furthermore, an extensive history of racial discrimination, data of Senator factors and pervasive racial bloc voting was available, but the court dismissed all these findings.⁷⁴

In 1990, the inequality between different racial groups in the United States had received considerable attention on the global scale by the winner of the

⁷² KOUSSER, *supra* note 10, at 387. J. Morgan Kousser compares two different maps from congressional districts in Texas to show the arbitrary discretion used in determining compactness. Side-by-side both maps appear similar and bizarre in shape yet one is held compact and the other is not. The 91% white, 72% Republican map was found constitutional and the 50% black, 75% Democratic map found unconstitutional.

⁷³ KOUSSER, *supra* note 10, at 385.

⁷⁴ *Shaw*, 509 U.S. at 657; *Miller*, 515 U.S. at 900 builds on *Shaw*'s dismissal of data that could have demonstrated a compelling state interest. Although the jurisdiction in *Miller* was under federal preclearance which proved in and of itself a history of racially discriminatory voting practices, the *Shaw* majority justices stated, with unabashed circular logic, that proof of racial discrimination was insufficient to prove a compelling state interest for majority-minority districts. Compliance with the Voting Rights Act did not prove a compelling state interest. *Miller* justified its disregard of facts by stating, in effect, race-conscious remedies were not reasonably necessary under a constitutional reading: (“Whether or not in some cases compliance with the [Voting Rights] Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here. As we suggested in *Shaw*, compliance with federal anti-discrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws.”); *See* 509 U.S., at 663-655; *Miller*, 515 U.S. at 921.

Nobel Prize of Economics, Amartya Sen.⁷⁵ Regarding health disparity, Sen put forth evidence showing that the premature mortality rates of black men in the United States were higher than men living in poverty in China, Sri Lanka, Costa Rica and the Indian state of Kerala. Black women's premature mortality rates in the United States were also higher than women living in poverty in China and Kerala. Premature mortality alone could not be attributed to factors of violence or poverty.

A medical study revealed that, even when adjusted for variable incomes, black women die younger in very large proportions compared to white women in the United States. Black women in the United States had nearly three times the mortality rate of white women, and black men had nearly two times the mortality rate of white men.⁷⁶ Regarding environment justice, in 1991, "a report from the Environmental Protection Agency confirmed that a disproportionate number of toxic waste facilities were found in African American communities nationwide."⁷⁷ Regarding education and employment inequity, prior to the 1990 census, black women accounted for 52% of all private household cleaners and one-quarter of those employed as maids.⁷⁸ Regarding a history of official segregation, racially explicit government policies segregated American metropolitan areas and were powerful enough to create *de jure* segregation.⁷⁹ Regarding economic injustice, in 1990, an undercover test reported the average profit on an \$11,000 car deal. Adjusted for inflation to 2019, this study revealed the average profit for a \$21,609 car

⁷⁵ See Amartya Sen, *Development as Freedom*, (Anchor Books, 1999) 96-98.

⁷⁶ *Id.*

⁷⁷ See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright Publishing Corp. 2017) at 56.

⁷⁸ Jewell, *supra* note 47, at 44.

⁷⁹ Rothstein argues that the effects of government sponsored segregation exist today in neighborhoods and schools and therefore, we have a constitutional obligation to remedy them. *De jure* segregation refers to government sponsored segregation: the intent of policies set forth by the Public Works Administration and the Federal Housing Administration to segregate based on race. Rothstein's research debunks the myth of *de facto* segregation, that racially segregated neighborhoods are the result of private prejudice and income differences. Rothstein, *supra* note 77, at 56.

deal: \$711 profit on a white male; \$990 on a white female; \$1,538 profit on a black male; and a \$2,430 profit on a black female.⁸⁰ Regarding criminal justice disparity, “In 1991, the Sentencing Project reported that the number of people behind bars in the United States was unprecedented in world history, and that one fourth of young African American men were now under the control of the criminal justice system.”⁸¹

Criminal justice disparity, economic injustice, official discrimination and segregation, education and employment inequality, environment justice and health disparities clearly demonstrated the first two Senator Factors and corroborated evidence of voting rights violations. These disparities existed under America’s national leadership, comprised almost exclusively of white, Anglo-Saxon, Protestant males for the first two-thirds of the 20th century, leading up to *Shaw*.⁸² North Carolina was not immune to the nation’s malady of racial inequity.

The Value of Political Integration

It was not a matter of data that North Carolina lacked to prove a history of discrimination to defend its compliance with the Voting Rights Act and its predominant use of race in District Twelve. It was a matter of judicial comprehension and consciousness: the political and racial lens through which the Supreme Court manufactured its decision. The *habitus*⁸³ used to justify

⁸⁰ Jewell, *supra* note 47, at 93.

⁸¹ See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (The New Press 2012) at 56.

⁸² See Sen, *supra* note 75, at 56.

⁸³ Robin DiAngelo, *White Fragility*, 3(3) INT. J. OF CRITICAL PEDAGOGY 54, 58 (2011). Robin DiAngelo articulates the disequilibrium of white identity in American white supremacist culture by referencing the concept of *habitus* first put forth by French social theorist, Pierre Bourdieu, framing the cultural conditioning of Whiteness. DiAngelo defines *habitus* as: (“socialized subjectivity; a set of dispositions which generate practices and perceptions. As such, *habitus* only exists in, through and because of the practices of actors and their interaction with each other and with the rest of their environment. Based on the previous conditions and experiences that produce it, *habitus* produces and reproduces thoughts, perceptions, expressions and actions.”)

Shaw, and its enduring judicial legitimacy provokes two underlying questions: 1) What was the Court's theory on political integration; and 2) What was the Court's theory on how political freedoms were actually to be exercised, put into practice, and accessible in a functioning democracy. The importance of political access - the ability to practice democratic and political rights— requires a private right of action to manifest political integration. This private right of action is the federal Voting Rights Act as authorized under Section II of the Fifteenth Amendment.

Sen asserts,

The extraordinary deprivations in health care, education, and the social environment of African Americans in the United States help to make their mortality rates exceptionally high, and this is not prevented by the working of American democracy. Democracy has to be seen as creating a set of opportunities, and the use of these opportunities calls for analysis of a different kind, dealing with the *practice* of democratic and political rights. In this respect, the low percentage of voting in American elections. . . . and other signs of alienation cannot be ignored. Democracy does not serve as an automatic remedy of ailments as quinine works to remedy malaria. The opportunity it opens up has to be positively grabbed. . . .⁸⁴

One of America's most prominent voting rights leaders and litigators, Joaquin G. Avila, similarly affirmed, “[p]olitical power is never given away, you have to take it.”⁸⁵ From a self-preservation perspective, Avila spoke often on the importance of political integration of historically oppressed communities:

[i]f you don't have [people] politically integrated, they are not part of the body politic, they don't have a sense of ownership, they don't have a vested interest into the future... Just from a purely

⁸⁴ Sen, *supra* note 75, at 155.

⁸⁵ Obituary, Sam Roberts, *Joaquin Avila, Advocate of Hispanic Voting Rights, Dies at 69*, N.Y. TIMES, (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/obituaries/joaquin-avila-advocate-of-hispanic-voting-rights-dies-at-69.html> [<https://perma.cc/F2FC-GFPS>].

societal self-preservation instinct, the majority, middle-class white America, should see it is in their vested interest to make sure that the political process is completely accessible and completely transparent.⁸⁶

Colorblind jurisprudence has deteriorated political accessibility, transparency and accountability. Additionally, it has manifested rife partisan and racial polarization. Contrary to legal precedent that justified race-conscious remedies in voting rights violations, Justice O'Connor (joined by Justices Rehnquist, Scalia, Kennedy and Thomas) held in *Shaw*, “[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters- a goal that the Fourteenth and Fifteenth Amendments embody, to which the Nation continues to aspire.” Its critical to note the term *racial gerrymandering* referred to the drawing of race-conscious districts. Justice O'Connor’s misappropriation of this term has endured. She further opined that *racial gerrymandering* would reinforce stereotypes that members of the same race voted alike, and therefore, these stereotypes would lead elected officials to respond only to their own racial group rather than the entire district. Justice O'Connor’s analysis did not fail to appreciate that color did not always determine how one individual voted, however, her analysis did fail to acknowledge the history of American elections up until present-day: that collective racial identity matters and that it has always defined partisan lines.⁸⁷

⁸⁶ Network X, *The National Election and the Future of American Democracy*, Guest - Joaquin Avila, *Visiting Assistant Prof. of Law MacArthur Fellow*, (Nov. 4, 2004), YOUTUBE (January 24, 2009) <https://www.youtube.com/watch?v=Hns6e-rQypI> [<https://perma.cc/KV87-RVGX>].

⁸⁷ See Rory McVeigh, David Cunningham & Justin Farrell, *Political Polarization as a Social Movement Outcome: 1960s Klan Activism and Its Enduring Impact on Political Realignment in Southern Counties, 1960 to 2000*, 79 AM. SOC. REV. 1144, 1144-1171 (2014). (McVeigh, Cunningham and Farrell examine how politics have become more polarized in the United States since the Civil Rights Movement although people in general have not. Prior to the 1960s, the South predominately identified as Democratic. The Klu Klux Klan mobilized white voters in the south to shift their allegiance from Democratic to

Since historical and present harms impact racial groups, the remedies must be afforded accordingly. Remediating barriers to equality in political rights is not about an individual voter but about voters as a group and whether *communities* of color have equal access to the ballot. Data reveal that race and color highly correlate with how one votes. Redistricting has always been and continues to be racialized.

Year and Democratic Presidential Candidate⁸⁸	Percentage of Black Voters	Percentage of Latinx Voters	Percentage of White Voters
1996 Bill Clinton	84%	73%	44%
2000 Al Gore	90%	62%	42%
2004 John Kerry	88%	53%	41%
2008 Barack Obama	95%	67%	43%
2012 Barack Obama	93%	71%	39%
2016 Hillary Clinton	89%	66%	37%

For the majority of the twentieth century and all of the twenty-first century, African American and Latinx communities have overwhelmingly voted for Democratic candidates. Although this sample does not reflect the

Republican, encouraging white voters to prioritize the defense of white supremacy when making voting decisions. Polarization in local contexts resulting from Klan activism in the 60s helped ensure that voting realignment would be long-lasting).

⁸⁸ *How Groups Voted*, ROPER CENTER, <https://ropercenter.cornell.edu/data-highlights/elections-and-presidents/how-groups-voted> [<https://perma.cc/RZM9-LG9H>].

complexities of individual racial identities and alternative political preferences, it does show how race aligns with partisanship.

Colorblind narratives are illusions. Jurisprudence is not created in a blind vacuum, devoid of culture, politics, partisanship, economics, and one's personal identity and experiences. An independent judiciary is not only charged with interrogating data and discerning the causes and conditions that produce the data, but with questioning deracialized narratives.

IV: PLESSY'S DESCENDANTS: SHAW, BLUM AND SHELBY

Racism isn't a product of race.

Race is a product of racism.

—Dorothy Roberts⁸⁹

Judges with lifetime appointments base their decisions on narratives, on the art of storytelling, and on conjecture and fantasy. The fantasy of transcendence and aspiration of a society that sees no color is apathetic and intellectually indolent. It is dishonorable because it negates the hard-fought progress of American civil and human rights.

In *Shelby County*, the court had 15,000 pages of evidence of persistent and pervasive racial discrimination in the covered jurisdictions, but in a five-four decision, the court determined that preclearance was unnecessary.⁹⁰ This hazardous decision was not based on data; rather the decision was based on

⁸⁹ Leviton, *supra* note 7, at 4.

⁹⁰ See *Legislative Proposals to Strengthen the Voting Rights Act*, Hearing Before the Comm. on the Judiciary, 116th Congress (Oct. 17, 2019) (statement of Witness, J.M. Kousser, CA Institute of Technology); See also Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justices Opinion in Shelby County?*, TRANSATLANTICA, 2015, at 1, 37. Kousser bases his opinion on research from the “largest database of voting rights ‘events’—successful lawsuits, Section 5 Justice Department objections and ‘more information requests,’ and consent decrees or settlements out of court that led to prominority changes—ever compiled”—to provide an “overview of the history of U.S. voting rights from 1957, when the first U.S. civil rights law in 82 years passed, through 2013”) [<https://perma.cc/8GTC-N3DE>]. For synthesis, see *Voting Rights, by the Numbers*, N.Y. TIMES, Apr. 19, 2015, at 10.

the principle of colorblindness in a fantastical post-racial democracy.⁹¹ The narrative of a post-racial federalist democracy persuaded five justices to “throw out the umbrella in a rainstorm because [they] were not getting wet.”⁹²

Shaw not only set the stage for the gutting of the federal Voting Rights Act in *Shelby County v. Holder*,⁹³ but it reverberates today in the Ninth Circuit Court of Appeals. In June 2018, the Ninth Circuit ruled in *Higginson v Becerra* that a white voter had Article III standing to allege an injury based on a change of election method from at-large to by-district.⁹⁴ The Ninth Circuit, in an unpublished opinion, conferred federal standing to a white voter to pursue a *Shaw* Equal Protection claim,⁹⁵ although the voter, similar to *Shaw* plaintiffs, neglected to state his race or the racial make-up of his district.⁹⁶ Yet, he alleged that due to his race, he suffered an injury as a result of a by-district election method.⁹⁷

By-district election methods are common remedies for vote dilution when racially polarized voting (RPV) interacts with racial bloc voting.⁹⁸ By-district election methods protect a racial minority community’s ability to equally

⁹¹ Crenshaw, *supra* note 50, at 40.

⁹² *Shelby Co.*, 570 U.S. at 561 (Ginsburg, J. dissenting).

⁹³ In *Shelby Co.* the Supreme Court gutted the federal Voting Rights Act by invalidating Section 4(b), what is commonly known as federal preclearance. Federal preclearance under the VRA was the most effective civil rights mechanism to counter voter discrimination due to the fact that case-by-case litigation was ineffective. In *South Carolina v. Katzenbach*, in an 8 to 1 decision, the Court upheld federal preclearance and the mechanism that placed the burden of proof on the jurisdiction, not the victims, stating, (“Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”) *Carolina v Katzenbach*, 383 U.S. 301, 328 (1966).

⁹⁴ *Higginson v. Becerra*, No. 17CV2032-WQH-JLB, 2018 WL 4759204 (S.D. Cal. Oct. 2, 2018).

⁹⁵ *Higginson v. Becerra*, 733 Fed. Appx. 402, 403 (9th Cir. 2018).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

participate in the electoral process and elect a candidate of its choice.⁹⁹ Simply put, in *Higginson v Becerra*, one Ninth Circuit three-judge panel allowed a voter to sue a state and local jurisdiction for enforcing civil rights legislation, legislation authorized under state and federal law.¹⁰⁰

The most disingenuous distortion of the Fourteenth Amendment has been the campaign of Edward Blum. Blum, a wealthy financial advisor, with no legal background, has funded dozens of lawsuits to use colorblind theory to undermine the Fourteenth and Fifteenth Amendments.¹⁰¹ Blum funded *Higginson v Becerra* and heads the Project on Fair Representation, which is a “public interest organization dedicated to the promotion of equal opportunity and racial harmony. working to advance race-neutral principles.”¹⁰² Blum’s most infamous win was *Shelby County v Holder*. Since

⁹⁹ Racially polarized voting (RPV) is when voters vote within racial coalitions. Bloc-voting is when a racial majority voting coalition defeats the preferred candidate of a cohesive minority racial voting coalition. RPV analysis is: (“a social science methodology that allows practitioners to assess whether or not elections for city council (or another office) can be characterized by opposing voting coalitions – hence polarized...Using demographic data about the race or ethnicity of the voters within a precinct, the social scientist can determine whether or not a certain candidate for political office was preferred by the racial group that is a numeric minority in the city. Beyond this, [RPV analysis] can reveal whether or not the same candidate was preferred or blocked by voters who make up the numeric majority in the city...Polarized voting is determined by examining the results of past elections in which at least one candidate of the protected class ran and assessing whether the protected class voted cohesively to try and elect their preferred candidate, but the rest of the population came together to bloc-vote against the protected class’ preferred candidate.”)

Amicus Curiae Br. of The UCLA Voting Rights Project In Support Of Appellees at 11-13, *Higginson v Becerra*, No. 19-55275 (9th Cir., 2019) (No. 58) (filed August 22, 2019).

¹⁰⁰ *Higginson v. Becerra*, 786 Fed. Appx. 705, 707 (9th Cir. 2019) *Higginson* was dismissed for failure to state a claim under 12(b)(6) by the 9th Circuit on December 4, 2019. The case was also dismissed twice by the Southern District Court of California for failure to state a claim.

¹⁰¹ Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He’s Taking on Harvard*, N.Y. TIMES (Nov.19, 2017),

<https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html>

[<https://perma.cc/VW3B-HJD2>] Blum groomed *Higginson* in colorblind theory.

¹⁰² See Amicus Curiae Br. of Project for Fair Representation, Dep’t of Com. v. N.Y., 315 F. Supp. 3d 766 (2019) (No. 18-966) (filed Feb. 12, 2019) available at

Shelby, the flood gates have opened for notorious voter suppression in the formerly covered states, which one could argue contributed to the 2016 Presidential outcome.¹⁰³ The campaign of Donald Trump had the most well-documented Senate Factors: racially polarized voting and a political campaign characterized by overt racial appeals.¹⁰⁴

Blum's rhetoric of promoting racial harmony while simultaneously gutting the most important civil rights legislation authorized by the Fourteenth and Fifteenth Amendments is akin to the narrative of "separate but equal" by the Supreme Court in *Plessy*, legalizing racial apartheid as a valid exercise of "the state's power to promote health, safety, and morals."¹⁰⁵ Looking beneath the veneer of narratives, the strategy of using language such as "racial harmony" and "race-neutral policies" to deepen the chasm of racial disparity in positions of social, economic, and political power is not only ironic but deceitful. During the end of the Nineteenth century, with the sharp rise of lynching and other forms of white supremacist domestic terrorism,

https://www.supremecourt.gov/DocketPDF/18/18-966/91010/20190306184903400_18-966_Amicus_Brief.pdf [<https://perma.cc/Z5AH-7A24>].

¹⁰³ See Morris *supra* note 12; See Crenshaw, *supra* note 57, at 50.

¹⁰⁴ The Trump Administration rhetoric has emboldened a rise in white nationalism, hate crimes and violence, not only within our borders but abroad. A coalition of organizations is tracking the rise in hate crimes since the 2016 election. Editorial Board, Opinion, *Why We Need A Project to Document Hate Crimes*, N.Y. TIMES (Jan. 17, 2017), <https://www.nytimes.com/2017/01/17/opinion/why-we-need-a-project-to-document-hate-crimes.html> [<https://perma.cc/DS77-F283>]; See *supra* note 12; See David A. Graham, Adrienne Green, Cullen Murphy, & Parker Richards, *An Oral History of Trump's Bigotry*, THE ATLANTIC (June 2019), <https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/> [<https://perma.cc/SRH3-Y5RU>]; See Peter Baker and Michael D. Shear, *El Paso Shooting Suspect's Manifesto Echoes Trump's Language*, N.Y. TIMES (Aug. 4, 2019), <https://www.nytimes.com/2019/08/04/us/politics/trump-mass-shootings.html> [<https://perma.cc/5KCN-YBT2>]. Senator Kamala Harris has requested that Twitter suspend Trump's account because of its white nationalist rhetoric, See Chandelis Duster, *Kamala Harris Defends Her Push to Get Trump's Twitter Account Suspended*, CNN (October 16, 2019), <https://www.cnn.com/2019/10/16/politics/kamala-harris-trump-twitter-suspension-cnn/index.html> [<https://perma.cc/RE9B-PC5G>].

¹⁰⁵ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY, 21, 24 (Oxford Univ. Press, 2004).

segregation was justified as an “embodiment of enlightened public policy,” just as colorblind theory was applauded and justified at the end of the Twentieth century in *Shaw*. *Shaw* is a direct descendant of *Plessy*.

As J. Skelly Wright, former Chief Justice of the United States Court of Appeals for the District of Columbia Circuit, referring to *Plessy*, opined, “It is a tribute to the American ideal of equality that the High Court was driven to *lie* rather than to admit what it was doing.”¹⁰⁶ Similarly, when the Supreme Court ruled in *Shaw v. Reno* that a white voter had standing to allege a Fourteenth Amendment Equal Protection claim, based on a generalized grievance of a majority-minority district electing the first black representative in nearly 100 years, the court was driven to lie rather than admit what it was doing. The court was designing a mechanism for white citizens to appropriate and co-op laws that were specifically written to provide remedies to voters of color who were, and currently are, denied an equal opportunity to participate in the democratic process and, therefore, disparately underrepresented in local, state, and federal government.¹⁰⁷

¹⁰⁶ J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI L. REV. 213, (1980). Judge Wright was appointed by President John F. Kennedy and laid the foundation for affirmative action.

¹⁰⁷ The Voting Rights Act was a culmination of a century of civil rights laws intended to protect the constitutional rights of people of color within the borders of the United States. The Civil Rights Enforcement Acts of 1866, 1870 (also known as the First Klu Klux Klan Act) and 1871 (also known as the Second Klu Klux Klan Act) pioneered efforts to enforce the Fourteenth and Fifteenth Amendments. The Acts were originally passed specifically to protect African Americans’ human rights after the Civil War. White judges refused to enforce the laws. Section 1983, which originated as Section 1 in the Second Klu Klux Klan Act allowed people to sue in federal court when a state or local official violated their federal rights: e.g., acts of terrorism by local officials against African Americans who attempted to participate in the political process. Section 1983 and The Voting Rights Act originated from congressional effort to enforce the Fourteenth and Fifteenth Amendments. See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 84 (2009). See The Civil Rights Act of 1866, 14 Stat. 27-30 (1866), Civil Rights Act of 1870, H.R. 1293, 41st Cong. § 1, §6, §7, (1870) (also known as the First Klu Klux Klan Act of 1870), Civil Rights Act of 1871, H.R. 2634 (also known as the Second Klu Klux Klan Act), Civil Rights Act of 1957, Pub. L. 85-315, § 131(b), 71 Stat. 337 (1957), Voting Rights Act of 1965, 52 U.S.C. § 10301. *Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in*

Similar to how *Plessy* paved the way for *Shaw*, *Shaw* paved the way for *Shelby County*.

Narratives used to evade responsibility and aspire to colorblindness were commonly used during the *Plessy* Era, denying and disguising the terrors of racial violence. In 1921, in the peak of widespread lynching, the Mississippi Supreme Court opined that “the humblest human being, be he white or black, red or yellow, is entitled to a fair and impartial trial on the dole issues of guilt and innocence.”¹⁰⁸ In reality, this was the same time blacks could not serve on juries, black lawyers would not be heard in court, the credibility of black witnesses was always questioned, and the death penalty was used for black men convicted of victimizing white women.¹⁰⁹ This was a time when mobs frequently surrounded courthouses, and retaliation was encouraged against public supporters of black defendants, a time when defense lawyers for black defendants were not appointed until the very morning of a trial.¹¹⁰ Today, we walk the same walk and talk the same talk. Without Socratic and independent discernment in America’s racialized administration of justice, judges can easily fall prey to aspirations of colorblind theory and “racial harmony” that are divorced from reality.

SECTION V: TOWARD A JUDICIAL EVOLUTION

Expensively kept, economically unsound,
a spurious and useless political asset in election campaigns,
racism is as healthy today
as it was during the Enlightenment.

—Toni Morrison¹¹¹

Congress, H.R. HISTORY, ART, & ARCHIVES, [http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/\[https://perma.cc/54TA-S65P\]](http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/[https://perma.cc/54TA-S65P]).

¹⁰⁸ KLARMAN, *supra* note 105, at 130-31.

¹⁰⁹ KLARMAN, *supra* note 105, at 130-31.

¹¹⁰ *Id.*

¹¹¹ Morrison, *supra* note 55, at 63.

During *Shaw*'s era, Justices Brennan, Marshall, Blackmun, White, and Souter laid the groundwork for racially-conscious remedies that today may instruct federal courts.

Bakke's Dissent

In *University of California Regents v. Bakke*¹¹², five years before *Shaw*, the Supreme Court banned the University of California Regent's affirmative action quota. At the time of *Bakke*, African Americans represented "1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers, and 2.6% of the college and university professors."¹¹³ Although Justice Blackmun, in his dissent, stated,

[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.¹¹⁴

Dethroning the supremacy of colorblindness, he elaborated, "[t]he sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene."¹¹⁵ His dissent accurately critiqued the illusion of a colorblind society and signaled a warning call.

Justice Marshall's dissent educated the court with a history lesson on the origin of the Fourteenth Amendment and current data on the education, health, and social mobility of African Americans.¹¹⁶ He pointed to the racial disparity in infant mortality – twice that of white infants, in maternal mortality – three times that of whites, in poverty – four times greater than

¹¹² *Bakke*, 438 U.S. at 265. Note that Justices Marshall, Brennan, White and Blackmun concurred in judgment but wrote separate opinions of dissent.

¹¹³ *Id.* at 396 (Marshall, J. dissenting).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 407 (Blackmun, J. dissenting).

¹¹⁶ *Id.* at 396 (Marshall, J. dissenting).

whites in general.¹¹⁷ His call to the court was clear: to affirm race-conscious remedies. Justices Marshall and Blackmun analyzed data of racial discrimination and concluded the federal court had a responsibility to uphold racially-conscious remedies.¹¹⁸

The majority opinion of *Bakke*, similar to that of *Shaw*, did not account for massive racial disparity and inequality nor the Court's constitutional imperative to remedy racial injustice under the Fourteenth Amendment. The majority went so far as to state that the very "concepts of 'majority' and 'minority' necessarily reflect *temporary arrangements* and political judgments," effectively disregarding over 200 years of data on America's fixed and static white economic, cultural and political hegemony.¹¹⁹ The opinion further extended the idea that as demographics shift, white Anglo-Saxon Protestants would become the minority, inferring reverse racism.¹²⁰ The court had yet to learn the definition of racism itself: that racism does not work in reverse in a society where institutional power is white.¹²¹ Personal

¹¹⁷ *Id.* at 395, 396 (Marshall, J. dissenting).

¹¹⁸ *Id.* at 396 (Marshall, J. dissenting); *Id.* at 407 (Blackmun, J. dissenting).

¹¹⁹ *Id.* at 326-327 (Brennan J., White J., Marshall J., & Blackmun J. concurring in the judgment in part and dissenting in part) ("The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the "last resort of constitutional arguments." *Buck v. Bell*, 274 U. S. 200, 208 (1927). Worse than desuetude, the [Equal Protection] Clause [of the Fourteenth Amendment] was early turned against those whom it was intended to set free, condemning them to a "separate but equal" status before the law, a status always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred by our decision in *Brown v. Board of Education*, 347 U. S. 483 (*Brown I*), and its progeny, which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution."); see also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (Oxford Univ. Press, 2004); see also Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (Liveright Publishing Corp. 2017).

¹²⁰ *Id.* at 395, 396 (Marshall, J. dissenting).

¹²¹ Robin DiAngelo, 3(3) *White Fragility*, INT'L J. of CRITICAL PEDAGOGY 54, 54-57 (2011) ("Racism is not fluid in the U.S.; it does not flow back and forth, one day benefitting

bias based on color can exist from black to white, but the social construct of race and racism exists and is systemically upheld by institutional structures.¹²²

Shaw's Dissent

In *Shaw*, Justice Blackmun's dissent reiterated his theme from *Bakke*, the importance of integrating the real world. He cautioned,

[i]t is particularly ironic that the case in which today's majority chooses to abandon settled law and to recognize for the first time this 'analytically distinct' constitutional claim is a challenge by white voters to the plan under which North Carolina has sent black representatives to Congress for the first time since Reconstruction.¹²³

whites and another day (or even era) benefiting people of color. The direction of power between whites and people of color is historic, traditional, normalized, and deeply embedded in the fabric of U.S. society"). DiAngelo cites the work of Toni Morrison, Dr. John Richard Feagin, Charles W. Mills, Patricia McIntosh, Ruth Frankenberg, Beverly Tatum, and other Whiteness scholars. See John Richard Feagin, *Systematic Racism: A Theory Of Oppression* (Routledge, 2006); Charles W. Mills, *The Racial Contract* (Cornell University Press, 1999); Ruth Frankenberg, *Introduction: Local Whitenesses, localizing Whiteness*, In Ruth Frankenberg (Ed.), *Displacing Whiteness: Essays in social and cultural criticism* (Duke University Press, 1997) at 1-33; Beverly Tatum, "Why are All the Black Kids Sitting Together in the Cafeteria?": And Other Conversations about Race (Basic Books, 1997); Morrison, *supra* note 53 ; Peggy McIntosh, *White privilege and male privilege: A personal account of coming to see correspondence through work in women's studies*. In M. Anderson, & P. Hill Collins (Eds.), *Race, class, and gender: An anthology* (Wadsworth, 1998) at 94-105.

¹²² *Id.* Examples of institutional structures and internalized white superiority in mainstream culture: ("our [white people's] centrality in history textbooks, historical representations and perspectives; our centrality in media and advertising (for example, a recent Vogue magazine cover boldly stated, "The World's Next Top Models" and every woman on the front cover was white); our teachers, role-models, heroes and heroines; everyday discourse on "good" neighborhoods and schools and who is in them; popular TV shows centered around friendship circles that are all white; religious iconography that depicts god, Adam and Eve, and other key figures as white, commentary on new stories about how shocking any crime is that occurs in white suburbs; and, the lack of a sense of loss about the absence of people of color in most white people's lives.").

¹²³ *Shaw*, 509 U.S. 630, at 676 (Blackmun, J. dissenting).

Justice Souter’s dissent focused on the lack of a cognizable legal theory, challenged the use of strict scrutiny in redistricting cases, and emphasized the lack of injury. “Under our cases there is, in general, a requirement that in order to obtain relief under the Fourteenth Amendment, the purpose and effect of the districting must be to devalue the effectiveness of a voter compared to what, as a group member, he would otherwise be able to enjoy.”¹²⁴ Justice White emphasized how the Voting Rights Act and the Fifteenth Amendment clearly authorized race-conscious remedies in redistricting to ameliorate vote dilution and that the State had met its burden.¹²⁵ Similar to Justice Souter, Justice White questioned strict scrutiny as the appropriate level of scrutiny and stated the Court had no constitutional basis for requiring geographical compactness as part of its strict scrutiny analysis.¹²⁶ He asked, “[i]s it more ‘narrowly tailored’ to create an irregular majority-minority district as opposed to one that is compact but harms other state interests such as incumbency protection or the representation of rural interests?”¹²⁷ Justice Stevens also questioned the requirement of compactness and found the Twelfth District’s shape irrelevant because of its known purpose, stating,

[t]here is no independent constitutional requirement of compactness or contiguity, and the Court’s opinion does not suggest otherwise. The existence of bizarre and uncouth district boundaries is powerful evidence of an ulterior purpose behind the shaping of those boundaries—usually a purpose to advantage the political party in control of the districting process. Such evidence will always be useful in cases that lack other evidence of invidious intent. In this case, however, we know what the legislators’ purpose was: The

¹²⁴ *Id.* at 684 (Souter, J. dissenting).

¹²⁵ *Id.* at 675 (White, J. dissenting).

¹²⁶ *Id.*

¹²⁷ *Id.*

North Carolina Legislature drew District 12 to include a majority of African-American voters.¹²⁸

Justice Stevens further denounced the majority's rationale as "perverse" stating,

[i]f it is permissible to draw boundaries to provide adequate representation for rural voters, for union members, for Hasidic Jews, for Polish Americans, or for Republicans, it necessarily follows that it is permissible to do the same thing for members of the very minority group whose history in the United States gave birth to the Equal Protection Clause...A contrary conclusion could only be described as perverse.¹²⁹

The dissents in both *Bakke* and *Shaw* caution that colorblind principles will create injustice.

Former Supreme Court Justice, Benjamin Cardozo, in *Nature of the Judicial Process* – part of the American legal cannon read by law students for the past century – wrote,

[t]he rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. ...if a rule continues to work injustice it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.¹³⁰

The experiment of colorblind jurisprudence has been tested. In testing, reformulating, and re-examining rules and principles, Cardozo urged the judiciary to take its time: "[t]his work of modification is gradual. Its effects must be measured by decades and even centuries. Thus measured, they are

¹²⁸ *Id.* at 679 (Stevens, J. dissenting).

¹²⁹ *Id.*

¹³⁰ BENJAMIN N. CARDOZO, *NATURE OF THE JUDICIAL PROCESS*, 23 (Yale U. Press, 1921).

seen to have behind them the power and the pressure of the moving glacier.”¹³¹ One century after *Plessy*, we view its decision as archaic and indefensible. Decades after *Shaw*, measuring its effects – the results are in and the glaciers are melting. The culmination of colorblind jurisprudence is a current political climate wrought with racial injustice. Today, we see a sharp rise in white nationalist domestic terrorism,¹³² rampant abuse of children of color within immigration detention centers,¹³³ state-sanctioned violence against African Americans by law enforcement,¹³⁴ environmental justice and health disparities for communities of color within and beyond our borders,¹³⁵ and widespread voter suppression and political disintegration.¹³⁶ Denying the very real and present danger of colorblind jurisprudence has not afforded the legal system the comfort it had hoped to secure. Instead, it exists

¹³¹ *Id.* at 25.

¹³² See *supra* note 13; *supra* note 104.

¹³³ See *supra* note 14.

¹³⁴ “Alicia Garza, *Black Love-Resistance and Liberation*, 20(2) RP&E J., 21, 22 (2015) (“State-sanctioned violence and anti-Black racism have shaped our physical, emotional, economic, political, and cultural landscapes in profound ways that impact our ability to work together, dream together, and transform together.”); See Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL ED. 381, 381-404 (2015); *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html> [<https://perma.cc/2E44-RD8X>];

Mariel Padilla, *Family of Antwon Rose, Teenager Killed by Police, Settles Suit for \$2 Million*, N.Y. TIMES (Oct. 29, 2019); See The New York Times, *What We Know About the Fort Worth Police Shooting of Atatiana Jefferson*, N.Y. TIMES, October 15, 2019 available at ; See Marina Trahan Martinez, Sarah Mervosh and John Eligon, *Former Dallas Police Officer Is Guilty of Murder for Killing Her Neighbor*, October 2, 2019. The Counted: *People Killed by Police in the United States*, THE GUARDIAN (last visited Nov. 7, 2019) available at <https://www.nytimes.com/2019/10/01/us/amber-guyger-trial-verdict-botham-jean.html> [<https://perma.cc/H2E9-MV8F>].

¹³⁵ See *supra* note 15.

¹³⁶ See *supra* note 12; See Zak Bennett, *Is America a democracy? If so, why does it deny millions the vote?* THE GUARDIAN (Nov. 7, 2019), <https://www.theguardian.com/us-news/2019/nov/07/is-america-a-democracy-if-so-why-does-it-deny-millions-the-vote> [<https://perma.cc/MN5G-6ZNL>].

as an undiagnosed cultural illness. The legitimization of *Shaw* claims feeds the virus.

CONCLUSION

I propose that the Fourteenth and Fifteenth Amendments were never founded on a belief that we would achieve a political system in which race no longer mattered. Section V of the Fourteenth Amendment and Section II of the Fifteenth Amendment gave Congress power to enforce the Amendments.¹³⁷ It would not only be absurd but antithetical to draft such legislation – which seeks to cure historical and present-day white supremacy – without naming race, without analyzing race, without factoring race, without race-consciousness. Logically and accordingly, the authorization of legislation and remedies to enforce the 14th and 15th Amendments requires race-consciousness.

It is intellectually disingenuous to state that at a time when white families gathered on a Sunday afternoon to watch a lynching, when terrorism reigned upon communities of color,¹³⁸ when children feared their parents would be killed exercising their right to vote, Congress intended the Fourteenth and Fifteenth Amendments to be interpreted through a colorblind lens.

Applying the facts to the law requires the judiciary to interrogate the narratives and examine the causes and conditions that create racial inequality and human suffering. For those who have neglected to learn America’s history of domestic terrorism against black and brown communities, jurisprudence based on the aspiration of a society where race no longer

¹³⁷ U.S. CONST. amend. XIV, § 5. (“The Congress shall have the power to enforce, by appropriate legislation”); U.S. CONST. amend. XV, § 2. (“The Congress shall have the power to enforce this article by appropriate legislation.”)

¹³⁸ For a concise yet in-depth history of terrorism against Latinx communities between 1848-1928, see *Oversight Of The Trump Administration’s Border Policies And The Relationship Between Anti-Immigrant Rhetoric And Domestic Terrorism: Hearing Before the Comm. On the Judiciary, 116th Cong. (Sept. 6, 2019) (Testimony of Monica Muñoz Martinez, Ph.D.)*.

matters is, in fact, a racial act. Toni Morrison poignantly declared, “Statements...insisting on the meaninglessness of race to the American identity are themselves full of meaning. The world does not become raceless or will not become unracialized by assertion.”¹³⁹ Refusing to see data of America’s economic and political racial hierarchy will not manifest political integration of historically underrepresented communities. Political integration is the true goal of the Fourteenth and Fifteenth Amendments. The next Reconstruction – our current civil and human rights crisis – demands eyes wide open.

Seventeenth-century French Archbishop Frances Fénelon counseled, “We only perceive our malady when the cure begins.”¹⁴⁰ The 1965 Voting Rights Act and racially-conscious legislation and remedies authorized by Section V of the Fourteenth Amendment and Section II of the Fifteenth Amendment are the cures that allow us to perceive the malady of white supremacy. It is time an independent and conscious judiciary allows the medicine to work its cure.

¹³⁹ Morrison, *supra* note 55, at 46.

¹⁴⁰ FRANÇOIS DE SALIGNAC DE LA MOTHE- FÉNELON, THE SPIRITUAL LETTERS OF ARCHBISHOP FENELON: LETTERS TO WOMEN 29 (H.L. Sidney Lear trans., Longmans Green & Co. 1900) (1690).

