

**JACKALS, TALL SHIPS, AND THE ENDLESS
FOREST OF LIES: FOREWORD TO SYMPOSIUM
ON THE VOTING RIGHTS ACT IN THE WAKE OF
*SHELBY COUNTY V. HOLDER***

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*Chacales que el chacal rechazaría,
piedras que el cardo seco mordería escupiendo,
víboras que las víboras odiaran!*¹

- Pablo Neruda, *Explico Algunas Cosas*

Voting is the language of representative democracy.² Language is life. Disenfranchisement is violence. Violence is where language loses its meaning. The violence is fatal. Black has been the mark of violent exclusion from American life. *Shelby County v. Holder* is part of the storied violence of

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¹ PABLO NERUDA, *Explico Algunas cosas / I Explain Some Things*, in THE ESSENTIAL NERUDA: SELECTED POEMS 65 (City Lights Publishers: 2004) ("Jackals the jackal would reject, stones the dry thistle would bite then spit out, vipers the vipers would despise!").

² Anthony Paul Farley, *Lacan & Voting Rights*, 13 YALE JOURNAL OF LAW AND HUMANITIES 283 (2001).

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democracy in America, but not the end.³ The end was in the beginning.⁴ Everything after has been repetition and spectacle. This joint symposium of the *Touro Law Journal of Race, Gender, and Ethnicity* and the *Berkeley Journal of African-American Law & Policy* is a different story.⁵

Everywhere we look, we see only the spectacle.⁶ Things and the true explanations of how they came to be have no place in the fraudulent archive of our false time. We are still within the superstructure of the ship. The coffer, the darkness below decks, the auction block, the cotton field, the eyeless long march up Vinegar Hill; there are nine billion names for the motionless movement of the dead.

Slavery is death, only death, and that continually. Slavery to segregation to neo-segregation is white-over-black to white-over-black to white-over-black. We are bored.⁷ The spectacle is the system's unending hymn of self-praise.⁸ The white sails of the tall ships fill our empty eyes with nothing.

³ 133 S. Ct. 2612 (2013).

⁴ RALPH ELLISON, *INVISIBLE MAN* 571 (1952).

⁵ Symposium, *The Voting Rights Act in the Wake of Shelby County v. Holder*, 7 *TOURO JOURNAL OF RACE, GENDER, AND ETHNICITY* 1 (2015); 17 *BERKELEY JOURNAL OF AFRICAN AMERICAN LAW & POLICY* 1 (2015).

⁶ "1. THE WHOLE LIFE of those societies in which modern conditions of production prevail presents itself as an immense accumulation of spectacles." GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* 12 (Donald Nicholson-Smith Trans., Zone Books: 1995).

⁷ The struggle for the franchise ought not to distract us, of course, from the struggle for direct democracy. As Sartre wrote:

To vote or not to vote is all the same. To abstain is in effect to confirm the new majority, whatever it may be. Whatever we may do about it, we will have done nothing if we do not fight at the same time – and that means starting today – against the system of indirect democracy which reduces us to powerlessness. We must try, each according to his own resources, to organize the vast anti-hierarchic movement which fights institutions everywhere.

JEAN-PAUL SARTRE, *Elections: A Trap for Fools, in WE HAVE ONLY THIS LIFE TO LIVE: THE SELECTED ESSAYS OF JEAN-PAUL SARTRE 1939-1975*, 491, 501 (Ronald Aronson and Adrian Van Den Hoven eds., NYRB: 2013) (First Published in *Les Temps modernes* 318 (January 1973)) (This translation by Paul Auster and Lydia Davis was first published in *LIFE/SITUATIONS: ESSAYS WRITTEN AND SPOKEN* (New York: Pantheon Books: 1977)).

⁸ "24. BY MEANS OF THE SPECTACLE the ruling order discourses endlessly upon itself in an uninterrupted monologue of self-praise. The spectacle is the self-portrait of power in the age of power's totalitarian rule over the conditions of existence." GUY DEBORD, *THE SOCIETY OF THE SPECTACLE* 19 (Donald Nicholson-Smith, Trans., Zone Books: 1995).

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Death is the end. It is endless. It does not stop. It is in that sense, its endlessness, the endlessness of the undiscovered country, that death seems to be something. It is in that sense, by seeming to be something, that death imitates life. The modern world, the world slavery made, is an imitation of life. The spectacle is the material representation of the imitation of life; it looks like life but it is not.

Everything after the Middle Passage is a lie. There is nothing *after* slavery. Every lie strikes us as a new and brighter day. But there are no more days. Nothing is new. The lies, an endless forest of them, lead right back into the dark, where we have always been, below the decks, chained together in a floating coffin of American wood.

The great William Kunstler once told me that the Rehnquist Court should be thought of as "a pack of jackals running us down the road to an unfree and illiberal society." Kunstler, I thought to myself, did not understand time: Everything was already over. Everything within spectacular time was always already over.

What would Kunstler's spirit say to the Roberts Court in the wake of *Shelby County v. Holder*? "The past returns to haunt the present?" "History repeats itself: the first time as tragedy, the second time as farce?" Would he borrow Neruda's description of fascist "jackals whom other jackals would despise" in order to explain a few things about time and repetition to the Roberts Court?⁹

Life is a composition of choices made in historical time. Repetitions are not choices and spectacular time is not historical time.¹⁰ The repetitions of spectacular time are opposed to life. Spectacular time is the false history that

⁹ PABLO NERUDA, *Explico Algunas cosas / I Explain Some Things*, in THE ESSENTIAL NERUDA: SELECTED POEMS 65 (City Lights Publishers: 2004)

¹⁰ The Situationists are instructive:

157: THE LACK OF GENERAL HISTORICAL LIFE also means that individual life as yet has no history. The pseudo-events that vie for attention in spectacular dramatizations have not been lived by those who are informed about them; and in any case they are soon forgotten due to their increasingly frenetic replacement at every pulsation of the spectacular machinery. Conversely, what is really lived has no relation to the society's official version of irreversible time, and clashes with the pseudocyclical rhythm of that time's consumable by-products. This individual experience of a disconnected everyday life remains without language, without concepts, and without critical access to its own past, which has nowhere been recorded. Uncommunicated, misunderstood and forgotten, it is smothered by the spectacle's false memory of the unmemorable.

GUY DEBORD, THE SOCIETY OF THE SPECTACLE 114 (Donald Nicholson-Smith Trans., Zone Books: 1995).

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supersedes historical time. Repetitions are the motionless movements of the already-dead that take place within and according to the dictates of spectacular time. I was not yet twenty and not yet an attorney when I spoke with Kunstler about the jackals. The end is the beginning. Law returns us to the beginning, white-over-black to white-over-black to white-over-black.

Three assumptions are necessary to Chief Justice Robert's return to white-over-black in *Shelby County v. Holder*.¹¹ First, assume that racial equality, whatever it is, has already been achieved: *We are all one race now, and that race is equal to itself*. Second, assume that colorblindness was and remains the key to the achievement of today's equality: *We are all colorblind now and so there is nothing to see or say about race that matters*. Third, assume that racial discrimination is that which disturbs the racial status quo for a race-related reason: *Racism is not racist; only anti-racism is racist*. These three assumptions of the Roberts Court return us to the past.

The status quo, however much it favors whites over blacks, is racially equal in the eyes of the Roberts Court. The Roberts Court sees the white-over-black status quo as equal justice under law because it assumes that we have largely achieved equality. We are all one race now. We are not one race now because the material stigmata of white-over-black have fallen away. No, nothing has changed. Reality continues to be white-over-black. But according to the spectacle, the fraudulent archive of our false time, we are all supposed to be one race now. It is the supposition that makes it so, not reality.

The spectacle is the system of lies that separates us from the reality of historical time. The jurisprudence of the Roberts Court is part of the spectacle: *We are all one race now, and that race is equal to itself. We are all colorblind now and so there is nothing to see or say about race that matters. Racism is not racist, only anti-racism is racist*. The ground norm of the Roberts Court – *We are all one race now* – is groundless. Unsupported, it supports itself. It is an occult phrase, a magic spell, wish-fulfillment in the form of jurisprudence. In psychoanalytic terms, the ground norm is the navel of the dream, the point beyond which interpretation cannot pass.

Because we are all now supposed to be one race, we are all, equally, in a position to redefine racism as the attempt to face reality, to face the reality of historical time. In reality, white-over-black is the rule, not the exception. Historical time reveals an unbroken line from the slave ships to the present. But according to the spectacle we are all one race and that race is equal to

¹¹ 133 S. Ct. 2612 (2013).

itself. History shows us that racism continues to place us in materially separate and unequal places: white-over-black to white-over-black to white-over-black. History itself is racism in the eyes of the Roberts Court. History, real world history, is racism in the eyes of the Roberts Court because real world history reveals the system of white-over-black. Historical time reveals the fact that we are not all one race today.

Racism, for the Roberts Court, is a matter of *seeing* the white-over-black status quo as white-over-black.¹² Discrimination, for the Roberts Court, is a matter of *doing* something to change the white-over-black status quo. The jurisprudence of the spectacle turns back time. To *do* anything about the white-over-black status quo one must first *see* the status quo for what it is: white-over-black. This is impossible for the colorblind. If there is no race, there can be no racism, at least not in the normal course of events. Indeed, because the normal course of events, the status quo, is white-over-black but *assumed* to be race neutral, anti-racism emerges within the spectacle as racism's only visible form.

Slavery is death, only death, and that continually. The continued harrying of the dead – slavery-to-segregation-to-neosegregation – is a strange feature of the repetitions. One recalls, and perhaps wishes for, Anubis, the jackal-headed protector of graves. Anubis was often depicted with a scale. The jackal-headed protector of graves used his scale to weigh the hearts of the dead. Perhaps the heaviest hearts were allowed to go on, perhaps the lightest. The god's scale suggests that even after all was said and done, there was still something to preserve and still something to say. That thought, the thought that even after all is said and done there yet remains something to preserve and something to say, was the theme of this symposium on *Shelby County v. Holder*.

The Voting Rights Act of 1965 seemed to turn back nearly a century of violent silence.¹³ Blacks had been excluded from democracy in America. We were the objects of democracy, the silence. The United States, half-slave and half-free, exploded into civil war. The slaves, by defecting from the Cotton Kingdom in uncountable numbers, turned the war between two economic systems, both anti-black, into a war against slavery. The slaves general strike destroyed the Confederate war machine. For a moment, chimes of freedom flashing, one might have seen democracy. But the social truce of

¹² The Roberts Court pursues the jurisprudence of the spectacle: "158. THE SPECTACLE, BEING the reigning social organization of a paralyzed history, of a paralyzed memory, of an abandonment of any history found in historical time, is in effect *a false consciousness of time*." GUY DEBORD, THE SOCIETY OF THE SPECTACLE 114 (Donald Nicholson-Smith Trans., Zone Books: 1995).

¹³ Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973aa-6 (1965).

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Reconstruction, 1865-1877, gave way to the treasonous white violence of the Redemption. A wave of mutilation swept blacks away from the polling places of the former Confederacy for nearly a century, from 1877 to 1965. With *Shelby County v. Holder*, the white violence returns.

The end really was in the beginning. As the Court observed in *Dred Scott v. Sandford*, the authors of the Constitution viewed blacks as "beings of an inferior order, and so far inferior that they had no rights which the white man was bound to respect."¹⁴ As Justice Harlan observed in his *Plessy v. Ferguson* dissent, the principles of that constitution were consistent, utterly and completely, with the eternal return to white-over-black: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."¹⁵ Finally, as Justice Bradley, writing for the Court, observed in the *Civil Rights Cases*, the end was in the beginning:

When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.¹⁶

The *Civil Rights Cases* show that "having no rights which the white man was bound to respect" is the same as "liberty and justice for all" once all evidence of historical time is removed:

There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens, yet no one at that time thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.¹⁷

¹⁴ 60 U.S. 393, 408 (1857).

¹⁵ 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

¹⁶ 109 U.S. 3, 26 (1883).

¹⁷ *Id.*

The Court, then as now, now as forever, replaces historical time with spectacular time.

Within the false chronicle of the Court, neither the white-over-black of slavery nor the white-over-black of segregation appear as white-over-black. Indeed, within the false time of the spectacle even white-over-black fails to appear as white-over-black. Within the pseudo-temporality of the spectacle, white-over-black is equality, not racism or discrimination. Why? Because racism and discrimination, having no temporal connection to slavery, per the jurisprudence of the spectacle, cannot be regarded as inconsistent with liberty and justice for all:

Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Thirteenth and Fifteenth Amendments.¹⁸

The Voting Rights Act of 1965, by force of the Fifteenth Amendment, was supposed to free us from discrimination in voting. Section 5 of the Voting Rights Act contains a "preclearance" requirement. States and local governments with a history must obtain "preclearance" from the United States Attorney General or from the United States District Court for the District of Columbia for any changes to their voting laws or practices. Section 4(b) of the Voting Rights Act contains the formula for determining which jurisdictions have a history that subjects them to Section 5's preclearance requirement. *Shelby County v. Holder* was goodbye to all that.¹⁹ The Roberts Court ruled Section 4(b) is unconstitutional because it is "based on 40 year old facts having no logical relationship to the present day." For the Roberts Court, 4(b) represents an impermissible burden on the constitutional principles of federalism and equal sovereignty of the states. The past, per the Roberts Court, is not reason enough to "subject" a state to preclearance. The country "has changed."²⁰

The Roberts Court insists that history did not happen, or it happened somewhere else, no evidence is on offer. There is no connection between *then* and *now* in the jurisprudence of the Roberts Court. *Shelby County v. Holder* separates us from historical time.²¹ There is only now, only the spectacle.

¹⁸ *Id.*

¹⁹ 133 S. Ct. 2612 (2013).

²⁰ *Id.*

²¹ *Id.*

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Shelby County v. Holder thus takes voting rights out of historical time and places it within spectacular time.²² Time to leave.

The Roberts Court's remarkable separation of the historical past from the present, its celebration of the spectacle, was the occasion for a remarkable symposium at Touro Law Center and a remarkable collaboration between two distinguished journals, *the Touro Law Journal of Race, Gender, and Ethnicity* and the *Berkeley Journal of African-American Law & Policy*. The event began when Dean Patricia Salkin, Associate Dean Deborah Waire Post, and Professor Deseriee Kennedy asked me to come to the Touro Law Center to "guest host" a symposium. I accepted their invitation to come to New York City with voting on my mind. Within hours, the three-dozen academics and practitioners I contacted accepted my invitation to participate.

A brilliant live version of the symposium took place at the Touro Law Center on March 20-21, 2014. What you hold before your eyes is the product of brilliant and outraged intellectuals from all over the United States and beyond: I thank all the presenters, essayists, and other participants; Deborah Archer,²³ Sahar Aziz,²⁴ Bridgette Baldwin,²⁵ Fred Brewington, Patricia Broussard,²⁶ Matthew H. Charity,²⁷ Olympia Duhart,²⁸ Pamela Edwards,²⁹ Ifetayo Flannery,³⁰ Sarah Jane Forman,³¹ Phyllis Goldfarb,³² Peter Halewood,³³ J. Corey Harris,³⁴ César Cuauhtémoc García Hernández,³⁵

²² *Id.*

²³ Deborah Archer, *Still Fighting After All These Years: Minority Voting Rights 50 Years After the March on Washington*.

²⁴ Sahar Aziz, *The Blinding Color of Race: Election-Democracy in the Post Shelby County Era*.

²⁵ Bridgette Baldwin, *Backsliding: The United States Supreme Court, Shelby County v. Holder and the Dismantling of the Voting Rights Act of 1965*.

²⁶ Patricia Broussard, *Eviscerating the Voting Rights Act and Moral Authority: Freedom to Discriminate Comes with a Price*.

²⁷ Matthew H. Charity, *Unmistakably Clear: Human Rights, the Right to Representation, and Remedial Voting Rights of People of Color*.

²⁸ Olympia Duhart, *Frederick Douglass on Shelby County*.

²⁹ Pamela Edwards, *One Step Forward, Two Steps Backward: How the Supreme Court's Decision in Shelby County v. Holder Eviscerated the Voting Rights Act and What Civil Rights Advocates Should Do About It*.

³⁰ Ifetayo Flannery, *On the Repeal of the Voting Rights Act and the Breadth of the Long Counter Revolution*.

³¹ Sarah Jane Forman, *Elimination Dance*.

³² Phyllis Goldfarb, *Demography and Democracy*.

³³ Peter Halewood, *Any is Too Much: Shelby County v. Holder and Diminished Citizenship*.

³⁴ J. Corey Alexander Harris, *The Past as Prologue: Shelby County v. Holder and the Risks Ahead*.

³⁵ César Cuauhtémoc García Hernández, *Unseen Exclusions in Voting and Immigration Law*.

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Pantea Javidan,³⁶ Paula Johnson,³⁷ Vik Kanwar,³⁸ David Kow,³⁹ Margaret Kwoka,⁴⁰ Ravi Malhotra,⁴¹ Abra Mason,⁴² Martha McCluskey,⁴³ Randy McLaughlin, Steven Morrison,⁴⁴ Janai Nelson,⁴⁵ Sarah R. Robinson,⁴⁶ Wendy Scott,⁴⁷ Sudha Setty,⁴⁸ Andre Smith,⁴⁹ Janet Steverson,⁵⁰ Christian Sundquist,⁵¹ Ciara Torres-Spelliscy,⁵² Charles Walker,⁵³ and Robert Ward.⁵⁴ They represent all manner of diversities and generations and perspectives.

Facing reality – historical time – is a political commitment, a rejection of the spectacle. The politics of this project is particularly personal for me. The essayists include former students of mine from every one of my former institutions up to the time of the *Shelby County v. Holder* decision: Boston College Law School, the Boston College Graduate Department of Sociology, Golden Gate University School of Law, Northeastern University Law School, City University of New York Law School, Albany Law School, and the Graduate Department of Africana Studies of the State University of New York at Albany.⁵⁵ This personal fact about the symposium may be the best testament to the fact that even when all is said and done, there remains yet

³⁶ Pantea Javidan, *Legal Post-Racialism as an Instrument of Racial Compromise in Shelby County v. Holder*.

³⁷ Paula Johnson, *Voting Rights and Civil Rights Era Cold Cases: Section Five and the Five Cities Project*.

³⁸ Vik Kanwar, *A Fugitive from the Camp of the Conquerors: The Revival of Equal Sovereignty Doctrine in Shelby County v. Holder*.

³⁹ David Kow, *An “Equal Sovereignty” Principle Born in Northwest Austin, Texas, Raised in Shelby County Alabama*.

⁴⁰ Margaret Kwoka, *Setting Congress Up to Fail*.

⁴¹ Ravi Malhotra, *Shelby, Race, and Disability Rights*.

⁴² Abra Mason, *Shelby County v. Holder: A Critical Analysis of the Post-Racial Movement's Relationship to Bystander Denial and its Effect on Perceptions of Ongoing Discrimination in Voting*.

⁴³ Martha McCluskey, *Toward a Fundamental Right to Evade Law? The Rule of Power in Shelby County and State Farm*.

⁴⁴ Steven Morrison, *The Post-Shelby County Game*.

⁴⁵ Janai Nelson, *Arc of Injustice: Pre- and Post-Decision Thoughts on Shelby County v. Holder*.

⁴⁶ Sarah R. Robinson, *The Voting Game*.

⁴⁷ Wendy Scott, *Reflections on Justice Thurgood Marshall and Shelby County v. Holder*.

⁴⁸ Sudha Setty, *Preferential Judicial Activism*.

⁴⁹ Andre Smith, *After NFIB v. Sebelius, When Does the Cost of Voting Become an Illegal Poll Tax?*

⁵⁰ Janet Steverson, *The Path Forward from Shelby County v. Holder*.

⁵¹ Christian Sundquist, *Post Oppression*.

⁵² Ciara Torres-Spelliscy, *Electoral Silver Linings After Shelby, Citizens United, and Bennett*.

⁵³ Charles Walker, *Grandpa*.

⁵⁴ Robert Ward, *The Second Reconstruction is Over*.

⁵⁵ After the symposium, I had the honor of serving as the Lassiter Distinguished Visiting Professor at the University of Kentucky College of Law (fall 2014) and the Andrew Jefferson Visiting Chair in Trial Advocacy at Texas Southern University's Thurgood Marshall School of Law (spring 2015). I hope that future symposia will include students of mine from those two institutions as well.

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more to say and do.⁵⁶ Perhaps this is the lesson of the jackal-headed god, the bearer of the scale, the assessor of hearts, the guardian of tombs, the one depicted in black: there is no end.

The end of this *Foreword* was, truly, in the beginning. Recall the words of James Baldwin:

Brethren, please remember, especially in this speechless time and place, that in the beginning was the Word. We are in ourselves much older than any witness to Carthage or Pompeii and, having been through auction, flood, and fire, to say nothing of the spectacular excavation of our names, are not destined for the rubble.⁵⁷

Voting is the language of representative democracy. "...*please remember, especially in this speechless time and place, that in the beginning was the Word.*"⁵⁸ Language is life. "...*especially in this speechless time and place...*"⁵⁹ Disenfranchisement is violence. "... *please remember...*"⁶⁰ Violence is where language loses its meaning. "...*in the beginning was the Word.*"⁶¹ The Roberts Court's jurisprudence of the spectacle, *Shelby County v. Holder*, is part of the storied violence of democracy in America. "*We are in ourselves much older than any witness to Carthage or Pompeii...*"⁶² We have been violently excluded from American life. "...*having been through auction, flood, and fire, to say nothing of the spectacular excavation of our names...*"⁶³ The violence is fatal. "*We are in ourselves much older than any witness to Carthage or Pompeii and, having been through auction, flood, and fire, to say nothing of the spectacular excavation of our names, are not destined for the rubble.*"⁶⁴ This symposium is an attempt to remember and to be something other than repetition and spectacle.

⁵⁶ Anthony Paul Farley, *The Station*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* (David Dante Troutt ed., The New Press: 2007).

⁵⁷ JAMES BALDWIN, *A Letter to Prisoners*, in *JAMES BALDWIN: THE CROSS OF REDEMPTION: UNCOLLECTED WRITINGS 261, 263* (Randall Kenan ed., Vintage: 2010).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*