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Faculty of Law

History of Precedent: African American Voting Rights in the United States Supreme Court from the Reconstruction Era to *Shelby County v. Holder*

Rights-Thinking: Exploratory Workshop on Current Legal Issues in the U.S.A.
Bachelor's thesis

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Abstract page

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This bachelor's thesis explores the history of African American voting rights in U.S. Supreme Court jurisprudence with particular attention to equal sovereignty of states doctrine. I will analyse how the Court's interpretation of federalism has shaped the protections for Black voting rights. Using case genetics method enables me to track the evolution of African American enfranchisement from the failed promises of racial equality made in the Reconstruction era to the triumph of Civil Rights Movement and finally, to the current legal state. I will closely examine four landmark cases: *Shelby County v. Holder* (2013), *South Carolina v. Katzenbach* (1966), *Giles v. Harris* (1903) and *United States v. Cruikshank* (1876). My findings illustrate the Court's contradictory role in the ongoing struggle for minority voting rights and reveal a persistent tension between state autonomy and individual rights.

Tämä notaarityö analysoi afroamerikkalaisten äänioikeuden historiaa Yhdysvaltojen korkeimman oikeuden oikeuskäytännössä, erityisesti suhteessa osavaltioiden itsemääräämisoikeuden periaatteeseen. Analysoin, kuinka tuomioistuimen tulkinta federalismista on vaikuttanut mustien äänioikeuden suojaan. Seuraan afroamerikkalaisten äänioikeuden tilan kehitystä jälleenrakentamiskauden petetyistä lupauksista kansalaisoikeusliikkeen menestyksen aikaan ja lopulta nykytilaan case genetics -menetelmän avulla. Tarkastelen lähemmin neljää merkittävää oikeustapausta: *Shelby County v. Holder* (2013), *South Carolina v. Katzenbach* (1966), *Giles v. Harris* (1903) ja *United States v. Cruikshank* (1876). Tutkimukseni tulokset valottavat korkeimman oikeuden ristiriitaista roolia taistelussa vähemmistöjen äänioikeuden puolesta ja paljastavat jatkuvan jännitteen, joka kulkee osavaltioiden autonomian ja yksilön oikeuksien välillä.

Key words: U.S. Constitutional Law, *Shelby County v. Holder*, the Voting Rights Act of 1965, voting rights, equal sovereignty of states doctrine

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1 Introduction

The United States is one of the world's oldest democracies and regarded as the leader of the free world. However, American democracy has a dark history of discrimination, much of which is tied to the descendants of former enslaved people. This history resurfaced in 2013 when the Supreme Court (hereafter 'the Court') struck down a key provision that had been critical in securing voting rights for African Americans in *Shelby County v. Holder.*

Siding with the majority in the case, Chief Justice Roberts stated that the legislation in question, the Voting Rights Act (hereafter 'the VRA'), has proven "immensely successful at redressing racial discrimination and integrating the voting process"[1], but he still arrived at the conclusion that the provision had to be overturned. This contradiction sparked an interest in me: why would the Court strike down a piece of legislation that it apparently considered a great success?

I decided to trace the origins of the ruling in *Shelby County* to gain insight of the legal and historical development of voting rights for Black Americans. Following that path led me all the way back to the Reconstruction era after the Civil War. Even though slavery was abolished in the aftermath of the War and African Americans were seemingly accepted as full citizens of the country, they were still mostly unable to exercise their vote for a century after the alleged emancipation. The right to vote for Black Americans was won through a long and difficult struggle and even today the battle for minority voting rights continues.

The Court's precedents and interpretation of the constitution played a major role in this struggle, for better and for worse. As the composition of the Court and public attitudes have shifted over time, so too has the judiciary's approach to Black voting rights. But regardless of the era or the justices involved, nearly all of the Court's cases concerning these rights approach the issue primarily by weighing the balance of power between the federal government and the states. On one hand, it is not surprising, as the division of power between the federal and state levels is one of the central questions in the legal system of the United States. On the other hand, it is striking that states' sovereignty often seems to take precedence over the basic rights of individuals and minorities.

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[1] *Shelby County v. Holder*, p. 15.

In this research paper I will examine how the Court's case law has shaped the ongoing journey to secure voting rights for African Americans: What kind of role has the Court played in either upholding or rejecting to uphold the voting rights of Black Americans? How has the tension between state sovereignty and federal oversight influenced their voting rights in the Court's jurisprudence?

As for the structure of my paper, I will start with a glance at my research materials and the way I have conducted my analysis. After that I will run through the legal history of African American voting rights starting from the Reconstruction era and ending with the recent developments in *Shelby County*. I believe that section to be of utmost importance in obtaining a strong grasp of the subject since law and the Court are not detached from society but function as essential parts of it.

When the foundation is laid, I will move on to analysing four of the Court's cases. Firstly, I will examine the reasoning behind the decision in *Shelby County.* Secondly, I will move on to discuss *South Carolina v. Katzenbach,* followed with the coverage of *Giles v. Harris*. Finally, I will explore the argumentation in *United States v. Cruikshank*.

In the conclusion I will reflect on the previous sections and present the most important results of my analysis. I will also discuss the impacts of *Shelby County* on Black Americans' voting rights and limited reach of federal power. I will also ponder whether my work on voting rights and state sovereignty principle provides insight on what is happening in the United States today.

2 Research Materials and Methods

The principal sources used in this paper are the majority opinions of the aforementioned cases: *Shelby County, Katzenbach, Giles* and *Cruikshank*. I also used concurring and dissenting opinions as sources to gain perspective on alternative legal constructions. As I will be mostly analysing the majority opinions, it is indicated in the text whenever concurring or dissenting opinions are addressed.

Other than the Opinions of the Court, legal articles were essential in deepening my understanding of the subject and providing different viewpoints. Almost all of the articles were found in the HeinOnline database, but I also made use of GoogleScholar. Articles dealing more broadly with the history of Black voting rights were especially important in grasping the overall context and when deciding which cases to analyse. Although there is a myriad of cases concerning voting rights, I believe that the ones I picked illustrate the evolution of African American voting rights very well.

Additionally, the cases reflect the conflict between state and federal power which is another focus in the research paper. It is also useful to note that conservative factions, like southern states and some justices, usually tend to emphasize state sovereignty. Conversely, liberal actors predominantly favour a stronger federal role in preventing rights violations. However, there are obviously exceptions and nuance. In the concluding section I will briefly discuss contemporary issues concerning the research topics, including President Trump's departure from this aforementioned traditional conservative principle.

Especially the equal sovereignty doctrine expressed in *Shelby County* proved to be a matter of intense legal debate as there were a lot of articles either challenging the principle or defending it. In that topic as well as in others, I will include diverse but well-founded views of the Court's decisions. The research method I used in this paper is called case genetics. My aim is to track the development of Black voting rights and state sovereignty principle and the evolving connection between the two. Case genetics method is well suited for this analysis as it enables the examination of legal developments over time.

3 Legal History of African American Voting Rights

3.1 The First Reconstruction

”We hold these truths to be self-evident, that all men are created equal”, is the premise right at the start of the Declaration of Independence of the United States of America, issued on 4th of July 1776. As we know that so-called equality omitted most groups of people: women, indigenous peoples, the poor and, of course, African-American slaves. The transatlantic slave trade to the US began at the beginning of the 17th century and the institution of slavery was still part of the basic fabric of the newly independent country at the turn of the 19th century. Before long, it became one of the central issues dividing the nation, ultimately contributing to the outbreak of the American Civil War (1861–1865) in which the Northern free states defeated the Southern slaveholding states and brought an end to slavery.

After the war, three so-called Reconstruction Amendments were enacted, aiming to permanently end discrimination against the formerly enslaved. The 13th Amendment abolished slavery and the 14th Amendment granted citizenship and equal protection under the law to all people born or naturalized in the United States. Most importantly for this research paper, the 15th Amendment guaranteed the right to vote regardless of “race, colour, or previous condition of servitude”.

Once they had been granted the right to vote, Black people truly chose to use it. After the Civil War, in many former Southern states the voter registration rate among Black citizens exceeded 90 percent, for example in Louisiana in 1867. In the same year in South Carolina, the number of registered Black voters was significantly higher than the corresponding number of white voters.[2] The number of Black voters meant that they were soon holding offices as well: the State House of Representatives of South Carolina became majority Black[3] and both United States senators from Mississippi were African American.[4]

However, the progress made by African-Americans provoked bitter and extremely violent reactions from some Southern white people. Prominent Black figures were assassinated in broad daylight with no one held accountable.[5] White conservative elites, largely organized

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[2] Burton 2018, p. 213.
[3] Burke 2006, p. 863-864.
[4] Burton 2018, p. 215.
[5] Burton 2018, p. 216-217.

through the Democratic Party, and white supremacist groups such as the Ku Klux Klan and the White Knights of the Camellia[6], gradually regained political power by using violence, intimidation, and electoral manipulation to suppress Black voting. Their tactics included ballot fraud, racial gerrymandering, and statutory voting restrictions designed to drastically reduce the Black and poor white electorate.[7] White terror included the 1873 Colfax massacre which I will discuss further in the text in section 7.

To combat the increasing violence and discrimination towards the newly empowered African-Americans, the Congress exercised its legislative power under the new Constitutional Amendments enacting numerous laws, such as the Enforcement Act of 1870, the Ku Klux Klan Act of 1871 and the Civil Rights Act of 1875. Federal officials monitored elections in the South to protect Black voting rights.[8]

Just when it seemed possible to bring Southern violence under control, the Supreme Court intervened.[9] During the 1870s and the early 1880s The Court made several rulings that construed the enforcement sections of the Reconstruction Amendments in a very narrow way, in practice nullifying the protective Acts enacted by the Congress.[10] Among the many cases invalidating the Acts, I chose to examine *United States v. Cruikshank (1876)* since it had arguably the overall biggest impact in dismantling the Reconstruction protections for Blacks.[11]

After the Court refused to secure African Americans' voting rights, white supremacists started to eliminate the rights bit by bit using the aforementioned tactics of intimidation and election control.[12] Yet Black voters proved persistent: in many areas whites had to rely on cheating since Black voters kept showing up even in the midst of full-on discrimination and facing a constant threat of violence. Cheating methods included simply not letting Black voters to register or rendering their cast votes as ”inefficient”.[13]

When white supremacists in southern states gained enough power through the suppression of African Americans, they drafted new state constitutions or amended the old ones. The new

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[6] Burton 2018, p. 217.
[7] Pildes 2000, p. 301; Burke 2006, p. 864.
[8] Burton 2018, p. 218-219; Burke 2006, p. 865.
[9] Burton 2018, p. 219.
[10] Burton 2018, p. 220; Davis et al. 2017, p. 313.
[11] Pope 2014.
[12] Pildes 2000, p. 301.
[13] Burke 2006, p. 869.

constitutions were passed starting with Mississippi in 1890 and ending with Georgia in 1908.[14] Together with other laws these constitutions formed what is better known as the Jim Crow system that disfranchised both Black people and impoverished whites for over half a century.

Black voters sought remedy from courts in vain. State courts refused to overturn clearly false election results in which votes from majority Black precincts were discarded and arbitrary as well as discriminatory election laws were upheld.[15] The Court endorsed a segregation system as well by establishing the ”separate but equal” doctrine in *Plessy v. Ferguson*. The final blow was delivered in 1903 in *Giles* when the Court shut down the door for challenges concerning the new disfranchising constitutions. I will cover the *Giles* case in section 6.

3.2 The Second Reconstruction

The situation regarding African American voting rights and segregation remained similar for the first half of the 20th century although the Court did rule some discriminatory measures as unconstitutional.[16] There were over 11 million Black people living in the South in 1960 with practically no political rights.[17] But things were changing: in 1957 the Congress enacted a Civil Rights Act enabling the United States Attorney General to bring challenges against parties impeding the right to vote based on race. That was a step in the right direction, albeit not a very effective one since case-by-case litigation proved to be slow and inadequate.[18]

The 1960s saw the rise of the Civil Rights Movement, also known as the Second Reconstruction, which advocated also for Black voting rights. In 1965 they organized a peaceful march towards Selma, Alabama which turned into a beating as Alabama state troopers used overtly excessive violence to break up the protest. The televised incident shocked Americans and amassed the political will to enact the Voting Rights Act of 1965 that finally began to implement the 15th Amendment's promise of equal right to vote between races.[19]

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[14] Pildes 2000, p. 301.
[15] Burke 2006, p. 869-871.
[16] The Court forbid the grandfather clause in *Guinn v. United States (1915)* and *Lane v. Wilson (1939)*. White primaries were declared unconstitutional in *Smith v. Allwright (1944)*.
[17] Finkelman 2015, p. 188-189.
[18] Resendez 2014, p. 1.
[19] Herbert 2012, p. 953-954.

The most innovate, effective and controversial section of the VRA was the preclearance requirement framed in Section 5. It compelled some jurisdictions – states, counties and other localities – to submit all legislative efforts concerning voting laws to United States Attorney General or United States District Court for the District of Columbia for confirmation before the laws could be passed. Vitally, Section 4(b) of the Act determined which legislative bodies were covered by Section 5. This was done by examining the level of discrimination in elections held in 1964, 1968 and 1972.[20] At the beginning, six whole states were covered, but subsequently counties and states were added.[21]

The states included in the coverage formula of Section 4(b) that were affected by Section 5 felt that their right to self-determination had been violated. According to them, the VRA passed by the Congress overstepped federal authority and infringed upon states' rights. The states filed lawsuits, but in 1966, the Supreme Court ruled in *Katzenbach* that the Act was constitutional because of the flagrant discrimination practiced in the States.[22]

Preclearance clause of Section 5 was originally intended to last 5 years, which is also one of the reasons why the Court declared it constitutional.[23] The Section was, however, renewed four times in 1970, 1975, 1982 and 2006. The two most recent extensions of the preclearance clause were supposed to last 25 years each.[24] The coverage formula was renewed as well, but it was not updated, which meant that the preclearance requirement continued to apply to the same states; those with the worst records of voting discrimination during the 1964, 1968, and 1972 elections.

But even though the Congress re-enacted the preclearance clause and the coverage formula in 2006, the Court ended up striking down the coverage formula of Section 4(b) in *Shelby County*. This effectively rendered Section 5 useless as well, because with the repeal of Section 4(b), the VRA no longer included a way to define which legislative bodies fell under the scope of the preclearance clause. In the next section, I will examine why the Court chose to rule as it did and the legal principles it invoked in doing so.

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[20] Jordan 2014, p. 975-978.

[21] Covered states at the beginning: Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia. Additionally, counties or other political subdivisions from Arizona, Hawaii, Idaho and North Carolina. *United States Department of Justice.*

[22] Resendez 2014, p. 4-8.

[23] *Shelby County v. Holder*, p. 4-5.

[24] *Id,* p. 5-6.

4 *Shelby County v. Holder (2013)*

4.1 Striking Down the Coverage Formula

Shelby County is a local jurisdiction in Alabama that had been subject to the Section 5 preclearance clause of the VRA since its enactment in 1965 as the provision applied to lower-level jurisdictions as well. In 2010 Shelby County started proceedings against the Attorney General of United States, Eric Holder. The county sought a judgement declaring that both the preclearance clause and the coverage formula were unconstitutional. Before Shelby County in 2009, another case, *Northwest Austin Municipal Utility District v. Holder*, already hinted at the Court's scepticism toward Sections 4(b) and 5 of the VRA. In *Northwest Austin* the Court noted that ”things have changed in the South. Voter turnout and registration rates now approach parity.”[25] Later in the majority opinion the Court emphasized that “past success alone, however, is not adequate justification to retain the preclearance requirements.”[26] In the end, the Court avoided the question of the constitutionality of Sections 4(b) and 5 of VRA, but issued a warning to the Congress to revise the Sections or risk losing them.[27]

The Congress did not use the opportunity. Four years later the Court's ruling in *Shelby County* struck down the section 4(b) of the Voting Rights Act as unconstitutional claiming that the Congress's ”failure to act leaves us today with no choice”.[28] The Justices' votes split 5–4, with conservative-leaning majority of justices voting for overruling the provision and the liberal minority defending the statute in vain. In his concurring opinion Justice Thomas states that he would have struck down the preclearance clause of section 5 as well.[29]

The majority bases its argumentation on the fact that Black participation in voting and holding offices has improved hugely after the enactment of the VRA, especially in the states covered by the preclearance clause. Hence why Chief Justice Roberts praised the Act of its efficacy. A table depicting Black voter registration rates compared to whites is presented in the opinion to support this argument.[30] Roberts also notes that ”voting discrimination still exist; no one doubts that”[31], but still concludes that in re-enacting the preclearance clause and coverage

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[25] *Northwest Austin Municipal Utility District v. Holder*, p. 202.
[26] *Ibid*.
[27] *Id*, p. 224-225.
[28] *Shelby County v. Holder*, p. 24.
[29] *Id*, concurring opinion, p. 1-3.
[30] *Shelby County v. Holder*, p. 15.
[31] *Id,* p. 2.

formula, the Congress overstepped its constitutional limits. Already in *Northwest Austin*, which is cited a lot by Roberts, the Court stated that ”current burdens must be justified by current needs”.[32]

Another case which is often cited in the opinion is *Katzenbach* (1966) where the Court held that the Act and its provisions were constitutional as they addressed ”voting discrimination where it persists on a pervasive scale”.[33] As the ”widespread” and ”rampant” disfranchisement of African Americans does not exist anymore, the Court declares that there is no constitutional support for continuing to breach states’ autonomy. In *Northwest Austin* Justice Thomas goes as far as to call the overturning of the sections in question a sign of ”victory”.[34]

The majority’s defence of its decision centres on the idea that the Voting Rights Act’s coverage formula unfairly singled out *Shelby County*, comparing it to a driver stopped simply for being a redhead and only after that cited for lacking a license. In the Court’s view, this illustrates an arbitrary classification.[35] But Hasen argues that comparison to be misleading. Shelby County is located in a state with a recent and documented history of racial discrimination in voting. A more accurate analogy would be to drivers previously convicted of drunk driving who are subject to closer monitoring. Even if those convictions are old, heightened scrutiny is not arbitrary but it is based on a record of past violations. Similarly, applying greater federal oversight to jurisdictions with proven histories of voting discrimination is not unfair targeting of southern states.[36]

Conversely, Consovoy and McCarthy point out the novelty and exceptionality of Section 4(b) in that it severely limits states’ powers compared to other legislation passed by the Congress. For instance, the Disabilities Act forces state courts to grant access to the handicapped, but states do not have to ”preclear” the architectural plans on the federal level before they are allowed to build a new courthouse. They also observe that Department of Justice, a branch of federal government tasked with preclearing election legislation of the states covered by the Act, failed to preclear certain voter identification laws in Texas and South Carolina (both covered jurisdictions) although an uncovered state – Indiana – passed equivalent laws. A

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[32] *Northwest Austin Municipal Utility District v. Holder,* p. 193.
[33] *Shelby County v. Holder*, p. 4, citing *South Carolina v. Katzenbach* p. 308.
[34] *Northwest Austin Municipal Utility District v. Holder*, concurring opinion, p. 226.
[35] *Shelby County v. Holder*, p. 21-22.
[36] Hasen 2014, p. 734.

Florida statute reducing early voting from 14 to 8 days was also initially blocked even though numerous states do not offer any possibility for early voting.[37]

4.2 Creating the Equal Sovereignty Doctrine

The Court's construction relies heavily on the principle of equal sovereignty between States. In *Northwest Austin,* the Court took a deliberate stance and declared that the sections 4 and 5 of the VRA impose ”substantial federalism costs” and differentiate ”between the States, despite our historic tradition that all the States enjoy equal sovereignty”.[38] This principle raised constitutional concerns and questions in the dissenting justices and in others. The majority appears to expand the Tenth Amendment by asserting that states retain broad autonomy except where powers are ”specifically” granted to the federal government. By emphasizing the word “specifically”, the Court effectively narrows congressional authority to tightly enumerated powers despite even the Framers' rejection of this interpretation of the Constitution. Even if one would agree on a narrow view of federal government's powers, the 15th Fifteenth Amendment clearly renders legislation preventing racial discrimination in voting, such as Section 5 of the VRA, at the heart of its power of enforcement.[39]

Critics of the principle also argue that the majority's reasoning is historically thin. Although Chief Justice Roberts faults Congress for relying on outdated conditions when it re-enacted the coverage formula of section 4(b) in 2006, the opinion gives little attention to how the Civil War Amendments reshaped the balance between federal and state level, like I mentioned in the previous paragraph. Instead, the Court relies heavily on a principle of equal sovereignty of states, requiring Congress to treat states alike absent strong justification. Yet the Constitution contains no clear basis for such a rule and the Reconstruction Amendments reflect that former Confederate states bore distinct obligations to protect voting rights. As former Tenth Circuit judge Michael McConnell noted, the equal sovereignty principle is ”made up”.[40]

Some scholars would, however, argue otherwise. Colby claims that the doctrine is not inherently hostile to civil rights legislation but instead operates as a structural rule requiring Congress to justify differential treatment among states. According to him the principle is

[37] Consovoy et al. 2012-2013, p. 31-41.
[38] *Shelby County v. Holder*, p. 6.
[39] Hasen 2014, p. 731-733.
[40] *Ibid*.

neutral: it can limit laws that burden some states more heavily, regardless of whether those laws expand or restrict individual rights. From this perspective, the Court in *Shelby County* is justified in demanding that federal statutes treating states unequally must be grounded in current and sufficient evidence, even when congressional enforcement of the 15th Amendment is considered.[41]

On the other hand, Schmitt holds that this outcome was not inevitable despite the usage of equal sovereignty principle. Congress had compiled substantial evidence of ongoing discrimination, and the Court could have deferred more heavily to that record. Ultimately, he points out that the decision reflects a shift in constitutional doctrine that constrains Congress's enforcement power under the Reconstruction Amendments and places greater weight on state equality among the states.[42]

One way to approach the dilemma between state sovereignty, federal control and protection of minorities' rights is conceptualized in an article by Davis, Francois and Starger. They state that there are two opposite narratives that explain what actually happened in the legislative reformation during the Reconstruction era: a Confederate narrative and a People's narrative. The former stresses that the legal changes were limited to the abolishment of slavery and states' rights remained untouched. It emphasizes states' right to govern themselves over the national protection of equal rights. The latter underlines that the legal reform altered the country's foundations and not only abolished slavery, but also gave the federal government the power to defend individuals' rights even if states' sovereignty was breached.[43]

The decision in *Shelby County* is to be placed among the pile of cases downplaying the Reconstruction Amendments and highlighting the Confederate narrative of narrow federal powers. As we move on to first to *Katzenbach* and then to the two other cases, these narratives are important to keep in mind to see which one has prevailed in the past.

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[41] Colby 2016, p. 1112-1117, 1165-1170.
[42] Schmitt 2016, p. 209-262.
[43] Davis et al. 2017, p. 302-303.

5 South Carolina v. Katzenbach (1966)

As I explained in the history section, the Congress's enactment of the VRA was the beginning of the end for the southern disfranchisement of African Americans. It was therefore no surprise when white southern state governments started challenging the VRA in courts, referencing particularly to the 10th Amendment which reserves the federal government only the powers delegated to it by the Constitution. Rest of the powers belong to the states themselves, or to the people. The Reconstruction Amendments widened the federal reach in theory, but the Court was not ready for a true expansion of the federal powers after the Civil War, as we will see in the next sections. So, in the hope of preserving Black voter suppression, white southerners placed their trust once again on the Court.

South Carolina's challenge to certain sections of the VRA reached the Supreme Court a year after the Congress had enacted it. In their brief to the Court the VRA was described as "unjustified", "arbitrary" and against the principle of "Equality of Statehood".[44] The Attorney General of Mississippi argued in a similar way a couple of years later in 1969 stating that "this is not right, no matter the cause, it is not right."[45] The Court invited all states to take part in the proceedings. Five other southern states sided with South Carolina, but most of the rest of the states, 21 in total, supported Attorney General Nicholas Katzenbach.[46]

The Court ended up holding Section 5 and other provisions of the VRA as constitutional with a clear majority of eight to one. The opinion written by Chief Justice Earl Warren makes a remarkable shift in doctrine as it expands the interpretation of the 15th Amendment from its former, strict construction to a broader one where the federal government has actual authority to enforce the Amendment's provisions: the realization of equal voting rights regardless of race. Much of the Court's opinion focuses on displaying the flagrant disfranchisement system that is planned to keep African Americans from voting. The ruling is nevertheless groundbreaking as it finally acknowledges Blacks as a part of the citizenry and electorate nearly 100 years after the enactment of the Reconstruction Amendments which had been until this point mere useless words on paper.[47]

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[44] Katz 2013, p. 55.
[45] Fuentes-Rohwer et al. 2006, p. 828-829.
[46] *South Carolina v. Katzenbach*, p. 307-308.
[47] *Id*, p. 325-326.

The lone dissenter in the case, Justice Hugo Black, echoed the objections made by the covered states by stating that they have become ”little more than conquered province[s]”.[48] These echoes did not stop at *Katzenbach*.[49] On the contrary, they were repeated numerous times, especially after each renewal of the preclearance clause.[50] But it was only under Chief Justice Roberts' Court that these arguments prevailed.

The Court in *Shelby County* cited *Katzenbach* plenty of times relating to "exceptional conditions" that can justify the Congress to take far-reaching action.[51] Chief Justice Warren indeed stressed the discriminatory conditions in the states covered by the preclearance clause that render the federal government's acts appropriate.[52] However, the Court in *Katzenbach* also emphasized the Congress's ability to enact laws to enforce voting rights according to the 15th Amendment, which is definitely not mentioned in *Shelby County.*

Additionally, the Court created a rational basis test implying that Congress had to use rational means when using the powers reserved to it in the Constitution. The Court held Section 5 of the VRA rational both in theory and in practice, so it was constitutional.[53] This same test was applied in the subsequent challenges to the section as well.[54] Only in *Boerne v. Flores* in 1997 the Court converted back towards stricter federalism by formulating another adjacent test usually referred to as congruence and proportionality test which narrowed the scope of federal legislative reach.[55] It is notable that neither one of these tests was cited in *Shelby County* making the legal condition vague and uncertain.[56]

By examining and comparing the cases *Katzenbach* and *Shelby County,* it becomes clear how much the composition of the Court steers its judicial course. The Warren Court embraced the People's narrative that was discussed in the previous section: that the Civil War and its impacts changed the country's foundations through the Reconstruction Amendments and seeing them as empowering the federal government to protect African Americans' equal rights even at the cost of some state sovereignty. The Roberts Court seems to have adopted a

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[48] *Id*, dissenting opinion, p. 360.
[49] Hebert 2012, p. 957-958.
[50] For the renewals in 1970, 1975 and 1982, respectively: *Georgia v. United States, City of Rome v. United States* and *Lopez v. Monterey County.*
[51] *South Carolina v. Katzenbach*, p. 334.
[52] *Id*, p. 336.
[53] *Id*, p. 324 and 331.
[54] Hebert 2012, p. 959.
[55] *Id*, p. 960.
[56] Hasen 2014, p. 727-729.

view closer to the Confederate narrative where slavery was ended after the Civil War, but states' rights remained untouched.[57] Next, I will analyse a case decided by the Fuller Court, and we can again observe which narrative the Court leans toward.

[57] Davis et al. 2017, p. 302-303.

6 Giles v. Harris (1903)

In 1901, Alabama passed a new constitution that entailed "the most elaborate suffrage requirements that have ever been in force in the United States".[58] The constitution created a voter registration system that divided the people of the State into two: The first group consisted almost entirely of white people who had to register only once through a simple system to gain lifelong right to vote. The second group consisted mainly of African Americans added with some of the poorest white persons. Before every single election, they had to pass a much harder system that involved among others "literacy, employment and property tests".[59] The aim of the new constitution was clearly to get as close to a wholly white electorate as possible while eliminating impoverished whites as well. The scheme proved very successful: after the new constitution was enacted, the number of registered Black voters dropped from over 180 000 to about 3000.[60]

Jackson Giles was a literate Black man living in Montgomery, Alabama at the time. He worked as a janitor in a federal courthouse and was the president of the Colored Men's Suffrage Association. He had been a registered voter in Alabama since 1871. With the support of patrons[61] Giles brought a test case, on behalf of himself and 5000 other Black men from his county to a federal court arguing that the suffrage provisions of the State Constitution violate the 14th and 15th Amendments of the United States Constitution in preventing them from voting in the 1902 election.[62] In the end, the case ended up in the Supreme Court.

Previously in *Mills v. Green* (1895), the Court had used mootness as grounds to dismiss a case in which a Black plaintiff challenged an election law preventing him from exercising his vote in a past election. When the Court decided the case, the election was over and as the Court cannot grant the right to vote in an election that has already taken place, the case was rendered "moot" and dismissed.

The situation in *Giles* was similar compared to *Mills*, however, this time the Court refused to dismiss the case on the grounds of mootness[63] and instead ruled against Giles and his fellow Black men with a six to three majority. The author of the majority opinion, Justice Oliver

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[58] Pildes 2000, p. 302.
[59] Brenner 2009, p. 859.
[60] Pildes 2000, p. 303-304.
[61] *Id*, p. 304-306.
[62] *Giles v. Harris*, p. 475.
[63] *Id*, p. 484.

Wendell Holmes, cited two reasons why Giles's claim could not be accepted: Firstly, pursuant to Holmes even if the Court agreed that parts of Alabama's constitution were unconstitutional, it could not order Giles and the other Black men to be registered as doing so would make the Court a party in an "unlawful scheme" by adding their names to the allegedly illegal voter rolls. Secondly, Holmes simply argues that if the Court were to decide the case for Giles, its influence would not reach so far as to efficiently enforce that ruling.[64]

Pildes calls the first point presented by Holmes as "the most legally disingenuous analysis in the pages of the U.S. Reports" and I think that it is hard to disagree.[65] According to the majority opinion, Giles could not have challenged the lawfulness of the election section of the State Constitution on purely theoretical grounds. But when Giles made a concrete claim to add himself and the other Black men to the voting list that too is declared impossible by the Court. Apparently, even if the Court would have ruled for Giles, it could not have put anyone's name on an illegal list as that would make the Court a party in an "unlawful scheme".[66] So, there was no way for Giles to win the case either way.

I find the second argument even more appalling. By stating that the Court barely had any actual power to control the actions of the States and individuals and thus could not enforce political rights, Holmes himself arguably diminished the Court's authority. It is also unclear why the wrongs committed by Alabama State were approached as a political matter rather than a constitutional one despite the presence of the 15th Amendment in the Constitution. Additionally, the Court shifted the responsibility to handle political rights violations to the Congress. [67] Correspondingly, the following year the Congress claimed that merely the Courts were able to resolve such issues, which left African Americans with no support to exercise their vote, especially in the South where it would have been the most needed.[68]

Interestingly, when explaining why the Court would not be able to enforce political rights, Justice Holmes notes that "the great mass of the white people intends to keep the Blacks from voting" and "a name on a piece of paper will not defeat them".[69] In implying that the whole

[64] *Id,* p. 486-488.
[65] Pildes 2000, p. 306.
[66] *Giles v. Harris*, p. 486-487.
[67] *Id*, p. 487-488.
[68] Pildes 2000, p. 310.
[69] *Giles v. Harris*, p. 488.

white population in Alabama, or anywhere else in the country for that matter, was united to deny the right to vote from Blacks, Holmes was flat out wrong.

Establishing white supremacy in Alabama was a slow process spanning over decades.[70] In fact, since its admission to the United States in 1819, Alabama had “the most liberal suffrage rules in the nation”.[71] The Alabama State Constitution that disfranchised African Americans was accepted with only 57% of the vote and it is clear that election fraud was used to win the majority.[72] Not only in Alabama, but also in North Carolina, Mississippi and Virginia, the disfranchisement movement faced a fierce backlash before finally succeeding.[73] In Maryland, for instance, attempts to disfranchise resulted in a failure.[74]

So, contrary to Holmes’s views, white people did not stand unified against Black in this matter although there certainly were people who were eager to ban Blacks from voting. The Democratic Party elite was behind the disfranchisement plans aiming for both white supremacy and securing the political control of the South. But even Democrats did not expect the Court to approve of their efforts so plainly. It seems that by presuming that there was a white supremacy regime, Holmes actually ensured that it was established.[75]

Giles was one of many court cases in which the Court accepted the exclusion and subordination of Black people from society’s power structures. The court remained loyal to the Confederate narrative that the Reconstruction Amendments did not grant the federal government the authority to prevent racial discrimination in practice. In this case, I believe we see particularly clearly how the court acted as if it had no other options. I agree with Pildes that, in hindsight, history often appears inevitable, but even in this case the Court could have chosen differently and stood against the southern states’ overt efforts to establish white supremacy.[76]

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[70] Pildes 2000, p. 301.
[71] *Id*, p. 303.
[72] *Id,* p. 316.
[73] North Carolina: Pildes 2000, p. 313-315; Mississippi and Virginia: Pildes 2002, p. 657-659.
[74] Pildes 2000, p. 313.
[75] *Id,* p. 316.
[76] Pildes 2002, p. 645-646 and 659-660.

7 *United States v. Cruikshank (1876)*

In 1872 in the small town of Colfax, located in a majority-Black state election district in Louisiana[77], a dispute over contested local offices turned violent when white Democrats refused to yield the courthouse to newly elected Republicans. Eventually, a small group of Republicans seized the courthouse and over the next two weeks about 300 African Americans, including women and children, took shelter inside, holding the building. Outside, a force of mostly former Confederate soldiers gathered to attack what they called a riot. On Easter Sunday, after a brief warning, the white Democrats opened fire with cannons, overran the defenders, set the courthouse ablaze and shot many as they were trying to flee to a nearby forest. The surviving Republicans were taken prisoner, but nearly all were executed under the leadership of William Cruikshank. In total more than 150 African-Americans and three white Republican men were killed.[78]

The *Cruikshank* case ended up in a federal court where Supreme Court Justice Joseph Bradley joined Circuit Judge William B. Woods in hearing the case. While Judge Woods would have convicted the accused, Justice Bradley ended up ruling in favour of acquitting Cruikshank and his fellows on the basis of federal legislate overreach.[79] So, in 1876 the case ended up in the Court that issued a unanimous ruling in line with Justice Bradley's decision. [80] The opinion contained barely any reference at all to what actually happened in Colfax, as if attempting to push it into the background. Instead, Chief Justice Morrison Waite as the author wrote at length about state autonomy and limits of federal power.

The Court's decision did not overturn the Enforcement Act of 1870 which was one of the most important laws upholding the Reconstruction Amendments as it enabled the prosecution of white supremacists who used violence to suppress Black participation in politics and society as a whole. However, the charges against Cruikshank were declared insufficient, which in itself made the Act powerless to protect African-Americans from white violence.[81] If the most brutal incident of the Reconstruction era was not enough to trigger the legal protections created to defend African Americans, then nothing is.

[77]Pope 2014, p. 387
[78] Burton 2018, p. 225-226.
[79] Burton 2018, p. 227; Pope 2014, p. 407.
[80] *United States v. Cruikshank*.
[81] *Id*, p. 569.

What was the Court's reasoning behind the decision? In a previous group of cases, *Slaughter-House Cases* (1872), the Court had issued that the 14th Amendment, and by extension the Enforcement Act, protected few national rights, one of them being the right to peacefully assemble.[82] In Cruikshank, however, the Court stated that "the right of the people peaceably to assemble for lawful purposes […] existed long before the adaptation of the Constitution"[83] and thus, the protection of peaceful assembly falls upon the states, not the federal government. The Congress' power to protect African-Americans reached solely to assemblies "connected with the powers or duties of the national government".[84]

In the events unfolding in *Cruikshank*, also known as the Colfax massacre, it was a question about state elections. So, the Court decided that purely racial or discriminatory motives would not be enough for indictment, but the prosecution should have had to demonstrate that the accused were somehow attempting to obstruct the exercise of a right specifically related to the national level.[85]

Furthermore, the Court remarks that the burden to protect the lives and liberty of citizens as "natural rights of man" belongs strictly to the State as well as they precede the Constitution. The 14th Amendment does entail the *due process clause* prohibiting a State "from depriving any person of life, liberty, or property, without due process of law", but as stated this guarantee applies only to protect citizens from State discrimination. In *Cruikshank* there are two parties of private people, which excludes the possibility of any federal interference pursuant to the Court.[86]

The most ignorant and outrageous justification made by the Court, even from the most objective perspective, goes like this: "there is no allegation that this was done because of the race or color of the persons conspired against" and that the incident was nothing more than just a bunch of people trying to hinder other people from "enjoying the equal protection of the laws". According to the Court, the State is responsible for enforcing the equal protection of citizens and the 14th Amendment protects citizens only from the aggressions of the States, not private people.

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[82] Burton 2018, p. 228.
[83] *United States v. Cruikshank*, p. 548.
[84] *Id*, p. 548.
[85] Burton 2018, p. 228.
[86] *United States v. Cruikshank*, p. 553-554.

Additionally, the Court examines the Enforcement Act and the criteria it uses to ward off crimes against African-Americans, declaring it "too vague and general" and effectively dismantling the Act that was one of the most prominent defences for Black people against white supremacists.[87] Justice Nathan Clifford delivered a dissenting opinion as he thought that the whole 14th Amendment was too imprecise, but ended up to the same conclusion as the rest of the justices.[88]

In his dissent in *the Civil Rights Cases*, Justice Harlan ironically noted that the Court's ruling in the 1842 case *Prigg v. Pennsylvania* granted and even mandated the federal government to uphold slaveholders' claims to human beings as property according to the Constitution and the Fugitive Slave Acts of 1793 and 1850.[89] Pursuant to the decision, slaveholders were entitled to federal protection when they were to collect their fugitive slaves that had run to a free state. Harlan summarised the Court's interpretation of federal powers in *Prigg* as follows: "a clause of the Constitution conferring a right should not be so construed as to make it shadowy, or unsubstantial, or leave the citizen without a remedial power adequate for its protection".[90] In short, the Court found that federal powers were substantive enough to protect slaveholders, but subsequently Blacks were denied of that protection.

As is mentioned in the history section, the Congress enacted many laws to enforce the Reconstruction Amendments. The *Cruikshank* case was merely one of many similar cases that brought down those laws that were designed to protect African Americans. Other cases include among others the *Slaughterhouse Cases, United States v. Reese* and the aforementioned *Civil Rights Cases*.[91] I ended up choosing to analyse *Cruikshank* since I find it the most striking. Well over a hundred people were murdered and the Court chose deliberately to protect the perpetrators, which effectively ended federal enforcement of civil rights in everyday life.[92]

Conclusively, the Court rules for a strict and very narrow interpretation of federal government's right to protect its citizens. By refusing to reiterate the facts of the case, disregarding the racial nature of the deeds and blurring the meaning behind the

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[87] *Id*, p. 557-559.
[88] *Id*, dissenting opinion, p. 559-569.
[89] Davis et al. 2017, p. 322-323.
[90] *The Civil Rights Cases*, dissenting opinion p. 28.
[91] Burton 2018, p. 221-237.
[92] Pope 2014, p. 446-447.

Reconstruction Amendments and the legislation enforcing them, the Court turns its back on Black citizens of the country. Chief Justice Waite summarizes the Court's stance fittingly: "the government of the United States […] can neither grant nor secure to its citizens rights or privileges which are not expressly or by implication placed under its jurisdiction".[93] Among the other cases rendering the Reconstruction Amendments and their enforcement Acts powerless, *Cruikshank* was essential in creating of the Confederate narrative which I have discussed in the earlier sections.

The consequences following the *Cruikshank* ruling were immediate. White supremacy groups in Colfax and elsewhere in the South saw that their opportunity had come. Any violence committed by private persons in a situation without a direct connection to the federal government would virtually have no consequences. The Court's ruling was like a green light for paramilitarism.

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[93] *United States v. Cruikshank,* p. 542.

8 Conclusion

At this point of the research paper, it has become evident that *Shelby County* is a part of a long legal continuum and struggle where partially overlapping and partially disconnected interests and narratives clash. The dilemma concerns nothing less than the foundational structure of the United States. That structure was originally forged during a time when slavery was accepted and discrimination was commonplace. After 250 years and a Civil War, the structure still remains at the heart of the legal debate. For me it seems like a knot that simply refuses to be opened, but I will still summarize the Court's jurisprudence regarding Black voting rights and equal state sovereignty.

Federalism is one of the leading legal principles embedded deeply into the Constitution and the soul of the country that is United States. The limitation of central government power has its roots in the time before independence when the then-colonies resisted what they saw as unfair actions by the distant British government across the sea. This spirit of resistance and aspiration for independence was combined from the start with the right to own human beings.[94] The right to uphold inequality was lost in the Civil War, yet the principle of federalism still seems to carry an underlying notion that it justifies inequality – which is the core of the Confederate narrative that the Court has firmly upheld over the years, with some exceptions of course.

Having examined the Court's case law, I can conclude that the Court tends to avoid direct arguments about Black rights and instead pushes them into the background by focusing on questions of power division between the federal government and the states. Nevertheless, one could reasonably argue that this should lead to the reinforcement of rights through the Reconstruction Amendments, but I believe it is important to recognize that the entire discussion is being derailed from the outset. [95] Although the Court played an essential role in enfranchising Blacks and dismantling the Jim Crow system in the 1950s and -60s, it should be taken into account that the Court was also perhaps the most significant single enabler and supporter of that regime.

Today the Roberts Court is walking in the footsteps of its predecessors from the time after the Civil War when it is refusing to recognise the Reconstruction Amendments and choosing to

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[94] Davis et al. 2017, p. 303 and 305.
[95] *Id*, p. 305 and 322.

restrain federal reach. But things are undeniably different nowadays: the blatantly discriminatory system is gone even if some work still needs to be done. Black participation, as well as the participation of other minorities, is higher than ever as is noted numerous times in *Shelby County*. "Our country has changed", observed Chief Justice Roberts. [96]

Nonetheless, hard-won gains can also be lost. Straight after the Court's decision in *Shelby County*, Texas passed voter ID laws to reduce minority voter participation.[97] Since 2013 the Court has further diminished its power to forbid pro-partisanship election laws and policies, such as partisan and racial gerrymandering.[98] And let us not get started about Donald Trump's impact on undermining the legitimacy of elections. Curiously, Trump recently suggested that Republican state officials should strive to nationalize elections in certain states considered as Democratic or swing states.[99] This approach, seizing the control of elections from states to the government, is contrary to the traditional conservative view of state sovereignty.

All in all, what was the role of *Shelby County* in this development? In my opinion its symbolic impact might have been even bigger than its actual legal implications. The decision sent the message that the Court does not hesitate to dismantle federal oversight of minority rights, even in this case involving "the most successful piece of civil rights legislation ever enacted".[100] The divided Congress did not succeed in creating another coverage formula for the preclearance clause of VRA and its ability to enact new legislation to protect Blacks and other minorities appears to be paralysed in this era of polarisation. But best believe that the Court will be there to reassert the principle of equal state sovereignty and the limited reach of federal power if the Congress ever regains its footing.

[96] *Shelby County v. Holder*, p. 24.
[97] Resendez 2014, p. 17.
[98] For example, *Rucho v. Common Cause* and Hasen 2020.
[99] Chidi 2026.
[100] Garrow 1990, p. 393.