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Equality for all Americans?

The Supreme Court Justices Insertions Concerning Race

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Abstract

The Supreme Court declared §4(b) of the Voting Right Act (1965) unconstitutional in the case of Shelby County v Holder 570 U.S. in 2013. This is a recent decision regarding disenfranchisement towards African Americans which ends up not protecting the civil rights of all American citizens. Discrimination is nothing new in the United States but has become institutionalized over time which makes it harder to detect and prevent. The aim of this essay is to explore and present the current notion of voting discrimination against African Americans. This is done with the help of Critical Race Theory through a qualitative discourse analysis of the official insertions of two Supreme Court Justices and the Opinion of the Court. The analysis has displayed that White privilege is embedded in the structures and manifested by the insistence of claiming neutrality to the law and colorblindness. Consequently, the Shelby County v. Holder enhanced the negative discourse surrounding voting discrimination against African Americans by proclaim equal state sovereignty superior instead of disenfranchisement.

Key words: Discrimination, Constitutionality, Disenfranchisement, Equal, African American
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Table of contents

1 Introduction 1

1.1 Aim and Significance 2

1.2 Delimitations 2

1.3 The Voting Right Act 3

1.4 Brief History 3

1.5 Outline of the Study 5

2 Methodology 6

2.1 Discourse Analysis 7

2.2 Critical Discourse Analysis 8

3 Literature Review 9

3.1 Material Analysis 10

4 Theoretical Framework 11

4.1 Definitions 12

4.2 Critical Race Theory 12

4.2.1 The 5 tenets of Critical Race Theory 13

4.2.2 Nullification and Normalizations 14

4.3 Conclusion 15

5 The Supreme Court Justices insertions 16

5.1 Setting Precedent 17

5.1.1 Concerning Race 18

5.1.2 The Voting Right Act 19

5.1.3 Section 4 & Section 5 of the Voting Rights Act 19

5.2 The Opinion of the Court regarding Shelby County v. Holder 20

5.3 Justice Thomas Concurring 21

5.4 Justice Ginsburg Dissenting 22

6 Conclusion and Discussion 24

6.1 Further Research 25

7 References 26

7.1 Primary Sources 26

7.2 Secondary Sources 26

1 Introduction

The United States of America is looked upon as one of the most powerful states in the world and with the oldest standing Constitution dating back to 1776, America is perceived as a stable and great democracy (Wasserman, 2015:39). It is stated in The Declaration of Independence; "*that all Men are created equal"* a statement that stands out like a beacon. However, these words have still not been entirely fulfilled.

> "The greatest threat to the American experiment in democracy: its determination to preserve White supremacy and White privilege, even while proclaiming that the United States provides equal opportunity and access to all. Taking on this foe remains the task that the foot soldiers of freedom must continue to take on."
> (Samuels, 2015:202).

The cornerstone of democratic governance and a fundamental element of citizenship in democratic societies is equal voting rights, an issue that the United States has been struggling with since the beginning. Civil rights including voting equality independently of race became prescribed by law in The United States when the 15th Amendment of the Constitution was ratified in 1870. Even if voting discrimination has been prohibited in 147 years the question of disenfranchisement is still present (Shelby County v. Holder, 570 U.S. __
2013:24). Some states invented strategies around this, and it wasn't until 1965 when President Johnson signed the prominent Voting Right Act (VRA) in to law that at last African Americans got enfranchised nationwide (Justice.gov, 2016). Something that provoked dissatisfaction among multiple states, especially Section 4 and 5 in the VRA has been disputed and challenged in court as unconstitutional (Shelby County v. Holder, 570 U.S. __ 2013:6). This law is described as of extraordinary measures because it challenges the states sovereignty (Blacksher & Guinier, 2014).

The reading of the Constitution which is the Supreme Courts obligation keeps the interpretation of the text established in present time (Wasserman, 2015:136). This makes the decisions and judicial debates surrounding the Supreme Court important to the existing discourse within the American society. A very consequential case the Court ruled connected to the VRA and the 15th Amendment was Shelby County, Alabama v. Holder, Attorney General in 2013, where the latest development of voting equality can be recognized. The Supreme Court declared then §4(b) of the VRA unconstitutional which changed the Department of Justices responsibility to overlooking disenfranchisement in political subdivisions with an history of voting discrimination (Shelby county v. Holder, 570 U.S. __ 2013:24). In the Opinion of the Court delivered with the ruling it is stated that voting discrimination still exists and the success of the VRA is recognized, but nonetheless the judgment focused on the substantial federal cost and threat to equal state

sovereignty. It can be argued that this supplements the already normalized racism in the country.

In this thesis, I will examine the issue of voting discrimination of African Americans in current time and reflect over the present inequality that exists in this great democracy. Further in this chapter you will find the research question, outline of the study and a brief description of the history leading up to my question.

1.1 Aim and Significance

Many studies have previously been done concerning racism and inequality in the United States. Even so segregation and bigotry towards African Americans is still a common constituent within the American society but more implicit compared to history. Historical records of the discrimination of this group through voting rights has been suppressed and has therefore not been rectified but just changed shape (Shelby County v. Holder, 570 U.S. __ 2013:21). The aim is therefore to feature and manifest the aspects of discriminations so it can be critiqued. This issue is highly abiding in history and still in current time, this paper will therefore focus on the recent development of this negative discourse, emphasizing the existing structural issues. The significance of the study lies in elevating critique of the manifested structures because change will not happen by itself. Awareness is key because if we are aware of the inequalities within our society the goal to end oppression, may be achieved.

Research Question:

- *How is the judicial debate in the Supreme Court case "Shelby County, Alabama v. Holder, Attorney General" 570 U.S. __ (2013) describing the current notion of voting discrimination against African Americans?*

1.2 Delimitations

Delimitations is crucial for this thesis because the subject is broad with multiple layers and has an extensive history which is still evolving in present time. The material has been carefully chosen by means of directly concerning discrimination of voting rights for African Americans. The selected texts are connected to the judicial debate in Shelby County, Alabama v. Holder, Attorney General in 2013 which has regulated the amount and relevance of the material. To narrow down this study the data that will be analyzed is directly connected to the Constitution itself, specifically decisions and actions closely related to the 15th Amendment.

Another delimitation is that issues originating from the 15th Amendment considering other minorities than African Americans will not be analyzed. This will be avoided with the help of the theoretical framework that is specifically focused on discrimination towards African Americans.

1.3 The Voting Right Act

The Voting Right Act (VRA) was signed in to law 1965 by President Johnson. This happened 95 years after the ratification of the 15th Amendment and the purpose of the law was to enforce voting rights such as stated in the Constitution. Congress had to this point not been sufficient in implementing voting equality (Justice.gov, 2016). The Act has been questioned because it grants the Congressional power to work at its height which some suggests isn't congruent with the states sovereignty (Ginsburg dissenting, Shelby County v. Holder, 570 U.S. __ 2013:8). The law suits that have been filed regarding the VRA are most commonly connected to Section 2 or 5 in the Act.

Congress has reauthorized the VRA four times, last in 2006, the new amendments in §4(b) have extended the timeframe and broaden the definitions it covers. With the last reauthorization, the special provision Act was renewed, the provision of voting examiners was abolished and section 4 extended so the protection is currently set to last until 2031 (Justice.gov, 2016). The Supreme Court then declared §4(b) unconstitutional in 2013 with the justification that the section was supposed to be temporary and its extraordinary measures is no longer needed (Shelby County v. Holder, 570 U.S. __ 2013:24).

1.4 Brief History

To create an understanding of the depth of this issue I will briefly present an outline of historical episodes concerning inequality especially concerning voting rights regarding African Americans. With a short review of political and judicial decisions affecting the issue from the ratification of the Civil War Amendments (the 13th, 14th and 15th) in the end of the 18- hundreds to present time.

Black people has consistently been stigmatized and denied equal rights in the United States. According to the Constitution all citizens have the right to equal protection of the law (Amendment XIV) and:

"The right of citizen 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."

Amendment XV, 1870. The Constitution of the United States of America.

Even if the law clearly states the equality for all, discrimination towards African American is rather the norm than the exception in multiple regions of the country (Litwack, 2000:125). The American Constitution is considered to be one of the most important instruments to shape the nation and is usually treated with great respect and manifested as the highest law (Baker, 2004:58).

The actions taken regarding the equal rights, affirmed in the Civil War Amendments has been the exception. The Doctrine of Nullification is a theory mentioned in relation to this phenomenon when states consider having the right to declare some federal laws unconstitutional (Samuels, 2015:196). After the ratification of the 15th Amendment multiple Southern states passed laws that violated the Constitution (Opinion of Thomas, J., Northwest Austin v. Holder, 557 U.S. 193. 2009). During this time, African Americans did not even have the right to a fair trial, it was enough that two people identified them as a perpetrator to sentence them (Litwack, 2000:126). There is still traces of this in society today where a systematic imprisoning of African Americans accompanied with felon disenfranchisement erodes the amount of eligible African American voters (Uggen & Manza, 2002:780).

We don't have to go far in history to reach the time of the Jim Crow South with the claim of "separate but equal" for African Americans, a formulation that can have influenced the current need to appear as "colorblind" (Bell, 1994:1180). These laws were enforced until the mid-1950s when the civil rights movements pushed for change, which lead to that the VRA was signed (Britannica.com, 2016). The year after did the Supreme Court uphold the constitutionality of the Act in South Carolina v. Katzenbach, 383 U.S. 310 (Justice.gov, 2016). This part in history is just one generation away and has left deep scars in the society, which makes this subject hard to talk about for a great deal of the population.

By signing the VRA Congress reenacted the restraint against disenfranchisement, compared to before, the law now specifically prohibited tests and devices that was used to abridge African Americans the right to vote. This empowered Congress and the Attorney General to oversee states or political subdivisions and oblige them to seek preclearance if violations of the 15th Amendment has occurred (Shelby County v. Holder, 570 U.S. __ 2013:6). Recognizing that disenfranchisement still exists in the United States, there is no doubt that great improvement has taken place concerning voting rights and that is a direct result of the VRA (Shelby County v. Holder, 570 U.S. __ 2013:15). Improvements to the degree that opinions of that the VRA institutes affirmative actions has been raised (Samuels, 2015:201).

The last reauthorization in 2006 made some changes in Section 4, which became the subject of law suits. First Northwest Austin v. Holder, 557 U.S. 193 in 2009 followed by Shelby County v. Holder in 2013 which lead to the judgment to declare that §4(b) is unconstitutional, even if this decreases the protection of equal voting rights which, the justices admit themselves, is still not accomplished nationwide.

1.5 Outline of the Study

I have divided the study in 7 chapters, starting with the introduction, background and history of the subject. In the following chapter, the methodology will be described with reflections of discourse analysis. Chapter three has a literature review and discusses how the material has been analyzed. The fourth chapter, the theoretical framework will be outlined together with the context of race discrimination. In the fifth chapter, the empirical material will be presented and analyzed in light of the theoretical framework. In chapter six the conclusions and discussion of the study will be provided. Lastly, the references of the study will be displayed.

This study will review the discourse connected to the issues and the progress of African American voting rights in present time. The right to vote independently of race is not yet ensured equally around in the United States. There has been a very positive development from the ratification of the 15th Amendment in 1870 to the recent Supreme Court case regarding the subject, but discrimination is still present within the discourse (Shelby County v. Holder, 570 U.S. __ 2013). With the help of the judicial debate in this case, this study will outline the current notion of structural and voting discrimination.

2 Methodology

In this chapter, the methodical aspects of this discourse analysis will be discussed. This includes a discussion on research design, the analytical framework and a review of the literature that has been considered for this study. In addition, strengths and limitations of these techniques are reflected upon.

Through a qualitative discourse analysis leaning towards a critical ideological analysis this paper will examine how the interpretation of the disposition of the fifteenth Amendment to the Constitution has shaped or defaulted the discourse around African Americans voting rights today. By examining the case of Shelby County v. Holder which constitutes great importance in the question the absence of considering existing discrimination as the most significant issue is exposed (Beckman, 2007:67). The circumstances leading up to the current situation will provide the framework for the analysis (Neumann, 2003:94). The purpose of studying discourses is to discover the silent murmuring, trying to read between the lines. By analyzing statements, we can recognize social structures that has been normalized and institutionalized (Foucault, 1972). This is the reason why the statements that has not been said becomes interesting. When as in this case discrimination gets normalized the *need* of talking about it disappears, because it is perceived as stating the obvious (Bergström & Boréus, 2012:393).

Primary sources used in this study is the official produced Supreme Court "Opinion of the Court" and Justices insertions in connection with the Constitution and the VRA. Secondary sources are consisting of studies made on disenfranchisement or other structural discrimination with the help of academic critical discourse analysis using Critical Race Theory (Esaiasson, et al. 2012:212). Because of the boundary delimitations, cases that involve other demographics than African American will not be included. Other scholars that have used CRT in other disciplines than legal studies have been of major importance for this thesis, examples of them are DeCuir & Dixson (2004) and Briscoe & Khalifa (2015) which have applied the theory when analyzing racism towards African Americans in the educational system.

The reason a discourse analysis is the appropriate methodology to use for this research is because the aim is to create a comprehensive perspective of the consequences that the ratification of the 15th Amendment has, or has failed to, become instituted in America. When analyzing the judicial debate surrounding the decision in the case: Shelby County v. Holder 570 U.S. __ (2013) and the appurtenant "Opinion of the Court" a broader perspective of the current discourse will be achieved (Neumann, 2003:76). The representation of the superior ethos has not always been particularly disputed in this question and has because of that become institutionalized and formed the existing hegemony (Neumann, 2003:158).

The racial discrimination within social structures is not always transparent and therefore it is important to consider which methodology is appropriate to use when trying to expose them.

2.1 Discourse Analysis

Discourse analysis can include numerous kinds of studies but the common nominator is the mapping of power relationships, structures and understanding of the influence texts has on society (Esaiasson, et al. 2012:212). The structures in society can't be described by just studying texts in its literal form so to build a more complete understanding different aspects must be included. With a discourse analysis, the aim is to go deeper and uncover a cognitive development in the society (Beckman, 2007:88). In this study the text of the Supreme Court Justices opinions will be the primary material and to define the dominate discourse a qualitative analysis is required.

When looking at the data in-depth the context of the text and the process of the analysis is of importance. Leaders tend to produce the dominant discourse which in this case is the Supreme Court justices whose opinions do influence rhetoric's nationwide (Briscoe & Khalifa, 2015: 740-741). The Supreme Court's opinions through rulings do institutionalize structures and can because of that influence the preservation of the existing hegemony (Baker, 2004:114). Such an example is understood when state sovereignty ranks higher than individual and civil rights, which declaring section 4(b) of the VRA unconstitutional when simultaneously acknowledging the concerns of discriminations it is supposed to protects. The text will also be analyzed with a linguistic execution, because the study then has a better presupposition to high reliability (Bergström & Boréus, 2012:405). This will include word counting, identifying descriptive words and identifying where the individual puts the emphasis of the message.

Language, in this case expressed through text, is a form of political dealing because it effects people and has social consequences (Neumann, 2003:95). Discrimination of minorities is an example of this when the society's dominant discourse may describe a group as a problem or less valuable for the community (Beckman, 2007:92). This can be highlighted by interpretations and analysis of influential texts such as Supreme Court Justices opinion.

2.2 Critical Discourse Analysis

With grammatical strategies and by defining themes that emerged in the text a critical discourse analysis (CDA) has the ability to produce subjectivity which is important especially when questioning someone's approach to race (Anderson et al. 2015:341). This is because the issue of race and discrimination is a very infected subject and is therefore not always spoken candidly about. To highlight the way in which the material is saturated with discourses based on race the sort of tools that CDA provide is needed. Even if the material that this study is constructed of openly discusses race there is concealed notions which the subjectivity can be found (Briscoe & Khalifa, 2015: 740-741). The aim is to determine how the actors conceptualize and talk about these specific social structures and through that outline the conception of race as an interpellating discourse that produces the themes to which the analytical reasoning will be done in chapter 4 (Anderson et al. 2015:340).

Because the theory (CRT) is developed from legal studies it is designed for judicial reviews such as this thesis, recently the theory has been utilized in a more comprehensive manner, including more fields of science (DeCuir & Dixson, 2004:27). With the help of CDA this study will pivot to major in political science concentrating on the behavior and its effects. CDA is often used to determine power relations, which in this case is between the two Justices that argue for two different rulings (Bergström & Boréus, 2012:409). The question of power relations could be elevated but that has to be saved for another study.

The grammatical strategy surveys the repetition of word or phrases, descriptive words and rhetorical strategies such as use of statistics or referencing to historical events (Bergström & Boréus, 2012:405). The statement that became most apparent in this analysis was none of the above mentioned but rather what was not said (Anderson et al. 2015:341). One of the great challenges with this study is to always remember that researchers should remain cognizant of the boundaries within the theory (DeCuir & Dixson, 2004:29). Still this is one of the main reasons I chose to use this method, because when your analytical tools manage to shed light on the current political climate, the power structures appear and make it possible to analyze (Foucault, 1972). As mentioned before the aim with this study is to present attention to discrimination and thereby pushing for an end of oppression. The most interesting and important discourses to analyze concerning racism are the opinions that do not get voiced, either because of the taboo surrounding the subject or because its forgotten, both reasons are vicious and must be considered.

3 Literature Review

The purpose of this section is to outline key themes within the existing research and literature on the view of voting discrimination in the United States. Notably, a great quantity of studies has already been done on the subject and the literature regarding critique against discrimination in the United States is rapidly growing and evolving by the day. First the material used and similar research surrounding this subject will be covered and compared, and following the different methodologies and theories to analyze the material will be discussed.

Quite recently, considerable attention has been paid to disenfranchisement of African Americans which now has taken new forms also called "second generations" of voting discrimination. The question raised concerning this is if and how the VRA covers this issue. My primary material for this study, which is The Supreme Court case of Shelby County, Alabama v. Holder, Attorney General (2013), do touch upon this as well when Justice Ginsburg dissenting the ruling to declare §4(b) unconstitutional. The question of what "second generation discrimination" is and how to act against it is fairly new and is recurrently focused on the education system in America, examples of this see; DeCuir & Dixson, (2004), Briscoe & Khalifa, (2015) and Anderson et al. (2015).

There are other studies done analyzing the Shelby County v. Holder case, also questioning race. Samuels "Shelby County v. Holder: Nullification, Racial Entitlement, and the Civil Rights Counterrevolution," is one of them that has a similar goal as my thesis, but the difference is that Samuels focuses more on the doctrine of nullification (2015). Other political science studies made on disenfranchisement or other structural discrimination with the help of academic critical discourse analysis using Critical Race Theory is getting more common but the theory is still used more within legal research. Other scholars that have used CRT in other disciplines than legal studies have therefore been of major importance for this thesis.

Political science scholars researching issues linked with the 15th Amendment and voting rights often tend to writing about the criminal aspect - that you lose your right to vote when criminalized in a number of American states. This literature on democratic theory and American criminal justice is regarded as an extension of the genesis of one clause in the 13th Amendment; *"except as a punishment for crime whereof the party shall have been duly convicted"* which states have exploited by criminalizing African Americans and in that way keeping the oppression of this minority group after slavery was abolished (Uggen & Manza, 2002). There is a lot of research and theories about this, both academic and popular sources spreading knowledge about discrimination.

3.1 Material Analysis

The thematical framework is based on a constitutional theory which helps us to understand where the Supreme Court arguments are coming from and where they might take us (Baker, 2004:59). I have applied a thematic analysis approach to the material, where I followed the tenets of Derrick Bells Critical Race Theory (1995). This type of theoretical framework is an important method as it is possible to inductively extract, analyze and report pattern from the material. The analytical process initiated with having to familiarize with the material in order to generate initial examining and extract themes that was either repeated or missing in the text. From this, themes started to be produced and the next step of the process - reviewing them and ranking their relevance. The thematic analysis revealed that the discourse that stood out concerning discrimination in the text was the nonexisting one. From the analysis other themes were uncovered as well and will also be included in chapter 5.

With the five tenets provided by CRT and the methodical tools a detailed analysis of the text will make the study uncover more of the political process connected to the decision (Bergström & Boréus, 2012:399). With the help of scholars that have used this theory before, I found, indications of how to discover the subtleties of race and discrimination in the text (DeCuir & Dixson, 2004:29). This is a useful lens for examining this complex issue and thereby supporting or delegitimizing different knowledge paradigms. It is important to keep in mind that the results of the research will be influenced by the researcher, which means that it can never be completely "neutral" or "objective". Therefore, when trying to shed light on this issue the sources used and their purpose have been thought of (Briscoe & Khalifa, 2015:741- 742). I have had an ethical concern throughout the process of this research, in order to decrease the risk of biases, the use of CRT when doing the analysis has helped with this. This will be presented and further discussed in the following chapter on the theoretical framework.

4 Theoretical Framework

The theoretical framework for the thesis will mainly be based on Derrick Bells Critical Race Theory (CRT). This theory is not meant to be used to write more persuasive argument concerning discrimination but rather help to feature the struggles regarding race (Bell, 1995:910). In this chapter the theoretical framework with related doctrines will be presented and the challenges and limitations of the theory will be discussed.

The key component of this study is a text which rigidly refers to definitions in the Constitution which has very distinctive characteristics. This was taken into careful consideration when choosing theory. Because to be able to show the Supreme Court Justices opinions concerning race and discrimination their arguments need to be interpreted with the right instruments. I am aware that the result of this study will only focus on race and other components will not be included in the result (Esaiasson, et al. 2012:134). To place the text from the Shelby County v. Holder, case the theory provides context and helps with making sense of the output of the Supreme Court Justices insertions (Baker, 2004:120). Constitutional theories help us to understand where an argument is coming from and where it might take us (Baker, 2004:59).

The premises of the study are the ethnical discrimination in the United States and to get high internal validity the Constitutional Theory of Critical Race Theory will be used analyzing the material, its influence has recently expanded into other disciplines including political science (DeCuir & Dixson, 2004:27). Because this theory is crossing over different fields of study, the external validity will be developed when generalizing the themes originating from this legal text. The validity will be tested by unpacking the themes further when questioning the interpretations of the material (Anderson et al. 2015:341). There is a large quantity of research done on this subject but because the matter in question is still present that indicates there is more to be said. In this paper one theory will be used when analyzing the components, because the complexity of the subject requires an in-depth analysis to be able to give a complementary layer to earlier research (Esaiasson, et al. 2012:112).

With a discourse analysis, the focus will be on the structures in society and not individual opinions (Beckman, 2007:88). Even if the material represents the opinions of individuals, the Supreme Court Justices, the way they interpret the Constitutions limitations will manifest the structures in society. A constitutional theory is not chosen to lead to certain answers to the constitutional questions but more because it seems capable to provide competing arguments for going about deciding between what is the good and bad arguments (Baker, 2004:122).

4.1 Definitions

Race - a social construction based on skin color or other visual attributes (Bell, 1995), (Baker, 2004).

African American – one of the largest ethnic groups living in America. A person who lives in the US and is a member of a race of people that primarily identifies with dark skin that originates from Africa and are descendants of slaves (Britannica.com, 2016).

Affirmative actions – a policy of favoring members of a group suffering from discrimination. Also, referred to as *racial entitlements, reversed discrimination* and giving a group *preferential treatment*. (Bell, 1995), (Samuels, 2015).

4.2 Critical Race Theory

In this chapter, will Critical Race Theory first be introduced, with the background, strengths and weaknesses of the theory. Following will the 5 tenets of CRT be presented which will guide the execution of the analysis, after that the terms of Nullification and Normalization which is important in this theory overseen and finally a conclusion of this chapter.

Derrick Bell is the father of Critical Race Theory (CRT) and by using some of his work as a theoretical tool combined with additional research this study will achieve a cumulative analysis (Esaiasson, et al. 2012:60). The theory is mostly used in legal studies and derived from Critical Legal Studies (CLS) but recently this theory influence has expanded and has been applied to many studies with political science foundation (DeCuir & Dixson, 2004:29). CRT is focusing on race and discrimination institutionalized by law. In addition, CRT differs from CLS in that it has a more aggressive approach described as an activist aspect, the end goal of which is to bring change that will be implemented within social justice (DeCuir & Dixson, 2004:27). This also includes myself, the theory requires me to reflect over why I am doing this study, why do I want to overthrow my own white privilege? The answer to this is my interest in how racism is institutionalized in and by law but also to raise my own cognizant of the racial privilege surrounding me (Bell, 1995:898).

Bell and other CRT scholars are pessimistic and very controversial when questioning everything from a racial perspective and trying to provoke. Which is necessary according to the theory because to accomplish change awareness is needed (Baker, 2004:115). The theory is also highly suspicious of the liberal agenda

because it is where colorblindness and the aim to keep a neutrality towards the law which may sound great but does not achieve anything to reduce discrimination (Bell, 1995:899). The thought that colorblindness is the answer to reach equality may not be all wrong but it is proven to be insufficient (Bell, 1994:1180). When justifying neutrality of the law it only masks the problems (DeCuir & Dixson, 2004:29). Next part will scrutinize this factors which is included in the 5 tenets of CRT.

The way history has been treating African Americans, this group rarely show optimism or trust in their own constitutional rights (Bell, 1995:900). This makes it understandable if someone with African American heritage who has grown up with this chose to do this sort of research. This makes it important for me to reflecting over the sources used in connection to the theory and the reason they are produced (Bell, 1995:898). Because resentment can cloud judgments.

The limitations to this theory is also its strength, because of the narrowed focus and the aim to always critic the theory can interpret in-depth but the reflections risk to be one-sided. Other challenges with the theory and when trying to identify inherent patterns is to remember the importance to stay self-critical and trying to account for contingencies (Anderson et al. 2015:341). Criticism that has be raised against the theory is that the intense focus on race risks to obscure other factors such as gender and social class which also should be included when drawing broader conclusions (DeCuir & Dixson, 2004:29).

4.2.1 The 5 tenets of Critical Race Theory

The instruments used to analyze the material by CRT can be divided in to five main parts, these tenets focus directly on race effects and help us mapping hegemonic systems (DeCuir & Dixson, 2004:27). The linguistic execution used to achieve reliability will be guided by these tenets provided by CRT. Following:

- Counter-storytelling – is an essential tenet and means to expose and critique normalized dialogues, by challenging privileged discourse. This is achieved by questioning the validity of the premise accepted by the majority.
- Permanence of Racism - the premise of the notion of permanent racism which exist on all levels of society. It is racial hierarchical structures that govern all political, economic and social domains, which also includes the Supreme Court.
- Whiteness as property - the right of possession, the right to use, and the right to deposition. To utilize the CRT perspective when analyze voting discrimination it is important to note that voting was exclusively enjoyed by Whites during a big part of the country’s history.

- Interest convergence - that Black rights was embraced only because of the self-interest of Whites, which is proven by the fact that granting of rights for African Americans has not disrupted the normal life of Whites.
- Critique of Liberalism - is when neutrality to the law and colorblindness is claimed, which only masks the issue through incremental changes. (Bell, 1995) (DeCuir & Dixson, 2004).

All these five themes will not be included to the same extent. The degree of their suitability for this study will be determine by the methodical aspects used.

4.2.2 Nullification and Normalizations

Nullification is a constitutional doctrine that is based on a literal interpretation of the Constitution that argues that the intent of the Founders was that the states has the mandate to nullify, invalidate, any federal laws as unconstitutional (Samuels, 2015:196). This phenomenon is primarily associated with discrimination, because states have used this theory to withhold civil rights of African Americans. For example, the Supreme Court has acknowledged that the Southern states in multiple ways attempted to accomplish effective nullification of the Civil War Amendments (Opinion of Thomas, J., Northwest Austin v. Holder, 557 U.S. 193. 2009). Despite this, the case of Shelby County v. Holder fits the greater pattern of nullification because the Court's ruling did deprive the VRA of its most effective enforcement tool when declaring §4(b) unconstitutional (Samuels, 2015:201). The theory of nullifications becomes relevant in connection to CRT because when nullity is claimed it institutionalizes the fact and normalizes the discriminating structures.

Structures in society get normalized when not questioned (Foucault, 1972). Institutionalized racism is imbedded in the complexity of ideologies, policies and daily practices and has because of that become normalized (Briscoe & Khalifa, 2015:741). Even laws are never written with a neutral perspective, because we are only humans and laws are a production of the lawmaker's interpretation (Bell, 1995:901). The issue that arises here is that questioning the law is often perceived to be exclusively for justices which constitutes a small and privileged group in society.

4.3 Conclusion

From the discussion in this chapter, it is clear that the relationship between the Supreme Court Justices and the existing discriminating discourse is present and complex. When proceeding from the theoretical framework, it is apparent that allocation in itself can be decided and agreed-upon for a variety of reasons and purposes. The ultimate usefulness and the reason to choose a constitutional theory for this study, however, is to help differentiate between good and bad arguments and to make it at least somewhat more likely to interpret the Constitution and debates that sprung from it (Baker, 2004:122).

It is crucial to analyze the tension and power relations between the Justices and earlier rulings that has set precedent, to uncover the structural racism that will get infused in society through the opinions of the Justices. This will be done in the following chapter by studying the differences in the discourses between the official Opinion of the Court, concurring Justice Thomas and the dissenting Justice Ginsburg.

5 The Supreme Court Justices insertions

This chapter will analyze and discuss the texts produced by the Supreme Court. The first part will consider and examine the set precedent through the two earlier cases (South Carolina v. Katzenbach, 1966 and Northwest Austin v. Holder, 2009) in relations to Shelby County v. Holder. Following, an in-depth analysis of the justices' opinions in the recent cases reflection on the VRA, discrimination and Congress extraordinary measures of unprecedented nature. The opinions of the Court, Justice Thomas and Justice Ginsburg will be divided in to 3 sub-parts and analyzed separately.

These two previous cases that will be included in the analyses in this chapter of this thesis is chosen because they are the most referred to in connection to Shelby County v. Holder. The Court builds on precedents so the previous case: Northwest Austin Municipal Utility District number one v. Holder Attorney General 557 U.S. 193 (2009) and South Carolina v. Katzenbach (1966) is included even if the focal point is the Shelby County v. Holder, 2013 case. The reason to analyze the Supreme Court's decision concerning voting rights connected to racial and discrimination questions is because they affect the discourse in the whole country (Baker, 2004:61). To establish this study's relevance in present time the remaining literature will be chosen from the recent Supreme Courte case concerning the subject (Anderson et al. 2015:340).

The Supreme Court justices believes that their purpose is to be "The bulwark of a limited Constitution" (Northwest Austin v. Holder, 557 U.S. 193. 2009). Questionable if this is coherent with the ruling of Shelby County v. Holder, where the Court dismissed Congress work regarding protection of voting rights when stated in the 15th Amendment §2; "The Congress shall have power to enforce this article by appropriate legislation" (Blacksher & Guinier, 2014). They seem to be driven by more personal beliefs than attempting to follow earlier reading of the Constitution. Because the Justices official opinions most often gets institutionalized this dismissal can have fundamental consequences (Baker, 2004:114). Nevertheless, by tradition the cases ruled in the highest court of the land set precedent for each other, because of that the analysis will start with a concise review of two earlier cases.

5.1 Setting Precedent

Justice Ginsburg reflects over that the Court previously repeatedly encountered the remarkable "variety and persistence" of laws disenfranchising minority citizens in the United States, which should have set precedent for this later ruling (Shelby County v. Holder, 570 U.S. __ 2013). There are primarily two Supreme Court cases that has set precedent for the ruling in Shelby County v. Holder, 2013. Beginning with South Carolina v. Katzenbach in 1966, the law suit was filed against section 5, calling it unconstitutional. The Supreme Court with the Enforcement Act then ensured the constitutionality of the VRA, this was ruled to protect from "the evil" that voting discrimination describes as. The opinion also utters that rulings concerning the VRA always must be "judged with the historical experience which it reflects" in mind. Calling the actions "appropriate means for carrying out Congress constitutional responsibilities" (South Carolina v. Katzenbach, 383 U.S. 310. 1966). The Court openly discusses voting discrimination and the notion that comes across is how the gravity of the matter.

The second case that plays an essential role is: Northwest Austin v. Holder from 2009. The Court was again questioned about section 5 and its interfering in states sovereignty. Words that was of interest and is repeated from this case is: bailout, parity, statutory. The Opinion of the Court reflects over the importance of the 15th Amendment and "flagrant disenfranchisement", earlier enforcements to prevent this are mentioned as a failure. With reflections of history and the Courts purpose mentioning constitutional avoidance, discrimination is incorporated in a more implicit way compared to the previous case. This legitimize the colorblindness and keeps the notion of permanent racism intact (Bell, 1995:898). The Court interpreted the suit filed as to not needing to discuss discrimination but only referring to statutory, which can be seen via the repeated words. Therefore, they reverse the ruling and did not reach the question of constitutionality of section 5. This has set precedent for other future cases which will institutionalize the structure further (DeCuir & Dixson, 2004).

These cases were then followed by Shelby County v. Holder in 2013.

5.1.1 Concerning Race

When discussing race in these cases the arguments tend to circle around which Amendments of the Constitution should override another. For example, in Shelby County v. Holder the Tenth Amendment which declare equal sovereignty gets compared to the Fifteenth Amendment and equal individual rights (Shelby County v. Holder, 570 U.S. __ 2013:9).

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"
>
> Amendment X, 1791. The Constitution of the United States of America.

When talking about race and defending the VRA people have been accused for preforming affirmative actions (Samuels, 2015:196). Justice Scalia claims that after Congress last reauthorized parts of the VRA in 2006 the law became a "racial entitlement". He indicates this in the arguments leading up to the decision of Shelby County v. Holder, Justice Scalia also vocalize concerns regarding the normal political process and that this sort of question concerning race cannot be handled through that channel (Samuels, 2015:201). This sort of arguments can provoke Congress to try to implement and prove that they practice through colorblindness during decisions. This will lead to that racism gets institutionalized by law and secure the permanence of racism (Bell, 1995:898). Affirmative action's interlocks with interest converging, when the White hegemony feels threaten it claims that preferential treatment will provoke inequality further (DeCuir & Dixson, 2004).

The VRA has proven immensely successful in remedy racial discrimination (Shelby County v. Holder, 570 U.S. __ 2013:15). Even so the law has been questioned multiple times, but the Supreme Court has protected and declared the VRA constitutional repeatedly, but the word *unprecedented* is frequently recurring in the Courts arguments (Bergström & Boréus, 2012:393). This triggers questions towards the Courts validity, when inserting the word unprecedented the premise remains that the Court may rule differently with the next case. That law suits concerning race are not strongly discouraged by the Supreme Court does sadly only confirm the notion of CRT, that the Supreme Court as an institution preserves the white racial hegemony (Baker, 2004:114). Even if this is conscious or not from the Justices it declares acceptance towards questioning equality and with the ruling of Shelby County v. Holder did they take this further when declaring state sovereignty superior compared to reassuring the protection against voting discrimination (Blacksher & Guinier, 2014).

5.1.2 The Voting Right Act

The law is referred to as extraordinary and unprecedented but does rely on the 15th Amendment which states that Congress has the "power to enforce this article by appropriate legislation." U. S. Const., Amdt. 15, §2. (Northwest Austin v. Holder, 557 U.S. 193. 2009). The purpose of the law is to enforce this Amendment and the law begins with just repeating what is stated in the Constitution, section 2 has been declared as permanent because it applies nationwide, and has not been at issue in the majority of the law suits against the VRA (Shelby County v. Holder, 570 U.S. __ 2013:3). The more controversial parts are §4 and §5, which will be scrutinized in the next part.

Effects of implementing the VRA have been scrutinized through voluminous of records since the multiple filed suits against it but is still found a success (Shelby County v. Holder, 570 U.S. __ 2013). Nevertheless, the VRA has been blamed of instituting affirmative actions, this does not necessarily need to be negative but rather demanded until equality is achieved for all. Despite this the term is perceived as a synonym to discrimination (Samuels, 2015:196). This can be regarded as a product of Whiteness as property when used to being superior steps towards equality can be perceived as unfair treatment (DeCuir & Dixson, 2004).

5.1.3 Section 4 & Section 5 of the Voting Rights Act

After the ratification of the VRA several key decisions upholding the constitutionality of Section 5 was made by the Supreme Court, one of them is South Carolina v. Katzenbach, in 1966. According to Derrick Bell this was only an extension of the Interest convergence theory started in 1950s with the civil rights movement when the rights of African Americans were granted because it also benefitted the county and Whites at that time (Bell, 1995).

Under section 5 Congress allows "bailouts" for political subdivisions, this was under scrutiny in 2009 but the Court declared that Congress interpretation already nullify the bailout provision. Even if the filed suit is not exactly regarding both Section 4 and 5 Justice Thomas inserts his opinion that they should be declared unconstitutional because they are outdated (Northwest Austin v. Holder, 557 U.S. 193. 2009). This insertion is interesting because Justice Thomas claims that he is concurring in part and dissenting in part and then he implicit explains how to file a lawsuit that will declare §4 of the VRA unconstitutional. By this he is helping with obtaining the Permanence of Racism without even getting asked and clearly affecting the discourse because a new lawsuit is filed shortly after (DeCuir & Dixson, 2004).

By means of the VRA the Attorney General undertakes litigations throughout the United States where suspicion of voting discrimination arises (Justice.gov, 2016). Section 5 extended the power so that no change in voting procedures could take effect until it was approved by the Attorney General or other federal authority (VRA, 1965).

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different"
Section 5, The Voting Right Act (1965)

The question of the constitutionality of §4(b) which gives section 5 its muscles was discussed already in 1966 but the majority of the Court then declared the necessity of the law (South Carolina v. Katzenbach, 383 U.S. 310. at. 357. 1966). When the enforcement of section 5 is debated by the Court the litigation process and formula of how the jurisdictions are singled out is in focus, not as much *why* the specific states ends up under inspection. This have become the normalized dialogue which covers the question of the wrongdoing of the states (Bell, 1995).

5.2 The Opinion of the Court regarding Shelby County v. Holder

The Opinion of the Court is delivered by Chief Justice Roberts who has been serving the Court since 2005 when he was nominated by George W. Bush (Supremecourt.gov, 2016). The Supreme Court declared §4(b) unconstitutional which changed the authority of the Department of Justice and the Attorney General whom can no longer require preclearance from jurisdictions covered by the included formula (Shelby County v. Holder, 570 U.S. __ 2013:12). The majority of the Court agreed but the justices voted five against four so it was a narrow win, compared to 4 years earlier in Northwest Austin v. Holder where the vote concluded 8 to 1 for remanding the case and reversing the ruling
(Justice.gov, 2016).

The Constitution grants sovereignty to the states that also retains broad autonomy in structuring their governments and pursuing legislative objectives. This "equal sovereignty" doctrine that the Chief Justice Roberts circles the argument around risks to reinforce the White Privilege and reinsure Whiteness as property (Blacksher & Guinier, 2014). The Court argues that to keep the balance in the federal system they must strike down this Act of Congress even if it "is the gravest and most delicate duty that this Court is called on to perform." (Shelby County v. Holder, 570 U.S. __ 2013). Congress agrees on that significant progress has been made in eliminating first generation barriers but that more needs to be done. The Supreme Court, compared to Congress, seems to acts with neutrality to the law in mind (DeCuir & Dixson, 2004). Instead of discussing the complexity of the second-generation barriers which Congress lifts, the Court compares different constitutional Amendments, while they usually lay more weight on earlier set precedent.

With the linguistic execution, which looks at descriptive words and rhetorical strategies the words that was prominent were: sovereignty, race, discrimination, constitutional and equality. The Opinion of the Court do mention some recent history concerning the Act but only parts close to the reauthorizations and it is always compared and connected to sovereignty. The argument is build up to justify the further establishing of Permanence of Racism (Bell, 1995). Because it is admitted that voting discrimination still exist but instead of emphasizing the issue of race differences the individual equality the *State equality* is emphasized. It feels as Chief Justice Roberts trying to legitimize the ruling by using the word of equality because its expected in this case and when using it to describe something else than civil rights the injunction still sounds fair.

5.3 Justice Thomas Concurring

Justice Thomas was nominated by President George H. W. Bush in 1991 and is the second black American to serve on the Court (Supremecourt.gov, 2016). In 2009, Justice Thomas was concurring and dissenting in the ruling of Northwest Austin v. Holder and clearly stated that in his opinion both section 4 and 5 should have been declared unconstitutional. The law suit did not cover that but was only concerning the clause referring to bailouts (Northwest Austin v. Holder, 557 U.S. 193. 2009). In this case, he was the only Justice to vote against to rule the case reversed and remanded. Not accounting for Justice Thomas skin-color is hard, but he is known for maintain a textualism approach which tend to lean towards neutrality to the law (Bell, 1995). Which is stated in his insertions in Shelby County v. Holder as well.

The comparatively short (two and a half page) insertion by Justice Thomas is predominantly focusing on the unconstitutionality of section 4 and 5 in the VRA (Thomas, J., concurring, Shelby County v. Holder, 570 U.S. __ 2013). The concurring opinion shares striking similarities to his insertion form 4 years earlier in Northwest Austin v. Holder, 557 U.S. 193 in 2009. When applying a grammatical strategy to the text these words where prominent: section 5, unconstitutional, extraordinary, unprecedented and sovereignty. They were repeatedly emphasized and provides a descriptive apprehension of the dominant discourse (Anderson et al. 2015:341). The most illuminating fact taken from this is the absence of referring to race and discrimination. This insertion definitely applies to the notion of colorblindness, with a case regarding a law that's shaped to prevent discriminations and the only issue brought up is constitutional problems with the law (DeCuir & Dixson, 2004).

Justice Thomas argues that the principle of constitutional avoidance has no pertinence concerning this question (Northwest Austin v. Holder, 557 U.S. 193. 2009). The question here is; why not? The essential fact taken from the

Constitution when interpreted literally, is the notion of the small-scale federal governance with the checks and balances (Wasserman, 2015:136). When the Supreme Court overrules Congress as in this case this notion get unbalanced.

In this case I will argue that Justice Thomas concurring insertions does not just only build on the already privileged discourse of that it is approved of questioning African American right to equal individual rights. When he is acting according to the notion of colorblindness which, because of his own skin-color, Justice Thomas can legitimize easier, he makes it become statutory.

5.4 Justice Ginsburg Dissenting

Justice Ginsburg is the second women to serve the Court and was nominated by President Bill Clinton in 1993 (Supremecourt.gov, 2016). In her dissenting opinion, she was joined by Justice Breyer, Justice Sotomayor and Justice Kagan. The basis for the argument and the deference is firmly rooted in both constitutional text and precedent. Justice Ginsburg points to the fact that the Court does not write on a clean slate because The Fifteenth Amendment has previously been affirmed. So, when discussing the VRA which is built on the 15th Amendment and targets precisely and only racial discrimination in voting rights the earlier rulings should be statutory. The danger with getting comfortable and letting statutory decide is the notion of Permanence of Racism which is already imbedded this structure (Bell, 1995). In this case following precedent could have been satisfactory but the understanding should not be that this is always the best option, because to achieve equality the standing paradigm must change.

In regards to the ruling of declaring §4(b) unconstitutional Justice Ginsburg reflects over the new challenges the VRA are facing, also referred to as "Second generation barriers" such as gerrymandering which is less visible methods for disenfranchisement (Ginsburg, J., dissenting, Shelby County v. Holder, 570 U.S. __ 2013:21). She is also invoking the Doctrine of Constitutional avoidance which dictates that the cases that could be resolved on a nonconstitutional basis should not be ruled by the Supreme Court (Northwest Austin v. Holder, 557 U.S. 193. 2009). This notion is positive in the lens of CRT because Justice Ginsburg do argue against neutrality to the law and colorblindness by taking in to account the changing challenges and also acknowledge that the Supreme Court should not always set precedent (DeCuir & Dixson, 2004). When disagreeing with the Courts decision she is defending section 5 of the VRA and Congress and its legislative power.

With the linguistic execution looking at descriptive words and rhetorical strategies the words that was prominent and repeated in Justice Ginsburg's dissenting opinion were: discrimination, Congress, sovereignty, minority, preclearance. These word, compared to the once from Justice Thomas are focused on African Americans as a minority that still needs protection from existing discrimination (Bell, 1995). Sovereignty is mentioned here as well but in correlation

with the severability provision, which could be used as an argument for keeping the VRA intact and is not mentioned by Justice Thomas.

Taking the grammatical strategy further after word counting scrutinizing the text for difference in use of phrases and specific facts (Anderson et al. 2015:340). One example of that is when Justice Ginsburg is referring to especially violent historical events regarding voting discrimination and to Martin Luther King, Jr. (Ginsburg, J., dissenting, Shelby County v. Holder, 570 U.S. __ 2013:24). With mentioning this, it will provoke emotions of mistreatment with the goal of rally people to fight for change. Compared to Justice Thomas who's trying to defuse the ruling by circling his references the law and the Constitution.

6 Conclusion and Discussion

With this thesis, the discourse of racial discrimination towards African Americans have been scrutinized, specifically concerning voting rights. Through the insertions of the Supreme Court Justices the current discourse has been uncovered with the help of CRT. The bigger issue concerning this question is the notion of colorblindness and the Permanence of Racism which both are responsible for the statement that is not said (DeCuir & Dixson, 2004). I thought this was going to be the hardest task to establish, to read between the lines, but with CRT it became very clear (Bell, 1995). Both Chief Justice Roberts and Justice Thomas are responsible setting this sort of precedent which only establish Whiteness as property further. In this case the changes cannot be described as done incrementally but rather revitalizes history with this landmark decision in Shelby County v. Holder (Blacksher & Guinier, 2014). That these opinions will affect the nationwide discourse is granted, opening up for new disputes of the VRA and making it more polished and acceptable to question.

Equal sovereignty is used as an argument which, in an implicit way, gets ranked as superior compared to equal individual rights. Trying to give the argument weight by mentioning that the Founders of the Constitution intended the States to keep for themselves, cherishing the Tenth Amendment, because using words such as the Founders that almost has a holy status is not to be contested (Blacksher & Guinier, 2014). It is true that state autonomy is important for a federal state but equal rights is fundamental for a democracy, and if basing the argument on the Constitution the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments all precede equal voting rights.

The Justices insertions differs when describing the current notion of voting discrimination against African Americans, but the institutionalizing part which mainly is the Opinion of the Court, perceives the current disenfranchisement as unimportant (Bell, 1995). When Chief Justice Roberts focus on equal state sovereignty accompanied with confirming the success of the VRA leaves us with the impression of that equality is reached.

The result of the study proves my concerns, that the Permanence of Racism is present in the discourse and by demanding neutrality to the law and colorblindness the discrimination only gets imbedded in the existing institutions (Bell, 1995). The question is how to proceed from this? To achieve change the knowledge must be incorporated in structures on all levels (Esaiasson, et al. 2012:134). Because the current discourse proves that equality is not yet reached for all Americans.

It would be very fruitful to study the transition from Court ruling to institutionalized decision and the ramifications or lack of implications connected to the justices' insertions. This is not possible within the delimitations of this thesis. Given the present political gridlock in Washington that has turned the passage of

what were previously considered routine pieces of legislation (Wasserman, 2015:233). The likelihood of Congress in the near future manage to carry out its constitutional duty and revisit the reauthorizations of the VRA seems as a herculean task and appears remote for the foreseeable future (Samuels, 2015:202). During the last years prevailing political climate in America the checks and balances between the three branches has been disturbed, because when Congress is not functioning accordingly they cannot balance out the Supreme Court decisions. This results in giving the Courts decision and the Justices insertions unconstitutional power.

6.1 Further Research

After the latest Presidential election, 2016, the voting right discussion became very prevalent in America. President-elect Donald Trump's nomination of Alabama Senator, Jeff Sessions, to Attorney General sparked a debate reevaluating the Supreme Court decision to declare §4(b) unconstitutional a positive ruling. The impact of discourse formed regarding this case has not yet been finalized and with the latest development further research on the matter will be of importance.

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