Slouching Toward Universality: A Brief History of Race, Voting, and Political Participation

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INTRODUCTION

In *Yick Wo v. Hopkins*,[1] the United States Supreme Court memorably observed, almost orthogonally, that voting is "a fundamental political right, because it is preservative of all rights."[2] *Yick Wo* was a peculiar place for the Court to essentially announce what one could

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1. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
2. *Id*. at 370.

fairly characterize as a positive universal right of political participation. The case was not about voting but racial discrimination in the laundry business.[3] Chinese laundry operators were denied permits to continue the operation of their laundry businesses by the San Francisco Board of Supervisors.[4] The operators continued to operate their business, were fined and eventually jailed.[5] The issue before the Supreme Court was not whether they were improperly imprisoned, but whether the ordinances, pursuant to which they were denied their permits, were administered in a racially discriminatory manner and thus violated the Equal Protection Clause of the Fourteenth Amendment.[6]

Writing for the Court, Justice Matthews objected to the ordinances on the ground that they permitted the decision makers to exercise their discretion on mere whim, or what he branded "purely personal and arbitrary power."[7] Justice Matthews argued that this unfettered discretion was contrary to the very freedom canonized by the Reconstruction Amendments. In his words, "the very idea that one man may be compelled to hold his life, or the means of living, or any material essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails."[8] Poignantly, considering that the Thirteenth Amendment had been ratified only twenty years earlier, he analogized this system of decision-making unconstrained by any limits other than caprice as "the essence of slavery itself."[9]

To illustrate the truth of this proposition—that it is "intolerable" that "one man may be compelled to hold . . . any material essential to the enjoyment of life[ ] at the mere will of another"— Justice Matthews offered as his first example the "case of the political franchise of voting."[10] This is a remarkable shift in the life of the nation and its understanding of rights as conduits of liberty. Barely 20 years before, a conception of freedom, as codified in the Civil Rights Act of 1866, focused only on the narrow question of free labor and economic

3. *See id*. at 366.

4. *See id*.

5. *See* Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts about Yick Wo*, U. ILL. L. REV. 1359, 1362 (2008).

6. *Yick Wo*, 118 U.S. at 373. For a contrary view, see Chin, *supra* note 5.

7. *Yick Wo*, 118 U.S. at 370.

8. *Id*.

9. *Id*.

10. *Id*.

agency in the marketplace.[11] Yet by the time of *Yick Wo*, voting had become "essential to the enjoyment of life."[12] To be sure, Justice Matthews acknowledged that voting is "not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under certain conditions."[13] And he further conceded that a legislature may "adopt any reasonable and uniform regulations" to administer a political right or privilege.[14] What a legislature may not do is implement regulations that "should subvert or injuriously restrain" these rights or privileges.[15] Consequently, state courts may review whether regulations "were or were not reasonable regulations, and accordingly valid or void."[16] For support, he cited a voting discrimination case, *Monroe v. Collins*,[17] decided by the Ohio Supreme Court in 1867, before the ratification of the Fifteenth Amendment.

Yick Wo is a remarkable case, not least of which because the Court deduced the principle that arbitrary deprivation of a fundamental right was incompatible with freedom. More importantly, the Court understood voting as the archetypal example of a fundamental right and expressed its fundamentality in the language of universality. Though allowing that voting was not "strictly" a natural right, Justice Matthews minimized the cost of that concession by imposing limits on how the government could regulate the right.[18] It was in this context that Justice Matthews expressed the now iconic view that the right to vote "is regarded as a fundamental political right, because preservative of all rights."[19]

Justice Matthews's observation in *Yick Wo* had its most famous expression almost one hundred years later in another landmark case, *Reynolds v. Sims*,[20] which examined the malapportionment of Alabama's legislature. Citing *Yick Wo*, Chief Justice Earl Warren memorably exclaimed in *Reynolds* that "[u]doubtedly, the right of suffrage is a fundamental matter in free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is

11. Civil Rights Act of 1866, ch. 31, sec. 1, 14 Stat. 27 (1866); *see* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN (1970).
12. *Yick Wo*, 118 U.S. at 370.
13. *Id.*
14. *Id*.
15. *Id*.
16. *Id.*
17. Monroe v. Collins, 17 Ohio St. 665 (1867).
18. *Yick Wo*, 118 U.S. at 370.
19. *Id*.
20. Reynolds v. Sims, 377 U.S. 533 (1964).

preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[21] Following *Reynolds* and the malapportionment cases, every state would have to draw its legislative districts consistent with the constitutional maxim of one-person one-vote.[22] Population inequality in apportionment was a violation of the individual citizen's "right to exercise the franchise in a free and unimpaired manner."[23]

Yick Wo and *Reynolds* appear to stand for a fundamental axiom, akin to a universal truth, at the heart of the American democratic experiment: voting is a positive, universal, and fundament right. As Alex Keyssar put it in his definitive history of the right to vote: "the image of a democratic United States is that of a nation with universal suffrage."[24] However, to the extent that *Yick Wo*, *Reynolds*, and other similar examples purport to offer a descriptive account of the practice of democracy in the United States, that account is woefully inaccurate. Consider some examples.

We are currently in the midst of a decentralized and unorganized debate over the preconditions that states can impose as prerequisites to democratic participation. Some argue that state laws requiring voters to present photographic voter identification at the polls or when they register to vote before they are allowed to cast their ballots are designed to impede the exercise of the right because they are not related (rationally or otherwise) to any legitimate or important state objective. Are these laws designed to facilitate the voter's ability to exercise the franchise in a free or unimpaired manner, or do they subvert or impede the right? Consider also North Carolina's omnibus voting reform law. The law eliminates same-day registration, straight party voting, out-of-precinct voting, and teenage pre-registration.[25] It bars county election boards from ordering polls to stay open an extra hour if problems arise.[26] It shortens early voting days.[27] Notably, the

21. *Id*. at 562.

22. *Id*. at 589–90 (Harlan, J., dissenting) ("In these cases the Court holds that seats in the legislatures of six States are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the other 44 States will meet the same fate.").

23. *Id*. at 562.

24. Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States xx (Basic Books 2009).

25. *See* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 217–18 (4th Cir. 2016).

26. *See id*.

27. *See id.*

56-page law was passed in the last 72 hours of the 2013 General Assembly.[28] Similar laws have passed across the states.[29]

In a different vein, consider the modern debate about political gerrymandering. Should the government be permitted to draw lines in a way that maximizes the electoral prospects of the party in charge of the line-drawing and minimizes the electoral prospects of the opposing party? Should the government be allowed to move voters in or out of districts in order to dilute their vote simply because the voters are likely to vote against the government's preferences?

Finally, consider debates about the denial of the vote to certain classes of people. United States citizens living in Puerto Rico have neither a right to vote for a member of Congress nor are they not entitled to representation in the Electoral College.[30] This is because Puerto Rico is not a state and federal representation remains largely within state authority. Similarly, residents of the District of Columbia cannot vote for members of Congress but can vote for presidential electors by grace of the Twenty-Third Amendment. And felons or ex-felons, even if citizens of the United States, may be denied the right to vote in both federal and state elections.[31]

The Court's declaration in *Reynolds,* and by extension *Yick Wo*, assumed that voting was a right and declared confidently that the right was fundamental. But American democratic practice has yet to reconcile itself with the lofty theoretical language of universality and fundamentality expressed in *Reynolds* and *Yick Wo*. Since at least the advent of the Voting Rights Act, we have generally viewed our struggles about voting through the prism of race. This is, in part, because voting and political participation in the United States have always been imbricated with the struggle for racial equality.[32] The history of voting in the United States and the struggle for racial equality are not the same phenomena, but they are related. In fact, we argue that one

28. *See* William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the 'Monster' Law*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html.

29. *See* Max Garland et al., *New Voting Laws in the South Could Affect Millions of African Americans*, NBC NEWS (Aug. 29, 2016), https://www.nbcnews.com/news/nbcblk/new-voting-laws-south-could-affect-millions-african-americans-n639511; Ari Berman, *The GOP War on Voting*, ROLLING STONE (Aug. 30, 2011), https://www.rollingstone.com/politics/politics-news/the-gop-war-on-voting-242182/.

30. Igartua De La Rosa v. United States, 229 F.3d 80, 83 (1st Cir. 2000).

31. Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

32. Is it simply an accident of history that *Yick Wo*, the case in which the Court declares the fundamentality of voting is a case about racial discrimination?

cannot understand the scope and contours of the legal status of voting apart from race. Race has mediated our engagement with voting.

In this brief history of race and voting in the United States, we look at five distinctive yet interrelated moments. The first is the founding period, a moment when the framers put our constitutional structure in place and set the initial federalist calculus in favor of the existing states.[33] This is perhaps the most important moment in the story. The framers chose to allow the states to define the criteria for voting qualifications for federal elections.[34] Instead of uniformity and centralization, they opted for diversity and decentralization.[35] This is a choice that reverberates to this day. The second moment is the Civil War and Reconstruction, a moment acknowledged by many as a time when congressional leaders reset the federalism calculus towards the national government. The third moment is the expected retrenchment by the turn of the century, beginning in 1890 with the Mississippi plan. The fourth is the Second Reconstruction, which, for our purposes, culminated in the passage of the Voting Rights Act of 1965. The final moment is the concomitant retrenchment, exemplified by the recent *Shelby County*[36] decision, and what commentators have labeled the new voter suppression. We take up each moment in turn.

From this brief history, we distill three lessons. First, we underscore that this is not a whiggish history of inevitable progress. Second, this is a story that highlights the underappreciated role of social movements, the complementary role played by the United States Supreme Court, and the limits of constitutional norms, even explicit ones. Finally, and what we take to be the most important point of this history: The history of the right to vote in the United States is a history of battles over political power fought on a distinctively racialized canvas. Race has been the archetype for our understanding of voting. This is crucial if under-appreciated. Rather than debate the merits or costs of expanding political rights, we have instead litigated these issues on racial terms. There has been a distinctive benefit of viewing questions of voting and political participation through the lens of race. It is because of our thinking about race and voting that we as a society are slowly coming to the realization that restrictions on voting and politi-

33. *See* U.S. CONST. amend. X.

34. *See* U.S. CONST. art. 1, sec. 2.

35. *Id.* (illustrating that the new national government placed on the states the authority to define who "the people" were).

36. Shelby County v. Holder, 570 U.S. 529 (2013).

cal participation are hard to justify, whether they implicate race or not. It is thus ironic, as we conclude, that because of race, we are slouching toward universality.

I. THE FIRST MOMENT: THE FOUNDING, REPRESENTATION AND OUR FEDERALISM

The original U.S. Constitution – understood as the document ratified in 1787 plus the Bill of Rights – is curiously silent on the nature and scope of the nascent American political community. Though surprising to modern political sensibilities, the original Constitution says precious little about the right to vote. This silence is consistent with the amount of time the convention delegates devoted to the issue. The delegates focused on the defect of the existing confederation, such as securing against foreign invasion, checking the quarrels between the states, and failing to attain any advantages that their union would bring.[37] These were all classic defects inherent to collective action. Drawing the political boundaries of the new nation – that is, deciding how far to extend the right to vote – was not at the forefront of the debates.

The Constitutional Convention reached a quorum and opened for business on May 25.[38] And for the first two months, convention delegates took up and debated the big questions.[39] Finally, on July 26, the day before the convention recessed for two weeks, the issue finally arose.[40] George Mason moved "that the Committee of detail be instructed to receive a clause requiring certain qualifications of landed property & citizenship ⟨of the U. States⟩ in members of the Legislature."[41] Mason also moved to disqualify anyone "having unsettled Accts. with or being indebted to the U. S." from serving in the new Congress.[42] These proposals went to the heart of the delegates' conceptions of political equality. Should the Constitution set any limits on the political community, on either the electors or the elected? And more importantly, what role should property ownership play in this debate? This was no idle question. The question was not whether the

37. MAX FARRAND, ED., THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 4 vols., rev. ed. (New Haven, Conn.: Yale University Press, 1937, repr. 1966).
38. *Id*.
39. *Id*.
40. *Id*.
41. MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 VOL. 2 121 (Max Farrand ed., 1911).
42. *Id*.

right to vote was a right of citizenship – it was – but how to properly define citizenship, or how to determine the necessary attachment to the community. Property qualifications were prevalent across the colonies.[43] More importantly, property ownership demonstrated the requisite independence and free will that all voters must have.

It is here when we first see a discussion of voting qualifications by the convention delegates. It came in the form of Gouverneur Morris' brief answer to Mason's proposal: "If qualifications are proper, he wd. prefer them in the electors rather than the elected."[44] James Madison agreed on this point, "in thinking that qualifications in the Electors would be much more effectual than in the elected."[45] But this would not be an easy task, Madison recognized, due to "[the difficulty of] forming any uniform standard that would suit the different circumstances & opinions prevailing in the different States."[46] John Dickinson similarly remarked that he "was agst. any recital of qualifications in the Constitution. It was impossible to make a complete one, and a partial one would by implication tie up the hands of the Legislature from supplying the omissions."[47] While agreeing that this point had some merit, Dickinson argued that "The best defense lay in the freeholders who were to elect the Legislature. Whilst this Source should remain pure, the public interest would be safe. If it ever should be corrupt, no little expedients would repel the danger."[48]

The delegates accepted the first part of Mason's resolution as amended by Madison to strike out the word "landed" from the proposal.[49] This meant that the convention delegates were in favor of property and citizenship qualifications for voting. In contrast, the convention rejected the second part of Mason's proposal, disqualifying debtors and those with "unsettled accounts."[50]

The Committee of Detail took up the convention's work the next day, July 27, and met for two weeks.[51] The five committee members

43. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, 168 (1969); Sean Wilentz, *Property and Power: Suffrage Reform in the United States, 1787–1860*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 31 (Donald W. Rogers & Christine Scriabine eds., 1992).

44. FARRAND, *supra* note 41, at 121.

45. *Id.* at 124.

46. *Id.*

47. *Id*. at 123.

48. *Id.* at 123.

49. *Id.* at 124.

50. FARRAND, *supra* note 41, at 126.

51. *Id.* at 129.

met behind closed doors. They made clear the nature of their work on August 6, when they delivered a report of their work to the full convention. Notably, their draft began as follows:

> We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and of our Posterity.[52]

This is the draft of language that would become the preamble to the Constitution. At this stage in the process, this would be a union of states. Within a few weeks, "we the people" would provide its consent instead.

Of particular interest to us is Article IV of the draft report. In language familiar to modern ears, the committee of detail offered the following under section 1:

> The members of the House of Representatives shall be chosen every second year, by the people of the several States comprehended within this Union. The qualifications of the electors shall be the same, from time to time, as those of the electors in the several States, of the most numerous branch of their own legislatures.[53]

This language clearly rejects the first part of Mason's resolution, which called for property and citizenship qualifications. The report also provided age, citizenship, and residency qualifications for membership in the new House of Representatives.[54] This language contravened the Mason resolution.

As expected, the delegates aligned on the same two camps. Gouverneur Morris first moved to strike the sentence about voter qualifications and instead to add language "which wd. restrain the right of suffrage to freeholders."[55] Otherwise, he argued, those without property "will sell [their votes] to the rich who will be able to buy them."[56] John Dickinson concurred, as he "considered [freeholders] as the best guardians of liberty."[57] To his mind, a property qualifica-

52. *Id.* at 177.
53. *Id.* at 178.
54. *Id.* ("Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of [in] the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen.").
55. *Id.* at 201.
56. FARRAND, *supra* note 41, at 202.
57. *Id.*

tion would be "a necessary defense against the dangerous influence of those multitudes without property & without principle."[58] James Wilson disagreed; not only had this language been "well considered by the Committee," and difficult to improve, but it would also be hard to establish a uniform voter qualifications rule to apply across the states.[59] But this was "neither great nor novel," Gouverneur Morris responded.[60] Morris then raised a further objection: that the clause would improperly place the qualifications for voting for the national legislature in the hands of the states.[61]

The debate took up the rest of the day and the next.[62] Many delegates rose in defense of the language of the report.[63] Some delegates made a practical argument. They looked ahead to the upcoming ratification process and the need to secure popular approval of the work of the convention. According to Pierce Butler, for example, "There is no right of which the people are more jealous than that of suffrage."[64] As such, Oliver Ellsworth argued that "The people will not readily subscribe to the National Constitution, if it should subject them to be disfranchised."[65] And George Mason similarly offered that "Eight or nine States have extended the right of suffrage beyond the freeholders. What will the people there say, if they should be disfranchised."[66] More generally, Ben Franklin suggested that denying the "lower classes" of the right to vote "would debase their spirit and detach them from the interest of the country."[67]

In response, Madison recognized the right to vote as "certainly one of the fundamental articles of republican Government," and so the right "ought not to be left to be regulated by the Legislature."[68] He further argued that "the freeholders of the Country would be the safest depositories of Republican liberty."[69] Dickinson agreed, since "'[n]o one could be considered as having an interest in the government unless he possessed some of the soil."[70] Gouverneur Morris ad-

58. FARRAND, *supra* note 37, at 202.
59. *Id.* at 201.
60. *Id.*
61. *See id.*
62. FARRAND, *supra* note 37, at 202.
63. *Id.*
64. *Id.*
65. *Id.* at 201.
66. *Id*. 201–02.
67. FARRAND, *supra* note 37, at 210.
68. *Id*. at 203.
69. *Id.* at 203.
70. *Id.* at 209.

ded that to allow all freemen to vote would lead to aristocracy.[71] Madison agreed.[72]

In the end, most of the delegates accepted the committee's recommendation.[73] Federalism won out. Under Article I, the delegates entrusted the states to extend the right to vote to those electors with the "qualifications requisite for electors of the most numerous branch of the state legislature."[74] This was a curious choice. The new national government placed on the states the authority to define who "the people" were. And just as curiously, convention delegates never proffered an argument in favor of uniform national suffrage, or at the very least, an argument for a new constitutional right to vote more expansive and inclusive than what the states were presently doing. This choice also meant that national citizenship in the new nation would be divorced from the right to vote.

This was a crucial choice. In the parlance of modern voting rights law, this was the classic choice between rights and structure. The framers placed structure – federalism – over rights, and in so doing, they made a clear judgment about the value and meaning of the franchise in the new nation. To be sure, it is true that this was a decision driven less by ideology than practical considerations. As Alexander Keyssar explained in his magisterial history of the right to vote, "[a]ny national suffrage requirement was likely to generate opposition in one state or another, and a narrow national suffrage, such as a freehold qualification, seemed capable of derailing the Constitution altogether."[75] But as we move forward in this history of race and voting, it bears asking, what values are expressed by placing federalism at the heart of American Democracy? More importantly, is federalism a part of our constitutional DNA forever? Or can these values and meanings subsequently change at some point in history?

II. THE SECOND MOMENT: OF FREEDOM AND RECONSTRUCTION

In the summer of 1862, President Lincoln took the first step towards the emancipation of the slave population across the Confederate states. This is when he penned the draft of what ultimately

71. *Id.*
72. *Id.*
73. FARRAND, *supra* note 37, at 202.
74. U.S. CONST. art. I, § 2.
75. KEYSSAR, *supra* note 24, at 19.

became the Emancipation Proclamation.[76] Under the Proclamation, signed on January 1, 1863, President Lincoln freed the slave population across the United States, save for slaves who resided in Union-controlled areas (such as New Orleans) or in the Border States who remained in the Union (Delaware, Kentucky, Maryland, and Missouri). Within three years, the Thirteenth Amendment extinguished slavery across the nation.[77]

The end of slavery raised important questions about the meaning of freedom. What does it mean to be free? Is freedom simply the absence of chains? This was President Johnson's position, which led him, time and again, to clash with Congressional Republicans. To the President, the Thirteenth Amendment was the climax of Reconstruction, the end of the national government's duties towards the freedmen. To Congressional Republicans, however, freedom required much more. They could point to the immediate rise of the Black Codes and peonage as proof that the resettlement of the freed population required more than President Johnson allowed. Freedom required the enforcement of rights and a state apparatus committed to that enforcement.

Within a year, congressional Republicans gave us their answer. Soon, before adjourning in March of 1865, the 38th Congress adopted the Freedmen's Bureau bill, to which "more than any other institution, fell the task of assisting at the birth of a free labor society."[78] The Bureau was established in order to aid former slaves in matters of food, housing, education, health care and land ownership.[79] The Bureau would exist for only a year, a time after which the freedmen would no longer need its assistance to join American society.[80] Naturally, President Johnson vetoed the original bill, and Congressional Republicans failed to override it.[81] Congress enacted a revised version four months later and overrode the expected presidential veto.[82]

The following year, Republicans enacted the Civil Rights Act of 1866, a measure designed "to protect all Persons in the United States

76. *See* DAVID HERBERT DONALD, LINCOLN 362–65 (1995).

77. U.S. CONST. amend. XIII.

78. ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 142 (2005).

79. *Id.* at 243.

80. *Id.*

81. CONG. GLOBE, 39th Cong., 1st Sess. 421, 915–17 (1866).

82. Act of July 16, 1866, ch. 200, 14 Stat. 173; CONG. GLOBE, 39th Cong., 1st Sess. 3349 (1866).

in their Civil Rights and furnish the Means of their Vindication."[83] This was the Republicans' first attempt to provide substantive meaning to the Thirteenth Amendment. To be free meant to be equal before the law and to possess civil rights. This was a crucial point. Republicans agreed that the Act protected the "fundamental rights" of American citizenship. They were less certain about what these rights specifically entailed. On its terms, the Act protected the right

> to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizensÉ[84]

To be free, in other words, meant to be a free agent in the economic sphere. This definition lay at the heart of the free labor ideology central to the ethos of the Republican Party. President Johnson disagreed with this definition and vetoed the bill.[85] Republicans overrode his veto.[86]

Notable for our purposes is the fact that the Civil Rights Bill did not explicitly include political rights among its protections. In fact, Republicans assured their colleagues that they would not extend the right to vote to the freedmen. But this would not do. Republicans well understood that the settlement of the war question demanded political agency to the freedmen as a corollary to readmission of the Confederate states to the Union. Under terms of Presidential Reconstruction, the Southern states need only repeal their secession ordinances, repudiate all confederate debts, and adopt the 13th Amendment.[87] Were the Southern states to return to the Union on these terms, however, Republicans and Northern interests would be in a worse place than prior to the war. This is because of the three-fifths compromise, which gave slave states political power in reference to the number of slaves that resided within their borders. The 13th Amendment nullified the three-fifths compromise and would thus enhance the representation of the Confederate states in the House of Representatives and the Electoral College.[88] To allow the Southern states to return to the Union without guaranteeing political rights to

83. Act of May 31, 1870, § 18, 16 Stat. 144.
84. 14 Stat. 173 (1865).
85. FONER, *supra* note 78 at 115.
86. *Id*. at 117.
87. *Id*.
88. U.S. CONST. amend. XIII.

the freedmen would essentially expand the political power of these states in national politics. The war would have been fought for nothing.

Republicans were aware of this conundrum. They were also aware, however, that Northern states refused to extend voting rights to the freedmen, and proposals to do so in a number of these states had been recently defeated.[89] One possible answer was to grant the ballot to Southern Blacks alone, but only the radical Republicans in Congress supported this solution. The Republicans were in a bind. The Joint Committee on Reconstruction found a way out of this puzzle by "an ingenious contrivance worthy of a better cause."[90] Under the Amendment, the states remained free to disenfranchise its Black population at will. Under section 2 of the Amendment, however, their representation in Congress and the Electoral College would be reduced in proportion to the number of disenfranchised male citizens of the state over 21 years of age.[91] This solution would essentially penalize the Southern states for disenfranchising its population but not the North, whose Black population was too small for this penalty to matter. Frederick Douglass referred to this strategy as "compromising and worthless."[92]

The following year, Congress took a path to Black enfranchisement far more direct than believed possible in 1866. This was the Reconstruction Act of 1867.[93] The Act is best known for establishing military rule across the Confederate states.[94] More important for us is Section 5 of the Act, its suffrage provision.[95] Under this section, readmission to the Union required the Confederate states to enfranchise all its male citizens over 21-years-old, irrespective of race, color, or previous condition of servitude, and who have resided in the states for one year prior to the election.[96] This was a conservative pragmatic approach to the problem at hand; the Act extended black suffrage

89. WANG XI, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860–1910, at 45–46 (1997).

90. JAMES B. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 514 (2nd ed. 1992).

91. U.S. CONST. amend. XIV § 2.

92. Frederick Douglass, *At Last, At Last, the Black Man has a Future: An Address Delivered in Albany, New York, on 22 April 1870*, ALB. EVENING J., Apr. 23, 1870 [hereinafter "*At Last*"].

93. 14 Stat. 428 (1867).

94. *Id*.

95. *Id*.

96. *Id*.

only to the Southern states, not to the nation as a whole.[97] And yet, the turnaround from the prior year is nothing short of remarkable. Foner explains it as follows:

> The astonishingly rapid evolution of Congressional attitudes that culminated in Black suffrage arose both from the crisis created by the obstinacy of Johnson and the white South, and the determination of Radicals, blacks, and eventually Southern Unionists not to accept a Reconstruction program that stopped short of this demand.[98]

Black suffrage, in other words, was both a response to the exigencies created by the politics of the day and a paean to racial equality. These two arguments happily converged in 1867 and into the future. But only to a point. Would Congress extend the tenets of the '67 Act and the implied promise of Section 2 of the 14th Amendment across the nation? More importantly, would Congress secure the rights afforded by the '67 Act through a constitutional amendment that would apply to the nation as a whole? These were not idle questions. Without an amendment to the constitution, future majorities may wrest away the hard-fought gains for Black rights. A new Amendment, enshrining Black suffrage, was needed.

Republicans recognized the difficulties ahead. They may well have sought to enfranchise the Black population in the North in order to strengthen its power, particularly in areas where political power was evenly divided.[99] Doing so, however, threatened to alienate core Republican constituencies who opposed Black enfranchisement.[100] As a result, the draft of the Amendment passed by Congress on February 26, 1869 and sent to the states for ratification reflected the most conservative proposal debated by the body.[101] One proposal affirmed the right by all male citizens over 21 years of age to vote.[102] A second proposal forbids states to deny its citizens the right to vote on account of race, color, or previous condition of servitude, and it further forbid the use of literacy tests, property or nativity qualifications for voting. A final proposal was the now-familiar ban on race, color and previous

97. *Id*.

98. FONER, RECONSTRUCTION, *supra* note 78, at 277.

99. *See* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1969).

100. *See* LaWanda Cox & John H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. S. HIST. 303 (1967).

101. WANG XI, *supra* note 89.

102. *Id*.

condition of servitude as a voting prerequisite.[103] This was the proposal sent to the states for ratification, and ratified to the states on March 30th.[104]

Passage of the 15th Amendment led supporters of Black suffrage to hail its promise. In a special message to Congress, President Grant remarked that "the adoption of the fifteenth amendment to the Constitution completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life."[105] Passage of the Amendment was seen as the nation's second founding. Wendell Phillips, the Massachusetts abolitionist, argued that the Amendment marked the real birthday of the nation because the Declaration of Independence finally applied to all.[106] And to the question, "what does this Fifteenth Amendment mean to us?" Frederick Douglass answered:

> I will tell you. It means that the colored people are now and will be held to be, by the whole nation, responsible for their own existence and their well or ill being. It means that we are placed upon an equal footing with all other men, and that the glory or shame of our future is to be wholly our own.[107]

This was a common refrain. Passage of the Fifteenth Amendment commonly meant that Black Americans were finally in charge of their own destinies. They were finally free. The Amendment, declared James Garfield, "confers upon the African race the care of its own destiny. It places their fortunes in their own hands."[108] Only now could Reconstruction finally be over. Or in the words of the New York Tribune, "Let us have done with Reconstruction. . . . The country is tired and sick of it. . . . LET US HAVE PEACE."[109]

The achievement of Reconstruction in this context could not be understated. Only a generation ago, in *Dred Scott*, the U.S. Supreme Court had declared that Black Americans could not be United States citizens.[110] In a scant five years after the war, the country had not

103. *Id*.
104. *Id*.
105. UVA: Miller Center, *March 30, 1870: Announcement of Fifteenth Amendment Ratification*, inhttps://millercenter.org/the-presidency/presidential-speeches/march-30-1870-announcement-fifteenth-amendment-ratification.
106. William Gillette, Retreat from Reconstruction 1869–1879, at 23 (1979).
107. *At Last*, *supra* note 92.
108. Eric Foner, Forever Free: The Story of Emancipation and Reconstruction 149 (2005).
109. David Blight, Professor, Yale Univ., Lecture on The Civil War and Reconstruction Era, 1845-1877.
110. Scott v. Sandford, 60 U.S. 393 (1857).

only rejected *Dred Scott*'s central holding, but it had also placed Black Americans on a plane of equality that few could imagine a few years earlier. The numbers tell a poignant story. At the height of Reconstruction, two-thirds of all eligible Black voters cast ballots for presidential and gubernatorial elections.[111] More importantly, these new voters helped elect record numbers of candidates to public office – 324 members of Congress and state legislatures in 1872 alone.[112] This figure amounted to 15% of all Southern officeholders.[113]

The Fifteenth Amendment is generally understood as responsible for this remarkable feat. This is clearly wrong, however, or at best incomplete. The freedmen registered and came to the polls in historic numbers, so much is true. But the leading reason for this was the Reconstruction Act of 1867 and its demand of Black enfranchisement as a pre-condition for readmission to the Union.[114] This was key. Blacks joined the American political community in the South because the North so demanded it. In other words, mass enfranchisement was a question of political will enforced through military rule. The Fifteenth Amendment sought to extend the promise of the '67 Act, but it did so in a very different way. The Reconstruction Act essentially forced the Southern states to enfranchise all eligible male Black voters. The Fifteenth Amendment established instead a negative right: race may not be the basis for regulating the franchise. The need for a stronger enforcement arm became clear almost immediately. Congress responded with a series of enforcement acts.[115]

As the Reconstruction Era came to a close and military rule across the South ended, it became an open question whether the fragile commitment to Black voting would last. Frederick Douglass put it best, in a speech he gave in 1875 on "the color question."[116] He asked, "when this great white race has renewed its vows of patriotism and flowed back into its accustomed channels . . . in what position will this stupendous reconciliation leave the colored people?"[117] He asked, "when this great white race has renewed its vows of patriotism

111. J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions* 135, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (Bernard Grofman and Chandler Davidson eds. 1992).
112. *Id*. at 140 (table 1).
113. *Id*.
114. 14 Stat. 428 (1867).
115. *Id.*
116. FREDERICK DOUGLASS, *The Color Question, July 5, 1875*, *in* FREDERICK DOUGLASS PAPERS.
117. *Id.*

and flowed back into its accustomed channels . . . in what position will this stupendous reconciliation leave the colored people?"[118] Douglass then asked the question at the heart of the Reconstruction project, a question that remains with us to this day: "If war among the whites brought peace and liberty to the blacks, what will peace among the whites bring?"[119] He was not optimistic. "The signs of the times are not all in our favor."[120] His words proved prescient.

III. THE UNWINDING OF RECONSTRUCTION

The Reconstruction settlement was deeply intertwined with the electoral fortunes of the Republican Party. Passage of the Fourteenth Amendment in Congress and the various Reconstruction Acts made sense in reference to the outcome of the election of 1866. However, by the fall of 1867, signs of trouble surfaced, specifically in Ohio, where Republicans proffered a referendum to amend their state constitution in support of Black suffrage, hoping to begin a domino effect for Black suffrage across the North. Instead, Ohio voters rejected the amendment.[121] Black equality remained a mirage in Republican minds.

By 1874, Democrats had reversed Republican majorities in what may be described as "an electoral tidal wave."[122] Democrats turned a 110-seat deficit in the House into a 6-seat majority.[123] They also won many gubernatorial races across the North and the Midwest, from New Hampshire and Massachusetts to Indiana and Illinois.[124] Republicans still held on to the White House and the US Senate, but Democratic victories across the states ensured that Republicans would lose seats in the Senate. To be sure, the Depression of 1873 explains these changed political fortunes. But whatever the reason, it remained to be seen how the new political landscape would affect the Reconstruction agenda.

The winds of public opinion were shifting, and the U.S. Supreme Court took notice. From the moment the Court got a chance to render its verdict on the nascent Reconstruction policy, it offered a narrow and almost unrecognizable account of Republican policymak-

118. *Id.* at 117.
119. *Id.*
120. *Id.*
121. GILLETTE, *supra* note 106.
122. FONER, *supra* note 11, at 523.
123. GILLETTE, *supra* note 106, at 246 (1979).
124. *See id.*

ing. These were *the Slaughterhouse Cases*.[125] In *Slaughterhouse*, the Court agreed that the 14th Amendment had been enacted as a way to protect Black rights.[126] Yet the Court further concluded that the Amendment only protected the rights of national, not state, citizenship.[127] These were a very limited set of rights. This meant that the Amendment did not alter the calculus of our traditional federalism; that is, the states remained in charge of protecting their citizens and their rights. This is a curious reading of the Amendment, for as Justice Field noted in dissent, if this were its proper meaning, "it was a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage."[128] This cannot possibly be the extent of the jewel of Reconstruction. The Court, which was staffed by Lincoln and Grant nominees and confirmed by Republican majorities, had essentially narrowed the Amendment into something that few Republicans could recognize. The tide of public opinion was clearly shifting.

Three years later, the Court went further. In *U.S. v. Cruikshank*,[129] the justices overturned three convictions that resulted from the Colfax massacre, in which a white mob killed and wounded around 100 Blacks residents of Colfax, Louisiana.[130] The federal government brought indictments under the Enforcement Act of 1870.[131] And once again, federalism ruled the day. Technically, the Court based its holding partly on the fact that the government failed to single out race as the motivation behind the rioters' conduct.[132] But far more important was the Court's view that the postwar Amendments were subject to a state action requirement; that is, the Amendments may only be deployed against the actions of states, not private actors.[133] This meant that the responsibility for protecting citizens from crimes perpetrated by individuals remained with the states and local governments. In postwar America, as the Court must have known,

125. Slaughter-House Cases, 83 U.S. 36 (1873).

126. *Id.* at 62.

127. *Id.* at 73–74.

128. *Id.* at 96.

129. U.S. v. Cruikshank, 92 U.S. 542 (1876).

130. LeeAnna Keith, The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction (2009); Charles Lane, The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction (2009).

131. *Cruikshank*, 92 U.S. at 548.

132. *Id.* at 556.

133. *Id.* at 552.

this meant that crimes against the Black community would go unpunished. The justices noted that the national government retained the authority to protect national rights, but as the *Slaughterhouse Cases* held, this subset of rights was narrow in nature and almost inconsequential.[134] They were meaningless. In the meantime, private acts of terror, the issue of the day, remained unpunished.

The same day the Court decided *Cruikshank*, it also decided *U.S. v. Reese*, a case that bears directly on our story.[135] *Reese* involved a constitutional challenge to a Kentucky law that required, among other things, the payment of a poll tax, which the city of Lexington had set at $1.50.[136] Many Black residents could not pay the tax, and those who tried to pay it were often refused.[137] Plaintiffs brought a challenge under the prohibitions with the interference of the right to vote under sections 3 and 4 of the Enforcement Act of 1870.[138] The Supreme Court brushed this challenge aside.[139] As with *Slaughterhouse* and *Cruikshank*, our federalism carried the day. According to the Court, the Fifteenth Amendment did not give Congress plenary power over elections; such powers remained with the states.[140] Rather, the Amendment gave Congress the power to prohibit racial discrimination in voting.[141] As such, the Court struck down sections 3 and 4 of the Act as beyond the power of Congress. These sections had been drafted so broadly as to cover any imaginable instance where Blacks had been denied the right to vote, for whatever reason. This was precisely what Congress could not do.

Taken together, these cases paved the way for the betrayal of Reconstruction and the abandonment of Blacks by the national government. They paved the way, in other words, for the rise of Jim Crow. This is how Charles Warren put it, in his influential history of the Court:

> Viewed in historical perspective now, there can be no question that the decisions in these cases were most fortunate. They largely eliminated from National politics the negro question which had so long embittered congressional debates; they relegated the burden and

134. *Slaughter-House Cases*, 83 U.S. at 82.
135. United States v. Reese, 92 U.S. 214 (1876).
136. *Id.* at 215.
137. ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE LOSING THE VOTE IN REESE AND CRUIKSHANK (2001).
138. *Reese*, 92 U.S. at 215.
139. *Id.* at 222.
140. *Id.* at 220.
141. *Id.*

> the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.[142]

The Court had placed the states once again in charge of protecting the rights of its colored citizenry. It was as if Reconstruction never happened. This was the moment Frederick Douglass had feared.

A roadblock remained. The Court recognized that the design of the Reconstruction Amendments was "to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it."[143] This was the clear lesson of Reconstruction. The states must stay away from explicit racial classifications that discriminate against the Black population as a class. The Court made this point clearly. In *Strauder v. West Virginia*[144], a case decided on the heels of the *Slaughterhouse Cases* and soon before the *Civil Rights Cases*[145], the Court struck down a state law that explicitly barred Blacks from participating in juries. In so doing, the Court pointed the way to the future. States shall not use race as the basis to form their jury pools, so much was clear. However, the Court continued, this was not to say that the Court may not "make discriminations."[146] For example, states "may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this."[147] In other words, states may not explicitly bar blacks from voting, or from juries, or from the exercise of civil rights more generally. But proxies would work just as well, and the U.S. Constitution and federal law would not stand in their way.

IV. THE THIRD MOMENT: VOTE SUPPRESSION IN THE SHADOW OF THE 15TH AMENDMENT

"The government, which made the black man a citizen of the United States," Senator Lodge told his colleagues, "is bound to protect him in his rights as a citizen of the United States and it is a cowardly government if it does not do it. No people can afford to write

142. CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, vol. 3, 330 (1923).
143. Strauder v. West Virginia, 100 U.S. 303, 310 (1879).
144. *Id.* at 303
145. The Civil Rights Cases, 109 US 3 (1883).
146. *Strauder*, 100 U.S. at 310.
147. *Id.*

anything into their constitution and not sustain it."[148] He was speaking in direct reference to the Lodge Election Bill of 1890, a measure intended to protect black voters in their exercise of rights seemingly protected by the 15th Amendment.[149] For almost as soon as the Northern commitment to Reconstruction ended, the presence of Black voters in Southern registration lists dropped dramatically. White-only governments across the South accomplished this retrenchment through fraud and violence. The Lodge Bill was an effort to enforce an explicit constitutional command.

Supported by President Harrison and Republican majorities in Congress, the bill authorized the national supervision of federal elections. Upon petition by 100 or more voters within a congressional district, the bill authorized a circuit court judge to appoint federal supervisors on a bipartisan basis, whose duty was to watch and report on election procedures.[150] The Circuit Court was further authorized to decide disputes over the election, as well as begin investigations of persons charged with electoral fraud, bribery or intimidation.[151] The bill applied to all congressional districts across the country.[152] Its purpose, according to Senator Lodge, was to "[m]ake public all the facts relating to elections, to protect the voters and to render easy the punishment of fraud."[153]

The critics were unconvinced. They labeled the legislation a "force bill" and traced it back to measures from the Reconstruction era. The arguments were familiar: the bill was a sectional measure, intended to target the South; it would be costly; it would impose severe penalties; and, above all else, it would threaten state sovereignty. To be sure, racism and the explicit threat to white supremacy motivated some critics of the bill, particularly in the South. But it is also true that partisan motives played a role as well. Fair and honest elections would threaten up to 30 congressional seats then in Democratic hands.[154]

148. 21 Cong. Rec. 6543 (1890).

149. Lodge, The Federal Election Bill, 151 North American Review 257, 259 (1890).

150. Lodge, The Federal Election Bill, 151 North American Review, No. 406, 257, 267 (1890).

151. Lodge, The Federal Election Bill, 151 North American Review, No. 406, 257 (1890).

152. Lodge, The Federal Election Bill, 151 North American Review, No. 406, 257, 272 (1890).

153. Lodge, The Federal Election Bill, 151 North American Review, No. 406, 257, 259 (1890).

154. *Id.*

The bill succumbed to a filibuster.[155] Its defeat sent a clear signal that the national government would no longer protect the voting rights of Black Americans. In the wake of the bill's defeat, the promise of Reconstruction ended tragically. Black voters were removed from the voting rolls almost as quickly as they had joined them. This disenfranchisement happened all across the South, between the years 1890 and 1910, in a world where the Fifteenth Amendment was good law.[156] The political strategies varied across the states.

The leading practice, though by no means the most effective, was the poll tax and its requirement that eligible voters pay a capitation tax as a pre-condition to voting.[157] States also began to experiment with periodic voting registration requirements.[158] Even if applied neutrally, these requirements significantly suppress voter turnout. But these were not neutral requirements. The states required very specific levels of information, and any mistake—no matter how insignificant—would invalidate the application.[159] They also set specific days and times for registration. And once registered, a prospective voter must bring his registration certificate to the polling place.[160] Above all these changes and requirements, these new Southern registration laws granted great amounts of discretion to local registrars. This was key. The requisite neutrality in election administration gave way to the whims and biases of local registrars across the region.

States also made a concerted effort to disenfranchise illiterate persons. This strategy had the dual effect of removing both Black and poor voters from the rolls. Most obviously, some states required applicants to read a section of the state or federal Constitution and to occasionally explain to the registrar what they had read. Some states also maintained separate boxes for each seat up for election and required voters to place his particular choice in the right box. Ballots placed in the wrong box were not counted. This created an obvious problem for illiterate voters, who could not read the boxes and thus risked placing their ballots in the wrong box. The boxes were periodically rearranged in order to ensure that illiterate voters could not be

155. Jeffery A. Jenkins & Justin Peck, Legal History and Legislature: *Building Toward Major Policy Change: Congressional Action on Civil Rights*, 1941-1950, 31 LAW & HIST. REV. 139, 143 (2012).

156. Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 305 (1998).

157. *Id.* at 309.

158. *Id.* at 352.

159. *Id.* at 352–54.

160. *Id*.

assisted by friends prior to entering the voting place. Finally, states also began to adopt the secret ballot. Prior to this time, political parties printed and distributed ballots.[161] This practice allowed illiterate voters to receive assistance prior to Election Day. The advent of the secret ballot in the late 19th Century meant that voters must look up and down the list printed by the government in order to find their preferred candidate. This made the task of voting much more difficult on illiterates, if not downright impossible. It also made the task far more difficult on anyone who did not speak English fluently.

This era is commonly known as the first voter suppression period. Most voter suppression practices date back to this period. These are not only the aforementioned literacy tests and poll taxes, but also residency requirements, felon disenfranchisement laws, good character clauses and, in due course, the white primary.[162] As a safety valve to ameliorate the over-inclusiveness of these practices, which swept many whites as well, the states implemented the grandfather clause. Though these exemptions varied, they generally allowed otherwise ineligible voters to vote if they were lineal descendants of a veteran of war or anyone who voted prior to 1867.[163] The wide discretion afforded local registrars also ensured that the burden of these new electoral restrictions fell hardest on the Black community.

Taken together, these various electoral changes had the desired effect. The numbers tell a poignant picture. Reconstruction policies had a salutary effect on Black political participation. Black voters came to the polls and gained political office in numbers not seen again until the 1990's. For example, Blacks gained an electoral majority in many states across the South and held elected office in record numbers – around 2,000 – at every level of government, from the U.S. Senate to state Supreme Courts and local government.[164] But the electoral retrenchment took its toll. In Louisiana, for example, there were 130,334 registered Black voters in 1896.[165] After the new state constitution took effect in 1898, the number of registered Black voters dropped to 5,320.[166] There were only 730 registered Black voters in

161. *Id.*

162. *Id.*

163. *Id.* at 353.

164. Richard H. Pildes, *The Canon(s) Of Constitutional Law: Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENTARY 295, 300 (2000).

165. United States v. Louisiana, 225 F. Supp. 353, 374 (E.D. La. 1963).

166. *Id*.

1910, or 0.5% of the eligible population.[167] A similar disenfranchisement occurred across the Southern states. Alabama dropped from 181,315 registered Black voters to just 2,980 in 1903.[168] Both Virginia and North Carolina saw their estimated black voter turnout drop by virtually 100%.[169] These drops were consistent across the South.[170]

Advocates of Black political rights knew that they could not fight back this suppression wave through the political branches. The defeat of the Lodge Bill made clear that voting rights enforcement must happen outside of Congress. The only institution that offered any hope was the federal judiciary. And that's precisely where they went. The case was *Giles v. Harris*.[171]

Jackson Giles was a literate, Republican Party activist, who held a patronage job as janitor in the Montgomery, Alabama federal courthouse.[172] Mr. Giles had been a registered voter from 1871 to 1901.[173] He also happened to be Black.[174] Ratification of the 1901 Alabama state Constitution – "the most elaborate suffrage requirements that have ever been in force in the United States"[175] – thus ensured that Mr. Giles would be removed from the registration lists.[176] But Mr. Giles was asking the Court to add his name and the names of 5,000 similarly situated black voters to the voting rolls.[177] The Court refused, reasoning that if the plaintiff was in fact correct, "how can we make the Court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?"[178] The Court offered a second reason. The litigation was essentially a frontal attack on Jim Crow and the mass disenfranchisement begun in 1890. In the Court's words, the complaint alleged "that the great mass of the white popula-

167. *Id.*

168. PEYTON MCCRARY ET AL., ALABAMA, IN QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, 38, 38–52 (Chandler Davidson & Bernard Grofman eds., 1994).

169. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE, RESTRICTION, AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 at 241 (1974).

170. Pildes, *supra* note 164, at 303 ("The effect of these disenfranchising constitutions throughout the South, combined with statutory suffrage restrictions, was immediate and devastating.").

171. Giles v. Harris, 189 U.S. 475 (1903).

172. Pildes, *supra* note 164, at 299.

173. *Id.*

174. *Id.*

175. *Id.* at 302.

176. *Id.* at 302–03.

177. *Id.* at 305.

178. Pildes, *supra* note 170, at 306.

tion intends to keep the blacks from voting."[179] So much was clear. The question for the Court was whether, if "the conspiracy and the intent exist, a name on a piece of paper will . . . defeat them."[180] The answer was just as clear, at least to a majority of the Court. An effective ruling for Mr. Giles, and black rights in general, required a commitment by the Court to "supervise" local elections. This was not a role that the justices could see for themselves and the institution of the Court in 1903. So, they punted.

Giles closed the last available door available for enforcing the 15th Amendment. The promise of black political rights died in its wake. Looking to the future, it remained to be seen whether, and how, the promises made in 1870 would ever become a reality.

V. THE FOURTH MOMENT: THE SECOND RECONSTRUCTION

Registering to vote in 1960 Louisiana was no easy task. First came the technicalities of the process. A prospective voter must fill out an application form.[181] She would state her age in years, months, and days; she would also state her gender and her race; her address; her occupation; and her previous place of registration.[182] The applicant must fill out this form very carefully, for any mistake might lead the registrar to reject the application. Further, under the state Constitution, an applicant must "establish that she is the identical person whom [s]he represents [her]self to be when applying for registration."[183] If the registrar had "good reason to believe" that she was not the same person, "he may require the applicant to produce two credible registered voters of his precinct to make oath to that effect."[184]

Second came the literacy threshold. Under the Louisiana Constitution, a prospective voter must "be able to read any clause in this Constitution, or the Constitution of the United States, and give a reasonable interpretation thereof."[185] The interpretation must be satis-

179. *Giles*, 189 U.S. at 488.

180. *Id.*

181. COMM'N ON CIV. RIGHTS, VOTING: 1961 COMMISSION ON CIVIL RIGHTS REPORT 49 (1961).

182. *Id.*

183. Byrd v. Brice, 104 F. Supp. 442, 443 (W.D. La. 1952).

184. *Id.*

185. *Louisiana*, 225 F. Supp. at 358.

factory to the registrar in her parish.[186] Until 1960, Louisiana applicants could demonstrate their literacy by filling out the application, and illiterate applicants could dictate the information to the registrar (though they must still pass the interpretation portion of the registration).[187] Beginning in 1960, under a law approved by state voters, illiterate persons could no longer register.[188] Two years later, the Louisiana State Board of Registration adopted a voter qualification test.[189] Under this test, an applicant must draw one of ten cards.[190] Each card had six multiple choice questions, and the applicant must answer four questions correctly in order to pass the test.[191] Questions included the name of the first U.S. President or the number of justices on the U.S. Supreme Court.[192]

Finally, and also beginning in 1960, the registrant must show that she was not a person of "bad character."[193] The law defined "bad character" as, among other things, "living in a common law marriage within 5 years prior to applying to vote;" giving birth to an illegitimate child within 5 years immediately prior applying for registration, unless the child was conceived "as a consequence of rape or forced carnal knowledge;" or fathering an illegitimate child within 5 years immediately prior to applying for registration.[194] The statutory definitions of "bad character" were not all inclusive. The law further provided that registrars may establish any of these definitions with "competent evidence," a term that the law did not define.[195]

The registration process was further complicated by the many techniques designed to keep voters from registering. For example, the state would periodically purge voters from the voting rolls and then ask them to re-register, at which point the state may retroactively challenge any registrant it so chose.[196] The state may also slow down its registration process.[197] Registration offices may only open once a

186. Baton Rouge Comm. on Registration Educ., Negro Voting in Louisiana 9, 1st ed. (1963).
187. Louisiana v. United States, 380 U.S. 145, 149–50 (1965).
188. *Voting Rights: A Case Study of Madison Parish, Louisiana*, 38 U. Chi. L. Rev. 726, 744 (1971).
189. *Louisiana*, 380 U.S. at 154.
190. *Louisiana*, 225 F. Supp. at 393.
191. *Voting Rights*, *supra* note 188, at 743.
192. *Id.*
193. *Id.* at 737 n.54.
194. *Id.*
195. *Id.*
196. *Id.* at 775–76.
197. Voting Rights, *supra* note 188, at 775–76.

week, or once a month, or over the lunch hour, or at the discretion of the local registrars.[198] Voters may be threatened with violence or economic repercussions if they insisted on registering to vote.[199] Voters may also be explicitly denied the right to register to vote.[200]

The root of the problem was the tremendous amount of discretion placed on registrars throughout the process. This was how racial bias creeped into the system. Consider how registrars administered and evaluated the interpretation test. Registrars could choose the level of difficulty for the question that any given applicant must answer. Registrars may also show applicants sample answers, or may assist applicants in answering questions. In practice, white applicants were generally asked to answer easier questions, saw sample answers, and received assistance from the registrars. Black applicants did not. Registrars also had ample discretion in evaluating the answers. A particularly egregious example saw a registrar ask a black applicant for an interpretation of the Article X, § 16 of the Louisiana Constitution, which states: "Rolling stock operated in this State, the owners of which have no domicile therein, shall be assessed by the Louisiana Tax Commission, and shall be taxed for State purposes only, at a rate not to exceed forty mills on the dollar assessed value."[201] The applicant answered that "it means if the owner of which does not have residence within the State, his rolling stock shall be taxed not to exceed forty mills on the dollar."[202] This answer was rejected.[203] In contrast, a registrar asked a white applicant to interpret Article 1, § 3 of the Louisiana Constitution.[204] The applicant answered: "FRDUM FOOF SPETGH."[205] The registrar accepted this interpretation.[206]

The raw data shows that these various strategies and provisions worked as intended. In 1960, whites in Louisiana 21 years old and older were 71.5% of the population, and non-whites were 28.5%.[207] Yet whites accounted for 86.2% of registered voters, while non-whites accounted for only 13.8%.[208] The data at the parish level raised more

198. *Id.*
199. *Id.* at 739–40.
200. *Id.* at 775 n.261.
201. LA. CONST. art. X, § 16.
202. *Louisiana*, 225 F. Supp. at 384.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. COMM'N ON CIV. RIGHTS, *supra* note 181, at 107.
208. *Id.*

questions. Four parishes with black populations between 61% and 66% had no black registered to vote at all.[209] Fifteen parishes had black voter registration under 10% of the voting age population.[210] Seven parishes had between 10% and 24% of the black voting age population registered.[211] And thirteen parishes had between 25% and 49% of the black voting age population registered.[212]

These figures were consistent across the Deep South. In its 1961 report, the U.S. Commission on Civil Rights concluded that "in about 100 counties in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee, there has been evidence, of varying degree, of discriminatory disenfranchisement."[213] More specifically, according to the commission, in 129 counties across ten Southern states where blacks are more than 5% of the voting age population, less than 10% of eligible black voters were registered to vote.[214] And in 23 counties in 5 of these states, no eligible Black voters were registered.[215] The commission concluded: "So in 1961 the franchise is denied entirely to some because of race and diluted for many others. The promise of the Constitution is not yet fulfilled."[216]

In his address at the Prayer Pilgrimage for Freedom on May 17, 1957, Dr. King was aware of this history.[217] He told his audience that "all types of conniving methods are still being used to prevent Negroes from becoming registered voters."[218] The speech came in the midst of debates in Congress over the right to vote, debates that culminated in the Civil Rights Act of 1957. Dr. King explained to his audience that nothing had changed. He then urged President Eisenhower and members of Congress "to give us the right to vote."[219] This is a remarkable address, not the least of which because Dr. King asked the nation to give people of color the very thing that had been granted

209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. COMM'N ON CIV. RIGHTS, *supra* note 181, at 133.
214. *Id.* at 111.
215. *Id.*
216. *Id.* at 135.
217. Amy Rogers Nazarov, *In the Footsteps of Martin Luther King Jr. in Washington*, WASH. POST (Jan. 12, 2017), https://www.washingtonpost.com/lifestyle/magazine/in-the-footsteps-of-martin-luther-king-jr-in-washington/2017/01/11/0e340cc4-c3d2-11e6-9578-0054287507db_story.html?utm_term=.a3aa82b108ce.
218. Barbara Arnwine & John Nichols, *Martin Luther King's Call to 'Give Us the Ballot' is as Relevant Today as it was in 1957*, THE NATION (Jan. 15, 2018), https://www.thenation.com/article/martin-luther-kings-call-to-give-us-the-ballot-is-as-relevant-today-as-it-was-in-1957/.
219. *Id.*

to them through the 15th Amendment. This is an arresting point. Reconstruction meant nothing. The settlement of Reconstruction and its many promises to the freedmen, came to naught. The larger lesson is clear: The Constitution is but a parchment promise absent the political will to enforce its mandates. And just as importantly, Dr. King was giving the nation a way to rid itself of its "people of color" problem. If given the ballot, people of color would then take their political fortunes in their own hands. The careful reader will note that this was not a new argument. This was the same argument made in 1870 by leading political figures, from Frederick Douglass to James Garfield and many others.[220] Dr. King joined very distinguished company.

Progress had come slowly since the national government had abdicated its enforcement responsibility in the early Twentieth Century. Most of the gains came through the courts. In 1915, the U.S. Supreme Court struck down the grandfather clause in *Guinn v. United States*.[221] And in 1927, the Court also truck down the Texas white primary in *Nixon v. Herndon*.[222] At first glance, these cases appear to contradict the Court's posture in *Giles* and its hesitation to take on the political elites of its day. But this was not new terrain for the Court. These cases were transparent attempts by the state to circumvent constitutional norms. The justices almost had no other choice. More crucially, the reach of the cases was small, almost trivial.[223] *Giles* asked the Court to overturn the entire voting registration regime in Alabama.[224] In contrast, Oklahoma was the only state at the time with a grandfather clause, and the white primary law at issue in *Nixon* was the only one of its kind in the nation; all other states banned blacks through party rule.[225] These cases also failed to reach other disenfranchising practices; they were *sui generis*. And, just as importantly, the cases did not question the legislative motives behind the challenged statutes, the kind of inquiries that would be needed in the future in order to address the voting suppression practices across the South.

220. *See* discussion *infra*.

221. *See generally* Guinn v. United States, 238 U.S. 347, 356–67 (1915).

222. Nixon v. Herndon, 273 U.S. 536, 541 (1927).

223. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 919–21 (1998).

224. Giles v. Harris, 189 U.S. 475, 486 (1903).

225. Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 58 (2001).

Guinn and *Nixon* are important for a different reason. Almost as soon as the Court issued its rulings, state actors responded in ways that undermined the rulings. In Oklahoma, the legislature responded by "grandfathering" the grandfather clause; that is, the new law provided for the automatic registration of anyone who voted in 1914, while requiring all other eligible voters to register within a 12-day window or be forever disenfranchised.[226] And the Texas legislature immediately passed a law that attempted to remove all traces of state action from the white primaries.[227] Rather than triumphs of judicial review, they instead epitomize the ease by which judicial rulings could be circumvented.[228] The cases offered a blueprint for the future. The Court could not do this important work alone.[229]

President Truman joined the fight for voting rights in 1946. In a wire to the NAACP convention, Truman expressed his view that "the ballot is both a right and a privilege."[230] More importantly, he told the convention that the "right to use it must be protected and its use by everyone must be encouraged."[231] The following year, and speaking from the steps of the Lincoln Memorial, President Truman argued that "[t]he National government must take the lead in safeguarding civil rights. We cannot afford to delay action until the most backward community has learned to prize civil liberty and has taken adequate steps to protect the rights of all its citizens."[232] This was no idle talk. In December 1947, the President's Committee on Civil Rights issued its report, *To Secure These Rights*, which highlighted the state of civil rights violations in the country and the need for further action.[233] Among its many recommendations, the report called for federal legislation to protect the right of eligible persons to participate in federal elections, and for authorizing the Department of Justice to use civil

226. *See* Lane v. Wilson, 307 U.S. 268, 276 (1939).

227. *See* Nixon v. Condon, 286 U.S. 73, 82–83 (1932); Grovey v. Townsend, 295 U.S. 45, 46–47 (1935).

228. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 86 (2004).

229. For the view that the understanding of the Court as a countermajoritarian hero is a myth, and that "the Court's capacity to protect minority rights is more limited than most justices or scholars allow," see Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6–7 (1996).

230. STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 119 (1999).

231. *Id.* 119–20.

232. *Id.* 123.

233. See generally THE PRESIDENT'S COMMITTEE, TO SECURE THESE RIGHTS (1947).

and criminal sanctions in the protection of that right.[234] This recommendation formed the basis, 10 years later, of the Civil Rights Act of 1957.

The '57 Act was the first national civil rights law since Reconstruction. The legislation vested authority on the executive branch, through the newly established civil rights division, to seek injunctive relief "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage" in acts that would deprive the right to vote based on race.[235] But the legislation fell short of expectations. For one, officials within the Department of Justice viewed their roles under the legislation very narrowly. They wished for Southern acquiescence to the law and viewed prosecution only as a last resort.[236] Also, federal judges throughout the South were recalcitrant to side with the federal government in these suits.[237] Further, registration officials would resign before the lawsuit commenced, forcing the federal government to sue the state.[238] But as the lower courts concluded, the law authorized the Department of Justice to bring suits against "persons," not states.[239] And just as importantly, subpoenas for the voting records at the center of these suits were either ignored or blatantly defied.[240] Files were destroyed or mysteriously disappeared.[241] As a result, the '57 Act was not nearly enough. Even as the NAACP conducted many registration drives, the number of eligible black voters rose a meager three percent, or just under 200,000.[242] More work remained to be done.

Three years later, Congress corrected many of the deficiencies of the '57 Act. Specifically, the 1960 Act authorized lawsuits directly against the states.[243] Also, the Act required state voting officials to preserve their voting record for twenty-two months and to allow the

234. *Id.* 107, 128.

235. The Civil Rights Act, Pub. L. No. 85-315, § 131 (c), 71 Stat. 637 (1957) (current version at 52 U.S.C. § 10101 (2019)).

236. U.S. Comm'n On Civil Rights, Report Of The U.S. Commission On Civil Rights, 1959, at 131 (1959); *see* Steven F. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 at 333 (1976).

237. *See* United States v. Mississippi, 380 U.S. 128 (1965).

238. *Id.* at 130.

239. *Id.* at 137.

240. *See* U.S. Comm'n On Civil Rights, Report Of The U.S. Commission On Civil Rights 1959, at 70-71, 81 (1959).

241. *Id.* at 134.

242. Lawson, *supra* note 236.

243. The Civil Rights Act, Pub. L. No. 86-450, § 601 (b), 74 Stat. 92 (1960) (current version at 52 U.S.C. § 10101 (2019)).

Attorney General and her representatives to inspect and photograph them.[244] The Act also permitted federal judges to appoint voting referees to register voters whenever the finding of racial discrimination in voting is pursuant to a "pattern or practice."[245] As before, however, these amendments depended both on the good will of federal judges across the South to enforce the law as well as the federal government's view of its own power and responsibilities, especially the lawyers within the Department of Justice. The federal government appeared ready to do its part. In the five months after passage of the '60 Act, the Civil Rights Division began four voting cases, which were one more than they had begun in the preceding two and a half years.[246] Private groups were also ready to do their part. Dr. King, Roy Wilkins, and Philip Randolph agreed to jointly sponsor a "nonpartisan crusade to register one million new Negro voters."[247] It was not clear, however, how Southern federal judges would react to the new law.

In November 1961, President Kennedy met with the U.S. Commission on Civil Rights in order to receive a statutory report from the commission. The commission took this opportunity to place the recent statutory achievements in historical context. The resulting report, *Freedom to be Free*, initially drafted by John Hope Franklin in consultation with Rayford Logan, Allan Nevins, and C. Vann Woodward, came out two years later.[248] The historians' influence on the report is unmistakable. The first line of the report points to the Emancipation Proclamation as the starting point, as any text that examines the march from bondage to freedom in the United States must.[249] But almost as soon as 1863 is barely mentioned, the report takes us back to 1619 and offers a "brief review of the slave's struggle for equality prior to emancipation."[250] The report then offers a brief history of race and freedom, through Reconstruction and Redemption, to Jim Crow and the march in the Twentieth Century towards equality.[251] The end of this discussion details the many gains in racial representation in government thanks to the Black community's "new

244. *Id.* § 301.
245. *Id.* § 601(A).
246. *See* Brian K. Landsberg, Sumter County, *Alabama and the Origins of the Voting Rights Act*, 54 Ala. L. Rev. 877 (2003); *see* Lawson, *supra* note 236 at 140–249.
247. David J. Garrow, Bearing the Cross 142 (1986).
248. U.S. Comm'n on Civil Rights, Freedom to the Free (1963).
249. *Id.* at 1.
250. *Id.* at 7.
251. *Id.* at 30.

political strength."[252] At the time of publication, the report noted that Blacks "now held more *elective* offices than at any time since 1877."[253] Despite this achievement, the report concluded, more work remained to be done.[254] The problem of racial disenfranchisement continued. At the heart of the problem, particularly in the South, was "resistance to the established law of the land and to social change."[255]

While the political branches and the bureaucracy continued to debate their duties and responsibilities under the Reconstruction power, the grassroots did not let on. The Voter Education Project, under the direction of the Southern Regional Council, formed in 1962 and lasted for two and a half years.[256] It raised and administered monies raised towards registering eligible voters in the South, funds that it then provided to the National Association for the Advancement of Colored People, the Southern Christian Leadership Conference, the Student Non-Violent Coordinating Committee, the Congress of Racial Equality, and the National Urban League.[257] More directly, VEP also coordinated registration drives and activities.[258] In 1964, civil rights groups, including CORE and SNCC, organized Freedom Summer, a voter registration drive aimed at increasing the number of Black registered voters in Mississippi.[259] The gains from these efforts were noticeable.

But these gains were not enough, nor were they a signal that the problem of racial discrimination in voting had been solved. Congress certainly did not think so, and so in 1964, they came back to the issue as part of the omnibus Civil Rights Act. This new bill continued to improve the traditional litigation avenues begun in 1957 while recognizing that local registrars had too much discretion to discriminate against voters of color at will.[260] In response, the '64 Act made it unlawful to apply different standards, practices, and procedures from those applied to successful applicants; it banned the use of immaterial

252. *Id.* at 189.

253. *Id.* (emphasis added).

254. *Id.* at 207.

255. *Id.*

256. TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1953, at 578 (1988)

257. Steven F. Lawson, *Prelude to the Voting Rights Act: The Suffrage Crusade*, 1962-1965, 57 S.C. L. REV. 889 (2006).

258. *Id*.

259. *Id.*; Lawson, *supra* note 236.

260. The Civil Rights Act, Pub. L. No. 88-352, § 101 (a), 78 Stat. 241 (1964) (current version at 52 U.S.C. § 10101 (2019)).

mistakes in the application form as a reason to deny registration; and it required that registration tests be administered in writing.[261] The Act also established the completion of sixth grade as a rebuttable standard of literacy.[262] The Act provided for three-judge courts with direct appeal to the U.S. Supreme Court.[263]

During his State of the Union address on January 4, 1965, President Johnson recognized that the fight against racial discrimination in voting was not over.[264] As he detailed the many challenges facing the nation, from education and clean water and air to crime and "crippling disease," President Johnson proposed as part of his national agenda that "we eliminate every remaining obstacle to the right to vote."[265] Later in the address, he asked that "a just nation throw open . . . the city of promise" to those Americans "still trapped in poverty and idleness and fear."[266] This promise included, for African Americans, the "enforcement of the civil rights law and elimination of barriers to the right to vote."[267] More work remained.

Two months later, on March 7, a group of marchers began a pilgrimage from Selma to Montgomery. They left Brown Chapel AME Church and marched silently through downtown Selma. But they did not make it past the Edmund Pettus Bridge. State and local officials awaited them.[268] And from the ashes of this tragic and unforgettable moment arose the most important and effective civil rights statute in our nation's history, the Voting Rights Act.[269]

VI. THE VOTING RIGHTS ACT

The Voting Rights Act reflected President Johnson's directive to the Department of Justice to "prepare the 'goddamnedest toughest' voting-rights bill possible."[270] Prior efforts to enforce the 15th Amendment failed because they pursued a court-centric, individual

261. *Id.* § 101 (a).
262. *Id.* § 101 (b).
263. *Id.* § 101 (d).
264. *See* Lyndon B. Johnson, Special Message to the Congress: The American Promise, 1 Pub. Papers 87 (Mar. 15, 1965).
265. The Civil Rights Act, § 101 (d).
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. Howell Raines, My Soul Is Rested: Movement Days in the Deep South Remembered 337 (1977) (interview with Nicholas Katzenbach, Attorney General during the Johnson Administration).

rights approach to what was clearly a structural problem. These prior efforts fell short, in the words of Attorney General Katzenbach, "tarnished by evasion, obstruction, delay, and disrespect."[271] This is how Katzenbach explained the problem to a House subcommittee:

> Our experience in the voting area has been that, no matter what is decided by courts, no matter what is passed by Congress in this respect, every single place in some States, the only way you can get compliance is to litigate and then that is defended, it is defended up through every court procedure to the Supreme Court, no matter how clear and obvious the points, no matter how many times those same points have been decided, until you eventually get a decree. Then the decree is examined carefully to see whether there is any way in which a certain practice not explicitly prohibited by the decree can be engaged in for the same discriminatory purposes. When this is done, and you go back to court to get the judge to broaden the decree, his capacity and jurisdiction to do that is litigated, then that is taken on appeal and that is taken to the Supreme Court. When you run out of these things, the legislature enacts a new test and that has to be litigated and appealed and go to the Supreme Court.[272]

"What is required," Katzenbach argued, "is a systematic, automatic method to deal with discriminatory tests, with discriminatory testers, and with discriminatory threats."[273]

The Act confronted the problem of racial discrimination in voting in new and aggressive ways. The most powerful provisions of the Act were Sections 4 and 5, the coverage formula and the preclearance provision. Under section 4(b), states who used literacy tests and had voter registration or voter turnout rates below 50% would become covered jurisdictions.[274] And any such jurisdiction was subject to section 5 of the Act, its preclearance provision.[275] This meant that any "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" within these jurisdictions must be approved by the federal government prior to implementation.[276] The Act also banned literacy tests from covered jurisdictions and provided

271. Voting Rights: Hearings on H.R. 6400 before the Subcomm. No. 5 of the H. Comm. on the Judiciary, 89th Cong. 1, 5 (1965).

272. *Id*. at 41–42.

273. *Id*.

274. The Voting Rights Act, Pub. L. No. 89-110, § 4 (b), 79 Stat. 438 (1965) (current version at 52 U.S.C. § 10101 (2019)).

275. Voting Rights Act of 1965, Pub. L. 89-110, §§ 4-5, 79 Stat. 437, 437 (1965).

276. *Id.*

for poll watchers and registrars.[277] No longer could local registrars stay ahead of the law and keep voters of color from joining the voting rolls. Notably, these special provisions of the Act would last 5 years; once voters of color were registered and able to vote, the need for the law would wane.[278]

Central to the history of the Voting Rights Act is the fact that the Court has generally treated the Act like a superstatute from the moment it first addressed the constitutionality of the Act in *South Carolina v. Katzenbach*.[279] For Chief Justice Warren, the constitutionality of the Act was not to be decided on the basis of a formalistic and rigid understanding of both the statute and the Constitution, but "with reference to the historical experience which it reflects."[280] The Court clearly viewed Congress as a partner in resolving the problem of racial discrimination in voting that had plagued (and notice the personalization of the problem) "our country for nearly a century."[281]

Undeniably, this was aggressive enforcement of the 15th Amendment. In *South Carolina v. Katzenbach*,[282] the Supreme Court upheld the Act under a deferential standard of review.[283] But in his opinion for the Court, Chief Justice Warren made a strategic mistake. In attempting to quell criticism that the Act targeted Southern jurisdictions as "conquered provinces," Warren justified the aggressive nature of the Act by pointing both to history and the legislative record.[284] He referred to the number of hearings in each congressional committee, the total number of witnesses, the length of the debates in each chamber, and final vote tallies.[285] From this "voluminous legislative history," Warren reached two conclusions.[286] First, he concluded that the country faced "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[287] And second, that "Congress concluded" that past attempts to enforce the 15th Amendment had

277. *Id.*
278. *Id.*
279. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 Iowa L. Rev. 1389 (2015).
280. *Id.* at 1406.
281. *Id.*
282. 383 U.S. 301 (1966).
283. Charles & Fuentes-Rowher, *supra* note 279, at 1406–07.
284. *See* South Carolina v. Katzenbach, 383 U.S. 301, 324.
285. *See id*. at 308–09.
286. *Id.* at 309.
287. *Id.*

fallen woefully short and must be replaced by "sterner and more elaborate measures."[288] Warren then "paused" in order to "summarize the majority reports of the House and Senate Committees, which document in considerable detail the factual basis for these reactions by Congress."[289]

Justice Brennan saw the problem immediately. In comments he sent to the Chief Justice on the first circulated draft of the opinion, Brennan questioned the need to justify the Act by pointing to the legislative record.[290] Justifying the Act in 1965 was quite easy; one need only open a newspaper or watch the news.[291] Brennan knew that as time passed, the evidence to justify the Act would not be as evident. To be sure, the coverage formula was a temporary measure, on the belief that the need for the Act would lessen and eventually end. And therein lied the rub. This was a question of epistemic authority. Who was in charge of deciding when the need for the VRA would no longer exist? More generally, who would be in charge of determining the proper scope of congressional powers under the Reconstruction Amendments? Who would be in charge, in other words, of determining whether legislation was "appropriate" to enforce the 13th, 14th and/or 15th Amendments? To Brennan, the Court need only point, as it did, to rational basis review and defer to the congressional judgment.[292] The nod to legislative findings was surplusage, and strategically mistaken.

Months later, Justice Brennan's fears came to pass. In *Katzenbach v. Morgan*, the Court confronted the constitutionality of section 4(e) of the Act, which barred the use of literacy tests for persons who had completed a sixth grade education in Puerto Rico.[293] This section was in direct tension with a recent case, *Lassiter v. Northampton*, which upheld the use of literacy tests as legitimate exercises of state power absent a finding that the tests were used as discriminatory tools.[294] Unfortunately for the Court, the voluminous congressional record in support of the special provisions of the Act did not encompass section 4(e). Writing for the Court, Justice Brennan deferred to

288. *Id.*
289. *Id.*
290. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 505-06 (2014).
291. *Id.* at 492–93.
292. *Id.* at 506–07.
293. *Id.* at 500.
294. *Id.* at 500–01.

the congressional vision of constitutional equality, notwithstanding the fact that that vision contradicted and displaced the Court's previously articulated understanding of constitutional equality.[295] This is what Justice Brennan had argued in *South Carolina*, but *Morgan* came one case too late and soon became a historical footnote, a blip in the Court's march towards a muscular version of judicial review.

Buried within *Morgan*'s apparent irrelevance lies an important lesson. The problem of racial discrimination in voting was too difficult for any one institution to handle alone. The problem required multiple institutions working in concert towards the same goal. Congress made the first move, in enacting an aggressive and inventive statute. It was then up to the justices and the executive to interpret and enforce the statute as needed. And this is precisely what *Morgan* offered, a clear signal to the political branches that the justices would do their part to further the promise of constitutional equality.

The effect of the Act was undeniable. Gains in registration and voting turnout were immediate.[296] These gains were made possible in spite of significant non-compliance on the part of state officials with some of the demands of the Act.[297] This led to an important crossroad for the Act. The special provisions were intended to last for five years. Should Congress extend them any further? The facts in the next landmark case, *Allen v. State Board of Elections*,[298] pointed towards an answer. In *Allen*, the Court examined the scope of the preclearance provision, and whether specific changes in state law were subject to preclearance.[299] The case put the Court in a bind. The Act as originally enacted focused on the act of registering and voting. Some of the changes at issue in *Allen* and its companion cases, however, were dilutive in nature; that is, eligible voters were able to register and vote, but the state was undervaluing the weight of their vote.[300]

Writing for the Court, and turning to the reapportionment cases for support, Chief Justice Warren argued that the Voting Rights Act was "aimed at the subtle, as well as the obvious, state regulations

295. *Id.* at 501.

296. UNITED STATES COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION (1968) at vii.

297. Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina*, 57 S.C. L. REV. 827 (2006).

298. 393 U.S. 544 (1969).

299. *Id.* at 563–64.

300. *See Allen*, 393 U.S. at 550–53.

which have the effect of denying citizens their right to vote because of their race."[301] Consequently, Warren concluded that Congress *intended* that "all changes, no matter how small, be subjected to § 5 scrutiny."[302] Had the Court decided otherwise, the Voting Rights Act would have succumbed, as prior attempts before it, to the ingenuity and ill will of local officials' intent on denying voters of color the right to a meaningful vote. *Allen* was thus crucial in the life of the Act, perhaps its most important moment. After *Allen*, Congress extended the special provisions of the Act for another five years and cited this ruling as a leading reason for doing so.[303]

The Court continued its expansive and flexible approach to in its interpretations of the language of the Act for the next decade. The Court meant what it wrote: every change, no matter how small, must be precleared under § 5. Though the statutory language specifically covered changes with which votes "could comply," the Court expanded the reach of § 5 to annexations and redistricting plans, changes with which voters need not comply.[304] The Court also demanded preclearance of a state rule demanding unpaid leave of employees seeking elective office, due to its "potential for discrimination."[305] Similarly, the Court also expanded the reach of jurisdictions covered by the law. Though the Act explicitly applied only to states or jurisdictions that registered voters, the Court expanded its reach to include political units that did not have registration responsibilities.[306] For the first decade of the Act, though there were certainly blips,[307] the Court was a willing partner in the project begun by Congress in 1965.

By 1980, only three justices remained from the Court that first upheld the constitutionality of the Act in *South Carolina*.[308] Under-

301. *Id*. at 565.

302. *Id.* at 568.

303. *See* Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals before Subcomm. No. 5 of the H. Comm. on the Judiciary, 91st Cong. 4 (1969). ("Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement. I hope that the case of Allen v. State Board of Elections, decided by the Supreme Court on March 3, 1969, is the portent of change.").

304. Perkins v. Matthews, 400 U.S. 379, 390–91 (1971); Georgia v. United States, 411 U.S. 526, 536 (1973).

305. *See* Dougherty Cnty. Bd. of Educ. v. White, 439 U.S. 32 (1978).

306. *See* United States v. Bd. of Comm'rs of Sheffield, 435 U.S. 110 (1978); Dougherty Cnty. Bd. of Educ. v. White, 439 U.S. 32 (1978).

307. *See* Beer v. United States, 425 U.S. 130 (1976).

308. These were Justices Brennan, Stewart, and White.

standably, the Court's posture began to change. In *City of Mobile v. Bolden*,[309] the Court held that § 2 of the Act inflexibly tracked the constitutional standard under the 15th Amendment. This was not an irrational or even illogical position. There was much evidence from the legislative record, as well as the language of § 2, to support such a conclusion.[310] But importantly, that decision signaled that the era of partnership and cooperation was coming to an end. It is true that the partnership continued, to a point. Two years later, Congress extended the special provisions of the Act and took the chance to overturn *City of Mobile*, offering its own interpretation.[311] The Court subsequently upheld this new standard, even though it was in direct conflict with the constitutional standard. This was a question the Court must face sometime in the future: could Congress, under its power to enforce the 15th Amendment's intent standard, implement an effect standard? Though many justices have raised the question in concurring and dissenting opinions through the years[312], the Court itself is yet to take up the question squarely.

Through the 1990's and into the new century, cracks in the voting rights edifice continued to show. In *Presley v. Etowah County*,[313] for example, the Court declined to extend preclearance coverage to changes in the distribution of authority of an elected body after an election had taken place.[314] Writing for the Court, Justice Kennedy reminded his audience that only changes with respect to voting were covered by § 5.[315] Consequently, governance changes, or what Justice Kennedy labeled the "internal operation of an elected body," did fall under § 5 coverage.[316] This case is exemplary of Court's change in posture. Had it been willing to do so, the Court could have nestled the changes in *Presley* within prior precedents. What happened in Etowah County, after all, fit perfectly within the historical record. And as in *Allen*, the Court in *Presley* could have interpreted the act of voting as protected by the Act through its prior voting rights prece-

309. City of Mobile v. Bolden, 446 U.S. 55 (1980).

310. *See, e.g.*, Voting Rights: Hearings before the S. Comm. on the Judiciary on S. 1564, 89th Cong. 171 (1965) (statement of Sen. Dirksen) (arguing that section 2 "is a restatement, in effect, of the 15th Amendment").

311. 42 U.S.C. § 1973.

312. *See* Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 142-43 (2010)

313. 502 U.S. 491 (1992).

314. *Id.* at 510.

315. *Id.* at 500.

316. *Id.* at 503.

dents. Had it done so, governance questions could have easily come under the purview of the Act.[317] But this was a different Court.

This was a Court that swung the voting rights pendulum hard in the opposite direction from the Warren Court. These were the *Shaw* cases, where the Court invented a new cause of action in the name of its colorblind vision.[318] These were also the *Bossier Parrish* cases, where the Court offered narrow interpretations of § 5 of the Act, and which Congress saw fit to partially reverse when it extended the special provisions of the Act for another twenty-five years.[319] Thus, in 2008, when plaintiffs challenged the constitutionality of the Voting Rights Act, in *Northwest Austin v. Holder*,[320] the stage was set. Would the Act survive its latest constitutional challenge?

It did, but only for a time.

VII. THE FIFTH MOMENT: UNWINDING THE SECOND RECONSTRUCTION AND THE FUTURE OF VOTING RIGHTS LAW

"Things have changed in the South," Chief Justice Roberts unanimously declared in *Northwest Austin*, and he had the evidence to prove it.[321] "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."[322] On this evidence, the Chief Justice implicitly asked, what else was left for the "temporary" VRA to do? Moreover, the Chief continued, the "statute's coverage formula is based on data that is now more than thirty-five years old, and there is considerable evidence that it fails to account for current political conditions."[323] One can almost hear the Chief Justice explicitly asking the question that is implicit in his *Northwest Austin* discourse—whether there is any useful purpose to maintaining an outmoded regulatory regime that has already achieved its

317. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1716–19 (1993); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Reynolds *Reconsidered*, 67 ALA. L. REV. 485, 520 (2015).

318. Karlan, *supra* note 317, at 1736–37.

319. *See, e.g.*, Reno v. Bossier Parish School Bd., 528 U.S. 320 (2000).

320. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).

321. *Id*. at 202.

322. *Id*.

323. *Id.* at 203.

public policy aims, especially in light of the purported "federalism costs" imposed by the statute.[324]

But the Court didn't go where its own words appeared to take it. Like Courts before it, the Roberts Court could also interpret the clear language of the law creatively, in furtherance of its own institutional goals. Specifically, in *Northwest Austin*, the Court interpreted the Act's bail out provision—which allowed covered jurisdictions to apply for exit from coverage—to include the plaintiffs, a local utility district in Texas.[325] The Court so concluded in the face of statutory language that only applied to states or political subdivisions that registered voters.[326] The utility district in *Northwest Austin* was neither, yet the Court argued that to hold otherwise and keep the utility district under coverage would raise a serious constitutional question.[327] And rather than face *that* serious question, the Court expanded the language of the Act.

Northwest Austin raised a puzzle for students of the Court. Why lecture the legal public about the improved state of race relations only to then avoid the obvious constitutional question through a creative, if unpersuasive, reading of the statutory language? The Court made its intentions clear in the next case, *Shelby County v. Holder*.[328] *Shelby County* marks the death of the Voting Rights Act as a superstatute.[329] Specifically, the Court struck down the Act's coverage formula, which identified the states that were subject to the Act's special provisions, and it effectively neutered the existing preclearance regime.[330] This is significant; it signals that the partnership between Congress and the Executive, on one side, and the Court, on the other side, has disintegrated. With *Shelby County* and its herald, *Northwest Austin*, the Court is cautiously dismantling the most important civil rights statute in our nation's history. The strong message of *Shelby County* is that the voting rights era—and maybe much more broadly, the civil rights era—as we have known it, is over.

Thus, the question with which we close this Essay: where does voting rights policy go from here? Not surprisingly, voting rights activ-

324. We examine the question of the Act's federalism costs in Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 127 (2015).
325. *Nw. Austin*, 557 U.S. at 210–11.
326. *Id.* at 205–06.
327. *Id.* at 211.
328. 570 U.S. 529 (2013).
329. *See* Charles & Fuentes-Rowher, *supra* note 279, at 1391.
330. *Id.*

ists called on President Barack Obama and Congress to enact a new coverage formula.[331] Indeed, a few weeks after the *Shelby County* decision, President Obama convened civil rights leaders to the White House to reassure them that his Administration is committed to a bipartisan fix for the Act.[332] Attorney General Eric Holder, for his part, promised to use the remaining sections of the VRA to vigorously enforce voting rights policy.[333] And as evidence of his commitment, Attorney General Holder filed suit in Texas and asked a lower court to use section 3(c) of the VRA to once again require the state to preclear some voting changes.[334]

As these early responses to *Shelby County* reveal, many of the proposed fixes and reactions to the decision reflect an attempt to restore the status quo ante. These early efforts have been aimed at promoting aggressive § 2 litigation, using section 3's bail-in provision, and using § 2 cases to craft a new coverage provision. Importantly, these strategies critically depend upon the continued persistence of racial discrimination in voting by state actors as the central problem of voting rights policy. This is because the most critical justification for the VRA has long been the presence, profundity, and persistence of intentional racial discrimination in voting by state actors. More importantly, modern voting rights law and policy is held together by a consensus that clearly understood the reality, pervasiveness, and extent of racial discrimination by state actors in democratic politics. This anti-discrimination consensus is the foundation upon which modern voting rights law is built.

However, rightly or wrongly, the Court no longer believes that intentional racial discrimination by state actors remains the dominant problem of democratic politics.[335] The decision in *Shelby County* is clear evidence that the Court's current conservative majority believes that the regulatory model that has undergirded modern voting rights policy and has been in place for almost fifty years is no longer tenable because of what it views as the backward-looking nature of the VRA's statutory scheme. A statutory scheme that, in its view, is focused on rooting out intentional discrimination by state actors as that discrimination manifested itself in the middle of the twentieth century. *Shelby*

331. *Id.*
332. *Id.* at 1391–92.
333. *Id.* at 1392.
334. *Id.*
335. *Id.*

County is the expression of the Court's dissent from the current voting rights model; *Shelby County* announces the dissolution of the framework that has guided voting rights law and policy of the past half-century.

CONCLUSION – SLOUCHING TOWARD UNIVERSALITY

In the wake of *Shelby County*, voting rights scholars and activists are searching for a way forward. This brief jaunt through our history can provide us some lessons for the future. First, *Shelby County* must be viewed as part of our ongoing dialectic on the scope and importance of voting and political participation. Though the history of franchise in American law and politics is generally one of expansion, it is also one of entrenchment. Progress is sometimes followed by backlash. From the founding and through the 21st Century, the history of the right to vote is a history of ebbs and flows, successes and failures; of voter expansion yet voter suppression; of racial empowerment yet racial retrenchment. This is a history of continuous political struggle.

Second, progress is a function of legal and social consensus, which is itself is the product of social movements. The VRA came about because of the civil rights movement. Though as lawyers, we often focus on the role of the Court and litigation, we should pay attention as much attention to social movements and the political process as providing the framework for exploring the scope and content of political participation. Thus, we ought to be looking to the political process and to a political movement to build a new way forward.

Third, the history of the voting in the United States is one that has been fought on a largely racialized battlefield. Additionally, since at the least the advent of the VRA, we have filtered most of our disputes with respect to political participation through a racial prism. One, as of yet unexplored or underexplored, benefit of this racial prism is that it has led us as a society to view restrictions on voting and political participation as unusual and less acceptable both on normative and instrumental grounds. On normative grounds, it is becoming increasingly difficult to justify barriers to voting and political participation. On instrumental grounds, as we search for a path forward from the voting rights, racialized model, we might find the only available path is one in which we view voting and political participation as a positive and universal right.