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The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination

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The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination

Paul Finkelman[*]

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INTRODUCTION

Fifty-one years ago, Congress passed the Civil Rights Act of 1964,[1] which revolutionized the social culture of the nation[2] in part because of swift decisions by the Supreme Court upholding the new law.[3] A year later Congress passed the Voting Rights Act of 1965.[4]

The Voting Rights Act was revolutionary in its concept. For the first time since Reconstruction, the federal government adopted legislation to vigorously enforce the Fifteenth Amendment, which prohibited discrimination in voting on the basis of "race, color, or previous condition of servitude."[5] This new commitment to voting rights was bolstered by the recently ratified Twenty-fourth Amendment,[6] known as the Poll Tax Amendment, which prohibited states from using the payment of taxes as a requirement for voting in any federal election or any primary election for federal office.[7] This revolution

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended as 42 U.S.C.A. §§ 2000a to 2000e–17 (West 2012)). For a discussion of the impact of that law see Paul Finkelman, *The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 had to Change*, 74 LA. L. REV. 1039 (2014).

2. *See generally* CLAY RISEN, THE BILL OF THE CENTURY (2014) (discussing the passage of the Civil Rights Act of 1964); JULIAN E. ZELIZER, THE FIERCE URGENCY OF NOW: LYNDON JOHNSON, CONGRESS, AND THE BATTLE FOR THE GREAT SOCIETY (2015) (discussing the political and social forces that influenced the passage of President Johnson's "Great Society" legislation, including the Civil Rights Act of 1964).

3. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

4. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended as 52 U.S.C.A. §§ 10101, 10301 to 10314 (West, Westlaw through P.L. 113-296)). On March 15, 1965, President Lyndon B. Johnson urged Americans of all colors, religions, regions, and political persuasions to "speak . . . for the dignity of man and the destiny of democracy" and to ensure the right of every American citizen to vote, without legal or social impediments. *Lyndon B. Johnson: Voting Rights Act Address*, GREAT AM. DOCUMENTS, http://www.greatamericandocuments.com/speeches/lbj-voting-rights.html [https://perma.cc/GM4R-W3YL] (last visited May 30, 2015) (transcript of President Johnson's speech on the Voting Rights Act of 1965, delivered on March 15, 1965).

5. U.S. CONST. amend. XV.

6. U.S. CONST. amend. XXIV. It states: "The right of citizens of the United States to vote in any primary or other election . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." *Id.*

7. Many states had required that voters pay a "poll tax" to vote, which discriminated against poor voters. In addition, states used payment of real estate or other taxes to certify voter eligibility. For example, South Carolina required that voters pass a literacy test, unless they owned $300 worth of real property or had paid taxes on at least $300 worth of real property. An Act to Regulate the Registration of Electors, the Holding of General Elections, and the Conduct of

in the regulation of American politics and voting was necessary a century after the Civil War ended because, as President Lyndon B. Johnson noted: "No law . . . [then] on the books . . . can ensure the right to vote [of all citizens] when local officials are determined to deny it."[8]

President Johnson was referring to the long history of black disfranchisement in the South. Because he was a native southerner, Johnson understood better than any other modern president the pervasiveness of black disfranchisement in the South. Since the end of the nineteenth century, state laws, local practice, bureaucratic intransigence, and sometimes intimidation and violence had prevented the overwhelming majority of blacks from voting in the South.[9] Southern states used a variety of techniques to suppress or completely eliminate the black vote.[10] Occasionally the Supreme Court struck down some state policies that blatantly violated the Fifteenth Amendment,[11] but the Court generally permitted literacy tests,[12] poll taxes, onerous

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Party Primaries and Conventions, and to Provide Punishment for Violations of this Act, No. 858, 1950 S.C. Acts 2059, at 2059–60.

8. *Lyndon B. Johnson: Voting Rights Act Address*, *supra* note 4.

9. I define "the South" as the 15 slave states that existed in 1861 in addition to West Virginia and Oklahoma. The 15 slave states in 1861 were: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, and Virginia. All 17 states had mandatory state-wide segregation in schools, public transportation, and other aspects of society and all were notorious for limiting or virtually abolishing black suffrage. For a more elaborate analysis of this definition, see Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 86–87 (1985).

10. By the early twentieth century, the most common techniques were literacy tests, poll taxes, and onerous or discriminatory registration procedures. *See, e.g.*, Act of Feb. 26, 1916, ch. 24, 1916 Okla. Sess. Laws 33 (providing an example of onerous registration procedures). This law was finally overturned by the Supreme Court in *Lane v. Wilson*, 307 U.S. 268 (1939).

11. *See, e.g.*, Guinn v. United States, 238 U.S. 347 (1915) (striking down Oklahoma's "grandfather clause," which allowed people to vote without passing a literacy test if they or their "lineal" ancestors would have been eligible to vote before January 1, 1866, but requiring all other voters to pass this test). Because blacks could not vote in most states on or before January 1, 1866, they were required to pass the literacy test, while all whites were exempt from the test because they were "grandfathered in." *Id.* The Court held that this was blatant racial discrimination in violation of the Fifteenth Amendment. *Id.* The relevant clause of the Oklahoma state constitutional amendment provided:

> No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.

Id. at 357.

12. *See* Williams v. Mississippi, 170 U.S. 213 (1898).

registration procedures,[13] and other devices that effectively disfranchised the vast majority of southern blacks.[14] In many places in the South, local officials simply refused to allow blacks to register to vote.[15] In some cases the Court refused to find unconstitutional disfranchisement even when states openly declared that their goal was to prevent blacks from voting.[16]

The massive history of voter discrimination and intimidation could not be turned around instantly. Thus, despite President Johnson's goals and the massive federal intervention in registering voters and monitoring elections, the Voting Rights Act did not lead to an immediate revolution in southern politics. Black representation in Congress illustrates the failure of the Voting Rights Act to lead to speedy change in the South. In 1985, there were 21 blacks in Congress, but only 5 came from the South, and only 2 of these came from former Confederate states,[17] even though the majority of blacks lived in the South. This Article presents an extended analysis of the history of voting rights in South Carolina to explore the background to the Voting

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13. In *Giles v. Harris*, 189 U.S. 475 (1903), for example, the Court used a flimsy jurisdictional issue to avoid considering Alabama's disfranchisement of almost all blacks in the state. The Court continued on this path in *Giles v. Teasley*, 193 U.S. 146 (1904), by once again refusing to come to terms with Alabama's disfranchisement of blacks. Both cases involved Alabama's 1901 Constitution, which required all existing voters to re-register before January 1, 1903. *Harris*, 189 U.S. at 482–485; *Teasley*, 193 U.S. at 162–64. However, Alabama officials simply refused to register black voters. Then, after January 1, these voters were told they had missed the deadline to re-register. *Harris*, 189 U.S. at 482–85. This scheme was created by a state constitutional convention allegedly "composed entirely of white men, although the population of the State [was] composed of 1,001,152 white and 827,545 colored persons." *Teasley*, 193 U.S. at 148. These cases echoed the equally dismal result in *Mills v. Green*, 159 U.S 651 (1895), where the Court refused to provide relief for South Carolina blacks who were unable to register to vote because of "unreasonable and burdensome regulations prescribed by the unconstitutional registration laws." *Id.* at 652.

14. *See infra* Part III.B (discussing methods used by South Carolina after the passage of the end of Reconstruction).

15. *See infra* Part II.

16. *See, e.g.*, *Williams*, 170 U.S. at 222–23 (approving provisions in the Mississippi Constitution even though the state supreme court confirmed that the purpose of these provisions was to eliminate black voting).

17. CQ PRESS, AMERICAN POLITICAL LEADERS 1789–2005, at 64, 378 (2005). Mickey Leland of Texas and Harold Ford, Sr. of Tennessee were from large urban areas in former Confederate states. Office of the Historian, U.S. House of Representatives, *George Thomas (Mickey) Leland*, HIST., ART & ARCHIVES, http://history.house.gov/People/Detail/16887 [http://perma.cc/VF9L-MEMF] (last visited Sept. 15, 2015); Office of the Historian, U.S. House of Representatives, *Ford, Harold Eugene*, HIST., ART & ARCHIVES, http://history.house.gov/People/Detail/13303 [http://perma.cc/A2MF-PCFW] (last visited Sept. 15, 2015). Two members came from Missouri and one from Maryland, which had not left the Union in 1861. CQ PRESS, *supra* at 378.

Rights Act and its necessity and to illustrate how deeply entrenched discrimination in voting was before 1965.

The South Carolina experience with race and voting demonstrates both why the Voting Rights Act of 1965 was so desperately needed and suggests some of the reasons why the law has failed to give African Americans equal access to the ballot box and to political power in the South. Part I discusses the Voting Rights Act of 1965 in the context of the Civil Rights Act of 1964 and demonstrates that changing the political culture and making voting meaningful was more difficult than ending de jure segregation. Part II of this Article suggests that the Civil Rights Act of 1964, although somewhat successful, was not enough to truly enfranchise African Americans. Part III illustrates why the Voting Rights Act of 1965 was needed to purge the southern states of legislation and practices created to stifle the black vote without language that was overtly discriminatory. Specifically, this Part discusses the efforts of white South Carolinians to disfranchise the state's black population from the end of Reconstruction to the passage of the Voting Rights Act. Part IV examines the role of party primaries in South Carolina and demonstrates that these practices limited the effectiveness of the Act to ensure equal access to the polls. Finally, Part V recognizes that while the Voting Rights Act of 1965 has led to some significant changes in the South, there are still large disparities between the actual population of African Americans in the South and the actual representation in southern legislatures and in Congress. In part, this is a result of residual white hostility to black political participation that has led to racial gerrymandering in much of the South.

I. THE VOTING RIGHTS ACT IN THE CONTEXT OF THE CIVIL RIGHTS ACT

The Civil Rights Act of 1964 led to the dismantling of the very visible and ugly stain of de jure segregation in America[18] with its persistent denial

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18. Although most segregation, and all de jure segregation, was in the South, in some places in the North private discrimination persisted—often in violation of the law—when individual owners of restaurants, motels, and other places of public accommodation also refused to serve blacks. For a discussion of anti-discrimination litigation and legislation in the North before the 1960s, see David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1101–29 (2011); *see also* City of E. Orange v. Bd. of Water Comm'rs, 194 A.2d 459, 464 (N.J. 1963) (terminating a lease for a municipal golf course that was in fact run as if it were a private club that refused to allow blacks to play on the course). The circumstances of this case were hardly unique:

> Post-World War II, many states and municipalities outside the Deep South enacted laws prohibiting discrimination based on race in places of public accommodation. Despite these laws, whites in some states

of dignity to African Americans.[19] Within a year or two after Johnson signed the Act, segregation in restaurants, in public restrooms, hotels and motels, public transportation, and in other areas of day-to-day life simply disappeared.[20] Although the visible symbols of black second-class citizenship, such as the "whites only" and "colored" signs were gone, this legal revolution did not end racism, discrimination, ghettoization, and segregation in housing and schooling. Nor did the 1964 Act suddenly provide massive economic opportunities to blacks. What the 1964 Act did accomplish was swift elimination of de jure segregation and the setting of the stage for far greater changes in American society.

Despite this end of de jure segregation and the formal second-class status of blacks, the 1964 Act did not alter the politics of America, especially in the South, where the majority of blacks lived and where they were almost totally excluded from voting or participating in electoral politics.[21] As long as voter registration and elections were run by segregationist officials, blacks would face discrimination and disfranchisement. President Johnson understood this, and thus pushed for the Voting Rights Act of 1965, which placed federal officials in charge of

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> remained resistant to integration efforts. For example, after the passage of the Freeman Civil Rights Act in 1949, many recreational facilities in New Jersey, to circumvent the law and keep blacks out, transformed from privately-operated swimming facilities open to the general public to private swim clubs requiring steep membership fees and checking identification.

Taunya Lovell Banks, *Still Drowning in Segregation: Limits of Law in Post-Civil Rights America*, 32 LAW. & INEQ. 215, 225–26 (2014); *see also* Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) (upholding prosecution under state law for refusing to board an African American on an excursion boat that went from Detroit to an amusement park in Canada); Taylor v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 294 F.2d 36 (1961) (providing an example of segregation in a northern state in violation of state law). Although *Taylor* involved schools, and the practice was unconstitutional under *Brown v. Board of Education*, 347 U.S. 483 (1954), the case illustrates how localities tolerate or facilitated discrimination in the North even where it was illegal. 294 F.2d 36.

19. *See generally* Finkelman, *supra* note 1 (discussing the motivations for and necessity of the Civil Rights Act of 1964).

20. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249–50 (1964) (upholding the provisions in the Civil Rights Act of 1964 that prohibited discrimination against blacks in renting motel rooms); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (upholding the provisions in the Civil Rights Act of 1964 that prohibited discrimination in serving food).

21. *See infra* Part III (discussing the disfranchisement of African Americans in the southern states, focusing on South Carolina). One exception to this was Oklahoma. The Court's decision in *Lane v. Wilson*, 307 U.S. 268, 275–76 (1939), invalidated Oklahoma's onerous registration procedures as it discriminated against black citizens. This decision led to some increased black voting. However, after redistricting in 1964, following *Reynolds v. Sims*, 377 U.S. 533 (1964), only a few blacks were elected to the state legislature.

registering voters, banned literacy tests, allowed the national government to monitor elections, and required court approval for changes in voting districts and other aspects of elections. While this Act would change American politics, the change was far more gradual than President Johnson hoped, or even expected. Moreover, the recent rise of voter identification laws, as well as continuing racial gerrymandering, suggests that the Act has not reached its potential and remains an unfulfilled promise.

Rather than eviscerating the Act, as the current Supreme Court seems to want to do,[22] the promise of full democracy and representative government will be achieved only by a more vigorous implementation of the Voting Rights Act. Similarly, the Voting Rights Act and the Fourteenth and Fifteenth Amendments should be used to aggressively strike down voter identification laws, which are designed to suppress minority political participation. Illustrative of this problem is the about-face by Judge Richard Posner, one of the most well-known conservative judges on the federal courts. Posner initially upheld the constitutionality of voter identification laws,[23] but more recently has effectively "confessed error," concluding that "a law requiring a photo ID as a condition of a registered voter's being permitted to vote . . . . should be invalidated."[24]

The history of voting rights in the period before the 1965 Act serves to remind us why it is important to vigilantly strive for great access to voting and representation.

II. THE LONG DECLINE OF BLACK VOTING RIGHTS IN THE SOUTH, THE RISE OF BLACK POLITICS IN THE NORTH, AND THE PRELUDE TO THE 1965 ACT

In the years leading up to the Voting Rights Act of 1965, a majority of blacks lived in the South where, with a few minor exceptions,[25] they had virtually no political power and were mostly disfranchised. In 1960, there were nearly 18.9 million blacks in the nation[26] and nearly 11.3 million of

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22. Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (stating its "broader concerns for the constitutionality of the Act" and striking down the coverage formula).

23. *See* Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 797 (2008).

24. Frank v. Walker, 773 F.3d 783, 797 (7th Cir. 2014) (Posner, J., dissenting).

25. After World War II, blacks were elected to city councils in Richmond, Winston Salem, Fayetteville (NC), Greensboro, Durham, Nashville, and a few other southern cities. Robert E. Martin, *The Relative Political Status of the Negro in the United States*, 22 J. NEGRO EDUC. 363, 376 (1953). In the 1940s and 1950s, a few African Americans were elected to state legislatures in four upper South states: Kentucky, Missouri, West Virginia, and Delaware. *Id.* at 375.

26. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the*

them, about 60%, lived in the South[27] where they were almost completely without political power or influence.[28] For example, there were no blacks in Congress from the South and there had not been one since George Henry White of North Carolina left at the end of the Fifty-Sixth Congress in 1901.[29] In contrast, northern blacks had some political power. In 1965, there were six African Americans in the House of Representatives from five different northern states,[30] and unlike their southern neighbors, northern blacks were more likely to be members of state legislatures or to sit on city councils.[31]

For the entire history of the United States, the majority of African Americans lived in the South. At the turn of the century, about 90% of all African Americans were in the South.[32] Despite significant black out-migration starting around World War I, the majority of blacks still lived in the South in the 1960s with much of the rural South having black majorities.[33] By 1960, there were large black populations in most southern cities that would have led to a significant number of black elected officials

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United States, Regions, Divisions, and States 19 tbl.1 (U.S. Census Bureau, Working Paper No. 56, 2002), *available at* http://mapmaker.rutgers.edu/REFERENCE/Hist_Pop_stats.pdf [https://perma.cc/RK28-3N3Q].

27. *See id.* at 22 tbl.4, 41 tbl.23, 58 tbl.40; *supra* note 9 (providing the definition of "the South").

28. *See generally* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969 (1976) (discussing the history of voting rights in the South during the time period leading up to and immediately after the passage of the Voting Rights Act of 1965).

29. CQ PRESS, *supra* note 17, at 378. On White see ERIC ANDERSON, RACE AND POLITICS IN NORTH CAROLINA 1872-1901: THE BLACK SECOND, at 227–314 (1981) and BENJAMIN R. JUSTESEN, GEORGE HENRY WHITE: AN EVEN CHANCE IN THE RACE OF LIFE (2001).

30. CQ PRESS, *supra* note 17, at 378. Those representatives were William L. Dawson (Illinois), Adam Clayton Powell (New York), Charles C. Diggs (Michigan), Robert N. C. Nix (Pennsylvania), Augustus Hawkins (California), and John Conyers Jr. (Michigan). *Id.*

31. There are no comprehensive sources found for black office holding in the U.S. before about 1970. In 1948, one scholar found "about fifty" black state legislators scattered over 16 states. J. Erroll Miller, *The Negro in Present Day Politics With Special Reference to Philadelphia*, 33 J. NEGRO HIST. 303, 337 (1948). With the exception of a few in Missouri, all were in the North. *Id.* A few years later, this number had increased to seventeen states. Martin, *supra* note 25, at 375. In 1953, Cora M. Brown became the first black woman elected to the Michigan Senate. *Id.* at 375. Coleman Young was elected to the Michigan Senate in 1964. Adam Clayton Powell, Jr. was elected to the New York City Council in 1941. CHARLES V. HAMILTON, ADAM CLAYTON POWELL, JR.: THE POLITICAL BIOGRAPHY OF AN AMERICAN DILEMMA (2001). In 1943, Benjamin J. Davis was elected to the New York City Council. BENJAMIN J. DAVIS, COMMUNIST COUNCILMAN FROM HARLEM (1969).

32. Gibson & Jung, *supra* note 26, at 106 tbl.A-14.

33. *Id.* at 98 tbl.A-8.

if there had been no discrimination in access to the ballot.[34] There were also large concentrations of African Americans in some northern and western cities,[35] which had led to a growing number of black elected and appointed officials as well as significant black participation in national politics.[36] In 1965, when the Voting Rights Act was passed, the only blacks in Congress were from five northern cities—Chicago, New York, Detroit, Philadelphia, and Los Angeles—where there were relatively large concentrations of African Americans.[37] But in parts of the South, there were also large concentrations of African Americans in both cities and rural areas, which would have led to their representation in state legislatures and Congress if they had been allowed a meaningful opportunity to vote.[38]

On the eve of the passage of the Voting Rights Act, African Americans made up a large percentage of the overall population in southern states, regardless of population density.[39] For example, in 1960, Georgia had more than one million African Americans who constituted 28.5% of the state's population.[40] Yet no African Americans served in the state legislature or represented Georgia in Congress. At this time, Louisiana's population was 32% black, South Carolina was 35% black, and Mississippi was 42% black.[41] But no African Americans served in the legislatures in any of these states or represented them in Congress. By making up such a significant proportion of the southern population, it seems likely that an African American would have been elected to Congress if there had been equal

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34. *See* Richard Morrill, *A Century of Change in the US Black Population, 1910 to 2010*, NEW GEOGRAPHY (Oct. 21, 2011), http://www.newgeography.com/content/002490-a-century-change-us-black-population-1910-2010 [https://perma.cc/PLA9-Z7LK].

35. *See id.*

36. *See supra* note 31.

37. *See* Office of the Historian, U.S. House of Representatives, *Black-American Representatives and Senators by Congress, 1870–Present*, HIST., ART & ARCHIVES, http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-Congress/ [https://perma.cc/JE74-X5EJ] (last visited May, 23, 2015). However, in some parts of the North, blacks were elected to public office by white majorities. For example, in 1963, Edward Brooke was elected attorney general of Massachusetts, which was only about 2% African American. *Id.*; Gibson & Jung, *supra* note 26, at 54 tbl.36. Similarly, in 1898, when John Francis Wheaton was elected to the Minnesota House of Representatives there were fewer than 5,000 blacks in the entire state, accounting for about two tenths of a percent of the population. *Wheaton, John Francis "Frank, J. Frank"*, MINN. LEGIS. REFERENCE LIBR., http://www.leg.state.mn.us/legdb/fulldetail.aspx?ID=12076 [http://perma.cc/H8J3-USC2] (last visited Sept. 15, 2015); Gibson & Jung, *supra* note 26, at 64 tbl.35, 66 tbl.38.

38. *See* Morrill, *supra* note 34.

39. *See* Gibson & Jung, *supra* note 26, at 98 tbl.A-8.

40. *Id.* at 43 tbl.25.

41. *Id.* at 51 tbl.33, 73 tbl.55, 57 tbl.39.

access to the ballot box. Thus, even if the African American populations were not as densely compact as in northern cities, there were sufficient numbers of black voters to guarantee that a fair election would have produced at least some black members of Congress and southern state legislatures in the absence of disfranchisement.[42]

The Voting Rights Act of 1965 ended many of the legal methods used by southern states to perpetrate black disfranchisement, resulting in a gradual increase in the number of black politicians elected to public office in the South.[43] In 1965, when the Voting Rights Act was passed, there were six African Americans—all from the North—in the House.[44] Two years later, Edward Brooke of Massachusetts became the first northern black in the United States Senate.[45] Four years after the passage of the Act, William Clay of Missouri, representing a majority black district in St. Louis,

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42. Black congressional representation in South Carolina presents a particularly illustrative example of this disparity. The last African American to represent South Carolina in Congress in the nineteenth century was George Washington Murray who lost his seat following the adoption of the 1895 Constitution. *See* CQ PRESS, *supra* note 17, at 378. Murray left Congress in early 1897, and no black would represent South Carolina for nearly a full century—until James E. Clyburn took his seat in 1993. *Id.* at 378–79. This lack of black representation took place despite the fact that the census showed South Carolina had a substantial black majority until the 1930s. Gibson & Jung, *supra* note 26, at 73 tbl.55.

43. *See supra* Part I. In 1967, an African American was elected to the Virginia House of Delegates, and two years later, L. Douglas Wilder was elected to the state senate. Ron J. Keller, *Virginia*, *in* 5 ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1986 TO THE PRESENT 45 (2009). At that time, Virginia was about 18% black, so African Americans could have reasonably comprised more than 1% or 2% of the House of Delegates. *See* Gibson & Jung, *supra* note 26, at 79 tbl.61. In 1989, Wilder was elected as governor of Virginia, becoming the first African American to be elected governor in the United States since Reconstruction. Dwayne Yancey, *L. Douglas Wilder (1931-)*, ENCYCLOPEDIA VA., http://www.encyclopedia virginia.org/Wilder_Lawrence_Douglas_1931-#start_entry [http://perma.cc/ND8P-SS4G] (last visited Sept. 15, 2015); PETER WALLENSTEIN, CRADLE OF AMERICA: A HISTORY OF VIRGINIA 379 (2d ed. 2014).

From December 29, 1872 to January 13, 1873, P.B.S. Pinchback briefly served as acting governor of Louisiana. ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION 171–72 (La. State Univ. Press rev. ed. 1996). Pinchback was elected to the state senate in 1868 and became the president pro tempore of that body in 1871. *Id.* When Lieutenant Governor Oscar J. Dunn died in office, Pinchback became the lieutenant governor. *Id.* Shortly after that, the legislature impeached Governor Henry C. Warmoth, and while his trial was pending, he was required to relinquish his office. This made Pinchback the acting governor, and he held this position until the end of Warmoth's original term.

44. John Conyers (MI), William Dawson (IL), Charles Diggs (MI), Augustus Hawkins (CA), Robert Nix (PA), Adam Clayton Powell, Jr., (NY). Office of the Historian, *supra* note 37.

45. *Id.*

became the first African American to enter Congress from a southern state in the twentieth century.[46] However, Clay's entrance into Congress as the first African American from a former slave state since 1901[47] contrasts with far more dramatic changes in the North. Clay was joined by four new northern African Americans in the House, including Shirley Chisolm, the first black woman to ever serve in Congress.[48] In 1971, Parren Mitchell,

46. CQ PRESS, *supra* note 17, at 65, 378.

47. Missouri did not end slavery until after the Civil War. I define "slave states" as those states that had slavery in 1860. Slavery of course was legal in all the colonies before the Revolution, and only Massachusetts and New Hampshire ended slavery in their Revolutionary-era Constitutions. During and after the Revolution, Pennsylvania, Connecticut, Rhode Island, New York, and New Jersey passed gradual emancipation laws, which meant slavery would gradually end. By 1850 there were no slaves in any of these states. *See generally* ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY (1981).

48. CQ PRESS, *supra* note 17, at 65, 378. These elections were not the only political victories for African-Americans, as they began to take positions in other levels of government in increasingly greater numbers. *See* Engstrom, *supra* note 18 (discussing the importance of black voters in the 1940s in New York, Ohio, and Michigan, as well as black state legislators like Charles Diggs, Sr., who was first elected to the Michigan Senate in 1937 and served until 1944). Diggs's son, Charles Diggs, Jr. won the same seat in 1951, serving until 1954 when he was elected to Congress. *Id.* In 1953, Cora M. Brown became the first black woman elected to the Michigan Senate. Martin, *supra* note 25, at 375. Coleman Young was elected to the Michigan Senate in 1964. Adam Clayton Powell, Jr. was elected to the New York City Council in 1941. HAMILTON, *supra* note 31. In 1943, Benjamin J. Davis was elected to the New York City Council. BENJAMIN J. DAVIS, COMMUNIST COUNCILMAN FROM HARLEM (1969). In 1939, Jane Bolin of New York City became the first black female judge in the nation. *Jane Bolin, America's First Black Woman Judge*, AFRICAN AM. REGISTRY, http://www.aaregistry.org/historic_events/view/jane-bolin-americas-first-black-woman-judge (last visited Oct. 14, 2015). Oscar De Priest was elected to the Chicago City Council in 1915 and William Dawson was elected to the Chicago City Council in 1933. In 1955, Ralph Metcalfe was elected to the Chicago City Council. De Priest, Dawson, and Metcalfe would later be elected to the United States House of Representatives. Raymond P. Alexander was elected to the Philadelphia city council in 1951. *Raymond P. Alexander, Lawyer, Politician, and Judge*, AFRICAN AM. REGISTRY, http://www.aaregistry.org/historic_events/view/raymond-p-alexander-lawyer-politician-and-judge :(last visited Oct. 14, 2015). In 1947, Edith Sampson became an assistant state's attorney in Cook County, Ill. *Edith Sampson, Lawyer, Judge Born*, AFRICAN AM. REGISTRY, http://www.aaregistry.org/historic_events/view/edith-sampson-lawyer-judge-born (last visited Oct. 14, 2015). John Wheaton was elected to the Minnesota House of Representatives in 1898. William "Billy" Williams served as the chairman of the Minnesota Department of Public Safety during World War I, an appointed political office. William "Billy" Williams, Served 14 Minnesota Governors, AFRICAN AM. REGISTRY, http://www.aaregistry.org/historic_events/view/william-billy-williams-served-14-minnesota-governors (last visited Oct. 14, 2015). Frederick Roberts was elected to the California Assembly in 1918. *Frederick Roberts, A California First*, AFRICAN AM. REGISTRY,

from Baltimore, Maryland, became the second southern black to enter Congress in the twentieth century,[49] but he was joined by three more northern blacks, including Ron Dellums, who—significantly—represented a district that did not have a black majority. Two years later, in 1973, Barbara Jordan, representing a majority black district in Houston, and Andrew Young, representing a majority black district in Atlanta, entered the House of Representatives.[50] In 1975, Harold Ford, Sr. became Tennessee's first black member of Congress, bringing the total number of southern black representatives in Congress to five.[51] These elections were not the only political victories for African-Americans, as they began to take positions in other levels of government in increasingly greater numbers.

Despite the Voting Rights Act of 1965 and increased black voting, African Americans' influence in southern political life was still anemic. In 1981, more than 15 years after the passage of the Voting Rights Act, there were only four African-American members of Congress from the South, only one fewer than in 1975[52]—all from the large cities of St. Louis, Baltimore, Houston, and Memphis.[53] These four members of Congress were the only ones representing the more than 14 million southern blacks.[54] This tiny black representation from the South contrasts with the four blacks in Congress just from the state of California,[55] with an African-American population of only 1.8 million, which was about 8% of the state.[56] In 1985, the twentieth anniversary of the Voting Rights Act, there

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http://www.aaregistry.org/historic_events/view/frederick-roberts-california-first. Augustus Hawkins was elected to the California legislature in 1935 and served until entering Congress in 1963. In 1963, Tom Bradley was elected to the Los Angeles City Council. He would become mayor of the city ten years later. In 1963 Edward Brooke was elected Attorney General of Massachusetts. Richard Hatcher was elected to the Gary City Council in 1963.

49. CQ PRESS, *supra* note 17, at 378.

50. However, unlike the emergence of the other southern black members of Congress, Young's victory was temporary and did not reflect a fundamental change in southern politics. When Young resigned to join the Carter administration, his seat was won by a moderate white Democrat, Wyche Fowler, Jr., who would hold the seat until 1987. Loch K. Johnson, *Wyche Fowler (b. 1940)*, NEW GA. ENCYCLOPEDIA, http://www.georgiaencyclopedia.org/articles/government-politics/wyche-fowler-b-1940 [http://perma.cc/F8WH-EP5K] (last updated Apr. 7, 2015). By this time, the district was more than 65% black. *Id.* It is not clear if Young's election was a function of the Voting Rights Act enfranchising large numbers of blacks in his Atlanta district, of the anomaly connected to Young's fame, or of the willingness of white liberals in his district to vote for an African American.

51. CQ PRESS, *supra* note 17, at 65, 378.

52. *See supra* note 50.

53. CQ PRESS, *supra* note 17, at 378.

54. Gibson & Jung, *supra* note 26, at 88 tbl.A-3.

55. CQ PRESS, *supra* note 17, at 378.

56. Gibson & Jung, *supra* note 26, at 88 tbl.A-3.

were 20 blacks in Congress, but only 5 came from the South, only 2 were from former Confederate States, and none were from the heart of the Deep South.[57]

In the 100th Congress (1987–1989), African Americans from Georgia and Mississippi entered the House.[58] Reapportionment after the 1990 census led to redistricting that brought blacks into the House from North Carolina and Louisiana in 1991 and from Alabama, Florida, South Carolina, and Virginia in 1993.[59] In some of these states, more than one African American entered Congress.[60] No blacks have ever represented Arkansas, Kentucky, Delaware, or West Virginia in Congress.[61] Further, since 2007, Tennessee has not had any African Americans in Congress,[62] even though the state has 9 seats in Congress and is 17% black.[63]

The Voting Rights Act had little immediate impact on black Congressional representation until a quarter of a century after its passage.

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57. *See supra* note 17. Two representatives came from Missouri and one from Maryland, which had not left the Union in 1861, but were instead considered "Border States." *The Civil War*, NAT'L PARKS SERV., http://www.nps.gov/civilwar/facts.htm [http://perma.cc/9U2P-RKZN] (last visited Sept. 15, 2015).

58. *See* CQ PRESS, *supra* note 17, at 378–79.

59. *See id.*

60. *See id.* There were four African Americans from Florida in the House of Representatives. *Id.*

61. *See id.*

62. Another anomaly of congressional politics is Tennessee's ninth district, which was represented by Harold Ford, Sr. and then Harold Ford, Jr., from 1975 until 2007. Office of the Historian, *supra* note 37. In 2006, Representative Ford ran for the U.S. Senate, and Steven Cohen, a white Democrat, won his open seat and has held the office ever since. Office of the Historian, U.S. House of Representatives, *Steven Cohen*, HIST., ART & ARCHIVES, http://history.house.gov/People/Listing/C/COHEN,-Stephen-(C001068)/ [http://perma.cc/A48V-6U5X] (last visited Sept. 15, 2015). Cohen is one of the few white politicians representing a predominately black Congressional district in the South. There have been two black Republicans who have represented white majority districts in the South—J.C. Watts in Oklahoma and Tim Scott in South Carolina. Office of the Historian, *supra* note 37. There have been a number of blacks representing white majority House districts in the North. Since 1967, a number of blacks have been elected to the Senate from the North. The best known was Senator Barack Obama of Illinois. Currently, Corey Booker is a U.S. Senator from New Jersey. A number of blacks have been mayors of cities that did not have a black majority, such as Chicago, New York, Los Angeles, Minneapolis, and Seattle, and black governors in Massachusetts and New York. There have also been black mayors in some white majority cities in the South, such as Dallas, San Antonio, and Columbia, South Carolina, and one black governor of Virginia, Douglas Wilder. The election of blacks by constituencies that are majority non-black suggests the beginnings of fundamental change in some voting patterns.

63. *State and County Quick Facts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/47000.html [http://perma.cc/9E2D-BHYP] (last updated Sept. 20, 2015).

Only since the late 1980s has there been significant growth in black representation in Congress. There are currently 47 African-American representatives and 2 African-American senators in Congress.[64] Nevertheless, state legislatures and some congressional delegations remain disproportionately white.[65] This fact is largely due to significant resistance to black political participation in some southern states, the decisive role of primary politics in "one-party" southern states, the concentration of the black vote in gerrymandered districts, and the recent emergence of voter identification laws, which seem to be a modern version of earlier onerous registration and voting requirements designed to limit black voting.[66]

The remainder of this Article will examine these developments in their historical context, mostly focusing on a state that was central to the struggle for voting equality in the United States—South Carolina. However, this Article should not be seen as an argument that South Carolina is particularly different from the rest of the Deep South. The kind of discrimination described in the rest of this Article existed—and still exists—in much of the South. The South Carolina story is not unique, rather it is emblematic of the nature of race and politics in the American South from Reconstruction to the present.[67]

III. THE PERSISTENCE OF BLACK DISFRANCHISEMENT IN THE SOUTH AND THE NECESSITY OF THE VOTING RIGHTS ACT OF 1965

The history of race and voting is surprisingly complex. At the time of the adoption of the Constitution, free African Americans could vote on the same basis as whites in five of the new northern states: New Hampshire, Massachusetts, New York, New Jersey, and Pennsylvania, as well as the southern state of North Carolina.[68] Thus, at the Founding, in about half the

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64. Office of the Historian, *supra* note 37. There are also two non-voting black delegates, one from the District of Columbia and one from the Virgin Islands. *Id.*

65. Although African Americans only make up less than 9% of the members of Congress, *see id.*, they make up 13.2% of the entire American population, *State and County Quick Facts*, *supra* note 63.

66. *See infra* Part V.

67. For discussion of race and voting in much of the rest of the South, see the essays in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1865-1990 (Chandler Davidson & Bernard Grofman eds., 1994) and V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION (prtg. 1984) (1949).

68. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 44 (2000). In addition, North Carolina allowed free African Americans to vote at the Founding. JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790-1860, at 106–07 (1943). A limited number of free blacks could also vote in Maryland at the Founding. *See* David Skillen Bogen, *The Maryland Context of* Dred Scott*: The Decline in the*

states, blacks voted for delegates to the state ratifying conventions and were thus clearly treated as "citizens" of their states.[69] At the time that the Constitution went into effect, African Americans were state citizens, and through their state citizenship, were also citizens of the nation.[70] In the 1790s, the new states of Vermont and Tennessee—which borrowed its Constitution from North Carolina—also enfranchised blacks.

The election of Thomas Jefferson as president in 1801 and the subsequent dominance of the Democratic Party in American politics undermined this auspicious beginning. Jefferson was unalterably opposed to black rights.[71] Starting in the 1820s, the Jeffersonian Democrats, and in the next decade the Jacksonian Democrats, began to expand suffrage for whites, but this was often tied to eliminating black suffrage. By the end of the 1830s, blacks had lost the right to vote in North Carolina, Tennessee, New Jersey, Pennsylvania, although by the 1850s, they had gained the right to vote in Maine and Rhode Island, and were able to vote in school-funding elections in Michigan.[72] By this time, New York had abolished its property requirement for white voters, but not for blacks. So while black men could and did vote in New York, they did not have equal suffrage.[73]

Legal Status of Maryland Free Blacks 1776-1810, 34 AM. J. LEGAL HIST. 381, 383 (1990).

69. This is despite the fact that the United States Constitution did not define "citizen" until the Fourteenth Amendment.

70. These facts undermined the claims by the Supreme Court in *Dred Scott v. Sandford*, 60 U.S. (19. How.) 393 (1857), that blacks were not citizens at the Founding and could never be citizens of the nation. In that case, Chief Justice Taney asserted:

> The question before us is, whether the class of persons [people of African descent] described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Id. at 404–05.

71. *See generally*, PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 193–280 (3d ed. 2014).

72. Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 425 (1986).

73. *Id.*

Antebellum South Carolina—and most of its southern neighbors[74]—never allowed blacks to vote. Thus, free blacks in South Carolina, of which there were nearly 10,000 by 1860,[75] had no more access to the ballot box than their enslaved black neighbors. However, this situation would change soon after the Civil War with the adoption of the three Civil War Amendments to the Constitution and the passage of a series of laws to enforce these amendments.

A. Reconstruction and the First Enfranchisement

The enlistment of black troops starting in August 1862,[76] the Emancipation Proclamation in 1863,[77] the implementation of the Proclamation by the United States Army that led to complete Confederate defeat and the unconditional surrender of all Confederate armies in the spring of 1865, and the Thirteenth Amendment,[78] ratified in December 1865, brought a final end to slavery. This was a dramatic change from the situation that existed when the Civil War began.

When the War began, slavery was legal in 15 states, the District of Columbia, and, under the holding in *Dred Scott* v. *Sandford*,[79] in every federal territory.[80] The Constitution protected slavery at every turn.[81] Under Chief Justice Roger B. Taney's reading of the Constitution as set out in *Dred Scott*, Congress has no power to end slavery anywhere in the country,[82] except,

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74. The two southern exceptions are North Carolina and Tennessee, which allowed free black men to vote on the same basis as whites until the 1830s. *Id.*

75. Gibson & Jung, *supra* note 26, at 73 tbl.55.

76. Act of July 17, 1862, ch. 201, 12 Stat. 597, 599. For a discussion of the implementation of this law in August 1862 see Paul Finkelman, *Lincoln, Emancipation and the Limits of Constitutional Change,* 2008 SUP. CT. REV. 349, 371 n.53 (2009).

77. The Emancipation Proclamation, No. 17, 12 Stat. 1268 (1863).

78. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

79. 60 U.S. (19 How.) 393, 396 (1857).

80. *Id.*

81. *See generally*, PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3–45 (3d ed. 2014).

82. *Dred Scott*, 60 U.S. (19 How.) at 426 ("The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society require. The States evidently intended to reserve this power exclusively to themselves.").

perhaps, the District of Columbia.[83] Under *Dred Scott*, free blacks, even those who could vote, practice law,[84] and hold public office in the states where they lived,[85] could not be citizens of the United States.[86] Even before *Dred Scott*, free blacks could not serve in the Army,[87] obtain passports,[88] deliver the mail,[89] or claim almost any other right under the

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83. In *Dred Scott*, Chief Justice Taney limited his analysis of Congressional power over slavery to the states and federal territories. The U.S. Constitution Article I, Section 8, Clause 17, gave Congress power "[t]o exercise exclusive Legislation in all Cases whatsoever" over what became Washington, D.C. Presumably, even Taney would have conceded that Congress could end slavery there, although freeing slaves in the District would have constituted a "takings" under the Fifth Amendment. In 1862, Congress would exercise this power to end slavery in the District through compensated emancipation. An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, ch. 54, 12 Stat. 376 (1862).

84. On antebellum black lawyers, see J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, at 2 (1993) and Paul Finkelman, *Not Only the Judges Robes Were Black*, 47 STAN. L. REV. 161, 171–79 (1994).

85. In 1860, free blacks could vote in Maine, New Hampshire, Vermont, Massachusetts, and Rhode Island on the same basis as whites. *See* Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, *supra* note 72. They had to comply with a property requirement in New York that was not required for whites, and they could vote in school bond elections in Michigan. *See id.* at 425. By this time, a few blacks had held elected and appointed political office in most of the states where they could vote. For example, Wentworth Cheswell was elected as constable in New Hampshire in 1768 and held various offices after the Revolution. David Quigley & Paul Finkelman, *New Hampshire*, *in* 2 ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1619-1895, at 437 (Paul Finkelman ed., 2006). Alexander Twilight served in the Vermont state legislature in 1836. Evan Haefeli & Paul Finkelman, *Vermont*, *in* 3 ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1619-1895, at 274 (Paul Finkelman ed., 2006). In 1847, Macon Bolling Allen was appointed as justice of the peace in Massachusetts. Finkelman, *Not Only the Judges Robes Were Black*, *supra* note 84, at 174 n.90. In 1857, Thomas Howland was elected as election warden in Providence, Rhode Island. ROBERT J. COTTROL, THE AFRO-YANKEES: PROVIDENCE'S BLACK COMMUNITY IN THE ANTEBELLUM ERA 93 (1982). In addition, John Mercer Langston was elected as a town clerk in Lorain County, Ohio, even though blacks could not vote in Ohio. WILLIAM FRANCIS CHEEK & AIMEE LEE CHEEK, JOHN MERCER LANGSTON AND THE FIGHT FOR BLACK FREEDOM, 1829-65, at 296 (1989). In the late nineteenth century, Langston would serve one term as a U.S. Congressman from Virginia. *See* CQ PRESS, *supra* note 17, at 378.

86. *Dred Scott*, 60 U.S. (19 How.) 393.

87. *Compare* Act of Feb. 18, 1795, ch. 36, 1 Stat. 424, *with* Act of July 17, 1862, ch. 201, 12 Stat. 597, 599.

88. Leon F. Litwack, *The Federal Government and the Free Negro, 1790-1860,* 43 J. NEGRO HIST. 261, 272 (1958).

89. Act of April 30, 1810, ch. 37, § 4, 2 Stat. 592, 594 ("That no other than a free white person shall be employed in carrying the mail of the United States . . . .").

Constitution.[90] Under the Fugitive Slave Law of 1850,[91] free blacks claimed as fugitive slaves were neither allowed to testify on their own behalf at hearings on their status nor were they allowed to apply for a writ of habeas corpus from either a state or a federal court.[92]

In *Dred Scott*, Chief Justice Taney argued that at the Founding, no African Americans were citizens and that they had "no rights" that whites had to respect.[93] Although Taney claimed that he was describing conditions in 1776 or 1787,[94] many people at the time believed that he was describing the status of African Americans as he saw it.[95] Thus, Taney wrote:

> [T]hat they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.[96]

The relationship of the United States government to slavery and free blacks changed dramatically during the Civil War, as Congress created procedures for seizing and freeing slaves used by the enemy,[97] ended slavery in the District of Columbia[98] and the territories,[99] and authorized the enlistment of black troops.[100]

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90. *See generally*, Litwack, *supra* note 88.
91. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.
92. *Id.* This provision of the 1850 law probably violated the Constitution, which allowed for the suspension of habeas corpus only "in Cases of Rebellion or Invasion." U.S. CONST. art. I, § 9, cl. 2.
93. 60 U.S. (19 How.) 393, 407 (1857).
94. This was clearly not the case for voting because free black men voted in at least six states on the same basis as whites in 1787 and 1788 when the Constitution was ratified.
95. *See generally* PAUL FINKELMAN, DRED SCOTT V. SANDFORD: A BRIEF HISTORY (1997); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN IN LAW AND POLITICS (1978); MARK GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).
96. *Dred Scott*, 60 U.S. (19 How.) at 407.
97. An Act to Confiscate Property Used for Insurrectionary Purposes [First Confiscation Act], ch. 60, 12 Stat. 319 (1861); An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes [Second Confiscation Act], ch. 195, 12 Stat. 589 (1862).
98. An Act for the Release of Certain Persons Held to Service or Labor in the District of Columbia, ch. 54, 12 Stat. 376 (1862).
99. An Act to Secure Freedom to All Persons Within the Territories of the United States, ch. 111, 12 Stat. 432 (1862).
100. Act of July 17, 1862, ch. 201, 12 Stat. 597.

These laws and proclamations, the enlistment of more than 200,000 black soldiers and sailors,[101] and the ultimate victory of the United States Army brought an end to slavery. But ending slavery did not lead to legal equality or enfranchisement. Immediately after the War, the former slave states passed numerous laws and regulations, collectively known as the Black Codes.[102] The Black Codes were designed to suppress blacks, limit their movement, and prevent them from enjoying their new freedom while forcing them to remain a politically powerless and easily exploitable labor force.[103] In response to these laws and enormous violence against former slaves, Congress launched a major investigation into the conditions in the South under the auspices of the Joint Committee on Reconstruction.[104]

Testimony before this Committee illustrated the need to pass legislation and amend the Constitution to establish and protect the civil liberties, civil rights, and political rights for former slaves. The leaders of Congress, many of whom had been working against slavery and for racial fairness throughout their careers, understood that black liberty would mean nothing if the freedmen did not have equal rights and access to the ballot box to protect and vindicate those rights.[105] Major General Edward Hatch, who was stationed in Tennessee, told the committee that while "the negro is perfectly willing to work,"[106] he needed "a guarantee that he would be secured in his rights under his contract."[107] Hatch testified that the whites in this former Confederate state wanted to "establish a kind of peonage; not absolute slavery, but that they can enact such laws as will enable them to manage the negro as they please—to fix the prices to be paid for his labor."[108] Similarly, Major General John W. Turner reported that in Virginia "[a]ll of the [white] people" were "extremely reluctant to grant to the negro his civil right—those privileges that pertain to freedom, the protection of life, liberty, and property before the laws, the right to

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101. DUDLEY TAYLOR CORNISH, THE SABLE ARM: BLACK TROOPS IN THE UNION ARMY, 1861-1865, at 288–90 (Univ. Press of Kan. 1987).

102. On the Black Codes, see generally Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 389 (2004).

103. *Id.* at 402.

104. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION AT THE FIRST SESSION 39TH CONGRESS, at xiii (1866), *available at* https://archive.org/stream/reportjointcomm00stevgoog#page/n170/mode/2up [https://perma.cc/4B4S-F6MQ] [hereinafter REPORT].

105. *See generally*, JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

106. REPORT, *supra* note 104, at pt. I, 107 (testimony of General Edward Hatch).

107. *Id.*

108. *Id.* at 107–08.

testify in courts, [etc.]."[109] A white sheriff in Fairfax County, Virginia, told Congress that his state was passing laws to disfranchise black voters and "passing vagrant laws on purpose to oppress the colored people and to keep them in vassalage, and are doing everything they can to bring back things to their old condition, as nearly as possible."[110]

In South Carolina, General Rufus Saxton, who had trained some of the first black regiments during the Civil War,[111] reported numerous atrocities perpetrated against blacks as many whites persisted in treating free people as if they were still slaves. He told of a black father "with three children, two male and one female [who] were stripped naked, tied up, and whipped severely," and of a woman who was given a hundred lashes while tied to a tree.[112] Saxton told the Committee about blacks being shot or tortured and the whipping of naked women by whites.[113] In addition to attacks on former slaves by individual planters, ruffians, and gangs, Saxton reported a more ominous trend:

> [O]rganized bands of "regulators"—armed men—who make it their business to traverse these counties, and maltreat negroes without any avowedly definite purpose in view. They treat the negroes, in many instances, in the most horrible and atrocious manner, even to maiming them cutting their ears off, [etc.].[114]

Congress responded to the anti-black violence and the repressive laws of the postwar South with the 1866 Civil Rights Act and the passage of the Fourteenth Amendment, which was sent to the states in 1866 and ratified in 1868.[115] In the next few years, Congress passed a number of statutes designed to secure black freedom and guarantee political and legal equality across the nation.[116] These laws and the three Constitutional Amendments

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109. *Id.* at pt. II, 4 (testimony of General John W. Turner).
110. *Id.* at 35.
111. CORNISH, *supra* note 101, at 79–80.
112. REPORT, *supra* note 104, at pt. I, 223.
113. *Id.* at 222–29.
114. *Id.* at 234.
115. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981–1982 (1987))).
116. The most important statutes are: (1) the Civil Rights Act of 1866; (2) the four Reconstruction Acts of 1867, Act of March 2, 1867, ch. 153, 14 Stat. 428, Act of March 23, 1867, ch. 6, 15 Stat. 2, Act of July 19, 1867, ch. 30, 15 Stat. 14, and Act of March 11, 1868, ch. 25, 15 Stat. 41; (3) the Enforcement Acts of 1870-71, including the Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870), and the Second Enforcement Act, ch. 99, 16 Stat. 433 (1871), and the Enforcement of 1871 [also known as the Ku Klux Klan Act], ch. 22, 17 Stat. 13; and finally (4) the Civil Rights Act of 1875.

ratified between 1865 and 1870 transformed the political life of African Americans across the United States.

The Thirteenth Amendment, ratified in 1865, concluded the long struggle to end legal slavery.[117] In the Civil Rights Act of 1866,[118] Congress tried to provide full citizenship for African Americans. At the same time, Congress wrote and passed the Fourteenth Amendment, which when ratified in 1868, secured state and federal citizenship for "[a]ll persons born" in the United States and prohibited the states from denying anyone in the nation, even non-citizens, "the equal protection of the laws."[119] The Thirteenth Amendment, combined with the Civil Rights Act of 1866, should have ended discrimination for all Americans.

The Thirteenth and Fourteenth Amendments, in addition to the Fifteenth Amendment, which was ratified in 1870, revolutionized the Constitution and also—in an important constitutional innovation—gave Congress explicit power to enforce their provisions with appropriate legislation.[120] Congress passed the 1866 Civil Rights Act under the enforcement clause of the Thirteenth Amendment, but also passed the Fourteenth Amendment at the same time to make sure that it had the actual power to pass the Civil Rights Act. Some members of Congress who supported the law, including the key Republican leader John Bingham, were uncertain if the Thirteenth Amendment empowered Congress to pass a post-emancipation civil rights law.[121] Others, including the equally powerful Thaddeus Stevens, had no doubt that the Thirteenth Amendment allowed this.[122] But the Fourteenth Amendment mooted this issue and was clearly designed to empower Congress to secure fundamental rights.

Starting in 1866, Congress passed a number of laws to enfranchise blacks in the former Confederate states. These laws had mixed success. For example, in 1867 and 1868, former Confederate states called constitutional conventions as required by new federal laws, but with the exception of South Carolina, blacks were significantly underrepresented in these conventions.[123] On the other hand, in 1867 in some places in the South, under the supervision of the United States Army, blacks voted and a few

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117. U.S. CONST. amend. XIII, § 1.

118. *Supra* note 115.

119. U.S. CONST. amend. XIV, § 1.

120. *See* U.S. Const. amends. XIII, XIV, XV.

121. Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 680–81 (2003).

122. *See* HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 386–438 (1982); Paul Finkelman, *The Historical Context of the Fourteenth Amendment*, *supra* note 102, at 399–400.

123. JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 102 (1961).

even held minor public office.[124] In the Fourteenth Amendment, Congress attempted to indirectly secure the enfranchisement of blacks in the former slave states in elections for federal office on the same basis as whites.[125] The new amendment contained a cumbersome clause that provided for the reduction of a state's congressional representation if blacks were not given equal access to the ballot.[126] This provision did not have any effect on southern politics, and it quickly became clear that the whites who held power in the former Confederate States were willing to risk having fewer members in the House of Representatives rather than allow blacks to vote on the same basis as whites. Moreover, this provision, even if implemented by Congress, would not affect a southern state's right to two senators.[127] Nor would it have affected representation in state legislatures or any other aspect of state government, because it only reduced a state's representation in Congress.[128] Congress responded to southern white resistance to black suffrage with a final civil rights amendment—the Fifteenth Amendment.[129] Ratified in 1870, this Amendment simply declared: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[130] Like the Thirteenth and Fourteenth Amendments, the Fifteenth specifically empowered Congress "to enforce this article by appropriate legislation."[131]

B. Black Political Participation in South Carolina and Post-Reconstruction Efforts to Disfranchise Blacks

Following the adoption of the Fifteenth Amendment, African Americans voted in large numbers throughout the South.[132] Black political participation in South Carolina was particularly impressive. For example, the 1880 presidential election saw a 77% turnout of eligible black voters

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124. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863-1877, at 284–89 (1988).

125. U.S. CONST. amend. XIV, § 2.

126. *Id.*

127. U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

128. For discussions of voting in the post-War South see KEYSSAR, *supra* note 68, at 87–116 and ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 243–317 (1997).

129. U.S. CONST. amend. XV.

130. *Id.* § 1.

131. *Id.* § 2; *see generally* THOMAS HOLT, BLACK OVER WHITE (1977) (discussing black political leadership in South Carolina during Reconstruction). More than half of all men elected to state and federal office from the end of the Civil War to 1876 were black. *Id.* at 1.

132. *See* RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS 128–29 (2004).

in South Carolina.[133] African Americans also participated in political life by holding public office.[134] In South Carolina, more than 400 blacks served in public office from 1867 until 1877, when Reconstruction formally ended.[135] These included State Supreme Court Justice Jonathan J. Wright, Lieutenant Governors Richard H. Gleaves and Alonzo J. Ransier, Speakers of the State House of Representatives Robert B. Elliott and Samuel J. Lee, Secretaries of State Francis L. Cardozo and Henry E. Hayne, and Congressmen Richard H. Cain, Robert C. DeLarge, Robert B. Elliott, Joseph H. Rainey, Alonzo J. Ransier, and Robert Smalls.[136]

Although impressive, black office holding in South Carolina during Reconstruction was never proportional to the state's African American population. In 1860, South Carolina had a white population of 291,300 and a black population of 412,320.[137] The overwhelming majority of those African Americans, 402,406, were slaves while only 9,914 were free.[138] In 1870, at the time African Americans gained the right to vote on the same basis as whites, they constituted 59% of the state's population, with 289,667 whites and 415,815 blacks in the state.[139] But only twice, in 1871–1873 and 1873–1875, did African Americans constitute a majority of South Carolina's delegation in the House of Representatives.[140] Never were any African Americans elected to the United States Senate from the state or as governor of the state, despite the huge black majority in the state's population.[141]

As Reconstruction came to an end, the participation of African Americans in South Carolina politics decreased due to the passage of a series of laws designed to deny African Americans the ability to exercise their newly created voting rights.[142] As early as 1876, some localities adopted schemes to prevent blacks from voting in primaries.[143] In 1878,

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133. *Id.* at 128.
134. *See* HOLT, *supra* note 131, at 1.
135. *See id.* at 73.
136. FONER, *supra* note 43, at xvi tbl.6; CQ PRESS, *supra* note 17, at 378.
137. Gibson & Jung, *supra* note 26, at 73 tbl.55.
138. *Id.*
139. *Id.*
140. Office of the Historian, *supra* note 37 (providing a list of all blacks elected to Congress, by Congress). For a full list of all members of Congress from South Carolina in these years, see CQ PRESS, BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774-1996, at 189, 194 (1997).
141. CQ PRESS, *supra* note 17, at 378; FONER, *supra* note 43, at xvi tbl.6.
142. *See generally* VALELLY, *supra* note 132, at 121–31 (discussing the Post-Reconstruction disfranchisement of African Americans in southern states, including South Carolina).
143. Orville Vernon Burton, Terence R. Finnegan, Peyton McCrary & James W. Loewen, *South Carolina*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT

the state instituted the use of separate ballot boxes for state and federal elections in an attempt to confuse black voters and prevent their ballots from being counted.[144]

The 1878 law provided detailed regulations for where elections could be held, naming stores and other buildings as polling places on a county-by-county basis. However, at the end of this statute, the legislature added the following language: "The word precinct in this Act shall be construed to embrace an area sufficient to provide for holding elections for members of Congress and Presidential Electors at different stations from those stations where elections are held for State and County officers."[145] In addition to this law, the legislature also required separate ballot boxes for state and federal elections, even if the votes were cast at the same polling place.[146] In other words, these two laws allowed election officials to move federal ballot boxes to new locations to confuse black voters, many of whom were former slaves and fully understood that they wanted to vote for Republicans—the Party of Lincoln—but who also were illiterate and could be easily tricked into putting their ballots in the wrong boxes. Illiterate whites might also have been harmed by these procedures, but elections officials were almost always willing to help whites cast their ballots.

These measures were only the beginning of a process that was calculated to deprive African Americans of the right to vote in the Palmetto State. This process did not take place overnight, but the effects were seen from the beginning of the enactment of these laws. For example, from 1871 until 1879, South Carolina had at least two black representatives in every session of Congress.[147] But after 1879, with the new laws in effect, there was never more than one black representative in the House from South Carolina, and sometimes there were none, even though more than 60% of the state's population was African American.[148]

OF THE VOTING RIGHTS ACT, 1965-1990, at 231 (Chandler Davidson & Bernard Grofman eds., 1994).

144. An Act to Amend an Act Entitled "An Act to Establish by Law the Voting Precincts in the Various Counties in This State," No. 513, § 2, 1877–1878 S.C. Acts 565, 570 (1878); *see also* Burton et al., *supra* note 143, at 193 ("[T]he Eight Box Law, intended as a de facto literacy test, required voters to place ballots for various offices in separate boxes, which election officials periodically shuffled. These discriminatory tactics effectively cut the African-American electorate in half.").

145. § 2, 1877–1878 S.C. Acts at 570.

146. An Act to Alter and Amend the Law in Relation to Elections, No. 542, 1877–1878 S.C. Acts 632 (1878).

147. Office of the Historian, *supra* note 37.

148. *Id.*

This evolving political strategy of the state's white minority combined with violence and intimidation perpetrated by white terrorists led to a sharp decline in the number of black office holders.[149] In 1882, the white majority in the legislature enacted an elaborate new election law, known as the "Eight Box Ballot Law," which was designed to reduce the black vote without overtly denying the right to vote on the basis of race.[150] The law attacked black voting in two ways: by creating a confusing system for casting ballots—the eight ballot boxes—and also by making registration nearly impossible for most blacks.

As one of the leading historians of voting in the South has noted, the "Eight-Box Ballot Law" was "one of the most clever stratagems" adopted in this period to eliminate the black vote, "and its provisions illustrate how ingenious southern authors could twist seemingly neutral devices for partisan and racist purposes."[151] It is important to understand that at this time, there were no voting machines or voting booths. Voters placed a paper ballot, usually supplied by a candidate or the party, into a ballot box. Thus, by requiring multiple ballots and multiple boxes, the state set the stage to legally not count numerous ballots.

As one renowned scholar of southern voting rights explains:

> Under this rule, ballots for individual offices had to be placed in separate ballot boxes. Put your ballot in the wrong box, and it would not be counted. Although the boxes were usually labeled properly, this meant little to illiterate black voters unable to read the labels. And if this were not enough, many election supervisors shifted the boxes around periodically. Countless wrongly placed—and hence uncounted—ballots were the result.[152]

In addition to the multiple ballot boxes, the new legislation also made registration difficult and arbitrary. Another leading historian of black voting in the South described the new rules and policies:

> South Carolina led the way in manufacturing legal obstructions to keep the Negro from the polls. In 1882 its lawmakers enacted a registration measure requiring individuals of voting age to enroll between May and June of that year or to risk permanent exclusion

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149. *See* VALELLY, *supra* note 132, at 121–29.

150. An Act to Amend Title II. (Entitled) "Of Elections" of Part I. (Entitled) "Of the Internal Administration of the Government" of the General Statutes, No. 717, § 29, 1881–1882 S.C. Acts 1110, 1117–18 (1882).

151. J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 35 (1999).

152. CHARLES L. ZELDEN, VOTING RIGHTS ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 75 (2002).

> from the suffrage lists. Minors were to be enfranchised when they reached the age of twenty-one if a registrar found them qualified. In addition, citizens were compelled to register each time they moved, a stipulation designed to penalize migrating black sharecroppers and tenants.[153]

These rules were easily manipulated to prevent African Americans from voting. However, the law provided an escape hatch for white voters who found the registration system difficult to navigate. The law further permitted registrars to add people to the voting rolls "upon such evidence as he may think necessary, in his discretion."[154] This rule allowed registrars, almost all of whom were white Democrats, to enroll illiterate whites—and even help them vote—while denying blacks access to the ballot.[155] The results were predictable, as "[b]lack turnout in South Carolina in the presidential election of 1884 dropped by an estimated 50 percent from its 1880 level."[156]

When subterfuge, confusing ballot boxes, and the heavy-handed tactics of registrars did not work, white South Carolinians used fraud, intimidation, and violence to undermine the black ballot.[157] For example, election officials sometimes moved ballot boxes to a new location on the day of the election, letting whites, but not blacks, know of the new location.[158] In addition, it was not uncommon for white militia companies to parade "around town just before voting day to scare away blacks."[159]

At times, white terrorists' actions went beyond intimidation and became lethal. Between 1868 and 1876, seven black state legislators were murdered in South Carolina.[160] Although federal prosecutions in 1871 and 1872 temporarily suppressed the Ku Klux Klan and other racist violence, peace did not last.[161] Organized mobs, often led by former Confederate generals, such as Matthew Calbraith Butler and Martin Witherspoon Gray, attacked and murdered blacks to suppress their political participation.[162] In 1876, "over seven hundred armed and mounted Democrats in red shirts

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153. LAWSON, *supra* note 28, at 6.
154. § 5, 1881–1882 S.C. Acts at 1112.
155. *See* KOUSSER, *supra* note 151, at 35 ("This open invitation to fraud and discrimination was designed to let registrars enfranchise all whites.").
156. *Id.*
157. *See* LAWSON, *supra* note 28, at 7.
158. *Id.*
159. *Id.*
160. Burton et al., *supra* note 143, at 192.
161. *See generally* LOU FAULKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871−1872 (1996) (discussing the South Carolina Ku Klux Klan trials of 1871 and 1872 as well as the surrounding efforts of federal officials to enforce the Fourteenth and Fifteenth Amendments).
162. Burton et al., *supra* note 143, at 192–93.

seized control of the county courthouse" in Edgefield County, preventing blacks from voting.[163] In 1882, an armed white mob prevented blacks from voting in Darlington County.[164] This scenario was repeated across the state as whites sought to dismantle black enfranchisement in practice, while maintaining laws on the books that, on their face, provided for equal voting rights for blacks and whites.

The post-Reconstruction efforts to strip South Carolina's African Americans of their political power began to have an effect on the number of blacks serving in public office. For example, the number of South Carolina blacks in the House of Representatives declined dramatically in the years after Reconstruction.[165] From 1871 to 1879, six South Carolina blacks served in the House of Representatives, and in each session of Congress, there were at least two—and sometimes as many as four—African Americans representing the state.[166] But after 1879, there was never more than one black in Congress from the state, and in some terms, the state's Congressional delegation was entirely white.[167] Black representation on the state level did not fare much better. Although there were some blacks in the state legislature in the 1890s, their number was miniscule and hardly reflected the state's nearly 60% black majority.[168]

Despite this huge black majority, by the 1890s, South Carolina was essentially a one-party state, with white Democrats controlling virtually all of the state's public offices.[169] In 1895, for example, of the 160 delegates elected to the state constitutional convention in 1895, 154 were white Democrats and 6 were black Republicans.[170] Blacks who tried to register to vote for delegates were generally unable to do so because of "the unreasonable and burdensome regulations prescribed by the unconstitutional registration laws."[171] As a result, white Democrats were able to adopt a new state constitution that was explicitly designed to eliminate all black political participation in the state.[172]

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163. *Id.* at 193.
164. LAWSON, *supra* note 28, at 7.
165. CQ PRESS, *supra* note 17, at 378.
166. *Id.*
167. *See id.*
168. ZELDEN, *supra* note 152, at 75; Gibson & Jung, *supra* note 26, at 73 tbl. 55.
169. *See generally* MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908 (2001) (discussing the dismantling of southern black voting rights and the coming to power of the white Democrats after Reconstruction).
170. George B. Tindall, *The Question of Race in the South Carolina Constitutional Convention of 1895*, 37 J. NEGRO HIST. 277, 277 (1952); Mills v. Green, 159 U.S 651, 652 (1895).
171. *Mills*, 159 U.S. at 652.
172. *See* Tindall, *supra* note 170, at 277–303 (discussing the people and events surrounding the South Carolina Constitutional Convention of 1895).

In 1895, South Carolina completed its disfranchisement of blacks with a new Constitution that contained 15 separate sections on voting rights.[173] For men of at least 21 years of age to be eligible to vote, the new Constitution required, among other things: residence in the state for two years, the ability to read and write any section of the Constitution submitted to him by a registration officer, the ownership of property in the state, and the payment of taxes in the state—including a poll tax.[174] There were also restrictions on those convicted of crimes.[175] These provisions might have eliminated many white voters as well, but registrars had great discretion in the questions they asked and the answers they accepted. This discretionary—but actually arbitrary—power allowed white officials to register illiterate and uneducated white voters, while eliminating all but the most persistent and well-educated black voters. By 1900, almost most no blacks voted.[176] As the Charleston *News and Courier* explained, when the convention to write the new state Constitution began, it was "called to accomplish the overthrow of negro suffrage. Nobody tried to conceal it, nobody seeks to excuse it."[177] This outcome was foreordained in a Convention with 154 white delegates and only 6 black delegates, even though the state was almost 60% black at this time.[178]

The results of the new laws and constitutional changes from 1882 to 1895 were predictable and dramatic.[179] In 1880, it is estimated that 77% of all adult black men in South Carolina voted in the presidential election.[180] In 1892, following the implementation of the new rules of 1882, only an estimated 17% of black men voted.[181] In 1900, with the new constitution in place, only 4% of potential black voters cast ballots, and by 1912 this number was further reduced to 2%.[182]

C. South Carolina's Persistent Resistance to Black Voting and the Need for the Voting Rights Act of 1965

This dramatic decline in black voter participation allowed white South Carolinians to further the policy of denying African Americans both basic civil rights in general and voting rights in particular. From 1900 until after World War II, blacks in South Carolina were effectively removed from the

173. S.C. CONST. of 1895, art. II, § 1–15.
174. *Id.* § 4.
175. *Id.* § 6.
176. VALELLY, *supra* note 132, at 128–29.
177. *See* PERMAN, *supra* note 169, at 28.
178. Tindall, *supra* note 170, at 277.
179. *See* VALELLY, *supra* note 132, at 128–29.
180. *Id.* at 128 tbl.6.3.
181. *Id.*
182. *Id.*

political process. There were almost no black voters and no blacks were elected to public office. The entire society was segregated. South Carolina, like the rest of the South, was also a one-party state. Every elected official in the state, and across the South, was a Democrat. In most parts of the South, no Republicans were even on the ballot for state and local offices.

Illustrative of the one-party nature of the South is the fact that from 1880 through 1916, every former Confederate state supported the Democratic candidate for president.[183] In 1920, Tennessee supported the Republican candidate, but in 1924, all the former Confederate states, joined by Oklahoma, supported the Democrats.[184] In 1928, the Democrats nominated a Roman Catholic, Al Smith, and five former Confederate states voted Republican as many southern voters succumbed to vicious anti-Catholic rhetoric aimed at the overwhelmingly evangelical Protestant South.[185] However, the Old Confederacy again supported the Democratic Party in 1932.[186] This support was solid until 1948, when Harry S Truman's support for civil rights led to the creation of the Dixiecrat Party, led by South Carolina's Strom Thurmond, which carried four Deep South states.[187] Even the vast popularity of General Dwight Eisenhower could not shake the southern Democratic Party, as the core of the Deep South voted against him in two elections,[188] and remained mostly Democratic in 1960 despite a northern liberal, Catholic candidate.[189]

In this political climate, with only one party likely to win elections, the most important political contest in the state was the Democratic

183. 2 JOSEPH CONLIN, THE AMERICAN PAST: A SURVEY OF AMERICAN HISTORY 843 (8th ed. 2009).

184. *See* PAUL FRYMER, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA 81 n.106 (1999) (explaining that Tennessee voted Republican in 1920).

185. *See* ALLAN J. LICHTMAN, PREJUDICE AND THE OLD POLITICS: THE PRESIDENTIAL ELECTION OF 1928, at 16 (1979); *see also* CHRISTOPHER M. FINIAN, ALFRED E. SMITH: THE HAPPY WARRIOR 226–30 (2002). The heart of the Deep South—Arkansas, Louisiana, Mississippi, Alabama, Georgia, and South Carolina—voted Democratic in this election. *Id.*

186. *United States Presidential Election of 1924*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/event/United-States-presidential-election-of-1924 [http://perma.cc/6NNK-K8WK] (last updated July 8, 2014).

187. PAUL F. BOLLER, JR., PRESIDENTIAL CAMPAIGNS 270, 273 (1985).

188. Louisiana supported Eisenhower in 1956, the only time the state voted Republican between 1880 and 1960. *Dwight D. Eisenhower: Campaigns and Elections*, MILLER CENTER, http://millercenter.org-/president/biography/eisenhower-campaigns-and-elections (last visited October 5, 2015).

189. In 1960 John F. Kennedy carried Maryland, Delaware, West Virginia, Missouri, North Carolina, South Carolina, Georgia, Louisiana, Arkansas, Texas, and all but one of Alabama's electors. *1960 Presidential General Election Results*, U.S. ELECTION ATLAS, http://uselectionatlas.org/RESULTS/national.php?year=1960 [http://perma.cc/ZZ8P-H8PU] (last visited Sept. 15, 2015).

primary, not the general election. In 1888, the South Carolina legislature turned the entire of process of running primaries over to the parties, allowing the primaries to be "conducted in the manner prescribed by the rules of the political party, organization, or association holding such primary election."[190] This move meant that the party could determine who could be a party member and who could vote in a primary. The law effectively invited the white-dominated Democratic Party to simply exclude blacks altogether from voting in primaries, which is exactly what happened.[191]

IV. THE WHITE PRIMARIES

The primary system that South Carolina developed, which became known as the "white primary," has aptly been described as "the 'most complete' in the South" for removing blacks from voting.[192] Regardless of the plethora of voting restrictions in place during the post-Reconstruction period,[193] the total exclusion of African Americans from the Democratic primaries ensured that black voters would not influence who was elected to public office.[194] Although there were occasional instances where some blacks might vote in a Democratic primary, V.O. Key, the most important political scientist to write on the South before the modern civil rights movement, noted that the white primary eventually prevailed over the entire South.[195]

The white primary persisted throughout much of the twentieth century all across the South. The white primary became particularly important after 1915, when, for the first time in a generation, the Supreme Court used the Fifteenth Amendment to strike down a discriminatory voting scheme in *Guinn v. United States*.[196] *Guinn* involved an amendment to the Oklahoma Constitution that created a strict literacy test for voters, but exempted most whites from the test.[197] Many states, including South

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190. An Act to Protect Primary Elections and Conventions of Political Parties and to Punish Frauds Committed Thereat, No. 9, § 3, 1888 S.C. Acts 10, 11.
191. *See id.*
192. PERMAN, *supra* note 169, at 305.
193. *See supra* Part III.B.
194. By 1900, the former slave states were almost entirely dominated by the Democratic Party, and the region was known as the "solid South." In most parts of the South—especially the eleven former Confederate states—the outcome of the general election was usually a foregone conclusion. *See generally* PERMAN, *supra* note 169, at 300–10. The winner of the Democratic primary was assured of victory in the general election, and most southern states contrived to exclude blacks from voting in the Democratic primary. *See id.* at 302.
195. KEY, *supra* note 67, at 620.
196. 238 U.S. 347 (1915).
197. *See supra* note 11.

Carolina, had literacy tests, as they were constitutional at the time.[198] Although these tests were effective in preventing blacks from voting, if administered fairly they would have also disfranchised many whites. Oklahoma sought to avoid this problem by exempting people from the literacy test if they or their male ancestors could have voted on January 1, 1866.[199] The provision was designed to "grandfather in" illiterate whites by allowing them to vote while still disfranchising blacks.[200] Notably, January 1, 1866 was before the passage of the 1866 Civil Rights Act or the Fifteenth Amendment.

The Supreme Court used the Fifteenth Amendment to strike down the Oklahoma constitutional provision on the grounds that the 1866 date was clearly chosen to disfranchise blacks.[201] In the same term, the Court upheld the power of the federal government to prosecute Oklahoma election officials who prevented blacks from voting.[202]

This was one of the first voting rights cases brought by the federal government since the 1880s and it was also the first case in which the newly organized National Association for the Advancement of Colored People ("NAACP") participated.[203] In 1911, the United States District Court declared the Grandfather Clause unconstitutional and the Eighth Circuit upheld this result and certified it for an appeal to the United States Supreme Court.[204] The Supreme Court heard arguments in 1913, but did not decide the case until 1915.[205] Given that the lower courts had struck down the constitutional provision, and that it was blatantly directed at blacks, many southerners must have feared that this case would lead to renewed voting rights for African Americans.

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198. *See* S.C. CONST. of 1895, art. II, § 1–15.

199. *Guinn*, 238 U.S. at 354–56.

200. *See supra* note 11.

201. *Guinn*, 238 U.S. at 357.

202. United States v. Mosley, 238 U.S. 383, 388 (1915) (decided the same day as *Guinn*, upholding convictions of election officials for refusing to accept ballots of African-American voters).

203. *See Guinn*, 238 U.S. at 353 (summarizing the brief of Moorfield Storey on behalf of the NAACP. Storey did not actually argue the case in person, but was made party to the case "by the consent of both parties and the Court itself.").

204. Guinn v. United States, 228 F. 103, 105 (1915). The district court opinion was not reported and the court of appeals certified the case to the Supreme Court without opinion. *Id.* The Eighth Circuit's opinion in 1915, issued after the Supreme Court decided the case, provides the only procedural history of this case. *Id.* It is clear from this history, however, that beginning in 1911, South Carolina and other southern states were on notice that the federal courts thought that the Oklahoma grandfather clause was unconstitutional.

205. *Guinn*, 238 U.S. at 347.

In February 1915, months before the Court announced its decision in *Guinn*,[206] the South Carolina legislature took steps to make sure that any decision in *Guinn* would not affect the state. Thus, the legislature acted to undermine any effort to re-enfranchise blacks. Knowing that the only election in the state that really mattered was the Democratic primary, the Palmetto State passed a law declaring that political parties in the state were merely "clubs," which could set their own rules and were free to determine who could be a member and who could not.[207] This approach was replicated throughout the "solid South," cementing the political control of the white Democrats.[208] As one southern white scholar noted in the 1930s, throughout the South, the "nomination by the Democratic Party is equivalent to election in state and local contests in most cases."[209]

A. Challenging the White Primary in Texas

Although the white primary existed throughout the South, including South Carolina, the most important attack on it came out of Texas, where some blacks living in large cities were able to challenge the white primary without great fear of vigilante terrorism or economic retribution from whites. The history of the Texas white primary cases is critical to understanding the need for the Voting Rights Act of 1965.[210] South Carolina's response to the primary cases illustrates how that state, like other Deep South states, was prepared to fight any court decision that might undermine the white primary or white political hegemony.

In 1924, election officials refused to allow Dr. Lawrence A. Nixon, a black physician in El Paso, to vote in the Texas Democratic Primary. This set the stage for a legal challenge to the Texas white primary.[211] As a physician serving the black community, Dr. Nixon could not be easily intimidated by white economic pressure and, living in El Paso, he was less likely than someone in East Texas to face violence or Ku Klux Klan-inspired terrorism.[212] Nixon challenged a Texas law, adopted in 1923, that declared

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206. *Id.* The case was decided on June 21, 1915, but it was argued in October, 1913. *Id.*

207. An Act to Regulate the Holding of All Primary Elections and the Organization of Clubs in Cities Containing Forty Thousand Inhabitants or More, No. 71, §§ 1, 17, 1915 S.C. Acts 81, 81, 85.

208. *See* O. Douglas Weeks, *The White Primary*, 8 MISS. L.J. 135, 135 (1935).

209. *Id.* at 135–36.

210. *See generally* DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS 25–49 (1979) (discussing the history of and legal challenges to the white primary in Texas).

211. *See* Nixon v. Herndon, 273 U.S. 536, 539–40 (1927).

212. *See generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 3–25

"in no event shall a negro be eligible to participate in a Democratic Party primary election held in the State of Texas."[213] Dr. Nixon sued the local election judges when he was denied the right to vote in the Democratic primary.[214] Nixon argued that the prohibition of black participation in the Democratic primary—the creation of the white primary—violated the Fourteenth and the Fifteenth Amendments.[215] Speaking for a unanimous Supreme Court, Justice Oliver Wendell Holmes, Jr. did not even reach the Fifteenth Amendment issue.[216] The Court had little problem determining that the new rules violated the Fourteenth Amendment, because the Texas law egregiously and openly denied a right to blacks that was available to whites.[217] Justice Holmes said it was "unnecessary to consider the Fifteenth Amendment because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth."[218]

Texas responded to *Nixon v. Herndon* with stunning speed. The Court decided the case on March 7, 1927.[219] Three months later, the legislature passed a new law providing that "[e]very political party in the State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party."[220] Texas was following South Carolina's lead set out in its 1915 law. Not surprisingly, the State Executive Committee of the Texas Democratic Party immediately adopted rules that allowed "all white democrats," who otherwise met the qualifications for voting, to participate in the Party's primaries.[221]

The case returned to the Supreme Court as *Nixon v. Condon*.[222] Texas argued that the Democratic Party was a private organization and, thus,

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(1976) (discussing the events leading up to and the cases proceeding *Briggs v. Elliott*). While some of them lost their jobs, as did their relatives, the spokesman for that community, Rev. Joseph Albert DeLaine, had to flee for his life after his church was burned to the ground and he was charged "with felonious assault with a deadly weapon," when he attempted to defend his church and himself from white terrorists. *Id.* at 3–4.

213. *Nixon*, 273 U.S. at 540.
214. *Id.* at 539–40.
215. *Id.* at 540–41.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 536.
220. An Act Authorizing Political Parties Through Executive Action Committees to Prescribe Qualification of Their Members, ch. 67, 1927 Tex. Gen. & Spec. Laws 193.
221. *See* Nixon v. Condon, 286 U.S. 73, 81 (1932).
222. *Id.*

there was no "state action" depriving Nixon of his rights.[223] Without any "state action," the state and the Texas Democratic Party argued that there was no cause of action under the Fourteenth Amendment.[224] Speaking for a five to four majority, Justice Benjamin N. Cardozo, in his first opinion on the Court, held that Nixon was "[b]arred from voting at a primary . . . for the sole reason that his color is not white" and that "[t]he result for him is no different from what it was when his cause was here before."[225] In essence, Cardozo found that the state had explicitly delegated to the executive committee of the Party the power to do what the Court had previously said the state itself could not do.[226] Cardozo concluded that "Delegates of the State's power"—the members of the executive committee of the party—"have discharged their official functions in such a way as to discriminate invidiously between white citizens and black."[227] This Act violated the Fourteenth Amendment, which Cardozo noted was "adopted . . . with special solicitude for the equal protection of members of the Negro race," and, thus, the Court was obligated to "level by its judgment these barriers of color."[228]

Having lost twice in the Supreme Court, the white Democrats of Texas tried a new tactic. The state Democratic Party called a statewide convention shortly after the decision in *Nixon v. Condon*.[229] This convention passed a resolution "that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations."[230]

In 1934, election officials denied a primary ballot to William Grovey, an African American living in Houston.[231] Relying on the two *Nixon* cases, he sued.[232] But this time, the Supreme Court decided that the actions of the Texas Democratic Party were made by the members of what the Court asserted was essentially a private organization and not by the state.[233] Nor were their actions specifically authorized by the state, as had been the case in *Nixon* v. *Condon*.[234] The Court held that because there was no state

223. *Id.* at 79.
224. *Id.* at 80–81.
225. *Id.* at 83.
226. *Id.* 88–89.
227. *Id.* at 89.
228. *Id.*
229. KLUGER, *supra* note 212, at 138.
230. Grovey v. Townsend, 295 U.S. 45, 47 (1935) (quoting the resolution of the state Democratic convention of Texas, adopted May 24, 1932).
231. *Id.* at 46.
232. *Id.* at 48.
233. *Id.* at 53, 55.
234. *Id.* at 53–54.

action, there was no violation of the Fourteenth Amendment.[235] The Court did not consider the Fifteenth Amendment issues, and thus blacks in Texas were once again deprived of the right to vote in the only meaningful election in the state.

The white primary now seemed secure. The Court unanimously reached this position, despite "a mountain of evidence" presented by Grovey's lawyers "to show that state laws defined and regulated the conduct of the party primary every inch of the way," including "the style of the ballots," the dimensions of the voting booths, and "the method of tabulation of the votes."[236] After more than a decade of litigation and three trips to the Supreme Court, black voters in Texas and the rest of the South remained shut out of the primary system, even though it was obvious to everyone who looked at the evidence "that in Texas[,] nomination by the Democratic party is equivalent to election."[237] The same could be said for the rest of the South as well, including, of course, South Carolina.[238]

In 1941, in *United States v. Classic*, the Court once again reversed itself, asserting that primary elections were subject to constitutional scrutiny.[239] This case had nothing to do with race. It involved corrupt practices by a Louisiana elected judge who refused to count some ballots in the all-white Democratic primary. The Court concluded that "[t]he right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution."[240] This conclusion was the wedge for ending the white primary. In 1944, in *Smith v. Allwright*, the Court, now almost completely remade by President Franklin D. Roosevelt, reversed the holding in *Grovey v. Townsend*.[241] In *Smith*, the Court once again struck down the Texas white primary.[242] The Court would no longer accept the subterfuge that political parties were private clubs or that primaries were private events sponsored by political clubs or private organizations and were divorced from state action. In theory, no state could now bar blacks from primaries, as long as they could register to vote. As Harvard Law Professor Michael Klarman has argued, *Smith* "inaugurated a political revolution in the urban South."[243] This is clearly an exaggeration, but after this case, some blacks in southern cities,

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235. *Id.* at 55.
236. KLUGER, *supra* note 212, at 167.
237. *Grovey*, 295 U.S. at 54.
238. Key, *supra* note 67, at 620; Weeks, *supra* note 208, at 135.
239. 313 U.S. 299, 325–29 (1941).
240. *Id.* at 325.
241. 321 U.S 649 (1944).
242. *Id.* at 664–66.
243. Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 56 (2001).

supported by the NAACP and knowing that the Roosevelt and Truman administrations were also on their side, began to register to vote—or at least try to register to vote—and attempted to participate in the Democratic primary.

B. Challenging the White Primary in South Carolina

Despite the outcome in *Smith* v. *Allwright*, there was no significant change for black voters in South Carolina and most other places in the Deep South. *Smith v. Allwright* may have had an impact in large cities, but South Carolina had no major cities like Houston, Dallas, New Orleans, or Atlanta. Moreover, South Carolina's restrictions on voter registration made it impossible for most blacks to vote in the Palmetto State even if the primaries were technically open to them.[244]

Most importantly, the political leadership of South Carolina was prepared to actively oppose any move to open its primaries to blacks, no matter what the Supreme Court held. As V.O. Key noted in his classic work, *Southern Politics*, South Carolina was one of three states, along with Mississippi and Alabama that "adopted measures of various sorts to preserve, in effect if not form, the white primary."[245] Indeed, as Key noted "the first plan contrived to avoid the effects of the Supreme Court decision was [known as] the 'South Carolina Plan.'"[246] The Court decided *Smith v. Allwright*, on April 3, 1944.[247] The state legislature had adjourned on March 18.[248] But the state could not wait for another year to respond to this decision, so Governor Olin D. Johnston "called a special session of the legislature to repeal all laws relating to primary elections" in an effort to avoid any claim that the white primary in South Carolina was connected to state action.[249] The legislature reconvened on April 14 and passed this act six days later.[250] South Carolina was removing itself from the business of running primaries to avoid allowing blacks to vote in those elections.

Governor Johnston's public statements on why the legislature had to be called into session are revealing and instructive. They illustrate the intensity of South Carolina's opposition to black participation in politics. The Governor declared:

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244. *See supra* Part I.
245. KEY, *supra* note 67, at 625.
246. *Id.* at 626.
247. *Smith*, 321 U.S. at 649.
248. 1944 S.C. Acts 1165.
249. Burton et al., *supra* note 143, at 195; Act of Apr. 3, 1943, No. 63, 1943 S.C. Acts 84.
250. Act of Apr. 20, 1944, No. 704, 1944 S.C. Acts 2231.

> After these statutes [the existing primary regulations] are repealed, in my opinion, we will have done everything within our power to guarantee white supremacy in our primaries of our State insofar as legislation is concerned. Should this prove inadequate, we South Carolinians will use the necessary methods to retain white supremacy in our primaries and to safeguard the homes and happiness of our people.[251]

If this law did not work, Governor Johnston hinted that he was prepared to sanction other measures—including, presumably, violence—to prevent blacks from voting in the Democratic primary. Openly endorsing racism, the Governor declared: "White Supremacy will be maintained in our primaries. Let the chips fall where they may!"[252]

United States District Judge J. Waties Waring struck down Johnston's plan in *Elmore v. Rice*,[253] and the Fourth Circuit Court of Appeals upheld the result a few months later.[254]

1. The Test Oath

But this setback did not deter the white power structure in South Carolina from seeking a new path to maintain white supremacy and prevent black participation in the primary system. The Party now allowed blacks to participate in the primaries, but required that all voters in the primaries take an oath declaring "I believe in and will support the social (religious) and educational separation of races."[255] This test oath for participating in the primary was, on its face, about the ideology of the Party, and presumably might have been protected free speech. After all, it would not be per se unconstitutional for a political organization to have a statement of principles to which all members should adhere. The goal of the statement, however, was to keep blacks out of the Party, and to be able to prevent them from voting in primaries if they were members of civil rights organizations or if they openly opposed segregation. This oath, along with other provisions of the Party rules, constituted a transparent attempt to prevent any blacks from voting in the Democratic primaries.

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251. KEY, *supra* note 67, at 627.
252. *Id.*
253. 72 F. Supp. 516 (E.D.S.C. 1947).
254. Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947).
255. The Party oaths are quoted by Judge Waring in *Brown v. Baskin*, 78 F. Supp. 933, 937 (E.D.S.C. 1948). The Party also required members to state they opposed "the proposed Federal so-called F.E.P.C. [Fair Employment Practices Commission] law" and that they would support the party nominee in the general election. *Id.*

Nevertheless, while this statement of principles might have kept most blacks from voting in the Democratic primary, some blacks might have been willing to sign the statement to be able to vote in the primary. Most blacks in the state probably would have been comfortable with maintaining the existing status quo—segregation—in churches. Some African Americans might have even been willing to accept segregation in schools and social settings as a tactic for the near term. After all, this was before the beginning of the civil rights movement in the South, and blacks in the Deep South were not prepared to challenge segregation. At most, they were trying to obtain better conditions within segregation and were not yet ready to challenge the system. For example, in Virginia, the NAACP had successfully fought for equal salaries for black teachers, but had not attempted to challenge segregation in the schools.[256] Similarly, while the white primary issue was coming to a head, black parents in rural Clarendon County, South Carolina asked the local school board for a single bus to transport rural black children to their dilapidated segregated schools.[257] Only when county officials denied this request did the black parents initiate litigation that led to *Briggs* v. *Elliot*, which challenged the constitutionality of segregation per se.[258] *Briggs* would later be consolidated with three other cases in *Brown v. Board of Education*.[259] Therefore, given the fact that at this time, no civil rights organizations were contemplating an immediate challenge to "the social, religious and educational separation of the races" in the Deep South, it is possible that some blacks for tactical reasons might have been willing to sign the test oath.[260]

2. Literacy Tests

The public officials and party leaders in the state were too shrewd to rely on just one tool—the test oath—to keep blacks from voting in the primary. Thus, the Party also implemented a literacy test for primaries that could be used to exclude black voters, just as literacy tests were used to keep blacks from registering to vote.

Unfortunately for the white supremacists, the federal courts would not accept such rules or subterfuges. Judge Waring held that these tests were

256. Significantly, salary equalization suits in Virginia had successfully raised salaries for black teachers within the system of segregation. *See* Alston v. Sch. Bd. of Norfolk, 112 F.2d 992 (4th Cir. 1940).
257. *See* KLUGER, *supra* note 212, at 14–15.
258. 98 F. Supp. 529, 530–31 (E.D.S.C. 1951).
259. 347 U.S. 483, 486 n.1 (1954).
260. KEY, *supra* note 67, at 629.

unconstitutional in *Brown v. Baskin*.[261] He noted that Governor Johnston "stated quite frankly what the purpose of this was and made no bones of the fact that the intention was to keep the primary elections in South Carolina limited to whites and to discriminate against Negroes."[262] Waring also noted that this law had been passed when the Governor "called an extraordinary (and it was extraordinary) session of the General Assembly of South Carolina and repealed all laws relating to primaries."[263] Running out of patience with the shenanigans of his home state, Judge Waring emphatically concluded: "it is quite apparent that the defendants and those working with them deliberately set out to continue a form of racial discrimination in the conduct of primary elections in this State. This is illegal and must be stopped."[264]

Meanwhile, the NAACP organized voter registration drives in the state and increased the number of black voters from about 1,500 to about 50,000.[265] In 1948, after the ruling in *Brown v. Baskin*, about 35,000 African Americans actually voted in the 1948 Democratic primary.[266] The following year, the United States Court of Appeals affirmed the decision in *Brown* v. *Baskin*.[267]

Undaunted, the South Carolina legislature enacted a new law, which was effectively a reenactment of the laws repealed after *Smith* v. *Allwright*, giving the state control of the primaries.[268] This new legislation also extended the literacy test of the general election to voting in the primaries.[269] The literacy test required that the voter be able to "both read and write any section of the said Constitution submitted to said elector by the registration officer or officers, or can show that he or she owns, and has paid all taxes collectible during the previous year on, property in this State assessed at three hundred ($300.00) dollars or more."[270] Because no court had ever held literacy tests to be unconstitutional, the state seemed to have finally found a vehicle to keep most blacks from voting in the only election that mattered in the state—the Democratic primary. Some blacks—those with taxable property valued over $300—could register to

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261. 78 F. Supp. 933 (E.D.S.C. 1948); 80 F. Supp. 1017 (E.D.S.C. 1948). The defendant in this case was the chairman of the South Carolina Democratic Party.
262. *Brown*, 80 F. Supp. at 1019.
263. *Id.*
264. *Id.* at 1020.
265. Burton et al., *supra* note 143, at 196–97.
266. *Id.* at 197.
267. 174 F.2d 391, 395 (4th Cir. 1949).
268. An Act to Regulate the Registration of Electors, the Holding of General Elections, and the Conduct of Party Primaries and Conventions, and to Provide Punishment for Violations of this Act, No. 858, 1950 S.C. Acts 2059, 2059–60.
269. *Id.* at 2060.
270. *Id.*

vote, but huge numbers of impoverished blacks owned no property in the state. They would have had to pass the literacy test, which was notoriously used to discriminate against black voters while being administered to allow uneducated whites to vote.

Black voter registration grew modestly in the next decade—to about 58,000 in 1960.[271] By 1962, it had risen to 91,000, which represented only 23% of the potential black voters in the state.[272] Little would change in the next three years, and black political participation in South Carolina would remain anemic until after the passage of the Voting Rights Act of 1965.[273] Immediately following the passage of the Act, there would be very little change in the politics of South Carolina and the rest of the South. Indeed, it would take a quarter of a century for the Voting Rights Act to fulfill even some of its potential in most of the Deep South.

V. THE VOTING RIGHTS ACT OF 1965: SOME THINGS CHANGE AND OTHERS REMAIN THE SAME

The Voting Rights Act of 1965 led to increased black participation in South Carolina politics, but change was slow.[274] For example, only one African American was elected to the South Carolina state senate from 1965 to 1984, even though blacks constituted about 30% of the state.[275] At the local level, "between 1965 and 1973, eleven of nineteen counties that elected at least some members of their governing board from districts had switched to at-large systems."[276] At-large seats prevented geographically compact minorities from electing representatives from their communities because there were no designated seats from communities within the county, city, or other electoral district. Thus, black political participation was blunted by the persistence of at-large seats in local legislatures combined with continuing resistance to black voting from state and local officials. Voting rights cases, including suits over redistricting and at-large seats for state and local offices, persisted throughout the state from the 1970s into the 1990s.[277] Voting in the state was often racially polarized to

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271. Burton et al., *supra* note 143, at 198.
272. *Id.*
273. *Id.* at 198–200.
274. *See* Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111, 112 (1991).
275. Burton et al., *supra* note 143, at 203.
276. Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 25 (Chandler Davidson & Bernard Grofman eds., 1994).
277. *See* Burton et al., *supra* note 143, at 203–16.

an extraordinary extent. Localities tenaciously held on to at-large voting—rather than single member districts—to prevent blacks from being elected to office.[278]

After the Voting Rights Act, there were seemingly interminable suits in South Carolina over voting and electoral districts. South Carolina persisted in its long-standing opposition to black political participation. A year after the Voting Rights Act, there were still no African Americans in the state legislature, even though blacks made up about 30% of the population and 21% of the electorate.[279] In 1990, African Americans made up 26% of the electorate, but held only 13% (16) of the seats in the state house of representatives and only 11% (5) in the state senate.[280] In 2000, African Americans constituted 29.5% of the state's population, but in 2001, African Americans made up only 15% of the members of the state senate and only 19% of the house.[281] The history of voting and race in South Carolina and the rest of the Deep South is grim. Blacks have not had anything close to proportional representation in the state's offices since the end of Reconstruction in 1876. For the first six and a half decades of the twentieth century, there were either no black office holders or only a few minor office holders in rural districts with black majorities. Since the passage of the 1965 Voting Rights Act, African Americans have been elected to some offices, but have never held offices that mirrored their representative percentage of the state's population. The Voting Rights Act has allowed for some meaningful black participation in South Carolina and elsewhere in the South, but has also led to the effective disfranchisement of blacks through racial gerrymandering. Thus, black representation in South Carolina and the rest of the South, at the local, state, and federal level, is substantially less than what would be expected if political districts were less gerrymandered.

Although concentrating the vote of a minority group will ensure some political representation of that group, the process also ensures complete dominance of the overall system of governance by the majority group. For example, in South Carolina, the bizarre work of racial gerrymandering created a single Congressional district that snakes through six counties, from Columbia to the coast, and managed to include nearly 82% of the

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278. *See id.* at 203–23.
279. *Id.* at 201.
280. *Id.* at 232.
281. CHARLES S. BULLOCK III & RONALD KEITH GADDIE, THE TRIUMPH OF VOTING RIGHTS IN THE SOUTH 176 (2009); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, SOUTH CAROLINA: 2000, at 2 (2002), *available at* https://www.census.gov/prod/2002pubs/c2kprof00-sc.pdf [https://perma.cc/Z56H-6464]. There were 7 blacks in the Senate and 24 in the House; these numbers increased to 8 and 27 by 2007. BULLOCK & GADDIE, *supra*.

states' black voters.[282] This assures that there will usually be a single black representative in Congress, and Representative James Clyburn has held this seat since it was created.[283] But putting such a huge percentage of the state's black population into one weirdly-shaped district also minimizes black political participation in the rest of the state.[284] This district essentially locks in the black vote, minimizing its impact state-wide. For example, although African Americans constitute about 30% of the state, Clyburn remained the only African American in the state's seven-seat delegation in Congress until 2010, when Timothy E. Scott was elected as a Republican in a majority white district.[285] Both Clyburn and Scott were re-elected in 2012. In late 2012, Governor Nikki Haley appointed Scott to replace Senator Jim DeMint who had resigned from that position.[286] When Scott took this seat in early 2013, he became the first African-American United States Senator from the South since Reconstruction.[287] Scott was succeeded by a white Congressman, and once again, in a state whose population is 30% black, only 14% of its House delegation is black.[288] This similarly reflects black representation in the state legislature.

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282. *See* Charles S. Bullock III & Ronald Keith Gaddie, An Assessment of Voting Rights Progress in South Carolina 13, http://www.aei.org/wp-content/uploads/2011/10/20060210_SouthCarolina.pdf [http://perma.cc/M3TW-H43E] (last visited Sept. 15, 2015) (discussing the redistricting scheme in the early 1990s that led to the creation of District 6, and that included parts of Charleston and Columbia and the entirety of Florence, and that was 62% black at the time of creation, though the percentage lowered to below 57% in 2002); *see also South Carolina*, REDISTRICTING AM., http://www.redistrictinginamerica.org/southcarolina/ [http://perma.cc/4DDY-FW4F] (last visited Sept. 15, 2015) (showing a map of the district and explaining that it is the only South Carolina district that has the potential to favor Democrats); *South Carolina Redistricting 2000*, VOTING & DEMOCRACY RES. CENTER, http://archive.fairvote.org/?page=330 [http://perma.cc/2ML8-HNCJ] (noting that the district was challenged twice and found unconstitutional, but amended, and the second suit was settled before trial).

283. *See* U.S. CENSUS BUREAU, *supra* note 281 (showing a map of the district and explaining that it is the only South Carolina district that has the potential to favor Democrats); BULLOCK & GADDIE, *supra* note 281 (noting that Clyburn was the first person to hold the seat).

284. Burton et al., *supra* note 143, at 193–94.

285. S.C. State Election Comm'n, *2010 General Election*, SCYTL, http://www.enr-scvotes.org/SC/19077/40477/en/summary.html# [http://perma.cc/6P8N-K9SU] (noting that Scott won District 1 with roughly 65% of the vote).

286. Jeff Zeleny, *Congressman is Chosen to Succeed DeMint as South Carolina Senator*, N.Y. TIMES (Dec. 17, 2012), http://www.nytimes.com/2012/12/18/us/politics/congressman-picked-for-south-carolina-senate-seat.html [http://perma.cc/5NDR-TWW2].

287. *Id.*

288. *See South Carolina*, GOVTRACK.US, https://www.govtrack.us/congress/members/SC [https://perma.cc/AXL9-N8HM] (last visited Sept. 15, 2015) (showing that of South Carolina's seven representatives, only one is black).

CONCLUSION

Historically, race has been a central factor in the politics of South Carolina and the rest of the Deep South. Democrats in the 1940s and 1950s worked hard to exclude all blacks from their primaries. Starting in the 1960s and 1970s, many of these same Democrats—such as Strom Thurmond—moved into the Republican Party, which attracted most politicians who had previously been associated with segregation and had been opposed to black political participation. While no serious politicians currently advocate for segregation or openly espouse racist ideas, the racial polarization of the electorate remains a powerful and divisive force in South Carolina politics.

Despite some gains in the 50 years since the passage of the Voting Rights Act of 1965, African Americans have not achieved proportional political influence in South Carolina and the rest of the Deep South. Not only is the South Carolina congressional delegation disproportionately white,[289] but also "[b]lack representation in the [South Carolina state] legislature continues to lag the black proportion of the population."[290] This is, in part, a function of southern tactics to disrupt the franchise combined with some of the most aggressive racial gerrymandering in the nation, which concentrates as many African Americans as possible in particular electoral districts. Such tactics and gerrymandering are found in other parts of the South as well.

The prognosis for political equality in South Carolina and much of the rest of the South is not great. Gerrymandering ensures some black districts while diluting the power of African-American voters and eliminating real electoral competition. Voter identification laws and other attempts to diminish voter turnout are inherently undemocratic but fit with the long tradition of attempting to diminish black access to political offices and to meaningful participation in state and local politics. Fifty years after the passage of the Voting Rights Act, we can see a great deal of progress in achieving equality in political access and office holding, and yet we also see just how far we have not come. As such, history thoroughly undermines the contentions of the majority of the Supreme Court in *Shelby County v. Holder* that the Voting Rights Act has outlived its purpose and is no longer necessary to achieve equality in the South.[291]

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289. As noted in this paragraph, the state is about 30% black and is generally considered to be one of the most racially polarized in the nation. With seven seats in Congress, we would expect two black members of the House instead of one. Similarly, in a state that is almost 30% black we would assume that something more than 15% of the state senate would be black. *See State and County Quick Facts*, *supra* note 63 (noting that the black population of South Carolina is roughly twenty-eight percent).

290. BULLOCK & GADDIE, *supra* note 281, at 188.

291. Shelby Cnty. v. Holder, 133 S. Ct. 2613, 2627–30 (2013).