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Voting Rights, Democracy, and the Constitution After January 6, 2021

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"It just seems un-American to try to limit the right of people to vote."[1]

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1. *Don Lemon Tonight* (CNN Television Broadcast Mar. 25, 2021).

INTRODUCTION

In mid-January 2021, Alice O'Lenick, the Republican chair of the theoretically bipartisan Board of Elections of Gwinnett County, Georgia, publicly demanded significant changes in the rules that govern Georgia's elections.[2] Unlike the losing presidential candidate, Donald J. Trump, she did not claim that there was fraud in Georgia in the 2020 election or that votes were stolen. She did not perpetuate what many reputable journalists have properly called "The Big Lie."[3] Apparently, O'Lenick agreed with Georgia's Secretary of State, Brad Raffensperger, a fellow Republican, and other Georgia election officials, that the 2020 presidential race in Georgia and the two senate runoff races that followed were clean elections. She accepted the outcome of multiple recounts in Georgia—all reaching the same conclusion: Joe Biden won the popular vote in Georgia (and thus the state's presidential electoral votes) and Democrats Raphael Warnock and Jon Ossoff won both runoff elections for two U.S. Senate seats.

Rather, O'Lenick argued that Georgia should change its election rules precisely because her party had lost the presidential election and then lost the two U.S. senate runoff elections. O'Lenick, a deeply partisan Republican—despite being a "bipartisan" election judge—was not shy about her strategy or her goal in changing the election rules: "They don't have to change all of them, but they've got to change the major parts of them so that we at least have a shot at winning."[4] In other words, she openly admitted that under the existing election rules, her political party might be unable to win a fair and honest election. Her solution was not to get more voters to the polls, have her party broaden its constituent base, or alter its ideology and policies to attract more voters. Rather, it was to change the rules to prevent Democrats from voting. Talking about the upcoming state legislative session, she noted, "I'm like a dog with a bone. I will not let them end this session without changing some of these laws."[5]

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2. Curt Yeomans, *Gwinnett Elections Board's New Chairwoman Wants Limits on No-excuse Absentee Voting, Voter Roll Review*, GWINNET DAILY POST (Jan. 16, 2021), https://www.gwinnettdailypost.com/local/gwinnett-elections-boards-new-chairwoman-wants-limits-on-no-excuse-absentee-voting-voter-roll-review/article_7df1c274-5715-11eb-a31d-dfa23b30ec62.html [https://perma.cc/6NBS-CCBE].

3. *See, e.g.*, Mark Z. Barabak, *Column: Debunking Trump's 'Big Lie,' Scholars and Statistics Show the Facts Don't Add Up*, L.A. TIMES (Aug. 17, 2021, 5:00 AM), https://www.latimes.com/politics/story/2021-08-17/trump-big-lie-experts-debunk-voting-fraud-claims [https://perma.cc/DAG6-HNJA].

4. Yeomans, *supra* note 2.

5. *Id.*

O'Lenick believed that her party could not win a fair and honest election under the current rules because too many of the "wrong" people—i.e., black people—were able to cast their vote. The rules she opposed, which were in part a response to the COVID-19 pandemic, mandated a Sunday voting day, allowed for no-excuse absentee mail-in voting, and provided for absentee ballot drop boxes. O'Lenick's goal was to make it more difficult for people to actually cast their ballots, which is a passive form of voter suppression. She did not publicly seek to disfranchise people, as Georgia and all other southern states[6] did from the late nineteenth century to the first two-thirds of the twentieth century, in order to prevent African Americans from ever being able to vote. O'Lenick did not appear to want to reinstitute illegal[7] and unconstitutional[8] barriers to voting such as a poll tax or literacy tests. These methods had historically allowed registrars discretion to allow semi-literate or illiterate whites to cast ballots[9] while denying most blacks, including many who were fully

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6. I define "the South" as the 15 states where slavery was legal in 1860, plus West Virginia, which broke off from the slave state of Virginia during the Civil War, and Oklahoma, which had a substantial amount of slavery as the Indian Territory in 1860. In addition, these 17 states, and only these states, mandated racial segregation on a statewide basis until court decisions and federal laws brought an end to formal, de jure segregation in the period from the mid-1940s to the late 1960s. For elaboration on this, see Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77 (1985) [hereinafter Finkelman, *Exploring Southern Legal History*]. On the specific issue of Oklahoma as a southern state, see Paul Finkelman, *Conceived in Segregation and Dedicated to the Proposition That All Men Were Not Created Equal: Oklahoma, the Last Southern State*, *in* BLACK AMERICANS AND THE CIVIL RIGHTS MOVEMENT IN THE WEST 213 (Bruce A. Glasrud & Cary D. Wintz eds., 2019) [hereinafter Finkelman, *Conceived in Segregation*].

7. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); *see also* CHANDLER DAVIDSON, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (2001).

8. U.S. CONST. amend. XXIV, § 1 provides that:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, 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.

9. In *South Carolina v. Katzenbach*, the Supreme Court noted: "A white applicant in Louisiana satisfied the registrar of his ability to interpret the state constitution by writing, 'FRDUM FOOF SPETGH.'" 383 U.S. 301, 312 n.12 (1966) (citing United States v. Louisiana, 225 F. Supp. 353, 384 (E.D. La. 1963)). "A white applicant in Alabama who had never completed the first grade of school

literate, the right to vote by asking them to take tests that were virtually (or actually) impossible to pass.[10] Rather, O'Lenick simply wanted to reduce voter turnout by limiting access to actually casting a ballot.

As of late July 2021, 18 states had passed various laws to limit early voting, limit voting by mail, and make it easier to purge registration rolls.[11] O'Lenick's state, Georgia, passed one of the most aggressive laws to undermine voting.[12] At the same time, 25 states passed laws to make voting easier.[13]

I. WILL CHANGING THE RULES CHANGE THE OUTCOMES?

O'Lenick asserts her "side" is unable to win a fair election under existing rules. This seems to be an admission that Georgia's electorate is no longer overwhelmingly Republican, as the 2020 election showed. Georgia is no longer a one-party state, and Republicans are not automatically going to carry it. For O'Lenick the response to this change is not, as I noted above, to expand her party's reach and campaign harder. It is to change the rules in order to lower participation by "the other side." This is her attempt to repeat history and once again disfranchise southern black voters. But repeating the history of disenfranchisement is difficult.

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was enrolled after the registrar filled out the entire form for him." *Id.* (citing United States. v. Penton, 212 F. Supp. 193, 210–11 (M.D. Ala. 1962)).

10. *See* Rebecca Onion, *Take the Impossible "Literacy" Test Louisiana Gave Black Voters in the 1960s*, SLATE (June 28, 2013, 12:30 PM), https://slate.com/human-interest/2013/06/voting-rights-and-the-supreme-court-the-impossible-literacy-test-louisiana-used-to-give-black-voters.html [https://perma.cc/KT3Z-TFHC]; *see also* Helen Hershkoff & Nathan Yaffe, *Unequal Liberty and a Right to Education*, 43 N.C. CENT. L. REV. 1 (2020); *see also* DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW, CASES AND MATERIALS 36–39 (6th ed. 2017). In *South Carolina v. Katzenbach*, the Supreme Court noted:

> In Panola County, Mississippi, the registrar required Negroes to interpret the provision of the state constitution concerning "the rate of interest on the fund known as the 'Chickasaw School Fund.'" In Forrest County, Mississippi, the registrar rejected six Negroes with baccalaureate degrees, three of whom were also Masters of Arts.

Katzenbach, 383 U.S. at 312 n.13.

11. *Voting Laws Round-Up: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021 [https://perma.cc/XEM3-S3PJ].

12. *Id.*

13. *Id.*

Under existing federal law and the U.S. Constitution, Georgia is precluded from actually disfranchising people on the basis of race.[14] Moreover, blatantly cheating by registering dead people or having people vote more than once is not easy. The phrase "vote early and often" has been attributed to various people in American political history,[15] but the illegal concept it implies no longer seems viable. Voting more than once in an election is not impossible, but it is difficult, and audits are likely to find the offenders.[16] Stuffing the ballot boxes is probably not a viable way for O'Lenick and her ilk to defeat Democrats in the future. Thus, their only option is to suppress the vote of their opponents by creating structural barriers such as fewer places to cast ballots, shorter hours for voting, reduced early voting, cumbersome registration rules, and limits on absentee balloting. These techniques will probably suppress voter participation. But it is not clear who that will hurt in Georgia or in other states where such changes are made.

Voting in Arizona, another state that supported Biden and elected two Democrats to the Senate, illustrates this uncertainty. Arizona had been a reliably Republican state for decades, sending members of that party to the Senate and supporting Republican candidates for president. This was done with flexible rules that allowed a great deal of mail-in balloting. In past elections, vote-by-mail favored Republicans who were often retirees who had resettled in Arizona.[17] In 2020, many Democrats took advantage of

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14. See *supra* text accompanying notes 7–10.

15. Some sources suggest it comes from William "Big Bill" Thompson, who was mayor of Chicago in the 1920s. WBEZ, *Early and Often*, AM. ARCHIVE OF PUB. BROAD., https://americanarchive.org/catalog/cpb-aacip-50-322bvw49 [https://perma.cc/D3ZD-2RGL] (last visited Sep. 10, 2021). But others argue for Boston's Mayor Curley who first held major office in 1914. Still others suggest it comes the New York City in the era of the Tweed Ring, or even from the corrupt voting by pro-slavery Missourians, who, in the 1850s, fraudulently voted in Kansas to prevent opponents of slavery from governing the Kansas Territory. *Id.*

16. Meredith Delilso, *Man Arrested in Wife's Murder Now Accused of Voting for Trump in Her Name*, ABC NEWS (May 14, 2021, 2:16 PM), https://abcnews.go.com/US/man-arrested-wifes-murder-now-accused-voting-trump/story?id =77692708 [https://perma.cc/9GMR-3EQM]. Barry Morphew was charged with forgery for casting an absentee ballot for Donald Trump in his wife's name. At the time of the election, his wife was missing and presumed dead. He has also been charged with murdering his wife. He confessed to the forgery, saying he did it "[j]ust because I wanted Trump to win," saying, "I just thought, give him another vote." *Id.*

17. Russell Berman, *The Republicans Telling Their Voters to Ignore Trump*, THE ATLANTIC (June 5, 2020), https://www.theatlantic.com/politics/archive/

vote-by-mail to avoid long lines at polling places during the COVID-19 pandemic. This new use of vote-by-mail may have helped Democrats win a second Senate seat and carry the state for their presidential candidate. But since Republicans won with these rules in almost every election for decades,[18] it is hard to imagine that changing the rules to reduce vote-by-mail will help Republicans regain their majority. It might have the opposite effect by reducing the votes of elderly residents, who often vote by mail and are more likely to vote for Republican candidates, more than it reduces the Democratic vote, which pre-pandemic had been mostly in-person. If pre-2020 voting patterns re-emerge by 2022 or 2024 and the vote-by-mail is more difficult, the outcome might reduce Republican voters because they can no longer easily vote by mail, rather than reducing Democratic voters who had only voted by mail because of the pandemic.

It is also, of course, not clear that the rule changes will pass constitutional muster. They are ostensibly race neutral. But motivation can undermine the constitutionality of a "neutral" process.[19] Politicians like O'Lenick and others across the nation want to change the rules to suppress their opponents' votes. These proposed changes are mostly directed at minority voting, and thus this suppression seems to be racially motivated. Some lawmakers have argued that these changes are necessary to prevent fraud, but they have been unable to find any meaningful examples of this. For example, after an extensive investigation in North Carolina in the wake of the 2020 election, prosecutors brought charges against 19 people for illegal voting[20]—out of more than 5.4 million votes cast in that state.[21] Because of the miniscule number of fraudulent votes, it is hard to imagine someone seriously defending voter suppression laws on the grounds of fraud. The claims of fraud are clearly pretexts for trying to suppress votes.

2020/06/trump-republicans-vote-mail-arizona-florida/612625/ [https://perma.cc/E5NK-A YVJ].

18. With the exception of 1996, Arizona had voted for the Republican candidate for President in every election from 1952 until 2020, when it went for Biden. *Presidential Voting Trends in Arizona*, BALLOTPEDIA, https://ballotpedia.org/Presidential_voting_trends_in_Arizona [https://perma.cc/UT5N-VZ75] (last visited Sep. 17, 2021).

19. *See generally* Washington v. Davis, 426 U.S. 229 (1976).

20. *19 Aliens Charged with Voter Fraud in North Carolina Following ICE Investigation*, U.S. IMMIGR. & CUSTOMS ENF'T (Sept. 3, 2020), https://www.ice.gov/news/releases/19-aliens-charged-voter-fraud-north-carolina-following-ice-investigation [https://perma.cc/Q4Y8-EB8G].

21. *North Carolina Election Results 2020*, NBC NEWS (Mar. 7, 2021, 4:31 PM), https://www.nbcnews.com/politics/2020-elections/north-carolina-results [https://perma.cc/3ZHR-2U36].

Voter participation in the United States is quite low compared to other democracies. The United States ranks 30th out of 35 nations in the Organization for Economic Cooperation and Development (OECD), according to the Pew Research Center.[22] Countries outpacing the U.S. include the U.K, Mexico, and Canada. "In some of these countries, voting is compulsory, and in most of them, Election Day is a holiday."[23] Requiring that all people vote on a single day—which is normally a Tuesday and thus a workday—reduces voting. In a complicated economy, not everyone can take time on a specific day to vote. Election laws that allow for early voting and early weekend voting enable voters to cast ballots without having to be absent from work, school, or family responsibilities, such as childcare or eldercare. So too does simple vote-by-mail. Such laws presumably increase voter participation. Limiting voting hours or methods, such as early voting or mail-in voting, obviously has a differential impact on various groups of people. Salaried white-collar employees, especially those in management, are more likely to have flexibility in their workday, and thus are able to leave work to vote when it is convenient and easy to do so without any economic cost. Hourly workers, on the other hand, must either start their workday earlier than usual to be at a polling place when it is open, extend their workday well past "quitting time" in order to vote, or lose pay by taking time from work to vote, *if* their employers allow them to do so.

Twenty-eight states require that employers give people time off to vote.[24] Twenty-two of these states require the employer to pay employees while they leave work to vote.[25] But 22 states do not require employers to allow employees to take time off to vote, and 6 states do not mandate that those leaving work be paid.[26] Needless to say, such differing rules, state-by-state, make a mockery of notions of equal protection on a national level. How these rules affect elections is less clear.

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22. Drew DeSilver, *In Past Elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RSCH. CTR., https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/ [https://perma.cc/Z5GU-MRKD] (last updated Nov. 3, 2020).

23. Cara Korte, *Why Not Make Election Day a National Holiday?*, CBS NEWS (Oct. 26, 2020, 10:57 AM), https://www.cbsnews.com/news/election-day-national-holiday/ [https://perma.cc/UGX8-ZW2C].

24. *States That Require Employers to Grant Employees Time Off to Vote, 2020*, BALLOTPEDIA, https://ballotpedia.org/States_that_require_employers_to_grant_employees_time_off_to_vote,_2020 [https://perma.cc/372Q-EDWB] (last visited Aug. 26, 2020) [hereinafter *States That Require Employers*].

25. *Id.*

26. *Id.*

There seems to be no strong political slant in how states treat voting. In 2020, for example, 22 states and the District of Columbia—almost half the nation—did *not* require that employers allow people to take time off from work.[27] Of those jurisdictions, 9 voted for Donald Trump and 14 voted for Joe Biden.[28] Eight were southern,[29] 7 were in the Northeast, 4 were in the Midwest and the Rocky Mountains, and 3 bordered the Pacific Ocean. Of the 21 that required employers to pay employees while they were voting, 12 supported Trump and 9 supported Biden.[30] Of the 7 that did not require that employers pay employees when they take time off, 5 supported Trump and 2 supported Biden.[31] Again, the politics of giving people time to vote seems to have little to do with parties, region, or ideology.

There are strong arguments for making election day a national holiday, as many other democracies do. Opponents of making election day a holiday argue that this will have economic costs, as employers will have to pay workers who do not work for a day. This is quite different than the 22 states that require employers to pay workers who take time off to vote. A requirement that employers pay employees if they take time off to vote seems to be a very minimal cost for most employers and does not raise particular logistical or time-cost issues. The fact that more than half of all

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27. *Id.*; *see also Voting Leave: State-by-State Summary*, DORSEY & WHITNEY LLP, https://www.dorsey.com/~/media/files/newsresources/publications/2008/10/employee-time-off-on-election-day-a-statebystate__/files/election-guide/fileattachment/election-guide.pdf [https://perma.cc/3UP2-G9EP] (last visited Aug. 26, 2020). Statistics on state policy in the rest of this paragraph are based on these two sources.

28. The following states supported Trump: Florida, Idaho, Indiana, Louisiana, Mississippi, Montana, North Carolina, North Dakota, South Carolina. Supported Biden: Connecticut, Delaware, District of Columbia, Hawaii, Maine, Michigan, New Jersey, New Hampshire, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

29. I define "the South" as the 15 slave states and the District of Columbia that existed in 1860 (11 of which seceded to form the Confederacy), plus those newer states (West Virginia and Oklahoma) which had state-wide segregation laws in 1954. Finkelman, *Exploring Southern Legal History*, *supra* note 6. These are: Delaware, District of Columbia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia.

30. Supported Trump: Alaska, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming. Supported Biden: Arizona, California, Colorado, Illinois, Maryland, Minnesota, Nevada, New Mexico, and New York.

31. Supported Trump: Alabama, Arkansas, Kentucky, Ohio. Supported Biden: Georgia, Massachusetts, and Wisconsin.

the states require that employers give time off to vote, and almost all of those mandate the time be paid, indicates such a rule is not seen as an economic hardship for employers. Given this experience, it seems that a national rule on paid time off to vote makes sense.

But having a paid holiday would be a different matter than giving people time to vote. Such a change would be another compulsory paid vacation day, which could adversely affect some businesses. The "holiday" for election day would create other problems as well, such as reduced public transportation, which might make it harder to vote. Essential workers, such as police, firefighters, transportation workers, hospital staffs, nursing home staffs, and people in many service industries, would still be on the job, but their children would not be in school, raising issues of childcare. In addition, some supporters of expanding opportunities to vote know a national holiday would increase turnout among some people but also worry it would discourage turnout for others by creating long lines at polling places as *more* people show up to vote. I am not sure there is any evidence to support this concern, which could also be addressed by increasing the number of polling places and the number of voting booths and counting machines. But we also know that long lines do discourage voters.

There is a simple alternative to the economic, logistic, and time costs of making election day a national holiday. A new federal voting rights act could require that all workers have paid time off to vote on election day and mandate a minimum, but meaningful, period for early voting, early voting on weekends, and easy and convenient mail-in voting. If done on a national level, this would give almost all voters an opportunity to vote with few or no costs to employers and only a few costs to boards of election. With deference to the tradition of state regulation of elections, such a law could set a floor for the minimum amount of early voting a state could require but allow states to go beyond that minimum. This would resemble Justice William Brennan's important insight about the Bill of Rights (and other constitutional rights) that the Constitution sets a floor for state protections of rights but not a ceiling.[32] Thus, if a federal law mandated that a state allow weekend voting for the two weekends before an election, a state could allow weekend voting on three weekends, but not one.

Whether the changes in voting rules passed in some states and contemplated in others will help one party or the other is not clear. Reducing the opportunity to vote, as Georgia is trying to do, is

32. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also* Robert C. Post, *Justice Brennan and Federalism*, 7 CONST. COMMENT. 227 (1990).

undemocratic and undermines our political structure and system. Ironically, it may also backfire on those who want to change the rules. Donald Trump and the Republican Party, for example, did very well in Pennsylvania and Michigan among blue-collar voters, who had traditionally been Democrats throughout most of the twentieth century. Neither state requires that employers allow employees to take time off to vote.[33] Trump, on the other hand, did poorly in middle class and wealthy suburbs of Philadelphia, Pittsburgh, and Detroit, which have traditionally voted for Republicans. If Michigan or Pennsylvania made it harder to vote, it is not at all clear which party that would help. Similarly, O'Lenick assumes that making it more difficult to vote in Georgia will stop more Democrats than Republicans from voting. But under the existing system, Republicans have dominated the state in the previous four elections. Except for allowing drop off boxes for absentee ballots because of COVID, there were no rule changes in 2020. Could rule changes that affect everyone in the state backfire for her and actually reduce Republican turnout? If the changes are localized and targeted, then they are clearly illegal and unconstitutional, and so such changes will likely be struck down. The facially neutral rule changes that many states have passed or are currently considering are designed to suppress minority votes, but it is just as possible the changes will energize these voters and bring more of them to the polls.

One thing is clear, however. Reducing voter participation undermines our democratic system of government. That, in the long run, is not good for any political party.

The status of voting rights in various states is of course now very much a political contest, as legislatures in some states are working to eliminate easy access to the ballot in the belief that it will lead to the political outcome they want. O'Lenick's statement and the calls for sweeping changes in voting laws in many other states—and actual changes in voting rules[34]—remind us why we needed the Voting Rights Act in 1965 and why we still need it. O'Lenick may be unaware of the history of voting rights in the South or of the history of voter suppression in her own state, or she may be aware of the history and simply does not care about it. Nevertheless, she should be aware of this history, because she is just the latest incarnation of a long tradition—mostly, but not entirely, in the South—of suppressing black voters to preserve white supremacy.

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33. *States That Require Employers*, *supra* note 24.

34. Nick Corasaniti & Reid J. Epstein, *What Georgia's Voting Law Really Does*, N.Y. TIMES (Apr. 2, 2021), https://www.nytimes.com/2021/04/02/us/politics/georgia-voting-law-annotated.html [https://perma.cc/NNJ9-X5NJ].

II. VIOLENT VOTE SUPPRESSION IN THE SOUTH

In the late nineteenth century and throughout the first two-thirds of the twentieth century, southern voter suppression led to murderous assaults on blacks who tried to vote or had voted and, in the 1960s, on whites and blacks who worked for equal access to the ballot. Two of the most lethal attacks on blacks took place in Louisiana. In the wake of the 1872 presidential election, Confederate veterans, white militia men, and members of the Ku Klux Klan—many in the lethal mob fit in two or three of these categories—murdered more than 100 blacks in the Colfax Massacre in Grant Parish, Louisiana. Prosecutions of the murderers failed when the U.S. Supreme Court overturned their convictions in what can only be described as a disgraceful opinion in *United States v. Cruikshank*.[35] A year later, the misnamed "Battle of Liberty Place" led to the deaths of about 100 blacks in New Orleans, as a white mob tried to overthrow the legally elected government of Louisiana. Federal troops stopped this insurrection a few days later.[36] In the Wilmington Race Riot of 1898 in North Carolina,[37] whites killed as many as 300 blacks in response to the election of an African-American man, George H. White,[38] to Congress and the election of a biracial city government. The coup successfully overthrew the local government, ending meaningful black political participation in North Carolina for more than half a century. Intimidation, new state laws and constitutions, violence, and lynching virtually eliminated black participation in politics in the rest of the South as well. The Supreme Court generally turned its back on black

35. United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1875); *see* XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910 (1997); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988) [hereinafter FONER, RECONSTRUCTION]; LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, & THE DEATH OF RECONSTRUCTION (2008).

36. *Reconstruction in Louisiana: The Battle of Liberty Place*, L. LIBR. LA. (Jun 23, 2021, 9:33AM), https://lasc.libguides.com/battle-liberty-place [https://perma.cc/QW6P-HLZM]; JAMES W. LOEWEN, LIES ACROSS AMERICA: WHAT OUR HISTORIC SITES AND MONUMENTS GET WRONG (2001).

37. DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY (David S. Cecelski & Timothy B. Tyson eds., 1998); *1898 Wilmington Race Riot Commission*, N.C. DEP'T NAT. & CULTURAL RES., https://www.ncdcr.gov/learn/history-and-archives-education/1898-wilmington-race-riot-commission [https://perma.cc/2M2Q-8D3D] (last visited Sep. 20, 2021).

38. *See* ERIC ANDERSON, RACE AND POLITICS IN NORTH CAROLINA 1872-1901: THE BLACK SECOND (1981); *see also* BENJAMIN R. JUSTESEN, GEORGE HENRY WHITE: AN EVEN CHANCE IN THE RACE OF LIFE (2001).

disenfranchisement, as long as the states did not overtly use race as the criteria for disenfranchisement.[39]

Blacks remained sidelined from southern politics until the civil rights movement of the 1950s and 1960s, when black and white civil rights workers tried to register voters and challenge white supremacy. This led to a new wave of white violence, such as the murder of Medgar Evers in Mississippi.[40] The most famous, and gruesome, attempt to stop black political participation was the June 1964 triple murder in Philadelphia, Mississippi of James Chaney, Andrew Goodman, and Michael Schwerner—one African American and two white Jewish men—for trying to register black voters.[41]

III. LEGAL SUBTERFUGE AND BLACK VOTE SUPPRESSION

On the morning of March 5, 2021, the day I presented an early version of this Article as part of a symposium at the Louisiana State University Law Center, my news feed from the *New York Times* had a headline story about voting rights at the state and federal levels. Two salient paragraphs set out the issue:

> Republican legislators in dozens of states are trying to make voting more difficult, mostly because they believe that lower voter turnout helps their party win elections. (They say it's to stop voter fraud, but widespread fraud doesn't exist.) The Supreme Court, with six Republican appointees among the nine justices, has generally allowed those restrictions to stand.

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39. For example, in *Williams v. Mississippi*, the Supreme Court gave its tacit approval to the disenfranchisement of virtually all blacks in Mississippi on the ground that the disenfranchisement was not based on race, but other factors. 170 U.S. 213 (1898). The Court quoted the Mississippi Supreme Court's assertion that "[w]ithin the field of permissible action under the limitations imposed by the federal constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race." *Id.* at 222. A rare example where the Court supported black rights was in *Guinn v. United States*, where the Court struck down Oklahoma's "grandfather clause" on the ground that it could only apply to white people and therefore was discriminatory. 238 U.S. 347 (1915).

40. *Life of Medgar Evers*, MEDGAR EVERS COLLEGE https://www.mec.cuny.edu/history/life-of-medgar-evers/ [https://perma.cc/VMN5-7PEH] (last visited Feb. 1, 2022).

41. *The Murder of Chaney, Goodman, and Schwerner*, MISS. CIV. RTS. PROJECT, https://mscivilrightsproject.org/neshoba/event-neshoba/the-murder-of-chaney-goodman-and-schwerner/ [https://perma.cc/L2AE-ADRP] (last visited Aug. 29, 2021).

> "I don't say this lightly," Michael McDonald, a political scientist at the University of Florida, recently wrote. "We are witnessing the greatest roll back of voting rights in this country since the Jim Crow era."[42]

This brings me back to Ms. O'Lenick, her open and frank bigotry, and her plans to prevent blacks from voting. She is not directly arguing for a return to race riots, political assassinations, and lynchings to prevent black political participation. Rather, she claims she only wants to tweak the rules, which of course she hopes will have the effect of reducing black voting, so her "side" can win elections. In this sense, her crusade and that of other white southerners who are trying to reduce voter turnout—for blacks and other minorities—illustrates the famous statement of Karl Marx that "history repeats itself, first as tragedy, second as farce."[43] The tragedy was Reconstruction, the post-Reconstruction period, and the South until after 1965—when blacks and whites were murdered to preserve white supremacy. In Wilmington, North Carolina, in 1898 the leaders of the Race Riot declared their goal was to eliminate "Negro rule," and with enough people killed, they accomplished this. That was the tragedy. The "farce" is the current moment—when Donald Trump and his supporters whine like crybabies about losing the election, lie about the outcome, and plot to lower voter turnout in the future. Their movement is dangerous, and tragically, some have died in their violent opposition to the outcome of the 2020 election, but there is still something farcical in their open plans to suppress voting.

As noted above, 18 states have passed laws designed to aggressively limit voting[44]—and clearly aimed at undermining democracy and government "[o]f the people, by the people, for the people."[45] Nevertheless, they are fortunately not necessarily going to change the outcome of elections, and while a threat to democracy, they are somewhat ludicrous. Georgia's new law, for example, shortens the window for

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42. David Leonhardt, *Voting Rights or the Filibuster? Democrats Will Probably Have to Choose*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/briefing/cuomo-nursing-homes-harry-meghan-interview-stimulus-bill.html [https://perma.cc/U3H5-CH2H].

43. Karl Marx, *The Eighteenth Brumaire of Louise Bonaparte*, *in* DIE REVOLUTION (1852).

44. *See Voting Laws Round-Up: July 2021*, *supra* note 11.

45. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (transcript available at http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm [https://perma.cc/G2U5-YMVZ]).

applying for absentee ballots (vote-by-mail) and requires that people ask for such ballots before receiving them.[46] It is not clear if this will undermine voting by the people O'Lenick wants to disfranchise—black and white Democrats—or if it will actually limit voting for elderly white Republicans. Neither outcome is good for our political system, but it is not necessarily clear that the outcome will be what O'Lenick is hoping for.

Similarly, the Republican dominated legislature in Arizona has made it harder for people to remain on the list to receive absentee ballots and created more onerous signature rules for those who vote with absentee ballots.[47] But in elections before the pandemic in 2020, the majority of voters using mail-in ballots have been senior-citizen retirees who tended to vote Republican. These new rules making it more difficult to vote by mail may actually end up suppressing voters who the Republicans in the legislature are counting on to get "their" candidates elected.

I do not mean to be pollyannaish here. The massive number of new laws are clearly designed to suppress voting, and especially to suppress minority voting. My only point is that the laws have a potential to backfire on those who have passed them.

Much of this Article is about the tragedy of voter suppression in American history, which ultimately led to the Voting Rights Act of 1965. We are, I think, currently in an era of high farce. That does not mean there will not be tragedies. The death of Officer Brian Sicknick, after a mob of white terrorists pretending to be patriots attacked the capital, is surely a tragedy.[48] So too were the deaths of a number of other officers who sadly took their own lives after the attack, as well the injuries to many officers.[49] The attack itself on the Capitol by an angry mob of people who refused to accept the outcome of democratic elections and were chanting their desire to hang the Vice President of the United States is tragic. But the event

46. *See Voting Laws Round-Up: July 2021*, *supra* note 11.

47. *Id.*

48. Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html [https://perma.cc/NJ7H-NAP6].

49. Whitney Wild, Paul Leblanc & Rashard Rose, *2 More DC Police Officers Who Responded to Capitol Insurrection Have Died by Suicide*, CNN (Aug. 3, 2021, 9:40 AM), https://www.cnn.com/2021/08/02/politics/dc-metropolitan-police-officer-suicide-january-6-capitol-riot/index.html [https://perma.cc/BW8U-N6TU].

itself—led by a spear-carrying, bare-chested Shaman with horns on his head[50]—does conjure up the notion of farce.

IV. HISTORICAL SUPPRESSION OF VOTERS THROUGH LEGAL MECHANISMS

My goal here is to help us understand why we needed the Voting Rights Act of 1965, why we still need it, and why we need a new voting rights act. This requires an understanding of a long tradition of voter suppression at the political level—the tragedy of America from the 1860s to the 1960s—that was supported by white terrorism at the ground level. In thinking about these issues, it is important to remember that during the Civil Rights movement, voting rights, not the integration of schools or lunch counters, was the most lethal struggle. No one was murdered trying to integrate a school (except people killed in riots at Ole Miss). But civil rights workers, and even non-activists, were murdered over voting rights, even when they might have had nothing to do with voting rights campaigns. Nine days after the passage of the Civil Rights Act of 1964, members of the Ku Klux Klan murdered Lt. Colonel Lemuel A. Penn while he was returning from reserve training at Fort Benning, Georgia.[51] The Klansmen believed he was sent to Georgia to help blacks vote.[52] An all-white jury in Georgia acquitted the murderers, but they were later convicted on federal civil-rights charges.[53] The beating of John R. Lewis, later Representative John R. Lewis, on the Edmund Pettis Bridge was over voting rights, not the integration of schools, restaurants, or public transportation. James Chaney, Andrew Goodman, and Michael Schwerner were not murdered by terrorists and anarchists posing as Mississippi police officers because they wanted to integrate the local schools. They were savagely killed because they wanted to register black voters. Segregationist Klansmen and local police officials, often the same people, fully understood that if blacks voted, the South would change, and political power would shift. Alice O'Lenick in Gwinnett County, Georgia, understands this as well, so she is "like a dog with a bone"[54] in her desire to turn the clock back the 1950s or perhaps the 1890s.

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50. Alan Feuer, *Capitol Rioter Known as QAnon Shaman Pleads Guilty*, N.Y. TIMES (Sept. 3, 2021), https://www.nytimes.com/2021/09/03/us/politics/qanon-shaman-capitol-guilty.html? [https://perma.cc/T4X2-4M9P].

51. BILL SHIPP, MURDER AT BROAD RIVER BRIDGE: THE SLAYING OF LEMUEL PENN BY MEMBERS OF THE KU KLUX KLAN (1981).

52. *Id.*

53. *Id.*

54. Yeomans, *supra* note 2.

To put this another way: in the end, the Civil Rights Movement was about "black power"—not in the guise of gun-toting members of the Black Panther Party—but in the central meaning of *power* in a democratic society. *Power*, in that context, is in the ballot, not the bullet. Mao Zedong, trying to organize a violent revolution against a non-democratic regime, argued that "[p]olitical power grows out of the barrel of a gun."[55] That is true in totalitarian systems and is also true during a revolution. It was the theory behind white-supremacist terrorism in Louisiana in 1872 and 1873, in Wilmington, North Carolina, in 1898, and in Philadelphia, Mississippi, in 1965. In these places, white terrorists, militia men, and police officials used the power of the gun to suppress voting and democratic political process. But terrorism and violence have no place in a democracy, where power grows out of the ballot box. Segregationists understood this in the years leading up to the Voting Rights Act of 1965, which is why they were willing to murder people to prevent voter registration and black political participation. This is the history as "tragedy." The new segregationists, embodied by people like Ms. O'Lenick and the state legislatures that have been rewriting their voting laws to suppress minority voters, have so far, thankfully, not resorted to organized violence since January 6, 2021. Their farcical—but nonetheless sometimes lethal and potentially very lethal—allies had their one moment of violence. Fortunately, our political institutions remained firm, and law prevailed over terrorism. It is nevertheless important to also understand the complexity of black voting rights in our history.

V. BLACK VOTING RIGHTS FROM THE REVOLUTIONARY ERA TO THE EVE OF WORLD WAR I

In 1776, Thomas Jefferson defended the right of the American colonists to revolt against the British monarchy on the basis of a simple political proposition: "Governments are instituted among Men, deriving their just powers from the consent of the governed."[56] The slogan of the Revolution—"taxation without representation is tyranny"—reflected this concept. Legitimate government is based on "the people" electing representatives. With the successful rejection of the British monarchy and the royal governors who represented it, the notion of self-government expanded to include the election of executive officials through legislatures

55. MAO ZEDONG, PROBLEMS OF WAR AND STRATEGY (1966).

56. THE DECLARATION OF INDEPENDENCE (U.S. 1776). The term "men" is jarring in our own times, reflecting the reality of the late eighteenth-century Atlantic world in which women (except for a few queens in king-less monarchies) were generally not involved in formal politics.

and eventually by the people themselves. These changes were deeply radical in fundamental ways.

At the American Founding, who constituted "the people" was contested. In *Dred Scott v. Sandford*,[57] Chief Justice Roger B. Taney argued that blacks could not be U.S. citizens because at the Founding, they were not considered part of the American polity. He infamously wrote:

> The question before us is, whether the class of persons 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.[58]

Taney was clearly wrong. His attempt at "originalism" was flawed by his intentionally dishonest history. In dissent, Justice Benjamin R. Curtis set out the many ways in which black people in fact participated in American politics at the time the Constitution was adopted.[59] During the Revolution, six states—Massachusetts, New Hampshire, New York, New Jersey, Pennsylvania, and North Carolina—enfranchised blacks on the same basis as whites.[60] There is evidence that in the 1780s, including during the ratification of the Constitution, free blacks also voted in Connecticut and Maryland.[61] Many of these voters were Revolutionary

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57. Dred Scott v. Sandford, 60 U.S. 393 (1857).

58. *Id.* at 404–05. For a longer discussion, see PAUL FINKELMAN, *DRED SCOTT V. SANDFORD*: A BRIEF HISTORY WITH DOCUMENTS (2nd ed. 2017).

59. *Dred Scott*, 60 U.S. at 530 (McLean, J., dissenting).

60. For a discussion of black voting from the Revolution to the Civil War, see Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415 (1986) [hereinafter Finkelman, *Prelude to the Fourteenth Amendment*].

61. *Id.* On blacks voting in Connecticut, see Robert P. Forbes, *Grating the Nutmeg: Slavery and Racism in Connecticut from the Colonial Era to the Civil War*, 20 CONN. HIST. REV. 170, 179, 182 (2013). On some free blacks voting in Maryland, see David Skillen Bogen, *The Maryland Context of* Dred Scott*: The*

War veterans of the Continental Army and the state militias.[62] After the Constitution was adopted, Vermont, which became a state in 1791, and Tennessee, which became a state in 1796, extended suffrage to black men.[63]

But shortly after the ratification of the Constitution, there was a white counter-revolution that began to chip away at black rights at the national level and in some states. During the Revolution, blacks served—sometimes with great distinction—in the Continental Army and some state militias.[64] Thus, as noted above, they were able to vote on the same basis as whites in about half the new states. Efforts to change this began shortly after the first Congress took office.[65]

The Militia Act of 1792 limited military service to white men.[66] This law prevented black men from claiming a right to participate in public life because they risked their lives to defend the nation. The rule was repealed in the Militia Act of 1862,[67] which was a precursor to constitutionally protected black suffrage in the aftermath of the Civil War.[68] The early naturalization acts,[69] which remained in force until after the Civil War,[70] allowed "[a]ny alien, being a free white perso[n]," to become a U.S.

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

62. Finkelman, *Prelude to the Fourteenth Amendment*, *supra* note 60.

63. *Id.*

64. *See generally* BENJAMIN QUARLES, THE NEGRO IN THE AMERICAN REVOLUTION (1961).

65. For a full discussion of this, see Paul Finkelman, *Race, Slavery, and Federal Law, 1789–1804: The Creation of Proslavery Constitutional Law Before* Marbury, 14 U. ST. THOMAS L.J. 1 (2018) [hereinafter Finkelman, *Race, Slavery, and Federal Law*].

66. Militia Act of 1792, ch. 33, 1 Stat. 271 (1972) (repealed 1903).

67. Act of July 17, 1862, ch. 201, § 12, 12 Stat. 597, 599 (providing for the enlistment of African Americans). On the political and legal context of this act, see Paul Finkelman, *Lincoln v. The Proslavery Constitution: How a Railroad Lawyer's Constitutional Theory Made Him the Great Emancipator*, 47 ST. MARY'S L.J. 63 (2015).

68. U.S. CONST. amend. XV.

69. Naturalization Act of March 26, 1790, 1 Stat. 103 (1790); *see* Naturalization Act of January 29, 1795, ch. 20, § 1, 1 Stat. 414 (repealed).

70. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256. The law allowed for people of African ancestry to be naturalized, but it did not allow Asians and others construed as "not white" but also not of African ancestry to be naturalized; *see* IAN HANEY LOPEZ, WHITE BY LAW: THE CONSTRUCTION OF RACE (1996).

citizen.[71] The 1802 Congress, at the behest of the Jefferson administration, prohibited blacks, whether free or slave, from delivering the mail for the post office.[72]

From 1803 until the Civil War, every newly admitted state, with one exception, refused to extend the vote to blacks; and by 1850, Pennsylvania, New Jersey, Tennessee, and North Carolina had disfranchised their black voters.[73] New Jersey, which had initially allowed women to vote, disfranchised them as well.[74] The new state of Maine enfranchised blacks in its first constitution in 1820, as did Rhode Island when it finally adopted a constitution in 1842.[75] In 1820, New York adopted a half-way covenant, expanding voting rights for white men while keeping property requirements for black voters.[76] Wisconsin voters approved a constitutional provision for equal suffrage, but the Wisconsin Supreme Court, dominated by Democrats (who were generally proslavery at the time) ruled the provision had not passed.[77]

The Civil War, of course, changed all this. Blacks were initially prohibited from serving in the army, as they had been since 1792.[78] But in

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71. Naturalization Act of January 29, 1795, ch. 20, § 1, *repealed by* Act of Apr. 14, 1802, ch. 28.

72. Act of May 3, 1802, ch. 48, 2 Stat. 189, 191. For a more detailed account of attacks on blacks in the new nations, see Finkelman, *Race, Slavery, and Federal Law*, *supra* note 65; *see also* DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820 (1971).

73. Finkelman, *Prelude to the Fourteenth Amendment*, *supra* note 60, at 424–25.

74. *Did You Know: Women and African Americans Could Vote in NJ Before the 15th and 19th Amendments?*, NAT'L PARKS SERV., https://www.nps.gov/articles/voting-rights-in-nj-before-the-15th-and-19th.htm [https://perma.cc/NHA8-URJ7] (last visited Dec. 13, 2021).

75. Before this, Rhode Island had operated under a modified version of its colonial charter. R.I. CONST. of 1842.

76. Finkelman, *Prelude to the Fourteenth Amendment*, *supra* note 60.

77. *Id.*

78. Act of May 8, 1792, 1 Stat. 271, provided:

> That and by whom each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be enrolled in the militia.

Blacks were allowed to serve in subordinate roles in the Navy, and some blacks fought with U.S. troops under Andrew Jackson at the Battle of New Orleans in 1815. Ironically, the only time blacks were able to fight for the U.S. from the Revolution to the Civil War was in a battle that had no military importance, because unbeknownst to the combatants, the War of 1812 was actually over when they fought the battle.

1862 Congress changed the rules,[79] and by the end of the war, more than 10% of the United States Army was black.[80] Most had been slaves when the war began.[81]

In the aftermath of the Civil War, there was powerful support for black suffrage throughout the North. In his last speech, Lincoln argued for black suffrage.[82] One of those who heard Lincoln call for black suffrage was John Wilkes Booth, who organized his assassination plot after hearing that speech.[83] Lincoln can be properly seen as the first martyr—of many martyrs—for black suffrage.

Like the assassin John Wilkes Booth, most southern whites opposed black suffrage. But we cannot say, as so many historians and legal scholars do, that a "majority" of southerners opposed black suffrage. After all, in 1870, Louisiana, Mississippi, and South Carolina had black majorities; Alabama was 49.3% black; and Georgia was 46% black.[84] Thus, it is likely that a majority of the populations in all five states favored black voting, since some southern Unionists and Republicans in Alabama and Georgia probably supported black suffrage. During Reconstruction, Congress imposed black suffrage on the former Confederate states, and across the South, hundreds of blacks held elected office.[85] This included two senators from Mississippi, a state supreme court justice in South Carolina, and, briefly, a governor in Louisiana.[86] At one point, more than half of South Carolina's delegation to the House of Representatives was black.[87] Blacks

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79. *See* Militia Act of July 17, 1862, ch. 201, § 12, 12 Stat. 597, 599.

80. DUDLEY TAYLOR CORNISH, THE SABLE ARM: BLACK TROOPS IN THE UNION ARMY, 1861-1865 (1956). By the end of the war, more than 200,000 African-American men had served in the U.S. Army and Navy.

81. *Id.*

82. Abraham Lincoln, *Last Public Address*, April 11, 1865, *reprinted in* 8 THE COLLECTED WORKS OF ABRAHAM LINCOLN 399, at 403 (Roy P. Basler ed., 1953).

83. ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND SLAVERY 331–32 (2010).

84. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, 51, 57, 73 (U.S. Bureau of the Census, Working Paper No. 56, 2002), https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf [https://perma.cc/MF44-H8LD].

85. *See generally* ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION (revised ed. 1996).

86. *Id.*

87. AMERICAN POLITICAL LEADERS 1789-2005, at 378 (C.Q. Press ed. 2005).

served on city councils, as sheriffs, and in state legislatures.[88] For a brief moment—roughly from 1869 to 1880—there was a sea change in southern politics, where about 93% of all African Americans lived.[89]

VI. WHITE TERRORISM, RACIST LEGISLATION, AND THE DEMISE OF BLACK SUFFRAGE

As we know, southern whites organized an unrelenting counterattack on black suffrage starting in the 1870s and continuing into the early twentieth century. White terrorists who disguised themselves under white sheets and masks perpetuated ruthless violence against blacks to prevent them from voting.[90] These white terrorists did not need to kill massive numbers of African Americans, although sometimes, such as in the attack at Grant Parish, they did.[91] A few lynchings or shootings, a few vicious beatings, strategic rapes of the wives and daughters of black voters and candidates, and assassinations of political leaders were sufficient to intimidate black voters across the South. With few blacks owning property in this overwhelmingly rural and agricultural region, plantation owners were able to pressure black tenant farmers and sharecroppers to simply not vote. Finally, as white Democrats took control of state legislatures, new laws created legal impediments to voting.[92] Almost all southern states adopted laws to suppress black voting. But South Carolina set the standard for how to eliminate black voting.

To understand what took place, modern readers need to understand how voting worked in the nineteenth century. There were no voting machines as there were in the mid-twentieth century. And of course, there were no machines to electronically record votes. Voting consisted of placing a paper ballot in a box. The ballots were then counted by hand and

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88. *Id.*

89. Gibson & Jung, *supra* note 84, at 10. The 1870 census recorded 4,539,314 blacks in the South. This is calculated by adding to the total number of blacks in the South Region to the black population of Missouri, which the Census Bureau placed in the Midwest region. However, Missouri, as a slave state when the Civil War began and a segregating state in 1954, is a Southern state. The total black population in 1870 was 4,880,009, which means that just over 93% of all blacks lived in the South in 1870. In 1880, the South had 6,099,253 blacks out of 6,580,703 in the country. Thus 92.7% of all blacks lived in the South that year. In 1890, 92.2% of all blacks lived in the South. *Id.* at 108.

90. WANG, *supra* note 35; FONER, RECONSTRUCTION, *supra* note 35.

91. ROBERT M. GOLDMAN, RECONSTRUCTION & BLACK SUFFRAGE: LOSING THE VOTE IN *REESE* AND *CRUIKSHANK* (2001); KEITH, *supra* note 35; *see also* United States v. Cruikshank, 92 U.S. (2 Otto) 542 (1876).

92. WANG, *supra* note 35; FONER, RECONSTRUCTION, *supra* note 35.

tallied up. In many elections, voters did not even "mark" their ballots as we do today. Rather, they deposited preprinted ballots provided by the candidates or the political parties. Such a system could lead to stuffing the ballot box by depositing more than one ballot at a time or by adding ballots to the box after the polls closed.

This system of prepared ballots accommodated voters who were not literate or might not speak English. A voter did not need to be able to read to know which candidate he supported. In the South, illiteracy rates were high for whites, and even higher for former slaves. But black voters knew who they supported. The Republican party was integrated and supported black civil rights. It was the party that had ended slavery and rewritten the Constitution with the Thirteenth, Fourteenth, and Fifteenth Amendments. Across the nation, blacks almost universally supported the party of Lincoln, and in the South they worked in tandem with white unionists and Union Army veterans who had remained in the South when the War ended. In the three black-majority states in 1870—South Carolina, Mississippi, and Louisiana—and in Alabama and Georgia where the populations were nearly equal in size, only legal subterfuge, supported by white terrorism, could prevent blacks from having a significant influence in politics. With the end of Reconstruction in 1877, southern whites began their relentless legislative attacks on black voting. South Carolina led the way.

In 1878, South Carolina 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.[93] Many of the black voters were illiterate former slaves. They understood who they wanted to vote for—Republican members of the Party of Lincoln, who supported black rights.[94] But they could not necessarily read the words on a ballot box to determine where to deposit their ballot. The new law provided detailed regulations for where elections could be held, including naming specific stores and other buildings as polling places in various counties.[95] This statute ended with 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

93. 1877–78 S.C. Acts 565; *see also* Orville Vernon Burton et al., *South Carolina*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 195, 231 (Chandler Davidson & Bernard Grofman eds., 1994).

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

95. 1877–78 S.C. Acts 565.

officers."[96] In other words, there would be one polling place for state and local elections and a different one for members of Congress and the president. This law allowed election officials to move federal ballot boxes to new locations in an attempt to confuse black voters. The Legislature also required separate ballot boxes for state and federal elections, even if the voting was at the same polling place.[97]

In 1882, South Carolina expanded its assault on black suffrage with the passage of the "Eight Ballot Box Law."[98] The law was designed to reduce the black vote without overtly denying the right to vote on the basis of race.[99] 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 more difficult, especially for blacks. As one of the leading historians of voting in the South has noted, the "eight-box law was one of the most clever stratagems" in this period to eliminate the black vote, "[a]nd its provisions illustrate how ingenious southern authors could twist seemingly neutral devices for partisan and racist purposes."[100] As noted above, 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.

Another important historian 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.[101]

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

96. *Id.*
97. 1877–78 S.C. Acts 632.
98. 1881–82 S.C. Acts 1110, 1117–18.
99. *Id.*
100. KOUSSER, *supra* note 94.
101. CHARLES L. ZELDEN, VOTING RIGHTS ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 75 (2002).

> registration measure requiring individuals of voting age to enroll between May and June of that year or to risk permanent exclusion 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.[102]

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 "[u]pon such evidence as he may think necessary, in his discretion."[103] 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.[104] The results were predictable, as "black turnout in South Carolina in the presidential election of 1884 dropped by an estimated 50 percent from its 1880 level."[105]

Statutes, however, could be repealed or even struck down by a federal court. And the suppression laws, however effective, could not entirely stop black voting. Even with the Eight Ballot Box law in place, South Carolina's black majority—60% of the state's population in 1890—still managed to elect at least one member to Congress in 1890, 1892, and 1896, and a few African Americans served in the South Carolina legislature.

Constitutionalizing voter suppression was a stronger tactic because it could lead to a more permanent and sweeping disenfranchisement. Between 1885 and 1907, more than half of the segregating states adopted new constitutions that were designed to disfranchise almost all blacks in their states.[106] During this period, southern states that did not create new

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102. STEPHEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969, at 6 (1976).

103. 1881–82 S.C. Acts 1112.

104. *See* KOUSSER, *supra* note 94, at 35 ("This open invitation to fraud and discrimination was designed to let registrars enfranchise all whites.").

105. *Id.*

106. Delaware, 1897; Florida, 1885; Kentucky, 1891; Mississippi, 1890; South Carolina, 1895; Louisiana, 1898; Alabama, 1901; Virginia, 1902; Oklahoma, 1907.

constitutions simply added amendments to existing constitutions to facilitate voter suppression.[107]

Mississippi led the way in this crusade for voter suppression in the Mississippi Constitution of 1890.[108] The Mississippi state constitutional convention was known as the Disenfranchisement Convention. Fraud and intimidation marked the election of delegates. Blacks constituted 59% of the state's population, but only one black delegate was elected to the Convention.[109] The Convention's product, the Mississippi Constitution of 1890, was openly and explicitly designed to eliminate black voting.[110]

The Mississippi Supreme Court openly acknowledged that the purpose of the Convention was to disfranchise blacks.[111] The court noted, almost bragging about its state Convention, that "[w]ithin the field of permissible action under the limitations imposed by the federal constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race."[112] The Mississippi Supreme Court was frank about the purpose of the change:

> By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites; a patient, docile people, but careless, landless, migratory within narrow limits, without forethought, and its criminal members given to furtive offenses, rather than the robust crimes of the whites. Restrained by the federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offenses to which

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107. Arkansas, 1874; Georgia, 1877; Maryland, 1867; Missouri, 1875; North Carolina, 1868; Tennessee, 1870; Texas, 1876; West Virginia, 1872.

108. It is worth noting that Louisiana's Constitution of 1898 certainly could compete with Mississippi on this issue.

109. Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1468 (1983).

110. 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, 1057 (2014).

111. *Id.* at 1057 n.132.

112. In *Williams v. Mississippi*, the U.S. Supreme Court quoted the Mississippi Supreme Court's assertion that "[w]ithin the field of permissible action under the limitations imposed by the federal constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race." 170 U.S. 213, 222 (1898).

its criminal members are prone.[113]

The new Constitution was overwhelmingly effective in disfranchising blacks in Mississippi:

> The new state constitution imposed a variety of suffrage qualifications designed to disfranchise blacks. Some, like the poll tax, tended to exclude many blacks automatically; others, like the literacy test and the requirement to "be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar," or the requirement to demonstrate "a reasonable understanding of the duties and obligations of citizenship," transparently invited invidious manipulation.[114]

The United States Supreme Court approved this voter discrimination in *Williams v. Mississippi* in 1898.[115] The case involved jury discrimination in a murder prosecution.[116] Williams, the defendant in the trial, was African American.[117] He argued that he was denied equal protection of the law because there were no black jurors when he was tried, convicted, and sentenced to death.[118] At this time, jury service was predicated on being a registered voter.[119] Thus, in upholding the verdict against Williams, the Supreme Court also upheld Mississippi's constitutional disenfranchisement of more than half the adult men in the state. Since Mississippi admitted that its new constitution was designed to discriminate against blacks, the Court might easily have determined that the new state constitution violated the Fourteenth and Fifteenth Amendments. But the Court did not do this.

Speaking for the Court, Justice Joseph McKenna refused to even consider that Mississippi's actions might have been based on racism and a conscious desire to violate the Fourteenth and Fifteenth Amendments.[120] McKenna accepted the Mississippi court's blatantly racist characterization of all blacks as being unfit for full citizenship.[121] The state, in the words of Justice McKenna, was perfectly free to take advantage of these racial

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113. *Id.* (quoting Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896)).
114. Schmidt, *supra* note 109, at 1462 (quoting MISS. CONST. of 1890, § 264).
115. *Williams*, 170 U.S. at 225.
116. *Id.* at 213.
117. *Id.*
118. *Id.*
119. *Id.* at 220.
120. *Id.* at 225
121. *Id.*

characteristics to limit black voting and black jury service.[122] McKenna determined that

> nothing tangible could be deduced from this. If weakness were taken advantage of, it was to be done "within the field of permissible action under the limitations imposed by the Federal Constitution," and the means of it were the alleged characteristics of the negro race, not the administration of the law by officers of the state.[123]

Astoundingly, the Court concluded: "It cannot be said, therefore, that the denial of the equal protection of the laws arises primarily from the constitution and laws of Mississippi; nor is there any sufficient allegation of an evil and discriminating administration of them."[124]

Following this case, the South successfully disfranchised almost all blacks. With the exception of one black elected official in West Virginia,[125] there were no black elected officials in the 17 segregating states from 1901, when Representative George H. White of North Carolina made his final speech in the House of Representatives, until after World War II.[126] White would be the last southern black in Congress until 1969, when William Clay of Missouri took his seat.[127] In this period, legislatures in the 17 segregating states boldly and creatively found ways to make sure that in the South, governments were instituted among white men who asked for no consent from vast segments—sometimes the majority—of the governed.

Occasionally, the Supreme Court would limit the most egregious and blatant acts designed to prevent blacks from voting. Oklahoma, the last southern state to join the Union,[128] required that citizens pass a literacy test

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122. *Id.*

123. *Id.* at 222.

124. *Id.*

125. Thomas Gillis Nutter, a black lawyer, served in the West Virginia state legislature in 1918 and 1919, in an era when there were virtually no black officeholders in the South. Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 163 (1994).

126. *Black-American Members by Congress, 1870–Present*, U.S. H.R.: HISTORY, ART & ARCHIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/black-American-Representatives-and-Senators-by-Congress/ [https://perma.cc/BB4B-RG8H] (last visited Aug. 26, 2021).

127. *Id.*

128. Finkelman, *Conceived in Segregation*, *supra* note 6, at 213–35.

in order to register to vote.[129] But the law provided an exception for illiterate voters who would have been able to vote if they had been adults on January 1, 1866, which was before the adoption of the Fourteenth and Fifteenth Amendments.[130] This was the classic "grandfather clause"—giving a right to whites based on rights their grandfathers had, while denying those rights to blacks because their grandfathers did not have those rights. In *Guinn v. United States*, the Court struck down Oklahoma's grandfather clause on the obvious grounds that it was directly aimed at preventing blacks from voting because they could not be grandfathered in.[131] This victory, however, accomplished little. In the wake of *Guinn*, Oklahoma created onerous registration laws that effectively eliminated black voters.[132] This law was not overturned until 1939.[133]

Other states used literacy tests and literacy exemptions in more sophisticated ways and generally were successful in disfranchising blacks. South Carolina, for example, 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.[134] The statute was race neutral and would have subjected poor whites, as well as blacks, to the vagaries of literacy tests. But for the white leadership in South Carolina, this was apparently a small price to pay to prevent blacks from voting.

Like all of the southern states before World War II, Texas was essentially a one-party state, especially in local and state-wide elections.[135] The nominee of the Democratic Party always won. Thus, in the 1920s Texas refused to allow blacks to participate in the Democratic Party primary. The Supreme Court twice struck down such laws as violating the

129. Guinn v. United States, 238 U.S. 347, 354–56 (1915).
130. *Id.*
131. *Id.*
132. 1916 Okla. Sess. Laws 33.
133. Lane v. Wilson, 307 U.S. 268 (1939).
134. 1950 S.C. Acts 2059–60.
135. On the politics of Texas, see RUPERT N. RICHARDSON ET AL., TEXAS: THE LONE STAR STATE, 354 (11th ed. 2021). The one exception was the presidential election of 1928, when Texas voted for the Republican candidate, Herbert Hoover, rather than the Democrat Al Smith. The reason was religion, not politics. Smith was the first Roman Catholic to run for president, and only six deep South states and Massachusetts and Rhode Island voted for Smith. Anti-Catholic prejudice overcame southern white hostility to the Republican Party in this election. Ironically, in voting for Hoover, these white southern voters elected the first non-white vice president: Hoover's running mate, Charles Curtis, who was an enrolled member of Kaw Nation of Kansas.

Fifteenth Amendment.[136] But persistently, Texas tried new tactics, ultimately removing all state oversight of party primaries. In 1935, the Court upheld this new law and accepted the specious argument of the Texas Democratic Party that there was no "state action" involved in the primary, which was run by the allegedly private Democratic Party.[137] It was now possible for all southern states to keep blacks from voting in what was usually the only election that mattered—the Democratic primary. In this period, all U.S. senators and governors in the South were Democrats, and Democrats controlled all state legislatures.

In 1941, in *United States v. Classic*, which did not involve race, the Court reversed itself, asserting that primary elections were subject to constitutional scrutiny.[138] The Court concluded, "The right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitutio[n]."[139] This conclusion was the wedge for ending the white primary. In 1944, in *Smith v. Allwright*, the Supreme Court, now almost completely remade by President Franklin D. Roosevelt, reversed the holding in *Grovey v. Townsend*.[140] In *Smith*, the Court once again struck down the Texas white primary.[141]

In response to this, South Carolina once again led the way in fighting black suffrage. The state could not wait for another year until the next session of the legislature to respond to this decision, so Governor Olin D. Johnston "[c]alled a special session of the legislature to repeal all laws relating to primary election[s]" in an effort to avoid any claim that the white primary in South Carolina was connected to state action.[142] The special session of the legislature convened on April 14, 1944, and passed this act six days later.[143] 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 he had to call the legislature into special 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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136. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932).
137. Grovey v. Townsend, 295 U.S. 45, 47 (1935).
138. United States v. Classic, 313 U.S. 299, 325–29 (1941).
139. *Id.* at 325.
140. Smith v. Allwright, 321 U.S. 649 (1944).
141. *Id.* at 664–66.
142. Burton et. al., *supra* note 93, at 231.
143. 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. [144]

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!"[145]

Despite the bravado of the governor in South Carolina and elsewhere, the white primary was no longer a viable tool for preventing black voting. But blacks still only had a marginal impact on elections in the South. The prelude to voting was registration. If blacks could not register to vote, then they could not cast a ballot in an election. In the wake of World War II, the southern states reverted to registration impediments. The two most common were poll taxes and literacy tests.

In 1962, Congress passed the Twenty-fourth Amendment, banning poll taxes.[146] It was ratified in 1964.[147] At the time, only five southern states—Alabama, Arkansas, Mississippi, Texas, and Virginia—still had poll taxes, and all five refused to ratify the Amendment.[148] Significantly, however, five other southern states that did not have poll taxes—South Carolina, Georgia, Louisiana, North Carolina, and Oklahoma—also failed to ratify it, along with Arizona and Wyoming. [149]

The Supreme Court enforced the new amendment in *Harman v. Forssenius*, striking down Virginia's requirement of paying poll taxes before people could vote in state elections.[150] The law allowed people to

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144. V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 627 (1949).

145. *Id.*

146. *24th Amendment, Banning Poll Tax, Has Been Ratified; Vote in South Dakota Senate Completes the Process of Adding to Constitution*, N.Y. TIMES, Jan. 24, 1964, at 1.

147. *Id.*

148. *Id.*; *see generally* LAWSON, *supra* note 102.

149. Alabama (2002), Texas (2009), and Virginia (1977) later symbolically ratified it, along with North Carolina (1989). None of the other non-ratifying states (Arkansas, Arizona, Georgia, Louisiana, Oklahoma, Mississippi, South Carolina, and Wyoming) have done so.

150. Harman v. Forssenius, 380 U.S. 528 (1965).

avoid the tax by proving "residence" in the state.[151] This was simply a subterfuge for finding new ways to prevent blacks from voting, and the Court would have none of it. The next year, in *Harper v. Virginia Board of Elections*, the Court struck down laws in Alabama, Mississippi, Texas, and Virginia requiring poll taxes in state elections.[152] By this time only Arkansas had repealed its poll tax law.

Poll taxes were an inefficient and cumbersome way of preventing blacks from voting because the tax also disfranchised whites who could not afford or chose not to pay the tax. This may explain why most states, even in the deep South, had done away with them. Literacy tests, on the other hand, were a tried and true method of preventing blacks from registering to vote.

As noted above, Oklahoma had tried to impose a literacy test on all voters but allowed them to avoid the test if they would have been eligible to vote on January 1, 1866.[153] This grandfather clause would have allowed illiterate whites to vote but not illiterate blacks. Even if fairly and honestly administered, this law would have eliminated many potential black voters while not affecting white voters. The Court properly struck down the law, but not because it imposed a literacy test.[154] Rather it was struck down because the mechanism for avoiding the test violated the Fourteenth and Fifteenth Amendments.[155] The Court saw no constitutional problem with a literacy test per se.[156]

However, by 1965, President Lyndon B. Johnson and the Congress fully understood the nature of southern literacy tests. Thus, the Voting Rights Act of 1965 specifically prohibited states from requiring literacy tests or using tests involving the moral character of citizens to determine whether they could vote.[157]

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151. *Id.* at 529.
152. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).
153. Guinn v. United States, 238 U.S. 347, 354–56 (1915).
154. *Id.*
155. *Id.*
156. *Id.*
157. After prohibiting "tests or devices" for voters or for registering votes, § 4(c) of the Act declared:

> The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Voting Rights Act of 1965, § 4(c), Pub. L. No. 89-110, 79 Stat. 437.

In upholding this law, the Supreme Court explained why the law was necessary by giving examples of how southern states had used literacy tests and other devices to allow whites to vote, even if they could not have passed such tests if properly administered, but deny blacks the right to vote, even when they could have passed a fairly administered test.[158] Congress passed the 1965 Voting Rights Act in part because of this long tradition of discriminatory implementation. In *South Carolina* v. *Katzenbach*, the Court noted:

> According to the evidence in recent Justice Department voting suits, the latter stratagem is now the principal method used to bar Negroes from the polls. Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment. Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread "pattern or practice." White applicants for registration have often been excused altogether from the literacy and understanding tests, or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers. Negroes, on the other hand, have typically been required to pass difficult versions of all the tests, without any outside assistance and without the slightest error. The good-morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials. Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes are on the rolls.[159]

Examples of the behavior of southern registrars illustrated the practice. "A white applicant in Louisiana satisfied the registrar of his ability to interpret the state constitution by writing, 'FRDUM FOOF SPETGH.'"[160] Similarly, the Court noted that "A white applicant in Alabama who had never completed the first grade of school was enrolled after the registrar filled out the entire form for him."[161] In contrast to the failure to actually enforce the literacy test against whites, the Court noted bizarre discriminatory enforcement against blacks. Thus, in Panola County, Mississippi, "the registrar required Negroes to interpret the provision of

158. South Carolina v. Katzenbach, 383 U.S. 301, 312–13 (1966).
159. *Id.*
160. *Id.* at 312 n.12.
161. *Id.*

the state constitution concerning [t]he rate of interest on the fund known as the 'Chickasaw School Fund.'"[162] Similarly, in Forrest County, Mississippi, "the registrar rejected six Negroes with baccalaureate degrees, three of whom were also Masters of Arts."[163]

The Court also noted the appallingly low rate of black voter registration in the South.[164] In 1964 only 31.8% of eligible adult blacks were registered in Louisiana, just 19.4% were registered in Alabama, and in Mississippi only 6.4% were registered.[165] Registration of white adults ran at 50 points higher than blacks, so that in Louisiana, nearly 82% of eligible whites were registered.[166]

The findings set out in the *Katzenbach* opinion could have been supported by similar findings throughout the South, as well as in some places outside the South. The evidence was overwhelming that in the 17 states that mandated segregation at the time of the *Brown* decision,[167] discrimination against black voters had been massive, pervasive, and thorough. And it had been incredibly effective. There were virtually no black elected officials in any of these states, even in cities, towns, counties, and congressional districts where blacks constituted a majority of the population. Two years after *Katzenbach*, William Clay would win a seat in Congress from a black majority district in St. Louis, becoming the first black person elected to Congress from the South since 1898.[168] Others would follow, slowly. The first twentieth century black members of Congress from Georgia and Mississippi were elected in 1986; blacks won seats in the House from Louisiana and North Carolina in 1990 and in Alabama, Florida, South Carolina, and Virginia in 1992.[169]

With poll taxes and literacy tests banned, black voters have had an enormous impact on U.S. politics, which has led to dramatic changes, especially in the South. Today, there are 28 blacks from the South in the House and 2 in the Senate. The push by O'Lenick and others to undermine black voting may affect state-wide races, such as for senators or governors, and may also affect how states vote for presidential candidates. But these laws are unlikely to change the make-up of the House of Representatives because most House districts are not very competitive.

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162. *Id.* at 312 n.13.
163. *Id.*
164. *Id.* at 313.
165. *Id.*
166. *Id.*
167. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
168. *Black-American Members by Congress*, *supra* note 126.
169. *Id.*; *see also* AMERICAN POLITICAL LEADERS, *supra* note 87.

VII. FROM TRAGEDY TO FARCE, OR PERHAPS TO AN EXPANDED DEMOCRACY

We have just passed the 150th anniversary of the Fifteenth Amendment as well as the 100th anniversary of the ratification of the Nineteenth Amendment, which enfranchised women. But both Amendments, reflecting the complexity of American federalism and the historical use of constitutional language, contain problematic language. Both are phrased in the negative. The Fifteenth Amendment says that "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."[170] The authors of the Amendment assumed this would enfranchise all African-American men. But the Reconstruction Congress could not imagine the creativity of southern whites, who would expend enormous intellectual and political energy on resisting racial equality and accepting the outcome of their failed experiment in treason.

Thus, the South spent a century resisting black equality, constitutional change, and the meaning of American political culture. Southern whites created an absurd system of segregation that undermined economic, educational, and social progress. Southern states were ultimately willing to disfranchise poor and uneducated whites with poll taxes and literacy tests if that was what it took to disfranchise all blacks.

In the 1960s, the nation at least formally rejected this racism with the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act (Open Housing Act) of 1968. The Voting Rights Act ultimately led to a revolution in southern politics, as blacks and other non-whites have been elected as mayors of major southern cities, to state legislatures, to the House of Representatives, to the Senate, and to southern state governorships. But a new wave of racism threatens democracy, as Republicans in the South, and elsewhere, are intent on disfranchising blacks and their white allies. The racism is not as blatant as it was in the nineteenth century or the first half of the twentieth century. And so far, there are no massive lethal attacks on black voters as there were in the nineteenth century. But the goal is clear. The Alice O'Lenicks of the world cannot accept racial equality or the right of blacks to participate in the political system. They seek to turn the clock back more than a half century.

It is likely they will fail. But in the process they will cause pain, dislocation, and waste enormous amounts of tax dollars and human capital in their relentless desire to preserve white supremacy at the expense of the fundamental American values that:

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170. U.S. CONST. amend. XV.

> We hold these Truths to be self-evident: That all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the Pursuit of Happiness--That to secure these rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.[171]

Hopefully we are witnessing the last gasp of opponents of the central meaning of the United States, who cynically and dishonestly assert that patriotism requires racism, discrimination, and rejection of democratic values.

171. THE DECLARATION OF INDEPENDENCE (U.S. 1776).