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# Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?

Sheryll D. Cashin\*

In 2005 our nation marked the fortieth anniversary of the passage of the Voting Rights Act.<sup>1</sup> This comes on the heels of other august celebrations that remind us of what the civil rights revolution wrought: the fortieth anniversaries of the March on Washington and the Civil Rights Act of 1964; and the fiftieth anniversary of *Brown v. Board of Education*.<sup>2</sup> Elsewhere I have written about the modern meaning of these milestones, and the challenges that remain.<sup>3</sup> In this essay I reflect on the impact of the Voting Rights Act (“the Act”) and what growing racial diversity portends for American democracy in the twenty-first century. There is much to celebrate. Within a few years of the Act’s passage roughly a million new voters were registered in the South.<sup>4</sup> In Mississippi, in the wake of the Act, black

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\* Professor of Law, Georgetown University Law Center. This essay expands on a lecture I gave as the University Distinguished Visiting Scholar, a Public Interest Law Speakers Series Lecturer, and the Black Law Students Association Dr. Martin Luther King, Jr. Commemorative Speaker at Washington University in St. Louis on January 18, 2006. I would especially like to thank Karen Tokarz for honoring me with the invitation to lecture and visit, and the many faculty and students of numerous disciplines at Washington University who gave me feedback on these and other ideas. The stimulation was invaluable. I would also like to thank those of the law faculties at Georgetown and Boalt Hall who attended presentations of this paper. I am especially thankful to Mike Seidman and Ian Haney-Lopez for their insightful comments. Finally, many thanks to my research assistant, Elias Salameh, for his very helpful assistance in writing this essay.

1. Voting Rights Act, 42 U.S.C. §§ 1971–1974 (2000).

2. 349 U.S. 294 (1955).

3. See, e.g., SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004) [hereinafter CASHIN, *THE FAILURES OF INTEGRATION*]; Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN’S L. REV. 253 (2005) [hereinafter Cashin, *Shall We Overcome?*].

4. ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 264 (2000); see also BERNARD GROFMAN ET AL.,

voter registration rose from less than 7% in 1964 to almost 60% in 1968.<sup>5</sup> As of 2004 the rate of black voter registration in Mississippi *exceeded* that of whites.<sup>6</sup> Black voter registration and turnout rates are also approaching parity with that of whites at the national level.<sup>7</sup> The Act not only returned African Americans to their rightful place as active participants in democracy, it also greatly increased the ranks of blacks holding elective office. In 1965, there were three black members of Congress.<sup>8</sup> Today there are forty-three.<sup>9</sup> Nationwide, the number of black elected officials has risen from 1469 in 1970, the first year such statistics were collected, to a high of 9101 in 2001.<sup>10</sup> After the Act was amended in 1975 to protect Latino and other voters of color, the number of Latino elected officials also rose significantly, to nearly 6000 today, including twenty-seven in Congress.<sup>11</sup>

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MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 22 (1992).

5. GROFMAN, *supra* note 4, at 23.

6. See Bradley J. Schlozman, Acting Assistant Attorney Gen., Prepared Remarks for the Fortieth Anniversary of the Voting Rights Act of 1965, at 3 (July 27, 2005) (transcript available at [http://www.usdoj.gov/crt/speeches/40\\_years\\_vra.pdf](http://www.usdoj.gov/crt/speeches/40_years_vra.pdf)) (noting black Mississippian's voter registration was 76.2% to 73.6% of white Mississippians).

7. *Id.*

8. Darryl Fears, *40 Years After Passage, Voting Law is in Dispute; Continued Need Debated as Expiration Nears*, WASH. POST, Aug. 6, 2005, at A3.

9. *Id.*

10. Despite the successes, currently blacks account for only 2% of all elected officials in the United States. Amanda Ruggeri, *Voting Rights Act's Legacy; While Problems Exist, Progress Has Been Made*, HERALD NEWS (Passaic County, N.J.), Aug. 7, 2005, at A16. In the states most directly regulated by the Act, black officials are typically aligned with the minority party. The states that must comply with the Act's section 5 pre-clearance provision are: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. See 28 C.F.R. § 51 (2004); 30 Fed. Reg. 9897 (Aug. 7, 1965); 40 Fed. Reg. 49,422 (Oct. 22, 1975); 40 Fed. Reg. 43,746 (Sept. 23, 1975). Currently, Republicans hold the legislative branches in every one of these states except Louisiana. See *Partisan Composition and Control*, <http://www.ncsl.org/programs/legman/elect/partycomp.htm> (last visited Sept. 10, 2006). Republicans control the executive branch in five of the nine pre-clearance states (Alabama, Georgia, Mississippi, South Carolina, and Texas). See 2006 Governors: Party Control, <http://www.rga.org/media/pdf/2006partycontrol.pdf> (last visited Oct. 15, 2006). Meanwhile very few black elected officials in these states are Republicans. See *generally* Black GOP Elected Officials, <http://www.nationalblackrepublicans.com/index.cfm?fuseaction=pages.Black%20GOP%20Elected%20Officials&x=2074429> (last visited Oct. 15, 2006) (showing very small numbers of Republican black elected officials in the pre-clearance states and, with the exception of two black Republicans in the Georgia legislature, none in the state legislatures).

11. John Lewis, *Keeping the Polls Open*, N.Y. TIMES, Aug. 6, 2005, at A13. For example, the number of Latino elected officials in Arizona, California, Florida, New Mexico, New York, and Texas increased from 1280 in 1973 to 3677 in 1991. See Rodolfo O. de la Garza & Louis

Several key provisions of the Act will expire in 2007 unless Congress votes to renew them. Among those provisions are section 5's requirement that the federal government approve any proposed voting changes in states and local jurisdictions with a documented history of discriminatory voting practices, and section 203's requirement of bilingual voting assistance in communities with sufficient concentrations of non-English speakers.<sup>12</sup> There is a rich voting rights literature debating whether such statutory provisions should be retained or how they should be reformed.<sup>13</sup> Rather than

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DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1495 (1993).

12. See *infra* Part II.B (describing provisions of the Act).

13. See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (2d ed. 1995) (arguing that, given the high level of racially polarized voting, majority-minority districts are necessary under the American electoral system); PENDA D. HAIR & PAMELA S. KARLAN, *ADVANCEMENT PROJECT, REDISTRICTING FOR INCLUSIVE DEMOCRACY* (2000), available at <http://advancementproject.org/RFD.pdf> (arguing for the continued use of majority-minority districts as a means of maintaining voter turnout levels among minorities); CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* (1993) (suggesting that although majority-minority districts may create some safe seats it actually hurts the careers of the individual politicians elected because they are not forced to form the biracial coalitions necessary to reach higher office); Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 ASIAN L.J. 41 (2002) (examining their study surveying the ways in which large numbers of Asian American and Latino candidates were elected and concluding that majority-minority districts are even more important for them than for black candidates); Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001) (arguing for district specific analysis to determine what percentage of minority voters is needed to give them an equal opportunity to elect a candidate of their choice); Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589 (2004) (noting the normative considerations which support the use of the one person, one vote rule and arguing for its relaxation as a means of compensating for minority voting power); Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J. POLITICS 384, 386-87 (1995) (noting that the three possible harms to Republicans through racial gerrymandering are either illegal or highly unlikely and arguing that such gerrymandering cost four white Democrats their seats in the election); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004) (arguing that section 5 invites partisan enforcement by the Justice Department since most white Southerners vote Republican and most black Southerners vote Democratic); Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987 (2002) (noting that sections 2 and 5 of the Act could be tools to battle racial inequalities in the campaign finance system, but arguing that the Act does not adequately address the problem as a whole); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science*

engage in the specifics of that debate, this essay examines the cultural impediments to meaningful participation in democracy on the part of those traditionally disenfranchised. What is the current tenor of race relations and how do American race relations manifest in the marketplace for votes? As the numbers of brown, yellow, red, and black people continue to grow exponentially in the United States, how will our race relations contribute to, or detract from, the health of American democracy?

The enduring quandary of the Act, in my view, is that it attempts to ensure meaningful political participation for the traditionally disenfranchised while operating against a backdrop of still-divisive race relations. The historic cleavage between blacks and whites in the South remains a centuries-old conundrum, familiar to any student of American politics. Such racial divides are less pronounced nationally. But it remains the case that race and political affiliation are substantially correlated and that whites gravitate to the Republican Party while African Americans, Latinos, Asians, and Native Americans gravitate, in varying degrees, to the Democratic Party.<sup>14</sup> Ultimately, I conclude that as long as such pronounced racial cleavages remain evident in party affiliation, the risk of minority voter suppression is such that the Act's race- and language-minority protections will continue to be necessary. At the same time, I acknowledge the unintended consequences of the Act and racial gerrymandering, arguing that unless and until we create a political discourse and legal context that encourages, rather than discourages, enduring interracial alliances, the health of American democracy remains insecure.

Part I of this essay begins one hundred years before the passage of the Act, with Reconstruction. I briefly canvas the interracial alliances

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*and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002) (arguing that changes in white voters' willingness to vote for black candidates renders "coalitional" districts, where blacks make up a third or more of the voting population, sufficient to achieve the purposes of the Act); Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605 (2005) (arguing that problems of partisanship are rare because civil servant lawyers, rather than political appointees, play a primary role in reviewing submissions).

14. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1223 (1996); see also *infra* Part III (discussing racial divides in the electorate).

of the Reconstruction and Redemption periods, underscoring that American democracy has been most responsive to the masses, including working class whites, when interracial alliances between whites and blacks commanded majority power. I then recount how a politics of white supremacy animated and perpetuated racial schisms between blacks and whites for a century in the South. Part II describes how the Act came to be passed, emphasizing the role of protest and coalition politics in its enactment, and the dramatic impact of the Act in fostering active participation by communities of color in American politics. Part III explores the opportunities and challenges presented by growing diversity of the electorate, underscoring the modern manifestations of historic racial divides in American politics. There is a continued, albeit less pronounced, strain of race loyalty in voting patterns that we have not yet vanquished.

## I. RECONSTRUCTION, “REDEMPTION,” AND THE POLITICS OF WHITE SUPREMACY

### *A. Reconstruction*

To understand the continued role of racial schism in American politics, one must begin with Reconstruction, which featured interracial alliances between blacks and whites that, in turn, unleashed an explicit politics of white supremacy that would last nearly a century in the South. As most blacks lived in the South in the nineteenth century, the South initiated the course of race relations in America.<sup>15</sup> Unfortunately, the South also introduced the phenomenon of racial solidarity into American politics.

With the ratification of the Fifteenth Amendment in 1870, black males were constitutionally guaranteed the right to vote.<sup>16</sup> Prior to this amendment the Military Reconstruction Act of 1867,<sup>17</sup> which

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15. See EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 17–18 (2002).

16. The amendment prohibits discrimination in voting “on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV. Females were not constitutionally guaranteed the right to vote until ratification of the Nineteenth Amendment in 1920. U.S. CONST. amend. XIX.

17. Reconstruction Act of 1867, 14 Stat. 428–429, 15 Stat. 2–4, 14–16 (1867).

allowed former Confederate states to be readmitted to the Union if they adopted new state constitutions that permitted universal male suffrage, catapulted newly emancipated slaves into an unmatched period of active democratic engagement. Most freedmen were poorly prepared for enfranchisement at this time, having been so recently granted even the legal right to read. Yet they were eager to learn, as the illiterate former slave Beverly Nash, sitting as a delegate to the South Carolina constitutional convention aptly articulated:

I believe, my friends and fellow-citizens, we are not prepared for this suffrage. But we can learn. Give a man tools and let him commence to use them, and in time he will learn a trade. So it is with voting. We may not understand it at the start, but in time we shall learn to do our duty.<sup>18</sup>

Given the chance, blacks voted en masse throughout Reconstruction. It is estimated that in many elections black turnout approached 90%—record levels that have yet to be surpassed.<sup>19</sup> And, ironically, during the brief period from the onset of radical Reconstruction to the ratification of the Fifteenth Amendment (from 1867 to 1870), blacks actually had greater voting rights in the South than they did in much of the rest of the nation.<sup>20</sup> South Carolina, in

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18. JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 88 (2d ed. 1994).

19. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 291, 314 (2002). Nationally, the highest turnout of black voters, according to modern census records, was actually the year *before* the Voting Rights Act was passed. See Voting and Registration Data, <http://www.census.gov/population/www/socdemo/voting.html#hist> (follow the “Table A-1, Excel” hyperlink) (last visited Sept. 10, 2006). In 1964, in the wake of President Kennedy’s assassination, 58.5% of black voters turned out at the polls. *Id.* By comparison, in the 2004 presidential election, black voter turnout was 56%. Bob Kemper & Tom Baxter, *Voting Rights Act: Renewal of Good Faith*, ATLANTA J.-CONST., Aug. 5, 2005, at A1.

20. During the colonial period free blacks were permitted to vote almost everywhere. W.E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION* 7 (1935). Only in Georgia, South Carolina, and Virginia were they denied suffrage. *Id.* However, disenfranchisement was to sweep the nation in the latter eighteenth and early nineteenth centuries. In the South: Delaware, 1792; Maryland, 1783; Louisiana, 1812; Mississippi, 1817; Alabama, 1819; Missouri, 1821; Florida and Texas, 1845. *Id.* In the North: blacks in Maine, Vermont, and New Hampshire faced a property qualification; disenfranchisement came to Connecticut in 1814; blacks were disenfranchised in New Jersey from 1807–1820 and from 1847 until the passage of the Fifteenth Amendment in 1870; New York had disenfranchised its blacks in the eighteenth century, but permitted them to vote after 1821, subject to a \$250 property qualification which whites did not face; and Pennsylvania disenfranchised its black population in 1838. *Id.* at 8.

1870, offered an example of what a large, motivated, black population could achieve. By actively striving for a greater share of the political spoils, South Carolina blacks were able to win three congressional seats, four of the state's eight executive offices, and to place Jonathan J. Wright on the state Supreme Court—a feat not equaled in any other state during Reconstruction.<sup>21</sup> While South Carolina was the exemplar, generally Reconstruction marked a period of robust black political representation. “Between 1870 and 1900, Southern states sent 700 African Americans to state legislatures and 22 African Americans to Congress.”<sup>22</sup>

Reconstruction also marked a period of bi-racial power sharing that may be without equal in our nation's history. Even with massive turnout Southern blacks could not dictate results in most states.<sup>23</sup> Hence they were forced to form a coalition with Northern “carpetbaggers,” who constituted less than 2% of the population in the southern states, and “scalawags” (southern-born white Republicans).<sup>24</sup> The coalition was imperfect; it was easy for the white Republican elite to take the black vote for granted, as voting for the Democrats would have been voting for their own disenfranchisement.<sup>25</sup> While whites tended to make the most important political decisions and control state and local patronage systems, blacks did make important inroads.

All of the constitutions adopted by southern states during Reconstruction guaranteed blacks civil and political rights. Each constitution ensconced the South's first state-funded systems of free,

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Rhode Island bucked the trend and granted blacks suffrage in 1842. *Id.* In the territories, blacks were generally permitted to vote, but with statehood came disenfranchisement: Ohio, 1803; Indiana, 1816; Illinois, 1818; Michigan, 1837; Iowa, 1846; Wisconsin, 1848; Minnesota, 1858; and Kansas, 1861. *Id.*

21. FONER, *supra* note 19, at 352.

22. SPENCER OVERTON, *STEALING DEMOCRACY* 89 (2006).

23. Only in South Carolina (nearly 60%), Mississippi, and Louisiana (just over half) did blacks constitute a majority of the population in 1870; they made up between 40% and 50% in Alabama, Florida, Georgia, and Virginia; over one third in North Carolina; and between one third and one quarter in Arkansas, Tennessee, and Texas. ERIC FONER, *FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION*, at xiii (1993).

24. FONER, *supra* note 19, at 296–97.

25. *Id.* at 330–31.



though not integrated, public education.<sup>26</sup> Additionally, they abolished remnants of former regimes, such as imprisonment for debt, property qualifications for holding office and jury service, and *viva voce* voting.<sup>27</sup> The four blacks who became State Superintendents of Education had significant authority in running the new school systems, and six blacks achieved the rank of Lieutenant Governor, presiding over state senates and occasionally, in the absence of their chief executive, acting as Governor.<sup>28</sup>

The over 600 black representatives who were elected to state legislatures achieved concrete gains in public policy. Black lawmakers not only supported appropriations for schools, asylums, and social welfare, but also succeeded in enacting laws guaranteeing equal access to transportation and public accommodations throughout the Deep South.<sup>29</sup> Generally, however, these state civil rights laws were not enforced.<sup>30</sup> That said, blacks and whites in the South experienced integration most fully in the institutions of politics and government. They served together on juries, school boards, and city councils. The Republican Party provided a rare context where civic-minded men of both races could work and interact together. Thus, despite its shortcomings and in stark contrast to the previous era of slavery and the regime of segregation to come, Reconstruction succeeded in cultivating a “standard of equal citizenship and a recognition of blacks’ right to a share of state services.”<sup>31</sup>

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26. *Id.* at 319–20.

27. *Id.*

28. *Id.* at 354.

29. *Id.* at 365, 370.

30. *Id.* at 371.

31. *Id.* at 372. It was often from local (as opposed to state) elective posts that blacks had the greatest impact on their communities. *Id.* In virtually every county throughout the South, blacks held some of the local posts. *Id.* at 356. Three positions, in particular, were of great local importance: Justices of the Peace, who generally ruled on minor criminal offenses and the majority of civil cases; County Commissioners, who established tax rates, controlled local appropriations, and administered poor relief; and Sheriffs, who enforced the law, selected trial jurors, and carried out foreclosures and public sales of land. These were the jobs which, in the words of one Alabama lawyer, dealt with “the practical rights of the people, . . . our ‘business and lives.’” *Id.* at 355. During Reconstruction 228 blacks were justices of the peace, 111 served as county commissioners, and 41 were sheriffs. FONER, *supra* note 23, at xvii. These posts were key as the criminal justice system became a central battleground for black power. Quite often during Reconstruction whites attempted to use criminal law to restrict black freedom and to reinforce white dominance. See Donald G. Neiman, *Black Political Power and Criminal*

### B. Redemption

Despite the adoption of the Fifteenth Amendment, the promise of Reconstruction proved ephemeral for black voters. While the final curtain did not fall on Reconstruction until the Hayes-Tilden compromise of 1877,<sup>32</sup> it had ended in fact in most states before that when Democrats regained control of state government, a process called “redemption.”<sup>33</sup> Blacks did not cease to hold elective office with redemption. A few more blacks managed to serve in Congress and small numbers remained in legislatures throughout the South.<sup>34</sup> A few areas in plantation counties remained bastions of black power, including the “‘black second’ Congressional district in eastern North Carolina[,] . . . South Carolina’s low country and Texas’ black belt.”<sup>35</sup> From the end of Reconstruction until the final disenfranchisement at the turn of the century, however, blacks experienced a steady erosion of their political rights. Re-oppression came fastest in the Deep South; electoral fraud was widespread, the threat of violence hung heavily over black communities, and the Southern Republican Party largely disintegrated after 1877.<sup>36</sup> These events were hastened by the congressional Hayes-Tilden compromise, in which the Democrats ceded the presidency to the Republican Rutherford B. Hayes in exchange for the Republicans withdrawing federal soldiers from the South.<sup>37</sup>

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*Justice: Washington County, Texas, 1868–1884*, 55 J.S. HIST. 391, 392 (1989). Once they began to win power within the judicial system, blacks quickly demanded color-blind justice. *Id.* Because those who operated the criminal justice system were popularly elected local officials whose actions were subject to scrutiny by their constituents, blacks’ ability to use political power was crucial to the outcome. *Id.* Additionally, one of the greatest changes wrought by black political power, with a profound influence on daily life, was the new presence of black on juries. *Id.* at 398.

32. FONER, *supra* note 19, at 581–82.

33. Taking the year in which an election produced simultaneous Democratic control of both houses of the legislature and the governorship the southern states were redeemed in the following years: Tennessee, 1870; Georgia, 1871; Texas, 1873; Virginia, 1873; Arkansas, 1874; Alabama, 1874; Mississippi, 1875; South Carolina, 1876; North Carolina, 1876; Florida, 1876; Louisiana, 1876. FONER, *supra* note 23, at xiii.

34. George H. White of North Carolina, who served in Congress from 1897–1901, was the last black to hold congressional office until the modern era. FONER, *supra* note 19, at 591.

35. *Id.*

36. *See id.* at 590–91.

37. *See id.* at 581–82.

Throughout Redemption southern states used legal and extra-legal methods, especially Klan-backed violence, to disenfranchise black voters.<sup>38</sup> They evaded the reach of the Fifteenth Amendment by using race-neutral criteria. The definitive legal disenfranchisement of Southern blacks came with the adoption of new or amended state constitutions, beginning in the 1890s. The results of these legal and extra-legal methods of disenfranchisement were rather stark. In my home state of Alabama, for example, the Alabama Constitution of 1901 employed, *inter alia*, grandfather clauses, literacy tests, and poll taxes, which ensured a dramatic reduction in both black and poor white voters.<sup>39</sup> In 1890 the black electorate in Alabama stood at 140,000, but by 1906 only forty-six blacks were registered in the entire state.<sup>40</sup>

Democratic Senator Ben Tillman of South Carolina, the person most responsible for South Carolina's disenfranchising 1895 Constitution, attested to the virulent methods of Southern white supremacists when he stated: "We have done our level best. We have scratched our heads to find out how we could eliminate every last one of them. We stuffed ballot boxes. We shot them. We are not ashamed of it."<sup>41</sup> Such drastic tactics, and the resulting dismal levels of black voter participation would remain largely unchecked in the South until after World War II, when black voter registration began to rise in large Southern cities as racial attitudes began to improve, especially in upper and border Southern states.<sup>42</sup>

### *C. The Politics of White Supremacy*

From the onset of Redemption, Democrats in the eleven states of the former confederacy aggressively cultivated a culture in which voting Democratic equated race loyalty for whites.<sup>43</sup> As Senator

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38. HANES WALTON, JR., *BLACK REPUBLICANS: THE POLITICS OF THE BLACK AND TANS* 90 (1941).

39. *Id.* at 83.

40. *Id.* at 84.

41. RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 91 (2d ed. 1997).

42. See MIKE J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 187-89* (2004).

43. See WALTON, *supra* note 38, at 138.

Tillman put it, “We organized the Democratic [P]arty with one plank, and only one plank, namely, that ‘this is a white man’s country and white men must govern it.’”<sup>44</sup> The white supremacy strategy was a direct response to the bi-racial coalitions of Reconstruction. The necessity of cultivating racial solidarity became even more pointed with the ascendancy of populism in the 1890s. The Populist movement, with its direct challenge to the economic caste system and industrial oligarchy, threatened to unite poor blacks and whites. In his insightful book, *The Populist Moment*, Lawrence Goodwyn describes a “sequential process of democratic movement-building” that, if successful, occurs in four stages:

(1) the creation of an autonomous institution where new interpretations can materialize that run counter to those of prevailing authority . . . describe[d] as “the movement forming”; (2) the creation of a tactical means to attract masses of people—“the movement recruiting”; (3) the achievement of a heretofore culturally unsanctioned level of social analysis—“the movement educating”; and (4) the creation of an institutional means whereby the new ideas, shared now by the rank and file of the mass movement, can be expressed in an autonomous political way—“the movement politicized.”<sup>45</sup>

At each stage of movement building, Goodwyn argues, there are “[i]mposing cultural roadblocks” that will cause a loss of constituents who might otherwise be allies in the movement.<sup>46</sup> A movement might not succeed at “recruiting” some folks, it may fail at “educating” others, and even those who are recruited and educated may decline to take the final step of autonomous political action.<sup>47</sup> Above all, the “forces of orthodoxy” which typically occupy “the most culturally sanctioned command posts in . . . society, can be counted upon, out of self-interest, to oppose each stage of the sequential process—

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44. BLACK & BLACK, *supra* note 15, at 44.

45. LAWRENCE GOODWYN, *THE POPULIST MOMENT*, at xviii (1978).

46. *Id.*

47. *Id.*

particularly the latter stages, when the threat posed by the movement has become clear to all.”<sup>48</sup>

So it was the elite white regimes in the South who were directly threatened by the potential power of an alliance of poor black and white farmers. The National Farmers Alliance developed “the world’s first large-scale working class cooperative.”<sup>49</sup> It succeeded in recruiting farmers by the millions and proceeded to educate them about economic hierarchy and privilege in America.<sup>50</sup> When the Alliance’s efforts at economic self-help were defeated by the American industrial establishment, the Alliance turned to independent action, creating the Populist or “People’s Party,” which was active from 1877 to 1892.<sup>51</sup> This new party was founded upon one of the most radical ideas in our nation’s history: “a farm-labor coalition of the ‘plain people’ that was interracial.”<sup>52</sup>

The clarion call of white supremacy defeated the Populists in at least two ways. First, it created a specter of fear that prevented all but the most courageous blacks from publicly engaging in Populist Party organizing.<sup>53</sup> The organizing of black farmers’ Alliance chapters was mostly clandestine.<sup>54</sup> Second, racial solidarity tended to cleave blacks to the Republican Party, their historic protector from racial subordination, and whites to the Democratic Party, the claimed protector of white dominance.<sup>55</sup> In the end, any possibilities for a sustained, interracial political alliance were defeated by exploiting whites’ fear of being dominated by Negroes. The Populists themselves sometimes feared explicitly seeking the black vote because Democrats, in their zeal to pass election laws to disenfranchise blacks, might vindictively or intentionally disenfranchise poor whites as well.<sup>56</sup> “When it became evident that white factions would find themselves competing for the black vote

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48. *Id.*

49. *Id.* at xx.

50. *Id.* at xx–xxi.

51. *Id.* at xxi.

52. *Id.* at 118.

53. *Id.* at 122–23.

54. *See id.*

55. *See id.* at 121–22, 189; WALTON, *supra* note 38, at 138.

56. *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 285 (8th ed. 2000).

and thus frequently give blacks the balance of power,” whites of all classes ultimately coalesced around the idea of complete disenfranchisement of blacks.<sup>57</sup> But, as mechanisms like poll taxes became constitutional requirements, white solidarity often had the effect of disenfranchising poor whites as well.<sup>58</sup> Indeed, Jim Crow segregation laws were a form of appeasement for poor whites. If they could not share fully in voting suffrage or the spoils of an economic caste system, then the racial caste system of Jim Crow would accord them the psychological balm of legally sanctioned racial superiority.<sup>59</sup>

In some states the Populists did succeed in forming a “fusion” alliance with remnants of old Republican organizations. In 1894 such an alliance gained control of the North Carolina legislature.<sup>60</sup> The “Fusionist” legislature of 1895 repealed the Democrats’ restrictive voting requirements, enabling blacks to reassert political influence.<sup>61</sup> Many counties had black deputy sheriffs and the city of Wilmington had fourteen black police officers.<sup>62</sup> The black and white citizens of Wilmington, who had the effrontery to form an alliance that elected black and white progressives to office throughout city government, were rewarded with a vicious coup and race riot in 1898.<sup>63</sup> As recently recounted by the Wilmington Race Riot Commission, white supremacists carefully planned the overthrow of a popularly elected government, banished prominent blacks and whites from the city, and killed scores of black citizens.<sup>64</sup> At the state level, the Democrats broke up the interracial Populist-Republican alliance with an aggressive campaign of white supremacy and violent deployment of “Red Shirts” that kept blacks away from the polls.<sup>65</sup> They reclaimed the North Carolina state government, stripped black citizens of the

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57. *Id.* at 286.

58. *Id.* at 286–87.

59. See DERRICK BELL, *SILENT COVENANTS* 44 (2004).

60. See FRANKLIN & MOSS, *supra* note 56, at 285.

61. See WALTON, *supra* note 38, at 89.

62. FRANKLIN & MOSS, *supra* note 56, at 285.

63. 1898 WILMINGTON RACE RIOT COMMISSION—FINAL REPORT, May 31, 2006, <http://www.ah.dcr.state.nc.us/1898-wirc/report/report.htm>; see also Brent Staples, *When Democracy Died in Wilmington, N.C.*, N.Y. TIMES, Jan. 8, 2006, at 13.

64. *Id.*

65. See WALTON, *supra* note 38, at 90.

right to vote, and brought this rare example of bi-racial democracy to a close.<sup>66</sup>

Not surprisingly, pogroms like those of Wilmington, North Carolina; Rosewood, Florida; and Oklahoma City, Oklahoma; and the decades-long practice of lynching, cowed many, if not most, Southern blacks into acceptance of their banishment from the political sphere. Because of the durable force of white supremacy politics, the interracial cooperation of late-nineteenth century Wilmington, North Carolina would not be seen again in the South for at least six decades. The Southern Democratic Party shaped the segregationist identities of most white Southerners. In 1940, for example, 98% of white Southerners supported racial segregation.<sup>67</sup> “For *most* whites living in *most* parts of the South during the first half of the twentieth century, being a Democrat and believing wholeheartedly in white supremacy were essential elements of their identities.”<sup>68</sup>

Southern whites also paid a high price for a politics premised upon white supremacy. As John Hope Franklin surmised:

Since all other issues were subordinated to the issue of ‘the Negro,’ it became impossible to have free and open discussion of problems affecting all the people. There could be no two-party system, for the temptation to call upon blacks to decide between opposing factions would be too great. Interest in politics waned to a point at which only professionals, who skillfully deflected the interest from issues to races, were concerned with public life.<sup>69</sup>

The end result was an impoverished, pale imitation of democracy, one that placed government heavily under the control of a small elite class of propertied white males.

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66. *See id.* at 89–91.

67. *Id.*

68. BLACK & BLACK, *supra* note 15, at 45.

69. FRANKLIN & MOSS, *supra* note 56, at 291.

## II. RESTORING DEMOCRACY: THE VOTING RIGHTS ACT

### A. *The Impetus for the Act*

When 600 people walked peaceably over the Edmund Pettus Bridge in Selma, Alabama on March 7, 1965, to begin a fifty-four-mile march to Montgomery in protest of black citizens' inability to register to vote, little did they know that their efforts would result in one of the most transformative pieces of legislation in the history of the United States. Infamously, the marchers never made it past the mid-point of the bridge. When confronted by police and state troopers wielding billy clubs, tear gas, and the might of horses, this strong, multi-racial band of protesters knelt to pray. The television footage of peaceful protestors being bludgeoned burnished the image of Bloody Sunday in the minds of millions of Americans, instantly altering the nation's conscience and the political saliency of robust federal voting rights legislation.<sup>70</sup>

Before this moment, tepid federal voting rights protections had been enacted in 1957 and 1960.<sup>71</sup> These provisions, however, were no match for the virulent legal and extra-legal methods used in the era of Jim Crow to deny African Americans their constitutionally guaranteed right to vote.<sup>72</sup> Prior efforts to enact more robust federal voting rights protections had not succeeded.<sup>73</sup> As with the Civil

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70. See JOHN LEWIS WITH MICHAEL D'ORSO, *WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT* 331–32 (1998); Michael E. Ross, *The Voting Rights Act Turns 40*, MSNBC, Aug. 31, 2005, <http://www.msnbc.msn.com/id/8487686> (last visited Sept. 10, 2006).

71. See Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 637 (codified at 40 U.S.C. §§ 1971–1973 (2000)). The Act of 1957 created the Civil Rights Division within the Department of Justice and the Commission on Civil Rights. *Id.* It gave the Attorney General authority to intervene in and institute lawsuits seeking injunctive relief against violations of the Fifteenth Amendment. *Id.* The 1960 Act empowered the Division to sue on behalf of citizens denied the right to vote on account of race and permitted federal courts to appoint voting referees to conduct voter registration following a judicial finding of voting discrimination. *Id.* The Civil Rights Act of 1964 contained some relatively minor voting-related provisions. *Id.*

72. Overall, this anti-discrimination regime, which relied on individual lawsuits, did not affect systemic change. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 327–28 (1966) (“Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits.”).

73. See, e.g., Lyndon B. Johnson, U.S. President, Special Message to the Congress: The American Promise (Mar. 15, 1965), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED*



Rights Act of 1964, which resulted not from the leadership of political elites, but from sustained, organized grassroots protests that demanded a different social order from political elites,<sup>74</sup> the Voting Rights Act came about because of the demands of organized protest. Prior to Bloody Sunday grassroots citizen movements had sought to build popular pressure on Southern governors and local officials to enable blacks to register. The Southern Christian Leadership Conference and others civil rights organizations sponsored efforts to advocate for the enfranchisement of blacks including marches, rallies, boycotts, petitions, and lawsuits.<sup>75</sup> Bloody Sunday was the turning point for these efforts. Selma was chosen as the starting place for a symbolic march to Montgomery in part because organizers knew the sheriff had the kind of “Bull Connor-like proclivities” that would garner national media attention.<sup>76</sup> Local law enforcement behaved as predicted, resulting in several injuries, including the fracturing of a young John Lewis’ skull and the death of a white Unitarian minister from Boston named James Reeb.<sup>77</sup> Protests denouncing the violence ensued in over eighty cities. On March 9, 1965, Dr. Martin Luther King led another march to the bridge that was blocked by police.<sup>78</sup> On March 21, 1965, with court ordered protection, 3000 marchers completed the trek from Selma to Montgomery, their numbers swelling to 25,000, under the glare of worldwide press coverage.<sup>79</sup>

President Lyndon B. Johnson responded quickly to the tragedy. He ordered then-Attorney General Nicholas Katzenbach to prepare “the goddamnedest toughest voting rights bill possible,”<sup>80</sup> and delivered a nationally televised address to a special joint session of

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STATES, 1966, at 281–87 (transcript available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650315.asp>) (noting in an address to a joint session to Congress, “The last time a President sent a civil rights bill to the Congress it contained a provision to protect voting rights in Federal elections.” When Congress passed the bill eight months later and sent it to the President for his signature “the heart of the voting provision had been eliminated.”).

74. See Cashin, *Shall We Overcome?*, *supra* note 3, at 260–66.

75. See KEYSSAR, *supra* note 4, at 258.

76. See KLARMAN, *supra* note 42, at 400.

77. See LEWIS WITH D’ORSO, *supra* note 70, at 326–30, 336, 338.

78. See Janai S. Nelson, Op-Ed., *40 Years After Bloody Sunday, Challenges Remain*, *MIAMI HERALD*, Mar. 13, 2005.

79. See *id.*

80. HOWELL RAINES, *MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED* 337 (1977).

Congress that stressed the intertwined destinies of black and white America.<sup>81</sup> Among other things, he stated:

At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.

. . . . There is no Negro problem. There is no Southern problem. There is no Northern problem. There is only an American problem.

. . . .

. . . What happened in Selma is part of a far larger movement . . . . It is the effort of American Negroes to secure for themselves the full blessings of American life.

Their cause must be our cause too. Because it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice.

And we shall overcome.<sup>82</sup>

The Voting Rights Act became law five months later with bipartisan support.

### *B. Key Provisions of the Act*

Section 2 of the Act, as amended, prohibits any voting “qualification . . . prerequisite . . . standard, practice, or procedure” that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color,”<sup>83</sup> also known as “vote dilution.”<sup>84</sup> This provision, which tracks the language of the

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81. Lyndon B. Johnson, U.S. President, Special Message to the Congress: The American Promise (Mar. 15, 1965), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, 1966, at 281–87 (transcript available at <http://ljbllib.utexas.edu/johnson/archives.hom/speeches.hom/650315.asp>).

82. Lyndon B. Johnson, *supra* note 73.

83. 42 U.S.C. § 1973 (2000).

84. Jocelyn Benson, Note, *Turning Lemons into Lemonade: Making Georgia v. Ashcroft*

Fifteenth Amendment,<sup>85</sup> has proven immensely successful in realizing the potential of that Reconstruction amendment, in part because discriminatory intent is not required to establish a violation.<sup>86</sup> Perhaps even more important, in light of the virulence of the tactics of disenfranchisement and of white supremacy in the South, is the section 5 “pre-clearance” requirement. This section, which applies only to those states and local jurisdictions with the worst histories of race-based voting discrimination and low turnout, requires covered jurisdictions to submit all proposed changes to voting qualifications and procedures to the federal government for approval before those changes can go into effect.<sup>87</sup> At the time of its passage both opponents and proponents of the Act understood that section 5’s pre-clearance provisions would fundamentally and radically shift the balance of power from the states to the federal government.<sup>88</sup>

In 1970 Congress extended the pre-clearance provision for another five years and, over the next four years, expanded it to cover

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*the Mobile v. Bolden of 2007*, 39 HARV. C.R.-C.L. L. REV. 485, 487 (2004).

85. U.S. CONST. amend. XV.

86. The section was weakened when the Supreme Court read the section to require a discriminatory intent rather than merely a discriminatory result. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Congress chose to legislatively overrule this holding by explicitly removing the intent requirement in its 1982 reauthorization of the Voting Rights Act. *See Benson, supra* note 84, at 487–88.

87. Specifically, section 5 requires the Attorney General or the United States District Court for the District of Columbia to pre-clear any proposed changes to any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting, in the covered jurisdictions. 42 U.S.C. § 1973c (2000); *see also Rodríguez, supra* note 75, at 772. Initially, the pre-clearance provision applied to: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and several counties in North Carolina. 30 Fed. Reg. 9897 (Aug. 7, 1965). The Supreme Court applied this section to changes that qualitatively diluted voter power as well as those that disenfranchised minority voters, thus providing a potent weapon to attack more subtle forms of discrimination. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

88. Upon signing the Civil Rights Act of 1964, after a two month filibuster by Southern Democrats, President Lyndon B. Johnson reportedly stated to a colleague, “There goes the South for a generation.” Timothy Noah, *Forget the South, Democrats*, SLATE, Jan. 27, 2004, <http://www.slate.com/id/2094552>. Johnson’s prescient prediction that most Southern whites would leave the Democratic Party as a result of the radical intervention of the federal government into Southern prerogatives did come to pass with the realignment of the South to the Republican column. *See also infra* Part III.A. *See generally* DAVID LUBLIN, *THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE* (2004) (discussing the gradual shift of Southern Democrats to the left and the resulting move of white candidates and voters to the Republican Party).

a few counties in California and New York and ten municipalities in New Hampshire because these areas imposed voting tests and had low voter registration or participation.<sup>89</sup> Congress amended the Act again in 1975, this time extending the pre-clearance provision for seven more years and expanding it to cover Alaska, Arizona, Texas, and several counties in California, Florida, New York, and South Dakota as well as a few localities in Michigan.<sup>90</sup> All of these areas had significant populations of language minorities and low voter turnout ostensibly correlating with their use of English-only materials.<sup>91</sup> As with the Civil Rights Act of 1964, anti-discrimination protections borne of a concern with Jim Crow-style discrimination against blacks in the South were now being expanded to protect other status groups.<sup>92</sup>

In addition to expanding the geographic reach of the preclearance provision, the 1975 amendments required areas with large numbers of language minorities to translate registration forms and ballots, to recruit bilingual registration clerks and poll workers who will give oral assistance, and to publicize the bilingual assistance that is available.<sup>93</sup> In 1982 Congress renewed the pre-clearance requirements for another twenty-five years and the language assistance requirements for another ten years, which Congress extended yet again in 1982 for fifteen years.<sup>94</sup> As a result, as stated above, both the pre-clearance and language assistance provisions will expire in 2007 if not reauthorized.

Clearly, the Act has had a tremendous, transformative impact, not just for African Americans but also for Latinos, Asians, and Native

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89. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified as amended at 40 U.S.C. §§ 1971–1973 (2000)); see 36 Fed. Reg. 5809 (1971); 39 Fed. Reg. 16912 (1974).

90. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 402 (codified as amended at 40 U.S.C. §§ 1971–1973 (2000)); see 40 Fed. Reg. 43,746 (Sept. 23, 1975); 40 Fed. Reg. 49,422 (Oct. 22, 1975).

91. See 40 U.S.C. § 1973b(f)(3) (2000) (stating the test for coverage under the provision).

92. See Cashin, *Shall We Overcome?*, *supra* note 3, at 267–68 (describing expansions to the Civil Rights Act).

93. 42 U.S.C. § 1973b(f).

94. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(6), 96 Stat. 131, 133 (1982) (codified as amended at 40 U.S.C. §§ 1971–1973 (2000)); Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (1992).

Americans.<sup>95</sup> Officials in Buffalo County, South Dakota, for example, can no longer pack nearly all of the county's Native American majority into a single voting district so as to deprive them of control on the three-member county commission.<sup>96</sup> In 2001, because the language assistance provisions of the Act were invoked to mandate Chinese-language ballots in New York City, more than 100,000 Asian American citizens who were not fluent in English were able to vote and help elect John Liu, the first Asian American member of the New York City Council.<sup>97</sup> In the "Immigrant City" of Lawrence, Massachusetts, the Latino majority now benefits from bilingual voting information, ballots, and poll workers; a schools committee that elects most of its members by district rather than city-wide; a bilingual voting registrar; and a full time bilingual staff member in the city's elections office.<sup>98</sup> These hard-won protections have not just resulted in greater Latino voter participation but they have also forced candidates and officials of all backgrounds to consider the perspectives of all of Lawrence's citizens.<sup>99</sup> These are but a few examples of the thousands of voting rights cases that have ensued since the Act's passage. They testify to the Act's direct role in enabling previously marginalized peoples to be respected, full participants in the political process.

### *C. Growing Diversity: The Opportunities and Challenges*

A consistent theme or tension in voting rights scholarship regards the issue of unintended consequences for American democracy. For example, racial gerrymandering that creates both majority-minority districts and "safe" Republican, mostly-white districts reduces the number of competitive races and contributes to a balkanized electorate in which politicians and citizens have less incentive to consider collective as opposed to parochial interests, or to build bridges across boundaries of race.<sup>100</sup> In the next part of this essay I

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95. See *supra* notes 6–11 and accompanying text.

96. See LEWIS, *supra* note 11.

97. *Id.*

98. See OVERTON, *supra* note 22, at 126–29.

99. *Id.*

100. See, e.g., GUINIER, *supra* note 13 (suggesting cumulative voting as a programmatic

argue that such tension inherent in voting rights debates is of a piece with a tortured racial history in which political allegiances have been cultivated explicitly and implicitly around notions of racial loyalty. America's growing racial complexity, however, presents both opportunities and challenges for transcending these historic tensions.

In 1960 about 89% of the population of the United States was white, 11% was black, and the small remainder was composed of other races.<sup>101</sup> Today, Latinos outnumber African Americans and demographers predict that we will become a majority-minority nation shortly after mid-century.<sup>102</sup> Latinos are our fastest growing demographic group, followed by Asians.<sup>103</sup> I see both promise and peril in these trends. On the one hand, there is some evidence to suggest that race relations are improved in environments where not just two, but three or more demographic groups are forced to coexist.<sup>104</sup> In theory it should be easier for our nation to move beyond the tortured "black-white" dynamic of American relations as the racial spectrum broadens. Even in a context of extensive racial gerrymandering, at the state and national level, increasingly political parties will be forced to reckon with racial complexity and attempt to be competitive in attracting a diverse electorate. On the other hand, growing racial complexity may make it easier for politicians and political parties to exploit racial fears of the still-dominant white majority, or of any voter who may harbor misgivings or worse about a different demographic group. This is the signature challenge that multiculturalism presents for American democracy in the twenty-first century.

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reform that might increase the influence of minority voters and hopefully create a healthier democracy than a winner-take-all system in which voters are often gerrymandered into racially identifiable districts).

101. See 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* tbl.A-8 (Population Div., U.S. Census Bureau, Working Paper No. 56, 2002), available at <http://www.census.gov/population/documentation/twps0056/twps0056.pdf>.

102. See CASHIN, *THE FAILURES OF INTEGRATION*, *supra* note 3, at 90.

103. *Id.*

104. See *id.* at 52–57 (describing "Multicultural Islands," neighborhoods with three or more races, a diverse housing mix, and a host of civic organizations that build relationships and trust across boundaries of race and class).

### III. MODERN RACIAL DIVISIONS IN THE ELECTORATE

The civil rights revolution has done much to expand opportunity and enhance race relations in this country.<sup>105</sup> That said, the central narrative of racial cleavage that dominated Southern politics in the twentieth century and made the Act necessary, continues to be evident in voting patterns both in the South and nationally. Both political parties, Republicans and Democrats, share the blame for exploiting and perpetuating racial divisions. Fortunately, we have transcended the era when overt appeals to white supremacy were accepted as legitimate political discourse. For nearly a century in the Deep South many Democrats successfully deployed this explicit racist strategy. The Republican Party, on the other hand, was founded on an antislavery platform.<sup>106</sup> Republicans were the champions of Radical Reconstruction and were the authors of the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>107</sup> They offered our nation its first example of how an inclusive, interracial political coalition could command majority power. An interracial coalition brought Republicans back in power in 1896 with the election of President McKinley and the same interracial coalition maintained Republicans in power until the Great Depression, when blacks, working class whites, labor, and other groups coalesced around Franklin Roosevelt's New Deal.<sup>108</sup> Moderate Republicans also made civil rights legislation possible in the 1960s; they provided the additional votes needed to overcome the staunch opposition of Southern segregationist Democrats.<sup>109</sup> At the same time, we should not forget

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105. For example, the black poverty rate has fallen from 72% in 1950 to 24% in 2002. *See* Cashin, *Shall We Overcome?*, *supra* note 3, at 259 (citing 2002 census data); Michael B. Katz & Mark J. Stern, *Poverty in Twentieth-Century America* 34 (America at the Millenium Project, Working Paper No. 7, 2001) (citing a 72% poverty rate for non-Hispanic blacks in 1950). One indicia of improved race relations is the professed willingness of non-blacks to share their life space (their neighborhood) with blacks. Between 1958 and 1997 the percentage of non-blacks who said in public opinion polls that they would move if great numbers of blacks moved into their neighborhood fell from 80% to 18%. CASHIN, *THE FAILURES OF INTEGRATION*, *supra* note 3, at 11–12.

106. *See* FRANKLIN & MOSS, *supra* note 56, at 218; JOHN B. JUDIS & RUY TEIXEIRA, *THE EMERGING DEMOCRATIC MAJORITY* 13 (2002).

107. *See* FRANKLIN & MOSS, *supra* note 56, at 252–53.

108. *See* ALEXANDER P. LAMIS, *SOUTHERN POLITICS IN THE 1990S*, at 393 (1999).

109. *See, e.g.*, Cashin, *Shall We Overcome?*, *supra* note 3, at 260–68 (recounting the

that after the civil rights revolution, the Republican Party pursued a “southern strategy” that was explicitly premised on exploiting racial divisions.<sup>110</sup> And it worked.

### A. *Southern Realignment and Continued Divisions*

Nineteen sixty-four was a watershed year in American politics. “When the Republican [P]arty nominated Arizona Senator Barry Goldwater—one of the few northern senators who had opposed the Civil Rights Act—as their presidential candidate in 1964, the party attracted many racist [S]outhern whites . . . [and] permanently alienated African-American voters.”<sup>111</sup> This was the first time since the inception of the Republican Party that more Southern whites voted Republican than Democratic, a pattern that has been repeated in every subsequent presidential election.<sup>112</sup> The civil rights movement was the catalyst for this shift. To this day, elections in the South tend to separate vast majorities of blacks into the Democratic column and smaller majorities of whites into the Republican column.<sup>113</sup> Two-party politics finally emerged in the South but it did not extinguish a centuries long racial narrative of virtually continuous conflict between Southern whites and blacks—through the eras of slavery, segregation, and white supremacy.<sup>114</sup>

But racial divisions in the electorate are not limited to the South. In the South and elsewhere the emergence of blacks as committed Democrats has put seemingly permanent pressure on Republicans to woo large white majorities.<sup>115</sup> An earlier generation of Southern Republican candidates often could not resist the urge to use explicit or coded racial appeals to achieve this goal, a strategy that spilled

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coalition politics that led to the passage of the Civil Rights Act of 1964).

110. See *infra* text accompanying notes 115–26.

111. BLACK & BLACK, *supra* note 15, at 4.

112. *Id.*

113. *Id.*

114. *Id.* at 244. Studies show that our tortured history of racial opposition has greatly shaped the political identity of African Americans, underscoring why the vast majority of blacks vote Democratic, regardless of economic status. See generally MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS (1994) (discussing the effect of race and class on politics and policy).

115. See BLACK & BLACK, *supra* note 15, at 22–23.



over into national politics. Kevin Phillips was quite prescient when he suggested in his seminal 1969 book *The Emerging Republican Majority* that it was possible for Republicans to simply cede the minority vote to Democrats and still win elections.<sup>116</sup> This was a viable strategy when voters of color were only about one-tenth of the electorate.<sup>117</sup> Strom Thurmond, in 1948, and George Wallace, in 1964 and 1968, who both ran as segregationist “Dixiecrats,” succeeded in peeling white voters from the Democratic column.<sup>118</sup> In his campaigns for the presidency, Republican Richard Nixon, in turn, would court white voters with race coded “law and order” messages.<sup>119</sup>

Ronald Reagan engaged in a similar kind of race-coded politics although he was adept at embedding racial symbolism within respectable traditions of economic conservatism. In 1980 he chose the small town of Philadelphia, Mississippi, where civil rights workers Michael Schwerner, Andrew Goodman, and James Chaney were murdered, as the place to launch his post-convention presidential campaign.<sup>120</sup> His own pollster emphatically advised him not to appear in a town that was a symbol of murderous racism to many.<sup>121</sup> He rejected that advice, probably understanding that the powerful symbolism would work in his favor with many white voters. In his speech he stated “I believe in states rights,” a code phrase that had been used by Southern segregationists to defend their opposition to civil rights and desegregation.<sup>122</sup> On the campaign stump Reagan railed against the “welfare queen” in Chicago who reportedly had “eighty names, thirty addresses, twelve social security cards” and tax free income of “over one hundred and fifty thousand dollars.”<sup>123</sup> While I am not suggesting that Reagan was a racist his actions and words sent an unmistakable message of white racial

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116. See JUDIS & TEIXEIRA, *supra* note 106, at 61 (citing KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* 446 (1969)).

117. See JUDIS & TEIXEIRA, *supra* note 106, at 61.

118. See, e.g., *id.* at 17–19 (describing how the Republican Party benefited from the explicitly racist campaigns of George Wallace, inheriting Wallace voters).

119. See *id.* at 57.

120. See BLACK & BLACK, *supra* note 15, at 216–17.

121. *Id.*

122. *Id.*; see also JUDIS & TEIXEIRA, *supra* note 106, at 21.

123. JUDIS & TEIXEIRA, *supra* note 106, at 25.

solidarity.<sup>124</sup> On the key question that had dominated Southern politics for more than a century, “Whose side are you on?”, there was no doubt as to how Reagan was perceived in the South.<sup>125</sup> He solidified the Republican Party’s hold on Goldwater and Wallace supporters and, because of his popularity as President, hastened an era where Republicans no longer had to engage in explicit racial appeals to attract large numbers of white voters.<sup>126</sup> His coded appeals around a cluster of race-oriented issues resonated not just in the South but also in the ethnic suburbs of the Midwest and Northeast. “In many of those areas, the two parties became identified with their different racial compositions—the Republicans as the ‘white party’ and the Democrats as the ‘black party.’”<sup>127</sup> Such identification created no incentive for racial reconciliation and great incentive for Republicans to create political majorities by dividing whites from blacks.<sup>128</sup>

In the 1980s the nation would witness Republican candidates from Jesse Helms to George H. W. Bush use racial wedge issues that played on the racial anxieties, fears, and frustrations of whites.<sup>129</sup> A cluster of race-oriented issues like affirmative action, busing, crime, and capital punishment helped Republicans make inroads with white working class voters who had been dependable Democrats from 1932 to 1960.<sup>130</sup> The stagflation of the 1970s and economic restructurings of the 1980s fueled these voters’ resentments about race. Indeed, in some blue-collar areas race seemed to be the predominant factor in whites’ transition from the Democratic to Republican column. For example, Macomb County, Michigan, just north of Detroit, went from being the most Democratic suburban county in the country in 1960, voting 63% for Kennedy that year, to voting 66% for Reagan in 1984.<sup>131</sup> In focus groups, Democratic pollster Stanley Greenberg found racial resentment animated much of the switch:

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124. See BLACK & BLACK, *supra* note 15, at 216–17.

125. See *id.*

126. See *id.*

127. JUDIS & TEIXEIRA, *supra* note 106, at 170.

128. See *id.*

129. See *id.* at 62–64, 170–71.

130. *Id.* at 62–64.

131. *Id.* at 22.

'Blacks constitute the explanation for their vulnerability for almost everything that has gone wrong in their lives.' . . . [They see] the federal government 'as a black domain where whites cannot expect reasonable treatment.' This view 'shapes their attitudes toward government, particularly spending and taxation and the linkage between them. There was a widespread sentiment . . . that the Democratic [P]arty supported giveaway programs, that is, programs aimed primarily at minorities.'<sup>132</sup>

Such electoral defeats in the 1980s led centrist Democrats in the 1990s to take affirmative steps to inoculate their party from covert racial appeals.<sup>133</sup> Bill Clinton is lauded by some for having successfully countered the Democrats image as the party of black people.<sup>134</sup> Among other tactics, Clinton advocated welfare reform and the death penalty, and engaged in a much-publicized spat with the Reverend Jesse Jackson on the eve of the 1992 Democratic convention.<sup>135</sup>

Hopefully, coded racial appeals are no longer deemed acceptable or beneficial in American politics, recent skirmishes over the Confederate flag notwithstanding.<sup>136</sup> Race-coded politics have backfired in some recent state elections.<sup>137</sup> In the marketplace for votes most Republican candidates now emphasize their economic and social conservatism.<sup>138</sup> Our country is much less racially polarized

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132. *Id.* at 22–23.

133. *See id.* at 29, 64.

134. *See id.*; WILLIAM A. GALSTON & ELAINE C. KAMARCK, *THIRD WAY, THE POLITICS OF POLARIZATION* 5 (2005), <http://www.third-way.com/products/16> (follow the "Download PDF" hyperlink).

135. *See* JUDIS & TEIXEIRA, *supra* note 106, at 64; *see also* CASHIN, *THE FAILURES OF INTEGRATION*, *supra* note 3, at 278–82 (discussing Clinton's "triangulation" strategies and his maneuvers around race).

136. *See* JUDIS & TEIXEIRA, *supra* note 106, at 113 (citing Mississippi in 2001 and South Carolina in 1997 as examples of states that had "raging controversies over whether to fly a Confederate flag, a symbol of Southern racism, over their state capitols" and noting this as evidence that racial issues continue to dominate over economic issues in the political cultures of some states).

137. *See* JUDIS & TEIXEIRA, *supra* note 106, at 171–73 (recounting the negative reaction among voters to the use of race-coded issues by Republican gubernatorial candidates in New Jersey and Virginia).

138. *See* BLACK & BLACK, *supra* note 15, at 13.

than it used to be. One can find evidence of an improved racial climate in empirical studies examining the willingness of whites to vote for black candidates.<sup>139</sup> In the 1996 elections, because of Supreme Court rulings casting suspicion on majority-black districts, five black congressional incumbents were forced to run for reelection in districts that had been redrawn from majority-black to majority-white.<sup>140</sup> All of them ran in Southern districts that ranged from 35% to 45% black, and all five of them won, demonstrating that interracial alliances are not dead in Southern politics.<sup>141</sup>

However, one can also find studies suggesting that white voters are not yet color blind in their voting preferences.<sup>142</sup> Voting rights scholars debate the significance of these studies and their implications for the continued necessity of voting rights protections. Reasonable people can disagree on the existence or degree of racial discrimination exhibited in the voting booth against candidates of color, but the evidence of a racial cleavage in partisan identification is unmistakable. While racial divisions may be more pronounced in the South, which has endured a unique racial history, this cleavage shows up in national elections as well. The New Deal model of politics, which pitted a winning coalition of economically marginal

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139. See, e.g., Benjamin Highton, *White Voters and African American Candidates for Congress*, 26 POL. BEHAV. 1 (2004) (analyzing exit poll data from 1996 and 1998 House of Representatives elections and finding very little evidence that white voters are averse to black candidates). Highton's article also cites other studies conducted since 2000 which similarly find little evidence that black candidates receive less support than white candidates among whites. *Id.* at 5; see also Tim R. Sass & Stephen L. Mehay, *The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections*, 38 J. L. & ECON. 367 (1995) (finding that while district elections aided black candidates in the early 1980s, over the following decade blacks achieved substantially greater success in at-large elections likely due to a reduction in the racial polarization of voters). *But see infra* note 142.

140. LAMIS, *supra* note 108, at 387.

141. *Id.* The five successful black incumbents were Cynthia McKinney and Sanford Bishop of Georgia; Bernice Johnson and Sheila Jackson Lee of Texas; and Corrine Brown of Florida. *Id.* at 387 n.16. Cleo Fields of Louisiana, whose district was also redrawn from majority black to majority white, did not seek reelection, opting instead to make an unsuccessful bid for governor. *Id.*

142. See, e.g., Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111, 111 (1991) (finding "little evidence to suggest a widespread decrease in racially polarized voting in the South," and concluding that "districts that are at least 60% black . . . are most likely to elect a black legislator"); Highton, *supra* note 139, at 5 (citing two studies from 1999 "that find substantially lower support for African American candidates among whites").

black and white Democrats against a small minority of wealthy Republicans, has been transformed by a modern Republican Party that manages to unite many affluent and working class white voters.<sup>143</sup>

### B. National Trends

A record 58% of whites voted Republican in the 2004 presidential election, up from 54% in 2000,<sup>144</sup> 46% in 1996, and 40% in 1992.<sup>145</sup> Meanwhile, in 2004, 88% of blacks, 56% of Asians, 53% of Latinos, and 54% of Native Americans and those voters classified as “other” voted Democratic.<sup>146</sup> One can posit race neutral explanations for this divergence of political allegiances between the dominant white majority on the one hand and communities of color on the other. Whites tend to have higher incomes and more wealth than blacks and Latinos, hence, they are more likely to be attracted to Republican economic conservatism. But this does not explain the disconnection between economic status and voting patterns. Political scientists who have carefully examined a similar political divergence of black and white voters in the South conclude that race is the dominant issue. They note that both blacks and whites appear to hew to a racial interest as opposed to an economic one. Large majorities of Southern blacks, regardless of income, identify themselves as core Democrats, while core Republicans outnumber core Democrats in every income category among Southern whites.<sup>147</sup> There is a tight racial architecture to politics in the South that, admittedly, has been exacerbated by racial gerrymandering. Republicans now dominate in the districts that are 0–14% black; they are competitive in the districts that are 15–29% black; and they fail in districts with black

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143. See JUDIS & TEIXEIRA, *supra* note 106, at 62–65.

144. CNN.com, Election Results, <http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html> (last visited Sept. 10, 2006).

145. *Id.*; see also Bob Wing, *The White Elephant in the Room: Race and Election 2004*, BLACK SCHOLAR, Spring 2005, at 16, 16 (noting that the Republicans share of the white vote in the 2004 election was 58%, representing “a four-point gain over their share in the election year 2000; a 12-point gain over 1996 and a grim 18-point gain over 1992”).

146. CNN.com, *supra* note 144 (identifying national elections by race in 2004 and 2000).

147. See BLACK & BLACK, *supra* note 15, at 246–47.

populations above 30%.<sup>148</sup> This pronounced racial structure dramatically shapes how and whether a politician can assemble a winning coalition.<sup>149</sup> White Republicans can espouse a robust conservatism designed to attract substantial white majorities and black Democrats can be equally robust liberals.<sup>150</sup> The racial architecture of Southern politics does not leave much room for moderation and it certainly does not encourage cross-racial competition for votes or a discourse of racial empathy.

Situated between the cleavage of Southern blacks and whites are Latino voters. For Latinos, unlike with black and white voters, economic status is a reliable predictor of partisan loyalties. A low-income Latino predictably can be expected to vote Democratic, just as a high-income Latino is likely to vote Republican.<sup>151</sup> Perhaps Latino voters, many of whom are immigrants who have lived outside of the dominant, tortured racial narrative of black-white opposition in the South, feel free to vote their economic interests.<sup>152</sup>

The trends of the South are mirrored, although perhaps to a lesser degree, in the national electorate. The Republican Party continues to make inroads with working class whites and its gains with minority voters in the 2004 election, while disputed among pollsters, have been modest.<sup>153</sup>

Contrary to popular media coverage about President George W. Bush's gains with conservative Christians in the 2004 presidential

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148. *Id.* at 380.

149. *Id.* at 382.

150. *Id.* at 386.

151. *See id.* at 246–47 (noting that a majority of low-income (65%) and middle-income (56%) Hispanics were core Democrats, while a majority of upper-income (69%) Hispanics were core Republicans).

152. *See* Harry P. Pachon, *The Battle for Latino Voters 2*, DEMOCRATIC LEADERSHIP COUNCIL (2002), [www.ndol.org](http://www.ndol.org) (type “Pachon” in search box; follow “The Battle for Latino Voters” hyperlink; follow the “Full text of this briefing” hyperlink) (noting that in “a national poll, most Latinos said they identified as ‘working families’ rather than any ethnic (Mexican American, Cuban American) or pan-ethnic (Hispanic/Latino) group identifications” and that it would be “more useful” for political parties “to think of these voters as ‘working class’ rather than ‘Latino’”).

153. The Republican Party actually lost ground with Latino and Asian voters in the 1990s when prominent candidates like Bob Dole championed an English-only requirement and Republicans in California and the United States Senate supported punitive measures aimed at illegal and legal immigrants. *See* JUDIS & TEIXEIRA, *supra* note 117, at 58, 83–84 (discussing, *inter alia*, Proposition 187 to deny public services to children of illegal immigrants).

election, he garnered his largest gains with married white women and Catholics.<sup>154</sup> I am not suggesting that racial differences are the only explanation for diverging partisan affinities between whites and communities of color. Interestingly, partisan identification has remained rather steady over the last three decades.<sup>155</sup> What has changed is that *partisanship* has intensified. Incumbents of all races and political ideologies have done a good job of propagating themselves, such that only a few dozen congressional seats are competitive in each election cycle.<sup>156</sup> Incumbents running in safe, ideologically homogenous districts have little incentive to moderate. As such, our political discourse has become much more ideologically polarized even as racial polarization has declined. In a context of growing racial diversity, however, ideological polarization may influence racial division and vice versa, racial division may contribute to ideological division.

In the twenty-first century majority “white America” is going to be replaced by “multiracial, multiethnic America.” Inevitably, this transition creates social conflict—a conflict of values, of culture, and perhaps of political philosophy.<sup>157</sup> Some voters, including many white ones, embrace diversity as a positive value and want the communities they live in, the employers they work for, and the governments they vote for to reflect their own openness and tolerance.<sup>158</sup> They are averse to policies that ostracize particular groups, be they gays, illegal immigrants, or racial minorities.<sup>159</sup> On the other hand, in a “flat world” where globalization is causing a great deal of economic pain and dislocation in some communities,<sup>160</sup> growing racial complexity could be experienced as a threat. The philosophy of a small, limited, “color blind” government that takes no cognizance of racial and ethnic difference, and touts “traditional”

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154. See GALSTON & KAMARCK, *supra* note 134, at 30.

155. *Id.* at 3 (noting that, on average, over the last thirty years, 20% of voters identify themselves as liberal, 33% as conservative, and 47% as moderate; and, similarly, in the 2004 election, the electorate was 21% liberal, 34% conservative, and 45% moderate).

156. See *id.* at 53.

157. See JUDIS & TEIXEIRA, *supra* note 106, at 6.

158. See *id.* at 73.

159. See *id.*

160. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

values may have more resonance with voters who feel dislocated or disoriented by America's racial and economic transitions.<sup>161</sup>

Admittedly, this is conjecture on my part. These are only theories that might explain why many whites and people of color diverge politically. However, this divergence, whatever the underlying explanations, has both positive and negative implications regarding reauthorization of the Voting Rights Act. A positive take on racial divergence is that both parties should have a vested interest in attracting the growing minority electorate—especially Latinos, who comprise the fastest growing population in the United States and do not exhibit patterns of racial solidarity in their voting preferences. There are certain states, including California, Texas, New Mexico, and Florida, where Latino voters could determine the outcome of state-wide elections.<sup>162</sup> President Bush's pre-9/11 stances on foreign immigration and his recent guest worker proposal suggest that he is trying to woo, or placate, Latino voters. Yet there is a pronounced gap between the size of the Latino population and its rates of citizenship and voter registration, a gap that demographers and political scientists expect to continue for the foreseeable future.<sup>163</sup> Hence, in the near term, the incentive to attract minority voters may be modest.

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161. JUDIS & TEIXEIRA, *supra* note 106, at 74–76.

162. See Pachon, *supra* note 152, at 5 (noting that, especially in California, Texas, New Mexico, and Florida, “the Hispanic electorate has the clear potential of being the much heralded swing vote” because their numbers are enough to translate into a 1% change in the outcome of a statewide election); JEFFREY S. PASSEL, URBAN INST. IMMIGRATION STUDIES PROGRAM ELECTION 2004: THE LATINO AND ASIAN VOTE 2 (2004), <http://www.urban.org/uploadedPDF/900723.pdf> (noting that Latinos account for more than 5% of the electorate in fifteen states and that they could play a key role even in battleground states such as Ohio or Wisconsin where they constitute only 1–2% of the population). *But see* James G. Gimpel, *Losing Ground or Staying Even? Republicans and the Politics of the Latino Vote*, CTR. FOR IMMIGRATION STUDIES, Oct. 2004, <http://www.cis.org/articles/2004/back1004.html> (noting that the “vast majority of Latino voters live in states that [were] not battlegrounds in the [2004] presidential race” and predicting that their impact on that election would be modest).

163. See JACK CITRIN & BENJAMIN HIGHTON, *HOW RACE, ETHNICITY, AND IMMIGRATION SHAPE THE CALIFORNIA ELECTORATE*, at vi (2002) (noting that low voter participation rates among Latino voters in California “are almost entirely a function of reduced citizenship and lower socioeconomic status”); PASSEL, *supra* note 162, at 1 (noting that while Latinos represented 12.6% of the population in 2000 they cast only 5.3% of the votes that year, compared to whites who were 70% of the population but over 81% of the electorate, and noting that only 38% of legal Latino immigrants had naturalized as of 2000, compared to 60% of all other immigrants, contributing mightily to the gap in Latino voter participation).



A negative take on racial divergence of the electorate is that such divisions will be easier to exploit than to transcend. One could argue, given the Democratic leanings of communities of color, that growing racial diversity of the electorate provides strong incentive for the Republican Party to suppress the “minority” or “ethnic” vote while attempting to expand its majority with white voters. Several authors, including Mark Crispin Miller and Greg Palast, have offered detailed expositions of voter suppression efforts by or for the benefit of Republicans.<sup>164</sup> Readers of such books can judge for themselves the prevalence, *vel non*, of minority voter suppression. The state of Georgia’s recent adoption of a law that requires presentation of government issued identification in order to vote is a salient example of the risks.<sup>165</sup> The new law passed swiftly in the Republican-controlled state legislature and was signed by a Republican governor who made the Confederate flag one of his central campaign issues.<sup>166</sup> Under the law, which a federal district court recently held to be in violation of the Voting Rights Act,<sup>167</sup> those who do not have a driver’s license must pay twenty dollars for an identification card.<sup>168</sup> In a state with 159 counties, the cards could only be purchased at one of sixty offices of the Department of Motor Vehicles, none of which was in the city of Atlanta.<sup>169</sup> Under prior law, a voter could present any one of seventeen types of identification, including utility bills and bank statements.<sup>170</sup> The Georgia Secretary of State, a Democrat, stated publicly that she did not know of a single case of someone trying to impersonate another voter at the polls.<sup>171</sup> Despite the clear likelihood of poor and minority voters being disproportionately affected because they have fewer driver’s licenses, the Bush

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164. See MARK CRISPIN MILLER, *FOOLED AGAIN* (2005); GREG PALAST, *THE BEST DEMOCRACY MONEY CAN BUY* (2002).

165. See Darryl Fears, *Voter ID Law is Overturned; Georgia Can No Longer Charge for Access to Nov. 8 Election*, WASH. POST, Oct. 28, 2005, at A3.

166. Kristen Wyatt, *Georgia Sees Competitive Democratic Race*, ASSOCIATED PRESS, Feb. 20, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A56825-2004Feb20.html>.

167. See *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

168. See Fears, *supra* note 165.

169. *Id.*

170. *Id.*

171. See *id.* Fraud is more prevalent with absentee ballots but absentee ballots were not covered by the Georgia law. Editorial, *Georgia’s New Poll Tax*, N.Y. TIMES, Sept. 12, 2005, at A20.

administration “pre-cleared” the law, proclaiming it was in compliance with the Voting Rights Act.<sup>172</sup> Thus far civil rights groups have successfully challenged this provision in court.<sup>173</sup>

Ironically, Democrats have been less vigorous than they should be on the issue of minority voter suppression, perhaps out of fear of being put back in the box of being the party for blacks. Al Gore did not press the issue that analysts claim was the most egregious potential encroachment on voting rights in the 2000 election in Florida—that of erroneous purging of voters with names similar to former felons.<sup>174</sup> Critics claim that the Republican-controlled Florida government intentionally used an overly blunt mechanism to purge voters, who were disproportionately minority.<sup>175</sup> Again, readers can judge for themselves the veracity of these claims. My point is that racial divisions continue to infect the quality of American democracy. The racially and economically segregated landscape of America, coupled with racial and partisan gerrymandering that builds a racial architecture into our democracy, creates a continued risk of political machinations that, in my view, justify renewing the pre-clearance and language minority protections of the Voting Rights Act.

#### IV. CONCLUSION: SHALL WE OVERCOME?

Despite this conclusion, voting rights advocates should acknowledge, and attempt to redress, the unintended consequences of the Voting Rights Act and racial gerrymandering, as brave scholars like Lani Guinier have argued.<sup>176</sup> We need to think deeply about how we can improve political discourse and structure laws in a way that encourages, rather than discourages, interracial alliances. The

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172. The state of Georgia asserted pre-clearance as a defense in Part IV of its initial Brief in Opposition to Plaintiff’s Motion for Preliminary Injunction in *Common Cause/Georgia v. Billups*. State Defendant’s Initial Brief in Opposition to Plaintiff’s Motion for Preliminary Injunction at 18, *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (No. 4:05-CV-201-HLM).

173. See *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). The statute was later amended, and the amended version was called into doubt in *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1296 (N.D. Ga. 2006).

174. See, e.g., MILLER, *supra* note 164, at 214–15, 218–24.

175. See *id.*

176. See GUINIER, *supra* note 13.

growing success of black elected officials in majority white districts, the decline of explicit or covert racial appeals in politics, and the growing openness to diversity in American society give me cause for hope. One can find pockets of America that seem to have transcended traditional race struggles. Two, admittedly Democrat, pollsters write of the American “ideopolis”—metropolitan areas that attract the creative class, knowledge and high-tech workers, and a population that values diversity. In such areas, voters do not display stark patterns of race loyalty at the ballot box.<sup>177</sup>

As in Wilmington, North Carolina in the 1890s, cross-racial alliances and power sharing are possible. In our diverse future such alliances will also be essential to creating a healthy democracy that will be responsive to the needs of most Americans. As with the Republicans during Reconstruction, as with the Democrats during the New Deal, and as with the civil rights movement itself, majority power can be created out of a positive alliance across boundaries of difference.<sup>178</sup> Reflecting on American history, the social advances of which we are most proud were premised upon optimistic, inclusive visions and optimistic, inclusive politics. Shall we overcome our historic divisions? I hope so. Elsewhere I have written about the labor-intensive educational and institutional challenges to cross-racial coalition building.<sup>179</sup> In the absence of institutional fora that consciously attempt to bridge differences, preferably by establishing a convergence of enlightened self-interest, differing racial and ethnic groups are not likely to become allies.<sup>180</sup> However, in the long

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177. See JUDIS & TEIXEIRA, *supra* note 106, at 73–74 (citing, *inter alia*, San Francisco, Chicago, and Princeton/Mercer County, New Jersey). *But see id.* (noting that in metropolitan areas like St. Louis, Cleveland, and Detroit politics has been “marked by familiar race and class cleavages”).

178. My favorite recent example is the multiracial coalition that led to the adoption of the “Texas 10 Percent Plan”—the legislation that guarantees admission to the flagship public universities of Texas to graduating seniors in the top 10% of every high school in the state. See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 68–73 (2002). The program, developed by a group of Latino and black activists, legislators, and academics, passed in the Texas legislature by one vote, after conservative Republican rural members—whose constituents were not regularly being admitted to the University of Texas—decided to support the legislation. *Id.*

179. See Cashin, *Shall We Overcome?*, *supra* note 3.

180. See, e.g., Reuel R. Rogers, *Race-Based Coalitions Among Minority Groups: Afro-Caribbean Immigrants and African-Americans in New York City*, 39 URB. AFF. REV. 283, 312

term—because of growing diversity—institutions, especially political ones, will have no choice but to build interracial alliances. In my view, the organizations that succeed in building such alliances, rather than exploiting divisions, will dominate in the twenty-first century. I hope, dear reader, that you will contribute to an inclusive American democracy.

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(2004) (concluding that racial commonalities were not enough to overcome inter-minority tensions, especially given the absence of an institutional mechanism for building trust and relationships among the elite of both groups).