

7-1-2014

To Make Freedom Happen: Shelby County v. Holder, The Supreme Court, and the Creation Myth of American Voting Rights

Aderson Bellegarde Francois

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

Suggested Citation

Aderson Bellegarde Francois, To Make Freedom Happen: Shelby County v. Holder, The Supreme Court, and the Creation Myth of American Voting Rights, 34 N. Ill. U. L. Rev. 529 (2014).

This Article is brought to you for free and open access by the College of Law at Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact jschumacher@niu.edu.

To Make Freedom Happen: *Shelby County v. Holder*, the Supreme Court, and the Creation Myth of American Voting Rights

ADERSON BELLEGARDE FRANCOIS¹

*Americans keep wondering what has “got into” the students. What has “got into” them is their history in this country [T]hese young people are determined to make it happen and make it happen now. They cannot be diverted. It seems to me they are the only people in this country now who really believe in freedom. Insofar as they can make it real for themselves, they will make it real for all of us.*²

*[C]ultures become richer and evolve in directions of social equity and human freedom when they attend to their neglected stories—to those people, ideas, and events that its members were once somehow predisposed to neglect The final word, then, is a plea for . . . the courage to rethink doctrine and other canonical stories in light of the stories we have been apt to forget.*³

1. Associate Professor of Law and Supervising Attorney of the Civil Rights Clinic, Howard University School of Law. I am thankful to Professor Peggy Cooper Davis of the Experiential Learning Lab at New York University School of Law. This Article is based on two amicus curiae briefs the Civil Rights Clinic at Howard University School of Law filed in *Shelby County Ala. v. Holder*. Professor Davis’s work in the Experiential Lab served as the foundation and inspiration for the briefs and, as such, for the Article itself. I also wish to thank Howard University School of Law for its research support in drafting the Article, and the Law Review at Northern Illinois University School of Law for the invitation to submit for this issue. Its editors, in particular Bailey Standish and Emily Fitch, showed more patience than I deserved or had any right to expect. Last, but not least, I am grateful to Parisa, Kian, and Sharzad for making time for me to write.

2. James Baldwin, *They Can’t Turn Back*, in *THE PRICE OF THE TICKET* 228 (St. Martin’s Press 1985).

3. PEGGY COOPER DAVIS, *NEGLECTED STORIES* 251 (1997).

I. INTRODUCTION	530
II. FEDERALISM AND PROTECTION OF INDIVIDUAL LIBERTIES	531
III. FEDERALISM AND POLITICAL ENFRANCHISEMENT	536
IV. THE SUPREME COURT'S VOTING RIGHTS RECORD BETWEEN EMANCIPATION AND THE VOTING RIGHTS ACT OF 1965	547
V. CONCLUSION	553

I. INTRODUCTION

There is a story the United States Supreme Court tells every time it has been asked to rule upon the constitutionality of section 5 of the Voting Rights Act of 1965,⁴ which, up until the Court's decision in *Shelby County, Ala. v. Holder*,⁵ used to require selected jurisdictions to seek approval from the Justice Department of a special three-judge panel of the United States District Court for the District of Columbia before enacting any changes to their election laws.⁶ The story, which may be thought of as the Supreme Court's version of the creation myth of voting rights, goes something like this: Long ago, when blacks were slaves, they did not have the right to vote. Then the Civil War came, and when it was all over the Fifteenth Amendment granted blacks the right to vote. But for the next century, the Fifteenth Amendment was, for all intents and purposes a dead letter, because Congress did not bother enforcing it. Somewhere around the 1950s, Congress finally got around to enforcement when it enacted various voting rights statutes. However, those statutes were not terribly effective because they depended on individual lawsuits, and no sooner had the Court outlawed one means of racial disenfranchisement then states would come up with entirely new ones. So, finally, Congress tired of playing catch up and took the drastic step of adopting the strong medicine of section 5, which finally broke the fever of racial disenfranchisement.

To propose that this story is the Court's version of the creation myth of voting rights is to say at least two things. First, as with all creation myths, there is a simple beauty to the Court's voting rights story in the sense that the details are broad enough and vague enough to support almost any lesson one cares to draw as the final coda of the narrative.⁷ So, for nearly fifty

4. See *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1965); *City of Rome v. United States*, 446 U.S. 156, 180 (1975); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

5. *Shelby Cnty., Ala. v. Holder*, 133 S.Ct. 2612 (2013).

6. 42 U.S.C. § 1973 (2006).

7. Cultural anthropologists tell us that, more than just being "symbolic stories describing how the universe and its inhabitants came to be," creation myths are "symbolic stories that reflect the world views and values of a group of people, as well as their social

years, the Court told and retold the story in order to uphold the constitutionality of section 5.⁸ But then, in 2013, the Court once again rehearsed the very same story, but this time in order to indirectly invalidate section 5 by finding that the section 4B coverage formula, which serves to identify which jurisdictions are subject to the preclearance provisions of section 5, represents a violation of federalist principles and an unconstitutional infringement upon what the Court called “equal state sovereignty.”⁹ Second, again as with all creation myths, the story tells a lot about the narrator but very little about the subject matter of the story.¹⁰ That is to say, the Court’s voting rights creation myth may say a great deal about how the Court perceives and understands its role in the struggle for equal voting rights, but it says very little about voting rights and even less about human rights.

So here, then, is one possible alternative version of the story.

II. FEDERALISM AND PROTECTION OF INDIVIDUAL LIBERTIES

The original Framers of our Constitution committed federal power to protect “[t]he right to traffic in [human property] like an ordinary article of merchandise.”¹¹ In *Dred Scott v. Sanford*, the Supreme Court ruled that Congress lacked the power to outlaw slavery and declared that “the Constitution brought into existence” a “political family” from which African Americans were excluded.¹² The nation fought the Civil War to transform the federal government from a guardian of human property to a protector of human freedom.¹³ *Dred Scott*’s exclusionary description of the national family was fully repudiated by the Civil War Amendments.¹⁴ Never in our reconstructed nation will people of African descent—or people of any description—stand without rights that the nation is bound to respect and enforce. These amendments broadened our definition of the American politi-

organization.” MARI WOMACK, *SYMBOLS AND MEANING: A CONCISE INTRODUCTION* 80, 81 (2005). In that sense, creation stories embody important social values and establish a people’s cultural identity. In the context of voting rights, the Supreme Court’s narrative arc of voting rights in America is less about establishing an accurate factual account than it is about marking the role of the Court in enforcing voting rights.

8. See COOPER DAVIS, *supra* note 3.

9. *Shelby County*, 133 S. Ct. 2612, 2623 (2013).

10. See 42 U.S.C. § 1973.

11. *Dred Scott v. Sanford*, 60 U.S. 393, 451-52 (1856).

12. *Id.* at 406.

13. See *Ex parte Virginia*, 100 U.S. 339, 344-45 (1879).

14. U.S. CONST. amend. XII, XIV, XV. See also Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4 (1987) (“While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment, ensuring protection of the life, liberty, and property of *all* persons against deprivations without due process, and guaranteeing equal protection of the laws.”).

cal family, deepened our understanding of federal citizenship, and changed the relationship between the federal and state governments. In this reconstructed national family, every person and every group has the right to participate fully in civic and political life. Congress has the power—and the duty—to protect these basic rights and liberties.¹⁵

Taken as a whole, the Reconstruction Amendments opened to all American citizens the doors to political and civic life and made the federal judiciary the primary guardian of individual liberty rather than merely the enforcer of the limits on federal power. The story of post-Reconstruction jurisprudence is the story of the federal government intervening time and time again to protect the rights of the individual against infringement by the states and by private actors condoned by the state government.

The catalogue of federal enforcement of constitutional citizenship is much too long to be usefully recounted here except to make the unarguable point that the end of state-sponsored and enforced political inequality and racial apartheid was brought about precisely because of federal intervention and the Supreme Court's oversight.¹⁶ Circumventing claims of state sovereignty, the Court struck down state laws that posed undue infringements on liberty,¹⁷ compelled social subjugation,¹⁸ infringed on an individual's right of association,¹⁹ or prevented full access to the democratic process.²⁰ In *Boynton v. Virginia*, the Court pronounced an African American's right to be served in a bus terminal restaurant when the Supreme Court of Virginia affirmed his conviction for trespassing without even issuing an opinion to explain its decision.²¹ In *Garner v. Louisiana*, the Court stood up for students' rights to be served at a lunch counter when the highest court of Louisiana upheld their conviction under a state statute for disturbing the peace with their mere presence.²² In *Peterson v. City of Greenville*, the Court protected the right of citizens to the public sphere when a South Carolina tres-

15. Jack Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805 (2010) ("Modern doctrine has not been faithful to the text, history, and structure of the Thirteenth, Fourteenth, and Fifteenth Amendments. These amendments were designed to give Congress broad powers to protect civil rights and civil liberties: Together they form Congress's Reconstruction Power.").

16. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See also Michal R. Belknap, *The Real Significance of Brown v. Board of Education: The Genesis of the Warren Court's Quest for Equality*, 50 WAYNE L. REV. 863, 891 (2004) ("What *Brown* did do was eliminate all legal sanction for the American version of apartheid.").

17. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

18. *Brown*, 347 U.S. 483.

19. *Loving v. Virginia*, 388 U.S. 1 (1967).

20. *United States v. Louisiana*, 380 U.S. 145 (1965); *United States v. Mississippi*, 380 U.S. 128 (1965).

21. *Boynton v. Virginia*, 361 U.S. 958 (1960).

22. *Garner v. Louisiana*, 368 U.S. 157 (1961).

pass law and a city ordinance mandating segregation in restaurants would have otherwise violated their Fourteenth Amendment right to equal protection.²³ In *United States v. Price*, the Court applied the Federal Enforcement Act of 1870 to bring the murderers of three African American men in Mississippi to justice when the state refused to do so.²⁴

Prior to the Court's historic decision in *Brown v. Board of Education*, schools for the freed blacks in Southern states faced violent attacks by whites.²⁵ Three years after *Brown*, when nine children attempted to exercise their right to equal public education in Little Rock Central High School, and the governor of Arkansas deployed the Arkansas National Guard to block the schoolhouse door, it was the federal government that escorted them to school.²⁶ These events merely confirmed what Justice Strong long ago explained in *Ex parte Virginia*: that the Reconstruction Amendments

were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact.²⁷ And yet, in the mythology of our constitutional origin, particularly in the context of voting rights enforcement, the code of the national narrative always seems to settle on the necessity to restrict federal power.²⁸ In the telling of that story, the

23. *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

24. *United States v. Price*, 383 U.S. 787 (1966).

25. See RONALD BUTCHART, *SCHOOLING THE FREED PEOPLE* 154-178 (Univ. of N.C. Press 2010).

26. See *Cooper v. Aaron*, 358 U.S. 1 (1958). See also TONY A. FREYER, *LITTLE ROCK ON TRIAL: COOPER V. AARON AND SCHOOL DESEGREGATION* 202-03 (2007).

27. *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

28. Here, for example, is Justice Roberts in *Shelby County*:

Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing

Framers, having recently cast off Britain's oppressive monarchy, were wary of the tyranny of centralized power and thus understood the federal government as a necessary evil—an ever-present threat to liberty that, if not restrained, would trample the rights and liberties of the People.²⁹

But the narrative of federalism, as a principle that begins and ends with limited federal power, sacrifices complicated truth for straightforward coherence.³⁰ The messy truth is not quite the often-repeated claim that, in the balance of power between federal and state governments, the Framers intended for those powers which “in the ordinary course of affairs, concern the lives, liberties and properties of the people [be] held by governments more local and more accountable than a distant federal bureaucracy.”³¹ Rather, the more complicated answer to the federalist question that “perpetually . . . aris[es]”³² is that federalism represents an on-going effort to reconcile the ambiguous and conflicting principles upon which this nation was founded and to apply them, once resolved, in the service of the people.³³

Published at a time when leaders of the early Republic struggled to assert an identity distinct from the British system they had so recently rejected, the Federalist Papers, which often serves as the authoritative source for the narrative of limited federal power, were never intended to be the faithful expression of the Framers' original intent, but were instead part of an effort to garner political support for constitutional ratification by quelling anti-federalist fears that Congress would be an oligarchy and the president a

legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. This “allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.”

Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2623 (2013) (citations omitted).

29. Or as Justice Roberts again puts it in *Shelby County*: “[T]he federal balance ‘is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’” *Shelby Cnty.*, 133 S. Ct. at 2623 (citations omitted).

30. JANET MALCOLM, *THE CRIME OF SHEILA MCGOUGH* 3-4 (New York: Alfred A. Knopf 1999).

31. THE FEDERALIST NO. 45, at 293 (James Madison).

32. *M’Culloch v. Maryland*, 17 U.S. 316, 405 (1819).

33. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (discussing corporate personhood demands of First Amendment protection); *Roe v. Wade*, 410 U.S. 113 (1973) (conceding at oral argument that the personhood of a fetus would defeat a woman’s right to privacy in her reproductive decisions); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

king.³⁴ But even as a form of political propaganda, the Federalist Papers show, if nothing else, that the Framers did not uniformly share a belief that limited federal power and broad state power were necessary to protect the interests of the people.³⁵

Alexander Hamilton's support of strong central government is documented in his contributions to the Federalist Papers and to the Federal Convention of 1787, where he proposed an exclusively national government.³⁶ Specifically, Hamilton believed that "there is no absolute rule on the subject" of balancing federal and state power and that efforts to prove such a rule were "the cause of incurable disorder and imbecility in the government."³⁷

James Madison, for his part, was chiefly concerned with the liberty of the people. As he explained:

Were the Union itself inconsistent with the public happiness, it would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people,

34. THE FEDERALIST NO. 84 (Alexander Hamilton); Debates of the Federal Convention of 1787, Notes of J. Madison, June 18, 1787.

35. In THE FEDERALIST NO. 22, for example, Hamilton criticized the very features of the Articles of Confederation that were so concerned with limiting centralized government that it made actual governing impractical. *See also* Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1496 (2012) ("What James Madison, Alexander Hamilton, and John Jay wrote in the Federalist Papers, . . . while undoubtedly of great interpretive significance, does not necessarily reflect the views of all of those involved in the drafting of the Constitution. Moreover, their statements most certainly cannot be presumed to reflect the understanding of each of the state ratifying conventions, since the Federalist papers were written for the purpose of directly influencing only the New York Convention. Similarly, while the writings of John Adams and Thomas Jefferson are considered evidence of the original intent of the Framers, neither man even attended the Philadelphia Convention. Therefore, whether they even qualify as 'Framers' for the purposes of an inquiry into Framers' intent is subject to debate. The fundamental problem with any effort to discern Framers' intent is the impossibility of gleaning a single, coherent collective intention. Any assumption that all those involved in the drafting and ratification processes shared some single vision is either hopelessly naive or shamefully disingenuous. Moreover, even were we able to suspend disbelief on this insurmountable interpretive difficulty, any attempt to ascertain Framers' intent suffers from a significant archeological defect: The simple reality is that there generally exists insufficient data upon which to determine intent with any reasonable certainty.")

36. THE FEDERALIST NO. 84 (Alexander Hamilton); Debates of the Federal Convention of 1787, Notes of J. Madison, June 18, 1787.

37. THE FEDERALIST NO. 9 (Alexander Hamilton).

the voice of every good citizen must be, Let the former be sacrificed to the latter.³⁸

Thus he expressed dismay that the sovereignty of the states would be seen as an end in itself:

Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? . . . It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object . . . In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter. How far the sacrifice is necessary, has been shown. How far the unsacrificed residue will be endangered, is the question before us.³⁹

The notion that state sovereignty is a virtue for its own sake, even when it prevents the federal government from acting in the defense of liberty, is inconsistent with the nation's story. The Founders may have had reason to fear concentrated federal power, but they were equally mindful of the dangers of a too assiduous protection of states' rights.

III. FEDERALISM AND POLITICAL ENFRANCHISEMENT

The Founders of the Republic held a deep (though albeit selective) concern for the protection of meaningful political participation by members

38. THE FEDERALIST NO. 45 (James Madison).

39. THE FEDERALIST NO. 45 (James Madison).

of the national family.⁴⁰ They recognized that the structural paradox of republican government in general and American federalism in particular is that pursuit of individual liberty and fealty to state sovereignty often leads to silencing of the political voice of minorities.⁴¹ James Madison identified the “propensity” of democratic governments to the “dangerous vice” of political factions and the problem that “measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”⁴² These problems, Madison contended, are inherent in republican government, as they are “sown in the nature of man.”⁴³ Madison’s solution was a republican form of government in which “[t]he influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.”⁴⁴

Viewed from that perspective and contrary to the Supreme Court’s voting rights foundation mythology, the need for federal protection against voter suppression is neither a temporary nor extraordinary departure from federalist principles, but is instead a necessary and permanent corrective to the ever present tendency of “political factions” to exclude real or perceived “minorities” from our national political family.⁴⁵

This necessity for this correction to state power is most evident in our nation’s struggle to define the contours of its electorate. In every democracy, privileged groups will seek to limit the political participation of those who challenge their social position. Our experience in the United States has been—and remains—no different. Efforts to secure the promise of mean-

40. See Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS. L. REV. 65, 118 (2012) (“Classical Athenian democrats tended to value political participation for its own sake to a far greater degree than did the American founders who were responsible for crafting the federal Constitution . . . Aristotle, although neither an Athenian nor a democrat, nevertheless expressed the powerful meaning of citizenship in classical Athens with his claim that political participation is the means by which individuals fulfill their distinctively human nature (telos). For James Madison, America’s Aristotle, political participation by the citizen body was not intrinsically important. Madison, like his fellow Federalists, believed that ordinary citizens lacked the competence to participate directly in their government. Public participation was best limited to electing a governing elite and holding those elected officials accountable in future elections.”).

41. For example, Madison wrote that “the evidence of known facts will not permit us to deny” that “the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.” THE FEDERALIST NO. 10, at 54 (James Madison) (Palgrave Macmillan ed., 2009).

42. THE FEDERALIST NO. 10, at 49-54 (James Madison) (Palgrave Macmillan ed., 2009).

43. *Id.* at 50, 54.

44. *Id.* at 54.

45. See ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF THE UNITED STATES, at xxiii (2009).

ingful universal suffrage have always faced fierce opposition from those who wish to maintain the place of fortunate sons in the American political family.⁴⁶

Each of the states resolved the conflict between political family members through its own unique definition of the franchise. Some states, such as Pennsylvania, recognized suffrage as a civil right and extended the franchise to nearly all adult males.⁴⁷ In other states (Massachusetts, for example), the propertied elite successfully rebuffed efforts to extend the franchise universally and retained regressive property qualifications for voting.⁴⁸ In Vermont, popularly elected delegates wrote a truly democratic constitution, extending the franchise to men universally without any consideration of the individual's race or social status.⁴⁹ The various forms of the franchise at the state level left the Framers of the national Constitution without any clear consensus about the proper scope of the right to vote.⁵⁰

At the time of the constitutional convention, the Framers were well aware that privileged factions in various states had already engineered to limit the right to vote to a privileged few and remained unsure how to devise a system of national suffrage.⁵¹ The committee charged with resolving the issue of national suffrage could not agree on a uniform standard for national elections and decided ultimately to table the issue after extended deliberations.⁵²

46. See Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1346-47 (2003).

47. Keyssar, *supra* note 45, at 13.

48. KEYSSAR, *supra* note 45, at 15-16. See also Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 337 (1989).

49. Vermont offered the franchise to an adult male who swore an oath to vote his conscience in the public interest. KEYSSAR, *supra* note 45, at 13-16.

50. *Id.* at 18-19.

51. See *Id.* at 12-13. While States such as Vermont and Pennsylvania adopted broadly democratic constitutions and extended the franchise to nearly all men (but not women), in other states (Massachusetts, for example), the propertied elite successfully rebuffed efforts to extend the franchise universally and retained regressive property qualifications for voting. *Id.* at 13-16, 18-20. Nor was the denial of the political franchise limited to women and racial minorities. Religious minorities fared no better. See Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 368 n.58 (1995) (discussing the political power of non-Christians and non-Protestants at the time of the 1787 convention).

52. KEYSSAR, *supra* note 45, at 18-20. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 183-84 (2012). See also ALEXANDER J. BOTT, *HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES* 1 (1990) ("Nowhere in the First Amendment is there any reference to the fundamental right to vote or the right to hold free elections. At the convention, the Founding Fathers could not agree on who could vote, and as a result the Constitution left the qualifications of voters in federal elections to be determined by the states.").

With citizenship left undefined in the 1787 Constitution, over the next six decades (from 1790 to 1850), every state in the Union revised their constitution at least once, often in response to the persistent advocacy of the disenfranchised for universal suffrage.⁵³ Faced with the possibility of disorderly protests by a significant portion of their states' populations, legislators across the country offered concessions by extending the franchise to new residents and to the property-less masses.⁵⁴ Partisan competition contributed to this dynamic as rival politicians appealed to the interests of the silent majorities in their campaigns. By the middle of the nineteenth century, the broadening of the franchise led to a dramatic increase in political participation; in some communities, eighty percent of all adult men came to the polls to express their opinions on matters of concern for the welfare of the political family.⁵⁵ The broadening of the franchise had limits, however. State legislators refused to extend the franchise beyond certain limits, reflecting a belief that white men alone were entitled to make decisions on behalf of the political family.⁵⁶ Women, African Americans, paupers, and felons had no right to speak at the table when important decisions were made on behalf of the family.

In the nineteenth century, female participation in the political process was rarely considered and universally denied.⁵⁷ New Jersey, the only state that allowed women to vote before 1800, restricted the franchise to exclude women in 1807.⁵⁸ In that year, the state legislators of New Jersey formed a bipartisan agreement to limit the franchise to white men; Republicans sought to limit the vote of Federalist women in the southern part of the state, while Federalists feared the voting power of newly freed black Republicans in the north of the state.⁵⁹ Unable to agree on which group was less suitable to vote, the legislators apparently decided to disenfranchise both.⁶⁰

New Jersey followed a national trend as state legislatures simultaneously expanded the franchise for white men while disenfranchising other less powerful groups in society.⁶¹ Free blacks were the most notable victims of this effort; only five states (Massachusetts, Vermont, New Hampshire, Maine, and Rhode Island) did not join the disenfranchisement movement

53. KEYSSAR, *supra* note 45, at 22.

54. *Id.* at 308-09.

55. *Id.* at 36-42.

56. *Id.* at 306-07.

57. Irwin Gertzog, *Female Suffrage in New Jersey: 1790-1807*, 10 WOMEN AND POLITICS 47 (1990).

58. *Id.* at 55.

59. *Id.* at 56.

60. *Id.*

61. KEYSSAR, *supra* note 45, at 63.

before 1855.⁶² By the time the Supreme Court officially designated blacks as a people unworthy of political recognition, the vast majority of states had already denied free blacks the opportunity to protest the conditions facing their enslaved peers in the electoral process.⁶³ In contrast to the disenfranchisement of women in New Jersey, the disenfranchisement of blacks was primarily a reflection of racial animus rather than the naked pursuit of partisan gain.⁶⁴ Blacks were treated in a similar fashion as paupers and felons;⁶⁵ they were considered incapable of exercising the independent judgment necessary for full political participation.⁶⁶

Although most white men were considered to have a civil right to vote by the 1830s, political factions still sought to suppress the votes of particular groups for partisan gain.⁶⁷ The Whig Party, facing the challenge of strong immigrant support for the Democratic Party in the cities of the Northeast, advocated for a system of voter registration to limit the influx of new voters on the electoral rolls and proposed that illiterate be barred from voting.⁶⁸ In Rhode Island, partisan conflict over the right to vote led to a fierce debate when residents of the city of Providence, disenfranchised by a colonial-era requirement that voters own property, demanded recognition from the state's legislature.⁶⁹ In an 1842 referendum on expansion of the franchise, a majority of Rhode Island men expressed their support for a new constitution, but the entrenched members of the legislature refused to submit to public opinion.⁷⁰ Partisans on both sides attacked the legitimacy of the other, resulting in a state constitutional crisis and the imprisonment of the leading advocate for expansion of the franchise, Thomas Dorr, on the charge of treason.⁷¹ The United States Supreme Court, wary of wading into a political maelstrom, declined to intervene in the dispute,⁷² and the crisis subsided through an uneasy constitutional compromise (expanding the franchise on a limited basis) between the Democratic Party and the newly formed Law and Order Party.⁷³

In the 1850s, nativist sentiment reached new heights in different regions of the country. The American Party (known popularly as the Know-Nothings), an organization that catapulted into the political arena and at-

62. *Id.* at 44.

63. *Id.* at 44-45, 320.

64. *Id.* at 45.

65. *Id.* at 45-46.

66. KEYSSAR, *supra* note 45, at 46.

67. *Id.* at 65-66.

68. *Id.* at 52-53.

69. *Id.* at 57-58.

70. *Id.* at 58.

71. KEYSSAR, *supra* note 45, at 57, 59.

72. *Luther v. Borden*, 48 U.S. 1 (1849).

73. KEYSSAR, *supra* note 45, at 60.

tracted support across the country, captured this nativist sentiment and translated it into a robust policy agenda.⁷⁴ The Know-Nothings advocated for radical reforms of the immigration system to limit the political power of “foreigners” and strictly policed their membership to exclude Catholics and foreign-born citizens.⁷⁵ After a wave of victories in the elections of 1854 and 1856, the Know-Nothings were powerful enough to reform the electoral systems of two states, Massachusetts and Connecticut, by introducing new voting qualifications to suppress the immigrant vote.⁷⁶ Both states approved the use of literacy tests for prospective voters (with a grandfather clause exempting current voters), and Massachusetts created an additional requirement that immigrants prove their citizenship to election officials at least three months before elections.⁷⁷

A similar debate (with even more troubling results) would occur after the Civil War about the voting rights of newly freed African Americans. While Democrats could be counted on to fight for the rights of immigrants to participate in the public debate, the Party was fiercely opposed to extending that right to black Americans.⁷⁸ The staunch opposition of Democrats and a widely held belief in white supremacy prevented advocates of universal suffrage from expanding the franchise to include African Americans through the legislative process at the state level.⁷⁹ Nevertheless, Republicans in Congress bravely continued their efforts to include freed slaves in the nation’s political family, successfully approving the Fourteenth Amendment to the Constitution.⁸⁰ The precise question of black suffrage was left to the states, however, until the passage of the Fifteenth Amendment in 1870.⁸¹

To be sure, efforts to exclude blacks and other perceived minorities did not end with the Civil War and passage of the Reconstruction Amendments.⁸² Opposition to the amendment would persist even after its passage at the state level; legislators in both the North and South quickly devised methods to subvert the intent of the Constitution and disenfranchise groups

74. *Id.* at 65-66.

75. *Id.* at 66.

76. *Id.* at 67.

77. *Id.* at 66-68.

78. KEYSSAR, *supra* note 45, at 70.

79. *Id.* at 71.

80. *Id.* at 71-74.

81. *Id.* at 74-75.

82. Although many Republicans (most notably Congressman Samuel Shellabarger and Senator Henry Wilson) advocated for a broad prohibition of all voting qualifications under the Fifteenth Amendment, the majority of Republicans sought to focus the proposed amendment on racial qualifications alone. *Id.* at 75-80.

through complex legal and extralegal schemes.⁸³ While the Republican-led government attempted to resist local efforts by southern Democrats to disenfranchise African Americans, voter suppression in the North proceeded with little to no federal resistance after the passage of the Fifteenth Amendment.⁸⁴

Yet, for all the opposition the Fifteenth Amendment faced, it still remained that, for a brief shining moment following the conclusion of the Civil War and ratification of the Fifteenth Amendment, the federal government assured that African American citizens of former confederate states would have full access to the political process.⁸⁵ Immediately after Emancipation, African Americans in Alabama “began acting like independent men and women.”⁸⁶ Former slaves, who had lived for generations under the control of white slave masters, who were not permitted to learn to read, who could not control the destiny of their own families, and who certainly could not vote, were beginning to participate in civic life in unprecedented ways.⁸⁷ In 1868, 700,000 African Americans, mostly freed slaves, voted for the first time in Ulysses Grant’s presidential election.⁸⁸

The Census of 1870 showed that African Americans made up a majority of the population in three

83. For example, Republicans could agree to offer blacks a seat at the family table, but were divided on whether to offer seats to immigrants and the working poor. The ratification debate in the states reflected these divisions; in the Western states, foes of the amendment raised the specter of Chinese voters, while in Rhode Island, Republicans worried that the amendment would be used to protect the rights of Irish voters. KEYSAR, *supra* note 45, at 81-82. Racial animus and concern about the nation’s changing demography led to the repeal of “alien” suffrage in every state that had permitted noncitizens to vote, and, in some Western states (California, Oregon, and Idaho), nativists approved constitutional provisions to explicitly bar Chinese natives from voting. *Id.* at 111.

84. Although northern Democrats and their allies, in particular ethnic communities, were able to mobilize against biased legislation in several states, Republicans and their allies successfully devised complex systems of voter qualifications and registration that reduced the political participation of immigrants and the working poor in most Northern cities. *Id.* at 109-28.

85. *See generally* ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION: 1863-1877 (1988).

The material on pages 15-20 (spanning footnotes 86-137) is largely taken from an amicus brief written by Professor Francois.

86. HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 195 (Harper Perennial Modern Classics, 5th ed. 2003), *quoted in* Brief for the Honorable Congressman John Lewis as Amicus Curiae in Support of Respondents and Intervenor-Respondents at 10, *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848 (D.C.C. 2013) (No. 12-96) [hereinafter Lewis Brief].

87. Lewis Brief, *supra* note 86, at 10.

88. *Id.* at 194.

of the former Confederate states, Louisiana, Mississippi, and South Carolina. They were over 40% in Alabama, Florida, Georgia, and Virginia; and more than a third in North Carolina. In no former Confederate state were African Americans less than a quarter of the population.⁸⁹

This translated into political power. As Professor Foner, the foremost historian on Reconstruction, has shown, “[b]y the early 1870s, biracial democratic government, something unknown in American history, was functioning effectively in many parts of the South, and men only recently released from bondage were exercising genuine political power.”⁹⁰ Newly freed African American men were elected to state legislatures in former confederate states. In South Carolina, African Americans were the majority in the lower house.⁹¹ In states such as Louisiana, Mississippi, and South Carolina, African Americans outnumbered whites in voter registration.⁹² In others, such as Alabama and Georgia, African Americans constituted near forty percent of registered voters.⁹³ By 1880, “African Americans were an absolute majority in Louisiana, Mississippi, and South Carolina and were over 40% of the population in Alabama, Florida, Georgia and Virginia.”⁹⁴ By 1898, Mississippi had 190,000 African American voters and only 69,000 white voters.⁹⁵ At the federal level, in 1869, Hiram Rhodes Revels and Blanche Bruce, two African Americans, one a former slave, were elected to the United States Senate, along with twenty African American Congressmen.⁹⁶

This racial progress was not the natural trajectory of emancipation, nor was it coincidental; it was the direct result of the federal government’s presence throughout the southern United States.⁹⁷ And indeed, the moment of black political empowerment was short lived. With the ratification of the Fifteenth Amendment, the words “right to vote” were written into the U.S. Constitution for the first time, “announcing a new, active role for the feder-

89. See Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 89 (2008).

90. ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* 129 (2006).

91. ZINN, *supra* note 86, at 195 *cited in* Lewis Brief, *supra* note 86, at 10.

92. See Chin & Wagner, *supra* note 89, at 89, *cited in* Lewis Brief, *supra* note 86, at 11.

93. *Id.* See also Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1357-58 (1993-94).

94. Chin & Wagner, *supra* note 89, at 66, *cited in* Lewis Brief, *supra* note 86, at 11.

95. *Williams v. Mississippi*, 170 U.S. 213, 215 (1898), *cited in* Lewis Brief, *supra* note 86, at 11.

96. ZINN, *supra* note 86, at 195, *cited in* Lewis Brief, *supra* note 86, at 11.

97. Lewis Brief, *supra* note 86, at 11.

al government in defining democracy.”⁹⁸ But with the removal of federal troops from the South, state legislatures and vigilante groups, such as the Ku Klux Klan, demonstrated “direct and positive disregard of the 15th Amendment.”⁹⁹ By late 1870, all the former confederate states had been readmitted to the Union and most were controlled by the Republican Party, due primarily to the support of African American voters.¹⁰⁰ The heavily disputed presidential election of 1876 ended in a compromise that resulted in troops being withdrawn from the South in 1877, signifying the formal end of Reconstruction.¹⁰¹

During floor debates on the Civil Rights Act of 1871, African American representative Robert B. Elliot reminded his fellow legislators that, “the declared purpose [of the Democratic party of the South is] to defeat the ballot with the bullet and other coercive means”¹⁰² His prediction came to pass.¹⁰³ Between 1890 and 1908, ten of the eleven former confederate states adopted a number of voter suppression methods, including poll taxes, literacy tests, property requirements for municipal voters, and outright violence by the Ku Klux Klan and other vigilante groups.¹⁰⁴ And, by 1880, blacks had been stripped of virtually all the state and federal political power they had achieved during Reconstruction.¹⁰⁵ Democrats in the South convened state constitutional conventions with the explicit purpose to disenfranchise African Americans.¹⁰⁶ In the period after 1878, in a deliberate effort to disenfranchise the potentially powerful voting bloc of former slaves, southern states like Alabama, Georgia, Mississippi, and Louisiana enacted literacy tests, grandfather clauses, poll taxes, and other unfair voter registration practices.¹⁰⁷ By 1880, white Democrats in the South had regained control over state and local governments, and the number of southern African American legislators fell dramatically.¹⁰⁸ Once federal presence was removed, the enormous political, social, and economic progress was wiped away and would not be regained for almost a century.¹⁰⁹

98. KEYSSAR, *supra* note 45, at 82-83, *quoted in* Lewis Brief, *supra* note 86, at 11.

99. *Guinn v. United States*, 238 U.S. 347, 365 (1915).

100. Lewis Brief, *supra* note 86, at 11.

101. *Id.* at 11.

102. CONG. GLOBE, 42d Cong., 1st Sess. 389-92 (1871), *quoted in* Lewis Brief, *supra* note 86, at 11.

103. *See* Lewis Brief, *supra* note 86, at 12.

104. *See* WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION: 1869-1879*, at xiii (1979).

105. *See* J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 322 (Univ. of N.C. Press 1999).

106. KEYSSAR, *supra* note 45, at 84-85, *cited in* Lewis Brief, *supra* note 86, at 12.

107. *Id.* at 89-91.

108. *Id.* at 86.

109. Lewis Brief, *supra* note 86, at 11.

No amount of statistics can make the point clearer than the lone story of the family of Congressman John Lewis, the United States Representative of Georgia's Fifth Congressional District, since January 1987.¹¹⁰

Today, many political historians and constitutional scholars acknowledge that one of the main impetuses for President Lyndon Johnson submitting the Voting Rights Act to Congress on March 15, 1965, and its passage by both Houses of Congress a mere five months later, was the brutalization of nonviolent civil rights marchers on the Edmund Pettus Bridge in Selma, Alabama by state troopers a week earlier on Sunday March 7, 1965.¹¹¹

In June 1964, the Student Non-Violent Coordinating Committee (SNCC) began a voting campaign in Mississippi, where due to the state's Jim Crow voting practices, only five percent of eligible African Americans were registered to vote.¹¹² The aim of what came to be known as "Freedom Summer" was to integrate the Mississippi Delegation of the 1964 Democratic National Convention by educating and organizing African American voters across the state, and to solicit their support for the Mississippi Freedom Democratic Party.¹¹³

As chairman of SNCC, Congressman Lewis helped plan and mobilize Freedom Summer.¹¹⁴ In years prior, he worked to register voters in Selma, Alabama.¹¹⁵ At that time in Alabama, only one percent of voting-age African Americans were registered to vote, state troopers used cattle prods to corral protestors, and crosses were burned in sixty-four of the state's eighty-two counties.¹¹⁶ In Mississippi, by the end of Freedom Summer, activists had endured more than one thousand arrests, thirty-five shootings, more than thirty church burnings, and just as many bombings.¹¹⁷

On March 7, 1965, nearly 600 people, including women and children wearing their Sunday church outfits, gathered at Brown's Chapel African Methodist Episcopal Church to march fifty-four miles from Selma to Montgomery to protest the killing of one of their own: Jimmy Lee Jackson, a twenty-six-year-old Army veteran and voting rights worker shot by an Alabama state trooper as he tried to protect his mother during a voting rights

110. See *Biography*, CONGRESSMAN JOHN LEWIS, <http://johnlewis.house.gov/johnlewis/biography> (last visited May 6, 2014).

111. Lewis Brief, *supra* note 86, at 1.

112. JOHN LEWIS, *WALKING WITH THE WIND, A MEMOIR OF THE MOVEMENT* 241-62 (Mariner Books 1999), *cited in* Lewis Brief, *supra* note 86, at 5-7.

113. *Id.*, *cited in* Lewis Brief, *supra* note 86, at 5-7.

114. Lewis Brief, *supra* note 86, at 6.

115. *Id.* at 6.

116. LEWIS, *supra* note 112, at 229-31, 233-37, *cited in* Lewis Brief, *supra* note 86, at 5-7.

117. *Id.* at 274, *cited in* Lewis Brief, *supra* note 86, at 5-7.

protest.¹¹⁸ With Congressman Lewis leading the way, they marched “two abreast, in a pair of lines that stretched for several blocks At the far end, bringing up the rear, rolled four slow-moving ambulances.”¹¹⁹ The march was peaceful, “somber and subdued, almost like a funereal procession.”¹²⁰ “There were no big names up front, no celebrities. This was just plain folks moving through the streets of Selma.”¹²¹

And then the marchers reached the Edmund Pettus Bridge, carrying U.S. Highway 80 across the Alabama River, where on the other side waited for them “a sea of blue-helmeted, blue-uniformed Alabama state troopers” backed by “several dozen more armed men . . . some on horse-back . . . many carrying clubs the size of baseball bats.”¹²² As the marchers crested the top of the bridge, the trooper in charge ordered them to disperse.¹²³ When they knelt to pray, troopers and deputized citizens charged and, with the cries of rebel yells and “*Get ‘em! Get the niggers!*”, swept forward “like a human wave, a blur of shirts and billy clubs and bull-whips.”¹²⁴

Without a word, one trooper swung his club against the left side of Congressman Lewis’s head, fracturing his skull.¹²⁵ A cloud of tear-gas enveloped the marchers.¹²⁶ Bleeding badly and barely hanging onto consciousness, Congressman Lewis tried to stand up from the pavement only to find himself surrounded by women and children weeping and vomiting while “men on horses [moved] in all directions, purposely riding over the top of fallen people, bringing the animals hooves down on shoulders, stomachs, and legs.”¹²⁷

In the late afternoon, hours after the attack had begun, “troopers, possemen, and sheriff’s deputies pursued the marchers over the mile back to the neighborhood around Brown Chapel, where they attacked stragglers in a frenzy,” taunting those who had taken refuge in the church “for the Negroes to come out.”¹²⁸

That evening, just past 9:30 p.m., ABC Television cut into its Sunday night movie—a premiere broadcast of Stanley Kramer’s *Judgment at Nuremberg*, a film about Nazi racism—with “a special bulletin,” showing to

118. *Id.* at 327-28, cited in Lewis Brief, *supra* note 87, at 5-7.

119. *Id.* at 337, cited in Lewis Brief, *supra* note 86, at 5-7.

120. *Id.* at 338, cited in Lewis Brief, *supra* note 86, at 5-7.

121. LEWIS, *supra* note 112, at 338, cited in Lewis Brief, *supra* note 86, at 5-7.

122. *Id.* at 338-39, cited in Lewis Brief, *supra* note 86, at 5-7.

123. *Id.* at 339, cited in Lewis Brief, *supra* note 86, at 5-7.

124. *Id.* at 340, cited in Lewis Brief, *supra* note 86, at 7.

125. *Id.*, cited in Lewis Brief, *supra* note 86, at 5-7.

126. LEWIS, *supra* note 112, at 340, cited in Lewis Brief, *supra* note 86, at 5-7.

127. *Id.* at 341, cited in Lewis Brief, *supra* note 86, at 7.

128. TAYLOR BRANCH, *AT CANAAN’S EDGE: AMERICA IN THE KING YEARS 1965-1968*, at 53 (2006), quoted in Lewis Brief, *supra* note 86, at 8.

the entire country fifteen minutes of film footage of the attack on the Edmund Pettus Bridge.¹²⁹

Eight days later, President Johnson addressed the American people: “I speak tonight for the dignity of man and for the destiny of democracy. 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 last week in Selma.”¹³⁰ The President ended by calling on Congress to enact the Voting Rights Act, which it did on August 6, 1965.¹³¹

But the irony is that, at the conclusion of the Civil War, a century prior to Bloody Sunday and the Edmund Pettus Bridge attack, Tobias and Elizabeth Carter, Congressman Lewis’s great-great-grandparents, exercised the full rights and privileges of citizenship.¹³² Both former slaves, they married soon after the Emancipation Proclamation, bought land, and settled in rural Alabama.¹³³ Congressman Lewis’s great-great-grandfather was part of the first generation of former slaves to register and vote in Alabama.¹³⁴

IV. THE SUPREME COURT’S VOTING RIGHTS RECORD BETWEEN EMANCIPATION AND THE VOTING RIGHTS ACT OF 1965

Thus it is inaccurate to say, as the Supreme Court recounts in its creation myth of voting rights, that after a century of congressional inaction and failure, the Voting Rights Act of 1965 served as the starting point of effective federal participation to enforce the Fifteenth Amendment.¹³⁵ Rather, the narrative of voting rights, as evidenced by the story of Congressman Lewis’s own ancestors, is one of a cycle of retrenchment and reconstruction.¹³⁶ The approximately twenty-year period between 1866 and 1880 was a brief moment of reform.¹³⁷ Among other things, the Civil Rights Act of 1866, the Civil Rights Act of 1870, and Civil Rights Act of 1871, established robust federal enforcement of constitutional rights for all Americans by establish-

129. *Id.* at 55.

130. President Lyndon B. Johnson, Special Message to the Congress: The American Promise (Mar. 15, 1965), *quoted in* Lewis Brief, *supra* note 86, at 8.

131. Lewis Brief, *supra* note 86, at 8.

132. See generally *Finding your Roots: John Lewis and Cory Booker* (PBS television broadcast June 10, 2012), available at <http://www.pbs.org/wnet/finding-your-roots/video/john-lewis-and-cory-booker>, *cited in* Lewis Brief, *supra* note 86, at 9.

133. *Id.*

134. *Id.*

135. Lewis Brief, *supra* note 86, at 12.

136. *Id.*

137. *Id.*

ing civil and criminal penalties for denying African Americans the right to vote and providing for federal troops to patrol polls in the South.¹³⁸

If, by 1880, federal enforcement of voting rights began a period of relative retrenchment, it must be acknowledged that, even while striking down some of the most blatant forms of voter disenfranchisement,¹³⁹ the Court's cramped interpretation of federalism coupled with its expansive reading of state sovereignty was one of the most significant factors that contributed to a weakening of federal involvement in voting rights enforcement, the end of Reconstruction, and the political disempowerment of African Americans.¹⁴⁰ Put simply, the Court's Reconstruction-era jurisprudence gave "a legal pass to private actions that were not merely discriminatory but were quite literally meant to keep blacks in a state of near slavery and, failing that, mark them as social, biological, economic, political inferiors in the country's racial caste system."¹⁴¹ Decades would pass and generations would come and go before the Court would hold a voter-suppression tactic unconstitutional. And when the Court did strike down one method of voter suppression, a state would quickly respond and implement "schemes intended to emasculate constitutional provisions or circumvent [the Court's] constitutional decisions."¹⁴²

In *Neal v. Delaware*, the Court held that the adoption of the Fifteenth Amendment voided state constitutional provisions explicitly limiting the right to vote to whites.¹⁴³ This decision, however, rang hollow in light of the Court's decisions in *United States v. Cruikshank*¹⁴⁴ and *United States v. Reese*.¹⁴⁵ In *Cruikshank*, the Court refused to uphold the authority of federal

138. *Id.* (citing Civil Rights Act of 1866, 14 Stat. 27 (1866); Civil Rights Act of 1870 (The Enforcement Act), 16 Stat. 140 (1870); Civil Rights Act of 1871, 17 Stat. 13 (1871)).

139. *Id.* (citing *e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Myers v. Anderson*, 238 U.S. 368 (1915); *Guinn v. United States*, 238 U.S. 347 (1915); *Neal v. Delaware*, 103 U.S. 370 (1880)).

140. Lewis Brief, *supra* note 86, at 12 (citing *Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1889); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1875)).

141. Aderson Bellegarde Francois, *Through a Glass Darkly: The Supreme Court, Reconstruction Amendments, and Civil Rights*, AM. CONST. SOC'Y (Sept. 16, 2011), <http://www.acslaw.org/acsblog/through-a-glass-darkly-the-supreme-court-reconstruction-amendments-and-civil-rights>.

142. *Harrison v. Nat'l Ass'n for the Advancement of Colored People*, 360 U.S. 167, 182 (1959) (Douglas, J., dissenting).

143. *Neal v. Delaware*, 103 U.S. 370 (1880), cited in Brief for the Veterans of the Miss. Civil Rights Movement as Amicus Curiae in Support of Respondents and Intervenor-Respondents at 12, *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848 (D.C.C. 2013) (No. 12-96) [hereinafter *Veteran Brief*].

144. *United States v. Cruikshank*, 92 U.S. 542 (1876).

145. *United States v. Reese*, 92 U.S. 214 (1875).

authorities to prosecute a mob of white vigilantes after they surrounded the Grant Parrish Courthouse in Colfax, Louisiana and massacred a group of freedmen who had gathered there to support the election of their Republican candidates.¹⁴⁶ Shortly after ratification of the Fifteenth Amendment, the Court decided *United States v. Reese* in which a Kentucky election official was indicted under the Enforcement Act of 1870, a federal statute enforcing the Fifteenth Amendment, for refusal to count the votes of two African Americans on account of their race.¹⁴⁷ The Court held that the statute had exceeded Congress's power to enforce the Fifteenth Amendment.¹⁴⁸

These decisions had severe consequences.¹⁴⁹ From 1890 to 1908, ten of the eleven former confederate states passed disfranchising constitutions or amendments that included poll taxes, residency requirements, literacy tests, and grandfather clauses that effectively disfranchised most African American voters.¹⁵⁰ Yet, the Court remained reluctant to intervene, as demonstrated by two turn-of-the-century cases: *Giles v. Harris*¹⁵¹ and *Giles v. Teasley*.¹⁵² In 1903, the Alabama legislature created a provision in the state's constitution that required any person not registered to vote before January 1, 1903 to pass a series of tests before the state would allow registration.¹⁵³ A person was exempted from the tests who was "of good character and who understand the duties and obligations of citizenship under a republican form of government."¹⁵⁴ Although the Court observed that the Alabama statute "opened a wide door to the exercise of discretionary power by the registrars," the Court ruled in both cases it lacked the power to grant the requested relief.¹⁵⁵

One of the early tactics used to preclude African Americans from voting was the grandfather clause. In 1915, the Court began to protect the right to vote to some extent by outlawing grandfather clauses in *Guinn v. United States*.¹⁵⁶ In that case, Oklahoma's constitution contained a provision that required prospective voters to pass a literacy test in order to qualify to vote, but it also contained a grandfather clause exception.¹⁵⁷ The Court held that while states have the right to determine race neutral voter qualifications, the

146. *Cruikshank*, 92 U.S. at 556-557, 559.

147. *Reese*, 92 U.S. at 215.

148. *Id.* at 218.

149. See generally ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK (2001).

150. See Chin & Wagner, *supra* note 89, at 89.

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

152. *Giles v. Teasley*, 193 U.S. 146 (1904).

153. *Harris*, 189 U.S. at 483.

154. *Id.*

155. *Teasley*, 193 U.S. at 163, 166; *Harris*, 189 U.S. at 485.

156. *Guinn v. United States*, 238 U.S. 347, 355 (1915).

157. *Id.* at 355-56.

grandfather clause “re-create[d] and perpetuate[d] the very conditions which the Amendment was intended to destroy.”¹⁵⁸ The Court would also hold in a companion case, *Myers v. Anderson*, that state officials could be held liable for civil damages for enforcing a state's grandfather clause.¹⁵⁹

Following the invalidation of the grandfather clause, Oklahoma quickly changed its law, this time enacting a similar grandfather clause.¹⁶⁰ However, it would take fifteen years before the Court would invalidate Oklahoma's new scheme when an African American citizen of Oklahoma sued three county election officials for declining to register him.¹⁶¹ The Court once again struck down the voting statute stating that the discriminatory statute was another attempt “to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color,” which “has been amply expounded by prior decisions.”¹⁶² The Court acknowledged Oklahoma's craftiness but stated the Fifteenth Amendment “nullifies sophisticated as well as simple-minded modes of discrimination.”¹⁶³

Although the Court in *Guinn* found the grandfather clause exemption to the literacy test to be unconstitutional, the Court considered the literacy tests themselves a valid “exercise of state judgment.”¹⁶⁴ In 1890, Mississippi was one of the first states to implement literacy tests. Despite the obvious purpose behind literacy tests, the Court held them to be a valid exercise of state police power.¹⁶⁵ In *Davis v. Schnell*, Alabama's literacy test required a citizen to “understand and explain” an article of the Federal Constitution.¹⁶⁶ Finding such a requirement to be vague and ambiguous, the district court held that the literacy test violated the Fifteenth Amendment and the Supreme Court affirmed this decision.¹⁶⁷ However, just ten years later, the Court in *Lassiter v. Northampton County Board of Elections* explicitly approved the discriminatory practice by stating, “a State might conclude that only those who are literate should exercise the franchise.”¹⁶⁸ The Court attempted to distinguish its affirming decision in *Schnell* by explaining that “[t]he legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device

158. *Id.* at 360.

159. *Myers v. Anderson*, 238 U.S. 368, 383 (1915).

160. *Lane v. Wilson*, 307 U.S. 268, 269 (1930).

161. *Id.* at 271.

162. *Id.* at 275.

163. *Id.*

164. *Guinn v. United States*, 238 U.S. 347, 360 (1915).

165. *See Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51 (1959).

166. *Davis v. Schnell*, 81 F. Supp. 872, 873 (S.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949).

167. *Id.*

168. *Lassiter*, 360 U.S. at 53.

to make racial discrimination easy.”¹⁶⁹ It would not be until after the passage of the Voting Rights Act of 1965, which banned literacy tests, that the Court would acknowledge the “long history of the discriminatory use of literacy tests to disenfranchise voters on account of their race.”¹⁷⁰

In addition to the grandfather clause and literacy test, whites in the 1920s began holding white-only primaries to prevent African Americans from voting. In 1924, the Court in *Love v. Griffith* failed once again to right the wrong of African Americans being excluded from voting on account of their race.¹⁷¹ Two weeks before a Democratic city primary election, the City Democratic Executive Committee of Houston created a rule that prohibited African Americans from voting in the election.¹⁷² The lower court held that the rule did not violate the Fifteenth Amendment, and by the time it reached the appeals court, the election had already concluded.¹⁷³ The Court affirmed the appeals court decision and held that no constitutional rights were infringed by holding that a cause of action ceased to exist because the rule was for a single election only.¹⁷⁴

A few years after *Griffith*, the Court decided another white primary case and relied on the Fourteenth Amendment to invalidate a Texas law that forbade African Americans from voting in the Democratic primary.¹⁷⁵ The Court found it “unnecessary to consider the Fifteenth Amendment, because it seem[ed] to [them] hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment].”¹⁷⁶ This victory was short lived as, just five years later, the Court decided another white primary case in Texas. After *Nixon v. Herndon*, the Texas legislature promptly enacted a new statute that allowed each political party to determine who shall be qualified to vote and participate in their political party.¹⁷⁷ In response to *Herndon*, “[d]elegates of the state’s power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black.”¹⁷⁸ The Court invalidated the statute by relying on the Equal Protection Clause of the Fourteenth Amendment.¹⁷⁹

Reacting once again to the Court’s ruling, the Democratic Party in Texas barred African Americans from participating in the party nominating conventions. In *Grovey v. Townsend*, the Court seemed to reverse course

169. *Id.*

170. *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970).

171. *Love v. Griffith*, 266 U.S. 32 (1924).

172. *Id.*

173. *Id.* at 34.

174. *Id.*

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

176. *Id.* at 540-41.

177. *Nixon v. Condon* 286 U.S. 73, 82 (1932).

178. *Id.* at 89.

179. *Id.*

and held that the federal government had no authority over primaries that were under the direction of private political parties.¹⁸⁰ The Court's decision in *Terry v. Adams* finally recognized how much private parties influenced, if not controlled, the outcome of elections.¹⁸¹ The Court held that when private parties control elections, they, along with the states, are subject to the Fifteenth Amendment.¹⁸² It was not until 1944 in *Smith v. Allwright* that the Court finally put an end to white primaries in Texas and other states.¹⁸³

In short, the story of voting rights between ratification of the Fifteenth Amendment and passage of the Voting Rights Act of 1965 is not simply one of congressional failure to enact effective enforcement legislation. It is also the story of the Supreme Court and its ambivalence—if not outright indifference—in the face of post-Reconstruction hostility to universal franchise to properly assume its role in policing the boundaries of federal power and discharge its fundamental duty as guarantor of the dignity of national citizens.

At times, the Court believed itself—not always credibly—to be lacking in the requisite grant of constitutional or statutory power to stop what were plainly attempts by state officials to deny the political franchise to African Americans.¹⁸⁴ But at its best, in the years between Reconstruction and passage of the Voting Rights Act of 1965, the Court was the one institution that refused to permit claims of state sovereignty to trump demands for full national citizenship.¹⁸⁵ In those years, what the Court learned was that, as soon as it struck down one method of voter suppression, states would quickly respond with “schemes intended to emasculate constitutional

180. *Grovey v. Townsend*, 295 U.S. 45, 55 (1935).

181. *Terry v. Adams*, 345 U.S. 461, 476 (1953).

182. *Id.*

183. *Smith v. Allwright*, 321 U.S. 649 (1944).

The material in this paragraph (spanning footnotes 184-188) was taken from an amicus brief written by Professor Francois.

184. Veteran Brief, *supra* note 143, at 11-13 (citing *United States v. Reese*, 92 U.S. 214, 218 (1875) (holding that Congress lacked the power under the Fifteenth Amendment to require state election officials to count the ballots of all qualified voters); *United States v. Cruikshank*, 92 U.S. 542 (1876) (finding that the Fourteenth Amendment did not provide Congress the authority to indict a mob of private citizens for the killing of freedmen in the disputed 1872 Louisiana elections); *Giles v. Harris*, 189 U.S. 475 (1903); *Giles v. Teasley*, 193 U.S. 146 (1904) (upholding good character clauses); *Love v. Griffith*, 266 U.S. 32 (1924); *Grovey v. Townsend*, 295 U.S. 45, 55 (1935) (declining to outlaw white primaries); *Lassiter v. Northampton Cnty Bd. of Elections*, 360 U.S. 45, 51 (1959) (upholding constitutionality of literacy tests). See also ROBERT M. GOLDMAN, RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK (2001)).

185. Veteran Brief, *supra* note 143, at 11-13.

provisions or circumvent [the Court's] constitutional decisions."¹⁸⁶ Decisions such as *Neal v. Delaware*, *Guinn v. United States*, *Myers v. Anderson*, *Lane v. Wilson*, *Nixon v. Herndon*, *Nixon v. Condon*, *Smith v. Allwright*, *Terry v. Adams*, and *Gomillion v. Lightfoot*, show, if nothing else, that this Court's own precedent served as the jurisprudential justification for the Voting Rights Act.¹⁸⁷ For if, as Chief Justice Roberts explained barely four years ago, the Voting Rights Act is grounded in a judgment by Congress that it needed to have preemptive measures "[r]ather than continuing to depend on case-by-case litigation," it was in no small part the work of this Court between 1915 and 1964 that provided the incontrovertible evidence that nothing short of a permanent federal presence would ever be a sufficient corrective to the "dangerous vice" of political factions.¹⁸⁸

Therefore, if there is one overriding lesson to be learned from the Court's own jurisprudence on voting rights, it is simply this: since ratification of the Fifteenth Amendment, the United States Supreme Court, when deciding questions of the legitimacy of federal enforcement of voting rights, has always reached for a narrative of federalism that cast federal intervention as a historical aberration at best and a constitutional perversion at worst. Yet, for all of the Court's portrayal of federal power as an interloper upon state sovereignty when it comes to voting rights enforcement, the fact remains that there has never been a moment in American history—not one—when federal intervention, supervision, or enforcement was not necessary to guarantee full and meaningful voting rights for African Americans. And, whether the Court is willing to acknowledge that fact and the constitutional responsibilities that flow from it, in the end the Court's willingness to abide by the need for federal intervention has been—and always will be—the measure of African American political enfranchisement in America.

V. CONCLUSION

Above and beyond its jurisprudential omissions and inaccuracies, in the final analysis, the fundamental flaw in the Supreme Court's creation

186. *Harrison v. Nat'l Ass'n for the Advancement of Colored People*, 360 U.S. 167, 182 (1959) (Douglas, J., dissenting), *quoted in* Veteran Brief, *supra* note 143, at 11-13.

187. Veteran Brief, *supra* note 143, at 11-13 (citing *Neal v. Delaware*, 103 U.S. 370 (1880); *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 67 P.2d 542 (Kan. 1937); *Lane v. Wilson*, 59 S. Ct. 872 (1939); *Nixon v. Herndon*, 47 S. Ct. 446 (1927); *Nixon v. Condon*, 52 S. Ct. 484 (1932); *Smith v. Allwright*, 64 S. Ct. 757 (1944); *Terry v. Adams*, 73 S. Ct. 809 (1953); *Gomillion v. Lightfoot*, 81 S. Ct. 125 (1960)), *cited in* Veteran Brief, *supra* note 143, at 11-13.

188. THE FEDERALIST NO. 10, at 49-54 (James Madison) (Palgrave Macmillan ed., 2009), *cited in* Veteran Brief, *supra* note 143, at 11-13.

myth of voting rights is that the story the Court tells over and over again is one of a struggle between the reach of federal power and respect for state sovereignty. As I have tried to point out, completely absent from that narrative is the rather basic point that the Framers of the Constitution themselves repeated in the Federalist Papers, namely that the entire purpose of the American federalist project was not to protect the dignity of more or less random geographical demarcations on a map but rather to safeguard individual liberty, human freedom, and personal dignity.

But in a way it is perversely fitting that, in the half century of stories the Court has told about the need for the preclearance provisions of the Voting Rights Act of 1965, it has never seen the need to introduce into the narrative the part played by individual human actors. Years ago, before passage of the Voting Rights Act of 1965, when many of these individuals were barely out of their teens, they worked through such institutions as the Student Nonviolent Coordinating Committee (SNCC),¹⁸⁹ the Congress for Racial Equality (CORE),¹⁹⁰ the National Organization for the Advancement of Colored People (NAACP),¹⁹¹ the Council of Federated Organizations (COFO),¹⁹² the Mississippi Freedom Democratic Party (MFDP),¹⁹³ and Freedom Schools¹⁹⁴ throughout the Deep South to help register disenfranchised African American citizens in Mississippi and other southern states. The work was difficult and dangerous and some of their numbers were assassinated trying to carry it out, but it helped bring about enactment of the Voting Rights Act. To get deeper to the heart of the matter: without the work of these anonymous young people, the Voting Rights Act would not have existed.

189. For a brief history of the Student Nonviolent Coordinating Committee, see *What is SNCC?*, STUDENT NONVIOLENT COORDINATING COMMITTEE, <http://www.sncc50thanniversary.org/sncc.html> (last visited May 6, 2014).

190. For a brief history of the Congress of Racial Equality, see *The History of CORE*, THE CONGRESS OF RACIAL EQUALITY (May 6, 2014, 4:43 PM), <http://www.core-online.org/History/history.htm>.

191. For a brief history of the National Advancement of Colored People, see *NAACP: 100 Years of History*, NAACP, <http://www.naacp.org/pages/naacp-history> (last visited May 6, 2014).

192. For a brief history of the Council of Federated Organizations, see *COFO: What it Is, What it Does*, COUNCIL OF FEDERATED ORGS. (Dec. 10, 1964), <http://www.crmvet.org/docs/cofo.pdf>.

193. For a brief history of the Mississippi Freedom Democratic Party, see *Mississippi Freedom Democratic Party*, CENTER FOR ORAL HISTORY AND CULTURAL HERITAGE AT THE UNIV. OF SO. MISS., <http://www.usm.edu/crdp/html/cd/mfdp.htm> (last visited May 6, 2014).

194. *Id.*

Many of them worked on the ground in what was then considered ground zero of the civil rights movement: the State of Mississippi.¹⁹⁵ Today, those who survive—and every year fewer and fewer remain—belong to an organization called Veterans of the Mississippi Civil Rights Movement. Their stories as veterans of the movement are as diverse as their races, religions, economic backgrounds, and ancestral origins. Some of their ancestors were slaves and sharecroppers. Some of their ancestors were immigrants escaping oppression elsewhere in the world. Some of them are children of the Deep South whose lives were touched by lynchings and other forms of racial terror. Some of them traveled to the Deep South as students inspired by civil rights protesters' brave claims of the right to occupy public spaces, to register and vote, and to take their civic roles as people of the United States. The common thread that runs through our lives is a desire to "provide leadership in the ongoing pursuit of human rights."¹⁹⁶ Here are some of their stories.¹⁹⁷

Hollis Watkins is the great-grandson of an African slave on his father's side and a Choctaw Native American and White Jewish plantation owner on his mother's side.¹⁹⁸ Now the Chair of the Veterans, Mr. Watkins began his voting rights work as a seventeen-year-old member of the youth chapter of the NAACP.¹⁹⁹ At nineteen he became a Mississippi field secretary for SNCC with the responsibility of going door to door throughout the state to register African Americans to vote. For that, he was arrested and sent to work on a chain gang.²⁰⁰ He was then transferred to the state penitentiary where he was locked in the maximum-security death row unit.²⁰¹ For singing freedom songs, he was placed in solitary confinement, a six-by-six foot concrete box called "the hole" where the only access to air was the small crack between the bottom of the door and the floor.²⁰² A native of

195. See Douglas O. Linder, *Bending Toward Justice: John Doar and the "Mississippi Burning" Trial*, 72 MISS. L.J. 731, 731 (2002). See also JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* (1994).

196. See VETERANS OF THE MISS. CIVIL RTS. MOVEMENT, INC., <http://www.ms civilrights veterans.com/> (last visited Apr. 14, 2014).

197. A complete archive of their stories has been collected in Oral History Project, VETERANS OF THE MISS. CIVIL RTS. MOVEMENT, INC., <http://www.ms civilrights veterans.com/oral-history.html>. Selected biographical sketches of the veterans discussed in this Article were taken from videotaped interviews conducted by the author on the campus of Tugaloo College in Mississippi in January 2013. The full recording of the interviews are available at Neglected Voices, N.Y.U. SCH. OF L., <http://www1.law.nyu.edu/davisp/neglectedvoices/index2.html>.

198. See *Neglected Voices*, N.Y.U. SCH. OF L., <http://www1.law.nyu.edu/davisp/neglectedvoices/index2.html> (last visited Apr. 14, 2014).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

Mississippi, Mr. Watkins has lived in the state all his life and today continues to work on behalf for equal rights for all Americans.²⁰³

Jesse Harris's ancestors came from the Bahamas, where his grandfather worked on a plantation before immigrating to South Carolina, and Mississippi, where his grandmother grew up on a Choctaw Reservation.²⁰⁴ The year Harris turned seventeen, a local white mob lynched Mack Charles Parker, a twenty-three-year-old black man, accused but not tried or convicted, of sexually assaulting a white woman.²⁰⁵ Two years later, Harris joined the Freedom Rides when they arrived in Jackson, Mississippi.²⁰⁶ He was arrested and sent to the Mississippi State Penitentiary.²⁰⁷ There, he recalls, his education began. His cellmates were James Farmer, a cofounder of CORE, James Lawson, an early adherent of Gandhi and nonviolent protest, and James Bevel, a member of SNCC.²⁰⁸ He remembers listening to and learning from these activists and, even though in prison, feeling for the first time in his life like a free man.²⁰⁹ On his release, he became a field secretary for SNCC, working on voter registration in Mississippi and organizing direct protests to desegregate public accommodations in Jackson, Mississippi.²¹⁰

Dr. Robert (Bob) Moses's paternal grandparents, William Henry Moses and Julia Trent Moses, met while students at Virginia Seminary late in the nineteenth century. William was a former officer in General Robert E. Lee's army of Northern Virginia who, in time, would become a Vice President of the National Baptist Convention and a supporter of Marcus Garvey.²¹¹ Moses's maternal grandmother was raised in Richmond, Virginia, and traces her family to a slave plantation in Richmond where her grandfather appears as an item of property on the will of the plantation owner. Moses was raised in Harlem.²¹² He attended public schools in New York and earned his Bachelor's degree at Hamilton College in 1956 and his Master's

203. See *Neglected Voices*, N.Y.U. SCH. OF L., <http://www1.law.nyu.edu/davisp/neglectedvoices/index2.html> (last visited Apr. 14, 2014).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. See *Neglected Voices*, N.Y.U. SCH. OF L., <http://www1.law.nyu.edu/davisp/neglectedvoices/index2.html> (last visited Apr. 14, 2014).

209. *Id.*

210. *Id.*

211. Interview with Dr. Robert Moses, President and Founder of the Algebra Project, in New York City (Nov. 12 & 19, 2012) (on file with the author). The Algebra Project is "a 501 (c) (3) national, nonprofit organization that uses mathematics as an organizing tool to ensure quality public school education for every child in America." See *Who We Are*, THE ALGEBRA PROJECT, <http://www.algebra.org/whoweare.php> (last visited May 6, 2014).

212. Interview with Dr. Robert Moses, President and Founder of the Algebra Project, in New York City (Nov. 12 & 19, 2012) (on file with the author).

in Philosophy at Harvard University in 1957.²¹³ In 1958, Moses was working as a math teacher at the Horace Mann School in New York when the sit-ins broke out in the Deep South.²¹⁴ Fascinated, that April he visited Virginia to experience the sit-in movement first hand.²¹⁵ He marched with Hampton students to Newport News, and then worked in Harlem to gather support for Dr. Martin Luther King, Jr. and Bayard Rustin, who eventually organized the 1963 March on Washington, ran the Harlem office, and sent Moses to work with Ella Baker of SCLC in Atlanta. In the SCLC Atlanta office, Moses discovered SNCC and began a SNCC scouting trip through Alabama, Mississippi, and Louisiana.²¹⁶ In Mississippi, Moses met Amzie Moore, president of the Cleveland, Mississippi NAACP, who laid out the concept of student-led voter registration organizing among blacks of the Mississippi Delta. Moses spent the next four years working on the “SNCC/Amzie Moore” voter registration strategy.²¹⁷ These days, Moses applies the lessons learned in the Mississippi voter registration work to establish math as an indispensable aspect of twenty-first century literacy for the nation’s students.²¹⁸

Owen Herman Brooks was born in 1928 in New York City of parents who emigrated from Jamaica.²¹⁹ His family moved to Boston, Massachusetts, where he began his political education working on the municipal campaign of Edward Brooks, who would in time serve as a the first African American in the United States Senate since Reconstruction.²²⁰ He recalls his first journey South in 1951, chartering an integrated bus to drive to Richmond, Virginia to observe the trial of the so-called Martinsville Seven, a group of young African American men who were tried, convicted, and executed for the alleged gang rape of a white woman.²²¹ He came to Mississippi for the first time in 1964.²²² That year, the National Council of Churches, an ecumenical partnership of Christian faith groups, formed the Delta Ministry to hold grassroots training of black sharecroppers in Mississippi on the importance of voting and political activism.²²³ Brooks became a field repre-

213. *Id.*

214. *Id.*

215. *Id.*

216. *See Neglected Voices*, N.Y.U. SCH. OF L., <http://www1.law.nyu.edu/davisp/neglectedvoices/index2.html> (last visited Apr. 14, 2014).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *See Neglected Voices*, N.Y.U. SCH. OF L., <http://www1.law.nyu.edu/davisp/neglectedvoices/index2.html> (last visited Apr. 14, 2014).

222. *Id.*

223. *Id.*

sentative of the ministry in 1965 and has remained in the state to the present day working on political empowerment of disenfranchised groups.²²⁴

Ellen Lake's ancestors were Jews; some came from Germany, while others fled Eastern Europe at the turn of the twentieth century to escape anti-Jewish pogroms and forced draft into the Tsar's army.²²⁵ Her family settled in New York City.²²⁶ Her first involvement with civil rights work came as a high school student when she picketed a landlord in Rye, New York, who would not rent to blacks.²²⁷ In 1964, after her sophomore year in college, she travelled to Mississippi for Freedom Summer, where she worked on voter registration.²²⁸ The following summer, she cofounded *The Southern Courier*, a weekly civil rights newspaper in Alabama.²²⁹ After Lake went South for Freedom Summer, her father became the treasurer of the local Friends of the Mississippi Freedom Summer while her mother wrote letters to her congressmen, senators, and the Justice Department, demanding protection for the volunteers and for the local civil rights activists.²³⁰

Willie Edward Blue is a native of Charleston, Mississippi, whose grandparents worked as sharecroppers on a plantation in Louisiana.²³¹ Growing up, he recalls two neighbors being run out of town, their houses burned, their lands seized for trying to organize a local chapter of the NAACP for Tallahatchie County.²³² After discharge from the United States Navy in 1963, he returned to Charleston, planning to use his veteran benefits to spend time home before college.²³³ However, at the time, Mississippi vagrancy laws required that he be employed or deemed vagrant and subject to arrest and imprisonment.²³⁴ The only employment open to a young black man was work in cotton fields, so he hitchhiked to Greenwood, Mississippi, where he joined the local SNCC office, first as a volunteer and then as a

224. *Id.*

225. Email Interview with Ms. Ellen Lake, co-founder of the Southern Courier, (Jan. 31, 2013) (on file with the author). The Southern Courier was a bi-racial newspaper established in 1965 by students from Harvard College to document the civil rights struggle in the Deep South. The paper was based in Montgomery, Alabama and had offices in Alabama and Mississippi. It began publication in July 1965 and published weekly for three years for a total of 177 issues. *See also The Courage of Courier*, THE S. COURIER, <http://www.southerncourier.org/> (last visited May 6, 2014).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *See Neglected Voices*, N.Y.U. SCH. OF L., <http://www.l.law.nyu.edu/davis/neglectedvoices/index2.html> (last visited Apr. 14, 2014).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

staff member in the organization's voter registration campaign.²³⁵ Like many of his colleagues, he suffered jails and beatings, the physical scars of which he carries to this day.²³⁶ And, like many of his colleagues, he recalls back in those days of protests turning to the Federal Bureau of Investigation and other federal agencies for protection, only to be told that it was not the place of the federal government to interfere with state business.²³⁷

Doctor Leslie Burl McLemore was born in 1940 in Walls, Mississippi.²³⁸ He obtained a bachelor's degree from Rust College, a Master's Degree in Political Science from Atlanta (now Clark) University, and a Ph.D. in Government from the University of Massachusetts at Amherst.²³⁹ After a postdoctoral fellowship at John Hopkins University, he joined the faculty at Jackson State University. Since his retirement from Jackson State as Professor Emeritus in Political Science, Dr. McLemore has served as Director of the Fannie Lou Hamer National Institute on Citizenship and Democracy.²⁴⁰ Founded in 1997 and named after a pioneer of the civil rights movement, the institute works with local school boards, colleges, state agencies, and national organizations to promote civic engagement and popular sovereignty.²⁴¹ Dr. McLemore began his civil rights work as a student in 1961.²⁴² There, he helped organize to integrate the lone movie theater and lunch counter in Hollis Springs.²⁴³ Rather than integrate, the movie theater closed down, while the drug store removed all seating at its lunch counter.²⁴⁴ He helped found a local branch of the NAACP at his college.²⁴⁵ Approximately a year before he was assassinated in his driveway, Medgar Evers installed Dr. McLemore as an officer of the local NAACP.²⁴⁶ Dr. McLemore's grandfather was one of the first African American men to own land in Walls, Mississippi, but he was not permitted to vote.²⁴⁷ Today, Dr. McLemore continues his civil rights work through the Fannie Lou Hamer Institute.²⁴⁸

235. *Neglected Voices*, N.Y.U. SCH. OF L., <http://www1.law.nyu.edu/davisp/neglectedvoices/index2.html> (last visited Apr. 14, 2014).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *See Neglected Voices*, N.Y.U. SCH. OF L., <http://www1.law.nyu.edu/davisp/neglectedvoices/index2.html> (last visited Apr. 14, 2014).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *See Neglected Voices*, N.Y.U. SCH. OF L., <http://www1.law.nyu.edu/davisp/neglectedvoices/index2.html> (last visited Apr. 14, 2014).

246. *Id.*

247. *Id.*

248. *Id.*

“All legal doctrines are stories, structured upon formal but ambiguous texts and nourished by history and culture. They owe their existence to collective recognition which comes as a result of their resonance with the culture and traditions of the people who announce and live by their terms.”²⁴⁹ None of these individuals have ever been credited or even mentioned in a Supreme Court’s decision for their role in passage of the Voting Rights Act of 1965, and, needless to say, not one of them was mentioned in Chief Justice Roberts’s majority opinion that effectively invalidated section 5. They are not part of the story, and, being absent from the narrative, they have neither shaped the Court’s voting rights doctrine, nor have they come to resonate “with the culture and tradition” of the Court. They have constructed for themselves, and for those who love them, lives full of meaning. However, while some have achieved a measure of public recognition, for the most part and for most of them, their role in bringing about the Voting Rights Act remains unknown and unacknowledged in the precincts of the United States Supreme Court. But if there is to be a creation myth of American voting rights, they have more than earned their part in it—they have more than earned *the* major part in it. In the teeth of violence and terror and sometimes at the price of their own lives, they made sure our nation would honor the dignity and political voice of all Americans. They were determined “to make [freedom] happen,” believing that “insofar as they can make it real for themselves, they will make it real for all of us.”²⁵⁰

Only a few of these individuals still live now. Year by year, day by day, more and more pass on. And, while those few who are still with us have been “made weak by time and fate,”²⁵¹ their work, past and present, is proof that they have “fought a good fight,” they have “finished [the] course,” they have “kept the faith.”²⁵² And now that with the *Shelby* decision section 5 has passed into legend, their work, past and present, remains the one true creation myth of American voting rights.

249. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 6 (1997).

250. James Baldwin, *They Can't Turn Back*, reprinted in *THE PRICE OF THE TICKET* 228 (St. Martin's Press 1985).

251. Alfred Lord Tennyson, *Ulysses*, in *THE POEMS OF TENNYSON* 560, 562-66 (Christopher Ricks ed., Longmans, Green & Co. Ltd. 1969).

252. *2 Timothy* 4:7 (King James).