

THE VOTING RIGHTS ACT AND THE TWO RECONSTRUCTIONS

In 1895, when the Fifteenth Amendment turned twenty-five, nobody celebrated. In South Carolina that year, Ben Tillman's faction passed a temporary registration law to prevent blacks from voting in a referendum on calling a disfranchising convention, insured that the convention would be called by stuffing the ballot box, struck a deal with the faction's "upper class" opponents to disfranchise many poor whites along with nearly all blacks, and proclaimed the new constitution without offering the voters a chance to reject it. Five years earlier, the Democratic leadership of Mississippi had jammed through a similar constitutional disfranchising scheme. By 1895, Georgia, Florida, Tennessee, and Arkansas had buttressed white Democratic supremacy with the poll tax, while every other ex-Confederate state except North Carolina had enacted some direct restriction on voting with the primary intent and effect of disproportionately disadvantaging African-Americans.¹

Ninety-five years later, Virginia has a black governor, 24 blacks and 10 Hispanics sit in Congress, there are 417 black and 124 Hispanic state legislators and

Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven: Yale Univ. Press, 1974), *passim*.

4388 black and 1425 Hispanic officers of city or county governments, six of the ten largest cities in the country have or have had black mayors, and in the eleven states that seceded, 61 % of the blacks and 70% of the whites were registered to vote in 1986.² South Carolina's nomination of an African-American for Governor in 1990 was hardly considered worthy of national remark. No one, even in the Reagan Administration, the most reactionary presidency since Coolidge's, proposed openly to restrict the suffrage of any non-whites.

Why the contrast? In this paper, I will argue that a detailed comparison of certain aspects of the two Reconstructions will help us to understand both more adequately. On the one hand, by making us more conscious about the problematic nature of facts that are too often taken for granted, the comparison provides a new approach to the classic question of why the First Reconstruction failed. On the other hand, the analogy throws a different light on controversies over the intent, development, consequences, and desirability of the 1965 Voting Rights Act, its interpretations, amendments, and proposed relaxation.

In a 1989 essay, the scholar who invented the term "Second Reconstruction" for the period since 1954, and who almost singlehandedly initiated the comparative history of America's First Reconstruction, confessed, in his typically ironic tone, to failure. Not only had the First Reconstruction failed, remarked C. Vann

²*Statistical Abstract, 1990* (Washington: GPO, 1990), 257, 260-1, 264.

Woodward, but he personally had failed "to find a satisfactory explanation for the failure of Reconstruction."³ In contrast, Eric Foner, no doubt constrained by the textbook format of his recent masterwork on Reconstruction, could not afford Woodward's rather coy reticence. Foner enumerated six reasons for the demise of Reconstruction: violence, "the weakening of Northern resolve," the inability of southern Republicans to develop a long-term appeal to whites, factionalism and corruption within the GOP, the rejection of land reform, and changing patterns in the national and international economic system.⁴

As admiring of the work of both Woodward and Foner as I am, I suggest that rather different and perhaps more satisfying answers to the general question of why Reconstruction failed may be obtained by simultaneously narrowing and lengthening the inquiry. To render the problem tractable, as well as to make it more relevant to the Voting Rights Act, I will concentrate solely on politics. Instead of comparing race relations in post-Civil War America to those in other post-emancipation societies, I will analogize it to post-World War II America. And instead of truncating the first period at 1877, when the revolution was not only unfinished, it was not even clearly over, I will carry my analysis through the turn of

³C. Vann Woodward, *The Future of the Past* (New York: Oxford Univ. Press, 1989), 199.

⁴Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper and Row, 1988), 603.

the nineteenth century.

The centerpiece of Reconstruction, Radical Republicans thought, was the vote. "A man with a ballot in his hand," the abolitionist Wendall Phillips declaimed, "is the master of the situation. He defines all his other rights. What is not already given him, he takes...The Ballot is opportunity, education, fair play, right to office, and elbow-room."⁵ But Republicans were not, even as they celebrated passage of the Fifteenth Amendment in 1870, so naive as to believe that the right to vote was self-executing, as Phillips's and other similar statements might seem to imply.⁶ All too aware of the difficulty of struggles over black enfranchisement even in the North, where blacks were largely disfranchised in 1865 and where white voters rejected racially equal suffrage in eight of eleven referenda from 1865 to 1869, Radicals fully realized that enfranchisement required practical safeguards against evasion and retrogression. From the first draft introduced into Congress of what were to become the Fourteenth and Fifteenth Amendments, therefore, proponents of racially impartial suffrage banned abridgement, as well as outright denial of the

⁵Quoted in William Gillette, *Retreat from Reconstruction, 1869-1879* (Baton Rouge: LSU Press, 1979), 23.

⁶And as some scholars carelessly charge. See William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore: Johns Hopkins Univ. Press, 1965), 161-62.

right to vote of any loyal, non-criminal, adult male citizen.⁷ Although they never specified in reports or floor debates from 1866 to 1869 exactly what practices "abridgement" prohibited, Congressmen probably had in mind the widely known example of New York, where Martin Van Buren and his allies in the "Albany Regency" had imposed a \$250 property requirement on blacks, but not on whites, in 1821, and where attempts to repeal the discriminatory standard had failed, though by ever closer margins, in referenda in 1846, 1860, and 1869.⁸ The meaning of the word "abridge" was by no means the only ambiguity in the deceptively simple Fifteenth Amendment. After Congress enfranchised blacks in ten southern states through the 1867 Military Reconstruction Act, white Democrats in Georgia, reasoning that the right to vote did not imply the right to hold office, expelled all the blacks elected to the subsequent state legislature.⁹ When, in 1869,

⁷Section two of the Fourteenth Amendment requires reduction of the Congressional representation of any state in which the suffrage "is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or *in any way abridged*, except for participation in rebellion, or other crime..." (italics supplied) According to James G. Blaine, *Twenty Years of Congress* (), II, 418-19, this language barred states from passing even facially neutral property, literacy, or religious tests. Repeated attempts in the first quarter of the twentieth century to enforce this section failed in Congress.

⁸Phyllis F. Field, *The Politics of Race in New York: The Struggle for Black Suffrage in the Civil War Era* (Ithaca: Cornell Univ. Press, 1982), 199 and *passim*; John Mabry Mathews, *Legislative and Judicial History of the Fifteenth Amendment* reprint ed., (New York: Da Capo Press, 1971), 14-15, 25, 34, 38-19. That they had a particular instance in mind, of course, does not mean that they would have opposed the application of the Amendment to other examples of abridgement. They were, after all, enacting a broad constitutional principle, rather than a minor statute that aimed to correct a transient situation.

⁹Edmund L. Drago, *Black Politicians and Reconstruction in Georgia: A Splendid Failure* (Baton Rouge: LSU Press, 1982), 48-49, 55-56.

Congress first explicitly guaranteed the right of African-Americans to hold office, then deleted that provision from the Fifteenth Amendment, did they do so, as historian William Gillette claims, with the intent of allowing racial restrictions on officeholding? Or, as prominent Radical Congressmen and Senators asserted at the time, was the connection between voting and officeholding so obviously close as to make formal protection of the latter superfluous, and might mentioning it explicitly be taken to imply that other restrictions were allowed?¹⁰ Similarly, did Congress's deletion of bans against literacy and property tests, after it had initially included such prohibitions in the Fifteenth Amendment, indicate that such qualifications, which everyone recognized would have a disproportionate impact on blacks, were constitutional?¹¹ Or, as the Radicals' position on the controversy over officeholding suggested, did the broad statement of the Fifteenth Amendment, together with the Equal Protection Clause of the Fourteenth, outlaw literacy, property, and all other similar qualifications? How wide was congressional power under section 2 of the Fifteenth Amendment? Did it grant Congress almost unlimited control over local, state, and federal elections, as Democrats and many Radicals agreed during

¹⁰William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore: The Johns Hopkins Univ. Press, 1965), 64-71; Mathews, *Legislative and Judicial History*, 47-8.

¹¹For the barebones narrative of these and other roll calls on the Fifteenth Amendment, see Edward McPherson, *The Political History of the United States of America During the Period of Reconstruction, April 15, 1865 - July 15, 1870*, reprint ed. (New York: Da Capo Press, 1972), 399-406.

the 1869 debates?¹² In particular, did it authorize Congress to prohibit individuals from interfering with the right to vote of other individuals, and could Congress regulate elections in an attempt to eliminate fraud? Or was section 2 essentially meaningless, as Democrats claimed whenever Congress considered bills to implement the Fifteenth Amendment after it had passed?¹³ To what degree did the Fifteenth Amendment, combined with the Fourteenth, constitute a national guarantee, which might be enforced by courts, as well as congress, of fundamental rights, including the right to be protected by state governments against violence?

Acting within two months of the proclamation of the passage of the Fifteenth Amendment,¹⁴ Republicans in Congress sought to protect every male citizen's right to vote against interference through violence, intimidation, or bribery by any persons or groups, official or unofficial. The far-reaching law, which still forms the basis of national protective legislation, undercuts the arguments of those historians who claim that Reconstructionists were constitutional conservatives, seriously

¹²Mathews, *Legislative and Judicial History* 47-50.

¹³Mathews, *Legislative and Judicial History*, 76-77, 90-96.

¹⁴Compare Michal R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South* (Athens: Univ. of Ga. Press, 1987), 10: "It was only with great reluctance that the Republican majority in Congress moved beyond the sort of negative intervention represented by statutory and constitutional prohibitions limiting what states could do to the enactment of legislation authorizing the federal government itself to prosecute wrongdoers who otherwise would have evaded punishment." Whatever reluctance congressmen felt did not slow them down appreciably.

constrained by traditional theories of federalism.¹⁵ Within a year, Congress had passed two more election acts, one supervising congressional elections from registration through the counting of ballots, and the other granting the President extensive powers to suppress the Ku Klux Klan and similar conspiracies.¹⁶ In 1875, the House passed an even stronger "Force Bill," providing more severe penalties, widening the scope of federally criminalized violent offenses, and prohibiting excessive poll taxes (an indication that Republicans believed that the Fifteenth Amendment at least allowed *Congress* to forbid tests that did not explicitly mention race). Democratic defiance and the disillusionment of some Republicans prevented the Senate from acting on the bill.¹⁷ In the next Congress in which they composed majorities of both houses, that of 1890, the Republicans came within a single vote of passing the most extensive bill in American history that aimed at corruption in elections.¹⁸

¹⁵The most careful and qualified of these is Michael Les Benedict, "Preserving the Constitution: The Conservative Basis of Radical Reconstruction," *Journal of American History*, 61 (1974), 65- ; and "Reconstruction and the Waite Court," *Supreme Court Review* (1978), 39-79.

¹⁶William Gillette, *Retreat from Reconstruction, 1869-1879* (Baton Rouge: LSU Press, 1979), 25-27; Foner, *Reconstruction*, 454-59.

¹⁷Gillette, *Retreat from Reconstruction*, 283-84; Edward McPherson, *Hand-Book of Politics for 1876* (Washington: Solomons and Chapman, 1876), 13-18.

¹⁸Edward McPherson, *Hand-Book of Politics for 1890*, reprint ed. (New York: Da Capo Press, 1974), 207-19; Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven: Yale Univ. Press, 1974), 29-33.

The Fifteenth Amendment and the Enforcement Acts were more effective than many scholars contend,¹⁹ and extensive black voting continued long after 1877. Tables 1 and 2 give two incomplete and inadequate glimpses of the process. In the early part of Reconstruction, blacks typically elected from 250 to over 300 state legislators and congressmen - about a sixth of the total - from the eleven states that actually joined the Confederacy.²⁰ They also composed a quarter of the delegates to the ten state conventions that reshaped the southern constitutional order between 1867 and 1869.²¹ In the mid-1870s, there was a dramatic plunge in the number of African-American officeholders elected, but thereafter, the total shrank gradually. At the end of the 1880s, as more southern states began to adopt laws restricting the suffrage, the number of black legislators was comparable to that in 1970, five years after the passage of the Voting Rights Act.

Perhaps most interestingly, the series beginning in 1868 is almost a perfect

¹⁹E.g., Gillette, *Retreat from Reconstruction*, 292-99.

²⁰There is no central source for the figures in Table 1, which was put together from numerous books and articles about each state. Because many of the Reconstruction state legislators were very obscure, and because later Democrats made considerable efforts, *1984*-style, to blot out evidence about Reconstructionists from published and unpublished records, the race of some legislators is unknown. Statistics for later years are generally more reliable, when they exist. The scanty histories of Florida and Arkansas give very incomplete lists, and these are the states for which the data is listed as missing in Table 1. The composition of the 1870 Georgia legislature is also unclear from published sources.

²¹Richard L. Hume, "Negro Delegates to the State Constitutional Conventions of 1867-69," in Howard N. Rabinowitz, ed., *Southern Black Leaders of the Reconstruction Era* (Urbana: Univ. of Illinois Press, 1982), 133.

mirror image of that a century later, the pattern of decay in the first inversely reflecting that of growth in the second, with relatively flat periods of little change in the middle of each. Since the Fifteenth Amendment and the Voting Rights Act were roughly analogous laws, and since each was followed by a series of enforcing and strengthening acts, the stark divergence in the trends in officeholding demands explanation.

(Table 1 about here.)

Although blacks' first preference, then as now, was to be represented by people of their own race, *ceteris paribus*, they continued to vote in large percentages even after widespread black officeholding became infeasible. As Table 2 shows, three years after Rutherford B. Hayes symbolically confined U.S. troops to their barracks in the South, an estimated two-thirds of the adult male blacks were recorded as voting, and two-thirds of *those* managed to have their votes recorded for James A. Garfield, whom they had nearly all, no doubt, supported, for President. Lest it be thought that the high black turnout, which would be very respectable a century later, was a fluke, or that Democrats allowed it only because national elections were less important to them than those closer to home, the second row averages estimates for one gubernatorial contest in each of the eleven states during the decade of the eighties. Despite the fact that none of these elections took place on the same day as voters balloted for president, six out of ten blacks turned out, and a similar percentage of them supported the Republican, Greenbacker, or other

anti-Democratic candidate.²² Even in the 1890s, after several states had restricted the suffrage, nearly half of the blacks are estimated to have voted in key gubernatorial contests, although the Populist-Democratic battles were sufficiently severe that Democrats pushed fraud to new levels.

(Table 2 about here.)

What accounts for the trend in the nineteenth century figures and for the differences between the nineteenth and twentieth century patterns?

The late nineteenth century counterrevolution took time, and its mechanisms were complex. There were five elements in the reversal of political Reconstruction, none sufficient by itself, all working together, but, roughly speaking, following a predictable developmental sequence: violence, fraud, structural discrimination, statutory suffrage restriction, and constitutional disfranchisement.²³

Violence was important, not only because it killed off or scared off southern Republican leadership, as is often noted, but also because it transfixed northern Republicans. The extent of Reconstruction violence and its political nature have

²²In these instances, there was probably not quite so much fraudulent counting as in the presidential race. Several of the Democratic candidates openly appealed for black votes, while some of the independents had such bad civil rights records that many black voters deserted their tickets.

²³For evidence on the existence of this developmental sequence, see my *Shaping of Southern Politics*.

been rightly stressed. Between the gubernatorial election in April and the presidential election in November of 1868, for instance, Louisiana Democrats, according to a congressional investigation, killed 1081 persons, mostly black. In St. Landry Parish alone in that six month period, as many as 200 African-Americans fell to the "Knights of the White Camelia" - about four times as many as died in the whole South during the civil rights movement of the 1950s and 60s.²⁴ 46 blacks were massacred in Memphis and 34 in New Orleans in 1866; 25-30 at Meridian, Mississippi in 1871, and 35 at Vicksburg in 1874; 105 at the tiny hamlet of Colfax, Louisiana on Easter Sunday, 1873, including 40 or so after they had laid down their arms and surrendered.²⁵ This extensive, systematic political terrorism has no parallel in the modern civil rights movement, and in sheer extent, it far surpassed the lynching spree of the 1890s.²⁶ Reconstruction violence astonished, mesmerized, and sometimes paralyzed the national Republican leaders, who devoted much - too much - of their legislative attention, as well as a great

²⁴Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (New York: Harper and Row, 1971), 129-35. Belknap, *Federal Law and Southern Order*, 29, notes only six civil rights-connected murders in the four years beginning in 1955 in the eleven states of the former Confederacy.

²⁵Trelease, *White Terror*, xlv; Vernon Lane Wharton, *The Negro in Mississippi, 1865-1890* (Chapel Hill: Univ. of North Carolina Press, 1947), 189-90; Ted Tunnell, *Crucible of Reconstruction: War, Radicalism and Race in Louisiana, 1862-1877* (Baton Rouge: LSU Press, 1984), 192.

²⁶Of course, I do not mean to belittle the violence of the 1950s and 60s, nor the suffering it caused. My point is that the violence in the First Reconstruction claimed perhaps a hundred times as many victims.

many "Bloody Shirt" speeches, to the topic.

The attention was excessive because violence was a relatively politically ineffective as well as a dangerous weapon for a conservative, upper-class-dominated group such as the southern Democrats to employ. If violence had permanently inhibited the political opposition, one would expect presidential returns from counties where there were well-known violent incidents in the 1860s and 70s to show a once-and-for-all destruction of the Republican vote. Table 3 demonstrates that this was not the case. In nine of twelve southern counties in which there were well-known "riots" or extensive assassinations, Republicans received approximately the same proportion of the votes as there were blacks in the population in the election after the incidents.²⁷ Even in the remaining three, the Republicans polled *some* votes. Furthermore, Establishment violence is costly, for those who own and control property and power have much to lose if the labor force leaves²⁸ or fights back by sabotaging property. And outside the region, the southern whites' reputation for violent oppression of blacks fueled campaigns for national

²⁷The list comes from Trelease, *White Terror*, xlv, 129; Tunnell, *Crucible of Reconstruction*, ch. 9.

²⁸Michal R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-Brown South* (Athens: Univ. of Ga. Press, 1987), 23.

intervention.²⁹ In sum, the direct political effect of violence, though significant, cannot, by itself, account for the decline of black voting in the nineteenth century.

(Table 3 about here.)

Fraud was probably more significant than violence, as composing election returns became a recognized art form, and excuses for the loss of official ballots stretched even the southern capacity for hyperbole. Mississippi officials, for instance, reported that horses and mules had developed a taste for ballot boxes.³⁰ Governor Samuel D. McEnery of Louisiana, a zealous enforcer of the legislative will, stated that his state's election law "was intended to make it the duty of the governor to treat the law as a formality and count in the Democrats." Virginia elections, according to the author of the state's chief election statute, were "crimes against popular government and treason against liberty." "Any time it was necessary," reported a delegate to the Alabama Constitutional Convention of 1901, whites who controlled the black belt "could put in ten, fifteen, twenty or thirty thousand Negro votes." "It is no secret," a leader of the 1890 Mississippi Constitutional Convention admitted, "that there has not been a full vote and a fair

²⁹See, e.g., Senate Report No. 855, 45 Cong., 1 Sess.(1878). As Jonathan Rowell (R, IL) expressed it during the debates on the Lodge Fair Elections Bill in 1890, "It is everywhere in Northern circles believed that the black vote of the Southern States is suppressed. It is everywhere believed that the Fifteenth Amendment to the Constitution of the United States is nullified." *Cong. Rec.*, 51 Cong., 1 Sess., 6555.

³⁰orton, *Negro in Mississippi*, 204.

count in Mississippi since 1875."³¹ But Congress often unseated counted-in candidates, and Republicans twice almost succeeded in strengthening laws against electoral chicanery.³² Like violence, moreover, fraud was a dangerous device for a government of the "best men," one whose propagandistic staple, in the South and especially in the North, was the charge that Reconstructionists had been corrupt.³³

The third means of accomplishing the counterrevolution, structural discrimination, involved such tactics as gerrymandering, the substitution of at-large for single-member-district elections and appointive for elective means of filling offices, annexations, and the adoption of non-statutory white primaries. By severely constraining the number of offices that anti-Democratic parties could hope to capture, even in a fair election, structural changes reduced the amount of overall violence and fraud necessary for the Democrats to carry elections, concentrated the opposition's attention on a few potentially winnable seats, dispirited the Democrats' adversaries, especially in districts where they had no chance to win, and increased the number of legislators willing to support further attacks on ethnic and political

³¹All quotes in Kousser, *Shaping of Southern Politics*, 46-47.

³²Kousser, *Shaping of Southern Politics*, 45-47.

³³The best-known examples of such propaganda are James S. Pike, *The Prostrate State: South Carolina Under Negro Government* (New York: D. Appleton and Co., 1874); and Hilary A. Herbert, et al., *Why the Solid South? Or Reconstruction and Its Results* (Baltimore: R.H. Woodward and Co., 1890).

minorities.³⁴

Gerrymanders were the paradigm example of this strategy. Two of the most impressive ones were the congressional monstrosities perpetuated in South Carolina and Mississippi. (See Figures 1 and 2 and Tables 4 and 5.) In the 1860s and early 1870s, Radical Republicans drew roughly equi-populous and compact districts that, with the exception of the Mississippi First District after 1873, did not outrageously concentrate the white population. Democrats played by no such rules, constructing the bizarre South Carolina Seventh, which contained the homes of two Republican incumbents and sliced across county lines in order to pack in every possible black voter, and the notorious Mississippi "shoestring" Sixth, which tracked the river for the length of the state and contained so much of the black population as to make the other five districts easy to carry with a modicum of violence and fraud. The outcomes in the districts, as Table 5 shows, were entirely as predicted. Well-known gerrymanders reduced the chances of electing black or black-favored white congressional candidates in other states,³⁵ and similar discriminatory games no

³⁴Kousser, "The Undermining of the First Reconstruction: Lessons for the Second," in Chandler Davidson, ed., *Minority Vote Dilution* (Washington: Howard Univ. Press, 1984), 27-46.

³⁵Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* (Baton Rouge: LSU Press, 1981); Sarah Wookfolk Wiggins, "Democratic Bulldozing and Republican Folly," in Otto H. Olsen, ed., *Reconstruction and Redemption in the South* (Baton Rouge: LSU Press, 1980), 68-69; Foner, *Reconstruction*, 590-91.

doubt took place on the local and state legislative levels.³⁶

(Tables 4 and 5 and Figures 1 and 2 about here.)

Although violence, fraud, and restructuring could usually keep political dissent in check, they could not eliminate it. Nineteenth century Democrats rightly feared national anti-violence and anti-corruption bills before legal disfranchisement, for there was a core of black political strength to build on if southern Democrats could be forced to allow "a free ballot and a fair count."³⁷ The final solution to the problems of political dissent and black suffrage was the adoption of statutory restrictions such as registration and secret ballot laws (the latter often serving as *de facto* literacy tests), and constitutional provisions, such as poll taxes and literacy or property qualifications. The first set of laws often shrank dissent so that the second set could be imposed.³⁸ It is these latter laws, along with the formal white primary that often attended them, that first attracted national legislative and judicial attention after 1930.

Why was there no move to attack the discriminatory southern electoral

³⁶For instance, in Jacksonville, Florida, a poll tax and a multiple ballot box law failed to rid the city council of all black members, so in 1907, the council constructed a blatant racial gerrymander. No black was elected to the council from then until the 1970s. Edward N. Akin, "When a Minority Becomes the Majority: Blacks in Jacksonville Politics, 1887-1907," *Florida Historical Quarterly*, 53 (1974), 123-45.

³⁷This argument is developed at much greater length in my *Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven: Yale Univ. Press, 1974).

³⁸The sequences and much detail are provided in Kousser, *Shaping of Southern Politics*.

structures,³⁹ which were widely known and condemned in the late nineteenth century,⁴⁰ and why were congressional efforts to punish violence and prevent fraud much less successful than in the period since 1957? There are two answers to these questions: congressional partisanship, and judicial perfidy. Tables 6 and 7 present a remarkably sharp and little-noticed contrast. Civil rights was an entirely partisan issue in the nineteenth century, but, in the north at least, voting rights has enjoyed nearly unanimous support since 1957. That partisanship helped consolidate Republican support for civil rights in the postbellum period has often been noted, and Republicans have repeatedly been derided for it.⁴¹ Many Republicans did not "really" support black rights, the line goes, but only "expediently" endorsed bills under the party whip. .cp4

³⁹In 1890, the radical Harrison Kelley (R, KA) did introduce a bill, drafted by former North Carolina carpetbagger Albion Tourgee, that required Congressional districts to be equal in population, and gave Congress the right to draw district boundaries. It also made the secret ballot mandatory in congressional elections and required states to allow all adult males except felons to vote. Tourgee appeared before a congressional committee to testify for his bill, and Speaker Thomas B. Reed endorsed some parts of it, but the bill was too radical for the Republican caucus. Daniel W. Crofts, "The Blair Bill and the Elections Bill: The Congressional Aftermath to Reconstruction," (unpub. Ph.D. thesis: Yale Univ., 1968), 252-61.

⁴⁰See, e.g., *New York Times*, July 13, 1882, 5; July 27, 1882, 5. In his first annual message in 1889, President Benjamin Harrison asked: "When and under what conditions is the black man to have a free ballot? When is he in fact to have those full civil rights which have so long been his in law? When is that equality of influence which our form of government was intended to secure to the electors to be restored?" In his second annual message in 1890, he remarked that "Equality of representation and the parity of the electors must be maintained or everything that is valuable in our system of government is lost." James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (Washington: GPO, 1900), IX, 56, 127-29.

⁴¹William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* (Baltimore: Johns Hopkins Univ. Press, 1965) is perhaps the most strident modern example.

Whatever the validity of this argument, its converse surely holds for the Democrats.⁴² From 1866 to the turn of the century, not a *single* Democrat in the House or Senate *ever* voted in favor of a piece of civil rights legislation! Northern Democrats repeatedly defended southern violence and fraud or denied their obvious existence, and they staunchly supported the endless filibusters - for instance, a month in the Senate in 1890 - against civil rights laws.⁴³ This was true in spite of the fact that a considerable number of Democrats defected from their party's racist tradition from time to time on local issues in the North. As governor of New York, for instance, Grover Cleveland signed a school integration measure that applied to Manhattan in 1883; and Governor George Hoadly of Ohio convinced some Democrats to vote for school integration bills in that state's legislature in 1884. Democrats all over the North either supported or acquiesced in the passage of state

⁴²I find, somewhat to my chagrin, that C. Vann Woodward anticipated this argument long ago. See his *The Burden of Southern History* (Baton Rouge: LSU Press, 1960), 97.

⁴³Lawrence Grossman, *The Democratic Party and the Negro: Northern and National Politics, 1868-92* (Urbana: Univ. of IL Press, 1976), 48-49, 143-55. Thus, Roswell P. Flower (D, NY) condemned the 1890 supervisory bill as an attempt to "revolutionize the Government and set up on the ruins of our free institutions a government by fear, force, and fraud." Richard Vaux (D, PA) thought the authors of the bill were aiming at the "overturning of the Constitution of the United States and destroying our form of government." William McA doo (D, NJ) denounced the effort as "drastic and revolutionary." William J. Stone (D, MO) referred to proponents of the bill as "damned, odious traitors." Cong. Rec., 51 Cong., 1 Sess., 6601, 6603, 6672-75, 6848. Democratic bills to repeal the Reconstruction supervisory act passed both houses of Congress, on strict party line votes, in 1878 and 1894. In the former, President Hayes vetoed the bill, even though it was a rider to an Army appropriations act. In the latter, President Cleveland signed the bill. Vincent P. DeSantis, *Republicans Face the Southern Question: The New Departure Years, 1877-1897* (Baltimore: Johns Hopkins Univ. Press, 1959), 85; Stanley P. Hirshson, *Farewell to the Bloody Shirt: Northern Republicans and the Southern Negro, 1877-1893* (Bloomington: Univ. of Ind. Press, 1962), 56-57; Leon Burr Richardson, *William E. Chandler, Republican* (New York: Dodd, Mead and Co., 1940), 461-64.

integrated public accommodations laws after the Supreme Court's abrogation of the 1875 national civil rights law in 1883.⁴⁴ It was neither constituency pressure nor personal racist belief that kept Democrats from backing voting rights bills in the nineteenth century, for at home, some were willing to defect from the party's traditional racism. The imperative that drove big-D Democrats to abandon small-d democratic ideals in the nineteenth century was clearly the drive for national political power.

(Tables 6 and 7 about here.)

Table 7 shows that since 1957, support for voting rights has been overwhelming and constant for northern Democrats in both houses of Congress, and for northern Republicans in the Senate.⁴⁵ There was a substantial anti-VRA shift among House Republicans during the Nixon Administration, but that "southern strategy" quickly faded. The southern pattern is one of a dramatic shift toward civil rights, most strikingly among House Democrats, who opposed the extremely weak 1957 law unanimously, but backed the much more stringent 1982 Act by a ten-to-one ratio. At the height of the Reagan Administration's power, six out of ten southern

⁴⁴Lawrence Grossman, *The Democratic Party and the Negro: Northern and National Politics, 1868-92* (Urbana: Univ. of IL Press, 1976), 66-67, 82-106.

⁴⁵This fact has either gone unnoticed or been treated as unproblematic or unimportant. For instance, in their recent *Race and the Decline of Class in American Politics* (Urbana: Univ. of IL Press, 1989), Robert Huckfeldt and Carol Weitzel Kohfeld comment: "To the extent that both major parties depend upon black votes, they would both be forced to become parties of civil rights." (p.179) As they show, blacks are overwhelmingly Democratic, yet on voting rights issues, the two parties are already parties of civil rights.

Republicans voted for the Voting Rights Act on final passage.

Why was there such unanimity within and such division between the parties on this issue in the nineteenth century, and why did the two centuries' patterns contrast so starkly? Tables 8 and 9 suggest some tentative answers. Table 8 demonstrates that the nineteenth century Congress was much less stable in membership than in more recent years. The standard deviation of the Republican percentage of House members for the nineteen sessions from 1865 through 1901 was more than four times as high as that for the seventeen sessions from 1957 through 1989. That in the Senate was nearly twice as high in the first as in the second period. Politicians, of course, took note of such facts, James G. Blaine, for instance, remarking in his memoirs that new members composed majorities of nine of the ten sessions of the House from 1861 to 1881.⁴⁶

(Table 8 about here.)

That it was not the fickleness of the nineteenth century electorate that led to the relatively extreme fluctuations in congressional representation is substantiated by Table 9, which shows that in presidential elections, it is the *recent* period that is unstable, while the earlier one was comparatively immobile. In both the percentage of the popular vote and that of the electoral vote, the standard deviation in the last nine presidential contests has been more than twice that in the nine elections from

⁴⁶Blaine, *Twenty Years of Congress* (Norwich, CT: Henry Bill, 1886), II, 675.

1868 through 1900. What are we to make of the inconsistencies in these patterns, and what implications do they have for the fate of voter protections by the national government?

(Table 9 about here.)

I have no good answer to the first question. As Peter Argersinger has recently pointed out, historians have just begun to examine most structural questions about nineteenth century non-southern politics. We do not know whether the "swing ratio" was different in the last century, how unequal and how partisan congressional and legislative apportionments were in general, and to what extent structural characteristics of the political system might account for the instability of congressional results.⁴⁷ For the years since 1946, the most recent work rejects "structural" explanations in favor of "political" ones. "Divided party control," Gary Jacobson contends, "reflects, rather than thwarts, popular preferences..."⁴⁸ Mass attitudes might, however, account for much less of the dissonance between congressional and presidential returns in the 1800s.

The consequences of the differences between centuries seem to me clearer. When they arrived in Washington in the nineteenth century, congressmen had little

⁴⁷Peter H. Argersinger, "The Value of the Vote: Political Representation in the Gilded Age," *Journal of American History*, 76 (1989), 59-90.

⁴⁸Gary C. Jacobson, *The Electoral Origins of Divided Government: Competition in U.S. House Elections, 1946-1988* (Boulder, CO: Westview Press, 1990), xv.

identity apart from their political party, and few remained long enough to develop one. They therefore naturally adopted their party's dominant view. As the Senate leader of the fight for the Fair Elections Bill of 1890 phrased it, a free ballot was the "very definition of Republicanism."⁴⁹ The only way to alter the party identity was to experience a series of whipsawing elections, such as those from 1890 through 1894, which first leveled Republican incumbents, and then did the same thing to the Democrats, resulting in the retirement of large numbers of core members of each party.

As for presidential elections in the late nineteenth century, they were so close, and candidates before "civil service reform" were so dependent on party activists and so independent of nonpartisan special interest groups, compared to their counterparts today, that they had to enliven the faithful with appeals to traditional issues - the Civil War and its associated race issues, as well as the tariff and monetary policy. Furthermore, since Republicans realistically believed that with anything like a fair count, they could carry some southern states during this period, and since Democrats needed every southern electoral vote to win the presidency, control of the southern ballot box was crucial to both parties. By contrast, only in 1960 and 1976 in recent years have the two parties closely contested southern electoral votes. Usually, the Republicans have been able to count on them, whether

⁴⁹George F. Hoar, "The Fate of the Election Bill," *The Forum*, 11 (April, 1891), 127-28.

blacks voted overwhelmingly for the Democrats or not. Republican presidents therefore have had little incentive to oppose even a strengthened VRA, while Democrats, heavily dependent on their black constituents if they were to have a chance of carrying a national election, have had no choice but to support civil rights enthusiastically.

As far as minority voting rights are concerned, in the nineteenth century, the parties were too competitive, too "responsible," too dependably committed to a program, and the voters were too civically conscious to let elites stray from orthodoxy. Black votes counted for too much nationally. In this view, it is the presidential landslides, the durability of congressional incumbents, the decline of party loyalty among voters and elites, and the inattention of the public in the last generation that explain why voting rights for blacks and browns has become a consensus issue. The First Reconstruction died, I am suggesting, from too much democracy, while the Second has thrived precisely because competition has shriveled.

Even if political conditions had favored congressional action on civil rights after 1874, the Supreme Court would probably have invalidated or undermined any

resulting laws. During the 1880s, to be sure, in *Ex parte Siebold*⁵⁰, *Ex parte Clarke*,⁵¹ and *Ex parte Yarbrough*,⁵² the high court interpreted Congress's plenary power under Article I, section 4 to regulate the "times, places and manner of holding elections" to Congress broadly enough to allow it to guarantee peaceable assembly and restrict fraud and violence. These decisions encouraged the sponsors of the 1890 Fair Elections Bill.

But two disastrous opinions of 1876 in *U.S. v. Reese*,⁵³ and *U.S. v. Cruikshank*⁵⁴ had ruled unconstitutional or largely unenforceable those sections of the 1870-72 Enforcement Acts that attempted to protect all citizens against violence or fraud, state-sponsored or private, in connection with state or local elections. Kentucky officials had refused to accept the ballots of citizens because they were black, while Louisiana had both failed to protect the victims of the Colfax "riot" and to indict the perpetrators of that largest racial mass murder in American history. Yet, according to Chief Justice Morrison Waite, convictions for these actions in federal courts must

⁵⁰100 U.S. 371 (1880).

⁵¹100 U.S. 339 (1880).

⁵²110 U.S. 651 (1884).

⁵³92 U.S. 214 (1876).

⁵⁴92 U.S. 542 (1876).

be overturned. In each case, the key to the ruling was Waite's insistence that laws and indictments focus on racial intent.

The Enforcement Act at issue in *Reese* had four relevant sections, the first two of which mentioned race, while the last two did not, but referred, for instance, to the "wrongful act or omission as aforesaid" - i.e., the act by which blacks, on account of their race, were denied the right to become legally qualified to vote.⁵⁵ Waite ruled that sections 3 and 4 were unconstitutional, because they did not directly mention race, and the only national power to protect citizens' right to vote in state and local elections derived from the Fifteenth Amendment. Likewise, in *Cruikshank*, after a preliminary disquisition on federalism that echoed Democratic rhetoric during the "Force Bill" debates, Waite dismissed the case, not on the ground that the law was unconstitutional, but because the indictment did not aver that the blacks were murdered or denied the right to vote *because* they were black.

The decisions were deeply disturbing for four reasons: Most fundamentally, the Lexington blacks were admittedly denied the right to vote on account of their race; all the victims at Colfax were black; the laws perfectly fit the situations in each instance; indictments were filed, and southern juries convicted the malefactors; yet the Republican Supreme Court let them off. The Reconstruction attempt to use the normal instrumentalities of government to protect the new citizens had failed at the

⁵⁵For a trenchant analysis of the act, see the dissent of Justice Hunt, 23 L.Ed. 563, at 572 (1876).

top. Second, the Fourteenth Amendment, which sought, without explicitly mentioning race at all, to protect all citizens against discrimination and deprivation of liberty, was significantly weakened.⁵⁶ Waite might have torn sections three and four from sections one and two and still sustained them as protections of citizens' rights to enjoy the suffrage impartially under the Equal Protection or Privileges or Immunities Clauses of the Fourteenth Amendment. He might then have ruled that the rights of peaceable assembly and life were guaranteed by the nation under the Fourteenth Amendment, and that they were rights that applied to all citizens, rather than depending on race.⁵⁷ Third, by insisting on proof of a racist intent, perhaps even of racial hostility, Waite was making it much more difficult to obtain convictions. If 105 black bodies did not prove racial animosity, what would? Finally, these two decisions severely constrained the potential of congressional

⁵⁶Unlike the Fifteenth Amendment, which bans discrimination in voting "on account of race, color, or previous condition of servitude," the Fourteenth Amendment does not mention race, and, of course, it was used extensively in the period before 1937 to guarantee the rights of corporations, which have no race. In "Congressional Power under the Fourteenth Amendment - The Original Understanding of Section Five," *Constitutional Commentary* 3 (1986), 123-55, Michael P. Zuckert demonstrates conclusively that in the debate over the Ku Klux Act, Congress relied on the Fourteenth Amendment, and that it adopted the "state failure," rather than the "state action" interpretation of that Amendment. If Congress anticipated that a state would fail to protect its citizens against other individuals, in other words, Congress could directly provide that protection.

⁵⁷To consider merely one fact, extensive reports from the South emphasizing persecution not only of blacks, but of southern ex-Unionists were crucial in building support for Radical Reconstruction from 1865 on. See, e.g., Foner, *Reconstruction*, 225-26. That the Fourteenth Amendment was meant to protect the rights of all citizens is argued most forcefully in Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham: Duke Univ. Press, 1986).

action.⁵⁸ Whatever potential the Waite Court left, the Fuller Court destroyed.⁵⁹ In *Williams v. Mississippi*⁶⁰ in 1898, the Court denied disfranchised blacks a remedy by very strictly construing its earlier decision in *Yick Wo v. Hopkins*.⁶¹ Counsel for the Chinese laundrymen had shown that a San Francisco ordinance was adopted with both the intent and effect of discriminating against Chinese. While Henry Williams's lawyer quoted extensively from the Mississippi disfranchising convention of 1890 to demonstrate its racist intent, he apparently took the exclusion of blacks from the Greenville voter, and, therefore, jury rolls to be proof enough of the state constitution's discriminatory impact. The Court's crabbed reading of *Yick Wo* cost Williams, convicted of murder by an all-white jury, his life. Yet when a lawyer representing disfranchised Alabama blacks presented extensive evidence of

⁵⁸Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, and Co., 1922), III, 324-30; Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," *Supreme Court Review* (1978), 39-79; Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876* (New York: Oceana Pub., Inc., 1985), 199-229; John Braeman, *Before the Civil Rights Revolution: The Old Court and Individual Rights* (Westport, CT: Greenwood Press, 1988), 65-66. The Republican majority in the Senate did pass a bill restoring the provisions of the Enforcement Act that the Court had voided in *Reese*, this time unmistakably limiting their scope to denials based on race, but the Democratic-controlled House, naturally, did not act on the bill. C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* (New York: , 1963), 131.

⁵⁹As a Copperhead state legislator in Illinois during the Civil War, Fuller had - after the Emancipation Proclamation - introduced a bill to endorse a constitutional amendment guaranteeing slavery against legislative or executive action by the national government. Willard L. King, *Melville Weston Fuller, Chief Justice of the United States, 1888-1910* (New York: Macmillan Co., 1950), 116.

⁶⁰170 U.S. 213 (1898).

⁶¹118 U.S. 356 (1886).

discriminatory effect, as well as intent, the Court, in a decision written by the

"liberal" Oliver Wendall

Holmes, declared that the Court could do nothing, because suffrage was a "political question."⁶²

If, as argued earlier, one line on the tombstone of Reconstruction, should read "died of democracy," the next should have chiseled on it "and of the failure to protect democracy."⁶³ The contrast between the actions of the Waite and Fuller Courts and those of the Warren and even the Burger and Rehnquist Courts could hardly be stronger.

During the Second Reconstruction, not only did Congress pass and repeatedly

⁶² *Giles v. Harris*, 189 U.S. 475 (1903). In *Guinn and Beal v. U.S.*, 238 U.S. 347 (1915), the Oklahoma grandfather clause case, Chief Justice White entirely ignored *Williams* and *Giles*. Invalidating the grandfather clause enfranchised no blacks, because that patently unconstitutional device merely allowed illiterate whites to register legally. Throwing out *Giles*, however, would allow blacks to vote, since *Giles* was a challenge to the administration of the Alabama Constitution. A former member of the "conservative" faction of the Democratic party in Louisiana, which had opposed the grandfather clause in that state's constitutional convention in 1897, White wished to rule that escape clause unconstitutional, but he did not want to endanger white Democratic supremacy in the South. Consequently, he paid no attention whatsoever to the most obvious precedents. For a more extensive discussion of these cases, see my "How to Determine Intent: Lessons from L.A.", Social Science Working Paper 741 (June, 1990), 43-48.

⁶³ What of Foner's six causes of the failure of Reconstruction enumerated above? Violence, I have already discussed, and land reform is of fairly small relevance to politics, for the same violence that kept blacks from the ballot box could have deprived them of their property. Northern resolve did not weaken uniformly or decisively until much later in the century. Republican factionalism and inability to appeal to whites could have been overcome, if Republican voters could have been adequately protected and their votes counted. The depressions of the 1870s and 1890s were critical, I think, because they removed from office Republican elites who were committed, in varying degrees, to black rights. Foner's list is, in sum, not so much wrong as it is incomplete. I would put much more stress on political self-interest and on the actions of politicians (including judges) who controlled major political institutions.

strengthen its protections of minority voting rights, but the Supreme Court, with the exception of *Mobile v. Bolden*,⁶⁴ supported the law with considerable vigor. *Gomillion v. Lightfoot*⁶⁵, the Tuskegee gerrymander case, ran the film of the decisions from *Reese* to *Giles* backwards, as it were. Despite brute intransigence and ingenious subterfuges by white officials in the nation's most heavily black county, enough African-Americans managed to register to vote to threaten white control of the town of Tuskegee. Macon county Representative Sam Englehardt therefore pushed through the Alabama legislature a bill redefining the boundaries of Tuskegee to make it an almost wholly white town.⁶⁶

Justice Felix Frankfurter's opinion smashed the "political question" or "justiciability" roadblock. Even Frankfurter, who had held back consideration of rotten borough cases in *Colegrove v. Green*,⁶⁷ was shocked by the "strangely irregular 28-sided-figure" drawn to "fence out" blacks from Tuskegee. The decision also reunited the Fourteenth and Fifteenth Amendments, sundered in *Reese* and *Cruikshank*, ruling that a lack of equal protection through a racially discriminatory

⁶⁴446 U.S. 55 (1980).

⁶⁵364 U.S. 339 (1960).

⁶⁶The best treatment of these events is Robert J. Norrell's *Reaping the Whirlwind: The Civil Rights Movement in Tuskegee* (New York: Alfred A. Knopf, 1985), 79-110.

⁶⁷328 U.S. 549 (1946).

electoral structure was also a denial of the right to vote guaranteed by the Fifteenth Amendment, and resting its holding on both grounds. Finally, the case implicitly ruled that a racially discriminatory intent could be proven solely on the basis of its effect. Robert Carter of the NAACP began his oral argument before the Supreme Court by saying: "Your Honors, our position is simple. This is purely a case of racial discrimination. The *purpose* of this legislation - Alabama Act 140 - was discriminatory." When Justice Douglas asked Carter whether purpose was "the central aspect of your case", Carter replied "Purpose and effect - the effect reveals the purpose..."⁶⁸ Although the NAACP introduced no direct evidence of intent, no "smoking gun" statements, for instance, the Supreme Court ruled in its favor, declaring that "Acts generally lawful may become unlawful when done to accomplish an unlawful *end*."⁶⁹ The nineteenth century decisions were tacitly buried.

The Court continued in the *Gomillion* tradition in the crucial case of *Allen v. Board of Elections*.⁷⁰ Chief Justice Earl Warren held that under section 5 of the 1965 Voting Rights Act, the U.S. Department of Justice could refuse to allow election laws in Virginia and Mississippi to go into effect even if those laws had no direct

⁶⁸Quoted in Bernard Taper, *Gomillion versus Lightfoot: the Tuskegee Gerrymander Case* (New York: McGraw Hill, 1962), 86, 88-89. Italics supplied.

⁶⁹81 S. Ct. at 130, quoting *U.S. v. Reading Co.*, 226 U.S. 324, 357, italics supplied.

⁷⁰393 U.S. 544 (1969).

connection with voter registration, but, instead, changed the structure of elections, for example, from single member to at-large districts. In the 1973 case of *White v. Regester*⁷¹, Justice Byron White introduced the "totality of the circumstances" test and enumerated factors that were to be taken into account for an electoral structure to be ruled racially discriminatory.

The Supreme Court briefly departed from this line of decisions in *Bolden*, in which a plurality endorsed Justice Potter Stewart's opinion that the Fifteenth Amendment and section 2 of the Voting Rights Act required proof of purpose, and that, piece by piece, the objective evidence presented by the Mobile plaintiffs did not satisfy that standard. *Bolden's* troubled life, however, was cut short after less than twenty-seven months. In *Rogers v. Lodge*⁷² in 1982, Justice White merged the effect-based standards of *Regester* with the intent notions of a series of Fourteenth Amendment cases, and gingerly sidestepped the *Bolden* plurality ruling. Four years later, Justice William Brennan, in *Thornburg v. Gingles*,⁷³ focused judicial attention on three particularly important factors for determining a voting rights violation and rejected the attempt to make it much more difficult to prove that voting was racially polarized. Plaintiffs did not have to demonstrate, said Justice Brennan, that racism

⁷¹412 U.S. 755 (1973).

⁷²458 U.S. 613 (1982).

⁷³478 U.S. 30 (1986).

was the sole or most important *cause* of differences in voting patterns, but only that the electorate *did*, as a matter of fact, split along racial lines. Most lawyers and academics who have studied these developments have approved the five leading Supreme Court decisions and criticized *Bolden*. If the decisions had gone the other way, or if Congress had not continued and expanded its protective acts, progress toward political equality would not only have been stopped, it might well have been reversed, as it was a century earlier. Among the few dissenters, the most comprehensive case has been offered by Abigail Thernstrom.⁷⁴ What is Thernstrom's argument, and how well does it hold up, especially in light of the events of the First Reconstruction?

"The aim of the Voting Rights Act - the *single* aim" Thernstrom asserts, "was black enfranchisement in the South." Four years later, in *Allen*, the U.S. Supreme Court went well beyond the original intent of the law when it "turned a minor provision of the act - section 5 - into a major tool with which to combat white resistance to black power." Nevertheless, presumably because of Mississippi's notorious record of discrimination and because its attempt to counteract increased black registration was so blatant, Thernstrom grudgingly approves *Allen*, calling it "both correct and inevitable." To her, however, *Allen's* consequences for other

⁷⁴Abigail M. Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (Cambridge: Harvard Univ. Press, 1987). Although Thernstrom surely does not disagree with *Gomillion*, she barely mentions it (pp.15, 176-77), and misrepresents its findings when she does. The connection between disfranchisement and dilution, so obvious in *Gomillion*, would no doubt interfere with the argument that she wants to make.

jurisdictions are "troubling." By "implicitly enlarg[ing] the definition of enfranchisement," the Court made "proportionate ethnic and racial representation...an entitlement" which requires "gerrymandering to maximize minority officeholding." These "large and unanticipated results" brought the nation to "a point no one envisioned in 1965."⁷⁵ Marveling that minority electoral rights have enjoyed overwhelming congressional support since 1965, while efforts to combat racial and ethnic discrimination in housing and employment have been bitterly opposed, and those in education have completely stalled, Thernstrom seeks to eliminate the anomaly by convincing her readers that the Voting Rights Act is now only another affirmative action program.⁷⁶

Allen is not the only Supreme Court case that she criticizes. *White v. Regester's* judgment was "abstruse," its findings of fact, "unexplained assertions of indeterminate weight" which "lacked coherence." Without a complete definition of a fair democratic process, which (she apparently thinks) it was the Court's duty to provide, the list of factors in *Regester* was "arbitrary," and therefore unconstitutional, because "Arbitrary federal interference with local and state electoral arrangements is in clear violation of the Constitution..."⁷⁷ Yet the attempt to codify the decision

⁷⁵Thernstrom, *Whose Votes Count?*, 3-9, 30, her italics.

⁷⁶*Ibid.*, 6, 233.

⁷⁷Thernstrom, *Whose Votes Count?*, 73-75.

"simplifies what cannot be simplified; makes orderly a process that is inherently disorderly."⁷⁸ *Regester's* was a "Chinese menu approach," a formula which "never worked," in which factors can be chosen "at random" to prove tautologically the existence of racial discrimination.⁷⁹ *Rogers v. Lodge*, she condemns as unfaithful to *Mobile v. Bolden*, a decision that she terms "principled, simple, and tight" at one point, and condemns as vague at another.⁸⁰ Nor does Thernstrom like *Thornburg v. Gingles*, because of its rejection of the "multicausal" attack on the statistical methods which are commonly used to determine racially polarized voting, and because it "distorts the meaning of electoral opportunity..." If blacks are a minority in a jurisdiction, she asserts, they have no right to any representation at all.⁸¹

Nor are judges the only ones to feel Thernstrom's wrath. Almost all members of Congress are, to her, either blind, gullible, unobservant, incompetent, or Machiavellian. The mention of "effect" in section 5 of the original 1965 Voting Rights Act was "unnoticed." The 1970 amendments "reinforced the act in unintended and unforeseen ways." "[S]lapdash, inattentive" House members cast merely "symbolic votes" in 1981, while the strategy of the leading prospective

⁷⁸*Ibid.*, 227.

⁷⁹*Ibid.*, 127, 136.

⁸⁰*Ibid.*, 75-76, 133.

⁸¹*Ibid.*, 206.

opponent of the Voting Rights Act, Rep. Henry Hyde, was so inept that it presented "a gift" to the bill's supporters, and the Reagan Administration's indecisiveness robbed it of any influence whatsoever in the struggle. Senator Orrin Hatch, the book's only heroic figure, was a man of considerable "political acumen," who had, she thinks, the best of all the arguments, but commanded almost no votes, betrayed as he was by such ambitious opportunists as Senator Robert Dole. By contrast, Representative Don Edwards and the "diehards," a "determined minority hewing to a hard line" within the voting rights lobby, were insidiously crafty, seeking to "deflect scrutiny" of changes in section 2 which aimed at overruling *Bolden*, harassing potential witnesses for the other side, and, with their "self-proclaimed moral superiority" and deplorable perseverance, overwhelming "moderates" who had "soft hearts and weak stomachs." Even before 1981, members of Congress, as well as lobbyists had deliberately obfuscated the voting rights issue by conflating disfranchisement and dilution. The black and brown masses, she thinks, were in no danger of losing their votes, but by charging that they were, the civil rights forces could create safe seats for African- and Mexican-American politicians.⁸²

During the 1981-82 battle over renewal, Thernstrom charges, the media, "with few exceptions, functioned as part of" the civil rights lobby, and it "often...suppressed information" that might hurt The Cause. Judges on the District

⁸²*Ibid*, 26, 38, 101-02, 84, 114-16, 135-36, 83, 87, 98-99, 41, 45-46, 53, 58, 104, 118-19.

Court for the District of Columbia, along with officials of the Department of Justice, wantonly ignored decisions of the Supreme Court. Instead of administering the Voting Rights Act honestly, the Justice Department "has been creating detours around the law" in an effort to protect and extend the influence, not of minority voters, but of minority officeholders. Those who support the Voting Rights Act as it exists today, she proclaims, are "promoting racial separation," "inhibit[ing] political integration."⁸³ One who makes so many harsh accusations against so many people can hardly complain when her own work is subjected to scrutiny.

Although Thernstrom never explicitly describes the world as she would like it to be, her critique implies a vision. Section 5, the preclearance clause of the Voting Rights Act, would have been allowed to lapse, perhaps as early as 1970, because it was proposed only to meet a temporary "emergency." Once discrimination against southern blacks in the administration of literacy tests had been eliminated and any southern white efforts to prevent blacks from registering through some other subterfuge had been restrained, there would be no further need for section 5. Consequently, that provision, which had been distorted through "radical" decisions like *Allen*, should be repealed, because, as applied, it represents an "extraordinary usurpation of traditional local prerogatives by federal authorities," by which the "the career attorneys who roam the halls of the Department of Justice, but seldom

⁸³*Ibid.*, 107, 118, 138, 156, 187, 242.

the streets of a southern town" can "override decisions arrived at democratically."⁸⁴

Section 4 of the law, which bans literacy tests, would presumably remain, although one who shares the "optimism about American society and its political process" of the opponents of the 1982 amendments, as Thernstrom manifestly does, would not expect a reimposition of such tests even if the proviso were scrapped. Section 2 would be amended to return it to what she thinks was its original meaning, a mere restatement of the Fifteenth Amendment, containing an implicit intent test.⁸⁵ Library floors would be littered with Supreme Court opinions that would be reversed or made irrelevant - *Allen, Regester, Lodge, Gingles*. Among major voting rights decisions, only Justice Stewart's plurality opinion in *Bolden*, which even Thernstrom admits offers little guidance on how to determine intent, would survive.

In the *Civil Rights Cases*, which overturned the 1875 national public accommodations law, Justice Joseph Bradley announced that after slavery and its "concomitants" had been abolished, "there must be some stage in the progress of [the African-American's] elevation when he takes the rank of a mere citizen, and

⁸⁴*Ibid.*, 31, 46, 104, 25, 168, 78, 237. In her concluding chapter, Thernstrom denies this implication of her earlier argument, saying that she would keep section 5 to guard against intentional discrimination (which she proposes no standards for proving) and backsliding from the previous proportion of minority seats enjoyed (which, in using an implicit proportional representation standard, contradicts arguments that she makes throughout the book!). Because of the inconsistency between this isolated paragraph on p. 236 and the burden of Thernstrom's rationale, I have emphasized what seems to me the main line of her case.

⁸⁵*Ibid.*, 132, 81.

ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."⁸⁶ In an eerie echo of Bradley, Thernstrom asks rhetorically "how much special protection from white competition are black candidates entitled to?" Civil rights advocates, she says, should "trust in the political process left substantially to its own devices."⁸⁷ Like Bradley, she would remove most of the legislative and judicial protections of the most recent Reconstruction.

Thernstrom's account suffers from her failure to set out explicit models for the determination of intent, of the normal course of policy development, and of the consequences of policy changes. All of these difficulties would have been avoided had she explicitly compared experiences in the two Reconstructions, especially the unraveling of the First.

One of the primary reasons for the length and heat of the controversy over the original intent of the Fourteenth Amendment is that Republican members of Congress and of the state legislatures that ratified the Amendment devoted comparatively few words to explaining what they meant by "privileges or immunities," "equal protection," and "due process." Frustratingly to modern scholars, they spent much more time discussing Confederate disfranchisement and

⁸⁶3 S.Ct. 18, at 31 (1883).

⁸⁷Thernstrom, *Whose Votes Count?*, 5, 240.

debt.⁸⁸ As the example demonstrates, the amount of attention devoted in floor debate to one provision of a law may not be a good guide to its later, or even present importance, but may represent, instead, a strategic decision on the part of each side to focus its rhetoric on what unites its forces and divides its opponents. Radical Republicans might disagree on whether the rights of corporations should be protected, or whether schools or public places in the South ought to be integrated, but there was no division over their refusal to pay the debts of the secessionist traitors. In other instances, people may stress what they perceive to be the strongest or weakest facets of the bill, depending on whether they generally support or oppose it, and each side may respond to the other's attacks. In the controversy over the Fair Elections Bill of 1890, Republicans concentrated on the corruption of southern elections, and Democrats on the threat that national regulation posed to states' rights, but each did, from time to time, make reference to the other's position. Often, as the controversies over the officeholding and literacy and property test ban provisions in the Congress that framed the Fifteenth Amendment showed, congressmen's actions and statements were subject to more than one interpretation.

Applied to the question of the intent of the 1965 Voting Rights Act and the subsequent amendments, these historical reflections suggest that expectations about the importance of section 5 cannot be gauged by the comparatively small attention

⁸⁸Alfred H. Kelly, "The Fourteenth Amendment Reconsidered: The Segregation Question," *MI Law Rev.*, 54 (1956), 1077, 1084; Robert J. Kaczorowski, "Searching for the Intent of the Framers of the Fourteenth Amendment," *CT Law Rev.*, 5 (1972-73), 379; Curtis, *No State Shall Abridge*, 6.

paid to it in the published committee hearings and reports or in floor debate.

Southerners brayed incessantly about states' rights, while Yankees recounted lurid tales of the blatantly discriminatory administration of literacy tests and harshly condemned the inequity of requiring poor people to pay for the privilege of voting.

The very nature of section 5 militated against clear definition, for it was an administrative remedy designed to prevent southern states from using new, as well as familiar means of inhibiting black voting power. The few discussions of what it was meant to cover, therefore, were necessarily vague. In his opening statement in the House hearings, for instance, Atty. Gen. Nicholas Katzenbach, the Johnson Administration's most important witness, noted that "The tests and devices with which the bill deals include the usual literacy, understanding, and interpretation tests that are easily susceptible to manipulation, *as well as a variety of other repressive schemes,*" and he prominently mentioned *Gomillion*.⁸⁹ Inviting an even broader interpretation, Asst. Atty. Gen. Burke Marshall declared that the changes in election laws that would be disallowed under section 5 were not limited to "tests and devices," but included such measures as poll taxes, while Katzenbach declined to enumerate the sorts of changes that might be legitimate, "because there are an awful lot of things that could be started for purposes of evading the Fifteenth Amendment

⁸⁹*Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 89 Cong., 1 Sess., on H.R. 6400* (Washington: GPO, 1965), 9, 15, italics supplied (hereafter referred to as 1965 House Hearings).

if there is the desire to do so."⁹⁰ Even as originally introduced, therefore, section 5 seems easily open-ended enough to have covered structural changes in voting systems.

But the section was amended in the House in 1965 to prohibit not only "qualifications or procedures for voting," but, in addition, any "standard, practice, or procedure with respect to voting," and section 2 was similarly expanded.⁹¹ This final language was arguably as broad as the proposal made by the ever-prescient Don Edwards, to prohibit any covered jurisdiction from enacting "any election law or ordinance different than those in force and effect on Nov. 1, 1964," a suggestion that Edwards said was offered in an attempt "to preclude other devices which might be used to discriminate, such as changing the boundaries of voting districts or qualifications for holding office."⁹² Thus, the nature of the remedy established by section 5, its language, and authoritative comments at the relevant hearings strongly support Chief Justice Warren's opinion in *Allen*. Combined with the cautions drawn from the example of the framers' discussions of the Fourteenth Amendment on how to interpret evidence about the weight that Congress intends to place on different

⁹⁰House Hearings, 72, 95. What became section 5 of the bill was originally section 8. I refer to it as section 5 throughout in the text to minimize confusion.

⁹¹See *House Report 439, 89 Cong., 1 Sess., "Voting Rights Act of 1965"* (Washington: GPO, 1965), 3; House Hearings, 864.

⁹²House Hearings, 767.

parts of laws, this evidence seriously undermines Thernstrom's case about the initial insignificance of section 5 and the *exclusive* concern of Congress and the Johnson Administration with getting blacks registered.⁹³

Suppose, for a moment, however, that these considerations were irrelevant, and that an unruly Justice Department and an ideologically committed Supreme Court had overstepped the clear bounds that Congress had meant to impose in 1965. Would one not, then, expect to see an attempt in 1970 to rein in section 5, if it could not be repealed altogether, to confine its language so clearly to pure registration and ballot-casting that *Allen* would be reduced to a curiosity? Politically, conditions would have seemed primed for such a move, with Richard Nixon's "Southern Strategy" having paid such large recent dividends, with George Wallace's segregationist following ripe for Republican harvest, with John Mitchell and Jerris Leonard substituted for Nicholas Katzenbach and Burke Marshall at Justice, with James Eastland and Co. still potent in the Senate. A decade later, when the Supreme Court, according to civil rights supporters, distorted the original intent of section 2 in its *Bolden* decision, there was a tremendous outcry and a massive and effective campaign to amend section 2 to reinstate the pre-*Bolden* understanding of the law. But although the Nixon Administration and the Deep South members of Congress sought outright repeal of section 5 in 1970, no one seems to have

⁹³Of course, no one doubts that that was their *chief* concern. Thernstrom's claim goes much further.

proposed merely confining the bureaucracy and the Court to banning non-structural electoral changes, as they would have if they had espoused Thernstrom's interpretation.⁹⁴ And, of course, Congress implicitly accepted *Allen* by renewing the temporary part of the law for another five years. In her analysis of the intent of section 5, then, Thernstrom does not take into account what did *not* happen, despite its obvious relevance to her contentions.

No sins loom as large in Thernstrom's jeremiad as the linguistic dishonesty of the liberals. They twisted the meaning of voting rights deliberately, she charges, substituting a complex and controversial policy of proportional representation and guaranteed minority officeholding for a simple and consensually-supported one of assuring that each individual has a chance to vote.

This indictment is misguided for two reasons: First, nothing in morals or law prohibits the originators of a policy from monitoring its success and changing the means of attaining their goals, or even those goals themselves, as they gain experience. Indeed, this is just what Congress and the Justice Department did in their efforts to expand black voting rights in the 1957, 1960, and 1964 Civil Rights laws, and what an earlier Congress had done, or tried to do in 1866 with the Fourteenth Amendment, in 1867 with the Military Reconstruction Acts, in 1868-69 with the southern state constitutions and the Fifteenth Amendment, in 1870-72 with

⁹⁴The most extensive treatment of the 1970 renewal battle is Steven F. Lawson, *In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982* (New York: Columbia Univ. Press, 1985), 121-57.

the Enforcement Acts, in 1875 with the "Force Bill," and in 1890 with the Fair Elections Bill. Unless a legislative policy emerges, full-grown, from some Jovian legislator's brow, that is just how policy is always set. Voting rights policy, then, provides no occasion for special denunciation on that ground.

The second reason to reject the indictment is that disfranchisement and dilution are not pure concepts. They not only merge into each other, they are complementary, each increasing the other's effectiveness, as Thernstrom would have been forced to admit, if she had confronted the lengthier historical record.

It is, in fact, her radically foreshortened perspective,⁹⁵ not, as she claims, a difference in disposition between her optimism about America and the civil rights community's pessimism⁹⁶ that accounts most deeply for the differences in judgment between Thernstrom and her critics. Two pages on the experiences of litigators bring her from 1957 to 1965. There is nothing on Reconstruction, on nineteenth century attempts to guarantee the right to vote, on turn of the century disfranchisement, or on the struggles against the white primary and the poll tax, even though the literature on all these subjects was extensive long before Thernstrom began writing, and even though every one of the topics demonstrated

⁹⁵It is more than a bit ironic that the spouse of one of America's most distinguished historians, who is the editor of the best single reference work on ethnic groups in America, and to whom *Whose Votes Count?* is dedicated, should pay so little attention to history.

⁹⁶Thernstrom, *Whose Votes Count?*, 9-10, 240-41.

connections and overlaps between dilution and disfranchisement.

The white primary, for instance, formally disfranchised no one. Blacks could, under its rules, register and vote freely in the general election. What it did was to debase their suffrage, to dilute it, by banning them from having a chance to influence the outcome in the only election that mattered, just as at-large elections in areas with racially polarized voting patterns do. Nor did the poll tax exclude people from the polls by itself. Instead, it made them pay for the privilege, and groups such as blacks that had fewer members who could afford to pay suffered a decline in influence. The poll tax, in other words, affected the worth of an individual black's vote by diminishing the power of the principal group to which he belonged. In this sense, of course, Thernstrom's vague and unevidenced statement that "In the American constitutional tradition, it is often said, there are no group rights to representation" is misleading.⁹⁷ To discourage from voting a significant proportion of members of a group that others treat as distinct reduces the value of the vote for every individual member of that group, and vice-versa. For members of such groups, individual and group rights, disfranchisement and dilution, are integrally connected.

In brief, history, even the fairly recent history of the 1930s, 40s, and 50s, undermines Thernstrom's absolute distinction between disfranchisement and

⁹⁷*Ibid.*, 7.

dilution, and, once this distinction collapses, her chief thesis erodes and her moralistic indictment of the civil rights proponents collapses.

What of the consequences of policy change? What if, as Thernstrom's critique suggests, the Justice Department at least largely got out of the preclearance business? What if section 2 and the Fourteenth And Fifteenth Amendments were interpreted to impose an intent criterion that, Thernstrom says, approvingly, "made cases harder to win"? What if dilution of the Hispanic vote were not illegal, as dilution of Italian or Polish votes is not illegal, on the ground that Mexican-Americans and Puerto Rican-Americans have, in Thernstrom's view, "no legacy of disfranchisement comparable to that experienced by southern blacks..."?⁹⁸

The nineteenth century lessons, as well as the more recent aftermaths of the destruction of the white primary in the 1940s and the literacy test in the 1960s give one little reason to be sanguine - certainly not as sanguine as Thernstrom, who, as Karlan and McCrary have devastatingly shown, has a tendency to ignore contradictory evidence.⁹⁹ But perhaps even more fundamentally, Thernstrom mistakes the causes for racial discrimination in electoral affairs. As the record of

⁹⁸Thernstrom, *Whose Votes Count?*, 81, 55.

⁹⁹Pamela S. Karlan and Peyton McCrary, "Book Review: Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act," *Journal of Law and Politics*, 4 (1988), 751-77; Similarly, see Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* (Chapel Hill: Univ. of North Carolina Press, 1990).

the northern Democrats on civil rights roll calls in the nineteenth century shows, it was not simple racism or racial hostility that undermined support for black voting rights, and, as a more detailed look at the history of late nineteenth and early twentieth century disfranchisement and Jim Crow would demonstrate, it was not so much that southern whites hated blacks or found contact with them distasteful. Black voting rights and even legalized segregation were more matters of racial *power* than of unthinking racial *animosity*. Consequently, a decline in the overall level of white racism, which has obviously occurred since 1960,¹⁰⁰ does not guarantee the fair treatment of racial minorities if, as in the nineteenth century, national legal and judicial safeguards were to be removed.

Ninety-five years ago, on that earlier twenty-fifth anniversary of a minority voting rights act, there were few reasons for congratulations or joy among civil rights supporters. Today, drugs, dropouts, and disease may plague the ghettos and barrios, the growing disparity between the economic and physical health of the rich and the poor would embarrass a properly sensitive nation, and social reform is as unpopular as fiscal responsibility. But the Second Reconstruction can boast of one success, at least - minority group members can often choose candidates who are their own first preferences. They can do so, as their great-grandfathers could not, I have argued, because the national legislature and judiciary have been willing to

¹⁰⁰See, e.g., Howard Schuman, Charlotte Steeh, and Lawrence Bobo, *Racial Attitudes in America: Trends and Interpretations* (Cambridge: Harvard Univ. Press, 1985).

guard not only the exercise of the right to cast a ballot, but also the right not to have their votes submerged by discriminatory electoral structures. Those who would remove or weaken those protections had best hesitate, while they relearn or reflect upon the nation's earlier history.