

Civil Right No. 1: **Dr. King’s Unfinished** **Voting Rights Revolution**

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I. INTRODUCTION

On March 14, 1965, one week after “Bloody Sunday” in Selma, Alabama, and one day before President Lyndon Johnson delivered a now-famous speech to Congress calling for passage of the Voting Rights Act, Dr. Martin Luther King, Jr. published an article in the *New York Times Magazine* entitled *Civil Right No. 1: The Right to Vote*.¹ Dr. King not only described the severe barriers to enfran-

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1. Martin Luther King Jr., *Civil Right No. 1: The Right to Vote*, N.Y. TIMES, Mar. 14, 1965, at 26, <https://www.nytimes.com/1965/03/14/archives/civil-right-no->

chisement that African Americans faced in the American South and elsewhere; he also offered a vision of what full enfranchisement would mean for African Americans. Declaring that “[v]oting is the foundation stone for political action,”² Dr. King saw the vote not as an end within itself but as the means to a better life for African Americans and other Americans. He predicted that “[o]ur vote would place in Congress true representatives of the people who would legislate for the Medicare, housing, schools and jobs required by all men of any color.”³ This was consistent with Dr. King’s belief that the vote would help African Americans, many mired in poverty after two centuries of slavery and government and private discrimination, achieve greater economic success, peace, and prosperity.

Fifty-three years after Dr. King wrote *Civil Right No. 1*, African Americans’ access to the franchise, economic security, and government responsiveness has improved markedly but not nearly enough. Gone are the literacy tests, poll taxes, violence, and intimidation that stymied African American efforts to register and vote, especially in the South. Thanks to the Voting Rights Act, many more African Americans and African American-preferred candidates serve in Congress, in state legislatures, and on local, elected bodies.⁴ The country has come a long way since Dr. King wrote, while incarcerated in a Selma, Alabama, jail in February 1965 following a voting rights protest, that “THERE ARE MORE NEGROES IN JAIL WITH ME THAN THERE ARE ON THE VOTING ROLLS.”⁵

1-the-right-to-vote-civil-right-no-1-the-right-to.html. On the history of Bloody Sunday in Selma, Alabama, see DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 (1978). For a video recording and transcript of President Johnson’s March 15, 1965 speech calling for the United States to adopt the Voting Rights Act, see *Lyndon B. Johnson: Voting Rights Act Address*, GREAT AMERICAN DOCUMENTS, <https://www.greatamericandocuments.com/speeches/lbj-voting-rights/> (last visited Sept. 25, 2018).

2. King, *supra* note 1, at 26.

3. *Id.*

4. See *infra* note 29 and accompanying text.

5. GARROW, *supra* note 1, at 52. Dr. King wrote in his *New York Times Magazine* article that “[s]o far 3,400 Negroes have been arrested in Selma, placing 10 times as many in Selma jails as are on the voters’ roll.” King, *supra* note 1, at 27. Two scholars have suggested that the *Magazine* article was first drafted in the Selma

African Americans have nonetheless failed to fully achieve the voting rights, economic parity, and political responsiveness that Dr. King envisioned in his 1965 article. The three primary reasons for the unfinished revolution are: the endurance of private discrimination, which first the Democrats and now the Republican Party have used for political ends; a conservative Supreme Court's narrow reading of voting rights laws and chary interpretation of the Constitution's protections for voting rights, which allowed discrimination and a new wave of voter suppression laws to flourish; and felon disenfranchisement laws, which help perpetuate a cycle of poverty and political powerlessness. These three reasons, for the lack of full progress, reinforce one another in important ways.

Part II of this Essay sets out in more detail Dr. King's vision of what securing the vote would mean for African American voters beyond the important symbolic value of treating all voters with equal rights and dignity. Part III then briefly catalogs the great success achieved in the five decades since Dr. King and others helped bring about the voting rights revolution but also shows that Dr. King's vision remains partially unfulfilled. Part IV then turns to the three principal reasons for the unfulfilled vision and asks what it would take to more fully achieve his vision over the next fifty years. Even if "the arc of the moral universe" eventually "bends toward justice,"⁶ vigilance and activism remain necessary, as private racism remains an enduring problem, courts retreat from protecting minority voting rights, and achieving equal political and economic rights requires a state-by-state slog.

jail; however, these scholars do not cite to any evidence to substantiate the claim, and I cannot independently validate it. LAURIE COLLIER HILLSTROM, *DEFINING MOMENTS: THE VOTING RIGHTS ACT OF 1965*, at 82 (2009); DARA N. BYRNE, *THE UNFINISHED AGENDA OF THE SELMA-MONTGOMERY VOTING RIGHTS MARCH 9* (2005).

6. MARTIN LUTHER KING, JR., *Love, Law, and Civil Disobedience*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 47, 52 (James Melvin Washington ed., 1986) [hereinafter *A TESTAMENT OF HOPE*] (quoting a 1961 speech of King).

II. DR. KING'S VISION

No doubt Martin Luther King saw the expansion of voting rights as a way to ensure the individual dignity and equality of each eligible voter, including African Americans. In 1959, he argued that “[t]he denial of the vote not only deprives the Negro of his constitutional rights—but what is even worse—it degrades him as a human being.”⁷ In his 1965 *New York Times Magazine* article, he wrote that “[v]oting as a badge of full citizenship has always had a special meaning to the Negro, but in 1965 the denial of the right to vote cuts painfully and deeply into his new sense of personal dignity. It is salt on his wounded pride.”⁸

Dr. King's focus was not simply on the symbolic importance of the vote, but on how wider access to the franchise, which he called an “effective tool for change,”⁹ would improve the material conditions of African Americans. In his famous 1957 speech on voting rights delivered in front of the Lincoln Memorial, *Give Us the Ballot—We Will Transform the South*, Dr. King described how equal voting rights would improve the lives of African Americans:

Give us the ballot and we will no longer have to worry the federal government about our basic rights.

Give us the ballot and we will no longer plead to the federal government for passage of an antilynching law; we will by the power of our vote write the law on the statute books of the southern states and bring an end to the dastardly acts of the hooded perpetrators of violence.

Give us the ballot and we will transform the salient misdeeds of blood-thirsty mobs into the calculated good deeds of orderly citizens.

....

7. MARTIN LUTHER KING, JR., *Speech Before the Youth March for Integrated Schools*, in *A TESTAMENT OF HOPE*, *supra* note 6, at 21, 22 (quoting 1959 King speech).

8. King, *supra* note 1, at 26.

9. *Id.*

Give us the ballot and we will place judges on the benches of the South who will “do justly and love mercy,” and we will place at the head of the southern states governors who have felt not only the tang of the human, but the glow of the divine.

Give us the ballot and we will quietly and nonviolently, without rancor or bitterness, implement the Supreme Court’s decision of May 17, 1954.¹⁰

He similarly asked in 1959:

Do you realize what would happen in this country if we were to gain three million southern Negro votes? We could change the composition of Congress. We could have a Congress far more responsive to the voters’ will. We could have all schools integrated—north and south. A new era would open to all Americans. Thus, the Negro, in his struggle to secure his own rights is destined to enlarge democracy for all people, in both a political and a social sense.¹¹

His 1965 *New York Times Magazine* article sounded the same themes. To Dr. King, the franchise would allow African American voters to use the political process to protect themselves from violence and discrimination, to pass equal rights legislation, and to enforce court desegregation and other orders. Political representation would

10. MARTIN LUTHER KING, JR., *Give Us the Ballot—We Will Transform the South*, in A TESTAMENT OF HOPE, *supra* note 6, at 197, 197–98 (quoting 1957 King speech). He sounded similar themes in a 1965 address “Our God is Marching On!”:

Let us march on ballot boxes, march on ballot boxes until race baiters disappear from the political arena. Let us march on ballot boxes until the Wallaces of our nation tremble away in silence.

Let us march on ballot boxes, until we send to our city councils, state legislatures, and the United States Congress men who will not fear to do justice, love mercy, and walk humbly with their God. Let us march on ballot boxes until all over Alabama God’s children will be able to walk the earth in decency and honor.

MARTIN LUTHER KING, JR., *Our God Is Marching On!*, in A TESTAMENT OF HOPE, *supra* note 6, at 227, 229 (quoting 1965 Dr. King speech).

11. KING, *supra* note 7, at 22 (quoting 1959 King speech).

lead to improved health care, housing, schools, and job market. An equal vote would eliminate the “gantlet of Southern power” in Congress which had been stymieing “[b]ills providing for the welfare of our nation, from Medicare to education.”¹²

Dr. King expected coalition politics to drive policy changes, helping African Americans and others, with both Democrats and Republicans courting African American voters:

The future of the Democratic Party, which rests so heavily on its coalition of urban minorities, cannot be assessed without taking into account which way the Negro vote turns. The wistful hopes of the Republican party for large city influence will also be decided not in the boardrooms of great corporations but in the teeming ghettos.¹³

He added that the “growing Negro vote in the South is another source of power. As it weakens and enfeebles the dixiecrats, by concentrating its blows against them, it undermines the congressional coalition of southern reactionaries and their northern Republican colleagues.”¹⁴

And yet despite his focus on national politics, Dr. King thought that new voting rights protections should be applied “especially to local elections for sheriff, school boards, etc.”¹⁵ where he saw the greatest need for change and greatest potential that an expanded franchise would bring better elected officials and protection from official discrimination.

III. REAL BUT PARTIAL PROGRESS

The political and economic conditions of African Americans have improved markedly in the five decades since Dr. King wrote *Civil Right No. 1* but not nearly enough. In retrospect, Dr. King had

12. King, *supra* note 1, at 26.

13. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 154–55 (1968).

14. MARTIN LUTHER KING, JR., *Black Power Defined*, in A TESTAMENT OF HOPE, *supra* note 6, at 303, 307.

15. King, *supra* note 1, at 95.

too much confidence that voting rights and coalition politics could overcome hundreds of years of political and social repression and enduring white racism.

A. Marked Improvement

In the immediate aftermath of the Voting Rights Act's passage in 1965, African American voter registration increased dramatically, as poll taxes, literacy tests, and other tests or devices for voting became illegal.¹⁶ A key provision of the Voting Rights Act, Section 5, required states (mostly in the South) with a history of racial discrimination in voting to get federal permission before making changes in their voting rules and to show that these changes would not make protected minority voters worse off.¹⁷ The Act also sent federal monitors to the polls to ensure a free and peaceful vote, without official or private voter intimidation, and eliminated poll taxes and literacy devices for voting.¹⁸ At least at the beginning, these latter measures were more important to black voter registration than Section 5.¹⁹

In Mississippi, "black voter registration increased from 6.7 percent before the act to 59.8 in 1967,"²⁰ with similar increases across much of the South. By 2012 the national rate of African American voter registration was 73.1%, almost two percentage points higher than the national average.²¹ Such rates scarcely seemed imaginable when Dr. King wrote *Civil Right No. 1*.

16. For a brief history of the Voting Rights Act, see Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7–51 (Bernard Grofman & Chandler Davidson eds., 1992).

17. For the legal issues surrounding the interpretation and constitutionality of the Voting Rights Act, see DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 33–47, 215–374 (6th ed. 2017).

18. *Id.* at 46.

19. For a general history and overview of improved African American registration and electoral success, see *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* (Chandler Davidson & Bernard Grofman eds., 1994).

20. Davidson, *supra* note 16, at 21.

21. U.S. CENSUS BUREAU, *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2012*: REP. NO. P20-568, tbl. 4b (2013),

African American voter turnout in recent presidential election years was on par with white voters. In 2008 and 2012, when Barack Obama, the first African American president, was on the ballot, African American turnout rates exceeded those of white voters.²² Conversely, in the 2016 Clinton-Trump election, with Obama no longer on the ballot, African American voter turnout declined.²³ The picture is not all rosy: African American turnout (as well as Democratic turnout generally) is lower in midterm election years,²⁴ and the recent Doug Jones United States Senate victory in Alabama shows the im-

<https://www.census.gov/data/tables/2012/demo/voting-and-registration/p20-568.html>.

22. See William H. Frey, *Minority Turnout Determined the 2012 Election*, BROOKINGS (May 10, 2013), <https://www.brookings.edu/research/minority-turnout-determined-the-2012-election/>; Sam Roberts, *2008 Surge in Black Voters Nearly Erased Racial Gap*, N.Y. TIMES (July 20, 2009), <https://www.nytimes.com/2009/07/21/us/politics/21vote.html>.

23. Jens Manuel Krogstad & Mark Hugo Lopez, *Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots*, PEW RES. CTR. (May 12, 2017), <http://www.pewresearch.org/fact-tank/2017/05/12/black-voter-turnout-fell-in-2016-even-as-a-record-number-of-americans-cast-ballots/>:

The black voter turnout rate declined for the first time in 20 years in a presidential election, falling to 59.6% in 2016 after reaching a record-high 66.6% in 2012. The 7-percentage-point decline from the previous presidential election is the largest on record for blacks. (It's also the largest percentage-point decline among any racial or ethnic group since white voter turnout dropped from 70.2% in 1992 to 60.7% in 1996.) The number of black voters also declined, falling by about 765,000 to 16.4 million in 2016, representing a sharp reversal from 2012. With Barack Obama on the ballot that year, the black voter turnout rate surpassed that of whites for the first time. Among whites, the 65.3% turnout rate in 2016 represented a slight increase from 64.1% in 2012.

Id. (emphasis omitted). See also Michael P. McDonald, *Voter Turnout Graphics*, U.S. ELECTIONS PROJECT, <http://www.electproject.org/home/voter-turnout/demographics> (last visited Sept. 25, 2018) (presenting data on voter turnout by race and ethnicity).

24. See Jeff Goldberg, *Concerns Over Low Black Voter Turnout for Midterm Elections*, ASSOCIATED PRESS, <https://wjla.com/news/elections/concerns-over-low-black-voter-turnout-for-midterm-elections-108549> (last visited Sept. 25, 2018).

portance of turnout in crucial off-year elections.²⁵ In local elections, turnout is much lower and less diverse than in national, especially presidential, election years.²⁶

Thanks in part to the 1982 amendments to the Voting Rights Act, which required the creation of more African American minority opportunity districts, African American representation in legislative bodies increased dramatically.²⁷ “The number of black elected officials increased from fewer than 100 in 1965 in the seven originally targeted states to 3,265 in 1989. In 1989 blacks in these states comprised 9.8 percent of all elected officials as compared with about 23 percent of the voting-age population.”²⁸

Across the United States, in the first fifty years after the passage of the Voting Rights Act, the number of African American elected officials went from 5 to 46 combined in the U.S. House and Senate, from under 200 to nearly 700 in state legislatures, and from about 1,000 to 10,000 in combined federal, state, and local offices.²⁹

B. Progress Not Yet Achieved

Despite these gains, the coalition politics that Dr. King envisioned have not materialized across much of the U.S., thanks in part to the persistence of racially polarized voting. African Americans do not have close to a proportional share of political power. According to a report from the Joint Center, “African Americans are 12.5% of

25. Mike Cason, *Turnout Exceeds Expectations in Doug Jones Win in Alabama Senate Race*, AL.COM, https://www.al.com/news/index.ssf/2017/12/turnout_exceeds_expectations_i.html (last updated Dec. 13, 2017).

26. See KHALILAH BROWN-DEAN ET AL., 50 YEARS OF THE VOTING RIGHTS ACT: THE STATE OF RACE IN POLITICS 12–13 (2015), <http://jointcenter.org/sites/default/files/VRA%20report%2C%203.5.15%20%281130%20am%29%28updated%29.pdf>.

27. See Davidson, *supra* note 16, at 43.

28. *Id.* In the 2014 election, a record 82 African American candidates ran for federal office. Susan Davis, *Black Candidates for Congress Hit Record High in 2014*, USA TODAY (Oct. 1, 2014, 6:18 PM), <https://www.usatoday.com/story/news/politics/2014/10/01/black-candidates-new-record/16547083/>.

29. BROWN-DEAN ET AL., *supra* note 26, at 24–29.

the citizen voting age population, but they make up a smaller share of the U.S. House (10%), state legislatures (8.5%), city councils (5.7%), and the U.S. Senate (2%).”³⁰

Racially polarized voting persists, with whites tending to vote for one set of candidates and African American voters (and other minority voters) voting for another set of candidates. In federal and state elections, this often translates into a Republican-Democratic divide. “In the 2014 congressional elections, the gap between white Americans, who gave 62% of their votes to Republican congressional candidates, and African Americans, who bestowed only 10% of their votes on Republican candidates, is a whopping 52 points.”³¹

The divide is not just about political party. “Racially polarized voting” persists, especially in states that were covered under Section 5 of the Voting Rights Act, even when controlling for political party.³² For example, Professors Stewart, Persily, and Ansolabehere wrote, in a study of race and the 2012 elections, of the persistence of “racially polarized voting,” especially in states that had been covered by the Section 5 preclearance provisions of the Voting Rights Act; the study found that:

After controlling for [a number of factors], we still found that whites in the covered states were less likely to vote for President Obama than for Hillary Clinton. In other words, even when limiting the analysis to Democrats—that is, taking party out of the equation—differences in the behavior of white voters in the covered and noncovered states remained.³³

Even on the local level, in non-partisan races, racially polarized voting is a serious problem. A Joint Center study found that in

30. *Id.* at 4.

31. *Id.* at 17.

32. See Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1390 (2010).

33. Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 218 (2013).

five cities with mostly non-partisan elections, there was a 38.3% gap between the preferences of white voters and African American voters.³⁴

Legislatures (especially in the South) marginalized African American-preferred representatives, with many senior African American legislators losing seniority rights as Republicans consolidated legislative power.³⁵ The coalition politics that Dr. King envisioned are a reality in many parts of the United States but not prevalent across the deep South. The main exception is local politics in more integrated, politically liberal Southern cities.³⁶

The lack of fuller representation for African American residents in legislatures and on other legislative bodies has consequences because it allows states and localities to continue to pass discriminato-

34. BROWN-DEAN ET AL., *supra* note 26, at 19–20.

35. Thomas B. Edsall, *The Decline of Black Power in the South*, N.Y. TIMES: OPINIONATOR (July 10, 2013, 9:34 PM), <https://opinionator.blogs.nytimes.com/2013/07/10/the-decline-of-black-power-in-the-south/>:

Since the enactment of the Voting Rights Act in 1965, the number of blacks elected to Southern state legislatures has grown from fewer than five to 313, all but a handful as Democrats. While blacks rose in the once dominant Democratic Party, Southern whites defected. Now, in the former Confederacy, Republicans have gained control of all 11 state legislatures.

Despite their growing numbers, the power of Southern blacks has been dissipated. African-American Democratic officials—according to data compiled from academic research and the Web sites of state legislatures—have been relegated to minority party status. Equally important, an estimated 86 African-Americans who spent years accumulating seniority have lost their chairmanships of state legislative committees to white Republicans.

The loss of these committee positions has meant the loss of the power to set agendas, push legislation to the floor, and call hearings. At the state level, “black voters and elected officials have less influence now than at any time since the civil rights era,” wrote David A. Bositis, a senior research associate at the Joint Center for Political and Economic Studies, in a 2011 paper, “Resegregation in Southern Politics?”

Id.

36. David A. Graham, *Red State, Blue City*, THE ATLANTIC (Mar. 2017), <https://www.theatlantic.com/magazine/archive/2017/03/red-state-blue-city/513857/>.

ry voting laws. Voter discrimination remains a problem, despite many successful lawsuits and administrative actions before 2013 helping to assure fair representation for African American voters and other minority groups. Isolated lawsuits cannot keep up with voting discrimination, especially as states can enact new laws that can discriminate. A 2014 report by the National Commission on voting rights found “332 successful voting rights lawsuits and denials of” preclearance under Section 5 of the Voting Rights Act through 2013.³⁷ Many of these suits or voting rights objections involved re-districting plans that minimized African American voting strength.³⁸ Voting rights problems were especially high in parts of the South, especially in Texas, Georgia, Louisiana, Mississippi, and South Carolina.³⁹

In 2013, after the United States Supreme Court effectively killed Voting Rights Act Section 5 preclearance in the *Shelby County v. Holder* case,⁴⁰ problems of voter suppression increased with states passing new laws, such as strict voter identification laws, making it harder to register and to vote.⁴¹ Many of these laws seemed aimed at African American voters, even if the laws’ precise effects were difficult to measure. The United States Court of Appeals for the Fourth Circuit reviewed a lawsuit by the North Carolina NAACP against a North Carolina law imposing a strict voter identification law, which cut back on early voting and made other restrictive voting changes, and held the state passed the law with an unconstitutional, racially

37. NAT’L COMM’N ON VOTING RIGHTS, PROTECTING MINORITY VOTERS: OUR WORK IS NOT DONE 8 (2014).

38. *See id.* at 102–32 (discussing minority vote dilution and voting discrimination generally in Chapter 5).

39. *Id.* at 8.

40. 570 U.S. 529, 557 (2013) (holding that the Voting Rights Act formula for determining which jurisdictions are subject to preclearance violates the U.S. Constitution).

41. *See* Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, THE ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>.

discriminatory purpose.⁴² It concluded that the law “target[ed] African Americans with almost surgical precision.”⁴³

Felon disenfranchisement remains a serious problem, especially given the higher rates of incarceration among poorer African American voters.⁴⁴ “For example, many states disenfranchise former offenders after they have completed their sentences, and as a result, 7.7% of black adults are disenfranchised nationally, including 22% of black adults in Kentucky and 23% in Florida.”⁴⁵ Further:

By counting inmates as residents of the jurisdiction where they are incarcerated rather than as residents of their home prior to incarceration, many states inflate the voting strength of populations who live near prisons (often rural areas) and diminish the voting strength of non-incarcerated people in the prisoners’ home communities.⁴⁶

The lack of full representation has serious policy consequences. African American voters were much less likely than other groups to see their preferences enacted into law, compared to the preferences of others including the poor and women.⁴⁷ Considering income and wealth, a 2017 study found that 22% of African American families lived in poverty compared to 9% of whites and 13% of families overall.⁴⁸ African American life expectancy remains below that of white

42. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 244 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

43. *Id.* at 214 (“Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist.”).

44. Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1147 (1994).

45. BROWN-DEAN ET AL., *supra* note 26, at 7. There are 1.5 million more black women than black men in free American society due to a combination of incarceration and death of black men. Justin Wolfers, David Leonhardt & Kevin Quealy, *1.5 Million Missing Black Men*, N.Y. TIMES: THE UPSHOT (Apr. 20, 2015), <https://www.nytimes.com/interactive/2015/04/20/upshot/missing-black-men.html>.

46. BROWN-DEAN ET AL., *supra* note 26, at 7.

47. BROWN-DEAN ET AL., *supra* note 26, at 21–23.

48. *Poverty Rate by Race/Ethnicity*, KAISER FAMILY FOUND., <https://www.kff.org/other/state-indicator/poverty-rate-by->

Americans, although the gap is closing, in part because white life expectancy has fallen due to the opioid crisis and in part because of decreasing rates of violence affecting the African American community.⁴⁹

In short, it is possible to recognize both tremendous progress and tremendous disappointment in the current condition of African American voters. Access to the ballot has no doubt helped African Americans but not nearly enough to fulfill Dr. King's vision of what the franchise would bring.

IV. THE REASONS FOR DR. KING'S UNFINISHED REVOLUTION

A. Harnessing of Private Racism

Dr. King recognized that political forces have long used private racism to achieve political goals. In a March 25, 1965 speech, *Our God is Marching On!*, he described how the white power elite in the post-Reconstruction South reconsolidated its power by using Jim Crow to drum up support from poor white voters:

If it may be said of the slavery era that the white man took the world and gave the Negro Jesus, then it may be said of the Reconstruction era that the southern aristocracy took the world and gave the poor white man Jim Crow. . . . He gave him Jim Crow. . . . And when his wrinkled stomach cried out for the food that his empty pockets could not provide, . . . he ate Jim Crow, a psychological bird that told him that no matter how bad off he was, at least he was a white man, better than the black man. . . . And he ate Jim Crow. . . . And when his undernourished children cried out for the necessities that his low wages could not provide, he showed them the Jim Crow signs on the buses and in the stores, on

raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Sept. 25, 2018).

49. Sabrina Tavernise, *Black Americans See Gains in Life Expectancy*, N.Y. TIMES (May 8, 2016), https://www.nytimes.com/2016/05/09/health/blacks-see-gains-in-life-expectancy.html?_r=0.

the streets and in the public buildings. . . . And his children, too, learned to feed upon Jim Crow, . . . their last outpost of psychological oblivion.⁵⁰

Earlier in the last century, Democrats simply barred African Americans from voting in party primaries until the United States Supreme Court, in a series of cases, held that all-white political party primaries violated the Constitution.⁵¹ But parties, now deprived of devices of de jure disenfranchisement, have still been able to use private racism for political advantage.

In today's American South and elsewhere in parts of the United States, it is the Republican party, and not the Democratic party, which most represents the interests of white voters, and which can harness private racism for political ends. Over the last few decades, as Republicans took over state legislatures and state redistricting processes, some pursued a strategy of eliminating white Democratic legislators as part of a larger plan to portray the Democratic Party as the "black party" in an effort to thwart the coalition politics that Dr. King envisioned after passage of the Voting Rights Act.⁵²

Within five years of the passage of the Voting Rights Act, Kevin Phillips, an advisor to President Richard Nixon, declared that "white Democrats will desert their party in droves the minute it becomes a black party. When white Southerners move, they move fast."⁵³ The writing was also on the wall in 1985, when Donald

50. Martin Luther King, Jr., *Our God is Marching On!* (Mar. 25, 1965), <https://kinginstitute.stanford.edu/our-god-marching>. I have removed exclamations from the crowd that the editors included in this version of the speech, such as "Speak!" The version of this speech in the compilation KING, *Our God Is Marching On!*, in A TESTAMENT OF HOPE, *supra* note 10, at 227, 228, omits this paragraph and surrounding paragraphs about Jim Crow.

51. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

52. See *infra* note 53 and accompanying text.

53. GARRY WILLS, *NIXON AGONISTES: THE CRISIS OF THE SELF-MADE MAN* 267 (1970) (quoting Phillips); see also KEVIN PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* 326 (2015) ("Negroes are slowly but surely taking over the apparatus of the Democratic Party in a growing number of Deep Southern Black Belt counties, and this cannot help but push whites into the alternative major party structure—that of the GOP.").

Fowler, who chaired the South Carolina Democratic Party (and later the Democratic National Committee), told an interviewer that:

For a long time now, Democrats generally in the South have been walking a fairly narrow line between using black support as an advantage and letting blacks take over and the Democratic Party becoming a black party. Blacks, if they control the Democratic Party, will make it lose its viability. . . . “Blacks understandably are restless in the Democratic Party because they look at their level of loyalty and say ‘Damn, if anybody deserves anything, we do.’ And in normal political terms, that’s true. But the other side of it is that if we gave them everything they wanted, it would be a black party.”⁵⁴

The transformation accelerated in the 1980s as Section 2’s focus on the creation of majority-minority districts meant that, even as Democrats remained in control of redistricting in Southern states, the number of elected white Democratic legislators declined. Cases like *Georgia v. Ashcroft*,⁵⁵ involving Democrats spreading African American voters over a larger number of districts, showed the struggle over whether Democrats could effectively create cross-racial coalitions or would stick with greater black representation.⁵⁶

Once Republicans came to take over redistricting in Southern states, the trend increased precipitously. Journalist Thomas Edsall reported in 2013 that “[i]n private discussions, Republicans in the South talk explicitly about their goal of turning the Democratic Party into a

54. THOMAS BYRNE EDSALL WITH MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 271 (1991) (citation omitted) (interview with Fowler). The quote also appears in Pam Karlan’s important piece, Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 319 (1997). On the emergence of the Democratic Party as the “black party,” see JOHN B. JUDIS & RUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY 170–71 (2002).

55. 539 U.S. 461 (2003). The case concerned the effort by Georgia Democrats to spread out African American voters across districts so as to maximize the number of Democratic seats. *See id.*

56. For a careful analysis of the tradeoffs, see Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002).

black party, and in many Southern states they have succeeded.”⁵⁷ When white racists think of the Democratic party as the Black Party, it reinforces their allegiance to the Republican Party even if that party is not otherwise serving their interests. It is an echo of the Jim Crow fed to poor whites a century before.

The black party strategy has frequently arisen in the context of redistricting litigation challenging Republican-led districting plans as violations of the Voting Rights Act, unconstitutional racial gerrymandering, or both. Professor Michael Kent Curtis described the overlap of race and politics in recent North Carolina redistricting litigation:

As a matter of fact, Republicans did have some political objectives in their use of gerrymandering, but all of the objectives were inseparable from race: districts were to be 50% or more Black voting age population; the target was to have Blacks in the legislature in proportion to their share of the voting age population; the “steroid districts” were shaped so they destroyed pre-existing multi-racial and multi-ethnic coalitions; and they were constructed to help to rid as many White Democrats as possible—advancing racial polarization between a Black party and a White party (a historic goal in Southern Republican districting.) The record of racial design is clear. If a party seeks racial polarization by racial means for political purposes, that should not sanitize the use of race.⁵⁸

57. Edsall, *supra* note 35. Professor Terry Smith makes a provocative argument that under looser ballot access rules and greater protections for minor political parties, a separate black political party could enhance African American voting power and foster greater coalitional politics. Terry Smith, *A Black Party?* Timmons, *Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1 (1998). Smith’s motivations for pursuing a black party strategy are to increase African American political power, the opposite of those who use race as a way to harness racism and minimize African American voting power. *See id.*

58. Michael Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina’s “Redemption” Revisited 1870–1905 and 2011–2013*, 33 LAW & INEQ. 53, 130–31 (2015). In recent Alabama racial gerrymandering litigation, African American Democrats made a similar claim that Republicans were engaging in a “black party” strategy. The majority on the three-judge court rejected the claim.

The matter arises not just in redistricting but in appeals aimed at white racist voters even if Republican leaders are not racist themselves. President Ronald Reagan, for example, made a number of statements which appealed to white racists in the 1980s,⁵⁹ and he even launched his post-convention 1980 presidential campaign in “the small town of Philadelphia, Mississippi, where civil rights workers Michael Schwerner, Andrew Goodman, and James Chaney were murdered.”⁶⁰ As Professor Sheryll Cashin put it, “[w]hile I am not

Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1290 (M.D. Ala. 2013) (three-judge court) (“The Black Caucus plaintiffs and the Democratic Conference plaintiffs also argued that the Acts were the product of a grand Republican strategy to make the Democratic Party the ‘black party’ and the Republican Party the ‘white party,’ but the record does not support that theory.”). The dissent did not:

In this case, there is a deep dispute regarding the legislative purpose behind these plans. According to the drafters, they sought nothing more than to comply with their legal duties and honor their colleagues’ wishes as far as that was possible. According to the plaintiffs, these redistricting plans are part of a scheme to eliminate all white Democrats in the State and thereby establish the Republican Party as the natural home for all white Alabamians, leaving the Democratic Party comprised of only black voters and legislators. In furtherance of that scheme, the plaintiffs claim, the drafters packed as many black people as possible into the majority-black districts, thereby eliminating their influence anywhere else. All this, the plaintiffs claim, was done under the pretext of seeking to comply with § 5, while in reality the drafters were motivated by invidious racial discrimination. Apparently for this reason, no black legislator voted in favor of these plans.

Id. at 1347 (Thompson, J., dissenting). For more on this dispute in the case, which the Supreme Court did not resolve when it took the case up on appeal, 135 S. Ct. 1257 (2015), see Richard L. Hasen, *Racial Gerrymandering’s Questionable Revival*, 67 ALA. L. REV. 365, 380–81 (2015) [hereinafter Hasen, *Racial Gerrymandering*]. On the general overlap of race and party in the redistricting and other cases in the American South, see Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018).

59. See *infra* note 61. For a defense of Reagan on the question of racial rhetoric, see Lou Cannon, *Reagan’s Southern Stumble*, N.Y. TIMES (Nov. 18, 2007), <https://www.nytimes.com/2007/11/18/opinion/18cannon.html>.

60. Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL’Y 71, 94 (2006).

suggesting that Reagan was a racist his actions and words sent an unmistakable message of white racial solidarity.”⁶¹

Many Republican Party leaders before and after Reagan have sounded themes that appeal to white racists, including ending racial “preferences” for jobs and education, curtailing immigration from Mexico and other Latin American countries, and promoting the false narrative that Democratic and minority voters steal elections through voter fraud.⁶² The party is not monolithic, and many other Republican leaders have avoided or rejected such rhetoric.⁶³

Most recently, however, rhetoric returned to dog-whistle politics. President Trump embraced nativist and racist rhetoric campaigning in the 2016 presidential election, railing against Mexican “rapists,”⁶⁴ claiming that voter fraud is rampant in areas with minority

61. *Id.* at 94–95. Cashin wrote:

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

Id. at 94 (citations omitted).

62. Clay Risen, *How the Party of Lincoln Became the Party of Racial Backlash*, N.Y. TIMES (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/opinion/sunday/spiro-agnew-mlk.html>.

63. E.g., Lauren Gambino, ‘Unraveling Our National Fabric’: Romney Condemns Trump after Charlottesville, THE GUARDIAN (Aug. 18, 2017, 1:48 PM), <https://www.theguardian.com/us-news/2017/aug/18/mitt-romney-donald-trump-charlottesville-comments>.

64. Christina Wilkie, *Trump Planned ‘Rapists’ Comments About Mexicans*, HUFFINGTON POST (Sept. 30, 2016, 4:54 PM),

voters,⁶⁵ and perhaps most importantly, refusing as President to flatly condemn the neo-Nazi activity in Charlottesville, Virginia; instead commenting on “many fine people on both sides” at the rally, with “many sides” to blame for the violent confrontation that left a counter-protester dead after she was run over by a white supremacist.⁶⁶

It may be, as Chief Justice John Roberts controversially declared in a 2009 case presaging the Court’s 2013 *Shelby County* case striking down a key provision of the Voting Rights Act that “things have changed in the South.”⁶⁷ But private racism and political parties opportunistically relying on that racism to achieve political ends have not.

B. The Supreme Court’s Chary View of Voting Rights

Racially polarized voting not only makes it harder for a minority party to elect representatives of their choice, but it also creates

https://www.huffingtonpost.com/entry/trump-mexicans-rapists_us_57eeb77ce4b082aad9bb342d.

65. Maggie Haberman & Matt Flegenheimer, *Donald Trump, a ‘Rigged’ Election, and the Politics of Race*, N.Y. TIMES (Aug. 21, 2016), <https://www.nytimes.com/2016/08/22/us/politics/donald-trump-a-rigged-election-and-the-politics-of-race.html>; Ashley Parker, *Donald Trump, Slipping in Polls, Warns of ‘Stolen Election’*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/us/politics/trump-election-rigging.html>.

66. Rosie Gray, *Trump Defends White-Nationalist Protesters: ‘Some Very Fine People on Both Sides’*, THE ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/>.

67. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009). The quote in context reads:

Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.

These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements.

Id. (citations omitted).

incentives for the majority party to manipulate the rules for partisan advantage. As Stewart, Persily, and Ansolabehere explain:

Under circumstances of severe racial polarization, efforts to gain political advantage translate into race-specific disadvantages. For example, a ruling party or coalition that seeks to hobble the competitive position of its adversary by making it more difficult for their constituencies to vote or campaign will inevitably discriminate against a racial group. In those circumstances, race-based discrimination becomes an efficient tool for incumbent protection or partisan advantage.⁶⁸

The result has been that states with Republican control of government have passed laws, such as strict voter identification laws, making it harder to register and to vote, and they have enacted redistricting plans that minimize minority voting power and reinforce the narrative of the Democratic Party as a “black party.” According to a count by the Brennan Center, since 2010, twenty-three states have passed laws making it harder to register and vote, three of which have been blocked by the courts.⁶⁹ All but two of the twenty-three states, Illinois and Rhode Island, had majority Republican legislatures when passing the laws.⁷⁰ Numerous Republican states have had their redis-

68. Ansolabehere, Persily & Stewart, *supra* note 33, at 209.

69. BRENNAN CTR. FOR JUSTICE, NEW VOTING RESTRICTIONS IN AMERICA 1 (2017), https://www.brennancenter.org/sites/default/files/analysis/New_Voting_Restrictions.pdf.

70. NAT’L CONF. OF STATE LEGISLATURES, 2017 STATE AND LEGISLATIVE PARTISAN COMPOSITION (2017), http://www.ncsl.org/portals/1/documents/elections/Legis_Control_2017_March_27_11am.pdf (giving a list of control of state legislatures as of 2017). The states in the Brennan Center survey are Alabama, Arkansas, Arizona, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Montana, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. *See* BRENNAN CTR. FOR JUSTICE, *supra* note 69.

tricting plans challenged in the last decade as unconstitutional racial gerrymanders.⁷¹

Some commentators, such as voting rights attorney Deuel Ross, see a direct line from pre-Voting Rights Act devices and tests for voting to the new vote denial⁷²:

Like the partisan “reformers” who turned to literacy tests before them, modern Republicans in the North and South are experimenting with voter ID laws, cuts to early voting, and other election law changes as facially race-neutral means of securing their political hegemony and undercutting the electoral clout of an opposition party overwhelmingly supported by voters of color.⁷³

In the face of electoral incentives of the Republican Party, especially in the South, to parlay private racism into political advantage, it has fallen to the courts, and especially the United States Supreme Court, to protect voting rights. Looking to the courts for protection in this area is nothing new. Dr. King concluded his *New York Times Magazine* article, *Civil Right No. 1*, by connecting the need for judicial protection of minority voting rights with the Supreme Court’s recent set of one person, one vote rulings⁷⁴:

At the time when the Supreme Court has said that the law of the land demands “one man, one vote,” so that all state legislatures may be democratically structured, it would be a mockery indeed if this were not followed

71. On Alabama’s litigation, see generally Hasen, *Racial Gerrymandering*, *supra* note 58.

72. On the new vote denial, see generally Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

73. Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 379–80 (2014).

74. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962).

without delay by an insistence upon “one vote for every man.”⁷⁵

The Supreme Court’s early role in dealing with the Voting Rights Act was an important component of the Act’s early success. It was the Supreme Court that repeatedly recognized Congress’s power to enact the preclearance provisions of the Voting Rights Act,⁷⁶ read Section 5 broadly to cover a wide array of voting procedures,⁷⁷ upheld its nationwide ban on literacy tests,⁷⁸ and construed Section 2 of the Voting Rights Act to require the creation of minority opportunity districts under certain conditions.⁷⁹ And it has been the Court that in recent years has held that some Republican gerrymanders were unconstitutional racial gerrymanders, often enacted in the false name of protecting the voting rights of minority voters.⁸⁰

But the Court’s overall record on protecting minority voting rights has been a relatively weak one, as conservative Justices held a majority on the Court for most of the last few decades. In Voting Rights Act cases, the Court has held that the Act cannot be used to challenge the power of minority-preferred representatives within legislative bodies,⁸¹ cannot be used to challenge the number of members of a legislative body so as to assure some minority representation,⁸² and it does not give minority voters the right to require the state to draw “influence” districts when the group of minority voters is not large and compact enough to make up a majority in a district.⁸³ These

75. King, *supra* note 1, at 95.

76. See Lopez v. Monterey Cty., 525 U.S. 266, 282–84 (1999); City of Rome v. United States, 446 U.S. 156, 177–78 (1980); Georgia v. United States, 411 U.S. 526, 535 (1973); South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966).

77. Allen v. State Bd. of Elections, 393 U.S. 544, 565–69 (1969).

78. Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

79. See Thornburg v. Gingles, 478 U.S. 30 (1986).

80. See Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788 (2017); Cooper v. Harris, 137 S. Ct. 1455 (2017); Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015). See generally Richard L. Hasen, *Resurrection: Cooper v. Harris and the Transformation of Racial Gerrymandering into a Voting Rights Tool*, 1 AM. CONST. SOC’Y SUP. CT. REV. 105 (2017).

81. Presley v. Etowah Cty. Comm’n, 502 U.S. 491, 509–10 (1992).

82. Holder v. Hall, 512 U.S. 874, 855 (1994).

83. Bartlett v. Strickland, 556 U.S. 1, 13, 25–26 (2009).

rulings were especially important in hindering efforts at greater cross-racial coalition politics in the South and elsewhere. The Court's most recent case under the Voting Rights Act, issued just before Justice Anthony Kennedy announced his retirement, rejected a Section 2 challenge to a number of Texas districts, upholding just a single finding of a racial gerrymander aimed at protecting a Latino district.⁸⁴ The case signals that a new conservative majority is likely to read the Voting Rights Act in increasingly narrow ways.⁸⁵

The Court in the 1990s allowed conservatives to use a new "racial gerrymandering" doctrine to prevent the creation of districting plans that helped both minority voters and Democrats.⁸⁶ Most significantly, after repeatedly recognizing Congress's ability to require states with a history of racial discrimination in voting to obtain federal Voting Rights Act preclearance for voting changes, the Court held in the 2013 *Shelby County* case⁸⁷ that Congress's failure to update the preclearance formula for "current conditions" in the states violated a newly-found state right to "equal sovereignty."⁸⁸ As Professors Charles and Fuentes-Rohwer put it, "the Court no longer believes that intentional racial discrimination by state actors remains the dominant problem of democratic politics."⁸⁹

The Court has also rejected challenges to the constitutionality of voter identification laws. In the 2008 case, *Crawford v. Marion County Election Board*, the Court rejected a facial challenge to Indiana's strict voter identification law, paving the way, along with *Shel-*

84. *Abbott v. Perez*, 138 S. Ct. 2305, 2334–35 (2018).

85. Richard L. Hasen, *Suppression of Minority Voting Rights Is About to Get Way Worse*, SLATE (June 25, 2018, 2:20 PM), <https://slate.com/news-and-politics/2018/06/the-abbott-v-perez-case-echoes-shelby-county-v-holder-as-a-further-death-blow-for-the-voting-rights-act.html>.

86. *Miller v. Johnson*, 515 U.S. 900 (1995) (holding unconstitutional legislative districts drawn by jurisdictions covered by the preclearance provisions of Section 5 of the Voting Rights Act to satisfy demands of U.S. Department of Justice); *Shaw v. Reno*, 509 U.S. 630 (1993).

87. 570 U.S. 529, 556 (2013).

88. *Id.* at 535, 540, 553. For a critique of the Court's new use of this principle, see Leah Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016).

89. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1392 (2015).

by County, for more states to enact ever stricter voting rules.⁹⁰ Eventually the Court is likely to give the green light to these stricter voting rules in cases coming from Texas or elsewhere.⁹¹ It has freed states to knock more eligible voters off the voting rolls despite federal law that would seem to protect these voters.⁹²

The Court also recently opened up the possibility that states and localities could draw districts containing equal populations of voters or citizens, rather than just people.⁹³ While the Court rejected the argument that a voter or citizen denominator was constitutionally required, it did not reject voter-based districts as constitutionally forbidden.⁹⁴

In sum, the Court's record on voting rights since the time of Dr. King's lifetime has been mixed. It decided key early cases upholding the Voting Rights Act and reading the Act in a way to help strengthen minority voting power. But it has not gone nearly as far as it could, and in more recent years the Court has stood in the way of greater coalition building and protection of key voting rights for minority voters and others.

C. *The Cycling Effects of Felon Disenfranchisement*

The courts' usual refusal to embrace expansive voting rights claims also extends to questions of felon disenfranchisement. All but two states, Maine and Vermont, disenfranchise current felons, and many states impose bans on felon voting even after felons complete

90. 553 U.S. 181, 202–04 (2008).

91. *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017). The trial court on remand found that Texas enacted its law with a racially discriminatory purpose. 249 F. Supp. 3d 868 (S.D. Tex. 2017). A divided Fifth Circuit panel reversed, upholding Texas's revised voter identification law and rejecting a finding of discriminatory purpose. 888 F.3d 792 (5th Cir. 2018).

92. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1848 (2018).

93. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132–33 (2016).

94. See Steven J. Mulroy, *Coloring Outside the Lines: Erasing “One-Person, One-Vote” & Voting Rights Act Line-Drawing Dilemmas by Erasing District Lines*, 85 MISS. L.J. 1271, 1274, 1290 (2017) (discussing the impact of citizen-based districting on Latinos). On what such a holding could mean, see Daniel Tokaji, *Evenwel and the Next Case*, AM. CONST. SOC'Y: ACSBLOG (Dec. 3, 2015), <https://www.acslaw.org/acsblog/evenwel-and-the-next-case>.

their sentences and probation.⁹⁵ As we have seen, the effect of felon disenfranchisement on the African American community is severe, with some states seeing over 20% of the adult black population disenfranchised because of a prior felony conviction.⁹⁶

In the 1974 case, *Richardson v. Ramirez*, the Supreme Court rejected a challenge to state disenfranchisement laws under the Fourteenth Amendment's Equal Protection Clause.⁹⁷ The Court reasoned that because states were not penalized in congressional representation (under Section 2 of the Fourteenth Amendment) for disenfranchising felons, such disenfranchisement cannot be a denial of equal protection.⁹⁸ More recently, lower courts also have rejected challenges to felon disenfranchisement under the Voting Rights Act despite the racially disparate impact of the practice.⁹⁹

The courts have left some room for litigation over the practice of felon disenfranchisement, which disproportionately burdens the African American community.¹⁰⁰ In *Hunter v. Underwood*, the Court held unconstitutional an Alabama felon disenfranchisement law for

95. *Criminal Disenfranchisement Laws in the United States*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states> (last updated Sept. 7, 2018).

96. *See supra* notes 44–46 and accompanying text.

97. 418 U.S. 24, 56 (1974). For more recent unsuccessful constitutional challenges, see *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010); *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010); *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010) (rejecting claim based upon discriminatory intent).

98. *Richardson*, 418 U.S. at 53–56.

99. *See Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc); *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Johnson v. Governor of the State of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc). On the difficulties of reading the Voting Rights Act to bar state felon disenfranchisement laws in light of the history of the Fifteenth Amendment, see Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1663–68 (2012).

100. ERIN KELLEY, BRENNAN CTR. FOR JUSTICE, RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY 1 (2017), https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf.

crimes involving “moral turpitude” enacted for a racially discriminatory purpose and with racially discriminatory intent.¹⁰¹

Alabama revamped its law, resulting in litigation and legislation over the scope of its disenfranchisement law. Most recently, in response to the 2016 *Thompson v. Alabama* litigation, the Alabama legislature passed a 2017 law narrowing and defining which felonies count to disenfranchise voters, and voting rights advocates have been trying to register former felons who were disenfranchised for crimes not covered by the new law.¹⁰² Even after the 2017 law, many Alabama voting officials took the position that former felons who committed felonies that were not on the new list nonetheless could not have their voting rights restored until they paid their fines.¹⁰³ Critics said this practice amounted to a modern-day poll tax.¹⁰⁴ Alabama Secretary of State John H. Merrill eventually declared, contrary to an earlier statement, that Alabama residents who committed felonies not on the 2017 list but who still owed fines could be re-enfranchised immediately.¹⁰⁵ Critics also attacked Merrill for failing to alert those who had been told they were disenfranchised because they committed a felony not on the 2017 list that they were now entitled to vote.¹⁰⁶

101. 471 U.S. 222, 233 (1985).

102. For information on the lawsuit, see *Cases & Actions: Thompson v. Merrill*, CAMPAIGN LEGAL CTR., <http://www.campaignlegalcenter.org/case/thompson-v-alabama> (last updated May 16, 2018).

103. Connor Sheets, *In Wake of Reports, Alabama Clarifies That Some Felons Can Vote Despite Debts*, AL.COM (Oct. 6, 2017), https://www.al.com/news/index.ssf/2017/10/in_wake_of_reports_alabama_cla.html (reporting that some county registrars had not been following the Secretary of State’s guidance and refused to register former felons with outstanding financial debts).

104. Connor Sheets, *Too Poor to Vote: How Alabama’s ‘New Poll Tax’ Bars Thousands of People from Voting*, AL.COM (July 24, 2018), http://www.al.com/news/index.ssf/2017/10/too_poor_to_vote_how_alabamas.html.

105. Sheets, *In Wake of Reports, Alabama Clarifies That Some Felons Can Vote Despite Debts*, *supra* note 103.

106. Pema Levy, *Don’t Blame Black Voters If Roy Moore Wins. Blame Alabama’s Secretary of State*, MOTHER JONES (Dec. 11, 2017, 6:00 AM), <http://www.motherjones.com/politics/2017/12/the-republican-overseeing-the-alabama-election-doesnt-think-voting-should-be-easy/> (“Earlier this year, Alabama passed a law extending the right to vote to thousands of residents previously barred from voting for low-level felony convictions. But Merrill decided this spring that his office would not reach out to these individuals or more broadly promote the new law

The Alabama experience shows that the battle over felon disenfranchisement is a state-by-state slog, which will be won sometimes through litigation but more often in the political arena. In Virginia, a battle between the state's Democratic Governor Terry McAuliffe and the state's Republican legislature led to prolonged litigation and McAuliffe having to restore thousands of felons voting rights through separately signed orders.¹⁰⁷ By April 2017, he had individually restored voting rights to more than 150,000 former felons.¹⁰⁸

In Florida, Governor Charlie Crist engaged in a concerted effort to restore felon voting rights of those who had completed their sentences (he had the record until McAuliffe beat it),¹⁰⁹ a process his successor in office, Governor Rick Scott, virtually stopped cold.¹¹⁰

to the people who might now be able to register. 'I'm not going to spend state resources' to notify 'a small percentage of individuals who at some point in the past may have believed for whatever reason they were disenfranchised,' he told the *Huffington Post* in June.”).

107. Laura Barrón-López, Amber Ferguson & Sam Levine, *67,000 Virginia Ex-Felons Just Got Their Voting Rights Back. This Man Wants to Make Sure They Keep Them.*, HUFFINGTON POST (Oct. 21, 2016), https://www.huffingtonpost.com/entry/virginia-felons-voting-rights_us_5809292fe4b000d0b155b2cc (reporting that McAuliffe has signed 67,000 separate orders restoring voting rights after the Virginia Supreme Court rejected his attempt to grant a blanket restoration of voting rights).

108. Laura Vozzella, *Va. Gov. McAuliffe Says He Has Broken U.S. Record for Restoring Voting Rights*, WASH. POST (Apr. 27, 2017), https://www.washingtonpost.com/local/virginia-politics/va-gov-mcauliffe-says-he-has-broken-us-record-for-restoring-voting-rights/2017/04/27/55b5591a-2b8b-11e7-be51-b3fc6ff7faee_story.html?utm_term=.8b024574876d (“McAuliffe (D) said he had individually restored rights to 156,221 Virginians, surpassing the previous record-holder by a nose. As governor of Florida from 2007 to 2011, Charlie Crist restored voting rights to 155,315 felons, according to figures that McAuliffe’s office obtained from Florida.”).

109. *Id.*

110. ERIKA L. WOOD, BRENNAN CTR. FOR JUSTICE, FLORIDA: AN OUTLIER IN DENYING VOTING RIGHTS 13 (2016) (“In 2010, a year that included some time when Crist’s rules were still in effect, 36,713 applications were filed and only 27,456 were processed. In 2011, under Scott, just 52 applications were approved, representing a 99.8 percent decrease from 2009. In 2012, this number increased to 342, still less than 2 percent of the number restored in 2009 under the Crist rules. In 2013 and 2014, the numbers were 569 and 562, respectively. In 2015, 427 citizens had their voting rights restored.”) (footnotes omitted).

Opponents of Florida's disenfranchisement law are now pushing a ballot measure enacting a constitutional amendment that would restore the voting rights of up to 1.5 million disenfranchised Floridians who had completed their criminal sentences.¹¹¹

No doubt felon disenfranchisement falls harder on African Americans than others because of lingering high poverty rates.¹¹² Felon disenfranchisement perpetuates poverty.¹¹³ Felons cannot vote and therefore cannot support government programs to end poverty. Continued poverty leads to more felons who are disenfranchised. The lack of political power and economic power go hand in hand, with felon disenfranchisement laws as a key link.

V. CONCLUSION

I expect Dr. King would have marveled at the progress made by African Americans in the last fifty years even as he would have lamented how much further there is to go. I also suspect he would not have been surprised that the election of the first African American U.S. president would be followed by the election of a presidential candidate who infused his campaign with a startling message of white resentment the likes of which the country had not seen for at least a generation.

One of Dr. King's key lessons was that nonviolent activism presented the best hope for political change. The path to finally fulfilling Dr. King's dream remains through continued nonviolent political activism and the building of cross-racial and cross-class coalitions. If private racism cannot be banished, it can be diluted through greater rates of voting by members of minority groups and those in the white

111. The Editorial Board, *Florida's 1.5 Million Missing Voters*, N.Y. TIMES (Jan. 2, 2018), <https://www.nytimes.com/2018/01/02/opinion/florida-missing-voters.html>.

112. See Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1173 (1994).

113. Darren Wheelock & Christopher Uggen, *Race, Poverty, and Punishment: The Impact of Criminal Sanctions on Racial, Ethnic, and Socioeconomic Inequality* 2 (Nat'l Poverty Ctr., Working Paper Series, Paper No. 06-15, 2006), http://nationalpovertycenter.com/publications/workingpaper06/paper15/working_paper06-15.pdf.

majority aligned with them. If the Supreme Court will not fully enforce the protections of the Voting Rights Act, it is up to the people to organize to strengthen the Voting Rights Act in Congress, and if necessary, bring change to the Supreme Court itself through the election of Presidents and Senators who will confirm Justices committed to a strong voting rights vision.

The people themselves are more apt to bring about positive political changes than a conservative Supreme Court or wishful thinking about the magical disappearance of racism from the American South and elsewhere. The struggle for full and equal voting rights is hardly over. Indeed, in some ways, it has begun again to counter new efforts at retrenchment. It is a noble effort that all Americans, and not just African Americans, should actively support. As Dr. King prayed, "God grant that we wage the struggle with dignity and discipline."¹¹⁴

114. MARTIN LUTHER KING, JR., *Nonviolence and Racial Justice, in A TESTAMENT OF HOPE*, *supra* note 6, at 5, 9.