

## CANONIZING THE CIVIL RIGHTS REVOLUTION: THE PEOPLE AND THE POLL TAX

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### I. NEW GENERATION

The sun is setting on the civil rights revolution. Over the last decades, the constitutional meaning of this egalitarian breakthrough has been interpreted by lawyers and judges who lived through the struggles of the 1950s and 1960s. But as the profession moves into the twenty-first century, Earl Warren and Martin Luther King, Jr., John F. Kennedy and Lyndon Johnson are receding into history. If members of the rising generation are to interpret the constitutional contributions of the fading past, their lived experi-

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ence will no longer enable them to place particular achievements within a larger historical context. They will be obliged to select some canonical texts as representative of the civil rights revolution and use this canon to interpret the enduring meaning of this twentieth-century breakthrough. Just as modern lawyers read the original Constitution, the *Federalist Papers*, *Marbury*, and *McCulloch* to gain a sense of our early beginnings,<sup>1</sup> they must formulate a similar canon if a new generation is to interpret the achievement of its immediate predecessors.

But *which* texts should we select? *Brown*<sup>2</sup> is obviously one, but what are the others? The choice is critical: While a few lucky historians may spend a happy lifetime exploring the archives, lawyers and judges can afford no such luxury. They are in the business of litigating and deciding cases: The achievements of the past must be packaged into a readily available form for the very busy men and women who are charged with sustaining our constitutional tradition. Canonization is a professional necessity.<sup>3</sup>

Once a text is admitted into the canon, it will be open to a variety of interpretations, as the history of *Brown* suggests.<sup>4</sup> Nevertheless, the profession's choice of canonical texts will shape profoundly the overall character of the ongoing interpretive effort—determining what we see, *and don't see*, as we argue about the constitutional significance of the twentieth century.

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This is the larger lesson of the recent Senate confirmation hearings of John Roberts and Samuel Alito, which gave birth to an idea with a promising future in our constitutional life: the “superprecedent.” The basic premise of the hearings was this: While Supreme Court Justices are free to overrule ordinary precedents, they must treat superprecedents as fixed parts of the constitutional canon, which serve as fundamental points of reference for further legal development. Led by Senator Arlen Specter, both Alito and Roberts were quizzed endlessly on whether they would grant superprecedential status to one or another leading decision of the twentieth century. The paradigm case was *Brown*, whose superprecedential status was readily acknowledged by both nominees.<sup>5</sup> But did *Roe v. Wade*, or other leading

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<sup>1</sup> THE FEDERALIST (Jacob E. Cooke ed., 1961); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>2</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>3</sup> For further discussion of canonization, see Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1739–56, 1751 n.32, 1753 n.38 (2007).

<sup>4</sup> See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989) (discussing the evolution of *Brown*'s constitutional meaning over time).

<sup>5</sup> See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the United States Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 321, 452 (2006) [hereinafter Alito]; *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief*

cases, deserve similarly privileged status? The nominees bobbed and weaved in response,<sup>6</sup> but, for our purposes, the senators' persistent questions were more important than the nominees' particular answers. The Senate dialogues mark a new stage in the self-conscious elaboration of the civil rights canon, forcing us all to reflect on the criteria we should use in identifying the crucial legal texts of the twentieth century.

This is progress, but the next step might lead down a blind alley. Given our inveterate court-watching habits, we might be tempted to suppose that the civil rights canon should be exclusively composed of judicial decisions—and that the only interesting question is how to identify the cases that should join *Brown* in qualifying for superprecedential status. We reject this view, and urge the profession to broaden the canon to embrace the constitutional amendments and landmark statutes of the civil rights era.

*Brown* was only the beginning of a complex process, lasting through the 1960s and into the early 1970s, in which the American people finally brought an end to Jim Crow and redefined their constitutional commitment to equality. Without the rise of the popular movement led by Martin Luther King, Jr., without the decisive victory of Lyndon Johnson over Barry Goldwater in 1964, without the consolidations under Richard Nixon, *Brown's* promise might have been overwhelmed by a segregationist backlash at the polls and racial rioting in the streets. While the Supreme Court remained important throughout the 1960s, constitutional leadership turned to other branches, which broadened and consolidated *Brown's* promise in landmark statutes like the Civil Rights Act of 1964 and the Voting Rights Act of 1965. A constitutional canon that fails to recognize the centrality of these extrajudicial acts of popular sovereignty will blind the profession to the full meaning of the civil rights revolution.

This is the broad argument presented in a recent lecture series by one of us.<sup>7</sup> The present Article follows up with a particularly spectacular case study of the distortions threatened by an overly court-centered canon. It deals with the poll tax, one of the great symbols of Southern racism—and an ongoing subject of public debate since the New Deal—that has been virtually ignored in the scholarly literature.<sup>8</sup> But we try to do more than fill

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*Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144–45 (2005) [hereinafter Roberts].

<sup>6</sup> See Alito, *supra* note 5, at 321; Roberts, *supra* note 5, at 145.

<sup>7</sup> See Ackerman, *supra* note 3.

<sup>8</sup> The legal literature is remarkably thin. The constitutional problems raised by the poll tax were last a source of sustained discussion in the 1940s. See, e.g., Louis B. Boudin, *State Poll Taxes and the Federal Constitution*, 28 VA. L. REV. 1 (1941); Joseph E. Kallenbach, *Constitutional Aspects of Federal Anti-Poll Tax Legislation*, 45 MICH. L. REV. 717 (1947); Henry N. Williams, Comment and Case Notes, *The Poll Tax and Constitutional Problems Involved in its Repeal*, 11 U. CHI. L. REV. 177 (1944). More contemporary articles deal with the Twenty-Fourth Amendment only in relation to felony disenfranchisement or women's suffrage. See, e.g., J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435 (2001); Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women's Poll Tax Repeal Movement After the Nineteenth*

this gap—we use the poll tax as a window into larger issues arising from the construction of a suitable constitutional canon for the twenty-first century.

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Beginning in the 1930s, there were repeated efforts to enlist the federal government in a campaign to abolish the tax. But these early campaigns failed to achieve lasting results, at least until the climactic years of the civil rights revolution. Then the dikes broke, and between 1962 and 1966 a cascading wave swept away the poll tax once and for all: The Twenty-Fourth Amendment, Section Ten of the Voting Rights Act,<sup>9</sup> and, finally, *Harper v. Virginia State Board of Elections*.<sup>10</sup>

Yet when lawyers today reflect upon the decline and fall of the poll tax, only one of these texts remains familiar: surprisingly, it is *Harper*. We say “surprisingly” because our official theory of the Constitution suggests that the Twenty-Fourth Amendment should have primacy in the professional mind—after all, it’s part of the formal Constitution, and so its place in the canon should be secure.

But the truth is otherwise. Many leading professors of constitutional law would flunk a pop quiz on the Twenty-Fourth Amendment—nope, that isn’t the one giving the District of Columbia voting power in presidential elections!<sup>11</sup> And so far as Section Ten is concerned, even election law junkies might pause before they recall this now-obsolete section of the Voting Rights Act (VRA).<sup>12</sup> In contrast, any well-educated constitutional lawyer can identify *Harper* as the famous Warren Court decision that condemns wealth discrimination as an invidious basis for limiting the suffrage under the Equal Protection Clause. We mean to challenge the prevailing frame of legal understanding that places *Harper* in the foreground, Twenty-Four and

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*Amendment*, 73 NOTRE DAME L. REV. 839 (1998); Sloan G. Speck, Comment, “*Failure to Pay Poll Tax or Other Tax*”: *The Constitutionality of Tax Felon Disenfranchisement*, 74 U. CHI. L. REV. 1549 (2007) (arguing that the Twenty-Fourth Amendment should be construed narrowly to permit the disenfranchisement of tax felons). Despite his comprehensive ambitions, Professor Akhil Amar devotes precisely one and a half pages to the amendment. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 442–44 (2005).

<sup>9</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 10, 79 Stat. 437, 442–43 (codified as amended at 42 U.S.C. § 1973(b) (2000)).

<sup>10</sup> 383 U.S. 663 (1966).

<sup>11</sup> The Amendment reads:

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XXIV.

<sup>12</sup> Voting Rights Act of 1965 § 10.

Ten in the deep background. Reversing background and foreground will not only generate new insights into the dynamics of popular sovereignty in the 1960s; it will also allow a deeper understanding of *Harper* and the extent to which it deserves superprecedential status.

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First things first: The Twenty-Fourth Amendment and Section Ten of the VRA are a unique pair in our constitutional history. Both are aimed at the same problem—the poll tax. Both condemn the tax—the Amendment prohibiting it in federal elections, the landmark statute condemning its use in state elections—but they employ different legal forms to express their opposition. The federal ban takes the classical form of an Article Five amendment. Section Ten takes the modern form of a “landmark statute” passed in response to a presidential claim of a popular mandate for a revolutionary reform of our constitutional arrangements.<sup>13</sup>

This unique juxtaposition permits a new perspective on some conventional wisdom. If constitutional lawyers know anything, they know that a formal amendment serves as the nation’s last resort, when all statutory modes of revision have failed. Yet our sequence does not conform to this banality. To the contrary, the Twenty-Fourth Amendment became part of the Constitution in 1964, a year before the VRA, and its ban on poll taxes in federal elections might well have been accomplished through the enactment of a statute. In contrast, the VRA denounced the poll tax in *state* elections, revolutionizing deeply entrenched constitutional understandings. If either of these moves required a formal amendment, surely it was the latter, not the former?

Indeed the National Association for the Advancement of Colored People (NAACP) *opposed* the Twenty-Fourth Amendment precisely because it threatened to condemn further civil rights initiatives to the tender mercies of a minority veto by the states under Article Five of the Constitution, which requires ratification by three-fourths of the states.<sup>14</sup> But these highly plausible objections were ignored by the Kennedy Administration, Congress, and the states as they proposed and ratified the amendment in the early 1960s. What is more, when the state poll tax returned to center stage in 1965, the NAACP’s fears proved well founded: the Twenty-Fourth Amendment served as a powerful rhetorical weapon for opponents of further reform.

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<sup>13</sup> See Ackerman, *supra* note 3, at 1742.

<sup>14</sup> U.S. CONST. art. V. Article Five provides in relevant part:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

Nevertheless, the draftsmen of the VRA finally managed—in Section Ten—to undermine state poll taxes through a self-consciously novel form of lawmaking. In short, we will be telling a story in which the landmark statute *supersedes* the classical amendment as the form of higher lawmaking most appropriate for modern America.

The leading participants in the debates surrounding the Amendment and the VRA were entirely aware of the potential significance of this transformation in the forms of higher lawmaking. Why, then, has the importance of this shift from classical to modern been lost to view in our times?

Because Justice William O. Douglas, in his opinion for the Court in *Harper*, erased the role of the amendments and landmark statutes of the 1960s in redefining the constitutional status of the poll tax. Although the Twenty-Fourth Amendment and the Voting Rights Act specifically addressed the issue, Douglas preferred to strike down the tax on the basis of a precedent-shattering interpretation of the Fourteenth Amendment. Since American lawyers are inveterate court watchers, Douglas's erasure has blinded them to the importance of the constitutional politics of the 1960s in legitimating this egalitarian breakthrough.

This failure is especially unfortunate, since Douglas's slipshod opinion is the result of historical accident. When *Harper* first came before the Court in 1965, Justice Arthur Goldberg grasped its fundamental relationship to the constitutional politics then gripping the nation. His colleagues did not—indeed, a strong majority was initially inclined to *uphold* state poll taxes in a summary opinion based on *stare decisis*. But Goldberg circulated a dissent, emphasizing the Twenty-Fourth Amendment, which led them to question their knee-jerk reaction and set *Harper* down for plenary consideration. Unfortunately, Goldberg then resigned from the Court before *Harper* came up for argument, and the task of writing the opinion fell to Douglas. Although the Solicitor General, in a brief written by the young Richard Posner,<sup>15</sup> powerfully developed arguments based on the Twenty-Fourth Amendment and the recently enacted VRA, Douglas simply ignored them.<sup>16</sup>

In contenting ourselves with Douglas's erasure, we are indulging in a very superficial sort of court-watching. Unlike the *Harper* that resides in our casebooks, Goldberg's version would have invited its readers to see the Court's decision as the concluding stage of a three-part process in which the Twenty-Fourth Amendment and Section Ten of the VRA served as essential preliminaries. Both Goldberg's opinion and the Solicitor General's

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<sup>15</sup> Brief for the United States as Amicus Curiae, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1965) (No. 48).

<sup>16</sup> We owe Goldberg's unpublished opinion to the scholarly sleuthing of the late Professor Bernard Schwartz, but the methodological significance of this discovery has not been adequately appreciated. See Bernard Schwartz, *More Unpublished Warren Court Opinions*, 1986 SUP. CT. REV. 317 (discussing Goldberg's unpublished opinion).

brief invite us to see poll-tax abolition as the product of a process of *dynamic triangulation* in which a formal amendment, a landmark statute, and a Supreme Court opinion each played a significant role in expressing the American people's decision to strike down wealth discrimination in voting during the 1960s.

From this vantage, our case study enriches a series of long standing debates. A few months after *Harper*, Justice Brennan wrote a famous opinion for the Court in *Katzenbach v. Morgan*,<sup>17</sup> which granted new authority to constitutional judgments made by Congress under Section Five of the Fourteenth Amendment. Our reinterpretation of *Harper* vindicates a much broader role for Congress. In enacting the landmark statutes of the civil rights era, Congress was responding to a constitutional mandate from the American people to establish a new regime that would decisively move beyond the failed promise of Reconstruction.

Moving from process to substance, dynamic triangulation offers a new perspective on the status of wealth discrimination in our constitutional law. It accounts for *Harper*'s surprising endurance despite the Supreme Court's retreat on economic inequality over the last generation,<sup>18</sup> and it provides the basis for a fundamental reinterpretation of leading cases on the constitutional status of economic inequality in our democracy: the classic *Buckley v. Valeo*<sup>19</sup> and the very recent *Crawford v. Marion County Election Board*.<sup>20</sup> We also hope that our case study spurs others to launch further investigations of the civil rights canon. Only a series of careful, historically nuanced studies will permit a deeper perspective on the constitutional legacy left to us by the twentieth century.<sup>21</sup>

But for the present, it will be good enough to understand the poll tax.

## II. THE TWENTY-FOURTH AMENDMENT

The Twenty-Fourth Amendment lies deep in the shadows, but the slightest glance in its direction reveals a series of paradoxes. Begin with the Amendment's leading sponsor, Senator Spessard Holland of Florida. One would suppose that the Senator leading the charge against the poll tax would be a supporter of Martin Luther King, Jr., whose March on Washing-

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<sup>17</sup> 384 U.S. 641 (1966).

<sup>18</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (“[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . .”).

<sup>19</sup> 424 U.S. 1 (1976).

<sup>20</sup> 128 S. Ct. 1610 (2008).

<sup>21</sup> One of us will be embarking on this venture in a forthcoming book, BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (forthcoming).

ton would take place about a year after Holland finally convinced two-thirds of Congress to endorse his amendment.<sup>22</sup>

Nothing could be further from the truth. Holland was a life-long segregationist.<sup>23</sup> He signed the Southern Manifesto<sup>24</sup> and voted against the Civil Rights Acts of 1957 and 1960.<sup>25</sup> He would go on to vote against the Civil Rights Act of 1964<sup>26</sup> and, even more remarkably, the Voting Rights Act of 1965. What led Holland to make an exception in this case?

Paradox reappears when we turn to the NAACP. One might suppose that civil rights activists would rejoice at seeing a renewed commitment to voting rights sanctified in the modern Constitution. But one would suppose wrongly: the NAACP emphatically called upon Congress to reject the Amendment—and precisely because it was an Amendment.<sup>27</sup>

From its perspective, Congress already had ample power to ban poll taxes in federal elections. If it chose to take the Article Five route, the NAACP feared that the action would provide “an immutable precedent for shunting all further civil rights legislation to the amendment procedure.”<sup>28</sup> The civil rights revolution could then be blocked by thirteen states, making sweeping reform impossible. The NAACP joined forces with a range of liberal organizations—including the American Jewish Congress, the Americans for Democratic Action, the Anti-Defamation League, and the United Automobile Workers—to denounce Holland’s initiative: “[I]t is a travesty to call a constitutional amendment a civil rights measure when Congress has the constitutional power to abolish the poll tax by legislation . . . .”<sup>29</sup> For the liberal coalition, the only acceptable solution was the “immediate abolition of the tax through Federal legislation.”<sup>30</sup>

But these protests were not enough to stop the wheels of Article Five—even though Holland had a lot of parliamentary maneuvering to do before he could persuade the Senate to cast a vote against wealth discrimination in voting rights. Before pushing onward to the micro-politics of the Amendment’s passage, we pause to consider the bigger question: Despite the un-

<sup>22</sup> The final act of congressional approval was by the House on August 21, 1962, about a year before the March on Washington in the spring of 1963. *See generally* TRICIA ANDRYSZEWSKI, *THE MARCH ON WASHINGTON 1963: GATHERING TO BE HEARD* (1996) (describing the march and historical antecedents).

<sup>23</sup> *See* EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 73 (1989) (referring to Spessard Holland as a “segregationist stalwart”); GERALD C. WRIGHT, JR., LEROY N. RIESELBACH & LAWRENCE C. DODD, *CONGRESS AND POLICY CHANGE* 85 (1986) (same).

<sup>24</sup> *See* 102 CONG. REC. 4515–16 (1956).

<sup>25</sup> *See* 103 CONG. REC. 13,900 (1957); 106 CONG. REC. 7810-11 (1960).

<sup>26</sup> *See* 110 CONG. REC. 14,511 (1964).

<sup>27</sup> *See infra* Part II.C.

<sup>28</sup> *The Twenty-Fourth Amendment*, 1962 CONG. Q. ALMANAC 405; *After the Poll Tax*, CHI. DAILY TRIB., Mar. 31, 1962, at 12.

<sup>29</sup> *NAACP Against Tax Amendment*, PITTSBURGH COURIER, Mar. 31, 1962, at 16.

<sup>30</sup> *Id.*

embarrassed racism of Holland and the emphatic opposition of the NAACP, how could two-thirds of Congress, and the larger public, perceive the Amendment as a step forward in the struggle for voting rights?

The answer—in two words—is the *New Deal*. The popular understanding of poll-tax abolition was rooted in a generation of political and legal campaigning that began in the 1930s. It would take more than a burst of last minute lobbying to transform the entrenched public meaning of the abolition campaign.

#### A. *New Deal Roots*

New Deal progressives framed their opposition to the poll tax as an issue of class, not race.<sup>31</sup> Franklin Roosevelt's larger campaign against the reactionary leadership of the Southern Democratic Party galvanized the effort.<sup>32</sup> When leading Southerners joined Republicans to defeat his court-packing plan in 1937, Roosevelt struck back in the Southern Democratic primaries of 1938—supporting a string of liberal challengers to well-entrenched conservatives like Senator Walter George of Georgia.<sup>33</sup> Roosevelt's aim was nothing less than the transformation of the Democrats into an ideologically coherent liberal party that could sustain progressive politics on a national basis.<sup>34</sup> But this would require a revolution in Southern politics.

Conditions seemed ripe. Public opinion polls consistently revealed that the South had a larger proportion of self-identified “liberals” than any other region. This is hardly surprising in an era when “liberal” meant support for New Deal economic assistance programs that disproportionately benefited an impoverished Dixieland.<sup>35</sup> Nevertheless, the President still had a problem. As he explained to Aubrey Williams, the Alabaman who was director of the National Youth Administration, “I think the South agrees

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<sup>31</sup> See MANFRED BERG, “THE TICKET TO FREEDOM”: THE NAACP AND THE STRUGGLE FOR BLACK POLITICAL INTEGRATION 105 (2005) (“In the campaign against the poll tax, the emphasis was on class rather than race.”).

<sup>32</sup> See Jerome M. Mileur, *The “Boss”: Franklin Roosevelt, the Democratic Party, and the Reconstitution of American Politics*, in *THE NEW DEAL AND THE TRIUMPH OF LIBERALISM* 121–24 (Sidney M. Milkis & Jerome M. Mileur eds., 2002).

<sup>33</sup> See WILLIAM E. LEUCHTENBURG, *THE WHITE HOUSE LOOKS SOUTH* 91–98 (2005) (describing Roosevelt's various efforts to oust Senator Walter George); HALFORD ROSS RYAN, *U.S. PRESIDENTS AS ORATORS* 161 (1995) (discussing “purgee” George); see also PETER W. SCHRAMM & BRADFORD P. WILSON, *AMERICAN POLITICAL PARTIES AND CONSTITUTIONAL POLITICS* 163–72 (1993) (providing context for Roosevelt's “purge campaign”).

<sup>34</sup> See LEUCHTENBURG, *supra* note 33, at 116–17; KEVIN J. MCMAHON, *RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN* 17–18 (2004).

<sup>35</sup> See ROBERT S. ERIKSON, GERALD C. WRIGHT, & JOHN P. MCIVER, *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* 221–24 (1993) (analyzing public opinion poll data and observing that the “most liberal of the prewar states were found incongruously (by current standards) in the Democratic South”).

with you and me. One difficulty is that three quarters of the whites in the South cannot vote—poll tax etc.”<sup>36</sup>

Three months later, Roosevelt went public with his campaign to purge conservatives from the party, denouncing them as representatives of “Poll-taxia.”<sup>37</sup> At the same time, he was covertly encouraging ongoing campaigns to repeal the poll tax on a state-by-state basis.<sup>38</sup> These campaigns had already gained some success—only the year before, progressive New Dealers had abolished the poll tax in Florida<sup>39</sup> with an immediate political payoff: liberal Claude Pepper won the Democratic Party’s nomination for the Senate over conservative opposition, becoming an emphatic New Dealer on his arrival in Washington.<sup>40</sup>

But Pepper was the exception. Strong New Dealers failed to sweep away conservatives in the Southern primaries of 1938 and Roosevelt beat a hasty retreat. Reconciling himself to the status quo, he blandly explained, “at no time and in no manner did I even suggest federal legislation of any kind to deprive states of their rights directly or indirectly to impose the poll tax.”<sup>41</sup> He also distanced himself from local efforts to abolish the tax, calling them “campaigns of state issues” in which he was not personally involved.<sup>42</sup>

Nevertheless, the President’s earlier campaign against “Polltaxia” was making poll-tax abolition a key progressive demand for the next generation—if the Party of Roosevelt had a future in the South, it was essential for poor whites to vote liberal, and state-wide campaigns continued, with sig-

<sup>36</sup> STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969*, at 57 (1976) (citing Letter from Franklin D. Roosevelt to Aubrey Williams (Mar. 28, 1938), President’s Personal File 200, Franklin Delano Roosevelt Library).

<sup>37</sup> LAWSON, *supra* note 36, at 57; see FRANK FREIDEL, *F.D.R. AND THE SOUTH* 99 (1965); MCMAHON, *supra* note 34, at 17, 120; SIDNEY MILKIS, *THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL* 77 (1993).

<sup>38</sup> For example, Roosevelt expressed his delight with the anti-poll tax campaign in a letter to Brooks Hays, a repeal advocate from Little Rock, declaring the poll tax “inevitably contrary to fundamental democracy and its representative form of government in which we believe.” LAWSON, *supra* note 36 at 57 (quoting Letter from Franklin D. Roosevelt to Brooks Hays (Aug. 31, 1938), President’s Personal File 156, Franklin Delano Roosevelt Library).

<sup>39</sup> See FREDERIC D. OGDEN, *THE POLL TAX IN THE SOUTH* 182–85 (1958). Poll taxes were successfully abolished in Florida largely due to concerns over election fraud. *Id.* at 184. Economic concerns stemming from the Great Depression also led to the greater disenfranchisement of white voters reluctant or unable to pay the levies. See *id.*; V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 578 (1984).

<sup>40</sup> See MATTHEW CRENSON & BENJAMIN GINSBERG, *PRESIDENTIAL POWER: UNCHECKED AND UNBALANCED* 167 (2007) (describing Senator Pepper as a “New Deal loyalist”); see also MCMAHON, *supra* note 34, at 121 (noting unusually high turnout in 1938 relative to 1936).

<sup>41</sup> LAWSON, *supra* note 36, at 57.

<sup>42</sup> *Id.*; see also NANCY J. WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR* 251 (1983).

nificant success, during the coming decades.<sup>43</sup> While abolition of the tax helped break down the class barrier, its impact on blacks was less dramatic. Even if blacks paid their tax, Southern registrars were notorious for flunking blacks on literacy tests,<sup>44</sup> and even if they successfully registered, they risked violent retribution if they were brave enough to cast a ballot on election day. Nevertheless, abolition did have a positive impact in urban areas where racism was less intense and where the tax served as a decisive obstacle for an impoverished black population.<sup>45</sup> But as it emerged from the New Deal, the poll tax was a class issue first and foremost.

This key point allows us to solve the riddle of Spessard Holland—why would a proud racist seize the chance to push for poll-tax abolition in the early 1960s?

Holland's views were not a response to the rising civil rights movement, but were rooted in his early days as a politician. He was a Florida state senator in 1937, at a moment when the movement for abolition of Florida's poll tax was cresting.<sup>46</sup> As a rising Democrat, he had no trouble sweeping away a barrier to the participation of poor whites who would give sustained political support to New Deal values.<sup>47</sup> When a political opening appeared in the early 1960s, the elderly Holland was reenacting one of his early triumphs by undertaking a similar initiative on the federal level—but the sit-ins and Freedom Rides were then generating a very different political dynamic on the national stage.

The New Deal legacy also decisively shaped the Warren Court's understanding of the poll tax. The critical poll-tax case of the 1930s, *Breedlove v. Suttles*,<sup>48</sup> wasn't initially related to the legislative campaign against the poll tax. It was the brainchild of a Georgia lawyer, J. Ira Harrelson,

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<sup>43</sup> See MCMAHON, *supra* note 34, at 157 (arguing that New Dealers believed that the poll tax disfranchised poor whites likely to support progressive candidates); OGDEN, *supra* note 39, at 225, 228 (same).

<sup>44</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 31 (2006); Nicholas Katzenbach, *Toward a More Just America for All: Johnson the Civil Rights Warrior*, in LYNDON JOHNSON REMEMBERED: AN INTIMATE PORTRAIT OF A PRESIDENCY 130 (Thomas W. Cowger & Sherwin J. Markman eds., 2003).

<sup>45</sup> See JERRY F. HOUGH, CHANGING PARTY COALITIONS: THE MYSTERY OF THE RED STATE-BLUE STATE ALIGNMENT 131–32 (2006) (showing table with increasing rates of black voter registration and hypothesizing that the “declining role of the poll tax probably did help black turnout to some extent”).

<sup>46</sup> Spessard Holland served as a member of the Florida state senate from 1932 through 1940, and then went on to become governor. See ALLEN COVINGTON MORRIS, THE FLORIDA HANDBOOK 172 (1997).

<sup>47</sup> See JOHN W. MALSBERGER, FROM OBSTRUCTION TO MODERATION: THE TRANSFORMATION OF SENATE CONSERVATISM 12–13 (2000). In contrast to “obstructionist conservatives” who “generally opposed all that Franklin Roosevelt and the New Deal represented,” Malsberger characterizes Holland as a “new” conservative who accepted “an enlarged role for the state.” *Id.*

<sup>48</sup> 302 U.S. 277 (1937).

who had launched an independent judicial challenge on behalf of Nolan R. Breedlove, a twenty-eight-year-old white man.<sup>49</sup>

When the Georgia courts upheld the poll tax, Harrelson pushed onward to the Supreme Court, which granted certiorari at a particularly unpropitious moment: 1937. Confronting the case in the immediate aftermath of the Court-packing crisis, the liberal Justices were in no mood to consider new ventures in judicial activism. They signed onto a unanimous decision by Justice Butler, who dismissed the challenge in a cursory opinion.<sup>50</sup> In Butler's view, it was misleading to look upon the levy as a tax on voting. He emphasized that the state had imposed a head tax upon many nonvoters, including aliens, and it had simply chosen to enforce the tax by barring non-payers from casting their ballots.<sup>51</sup> This technique represented "a familiar and reasonable regulation long enforced in many States," and could not plausibly be viewed as a violation of the Equal Protection Clause.<sup>52</sup>

The Court confronted another problem when it came to the Nineteenth Amendment.<sup>53</sup> Although Georgia imposed a head tax on a broad range of its male residents, it only imposed the tax on women who wanted to vote.<sup>54</sup> Nevertheless, Butler dismissed as "fanciful" the claim that it had thereby violated the Nineteenth Amendment.<sup>55</sup> All in all, it took precisely 1,188 words for the unanimous Court to reject the constitutional case against the poll tax. The message could not have been clearer.

And once again, the message would be remembered when the issue returned to the Court in the 1960s. *Breedlove* was one of the first cases that Hugo Black decided as a Justice,<sup>56</sup> and he would issue a ringing dissent when *Harper* overruled *Breedlove* in its great egalitarian leap forward.<sup>57</sup>

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<sup>49</sup> See OGDEN, *supra* note 39, at 272 (describing Breedlove as a "28-year old white Georgia citizen"); *Supreme Court Upholds U.S. in Aluminum Suit: Payment of Accumulated Poll Taxes in Georgia Also Upheld*, THE NEWS (Frederick, MD), Dec. 6, 1937, at A1 (describing litigation brought by "Nolan R. Breedlove"). Matters got political only when Harrelson petitioned the Supreme Court to review the rejection of his case in the state courts. After he refused to withdraw the suit, Breedlove was arrested and charged with forging \$10 worth of checks, a felony which would deprive him of his right to vote. He was then sent to the chain-gang on trumped-up charges, allowing Georgia's lawyers to assert that the case was moot. It was at this point that Georgia's governor, the New Deal Democrat Eurith Dickinson Rivers threw a bombshell into the state's own case by pardoning Breedlove and restoring his citizenship. See *Discriminatory Poll Tax in South Under Fire in Court*, FRESNO BEE, Nov. 28, 1937, at A1 (reporting on background of the case). Despite an exhaustive search, we have only found this single newspaper report establishing these underlying facts.

<sup>50</sup> *Breedlove*, 302 U.S. 277.

<sup>51</sup> *Id.* at 282–83.

<sup>52</sup> *Id.* at 283.

<sup>53</sup> U.S. CONST. amend. XIX.

<sup>54</sup> *Id.* at 279–80.

<sup>55</sup> *Id.* at 284.

<sup>56</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670–71 (1966) (Black, J., dissenting) (referring to *Breedlove* as a case decided a "few weeks after I took my seat as a member of this Court").

<sup>57</sup> *Id.* at 670–80.

Memories of 1937 ran deep in the 1960s. Just as Spessard Holland would be reenacting his New Deal vote in the Florida State Senate,<sup>58</sup> Hugo Black would be reenacting his New Deal vote on the United States Supreme Court.

*B. Interregnum: Between the New Deal and the Civil Rights Era*

Though *Breedlove* was initiated by a lone lawyer, the Court's decision precipitated a sustained organizational campaign that kept the issue alive on the federal level for the next quarter-century. With the NAACP now taking a significant role,<sup>59</sup> a new Southern Conference for Human Welfare (SCHW) was created in 1938, and it quickly came up with a two-pronged legal and political strategy against the poll tax.<sup>60</sup>

On the legal side, the Southern Conference tried to contain *Breedlove* by launching a second lawsuit in 1939. The coalition chose a white man, Henry Pirtle, to attack Tennessee's poll tax, but this time on a more discriminating ground. His lawyers focused narrowly on the state's power to impose the tax on federal elections, arguing that this involved a violation of the Fourteenth Amendment's Privileges or Immunities Clause.<sup>61</sup> But the Court of Appeals for the Sixth Circuit was far more impressed with the fact that Article One, Section Two expressly provided that voters for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."<sup>62</sup> If taken literally, this would make it unconstitutional for voters in federal elections to be freed of the poll tax if they were still required to pay it to vote for state representatives. Without expressly deciding this issue, the court rejected the new case on the authority of *Breedlove*<sup>63</sup>—and when the Supreme Court denied cer-

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<sup>58</sup> Though his specific voting record in the Florida state Senate is unavailable, Holland consistently emphasized that he "strongly supported the repeal." *Hearings on S. 1024 Before the S. Rules and Admin. Comm.*, 80th Cong. (Mar. 23, 1948) (statement of Sen. Spessard Holland); see also *Hearings on S. 1024 Before the S. Judiciary Comm.*, 83d Cong. (May 11, 1954) ("[A]s far back as 1937 . . . I participated in the successful fight to remove the poll-tax as a Florida requirement for voting.")

<sup>59</sup> See BERG, *supra* note 31, at 106; LAWSON, *supra* note 36 at 62, 65, 105.

<sup>60</sup> See LAWSON, *supra* note 36, at 58–59. The Conference was organized in Birmingham, Alabama and largely grew out of the Alabama Policy Committee. It first convened on November 20, 1938, with 1,200 delegates representing "churches, schools, civil clubs, student groups, YMCA and YWCA, labor organizations, industrialists, Negro groups, influential newspapers, Jewish organizations, Catholics, Protestants, Democrats and Republicans." OGDEN, *supra* note 39, at 244 n.3. At the first meeting of the Executive Board, Joseph Gelders and Virginia Foster Durr (the sister-in-law of Justice Hugo Black) established the Civil Rights Committee within the larger conference to "concentrate on poll tax abolition" and to emphasize that the "southern poll tax was a matter of national concern." LAWSON, *supra* note 36, at 59.

<sup>61</sup> See *Pirtle v. Brown*, 118 F.2d 218, 221 (6th Cir. 1941); LAWSON, *supra* note 36, at 60.

<sup>62</sup> *Pirtle*, 118 F.2d at 219.

<sup>63</sup> *Id.* at 221.

tiorari in 1941,<sup>64</sup> it was plain that it would be Congress, not the courts, that would serve as the central forum for the next generation.

As *Pirtle* worked its way through the courts, the Southern Conference was developing its legislative strategy. In late 1939, it collaborated with California Representative Lee Geyer to mount a congressional campaign for poll-tax abolition.<sup>65</sup> Once again, the target was limited to federal elections, but this time the reformers didn't rely on the Privileges or Immunities Clause. Instead, Geyer relied on Congress's express power to control the "manner" of federal elections.<sup>66</sup>

Pointing to evidence that corrupt politicians bought and sold poll-tax receipts, Geyer argued that Congress could constitutionally ban the tax as a means to ensure honesty in federal elections.<sup>67</sup> To dramatize this point, Geyer presented his bill as an amendment to the 1939 Hatch Act, which sought to prevent "pernicious political activities."<sup>68</sup> His campaign began to pay off just as the litigation strategy was running into a dead end. Though segregationist Hatton Sumners used his power as chairman of the House Judiciary Committee to bottle up the bill, Geyer's supporters finally gained majority support for a discharge petition, which allowed the full House to pass the initiative in October 1942.<sup>69</sup> But at that point, Southern conservatives managed to filibuster the bill to death in the Senate—the first of many over the next two decades.<sup>70</sup>

Despite the collapse of both its judicial and legislative strategies, the Southern Conference's initial efforts had long-lasting effects, encouraging congressional activists to carve out federal elections from the more general problem posed by poll taxes. To sustain a long-term campaign, the Southern Conference passed the job over to a single-issue lobbying outfit, the National Committee to Abolish the Poll Tax (NCAPT).<sup>71</sup> The Committee was created expressly to "avoid confusing their movement with the related struggle for Negro voting rights."<sup>72</sup> Although the NAACP continued to be a

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<sup>64</sup> 314 U.S. 621 (Oct. 13, 1941) (No. 117).

<sup>65</sup> 84 CONG. REC. H11,229 (daily ed. Aug. 11, 1939) (1939).

<sup>66</sup> LAWSON, *supra* note 36, at 61; OGDEN, *supra* note 39, at 244.

<sup>67</sup> OGDEN, *supra* note 39, at 245.

<sup>68</sup> H.R. 7534, 76th Cong. (1939).

<sup>69</sup> S. 1280, 77th Cong. (1942); S. Rep. No. 77-1662 (1942); H.R. 1024, 77th Cong. (1941); *see also* OGDEN, *supra* note 39, at 246. Geyer did not live to see this moment of triumph. Upon his death, Representative Joseph A. Gavan assumed leadership, and the initiative finally passed the House on a vote of 254 to 84 on October 13, 1942. *See* 88 CONG. REC. 8174 (1942); OGDEN, *supra* note 39, at 247; Kaltenbach, *supra* note 8, at 717–18 (1947).

<sup>70</sup> 88 CONG. REC. 9065 (1942).

<sup>71</sup> *See* VIRGINIA FOSTER DURR, OUTSIDE THE MAGIC CIRCLE: THE AUTOBIOGRAPHY OF VIRGINIA FOSTER DURR 152 (Hollinger F. Barnard ed., 1990); LAWSON, *supra* note 36, at 61.

<sup>72</sup> LAWSON, *supra* note 36, at 61; *see also* HARVARD SITKOFF, A NEW DEAL FOR BLACKS 133 (1978) (arguing that most Southern liberals tried to isolate the poll tax from the issue of race).

leading player,<sup>73</sup> the Committee's very existence—which continued, in various forms, through the enactment of the Twenty-Fourth Amendment<sup>74</sup>—testified to a continuing determination to define the issue in New Deal terms. Class, not race, would be the order of the day. According to the group's estimates, the poll tax disenfranchised three whites for every two black voters.<sup>75</sup>

After Lee Geyer's death,<sup>76</sup> congressional leadership passed from a Californian to a Southerner, Florida's Claude Pepper, who emphasized that his state's abolition of the poll tax had "contributed to my very large majority in 1938 in [my] first primary."<sup>77</sup> The renewed campaign began on a hopeful note with the Soldier Vote Act of 1942.<sup>78</sup> Passed in the aftermath of Pearl Harbor, Section Two forbade any state from requiring a poll tax for absentee voting in federal elections.<sup>79</sup> Even Southern conservatives could not filibuster a bill that guaranteed the vote to all those fighting for America,<sup>80</sup> and the Committee to Abolish the Poll Tax, with the support of Eleanor Roosevelt, looked upon this victory as a token of larger successes ahead.<sup>81</sup>

But her husband was more skeptical. Given his failed campaign against Polltaxia, he was "walking a delicate tightrope, struggling to balance his concern for equal suffrage with his desire to keep his allies in control of the Democratic party in the South."<sup>82</sup> While his wife vigorously

<sup>73</sup> Although the Committee included fifty different organizations, including the AFL, the CIO, and the American Civil Liberties Union, "[t]here was no question that the NAACP, as the largest and best-known African-American civil rights group, would play a prominent role . . ." BERG, *supra* note 31, at 105.

<sup>74</sup> When their efforts are cumulated, the SCHW and the NCAPT led a ten-year campaign lasting from 1938 until 1948. The NCAPT then ran out of money, collapsing under the weight of internal squabbling and external Red-baiting. At that point, the initiative passed back to the SCHW, whose Southern Conference Educational Fund (SCEF) continued the poll-tax campaign until its final success in the 1960s. See LINDA REED, *SIMPLE DECENCY AND COMMON SENSE: THE SOUTHERN CONFERENCE MOVEMENT, 1938–1963*, at ix (1991) (providing a chronology of the rise and collapse of the Southern Conference movement); PATRICIA SULLIVAN, *DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA* 274 (1996).

<sup>75</sup> BERG, *supra* note 31, at 105–06.

<sup>76</sup> DURR, *supra* note 71, at 152.

<sup>77</sup> *Id.*

<sup>78</sup> Soldier Vote Act, 56 Stat. 753 (1942).

<sup>79</sup> *Id.* ch. 561, § 2.

<sup>80</sup> Supporters argued that if a soldier was "qualified without paying tribute, to fight under the flag, he is qualified without paying tribute, to vote under the flag." PHILIP A. KLINKNER WITH ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 174 (2002).

<sup>81</sup> LAWSON, *supra* note 36, at 63. Edgar G. Brown, director of the National Negro Congress, hailed the measure as the first congressional action in seventy years "to make secure political rights of disenfranchised Negroes." Edward Ryan, *Senate Passes Bill for Soldier Vote*, N.Y. TIMES, Aug. 26, 1942, at 22.

<sup>82</sup> LAWSON, *supra* note 36, at 76.

supported the public campaign for a statutory ban,<sup>83</sup> his private correspondence made clear that “a constitutional amendment [was] the only practical way to eliminate the assessment.”<sup>84</sup>

The President proved to be the better prophet. Yet the stakes involved in the struggle only increased when the Court struck down the white primary in April 1944, leaving the poll tax as one of the great remaining bulwarks of racial exclusion.<sup>85</sup> The symbolic significance of the issue was enhanced further by the Republican platform of 1944, which urged the elimination of the tax in federal elections. As the party of Lincoln, the Republicans had no trouble condemning this bar on voting—significantly, they urged its elimination through a constitutional amendment, not a statute.<sup>86</sup>

So matters stood in 1946, when Spessard Holland arrived from Florida to take his seat in the Senate and begin his long struggle for an Article Five amendment. While Holland’s first initiative passed the House, it was defeated by a filibuster in the Senate.<sup>87</sup> This scenario repeated itself twice over the next dozen years, as Holland regularly reintroduced his measure in each new Congress.<sup>88</sup>

<sup>83</sup> ELEANOR ROOSEVELT, *THE AUTOBIOGRAPHY OF ELEANOR ROOSEVELT* 191 (1992) (“I also remember wanting to get all-out support [in Congress] for the anti-lynching bill and the removal of the poll tax, but though Franklin was in favor of both measures, they never became ‘must’ legislation.”).

<sup>84</sup> LAWSON, *supra* note 36, at 76. The NAACP was already on record as opposed. Leslie Perry, legislative representative for the NAACP’s Washington Bureau, called it an “idle gesture. Instead of fighting the poll tax on one front—Congress, we would have to spread ourselves thin over forty-eight states.” Leslie Perry, *NAACP BULL.* III, at 3 (June 1944).

<sup>85</sup> *See* *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>86</sup> 108 CONG. REC. 17,655 (1962) (statement of Rep. Celler) (providing overview of various platforms and efforts in Congress to abolish the poll tax); LAWSON, *supra* note 36, at 76.

<sup>87</sup> OGDEN, *supra* note 39, at 248. Here is Holland making the constitutional case for taking the amendment route in a letter to a constituent:

The framers of the Federal Constitution provided that the qualifications for voting to elect the members of the most numerous branch of the State Legislature of each State should be the qualifications for voting to elect members of the United States House of Representatives. Article I, Section 2, of the Constitution so provides in the clearest possible words, and the article by Alexander Hamilton on this subject in the Federalist Papers makes the point crystal clear. In other words, the original founding fathers specifically determined that the States and not the Federal Government should prescribe the qualifications for voters in both State and Federal elections.

Letter from Spessard Holland to John Raymar (May 12, 1948) (on file with authors).

<sup>88</sup> Here is a summary of congressional action during the 1940s and 1950s:

Eightieth Congress, H.R. 29: Passed House 290 to 112 on July 21, 1947. Reported and debated in the Senate, only to be defeated by filibuster.

Eighty-First Congress, H.R. 3199: Passed House July 26, 1949, by 273 to 116. The bill remained bottled up in the Senate Committee on Rules and Administration, however, with the Senate distracted by the outbreak of fighting in Korea.

Eighty-Sixth Congress, Senate Joint Resolution 39: Passed Senate February 2, 1960, 72 to 16 as a constitutional amendment. By vote of 50 to 37, Holland’s motion to table Javits’s amendment by statute on February 2, 1960 succeeded. The House reported measure after deleting anti-poll tax portion on May 31, 1960.

This repeated cycle of proposal and rejection proved important in the long run. It served to entrench the poll-tax amendment in the liberal reform agenda, prepackaging it for use when political conditions became more favorable. While the amendment's symbolic salience was increasing, its practical significance was decreasing. The New Deal reform coalition had slowly repealed the tax in the border states and middle South.<sup>89</sup> By 1960, only four states from the Deep South retained the tax, and Virginia remained the only holdout from the upper South.<sup>90</sup>

The New Deal aim had been largely achieved—poor whites could vote and the major obstacle to black suffrage was now the discriminatory use of literacy tests.<sup>91</sup> If the rising tide of public opinion required Southern senators to engage in a strategic retreat in defense of Jim Crow, Holland's amendment had obvious attractions: most Southerners could sacrifice the poll tax without changing political realities in their home states, enabling them to concentrate their energies on a last-ditch battle to save literacy tests and other devices that remained key barriers against black participation.

### C. Process

Beware anachronism. Although the Democratic Party is today associated with minority rights, this wasn't true when Richard Nixon faced off against John F. Kennedy in the presidential election of 1960. It was the former, not the latter, who had the stronger track record on civil rights,<sup>92</sup> and the two parties' positions were virtually indistinguishable in the public mind.<sup>93</sup> While Kennedy had made some striking gestures during the cam-

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Eighty-Seventh Congress, Senate Joint Resolution 29: Passed Senate March 27, 1962—voice vote. Javits' amendment defeated March 27, 59 to 34, and resolution itself passed Senate by vote of 77 to 16.

108 CONG. REC. 17,655 (1962) (statement of Rep. Celler) (providing overview of various platforms and efforts in Congress to abolish the poll tax); OGDEN, *supra* note 39, at 248.

<sup>89</sup> After North Carolina repealed its tax at the time women gained the suffrage in 1920, nothing happened until New Deal coalitions in five states joined the reform movement between 1934 and 1953. See CHANDLER DAVIDSON & BERNARD GROFMAN, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 19–298 (1994) (providing a general state-by-state survey of disfranchisement and re-enfranchisement of African Americans in the South); OGDEN, *supra* note 39, at 178–200.

<sup>90</sup> DAVIDSON & GROFMAN, *supra* note 89, at 276.

<sup>91</sup> See *id.* at 365 (demonstrating that before the Voting Rights Act, “literacy tests had their greatest disadvantaging effects on blacks in areas with high black populations”).

<sup>92</sup> Even Kennedy's admirers recognize that he “knew and cared comparatively little about the problems of civil rights and civil liberties” during his years in the Senate. THEODORE C. SORENSEN, KENNEDY 17 (1965). Indeed, he voted with the South to weaken the Civil Rights Act of 1957; in contrast, Richard Nixon publicly condemned this move as “one of the saddest days in the history of the Senate.” See NICK BRYANT, THE BYSTANDER: JOHN F. KENNEDY AND THE STRUGGLE FOR BLACK EQUALITY 66–76 (2006).

<sup>93</sup> Between 1954 and 1962, Americans considered the Republicans to be the more racially liberal political party, albeit by small margins. See CARMINES & STIMSON, *supra* note 23, at 111 fig.4.7. The

paign,<sup>94</sup> his actual performance in office fell far short. He owed his narrow margin over Nixon to Democratic victories in key states of the former Confederacy,<sup>95</sup> and he was reluctant to burn his bridges to the Southern white voters who might provide his margin for reelection.<sup>96</sup>

Kennedy held conventional liberal views on civil rights, but his passions were directed elsewhere. He was very much a Cold War liberal, whose first priority was the struggle with the Soviet Union for world domination;<sup>97</sup> and on the home front, he was far more interested in using new-fangled Keynesian tax cuts to reestablish the Democrats' reputation as the party of prosperity.<sup>98</sup> So far as he was concerned, the Freedom Riders and sit-ins of 1961 and 1962 presented a political problem of the first magnitude, threatening to destroy his relationship to Southern committee chairmen in charge of key legislative initiatives and to alienate Southern voters in the reelection campaign.<sup>99</sup>

While the Justice Department engaged in desperate efforts to contain violent confrontations in the South, the President contented himself with rhetorical support for serious civil rights legislation. In his 1962 State of the Union, he emphasized that "the right to vote should no longer be denied through . . . literacy tests and poll taxes."<sup>100</sup> But immediately afterwards, anonymous White House staffers reminded reporters that he had made "no urgent request" for new legislation.<sup>101</sup>

For Kennedy, Holland's continuing agitation for his amendment was a godsend. If the Senator from Florida succeeded in winning broad congressional support, the Administration would be happy to get on the bandwagon and claim credit for a civil rights win that didn't damage its relationships with powerful Southerners on Capitol Hill. Better yet, if the amendment was ratified before 1964, it might help Kennedy win reelection.

Holland was already on the move. Even before Kennedy took office, Holland had cleverly exploited a parliamentary opening provided by an un-

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Republicans lost their edge between 1960 and 1964, as the civil rights agenda moved onto center stage in Washington under a liberal Democratic Congress and presidency. *Id.* at 46 fig.2.1.

<sup>94</sup> Most famously, Kennedy telephoned Coretta King after her husband was jailed in Atlanta after his attempt to enter the Magnolia Room, a well-known restaurant. The call was widely reported in the press at the height of the 1960 campaign. *See* BRYANT, *supra* note 92, at 180–85.

<sup>95</sup> *Id.* at 187.

<sup>96</sup> In Nicholas Katzenbach's view, Kennedy "was always conscious of the closeness of the elections, I always thought too conscious. He didn't feel he had a mandate, didn't feel he would succeed . . . Kennedy was inhibited about civil rights; he had all these demons going—the sit-ins, Meredith [James Meredith, the first black to attend the University of Mississippi,] Wallace. He wanted to get other things done." GERALD S. STROBER & DEBORAH H. STROBER, "LET US BEGIN ANEW": AN ORAL HISTORY OF THE KENNEDY PRESIDENCY 276–77 (1993) (quoting Nicholas Katzenbach).

<sup>97</sup> *See* BRYANT, *supra* note 92, at 32.

<sup>98</sup> *See id.* at 413.

<sup>99</sup> *Id.* at 45.

<sup>100</sup> *Id.* at 298.

<sup>101</sup> *Id.* at 298–99.

related constitutional amendment proposed by Senator Estes Kefauver.<sup>102</sup> When Kefauver's resolution got to the floor in 1960, Holland tacked on his poll-tax proposal. Senator Kenneth Keating then joined the fray with his own personal hobby-horse, giving the vote to federal officials residing in the District of Columbia.<sup>103</sup> After more procedural maneuvering, the omnibus bill finally passed the Senate on February 2, 1960—the first time Holland's measure had ever cleared this critical barrier.

This stunning parliamentary maneuver set the stage for a blur of initiatives in the House, all of which led nowhere—except for a promise from Emanuel Celler, the liberal Chairman of the House Judiciary Committee, to push a separate poll-tax measure through the House at some later point.<sup>104</sup> Armed with Celler's commitment, Holland returned to the Senate to obtain sixty-seven cosponsors and a full airing before the Senate Judiciary's subcommittee on constitutional amendments.<sup>105</sup> But at that point, he met a roadblock in the form of arch-segregationist James Eastland, Chairman of the Senate Judiciary and Senator from poll-tax Mississippi.<sup>106</sup> The only way forward was through more parliamentary razzle-dazzle, this time spearheaded by Majority Leader Mike Mansfield.<sup>107</sup>

To evade the Eastland roadblock, the Committee on Interior and Insular Affairs brought an innocuous resolution to the floor, making Alexander Hamilton's house a national monument.<sup>108</sup> Mansfield then immediately moved to strike everything except the enactment clause and to substitute Holland's amendment,<sup>109</sup> sparking a ten-day “friendly” filibuster,<sup>110</sup> which allowed proponents to collect further support that finally yielded a 77 to 16 vote for final passage.<sup>111</sup> Throughout the debates, Holland again emphasized that his concern was with wealth, not race, discrimination: “[T]he

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<sup>102</sup> The amendment responded to the threat of a nuclear attack with new rules ensuring continuity in government. See RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA* 136 (1995).

<sup>103</sup> *Id.* at 137.

<sup>104</sup> *Id.*

<sup>105</sup> See *Nomination and Election of President and Vice President and Qualifications for Voting: Hearings on S.J. Res. 14, 20, 54, 58, 67, 71, 81, 90 Before the S. Comm. on the Judiciary*, 87th Cong. 1 (1961).

<sup>106</sup> See STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 105, at 80.

<sup>107</sup> 108 CONG. REC. 2851, 4150 (1962).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> This is the characterization offered by Minority Whip Thomas H. Kuchel (R-CA). *Id.* at 5104. Nick Bryant suggests that the filibuster was used sparingly by segregationists for fear that the tactic “would harden Northern opinion against them.” BRYANT, *supra* note 92, at 303. Nevertheless, the Southern Caucus decided to mount one here as a “highly symbolic gesture of defiance.” See *The Twenty-Fourth Amendment*, *supra* note 28, at 404.

<sup>111</sup> Among the sixteen senators voting against the amendment, fourteen were Southern Democrats, one a Northern Democrat, J.J. Hickey (Wyoming), and one a Republican, John G. Tower (Texas). Eight Southerners voted for the amendment; one, Ralph W. Yarborough (Texas), was from a poll-tax state. See *The Twenty-Fourth Amendment*, *supra* note 28, at 404.

proposal does not come under the ordinary classification of the [sic] ordinary civil rights legislation. It applies to majorities, to minorities, and to every person of every color."<sup>112</sup>

Once the bill came to the House, Representative Celler engaged in similar parliamentary maneuverings to override the staunch resistance of Howard W. Smith of poll-tax Virginia, Chairman of the powerful Rules Committee. Celler forced the proposal to the House floor under an extraordinary procedure allowing only forty minutes of debate.<sup>113</sup> Nevertheless, hardcore segregationists organized four hours of bitter opposition through a series of procedural roll and quorum calls,<sup>114</sup> until the Twenty-Fourth Amendment finally moved on to the states for ratification after a House vote of 294 to 86.<sup>115</sup>

These procedural details may seem tedious today, but they had a powerful meaning to a twentieth-century audience. For generations, Southern barons had been master manipulators of parliamentary procedures to kill efforts to achieve racial justice. But this time around, it was the liberals, led by a Southerner, who were beating the Southerners at their own game—repeatedly exploiting loopholes to evade the vetoes of racist committee chairmen and finally gaining a victory.

This was not the first such triumph. Majority Leader Lyndon Johnson had accomplished similar feats in gaining enactment of the Civil Rights Acts of 1957 and 1960. As on these occasions,<sup>116</sup> success came at a large price; in order to overcome Southern resistance, progressives had to water down their initiative and accept a ban that applied only in federal, and not in state, elections. But surely it was yet another small step forward down the path of progress?

No, replied the NAACP and other liberal groups<sup>117</sup> for reasons that are significant for our larger thesis. By 1962, the liberal coalition was prepar-

<sup>112</sup> 108 CONG. REC. 2851, 4154 (1962).

<sup>113</sup> Because Senate Joint Resolution 29 had not received a permissive rule from the House Rules Committee, floor leaders called the bill up under suspension of the rules, a procedure that requires two-thirds approval, and only allows forty minutes of debate and no amendments. *The Twenty-Fourth Amendment*, *supra* note 28, at 406.

<sup>114</sup> *See id.* at 406.

<sup>115</sup> There were 295 “yeas,” 86 “nays,” one representative answered present, and fifty-three representatives did not vote. 108 CONG. REC. 2851, 17,670 (1962). Supporters included 132 Republicans and 163 Democrats. Fifteen Republicans and seventy-one Democrats voted against it—all but one from the South. *Id.*

<sup>116</sup> *See* ROBERT A. CARO, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON 1944–89* (2002).

<sup>117</sup> The organizations included the Jewish Congress, American Veterans Committee, Americans for Democratic Action, Anti-Defamation League of B’Nai B’rith, International Union of Electrical Workers (AFL-CIO), National Association for the Advancement of Colored People, and United Automobile Workers (AFL-CIO). *See The Twenty-Fourth Amendment*, *supra* note 28, at 405.

ing for a great leap forward in the struggle for civil rights.<sup>118</sup> While it was perfectly happy with a *statute* striking down federal poll taxes, it was no longer willing to accept piecemeal change at the price of creating “an immutable precedent for shunting all further civil rights legislation to the amendment procedure.”<sup>119</sup>

No sweeping repudiation of Jim Crow would be possible so long as thirteen states could veto decisive constitutional change. If the country was going to move beyond largely symbolic gestures, it would have to forsake the federalist mode of amendment described by Article Five and take the more nationalist path developed over 150 years of constitutional practice. Since the days of Thomas Jefferson and his “revolution of 1800,” various presidents have repeatedly claimed mandates for sweeping change in the name of the American people, with Franklin Roosevelt developing this model further during the New Deal.<sup>120</sup> After gaining a series of popular victories at the polls, Roosevelt had not only won congressional support for landmark statutes like the Social Security Act and the National Labor Relations Act; his victories were sealed by the Supreme Court in superprecedents that elaborated the principles of the new constitutional consensus.<sup>121</sup>

It was this modern model—presidential electoral mandates, congressional landmark statutes, judicial superprecedents—that was once again coming to the fore in the 1960s. If the American people were to have a realistic chance of breaking the back of Jim Crow and inaugurating a decisive transformation in our constitutional values, it was *only* this model that had a real promise of success. Unsurprisingly, the liberal interest groups were the first to emphasize this point. And in opposing the Twenty-Fourth Amendment, they were willing to pay a short-run price to keep the path clear for the modern model of constitutional transformation through landmark statutes.

In a statement submitted to the House subcommittee hearing, the NAACP’s Clarence Mitchell declared:

To accept the amendment method of elimination . . . . would be a bad precedent, inasmuch as the constitutional issue is raised whenever a piece of civil rights legislation is considered. Once this concession is made . . . . [s]uch a course would give lukewarm supporters of civil rights a chance to avoid mak-

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<sup>118</sup> See RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 173–98* (discussing the “coalition of 1961–1965”).

<sup>119</sup> *After the Poll Tax*, *supra* note 28, at A12; see also *The Twenty-Fourth Amendment*, *supra* note 28, at 405.

<sup>120</sup> See generally BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

<sup>121</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); see also *infra* Part V.C.

ing a strong battle, and would give opponents an opportunity to block amendments in the States.<sup>122</sup>

The NAACP and its allies were not indulging in “cheap talk” by declaring that the federalist forms of Article Five were fundamentally inadequate for the constitutional politics of the 1960s.<sup>123</sup> They were rejecting Article Five even if this meant sacrificing more immediate progress on the poll tax.

This show of constitutional determination was beginning to reach a broader audience. As Holland’s amendment came to its final vote, Senators Jacob Javits of New York and John Sherman Cooper of Tennessee joined the attack on Article Five. When Mansfield’s parliamentary maneuver successfully placed the poll-tax amendment on the floor, Southern conservatives responded with a filibuster that was finally broken after ten days by a vote of 77 to 16.<sup>124</sup> With discussion turning to the merits, Senator Javits moved to substitute a landmark statute prohibiting poll taxes for Holland’s constitutional amendment,<sup>125</sup> emphasizing the danger that “if the Senate would set the precedent that a matter of this character has to be done by constitutional amendment, the very same argument will be made” in future efforts to abolish the literacy test.<sup>126</sup> Despite the brevity of House debate, John Lindsay of New York seized the floor to oppose the use of “a cannon to kill a gnat, a sledge hammer to drive a tack.”<sup>127</sup> He emphasized that the “same result [could] be reached by statute and the committee, like the Justice Department, well knows this.”<sup>128</sup> Liberal Republicans took the lead here, but there was more than narrow partisanship involved. Senator Paul Douglas, a major Democratic figure, joined the Senate chorus in condemning the amendment as a “booby trap.”<sup>129</sup>

The Kennedy Administration was unmoved. At the hearings on the Holland amendment, Assistant Attorney General Katzenbach firmly rejected the landmark statute/superprecedent option in favor of the Article Five approach:

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<sup>122</sup> *Abolition of Poll Tax in Federal Elections: Hearings on H.J. Res. 404, 425, 44, 594, 601, 632, 655, 663, 670, S.J. Res. 29 Before the H. Comm. on the Judiciary*, 87th Cong. 28 (1962) (statement of Clarence Mitchell, Director of the Washington Bureau of the NAACP).

<sup>123</sup> See BERG, *supra* note 31, at 107–08 (“The demand for constitutional amendments did not play a role in the NAACP’s legal and political strategies . . . [T]he NAACP strictly insisted on the congressional authority to outlaw the poll tax in federal elections and attacked all proposals for a constitutional amendment as a ‘fraud on the American people.’”).

<sup>124</sup> See BRYANT, *supra* note 92, at 303.

<sup>125</sup> 108 CONG. REC. 4155 (1962).

<sup>126</sup> Cooper joined him in castigating the Administration for “playing around” with civil rights without making significant “progress . . . in the past two years.” Anthony Lewis, *Senate Approves Ban on Poll Tax in Federal Votes*, N.Y. TIMES, Mar. 28, 1962, at A1.

<sup>127</sup> 108 CONG. REC. 8887 (1962).

<sup>128</sup> *Id.*

<sup>129</sup> Lewis, *supra* note 126.

While we think that the recent trend in decisions [is] that the courts would ultimately uphold such a statute, the matter is not free from doubt. In any event, as a practical matter and in views of the widespread support offered by the many sponsors of Senate Joint Resolution 58, the poll tax may possibly be laid forever to rest faster by constitutional amendment than by attempt to enact and litigate the validity of the statute. All of us know that long delays are inherent in litigation generally, and this is particularly true when important constitutional issues are at stake. Accordingly, the Justice Department supports the proposed amendment as a realistic technique which seeks the early demise of the poll tax.<sup>130</sup>

Katzenbach didn't launch an unconditional defense of Article Five as the *only* plausible route to constitutional transformation. He conceded that the Supreme Court might well overrule *Breedlove* and uphold a statute striking down the poll tax—although the matter wasn't "free from doubt." But if this is so, why wasn't he willing to endorse the landmark statute/superprecedent option?

After all, generations of American leaders had gone down the statutory path, reserving Article Five as a lawmaking mechanism of last resort. Katzenbach's answer was clear: practical politics was making Article Five the lawmaking vehicle of first, not last, resort. Thanks to the "the widespread support" for Holland's resolution, the Administration could gain a civil rights victory at no political cost. But Holland was firmly opposed to the statutory option, and if the Administration defied him, he would switch sides and lead a sustained Southern filibuster.<sup>131</sup> In 1962, the Kennedy Administration was entirely unwilling to fight such a battle, which it would have almost certainly lost. When faced with the choice of an easy victory or a costly defeat, the Kennedy Administration remained on the sidelines while Javits's statutory motion lost by a vote of 59 to 34, clearing the decks for the approval of Holland's constitutional amendment.<sup>132</sup>

From Holland's angle, the short-term politics were equally compelling, as the Senator made clear in response to an outraged constituent who had condemned his apparent departure from segregationist orthodoxy:

You have been a good friend to me through the years and I think good friends should be frank with each other. The trouble with you is you get down behind a bush which prevents you from seeing the forest . . . .

How do you think we got the 53–43 vote against cloture on the literacy bill which I think we will finally defeat Monday? One of the strong factors in the poll tax amendment against which you seem to have a bad aversion but which

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<sup>130</sup> *Abolition of Poll Tax in Federal Elections: Hearings on H.J. Res. 404, 425, 434, 594, 601, 632, 655, 663, 670, S.J. Res. 29 Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 87th Cong. 26 (1962)* (statement of Sen. Spessard L. Holland) (quoting Assistant Att'y Gen. Nicholas B. Katzenbach).

<sup>131</sup> Indeed, during the 1965 debates on the Voting Rights Act, Holland joined his fellow Southerners in their lengthy filibuster. See *infra* Part III.A.

<sup>132</sup> See *The Twenty-Fourth Amendment*, *supra* note 28, at 405.

has allowed many Senators to cast a Constitutional vote on a relatively non-important matter which gave them an out on vastly more important matters like the literacy test bill.

It is rather disappointing to have such reactions as those contained in your letter when I have been fighting night and day against an ultra-liberal Administration and an ultra-liberal majority for the preservation of the most worthwhile values in the American system.<sup>133</sup>

The amendment was smart politics for both Holland and Katzenbach, but the Javits motion emphasized the long-term problem that had been shoved under the rug. The NAACP was perfectly correct: If future initiatives against Jim Crow were consigned to the Article Five track, even massive popular mobilizations could be defeated by vetoes from thirteen state legislatures. It was one thing to gain the ratification of a constitutional amendment imposing a partial ban on a poll tax that only remained in effect in five states. It was quite another to impose sweeping prohibitions on discrimination in public accommodations or employment, let alone launch an all-out attack on the myriad obstacles to the effective exercise of black political power. It would be hard enough for some future Congress and President to overwhelm Southern filibusters blocking passage of landmark legislation that would define the requirements of constitutional equality for the twentieth century; it would be all but impossible to gain the consent of three-fourths of the states for such sweeping initiatives. Did the short-term victory on the Twenty-Fourth Amendment condemn the future of civil rights in America?

Perhaps it seemed safe to defer these issues to the indefinite future when Congress endorsed the Twenty-Fourth Amendment in August 1962—a moment when Martin Luther King, Jr. had not yet led his March on Washington, much less successfully agitated for the enactment of landmark civil rights legislation. As the Kennedy Administration struggled to control the political fallout of the first waves of Freedom Rides, few sober politicians imagined that the President and Congress would act decisively to revolutionize voting rights within three short years.

When the moment came, Lyndon Johnson's initiative took the form of a landmark statute, the Voting Rights Act, not a constitutional amendment, and this decision returned the question of Article Five to the center of the political stage. Among many other things, proponents of the Voting Rights

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<sup>133</sup> Letter from Spessard L. Holland to E.H. Crowson (May 12, 1962) (Spessard Holland Archives, Univ. of Fla., Gainesville) (on file with authors). Holland's letter includes more blow-by-blow analysis:

I remind you that through the strategy we have played here we have so far defeated federal aid to education, FEPC [Fair Employment Practices Commission], the terrible Part III provision which would allow the Attorney General to use injunctions and criminal contempt without juries in civil rights matters, the implementation of the school integration decisions, the repeal of Rule 22 [regarding filibusters] and other matters of completely vital importance.

*Id.*

Act wanted to prohibit the remaining uses of the poll tax in state elections, forcing them to confront the ghosts left behind by the Twenty-Fourth Amendment: Was it constitutional for Congress to impose a statutory ban on poll taxes in state elections when nothing less than a constitutional amendment was required to forbid poll taxes in federal elections?

Senator Douglas's fears of a "booby-trap" were prescient—the poll-tax question would later generate a constitutional standoff that threatened to prevent the passage of the entire landmark statute of 1965.

### III. THE VOTING RIGHTS ACT OF 1965

Once Congress proposed the Twenty-Fourth Amendment in August 1962, its ratification in the states was propelled forward by the rising tide of support for the civil rights movement. With blinding speed, Senator Holland's quixotic struggle over the decades had suddenly become a relatively uncontroversial—if painfully inadequate—response to the country's racial and economic problems. Within the short span of sixteen months, the amendment gained the approval of thirty-eight states.<sup>134</sup> When the Secretary of State declared its formal reception into the constitutional canon, his announcement was greeted with a yawn from the general public.<sup>135</sup> Rather than celebrating the moment of formal canonization, Americans were on the threshold of a modern constitutional revolution marked by presidential electoral mandates, landmark statutes, and judicial superprecedents.

Only two months before, the assassination of President Kennedy had transformed the political dynamics in Washington. Whenever the late President took a strong stand on civil rights, he risked alienating Southern white voters who might prove crucial for his reelection. But Lyndon Johnson could count on a powerful "favorite son" vote from the South even if he took the high road by supporting civil rights.<sup>136</sup> While the Kennedy Administration was happy to give Senator Holland the lead in pushing for a poll-tax amendment, Johnson spearheaded the drive for the epochal Civil Rights Act of 1964, refusing to compromise despite the longest filibuster in the history of the Senate.

The transformation of public opinion was no less profound. The spring of 1963 was a turning point. The dignity of the March on Washington—in contrast to the brutalities of Birmingham—catalyzed national opinion, with

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<sup>134</sup> See BERNSTEIN & AGEL, *supra* note 102, at 138; *38 States Are Listed in Ratification Order*, N.Y. TIMES, Jan. 24, 1964, at A16.

<sup>135</sup> The story was buried on page A14 of the *New York Times*, alongside a photograph of President Johnson signing a witness document certifying ratification by three-fourths of the states. See Nan Robertson, *24th Amendment Becomes Official: Johnson Hails Anti-Poll Tax Document at Ceremonies*, N.Y. TIMES, Feb. 5, 1964, at A14.

<sup>136</sup> See NICK KOTZ, *JUDGMENT DAYS*, at xv (2005) (noting that Johnson could push civil rights "[w]ith a credibility that no northerner could claim").

sixty to seventy percent supporting a strong civil rights bill.<sup>137</sup> Matters reached a climax in the presidential election of 1964, with Lyndon Johnson strongly defending the vision behind the new Civil Rights Act and Barry Goldwater denouncing it as unconstitutional.<sup>138</sup> When Johnson crushed Goldwater in the largest landslide since 1936, the President viewed his popular mandate as authorizing further sweeping actions on behalf of racial equality.<sup>139</sup>

#### A. *The Shadow of the Twenty-Fourth*

Here is where Article Five in general, and the Twenty-Fourth Amendment in particular, began to cast a shadow. Lyndon Johnson's initiative in 1965 took the form of a landmark statute, the Voting Rights Act, not a constitutional amendment, and this decision returned the question of Article Five to the center of the political stage. Among other things, the proponents of the Voting Rights Act wanted to condemn the remaining uses of the poll tax in the states, forcing them to confront the ghosts left behind by the Twenty-Fourth Amendment: Was it constitutional for Congress to impose a statutory ban on poll taxes in state elections when nothing less than a constitutional amendment was required to forbid poll taxes in federal elections? Predictably, Senator Holland<sup>140</sup> and other leading Southerners<sup>141</sup> answered

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<sup>137</sup> With the civil rights bill stalled in the Senate, an April 1964 Harris Poll asked a random sample of 1,250 respondents: "From what you know or have heard, do you favor or oppose the civil right[s] bill?" Seventy percent were in favor; only thirty percent were opposed or not sure. See Louis Harris & Assocs., Harris Survey (Apr. 1964), available at <http://www.ropercenter.uconn.edu/ipoll.html>. Shortly after the bill was signed into law, a Gallup Poll in October indicated nearly sixty percent were in favor and thirty-one percent were opposed—with eighty-seven percent of the latter believing that the bill went too far and five percent believing that it didn't go far enough. Gallup Org., Gallup Poll (Oct. 1964), available at <http://www.ropercenter.uconn.edu/ipoll.html>. Another Gallup poll offered a more refined question: "If two candidates of your own party were alike in all respects except that one candidate took a strong stand in favor of civil rights and the other took a strong stand against civil rights, which man would you be more likely to prefer?" The answer: sixty-three percent would vote for the pro-civil rights candidate, twenty-three percent for the anti-, and fifteen percent had no opinion. See Gallup Org., Gallup Poll (June 25–30, 1964), available at <http://www.ropercenter.uconn.edu/ipoll.html>.

<sup>138</sup> See Gary Orfield, *The 1964 Act and American Education*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 89, 108 (Bernard Grofman ed., 2000) (describing Barry Goldwater's opposition to the 1964 Civil Rights Act).

<sup>139</sup> See Ackerman, *supra* note 3 at 1786.

<sup>140</sup> The prospect of a statutory ban prompted Senator Holland to plead with his colleagues to return to the path established by the Twenty-Fourth Amendment:

I am still standing where I have been standing all these years; namely, for the elimination of the poll tax as a requirement for voting, but not by unconstitutional means and not by offering a gap in the armor of the Constitution through which temporary majorities of both Houses of Congress may find it desirable to vote many other suspensions of constitutional provisions, and in knocking out many other constitutional provisions.

111 CONG. REC. 9943 (1965).

<sup>141</sup> Senator Eastland, for example, echoed Holland's line:

no. They denounced the move as unconstitutional in light of Congress's recent decision to take the "proper course" in proposing "a constitutional amendment to the States."<sup>142</sup>

Taken by itself, the southern objection wouldn't be enough to cause real trouble, precisely because it was *so* predictable. Whatever the Constitution said, the Southerners were going to fight to the bitter end. The key question was whether Holland's argument appealing to the precedent of the Twenty-Fourth Amendment would have broader resonance, forcing leaders in Congress and the Administration to resist the temptation to ban poll taxes by means of a landmark statute.

This was precisely the anxiety that led the NAACP and liberal Congressmen to oppose Holland's amendment in 1962. And these fears came home to roost in 1965. We emphasize this point because it runs against the grain of much contemporary legal theory. Whatever else divides Critical Legal Studies from Rational Choice Theory, both view constitutional arguments in utterly instrumental terms. Both revel in the Realist truth that law is politics waged by other means. Our case study provides a counterexample.

After all, it was *awfully* tough to explain why it was acceptable for Congress to use a statute in 1965 when it had insisted on a formal amendment only three years earlier. Indeed, the case for a formal amendment seemed far *more* compelling in 1965, when Congress was ordering the states around, than it did in 1962, when Congress was merely regulating the terms of federal elections. While liberals tried to parry this obvious line of legal argument, the key thing to note is how strongly it appealed to leaders in the Administration and the Senate, who were otherwise deeply committed to ending the system of racial exclusion in the South.

Most notably, Attorney General Nicholas Katzenbach and his Department of Justice repeatedly intervened against liberal Congressmen pushing for a statutory ban on state poll taxes. Their "legalistic backlash" operated as a significant check on liberal activism, but it did not monopolize the cultural force field swirling around the draftsmen of the landmark statute. Instead, legalistic backlash competed with the "movement frontlash"<sup>143</sup>

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I had thought that the long debate over the adoption of the 24th amendment had forever laid to rest the theory that these State qualifications could be abolished by any other method than by constitutional amendment.

But this legislative juggernaut is not founded upon constitutional principles but upon the ancient axiom that might makes right; it is not based on law but power; it is not premised on the force of reason but the reason of force; it is not the result of deliberation but the steamrolled product of ultimatum; it is an unconstitutional means to a questionable end.

111 CONG. REC. 10,028 (1965).

<sup>142</sup> 111 CONG. REC. 10,045 (1965) (statement of Sen. Stennis).

<sup>143</sup> "Frontlash" was Lyndon Johnson's term to explain why his advocacy of civil rights helped win his landslide victory in 1964. See KOTZ, *supra* note 136, at 198.

generated by Martin Luther King's campaign for voting rights on the streets of Selma, Alabama.

It was this campaign—and its climax in the brutal March 7, 1965, suppression of King's marchers on the Pettus Bridge—that provided the political energy propelling the Voting Rights Act forward.<sup>144</sup> When Lyndon Johnson introduced the VRA to Congress in his famous “We Shall Overcome” speech, he promised a decisive effort that would break the back of Southern resistance once and for all.<sup>145</sup> This overriding objective would have been gravely compromised by total capitulation to the legalists at the Justice Department. Given the symbolic centrality of poll taxes in the decades-long struggle for voting rights, the landmark statute could not credibly ignore the fact that Southern states were still imposing poll taxes as part of their defense of the racist status quo. If the VRA had not taken a strong stand, its claim to landmark status would have been revealed as sheer pretense. Caught between movement frontlash and legalistic backlash, Congress teetered uncertainly, struggling to reach a new constitutional equilibrium.

When push came to shove, Congress repudiated the precedent it had set only three years before with the Twenty-Fourth Amendment and thereby dealt a body blow to Article Five in the living Constitution of the modern republic. Instead of breathing new life into Article Five, Katzenbach reached an agreement with King that represented an innovative twist on the modern system of higher lawmaking through landmark statutes and judicial superprecedents.

We shall explore this story with care, since it constitutes a precedent of enduring significance, especially today when the law reviews feature an ongoing debate in which defenders of “originalism” and “living constitutionalism” struggle for intellectual supremacy.<sup>146</sup> The Voting Rights Act represents one of the rare moments when this debate broke out beyond narrow legal circles to become a matter of great public importance and self-conscious political decision.

*I. A Voting Rights Amendment?*—Johnson signed the Civil Rights Act of 1964 on July 2, framing one of the great issues of the presidential

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<sup>144</sup> See Clayborne Carson, *The Crucible: How Bloody Sunday at the Edmund Pettus Bridge Changed Everything*, in *THE UNFINISHED AGENDA OF THE SELMA-MONTGOMERY VOTING RIGHTS MARCH 27* (Dara N. Byrne ed., 2005).

<sup>145</sup> See Lyndon B. Johnson, Special Message to Congress: The American Promise, 1 PUB. PAPERS 87 (Mar. 15, 1965) (“We Shall Overcome” speech).

<sup>146</sup> See, e.g., Ackerman, *supra* note 3; Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 10–11 (1988) (advocating originalism as a means of judicial restraint); William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL'Y 401, 403–04 (2006) (analyzing the idea of a “living constitution”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (arguing for originalism as “more compatible with the nature and purpose of a Constitution in a democratic system”).

election.<sup>147</sup> As his campaign against Goldwater proceeded, Johnson was already instructing the Justice Department to engage in long-term planning on the next step—a breakthrough on voting rights.<sup>148</sup>

It wasn't clear, though, whether Johnson would make voting rights a key priority once he had won his overwhelming electoral mandate in the fall. Martin Luther King didn't get a clear answer when he visited the White House in December after his own triumphant return from Oslo as the winner of the Nobel Peace Prize.<sup>149</sup> During his meeting with President Johnson, King pressed for a voting rights law, but Johnson avoided a commitment, suggesting that Great Society legislation would do more to improve the conditions of blacks.<sup>150</sup> King left the White House disappointed but was determined to change the political equation. As he later recalled, "I left the mountaintop of Oslo and the mountaintop of the White House, and two weeks later went down to the valley of Selma, Alabama . . . ."<sup>151</sup>

In the meantime, Johnson considered his options. On December 18—shortly after King's visit—the President telephoned Nicholas Katzenbach at the Department of Justice and told him to "undertake the greatest midnight legislative drafting session" to guarantee black voting rights.<sup>152</sup> If effective legislation ran against constitutional barriers, he instructed the Department of Justice to draft a constitutional amendment to break through the roadblock.

On December 28, Katzenbach sent Johnson a memo urging that he take the Article Five path, and the Department followed up with formal language in early January:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State for any cause except (1) inability to meet residence requirements not exceeding sixty days or minimum age requirements, imposed by State law; (2) conviction of a felony for which no pardon or amnesty has been granted; (3) mental incompetency adjudicated by a court of record; or (4) confinement pursuant to the judgment or warrant of a court of record at the time of registration or election.

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<sup>147</sup> See Ackerman, *supra* note 3, at 1769–70.

<sup>148</sup> After the Civil Rights Act of 1964 was signed, Johnson "immediately" announced his intention to pursue a voting rights law, though he was vague on the precise timetable. GARTH E. PAULEY, *LBJ'S AMERICAN PROMISE: THE 1965 VOTING RIGHTS ADDRESS* 74 (2007). According to Eric Goldman, a presidential advisor, Johnson gave his instructions in "mid-1964" but made it clear that it had to be "kept out of the press" for fear that it would help Goldwater in the South. See ERIC F. GOLDMAN, *THE TRAGEDY OF LYNDON JOHNSON* 318 (1969).

<sup>149</sup> See RONALD W. WALTERS, *FREEDOM IS NOT ENOUGH: BLACK VOTERS, BLACK CANDIDATES, AND AMERICAN PRESIDENTIAL POLITICS* 15 (2005).

<sup>150</sup> See MARTIN LUTHER KING, JR., *THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR.* 270–71 (Clayborne Carson ed., 1998).

<sup>151</sup> *Id.* at 271.

<sup>152</sup> PAULEY, *supra* note 148, at 76.

SECTION 2. The Congress shall have power to enforce this Article by appropriate legislation.<sup>153</sup>

The Department of Justice had grand ambitions in framing its proposal. It was not merely concerned with closing the poll-tax gap left by the Twenty-Fourth Amendment, but aimed to create a new foundation for the entire law of voting rights. The Constitution notoriously failed to contain an affirmative guarantee of the right to vote—it left this up to the states, subject to the condition that they not engage in discrimination based on race<sup>154</sup> and gender.<sup>155</sup> But the new initiative changed the baseline. It swept away literacy tests and poll taxes and preempted the use of other exclusionary tactics—leaving intact only a few, relatively innocuous, exceptions.<sup>156</sup>

But there was an obvious problem. Here is Katzenbach dealing with the politics of Article Five in his memo to the President:

It is difficult to estimate the extent of the opposition to this kind of constitutional amendment. In addition to resistance from the South, there may be opposition from sources genuinely concerned about federal interference with a fundamental matter traditionally left to the States. One possible alternative—to follow the poll-tax amendment precedent and limit the reach of the new amendment to federal elections—would tend to decrease the magnitude of the opposition, but it would also impair the effectiveness of the measure.<sup>157</sup>

Note the legalist response to the political problem: if opposition to the Twenty-Fifth Amendment becomes too intense, *don't* abandon the classical amendment system. Keep on the Article Five track, and split the opposition between Southern die-hards and serious conservatives who are “genuinely” concerned about states’ rights. The proper fallback, under the Department’s scenario, was to cut the amendment’s scope to include only federal elections. This worked for Twenty-Four, why not for Twenty-Five?

While an Article Five amendment was clearly Option Number One, Katzenbach’s memo explored two statutory possibilities. Option Number Two involved “legislation vesting in a federal commission the power to conduct registration for federal elections.”<sup>158</sup> Since this statute did not tar-

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<sup>153</sup> The draft also contained the usual provision stating that the amendment “shall be inoperative unless it shall have been ratified . . . within seven years from the date of its submission to the States by the Congress.” Memorandum (unsigned) from the Dep’t of Justice to Lyndon B. Johnson, *Constitutional Amendment* (Jan. 18, 1965) (Lyndon B. Johnson Library Archives) (on file with authors).

<sup>154</sup> U.S. CONST. amend. XV.

<sup>155</sup> U.S. CONST. amend. XIX.

<sup>156</sup> We haven’t any indication that the Justice Department appreciated the racially exclusionary implications of the amendment provisions authorizing the states to deny the ballot to felons. Memorandum (unsigned) from the Dep’t of Justice to Lyndon B. Johnson, *Constitutional Amendment* (Jan. 18, 1965) (Lyndon B. Johnson Library Archives) (on file with authors).

<sup>157</sup> Memorandum from Nicholas B. Katzenbach to Lyndon B. Johnson (Dec. 28, 1964) (Lee White Files, Box 3, Lyndon B. Johnson Library Archives) (on file with authors).

<sup>158</sup> *Id.*

get state elections, it received a clean bill of health from the Department.<sup>159</sup> But Katzenbach was “more dubious” when it came to a statute that would “assume direct control of registration for voting in both federal and state elections in any area where the potential Negro registrants actually registered is low.”<sup>160</sup> This was the last option, so far as the Department of Justice was concerned. Not only was it constitutionality questionable, but its politics were problematic—“a somewhat similar proposal” had been rejected by key Republican moderates in 1963.<sup>161</sup>

Johnson would ultimately overrule his Department and support a sweeping landmark statute by the time he made his great “We Shall Overcome” speech on March 15. But a couple of months is an eternity in politics, and the Administration was vacillating between Options One and Two in early January.<sup>162</sup> When the President delivered his State of the Union Address on January 4,<sup>163</sup> he announced that he would submit a detailed proposal on voting rights “within six weeks.”<sup>164</sup> At the same time, his spokesman Bill Moyers emphasized that a definitive choice had not yet been made between an amendment and a statute.<sup>165</sup>

More precisely, the Katzenbach memo suggests that the operational choice was between an *amendment* that would act to decisively end “racially-discriminatory manipulation”<sup>166</sup> in both state and federal elections or a *statute* that would limit itself to registration of blacks in federal elections. How, then, to account for the rapid shift to Option Three over the next two months?

The answer is clear: Martin Luther King’s campaign in Selma. King began organizing on January 2, and he was soon gaining national media attention and broad public support for a decisive breakthrough on voting rights. In a telephone conversation on January 15, King appealed to Johnson’s political instincts, pointing out that the only Southern states that Johnson had not carried in 1964 “have less than forty percent of the Negroes

<sup>159</sup> The Department was on solid ground here. The Constitution gives Congress power to regulate the “time, place and manner” of congressional elections, and while it only gives Congress power to stipulate the “time” for electing presidential electors, the *Burroughs* case had upheld more extensive congressional authority. See U.S. CONST. art. I, § 4; *Burroughs v. United States*, 290 U.S. 534 (1934).

<sup>160</sup> Memorandum from Nicholas B. Katzenbach to Lyndon B. Johnson, *supra* note 157.

<sup>161</sup> The memo mentions “Congressman McCulloch and others.” *Id.* McCulloch was the pivotal House Republican on civil rights legislation throughout this period. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 22 (1994) (describing McCulloch as a “pivotal voter”).

<sup>162</sup> PAULEY, *supra* note 148, at 76 (“[T]he [P]resident and his advisors initially endorsed Greene’s second proposal . . .”).

<sup>163</sup> See Johnson, *supra* note 145.

<sup>164</sup> GARTH PAULEY, *THE MODERN PRESIDENCY AND CIVIL RIGHTS: RHETORIC ON RACE FROM ROOSEVELT TO NIXON* 174 (2001).

<sup>165</sup> PAULEY, *supra* note 148, at 77.

<sup>166</sup> Memorandum from Nicholas B. Katzenbach to Lyndon B. Johnson (Dec. 18, 1964) (Lyndon B. Johnson Library) (on file with authors).

registered to vote.”<sup>167</sup> He urged Johnson to build a “coalition of the Negro vote and the popular white vote that will really make the New South.”<sup>168</sup>

Johnson responded eagerly: “That’s exactly right. I think it is very important that . . . we take the position that every person born in this country when they reach a certain age, that he have a right to vote, just like he has the right to fight.”<sup>169</sup> To press the point further, King flew from Selma to Washington about three weeks later to ask Johnson personally for a statute that would cover both federal and state elections and establish machinery to crush the arbitrary power of local officials, prohibit literacy tests, and provide for enforcement by federal registrars. As he left the White House on February 9, King praised Johnson’s “deep commitment,” calling the meeting “very successful.”<sup>170</sup>

But the Department of Justice was slow to follow through. On January 18—the date of the first Selma march organized by the Southern Christian Leadership Conference—Katzenbach promised the President that he would have a draft statute ready in a week.<sup>171</sup> Yet nothing was forthcoming. With every passing day, a statute limited to federal elections (Option Two) seemed an increasingly inadequate response to the rising public demand for decisive action, but the Department was still struggling with its constitutional doubts about a more sweeping statute (Option Three). With civil rights leaders and liberal congressmen pressing for resolute measures,<sup>172</sup> the logjam broke in mid-February with a memo from Deputy Attorney General Ramsay Clark announcing that the Department had concluded “that a constitutional amendment would not be a satisfactory approach.”<sup>173</sup>

During the next month, the Department of Justice was the scene of furious activity as the Department struggled to draft a landmark statute that revolutionized traditional federal-state relationships.<sup>174</sup> By March 5, the

<sup>167</sup> Transcript Recording: Telephone Conversation Between Lyndon B. Johnson and Martin Luther King, Jr., No. 1803, WH6501.04 (Jan. 15, 1965) (Lyndon B. Johnson Library Archives).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 388 (2004).

<sup>171</sup> PAULEY, *supra* note 148, at 77.

<sup>172</sup> By early February, representatives of the NAACP were already campaigning against an Article Five approach. See LAWSON, *supra* note 36, at 309; see also DENTON WATSON, LION IN THE LOBBY: CLARENCE MITCHELL, JR.’S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS 662 (2002).

<sup>173</sup> Memorandum (unsigned) to Lyndon B. Johnson, *Reports on Legislation* (Feb. 15, 1965) (on file with authors); see also DAVID GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965, at 60 (1978); PAULEY, *supra* note 148, at 78 (quoting Letter from Ramsey Clark, Deputy Att’y Gen., to Lawrence O’Brien, Postmaster Gen. (Feb. 15, 1965)).

<sup>174</sup> By February 23, Solicitor General Archibald Cox had already sketched out some ideas that would be developed further in the weeks ahead. Under his scheme, the existence of a literacy test, or similar tests, would constitute prima facie evidence of discrimination in states with low registration rates, warranting their suspension for ten years. He also proposed statistical measures that anticipated the act’s preclearance provisions. But much remained to be done before a formal draft would emerge

Department had completed its first draft, which included provisions appointing federal registrars authorized to accept payments of the poll tax.<sup>175</sup> When it was finally submitted on March 18, the Administration's bill targeted the worst Southern states for extraordinary treatment—suspending literacy tests and authorizing federal registrars to intervene in the worst areas to register blacks for full participation in state, as well as federal, elections.<sup>176</sup> Even more remarkably, the Administration's bill took prophylactic steps to prevent Southern states from barring blacks in the future. The proposal stripped them of their power to change the rules regarding their own electoral systems and required them to persuade a three-judge federal court in the District of Columbia that a change wouldn't have the "effect of denying or abridging rights guaranteed by the Fifteenth Amendment."<sup>177</sup> Quite simply, this provision stripped the offending states of any pretense at sovereignty. In designing their fundamental political institutions, they would be obliged to go, on bended knee, to seek the approval of judges in Washington, D.C., before their laws could even go into effect.<sup>178</sup> Nothing like this shattering assault on federalism had been seen since the days of Reconstruction.

Compared to the suspension of literacy tests, the invasion of federal registrars, and the humiliating prescreening procedures, the constitutional problem posed by a ban on state poll taxes seemed like small potatoes. Nevertheless, the Twenty-Fourth Amendment would make the poll-tax controversy into a great *cause célèbre* during the congressional debate.

2. "We Shall Overcome".—As the escalating voting rights campaign in Selma swept forward, it reached its climax on "Bloody Sunday," March

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from the Department of Justice. See Memorandum of Archibald Cox to Nicholas B. Katzenbach (Feb. 23, 1965) (on file with authors); see also BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE VOTING RIGHTS ACT OF 1965*, at 158 (2007) (discussing drafts of voting rights legislation). By March 4, 1965, Lee White was writing a memo to Lyndon Johnson giving him "Notes for Meeting with Dr. King on March 5th," in which he declared, "There is general agreement that the Constitutional amendment approach would require too much time and thus we have concentrated on a statute." Memorandum from Lee C. White to Lyndon B. Johnson (Mar. 4, 1965) (LE/HU 2-7, F6155-18, Lyndon B. Johnson Library Archives) (on file with authors).

<sup>175</sup> LANDSBERG, *supra* note 174, at 158. Subsequent versions toyed with the idea of banning the tax altogether in areas where registrars had been appointed, *id.* at 159, but these provisions did not see the light of day when the Administration submitted its bill to Congress. See *infra* Part III.B.

<sup>176</sup> S. 1564, 111th Cong. (1965) (as submitted by Sen. Mansfield, March 18, 1965) (on file with authors).

<sup>177</sup> *Id.* § 8.

<sup>178</sup> To top off the humiliation, the states could not even make their arguments before the federal courts of the South, whose personnel had been carefully vetted by Southern senators. Instead, the only court that was granted jurisdiction was the Court of Appeals for the District of Columbia. *Id.* Since the District has no senators, these judges have traditionally been selected by the President free of normal notions of senatorial privilege—and were prone, in this period, to reflect the strong anti-racist commitments of the Eisenhower, Kennedy, and Johnson Administrations.

7,<sup>179</sup> when a peaceful march was shattered by a brutal display of police violence on the Edmund Pettus Bridge. Many more violent acts of suppression had occurred during the past century, but television made all the difference—transforming the terrible scenes into an ugly symbol that shocked the conscience of the nation.<sup>180</sup> The indignant response was overwhelming, but Lyndon Johnson was not yet in a position to respond with a solemn address to the nation. His Justice Department was still laboring mightily on the revolutionary architecture of the Voting Rights Act, and Johnson could not go forward without a serious-looking proposal that might channel the public outrage into enduring legal commitments.<sup>181</sup>

After a week had gone by, he was in danger of losing the political initiative. When he announced his plans to give a speech to Congress, the *Christian Science Monitor* explained that the White House was “trying rather desperately to keep one jump ahead of national indignation over the civil rights crisis in Selma.”<sup>182</sup> As the President drove down Pennsylvania Avenue to the Capitol on March 15, the Justice Department was still burning the midnight oil. Though he had promised congressional leaders draft legislation before the event, the Administration was only prepared to present a formal proposal a couple of days later—and even then, the Department of Justice reserved the right to continue tinkering.<sup>183</sup>

But all of this was utterly irrelevant to the seventy million Americans who turned on their television sets to hear their President offer up a diagnosis of the current crisis:

What happened in Selma is part of a far larger movement which reaches into every section and state of America. It is the effort of American Negroes to secure for themselves the full blessings of American life.

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<sup>179</sup> See JANUS ADAMS, *FREEDOM DAYS: 365 INSPIRED MOMENTS IN CIVIL RIGHTS HISTORY*, March 7 (1998); GARROW, *supra* note 173, at 73–77.

<sup>180</sup> Shortly after 9:00 p.m. on Bloody Sunday, ABC interrupted its evening movie, *Judgment at Nuremberg*, “for a long film report of the assault on Highway 80, a sequence which showed clearly the quiet column, the flailing clubs, the stampeding horses, the jeering crowd and the stricken, fleeing blacks.” GARROW, *supra* note 173, at 78. The story also ran on the front page of almost every major newspaper, accompanied by grisly photos. The *Washington Post* screamed a large banner headline, *Tear Gas, Clubs Halt 600 in Selma March*, while the *New York Times* breathlessly reported, *Alabama Police Use Gas and Clubs to Rout Negroes*. See Leon Daniel, *Tear Gas, Clubs Halt 600 in Selma March*, WASH. POST, Mar. 8, 1965, at A1; Roy Reed, *Alabama Police Use Gas and Clubs to Rout Negroes*, N.Y. TIMES, Mar. 8, 1965, at A1.

<sup>181</sup> On March 16, 1965, reporters asked the White House’s George Reedy about the status of the Administration’s voting rights proposal, only to be told, “That’s still down the road a ways.” GARROW, *supra* note 173, at 82.

<sup>182</sup> PAULEY, *supra* note 148, at 77.

<sup>183</sup> The Administration formally set the legislative wheels in motion on March 17, when it submitted a proposed bill to Congress. *Voting Rights Act of 1965*, 1965 CONG. Q. ALMANAC 540; see also LANDSBERG, *supra* note 174, at 161 (noting that the Department of Justice continued tinkering with its proposal).

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

And we shall overcome.

As a man whose roots go deeply into Southern soil I know how agonizing racial feelings are. I know how difficult it is to reshape the attitudes and the structure of our society.

But a century has passed, more than a hundred years, since the Negro was freed. And he is not fully free tonight.

It was more than a hundred years ago that Abraham Lincoln, a great president of another party, signed the Emancipation Proclamation, but emancipation is a proclamation and not a fact.

A century has passed since the day of promise. And the promise is unkept.

The time for justice has now come.<sup>184</sup>

These great lines anchor the meaning of the present crisis firmly within the framework of the constitutional past—but not by means of the standard narrative known to lawyers. When lawyers look to the Civil War and Reconstruction, their eyes turn to the formal texts of the Thirteenth, Fourteenth, and Fifteenth Amendments. But when Johnson turned to the past, the key figure was Abraham Lincoln and his Emancipation Proclamation.<sup>185</sup>

As any lawyer knows, the Proclamation failed to guarantee civil equality to blacks, let alone the right to vote; it is even doubtful whether Lincoln had the constitutional authority to issue his edict.<sup>186</sup> But these legalistic quibbles were unimportant to Johnson's audience. For viewers, Lincoln was the great Liberator, and Johnson was trying to follow in his footsteps, urging his fellow Americans to see the present crisis as calling for a similar act of constitutional redefinition. The way forward was through a collective commitment to the civil rights movement—to recognize that it was not merely the work of Southern protestors, or even a broader struggle by black Americans, but “really it's all of us who must overcome the crippling legacy of bigotry and injustice.” The “We” in “We Shall Overcome” must become “We the People of the United States.”

It was within the evolving historical frame of popular sovereignty that the President called upon Congress to “join with me in working long hours—nights and weekends if necessary—to pass this bill.” While he welcomed suggestions from Congress “to strengthen this bill,” he made it

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<sup>184</sup> Johnson, *supra* note 145, at 9.

<sup>185</sup> See ACKERMAN, TRANSFORMATIONS, *supra* note 120, at 131–33.

<sup>186</sup> See *id.* at 131.

plain that “[t]his time, on this issue, there must be no delay, or no hesitation, or no compromise with our purpose.” However, when the Administration submitted its bill a couple of days later, it did “hesitate” and “compromise” on one large matter: the poll tax.

### B. Action and Reaction

As Americans turned away from their television sets, the public message was clear: Now was the time for bold and resolute action. Behind the scenes, however, the President’s legal advisors proceeded with caution. The Justice Department’s bill proposed a revolutionary assault on traditional notions of federalism, but it pulled its punches when it came to the poll tax. Although it suspended literacy tests and “other tests and devices,”<sup>187</sup> it merely proposed an institutional mechanism that made it easier for blacks to pay their poll taxes.<sup>188</sup> The Twenty-Fourth Amendment, ratified only a year before, was casting a long shadow.

The source of the Administration’s caution became plain at the first round of House hearings on the bill:

THE CHAIRMAN: As you know, we have a constitutional amendment which abolishes payment of poll taxes as a condition precedent in Federal elections? Do you believe that poll taxes should be abolished even in State elections . . . ?

MR. KATZENBACH: Yes; I would like to get rid of poll taxes.

THE CHAIRMAN: Can we do this by statute without a constitutional amendment?

MR. KATZENBACH: I think it is very difficult, Mr. Chairman, to do it by statute. There is presently pending in the Supreme Court a case [*Harper*] which the Supreme Court will hear at its next session and may do that job. A constitutional argument can be made that the poll tax, as a condition precedent to voting, is a restriction against voting which is unwarranted by the Constitution, whether applied discriminatorily or not. That argument is being made to the

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<sup>187</sup> S. 1564, 89th Cong. § 3(a), (c) (1st Sess. 1965).

<sup>188</sup> The Administration bill authorized federal examiners to accept poll-tax payments, and state authorities would be obliged to recognize these receipts as qualifying the recipient for any election during the year of payment. Examiners were also authorized to collect the tax and pass it on to state or local officials. *Id.* § 5(e). An Administration spokesman—as well as Katzenbach during hearings—reported that the poll-tax provision of the bill was designed to eliminate situations in which the taxes had to be paid nineteen months before an election—the “accumulated” or “cumulative” poll tax. *See Voting Rights: Hearings on H.R. 6400 Before the H. Comm. on the Judiciary*, 89th Cong. 22 (1965) (statement of Nicholas B. Katzenbach, Att’y Gen. of the United States); *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 152–53 (1965) (statement of Nicholas B. Katzenbach, Att’y Gen. of the United States).

Court. Of course, if the Court should come to the conclusion, as I think it might, then poll taxes would be eliminated at State elections.<sup>189</sup>

According to Katzenbach, Congress was just looking for trouble if it tried to abolish the poll tax. It should simply stand on the sidelines and leave it to the Court to decide whether to overrule *Breedlove* in *Harper*.

From Katzenbach's perspective, it was the literacy test, not the poll tax, that was the crucial obstacle to black voting in the South: "Negroes who cannot register because of other tests have not had any incentive to pay their poll tax."<sup>190</sup> While the Civil Rights Commission had developed some data suggesting that poll taxes played an exclusionary role, Katzenbach refused to support a statutory ban.<sup>191</sup> Even more remarkably, he explicitly recognized that the remaining poll-tax states had "enacted them with discrimination in mind."<sup>192</sup> But this wasn't enough for him to resolve his constitutional doubts, given the Twenty-Fourth Amendment.<sup>193</sup>

Unsurprisingly, liberals were not impressed by Katzenbach's legalistic caution. Both the House and Senate Judiciary Committees added an unconditional poll-tax ban to the bill that they reported out for debate on the floor. With Emanuel Celler and Ted Kennedy taking the lead,<sup>194</sup> the com-

<sup>189</sup> *Voting Rights: Hearings on H.R. 6400 Before the H. Comm. on the Judiciary*, 89th Cong. 22 (1965).

<sup>190</sup> *Id.*

<sup>191</sup> See *Hearings Before the S. Comm. on the Judiciary*, 89th Cong. 148–49 (1965) (statement of Nicholas B. Katzenbach, Att'y Gen. of United States) ("Because I have reservations that that would be sound constitutionally, Senator . . . I believe that figures derived as the Civil Rights Commission derived them could probably be successfully contested."); U.S. COMM. ON CIVIL RIGHTS, FREEDOM TO THE FREE: CENTURY OF EMANCIPATION, 1863–1963 (1963) (presenting findings on voter participation rates and factors).

<sup>192</sup> *Hearings Before the S. Comm. on the Judiciary*, *supra* note 191.

<sup>193</sup> Katzenbach adhered to this position repeatedly in his dealings with the congressional leadership. See Memorandum from Harold Greene to Barefoot Sanders, *House of Representatives Draft of the Voting Bill* (Apr. 12, 1965) (on file with authors) ("As the Attorney General has stated on a number of occasions there are substantial constitutional problems with eliminating poll tax requirements by legislation."). But behind the scenes, the Department of Justice lawyers were already brainstorming ideas that might be used in an eventual compromise. For example, Greene suggested to the Attorney General that a statutory directive be added to bring test cases against states that still required the poll tax as a voting prerequisite. *Id.* Stephen Pollak, a Civil Rights Division lawyer, cautioned that an unconditional position "could possibly embarrass us at some future time when we may wish to approve a legislative attempt to abolish the poll tax." Memorandum from Stephen Pollak to Barefoot Sanders (Apr. 7, 1965) (on file with authors).

<sup>194</sup> The Senate leadership prevented stalling tactics by Judiciary Chairman James Eastland (D-MS) by giving his committee only fifteen days to consider the bill before reporting it to the floor. See *Voting Rights Act of 1965*, *supra* note 183, at 541. During this brief interval, a liberal coalition led by Kennedy added a poll-tax ban to the Administration bill, as well as four other strengthening amendments. See Edward G. Carmines & Robert Huckfeldt, *Party Politics in the Wake of the Voting Rights Act*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 123 (Bernard Grofman & Chandler Davidson eds., 1992).

Meanwhile, a subcommittee of the House Judiciary also added a poll-tax ban—which then gained the support of the full committee—that added a congressional finding that the payment of poll taxes as a

mittee bills insisted that Congress take on the mantle of constitutional leadership and refused to leave the poll tax to the courts.<sup>195</sup> But this liberal demand only triggered a complex process of congressional give-and-take.

1. *The Senate Compromise.*—The Senate Judiciary Committee’s bill hit a roadblock when Southern Democrats launched a predictable filibuster.<sup>196</sup> A two-thirds vote was required to end debate, and this provoked another round of negotiation between the Democratic and Republican leaders—Mike Mansfield and Everett Dirksen. As the filibuster droned on for more than a month, the two leaders went into private sessions to fashion the terms of a compromise bill that would gain the bipartisan support needed for cloture.<sup>197</sup>

This provided an opening for a legalistic counterattack by the Department of Justice. As the Senate leaders emerged from the shadows to announce their compromise, the poll-tax ban had been stripped from the bill. Brandishing a letter from Katzenbach, Minority Leader Dirksen relayed the Attorney General’s belief that “there are constitutional risks if we adopt the Kennedy amendment. The Attorney General says the constitutional approach—like that taken by the Senator from Florida [Spessard Holland]—is the proper approach.”<sup>198</sup>

Dirksen and Katzenbach were determined to respect the precedent established by the Twenty-Fourth Amendment. But they could hardly ignore the prospect of liberal opposition if they eliminated the statutory ban and allowed state poll taxes to continue. The intense political pressure from racial liberals proved constitutionally creative, encouraging the Justice Department to devise an unconventional pathway to the repudiation of the poll tax—one that allowed the Department to preserve its constitutional scruples

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requirement for voting violated the Fourteenth and Fifteenth Amendments. The Committee formally reported its bill out on June 1. *Voting Rights Act of 1965*, *supra* note 183, at 558.

<sup>195</sup> Senator Kennedy insisted that the statutory ban would “work quickly while [proposed substitutes would] work slowly. Ours clearly expresses the policy of Congress in this area while theirs leaves the making of policy to the courts.” 111 CONG. REC. 9913 (1965). He called for

a strong congressional declaration that the prohibition of the poll tax as a voting requirement is necessary. The courts always give a great weight to such declarations by Congress. The courts have said that they do this because Congress does have the ability to review the whole situation and gather all the evidence, while the courts can only look at the facts of the case before them. Congress can declare a national policy, while the courts can only decide the pending cases.

*Id.* Emanuel Celler, opening the House debate, declared that the committee bill built a system that was “impervious to all legal trickery and evasion.” *Voting Rights Act of 1965*, *supra* note 183, at 560. Representative Farber elaborated the point by declaring that the “constitutionality of section 10 [banning the poll tax] has been, and will again be, the victim of attacks from those among us who perpetually caution, ‘Go slow, beware, hold back!’ I think we have held back too long.” 111 CONG. REC. 15,717 (1965).

<sup>196</sup> See KOTZ, *supra* note 136, at 328–29.

<sup>197</sup> *Id.* at 329.

<sup>198</sup> 111 CONG. REC. 10,078 (1965).

against a statutory ban while allowing Congress to take a strong stand against the tax.<sup>199</sup>

To grasp the logic of the new proposal, recall Katzenbach's initial presentation before the House Judiciary Committee two months earlier.<sup>200</sup> He then emphasized that literacy tests functioned as the principal obstacle to black voting and suggested that it would be enough to focus on these, and similar, devices. Given the profound way in which the VRA's assault on literacy tests strained traditional constitutional understandings, he saw no need to clutter up the sweeping initiative with even more controversial end runs around the Twenty-Fourth Amendment on the basis of a weak factual record.

This is precisely the point where the Mansfield-Dirksen compromise proposed a clever kind of legal jiu-jitsu. Because the data on the poll tax were weak, Congress could take a leadership role by enacting a provision that enhanced the data's constitutional significance. Following the advice of the Justice Department, the new compromise contained a solemn proclamation announcing that Congress was terribly impressed by the evidence, and directed the Attorney General to use this finding in a lawsuit that would urge the Supreme Court to strike down the poll tax:

Sec. 9 (a) In view of the evidence presented to the Congress that the constitutional right of citizens of the United States to vote is denied or abridged in certain States by the requirement of the payment of a poll tax as a condition of voting, Congress declares that the constitutional right of citizens of the United States to vote is denied or abridged in such States by the requirement of the payment of a poll tax as a condition of voting. To assure that such right is not denied or abridged in violation of the Constitution, the Attorney General shall forthwith institute in such States . . . actions for declaratory judgment or injunctive relief against the enforcement of any poll tax . . . .<sup>201</sup>

Section Nine self-consciously proposed a distinctive institutional dynamic of constitutional revision, in which neither Congress nor the Court monopolized the business of constitutional change. Instead, both cooperated to repudiate the poll tax—one through aggressive constitutional findings, the other by using these findings to overrule well-entrenched judicial precedents. As Katzenbach explained to the President, the cooperative engagement of both Congress and the Court provided the “safest, swiftest and most efficient course to eliminate the poll tax.”<sup>202</sup>

This “collaborative” model had no direct precedent in our history. While the Justice Department had devised it independently, its credibility

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<sup>199</sup> See LANDSBERG, *supra* note 174, at 185.

<sup>200</sup> See *supra* note 189 and accompanying text.

<sup>201</sup> 111 CONG. REC. 10,073, 10,866 (1965) (read into the record by Sen. Sparkman).

<sup>202</sup> Memorandum from Att'y Gen. Nicholas B. Katzenbach to Lyndon B. Johnson, *Reasons Why the Department of Justice Has Favored the Mansfield-Dirksen Approach to Elimination of the Poll Tax* (May 21, 1965) (on file with authors).

was greatly enhanced by a Supreme Court decision announced three days before Mansfield and Dirksen went public with their proposal.<sup>203</sup> *Harman v. Forssenius*<sup>204</sup> served as the Court's first word on the Twenty-Fourth Amendment, responding to a transparent effort by Virginia to evade the new ban on poll taxes in federal elections.<sup>205</sup> The Court had little difficulty striking down a new state law imposing a cumbersome administrative procedure on Virginians who wished to vote in federal elections without paying its poll tax. More importantly for present purposes, Chief Justice Warren's opinion relied on factual presentations made at congressional hearings:

Even though in 1962 only five States retained the poll tax as a voting requirement, Congress reflected widespread national concern with the characteristics of the tax. . . . Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax. . . . In addition, and of primary concern to many, the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner. It is against this background that Congress proposed, and three-fourths of the States ratified, the Twenty-fourth Amendment abolishing the poll tax as a requirement for voting in federal elections.<sup>206</sup>

Given the Court's generous treatment of testimony emphasizing the discriminatory use of poll taxes, wouldn't it be even more receptive to formal congressional findings?

2. *Liberal Counterattack.*—Senate liberals, and their civil rights allies, were unpersuaded. While Katzenbach's legal fireworks helped convince Dirksen to deliver the Republican votes needed to break the filibuster, the liberals quickly moved to reinstate a statutory ban on the floor of the Senate. Senator Case derided the Department of Justice (DOJ) maneuver, asking Jacob Javits whether "in his many years of experience as a lawyer [he had] . . . ever seen an animal of the kind that the so-called substitute amendment would set up . . . ? Ha[d] he ever seen anything like it in all the years of his experience?"<sup>207</sup>

Javits replied, on cue, that the provision was a "strange one. It gives the Attorney General a direction by saying, 'We have heard some evidence on this subject. We do not rightly know what to do about it, except to ask

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<sup>203</sup> Mansfield and Dirksen introduced their proposal on the floor on April 30, 1965. *Voting Rights Act of 1965*, *supra* note 183, at 548.

<sup>204</sup> 380 U.S. 528 (1965). The decision was handed down on April 27, 1965. *Id.*

<sup>205</sup> Under the Virginia statute, voters who did not wish to pay a poll tax in federal elections were required to undertake a time-consuming procedure in which they filed a certificate of residence. *See id.* at 529 n.1 (citing VA. CODE ANN. § 24-17.2 (Supp. 1964)).

<sup>206</sup> 380 U.S. at 539–40.

<sup>207</sup> 111 CONG. REC. 9926 (1965).

you to go into court and find out about it.”<sup>208</sup> He returned later to condemn the unconventional character of the emerging compromise. The “Mansfield-Dirksen poll tax provision is a rare bird, indeed. We would be saying to the Attorney General, ‘We have heard some evidence. We are sorry that we cannot make up our own minds. So, Mr. Attorney General, please ask the Court to make up our minds for us.’”<sup>209</sup>

Javits was exaggerating, since the provision actually “declares” that “the constitutional right of citizens” had been “denied or abridged” by “the payment of a poll tax.” Nevertheless, he was correct in emphasizing that Congress was speaking in a distinctive voice—announcing a *constitutional judgment* without following up in the ordinary way, by *legislating* against the practice. So far as he was concerned, this effort to speak in a *purely constitutional* voice was pointless because the Attorney General obviously could “go into court” and do that even without such a provision. Indeed, he pointed to the *Harper* case “now pending” before the Supreme Court, which would allow the Department of Justice to make its constitutional arguments without the need for congressional assistance.<sup>210</sup>

With twenty-twenty hindsight, it’s clear that Javits missed the point. To use Arlen Specter’s phrase, Congress was urging the Court to revolutionize the law with a new “superprecedent.” The statute’s special mandate to the Attorney General was a means of expressing the significance attached to this new mode of Congress-Court collaboration. From this vantage, Javits and his fellow liberals were legal traditionalists, determined to condemn DOJ’s “rare bird”<sup>211</sup> to immediate extinction.<sup>212</sup>

This was one matter on which Senator Strom Thurmond could agree with his antagonists: “[T]o direct the Attorney General to challenge the constitutionality of a specific State law could establish a precedent which may well be regretted in future years.”<sup>213</sup> There was only one way in which Congress could speak in a constitutional voice, Senator Holland joined in, and that was by proposing a constitutional amendment.<sup>214</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Senator Wayne Morse was particularly scathing, characterizing the proposal as another attempt to “pass[] the buck [from Congress] to the courts, ask[ing] the Supreme Court for what may be an advisory opinion, and leav[ing] unsettled what will happen if that opinion is not forthcoming or does not ban the poll tax.” 111 CONG. REC. 10,051 (1965). He insisted: “In our tripartite system of Government, Congress is supposed to legislate and the Court to enforce and interpret that legislation. If the substitute bill stands, Congress will have failed in its major responsibility—to legislate.” *Id.*

<sup>213</sup> 111 CONG. REC. 11,013 (1965) (statement of Sen. Thurmond).

<sup>214</sup> *Id.* at 9939, 9943 (statement of Sen. Holland). *See also* 111 CONG. REC. 9939 (1965) (“I do not like the particular means adopted, which I believe to be unconstitutional. I do not like to see this spoken-in-the-wheel attempt, that will be resented, take the place of the orderly method of eliminating the poll tax for all purposes in the four remaining States in the next few years.”) (statement of Sen. Holland).

But Javits had had enough of Holland's advice. He called upon his fellow liberals to "learn[] our lesson": "[A]fter being led down. . . the garden path of the [Twenty-Fourth] amendment, it is high time for us to have the courage to face our responsibilities and now, at long last, ban the poll tax, lock, stock, and barrel, root and branch."<sup>215</sup> Senator Kennedy, who sponsored the liberal ban, joined the chorus by invoking Johnson's "We Shall Overcome" speech.<sup>216</sup> Without a ban on poll taxes in state elections, he explained, there was no guarantee that blacks would be in a position to vote against the George Wallaces of the world and prevent future tragedies like the one at Selma.<sup>217</sup>

But it was to no avail. The Kennedy amendment lost 45–41, and Katzenbach's unconventional "third way" between a constitutional amendment and a legislative prohibition made it through the Senate.<sup>218</sup>

3. *Meanwhile.*—In the meantime, Congressman Celler, Chairman of the House Judiciary Committee, confronted his own series of obstacles. Once his committee reported out a bill, Celler confronted the implacable opposition of Howard Smith of Virginia, the Chairman of the House Rules Committee. After Smith stalled for five weeks, Celler broke the logjam by initiating the cumbersome procedure required to discharge the bill from the Committee's iron grip. Under the terms of the resulting compromise, the Rules Committee allowed the bill to proceed to the floor—provided that the House would also be allowed to vote on a Republican substitute. In contrast to Celler's bill, this substitute—proposed by Congressmen Ford and McCulloch—failed to contain a poll-tax ban.<sup>219</sup>

When push came to shove, the Republican substitute went down to defeat by a vote of 215 to 166.<sup>220</sup> But as the House debate was unfolding, Martin Luther King called the President on July 7 to express his concern about the "McCulloch amendment" and pressure him to consider "what we can do to really block it."<sup>221</sup>

Johnson responded by redefining the issue. The key for him was not merely to block McCulloch but to block Celler as well, and to enlist King in a campaign in support of Katzenbach's Senate compromise. He assured King that he wanted to get rid of the tax, but in a way that didn't run the

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<sup>215</sup> *Id.* at 9924.

<sup>216</sup> *Id.* at 9913.

<sup>217</sup> *Id.*

<sup>218</sup> *Voting Rights Act of 1965*, 1965 CONG. Q. ALMANAC 545; 111 CONG. REC. 10,073, 11,018 (1965).

<sup>219</sup> *Voting Rights Act of 1965*, 1965 CONG. Q. ALMANAC 559; 111 CONG. REC. 16,038 (1965).

<sup>220</sup> 111 CONG. REC. 16,230 (1965).

<sup>221</sup> Transcript of Recording of Telephone Conversation between Lyndon B. Johnson and Martin Luther King, Jr., No. 8311, Tape WH6507.02 (July 7, 1965) (White House Series, Recordings and Transcripts of Conversations and Meetings, Lyndon B. Johnson Library) (on file with authors).

risk that the courts might “nullify[] the whole law.”<sup>222</sup> He emphasized Katzenbach’s worries about the constitutionality of a blanket repeal and made it clear that his legalistic objections were decisive. Even if the civil rights leadership didn’t “have much confidence in the Attorney General,” he continued, “they’re going to be in trouble anyway because he’s the man we have to try to rely on to help us . . . . Now you asked for my advice and I’m just telling you, you will either have confidence in me and in Katzenbach, or you’ll pick some leader that you do have and then follow [him].”<sup>223</sup>

It was either “my way or the highway.” After confronting King with this stark choice, Johnson urged him to look ahead to the critical moment when the House-Senate conference committee set about reconciling the competing positions of the two chambers. Together, they would beat the South’s “smart parliamentarians” at their own game.<sup>224</sup>

Then we go to conference. Suppose we get them all in a room and you come and talk to them and everyone talks to them, and say, “Please get your agreement, we’re willing to follow the attorney general . . . .” So I would say there are about two things that ought to be done. There ought to be the strongest man that can speak for you, the most knowledgeable legislative-wise, authorized to speak, and authorized to tell people like this Speaker that what you want, that you don’t want this fight to go on . . . . If you can trust me, if you can trust the attorney general . . . I’ll give every ounce of energy and ability in me that I have to passing the most effective bill that can be written.<sup>225</sup>

The ball was in King’s court: Would he back Celler and his liberal allies or Katzenbach and the constitutionalists in the Justice Department?

4. *The Katzenbach-King Compromise.*—King’s moment of truth would not long be delayed. Once Chairman Celler had successfully shepherded his poll-tax ban through the House, he would lead a strong liberal delegation to the conference in an attempt to kill Katzenbach’s compromise. The fate of his initiative would depend on the Senate delegation. Its judiciary chairman, James Eastland of Mississippi, was a staunch segregationist, and Edward V. Long was a moderate, leaving room for only two strong racial liberals—Thomas Dodd and Philip Hart – amongst the Democrats. The

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Transcript of Recording of Telephone Conversation between Lyndon B. Johnson and Martin Luther King, Jr., *supra* note 221 (“So if we beat off McCulloch . . . we still have one bill in the Senate and one in the House, that’s what the Southerners that are smart parliamentarians want us to do. They want your wife to go in one direction and you to go in the other. And the kids don’t know which one to follow.”).

<sup>225</sup> *Id.*

two remaining slots went to Minority Leader Dirksen and his fellow Republican Roman Hruska, giving Dirksen a decisive influence over the result.<sup>226</sup>

Given the radical constitutional assault on federalism embraced in other sections of the Voting Rights Act, the conferees had their hands full. Nevertheless, they resolved most matters with dispatch until they hit a stone wall on the poll tax.<sup>227</sup> Celler was insisting on his statutory ban, and the Chairman was a formidable force. But so was Dirksen, who had stripped the prohibition from the bill in his deal with Mansfield to break the filibuster. And once again, Dirksen's opinions could not be ignored. Given the even split between the four Democrats on the Senate delegation, he (and Hruska) could veto any House-Senate agreement. Although the NAACP and its Senate allies turned up the heat on the Senate conferees, they could not repeal the laws of addition. Dirksen stood firm.<sup>228</sup> An irresistible force was confronting an immovable object—unless some third party could intervene as mediator.

Katzenbach was the obvious choice. When push came to shove, Celler would have a tough time opposing a Democratic administration on a make or break issue. And Dirksen had already relied on Katzenbach when making his deal with Mansfield—in stripping the statutory ban from the leadership bill, he had publicly relied on the Attorney General's view that Senator Holland's Article Five methods served as the only "proper approach" to a flat prohibition.<sup>229</sup> As the conferees deadlocked during the week of July 19, Katzenbach returned to the Department of Justice to come up with a new formula that would banish the ghost of the Twenty-Fourth Amendment from the living Constitution.

By the following week, Katzenbach was ready. His new statutory language built upon the DOJ approach that had already gained Dirksen's support. He retained the basic two-step structure of the Senate bill—Congress would continue to speak in a constitutional voice condemning the poll tax, and it would then direct the Attorney General to bring a special lawsuit that aimed to convince the Supreme Court to defer to Congress's considered judgment. But this time around, Congress would express its condemnation in even stronger terms. We shall shortly explore the legal implications of the new DOJ formulation.<sup>230</sup> For the present, the key point is that it worked.

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<sup>226</sup> See ADA CHENOWETH MCCOWN, THE CONGRESSIONAL CONFERENCE COMMITTEE 16 (1927) (describing customary congressional practices granting conference committee managers greater discretion); GARROW, *supra* note 173, at 130 (listing conference committee members).

<sup>227</sup> The House and Senate bills went into conference on Monday, July 12, but the conferees reached an impasse during the week of July 19th. See GARROW, *supra* note 173, at 130–31.

<sup>228</sup> Robert C. Albright, *Conferees Bog Down on Poll Tax Ban*, WASH. POST, July 28, 1965, at A2 ("Instead of flatly banning use of poll taxes in state and local election, as the House bill provided, Dirksen proposed a congressional declaration against such taxes coupled with instructions to the Attorney General to proceed 'forthwith' to institute court action to invalidate the levies.").

<sup>229</sup> 111 CONG. REC. 10,078 (1965).

<sup>230</sup> See *infra* Part III.B.5.

At a private meeting on July 27, both Dirksen and Celler signed on to the new compromise.<sup>231</sup>

Dirksen's consent guaranteed a majority from the Senate delegation, but when the conference committee met later in the day, Celler confronted a rebellion from a majority of House conferees, forcing the leadership to make a final effort to clear the road for passage. With the NAACP and congressional liberals heavily invested in the statutory ban, King's moment of truth had arrived. He was the only civil rights leader with the moral authority to break the logjam—and when Katzenbach called on him, he followed down the line prepared by his conversation with the President. The Attorney General reached the movement leader late on Wednesday night and reported his success in a letter to Celler on the following day:

Late last night I discussed with Martin Luther King the proposed voting rights bill as it now stands in conference, and particularly the new poll tax provision. Dr. King strongly expressed to me his desire that the bill promptly be enacted into law and said that he felt this was an overriding consideration . . . .

With respect to the poll tax provision he expressed his view to me thusly: "While I would have preferred that the bill eliminate the poll tax at this time—once and for all—it does contain an express declaration by Congress that the poll tax abridges and denies the right to vote. In addition, Congress directs the Attorney General 'to institute forthwith' suits which will eliminate and prevent the use of the poll tax in the four states where it is still employed. I am confident that the poll tax provision of the bill—with vigorous action by the Attorney General—will operate finally to bury this iniquitous device."<sup>232</sup>

Celler immediately convened the conference, read the letter, and gained the consent of the remaining liberal holdouts to the compromise.<sup>233</sup>

Celler returned to the House floor to present the committee's report only to confront a maelstrom of indignation. The sense of betrayal was palpable. Representative Robert McEwan from New York moved to recommit, accusing the conferees of "watering down" the voting bill to only "half a loaf."<sup>234</sup> Representative Latta denounced the compromise: "[W]e are

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<sup>231</sup> See GARROW, *supra* note 173, at 130–31. Katzenbach's key role is suggested by a memo from Mike Manatos—a White House aide—that reported: "Nick Katzenbach tells me that the conference will reach agreement tomorrow on Voting Rights. Apparently, the compromise language which Nick suggested on Poll Tax is acceptable to Dirksen and Celler. It is my understanding that these two individuals will meet off-the-record tomorrow at noon." See Memorandum from Larry O'Brien to Lyndon B. Johnson (April 26, 1965) (LE/HU 2-7, FG 11-8-1/O'Brien, Lyndon B. Johnson Library) (on file with authors). In other words, the formal meeting of the full conference committee was something of an anticlimax.

<sup>232</sup> 111 CONG. REC. 19,444 (1965).

<sup>233</sup> King's intervention was particularly decisive for House conferees Rodino and Donohue. See GARROW, *supra* note 173, at 435.

<sup>234</sup> *Voting Rights Act of 1965*, 1965 CONG. Q. ALMANAC 563; 111 CONG. REC. 19,200 (1965).

against the poll tax . . . [and] [w]e do not want to prolong and perpetuate this problem just to carry it over to another campaign.”<sup>235</sup>

But Celler remained steadfast as the bill passed the House by a margin of 328 to 74.<sup>236</sup> During the floor debate, Celler kept King’s last-minute intervention confidential.<sup>237</sup> But Washington isn’t a good place for keeping secrets. It was headline news in the *Washington Post* on the following day,<sup>238</sup> and Katzenbach’s letter was immediately reprinted in the Congressional Record.<sup>239</sup>

The truth was there for all to see: the Voting Rights Act had gained passage through a combination of constitutional creativity by the Justice Department and the decisive support of Martin Luther King. “*We shall overcome*”—President Johnson spoke better than he knew in adopting the slogan of the civil rights movement in his great speech to Congress. It took the authority of Martin Luther King to bury the ghost of Article Five, and to blaze a new path to constitutional transformation.

5. *The Collaborative Model.*—The King-Katzenbach-Celler-Dirksen compromise is codified in Section Ten of the Voting Rights Act. It marks a new stage in the evolution of the modern system of higher lawmaking. When Franklin Roosevelt elaborated the model during the New Deal, it took a straightforward form. Backed by a powerful mandate from a mobilized electorate, the President and Congress enacted landmark statutes—the National Industrial Recovery Act (NIRA)<sup>240</sup> and the Social Security Act<sup>241</sup>—that challenged constitutional orthodoxy.

These enactments set the stage for a stark choice by the Supreme Court. Either it could continue to defend constitutional orthodoxy, as it did when striking down the NIRA, and escalate the constitutional crisis to a higher level. Or it could execute a “switch in time” and begin to elaborate the New Deal’s constitutional philosophy in a series of superprecedents, as it did in cases involving the Social Security Act,<sup>242</sup> the National Labor Rela-

<sup>235</sup> 111 CONG. REC. 19,195 (1965).

<sup>236</sup> *Voting Rights Act of 1965*, 1965 CONG. Q. ALMANAC 563.

<sup>237</sup> In keeping it secret, Celler was keeping faith with Katzenbach, whose letter concluded with a request of confidentiality:

Dr. King further assured me that he would make this statement publicly at an appropriate time.

While you are free to show this letter privately to whomsoever you wish I would appreciate it if you did not use it publicly without informing me so that I, in turn, may discuss it with Dr. King.

111 CONG. REC. 19,444 (1965).

<sup>238</sup> Richard L. Lyons, *Voting Rights Bill Passed by House After GOP Attack*, WASH. POST, Aug 4, 1965, at A1.

<sup>239</sup> The letter appeared on August 4, the same day as the *Washington Post* story. 111 CONG. REC. 19,444 (1965).

<sup>240</sup> National Industrial Recovery Act, ch. 90, 48 Stat. 19 (codified at 15 U.S.C. § 703 (2000)).

<sup>241</sup> Social Security Act, Pub. L. No. 89-97, tit. I, § 102(a), 79 Stat. 286, 291 (codified as amended at 42 U.S.C. § 1395 (2000)).

<sup>242</sup> *Id.*

tions Act,<sup>243</sup> and the Fair Labor Standards Act.<sup>244</sup> We will call this the *challenge model*—the landmark statute challenges basic principles entrenched in existing jurisprudence, confronting the Court with the fateful choice of defending or revising the reigning constitutional philosophy.<sup>245</sup>

Section Ten takes a different approach. It chooses collaboration over confrontation. Instead of challenging the Justices to abandon their old jurisprudence, it simply announces its revisionist constitutional judgments and then “directs” the Attorney General to invite the Court to use these pronouncements as the basis for a superprecedent that expresses the rising generation’s new constitutional commitments.<sup>246</sup> As we have seen, the key provisions were strengthened through the last-minute collaboration between King and Katzenbach:

The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.<sup>247</sup>

These “findings” crystallize commitments rooted in two generations of constitutional politics. The first two pronouncements represent the culmination of the New Deal struggle to open up the ballot box to the poor. The third finding brings the contemporary civil rights movement to the fore in asserting that “in some areas,” the tax has a racist “purpose or effect.” Section Ten concludes with a bit of a swerve: Congress “declares” that these findings require the conclusion that the “constitutional rights of citizens” have been denied “in some areas.”

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<sup>243</sup> National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

<sup>244</sup> Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006).

<sup>245</sup> With the exception of Section Ten, the Voting Rights Act follows this New Deal model—granting extraordinary powers to the federal government and challenging the Court to vindicate its revolutionary reworking of traditional understandings of federalism. In contrast to the New Deal, President Johnson and Congress were far more confident about the Warren Court’s likely response to their challenge. Given its leadership in the struggle for civil rights since *Brown*, there wasn’t much of a risk that the liberal Court of the 1960s would follow the old Court’s confrontational examples in dealing with the New Deal, and strike down the more adventurous provisions of the VRA. To nobody’s surprise, the Warren Court quickly upheld the landmark statute in a ringing vindication of national power in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Analytically, however, *South Carolina v. Katzenbach* follows in the footsteps of New Deal superprecedents like *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937), in which the Court responded to a challenge by transforming its traditional jurisprudence in a way that supported the shattering assertion of national power.

<sup>246</sup> Voting Rights Act § 10, 42 U.S.C. § 1973h(b) (2000).

<sup>247</sup> *Id.* § 1973h(a).

The puzzle is clear enough: if Congress's first two findings are valid, then the tax is unconstitutional in *all*, not "some," areas. It is only the third finding—dealing with racist purpose or effect—which is restricted to "some" areas of the South. So what was Congress really saying: "some" or "all"?

When set in its collaborative context, this ambiguity should be viewed as framing a fundamental question for the Supreme Court. If it accepted the congressional invitation, and overruled *Breedlove*, Section Ten was encouraging the Justices to ponder the deeper meaning of the constitutional politics that culminated in the announcement of a new public philosophy on the poll tax. On the one hand, they could use Section Ten as the basis for a narrow opinion that emphasized the civil rights movement's contribution to the living Constitution. Under this scenario, the Court would emphasize Congress's third finding, and instruct the lower courts to investigate the "purpose or effect" of the poll tax in the states which still imposed it. Call this the "Civil Rights" option.

But Section Ten also invited the Justices to consider whether they should be more ambitious and sweep away *all* poll taxes as "unreasonable financial hardship[s]" on the right to vote. This opinion would view Congress's new constitutional understandings as the product of a generational struggle that began with Roosevelt's campaign to open up the ballot box to *all* Americans, regardless of their wealth, and culminating in the successful collaboration of King and Johnson in the Voting Rights Act. Call this broader approach the "New Deal-Civil Rights" synthesis. Which would it be: narrow or broad?

Old New Dealers, like Congressman Claude Pepper, greeted the conference committee report with confidence. After all, he pointed out, the Supreme Court had handed down *Harman v. Forssenius*—its first decision under the Twenty-Fourth Amendment—only three months before. That decision relied heavily on findings by congressional committees that were far less authoritative than those contained in the formal statutory language of Section Ten. As a consequence, he concluded that "[n]ow we have fulfilled, I believe, the requirements of the Supreme Court decisions for striking down the poll tax as a condition to voting in the findings made in this conference report."<sup>248</sup>

Another New Dealer, Lyndon B. Johnson, was also optimistic at a nationally televised signing ceremony at the White House on August 6, 1965:

The Members of the Congress, and the many private citizens, who worked to shape and pass this bill will share a place of honor in our history for this one act alone.

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<sup>248</sup> 111 CONG. REC. 19,197 (1965).

There were those who said this is an old injustice, and there is no need to hurry. But 95 years have passed since the [Fifteenth Amendment] gave all Negroes the right to vote.

And the time for waiting is gone.

There were those who said smaller and more gradual measures should be tried. But they had been tried. For years and years they had been tried, and tried, and tried, and they had failed, and failed, and failed.

And the time for failure is gone.

There were those who said that this is a many-sided and very complex problem. But however viewed, the denial of the right to vote is still a deadly wrong.

And the time for injustice has gone . . . .

This good Congress, the 89th Congress, acted swiftly in passing this act. I intend to act with equal dispatch in enforcing this act.

And tomorrow at 1 p.m., the Attorney General has been directed to file a lawsuit challenging the constitutionality of the poll tax in the State of Mississippi. This will begin the legal process which, I confidently believe, will very soon prohibit any State from requiring the payment of money in order to exercise the right to vote . . . .

So, we will move step by step—often painfully but, I think, with clear vision—along the path toward American freedom.<sup>249</sup>

But would the Court take the next step down the path marked out by Martin Luther King, Congress, and the President?

#### IV. ERASURE BY JUDICIARY: *HARPER V. VIRGINIA* *BOARD OF ELECTIONS*

The answer is yes and no.

Yes, the Court did fulfill the expectations of the political branches, and joined in their repudiation of the poll tax. Only months after Johnson's confident signing statement, the Justices came down with an opinion in *Harper* which tracked the broader of the two options opened up by Congress in Section Ten. In his majority opinion, Justice Douglas did not simply prohibit the states from levying taxes that were passed with racial animus or imposed a disproportionate impact on blacks. Instead, his opinion expressed the broader concerns of the emerging New Deal-Civil Rights

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<sup>249</sup> President Lyndon B. Johnson, Remarks on the Signing of the Voting Rights Act (Aug. 6, 1965), available at <http://millercenter.org/scripps/archive/speeches/detail/4034>.

regime. Douglas repudiated financial tests for the franchise as “invidious” forms of wealth discrimination, and held that they bore no “reasonable relationship to any legitimate State interest.”<sup>250</sup> If we look only at the doctrinal bottom line, *Harper* served as the final stage in the process of dynamic triangulation—beginning with Twenty-Four and continuing in Ten—through which the American people repudiated poll taxes in the 1960s.

But if we move beyond *Harper*’s black-letter law and consider Douglas’s constitutional reasoning, we enter the field of darkness. While Douglas managed to codify the conclusions of the constitutional politics of the 1960s, he refused to acknowledge his jurisprudential debt to the Twenty-Fourth Amendment or Section Ten of the VRA. He didn’t even mention them, despite pointed references to these recent enactments in the briefs and Justice Goldberg’s previous draft. The historically naïve reader of Douglas’s opinion would suppose that the Warren Court considered itself the only constitutional change agent of the 1960s. *Harper* presents itself as yet another chapter in the Warren Court’s creative reinterpretation of the Equal Protection Clause: wealth discrimination in voting is no less invidious than racial segregation in schooling. Onward and upward from *Brown v. Board of Education*,<sup>251</sup> to *Reynolds v. Sims*,<sup>252</sup> to *Harper v. Board of Elections*,<sup>253</sup> to . . . ? Where will America go next in the pursuit of constitutional equality?

Douglas’s opinion makes one thing clear: it is up to the Court to decide, without the help of the President, the Congress, the states, or the American people living in the here-and-now. It was good enough for the Justices to update the ancient wisdom expressed by the Equal Protection Clause. While *Harper* said “yes” to the new constitutional principles of the emerging New Deal-Civil Rights regime, it said “no” to the collaborative model of constitutional change. Instead, it chose to erase all trace of its indebtedness to contemporary achievements of constitutional politics. This, we suggest, was a big mistake.

And a surprising one given the course of the Justices’ secret deliberations in the case. Douglas’s opinion comes into this story only at a late stage. When *Harper* was first considered in conference, the Court did not see it as a good vehicle for continuing its egalitarian revolution. By a vote of 6 to 3, the Justices refused to overrule *Breedlove*, thereby reaffirming the constitutional legitimacy of the poll tax.<sup>254</sup> It was only a dissent by Arthur Goldberg that caused the majority to rethink its initial conclusion. Goldberg explicitly relied on the Twenty-Fourth Amendment in emphasizing how the constitutional achievements of the 1960s had eroded *Breedlove*’s seeming certainties.<sup>255</sup> In his view, this was “the most important” unpub-

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<sup>251</sup> 347 U.S. 483 (1954).

<sup>252</sup> 377 U.S. 533 (1964).

<sup>253</sup> 383 U.S. 663 (1966).

<sup>254</sup> See Schwartz, *supra* note 16 at 320.

<sup>255</sup> *Id.* at 322–33.

lished opinion he ever wrote because it successfully convinced a majority to engage in an agonizing reappraisal of their doctrinal certainties.<sup>256</sup> Given Goldberg's crucial role in this turnaround, Chief Justice Earl Warren would have undoubtedly assigned him the task of writing the opinion for the new majority.

But matters did not take their ordinary course. Between the moment of dissent and the moment of decision, Lyndon Johnson managed to seduce Goldberg off the court, making room for his buddy, Abe Fortas.<sup>257</sup> As a consequence, Warren assigned the opinion to Douglas, who had joined Goldberg's initial dissent, but who failed to elaborate on the themes in his colleague's initial opinion. This micro-history suggests two key points. First, Goldberg's emphasis on the constitutional achievements of the 1960s was a proximate cause of the Court's decisive breakthrough on wealth discrimination; and second, historical accident played a key role in explaining why the Warren Court managed to erase any reference to these achievements from its opinion.

Given the court-watching tendencies of the profession, Douglas's erasure in *Harper* has had fateful consequences, permitting the Twenty-Fourth Amendment and Section Ten to drop out of our collective constitutional memory. The ultimate question, of course, is whether the next generation of lawyers should undo Douglas's erasure and revise the constitutional canon to recognize the decisive role of the American people in ending wealth discrimination during the 1960s.

We take this question up in earnest in the next Part. But our first task is to explore the twists and turns of this understudied chapter in Supreme Court history.

### A. *The Goldberg Intervention*

More than a year before President Johnson presented his voting rights initiative with a stirring "We Shall Overcome," the American Civil Liberties Union (ACLU) was already on the move. In November 1963, it requested a three-judge district court hear its attack on Virginia's poll tax on behalf of Annie Harper.<sup>258</sup> Once the special panel convened, it summarily

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<sup>256</sup> *Id.* at 317.

<sup>257</sup> In Goldberg's mind, his leave was only temporary. He fully expected to return as Chief Justice one day, but it didn't turn out that way. See MICHAL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953–1969*, at 106 (Herbert A. Johnson ed., 2005).

<sup>258</sup> In November 1963, Evelyn Butts, a long-time civil rights activist in Norfolk, Virginia, filed a class action suit in district court seeking declaratory judgment and a permanent injunction. Annie Harper soon did the same. See PETER WALLENSTEIN, *BLUE LAWS AND BLACK CODES: CONFLICT, COURTS AND CHANGE IN TWENTIETH-CENTURY VIRGINIA* 188 (2004); see also Jurisdictional Statement of Appellants, *Harper v. Va. Bd. of Elections*, 380 U.S. 930 (1964) (No. 835), reprinted in *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 835–51 (Philip B. Kurland & Gerhard Casper eds., 1975) (noting Harper's representation by the ACLU).

rejected this challenge on the authority of *Breedlove*,<sup>259</sup> and by January 1965, the ACLU was appealing directly to the Supreme Court. By February, the case was up for decision at the conference—this was the moment when the Court would determine whether it would grant a plenary hearing or summarily reaffirm *Breedlove* in a one-line per curiam.<sup>260</sup>

Note the date—during February, King was flying from Selma to Washington to demand a voting rights act from President Johnson and the Department of Justice was finally getting serious about drafting a landmark statute.<sup>261</sup> Like the DOJ, the Justices were behind the curve of constitutional politics. At their February conference, a six-man majority voted in favor of a summary affirmance of the poll tax—without even pausing to hear plenary argument. The recent enactment of the Twenty-Fourth Amendment was mentioned in the cursory discussion, but merely as evidence that the poll tax was dying and that there was no need for the Court to join in the burial.<sup>262</sup> Only Warren, Douglas, and Goldberg briefly demurred.<sup>263</sup>

This decision might not have seemed extraordinary if *Harper* had come up to the Court on a writ of certiorari—after all, a refusal to grant this writ is entirely discretionary. But the case arrived as an appeal, and technically speaking, the six-man majority was reaching the merits. If the Court had stuck to its guns and dismissed the case for want of a substantial federal question, it would have been *upholding Breedlove on the merits* only a month before the President's address to Congress kick-started the next phase of the popular sovereignty dynamic that generated the Voting Rights Act.

But Goldberg wasn't willing to let the majority's decision stand without raising his voice in protest. The majority's final decision was deferred while he drafted a full-blown dissent. The midnight oil was also burning a few blocks away at the Justice Department, where the rush was on to crank out a first draft of the Voting Rights Act. The legal mandarins were beginning to catch up with the dynamics of constitutional politics.

Goldberg circulated his opinion, which Warren and Douglas joined, on March 4<sup>264</sup>—three days before Bloody Sunday at Selma.<sup>265</sup> The day after

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<sup>259</sup> See *Harper v. Va. Bd. of Elections*, 240 F. Supp. 270 (E.D. Va. 1964) (deciding case on November 10, 1964).

<sup>260</sup> See Schwartz, *supra* note 16, at 320.

<sup>261</sup> See *supra* Part III.A.2.

<sup>262</sup> See Schwartz, *supra* note 16, at 321–22.

<sup>263</sup> *Id.*; see also Letter from William O. Douglas, Associate Justice, to Earl Warren, Chief Justice (Feb. 26, 1965) (National Archives, Files of Earl Warren, Box 351, William O. Douglas Correspondence) (on file with authors) (“Dear Chief: In No. 835—*Harper v. Virginia Board*, please note that I dissent from affirmance.”).

<sup>264</sup> See Schwartz, *supra* note 16, at 321.

<sup>265</sup> GARROW, *supra* note 173, at 69–72 (describing developments surrounding Selma from March 4 to March 7). It would be speculative to suggest that the Selma crisis had a direct effect on the Justices’

Selma, *Harper* returned to the Conference, and Goldberg gained his victory—Black, Brennan, and White switched their votes, and the Court set the case down for plenary consideration.<sup>266</sup>

Goldberg's opinion combined two strands of argument—one drawn from the Warren Court's equal protection jurisprudence; the other, from congressional debates culminating in the Twenty-Fourth Amendment. Only three years had passed since *Baker v. Carr*<sup>267</sup> opened the floodgates in 1962 and Goldberg took full advantage of this recent breakthrough in equal protection doctrine. But he also relied heavily on the congressional debates over the Twenty-Fourth Amendment to dismiss the significance of the traditional interests invoked to establish the legitimacy of the tax. According to Virginia, its demand for a small tax payment was vindicated by its legitimate interest in determining whether a voter "took sufficient interest in the affairs of the State."<sup>268</sup> Goldberg responded by emphasizing that the House Judiciary Committee confronted an "identical contention" in reporting out the Twenty-Fourth Amendment, quoting the committee report's rebuttal at length.<sup>269</sup> He took the same tack in denying that the poll tax discharged a significant revenue-raising function.<sup>270</sup>

As he moved toward his conclusion, Goldberg took on colleagues, like Justice Harlan,<sup>271</sup> who tried to use the recent passage of the Amendment as a rallying cry for judicial restraint:

Finally, nothing in the language or history of the Twenty-fourth Amendment, which was an affirmative effort to eliminate the poll tax in federal elections, even suggests that in so doing, Congress and the state legislatures attempted impliedly to repeal the operation of the Fourteenth Amendment in this fundamental area. In fact the long history of the Twenty-fourth Amendment leads to just the opposite conclusion. The Hearings before a Committee

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deliberations. But Chief Justice Warren's scrapbook of newspaper clippings—available in his files at the National Archives in Washington, D.C.—does include coverage of the unfolding events at Selma.

<sup>266</sup> *Harper v. Va. Bd. of Elections*, 380 U.S. 930 (1965) (noting probable jurisdiction); see also Memorandum for the Conference from Hugo Black, Associate Justice, to William Brennan, Associate Justice (March 4, 1965) (National Archives, Hugo Black files, Box I: 128, Folder 6) (on file with authors) ("Brother Goldberg's circulation persuades me that our lines of decisions since *Breedlove v. Suttles* presents new arguments against the *Breedlove* poll tax holding that call for consideration by the Court after full hearings. For that reason I shall vote against summary decision by a *per curiam* opinion."). Note, however, that Black ultimately dissented in *Harper*. See *infra* notes 293–295 and accompanying text. Despite the reasons Black proffers in his memo, Richard Hasen suggests that Justice Black switched his vote in the hopes that the 6–3 vote for summary affirmance would yield a full-dress opinion of the Court reaffirming *Breedlove*. See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* 38, 157 (2003).

<sup>267</sup> 369 U.S. 186 (1962).

<sup>268</sup> See Schwartz, *supra* note 16, at 326 (citing *Campbell v. Goode*, 25 S.E. 456, 457 (Va. 1939)).

<sup>269</sup> *Id.* at 326–27.

<sup>270</sup> *Id.* at 324 ("[T]here are available to the State alternative methods of producing revenue which do not operate to deprive poor people of their basic and fundamental right to vote.")

<sup>271</sup> See 383 U.S. 663, 680–81 (Harlan, J., dissenting).

of Congress contain a long history of bills that had been introduced to abolish the poll tax in both state and federal elections by legislation based upon effectuation of the Fourteenth and Fifteenth Amendments. The fact that the measure was finally passed as a constitutional amendment applicable to federal elections shows, at best, that the passage of this Amendment in this manner was a compromise necessary at this time to get some progress in this area.<sup>272</sup>

While a citation to *Breedlove* sufficed to resolve the matter for a majority of the Justices in February, the constitutional politics of the 1960s played a decisive role in motivating the Court's March reversal, and on two fronts. With Goldberg's opinion emphasizing the Twenty-Fourth Amendment and the TV screens replaying the brutal confrontation in Selma, *Breedlove* had suddenly become too insubstantial a prop for a summary decision that would give it new life as a binding precedent. At the very least, plenary reconsideration now seemed necessary.

But by the time the case came up for oral argument in January 1966, Goldberg had become Ambassador to the United Nations and Abe Fortas had replaced him.<sup>273</sup> Historical accident opened up the prospect of judicial erasure. It would be up to the other Justices to build upon or abandon the constitutional foundations that Goldberg had begun to construct.

### B. *The Briefs*

As the Court convened in October for its 1965 Term, the legal meaning of *Harper* had once again been transformed—this time by the enactment of the Voting Rights Act a couple of months before. Adapting to this new reality, the Court promptly granted Solicitor General Thurgood Marshall permission to intervene in the ACLU's lawsuit,<sup>274</sup> which had now been consolidated with a companion case, *Butts v. Harrison*.<sup>275</sup> Marshall didn't have access to Goldberg's unpublished opinion. Nevertheless, his office submitted a brief that developed similar lines of argument—only now, the Solicitor General's brief moved beyond the Twenty-Fourth Amendment to stress the centrality of Section Ten of the VRA.

Written largely by the young Richard Posner, then an Assistant in the Solicitor General's office,<sup>276</sup> the brief emphasized the collaborative invitation offered by Section Ten:

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<sup>272</sup> See Schwartz, *supra* note 16, at 332 (internal citation omitted).

<sup>273</sup> See BELKNAP, *supra* note 257.

<sup>274</sup> See Letter from Thurgood Marshall, Solicitor General, to John F. Davis, Clerk of the Supreme Court of the United States (Dec. 1, 1965) (National Archives, William O. Douglas Folder, "Opinions") (on file with authors) (requesting "that the United States be granted 30 minutes in order to present its views at the oral arguments of the cause").

<sup>275</sup> Motion of Appellants for Leave to Proceed In Forma Pauperis, *Butts v. Harrison*, 382 U.S. 806 (1965) (No. 28) (consolidating case with *Harper* and allotting two hours for oral argument).

<sup>276</sup> Ralph Spritzer, another Special Assistant to the Solicitor General, was a career professional who frequently supervised the brief-writing process in the office. He also signed the brief. See Brief for the United States as Amicus Curiae, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1965) (No. 48). In

Congress was aware that this case was pending, and one of the principal arguments made in favor of a congressional declaration that poll taxes were unconstitutional, rather than an outright prohibition, was the belief that the former approach would avert the likelihood of a remand by this Court.<sup>277</sup>

To be sure, Section Ten also expressly “directed” the Attorney General to begin another set of lawsuits if the Court somehow ducked the issue in *Harper*.<sup>278</sup> But Posner was right to suggest that Congress and the President would be even happier if the Court used *Harper* as its vehicle for constitutional reassessment.

The brief then placed great stress on contemporary events in urging the repudiation of *Breedlove*. It emphasized Section Ten’s finding that the tax failed to bear “a reasonable relationship . . . [to] the State’s legitimate interest,” and showed how similar “findings had earlier been made by Congress in proposing the Twenty-fourth Amendment.”<sup>279</sup> After elaborating on these themes, Posner’s brief concluded:

The problem of the poll tax has been before the Congress for some years. Congress has studied it and concluded, with ample basis in fact and experience, that the poll tax is not a justifiable exercise of State power to establish voting qualifications. *Without going so far as to suggest that this judgment is binding upon the Court, we submit that it is entitled to great weight.*<sup>280</sup>

The Government’s message was explicit: the Court should dynamically triangulate its constitutional judgment with those made by Congress in the name of the People when it endorsed the Twenty-Fourth Amendment and the Voting Rights Act.<sup>281</sup>

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response to a query from Bruce Ackerman, Richard Posner wrote: “Unfortunately, I have zero recollection of having worked on the Harper case. If I signed it, that would mean I wrote it.” E-mail from the Honorable Richard Posner, Seventh Circuit Court of Appeals, to Bruce Ackerman, Professor of Law, Yale Law School (May 17, 2007, 02:11 EST) (on file with authors).

<sup>277</sup> See Brief for the United States as Amicus Curiae at 4, *Harper*, 383 U.S. 663 (No. 48) (citation omitted).

<sup>278</sup> Voting Rights Act § 10, 42 U.S.C. § 1973h(b) (2000).

<sup>279</sup> Brief for the United States as Amicus Curiae, *supra* note 277, at 25–26. The government conceded, of course, that:

[T]he Twenty-fourth Amendment is applicable only to federal elections. No inference can be drawn from this limitation, however, that Congress believed that poll taxes were any less invidious as a precondition to voting in State elections. In enforcing the poll tax laws, the States had never differentiated between State and federal elections, and there was certainly no indication that the poll tax placed a lesser burden on the exercise of the State than the federal franchise. The Twenty-fourth Amendment was limited to federal elections as a matter of political compromise. Nor is there any basis to suppose that Congress or the ratifying States intended the Twenty-fourth Amendment to effect a silent repeal of the Fourteenth Amendment insofar as that Amendment might limit State power to tax the vote. Our study of the legislative history of the Twenty-fourth Amendment discloses no instance in which it was ever suggested that any such radical result was contemplated or might follow.

*Id.* at 26 n.24 (internal citation omitted).

<sup>280</sup> *Id.* at 27 (emphasis added).

<sup>281</sup> The ACLU joined in the bandwagon in its brief for the Appellants:

C. *Oral Argument*

Here is the point at which Justice Goldberg's presence was sorely missed. When Thurgood Marshall presented the Government's case at oral argument, none of the Justices explored the dynamic approach developed in the Government's brief. But the issue did arise in *Butts*, the companion case to *Harper*, and Butts's lawyer, Robert L. Segar, proved unequal to the challenge. Transcripts of the time do not identify particular Justices, so we don't know who began the colloquy by remarking that "somebody"—presumably referring to Katzenbach—had testified at the hearings on the VRA that the constitutionality of "legislation might be dubious . . . but they didn't seem to have any doubts . . . that the Court could do it, even though the Congress couldn't."<sup>282</sup>

Segar was entirely unprepared for this point. He failed to explain that Congress responded to Katzenbach's problem by condemning the poll tax in Section Ten; nor did he follow the path laid out in the Solicitor General's brief and argue that this constitutional judgment was entitled to "great weight."<sup>283</sup> To the contrary, he explicitly disclaimed any reliance on the landmark statute: "I was not [at the congressional hearings]. We don't base our argument on what Congress said . . . . In fact, our case was started prior to the 1965 Voting Rights Act . . . and that Act is not cited in our brief, incidentally."<sup>284</sup>

The anonymous Justice then responded by invoking the Twenty-Fourth Amendment, but in an unhelpful fashion:

THE COURT: Under your argument, the Twenty-fourth Amendment would have been surplusage.

MR. SEGAR: Would have been what?

THE COURT: Surplusage; you wouldn't have needed it.

MR. SEGAR: Oh, that's right; absolutely.<sup>285</sup>

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Congress likewise has recently expressed its dissatisfaction with poll tax requirements—first, by initiating the Twenty-fourth Amendment which prohibits use of such taxes in federal elections, and second, in the Voting Rights Act of 1965 (P.L. 89-110, 89th Cong. 1st Sess.) which contains a clear congressional statement of opposition to use of the tax in any election.

Brief for the Appellants at 6, *Harper*, 383 U.S. 663 (No. 48).

<sup>282</sup> See Transcript of Oral Argument at 28, *Harper*, 383 U.S. 663 (No. 48), reprinted in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1023-87 (Philip B. Kurland & Gerhard Casper eds., 1975).

<sup>283</sup> Brief for the United States as Amicus Curiae, *supra* note 277, at 27.

<sup>284</sup> Transcript, *supra* note 282, at 1027.

<sup>285</sup> *Id.* Obviously exasperated by this line of questioning, Segar immediately moved back to his pre-planned oral presentation, which emphasized the implications of the First Amendment to the case. This turned out to be a nonstarter in the Justices' deliberations. *Id.*

Once again, Segar dropped the ball. He failed to urge the Court—in the manner of Justice Goldberg and the Solicitor General—to view the Amendment’s recent repudiation of poll taxes as a reason to rethink its position in *Breedlove*. Instead, he accepted the hostile Justice’s unfriendly suggestion that his equal protection argument would require the Court to view the recent Amendment as absolutely pointless.

We suspect that this hostile series of questions came from Justice Harlan—we will soon be seeing him making identical claims in his dissent in *Harper*. But whoever introduced the subject, our main point remains the same—the remarkable role of historical contingency in generating the *Harper* opinion. With Goldberg off the Court, and Segar creating confusion, it would be up to Justice Douglas to rethink the question on his own.

#### D. Erasure

The most remarkable thing about Justice Douglas’s opinion is what it doesn’t say—neither the Twenty-Fourth Amendment nor Section Ten are even mentioned.

This erasure is all the more surprising in light of what Douglas *does* say:

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality . . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change . . . . This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. Seven of the eight Justices then sitting subscribed to the Court’s opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954—more than a half-century later—we repudiated the “separate-but-equal” doctrine of *Plessy* as respects public education we stated: “In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”<sup>286</sup>

This is one of the most emphatic declarations of “living constitutionalism” to be found in the pages of the *United States Reports*, rivaling the canonical statement by Holmes in *Missouri v. Holland*.<sup>287</sup> One may disagree with it, but for present purposes, it is more fruitful to consider how poorly

<sup>286</sup> *Harper*, 383 U.S. at 669–70 (citations omitted).

<sup>287</sup> 252 U.S. 416, 433 (1920) (“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”).

Douglas develops his master insight in the remainder of his opinion. After all, the problem with any judicial effort to “unshackle” equal protection from “the political theory of a particular era” is perfectly obvious: Why is the Court so sure that it speaks for the zeitgeist? Perhaps it is only talking for a tiny minority of judicial do-gooders?

Douglas only invites the charge of elitism by blandly declaring that *Breedlove*'s support for the “unequal and discriminatory treatment” imposed by the poll tax “sound[s] strange to a contemporary ear”—as if this were a matter of music appreciation. It would have been far more compelling if he had invoked Section Ten to support his appeal to judicial intuition. After all, that was the entire point of passing the provision in the first place. Under the leadership of Katzenbach and King, Congress had expressly called upon the Court to move beyond the limited condemnation of the poll tax in the Twenty-Fourth Amendment and apply contemporary constitutional judgments to the precise problem posed by *Harper*. But Douglas chose to ignore this congressional pronouncement, codified only months before, and presented the Court as the only authoritative judge of the changing temper of the times.

Douglas's erasure becomes even more puzzling when we consider the precise grounds upon which he invalidated the poll tax:

To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an “invidious” discrimination that runs afoul of the Equal Protection Clause.<sup>288</sup>

To support this conclusion, Douglas relied most heavily on a flood of recent cases decided in the wake of *Baker v. Carr*. But in asserting that the poll tax introduces “a capricious or irrelevant factor,” the Court was simply repackaging Section Ten's finding that the tax bore no “reasonable relationship to any legitimate State interest,” and in condemning the financial payment as “invidious,” it was rehearsing Congress's finding of “unreasonable financial hardship.”<sup>289</sup>

Douglas's erasure seems even more curious in light of a final fact. As we have seen, the President had instructed the Justice Department immediately to bring lawsuits under Section Ten against each of the remaining poll-tax states. By the time Douglas was writing his opinion, the cases against Alabama and Texas had led to judgments by three-judge district courts striking down the tax. The opinion by Judge Homer Thornberry in the Texas case is particularly instructive. After reciting all three of Con-

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<sup>288</sup> *Harper*, 383 U.S. at 668.

<sup>289</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 442 (codified as amended at 42 U.S.C. § 1973b (2000)); see also *supra* note 247 and accompanying text (quoting entire provision).

gress's constitutional pronouncements in Section Ten, Thornberry turned to Texas's defense:

The Attorney General of the State of Texas contends that the members of Congress had no evidence to substantiate their findings in relation to the Texas poll tax. In support of this allegation, he offered letters from fifty-nine legislators who answered his inquiry. Fifty-eight of the fifty-nine stated that no evidence had been offered to support the findings as to Texas. The United States, however, submitted excerpts from the legislative history of the Voting Rights Act of 1965, the Twenty-Fourth Amendment and earlier poll tax bills to refute the State's contention.<sup>290</sup>

While Douglas cited Thornberry's opinion for a different point, he failed to note Thornberry's enthusiastic embrace of Court-Congress collaboration elaborated by Section Ten or his invocation of the legislative history of the Twenty-Fourth Amendment.

Instead, Douglas stood silent and allowed the three dissenters to the Court's opinion to use the rhetoric of higher lawmaking for their own purposes. John Harlan, dissenting with Potter Stewart, confronted Douglas's disparagement of the tax as "irrelevant" on the grounds the tax could certainly serve "rational" purposes in promoting "civic responsibility."<sup>291</sup> He then turned to Douglas's effort to discredit such views, explicitly reacting to the precise language of the majority:

These viewpoints, to be sure, *ring hollow on most contemporary ears*. Their lack of acceptance today is evidenced by the fact that nearly all of the States, left to their own devices, have eliminated property or poll-tax qualifications; by the cognate fact that Congress and three-quarters of the States quickly ratified the Twenty-Fourth Amendment . . . . However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process.<sup>292</sup>

Note the paradox. Harlan and Stewart view the Twenty-Fourth Amendment as if it were a strict rule of limitation: We the People have banned the taxes in federal elections, and the Court has no authority to go further. But Douglas does not even bother to mention the Amendment, much less challenge Harlan's restrictive interpretation of its significance, much less reflect on the way that Section Ten generalizes the Amendment's constitutional critique to the problem posed by state, as opposed to federal, taxes.

Douglas's silence also made life easy for Justice Black, whose dissent predictably declaimed against the Court's theory of the living Constitution:

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<sup>290</sup> *United States v. Texas*, 252 F. Supp. 234, 247 n.65 (W.D. Tex. 1966).

<sup>291</sup> *Harper*, 383 U.S. at 684–85 (Harlan, J., dissenting).

<sup>292</sup> *Id.* at 685–86 (emphasis added).

[W]hen a ‘political theory’ embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.<sup>293</sup>

Despite this paean to Article Five, Black failed to mention the Twenty-Fourth Amendment, let alone consider whether its enactment had not significantly undermined *Breedlove*.

If Justice Goldberg had remained on the bench, he would have never allowed this chatter to go unchallenged. His unpublished opinion already blazed the path toward a more sophisticated approach. It recognized that the Twenty-Fourth Amendment did not explicitly abolish state poll taxes, calling it a “compromise necessary . . . to get some progress in this area.”<sup>294</sup> But Goldberg insisted that the Amendment was relevant to the case at hand. Recall a key passage from this draft opinion:

Finally, nothing in the language or history of the Twenty-fourth Amendment, which was an affirmative effort to eliminate the poll tax in federal elections, even suggests that in so doing, Congress and the state legislatures attempted impliedly to repeal the operation of the Fourteenth Amendment in this fundamental area. In fact the long history of the Twenty-fourth Amendment leads to just the opposite conclusion.<sup>295</sup>

Goldberg wrote this line in late February 1965—before the Voting Rights Act was even proposed, much less enacted. Once Section Ten had become law, he would have been in a position to extend his argument further. With the Assistant Solicitor General urging that the VRA deserved “great weight,”<sup>296</sup> it would have been natural to add the italicized lines before publishing his opinion in the name of the Court:

Finally, nothing in the language or history of the Twenty-fourth Amendment, which was an affirmative effort to eliminate the poll tax in federal elections, even suggests that in so doing, Congress and the state legislatures attempted impliedly to repeal the operation of the Fourteenth Amendment in this fundamental area. *To the contrary, the constitutional judgments made by the Voting Rights Act invite us to extend the principles expressed by the recent amendment to state elections. We agree with Congress in finding that these taxes impose an “unreasonable financial hardship” on “persons of limited means;” and that they do “not bear a reasonable relationship to any legitimate State interest.” As a consequence, we condemn the tax as a constitutionally invidious form of wealth discrimination.*

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<sup>293</sup> *Id.* at 678 (Black, J., dissenting).

<sup>294</sup> Schwartz, *supra* note 15, at 332; *see supra* note 268 and accompanying text.

<sup>295</sup> Schwartz, *supra* note 15, at 332 (internal citation omitted); *see supra* note 268 and accompanying text.

<sup>296</sup> Brief for the United States as Amicus Curiae, *supra* note 273, at 26 n. 24; *see supra* note 276 and accompanying text.

Recall that Judge Thornberry had already made a similar point in the Texas poll-tax case.<sup>297</sup> If Goldberg needed any prodding—which is doubtful—he would have quickly seen how Thornberry’s opinion could be effectively deployed in making the Court’s case against Black and Harlan.

Under this scenario, future generations of lawyers and judges would have learned a very different lesson when they turned to *Harper* and its condemnation of wealth discrimination. Goldberg’s opinion for the Court might well have contained a paean to the living Constitution, but it would not have been the *same* living Constitution that Douglas describes in the 383rd volume of the *United States Reports*. Douglas writes as if the Warren Court was the only significant force propelling the Constitution forward. Goldberg’s opinion would have presented *Harper* as the culmination of a three-stage dynamic in which Americans of the 1960s played the key propulsive role—first, by expressing their constitutional judgments through the antique form of Article Five, and then through a landmark statute. Within this picture, the Supreme Court emerges as an institution that seeks to synthesize these new judgments within its evolving understanding of the constitutional meaning of equality.

But it didn’t happen that way. Goldberg went off on a fool’s errand at the United Nations, and Douglas managed to project a very different vision of the living Constitution. The question is whether we will allow this accident of history to block a deeper understanding of the enduring contribution of the civil rights revolution to our constitutional tradition.

#### V. REGIME CHANGE

Whatever else may be said about Justice Douglas’s act of erasure, it succeeded. Nobody wastes time thinking about the Twenty-Fourth Amendment today—despite its august formal status in the Constitution, you are reading the first scholarly article that has ever taken it seriously. Section Ten is even more obscure.<sup>298</sup> Only *Harper* remains as a professionally significant marker of a constitutional sea change.

So what? Does it really matter?

We think so, and on two levels. Douglas’s opinion consigns the constitutional politics of the 1960s to professional oblivion. It encourages us to interpret the civil rights revolution as an achievement of the Warren Court, not the American people. This is a mistake that even the most dedicated court-watcher can’t afford to make. As we have seen, the Supreme Court was well on its way to reaffirming *Breedlove* in 1965 until the constitutional politics of the 1960s intervened. But our case study aims to make a

<sup>297</sup> See *United States v. Texas*, 252 F. Supp. 234, 247–48 (W.D. Tex. 1966).

<sup>298</sup> A leading election law casebook, for example, briefly mentions the controversy over poll-tax repeal during the passage of the Voting Rights Act, but does not refer specifically to Section Ten. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 556–71 (2002).

larger point: we must move decisively beyond court-watching if lawyers of the twenty-first century are to come to terms with the enduring contribution of the civil rights revolution. We cannot pretend to understand this legacy without redefining the canon, treating landmark statutes like the VRA with the same or greater dignity than we accord to the Twenty-Fourth Amendment.

From this vantage, the debates of the 1960s mark a decisive turning point—signifying a self-conscious political decision to move beyond the forms of Article Five and embrace landmark statutes as an equally legitimate mode of expressing the will of the American people in the present era. After reflecting on the larger significance of this decision, we return to the level of judicial doctrine and show how our case study casts new light on two classic problems—one dealing with the powers of Congress to expand the meaning of the Fourteenth Amendment; the other with the status of wealth discrimination as a suspect classification in equal protection analysis.

#### A. *The Form and Substance of Popular Sovereignty*

This Article is a chapter in a much longer tale of popular sovereignty, and its changing modalities, over the course of American history. The bigger story suggests a far broader shift from Article Five amendments to landmark statutes, and one that is based on a deeper change in the constitutional consciousness of the American people. At the time of the Founding, Americans were citizens of New York or Virginia, but were only problematically citizens of the Union. Within this context, it made perfect sense to give one-fourth of the states an absolute veto on Article Five amendments. But this strongly federalist understanding of the Union was shattered in the Civil War, and with the passage of generations, Americans developed a more nationalistic understanding of themselves as a People.

During the twentieth century, the New Deal and the civil rights era played central roles in confirming the growing sense that Americans could act through national institutions, and not only through federal ones, in articulating their constitutional will. At the dawn of the twenty-first century, Americans have mastered the art of acting as We the People of the *United States*, and not only as We the People of the *United States*.<sup>299</sup> The challenge for constitutional lawyers is to reflect upon this already existing transformation and provide a fine-grained understanding of its distinctive dynamics—tracing the patterns through which the Presidency, Congress, and the Court have successfully elaborated the constitutional achievements of the American people in landmark statutes and superprecedents, as well as formal amendments.

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<sup>299</sup> See Ackerman, *supra* note 3, at 1738–57.

From this perspective, our case study provides a snapshot of a moment of transition—both procedural and substantive. On the procedural side, it is a moment of self-conscious political recognition that the federalist forms of Article Five were *fundamentally* inadequate to express the constitutional meanings of the civil rights era, and that only landmark statutes could plausibly serve this function. On the substantive side, it is a moment at which the New Deal regime adapted its leading principles to express the rising ideals of the civil rights movement.

### B. From Amendment to Statute

Our case study does not merely report on a shift from formal amendment to landmark statute in the constitutional struggle against the poll tax. It tells a story in which Article Five is *self-consciously* repudiated in the formation of the Voting Rights Act by Martin Luther King, the Johnson Administration, and the congressional leadership.

Paradoxically, we owe the self-conscious character of this repudiation to Spessard Holland and his success in breathing new life into Article Five. His campaign put the NAACP and liberal Senators on notice of the dangers involved in creating a higher lawmaking precedent that might compel the civil rights movement to use Article Five as the exclusive vehicle for the sweeping changes it was placing on the constitutional agenda.<sup>300</sup> Racial liberals were determined to repudiate the Article Five approach at the first available opportunity. When their moment of triumph came in the aftermath of Selma, their embrace of a landmark statute predictably generated a strong constitutional challenge from Holland and his allies.

As a consequence, the framers of the Voting Rights Act could not launch another attack against the poll tax without self-consciously confronting the precedent set by the Twenty-Fourth Amendment. This was no problem for the NAACP or leading liberals like Emmanuel Celler and Jacob Javits. They had protested against Holland's amendment in the first place, and they were hardly prepared to let it stop them now. But Holland posed a much bigger problem for legalists in the Justice Department and swing Senators like Minority Leader Dirksen.<sup>301</sup>

Our story challenges the cynical view that constitutional argument is a mere smokescreen for political manipulation. Cynics differ in their techniques and political sympathies—ranging from Critical Legal Studies to Public Choice Theory. But whatever their form, these narrow instrumentalisms blind us to the complex ways in which constitutional argument functions as an *independent* force in political life.

We do not claim that a powerful constitutional objection stops all contrary political initiatives dead in their tracks. But it does serve to channel

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<sup>300</sup> See *supra* Part II.C.

<sup>301</sup> See *supra* Part III.B.

them in surprising ways that may often shape the ultimate outcome. In the present case, it was precisely the power of Holland's legal logic that forced the Johnson Administration, congressional leaders, and Martin Luther King into a fundamental reconsideration of Article Five as the exclusive vehicle for the expression of popular sovereignty.

There could be no denying that the abolition of poll taxes in state elections represented a larger, not smaller, change in traditional constitutional understandings than that contemplated by the Twenty-Fourth Amendment. But Lyndon Johnson could not credibly proclaim that "the time for waiting is gone"<sup>302</sup> if the fate of state poll taxes had been consigned to the tender mercies of Article Five. If the Voting Rights Act was to express the rising American commitment to bring a decisive end to Jim Crow, the landmark statute would have to announce the end of *all* of the traditional exclusionary practices of the South.

It was one thing to break out of the federalist strait jacket of Article Five, quite another to design an appropriate legal form that crystallized the new constitutional commitment. The innovative activity proceeded on two fronts—legal and political. On the legal side, it was up to the Justice Department to come up with a credible legal mode of expressing a constitutional commitment. This involved an unconventional adaptation of preexisting lawmaking forms—Section Ten was a statute, not a formal amendment, but it was a statute that spoke in a distinctively constitutional voice.<sup>303</sup> On the political level, it required the Johnson Administration to build a broad coalition in support of its innovative landmark statute. This involved a two-front effort: Johnson and Katzenbach had to convince *both* Republican leaders like Dirksen *and* movement leaders like King to swing their constituencies behind Section Ten.

When judged by its short-term results, this legal and political effort was a great success. The Katzenbach-Dirksen-King compromise broke the logjam that was blocking passage of the VRA and created a constitutional environment that encouraged the Supreme Court to repudiate *Breedlove*.<sup>304</sup> Martin Luther King was absolutely right in predicting with "confiden[ce]" that the poll tax provision of the bill—with vigorous action by the Attorney General—will operate finally to bury this iniquitous device."<sup>305</sup>

But over the longer run, King's repudiation of Article Five failed to have the impact it deserved—both on professional understanding and on the larger constitutional culture.

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<sup>302</sup> Lyndon B. Johnson, Remarks on the Signing of the Voting Rights Act, *supra* note 249.

<sup>303</sup> For analogous examples of unconventional adaptation at earlier moments of American constitutional history, see Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475; Ackerman, *supra* note 13 (discussing unconventional constitutional adaptations during Reconstruction and the New Deal).

<sup>304</sup> See *supra* Part III.B.

<sup>305</sup> 111 CONG. REC. 19,444 (1965) (quoting letter from Martin Luther King, Jr. to Attorney General Nicholas B. Katzenbach).

*I. Reframing Morgan v. Katzenbach.*—As we have seen,<sup>306</sup> Section Ten moved beyond the traditional system of constitutional change inherited from the New Deal. Under this “challenge model,” the President and Congress passed breakthrough legislation that shattered preexisting constitutional understandings. The enactment of a new landmark statute confronted the Court with a stark choice—either strike it down or repudiate established caselaw to accommodate sweeping change. In contrast, the King-Katzenbach-Dirksen initiative developed a more collaborative approach between the Court and the political branches: Section Ten didn’t challenge existing caselaw directly through a flat-out prohibition of poll taxes; it changed the Court’s *jurisprudential environment* by announcing *new constitutional principles* and *findings of fact* that would encourage the Justices to repudiate old caselaw and reconstruct new foundations in a decisive superprecedent. By erasing Section Ten from legal view, Douglas successfully took this particular form of institutional collaboration—call it the “jurisprudential leadership” option—off the agenda of legal thought for the next generation.

But Douglas did not kill off the more general idea that collaborative constitutional change might make a lot of sense. His erasure simply displaced this idea to a different site. For the last half century, it has been *Katzenbach v. Morgan*,<sup>307</sup> not *Harper*, that has served as the *locus classicus* for professional reflection on the collaborative model. Nevertheless, Douglas’s displacement proved consequential: Justice Brennan’s opinion of the Court in *Morgan* envisioned a different form of institutional collaboration than King had endorsed in Section Ten.

To grasp the differences between *Morgan* and *Harper*, begin with some underlying similarities. Both were decided in the spring of 1966 in response to the sweeping constitutional changes set in motion by the Voting Rights Act. While Section Ten targeted the poll tax, the provision that provoked *Morgan* took on a different problem: Puerto Ricans were being deprived of their voting rights by literacy tests requiring proficiency in English.<sup>308</sup> Although the problems were different, Congress was confronting the same difficulty—hostile Supreme Court decisions. Just as *Breedlove* had upheld the poll tax, *Lassiter v. Northampton County Board of Elections* had upheld English-only literacy tests.<sup>309</sup> Once again, the President and Congress were determined to overcome these decisions, but in the case of English-only literacy tests, the landmark statute adopted the more traditional approach to constitutional change: Section 4(e) of the VRA is-

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<sup>306</sup> See *supra* Part III.B.

<sup>307</sup> 384 U.S. 641 (1966).

<sup>308</sup> *Id.* at 643.

<sup>309</sup> 360 U.S. 45 (1959).

sued a flat-out directive requiring the states to allow literate Puerto Ricans to vote.<sup>310</sup>

Unsurprisingly, the lower courts struck down the provision on the authority of *Lassiter*,<sup>311</sup> setting the stage for the typical “challenge-model” confrontation in the Supreme Court. Would the Justices stand by *Lassiter*, or would they overrule it in the name of a more liberal understanding of the Equal Protection Clause?

Neither, Justice Brennan famously replied for the Court. Instead, he created a “third way” solution to the problem of constitutional change—in which the Court stood by its decision in *Lassiter*, and yet collaborated with Congress in expanding the operational meaning of equality. He turned this trick through an expansive reading of the power “to enforce” the Equal Protection Clause granted to Congress by Section Five of the Fourteenth Amendment. This “enforcement power,” he explained, provided an independent basis for Congress to move beyond the Court’s limited understanding of the Equal Protection Clause.<sup>312</sup>

Brennan’s opinion has had an enormous impact, as courts and commentators have endlessly debated the extent to which the Court should appropriately limit the scope of Congress’s expansionary powers. But for present purposes, it is more important to emphasize how this debate over the limits of Court-Congress collaboration differs from the model envisioned by the King-Katzenbach-Dirksen initiative in Section Ten. Under the collaborative enterprise erased by *Harper*, Congress attempted *jurisprudential* leadership, calling on the Court to strike down its old precedents on the basis of its landmark constitutional pronouncements. *Morgan* understands the rationale for collaboration with Congress in very different terms. On its view, the Court defers to the political branches because they have special insights into problems of *implementing*, not *defining*, equality. While Brennan gave an exceptionally generous interpretation to Congress’s comparative advantage on this front, he did not suggest that landmark statutes could create brand new constitutional meanings.<sup>313</sup>

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<sup>310</sup> Specifically, section 4(e)(1) provides that “Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.” Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e)(1), 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973b (2000)).

<sup>311</sup> See *Morgan v. Katzenbach*, 247 F. Supp. 196, 201–02 (D.C. 1965) (“*Lassiter v. Northampton County Bd. of Elections* . . . is practically on all fours with the case at bar.”).

<sup>312</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 649–51 (1966).

<sup>313</sup> Archibald Cox began the academic debate over the meaning of *Morgan* by construing it in the broadest possible terms. In his view, it granted Congress “the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights.” Archibald Cox, *The Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966). But the Rehnquist Court has famously understood *Morgan* as compatible with a much narrower

Yet this is precisely what King, Katzenbach, and Dirksen were insisting on. In enacting Section Ten, the Voting Rights Act self-consciously repudiated the notion that We the People could speak only through an Article Five amendment. Once we undo Douglas's erasure, we should move beyond *Morgan's* narrow understanding of institutional collaboration and recognize landmark statutes as an independent source of constitutional meaning in our modern democracy.<sup>314</sup>

2. *From Civil Rights to Women's Rights, and Beyond.*—Douglas's erasure has not only distorted the course of professional debate. It also provided misleading cues for the women's movement as it embarked on the next round of constitutional politics in the 1970s. If Goldberg's would-be opinion had shaped legal consciousness, *Harper* would have emphasized that it was no longer necessary to use Article Five to speak in the name of the People—that a landmark statute along the lines of Section Ten sufficed to guide the Court to construct new foundations for constitutional equality. Perhaps this clear signal would have served to discourage feminist leaders from investing enormous time and energy into a campaign for the Equal Rights Amendment (ERA), only to be defeated by the federalist rules of Article Five. Throughout the struggle for ratification, the ERA had the strong support of the American people when measured on a national basis.<sup>315</sup> Nevertheless, the women's movement could not convert this sustained national majority into the support of thirty-eight state legislatures.<sup>316</sup> Although the movement was winning major gains in the Supreme Court, the defeat of the ERA cast a pall over its generational achievement.<sup>317</sup>

It was only with the defeat of the ERA that the forgotten lessons of the 1960s became the conventional wisdom of constitutional politics. Every

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interpretation of Section Five, requiring Congress to "narrowly tailor" its remedial interventions. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 519, 532–34 (1997). For a powerful critique, see Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 478 (2000). Our analytic point does not require us to take sides in this debate. We emphasize instead how the entire debate would have been reshaped by a Goldberg-style opinion in *Harper*, which would have explicitly upheld Congress's power to introduce new jurisprudential premises into the judicial conversation, even if these constitutional judgments went beyond the remedial powers of Section Five—however broadly or narrowly construed.

<sup>314</sup> This does not imply that Congress can change the constitution whenever it likes. The Voting Rights Act was passed at a culminating point in the constitutional politics of our history, and it is this special pedigree that compels its full recognition as part of the constitutional canon for the twenty-first century. *See Ackerman, supra* note 3, at 1757–92.

<sup>315</sup> *See STEVEN M. BUECHLER, WOMEN'S MOVEMENTS IN THE UNITED STATES: WOMAN SUFFRAGE, EQUAL RIGHTS AND BEYOND* 192 (1990) ("The Equal Rights Amendment enjoyed broad, consistent public support at the time of its congressional passage and throughout much of the subsequent debate over ratification.").

<sup>316</sup> *See JANE MANSBRIDGE, WHY WE LOST THE ERA* (1986).

<sup>317</sup> *See Bruce Ackerman, Interpreting the Women's Movement*, 94 CAL. L. REV. 1421, 1435–37 (2006); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1323–1419 (2006).

constitutional movement now understands that Article Five is a road to nowhere, and that it should concentrate its energies on the creation of landmark statutes and judicial superprecedents. The conservative movement's recognition of this point is especially noteworthy. Despite its professions of faith in the written Constitution, the Republican Right has not made serious efforts to change the text to express its positions on abortion or religion or the like. Instead, it has been taking the modern path—championing landmark statutes and campaigning for Supreme Court appointments whose opinions might serve as superprecedents crystallizing a new constitutional consensus.<sup>318</sup>

It is too soon to say whether this latest movement will succeed or fail. Only one thing is clear: you won't find out by looking at the formal Constitution and seeing whether it contains sweeping new amendments; you will only find out by consulting the Statutes at Large and the *United States Reports*. Nevertheless, when we turn to the past, lawyers don't display a similar sophistication. In considering the achievements of the civil rights era, we do not reflect upon the self-conscious repudiation of Article Five by King and Johnson, the civil rights movement, and the Congress, in enacting the Voting Rights Act. We have even allowed Justice Douglas's opinion in *Harper* to blot out the Twenty-Fourth Amendment. We act as though the opinions of the Warren Court provide the only source of constitutional insight.

But surely, this blindness isn't inevitable?

In emphasizing the rising importance of landmark statutes, we hardly wish to deny that the original Constitution and its formal amendments remain an important part of our legal legacy. They simply don't represent the whole story, especially when it comes to the great constitutional transformations of the twentieth century. If modern lawyers are to make sense of the *entire* historical achievement of the American people, we must take into account both formal amendments *and* landmark statutes, as well as the superprecedents that have already been the subject of much discussion.

### C. *The New Deal-Civil Rights Regime*

Taken together, the conjunction of Twenty-Four and Ten announce a fascinating moment of transition. The civil rights leadership sought to use the language and processes of the New Deal in order to give constitutional meaning to the rising movement for racial justice and a more egalitarian vision of democracy. We are seeing the birth of something we have been calling "the New Deal-Civil Rights" regime.<sup>319</sup>

We have already explored one aspect of the civil rights adaptation of New Deal constitutionalism: the use of landmark statutes, rather than for-

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<sup>318</sup> See Ackerman, *supra* note 3, at 1741–42.

<sup>319</sup> See *supra* Part III.B.5.

mal amendments, to express the will of We the People. But when we turn to the Twenty-Fourth Amendment, it is easy to identify a more substantive aspect. As we have seen, the origins of the Twenty-Fourth Amendment have nothing to do with the civil rights era. It was rooted in the politics of the New Deal and its primary target was economic, not racial, inequality.<sup>320</sup> Its primary beneficiaries were poor whites, not poor blacks.

Indeed, Senator Holland's initial proposal presented a particularly conservative version of this New Deal vision. When he introduced his amendment in the Eighty-Seventh Congress, it contained two distinct sections—the first abolished the poll tax, but the second contained a proviso that threatened to undermine the larger meaning of abolition: “Section 2. Nothing in this article shall be construed to invalidate any provision of law denying the right to vote to paupers or persons supported at public expense or by charitable institutions.”<sup>321</sup> This egregious provision would have served as a standing invitation to purge welfare recipients from the voting rolls. Southern conservatives like Holland might not think this objectionable—it was enough for this conservative New Dealer to guarantee the franchise to white workers. But the “pauper provision” could not hope to gain broad support in the America of the 1960s. It became an object of liberal scorn, with a coalition of leading groups condemning its effort to give an “anti-democratic concept a respectability which it has never had before and which we regard with the greatest abhorrence.”<sup>322</sup>

It quickly proved a nonstarter, with Majority Leader Mike Mansfield playing the crucial role of gatekeeper. Only Mansfield could free the amendment from the clutches of a Judiciary Committee chaired by arch-

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<sup>320</sup> See *supra* Part II.A.

<sup>321</sup> 108 CONG. REC. 5082–83 (1962) (reporting the version of Senate Joint Resolution 58 “pending in the Subcommittee on Constitutional Amendments at the close of the 1st session of the 87th Congress”). Holland's initial version of Section One also differed from the final text in two respects—the addition is indicated by italics, the deletion by brackets:

The right of citizens of the United States to vote in any primary or other election *for President or Vice President*, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax [or to meet any property qualification].

*Id.* at 5082 (emphasis added). Since there was much agitation for the elimination of the Electoral College at the time, the new addition in the final draft broadens its scope to abolish poll taxes in any future direct election for the presidency. The deletion is more consequential, broadening the prohibition to ban taxes of any and all types. *Id.*

<sup>322</sup> *NAACP Against Tax Amendment*, *supra* note 29, at 16. The statement was signed by the NAACP, American Jewish Congress, American Veterans Committee, Americans for Democratic Action, Anti-Defamation League, International Union of Electrical Workers, and the United Automobile Workers of America. It also argued that the “provision would open a Pandora's box of legislative pettifoggery, and the litigation which would be required to block attempts to disenfranchise the poor by legislative redefinitions of the words ‘paupers or persons supported at public expense’ would jam court calendars for years.” *Id.*

segregationist James Eastland of poll-tax Mississippi.<sup>323</sup> But before Mansfield was willing to devise a special parliamentary detour around Judiciary, he insisted on the elimination of the pauper provision. Holland was happy to comply.<sup>324</sup> By the time the amendment hit the floor, he was in a position to elaborate on poll-tax abolition as expressing a principled national consensus:

I think that, as a matter of right, every citizen of the United States should be entitled to vote for President, Vice President, Senators, and Representatives on something like *terms of equality* with the citizens in every other State in the Union, some of which while they once had voting provisions much more stringent than the poll tax provision, have laid such provisions aside; and I said I thought it was *time for us to show some awareness of the fact that that is the national thinking in connection with this manner, and that when it came to electing National Government officials, we would be standing on higher ground and on sounder ground if we took this position.*<sup>325</sup>

He was joined by many others, including Ralph Yarborough of Texas, who took the floor to declare that his own state's poll tax "unjustly discriminated against people of limited means."<sup>326</sup> Representatives from other regions were even more emphatic. Here is a characteristic remark from Congressman Samuel Joelson from New Jersey: "It is unthinkable that in the United States, there are still areas in which American citizens are required to pay for the right to vote. Such a system tends to discourage our poorer citizens from the exercise of their precious right of choosing their officials."<sup>327</sup>

This theme returned to center stage when the Amendment finally gained the ratification of thirty-eight states. While the presidency is not assigned any official functions by Article Five, Presidents since Abraham Lincoln have played a variety of roles in the process,<sup>328</sup> and Lyndon John-

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<sup>323</sup> During the first session of the Eighty-Seventh Congress, Holland's proposal languished in the Subcommittee on Constitutional Amendments of the Judiciary Committee. For a description of these special parliamentary procedures, see *supra* notes 109–110 and accompanying text.

<sup>324</sup> Holland explained, "I have made these changes in pursuance of a request from the distinguished majority leader, who felt that the issue could be simplified in that way without losing any of its vital components, and I have been very glad to accept that suggestion . . . . I have offered the amendment with the joinder of the two distinguished leaders, at their specific request, so that it might be apparent that each of them is strongly supporting the amendment in the simplified form . . . ." 108 CONG. REC. 5043 (1962).

<sup>325</sup> *Id.* at 4153 (emphasis added).

<sup>326</sup> 108 CONG. REC. 4585 (1962).

<sup>327</sup> 108 CONG. REC. 17,662 (1962). Newspaper coverage during debates over the amendment sounded similar themes. For example, a *Washington Post* editorial—*Send It to the States*—opined that the "drive for final enactment of the resolution should not lag because the poll tax survives in only five states and is regarded as a serious bar to Negro voting only in Mississippi and Alabama. The point is that a monetary price on voting is inimical to the modern concept of democracy and should not exist anywhere in the United States." Editorial, *Send It to the States*, WASH. POST, May 29, 1962, at A18.

<sup>328</sup> See ACKERMAN, *WE THE PEOPLE*, *supra* note 120, at 123.

son followed down this path by signing a statement that witnessed the Amendment's formal ratification. With this Amendment, he explained, "*there can be no one too poor to vote. There is no longer a tax on his rights . . . .* The only enemy to voting that we face today is indifference. Too many of our citizens treat casually what other people in other lands are ready to die for."<sup>329</sup>

Spessard Holland's long struggle had finally yielded a remarkable repudiation of wealth discrimination. Yet the Senator from Florida would have remained in the political wilderness were it not for the civil rights movement's success in mobilizing Americans for a new rebirth of freedom in the 1960s. This mobilization, in turn, generated new political coalitions that saw class in terms of race and race in terms of class. Political parties realigned as old enemies found common ground on a shared vision of a vibrant American democracy.<sup>330</sup> The proposal and enactment of the Amendment, in short, represented a distinctive merger of New Deal and civil rights exercises in constitutional politics.

This New Deal-Civil Rights synthesis is also memorialized by Section Ten of the Voting Rights Act. In contrast to the formal amendment, it explicitly condemns the tax "for denying persons the right to vote on the basis of race or color."<sup>331</sup> But at the same time, it reaffirms the continuing relevance of the New Deal campaign against "unreasonable financial hardship."<sup>332</sup> Within this context, it is simply wrong to view *Harper* as a paradigmatic example of rootless judicial activism.

Once we move beyond the surface of Douglas's opinion, we can see the Court's decision for what it is: a remarkable example of the way in which the civil rights revolution revived popular support for New Deal constitutional values. By emphasizing wealth, not race, *Harper* represents the culmination of a generational struggle—from Franklin Roosevelt to Lyndon Johnson and Martin Luther King—to open the ballot box to all Americans, regardless of wealth. Despite Justice Douglas's erasure, we should place *Harper* in its higher lawmaking context, and reinterpret it as codifying a larger effort by the American people, during the 1960s, to create a more egalitarian democracy. *Harper* is not the product of an activist Court, but of an activist People.

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<sup>329</sup> Nan Robertson, *24th Amendment Becomes Official: Johnson Hails Anti-Poll Tax Document at Ceremonies*, N.Y. TIMES, Feb. 5, 1964, at 14 (emphasis added).

<sup>330</sup> See generally THEODORE ROSENOF, REALIGNMENT: THE THEORY THAT CHANGED THE WAY WE THINK ABOUT AMERICAN POLITICS (2003) (exploring the influence of realignment concepts on the study of politics); JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES (1983) (discussing various party realignments in American political history).

<sup>331</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 10, 79 Stat. 437, 442 (codified as amended at 42 U.S.C. § 1973b (2000)); see *supra* Part IV.A.

<sup>332</sup> Voting Rights Act of 1965 § 10.

Our conclusion permits new perspectives on the puzzling persistence of *Harper* in our current jurisprudence. *Harper* is a rather exceptional case in finding a wealth classification unconstitutional under the Equal Protection Clause.<sup>333</sup> Once the Burger Court came to the fore,<sup>334</sup> it quickly shattered this promise of the Warren era—with *Dandridge* and *Rodriguez* rejecting the notion that wealth was a suspect classification.<sup>335</sup> For forty years now, wealth discrimination has been a dead zone of equality jurisprudence. And it is perfectly obvious that the Roberts Court won't be expanding *Harper* any time soon. This leads to an obvious question: Should *Harper* be overruled?

Curiously, nobody asks this question, least of all the Supreme Court. To the contrary, the present Court remains a *Harper* enthusiast—endorsing the case in *Bush v. Gore*,<sup>336</sup> and repeatedly since.<sup>337</sup> What is to account for its continuing embrace?<sup>338</sup>

Certainly not the quality of *Harper*'s reasoning. As we have seen, Douglas produced a parody of the "Warren Court opinion" that levitates itself far beyond the original understanding without deigning to provide a thoughtful structural or jurisprudential argument. Douglas's style is as far removed from opinions written by David Souter or Stephen Breyer as it is from those by Antonin Scalia or Clarence Thomas. If *Harper*'s surprising resilience can't be explained by Douglas's reasoning or the larger pattern of doctrinal development, what does account for its staying power?

Maybe nothing. Perhaps it is time to proclaim that this particular emperor has no clothes, and that it should be overruled at the first opportunity? But perhaps not. In our view, it makes more sense to attribute *Harper*'s puzzling persistence to another cause: The Justices have retained a sound intuition that *Harper* has deep roots in our current constitutional order, and that it would be a grievous mistake to cut our mooring lines to this particular triumph of the civil rights era.

We have been trying to account for this judicial intuition. Within our framework, *Harper* is not an anomaly, nor even a garden-variety precedent. We will call it a "codifying precedent," and propose to distinguish it from other extraordinary forms of judicial authority. Begin with an orienting

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<sup>333</sup> See also *Griffin v. Illinois*, 351 U.S. 12, 18–20 (1956) (holding that refusal to furnish transcript for purposes of appeal violated equal protection and due process).

<sup>334</sup> See, e.g., *Boddies v. Connecticut*, 401 U.S. 371, 386 (1971) (striking down a statute for "invidious discrimination based on poverty").

<sup>335</sup> *Dandridge v. Williams*, 397 U.S. 471, 485–87 (1970); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23–24 (1973).

<sup>336</sup> 531 U.S. 98, 105 (2000).

<sup>337</sup> See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 227 (2003).

<sup>338</sup> See e.g., *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 78 (1980) (citing *Harper*); *Oregon v. Mitchell*, 400 U.S. 112, 129 (1970) (same); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969) (same).

contrast to great cases like *Brown v. Board of Education*<sup>339</sup> or *Reynolds v. Sims*.<sup>340</sup> Whatever else may be said about them, these decisions were *not* announced at culminating moments of constitutional politics. When *Brown* came down in 1954, the struggle for civil rights was on the periphery of American politics. And the same was true for reapportionment when *Reynolds* was decided in 1964—indeed, there has never been anything remotely resembling a mass movement for reapportionment in the nation’s history. While *Brown* and *Reynolds* may well deserve their present status as superprecedents, their claims must rest on other grounds—the quality of their legal reasoning or the subsequent success in entrenching their principles into the constitutional framework.

Contrast *Harper*. As we have made clear, we are not great fans of Douglas’s reasoning. Nor do we suggest that *Harper* deserves special respect because its wealth-discrimination principle has entrenched itself into the constitutional framework over the past generation. To the contrary, our challenge is to explain *Harper*’s remarkable staying power in a hostile jurisprudential universe.

From this perspective, we base our case on one remarkable aspect of Douglas’s opinion: Although *Harper*’s reasoning was defective, its *doctrine* mirrors, with remarkable fidelity, the congressional statements of constitutional principle expressed in Section Ten. As we have seen, Douglas’s characterization of the poll tax as “a capricious or irrelevant factor” simply restates Section Ten’s finding that it bears no “reasonable relationship to any legitimate State interest.”<sup>341</sup> Similarly, his condemnation of Virginia’s “invidious” discrimination against the poor simply translates Section Ten’s finding of “unreasonable financial hardship.”<sup>342</sup> We can, in short, isolate the reason for *Harper*’s enduring importance by focusing on its doctrinal bottom line. This is precisely our point in calling it a codifying precedent.

From our vantage point, *Harper* most closely resembles codifying precedents from the New Deal era, most notably *Darby*<sup>343</sup> and *Wickard*.<sup>344</sup> In mainstream constitutional thought, these cases serve as fixed points for ongoing legal reflection on the nature and limits of congressional power.<sup>345</sup> Although there are hundreds of cases dealing with the Commerce Clause, jurists don’t think they are acting arbitrarily in giving these superprecedents

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<sup>339</sup> 347 U.S. 483 (1954).

<sup>340</sup> 377 U.S. 533 (1964).

<sup>341</sup> *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966); Voting Rights Act of 1965, Pub. L. No. 89-110 § 10, 79 Stat. 437, 442 (codified as amended at 42 U.S.C. § 1973h (2000)).

<sup>342</sup> 383 U.S. at 668; Voting Rights Act of 1965 § 10.

<sup>343</sup> *United States v. Darby*, 312 U.S. 100 (1941).

<sup>344</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>345</sup> We recognize, of course, that Justice Thomas believes that *Wickard* and *Darby* mark a “wrong turn” in our constitutional development. See *United States v. Lopez*, 514 U.S. 549, 599 (1995) (Thomas, J., concurring). But this extreme view only serves to place him out of the constitutional mainstream.

special attention. They treat them as special precisely because they codify central doctrinal commitments emerging from the New Deal's successful exercise in constitutional politics.

And the same thing should be true of *Harper*, which also stands in a strategic relationship to one of the greatest successes in constitutional politics in our history. If the civil rights revolution, like the New Deal, marks a successful exercise in popular sovereignty—and we believe it does<sup>346</sup>—*Harper* should join *Wickard* and *Darby* amongst the superprecedents of the twentieth century. Though Douglas's reasoning exaggerates the role of the Warren Court as the change agent in the affair, *Harper*'s doctrinal bottom line crystallizes the conclusions of the larger process—expressed both by the Twenty-Fourth Amendment and Section Ten—through which Americans of the last century self-consciously repudiated wealth discrimination in the democratic process. On our view, courts are duty-bound to take this point with high seriousness as they struggle to interpret the constitutional meaning of democracy in the twenty-first century.

This transformation of *Harper*—from constitutional anomaly to canonical superprecedent—won't happen overnight, if it happens at all. It will require the academy to compensate for Douglas's erasure and teach the next generation to see the Court's decision as the third and final stage of a larger process through which the American people successfully repudiated wealth discrimination at the ballot box. It will also require the next generation of judges to look back at the civil rights revolution with a sympathetic appreciation of its profound significance in America's constitutional development.

The doctrinal stakes are high. To suggest some of the broader implications, we conclude with a reinterpretation of two major cases: *Buckley v. Valeo*,<sup>347</sup> and the recently decided *Crawford v. Marion County Election Board*,<sup>348</sup> dealing with the constitutionality of photo-identification requirements at the polls.

*I. Reframing Buckley.*—Reinterpreting *Harper*—and its skepticism about the role of money in politics—should prompt a reevaluation of the master premise governing the law of campaign finance as laid down in *Buckley*. In this decision, the Burger Court famously declared that it was “wholly foreign” to our constitutional tradition to recognize the “governmental interest in equalizing the relative ability of individuals . . . to influence elections . . . .”<sup>349</sup> In repudiating the constitutional relevance of equality in assessing campaign reform, the Court failed to weigh—or even to mention—the Twenty-Fourth Amendment and Senator Holland's effort

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<sup>346</sup> See Ackerman, *supra* note 3, at 1757–92.

<sup>347</sup> 424 U.S. 1 (1976).

<sup>348</sup> 128 S. Ct. 1610 (2008).

<sup>349</sup> *Buckley*, 424 U.S. at 49.

to “express the national thinking” that the time had come to permit Americans to vote “on something like terms of equality.”<sup>350</sup> Nor did it consider how this judgment was generalized further by Section Ten. Instead, it followed Douglas’s lead and erased the contribution of the 1960s to our evolving constitutional commitment to equality.

There is an irony here—it is the exaggerated pretensions of the liberal Warren Court that made the conservative readings of the Burger Court seem plausible. Since Douglas in *Harper* asserted the Warren Court’s unilateral power to “[un]shackle” the Constitution from the conclusions of constitutional politics, the Burger Court was in a perfect position to assert a similar privilege—unshackling itself from *Harper*, and repudiating a concern with economic equality as “wholly foreign” to American democracy. Curiously, the Court seems to concede the drastic character of its doctrinal revolution in its brief discussion of *Harper*. In a single footnote, the Court conceded that *Harper* established that wealth “is not germane to one’s ability to participate intelligently in the electoral process.”<sup>351</sup> But if this is so, surely it isn’t “wholly foreign” to our tradition when campaign finance reform carries *Harper*’s concerns further by reducing the impact of wealth on each citizen’s ability “to participate intelligently in the electoral process?”

But it would be a mistake to make too much of *Buckley*’s footnote concession. It may represent nothing more than the effort of a conscientious law clerk trying to cover all the legal bases on the way to the Court’s home run. Rather than quibbling with *Buckley*’s craftsmanship, we want to challenge its master premise by reinterpreting *Harper* as the final stage of a constitutional dynamic that includes the Twenty-Fourth Amendment and Section Ten. If Americans repudiated poll taxes over the course of the 1960s, isn’t this judgment entitled to substantial weight when considering the balance between free speech and equality in the control of campaign contributions?

Formally speaking, the answer depends on whether one views the Twenty-Fourth Amendment or Section Ten as announcing a *rule* or a *principle* of constitutional law. Rules, as Ronald Dworkin taught us long ago,<sup>352</sup> have a dichotomous logic to them—either the rule applies or it doesn’t. But principles don’t display this same binary logic. They announce constitutional values that are potentially relevant to a broad array of issues. A principle’s limits can only be defined by weighing the relevance of competing principles to the case at hand. Under the first interpretation, the Twenty-Fourth Amendment is simply a *rule* abolishing federal poll taxes; under the

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<sup>350</sup> 108 CONG. REC. 4153 (1962).

<sup>351</sup> *Buckley*, 424 U.S. at 49.

<sup>352</sup> See RONALD DWORKIN, *Model of Rules I & Model of Rules II*, in TAKING RIGHTS SERIOUSLY 14–45, 46–80 (1977); see also Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

second, it announces a *principle* against wealth discrimination that was developed further by Congress in Section Ten and by the Court in *Harper*.

The Constitution is full of texts that raise similar interpretive problems. To take a familiar example, suppose that we interpreted the First Amendment as announcing a rule. Then its first five words make it clear that it would apply *only* to “Congress [which] shall make no law,” and did not restrict the powers, say, of the President. If, however, we took the principled approach, the express textual limitation to “Congress” is no longer decisive. While “Congress” may well serve as a paradigm case for the application of First Amendment values, a principled interpretation of the text authorizes its application to the presidency and other institutions—unless countervailing constitutional principles have greater weight.<sup>353</sup>

The law of the First Amendment took the principled path a long time ago. But thanks to Douglas, we have utterly failed to consider whether our interpretation of the Twenty-Fourth Amendment should also take the path of principle. By placing *Harper* in its higher lawmaking context, we are in a position to debate this question for the first time—and in so doing, put *Buckley v. Valeo* in a new perspective. On our view, the Burger Court was wrong to ignore *Harper*’s relevance to its decision. Rather than viewing it as a constitutional oddity of the Warren Court, the case is best seen as the judicial codification of a sustained exercise in constitutional politics—expressed by the Twenty-Fourth Amendment and Section Ten of the VRA—condemning wealth discrimination in our democracy.

This conclusion suffices to discredit *Buckley*’s strong assertion that concerns about wealth inequality are “wholly foreign” to the constitutional problems posed by campaign finance reform. But it does not suffice to decide concrete cases. Our reinterpretation of *Harper* simply suggests the need to abandon *Buckley*’s one-sided emphasis on the value of free expression and recognize that America’s constitutional history requires the courts to balance the values of *both* equality *and* free speech in their assessments. Given the complexities of campaign finance, the requisite reorientation can’t be captured by some simple formula. It will require sustained debate that searches for a sensible accommodation of both values in a broad variety of contexts.

We refuse to predict the outcome of this debate before it has begun. The point of our redefinition of the canon has been to reconfigure the field of constitutional conversation, not to compel the ongoing professional dialogue to a predetermined doctrinal conclusion.

2. *Reframing Harper: Crawford’s Dead End.*—American lawyers presently view *Harper* as a free-standing object in judicial space. They focus their analytic microscope on the surface of Douglas’s opinion and sup-

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<sup>353</sup> See JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 178–95 (2001).

pose that it serves as the beginning of modern wisdom concerning the constitutional status of wealth discrimination in American democracy. We reject this singular focus and urge the profession to engage *Harper* as part of a process of dynamic triangulation—in which Douglas’s opinion emerges as the third and final stage of a process of popular sovereignty begun by the Twenty-Fourth Amendment and continued in the landmark Voting Rights Act. Within this framework, the Court’s recent decision in *Crawford v. Marion County Election Board*<sup>354</sup> is a dramatic demonstration of the perils of ignoring these earlier phases of the constitutional dynamic.

In 2005, Indiana passed a law requiring voters to go to the polls with an official photo ID, which in turn requires documents, like a birth certificate or passport, that verify identity.<sup>355</sup> Getting these papers costs money, as well as time and effort. This raises the question whether the extra expense violates the Twenty-Fourth Amendment’s absolute ban on all “poll taxes and other taxes” in federal elections.

Yet *Crawford* didn’t even ask this question—let alone answer it. Instead, the Justices focused *exclusively* on the Fourteenth Amendment issues defined by *Harper*, and even then could not reach consensus. They produced four very different opinions, with none gaining more than three votes. But for all their disagreements, they all gave short shrift to the leading case under the Twenty-Fourth Amendment, *Harman v. Forssenius*.<sup>356</sup>

As we have seen,<sup>357</sup> *Harman* was decided in 1965, one year after the amendment came into force. Virginia had responded to the poll-tax prohibition by allowing citizens to escape payment if they filed a formal certificate establishing their place of residence. Otherwise, they would be obliged to continue paying a state tax of \$1.50 if they wanted to cast a ballot. Lars Forssenius refused to pay the tax or to file the residency certificate, and brought a class action attacking the statute as unconstitutional. The Supreme Court agreed in a near-unanimous opinion by Earl Warren.<sup>358</sup> The Chief Justice emphasized that Virginia’s escape clause for avoiding the \$1.50 was unconstitutionally burdensome. “For federal elections,” he explained, “the poll tax is abolished absolutely as a prerequisite to voting, and no *equivalent or milder substitute* may be imposed.”<sup>359</sup>

*Harman* casts a shadow on Indiana’s photo ID law. On the face of things, Indiana provides identification free of charge, but so did Virginia when it required proof of residence. Like Virginians trying to avoid the tax, Indianans must file paperwork to get their IDs. And their burden is often heavier. It was enough for a Virginian to swear that he or she was a resi-

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<sup>354</sup> 128 S. Ct. 1610 (2008).

<sup>355</sup> *Id.* at 1611.

<sup>356</sup> 380 U.S. 528 (1965).

<sup>357</sup> *See supra* Part III.A.2.

<sup>358</sup> John Marshall Harlan did not join the opinion, but concurred in the result. *See* 380 U.S. at 544.

<sup>359</sup> *Id.* at 542 (emphasis added).

dent in front of witnesses or a notary public.<sup>360</sup> But Indianans must also travel to the Bureau of Motor Vehicles to get a photo ID, as well as pay for supporting documents like a birth certificate or passport. They can escape the requisite fees only by casting a provisional ballot and by taking another trip to a local official to swear that they are too poor to comply. And they must repeat this humiliating procedure every time they cast a ballot.<sup>361</sup>

Like Indiana, Virginia told the Court that a certificate of residency was necessary to preserve the integrity of its elections.<sup>362</sup> In 1965, the Justices would have none of it. According to *Harman*, the Twenty-Fourth Amendment could not be satisfied by a showing of “remote administrative benefits”—especially when other less burdensome devices were available for proving residency. In particular, the Court pointed out that Virginia could ask voters to take an oath and rely on the threat of punishment to deter lying. The same is true today in Indiana.

Yet the Justices ignored these compelling analogies—in part because the parties failed to put *Harman* at the center of their case. Their petition for certiorari only raised issues arising under the First and Fourteenth Amendments.<sup>363</sup> The Twenty-Fourth Amendment made a passing appearance in their briefs,<sup>364</sup> but it wasn’t mentioned at oral argument.<sup>365</sup> Although

<sup>360</sup> *Id.* at 529 n.1.

<sup>361</sup> See Senate Enrolled Act No. 483, 2005 Ind. Acts 2005.

<sup>362</sup> See Brief for the Appellants at 24, *Harman*, 380 U.S. 528 (No. 360) (“What the court below has done is to strike down, for the flimsiest of reasons, a reasonable and legitimate requirement intended solely to prevent fraud and irregularity at the polls by supplying a rational alternative to the traditional means of proof of residence.”).

<sup>363</sup> Before the cases were consolidated, the petitions for certiorari in both *Crawford v. Marion County* and *Indiana Democratic Party v. Rokita* presented the following question:

Whether an Indiana statute mandating that those seeking to vote in-person produce a government-issued photo identification violates the First and Fourteenth Amendments to the United States Constitution.

The Supreme Court’s grant of certiorari accepted the same formulation and adopted it as the official question presented in the consolidated case. Compare Petition for Writ of Certiorari at i, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (No. 07-21), and Petition for Writ of Certiorari at i, *Ind. Democratic Party v. Rokita*, 128 S. Ct. 1610 (2008) (No. 07-25), with Grant of Certiorari, *Crawford*, 128 S. Ct. 33 (2007) (No. 07-21), and Question Presented, *Crawford*, 128 S. Ct. 1610 (No. 07-21), available at <http://www.supremecourtus.gov/qp/07-00021qp.pdf>.

<sup>364</sup> Specifically, the petitioner’s merits brief in *Indiana Democratic Party v. Rokita* mentions the Twenty-Fourth Amendment. Brief for the Petitioner at 27, *Rokita*, 128 S. Ct. 1610 (No. 07-25) (“[E]ven a small fee for voting violates the First and Fourteenth Amendments (as well as the Twenty-fourth Amendment) because a law discriminating against the poor with respect to access to the polling booth is treated as inherently and severely burdensome.”). The petitioner’s brief in *Crawford v. Marion County* does not explicitly cite the Twenty-Fourth Amendment, though it does discuss and cite *Harman* numerous times. See Brief for the Petitioner William Crawford at 36, 38, 55 & n.23, *Crawford*, 128 S. Ct. 1610 (No. 07-21). Finally, the state respondents’ merits brief also cites *Harman*, but remains silent on the Twenty-Fourth Amendment. See Brief of State Respondents at 43, *Crawford*, 128 S. Ct. 1610 (No. 07-21).

<sup>365</sup> See Transcript of Oral Argument, *Crawford*, 128 S. Ct. 1610 (No. 07-21), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/07-21.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-21.pdf).

Congressman Keith Ellison filed an amicus brief that tried to correct this imbalance,<sup>366</sup> he waved his warning flag in vain.

This sort of thing doesn't happen every day in the life of the Court—indeed, we can't think of another case in which the Justices utterly failed to notice the most obviously relevant provision of the constitutional text.<sup>367</sup> The lapse is remarkable, but it would be a mistake to spend time apportioning blame between the lawyers and the Justices. Their singular fixation on the Equal Protection Clause is best understood as a tribute to Douglas's remarkable success in erasing the triadic relationship of *Harper* to the Twenty-Fourth Amendment and Section Ten.

Consider how the Twenty-Fourth Amendment was pushed to the side as *Crawford* moved up the judicial hierarchy. From the very beginning, the parties put *Harper* at the center of their challenge to the statute before the district court.<sup>368</sup> When they moved beyond the Fourteenth Amendment, they looked to the First Amendment to buttress their case<sup>369</sup>—their refer-

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<sup>366</sup> See Brief for United States Congressman Keith Ellison as Amicus Curiae Supporting Petitioners at 2–3, *Crawford*, 128 S. Ct. 1610 (No. 07-21). The brief argues:

The Twenty-Fourth Amendment to the United States Constitution prohibits a state from abridging a citizen's right to vote by prohibiting "any poll tax or other tax." Indiana's photo ID requirement violates the Twenty-Fourth Amendment. The requirement is unconstitutional not only because voters must initially spend money to obtain the requisite government issued photo ID or obtain related documentation, but also because voters who wish to qualify as "indigent" under the statute must make a separate trip to a county office and "affirm" their economic status before being allowed to vote. This is an unconstitutional burden on the fundamental right to vote.

*Id.*

<sup>367</sup> One might defend the Court's erasure of the Twenty-Fourth Amendment by suggesting that its grant of certiorari was strictly limited to issues arising under the First and Fourteenth Amendments. As a technical matter, this is incorrect. In granting jurisdiction, the Court did not expressly order a limited grant of certiorari. See Grant of Certiorari, *supra* note 363. But even if it had limited its grant of certiorari, the Court's order would "not operate as a jurisdictional bar" to the Court's consideration of "questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 312 (2002) (citing *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 687 & n.2 (1999); *Piper Aircraft Co. v. Reyno*, 451 U.S. 235, 247 n.12 (1981); *Olmstead v. United States*, 227 U.S. 438, 466, 488 (1928)). As such, the Court has sometimes found it necessary to rest its decisions on what it deems appropriate grounds, even though not always within the strict confines of the issues presented. See, e.g., *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999); *Stevens v. Marks*, 383 U.S. 234 (1966); STERN, *supra*, at 312 n.75. As we have seen, the Twenty-Fourth Amendment and *Harman* were cited in the principal briefs and extensively discussed by amici. Consequently, the Court's erasure cannot be explained on jurisdictional grounds, but only by reference to the deeper workings of the legal culture that we have explored.

<sup>368</sup> Indeed, the parties did not even mention the Twenty-Fourth Amendment in their complaint before the District Court, see Second Amended Complaint, *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006), only later adding it in the motion for summary judgment. See Plaintiff's (Crawford) Motion for Summary Judgment at \*18, \*21, *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006) (No. 1:05-CV-00634), 2005 WL 3707710.

<sup>369</sup> The Indiana Democratic Party, for example, argued that ID requirements would infringe on its First Amendment associational rights to determine with whom it would politically associate. By disallowing the votes of people seeking to associate with the party solely because they were unable to pro-

ences to *Harman* and the Twenty-Fourth Amendment were little more than add-ons. Little wonder, then, that Judge Sarah Barker restricted herself to *Harper* in rejecting the claim that Indiana's law represented an unconstitutional poll tax.<sup>370</sup> Her failure to quote, much less analyze, the terms of the Twenty-Fourth Amendment set the stage for future acts of judicial erasure.<sup>371</sup>

The same scenario repeated itself in the Court of Appeals.<sup>372</sup> Once again, the parties placed the spotlight on the Fourteenth Amendment, bolstered by the First;<sup>373</sup> and once again, the Court of Appeals left *Harman* and Twenty-Four entirely in the shadows.<sup>374</sup> Even Judge Terence Evans, who

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duce narrow forms of identification, the state threatened constitutional harm. See Plaintiffs' (Indiana Democratic Party and Marion County Election Board) Motion for Summary Judgment at \*18, *Rokita*, 458 F. Supp. 2d 775 (No. 1:05-CV-00634), 2005 WL 3707711. Furthermore, the plaintiffs argued, the right to vote was now respected as a "fundamental right" protected by both the First and Fourteenth Amendments. *Id.* at 26 (citing *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Turner v. D.C. Bd. of Elections*, 77 F. Supp. 2d 25, 31 (D.D.C. 1999) ("voting is speech"); *Paul v. State of Ind. Election Bd.*, 743 F. Supp. 616, 623 (S.D. Ind. 1990) ("[T]he right to vote for the candidate of one's choice, far from being a penumbral right, lies at the heart of the First Amendment's protection.")).

<sup>370</sup> See *Rokita*, 458 F. Supp. 2d at 826–27 (S.D. Ind. 2006).

<sup>371</sup> Judge Barker declared that "the imposition of tangential burdens does not transform a regulation into a poll tax," given the range of underlying documents that could be furnished to obtain identification. *Id.* at 827. Moreover, Baker argued that time and travel costs were the same ones incurred by registering and voting in the first place. *Id.* Thus, she concluded, "plaintiffs provide no principled argument in support of this poll tax theory." *Id.* As we shall suggest, the Twenty-Fourth Amendment does indeed provide such a "principled" basis. See *infra* Part VI.

<sup>372</sup> See *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007).

<sup>373</sup> The plaintiffs argued that "[t]he First and Fourteenth Amendments protect both the rights of voters and political parties to associate through primary elections." See, e.g., Brief of Plaintiff-Appellant Indiana Democratic Party and Marion County Democratic Central Committee at 40, *Crawford*, 472 F.3d 949 (No. 06-2218), 2006 WL 1786074 (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000)). Citing *Burdick v. Takushi*, 504 U.S. 428, 432 (1992), the parties nevertheless acknowledged that the court must "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against the 'precise interests put forward by the State as justification for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" Brief of Plaintiff-Appellant *Crawford* at 39–40, *Crawford*, 472 F.3d 949 (No. 06-2218), 2006 WL 1786073. Under this test, the state imposed unjustified severe burdens, and the law was therefore unconstitutional. *Id.* at 39.

<sup>374</sup> The parties presented the basic issue in a broad fashion—asking the court to consider whether the Indiana law was "consistent with constitutionally protected voting rights"—which would have allowed the court to decide the case under the Twenty-Fourth Amendment if it had chosen to do so. See Brief of Appellees *Rokita*, King and Robertson and Intervenor/Appellee the State of Indiana at 3, *Crawford*, 472 F.3d 949 (No. 06-2218), 2006 WL 2180191 (emphasis added). Nevertheless, the amendment was conspicuously absent despite several appearances in the briefs. See, e.g., *id.* at 27 (citing *Harman* as "poll tax in violation of the 24th Amendment"); *id.* at 20 ("[T]he Elections Clause, in conjunction with Article I, section two, and Article II, section one, is the font of the constitutional right to vote, a right later reinforced by Amendments I, XIV, XV, XVII, XIX, XXIV, and XXVI."); see also Reply Brief of Plaintiffs-Appellants, Indiana Democratic Party and Marion County Democratic Central Committee at 16, *Crawford*, 472 F.3d 949 (No. 06-2218), 2006 WL 2365329 ("In *Harman*, the Supreme Court noted that individuals would likely find it easier to pay the \$1.50 poll tax rather than complete the

voted to strike down the statute, failed to mention them in his dissent.<sup>375</sup> Our story takes on an ironic twist when it comes to the majority opinion. It was written by the very same Richard Posner who, as a young Assistant Solicitor General, had urged the Court to give “great weight” to the judgments expressed by Twenty-Four and Ten.<sup>376</sup> But more than forty years separated Judge Posner from his younger self, and he had long since forgotten the incident.<sup>377</sup> Given his legal standing, Posner’s erasure didn’t encourage either the litigants or the Justices to take Twenty-Four seriously when the case came before the Supreme Court.<sup>378</sup>

But this, we hope we’ve convinced you, was a mistake—and one which the Court should soon be in a position to rectify. While the *Crawford* Court refused to strike down the Indiana statute, Justice Stevens opened the door for a second lawsuit after the state’s 2008 presidential primary. Writing for three of the six Justices in the majority, Stevens invited would-be voters to renew their challenge to Indiana’s law once they could show—in very concrete terms—that they had been unjustifiably excluded from the ballot box.<sup>379</sup> The next time around, litigants should put the Twenty-Fourth Amendment at the very center of their case.

The constitutional text provides them with two basic arguments. The first emphasizes that the amendment bans all “other taxes” and not merely the poll tax. The second, that it prohibits the “abridgment” of the right to vote, not merely its “denial.” The first point focuses on the fees that voters must pay to produce the documents that Indiana requires for its photo ID—one hundred dollars for a passport, a lesser sum for an official birth certificate.<sup>380</sup> In other contexts, it might make sense to distinguish these “fees” from “taxes,” especially if they only cover the costs involved in producing the document. Most of the time, nobody is forcing the applicant to pay the fee—it’s entirely up to the applicant whether the passport or birth certificate is worth the cost of its production. But this is no longer true when Indiana *requires* its citizens to pay as a condition for voting. This forces some Indians to pay for a passport even though they aren’t planning foreign travel. It was the very point of the Twenty-Fourth Amendment to prohibit these coercive kinds of payments.

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residency certificate requirement.”); *id.* at 11 n.5 (noting that the “Twenty Fourth Amendment’s prohibition of conditioning voter eligibility on the payment of poll taxes applies only to federal elections, whereas *Harper* dealt with the use of poll taxes in state elections”).

<sup>375</sup> See *Crawford*, 472 F.3d 949 (Evans, J., dissenting).

<sup>376</sup> See *supra* notes 279–280 and accompanying text.

<sup>377</sup> See Posner Email, *supra* note 276.

<sup>378</sup> *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

<sup>379</sup> In Stevens’s words, he simply found that the Indiana law was not “excessively burdensome” on the “basis of the record that has been made in this litigation.” *Id.* at 1623 (emphasis added).

<sup>380</sup> See *id.* at 1621 n.17 (Stevens, J.) (describing birth certificate fees); *id.* at 1631 n. 17 (Souter, J., dissenting) (describing passport fees).

To be sure, Indiana does allow voters who are too poor to escape this requirement to cast a provisional ballot and travel to the county seat, within ten days, to plead poverty before a local official. But here is where the second point enters: the text bans “taxes” that “abridg[e],” as well as “den[y],” the right to vote. By requiring the poor to take a second trip, Indiana “abridges” their right to vote by making it harder to cast a valid ballot. As *Harman* put it, the text makes it clear that “the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed.”<sup>381</sup>

Or so the challengers should argue—and thereby add another ironical twist to our tale. After all, the Roberts Court is supposed to be a great fan of textual argument. But roles will be reversed under our scenario: Voting rights advocates will be calling upon Justice Stevens and his colleagues to abandon their balancing tests under the Fourteenth Amendment and embrace the original understanding of the Twenty-Fourth Amendment. Indeed, textualists like Justices Scalia and Thomas might have to think again before casting another vote against voters’ rights.<sup>382</sup>

We emphasize that our construction of the Amendment does not prevent the states from taking further steps to assure the integrity of their elections. It only forbids them from requiring voters to bear the cost. For example, if Indiana wants photo IDs, it could set up mini-offices in each election district, and process applications on the spot with the aid of computer searches—or provide a procedure in which voters apply for cards at one election and receive them (or a rejection notice) the next time they show up at the polls. Setting up a system would, of course, cost money. But we have paid the price for similar systems in other areas—think, for example, of the computerized procedures for checking identities of would-be gun purchasers.<sup>383</sup> The question is whether Indiana places a similar priority on the prevention of voter fraud. If it does, Twenty-Four is no bar—it only insists that the state’s treasury, not its voters, bear the burden.<sup>384</sup>

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<sup>381</sup> *Harman v. Forssenius*, 380 U.S. 528, 542 (1965).

<sup>382</sup> Justice Scalia’s concurrence in *Crawford* carefully avoids an originalist approach—perhaps because Justice Alito, who joined his opinion, has not yet made his methodological commitments clear. See 128 S. Ct. at 1624 (Scalia, J., concurring).

<sup>383</sup> In most cases, the current National Instant Criminal Background Check System (NICS) aims to provide a computerized check on the criminal background of a potential gun purchaser within thirty seconds. See Federal Bureau of Investigation, *National Instant Criminal Background Check System Fact Sheet*, available at <http://www.fbi.gov/hq/cjisd/nics/nicsfact.htm#top>. If this is technically possible for potential gun-purchasers, why not for potential voters?

<sup>384</sup> Our interpretation of the Twenty-Fourth Amendment makes it an analogue of the Takings Clause, which requires the taxpayer to pay for any law that seeks to fulfill a “public purpose” by imposing concentrated costs on particular individuals. See generally BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977). The only difference between the two provisions is this: The Takings Clause protects individuals in their capacity as property owners, the Twenty-Fourth Amendment protects them in their capacity as citizens.

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Twenty-Four applies to “any primary or other election for President,”<sup>385</sup> and directly governs legal challenges coming out of the 2008 elections. But Indiana’s law covers state as well as federal races, and the text of the Amendment doesn’t reach that far. Nevertheless, this shouldn’t stop the Court from invalidating the entire regulatory scheme. The statute contains no severability clause, and the Justices should leave it to the state legislature to decide whether it is worth running a cumbersome two-tier system in which voters without photo identification would be shunted to special voting machines allowing them to vote for federal, but not state, offices.<sup>386</sup> Until some state expressly adopts a two-tier system, there is no compelling need for the Court to retrieve Section Ten of the Voting Rights Act from the shadows of history and reinterpret the meaning of *Harper* in the light of this forgotten landmark statute.

This will provide a pause for other scholars to join the debate, and help enlighten the deeper issues raised by our case study. For present purposes, simply recall some orienting contrasts.

Consider, on the one side, the equivocal history of the Twenty-Fourth Amendment: promoted by an arch segregationist, opposed by the NAACP, and backed by a Kennedy Administration that was desperate for a politically innocuous gesture to its black constituency. Consider, on the other side, the remarkable history of Section Ten: fashioned by Martin Luther King, Nicholas Katzenbach, and Everett Dirksen in a self-conscious effort to move beyond the framework of Article Five and vindicate Lyndon Johnson’s proud claim that “We *shall* overcome.”<sup>387</sup>

Consider, on the one side, how the Twenty-Fourth Amendment passed through the states as a sideshow to the great civil rights struggle then reaching its climax. Consider, on the other side, how the Voting Rights Act served as a culminating landmark of this very same struggle—marking the moment at which the modern democracy was truly born in America.

These contrasts set up the key question in canon definition. As we have emphasized throughout, we believe that it is past time for the Supreme Court to admit Twenty-Four into the constitutional canon. But would it not be strange for it to deny the same status to Ten, which represents the substance, and not merely the form, of popular sovereignty in modern America?

In terms of post-Indiana litigation, one aspect of Section Ten commands attention: Section Ten not only condemned the poll tax because it

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<sup>385</sup> U.S. CONST. amend. XXIV.

<sup>386</sup> Under standard doctrine, the Court won’t declare provisions severable unless they are capable “of functioning independently,” a condition that doesn’t apply to the case at hand. See *Rita v. United States*, 127 S. Ct. 2456, 2483 n.7 (2007) (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987)).

<sup>387</sup> See *supra* note 145 and accompanying text.

did “not bear a reasonable relationship to any legitimate State interest in the conduct of elections.”<sup>388</sup> It also, and independently, condemned the tax because it “impose[d] unreasonable financial hardship” on “persons of limited means.”<sup>389</sup> While *Harper* contains language recognizing this second point, the opinions in *Crawford* tend to downplay it.<sup>390</sup>

Perhaps this would be entirely acceptable if *Harper* were an ordinary precedent, open to evolving judicial reinterpretation. But once *Harper*’s roots in the landmark statute are recognized, its status as a superprecedent requires special respect. Its egalitarian doctrine should not be restricted to explicit wealth discrimination. Even in cases, like photo identification, where the state is pursuing a legitimate interest, its regulations require strict scrutiny when they impose “unreasonable financial hardship” on “persons of limited means.”<sup>391</sup> This standard may be less stringent than the more absolutist approach marked out by *Harman* under the terms of the Twenty-Fourth Amendment. But it represents a far more incisive inquiry than the kind of balancing envisioned by the majority in *Crawford*.<sup>392</sup> The meaning of “unreasonable financial hardship” transparently calls for a contextualized judgment, and it would be pointless to say more until a state tests the limits of its regulatory powers. The key point, at present, is to recognize that the meaning of *Harper* should be informed by the decisions made by Lyndon Johnson, the congressional leadership, and Martin Luther King in the landmark statute.

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<sup>388</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 10, 79 Stat. 437, 442 (codified as amended at 42 U.S.C. § 1973h (2000)).

<sup>389</sup> *Id.*

<sup>390</sup> Justice Stevens’s lead opinion, for example, gestured towards *Harper*, but then invoked *Anderson v. Celebrezze*, 460 U.S. 780 (1983), for “the general rule that ‘evenhanded restrictions that protect the integrity and reliability of the electoral process itself’ are not invidious and satisfy the standard set forth in *Harper*.” *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008) (citations omitted). This transforms *Harper*’s principled suspicion of burdensome financial impositions into a license for judicial balancing.

While Justice Souter’s opinion is more protective of the “fundamental right to vote,” he would have applied a “sliding-scale balancing analysis” through which “the Court has long made a careful, ground-level appraisal both of the practical burdens on the right to vote and of the State’s reasons for imposing those precise burdens.” *Id.* at 1628 (Souter, J., dissenting).

A third opinion, written by Justice Scalia, treats *Harper* dismissively as an “early right-to-vote decision[], purporting to rely upon the Equal Protection Clause . . . .” *Id.* at 1626 n.\* (Scalia, J., concurring). To the extent that Scalia concedes that the case retains vitality, he limits its scope by “not[ing] that we have never held that legislatures must calibrate *all* election laws, even those totally unrelated to money, for their impacts on poor voters or must otherwise accommodate wealth disparities.” *Id.*

<sup>391</sup> Voting Rights Act of 1965 § 10.

<sup>392</sup> See 128 S. Ct. at 1616 (Stevens, J.) (“Rather than applying any ‘litmus test’ that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.”).

## VI. A NEW CANON FOR THE TWENTY-FIRST CENTURY?

According to a familiar critique, Warren & Co. left us with a legacy of “judicial activism” which requires fundamental revision.<sup>393</sup> On this view, Douglas’s opinion in *Harper* is a particularly egregious example of a more general and regrettable tendency to engage in fast and loose interpretation of ancient and honored texts. Our analysis suggests a very different diagnosis. In some—but not all—cases, Warren Court “activism” was actually a product of *intellectual conservatism*. Time and again, the Court failed to root its decisions in the constitutional politics of the 1960s. Instead, it repeatedly upheld these egalitarian breakthroughs by wrapping them in “myths of rediscovery”—as if the constitutional categories of the eighteenth and nineteenth centuries sufficed to capture their meaning.<sup>394</sup>

As the Goldberg opinion suggests, this was not inevitable. But it was understandable. While the American people were endorsing the new egalitarianism of the civil rights movement, it is hardly surprising that the Nine Old Men on the Court were having a hard time recognizing the new messages of the Twenty-Fourth Amendment and the Voting Rights Act. After all, they had been trained as lawyers in an earlier age, and it was only natural for them to pour new wine into old bottles. Whatever else may be said of Douglas’s opinion, “equal protection” was a very familiar idea to his generation of lawyers.

In contrast, it required a great deal of intellectual agility for a Goldberg or a Posner to urge the Court to move beyond the familiar formulations of the First Reconstruction and confront the new principles of the Second Reconstruction that had gained constitutional stature in 1964 and 1965. To be sure, Douglas’s effort to adapt old legal ideas to the new constitutional moment led to an opinion that seems slipshod and unpersuasive—“activist,” in the pejorative sense. But this activism was a consequence of a deeper conservatism, one that is characteristic of legal adaptation.

Generally speaking, lawyers *are* intellectual conservatives. Once they are trained in the legal categories of their youth, they have neither the time nor the inclination to rethink them from the ground up. Creative adaptation, not fundamental reconceptualization, is what legal argument is (almost) all about.<sup>395</sup> Genuinely new ideas take decades to mature—as one generation succeeds another, new minds find it easier to confront different legal realities, and are more open to new insights.

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<sup>393</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 69–100 (1990); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 149 (1997).

<sup>394</sup> See Ackerman, *supra* note 3, at 1803.

<sup>395</sup> See ACKERMAN, *WE THE PEOPLE*, *supra* note 13, at 95, 121 (noting the intellectual conservatism of the Judiciary at prior constitutional turning points); see also GERALD GARVEY, *CONSTITUTIONAL BRICOLAGE* 85 (1971) (adapting the term “bricolage” from Levi-Strauss, to refer to a process of creating solutions to problems as they arise); CLAUDE LEVI-STRAUSS, *THE SAVAGE MIND* 17 (1966) (explaining the concept of “bricolage”).

This is, at least, our hope in writing this Article. It is time for a new generation of lawyers to give legal expression to something everybody recognizes—that the 1960s was one of the great eras of popular sovereignty in American history. We should learn to use cases like *Harper* in a new way, looking beyond their self-aggrandizing language to place them in the larger context through which the American people—and not only the Warren Court—expressed new constitutional commitments. We should be looking, first and foremost, to the principles expressed in the landmark statutes of the period, which served as the preeminent—if not the exclusive—vehicle for popular sovereignty in the civil rights era.

Constitutional understanding will come—if it comes at all—on a piecemeal basis. Our analysis of the Twenty-Fourth Amendment and Section Ten represents only a small piece of the puzzle. It will take many more case studies before American lawyers can begin to put bits and pieces together and gain a fuller sense of the constitutional achievements of the American people during the civil rights revolution. It is past time to put the Warren Court in its place and recognize it as one—but only one—of the actors in this great drama. Otherwise we condemn ourselves to a superficial understanding of an era that continues to shape the fundamental terms of our collective life together.