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Reflections on the Fiftieth Anniversary of the March and the Speech: History, Memory, Values


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I. INTRODUCTION

In early 1941, A. Philip Randolph, the head of the Brotherhood of Sleeping Car Porters, announced his plan to dramatize the economic grievances of American blacks by sponsoring a march on Washington. He initially hoped to attract some 10,000 supporters, but growing enthusiasm in the black community led him to believe that many times that number might turn out. The Franklin D. Roosevelt administration, fearing violence and anticipating damaging political repercussions, sought repeatedly to persuade him to abandon the plan. After rejecting several compromise offers, Randolph finally secured one he liked. He agreed to call off the march in exchange for the president’s promise to establish a Fair Employment Practice Committee (FEPC) and ban employment discrimination in defense industries and federal agencies. Although political opposition and racial prejudices meant that the resulting Executive Order 8802 establishing the FEPC would prove exceptionally controversial and bring only limited results, it was the federal government’s first substantial effort to advance the equal rights cause since Reconstruction.

By 1963, when a black-led march for equal rights finally took place in the nation’s capital, many things had changed. A national civil rights movement had emerged after World War II that was better organized, increasingly militant, more widely and enthusiastically embraced by blacks, and supported (or at least accepted) by growing numbers of whites. The administration of President John F. Kennedy, moreover, was more sympathetic to the civil rights cause than Roosevelt’s had been and, though initially hoping for immediate political reasons to derail the planned march as Roosevelt had done, proved mildly supportive and ultimately welcomed the idea once black leaders made it clear that this time they would not be put off.


2. Pfeffer, supra note 1, at 47–49. Like all Democratic presidents between Reconstruction and the 1960s, Roosevelt was exceptionally sensitive to the party’s Southern base and acutely aware of his need for its continued support. See generally Nancy J. Weiss, Farewell to the Party of Lincoln: Black Politics in the Age of FDR (1983). For more about the South and its subsequent shift of allegiance to the Republicans after the 1960s, see, e.g., William E. Leuchtenburg, The White House Looks South: Franklin D. Roosevelt, Harry S. Truman, and Lyndon B. Johnson (2005).


4. The FEPC “was the most controversial federal agency in the nation during World War II and perhaps in modern American history.” Merle E. Reed, Seedtime for the Modern Civil Rights Movement: The President’s Committee on Fair Employment Practice, 1941–1946, at 1 (1991). For more information on the importance of economic issues in civil rights litigation in the 1940s, see generally Risa L. Goluboff, The Lost Promise of Civil Rights (2007).

5. “There will be a march,” Randolph announced boldly at a White House meeting between civil rights leaders and top administration officials—including President Kennedy. Taylor Branch, Parting the Waters: America in the King Years, 1954–63, at 839–40 (1988) [hereinafter Branch, Parting
Indeed, in 1963 it was Randolph himself—still active and influential at the age of seventy-four—who once again proposed a march in the nation’s capital.6 Ever since 1941, “the dream of such a march had burned brightly in his mind,” James Farmer, one of the March’s leaders, recalled.7 Rallying to show a united front and organizing with the greatest thoroughness, black civil rights leaders and their organizations produced one of the signal events of the 1960s and one of the landmarks in the long struggle to end racial injustice in America.

Part II of this article examines the March and its high point, Martin Luther King, Jr.’s “I Have a Dream” speech, and their impact on millions of Americans. Part III considers the place of the March and the Speech in the broader history of race relations and civil rights campaigns in America, ending with the triumphant passage of the great Civil Rights Acts of 1964 and 1965. Part IV recounts the history of the subsequent half century, focusing on the fading of what was called “The Civil Rights Movement” and the political transformation of the Republican Party. Concluding with a discussion of the concomitant transformation of the U.S. Supreme Court, Part IV examines the decision of the Court’s five conservative justices in Shelby County v. Holder,8 which—on the fiftieth anniversary of the March and the Speech—overturned a central provision of the 1965 act. This article argues that their decision was legally and factually unjustified and that it exemplifies the political and ideological values that drive the Court’s current conservative majority. A brief conclusion estimates the long-term significance of both Shelby County and King’s dream.

II. THE MARCH AND THE SPEECH

A. History

On Wednesday, August 28, 1963, more than 250,000 people—some twenty percent of whom were white9—gathered for what was heralded as the March on Washington for Jobs and Freedom.10 Designed in significant part to generate support


7. Farmer, supra note 6, at 239.

8. 133 S. Ct. 2612, 2617 (2013). The five conservative justices in the majority were Chief Justice John Roberts and Associate Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito. Id.


10. The general story of the March and the Speech has been frequently recounted. In summarizing those events, I have drawn largely on Thomas Gentile’s book March on Washington: August 28, 1963, and the first volume of Taylor Branch’s superb three-volume biography of Martin Luther King, Jr. entitled
for a new and relatively far-reaching civil rights bill that the Kennedy administration had recently sent to Congress, \(^{11}\) the March ultimately packed most of the long area that stretched from the Lincoln Memorial to the Capitol. It seemed a stunning culmination of years of increasingly militant local civil rights campaigns that had occurred across the South and much of the country. At the time, it was the largest such political march in American history.

For months, organizers had debated tone and tactics, the content of the planned speeches, and the practical purposes the event might serve. Bayard Rustin, the head of the Southern Christian Leadership Conference (SCLC), who was primarily responsible for day-to-day planning and organization, originally suggested that the March end with a sit-in at the Capitol, while John Lewis, the head of the Student Nonviolent Coordinating Committee (SNCC), wanted speeches with aggressive rhetoric and actions that would directly confront and challenge the status quo. Countering their proposals, however, most of the other March leaders urged a safer and more restrained approach. Recognizing the potential for violence and political backlash, and under steady pressure from the White House, they sought a disciplined and orderly demonstration that would show the internal unity of the civil rights movement, prove its peaceful and nonviolent nature, and keep the spotlight fixed on its compelling political and moral claims. The heads of the long-established and more conservative organizations, Roy Wilkins of the National Association for the Advancement of Colored People (NAACP) and Whitney Young of the Urban League, joined Randolph, Farmer of the Congress of Racial Equality (CORE), and Martin Luther King, Jr. of the SCLC in insisting that success depended on the March remaining disciplined and—above all—peaceful.\(^{12}\) Deeply concerned about possible disruptions or violence by marchers, unaffiliated blacks, and especially angry white onlookers, Rustin worked overtime with the police to arrange for the strictest security and brought in an additional 4,000 volunteer marshals from New York to help maintain order.\(^{13}\)

Eight days before the March, the leaders sent an engraved invitation to every member of Congress inviting them to attend, and they set aside a section of chairs in front of the podium for them. Almost half replied and more than eighty attended.
though many declined on the ground that Congress was in session and they could not get away.\textsuperscript{14} Few Southern senators even bothered to respond, but Democratic Senator Olin D. Johnston of South Carolina sent a telegram that likely captured their view:

\begin{quote}
I positively will not attend. You are committing the worst possible mistake in promoting this March. You should know that criminal, fanatical, and communistic elements, as well as crackpots, will move in to take every advantage of this mob. You certainly will have no influence on any member of Congress, including myself.\textsuperscript{15}
\end{quote}

The sharpest controversy among the March leaders erupted during the two days immediately prior to the event, when members of SNCC—including James Forman, Julian Bond, and Eleanor Holmes—helped prepare a stinging speech for Lewis and circulated advance copies.\textsuperscript{16} Their draft criticized the Kennedy administration’s pending civil rights bill, condemned the arrests of thousands of civil rights activists on “trumped up charges,” and called on “the masses” to bring about “radical social, political and economic changes.”\textsuperscript{17} Forman added a particularly inflammatory passage declaring, among other things: “We will march through the South, through the heart of Dixie, the way Sherman did.”\textsuperscript{18} Most of the other leaders saw the speech as far too radical, and Rustin quickly arranged an emergency meeting in a Washington hotel that produced an angry debate over censorship, political tactics, and the very purpose of the March itself. A last minute compromise left Lewis with most of his rhetoric intact, including an appeal to “the black masses,” a call for “a serious social revolution,” and the charge that most American politicians had “[built] their careers on immoral compromises” and “political, economic, and social exploitation.”\textsuperscript{19} He agreed, however, to delete a few of his most provocative assertions, including the passage about repeating Sherman’s march.\textsuperscript{20}

In spite of the leaders’ promises that the March would be peaceful, including repeated assurances that Wilkins and King gave on national television, public anxieties ran high.\textsuperscript{21} A number of white supporters, including some Democratic congressional leaders, worried that the March would backfire and fan opposition to the administration’s civil rights bill.\textsuperscript{22} Many others feared far worse—some warning that bands of black marauders would run wild in the capital’s streets. Anticipating

\begin{enumerate}[\textsuperscript{14}]
\item Gentile, supra note 9, at 136–37; see also Branch, Parting the Waters, supra note 5, at 881.
\item Gentile, supra note 9, at 138.
\item See id. at 164–83.
\item Branch, Parting the Waters, supra note 5, at 873.
\item Id. at 873–74. Forman’s insertion continued in heated—if ambiguously qualified—language. “We shall pursue our own ‘scorched earth’ policy and burn Jim Crow to the ground—nonviolently. We shall crack the South into a thousand pieces and put them back together in the image of democracy.” Id. at 874.
\item Id. at 880.
\item Id. at 879–80.
\item Id. at 871–72.
\item Brauer, supra note 5, at 291.
\end{enumerate}
the worst, the city prohibited liquor sales, area hospitals cancelled elective surgeries, merchants moved their goods out of stores and into locked warehouses, and the Washington Senators baseball team postponed two games until the day had passed. For its part, the administration drafted an emergency proclamation authorizing the restoration of order by 4,000 assembled troops backed by an additional 15,000 paratroopers on stand-by.23

When the day of the March finally arrived, however, everything went almost perfectly.24 In the morning, twenty-one chartered railroad trains pulled into Washington’s Union Station, while more than a hundred buses an hour poured steadily into the city through the Baltimore tunnel. Most of the participants came from cities along the East Coast and from as far south as Miami, but thousands upon thousands more trekked in from as far away as Milwaukee, St. Louis, Little Rock, Pittsburgh, Cincinnati, and Detroit. Estimates of the massing throng grew to over 300,000.25 Rustin’s methodical planning provided tight security and furnished some 80,000 bag lunches, twenty-one drinking fountains, and many first-aid stations and portable toilets for the marchers.26 National television crews, reporters, and photographers from across the world, clergymen from the major denominations, famous black activists and celebrities from Rosa Parks to Josephine Baker, and a flood of glamorous Hollywood stars including Charlton Heston, Sidney Poitier, Burt Lancaster, Marlon Brando, and James Garner combined to highlight the importance of the event and confirm the widespread and enthusiastic support that the Movement had generated. Opening musical performances by Joan Baez, Odetta, Bob Dylan, Mariah Anderson, Mahalia Jackson, and Peter, Paul and Mary brought the crowd to its feet and, when Jackson sang the old Negro spiritual “I’ve Been ’Buked and I’ve Been Scorned,” tears to the eyes of many.27 Then speaker after speaker—whom Rustin tried to hold to seven minutes each—addressed the crowd with strong, insistent, and often moving words.28

23. Branch, Parting the Waters, supra note 5, at 872; Gentile, supra note 9, at 129, 148–50. On the night before the March, J. Edgar Hoover continued his efforts to undermine the civil rights movement by ordering FBI agents to telephone celebrities who were planning to attend the March and to warn them to stay away because the government expected violence. Branch, Parting the Waters, supra note 5, at 876; Curt Gentry, J. Edgar Hoover: The Man and the Secrets 527 (1991).

24. In retrospect, one obvious embarrassment—typical of most American political organizations and campaigns until the emergence of the women’s movement in late 1960s—was the fact that the March leaders refused to allow any women speakers. “In essence, the role and importance of women in the civil rights movement was brushed aside by the March’s all-male leadership.” Gentile, supra note 9, at 142.

25. Branch, Parting the Waters, supra note 5, at 876, 878; Gentile, supra note 9, at 184–88, 190–92.

26. Branch, Parting the Waters, supra note 5, at 873. Critical to the event, the organizers had installed a high-quality public address system and placed forty-six “massive speakers” on two large towers along the sides of the Lincoln Memorial’s Reflecting Pool, allowing most of the crowd to hear the performers and speakers quite well. Gentile, supra note 9, at 147–48.

27. Gentile, supra note 9, at 208–19; Branch, Parting the Waters, supra note 5, at 877, 881.

28. Branch, Parting the Waters, supra note 5, at 873, 877–81. For a summary of the events and the speeches of the other leaders, see Gentile, supra note 9, at 184–255.
Watching on television from his jail cell in Donaldsonville, Louisiana, where he had remained after his arrest for leading a protest against police brutality, Farmer wept at the sight. It was, he declared, an “awesome spectacle.” 29 King was equally ecstatic. “[I]n its entire glittering history,” he later wrote, “Washington had never seen a spectacle of the size and grandeur that assembled there on August 28, 1963.” 30

Finally, as the last speaker of the day, King himself came forward. Introduced by Randolph as “the moral leader of our nation,” he spurred a rolling cascade of applause that lasted almost a full minute. 31 King had been working on his speech for two days, blending words and ideas that fit the needs of the occasion with those he had been using widely for a decade. 32 The day had been hot; the program had lasted for hours; and the crowd was growing tired. Still, it seemed a fitting and climactic moment, and for millions of Americans across the land the timing of King’s appearance was ideal. While CBS had been televising the entire event live, by the time King came to the podium both ABC and NBC had cut away from their regular programming and joined the live coverage. 33 To the greatest extent possible at the time, the entire nation was watching.

Speaking in his deep baritone voice, with cadences slow and resounding, King roused the audience repeatedly. Insisting on “the fierce urgency of now,” he exhorted his listeners to redouble their efforts and to insist on justice and equality now. “This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism,” he declared. “Now is the time to make real the promises of democracy.” Still, he stressed, their efforts must remain nonviolent. “Again and again, we must rise to the majestic heights of meeting physical force with soul force.” 34

Nearing the end of his prepared remarks, reaching what seemed their relatively weak and anticlimactic conclusion, King suddenly hesitated. 35 Perhaps an experienced preacher’s intuition whispered that he might be losing an audience fatigued from the heat of the long August day. Perhaps he suddenly felt compelled to preach the essence of his message on an occasion that he sensed would never come again. Although his seven minutes had expired, those on the platform urged him to continue. Then Mahalia Jackson’s distinctive voice piped up. “Tell ’em about the dream, Martin,” she

29. Farmer, supra note 6, at 245.
30. Martin Luther King, Jr., The Autobiography of Martin Luther King, Jr. 221 (Clayborne Carson ed., 1998) [hereinafter King, Autobiography]. For King’s description of the March, see id. at 218–28. King’s autobiography, authorized by his estate, was assembled posthumously from his published and unpublished writings.
31. Branch, Parting the Waters, supra note 5, at 881.
32. Id. at 875–76, 881–83. For the full text of the Speech, see Martin Luther King, Jr., A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr. 217–20 (James Melvin Washington ed., 1986) [hereinafter King, Testament of Hope].
33. Branch, Parting the Waters, supra note 5, at 881; see also Aniko Bodroghkozy, Equal Time: Television and the Civil Rights Movement 101 (2012).
35. Branch, Parting the Waters, supra note 5, at 882.
called. Whether or not King heard her, he did just that. Abandoning his text, drawing on the deep well of long years of activism and an even longer life in the pulpit, he launched extemporaneously into what would become his overpowering peroration.

“...”,
replaced with awe.” 41 James Baldwin, who had been skeptical about the March, declared that “it almost seemed that we stood on a height, and could see our inheritance; perhaps we could make the kingdom real.” 42 Watching on television, President Kennedy exclaimed, “He’s damn good,” and greeted King at the White House later that day by saying simply “I have a dream.” 43 William Sullivan, the assistant director of the Federal Bureau of Investigation, rendered the same judgment, though spinning its significance to please his boss, the Bureau’s racist and virulently anti-King director, J. Edgar Hoover. 44 King gave a “powerful demagogic speech,” Sullivan reported, and as a result he was now “the most dangerous Negro of the future of this Nation from the standpoint of Communism, the Negro and national security.” 45

In his autobiography King downplayed the importance of his speech in favor of emphasizing the combined impact of all the speakers and, especially, the significance of the massive and peaceful march itself. “[T]he stirring emotion came from the mass of ordinary people who stood in majestic dignity as witnesses to their single minded determination to achieve democracy in their time,” he explained. “The enormous multitude was the living, beating heart of an indefinitely noble movement.” 46 The March was “the first organized Negro operation that was accorded respect and coverage commensurate with its importance.” 47 The fact that it was nationally televised was critical. “Millions of white Americans, for the first time, had a clear, long look at Negros engaged in a serious occupation,” King explained. “For the first time millions listened to the informed and thoughtful words of Negro spokesmen, from all walks of life.” 48 He summed up the event in his typical style, invoking the noblest of human hopes and proclaiming the event’s worldwide resonance:

41. Farmer, supra note 6, at 245.
42. Michiko Kakutani, The Dream, the Speech and Its Lasting Power, N.Y. Times, Aug. 28, 2013, at A1, A18 (internal quotation marks omitted).
43. Branch, Parting the Waters, supra note 5, at 883. After the March, Kennedy issued a short statement praising the event. “We have witnessed today in Washington tens of thousands of Americans—both Negro and white—exercising their right to assemble peacefully and direct the widest possible attention to a great national issue.” Lewis, supra note 12, at 230.
44. Many of his associates “noted Hoover’s growing obsession with destroying King.” Gentry, supra note 23, at 505.
45. David J. Garrow, The FBI and Martin Luther King, Jr. 68 (1981); see also Gentry, supra note 23, at 528. More apt criticism came from a few of the Movement’s sympathizers. One veteran civil rights activist expressed annoyance with King that some other blacks may have shared. “Martin had no right to say ‘I have a dream’; why, we have all had that dream for generations.” August Meier & Elliott Rudwick, From Plantation to Ghetto 290 (3d ed. 1976) (quoting an unnamed “old-line” activist) (internal quotation marks omitted). Before changing his mind and adopting a far more favorable view, David Levering Lewis, who criticized King from the Left, denigrated the Speech as “rhetoric almost without content.” Lewis, supra note 12, at 228. Thomas Gentile suggested that many marchers were tired from the long, hot day and that the Speech was not for them “the moving experience that it became later on in hindsight.” Gentile, supra note 9, at 249.
46. King, Autobiography, supra note 30, at 222.
47. Id. at 227.
48. Id.
As television beamed the image of this extraordinary gathering across the border oceans, everyone who believed in man’s capacity to better himself had a moment of inspiration and confidence in the future of the human race. And every dedicated American could be proud that a dynamic experience of democracy in the nation’s capital had been made visible to the world.49

B. Memory

The March and the “I Have a Dream” speech helped shape my own personal views, and as a historian I cannot avoid acknowledging the extent to which those views have influenced my memory, my political values, and my understanding of those now long-past events. In that, however, I am hardly alone. For Americans, memories of the March and the Speech, like almost all matters involving race, have an unavoidably personal component. The realities of race have touched us all in countless ways, some obvious and some less so. Some perhaps buried too deeply to be fully uncovered. Race has helped shape every aspect of our national life.50

As a young student, I was one of the millions of people across the nation and world who were educated and inspired by the civil rights movement. The courage and commitment of those who engaged in boycotts, sit-ins, Freedom Rides, and so many other similar actions quickly commanded my attention and earned my admiration. I was also one of the many millions who King reached and moved with his faith, humanity, and passion for simple and long-overdue justice. The March helped convince us that substantial changes could actually be achieved, and the “I Have a Dream” speech seemed to provide the noble vision that could, as Abraham Lincoln had prayed at Gettysburg, lead the nation to rededicate itself to “a new birth of freedom.”51

Looking back from the present, I am embarrassed to recognize what little awareness I had about racial matters as I was growing up in a pleasant, white, working-class neighborhood in Kansas City, Missouri in the 1940s and 1950s. I do remember that at some point my parents and their friends began to talk about black people moving into nearby areas. Few of them used the nastiest forms of racist language, at least in front of their children, but they expressed their fears and anxieties clearly, and often made their underlying anger apparent. I also recall the summer afternoon when, for the first time, several young black boys appeared at the local baseball field and stood quietly on the sidelines hoping to be invited to join our game. Shortly thereafter, my family moved across town to what was called a “better neighborhood.”

Through those early years I do not recall ever associating with or even actually knowing a black person. There were none in my grade school class, our local Catholic

49. Id. at 228. For a broad selection of King’s work, see King, Testament of Hope, supra note 32.

50. This is nowhere more apparent than in our constitutional law, especially in the interpretation and application of what are called the “principles of federalism.” See, e.g., Edward A. Purcell, Jr., Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry 63–65 (2007).

church, or the summer baseball leagues where my friends and I played; and there were none in my class at the small Jesuit high school I attended—though there were two or three in other years. I do, however, remember one classmate who befriended me early in my freshman year. He turned out to be an overt racist who soon began making mocking, derogatory comments about both blacks and Jews—comments that surprised me and that I somehow had the good sense to find both puzzling and disturbing. By sophomore year we had parted company.

In college, things began to change. I had been wholly oblivious to the Montgomery Bus Boycott in 1955, but the sit-ins and Freedom Rides that began in 1960 quickly intruded into my consciousness. Fortunately, too, by then I had another friend who was far more enlightened than I was. He urged me to support what he called the Kansas City Equality Team, a group he had organized in an effort to persuade local restaurants and businesses to serve black students. More influential, I also had a new black teammate on my amateur basketball team. His name was also “Ed,” and he was the first black person I came to know on a regular and personal basis.

My most acute memory of Ed did not occur on a basketball court. Our team had just won an important game, and several teammates urged us all to mark the victory by crossing over into Kansas—where the legal drinking age was eighteen, compared with twenty-one in Missouri—to celebrate at their favorite hangout, a bar and restaurant called “Morrie’s.” I remember my growing sense of unease as Ed tried to beg off on some or other excuse, but then, after repeated entreaties, finally agreed to join us. I remember entering Morrie’s and turning back to see Ed step through the door and then stand motionless in the entryway, a strange and taut expression on his face. I remember the owner, who had been working behind the bar when we entered, looking up and then immediately rushing toward us shouting in an angry and almost fierce voice: “The bar is closed! The bar is closed!” Shocked and speechless in our naiveté, we looked at one another blankly and then, vaguely understanding, turned and walked out. I remember realizing that Ed must have been harboring a knowing sense of foreboding all along and afterwards, though he never said a word, must have felt a stinging hurt. I remember, too, feeling a deep sense of shame and embarrassment, a feeling that held me back from ever even mentioning to Ed what had happened that night. Never again did our team attempt to go to a bar or restaurant together. Morrie’s remained open until I graduated from college and left Kansas City, but I never went back.

As a historical matter the incident at Morrie’s was utterly trivial, but it seems worth recording. Its very triviality shows the extent to which overt public racial discrimination remained an ordinary and everyday occurrence in 1960.  

52. In 1961, discussing a sit-in case in conference, Justice Hugo Black warned his colleagues about the dangers of integrating lunch counters: “Many people in the South would be alarmed at the mere presence of black people sitting there.” The Supreme Court in Conference (1940–1985), at 709 (Del Dickson ed., 2001). A few years earlier, a Virginia judge had issued an opinion upholding a conviction under the state’s anti-miscegenation law:

Almighty God created the races white, yellow, malay and red, and He placed them on separate continents. And but for the interference with His arrangement there would be
illustrates the unavoidably personal nature of race relations in America, the countless ways in which race has touched—and continues to touch—each and every one of us. For my part, a half century later, I still remember that night at Morrie's and the way it sharpened my awareness and pierced my conscience. As for Ed, I can only guess. For him, the memory of what happened that night may have wholly faded away, blended into a mass of other similar—and perhaps far more hurtful—experiences.

III. IMPACT AND SIGNIFICANCE

A. History

The historical significance of the March on Washington and the “I Have a Dream” speech can, of course, hardly be assessed in isolation. As a matter of history, they were but small parts of a complex and long-evolving struggle.

1. The Slighted Context

Focusing on the March and the “I Have a Dream” speech elides a vast historical drama. It overlooks not only those on the front lines who regularly endured terrible dangers and too often suffered accordingly, but also those who sustained the Movement with essential but unspectacular organizational and back-office work. It overlooks the steady and often unrecognized efforts of local civil rights workers and organizations in towns, cities, and states across the nation, and it overlooks the mass no cause for such marriages. The fact that He separated the races shows that He did not intend for the races to mix.

Id. at 695; Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting the Virginia state trial court judge).


of Americans, black and white, whose support, however limited or belated, helped give the Movement its growing momentum and ultimate political power.55

Further, such a focus minimizes the internal complexities of the civil rights movement and the extent to which both activists and the black community in general were often sharply divided over tactics and goals.56 It ignores the challenges that Malcolm X presented and minimizes the deep skepticism of the more radical activists in both CORE and SNCC.57 It passes over the great difficulties that black civil rights lawyers confronted in representing the Movement and its supporters,58 and it ignores the embarrassing fact that a small but noticeable number of blacks actually cooperated with white segregationists and worked to undermine the Movement.59

More broadly, it passes over a multitude of critical social and political factors. It ignores the significance of black migrations out of the South, the social and cultural impact of World War II, the NAACP’s methodical campaign that led to Brown v. Board of Education60 and other constitutional victories, and the social and economic hardships that continued to plague black communities in both the North and the South.61 It passes over the role of local and national politics, including the complex and conflicted roles of the Truman, Eisenhower, Kennedy, and Johnson administrations in attempting to address the mounting pressures the Movement generated.62 It overlooks

55. See, e.g., Gary May, Prologue to Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy, at ix (2013) (“This book tells the story of the struggles of ordinary people, many unknown to most Americans, who were, in fact, quite extraordinary. They risked all to obtain a fundamental American right that had been codified in the Constitution’s Fifteenth Amendment, though it was not fulfilled until 1965.”).


58. Civil rights lawyers, both black and white, shouldered many burdens in supporting the Movement, but black lawyers generally faced their own special challenges. See generally Kenneth W. Mack, Representing the Race: The Creation of the Civil Rights Lawyer (2012). See also William B. Rubenstein, Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns, 106 Yale L.J. 1623 (1997).

59. Randall Kennedy, Sellout: The Politics of Racial Betrayal 50–54 (2008); see also Branch, Parting the Waters, supra note 5, at 873–74, 916 (describing the more militant element’s fundamental disagreements with the entire premise underlying the March, which Malcolm later declared should have been called the “Farce on Washington”).

60. 347 U.S. 483 (1954).


the FBI’s disgraceful and unlawful efforts to stifle the civil rights movement and intimidate its leaders,63 and it ignores the extent to which the demands of American foreign policy both encouraged and limited the Movement’s achievements.64 Most broadly, it ignores the other vibrant social and political movements that exploded in the 1960s and affected the campaign for black civil rights,65 and it overlooks completely the pervasive anti-colonialist social and cultural transformations that were sweeping across much of the world in the same decade.66

Finally, a focus on the March and the Speech misses the powerful if immeasurable contributions that generations of black writers and intellectuals made in educating so many white Americans. In particular, I think of the work of Frederick Douglass and W.E.B. DuBois, of Jean Toomer and Richard Wright, and of James Baldwin, Ralph Ellison, Amiri Baraka, and John Hope Franklin.67 They opened our eyes, aroused our sympathies, and deepened our understanding. Their imprints, especially those of *Native Son* and *Invisible Man*, remain with me today.68

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63. “In January 1959, entirely on his own and without officially opening a security investigation, Hoover ordered FBI agents to burglarize the SCLC offices. It was the first of twenty known break-ins between that date and January 1964.” Gentry, supra note 23, at 501; see also Garrow, supra note 45.


68. See Richard Wright, *Native Son* (1940); Ralph Ellison, *Invisible Man* (1952). Consider, for example, the evolution of Garry Wills. He began his career as a determined conservative and gradually shifted toward the Left as he became one of the country’s most prominent independent, and generally liberal, intellectuals. The influence of black activists and writers on his thinking seems apparent in a transitional book he published in 1968. See Garry Wills, *The Second Civil War: Arming for Armageddon* (1968).
2. Contributions of the March and the Speech

Recognizing the long and complex historical context that set the stage, it nonetheless remains true that the March and the Speech made their own distinctive contributions. Together they strengthened the slow but powerful gathering of support for the civil rights movement and, in particular, for the groundbreaking civil rights legislation that would shortly follow.

The March itself had special resonance because it came in the wake of growing violence against civil rights protests across the South.\(^{69}\) Perhaps most pivotal, it came only three months after national television audiences had witnessed shocking and vicious police brutality against hundreds of peaceful civil rights marchers in Birmingham, Alabama.\(^{70}\) Given that prologue, the peaceful and disciplined nature of the March seemed to confirm the innocence and legitimacy of those earlier civil rights marchers and to indict Birmingham and its police for cruel and unjustified violence. Exhibiting the peaceful and nonviolent nature of the Movement and its undeniable goals of justice and equality for all, the March accelerated the swing of public opinion in favor of the Movement and the general cause of civil rights.\(^{71}\)

The Speech did the same, and in the long run far more. King’s role in the civil rights movement, Clayborn Carson, the editor of King’s papers, concluded, was “extraordinary.”\(^{72}\) Initially, he had inspired blacks “to believe that their protests had a moral and spiritual significance and that they were part of a global struggle to resist subordination and injustice.”\(^{73}\) Then, at the March, from the platform in front of the Lincoln Memorial, he did the same thing for the nation.\(^{74}\) King “transformed prosaic,

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69. In a ten-week period in the late spring and early summer of 1963, “statisticians counted 758 racial demonstrations and 14,733 arrests in 186 American cities.” Branch, Parting the Waters, supra note 5, at 825.

70. It was the violence in Birmingham that “changed everything,” according to Harvard historian Michael Klarman. The “percentage of Americans who deemed civil rights to be the nation’s most urgent issue rose from four percent before Birmingham to fifty-two percent afterward. A majority of Americans now favored expansive civil rights legislation.” Klarman, supra note 61, at 436.

71. Opinions vary, but most observers and scholars agree that the March had a considerable impact on general public opinion, but relatively little immediate and direct impact on Congress. See, e.g., Brauer, supra note 5, at 292. Much of the influence of the March may have come from its religious overtones. “Never before had leading representatives of the Catholic, Protestant, and Jewish faiths identified so closely and visibly with black demands.” Fairclough, supra note 6, at 153. David Levering Lewis issued a similar but more pessimistic judgment on the significance of the March. “Hearts were touched; spirits were uplifted. But, like any masterfully produced and thematically provocative spectacle, its intrinsic and durable impact upon those who walked and those who watched was largely, though by no means totally, dissipated against the obdurate mass of prejudice, apathy, and politico-economic stasis in race relations.” Lewis, supra note 12, at 229.


73. Id.

74. The Speech “virtually defined the March on Washington, effectively stamping it as King’s personal platform. The march and the speech enhanced King’s prestige beyond measure.” Fairclough, supra note 6, at 155.
transitory expressions of discontent into inspiring oratory that has endured.”75 “The slow determination of his cadence,” Taylor Branch wrote in his monumental three-volume biography, “exposed all the more clearly the passion that overshadowed the content of the dream.”76 The result was transforming. “[T]he emotional command of his oratory gave King authority to reinterpret the core intuition of democratic justice,” Branch explained. “More than his words, the timbre of his voice projected him across the racial divide and planted him as a new founding father.”77

In retrospect, the March set an unparalleled scene, but King commanded the stage of history. He impressed on the event, and the nation’s conscience, a compelling moral vision that urged Americans to their best, confronting them with their own highest ideals and calling on them to fulfill them. The words he spoke that day still resonate and inspire, and those words ultimately gave that day its paramount and enduring historical significance.

3. High Tide of the Civil Rights Movement

Combined with subsequent events, major and decisive legislative achievements followed the March in short order.78 Kennedy’s support for a new and muscular civil rights act, his shocking assassination only months later, the ascension to the presidency of the savvy and determined Lyndon B. Johnson, and continued civil rights activism across the country—especially the mass protests in Birmingham with their accompanying police violence and television coverage—generated intense political pressure for meaningful congressional action.79 A civil rights bill that seemed to have

75. Carson, supra note 72, at 282.
76. Branch, Parting the Waters supra note 5, at 882.
77. Id. at 887.
little possibility of passage in the spring of 1963 became law in June of 1964,\textsuperscript{80} passing with overwhelming support from House and Senate members outside of the South.\textsuperscript{81} Prohibiting discrimination based on race, sex, color, religion, and national origin, the act expanded the enforcement powers of the federal government, created new remedies for employment discrimination, struck at segregated educational practices and certain restrictions on voting, authorized termination of federal funding for governmental agencies that violated the law, and—in what was regarded as its most controversial and far-reaching provision—ensured equal treatment for all in services held out to the general public: the so-called “public accommodations” provision.\textsuperscript{82}

The next year produced the equally pivotal and even more important Voting Rights Act of 1965.\textsuperscript{83} SNCC’s “Mississippi Freedom Summer” in 1964 drew hundreds of mostly white college students from the North to help register black voters and kept the nation’s attention focused on racial conditions in the South; and, when three of the volunteers—two white and one black—were murdered in Philadelphia, Mississippi, most Americans were stunned and outraged.\textsuperscript{84} A huge Democratic landslide in November made the time seem propitious, and civil rights leaders seized the opportunity to press for further legislation.\textsuperscript{85} A series of protests against voting discrimination in Selma, Alabama highlighted the issue’s critical importance, and once again Southern police officers outraged the nation by responding with unprovoked violence and brutality against peaceful marchers. The combination of events led the Johnson administration and Congress to act once more.


\textsuperscript{84} Civil rights activists in Mississippi, after struggling for years against horrific violence to organize the state, decided to import hundreds of mostly white northern college students for a Freedom Summer of civil rights activity. They understood that bringing “outside agitators” to Mississippi would probably elicit a deadly response, and they calculated that the national media and the Johnson administration would lavish attention on relatively affluent whites from the nation’s most prestigious universities. The strategy worked even more effectively and more tragically than they had anticipated.

\textsuperscript{85} See generally Taylor Branch, \textit{At Canaan’s Edge: America in the King Years, 1965–68} (2006) [hereinafter Branch, Canaan’s Edge].
The Voting Rights Act of 1965, often considered “the single most effective piece of civil rights legislation ever passed by Congress,” was vigorous and comprehensive. It prohibited discrimination in voting, banned various “tests” and other restrictions on the right to vote, barred residency requirements of more than thirty days for voting in presidential elections, allowed special assistance for illiterate and disabled voters, and prohibited efforts to intimidate or harass those who went to the polls. Spurring far more extensive national enforcement efforts, moreover, it authorized federal examiners to supervise voting in certain districts, and it prohibited states and counties with histories of racial discrimination in voting from altering their voting laws without prior federal approval. In the decades following its passage, the act enabled millions of previously disenfranchised Americans, particularly blacks in the South, to vote.

Reflecting the mood of the time, the federal government quickly moved into action. The Justice Department became increasingly effective in using its new powers to protect civil rights, while the Court acted with astonishing immediacy to reject constitutional challenges to both statutes. It took the Court only six months to uphold the 1964 act and only seven months to do the same with the 1965 act. In spite of obstacles, including the continued recalcitrance of some Southern federal judges, by the 1970s the two acts had brought major changes to the South and the nation as a whole.


87. See David J. Garrow, Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965, at 31–132 (1978); May, supra note 55.

88. [T]he most dramatic changes have occurred under the aegis of the VRA—through administrative implementation by state governments and the Department of Justice, dynamic Supreme Court constructions (typically driven by the department’s suggestions), and congressional amendments expanding this law in light of experience and practice. Like the Civil Rights Act of 1964, the VRA is a superstatute because it (1) was responsive to the new shape of America’s pluralism and adopted new principles and new institutional frameworks to assure the franchise for newly significant social groups, (2) was drafted and enacted after a process of publicized institutional deliberation responsive to the voices and needs of We the People, and (3) was accepted by We the People and formally reaffirmed by Congress after a period of implementation and public discussion of the controversial new ideas advanced in the law or its implementation.


89. See Brian K. Landsberg, Enforcing Civil Rights: Race Discrimination and the Department of Justice (1997). There were exceptions, however, and not all agencies of the federal government fell into line. See Pete Daniel, Dispossession: Discrimination Against African American Farmers in the Age of Civil Rights (2013) (discussing certain policies at the U.S. Department of Agriculture that evidenced lingering racism in the bureaucracy).


92. 2 Race, Voting, and Redistricting and the Constitution: Sources and Exploration on the Fifteenth Amendment, Enforcing and Challenging the Voting Rights Act of 1965 (Marsha...
B. Memory

I had the good fortune to be in Washington in early June when the battle to pass the Civil Rights Act of 1964 neared its climax, and I still remember the frenzied scene. For me, the high point came on the day when the Senate voted on the cloture petition that Democratic majority leader Mike Mansfield had at long last filed. Passage of the petition was essential to cut off a Southern filibuster and thereby ensure that the bill—which had already passed the House—could reach the Senate floor for a final vote. The bill unquestionably enjoyed majority support, but it was uncertain whether a cloture petition could command the necessary sixty-seven votes to end the filibuster.93 The South’s desperate final effort to talk the bill to death had lasted fifty-seven days, consumed 534 hours of debate, filled 63,000 pages of the Congressional Record, and spewed out some ten million words.94 Topping the list of the bill’s opponents, Democratic Senator Robert Byrd of West Virginia had spoken for fourteen hours and thirteen minutes before yielding the floor in exhaustion. It was at the time “the longest speech of the longest filibuster in Senate history.”95

I was traveling with a fellow graduate student from England, and we longed above all to see the action in the Senate on the day when the decisive cloture vote was scheduled. We were hardly alone in that goal. The area around the Capitol was packed as civil rights supporters, political observers, and reporters from across the globe joined the ordinary legions of summer tourists jamming sidewalks, halls, and offices. In the hope of somehow getting lucky, I led us to the office of my home-state’s senior senator, Stuart Symington, a liberal Democrat from Missouri who had served as secretary of the Air Force under President Truman. Symington’s outer office was packed with visitors clamoring for attention, and harried staffers were scurrying about their tasks and trying to answer questions and respond to requests. The situation appeared chaotic, and our spirits sagged. Then, scanning the scene and

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93. To weaken the 1960 act “to the point of meaninglessness,” Southern senators had filibustered, and the bill’s supporters could not command the votes necessary to invoke cloture. More striking, civil rights supporters not only failed to pass the cloture petition, but they could not even gather a majority to support it. The vote to end debate produced only forty-two affirmative votes while drawing fifty-three negatives. Caro, Master of the Senate, supra note 62, at 1034.

94. See Caro, Passage of Power, supra note 62, at 568; Taylor Branch, Pillar of Fire: America in the King Years, 1963–65, at 336 & n.7 (1998) [hereinafter Branch, Pillar of Fire]. Over the course of debate, Southern senators introduced 483 amendments and demanded roll-call votes on more than a hundred of them. They succeeded, however, in making only one significant change to the bill: expanding the right of defendants in criminal contempt cases to demand jury trials. Passage of Rights Bill Intact Surprises Congress, N.Y. Times, June 20, 1964.

95. Branch, Pillar of Fire, supra note 94, at 336. There have been a few individual filibusters that lasted longer than Byrd’s, but no extended group filibuster that lasted longer than the one directed against the Civil Rights Act of 1964. See, e.g., Aaron Blake, Where Ted Cruz’s Marathon Speech Stands in History, Wash. Post Blog (Sept. 25, 2013, 12:27 PM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/09/24/where-ted-cruzs-filibuster-stands-in-history/ (ranking Byrd’s as the eighth longest filibuster in Senate history).
desperately trying to figure out our next move, I spotted one of the doors at the back of the office open and, hurrying through it, an old friend from college. “Buffie,” I blurted out, calling loudly and waving frantically to catch her attention. Her name really was “Buffie.” She saw me and immediately came toward us with a welcoming smile. We hugged and exchanged brief greetings, and I hastily introduced my friend and began explaining our plight. Buffie quickly nodded. “Wait right here.” With that, she turned, flew across the outer office and into another room, and shortly reemerged with two pieces of paper in hand. “These are passes to the senators’ private gallery, which is reserved for their special guests,” she told us. “You can stay there today as long as you want.” Astonished and delighted, we thanked her profusely. To this day my English friend never fails to feign awe at the “incredible influence” I wield in the nation’s capital, while we both remain forever grateful to our happily remembered benefactress.

Clutching our two precious passes, we rushed to the Senate chamber where we were promptly ushered into a private section of the gallery. The public galleries were packed with visitors who had to stand in long lines to get in, and their stays were being ruthlessly cut short at regular intervals as guards continuously led one group out and replaced it with another. As we entered, Senator Everett Dirksen of Illinois, the Republican minority leader, was speaking in support of the petition. “We are confronted with a moral issue,” he concluded in his familiar husky and resonant tones. “Today let us not be found wanting in whatever it takes by way of moral and spiritual substance to face up to the issue and to vote cloture.”

Then, by prearranged rule, the Senate proceeded to the business that had finally been scheduled. As my friend and I sat transfixed, the clerk called the roll for a quorum, and the Senate floor began to fill and buzz as all one hundred senators came forward to answer. Twice the acting president ordered the sergeant at arms to clear everyone not privileged to be on the floor during the vote, and then he called the question. It was an extraordinary spectacle—not only were one hundred senators actually present on the floor at one time or another, but most seemed to remain there after voting, milling about and waiting anxiously to learn the petition’s fate. Although its supporters had done their homework and believed that they would be able to

96. 110 Cong. Rec. 13320 (June 10, 1964) (statement of Sen. Dirksen). Dirksen was the last senator to speak on the cloture petition before the vote. The fact that he enjoyed such a featured position was likely the result of advice that President Johnson had given to Democratic Senator Hubert Humphrey, the bill’s floor leader. Johnson was determined to use every means possible to persuade Dirksen to vote for cloture and to use his influence as minority leader to bring most Republicans—essential to reach the necessary sixty-seven votes—along with him. “You and I are going to get Ev,” Johnson had told Humphrey, and he explained how it would be done. “You’ve got to let him have a piece of the action,” he explained. “He’s got to look good all the time.” CARO, PASSAGE OF POWER, supra note 62, at 564. As Robert A. Caro concluded, their “courtship of Dirksen had never stopped.” Id. at 568. Although Johnson played a key role in the bill’s passage, especially in the House, the shrewd and methodical efforts of both Humphrey and Dirksen were essential to its passage in the Senate. See, e.g., Stewart, supra note 80.
muster the necessary sixty-seven votes, growing tension and excitement filled the chamber as the roll call continued and the count slowly mounted. At last came the sixty-seventh vote in favor, cast by Senator John J. Williams, a Republican from Delaware. The bill was going to reach the Senate floor, and it would surely be passed.97 The final tally ended at 71-29, four votes more than was necessary.98 For millions, my friend and I included, the result was exhilaration, a broadly shared feeling of both vindication and joy.99

Besides passage of the petition, the most memorable event of the day for me was the appearance on the floor of Senator Clair Engle, a Democrat from California. Elected to the Senate in the Democratic tide of 1958, Engle had developed a brain tumor that required him to undergo two operations. The result left him partially paralyzed, wheelchair-bound, and unable to speak. By late April of 1964, his hopes of recovery had vanished, and he announced that he was abandoning his planned reelection campaign. Quite vividly I recall the sight of the crowded Senate floor, the drama of the ongoing roll call, and then the emotional impact of seeing a man in a wheelchair—there was no doubt who the slumped figure had to be—pushed onto the Senate floor where he gained recognition from the clerk and cast an inaudible “aye” vote in favor of cloture by feebly lifting his hand and pointing to his eye. After voting, he was quickly wheeled away and, on a minor procedural vote taken only a short time later that day, he did not reappear.100 The exhausting effort he had made to reach the Senate floor for that one decisive cloture vote was apparently all his failing body could manage.

Engle’s implacable determination to be counted on that momentous vote struck me then, as it does now, as symbolizing the passion and conviction that the civil rights movement inspired. Centuries of oppression and abuse had to be remedied, and the cause justly demanded the greatest possible effort. A little more than a month after the vote, Clair Engle died. He was only fifty-two years old.101


98. The final vote on cloture appears at 110 Cong. Rec. 13327 (June 10, 1964). Forty-four Democrats joined twenty-seven Republicans to adopt the petition, while twenty-three Democrats and six Republicans (including the party’s future presidential nominee, Barry Goldwater) voted nay. Caro, Passage of power, supra note 62, at 568.

99. Addressing a related matter shortly after the cloture vote, Democratic Senator Richard Russell of Georgia, the leader of the Southern bloc, protested in words that revealed not only the bitterness and intransigence of the opposition, but also the racial cruelty that marked their rhetoric and attitudes. “Mr. President, we are confronted with the spirit of not only the mob but of a lynch mob in the Senate of the United States.” 110 Cong. Rec. 13329 (June 10, 1964).

100. Id.

IV. FIFTY YEARS LATER

A. The Fading of the Civil Rights Movement

If passage of the Voting Rights Act in 1965 represented the peak of the civil rights movement, the same year also marked the beginning of its decline. While more victories followed in the late 1960s and into the 1970s, the Movement increasingly ran into heavy obstacles, some internal and more external.

Internally, divisions sharpened and momentum began to dissipate. The emergence of a “black power” movement encouraged more radical actions and rhetoric, alienating many supporters, both black and white. Interviewing blacks in several northern cities in 1967, for example, Garry Wills was struck by the new attitudes he found. Marches were out of date and merely “nostalgic,” one black man in Detroit told him. “Don’t you understand?—black people are looking for confrontations.” The next year Wills published his findings under the title of The Second Civil War, a book with the dispiriting subtitle Arming for Armageddon. Two years later, Alexander Bickel—who had been a firm supporter of the Supreme Court’s desegregation decisions—charged that Brown’s ideal of an “egalitarian and assimilationist” school system was becoming “increasingly illusory and myth-ridden.” Many blacks, he had come to believe, were now “more intent on group autonomy than on individual equality.”

Equally important, King further fragmented and blunted the Movement with two critical decisions: First, he decided on moral grounds to oppose the war in Vietnam and broke openly on the issue with President Johnson and much of the Democratic Party. Second, he decided to turn the Movement northward and attack problems of black unemployment and urban poverty. The former decision alienated...
supporters who backed the war or were determined to remain loyal to Johnson, while the latter forced the Movement to confront the morally more ambiguous and practically more complex problems presented by seemingly unshakeable economic interests and deeply entrenched systems of informal social segregation.108

Externally, urban rioting, the war in Vietnam and its steadily mounting costs, and the explosion of other “radical” and divisive social and cultural movements combined to drain the Movement’s support and spur a sharpening white backlash.109 Then came the assassinations. King was murdered in April 1968, and two months later Robert F. Kennedy met the same fate. Those twin blows deprived the Movement of both its most charismatic and compelling leader and the passionate new presidential candidate who had most aroused the hopes of blacks and other civil rights supporters. At the end of the year, the election of Richard M. Nixon marked a turning point, and a subsequent series of crises both domestic and foreign helped push the nation ever politically rightward. Battles over “affirmative action” proved especially disheartening, dividing civil rights supporters and provoking even more determined and bitter opposition from others.110 Although the Court held out for some time, it too eventually succumbed. By the 1980s, Republican presidents had succeeded in placing on the Court a majority of justices who shared—and were willing to

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108. Hannah Arendt was among the commentators who concluded that civil rights activists encountered a stone wall when they shifted their attention to the North and to issues of economic inequality. “Then they collided with the enormous social needs of the city ghettos in the North—and there they came to grief, there they could accomplish nothing.” Arendt, supra note 66, at 70; see also Chicago 1966: Open Housing Marches, Summit Negotiations, and Operation Breadbasket (David J. Garrow ed., 1989); Branch, Canaan’s Edge, supra note 85. But see Mantler, supra note 107 (arguing that King’s “Poor People’s Campaign” led to some successful political consequences).


implement—the party’s post–Nixonian ideological convictions, including its hostility toward civil rights. 111

In spite of setbacks, civil rights groups continued their activities and fought vigorously against the rightward drift. Occasionally they were able to slow its momentum. 112 However, sometime between the late 1960s and the early 1980s, what had been hailed as “The Civil Rights Movement”—the vibrant, aggressive, and galvanizing Movement that the March on Washington and the “I Have a Dream” speech symbolized—lost its momentum and then faded away. 113

B. An Altered America

Today, a half century after the March and the “I Have a Dream” speech, American society and politics look considerably different. Two general observations seem warranted: One is that the nation has made substantial progress in honoring the civil rights of all Americans and in improving its treatment of black Americans. The other is that the progress is limited, and worse, that signs of regression are apparent. 114

Perhaps most centrally, the half century after 1963 witnessed the formation of a new American politics of race and class. Through the 1950s and into the 1960s, racist language, appeals, and actions still remained relatively common. 115 The civil rights movement helped reduce such overt racism and, for the most part, banished explicitly racist language and arguments from the public sphere. Over the decades, political,
social, cultural, and economic changes gradually altered the views of many white Americans. Some embraced the ideal of racial equality, and others at least accepted the ideal’s consequences in the nation’s public practices. Some remained untouched.

The racial prejudices that remained mostly went underground and often melded into other, more general social and political views that offered alternative public grounds for opposing the cause of black civil rights. That melding process was encouraged by the birth in the late 1960s of a new and more subtle political rhetoric that used code words and categories that were not explicitly racial, but that nevertheless carried well-understood racial messages. Embracing a “Southern Strategy,” Nixon attacked the Warren Court by invoking the threat of lawlessness and proclaiming his commitment to “law and order”—themes that played to white fears of black radicalism and criminality. 116 Ronald Reagan, who had opposed both the Civil Rights Act of 1964 and the Voting Rights Act of 1965, sent unmistakable signals to both whites and blacks, stirring racial passions with praise for “states’ rights” and denunciations of “welfare queens.” More baldly, he staged presidential campaign rallies in Philadelphia, Mississippi—unknown to the nation except as the location where three civil rights workers were infamously murdered in 1964—and Stone Mountain, Georgia—a shrine to the Confederacy, a traditional site of Ku Klux Klan rallies, and the symbol of Southern racism that King had specifically invoked in the peroration of his “I Have a Dream” speech. 117 Just as obviously, George H.W. Bush played on racist assumptions and fears in 1988 by using the notorious “Willie Horton” campaign advertisement to imply that his Democratic opponent was freeing convicted black murderers from prison so they could prey on helpless, law-abiding Americans. 118


117. Tova Andrea Wang, The Politics of Voter Suppression: Defending and Expanding Americans’ Right to Vote 53 (2012). In 2004, Roger Wilkins, who had been one of the leaders of the March on Washington and was then a professor of history at George Mason University, summed up perceptions of Reagan’s efforts in an oral interview:

Reagan was an incredible combination of a person who was very optimistic, upbeat, but underneath there were some really ugly parts of his politics. . . . [H]e capitalized on anti-black populism by going to Philadelphia . . . [in] Mississippi, for example, in the beginning of his campaign in 1980. Nobody had ever heard of Philadelphia . . . [in] Mississippi outside of Mississippi, except as the place where three civil rights workers had been lynched—in 1964—he said I believe in states rights. Everybody knew what that meant. He went to Stone Mountain, Georgia, where the Ku Klux Klan used to burn its crosses, and he said Jefferson Davis is a hero of mine.

. . . .

And the impact of that plus his attacks on welfare women, welfare queens in Cadillacs, for example. And his call for cutting the government. He didn’t cut the government; the military bloomed in his time. But programs for poor people . . . diminished entirely and America became a less civilized and less decent place.


Bush’s top political strategist, Lee Atwater, privately acknowledged the evolution of the party’s rhetoric dealing with racial issues, and he explained it in the bluntest of terms:

You start out in 1954 by saying, “Nigger, nigger, nigger.” By 1968 you can’t say “nigger”—that hurts you, backfires. So you say stuff like, uh, “forced busing,” “states’ rights,” and all that stuff, and you’re getting so abstract. Now, you’re talking about cutting taxes, and all these things you’re talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites. . . . “We want to cut this” is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than “Nigger, nigger.”

Atwater’s statement did far more than trace the evolution of Republican rhetoric dealing with race, for it also captured the party’s renewed emphasis on certain kinds of economic policies, especially tax cuts for the wealthy and limitations on federal social programs. “The Reagan Revolution, as I had defined it, required a frontal assault on the American welfare state,” David Stockman, Reagan’s first budget director, explained. “That was the only way to pay for the massive Kemp-Roth tax cut.”

Consistent with the new rhetoric of race and class, those economic policies carried not only economic but also racial significance. As three political scientists concluded in 2002, “[T]he language of government spending and taxation has become racially ‘coded,’ such that its invocation in political appeals primes racial considerations even in the absence of racial imagery.”

The Republican commitment to tax cuts and restrictions on welfare programs encouraged the party’s increasingly fervent embrace of political and economic policies that were consistent with, and could be justified by, sweeping and abstract claims about the benevolent operations of “the market.”

121. Nicholas A. Valentino et al., Cues that Matter: How Political Ads Prime Racial Attitudes During Campaigns, 96 Am. Pol. Sci. Rev. 75, 87 (2002), Accord Thomas Byrne Edsall & Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics (1991). Political scientists have explored whether implicit or explicit racial appeals are more effective in politics, and they have reached conflicting conclusions. Their findings are consistent, however, in showing that race and racial messaging, regardless of their form, remain significant factors in American politics. Compare, e.g., Talia Mendelberg, The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality (2001) (arguing that implicit racial messages are more effective in encouraging racialized politics), with Gregory A. Huber & John S. Lapinski, Testing the Implicit-Explicit Model of Racialized Political Communication, 6 Persp. on Pol. 125 (2008) (challenging the claim that implicit racial messages are more effective than explicit ones).
122. It is essential to note that Republican “market” ideologies are quite different from genuine economic theories of market behavior. The former are sweeping, abstract, absolute, and designed for partisan political purposes. The latter are varied, cautious, limited, and often highly qualified. As opposed to...
were malleable formations used to rationalize and meld a range of partisan interests, beliefs, and values. Although their market ideologies could appeal to voters on a variety of grounds independent of racial motivations and prejudices, they nonetheless in practice brought predictable and well-understood social and racial consequences. Restrictions on federal social programs and deep tax cuts favoring the wealthy worked against tens of millions of ordinary Americans, including millions of whites, but they also worked disproportionately against blacks and other socially disadvantaged minorities. From the perspective of those who truly believed in such market ideologies, those disparate results were simply unintended and incidental consequences of wise economic policy.

Ultimately, Atwater’s statement anticipated the political world of the present where market ideologies shape the debate over the economic issues that dominate public discourse, while racial messages and prejudices remain muted or masked. Republicans proclaim the virtues of an ostensibly “free” market, the necessity of encouraging business and the wealthy with tax breaks and other favorable policies, and the evil consequences that necessarily follow from government economic regulation and social welfare programs. Wealth and success are emblems of virtue and hard work, they believe, while poverty and unemployment are the fault of the poor and unemployed, the result of their own lazy, incompetent, undisciplined, and often immoral behavior. Thus, their market ideologies lead many Republicans to understand economic inequality as benevolent and desirable while convincing them that racial discrimination is insignificant, non-existent, irrelevant, or simply unavoidable. As a result, public policies increasingly favor the wealthy, economic market ideologies, serious economic theories of markets recognize the role and importance of such factors as the social and cultural construction of markets, the sharply bounded scope of “rational” economic behavior, the shaping and limiting impact of existing institutions on market behavior, and the pervasive nature and wide variety of market imperfections and failures that mark the real world. See, e.g., Alan S. Blinder, Hard Heads, Soft Hearts: Tough-Minded Economics for a Just Society (1987); Jacob S. Hacker, The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream (2008) [hereinafter Hacker, Risk Shift]; Albert O. Hirschman, The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph (1977); Paul Krugman, The Great Unraveling: Losing Our Way in the New Century (2003); Joseph E. Stiglitz, The Price of Inequality (2012).

123. The “war on poverty” that raised federal spending prior to the Reagan presidency had originally been designed primarily to assist poor whites—not blacks. James T. Patterson, America’s Struggle Against Poverty, 1900–1980, at 134–35 (1981).


125. For the continued, and likely growing, impact of racial prejudice and resentments in American politics, see infra notes 168–71 and accompanying text.

126. “Constitutional interpretation involves judicial discretion; judicial discretion reflects political ideology; and conservative justices tend, unsurprisingly, to subscribe to the conservative racial ideology of the party that appointed them.” Marcia Coyle, The Roberts Court: The Struggle for the Constitution 46 (2013) (quoting Klarman). “That ideology embraces a narrow, formalist conception
INEQUALITY GROWS STEADILY, AND BLACKS AND OTHER MINORITIES CONTINUE TO COME OUT ON THE SHORT END.\footnote{127}

In the days after the March and the Speech, the Republican Party had overwhelmingly joined the effort to force cloture on the Senate and secure passage of the Civil Rights Act of 1964, and its senators and representatives had generally lined up solidly behind both the 1964 and 1965 Civil Rights Acts. Unlike the civil rights movement, that party had not simply faded away. Rather, it had been methodically reoriented and, in many ways, shifted into reverse.\footnote{128}

C. An Altered Supreme Court

Those market ideologies and the new politics of race and class transformed the Court. As it fell under the domination of an activist and conservative Republican majority, it began reshaping the law and the Constitution in line with the party's ideological convictions. Supporting the interests of business and organized wealth, it increasingly disfavored a variety of other social groups, including workers, consumers, tort victims, environmentalists, antitrust and securities law claimants, and those seeking relief under the civil rights laws.\footnote{129}


\footnote{129. See, e.g., Edward A. Purcell, Jr., From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts, 162 U. Pa. L. Rev. 1731 (2014); see supra sources cited note 111.}
The institutional change started with the election of Nixon in 1968 and his subsequent appointment of four Supreme Court justices. William Rehnquist, serving under Nixon as assistant attorney general in the Office of Legal Counsel, explained the significance of the new president’s declared intention to appoint “strict constructionists” to the federal courts. “A judge who is a ‘strict constructionist’ in constitutional matters,” Rehnquist wrote when advising Nixon on judicial nominations, “will generally not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs.” Rehnquist’s characterization, White House Counsel John Dean noted, represented “a very accurate description of what Nixon wanted” in his judicial appointees.

Rehnquist’s advice aptly captured the administration’s politics and ideological orientation. The concern with “criminal defendants” reflected the new rhetoric of non-racial categories that nonetheless carried racial significance for many Americans, while his reference to “civil rights plaintiffs” was overt in its political implications, though also framed in a formally non-racial category. More revealing was the fact that his statement essentially equated the profoundly different claims of criminal defendants and civil rights plaintiffs. Formal legal arguments based on principles of

130. See, e.g., Simon, supra note 116. “Supreme Court decisions are already reversing all the civil rights legislation. It’s going to be harder for you to prove discrimination. Everything is being turned around.” Feagin & Sikes, supra note 114, at 323.

131. John W. Dean, The Rehnquist Choice: The Untold Story of the Nixon Appointment That Redefined the Supreme Court 16 (2001). Suggesting the political resonance of those formal constitutional labels, James Jackson Kilpatrick, an overt racist dedicated to defending legalized segregation and “states’ rights,” used the contrary phrase “broad constructionists” to refer to those who supported Brown and thereby “obliterated” the constitutional “rights and powers of the States.” Kilpatrick, The Sovereign States, supra note 115, at x.

132. Dean, supra note 131, at 16. In 1971, after Justices Hugo Black and John Marshall Harlan announced their retirements, Nixon considered proposing a nominee who immediately drew sharp criticism from civil rights advocates. Angered by the negative reaction, Nixon told H.R. Haldeman, his White House Chief of Staff, that as a result he was “going to go for a real Right-Winger” on civil rights and “really stick it to the opposition.” Shortly thereafter, Nixon “came up with the idea of nominating [Senator Robert] Byrd of West Virginia” because, among other qualities, “he was a former Ku Klux Klanner” and was “more reactionary than [Governor George] Wallace.” Diary Entry, Oct. 2, 1971, H.R. Haldeman Diaries Collection (on file with the Richard Nixon Presidential Library and Museum, Yorba Linda, California). Nixon later suggested to another aide that he had not meant his statement about Byrd to be taken seriously and that its purpose “was to scare the hell out of the liberals” so that they would be relieved “when we appointed somebody that was not a member of the Ku Klux Klan.” Jill Lapore, The Great Paper Caper, New Yorker, Dec. 1, 2014, at 32, 35. Nixon subsequently nominated Rehnquist himself for a place on the Court, and civil rights supporters attacked Rehnquist sharply for a memo he had written in 1952 as law clerk to Justice Robert Jackson when the Court was considering the issue of school desegregation. Rehnquist’s memo stated that Plessy v. Ferguson “was right and should be reaffirmed.” Id. at 35. When the Senate finally confirmed Rehnquist’s nomination over the opposition, Nixon called the new justice to congratulate him and to urge him to live up to his reputation: “Be as mean and rough as they said you were, Okay?” Id. at 36.

federalism, narrow construction of the Bill of Rights, or constraints on the incorporation doctrine could explain why a "strict constructionist" would disfavor the claims of criminal defendants, but those doctrines should hardly undermine the claims of civil rights plaintiffs. Unlike the former, the latter were acting under federal civil rights statutes and the Fourteenth and Fifteenth Amendments—constitutional provisions that explicitly and directly bound the states. The Court had clearly and firmly upheld those statutes, while the two constitutional amendments properly trumped federalism principles.134 Thus, it was not the Constitution that required either Rehnquist’s equation of the legal rights of criminal defendants with those of civil rights plaintiffs or Nixon’s agreement with that equation. It was politics and the emerging ideology of the Republican Party—the ideology that would come to dominate the Court after Reagan’s election in 1980.

Innumerable cases illustrate the ideological perspective of the conservative justices, but as a symbol of their goals and values, on the fiftieth anniversary of the March and the Speech, one decision towers above the rest. In the golden anniversary year of 2013, the five Republican conservatives on the Court joined to invalidate a critical provision of the Voting Rights Act of 1965, thereby negating one of the civil rights movement’s most valuable and commanding legal achievements.135

Shelby County v. Holder136 involved a challenge to the constitutionality of §§ 4(b) and 5 of the Voting Rights Act of 1965. Section 4(b) established a formula to identify “covered jurisdictions”: states or political subdivisions with a history of using racially discriminatory devices to limit voting. Section 5 established a “preclearance” requirement, providing that no “covered jurisdiction” could change its voting laws without prior approval from the U.S. Attorney General or a special three-judge federal court.137 Shelby County in Alabama, a “covered jurisdiction,” sued to have both provisions declared unconstitutional. The lower courts rejected the challenge, but the five conservative Republicans on the Court reversed.

Relying on the “principle that all States enjoy equal sovereignty,”138 the five-justice majority ruled that Congress could not limit the power of “covered jurisdictions” to regulate voting absent “a coverage formula grounded in current conditions.”139 The

134. See, e.g., cases cited supra notes 90–91. For the indeterminate, plastic, and manipulable nature of constitutional “federalism” and its “principles,” see Purcell, supra note 50.

135. The Court’s decision on the Voting Rights Act of 1965 is merely one decision in a long and continuing line of socially similar decisions. Across a wide range of substantive issues—from arcane matters of jurisdiction and procedure to the construction of federal statutes and the interpretation of the Constitution—the Court under Chief Justices Rehnquist and Roberts has consistently issued decisions reflecting the ideology of the contemporary Republican Party and its hostility to civil rights. Purcell, supra note 129.


137. 133 S. Ct. at 2619–20.

138. Id. at 2618. The majority repeatedly invoked this principle. See id. at 2621–24, 2630.

139. Id. at 2629.
formula Congress used in § 4(b) was based on out-of-date information, they stated, and the legislative record it compiled lacked evidence of “current” racial discrimination in voting. Congress “cannot rely simply on the past.” On that ground, they ruled § 4(b) unconstitutional and suggested implicitly that § 5 might properly deserve the same fate.

_Shelby County_ exemplifies the conservative majority’s ideologically-driven decisionmaking. First, the five conservative justices invalidated the provision even though they acknowledged that “improvements” in eliminating racial discrimination “are in large part because of the Voting Rights Act.” More telling, they also acknowledged that there was a continuing problem and that “voting discrimination still exists.” Indeed, they admitted with surprising candor, “no one doubts that.”

Second, the five conservative justices discounted the substantial “current” evidence that Congress had collected to support the act’s reauthorization. That evidence showed that many states and localities in covered jurisdictions had repeatedly proposed changes in their voting laws, that those changes would likely produce racially discriminatory results, and that it was federal supervision—exercised or merely threatened—that had consistently blocked their efforts. Further, the five justices dismissed out of hand the likelihood—amply supported by the record—that invalidating the act would encourage more efforts by “covered jurisdictions” to enact new voting schemes that would, in practice, be racially discriminatory.

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140. _Id._

141. The majority expressly left open the question of the constitutionality of § 5, _id._ at 2631, but in a sole concurrence, Justice Thomas, who joined the majority opinion, maintained that the opinion’s reasoning meant that § 5 was also unconstitutional and that the majority had merely left that “inevitable conclusion unstated.” _Id._ at 2632 (Thomas, J., concurring).

142. _Id._ at 2619, 2626.

143. Justice Ruth Bader Ginsburg’s dissent, joined by Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor, highlights many of the more salient parts of the record. _Id._ at 2639–44. The majority, Ginsburg noted, “does not even deign to grapple with the legislative record.” _Id._ at 2644.

144. See _id._ at 2639–44 (Ginsburg, J., dissenting). Justice Ginsburg also noted additional evidence of racially discriminatory actions in Alabama, the “covered jurisdiction” at issue in the case. _Id._ at 2646–47.

145. The majority dismissed this “deterrent” argument on the ground that it would make the challenged provision “effectively immune from scrutiny.” _Id._ at 2627. In doing so, the five conservative justices ignored the evidence in the record showing that “covered jurisdictions” had repeatedly attempted to enact discriminatory voting laws and had been consistently blocked by the statute’s pre-clearance provision. _Id._ at 2639–40 (Ginsburg, J., dissenting). Attempting to check the innumerable kinds of devices that could be used to suppress voting “resembled battling the Hydra,” Justice Ginsburg noted in dissent. “Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place.” Over the years, the Court had “repeatedly encountered the remarkable variety and persistence of laws disenfranchising minority citizens.” _Id._ at 2633 (internal quotation marks omitted) (Ginsburg, J., dissenting). Ginsburg’s Hydra image was entirely apt. In 2014, for example, a local election board in North Carolina—previously a covered jurisdiction and currently a potential swing state of immense importance in national elections—proposed to consolidate five heavily black voting precincts into two, a change that would make voting more inconvenient for many black voters. “We know,” declared the president of the local NAACP chapter, “that this is part of a bigger trend—a movement to suppress people’s right to vote.” Richard Fausset, _Mistrust in North Carolina Over Plan to Reduce Precincts_, _N.Y. Times_, July 8, 2014, at A9.
Third, to justify both discounting the evidence in the record and requiring that Congress produce more “current” evidence, the five conservatives had to come up with some relatively demanding constitutional standard by which to void the provision. Though they cited precedents that called for the application of a “rational basis” test, and at times spoke as though they were applying such a test, they did not do so—and for good reason. Under a fairly applied rational basis test, both sections of the Voting Rights Act were unquestionably constitutional. Instead, without identifying exactly what they were doing, they invoked language from the Court’s four-year-old decision in *Northwest Austin Municipal Utility District No. One v. Holder*—a decision that turned on statutory construction rather than the Constitution—and ruled that the act’s coverage formula was void because it was not “sufficiently related” to the voting problems it targeted.

That “sufficiently related” test was not only novel as a matter of the constitutional law of voting rights, but it was also inherently amorphous and readily manipulable.

146. 133 S. Ct. at 2625, 2628–30.
147. *Id.* at 2637–39 (Ginsburg, J., dissenting).
148. 557 U.S. 193 (2009). In *Northwest Austin*, a utility district in Texas sued to avoid the “preclearance” provision of the Voting Rights Act, presenting a statutory claim for avoidance and also challenging the provision’s constitutionality. The Court ruled in the district’s favor on its statutory claim and avoided a decision on the constitutional issue. Nonetheless, it prefaced its statutory decision with dicta about the constitutional issue. Praising the act’s “historic accomplishments,” *id.* at 201, and declaring that “improvements” in voting rights stand “as a monument” to the act’s “success,” *id.* at 202, the Court declared that the preclearance provision imposed “federalism costs,” *id.*, intruded into areas of state authority, and violated the principle of the “equal sovereignty” of the states, *id.* at 203. The provision, it continued, “imposes current burdens and must be justified by current needs.” *Id.* Then it offered its standard of review, declaring that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” *Id.* Avoiding the constitutional issue, it did not apply the sufficiently related standard in *Northwest Austin*.

149. 133 S. Ct. at 2630 (quoting *Nw. Austin*, 557 U.S. at 203).
150. The phrase was novel in terms of voting rights jurisprudence, though it had occasionally been used in other contexts. Revealingly, in 1981 a four-justice conservative plurality (then, Justice Rehnquist writing for Chief Justice Warren E. Burger and Justices Potter Stewart and Lewis F. Powell, Jr.) had used the phrase to uphold a state statute challenged on gender-discrimination grounds. Michael M. v. Super. Ct. of Sonoma Cnty., 450 U.S. 464, 473 (1981). There, the four conservatives used the phrase “sufficiently related” to create a lower and less demanding standard than the “intermediate scrutiny” standard (requiring that means and ends be substantially related) the Court had previously applied to gender-discrimination claims in *Craig v. Boren*, 429 U.S. 190, 197 (1976). Indeed, Rehnquist stated explicitly that the sufficiently related standard required “great deference” to the legislature. Michael M., 450 U.S. at 470. Thus, in *Michael M.*, four conservatives used the “sufficiently related” phrase to avoid precedent in order to apply a less demanding and highly deferential standard that allowed them to uphold the statute at issue and thereby deny a discrimination claim. In *Shelby County*, the five conservatives also used that same phrase to avoid precedent, but this time they did so in order to apply a more demanding and minimally deferential standard that allowed them to invalidate the statute at issue and thereby negate a legislative safeguard against discrimination. Thus, the sufficiently related test was amorphous and indeterminate, and justices could deploy it flexibly to either uphold or invalidate challenged legislative enactments. In the two cases, of course, the consistency came only in the result: Conservative justices used the test in both cases to defeat the cause of civil rights and the goals of anti-discrimination law. For a similar result-oriented use of the same accordion-like phrase, “sufficiently related,” see infra note 156.
Indeed, it appeared to be a vaguer version of the “congruence and proportionality” test that the Court had established in City of Boerne v. Flores to limit the power of Congress under the Fourteenth Amendment. In Northwest Austin, the party challenging the Voting Rights Act had urged the Court to adopt Boerne’s more demanding congruence and proportionality test instead of a rational basis test. In that case, however, the Court refused to do so. Instead, it finessed the issue by employing fresh words to characterize a new constitutional standard. The proper test, Northwest Austin announced, was whether a statutory provision was sufficiently related to the problem it sought to remedy.

Northwest Austin’s sufficiently related test was the constitutional standard the five conservatives in Shelby County claimed to apply. Their selection and use of that test suggest three critical conclusions. First, the sufficiently related test is, in effect, another form of Boerne’s congruence and proportionality test. Compared to the rational basis test, both demand some uncertain and unspecified amount of legislative fact-finding to justify statutory mandates and some kind of relatively close, but indeterminate and elastic, fit between statutory means and ends. Second, the five conservatives were compelled to use those new words to describe the higher standard they proclaimed in Shelby County because Justice Antonin Scalia, who provided the essential fifth vote to invalidate the challenged provision, had previously and quite bluntly rejected by name the congruence and proportionality test. Thus, in order to

152. The Court used the Boerne test to limit Congress’s enforcement power under § 5 of the Fourteenth Amendment in private suits for damages brought against states and state agencies. The conservative majority had previously deployed it to limit other civil rights laws. See, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Bd. of Trs. v. Garrett, 531 U.S. 356 (2001).
153. 557 U.S. at 204.
154. 133 S. Ct. at 2630.
155. The congruence and proportionality test requires “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” Boerne, 521 U.S. at 520. The sufficiently related test “requires an Act’s ‘disparate geographic coverage’ to be ‘sufficiently related’ to its targeted problems.” Shelby Cnty., 133 S. Ct. at 2630 (quoting Nw. Austin, 557 U.S. at 203). To meet their requirements, both tests impose evidentiary burdens of a qualitatively and quantitatively uncertain nature on Congress, and both consequently allow ample leeway for highly disparate and subjective applications. Further, as Justice Scalia pointed out in rejecting the congruence and proportionality test, the sufficiently related test “has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.” Tennessee v. Lane, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting). See infra text accompanying notes 156–57 and examples supra note 150.
156. Justice Scalia had previously employed the phrase “sufficiently related” in one of his most dubiously reasoned opinions. Boyle v. United Techs. Corp., 487 U.S. 500, 505 (1988) (Scalia, J.). There, in a tort action against a product manufacturer brought by the father of a deceased soldier, Scalia used the indeterminate scope of the phrase to stretch for a connection between the tort claim at issue and a state law involving privity of contract—a law the state had apparently abandoned twenty-eight years previously—in order to help justify his use of a contract precedent to support a tort law ruling. The only actual connection in the case between the tort claim and any contract was the fact that the claim arose from an injury allegedly caused by the defective design of a product made for the United States pursuant to the government’s contract with the product manufacturer. The government was not a party to the suit, and its contract was not at issue in any way. In Boyle, the stretch helped justify the creation of a new
enable Scalia to join the majority opinion, the conservatives had to employ some alternative formulation to characterize their new and more demanding test. “Sufficiently related” would serve.

Third, and most important, Scalia had rejected the congruence and proportionality test because he believed that it was unavoidably subjective and constitutionally unfounded. That test, Scalia had declared, “like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.” Indeed, Scalia indicted the congruence and proportionality test on grounds that the five were compelled to ignore because those grounds equally indicted their sufficiently related test.

As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test (“congruence and proportionality”) that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.

Scalia’s analysis of the congruence and proportionality test applied equally to Shelby County’s amorphous and essentially ad hoc sufficiently related test, and that analysis identified precisely why the decision in Shelby County flowed not from the Constitution but from the “policy-driven decisionmaking” of the five conservative justices.

Finally, revealing Shelby County’s ideological roots even more starkly, the five chose to justify their higher sufficiently related standard—and ultimately their whole decision—by invoking “the principle that all States enjoy equal sovereignty.” In selecting and applying that principle, they made two free and logically unforced choices that made it clear that their decision was not compelled by law, the Constitution, or even by the very principle they invoked.

federal common law rule that barred plaintiff’s tort claim and deprived him of his $725,000 recovery.

Id. If the tort claim in Boyle was sufficiently related to the government’s contract, then the coverage formula in the Voting Rights Act could surely have been found to be sufficiently related to the problem the act targeted.

157. Lane, 541 U.S. at 554, 557 (Scalia, J., dissenting).

158. Id. at 558 (Scalia, J., dissenting). The year before Shelby County came down, Justice Scalia reiterated his denunciation of the congruence and proportionality test, insisting again that it “makes no sense” because “that flabby test is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.” (quoting his dissent in Lane, 541 U.S. at 557–58). Coleman v. Court of Appeals, 132 S. Ct. 1327, 1338 (2012) (Scalia, J., concurring in the judgment).

159. 133 S. Ct. at 2618. The majority repeatedly invoked this principle. See id. at 2621–24, 2630. For support, it again relied on Northwest Austin, 557 U.S. at 206–11. There, deciding the case on statutory rather than constitutional grounds, Chief Justice Roberts inserted language about state equality and possible constitutional problems with the Voting Rights Act. In Shelby County he deployed that language. The Court’s liberals, apparently not anticipating the ways in which the conservatives would use the language, had joined Roberts’s opinion, a fact that Roberts emphasized in Shelby County. 133 S. Ct. at 2621, 2630. Justice Ginsburg responded tartly to his comments, noting that recognizing in Northwest Austin “the existence of ‘serious constitutional questions’ does not suggest how those questions should be answered.” Id. at 2637 n.3 (Ginsburg, J., dissenting).
First, in applying the principle of state equality, they chose to stretch it far beyond its previous applications. The Court’s relevant precedents required the equal treatment of states only when they were admitted to the Union, not when the federal government acted subsequently to regulate actions taking place within their borders. Thus, the principle as previously applied did not reach the facts of Shelby County, and only the majority’s discretionary choice to extend it more widely made it relevant.

Second, and more fundamental, the conservatives never explained why they chose to rest on the principle of state equality in the first place. Even as stretched, that principle conflicted sharply with another constitutional principle that was—in a case involving both potential racial discrimination and the fundamental right to vote—of comparable, if not far greater, weight: The principle that all citizens have an equal right to vote and that governments have a duty to protect that equal right. Those two conflicting principles presented a choice between a principle that could be used to void the statute and a principle that could be used to uphold it. The choice the five conservative justices made was a free one, unforced by law, logic, principle, or the Constitution. They chose the former, and their choice evidenced, on yet another ground, that their decision was driven by an ideological imperative.

Consistent with its inspiration, Shelby County may have far-reaching and damaging consequences for the cause of civil rights and, indeed, for the future of the nation’s electoral democracy. As everyone familiar with recent political developments is

160. The Court acknowledged that its precedents—at least before Roberts’s seed dicta in Northwest Austin—established only a narrow principle of state equality. “Coyle v. Smith concerned the admission of new States, and South Carolina v. Katzenbach rejected the notion that the principle [of state equality] operated as a bar on differential treatment outside that context.” 133 S. Ct. at 2623–24. Justice Ginsburg made the same point in her dissent. Id. at 2649 (Ginsburg, J., dissenting).

161. Indeed, even assuming that some principle of state equality was applicable to the case, the majority never explained why that principle required the subjective and amorphous sufficiently related standard of review, why it did not require the Court to defer to the substantial findings that Congress had made, and why on the facts of the case it authorized the Court to trump the constitutional principles that called for the contrary result.

162. “Nowhere in today’s opinion, or in Northwest Austin,” Justice Ginsburg noted, “is there clear recognition of the transformative effect the Fifteenth Amendment aimed to achieve.” 133 S. Ct. at 2637 (Ginsburg, J., dissenting). To the same effect, the majority ignored the principle that the right to vote is “fundamental” and that restrictions on that right should accordingly be judged under a “strict scrutiny” standard. Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966).

163. The immediate result of the decision means that those denied the franchise have no remedy except the exceptionally costly, burdensome, and largely ineffective option of litigation. As Justice Ginsburg pointed out, “litigation places a heavy financial burden on minority voters,” and in any event comes “only after the fact, when the illegal voting scheme has already been put in place.” 133 S. Ct. at 2640 (Ginsburg, J., dissenting). More importantly, as a matter of current politics, the significance of Shelby County lies in what is unquestionably “current.” The majority’s decision emphasized that Congress could enact a new version of § 4(b) by developing and providing evidentiary support for a new and “current” formula to identify “covered jurisdictions.” 133 S. Ct. at 2631. Not surprisingly, the lawyers who represented Shelby County pointed contentedly to the same option. “It’s now Congress’s move,” they wrote. Consovoy & McCarthy, supra note 136, at 31, 33. As a “current” matter, however, that option seems a nullity, for it ignores the fact that Republicans control the House, will likely continue to do so under the laws they have passed gerrymandering state and federal legislative districts, and will almost certainly refuse to act in a way that will provide effective protection for eligible voters. Indeed, the
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aware, for more than a decade Republicans have been making increasingly widespread and energetic efforts to suppress voting among social and economic groups that tend to vote Democratic, especially blacks and other disadvantaged minorities. Shelby County not only freed “covered jurisdictions” to join that campaign, but also encouraged Republicans in other states to redouble their efforts to do the same.

current political context gives the Republicans something close to a “lock-in” power to block such remedial legislation through control of the House, gerrymandered state and federal legislative districts, voter suppression laws, unlimited campaign funds, and backing from the Court’s conservative majority.

Shortly before Shelby County came down, for example, three books—among many other studies that were available at the time—made clear what was at stake. “All across the country following the 2010 midterm Republican legislatures passed and governors enacted a series of laws designed to make voting more difficult for Obama’s constituency—minorities, especially the growing Hispanic community; the poor; students; and the elderly or handicapped.” May, supra note 55, at 241. When in control of the federal government and some states, especially in the South, a second study found, Republicans had used a variety of methods to make it more difficult for black politicians to run for office, win, or enjoy successful careers. Under Reagan and the first George Bush, for example, “black elected officials were five times more likely than their white counterparts to be investigated by the DOJ” for “official corruption.” George Derek Musgrove, Rumor, Repression, and Racial Politics: How the Harassment of Black Elected Officials Shaped Post-Civil Rights America 5 (2012). The late twentieth century witnessed the formation of “a new racial terrain on which historical actors continue to employ repression and the politics of race in their struggles for power.” Id. at 9. The third book surveyed the history of voter suppression efforts and dealt at length with recent Republican tactics. “Overall,” it declared, “as has been the case over the last five decades, it was Republicans who predominantly engaged in vote suppression tactics through manipulation of the laws and procedures.” Wang, supra note 117, at 94.


In a surprisingly overt opinion five years earlier, Justice Scalia, joined by Justices Thomas and Alito, proposed an approach that provided ample leeway for—and seemed to encourage—those who sought to enact such restrictive voting laws. Concurring in the Court’s judgment upholding an Indiana law requiring voters to have a government-issued photo ID, Scalia denied the legal relevance of burdens on voting that were “merely inconvenient” and declared that there was no valid legal objection to voting restrictions merely because they had particularly burdensome “individual impacts” on voters. “Indeed,” he declared sweepingly in words that seemed to promise a blind eye to cleverly crafted voter restriction efforts, “it may even be the case that some laws already on the books are especially burdensome for some voters.” Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204–05, 208 (2008) (Scalia, J., concurring in the judgment). Further, he seemed to suggest that “general” laws that, as a practical matter, had a disproportionate impact on some social groups could not be found unconstitutional. The Court’s “precedents refute the view that individual impacts are relevant to determining the severity of the
“State officials across the South,” The New York Times reported a month after Shelby County came down, “are aggressively moving ahead with new laws requiring voters to show photo identification at the polls after the Supreme Court decision striking down a portion of the Voting Rights Act.”

When the Court decided Shelby County, the public record concerning those voter suppression laws was already well established. In ten states that required voters to show government-issued photo identification, for example, a study issued the year before Shelby County found that approximately eleven percent of eligible voters lacked such IDs. Those eligible voters included approximately 500,000 Hispanics, 1.2 million blacks, and more than a million individuals who fall below the federal poverty line. For pressing reasons of time, money, distance, and convenience, the study pointed out, many of those eligible voters would likely be unable to obtain the required ID and, hence, would be barred from the polls. Another study found that Republicans had pushed voter suppression laws “more aggressively in states with more minority voters” and that their “recent wave of restrictive-access legislation is rooted in long-standing racial and classist motivations revived for modern deployment.” Those “recent restrictive voter-access policies introduce still more hurdles to those that already exist for minorities and lower-income citizens.”

Such voter suppression laws—like post-Nixonian Republican political rhetoric—avoid overt racial references or categories and frame their restrictions in formally neutral and general terms. They achieve their desired de facto results by exploiting two practical considerations: first, that various identifiable voter groups have different social resources and characteristics; and, second, that as a consequence, restrictive laws will likely have disparate impacts on those different groups. Those considerations

168. See supra, notes 159–60 and the sources cited at footnotes 89–91 in Edward A. Purcell, Jr., Paradoxes of Court-Centered Legal History: Some Values of Historical Understanding for A Practical Legal Education, 64 J. Legal Educ. 229 (2014). Republicans sought to justify the need for such laws by promoting the threat of voter fraud, a problem for which there was virtually no evidence. See, e.g., Hasen, supra note 165.
170. Keith G. Bentele & Erin E. O’Brien, Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies, 11 Persp. on Pol. 1088, 1106 (2013). “[G]iven the internal dynamics of the GOP and the current political landscape facing that party, we expect the incentives to engage in suppression and other electoral manipulations to remain heightened and to pose a continuing and significant threat to full electoral participation in the years to come.” Id.
mean that, in practice, such voter restrictions are likely to disproportionately burden blacks, other minorities groups, the elderly, the disabled, and the poor—all social groups that tend to vote Democratic. A study of a restrictive Pennsylvania voter ID law enacted in 2012, for example, found that "voters from predominately black districts" were "eighty-five percent more likely to be disenfranchised by the new law" than other voters. Openly acknowledging the law’s purpose, the Republican majority leader of the Pennsylvania House stated that his state’s new voter ID law “is gonna [sic] allow [Republican] Governor Romney to win the state of Pennsylvania” in the coming presidential election. Two years later, on the basis of elaborate and detailed findings made after extensive evidentiary hearings, federal courts in Wisconsin and Texas found that state laws requiring special voter IDs placed disproportionate practical burdens on the right of minorities and the poor to vote. Both courts declared the laws unconstitutional and enjoined their enforcement.

Moreover, beyond showing Republican efforts to suppress black and minority voting, mounting evidence also suggests that active racial prejudices and white racial resentments continue to exert a heavy influence on American politics. Racial discrimination and disparities still exist widely across American society, and


evidence from a variety of sources demonstrates the sharp and perhaps growing impact of racial prejudice against blacks and particularly against President Barack Obama.177 The evidence further shows that those racial prejudices and white racial resentments are driving both voting behavior and judgments on substantive policy issues.178

That mass of evidence highlights not only Shelby County’s likely political impact but also the callous irony of its insistence on the need for “current” data. In fact, current data in a multitude of forms readily demonstrates that racial prejudices are shaping political views, that voter suppression laws are increasingly endangering the right to vote, and that those laws are likely to substantially and disproportionately burden blacks, minorities, and other disadvantaged social groups. Together with the record Congress assembled, such “current” evidence demonstrates—under any conceivably legitimate constitutional standard—the validity of the challenged provision of the Voting Rights Act and cries out for its continued necessity.

V. CONCLUSION

Shelby County was a blow to those who continue to share King’s dream. It was a significant step backwards in American politics and an unjustified step backwards in constitutional jurisprudence. It dredged up memories of earlier social conditions in


America, of hard-earned progress subsequently achieved, and of the galvanizing values that inspired the March and found their voice in the Speech. Most acutely, it brought back memories of the exhilaration that came with passage of the great Civil Rights Acts of 1964 and 1965. Those memories and those values suggest that, although Shelby County turned its back on the cause of equal voting rights, it will ultimately prove—as the better angels of our nature rise once again—a more serious and more enduring blow to the reputation of the Roberts Court. The opinion of the five conservative justices stands, and will continue to stand, as a towering monument to the ideological roots of their constitutional jurisprudence.

“It gets discouraging sometimes,”179 King acknowledged shortly before his assassination. War, urban poverty, white intransigence, and divisive internal conflicts all pressed on him with ever more staggering weight. His hopes were chastened, but his faith remained firm. “The dream may not be fulfilled,” he declared, “but it’s just good that you have a desire to bring it into reality. It’s well that it’s in thine heart.”180

Reflecting on the half century that followed the March and the “I Have a Dream” speech, it seems clear that we as a nation have both advanced and backtracked—succeeded and fallen away. Despite everything, however, the dream of justice and equality for all remains firmly rooted in our national ideals and in the true meaning and purpose of our fundamental law. The March and the Speech have helped preserve that dream in our hearts, as King so fervently hoped, and they will continue to inspire ever-reviving efforts in the future once again to move that dream closer to reality.

179. King, Autobiography supra note 30, at 357.
180. Id.