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## Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina after the Civil War

W. Lewis Burke

*University of South Carolina School of Law*

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Burke: Killing, Cheating, Legislating, and Lying: A History of Voting Ri  
**KILLING, CHEATING, LEGISLATING, AND LYING:**  
**A HISTORY OF VOTING RIGHTS IN SOUTH CAROLINA**  
**AFTER THE CIVIL WAR**

W. LEWIS BURKE\*

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I. INTRODUCTION

As the extension of the 1965 Voting Rights Act comes up for consideration by Congress,<sup>1</sup> it seems an appropriate time to examine the history of voting rights in South Carolina. In 1986, Laughlin McDonald wrote a law review article on that subject entitled “An Aristocracy of Voters: The Disfranchisement of Blacks in

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\* Professor of Law, University of South Carolina School of Law. B.A., Mississippi State University; J.D., University of South Carolina School of Law. While a number of people deserve credit for helping research this paper, no one should be thanked more than my colleague Dr. Michael Mounter of the University of South Carolina School of Law Library for his tireless research and guidance. I also must express my great appreciation to Professor Josie Brown for organizing the Law School’s symposium on voting rights. I also want to thank Professor Danielle Holley-Walker, Terrye Conroy, Karen Taylor, Jack Cohoon, and Amanda Barnhart for their assistance. As always, I must thank Anne Burke for her editing and patience. Finally, thanks to Matthew J. Perry, Armand Derfner, Laughlin McDonald, and Chris Coates for making voting rights a reality in South Carolina.

1. The “temporary” provisions of the Voting Rights Act of 1965 that are up for renewal are known as the preclearance provisions (Sections 4 and 5), the federal observer and examiner provisions (Sections 6–9), and the language assistance provisions (Sections 203–204(f)(4)). See 42 U.S.C.A. §§ 1973a, 1973b–f, 1973k, 1973aa-1a (2003).

South Carolina.”<sup>2</sup> He chose his title because South Carolina was founded as an aristocracy and not as a democracy. After the American Revolution, South Carolina limited the right to vote to white men who owned property or paid fifty pounds in taxes.<sup>3</sup> Although some may disagree, there is evidence to suggest that “aristocratic” tradition continues today.<sup>4</sup> Recent examples of disputes over black citizens’ voting rights exemplify why South Carolina has historically been singled out for coverage by the 1965 Voting Rights Act. For example, certain white partisans in the presidential election of 2004 directed efforts to prevent or intimidate black college students from voting.<sup>5</sup> In 2003, the United States District Court for the District of South Carolina found the at-large system for electing the Charleston County Council violated the Voting Rights Act, citing the history of discrimination against black voters as one of the primary reasons for its decision.<sup>6</sup>

The original, aristocratic mindset of South Carolina’s founders that denied the right to vote to all but white men of “means” was also a mindset that believed in slavery. When blacks were slaves, they posed no threat to upper-class voting rights. After the Civil War, however, black enfranchisement suddenly threatened aristocratic hegemony and the “genteel” way of life. In the second half of the nineteenth century, the means whites employed to deny blacks the right to vote were the very antithesis of gentility. Killing, cheating, legislating, and lying were all used to prevent African Americans from exercising their right to cast a ballot.

However, the story of white resistance to African American empowerment does have a counter-narrative. That narrative is of black citizens and their never-ending struggle to gain both the right to vote and the resulting influence that accompanies the franchise. Soon after the Civil War, blacks in South Carolina began to claim their right of citizenship. Since 1865, they have persisted in attempting to vote, run for office, and litigate in all available venues to defy the killing, cheating, legislating, and lying. Whites’ consistent opposition for 140 years to that persistence is truly sad and shameful. This Article will explore that battle in South Carolina.

## II. RECONSTRUCTION

On September 27, 1865, soon after the Civil War had ended, a convention of delegates consisting wholly of white men gathered in Columbia and promulgated

2. Laughlin McDonald, *An Aristocracy of Voters: The Disfranchisement of Blacks in South Carolina*, 37 S.C. L. REV. 557 (1986).

3. The restrictions were placed on the right to vote beginning in 1704 and were not modified until after the Revolution. See Act No. 227, 2 S.C. Acts 249 (1704); Act No. 373, 3 S.C. Acts 2 (1717); Act No. 1147, 4 S.C. Acts 510 (1782).

4. An editorial in the Columbia newspaper, *The State*, criticized the South Carolina Republican Party for engaging in “intimidation” and “anti-democratic tactics” to prevent black citizens from voting. Editorial, *Let Us Celebrate, And Learn From, High Voter Turnout*, THE STATE (Columbia, S.C.), Nov. 4, 2004, at A16.

5. John C. Drake, *Benedict Students Face GOP Challengers*, THE STATE (Columbia, S.C.), Nov. 4, 2004, at B5.

6. *United States v. Charleston County*, 316 F. Supp. 2d 268, 271, 306–07 (D.S.C. 2003).

a new state constitution.<sup>7</sup> The provisional governor Benjamin F. Perry, appointed by President Andrew Johnson to lead the state back into the Union, called the convention.<sup>8</sup> Perry knew that to comply with the President's plan of Reconstruction, the convention was "required" to declare secession "null and void" and adopt a constitution that recognized the abolition of slavery.<sup>9</sup> Though the convention refused to declare the articles of secession null and void, it did agree to repeal them; likewise, the convention only grudgingly abolished slavery.<sup>10</sup> Historian Walter Edgar described the wording of the abolition clause as an "omen."<sup>11</sup> With some dissenting votes, the convention acknowledged that "United States authorities" had emancipated the slaves.<sup>12</sup> The supposed purpose of the new constitution was to gain approval for the state's congressional delegation to return to the United States Congress.<sup>13</sup> However, in its defiantly racist mindset, the convention adopted a new constitution that only allowed free white men twenty-one years and older who satisfied certain residency requirements to vote or hold elective office.<sup>14</sup> Black citizens of South Carolina voiced their opposition to this new constitution in late November 1865 at the Colored People's Convention in Charleston, passing a resolution in which they rejected the restriction on suffrage and any other discrimination based on color.<sup>15</sup> The all-white legislature ignored the call for equality and instead enacted what came to be known as the Black Codes.<sup>16</sup> Thus, although the new 1865 South Carolina Constitution acknowledged the abolishment of slavery,<sup>17</sup> the Black Codes, which were modeled after the old Slave Codes, resulted in a virtual re-enslavement of African Americans.<sup>18</sup> Over the next

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7. WALTER EDGAR, *SOUTH CAROLINA: A HISTORY* 383 (1998).

8. *Id.*

9. *Id.*

10. JOURNAL OF THE CONVENTION OF THE PEOPLE OF SOUTH CAROLINA 27–29 (1865) [hereinafter JOURNAL OF THE CONVENTION].

11. EDGAR, *supra* note 7, at 383.

12. JOURNAL OF THE CONVENTION, *supra* note 10, at 64; EDGAR, *supra* note 7, at 383; JOEL WILLIAMSON, *AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861–1877*, at 72 (1965).

13. See WILLIAMSON, *supra* note 12, at 72.

14. S.C. CONST. of 1865, art. IV, *reprinted in* JOURNAL OF THE CONVENTION, *supra* note 10, at 148.

15. RESOLUTION OF NOVEMBER 24, 1865, COLORED PEOPLE'S CONVENTION OF THE STATE OF SOUTH CAROLINA, HELD IN ZION CHURCH, CHARLESTON, NOVEMBER 1865, *reprinted in* 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865, at 297 (Philip S. Foner & George E. Walker eds., 1979).

16. Act Nos. 4730–33, 13 S.C. Acts 245–85 (1865). These codes regulated all aspects of African Americans' lives in the state down to minute detail. For example, the codes regulated their "domestic relations" and specifically said such persons were "not entitled to social and political equality." *Id.* at 245. They prohibited those who worked on a white man's farm from selling any farm product without written permission. *Id.* at 249. They prohibited blacks from owning firearms without written judicial permission. *Id.* at 250. They established a separate court system for their grievances. *Id.* at 255–56. And in the greatest of detail, the codes regulated African Americans' right to work. *Id.* at 274–81.

17. S.C. CONST. of 1865, art. IX, § 11, *reprinted in* JOURNAL OF THE CONVENTION, *supra* note 10, at 151.

18. See WILLIAMSON, *supra* note 12, at 72–77.

three years, both the federal and state governments wrangled over the civil rights of black South Carolinians.<sup>19</sup>

General Daniel Sickles, the federal military commander of South Carolina, issued an order on January 1, 1866 that abrogated the Black Codes.<sup>20</sup> On June 13, 1866, the United States Congress proposed the Fourteenth Amendment to the United States Constitution.<sup>21</sup> On September 21, 1866, the South Carolina legislature, in a half-hearted attempt to appease federal authority, passed an act that granted some civil rights to African Americans—the right to vote was not one of them.<sup>22</sup> Congress realized that “no legal State governments or adequate protection for life or property” existed in South Carolina.<sup>23</sup> On March 2, 1867, in order to establish “peace and good order” in South Carolina as well as other Southern states, Congress passed “An Act to provide for the more efficient Government of the Rebel States” that divided the states into military districts.<sup>24</sup> North Carolina and South Carolina together were the second military district.<sup>25</sup> The Act set requirements that the “Rebel States” would have to comply with to be “declared entitled to representation in Congress.”<sup>26</sup> The “Rebel States,” South Carolina included, had to form constitutions

in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said state, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election.<sup>27</sup>

Also, a majority of the state’s registered voters had to ratify the new state Constitution, and Congress had to approve it.<sup>28</sup> Finally, the states had to adopt the Fourteenth Amendment to the Constitution.<sup>29</sup>

19. See Act No. \*4798, 13 S.C. Acts 36629 (1866); D. E. Sickles, Headquarters, Dept. of South Carolina, *General Orders, No. 1, January 1, 1866*, CHARLESTON DAILY COURIER, January 23, 1866, at 2.

20. Sickles, *supra* note 19, at 2.

21. Joint Resolution Proposing an Amendment to the Constitution of the United States, 114 Stat. 358, 358–59 (1866).

22. Act No. \*4798, 13 S.C. Acts 36629 (1866).

23. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, 428 (1867).

24. *Id.*

25. *Id.*

26. *Id.* at 429.

27. *Id.*

28. *Id.*

29. An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, 429 (1867). Acts supplementary to the former act [or Supplemental Acts] were passed on March 23 and July 19, 1867. See Act of March 23, 1867, ch. 6, 15 Stat. 2, 2–4; Act of July 19, 1867, ch. 6, 15 Stat. 13, 14–15.

Under this mandate, over 123,000 people registered to vote in the election held to approve or disapprove the call for a constitutional convention.<sup>30</sup> This number included 80,000 African Americans who registered to vote for the first time in the history of the state, which meant that a majority of potential voters were black.<sup>31</sup> Apparently recognizing that the black majority would approve the call for a convention, whites decided to boycott the election in hopes that the black vote would be too low to constitute the "majority of those registered" as required by Congress.<sup>32</sup> However, on November 19 and 20, 1867, over 71,000 people voted, of whom 68,768 cast their ballot to approve the constitutional convention.<sup>33</sup> Historian Richard Zuczek questioned why so many blacks endangered passage of the convention call by not voting, but eighty-five percent or more of registered blacks did vote in this first election in which they were allowed to participate in South Carolina history.<sup>34</sup> What is startling is the unity of the white voters in their desire to prevent the drafting of a constitution that would grant the franchise and other civil rights to blacks. Only 2,350 whites voted for the convention meaning that ninety-five percent of eligible white voters either cast negative votes or boycotted the election.<sup>35</sup>

Despite the white racist reaction, a clear majority of the voters in South Carolina approved the 1868 Constitutional Convention call. Black and white delegates from across South Carolina assembled to draft the new constitution in Charleston on January 14, 1868.<sup>36</sup> Notwithstanding considerable debate on a number of issues, the convention produced a final draft. Article VIII of the 1868 South Carolina Constitution provided that every male citizen twenty-one years of age or older, "without distinction of race, color, or former condition," who met the residency requirements was entitled to vote.<sup>37</sup> Thus, for the first time, a South Carolina constitution allowed African Americans to vote.<sup>38</sup>

Also for the first time in South Carolina history, a constitution was ratified by the voters,<sup>39</sup> and the majority of those voters were black. For the first time in the state's history, black candidates were elected to office. Numerous blacks were elected to local offices, a black majority was elected to the State House of

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30. ALRUTHEUS AMBUSH TAYLOR, *THE NEGRO IN SOUTH CAROLINA DURING THE RECONSTRUCTION* 126-27 (1924) (totaling registration at 125,328); RICHARD ZUCZEK, *STATE OF REBELLION: RECONSTRUCTION IN SOUTH CAROLINA* 41 (1996) (totaling registration at 127,550).

31. ZUCZEK, *supra* note 30, at 41.

32. *Id.*

33. *Id.*

34. *Id.*

35. CAROL K. ROTHROCK BLESER, *THE PROMISED LAND: THE HISTORY OF THE SOUTH CAROLINA LAND COMMISSION, 1869-1890*, at xiii (1969).

36. *Id.*

37. S.C. CONST. of 1868, art. VIII.

38. *Id.*

39. James Lowell Underwood, *African American Founding Fathers*, in *AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA* 1, 25, 198 n.208. (James Lowell Underwood & W. Lewis Burke eds., 2000).

Representatives,<sup>40</sup> and ten blacks were elected to the state Senate.<sup>41</sup> Francis L. Cardozo was elected secretary of state, becoming the first African American elected to any statewide office in the nation.<sup>42</sup> The unspeakable had occurred to the white racists of South Carolina.

On June 25, 1868, Congress approved the South Carolina Constitution and allowed the state's congressmen to take their seats under strict statutory protections for voting rights.<sup>43</sup> These specific statutory protections provided that South Carolina's constitution could never be amended "to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized, except as a punishment for such crimes as are now felonies at common law."<sup>44</sup> In theory, this statute became the first federal voting rights act.

Despite the congressional protections for African American voters, whites received encouragement from President Andrew Johnson's amnesty proclamation of December 25, 1868, which restored all civil rights, including that of suffrage, to the vast majority of former Confederates.<sup>45</sup> Whites realized that boycotting elections was not the answer and instead began strategizing on how to limit black electoral activity. Whites knew that voting was not necessarily the solution because, for the first time in the state's history, the majority of the voting population was black. More aggressive tactics had to be employed. For example, many white planters threatened and intimidated their black laborers.<sup>46</sup> Other planters formed clubs and pressured their peers into keeping their black workers out of politics.<sup>47</sup> Both as an outgrowth of the tradition of slave patrols<sup>48</sup> and in response to the black victory in the constitutional convention election, the Ku Klux Klan organized across the state.<sup>49</sup> Klan members were night riders and assassins.<sup>50</sup> Thus, America's most infamous terrorist organization roamed South Carolina intimidating and

40. THOMAS HOLT, *BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION* 96–98 (1977).

41. *Id.* at 97.

42. W. Lewis Burke, *Post-Reconstruction Justice: The Prosecution and Trial of Francis Lewis Cardozo*, 53 S.C. L. REV. 361, 366–67 (2002).

43. An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73, 73–74 (1868).

44. *Id.* at 73.

45. Proclamation No. 15, 15 Stat. 711, 711–12 (1868).

46. See ZUCZEK, *supra* note 30, at 53. For a discussion of both the evidence on the reason the Ku Klux Klan was formed and a review of the historical literature and opinions on the subject, see *id.* at 55–61.

47. *Id.* at 53.

48. Slave patrols were organized to control slaves when they were off the plantations. Slaveholding whites usually made up the patrols and were feared official or unofficial gangs or posses that patrolled the rural areas to control slaves and apprehend runaways. Often because of their non-proprietary interest in the slaves, the patrols could be especially violent simply for the sake of venting their anger at blacks. See LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 28 (1981).

49. ZUCZEK, *supra* note 30, at 55, 57.

50. *Id.* at 55.

killing blacks.<sup>51</sup> According to all credible evidence, the Klan's chief aim was to prevent black voting and to regain white power.<sup>52</sup>

In response to these terrorist acts and to specifically combat the Klan, Congress passed three "Enforcement Acts." The First Enforcement Act, passed on May 31, 1870, barred state officials from discriminating against voters based on "race, color, or previous condition of servitude" in the application of local election laws; outlawed the use of "force, bribery, threats, intimidation, or other unlawful means" to keep voters from going to the polls; and made it a misdemeanor to deprive a citizen of "employment or occupation" in order to control his vote.<sup>53</sup> The most important provision of the First Enforcement Act prohibited disguised groups, such as the Klan, from traveling on "the public highway, or upon the premises of another" with the intent of interfering with the "free exercise and enjoyment of any right or privilege granted . . . by the Constitution or laws of the United States."<sup>54</sup> The Second Enforcement Act, passed on February 28, 1871, following the November 1870 election, and extended federal control of the election process by providing for the stationing of federal supervisors of elections "in cities where election irregularities were considered likely," and "to stand guard over and scrutinize registration and voting procedures and [c]ertify returns."<sup>55</sup> The Third Enforcement Act, "popularly known as the Ku Klux Act, made it a federal offense . . . to conspire to prevent persons from holding offices, serving on juries, enjoying equal protection of the laws, or voting," or to conspire to "overthrow . . . or destroy by force the government of the United States."<sup>56</sup>

By virtue of these new statutes, the federal government prosecuted Klan members for their campaign of violence. Despite the fact that former Confederate General Wade Hampton recruited some of the best lawyers in the country to defend the Klansmen, federal prosecutors obtained "an enviable conviction record."<sup>57</sup> These successful prosecutions in 1871 and 1872 managed to break up the Klan as an official organization; however, its members remained active in less organized

51. *Id.*

52. *Id.* at 56–57.

53. An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes, ch. 114, 16 Stat. 140, 140–41 (1870).

54. *Id.* at 141; see also Everette Swinney, *Enforcing the Fifteenth Amendment, 1870–1877*, 28 J. S. HIST. 202, 203 (1962) (noting the importance of the provision preventing travel on public highways "with the intent to interfere with constitutional liberties").

55. An Act to Amend an Act Approved May Thirty-One, Eighteen Hundred and Seventy, Entitled "An Act to enforce the Rights of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes," ch. 99, 16 Stat. 433, 433–40 (1871); Swinney, *supra* note 54, at 203.

56. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13, 13–14 (1871); Swinney, *supra* note 54, at 203.

57. LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872*, at 113 (1996). Reverdy Johnson of Maryland and Henry Stanbery of Ohio were both former United States Attorney Generals, and Johnson was supposedly the highest paid lawyer in the country. *Id.* at 54–55.



ways, and their influence remained constant during and even after Reconstruction.<sup>58</sup> Despite the violence, from 1868 to 1876, African Americans used their majority status to elect candidates of their choice across the state. Blacks held a majority of the seats in the state house and held the offices of Speaker of the House, President Pro Tem of the Senate, and numerous statewide offices such as Lieutenant Governor, Secretary of State, State Treasurer, and Adjutant General.<sup>59</sup> This black majority should have been firmly in control, but white violence required the presence of the Union Army in the state to protect black voters throughout the Reconstruction era. During the election of 1876, although white Democrats used violence and intimidation during the campaign,<sup>60</sup> the presence of federal troops in South Carolina kept violence low on election day; however, these troops could not prevent voting irregularities.<sup>61</sup> The election results were highly contested. The first results reports showed Wade Hampton, the Democrat, winning by a slim margin, but his apparent victory hinged on the returns from Edgefield and Laurens Counties, where he apparently received more votes than there were registered voters.<sup>62</sup> The black-dominated Republican Party still controlled both houses of the state legislature, so when the state election commission threw out the returns from Lauren and Edgefield counties, the two legislative bodies declared the Republican Governor D.H. Chamberlain the winner.<sup>63</sup> However, the white Democrats organized their own legislature and declared their gubernatorial candidate the winner.<sup>64</sup> The two competing “governments” vied for control of the state. Ultimately, under the Compromise of 1877, South Carolina whites agreed to cast the state’s electoral votes for Republican presidential candidate Rutherford B. Hayes, and in exchange, the new Republican President agreed to remove federal troops from South Carolina.

On April 10, 1877, federal troops withdrew from South Carolina, marking the end of Reconstruction.<sup>65</sup> Without federal protection, the black Republican statewide office-holders resigned.<sup>66</sup> White Democrat Wade Hampton assumed the governorship and called a “special session of the legislature,”<sup>67</sup> which employed

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58. *Id.* at 113. These convictions were even used to aid in re-establishing white rule in the state after Reconstruction ended. For example, after whites regained power, the state prosecuted and obtained the conviction of two prominent black Reconstruction leaders on spurious corruption charges. In exchange for the President of the United States pardoning some of these Klansmen, the South Carolina governor pardoned the two black leaders. See W. Lewis Burke, *Reconstruction Corruption and the Redeemers’ Prosecution of Francis Lewis Cardozo*, 2 AM. NINETEENTH CENTURY HIST. 67, 93–94, 98 (2001).

59. HOLT, *supra* note 40, at 96, 229–41 tbl.5.

60. GEORGE BROWN TINDALL, *SOUTH CAROLINA NEGROES, 1877-1900*, at 11–14 (1952).

61. EDGAR, *supra* note 7, at 404.

62. *Id.*

63. WALTER ALLEN, *GOVERNOR CHAMBERLAIN’S ADMINISTRATION IN SOUTH CAROLINA*, 435–39 (photo. reprint 1969) (1888); EDGAR, *supra* note 7, at 404.

64. EDGAR, *supra* note 7, at 404.

65. TINDALL, *supra* note 60, at 15.

66. HOLT, *supra* note 40, at 209.

67. *Id.*

outright illegal legislation, intimidation, and threats of criminal prosecution to force out numerous black and white Republican legislators.<sup>68</sup>

The Republican party crumbled. However, black voters and some black politicians, refused to simply disappear, and whites again resorted to violence and intimidation. Letters sent to the U.S. Department of Justice by such people as former South Carolina Supreme Court Justice Jonathan Jasper Wright, a report prepared by the South Carolina Republican Party, and a report of a United States Senate committee all suggest that violence against black voters was as intense or worse in the elections of 1878, 1880, and 1882 than in the election of 1876.<sup>69</sup> Despite the intimidation, black Congressman Robert Smalls was re-elected in 1882—white candidate George Tillman vigorously but unsuccessfully challenged Smalls' election.<sup>70</sup> Although federal authorities attempted to prosecute several cases of voter intimidation,<sup>71</sup> an order by the state's governor impeded these prosecutions by requiring the state attorney general to defend anyone indicted for violating the federal election laws and providing for the legislature's special appropriation of \$10,000 to fund those defenses.<sup>72</sup> In addition, the state legislature began implementing methods to circumvent the federal authorities and hinder black voters. In 1877, the state legislature separated the state and federal ballot boxes, which effectively prevented federal authorities from asserting any jurisdiction to protect black voters' ballots for state offices.<sup>73</sup> Additionally, since a black congressman was still representing the state in Washington, D.C., whites were determined to develop more sophisticated means to thwart black voting. Whites hoped that new legislation introduced in 1882 would solve the "problem." Legislator Edward McCrady illustrated whites' motivations to thwart black voting by proposing new franchise requirements in response to "the great and cruel injury done to the white race in the South by forcing upon us the ignorant negro vote."<sup>74</sup>

68. *Id.* at 209–10.

69. See Letter from Jonathan Jasper Wright, Assoc. Justice of the S.C. Supreme Court to Benjamin H. Brewster, U.S. Attorney Gen. (Aug. 24, 1882), *microformed on* Letters Received by the Department of Justice from South Carolina, 1871-1884 Roll 6, Publication M947 (Nat'l Archives Microfilm Publ'ns 1974); See generally THE ELECTION OF 1880 IN SOUTH CAROLINA: ADDRESS OF THE STATE EXECUTIVE COMMITTEE OF THE UNION REPUBLICAN PARTY OF SOUTH CAROLINA (1880) (describing widespread violence against black and Republican votes during 1880 elections); SOUTH CAROLINA IN 1878: REPORT OF THE UNITED STATES SENATE COMMITTEE TO INQUIRE INTO ALLEGED FRAUDS AND VIOLENCE IN THE ELECTIONS OF 1878 (1879) (collecting testimony of fraud and violence during the 1878 elections).

70. STEPHEN KANTROWITZ, BEN TILLMAN & RECONSTRUCTION OF WHITE SUPREMACY 96, 330 n.38 (2000).

71. WILLIAMS, *supra* note 57, at 144–45.

72. Act of Dec. 22, 1883, 1883 S.C. Acts 360, 365; 1884 S.C. ATT'Y GEN. REP. 562.

73. WILLIAMS, *supra* note 57, at 145.

74. EDWARD MCCRADY, JR., THE NECESSITY OF RAISING THE STANDARD OF CITIZENSHIP AND THE RIGHT OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA TO IMPOSE QUALIFICATIONS UPON ELECTORS 38 (1881).

So began seventy-five years of consistent abrogation of the Fifteenth Amendment in South Carolina.<sup>75</sup> A series of acts were enacted to frustrate black voters. For example, the 1882 registration law required all men to re-register by June of 1882 or forever be barred from voting.<sup>76</sup> Consequently, the only way new voters could register was either by turning twenty-one or by moving into the state.<sup>77</sup> To further inhibit voting, a prerequisite to be able to vote was paying a poll tax.<sup>78</sup> The tax was first an economic burden on most black workers, but to make matters worse, the legislature criminalized non-payment of the tax.<sup>79</sup> Every detail of voter registration was carefully intended to restrict black voting. For example, if a voter moved within a precinct, he had to re-register.<sup>80</sup> This provision dramatically disenfranchised black farm laborers, who often moved with the crops and seasons.<sup>81</sup> If someone who was denied the right to register wished to contest the denial, he had to file a written notice with the registration official within five days and then appeal to the circuit court within ten days.<sup>82</sup> Not only were registration requirements altered, the voting process was altered. Precinct boundary lines were re-drawn; some black voters had to travel all day to vote.<sup>83</sup> But probably the most "effective" provision was the "Eight Box Law."<sup>84</sup> The Eight Box Law required voters to deposit the ballot for each office in separate ballot boxes, and if a voter put his ballot in the wrong box, his vote did not count.<sup>85</sup> The U.S. Attorney for South Carolina estimated that this provision eliminated approximately eighty-three percent of black ballots.<sup>86</sup>

Two other nefarious schemes developed during this period proved to have long-lasting influence on black voting: the organization of all-white Democratic clubs and the creation of the white primary. In 1888, the legislature authorized the political parties to hold primary elections and conventions and to determine the rules under which they would be conducted. This authorization ultimately led to the all-white primary. Under this mechanism, the white Democrats could keep blacks

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75. See generally TINDALL, *supra* note 56, for a full recounting of the last two decades of the nineteenth century for black citizens in the state.

76. An Act to Amend Title II (Entitled) "Of Elections" of Part I (Entitled) "Of the Internal Administration of the Government" of the General Statutes, 1882 S.C. Acts 1110, 1111-12; EDGAR, *supra* note 7, at 414.

77. 1882 S.C. Acts at 1113.

78. An Act to Raise Supplies and Make Appropriations for the Fiscal Year Commencing November 1, 1878, 1878 S.C. Acts, 793, 797.

79. *Id.*

80. TINDALL, *supra* note 56, at 69.

81. *Id.*

82. 1882 S.C. Acts at 1113.

83. EDGAR, *supra* note 7, at 413. For examples of altered precincts, see An Act to Establish Polling Precincts in Charleston County, 1879 S.C. Acts 169; An Act to Make Certain Changes in the Voting Precincts of the Counties Therein Named, 1879 S.C. Acts 174; An Act to Amend an Act Entitled "An Act to Make Certain Changes in the Voting Precincts of the Counties Therein Named," Approved 24th December, 1879, so Far as the Same Relates to Edgefield and Lexington Counties, 1880 S.C. Acts 285.

84. TINDALL, *supra* note 56, at 69.

85. EDGAR, *supra* note 7, at 414.

86. *Id.*

off the ballot in the primary elections, and only white Democrats would have any chance of being elected to public office because the restrictive registration laws had disenfranchised the vast majority of black voters.<sup>87</sup>

### III. THE STATE COURTS GRANT NO RELIEF

Over the last decades of the nineteenth century, black voters' persistence continued to frustrate white racists. Blacks continued to run as Republicans, and these candidates continued to win elections in black areas with a black majority population. Whites needed more than legislation to stop them. The predominant strategy across the state became cheating: first, to prevent blacks from registering to vote, and second, to render those votes black citizens actually managed to cast ineffective. As mentioned previously, several federal prosecutions were instituted in egregious instances of such cheating, but the Department of Justice finally abandoned all of its enforcement efforts by the mid-1880s.<sup>88</sup>

Left with few remedies, black voters tried to pursue their claims in state court. Virtually all of these cases proved futile. In *Ex parte Mackey*,<sup>89</sup> the South Carolina Supreme Court refused to overturn an election even though election officials refused to count the votes from majority black precincts.<sup>90</sup> In *Ex parte Elliott*,<sup>91</sup> election officials refused to count ballots for a black congressional candidate because of the ballots' color, size, inclusion of the word "for" before the word "Congress," and because the ballots revealed the name of the candidate when folded.<sup>92</sup> The South Carolina Supreme Court refused to overturn that election as well.<sup>93</sup>

### IV. THE JIM CROW CONSTITUTION

With no federal counterforce and no opposition from the state courts, whites were able to make effective progress toward their goal of eliminating black voting. In the Presidential Election of 1876 there were over 91,000 votes for the Republican candidate, mostly cast by African Americans.<sup>94</sup> By 1888, this number had declined to just under 14,000.<sup>95</sup>

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87. An Act to Protect Primary Elections and Conventions of Political Parties and to Punish Frauds Committed Thereat, 1888 S.C. Acts 10; *See Rules Governing the Membership of Democratic Clubs, the Qualification of Voters, and the Conduct of Primary Elections of the Democratic Party of South Carolina* (adopted May 26, 1904).

88. TINDALL, *supra* note 56, at 72; *see generally* Letters Received by the Department of Justice from South Carolina, 1871-1884, *supra* note 69 (describing ongoing Department of Justice efforts); and Letters Sent by the Department of Justice: Instructions to U.S. Attorney Generals and Marshals, 1867-1904, *microformed on* Publication 701 (Nat'l Archives Microfilm Pub'ns 1967) (same).

89. 15 S.C. 322 (1881).

90. *Id.* at 335-37.

91. 33 S.C. 602, 12 S.E. 423 (1890).

92. *Id.* at 603, 12 S.E. at 425.

93. *Id.* at 604-05, 12 S.E. at 426.

94. TINDALL, *supra* note 60, at 73.

95. *Id.*

In 1890, one of the state's most racist politicians was elected governor of South Carolina.<sup>96</sup> According to Ben Tillman, even 14,000 black voters were more than he and his followers could stand.<sup>97</sup> The use of fraud, intimidation, and legislation were not enough. Tillman called for a new constitution to protect "Anglo-Saxon supremacy."<sup>98</sup> With that "end" in mind, he used Mississippi as his model for action.<sup>99</sup> Mississippi had promulgated a new constitution in 1890 that virtually eliminated the black vote.<sup>100</sup> Consequently, over the next two years, Tillman worked assiduously at having a similar constitution adopted in South Carolina.<sup>101</sup> By December 1892, Tillman finally had enough support in the legislature to authorize a referendum on whether to call a constitutional convention.<sup>102</sup>

Despite this support, Tillman and his supporters faced opposition from white "[c]onservative" Democrats, white Republicans, and blacks.<sup>103</sup> This joint opposition may account for three cases brought by two white lawyers from Winnsboro, Henry Obear and Charles A. Douglass. Their clients were apparently one black man and two white men challenging the 1882 registration law. Their appeals were consolidated by the South Carolina Supreme Court in *Ex parte Lumsden*.<sup>104</sup> The 1882 registration law allowed new voters to register only on the first Monday of each month and only through the month of July in order to vote in that year's fall election.<sup>105</sup> The limitation was vigorously enforced with respect to blacks and white Republicans. This scheme was especially tricky because those eligible to vote in 1882 had to have registered in that year, and subsequently only newly eligible voters could register. And, the only newly eligible voters were those who reached the age of twenty-one after 1882 or those who moved to the state and satisfied the residency requirement.<sup>106</sup> Lawrence Mills, a black tailor, apparently first became eligible in register in 1890 but could not register that year because the line was too long and he never gained admittance into the registration office.<sup>107</sup> One of the other appellants failed to register in 1882 because he was out of town

96. *Id.* See also KANTROWITZ, *supra* note 70, at 162 (describing a Tillman campaign in which he boasted about having murdered black Republicans).

97. KANTROWITZ, *supra* note 70, at 198.

98. *Id.*

99. *Id.*

100. *Id.*; TINDALL, *supra* note 56, at 74.

101. TINDALL, *supra* note 56, at 73-74.

102. *Id.* at 74; A Joint Resolution to Provide for the Calling of a Constitutional Convention, 21 S.C. Acts 6 (1982).

103. TINDALL, *supra* note 56, at 74-75.

104. 41 S.C. 553, 553-54, 19 S.E. 749, 749-52 (1894). The three plaintiffs were Lawrence Mills, Joshua L. Lumsden, and John J. Cormac. Their racial identification is based on the United States census. See U.S. TWELFTH CENSUS (1900), Richland County, S.C., at 16 ln. 93 (identifying Mills' race as black); *id.* at 6 ln. 99 (identifying Cormac as white). The only Lumsden in U.S. Census records for South Carolina around the time is a Joshua Lumsden found in the 1860 census who was white and is listed as a slave owner. See U.S. EIGHTH CENSUS (1860), Richland County, S.C., at 29 ln. 22; *id.* (Slave Schedule) at 9 ln. 27.

105. An Act to Amend Title II (Entitled) "Of Elections" of Part I (Entitled) "Of the Internal Administration of the Government" of the General Statutes, 1882 S.C. Acts 1110, 1112.

106. *Id.* at 1113.

107. *Ex parte Lumsden*, 41 S.C. at 554, 19 S.E. at 751.

when he turned twenty-one, and the third appellant moved into the state in 1890 but was ignorant of the registration laws, so he did not register when he was eligible under the "Byzantine" scheme.<sup>108</sup> The South Carolina Supreme Court saw nothing wrong with refusing to register these new voters.<sup>109</sup>

One black voter in Orangeburg County managed to appeal his denial of a voter registration certificate to the local board of registration and obtain his certificate,<sup>110</sup> but a Richland County black voter failed in his appeal to the local board.<sup>111</sup> Two other black voters in Richland County in 1894 were denied their local appeals and failed in their appeals to the South Carolina Supreme Court.<sup>112</sup>

There is some evidence these appeals were part of a coordinated strategy to prevent the calling of a new convention, although this strategy failed. In the November 1894 election, the convention was approved by a margin of only 1,879 votes.<sup>113</sup> There were outcries by whites that Tillman stole the election.<sup>114</sup> Nonetheless, an election to select delegates to write a new constitution was instituted.<sup>115</sup> Efforts were launched to prevent the convention. The person behind the failed attempt in the state courts may have been black United States Congressman George Washington Murray from Sumter.<sup>116</sup> Murray and other black leaders stumped the state and raised money from hundreds of blacks to fund a final effort to throw out the registration laws and prevent the convention.<sup>117</sup> White lawyers Henry Obear and Charles A. Douglass filed a new test case, but this time they filed suit in federal court. Again their client was Lawrence P. Mills, the black tailor, who had failed to reach the front of the line at the registration office. In an astounding decision, Federal Judge Nathan Goff, a West Virginia Republican, declared the registration laws invalid under the United States Constitution.<sup>118</sup> Judge Goff also issued an injunction preventing the convening of the constitutional convention.<sup>119</sup> He described the state's registration laws as "unreasonable, burdensome . . . harassing . . . without reason . . . vexatious . . . cumbersome, and

108. *Id.* at 554, 19 S.E. at 751.

109. *Id.* at 554, 19 S.E. at 752.

110. *Ex parte Wade*, 1894 S.C. Att'y Gen. Rep. 531, 531.

111. *Ex parte Hall*, 1894 S.C. Att'y Gen. Rep. 531, 531.

112. *State ex rel. Arnett v. Mason*, 1895 S.C. Att'y Gen. Rep. 19, 19.; *State ex rel. Hopkins v. Mason*, 1895 S.C. Att'y Gen. Rep. 19, 19. Arnett's racial identification is based on his photograph and his listing as a professor at Allen University and on his biographical sketch in the Centennial Encyclopaedia of the African Methodist Episcopal Church. THE CENTENNIAL ENCYCLOPAEDIA OF THE AFRICAN METHODIST EPISCOPAL CHURCH 27 (Richard R. Wright, Jr. ed., 1916). Hopkins was a farmer. See U.S. TWELFTH CENSUS (1900), Richland County, S.C., at 13B ln. 57.

113. TINDALL, *supra* note 56, at 75.

114. *Id.* at 75-76.

115. *Id.*

116. See William J. Gaboury, *George Washington Murray and the Fight for Political Democracy in South Carolina*, 62 J. OF NEGRO HIST. 258, 258-59 (1977).

117. *Id.* at 262-63.

118. *Mills v. Green*, 67 F. 818, 832-33 (D.S.C. 1895), *rev'd*, *Green v. Mills*, 69 F. 852, 862 (4th Cir. 1895), *appeal dismissed*, *Mills v. Green*, 159 U.S. 651, 658 (1895).

119. *Id.* at 833.

peculiarly stringent.”<sup>120</sup> Judge Goff also pointed out that under the state’s 1868 constitution, a potential voter simply needed to be a twenty-one year old male, a resident of the state for one year, and registered two months before an election to be eligible to vote.<sup>121</sup> Judge Goff concluded the 1882 registration law was “not only unreasonable, but unconstitutional.”<sup>122</sup> But the force of his opinion was based up on the Fourteenth and Fifteenth Amendments, which he found clearly prohibited the race-based nature of the registration scheme.<sup>123</sup>

Mills’ victory was short lived. On June 11, 1895, the Fourth Circuit Court of Appeals in Richmond overturned Goff’s decision. Chief Justice Melville Fuller ruled that there was no proof of any discrimination based on “race, color, or previous condition of servitude.”<sup>124</sup> By the time the United States Supreme Court took up the matter of *Mills v. Green* in November 1895, the constitutional convention had been held, and the case was thus moot.<sup>125</sup>

Meanwhile, the constitutional convention began with an opening address by its temporary chairman demanding the repeal of the 1868 constitution because it was drafted in part by “negroes” and was a “stain on the reputation of South Carolina.”<sup>126</sup> Governor John Gary Evans, after his election as president of the convention, made the goal of the new constitution clear. Evans called for “an educational qualification for right of suffrage if the supremacy of intelligence is to be preserved.”<sup>127</sup> He went on to explain that “[w]e have experienced the cost and hardship of the rule of the ignorant.”<sup>128</sup> Governor Evans was using the “code words” of the era to discredit the worth of the black citizenry of South Carolina. In an amazingly forthright speech to the convention, Ben Tillman—by then a U.S. Senator—admitted that he and other whites had repeatedly used “fraud and violence” as well as such measures as the eight box law to deprive blacks from voting, but he then asserted that the constitution must go further and “take from them every ballot.”<sup>129</sup> To achieve that end, the convention adopted the so-called Mississippi Plan. This plan was based on a facially neutral literacy test. Basically, voters who did not own \$300 worth of property and have all their taxes paid, had to be able to read and write any section of the state’s constitution when presented

120. *Id.* at 830.

121. *Id.*

122. *Id.*

123. *Id.* at 826–29 (beginning with a discussion of the “institution of slavery” and summing up with the observation that “the right of suffrage” should be “exempt from discrimination”).

124. *Mills v. Green*, 67 F. 818, 832–33, *rev’d*, *Green v. Mills*, 69 F. 852, 862 (4th Cir. 1895), *appeal dismissed*, *Mills v. Green*, 159 U.S. 651, 658 (1895).

125. *Mills v. Green*, 159 U.S. at 653.

126. Robert Aldrich, Delegate from Barnwell, Address to the Constitutional Convention (Sept. 1, 1895) in JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 1, 2 (1895) [hereinafter JOURNAL OF THE CONSTITUTIONAL CONVENTION].

127. Gov. John Gary Evans, President of the Convention, Address to the Constitutional Convention (Sept. 10, 1895), in JOURNAL OF THE CONSTITUTIONAL CONVENTION, *supra* note 126, at 12.

128. *Id.*

129. Sen. Ben Tillman, Address to the Constitutional Convention, *supra* note 126, (Nov. 1, 1895), in JOURNAL OF THE CONSTITUTIONAL CONVENTION at 464–65.

to them by the voter registration officer.<sup>130</sup> This mechanism resulted in each voter registrar having full discretion to determine the qualifications of each voter. And so long as the voter registrar was willing to “lie” about whether a black citizen had passed the literacy test, no black could register. The literacy test proved effective in Mississippi to thwart black registration, and it succeeded in its devilish purpose in South Carolina as well.<sup>131</sup>

In fact, the plan succeeded all across the South. Alabama promulgated a new constitution with a literacy test in 1901, also modeled after Mississippi’s test. Despite being presented with evidence of the Alabama constitutional convention’s racist intent, the United States Supreme Court, in an opinion written by Oliver Wendell Holmes, refused to declare the plan unconstitutional.<sup>132</sup> The effect of this decision more or less extinguished the federal role in enforcing black voting rights because Congress had already repealed virtually every provision of the three Enforcements Acts it passed in 1870 and 1871 to combat Klan violence and intimidation of black voters.<sup>133</sup>

## V. THE FIGHT CONTINUES

Although the battle appeared to have been lost in the constitutional convention, in the legislature, in the state courts, in the federal courts, and in the halls of Congress, some innovative black lawyers continued to fight. Some of the early congressional races were challenged all the way to Congress and the black candidates prevailed, both because it was clear that whites stole the elections and because the state’s voter registration statutes were found to be invalid under the state’s 1868 constitution.<sup>134</sup> Despite this early success, the 1895 Constitution created new dilemmas for black voters, candidates, and lawyers. Because of the new constitution’s Machiavellian procedure of granting full discretion to local registrars, there was no longer a need to steal elections. This new scheme had the following effect: virtually no blacks would be allowed to register, much less vote, and consequently, there would be no need to commit fraud on election day. By virtue of the 1895 constitution, there was no conflict between the state constitution and the state’s registration laws. Thus, congressional committees could no longer

130. S.C. Const of 1895, art. II, § 4(d).

131. See LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 223–225 (1998).

132. See *Giles v. Harris*, 189 U.S. 475, 482–84, 486–87 (1903); see also LITWACK, *supra* note 131, at 227. As to the racist intent of the Alabama convention see the comment on day two of the convention by John Knox, chairman of the convention. CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 10, available at [http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901\\_proceedings\\_vo11/day2.html](http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901_proceedings_vo11/day2.html).

133. An Act to Repeal All Statutes Relating to Supervisors of Elections and Special Deputy Marshals, and For Other Purposes, ch. 25, 28 Stat. 36 (1894).

134. See cases reprinted in CHESTE H. ROWELL, *A HISTORICAL AND LEGAL DIGEST OF ALL OF THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIRST TO THE FIFTY-SIXTH CONGRESS 1789–1901*, at 381–87, 461–64, 530–34 (photo. reprint 1976) (1901).



award a congressional seat to a black Republican on the basis that the state's registration laws were unconstitutional under the state constitution.<sup>135</sup>

Like much of the law of the Jim Crow era, the 1895 Constitution was a hypocritical document. Article I, Section 9 declared that "the right of suffrage ... shall be protected," but this section of the document's "Declaration of Rights" was simply a lie.<sup>136</sup> Article II, entitled "The Right of Suffrage," was as long as the constitution's entire "Declaration of Rights" and in minute detail devised a scheme to reduce, if not eliminate, the black vote.<sup>137</sup> This new constitution served its intended purpose in practice.

The general elections in the fall of 1896 offered the first major opportunity to develop new strategies on behalf of black voters. The South Carolina Republican Party ran one black candidate and six white candidates for all of the state's congressional seats. All of these candidates lost and then contested the results with their own version of the Republican "Mississippi Plan."<sup>138</sup> Mississippi Republicans challenged their state's 1890 constitution on the grounds that its voter registration restrictions violated the Reconstruction-era federal statute that allowed Mississippi to be readmitted to the Union.<sup>139</sup> Six of these South Carolina Republican congressional candidates directly challenged the validity of South Carolina's 1895 Constitution using this Mississippi argument.<sup>140</sup> George Washington Murray, the lone black candidate and the only incumbent, based his challenge before the state board on other grounds.<sup>141</sup> Murray later adopted the contest to the state constitution in his protest filed with Congress.<sup>142</sup> His initial challenge to the state board was based on the theory that the new state constitution's literacy requirements violated those Reconstruction statutes of 1868 which prohibited the state from restricting the franchise except as to age, sex, and conviction for a felony.<sup>143</sup>

This was a remarkably prescient argument in light of the fact that federal legislation in the form of the 1965 Voting Rights Act would effectively void the state constitution's literacy clause. However, while ahead of its time, the argument was not entirely new. This argument was a variant of a successful argument based on the state's federally approved 1868 Constitution. In the congressional election of 1888, Thomas Miller, a black Republican, persuaded Congress to seat him instead of white Democrat William Elliott because the state's 1882 voter registration law restricted registration more stringently than the 1868 Constitution allowed. Therefore, the 1868 Constitution, having occasioned the readmission of South Carolina into the Union, represented Congress's acceptable level of voter

135. See ROWELL, *supra* note 134, at 461–64.

136. See S.C. CONST. of 1895 art. I, § 9.

137. See S.C. CONST. of 1895, art. II.

138. Contested Results of the Election of Nov. 3, 1896, at 542–73, *microformed on Records of the Election Commission, State Board of Convassers Proceedings and Returns 1868-1929*, vol. 2 (S.C. Dept. of Archives and History) [hereinafter RECORDS OF THE ELECTION COMMISSION].

139. *Sproule v. Fredericks*, 11 So. 472, 474 (Miss. 1892).

140. RECORDS OF THE ELECTION COMMISSION, *supra* note 138, at 554–573.

141. *Id.* at 545–553.

142. *The South Carolina Vote*, N.Y. TIMES, Feb. 7, 1897, at 1.

143. *Id.*

protection. This argument allowed the congressional committee to recognize the true intent of the state's 1882 registration law. The committee called the registration law "an abridgement, subversion, and restraint" on the right to vote.<sup>144</sup> Even the Chief Justice of the South Carolina Supreme Court dissented in an appeal by a white litigant because he believed the state's registration laws were in conflict with the state constitution.<sup>145</sup> However, other challenges using this argument produced mixed results. In one case that used this argument, the congressional committee decided there was no winner in a race between a white Republican and a white Democrat and declared the seat vacant.<sup>146</sup> In another case, Joshua Wilson, a black Republican, failed in his effort to convince the congressional committee to declare him the winner or even to declare the seat vacant.<sup>147</sup> Although the committee felt the 1882 registration laws were invalid, they found that Wilson had failed to proffer sufficient evidence to prove that he would have won the election if those individuals he claimed were disenfranchised had been allowed to vote.<sup>148</sup>

The new argument, offered by the South Carolina Republican challengers, attacked the validity of the 1895 Constitution. In a similar challenge to a local election in Mississippi, that state's supreme court held in 1892 that the federal statute could not control the election laws of a state.<sup>149</sup> In 1896, the supremacy argument was again rejected in three congressional challenge cases brought by candidates from Mississippi.<sup>150</sup> It fared no better with the seven Republican congressional candidates from South Carolina, all of whom failed in their challenges in 1896.<sup>151</sup>

Nevertheless, black candidates continued to file election challenges. In 1898, George Washington Murray, through his black attorneys J. I. Washington and W. F. Myers, appealed again to the state board.<sup>152</sup> Myers, along with Jacob Moorere, another black attorney, also filed a challenge to the 1895 Constitution on behalf of congressional candidate J. H. Weston.<sup>153</sup> Although the state board was not persuaded in these cases, many candidates and their lawyers continued their election challenges well into the twentieth century.<sup>154</sup> Black lawyers William Whipper, Jacob Moorere, John B. Edwards, Edward F. Smith, T. St. Marks

144. ROWELL, *supra* note 132, at 461.

145. *Butler v. Ellerbe*, 44 S.C. 256, 281, 22 S.E. 425, 437 (1895).

146. ROWELL, *supra* note 132, at 531.

147. ROWELL, *supra* note 132, at 541.

148. *Id.* at 543.

149. *Sproule v. Fredericks*, 11 So. 472, 475 (Miss. 1892).

150. ROWELL, *supra* note 132, at 540-41.

151. The Rowell digest of election cases contains no record of these candidates appealing their cases to the congressional committees, but they all lost before the state board of canvassers.

152. RECORDS OF THE ELECTION COMMISSION, *supra* note 138, at 6-8.

153. *Id.* at 8-12.

154. *Id.* at 124 (J.L. Mitchell made the argument on behalf of Aaron Prioleau, a black Republican candidate); *see generally*, MERRILL MOORES, collator, A HISTORICAL AND LEGAL DIGEST OF ALL THE CONTESTED ELECTION CASES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES FROM THE FIFTY-SEVENTH TO AND INCLUDING THE SIXTY-FOURTH CONGRESS, 1901-1917 (1917) (reporting contested cases in Congress 1901-1917); ROWELL, *supra* note 134 (reporting several contested cases in the Fifty-sixth Congress, 1899-1901).

Sasportas, Julius Washington, and Julian Mitchell all filed challenges. These lawyers did not exclusively rely on the state constitution argument. They sometimes asserted fraud, and in other cases, they made challenges on very technical grounds—like those which whites had used against them before 1895, such as asserting that the ballots were the wrong color.<sup>155</sup> Jacob Moorer attacked the 1895 Constitution in congressional challenge cases in both state court cases and in the United States Supreme Court. He never succeeded in overturning the state constitution, but he managed to provoke some startling arguments. For example, in one case, the attorney for the state of South Carolina argued that because secession from the Union was illegal and invalid, South Carolina had never in fact left the Union.<sup>156</sup> The closest Moorer came to a victory was a moral victory. Alexander Dantzler ran for congress in 1902, and after he lost, Moorer filed a challenge. The Congressional committee hearing the case agreed that the constitutional argument had validity but admitted Congress would have to deny seats to white congressmen across the South if they granted Dantzler relief. Not willing to deny seats to their colleagues, the committee suggested the United States Supreme Court needed to consider the issue.<sup>157</sup> Awaiting an opportunity to take the issue before the Supreme Court, Moorer continued to contest congressional election results on behalf of black candidates through at least 1910.<sup>158</sup> Aaron

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155. RECORDS OF THE ELECTION COMMISSION, vol. 1, *supra* note 138, at 547 (Edwards and Sasportas on behalf of G. W. Murray in the First Congressional district protesting the re-opening of the counting of ballots after the result had been certified, Nov. 10, 1896); *id.* vol. 1, at 548 (Whipper and Washington on behalf of Murray in First Congressional district for allowing unregistered whites to vote, Nov. 9, 1896); *id.* vol. 2, at 80 (Edwards contesting the color of the ballots on behalf of William Becket in the First Congressional District in 1900, Nov. 13, 1900); *id.* vol. 2, at 82 (Washington on behalf of W.W. Beckett in the First Congressional District contesting the legality of certain ballots, Nov. 13, 1900); *id.* vol. 2, at 85 (Mitchell on behalf of Beckett in the First Congressional district election held on Nov. 6, 1900, contesting the color and the words of the ballots, undated); *id.* vol. 2, at 87 (Moorer on behalf of Alexander Dantzler in the Seventh Congressional district, contesting the counting and tabulation of votes, Nov. 13, 1900); *id.* vol.2, at 248 (Smith on behalf of Aaron Prioleau in the First Congressional district contesting the impartiality of the ballot count, Nov. 1901); South Carolina Dept. of Archives and History, File S155019, (Smith on behalf of Prioleau in the First Congressional district protesting the closing of predominantly black precincts, 1904); South Carolina Dep't of Archives and History, File S155019 (Moorer on behalf of R.H. Richardson in the Seventh Congressional district for unlawful rejection of votes, Nov. 3, 1908).

156. See Brief of Defendant in Error, *Brownfield v. South Carolina*, 189 U.S. 426 (1903).

157. MOORES, *supra* note 154, at 25–27.

158. In the 1904 Seventh Congressional District election contest, *Jacobs v. Lever*, Moorer and the Washington law firm of Dudley and Michener made the same argument on behalf of Jacobs, a former classmate of Moorer and once valedictorian of Claflin in the 1890s, to no avail. The March 18, 1904, House of Representatives Report Number 1740 was cited in this report. H.R. Rep. No. 4781, at 1–3 (1906). Moorer also handled the following cases that ended up with the same result and citation of the March 18, 1904 House of Representatives Report Number 1740 as a precedent: *Isaac Myers v. J. O. Patterson* (Second Congressional District, November 8, 1904), H.R. Rep. No. 4780, at 1–4 (1906); *Alexander D. Dantzler v. Asbury F. Lever* (Seventh Congressional District, November 6, 1906), H.R. Rep. No. 1817, at 1–4 (1909); *Isaac Myers v. J. O. Patterson* (Second Congressional District, November 6, 1906), H.R. Rep. No. 1819, at 1–5 (1909); *R. H. Richardson v. Asbury F. Lever* (Seventh Congressional District, November 3, 1908), H.R. Rep. No. 1638, at 1–7 (1910); *Isaac Myers v. J. O. Patterson* (Second Congressional District, November 3, 1908), H.R. Rep. No. 1640, at 1–4 (1910). Moorer argued *Myers v. Patterson* and *Richardson v. Lever* from the 1908 election cases before the

Prioleau of Orangeburg, a black candidate for Congress, used the constitutional argument in his challenge to the election of 1914. The congressional committee declared that "the House has repeatedly decided against contestant [Prioleau] as to the contention he makes with regard to the constitution and election laws of South Carolina."<sup>159</sup> In 1920, T. St. Mark Sasportas, a black lawyer, and L.A. Hawkins, a black real estate agent, ran for congressional seats. After losing, they protested the election results to the state Board of Canvassers. They lost at this level, but the state board's records contain no information on the basis of their challenges.<sup>160</sup> However, a newspaper account stated that Hawkins argued partially on the fact that certain persons were not allowed to register, which might indicate the challenge to the 1895 Constitution was still being used as late as 1920.<sup>161</sup> There is no record of any appeal by either Sasportas or Hawkins to Congress. While some black candidates continued to run for both Congress and lesser offices over the next thirty years, the appeal to the United States Congress based on the Reconstruction statute was last heard in Prioleau's case.<sup>162</sup>

## VI. JURY CHALLENGES

Black citizens and their lawyers were forced to combat their disenfranchisement by the Jim Crow laws through other avenues. Because jurors had to be registered voters, objections to all-white juries were, in fact, challenges to the voter registration laws. For example, John Brownfield, a black barber, refused to pay the poll tax, which resulted in an illegal attempt to arrest him.<sup>163</sup> Brownfield resisted arrest and killed the deputy who was making the arrest in the ensuing struggle.<sup>164</sup> In Brownfield's murder trial, his lawyers, William Whipper

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House Committee on elections in 1910.

159. MOORES, *supra* note 154, at 92.

160. RECORDS OF THE ELECTION COMMISSION vol. 2, *supra* note 138, at 516.

161. A Columbia newspaper reported that Hawkins contested the election because the polls were not opened on time in Columbia, and that certain persons were not allowed to register for the election. The newspaper rather tersely remarked that he had set forth "other reasons for his protest." *Republicans File Election Protests*, COLUMBIA REC. (S.C.), Nov. 12, 1920, at 12.

162. For example in 1916, black Republican Isaac Myers ran in the Second Congressional District, and black Republican I. S. Leevy ran in the Seventh Congressional District. But the elections were not contested. See RECORDS OF THE ELECTION COMMISSION, vol. 2, *supra* note 138, at 459. In 1918, black Republican R. H. Richardson ran in the Seventh Congressional District and lost but did not contest the election. See *id.* at 481. In 1924, black Republican Jesse E. Beard lost in the First Congressional District but did not contest the election. *Id.* at 556-57. In 1944, black Progressive Democrat, Osceola McKaine ran against Olin D. Johnston for U.S. Senator and filed no appeal from his loss. See SUPPLEMENTAL REPORT OF THE SECRETARY OF STATE, ELECTION NOVEMBER 7, 1944 at, 10-13; see also Miles S. Richards, Osceola E. McKaine and the Struggle for Black Civil Rights: 1917-1946, at 169, 192-204 (1994) (unpublished Ph.D. dissertation, University of South Carolina). And in 1946, black Republican I. S. Leevy ran for Congress in the Second Congressional District and black candidate James E. Prioleau ran in the Sixth Congressional District. Neither contested the election. See SUPPLEMENTAL REPORT OF THE SECRETARY OF STATE, ELECTION NOVEMBER 5, 1946, 5-7.

163. TOM RUBILLO, TRIAL AND ERROR: THE CASE OF JOHN BROWNFIELD AND RACE RELATIONS IN GEORGETOWN, SOUTH CAROLINA 163 (2005).

164. *Id.*

and Julian Mitchell, asserted that because eighty percent of the population of Georgetown County was black, the exclusion of blacks from both the grand jury and the petit jury was unconstitutional.<sup>165</sup> Whipper and Mitchell did not directly attack the 1895 Constitution but instead asserted the jury service requirements intentionally excluded blacks.<sup>166</sup> Brownfield lost in the United States Supreme Court because, despite a conflicting record, the Court held that Whipper and Mitchell failed to present evidence proving the these requirements intentionally excluded black jurors.<sup>167</sup> In *Franklin v. South Carolina*,<sup>168</sup> black lawyers Jacob Moorer and John Adams defended a black farm laborer accused of killing a white lawman.<sup>169</sup> Franklin shot a white constable who broke into his house in the middle of the night to arrest him for violating his labor contract with a white plantation owner.<sup>170</sup> Although the constable had a warrant, he never identified himself as an officer of the law nor did he inform Franklin that he had an arrest warrant.<sup>171</sup> Moreover, the warrant was illegal because the statute under which it had been issued had been declared unconstitutional weeks before the attempted arrest.<sup>172</sup> Moorer and Adams did not object to the exclusion of black jurors, but they did attack the indictment by asserting the grand jury was an illicit product of the 1895 Constitution, which was invalid under the Reconstruction Act.<sup>173</sup> Finally, it seemed the United States Supreme Court would have to rule upon the validity of the “new” Jim Crow constitution. But the Court dodged the legal issue by requiring evidence “that persons of the African race were excluded because of their race or color from serving as grand jurors.”<sup>174</sup> The Court held that Moorer and Adams failed to present any evidence as to the intent of local officials.

In 1916, Jacob Moorer and a new lawyer in Columbia, Nathaniel J. Frederick, defended a husband and wife, James and Adlee Sanders, who were charged with murdering a white man.<sup>175</sup> Mrs. Sanders was found not guilty, but her husband was sentenced to death.<sup>176</sup> At trial, Moorer and Frederick moved to quash the indictment, but the trial judge would not allow them to offer proof that the grand

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165. *Brownfield v. South Carolina*, 189 U.S. 426, 427 (1903).

166. *Id.* at 427, 429.

167. *Id.* at 429; *see also* RUBILLO, *supra* note 163, at 162 (stating that “Holmes and his brethren simply accepted Judge Earnest Gary’s excuse that ‘the statement of facts set out in the grounds for quashing [the grand jury and trial jury panels] did not appear from the record or otherwise’”).

168. *Franklin v. South Carolina*, 218 U.S. 161 (1910).

169. *Id.* at 162.

170. *Id.* at 162–63.

171. *Id.* at 164.

172. *Id.* at 170.

173. *Id.* at 166.

174. *Franklin v. South Carolina*, 218 U.S. 161, 167 (1910).

175. *State v. Sanders*, 103 S.C. 216, 218, 88 S.E. 10, 11 (1916).

176. *Id.* at 218, 88 S.E. at 11.

jury ““was unlawfully constituted, in that . . . discrimination was made against the negro race because of race and color.””<sup>177</sup> They also challenged the petit jury on grounds:

(1) The testimony shows undoubtedly, that discrimination against the negro race was made in the formation of the said panel because of race and color, and (2) because the law under which the panel was made up is unconstitutional, in that the said law gives the jury commissioners the power to add other qualifications which control those provided by the Constitution.<sup>178</sup>

With respect to the petit jury challenges, the South Carolina Supreme Court ruled against Sanders on the first exception, holding that Moorner and Frederick had not offered any testimony to support the claim.<sup>179</sup> As to the second exception, the court held the trial judges findings of fact were not erroneous, and cited the United States Supreme Court’s decision in *State v. Franklin* as its authority.<sup>180</sup> The third exception on appeal was that the trial judge refused to allow Sanders’ attorneys to introduce the voter registration lists for the county, which clearly identified black voters.<sup>181</sup> The prosecution conceded that many names were “marked with the letter ‘C.’ or ‘Col.’”<sup>182</sup> The Supreme court held that the trial judge’s refusal to admit the registration records was not error.<sup>183</sup> Reading newspaper accounts of the trial leads to the conclusion that the facts as stated in the court’s opinion are at least incomplete, if not misleading. According to one newspaper account, the two black lawyers moved to quash the grand jury’s indictment and called witnesses to try to establish their claim of discrimination.<sup>184</sup> Supposedly, two of those witnesses were members of the jury commission, who admitted they chose grand jurors based on “personal choice.” Naturally, they also claimed they did not discriminate on account of race even though they chose no black jurors. The chairman of the election commission denied that the race of voters was noted on the registration books but admitted that there were between 1,000 and 1,500 black registered voters.<sup>185</sup> If the court had allowed Moorner and Frederick to introduce the registration records, they could have impeached the chairman of the election commission. In addition, they would have been able to show that the jury commissioners could identify black voters. Certainly the two lawyers had tried to establish a record that would allow them to avoid the “lack of evidence” issue that had been so problematic in both the *Franklin* and the *Brownfield* cases. After the

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177. *Id.* at 218, 88 S.E. at 11 (quoting the first exception of the appeal).

178. *Id.* at 218–19, 88 S.E. at 11 (quoting the second exception of the appeal).

179. *Id.* at 218, 88 S.E. at 11.

180. *Id.* at 219, 88 S.E. at 11.

181. *State v. Sanders*, 103 S.C. 216, 219, 88 S.E. 10, 11 (1916).

182. *Id.* at 219, 88 S.E. at 11.

183. *Id.* at 219, 88 S.E. at 11–12.

184. *Trial of Sanders Has Begun With New Features*, COLUMBIA REC. (S.C.), Jun. 10, 1915, at

2.

185. *Id.*

trial, Frederick and Moorner both told the press that they would take the case to the United States Supreme Court on constitutional grounds.<sup>186</sup>

Moreover, the two lawyers had a ground for an appeal to the state supreme court. In cross-examining a potential juror, a juror admitted to one of Sanders' lawyers that he had a bias and admitted he had "a natural resentment for one of your race pleading to a jury I am on."<sup>187</sup> The trial judge refused to excuse this juror for cause, and the state supreme court reversed Sanders' conviction, ruling that the trial judge erred in failing to excuse the juror.<sup>188</sup> At the retrial, Moorner and Frederick again tried to attack the selection of both the grand jury and the petit jury and again called witnesses to try to prove discrimination against black voters.<sup>189</sup> After a long trial and long jury deliberations, Sanders was again convicted. This time, however, the jury recommended mercy, and he was sentenced to life.<sup>190</sup> Although Moorner and Adams apparently considered it, the second case was not appealed.<sup>191</sup> In 1921, Sanders was paroled by the governor for good behavior based on the recommendation of the parole board, which received requests for parole from the trial judge and nine of the twelve jurors.<sup>192</sup>

## VII. THE NAACP ARRIVES

Moorner and Frederick saved their client's life, and although they did not get their test case to the United States Supreme Court, they formed an association that helped prepare the inexperienced Frederick for numerous battles ahead. Their collaboration also led to the creation of the Capital City Civic League.<sup>193</sup> The Civic League became the catalyst for the black community's advocacy of voting rights in the state. Moorner and Frederick were also joined in the battle against Jim Crow voter registration laws by two other black lawyers, Butler Nance and Green Jackson.

Black lawyers were disappearing fast from the state, and the association of these two men was important. Early on, the Civic League became the state's first

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186. *An Appeal Stays the Execution of Negro Manslayer*, COLUMBIA REC. (S.C.), July 16, 1915, at 6; *Orders Sanders to Death Chair*, THE STATE (Columbia, S.C.), Jun. 13, 1915, at 2.

187. *Sanders*, 103 S.C. at 220, 88 S.E. at 12 (quoting juror R.L. Bailey's voir dire testimony).

188. *Id.* at 220-21, 88 S.E. at 12.

189. *Bogus Sanders on Trial Again*, THE STATE (Columbia, S.C.), May 25, 1916, at 6.

190. *Sanders was Given Life In Prison, Jury Merciful*, COLUMBIA REC. (S.C.), May 28, 1916, at 28.

191. *Id.*

192. Petition for Clemency (Nov. 13, 1920), in Papers of Governor Robert A. Cooper, Pardons, Paroles, and Commutations, 1919-1922 (S.C. Dept. of Archives and Hist.); Letter of Mendel L. Smith, Trial Judge (Dec. 13, 1920), in Papers of Governor Robert A. Cooper, Pardons, Paroles, and Commutations, 1919-1922 (S.C. Dept. of Archives and Hist.); Petition Signed by Nine Jurors, in Papers of Governor Robert A. Cooper, Pardons, Paroles, and Commutations, 1919-1922 (S.C. Dept. of Archives and Hist.).

193. *Negro Leaders Call Conference*, COLUMBIA REC. (S.C.), Jun. 7, 1915, at 3.

NAACP chapter.<sup>194</sup> In a letter to W.E.B. DuBois of the NAACP in 1915, Nance stated the Civic League had registered eight-hundred black voters in Richland County.<sup>195</sup> Green Jackson worked for the newly formed NAACP chapter helping to register voters in 1919.<sup>196</sup> In that same year, a black preacher successfully registered in Greenwood County, but whites reacted with violence when other blacks tried to register. Nance sought the NAACP's assistance.<sup>197</sup> In turn, he was asked to investigate, but with little in the way of money, he took no legal action.<sup>198</sup>

After the approval of the Nineteenth Amendment granting women the right to vote, a group of black women tried to register in Columbia.<sup>199</sup> Although many of these women were college graduates, their registration attempts were rejected.<sup>200</sup> The state constitution required the potential voter to be able to read and write any section of the state or federal constitution, but the registrars required them to explain legal terms such as "mandamus" and "civil code."<sup>201</sup> Other women, some of whom were certified public school teachers, were denied registration because the registrar claimed that they mispronounced words.<sup>202</sup> Butler Nance filed the first NAACP suit in the state's history on behalf of thirty-two women.<sup>203</sup> The action was technically an appeal to the county court from the refusal of the county board of registration to register the women.<sup>204</sup> Nance pointed out that many of the women were graduates of "the State College at Orangeburg" and had the signature of the state's governor on their diplomas.<sup>205</sup> The county court judge dismissed the case.<sup>206</sup> The dismissal was then appealed to the court of common pleas.<sup>207</sup> There is no record of the case after this appeal was filed, and presumably it was dismissed.

194. See Letter from the NAACP to B.W. Nance (July 1, 1915), *microformed on PAPERS OF THE NAACP* (University Publications of America) [hereinafter *PAPERS OF THE NAACP*]; Letter from Roy Nash, Secretary, NAACP, to N.J. Frederick, Editor, *The Southern Indicator* (Feb. 19, 1917), *on PAPERS OF THE NAACP, supra*.

195. See Letter of Butler W. Nance to W.E.B. DuBois (June 5, 1915), *on PAPERS OF THE NAACP, supra* note 194.

196. See Letter of Butler W. Nance to Walter F. White (May 20, 1919), *on PAPERS OF THE NAACP, supra* note 194.

197. Letter of Butler W. Nance to Morefield Storey (Apr. 14, 1919), *on PAPERS OF THE NAACP, supra* note 194.

198. Letter from NAACP to Butler W. Nance (Apr. 29, 1919), *on PAPERS OF THE NAACP, supra* note 194; Letter from Butler W. Nance, President of the Columbia Branch, NAACP, to Morefield Storey (May 9, 1919), *on PAPERS OF THE NAACP, supra* note 194; Letter to the NAACP to C.L. Henderson (May 12, 1919), *on PAPERS OF THE NAACP, supra* note 194; Letter from C.L. Henderson, Presiding Elder, Greenville Dist. A.M.E. Church, to Walter F. White, Assistant Secretary, NAACP (May 17, 1919), *on PAPERS OF THE NAACP, supra* note 194; Letter from the Office Secretary, NAACP, to C.L. Henderson (May 21, 1919), *on PAPERS OF THE NAACP, supra* note 194.

199. William Pickens, *The Woman Voter Hits the Color Line*, *THE NATION*, Oct. 6, 1920, at 372.

200. *Id.* at 373.

201. *Id.*

202. *Id.*

203. See Letter of Butler W. Nance to Walter F. White (Sept. 12, 1920), *on PAPERS OF THE NAACP, supra* note 194.

204. *Negroes Appeal to County Court*, *THE STATE* (Columbia, S.C.), Sept. 16, 1920.

205. *Id.*

206. *Sixteen Negroes Appeal to Court*, *THE STATE* (Columbia, S.C.), Oct. 12, 1920, at 15.

207. *Bookman v. Richland County Bd. of Registration*, 1920 S.C. Att'y Gen. Ann. Rep. 13.



In the mid-1920s, Nathaniel J. Frederick, publisher of *The Palmetto Leader* newspaper, became the chief lawyer for the NAACP in Columbia and filed an action against local officials for refusing to register black voters who qualified as property owners.<sup>208</sup> Frederick obtained a court order requiring the registrar to issue certificates to these black property owners, but the registrar ignored the court order.

Also, through the work of the NAACP, the white primary was starting to receive attention across the South.<sup>209</sup> In 1926, Frederick pointed out the absurdity of the white primary in a newspaper editorial. He noted that a black voter could vote in the Democratic primary if he met two conditions: (1) if in 1876 he voted for Wade Hampton for governor and (2) if ten white men who would attest to that fact.<sup>210</sup> In 1926, under this Democratic Party rule, all potential black voters and his ten male witnesses would have to be at least seventy-one years old.<sup>211</sup> Furthermore, because no black woman could have voted in 1876, no black woman could ever qualify to vote in the Democratic primary. The United States Supreme Court held a Texas statute establishing a white primary unconstitutional,<sup>212</sup> but Frederick did not pursue a similar case in South Carolina—probably because he was heavily involved in a major murder trial and the NAACP's response to the subsequent lynching of his three clients in that 1926 case.<sup>213</sup> During this time, the local NAACP was in the process of being revived,<sup>214</sup> and it is possible that Frederick thought another lawyer would rise to the occasion. In fact, the national office of the NAACP tried to obtain copies of the South Carolina Democratic Party primary rules through a white lawyer in Spartanburg, but no action followed.<sup>215</sup>

After its first white primary system was thrown out, Texas established a different voter registration scheme which simply allowed the political parties to establish whatever rules they wished with respect to the qualification of voters.<sup>216</sup> In 1932, the NAACP again sued Texas, and the United States Supreme Court again ruled the Texas procedure was unconstitutional.<sup>217</sup> While the Texas case was pending in 1932, Frederick challenged the white primary in South Carolina. Frederick lost in both state and federal court, partly because the federal district court judge felt his case was moot because the Democratic primary had already been held

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208. *Congressman Stevenson Wrong*, PALMETTO LEADER (Columbia, S.C.), Jan. 29, 1927, at 4.

209. *Race Barred From Democratic Primary*, PALMETTO LEADER (Columbia, S.C.), Aug. 21, 1926, at 1.

210. *Negroes Barred from the Democratic Primary in South Carolina*, PALMETTO LEADER (Columbia, S.C.), Aug. 21, 1926, at 4.

211. *Id.*

212. *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927).

213. *See Three Lynched*, PALMETTO LEADER (Columbia, S.C.), Oct. 16, 1926, at 1.

214. *To Revive Local Branch of N.A.A.C.P.*, PALMETTO LEADER (Columbia, S.C.), Dec. 4, 1926, at 4.

215. Letters from William T. Andrews, Special Legal Assistant, to L.G. Southard (May 22, 1928 and May 28, 1922), on PAPERS OF THE NAACP, *supra* note 194.

216. *Nixon v. Condon*, 286 U.S. 73, 81–82 (1932).

217. *Id.* at 89.

that year.<sup>218</sup> Forestalling a new case seeking monetary damages, which was done successfully in Texas, the South Carolina Democratic Party called on the state legislature to repeal all laws relating to the party primary—Frederick saw no value in filing a case against a yet to be determined scheme.<sup>219</sup>

In July 1932, Frederick became one of the first black lawyers to be appointed to the NAACP National Legal Committee.<sup>220</sup> However, his activities on behalf of the NAACP began to gradually diminish. Facing the Great Depression and being one of only seven practicing black lawyers in the state<sup>221</sup> (and the only one of the group who had been willing to take civil rights cases), Frederick struggled to earn a living. At his death, he was nearly destitute and, according to his obituary in *The Palmetto Leader*, Frederick's last editorial appeared on May 7, 1938, in which he attacked the Democratic Party's exclusion of black voters.<sup>222</sup> After his death in 1938, only four black lawyers were left in the state, none of whom practiced in Columbia, Greenville, or Charleston.<sup>223</sup> None of the remaining lawyers were willing to challenge the denial of the right to vote to the black citizens of South Carolina.

However, members of the black community did not give up asserting their right to vote and seek public office. After a twenty-year hiatus, black candidates began to emerge in the 1940s. Blacks ran for local office as well as congressional seats.<sup>224</sup> Osceola McKaine ran unsuccessfully for the U.S. Senate in 1944.<sup>225</sup> There were

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218. See Complaint, *Adams v. Bd. of Comm'rs of Elections* (Apr. 22, 1932), on PAPERS OF THE NAACP, *supra* note 194; Letter from N.J. Frederick to Walter White, Secretary, NAACP (May 7, 1932), on PAPERS OF THE NAACP, *supra* note 194; Letter from N.J. Frederick to James Marshall (July 2, 1932), on PAPERS OF THE NAACP, *supra* note 194.

219. Letter from N.J. Frederick to James Marshall (July 2, 1932), on PAPERS OF THE NAACP, *supra* note 194.

220. 3 *Brilliant Lawyers Join N.A.A.C.P. Nat'l Legal Committee*, THE PALMETTO LEADER (Columbia, S.C.), July 9, 1932, at 6.

221. See W. Lewis Burke & William C. Hine, *The South Carolina State College Law School*, in MATTHEW J. PERRY: THE MAN, HIS TIMES AND HIS LEGACY, 17, 40–41 tbls.1 & 2 (W. Lewis Burke & Belinda F. Gergel eds., 2004).

222. *Id.* at 26; see Obituary, PALMETTO LEADER (Columbia, S.C.), Sept. 9, 1938; *In re: The Estate of N.J. Frederick, deceased, Corinne Frederick, Ex'x*, Probate Court of Richland County, S.C., Box 491, Package No. 12,783 (discussing Frederick's financial well-being); see also *Frederick v. S. Fidelity Mut. Ins. Co.*, 20 S.E.2d 372 (1942) (court ordering defendant insurance company to return money paid to it by Mrs. Frederick as executrix by reason of mutual mistake of fact regarding ownership, which was later repaid by Mrs. Frederick individually to the rightful owner).

223. See Burke & Hine, *supra* note 221.

224. In the 1944 election, black candidates I. S. Leevy and J. B. Lewie ran unsuccessfully against the Democratic Party candidates for State Representative in Richland County. SUPPLEMENTAL REPORT OF THE SECRETARY OF STATE TO THE GENERAL ASSEMBLY OF SOUTH CAROLINA, ELECTION OF NOVEMBER 7, 1944, at 27, in 1 REPORTS AND RESOLUTIONS OF SOUTH CAROLINA TO THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA (1945); see SUPPLEMENTAL REPORT OF THE SECRETARY OF STATE TO THE GENERAL ASSEMBLY OF SOUTH CAROLINA, ELECTION OF NOVEMBER 5, 1946, at 5, 7, 20, 23–24, 28, in 1 REPORTS AND RESOLUTIONS OF SOUTH CAROLINA TO THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA (1947).

225. See SUPPLEMENTAL REPORT OF THE SECRETARY OF STATE TO THE GENERAL ASSEMBLY OF SOUTH CAROLINA, ELECTION OF NOVEMBER 7, 1944, at 10, in 1 REPORTS AND RESOLUTIONS OF SOUTH CAROLINA TO THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA (1945).

numerous allegations that McKaine's vote had been falsely counted and falsely reported by white election officials.<sup>226</sup> In 1942, at the behest of the NAACP, for the first time in over sixty years, the United States Department of Justice prosecuted South Carolina white election officials for violating the rights of a black citizen trying to register to vote.<sup>227</sup> Unfortunately, the prosecution failed, and one of the black women who instigated the charges was fired from her job with the public school system.<sup>228</sup> In November of the same year, whites in Greenville severely beat an elderly black man who had been a black voting advocate.<sup>229</sup> Violence, intimidation, and lying to prevent blacks from voting thus had not disappeared.

Howard Law School graduate and Columbia native Harold Boulware returned home and was admitted to the South Carolina bar in 1940.<sup>230</sup> By September 1942, the state NAACP retained Boulware to file a challenge to the white primary.<sup>231</sup> The lawsuit could not be filed before Boulware's draft board called, and World War II interrupted his legal efforts.<sup>232</sup> Meanwhile, the NAACP continued to try and force Texas into constitutional compliance. In 1944, in *Smith v. Allwright*<sup>233</sup> the United States Supreme Court held that despite Texas's attempt to classify its white primary as a private activity, it simply did not comport with the Fifteenth Amendment.<sup>234</sup> This result did not impress the white South Carolina Democratic Party. In response to *Smith v. Allwright*, the governor called the legislature into a special session to repeal all state laws relating to the primary in an attempt to "retain white supremacy."<sup>235</sup>

After Boulware returned from war, his work was still waiting for him. The NAACP filed *Elmore v. Rice*,<sup>236</sup> which challenged the Democrats' white primary. At this time, the only eligible black voters in the white primary would have been ninety-two year old men with ten ninety-two year old white male witnesses. Thurgood Marshall and Harold Boulware, working for the NAACP, won a declaration that the white primary was unconstitutional.<sup>237</sup> However, the still

226. Richards, *supra* note 162, at 204–05.

227. *United States v. Ellis*, 43 F. Supp. 321 (W.D.S.C. 1942); see Letter from Roy Wilkins to Robert H. Jackson, United States Attorney General (Aug. 28, 1940), on PAPERS OF THE NAACP, *supra* note 194.

228. See *Board Acquitted*, GAFFNEY LEDGER (S.C.), Mar. 17, 1942, at 4; *School Board Fires Teacher for Trying to Register, Vote*, LIGHTHOUSE & INFORMER (Columbia, S.C.), June 28, 1942, at 1; Letter from Thurgood Marshall, Special Counsel, NAACP, to Lottie P. Gaffney (July 27, 1942), on PAPERS OF THE NAACP, *supra* note 194.

229. See Richards, *supra* note 162, at 119–20.

230. Burke & Hine, *supra* note 221, at 17, 29.

231. See Letter of James Hinton, Secretary, to Thurgood Marshall, Special Counsel, NAACP (Sept. 21, 1942), on PAPERS OF THE NAACP, *supra* note 194; Letter from Thurgood Marshall, Special Counsel, NAACP, to James Hinton (Nov. 18, 1942), on PAPERS OF THE NAACP, *supra* note 194.

232. Letter from Harold Boulware to Thurgood Marshall (Dec. 6, 1943), on PAPERS OF THE NAACP, *supra* note 194; Letter from James Hinton to Thurgood Marshall (Mar. 3, 1944), on PAPERS OF THE NAACP, *supra* note 194.

233. 321 U.S. 649 (1944).

234. *Id.* at 666.

235. See Richard, *supra* note 162, at 164–65.

236. 72 F. Supp. 516 (E.D.S.C. 1947).

237. *Id.* at 523, 528.

defiant white Democrats promulgated rules that vested control of the party primaries in clubs which blacks could not join and which allowed only those voters who would take “an oath that [they] believed in social and educational separation of the races.”<sup>238</sup> The NAACP, through Thurgood Marshall and Harold Boulware, again sued, and finally in 1949, the Fourth Circuit in *Baskin v. Brown* held that the white primary was dead.<sup>239</sup>

### VIII. THE VOTING RIGHTS ACT

While voting rights remained a topic of much interest to the black community, the Civil Rights Movement of the 1950s and early 1960s diverted its resources to cases about school desegregation, the right to demonstrate, and public accommodations. With the passage of the Voting Rights Act of 1965, black registration in South Carolina increased from under 60,000 to over 220,000.<sup>240</sup> Of course, this was not before South Carolina mounted the very first challenge to the Act, apparently still hoping that the plantation days were not truly over. In *South Carolina v. Katzenbach*,<sup>241</sup> the United States Supreme Court held the Voting Rights Act constitutional and noted that it was the “unremitting and ingenious defiance of the Constitution”<sup>242</sup> that necessitated the passage of this landmark legislation.

### XIV. CONCLUSION

With the Act in force, by 1970, black candidates were elected to the state House of Representatives for the first time in seventy years.<sup>243</sup> In 1973, Matthew J. Perry, the state’s premier black lawyer, scored a victory in *Stevenson v. West*,<sup>244</sup> a suit filed to challenge the at-large method of electing the state legislature. As a consequence, by 1974, the legislature had thirteen black members.<sup>245</sup> Decisions striking down various at-large methods of electing public officials in South Carolina have been decided in every decade since *Stevenson*.<sup>246</sup> The most recent

238. *Baskin v. Brown*, 174 F.2d 391, 392 (4th Cir. 1949).

239. *Id.* at 393–94.

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241. 383 U.S. 301 (1966).

242. *Id.* at 309.

243. EDGAR, *supra* note 7, at 541; see GEORGE C. ROGERS, JR., THE HISTORY OF GEORGETOWN COUNTY, SOUTH CAROLINA 476 (1970).

244. 413 U.S. 902 (1973).

245. EDGAR, *supra* note 7, at 541–42.

246. See, e.g., *United States v. Charleston County, S.C.*, 316 F. Supp. 268, 270 (D.S.C. 2003), *aff’d*, 365 F.3d 341 (4th Cir. 2004) (finding that at-large methods of electing the nine-member Charleston County Council violates Section 2 of the Voting Rights Act of 1965); *Jackson v. Edgefield County, S.C. Sch. Dist.*, 650 F. Supp. 1176, 1204 (D.S.C. 1986) (concluding that “the at-large method of election for membership on the Edgefield County, South Carolina, School Board Trustees results in denial or abridgement of voting rights of black citizens”); *NAACP v. Kershaw County, S.C.*, 838 F. Supp. 237, 239 (D.S.C. 1993) (reviewing proposed remedial plan after previous ruling that at-large method of electing members of the Kershaw County Council violated Section 2 of the Voting Rights Act).

case was in Charleston in 2003, which the Fourth Circuit Court of Appeals affirmed in 2004.<sup>247</sup>

In 1866, Frederick Douglass wrote to exhort approval of what would become the Fourteenth and Fifteenth Amendments: "The plain, common sense way of doing this work . . . is simply to establish in the South one law, one government, one administration of justice, one condition to the exercise of the elective franchise, for men of all races and colors alike."<sup>248</sup> Douglass' words may have helped gain approval for the two great civil rights amendments, but the common sense he urged was ninety-nine years in coming, and only then through the passage of the Voting Rights Act of 1965.

The Voting Rights Act outlawed many of the tactics that were employed by white South Carolinians to prevent voting by African Americans, including intimidation, fraud, literacy tests, interpretation tests, proof of qualification by "vouchers," and any "qualification or prerequisite to voting" because of race.<sup>249</sup> However, three sections of the act that are subject to expiration are of particular importance to African American voters in South Carolina. One provision permits the United States Attorney General to send poll watchers and examiners to states like South Carolina if individuals need protection from harassment at the polls.<sup>250</sup>

More important are Sections 4 and 5, under which certain states or political subdivisions are required to preclear with the United States Department of Justice any changes to their election laws or procedures that might abridge or deny voting rights to persons on account of their color.<sup>251</sup> South Carolina is a covered jurisdiction. Moreover, the phrase "deny or abridge" has come to mean anything that dilutes the voting strength of African Americans voters, which would certainly describe the frequency with which South Carolina officials have attempted to change elections procedures and methods to the detriment of black voters.

Over the last forty years, the number of voting rights cases has not diminished. Since November 1981, the United States Department of Justice's Civil Rights Division has refused to preclear eighty or more proposed changes to state and local election procedures because of the Department's belief that the state action would hinder the rights of African American voters in South Carolina.<sup>252</sup> In addition, it is an unfortunate truth that the harassment of African Americans voters in South Carolina has been continuously reported over the last thirty years. In the 1980s and 1990s, elderly African American voters faced so much "official harassment" in Charleston County that a circuit court judge issued an order restraining the local

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247. *United States v. Charleston County, S.C.*, 316 F. Supp. 2d 268 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004).

248. Frederick Douglass, *Liberty and Equality for All* (Dec. 1866), reprinted in *THE ATLANTIC*, March 2006, at 52.

249. See 42 U.S.C. §§ 1973(a), 1973i, 1973j and 1973aa (2000).

250. 42 U.S.C. §§ 1973d, 1973e, 1973f, 1973k (2000).

251. See 42 U.S.C. §§ 1973b, 1973c (2000).

252. See Objection Letters of the United States Department of Justice to South Carolina State and Local Governments (on the file with author).

election commission.<sup>253</sup> In another South Carolina county, between 1992 and 2002, white poll managers refused to provide required voting assistance to African American voters and hassled them with comments such as “Why can’t you read and write?”<sup>254</sup> Finally, as noted at the outset of this Article, black college students were intimidated and prevented from voting by white poll watchers in the 2004 presidential election.<sup>255</sup>

It is now 140 years since Frederick Douglass wrote a call for the enfranchisement of African Americans. He envisioned a nation in which the ballot alone would give African Americans “the power to protect themselves.”<sup>256</sup> In truth, however, while no one has been killed for trying to vote in South Carolina in decades, South Carolina’s history of killing, cheating, legislating, and lying to prevent African Americans from exercising the power of the ballot demonstrates that Congress must continue to renew the critical provisions of the Voting Rights Act.

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253. ELLEN KATZ ET AL., SOUTH CAROLINA REPORT, DOCUMENTING DISCRIMINATION IN VOTING 22 (2005), available at <http://sitemaker.umich.edu/votingrights/files/finalreport.pdf>.

254. *Id.*

255. John C. Drake, *Benedict Students Face GOP Challengers*, THE STATE (Columbia, S.C.), Nov. 4, 2004, at B5.

256. Douglass, *supra* note 248, at 52.

