Struggle for Mastery

Disfranchisement in the South, 1888–1908

Michael Perman
the disfranchisers' determination to protect white voters had immense repercussions, however, for the "saving" clause proved to be the most vexing issue confronting the Democrats in each state. Everywhere, it generated lengthy and rancorous debate. In several states, the effort to devise an acceptable loophole for whites threatened to derail the entire process. And in all of them, it was the feature of the final plan that provoked the most criticism in the press, invariably producing vigorous denunciation, even undisguised contempt and mockery. The "understanding" and "grandfather" clauses that occasioned such ridicule were castigated on several grounds. First, they were assumed to be deceptive, providing a loophole that was ostensibly nonracial but clearly aimed at protecting whites who could not meet the new requirements. Second, these clauses were almost certain to encourage fraud and abuse since registrars were given almost unlimited discretion in interpreting and administering the qualifying tests. Finally, they perverted the serious process of constitutional revision by introducing trivial and foolish stipulations that invited dishonesty and fraud. This barrage of denunciation did not, however, deter the disfranchisers or cause them to reconsider.

Outside the South, these loopholes became targets for reproach whenever the new constitutions were scrutinized in Congress and elsewhere. The dis-
franchisers claimed that their measures were fully in compliance with the Fifteenth Amendment, yet the “saving” clauses suggested quite the contrary. Although stated in nonracial terms, their only reason for existence was to exempt whites who were disqualified by the main suffrage provisions of each plan. Beginning with the debate on the Mississippi constitution in the U.S. Senate in which Ingalls of Kansas and John C. Spooner of Wisconsin successfully exposed the racial intent of the new document, northerners, whether Democratic or Republican, were reminded by the disfranchisers’ unflinching reliance on loophole clauses that the movement was aimed at blacks, not whites. Indeed, these clauses were the most controversial and memorable features of every revised constitution, and they have remained so in the century thereafter. They have become so closely identified with disfranchisement that many people have assumed that they were the primary disfranchising devices. Actually, their purpose was quite the opposite. As Senator George of Mississippi continually insisted, their purpose was to protect suffrage rather than deny it, to include voters rather than eliminate them. The loophole provisions permitted whites who would have been disfranchised by the scheme’s restrictive features to continue to enjoy the franchise. George’s protestations notwithstanding, these clauses clearly raised a red flag. Disfranchisement was racially motivated, and no one could deny it.

Attempts at denial were made, all the same. One of the more formal explanations was presented in 1905 by John B. Knox, the corporation lawyer from Anniston who presided over the Alabama constitutional convention of 1901. In an influential article in Outlook, a respectable journal of public affairs, he argued that disfranchisement was not undertaken “for the purpose of excluding the negro. The true philosophy of the movement was to establish restricted suffrage, and to place the power of government in the hands of the intelligent and virtuous.” Disqualification of the illiterate and the uninterested was intended to reform suffrage and produce a respectable and responsible electorate. The editors of Outlook endorsed Knox’s assessment. After all, they argued, saying that the voter “cannot vote until he learns to read is not the same as saying he cannot vote” at all. Yet they did not object to the state’s “saving” clause, which clearly countenanced illiterate and propertyless voters, an expedience that Knox himself defended as necessary to ensure ratification of the new constitution. The editors not only were prepared to overlook this inconsistency but also seemed unaware that Alabama was the only state that needed such a loophole to ensure ratification. Since the other states refused to submit their newly framed constitutions for popular ratification, they must have had other reasons for including a “saving” clause, and of course they did. Also ignored was Knox’s accusation that northerners were inconsistent and hypocritical about black suffrage. Northerners admitted that the Fifteenth Amendment, “whereby our former slaves were invested with the right of suffrage . . . was a mistake,” Knox noted, yet “many of them do not hesitate efforts of these [southern] States to which this mistake inflicted upon the

The Alabamian’s irritation over the mistake in enfranchising the South’s black he was less interested in improving the voting rights of the specific group of voters. Although a suffrage reform was undertaken to include African Americans in the electorate, it was probably one of them—the overt reason for the legislature’s rush to ratify the constitution. Indeed, Knox’s decision to write this compelling motive was undoubtedly rooted in the legal framework of the state’s constitution and its clauses. The purpose of which was to gerrymander districts and thus deliver “a punishment for undertaken suffrage reform.” If race was the “reduction of representation” anticipated, nor for writing the

Ironically, it was the disfranchisement of African Americans that motivated the Republican minority in Congress to pass the 14th Amendment as a penalty. Prior to these amendments, African Americans were stymied in their attempts to vote. The Lodge bill to increase supervision of elections in 1891. Many claimed that the disfranchisement of African Americans was a significant factor in the Democratic sweep of the 1892 elections. Once back in control of the national government, the Democrats for federal involvement by repealing the labor laws of 1891, which were seen as an attempt to protect the rights of African Americans. The Lodge bill to increase supervision was a means of ensuring that only qualified voters would be allowed to vote. The Lodge bill was not enacted, but its provisions were included in the 1904 campaign. The Lodge bill to increase supervision was a means of ensuring that only qualified voters would be allowed to vote. The Lodge bill was not enacted, but its provisions were included in the 1904 campaign.
AN AMERICAN DILEMMA

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The poll tax by federal law. In Representative Lee E. Geyer, a delegation committee Senate to the floor of the House by has been written (October, 1940) before the Senate. Liberals would much prefer that the United States Congress or by the Senate. No additional tax requirements remain for payment of a poll tax need be paid to vote in Mississippi, Texas, and Arkansas (see and Arkansas, $1.50 in y), without the cumulative and general election. (Bunche, idem., p. 119.)

38 For documented cases of each of these types of violence and intimidation, see the unpublished monographs prepared for this study (1940): Bunche, "The Political Status of the Negro," especially Vols. 2 and 4, and Arthur Raper, "Race and Class Pressures." See also Lewinson, op. cit., Chapter 6.

39 I have talked to a great number of registration officers in various Southern states, and they have usually been very outspoken on this point. They have also been astonishingly frank in describing the methods they used. A tax collector in Georgia, for example, referred to the Supreme Court jurisdiction clause of the State Constitution and said:

"I can keep the President of the United States from registering, if I want to. God, Himself, couldn't understand that sentence, I, myself, am the judge. It must be written to my satisfaction." (Interview by Myrdal, November 3, 1939.)


36 Interview by Wilhelmina Jackson, December, 1939, in Ibid., Vol. 4, p. 940.

37 Sometimes a vague excuse may accompany a refusal to permit a Negro to register or vote, such as that "there is no provision in the law for registering Negroes," or that the "quota" of Negro voters had been filled. (See Lewinson, op. cit., p. 118.)

38 Idem.

39 Ibid., p. 119.


41 The causes of local variations are discussed in Lewinson, op. cit., pp. 120-124, 132-138.

42 A candidate who does this is sometimes a "reform" candidate. For a description of several "reform" campaigns leading up to general elections, see Lewinson, op. cit., pp. 148 ff. When the 1928 campaign split the South, there were contests in the general elections for a few years afterwards where pro-Hoover Democrats joined the Republicans to battle the regular Democratic candidates. (See ibid., pp. 159 ff.)

43 Ibid., p. 147.

44 In one case at least the commission form of government is known to have hurt Negroes politically: In Chattanooga before 1920 the city had an aldermanic government, and there were Negro aldermen from Negro sections of the city. In 1920 a nonpartisan commission form of government was instituted and—since elections became city-wide—Negroes were outvoted. From that time on, according to a local labor leader, Negroes received less consideration in politics. (Interview by George Stoney, January, 1940, in Bunche, "The Political Status of the Negro," Vol. 4, p. 973.)

45 Here again we rely on Bunche's estimates.

46 See Chapter 12, Section 5. Corruption is absent only in the sense that Negroes are not intimidated at the polls. There have been reports of white plantation owners bringing their Negro croppers to the polling place and "voting" them. Too, the voting is not secret, so that white plantation owners know their tenants' vote. On the other hand, some Southern whites feel that the A.A.A. elections are bad because they are giving Negroes the idea that they can vote. Other whites satisfy themselves by believing that the Negroes do not know what they are voting for anyway or by telling Negroes how to vote. While Negroes vote in the main A.A.A. referenda, they are often not permitted to vote for the committeemen who administer the program locally. In some cases they are permitted to vote, but only for white nominees. In all Alabama, for example, there was only one county which had Negro committeemen in the A.A.A. program. (Hale
THE LAW OF DEMOCRACY

LEGAL STRUCTURE OF THE POLITICAL PROCESS

Revised Second Edition

by

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5. The Texas Democratic Party cases from *Nixon* through *Terry* are collectively referred to as the "White Primary Cases" and generally stand for the proposition that forcible exclusion of black voters from the political process will not be tolerated. Is it possible, however, to distinguish among the cases on different grounds? Consider an argument that focuses on the role of courts as preventing a lockup of the political process. One can begin by asking why it was so important to the Democratic Party to have the State of Texas forbid black voting in its primary elections. Perhaps the appeal to state intervention was a guarantee that no disgruntled elements of the party would seek to enhance their power by appealing to black voters. Historically, the Texas Democratic Party was a rather diverse and unstable mix of both conservative and populist currents that divided quite sharply over issues such as the New Deal. (This history is chronicled in Chandler Davidson, Race and Class in Texas Politics 155–79 (1990)). When such divisions were particularly sharp, what would discourage a sufficiently disgruntled faction from seeking to secure control of the Party by courting even the relatively small numbers of potential black voters? The answer was a precommitment among the varying factions that no one would appeal to black voters. The role of the state was guarantor of that agreement. In such circumstances, the agreements struck down in *Nixon v. Herndon*, *Nixon v. Condon*, and, although to a lesser extent, *Smith v. Allwright* all shared the critical feature of the Party using the state to secure the racial lockup of the political process. So long as the restrictive covenants of the Party were enshrined through state law, there was no prospect for black voters to serve as potential swing voters who could secure some measure of political redress in exchange for their votes. Under these circumstances, judicial intervention can be justified as the necessary destabilizing element required in order to break the stranglehold on a political system unable to generate change from within. (We shall see a variant of this same argument in the next Chapter in discussing the one-person, one-vote malapportionment cases.) Can the same be said of *Terry v. Adams*? By the time of *Terry*, the element of state enforcement had been removed. Certainly the Jaybirds were all white and held nearly complete power in the Democratic Party. But was this system stable? Was it as immune from change as those state-enforced arrangements struck down in the earlier White Primary Cases? Are competing values of freedom of political association more salient in *Terry* than in the other White Primary Cases? For a fuller analysis of the White Primary Cases as examples of political lockups, see Samuel Issacharoff and Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998). For a rich historical account of these cases, which argues that they were one of the few Court decisions that had significant practical effect on black political participation, see Michael J. Klarman, *the White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 Fla. St. U. L. Rev. ____ (2001).

3. **The Demise of Discretion**

With the elimination of the white primary, blacks sought to register in increasing numbers. The potential that black voters might hold the balance of power among competing white factions—the very concern that had motivated white primaries—now led election officials back to long-unused constitutional
provisions regarding literacy and good character tests. Louisiana, for example, had had an "interpretation test" since the 1898 disenfranchising convention, but the test was rarely, if ever, applied until the early 1950's. As the district court explained in United States v. State of Louisiana, 225 F.Supp. 353 (E.D.La.1963), aff'd, 380 U.S. 145 (1965), "[i]t was not needed. The Democratic white primary made registration futile for Negroes . . . . The white primary . . . effectively kept Negroes from voting in the only election that had any significance in the Louisiana electoral process. . . ." In the wake of Smith v. Allwright and increased attempts by blacks to register, partisans of Massive Resistance and white supremacy turned to the interpretation test to keep black voters out. The district court in United States v. Louisiana found that:

The registrar's whim alone determines which applicants will be tested. The Constitution merely states that applicants "shall be able to understand and give a reasonable interpretation" of a section of a constitution. Some registrars, for example, those in LaSalle, Lincoln, and Webster parishes, have interpreted this to mean that the applicant need not actually interpret the constitution, only that he have the ability to do so . . . .

The Louisiana Constitution contains 443 sections, as against 56 sections in the United States Constitution, and is the longest and the most detailed of all state constitutions. The printed copy published by the State, unannotated, contains 600 pages, not counting an index of 140 pages. The evidence clearly demonstrates great abuses in the selection of sections of the constitutions to be interpreted. Some registrars have favorite sections which they apparently use regardless of an applicant's race. Some open a volume containing the United States and Louisiana Constitutions and, like soothsayers seeking divine help from the random flight of birds, require an applicant to interpret the section on the page where the book opens. The Segregation Committee distributed to registrars sets of twenty-four cards, each containing three sections of the Constitution with instructions that they be used in administering the interpretation test . . . .

It is evident from the record that frequently the choice of difficult sections has made it impossible for many Negro applicants to pass. White applicants were more often given easy sections, many of which could be answered by short, stock phrases such as "freedom of speech", "freedom of religion", "States' rights", and so on. Negro applicants, on the other hand, were given [extremely complex parts of the state constitution].

***

Registrars were easily satisfied with answers from white voters. In one instance "FRDUM FOOF SPETGHI" was an acceptable response to the request to interpret Article 1, § 3 of the Louisiana Constitution [which guarantees freedom of speech].

On the other hand, the record shows that Negroes whose application
forms and answers indicate that they are highly qualified by literacy standards and have a high degree of intelligence have been turned down although they had given a reasonable interpretation of fairly technical clauses of the constitution. For example the Louisiana Constitution, Article X, § 16 provides: "Rolling stock operated in this State, the owners of which have no domicile therein, shall be assessed by the Louisiana Tax Commission, and shall be taxed for State purposes only, at a rate not to exceed forty mills on the dollar assessed value." The rejected interpretation was: "My understanding is that it means if the owner of which does not have residence within the State, his rolling stock shall be taxed not to exceed forty mills on the dollar."

In another instance the registrar rejected the following interpretation of the Search and Seizure provision of the Fourth Amendment: "[Nobody] can just go into a person's house and take their belongings without a warrant from the law, and it had to specify in this warrant what they were to search and seize." Another rejected interpretation of the same Amendment by a Negro applicant was: "To search you would have to get an authorized authority to read a warrant." The Louisiana Constitution Article I, § 5 provides: "The people have the right peaceably to assemble." A registrar rejected the following interpretation: "That one may assemble or belong to any group, club, or organization he chooses as long as it is within the law."

Each of these incidents could conceivably be an isolated event, indicating personal dereliction by one registrar, regrettable, but basically trivial in the general administration of the interpretation test. However, the great number of these and other examples, illustrative of a conscious decision, show conclusively that the discriminatory acts were not isolated or accidental or peculiar to the individual registrar but were part of a pervasive pattern and practice of disfranchisement by discriminatory use of the interpretation test.

The State does not deny that unlimited discretion is vested in the registrars by the laws of Louisiana, but argues that officials must act reasonably and that their decisions are subject to review by district courts. Louisiana, however, provides no effective method whereby arbitrary and capricious action by registrars of voters may be prevented or redressed. Unreviewable discretion was built into the test.

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The statistics demonstrate strikingly the effect of resurrection of the interpretation test. A report of the Louisiana Sovereignty Committee, December 14, 1960, boasts:

"We would like to call your attention to the fact that, during this four year period of time, from 1956 until 1960, 81,241 colored people became of voting age, when the registration figures of colored people actually declined 2,377. Going further during this four year period,
we had 114,529 white people who became of voting age and, during this four year period of time, the white registration increased 96,620."

Similarly, Davis v. Schnell, 81 F.Supp. 872 (S.D.Ala.), aff'd, 336 U.S. 933 (1949), struck down Alabama's Boswell Amendment, which limited registration to persons who could "understand and explain" any article of the Federal Constitution. The district court found that the test was both invalid on its face and invalid as applied:

"[U]nderstand" may mean to interpret. This meaning requires an exceedingly high, if not impossible, standard. The distinguished Justices of the Supreme Court of the United States have frequently disagreed in their interpretations of various articles of the Constitution. We learn from history that many of the makers of the Constitution did not understand its provisions; many of them understood and believed that its provisions gave the Supreme Court no power to declare an act of Congress unconstitutional. An understanding or explanation given by the Supreme Court a few years ago as to the meaning of the commerce clause does not apply today. Among our most learned judges there are at least four different understandings and explanations of the Fourteenth Amendment to the Constitution as to whether it made the first eight Amendments applicable to state action. Such a rigorous standard . . . illustrates the completeness with which any individual or group of prospective electors, whether white or Negro, may be deprived of the right of franchise by boards of registrars inclined to apply this one of the innumerable meanings of such an indefinite phrase.

* * *

It, thus, clearly appears that [the Boswell] Amendment was intended to be, and is being used for the purpose of discriminating against applicants for the franchise on the basis of race or color. Therefore, we are necessarily brought to the conclusion that the Amendment to the Constitution of Alabama, both in its object and the manner of its administration, is unconstitutional, because it violates the Fifteenth Amendment. While it is true that there is no mention of race or color in the Boswell Amendment, this does not save it.

The Alabama Literacy Test

The following example of a typical Alabama literacy test was reprinted in Howard Ball, Dale Krane & Thomas P. Lauth, Compromised Compliance 238-42 (1982). How many questions can you answer? Notice how some questions have ambiguous answers that allow for administrative discretion.

1. Which of the following is a right guaranteed by the Bill of Rights?

   _ Public Education   _ Voting
   _ Employment        _ Trial by Jury
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, SHIRLEY BROWN,
NANCY LEA WILDE, EDDIE LEE
HOLLOWAY, JR., MARIANNIS GINORIO,
FRANK YBARRA, SAM BULMER, PAMELA
DUKES, CARL ELLIS, RICKIE LAMONT
HARMON, DARTRIC DAVIS, BARBARA
ODEN, DEWAYNE SMITH, SANDRA
JASHINSKI, JUSTIN LUFT, ANNA SHEA,
MATTHEW DEARING, MAX K Ligman,
SAMANTHA MESZAROS, STEVE
KVASNICKA, SARAH LAHTI, DOMONIQUE
WHITEHURST, EDWARD HOGAN, ANTHONY
JUDD, and ANTHONY SHARP, on behalf
of themselves and all others
similarly situated,

Plaintiffs,

-vs-

Case No. 11 CV 1128

SCOTT WALKER, in his official
capacity as Governor of the State
of Wisconsin, et al.,

Defendants.

Deposition of KRISTINA BOARDMAN
Wednesday, March 28th, 2012
8:02 a.m.
at

WISCONSIN DEPARTMENT OF JUSTICE
17 West Main Street
Madison, Wisconsin

Reported by: Debbie A. Harnen, R.P.R.
Q Understood. Let me stipulate, also -- I should have said this earlier. Let's stipulate that VIC will signify Veterans Identification Card.

A Okay.

MR. KAWSKI: Sounds good.

MR. SHERMAN: That's issued -- I should have said, also, issued by the U.S. Department of Veterans Affairs.

MR. KAWSKI: Yes.

BY MR. SHERMAN:

Q Why would that not suffice -- at present, does a VIC count as proof of identity for the Wisconsin driver's license and ID card? And you can look at the Exhibit Trans 102.15 or BDS 316. I would note in 102.15 there is a statement, "A U.S. Government and military dependent identification card," and I just wanted to clarify whether a VIC would work --

A I can't answer that.

Q -- for that. Okay.

Do you have any alternative procedures for customers who represent that they can't afford their birth certificate?

A Not currently, no.

Q So if a person is indigent, there's no provision that they can simply sign an affidavit under
penalty of perjury that they are a U.S. citizen, correct?

A We do not currently have a procedure for that.

Q Understood.

A We provide our products free of charge, and I think it would be up to the vital records office to make that level determination for indigency for the distribution of their products.

Q So it's up to the customer service center to decide whether or not there's some flexibility for a person who represents that they cannot afford their birth certificate application? I'm sorry. I may have misunderstood your answer.

A No. We do not make rulings of -- we do not have an exceptions process for indigency standards for what you need to show to get a product.

Q Understood. At this time, are you -- is the DMV considering adding some sort of affidavit of citizenship procedure as sort of an alternative for people who cannot afford or for other -- or, for various reasons, cannot obtain a certified copy of their birth certificate?

A There's nothing been proposed yet as of this date.

Q I'm going to hand you what we'll mark as Exhibit 46, I believe.
the population.

Q Let's say a homeless person says, "I'm penniless, living on food stamps, I cannot afford even my next meal, I can't afford a certified copy of my birth certificate from Minnesota, which costs 26 bucks, is there any alternative for me?"

MR. KAWSKI: Object to speculation. You can answer.

BY THE WITNESS:

A Under current law, we do not have the ability to exempt one from statutory requirements for indigency.

BY MR. SHERMAN:

Q On Exhibit 60, I'm almost sure there is a reference to the South Carolina issue, as well, but I'm struggling to find it now.

While I have this document in front of you, do you see under the fifth bullet point down from No. 2 on Page 1, it says, "The question was asked, is it true that DMV staff will soon have more discretion when an applicant needs to prove residency." DMV responded that, "Staff have always had a certain amount of discretion. There will be no change." Is that your understanding?

A I think it is true to say that DMV staff has
STATE OF WISCONSIN  )
   ) SS:
COUNTY OF MILWAUKEE   )

   I, Debbie A. Harnen, a Registered
Professional Reporter and Notary Public in and for the
State of Wisconsin, do hereby certify that the
deposition of KRISTINA BOARDMAN was reported by me and
reduced to writing under my personal direction.

   I further certify that said deposition
was taken at WISCONSIN DEPARTMENT OF JUSTICE, 17 West
Main Street, Madison, Wisconsin, on the 28th day of
March, 2012, commencing at 8:02 a.m. and concluding at
1:41 p.m.

   I further certify that I am not a relative
or employee or attorney or counsel of any of the
parties, or a relative or employee of such attorney or
counsel, or financially interested directly or
indirectly in this action.

   In witness whereof, I have hereunto set my
hand and affixed my seal of office at Milwaukee,
Wisconsin, this 30th day of March, 2012.

Debbie A. Harnen - Notary Public
In and for the State of Wisconsin