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## Black and White Disenfranchisement: Populism, Race, and Class

Burton D. Wechsler

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## Black and White Disenfranchisement: Populism, Race, and Class

## ARTICLES

BLACK AND WHITE  
DISENFRANCHISEMENT:  
POPULISM, RACE, AND CLASS

Burton D. Wechsler \*

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## INTRODUCTION

There is a vast literature on the Populism movement of the 1890s.<sup>1</sup> The Populists were the largest and most indigenous political movement this nation ever witnessed. The movement was large, radical, exuberant, and organized from below; predominantly,

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\* Professor Emeritus, *American University, Washington College of Law*. This Article is a chapter from a book in progress by Professor Wechsler entitled, *THE FALL AND RISE OF SECTION 1983*. The chapter provides background to the decision by Justice Oliver Wendell Holmes in *Giles v. Harris*, 189 U.S. 475 (1903). Burt gratefully acknowledges the tireless work of his many student research assistants without whom this project would not have come to fruition.

1. For further reading on Populism in the nineteenth century, *see generally* JOHN B. CLARK, *POPULISM IN AMERICA* (1926); LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA* (1976); ROBERT C. McMATH, JR., *AMERICAN POPULISM: A SOCIAL HISTORY, 1877-1898* (1993); WILLIAM ALFRED PEPPER, *POPULISM, ITS RISE AND FALL* (Peter Argersinger ed., 1991).

though not entirely, composed of tillers of the soil; class conscious, often joined by trade unions and workers of all stripes, widely composed of women, democratic; in some places, like the Northeast, little more than a nuisance; in other areas, like some parts of the South and Prairie States, a serious threat to those who governed.<sup>2</sup>

Nothing comes from nowhere, nothing without progenitors. That was true of Populism and its offspring, the Peoples' Party. It had numerous ancestors of various disparate visions. These post-reconstruction modules included the Grange,<sup>3</sup> the Greenback Party,<sup>4</sup> the Union Labor Party,<sup>5</sup> and the Farmers' Alliance.<sup>6</sup>

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2. In examining the causal connections between Populism and "legal" disenfranchisement of blacks and poor uneducated whites, I have concentrated on Alabama without intentionally ignoring a multitude of other compelling and related events in other southern states during the Populist era. I have targeted Alabama for the following reasons: (a) the availability of a complete and lengthy transcript of Alabama's 1901 Constitutional Convention that effectively disenfranchised blacks; (b) an abundance of fine, and, I'm happy to say, often conflicting scholarly material on Alabama Populism; (c) Alabama had, I believe, one of the most powerful Populist movements in the South, seriously threatening its Bourbon ruling elite; (d) Alabama Populists managed to develop various credible and respectful ways of working with blacks, though not without wrenching conflicts; (e) Alabama was the first state to adopt a "fighting grandfather" clause; (f) an important case, *Giles v. Harris*, 189 U.S. 475 (1903), involving among other things, Alabama's newly enacted grandfather clause, was decided by the United States Supreme Court in 1903; and (g) none other than the august Honorable Oliver Wendell Holmes, Jr., fresh to the United States Supreme Court bench, wrote the *Giles* majority opinion, a veritable judicial shipwreck, sometimes overlooked by thoughtful Supreme Court observers and Holmes aficionados.

3. The Grange, or the Order of Patrons of Husbandry, was a progressive agricultural organization formed on December 4, 1867 in Washington, D.C. For further reading on the Grange, see generally CHARLES GARDNER, *THE GRANGE, FRIEND OF THE FARMER: A CONCISE REFERENCE HISTORY OF AMERICA'S OLDEST FARM ORGANIZATION, AND THE ONLY RURAL FRATERNITY IN THE WORLD, 1867-1947* (1949); DENNIS S. NORDIN, *RICH HARVEST: A HISTORY OF THE GRANGE, 1867-1900* (1974).

4. The Greenback Party was a political organization formed in 1874 to promote currency expansion. The members were primarily farmers from the West and the South who supported inflation of currency values in order to wipe out farm debts. The Greenback Party eventually dispersed and its members became figures in the Union Labor Party and the Populist Party. For further reading about the Greenback Party, see generally SIMON NEWCOMB, *A CRITICAL EXAMINATION OF OUR FINANCIAL POLICY DURING THE SOUTHERN REBELLION* (Michael Hudson ed., 1974); GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTI-MONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA* (1997); IRWIN UNGER, *THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865-1879* (1964).

5. After the Greenback Party disappeared, there were attempts to reorganize under labor leadership. In 1887, members of the Grange, the Greenbackers, and Farmers' Alliance held a convention to organize the National Union Labor Party. Soon after, the Greenback-Labor Party, an intermediate step in the dissolution of the Greenback Party, declared itself dissolved. The Party's platform opposed land monopoly, contract and Chinese labor, and favored a graduated income tax and direct election of Senators. See WILLIAM WARREN ROGERS, *THE ONE-GALLUSED REBELLION* 125-30 (2001).

6. After the Civil War, southern farmers saw much hardship as their economic mainstay, cotton, dropped dramatically in price. In September 1877, farmers gathered in Texas to discuss their situation and began the National Farmers' Alliance

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During the political storms that swept the South from 1886 to 1896, the Farmers' Alliance, quickly succeeded by the more politically minded and powerful Populists, shook the pillars of the ruling house, which consisted of the "Redeemers,"<sup>7</sup> the Democratic Party, the Bourbons,<sup>8</sup> the southern oligarchy, and the black belt aristocracy. This overlapping ruling combination had reigned in the South since the end of Reconstruction. The Populist challengers were primarily those in financial straits. They were, predominantly, small land-owning farmers, tenant farmers, sharecroppers, and laborers, urban and rural. They were white, and they were black. They were men, and they were women.

For those days and in many respects, for these days too, theirs was a radical program: public ownership of railroads and utilities; a graduated income tax; meaningful debtor relief; popular election of President and Senators; a free and fair ballot honestly counted; powerful farm cooperatives; national treasury assistance to farmers at low interest rates; increased monetary supply; reapportionment of political units; federal public works programs; and more. They vigorously condemned, among other things, corporate monopoly, "ring rule," convict labor, high interest rates, national banks, private police, under-taxation of wealth, railroad depredations, and corporate corruption of state and local legislative bodies. Many Populists had in mind establishing a society much healthier and more democratic than that which they (or the nation) had ever witnessed. Frightened southern elites excoriated these Populists as "anarchistic,"

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and Industrial Union, more commonly referred to as the Southern Farmers' Alliance. For further reading on the Southern Farmers' Alliance, *see generally* DONNA A. BARNERS, *FARMERS IN REBELLION: THE RISE AND FALL OF THE SOUTHERN FARMERS' ALLIANCE AND THE PEOPLE'S PARTY IN TEXAS* (1984); W.L. GARVIN & J.O. DAWS, *HISTORY OF THE NATIONAL FARMERS' ALLIANCE AND COOPERATIVE UNION OF AMERICA* (1887); ROBERT C. McMATH, JR., *POPULIST VANGUARD: A HISTORY OF THE SOUTHERN FARMERS' ALLIANCE* (1975).

7. "Redeemers" and "redemption" were part of the terminology—nicely attuned to southern religion—invoked by conservative Democratic party leaders in ridding the South of Reconstruction in the first half of the 1870s. As in salvation, the "Redeemers," as they saw it, had "saved" the South from the combined wicked evils of northern vindictiveness, the Republican Party, carpetbaggers, scalawags, corruption, and "Negro domination."

8. *See* ALLEN JOHNSTON GOING, *BOURBON DEMOCRACY IN ALABAMA 1874-1890*, at v (1951) (explaining that many historians use the term "Bourbon" as a name for southern democratic leaders who resisted Reconstruction policies and took power in the South after Reconstruction). The term was originally used by Radicals during Reconstruction to describe the ultraconservatives in southern society. *Id.* Its history harks back to the French royal family reigning intermittently in France and elsewhere on the continent from the sixteenth to the nineteenth centuries. *AMERICAN HERITAGE DICTIONARY* 224 (3d ed. 1996).

“communistic,” “ignorant,” “vicious,” and “nigger-loving,” along with a spate of other scurrilities.

Populists, coming out of the Farmers’ Alliance in the late 1880s, turned to politics when their plans for cooperatives, money, credit, banking, and transportation, failed to ease their economic woes significantly. The political structures they built varied from state to state, depending upon local conditions and local leadership. In some states, it was a new party, the Peoples’ Party, in which Populists chose to spike their staff and unfurl their banners. In other states, Populists stayed in the Democratic Party, creating a progressive wing within it for the announced purpose of capturing it from their overlords: the Bourbons, who dominated the Party. In Alabama, the Jeffersonian Democrats, the reform wing of the Democratic Party, existed side by side with the Peoples’ Party.<sup>9</sup>

As challengers of the existing order, the Populists developed a keen understanding of the necessity to form coalitions with other groups who also were being excluded from power and lacked meaningful control over their own existence. They built strategic coalitions with labor, with blacks, and, subject to time, place, and conditions, with Republicans (or black Republicans), Democrats, Socialists, labor parties, Greenbackers, Prohibitionists, and Independents. Nor did the Populists fail to include in their numbers the majority of adult Americans who, for the most part, could not vote at all: women.

These were hard times, and the distressed reached out to each other for support. This coming together, this sharing of experiences, this search for solutions by people barely eking out a living, scratching the earth, fretting over cotton, floundering in debt, this questioning of the inevitability of existing arrangements, proved increasingly threatening to the Bourbons. Moreover, here was a growing breed, restive whites—Alliancemen, Populists—no longer so politically paralyzed by Bourbon myths about Reconstruction, black domination, and Redemption, to catch the nearest way. Here was a politically emboldened species, many of its leaders now daring to offend southern mores and Bourbon power by appealing to blacks for support, joining with them at times in incipient alliances, however

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9. Republicans were not liked in the South because of their role in Reconstruction policy. Every Alabama state official elected between 1874 and 1892 was a Democrat. When Reuben Kolb, a leader of the Farmers’ Alliance, sought the 1890 Democratic nomination for governor, the state Democratic Party used fraudulent tactics to defeat him. These events led Alliance supporters to form the Jeffersonian Democratic Party in 1892, which nominated Kolb for governor against Democratic nominee Thomas Goode Jones. See ROGERS, *supra* note 5, at 161, 213-16.

spotty, tentative, and inconsistent. Quite a remarkable feat, this sporadic bi-racial coalition, blemishes and all, occurring a mere twenty-five years after a bloody Civil War.

Certainly, the Populist coalition had its gnawing differences. Sharp quarrels occurred over the ultimately defeated legislation forwarded by Henry Cabot Lodge in 1890 that provided for supervision of federal elections.<sup>10</sup> Additionally, the (white) Farmers' Alliance opposed the 1891 cotton-pickers' strike, organized and supported by various members of its organizational ally, the Colored Farmers' Alliance.<sup>11</sup> The shifting and loose black/white Populist relationship somehow roughly managed to ride out these weaknesses until the ultimate collapse of Populism with the fatal presidential election of 1896.<sup>12</sup> In the interim, this restive racial association engaged in a shared endeavor to overcome an economic system and its partner, the government, which kept so many people, both white and black, poor, overworked, undereducated, and politically impotent. The alliance sought to replace this system with what the Populists liked to call the "cooperative commonwealth." I agree with the conclusion of Gene Clanton that:

Populists, despite a gale of criticism and outrageous misrepresentation, fought the good fight; they mounted what was, at least until the civil rights movement five decades later, the most significant mass democratic movement in American history, an extraordinary effort that continues, nearly a century later, to inspire and fascinate.<sup>13</sup>

I do not wish to leave the impression that southern blacks flocked headlong into the Populist Party, abandoning the party of Lincoln in droves, or severed all political connections with the Democratic Party with its veneer of protective paternalism. But many blacks were in

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10. See Henry Cabot Lodge, *The Coming Congress*, 149 N. AM. REV. 293, 297-99 (1889) (indicating that "[t]here can be almost as little question of the expediency of a simple but efficient statute which shall make federal election as honest as possible . . . for it would greatly reduce, if not entirely prevent, violence, fraud, false counting, and the use of money for corrupt purposes.").

11. The Colored Farmers' Alliance was organized in Texas on December 11, 1886, and led by General R. M. Humphry, a white man. The Alliance may have evolved from secret rural societies. In 1891, the total membership of the Alliance was estimated at 1.2 million. ROGERS, *supra* note 5, at 141. For further reading about the Colored Farmers' Alliance, see generally Martin Dann, *Black Populism: A Study of the Colored Farmers' Alliance through 1891*, 2 J. ETHNIC STUD. 58 (1974).

12. See ROGERS, *supra* note 5, at 318-30 (highlighting that in 1896, the Populists nominated William Jennings Bryan, as did the Democratic Party, against Republican William McKinley). Infighting within the Populist Party, illustrated by the controversial nomination of the Bryan ticket, eventually led to dissolution. *Id.*

13. GENE CLANTON, *POPULISM, THE HUMANE PREFERENCE IN AMERICA 1890-1900* xiv (1991).

fact more receptive to the Populists and their program than they were to the lily-white southern Republicans<sup>14</sup> and the Democratic Party of the black belt Bourbons.

In some places, like North Carolina, Populists were highly successful.<sup>15</sup> In other southern states, like Florida and Arkansas, their impact was less.<sup>16</sup> In Alabama, on which we focus our attention, the Populists enjoyed important electoral and legislative victories, notwithstanding losses in three bitterly fought battles for the governorship.<sup>17</sup> The southern Populists, for almost a decade, mounted a fierce, hydra-headed challenge to the Democratic Party, to the southern oligarchy, and to the political/economic order they fashioned.

What made the Bourbons particularly apprehensive was that in this struggle over power, blacks regained a modest measure of the political significance they lost with the collapse of Reconstruction. In this new era of the Populist challenge, blacks now held an all-important balance of power. In Alabama, for instance, blacks constituted forty-five percent of the population.<sup>18</sup> It is true that through intimidation and violence, black voting in Alabama, as well as elsewhere in the South, declined substantially after Reconstruction. However, the black vote always remained a force. The political parties vied for that vote. One persistent suitor, the Democratic Party, seemingly oblivious to the striking contradiction of being the sworn party of white supremacy, while simultaneously courting the black vote, tried at first to keep the black vote out of the Republican column, later to sway it from the Populist cause. Ironically, it was in the "black belt" where blacks outnumbered whites and where the preponderance of Alabama's conservative forces

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14. The Republican Party was divided into two factions—the "black and tans" and the "lily whites." The black and tans felt that the blacks were the mainstay of the Republican Party in the South and thus supported voting rights for blacks. The lily whites felt that blacks did not fit into a party that represents "intelligence, progress and higher civilization." MALCOLM COOK McMILLAN, *CONSTITUTIONAL DEVELOPMENT IN ALABAMA: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM* 261 (1955).

15. Other southern states—Texas, Georgia, Louisiana, and Alabama along with some Western and Great Plains states had significant populist movements. CARL DEGLER, *THE OTHER SOUTH: SOUTHERN DISSENTERS IN THE 19TH CENTURY* 320 (1982).

16. *Id.*

17. The Populists, together with the Jeffersonian Democrats, nominated Kolb for governor in the 1890, 1892, and 1894 elections. Historians believe that Kolb actually received more votes than were counted, but black belt Democrats stuffed ballot boxes to ensure a Democratic victory. Despite the repeated defeats, Populists were elected to more than a third of the seats in the state legislature, two congressional seats, and to many county offices. ROGERS, *supra* note 5, at 217-28, 271-86.

18. See McMILLAN, *supra* note 14, at 264 (indicating that blacks, with a population over 800,000, constituted a large minority of the state's population).

resided, that the Bourbons were able to maintain state power against reform, defeat black aspirations, and stave off the Populist menace by means of rank fraud and manipulation of the black vote.<sup>19</sup>

The time arrived, however, when the forces of aristocracy no longer wished to rely on fraud and manipulation of the black vote to capture one election after another. The Populist agenda was too dangerous, Populist appeal too popular, Populist growth too alarming, and the enormity of the black belt vote fraud too embarrassing for the Bourbons to shoulder. And, worst of all, the perils of Populism were compounded greatly by Populists' courting blacks on issues dear to them but unwelcome by their overlords, like improving blacks' (along with whites') miserable economic existence, and purifying the electoral process, which to blacks meant not only the right to vote but to have their votes counted fairly. These goals gave blacks, as individuals, a deep sense of personal pride; and, at the same time, gave blacks, as a community, a solid piece of political power.

To many in the establishment—the Democratic Party, Bourbons, black belt aristocrats, bankers, affluent merchants, railroad and other corporations, as well as their lawyers—the situation was intolerable. It called for drastic measures to bedevil the current Populist scourge and to inoculate the body politic from the threat of any similar plague in the future. In Alabama, as in many other states, the black belt led the way.

The Bourbons felt a solution lay in further manipulation of the electoral system. The electorate had to be pruned of those constituting a major part of the threat: the poor, the uneducated, those without property, and the indebted. Additionally, the pruning needed to be substantial if political dominance was to be assured. New voting prerequisites provided the key by addressing two prime attributes of class, wealth and education.<sup>20</sup> It is important to understand what else the southern disenfranchisers contemplated. They also hoped to snatch the ballot away from those economically desperate whites, backs to the wall, to whom the Populist message was alluring, and from whose ranks had sprung an imposing collective resistance to Bourbon rule. Thus, in the ensuing assault on the ballot, the class and race of the quarry were intertwined.

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19. Money, alcohol, and intimidation were used to influence voters. Ballot boxes were stolen to ensure that the Democratic candidates won over Populists. *Id.* at 219-20, 230; ROGERS, *supra* note 5, at 222-24.

20. By alluding to class, I do not mean to understate the significance of race and the special devastation inflicted on black suffrage, as well as all other facets of black life, by an endemic racism of national proportions.

## I. THE 1901 ALABAMA SUFFRAGE PLAN

On November 11, 1900, the Alabama electorate adopted a new state Constitution along with the new suffrage provision it contained. The Constitution was proclaimed to be in effect on November 28, 1901. Nothing in this document played a more important role than suffrage issues.<sup>21</sup> At the core of the suffrage issues lay the literacy, property, and grandfather clauses.

Against the backdrop of southern reality, the new suffrage prerequisites might more accurately be characterized, not as property and literacy, but as wealth and education. To exclude field and factory workers, “the downwardly mobile and geographically transient,” on the move in search of employment, voter registration would now turn on such class characteristics as minimum property holdings; ability to pay poll taxes; uninterrupted employment; literacy; recondite constitutional interpretation; and lengthy fixed residence.<sup>22</sup>

Under the newly proposed electoral regime, wealth meant property holdings. Literacy, with variations, meant the ability to read and write. Literacy is a creature of education and education is historically interlocked with class. At the turn of the century, education was highly improbable for the offspring of southern white or black sharecroppers or the urban poor. Many southern states spent a pittance on public education. Child labor was rampant, often essential to the most meager level of survival for countless families. Pre-pubescent and adolescent children toiled day and night in textile mills.<sup>23</sup> Others stayed home to work the farm. For those reasons, southern illiteracy ran high.

Blacks, only recently emerged from slavery and still oppressed by its conspicuous vestiges, were the poorest and least educated of the southern populace. Accordingly, the disenfranchising plan, so riveted on class, would unquestionably hit them the hardest. But poor and poorly educated whites, also large in numbers, would likely suffer the same fate, for Bourbon Democrats were determined to rid the election rolls of them too. Bourbons repeated over and over again, like a catechism, that the ballot belonged to the “intelligent

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21. ALA. CONST. of 1901, art. VIII, §§ 177, 180, 181.

22. GEORGE TINDALL, *THE PERSISTENT TRADITION IN NEW SOUTH POLITICS* 40 (1975).

23. See WILLIAM MABRY, *THE NEGRO IN NORTH CAROLINA POLITICS SINCE RECONSTRUCTION* 74 (1940) (explaining that in 1903, South Carolina, taking a progressive leap forward, passed a law forbidding employers from hiring children under the age of twelve and limiting the working hours of children age twelve through seventeen to sixty-six hours a week).

and virtuous,” not to the “ignorant and vicious.”<sup>24</sup> In that respect, the color of the voter cut no great divide. In fact, poor whites may have constituted the graver danger. As serious a pestilence as independent black voters were to the Democratic Party, it was a majority white Alliance/Populist movement that convulsed the South for almost a decade and came close to toppling the Bourbons from power.

Poor whites understood well enough that wealth and education requirements were likely to cause them, as well as blacks, to lose their right to vote. It was precisely for that reason that they defeated similar proposals to limit suffrage in Alabama when that state adopted its 1867 Constitution,<sup>25</sup> showing such strength in victory that the issue was not even raised when Alabama adopted its 1875 Constitution.<sup>26</sup>

Nevertheless, Alabama’s radical Bourbons, persevering, tried to call a constitutional convention on the same issue in 1892. That bid also failed and for the same reason.<sup>27</sup> Moreover, to many northern Alabama whites, scant of money, arable land, and formal education, the notorious thirteenth plank in Alabama’s Democratic Party platform of 1892 left the party’s intentions undisguised: “We favor the passage of such election laws as will better secure the government of the state in the hands of the intelligent and virtuous and will enable every elector to cast his ballot secretly and without fear of restraint.”<sup>28</sup> Alabama Populists would not let plank thirteen fade in people’s memory.

Faced with the perils of Populism, the Bourbons had to find some way to induce whites in Alabama, as in the rest of the South, to approve a plan limiting suffrage to the affluent and educated, thus disenfranchising most blacks, and, in the process, an untold number

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24. See 3 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 2875, 2958, 3022, 3093, 3282, 3333 (1901) [hereinafter OFFICIAL PROCEEDINGS]; MCMILLAN, *supra* note 14, at 268 (quoting John B. Knox, Chairman of the Democratic State Executive Committee and delegate from Alabama to the Democratic National Convention in 1892 and 1896, as saying that the primary reason for the disenfranchisement of blacks was to establish “white supremacy by law” because “[t]here is in the white man an inherited capacity for government, which is wholly wanting in the Negro . . . [t]he Negro . . . is descended from a race lowest in intelligence and moral perceptions of all the races of man.”).

25. MCMILLAN, *supra* note 14, at 135-50.

26. *Id.* at 189-210.

27. *Id.* at 249-54.

28. *Id.* at 249-50 (citing MONTGOMERY ADVERTISER, June 9, 1892). Republicans also favored changes in the electoral system. See Lodge, *supra* note 10, at 299 (discussing the possibility of using state election strategies or the Australian system as a model for a federal election law). The secret, or Australian ballot, was devised to work against illiterates by failing to identify candidates by party and, as in Virginia, requiring people to vote in two and one-half minutes. MCMILLAN, *supra* note 14, at 220 n.15.

of white voters. The idea of white supremacy supplied a good part of the methodology. White supremacy always constituted the white south's critical and familiar battle cry during Reconstruction and post-Reconstruction. The core of the doctrine was that blacks were innately and unalterably inferior and for that reason, should never be permitted to govern. Rather, blacks must always be governed by whites and (with an important addendum, whether explicit or implicit) for the benefit of white people. To disenfranchise blacks, therefore, and to "take back the South," an even more vociferous call rang out for white supremacy. So it was that white supremacist oratory permeated the air as never before.<sup>29</sup>

It was not that difficult for the South's ruling elite to promote white supremacy among poor white southern throngs. During slavery, impoverished whites might console themselves with the belief they were blessed with the "badges of supremacy,"<sup>30</sup> a status they viewed as infinitely superior to the slaves toiling about them. As we know, after slavery came to an end, many of the "badges and incidents of slavery" still endured for black Americans. However, many of the badges of supremacy also lingered among ordinary white people. Recognizing the contradictions inherent in the relationship between blacks and poor whites, the southern Bourbons astutely continued to pursue white supremacy with particular emphasis on poor whites. The tactic did not prove ineffective as class frequently bows to color.<sup>31</sup> Surveying our own history, anti-black sentiment has too often prevailed, its beneficiaries most frequently those at the top of the scale, not those at the bottom.

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29. The following examples were typical. When Democrats succeeded in replacing the Republicans in Baltimore in 1899, they used the slogan "This is a White Man's City." MARGARET LAW COLLICOTT, *THE NEGRO IN MARYLAND POLITICS* 99 (1969). Maryland's Democratic candidate for Governor, Edwin Warfield, articulated the mantra of white supremacy in no uncertain terms:

This election is a contest for the supremacy of the white voters in Maryland. . . . The elevation of the Negro is a well-nigh hopeless task, so long as they exercise like dumb, driven cattle, solidly and without intelligence or reason, their right of suffrage as a weapon of offense against the Democratic party, directed and guided by Republican politicians. . . . The white man is the highest type of human family; the Negro is the lowest. God has made no other race equal of the Caucasian, and neither amendments to the Constitution nor anything else can do what God had failed to do: that is, make the negro the equal of the white man.

*Id.* at 107-08.

30. William A. Brewer, *Poor Whites and Negroes in the South Since The Civil War*, 15 J. NEGRO HIST. 26, 27 (1930).

31. See generally R. HUCKFELDT & C. KOHFELD, *RACE AND THE DECLINE OF CLASS IN AMERICAN POLITICS* (1989).

The more successful the efforts of southern blacks and whites to work together politically in the late 1880s and 1890s, the more disconcerted and desperate the Bourbons became, substantially increasing their efforts to crush the opposition. For instance, in the 1890s, the relaxed racial attitudes of Arkansas Populists, compared with the Democrats, prompted the Democratic Arkadelphia Siftings to predict that “[t]his is a white man’s country, and white men are going to rule it, and when the third party opened its arms to the Negro at its state convention, it invited its certain death at the polls next fall.”<sup>32</sup>

Public speakers and the North Carolina Democratic Party pressed the white supremacy issue, even forming white supremacy clubs. The attack worked well. In 1898, the Democratic Party defeated the once successful fusion between the Populists and the Republicans. *The News and Observer* quoted the Chairman of the Democratic Party, who exclaimed that “North Carolina is a WHITE MAN’S state and WHITE MEN will rule it, and they will crush the party of Negro domination beneath a majority so overwhelming that no other party will ever dare to attempt to establish Negro rule here.”<sup>33</sup>

Robert Aldrich, the Chairman of the 1895 South Carolina Constitutional Convention, lambasted South Carolina’s 1868 Constitution that granted blacks the right to vote, saying it was “made by aliens, negroes and natives without character, all the enemies of South Carolina, and . . . designed to degrade our State, insult our people and overturn our civilization.”<sup>34</sup>

And in Alabama, after being elected governor in 1890, Thomas Goode Jones editorialized that “it is [in] the Black Belt that the necessity for Caucasian supremacy is most keenly felt.”<sup>35</sup> Joseph Johnston, after his 1896 nomination for governor of Alabama, declaimed:

We do not believe in surrendering any section of our state to the control of the Negro . . . [for that] would be fatal alike to the peace and prosperity of both races. We have no hostility for the colored man . . . but we do not believe he is fitted by birth, education or

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32. John Graves, *Negro Disenfranchisement in Arkansas*, 26 *ARK. HIST. Q.* 199, 205 (1967), in 6 *RACE, LAW, AND AMERICAN HISTORY* 221 (Paul Finkelman ed., 1992).

33. MABRY, *supra* note 23, at 49 (citing *NEWS AND OBSERVER*, Nov. 3, 1898).

34. Laughlin McDonald, *An Aristocracy of Voters: The Disenfranchisement of Blacks in South Carolina*, 37 *S.C. L. REV.* 557, 570 (1986) (quoting *JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA* 1, 1-2 (1895)).

35. Rogers, *supra* note 5, at 219. This is the same Thomas Goode Jones, who, a decade later, when Populism was no longer a credible threat to Alabama’s Democratic party, opposed that states’ adoption of a grandfather clause because, he said, it clearly discriminated against blacks otherwise eligible to vote.

experience, to engage in making or executing laws for the people of Alabama . . . .<sup>36</sup>

The 1896 Alabama Democratic Party convention platform reinforced this clear goal of creating a steady progression of laws with the purpose of disenfranchising blacks and ensuring a predictable electorate: “It is our purpose to maintain a government in Alabama, fair and just to all under control of the white men of Alabama.”<sup>37</sup> In his splendid book on Alabama’s constitutional development, Malcolm McMillan unambiguously describes the Democratic Party’s goal of black and white disenfranchisement in 1901: “[w]ith a campaign cry of ‘white supremacy’ . . . [and] the support of the railroads . . . [the conservatives of Alabama] created a greatly reduced electorate with more conservative tendencies than the old.”<sup>38</sup>

All the foregoing illustrates how anxious the Bourbons were to fuel the flames of racial antagonism, deflate the newly acquired balance of power blacks had achieved with such arduous struggle, and undermine that ominous threat from below, the Populists. Ridding the election rolls of the growing and malignant southern pestilence—black voters—topped the list of imperatives. It was powerful racist weaponry. But how was the Bourbon class to accomplish that goal while simultaneously convincing poor, uneducated whites that their vote would not be imperiled?

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This seeming conundrum was resolved by the Bourbons, who devised several qualifications for voting, among them the ingenious “grandfather clause,” which bestowed voting eligibility on males whose ancestors had served in the American military.<sup>39</sup> To visualize the contending forces buffeting the grandfather clause, it is essential to compare the two different stages of voter registration: the Permanent and Temporary Plans. They had but one major similarity: only males, twenty-one years or older, could register to vote.<sup>40</sup>

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36. *Id.* at 204-05.

37. ROGERS, *supra* note 5, at 304.

38. MCMILLAN, *supra* note 14, at 363. Ben Tillman, later Governor of South Carolina, took his stand on white supremacy as a young man and became a member of the Sweetwater Saber Club. Accoutered with uniforms, guns brandished, its members were determined to rid the state of all Negro influence at the polls. To Tillman, it was quite simple, “[t]he Creator made the Caucasian of a better clay than he made any of the colored people.” FRANCIS BUTLER SIMKINS, *THE TILLMAN MOVEMENT IN SOUTH CAROLINA* 39 (1964). In his 1890 gubernatorial inaugural speech, Tillman was exuberant. “Democracy has won a great victory unparalleled. The triumph of Democracy and white supremacy over mongrelism and anarchy is most complete.” *Id.* at 136-37.

39. *See generally infra* Part I.B (describing “The Temporary Plan”).

40. After unceasing struggles dating at least as far back as the 1848 New York

*A. The Permanent Plan*

The permanent plan began on January 1, 1903, and was, as its title stated, to remain in force permanently thereafter.<sup>41</sup> Under its provisions, no male could register to vote in Alabama (assuming he satisfied the residency conditions)<sup>42</sup> unless he met one of two onerous requirements:

(1) Requirement #1: Literacy and Employment. The applicant had to be able to read and write any article of the United States Constitution, and (unless disabled) have worked for the greater part of the year preceding registration;<sup>43</sup> or

(2) Requirement #2: Property Ownership. He or his wife had to own and reside on at least forty acres of land, or own personal property, either of which was assessed for taxation purposes at more than \$300.00.<sup>44</sup>

Thus, within a year after ratification of Alabama's proposed Constitution, literacy and/or property holdings became permanent prerequisites to voting, impediments to what we consider today as the indispensable core of anything resembling democratic practice. By design, voting under Alabama's permanent plan was prohibitive to untold thousands of its male voters, black and white, because of poverty, lack of education, and periodic unemployment.

*B. The Temporary Plan*

Prior to December 20, 1902, any male could register to vote in Alabama (assuming he satisfied the residency conditions) if he served in the military, was the descendant of someone who served in the military, or was a person of good character and understood the obligations of citizenship.<sup>45</sup> The Alabama electorate approved its new Constitution on November 11, 1901. The temporary plan lasted 400 days ending on December 19, 1902.

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Seneca Falls Convention, women won the right to vote in the Wyoming Territory in 1869, retaining it when Wyoming became a state in 1889. Colorado enfranchised women in 1893, followed by Utah and Idaho in 1896 and by more states in the first two decades of the twentieth century. *See generally* ELLEN DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMAN'S MOVEMENT IN AMERICA, 1848-1969* (1978); ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* (1958); JONI LOVENDUSKI & JILL HILLS, *THE POLITICS OF THE SECOND ELECTORATE: WOMEN AND PUBLIC PARTICIPATION* (1981). Finally, the Nineteenth Amendment, ratified in 1920, prohibited the denial to vote on account of sex. U.S. CONST. amend. XIX.

41. ALA. CONST. of 1901, art. VIII, § 181.

42. *Id.* § 177.

43. *Id.* § 181.

44. *Id.*

45. *Id.*

For uneducated white men with no property, the temporary plan amounted to relief, perhaps alluring but deceptive, from the harsh class commands of the permanent plan. The permanent plan demanded substantial property holdings or both literacy and uninterrupted employment. The temporary plan contained none of these limitations. Under the temporary plan, applicants had to meet one of the three requirements:

(1) Requirement #1: War Veterans. This clause entitled all men to register who served in the United States Armed Forces during the War of 1812, the wars with Mexico or Spain, any war with the Indians, or who served on either the side during the Civil War, or in the National Guard or militia of any state.<sup>46</sup>

(2) Requirement #2: Descendants of War Veterans. If a man was not a veteran of the enumerated wars, he could still register if he was a descendant of any veteran of those wars or of the American Revolutionary War.<sup>47</sup> This provision earned the label “grandfather clause” because it exempted a class of men, overwhelmingly white, from the rigors of the permanent plan, based on preexisting facts.<sup>48</sup>

(3) Requirement #3: Good Character and Understanding. The restrictions of having a good character and understanding the responsibilities involved with being a citizen opened the final escape hatch from the permanent plan.<sup>49</sup> If the aspiring registrant was neither a veteran nor a descendant of a veteran, he might still qualify if he was a man of good character who understood the duties and obligations of a citizen under a republican form of government.<sup>50</sup> Good character by itself was not enough, neither was understanding the nature of our government. Both elements were prerequisites to qualifying under this section.<sup>51</sup>

The key to the entire temporary plan was the second requirement, the grandfather clause. It offered the widest possibility for white registration. The other two clauses were much less promising.

It was anticipated that most white men were not war veterans and thus could not qualify under the first requirement. “Who constituted the group in the soldier clause?” a delegate asked and then responded:

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46. *Id.* § 180.

47. *Id.*

48. Today’s use of the term “grandfathered” in other contexts has its origins in the disenfranchising constitutions of the South at the turn of the century.

49. ALA. CONST. of 1901, art. VIII, § 180.

50. *Id.*

51. *Id.*

The soldiers of 1812 have passed away and joined the ranks on the other side. The soldiers in the Indian wars are gone. The soldiers of the war with Mexico constitute an insignificant class. There are probably not one hundred of them in Alabama. The soldiers who served in the Confederate army have mainly crossed over the river. The average age of the soldier in the Confederate army when he entered was 35 or 36 years. They entered from 16 to 60. Add to his then age the thirty-six years that have passed since the war closed and you have 71. So the man of average age who entered in the Confederate army has passed beyond his three score years and ten. There are only a few of them left.<sup>52</sup>

The Good Character and Understanding Clause, the third requirement, was too vague and uncertain. What did “good character” mean? And exactly what were “the duties and obligations of citizenship under a republican government” that one was to understand? Weren’t applicants under this clause at the mercy of local registrars? Altogether, then, the terms “good character” and “understanding” were much too standardless to be reassuring to poor and uneducated voters and their advocates.<sup>53</sup>

These severe limitations surrounding the War Veterans and Good Character and Understanding Clauses made the grandfather clause (“Descendants of War Veterans”) all the more important. No other issue during the Convention’s suffrage debates, or in the campaign for ratification that followed, equaled the barrage of protest aimed at the grandfather clause. John Knox, Convention President and ardent supporter of the clause, acknowledged that the “most strenuous opposition offered to the report of the Committee [was] directed against that part of the plan commonly known as ‘the grandfather clause.’”<sup>54</sup> He conceded that this part of the plan “has been criticised and attacked from unexpected sources” and complained that the attack was “intempera[te] . . . and wholly unwarranted.”<sup>55</sup>

The concepts of law and legality enveloped the suffrage debates. Again and again, the magnetic power of the law impelled delegates of all political hues to frame and resolve the issues in the time-honored language of law and in the name of the Constitution.

This was nothing new, of course. The primacy of law infused political discourse almost from the nation’s beginning. The colonists were nursed on the Magna Carta and the English common law, and

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52. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2859-60.

53. McMILLAN, *supra* note 14, at 294-95.

54. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2915.

55. *Id.*

when the time came, turned against the British themselves. The written Constitution that ensued, later generations would expound grandiloquently, was epitomized in John Marshall's adoration as "a government of laws, not of men."<sup>56</sup> Marshall's aphorism would in time become interchangeable with one of America's favorite beatitudes, the "rule of law." We might label this reverence for the Constitution, this preoccupation with the idea of Constitution, as Constitutionalism.

Constitutionalism was not foreign to the people of Alabama. The 1901 gathering in Montgomery constituted that state's sixth Constitutional Convention. Constitutionalism, neatly verbalized by former Governor Jones pervaded this Convention: "I take it that no serious minded delegate, no delegate devoted to the welfare of his country . . . wants to adopt any plan which deliberately wars on the supreme law, and . . . which he believes is in violation of the Constitution of the United States."<sup>57</sup>

Ironically this focus on Constitutionalism appears to have escaped some of its most fervent devotees at the Convention. This was especially true in light of the unrepresentative composition of the delegates, the undemocratic disenfranchising enterprise on which they had embarked, and the bestowal of the franchise as a reward for lamentable past conduct.

The grandfather clause rewarded a particular body of "descendants." Along with all the other white inhabitants of this nation, however, those "descendants," including all the Convention delegates, occupied a land that had been wrested from another people. "The U.S. Cavalry and the Bureau of Indian Affairs annihilated the Native American population whenever it stood in the way of the expansion of the United States."<sup>58</sup> And the U.S. Constitution broadly empowered Congress to govern those conquered tribes.<sup>59</sup>

Here, at the Alabama Convention where delegates were rewriting their own state Constitution, no one noted the anomaly of specially anointing with the democratic right of suffrage, those who had engaged in that slaughter and theft of the land, those men who were veterans or the descendants of veterans of "any war with the Indians."

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56. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

57. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2887.

58. W.H. Locke Anderson, *Cold Soldiers Never Die*, 41 MONTHLY REV. 56, 58-59 (1989) (reviewing T. SMITH, *THINKING LIKE A COMMUNIST: STATE AND LEGITIMACY IN THE SOVIET UNION, CHINA, AND CUBA* (1987)).

59. U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [3] To regulate Commerce . . . with the Indian Tribes.").

On this discrete issue, the Suffrage Committee Report succeeded without debate. It mattered little to the delegates that the clause did not similarly enfranchise the descendants of the victims of those wars.

Moreover, on whatever other principles the nation was founded, it was grounded in no small measure on the institution of slavery. The U.S. Constitution, while managing decorously to shy clear of the distasteful word “slavery,” shielded slavery and the slave trade from constitutional amendment for seventy-six years, bolstered the slaveholding states’ congressional representation by counting three-fifths of their slaves, and barred a capitation tax.<sup>60</sup>

By the time of the 1901 Alabama Constitutional Convention, no blacks remained in elective office in that state.<sup>61</sup> Of the 155 delegates to the Convention, none were black. Blacks had even been excluded from taking part in the conventions or voting in the primaries that selected the delegates to this Constitutional Convention.<sup>62</sup> In fact, the majority of delegates at this assemblage had convened with the declared aim of disenfranchising blacks. And they succeeded.

## II. PROTECTING THE UNEDUCATED WHITE VOTE

Holy assertions abounded that “not a single white man” would be disenfranchised. A “grandfather” exception would see to that. Any man who had an ancestor that served in the American military or in any American war would be allowed to vote. And there were plenty of those to look back to. It would be the rare white man who did not have, or could not imagine, such an ancestor somewhere in his lineage. Therefore, to vote, white men had only to summon the grandfather clause to be excused from scaling the twin barriers of property and education. Not so, however, with most southern black men. Although many black men fought in past American wars, the vast majority of southern blacks, freshly emerging from slavery, would be harder put to find such a “fighting grandfather.”

Manifestly, then, blacks were a prime target of the well-aimed property and literacy projectiles. They did not own much property, so they could not qualify under that provision. Additionally, sixty percent of eligible blacks in Alabama could not meet the reading or writing requirements, automatically disqualifying them.<sup>63</sup> Those who

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60. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV; U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII.

61. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 3019.

62. Allen Woodrow Jones, A History of the Direct Primary in Alabama 1840-1903, at 178 (1964) (unpublished Ph.D. Dissertation, Univ. of Alabama).

63. See McMILLAN, *supra* note 14, at 271, 276 (citing Bureau of the Census, Twelfth Census of the United States: 1900 (Washington, D.C.), I, 970); 6 APPELTON'S

were literate would probably be eliminated by arcane constitutional queries put to them by hostile, unelected, white registrars cloaked with unlimited discretion, who would only be doing the job expected of them: helping to create an almost totally white male electorate. With such a consummation, white supremacy would reign again, blacks would no longer hold a balance of power, electoral fraud would be eliminated, intra-white acrimony would diminish, and peace and prosperity would prevail. Such were the broad brush strokes of the ideas the Bourbons painted as their vision of a southern future.

In Alabama, as in some other southern states, the initial push for disenfranchisement came from the black belt and the planters who reigned supreme there. Now at this Convention black belt delegates urged one of their numbers, Richard Jones, a Suffrage Committee member, to address the assemblage on behalf of the grandfather clause. They had chosen wisely: Confederate officer, former president of the University of Alabama, lawyer, constitutional law professor, president of the State Bar, and—down-home racist to boot. Accepting his charge, Jones stoutly defended the clause, linking it, in a flight of cloying oratory, to white illiteracy. “I was astonished,” he said, “to see how many of those [Alabama] soldiers [who I commanded during the Civil War] could not read [or] write [or] sign their names, and yet I declare to you there were no better soldiers in the Army . . . than those Alabamians who had patriotically gone out to defend the principles of the South on the battlefields . . . .”<sup>64</sup> When these men came home from the war, Jones continued, they “wanted to educate their children” but could not.<sup>65</sup>

I have heard some of them say, “If I just had the means to send my children to school and give them the advantages of an education, it would have been the very joy of my life, but I didn’t have the means to do it, and I had to put them to work.” These children are of the same stock of the soldiers of whom I have spoken, and my right arm should be palsied before I would do anything to prevent them taking part in the government of Alabama.<sup>66</sup>

By interjecting formal education into the grandfather clause debate, Jones presumably hoped to allay white fears of white disenfranchisement aroused by the new literacy test that required

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ANN. CYCLOPEDIA 665 (3d ser. 1901) (indicating that of the 181,345 black males of voting age, only 73,399 were literate). Only fourteen percent of white males could not meet the requirements. MCMILLAN, *supra* note 14, at 276.

64. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2881-82.

65. *Id.*

66. *Id.*

registrants to read and write any part of the Constitution.<sup>67</sup> To thousands of uneducated, functionally illiterate white men, Jones thus portrayed himself as proud protector of their embattled ballot. Yet ironically it was their ballots to which he and his disenfranchising Bourbon allies, in another part of the suffrage plank—the literacy clause—had just laid a devastating siege.<sup>68</sup> As history later played itself out, the grandfather clause, to whose aid Jones scurried, did precious little to lift that siege. Rather, two-thirds of a century would pass before Congress, in the 1965 Voting Rights Act, finally liberated the ballot from the suffocating literacy test.

Leaving no doubt of his intentions, Jones affirmed his credentials as adulator of the color white, one who would prefer to have his “right arm . . . palsied” than to disenfranchise confederate soldiers’ children. In stark contrast, however, he then proclaimed: “I would just as soon give a toddling child a razor in his hand expecting him not to hurt himself, as to expect the negro to use the ballot and not use it to his injury and to ours. [For] God Almighty has made [the black man] different from the white man. You had just as well try to . . . legislate a Negro into a white man . . . It is impossible to do it.”<sup>69</sup>

The grandfather clause thus became the lubricant of Alabama’s suffrage strategy. Property and literacy clauses were to obliterate the black vote. Without some relief, the same destiny awaited thousands of poor uneducated white men and ratification was hopeless without assurance that this would not occur. The grandfather clause was to provide the guarantee. As events unfolded, however, the grandfather clause assumed a very different primal function. It safeguarded the white man’s vote in order to muster that vote in favor of ratifying a suffrage plan, geared to wealth and education, which would in due time and by design also wipe out much of the unaffluent, uneducated white male vote. That was the crowning irony of the grandfather clause.

The grandfather clause met powerful opposition, not only from blacks, but for clashing reasons. Whites, Populists, and Republicans resisted, some because it discriminated against blacks, but most because they understood that the grandfather clause, limited to a one year registration period, would not ultimately save the bulk of the

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67. *See id.* at 289 (describing other delegates’ support for the grandfather clause based upon the necessity to exempt the sons of Confederate soldiers who were illiterate because of the “fortunes of war”).

68. *See id.* at 349-50 (noting passage of the literacy requirement amendment, with Richard Jones voting in support).

69. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2880-81.

white vote from the ravages of the disenfranchising scheme. Some members of the ruling elite also fought the grandfather clause because they thought it unconstitutional, a reversion to English hereditary privilege, unfair to blacks, or too permissive in allowing lower class whites to vote.

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No one at the Convention, as far as we know, was poor or uneducated. The delegates included twelve bankers, ninety-five lawyers (many of whom represented railroads and other corporate interests), four journalists, and numerous doctors, engineers and teachers.<sup>70</sup> Sixty-two delegates were college graduates and twenty-eight had finished at least a year of college.<sup>71</sup> A powerful core at this all-white gathering was determined to disenfranchise poor uneducated white men. They succeeded.

During the steaming hot summer months of July and August 1901, the Montgomery Convention Hall walls reverberated with stentorian male voices on the future of suffrage. No women sat in attendance as delegates, nor did they occupy the floor, rather they watched from distant galleries, powerless, mere observers of the scene. To the highly influential *Montgomery Advertiser*, the leading Bourbon newspaper in the state, the May opening of the Convention presented a quaint and lovely vision. "The galleries had filled to overflowing with beautiful women and brave men and was an attractive picture to look upon."<sup>72</sup> Southern sentimental stereotypes of pretty belles notwithstanding, women did not hold any elective public office in Alabama; neither could they vote in Alabama, nor anywhere else in the union. Undaunted by prohibitive odds against success, women suffragists mustered their forces and resolutely petitioned the all-male Constitutional Convention to enfranchise the women of Alabama.<sup>73</sup> The women did not succeed.<sup>74</sup>

Against this backdrop of undemocratic representation and intentions, the Convention nevertheless resonated with learned legal precedent and glowing constitutional oratory. If the commanding culture of law and Constitution were not enough to imbue the

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70. MCMILLAN, *supra* note 14, at 263 (citing MONTGOMERY ADVERTISER, June 25, 1901 and July 30, 1901).

71. *Id.*

72. MONTGOMERY ADVERTISER, May 22, 1901, at 1.

73. See MCMILLAN, *supra* note 14, at 278-79 (indicating that although the Suffrage Committee did not give serious consideration to suffrage for women, Virginia Clay Clopton and Frances Griffin petitioned the Convention on behalf of the female voting rights, garnering a few male delegate supporters).

74. See *id.* (noting that the women's suffrage measure was defeated by a vote of 87 to 22) (citing 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 3873-74).

Convention with the spirit of Constitutionalism, the presence of ninety-five lawyers (many of them luminaries in the law), comprising sixty-one percent of the 155 delegates, would certainly achieve that result. And on the issue of the grandfather clause, the focus on Constitutionalism animated the debate.

The grandfather clause, pivotal to the disenfranchising plan, galvanized the most formidable resistance to the Suffrage Committee's majority report. In an aura of Constitutionalism, the protest probed, more than did any other issue the Convention had to face, the very meaning of the Constitution and, more particularly, the future of the Fifteenth Amendment.

A. *The Minority Report: Opposition to the Grandfather Clause*

Disenfranchisement, grandfather clause and all, was the disfigured offspring of the Bourbons, lords of the New South and Democratic Party, accosted of late by a bunch of discontented, disrespectful Populists, an ambitious lot that spoke to power, not as supplicants, but as contenders for the throne. Yet a minority of Bourbons, some eminent, spurned the grandfather clause and waged a battle royal against it, yielding only at the last moment when the entire suffrage plan came up for final vote.<sup>75</sup> Better, they no doubt ultimately concluded, to live with a grandfather clause confined solely to current (not prospective) poor, ignorant, white male voters than to see the Bourbons' complete disenfranchising plan, their grand blueprint for a politically sustainable future, go down to ignominious defeat.

Four Suffrage Committee members, Frank White, George Harrison, William Oates, and Stanley Dent, all Bourbons, all prestigious, all Confederate veterans, issued a minority report<sup>76</sup> condemning the grandfather clause in resounding terms.

[The grandfather clause] violates the Federal Constitution . . . . It undertakes, by indirect means, to deny or abridge the right to vote to citizens of the United States, on account of race, color or previous condition of servitude, which is forbidden by the Fifteenth Amendment . . . . The clause . . . does not erect a standard of qualifications applicable to both races, but establishes an arbitrary standard, which, considered in connection with the history of the country, confers the right of suffrage on members of the white race (who are descendants of such soldiers) and denies it to members of the black race, who are not such descendants . . . . It establishes a

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75. *Id.* at 295.

76. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 1264-66.

permanent, hereditary, governing class, which is undemocratic, un-republican, and un-American.<sup>77</sup>

In addition to this foursome, a number of other prominent delegates took the floor to combat the grandfather clause, often eloquently, and for various reasons. Two compelling critiques, not easily overcome, branded the cause, first as unconstitutional, and second, as suffrage by heredity.

First in importance was the charge that the clause violated the Fifteenth Amendment prohibition against abridging the right to vote on account of race, color, or previous condition of servitude.<sup>78</sup> The majority of southern white males, but only a small percentage of southern black males, qualified under the grandfather clause. Of course, blacks participated in large numbers in prior American wars.<sup>79</sup> An estimated 5,000 free blacks served in the Revolutionary War.<sup>80</sup> Two black battalions helped defeat the British at New Orleans in the War of 1812.<sup>81</sup> Black regiments also fought in many battles during the Mexican War.<sup>82</sup> During the Civil War, approximately 186,000 blacks served in the Union Army and 26,000 in the Union Navy—212,000 blacks in all;<sup>83</sup> 16 of them received the Medal of Honor; 75 to 100 were commissioned officers; 38,000 black soldiers died in the carnage of that war.<sup>84</sup>

This does not tell the full military story of southern blacks, most of whom were slaves at the start of the Civil War. Unlike free blacks, slaves were never admitted into the military as fighting soldiers. Of the 212,000 black servicemen who fought in the Civil War, only 93,000 came from the seceding states; less than five percent of the

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77. *Id.* at 1265-66.

78. See U.S. CONST. amend. XV, §§ 1, 2 (providing that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude” and that “[t]he Congress shall have power to enforce this article by appropriate legislation.”).

79. See generally TRACY BARNETT, *THE BUFFALO SOLDIERS* (2002); JACK D. FONER, *BLACKS AND THE MILITARY IN AMERICAN HISTORY: A NEW PERSPECTIVE* (1974).

80. JOHN H. FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 135* (6th ed. 1988); DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 11 (2d ed. 1992).

81. FRANKLIN, *supra* note 80, at 100-01.

82. Black military regiments, called Buffalo Soldiers, fought along the Western frontier and the border with Mexico. In July of 1866, Congress approved legislation creating six all black regiments to serve in the peace time armies of the United States. They consisted of the 9th and 10th Cavalry and the 38th, 39th, 40th, and 41st Infantry. See, e.g., *The Buffalo Soldiers*, at <http://www.toptags.com/aama/bio/groups/buff.htm> (last visited Oct. 16, 2002). Cf. Alvin J. Schexnider, *The Development of Racial Solidarity in the Armed Forces*, 5 J. BLACK STUD. 415, 417-18 (1975) (noting that blacks have participated in every American war).

83. FRANKLIN, *supra* note 80, at 286.

84. *Id.* at 290.

almost four and a half million blacks held in slavery in 1860, when the war began.<sup>85</sup> As the Union Army fought their way into the South, thousands of slaves escaped and fled north, many joining the Union Army as soon as they could, serving in the military not as slaves but as free men. But the Federal Government did not admit blacks into the military until President Lincoln's Emancipation Proclamation went into effect on January 1, 1863.<sup>86</sup> Moreover, Alabama slaves who had not previously fled to freedom were not enlisted in the Union Army until Mobile fell in the spring of 1865.<sup>87</sup> That further limited the number of Alabama blacks who had fought in the Civil War. It also made no difference that slaves had participated in past wars as laborers, guides, messengers, cooks, teamsters, and hospital attendants. They were still not deemed to have served in the armed services within the meaning of the grandfather clause.

More than any other part of the disenfranchising scheme, the grandfather clause, with its inherent gross preference for white voters, cut to the heart of the Fifteenth Amendment. This is how many opponents of the grandfather clause saw it. Frank White, one of the four signatories to the Suffrage Committee's minority report, laid out the facts underpinning the constitutional objections to the grandfather clause. "[The Alabama] descendants of those who fought in the revolutionary war . . . the War of 1812 . . . the Indian wars, they are all white men."<sup>88</sup> As for the War Between the States, War Department records disclose that Alabama contributed only 2,750 men to the Union Army, and at least two of the regiments were known to be white.<sup>89</sup> On that basis, White estimated that at least ninety-five percent of the Alabama descendants of soldiers were white men and concluded that "[i]t is not a question of what we want. It is a question of what we can do under the Federal Constitution."<sup>90</sup> Drawing on law and lawyers for support, the delegates' favorite argumentative technique, White was certain that:

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85. *Id.* at 286.

86. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2909.

I do order and declare that all persons held as slaves within said designated States . . . are, and henceforward shall be free. . . . And I further declare and make known that such persons of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

Abraham Lincoln, Emancipation Proclamation (Sept. 22, 1862), in HENRY J. RAYMOND, *THE LIFE AND PUBLIC SERVICES OF ABRAHAM LINCOLN* 260-61 (1865).

87. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2909.

88. *Id.* at 2860.

89. *Id.* at 2861.

90. *Id.*

every man in this Convention who is a lawyer will admit [this] is a discrimination against the negro . . . . Your distinguished [United States] Senator, General [Frank] Pettus, one of the best lawyers in the South . . . investigated [a similar] provision in the Louisiana suffrage plan . . . and gave it as his written opinion that it violated the 15th Amendment.<sup>91</sup>

Confederate General George Harrison, the second of the four signatories to the minority report, joined in attacking the clause on constitutional grounds. “[F]our of us” on the Suffrage Committee he said, “tried to discharge our duty as confederate soldiers . . . . We are all white men in this Convention, we are very largely Democrats.”<sup>92</sup> But, he added, “we owe a duty to our common country . . . the federal union” as well as to our state and our political party.<sup>93</sup> Harrison further stated that those delegates issuing the minority report “believe this grandfather clause to be unconstitutional. So believing, however much I love my party or love my race, I cannot support [the clause] until I am satisfied that I am wrong in this opinion.”<sup>94</sup> He then put this question to the assembled delegates:

When we single out wars from the Revolution down, when the negro was not even a citizen and could not possibly participate in them, we simply say that these soldiers or their descendants, who were white men, may participate . . . . Does not the negro have his right today? And if you allow the white man to retain it, and not the negro, pray tell me is not this discrimination. Isn't it doing indirectly what the Constitution says directly we shall not do?<sup>95</sup>

Leading the attack on the grandfather clause on the convention floor was William Oates, another signer of the minority report: Bourbon, lawyer, former congressman, former governor, a confederate officer with empty sleeve, mute evidence of an arm lost in battle.<sup>96</sup> In 1894, Oates defeated Populist candidate Reuben Kolb for the governorship, with the help of the Democratic party's sweeping ballot machinations.<sup>97</sup> While regretting that the Fifteenth Amendment was enacted, Oates was adamant that the grandfather clause violated the Constitution.<sup>98</sup> “To include a class of voters on grounds that are repugnant to the equality of rights and privileges that are common heritage of the people, violates the spirit of the

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91. *Id.* at 2860-62.

92. *Id.* at 2849.

93. *Id.*

94. *Id.*

95. *Id.* at 2851.

96. MCMILLAN, *supra* note 14, at 191.

97. *Id.* at 226, 229; *see supra* notes 18, 20 (discussing fraud in Alabama elections).

98. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2798.

Constitution, if not its letter.”<sup>99</sup> He asked the delegates, “suppose that this Convention was to declare, in favor of the negro race as voters, practically excluding the whites. Would that be sustainable?”<sup>100</sup> Answering his own question: “I think not.”<sup>101</sup> He later added, “[w]e all took an oath to support the Constitution of the United States which says that no State shall disenfranchise any man because he is a negro . . . I intend to keep my oath.”<sup>102</sup>

Sharing Oates’ opinion on the unconstitutionality of the grandfather clause was Thomas Goode Jones. He too had impeccable credentials: scion of an elite southern family, Confederate major wounded four times in the war, Democratic Party patriarch, Bourbon, celebrated lawyer and long-time counsel for the Louisville and Nashville Railroad. He drafted the code of ethics for the Alabama State Bar Association and became president of the Bar. He, too, had been Governor, preceding Oates in that office from 1890 to 1894, and he, too, was opposed by Kolb and the Populists.<sup>103</sup> At the Alabama Constitutional Convention, Jones insisted the grandfather clause contravened the Fifteenth Amendment. It applied “one test . . . to a majority of the white people, and another test . . . to the majority of the black people; . . . our intention [is] to enfranchise the one and disenfranchise the other! . . . How is it possible for this act to be constitutional, in view of [the] inevitable results?”<sup>104</sup>

Some delegates, obviously impressed that constitutional objections to the grandfather clause came from such distinguished quarters—lawyer/warrior/statesmen—were swayed by this eminence to support the Suffrage Committee’s minority report. “The minority report,” said one delegate, “is signed by four of our number, who are known for their legal ability, who gave it as their opinion that [the grandfather clause] is violative of the Fifteenth Amendment of the Federal Constitution. Ex-governor Thomas Goode Jones, who is acknowledged to be one of the best constitutional lawyers in the State says the same thing.”<sup>105</sup> Furthermore, U.S. Senators “Morgan and Pettus are of the same opinion, and many others of our ablest men in

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99. *Id.* at 2791.

100. *Id.*

101. *Id.*

102. *Id.* at 3105.

103. MCMILLAN, *supra* note 14, at 228.

104. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2894.

105. *Id.* at 3073 (quoting Joel Murphee, large landowner, merchant, and director of the Mobile and Girard Railroad).

the South agree with them on this point.”<sup>106</sup>

Jones’ reputation with delegates as one of the best constitutional lawyers in Alabama stood him in good stead. In September 1901, shortly after the Alabama Constitutional Convention disbanded, President Theodore Roosevelt appointed him United States Circuit Court Judge for the Middle and Northern Districts of Alabama.<sup>107</sup> This was the same Thomas Goode Jones, leading light of the Alabama Constitutional Convention, the same federal judge who, in 1903, would preside over the case of *Giles v. Harris*.<sup>108</sup>

Jackson Giles brought the suit on behalf of himself and 5,000 other Montgomery County blacks that were exiled from the ballot box by the new Alabama State Convention.<sup>109</sup> Clearly, resolution of this case would profoundly affect the future of voting rights in the United States. In his complaint, Giles challenged, among other things, the constitutionality of the very grandfather clause that former Governor Thomas Goode Jones, as Convention delegate, had vigorously opposed on constitutional principle.<sup>110</sup> How then in 1903, less than two years after the Convention, did Thomas Goode Jones, now Judge of the U.S. Circuit Court, choose to act on the complaint in that crucial case before him? Quite simply. He dismissed it.<sup>111</sup>

The second major point of opposition to the grandfather clause was that it was undemocratic, reminiscent of the hereditary privileges of the British monarchy and nobility. It conjured up elite prerogatives that American colonists deplored and against which they revolted. “In the parliament of England they have hereditary peers and another class called life peers,” a delegate explained, “but in America we have no hereditary distinction, and cannot have any unless this instrument passes and becomes ratified.”<sup>112</sup>

Stanley Dent, who joined the minority report, picked up its refrain. The grandfather clause violates “one of the great fundamental doctrines of Republican Government.”<sup>113</sup> To create “an hereditary right or privilege” is to contravene “the spirit that has animated the people of this country from the Declaration of Independence down to this time . . . .”<sup>114</sup> He further stated that the clause not only

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106. *Id.*

107. McMILLAN, *supra* note 14, at 344.

108. 189 U.S. 475 (1903); *see infra* text accompanying note 149 (discussing the relation of *Giles v. Harris* to minority voting rights in Alabama).

109. *Giles*, 189 U.S. at 482.

110. *Id.*

111. *Id.* at 486-88.

112. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2934.

113. *Id.* at 2769.

114. *Id.*

conflicted with the U.S. Constitution, but that it was incompatible with the proposed State Constitution. With no dissent, he added, the Convention had just adopted Section 30, which declared that “no title of nobility or hereditary distinction, privileges[,] honor or emolument shall ever be granted’ . . . . Isn’t it hereditary distinction,” Dent asked, “to say that because a man was a soldier, his son shall be entitled to register and vote without any regard to his qualifications . . . .”<sup>115</sup>

Former Governor Oates joined in. The grandfather clause is “un-American. Why should we have any inheritable political right? Did you ever hear of it before.”<sup>116</sup> Our country proceeds on the hypothesis that “every tub stands on its own bottom . . . [t]hat is Americanism.”<sup>117</sup>

John Morgan, U.S. Senator from Alabama, also entered the lists against the grandfather clause, expressing his unequivocal views in a letter to Suffrage Committee dissenter Frank White who read the letter to the Convention.<sup>118</sup> To Morgan, the grandfather clause was counterrevolutionary. “The American revolution,” his letter began, “was not so much about redress of grievances, as it was a struggle to abolish heredity.”<sup>119</sup> The “real line of division [was] between Democratic and regal government.”<sup>120</sup> Morgan felt that forms of political heredity, such as prerogative and titular nobility, were not only prohibited by the Constitution, but that they had also helped instigate the Revolution. He further stated that those who would restore political heredity discredited the cause of Revolution. Morgan concluded his assault on the Suffrage Committee’s “ordinance of inheritable blood” with this warning: “When such a titled class of voters is created, it will soon occur to them that no other class should be allowed to vote, and they will usurp all power.”<sup>121</sup>

In addition to the distaste for unconstitutionality and the anathema of hereditary privilege, adversaries of the grandfather clause exposed, though with less emphasis, other fissures in its armor. They thought it doubtful the courts would find it constitutional. The highest levels of the judiciary were still in the hands of that “other” political party.

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115. *Id.* at 2768-70. “In the Parliament of England they have hereditary peers . . . but in America we have no hereditary distinctions, and cannot have any, unless this instrument passes and becomes ratified.” *Id.* at 2934.

116. *Id.* at 2797.

117. *Id.*

118. *Id.* at 2855.

119. *Id.* at 2862.

120. *Id.*

121. *Id.*

General Harrison observed that the clause “will most likely be tested in the Supreme Court of the United States, the majority of whom are Republicans.”<sup>122</sup> Moreover, if the grandfather clause fell, Harrison believed the entire suffrage plan would disintegrate with it.

Suppose the grandfather clause is held unconstitutional, what court on earth could tell who went in under one clause or the other? There is nothing in here providing that it shall be kept separate. They are so intermingled that no court could tell under which clause the voter registered. Therefore, if one is unconstitutional, the whole would be void.<sup>123</sup>

The suffrage plan called for no record keeping, no permanent chronicle of the specific suffrage provision under which each successful applicant had qualified to register.<sup>124</sup> Accordingly, after striking down the grandfather clause, a court might be forced to trash the registration rolls completely because it could not determine who had or had not been registered under the tainted grandfather clause; a judicial jettison of the whole suffrage plan, particularly the property, literacy, and poll tax requirements, was not what the Democratic Party’s Bourbon leaders had in mind.

Another reason for abjuring the grandfather clause was the congressional reaction it might provoke. How “do you believe,” asked Harrison, “that a United States Congress composed of Republicans would [decide] a closely contested Presidential election when the vote of Alabama, Louisiana, and North Carolina, [each having] these contested [grandfather] clauses, would settle the contest?”<sup>125</sup> Responding to his own query: “Methinks, I see, fellow delegates, a Republican Congress declaring that Alabama had not a republican form of government and refusing to count our votes . . . . [T]his is more than probable.”<sup>126</sup>

Less contingent than a congressional deadlock in a close presidential contest, was the real possibility of losing a number of seats in the House of Representatives. In enacting the Fourteenth Amendment, the 39th Congress authorized future Congresses, should the need so arise, to decrease proportionally the congressional representation of states denying any of their male citizenry the right to vote.<sup>127</sup> The relevant language of the

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122. *Id.* at 2854.

123. *Id.* at 2855.

124. ALA. CONST. of 1901, art. VIII.

125. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2855.

126. *Id.* at 2856.

127. U.S. CONST. amend. XIV. The Fourteenth Amendment was enacted by Congress on June 13, 1866, and, upon ratification by the states, became part of the

Amendment did not specifically mention blacks or the vanquished South, but the meaning was clear enough. The prospect of congressional reduction of Alabama's delegation to the House did not escape General Harrison's notice.

[A] Republican Congress is what I wish to warn you of . . . . They are as partisan as we are and they will never submit to the [grandfather clause] on earth. I for one cannot by my vote run any risk on [a] proposition that I feel will place Alabama again in the throes of reconstruction, and deprive her of her representation in the Congress of the United States.<sup>128</sup>

Some Bourbons fought the grandfather clause on humanitarian grounds. It was unfair to blacks and plainly undemocratic. Former Governor Oates was explicit on this point. "We claim a good deal for ourselves, as being Democrats, standing on Jeffersonian Democracy, and if we do, ought we to adopt any questionable means here in order to give white man the preference over the negro?"<sup>129</sup> A moment earlier, he had focused on the idea of ancestral privilege creating an "inheritable political right" that was "un-American."<sup>130</sup> Now at this point in the Convention, Oates took on the much more delicate and controversial side of democracy, the issue of race.

It would be a mistake to stamp this show of concern for black political equity by some Bourbons as hypocritical because it was quite consistent with Bourbon paternalism. In that dazzling incongruity of southern politics, the Bourbons were many contradictory things to many people. They were the leaders of the party of white supremacy, yet contemptuous and distrustful of lower class whites to whom they pretended to curry. They were a proud, white oligarchy, yet constantly beseeching former slaves and their progeny for electoral support. They were patrons to individual black subordinates, fatherly protectors of what they deemed to be "an inferior race"<sup>131</sup> permanently consigned by providence to their benevolent wardship. Yet, they were willing beneficiaries of the manipulation and theft of the black vote in the black belt by which they foiled the Populist

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Constitution on July 28, 1868. Under this Amendment, a state's total population, male and female, was to be counted for purposes of determining its congressional representation. *Id.* § 2. The Amendment did not authorize Congress to reduce any state's representation for denying, as every state did, the right of all black and white women to vote. *Id.*

128. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2856.

129. *Id.* at 2797-98.

130. *Id.* at 2797.

131. *See id.* at 2793 (quoting Former Governor Oates, now Convention delegate: "Let [Negroes] occupy a subordinate position, but do not silence them. Let the better element of them, though an inferior race . . . go to the polls and vote.").

threat and clung to the levers of power. And above all, they were the rulers of the South during the era when free black women and men unquestionably suffered their greatest defeats.

Opponents of the grandfather clause also pondered the black response to total black disenfranchisement and what that might portend for stability or rebellion—social conditions that all governments, especially those that are repressive, must seriously contemplate. Former Governor Oates contemplated:

[the potential for disruption if they were to] completely exclude the negro from participation—all participation—in the affairs of our State . . . did you ever . . . know of a people, and so large a minority not allowed any voice at all in the affairs of government who remained contented under that government? Have you ever heard of so large a minority, who have been admitted into the participation of the affairs of government for thirty years, who were afterwards silenced? Will not there be disturbances? . . . [Y]ou may live to see the time of outbreaks and troubles not now contemplated, such as every man who participates in making it thus will live to regret.<sup>132</sup>

Aside from the question of violent disturbances, blacks performed much of the unskilled labor and no small portion of the skilled labor in the South, just as they had done under slavery.<sup>133</sup> What if blacks reacted to disenfranchisement by leaving, Oates asked. “[W]ho . . . fixes all these telegraph and telephone poles on the street? I have never seen a white man on those poles. The negro performs nearly all of the labor down here in this country . . .”<sup>134</sup> And because blacks were now “citizens of the United States,”<sup>135</sup> “[t]hey have the right to go . . . where they please . . .” And if they

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132. *Id.*

133. Of the approximately 120,000 skilled artisans in the South at the end of the Civil War, it is estimated that about 100,000 were black. Bates, *Black Business and the Legacy of Racism*, 21 FOCUS, No. 6, June 1993, at 3. This race-based occupational division continued in many parts of the South after Appomattox. For instance, blacks comprised two-thirds of Wilmington, North Carolina’s population of 25,000, and did most of the work performed by brick masons, carpenters, mechanics, etc. MABRY, *supra* note 23, at 52.

134. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2794.

135. *Dred Scott v. Sandford*, the juridical harbinger of the Civil War, held that no Americans of African descent, slave or free, were citizens of the United States for any purpose under our Constitution. 60 U.S. (19 How.) 393, 406 (1857). That Supreme Court calamity will never be erased from memory, though later it was disowned by law—initially by the very first civil rights act passed by Congress after the Civil War, Civil Rights Act of 1866, Ch. 31, 14 Stat. 27 (current version at 42 U.S.C. § 1981 (2000)); and then, more indelibly in 1868, by the first sentence of the Fourteenth Amendment to the United States Constitution: “All persons born or naturalized in the United States and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1.

left, “[t]hen what would you do for labor in the South?”<sup>136</sup>

*B. The Short, Unhappy Life of the Alabama Grandfather Clause*

The grandfather clause failed miserably. The failure was not by inadvertence in fulfilling its avowed purpose, so widely trumpeted throughout the state—indeed, throughout the South: to safeguard the ballot of lower/working class white men; those least able to read and write any article of the Constitution; those to whom forty acres of land were but a distant dream; and those whose individual personal property, bundled altogether, did not even add up to \$300, no trifling sum in those deflationary days.<sup>137</sup> Alabama’s grandfather clause did not disintegrate merely because the Supreme Court held such clauses unconstitutional in 1915.<sup>138</sup> Rather, it perished under the death blow of the very provision that created it in 1901, for Alabama’s grandfather clause was part of the Temporary Plan, which was to last only a little more than a year, until December 19, 1902.<sup>139</sup> After that date, no one could register under any of the Temporary Plan’s three clauses—veteran, grandfather, or good character and understanding.

This meant that registration under the grandfather clause was only possible for white men who reached their twenty-first birthday by December 19, 1902, made the effort to register and in fact had been registered on or before that date. It made no difference that many of those white men were registered voters under the 1875 Constitution right up to the very day the 1901 Constitution replaced it. The new Constitution simply wiped out their old registration and they were required to register again. If men failed to re-register before December 20, 1902, they lost the opportunity to take advantage of the veteran, grandfather, or good character clauses. Moreover, the grandfather clause would not be available for white men who were not yet twenty-one on December 20, 1902; nor for previously unregistered white men who were of age in the year 1902, but who failed for one reason or another, to register in 1902; nor for white men who were of age in the year 1902, but moved to Alabama after 1902; nor for white men who were born after the year 1902; nor, presumably, for white men who reached the age of twenty-one by

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136. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2794.

137. ALA. CONST. of 1901, art. VIII, § 181. Its unavowed purpose was to induce those white voters fearful of the literacy and property clauses to vote to ratify the entire suffrage plank anyway.

138. *Guinn v. United States*, 238 U.S. 347, 364-65 (1915).

139. *Supra* Part I.B.

1902, but could not then meet the Constitution's new residency requirement—two years in the State, one year in the county, and three months in the precinct;<sup>140</sup> nor for white male immigrants who did not declare their intention to become citizens before ratification of the new Constitution, which was on November 11, 1901, a full fifty days before 1902;<sup>141</sup> nor, of course, was suffrage available to any woman in Alabama.

All in all, only a puny passage was left open for unlettered male issue of white warriors to wend their way to the ballot box. This stingy confinement of the grandfather clause should have come as no surprise. On the very first day of the Convention, John Knox, Convention President, spoke out unequivocally about the barbed wire barrier to registration that the Bourbon majority intended to erect. "We are pledged 'not to deprive any white man of the right to vote,' but this does not extend unless this Convention chooses to extend it beyond the right of voters [already of age] now living."<sup>142</sup>

Badly outgunned Convention Populists, Republicans, and a sprinkling of Democrats, fought valiantly to stretch the Temporary Plan's registration period, urgently pleading for a display of greater generosity to white men on the lower levels of the social scale. Against this impassioned entreaty, the Bourbons stood fast; not an extra day would they yield. They had promised poor white men a bone, not a full meal.<sup>143</sup>

Thus, the grandfather clause was vulnerable to withering critique. With the clause freighted with such fetid baggage, why did most Bourbons bother to defend it, nay insist upon it, this—the most indefensible provision of the Suffrage Committee report? Without the grandfather clause, the entire disenfranchising plan—literacy, property, poll tax, etc., the whole edifice—might come tumbling down. Ordinary white voters, fearful for the future of their franchise, leery of Bourbon motives, might, in combination with those black votes the Bourbons could not steal or purchase, deal a mighty death blow to ratification. That's how the majority of Bourbons saw it. And it is to them we now turn.

### C. *The Bourbon Majority: Fathers of the Grandfather Clause*

The four signatories to the Suffrage Committee's Minority Report—Frank White, George Harrison, William Oates, and Stanley

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140. ALA. CONST. of 1901, art. VII, § 178.

141. *Id.* § 180.

142. 1 OFFICIAL PROCEEDINGS, *supra* note 24, at 15-16.

143. McMILLAN, *supra* note 14, at 286-87.

Dent—were a distinct minority of the Bourbons in their opposition to the grandfather clause. But their honorable effort should not unhinge history's ultimate judgment on southern disenfranchisement: it was indeed the southern Bourbons, the southern ruling elites (including these four men) who devised, passed, and implemented the plan to disenfranchise almost all blacks and tens of thousands of poor whites.

It must be born in mind that had these four Bourbon dignitaries carried the day and defeated the grandfather clause, not a single additional black man would have been added to, or kept on the registration rolls; and thousands of poor uneducated white men would have been unable to vote—effectively barred by the literacy and property tests. Such a negative impact on ballot access did not appear to trouble the foursome at all.

On the contrary, like the rest of the Bourbon delegates to the Convention, they were the disenfranchisers; they who were socio-economically privileged; they who in the 1870s redeemed the South from the “evils of Reconstruction”; they who for twenty-five years thereafter stood astride the South like some unassailable colossus; they whose political/economic hegemony was, in those turbulent 1890s, put in jeopardy. They were not jeopardized by any branch of the Federal Government, not by the Republican Party, not by intrusive northerners, but by an enemy within, white and black: untold thousands of poor farmers, joined by a band of ordinary laborers, altogether a gaggle of Populists who no longer seemed to know or care about their proper station, their assigned place as servitors on the bottom rungs of the political, economic, social ladder of the New South.

On the surface, Suffrage Committee member Richard Jones' message was clear enough: the grandfather clause would rescue white ballots from the perils of illiteracy. With that attractive proposition, delegate William Handley fully agreed. “I know thousands of [young men] personally that cannot read and write, but they are splendid workers and pay their honest debts and they can come in under this old soldier clause. [T]he grandfather clause . . . is the most popular thing that there is . . . .”<sup>144</sup>

Most popular? Not according to lawyer, later Judge, Charles Ferguson, delegate from Birmingham in Jefferson County, Alabama's most populous county, dotted with iron and steel mills, iron ore and coal mines, a focal railway center, a burgeoning metropolis teeming

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144. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2878.

with industrial workers.<sup>145</sup> “For what purpose,” he asked, “is this grandfather clause placed in the Constitution, and why the necessity of it?”<sup>146</sup> Responding to his own query: “Is it not the prime purpose to get votes for the Constitution?”<sup>147</sup> Then pointedly: “Gentlemen [at this Convention] argue here that the people in the hills want the [grandfather clause] . . . Speaking for the greatest white electorate in the State . . . I never saw such overwhelming sentiment against a proposition in my life, as there is in the county of Jefferson against this grandfather clause.”<sup>148</sup>

The opposition did not prevail. The Convention approved the grandfather clause. The voters ratified it; or so it appeared. A Supreme Court majority, aloof to black adversity and indifferent to disenfranchisement, black or white, dawdled over Alabama’s suffrage plan in *Giles v. Harris*,<sup>149</sup> and then, in a barely intelligible Holmes

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145. As the Convention delegate from Jefferson County, Ferguson occupied a special place. Jefferson County included the city of Birmingham. Birmingham and Mobile were the two largest cities in Alabama at the turn of the century. Birmingham unquestionably played a major role in Jefferson County, which had a vast white electorate. Birmingham was highly urban and by far the most industrialized city in Alabama, leading the nation in pig iron production. The average wage in iron foundries was higher in Birmingham than in Alabama’s agricultural fields. In the midst of that working culture, Jefferson County experienced powerful labor turmoil when Northern Alabama Coal Miners walked off the job in sympathy with the 1894 general strike call by the United Mine Workers of America. ROGERS, *supra* note 5, at 93-97. Birmingham also had a large black population. Blacks comprised between fifty-five and sixty-five percent of the industrial labor force and occupied ninety percent of unskilled labor positions—the hardest and lowest paid work in Birmingham. Carl V. Harris, *Reforms in Government Control of Negroes in Birmingham, Alabama 1890-1920*, 38 J. S. HIST. 567, 570 (1972). Because blacks so uniformly and vigorously opposed the grandfather clause, we may assume that Ferguson was not unmindful of their bitter reaction to it. JOHN WHITSON CELL, *THE HIGHEST STAGE OF WHITE SUPREMACY: ORIGINS OF SEGREGATION IN SOUTH AFRICA AND THE AMERICAN SOUTH* 162-63 (1982). As Cell puts it, “[o]nly the populist challenge, which threatened the hegemony of both groups, eventually brought them together.” *Id.* at 164. Cell also agrees with other notable scholars that “[t]he political economy of the New South . . . had mainly class determinants.” *Id.* at 168. For the political and economic role of Birmingham at the turn of the century, see JONATHAN M. WIENER, *SOCIAL ORIGINS OF THE NEW SOUTH: ALABAMA 1860-1885*, at 162-85 (1978).

146. 3 OFFICIAL PROCEEDINGS, *supra* note 24, at 2932-33.

147. *Id.*

148. *Id.*

149. 189 U.S. 475 (1903). This case involved a bill of equity on behalf of black citizens of Montgomery County, Alabama to compel the Board of Regents to enroll them on the voting lists. *Id.* at 482. The plaintiffs, otherwise qualified to vote, claimed they were arbitrarily denied registration because of their color and that certain sections of the Alabama Constitution were inconsistent with the United States Constitution. *Id.* The Court dismissed the case, stating that equity could not compel the Court to enroll the plaintiffs under the same registration provisions they argued were void. *Id.* at 484. The Court held that legislative relief, rather than judicial action, was necessary because simply registering blacks under a flawed system would not cure the alleged fraud. *Id.* at 487-88.

opinion, refused to decide the case, a lethal blow to the advancements of Section 1983. Equity, federal court power to issue injunctions, was, as Holmes and the Court majority saw it, much too frail to come to the aid of political rights, a lame and disempowering doctrine that tenaciously persevered for years to come.

Fourteen years after the Alabama Convention, the Supreme Court struck down the grandfather clause.<sup>150</sup> This made little difference. It was too late. Literacy, property, poll tax, and similar clauses, left firmly in place, had already done their disreputable work. The grandfather clause, part lure, part ruse, paved the way. Virtually all blacks were now disenfranchised and so, too, were thousands of impecunious whites in Alabama and throughout the South.

I am in agreement with John Whitson Cell that it is dangerous for people under a republican form of government to establish a class of voters to which other voters cannot attain.<sup>151</sup> Federal equity was unavailable to heal the wounds. With the passage of time, the situation grew worse. For the next several decades, the region commonly referred to as the "Solid South" was a collection of one-party states, governed generally from on-high, poor and underdeveloped. The "Solid South" was, in many respects badly deformed by its strong commitment to racial apartheid, elite suffrage, malapportionment, rule by or for the upper-class, anti-trade unionism,<sup>152</sup> and vast economic disparities.<sup>153</sup> A vital Populist movement was no longer on the scene to arrest this development.

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150. See *Guinn v. United States*, 238 U.S. 347 (1915) (holding that Oklahoma suffrage provisions violated the Fifteenth Amendment because they denied blacks the right to vote); *Myers v. Anderson*, 238 U.S. 368 (1915) (holding that Maryland suffrage provisions violated the Fifteenth Amendment because they denied blacks the right to vote).

151. CELL, *supra* note 145.

152. For the deleterious effects of racism within the southern labor movement itself, particularly in mid-twentieth century Alabama during George Wallace's governorship, see Robert Norrell, *Labor Trouble: George Wallace and Union Politics in Alabama*, in *ORGANIZED LABOR IN THE TWENTIETH CENTURY SOUTH* (Robert H. Zeiger ed., 1991).

153. For a more upbeat view of some progressive elements in the South during this period, see C. VANN WOODWARD, *ORIGIN OF THE NEW SOUTH, 1877-1913* (1951).