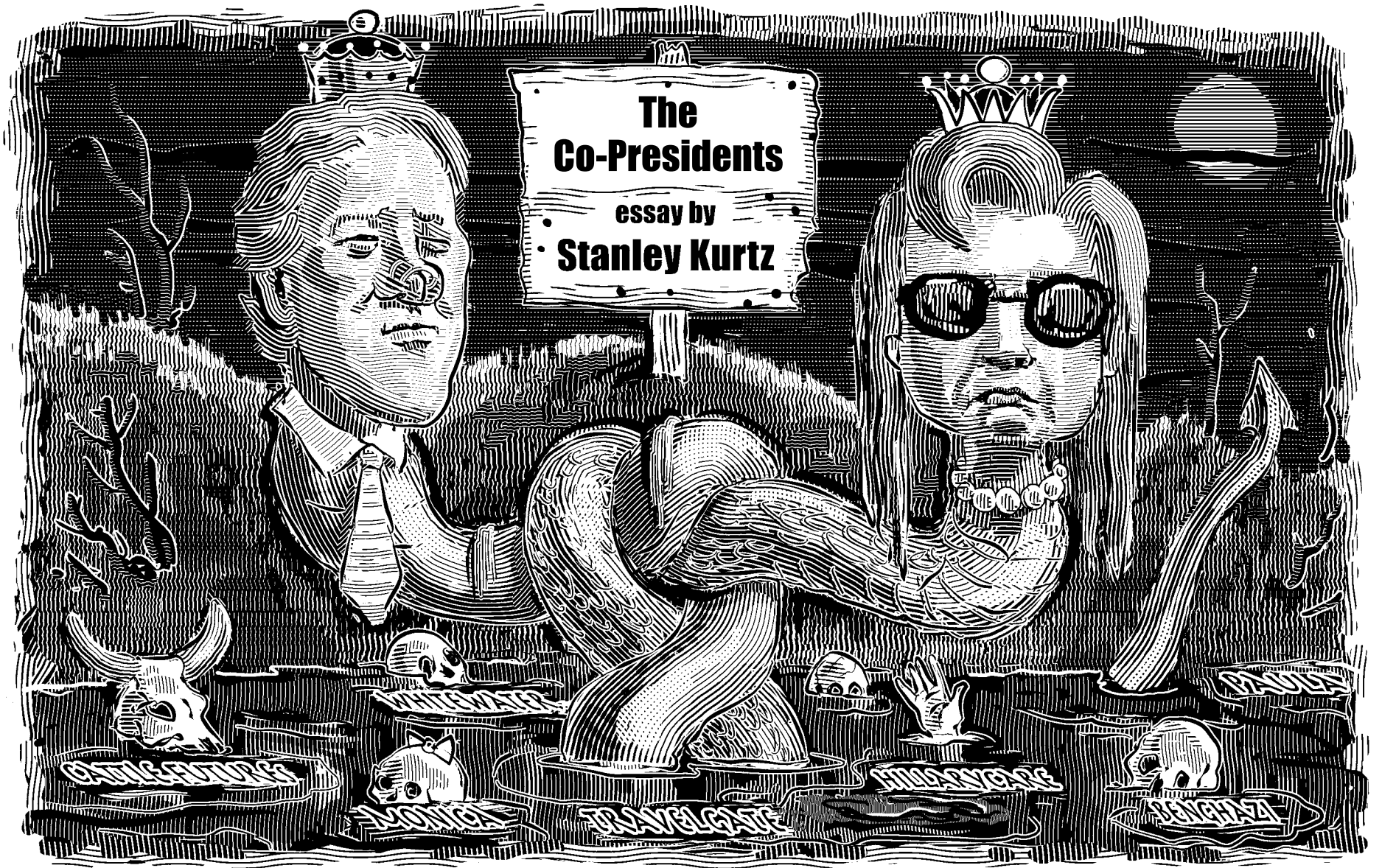


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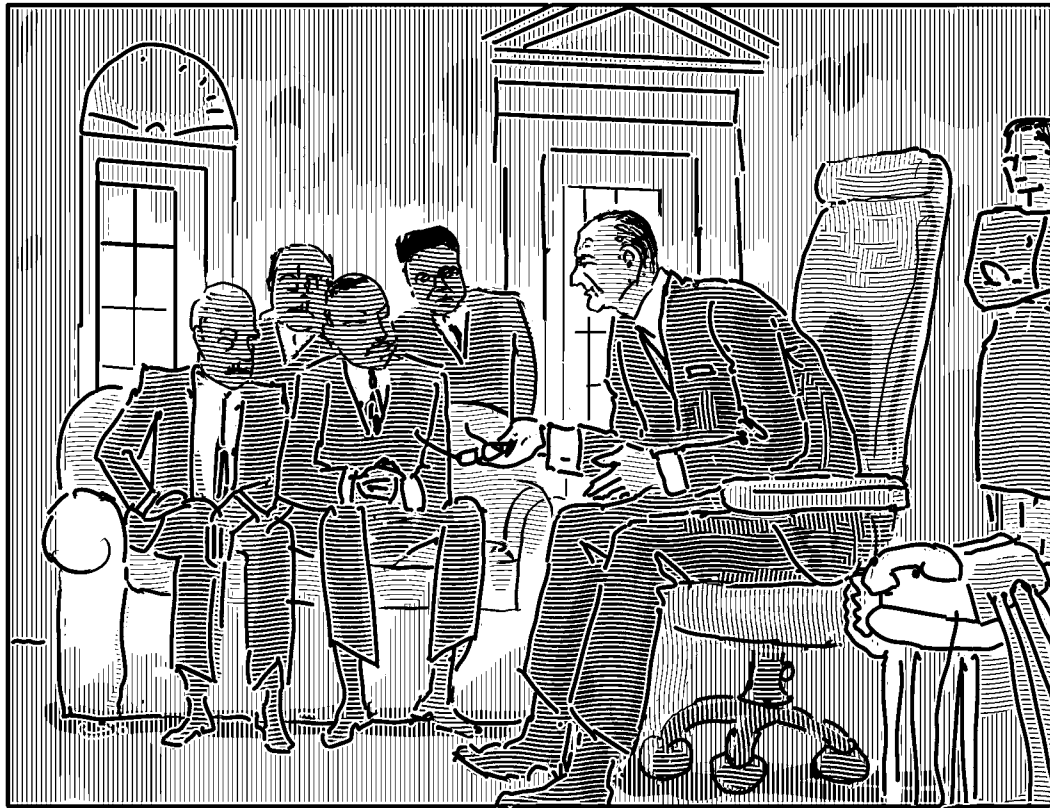
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Essay by Michael Nelson

TRIUMPH AND TRAGEDY



President Johnson meeting with civil rights leaders; drawing based on a photo taken at the White House

HAS ANY LEGISLATION EVER HAD such immediate beneficial effects as the Civil Rights Act of 1964 and the Voting Rights Act of 1965—the former currently commemorating its golden anniversary and the latter on the cusp of its own? Yet, with the passage of time, have any laws ever failed so thoroughly to satisfy the constituencies that demanded them?

Take the 1964 act, whose enactment is recounted and celebrated in *Politico* writer Todd S. Purdum's enjoyably breezy *An Idea Whose Time Has Come* and *New York Times* op-ed editor Clay Risen's richer, more detailed *The Bill of the Century*.

The original version of the proposed bill was sent to Congress by President John F. Kennedy in June 1963. JFK and his brother, Attorney General Robert F. Kennedy, had done their best for more than two years to shun serious action on civil rights, both from personal lack of concern and fear of alienating the Southern Democrats who ran Congress.

The president was finally goaded to act by a persistent campaign and by an immediate event. The persistent campaign was the civil rights movement, which under the leadership of the Reverend Martin Luther King, Jr., and

others, had been staging a series of real-life morality plays throughout the South. In Birmingham and elsewhere, nonviolent, hymn-singing demonstrators stood up for justice against big-bellied, cigar-chomping Southern sheriffs who ruthlessly deployed overwhelming force. What the Kennedys hated most about these spectacles were the images of whites beating blacks that appeared in newspapers all over the world—particularly in the dozens of newly independent African and Asian nations that had become the main Cold War battleground between the United States and the Soviet Union. Communists offered these scenes as living disproof of America's claim to stand for liberty and justice for all.

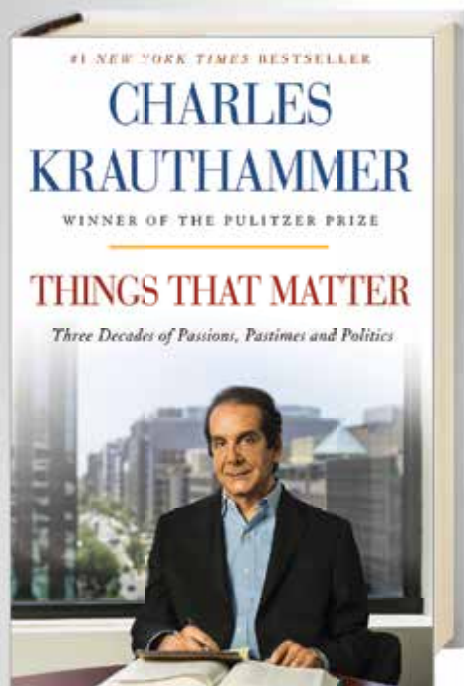
The immediate event occurred on June 11, 1963, when Alabama Governor George C. Wallace, surrounded by network television cameras, theatrically defied and then yielded to federal officials who came to Tuscaloosa to enroll two black students in the previously all-white University of Alabama. That night, a fed-up Kennedy delivered a stirring prime-time address in which he told the nation that a civil rights bill was coming. Eight days later he sent it to Capitol Hill.

Even Stronger

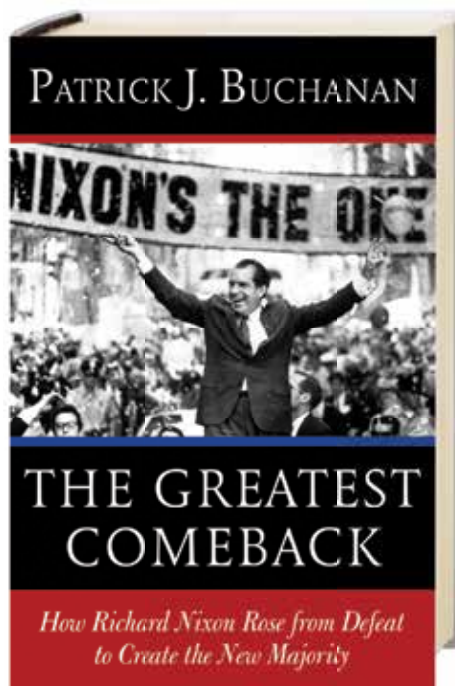
PURDUM AND RISEN EACH DESCRIBE THE common fate of previous postwar civil rights laws: the executive would submit a strong bill and Congress would dilute it in response to Southern Democrats' control of the House Rules Committee and their willingness to wage filibusters in the Senate. This time, however, the Civil Rights Act started out moderately strong and got stronger, when a ban on discriminatory employment practices (Title VII) came to be added to its ban on racial discrimination in public accommodations (Title II).

The main reason the act got stronger—although both authors do their best to deny the fact—is that Kennedy was assassinated and Lyndon B. Johnson succeeded him. At a commemoration earlier this year at the LBJ presidential library, President Barack Obama observed (with unintended self-mockery), “And passing laws is what LBJ knew how to do.... He could wear you down with logic and argument, he could horse trade and he could flatter.” Johnson's legislative mastery on civil rights also drives playwright Robert Schenkkan's three-hour *All the Way*, a surprise

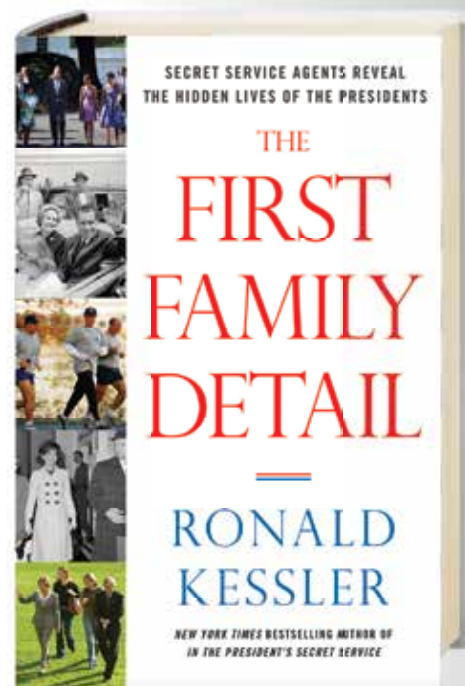
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Broadway hit this season starring *Breaking Bad's* Bryan Cranston as LBJ. (Cranston and the play both won Tonys.) Johnson told Doris Kearns after leaving office that as a Southerner he "had to produce a civil rights bill that was even stronger than the one they'd have gotten if Kennedy had lived."

Risen does his best to shift the spotlight from LBJ to other political actors, including Republican representative William McCulloch of Ohio, Senate leaders Everett Dirksen of Illinois (Republican) and Mike Mansfield of Montana (Democrat), and J. Irwin Miller, an Indiana industrialist. Miller was the first lay president of the National Council of Churches, and he rallied support for the bill among clergymen throughout Garrison Keillor country—the white, Protestant, small towns of the Midwest whose Republican solons were immune to pressure from traditional liberal and labor groups.

"We had been able to hold the line until all the churches joined the civil rights lobby," confessed the dean of the Southern Democratic senators, Richard B. Russell of Georgia. Exhibit A for his lament could be South Dakota Republican Senator Karl Mundt, who after supporting the bill on an important procedural vote, griped, "I hope that satisfies those two goddamned bishops that called me last night." Credit for the extension of Title VII's coverage to women, Risen indicates, goes to House Rules chairman Howard W. Smith, a Virginia segregationist but one who had promoted equal rights for women for as many decades as he had resisted civil rights for blacks. Smith believed that the special Progressive-era legal protections for female workers that midcentury feminist orthodoxy still cherished placed unnecessary impediments on factory owners.

Still, Risen's desire to bring the supporting actors out for a bow should not diminish Johnson's importance. Risen concedes that "[i]n almost every public address—press conferences, campaign speeches, talks with constituents—[LBJ] emphasized the need for a strong civil rights act." He also, the record shows, traded pork for votes with several crucial members of Congress, notably House Republican leader Charles Halleck of Indiana. LBJ's 80% approval rating in the Gallup Poll didn't hurt the cause, either. He made a point of signing the bill at a ceremony in the Oval Office on July 2.

Equal Rights to Equal Outcomes

ONCE ENACTED, THE CIVIL RIGHTS Act of 1964 had almost instantaneous positive consequences, espe-

cially for African Americans' access to previously segregated theaters, hotels, restaurants, stores, and other public accommodations—belying King's pessimism that "it will probably take five years to see the civil rights bill fully implemented in the South." Purdum invokes the example of a young army captain, Colin Powell, who "went back to the same Georgia drive-in that had refused to serve him just months before and ordered a hamburger without incident."

Books discussed in this essay:

An Idea Whose Time Has Come: Two Presidents, Two Parties, and the Battle for the Civil Rights Act of 1964, by Todd S. Purdum. Henry Holt and Company, 416 pages, \$30

The Bill of the Century: The Epic Battle for the Civil Rights Act, by Clay Risen. Bloomsbury Publishing, 320 pages, \$28

Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy, by Gary May. Basic Books, 336 pages, \$28.99

Down to the Crossroads: Civil Rights, Black Power, and the Meredith March Against Fear, by Aram Goudsouzian. Farrar, Straus and Giroux, 368 pages, \$30

Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It, by Richard Sander and Stuart Taylor, Jr. Basic Books, 368 pages, \$28.99

Stokely: A Life, by Peniel E. Joseph. Basic Civitas Books, 424 pages, \$29.99

Why was the public accommodations provision of the new law—Title II—accepted so readily? As Risen points out, for some time numerous Southern merchants had wanted to serve black customers, but each store owner was afraid to go first and risk the wrath of the racist White Citizens' Council and Ku Klux Klan. The region's commercial and industrial leaders had come to regard racial discrimination as a huge impediment to attracting investment from Northern and foreign firms. Now they and their political leaders—including

Russell, who fought the bill strenuously in the Senate but proclaimed "our duty as citizens" to obey the law after it was enacted—could say their hands were tied. RFK's warning to Johnson not to sign the bill until after July 4 lest troublemaking blacks use the national holiday "to go into every hotel and motel and every restaurant" proved groundless. Most businessmen were grateful for the surge of new customers.

In the short term, many Southern merchants and manufacturers were also quietly grateful for the legal cover that Title VII, the employment discrimination section of the new act, gave them to hire black workers for previously whites-only jobs. But because that provision—so important for Johnson's political reputation as a bolder champion of civil rights than Kennedy—was added on the legislative fly, it was less well crafted than the public accommodations provision.

Clearly Congress did not intend for racial discrimination in hiring to be succeeded by racial preferences. For example, Title VII allows employers to administer any ability test to prospective employees so long as it is not "designed, intended or used" to discriminate on the basis of race or sex. The title "bestows no preferences on any one group," said the liberal Democratic House sponsor of the civil rights act, Judiciary Committee Chairman Emanuel Celler of New York.

But by including the ambiguous word "used" and, more important, by covering the legal costs of successful plaintiffs, Risen observes, Title VII "fueled the emergence of an enormous civil rights bar"—so much so that "workplace discrimination suits today constitute about 18 percent of all litigation in federal courts," second only to petitions from prisoners. In the 1971 case of *Griggs v. Duke Power Co.* the Supreme Court misinterpreted the act to forbid employment and promotion tests that had racially different results regardless of what employers "designed" or "intended." Risen and Purdam each miss the Court's warping of Title VII, and its baleful effects. At about the same time as the *Griggs* case, President Richard Nixon made matters worse by instituting the Philadelphia Plan, a quota-based approach to increasing the number of African Americans working on federally funded construction projects. Nixon loved the idea of pitting two Democratic core groups, blacks and unions, against each other.

The Stage Is Set

THE MOST TOOTHLESS TITLE IN THE 1964 act, it turned out, was Title I, concerning voting rights. Handing King a pen at the bill-signing ceremony, Johnson told



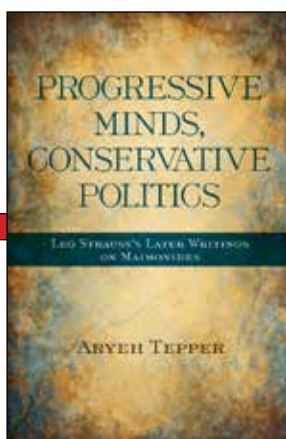
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him that the need for civil rights protests was over. But in that fall's presidential election, a majority of African-American adults remained disenfranchised in Alabama, Georgia, Louisiana, Mississippi (where only 7% were registered), North Carolina, South Carolina, and Virginia, with no real prospect that the situation would improve. In some black-majority counties in the Deep South, less than 1% of African Americans were on the voter rolls.

As University of Delaware historian Gary May shows in *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy*, all the elements of a successful, action-forcing voting rights campaign were in place in Selma, Alabama, by early 1965. The Student Nonviolent Coordinating Committee (SNCC), led at the time by King devotee John Lewis and still displaying as its logo a white hand clasped with a black one, had been active in the area for some time. Sheriff Jim Clark was a racist bully from central casting—perfect for the role of bad guy. Newly elected Mayor Joe Smitherman, writes May, “like other young, moderate bankers, lawyers, and merchants in Selma, feared that the city's racial problems would ruin its reputation and prevent northern businessmen from investing in municipal businesses.” Although these civic leaders felt they could not embrace voting rights voluntarily, they wouldn't mind being forced to. The stage was set when King decided to get involved.

Johnson was in no rush to introduce voting rights legislation in 1965. But in a January 15 phone conversation with the president, King offered an argument that got through. In the 1964 election, he said, “[t]he only states you didn't carry in the South...have less than 40 percent of the Negroes registered to vote.” A “coalition of the Negro vote and the moderate white vote...will really make the new South.” “That's exactly right,” Johnson replied. In February he got the Justice Department working on a voting bill and on March 7 Sheriff Clark did his part by leading a televised assault on a gathering of peaceful SNCC-led demonstrators who were about to march from Selma to Montgomery. That night ABC broke into its airing of *Judgment at Nuremberg* to show footage of the “Bloody Sunday” events in Selma. “Every time it appears that the movement is dying out,” May quotes a King aide as saying, “Sheriff Clark comes to our rescue.”

On March 15 Johnson told Congress and a national television audience that although “many of the issues of civil rights are very complex and most difficult,” this was an easy

one: “[e]very American citizen must have an equal right to vote.” It was probably LBJ's best speech, in which he solemnly intoned, “We—shall—overcome.” Neglected in history—but reclaimed by May—is Dirksen's even more eloquent speech introducing the bill in the Senate. “Men are taxed but not permitted to pass upon those who impose such taxes,” Dirksen declaimed.

Can this be consent of the governed? Men are compelled to render military service but not permitted to pass upon those who decree such service. Is that the consent of the governed?

Seeing the handwriting on the wall, Southern Democrats filibustered the voting bill halfheartedly, cloture was easily invoked, and, as with the 1964 act, a larger percentage of Republicans than Democrats in both houses voted for it. The president signed the Voting Rights Act into law on August 6.

Warped Implementation

BOTH THE CIVIL RIGHTS ACT AND THE Voting Rights Act were strong pieces of legislation that opened doors of equal opportunity to all Americans. Their unifying assumption was that with a level playing field and the passage of time African Americans eventually would equal whites not just in access to public accommodations but also in economic and political attainment. Purdum records that on the day Johnson signed the 1964 act, Freedom Summer volunteers in Vicksburg, Mississippi, celebrated by singing “a chorus of ‘We Shall Overcome,’ and then ‘We Have Overcome’ rang out.”

But equal opportunity has not produced equal results, certainly not fast enough to satisfy civil rights leaders such as Jesse Jackson and Al Sharpton or civil rights organizations such as the National Association for the Advancement of Colored People (NAACP) and the Urban League. Instead of asking, *What can our people do differently to take advantage of the new opportunities?* all too often the typical response of these leaders and groups has been: *What's wrong with these laws that they haven't produced equal outcomes?*

The ills experienced by legions of lower-class African Americans in the past half-century are severe and well known. The 1964 act and, for that matter, the whole panoply of LBJ-inspired Great Society programs did little to solve the growing problems created by fatherless families, dysfunctional schools staffed by tenured timeservers, dirty and unsafe neighborhoods, gang- and drug-related

violence, and a culture that undervalues academic achievement. Even when the economy went on a jobs-creating spree in the 1990s, Harvard sociologist Orlando Patterson argued, “jobless black youths simply did not turn up to take them. Instead, the opportunity was seized in large part by immigrants.” Patterson blames much of “the tragic disconnection of millions of black youths from the American mainstream” on the fact that “the ‘cool-pose culture’ of young black men was simply too gratifying to give up. For these young men, it was almost like a drug, hanging out on the street after school, shopping and dressing sharply, sexual conquests, party drugs, hip-hop music and culture.” In Obama’s debut on the national political stage, his 2004 Democratic convention speech, he rued “the slander that says a black youth with a book is acting white.”

De facto preferential hiring and college admissions have helped to expand the black middle class, but mostly in the non-profit making sectors of the economy—government agencies and, within private corporations, backwater departments such as human resources and community relations. Elite universities ardently began seeking African-American students, ultimately adopting the Supreme Court’s feeble 1978 *Bakke* rationale that providing white undergrads with a diverse set of classmates is a constitutional justification for racially disparate treatment. In the course of doing so, these institutions lowered admission standards, with the result that many black students enrolled at schools where their academic failure—or at least a detour into marginal majors such as ethnic studies and human development—was almost guaranteed. That’s the “mismatch” (a term introduced by economist Thomas Sowell) that is the title of UCLA law professor Richard H. Sander and *National Journal* writer Stuart Taylor, Jr.’s excellent book, subtitled *How Affirmative Action Hurts Students It’s Intended to Help, and Why Universities Won’t Admit It* (and reviewed by Sowell in the Fall 2012 CRB).

Sander and Taylor, skillfully deploying both statistics and story, trace the warping of affirmative action from its original purpose of making sure qualified minorities weren’t overlooked by old-boy network-style decision making into thinly disguised racial preferences. Instead of beating the bushes for smart minority students in poorer schools and neighborhoods, university admissions officers happily came to settle for the well-off but so-so minority applicants whose high school counselors and college-educated parents got them to apply on their own. Top-tier

universities like Duke began admitting black and Hispanic students who would have done fine at, say, Wake Forest but couldn’t keep up with their white and Asian peers at Duke. Meanwhile, minority students who’d have done well at Millsaps or Hendrix stumbled at Wake Forest—and so on down the ladder of academic prestige.

One consequence of this “cascade effect” is that the vast majority of minority students, who enter college just as determined as whites to major in science, technology, engineering, and math (collectively known as STEM), end up falling back and not doing so. Professors at any school teach to the middle of the class, Sander and Taylor point out, “introducing terms and concepts at a speed that is challenging even to the best-prepared student” and thereby leaving behind many blacks and Hispanics who enter school lagging most of their peers and never catch up. In sharp contrast, at historically black colleges and universities (HBCUs) such as Clark Atlanta and Fisk, students don’t get stuck at the starting gate and, with more patient in-

Placing a high floor under black political success in the South also created a low ceiling.

struction, often go on to do well. “Among the top twenty-one college producers of future blacks with science doctorates,” Sander and Taylor note, “seventeen were HBCUs and none were Ivies.”

From Equal Rights to Black Power

CIVIL RIGHTS GROUPS TODAY REMAIN upset that even with rising incomes (“since the 1960s,” the Pew Research Center reported last year, “household income growth for African Americans has outpaced that of whites”), middle-class African Americans have accumulated so little wealth—on average, about one dollar in assets for every nine owned by whites, according to the Brandeis University Institute on Assets and Social Policy.

The civil rights establishment seems equally unhappy with the results of the 1965 Voting Rights Act. Looking at the evidence, one might wonder what the problem is. Within months of the bill’s enactment, black registration mushroomed throughout the South, ris-

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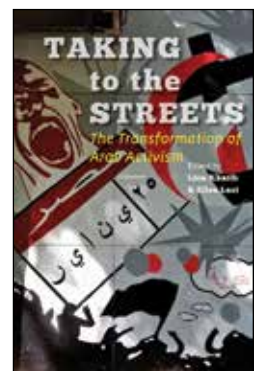
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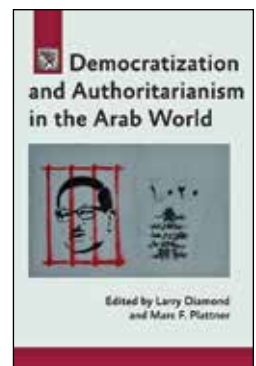
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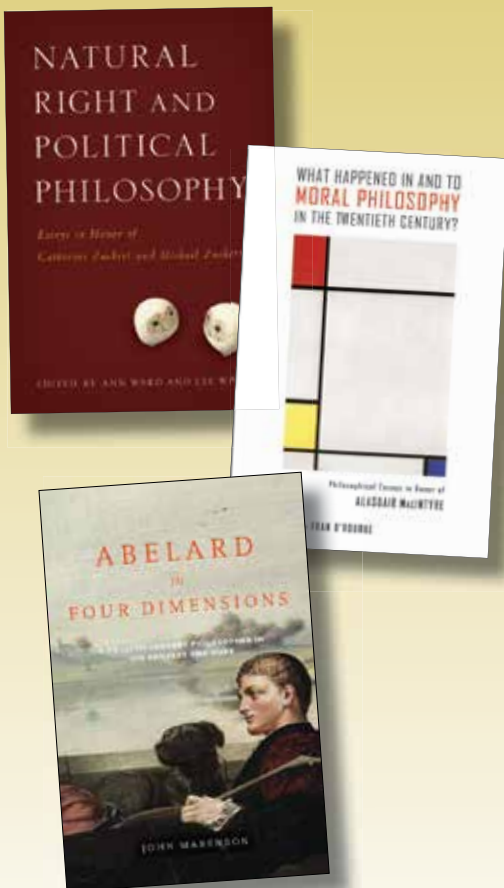
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ing in Mississippi from 28,500 to more than 130,000 by April 1966. But SNCC's bizarre response was to adopt a new no-whites membership policy and try to organize all-black political parties in Alabama and other Southern states under the Black Panther banner. Leading the charge to expel whites from the organization was Stokely Carmichael, a Trinidad-born, Bronx-raised, and Howard-educated firebrand who in May 1966 displaced John Lewis as SNCC's president. "Don't fool yourself," King warned Carmichael and others who favored the blacks-only approach, "We are not in a majority in a single state in the United States."

King uttered those cautionary words while marching with Carmichael from Memphis to Jackson, Mississippi, in June 1966. The riveting story of that march, precipitated by the shooting of James Meredith, the first African-American student admitted to the University of Mississippi, is ably recounted by University of Memphis historian Aram Goudsouzian in *Down to the Crossroads: Civil Rights, Black Power, and the Meredith March Against Fear*.

Meredith began his march to Jackson quixotically, as a solo effort to encourage "Negro men" to stop "hiding behind their women and children" in civil rights campaigns. On the second day, a white Memphis man sprayed Meredith with bird shot, not enough to kill him but more than enough to send him to the hospital. Instantly the leaders of every leading civil rights organization—the NAACP, the Urban League, SNCC, CORE (Congress of Racial Equality), and the SCLC (Southern Christian Leadership Conference)—descended on northern Mississippi to resume the march where Meredith left off.

For mainstream leaders the effort—newly dubbed the "March Against Fear"—was a nonviolent vehicle to win cross-racial support for LBJ's proposed 1966 civil rights bill to ban discrimination in jury selection and in the sale or rental of housing. They regarded the march as a follow-on to the Birmingham campaign for the 1964 Civil Rights Act, and to the Selma march that produced the 1965 Voting Rights Act. For Carmichael and other militants, by contrast, the march was an opportunity to mobilize and unite blacks as a force apart from their moderate and liberal white sympathizers, as well as to sideline non-violence as the movement's dominant philosophy and strategy.

Although King and Carmichael marched side by side, the loudest shouts from the crowds were inspired by Carmichael. "We been saying freedom for six years and we ain't got nothin'," he thundered to a raucous

multitude in Greenwood, Mississippi. "What we got to start saying now is Black Power!" He added, "Every courthouse in Mississippi ought to be burned down to the ground to get rid of the dirt." Carmichael's wasn't the only rhetoric that verged on violence. "For the first time," Goudsouzian writes, "a national civil rights demonstration showcased and sanctioned blacks practicing armed self-defense" in the form of the thuggish Deacons for Defense and Justice, an M-1 rifle-toting group from Louisiana.

Media coverage of the march confirmed King's fears that the "black power" slogan in combination with incendiary language would turn off far more people than it would inspire. "The Civil Rights Bill of 1966, considered a *fait accompli* upon the shooting of James Meredith—never passed," Goudsouzian points out. Carmichael's militancy soured the legislation for most white voters. It also hastened the demise of SNCC, whose next (and last) attempted campaign—aborted for lack of interest—was to picket the wedding of President Johnson's daughter Luci.

High Floor, Low Ceiling

CARMICHAEL WAS UNFAZED BY THE failure of his separatist political strategy. According to historian Peniel E. Joseph of Tufts University in his hagiographic *Stokely: A Life*, Carmichael told his followers: "To ask Negroes to get in the Democratic party is like asking Jews to join the Nazi party." Enraptured by his own bombast, Carmichael added, "When you talk of 'black power,' you talk of building a movement that will smash everything Western civilization has created." With grandiloquence matching that of his subject Joseph implausibly argues that Carmichael—"America's leading critic of the Vietnam war" and "the world's foremost black revolutionary"—belongs in the "pantheon" of black leaders alongside Frederick Douglass and Martin Luther King.

Most newly enfranchised black voters ignored Carmichael. He soon moved to Guinea and attached himself to brutally repressive dictators such as Sékou Touré (Guinea) and Idi Amin (Uganda), who for publicity reasons were willing to treat him as a big deal. (In Touré's honor, Carmichael even changed his name to Kwame Ture.) Back home, all but a handful of Southern blacks registered as Democrats, not as Black Panthers. But placing all their eggs in one major party's basket soon generated its own problems.

Like the Civil Rights Act, the Voting Rights Act was full of provisos against guaranteed electoral outcomes for candidates of



any race. But as with the 1964 act, in time it was reinterpreted by federal judges and bureaucrats, in this case to require that “minority-majority districts”—that is, local, state, and congressional legislative constituencies in which racial minorities constitute a majority of voters—be created wherever possible. As a result many African-American candidates were elected to office. By 1987 Mississippi had the largest number of black elected officials in the country, and Alabama the highest percentage of officeholders who were African-American.

But placing a high floor under black political success in the South also created a low ceiling. Because African-American voters are almost universally Democratic, so are African-American office-holders, notwithstanding that the region has become strongly Republican. And because the Democratic candidates who thrive in monochromatically black districts can get by without competing for white votes, they have little occasion to develop the political skills, networks, and issue positions that would enable them to compete statewide.

Some civil rights leaders complain that statewide offices, especially in the South, still seem reserved for whites only, and charge this to a flaw in the Voting Rights Act. But how then did Governor Bobby Jindal of Louisiana and Governor Nikki Haley of South Carolina—nonwhite candidates—manage to win statewide elections below the Mason-Dixon line? What made Jindal and Haley different from, say, the 18 Southern members of the Congressional Black Caucus, all of them House Democrats, is that they ran as Republicans who knew they could win support from white Southerners by taking conservative stands on the issues.

Wide Open

THE LATEST CIVIL RIGHTS CAUSES célebres, of course, are the Supreme Court’s 2013 *Shelby County v. Holder* decision and the host of state laws, spanning all regions of the country, recently enacted to validate voters’ credentials and assure ballot integrity. In *Shelby* the Court held that section 4(b) of the Voting Rights Act is no longer constitutional because its list of legally suspect Southern states is “based on 40-year-old facts having no logical relationship to the present day.” Indeed, by 1968, just three years after the act was passed, African Americans were voting in the South at a rate that already met the law’s standard of success, which was a voter turnout rate exceeding half of the adult population in each county. The act stipulated

that literacy tests were abolished and federal officials would take over the registration process in counties that failed to clear this threshold. That threat was enough to persuade nearly all Southern jurisdictions to comply on their own.

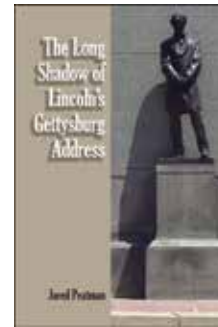
But rather than declare victory, civil rights leaders have continued to act as if white county registrars never stopped slamming the door in the faces of franchise-seeking blacks. They treat recent experiments in voting that some states are now curtailing—early voting, Sunday voting, online voting, same-day registration, and preregistration of underage students in their schools—as fundamental aspects of the franchise—even though these practices scarcely existed as recently as 1992, when young Barry Obama was organizing voter registration drives in Chicago. One would like to think Peniel Joseph is kidding when he writes that the *Shelby* decision “would confirm [Stokely Carmichael’s] belief that nothing short of global Pan-African revolution could secure justice and human rights for black Americans and those African descendants living across the entire world.” But he isn’t.

As for the recent wave of ballot-protection statutes, why can’t civil rights groups acknowledge that minority participation rose in the 2012 election in several states, including Georgia, even after a voter identification requirement was instituted? Or accept that everyone is better off having an official photo I.D., which an increasing number of stores require for the purchase of cold medicine, never mind casting a ballot? President Obama declares that these recent state statutes are “un-American” attempts to “restrict the vote” of minorities. “The right to vote,” he told the annual convention of Al Sharpton’s National Action Network on April 11, “is threatened today in a way that it has not been since the Voting Rights Act became law nearly five decades ago.”

Well, no, it is not, and thank goodness for that. As with jobs and public accommodations, the doors of opportunity remain wide open. But people still need to pick themselves up and walk through.

Michael Nelson is Fulmer Professor of Political Science at Rhodes College, a fellow at the Center for Presidential History at Southern Methodist University, and a senior fellow at the University of Virginia’s Miller Center. His new books are Resilient America: Electing Nixon in 1968, Channeling Dissent, and Dividing Government (the University Press of Kansas) and 41: Inside the George H.W. Bush Presidency (Cornell University Press).

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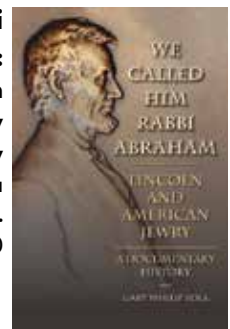


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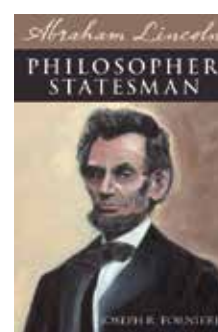
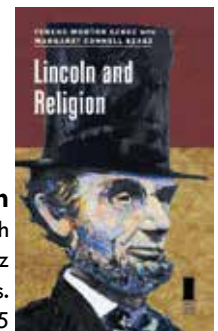
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