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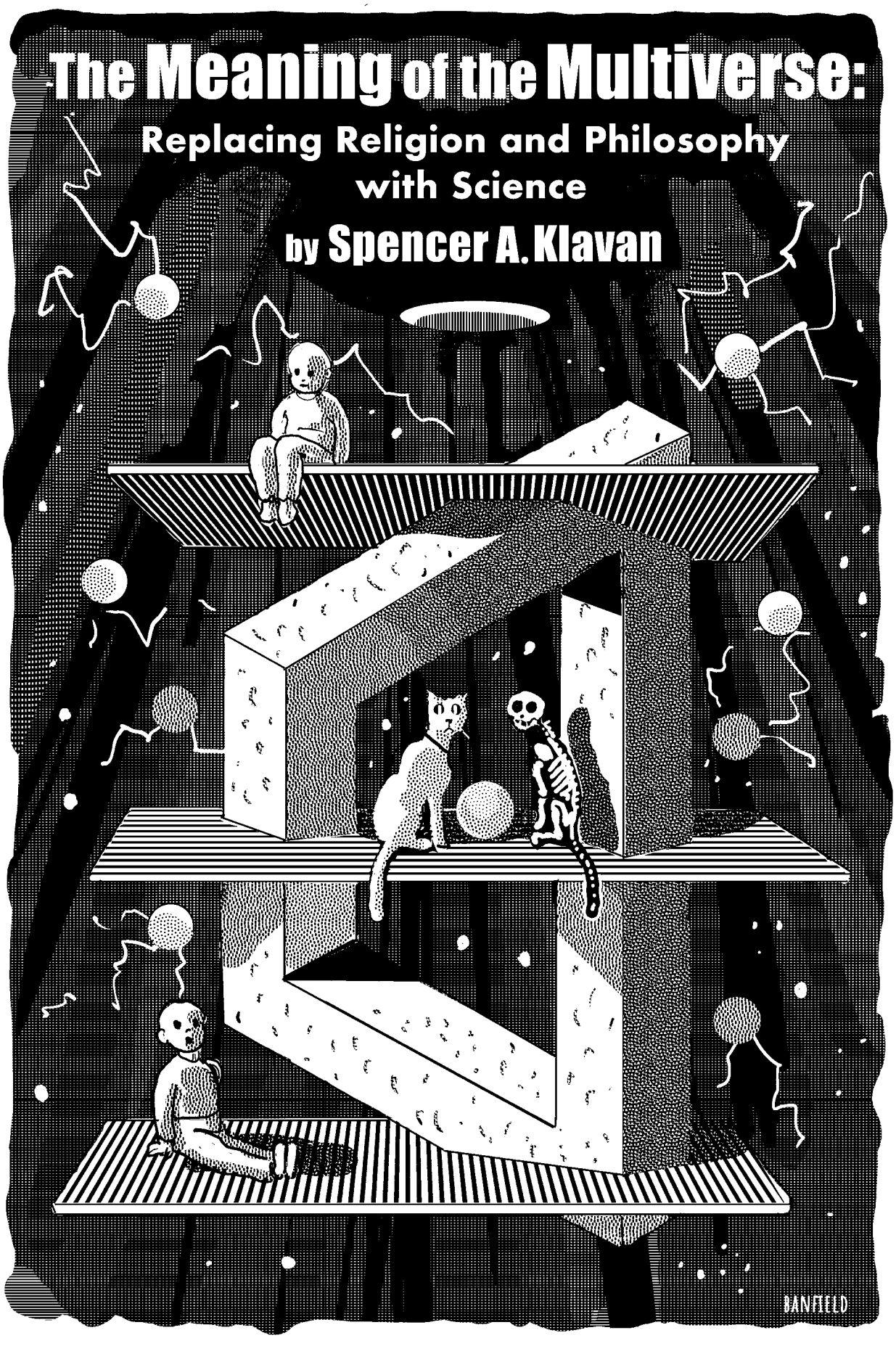

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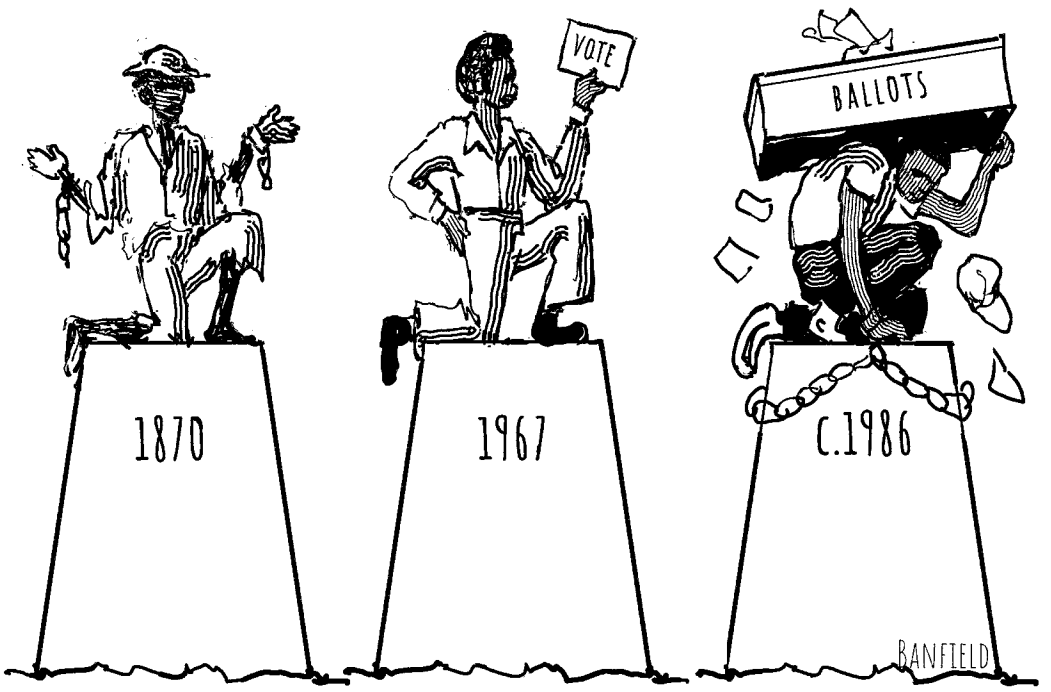
Essay by Charles R. Kesler

Voting Rights and Wrongs

Three generations of voting rights are enough.



With senator joe manchin's announcement last year that he would not vote for H.R. 1, the prospects of passing the Democrats' "For the People Act," the most sweeping voting rights legislation in years, faded. Its companion bill, the "John Lewis Voting Rights Advancement Act," stalled, too. These bills would have, among other things, significantly loosened voter ID requirements, abolished limits on absentee voting, established public financing for some campaigns, and federalized the regulation of all American elections.

Senator Manchin had made the simple, straightforward point that no voting rights bill could pass or endure without Republican buy-in. It would ideally command a large, bipartisan majority, and it would have to be written so as to attract such a majority. This was the formula, more or less, for the original Voting Rights Act of 1965, and for its various renewals and expansions in the following decades. The "For the People Act" commanded only Democratic votes in the Senate, and, obviously, not all of those.

Nor was the bill's tone, or that of its supporters, remotely bipartisan or moderate. President Biden was among the worst offenders. "The 21st-century Jim Crow assault is real," he told the National Constitution Center in Philadelphia in July 2021. "We're facing the most significant test of our democracy since the Civil War. That's not hyperbole. Since the Civil War."

Six months later Biden gave a similar speech in Atlanta. He put the question as coolly and factually as he could:

> Do you want to be on the side of Dr. King or George Wallace? Do you want to be on the side of John Lewis or Bull Connor? Do you want to be on the side of Abraham Lincoln or Jefferson Davis?

The instant cause of his indignation was the new GOP-sponsored election law in Georgia, which among other things provided to citizens of every race 17 days of in-person early voting and a 67-day window for requesting absentee ballots.

When passengers are required to show up at an appointed time with a government-approved form of ID in order to board an airplane, no one objects to this as "passenger suppression." But Democrats increasingly insist that asking for voter ID at the polls, or following instructions in completing an absentee ballot, amounts to "voter suppression." Their bill, H.R. 1, was certainly ambitious. It would have done many things that might prove advantageous to the Democratic Party on election day; but it would have done almost nothing to abolish Jim Crow. That's because Jim Crow was abolished a long time ago. Hence the need to conjure Jim Crow 2.0.

Vote Dilution

How did the parties get so far apart on matters that might seem to most Americans to amount to commonsense electoral hygiene? The very closeness of elections in a country so evenly divided as ours has something to do with it. Democracy—majority rule—works better when, as for large stretches of our history, one party is clearly the majority party and the other is the minority party. For one thing, there is less incentive to cheat when the margins between candidates and parties are large. This arrangement has disadvantages, too, but so long as the parties may change places "easily with deliberate changes of popular opinions and sentiments," as Abraham Lincoln put it in his First Inaugural, the system tends to produce political stability, lawfulness, and flexibility.

American politics at the national level, however, doesn't look like this model anymore. For half a century the two parties have been more or less stalemated, alternating control of the presidency and the Senate and, increasingly, of the House of Representatives. The margins of control in the House and Senate

have been among the smallest ever, but that hasn't stopped either party from making maximal legislative demands on the narrowest and most temporary partisan majorities—e.g., Obamacare, the repeal of Obamacare, Build Back Better, etc. The result is extreme volatility, frustration, and partisan ill will.

In an era of digital surveillance and social mistrust, of never-ending emergency powers proclaimed in reaction to the pandemic, and relaxed election laws enabled by the emergency powers, close elections are dangerous. Doubtless, too, Florida's election debacle from 2000 didn't help. It left Democrats with a chip on their shoulder. President Trump warned well in advance of the 2020 election that the Democrats would try to cheat him out of it, though he still did almost nothing to prevent them from trying. He seemed to like having a chip on his shoulder. But the deepest reasons we're having these kinds of arguments over the legitimacy of our democracy go back to the origins of modern voting rights, and the controversy over their nature.

The Voting Rights Act (VRA), passed in 1965, was intended to put teeth into Congress's enforcement of the 15th Amendment, which had prohibited the United States or any state from denying or abridging, on account of "race, color, or previous condition of servitude," the right of citizens to vote. Added in 1870, the amendment marked the first mention in the U.S. Constitution of "race" and "color," and only the second of "the right… to vote." The VRA was meant to overthrow the neo-Confederate laws and policies that for almost a century had kept blacks in the South from having the same access to the ballot that whites and other American citizens had enjoyed.

The goal of the VRA, to end the almost total exclusion of blacks from the electoral process, was accomplished by suspending literacy tests in states with less than 50% voter registration (black and white) or voter turnout in the 1964 presidential election, and appointing federal registrars to sign up blacks to vote and to review local registration procedures in covered jurisdictions. By most measures, the VRA was remarkably, and almost immediately, successful. From 1965 to 1967, black registration figures rose in Mississippi from 6.7 to 59.8%, in Alabama from 19.3 to 51.6%, and in Georgia from 27.4 to 52.6%. The overall gap between white and black registration in the seven Southern states covered by the Voting Rights Act declined from 44.1% in 1965 to 11.2% by 1972. Black office-holding in the covered states grew from less than a hundred local officials and legislators when the VRA was enacted to almost a thousand by 1974.

But no one was ready to call it a day. As with the Civil Rights Act, passed one year earlier, success brought not only redoubled efforts but also mission creep. Local politicians in the covered states, always creative in their enforcement of equal rights laws, turned from unfair literacy tests to new ways of shaping the electoral landscape, like changing city boundaries and converting county and city elections from single-member districts to at-large contests. Once the direct impediments to voting had been removed, the advocates of black voting rights shifted their attention to these new, indirect obstacles to black office-holding.

Federal judges and members of what came to be called the voting rights bar soon began to distinguish between "first-generation" and "second-generation" voting rights. The former protected the individual's right to cast a ballot and have the ballot counted; this was what the VRA was originally all about. Second-generation rights were about the right to an *effective* vote, that is, a vote that succeeded in electing a minority group's preferred candidate, thus increasing the overall representation of underrepresented minorities and their presumptive weight in the policy process. First-generation voting rights inhered in the individual and were essentially colorblind. The new ones were group rights that required that the government know the race or ethnicity of voters, and presumed that individuals would *identify* with their racial or ethnic group.

The new kind of voting rights made their debut in 1969 in the Supreme Court's decision in *Allen v. State Board of Elections*, which one scholar called "the *Brown v. Board of Education* of voting rights." Chief Justice Earl Warren, writing for the Court, argued that electoral changes in Mississippi and Virginia—e.g., substituting at-large elections for district elections in county supervisorial contests—would *dilute* the black vote by submerging it into a white majority. No black voter would be denied a ballot, or have his vote go uncounted; but "the right to vote can be affected by a dilution of voting power," Warren declared, "as well as by an absolute prohibition on casting a ballot. This type of change could therefore nullify their ability to elect a candidate of their choice, just as would prohibiting them from voting."

Warren found support for this expansive new interpretation of voting rights in one of his own favorite cases, *Reynolds v. Sims*, the reapportionment case decided five years before in which he had held for the Court that the 14th Amendment's Equal Protection Clause compels every state to arrange its legislature so that every member of each house repre-

sents basically the same number of people. Otherwise, an individual's right to vote for state legislators "is unconstitutionally impaired when its weight is in a substantial fashion diluted." Warren enjoyed citing himself, instantly turning novel doctrines into respectable precedents and allowing him to spread their influence far and wide. The invention of "vote dilution" jurisprudence was one of his proudest accomplishments.

In any case, *Reynolds* and the other reapportionment cases dealt with the 14th, not the 15th Amendment, and concerned a right to vote tied essentially to individuals who could be counted in each district—one person, one vote. "Legislators represent people," Warren declared famously in his opinion, "not trees or acres. Legislatures are elected by voters, not farms or cities or economic interests." His "population" principle put an unprecedented emphasis on numbers at the expense of all the other political factors that had hitherto also counted when composing state legislatures, things like history, wealth and poverty, urban-rural balance, and geographical affinities. In his brisk dissent, Justice John Marshall Harlan argued, "people are not ciphers and…legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the place where the electors live."

Reynolds had committed the country to a revolution of state constitutional redistrictings—at least one house in each state legislature and both houses in most states were declared invalid and had to be redrawn. But at least the standard by which to measure vote "dilution" or "debasement" had been intelligible and narrowly conceived: "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen." This line of cases stopped where *Allen v. State Board of Elections* proposed to begin, with the recognition that citizens voted not merely as individuals but as members of communities, united by various interests, economic, social, political—and racial.

A Meaningful Vote

This opened a whole new can of worms. Though still called "voting rights," the new claims were, increasingly, about voting *power*. At issue was not the right to cast your ballot but to cast a winning or empowering one. The transition from first- to second-generation rights made sense to the reformers insofar as the at-large election format, with its winner-take-all rules, instituted by many Southern counties and cities in response to increased black registration, allowed a determined white majority to win all the available positions. "Fifty-one percent of the population consistently decided one hundred percent of the elections," as Lani Guinier put the point vigorously. The black minority was excluded from meaningful participation, despite its unimpeded right to vote and have its votes counted.

The trend toward second-generation rights became more apparent with each revision of the VRA. The tortuous history of its interpretation and revision is well analyzed in the late Abigail Thernstrom's two studies, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (1987) and *Voting Rights—And Wrongs: The Elusive Quest for Racially Fair Elections* (2009). Increasingly, voting rights litigation, as Thernstrom shows, concentrated on the issue of "qualitative vote dilution." The formal right to vote for black citizens didn't guarantee that black candidates would be elected. The only viable way to ensure that the numbers of black elected officials would rise and keep rising seemed to be by clever racial gerrymandering: by creating black single-member districts whenever possible out of at-large ones, or from white-majority districts with sufficient black voters to be spun off on their own. In 1982, in fact, Congress amended the Act to include the explicit right to a "meaningful vote," meaning a vote that led to the election of a viable minority candidate by an authentic black electoral majority.

Measured by victorious candidates and causes, political *might* became the effective standard of political *right*. Thus the idealism of mid-1960s' voting rights campaigns, the marches, the registration efforts, "Bloody Sunday" at Edmund Pettus Bridge in Selma, began to drain away from the pitched political fights over how to carve up "larger, heterogeneous electorates into smaller, homogeneous, majority-black districts where black voters could elect candidates of their choice," to quote Guinier again. Democrats were usually behind these gerrymanders, but Republicans took their turn, too, trying to crowd as many black voters as possible into "max black" districts so as to open up more GOP seats. Social scientists offered their services to both parties, keen to crunch election data precinct by precinct using new statistical tests and models.

The pot of gold at the end of this rather dismal rainbow seemed to be a regime in which blacks were represented by blacks, and other minorities by their own authentic spokespersons, and whites by whites. (As early as 1975, the VRA was amended to add "language minorities" to its protected categories: "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." They were entitled to bilingual ballots if they constituted more than 5% of voting-age citizens.) Ethnic as well as racial groups with no direct experience of slavery or Jim Crow were now subsumed under the VRA, and in places about as distant from the Old South as one could get in the United States.

The covered groups jibed with the list of what sociologist John Skrentny called America's "official minorities." In *The Minority Rights Revolution* (2002), he explained, "After advocates for black Americans helped break the taboo on targeting policies at disadvantaged groups, government officials quickly categorized some groups as 'minorities'—a never defined term that basically meant 'analogous to blacks.' These classifications were *not* based on study, but on simple, unexamined prototypes of groups." More and more, second-generation voting rights pointed distantly but persistently to a regime of proportional representation by race, or by other politically approved characteristics.

Hence President Biden's, and generally speaking the Democrats', difficulty in letting go of Jim Crow. As he admitted in Atlanta, the issue is "no longer about who gets to vote."

Books mentioned in this essay:

Whose Votes Count?: Affirmative Action and Minority Voting Rights, by Abigail Thernstrom. Harvard University Press, 308 pages, $43.50 (paper)

Voting Rights—And Wrongs: The Elusive Quest for Racially Fair Elections, by Abigail Thernstrom. AEI Press, 250 pages, out-of-print

The Minority Rights Revolution, by John D. Skrentny. Belknap Press, 496 pages, $34 (paper)

Our Time Is Now: Power, Purpose, and the Fight for a Fair America, by Stacey Abrams. Henry Holt and Co., 304 pages, $27.99 (cloth), $18 (paper)

Deconstructing the Republic: Voting Rights, the Supreme Court, and the Founders' Republicanism Reconsidered, by Anthony A. Peacock. AEI Press, 224 pages, $24.99 (paper)

In the classic sense of stopping black Americans from voting, Jim Crow ended more than 50 years ago. According to Biden, the issue now is "about making it harder to vote." He is referring to the dread techniques of voter suppression that Democrats like to bemoan. Stacey Abrams, for example, the losing candidate for Georgia governor in 2018 who refused to concede the race, denounced the new Georgia election law as Jim Crow 2.0. Biden followed her example in his speech, explaining that "Jim Crow 2.0 is about two insidious things: voter suppression and election subversion."

In her post-election book *Our Time Is Now* (2020), Abrams claimed, "modern-day suppression has swapped rabid dogs and cops with billy clubs for restrictive voter ID and tangled rules for participation." Richard Lowry in *National Review* astutely pointed out the contradiction in her book, captured in a single sentence from it: "I watched in real time as the conflicts in our evolving nation became fodder for racist commercials, horrific suppression—and the largest turnout of voters of color in Georgia's history."

Indeed, the elections of 2018 featured the highest midterm turnout in a century, and black turnout in 2012 and 2020 was at historic highs.

Abrams's other major complaint concerned the Supreme Court's ruling in *Shelby County v. Holder* (2013), which ended so-called Section 5 "preclearance" under the Voting Rights Act. Chief Justice John Roberts, writing for the Court, struck down as antiquated and unfair the requirement that the federal government sign off on all changes to the electoral systems in those states that once had enacted disenfranchisement. "Without a Voting Rights Act-style oversight, voters of color once again face the specter of being outside the protections of our Constitution," Abrams fretted. Well, you couldn't tell it by the alacrity with which Georgians of every color voted, including for those two Democratic U.S. senators in the run-off elections in January 2021.

In politics, of course, it's often the case that major events or traumas get relived by a kind of repetition compulsion. Democrats want every election to be 1932 again; Republicans have similar feelings about 1980. Politicians from both parties want to relive the civil rights movement. Who wouldn't want to stand with Dr. King against George Wallace, John Lewis against Bull Connor, or Abraham Lincoln against Jefferson Davis? Granted, it's a little awkward that all of the bad guys are Democrats, but Biden isn't embarrassed by such incongruities. Nor is he bothered by the highly fanciful assimilation of second-generation voting rights conflicts to the noblest moments of the battle for first-generation rights. As political slogans go, those from the first generation (equal rights, am I not a man?) beat any honest ones from the second (more black districts, black leaders for black people).

The focus was now on the distinction between "meaningful" and "meaningless" votes, effective and ineffective ones. And the struggle for the effective or meaningful right to vote was gradually turning into a kind of entitlement, the basis of a new American politics which Anthony A. Peacock, the author of the excellent and clear-eyed *Deconstructing the Republic: Voting Rights, the Supreme Court, and the Founders' Republicanism Reconsidered* (2008), calls "the politics of multiculturalism." He defines this politics as being loyal to "a vision of America that considers race and ethnicity not merely as sources of identity and of mutual interest but also as legally determinative categories that afford legitimate foundations for claims to representation and political rule." Once it was agreed that the VRA concerned not the individual right to vote but the group-based right to undiluted voting power, it was but a small step to conclude that the "proper" number of seats minorities should control was proportionate to their numbers in the relevant population at large.

Clarence Thomas, the Supreme Court justice whose concurring opinion in *Holder v. Hall* (1994) Peacock considers "by far the most comprehensive and cogent critique of vote-dilution law," referred to this new politics of racial factionalism as a struggle over race-based "political homelands." Thomas concluded that the only way to avoid such fratricide was to insist that second-generation voting rights were not, and should not be, covered by the Voting Rights Act. Any other assumption, he wrote, "should be repugnant to any nation that strives for the ideal of a colorblind Constitution."

False Consciousness

As things stand now, however, the contradictions between first- and second-generation voting rights are clearer than ever. For one thing, the American Left is more candid than ever about the major premise of second-generation political reasoning: America is a systemically racist country. Although the civil rights movement—Martin Luther King's crusade and martyrdom, the Voting Rights Act itself, as well as the hopeful early days of the Civil Rights Act—may have alleviated some of the worst suffering, it was unable to reform the American people, the white majority, whose viciousness or racism remains. Accepted as fact or even science (anti-black racism is in America's political DNA, according to Nikole Hannah-Jones), this premise relieves voting rights reformers from having to find intentional racism in any particular jurisdiction or measure. You don't have to prove any disparity amounts to discrimination. You can assume it.

Hence some of the peculiar attitudes of today's Democrats to the regulation of elections. Generally speaking, they seek to bring second-generation solutions to bear on first-generation problems of ballot integrity. If one assumes that black citizens want to vote for black candidates as their authentic representatives—selected by the community, not by the white establishment, and "descriptively" representative in the sense of being physically and culturally similar to their constituents—then it is easier to explain the supposed hostility to voter ID. If the collective or bloc vote is the natural vote, the *authentic* vote, then voter ID and other ballot formalities threaten to encumber the right to vote with excessive individuality. The reality, as the advocates of second-generation rights see it, is that voting is a social process, translating race (and as we'll see, class) into consent and empowerment. Voting is the authentic expression of race and class, the primordial political factors, which in America happen to manifest themselves in an individual voting booth but could be *inferred* rationally from the race and class of the voters, from their objective interests, to use Marxist language.

This is why Democrats ask frequently, "What's the matter with Kansas?" That is, why don't poor whites in Kansas vote with poor blacks for Democrats, rather than with rich whites for Republicans? (Short answer: false consciousness.) That question reflects several stereotypes that are not aging well (e.g., rich whites vote increasingly Democratic). But the point is that from the second-generation point of view, to demand the voter show a driver's license, or that signatures match, or that the voter locate the correct precinct, imposes huge opportunity and compliance costs for the sake of very small gains in terms of justice. And what you are likely to gain in the ordinary sense of justice (that is, law-abidingness) may be vastly overborne by what you lose in social justice.

Unlike the literacy tests of old, the voter ID requirements don't have to be unfairly conceived or applied to be unfair. As in "structural" or systemic racism, as analyzed by Ibram X. Kendi and other contemporary theorists of "antiracism," no one has to be *consciously* racist for racism to pervade the system. It is the existence of disparities in racial and class outcomes—the violations of systemic proportional representation, as it were—that reveal discrimination and hence the cloven hoof of racism. This rarified theory has never been widely accepted outside of universities, human relations departments, and civil rights law firms, at least until recently. Even now, opinion surveys show consistently that huge majorities of blacks and whites and the country as a whole favor voter ID and other commonsense election safeguards.

You don't have to prove any disparity amounts to discrimination. You can assume it.

Drop boxes and vote harvesting fall under a similar analysis. It's more important that the votes of black people be *effective*, that their bloc of votes serve to elect the black representative of their choice, than that the vote of this or that individual black citizen be recorded faithfully and conscientiously. It would be nice to satisfy both imperatives, but if it comes to a conflict the former ought to take priority, e.g., over such bloodless matters as ascertaining the chain of possession through which a ballot has passed. The individual is not voting for himself, after all, except in an unhealthy or bourgeois sense. He's voting for his class or racial interest, and for himself insofar as he is a member of that race or class. (This is how second-generation rights theorists try to recapture at least a hint of the moral idealism associated with the first.) It is, to be sure, a bit of a difficulty for the second-generation theorist that there seem to be two or three ways (race, class, gender) to account for such authenticity or group interest. That is why "intersectionality" had to be invented, to mitigate or downplay the competing types of determinism in the theory.

Abandoning Majority Rule

Despite their long and fervent investment in second-generation rights, however, liberal Democrats have never been entirely satisfied with the results. For at least 30 years, they have been longing for a third generation of voting rights law and litigation. Perhaps the first public eruption of their impatience came with the nomination of Lani Guinier (who died early this year, after a long career at Harvard Law School), then a professor at University of Pennsylvania Law School, to be President Bill Clinton's assistant attorney general for civil rights in 1993. After naming her in April, Clinton yanked her nomination in June, on the carefully worded grounds that her writings "clearly lend themselves to interpretations that do not represent the views I expressed on civil rights during my campaign." That is, he didn't necessarily disagree with her or even with those "interpretations" of her views (a "quota queen," said Clint Bolick), but some of the latter were far ahead of what he cared, or dared, to say to voters.

Guinier didn't hide her impatience with second-generation voting rights. It was right there in the title of her article that caused her the most trouble, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success," which appeared in 1991 in the *Michigan Law Review*. Young civil rights attorneys and law professors of her generation spent their careers suing cities, counties, and states in order to create more majority-black districts from which black representatives could be elected to office. Consumed by the struggle for a seat at the table, they were in danger of forgetting the transformative goals of the original civil rights movement, particularly its deep-seated desire to expand the

welfare state and elevate blacks to substantive economic and political equality. The point of voting rights was not merely black faces in the room, but "a fair chance to have their policy preferences *satisfied*" (her emphasis). "Black electoral success theory," her term for the second-generation agenda, "romanticizes black elected officials as empowerment role models," she charged. Ignoring "problems of tokenism and false consciousness," the theory forgets the phenomenon of Uncle Toms (not her term) and, worst of all, tends to "legitimate the ideology of 'equality of opportunity.'"

To put it in '60s speak, the theory sells out to the System. Beginning with the Kennedy Administration, the white political establishment favored the move "from protest to politics" because it strengthened and stabilized the overall white power structure. "The theory responds to minority disadvantage," she wrote, "not by challenging majority rule but by providing a few electoral districts in which blacks are the majority." Both integrationists and black nationalists could support "black electoral success theory," which helped to explain its easy adoption by the movement as a whole but "camouflaged the tension between assimilation and recognition of racial group identity and interests."

Above all, the second-generation strategy had failed to come to terms with the fact that "as a general rule whites do not vote for blacks." In truth, whites and blacks prefer, absent a compelling reason, to vote for "persons of their own racial/ethnic background." Borrowing language from James Madison, Guinier diagnosed America as suffering from a "permanent majority tyranny based on prejudice." Blacks were "a permanent loser" in majority-faction America, and could never elect sufficient representatives to escape marginalization. The open secret of proportional representation was that if 12% of the population were black, civil rights litigators would be satisfied if 12% of elected officials nationwide were black. The proportion would quickly become a quota, she suspected—a ceiling rather than a floor.

A racial minority would always be at a disadvantage in a majority-rule republic, all the more so in a "permanent majority tyranny based on prejudice." She could be accused of assuming the worst about her prejudiced fellow citizens, though she had plenty of contemporary social science studies to back her up. Guinier knew the counterarguments that Thomas Sowell, Abigail Thernstrom, and others were making, pointing to the falling race prejudice in America and the growth of multiracial political parties even in the South. Guinier's replies were pro forma, uninspired. She couldn't imagine that the country would ever be much different than it had been. The problem of a permanent, racist majority could only be solved by changing the composition of that majority, or by abandoning the principle of majority rule altogether. Perhaps the former could be accomplished by wholesale re-education or new immigration, but Guinier's thoughts ran to the latter. This was the direction, she speculated, that third-generation rights theory should, and would, take.

Her own plan, left deliberately vague in "The Triumph of Tokenism," pointed to structural constitutional changes of several kinds that could "soften the harshness of majority rule" by weakening the power of majorities and strengthening that of minorities. "'A minority veto' for legislation of vital importance to minority interests" was one suggestion. "Supermajority arrangements" like "concurrent legislative majorities" was another, to which she attached a discreet footnote in which she observed, "The concurrent majority is a particular type of supermajority requirement. It was initially promulgated by John Calhoun to protect the minority interests of the South." She had the audacity to bring up the great Southern political thinker, but not enough to admit that the "minority interests of the South" he was protecting were slaveholders and their slave property. At any rate, as she notes, under the concurrent majority "in order to pass, legislation would need the support of a majority of minority representatives, however defined, as well as a majority of majority representatives." However defined, indeed. Calhoun predicted that the concurrent majority, along with his idea of state nullification, would bring harmony and civic spirit to the Union again. It seemed likelier to bring either a permanent house divided, or a permanent slavocracy.

Guinier had other ideas for constitutional renovations, too, all under the heading of what she called "proportionate interest representation," and all having the effect of making constitutional democracy as the U.S. has known it more difficult and tenuous by balkanizing free and equal citizens into more and more unsympathetic factions. Compared to first-generation voting rights, politics in the third generation would be collectivist and zero-sum: which racial group are you hurting, which helping?

One conclusion may safely be drawn. Once we depart from the freedom and equality of first-generation rights, however difficult to sustain and fructify these have proven, there is no obvious destination—or stopping point—for our constitutional experiments.

Consider, for example, two of the striking suggestions along similar lines made since Lani Guinier left Washington. If the voting majority is the problem, why not empower minority groups directly by adopting plural or weighted voting? Theodore R. Johnson, the senior director of the Fellows Program at the Brennan Center for Justice, proposed in the *Washington Post* in 2015 that enslaved black Americans, once counted under the Constitution as three fifths of a person for purposes of taxation and representation, should be recompensed now by assigning to today's black citizens five thirds of a vote. He hailed the "redemptive, lyrical quality" of the number, and justified the reform in the name of reparations for slavery and Jim Crow.

Brandon Hasbrouck, an associate professor at Washington and Lee University School of Law, proposed in the *Nation* in 2020 double-counting all black persons' votes, also as a form of reparations. Two is certainly more lyrical, and probably more redemptive, than five thirds. Nonetheless, reparations are not a good excuse to alter voting rights, or to transform America from a republic of equal citizens to an oligarchy of unequal ones.

Charles R. Kesler is editor of the Claremont Review of Books *and the author, most recently, of* Crisis of the Two Constitutions: The Rise, Decline, and Recovery of American Greatness *(Encounter Books).*