Enforcing Voting Rights: The Eisenhower and Kennedy Civil Rights Division (1957-1963)

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Contents

Acknowledgements 2
Introduction: “The Hollow Hope” of the Civil Rights Division? 3
Chapter One: Rising Expectations but Stubborn Continuities, 1870-1959 17
Chapter Two: “High Hopes”: Redistricting and a New Administration, 1960-1961 42
Chapter Three: The Magnolia Quagmire: Positive and Negative Mobilization, 1961-1963 74
Epilogue: “Let Us Continue,” 1963-2023 102
Bibliography 110

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Introduction: "The Hollow Hope" of the Civil Rights Division?

The use of the courts in the civil rights movement is considered the paradigm of a successful strategy for social change. . . . Yet, a closer examination reveals that before Congress and the executive branch acted, courts had virtually no direct effect *on ending discrimination in the key fields of education, voting, transportation, accommodations and public places, and housing. Courageous and praiseworthy decisions were rendered, and nothing changed (Emphasis Added).*

- *Gerald Rosenberg,* The Hollow Hope*, Pages 70-71*

In the spring of 1938, few could have predicted that a footnote would redefine the purpose of the federal judiciary. Justice Harlan Fiske Stone, writing for the majority in *United States v. Carolene Products*, affirmed that the federal government could regulate filled milk.[1] The actual holding, though, is not what made this case important. Instead its importance lies in Justice Stone's "Footnote Four," which justified the Supreme Court's use of rational basis review (the most lenient level of judicial scrutiny) vis-à-vis the milk regulation.[2] Footnote Four stipulated that the Court would apply stricter forms of scrutiny in several types of cases.[3] The first type involves cases examining "legislation that restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[4] In other words, the Court—and by extension the courts—can remedy what the legal scholar John Hart Ely called "stoppages in the democratic process," e.g., "restrictions upon the right to vote" and state legislatures' refusal to redraw malapportioned districts.[5]

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[1] *United States v. Carolene Products Co.*, 304 U.S. 144, 145 (1938).
[2] *Id*. at 152.
[3] Richard L. Hasen, *The Supreme Court and Election Law* (New York: New York University Press, 2003), 4.
[4] *United States v. Carolene Products Co.*, 304 U.S. 144, 155 n.4 (1938).
[5] Hasen, *The Supreme Court and Election Law*, 4; *United States v. Carolene Products Co.*, 304 U.S. 144, 155 n.4 (1938).

Meanwhile, a second type of case identified by Footnote Four concerns "prejudice against discrete and insular minorities." The courts can step in when the law "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[6] Justice Stone's articulation of judicial purpose was novel. His footnote, writes the legal scholars Geoffrey R. Stone (no relation) and David A. Strauss, "sketched out a new role for the Court now that it was out of the business of invalidating social welfare and regulatory laws."[7] Initially, lawyers did not appreciate Footnote Four's latent power. The Court did not mention it in a landmark segregation case, *Missouri ex rel. Gaines v. Canada*, heard just months later.[8] Despite the delayed recognition it received, Footnote Four heralded a "paradigm shift," one eventually taken up by the Warren Court.[9] Indeed, Justice Department lawyers cited the footnote when arguing the 1962 redistricting case *Baker v. Carr*.[10]

Because of its concern for "prejudice against discrete and insular minorities," Footnote Four has given social movements a justification for seeking judicial intervention in cases of discrimination. Nevertheless, a strategy centered around litigation—critics contend—cannot achieve meaningful social change. By constitutional design, the judiciary is "the least dangerous" of all the branches, for judges lack the powers of the purse and the sword. "It may truly be said to have neither FORCE nor WILL, but merely judgment," predicted Alexander Hamilton in *Federalist No. 78*, "and must ultimately depend upon the aid of the executive arm even for the

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[6] *United States v. Carolene Products Co.*, 304 U.S. 144, 155 n.4 (1938).
[7] Geoffrey R. Stone and David A. Strauss, *Democracy and Equality: The Enduring Constitutional Vision of the Warren Court* (New York: Oxford University Press, 2019), 20.
[8] Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2007), 45.
[9] David A. Strauss, "Is *Carolene Products* Obsolete?," *University of Illinois Law Review* 2010, no. 4 (2010): 1259. The use of the word "paradigm" inspired by Goluboff, *The Lost Promise of Civil Rights*, 45.
[10] Richard C. Cortner, *The Apportionment Cases* (Knoxville: University of Tennessee Press, 1970), 105-06.

efficacy of its judgments."[11] Notwithstanding the structural weaknesses of the judiciary, social movements have sought judicial recognition of the rights they claim.

Why wage this seemingly futile struggle? The skeptics are, after all, many and prominent. One notable voice is the political scientist Gerald Rosenberg, who argued in his 1991 book *The Hollow Hope: Can the Courts Bring About Social Change?* that litigation is limited in its capacity to facilitate durable, material progress for marginalized constituencies.[12] Even though he focuses on the Supreme Court, much of his analysis implicates agencies that employ judicial processes to effect change. Chief among them is the Civil Rights Division of the U.S. Department of Justice, which litigated a series of voting rights cases in the early 1960s.

The Civil Rights Division (CRD) offers a unique and valuable, but often neglected, case study for analyzing the dynamic between litigation and social change. Unlike the judiciary, the CRD is a political entity in the sense that its leaders are political appointees who serve at the direction of the incumbent administration. Christy Lopez, a former Deputy Chief in the Special Litigation Section, acknowledges "the Division's inherently political nature."[13] At the same time, the CRD differs from other political entities in the executive branch, even from those within the Justice Department. "Whatever the appropriate level of political influence, it is important to note that this impact plays differently in the Civil Rights Division than in other Divisions," explains Lopez, "because the Civil Rights Division's mandate largely involves protecting the rights of people who have been politically marginalized."[14] Moreover, the CRD influences policy through

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[11] Alexander Hamilton, "The Federalist Papers : No. 78," *The Avalon Project*, n.d., https://avalon.law.yale.edu/18th_century/fed78.asp.
[12] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd ed. (Chicago: University of Chicago Press, 2008), 71.
[13] Christy Lopez, "The Civil Rights Division: The Crown Jewel of the Justice Department," *Yale Law Journal Forum* 130 (2020-2021): 479-80.
[14] Ibid., 480.

litigation. This function means that its personnel litigate under constraints like precedent and professional norms. In short, the CRD operates at the murky intersection of law and politics. For the historian, its quasi-judicial, quasi-political role presents interesting angles from which to analyze the dynamic between litigation and social change. Lopez is correct to underscore the Division's "*unique* potential to create a shared understanding of reality upon which to build coalitions to change laws and social structures" (emphasis added).[15]

Rosenberg and his crowd appear to disagree. When discussing voting rights, he asserts that the Division's cases accomplished little: "Even [Kennedy] administration officials came to the conclusion that litigation was fruitless."[16] Other historians, such as David Garrow, concur.[17] In response to these skeptics, this thesis shows how federal voting litigation did in fact promote social change during the Eisenhower and Kennedy years (1957-1963), albeit indirectly. Rosenberg correctly identifies many shortcomings of the federal government's litigation strategy but misses its mobilizing effects. I use the Civil Rights Division as a case study to convey how litigation can mobilize activists and ordinary citizens alike. The shaping of expectations, I argue, was the principal mechanism by which CRD litigation mobilized local communities, intentionally and—as we will see—unintentionally.

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A brief overview of civil rights historiography can illuminate the scholarly intervention made by this thesis. According to the historian Steven F. Lawson's 1991 review essay, civil

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[15] Ibid., 486.
[16] Rosenberg, *The Hollow Hope*, 62.
[17] David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* (New Haven: Yale University Press, 1978), 14.

rights historiography consists of three waves. The first wave, stretching from the late 1960s and into the early 1970s, peddled a triumphalist narrative of the civil rights movement, emphasizing top-down history while neglecting social history.[18] Its top-down histories centered civil rights around Washington power structures, especially Congress and the Supreme Court. Consequently, second-wave historians from the late 1970s into the early 1980s devoted their attention to local organizations in places like Mississippi.[19] The third wave tried to "synthesize" both national and local perspectives.[20] In the decades since Lawson's 1991 essay, many scholars have shifted their focus to the history of voting rights. But many of their works study only Selma (the 1965 march that was the immediate catalyst for the Voting Rights Act), the Johnson administration, or the post-1965 era; they neglect voting rights during the Eisenhower and Kennedy years.[21]

Earlier works also limited themselves to studying elite lawyers. As historians took a greater interest in the Justice Department, it became apparent that the historiography omitted the contributions of ordinary lawyers. Their role did not gain proper recognition until the 2007 publication of Risa L. Goluboff's book *The Lost Promise of Civil Rights*, which explored the labor, fair-pay litigation of the Division's predecessor: the Civil Rights Section. *The Lost Promise of Civil Rights* provides a useful model for describing ordinary lawyers. Goluboff relies on oral histories and DOJ personnel files instead of personal anecdotes.[22]

No comparable work exists for the Civil Rights Division. The closest approximation would be Brian K. Landsberg's 1997 book *Enforcing Civil Rights: Race, Discrimination, and the*

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[18] Steven F. Lawson, "Freedom Then, Freedom Now: The Historiography of the Civil Rights Movement," *The American Historical Review* 96, no. 2 (Apr., 1991): 456.
[19] Ibid., 457.
[20] Ibid.
[21] Glenn T. Eskew, "The State in Recent Civil Rights Scholarship," *The Alabama Review* 72, no. 2 (April 2019): 90. The titles listed are *Selma's Bloody Sunday*, *Selma to Saigon*, *Why the Vote Wasn't Enough for Selma*, *Carry It On: The War on Poverty and the Civil Rights Movement in Alabama*, and *The Music Has Gone Out of the Movement: Civil Rights and the Johnson Administration*.
[22] Goluboff, *The Lost Promise of Civil Rights*, 317.

Department of Justice. Shedding new light on the literature, Landsberg notes, "No focused and thorough examination of the role and influence of civil servants in the Civil Rights Division exists."[23] Landsberg lays important groundwork for understanding the CRD, but his analysis falls short. He contends that the ordinary CRD lawyer did well academically, entered the Justice Department via the Honors Program, and used the CRD as a springboard for more prestigious positions.[24] In a footnote, Landsberg reveals that his assertions are "not based primarily on examination of the records of the division, although such an examination might be revealing." In lieu of primary sources, he relies on "personal impressions."[25] Landsberg's impressions may well be right, but they cry out for a more rigorous methodology.

This thesis poses three interconnected arguments. First, it argues that CRD litigation promoted social change by shaping African Americans' expectations. I introduce a distinction that reframes the CRD literature: positive vs. negative mobilization. Under the former, raised expectations translated into greater Black voter registration. Government action, spurred by greater support from the federal government, inspired more African Americans to think change was possible, encouraging them to organize, register to vote, and demonstrate. In regard to negative mobilization, it too involves raised expectations. The incrementalism of the Division's litigation disappointed many African Americans whose expectations had been raised. Disappointment prompted activists to pursue more militant activities and innovative forms of protest. An example is the mock vote known as the 1963 Freedom Vote, which Chapter Three chronicles. Negative mobilization and the social justice activities it catalyzed successfully

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[23] Brian K. Landsberg, *Enforcing Civil Rights: Race, Discrimination, and the Department of Justice* (Lawrence: University Press of Kansas, 1997), 158.
[24] Ibid., 159.
[25] Ibid., 238. Landsberg himself was a CRD lawyer from 1964 to 1986.

prodded an otherwise lethargic government into bolder action, culminating in the 1965 passage of the Voting Rights Act.

To be clear, elements of this argument are not new. As far back as 1968, the historian Richard M. Dalfiume touched on the theme of rising expectations. In an essay entitled "The 'Forgotten Years' of the Negro Revolution," he contends that the rising Black expectations engendered by World War II laid the foundation for the civil rights movement.[26] Similarly, Neil R. McMillen, a historian of Mississippi's pre-1950s Black population, said World War I had also "raised black expectations."[27] Both John Dittmer, another historian who studies African-American activism in Mississippi, and David A. Nichols, a scholar of the Eisenhower civil rights record, wrote book chapters entitled "Rising Expectations."[28] There is little doubt that the theme of rising expectations enjoys prominence within civil rights historiography.

Positive and negative mobilization also have antecedents in civil rights historiography and legal scholarship. With respect to the 1960 sit-ins, the historian Christopher W. Schmidt offers a more extensive articulation of this framework. Instead of the term "positive mobilization," he uses the word "optimism."[29] Schmidt identifies the Montgomery Bus Boycott and the Little Rock Nine as seminal events which "inspired" a "confidence to act."[30] For negative mobilization he recognizes that the African-American demonstrators "grew up in a world in which expectations had been raised" by, among other factors, *Brown v. Board of*

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[26] Richard M. Dalfiume, "The 'Forgotten Years' of the Negro Revolution," *The Journal of American History* 55, no. 1 (Jun., 1968): 106.
[27] Neil R. McMillen, *Dark Journey: Black Mississippians in the Age of Jim Crow* (Urbana and Chicago: University of Illinois Press, 1989), 316.
[28] John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi* (Urbana and Chicago: University of Illinois Press, 1994), 19; David A. Nichols, *A Matter of Justice: Eisenhower and the Beginning of the Civil Rights Revolution* (New York: Simon & Schuster, 2007), 214.
[29] Christopher W. Schmidt, *The Sit-Ins: Protest & Legal Change in the Civil Rights Era* (Chicago: University of Chicago Press, 2018), 25.
[30] Ibid., 26 and 28.

Education.[31] "Because of these heightened hopes," Schmidt continues, "the minimal desegregation that resulted was all that much more disappointing."[32] On the other hand, the political scientist Stuart Scheingold cites positive mobilization as a benefit of litigation. He observes that "rights are employed as mobilizing catalysts" and "provide credible goals, cue expectations, and enhance self-images." Litigation positively mobilizes communities through two of the mechanisms mentioned: it "[cues] expectations" and deploys "rights as mobilizing catalysts."[33]

This thesis emphasizes the importance of the Civil Rights Division—rather than the federal government as a whole—in raising these expectations. The only other historian who appears to have done so is Allan Lichtman. In a 1969 article entitled "The Federal Assault Against Voting Discrimination in the Deep South," he claims (rather patronizingly) that "Division litigation . . . helped actuate passive Southern blacks," since "for the first time, many Negroes . . . became aware of the possibility of exercising democratic privileges."[34] Litchman then points out the Division's failure to meet Black expectations, which bred "frustration [that] manifested itself in the Selma demonstrations."[35] The first and second quoted sentences articulate the gist of positive and negative mobilization, respectively.

Regrettably, Lichtman says little more. This thesis builds on and expands his observations. I mimic the structure of Schmidt's argument and the language of Scheingold's but apply them to voting rights and the Civil Rights Division. CRD activities gave local communities

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[31] Ibid.
[32] Ibid., 28.
[33] Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Ann Arbor: University of Michigan Press, 2004), 214.
[34] Allan Lichtman, "The Federal Assault Against Voting Discrimination in the Deep South, 1957-1967," *The Journal of Negro History* 54, no. 4 (Oct., 1969): 366-67.
[35] Ibid., 367.

"the confidence to act" knowing that the federal government was on their side.[36] Litigation worked with grassroots campaigning to heighten interest in registering and voting. That said, Washington's incrementalism frustrated activists who wanted stronger action. To pressure the Kennedy administration, they embraced confrontational, innovative tactics that would garner press coverage and thereby gin up public pressure.

Unlike most historians, I do not silo the histories of the Civil Rights Section and the Civil Rights Division; this thesis integrates them into one seamless narrative. Such integration shows that litigation had been mobilizing African-American activists since the 1940s. The Civil Rights Section's 1941 victory in *United States v. Classic*, for example, led the NAACP to litigate the 1944 case that ended the all-white primary: *Smith v. Allwright*.[37] In addition, this study respects the agency exercised by African Americans. As we will see, the relationship between federal lawyers and Black activists was synergistic. Though the CRD helped mobilize local populations, its efforts rested on a foundation laid by groups like the NAACP. Federal lawyers worked with Black activists, not over them. In fact, the latter often pressured the former to do more, a dynamic which demonstrates that African Americans mobilized the federal government too.

The second scholarly contribution of this thesis is quite new. When studying the Division's voting litigation, other historians look only at voter registration; they neglect the separate but related issue of redistricting. I spotlight the role that the Civil Rights Division played in two landmark cases, *Gomillion v. Lightfoot* and *Baker v. Carr*, both of which concerned state legislatures' diluting Black votes (*Gomillion* directly and *Baker* indirectly). The literature on redistricting itself likewise makes little-to-no mention of the Division's role. Rather, the histories

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[36] Schmidt, *The Sit-Ins*, 28.

[37] Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944-1969* (New York: Columbia University Press, 1976), 41-42.

written by Richard C. Cortner and Gene Graham credit the Solicitor General's Office, notwithstanding the fact that CRD lawyers drafted the Justice Department's briefs.

Finally, the third contribution corrects the lack of credit given to the rank-and-file lawyers who fought the Division's battles. I define the "rank and file" as the twenty-five or so lawyers who served in the CRD from 1957 to 1963.[38] This contribution draws inspiration from the methodology of a revisionist movement in civil rights historiography, the New Civil Rights History. As Goluboff explains in an article defending the New Civil Rights History, "Scholars writing the new civil rights history broaden the definition of legal actors from judges and lawyers to government officials, social movement organizations and participants."[39] The type of lawyer studied must be "many and diverse," for such "lawyers . . . serve as intermediaries."[40] Goluboff herself models this methodology vis-à-vis the lawyers in the Civil Rights Section. I do the same for the rank-and-file lawyers in the Civil Rights Division and shed new light on the gap highlighted by Landsberg.

This thesis proceeds in three chapters. In Chapter One, I chronicle the historical background of voter suppression, the Civil Rights Section, and the founding and early years of the Civil Rights Division (1870-1959). I establish that federal action and litigation have a long history of mobilizing African-American activists, from the New Deal to the passage of the Civil Rights Act of 1957 (the statute that created the CRD). In Chapter Two, I dive into redistricting, specifically *Gomillion v. Lightfoot* and *Baker v. Carr*. I also chronicle the Division's

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[38] Burke Marshall and John Doar are not included because they both have already received extensive attention. For the full list of the twenty-five or so lawyers, see John Doar, "The Work of the Civil Rights Division in Enforcing Voting Rights under the Civil Rights Acts of 1957 and 1960," Florida State University Law Review 25, no. 1 (Fall 1997): 16-17.

[39] Risa L. Goluboff, "Lawyers, Law, and the New Civil Rights History," *Harvard Law Review* 126, no. 8 (2013): 2321.

[40] Ibid., 2322.

development and argue that CRD involvement in the formation of the Voter Education Project raised Black expectations. As a result, African-American activists thought the federal government would protect them from violent reprisals. The failure to meet this expectation is the focus of Chapter Three. Looking at Mississippi, I outline the reasons why CRD leaders refused to support a stronger police presence there. After presenting these reasons, I conclude that the Kennedy administration was misguided in its caution. Violence targeting the Voter Education Project pushed it to its breaking point. Activists therefore organized the Freedom Vote, a mock election which mimicked the 1963 Mississippi gubernatorial race. This event, I emphasize, piloted innovative tactics that would come to full fruition in Freedom Summer.

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Primary sources constitute the foundation of my contributions. To tell a full story about the Civil Rights Division, I draw on five types of primary sources: memoirs, oral histories, archives, contemporaneous academic articles, and newspapers. Memoirs written by DOJ officials are useful because they describe the Eisenhower and Kennedy administrations' perspectives. Herbert Brownell's memoir *Advising Ike: The Memoirs of Attorney General Brownell* helped me understand the impetus behind the Division's creation. John Doar's article "The Work of the Civil Rights Division in Enforcing Voting Rights under the Civil Rights Acts of 1957 and 1960" offers an excellent window into the Kennedy administration and lists every CRD lawyer who served during the early 1960s.[41] Doar's list was an invaluable resource when I researched rank-and-file lawyers. One of those lawyers, Gordon A. Martin, wrote a memoir entitled *Count Them*

[41] Doar, "The Work of the Civil Rights Division in Enforcing Voting Rights," 16-17.

One by One: Black Mississippians Fighting for the Right to Vote. Unlike Brownell's and Doar's accounts, it eschews a grand narrative. Martin instead focuses on *United States v. Lynd*, a 1962 suit filed against a recalcitrant Forrest County registrar who refused to register Black voters. *Lynd* matters because it encapsulates the pitfalls of a case-by-case litigation strategy, something Chief Justice Earl Warren echoed several years later in his opinion for *South Carolina v. Katzenbach* (the case that affirmed the constitutionality of the Voting Rights Act). Through Martin's focused approach, I absorbed intimate details about CRD field work.

To understand other rank-and-file lawyers, I consulted two types of sources: obituaries and oral histories. Many of the lawyers listed by Doar—a key CRD leader—went on to enjoy successful legal careers as state and federal judges, public lives notable enough to be chronicled in newspaper obituaries. Furthermore, several CRD alumni have done oral history interviews with the Library of Congress and the University of California, Berkeley.[42]

Given the biases of memoirs and oral histories, I balanced my research with archival work. Fortunately, the John F. Kennedy Presidential Library and Museum houses the Burke Marshall Personal Papers—named for the Assistant Attorney General who led the Civil Rights Division from 1961 to 1964—and the Papers of John F. Kennedy. The John Doar Papers at Princeton University complement the JFK Library, consisting of court documents, briefs, and case assignments. I visited the collection in August 2022, thanks to Vanderbilt's Gertrude Casebier Grant. Doar's papers not only paint a fuller picture of CRD litigation, but also provide an in-depth view of CRD administration. More specifically, they cover the Division's budgets, subject files on civil rights groups like the Southern Regional Council, and relationships with

[42] Judge Thelton Henderson, who served in the CRD from 1962 to 1963, spoke with U.C. Berkeley and the California newspaper *Capitol Weekly*. Henderson is notable for being the first African-American CRD lawyer to do field work. John Rosenberg, who served in the Civil Rights Division from 1962 to 1970, sat down with the Library of Congress.

other federal agencies (e.g., correspondence with the FBI). Several of the files, it must be noted, just opened in 2020; the overall collection opened in 2014. This thesis has the rare distinction of drawing material and conclusions from the John Doar Papers. Indeed, the historian Kevin M. Kruse, when describing his unpublished biography of John Doar, called the collection "previously untapped."[43] To understand the CRD from a rank-and-file perspective, I also examined the Harold H. Greene Papers at the Library of Congress. It conveyed the importance of redistricting and the Division's *amicus curiae* briefs.

Beyond interviews and memoirs, contemporaneous academics debated about voting rights. Law is as much a product of ideas as it is a manifestation of politics, and many of those ideas come from legal academia. Burke Marshall himself recognized the salience of scholarly debate, a recognition which prompted him to write *Federalism and Civil Rights*. His book opines that notwithstanding the actions of many derelict Southern officials, federalism itself works. A reflection of the Kennedy Justice Department's commitment to traditional policy paths, Marshall's argument has not escaped criticism, which I document in Chapter Three. Book reviews and law review articles were essential primary sources because they feature the voices of those critics, most notably former CRD lawyer Richard Wasserstrom's critique of Marshall's book. Law review articles, in particular, enabled me to gauge how seasoned researchers and trained lawyers appraised the Division's performance. Unlike journalists, these scholars have a specialized knowledge of law and are thus better able to judge the merits of CRD policy.

Nevertheless, the ivory tower can be an exclusive space insulated from public discourse. Newspapers, by contrast, reflect how certain segments of the body politic viewed the Civil Rights Division. They reveal what was known to the reading public and considered important by

[43] "Kevin M. Kruse," *Department of History - Princeton University*, n.d., https://history.princeton.edu/people/kevin-m-kruse.

editors. The columns of Anthony Lewis, a preeminent legal journalist who wrote for *The New York Times*, analyzed CRD milestones in real time, such as the confirmation of Assistant Attorney General W. Wilson White. Newspapers are crucial in Chapter One, which gives the historical context behind voting rights and delves into the origins of both the Civil Rights Section and the Civil Rights Division.

These primary and secondary sources have allowed me to shed new light on areas that hold back civil rights historiography. In light of its centrality to federal voting litigation, the Civil Rights Division cannot be ignored. Its successes and failures illustrate both the upsides and the downsides of employing judicial processes to defeat voter suppression. A study of the CRD also crystallizes the place ordinary lawyers have in promoting social change. Such insights are more important than ever, given today's ongoing debates over the ballot, federalism, and the efficacy of the legal system. America's status as an inclusive democracy never went uncontested, as the following three chapters show. Historians would do well to review and retell this story.

Chapter One: Rising Expectations but Stubborn Continuities, 1870-1959

Give us the ballot, and we will no longer plead to the federal government for passage of an anti-lynching law; we will by the power of our vote write the law on the statute books of the South and bring an end to the dastardly acts of the hooded perpetrators of violence.

Give us the ballot, and we will transform the salient misdeeds of bloodthirsty mobs into the calculated good deeds of orderly citizens.

Give us the ballot, and we will fill our legislative halls with men of goodwill and send to the sacred halls of Congress men who will not sign a 'Southern Manifesto' because of their devotion to the manifesto of justice.

Give us the ballot, and we will place judges on the benches of the South who will do justly and love mercy, and we will place at the head of the southern states governors who will, who have felt not only the tang of the human, but the glow of the Divine.

Give us the ballot, and we will quietly and nonviolently, without rancor or bitterness, implement the Supreme Court's decision of May seventeenth, 1954.

- *Martin Luther King, "Give Us the Ballot" Speech, May 17, 1957*

Charles Gomillion, the President of the Tuskegee Civic Association, was restless. In an 18 April 1958 letter to Assistant Attorney General W. Wilson White, he detailed how Alabama's Macon County Board of Registrars had blocked 13,000 African Americans from voting. For almost two decades, the Board repeatedly stymied Black voter registration. If African-American applicants were lucky enough to secure a hearing, they made their case in a courtroom separate from the one where white applicants normally registered. And if the physical separation failed to

send a clear message, the Board limited its work hours and the number of African Americans allowed inside the courtroom to just two.[44]

Gomillion's letter came at a time of rising Black expectations. The historian Richard M. Dalfiume, writing about the 1940s, argues that "the democratic ideology and rhetoric with which World War II was fought stimulated a sense of hope and certainty in black Americans that the old race structure was destroyed forever."[45] The War, in short, stimulated Black hope, so "when the expected white acquiescence in a new racial order did not occur, the ground was prepared for the civil rights revolution."[46] Similarly, this chapter seeks to show that government action mobilized African Americans, many of whom hitherto faced powerful disincentives to political participation. The New Deal began this trend of rising expectations, during which time the Civil Liberties Unit (renamed the Civil Rights Section) formed at the DOJ. During the 1950s, the magnitude of those expectations—and the Justice Department's role in fueling them—grew. This trend would reach a milestone with the founding of the Civil Rights Division in 1957.

But the raising of expectations did not imply their fulfillment. W. Wilson White, the Division's first Assistant Attorney General, was hardly proactive in his handling of cases. Thus, the second theme of this chapter emphasizes continuity between the Civil Rights Section and the Civil Rights Division. Both entities, hindered by similar political obstacles and institutional pathologies, could not—and at times would not—live up to their promise. Chapter One tells a story of rising expectations juxtaposed with a slower rise in CRD capacity and will.

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[44] Letter to W. Wilson White, 18 April 1958, MC247, Box 234, US v. Macon Co., Alabama Voting - TEMPORARY, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[45] Dalfiume, "The 'Forgotten Years' of the Negro Revolution," 106.
[46] Ibid.

The history of the Civil Rights Division cannot be divorced from the institutional pathology of its parent agency, the U.S. Department of Justice. Founded during Reconstruction, the Justice Department was—so the popular narrative goes—established to combat violations of African-American civil rights.[47] The truth, as is often the case, elicits a more nuanced picture. In reality, Congress passed the DOJ Act with the aim of decreasing fiscal waste and improving bureaucratic efficiency.[48] Prior to 1870, the federal government hired private lawyers, an expensive practice.[49] Rather than there being one centralized source for legal advice, different departments kept different counsel.[50] The fact that fiscal concerns, not civil rights, animated the 41st Congress can be seen in the lack of Democratic opposition to the DOJ Act. Indeed, some Democrats backed the bill, which President Ulysses S. Grant signed on June 22, 1870.[51]

What was a mere efficiency measure quickly became something else. Organizations depend not only on the structures that frame them but also on the people who make them. A week before signing the DOJ Act, Grant tapped Amos T. Akerman to serve as Attorney General. This Confederate veteran was, ironically, the man who would oversee the Department's first foray into civil rights.[52] Only then did the Justice Department "forge its identity in the battle to slay the Ku Klux Klan and such offshoots as the Knights of the White Camellia."[53] Akerman and the Department's first Solicitor General, Benjamin H. Bristow, slapped the Klan with 1,143

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[47] Ron Chernow, *Grant* (New York: Penguin Books, 2017), 701.
[48] Jed Handelsman Shugerman, "The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service," *Stanford Law Review* 66, no. 121 (January 2014): 126.
[49] Ibid., 123.
[50] Ibid., 150.
[51] Ibid., 159 and 163.
[52] Chernow, *Grant*, 700.
[53] Ibid., 701.

convictions out of a total 3,384 indictments.[54] These actions protected, among other rights, the recently-ratified Fifteenth Amendment.[55] Its prohibition against restricting the franchise on the basis of race would become the mission of the future Civil Rights Division.

Reconstruction lost steam nonetheless. Northern whites tired of policing the South, for civil rights exacted a political cost. Even "Unconditional Surrender" Grant thought the Fifteenth Amendment "had done the Negro no good, and had been a hindrance to the South, and by no means a political advantage to the North."[56] Such exhaustion came to a head in the Compromise of 1877, wherein Republicans pledged to pull the last federal troops out of the South. With that the former slaves' "brief moment in the sun," as W. E. B. Du Bois put it, ended.[57]

The abdication of Reconstruction was by no means limited to the executive and legislative branches. Beginning in 1873 with the *Slaughter-House Cases*, the Supreme Court emasculated the Reconstruction Amendments of their original purpose and power.[58] Most egregious was the Court's decision in an 1898 case, *Williams v. Mississippi*, promulgated just two years after *Plessy v. Ferguson*. That case saw the Court validate the 1890 Mississippi Constitution, notwithstanding the Fifteenth Amendment.[59] Mississippi's triumph provided the other Southern states with a workable blueprint for voter suppression: pass restrictions that appear neutral on their face, but impact Black voters differently and perniciously.[60] Some of the devices featured in the 1890 Constitution would gain notoriety. Its sections on poll taxes and

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[54] Ibid., 708.
[55] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper Perennial Modern Classics, 2002), 454.
[56] Ibid., 577.
[57] Ibid., 602.
[58] Ibid., 529.
[59] Lawson, *Black Ballots*, 12.
[60] Ibid., 11.

literacy tests made no mention of race.[61] "Every elector shall . . . be able to read any section of the constitution of this State," the one on literacy tests read, "or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof."[62] But African Americans and whites took different tests. Whereas the latter only needed to answer the question "who was George Washington," the former had to articulate "the meaning of Section 1 of the Mississippi Constitution."[63] Evidently, the Supreme Court turned a blind eye to this unequal treatment. No wonder State Speaker James K. Vardaman bluntly said, "Mississippi's constitutional convention of 1890 was held for no other purpose than to eliminate the n***** from politics."[64]

States like Louisiana and Virginia "refined" the 1890 Constitution.[65] Perhaps the most pernicious of these refinements was the white-only primary. Given the Democrats' one-party hegemony, the primary trumped the general election in importance throughout the South.[66] Thus, an entire apparatus of subterfuge and intimidation coalesced with devastating effect. After holding constitutional conventions, Louisiana and Virginia slashed their Black electorates by 96% and 86%, respectively.[67] Internalizing the message "politics is white folks' business," the Black voter faced formidable impediments to political participation.[68]

The Justice Department did not address violations of the Fifteenth Amendment meaningfully until the 1930s and 1940s. By then, a Great Depression and a Great Migration had reordered the political landscape, creating new incentives that benefited African Americans.

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[61] Ibid.
[62] "The Mississippi Constitution of 1890 as originally adopted," *Mississippi Department of Archives and History*, n.d., https://www.mshistorynow.mdah.ms.gov/issue/mississippi-constitution-of-1890-as-originally-adopted.
[63] Howard Glickstein et al., "Civil Rights Division Association Symposium: The Civil Rights Division at Forty," *McGeorge Law Review* 30, no. 957 (1999): 961.
[64] McMillen, *Dark Journey*, 43.
[65] Lawson, *Black Ballots*, 12.
[66] Ibid., 13.
[67] Ibid., 14-15.
[68] Ibid., 13 and 15.

President Franklin D. Roosevelt's New Deal brought "relief, recovery, and reform" to millions. For the first time, many Americans experienced the promise of federal power. Such an experience, in making government less remote and more tangible, increased political participation.[69] African Americans were no less immune than everyone else. Two New Deal entities, the Agricultural Adjustment Administration (AAA) and the National Labor Relations Board, held elections, making Black workers comfortable with the idea of voting. The former entity troubled the Sheriff of Dallas County, Alabama, a county which would—in 1965—gain notoriety as the place where Alabama State Troopers beat marchers on the Edmund Pettus Bridge. "This AAA voting," he complained, "is giving them ideas that they can become regular voters."[70] His complaint proved prescient. Government action—courtesy of the New Deal—further "politicized" African Americans, raising their expectations.[71]

Jim Crow had reason to fear not only the African Americans who remained below the Mason-Dixon Line, but also the growing Black population above it. Approximately 200,000 African Americans headed north between 1890 and 1910, 500,000 between 1910 and 1920, 750,000 during the 1920s, and 400,000 during the 1930s.[72] Because Northern states kept fewer restrictions on the franchise, more Black migrants meant more Black voters, and more Black voters meant more Northern politicians interested in civil rights. Thanks to the New Deal, African Americans—from the 1934 midterms onward—increasingly voted Democratic.[73] The prospect of a Black exodus from the GOP spurred an interparty contest over who could woo Black voters and, with their support, win control of Northern swing states.[74]

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[69] Harvard Sitkoff, *A New Deal for Blacks* (New York: Oxford University Press, 1978), 89.
[70] Ibid., 98.
[71] Ibid., 89.
[72] Ibid., 10, 30, and 38.
[73] Ibid., 88.
[74] Ibid., 91-92.

Institution building empowered African Americans to bargain with the two main parties. The most notable institution—at this point in time—was the National Association for the Advancement of Colored People (NAACP). Founded in 1909 as the National Negro Committee, it emerged after the 1908 Springfield Riot, a race riot which engulfed Abraham Lincoln's hometown.[75] The Association's origins, however, reached back to 1905, when W. E. B. Du Bois assembled the Niagara Movement.[76] Notwithstanding Du Bois's involvement, white liberals led the early NAACP.[77] These included men like Moorfield Storey, a Boston Brahmin and protégé of Senator Charles Sumner.[78] From 1910 to 1929, Storey oversaw the Association's litigation.[79] Fittingly, the NAACP first appeared before the Supreme Court in *Guinn and Beal v. United States*, a 1915 case concerned with Oklahoma's Grandfather Clause.[80] This device, in disenfranchising voters whose grandparents could not vote, discriminated against African Americans; many of them had grandparents who were formerly enslaved.[81] Although the NAACP argued *Guinn* as a third party (since the U.S. Attorney's Office initiated the case), it played an instrumental role in persuading the Court to strike down the Grandfather Clause.[82]

Storey argued *Guinn* himself and set the tone for how the NAACP would promote social change. To quote the historian Gloria J. Browne-Marshall, "he was relying on a belief that the courts, not Congress, held the key to racial justice."[83] Considering the political climate back then, one can hardly blame him; Congress remained the preserve of Southern Democrats. During

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[75] Gloria J. Browne-Marshall, *The Voting Rights War: The NAACP and the Ongoing Struggle for Justice* (Lanham: Rowman & Littlefield, 2016), 1 and 5.
[76] Ibid., 9.
[77] Ibid., 17.
[78] Ibid., 18.
[79] Ibid., 19.
[80] Ibid., 46.
[81] Ibid., 42.
[82] Ibid., 46-47.
[83] Ibid., 42.

the 1920s and 1930s, the NAACP continued its strategy of using litigation to advance voting rights. In the 1924 case *Nixon v. Herndon* and the 1932 case *Nixon v. Condon*, its lawyers convinced the Supreme Court to block state statutes barring African Americans from Texas's white primary.[84] Because the Texas State Legislature had set qualifications for primary elections, the justices reasoned that its policies constituted discriminatory "state action" in violation of the Fourteenth Amendment.[85] But in 1935 the Court decided *Grovey v. Townsend*, affirming Texas's white primary on the grounds that it was the private function of a private political party.[86]

Old habits died hard. Southern Democrats, by dint of the seniority system, still controlled key committee chairmanships on Capitol Hill.[87] Further adding to their influence was the filibuster, used to devastating effect against anti-lynching legislation. Afraid that civil rights would imperil the passage of his beloved New Deal programs, President Roosevelt refrained from publicly supporting the Wagner-Costigan Anti-Lynching Bill of 1937.[88]

Collectively, these factors vindicated the journalist William S. White's explanation of the Senate as "the South's unending revenge upon the North for Gettysburg."[89] Other Roosevelt officials behaved like General George Meade after that battle: halting and evasive. Reflecting on a 1933 meeting with Attorney General Homer Cummings, NAACP Executive Secretary Walter White described his response to a recent lynching as "suave" and noncommittal. Cummings ultimately decided against intervention. He moved heaven and earth to support the Lindbergh Kidnapping Act, but when the focus turned to lynching—White observed—"the attorney general abandoned his broad construction [of kidnapping law] and began hopping from one position to

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[84] Ibid., 78-79.
[85] Ibid., 79-80.
[86] Ibid., 80-81.
[87] Sitkoff, *A New Deal for Blacks*, 45.
[88] Ibid., 283.
[89] Robert Caro, *The Years of Lyndon Johnson: Master of the Senate* (New York: Alfred A. Knopf, 2002), xxiii.

another to avoid taking jurisdiction." Cummings's inconsistency soured White on the idea of a pro-civil rights DOJ. "One cannot help but be amused at the awkward and ludicrous ducking and dodging of the august United States Department of Justice," he fumed in a 1935 article entitled "U.S. Department of (White) Justice."[90]

By 1939, then, it was far from certain that the DOJ would reassume the mantle of African-American civil rights. When Cummings resigned and Michigan Governor Frank Murphy took his place, the new Attorney General established a Civil Liberties Unit within the Criminal Division on February 3, 1939.[91] It instantly garnered media attention. For a unit dedicated to civil liberties, however, there was a glaring omission. "Mr. Murphy promises that this unit will be dedicated to the principle of justice for all," wrote the journalist Russell Porter for *The New York Times*, "including business as well as labor." Porter then quoted Attorney General Murphy as saying, "There will be protection for the rights of the weak and obscure, and those of the Left with whose views we disagree, but there will be the same amount of protection for business men, industrialists and others of the Right."[92] A month later, the Attorney General named journalists, Mormons, and picketers among those whose liberties the Unit sought to protect.[93] Noticeably absent was any direct mention of African Americans.[94]

Despite being overlooked, Black elites recognized the potential of the new entity. Like the original Justice Department, the Civil Liberties Unit constituted a latent power that could, if tapped, powerfully advance civil rights, notwithstanding its divergent origins. According to *The*

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[90] Walter White, "U.S. Department of (White) Justice," *The Crisis*, October 1935, 309.
[91] Peter Irons, "Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties," *Washington Law Review* 59, no. 4 (November 1984): 705.
[92] Russell Porter, "Our No. 1 Trouble-Shooter," *The New York Times*, April 16, 1939.
[93] "Text of Murphy's Address to Mayors on Civil Liberties," *The New York Times*, May 16, 1939.
[94] Risa L. Goluboff, "The Thirteenth Amendment and the Lost Origin of Civil Rights," *Duke Law Journal* 50 (2001): 1616.

Chicago Defender, "leaders here have welcomed the action of Attorney General Frank Murphy in establishing a civil liberties division," believing that "the new unit will ultimately prove of great value to the fight against lynching."[95] Contrary to their expectations, its early cases involved police brutality and economic coercion, not lynching.[96] Even so, African-American civil rights would grow in importance, consuming a greater share of the Unit's caseload. As if to underscore the point, the Civil Liberties Unit received a new name: the Civil Rights Section.[97]

The first significant voting case litigated by the Civil Rights Section (CRS) had little to do with Black voting. Ever since 1935, when Senator Huey Long was assassinated, the Louisiana Democratic Party had been split into two factions, Long loyalists and reformists. Patrick Classic, who belonged to the latter faction, and his accomplices committed voter fraud to ensure a reformist victory in the 1940 Democratic primary.[98] Prodded by Long loyalists, the local U.S. Attorney notified Washington. Attorney General Robert Jackson, Murphy's successor and a future Justice, allowed the CRS to appeal to the Supreme Court.[99] The following May, the Court ruled that a primary election fell under federal jurisdiction: "the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article 1, § 2 [of the Constitution]."[100] *United States v. Classic* was, as Professor Robert K. Carr understood it, "the first important case handled by the Civil Rights Section."[101]

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[95] "U.S. May Dig Into Problem of Lynching," *The Chicago Defender*, February 18, 1939.
[96] For police brutality, see Irons, "Politics and Principle," 707. For economic coercion, see Goluboff, "The Thirteenth Amendment and the Lost Origin of Civil Rights," 1642.
[97] Irons, "Politics and Principle," 705.
[98] Robert K. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (Ithaca: Cornell University Press, 1947), 85.
[99] Ibid., 86.
[100] *United States v. Classic*, 313 U.S. 299, 324 (1941).
[101] Carr, *Federal Protection*, 85.

The Professor's observation turned out to have merit, for *Classic* raised the expectations of one influential organization. In a 10 November 1941 board meeting, the NAACP decided to target *Grovey v. Townsend*, the 1935 ruling that had left Texas's white primary intact.[102] *Classic* gave the NAACP hope that *Grovey*'s days were numbered. CRS litigation therefore helped mobilize its leaders, under Thurgood Marshall, to take up the suit of Dr. Lonnie Smith against the Texas Democratic Party.[103] Smith's suit went too far for FDR, who could ill afford to shed Southern support on Capitol Hill.[104] With America fighting fascism abroad, Roosevelt needed segregationist senators to vote for his military bills.[105] Consequently, the Civil Rights Section chose not to file an *amicus curiae* brief.[106] Marshall and his team won anyway on April 3, 1944, when the Supreme Court abolished the white primary and overturned *Grovey*. *Smith v. Allwright* touched off a temporary increase in Black voter registration.[107] "As efficient as poll taxes, literacy tests, and purges later proved in keeping black southerners away from the polls," affirms the historian Evan Faulkenbury, "before 1944, the all-white primary functioned as the main barrier."[108] An emboldened NAACP dialed up the pressure. Marshall declared that "failure of the Department of Justice to act will be for political rather than legal reasons."[109]

CRS lawyers, however, found themselves stretched to capacity. Three years after *Smith v. Allwright*, the Civil Rights Section employed a mere seven attorneys, despite the enactment of stricter literacy tests in the wake of the case.[110] Furthermore, physical and economic coercion

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[102] Lawson, *Black Ballots*, 35 and 41.
[103] Ibid., 41-42.
[104] Ibid., 42.
[105] The quoted phrase can be found in Caro, *Master of the Senate*, xxiii.
[106] Lawson, *Black Ballots*, 42.
[107] Evan Faulkenbury, *Poll Power: The Voter Education Project and the Movement for the Ballot in the American South* (Chapel Hill: University of North Carolina Press, 2019), 12.
[108] Ibid., 11.
[109] Lawson, *Black Ballots*, 47.
[110] Ibid., 90 and 121.

dissuaded would-be Black voters from registering lest they lose their lives and livelihoods.[111] To make matters worse, the CRS suffered not only from lack of personnel but also from lack of office space. Professor Carr, who became the executive secretary of President Harry S. Truman's Committee on Civil Rights, revealed that "at no time since its creation has the CRS occupied more than four or five modest office rooms in the Justice Department building."[112] The scarce space was indicative of a larger problem. Looking back on his CRS days, former lawyer Henry Putzel acknowledged the Section's less-than-stellar reputation. Other lawyers saw the Civil Rights Section as "a little group off the mainstream," or—to put it more colorfully—the "ugly duckling of the criminal division," starved for resources and respect.[113]

These obstacles complicated the Section's actual work. Because there were only seven attorneys in Washington, the CRS had no choice but to rely on local U.S. Attorneys. Admittedly, this arrangement had its advantages. Since a U.S. Attorney likely came from the jurisdiction he oversaw, it helped to have "a government attorney . . . who can match the defense attorney's southern accent and his understanding of the ways of southern juries can readily be appreciated."[114] At the same time, such an appreciation risked glossing over "the animosity revealed by certain United States Attorneys toward civil rights prosecutions."[115] The Attorneys' animosity reflected the fact that they, having grown up in the South, carried its biases. Carr, in a 1947 study of the Civil Rights Section, also pointed out that "some of [them] are deeply enmeshed in local politics."[116] About sixteen years later, in 1963, Administrative Assistant Attorney General S. A. Andretta would stress the self-reliance of the Civil Rights Division,

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[111] Ibid., 97.
[112] Carr, *Federal Protection*, 122.
[113] Goluboff, *The Lost Promise of Civil Rights*, 123.
[114] Carr, *Federal Protection*, 144-45.
[115] Ibid., 145.
[116] Ibid., 146.

making an implicit but noted contrast with its predecessor. "I know you realize that the Civil Rights Division operates differently," he wrote in a memorandum to John Doar, "in that the other Divisions have as adjuncts to their division the services of the United States Attorneys."[117] One cannot help but wonder if Carr's observations crossed Andretta's mind.

Self-reliance remained a remote prospect for the CRS lawyers who addressed postwar civil rights violations. Though the late 1940s flowed with rich structural forces, rank-and-file lawyers helped steer their course. Maceo Hubbard was the Section's only African-American lawyer and someone who showed the difference individuals can make. A native Georgian from Forsyth, he first entered government service in 1942, practicing law for the Fair Employment Practices Committee. Four years later, the Truman administration offered him a job at the Civil Rights Section.[118] This invitation began a three-decade-long career there.[119]

Hubbard quickly made useful contributions to expand the CRS policy toolkit. As early as February 1947, he participated in a conference urging that the Civil Rights Section be allowed to use civil remedies, a break from its wholesale reliance on criminal statutes.[120] Hubbard and his colleagues correctly identified the flaw with criminal prosecution: it only punished voter suppression after the fact, meaning the damage had already been done. Civil remedies like injunctions, by contrast, could prevent such damage from occurring.[121] Moreover, Hubbard authored a memorandum that supported curbing registrars' discretion, which replaced the now-nullified white primary as the main instrument of voter suppression.[122]

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[117] Long Distance Telephone Bill for Period April 1-12, 1963, 25 April 1963, MC247, Box 98, Administration: Other Bureaus and Divisions, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[118] "OBITUARY: Maceo H. Hubbard, ex-Philadelphia rights lawyer, 92," *The Philadelphia Tribune*, July 30, 1991.
[119] Doar, "The Work of the Civil Rights Division in Enforcing Voting Rights," 16.
[120] Lawson, *Black Ballots*, 121 and 380.
[121] Ibid., 121.
[122] Ibid., 120-21.

These contributions found their way into an agency-changing report. Published that same year, *To Secure These Rights* was the first official government endorsement of civil remedies for the Justice Department.[123] More importantly, it endorsed the formation of a Civil Rights Division. In his 1947 study of the Civil Rights Section, Carr lauded division status as something that "would give the agency and its program a sense of permanence which they now lack."[124] Elevating the CRS would also "give the agency specific recognition in the Department's budget," "permit it to have a larger and more varied staff," and "make it less dependent on the general aid provided by the Criminal Division's trial lawyers."[125] Elevation to division status, in other words, promised the CRS a host of tangible benefits.

Among the readers who digested the contents of *To Secure These Rights* was a former Chairman of the Republican National Committee. The "provisions [creating the Civil Rights Division and the Civil Rights Commission] had been developed by President Truman's Civil Rights Commission," Herbert Brownell remembered. "I thought they were worthwhile."[126] In 1953 Brownell became President Dwight D. Eisenhower's Attorney General. Despite losing 73% of the Black vote, Eisenhower won the 1952 presidential election.[127] Brownell—who had chaired the Republican National Committee when Thomas Dewey lost the 1948 race—could see that a less-renowned nominee would have fared worse, given the Northern cities populated by African Americans.[128] The fruits of the Great Migration were ripening. Across the aisle, Senate Majority Leader Lyndon B. Johnson coveted the presidency. To be nominated, he needed Northern

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[123] "To Secure These Rights," *Harry S. Truman Presidential Library and Museum*, n.d., https://www.trumanlibrary.gov/library/to-secure-these-rights, 129.
[124] Carr, *Federal Protection*, 208.
[125] Ibid., 208-09.
[126] Herbert Brownell, *Advising Ike: The Memoirs of Attorney General Herbert Brownell* (Lawrence: University Press of Kansas, 1993), 228.
[127] Lawson, *Black Ballots*, 141.
[128] Ibid., 151.

delegates. Thus, the ambitious Texan eyed civil rights as a winning issue.[129] Ambition, rather than counteracting itself, intersected with ambition to create a narrow opening for legislation.[130]

Attorney General Brownell fired the opening salvo in what became the battle for the Civil Rights Act of 1957. Maceo Hubbard again played a pivotal role, this time by authoring a memorandum on voter suppression in Mississippi; its contents helped spur Brownell to act.[131] The historian Mary Frances Berry confirms that "Brownell's legislative proposal was based on a memo prepared by Maceo Hubbard."[132] Brownell developed a four-part bill to (1) create a Civil Rights Commission, (2) give the Civil Rights Section division status, (3) enable the Attorney General to use civil remedies, and (4) authorize injunctive relief for violations of voting rights.[133] Parts Two and Three were connected. J. W. Anderson, author of the first authoritative account of the 1957 Act, recognized that "the reorganization [of the CRS] . . . was intended both to symbolize and to implement the Department's growing interest in civil remedies."[134]

Some Southern Senators denounced the specter of a Civil Rights Division. Senator Olin Johnston of South Carolina likened it to a "new Gestapo."[135] His colleague Strom Thurmond thought "there was no need" to elevate the Civil Rights Section. He feared an elevated CRS "would keep the people in a constant state of apprehension and harassment."[136] Nevertheless, their critiques constituted a minority in the Southern caucus. Division status, by and large, was

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[129] Caro, *Master of the Senate*, 850.
[130] Wording inspired by *Federalist No. 51*. See James Madison, "The Federalist Papers : No. 51," *The Avalon Project*, 2008, https://avalon.law.yale.edu/18th_century/fed51.asp.
[131] Lawson, *Black Ballots*, 149-50.
[132] Mary Frances Berry, *And Justice for All: The United States Commission on Civil Rights and the Continuing Struggle for Freedom in America* (New York: Alfred A. Knopf, 2009), 18.
[133] Brownell, *Advising Ike*, 218-19.
[134] J. W. Anderson, *Eisenhower, Brownell, and the Congress: The Tangled Origins of the Civil Rights Bill of 1956-1957* (Tuscaloosa: University of Alabama Press, 1964), 21.
[135] Caro, *Master of the Senate*, 933.
[136] Statement by Senator Strom Thurmond (D-SC) for television film clips on subject of civil rights legislation pending in the Congress, 26 February 1957, Mss 100, Box 1552, Strom Thurmond Collection, Clemson Libraries, Clemson University, Clemson, SC.

far from being the most controversial provision; that distinction belonged to Part Three, civil remedies, since its broad language threatened the continued segregation of schools.[137] Compared to integration, voting aroused cooler tempers. According to LBJ biographer Robert Caro's account of the legislative negotiations, "When the right to vote came up, the tone of voice was different: less defiant—sometimes, in fact, almost ashamed."[138] When the Senate Majority Leader hammered out a compromise to rescue the bill (and his presidential hopes), Part Two remained intact. Part Three did not survive the Senate, and its death, in effect, reduced the Civil Rights Act to a voting bill (civil remedies applied only to the franchise).[139] Politics, the so-called "art of the possible," narrowed the possibilities for the nascent Civil Rights Division.

Some African Americans were furious. Roy Wilkins, Walter White's successor at the NAACP, counseled acceptance of the imperfect: "If you are digging a ditch with a teaspoon, and a man comes along and offers you a spade, there is something wrong with your head if you don't take it because he didn't offer you a bulldozer."[140] Upon its passage in August, the Civil Rights Act of 1957 added needed civil rights provisions to the books, the first since Reconstruction.[141] Although the removal of Part Three was a setback, it should not obscure the significance of this achievement. LBJ predicted that passing another bill would "be easier next time."[142] Passage itself raised Black expectations, generating pressures that would "run down . . . like a mighty stream."[143] During the congressional deliberations, the Prayer Pilgrimage for Freedom marched on Washington. It was there that a Baptist from Atlanta, the Reverend Martin Luther King,

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[137] Robert Fredrick Burk, *The Eisenhower Administration and Black Civil Rights* (Knoxville: University of Tennessee Press, 1984), 171.
[138] Caro, *Master of the Senate*, 891.
[139] Burk, *The Eisenhower Administration and Black Civil Rights*, 171.
[140] Lawson, *Black Ballots*, 195-96.
[141] Caro, *Master of the Senate*, 996.
[142] Ibid., 893.
[143] Quotation comes from Amos 5:24. MLK famously used this verse.

demanded, "Give Us the Ballot."[144] Later, in November 1957 the NAACP convened a conference "as part of a national campaign to stir Negroes to greater interest in election activity in response to the Civil Rights Act."[145] Two of the participants, Wilkins and King, would symbolize the different types of mobilization generated by government action. While Wilkins felt the Civil Rights Act of 1957 confirmed the wisdom of working within the system, King was less exuberant. For him, notes biographer Taylor Branch, "the lesson of the bill was that Negroes should place less reliance on white institutions and take more responsibility upon themselves."[146] In essence, government action generated positive and negative mobilization. But the common denominator was raised expectations, met (Wilkins) or unmet (King).

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Their expectations rested on the shoulders of the Civil Rights Division. Its first Assistant Attorney General, W. Wilson White, did not meet them. His conservative credentials were anything but secret. Shortly after the Senate confirmed him—ending a seven-month delay instigated by Southerners over his role in the Little Rock Nine Crisis—*The Hartford Courant* ran a profile entitled "Civil Rights Director Has Conservative Look."[147] One rank-and-file CRD lawyer, J. Harold "Nick" Flannery, recalled that his Harvard-educated boss had "an upper-

[144] Faulkenbury, *Poll Power*, 19-20.
[145] John N. Popham, "N.A.A.C.P. in South Plans Vote Drive," *The New York Times*, November 17, 1957.
[146] Taylor Branch, *Parting the Waters: America in the King Years, 1954-63* (Riverside: Simon & Schuster, 1989), 221-22.
[147] "Civil Rights Director Has Conservative Look," *The Hartford Courant*, August 24, 1958.

middle-class orientation."[148] It was clear from the outset, therefore, that White would manage the CRD like how he dressed: "careful but conservative."[149]

One similarity between the Civil Rights Section and the Civil Rights Division was that both entities depended on the FBI to process complaints. In 1947 Carr had reported that while "the CRS and the FBI, . . . on the whole, have worked together reasonably well," the latter's conduct in the case *United States v. W. F. Sutherland* "reveals a strong reluctance by the FBI to co-operate."[150] The reason was the Bureau's desire not to "endanger its good relations with the police departments of Atlanta and other cities."[151] If anything, Carr understated the matter. Still FBI Director in 1958, J. Edgar Hoover—according to rank-and-file CRD lawyer Gordon A. Martin—balked at entering "situations in a way that would only harm the bureau's highly cultivated relationship with local police chiefs and sheriffs."[152] Notwithstanding Hoover's personal attitudes (he viewed the Civil Rights Division as the product of a communist conspiracy), White continued the CRS policy of depending on the FBI.[153] In response to Charles Gomillion's 18 April 1958 letter concerning the Macon County Board of Registrars, he told him that "if you have knowledge of any such recent discriminatory acts that you furnish full details to the Federal Bureau of Investigation."[154] White's noncommittal response was far too typical.

Another area of continuity between the Civil Rights Section and the Civil Rights Division centered around the receipt of complaints. "In general," conceded Carr in 1947, "the CRS is

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[148] Gordon A. Martin, *Count Them One by One: Black Mississippians Fighting for the Right to Vote* (Jackson: University Press of Mississippi, 2010), 31.
[149] "Civil Rights Director Has Conservative Look," *The Hartford Courant*, August 24, 1958.
[150] Carr, *Federal Protection*, 152-53.
[151] Ibid., 152.
[152] Martin, *Count Them One by One*, 25.
[153] Nichols, *A Matter of Justice*, 126.
[154] Letter to Charles Gomillion, 4 August 1958, MC247, Box 234, US v. Macon Co., Alabama Voting - TEMPORARY, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.

forced to follow a policy of waiting for complaints to come into its office before taking any action."[155] Eleven years later, the Civil Rights Division was still waiting. White's conservatism kneecapped the Division's ability to address voter suppression. For starters, only literate African Americans could submit written complaints, assuming that "ignorance of the law and the possibility of violent reprisals" did not otherwise deter them.[156] White's policy undeniably burdened suppressed voters.

Two additional reasons clarify why White's Civil Rights Division litigated so little. First, White and his allies naively assumed that a handful of test cases would be enough to break Jim Crow.[157] Second, they desired a winning record and, to that end, litigated with caution.[158] These factors limited the early Division's caseload to an unimpressive number: three—*United States v. Raines*, *United States v. Alabama*, and *United States v. McElveen*. *Raines* came out of Terrell County, Georgia, involving a constitutional challenge to the year-old Civil Rights Act.[159] *McElveen* targeted the voter purges orchestrated by the Louisiana Citizens' Council.[160]

Among all three test cases, *United States v. Alabama* most embodied the flaws and tendencies that undermined the Civil Rights Division at this point. Complementing Gomillion's letter was a complaint submitted by James H. M. Henderson, an ordinary "citizen and registered voter." Henderson's complaint shows that Black expectations were rising. "It is your office -- and that of the President's -- alone which can take the official move," he insisted to Attorney General William P. Rogers, Brownell's successor. "Any other office or body is powerless to

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[155] Carr, *Federal Protection*, 124.
[156] Lichtman, "The Federal Assault Against Voting Discrimination," 348.
[157] Lawson, *Black Ballots*, 205.
[158] Ibid., 206.
[159] Ibid., 206-07.
[160] Ibid., 211.

correct this despicable example."[161] To find such writing from a layperson is remarkable, not least because of its rarity. Aside from the fact that Henderson could write, he came from the exceptional Macon County. Home to the Tuskegee Institute, it "possessed a high degree of political consciousness."[162] As Nick Flannery put it, "Victims of civil rights crimes are not your middle-class politically conscious types."[163]

Hence, the Division's slowness in filing *Alabama* becomes all the more puzzling when one considers the advantages of litigating a case from Macon County. Charles Gomillion himself typified what the *New Yorker* journalist Bernard Taper dubbed Tuskegee's "sizeable colored bourgeoisie."[164] Gomillion's rise to bourgeois status was unlikely but all the more remarkable. A native of Johnston, South Carolina, Gomillion received "a total of twenty-six months of elementary-school education."[165] Though his father was an illiterate ex-slave and his mother went no further than third grade, he managed to acquire a Ph.D. from Ohio State University and—in 1928—become a sociology professor at the Tuskegee Institute.[166] After moving to Alabama, he joined a nascent organization dedicated to "community improvement": the Tuskegee Men's Club. In those early years, the Men's Club focused on community service, including electrification and trash collection; it ignored politics.[167] With the war clouds brewing in 1941, Gomillion and his colleagues inaugurated a makeover of the Tuskegee Men's Club,

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[161] Letter to William P. Rogers, 8 December 1958, MC247, Box 234, US v. Macon Co., Alabama Voting - TEMPORARY, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[162] Lawson, *Black Ballots*, 209.
[163] Martin, *Count Them One by One*, 31.
[164] Bernard Taper, *Gomillion versus Lightfoot: The Tuskegee Gerrymander Case* (New York: McGraw-Hill Book Company, 1962), 41.
[165] Steven P. Brown, *Alabama Justice: The Cases and Faces that Changed a Nation* (Tuscaloosa: University of Alabama Press, 2020), 106; Taper, *Gomillion versus Lightfoot*, 36.
[166] Brown, *Alabama Justice*, 106; Taper, *Gomillion versus Lightfoot*, 36.
[167] Brown, *Alabama Justice*, 106.

renaming it the Tuskegee Civic Association. True to its name, the renamed organization would prioritize civics education.[168]

Simultaneously, World War II began a shift in local African-American attitudes toward voting.[169] "Dr. Gomillion pointed out that, because of Booker T. Washington's philosophy of racial accommodation, local Negroes had never had any interest in fighting the whites," recorded Taper, who interviewed Gomillion while on assignment.[170] "It wasn't until around the Second World War, he said, that local Negroes began to think that by not voting they had been remiss in their duties as American citizens."[171] Tuskegee's Black population increasingly agitated for a say in the political process after the guns fell silent. One turning point came when Jessie P. Guzman ran for the Macon County School Board in 1954, coincidentally the year of *Brown v. Board of Education*.[172] Guzman's candidacy was unsuccessful but her audacity still stunned the local white population, which numbered less than 3,000 out of the 30,000 total residents who inhabited Macon County.[173] Ever the observant journalist, Taper perceived that the white people there could not look past their "benign paternalism."[174] Yet paternalism did not stop the Alabama State Legislature from entertaining a gerrymander of Tuskegee, lest Black political power achieve further success.[175] These were the circumstances under which Gomillion wrote his letter to the Justice Department: a situation made uncertain by shifting attitudes amid post-*Brown* turmoil.

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[168] Ibid., 110.
[169] Taper, *Gomillion versus Lightfoot*, 33.
[170] Ibid., 31-32.
[171] Ibid., 33.
[172] Ibid., 13.
[173] Ibid.; Brown, *Alabama Justice*, 111.
[174] Taper, *Gomillion versus Lightfoot*, 11.
[175] Ibid., 14.

The challenge against the gerrymander would wait for another case, *Gomillion v. Lightfoot*. In the meantime, the Civil Rights Division had to answer Gomillion's allegations—per his 18 April 1958 letter—that the Macon County Board of Registrars suppressed the votes of 13,000 African Americans.[176] On February 6, 1959, about ten months after Gomillion first wrote to White, the CRD finally filed suit in *United States v. Alabama*, slapping two registrars with a permanent injunction and naming the State of Alabama as a defendant.[177] The decision to name a state was unprecedented but vital. It heralded the first of a series of incremental changes made by the CRD, changes which departed from CRS tradition. For the moment, the naming of a state proved too novel for U.S. District Judge Frank M. Johnson. Judge Johnson dismissed the Division's suit, ruling that the State was not a "person" under the Civil Rights Act of 1957.[178] Nevertheless, he threw civil rights a bone, commenting that such a suit would be legal if Congress enacted new legislation.[179] After the Fifth Circuit Court of Appeals affirmed Judge Johnson's ruling on June 16th, CRD lawyers appealed to the Supreme Court.[180]

The year 1959 closed with *Alabama* in limbo before the nation's highest court. It also marked the end of the road for White. News of his resignation elicited scorn from *The Chicago Defender*, which emphasized that not even "rabid Southerners" on the Civil Rights Commission defended his "ineffectual" conduct.[181] *New York Times* columnist Anthony Lewis likewise critiqued the Division's *modus operandi*. The prevailing consensus, indicated Lewis, was "that

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[176] Letter to W. Wilson White, 18 April 1958, MC247, Box 234, US v. Macon Co., Alabama Voting - TEMPORARY, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[177] Seventh Anniversary Celebration of the Crusade for Citizenship Brochure, 23 June 1964, MC247, Box 113, Negro Organizations: Tuskegee Civic Association, 1957-1965, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[178] Ibid.
[179] Lawson, *Black Ballots*, 210.
[180] Seventh Anniversary Celebration of the Crusade for Citizenship Brochure, 23 June 1964, MC247, Box 113, Negro Organizations: Tuskegee Civic Association, 1957-1965, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[181] "The Resignation Of Wilson White," *The Chicago Defender*, October 10, 1959.

lawsuits are an ineffective answer to the voting problem"; the Civil Rights Division needed an expanded policy toolkit. In addition, Lewis's column on a Civil Rights Commission report identified apathy as problematic. "It says 'apathy is part of the answer [to the question of low African-American registration rates],'" he affirmed, "apathy stemming from poverty, from lack of education, from the historically submerged status of the Negro."[182]

Apathy demanded a response stronger than three lawsuits. Compared to Mississippi, Alabama's post-*Brown* turmoil was mild. A recurring theme in civil rights historiography is that no other state matched Mississippi vis-à-vis the violence inflicted upon African Americans.[183] To use John Dittmer's pithy phrase, Mississippi stood in "a class by itself."[184] But change was coming there too, especially in 1954. Just as the Supreme Court handed down *Brown v. Board of Education* and Jessie P. Guzman declared her candidacy for the Macon County School Board, Medgar Evers became the first full-time field secretary of the Mississippi NAACP.[185] But *Brown* precipitated a terrible backlash. The Association of White Citizens' Councils formed, along with the Mississippi State Sovereignty Commission.[186] Regrettably, the latter could have been an import from Stalin's Russia. According to the journalist Wilson F. Minor, it resembled an "NKVD among the cotton patches," since its functions included spying and surveillance of anti-segregationist dissidents.[187] The Commission also funded the White Citizens' Councils.[188] As the

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[182] Anthony Lewis, "Issue of Negro Vote Now Sharply Drawn," *The New York Times*, September 13, 1959.
[183] William H. Lawson, *No Small Thing: The 1963 Mississippi Freedom Vote* (Jackson: University Press of Mississippi, 2018), 14.
[184] Dittmer, *Local People*, 59.
[185] Ibid., 48-49.
[186] J. Todd Moye, *Let the People Decide: Black Freedom and White Resistance Movements in Sunflower County, Mississippi, 1945-1986* (Chapel Hill: University of North Carolina Press, 2004), 32-33.
[187] Dittmer, *Local People*, 60.
[188] Lawson, *No Small Thing*, 21.

historian J. Todd Moye observed in his history of Sunflower County, both institutions "made it dangerous for African Americans and moderate-to-progressive whites to disagree."[189]

If the prospects for change were not already dim in Mississippi, then the violence made them so. The new year, 1955, brought a string of lynchings meant to intimidate the local Black population. In May, the Vice President of the Regional Council of Negro Leadership—the Reverend George W. Lee—was shot while driving.[190] Having lost his lower face and jawbone, the voting rights activist did not make it to the hospital.[191] Sheriff Ike Skelton blithely attributed the wounds to "dental fillings."[192] Lee's death left his friends shaken. One of them was Gus Courts, who managed a grocery store and served as the first President of the Humphreys County NAACP.[193] Because of this latter role, Courts became a target for assassination, which he narrowly survived. Unsurprisingly, the grocer chose exile in Chicago and—thanks to the NAACP—resumed his business there.[194] August 1955 brought additional casualties. Lamar Smith was rallying Black voters on a courthouse lawn when someone shot him. And unlike Lee's murder, Smith's unfolded in daylight.[195] Perhaps most infamously, two men brutally tortured and executed fourteen-year-old Emmett Till.[196] The searing images of his remains communicated the true nature of the violence in Mississippi.[197] With respect to Lee, Courts, and Smith, their ordeals also convey that activists were exercising Black agency long before the Civil Rights Division entered the picture in Mississippi.

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[189] Moye, *Let the People Decide*, 33.
[190] Ibid., 80.
[191] Dittmer, *Local People*, 53-54.
[192] Gary May, *Bending Toward Justice: The Voting Rights Act and the Transformation of American Democracy* (New York: Basic Books, 2013), 12.
[193] Moye, *Let the People Decide*, 79-80.
[194] Dittmer, *Local People*, 54.
[195] May, *Bending Toward Justice*, 12; Lawson, *No Small Thing*, 21.
[196] Dittmer, *Local People*, 56.
[197] Ibid., 58.

Before 1960, the Civil Rights Division maintained patterns of continuity with the Civil Rights Section. The CRD continued to depend on the FBI and the receipt of complaints; resources and personnel remained as inadequate as ever. At the same time, inklings of progress emerged. The Civil Rights Act of 1957, in LBJ's crude vernacular, "broke the virginity" working against racial equality.[198] Less than three years after its passage, a second law—the Civil Rights Act of 1960—passed. Within the decade followed the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The CRD itself would welcome new leaders and lawyers who expanded its policy toolkit. These new tools included field work, *amicus curiae* briefs in redistricting cases, and expanding research on voter suppression.

Through it all ran the rising tide of Black expectations. During the New Deal, the Civil Rights Section gradually entered the picture. Its victory in *United States v. Classic* encouraged the NAACP to litigate *Smith v. Allwright*, a mortal blow against the white primary. But the mobilization engendered by CRS and CRD actions was limited to those groups and individuals who were already politically active, such as the Tuskegee Civic Association.[199] Many African Americans had not yet felt the Division's impact**.**[200] Fear, apathy, and lack of knowledge kept Black mobilization low. Mobilizing new voters required more lawsuits—and more lawyers to travel southward, gather evidence, and spread the word about registration. It also required a civil rights movement working in tandem with Washington, a movement whose expectations would be dashed by the imperfections of litigation. The 1960s therefore promised a "new frontier" for the Civil Rights Division, as it did for the rest of the country.

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[198] Caro, *Master of the Senate*, 893.
[199] Lawson, *Black Ballots*, 209.
[200] Martin, *Count Them One by One*, 31.

Chapter Two: "High Hopes": Redistricting and a New Administration, 1960-1961

Everyone is voting for Jack
Cause he's got what all the rest lack
Everyone wants to back -- Jack
Jack is on the right track.
'Cause he's got high hopes
He's got high hopes
Nineteen Sixty's the year for his high hopes.

- *Frank Sinatra, "High Hopes" (Theme Song for the Kennedy Campaign)*

It was dark, damp, and discomforting inside the prison. To comfort themselves, the inmates sang "We Shall Overcome" and other hymns.[201] Like Paul and Silas centuries before, writes Taylor Branch, the Freedom Riders—by and large—had an unshakeable belief that God was on their side.[202] Their trials and tribulations were not for the meek. Beatings with cattle prods, forced strippings, beds without mattresses, the scorching Mississippi summer—these constituted the afflictions of the imprisoned Freedom Rider.[203] Parchman Penitentiary—a sprawling complex ringed with barbed wire, more military camp than prison— was the "heart of the beast."[204] In his novel *The Mansion*, William Faulkner described Parchman as "destination . . . doom."[205] Given Parchman's fearsome reputation, the Freedom Riders were euphoric when they left the penitentiary on July 7, 1961.[206] These young activists felt secure in the knowledge that "no weapon formed against [them] shall prosper."[207]

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[201] Branch, *Parting the Waters*, 484.
[202] Ibid., 482. The story of Paul and Silas comes from the Book of Acts, Chapter 16.
[203] Ibid., 484-85.
[204] Ibid., 483 and 485.
[205] William Faulkner, *The Mansion*, 3rd ed. (New York: Random House, 1959), 48.
[206] Branch, *Parting the Waters*, 485.
[207] Isa. 54:17.

As military strategists well know, victory is rarely a settled proposition. Those who had survived Parchman learned that the Student Nonviolent Coordinating Committee, the organization to which many of them belonged, was shifting away from confrontational, "direct action" demonstrations.[208] The ex-inmates were dismayed. According to Branch, "those just out of prison objected that there was nothing Gandhian about voter registration, which they saw as conventional . . . and very probably a tool of the Kennedy Administration for getting 'direct action' demonstrators off the streets."[209] They lost the battle over the shift toward voter registration, but would win the war in terms of holding Washington's feet to the fire.

This chapter tells the first part of that story, namely the battle over voter registration, through the lens of the Justice Department's Civil Rights Division as it developed from the final year of the Eisenhower administration to the first year of the Kennedy administration. During this time, the Civil Rights Division began to send lawyers out into the Southern countryside, doing field work that helped raise the political consciousness of rural African Americans. The CRD boosted Black expectations of federal support, which mobilized would-be voters, through interactions with activists and field work. It also boosted expectations by contributing to the formation of the Voter Education Project, a multi-state registration campaign.

Less obvious, but no less important, was the Division's use of *amicus curiae* briefs in two landmark redistricting cases: *Gomillion v. Lightfoot* and *Baker v. Carr*. The secondary literature on the Civil Rights Division completely overlooks redistricting, even though it figures prominently in CRD documents. Since voting rights is about more than registration, this chapter also examines gerrymandering and malapportionment. Only through such a perspective can the historian fully appreciate the record of the CRD.

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[208] Branch, *Parting the Waters*, 485.
[209] Ibid., 485-86.

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The "high hopes" of the Kennedy presidency were inflated by the disappointments of the Eisenhower years. In 1960 Eisenhower was winding down his second term, just as the Civil Rights Division was ramping up. On May 17th, NAACP lobbyist Clarence Mitchell spoke before a gathering of the Division's lawyers. Mitchell explained why the civil rights movement felt that "the greatest obstacle . . . is the Department of Justice's rigid adherence to certain policy decisions on civil rights cases made in the past which are not necessarily valid."[210]

Three particular flaws in the Department's policy colored Mitchell's explanation. First, the Eisenhower Justice Department refused to intervene in cases with concurrent federal-state jurisdiction. Such a stance, charged Mitchell, ignored "the attitude of some state officials, from the Governor on down, of defying the law of the land." Second, the Justice Department was too fearful of losing. Though DOJ apologists maintained "that failure merely lends encouragement to civil rights foes," they neglected two considerations. "Defiant states are already so contemptuous of Federal authority that nothing could further lessen their respect for it," said Mitchell. "Also it overlooks the fact that this situation is not just another brutality case, but a showdown fight to preserve the Constitution." Third, the Justice Department would litigate only if it had an indictment. "The secrecy of a grand jury room," however, prevented the emergence of a public record of facts and allegations. Even if a grand jury refused to indict, the emergence of a public record could help the Civil Rights Division in future cases.[211]

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[210] Statement of Clarence Mitchell, 17 May 1960, MC247, Box 91, Staff Meetings (Administration), John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[211] Ibid.

While the general reaction to the speech remains unknown, at least one person registered his disagreement. Acting Assistant Attorney General Joseph M. F. Ryan, W. Wilson White's temporary successor, scrawled on the margins of a printed transcript, "My opinion is that this is inaccurate and misleading."[212] Still, good politics once again advanced the Black freedom struggle. As Russell Baker of *The New York Times* recognized, the passage of the Civil Rights Act of 1960 was "the work of Lyndon Johnson of Texas, . . . whose campaign for the Democratic nomination is expected to benefit."[213] Anxious to solidify his presidential prospects, the Senate Majority Leader backed a bill with three key provisions.

Its first provision required the preservation of voting records. State officials could no longer discard records dated within the previous twenty-two months and were required to produce all documents requested by the Attorney General.[214] This provision was difficult to enforce. Wrangling over recordkeeping became crucial in subsequent CRD litigation, most notably *United States v. Lynd*, a 1962 case in which a Mississippi registrar admitted to partial document destruction, specifically of registration forms. Such subterfuge, aided by the Mississippi State Legislature, made it imperative that CRD lawyers collect their own facts via field work.[215]

Meanwhile, the second provision authorized the Justice Department to sue states that violated the voting rights of their inhabitants.[216] Unlike the Act's first provision, the second yielded immediate dividends. The Supreme Court handed the Civil Rights Division a win by remanding (i.e., returning a case to a lower court for retrial) *United States v. Alabama*, the case

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[212] Ibid.
[213] Nichols, *A Matter of Justice*, 254-55.
[214] Ibid., 255.
[215] Martin, *Count Them One by One*, 177-78.
[216] *United States v. Alabama*, 362 U.S. 602, 604 n.3 (1960).

which closed the previous chapter. After receiving the remanded case, U.S. District Judge Frank M. Johnson issued a swift ruling: Macon County had to register fifty-four African Americans at once.[217] Litigation continued into 1962, but the authority to sue a state still went a long way.[218] "One of the immediate results of the 1960 law," affirms the political scientist Charles V. Hamilton, "was to nullify what had been a rather effective tactic of registrars—resignation."[219]

Last but not least, the third provision of the 1960 Act established a procedure for appointing voting referees. It authorized federal district courts to appoint them wherever a pattern of discrimination existed. Referees could send a list of African Americans to a district court, which could allow those listed to vote.[220] The Eisenhower administration watered down the bill before passage. Although the Civil Rights Commission had suggested that voting registrars be appointed by the President, the Justice Department wanted referees instead—to limit Eisenhower's political exposure. While Johnson's bill still required state registrars to preserve five years of records, the Administration pushed to shorten the period to twenty-two months. Underscoring his caution, Eisenhower signed the Civil Rights Act of 1960 quietly on May 9th; only the Attorney General and the Assistant Attorney General for Civil Rights attended.[221]

Among the lawyers involved in the design of the Civil Rights Act were those of the Appeals and Research Section. At this point in time, four sections constituted the Civil Rights Division: Appeals and Research, Administrative, General Litigation, and Voting and Elections. Led by Section Chief Harold H. Greene, Appeals and Research managed the preparation of

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[217] Charles V. Hamilton, *The Bench and the Ballot: Southern Federal Judges and Black Voters* (New York: Oxford University Press, 1973), 97.
[218] Ibid., 101.
[219] Ibid., 91.
[220] Nichols, *A Matter of Justice*, 255.
[221] Berry, *And Justice for All*, 35.

briefs and research in Supreme Court and appellate cases.[222] As *United States v. Alabama* confirms, this was no small responsibility. A huge burden rested on Greene's shoulders.

At first glance, this bespectacled, balding lawyer looked like many others in the Justice Department. Born in Frankfurt, Germany, Heinz "Harold" Greene experienced upheavals similar to those of another German-Jewish émigré named Heinz, Henry Kissinger (also born in 1923). With Nazi antisemitism on the rise, Greene's family emigrated in 1939. The Greenes passed through Belgium, Vichy France, Spain, and Portugal before reaching America four years after their initial departure from Germany. Amazingly, Greene chose to return to Europe, interrogating captured Nazis as a member of U.S. Army intelligence. He then used his veterans benefits to attend George Washington University's undergraduate and law schools. In 1957 the Justice Department's Office of Legal Counsel hired Greene. He soon transferred to the Civil Rights Division and headed its Appeals and Research Section.[223] William Yurcik, a former George Washington University graduate student who knew him, observed that "these events [connected with the Nazis] did have a most dramatic effect on Greene's life." "Greene," he continued, "expressed that the power of the law, and its fair enforcement through the courts could mitigate society's worst tendencies whether it would be the Nazis or the Ku Klux Klan."[224]

Greene's story was hardly anomalous within the Civil Rights Division. At least two other CRD lawyers, Frank Schwelb and John Rosenberg, had fled the Nazis. The Prague-born Schwelb recalled seeing *Wehrmacht* soldiers occupy the city. Upon the German annexation of Czechoslovakia in March 1939, the Gestapo briefly detained Schwelb's father, Egon; in August

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[222] U.S. Department of Justice, *Report of Assistant Attorney General W. Wilson White in Charge of the Civil Rights Division*, 1958.
[223] Martin Weil, "Harold Greene AT&T Case Judge, Dies," *The Washington Post*, January 30, 2000.
[224] William Yurcik, "Judge Harold H. Greene: A Pivotal Judicial Figure in Telecommunications Policy and His Legacy," *University of South Florida*, n.d., http://magrawal.myweb.usf.edu/dcom/Ch12_Yurcik_JudgeGreen_IEEE.pdf.

the Schwelbs fled to England. Egon Schwelb served as a lawyer for the Czechoslovak government-in-exile until the end of the war. Despite his prominent position, many relatives failed to secure exit visas and perished in the Holocaust. Frank Schwelb was deeply affected, reflecting, "The liberties of the citizen were terribly important to [my parents], as they are to me, which generated the career I chose." That career was law, and the cause freedom. Being free "doesn't mean the Nazis coming in and locking up my father . . . for being Jewish," said Schwelb. "And it doesn't mean subjugating people on account of their race or color."[225]

Like Greene and Schwelb, Rosenberg connected the Holocaust with the Black freedom struggle. Rosenberg's story began in Magdeburg, Germany, where his father taught in the Jewish schools. "When Adolf Hitler required the schools to be segregated," remembered Rosenberg, "[my father] and another man set up the school for Jewish kids." Rosenberg experienced *Kristallnacht* and his father's brief internment in a concentration camp. After a year-long sojourn in the Netherlands, the Rosenbergs came to America "on pretty much the last ship." Asked why he decided to practice civil rights law, Rosenberg brought up his Jewish heritage. "I think it was a combination of having been born in Germany and seeing and thinking about this Holocaust history of ours," he answered. "And then seeing, really, in having been in the service with people who were black and thinking that this caste system is wrong in this country."[226]

The history of Jewish lawyers in civil rights predates the Civil Rights Division. Analyzing the personnel in its predecessor, the Civil Rights Section, Risa L. Goluboff identifies two Jewish lawyers: Albert Arent and Sydney Brodie. "The commitment of Jewish CRS lawyers

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[225] National Czech & Slovak Museum & Library, "Frank Schwelb," *NCSML Digital Library*, n.d., https://ncsml.omeka.net/items/show/4049.

[226] "John and Jean Rosenberg," *Library of Congress*, August 15, 2013, https://tile.loc.gov/storage-services/service/afc/afc2010039/afc2010039_crhp0100_Rosenbergs_transcript/afc2010039_crhp0100_Rosenbergs_transcript.pdf.

like Arent was not merely abstract," she writes. "[T]hey had all 'endured' prejudice and discrimination in their own lives."[227] One constant strength of the CRS—as well as its successor, the Civil Rights Division—was that their mission attracted legal talent.

Such talent came in handy when Greene's Appeals and Research Section took up complex redistricting cases. Redistricting is the process by which, every decade, state legislatures redraw district lines for congressional and state house and senate seats. State legislatures can also redraw municipal boundaries, since a municipality is an administrative subdivision chartered by a state government. Accordingly, the Alabama State Legislature redrew Tuskegee in 1957. Back then, 42% of the electorate there was African American, a demographic development which promised more Black political influence.

Troubled, the State Legislature redrew Tuskegee's municipal boundaries, keeping merely ten Black voters (out of 420) within the redrawn city.[228] State Senator Sam Engelhardt, Jr., the man responsible for the new map, saw gerrymandering as an apt tool for voter suppression. Judicial precedent indicated that the courts would not intervene.[229] In the 1946 case *Colegrove v. Green*, the Supreme Court reiterated the "political question" doctrine. Basically, the drawing of district lines was a "political question" outside the reach of the courts, answerable only by the political branches. Justice Felix Frankfurter maintained that political questions were nonjusticiable, so the courts could not intervene.[230] Concerns over judicial involvement in "politics" extended as far back as 1849, when Chief Justice Roger Taney refused to enforce the Constitution's "guarantee to every State . . . a Republican Form of Government," in a dispute

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[227] Goluboff, *The Lost Promise of Civil Rights*, 123.
[228] *Opelika Daily News* Article, 23 February 1960, MC247, Box 234, Macon County, Alabama, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[229] Cortner, *The Apportionment Cases*, 71-72.
[230] Ibid., 20-21.

between rival claims to power in Rhode Island. Enforcing the Guarantee Clause, he conceded in *Luther v. Borden*, was the job of the political branches.[231]

Senator Engelhardt's work in Alabama, however morally dubious, made legal sense under the existing regime of precedents. That said, the Fifteenth Amendment remained a latent threat to *Luther* and *Colegrove*. *Smith v. Allwright* and the so-called "white primary cases" formed a separate strand of precedents counteracting the political question doctrine.[232] Whereas redistricting presented a nonjusticiable issue, racial discrimination in the electoral process itself could warrant judicial intervention.[233] *Gomillion v. Lightfoot*—the case name for Alabama's gerrymander litigation—implicated both of these strands.[234]

Filed in 1958 by the Tuskegee Civic Association, *Gomillion* reached the Supreme Court two years later from the Middle District of Alabama.[235] A group of Tennesseans working on a separate but related case, *Baker v. Carr*, watched the developments eagerly. The *Baker* lawyers saw in *Gomillion* an opportunity to overturn the political question doctrine.[236] For its part, the Division's Appeals and Research Section kept tabs on *Gomillion*. As early as February 23, 1960, Section Chief Greene received a memorandum noting "the independent interest of the government in the cause of the [*Gomillion*] petitioners," "urging the Supreme Court to grant certiorari" and take up the case, and advising that "should the writ be granted, we [the Justice Department] would, of course, expect to file a brief, amicus curiae."[237] An *amicus curiae* or

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[231] Ibid., 11. The quotation comes from U.S. Const. art. IV, § 4.
[232] Ibid., 72.
[233] Ibid., 72-73.
[234] Ibid. 72.
[235] Seventh Anniversary Celebration of the Crusade for Citizenship Brochure, 23 June 1964, MC247, Box 113, Negro Organizations: Tuskegee Civic Association, 1957-1965, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[236] Cortner, *The Apportionment Cases*, 78.
[237] *Gomillion v. Lightfoot* Memorandum, 23 February 1960, Box 13, 1960, Harold H. Greene Papers, Library of Congress, Washington, D.C.

"friend of the court" brief is a brief filed by a third party. In a 1963 *Yale Law Journal* article entitled "The Amicus Curiae Brief: From Friendship to Advocacy," Samuel Krislov, Associate Professor of Political Science at Michigan State University, quoted the lawyer and writer Newman Levy, who likened the *amicus* brief to "an endorsement on a note . . . to tell the court that we agree with the appellant and we hope it will decide in his favor."[238] Assisted by three Appeals and Research lawyers—Greene, D. Robert Owen, and Nick Flannery—Eisenhower Solicitor General J. Lee Rankin signed off on the filing.[239]

After the Supreme Court agreed to hear the case, at issue was whether the Court should overturn *Colegrove*.[240] In its *amicus* brief, the Justice Department eloquently articulated the interconnectedness of redistricting and voting rights. Alabama's racial gerrymander was "a method for accomplishing indirectly what [the State] could not do directly, namely, depriving its Negro citizens of their constitutional rights."[241] The right most directly deprived was access to the franchise. Gerrymandering undermined the Fifteenth Amendment because it excluded African Americans from municipal elections. Nevertheless, the political question doctrine went unchallenged. In fact, the brief distinguished *Gomillion* from *Colegrove*. Unlike the latter case, it claimed, "the disenfranchisement here is not the result of a long-term population shift, but of a particular statute."[242] This distinguishing factor justified judicial intervention in "one area from which 'this Court has traditionally [not] held aloof'": "attempts by the States to discriminate against members of the Negro race."[243]

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[238] Samuel Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy," *Yale Law Journal* 72, no. 4 (Mar., 1963), 712.
[239] Brief for the United States as *Amicus Curiae* Supporting Petitioners at 19, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (No. 32).
[240] Cortner, *The Apportionment Cases*, 85-86.
[241] Brief for the United States as *Amicus Curiae* Supporting Petitioners at 5, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (No. 32).
[242] Ibid., 8.
[243] Ibid., 10.

In its ruling, the Court echoed the brief's evasion of political questions. Justice Frankfurter, writing for the majority, struck down Alabama's racial gerrymander, reasoning that gerrymandering designed to exclude Black voters presents a justiciable issue and violates the Fifteenth Amendment.[244] Notwithstanding this precedent, the *Baker* lawyers felt let down, having hoped for the final demise of *Colegrove*. Even so, the prospect that the Justice Department would be filing an *amicus* brief on their side in *Baker* elated them.[245] The significance of the Department's endorsement should not be understated. "Because the solicitor general is held in high esteem by the Court and is expert in Supreme Court practice," explains the historian Richard C. Cortner, "his participation in nongovernmental litigation before the Court is highly advantageous to the party he supports and is therefore much sought after."[246] The historian Gene Graham adds that "his entry automatically would extend the length of time they would have in which to argue their case" and indicate *Baker* "was not simply a lawsuit from Tennessee, but a perplexing problem in which many states and millions of citizens . . . had enormous stakes."[247] Yet it would be a mistake to credit the Solicitor General solely. The Division's Appeals and Research Section, as seen in *Gomillion*, actually did the hard work of preparing "briefs for or against certiorari and on the merits in the Supreme Court."[248] Kennedy Solicitor General Archibald Cox indirectly confirmed this fact. Years after the case, he admitted the possibility that Rankin "had authorized the Civil Rights Division to prepare a brief which would be revised in the office of the Solicitor General."[249]

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[244] Cortner, *The Apportionment Cases*, 87.
[245] Ibid., 77.
[246] Ibid., 76.
[247] Gene Graham, *One Man, One Vote:* Baker v. Carr *and the American Levellers* (Boston: Atlantic Monthly Press, 1972), 209-10.
[248] U.S. Department of Justice, *Report of Assistant Attorney General W. Wilson White in Charge of the Civil Rights Division*, 1958.
[249] Graham, *One Man, One Vote*, 214.

One of the lawyers who would work on *amicus curiae* briefs was Howard Glickstein. Almost forty years later, in 1998, Glickstein revealed how he ended up at the Civil Rights Division: "I had been interested in civil rights since my days in high school." Even given his interest, the CRD rejected him twice; one of Glickstein's contacts found that "there was a feeling in the Division that they did not need to hire a New York Jew." Fortunately, the New Yorker received a big break when Harold R. Tyler became Assistant Attorney General in 1960.[250] The latter expanded the CRD, hiring twelve new lawyers and securing an appropriation worth $100,000. Earlier expansions had been driven by Justice Department lawyers who transferred from other divisions; not so with Tyler's. To acquire the best talent, he contacted the faculties of law schools throughout the Northeast and Howard University.[251] Among the new lawyers brought on by Tyler was Glickstein, who was practicing privately before joining Greene's Section. "One of the first assignments I was given," he reminisced, "was to recommend whether the United States should file an amicus brief in support of a petition for certiorari in . . . *Baker v. Carr*."[252]

The story of *Baker* began in 1901, when the Tennessee State Legislature passed an apportionment act that drew the district lines for state house and senate seats.[253] More than half a century later, those lines remained the same. But much had changed with respect to Tennessee's demographics. Cities expanded, such that—underscored the Justice Department's *amicus curiae* brief—"a vote in Stewart or Chester County has almost eight times the weight of a vote in Shelby or Knox County"; Shelby and Knox Counties contain Memphis and Knoxville,

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[250] Glickstein et al., "Civil Rights Division Association Symposium," 965.
[251] Lichtman, "The Federal Assault," 351.
[252] Glickstein et al., "Civil Rights Division Association Symposium," 966.
[253] Cortner, *The Apportionment Cases*, 29.

respectively.[254] Such disparities in voting power translated into fewer seats for urban constituencies. Despite dwarfing the electorate of rural Moore County by 310,005 voters, Shelby County had only six additional state representatives. Overall, sixty-three out of ninety-nine state representatives answered to 40% of the state electorate. As for the State Senate, the malapportionment was not any better: thirty out of thirty-three state senators answered to 37% of the electorate.[255] Stanley H. Friedelbaum, Associate Professor of Political Science at Rutgers University, likened the whole mess to a "rotten borough system."[256]

Denied effective and equal representation, cities lost vital policy battles. One Massachusetts politician took note and penned an op-ed on the matter in 1958, just one year before *Baker* was filed in the U.S. District Court for the Middle District of Tennessee. Urban pollution and poverty, opined Senator John F. Kennedy, were symptoms of a larger sickness: "that these local governments receive all too little help . . . from Washington and state legislatures." Kennedy blamed malapportionment as "the root of the problem," for "the failure of our governments to respond to the problems of the cities reflects this . . . discrimination."[257]

Litigating as they did amid the 1960 presidential election, the *Baker* lawyers could not help but notice that the once-obscure Massachusetts Senator was now the Democratic nominee. Kennedy's article led the legal team to believe that a Kennedy Justice Department would file an *amicus curiae* brief on their side. The *Baker* lawyers esteemed DOJ intervention so much that they had taken the bold step of contacting the Eisenhower Justice Department and, later, the

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[254] Brief for the United States as *Amicus Curiae* on Reargument Supporting Petitioners at 17-18, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6).
[255] Phil C. Neal, "Baker v. Carr: Politics in Search of Law," *The Supreme Court Review* (1962): 254.
[256] Stanley H. Friedelbaum, "*Baker v. Carr*: The New Doctrine of Judicial Intervention and its Implications for American Federalism," *University of Chicago Law Review* 29 (1962): 673.
[257] John F. Kennedy, "The Shame of the States," *The New York Times*, May 18, 1958.

Kennedy transition.[258] *Baker* lawyer Charles Rhyne called Solicitor General Rankin directly. To prove that the "case presents the administration with a good opportunity," *Baker* lawyer Z. T. Osborn stressed two factors, both of which invoked politics. *Baker* was "a voting right [*sic*] case . . . which involves something more than the Negro question" and "involves the right of city dwellers with which the Republican Party has had less than the 'edge.'"[259] In the end, the Eisenhower administration lacked the time to file the brief it had greenlit and drafted.[260]

Thus, the Kennedy administration finished the fight, eventually producing two briefs: one for the first argument, the other for reargument. Still, both briefs shared a commitment to "securing a decision upon the narrowest possible grounds," as noted by Cortner.[261] Those narrow grounds entailed the removal of *Colegrove* as precedent and the recognition that redistricting presents a justiciable issue.[262] Both briefs skirted the question of what relief should actually look like; this question remained unanswered until 1964, when the Court decided *Reynolds v. Sims* and promulgated "One Person, One Vote"—the principle that districts should contain equivalent populations.[263] In the meantime, the Justice Department floated a variety of possibilities for relief: an at-large election and weighted voting, among others.[264]

Though it became salient in subsequent litigation, the relief question was not as central to *Baker*. "The most compelling argument the appellants possessed in *Baker v. Carr*," concluded Cortner, "was that apportionment and voting were indivisible and that gross discrimination in apportionment was as offensive constitutionally as the denial of the right to cast a ballot."[265]

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[258] Cortner, *The Apportionment Cases*, 77 and 89.
[259] Ibid., 77.
[260] Ibid., 90.
[261] Ibid., 103.
[262] Ibid., 103-04.
[263] Ibid., 227-28.
[264] Ibid., 108.
[265] Ibid., 117.

Indeed, the first *amicus curiae* brief capitalized on developments associated with African-American voting rights. It cited *Gomillion v. Lightfoot* to argue that *Colegrove* "has subsequently been undermined by later developments."[266] In the reargument brief, its authors—who included CRD lawyers Greene, Glickstein, and David Rubin—cautioned against efforts "to distinguish *Gomillion* from the present case," observing that "a case is not the more justiciable because it involved racial discrimination and arises under the Fifteenth, instead of the Fourteenth, Amendment."[267] For all their timidity, the Civil Rights Acts of 1957 and 1960 brought congressional considerations into the conversation. "Congress," argued the first brief, "made clear a national policy that . . . the right to vote should be afforded federal protection to the fullest possible extent," with protection taking "the form of court action."[268]

Both briefs group *Gomillion v. Lightfoot* and *Baker v. Carr* together, and connect the latter case, however indirectly, to the Black freedom struggle. The Justice Department linked *Baker* to *Gomillion* and the Black freedom struggle because the Black population was increasingly concentrated in the urban cities of the South. During the Great Migration. African Americans moved not only from the rural South to the urban North, but also from the rural South to the urban South. Atlanta, Louisville, Memphis, and New Orleans all grew during this time.[269] According to the sociologist Doug McAdam, the "overwhelming" majority of NAACP Southern

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[266] Brief for the United States as *Amicus Curiae* on Supporting Petitioners at 10, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6).
[267] Brief for the United States as *Amicus Curiae* on Reargument Supporting Petitioners at 59-60, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6).
[268] Brief for the United States as *Amicus Curiae* on Supporting Petitioners at 11, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6).
[269] Luther Adams, *Way Up North in Louisville: African American Migration in the Urban South, 1930-1970* (Chapel Hill: University of North Carolina Press, 2010), 6.

chapters operated from Southern cities.[270] Malapportionment disenfranchised the increasing number of Black voters who lived in cities.

It would be a mistake, therefore, to dismiss *Baker* for not concerning African-American voting rights exclusively. The Civil Rights Division did not see things that way. According to a note written by CRD lawyer John Doar, *Baker* enjoyed prominence within the CRD long before the Supreme Court decided the case. In an April 1961 staff meeting, Greene said there was "lots of demand for [*Baker*] briefs."[271] The fact that *Baker* came up this early in the Division's deliberations implies its importance to the CRD. More than a year later, on October 26, 1962, Greene recommended David Rubin for promotion. "Among the more outstanding of the cases in which Mr. Rubin has participated is Baker v. Carr," wrote the veteran Section Chief.[272] With the Cuban Missile Crisis in full swing, the specter of nuclear war did not deter Greene from thinking about redistricting. *Baker* was significant enough to merit Rubin's promotion. Also, the Division's publications consistently trumpeted its contributions to the case. In the Attorney General's Annual Report to Congress for 1962, the CRD asserted that "the analysis set forth in the Section's amicus brief was substantially adopted by the Supreme Court in deciding . . . *Baker v. Carr*."[273] *Baker* was, in the words of the Attorney General's 1961 Annual Report, "a most unusual and significant case."[274] Almost forty years later—in 1998—Greene too would go out of

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[270] Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970* (Chicago: University of Chicago Press, 1999), 105.
[271] Staff Meeting - Friday - April 7, 1961, 7 April 1961, MC247, Box 237, Notes: Cases by Topic, etc. (2), John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[272] Promotion of David Rubin, 26 October 1962, Box 14, 1962-1963, Harold H. Greene Papers, Library of Congress, Washington, D.C.
[273] U.S. Department of Justice, *Report of Assistant Attorney General Burke Marshall in Charge of the Civil Rights Division*, 1962.
[274] U.S. Department of Justice, *Report of Assistant Attorney General Burke Marshall in Charge of the Civil Rights Division*, 1961.

his way to state, "We wrote amicus briefs to the Supreme Court . . . for landmark cases, such as *Baker v. Carr*."[275] To the Division's lawyers, then, redistricting clearly mattered.

Considering the consequential impact *Baker* had on voting rights (and on the urban Black vote), its omission from the scholarly literature on the Civil Rights Division becomes all the more mystifying. Contemporary observers understood the implications of the Supreme Court's decision. In the *University of Chicago Law Review*, Stanley H. Friedelbaum employed phrases like "the close of an era" and "a new epoch" to describe *Baker*.[276] Similarly, Deputy Attorney General Nicholas Katzenbach, writing for the *Vanderbilt Law Review*, recognized the case as "a first, and seemingly simple, step in the whole . . . process of reapportionment," one which constitutes "a great example of the rule of law in our society."[277] Katzenbach would oversee the Division's monitoring of at least fifty post-*Baker* redistricting cases.[278] In the thick of it all was David Rubin, whose new assignment—to monitor "private reapportionment litigation throughout the United States"—confirms the continuing importance of redistricting.[279] But no endorsement verifies *Baker*'s relevance more than Georgia Senator Richard Russell's. An infamous segregationist, he called the case "another major assault on our constitutional system."[280]

Russell had a reason to denounce *Baker*, for its ruling increased Black political representation. The experience of Tennessee remains instructive. It took the State Legislature more than two years afterwards to devise a reapportionment plan that satisfied the U.S. District

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[275] Glickstein et al., "Civil Rights Division Association Symposium," 961.
[276] Friedelbaum, "*Baker v. Carr*: The New Doctrine of Judicial Intervention," 702 and 704.
[277] Nicholas deB. Katzenbach, "Some Reflections on Baker v. Carr," *Vanderbilt Law Review* 15, no. 3 (June 1962): 829 and 836.
[278] Requested Amendment to Fiscal 1964 Budget Estimate, 5 October 1963, MC247, Box 94, Civil Rights Division Budget - 1964, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[279] Promotion of David Rubin, 26 October 1962, Box 14, 1962-1963, Harold H. Greene Papers, Library of Congress, Washington, D.C.
[280] Cortner, *The Apportionment Cases*, 145.

Court for the Middle District of Tennessee.[281] As a result of the reapportionment, cities found themselves split into smaller districts. This arrangement equalized the populations of legislative constituencies and made it easier for African-American candidates to win in Knoxville, Memphis, and Nashville.[282] "You could not have said to a Negro in Nashville in 1946, or really until *Baker v. Carr*," reflected *Baker* lawyer Z. T. Osborn, "that you have any possibility of electing yourself or the most respected member of your community to the legislature."[283] Increased Black political representation seems to have spread elsewhere too. The Atlanta journalist Bruce Galphin, reflecting in 1969, identified "the most dramatic visible change" as "the appearance of a few black faces on the floors of halls that in the early days of this decade still maintained segregated public galleries."[284] What orchestrated this change was "reapportionment, combined with the Voting Rights Act."[285]

Though it would later generate fierce controversy, the standard of "One Person, One Vote" stands as another *Baker* outgrowth. The phrase itself comes from Justice William O. Douglas's opinion in a 1963 case, *Gray v. Sanders*. Previously, Georgia had employed a county unit system for statewide primaries. Successful nominees needed to win a plurality of counties, rather than a plurality of citizens.[286] This system favored the sparsely populated, but numerically numerous, rural counties.[287] "The practical effect of this system," reckoned Justice Douglas, "is that the vote of each citizen counts for less and less as the population of his county increases."[288] As arcane as such a system may seem, it decided who would fill key statewide offices, including

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[281] Graham, *One Man, One Vote*, 282.
[282] Ibid.
[283] Ibid., 275.
[284] Ibid., 283.
[285] Ibid.
[286] Hasen, *The Supreme Court and Election Law*, 21.
[287] *Gray v. Sanders*, 372 U.S. 368, 379 (1963).
[288] *Id*. at 368.

the governorship. CRD lawyers intervened once again, with "Assistant Attorney General Marshall, . . . Harold H. Greene, David Rubin and Howard A. Glickstein" listed as authors on the Justice Department's *amicus curiae* brief. Attorney General Robert F. Kennedy argued the case himself, a notable sight since attorneys general seldom appear before the Supreme Court.[289]

This time, the Court overstepped the brief's limited argument. The latter stressed "that the Court should delete those portions of the decree below" and that "adjudication of the constitutionality of any party statute or party rule . . . should await the action of the state authorities."[290] But the One Person, One Vote standard did not necessarily flow from this premise.[291] Dissenting, Justice John Marshall Harlan II contested the notion that One Person, One Vote was ever "the universally accepted political philosophy in England, the American Colonies, or in the United States."[292] While Douglas did not divine that standard from the Department's brief, he did rely on precedents created by lawyers in the Civil Rights Division and the Civil Rights Section. Douglas quoted *United States v. Classic* (and *Gomillion* later) to hold that the Constitution protects the ballots cast by primary voters.[293] He also cited *Baker* as confirmation that the plaintiffs could file suit and seek judicial redress.[294]

The Civil Rights Division may not have supported One Person, One Vote, but it certainly laid the groundwork for such a standard. In Douglas's own words, "political equality . . . can mean only one thing—one person, one vote."[295] The implications were not insignificant. In *Wesberry v. Sanders*, a 1964 case, the Supreme Court rejected the constitutionality of unequal

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[289] *Id*. at 370.
[290] Brief for the United States as *Amicus Curiae* Supporting Appellants at 19, *Gray v. Sanders*, 372 U.S. 368 (1962) (No. 112).
[291] Hasen, *The Supreme Court and Election Law*, 22.
[292] *Gray v. Sanders*, 372 U.S. 368, 384 (1963).
[293] *Id*. at 380.
[294] *Id*. at 375.
[295] *Id*. at 381.

districts for the U.S. House of Representatives. And in *Reynolds v. Sims*, the Court mandated equal districts for state legislatures.[296] The legal scholars Geoffrey R. Stone and David A. Strauss deem One Person, One Vote "an established principle," because it "had foundations in American constitutional traditions . . . characterized by an evolution toward equality in voting rights."[297] This chapter makes clear that the CRD played a role in the redistricting revolution and explains what its role entailed. The Division's lawyers helped expand judicial power over a domain hitherto reserved for the political process.

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Before the *Baker* lawyers, Solicitor General Cox, and the Civil Rights Division could land a blow against malapportioned systems, John F. Kennedy first had to be elected President of the United States. The 1960 presidential election was remarkably close: Kennedy eked out a 118,574 vote-margin over Nixon, winning a plurality rather than a majority.[298] With the gap this close, historians have emphasized the Black vote as crucial to Kennedy's narrow victory. They cite his October 26th call to Coretta Scott King. After Georgia police imprisoned Martin Luther King, the Democratic nominee—at the urging of his aide Harris Wofford—called Coretta Scott King to convey his sympathy for her husband's plight. Predictably, Southerners fumed; Robert F. Kennedy was apoplectic at first, worried that the call would cost his brother the South. African Americans, on the other hand, gravitated toward JFK in what became a 30% swing. Given the Great Migration, Black voters likely swung Illinois, Michigan, New Jersey, and Pennsylvania to

[296] Hasen, *The Supreme Court and Election Law*, 22.
[297] Stone and Strauss, *Democracy and Equality*, 87.
[298] Robert Dallek, *An Unfinished Life: John F. Kennedy, 1917-1963* (New York: Little, Brown and Company, 2003), 294.

Kennedy's column.[299] This theory was so plausible that the President-elect, reports Branch, fretted over "the new perception of him as a man beholden to Negro voters."[300]

These expectations placed "high hopes" on Kennedy's ability to deliver where his predecessor could and would not. David Roberson—an African-American resident of Forrest County, Mississippi, and witness in *United States v. Lynd*—captured that optimistic aura surrounding JFK: "Kennedy sounded so different from all the others who campaigned for president. You got a feeling that he was going to include all of the citizens of the country, rather than just the white leadership." Roberson even pinpointed "the Kennedy campaign for the presidency" as "the real turning point" from his perspective.[301] Kennedy's idealistic campaign rhetoric and call to Coretta Scott King encouraged African Americans throughout the country, not just Roberson. Soon the Southern Regional Council, an Atlanta-based organization that researched civil rights, mobilized to publish a report, *The Federal Executive and Civil Rights*.[302] "The Presidency is the center of American energy," it read. "What the President says and does will mark the direction and the speed with which the country moves to perfect its racial relations."[303] Activists laid the onus for action on Kennedy's shoulders, expecting much out of him. With respect to voting rights, the report advocated "a registration drive, spurred by the prestige of the President and sustained by his subordinates."[304] Kennedy adopted Richard Neustadt's view on presidential power instead.[305] A Columbia political scientist, Neustadt wrote the influential 1960 book *Presidential Power: The Politics of Leadership*, which posited that

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[299] Branch, *Parting the Waters*, 374.
[300] Ibid., 376.
[301] Martin, *Count Them One by One*, 93.
[302] Faulkenbury, *Poll Power*, 9 and 38.
[303] *The Federal Executive and Civil Rights*, January 1961, MC247, Box 237, The Federal Executive and Civil Rights, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[304] Ibid.
[305] Dallek, *An Unfinished Life*, 306 and 379.

presidential power essentially amounted to persuasion. "Laws and customs now reflect acceptance of [the president] as the great initiator," acknowledged Neustadt. "But such acceptance does not signify that all the rest of government is at his feet."[306] Sandwiched between two competing views on the office he would occupy, the President-elect opted for Neustadt's circumspection, much to the chagrin of activists later.

As important as ideas were during the transition, so too were personnel matters. Led by Democratic Party-elder Clark Clifford, the Kennedy team settled on several key appointments: J. Edgar Hoover would keep his job as FBI Director and Robert F. Kennedy would become Attorney General. Sargent Shriver, the Kennedys' brother-in-law, wanted the liberal Harris Wofford to be the new Assistant Attorney General for Civil Rights.[307] On paper, Wofford appeared to be the most logical pick. He had orchestrated the Kennedy-King Call and, in his youth, studied law at Howard University, an unusual choice for a white student.[308] What Shriver saw as impeccable civil rights credentials was anathema to Byron White, the incoming Deputy Attorney General and future Supreme Court Justice.[309] White favored Burke Marshall, who practiced corporate and antitrust law, over Wofford.[310] RFK interviewed Marshall, though neither man said much; they mainly stared at each other in awkward silence. CRD lore would fittingly name the first Kennedy-Marshall encounter the "silent interview." A dejected Marshall did not expect Kennedy's job offer, thinking himself better suited to be Assistant Attorney General for Antitrust. He and Shriver, however, missed what Kennedy and White were seeking: "an elite lawyer too smart to make mistakes, too self-possessed to blunder compulsively into

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[306] Richard Neustadt, *Presidential Power: The Politics of Leadership* (New York: John Wiley & Sons, Inc., 1960), 6.
[307] Branch, *Parting the Waters*, 387.
[308] Ibid., 207.
[309] Ibid., 387.
[310] Ibid., 387-88.

controversy."[311] Unlike Wofford, whom Kennedy "didn't want . . . as head of the Civil Rights Division," Marshall fit that mold.[312]

Another critical moment was the decision to keep John Doar, a Republican, in the Civil Rights Division. Like Marshall, Doar initially lacked civil rights credentials. Doar's closest brush with civil rights before 1960 came when he left his native Wisconsin to attend Princeton University, the alma mater of two Southern presidents: James Madison and Woodrow Wilson. "My friends from the South acknowledged that they had a problem, but they had to solve it for themselves," recalled Doar. "The worst thing that could happen to the country would be if any Yankees came down and messed with it."[313] Doar did not see the South's "problem" as the South's alone. Loyal to Wisconsin, he worried that the state was "a second-class State." Conversely, Southern states, "with the one-party system, the southern senators, the southern Congressmen, controlled most of the activities in the House and the Senate," a privilege which Doar "didn't think . . . was right for Wisconsin." So when Assistant Attorney General Tyler offered him a job at the CRD, he accepted, moving to Washington in July 1960.[314]

In hindsight, Tyler's offer facilitated the Division's development. Before Doar, the Civil Rights Division had followed the CRS practice of "waiting for complaints to come into its office before taking any action."[315] After Doar, CRD lawyers took the initiative, performing tasks normally done by the FBI. Director Hoover's hostility to civil rights, coupled with the fact that

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[311] Ibid., 388.
[312] "Burke Marshall Oral History Interview - RFK, 1/19-20/70," *John F. Kennedy Presidential Library and Museum*, January 1970, https://www.jfklibrary.org/asset-viewer/archives/RFKOH/Marshall%2C%20Burke/RFKOH-BM-01/RFKOH-BM-01.
[313] Brian K. Landsberg et al., "Symposium: Voices of the Civil Rights Division: Then and Now (October 28, 2011)," *McGeorge Law Review* 44, no. 2 (2013): 293.
[314] Ibid., 294.
[315] Carr, *Federal Protection*, 124.

local FBI agents shared local prejudices, necessitated this departure from CRS tradition.[316] Consequently, Doar embraced field work, which Branch dubs his "pioneering trademark."[317] What made it so intensive was the sheer amount of preparation that went into a typical trip. "Division lawyers had to master everything . . . [about] a distant and unknown territory," clarified Doar. They scrutinized "the back roads; the operations of county registrar's offices; the states' registration laws; 100 years of history."[318] And the studying did not end after a trip. CRD lawyer Gordon A. Martin confirmed that "field operatives of the Civil Rights Division spent the full workweek in Washington, analyzing . . . records." Martin himself developed "a headache looking at thousands of pages photographed by the FBI on murky microfilm."[319] The travel was grueling as well. CRD lawyers typically spent "sixteen straight days in the field" per trip. Such prolonged absences, often done on a "county by county" basis, strained marriages and tested stamina.[320]

Not only did the Kennedy administration keep Doar, but it also ramped up field work—a shift toward greater positive mobilization. The new Attorney General, by all accounts, approached voting rights with a gung-ho attitude. In his 29 January 1961 diary entry, a little over a week after John F. Kennedy assumed the presidency, Doar noted that "K [Robert F. Kennedy] wanted to act quick" and "smack" Southerners with "federal income tax investigations." RFK naively expected that these measures would "get [him] help in [the] voting field from Southern politicians."[321] Around the same time, he instructed Marshall and Doar, "You've got to do

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[316] Michal R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-*Brown *South* (Athens: University of Georgia Press, 1995), 113.
[317] Branch, *Parting the Waters*, 335.
[318] Doar, "The Work of the Civil Rights Division," 4.
[319] Martin, *Count Them One by One*, 42.
[320] Doar, "The Work of the Civil Rights Division," 4.
[321] Civil Rights Diaries, 29 January 1961, MC247, Box 261, 1961, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.

more." The new Assistant Attorney General famously replied, "Well, General, we're going to need more lawyers." Kennedy greenlit the hiring of additional personnel, among whom was Gordon A. Martin.[322] Unlike his brother, whose position inherently demanded that he monitor the Black freedom struggle, President Kennedy preferred to avoid the issue altogether. Distracted by the Bay of Pigs and his upcoming Vienna Summit with Soviet premier Nikita Khrushchev, he was content to prioritize foreign policy over civil rights.[323]

Realistically, the President could not ignore Jim Crow forever. A new organization prevented him from relegating civil rights to the back burner: the Student Nonviolent Coordinating Committee (SNCC).[324] As its name suggests, SNCC consisted of college students. These young African Americans experienced disillusionment after *Brown v. Board of Education* failed to integrate the education system. "[W]e thought we would be going to better schools," lamented a SNCC member from Troy, Alabama, "and it just didn't happen."[325] John Lewis was not alone in feeling frustrated. A turning point for Lewis and his fellow members was the sit-in movement, which began in February 1960 with the Greensboro sit-ins.[326] The movement quickly spread to other Southern cities, including Nashville.[327] There, African-American students from local HBCUs—American Baptist Theological Seminary, Fisk University, Meharry Medical College, Tennessee State University—sought to desegregate public accommodations.[328] Lewis was one of them, and so too were icons like Diane Nash, James Bevel, and James Lawson.[329]

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[322] Doar, "The Work of the Civil Rights Division," 3-4.
[323] Branch, *Parting the Waters*, 434.
[324] Ibid., 479. Branch questions whether SNCC was an "organization." "SNCC was not really an organization," he claims, "having only one full-time staff member."
[325] Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York: Oxford University Press, 2011), 137.
[326] Ibid., 139.
[327] Ibid., 140.
[328] Branch, *Parting the Waters*, 274.
[329] Ibid., 280.

SNCC formally came into existence in April 1960, thanks to the efforts of Ella Baker.[330] She was a veteran of the NAACP and Martin Luther King's organization, the Southern Christian Leadership Conference (SCLC). During her time with the SCLC, Baker oversaw a 1958 registration drive called the "Crusade for Citizenship."[331] It fizzled out, falling short of its lofty ambition to "double the number of black voters by 1960."[332] Two years after the Crusade, Baker helped form another organization: SNCC.[333] Two unique features defined its design, as recognized by the historian Tomiko Brown-Nagin. First, SNCC tactically pursued "direct action," i.e., confrontational demonstrations; examples include sit-ins and freedom rides.[334] Second, SNCC strategically embraced "a democratic movement, one premised on lay, rather than expert, leadership."[335] "The organization," elaborates Brown-Nagin, "openly opposed the idea of top-down, professional and ministerial leadership of the civil rights movement."[336] Guided by a bottom-up approach to activism, SNCC—along with the Congress of Racial Equality—targeted segregated busing in the 1961 Freedom Rides.[337]

The ensuing crisis threatened to embarrass the Kennedy administration abroad, just as the President was embarking on his first state visits in Europe.[338] On June 16th, Robert F. Kennedy met delegates from the Freedom Ride Coordinating Committee—Diane Nash, Charles Jones, Charles McDew, and Charles Sherrod—inside DOJ headquarters.[339] The Attorney General issued a demand of sorts: direct confrontations like the Freedom Rides had to stop. Instead,

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[330] Brown-Nagin, *Courage to Dissent*, 140.
[331] Faulkenbury, *Poll Power*, 23.
[332] Ibid., 24.
[333] Brown-Nagin, *Courage to Dissent*, 140.
[334] Ibid., 175.
[335] Ibid.
[336] Ibid., 140.
[337] Branch, *Parting the Waters*, 412.
[338] Ibid., 472.
[339] Faulkenbury, *Poll Power*, 29.

suggested Kennedy, activists could register voters and focus on voting rights.[340] Unsurprisingly, the proposal to prioritize voter registration ignited fierce controversy within the activist community. During the June 16th meeting, Charles Sherrod angrily told the Attorney General, "It's not your responsibility . . . to tell us how to honor our constitutional rights."[341] Sherrod and the SNCC Freedom Riders recently imprisoned at Parchman saw voter registration as a cynical ploy by Washington, protesting that cooperation meant acceptance of a "bribe."[342]

After the June 16th meeting, RFK pulled out all the stops to promote voter registration. He and Burke Marshall arranged for *The New York Times* to publish a June 25th article entitled "Negro Vote Surge Expected in South."[343] It acknowledged that "Negro leaders . . . have viewed talk about the importance of Negro voting as a device to distract attention," but insisted "this attitude is now changing." Even MLK "and other leaders of the new militant movements," emphasized the *Times*, "have come around to agree that the vote is the key."[344] Given Kennedy's involvement, this article served to pressure the movement by underscoring the appeal of voter registration. Kennedy also enlisted the African-American celebrity Harry Belafonte, who reached out to his contacts within SNCC and donated $10,000 for a potential registration campaign.[345]

Leaving nothing to chance, the Kennedy administration played an instrumental role in the development of the Voter Education Project (VEP). Managed by the Southern Regional Council (SRC), the VEP distributed grants to registration campaigns throughout the South.[346] Private philanthropic foundations, such as the Taconic Foundation, provided the money for these grants.

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340 Ibid., 29-30.
341 Branch, *Parting the Waters*, 480.
342 Ibid., 480 and 485.
343 Ibid., 481.
344 Anthony Lewis, "Negro Vote Surge Expected in South," *The New York Times*, June 26, 1961.
345 Branch, *Parting the Waters*, 481.
346 Faulkenbury, *Poll Power*, 2 and 50.

Philanthropy, however, could not flourish without tax exemptions.[347] Because the Project's activities were possibly "political," the SRC needed the IRS to confirm that its tax-exempt status would not be jeopardized. "There was no guarantee," notes Evan Faulkenbury, "that the IRS would extend the SRC's tax exemption to the registration program."[348] Here was where the Administration's involvement became critical. Robert F. Kennedy spoke with the IRS Commissioner, Mortimer Caplin (his former law professor at the University of Virginia), securing the tax exemption.[349] Final confirmation from the IRS came in March 1962, and the VEP began operations shortly thereafter.[350]

Senior federal officials also helped coordinate the VEP itself. The President of the Taconic Foundation, Stephen Currier, hosted the Project's first strategy sessions. On July 28, 1961, a who's who of the civil rights movement gathered at his Manhattan office.[351] They included representatives from the Congress of Racial Equality, the NAACP, the National Urban League, the SCLC, SNCC, and the National Student Association.[352] It is simplistic to say that the VEP was taking direct orders from Washington. As noted by the historian Carl M. Brauer, "Currier . . . did not view himself as an agent of the Kennedy administration."[353] And neither did the Black luminaries—MLK, Thurgood Marshall, Roy Wilkins, Charles McDew, Marrion Berry, James Farmer, Whitney Young—who attended.[354]

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[347] Ibid., 36.
[348] Ibid., 55. This uncertainty led the SRC to stress the Project's educational aims. Careful to avoid accusations of political involvement, SRC leaders named their effort the "Voter Education Project."
[349] Ibid.
[350] Ibid., 56.
[351] Ibid., 47.
[352] Ibid., 47-48.
[353] Carl M. Brauer, *John F. Kennedy and the Second Reconstruction* (New York: Columbia University Press, 1977), 114.
[354] Faulkenbury, *Poll Power*, 47.

In the room alongside them were Burke Marshall and Harris Wofford.[355] Rather than control the VEP directly, the Kennedy administration recognized the opportunity that it presented and gave valuable support. This support consisted of tax exemption, coordination, and legal advice. At the July 28th meeting, Burke Marshall explained "the legal responsibilities of the Department of Justice" vis-à-vis voting.[356] His words were to foment controversy; activists would later charge that the Assistant Attorney General had assured them federal protection. Regardless of what he actually said, argues the historian Steven F. Lawson, "Marshall apparently left the impression."[357]

Even so, the time for retrospective disputes over federal promises had not yet arrived. Another important development in the meeting came when Martin Luther King—representing the SCLC—suggested that the SRC lead the VEP.[358] Each organization represented at the meeting participated in the VEP, albeit to varying degrees. SNCC, for example, would control and dominate the 1962 and 1963 Mississippi registration campaigns.[359] Despite the uneven participation, the Kennedy administration got what it wanted: an organization to steer civil rights away from the "direct action" of the Freedom Rides and toward voter registration.

The VEP still needed the support of the broader movement. African-American activists, after all, were not without agency and could have rejected the Administration's maneuvers. In August 1961 SNCC activists met at Tennessee's Highlander Folk School. What ensued was a dramatic showdown between those who defended direct action and those who thought of voter registration as a more promising goal. SNCC field secretary Charles Sherrod did not understate

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[355] Ibid.
[356] Ibid., 48.
[357] Lawson, *Black Ballots*, 265.
[358] Faulkenbury, *Poll Power*, 48.
[359] Neil R. McMillen, "Black Enfranchisement in Mississippi: Federal Enforcement and Black Protest in the 1960s," *The Journal of Southern History* 43, no. 3 (Aug., 1977): 361.

the stakes when he predicted that "the outcome of this meeting may determine the direction of the civil rights fight for years to come!"[360] Three days of stalemate followed. To prevent tensions from rising further, Ella Baker brokered a compromise. SNCC would pursue both programs simultaneously, with Charles Jones directing voting and Diane Nash overseeing direct action.[361]

Leading the charge to register Black voters was a New Yorker with a fitting last name, Robert Moses (who did not attend the Highlander Folk meeting). A son of Harlem and an alumnus of Harvard's graduate program in philosophy, Moses taught mathematics for some time at the prestigious Horace Mann School.[362] But the 1960 sit-ins piqued his interest in civil rights. "I could feel myself in the faces of the people that they had there on the front pages," he recalled.[363] Eventually Moses came down South to Mississippi and settled in McComb County.[364] The ex-math teacher now taught rural Black Mississippians the nuts and bolts of voting. At his first "class"—held on August 7, 1961—Moses covered the Mississippi Constitution and the registration form.[365] Unlike direct action, "voter registration," explains the historian John Dittmer, "had been the staple of black political activism in Mississippi for nearly a half century."[366] Thus, locals welcomed Moses's "revitalized registration effort."[367] One of those locals lived in nearby Amite County, E. W. Steptoe, a leader of the NAACP branch there. Both Moses and Steptoe would experience tragedy together over the next several years.[368]

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[360] Branch, *Parting the Waters*, 486.
[361] Ibid., 487.
[362] Ibid., 325-27.
[363] Dittmer, *Local People*, 102.
[364] Ibid., 103.
[365] Ibid., 105.
[366] Ibid., 104.
[367] Ibid.
[368] Ibid., 106.

In Washington, SNCC organizers worked closely with the Civil Rights Division, reviewing "targeting, demographics, law, and strategy."[369] John Doar advised them to target Georgia's Terrell County and Alabama's Dallas County.[370] Mississippi also came up in the Division's list of concerns. SNCC had, as early as July 1961, notified the Kennedy administration that it was targeting McComb County. Burke Marshall told Deputy Attorney General Byron White to expect "economic and other types of reprisals." The Assistant Attorney General warned, "we will have to move immediately" and obtain "court orders which may have to be enforced by federal marshals."[371] To Moses's chagrin, Marshall soon renounced the use of federal marshals, arguing that federalism prohibited it.[372]

Ultimately, the events that followed the June 16th meeting engendered conflicting expectations regarding federal protection. As the historian Neil R. McMillen states, there existed "an informal agreement," one part of which held that "the administration—or so black activists believed—[had] offered assurances of federal protection for black voting aspirants and voter-registration workers."[373] Such an assurance was too lofty to keep, given the Administration's political horizons. African Americans would endure terror, threats, and killings for the next two years, 1962 and 1963. Federal inaction "shattered" Black expectations, contends the historian Allan Lichtman, so much so that "the ensuing frustration manifested itself in the Selma demonstrations and helped produce the embryo of the black power movement."[374] Notwithstanding these shortcomings, the Civil Rights Division had achieved important progress in the years 1960 and 1961. *Amicus curiae* briefs improved the representation that urban voters

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[369] Branch, *Parting the Waters*, 487.
[370] Ibid.
[371] Dittmer, *Local People*, 108.
[372] Ibid., 109.
[373] McMillen, "Black Enfranchisement in Mississippi," 359.
[374] Lichtman, "The Federal Assault," 367.

received, many of whom were African American. The Division's field work would place it in close contact with local activists, ensuring greater cooperation between the government and the grassroots. Overall, Black bargaining and pressure had compelled the Kennedy administration to promote voter registration as a priority for the movement. More federal action would, in turn, encourage more African Americans to expect even more from their government.

Chapter Three: The Magnolia Quagmire: Positive and Negative Mobilization, 1961-1963

There is a town in Mississippi called Liberty, and there is a Department in Washington called Justice.

- *Joke told among activists registering Black voters in Mississippi*

For activists working to register African Americans, the backroads of Mississippi's Amite County promised dead ends and death threats. On one such road CRD lawyer John Doar and SNCC leader Robert Moses traveled in September 1961. Doar had learned that hostile white residents were gathering the license numbers of those who attended SNCC gatherings. To figure out who was behind this effort, he asked E. W. Steptoe, a farmer, for information.[375] Steptoe mentioned the names of two individuals, E. H. Hurst and Herbert Lee. The former was a state representative, "the most important white person in the area."[376] The latter, on the other hand, was an African-American tenant of Hurst's; Hurst and Lee had been acquaintances since boyhood. According to Steptoe, Lee would know who had gathered the license numbers. Unfortunately, Lee was absent when Doar and Moses came knocking, forcing a disappointed Doar to postpone the interview.

After his flights back to Washington, Doar reached DOJ headquarters in the thick of night, 10:00 p.m. on September 29, 1961.[377] Despite what must have been a day's worth of exhausting travel, the CRD veteran digested the contents of a startling memo: Hurst fatally shot Lee, insisting that he did so to defend himself. Moses, for whom Lee had served as an occasional

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[375] "Interview with John Doar," *Washington University in St. Louis University Libraries*, November 15, 1985, http://repository.wustl.edu/downloads/s1784n301.
[376] Doar, "The Work of the Civil Rights Division," 6.
[377] Ibid.

driver, gathered what evidence was available. He discovered that Louis Allen, an African-American logger, had not only witnessed the shooting but also contradicted Hurst's account. Allen, however, refused to go public, lest he and his family suffer violent reprisals. Meanwhile, Doar urged the FBI to conduct an autopsy before the burial of Lee's body.[378] No FBI autopsy took place, and the funeral itself was no less grinding. At one point, Lee's widow confronted Moses and cried, "You killed my husband!"[379]

The Herbert Lee murder illuminates the intimacy of violence in Mississippi. During the early 1960s, Black voters and activists faced intimidation—physical and economic—from state actors and vigilantes bent on maintaining the status quo. As chronicled in Chapter Two, the Kennedy administration established the expectation that federal protection would shield activists working to register African Americans. Yet CRD leaders and lawyers could not live up to this expectation, whether for Herbert Lee or others. This chapter argues that the subsequent failure to do so engendered "negative mobilization." In other words, disappointed activists increasingly embraced more innovative but militant forms of protest. The most notable example of this was the 1963 Freedom Vote, a mock gubernatorial election. Aside from negative mobilization, the Justice Department promoted social change by inadvertently showing the inadequacy of litigation. CRD cases enjoyed limited success, but remained too slow and piecemeal to undo Jim Crow. With litigation stymied by its inherent limitations, the federal government would increasingly embrace more innovative but radical reforms.

The final thread underlying this chapter is the role of rank-and-file lawyers, especially Thelton Henderson and David L. Norman. Both men illustrate the impact individuals can have vis-à-vis institutions. In Henderson's case, there is an additional complicating factor: race. As

[378] Branch, *Parting the Waters*, 511.
[379] Ibid., 510.

one of the Division's few Black lawyers, he spotlights the diversity struggles that shaped the CRD, a predominantly white entity. Such struggles were microcosms of larger conversations about race and representation in American life.

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Before John F. Kennedy assumed the presidency, Mississippi was a state where no CRD lawyer had filed suit. One of its two senators, the powerful James Eastland, chaired the Senate Judiciary Committee. Hence, some historians have speculated that an unofficial understanding existed between the Eisenhower Civil Rights Division and Eastland; no litigation would target Mississippi considering his chairmanship and political leverage.[380] Attorney General William P. Rogers and Assistant Attorney General Harold R. Tyler both adopted a "'Don't offend Eastland' attitude."[381] Their moratorium on litigation ended with the advent of the Kennedy administration.

One of its first cases in the Magnolia State was *United States v. Lynd*. A civil action, the case addressed Forrest County registrar Theron Lynd's suppression of Black votes. Lynd was not the first registrar to do so in Forrest County, a jurisdiction fittingly named for Confederate general and KKK founder Nathan Bedford Forrest.[382] Lynd's predecessor, Luther Cox, had turned away African-American applicants as well; fifteen unsuccessfully sued Cox in 1950.[383] Two years later—in 1952—nine African Americans tried again. When rejected, they each sent affidavits to the NAACP, "at a time when SNCC, the Congress of Racial Equality (CORE), and

[380] McMillen, "Black Enfranchisement in Mississippi," 355.
[381] Martin, *Count Them One by One*, 32.
[382] Ibid., 9.
[383] Ibid., 4.

the Southern Christian Leadership Conference (SCLC) were still unheard of."[384] In fact, the Forrest County NAACP began on September 4, 1946, long before the tumult of the 1950s and 1960s.[385] Thurgood Marshall forwarded the nine affidavits to the Justice Department and asked that the Criminal Division undertake "the necessary definitive action to insure the protection of the right of qualified Negro electors to register and vote in the State of Mississippi."[386] For four years the Criminal Division did little to remedy the situation.[387]

Meanwhile, Theron Lynd challenged Cox in the 1955 primary election for country registrar. The former lost to the latter but won in the 1959 special election, held because Cox had died a few months prior.[388] It may have helped that Lynd ran on a promise to continue the policies of his predecessor and former opponent, a man whom he hailed as having done "an outstanding job" and "served us so well."[389] Contrast this promise with that of his unsuccessful 1955 campaign. CRD lawyer Gordon A. Martin, reflecting on Lynd's conduct in the 1955 race, concluded, "There was no public sign [then] that Theron Lynd understood that his main task as circuit clerk would be to deny black people the right to vote."[390] So in August 1960 it would be Lynd who would enforce Jim Crow's grip on the franchise. The opening salvo of *United States v. Lynd* came that very month, when the Justice Department cited the Civil Rights Act of 1960 to request registration records from Forrest County.[391] Given the abysmal number of registered Black voters, one can hardly fault the request. From 1949 to 1961, only fourteen African Americans registered out of an eligible voting population of 7,500. All of those fortunate

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[384] Ibid.
[385] Ibid., 9.
[386] Ibid., 5.
[387] Ibid., 22.
[388] Ibid., 37-38.
[389] Ibid., 38.
[390] Ibid., 37.
[391] Ibid., 46; Garrow, *Protest at Selma*, 23.

fourteen were registered before 1954, meaning that zero African Americans made it to the rolls between 1954 and 1961.[392] To maintain the status quo, Lynd ignored the Department's August 1960 request for registration records.[393]

This case offers a useful in-depth look at CRD litigation for two reasons. First, *Lynd*—to quote the historian David Garrow—conveys "this greater problem centered around the substantial delays that many Justice Department suits . . . were experiencing in the federal district courts of the South."[394] Consider the fact that the Civil Rights Division filed its initial complaint on July 6, 1961 (with the Division's investigation dating back to April). But litigation stretched well beyond July 1963, more than two years later.[395] An internal CRD analysis found that "this case . . . shows the delay that can be occasioned by the District Court's refusal to proceed," notwithstanding "the rule of the Fifth Circuit . . . that in such an appeal the District Court should continue on with the case."[396] Second, *Lynd* had long-term implications for the Voting Rights Act of 1965. Martin, who participated in the case, contends that it "helped bring about the passage of the Voting Rights Act by demonstrating the limitations of the 1957 and 1960 statutes."[397]

One such limitation involved the power wielded by district court judges. In *Lynd* Judge William Harold Cox was the Division's stumbling block at the U.S. District Court for the Southern District of Mississippi. Ironically, President Kennedy appointed him to the bench as his first Southern judge. Burke Marshall defended the decision on the basis of senatorial courtesy,

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[392] Burke Marshall, *Federalism and Civil Rights* (New York: Columbia University Press, 1964), 32.
[393] Garrow, *Protest at Selma*, 23.
[394] Ibid., 22.
[395] Marshall, *Federalism and Civil Rights*, 33.
[396] Summaries of Cases, 1958 - Summer 1963: United States v. Lynd, n.d., MC247, Box 32, Operating Files: Voting: General (Status Reports, Voting Rights Act, etc.), John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[397] Martin, *Count Them One by One*, 8.

the tradition under which presidents defer to senators for appointments made in their respective states. In this case, Senator Eastland's word held sway. "To not appoint Judge Cox," stressed Marshall, "you would have had to attack the entire system of judicial selection."[398]

Even so, senatorial courtesy forced Marshall and the Kennedys to gloss over the Judge's friendship with the segregationist Eastland.[399] A witness in *Lynd*—Jesse Stegall—remembered the "really depressing" images and mural adorning the courtroom wall, hung presumably with Judge Cox's consent. The images showed African Americans picking cotton while the mural portrayed "happy plantation life."[400] Such was the atmosphere in which the CRD lawyers and their African-American witnesses detailed Theron Lynd's suppression of Black votes. Judge Cox actively aided Lynd and his lawyers throughout the proceedings, asking questions that would have the record reflect Lynd's "neutrality" toward race: "What you are saying is that the criteria you use for both white and colored are alike?"[401] The CRD analysis therefore concluded that *Lynd* "shows the difficulties experienced in the Southern District Court."[402]

As for the African-American witnesses, several of them were highly educated yet still failed the tests. Eloise Hopson was a teacher with a master's degree from Columbia University.[403] For his part, the Reverend Wendell Phillips Taylor exuded "a unique aura of sophistication."[404] "I was a graduate of Columbia University, was in a class with John Eisenhower, the president's son," recalled the Reverend. "Here's a man [himself] who has a

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[398] "Marshall, Burke: Oral History Interview - JFK #4," *John F. Kennedy Presidential Library and Museum*, June 14, 1964, https://www.jfklibrary.org/asset-viewer/archives/JFKOH/Marshall%2C%20Burke/JFKOH-BM-04/JFKOH-BM-04.
[399] Ibid.
[400] Martin, *Count Them One by One*, 65.
[401] Ibid., 178-79.
[402] Summaries of Cases, 1958 - Summer 1963: United States v. Lynd, n.d., MC247, Box 32, Operating Files: Voting: General (Status Reports, Voting Rights Act, etc.), John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[403] Martin, *Count Them One by One*, 99.
[404] Ibid., 158.

master's degree, in a class with the president's son, and can't vote."[405] All in all, CRD lawyers would call five teachers, each of whom held a master's degree.[406] These witnesses were, in Martin's words, "our greatest strength" and "the most damning evidence of Theron Lynd's discrimination."[407] When defending the constitutionality of the Voting Rights Act of 1965, Chief Justice Earl Warren mentioned them in *South Carolina v. Katzenbach*: "In Forrest County, Mississippi, the registrar rejected six Negroes with baccalaureate degrees, three of whom were also Masters of Arts."[408] This rejection, writes Martin, "flagged the whole registration process as a farce."[409] The Chief Justice cited the farcical nature of registration as justification for the Voting Rights Act. One of its provisions empowered federal examiners to register voters. "This was clearly an appropriate response to the problem," ruled the Chief Justice, since "voting officials have persistently employed a variety of procedural tactics to deny Negroes the franchise, often in direct defiance or evasion of federal court decrees."[410] One cannot help but recall Lynd's defiance and evasion, facilitated by Judge Cox.

However farcical the registration process may have been, it paled in comparison to the inefficiencies afflicting the Division's litigation. *Lynd* and its companion cases testify to the inadequacy of "case-by-case litigation." "Having determined case-by-case litigation inadequate to deal with racial voting discrimination," opined Chief Justice Warren, "Congress has ample authority to prescribe remedies not requiring prior adjudication."[411] Indeed, Congress did consider the inefficiencies part and parcel of litigation. Attorney General Nicholas Katzenbach

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[405] Ibid., 163.
[406] Ibid., 59.
[407] Ibid., 51 and 101.
[408] *South Carolina v. Katzenbach*, 383 U.S. 301, 355 n.13 (1966).
[409] Martin, *Count Them One by One*, 10.
[410] *South Carolina v. Katzenbach*, 383 U.S. 335-36 (1966).
[411] *Id*. at 303.

testified before the Senate Judiciary Committee on March 23, 1965. In his testimony he observed, "Three times since 1956 [those who oppose stronger federal legislation] have said that local officials . . . will solve the voting problem." Unfortunately, such local control did little to bolster the Black vote. "The discouraging situation," explained Katzenbach, "exists largely because the judicial process, upon which all existing remedies depend, is unconstitutionally inadequate to deal with practices so deeply rooted in the social and political structure."[412] Almost four months earlier—in December 1964—the Attorney General specifically blamed "the litigation process" for remaining "a relatively slow method of overcoming discriminatory practices."[413]

While litigation promoted social change by inadvertently revealing its own inadequacy, CRD lawyers were able to make marginal improvements. One of those lawyers, David L. Norman, developed a tactic called "freezing." In essence, the Civil Rights Division asked that the courts subject African Americans only to the requirements affecting white voters "during the period within which the pattern of discrimination is found to exist." Otherwise a clever registrar could impose prohibited practices on African-American and white voters alike. Such a move technically did not discriminate but would have undermined an injunction. Since it lessened the possibilities for subterfuge, freezing constituted "perhaps the most notable victory achieved by the federal government," at least in the estimation of Steven F. Lawson.[414]

Consequently, David L. Norman deserves much credit for his clever tactic. His path to the Civil Rights Division was as remarkable as it was unlikely. During his childhood, Norman

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[412] Statement by Attorney General Nicholas deB. Katzenbach Before the Senate Committee on the Judiciary on S. 1564, A Bill to Enforce the Fifteenth Amendment to the Constitution of the United States, 23 March 1965, Box 19, Voting Rights Act of 1965 Vol. I, Harold H. Greene Papers, Library of Congress, Washington, D.C.
[413] Memorandum to the President on Voting Legislation, 28 December 1964, Box 19, Voting Rights Act of 1965 Vol. I, Harold H. Greene Papers, Library of Congress, Washington, D.C.
[414] Lawson, *Black Ballots*, 268.

made the mistake of gazing at a partial eclipse, a mistake which "severely" impaired his vision. Afterwards he matriculated at the Nebraska School for the Blind and, when World War II broke out, joined a Lockheed assembly line in California (via an "employ the handicapped" program). The California Department of Vocational Rehabilitation likely saved him from a life of menial labor, for its assessment recognized his "academic potential." Norman went off to Berkeley Law, where he studied by either having friends read his assignments aloud or using special optical devices. Despite these hurdles, the DOJ recruit graduated third in his class and joined the Criminal Division in 1956. After transferring to the Civil Rights Division a year later, he helped develop "methods for making detailed analyses of voting records." Norman then formulated freezing, saving the Division's lawyers time and energy.[415]

This tactic was by no means the sole success to emerge from litigation. As acknowledged previously, cases engendered positive mobilization. African Americans saw that the federal government supported their enfranchisement and felt encouraged to register and vote as a result. "Merely by filing franchise suits," concurs Lawson, "the Justice Department encouraged many Negroes to attempt to register."[416] Charles V. Hamilton elaborates further, writing that litigation "was especially utilized by voter registration workers, who then had an answer when blacks asked 'What's the use?'"[417] Norman himself affirmed the potency of positive mobilization. Recalling a case he brought before "Judge Dawkins," who was "nowhere near a decision," the CRD lawyer nonetheless emphasized its mobilizing effect: "I expect [we'll] get a thousand Negroes registered in that Parish and it won't make much difference what sort of ruling we get from Dawkins."[418] During his questioning, Norman made it a point to ask the registrar about the

[415] Bart Barnes, "DAVID L. NORMAN DIES AT 70," *The Washington Post*, February 8, 1995.
[416] Lawson, *Black Ballots*, 283.
[417] Hamilton, *The Bench and the Ballot*, 220.
[418] Ibid., 221.

registration process. “And the Negroes are sitting right there,” he noted, “and they leave the courtroom armed with all that information.”[419] Positive mobilization ensued.

Anecdotal evidence admittedly constitutes the bulk of the link between litigation and positive mobilization. The little empirical evidence that does exist, however, confirms African Americans’ optimism over their political future. In 1963, a *Newsweek*, Brink-Harris survey prompted Black respondents “to assess how they expected their situation five years from now to compare with their present status.” Among the issues examined was “being able to register and vote.” Although the percentage of lay African Americans who responded with “better-off” fell below 50% (specifically 42%), that percentage dwarfed “worse-off” responses (1%). As for Black leaders, the better-off percentage still outpaced the worse-off one, 15% to 2%. But the numbers vis-à-vis “white attitudes” reflect an even greater optimism. Remarkably, 73% of lay African Americans responded with better-off while only 2% did so with worse-off. Meanwhile, 93% of Black leaders responded with better-off while 0% did so with worse-off.[420] It is hard to imagine a more ringing endorsement for optimism than these numbers.

General optimism also translated into a greater willingness to take collective action; hence the mobilizing effect. “When asked whether they would be willing to participate in various forms of protest activity,” points out the sociologist Doug McAdam, “an amazingly large number of the respondents replied affirmatively.” Take “march in a demonstration”—51% of lay African Americans and 57% of Black leaders indicated their willingness to do so. For “go to jail,” 47% of lay African Americans and 58% of Black leaders answered likewise.[421] It is important to make a quick note on causality here. Yes, the survey did not ask its participants to identify the specific

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[419] Ibid., 220.
[420] McAdam, *Political Process and the Development of Black Insurgency*, 162.
[421] Ibid., 163.

reasons behind their optimism. That said, McAdam's observation is worth quoting: "Given the salience of the civil rights issue at the time of the survey, it would seem logical to interpret this discrepancy as at least a partial reflection of . . . what, in 1963, was perceived to be the likely direction of change in racial matters."[422] In the spirit of this statement, the salience of civil rights makes it logical to credit CRD litigation with partial responsibility.

One useful indicator of salience is the Citizens' Mail Analysis, written by the Division's Administrative Office. Throughout the autumn of 1963, the Civil Rights Division received mail from ordinary citizens expressing outrage over its perceived inaction. For October 10th, the analysis notes, "Writers allege [the] Justice Department has the power to intervene and charge that 'Southern Caucasian FBI officials are closely identifying themselves with the local officials.'"[423] Furthermore, the October 31st entry quotes two citizens—Sidney Hollander and the Reverend Laurice M. Walker—as condemning the CRD: "Surely it is mockery to press for new civil rights legislation if we do not use existing laws" and "I feel that you are directly responsible that this situation is allowed to continue," respectively.[424] The Division's mail, it must be said, was not universally in favor of civil rights. One writer, Madeline H. Squier of New Jersey, predicted that "the South will take care of the Kennedys at the 1964 Convention."[425] "Thirteen writers allege they voted for this Administration in 1960," reported the September 11th

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[422] Ibid., 161.
[423] Citizens Mail Analysis: October 10, 1963, 10 October 1963, MC247, Box 83, Administration: Telephone Logs and Citizens' Mail Analysis, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[424] Citizens Mail Analysis: October 31, 1963, 31 October 1963, MC247, Box 83, Administration: Telephone Logs and Citizens' Mail Analysis, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[425] Citizens Mail Analysis: September 18, 1963, 18 September 1963, MC247, Box 83, Administration: Telephone Logs and Citizens' Mail Analysis, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.

entry, "but say they will vote against it in 1964 because of its strong Civil Rights stand."[426] From these entries emerge two key takeaways. The first is that civil rights was politically risky. The second, that civil rights enjoyed enormous salience, positive and negative. CRD mail, much less broader discourse, conveys "the salience of the civil rights issue."[427]

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In all likelihood, CRD leaders did not need the Citizens' Mail Analysis to tell them that civil rights was fraught with political risk. Nevertheless, the grinding pace of litigation meant little to the activists who endured intimidation and violence, even murder. One joke became particularly popular among their ranks: "There is a town in Mississippi called Liberty, and there is a Department in Washington called Justice."[428] The joke's dark irony was indicative of the unmet expectations that soured activist attitudes toward the federal government. As chronicled in Chapter Two, Robert F. Kennedy and Burke Marshall set the expectation that—in the words of Neil R. McMillen—"offered assurances of federal protection for black voting aspirants and voter-registration workers."[429] Though Lawson emphasizes they were less of an explicit promise and more of an "impression," these assurances influenced activists nonetheless.[430]

As a result, the intersection of federal reluctance and activist hope set up the latter for disappointment. Beginning in the summer of 1962, the Voter Education Project buckled under

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[426] Citizens Mail Analysis: September 11, 1963, 11 September 1963, MC247, Box 83, Administration: Telephone Logs and Citizens' Mail Analysis, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[427] McAdam, *Political Process and the Development of Black Insurgency*, 161.
[428] Lawson, *Black Ballots*, 279.
[429] McMillen, "Black Enfranchisement in Mississippi," 359.
[430] Lawson, *Black Ballots*, 265.

the weight of unrelenting violence. More specifically, the Project's summer push for registration targeted Bolivar, Coahoma, Holmes, Leflore, Marshall, Sunflower (Senator Eastland's home county), and Washington Counties.[431] The backlash manifested itself via brute force: "frivolous arrests and police harassment, shootings from ambush, fire bombings, and unprovoked assaults."[432] To make matters worse, economic intimidation reared its ugly head. African Americans dependent on white employers found their livelihoods imperiled by layoffs. One CRD case, *United States v. Board of Education of Greene County*, dealt with the firing of an African-American teacher named Ernestine Talbert. Greene County removed her as a gesture of retaliation, since she sought to undergo voter registration and signed a CRD affidavit. "There can be no question," read the Division's appellate brief in the Fifth Circuit Court of Appeals, "but that the Civil Rights Act of 1957 prohibits the use of economic power to intimidate . . . for the purpose of interfering with the right to vote."[433] Talbert's firing confirms the economic nature of voter suppression, and how multifaceted it was in its assault against activists.

But physical peril persisted as the most visceral danger that visited those who fought for voting rights. One particular incident encapsulates this fact: the shooting of Jimmy Travis. VEP official Randolph Blackwell visited Greenwood, Mississippi, on February 28, 1963. That evening, Travis drove Blackwell and Moses around town. As the party left the local SNCC headquarters, a Buick followed in hot pursuit. Darkening his headlights, Travis tried to lose the menacing car. Suddenly, the crack of gunfire filled the air as window glass shattered. Two

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[431] McMillen, "Black Enfranchisement in Mississippi," 360.
[432] Ibid., 361.
[433] *United States v. Board of Education of Greene County* Brief for Appellant, n.d., Box 8, 1958-1964, Harold H. Greene Papers, Library of Congress, Washington, D.C.

bullets struck Travis—in his neck and his shoulder. He lost control, crashing along the side of Highway 82. Fortunately, no one was killed; Travis survived his wounds.[434]

Still, the news from Greenwood sent a jolt through the Mississippi movement. A furious Wiley Branton of the Southern Regional Council fired off a telegram to the Kennedy administration, portions of which were made public by *The New York Times*.[435] In his March 1st telegram, Branton warned that he and his colleagues would launch "a concentrated, saturation campaign" targeting Leflore County. This warning came, clarified Branton, "so that you can provide at once the necessary federal protection to prevent violence and other forms of intimidation against registration workers and applicants."[436] His telegram is significant because it states the activists' unmet expectation that the federal government would protect them.

Another disappointing development concerns the aftermath of the Lee murder. Louis Allen, the logger who witnessed everything, gave a truthful account of what transpired in his interview with the FBI. Even given this demonstration of courage, the Justice Department decided not to file an indictment. According to Taylor Branch, Doar and Moses "knew that without a federal indictment there would be no effective protection for Louis Allen."[437] Their perception was perceptive. Allen's white clients boycotted him and terminated his line of credit.[438] He fled Mississippi on multiple occasions. At one point—after setting foot in Louisiana—Allen rejoiced, "Thank you, Jesus." Yet his exodus ended because he, lacking the economic means to live outside the state, returned to Amite County. In 1963 Allen's corpse was

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[434] Branch, *Parting the Waters*, 716-17.
[435] Ibid., 718.
[436] Telegram Dated March 1, 1963 to Attorney General Robert F. Kennedy, 1 March 1963, MC247, Box 112, Southern Regional Council Other Organizations, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[437] Branch, *Parting the Waters*, 521.
[438] Ibid.

found riddled with three shotgun blasts—all to the head.[439] The Division's failure to protect a witness marked a sad end to the tragedy that was the Lee murder.

Federal inaction begs the question, why did the Kennedy administration fall short of expectations? Its reluctance to protect arose from political constraints, first and foremost. Most visibly, Southern Democrats dominated Capitol Hill, as described in Chapter One. The President fretted over the fact that the Conservative Coalition could torpedo the rest of his legislative agenda if he lobbied aggressively for civil rights; at risk were a tax cut and Medicare.[440] Evidently, the Black freedom struggle did not rank high on the list of presidential priorities. To his credit, Kennedy aide Arthur M. Schlesinger admitted that "the Kennedy civil rights strategy, however appropriate to the congressional mood of 1961, miscalculated."[441]

One flaw of President Kennedy's strategy was its reliance on ad-hoc crisis management. In 1962 James Meredith triggered a showdown between the Kennedy administration and Mississippi Governor Ross Barnett. Meredith's *casus belli* was attempting to enroll at the University of Mississippi, as its first African-American student. Violence erupted on the Oxford campus, inducing a massive headache for the White House and the Justice Department. The lesson that should have been drawn from Ole Miss, argues the historian Michal R. Belknap, is federal power must be applied before violence metastasizes and mushrooms.[442] Instead, the Kennedy administration drew the opposite conclusion: federal intervention may well worsen the situation.[443] Opposing the deployment of federal marshals in 1964, Attorney General Nicholas Katzenbach cited Ole Miss. "The use of 130 deputy marshals for a period of several days in

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[439] Ibid., 921.
[440] Julian E. Zelizer, *The Fierce Urgency of Now: Lyndon Johnson, Congress, and the Battle for the Great Society* (New York: Penguin, 2015), 70-71.
[441] Ibid., 72.
[442] Belknap, *Federal Law and Southern Order*, 98.
[443] Ibid., 99.

Oxford, Mississippi," wrote the Attorney General, "placed a severe strain on the marshal service."[444] By 1964, it had become conventional wisdom—within the federal government at least—that intervention would be counterproductive to the goal of reducing violence.

There was a more fundamental miscalculation. The Kennedys failed to grasp that the civil rights movement had "revolutionary" momentum. Even Schlesinger acknowledged their failure to appreciate "the dynamism of a revolutionary movement."[445] Other contemporaries of the Kennedys saw what they could—or would—not. Vice President Lyndon B. Johnson, an astute analyst of electoral politics, thought his predecessor had "played into the Republicans' hands."[446] By trying to placate African Americans and segregationists simultaneously, he argued, the President pleased no one. In this case, Johnson's analysis hit the mark. During the Greenwood protests, Republican Senator Jacob Javits criticized the White House for being passive.[447] One of President Kennedy's likely opponents in 1964—New York Governor Nelson Rockefeller, another Republican—emphasized that he was inadequate on civil rights, evidently seeing the issue as a vulnerability for the incumbent president.[448] Vice President Johnson, however, was powerless, a reality which blunted the impact of his advice.[449]

To be fair, the Kennedy administration did gravitate toward substantive legislation by the spring of 1963. On February 28th, the President wrote a message to Congress, explaining his proposal for voting rights. He admitted that "federal executive action in such cases . . . can never

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[444] Memorandum for the President, 1 July 1964, MC247, Box 116, Use of United States Marshals (Legal Files), John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[445] Zelizer, *The Fierce Urgency of Now*, 72.
[446] Taylor Branch, *Pillar of Fire: America in the King Years, 1963-65* (New York: Simon & Schuster, 1999), 94.
[447] Branch, *Parting the Waters*, 721.
[448] Ibid., 699.
[449] Branch, *Pillar of Fire*, 91.

fully correct such abuses of power" and quoted the saying "Justice delayed is Justice denied."[450] With the courts clogged, Kennedy recommended that federal judges be directed, presumably via statute, to prioritize voting suits. At the same time, his proposal allowed those very judges to appoint referees who could register "applicants . . . during the pendency of a lawsuit."[451] Activists, however, scorned these solutions, for federal district courts contained segregationists like Judge Cox; no reasonable observer would trust them to prioritize voting suits and appoint referees.[452] Another key provision presumed voters with a sixth-grade education literate, a rehash of a 1962 literacy test bill sent by the Administration.[453] Robert Moses was unimpressed. Kennedy's exemption sidelined the many African Americans who had not completed sixth grade.[454] In essence, the presidential proposal was substantively inadequate. As Joseph Rauh, a co-founder of the liberal group Americans for Democratic Action, put it, "President Kennedy had yielded . . . before the fight had even begun; the proposed bill was hardly worth fighting for."[455] Indeed, this proposal was the specific target of Governor Rockefeller's attack, when the GOP presidential hopeful called JFK inadequate on civil rights.[456]

Based on his subsequent actions, neither did the President seem to think "the proposed bill was . . . worth fighting for."[457] Kennedy refused, as Carl M. Brauer concludes, "to make the

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[450] Special Message on civil rights, 28 February 1963, JFKPOF-052-016, Box 52, Folder 16, President's Office Files, Papers of John F. Kennedy, John F. Kennedy Presidential Library and Museum, Boston, MA. https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/052/JFKPOF-052-016#folder_info.
[451] Ibid.
[452] Lawson, *Black Ballots*, 295.
[453] Special Message on civil rights, 28 February 1963, JFKPOF-052-016, Box 52, Folder 16, President's Office Files, Papers of John F. Kennedy, John F. Kennedy Presidential Library and Museum, Boston, MA. https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/052/JFKPOF-052-016#folder_info.
[454] Lawson, *Black Ballots*, 295.
[455] Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964* (Lanham: University Press of America, 1990), 10-11.
[456] Branch, *Parting the Waters*, 699.
[457] Loevy, *To End All Segregation*, 11.

legislative fight his own."[458] Rather, the Justice Department was the one that lobbied Congress, despite it lacking the prestige and persuasive power of the bully pulpit.[459] This was not the first time the DOJ had to bargain alone; the year before, it "initiated and promoted" the Administration's literacy test bill.[460] Still reeling from the 1962 defeat, the Justice Department submitted its new bill to the House Judiciary Committee more than a month after President Kennedy's February 28th message. Such tardiness boded poorly for the new bill.[461] So while the Kennedy administration did partake in the legislative process, it by no means confronted Congress with the necessary level of urgency and boldness. Only with the Birmingham crisis that summer and his famous June 11th speech did the President undertake a shift toward bolder action: "there are other necessary measures which only the Congress can provide, and they must be provided at this session."[462] But a week after the speech, Kennedy promulgated another message to Congress, wherein he left his earlier February 28th proposals—warts and all—unaltered.[463]

Had the President and his brother seen what their contemporaries saw, how might the federal government—including the Civil Rights Division—have responded differently? The debate over police power was a prominent one in 1963 and 1964. Recall that Katzenbach advanced a "practicality" argument against the proposal to protect activists with federal marshals. Deployment, he feared, would invite violence greater than that witnessed during the

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[458] Bauer, *John F. Kennedy and the Second Reconstruction*, 222.
[459] Ibid., 133 and 222.
[460] Ibid., 133.
[461] Ibid., 223.
[462] John F. Kennedy, "Radio and Television Report to the American People on Civil Rights," *The American Presidency Project*, June 11, 1963, https://www.presidency.ucsb.edu/documents/radio-and-television-report-the-american-people-civil-rights.
[463] John F. Kennedy, "Special Message to the Congress on Civil Rights and Job Opportunities," *The American Presidency Project*, June 19, 1963, https://www.presidency.ucsb.edu/documents/special-message-the-congress-civil-rights-and-job-opportunities.

Meredith showdown.[464] Outsiders disagreed with Katzenbach's premise and suggested that marshals be concentrated in or near strategic sites, such as "key registration and voting places."[465]

Among the papers kept by John Doar was a 25 June 1964 letter written by Dr. Fredric Solomon of Howard University, who believed the strategic deployment of marshals would engender a deterrence effect. Dr. Solomon predicted that even a limited number of federal personnel "would effectively deter many local officials."[466] Attached to his letter was a journal article he co-wrote, "The Psychosocial Meaning of Nonviolence in Student Civil Rights Activities." Several observations stand out. For one, the article establishes that activists understood the importance of the media. "The students are aware that sympathetic press and radio coverage of demonstrations can . . . produce some sort of Federal intervention on their behalf," it states. More importantly, federal intervention could "deter" violence. As Dr. Solomon wrote in part, "There is much evidence to suggest that despite the proclaimed attitude of Southern segregationists toward the Federal government, they nonetheless have a profound respect for its power in a showdown."[467] Though this argument found its way into Doar's private files, the Civil Rights Division did not transform "deterrence" into a tangible public policy.

Less visible a reason for federal inaction was the FBI, which exhibited an aversion to civil rights. The Civil Rights Division worried about surveillance, presumably from Hoover's apparatus. In a 15 August 1962 memo sent to Doar, fellow lawyer Jerome K. Heilbron offered

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[464] Memorandum for the President, 1 July 1964, MC247, Box 116, Use of United States Marshals (Legal Files), John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[465] Lawson, *Black Ballots*, 282.
[466] Howard University Letter, 25 June 1964, MC247, Box 113, SNCC Student Nonviolent Coordinating Committee, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[467] "The Psychosocial Meaning of Nonviolence in Student Civil Rights Activities," May 1964, MC247, Box 113, SNCC Student Nonviolent Coordinating Committee, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.

"Practical Suggestions for Civil Rights Attorneys working 'in the Field.'" Heilbron's second suggestion urged CRD lawyers to "notify the FBI office in the area in which you will be working," lest they embarrass the Bureau's agents. His fourth suggestion was to avoid booking the same motel if lawyers revisited a city. "In most of the prominent motels," he warned, "the FBI agents have contacts working in the motel who keep them informed of any unusual out-of-town guests." Perhaps the most sensitive suggestion came eighth. Heilbron reminded lawyers that "in talking over a phone, . . . someone other than the party to whom you're talking may be listening."[468]

CRD lawyers were not alone in having to fear FBI surveillance. Under Hoover, the FBI viewed civil rights through a hostile lens. A 23 January 1962 report submitted to Dr. Arnold S. Trebach of the U.S. Commission on Civil Rights, and received by Doar, captured the Bureau's culture. FBI agent Jack Levine, who authored the report, revisited his training. It was a program wherein "the men are heavily indoctrinated with radical right wing propaganda." Such propaganda included hostility toward African Americans. "I would estimate that in about 90% of the situations in which Bureau personnel referred to Negroes," alleged Levine, "the word ["n*****"] was used and always in a very derogatory manner." He then supplies an interesting anecdote. Apparently, in early 1961 FBI agents had lamented that "the Federal Building was being overrun by ["n******"] since the Kennedy Administration took over."[469] Levine's allegations ring true given the Bureau's harassment of Martin Luther King.[470]

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[468] Practical Suggestions for Civil Rights Attorneys working "in the Field," 15 August 1962, MC247, Box 91, Legislative History = Civil Rights Division, John Doar Papers, Princeton University Special Collections, Princeton, NJ.
[469] Report on F.B.I., 23 January 1962, MC247, Box 100, FBI: Memos on Performance in Civil Rights Investigations, John Doar Papers, Princeton University Special Collections, Princeton University, Princeton, NJ.
[470] Branch, *Pillar of Fire*, 557.

Although they technically outranked Hoover, the Kennedys could not oust him with ease. CRD lawyer Thelton Henderson, one of the few Black lawyers, felt "mystified" by Hoover's power: "You kept hearing these things [the Kennedys] . . . couldn't get Hoover to do."[471] One source of Hoover's power was blackmail. JFK engaged in numerous extramarital affairs, a vulnerability which the FBI Director did not refuse to highlight.[472] As Henderson later realized, "We know now, from reading the books, that he got the goods on people in power."[473] These goods kept Hoover secure in the post he had held since 1935.

Hence, political constraints moderated the CRD. The legislative leverage of Southern Democrats, internal miscalculation, and the FBI all fed into what Christy Lopez called the Division's "pathological moderation." "The Civil Rights Division is not and never has been a radical agency," she opines in the *Yale Law Journal Forum*.[474] One reason is "the Division's inherently political nature."[475] If anything, this chapter has confirmed Lopez's thesis: that political constraints moderate the CRD, almost to a "pathological" point.[476]

Even so, it would be a mistake to attribute the Division's moderation to politics altogether. Legal constraints imposed by CRD leaders added another check on radicalism. In 1964 Burke Marshall completed a defense of the Kennedy administration, *Federalism and Civil Rights*. Because he served as Assistant Attorney General, his perspective matters. Taylor Branch agrees that "power at the subcabinet level flowed inexorably to [him]."[477] Marshall subscribed to

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[471] "Thelton Henderson," *The Bancroft Library at the University of California, Berkeley*, 2005, https://digitalassets.lib.berkeley.edu/roho/ucb/text/henderson_thelton.pdf.
[472] Branch, *Parting the Waters*, 568-69.
[473] "Thelton Henderson," *The Bancroft Library*, https://digitalassets.lib.berkeley.edu/roho/ucb/text/henderson_thelton.pdf.
[474] Lopez, "The Civil Rights Division: The Crown Jewel of the Justice Department," 485.
[475] Ibid., 480.
[476] Ibid., 485.
[477] Branch, *Parting the Waters*, 586.

a limited understanding of federalism. Deploying federal marshals to protect activists, asserted Robert F. Kennedy in the book's foreword, would create a "national police force."[478] Marshall recoiled from this proposition and claimed "that federal marshals are only process servers working for the courts."[479] Rather than sanction something he regarded as radical, the Assistant Attorney General supported working "within the framework of the same institutions."[480] His prescription meant more incrementalism, for he believed voter suppression "can be remedied with enough money, enough energy, enough lawyers, and enough months or years."[481]

Such faith in "the framework of the same institutions" rang hollow when those very institutions lacked diversity. Although it was an entity dedicated to civil rights, the Civil Rights Division faltered in terms of Black hiring. As early as 1961, CRD leaders knew that the lack thereof posed a problem. Robert F. Kennedy himself recognized this issue in his 6 May 1961 Law Day Address at the University of Georgia School of Law. "I found that very few Negroes were employed above a custodial level," he said of the Justice Department. "There were nine hundred and fifty lawyers working in . . . the Department of Justice in Washington, and only ten of them were Negroes."[482] One of those ten, presumably, was Maceo Hubbard, whose story surfaced in Chapter One. In 1962 he became the Employment Officer. His new responsibilities entailed the management of "complaints regarding hiring, promotion and other personnel matters."[483] Such complaints would only grow in importance.

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[478] Marshall, *Federalism and Civil Rights*, ix.
[479] Ibid., 5.
[480] Ibid., 85.
[481] Ibid., 38.
[482] Robert F. Kennedy, "Law Day Address at the University of Georgia School of Law," May 6, 1961, *American Rhetoric*, https://www.americanrhetoric.com/speeches/rfkgeorgialawschool.htm.
[483] "Dept. of Justice Post for Ex-Localite Maceo Hubbard Gets Gov't Personnel Post," *Philadelphia Tribune*, January 9, 1962.

That same year, Thelton Henderson joined the Civil Rights Division. Fresh from Berkeley Law, he was recruited by none other than John Doar, a fellow alumnus. "There had never been a black working for the Civil Rights Division, an attorney," remembered Henderson (however erroneously). Doar "thought he needed to do something about that." Thus, Dean William Lloyd Prosser called Henderson into his office and asked if he would consider a job with the CRD. Given the discrimination practiced by "the white firms," the young law student replied affirmatively. Off he went to Washington, where he encountered segregation. Whenever the CRD lawyers in the office planned dinner, they "would say, 'Oh, we can't go to that place, because we can't take Thelton.'" Adding to the shock value of this comment was the location of the restaurant in question, "the fact that it was down the street from the Department of Justice."[484]

An African American, Henderson would encounter segregation many more times. His first assignment was a visit to his birthplace: Shreveport, Louisiana. Rather than a homecoming, the visit "was an utter disaster." After driving to the airport to retrieve his belongings, he caught the attention of a highway patrolman, who then tailed him. "Put your hands up on the car," barked the patrolman. "I'm going to blow your brains out." Eventually, the situation calmed down and Henderson paid $25 for "reckless" and "careless" driving. Fearful that revelation of this close call would spook his superiors (and thereby end his ability to do field work), he kept quiet. Not even Doar knew, lest anyone "think, 'This [Henderson's presence] isn't working.'"[485]

So Henderson paid the penalty out of pocket. Being African American entailed advantages and disadvantages as a CRD lawyer. On the one hand, Henderson enjoyed a unique

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[484] "Thelton Henderson," *The Bancroft Library*, https://digitalassets.lib.berkeley.edu/roho/ucb/text/henderson_thelton.pdf.
[485] Ibid.

connection with Black activists that no white colleague could claim to replicate. "I could communicate with the Civil Rights leaders in a way that my white colleagues couldn't," he revealed. "They trusted me in certain ways and used me for information."[486] On the other hand, segregation hindered Henderson's freedom of travel. Barred from white hotels, Henderson lodged at either nearby military installations or Birmingham's A.G. Gaston Motel, "a black motel . . . where [he] met King."[487] It was a fateful meeting. In November 1963, Henderson got himself fired for lending his car to the civil rights leader—and for lying about it.[488]

Before he left the Civil Rights Division, however, Henderson made the acquaintance of another lawyer there: Richard A. Wasserstrom. Once, both men traveled to Selma together. Henderson and Wasserstrom asked Burke Marshall if they could escort SNCC volunteers, who were delivering sandwiches and water to Black voters waiting in line. The cautious Assistant Attorney General said no, and the SNCC volunteers endured beatings from Sheriff Jim Clark and his men. Frustrated, Wasserstrom left the federal government.[489] By 1966 he became a dean at the Tuskegee Institute, located in the same city from which *Gomillion v. Lightfoot* emerged.[490] In that capacity, Dean Wasserstrom wrote a scathing review of Marshall's *Federalism and Civil Rights*, "an important book because it so largely reflects the contemporary as well as prior governmental ideology."[491] Marshall mistakenly overlooked the fact "that these constraints might be the result, not of our federal system," bristled Wasserstrom, "but rather of a series of conscious decisions to reinterpret, redefine, and reconstruct the limits of justifiable federal

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[486] "The South and Civil Rights," *Capitol Weekly*, July 6, 2017, http://capweekly.wpengine.netdna-cdn.com/wp-content/uploads/2017/09/TheSouthTranscript.pdf.
[487] "Thelton Henderson," *The Bancroft Library*, https://digitalassets.lib.berkeley.edu/roho/ucb/text/henderson_thelton.pdf.
[488] "U.S. Confirms King Auto Use," *The Nashville Tennessean*, November 7, 1963.
[489] Lopez, "The Civil Rights Division: The Crown Jewel of the Justice Department," 475.
[490] Richard A. Wasserstrom, "Review of Federalism and Civil Rights by Burke Marshall," *University of Chicago Law Review* 33, no. 406 (1966): 413.
[491] Ibid., 409.

action." Politics informed those decisions. Wasserstrom identified the legislative leverage of Southern Democrats and White House calculation as two factors that framed federalism.[492] Federal inaction frustrated him nonetheless: "does the federal government pursue violators of sections 241 and 242 with one-half or even one-quarter of the zeal with which it searches out violators of the federal narcotics laws or labor racketeers?"[493] His book review thus emits the tension of having been a dissident lawyer within a "pathologically moderate" institution.[494]

The lack of diversity inside the Justice Department did not escape outside observers. On June 14, 1963, just two days after the assassination of Medgar Evers, Robert F. Kennedy confronted 3,000 protesters congregating near DOJ headquarters. In Branch's telling, one protester—unimpressed by Kennedy's boast that the Administration had brought on more diverse hires—"retorted that he saw precious few Negroes coming out the Justice Department's doors." Defensive, the Attorney General hit back, "Individuals will be hired according to their ability, not their color." This encounter captures the value of examining hiring and using it to contextualize the Division's institutional development. Hiring matters because diversity—namely the lack thereof—sheds light on the composition of the CRD ranks. The historian and CRD alumnus Brian K. Landsberg admits that his assertions about CRD composition are "not based primarily on examination of the records of the division," but on "personal impressions."[495] This chapter corrects Landsberg's source deficit and goes a step further. It draws attention toward an irony that animated activist and attorney general alike—a valuable historical contribution by itself—while nuancing the picture of a seemingly monolithic Civil Rights Division. We see Richard A. Wasserstrom challenge Burke Marshall's legal assumptions and

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[492] Ibid., 413.
[493] Ibid., 412.
[494] Lopez, "The Civil Rights Division: The Crown Jewel of the Justice Department," 485.
[495] Landsberg, *Enforcing Civil Rights*, 238.

Thelton Henderson caught between solidarity with the movement and obligation to his employer—two lawyers who shaped the CRD in the process. These struggles resonate due to their timeless implications for social change; organizations still debate incrementalism and institutional neutrality today.

Political and legal constraints did not mollify those who expected federal protection. The Freedom Vote of 1963 reacted to the violence, manifesting Black discontent. James Forman, an activist and surrogate for the Freedom Vote, noted the Travis shooting in speeches imploring African Americans to participate.[496] Staged by the Council of Federated Organizations, parent to the VEP, the Freedom Vote was a mock gubernatorial election.[497] African Americans could not register in the actual election, so they organized a mock one to demonstrate their willingness to vote.[498] A total of 90,000 people cast a ballot.[499]

Ultimately, the Freedom Vote was most successful not in precipitating turnout, but in preparing the way for Freedom Summer, a 1964 registration campaign in Mississippi. Allard Loewenstein, the white activist who organized the former event, recruited white students from Yale and Stanford Universities. They canvassed and registered voters from September to November 1963. Black activists, like Lawrence Guyot, discerned that the Yale and Stanford students got special treatment. The FBI agents trailing these outsiders, after all, monitored and ensured their safety.[500] This discernment informed a key decision that would shape Freedom Summer. When white students risked life and limb, the media paid attention.[501] More broadly, the Freedom Vote advanced the Black freedom struggle by leaving "a structured model and

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[496] Lawson, *No Small Thing*, 125.
[497] Moye, *Let the People Decide*, 114.
[498] Faulkenbury, *Poll Power*, 71.
[499] Branch, *Parting the Waters*, 920.
[500] Moye, *Let the People Decide*, 115.
[501] Lawson, *No Small Thing*, 148.

organized network for future civil rights work as well as tactical developments, such as how to effectively generate publicity through the inclusion of northern whites and promote agency through participation."[502] Freedom Summer recruited white volunteers thereafter, leading to the infamous 1964 murders of James Chaney, Andrew Goodman, and Michael Schwerner in Philadelphia, Mississippi. Coverage of the triple murder left a lasting impact on public opinion. Consequently, Neil R. McMillen concludes that Freedom Summer "provided summer-long, nationwide exposure of the iniquities of white supremacy."[503] The line from the Division's inaction may have been long. A line nonetheless existed between the Civil Rights Division and negative mobilization, setting the stage for both the Freedom Vote and Freedom Summer.

A line also existed between the Division's inaction and activists' growing appetite for confrontation. Exasperated by the violence he had seen, including the Lee murder, Moses felt that "the only hope was to force a confrontation between federal and state authority."[504] The veteran SNCC leader also agonized over the Allen murder, finally lending his support to the recruitment of white students for Freedom Summer.[505] Overall, Moses's acceptance of confrontation alluded to the unrest in Birmingham and foreshadowed the future in Selma.

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The assassination of President John F. Kennedy led to the ascendance of President Lyndon B. Johnson. As history would have it, the latter president presided over the breakthrough that was the Voting Rights Act of 1965. Notwithstanding the long list of post-1963

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[502] Ibid., 147.
[503] McMillen, "Black Enfranchisement in Mississippi," 367.
[504] Branch, *Parting the Waters*, 920.
[505] Ibid., 921.

developments, the Kennedy presidency set the stage for their fruition. Looking back on Camelot, Thelton Henderson delivered a favorable verdict. "Even though [the Kennedys] were very reluctant participants at the start, they gave hope," he ruled. "Whereas with Eisenhower . . . , there was nothing."[506] Positive and negative mobilization, in which the CRD played a major part, helped amplify and mold Black political consciousness. The synergy between Black agency and federal agencies turned the New Frontier into an open one. Through this open frontier, African Americans began to reclaim their share in American democracy.

[506] "Thelton Henderson," *The Bancroft Library*, https://digitalassets.lib.berkeley.edu/roho/ucb/text/henderson_thelton.pdf.

Epilogue: "Let Us Continue," 1963-2023

On the 20th day of January, in 1961, John F. Kennedy told his countrymen that our national work would not be finished 'in the first thousand days, nor in the life of this administration, nor even perhaps in our lifetime on this planet. But,' he said, 'let us begin.'

Today, in this moment of new resolve, I would say to all my fellow Americans, let us continue.

- *President Lyndon B. Johnson, Address Before Congress, November 27, 1963*

In the wake of President Kennedy's assassination, African-American leaders worried that his successor, Lyndon B. Johnson, would reverse course on civil rights. On the surface, President Johnson seemed an unlikely champion of the Black freedom struggle. He hailed from Texas, a Jim Crow state, and had—as Senate Majority Leader—limited the once-sweeping provisions of the Civil Rights Act of 1957 to voting rights.[507] One of his allies was Senator Richard Russell, an ardent segregationist.[508] To the skeptics' pleasant surprise, LBJ did not toe Dixie's line. On November 27, 1963, the new president spoke to a grief-stricken Congress and nation. "No memorial oration or eulogy," he declared, "could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill."[509]

The rest of this story is relatively familiar, at least to historians. By leveraging his familiarity with Congress and personal persuasiveness, Johnson put the full weight of the presidency behind the Civil Rights Act of 1964. It passed on July 2nd, outlawing racial discrimination in employment and public accommodations.[510] Four months later, "Landslide Lyndon" won the 1964 presidential election resoundingly, despite shedding support in the South.

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[507] Caro, *Master of the Senate*, 892.
[508] Ibid., 365.
[509] Lyndon B. Johnson, "Address Before a Joint Session of the Congress," *The American Presidency Project*, November 27, 1963, https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-0.
[510] Zelizer, *The Fierce Urgency of Now*, 128-29.

He trounced his opponent, the conservative Arizona Senator Barry M. Goldwater, 486 electoral votes to fifty-two.[511] Down ballot, liberals secured comfortable majorities for the 89th Congress. More specifically, Democrats at that point enjoyed a 155-seat majority in the House and a 36-seat majority in the Senate.[512] Thus, the historian Julian E. Zelizer concludes that "a sea change election" was one of two "critical" components of "the liberal ascendancy that overwhelmed, if briefly, the forces of conservatism that had been . . . so strong."[513]

Meanwhile, the second component was "a grassroots movement."[514] Agitation from Mississippi erupted during the summer. Inspired by the Freedom Vote of the previous year, Freedom Summer invited an influx of out-of-state white volunteers, including many college students, who registered African Americans to vote.[515] Most infamously, the Ku Klux Klan murdered three Freedom Summer participants, two of whom were white: James Chaney, Andrew Goodman, and Michael Schwerner. The ensuing coverage attracted publicity worldwide.[516] According to John Dittmer, the triple murder of Chaney, Goodman, and Schwerner prompted Mississippi elites to realize "that continued violent resistance to federal law would lead to political anarchy and economic devastation."[517] Concurring in judgment, Michal R. Belknap adds, "Not until public outrage fueled by an orgy of burning, bombing, beating, and killing in the summer of 1964 generated political pressures too powerful to ignore did [the federal government] move to create effective legal remedies for racist terrorism."[518] These two outcomes

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511 Ibid., 159.
512 Ibid.
513 Ibid., 324.
514 Ibid.
515 Browne-Marshall, *The Voting Rights War*, 123.
516 Dittmer, *Local People*, 247.
517 Ibid., 247-48.
518 Belknap, *Federal Law and Southern Order*, 250.

together constituted a step in the right direction. That said, Washington did not yet fully appreciate the need for a voting rights bill.

Alabama was the state where the straw broke the camel's back. President Johnson doubted the wisdom of introducing a voting rights bill so soon after the Civil Rights Act of 1964 had passed. Rather, he planned to prioritize healthcare and education.[519] Martin Luther King and the rest of the SCLC disagreed.[520] "Dissatisfaction with the pace of progress coalesced in Selma," argues Allan Lichtman. Notwithstanding the 13 April 1961 suit filed by the Civil Rights Division there, "lengthy judicial proceedings and fierce local resistance frustrated progress."[521]

Negative mobilization broke out in full force on February 26, 1965, when an Alabama state trooper shot and killed Jimmie Lee Jackson at a march for voting rights. Before long, the SCLC organized what became the March 7th showdown on the Edmund Pettus Bridge, located in Selma.[522] Peaceful marchers crossed the bridge, only to be met by a line of Sheriff Jim Clark's men. A television camera was rolling when the police rushed toward the marchers, beating those who stood in their way.[523] "Bloody Sunday," like so many Bloody Sundays before, sent a jolt through a nation's conscience. President Johnson appeared before Congress on March 15th, where he described the proposed Voting Rights Act as a measure that "will eliminate tedious, unnecessary lawsuits which delay the right to vote."[524] Almost five months later, the bill made its way to the President's desk. At the signing ceremony on August 6th, held in the Capitol Rotunda, Johnson recounted how "there were those who said smaller and more gradual measures

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519 Zelizer, *The Fierce Urgency of Now*, 204.
520 Ibid., 205.
521 Lichtman, "The Federal Assault Against Voting Discrimination," 365.
522 Browne-Jackson, *The Voting Rights War*, 126.
523 Ibid., 127.
524 Lyndon B. Johnson, "Address to a Joint Session of Congress on Voting Legislation," *American Rhetoric*, March 15, 1965, https://www.americanrhetoric.com/speeches/lbjweshallovercome.htm.

should be tried." "For years and years they had been tried, . . . and they had failed," he emphasized, nodding to the CRD experience.[525] LBJ then signed the Voting Rights Act of 1965 into law.

The passage of the Voting Rights Act (VRA) dealt a mighty blow to Jim Crow. CRD lawyer and Section Chief Harold Greene helped craft its provisions.[526] In fact, David Garrow attributes the Act's primary authorship to Greene and Sol Lindenbaum of the Justice Department's Office of Legal Counsel.[527] Unlike previous proposals, the VRA eschewed a piecemeal, incrementalist approach. Section 5, for example, enacted a "preclearance requirement." States and localities covered by the VRA would have to "preclear" any new election rules with the federal government, either the Justice Department or the U.S. District Court for the District of Columbia. The covered jurisdictions encompassed many of the areas to which CRD lawyers had traveled over the previous five years. Section 4(b) formulaically applied preclearance to two kinds of areas: states and localities (1) with literacy tests and like restrictions in effect for the 1964 presidential election, and (2) where voter turnout ran below 50% of the eligible population. Section 2 prohibited any "standard, practice, or procedure" that curbed the franchise "on account of race or color." Strengthening this sweeping standard, Section 4(c) clarified that literacy tests were no longer allowed for jurisdictions subject to preclearance; Congress would later expand this provision nationwide.[528]

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[525] Lyndon B. Johnson, "Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act," *The American Presidency Project*, August 6, 1965, https://www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act.

[526] Martin Weil, "Harold Greene AT&T Case Judge, Dies," *The Washington Post*, January 30, 2000. This article mentions that Greene "was regarded as a principal legal architect of the Civil Rights Act of 1964 and the Voting Rights Act of 1965."

[527] Garrow, *Protest at Selma*, 70.

[528] "Voting Rights Act (1965)," *National Archives and Records Administration*, n.d., https://www.archives.gov/milestone-documents/voting-rights-act.

Informed by the painful experience of piecemeal litigation, the VRA was a conscious effort to avoid the mistakes of the past. Chapter 3 made that clear with Attorney General Nicholas Katzenbach's 23 March 1965 testimony before the Senate Judiciary Committee.[529] The Civil Rights Acts of 1957 and 1960 had won only token advances in voter registration. For all its strengths, the Civil Rights Act of 1964 focused on desegregation more than it did on voting.[530] While the VRA did not eliminate voter suppression altogether, its provisions enabled substantial and substantive progress. Justice Ruth Bader Ginsburg, dissenting in the 2013 case *Shelby County v. Holder*, cited 1965 statistics that capture the state of Black voter registration then: 6.7% of eligible Black voters registered for Mississippi, 19.3% for Alabama, and 27.4% for Georgia. By 2004, those same statistics had risen to 76.1%, 72.9%, and 64.2%, respectively.[531]

At the end of the day, voting has implications greater than the expressive act of casting a ballot. The franchise facilitates political representation and translates policy preferences into actual policies. Indeed, the political scientists Sophie Schuit and Jon C. Rogowski compiled a 244-bill sample of congressional voting records on "Civil Rights," "Civil Liberties," and "Minority Issues."[532] After codifying these votes as either expansive or restrictive of civil rights, and highlighting Members of Congress whose districts had come under preclearance, Schuit and Rogowski found that those from precleared districts outscored their non-precleared peers on "civil rights support" by 13%.[533] The logic behind this phenomenon makes sense: "As votes from historically marginalized groups increased in importance, legislators were more responsive

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[529] Statement by Attorney General Nicholas deB. Katzenbach Before the Senate Committee on the Judiciary on S. 1564, A Bill to Enforce the Fifteenth Amendment to the Constitution of the United States, 23 March 1965, Box 19, Voting Rights Act of 1965 Vol. I, Harold H. Greene Papers, Library of Congress, Washington, D.C.
[530] Zelizer, *The Fierce Urgency of Now*, 128-29 and 204.
[531] *Shelby County v. Holder*, 570 U.S. 15 (2013).
[532] Sophie Schuit and Jon C. Rogowski, "Race, Representation, and the Voting Rights Act," *American Journal of Political Science* 61, no. 3 (July 2017): 516-17.
[533] Ibid., 520.

to those groups' interests."[534] If Justice Ginsburg's statistics show the substantial extent of African-American progress, then Schuit and Rogowski's study reinforce its substantive nature.

One instance of substantive change at work was Mississippi's 1967 elections. Race baiting, once a staple of Magnolia politics, declined because ambitious politicians now faced a counteracting incentive to win over Black voters.[535] The number of African Americans registered rose by 152,733 from 1965 to 1967.[536] Although the Mississippi State Legislature did not go quietly into the night—weaponizing subterfuges like filing requirements, gerrymandering, and the addition of multimember districts in 1966—voter suppression was never the same under the VRA.[537] The 1967 elections elevated twenty-two African Americans into public office.[538] Yes, most of their offices could be described as "relatively minor."[539] But gains were gains. Besides, the violence of the past tapered off as the decade continued. An all-white jury found seven suspects guilty for the 1964 murders of Chaney, Goodman, and Schwerner.[540] The case, *United States v. Price*, was a 1966 criminal action brought by the Justice Department and litigated in part by John Doar (who was by that point the Assistant Attorney General, having succeeded Burke Marshall).[541] It set a precedent among Mississippians, "that klansmen engaging in acts of terrorism now risked punishment by a jury of their peers."[542] This, along with increasing FBI infiltration of the Klan, constituted the federal response to the triple murder.[543] Negative mobilization had traveled a long way from the Freedom Vote of 1963, which set the

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534 Ibid., 523-24.
535 Dittmer, *Local People*, 415.
536 Ibid.
537 Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi After 1965* (Chapel Hill: University of North Carolina Press, 1990), 34-35; Dittmer, *Local People*, 415.
538 Dittmer, *Local People*, 416.
539 Ibid.
540 Ibid., 418.
541 *United States v. Price*, 383 U.S. 787, 788 (1966).
542 Dittmer, *Local People*, 418.
543 Ibid.

stage for Freedom Summer and all of the atrocities that forced Washington's hand against the Klan.

Much work remains to be done, however. To echo the historian Frank R. Parker, who chronicles voting rights in post-VRA Mississippi, "outright denial to black Mississippians of the right to vote, now prohibited by federal law, was replaced with these more subtle strategies to dilute and cancel out the black vote."[544] Over the past decade, since the Roberts Court eviscerated preclearance in *Shelby County v. Holder*, Parker's words have rung increasingly true. Inevitably, academics and policymakers will revisit the role of litigation in rolling back voter suppression. As recently as June 11, 2021, Attorney General Merrick Garland announced that the Justice Department would double the number of CRD personnel enforcing voting rights. Yet the Attorney General acknowledged that "we need Congress to . . . provide the department with the tools it needs."[545]

What this thesis does, if anything, is demonstrate that historical experience can enrich and enlighten these ongoing debates. Skeptics, such as Gerald Rosenberg, are right to caution against an enthusiastic faith in litigation.[546] Alexander Bickel, the leading critic of the Warren Court, aptly observed that "the [Supreme] Court . . . does not command the resources of administration."[547] The same may be said of the lower courts. Lacking the sword and the purse, judicial processes falter without ample assistance from the other branches of government.[548] Congress, which the Founding Fathers expected to be the most powerful branch, finally provided

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[544] Parker, *Black Votes Count*, 37.
[545] Merrick Garland, "Attorney General Merrick B. Garland Delivered a Policy Address Regarding Voting Rights," *U.S. Department of Justice*, June 11, 2021, https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivered-policy-address-regarding-voting-rights.
[546] Rosenberg, *The Hollow Hope*, 71.
[547] Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970), 91-92.
[548] Hamilton, "The Federalist Papers : No. 78," https://avalon.law.yale.edu/18th_century/fed78.asp.

such assistance via the Voting Rights Act.[549] Even so, litigation is not worthless. It can break legislative inertia by mobilizing the grassroots and reifying the inadequacies of existing policies. The key mechanism remains the raising of expectations. When spurred by their raised expectations, activists pressure the legislature to act. As the "crown jewel" of the U.S. Department of Justice, the Civil Rights Division may yet again—through its litigation—raise expectations and generate pressure in the fight for a free and fair franchise.[550]

[549] Vincent P. DeSantis, "The Historical Growth of Congress," *Current History* 27, no. 158 (October, 1954): 193; James Madison, "The Federalist Papers : No. 48," *The Avalon Project at Yale Law School*, February 1, 1788, https://avalon.law.yale.edu/18th_century/fed48.asp. Madison wrote, "It is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions. The legislative department derives a superiority in our governments from other circumstances."

[550] Lopez, "The Civil Rights Division: The Crown Jewel of the Justice Department," 462.

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