THE SUBSTANCE OF THINGS HOPED FOR: FAITH, SOCIAL ACTION AND PASSAGE OF THE VOTING RIGHTS ACT OF 1965[+]

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ABSTRACT

"*Now faith is the substance of things hoped for, the evidence of things not seen*."[Ω]

In the spring of 2015, Paramount Motion Pictures released *Selma*, a movie based on the historical occurrences that led to the infamous day in American history known as "Bloody Sunday," and President Lyndon Johnson's signing the subsequently passed Voting Rights Act of 1965 ("the Act"). *Selma* popularized, for a new generation, the clergy-led struggle for an egalitarian society, especially in the Jim Crow Deep South, where legislation was needed to ensure well-documented patterns of invidious discrimination at the polling place would

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[+] This Article is written in celebration of the 50th Anniversary of the Voting Rights Act of 1965 and dedicated to the committed clergy and laity, many of whom gave their lives during the American Civil Rights Movement, by sacrificing to bring the conceptualization of equality at the polling place to fruition. The authors, both people of tremendous faith, have dedicated their professional careers as litigators and academicians to preserving the legacy created by the many nameless heroes to whom this Article pays tribute. In furthering a research agenda focused on faith and social action, this work builds upon recent scholarship documenting the connection between the faith community and the on-going fight for civil rights and social justice. *See, e.g.*, JONATHAN C. AUGUSTINE, THE KEYS ARE BEING PASSED: RACE, LAW, RELIGION & THE LEGACY OF THE CIVIL RIGHTS MOVEMENT (2014); Jonathan C. Augustine, *The Theology of Civil Disobedience: The First Amendment, Freedom Riders, and Passage of the Voting Rights Act*, 21 S. CAL. INTERDISC. L.J. 255 (2012); *see also* Jonathan C. Augustine, *Environmental Justice in the Deep South: A Golden Anniversary Reflection on Stimulus and Change*, 47 U.S.F. L. REV. 399 (2013).

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[Ω] *Hebrews*, 11:1 (New King James Version) (hereinafter, unless otherwise specifically stated, any and all scriptural references are from the New King James Version of the Holy Bible).

end. This Article, written in the same vein as *Selma*, shows how faith and faith-based leaders worked through life-threatening and often life-ending struggles to ensure the Fifteenth Amendment guarantee would no longer be usurped by the institution of racism, and that Blacks would have the ability to elect candidates of their own choosing.

With the biblically based "suffering servant" theology detailed by the messianic writers in *Isaiah* 53 as an undergirding theme, this interdisciplinary Article brings together law, history, and theology to explore the Judeo-Christian concept of suffering being redemptive—a concept the Reverend Dr. Martin Luther King, Jr. made extremely popular during the Civil Rights Movement. Further, as its central thesis, this Article argues, in paraphrasing the writer of *Hebrews*, that faith brings to fruition things that might otherwise seem impossible, or that faith is the precedent to social action. Indeed, just as prior to the faith-motivated and dissident demonstrations that resulted in Bloody Sunday, the Act seemed like an impossibility. When faith leads to social action, however, otherwise impossible results can include the election of Blacks to local, state, and federal office, with the most significant being the election and reelection of Barack Obama, the first Black president of the United States of America.

In supporting the central thesis that faith-based actions led to passage of the Act, this Article is divided into five parts. Part I serves as an introduction, providing an overview of sociopolitical conditions that necessitated the Act's enactment. Part II builds upon Part I by overviewing the evolution of the Act's Sections 2 and 5, arguably its most important parts, while also detailing why the two sections were and remain very important. Part III explores how a theology of civil disobedience, motivated by faith and the Judeo-Christian concept of suffering being redemptive, shaped a climate for the Freedom Rides and lunch counter sit-ins of 1961, events that served as a natural precursor to Bloody Sunday in 1965, a watershed sociopolitical occurrence that forced President Johnson's Great Society Initiative to include voting rights along with education reform and poverty eradication. By setting a theological foundation of where faith and social action meet, Part III details some of the chronological events that led to the Act becoming law.

The Article's Part IV looks at the political reality of how the Supreme Court's 2013 decision in *Shelby County v. Holder* undermines and essentially guts the Act's practical reach, while somehow leaving it constitutionally intact, with Part V looking at the Act's future and limited practical application, serving as this Article's conclusion. Unless those in the post-modern era replicate the actions of the Movement's faith leaders, demand that the Republican-controlled Congress

act in response to the Court's decision in *Shelby County*, and enact a new and improved Act, its future is arguably very bleak.

I. INTRODUCTION

Faith motivates people. The author of *Hebrews* suggests that since the beginning of recorded history, faith has motivated human beings to look past limitations associated with their immediate conditions and believe better conditions are possible.[1] Indeed, according to *Hebrews*' author, this more than optimistic perspective in Judaism and Judeo-Christian tradition can only be motivated by something as intangible as faith.[2] One can therefore easily argue that "the substance of things hoped for and evidence of things not seen" motivated committed clergy and laity alike to hope for free and fair elections, notwithstanding the so-called guarantees of the Fifteenth Amendment,[3] which were not realized prior to the Civil Rights Movement ("Movement")[4] and passage of the Voting Rights Act of 1965 (hereinafter "VRA" or "the Act").[5]

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[1] *See Hebrews* 11: 1–39.

[2] *Id.*

[3] In relevant part, the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." U.S. CONST. amend. XV, § 1.

[4] While theories vary on when the Movement began, for this Article's purposes, the authors respectfully argue the Movement began on December 1, 1955, with Rosa Parks's act of civil disobedience in refusing to vacate her seat on a Montgomery, Alabama municipal bus in favor of a white person. *Cf.,* Jonathan C. Augustine, *The Interest Convergence of Education Reform and Economic Development: A Response to "The State of Our Unions"*, 51 U. LOUISVILLE L. REV. 407, 408 n.3 (2013) (arguing in a separate context that the Movement was already underway in 1954 when the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954)). Indeed, Mrs. Parks's courageous act was the impetus of the Montgomery Bus Boycott, an arguably universal recognition that the Movement was underway. CHARLES MARSH, THE BELOVED COMMUNITY: HOW FAITH SHAPES SOCIAL JUSTICE, FROM THE CIVIL RIGHTS MOVEMENT TO TODAY 20 (2005). Moreover, for this Article's purposes, the authors respectfully argue the Movement's numerous acts of civil disobedience, such as Mrs. Parks's refusal to vacate her municipal bus seat on December 1, 1955, proved empirically successful when the Voting Rights Act of 1965 became law.

[5] President Lyndon Johnson signed the Act into law on August 6, 1965. In chronicling the Act's historical significance, noted historian David Garrow writes:

> [T]he newspapers of August 7 devoted [significant] headline coverage [to the Act]. On the same morning, front page stories also informed readers that voter registration officials in Sumter County, Georgia had dropped their opposition to a [B]lack registration drive that had been going on for two weeks, and that some three hundred new [B]lack voters had been registered in Sumter County on August 6 alone.

DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS

In honoring the fiftieth anniversary of the Act's passage, and focusing on the infamous Bloody Sunday,[6] Paramount Motion Pictures released the movie *Selma*,[7] popularizing for a new generation the faith exhibited by the 1960s social activists that made the Act's passage a reality. This Article, written as part of the Act's fiftieth anniversary commemoration, highlights the connection between faith and social action by focusing on the Act's passage and arguing that the "suffering servant" theology of suffering being redemptive was foundational for those motivated by Judeo-Christian faith,[8] seeking egalitarianism under

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ACT OF 1965 xi (1979) [hereinafter GARROW, PROTEST AT SELMA] (internal citations omitted). Moreover, in analyzing the Act Professor Garrow also writes that "the Voting Rights Act was being called 'the most successful piece of civil rights legislation ever enacted' by [Nicholas Katzenbach] a former attorney general and 'one of the most important legislative enactments of all time' by [the Rev. Theodore M. Hesburg] . . . [president emeritus of the University of Notre Dame and former] chairman of the U.S. Civil Rights Commission." *Id.* (internal citations omitted). Indeed, while the Act's passage marked a significant change in America's political history, it was critically important in protecting the right to vote, described by the Supreme Court as "preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (discussing the Equal Protection Clause and using the right to vote as an example of a fundamental political right in a larger discussion).

[6] March 7, 1965 is the day that infamously became known as "Bloody Sunday." *See, e.g.*, Jonathan C. Augustine & U. Gene Thibodeaux, *Forty Years Later: Chronicling the Voting Rights Act of 1965 and Its Impact on Louisiana's Judiciary*, 66 LA. L. REV. 453, 453 n.2 (2006) (describing the events of Bloody Sunday by indicating that "Hosea Williams and Student Nonviolent Coordinating Committee Chairman John Lewis led a group of about 525 silent marchers across the Edmund Pettis Bridge in Selma, Alabama where they were [brutally] attacked by police."). Furthermore, in describing the events of that horrific day, historian Taylor Branch writes that:

> Doctors and nurses worked feverishly through more than a hundred patients, bandaging heads, daubing eyes, shipping more serious cases to the only local hospital that would treat them—Good Samaritan, a Catholic mission facility run by the Edmundite Order in a Negro neighborhood . . . .
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> Lafayette Surney found John Lewis at Good Samaritan two hours after the rampage, admitted for a fractured skull. FBI agents reported the most common injuries to be lacerations and broken bones, but Lewis and Surney alike saw more suffering from tear gas that still seeped out of the patients' saturated clothes.

TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA AND THE KING YEARS 1954–55, 1965–68 (2006).

[7] *See* Brian Truitt, *Selma: The Movie and What Really Happened*, USA TODAY (Mar. 7, 2015, 2:49 PM), http://www.usatoday.com/story/life/movies/2015/03/05/selma-real-life-vs-movie/24444003/.

[8] The authors respectfully argue that a core theological philosophy undergirding the Movement was the Christological belief that suffering is redemptive, originating in the "Suffering Servant Song," *Isaiah* 53, and becoming popularized by and through the life

both moral and man-made laws during the Movement.[9] Indeed, as argued herein, the Deep South's caste system, refusal to apply the Fifteenth Amendment and post-Reconstruction Era civil rights legislation, and the general oppression under which "[B]lacks"[10] were forced to live, necessitated the Act's passage.

(A) Why the Act was Necessary

Although the Civil Rights Amendments[11] ended involuntary servitude, granted Blacks full citizenship, and theoretically granted the right to vote, the Amendments' practical effect was far less functional. Accordingly, the Act "set its sights on the most visible barriers to [B]lack legal equality. These barriers were defined primarily as direct, formal discriminatory practices intended to exclude [B]lack participation in the central political and economic institutions of American life."[12] Indeed, the United States has a bitterly long history of racial

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and death of Jesus, the prophet from Galilee. *See* Augustine, *The Theology of Civil Disobedience*, *supra* note "+", at 275.

[9] For an interesting perspective differentiating between moral and man-made laws, see MARTIN LUTHER KING, JR., *Letter From Birmingham Jail*, *in* WHY WE CAN'T WAIT 76–95 (1964) [hereinafter *Letter From Birmingham Jail*]. The Reverend Dr. Martin Luther King, Jr., is popularly regarded as the Movement's leader. *See* JESSIE CARNEY SMITH, BLACK HEROES 422–430 (2001). King's nonviolent leadership during the Movement was influenced in large part by his divinity school study of Mohandas K. Gandhi's use of civil disobedience during the 1940s Indian Independence Movement. MARSH, *supra* note 4, at 45–46. For an excellent analysis of King's understanding of Gandhi's position on civil disobedience and how it influenced his leadership during the Movement, along with civil disobedience in other contexts, see Yxta Maya Murray, *A Jurisprudence of Nonviolence*, 9 CONN. PUB. INT. L.J. 65 (2009).

[10] Several legal scholars argue "Black" should be capitalized as a proper noun because, similar to "Asian" and "Latino," it denotes a specific cultural group. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Entrenchment*: *Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988); D. Wendy Greene, *Black Women Can't Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405, 405 n.2 (2011); *see also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 4 (1991). In deference to these scholars' advocacy, the authors hereinafter either use the terms "African American" or "Black" to denote Americans of African descent.

[11] The United States Constitution's Reconstruction Amendments are often referred to as "The Civil Rights Amendments." *See* U.S. CONST. amends. XIII (1865), XIV (1868), and XV; *see also* A. Leon Higginbothm, Jr., IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 5–7 (1978). Noted legal scholars argue the central purpose of the Amendments was to prohibit state-sponsored racial discrimination. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 713–726 (4th ed. 2011).

[12] Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838 (1992).

divisiveness.[13] Even though Blacks were "free" to vote after adoption of the Fifteenth Amendment,[14] states continued to deny them the power of the franchise.[15] Moreover, in addressing the necessity of federal legislation to protect minority citizens' right to vote:

> Litigation of voting rights claims on a case-by-case basis under the Civil Rights Acts of 1957, 1960, and 1964 attempted to remedy unconstitutional voting practices but had only negligible success, resulted in only piecemeal gains . . . and was thwarted by the development of new voting practices abridging or denying the minority right to vote.[16]

The Movement's leaders clearly recognized its success would be incomplete unless it resulted in the extension of voting rights to Blacks. Andrew Young, for example, an ordained United Church of Christ minister and one of the Movement's chief lieutenants who later served as a U.S. ambassador to the United Nations, a member of Congress, and a mayor of Atlanta writes "the Civil Rights Act . . . though historic and important, wasn't sufficient without guarantees of the ballot."[17] In discussing the very deliberate decision King and other civil rights activists made to pursue legislation that would protect all citizens' voting rights,

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[13] *See, e.g.*, SUSAN M. LESSON & JAMES C. FOSTER, CONSTITUTIONAL LAW: CASES IN CONTEXT 59 (1992) ("Beginning with the administration of James Madison, the policy of the United States government was to remove Indians from lands that whites wished to occupy.").

[14] In *Lane v. Wilson*, Justice Felix Frankfurter observed that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise . . ." 307 U.S. 268, 275 (1939). Despite the Fifteenth Amendment's obvious intentions, however, "white [s]outherners in charge of registration and voting readily circumvented the Fifteenth Amendment. They had an arsenal of discriminatory schemes." EDWARD S. CORWIN & J.W. PELTASON, UNDERSTANDING THE CONSTITUTION 152 (4th ed. 1967). It was indeed necessary for Congress to pass federal legislation that would combat those schemes.

[15] *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); Jonathan C. Augustine, *Rethinking Shaw v. Reno, the Supreme Court's Benign Race-Related Jurisprudence and Louisiana's Recent Reapportionment: the Argument for Intermediate Scrutiny in Racial Gerrymandering According to the Voting Rights Act*, 29 S.U. L. REV. 151, 163 (2002) [hereinafter Augustine, *Rethinking Shaw*]; *see also* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

[16] Tricia Ann Martinez, Comment, *When Appearance Matters: Reapportionment Under the Voting Rights Act and Shaw v. Reno*, 54 LA. L. REV. 1335, 1336 (1994).

[17] ANDREW YOUNG, AN EASY BURDEN: THE CIVIL RIGHTS MOVEMENT AND THE TRANSFORMATION OF AMERICA 326 (1996). Both the Civil Rights Act of 1964 and Voting Rights Act of 1965 were upheld as valid congressional enactments after judicial challenge before the United States Supreme Court. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding challenged provisions of the Voting Rights Act as constitutional), *abrogated by* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013); *see also* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding as valid the public accommodations provisions of the Civil Rights Act of 1964).

it was apparent the Civil Rights Acts of 1957 and 1960 were simply not enough.

Blacks, especially those in the Deep South, needed a specific federal law aimed at protecting the constitutionally provided right to vote.[18] Indeed, prior to the Act's passage in 1965, the Supreme Court heard numerous cases addressing voting rights violations under applicable provisions of the Civil Rights Acts of 1957 and 1960.[19] Consequently, it was essential that the Movement's religious leaders sought to protect voting rights and essential that Congress act to prevent continued discrimination at the polling place.[20] The timing was right and the Movement was poised to draw attention to the drastic problems of racial inequality.

(B) A Practical Analysis of the Voting Rights Act: What Sections 2 and 5 Sought to Accomplish

The Act essentially shifted the responsibility of ensuring that the right to vote was not abridged from the courts to the United States Department of Justice.[21] In support of this legislative goal, Sections 2 and 5 of the Act eliminated qualifications as prerequisites to voting.[22] In relevant part, "Section 2 was originally a restatement of the Fifteenth Amendment and applies to all jurisdictions. It prohibits any state or political subdivision from imposing a 'voting qualification or prerequisite to voting or standard, practice or procedure . . . in a manner which results in the denial or abridgment of the right to vote on account of race or color.'"[23] Accordingly,

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[18] *See* David J. Garrow, *Bridge to Freedom (1965)*, *in* THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE 204 (Clayborne Carson, David J. Garrow et al. eds., 1987) [hereinafter Garrow, *Bridge to Freedom*]. Further, notwithstanding the Civil Rights Acts of 1957 and 1960, as Professor Garrow writes in addressing the voting demographics in Selma, Alabama's Dallas County in April 1961, "Blacks comprised approximately half of the voting-age population of Dallas County . . . but only 156 of them, out of 15,000 or so, were registered voters, and only fourteen had been added to the rolls since 1954." GARROW, PROTEST AT SELMA, *supra* note 5, at 31.

[19] *See, e.g.*, United States v. Mississippi, 380 U.S. 128 (1965); Baker v. Carr, 369 U.S. 186 (1962).

[20] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521–22 (1989) (noting that Section five of the Fourteenth Amendment gives Congress the unique power to combat state-existent problems of race) (Scalia, J., concurring). Moreover, as the Supreme Court noted the year prior to the Act's passage, "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." *Reynolds*, 377 U.S. at 561–62.

[21] *See* Augustine, *Rethinking Shaw*, *supra* note 15, at 163.

[22] Martinez, *supra* note 16, at 1337–1339.

[23] NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2000 48 (1999)

> [t]he Act was viewed by many southern African-Americans and civil rights activists as the resurrection of the [F]ifteenth [A]mendment, a provision rendered impotent prior to passage of the Act by discrimination. For more than a half century, white-controlled governments in the South had suppressed the minority right to vote through the use of violence, intimidation, and devices such as literacy tests, poll taxes, and primaries restricted on the basis of race and wealth.[24]

Furthermore, Section 5 of the Act also requires Department of Justice approval before a "covered jurisdiction"[25] can change voting practices. "A jurisdiction covered under Section 5 is required to preclear any changes in its electoral laws, practices or procedures with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia."[26] Congress, therefore, passed the Act to ensure states adhered to the Fifteenth Amendment's mandates[27] in attempting to "rid the country of racial discrimination in voting."[28]

1. Section 2 of the original Act and its subsequent amendments

Section 2 of the Act, as originally passed in 1965,[29] provided as follows:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or

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[hereinafter NCSL] (quoting 42 U.S.C. § 1973(a)), http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/red-tc.htm.

[24] April D. Dulaney, Comment, *A Judicial Exception for Judicial Elections: "A Burning Scar on the Flesh of the Voting Rights Act*", 65 TUL. L. REV. 1223, 1223–24 (1991).

[25] *See* 42 U.S.C. § 1973b (codified as amended at 52 U.S.C. § 10303 (2012)) (defining a "covered jurisdiction" under the Act).

[26] NCSL, *supra* note 23, at 48 (citing 42 U.S.C. § 1973(c) (codified as amended at 52 U.S.C. § 10301(c) (2012)); *see also* Robert B. McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOY. L. REV. 931, 974 (1993).

[27] *See* Martinez, *supra* note 16, at 1336–37.

[28] South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966), *abrogated by* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

[29] Prior to its most recent reauthorization in 2006, after what was arguably its most intensive fact-finding, Congress passed the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006. Pub. L. No. 109–246, 120 Stat. 577 (codified at 52 U.S.C. §§ 10302–10305, 10308–10310, 10503 (2012)); *see* H.R. REP. No. 109–478, at 5 (2006); 152 CONG. REC. S7967–S7968 (daily ed. July 20, 2006) (statement of Sen. Kennedy). Before reauthorizing the Act, the House and Senate Judiciary Committees held twenty-one hearings on the Voting Rights Act over a period of nine months. 152 CONG. REC. S7974 (statement of Sen. Durbin). Prior to 2006 and after its initial enactment in 1965, the Act was amended three times: 1970, 1975 and 1982. *See* NCSL, *supra* note 23, at 48.

> color, or in contravention of the guarantees set forth in section 10303(f)(2)of this title. . . .[30]

In 1982, Congress amended the Act to infuse it with new life.[31] More importantly, Congress specifically amended Section 2 in response to the Supreme Court's ruling in *City of Mobile v. Bolden*.[32]

In *Bolden*, a group of black citizens alleged that Mobile's practice of electing commissioners at-large illegally diluted minority voting strength, thus violating the Fourteenth and Fifteenth Amendments and Section 2 of the Act.[33] The Court's plurality opinion provided that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation."[34] Moreover, the Court concluded the plaintiffs failed to prove a violation under Section 2 of the Act because Congress did not intend Section 2 to have any different effect from that of the Fifteenth Amendment.[35] Indeed, the *Bolden* Court reasoned Section 2 only operated to prohibit intentionally discriminatory acts by state officials.[36] In analyzing the opinion, subsequent scholarship argues:

> [T]he Court required proof of discriminatory intent for claims brought under [S]ection 2 of the . . . Act, as well as those brought under the [F]ourteenth and [F]ifteenth [A]mendments. Under this new, onerous burden of proof, plaintiffs could no longer rely on proof of discriminatory effect to raise an inference of intent; they now had to prove discriminatory purpose by 'direct, smoking gun evidence.'[37]

Accordingly, under the Court's holding, "[a]bsent direct evidence of invidious purpose, no multimember electoral systems could be challenged under either the Constitution or the Voting Rights Act."[38]

Congress amended Section 2 so that proof of intent would not be required to establish a violation of the Act.[39] In doing so, "Congress

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[30] 42 U.S.C. § 1973(a) (codified as amended at 52 U.S.C. § 10301(a) (2012)).

[31] Dulaney, *supra* note 24, at 1225.

[32] "Congress seized the opportunity to re-examine the entire Voting Rights Act. Several members of Congress voiced displeasure regarding the Supreme Court's 1980 decision in City of Mobile v. Bolden." Dulaney, *supra* note 24, at 1225–26 (citing City of Mobile v. Bolden, 446 U.S. 55 (1980), *superseded by statute as stated in* Thornburg v. Gingles, 478 U.S. 30 (1986)).

[33] *See Bolden*, 446 U.S. at 58.

[34] *Id.* at 62.

[35] *See id.* at 60–61.

[36] *Id.* at 61–62.

[37] Dulaney, *supra* note 24, at 1226 (citation omitted).

[38] Issacharoff, *supra* note 12, at 1845–46 (citation omitted).

[39] *See* NCSL, *supra* note 23, at 48. Congressional response to *Bolden* was swift. A House Judiciary Committee's report found the intent standard inappropriate and indicated the proper judicial focus should be on election outcomes, not discriminatory intent. *See* H.R. REP. NO. 97–227, at 29–31 (1981).

adopted the 'results' test, whereby plaintiffs may prevail under [S]ection 2 by demonstrating that, under the totality of the circumstances, a challenged election law or procedure has the effect of denying or abridging the right to vote on the basis of race."[40] It is therefore clear that Congress "amended the Voting Rights Act expressly to repudiate *Bolden* and to outlaw electoral practices that 'result in' the denial of equal political opportunity to minority groups."[41]

The Senate Judiciary Committee found the *Bolden* Court "had broken with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory intent."[42] As such, the committee's report concluded "[t]his intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial injury [sic] from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."[43] The committee's report also included, from *Zimmer v. McKeithen*,[44] a non-exhaustive list of factors for courts to consider as part of Section 2's legislative history.[45]

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[40] Chisom v. Edwards, 839 F.2d 1056, 1059 (5th Cir. 1988), *overruled by* League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990), *rev'd sub nom.* Hous. Lawyers' Ass'n v. Texas, 501 U.S. 419 (1991). Congress's final adoption of the "results test" included recommendations from the Senate Judiciary Committee, encompassing relevant language from *White v. Regester*, 412 U.S. 755 (1973), a case involving multimember state legislative districts in Texas. *See* NCSL, *supra* note 23, at 52.

[41] Issacharoff, *supra* note 12, at 1846 (citation omitted).

[42] NCSL, *supra* note 23, at 53.

[43] S. REP. NO. 97–417, at 16 (1982).

[44] Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd per curiam sub nom.* E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

[45] The list of factors included the following:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
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> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
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> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
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> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; .
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> 5 the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
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> 6. whether political campaigns have been characterized by overt or subtle racial

2. Judicial interpretation of the Act's 1982 amendments to Section 2

In 1984, the first case challenging at-large judicial elections under Section 2 was filed in the United States District Court for the District of Southern Mississippi.[46] Between 1982 and 1986, several lower court decisions upheld the constitutionality of the Act's 1982 amendments.[47] However, the Supreme Court first considered the Act's 1982 amendments in the 1986 case *Thornburg v. Gingles.*[48]

In *Gingles*, the plaintiffs challenged North Carolina's 1982 redistricting plans in a case that implicated seven voting districts, including one single-member district.[49] Pursuant to Section 5 of the Act, the Department of Justice precleared the districts.[50] The plaintiffs, however, alleged the redistricting scheme impaired Black citizens' ability to elect representatives of their choice, in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Act.[51]

Writing for the Court, Justice Brennen analyzed Section 2's legislative history.[52] He noted that Congress rejected the earlier test of an intent to discriminate and instead instructed that, in determining if a Section 2 violation has occurred, the courts should evaluate whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their own choice."[53] Justice Brennen further indicated that a court "must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'"[54]

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appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. REP. NO. 97–417, at 28–29 (1982); *see also Regester*, 412 U.S. at 765–70.

[46] McDuff, *supra* note 26, at 937–38.

[47] *See, e.g.,* United States v. Marengo Cnty. Comm'n, 731 F.2d 1546 (11th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984); Katchem v. Byrne, 740 F.2d 1398 (7th Cir. 1984); *see also* Rybicki v. State Bd. of Elections (*Rybicki I*), 574 F. Supp. 1082 (N.D. Ill. 1982); Rybicki v. State Bd. of Elections (*Rybicki II*), 574 F. Supp. 1147 (N.D. Ill. 1983).

[48] 478 U.S. 30, 34 (1986).

[49] *See id.* at 35.

[50] *See id.* at 50–51; Damian Williams, *Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act* Reform, 166 YALE L. J. 1116, 1136 n.104 (2007).

[51] *Thornburg*, 478 U.S. at 35.

[52] *See id.* at 42–52.

[53] *Id.* at 43–44 (citing S. REP. NO. 97-417, at 28 (1982)).

[54] *Id.* at 43–45; *see also* McDuff, *supra* note 26, at 972 ("The statement in *Gingles* regarding size and compactness of the minority population illustrates one of the requirements in

In addition to the "objective factor" analysis, the *Gingles* Court developed a new three-part test that a minority group must meet to establish a vote dilution claim under Section 2.[55] The test requires that a minority groups prove: (1) it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it is politically cohesive; and (3) in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate.[56]

3. The original Section 5, its preclearance requirement for covered jurisdictions, and its subsequent amendments

When the Act was originally passed, "Section 5 was considered one of the primary enforcement mechanisms to ensure that minority voters would have an opportunity to register to vote and fully participate in the electoral process free of discrimination."[57] Moreover, "[t]he intent of Section 5 was to prevent states that had a history of racially discriminatory electoral practices from developing new and innovative means to continue to disenfranchise Black voters."[58]

Prior to the Act's original passage in 1965, Congress had already passed several laws attempting to protect minority citizens.[59] Nevertheless, "[d]espite the earnest efforts of the Justice Department and of many federal judges . . . laws [did] little to cure the problem of voting discrimination."[60] Before Section 5 was passed, "the federal government, through the Civil Rights Division of the Department of Justice, undertook the arduous and time-consuming task of filing individual suits against each discriminatory voting law. This approach proved unsuccessful in increasing Black voter registration."[61] Arguably, the

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[S]ection 2 cases—plaintiffs must demonstrate the potential of creating some other remedial electoral configuration that will improve minority opportunities to elect candidates of choice.").

[55] *Thornburg*, 478 U.S. at 49–51.

[56] *See id.* at 50–51.

[57] NCSL *supra* note 23, at 80; *see* McDuff, *supra* note 26, at 974.

[58] NCSL *supra* note 23, at 80; *see also* McDuff, *supra* note 26, at 974 ("In passing the 1965 Voting Rights Act, Congress attempted, among other things, to prevent states and localities with severe histories of electoral discrimination from devising new schemes to frustrate the emergence of black political power.").

[59] *See* Martinez, *supra* note 16, at 1336.

[60] South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966), *abrogated by* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013).

[61] NCSL, *supra* note 23, at 80. Before passage of Section 5, only 29 percent of Blacks were registered to vote in several southern states, including Louisiana and Mississippi, compared with 73.4 percent of whites. By 1967, only two years after Section 5 was adopted, more than 52 percent of Blacks were registered in those same states. *See id.*

Act has proved so effective because of Section 5's requirements.

Section 5 requires covered jurisdictions[62] to submit any proposed changes in voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting to either the U.S. Department of Justice or U.S. District Court for the District of Columbia for preclearance before the proposed change can be implemented.[63] If a covered jurisdiction seeks preclearance through the courts,[64] the preclearance is considered "judicial."[65] Conversely, if the jurisdiction seeks the preclearance through the Department of Justice, the preclearance is considered "administrative."[66]

In 1970, Congress extended Section 5's preclearance requirements for an additional five years.[67] The Act's 1975 and 1982 amendments broadened Section 5's substantive scope even further and also extended its operation until 2007. In 1975, Congress extended Section 5's preclearance requirements for an additional seven years, or through the 1980 redistricting cycle.[68] Similarly, in 1982, Congress again extended the section's preclearance requirements for an additional twenty-five

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[62] *See* 42 U.S.C. § 1973b (codified as amended at 52 U.S.C. § 10303 (2012)) (defining covered jurisdictions under the Act).

[63] *See* NCSL, *supra* note 23, at 80 (citing 42 U.S.C. § 1973c (codified as amended at 52 U.S.C. § 10304 (2012))). To obtain judicial preclearance for the U.S. District Court for the District of Columbia, a covered jurisdiction must file a petition for declaratory judgment with the requisite burden of proving the proposed electoral change will not have the effect of denying or abridging the right to vote on account of race or color or membership in a language-minority group. The Department of Justice serves as the opposing party in litigation. *See* 42 U.S.C. § 1973c (codified as amended at 52 U.S.C. § 10304) (outlining procedures for states to obtain judicial preclearance).

[64] *See* McDuff, *supra* note 26, at 974–75; *see also* NCSL, *supra* note 23, at 92–93 (describing the process of filing a petition for declaratory judgment against the Department of Justice and the requisite burden of proof associated therewith).

[65] *See, e.g.*, Beer v. United States (*Beer II*), 425 U.S. 130 (1976); *see also infra* text accompanying notes 74–81 (discussing *Beer*).

[66] The Department of Justice has issued guidelines regarding the administrative preclearance process. The most recent guidelines were issued in 1988 and updated in 1998. *See* 28 C.F.R. § 51.1(b) (2015). In light of the Supreme Court's decision in *Reno v. Bossier Parish School Board*, questioning the validity of the regulations, the Department of Justice repealed the part of the Section 5 preclearance guidelines that required a plan to also comply with Section 2 of the Act. 520 U.S. 471 (1997); *see* 28 C.F.R. §§ 51.13–.27.

[67] NCSL, *supra* note 23, at 79. Congress's 1970 amendments to the Act also expanded coverage to those states and political subdivisions that used a specified test or devise and where less than half the voting age population was registered to vote by November 1, 1968, or actually voted in the November 1968 presidential election. *Id.* As a result of Section 5's 1970 amendments, three counties in New York City—New York, Kings, and Bronx Counties—and parts of New Hampshire became subject to Section 5's preclearance requirements. *Id.* n.368.

[68] *Id.* at 79.

years.[69] With regard to covered jurisdictions, therefore, Section 5's preclearance requirements are almost absolute.[70]

The 1975 amendments required the use of bilingual election materials and assistance if five percent of the jurisdiction's voting age citizens were of a single language minority group with an illiteracy rate higher than the national average.[71] Furthermore, the 1975 amendments expanded Section 5's coverage requirements to include jurisdictions that maintained any test or device and had less than half of their voting age population either (a) registered to vote on November 1, 1972; or (b) actually voted in that year's presidential election.[72] Because the 1982 amendments only extended Section 5's preclearance requirement an additional twenty-five years, they did not make any substantive changes to the section.

4. Judicial interpretation of Section 5

(a) Beer v. United States

In *Beer v. United States*, the Supreme Court addressed the issue of whether changes in the apportionment of city council districts in the City of New Orleans ("the City") violated the Act.[73] The City conducted its standard decennial reapportionment after it received the figures from the 1970 Census. When the City attempted to obtain administrative preclearance of its reapportionment from the U.S. Department of Justice, however, the Attorney General rejected the City's plans as impermissibly "dilut[ing] black voting strength by combining a number of black voters with a larger number of white voters."[74] The City,

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[69] *Id.* at 80.

[70] The Act's only exception to Section 5's requirements is the so-called "bail out" provision. *See* 42 U.S.C. § 1973b(a)(1)–(3) (codified as amended at 52 U.S.C. § 10303(a)(1)–(3) (2012)). Under this provision, an otherwise covered jurisdiction may bail out from Section 5's preclearance requirements if it can demonstrate that, during the preceding ten-year period, it complied with the Act and undertook efforts to ensure minority participation in the electoral process. NCSL, *supra* note 23, at 97–98 (citing 42 U.SC. § 1973b(a)(1) (codified as amended at 52 U.S.C. § 10303(a)(1)).

[71] NCSL, *supra* note 23, at 80 (citing 42 U.S.C. § 1973b(f)(4) (codified as amended at 52 U.S.C. § 10303(f)(4) (2012))).

[72] *Id.* at 80. As a result of the Act's 1975 amendments, Alaska, Arizona, New Mexico, Texas, and parts of California, Florida, Michigan and South Dakota were covered under the Act. *Id.* at 80–84; *see* McDuff, *supra* note 26, at 974.

[73] Beer v. United States (*Beer II*), 425 U.S. 130, 133 (1976).

[74] *Id.* at 135–36. Even before the Department of Justice rejected the City's Plan I, it began working on Plan II. *Id.* at 135. The attorney general nevertheless also rejected Plan II. *Id.* at 136. To see the standard the Department of Justice employs in such cases, see 28 C.F.R. § 51.54(a) (2015).

therefore, filed a petition for declaratory judgment with the U.S. District Court for the District of Columbia pursuant to Section 5 of the Act.[75]

The City sought judicial preclearance of its newly adopted city council reapportionment plan. Similar to the Department of Justice, however, the district court found the City's new reapportionment plan would "have the effect of abridging the right to vote on account of race or color."[76] Accordingly, the district court dismissed the City's suit.[77]

On appeal, the Supreme Court vacated and remanded the district court's ruling.[78] The Court found the City's new reapportionment plan was valid where it had the effect of enhancing the position of racial minorities. In reversing, the Court noted "[t]he language of § 5 clearly provides that *it applies only to proposed changes in voting procedures*. '*[D]iscriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance* [*under § 5*].'"[79] Moreover, the Court concluded, "[a] new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution."[80]

(b) City of Lockhart v. United States

In 1983, the Court broadened the *Beer* Court's retrogression standard in *City of Lockhart v. United States*.[81] In *Lockhart*, the Court precleared an electoral change that did not improve the position of minority voters. The Court noted, however, that "[a]lthough there may have been no improvement in [minority] voting strength, there has been no retrogression, either."[82] Accordingly, the Court reasoned that "[s]ince the new plan did not increase the degree of discrimination against Blacks, it was entitled to § 5 preclearance."[83]

Justice Thurgood Marshall, the Court's only Black member, dissented in *Lockhart.* Justice Marshall wrote that "[b]y holding that § 5

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[75] *Beer II*, 425 U.S. at 136.

[76] *Id.*

[77] Beer v. United States (*Beer I*), 374 F. Supp. 363, 402 (D.D.C. 1974) ("[T]he feature of the [C]ity's electoral scheme by which two councilmen are selected at large has the effect of impermissibly minimizing the vote its black citizens; and the further conclusion that for this additional reason the [C]ity's redistricting plan does not pass muster.") (citations omitted), *vacated*, 425 U.S. 130 (1976).

[78] *Beer II*, 425 U.S. at 143.

[79] *Id.* at 138 (alterations in original) (emphasis added).

[80] *Id.* at 141.

[81] City of Lockhart v. United States 460 U.S. 125, 134–36 (1983).

[82] *Id.* at 135.

[83] *Id.* at 134.

forbids only electoral changes that increase discrimination, the Court reduces § 5 to a means of maintaining the status quo."[84] Marshall therefore reasoned the Court's view would permit the adoption of a discriminatory electoral scheme, provided the scheme was no more discriminatory than its predecessor and was consistent with both Section 5's language and intent.[85]

(c) Young v. Fordice

In *Young v. Fordice*, the Supreme Court specifically addressed the question of whether changes the State of Mississippi made to the procedure by which its residents and/or citizens were allowed to register to vote—changes made to be in compliance with the National Voter Registration Act of 1993 ("NVRA")[86]—required preclearance under Section 5.[87] The Court began with the position that *all* electoral changes, regardless of the reason therefore, must be precleared by covered jurisdictions.[88] Accordingly, the Court expressly ruled that Mississippi's compliance with the NVRA was subject to Section 5's requirements.[89]

The NVRA requires states to provide simplified systems for registering to vote in federal elections.[90] In accordance with the NVRA, states must provide a system for voter registration by mail,[91] at various state offices,[92] and on a driver's license application.[93] In an effort to comply with the statute, the state of Mississippi made certain changes in its registration procedures[94] that were subsequently challenged by

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[84] *Id.* at 137 (Marshall, J., concurring in part and dissenting in part) (emphasis removed).

[85] *Id*.

[86] 42 U.S.C. §§ 1973gg to 1973gg-9 (codified as amended at 52 U.S.C. §§ 20502 to 20510 (2012)).

[87] Young v. Fordice, 520 U.S. 273, 275 (1997).

[88] *Id.* at 284 (citing NAACP v. Hampton Cty. Election Comm'n, 470 U.S. 166, 175–77 (1985); Allen v. State Bd. of Elections, 393 U.S. 544, 566–69 (1969)); *see also* 28 C.F.R. § 51.12 (2015) (requiring preclearance of "[a]ny change affecting voting, even though it appears to be minor or indirect . . . ."); Lopez v. Monterey Cty., 519 U.S. 9, 22 (1996) (quoting *McDaniel v. Sanchez* to emphasize the necessity for covered jurisdictions to preclear any change in voter or voting practices resulting from policy decisions); McDaniel v. Sanchez, 452 U.S. 130, 153 (1981) (requiring preclearance for any changes in voter or voting practices or procedures within covered jurisdictions).

[89] *Young*, 520 U.S. at 275, 291.

[90] *See* 52 U.S.C. § 20503 (2012).

[91] 42 U.S.C. § 1973gg-4 (codified as amended at 52 U.S.C. § 20505 (2012)).

[92] *Id.* § 1973gg-5 (codified as amended at 52 U.S.C. § 20506).

[93] *Id.* § 1973gg-3 (codified as amended at 52 U.S.C. § 20504).

[94] *Young*, 520 U.S. at 277. As previously indicated, all such changes within covered jurisdictions must receive Section 5 preclearance. *Id.* at 276. It is important to note, therefore, that the NVRA specifically provides that it does not supersede, restrict, or limit the

four private plaintiffs in the district court and consolidated with a similar matter filed by the United States.[95] The three-judge district court granted the defendant's motion for summary judgment and rejected the plaintiffs' argument.[96] The district court rejected the plaintiffs' argument because the statute designed to correct a misapplication of state law did not require preclearance under Section 5 of the Act.[97]

In discussing the critical nature of Section 5's preclearance provision(s) in all instances when a covered jurisdiction makes any changes voting laws, the Supreme Court reversed the district court's ruling.[98] Discussing the absolute necessity of preclearance, the Court wrote that

> [p]reclearance is, in effect, a determination that the change 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.' In the language of § 5 jurisprudence, this determination involves a determination that the change is not retrogressive.[99]

Furthermore, in specifically discussing the issues in *Young*, the Court reasoned that:

> The problem for Mississippi is that preclearance typically requires examination of discretionary changes in context—a context that includes history, purpose, and practical effect. . . . The appellants and the Government argue . . . the particular changes and the way in which Mississippi administers them *could* . . . abridg[e] the right to vote. . . . We cannot say whether or not that is so, for that is an argument for the merits. The question here is "preclearance," and preclearance is necessary so that the appellants and the Government will have the opportunity to find out if it is true.[100]

The Court, therefore, reversed the district court's grant of summary judgment against the plaintiffs.[101] It also remanded the litigation, directing the State of Mississippi preclear the changes it made to be in compliance with the NVRA.[102]

Act's application and does not "authoriz[e] or requir[e] conduct that is prohibited by the Voting Rights Act of 1965." *Id.* (quoting 42 U.S.C. § 1973gg-9(d)).

[95] *Young*, 520 U.S. at 280.

[96] *Id.* at 280–81.

[97] *Id.* at 281.

[98] *Id.* at 291.

[99] *Id.* at 276 (internal citation omitted).

[100] *Id.* at 290–91 (citations omitted).

[101] *Young.* 520 U.S. at 291.

[102] *Id.*

II. A THEOLOGY OF CIVIL DISOBEDIENCE: DISSIDENT ACTS AND PRECURSORS TO BLOODY SUNDAY

Distinguishing Between Civil Disobedience and Civil Challenge

1. The Track of Civil Disobedience

The Movement's reform-oriented agenda essentially moved on parallel tracks of civil disobedience and civil challenge. While definitions of civil disobedience abound,[103] this Article defines civil disobedience as an outward act in direct contravention of a known prohibition or mandate, based on a perceived moral duty to violate that which is deemed immoral, with the understanding that the immoral prohibition or mandate is government-imposed.[104]

The Movement's track of civil disobedience was theologically based and action-oriented, as members of the clergy and committed laity defied what they deemed to be unjust laws.[105] For example, in spite of laws prohibiting African Americans from eating at public lunch counters in much of the Deep South, many students and members of the clergy participated in lunch counter sit-ins as a means of civil disobedience.[106]

2. The Track of Civil Challenge

The track of civil challenge must be distinguished from the track of civil disobedience. This Article defines civil challenge as compliant

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[103] *See, e.g.*, Matthew R. Hall, *Guilty But Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2085 n.2 (2007); Steven M. Bauer & Peter J. Eckerst, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1175 n.14 (1987); *see also* Howard Zinn, *Law, Justice and Disobedience*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 899, 900 (1991) (symposium issue dedicated to the subject of civil disobedience).

[104] *See* Henry David Thoreau, *Civil Disobedience*, *in* THE POWER OF NONVIOLENCE 15 (2002).

[105] This Article's definition of civil disobedience is quasi-First Amendment in nature, as it presupposes the dissident actor(s) openly display their nonconformance against that which is deemed as unjust, by deliberately violating the government's prohibition in a public place during a peaceful assembly. *See* U.S. CONST. amend. I.

[106] *See e.g.*, DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 127–28 (1986) [hereinafter GARROW, BEARING THE CROSS] (discussing the North Carolina A&T college students' February 1, 1960 sit-ins in protest of racial segregation laws at the F.W. Woolworth lunch counter in Greensboro, N.C., along with Dr. King's vocal support of the college students' activities); DOROTHY STERLING, TEAR DOWN THE WALLS!: A HISTORY OF THE AMERICAN CIVIL RIGHTS MOVEMENT 190–93 (1968). Moreover, there are also countless historical examples of how interfaith clergy and seminarians hosted and participated in public demonstrations in protest of unjust laws. *See e.g.*, BRANCH, *supra* note 6, at 216–17.

action, operating within the established realm of acceptable government protocol, relying upon the First Amendment's protections to petition government for redress of grievances.[107] Accordingly, the Movement's track of civil challenge was litigious in nature, marked by attorneys working in collaboration with organizations like the National Association for the Advancement of Colored People ("NAACP") to challenge the constitutionality of unjust laws *within* the judicial system.[108]

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[107] *See* U.S. CONST. amend. I; *see also* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2160 (1998) (providing a historical analysis of the First Amendment's Petition Clause, with an emphasis on its political origins in colonial America, and discussing its inherently political function); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 16–19 (1993). Although the First Amendment concept of petitioning government for redress of grievances can mean an indirect petition through Congress, as other scholarship makes clear, it was not until *after* the VRA's 1965 enactment that there was a significant increase in the amount of Blacks elected to Congress and state legislatures. *See, e.g.*, Augustine, *Rethinking Shaw*, *supra* note 15, at 151–52. Indeed, there was no Congressional Black Caucus as is known today. *See History: The History of the Congressional Black Caucus (CBC)*, AM.'S CONG. BLACK CAUCUS, https://cbc-butterfield.house.gov/history (last visited Feb 14, 2016) (discussing the history of the congressional Black Congress and its founding in 1971). During the Movement, therefore, even though the First Amendment's right to petition included political participation, prior to the VRA's enactment, the track of civil challenge was limited to the petitioning government through the judicial system.

[108] The oft-cited Brown v. Board of Education, 347 U.S. 483, 487 (1954), challenging the constitutionality of school segregation laws under the Fourteenth Amendment's Equal Protection Clause, provides a classic example of civil challenge. *See, e.g.*, ROBERT J. COTTROL ET AL., BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION 101–18 (2003) (detailing the NAACP's many efforts at challenging "separate but equal" in public education); RAWN JAMES, JR., ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION (2010) (detailing the mentor-mentee relationship between Charles Hamilton Houston and Thurgood Marshall as the NAACP chose the track of civil challenge in numerous monumental cases over several decades); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 116–23 (2004) (discussing Charles Hamilton Houston's role as special counsel to the NAACP and the many litigious challenges instituted against Jim Crow segregation laws); Wendy B. Scott, *Desegregation Law and Jurisprudence*, 1 DUKE F. FOR L. & SOC. CHANGE 1, 3–8 (2009) (discussing *Brown v. Board* proceeding in the judicial system and NAACP arguments associated therewith); *see also* Jonathan C. Augustine & Craig M. Freeman, *Grading the Graders and Reforming the Reform: An Analysis of the State of Public Education Ten Years After No Child Left Behind*, 57 LOY. L. REV. 237, 239–40 (2011) (discussing *Brown v. Board* and many of the systemic inequities in public educational systems that resulted as a consequence).

3. Reconciling the Tracks of Civil Disobedience and Civil Challenge

Although the respective tracks of civil disobedience and civil challenge ran parallel courses, civil disobedience often led to civil challenge. While the aftermath of Rosa Parks's refusal to give up her bus seat and the ensuing Montgomery Bus Boycott, for example, demonstrate how the Movement's acts of civil disobedience ultimately helped shape the First Amendment, the associated lawsuit *Browder v. Gayle* shows how civil disobedience naturally led to civil challenge.[109]

III. THE THEOLOGICAL UNDERPINNINGS OF THE MOVEMENT'S TRACK OF CIVIL DISOBEDIENCE

(A) The Role of the Clergy

Although the Movement's impetus came from outside of the church,[110] the clergy accepted leadership in a newly developing "social gospel" and provided Black Americans with a sense of stability in the

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[109] During the Montgomery Bus Boycott, an act that resulted from Mrs. Parks's act of civil disobedience, members of the Montgomery Improvement Association concurrently engaged in civil challenge by testing the constitutionality of an Alabama state statute and companion Montgomery ordinance requiring racial segregation in public transportation. The Alabama federal district court declared the laws unconstitutional, and the United States Supreme Court affirmed on appeal. Browder v. Gayle, 142 F. Supp. 707, 715, 717 (M.D. Ala. 1956), *aff'd*, 352 U.S. 903 (per curiam) *& aff'd sub nom.* Owen v. Browder, 352 U.S. 903 (per curiam) (distinguishing Plessy v. Ferguson, 163 U.S. 537 (1896) and relying on Shelley v. Kramer, 334 U.S. 1, 22 (1948) to declare the Alabama laws at issue unconstitutional).

[110] Rosa Parks's dissident act of civil disobedience was in response to the 1950s sociopolitical climate. After she was arrested for refusing to follow a bus driver's order to vacate her seat for a white passenger, King and almost all the other Black ministers in Montgomery led a boycott of the city's bus system. *See* MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM 43–48 (1958); *see also* JAMES H. CONE, RISKS OF FAITH: THE EMERGENCE OF A BLACK THEOLOGY OF LIBERATION, 1968–1998, at 57 (1999) (discussing King's study of Henry David Thoreau as a student at Morehouse College and Gandhi while at Crozer Seminary as influences on his philosophical development regarding civil disobedience). Further, in noting the boycott's significance in the Movement and indirectly describing a difference between civil disobedience and civil challenge, Professor Oppenheimer writes that

> [t]he Montgomery bus boycott initiated a profound change in the struggle for civil rights. Whereas the NAACP believed in legal reform through lobbying and litigation, the preachers used the weapon of direct confrontation. *Dr. King believed that only by personally confronting the immorality of segregation, placing his own safety and liberty at risk, would the laws and customs of inequality be challenged.*

David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 648 (1995) (emphasis added).

midst of on-going social change.[111] Black members of the clergy were natural leaders of the Movement because of their independence.[112] Similar to Black lawyers, who served a primarily Black clientele during the Movement, Black pastors who served predominately Black congregations were largely immune from white reprisal. The theologically based interfaith organization that provided a cooperative infrastructure for the clergy's active involvement in the Movement was the Southern Christian Leadership Council ("SCLC"), founded in 1957, with Reverend Dr. Martin Luther King, Jr. ("King") as its president.[113] Through the Black church, ministers helped facilitate the Movement by organizing and leading bus boycotts across the South.[114] In addition, Fred Shuttlesworth, an Alabama clergyman, was instrumental in organizing an alternative civil rights group in Birmingham after the state legislature outlawed the NAACP.[115]

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[111] *See* ADAM FAIRCLOUGH, TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR. 15 (1987).

[112] *Id.* at 14.

[113] *See id.* at 13; *see also* GARROW, BEARING THE CROSS, *supra* note 106, at 97 (discussing King's proposal to name the civil rights organization the Southern *Christian* Leadership Conference "to emphasize that most of its participants and its potential popular base came from the [B]lack church").

[114] It bears noting that the Montgomery boycott *was not* the first of its kind. Two years earlier, in Baton Rouge, Louisiana, Blacks also boycotted city buses as a means of exerting economic pressure. With a willingness to compromise on the parts of both Black and white citizens, Rev. T.J. Jemison and Baton Rouge's Black ministerial leadership succeeded in establishing a "first come, first served" segregated seating. Under this arrangement, white passengers took seats from the front of the bus going toward the rear, while Blacks seated themselves from the back towards the front. It eliminated the more objectionable features of bus segregation: Blacks having to surrender their places to whites, or being compelled to stand while reserved "white" seats remained empty. *See* FAIRCLOUGH, *supra* note 111, at 11–12; *see also* ANTOINE L. JOSEPH, THE DYNAMICS OF RACIAL PROGRESS: ECONOMIC INEQUALITY AND RACE RELATIONS SINCE RECONSTRUCTION 120 (2005) (discussing the popularity of the Baton Rouge, Louisiana, bus boycott of 1953 and how it was overshadowed by the publicity generated from the arguments leading up to the Supreme Court's historic May 17, 1954 decision in *Brown v. Board of Education*, 347 U.S. 483 (1954)). Additionally, during King's leadership of the Montgomery Boycott, a bus boycott was also underway in Tallahassee, Florida. FAIRCLOUGH, *supra* note 123, at 13.

[115] FAIRCLOUGH, *supra* note 111, at 13. After the Montgomery boycott's success, segregationists in Alabama successfully sought an injunction prohibiting the NAACP from operating within the state. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 283 (1994). When the NAACP opposed the injunction, the State of Alabama successfully sought disclosure of the NAACP's membership lists. *Id.* On appeal, however, the Supreme Court reversed. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 310 (1964).

(B) The Movement's Motivating Theological Principles

The primary theological principles that motivated the Movement were: (1) the concept of evangelical liberalism, which envisioned Christians and the Church playing an active role in reforming social institutions; (2) the moral duty to disobey the unjust laws that flowed from evangelical liberalism; (3) King's emphasis on love and equality; and (4) the messianic suffering servant theology. This section explores the manner in which these theological principles permeated and motivated the Movement's clergy leadership and lay participants. Because of his influential role and leadership, King and his contributions receive special attention herein.

1. Evangelical Liberalism

The Movement's foundational theology, led by the SCLC and many ordained clergy, was based on the concept of evangelical liberalism. Evangelical liberalism focused on human goodness and the church's necessary social role in society at-large.[116] By contrast, unlike evangelical conservatism, which envisioned a strict separation between

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[116] As Georgetown law professor Anthony Cook writes:

> From its theory of human nature, evangelical liberalism deduced a new role for the Church and the Christian. Given intrinsic human goodness, social institutions could and should be transformed to reflect more accurately the ideals of universal kinship and cooperation. An infallible scripture reflecting the static will of God could not justify social institutions like slavery and segregation.

Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1025–26 (1990). Furthermore, as other scholarship notes,

> "the formative religious traditions of the Western world—Judaism and Christianity—have for millennia embraced the conviction that their religious duty entailed active intervention in the body politic." As a result . . . "churches and synagogues can no more be silent on public issues than human beings can refrain from breathing."

Daniel O. Conkle, *Secular Fundamentalism, Religious Fundamentalism, and the Search for Truth in Contemporary America*, 12 J.L. & RELIGION 337, 355 (1995-1996) (quoting Dean M. Kelley, *The Rationale for the Involvement of Religion in the Body Politic*, *in* THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY 159, 168, 188 (James E. Woods, Jr. & Derek Davis, eds., 1991). Moreover, King was influenced by the theology of Walter Rauschenbusch, a Baptist minister and professor of church history, who "believed that the American democracy undergirded by Christian morality represented a new era of social progress." Janet Forsythe Fishburn, *Walter Rauschenbusch and "The Woman Movement": A Gender Analysis*, *in* GENDER AND THE SOCIAL GOSPEL 71 (Wendy J. Deichmann Edwards & Carolyn De Swarte Gifford eds., 2003). Further, King also credited his studies of Rauschenbusch and Gandhi's ethics of nonviolence as a basis for his social views. *See* Michael Dwayne Blackwell, *In the Legacy of Martin Luther King Jr.: The Social Gospel of Faye Wattleton and Marian Wright Edelman*, *in* GENDER AND THE SOCIAL GOSPEL, *supra*, at 216.

the church and social or political issues, evangelical liberalism envisioned Christians and the church playing an active role in reforming or eradicating unjust social and political institutions, like slavery and segregation, to reflect Christian ideals.[117] In a sense, therefore, evangelical liberalism was more present-minded than evangelical conservatism in that it attempted to focus Christians on society's existing injustices rather than the future rewards of an afterlife.[118]

2. The Moral Duty to Disobey Unjust Laws

The Movement was characterized by a belief that people had a moral duty to deliberately disobey unjust laws. With respect to King's theological beliefs regarding this duty, Peter Paris, professor emeritus at Princeton Theological Seminary, also writes that "King . . . advocated time and again that those who acquiesce to evil participate in promoting evil and are, therefore, as much the agents of evil as the initiators themselves, he concluded that one could not be moral by obeying immoral laws."[119]

Any decision by the leaders and participants in the Movement to engage in civil disobedience was the product of a deliberate process. As a requisite, they initially engaged in acts of discernment to determine whether a law was just or unjust. In his discernment and ethical determination of a particular law's "status," King was influenced by St. Augustine, writing:

> You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How

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[117] Indeed, with respect to the church's role in society, Professor Cook also writes that "unlike the dichotomy of conservative evangelicalism, there was a necessary relationship between the sacred and the secular, the [c]hurch and social issues." Cook, *supra* note 116, at 1026.

[118] *Id.* (recognizing that it was necessary for "[t]he social gospel [to turn] Christian attention from the glories of the kingdom to come to the injustices of the kingdom at hand"); *see also* ALBERT J. RABOTEAU, CANAAN LAND: A RELIGIOUS HISTORY OF AFRICAN AMERICANS 124 (2001) ("The churches not only reacted to social and political change; they also participated in making it happen."). Further, at the end of the successful Montgomery boycott, King himself remarked about the church's "old order" passing away as the church moved toward "stressing a social gospel as well as a gospel of personal salvation." MARSH, *supra* note 4, at 1; *see also* CHARLES MARSH, GOD'S LONG SUMMER: STORIES OF FAITH AND CIVIL RIGHTS 3 (1997) (discussing the role of faith and the church's developing social gospel, with a focus on the national events occurring in Mississippi during the summer of 1964).

[119] PETER J. PARIS, BLACK RELIGIOUS LEADERS: CONFLICT IN UNITY 120 (1991).

> can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."[120]

King's explanation to his fellow members of the clergy regarding the Movement's civil disobedience in Birmingham did not stop with his reliance on St. Augustine. King went further to expound on his discernment between "just" and "unjust" laws to support his actions. In relevant part, he continued by asking:

> [n]ow, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. *All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority.*[121]

After making the requisite determination, the leaders decided whether they would follow the law or peacefully disobey it. If they deemed a law unjust, they deliberately engaged in active disobedience. For example, although there is a popular misconception that Rosa Parks's historic act of civil disobedience was merely that of a fatigued worker, scholars observe that in reality her action was a deliberate and conscientious objection in stating that:

> Her decision to choose arrest rather than humiliation when driver J. F. Blake ordered her to give up her seat on December 1, 1955, was more than the impulsive gesture of a seamstress with sore feet. Although shy and unassuming, Rosa Parks held strong and well-developed views about the inequities of segregation. Long active in the NAACP, she had served as secretary of the local branch. In the summer of 1953 she spent two weeks at Highlander Folk School in Monteagle, Tennessee,

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[120] *Letter from Birmingham Jail*, *supra* note 9, at 84.

[121] *Id.* at 85 (emphasis added). One can also logically argue that as a Baptist minister, King's willingness to break laws for a noble cause was patterned after Jesus's violation of the Hebrew laws prohibiting work on the Sabbath, as done during his public ministry. *See, e.g.*, *Matthew* 12:9–15. Accordingly, King's Judeo-Christian theology and associated willingness to accept the consequences of breaking unjust laws shows "[t]he philosophy of civil disobedience embod[ying] the recognition that obligations beyond those of the law might compel law breaking, but the doctrine steers that impulse toward a tightly-cabined form of illegal protest nevertheless consistent with respect for the rule of law." Hall, *supra* note 103, at 2083.

> an institution which assiduously encouraged interracial amity. Founded and run by Myles Horton, Highlander flouted the local segregation laws and gave black and white Southerners a virtually unique opportunity to meet and mingle on equal terms. Rosa Parks's protest on the Cleveland Avenue bus was the purposeful act of a politically aware person.[122]

Scholars also observe that King's belief in a moral duty to disobey unjust laws was tempered with a respect for the rule of law, which manifested itself through the resignation of King and his followers to accept the penalties for violating laws they considered unjust.[123] King contended that the breaking of unjust laws must be done in the spirit of love,[124] an attitude that demonstrated a high regard for law in principle.[125] Moreover, highly reputed church historians view the Movement's theological underpinnings as a faithful willingness to suffer the consequences of direct action, like sit-ins and marches, for the anticipated reform of an unjust system.[126]

3. Love and Equality

King's socio-political theology was, first and foremost, undergirded by a Christian philosophy of love.[127] As Professor Paris writes,

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[122] FAIRCLOUGH, *supra* note 111, at 16.

[123] *See, e.g.*, Murray, *supra* note 9, at 72.

[124] Professor Murray describes King's philosophy of love as "agape." *Id.* at 73–74. Indeed, theologians regard the Greek word agape as love or allegiance shared by members of a group. *See, e.g.*, BRUCE J. MALINA & JOHN J. PILCH, SOCIAL-SCIENCE COMMENTARY ON THE LETTERS OF PAUL 116–18 (2006) (defining and discussing the concept of agape in the Apostle Paul's 1 *Corinthians* 13).

[125] PARIS, *supra* note 119, at 121.

[126] *See* 2 JUSTO L. GONZALEZ, THE STORY OF CHRISTIANITY: THE REFORMATION TO THE PRESENT DAY 485–86 (2010) (discussing King, the SCLC, and direct action during the Movement).

[127] Ironically, notwithstanding such philosophy, many Christians justified racial discrimination, including the institution of slavery, under the so-called Curse of Ham detailed in *Genesis* 9. *See* DAVID M. WHITFORD, THE CURSE OF HAM IN THE EARLY MODERN ERA: THE BIBLE AND THE JUSTIFICATION FOR SLAVERY 1–2 (2009) (discussing former U.S. Senator Robert Byrd's opposition to the Civil Rights Act of 1964 and his justification of Jim Crow segregation, based on *Genesis* 9:18–27); George H. Taylor, *Race, Religion, and the Law: The Tension Between Spirit and Its Institutionalization*, 6 U. MD. J. RACE, RELIGION, GENDER & CLASS 51, 52 (2006) ("Biblical predicates for racist claims by [w]hite Christians include the condemnation by Noah of his son Ham's progeny, due to Ham's misconduct. The book of *Genesis* quotes Noah saying of Ham's son, Canaan: 'Cursed be Canaan; a slave of slaves shall he be to his brothers.'" (quoting *Genesis* 9:25 (RSV))). *See generally Numbers* 25 (detailing the violence instituted because of interracial relations between the children of Israel and other nations). Professor Cook credits King's theological studies as providing the foundation upon which he was able to deconstruct the logic of both "biblically-based racists," like *Genesis* 9 justifiers, and the "slow down clergy," like those who sent their written criticism to which he responded in writing *Letter From Birmingham Jail*.

King believed that:

> [n]ot only was love in the form of nonviolent resistance in accord with God's will, but, he claimed, it was the most effective means available to the oppressed in their fight against injustice. Indeed, he contended that there would be no permanent solution to the race problem until oppressed people developed the capacity to love their enemies.[128]

King's unfavorable experiences with litigation lead to an inference that he preferred civil disobedience to civil challenge. For example, when King and others in the Movement challenged Birmingham Commissioner Eugene "Bull" Connor's discriminatory refusal to issue a parade permit that would have allowed clergy members to peacefully and *legally* assemble on Good Friday in 1963, they lost before the Supreme Court.[129] After the Alabama court enjoined the ministers from assembling, the Supreme Court affirmed by looking at the fact that the protestors lacked a permit and neglected to cite the discriminatory reasons behind Connor's denial of the permit:

> The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial proceedings is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.[130]

In relevant part, Professor Cook writes that

> [t]he evangelicalism of Dr. George Washington Davis, King's professor of theology at Crozer Seminary, and the social gospel of Walter Rauschenbusch gave King the theological perspectives to challenge conservative evangelicalism's conception of human nature and its debilitating dichotomy between the spiritual and the secular and between order and freedom. Evangelical liberalism turned conservative evangelicalism conception of human nature on its head and called into question the universality of that theology's assumptions. Evangelical liberalism posited the goodness of human nature, as reflected in and resulting from human moral reasoning, and conjectured that evil institutions had limited people's efforts to pursue the ideal of the Kingdom of Value, what King would later call the Beloved Community.

Cook, *supra* note 116, at 1025.

[128] PARIS, *supra* note 119, at 113.

[129] Walker v. City of Birmingham, 388 U.S. 307, 320–21 (1967).

[130] *Id.* at 320–321; *see also* LESLIE C. GRIFFIN, LAW AND RELIGION: CASES AND MATERIALS 161–62 (2010) (discussing King's stance on civil disobedience, the Supreme Court's decision in *Walker*, and King's *Letter From Birmingham Jail*); *see also* David Luban, *Legal Storytelling: Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2157–58 (1989).

Despite this legal defeat, King remained steadfast in his theological convictions that the Movement—essentially an interdisciplinary juxtaposition of law and religion—placed his actions on a moral high ground that preempted state law. As a testament to his theology, on December 5, 1955, at the onset of the Montgomery Bus Boycott, King shared the following affirmation of civil disobedience while speaking in Montgomery:

> [W]e are not wrong in what we are doing. If we are wrong, then the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong. If we are wrong, Jesus of Nazareth was merely a utopian dreamer and never came down to earth. If we are wrong, justice is a lie. And we are determined here in Montgomery to work and fight until justice runs down like water, and righteousness like a mighty stream.[131]

From King's theological perspective, human equality stemmed from the identity of *all* humans as being children of God.[132] Indeed,

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[131] RABOTEAU, *supra* note 118, at 110; *see also* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1000 (1989) (describing King's first public speech as the leader of the Montgomery Bus Boycott as displaying attentiveness to legal symbolism). Moreover, in recognition of the interdisciplinary connectedness of law and religion, after King's death, the editors of the *Columbia Law Review* dedicated an issue to King's life and works. Kennedy, *supra*, at 1000 n.2.

[132] *See Letter from Birmingham Jail*, *supra* note 9, at 99. As a point of philosophical lineage, in King's essay on civil disobedience, *Letter From Birmingham Jail*, King cites St. Augustine, who is affectionately regarded by theologians as a great doctor/teacher of the church. *See* INVITATION TO CHRISTIAN SPIRITUALITY: AN ECUMENICAL ANTHOLOGY 103-13 (John R. Tyson, ed., 1999) (highlighting St. Augustine's life and theology). St. Augustine's teachings are known to have significantly influenced the theology of King's namesake, Martin Luther, an Augustinian monk who demonstrated civil disobedience against cannon law after disagreeing with the Catholic Church and posting on the church door in Wittenberg his famed *Ninety-Five Theses on the Power and Efficacy of Indulgences*, a point-by-point refutation of Catholic Church orthodoxy. *See generally* DAVID M. WHITFORD, LUTHER: A GUIDE FOR THE PERPLEXED (2011) (providing an overview of Martin Luther's theological arguments and beliefs). Indeed, Martin Luther's *protest*—an act of civil disobedience by this Article's definition—began the Protestant Reformation in Germany. *See* 2 GONZALEZ, *supra* note 126, at 25–31. Moreover, St. Augustine and Martin Luther, figures King undoubtedly studied in seminary, were impacted by the Apostle Paul's theology as an evangelist and apologist in early church history. Although the subject of authentic and disputed ("deutero-Pauline") authorship is beyond this Article's scope, *see, e.g.*, JAIME CLARK-SOLES, ENGAGING THE WORD: THE NEW TESTAMENT AND THE CHRISTIAN BELIEVER 77–87 (2010); MALINA & PILCH, *supra* note 124, at 1, in examining *Galatians*, epistle scholars uniformly agree Paul actually wrote, *see, e.g.*, MICHAEL J. GORMAN, APOSTLE OF THE CRUCIFIED LORD: A THEOLOGICAL INTRODUCTION TO PAUL & HIS LETTERS 87 (2004); CLARK-SOLES, *supra*, at 77; MARION L. SOARDS, THE APOSTLE PAUL: AN INTRODUCTION TO HIS WRITINGS AND TEACHINGS 57 (1987), the theology of agape is omnipresent. In expressing "group love" as a universally shared sentiment among believers, St. Paul, a Pharisaic Israelite, famously penned: "There is neither Jew nor Greek,

this is the very essence of agape. As Professor Paris observes:

> King's vision of the kinship of humans as a direct corollary of the parenthood of God pervaded his entire thought. Only the divine principal of love can hold the diversity of humankind together in a harmonious community. That kinship of persons under the parenthood of God was, in King's mind, the kingdom of God . . . . His fundamental ethical norm was the Christian understanding of love as presented primarily in the Sermon of the Mount and as symbolized most vividly in the cross on which Jesus died while forgiving his enemies. King viewed Jesus as the supreme manifestation of that religious and ethical principle.[133]

Further, it is readily apparent that in keeping with the Movement's theology of equality, clergy and laity alike engaged in direct action, just as did Rosa Parks when she refused to give-up her bus seat in the act of civil disobedience that was the Movement's genesis. King actually suggested direct action was systematically designed to create crisis as a prelude to peace:

> In any nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices exist; negotiation; self-purification; and direct action. . . .
>
> . . . .
>
> . . . We had no alternative except to prepare for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and the national community. . . .
>
> . . . .
>
> You may well ask: "Why direct action? Why sit-ins, marches and so forth? Isn't negotiation a better path?" . . . . Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis . . . that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored. My citing the creation of tension as part of the work of the nonviolent-resister may sound rather shocking. But I

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there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus. And if you are Christ's, then you are Abraham's seed, and heirs according to the promise." *Galatians* 3:28–29; *see also Philemon* 10–16 (describing Paul's appeal to Philemon to accept Onesimus, Philemon's former slave, back into his household as a "brother" in Christ with Paul as a mutual spiritual father). It is therefore apparent the theology of agape transcended from apostolic evangelism in antiquity to King in the Movement. *See, e.g.*, MARSH, *supra* note 4, at 45 (quoting King, while pastor of Dexter Avenue Baptist Church in Montgomery, as saying "[s]egregation is a blatant denial of the unity which we all have in Jesus Christ . . . it is still true that in Christ there is neither Jew nor Gentile (Negro nor white) and that out of one blood God made all men to dwell upon the face of the earth.").

[133] PARIS, *supra* note 119, at 108–09.

> must confess that I am not afraid of the word "tension." I have earnestly opposed violent tension, but there is a type of constructive, nonviolent tension which is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, so must we see the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood.
>
> The purpose of our direct-action program is to create a situation so crisis-packed that it will inevitably open the door to negotiation.[134]

(C) The Suffering Servant and Messianic Theology in the Movement

King believed that Jesus's cross symbolized suffering *and* victory, and that Jesus suffered such a brutal death because he consistently lived a life of love:

> In [Jesus's crucifixion], history witnesses the sacrificial element implied by love. Love is no guarantor against persecution and suffering. In confronting evil it risks the possibility of suffering and death . . . . And so, Christ died praying for his executioners, thereby manifesting the community his life and mission exemplified. Although he was crucified, love had not been destroyed, even in its darkest hour. And what is the victory the cross symbolizes. Those who love may suffer at the hands of injustice, but injustice cannot destroy the love of God, which is always redemptive.[135]

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[134] *Letter from Birmingham Jail*, *supra* note 9, at 79–82.

[135] PARIS, *supra* note 119, at 113–14. Moreover, consistent with his biblical beliefs on redemptive suffering, as a disclaimer, King noted his reluctance to bring attention to his personal trials because he did not want to be seen as someone with a martyr complex who was in search of sympathy. Martin Luther King, Jr., *Suffering and Faith*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 41 (James Melvin Washington ed., 1986) [hereinafter King, *Suffering & Faith*] ("*My personal trials have also taught me the value of unmerited suffering . . . . I have lived these last few years with the conviction that unearned suffering is redemptive*.") (emphasis added) (internal citations omitted); RABOTEAU, *supra* note 118, at 113 ("*King explained that nonviolence . . . was based upon the firm conviction that suffering was redemptive because it could transform both the sufferer and the oppressor*; it tried to convert, not defeat the opponent; and was based on the confidence that justice would, in the end, win over injustice.") (emphasis added). Moreover, the Pauline Epistles also share this perspective, *see, e.g.*, *Romans* 8:17 ("[A]nd if children, then heirs—heirs of God and joint heirs with Christ, if indeed we suffer with *Him*, that we may also be glorified together."), as does the oldest gospel narrative, *Mark*, in showing Jesus came to die for others. *Mark* 10:45 ("For even the Son of Man did not come to be served, but to serve, and to give His life a ransom for many."). Indeed, King's concept of redemptive suffering was one of the essential faith tenants of the early church in believing humankind's debt resulting from original sin had been paid for by Jesus. *See* ST. ATHANASIUS, ON THE INCARNATION 18 (Cliff Lee ed., 2007), http://www.ccel.org/ccel/athanasius/incarnation.pdf (describing the sacrificial death of Jesus Christ); 1 JUSTO L. GONZALEZ, THE STORY OF CHRISTIANITY: THE EARLY CHURCH TO

Accordingly, the very center of King's theology—and arguably the theology of the Movement—was a belief that God's love was redemptive,[136] especially through unmerited suffering. From a Christological perspective, therefore, the suffering servant theology manifested in the life and death of Jesus, the profit from Galilee. King's perspective on this aspect of Christology is evident in the following excerpt from an article published in the February 6, 1957 issue of *Christian Century*:

> *There is something at the very center of our faith which reminds us that Good Friday may reign for a day, but ultimately it must give way to the triumphant beat of the Easter drums.* Evil may so shape events that Caesar will occupy a palace and Christ a cross, but one day that same Christ will rise up and split history into A.D. and B.C., so that even the life of Caesar must be dated by his name. So in Montgomery we can walk and never get weary, because we know there will be a great camp meeting in the promised land of freedom and justice.[137]

King also derived his Judeo-Christian perspective on redemptive suffering from messianic scriptures. For example, *Isaiah*'s Fourth Servant Song, presumably written to provide hope and inspiration to the children of Israel while suffering during the Babylonian Exile, depicts extreme and unmerited suffering in the name of redemption.[138]

THE DAWN OF THE REFORMATION 199–201 (2010) (summarizing Athanasius's Christology as believing the debt of human sin was so significant that God himself became incarnate in the form of Jesus Christ to suffer and die for the redemption of humankind such that believers might not perish but have eternal life); *see also* READINGS IN CHRISTIAN THOUGHT 82–93 (Hugh T. Kerr ed., 2d ed. 1990) (discussing the theology of Anselm of Canterbury and his belief that Jesus's incarnation and unmerited redemptive suffering was to forgive human sin).

[136] *See, e.g.*, GLENN TINDER, THE FABRIC OF HOPE: AN ESSAY 71–72 (1999) (explaining the connectedness of hope and suffering through the concept of justification by faith).

[137] Martin Luther King, Jr., *Nonviolence and Racial Justice*, *in* A TESTAMENT OF HOPE, *supra* note 135, at 9 (emphasis added).

[138] Named for the major prophet of Jerusalem and son of Amoz who is believed to be one of the composite's authors, *Isaiah* was written by at least three different people who presumably were prophets during various stages in Israel's history. Indeed, a textual analysis allows the reader to discern three distinct periods, each portrayed in the composite's respective sections. *Isaiah* 1–39, referred to as "First Isaiah," is believed to have been written by the composite's namesake, a prophet of the Southern Kingdom (Judah). Moreover, it is believed to have been written during the time the Southern Kingdom was under Assyrian domination to the Northeast, after the Northern Kingdom (Israel) had ceased to independently exist. Consistent with his contemporaries, the prophet Isaiah presents a message of social justice, faith in God, reward for the obedient, and judgment on the unfaithful. *Isaiah* 40–55, commonly referred to as "Second Isaiah" or "Deutero-Isaiah," is attributed to an unknown prophet who presumably lived in Babylon during the Sixth Century Babylonian exile. A logical deduction is that Second Isaiah's author ministered to the people of Israel during their exile. Consequently, "Deutero-Isaiah" shows continuity with "First Isaiah" by emphasizing trust in God and hope for Israel's imminent return from exile, a

The Fourth Servant Song provides as follows:

> Surely He has borne our griefs And carried our sorrows; Yet we esteemed Him stricken, Smitten by God, and afflicted. But He was wounded for our transgressions, He was bruised for our iniquities; The chastisement for our peace was upon Him, And by His stripes we are healed. All we like sheep have gone astray; We have turned, every one, to his own way; And the LORD has laid on Him the iniquity of us all.
>
> He was oppressed and He was afflicted, Yet He opened not His mouth; He was led as a lamb to the slaughter, And as a sheep before its shearers is silent, So He opened not His mouth. He was taken from prison and from judgment, And who will declare His generation? For He was cut off from the land of the living; For the transgressions of My people He was stricken. And they made His grave with the wicked—But with the rich at His death, Because He had done no violence, Nor was any deceit in His mouth.
>
> Yet it pleased the LORD to bruise Him; He has put Him to grief. When You make His soul an offering for sin, He shall see His seed, He shall prolong His days, And the pleasure of the LORD shall prosper in His hand. He shall see the labor of His soul, and be satisfied. By His knowledge My righteous Servant shall justify many, For He shall bear their iniquities.[139]

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period of redemptive suffering. "Second Isaiah" is therefore messianic in providing hopeful anticipation for a redemptive reconciliation after a period of suffering. Finally, *Isaiah* 56–66, attributed to prophet(s) who lived in Judah after Israel's return from exile, is commonly referred to as "Third Isaiah" or "Trito-Isaiah." It is believed to have been written much later than "Second Isaiah." Its overall eschatological interest is in events surrounding the last days and on salvation. Accordingly, as a composite, *Isaiah* connects the aforementioned periods of Israel's history and establishes a theme of messianic salvation and eventual reward after redemptive suffering. *See* THE HARPERCOLLINS STUDY BIBLE: FULLY REVISED AND UPDATED 912–14 (Harold W. Attridge ed., 2006). *See generally* Geoffrey W. Grogan, *Isaiah*, *in* 6 THE EXPOSITOR'S BIBLE COMMENTARY 4–13 (Frank E. Gaebelein & Richard P. Polcyn eds., 1986) (discussing the possible authorship, date, and unity of the Book of Isaiah).

[139] *Isaiah* 53:4–12. The cited pericope demonstrates the sinless suffering of God's servant such that all people might receive salvation. This sinless suffering was arguably the very essence of King's theology. The pericope was written after the fall of Jerusalem in 587 B.C. and during the period of the Babylonian exile before King Cyrus of Persia defeated Babylon in 539 B.C. Consequently, its author(s)' prophesies were directed toward those in exile and were likely delivered shortly before their 538 B.C. return to Judah, as a means of establishing hope. *See* LYNNE M. DEMING, 12 BASIC BIBLE COMMENTARY: ISAIAH 128–32 (1988) (discussing the possible meanings behind God's speech in the Fourth Song). Similarly, "hope" fueled the optimism that sustained the Movement's sacrificial activity. *See* VINCENT HARDING, HOPE AND HISTORY: WHY WE MUST SHARE THE STORY OF THE MOVEMENT 95 (1990) (discussing the Student Nonviolent Coordinating Committee's founding statement of purpose "We affirm the philosophical or religious ideal of nonviolence as the foundation of our purpose, the presupposition of our faith, and the manner of our action. Nonviolence as it grows from Judaic-Christian traditions seeks a social order of justice permeated by love.").

Scholars debate whether the redemptive suffering was done by the people of Israel or whether it was messianic in describing Jesus, the foretold Christ who would suffer on behalf of all people.[140] Regardless, in the Movement's context, this suffering servant theology was epitomized by the willingness of many students, clergy, and lay activists to endure beatings, be spat upon, and be the targets of trained attack dogs and water hoses, all because they believed their temporal suffering was for a greater and sustaining cause.[141]

Just as King's theology viewed his personal suffering as redemptive, he viewed the sacrifices of others engaged in the Movement as redemptive, too.[142] In May of 1961, the Congress for Racial Equality

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[140] *See, e.g.*, MICHAEL D. COOGAN, A BRIEF INTRODUCTION TO THE OLD TESTAMENT: THE HEBREW BIBLE IN ITS CONTEXT 334–35 (2009).

[141] *See, e.g.*, STERLING, *supra* note 106, at 191–98 (discussing the North Carolina students' lunch counter sit-ins and the Freedom Riders' mob attacks, bus burnings and bombings, while noting an activist's message from his hospital bed: "*These beatings cannot deter us . . . . We want only equality and justice and we will get it. We are prepared to die*.") (emphasis added). Indeed, in the Black church, the theological belief that suffering is a prelude to victory comes through "liberation hermeneutics." "Hermeneutics," a word commonly used by theologians to describe scriptural interpretation based on religious experience, is derived from the Greek god Hermes (the Roman god Mercury), the messenger or interpreter for the other gods. *See* MICHAEL J. GORMAN, ELEMENTS OF BIBLICAL EXEGESIS: A GUIDE FOR STUDENTS AND MINISTERS 140 (rev. expanded ed. 2008); JAMES H. HARRIS, PREACHING LIBERATION 55–62 (1995) (discussing preaching styles influenced by a scriptural read aimed at uplifting the marginalized); *see also* CLEOPHUS J. LARUE, I BELIEVE I'LL TESTIFY: THE ART OF AFRICAN AMERICAN PREACHING 96–97 (2011) (using King's famous *I Have A Dream* speech in support of the hypothesis that effective Black preaching often creates a world that does not exist).

[142] After expounding upon the realities of prison for blacks during the Movement, including anticipated beatings and the harsh separation from family, King wrote about young people's willingness to suffer in prison as part of the Movement and for the cause in which they believed as follows:

> There were no more powerful moments in the Birmingham episode than during the closing days of the campaign, when Negro youngsters ran after white policemen, asking to be locked up. There was an element of unmalicious [sic] mischief in this. The Negro youngsters, although perfectly willing to submit to imprisonment, knew that we had already filled up the jails, and that the police had no place left to take them.
>
> When, for decades, you have been able to make a man compromise his manhood by threatening him with a cruel and unjust punishment, and when suddenly he turns upon you and says: "Punish me. I do not deserve it. But because I do not deserve it, I will accept it so that the world will know that I am right and you are wrong," you hardly know what to do. You feel defeated and secretly ashamed. You know that this man is as good a man as you are; that from some mysterious source he has found the courage and the conviction to meet physical force with soul force.

Martin Luther King, Jr., *The Sword That Heals*, *in* WHY WE CAN'T WAIT, *supra* note 9, at 18–19.

("CORE"), a multiracial group of direct action activists that was originally founded in 1942, challenged the Deep South's segregationist interstate commerce practices by sending buses of college students and other young activists on "freedom rides" from Washington, D.C. to New Orleans.[143] In Alabama and Mississippi, the Freedom Riders were violently attacked and beaten by racist mobs.[144] Clearly consistent with a theological perspective of the suffering servant enduring for the greater good, the Freedom Riders significantly affected the Movement's momentum leading up to the VRA's passage in that their personal safety and security was subordinate to the greater causes in which they believed.

Professor Arsenalt writes about the Freedom Riders' suffering servant mentality in describing their willingness to literally sacrifice their bodies in their non-violent protest(s) against racial segregation in interstate commerce:

> Deliberately provoking a crisis of authority, the Riders challenged federal officials to enforce the law and uphold the constitutional right to travel without being subjected to degrading and humiliating racial restrictions. *Most amazingly, they did so knowing that their actions would almost certainly provoke a savage and violent response from militant white supremacists. Invoking the philosophy of nonviolent direct action, they willingly put their bodies on the line for the cause of racial justice*.[145]

King also recognized the Freedom Riders' unwavering commitment to endure suffering in order to achieve justice on November 16, 1961, speaking before the annual meeting of the Fellowship for the Concerned, a multiracial fellowship group affiliated with the Southern Regional Council:

> I can remember the times that we've been together, I remember that night in Montgomery, Alabama, when we had stayed up all night discussing the Freedom Rides, and that morning came to see that it was necessary to go on with the Freedom Rides, that we would not in all good conscience call an end to the Freedom Rides at that point. *And I remember the first group got ready to leave, to take a bus to Jackson, Mississippi, we all joined hands and started singing together. "We shall overcome, we shall overcome." And something within me said, now how is it that these students can sing this, they are going down to Mississippi, they are going to face hostile and jeering mobs, and yet*

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[143] *See generally* RAYMOND ARSENAULT, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 63 (abridged ed. 2011) (providing a narrative historical account of social-political events that led to Freedom Rides of May 1961, beginning with the 1947 Journey of Reconciliation).

[144] *See id.* at 3–9.

[145] *Id.* at 5 (emphasis added).

> *they could sing "We shall overcome." They may even face physical death, and yet they could sing, "We shall overcome." Most of them realized that they would be thrown into jail, and yet they could sing, "We shall overcome, we are not afraid."* Then something caused me to see at that moment the real meaning of the movement. That students had faith in the future. That the movement was based on hope, that this movement had something within it that says somehow even though the arc of the moral universe is long, it bends toward justice. . . . *Before this victory is won some may have to get scarred up, but we shall overcome. Before the victory of brotherhood is achieved, some will maybe face physical death, but we shall overcome. Before the victory is won, some will lose jobs, some will be called communist, and reds, merely because they believe in brotherhood, some will be dismissed as dangerous rabblerousers and agitators merely because they're standing up for what is right, but we shall overcome.*[146]

From a theological perspective, therefore, the Freedom Riders shared King's redemptive suffering sentiment as they achieved victories for freedom of speech and association in interstate commerce.[147]

Furthermore, the same willingness to endure unmerited brutality for the accomplishment of larger and more far-reaching goals motivated the Bloody Sunday marchers[148] in bringing attention to the need

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[146] Martin Luther King, Jr., *Law, Love, and Civil Disobedience*, *in* A TESTAMENT OF HOPE, *supra* note 135, at 52 (emphases added). Many members of the clergy, Black and white, were also engaged in the Freedom Rides. On September 15, 1961, only days before a noted Interstate Commerce Commission ruling, several ordained ministers were singled out by the Hinds County, Mississippi courts to receive punitive fines and sentences of incarceration for their role in the Freedom Rides. *See* ARSENAULT, *supra* note 143, at 267–68.

[147] In detailing the violent beatings the Freedom Riders endured in May of 1961 and their suffering servant resilience, author Helene Hanff observed that:

> [t]he riders stayed in Montgomery four days, as guests in Negro homes, until the injured among them were able to travel. On Wednesday, May 24, accompanied by National Guardsmen and sixteen reporters, they left Montgomery for Jackson, with James Lawson holding classes in nonviolent techniques on the bus as it rode into Mississippi.
>
> At Jackson, twenty-seven Freedom Riders were arrested and given the choice of a two-hundred dollar fine or two months in jail. Since fines were an enormous burden, the students chose jail. They were immediately transferred from the city jail to Parchman State Penitentiary. There, nine black girls were locked in one filthy cell with the white girls occupying an adjoining cell. The cells contained nothing but mattresses and sheets thrown on the steel floor. When the girls began to sing freedom songs, prison guards took their mattresses away. When they sang the Star-Spangled Banner the guards took their sheets away. For three nights they slept on the steel floor.

HELENE HANFF, THE MOVERS AND SHAKERS: THE YOUNG ACTIVISTS OF THE SIXTIES 32 (1970).

[148] *See* Martin Luther King, Jr., *Love, Law, and Civil Disobedience*, *in* A TESTAMENT OF HOPE, *supra* note 135, at 52.

for voting rights legislation in 1965.[149] On the morning of March 7, 1965, more than five hundred demonstrators, including ordained clergy members of the SCLC and the Student Nonviolent Coordinating Committee, assembled at Brown Chapel African Methodist Episcopal Church in Selma, Alabama.[150] Those assembled planned a peaceful demonstration in support of the unbiased right to vote along with a voter registration drive.[151] The end result, however, was that uniformed officers brutally attacked the peaceful demonstrators. The willingness of both the Freedom Riders and the Bloody Sunday marchers to endure suffering to garner rights gained the attention of the nation and ultimately facilitated legal advances in their favor.

IV. EVALUATING THE FRUIT GROWN FROM THE LYNCHING TREE: AN ANALYSIS OF THE ACT AND THE AUTHORS' ARGUMENT THAT IT WAS THE MOVEMENT'S MOST IMPORTANT CONSEQUENT

Although the Movement's leaders had many goals, the authors respectfully argue the Movement's "main goal" was to achieve full civic participation without racial discrimination. The passage of the Civil Rights Act of 1964[152] and the VRA—legislative achievements made possible through civil disobedience—demonstrate that the Movement was indeed successful.[153] Moreover, although both enactments were extremely significant milestones in the Movement's history, the authors argue the VRA is a better indicator of the Movement's success because it paved the way for Black political participation in American

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[149] The Bloody Sunday demonstration was scheduled to be a memorial march honoring the life of Jimmy Lee Jackson, a civil rights activist killed after being shot by an Alabama state trooper on February 17, 1965, in Marion, Alabama. Garrow, *Bridge to Freedom*, *supra* note 18, at 204, 206 ("Marion activists, in conjunction with the SCLC staff, decided that a fitting [M]ovement response to his death would be a mass pilgrimage from Selma to the Alabama state capitol in Montgomery.").

[150] GARROW, PROTEST AT SELMA, *supra* note 5, at 72.

[151] *See* JOSEPH, *supra* note 114, at 125–26.

[152] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241(1964) (codified as amended in scattered sections of 42 U.S.C.).

[153] The authors respectfully acknowledge other scholars' opinions may differ as to whether the Act was the Movement's most significant measure of success. *See, e.g.*, Oppenheimer, *supra* note 110, at 645 ("The [Civil Rights Act] was probably the most important legislation enacted by the United States Congress in the twentieth century."). As advanced herein, however, because of the VRA's empirical measure of success, the authors respectfully argue the VRA was the Movement's crowning achievement. As recent history records show, "[i]n 1990, the twenty-fifth anniversary of the Voting Rights Act, Virginia would have an elected [B]lack governor, there would be 24 [B]lack members of Congress, 417 [B]lack state legislators, 4,388 [B]lack officers of city and county governments, and six of the ten largest cities would have [B]lack mayors." JOSEPH, *supra* note 114, at 135.

democracy.[154]

(A) Making the Movement Complete: How the Voting Rights Act Became Law and the Movement's Empirical Measure of Success

With the Movement well under way, the Bloody Sunday demonstrators only "attempted to draw attention to the political disparities and inequalities [B]lacks were forced to endure because African-Americans were so frequently denied the right to vote."[155] It worked. On March 15, 1965, just over a week after Bloody Sunday, President Johnson submitted a voting rights bill to Congress, which in turn acted pursuant to its constitutional authority[156] and passed the Act on August 4, 1965.[157] President Johnson signed the Act into law on August 6th. The theology of civil disobedience proved successful and the Act's passage unquestionably caused significant changes in the United States.[158]

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[154] *See, e.g.*, Augustine & Thibodeaux, *supra* note 6, at 477–93 (detailing the significant increase in the number of African American lawyers elected to the bench in the State of Louisiana under the Act and litigation filed pursuant thereto); *see also* ALEX POINSETT, WALKING WITH PRESIDENTS: LOUIS MARTIN AND THE RISE OF BLACK POLITICAL POWER 150–153 (1997) (discussing the advances many African Americans were able to make after the Act became law, especially through lawsuits in southern states including Mississippi, Louisiana and Alabama). Furthermore, in discussing the Act as the Movement's measure of success, Professor Garrow writes that "[t]he Voting Rights Act of 1965 revolutionized black access to the ballot throughout most of the Deep South. In so doing, it changed forever the politics of those states and, indirectly, those of the entire nation." GARROW, PROTEST AT SELMA, *supra* note 5, at 1; *see also* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 2 (2008) ("The Voting Rights Act has dramatically reshaped the political landscape of the United States. In the four decades since its enactment, it has helped substantially expand political opportunities for minority voters and has contributed to the radical realignment of southern politics.").

[155] Augustine & Thibodeaux, *supra* note 6, at 453–54.

[156] The Fifteenth Amendment expressly provides, "[t]he Congress shall have the power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.

[157] *See* POINSETT, *supra* note 154, at 152–53. With respect to the VRA's enactment and immediate effects:

> The Voting Rights Act included: (1) the prohibition of literacy tests and similar voting restrictions; (2) the empowerment of the attorney general to oversee federal elections in seven southern states by appointing examiners to register those denied the right to vote; and (3) instructions to the attorney general to challenge the constitutionality of poll taxes in state and local elections.

JOSEPH, *supra* note 115, at 126.

[158] *See* Augustine, *Rethinking Shaw*, *supra* note 15, at 152 (discussing the election of several African Americans to the United States House of Representatives in congressional districts drawn under the VRA); McDuff, *supra* note 26, at 939–45 (discussing litigation under the Act in which the author served as lead counsel with the Lawyers' Committee for Civil Rights Under Law that extended the Act to the elected judiciary); *see also* GARROW, PROTESTS AT SELMA, *supra* note 5, at xi. Further, in discussing the Act's significance,

By precipitating Black voter registration gains and targeting discriminatory election techniques, the Act gave southern Blacks in small towns and rural communities their first opportunity to meaningfully participate in the American electoral process.[159] Even in places that were not covered jurisdictions, African Americans achieved significant firsts with election to offices never before held by Blacks. For example, in 1967 Richard Hatcher and Carl Stokes each became the first African American mayors elected in Gary, Indiana and Cleveland, Ohio, respectively.[160] Without question, their successful elections, followed in succession by many Black candidates across the United States, showed the Movement had progressed from "protest to politics."[161] Therefore, notwithstanding flagrant attempts to limit minority citizens' power of the franchise,

> [t]he Voting Rights Act is one of the most successful civil rights statutes ever passed by Congress. The [A]ct accomplished what the [Fifteenth] Amendment to the U.S. Constitution and numerous federal statutes had failed to accomplish—it provided minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination.[162]

Congress was uniquely situated, in accordance with its constitutional authority, to enact legislation that protects minority citizens in their attempts to fully participate in the political process and elect representatives of their own choosing.

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while also describing his then-work as an attorney with President Johnson's Office of Economic Opportunity ("OEO") and associated work with the non-profit Voter Education Project ("VEP"), civil rights icon Vernon Jordon writes that

> the passage of the Voting Rights Act in August 1965 changed the entire landscape. For the first time, federal registrars came to the South to make sure that local officials did not thwart the enforcement of the law. From my office at the OEO, I understood immediately what this might mean: The VEP could now do better at the job it had been designed to do. With the help and protection of the federal government, money from this not-for-profit entity could be used to transform the Southern electorate and, along with it, the South.

VERNON E. JORDAN, JR. & ANNETTE GORDON-REED, VERNON CAN READ: A MEMOIR 179 (2001).

[159] Garrow, *Bridge to Freedom*, *supra* note 18, at 208.

[160] *See* Gerald Gill, *Power!: 1966–1968*, *in* THE EYES ON THE PRIZE CIVIL RIGHTS LEADERS, *supra* note 18, at 334.

[161] *Id.* at 334–35.

[162] NCSL, *supra* note 23, at 51 (alterations in original).

(B) The VRA's Future?

After Congress's 2006 reauthorization of the Act,[163] the Supreme Court was called upon to address Section 5's constitutionality in *Northwest Austin Municipal Utility District No. One v. Holder* ("*N.W. Austin*").[164] Instead of doing so, however, the Court resolved the dispute on statutory grounds, reversing a separate part of the appeal without addressing Section 5's validity. In *N.W. Austin*, the petitioner was a small utility district with an elected board that was required to seek preclearance under Section 5 before it could change anything related to its elections.[165] The utility district sought judicial preclearance by seeking relief under the "bailout provision" in the VRA's Section 4,[166] asserting that it should be released from preclearance because it met certain requirements.[167] Alternatively, the utility district argued if Section 5 were interpreted to render it ineligible for Section 4's bailout, Section 5 was unconstitutional.[168] The federal district court rejected both claims, opining the utility district was not eligible for Section 4's bailout and, considering the extensive and comprehensive legislative history associated with the Act's 2006 reauthorization, Section 5's twenty-five year extension was indeed constitutional.[169] The utility district appealed.

In noting the *N.W. Austin* litigation's significance, yet deciding to resolve the matter by means other than looking at Section 5's constitutionality, the Court wrote:

> That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions. We agree that the district is eligible under the Act to seek bailout. We therefore reverse, and do not reach the constitutionality of § 5.[170]

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[163] *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, 120 Stat. 577 (codified at 52 U.S.C. §§ 10302–10305, 10308–10310, 10503 (2012))

[164] 557 U.S. 193, 196 (2009).

[165] *Id.* at 196.

[166] To be eligible for Section 4's bailout, the interested political entity must seek declaratory relief before a three-judge panel of the United States District Court for the District of Columbia. 52 U.S.C. §§ 10303(a)(1); 10304(a) (2012). Among other things, the entity must show it has not been found liable of voting rights violations. *See* 52 U.S.C. §§ 10303(a)(1)(A)–(F).

[167] *N.W. Austin*, 557 U.S. at 197.

[168] *Id.* at 193.

[169] *See id*. at 201.

[170] *Id.* at 197.

While the Court avoided the question of Section 5's constitutionality in *N.W. Austin*, it squarely took the issue on in 2013's *Shelby County v. Holder*.[171] The 5-4 *Shelby County* majority essentially concluded that the VRA had "worked" and run its course—that Section 4(b)'s coverage formula for determining which jurisdictions are subject to federal preclearance was antiquated and unconstitutional.[172] The Court upheld the constitutionality of Section 5, but until Congress prescribes a new coverage formula to replace Section 4(b), no jurisdiction will be subject to Section 5 federal preclearance.

Writing for the *Shelby County* majority, Chief Justice Roberts maintained that subjecting certain states to these preclearance requirements violates the "historic tradition that all the States enjoy equal sovereignty."[173] In support of the holding, Chief Justice Roberts relied mainly on dicta that he authored in *N.W. Austin*, where he expressed serious constitutional concerns about Section 5's preclearance scheme.[174] Dissenting, Justice Ginsberg noted that the majority's invoking the "equal sovereignty" argument is contrary to the Court's 1966 *South Carolina v. Katzenbach* decision, and that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[175] Notably, in the immediate aftermath of the decision, voting districts that were formerly subject to Section 5's preclearance requirements enacted changes to their respective voting policies that seemingly have the effect of curtailing democratic voter turnout.[176]

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[171] 133 S. Ct. 2612 (2013).
[172] *See id*. at 2628–29.
[173] *Id*. at 2621.
[174] *N.W. Austin*, 557 U.S. at 201–05.
[175] *Shelby County*, 133 S. Ct. at 2649–50 (Ginsberg, J., dissenting); South Carolina v. Katzenbach, 383 U.S. 301 (1966).
[176] *See* Kara Brandeisky & Mike Tigas, *Everything That's Happened Since the Supreme Court Ruled on Voting Rights*, PROPUBLICA (Nov. 4, 2014, 12:31 PM), https://www.propublica.org/article/voting-rights-by-state-map (noting how these post-*Shelby County* changes largely implicate southern states).

V. CONCLUSION

As the writer of *Hebrews* suggests, since the very beginnings of human existence, faith has motivated people to want better for themselves and believe better is indeed possible. Race relations in United States, especially those in the Deep South, necessitated action. Clergy and laity alike, motivated by a faith that regards suffering as redemptive, acted in the sacrificial ways to ensure minority citizens could have better. Specifically, they suffered and sacrificed to ensure the constitutionally guaranteed right to vote could no longer be abridged.

Recent Supreme Court decisions have significantly undermined the most significant achievement and empirical measure of success gained by the faith-motivated community during the Civil Rights Movement. Although the Act was most recently reauthorized in 2006, its likelihood of continued effectiveness is significantly in question. Indeed, since "[f]aith is the substance of things hoped for and evidence of things not seen," the authors, writing on behalf of the broad-based faith community choose optimism over fear and believe the sacrificial suffering of the past will not have been in vein.[177]

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[177] *Hebrews* 11:1.