EX-FELON DISENFRANCHISEMENT AND ITS INFLUENCE ON THE BLACK VOTE: THE NEED FOR A SECOND LOOK

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The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.[1]

INTRODUCTION

In the United States, the right to vote is regarded as an essential element of liberty, freedom, and self-expression. The ability to exercise the franchise lies at the very root of citizenship[2] and is zealously guarded by those who have struggled to gain its privilege.[3] However, even in this day and age of equality for all, not every citizen is entitled to participate in the electoral process. The several states still retain the power to restrict the franchise,[4] thereby

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[1] Reynolds v. Sims, 377 U.S. 533, 555 (1964).

[2] *See* James B. Jacobs, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 27 (1983) (noting the "centrality of the franchise to the meaning of citizenship").

[3] This is particularly true in the case of women and minorities. *See* Eric Foner, *From Slavery to Citizenship: Blacks and the Right to Vote, in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 54, 54-65 (Donald W. Rogers ed., 1990) [hereinafter VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY]; *see also infra* notes 210-15 and accompanying text (noting the struggle by minorities to acquire voting rights and the attempts by primarily white governments to stop them).

[4] The Guarantee Clause of the U.S. Constitution grants the states some control over the franchise. *See* U.S. CONST. art. IV, § 4 (guaranteeing each state a republican form of government); *see also* Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 39 (1988) (noting that although numerous provisions of the Constitution have been interpreted to grant Congress the power to overturn state election practices, "the guarantee clause . . . still assures the states some control over the franchise"). For instance, states may restrict voting to property owners in certain elections and establish residency requirements for all state and local elections. *See, e.g.*, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 730-35 (1973) (upholding a California statute that permitted only landowners to vote in water storage district elections); Marston v. Lewis, 410 U.S. 679, 680 (1973) (upholding Arizona's 50-day durational residency requirement for state and local elections as "necessary to achieve the State's legitimate goals" of preparing accurate voter lists).

excluding certain groups of individuals. Convicted felons comprise one such group.[5]

To date, fifteen American states permanently disenfranchise ex-felons.[6] While some authorities have condemned the disenfranchisement of ex-felons,[7] typical arguments overlook one important

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[5] Section 2 of the Fourteenth Amendment has been interpreted to confer authority upon states to disenfranchise persons convicted for "participation in rebellion, or other crime." U.S. CONST. amend. XIV, § 2; *see also* Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (upholding the constitutionality of states disenfranchising felons on the basis of § 2). *But see infra* text accompanying notes 93-94 (noting Justice Marshall's criticism of the use of § 2 to disenfranchise).

[6] Some states disenfranchise all felons, while others exclude only those who have committed enumerated offenses or "infamous crimes." *See* ALA. CONST. art. VIII, § 182 (disqualifying from voting "those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property . . . robbery . . . burglary, forgery, bribery"); ARIZ. CONST. art. 7, § 2 ("No person . . . convicted of treason or felony [shall] be qualified to vote in any election . . . ."); DEL. CONST. art. V, § 2 ("[N]o . . . person convicted of a crime deemed by law felony . . . shall enjoy the right of an elector . . . ."); FLA. CONST. art. VI, § 4 ("No person convicted of a felony . . . shall be qualified to vote . . . ."); IOWA CONST. art. 2, § 5 ("No . . . person convicted of any infamous crime shall be entitled to the privileges of an elector."); KY. CONST. § 145 (excluding from the vote "[p]ersons convicted . . . of treason, or felony, or bribery in an election"); MD. CONST. art. I, § 4 ("The General Assembly by law may . . . prohibit the right to vote of a person convicted of infamous or other serious crime . . . ."); MISS. CONST. art. 12, § 241 (disenfranchising persons "convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy"); NEV. CONST. art. 2, § 1 ("[N]o person who has been . . . convicted of treason or felony . . . shall be entitled to the privilege of an elector."); N.H. CONST. pt. I, art. 11 (disenfranchising persons convicted of treason, bribery, and election offenses only); N.M. CONST. art. VII, § 1 (disqualifying "persons convicted of a felonious or infamous crime" from voting); TENN. CONST. art. I, § 5 (denying suffrage to persons convicted of "infamous crimes"); UTAH CONST. art. IV, § 6 (disenfranchising persons committing treason and election offenses only); VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote . . . ."); WYO. CONST. art. 6, § 6 ("All . . . persons convicted of infamous crimes . . . are excluded from the elective franchise."); *see also* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1300 n.1 (1989) (challenging ex-felon disenfranchisement generally). While the number of black felons and the degree of black vote dilution may vary among these states, this Comment addresses the problem from a broader, more theoretical perspective, and also examines the six states where the impact of felon disenfranchisement statutes on the black vote is greatest. *See infra* note 12 & part I.

[7] *See generally* Note, *supra* note 6, at 1300-17 (attacking policy concerns and political justifications for ex-felon disenfranchisement). *See also* Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 721-757 (1973) (condemning ex-felon disenfranchisement as contrary to society's criminal rehabilitative goals); Gary L. Reback, Note, *Disenfranchisement of Ex-felons: A Reassessment*, 25 STAN. L. REV. 845, 845-64 (1973) (attacking the constitutionality of ex-felon disenfranchisement).

aspect of the problem—the impact of this disenfranchisement on the black vote. In 1985, the issue was addressed for the first time by a Tennessee federal district court in *Wesley v. Collins*.[8] In *Wesley*, the plaintiff, a black convicted felon, argued that a Tennessee statute disenfranchising felons resulted in the unlawful dilution of the black vote in violation of the U.S. Constitution and the federal Voting Rights Act Amendments of 1982.[9] Because the court dismissed the plaintiff's complaint for failure to state a claim,[10] the many issues raised by *Wesley* went largely unresolved. This Comment will explore some of these issues in arguing that the disenfranchisement of ex-felons[11] deserves closer judicial scrutiny because of its potential to impermissibly dilute black voting power.[12]

Part I of this Comment examines the problem from a statistical standpoint in order to show that, due to the disproportionate percentage of black convicted felons removed from the already limited pool of eligible black voters, ex-felon disenfranchisement negatively impacts the black vote. In addition, Part I looks at certain felon-disenfranchising states where, due to the larger number of blacks imprisoned compared to whites in proportion to total population for each group, there is a significant impact on the black vote. While such an analysis might be met with a generally

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[8] 605 F. Supp. 802 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

[9] Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. § 1973(a)-(b) (1988)); *see also Wesley*, 605 F. Supp. at 804-14. According to the amendments to § 2 of the Voting Rights Act, a plaintiff need only show that a challenged statute has the result of denying minorities "an equal chance to participate in the political process." S. REP. NO. 417, 97th Cong., 2d Sess. 16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 193. Thus, the amendments effectively lessened the burden imposed upon minority vote dilution plaintiffs by City of Mobile v. Bolden, 446 U.S. 55 (1980), which required proof of discriminatory intent in § 2 cases. *See id.* at 69-70. In *Bolden*, a class action suit was brought on behalf of all black citizens of the city of Mobile challenging the city's at-large system of municipal elections. *See id.* at 58.

[10] *See Wesley*, 605 F. Supp. at 814.

[11] The terms "felon" and "ex-felon" are used interchangeably throughout this Comment to refer to those who have been convicted of a felony and have been released from prison (except when referring to current prison population statistics).

[12] Stated simply, vote dilution occurs when a statute or electoral practice results in denying minorities "an equal chance to participate in the political process." S. REP. NO. 417, *supra* note 9, at 16, *reprinted in* 1982 U.S.C.C.A.N. at 193. I am not necessarily arguing that felon disenfranchisement unlawfully dilutes the black vote in every state listed in note 6, *supra*. Rather, I am adopting a broad approach to the problem in arguing that certain factors, many of which the *Wesley* court brushed aside, must be given greater emphasis when assessing the impact of felon disenfranchisement on the black vote. Also, in certain states that still disenfranchise felons, a significant impact on the black vote may be evidence, although not dispositive, of black vote dilution. *See infra* part I.A.

unsympathetic reception,[13] Part I also addresses possible reasons for the disproportionate imprisonment figures, namely the disparate targeting and treatment of blacks by the criminal justice system.

Part II describes the general arguments advanced against the disenfranchisement of ex-felons and analyzes the significance of black status to such arguments. Part III explores the particular applicability of § 2 of the Voting Rights Act to cases such as *Wesley*[14] involving alleged vote-diluting ex-felon disenfranchisement statutes, and argues for the inclusion of and special emphasis on certain factors—specifically those described in Parts I and II as well as evidence of socioeconomic and voting discrimination—in the Act's "totality of circumstances" analysis.[15] Part III also criticizes the *Wesley* decision for its faulty analysis under the Voting Rights Act. Finally, in proposing a possible approach for future courts to pursue

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[13] Indeed, some would argue that the mere fact that a disproportionate number of blacks are convicted of felonies deserves little attention, since the decision to commit a crime is an individual one, and felon disenfranchisement statutes obviously do not directly interfere with the voting rights of non-felons. *See Wesley*, 605 F. Supp. at 813 ("Felons are . . . disenfranchised based on . . . their conscious decision to commit an act for which they assume the risks of . . . punishment."). *But see infra* notes 163-65 and accompanying text (examining the link between adverse social conditions and criminal acts); *infra* part I.B.2 (examining the significance of black status in imprisonment rates).

[14] Although the plaintiff in *Wesley* also alleged violation of the Fourteenth and Fifteenth Amendments, this Comment focuses specifically on challenges brought under the Voting Rights Act. The constitutional intent standard applied in Fourteenth and Fifteenth Amendment cases may be very difficult to meet, as Congress recognized in amending § 2 of the Voting Rights Act. In addition, since "[a] finding of liability under section two would obviate the necessity to decide . . . plaintiffs' Fourteenth and Fifteenth Amendment claims," Voting Rights Act claims are more likely to succeed. Lee County Branch of the NAACP v. City of Opelika, 748 F.2d 1473, 1478 (1984) (footnote omitted). Furthermore, as the *Lee* court observed, "if . . . plaintiffs cannot prevail under the generally more easily proved 'results' standard of section 2, it is unlikely that they could prevail on their constitutional claims in any event." *Id.* at 1478 n.7. Part II, however, explores the general constitutional arguments against ex-felon disenfranchisement and recommends a different approach to the constitutional intent standard in discrimination cases.

[15] Section 2(b) of the Voting Rights Act Amendments provides that vote dilution in violation of the Act is established if

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b) (1988). The details of this analysis, including the specific factors to be weighed in the "totality of circumstances" test, are discussed in Part III of this Comment.

in examining vote dilution claims against ex-felon disenfranchisement, Part III suggests that the strong presence of the above-mentioned factors should be presumed to work in conjunction with the particular ex-felon disenfranchising statute to impermissibly dilute the black vote under the Voting Rights Act.

I. THE PROBLEM IN NUMBERS

All fifteen disenfranchisement statutes now in existence[16] apply equally to felons of all races. The district court in *Wesley* rejected the plaintiff's contention that because a greater percentage of blacks than whites are convicted of felonies in Tennessee,[17] the disenfranchising statute dilutes black voting strength in violation of the Voting Rights Act.[18] However, the court of appeals noted that although a showing of disproportionate racial impact, as evidenced by statistical data, is not solely sufficient to establish vote dilution in violation of the Voting Rights Act,[19] such impact nonetheless should prompt a judicial inquiry into the "interaction of the challenged legislation 'with historical, social and political factors generally probative of dilution.'"[20] Evidence of disproportionate racial impact is not to be simply disregarded, as the district court indicated.[21]

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[16] *See supra* note 6 (listing the ex-felon disenfranchisment provisions in 15 state constitutions).

[17] Specifically, the plaintiff in *Wesley* presented evidence demonstrating that "the ratio of white felons to the general population of Tennessee whites [was] approximately 1 to 1000, while the corresponding black ratio [was] 1 to 100." *Wesley*, 605 F. Supp. at 804.

[18] *See id.* at 807 ("[R]elative to the potential voting strength of whites, the number of blacks of voting age is disproportionately reduced by Tennessee's disenfranchisement of felons . . . .").

[19] *See* Wesley v. Collins, 791 F.2d 1255, 1260-61 (6th Cir. 1986) (noting that "[i]t is well-settled . . . that a showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act"). For a thorough discussion of the Voting Rights Act and its analytical framework, see *infra* part III.

[20] *Id.* at 1261 (quoting Gingles v. Edmisten, 590 F. Supp. 345, 354 (E.D.N.C. 1984)). In essence, according to the *Wesley* court of appeals, data showing disproportionate impact automatically prompt a Voting Rights Act analysis of possible vote dilution.

[21] Although the district court found that the Tennessee act did indeed disproportionately impact blacks, that fact seemed to get lost in the court's misdirected search for a causal nexus between the "indicia of historically-rooted discrimination and the Tennessee statute disenfranchising felons." *Wesley*, 605 F. Supp. at 812. Part III of this Comment attacks the *Wesley* court's causal nexus approach and argues that statistical data showing impact should be weighed in the Voting Rights Act "totality of circumstances" analysis.

As demonstrated in the following analysis, when the relatively large percentage of black convicted felons is compared to the small percentage of the general population that blacks represent nationwide,[22] and the even smaller black voting age population, it becomes clear that disenfranchisement of ex-felons has a significant impact on black voting power. In certain disenfranchising states, this impact is enhanced by a disproportionate ratio of black prisoners to white prisoners in relation to total statewide population for each group. In these areas, the propensity for vote dilution is particularly great. While such strong statistical evidence of disproportionate impact cannot by itself establish vote dilution,[23] it nevertheless deserves greater weight than that afforded by the *Wesley* court.

A. *Statistical Evidence*

The 1990 census reported that 29,986,060 of a total 248,709,873 Americans are black, compared to 199,686,070 white citizens.[24] Blacks account for roughly 12.1% of the total U.S. population, compared to the 80.3% white population.[25] Of greater importance, however, is the black voting age population which, in 1988,[26] was estimated to be 9,171,000,[27] or approximately 4% of the current

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[22] While nationwide figures are obviously larger than similar statistics for any one state, national statistics are presented to demonstrate disproportionate impact on a broad scale, and thus to emphasize the need for greater judicial deference to statistical evidence in ex-felon disenfranchisement vote dilution cases. Figures for certain states are also included to show areas where felon disenfranchisement has its greatest impact on the black vote.

[23] Again, it should be remembered that the following statistics are offered to show impact, not to show vote dilution which must be established through Voting Rights Act analysis. *See supra* notes 19-20 and accompanying text. These figures should not only prompt the initial analysis but should be factored into the analysis. *See infra* part III.C.

[24] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 59 (1992) [hereinafter 1990 CENSUS]. Federal and state prisoners are included in this number. *See id.* at D-2.

[25] *See* NATIONAL URBAN LEAGUE, INC., THE STATE OF BLACK AMERICA 1992, at 310 (1992).

[26] The most recent estimates of black voting age population found are for 1988. *See* CARRELL P. HORTON & JESSIE C. SMITH, STATISTICAL RECORD OF BLACK AMERICA 480 (1990).

[27] *See id.*

total population.[28] Of that number of eligible black voters, 5,842,000 blacks, or 63.7%, were registered to vote.[29]

According to the most recent *Bureau of Justice Statistics Bulletin*,[30] blacks represented 47%[31] of a total 829,344 convicted felons[32] and 48% of felons convicted of violent crimes[33] in 1990, although they made up only 12.1% of the U.S. adult population in that year.[34] Comparatively, whites represented 52% of total convicted felons,[35] although they made up 80.3% of the total population in 1990.[36] Furthermore, because approximately 90% of all convicted felons in 1990 were of voting age,[37] it may be safely assumed that most of those black convicted felons were of voting age.

Of even greater relevance to the problem of black vote dilution are the data which show that in some of the states that still disenfranchise felons, the black population is much lower than the white population and the number of blacks imprisoned is comparatively high. As the following table indicates, in six states that disenfranchise ex-felons,[38] blacks comprise a larger portion of the prison population than do whites, while representing a much smaller portion of the total population.[39]

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[28] Based on total U.S. population for 1990 of 248,709,873, the exact percentage of voting-age blacks is 3.69% of the total population. *See* 1990 CENSUS, *supra* note 24, at 59.

[29] *See* HORTON & SMITH, *supra* note 26, at 480.

[30] PATRICK A. LANGAN & JOHN M. DAWSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: FELONY SENTENCES IN STATE COURTS, 1990 (1993). This report is issued approximately every two years.

[31] *See id.* at 5.

[32] *See id.* at 2. This figure is based on state-court felony convictions, which accounted for 96% of all felony convictions in the United States in 1990. *See id.* It is estimated that an additional 36,686 felons were convicted by federal courts in 1990. *See id.*

[33] *See id.* at 5. Violent crimes are listed as murder, rape, robbery, and aggravated assault. *See id.* at 1.

[34] *See* 1990 CENSUS, *supra* note 24, at 59.

[35] *See* LANGAN & DAWSON, *supra* note 30, at 5.

[36] *See* 1990 CENSUS, *supra* note 24, at 59.

[37] *See* LANGAN & DAWSON, *supra* note 30, at 5.

[38] For a list of all the states that disenfranchise felons, see *supra* note 6.

[39] These six states are by no means the only states where felon disenfranchisement may have significant impact on the black vote. Even in states like Tennessee, where the number of blacks imprisoned in 1985 was marginally less than the number of whites (3153 black prisoners compared to 3904 white prisoners), *see* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1985, at 57 (1987), the *Wesley* court found an impact on the black vote. *See* Wesley v. Collins, 605 F. Supp. 802, 812 (M.D. Tenn. 1985) (conceding that

TABLE 1
Proportion of Black and White Prisoners to Total Black and White Population for Selected States, 1990[40]

State	*Total Black Population*	*Black Prisoners*	*Percent*	*Total White Population*	*White Prisoners*	*Percent*
Alabama	1,020,705	9,893	0.9%	2,975,797	5,764	0.2%
Delaware	112,460	2,268	2.0%	535,094	1,137	0.2%
Florida	1,759,534	25,385	1.4%	10,749,285	18,206	0.2%
Maryland	1,189,899	13,771	1.2%	3,393,964	3,973	0.1%
Mississippi	915,057	5,965	0.7%	1,633,461	2,360	0.1%
Virginia	1,162,994	11,189	1.0%	4,791,739	6,306	0.1%

Also, it should be noted that if the national black voting age population constitutes only 4% of the total population, and is thus lower than the 12% total black population, it follows that the black voting age population in each of these states is even lower than the total statewide black population figures shown above. Furthermore, statistics show that in 1986, more than half of the state prison inmates nationwide were serving time for the commission of violent crimes,[41] and in 1990, blacks comprised 48% of felons nationwide who were convicted of violent crimes.[42] Therefore, one would expect that many of the blacks imprisoned in state prisons have committed a disenfranchising crime.[43]

"the Tennessee Act disproportionately impacts on blacks"), *aff'd*, 791 F.2d 1255 (6th Cir. 1986). Because the figures are so radically skewed in these states, however, they present a good example of how felon disenfranchisement may have a profound impact on black voting power. *See infra* text accompanying notes 52-53 (describing the potential impact of felon disenfranchisement in Florida).

[40] Information obtained from the 1990 CENSUS, *supra* note 24, at 59, and BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1990, at 83 (1992).

[41] *See* CHRISTOPHER A. INNES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PROFILE OF STATE PRISON INMATES, 1986, at 3 (1988) (citing the number of state prison inmates convicted of violent crimes as 54.6% of the total state prison population).

[42] *See* LANGAN & DAWSON, *supra* note 30, at 5.

[43] Those crimes that are categorized as violent crimes—namely murder, rape,

B. *Statistical Significance*

As evidenced by the national statistics mentioned above, the number of convicted felons is much higher for blacks in proportion to their general and, most importantly, voting-age populational representation. Thus, a 47% convicted black felon rate in 1990[44] has quite a significant impact on a 4% black voting age population[45] and an even more profound impact on the estimated 5,842,000 blacks registered to vote in that year.[46] From these figures alone, it can be concluded that statutes disenfranchising felons effectively eliminate a large number of potential black voters. Ignoring the specific state figures for a moment, the 389,792 black convicted felons in 1990[47] when released hypothetically would lose voting privileges if the states in which they reside enforced such a disenfranchisement provision.[48] That number represents additional black voters who, absent such statutes, would enlarge the black voting age population of 9,171,000,[49] thereby strengthening black

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robbery, and assault—are also the crimes that disenfranchising statutes usually target. *See id.* at 1 (defining "violent crimes"); *supra* note 6 (detailing crimes targeted by disenfranchising statutes).

[44] *See supra* notes 31-32 and accompanying text.

[45] *See supra* note 28 and accompanying text. This impact is particularly relevant, given that 90% of the total felons arrested were of voting age. *See supra* text accompanying note 37.

[46] *See supra* note 29 and accompanying text. Black registration figures are important because they represent numbers that would potentially increase if black felons were allowed to vote. While there is no available data on the number of felons who are registered or who actually vote in states without disenfranchisement statutes, the key issue here is *opportunity* to vote. Hence, black felons should at least be given the opportunity to enlarge the black voting age population and be included among the ranks of registered black voters.

[47] This figure is derived from the 47% of 829,344 total convicted felons. *See supra* notes 31-32 and accompanying text.

[48] It is worth noting that six of the ten states with the largest black populations in 1990 also happen to be states that still disenfranchise ex-felons. *See* NATIONAL URBAN LEAGUE, INC., *supra* note 25, at 314 (listing the top 10 states which include Mississippi, Alabama, Maryland, Virginia, Delaware, and Tennessee); Note, *supra* note 6, at 1300 n.1 (listing those states that disenfranchise ex-felons for life). Within these individual states, however, blacks are still outnumbered by whites, as they are in all 50 states. *See* 1990 CENSUS, *supra* note 24, at 59.

[49] *See supra* notes 26-27 and accompanying text. The black voting age population is estimated based on registration figures from which felons who cannot vote, either by statute or because they are imprisoned, are presumably excluded. *See* HORTON & SMITH, *supra* note 26, at 480.

One might argue that other measures, such as increased voter registration drives, would help to lessen the impact on the black vote. Generally, however, registration drives have had very limited success in increasing the number of registered black voters. *See* Ankur J. Goel et al., Comment, *Black Neighborhoods Becoming Black Cities:*

voting power. Although this data showing impact cannot alone establish vote dilution,[50] such lost voter potential deserves greater recognition by courts in assessing vote dilution claims, especially considering the already small number of eligible black voters nationwide.

Of further significance are the statistics for those six states listed in Table 1 that still disenfranchise felons. Because the number of blacks imprisoned in those states is severely disproportionate to the number of whites imprisoned, and given the comparatively lower total black population and even smaller black voting age population[51] in those states, felon disenfranchisement laws disproportionately impact the black vote to a significant degree. For example, in Florida, the state in Table 1 in which the racial disparity is greatest,[52] the felon disenfranchisement law potentially affects some 25,385 black prisoners[53] as opposed to 18,206 white prisoners. Derivatively, this law disproportionately impacts the voting power of the 1,734,149 nonimprisoned blacks who, simply by virtue of being significantly fewer in number, already have less voting power than their 10,731,079 white counterparts. Furthermore, the larger number of blacks imprisoned in that state represent potential voters that without felon disenfranchisement would strengthen the voting power of the smaller number of blacks.

Such evidence of severe disproportionate impact should not only initially prompt judicial vote dilution analysis in cases brought within those six states and elsewhere,[54] but should also be weighed

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Group Empowerment, Local Control and the Implications of Being Darker than Brown, 23 HARV. C.R.-C.L. L. REV. 415, 443 (1988) (noting that while voter registration drives "have brought about growing minority representation in government, voter apathy among blacks remains overwhelming"). Furthermore, the solution of voter registration drives does not address the fact that felon disenfranchisement laws still impact the black vote and may violate the Voting Rights Act.

[50] *See supra* notes 19, 23 and accompanying text.

[51] As previously stated, if the black voting age population is smaller than the total black population nationwide, this should logically hold true for individual states as well.

[52] The racial disparity cited here focuses on the smaller total black population in relation to white population, as compared to the significantly larger number of blacks imprisoned than whites.

[53] Again, while not all of these black prisoners may have committed crimes that will cost them their right to vote, statistics show that a large portion of them probably have done so. *See supra* notes 41-43 and accompanying text. It is also safe to assume that most of them are of voting age. *See supra* text accompanying note 37.

[54] Again, these six states are used only as an example. *See supra* note 39. Severe disproportionate impact could also be shown in a state such as Kentucky. Obviously, in that state, disenfranchising a potential 2741 black prisoners has a far greater

in the analysis to show that blacks in those states have "less opportunity than other members of the electorate to participate in the political process."[55]

Numbers such as those discussed above are quite revealing but are of very little persuasiveness if one considers criminal justice to be administered in a fair, proportionate manner with respect to race. Indeed, one could argue that the criminal justice system treats blacks and whites alike, and therefore, the disproportionate number of black felons and prisoners (both nationally and in many states) is not necessarily the result of systematic discrimination. However, evidence shows that this is not always the case, and in order to fully realize the relevance of the statistical data mentioned above, it is necessary to examine the underlying factors that may account for such disproportionately large numbers—namely, the disparate targeting and treatment of blacks by the criminal justice system. This evidence of disparate targeting and treatment should accompany statistical data in vote dilution analysis to show that felon disenfranchisement inflicts a "double-whammy" against black felons who may be singled out by the criminal justice system from the start.

1. Disparate Targeting

According to the 1990 Federal Bureau of Investigation's *Uniform Crime Report for the United States*,[56] approximately 3,224,060, or 29%, of 11,151,368 total people arrested were black.[57] Of the 9,412,688 persons arrested who were of voting age (eighteen or older), 2,768,896, or 29.4%, were black.[58] Furthermore, authorities estimate that the number of black arrests is only likely to increase in the future.[59] This discouraging data on black arrests may be

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impact on the voting power of the 260,166 nonimprisoned black population than the impact on 3,385,552 whites by the disenfranchisement of some 6280 white prisoners. *See* 1990 CENSUS, *supra* note 24, at 59; BUREAU OF JUSTICE STATISTICS, *supra* note 40, at 83. Because the census includes state prisoners, nonimprisoned population figures were arrived at by subtracting the number of prisoners from total statewide population for each racial group. *See supra* note 24.

[55] 42 U.S.C. § 1973(b) (1988). This language, which essentially defines vote dilution, is borrowed from the Voting Rights Act "totality of circumstances" analysis which is discussed in depth in Part III. *See infra* text accompanying note 196 (detailing the "totality of the circumstances" test).

[56] FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1990).

[57] *See id.* at 192.

[58] *See id.* at 194.

[59] *See* William H. Inman, *Justice System Accused of Anti-Black Bias*, L.A. TIMES, Aug.

largely attributable to disparate targeting of blacks by the criminal justice system.

Nowhere is evidence of the criminal justice system's targeting of minorities stronger than in the so-called "war on drugs," which in the words of one authority, is essentially "a war on minorities."[60] In 1990, drug traffickers and possessors accounted for 33% of all convicted felons,[61] with blacks representing 56% of that group.[62] According to one 1989 report, although blacks represent 41% of all drug arrests, they account for only 15% of the drug-using population.[63] A more recent study found that although roughly nine million Americans are illegal drug users, black and Hispanic drug users combined represent just one-third of that number, or 3.1 million.[64] While some law enforcement officials attribute the discrepancy to the fact that dealers, not users, are the subject of anti-drug efforts, FBI statistics show that two-thirds of the arrests on drug charges in 1991 were for possession, not sales.[65] As one commentator put it, "'[t]he so-called war on drugs . . . is racially biased on all fronts and has made young black men its enemy and the entire African American community its victim.'"[66]

Philadelphia's "drug czar" John Wilder even admits that "a black runs a much higher risk of getting stopped and frisked for drugs . . . than a white does in a white community."[67] Some believe that the conscious targeting of blacks is the "easiest and

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14, 1988, pt. 1, at 2, 34 (noting evidence that "[i]n cities with 250,000 or more people, half of all black men will be jailed by age 55 for murder, rape, robbery, aggravated assault, burglary, larceny, arson or auto theft—offenses the FBI's Uniform Crime Report classifies as the most serious").

[60] David Zucchino, *Racial Imbalance Seen in War on Drugs: Blacks and Hispanics Are Often Targeted for Arrest, Yet Three Times as Many Whites Are Users*, PHILA. INQUIRER, Nov. 1, 1992, at A1, A5 (quoting Kennington Wall of the Drug Policy Foundation).

[61] *See* LANGAN & DAWSON, *supra* note 30, at 1.

[62] *See id.* at 5.

[63] *See* Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System: Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4 (citing a 1989 *USA Today* study).

[64] *See* Zucchino, *supra* note 60, at A1 (citing U.S. Justice Department statistics). In Philadelphia alone, 93% of those arrested on drug charges in 1990 were minorities, although 46% of people admitted to Philadelphia hospitals for drug-related disorders were white. *See id.* at A15. Nationwide, whites represented 61% of drug overdose victims. *See id.* Similar disparities also exist in New York City and Baltimore, where 92% and 85%, respectively, of all drug arrests are of blacks or Hispanics. *See id.*

[65] *See id.* at A1.

[66] *Id.* at A1, A15 (alteration in original) (quoting a report by the National Center on Institutions and Alternatives).

[67] *Id.* at A15.

most expedient way" to respond to the "'political pressure in this country to make drug arrests.'"[68] According to critics, disruptive drug raids are more easily accomplished in inner-city neighborhoods where residents have relatively little political or economic power.[69] Comparatively, drug sweeps are less likely to be attempted in white suburban communities.[70] Yet another form of conscious targeting is "reverse sting" drug operations, which in Minneapolis netted some forty-eight black individuals compared to a total of five whites.[71]

Evidence of disparate targeting, such as that indicated by the war on drugs example, should be weighed with statistical data showing large numbers of black arrests and convictions to help explain possible reasons[72] for the perpetuation of the disproportionately higher number of black felons. It could then be argued that felon disenfranchisement only aggravates this disparate targeting by further punishing an individual who has been the discriminatory focus of the criminal justice system.

2. Disparate Treatment

Related to the problem of disparate targeting of blacks is their unequal treatment by the criminal justice system once such targeting has made a successful catch. Disparate treatment may be responsible for the higher number of blacks imprisoned nationwide and in many states, such as the six states listed in Table 1.[73] Felon disenfranchisement enhances the effects of such discrimination.

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[68] *Id.* (quoting Clarence Lusane, author of the book *Pipe Dream Blues: Racism and the War on Drugs*).

[69] *See id.* (acknowledging, however, "that law-abiding inner-city minorities often scream the loudest for police to act").

[70] *See id.* (quoting Deborah Leavy, executive director of Pennsylvania's American Civil Liberties Union).

[71] *See* Jill Hodges, *87% in "Reverse Sting" Arrests Are Black*, STAR TRIB. (St. Paul), Sept. 11, 1990, at 4B. A reverse sting occurs when a plainclothes police officer lures a drug buyer into a sale and then arrests that person. *See id.* A civil suit was filed by the Hennepin County public defender's office seeking to enjoin the police department from exercising these reverse stings; no ruling was made as of the time of Hodges's article. *See id.*

[72] Although I am not suggesting that evidence of disparate targeting is solely responsible for overall disproportionate statistics, it may have significant influence on the disproportionate black conviction and arrest figures and should factor into judicial analysis of statistical evidence. *See infra* part III.C (discussing other factors that should figure into judicial analysis under the "totality of circumstances" test).

[73] *See supra* text accompanying note 40.

In 1988, adult black males outnumbered white males in U.S. prisons 216,000 to 196,000.[74] A recent survey showed that 89% of blacks and 43% of whites believe that blacks do not receive equal treatment in the criminal justice system.[75] Statistics tend to support these perceptions.

For instance, a study by the RAND Corporation revealed that 44% of black convicted felons are sent to prison, compared to 33% of convicted white felons.[76] An earlier three-state study by the same group found that "Blacks and Hispanics are sentenced to prison more often and serve longer terms than whites convicted of similar crimes."[77] Another 1992 study by the Federal Judicial Center found that federal sentences for drug trafficking and firearms offenses were 49% higher for blacks than for whites in 1990, compared to 28% higher in 1984.[78] Also, among the fifteen states with the highest rates of imprisonment, eleven are in the South and have large minority populations.[79] As one authority noted, "[t]he higher incarceration rates may be seen . . . as a way to discipline the lower classes, minority classes."[80]

Furthermore, a 1991 investigation of some 700,000 criminal cases revealed that whites are more successful than minorities "at virtually every stage of pretrial negotiation."[81] According to the researchers, of the 71,000 adults with no prior felony arrests, "one-third of whites had the charges reduced, compared to one-fourth of

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[74] *See* Inman, *supra* note 59, at 2 (citing a report by the American Correctional Association).

[75] *See* Marcus, *supra* note 63, at A4 (citing a *Washington Post*-ABC News poll conducted after the first Rodney King verdict).

[76] *See* David Tuller, *Prison Term Study Finds No Race Link*, S.F. CHRON., Feb. 16, 1990, at A2. Although this study concluded that race was not a factor in sentencing decisions, civil rights groups have strongly criticized the study for ignoring evidence that blacks receive the death penalty more often than whites and are arrested and prosecuted more often. *See id.*

[77] *Jail More Likely for Minorities, a Study Shows*, PHILA. INQUIRER, June 30, 1983, at D4 (citing a 1983 RAND Corporation study examining the criminal justice systems of California, Texas, and Michigan).

[78] *See* Marcus, *supra* note 63, at A4.

[79] *See* Inman, *supra* note 59, at 34. Not surprisingly, six of the 15 states that disenfranchise felons also happen to be in the South. *See supra* note 6 (listing the 15 states).

[80] Inman, *supra* note 59, at 34 (quoting Maryland criminologist Ray Paternoster). This fact is of particular significance in constitutional challenges to ex-felon disenfranchising statutes, especially where black felons are concerned. *See infra* part II.A.2 (discussing the significance of black status in constitutional analysis).

[81] Marcus, *supra* note 63, at A4 (citing a *San Jose Mercury News* investigation).

blacks and Hispanics."[82] Moreover, in Florida cases involving nonfelonies, blacks accused of killing whites were found to be "twice as likely as whites accused of killing whites to have their cases upgraded to felony homicides."[83]

Such evidence of the criminal justice system's disparate treatment of blacks, like evidence of disparate targeting, should be considered along with raw data showing the disproportionate number of black criminals. This analysis will provide some enlightenment as to how the numbers became so skewed in the first place. Judging from the evidence mentioned above, the higher number of blacks arrested, convicted of felonies, and imprisoned can be attributed in large measure to discrimination by the criminal justice system.[84] After such discrimination removes more blacks from society than whites, disenfranchisement serves to remove them from the ranks of black voters, the numbers of which are already comparatively lower than whites. For this reason alone, statistics should play a more significant role in judicial evaluation of ex-felon disenfranchising statutes where such laws are alleged to unlawfully dilute the black vote.

II. GENERAL ARGUMENTS AGAINST EX-FELON DISENFRANCHISEMENT AND THE SIGNIFICANCE OF BLACK STATUS

Some authorities have written about the evils inherent in a state's disenfranchisement of ex-felons without reference to racial impact. In addition to statistical evidence, general arguments against felon disenfranchisement should play a persuasive role in judicial evaluation of black vote dilution claims, particularly when these arguments are applied to the special case of black ex-felons.[85]

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[82] *Id.*

[83] *Study Sees Disparity in Justice*, MIAMI HERALD, Dec. 15, 1985, at 1B (citing a study by University of Florida sociologist Michael Radelet); *see also* Marcus, *supra* note 63, at A4 (citing research by University of North Florida psychologist Linda Foley that shows blacks receive longer sentences when the victim is white). Florida also happens to be one of the six disenfranchising states previously mentioned where the number of black prisoners greatly outnumbers white prisoners. *See supra* text accompanying notes 40, 52-53.

[84] The skewed statistics might also be attributed to environmental conditions. *See infra* notes 163-65 and accompanying text.

[85] Obviously, a court cannot base its decision solely on these arguments. However, courts have in the past given great deference to broad-based persuasive arguments. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954) (relying largely on social policy arguments emphasizing the importance of education in society to

Generally, the two types of arguments against felon disenfranchisement can be classified as either constitutional or social policy/theory oriented, although there is considerable overlap.

A. *Constitutional Arguments*

1. General Arguments: Strict Scrutiny Analysis of Ex-Felon Disenfranchisement

As one authority has observed, "the only type of legislative prohibition of the suffrage on a class of persons that has withstood an equal protection challenge has been the restriction of voting rights of ex-felons."[86] Ex-felon disenfranchisement has come under attack from a number of authorities who condemn it as an "anachronism"[87] that has "its origin in the fogs and fictions of feudal jurisprudence and doubtless[ly] has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government."[88] Nevertheless, the Supreme Court's ruling in *Richardson v. Ramirez*[89] firmly reinforced states' authority to exclude ex-felons from the franchise by interpreting § 2 of the Fourteenth Amendment as an "affirmative sanction" of such exclusion.[90] In *Wesley*, the district court followed *Richardson* in

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overturn the doctrine of "separate but equal" in school segregation cases).

[86] Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475, 499 (1992) (examining congressional ability to repeal a statute establishing the District of Columbia's electoral colleges).

[87] Itzkowitz & Oldak, *supra* note 7, at 757 (noting that disenfranchisement runs afoul of the "rehabilitative goal of modern criminal justice" and the Fourteenth Amendment).

[88] Richardson v. Ramirez, 418 U.S. 24, 85-86 (1974) (Marshall, J., dissenting) (quoting Byers v. Sun Savings Bank, 139 P. 948, 949 (Okla. 1914)).

[89] *Id.* The felon plaintiffs in *Richardson* argued that the disenfranchisement law violated the Equal Protection Clause by disenfranchising a class of individuals—namely ex-felons. *See id.* at 33.

[90] *See id.* at 54 (stating that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment"). Section 2 of the Fourteenth Amendment provides, in part:

> [W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of

upholding Tennessee's right to disenfranchise ex-felons.[91] The premise of the *Richardson* decision, however, has come under fire from a number of authorities, the most notable of which is Justice Marshall who, in his dissenting opinion, attacked the Court's interpretation of § 2.[92]

Specifically, Justice Marshall contended that § 2 was not created to affirmatively remove felons from equal protection coverage, but instead was designed to provide the special remedy of reduced representation to cure the disenfranchisement of blacks.[93] As Marshall explained, simply "because Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by Section 2 does not necessarily imply congressional approval of this disenfranchisement."[94] Even before *Richardson*, author Gary Reback foreshadowed Justice Marshall's sentiments in arguing that "[r]ather than specifically permitting a state to disenfranchise ex-felons, section two merely indicates that if a state chose to disenfranchise ex-felons, it would not be penalized [by a reduction in representation] under section two."[95]

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male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2 (emphasis added). Essentially, the *Richardson* Court reasoned that the foregoing language clearly demonstrated the "understanding of those who adopted the Fourteenth Amendment" that felons were not to be afforded coverage under the Equal Protection Clause. *Richardson*, 418 U.S. at 54; *see also infra* note 113 and accompanying text (noting that the *Richardson* Court felt this language "mean[s] what it says").

[91] *See* Wesley v. Collins, 605 F. Supp. 802, 806 (M.D. Tenn. 1985) ("A state may constitutionally exclude some or all 'convicted felons from the franchise . . . .'" (quoting *Richardson*, 418 U.S. at 53)), *aff'd*, 791 F.2d 1255 (6th Cir. 1986). In addition to vote dilution claims, the plaintiff in *Wesley* argued that the "Equal Protection Clause of the Fourteenth Amendment require[d] Tennessee to demonstrate a compelling state interest justifying the disenfranchisement of felons since the classification impacts on the fundamental right to vote." *Id.* at 804.

[92] *See Richardson*, 418 U.S. at 74 (Marshall, J., dissenting) (noting that "§ 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment").

[93] *See id.* The emphasis on the protection of blacks' voting rights in the history of § 2 is of particular relevance in cases involving black felons and will be explored in more detail in the following Section of this Comment. *See infra* notes 113-14 and accompanying text.

[94] *Richardson*, 418 U.S. at 75-76; *see also* William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 65 ("[I]t seems quite impossible to conclude that there was a clear and deliberate understanding in the House that Section 2 . . . expressly recognized the states' power to deny or abridge the right to vote.").

[95] Reback, *supra* note 7, at 851.

Thus, according to Justice Marshall and Reback, § 2 should not be read to affirmatively exclude felons from equal protection coverage.[96] Because voting is a fundamental right, ex-felon disenfranchisement should be judged according to Equal Protection strict scrutiny standards, which would require states to demonstrate a compelling interest to justify such disenfranchisement.[97] According to Justice Marshall and Reback, states cannot meet these standards.

Essentially, Justice Marshall and Reback argued that the three findings necessary to demonstrate a compelling state interest under strict scrutiny—namely, that "the state interest served is compelling, that the means employed to achieve the state's goals are appropriately narrow, and that the state's purposes cannot be achieved by an alternative method"[98]—cannot be shown to justify ex-felon disenfranchisement.

The compelling state interest typically advanced in support of felon disenfranchisement has been termed the "purity of the ballot box" rationale, or a state's interest "'in preserving the integrity of

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[96] In addition to Reback and Justice Marshall, Justice Rehnquist made a similar argument. *See* David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303 (1976) ("[T]here is not a word in the fourteenth amendment suggesting that the exemptions in section two's formula are in any way a barrier to the judicial application of section one in voting rights cases, whether or not they involve the rights of ex-convicts.").

[97] *See Richardson*, 418 U.S. at 77 ("[D]isenfranchisement of ex-felons must be measured against the requirements of the Equal Protection Clause . . . ."); Reback, *supra* note 7, at 852 (arguing that the strict scrutiny test is the appropriate test in adjudicating felon disenfranchisement cases). Both Reback and Marshall, as well as the California Supreme Court in *Richardson*'s predecessor, Ramirez v. Brown, 507 P.2d 1345 (1973), point to a number of cases evidencing the developmental application of the strict scrutiny standard to voting rights cases. *See* Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (curtailing Tennessee's voter residency requirements and holding that if a state selectively restricts the right to vote of some citizens, "'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest'" (quoting Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969))); *Kramer*, 395 U.S. at 633 (utilizing strict scrutiny to strike down a New York statute allowing only certain voters to participate in school district elections); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (rendering poll taxes unconstitutional under the holding that "classifications which might invade or restrain [fundamental rights] must be closely scrutinized and carefully confined"); Carrington v. Rash, 380 U.S. 89, 91 (1965) (finding that although a state could impose "reasonable residence restrictions," it could not deny a resident ballot access simply because he was a member of the armed forces); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (noting that any infringement on the right to vote was to be scrutinized "carefully and meticulously"). *But see Richardson*, 418 U.S. at 54 (distinguishing felon disenfranchisement from other types of state voting qualifications).

[98] Reback, *supra* note 7, at 854 (footnotes omitted).

[its] electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims.'"[99] However, such a moral competency argument has an exclusionary tendency that has been associated with the historical "exclusion of blacks, women, and the poor from the political process."[100] The "argument that ex-felons should be disenfranchised because they have shown themselves lacking in virtue fits easily within this exclusionary tradition,"[101] especially in the case of black ex-felons. Furthermore, it is unclear why convicted felons are any less capable of making sound political decisions than anyone else.[102] In any event, Reback points out that a state's interest in protecting society from a felon's allegedly counter-social choices cannot constitute the compelling interest required for strict scrutiny, since it is well established that "a state cannot 'fence out' a group from the political process because it is concerned about the way [it] may cast [its] ballots."[103]

Similarly, the disenfranchisement of ex-felons to prevent election fraud, another popular state-interest justification, is not sufficiently narrow to meet the second element of the strict scrutiny standard. According to Reback, such disenfranchisement is a blanket exclusion based on the conclusory presumption that ex-felons, by virtue of their criminal record, are more likely to commit election fraud.[104] As Justice Marshall explained, in terms of election fraud, typical disenfranchisement provisions are overinclusive in that they generally are "not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws."[105] Instead, they usually encompass all former felons, even though

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[99] Note, *supra* note 6, at 1308 (quoting Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971)).

[100] *Id.* (noting that "political incompetence rationalized the lines that were drawn").

[101] *Id.*

[102] *See* Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 731 (1991) ("No one has put forward a convincing reason explaining why [felons] cannot make political decisions just as well or as badly as the rest of us can."); Reback, *supra* note 7, at 854 n.72 ("It is difficult to see how a felony conviction reflects on the ability of the ex-felon to participate intelligently in the electoral process.").

[103] Reback, *supra* note 7, at 854 (citing Carrington v. Rash, 380 U.S. 89, 95 (1965)).

[104] *See id.* at 855 (stating that the exclusion is an overly broad voter classification that fails the strict scrutiny test).

[105] Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting).

"there has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population."[106]

Finally, states cannot satisfy the third element of strict scrutiny by showing that there are no less drastic, alternative means to prevent election fraud than disenfranchisement of felons, since all states have enumerated penalties for election crimes.[107] As Justice Marshall noted, California "has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared,"[108] and such laws are "far less burdensome on the constitutionally protected right to vote."[109] Thus, if ex-felon disenfranchising statutes were to be judged under equal protection strict scrutiny standards, "[i]t is highly doubtful that [a] state could show a compelling interest . . . [in] using criminal conviction at all as a basis for withholding the franchise."[110]

While Marshall's and Reback's general arguments struggle to justify ex-felons' equal protection coverage (by asserting that § 2 did not necessarily remove them from such coverage), their analyses fail to take account of the special case of black felons who, simply by virtue of their racial status, could assert discrimination claims under the Equal Protection Clause.[111] However, in equal protection challenges where racial discrimination is alleged, plaintiffs must first show discriminatory purpose or intent.[112] The following Section addresses the problems associated with this standard, particularly where ex-felon disenfranchisement is concerned.

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[106] *Id.*

[107] *See* Reback, *supra* note 7, at 855-56 (noting that "ex-felons who commit election fraud can be prosecuted under these laws without infringing upon the rights of other ex-felons").

[108] *Richardson*, 418 U.S. at 80 (quoting Dunn v. Blumstein, 405 U.S. 330, 353 (1972)).

[109] *Id.*

[110] Ferguson v. Williams, 330 F. Supp. 1012, 1022 (N.D. Miss. 1971), *vacated*, 405 U.S. 1036 (1972).

[111] Although all U.S. citizens are obviously covered by the Equal Protection Clause regardless of race, black felons could bring Equal Protection challenges to disenfranchising laws by claiming that the laws were racially discriminatory even though facially neutral. *See* Hunter v. Underwood, 471 U.S. 222, 225 (1985) (holding that a state constitutional provision, although racially neutral on its face, still violated the Equal Protection Clause). However, this would require a showing of discriminatory intent which, as this Comment will address, may be especially difficult to establish in cases of ex-felon disenfranchisement. *See infra* note 128 and accompanying text.

[112] *See infra* note 124 and accompanying text.

2. The Significance of Black Status: *Hunter* and the Intent Standard

Through an extensive examination of the legislative history of § 2 of the Fourteenth Amendment, the *Richardson* Court concluded that Congress had intended to exclude ex-felons from equal protection coverage.[113] However, as the *Richardson* Court observed and Justice Marshall emphasized in his dissent, the primary goal of § 2 was to remedy the disenfranchisement of blacks by reducing the representation of any state that denied them the right to vote.[114] Congressional concern for protecting blacks' right to vote through the passage of § 2 is thus contradicted by felon disenfranchisement statutes which adversely affect the black vote. Accordingly, it is not clear that even if Congress intended to remove felons from equal protection coverage, it also would have desired the result of removing black felons from that coverage, since black felon disenfranchisement leads to the very same reduction in representation that Congress sought to remedy by passing § 2.

Furthermore, as the *Richardson* Court observed, every state readmitted to the Union after the Civil War via a congressional enabling act was required to submit for Congress's approval its proposed state constitution.[115] The act admitting Arkansas, the first state so admitted, conditioned the state's admission on the inclusion of constitutional language permitting felon disenfranchisement only "under laws equally applicable to all the inhabitants" of Arkansas.[116] In conditioning Arkansas's admission, Congress was primarily concerned that without such restriction, the state "might misuse the exception for felons to disenfranchise Negroes."[117]

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[113] *See Richardson*, 418 U.S. at 43-54. The Court specifically focused on the phrase "except for participation in rebellion, or other crime" in § 2 and concluded that "legislative history . . . indicates that this language was intended by Congress to mean what it says." *Id.* at 43.

[114] *See Richardson*, 418 U.S. at 74 (Marshall, J., dissenting) (stating that § 2 "put Southern States to a choice—enfranchise Negro voters or lose congressional representation"); *see also* Foner, *supra* note 3, at 61 ("The [Fourteenth] amendment . . . threatened to reduce Southern representation in Congress if blacks continued to be denied the franchise."); Reback, *supra* note 7, at 851 (stating that "Section two was intended to be an extra penalty" to secure former slaves' right to vote). Although § 2 was primarily aimed at Southern states, its coverage obviously extends to all states.

[115] *See Richardson*, 418 U.S. at 48-49.

[116] *Id.* at 52.

[117] *Id.* (noting Missouri Senator Drake's observation that "[i]t is a very easy thing in a State to make one set of laws applicable to white men, and another set of laws applicable to colored men").

Thus, Congress recognized at an early stage the danger that criminal disenfranchisement statutes posed to the black vote.

The reality of such danger was ultimately revealed in *Hunter v. Underwood*,[118] in which the Supreme Court struck down an Alabama constitutional provision that violated the Equal Protection Clause by disenfranchising persons convicted of "moral turpitude" crimes. The Court found that the original enactment of the statute had been motivated by a desire to discriminate against blacks and disenfranchise them.[119] Specifically, the Court found that although the disenfranchising provision was facially neutral, the "zeal for white supremacy [had run] rampant"[120] when it was adopted at the Alabama Constitutional Convention of 1901, and that the crimes selected for inclusion in the provision were those believed by the adopters to be most frequently committed by blacks.[121] In addition, the Court found that by 1903, the provision had achieved its intended result in disenfranchising approximately ten times as many blacks as whites.[122] The Court noted that such disparate effects continued to exist, with blacks being at least 1.7 times as likely as whites to be disenfranchised under the provision.[123] Hence, the *Hunter* Court found both the racially discriminatory intent, as well as disproportionate impact, necessary to show a violation of the Equal Protection Clause.[124]

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[118] 471 U.S. 222 (1985).

[119] *See id.* (holding that the desire to discriminate against blacks violated equal protection). Only that portion of the provision involving moral turpitude crimes not punishable by imprisonment was declared invalid, and Alabama continues to disenfranchise felons convicted of other crimes. *See supra* note 6 (listing the states that currently disenfranchise felons).

[120] *Hunter*, 471 U.S. at 229. The Court noted the opening address by convention president John B. Knox, in which he stated, "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." *Id.* The court also relied on the testimony of two expert historians who verified that "the aim of the 1901 Constitution Convention was to prevent the resurgence of Populism by disenfranchising practically all . . . blacks," and that throughout the debates, the delegates stated that they were primarily interested in disenfranchising blacks, not whites. *Id.* at 230-31.

[121] *See id.* at 226-27 (observing that "[v]arious minor nonfelony offenses such as presenting a worthless check and petty larceny fall within the sweep of § 182, while more serious nonfelony offenses . . . do not because they are [not] . . . considered crimes involving moral turpitude"). The Court adopted the finding of the court of appeals that "the crimes selected for inclusion . . . were believed by the delegates to be more frequently committed by blacks." *Id.* at 227.

[122] *See id.*

[123] *See id.* (finding that such a disproportionate impact existed in Jefferson and Montgomery counties).

[124] *See id.* at 227-28 ("Official action will not be held unconstitutional solely

In constitutional challenges to ex-felon disenfranchising statutes, intent to discriminate against blacks may arguably be inferred from statistics such as those presented in Part I.[125] Accordingly, it could be argued that due to the disproportionately higher number of black felons[126] and the disparate targeting of blacks particularly for drug crimes,[127] constitutional provisions which disenfranchise ex-felons may have been enacted with the understanding that more blacks than whites would lose voting rights. However, this argument is tenuous, and blatant discriminatory intent to disenfranchise blacks such as that found in *Hunter* may not be as easily shown in felon disenfranchisement cases.[128] Indeed, "the idea that all conduct is benign, except that which is consciously intended to harm, contradicts much of what we know of the dynamics of prejudice and discrimination."[129] For this reason, the intent standard necessary to bring equal protection challenges to felon disenfranchising statutes should be broadened, particularly where racially discriminatory intent, though not readily apparent, is a definite possibility.

As Judge Clark asserted in his dissenting opinion in *McCleskey v. Kemp*,[130] "[t]he intent test is not a monolithic structure. As with all legal tests, its focus will vary with the legal context in which it is

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because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (quoting Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977))).

[125] *See supra* parts I.A-B (discussing the statistical data on black felons and how disenfranchising statutes impact the black voting population).

[126] *See supra* notes 31, 34 and accompanying text (stating that blacks comprise 47% of convicted felons but only 12.1% of the population).

[127] *See supra* notes 60-66 and accompanying text (stating that blacks make up 41% of drug arrests but only 15% of drug users).

[128] Indeed, the difficulty of showing discriminatory intent was Congress's main concern in adopting the results test under the Voting Rights Act. *See supra* notes 9 & 14; *infra* notes 182-86 and accompanying text. Although this Comment proposes a different approach under the constitutional intent standard, its primary focus is on the impact of felon disenfranchising statutes and the applicability of the Voting Rights Act, since black vote dilution challenges to felon disenfranchising statutes are more easily addressed under the Act. *See supra* note 14.

[129] Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 530 (1991).

[130] 753 F.2d 877 (11th Cir. 1985), *aff'd*, 481 U.S. 279 (1987). In *McCleskey*, a black Georgia man convicted of killing a white police officer argued that because a study done by University of Iowa professor David Baldus found that black-committed white murders were more likely to result in the death penalty, such "discernible racial influence on sentencing render[ed] the operation of the Georgia [criminal justice] system [unconstitutionally] infirm." *Id.* at 895.

applied. Because of the variety of situations in which discrimination can occur, the method of proving intent is the critical focus."[131] As Judge Clark recognized, "[i]ntent may be proven circumstantially by utilizing a variety of objective factors and can be inferred from the totality of the relevant facts."[132] In the case of ex-felon disenfranchisement, the foremost of these factors are similar to those cited by Judge Clark as most essential to showing intent: the presence of historical discrimination and impact[133] as evidenced by statistics such as those presented in Part I of this Comment.[134] As the Court in *Rogers v. Lodge*[135] asserted:

> Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly . . . where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.[136]

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[131] *Id.* at 924 (Clark, J., dissenting in part). In addition, it has been noted that "although the equal protection clause has been interpreted to encompass only purposeful discrimination against protected groups, that narrow view is inconsistent with judicial interpretation of legislation." Perry, *supra* note 129, at 530 (footnote omitted). For instance, in claims brought under Title VII of the Civil Rights Act of 1964, "courts have adopted broader and more sophisticated models of discrimination than those focused exclusively on conscious discriminatory intent." *Id.* at 531. Furthermore, "analysis under other clauses of the Constitution has frequently focused on impact rather than intent." Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 115-16 (1991).

[132] *McCleskey*, 753 F.2d at 924 (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 492 U.S. 252, 266); *see also* Rogers v. Lodge, 458 U.S. 613, 618 (1982) ("[D]iscriminatory intent need not be proved by direct evidence. 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . .'" (quoting Washington v. Davis, 426 U.S. 229, 242 (1976))).

[133] Specifically, Judge Clark focused on the presence of historical discrimination and the impact of discriminatory capital sentencing on blacks, as revealed by the Baldus study. *See McCleskey*, 753 F.2d at 924 (stating that the results of the study, "coupled with the historical facts, demonstrate a prima facie Fourteenth Amendment violation").

[134] Most important is the impact of 389,792 black convicted felons on a black voting age population of 9,171,000. *See supra* text accompanying notes 47-49. Disparate targeting and treatment obviously should also factor into the analysis. *See generally supra* parts I.B.1-2 (discussing the targeting of blacks in the war on drugs and the higher conviction rates and longer prison terms for blacks).

[135] 458 U.S. 613 (1982).

[136] *Id.* at 625.

Evidence of historical discrimination in a particular state that removes ex-felons' voting rights could be used to buttress the argument that a disenfranchising provision was adopted with the knowledge that a disproportionate number of blacks would be impacted. In this way, discriminatory intent would not have to be as readily apparent as in *Hunter*, but instead could be inferred from relevant surrounding circumstances.

As previously discussed, the intent standard as it currently exists may be too difficult for black felons to satisfy.[137] Therefore, ex-felon disenfranchisement claims should be brought under the Voting Rights Act, which has a much easier standard.[138] Nevertheless, constitutional arguments against felon disenfranchisement, such as those advanced by Justice Marshall and Gary Reback, should play a role in the Voting Rights Act analysis,[139] as should social policy/theory arguments which are the subject of the next Section.

B. *Social Policy/Theory Arguments*

1. General Arguments: The Lockean Social Contract Theory and Punishment Rationale

In addition to constitutional arguments against ex-felon disenfranchisement, there exist social policy/theory arguments condemning the practice. Such arguments are typically used to counter similarly oriented arguments often advanced by courts to justify ex-felon disenfranchisement.[140]

For instance, in *Wesley*, the court observed the Lockean social contract theory historically relied upon by states to justify early exclusion of felons from the franchise, which holds that "by entering

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[137] *See supra* notes 128-29 and accompanying text.

[138] *See infra* parts III.A-B (discussing the history of the Voting Rights Act and its significance in felon disenfranchisement cases).

[139] *See infra* text accompanying notes 202, 242.

[140] *See, e.g.*, Green v. Board of Elections, 380 F.2d 445, 451 (2d Cir. 1967) ("[It can] scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases."); Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971) ("A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims."). The *Kronlund* court's rationale for disenfranchising ex-felons is known as the "purity of the ballot box." *See supra* text accompanying note 99.

into society, every man authorizes the society, or . . . the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance . . . is due."[141] From this observation, the court reasoned that "a man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact."[142] The Lockean theory, however, has been attacked on several grounds.

For example, it has been asserted that the Lockean justification for felon disenfranchisement "fails to take seriously important liberal values," specifically the modern liberal belief that "prior to the social contract, individuals have fundamental rights and liberties that allow them to bargain freely but that cannot be freely bargained away."[143] According to theorist John Rawls, the first principle of justice is that "all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply."[144] Thus, "[t]he disenfranchisement of ex-offenders violates this basic tenet of modern liberalism."[145] Furthermore, the removal of felons' voting rights violates the Lockean principle that each transgression from the social contract should be "'punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like.'"[146] Accordingly, "[d]isenfranchisement for life fails to meet this standard [since] permanent exclusion from the political community is imposed equally on all felons," regardless of the degree of severity of their crimes.[147]

Similarly, social policy activists have condemned the punishment justification for ex-felon disenfranchisement. As authorities Howard

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[141] Wesley v. Collins, 605 F. Supp. 802, 813 (M.D. Tenn. 1985) (quoting *Green*, 380 F.2d at 451), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

[142] *Id.* at 813 (quoting *Green*, 380 F.2d at 451).

[143] Note, *supra* note 6, at 1306.

[144] JOHN RAWLS, A THEORY OF JUSTICE 221 (1971).

[145] Note, *supra* note 6, at 1306.

[146] *Id.* at 1306-07 (quoting JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 8 (J.W. Gough ed., Basil Blackwell 1976) (3d ed. 1698)). Also, disenfranchisement does not necessarily "terrify" or deter potential offenders. *See infra* text accompanying notes 153-54 (noting the unlikelihood that disenfranchisement would be a stronger deterrent than a prison sentence).

[147] Note, *supra* note 6, at 1307; *see also* Reback, *supra* note 7, at 860 (stating that disenfranchisement is an excessive penalty that is "proportional in neither severity nor length to the seriousness of offenses").

Itzkowitz and Lauren Oldak point out, ex-felon disenfranchisement cannot satisfy even "one of the four traditionally accepted rationales for punishment: rehabilitation, deterrence, retribution and incapacitation."[148] In terms of rehabilitation, the removal of voting rights negatively impacts any attempt by ex-offenders to enhance self-esteem, which is essential to the reformative process, by implying that they are unfit to cast their ballots.[149] It has been suggested that disenfranchisement may even lead to recidivism.[150] Disenfranchisement also serves to further alienate and isolate ex-offenders from society by denying them "participation in the most crucial function of a democratic society" and is thus counterproductive to rehabilitation's aim of "strengthening the criminal's community ties by reinforcing his identification with community values and the habits of law-abiding citizens."[151] Moreover, rehabilitation's goal of fostering community acceptance of the ex-offender is undermined by disenfranchisement which "acts to increase social distance by branding the released criminal with a stigma which emphasizes . . . his difference from 'normal' citizens who retain their right of suffrage."[152]

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[148] Itzkowitz & Oldak, *supra* note 7, at 730-31.

[149] *See id.* at 732; *see also supra* note 102 and accompanying text (noting that no good reasons have been advanced to explain why an ex-felon cannot make political decisions as well as any other citizen).

[150] *See* Itzkowitz & Oldak, *supra* note 7, at 732 ("The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement, a fact that may lead to recidivism."); *see also* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, U.S. DEP'T OF JUSTICE, CORRECTIONS 592 (1973) [hereinafter NATIONAL ADVISORY COMM'N] ("[The ex-offender's] respect for law and the legal system may well depend, in some measure, on his ability to participate in that system.").

[151] Itzkowitz & Oldak, *supra* note 7, at 732; *see also* Trop v. Dulles, 356 U.S. 86, 111 (1958) ("It is perfectly obvious that [revocation of citizenship] constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast."); NATIONAL ADVISORY COMM'N, *supra* note 150, at 593 ("Loss of citizenship rights [including] the right to vote . . . inhibits reformative efforts. If corrections is to reintegrate an offender into free society, the offender must retain all attributes of citizenship."); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 90 (1967) ("[R]ehabilitation might be furthered by encouraging convicted persons to participate in society by exercising the vote."); Reback, *supra* note 7, at 864 ("[T]he offender's inability to vote may produce a feeling of estrangement from the [societal] institutions . . . that 'foster the development of law-abiding conduct.'" (quoting Walter M. Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1228 (1970))).

[152] Itzkowitz & Oldak, *supra* note 7, at 733.

The deterrence rationale also fails to justify disenfranchisement as punishment, since it is unlikely that the threat of disenfranchisement would deter potential offenders if, as studies show, a lengthy prison sentence does not.[153] A plausible reason for this failure is that most potential criminals are ignorant of the particular penalty associated with specific crimes and are also unaware that disenfranchisement accompanies conviction.[154] Furthermore, the goals of retribution cannot be fulfilled by disenfranchisement because the use of disenfranchisement as revenge for crime "can only exacerbate [the] hostility [that] exists between the criminal and society and, indeed, may lead to further injury to the community."[155] Nor can disenfranchisement correct the original crime.[156]

Finally, ex-felon disenfranchisement does not satisfy the concerns that form the basis of the incapacitation rationale, a type of specific deterrence which, in the case of felons' voting rights, has also been defined as the "purity of the ballot box" rationale.[157] As previously noted, this rationale has been attacked for being overly exclusionary,[158] and it is not clear why felons should be incapacitated from voting when there is no proof that they cannot make sound political decisions.[159]

Moreover, it has been asserted that "[a] fixation with what may be an isolated incident in a person's distant past . . . fails to further the goal of measuring a person's virtue in the present."[160] By assuming that an ex-felon is unworthy of exercising the franchise in a socially acceptable manner simply because of his or her criminal background, the incapacitation rationale fails to recognize the disjuncture between an individual's past and present behavior. Even if one could prove a correlation between past offenses and future

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[153] *See id.* at 734 (citing a 1968 study by the California Assembly Committee on Criminal Procedure showing that "lengthy prison sentences are not effective deterrents").

[154] *See id.* at 734-35 (stating that because this punishment receives little attention, it is "likely that the potential offender would not realize that [a] conviction would result in the loss of the right to vote").

[155] *Id.* at 736.

[156] *See id.* ("[H]ow can depriving a man of his right to vote, a man who presumably has paid his debt to society by years of incarceration, restore the money stolen or expunge the adulterous act?").

[157] *See id.* at 737 (noting that judicial opinions have not been clear as to exactly what evils disenfranchisement would eliminate); *see also supra* text accompanying note 99 (explaining the "purity of the ballot box" rationale).

[158] *See supra* text accompanying notes 100-01.

[159] *See supra* note 102 and accompanying text.

[160] Note, *supra* note 6, at 1309.

election crimes,[161] our "criminal justice system is based on the premise that once a criminal has completed his sentence, society has the burden of proving guilt of a new crime beyond a reasonable doubt and does not have the right to punish the ex-criminal in advance on a basis of probability."[162]

Thus, arguments advanced to justify felon disenfranchisement, most notably the Lockean theory and punishment rationale, are successfully countered by social policy/theory arguments. The significance of social policy challenges to ex-felon disenfranchisement is further enhanced by the element of black status.

2. The Significance of Black Status: The Heightened Negative Effects of Disenfranchisement

As one authority states, "Disenfranchisement is a prop in [the] act of communal self-delusion. By rationalizing and facilitating a tendency to localize the blame for crime in the individual, disenfranchisement helps to obscure the complexity of the roots of crime and their entanglement with contingent social structures."[163] Inherent in these social structures are what author Ramsey Clark describes as "fountainheads of crime," or more specifically, "slums, racism, ignorance and violence, . . . corruption and impotence to fulfill rights, . . . poverty and unemployment and idleness, . . . generations of malnutrition . . . sickness and disease, . . . pollution, . . . decrepit, dirty, ugly, unsafe, overcrowded housing, . . . alcoholism and narcotics addiction, . . . fear, hatred, hopelessness and injustice."[164] Unfortunately, the victims of such conditions are most often black. Disenfranchisement of black ex-felons tends to overlook these environmental conditions that can be held largely responsible for crime,[165] and therefore ignores the fact that a

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[161] *See supra* text accompanying notes 105-06 (noting Justice Marshall's view that disenfranchisement provisions are not restricted to those cases in which such a correlation has been proven).

[162] Itzkowitz & Oldak, *supra* note 7, at 739; *see also* Steven B. Snyder, *Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office*, 4 J.L. & POL. 543, 566 (1988) ("[P]unishment as a rationale [for disenfranchisement] is merely conclusory. It begs the question of why [disenfranchisement] is necessary as a punishment, especially when the ex-felon has already served the appropriate prison and parole time."). Snyder's article primarily focuses on the disqualification of felons from holding elected positions, another type of restriction imposed upon felons simply by virtue of their criminal record.

[163] Note, *supra* note 6, at 1311.

[164] RAMSEY CLARK, CRIME IN AMERICA 17 (1970).

[165] *See* Inman, *supra* note 59, at 2 (stating that "[m]ounting poverty . . . , one-

felon's "conscious decision" to commit a crime, allegedly justifying disenfranchisement,[166] may have been influenced by environmental forces mostly beyond his or her control.

Furthermore, "in conjunction with other degrading disabilities [such as societal isolation and alienation] often faced by ex-offenders, disenfranchisement stands as a gratuitous impediment to reentry into the community."[167] In the context of race, the degrading disability is not the status of being black, but rather it is the prevalence of discrimination[168] and environmental conditions such as those previously discussed. Also, the social stigmatization that disenfranchisement imposes upon ex-felons,[169] by implying that they are unfit to exercise the franchise,[170] is compounded by society's negative perceptions of black individuals.[171] Disenfran-

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parent families, teen unemployment and slack education play important roles" in the high crime rate among inner city blacks). According to James Eaglin, chairman of the National Association of Blacks in Criminal Justice, "[i]f you're uncertain where your next meal is coming from, uncertain if your mom is going to have enough money to pay back rent, there is a real strong incentive to move into the [criminal] process. . . . Crime very clearly grows out of opportunity." *Id.* at 34 (alteration in original); *see also* Ernest Van Den Haag, *No Excuse for Crime*, *in* CRIME IN SOCIETY 205, 205 (Leonard D. Savitz & Norman Johnston eds., 1978) ("'[I]f the ghetto victim does what for many such persons is inevitable and is then incarcerated . . . he is in a real sense a political prisoner,' because he is punished for the 'inevitable consequences of a certain sociopolitical status.'" (quoting S.I. Shuman, Professor of Law and Psychiatry at Wayne State University)).

[166] This was one of the *Wesley* court's arguments, which obviously failed to take notice of the environmental influences on crime. *See* Wesley v. Collins, 605 F. Supp. 802, 813 (M.D. Tenn. 1985) ("Felons are . . . disenfranchised based on . . . their conscious decision to commit an act for which they assume the risks of . . . punishment."), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

[167] Note, *supra* note 6, at 1316 (footnote omitted).

[168] For evidence of the continuing prevalence of discrimination, see T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 333 (1992) ("Blacks regularly report poorer service at restaurants and hotels, and harassment and surveillance while shopping . . . . Blacks walking or driving in predominantly white neighborhoods are followed by police, verbally abused, and physically harassed." (footnote omitted)).

[169] *See* Reback, *supra* note 7, at 863 ("It makes little sense to stigmatize a felon by denying him the right to vote . . . . Civil disabilities which affix an additional stigma to an ex-felon's already inferior status play a significant role in creating adverse community attitudes toward ex-felons." (footnote omitted)).

[170] *See supra* text accompanying note 149 (noting that this stigma can affect the ex-felon's self-esteem).

[171] *See* Aleinikoff, *supra* note 168, at 332 (citing a 1990 survey of 1372 U.S. households which found that "more than fifty percent of the whites surveyed thought that blacks were less intelligent, less hard-working, more violence-prone, and less patriotic than whites").

chisement only serves to strengthen these false, racist perceptions of black ex-felons.

Moreover, disenfranchisement hinders rehabilitation efforts by black felons whose community ties may already be severely weakened by the prevalence of racial discrimination, thereby creating a further barrier to their re-entry into the community.[172] Where discrimination exists, community acceptance of the black ex-offender will be reluctant if not nonexistent. He or she may feel even further removed from society if disenfranchisement accompanies such discrimination.

Indeed, the negative effects of felon disenfranchisement are felt two-fold by black ex-offenders who may already experience alienation and isolation in a racist society. For this reason, social policy/theory arguments, both general and race-focused, condemning ex-felon disenfranchisement should play an important persuasive role in judicial review of the impact of felon disenfranchising statutes on the black vote. Obviously, neither constitutional nor social policy arguments can show impact directly, but the logic and force of their premises are essential to claims challenging black ex-felon disenfranchisement. As the following Section will explore, such claims are best suited for judicial analysis under the federal Voting Rights Act.

III. BLACK VOTE DILUTION CHALLENGES TO EX-FELON DISENFRANCHISEMENT UNDER THE FEDERAL VOTING RIGHTS ACT

A. *Background: The Voting Rights Act and § 2 Amendments*

In response to decades of voting discrimination against blacks, Congress enacted the Voting Rights Act of 1965,[173] which President Lyndon B. Johnson called "a triumph for freedom as huge as any victory that has ever been won on any battlefield."[174] Prior to the Act, disenfranchisement for the most part had been a fact of life for many blacks, whose systematic deprivation of the right to vote

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[172] *See supra* notes 151-52 and accompanying text.

[173] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

[174] ROBERT WEISBROT, FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT 152 (1990) (quoting Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), *in* 1965 PUB. PAPERS 840, 840).

could not be effectively remedied by courts which were unable to change reality by "merely outlawing specific illegal practices."[175] The Act affirmatively gave blacks the right to vote, thereby "replacing the negative right to be free from discrimination in voting"[176] as guaranteed by the Fourteenth Amendment.

The original intent of the Voting Rights Act in 1965 was to "free minority voters from 'the near-tyranny of nonrepresentation' and to make state and local government more 'responsive.'"[177] Subsequent amendments to the Voting Rights Act, particularly Congress's 1982 amendments to § 2[178] which provides the statutory basis for vote dilution claims, "confirmed that the statutory goal underlying black empowerment remains 'to help assure adequate representation of all interests' and 'to gain the influence that [political] participation brings.'"[179]

In 1982, Congress amended § 2 of the Voting Rights Act in order to emphasize its original intent that "violations of the [Act] could be established by showing the discriminatory effect of the challenged practices" at issue.[180] Accordingly, the amended § 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which *results* in a denial or abridgement of the right of any citizen . . . to vote on account of race or color."[181]

Congress's amendment to § 2 came in response to the Supreme Court's 1980 ruling in *City of Mobile v. Bolden*.[182] The *Bolden* Court rejected the "results" standard previously relied upon by courts to decide minority vote dilution claims.[183] Instead, the Court required proof of discriminatory intent for § 2 claims as well as

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[175] Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1419 (1990).

[176] *Id.*

[177] Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1418 (1991) (footnote omitted) (quoting H.R. REP. NO. 439, 89th Cong., 1st Sess. 37, 53 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2466, 2482).

[178] 42 U.S.C. § 1973(a)-(b) (1988).

[179] Guinier, *supra* note 177, at 1418 (alteration in original) (footnote omitted) (quoting 115 CONG. REC. 5520, 5531 (1970) and U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 8 (1975)).

[180] Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1265 (1989).

[181] 42 U.S.C. § 1973(a) (emphasis added).

[182] 446 U.S. 55 (1980).

[183] The results standard had been used by the Supreme Court in Whitcomb v. Chavis, 403 U.S. 124 (1971) and White v. Regester, 412 U.S. 755 (1973).

Fourteenth and Fifteenth Amendment claims.[184] Congress, however, felt that this intent requirement placed "an unacceptably difficult burden on plaintiffs" by requiring them to prove that local officials were racist, and that it diverted proper judicial inquiry "from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."[185] In place of this intent standard, Congress reinstituted the "results" test which required that § 2 plaintiffs need only show that a "challenged election law or procedure . . . had the result of denying a racial . . . minority an equal chance to participate in the electoral process."[186]

B. *The Significance of the Voting Rights Act in Assessing Black Vote Dilution Claims Against Ex-Felon Disenfranchisement*

Typically, § 2 claims have been instituted in the context of at-large elections or legislative districting schemes.[187] Prior to *Wesley*, § 2 had not been examined in the context of claims of black vote dilution by ex-felon disenfranchising statutes.[188] However, as the court concluded in *Whitfield v. Democratic Party*,[189] "section 2 was not meant to apply only to cases challenging at-large election schemes and districting matters, although it is true that most of the previous section 2 cases concern these types of discriminatory voting practices."[190]

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[184] *See Bolden*, 446 U.S. at 69-70.

[185] S. REP. NO. 417, *supra* note 9, at 16, *reprinted in* 1982 U.S.C.C.A.N. at 193.

[186] *Id.* Specifically, Congress stated:

> In our view, proof of discriminatory purpose should not be a prerequisite to establishing a violation of Section 2 of the Voting Rights Act. Therefore, the Committee has amended Section 2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process, i.e., by meeting the pr[e]-*Bolden* results test.

Id.

[187] *See* Whitfield v. Democratic Party, 890 F.2d 1423, 1427 (8th Cir. 1989) (stating that "virtually all of the cases decided under section 2 deal with at-large elections or legislative districting matters"); Wesley v. Collins, 605 F. Supp. 802, 807 n.4 (M.D. Tenn. 1985) (stating that "[t]ypically, dilution charged under the Voting Rights Act appears in the context of reapportionment plans"), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

[188] *See Wesley*, 605 F.Supp. at 807 n.4 (noting that "[t]he context of dilution in this case [of ex-felon disenfranchisement] is unique and has not previously been presented before a federal court").

[189] 890 F.2d 1423 (8th Cir. 1989).

[190] *Id.* at 1427. The court added that "[n]owhere in the language of the [Voting

Furthermore, according to the Supreme Court, the purpose of the Voting Rights Act is "to rid the country of racial discrimination in voting,"[191] and therefore, the Act should be construed as having "the broadest possible scope."[192] Thus, § 2 may be used to bring vote dilution challenges to ex-felon disenfranchisement.[193]

The Voting Rights Act is particularly suited for such challenges given its far less burdensome results test. As previously noted, intent may be quite difficult to prove in ex-felon disenfranchisement cases.[194] The Voting Rights Act allows plaintiffs to show the effects of ex-felon disenfranchising statutes on the black vote without the need for an extensive, if not potentially fruitless, search for discriminatory motives.[195] Accordingly, plaintiffs in such cases may be able to "pass" the results test through the Act's "totality of circumstances" analysis, which should be appropriately tailored to the case of ex-felon disenfranchisement.

C. *The Totality of Circumstances Analysis of Ex-Felon Disenfranchisement Vote Dilution Claims*

The amended § 2 of the Voting Rights Act provides that vote dilution in violation of the Act is established if

> based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[196]

Rights Act] did Congress limit the application of section 2 [to cases] involving at-large elections or redistricting." *Id.*

[191] South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

[192] Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969).

[193] Although the *Wesley* court dismissed the plaintiff's § 2 claims for failure to establish a causal nexus, the court never contended that § 2 did not apply to the case of ex-felon disenfranchisement. For a discussion of the court's causal nexus fallacy, see *infra* part III.C.3. It would follow, then, that such claims may be brought under § 2.

[194] *See supra* text accompanying notes 125-28.

[195] Fourteenth and Fifteenth Amendment challenges would still require such a showing of intent and may thus send plaintiffs on a "fishing expedition for unspecified evidence." Wesley v. Collins, 791 F.2d 1255, 1263 (6th Cir. 1986). Furthermore, "[a] finding of liability under section 2 would obviate the necessity to decide the plaintiffs' Fourteenth and Fifteenth Amendment claims." Lee County Branch of the NAACP v. City of Opelika, 748 F.2d 1473, 1478 (11th Cir. 1984).

[196] 42 U.S.C. § 1973(b) (1988) (emphasis added). Congress was careful to include

Congress identified nine relevant factors to be weighed by courts in the totality of circumstances analysis.[197] While the assessment of these factors was intended to demonstrate that in the totality of circumstances, the result of the challenged practice or structure was to deny plaintiffs equal opportunity to participate in the electoral process, the factors are "neither exclusive nor controlling," and the totality of circumstances analysis "requires a highly individualistic inquiry."[198] Furthermore, no particular number of factors must be proven[199] and "[t]o the extent that the

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the disclaimer that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

[197] Congress established the following factors to be considered in vote dilution cases:

> 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;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 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;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 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;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. REP. NO. 417, *supra* note 9, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07 (footnotes omitted).

[198] *Wesley*, 791 F.2d at 1260. As Congress stated, "[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution." S. REP. NO. 417, *supra* note 9, at 29, *reprinted in* 1982 U.S.C.C.A.N. at 207.

[199] *See* Thornburg v. Gingles, 478 U.S. 30, 45 (1986).

enumerated factors are not factually relevant, they may be replaced or substituted by other, more meaningful factors."[200]

In the case of ex-felon disenfranchisement, these "other, more meaningful factors" should include statistics, such as those presented in Part I of this Comment, showing that the number of black ex-felons per black voting age population in a given state is disproportionately high compared to the corresponding numbers for whites. Evidence of disparate targeting and treatment should accompany these statistics to demonstrate possible reasons for such numbers.[201] In addition, constitutional and social policy arguments against ex-felon disenfranchisement should be included as persuasive evidence to show the tenuousness of a state's underlying policy reasons for ex-felon disenfranchisement.[202] These elements should supplement Congress's enumerated factors, not replace them.

In *Thornburg v. Gingles*,[203] the first Supreme Court case to interpret the amended § 2,[204] the Court adopted a "'functional' view of the political process" and isolated "the most important Senate Report factors bearing on § 2 challenges to multimember districts"—namely, the electoral success of minority candidates in the district and the extent of racial bloc voting.[205] In § 2 claims against ex-felon disenfranchisement, the most important factors are the history of official voting discrimination and the use of districting schemes and other voting practices and procedures to continue the effects of such historical discrimination,[206] and the extent to which the lingering effects of discrimination in socioeconomic areas such as education, employment, and health thwart effective black participation in the political process.[207] The plaintiff in *Wesley*

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[200] Major v. Treen, 574 F. Supp. 325, 350 (E.D. La. 1983) (three-judge court).

[201] *See supra* parts I.B.1-2 (discussing the significance of statistics related to disparate targeting and treatment).

[202] The tenuousness of underlying state policy is one of the additional factors cited by the Senate. *See supra* note 197.

[203] 478 U.S. 30 (1986).

[204] *See id.* at 34.

[205] *Id.* at 48 n.15. Hence, the Court tailored its analysis to multimember district claims.

[206] In essence, the third Senate factor can be regarded as an extension of the historical voting discrimination described by the first factor. *See supra* note 197 (listing the Senate factors). Therefore, I am combining them.

[207] This is the fifth Senate factor. *See supra* note 197. I am not suggesting that these factors are in themselves exclusive and controlling. Other enumerated factors may be present which are comparatively stronger than my proposed essential factors and may thus command greater deference. I am proposing that these factors, where

argued that the combination of these factors with ex-felon disenfranchisement impermissibly diluted the black vote,[208] suggesting that these factors are most relevant to such claims and should be given greater emphasis in judicial analysis.

1. Discrimination in Voting

According to one senator:

> The importance of the right to vote is recognized by those who want to participate in the democratic process and by those who have so bitterly and persistently opposed that participation. Both sides realize that the vote for any minority means some degree of significant political power—power that will lead to better lives.[209]

Although the Fourteenth and Fifteenth Amendments granted blacks full civil and political rights (at least theoretically), for many, access to the electoral process was achieved only after decades of "struggle in the courts, in Congress, and through [the] mass protests" of the Civil Rights Movement.[210] Indeed, prior to passage of the Voting Rights Act, white-dominated governments, particularly in the South,[211] "had suppressed the minority right to

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they are present to a great degree, deserve emphasis in § 2 challenges to ex-felon disenfranchisement, although not to the exclusion of the other enumerated factors that may also be present. *See* Gomez v. City of Watsonville, 863 F.2d 1407, 1413 (9th Cir. 1988) (noting that the Supreme Court "put substantially greater emphasis on some of the Senate factors than on others").

[208] The *Wesley* plaintiff argued that the historical repression of blacks in Tennessee, "marked by limited access to and segregation in the provision of health care, housing and education, and by sustained efforts to prevent blacks from registering to vote," would, in combination with the state's ex-felon disenfranchising statute, "progressively dilute the black vote thereby impeding the equal opportunity of blacks to participate in the political process." Wesley v. Collins, 605 F. Supp. 802, 804 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

[209] 116 CONG. REC. 6642 (1970) (remarks of Sen. Tydings). The remarks of one woman vividly illustrate the power of the vote:

> I was . . . told . . . that if I registered to vote, I would have food to eat and a better house to stay in . . . . My child would have a better education . . . . [Voting stood for] the basic needs of the people. The whites, they understood it even larger than that in terms of political power.

HENRY HAMPTON & STEVE FAYER, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S, at 180 (1990) (quoting Unita Blackwell, a participant in the voting rights movement that swept the South during the 1960s).

[210] Linda F. Williams, *The Constitution and the Civil Rights Movement: The Quest for a More Perfect Union*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY, *supra* note 3, at 97, 98.

[211] Coincidentally, six of the 15 states that still disenfranchise ex-felons for life are

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."[212] Even after passage of the Act and its 1982 amendments, the discriminatory effects of such devices continued in the form of "minority vote dilution through sophisticated legal and administrative barriers such as at-large electoral systems, racial gerrymandering, unfair candidate slating procedures, and runoff requirements."[213] In addition, other barriers exist that are beyond the scope of statutory remedy, such as "psychological barriers" in the form of a "lack of a habit of voting derived from years of exclusion from voting, fear, deference to whites, and apathy"[214] and "institutional obstacles" in the form of inadequate voter registration and procedure information, inconvenient registration locations and hours, and the "scarcity of black registration officials, especially in the South."[215] It is thus beyond question that significant obstacles to effective black electoral participation remain.[216]

The impact of these obstacles on the black vote is compounded by ex-felon disenfranchisment, which may be seen as yet another barrier to black electoral participation. Accordingly, ex-felon disenfranchisement, by removing potential voters from an already low number of eligible black voters, further enhances the dilution

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in the South. These states include Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia. *See supra* note 6 (listing the 15 states). Furthermore, these states, with the exception of Tennessee and Kentucky, are also states where, given the comparatively larger number of blacks imprisoned than whites, ex-felon disenfranchisement would have its greatest impact on the black vote. *See supra* parts I.A-B (citing statistics concerning the racial makeup of felons and voters, and discussing their significance).

[212] April D. Dulaney, *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). For examples of such discrimination, see Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (declaring unconstitutional Virginia's poll tax which made voter affluence an electoral standard); United States v. Louisiana, 380 U.S. 145 (1965) (invalidating as discriminatory a state constitutional provision requiring a voting applicant to pass a constitution interpretation test); Smith v. Allwright, 321 U.S. 649 (1944) (holding that rules of the Texas Democratic Party excluding blacks from voting in the party's primaries violated the Fifteenth Amendment).

[213] Williams, *supra* note 210, at 100.

[214] *Id.*

[215] *Id.*

[216] *See id.* ("The considerable progress made by blacks in eliminating barriers to their electoral participation . . . has not occurred evenly across all parts of the process, and substantial barriers remain."); *see also* Dulaney, *supra* note 212, at 1258-59 ("While the Voting Rights Act . . . has achieved much progress, racial discrimination continues to deny racial minorities the opportunity to participate meaningfully in the political process.").

and vote-inhibiting effects accompanying those barriers detailed above.

2. Discrimination in Socioeconomic Areas

Congress has recognized that "disproportionate education[,] employment, income level and living conditions arising from past discrimination tend to depress minority political participation."[217] According to Congress, "[w]here these conditions are shown, . . . [Voting Rights Act] plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation."[218] In *United States v. Marengo County Commission*,[219] the Eleventh Circuit clearly articulated Congress's intentions in holding that "when there is clear evidence of present socioeconomic or political disadvantage resulting from past discrimination," reduced political participation is inferred.[220] Thus, where discrimination has reduced the socioeconomic status of blacks, their ability to effectively participate in the franchise is assumed to be hindered.

Indeed, the socioeconomic status of many blacks has been devastated by discrimination in such areas as employment, education, and housing. As recently as 1989, the Eighth Circuit found evidence that as a result of discrimination in those areas, blacks in Arkansas "suffer from less education, less employment, lower income levels, and disparate living conditions as compared to whites."[221] Despite legislation aimed at its eradication, discrimination in these areas continues to be prevalent nationwide.

For instance, discrimination in housing continues to be widespread, with blacks being "more likely to be excluded from renting or buying in certain residential areas, to be given quotations of higher prices and rents, and to be 'steered' to areas already

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[217] S. REP. NO. 417, *supra* note 9, at 29 n.114, *reprinted in* 1982 U.S.C.C.A.N. at 207.

[218] *Id.*

[219] 731 F.2d 1546 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984).

[220] *Id.* at 1569 (citing Cross v. Baxter, 604 F.2d 875, 881-82 (5th Cir. 1979)); *see also* United States v. Dallas County Comm'n, 739 F.2d 1529, 1537 (11th Cir. 1984) (noting that "[i]nequality of access is an inference which flows from the existence of economic and educational inequalities" (quoting Kirksey v. Board of Supervisors, 554 F.2d 139, 145 (5th Cir. 1977))). The *Marengo* court held that this inference is rebutted if the defendant shows that some other factor is causing depressed political participation. *See Marengo*, 731 F.2d at 1569.

[221] Whitfield v. Democratic Party, 890 F.2d 1423, 1431 (8th Cir. 1989).

primarily populated by blacks."[222] Employment discrimination also remains widespread. Blacks continue to be discriminated against in the hiring process, receiving significantly fewer offers of employment than their white counterparts.[223] Given the persistence and pervasiveness of such societal discrimination, its negative effects on the socioeconomic status of blacks can only be expected to continue and to adversely affect their political participation.[224]

Ex-felon disenfranchisement effectively exacerbates the decreased political participation accompanying blacks' lower socioeconomic status. The denial of ex-felons' voting rights further erodes black participation by removing potential voters who might increase that participation. In addition, as the plaintiff in *Wesley* argued,[225] socioeconomic pressures largely attributable to the forces of discrimination may account for higher rates of crime among blacks.[226] Ex-felon disenfranchisement is the crowning blow in this chain reaction set in motion by racial discrimination. Where socioeconomic discrimination and voting discrimination factors are forcefully evident, ex-felon disenfranchisement may be assumed to work in conjunction with these factors to deny blacks equal opportunity to participate in the electoral process. As one court noted, racial vote dilution can be enhanced by cultural, political, social, and economic factors that relatively disadvantage racial minorities and "further operate to diminish practical political effectiveness."[227] The *Wesley* court incorrectly analyzed these important factors.

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[222] A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 50 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989). In addition, a 1991 study of 25 metropolitan areas revealed that 56% of black home buyers "experienced some form of unfavorable treatment, such as being shown different or fewer housing opportunities or offered less favorable terms or assistance than comparable white home buyers." Aleinikoff, *supra* note 168, at 336 (citing MARGERY A. TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION STUDY: SYNTHESIS vi (1991)).

[223] *See* MARGERY A. TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: DISCRIMINATION IN HIRING 31 (1991) ("[The] unequal treatment of black jobseekers is entrenched and widespread.").

[224] *See supra* note 216 and accompanying text (noting the continuing barriers to black electoral participation).

[225] *See* Wesley v. Collins, 605 F. Supp. 802, 807 (M.D. Tenn. 1985) ("[P]laintiffs maintain that as a consequence of centuries of racial discrimination, Tennessee's blacks have suffered under debilitating socioeconomic pressures which account, in part, for the significantly higher rate of felony convictions—and disenfranchisement—among blacks as compared to whites."), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

[226] *See supra* note 165 and accompanying text.

[227] Gingles v. Edmisten, 590 F. Supp. 345, 355 (E.D.N.C. 1984).

3. The Problem with *Wesley*

Although the court in *Wesley* conclusively found that "the historical effects of [socioeconomic and voting] discrimination against blacks continue to be present," the court held that a causal nexus between such discrimination and the ex-felon disenfranchising statute at issue had not been established.[228] Congress's rejection of the causal nexus requirement to show the link between socioeconomic factors and depressed political participation[229] should have alerted the court that Congress would disfavor the causal nexus approach where socioeconomic factors are shown. More importantly, however, the *Wesley* court's search for a causal nexus was clearly misguided.

Instead of looking for a causal link between the ex-felon disenfranchising statute and black vote dilution, which was the proper approach,[230] the court erroneously searched for "a causal connection . . . between the indicia of historically-rooted discrimination and the Tennessee statute disenfranchising felons."[231] The court concluded that despite the presence of totality-of-circumstances factors, namely voting and socioeconomic discrimination, "these facts cannot be tied to the historical tradition—and rationale—for disenfranchising felons."[232] According to the *Wesley* court's reasoning then, plaintiffs bringing § 2 claims would have to show

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[228] *Wesley*, 605 F. Supp. at 812 (stating that "the nexus between discriminatory exclusion of blacks from the political process and disenfranchisement of felons simply cannot be drawn").

[229] *See supra* text accompanying notes 217-18, 220 (noting that where reduced socioeconomic conditions were shown, Congress and the courts have stated that depressed electoral participation could be inferred).

[230] *See* Whitfield v. Democratic Party, 890 F.2d 1423, 1430 (8th Cir. 1989) (stating that "a causal connection between the challenged practice . . . and the diluted voting power of the minority must be established").

[231] *Wesley*, 605 F. Supp. at 812. The *Wesley* court also misconstrued the Eleventh Circuit's holding in United States v. Marengo County Comm'n, 731 F.2d 1546, 1569 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984), as imposing upon a defendant "the burden of denying a causal nexus between the indicia of discrimination and the challenged practice." *Wesley*, 605 F. Supp. at 812. Instead, *Marengo* held that "when there is clear evidence of present socioeconomic or political disadvantage resulting from past discrimination . . . the burden is not on the plaintiffs to prove that this disadvantage is causing reduced political participation, but rather is on [the defendant] to show that the cause is something else." *Marengo*, 731 F.2d at 1569. Thus, the proper focus was on the inferred link between socioeconomic disadvantage and reduced political participation, not on the link between historical discrimination and the statute at issue. *See also supra* text accompanying notes 217-20.

[232] *Wesley*, 605 F. Supp. at 812.

historical evidence of discriminatory motive in the state's adoption of the statute. However, to require such a showing would, in effect, return plaintiffs to the intent standard which Congress clearly rejected with regard to Voting Rights Act claims.[233]

Instead of dismissing the clearly established proof of discrimination as not embodying the rationale behind the statute, the court should have weighed this evidence of discrimination in assessing the statute's effects on the black vote. As the Supreme Court established, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure *interacts* with social and historical conditions to cause an inequality in the [electoral] opportunities enjoyed by black and white voters."[234] It is this interaction that is the proper focus of judicial review.

On appeal, the Sixth Circuit in *Wesley* held that evidence of historical discrimination could not "in the manner of original sin, condemn action that is not in itself unlawful."[235] Apparently arguing that historical discrimination alone could not demonstrate the unlawfulness of the ex-felon disenfranchising statute, the court again failed to properly analyze the combined effects of such discrimination and the statute on the black vote. As Congress determined, "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'"[236] Thus, evidence of historical discrimination and its lingering effects should not have been so hastily disregarded. In essence, the court assumed that ex-felon disenfranchisement is lawful regardless of its results. If the court had properly weighed the evidence of historical discrimination, it might have concluded that those results rendered the statute unlawful under the Voting Rights Act.

Future courts called upon to address vote dilution claims against ex-felon disenfranchisement should learn from the mistakes of the

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[233] *See supra* notes 182-86 and accompanying text (discussing Congress's rejection of the intent requirement set by the Supreme Court in Mobile v. Bolden, 446 U.S. 55 (1980)). As Congress clearly stated, "If the plaintiff proceeds under the 'results test,' then the court would assess the impact of the challenged . . . practice on the basis of objective factors, rather than making a determination about the motivations which lay behind its adoption or maintenance." S. REP. NO. 417, *supra* note 9, at 27, *reprinted in* 1982 U.S.C.C.A.N. at 205.

[234] Thornburg v. Gingles, 478 U.S. 30, 47 (1986) (emphasis added).

[235] Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986) (quoting City of Mobile v. Bolden, 446 U.S. 55, 74 (1980)).

[236] S. REP. NO. 417, *supra* note 9, at 30 *reprinted in* 1982 U.S.C.C.A.N. at 207 (quoting White v. Regester, 412 U.S. 755, 769-70 (1973)).

Wesley courts. The following Section suggests a possible approach for courts to pursue in determining whether vote dilution has occurred.

D. *Suggested Judicial Analysis of Ex-Felon Disenfranchisement Vote Dilution Claims Under the Voting Rights Act*

Although reform of ex-felon disenfranchisement can be achieved either through the courts or by legislative action, "the courtroom obviously presents the more accessible forum for the individual ex-offender."[237] This is especially true in cases of black vote dilution, since § 2 of the Voting Rights Act is primarily enforced by lawsuits and "does not depend upon voluntary compliance nor is it self-executing."[238] In addressing § 2 vote dilution claims against ex-felon disenfranchisement, courts should rely upon the totality of circumstances approach previously discussed.[239]

Statistics showing a disproportionate impact of ex-felon disenfranchisement on blacks should not be used solely to direct judicial inquiry into vote dilution analysis[240] and then be discarded, but should be analyzed with the other relevant factors in the totality of circumstances evaluation. Where figures show that the number of black ex-felons per black voting age population is disproportionately high[241]—and that, derivatively, ex-felon disenfranchisement disproportionately impacts the black vote—this evidence should be used to ascertain the possible compounding influence of felon disenfranchisement on the persistent vote-diluting effects of historical voting and socioeconomic discrimination. As previously stated, plaintiffs should also be allowed to introduce persuasive constitutional and social policy/theory arguments to demonstrate the tenuousness of a state's underlying policy for disenfranchising ex-felons.[242]

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[237] Itzkowitz & Oldak, *supra* note 7, at 740.

[238] Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 66, 84 (Bernard Grofman & Chandler Davidson eds., 1992).

[239] *See supra* part III.C.

[240] *See supra* note 20 and accompanying text (explaining that numbers showing impact should automatically prompt courts to inquire into the interaction of historical and political factors with the challenged legislation).

[241] Again, disparate targeting and treatment should not be overlooked as possible reasons for the disproportionate number of black ex-felons.

[242] *See supra* note 202 and accompanying text.

Where a plaintiff presents statistics that clearly demonstrate an impact,[243] and there is strong evidence of historical voting and socioeconomic discrimination, the effects of which still greatly hinder black political participation and are compounded by ex-felon disenfranchisement, the court should deem these factors to work in conjunction with the challenged ex-felon disenfranchising statute to deny blacks an equal opportunity to participate in the political process, thereby unlawfully diluting the black vote in violation of the Voting Rights Act.

Additional evidence, in the form of the other totality of circumstances factors and/or other unenumerated factors that are relevant in certain cases, should also enter into courts' analyses. Because facts and circumstances will vary with each case, establishing threshold figures for impact[244] or the specific number of facts needed to constitute "strong" evidence of discrimination would be unwise. Courts should therefore apply this analysis on a case-by-case basis.

With regard to appropriate relief, the Fifth Circuit has reasoned that where a violation of the Voting Rights Act has been established, "courts should make an affirmative effort to fashion an appropriate remedy for that violation."[245] As stated in the Act's legislative history, "[t]he court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice."[246] Thus, the Voting Rights Act does not prescribe any exact form of relief for vote dilution and such relief apparently must be determined on a case-by-case basis, in a manner best suited to correct the particular vote dilution involved.[247] The plaintiff in *Wesley* sought injunctive and declaratory relief,[248] which in some

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[243] Where the number of black ex-felons per black voting age population is disproportionately high compared to the number of white ex-felons per white voting age population, there is obvious disproportionate impact on the black vote.

[244] I cannot suggest definite numbers or ratios to establish an impact standard, since these will vary from case to case, and impact is a relative concept.

[245] Monroe v. City of Woodville, 819 F.2d 507, 511 n.2 (5th Cir. 1987).

[246] S. REP. NO. 417, *supra* note 9, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 208.

[247] *See id.* (stating that vote dilution remedies will "necessarily depend upon widely varied proof and local circumstances").

[248] Wesley v. Collins, 605 F. Supp. 802, 804 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986). Furthermore, as the Sixth Circuit in *Wesley* pointed out, "any relief afforded to Wesley would inure to the benefit of all others who stand to be injured by the state's conduct, namely, black citizens of Tennessee convicted of

cases may be the best remedy for vote dilution caused by ex-felon disenfranchisement. Such relief, however, may not be appropriate in all cases, and future courts addressing these claims should fashion remedies according to the particular circumstances of each case.

Most importantly, unlike the *Wesley* courts which seemed to dismiss the possibility of a violation without thoroughly and correctly weighing the evidence,[249] courts should recognize the potential of ex-felon disenfranchisement to unlawfully dilute the black vote. Once courts acknowledge this potential, they can effectively address and correct any resultant impediment to effective black electoral participation.

CONCLUSION

The right to vote serves as the embodiment of political empowerment, and it is essential to the full privilege of effective citizenship. Given the fundamental importance of the right to vote, the issue of ex-felon disenfranchisement will continue to be a hotbed of dispute. *Wesley*, the first case to address the special problem of black vote dilution in the context of ex-felon disenfranchisement, will undoubtedly prompt future challenges to the removal of ex-offenders' voting rights, especially given the ongoing, vote-impacting effects of discrimination in this country.

Where legislatures fail to repeal old laws that infringe such fundamental rights as voting, and that since their adoption may have become unlawful under statutory developments, courts should take "a 'second look' [through] the eyes of the people"[250] directly and indirectly affected by such laws, and take steps to correct their harmful effects. To the extent that it may, in some circumstances, unlawfully dilute the black vote, ex-felon disenfranchisement deserves this second look.

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felonies." Wesley v. Collins, 791 F.2d 1255, 1258 (6th Cir. 1986). Thus, according to the Sixth Circuit, relief afforded to one black felon would extend to the entire class of black felons and would therefore presumably correct the black vote dilution problem.

[249] *See Wesley*, 605 F. Supp. at 813 ("Disenfranchising the felon has never been attributed to discriminatory exclusion of racial minorities from the polls."); *Wesley*, 791 F.2d at 1261 (dismissing "evidence of past discrimination" and determining that Tennessee's "legitimate and compelling rationale for enacting the statute" lead to "the inescapable conclusion that the Voting Rights Act was not violated"); *see also supra* part III.C.3 (discussing the "problem with *Wesley*").

[250] Calabresi, *supra* note 131, at 104.