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THE DEATH OF VOTING RIGHTS: THE LEGAL DISENFRANCHISEMENT OF MINORITY VOTERS

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OUTLINE

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"The Convention's goal is to establish white supremacy in the State, within the limits imposed by the Federal Constitution."

John B. Knox, Alabama Delegate[1]

INTRODUCTION

Minority voting rights are dead—the majority rules. In the last century and a half, minority access to the ballot box has been, if not killed, then at least rendered largely unenforceable by a combination of racial bias in the criminal justice system and the Supreme Court's so-called "color-blind" jurisprudence, with the result that meaningful minority access to the electoral process has been greatly diminished. Minority disenfranchisement has moved in cycles, from intentional, direct, *de jure* disenfranchisement before the Civil War, through indirect means of exclusion (including felon disenfranchisement) following Reconstruction and passage of the Fifteenth Amendment, to the United States Supreme Court's "color-blind" jurisprudence, which has interacted with the last remnants of *de jure* disenfranchisement to complete the cycle of exclusion. At the turn of the twenty-first century, the Supreme Court has come full circle, conjuring up language and imagery more appropriate to the nineteenth century's *Dred Scott* and *Plessy* Courts. The Court's color blindness has interacted with historical remnants of intentional discrimination so as to all but nullify the Voting Rights Act[2] and the equal protection clause, perpetuating the legacy of intentional disenfranchisement as effectively as any post-civil war "black code."

Many scholars have addressed specific changes and remedies that might make remedies more fair or feasible, or make the Voting Rights Act more effective.[3] This Article explores the premise

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[1] Official Proceedings of the Constitutional Convention of the State of Alabama, May 21, 1901, to Sept. 3d, 1901 (Second Day) (1901) (statement of Delegate John B. Knox concerning convict disenfranchisement provisions).

[2] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

[3] *See, e.g.*, Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289 (1997); *see also* LANI GUINIER, THE TYRANNY OF THE MAJORITY 69, 72 (1994) [hereinafter GUINIER, TYRANNY OF THE MAJORITY] (arguing that the Voting Rights Act should embody the civil rights movement's "transformative vision of politics"); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the*

that the Supreme Court's "color-blind" jurisprudence has interacted with systematic problems such as the disproportionate criminalization of minorities and the last remaining Jim Crow laws[4] to all but nullify the Voting Rights Act's mission to provide meaningful ballot access for minority populations. This Article examines the cycle of exclusion from the Civil War to the present. It begins by examining the Civil War and Reconstruction-era Jim Crow laws and the agonizingly slow process of establishing meaningful access to the ballot box that culminated with the Voting Rights Act. The Article next examines the systematic dismantling of minority voting rights through the interaction of Jim Crow felon disenfranchisement laws and the Supreme Court's "color-blind" jurisprudence. Finally, the Article proposes that any changes to the Voting Rights Act will be illusory unless the Court abandons the fiction of the "color-blind" Constitution and returns to an equal protection analysis of any procedure that burdens minority groups from achieving effective access to the ballot box.

I. THE CYCLE OF MINORITY DISENFRANCHISEMENT BEGINS

> *"This plan of popular suffrage will eliminate the darkey as a political factor in this State in less than five years, so that in no single county of the Commonwealth will there be the least concern felt for the complete supremacy of the white race in the affairs of government."*
>
> Carter Glass, Virginia Delegate[5]

Theory of Black Electoral Success, 89 MICH. L. REV. 1077, 1084-85 (1991) [hereinafter Guinier, *Triumph of Tokenism*] (analyzing different voting strategies in the context of the civil rights movement's quest for human dignity). For a detailed and thoughtful proposal for a Voting Rights Act analysis of the impact of disenfranchising ex-felons on minority voting strength, see Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994).

[4] The term "Jim Crow" reportedly first appeared in the North in the 1830s as a song title in a minstrel show in which white performers performed in "blackface" and parodied blacks in a derogatory manner. By the 1840s, it was applied to racially segregated Massachusetts railroad cars and became a generic term for discriminatory race laws. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 n.68 (1966).

[5] 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF VIRGINIA 3076 (1906) [hereinafter VIRGINIA PROCEEDINGS] (statement of Delegate Carter Glass). Delegate Glass, who later became a United States senator, said the purpose of the law was to eliminate "every Negro voter who can be gotten rid of." Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 1: The Heyday of Jim Crow*, 82 COLUM. L. REV. 835, 846 (1982); *see also* John Hope Franklin, *"Legal" Disenfranchisement of the Negro*, 26 J. NEGRO EDUC. 241,

Race-based exclusion of minority voters is long standing and deeply rooted. Restrictions on minority voting access have gone through three distinct phases: outright, explicit disenfranchisement; indirect disenfranchisement through adoption of laws and practices that burdened minority voting; and most recently, the Supreme Court's systematic destruction of all remedies for anything but outright, explicit disenfranchisement.

A. From De Jure to De Facto Disenfranchisement

> *"[T]he most dangerous threat to democracy is the Negro. . . . The Negro is an uncontrollable objector to our [all-white] ticket."*
>
> The Commercial, Pine Bluff, Arkansas, 1892[6]

Passage of the Thirteenth Amendment did not automatically confer the right to vote.[7] Women of all races continued to be disenfranchised until passage of the Nineteenth Amendment, but even those freedmen ostensibly made full citizens by the abolition of slavery[8] did not automatically obtain the franchise.[9] Indeed, the

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241 n.1 (1957) (noting that in 1890, some whites were celebrating the apparent defeat of black voting initiatives); *id.* at 246 (quoting Delegate Glass as stating the intent to eliminate African-American voters legally, "without materially impairing the numerical strength of the white electorate"). For the definitive history of the disenfranchisement of African-Americans in the Reconstruction era, see generally J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 (1974).

[6] The Commercial, Pine Bluff, Arkansas, 1892. *The Pine Bluff Commercial*, a Pine Bluff, Arkansas, newspaper, stressed the racial purpose of the poll tax, urging voters to pass it "because the most dangerous threat to democracy is the Negro. . . . The Negro is an uncontrollable objector to our [all-white] ticket." *See* C. Calvin Smith, *The Politics of Evasion: Arkansas' Reaction to* Smith v. Allwright, *1944*, 17 J. NEGRO HIST. 47 (1982) (copy on file with author).

[7] *See* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 147 (1978) ("Emancipation was not the key that unlocked the door to full equality."). Even in New York State, where slavery was abolished before the Civil War, "if emancipation were tied to the granting of equal civil rights to blacks, the majority of New Yorkers were willing to allow slavery to continue in their midst." *Id.*

[8] When the Civil War began, and even at the time of the Emancipation Proclamation, no clear plans existed for protecting the rights of the freedmen. *See* HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 66, 67 (1978). From 1862 to 1865, however, Congress took a number of steps toward improving the freedmen's lot, *see id.* at 67, creating the Freedmen's Bureau in 1865 to provide relief and to rent land to the freedmen. *See id.* at 70-72; *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L.

denial of voting rights on the basis of race or previous condition of servitude was both legal and widely practiced.

1. Reconstruction: Intentional, Indirect Disenfranchisement

> *"Fortunately, the opportunity is offered the white people of the State in the coming election to obviate all future danger and fortify Anglo-Saxon civilization against every assault from within and without, and that is the calling of a constitutional convention to deal with the all important question of suffrage."*
>
> Columbia, S.C., Daily Register, Oct. 10, 1894[10]

Following the 1870 ratification of the Fifteenth Amendment to the United States Constitution, providing that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude,"[11] direct *de jure* ballot exclusion of the freedmen[12] was illegal. Violence, intimidation,[13] and fraud[14] persisted, how-

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REV. 1, 8 n.20 (1955).

9. *See* JOHN M. MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 36 (1909) (noting that the language of the Fifteenth Amendment did not guarantee the right to vote). *See generally* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 22-23 (1965). Moreover, "from the ratification of the [Fourteenth] Amendment in 1868 to 1870 not a single state, with the sole exception of Minnesota, heeded the warning or yielded to the inducement of the suffrage clause of the Fourteenth Amendment." William Pickens, *The Constitutional Status of the Negro from 1860 to 1870, in* THE AMERICAN NEGRO ACADEMY OCCASIONAL PAPERS 63, 66 (1899) (copy on file with author). *But see* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 75-88 (1987) (analyzing the "Ultimate Voting Rights Act"); Grier Stephenson, Jr., *The Supreme Court, the Franchise, and the Fifteenth Amendment: The First Sixty Years*, 57 UMKC L. REV. 47, 47 (1988) (arguing that the Supreme Court improperly has ignored the Fifteenth Amendment).

10. DAILY REGISTER (Colombia, S.C.), Oct. 10, 1894, *reprinted in* George B. Tindall, *The Campaign for the Disenfranchisement of Negroes in South Carolina*, 15 J.S. HIST. 212, 224 (1949).

11. U.S. CONST. amend. XV, § 1.

12. All potential minority voters in this era were male, as women remained disenfranchised until passage of the Nineteenth Amendment.

13. *See* Tindall, *supra* note 10, at 213. One account noted:

> Seeking to impress on blacks the perils of political involvement, armed bands rode through the countryside at night during the weeks preceding elections, firing small arms and sometimes even canon, [sic] and patrolled polling places on election day. And when they did resort to beatings and murders, they usually defined their targets carefully and struck quickly rather than inaugurating an ongoing campaign of terror.

ever, and white supremacists quickly sought legal but indirect hurdles to minority voting,[15] including the manipulation of voting requirements.[16] Unable to bar the freedmen from voting outright without having their state's representation reduced in Congress, white southerners created "whites-only" primaries,[17] so that the general election became a mere runoff between white-preferred candidates in which minority voters had a vote, but no real voice.[18] After *Smith v. Allwright*[19] struck down Texas' all-white primary system,[20] Arkansas, which had the same system, attempted to circumvent the holding by imposing lengthy residence requirements,[21] limiting party membership[22] to whites and establish-

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DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT, 90-91 (1991). This subtext of terror persisted until the present. Student Nonviolent Coordinating Committee organizer Fannie Lou Hamer noted the perils of democracy in "the land of the tree and the home of the grave," recounting the murders of Vernon Dahmer, James Chaney, Medger Evers and others. Neil R. McMillan, *Black Enfranchisement in Mississippi: Federal Enforcement and Black Protest in the 1960s*, 43 J.S. HIST. 351, 351, 354 (1977) (citing an interview with Fannie Lou Hamer, Mississippi Oral History Program, University of Southern Mississippi, Apr. 14, 1972).

14. *See* NIEMAN, *supra* note 13 at 92.

15. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880, at 5-7 (MacMillan 1992) (1962).

16. *See* James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 351, 354-56 (Chandler Davidson & Bernard Grofman, eds., 1994) (analyzing the effects of institutional mechanisms affecting voter registration in electing white candidates and keeping blacks in a subordinate position); Tindall, *supra* note 10, at 213; *see also* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973) (giving a detailed analysis of the elaborate mechanisms used to suppress and nullify minority voting, and the long legal battles against these devices).

17. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-10 (1993).

18. *See generally* JOEL GRAY TAYLOR, LOUISIANA RECONSTRUCTED, 1863-1877 (1974).

19. 321 U.S. 649 (1944).

20. *See* Terry v. Adams, 345 U.S. 461, 469 (1953); Smith v. Allwright, 321 U.S. 649, 664 (1944); Nixon v. Condon, 286 U.S. 73, 89 (1932); Nixon v. Herndon, 273 U.S. 536, 540-41 (1927) (holding that a Texas statute that established that "in no event shall a negro be eligible to participate in a Democratic party primary election" violates equal protection). Collectively, these are the "White Primary Cases," overturning anti-black Texas election tactics. For a thorough analysis of the events leading up to these cases, see Darlene Clark Hine, *The Elusive Ballot: The Black Struggle Against the Texas Democratic White Primary, 1932-45*, 81 TEX. STATE HIST. Q. at 371 (copy on file with author).

21. *See* Alt, *supra* note 16, at 354-56 (describing the "Magnolia formula" adopted in Mississippi in 1890 and copied elsewhere, combining literacy or understanding requirements, residence requirements and poll taxes to allow disenfranchising migrant workers as well as former slaves); *see also, e.g.*, Marston v. Lewis, 410 U.S. 679, 680 (1973) (Arizona's 50-day residency rule "pass[es] constitutional muster" because "sufficiently

ing separate primaries and run-off elections for black and white voters.[23] Non-party members could only vote in the primaries if they accepted the principles of the 1874 Arkansas Constitution, which included complete racial segregation, a ban on interracial marriage, and payment of a poll tax.[24]

By the early 1900s, a majority of states with large populations of freedmen had adopted poll taxes that effectively eliminated many potential African-American voters from the polls.[25] The *Harman v. Forssenius*[26] Court expressly noted the use of poll taxes as a means to disenfranchise blacks,[27] and barred their use as a qualification for voting in federal elections.[28] Literacy[29] and "un-

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strong local interests," such as the preparation of accurate voter lists, were demonstrated in support of the rule); Dunn v. Blumstein, 405 U.S. 330, 358-59 (1972) (holding that the relation between Tennessee's one-year residency requirement and state's interest in an informed electorate too attenuated to be found compelling). Virginia's 1902 Constitution required a one-year residency for voter registration, a restriction that endured until it was struck down by a federal court in 1970. *See* Bufford v. Holton, 319 F. Supp. 843, 846 (E.D. Va. 1970), *aff'd sub nom.* Virginia State Bd. of Elections v. Bufford, 405 U.S. 1035 (1972); Andrews v. Cody, 327 F. Supp. 793 (M.D.N.C. 1971), *aff'd*, 405 U.S. 1034 (1972) (holding that North Carolina's one-year residency requirement violated equal protection).

[22] Party membership was required for primary voting. *See, e.g.*, Smith v. Allwright, 321 U.S. at 664-65:

> The privilege of membership in a party may be . . . no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state.

[23] Smith, *supra* note 6, at 49.

[24] *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (finding poll tax unconstitutional under strict scrutiny standard because "wealth or fee paying has . . . no relation to voting qualifications"); *see also* Karlan, *supra* note 17, at 1709-10, 1709 n.13 (noting that the "participatory right [to vote] has been implicated by a variety of restrictions on franchise, including white primaries, de-annexation, poll taxes and literacy tests, durational residency requirements, and, most recently, the power to cast write-in votes").

[25] For details of the use of poll taxes to hinder minority voting, see Alt, *supra* note 16, at 356. Poll taxes were established in Alabama, *see id.* at 38-39; 44; Arkansas, *see id.* at 356; Florida, *see id.* at 356; Louisiana, *see id.* at 356, 414 n.18; Mississippi, *see id.* at 137, 146, 156; North Carolina, *see id.* at 158, 356; South Carolina, *see id.* at 194, 196, 356; Tennessee, *see id.* at 356; Texas, *see id.* at 235, 239; and Virginia, *see id.* at 272-73, 274-76, 356. J. Morgan Kousser described the poll tax as the "most effective device" for restricting black suffrage in Georgia. *See* KOUSSER, *supra* note 5, at 210-15 (citing figures for the 1892, 1894, and 1896 elections, in which the highest rate of black turnout was 38.3% in 1894, while white turnout rate was 68.6% in the same year).

[26] 380 U.S. 528, 540-54 (1965).

[27] *See id.* at 540-44.

[28] *See id.* at 544.

[29] Literacy requirements endured well into the 20th century. *See, e.g.*, Lassiter v.

derstanding" tests[30] that would disenfranchise the freedmen legally while appearing neutral on their face were widespread. "Grandfather"[31] and "old soldier" clauses[32] made it easier to disenfranchise blacks without similarly disenfranchising whites by exempting from the application of literacy tests and other voting restrictions anyone who had served in the United States or Confederate army or navy, their descendants, and anyone who had himself voted, or whose father had voted, or whose grandfather had voted before January 1, 1867.

The delegates to the Reconstruction-era state constitutional conventions that adopted these measures did not hide their intentions: Virginia Delegate William A. Dunning, for example, remarked:

Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959) (holding literacy tests to be rationally related to legitimate state interest in ensuring "intelligent use of the ballot").

30. *See, e.g.*, ALA. CONST. art. VIII, § 181 (repealed 1965) (literacy and understanding clauses). It was not until 1965 that understanding clauses were declared unconstitutional. *See* Louisiana v. United States, 380 U.S. 145 (1965). Albert Bushnell Hart reported that shortly after an enactment of the understanding clause in Virginia, a well-educated African-American attempting to resister to vote was asked to take such a test. He was asked, "What clauses of the present Virginia constitution are derived from the Magna Carta?" The young man replied, "I don't know, unless it is that no negro shall be allowed to vote in this commonwealth." *See* Albert Bushnell Hart, *The Realities of Negro Suffrage*, 1906 PROC. OF THE AM. POL. SCI. ASS'N. 149, 162 (copy on file with author). The young man was reportedly registered to vote. *See id.*

31. *See* Schmidt, *supra* note 5, at 846, 854 n.80 (quoting the Oklahoma Supreme Court in *Atwater v. Hassett*, 111 P. 802, 812 (1910) ("[T]he presumption follows . . . that the virtue and intelligence of the ancestors will be imputed to his [sic] descendants, just as the iniquity of the fathers may be visited upon the children unto the third and fourth generation."). Oklahoma had amended its constitution to incorporate a grandfather clause, but the United States Supreme Court ruled that the clause was unconstitutional because it perpetuated "the very conditions which the [Fifteenth] Amendment was intended to destroy." Guinn v. United States, 238 U.S. 347, 360 (1915). Similarly, in *Lane v. Wilson*, 307 U.S. 268 (1939), the Court invalidated a reenacted grandfather clause, holding that the Fifteenth Amendment nullified "sophisticated as well as simple-minded modes of discrimination . . . [and] hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Id.* at 275.

32. *See* Schmidt, *supra* note 5, at 846 ("'Old Soldier's Clause' [provides that] those who had fought in the Civil War or certain earlier wars, and their lawful descendants, could register without meeting literacy and property requirements."). For a detailed history and analysis of the evolution and effect of such devices, *see id.* at 845-81. A candidate in the 1905-06 Georgia gubernatorial race argued that without a grandfather clause, the literacy and understanding clauses would allow 93,000 educated blacks to vote while "keep[ing] out the votes of many an old democratic hero who was too busy shedding his blood in defense of Georgia to learn readin', 'ritin', and 'rithmetic." Russell Korobkin, *The Politics of Disenfranchisement in Georgia*, 74 GEORGIA HIST. Q. 296, 326 (1990) (copy on file with author).

> I do not expect [the understanding test] to be administered with any degree of friendship . . . to the suffrage of the black man. I expect the examination with which the black man will be confronted to be inspired by the same spirit that inspires every man upon this floor and in this convention.I would not expect an impartial administration of the clause.[33]

Warming to this theme, he added:

> The people of Virginia do not stand impartially between the suffrage of the white man and the suffrage of the black man. If they did, the uppermost thoughts in the hearts of every man within the sound of my voice would not be to find a way of disenfranchising the black man and enfranchising the white man. We do not come here prompted by an impartial purpose in reference to Negro suffrage.[34]

The Virginia convention also adopted selective disenfranchisement of convicted felons as a further means of reducing black electoral participation.[35] These Reconstruction electoral qualifications were remarkably effective. By 1910, registered voters among the freedmen dropped to 15% in Virginia, and under 2% in both Alabama and Mississippi.[36]

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[33] VIRGINIA PROCEEDINGS, *supra* note 5, at 2972 (statement of delegate William A. Dunning). The literacy test was one of the more effective tools for disenfranchising the freedmen, for:

> Given the legacy of slavery and the meager support for black schools in the aftermath of Reconstruction, illiteracy among blacks was widespread. In 1890 more than half of the adult black males in the South could not read, and many others were barely literate. Fairly administered, literacy tests (which required perspective voters to prove that they could read a provision of the state or federal constitution) would deny the ballot to most black men; applied by partisan white officials who were bitterly opposed to black suffrage, they would cut even further into the black electorate.

NIEMAN, *supra* note 13, at 106.

[34] VIRGINIA PROCEEDINGS, *supra* note 5, at 2972 (statement of delegate William A. Dunning).

[35] *See* Note, *The Need for Reform of Ex-Felon Disenfranchisement Laws*, 83 YALE L.J. 580, 582-84 (1974); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993) (discussing racially motivated disenfranchisement laws).

[36] *See* NIEMAN, *supra* note 13, at 107.

2. Felon Disenfranchisement Laws: Jim Crow's Last Hurrah

"Everybody knows that this Convention has done its best to disfranchise the negro."

William A. Dunning, Delegate, Virginia Convention[37]

During Reconstruction, white factions pressing for disenfranchisement denounced blacks as "ignorant, lazy, criminally inclined and venal, a race demonstrably unqualified to exercise [the franchise]."[38] In an effort to prevent African-Americans from voting, several states enacted felon disenfranchisement laws and "carefully selected disenfranchising crimes in order to disqualify a disproportionate number of black voters."[39] The racially discriminatory roots of felon disenfranchisement and the effect of these laws on minority vote dilution are seldom considered,[40] but many of today's laws disenfranchising felons can trace their roots to attempts by Reconstruction constitutional conventions to enact laws that would keep black voters out of the electoral process.[41] The laws disqualifying felons have been the most enduring enactments of the Reconstruction era when states "carefully selected disfranchising crimes in order to disqualify a disproportionate number of black

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[37] *See* 2 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21, 1901, TO SEPT. 3D, 1901, at 4782 (1901) [hereinafter ALABAMA PROCEEDINGS] (statement of Alabama delegate Freeman).

[38] NIEMAN, *supra* note 13, at 108.

[39] *Ex-Offenders' Voting Rights: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 93d Cong. 11 (1974) [hereinafter *Voting Rights Hearings*] (testimony of John A. Buggs, Staff Director, United States Commission on Civil Rights).

[40] *See, e.g.*, Fox Butterfield, *Many Black Men Barred from Voting*, N.Y. TIMES Jan. 30, 1997, at A-12.

[41] Armand Derfner of the Lawyers' Committee for Civil rights Under Law noted that "disqualifying voters for criminal convictions," . . . "like the poll tax, is an ancient tradition, but it has often been used to discriminate against blacks, as several Southern states did in the post-Reconstruction period by adding crimes like petit larceny to the list of disqualifying crimes." Derfner, *supra* note 16, at 571 & n.213. These provisions have been widely reported and discussed. *See, e.g.*, PAUL LEWINSON, RACE, CLASS, AND PARTY: A HISTORY OF NEGRO SUFFRAGE AND WHITE POLITICS IN THE SOUTH 84-86 (1932) (discussing explicit racism at state constitutional conventions); Harvey, *supra* note 3, at 1146 & n.6 (1994) (listing statutes); *id.* at 1177-81 (analyzing the significance of Voting Rights Act in assessing minority vote-dilution claims in light of felon disenfranchisement); Shapiro, *supra* note 35, at 537-42 (collecting statutes). For exhaustive statistical research and interpretation, see generally C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913 (1951).

voters."[42] The Alabama Constitution of 1875 disenfranchised "[t]hose who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary."[43] As of 1901, section 181 of the Alabama Constitution was amended to disenfranchise anyone unable to "read and write any article of the Constitution of the United States in the English language"[44] as well as anyone who had not "worked or been regularly engaged in some lawful employment, business, or occupation, trade, or calling, for the greater part of twelve months next proceeding the time they offer to register."[45] However, anyone failing to meet these standards could still vote if he was:

> The owner in good faith in his own right, or the husband of a woman who is the owner in good faith in her own right, of forty acres of land situate in this state, upon which they reside, [or] . . . assessed for taxation at the bale of three hundred dollars or more, [provided the taxes were either paid or legal contested.[46]

Delegate John B. Knox, later President of the Alabama Constitutional Convention of 1901, announced that the Alabama convention's goal was "to establish white supremacy . . . within

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[42] *Voting Rights Hearings*, *supra* note 39 (testimony of John A. Buggs, Staff Director, United States Comm'n on Civil Rights).

[43] ALA. CONST. OF 1875, art. VIII, § 3.

[44] ALA. CONST. OF 1901, art. VII, § 181. Delaware still retains the provision "that no person . . . shall have the right to vote unless he shall be able to read this Constitution in the English language and write his name." DEL. CONST. OF 1897, art. V., § 2.

[45] ALA. CONST. OF 1901, art. VIII, § 181.

[46] A man who met the above requirements was still disenfranchised if he was disqualified when the constitution was ratified, or if he was later convicted of:

> [T]reason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office or of suborning any witness or registrar to secure the registration of any person as an elector.

ALA. CONST. OF 1901, art. VIII, § 182.

the limits imposed by the Federal Constitution."[47] John Fielding Burns, who drafted the Alabama constitutional felon-disenfranchisement provision, "estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes."[48] So-called "robust" crimes,[49] including murder, which the legislators believed equally likely to be committed by whites,[50] were missing from the list of crimes precipitating disenfranchisement,[51] yet, in Alabama, preventing another person from voting was only a misdemeanor.[52]

In *United States v. Mississippi*,[53] the Supreme Court found that as of 1890, African-Americans outnumbered whites in Mississippi, but that the literacy, grandfather, and white primary provisions of the 1890 Mississippi convention "worked so well in keeping Negroes from voting . . . that by 1899 the percentage of qualified voters in the State who were Negroes had declined from over 50% to about 9%, and by 1954 only about 5% of the Negroes of voting age in Mississippi were registered."[54] The Court was persuaded in part by the plaintiffs' statistical evidence showing, for

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47. ALABAMA PROCEEDINGS, *supra* note 37, at 7-8 (1901).

48. Shapiro, *supra* note 35, at 541 (quoting Jimmie Frank Gross, Alabama Politics and the Negro 244 (1969) (unpublished Ph.D. dissertation, University of Georgia) (on file with author)).

49. Williams v. Mississippi, 170 U.S. 213, 266-67 (1898) (citing the Mississippi Supreme Court's findings distinguishing between "robust" crimes likely to be committed by whites, and "furtive" offenses more likely to be committed by African-Americans).

50. *See* MALCOM COOK MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM 275 & n.76 (1955) ("Most of the crimes contained in the report of the suffrage committee [of the Alabama Constitutional Convention] came from an ordinance by John Fielding Burns, a Black Belt planter. The crimes he listed were those he had taken cognizance of for years in his justice of the peace court . . . where nearly all his cases involved Negros.").

51. *See* Shapiro, *supra*, note 35, at 541 ("Mississippi's 1890 constitutional convention, which became a model for other states, replaced an 1869 constitutional provision disenfranchising citizens convicted of 'any crime' with a narrower section disenfranchising only those convicted of certain crimes, which blacks were supposedly more likely than whites to commit."), *see also* Ratliff v. Beale, 20 So. 865 (1896) (finding that blacks were more likely than whites to commit the enumerated crimes).

52. *See* JIMMIE FRANK GROSS, ALABAMA POLITICS AND THE NEGRO, 1874-1901, at 65-66 (1969).

53. 380 U.S. 128 (1965) (holding that the State of Mississippi, for three quarters of a century, systematically designed discriminatory constitutional provisions, statutes, and regulations to keep the number of black voters as low as possible).

54. *See id.* at 132; *see also* W. Roy Smith, *Negro Suffrage in the South*, *in* STUDIES IN SOUTHERN HISTORY AND POLITICS 231, 242 (1914) ("There was a general feeling, in the North as well as in the South, that if the negro was to be excluded from his political privileges in any case it would be better for all concerned to have it done legally rather than illegally.").

example, that Amite County, Mississippi (whose registrar was a defendant), had a white voting age population of 4449, of whom 3295 were registered to vote, while only one of the 2560 voting age African-Americans was registered.[55] The Mississippi Supreme Court had held that:

> By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain particularities of habit, of temperament and of character, which clearly distinguished it as a race from that of the whites,—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. *Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.*[56]

In enacting felon disenfranchisement provisions, the Mississippi constitutional convention of 1890 "paved the way for wholesale exclusion of the negroes on perfectly legal grounds . . . The ultimate ideal, of course, was to exclude all negroes and no whites."[57] The delegates from the white counties were reportedly

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[55] *See* United States v. Mississippi, 380 U.S. at 144. In *Williams v. Mississippi*, an African-American defendant indicted by an all-white grand jury and convicted by an all-white jury challenged his conviction on the grounds that the jury pool was limited to registered voters, and that the African-American community had been deliberately disenfranchised by the Mississippi constitutional convention. 170 U.S. 213, 214-15 (1898). The Supreme Court acknowledged the Mississippi Supreme Court's finding that the 1890 convention had "swept the circle of expedients to obstruct the exercise of the franchise by the negro race," *id.* at 222, but held that nothing in the United States Constitution prohibits a state from taking advantage of "the alleged characteristics of the negro race." *Id.* at 222. These efforts at legal disenfranchisement proved successful. *See also* Franklin, *supra* note 5, at 247 ("By 1910 the white supremacists could rest much more comfortably than they did in 1890. Every former Confederate state had strengthened its stand against Negro voting by 'legally' disenfranchising Negroes. There seemed to be nothing that anyone could do about it.").

[56] *Ratliff*, 20 So. at 868 (emphasis added). The court added: "Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes in which violence was the principal ingredient were not." *Id.* For a detailed discussion of *Ratliff*, see JOHN L. LOVE, THE DISFRANCHISEMENT OF THE NEGRO 20 (1899) (copy on file with author) (describing the Mississippi Supreme Court's findings as "[t]he most remarkable judicial utterance since the famous *Dred Scott* decision."); Shapiro, *supra* note 35, at 541 (discussing *Ratliff*).

[57] LOVE, *supra* note 56, at 15. Albert Bushnell Hart, writing near the time of the events, observed:

suspicious that disenfranchisement provisions would eliminate much of the white constituency as well.[58] Finally, a satisfactory combination of qualifications was reached including disenfranchisement for conviction of a crime. One observer called attention to the fact that

> The crimes mentioned as disqualifying [a person] from voting are such as it is always easy, when desirable, to convict the Negro of committing. Under the present method of administering justice in the states where these disenfranchising constitutions operate, the Negro has neither any guarantee of a fair and impartial trial nor any protection against malicious prosecution or false accusations when it is convenient to convict him.[59]

Historian J. Morgan Kousser, who testified as an expert witness in *Hunter v. Underwood*, supported the view that felon disenfranchisement laws were specifically intended to serve as insurance if courts struck down more blatantly unconstitutional clauses.[60]

The disenfranchisement of felons in South Carolina quickly followed suit.[61] As in Mississippi, the convention adopted a felon disenfranchisement provision excluding persons "who were invariably Negroes, convicted of a specified list of crimes."[62] The result

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> With a view to cut down negro suffrage . . . [t]he disqualification for crime have also been somewhat enlarged and possibly a penalty involving disfranchisement is sometimes affixed by judges upon a negro which would not be assigned to a white man.
>
> The important thing to remember in this process is that as a matter of fact the negro vote has been suppressed . . . There is hardly room for discussion with our Southern brethren as to whether they mean or expect to take away negro suffrage—they have done so practically.

Hart, *supra* note 30, at 159-60. The South Carolina provisions were so complex that their author told Hart that he himself had failed to follow them correctly and had lost his own vote in the election following their enactment. *Id.* at 163; *see also* Alt, *supra* note 16, at 354-55 (discussing how Mississippi's "Magnolia formula" for disenfranchising African-Americans was copied throughout the former Confederacy).

58. *See* Franklin, *supra* note 5, at 244.

59. *See* LOVE, *supra* note 56, at 16.

60. *See* J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, *in* MINORITY VOTE DILUTION 27 (Chandler Davidson ed., 1984); Shapiro, *supra* note 35, at 537 (reviewing Kousser's statistics).

61. *See* Franklin, *supra* note 5, at 244 ("In order to write a fundamental law that would disfranchise all Negroes and, at the same time, permit every white person however ignorant or poor, to vote, Ben Tillman left his seat in the United States Senate to serve as chairman of the convention's suffrage committee.").

62. *Id.* at 245.

was predictable: In 1868, South Carolina saw eleven freedmen elected to the state Senate and 82 to the state House; in 1896, no freedmen were elected to the state Senate, and only one was voted into the state House.[63]

Similar developments occurred in other states. Louisiana's minority vote declined from more than 130,000 voting in 1896 to 5,320 registered in 1900, two years after enactment of the Reconstruction constitution.[64] This number dropped to 1,342 by 1904.[65] After Alabama enacted its disenfranchising constitution in 1900, a mere 3,000 of 180,000 African-Americans were registered to vote.[66] Despite the infamous Black Codes,[67] Mississippi in 1867 had nearly 70% of the eligible African-American population registered. This number declined to less than 6% within two years of the enactment of disenfranchising laws at the state's 1890 constitutional convention.[68]

Felony disenfranchisement laws still exist in many states, and still effectively deny voting rights to many minorities, despite their facial neutrality.[69]

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[63] *See* Tindall, *supra* note 10, at 216 tbl.

[64] *See* Schmidt, *supra* note 5, at 847 (citing figures compiled by WOODWARD, *supra* note 4, at 56, 68); *see also* Derfner, supra note 16, at 542.

[65] *See* Schmidt, *supra* note 5, at 842 (citing Woodward's statistics).

[66] *See id.*; *see also* GROSS, *supra* note 52, at 274.

[67] For a detailed history of Reconstruction and the Black Codes, see generally W.E.B. DU BOIS, *supra* note 15. *See also* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1872):

> Among the first acts of legislation adopted by several of the States . . . were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value. . . . They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

[68] *See* Shapiro, *supra* note 35, at 538. Mississippi's efforts to keep blacks from exercising the vote did not stop even upon passage of the Voting Rights Act in 1965. *See generally* FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 (1990) (describing the state's efforts to nullify the black vote after the Voting Rights Act became law).

[69] The effect of these laws on current voting rights will be discussed later in this Article. *See infra* Part III.A.

B. The Voting Rights Act: A Temporary High Point

"[T]he convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race."[70]

The Voting Rights Act of 1965[71] prohibits any "voting qualification . . . which results in a denial . . . of the right . . . to vote on account of race or color."[72] Enacted to enforce the Fifteenth Amendment,[73] it has been described as "the most successful piece of federal civil rights legislation ever enacted."[74] The Voting Rights Act was passed at least in part in response to *Wright v. Rockefeller*,[75] in which Latino and African-American voters challenged a New York County[76] congressional districting plan which, they alleged, racially segregated districts in violation of the Fourteenth and Fifteenth Amendments.[77] The *Wright* Court rejected the

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70. Ratliff v. Beale, 20 So. 865, 868 (1896).

71. 42 U.S.C. §§ 1971 to 1973gg-10 (1994).

72. *Id.* § 1973(a). The text of this section is set out below, with the 1982 amendments indicated with strikeouts for deleted text and brackets surrounding added text:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision ~~to deny~~ [which results in a denial] or abridge[ment of] the right of any citizen of the United States to vote on account of race or color[, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.]
>
> [(b) A violation of subsection (a) 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 subsection (a) . . . 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, 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 . . .].

73. Congressional authority to establish the requirements of the Voting Rights Act derives from U.S. Const. amend. XV, § 2, which provides: "The Congress shall have power to enforce this article by appropriate legislation." *See* South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (upholding the Voting Rights Act as a legitimate exercise of congressional power under the Fifteenth Amendment).

74. Drew S. Days III, *Section 5 and the Role of the Justice Department*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 52 (Bernard Grofman & Chandler Davidson eds., 1992).

75. 376 U.S. 52 (1964).

76. New York County consists of Manhattan Island.

77. *See Wright*, 376 U.S. at 54.

constitutional challenge, finding that despite evidence "that the New York Legislature was motivated by racial considerations or in fact drew the districts on racial lines,"[78] plaintiffs had still not proven that the legislature's districting was done on the basis of race, since the same evidence could support other possible inferences.[79]

The Voting Rights Act was in some ways a high point of the struggle to breathe life into the minority electoral franchise. Once viewed as the culmination of the civil rights movement of the 1950s and 1960s,[80] it faced immediate attack. Advocates of "States' rights" immediately challenged its constitutionality, but in *South Carolina v. Katzenbach*,[81] the Supreme Court affirmed its constitutionality.[82]

The 1965 passage of the Voting Rights Act was intended to address both direct and indirect obstacles to minority voting, such as those at issue in *Wright*, but racial "bloc" voting by whites tended to defeat black candidates except in districts where minority voters predominated.[83] White incumbents quickly moved to restructure precincts into multi-member districts from which candidates were elected "at large," thus diluting the effect of the minority vote by consistently defeating the minority-preferred candidate.[84]

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78. *Id.* at 56.

79. *See id.* at 56-58. In *White v. Regester*, 412 U.S. 755, 759 (1973), plaintiffs challenged a Texas redistricting plan on the grounds that the plan created "impermissible deviations from population equality," and that the multi-member districts it created impermissibly diluted minority voting power. The Court rejected the "impermissible deviation" claim. *See id.* at 764. It held, however, that the multi-member district did violate the Fourteenth Amendment by impermissibly diluting the voting strength of the racial minorities in violation of the Fourteenth Amendment. *See id.* at 769-70.

80. *See* Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 830 n.182 (1989).

81. South Carolina v. Katzenbach, 383 U.S. 301 (1966).

82. *See id.* at 337 ("This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."); *id.* at 334.

83. *See* NIEMAN, *supra* note 13, at 213.

84. *See id.* ("[I]f members were elected at-large, with voters throughout the city casting ballots for all five seats, the white majority could preserve a lily-white council.").

1. Section 2 of the Voting Rights Act.

"[A]s for the equality, you know us white men will not tolerate it."

W.L. Peck, Populist Candidate
for Governor, Georgia, 1892[85]

The Voting Rights Act has two principal provisions. Section 2, which forbids imposition or application of any "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . by any state or political subdivision in a manner which results in a denial or abridgement of the right of an citizen of the United States to vote on account of race or color,"[86] and § 5, which requires federal approval of changes in voting procedures in areas with a history of discrimination.

According to the legislative history, Congress used the words "on account of race or color" in the Act to mean "with respect to" race or color, and not to connote any required purpose of racial discrimination.[87] If there had been any doubt that Congress intended to abolish all voting inequities, these doubts should have been laid to rest by the 1982 amendment to § 2.[88] By passing the

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[85] Korobkin, *supra* note 32, at 28 (quoting W.L. Peek, Populist candidate for governor of Georgia, in the Atlanta Constitution, Aug. 23, 1892).

[86] 42 U.S.C. § 1973(a) (1994) (listing violations contained within the Act).

[87] S. REP. NO. 417, at 206 n.109 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-08.

[88] Section 2, as amended, provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . . A violation of subsection (a) . . . 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 subsection (a) . . . 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, 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.

Voting Rights Act Amends. of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (1982) (codified as amended at 42 U.S.C. §§ 1973, 1973(b), 1973(aa)-(1a), 1973(aa)-6(a) (1988)) [hereinafter Voting Rights Act Amends. of 1982]. This section was amended expressly to abolish the judge-made intent requirement expressed in *Baker v. Carr.*

amendment, Congress intended to guarantee equal protection of the voting laws to all citizens, without any requirement of a showing of intent. The legislative history indicates that "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process."[89] In what came to be known as the "results" test, amended § 2 bars all voting qualifications, standards, practices, or procedures that result in a minority group having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[90] The 1982 "results" test was not a radical Congressional invention; the Court itself had applied this test in earlier cases to strike down schemes or procedures that had resulted in the electoral exclusion of a minority community[91] even without showing an intent to discriminate.[92] Instead of looking for invidious purpose, amended § 2 calls for a "totality of the circumstances" analysis of the harmful effects of any challenged election plan.

2. Section 5 of the Voting Rights Act

Section 5 of the Voting Rights Act prohibits localities with a history of voting discrimination from effectuating any new voting procedures, including new districts, without first completing "preclearance," *i.e.*, obtaining Justice Department or U.S. District Court approval of any changes that may have a negative effect on the minority community's ability to elect their chosen representatives.[93] Section 5 thus attempts to prevent any new forms of indirect discrimination from taking effect, but it does not address procedures that were in effect when it was enacted.[94] This "preclearance" provision was initially set to expire after five

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89. S. REP. NO. 417, at 206 n.109 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-08.

90. Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (1988).

91. *See* Clark, *supra* note 80, at 831 & n.183; *see also* Pleasant Grove v. United States, 479 U.S. 462, 464 (1987) (holding that annexation of all-white area to an all white city was a "change" in voting practice and procedure subject to Justice Department clearance; clearance denied because of history of racial discrimination and city's refusal to annex predominantly black neighborhood).

92. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973) (explaining vote dilution analysis listing evidentiary factors plaintiffs may use to establish their case).

93. 42 U.S.C. § 1973(c) (1994). For a comprehensive analysis of the provisions and operations of § 5, see Derfner, *supra* note 16, at 576-81.

94. *See* NIEMAN, *supra* note 13, at 215.

years,[95] but Congress extended its application for five years in 1970, for seven years in 1975, and for twenty-five years in 1982.[96]

In *United Jewish Organizations v. Carey*,[97] a plurality of the Court held that the Constitution did not prevent a jurisdiction that was subject to the Voting Rights Act from deliberately creating or maintaining majority-black districts in order to insure that a reapportionment plan satisfies the Act. Plaintiffs from Kings County, New York, a jurisdiction covered under § 5, challenged redistricting legislation that split the Hasidic Jewish community into two districts in order to create significant nonwhite majorities in these districts.[98] Members of the Hasidic Jewish community sued, alleging that splitting their community in order to create majority-black electoral districts unfairly diluted the Hasidic community's voting power. A plurality of the Supreme Court affirmed the district court's dismissal of the suit, on the grounds the United States Constitution allowed states to create or preserve majority-minority districts in order to satisfy the requirements of § 5 of the Voting Rights Act. Further, the plurality held that racial criteria could be used in districting and apportionment plans, and that their use is not limited to plans attempting to remedy past discrimination, affirming the district court's holding that use of race was justified as long as the districting "is in conformity with the unchallenged directive of and has the approval of the Attorney General," and the resulting plan is not "unfairly prejudicial to white[s] or nonwhite[s]."[99] Justice Brennan, by contrast, found that race-conscious districting could be constitutional when Congress had expressly adopted such a remedial policy, as in the Voting Rights Act.[100]

After several decades of Voting Rights Act litigation, the percentage of African-Americans of voting age registered to vote in the South, which was approximately 3% in 1940, increased from 43.3% (22.5% in the Deep South) in 1934 to approximately

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95. *See id.* at 214.

96. *See id.*

97. 430 U.S. 114 (1977).

98. *See id.* at 151-52.

99. *Id.* at 155.

100. *See id.* at 175 (Brennan, J., concurring) ("However the Court ultimately decides the constitutional legitimacy of 'reverse discrimination' pure and simple, I am convinced that the application of the Voting Rights Act substantially minimizes the objections to preferential treatment, and legitimates the use of even overt, numerical racial devices in electoral redistricting.").

63.7%.[101] In addition, the number of minority members elected to public office rose noticeably,[102] vividly demonstrating just how pressing the need was for the remedies provided by the Voting Rights Act.

It is somewhat ironic that without the increase in minority voting strength between 1965 and 1980, members of Congress would have been far less likely to support the 1982 amendments.[103] As it was, however, incumbent minority representatives overcame vigorous Reagan administration opposition to pass the 1982 amendments to the Act, which outlawed any practices, including those already in place which, in the totality of circumstances, gave the minority electorate less opportunity than other members of the electorate to elect representatives of their choice. [104]

C. Dismantling the Voting Rights Act

Particularly in its amended form, the Voting Rights Act had great potential for leveling the playing field between majority and minority interests, but the Supreme Court's right wing immediately began dismantling its key provisions. The present Court's definition of equal representation appears to be satisfied simply by ensuring each individual formal access to the ballot. The effect that the system has on the impact and strength of that vote as combined with other votes is not considered.[105]

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[101] *See* Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in* QUIET REVOLUTION OF THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, *supra* note 16, at 21, 29-30. Dr. Davidson defines the "Deep South" for statistical purposes as Alabama, Georgia, Mississippi and the Carolinas. *See id.* at 30.

[102] *See* Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*, 49 VAND. L. REV. 227, 239-40 (1996); Steven L. Lapidus, Note, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies under the Voting Rights Act Amends of 1982*, 52 FORDHAM L. REV. 93, 97 (1983) (summarizing the benefits which the Voting Rights Act provides to minorities).

[103] *See* KOUSSER, *supra* note 5, at 151 (noting the correlation between expansion of the franchise during the "second Reconstruction" and greater support by Southern members of Congress from voting rights legislation).

[104] 42 U.S.C. § 1973 (1994); *see also* NIEMAN, *supra* note 13, at 217-18 (detailing the Reagan administration's vigorous opposition to the amendments, and the battles resulting in their enactment).

[105] *See* Voting Rights Act Amends. of 1982, *supra* note 88; *see also* Gomez v. Watsonville, 863 F.2d 1407 (9th Cir. 1988) (challenges to at-large voting plans by Latinos); Windy Boy v. Big Horn, 647 F. Supp. 1002 (D. Mont. 1986) (challenges to at-large voting plans by Native-Americans). *See generally*, Su Sun Bai, Comment, *Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731 (1991) (focusing on discriminatory barriers that confront non-

1. Conflating Individual and Community Interests: *Wesley v. Collins*

In *Wesley v. Collins*,[106] a vote-denial and vote-dilution claim based on felon disenfranchisement, the petitioner alleged that Tennessee's law disenfranchising him upon acceptance of a guilty plea violated the Fourteenth and Fifteenth Amendments.[107] The Court found that the felon disenfranchisement provisions[108] were not motivated by an intent to exclude racial minorities, and denied plaintiff's appeal. In so doing, it grafted onto the statutory language a new burden of proof of intentional discrimination not present in the statute or relevant precedents.[109] This set the stage for a long line of cases in which individual rights and group rights are conflated, to the detriment of both.[110]

In *Wesley*, the § 2 violation was not the outright disenfranchisement of the particular individuals convicted of the specified offenses.[111] Rather, the violation was the dilution of the innocent minority community's voting strength. It is the group as a whole that has the protected rights under § 2, and selective disenfranchisement laws that affect the group as a whole, though directed at the individual, should logically fit within its framework.[112] More

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English speaking Asian Pacific-Americans and the effect of vote dilution that has excluded them from the political process).

[106] Wesley v. Collins, 605 F. Supp. 802, 807 n.4 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

[107] *See id.* at 803-04.

[108] *See id.* at 813. As one observer has commented, "[I]f the Voting Rights Act's results test had been properly applied, the plaintiffs would not have had to produce evidence of racially discriminatory intent at all." Shapiro, *supra* note 35, at 552 n.87.

[109] *See Wesley*, 605 F. Supp. at 807. Congress had explicitly rejected the intent test. *See* Shapiro, *supra* note 35, at 550 & nn.70-71; *cf.* Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991) (holding that once a school board has complied in good faith with a desegregation order and "the vestiges of *de jure* segregation have been eliminated as far as practicable," a school district should be released from an injunction imposing a desegregation plan).

[110] *See Wesley*, 605 F. Supp. at 807 n.4. Professor Gotanda has criticized the Court's acceptance of the lower court's reasoning: "The Court considered neither . . . Michigan's participation in maintaining *de jure* segregation nor government policies supporting the establishment of white-dominated housing in the suburbs as a basis for inter-district relief." Neil Gotanda, *A Critique of "Our Constitution is Color-blind"*, 44 STAN. L. REV. 1, 45 n.177 (1991).

[111] *See* Shapiro, *supra* note 35, at 553 n.91 (stating that the flaw in this argument is that § 2 states that a violation of the Act occurs when a minority group has less opportunity than other groups to participate in the electoral process).

[112] *See Voting Rights Hearings*, *supra* note 39, at 16 (Rep. Robert W. Kastenmeier, Chair, stating, "[P]ractically this may not now be realizable but I think [votes for prison-

a propos is the Fifth Circuit view in *Presley*, which invalidated an election in which black voters had been forced to use segregated booths if they wanted to participate, despite the fact that it was a mathematical impossibility for the excluded voters to have changed the outcome.

Presley v. Etowah County Commission[113] was not, as the Court suggested, a dramatic expansion of § 5 powers. Rather, the judicial branch of the government was asked to enforce the executive branch's exercise of the power established for it by the legislative branch. Not until Congress empowered the federal executive branch to register voters and to use § 5 to block new disenfranchising and vote-diluting tactics were African-Americans effectively enfranchised.[114] The Justice Department challenged the Etowah County, North Carolina, County Commissions' Common Fund and Road Supervision Resolutions as fairly obvious attempts to perpetuate indirectly what had previously been openly achieved: the exclusion of Etowah County's black citizens from county governance. This is a classic example of a maneuver that does not interfere with the minority population's ability to go to the polls and cast a vote, but which puts in place sophisticated stratagems to render that right is rendered nugatory in terms of affecting outcomes. The Court, however, refused to recognize the county's tactic of indirect minority disenfranchisement.

There are, of course, potential problems with creating "majority-minority" districts. While creating such districts guarantees a voice for an otherwise excluded community, it may also have a "ghetto" effect, cutting off both voters and candidates from any possible across-the-board coalition forming, and guaranteeing that the remaining white districts will dominate the resulting elected body. Additionally, limiting remedies to communities that are large enough to constitute majorities in their districts overlooks the possibility of influencing outcomes through swing voting. Often overlooked, however, is that majority-minority districting only comes into consideration when the voice of the minority community has been effectively silenced through majority "bloc" voting that has consistently defeated the minority community's preferred candidates.

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ers] ought to be the goal eventually if we are interested in a truly universal franchise.").

113. 502 U.S. 491, 495-99 (1992).

114. *See* Louisiana v. United States, 380 U.S. 145, 156 (1965) (striking down literacy, character, and understanding tests as purposefully discriminatory).

2. Section 5 and Non-Retrogression: Accepting Minimal Compliance

It was not until 1976, however, that the Court applied § 5 to a redistricting plan. In *Beer v. United States*,[115] upholding the legality of a redistricting plan that generally improved minority representation, though not as much as possible, the Court established the "non-retrogression" rule, holding that a plan is acceptable even if it does not eliminate vote dilution, so long as it does not lead to an actual "retrogression in the position of racial minorities."[116] In *Beer*, the city of New Orleans had sued under § 5 for approval of a plan to redraw the city council districts. The trial court found the proposed redistricting plan valid under the Voting Rights Act, but the Supreme Court reversed, finding that the plan improved minority electoral influence compared with the former plan. The Supreme Court held that minimal compliance with the Voting Rights Act was sufficient if the new reapportionment plan would not "lead to a retrogression in the position of racial minorities with respect to the effective exercise of the franchise."[117] Thus, the *Beer* Court moved in a small but significant way toward undercutting the available remedies for minority dilution. The "non-retrogression" principle was, in a sense, the foot in the door for the Rehnquist Court's color-blind jurisprudence and the subsequent death of minority voting rights.

II. DISMANTLING EQUAL PROTECTION: INNOCENCE AND INTENTIONAL HARM

> *"I take a dim view of this pathological search for discrimination. It is about time the Court faced the fact that the white people of the South don't like the colored people."*
>
> William Rehnquist, Now Chief Justice[118]

The prevalence of tactics expressly intended to prevent the freedmen from exercising their newly-acquired rights was one reason for passage of the Equal Protection Clause. On May 23,

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115. 425 U.S. 130 (1976).

116. *Id.* at 141.

117. *See id.*

118. Memorandum from William Rehnquist, *in* HARRY S. ASHMORE, CIVIL RIGHTS AND WRONGS: A MEMOIR OF RACE AND POLITICS 1944-1994, at 342 (1994).

1866, Senator Jacob Howard explained the language of the equal protection clause, saying:

> This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, the we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?[119]

Under the first principles of equal protection, racially biased application of an otherwise constitutional penalty would seem to violate equal protection under the Federal Constitution, and perhaps under state constitutional guarantees as well. At a minimum, states whose disenfranchisement laws were originally adopted in order to disenfranchise minority voters would seem to violate the principle of equal protection of the laws. For many years, Supreme Court jurisprudence recognized a Fourteenth Amendment collective equal protection right to an undiluted vote for minorities, whether political[120] or racial.[121]

In 1964, in what the late Chief Justice Warren regarded as his most important opinion,[122] the Supreme Court ruled that individu-

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[119] Senator Howard, Speech, *in* 39th Cong. 2766 (1866).

[120] *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 113, 124 (1986) (applying an equal protection analysis to political gerrymandering claims, and reversing the district court's finding that Indiana's state legislative apportionment did not unconstitutionally dilute Democratic votes in the largely Republican state). Concurring in the judgment, Justice O'Connor said: "[T]he partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended." *Id.* at 144-45 (1986) (O'Connor, J., concurring in the judgment).

[121] *See, e.g.*, White v. Regester, 412 U.S. 755, 765 (1973) (holding that multimember districting used invidiously to dilute minority votes is illegal).

[122] *See* Reynolds v. Sims, 377 U.S. 533, 560, *cited in* G. EDWARD WHITE, EARL

als have a right to "fair and effective representation." In *Reynolds v. Sims*[123] the Court held that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."[124] *Reynolds* had established the "one man, one vote" principle, requiring electoral redistricting each decade based on the latest census,[125] and had recognized that the "right of suffrage is a fundamental matter in a free and democratic society."[126] Even when there has been little or no net gain or loss in population in a particular jurisdiction, redistricting can still be required because of shifting populations within the jurisdiction.[127] The *Reynolds* Court held, "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."[128]

Despite its undeniable impact, *Reynolds* also has been described as a "spectacular failure."[129] Cynical misapplication of *Reynolds*' "one-man, one-vote" rule has proven to be a powerful tool in the cycle from post-Civil War, direct disenfranchisement to post-Cold War, indirect disenfranchisement of America's minority communities, undermining the values embodied in the Voting Rights Act.[130] The result of all this has been that recently, litigation under the Fourteenth Amendment to the United States Constitution has been unsuccessful because of the Court's reading of section 2

WARREN: A PUBLIC LIFE 337 (1982).

123. 377 U.S. 533 (1964).

124. *Id.* at 566.

125. *See id.* at 583 ("Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth.").

126. *Id.* at 561-62.

127. *See, e.g.*, Quilter v. Voinovich, 794 F. Supp. 695, 705-06 (N.D. Ohio 1992) (Dowd, J., dissenting) (describing that a 50,000 person gain in the total Ohio population of approximately 10 million people still required that "the majority of the 1981 configured districts in [all] major urban counties had to be reconfigured to meet the population requirements" of the Ohio Constitution); *rev'd*, 507 U.S. 146 (1993).

128. *Reynolds*, 377 U.S. at 555. *Reynolds* relied on *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (gerrymandering to exclude minority voters); *Terry v. Adams*, 345 U.S. 461 (1953) (whites-only primaries); *Smith v. Allwright*, 321 U.S. 649 (1944) (whites-only primaries); and *United States v. Classic*, 313 U.S. 299 (1941) (racially motivated electoral fraud).

129. Karlan, *supra* note 17, at 1705.

130. *See id.* at 1708 (One-person, one-vote allows for the invocation of judicial oversight but fails to check "partial" interpretations of the act by an increasingly partisan judiciary).

of the Fourteenth Amendment. Furthermore, there is no reason to believe that the current Court majority will be interested in redressing vote dilution caused by minority disenfranchisement, particularly since disenfranchisement has constitutional authorization under the Court's current color-blind scheme.[131]

The current Supreme Court, in its rush to dismantle remedies for racial bias, has disregarded original constitutional principles in following its own anti-civil rights agenda and turned its back on the letter and spirit of this vision of the equal protection of the law. The Rehnquist Court's disingenuously color-blind attitude has placed the Court of the 1990s squarely at the forefront of 19th Century jurisprudence, adopting the rationales that were used to strike down the original post-Civil War Civil Rights Statutes.[132]

A. The Rise of "Color Blindness"

The currently fashionable "color-blind" characterization of the constitution hails from Justice Harlan's dissent in *Plessy v. Ferguson*:[133]

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. . . . But in view of the Constitution, in the eye of the law, there is in this country

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[131] *See* Karlan, *supra* note 3. As Professor Karlan points out, the Court refused in *Holder v. Hall* to allow a vote dilution challenge to the size of a governing body under § 2 of the Voting Rights Act because, the Kennedy plurality said, the concept of vote dilution requires that there be a "norm with respect to which the fact of dilution may be ascertained." *Id.* at 303 (quoting Holder v. Hall, 512 U.S. 874, 880 (1994)). Justices Thomas and Scalia apparently do not recognize the existence of racial vote and in any case would not apply the Voting Rights Act to claims of racial vote dilution. *See id.* at 309. Professor Karlan notes that the Court has identified no circumstances under which the intentional creation of a majority-minority district would survive strict scrutiny. *See id.* at 290; *see also* Bush v. Vera, 116 S. Ct. 1941, 1973 (1996) (Thomas, J., concurring) ("Strict scrutiny applies to all governmental classifications based on race [and] there is no exception for race-based redistricting."); *id.* at 1971 (Kennedy, J., concurring) (suggesting that strict scrutiny applies "whenever a State, in redistricting, foreordains that one race be the majority in a certain number of districts . . . ").

[132] *Id.* For an in-depth analysis of the Court's "color-blind" jurisprudence in the context of multicultural America, see Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 860 (1997) (examining the Court's "color-blind" voting rights jurisprudence beyond the context of the black-white paradigm).

[133] Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954); *see* Rodney A. Smolla, *The Ghosts of Homer Plessy*, 12 GA. ST. U. L. REV. 1037, 1052-53 (1996) (arguing that Justice Harlan's ideal of abolishing race-conscious policies is gaining support in the current Supreme Court).

> no superior, dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind [and under the majority's holding] there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessing of liberty; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens.[134]

For Justice Harlan, a "color blind" Constitution did not permit unequal application of the laws. However, Justice Bradley's *Plessy* majority and their spiritual heirs, the Rehnquist-Scalia majority today, have appropriated the phrase, using it to strike down civil rights legislation and leave "equality" to the forces of social Darwinism. Under this view, minorities are seen as having all the rights of other citizens, able to move forward on their own without protection from Congress or the courts.[135] The Burger and Rehnquist Courts have veered sharply from the original intent of the Fourteenth Amendment,[136] embarking on a jurisprudence that could more aptly be called "blind" rather than "color blind."[137]

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[134] *Plessy*, 163 U.S. at 559, 563, *quoted in* ASHMORE, *supra* note 118, at 343 (1994).

[135] *See id.* at 343-44.

[136] *See* Jeanmarie K. Grubert, Note, *The Rehnquist Court's Changed Reading of the Equal Protection Clause in the Context of Voting Rights*, 65 FORDHAM L. REV. 1819 (1997) (questioning the Court's tendency to recognize an Equal Protection violation anytime that race is found to be a predominant factor in the creation of voting districts).

[137] With the Reagan-Bush era, the United States moved headlong toward what has been called "the revival of anti-civil rights sentiment," which came to be expressed in terms of the code words "color blindness," or "[t]he idea that standing in society depended on moral and intellectual fitness[, which] was particularly gratifying for those who had risen from humble beginnings." ASHMORE, *supra* note 118, at 344. In this sense, it is interesting to note that in practice and on the Court, Justice Rehnquist opposed desegregation of schools and public accommodations. *See id.* Dissenting in *Rome v. United States*, Justice Rehnquist argued against race-conscious remedies for racial discrimination. *See* Rome v. United States, 446 U.S. 156, 214 (1980) (Rehnquist, J., dissenting).

Justice Antonin Scalia wrote in 1979: "My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man." Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 47 WASH. U. L.Q. 147, 152 (1979). Justice Scalia works from this image of the "innocent" white to the idea that discrimination, if it exists, is intentional wrongdoing by specific wrongdoers, and that "innocent" beneficiaries of unfair systems owe nothing to the victims. *See* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 298 (1990) (exploring the "innocent white victim" argument). *But see* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) (arguing against color-blindness as a judicial position). He therefore draws no distinctions between race-conscious remedies for inequalities of opportunity caused by racial discrimination and the invidious use of race-

1. *City of Richmond v. J.A. Croson Co.*

One of the most disturbing examples of the Rehnquist Court's "color blind" reading of the Fourteenth Amendment's Equal Protection Clause is *City of Richmond v. J.A. Croson Co.*,[138] in which Justice O'Connor's plurality found that all governmental programs establishing race-based preferences are inherently suspect and subject to strict scrutiny because of the near-impossibility of distinguishing between benign remedial classifications on the one hand, and classifications based on "illegitimate notions of racial inferiority or simple racial politics."[139] Justice O'Connor added that racial classifications may stigmatize those whom the classification was supposed to help,[140] and expressed concern that affirmative action plans may reinforce stereotypes that the subjects of the plan are unable to succeed without special protection.[141] Finally, she rejected a lesser standard of review for remedial race-based classifications on the grounds that society would never reach equality unless all race-based classifications are strictly scrutinized.[142] Therefore, she said, a "watered-down" application of equal protection review "effectively assured that race will always be relevant in American life."[143]

Justice O'Connor, frequently the swing vote in 5-4 voting rights decisions, followed the conservative line on this issue. Although *Croson* did not address voting issues, it is a pivotal case in the evolution of the Rehnquist Court's "color-blind" rationale. Before *Croson*, the Court usually reserved strict scrutiny analysis for laws disadvantaging groups that had historically been subjected to discrimination. *Croson* was the first case in which the Supreme

based discrimination to deny equal opportunities to minorities. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring).

[138] 488 U.S. 469 (1989). In *Croson*, a white contractor challenged the city of Richmond's "Minority Business Enterprise" (MBE) ordinance requiring all contractors receiving city contracts to award at least thirty percent of the sub-contracted work to one or more MBEs. *See id.* at 477. The contractor argued that the set-aside violated the equal protection clause of the fourteenth amendment. *See id.* at 469.

[139] *Id.* at 493 (explaining that while the city's ordinance empowers minorities, it does so at the expense of non-minorities who are precluded from competing for contracts based upon their race).

[140] *See id.* at 493.

[141] *See id.* at 493-94 (citing University of Cal. Regents v. Bakke, 438 U.S. 265, 298 (1978)).

[142] *See id.* at 493.

[143] *Id.* at 495 (criticizing race-based government policies even where they are implemented for remedial purposes).

Court held that any race-based state action is subject to strict scrutiny regardless of whether the targeted racial group benefits or suffers by the classification. Although this reasoning has been derided as equating a welcome mat with a keep out sign, it has become the core of the present Court's "color blind" jurisprudence and has led to the engrafting of the judge-made requirement of intentional wrongdoing before the court will find a violation of equal protection.

Concurring in *City of Richmond v. J.A. Croson Co*, Justice Scalia set out the conservative manifesto of non-intervention to remedy race-based discrimination, saying, "In my view there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."[144] "When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns."[145] In evoking this image, Justice Scalia comes dangerously close to suggesting that resort to mob violence is justifiable when an "American principle" is violated. Characterizing this implied threat of violence as "an American principle" does nothing to justify it on constitutional grounds.[146] As Professor Gotanda points out, Justice Scalia is not invoking a neutral constitutional principle; rather, he is advocating the policy view that the costs of providing remedies to African-Americans and women may be more than white American men are willing to bear, and it is simply bootstrapping on Justice Scalia's part to try to pass a statement of racial policy off as a constitutional principle.[147] The conservative Court majority thus took a major step toward undercutting gains minority voters had made in the past century, all but eliminating equal protection by refusing to intervene on behalf of a disenfranchised minority population unless each member could show personal, intentional discrimination.[148]

Dissenting in a later case, Justice Blackmun again decried the Court's *Croson* decision, saying, "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or

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144. *Id.* at 524 (Scalia, J., concurring).
145. *Id.* at 527 (Scalia, J., concurring).
146. *See* Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989).
147. *See* Gotanda, *supra* note 110, at 47.
148. *See id.* at 2-3.

even remembers that it ever was."[149]

2. *Whitcomb v. Chavis*

In *Whitcomb v. Chavis*,[150] six plaintiffs brought a Fourteenth Amendment challenge to an Indiana system of multi-member districting which they alleged diluted the African-American vote in Marion County, Indiana.[151] The plaintiffs alleged that the districting scheme made possible "serial voting that, in the context of a majority voting bloc, will reward a cohesive majority with superordinate representation,"[152] by permitting each voter "to vote separately on each candidate for office, thereby allowing a voting majority to control every seat in an election."[153] The *Whitcomb* plaintiffs also challenged the constitutionality of multi-member districting in general.[154]

The Court refused to hold multi-member districting unconstitutional *per se*.[155] While it recognized that such systems can diminish the value of a group's votes within the dominant voting population, the Court required the plaintiffs to prove that in their situation, multi-member districting diluted the quality of representation when compared with single-member districting.[156] The Court recognized that a minority community's rights are violated if its voting strength is submerged by the multi-member district,[157] but found insufficient evidence of minority vote dilution because the plaintiffs had "equal opportunity to participate in and influence the selection of candidates and legislators. . . ."[158] Justice White seemed to confuse lack of participation, *i.e.*, exclusion of individuals from casting their ballot, with minority vote dilution, *i.e.*, ren-

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149. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting) (citing with disapproval *Croson*).

150. 403 U.S. 124 (1971).

151. *See id.* at 128-29. Marion County, Indiana, and the City of Indianapolis form a consolidated city-county with a unitary government.

152. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1840 (1992).

153. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588, 590 (1993).

154. *See Whitcomb*, 403 U.S. at 144 (restating voters' claim that multi-member districts have "unconstitutional advantages" over small districts or single-member votes).

155. *See id.* at 147 (refusing to recognize voters' charge that multi-member districts overrepresent their voters).

156. *See id.*

157. *See* Mary A. Inman, Comment, *C.P.R. (Change through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 1993 (1993).

158. *See Whitcomb*, 403 U.S. at 153.

dering the casting of ballots by minority voters nugatory by submerging them in districts of conflicting interests. This is made clear by his implication that plaintiffs could help to support their dilution claim with proof that African-Americans were unable to register, vote, or choose their political party, or that ghetto residents were "regularly excluded from the slates of both major parties."[159] What this has to do with proof "that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups" was never explained.[160] *Whitcomb* therefore reinforces the impression that the Court will enforce voting rights only in terms of a *pro forma* right to engage in the ritual of the ballot box. However, if the concept of a "right to vote" is to mean anything, it must be understood to include the right to influence outcomes in a significant way.

3. *City of Mobile v. Bolden*

If the quest for equality of voting rights is viewed as a cycle, Justice Stewart's plurality opinion in *City of Mobile v. Bolden*,[161] requiring plaintiffs to prove invidious purpose,[162] is undoubtedly an indication of a downturn toward the *Plessy* Court's acceptance of *de jure* exclusion. The *Bolden* plaintiffs were a group of black voters from Mobile who alleged that the city's at-large voting system unfairly diluted the votes of a large, geographically and politically distinctive minority group, and that racially polarized bloc voting by the white majority consistently defeated minority-preferred candidates.[163]

Justice Stewart's plurality opinion rejecting plaintiffs' position markedly restricted the protection of the Fifteenth Amendment right to vote, reading it as guaranteeing no more than the right to participate, *i.e.*, to cast a vote.[164] As in *Whitcomb*, the African-Ameri-

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159. *Id.* at 149-50.

160. White v. Regester, 412 U.S. 755, 765-66 (1973) (citing *Whitcomb*, 403 U.S. at 141-48).

161. 446 U.S. 55 (1980).

162. *Id.* at 73-74 (requiring that claimants demonstrate a "discriminatory intent" in order for a voting system to be invalidated).

163. *See id.* at 58 (noting that at-large voting system is followed by thousands of local governments throughout the country).

164. *See id.* at 64-65 ("The Fifteenth Amendment does not entail the right to have a Negro candidate elected. . . . The Amendment prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'").

can plaintiffs were able to register and cast their votes "without hindrance." The Stewart plurality found that their Fifteenth Amendment right to vote was not implicated by the consistent defeat of minority-preferred candidates, which is consistent with Stewart's view that Congress cannot constitutionally take race into account, even to remedy the results of past illegal discrimination.[165] Additionally, the plurality ruled that unless plaintiffs can prove intentional discrimination, they have no claim.[166] Thus, *Bolden* unambiguously established invidious purpose not only as the standard for Fifteenth Amendment claims, but also for claims under § 2 of the Voting Rights Act. Plaintiffs must now prove that the challenged multi-member district plan was "conceived or operated as [a] purposeful devic[e] to further racial discrimination."[167]

Despite Alabama's appalling history of intentional minority disenfranchisement, the Court also ruled that it is not enough to show that minority voting strength was diluted: Plaintiffs must show that the majority intentionally caused this exclusion. Although the *Bolden* plaintiffs were able to meet this standard upon retrial in district court, it is nevertheless true that by requiring plaintiffs to prove intentional discrimination in order to establish a violation of the Voting Rights Act's vote-dilution provisions, the *Bolden* Court departed from a long line of contrary holdings,[168] and greatly increased the burden on the disenfranchised.[169] With *Bolden*, it thus became all but impossible to challenge multimember districts unless

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[165] *See* Minnick v. California Dep't of Corrections, 452 U.S. 105, 128-29 (1981) (Stewart, J., dissenting) ("[B]y making race a relevant criterion . . . the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race—rather than according to merit or accountability. . . ."); Fullilove v. Klutznick, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting).

[166] *See Bolden*, 446 U.S. at 64-65 (stating that purposeful discrimination is the linchpin requirement for a voter's rights claim under the Fourteenth Amendment); *See also* NIEMAN, *supra* note 13, at 215.

[167] *Bolden*, 446 U.S. at 65-66 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)) (reiterating the "purposefulness" requirement for attacking a racially disproportional electoral system).

[168] *See, e.g.*, Connor v. Finch, 431 U.S. 407 (1977); Chapman v. Meier, 420 U.S. 1 (1975); White v. Regester, 412 U.S. 755 (1973); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965). While *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *Wright v. Rockefeller*, 376 U.S. 52 (1964), had seemed to suggest an intent requirement, it was not until *Bolden* that the Court raised this factor to the level of an absolute requirement. Congress amended the Voting Rights Act in 1982, Voting Rights Act of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (1982)), to re-establish the earlier results test.

[169] *See* NIEMAN, *supra* note 13, at 215 (noting that it took plaintiffs nearly two years after remand to establish proof of discriminatory intent).

the defendants were considerate enough to provide evidence that the plan for multimember districts was "conceived or operated" for such a use.[170] The addition of this intent requirement was a crippling blow to minority voting rights, since the odds of finding proof that a particular voting practice was adopted for the express purpose of discriminating against minorities have aptly been compared with the odds of finding the Holy Grail.[171]

As Justice Marshall bitterly noted in his dissent, the Stewart plurality's vision of the Fifteenth Amendment's "right to vote provide[d] the politically powerless with nothing more than the right to cast meaningless ballots."[172] He warned that the Court "cannot expect the victims of discrimination to respect political channels of seeking redress"[173] if they are unable to receive adequate representation due to the Court's stringent discriminatory standard of proof for a claim of minority vote dilution,[174] and predicted that the "superficial tranquility" created by the *Bolden* decision would be "short-lived."[175]

4. *Hunter v. Underwood.*[176]

Meanwhile, in Alabama, little had changed. The disenfranchising provisions of the Alabama Constitution retained the bar to voting for anyone convicted of any offense "involving moral turpitude," leaving it up to the registrars to interpret this prohibition.[177] The plaintiffs had been barred from voting in Montgomery and Jefferson Counties because of "nonprison" misdemeanor

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170. *Bolden*, 446 U.S. at 65-66; *see also* Inman, *supra* note 157, at 2038 (remarking that proving the subjective intentions of racist legislators is the "legal equivalent of finding the Holy Grail").

171. *See* Inman, *supra* note 157, at 2038 (noting that the Court never provided guidance as to what would constitute sufficient evidence for a successful claim against a discriminatory electoral system).

172. *Bolden*, 446 U.S. at 104 (Marshall, J., dissenting); *see* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 39 (1991) (stating that the Voting Rights Act was designed to "bring about a radical realignment of political control").

173. *Bolden*, 446 U.S. at 141 (Marshall, J., dissenting).

174. *See id.* (attacking the stringent "intentional discrimination" standard of proof for voters challenging an electoral system).

175. *Id.* (cautioning the Court that its failure in Bolden to nullify that discrimination would cause victims of discrimination to lose their respect for political channels of redress).

176. 471 U.S. 222 (1985).

177. *Id.* at 223-24.

check fraud convictions,[178] which Alabama had designated as crimes of "moral turpitude."[179] The plaintiffs alleged that the disenfranchising provisions of section 182 of the Alabama Constitution had been adopted for the express purpose,[180] and had the express effect, of disproportionately disenfranchising blacks,[181] a contention which the Court found to be true, based on what Justice Rehnquist termed substantial evidence.[182]

The Court first addressed the plaintiffs' contention that section 182 was unconstitutional under the Fourteenth Amendment's Equal Protection Clause, given Alabama's long-standing and well-documented history of intentional direct and indirect exclusion of minority voters.[183] The Court noted that "proving the motivation behind official action is often . . . problematic,"[184] but found that the plaintiffs had done so. The Court refused to address the issue of whether "intentional disenfranchisement of poor whites would qualify as a 'permissible motive,'"[185] saying:

> [I]t is clear that where both impermissible motivation and racially discriminatory impact are demonstrated, *Arlington Heights* and *Mt. Healthy* supply the proper analysis. . . . [A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a "but-for" motivation for the enactment of § 182[186]

Underwood made clear that a showing of intentional discrimination is the *sine qua non* of an equal protection claim, under standards derived from the Court's housing discrimination jurispru-

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178. *Id.* at 224.

179. *Id.*; *see also* ALA. CONST. art. 8, § 182.

180. *See* Underwood v. Hunter, 730 F.2d 614 (11th Cir. 1984), *aff'd*, 471 U.S. 222 (1985) (finding that discriminatory intent motivated adoption of this section; therefore it violates on account of race the fourteenth amendment as to those convicted of crimes not punishable by imprisonment in the penitentiary); *see also* Shapiro, *supra* note 35, at 547-48 (discussing the Court's "other crime" analysis in the context of felon disenfranchisement); *cf.* Milliken v. Bradley, 418 U.S. 717 (1974) (invalidating inter-district busing where there was no showing of an inter-district violation).

181. *See* Underwood v. Hunter, 730 F.2d at 616.

182. *See* Hunter v. Underwood, 471 U.S. at 227-31.

183. *See id.* at 222, 226-27, 229 (citing to testimony of historians, and citing as authoritative WOODWARD, *supra* note 41, at 321-22 (1971)).

184. *Id.* at 228.

185. *Id.* at 232.

186. *Id.*

dence.[187] The Court briefly addressed the question of whether felon disenfranchisement was "excepted from the operation of the Equal Protection Clause of § 1 of the Fourteenth Amendment by the 'other crime' provision of § 2. . . ."[188] Declining to revisit the issue decided in *Ramirez*, the Court said, "[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation" of the Alabama disenfranchising provision, which the Court said otherwise violates equal protection.[189] Thus, while ruling for the plaintiffs and striking down the challenged law, *Underwood* still serves to limit a plaintiff's case in any suit challenging franchise stratagems for which evidence of intent is not so readily available.

III. COMPLETING THE CYCLE: THE DEATH OF VOTING RIGHTS

> *"The Negro as a political force has dropped out of consideration. . . ."*
>
> Henry W. Grady[190]

Justice O'Connor referred to *Shaw v. Reno* as involving "the meaning of the Constitutional 'right' to vote,"[191] and perhaps this seemingly simple statement holds the key to present treatment of voting rights jurisprudence. Justice O'Connor's inverted commas around the word "right" suggest two possible interpretations, both disturbing. One possibility is that in her view, the right to vote is not a right at all, but merely a "right."[192] Nearly as troubling is the alternate interpretation, that the right to vote takes only a single form, which in the Court's current jurisprudence seems limited to

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187. *See id.* at 227-28 (quoting Arlington Heights v. Metro Housing Development Corp., 429 U.S. 252, 264-65 (1977)).

188. *Id.* at 233.

189. *Id.* (citing 418 U.S. 24 (1974).

190. HENRY W. GRADY, THE NEW SOUTH 244 (New York, R. Bonner's Sons 1890). Professor Franklin commented that, "In his claim regarding the ineffectiveness of the Negro as a political force Grady was literally *wishing* the Negro 'as a political force' out of the picture." Franklin, *supra* note 5, at 241 n.1.

191. Shaw v. Reno, 509 U.S. 630, 633 (1993).

192. *See* Karlan, *supra* note 17, at 1709 & n.13; *see also* James A Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 45 U. PA. L REV. 893, 933 (1997) (describing the Court's recent cases as demonstrating increasing hostility toward § 2 of the Voting Rights Act "because that provision implemented a protective-democracy solution to a problem that the Court defines as communitarian").

the mere right to participate in the voting process, *i.e.*, to cast a ballot, and to have that ballot counted,[193] without consideration of the diluting effects of majority bloc voting.

A. The Crackdown on Minorities: Disproportionate Minority Incarceration as Vote Dilution

Felony disenfranchisement laws still remain in many states, effectively blocking access to the polls for minority groups in those states. Trends in criminal prosecutions in the waning decades of the twentieth century have led to greater and greater percentages of the minority population being incarcerated.[194] Of a total voting age population of 10.4 million black men in the United States, approximately 1.46 million have been disqualified from voting because of a felony conviction.[195] Of these, 950,000 are in prison, on probation, or parole, and more than 500,000 are permanently barred by convictions in the 13 states that disenfranchise prisoners for life.[196] The United States is among the world's most active nations in imprisoning its citizens,[197] and the racial disparity in rates of incarceration is growing. In Baltimore, more than half of all black men in their twenties are in prison, on probation, or on parole, and in the District of Columbia, the figure is approximately 40%.[198]

The 1997 Sentencing Project report found that by 1994 the

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193. *See* Karlan, *supra* note 17, at 1709-10 & n.13.

194. *See* Andrew Hacker, *Malign Neglect: The Crackdown on African-Americans*, NATION, July 10, 1995, at 45, 46 ("Like welfare, crime has been given a racial coloration. Indeed, "black crime" is regarded as different and more fearsome than other forms of lawbreaking."). Current statistics are available at The Sentencing Project, *New Report: Americans Behind Bars* (visited Mar. 31, 1998) <http://www.sproject.com/press-1.htm> (copy on file with the *Case Western Reserve Law Review*).

195. *See* Butterfield, *supra* note 40, at A12.

196. *See id.* ("Felons are prohibited from voting while in prison in 46 states, and 31 of them disenfranchise offenders while they are on probation or parole."). See also *infra* Appendix B for states which do not disenfranchise or which make restoration of rights automatic or relatively simple. The states that disenfranchise permanently or which make restoration of rights difficult are set out *infra* Appendix A. See also *infra* Appendix C for state-by-state summary of disenfranchising provisions. For a detailed analysis of state restrictions on voting rights, see Note, *The Equal Protection Clause As A Limitation on the States' Power to Disfranchise Those Convicted of a Crime*, 21 RUTGERS L. REV. 297-98 & nn. 14-18 (1967) (collecting statutes); *see also* Harvey, *supra* note 3, at 1146-49 (analyzing continuing impact of disenfranchisement provisions).

197. *See* Hacker, *supra* note 194, at 46 ("Black men occupy more than half the nation's cells, and each year finds them accounting for more of the prison population.").

198. *See id.* at 48.

disparity in incarceration rates between blacks and whites had risen to a ratio of 7.66 blacks for every white in prisons, up from 6.88 in 1988.[199] The so-called "war on drugs," with its law-and-order approach has been aptly described as "crackdown on African Americans,"[200] and it has been a primary cause in recent years of the incarceration of citizens of color in numbers far exceeding their percentage of the population.[201] African-Americans make up 51% of the 1.1 million inmates in prison, although they only represent 14% of the nation's population.[202] Implementation of the Federal Sentencing Guidelines in 1987 has resulted in a radical shift in the racial balance of those sentenced for crime: before the guidelines, whites were 66.3% of those sentenced, African-Americans were 22.3% and Latinos were 8.5%.[203] After the Guidelines took effect, whites dropped to 44.5% of those sentenced, while African-Americans and Latinos increased dramatically, to 26.2% and 26.3% respectively.[204] In the 18 to 25 year old age group, the disparities are even more startling: white males sentenced in that age group dropped from 56% immediately before implementation of the Guidelines to 39.2% after; African-Americans increased from 27.6% to 29.2%; and Latinos sentenced almost tripled, from 12.4% before to 31.6% after Guidelines implementation.[205]

This imbalance in incarceration rates cannot be attributed to a disproportionate predilection for crime by minority populations:

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[199] *See* Butterfield, *supra* note 40, at A12. In its report *Americans Behind Bars: A Comparison of International Rates of Incarceration, 1995*, The Sentencing Project notes that the United States now has the highest recorded rate of incarceration of any nation in the world, surpassing both South Africa and the former Soviet Union. *See* The Sentencing Project, *supra* note 194; *see also* Hacker, *supra* note 194, at 47 (noting reasons why poor blacks committing crimes are more likely to get caught than white or blue-collar criminals).

[200] Butterfield, *supra* note 40, at A12 (citing Sentencing Project Study, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*). For specific state information, see *infra* Appendices A-C.

[201] *See* Butterfield, *supra* note 40, at A12 (citing Sentencing Project Study, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*); *see also* Harvey, *supra* note 3, at 1152 tbl.1, 1151-59. (providing statistics and statistical analysis); *id.* at 1158 ("44% of black convicted felons are sent to prison, compared to 33% of convicted white felons.").

[202] *See* Butterfield, *supra* note 40, at A-12 (citing Sentencing Project Study, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*). For specific state information, see *infra* Appendices A-C.

[203] *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 204 & 204 tbl.5 (1991).

[204] *See id.*

[205] *See id.* at 205 & 205 tbl.6.

93% of those convicted of drug offenses in New York State are black or Latino and only 6.3% white, despite the fact that "[s]tudies and experience have shown that most people who use and sell drugs in [New York] and the nation are white."[206] 93% of the United States African American population is located in 22 states, primarily New York, California, and those states in the South and Midwest, all of which disenfranchise those convicted of various offenses.[207]

Some states that disenfranchise for various offenses restore the vote once the person has completed the sentence,[208] but most put varying degrees of obstacles in the way of ex-prisoners seeking reinstatement of their voting rights.[209] In some states, persons once convicted are disenfranchised for life unless they seek and obtain a full pardons or similar extraordinary restoration of their voting rights.[210] This stark reality necessarily depletes a minority community's voting strength over time by consistently placing a greater proportion of minority than majority voters under a voting disability at any given time.[211] For this reason, the effects of the intentional discrimination that originally motivated felon disenfranchisement still linger. There are, of course, some states where felon disenfranchisement was not adopted for discriminatory reasons, but there, too, it operates with discriminatory effect. Testifying before the House Judiciary Subcommittee at a hearing on voting rights of former prisoners in 1974, John A. Buggs, the Director of the United States Commission on Civil Rights pointed out that, looking at the relative conviction rates for whites and nonwhites, "one gets a rather shocking idea of how disfranchising prohibitions based on felony convictions affect minorities."[212] Director Buggs added that

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[206] Shapiro, *supra* note 35, at 557 n.112 (citing *The Correctional Association of New York, Mandatory Sentencing Laws and Drug Offenders in New York State (Feb. 1993)* (citing figures from the New York State Department of Correctional Services, the National Institute on Drug Abuse, and the Legal Action Center)).

[207] *See* Butterfield, *supra* note 40, at A12 (citing Sentencing Project Study, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*). See *infra* Appendices A-C for specific state information.

[208] See *infra* Appendices A-C for specific state information.

[209] See *infra* Appendices A-C for specific state information.

[210] *See* Shapiro, *supra* note 35, at 538-39 & nn.15-16 (collecting statutes). For a more detailed description of state disenfranchising provisions, see *infra* Appendices A-C.

[211] *See* Butterfield, *supra* note 40, at A12 (citing Sentencing Project Study, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*).

[212] *Voting Rights Hearings*, *supra* note 39, at 12. Some states disenfranchised even misdemeanants. *See, e.g.*, Anderson v. State, 72 Ala. 187 (1882) (holding that under disenfranchisement provisions of Alabama's constitution, art. 8, § 3, a conviction of either

"even in those States where the lists of disqualifying crimes were not selected with the purpose of disfranchising blacks [the felon disenfranchisement laws] established an invidious racial discrimination against minority citizens."[213]

B. Richardson v. Ramirez

Curiously, section 2 of the Fourteenth Amendment[214] has not been applied against states that disenfranchised the freedmen after passage of the Fourteenth Amendment.[215] In *Richardson v. Ramirez*,[216] three parolees brought an equal-protection challenge to a California law which had disenfranchised them because of their convictions of "infamous crime[s]."[217] The California Supreme Court held that the law violated equal protection,[218] but

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grand or petit larceny disqualifies a citizen from voting). In addition to losing the right to vote, a convicted felon may be deprived of employment opportunities, professional licenses, and the right to hold office and sit on a jury. *See, e.g.*, IDAHO CONST. art. VI, § 3 (disqualifying a person convicted of a felony or "confined in prison on conviction of a criminal offense" from voting, serving as a juror, or holding any civil office); Williams v. Mississippi, 170 U.S. 213 (1898) (upholding Mississippi law that disqualified from jury service anyone disqualified from voting).

213. *Voting Rights Hearings*, *supra* note 39, at 13.

214. Section 2 of the Fourteenth Amendment provides:

> [W]hen the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, 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 male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

215. U.S. CONST. amend. XIV, § 2. *See* GROSS, *supra* note 52, at 222:

> [B]y 1900, Mississippi, Louisiana, South Carolina, and North Carolina had disfranchised the Negro through an assortment of devious legal devices, many of which were adopted by Alabama in the Constitution of 1901. Representation in Congress from these states had not been denied or reduced, as provided for in the Fourteenth amendment.

216. 418 U.S. 24 (1974). *Ramirez* followed closely on the heels of *Fincher v. Scott*, 352 F. Supp. 117, 119 (M.D.N.C. 1972), *aff'd*, 411 U.S. 961 (1973) (stating that North Carolina may constitutionally continue "historic exclusion" of felons from the franchise without regard to whether such exclusion can pass muster under the equal protection clause). *Cf.* Allen v. Ellisor, 664 F.2d 391 (4th Cir. 1981) (stating that South Carolina statute disqualifying persons convicted of selected crimes does not violate equal protection on its face, and remanding for consideration of plaintiff's claim that the statute was racially discriminatory, and vacated and remanded the underlying statute was amended), *vacated*, 454 U.S. 807 (1981).

217. Richardson v. Ramirez, 418 U.S. at 26-27.

218. Ramirez v. Brown, 507 P.2d 1345, 1357 (1974), *rev'd sub nom.* Richardson v. Ramirez, 418 U.S. 24 (1974).

the United States Supreme Court reversed.[219] The *Ramirez* majority held that because the framers of the fourteenth amendment's section 2 excepted "participation in a rebellion or other crime"[220] from the provision reducing representation for seceding states that denied blacks the right to vote, disenfranchisement based on a state-law conviction must not be a *per se* section 1 equal protection violation. The Court said:

> [I]n dealing with voting rights as it does, [§ 1 of the equal protection clause] could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.[221]

Therefore, a divided Court held, laws disenfranchising convicts were not subject to the strict scrutiny normally applied to voting restrictions.[222] As Professor David Shapiro has noted:

> The Court expressly disavowed the argument rejected in *Reynolds v. Sims* that section two is the only part of the fourteenth amendment dealing with voting rights. Nor did it suggest that a state law relating to voting rights is necessarily valid under the equal protection clause if it imposes a restriction widespread at the time the clause was adopted. . . . The sole basis of the decision was that the *explicit* exemption from the formula in section two precludes *judicial* invalidation under the equal protection clause of section one[223]

Justice Marshall, joined in dissent by Justice Brennan, said that the majority's holding was based on an "unsound historical analysis which already has been rejected by this Court,"[224] and predicted that the Court's holding could lead to disenfranchisement for "seduction under promise of marriage, or conspiracy to operate a motor vehicle without a muffler . . . or breaking a water pipe in

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219. *See* Richardson v. Ramirez, 418 U.S. 24 (1974).

220. Ramirez v. Brown, 507 P.2d at 1347.

221. Richardson v. Ramirez, 418 U.S. at 55.

222. *See id.*

223. David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303 (1976) (citations omitted). Professor Shapiro strongly criticizes the Rehnquist analysis in *Richardson v. Ramirez*. *See id.* at 302-04.

224. Richardson v. Ramirez, 418 U.S. at 56 (Marshall, J., dissenting).

North Dakota, [or e]ven a jaywalking or traffic conviction. . . ."[225] After a detailed analysis of the Court's equal protection jurisprudence in analyzing state statutes that "selectively distribute the franchise,"[226] Justice Marshall concluded that because voting is a fundamental right, "the Court must determine whether the exclusions are necessary to promote a compelling state interest."[227] He concluded that the state had not met its burden.[228]

The *Ramirez* Court left open the possibility of an equal protection challenge against disqualifications that are too broadly or vaguely defined, such as "crimes of moral turpitude" or the like. In such cases, or in cases in which there is no rational basis for selection of the disqualifying felonies, or where the law is inconsistently applied, the Court suggested that it would find an equal protection violation in "such a total lack of uniformity,"[229] but there is no indication of what set of circumstances would meet this test.

Of course, many non-racial motives have been advanced for felon disenfranchisement including the so-called "purity of the ballot box,"[230] with the loss of the franchise treated as a badge of infamy, indicating the "other" who is unworthy of the rights of a citizen.[231] Judge Leon Bazile, typified the view that sees the ex-felon and people of color as partaking of "otherness" or outsider

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225. *Id.* at 76 n.24 (Marshall, J., dissenting) (citing Otsuka v. Hite, 414 P.2d 412 (1966); Gary L. Reback, *Note, Disenfranchisement of Ex-felons: A Reassessment*, 25 STAN. L. REV. 845, 845-46 (1973) (collecting statutes); *id.* at 850 (arguing that disenfranchisement of ex-felons violates equal protection)); *see also* Harvey, *supra* note 3, at 1161-64 (discussing Reback's foreshadowing of Marshall's dissent).

226. Richardson v. Ramirez, 418 U.S. at 77 (Marshall, J., dissenting).

227. *Id.* at 78 (Marshall, J., dissenting).

228. *Id.*

229. *Id.* at 56 (remanding to state trial court for factual determination).

230. This catch-phrase apparently first appeared in a Reconstruction-era Alabama case challenging felon disenfranchisement, *see* Washington v. State, 75 Ala. 582 (1884), but it has persisted into recent years. *See* Dillenburg v. Kramer, 469 F.2d 1222, 1224 (9th Cir. 1972):

> Courts have been hard pressed to define the state interest served by [felon disenfranchisement] laws. . . . Search for modern reasons to sustain old governmental disenfranchisement prerogative has usually ended with a general pronouncement that a state has an interest in preventing persons who have been convicted of serious crimes from participating in the electoral process or a quasi-metaphysical invocation that the interest is preservation of the "purity of the ballot box."

231. Washington v. State, 75 Ala. at 585 (holding that one rendered infamous by conviction of base offense indicative of great moral turpitude is unfit to exercise the privilege of suffrage).

status in *Loving v. Virginia*, when he said:

> Parties [to an interracial marriage are] guilty of a most serious crime. . . . Almighty God created the races, white, black, yellow, malay, and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix. The awfulness of the offense [of interracial marriage] is shown by the fact . . . [that] the code makes the contracting of a marriage between a white person and any colored person a felony. Conviction of a felony is a serious matter. You lose your political rights, and only the government has the power to restore them. And as long as you live you will be known as a felon. "The moving finger writes and moves on and having writ / Nor all your piety nor all your wit / Can change one line of it."[232]

The unsavory facts are that present day felon disenfranchisement has its roots in a mentality that assigned people of color to the status of non-person, and that these laws continue to operate with discriminatory effect. The right to vote is so fundamental to our democratic system of government that the denial to any group of citizens of the right to vote should raise concerns over the system's integrity, especially when that right is disproportionately denied to minority voters in a continuation of historic, intentional disenfranchisement. Unfortunately, with the Supreme Court's recent views of equal protection challenges to vote-dilution vehicles, it is unlikely that such unfair laws will face invalidation in the near future.

C. "Compactness" and the "Ghetto" Requirement

Another disturbing trend in the Court's "color blind" constitutionalism is the Court's requirement—explicit in some cases, and implicit in others—that before a minority community is entitled to representation, minority members must live in geographically "compact" districts which can be justified on "traditional" distracting principles. In other words, to establish a § 2 violation,

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[232] Transcript of Record at 8, *reproduced in* Loving v. Virginia, 388 U.S. 1 app. at 42 (1967) (the Judge's name is given in the Appendix at 33). Legal historian Paul Finkelman has observed that "since colonial times the legal system has seen color itself as a sign of criminality." Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2064 (1993).

plaintiffs must prove that "the minority group . . . is sufficiently . . . geographically compact . . . [so that they can form a] majority-minority district."[233] The paradox, of course, is that the "traditional" principles resulted in the systematic defeat of minority-preferred candidates in the jurisdictions subject to the Voting Rights Act.

1. *Thornburg v. Gingles*

In *Thornburg v. Gingles*,[234] a vote-dilution case that originated in North Carolina, the Court established that while race-based vote dilution violated the "results" test, plaintiffs could only obtain a remedy against the majority's racially-polarized bloc voting if the minority plaintiffs can prove that they live in a geographically "compact" area. Justice O'Connor stated plainly: "[E]lectoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and . . . the elements of a vote dilution claim . . . create an entitlement to roughly proportional representation within the framework of single-member districts."[235]

The *Gingles* plaintiffs challenged the use of at-large elections in multi-member districts in North Carolina's state elections, even though the plan had been "precleared" by the Justice Department. The plaintiffs argued that the multi-member districts, from which candidates were elected at large (rather than each running from a separate district) diluted their votes by submerging them in a white majority.[236] The Court found that the challenged practice of at-large voting in multi-member districts in which the white majority

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233. Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R-C.L. L. REV. 173, 180 (1989); *see also* Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 476-77 (1988) (considering voting as a means of expression and interaction with fellow citizens); Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 4 (1987) (arguing that by giving an individual the right to vote, "[t]he community confirms an individual person's membership, as a free and equal citizen").

234. 478 U.S. 30, 43 (1986):

> While explaining that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in evaluating an alleged violation, §2(b) cautions that "nothing in [§2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

(quoting 42 U.S.C. § 1973(b)) (alterations in original).

235. *Id.*

236. *See id.* at 46.

routinely voted as a bloc to defeat minority-preferred candidates "interact[ed] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[237] The Court viewed the central issue as whether "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[238]

The *Gingles* plurality created a three-part test: to establish illegal dilution of votes by the majority racial group, minority plaintiffs first had to show that their group was sufficiently large and geographically compact to constitute a majority in a single-member district;[239] second, that the minority group was politically cohesive;[240] and third, that absent special circumstances, white majority "bloc voting" usually defeated the minority's chosen candidate.[241] The Court enumerated factors that could be used to meet the three-pronged test, including a history of voting discrimination and racially polarized bloc voting; the jurisdiction's history of using voting practices that disadvantage the minority group;[242] exclusion of minority candidates from slating processes; the extent to which minority group members continue to experience the effects of past discrimination which "hinder their ability to participate effectively in the political process";[243] the use of overt or subtle racial appeals in political campaigns; and the extent to which minority group members have been elected to public office.[244]

Gingles was a turning point in the Court's voting rights jurisprudence for several reasons. It affirmed the right of a minority community to be free from vote dilution caused by the majority's

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[237] *Id.* at 47.

[238] *Id.* at 44, (citing S. REP. NO. 94-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206.

[239] *See id.* at 50 (noting that in the absence of a large and geographically compact group, minority voters would still be unsuccessful in electing their candidates).

[240] *See id.* at 51 (requiring minority claimants to show that their groups share "distinct [political] interests").

[241] *See id.* at 49-51.

[242] *See id.* at 56-57. The Court gave as examples of such minority-defeating practices and procedures extremely large districts, majority vote requirements, and prohibitions against "bullet" voting. *See id.*

[243] *Id.* at 45 (providing a list of factors which courts should consider in deciding whether an electoral system is structured to discriminate against minorities).

[244] *See id.* at 45. The Court cited education, employment, and health as areas of discrimination that also could disadvantage a minority group politically. *See id.*

bloc voting along racial lines.[245] It also applied the results test, treating vote dilution as including more than intentional violations. This appears to be a shift away from the line of cases requiring proof of intentional discrimination.[246] Nevertheless, *Gingles* has been criticized for curtailing the scope of the results test and for having led to a "mechanistic application" of its formula.[247]

Gingles can also be seen as the point at which the Court began moving toward what can be called a "ghetto" requirement. To show that the "legislative decision to employ multimember, rather than single-member, districts . . . dilute[d] their votes by submerging them in a white majority,"[248] the plaintiffs had to prove that they likely would succeed if single-member districts were created. In effect, the Court said that the ability of a minority group to form a single-member district was the baseline for proving a vote-dilution violation of § 2 of the Voting Rights Act.[249] The Court thus mixed its preferred remedy—the majority-minority district—into the determination of whether vote dilution had occurred. This was a nearly unnoticed, but major, move toward the ghetto requirement: with a stroke of the pen, the Court limited voting rights remedies to residents of geographically compact minority enclaves, or, in other words, ghettos.

Gingles did not address the concerns of other politically cohesive minority voters whose preferred candidates are usually defeated by white majority bloc voting.[250] Although these three preconditions provide a judicially manageable standard for defining minority vote dilution, a judicially manageable standard—as demonstrated in the one person, one vote area—constricts the Court's

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245. *See* Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a) (1994) ("No voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.").

246. Section 2(b) of the Voting Rights Act establishes that a violation exists where the "totality of circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . 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) (1994).

247. *See* Inman, *supra* note 157, at 2049-50 (suggesting that the Court sacrificed its vision of "fair representation" for a judicially manageable standard for evaluating the merits of vote dilution claims).

248. *Gingles*, 478 U.S. at 46.

249. *See id.*

250. *See id.* at 52-61.

vision of fair representation. *Gingles* was a major step toward the judicially-created requirement that minority voters form geographically compact ghettos,[251] justifiable on "traditional" districting grounds. The *Gingles* plurality acknowledged this fact without truly addressing it, commenting:

> We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.[252]

In other words, a minority community that is too small, or not geographically adjoining another minority community with which to form a majority in a single-member district, has no remedy under *Gingles* even if it can prove that its preferred candidates are systematically defeated by race-based bloc voting of the majority in which they are submerged.[253]

2. *Shaw v. Reno*

In *Shaw v. Reno*,[254] the Court applied its "color-blind" *Croson* rationale to electoral redistricting and moved dramatically closer to indirect *de jure* disenfranchisement. *Shaw* arose from the 1990 census figures which showed that North Carolina was entitled to an additional congressional district.[255] The first proposed reapportionment plan provided for one majority-African-American congressional district, but this plan failed to win § 5 "preclearance."[256] The North Carolina legislature then submitted a plan providing for two

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[251] *See id.* at 46; *see also* Bernard Grofman & Chandler Davidson, *Postscript: What is the Best Route to a Color-Blind Society?, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 312 (Bernard Grofman & Chandler Davidson eds., 1992) (stating that "political ghettoization" concentrates black voters "in a handful of majority-black districts, with little or no influence in the remaining districts"); Christopher Eisgruber, *Ethnic Segregation by Religion and Race: Reflections on Kiryas Joel and* Shaw v. Reno, 26 CUMB. L. REV. 515 (1996); Inman, *supra* note 157, at 2051 (identifying the core value underlying *Gingles*' three preconditions as a right to proportional representation—but only for compact, cohesive, and sizable minority groups).

[252] 478 U.S. at 46 n.12 (emphasis added).

[253] *See id.* at 90 (O'Connor, J., concurring) (stating that the majority's reasoning means that minority groups must be "large," "geographically concentrated," or "cohesive" in order to present a successful claim).

[254] 509 U.S. 630 (1993).

[255] *See id.* at 635-36.

[256] *See id.*

majority-minority congressional districts, and the United States Attorney General approved the revised plan.[257]

White North Carolinians challenged the allocation of a second majority-minority district, arguing that one of the minority districts had such a bizarre shape that it should be struck down under the Fourteenth Amendment because it could only have been designed as a race-based gerrymander.[258] The district court found that the creation of two majority African-American districts was a *prima facie* racial gerrymander which triggered strict scrutiny; however, the district court found that compliance with the Voting Rights Act was a sufficiently compelling state interest to withstand strict scrutiny.[259]

The Supreme Court reversed, making *Shaw* the first case in which the Court elevated geographic compactness from a desirable attribute to a virtual constitutional requirement for relief from a deprivation of racial minorities' voting rights.[260] *Shaw* foreshadowed *Miller* and *Vera* when it invoked strict scrutiny in part because of the danger that officials elected from deliberately created majority-minority districts will "believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."[261] This rhetoric is ironic: As Professor Karlan notes, the Court, while requiring compactness for redress of race-based vote dilution, has made it clear that compactness is not a constitutional requirement for groups not defined by race, holding that "[d]istricts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one."[262] Thus, Professor Karlan has observed: "[G]roups or candidates that are not identifiable in racial terms—farmers, or Republicans in a Democratic region of the state, or gays, for that matter—enter the

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257. *See id.*

258. District 1 began in northeastern North Carolina, and extended southward "until it taper[ed] to a narrow band; then, with finger-like extensions, it reache[d] far into the southernmost part of the State." *Id.* at 635. In North Carolina, of course, the north-south dimension is relatively short. District 12 was about 160 miles long and much of it was no wider than the I-85 corridor. Its snakelike boundaries ran "through tobacco country, financial centers, and manufacturing areas 'until it gobbl[ed] in enough enclaves of black neighborhoods.'" *Id.* at 635-36.

259. *See* Shaw v. Barr, 808 F. Supp. 461, 470-472 (E.D.N.C. 1992), *rev'd*, Shaw v. Reno, 509 U.S. 630 (1993).

260. *See id.*

261. *Id.* at 648.

262. Bush v. Vera, 116 S. Ct. 1941, 1972 (1996) (Kennedy, J., concurring), *quoted in* Karlan, *supra* note 3, at 308 (1997).

process with a wide array of solutions that can satisfy their political aspirations. If they were the controlling force in the redistricting process, they would draw their own districts first, and those districts might well be reasonably compact."[263]

As Professor Karlan notes, Justice O'Connor's shameless use of such terms as "deliberate segregation,"[264] "apartheid"[265] and "balkaniz[ation],"[266] illustrates vividly the Court's retrogression toward the *Plessy* Court's jurisprudence of exclusion. These terms, drawn from the long "history of political exclusion of black Americans[, were used] as a justification for unseating the first black Representatives elected from North Carolina in this century."[267]

3. *Miller v. Johnson*

Like *Shaw*, *Miller v. Johnson*[268] also involved congressional redistricting following the 1990 Census which entitled Georgia to an eleventh congressional seat. Because of Georgia's well-documented history of voting discrimination, Georgia submitted the plan to the Justice Department for "preclearance" under § 5. The Justice Department approved the plan after several redrawings, with the final plan containing three majority-minority districts, including the additional district.[269] This "max-black" or "Macon-Savannah trade" plan[270] severed an urban part of Macon from its original district, uniting it with portions of Savannah by what the court termed the "narrowest of land bridges."[271] In November 1992, three African-American Representatives were elected to Congress from the three newly created majority-minority districts.[272] Five white voters challenged the redrawn districts as a racial gerrymander that violated Equal Protection under *Shaw*.

The *Miller* district court ruled that Georgia needed only one majority-minority congressional district out of a total of eleven districts in the state. Therefore, the district court found that Georgia's Eleventh Congressional District had not been created

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263. Karlan, *supra* note 3, at 308.
264. *See Shaw*, 509 U.S. at 641, *quoted in* Karlan, *supra* note 17, at 1739.
265. *See id.* at 647, *quoted in* Karlan, *supra* note 17, at 1739.
266. *See id.* at 657.
267. Karlan, *supra* note 17, at 1739.
268. 515 U.S. 900 (1995).
269. *See id.* at 907-08.
270. *Id.* at 907.
271. *Id.* at 908.
272. *See id.* at 909.

properly,[273] because it was created pursuant to a plan that was not narrowly tailored to meet a compelling state interest. On *certiorari*, the Supreme Court agreed that "[r]ace was . . . the predominant, overriding factor" in the redrawing of the Eleventh District,[274] and described the creation of the eleventh district as "a tale of disparity, not community,"[275] in part because the district included residents of four discrete, widely spaced urban centers that had nothing to do with each other. The Court therefore invalidated the plan under a strict scrutiny analysis.

The Court's analysis in *Miller* went beyond *Shaw*, making compact geographic districts, which some have termed ghettos, a constitutional requirement for minority vote dilution claims. While the *Shaw* opinion invalidated only those minority electoral districts that could be characterized as "bizarrely shaped," *Miller* went still farther, abandoning the *Shaw* rationale, and holding that regardless of compactness, race cannot be a "predominant, overriding" factor in creating districts.[276] Justice Kennedy wrote that "[s]hape is relevant not because bizarreness is a necessary element . . . or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale."[277] By invoking the Equal Protection Clause to strike down a redistricting plan that had received "preclearance," the Court held that regardless of shape, any congressional district could be disallowed if race was the predominant factor in the redistricting process. Justice Ginsburg, joined by Justices Souter and Breyer, dissented, noting:

> [S]tate legislatures may recognize communities that have a particular racial or ethnic makeup . . . in order to account for interests common to or shared by the persons grouped

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[273] *See* Johnson v. Miller, 864 F. Supp. 1354, 1393 (S.D. Ga. 1994) ("We finally conclude and declare that Georgia's Eleventh Congressional District is unconstitutional in its current composition."). The district court assumed that the Voting Rights Act compliance could be a compelling interest that would permit racially-motivated districting to survive strict scrutiny, but held that the Voting Rights Act did not require more than one majority-minority district in Georgia. *See id.* at 1381-82. Thus, the plan creating three such districts was not narrowly tailored to meet the requirements of the Voting Rights Act, and failed strict scrutiny analysis.

[274] Miller v. Johnson, 515 U.S. at 920.

[275] *Id.* at 908.

[276] *Id.* at 920.

[277] *Id.* at 913.

> together, . . . ethnicity itself can tie people together. . . . For this reason, ethnicity is a significant force in political life. . . . Our Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example. The creation of ethnic districts reflecting felt identity is not ordinarily viewed as offensive or demeaning to those included in the delineation.[278]

D. Bush v. Vera: *Requiem for Minority Voting Rights Remedies*

In 1996, the Supreme Court's conservative faction, after a decade of chipping away at voting rights remedies by requiring ghettos and proof of intentional discrimination went a step further, and for all intents and purposed repealed the Voting Rights Act as recourse for anything other than direct, race-based prevention of the act of casting a ballot. Until *Bush v. Vera*,[279] the normal remedy for minority vote dilution caused by racially-polarized majority bloc voting was the creation of majority-minority districts.[280] For many years, the Supreme Court interpreted the equal protection clause as guaranteeing political[281] and racial[282] minorities the right not to have their votes diluted. In *Vera*, the Court's conservative faction drove the final nail in the coffin of minority voting rights, and signaled the defeat of a century of struggle. *Vera* flies in the face of the legislative history of the 1982 Voting Rights Act amendment which states clearly that "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process."[283]

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278. *Id.* at 935, 944-45.

279. 116 S. Ct. 1941 (1996).

280. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 74 (1986) (invalidating at-large election system and multi-member districts in some North Carolina counties); Ketchum v. Byrne, 740 F.2d 1398, 1413 (7th Cir. 1984) (holding that the district court abused its discretion by not considering, *inter alia*, the use of supermajorities in redistricting plan), *cert. denied sub nom.* City Council of Chicago v. Ketchum, 471 U.S. 1135 (1985).

281. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 124 (1986) (finding that political gerrymandering claims are subject to equal protection analysis).

282. *See, e.g.*, White v. Regester, 412 U.S. 755, 765 (1973) (finding vote dilution by means of multimember districts illegal when used invidiously "to cancel out or minimize the voting strength of racial groups").

283. S. REP. NO. 97-417, at n. 117 (1982).

Vera arose when Texas became entitled to three additional congressional seats as a result of the 1990 census.[284] The Texas Legislature submitted a redistricting plan creating majority-black District 30 in Dallas County, majority-Latino District 29 in Harris County, and redrawing District 18, abutting District 29, as a majority-black district.[285] Six Texas voters challenged the plan in federal district court under the Fourteenth Amendment, alleging that the redistricting subjected them to racial gerrymandering in violation of the fourteenth amendment.[286]

Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, found that all but one of the six plaintiffs had personally been subjected to racial classification, and therefore had standing to challenge the districts in question.[287] Analyzing *Vera* as a mixed-motive case, the O'Connor plurality first addressed the level of scrutiny required.[288] Finding that Texas had substantially neglected "traditional" districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it "manipulated" district lines based on detailed racial data, the plurality chose to apply strict scrutiny to the districts, requiring the state to show a compelling state interest to justify their creation.[289] The Court made this determination notwithstanding its finding that "traditional" factors other than race, particularly incumbency protection, had clearly influenced the legislature's districting plan.

In invalidating the three districts, the O'Connor plurality cited "substantial disregard for the traditional districting principles of compactness and regularity, [and the fact] that the redistricters pursued unwaveringly the objective of creating [majority-minority] district[s]."[290] The plurality rejected the argument that the non-traditional district lines were necessary to unite communities of interest," which had in common a consistently urban character, shared media sources and major transportation lines to Dallas, and a history of voting Democratic. The plurality also rejected what it termed the state's "more substantial claim" that incumbency pro-

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284. *See Vera*, 116 S. Ct. at 1950.
285. *See id.* at 1950-51.
286. *See id.* at 1951.
287. *See id.*
288. *See id.*
289. *See id.* (citing Miller v. Johnson, 515 U.S. 900 (1995)).
290. *Id.* at 1948.

tection (traditionally an accepted basis for gerrymandering) was as important as race in determining the district's shape. Instead, it found that race had a "qualitatively greater" influence on the drawing of district lines than did political motives, which would not have been subject to strict scrutiny.[291] If political motives had been found to predominate, of course, the state would only have been required to show that the district lines were rationally related to a legitimate state interest, but this would not have been enough to strike them down, given Texas' need to comply with the Voting Rights Act. To avoid this outcome, the Court announced that the obvious political considerations (such as protecting the seats of incumbents)[292] were merely a "proxy" for race, which justified the application of the same strict scrutiny standard to which outright racial discrimination is subject.[293]

The Court assumed, without deciding, that a state might have a compelling interest in complying with the anti-vote-dilution provisions of the Voting Rights Act, in which case the state would be entitled to a "limited degree of leeway,"[294] so long as it applied "traditional" districting principles.[295] However, the plurality declared that a state could not use § 2 compliance as a compelling state interest if doing so would require it to subordinate "traditional" districting principles to race-conscious factors "more than is reasonably necessary."[296] In other words, a state whose "traditional" districting standards and history of intentional discrimination have placed it within the purview of § 2 may not depart from the traditional practices that led to the original Voting Rights Act violation. Having set up this standard, the achievement of which may well be impossible to achieve in light of the Court's current jurisprudence, the Court found that the districts at issue failed to meet it, because they were "bizarrely shaped and far from compact."[297] The Court further found that "those characteristics

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[291] *See* Davis v. Bandemer, 478 U.S. 109, 132 (White, J., plurality opinion).

[292] *See* Aleinikoff & Issacharoff, *supra* note 153, at 588 (noting that incumbent office holders and their political agents, using the redistricting process, choose what configuration of voters suits their political agenda best).

[293] *Cf.* Powers v. Ohio, 499 U.S. 400, 410 (1991) (holding that race-based peremptory challenges do not survive equal protection scrutiny merely because members of all races are subject to like treatment).

[294] *Vera*, 116 S. Ct. at 1960.

[295] *Id.* at 1951-52, 1960-61.

[296] *Id.* at 1961. *But see* Grofman & Davidson, *supra* note 251, at 300 (advocating the need for race-conscious remedies in a race-conscious world).

[297] *Vera*, 116 S. Ct. at 1961.

[were] predominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy,"[298] and therefore invalidated all of the majority-minority districts.[299] Paradoxically, this holding means that even if traditional districting practices have resulted in allowing polarized white voting to defeat black-preferred candidates on a consistent basis, a state may not depart from those practices even to achieve compliance with the Voting Rights Act and to level the playing field for minority voters.[300]

The *Vera* rationale reflects the spirit of Justice Joseph P. Bradley, whose majority opinion in *Plessy v. Ferguson*[301] held that segregating blacks and whites in places of public accommodation did not violate equal protection. Foreshadowing the current Court, Justice Bradley wrote that there must be some stage in emancipation when "[the freedman] takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected by the ordinary modes by which other men's rights are protected."[302] In a century, the Court has come full cycle, approaching the twenty-first century with the spirit of the nineteenth.[303]

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[298] *Id.* at 1949. Justice O'Connor announced the judgment of the Court and delivered an opinion, in which Chief Justice Rehnquist and Justice Kennedy joined; Justices O'Connor and Kennedy filed separate concurring opinions. Justices Thomas and Scalia joined in still another concurring opinion which took the view that the application of strict scrutiny in *Vera* was never a close question, since the intentional creation of majority-minority districts, by itself, is sufficient to invoke such scrutiny. *See id.* (Thomas, J. concurring); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201 (1995) (stating that all government classifications based on race trigger strict scrutiny); Miller v. Johnson, 515 U.S. 900, 920-21 (1995) (holding that Georgia's admission that it intentionally created majority-minority districts showed that race was a predominant, motivating factor in its redistricting).

[299] *See Vera*, 116 S. Ct. at 1951.

[300] In dissent, Justices Breyer, Ginsburg, and Souter argued that pursuit of the majority's color blind logic leads ultimately to declaring the Voting Rights Act unconstitutional. *See id.* at 2010-11 (Souter, J., dissenting).

[301] Plessy v. Ferguson, 163 U.S. 537, 544 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

[302] The Civil Rights Cases, 109 U.S. 3, 25 (1883); *cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1972) (holding that education is not a fundamental right, and that disparities in tax basis between Texas school districts did not violate Equal Protection Clause).

[303] The Supreme Court's "color blind" stance parallels strikingly the reasoning in such cases as *Williams v. Mississippi*, 170 U.S. 213 (1898) (upholding a literacy requirement for voters because it did not discriminate on its face). In an interesting foreshadowing of the Rehnquist Court's intent requirement, the 1898 Court found that the laws in question had been enacted for a discriminatory purpose, but held the appellant's allegation of dis-

If participation were the only issue, of course, the Court's "color blind" approach would be less harmful. However, if the right to vote is to mean anything at all, it must mean something akin to the due process right to be heard; it must be more than a *pro forma* ritual. Just as a sham trial does not satisfy due process, the mere ritual formality of casting a vote does not satisfy equal protection.[304] The Court's destruction of the Voting Rights Act removes all restraints on what has been termed "the superior force of an interested and over-bearing [white] majority . . . ignoring the interests of racial minorities and their claims to equal respect and treatment in the governance process."[305] The reality is that as we approach the end of the twentieth century, most direct obstacles to the casting of ballots have been eliminated.[306] For all practical purposes, the Supreme Court's refusal to allow race to be any part of redistricting decisions puts an end to any minority group using the Voting Rights Act as a means to redress *de jure* discrimination.

IV. CONCLUSION: ENDING THE CYCLES: A RETURN TO EQUAL PROTECTION

Most voting restrictions are subject to strict scrutiny under the Equal Protection Clause,[307] so that a state must prove that a voting restriction is narrowly tailored to protect a compelling state interest, and that no less-restrictive means are available. Felon

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crimination insufficient as a matter of law because it failed to allege how, when, and by whom the discrimination was carried out. *See id.*

304. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 30, 39-48 (1985) (suggesting that "Madisonian Republicanism" is really an "intermediate position" between the traditional republicanism espoused by the Anti-federalists and interest-group pluralism). For example, Madison rejected the traditional republican model which argued that direct participation in small republics would prevent faction and tyranny of the majority, and he rejected the conception of politics as a process consisting only of trade-offs between competing factions. *See id.* at 46-47. Sunstein further asserts that the Equal Protection Clause may be viewed as a rejection of the pluralist view of politics because it recognizes the evil of distributing "resources or opportunities to one group rather than another solely because those benefitted have exercised the raw power to obtain governmental assistance." *Id.* at 50-51.

305. *See* Karlan, *supra* note 17, at 1740 (quoting THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961)).

306. *See* Issacharoff, *supra* note 152, at 1838-39 (noting that outright denial of opportunities to cast ballots has for the most part been eliminated); *id.* at 1842 (stating that "precise harms were easy to identify" in denial cases, commenting on the present Court's preference for rules that are easy to apply).

307. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972) (striking a residency requirement of one year in the state and three months in the county).

disenfranchisement alone is exempted from strict scrutiny. It thus has survived constitutional challenge[308] despite its racially motivated origins and its continuing racially discriminatory impact. It is possible that state constitutional equal protection guarantees might nullify such a law, litigation in federal court has been unsuccessful because of the Court's reading of section 2 of the Fourteenth Amendment. As of this writing, *Underwood* is still the only case in which the Supreme Court has struck down criminal disenfranchisement provisions based on the discriminatory purpose for which they were adopted.[309] Not once in this line of cases has the Court addressed the real issue: that disproportionate disenfranchisement of minority voters necessarily dilutes minority voting strength.

The right to be heard at the polls is now a right without a remedy, and the Voting Rights Act stands reduced to a formality so insubstantial that cases invoking it are now routinely defeated on summary judgment. The Court's aggressive anti-minority stance is all the worse, given the lingering effects of the racially motivated felon disenfranchisement statutes and the disproportionate criminalization of the minority population.

The right to vote is fundamental to our democratic system of government, but sadly, the present Court's definition of equal representation appears to be satisfied simply by ensuring each individual formal access to the ballot. The effect that the system has on the impact and strength of that vote as combined with other votes is not considered.[310] Even an explicit amendment to the Voting Rights Act that restores the results test and allows for proof of discriminatory effects without proof of discriminatory intent would

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308. *See* U.S. CONST. amend. XV (prohibiting the denial of voting rights based on race, color, or previous condition of servitude); U.S. CONST. amend. XIX (granting suffrage to women); U.S. CONST. amend. XXIV (outlawing disenfranchisement for failure to pay poll tax or other tax, but not addressing disenfranchisement for tax-evasion under the criminal disenfranchisement provision); U.S. CONST. amend. XXVI (granting the right to vote to those age 18 and over).

309. *See* Shapiro, *supra* note 35, at 543 (expressing surprise that *Underwood* "has not paved the way for similarly successful suits" challenging other state disenfranchisement laws).

310. *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 719 (1985) (noting that the minority acquiescence principle, *i.e.*, that minorities are supposed to lose in a democratic system, is entirely consistent with democratic theory); D. Polsby & R. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 315 (1991) (noting that voting is not an act of utilitarian self-interest but "a means to affirm the philosophy of popular sovereignty").

be unlikely to survive. Nevertheless, these changes should be made. In our system of checks and balances, it is intolerable to let the oppressive hand of one branch silence the voices in other branches that would stand up for protection of minority rights.[311] The Court should abandon the fiction of the "color blind" Constitution and take into account existing civil disabilities in the minority population when fashioning remedies, and should adopt an equal protection analysis for purposes of identifying and remedying of voting rights violations. In *Yick Wo v. Hopkins*,[312] the Court held that a facially neutral law which was intended to operate in a racially discriminatory manner violated equal protection.[313] The Court's current stance is nothing less than an abandonment of its historical recognition of the right of a minority community to representation of its interests.

At least one commentator[314] has suggested that the § 2 "results" test could serve as a tool for overturning criminal disenfranchisement laws where they dilute minority voting strength.[315] He argues that plaintiffs could show that such laws deny the vote to a disproportionately non-white class of citizens, resulting in dilution of the voting strength of the minority community, and thereby establishing the laws' invalidity under § 2.[316] With *Vera*, however, the Supreme Court has effectively read the results test out of the Voting Rights Act, precluding such a strategy. Under the Court's current approach, it would be difficult to demonstrate that those directly disenfranchised have been denied the vote "on account of race." Proving vote dilution would also be difficult. Despite the fact that the 1982 Voting Rights Act amendments' legislative history advises courts to consider statistical data in applying the results test, assessing the impact of the challenged measure based on objective factors, there is no indication in the Supreme Court's recent holdings that it would accept such statistical evi-

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311. James Madison recognized that the tendency to form factions is ingrained in human nature, *see* THE FEDERALIST NOS., 10, 45, 46, 49 (James Madison), but urged that "the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression." THE FEDERALIST NO. 66 (James Madison).

312. 110 U.S. 356 (1886) (striking down a regulatory ordinance that affected Chinese more than whites; the Court found a discriminatory purpose based on an otherwise unexplainable differential impact on a minority group).

313. *Id.*

314. *See* Shapiro, *supra* note 35, at 543.

315. *Id.* at 543-44.

316. *See generally* Shapiro, *supra* note 35.

dence absent a showing that the individual convict had been denied the vote based explicitly on race. On the contrary, minority citizens are rapidly losing ground in the battle to influence outcomes at the ballot box, and that they can expect no recourse from the right-wing majority on the Rehnquist Court.

The case of felon disenfranchisement shows how devastating has been the impact of the Supreme Court's "color blind" jurisprudence, culminating in *Bush v. Vera*.[317] When considered in the light of the disproportionate representation of African-Americans and other minorities in the criminal justice system, felon disenfranchise should trigger equal protection concerns. There is indisputable evidence that the disenfranchisement laws are the product of intentional discrimination, and that they operate with a disproportionate impact on minority voting pools, leading to a classic case of vote dilution. Quite simply, the disenfranchisement of felons reduces electoral access for minority populations as a whole,[318] and in the post-*Vera* era, no remedy can be framed, even though both discriminatory intent and discriminatory results are present. Nothing could illustrate more clearly the way in which disproportionate criminalization of minorities has interacted with "color-blind" jurisprudence to render violations of the Fifteenth Amendment or the Voting Rights Act wrongs without a remedy.

Many vote dilution remedies have been proposed.[319] Proportional voting, for example, has been considered by legal minds as diverse as Professor Lani Guinier[320] and Rep. John C. Calhoun, "the South Carolina Machiavelli."[321] According to Professor Mary A. Inman, a proponent of proportional voting, our present electoral system can fairly be "labelled 'extreme majority rule' because the votes of members of any group constituting a minority in a given

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317. 116 S. Ct. 1941 (1996). The Supreme Court's voting rights jurisprudence has been aptly described as "teeter[ing] on the brink of legal incoherence and political chaos." Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2507 (1997).

318. Shapiro, *supra* note 35, at 547-48.

319. *See, e.g., id.* at 548 n.60 (suggesting a first amendment strict scrutiny analysis of felon disenfranchisement on the theory that disenfranchisement silences political speech, "one of the most fundamental means by which a citizen can speak or express herself politically . . . ").

320. *See* GUINIER, TYRANNY OF THE MAJORITY, *supra* note 3, at 72 (1994) (stating that the Voting Rights Act should embody the civil rights movement's "transformative vision of politics"); Guinier, *Triumph of Tokenism*, *supra* note 3, at 1084-85 (analyzing various voting strategies in the context of the civil rights movement's quest for human dignity).

321. ASHMORE, *supra* note 118, at 390.

district are essentially wasted."[322] "Where blacks and whites are geographically separate, race-conscious districting by definition isolates blacks from potential white allies such as white women who are not geographically concentrated."[323] Furthermore, she contends that "because majority minority districts isolate the minority groups, leaving other districts whiter and more Republican, the representative of a majority minority district is unlikely to exert significant influence within the legislature: the white representatives from the remaining districts will likely predominate."[324] The greatest difficulty with any of these proposed solutions, however, is that the current Court's willful color-blindness is unlikely to permit any of them to be implemented.[325]

The unholy trinity of *Shaw, Miller* and *Vera* have spawned a host of lawsuits challenging majority-minority districts in various states.[326] The Supreme Court has reached a nadir in its equal protection jurisprudence and has made a mockery of the struggle for electoral representation. The remedies are only invoked when minority-preferred candidates are systematically defeated by racially polarized majority block voting. The Court's voting rights jurisprudence flies in the face of equal protection doctrine, and the legislative history of the 1982 Voting Rights Act. As the *Gingles* plurality observed:

> Enforcement of Section 2 . . . should not be viewed as an undemocratic judicial intrusion into the political process. . . . Much of that influence has come from the presence of black elected officials with votes to trade within the halls of Congress, and it is important to remember that they usually owe the creation of their districts not to the courts directly, but to the exercise of pressure that Congress vested in the executive branch through creation of the preclearance requirement and to the horse trading of black

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322. Inman, *supra* note 157, at 1993.

323. *Id.* at 2051 (quoting Lani Guinier, *The Representation of Minority Interests: The Question of Single Member Districts*, 14 CARDOZO L. REV. 1135, 1163 (1993)).

324. *Id.* at 2052 (citing Guinier, *supra* note 321, at 1163).

325. *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941 (1996) Only four Justices assumed that § 2 of the Voting Rights Act is constitutional.

326. Such states include Florida, *see* Lawyer v. Justice, 65 U.S.L.W. 4629 (1997); Georgia, *see* Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga 1994); Louisiana, *see* Reno v. Bossier Parish, 117 S. Ct. 1491 (1997); Hays v. Louisiana, 839 F. Supp. 1188 (W.D. La. 1993), *vacated*, Louisiana v. Hays, 512 U.S. 1230 (1994); and Missouri, *see* Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996).

legislative caucuses within state legislatures.[327]

In the early years of this century, W.E.B. DuBois addressed "the strange meaning of being black at the dawning of the Twentieth Century. This meaning is not without interest . . . for the problem of the Twentieth Century is the problem of the color line."[328] Sadly, racial bias is still a fact of life in America at the turn of the twenty-first century, and race and fairness issues are the unfinished business of our democracy. Discussion of these issues must recognize that the nation's recent history means that minorities may have a community of interest. The Court's disingenuous attempts to deny any community or commonality of interest apart from the majority's interest in maintaining "traditional American principles" of geographic racial placement simply exacerbates the legacy of racism. To deny equal protection of the laws under the pretext of establishing a "color-blind" system is to perpetuate historic wrongs.

Under the Voting Rights Act of 1964, Congress has promised minority citizens that the Fourteenth Amendment will give them equal protection at the ballot box. The Department of Justice is responsible for earning its name by ensuring that states comply. It is time to recognize that vote dilution does deny minority communities the right to equal protection of the laws, and to recognize the lingering discriminatory effect of practices, such as felon disenfranchisement, originally adopted for the express purpose of excluding the minority population from participation in the electoral process. The Court must resist the temptation to emulate the Taney Court, and must do its part to level the playing field. At least the Court should take into account the disproportionate disenfranchisement rates among minority populations when fashioning "safe" districts under the Voting Rights Act; and provide for an orderly uniform method of restoring rights to those who have served their time.

The "color blind" Court has rejected equal protection-based voting litigation, in large part based on an extremely restrictive reinterpretation of the Fourteenth Amendment's Equal Protection Clause, and it has for all practical purposes nullified the Voting Rights Act by reading into it a non-existent requirement of show-

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327. Karlan, *supra* note 17, at 1738-39.

328. W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 1 (1903), *quoted in* Schmidt, *supra* note 5, at 444.

ing a discriminatory intent. Justices Souter, Breyer, and Ginsburg have had the courage to point out that the "failure to provide a practical standard for distinguishing between the lawful and unlawful use of race," has resulted in "inevitable confusion."[329] To avoid consideration of race, as the Court's right wing would do, is at worst, the *Plessy* Court redux, and at best, misconceived.

The Court has radically reduced the number of cases it has taken in recent years, so it is difficult not to see an agenda similar to the "Mississippi Plan" behind the selective choice of cases in which to implement "color blind" erosion of the franchise for all but the white majority. As Moorefield Storey replied, when confronted with the argument that segregated housing affected blacks and whites equally, "A law which forbids a Negro to rise is not made just because it forbids a white man to fall."[330]

The cycle of exclusion has come nearly full circle, and it will not end until the Supreme Court returns to the true meaning of equal protection, protecting minority citizens "with the same shield which it throws over the white man . . . [both] being alike citizens of the United States, both bound to obey the same laws, to sustain the same burdens of the same Government, and both equally responsible to justice and to God. . . ."[331] In the end, we cannot justify a return to legally-sanctioned white supremacy by invoking the mantra, "Our Constitution is color-blind."

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329. *Vera*, 116 S. Ct. at 1998 (Souter, Breyer, and Ginsburg, JJ., dissenting).

330. Moorfield Storey, attorney for the appellants in *Buchanan v. Warley*, 245 U.S. 60 (1917), *quoted in* Schmidt, *supra* note 5, at 504.

331. Speech of Sen. Howard (May 23, 1866), *in* CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

Appendix A:
States Which Disenfranchise Permanently or Make Restoration of Rights Difficult

State:	Citation:	Comments:
Alabama	ALA. CONST. art. VIII, § 182(b)	"No person convicted of a felony involving moral turpitude . . . shall be qualified to vote until restoration of civil and political rights."
	ALA. CODE § 17-3-10 (1994)	Person convicted of offenses mentioned in article VIII of the Constitution of Alabama may be restored to rights only by a pardon. The pardon must specifically mentions restoration of rights and must be accompanied by recommendation of judge or district attorney; no restoration allowed for persons convicted of "treason and impeachment."
Arizona	ARIZ. CONST. art. VII, § 2	No person convicted of treason or felony be qualified to vote in any election unless they are restored their civil rights.
	ARIZ. REV. STAT. ANN. §§ 13-905, 13-906 (West 1996)	"Upon completion of probation or at least two years from the date of absolute discharge, a person may have any civil rights which were lost or suspended by his conviction restored by the superior court judge who sentenced him or his successors in office from the county in which he was originally sentenced."
California	CAL. CONST. art. II, § 4 (amended 1974)	Disqualification while imprisoned or on parole for felony conviction.
	CAL. ELEC. CODE § 2101 (West 1996)	Disqualifies persons in prison or on parole for felony conviction; probation not mentioned.
	CAL. ELEC. CODE § 2201(c) (West 1996)	Provides for cancellation of voting registration upon proof that the person is presently imprisoned or on parole for felony conviction.
	CAL. PENAL CODE § 4852.01 (West 1996)	Permits application for a certificate of rehabilitation and pardon under certain circumstances.
Florida	FLA. CONST. art. VI, § 4	"No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability."
	FLA. STAT. ANN. § 944.292 (West 1996)	"Upon conviction of a felony . . . the civil rights of a person convicted shall be suspended . . . until such rights are restored by a full pardon, conditional pardon, or restoration of civil rights pursuant to s. 8, Art. IV of the State Constitution."
	FLA. STAT. ANN. § 97.041(3)(b) (West 1996)	"The following persons are not entitled to register or to vote: . . . (b) Persons convicted of any felony by any court of record and whose civil rights have not been restored."
	FLA. STAT. ANN. § 940.05 (West 1996)	Restoration occurs upon 1) receiving a full pardon from the Board of Pardons; 2) serving the maximum term of the sentence; or 3) being granted his final release by Parole Commission.
Iowa	IOWA CONST. art. II, § 5: Disqualified persons	"No . . . person convicted of any infamous crime, shall be entitled to the privileges of an elector." An infamous crime is "any crime made punishable by imprisonment in the penitentiary." *See* State v. Haubrich, 83 N.W.2d 451 (Iowa 1957). In order to be restored to the privilege of an elector, a person who has been convicted of an infamous crime must be given a certificate of restoration to all of the rights of citizenship by the governor. 1923-24 Op. Att'y Gen. 235.
Kansas	KAN. CONST. art. V, § 2	"The legislature may, by law, exclude persons from voting because of . . . commitment to a jail or penal institution. No person convicted of a felony under the laws of any state or of the United States, unless pardoned or restored to his civil rights, shall be qualified to vote."
Kentucky	KY. CONST. § 145	The right to vote is denied 1) for a conviction of a felony, treason, bribery in an election, "or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage," unless "restored to their civil rights by executive pardon"; or 2) to those who "at the time of the election are in confinement under the judgment of a court for some penal offense."

Appendix A:
States Which Disenfranchise Permanently or Make Restoration of Rights Difficult

State:	Citation:	Comments:
Louisiana	LA. CONST. art. I, § 10	"[R]ight [to vote] may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for conviction of a felony."
	LA. CONST. art. I, § 20	"Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense."
	75 Op. Att'y Gen. 75 (1975)	"Convicted felon on probation can vote but one on parole is in legal custody and can not vote."
Minnesota	MINN. CONST. art. VII, § 1	A person convicted of treason or felony shall not be entitled or permitted to vote unless their civil rights are restored.
	MINN. STAT. ANN. § 201.014.2(a) (West 1992)	Same.
	MINN. STAT. ANN. § 609.165 (West 1992)	"When a person has been deprived of civil rights by reason of a conviction of a crime and is thereafter discharged, such discharge shall restore the person to all civil rights and full citzenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide."
Mississippi	MISS. CONST. art. XII, § 241	Voting Rights lost for enumerated offenses: murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy.
Missouri	MO. REV. STAT. § 115.133(2) (1993)	Disenfranchisement while in prison, or on probation or parole for a felony, and permanent disenfranchisement for election offenses.
	MO. REV. STAT. § 561.026(1) (Supp. 1993)	Disenfranchisement while in prison, and permanent disenfranchisement for election felonies.
Nebraska	NEB. REV. STAT. § 29-112 (1995)	Disenfranchisement for all felonies, until placed on probation.
	NEB. REV. STAT. § 29-2264 (1995)	Provision for probation and restoration of rights.
New Jersey	N.J. STAT. ANN. § 2C:51-3 (West 1995)	Disenfranchisement if convicted of a crime under the laws of New Jersey, another state, or the United States.
	N.J. STAT. ANN. § 19:4-1(8) (West 1995)	Disenfranchisement while serving a sentence, on parole, or on probation for any crime of New Jersey, another state, or the United States.
New York	N.Y. ELEC. LAW § 5-106(2)-(5) (McKinney 1977)	Disenfranchisement if convicted of a crime under the laws of New York, another state, or the United States, and if the punishment is by death or imprisonment.
North Carolina	N.C. GEN. STAT. § 163-55(2) (1995)	Upon being adjudged guilty of a felony, "unless that person shall be first restored to the rights of citizenship in the manner prescribed by law."
Tennessee	TENN. CONST. art. I, § 5	Disenfranchisement for an infamous crime.
	TENN. CODE ANN. § 40-20-112 (1997)	"Upon conviction for any felony, it shall be the judgment of the court that the defendant be infamous and be immediately disqualified from exercising the right of suffrage."
	TENN. CODE ANN. § 40-20-112 note (1997) (Restoration After Pardon), *citing In re* Curtis, 6 Tenn. Civ. App. (6 Higgins) 12 (1915)	Person eligible to have rights restored "after pardon and right living, on petition and showing in circuit court."
Virginia	VA. CONST. art. II, § 1	Disenfranchisement upon conviction of a felony unless "civil rights have been restored by the Governor or other appropriate authority."

Appendix A:
States Which Disenfranchise Permanently or Make Restoration of Rights Difficult

State:	Citation:	Comments:
Wisconsin	WIS. CONST. art. III, § 2(4)(a)	Disenfranchisement upon conviction of treason or felony, unless restored to civil rights.
	WIS. STAT. ANN. § 6.03(1)(b) (West Supp. 1996)	Disenfranchisement upon conviction of treason, felony, or bribery, unless restored to civil rights.
	WIS. STAT. ANN. § 304.078 (West 1996)	Restoration occurs upon serving term of imprisonment or otherwise serving a sentence.
Wyoming	WYO. CONST. art. III, § 27	"[P]ersons convicted of felonies, unless restored to civil rights, are excluded from the elective franchise."
	WYO. CONST. art. VI, § 6	Prohibits special legislative bills to restore civil rights.
	WYO. STAT. ANN. § 6-10-106 (Michie 1997)	Disenfranchises upon felony conviction unless the conviction is reversed, a pardon is granted, or civil rights have been restored.

Appendix B:
States Which Do Not Disenfranchise or Which Have Automatic or Relatively Simple Restoration of Voting Rights:

State:	Citation:	Method of Restoration of Franchise:	Comments:
Alaska	ALASKA STAT. §§ 15.05.030, 15.07.135, 33.30.241 (Michie 1996)	Person may register upon presenting proof that the person is unconditionally discharged from custody.	This apparently includes completion of probation and/or parole.
Arizona	ARIZ. CONST. art. VII, § 2 ARIZ. REV. STAT. ANN. §§ 13-912, 16-101(A)(5) (West 1992)	Automatic upon completion of sentence.	First offense only.
Arkansas	ARK. CONST. art. III, §§ 1-2, *amended by* ARK. CONST. amend. 51, § 11(a)(4)	Upon discharge of sentence or pardon.	
Colorado	COLO. CONST. art. VII, § 10 COLO. REV. STAT. ANN. § 1-2-103(4) (West 1993)	Automatic upon release from confinement.	
Connecticut	CONN. GEN. STAT. ANN. §§ 9-46(a), 9-46a(a) (West 1993)	Person may register upon presenting proof of discharge from confinement, parole, or probation, and proof of payment of any fines.	
Delaware	DEL. CONST. art. V, § 2 DEL. CONST. art. V, § 4 DEL. CODE ANN. tit. 15, § 1701 (1981)	Automatic restoration 10 years following a felony conviction and sentence thereunder.	
Georgia	GA. CONST. art. II, § 1, ¶ 3(a)	Automatic "upon completion of the sentence."	
Hawai'i	HAW. CONST. art. II, § 2 HAW. REV. STAT. ANN. §§ 831-2, 831-5 (Michie 1993)	No disenfranchisement during parole or while serving suspended sentence; otherwise, franchise lost upon sentencing for felony and automatically restored at discharge.	Notation on discharge papers indicates that person's civil rights have been restored.
Idaho	IDAHO CONST. art. VI, § 3 IDAHO CODE § 18-310 (1997)	No one can vote if convicted of a felony at any place, unless restored to rights. Rights restored on completion of sentence, probation, or parole.	
Maine	ME. REV. STAT. ANN. tit. 21-A, §§ 111, 115 (West 1993)	No disenfranchisement provision.	
Maryland	MD. ANN. CODE art. 33, § 3-4(c) (1998)	Automatic upon completion of sentence.	First-time offenders only.

Appendix B:
States Which Do Not Disenfranchise or Which Have Automatic or Relatively Simple Restoration of Voting Rights:

State:	Citation:	Method of Restoration of Franchise:	Comments:
Massachusetts	MASS. CONST. pt. 1, art. 1 MASS. GEN. LAWS ANN. ch. 51, § 1 (West 1991) MASS. GEN. LAWS ANN. ch. 55, § 24 (West 1991)	No disenfranchisement except for election offenses.	Correctional institution inmates, who are duly qualified, registered voters in a municipality, have the right to vote in state elections. *See* Dane v. Board of Registrars of Voters of Concord, 371 N.E.2d 1358 (Mass. 1978).
Montana	MONT. CODE ANN. § 13-1-111(2) (1997)	Automatic upon completion of sentence.	
Oklahoma	OKLA. STAT. ANN. tit. 26, § 4-101(1) (West 1997) OKLA. STAT. ANN. tit. 26, § 4-120 (West 1997)	Automatic at end of time prescribed in judgment and sentence.	
Pennsylvania	PA. STAT. ANN. tit. 25, § 961.501(a) (West Supp. 1997)	Automatic upon expiration of 5 years after the end of imprisonment.	While the crimes of burglary and larceny are in the nature of crimen falsi, they are not infamous crimes within the meaning of PA. CONST. art. 2, § 7. *See* Commonwealth *ex rel.* Hazel v. Flannery, 13 Pa. D. & C.3d 58 (1979).
South Carolina	S.C. CODE ANN. § 7-5-120(B)(2)-(3) (Law Co-op. Supp. 1997)	Automatic upon service of the sentence, including probation and parole time "unless sooner pardoned."	
Texas	TEX. CONST. art VI, § 1 TEX. ELEC. CODE ANN. § 11.002(4)(A) (West Supp. 1993)	Automatic, two years from issuance of discharge papers at end of sentence, including probation and parole.	
Utah	UTAH CONST. art. IV, § 2	No felon disenfranchisement provision.	Prisoners vote absentee in county of prior residence. *See* Dodge v. Evans, 716 P.2d 270 (Utah 1985).
West Virginia	W. VA. CONST. art. IV, § 1 W. VA. CODE § 3-1-3 (1990)	Automatic upon service of sentence.	As soon as full term is served, or upon pardoning, voting rights are restored. *See* 51 Op. Att'y Gen. 182 (1965).

Appendix C:
Enumerated Offenses and Categories Triggering Disenfranchisement

	Citation	Felony or Treason	"Infamous" Crime	Larceny	"Moral turpitude"	Election Crimes	Other Crimes:	Comments
Alaska	ALASKA CONST. art. V, § 2 ALASKA STAT. § 15.05.030(a) (Michie 1996)				✓			Unless civil rights restored.
Arizona	ARIZ. REV. STAT. ANN. § 16-101(A)(5) (West 1996)	✓						Unless civil rights restored.
Arkansas	ARK. CONST. art. III, § 2	✓						
California	CAL. CONST. art. II, § 4	✓						Previously, CAL. CONST. art. II, § 1 (repealed 1974) disenfranchised for any "infamous crime," which was limited in *Otsuka v. Hite*, 414 P.2d 412 (Cal. 1966), to crimes involving moral corruption and dishonesty, because these branded a criminal as a threat to the integrity of the elective process.
Connecticut	CONN. GEN. STAT ANN. §§ 9-46(a), 9-46a(a) (West 1989)	✓ (other than non-support)					Former CONN. CONST. art. VI, § 3 (amended 1875) (superseded) enumerated bribery, forgery, perjury, dueling, fraudulent bankruptcy, and theft.	Those imprisoned but not disenfranchised can apparently vote absentee under CONN. GEN. STAT ANN. § 9-14a (West 1989) ("Any person in the custody of the state being held at a community corrections center or a correctional institution, whose voting rights have not been denied, shall be deemed to be absent from the town or city of which he is an inhabitant for purposes of voting....").
Delaware	DEL. CONST. art. V, § 2 DEL. CONST. art. V, § 7 DEL. CODE ANN. tit. 15, § 1701 (1981)	✓				✓ ✓	DEL. CONST. art. V, § 2: Qualifications for Voting also disqualifies those unable to read the state constitution in English.	
District of Columbia	D.C. CODE ANN. §§ 1-1302, 1-1311 (1992 & Supp. 1998)	✓						

Appendix C:
Enumerated Offenses and Categories Triggering Disenfranchisement

	Citation	Felony or Treason	"Infamous" Crime	Larceny	"Moral turpitude"	Election Crimes	Other Crimes:	Comments
Florida	FLA. STAT. ANN. ch. 97.041 (West 1987 & Supp. 1998)	✓						Formerly referred to "infamous" crimes—The Florida Attorney General has opined: "In determining if a crime was 'infamous' within the contemplation of prior language of this section, the real criterion to be applied was whether the offense was one for which the statute authorized the court to award an infamous punishment, that is, imprisonment in a state prison or penitentiary, and conviction of a person in a federal court of a crime constituting a felony under federal statutes could be deemed conviction of an infamous crime." Op. Att'y Gen. 203 (1951).
Georgia	GA. CONST. art. II, § 1, ¶ 3(a) GA. CODE ANN. § 21-2-219(a.1)(1)				✓ ✓			
Hawai'i	HAW. REV. STAT. ANN. § 831-2 (Michie 1993)	✓						Upon sentencing for a felony unless sentence is suspended.
Idaho	IDAHO CONST. art. VI, § 3 IDAHO CODE § 18-310 (1997)	✓						Before it was amended in 1981, IDAHO CONST. art. VI, § 3 disenfranchised those confined in prison on conviction of criminal offenses, as well as those convicted of felony, treason, embezzlement of the public funds, bartering or selling, or offering to barter or sell his vote, or purchasing or offering to purchase the vote of another, or other infamous crimes.
Indiana	IND. CONST. art. II, § 8		✓					
Iowa	IOWA CONST. art. II, § 5		✓					
Maryland	MD. CONST. art. I, § 2		✓	✓		✓		

Appendix C:
Enumerated Offenses and Categories Triggering Disenfranchisement

	Citation	Felony or Treason	"Infamous" Crime	Larceny	"Moral turpitude"	Election Crimes	Other Crimes:	Comments
Massachusetts	MASS. GEN. LAWS ANN. ch. 51, § 1 (West 1991) MASS. GEN. LAWS ANN. ch. 55, § 42 (West 1991)					✓		Only for election offenses; other incarcerated felons may vote by absentee ballot.
Mississippi	MISS. CONST. art. 12, § 241						Offenses listed in statute.	
Montana	MONT. CODE ANN. § 13-1-111(2) (1993)	✓						While serving sentence.
New Hampshire	N.H. CONST. pt. I, art. 11	✓				✓		Treason, bribery & election offenses only.
New Mexico	N.M. CONST. art. VII, § 1	✓	✓					
North Carolina	N.C. CONST. art. V, § 2	✓						
South Carolina	S.C. CODE ANN. § 7-5-120(B)(2)-(3) (Law. Co-op. Supp. 1997)	✓				✓	Anyone "laboring under disabilities named in the Constitution of 1895 of this State."	
Tennessee	TENN. CONST. art. I, § 5		✓					
Texas	TEX CONST. art. 6, § 1	✓						
Virgin Islands	V.I. CODE ANN. tit. 18, § 263(a) (1998)				✓			Ten years upon two felony convictions involving moral turpitude; otherwise, one year from discharge.
Virginia	VA. CONST. art. II, § 2	✓						
Washington (State)	WASH. CONST. art. VI, § 3				✓			
Wisconsin	WIS. CONST. art. III, § 2(4)(a) WIS. STAT. ANN. § 6.03(1)(b) (West Supp. 1996)	✓						

Appendix C:
Enumerated Offenses and Categories Triggering Disenfranchisement

	Citation	Felony or Treason	"Infamous" Crime	Larceny	"Moral turpitude"	Election Crimes	Other Crimes:	Comments
Wyoming	WYO. CONST. art. III, § 27 WYO. STAT. ANN. § 6-10-106 (Michie 1997)	✓						