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Note

***537 CHALLENGING CRIMINAL DISENFRANCHISEMENT UNDER THE VOTING RIGHTS ACT: A
NEW STRATEGY**

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Just a few decades after the Civil War, Southern conservatives gathered at state constitutional conventions and codified a growing white backlash against Reconstruction generally and black suffrage in particular. [FN1] Racial animus was rarely masked: "Discrimination!" one Virginia delegate exclaimed. "[T]hat, exactly, is what this Convention was elected for ... with a view to the elimination of every negro voter...." [FN2] The conventions adopted a panoply of voting barriers, including literacy and property tests, [FN3] poll taxes, [FN4] understanding clauses, [FN5] and grandfather clauses. [FN6] The purpose of these voting *538 restrictions was to disenfranchise as many blacks as possible without violating the recently ratified Fifteenth Amendment, [FN7] which prohibited denying the right to vote on account of race. [FN8] The effort was remarkably successful: blacks made up 44% of the electorate in Louisiana after the Civil War, but less than 1% in 1920. [FN9] Almost 70% of eligible blacks were registered to vote in Mississippi in 1867; less than 6% were registered two years after that state's 1890 disenfranchising convention. [FN10] The effect was as apparent among black elected officials: In the eleven former Confederate states, 324 blacks were elected to state legislatures and Congress in 1872, but only five were elected in 1900. [FN11]

Criminal disenfranchisement--the denial of the vote to citizens convicted of crimes--was the most subtle method of excluding blacks from the franchise. Narrower in scope than literacy tests or poll taxes and easier to justify than understanding or grandfather clauses, criminal disenfranchisement laws provided the Southern states with "insurance if courts struck down more blatantly unconstitutional clauses." [FN12] The insurance has paid off: A century after the disenfranchising conventions, criminal disenfranchisement is the only substantial voting restriction of the era that remains in effect. [FN13] Currently, all but three states deprive incarcerated offenders of the vote; [FN14] thirty-five states *539 disenfranchise nonincarcerated offenders, including those on probation and parole; [FN15] and fourteen states disenfranchise ex-offenders for life. [FN16] As a *540 result, the right to vote is denied to millions of American citizens, [FN17] a disproportionate share of whom are nonwhite. [FN18]

Like other voting barriers, laws disqualifying criminals from voting existed in the South before the constitutional conventions at the turn of the century, and before blacks had won the right to vote. But between 1890 and 1910, many Southern states tailored their criminal disenfranchisement laws, along with other preexisting voting qualifications, to increase the effect of these laws on black citizens. For example, Mississippi's 1890 constitutional convention, which became a model for other states, [FN19] 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. [FN20] The racially *541 discriminatory intent of this change was clear to the Mississippi Supreme Court when it reviewed the new law six years after its adoption:

[T]he convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. 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.... 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. [FN21]

At their conventions, other states, including South Carolina (1895), Louisiana (1898), Alabama (1901), and Virginia (1901-02), also disenfranchised criminals selectively with the intent of disqualifying a disproportionate number of blacks. [FN22] As in Mississippi, legislators in these states thought that blacks were more likely to commit "furtive offenses" such as petty theft than "robust crimes" such as murder. "It is not difficult to perceive how these elaborate regulations were designed to discriminate against the Negro," one historian wrote in 1944 about South Carolina. "Among the disqualifying crimes were those to which he was especially prone: thievery, adultery, arson, wife-beating, housebreaking, and attempted rape. Such crimes as murder and fighting, to which the white man was as disposed as the Negro, were significantly omitted from the list." [FN23] John Fielding Burns, the author of the Alabama constitutional provision disenfranchising criminals, "estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes." [FN24] The exaggerated nature of this claim underscores the racist intent *542 of the provision. [FN25] Indeed, at the time of the constitutional conventions, observers recognized both the purpose of these new disenfranchising laws and the grave impact the laws would have on blacks. [FN26]

Today, scholars widely acknowledge the historically racist motives underlying criminal disenfranchisement in the South. [FN27] The Supreme Court has also recognized this history. In 1985, the Court held in *Hunter v. Underwood* that an Alabama law disenfranchising certain criminal offenders violated the Fourteenth Amendment's Equal Protection Clause because the law had a disproportionate impact on blacks and was adopted with racially discriminatory intent. [FN28] The president of the 1901 Alabama constitutional convention that adopted the disputed section had declared to his fellow delegates: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." [FN29] *Underwood* marked the first time that a court struck down a criminal disenfranchisement law on account of racial discrimination. [FN30] Surprisingly, the *543 case has not paved the way for similarly successful suits alleging that other states' criminal disenfranchisement laws were adopted with racially discriminatory intent.

But, as this Note will demonstrate, a plaintiff challenging criminal disenfranchisement no longer needs to prove discriminatory intent. In 1982, Congress amended the Voting Rights Act of 1965 ("the Act"), [FN31] the federal law enforcing the Fifteenth Amendment, and explicitly established a results test for section 2 of the Act. [FN32] Section 2 now prohibits states from imposing electoral qualifications that result in a minority group having less opportunity than other voters to participate in the electoral process. [FN33] Remarkably, the significance of this legislation for race-based challenges to criminal disenfranchisement like *Underwood* has been almost completely unrealized. [FN34]

This Note recommends a new litigation strategy against criminal disenfranchisement. Criminal disenfranchisement is an outright barrier to voting that, like the poll tax and literacy test, was adopted in some states with racially discriminatory intent and has operated throughout our nation with racially discriminatory results. [FN35] This Note focuses on the racially *544 discriminatory nature of criminal disenfranchisement laws not to encourage states to reformulate these laws in a more "race neutral" manner but to give federal courts a new theory that will allow them to review these laws and strike them down. Courts do not have this opportunity when faced with *per se* challenges to criminal disenfranchisement that do not allege racial discrimination because the Supreme Court has held that states can, in general, constitutionally deprive offenders of the right to vote. Therefore, plaintiffs are most likely to succeed in challenging criminal disenfranchisement laws if they allege that these laws violate the Voting Rights Act because they disproportionately affect minorities. [FN36]

Part I of this Note reviews and critiques court decisions in cases challenging criminal disenfranchisement laws under the Constitution and the Voting Rights Act. Part II maintains that plaintiffs can rely on the results test in section 2 of the Voting Rights Act to establish that criminal disenfranchisement laws are illegal for two reasons: first, because these laws deny the vote to a class of individuals who are disproportionately nonwhite; and second, because these laws dilute the voting strength of minority communities. Nonwhites are substantially more likely

than whites to be disenfranchised as criminals; and states' justifications for disenfranchising criminals are highly tenuous. [FN37] Part III concludes that the Voting Rights Act is the most effective weapon against criminal disenfranchisement that critics of the practice have at their disposal.

I. THE STATE OF THE LAW: HOW COURTS HAVE RULED ON CHALLENGES TO CRIMINAL DISENFRANCHISEMENT

According to the Supreme Court, the right to vote is fundamental because it preserves other rights. [FN38] The Constitution prohibits denial of the right to vote on the basis of race, sex, failure to pay a poll tax, and age. [FN39] Most other voting restrictions are subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. [FN40] States must show that the electoral *545 law in question promotes a compelling state interest, is narrowly tailored, and is the least restrictive method of achieving the state's interest. [FN41] Suffrage qualifications are also subject to challenge under the Voting Rights Act, which prohibits any voting law or scheme that results in a minority group having less opportunity than other groups to participate in the electoral process. [FN42]

A. Constitutional Challenges to Criminal Disenfranchisement

In the last two decades, the Supreme Court has decided two important cases dealing with criminal offenders' constitutional right to vote. In *Richardson v. Ramirez*, in 1974, the Court declared that states may generally deprive offenders of the right to vote without violating the Fourteenth Amendment's Equal Protection Clause. [FN43] In *Hunter v. Underwood*, in 1985, the Court held that a law disenfranchising certain offenders violated the Fourteenth Amendment's Equal Protection Clause because the law was adopted with racially discriminatory intent and continued to have a disproportionate impact on nonwhite offenders. [FN44]

1. Evading Strict Scrutiny: *Ramirez* and "Other Crime"

In 1973, three California ex-felons who had been incarcerated and released from parole challenged a state law under which election officials had refused to let them register to vote. [FN45] The California Supreme Court agreed with the ex-felons that the state's disenfranchising law violated the Equal Protection Clause. [FN46] The election officials appealed to the U.S. Supreme Court, which granted certiorari and, in *Richardson v. Ramirez*, reversed the California court's ruling. [FN47]

*546 Justice Rehnquist, writing for the majority in *Ramirez*, stated that section 1 of the Fourteenth Amendment, which prohibits states from denying persons equal protection of the laws, must be read in light of section 2 of the amendment, which implies that states have the right to disenfranchise those who participate in "rebellion, or other crime." [FN48] Thus, the *Ramirez* majority claimed that section 1's strict scrutiny standard, which usually applies to laws that restrict the right to vote, does not apply to laws disenfranchising felons: "§ 1 ... could not have been meant to bar outright a form of disenfranchisement" which "has an affirmative sanction in § 2." [FN49]

A number of commentators, both before and since *Ramirez*, have challenged this reading of section 2. [FN50] Some have suggested that the 39th Congress added the words "or other crime" to "rebellion" only to ensure that Southern rebels could be excluded easily from the franchise during the Reconstruction period. [FN51] Justice Marshall, dissenting in *Ramirez*, noted that the majority's reading of section 2 of the Fourteenth Amendment as a limitation on section 1 could lead to "absurd results," including allowing states to disenfranchise citizens for seduction under promise to marry, conspiracy to operate a motor vehicle without a muffler, vagrancy, or breaking a water *547 pipe. [FN52] "Even a jaywalking or traffic conviction could conceivably lead to disenfranchisement, since § 2 does not differentiate between felonies and misdemeanors," Justice Marshall added. [FN53]

Still, unless the Supreme Court reverses its holding in *Ramirez*, lower courts must continue to defer to the majority of the Court's reading of "other crime." As a result, constitutional challenges to criminal disenfranchisement as such will almost certainly fail. Constitutional claims alleging the racially discriminatory intent of criminal disenfranchisement laws should have a greater chance of success.

2. Race and Criminal Disenfranchisement: Underwood and the Need to Show Intent

In *Hunter v. Underwood*, the Supreme Court put an important limitation on the "other crime" doctrine established in *Ramirez* by unanimously declaring that "§ 2 was not designed to permit ... purposeful racial discrimination ... which otherwise violates § 1 of the Fourteenth Amendment." [FN54] The plaintiffs in *Underwood* were two men, one black and one white, who had been "blocked from the voting rolls" by Alabama election officials because each had been convicted of presenting a worthless check, a misdemeanor of "moral turpitude" according to the Alabama attorney general. [FN55] The plaintiffs brought an action in federal court claiming that section 182 of the Alabama Constitution, under which they had been disenfranchised, violated the Fourteenth Amendment's Equal Protection Clause because it was adopted with intent to discriminate against blacks and was fulfilling its intended effect. [FN56] As one delegate to the 1901 Alabama constitutional convention that adopted *548 the disputed section had claimed, "[e]verybody knows that this Convention has done its best to disfranchise the negro in Alabama." [FN57]

The Supreme Court, in another opinion by Justice Rehnquist, affirmed the Court of Appeals' ruling that found substantial evidence that discriminatory intent was a motivating factor of section 182, that the provision had a discriminatory impact, and that it would not have been adopted absent the impermissible intent. [FN58] This last point is particularly important for plaintiffs who are considering challenging the racially discriminatory intent of a criminal disenfranchisement law--the Court noted that once a plaintiff shows that racial discrimination was a "substantial" or "motivating" factor behind the enactment of a challenged law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted had there been no racially discriminatory purpose. [FN59]

For the litigation strategy outlined in this Note, *Ramirez* and *Underwood* are most significant as precedential guideposts that should direct constitutional challenges of criminal disenfranchisement toward equal protection or Fifteenth Amendment claims that specifically allege racially discriminatory intent. [FN60] As *Underwood* showed, disenfranchising laws can be successfully challenged under the Fourteenth Amendment if plaintiffs establish that the laws were adopted with intent to discriminate on the basis of race. Though many plaintiffs and their attorneys might suppose that they cannot meet the burden of proving that a disenfranchising provision was adopted with discriminatory intent, the introduction to this Note shows that such a history of discriminatory *549 purpose is apparent in many Southern states. [FN61] More importantly, under the Voting Rights Act, plaintiffs challenging criminal disenfranchisement no longer have to meet the burden of establishing discriminatory intent. [FN62]

B. Challenging Criminal Disenfranchisement Under the Voting Rights Act

The Voting Rights Act was adopted to buttress the Fifteenth Amendment [FN63] and remedy what the Supreme Court has called the "insidious and pervasive evil" [FN64] of racial discrimination in American voting. [FN65] The Act has led to the disqualification of many voting barriers and to a remarkable increase in black voting and representation. [FN66]

*550 1. Section 2 and the Results Test

The success of the Voting Rights Act has not come easily. Faced with a continuing lack of political equality for nonwhites, as well as narrow interpretations of the Act by the Supreme Court, Congress has repeatedly amended the Act to increase minority voting strength. [FN67] In 1980, for example, the Supreme Court held in *City of Mobile v. Bolden* [FN68] that, as in constitutional claims, proof of discriminatory intent was required to show a violation of section 2 of the Voting Rights Act. [FN69] Recognizing that the intent standard was "unacceptably difficult" for plaintiffs in most voting rights cases to meet, Congress responded by amending section 2 of the Act in 1982 "to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*." [FN70] Congress formally enacted a results test, affirming that a plaintiff did not need to "demonstrate that the challenged election law or procedure was designed or maintained for a discriminatory

purpose." [FN71] Under the results test, an election law violates the Act if, under the "totality of the circumstances," the law results in a protected minority group [FN72] having "less opportunity than other members of the electorate to *551 participate in the political process and to elect representatives of their choice." [FN73]

2. Misconstruing the Results Test: A Case Study

Only one federal case challenging criminal disenfranchisement has been brought under the Voting Rights Act since Congress amended the Act in 1982. [FN74] In 1984, Charles Wesley, a 27-year-old black ex-Marine, brought suit in federal district court challenging a Tennessee law that deprived him of his right to vote while he served a plea-bargained suspended sentence. [FN75] A public interest law project, the Natural Rights Center, joined Wesley as a plaintiff in the case. [FN76] The district court dismissed the plaintiffs' case for failure to state a claim. It reached this unfortunate conclusion by misinterpreting the Act's results test, essentially reverting to the intent standard used in constitutional claims. [FN77]

The district court in *Wesley v. Collins* stated that the plaintiffs' claim was insufficient as a matter of law because the plaintiffs had not fulfilled three requirements that the court purported to derive from the Act. First, the court required a showing of disparate racial impact. The plaintiffs fulfilled this requirement. [FN78] Second, the court looked to the "totality of the circumstances" in the case, claiming that "it is only in the context of historical and social forces that a challenged practice can be determined to 'result' in discriminatorily diminished access to the political process." [FN79] The plaintiffs also succeeded in meeting the court's "totality of the circumstances" burden. [FN80] Third, the court insisted that "a causal connection must be established between the indicia of historically-rooted discrimination and the Tennessee statute disenfranchising felons." [FN81] Here, according to the district court, the plaintiffs failed: "[T]he nexus between discriminatory exclusion of blacks from the political process and disenfranchisement of felons simply cannot be drawn.... *552 [N]o violation occurs ... [because the law does not bear] the taint of historically-rooted discrimination." [FN82]

The Wesley district court's misapplication of the results test occurred largely because of the third requirement. The plaintiffs' fulfillment of both the first and second requirements should have provided sufficient evidence to establish a *prima facie* violation of the Voting Rights Act. As the court itself acknowledged, "a finding that a state practice imposes a disproportionate impact on blacks and occurs in a social context characterized by a history of discrimination against blacks at the polls, warrants the rebuttable presumption that a violation of the Voting Rights Act has occurred." [FN83] However, the district court's creation of an additional requirement--to prove a causal connection between the history of racial discrimination in Tennessee and the state's disenfranchising statute--essentially required the plaintiffs to show intent, contradicting both the language and the legislative history of section 2 of the Voting Rights Act. [FN84]

For this reason alone, the Sixth Circuit should have reversed the lower court's decision on appeal. [FN85] Additionally, the errors of the district court's decision should have been clear because, just a few months after the district court ruling, the Supreme Court declared in *Hunter v. Underwood* that criminal disenfranchisement laws had been adopted in parts of the South with racially discriminatory intent. [FN86] The Sixth Circuit acknowledged *Underwood*, as well as the plaintiffs' claim that, if their case had not been dismissed, discovery might have produced evidence of intent to discriminate in the history of Tennessee's disenfranchisement provision similar to that which was found in Alabama by the plaintiffs in *Underwood*. However, the Court of Appeals rejected the plaintiffs' request for discovery as "a fishing expedition for unspecified evidence." [FN87] The appellate court reiterated the district court's reasoning and held that the state had shown a "compelling rationale for enacting the statute here in issue." [FN88] Even if this last statement were true, the Senate legislative history of the 1982 amendment to the Voting Rights Act emphasizes 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." [FN89]

*553 II. THE PROMISE OF THE VOTING RIGHTS ACT FOR CHALLENGES TO CRIMINAL DISENFRANCHISEMENT

The sponsors of the 1982 amendment to the Voting Rights Act may not have foreseen challenges to criminal disenfranchisement based on the results test in section 2 of the Act. [FN90] Yet, the results test was meant to apply to all conceivable voting regulations including, of course, absolute disqualification from the electorate. [FN91] In 1991, the Supreme Court reiterated that the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." [FN92] As Part I of this Note explained, there is no clear precedent governing challenges to criminal disenfranchisement laws under the Act's results test because in the one case where plaintiffs made such a claim, the district court misapplied the results test and dismissed the plaintiffs' case before trial. Furthermore, since the results test was introduced in 1982, much of the general case law in the area of the Voting Rights Act has become muddled. [FN93] This Note clarifies the standards applicable to challenges brought under the Act by looking closely at the Act's *554 language and legislative history. Section 2 expressly prohibits any electoral qualification that denies or abridges voting rights in a manner that results in members of 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." [FN94] Courts that apply the Act consistently with the Act's language and legislative history should find that criminal disenfranchisement laws violate the Act in two ways. First, these laws deny the vote to a class of individuals who are disproportionately nonwhite. Second, these laws dilute (or abridge) the voting strength of minority communities. Vote denial can be shown by statistical data. Vote dilution can be established by statistical data in conjunction with evidentiary factors such as the tenuousness of the state's justifications for criminal disenfranchisement.

A. Distinguishing Vote Denial from Vote Dilution

The Voting Rights Act's results test has expanded the scope of the Act dramatically. [FN95] At its inception in 1965, the Act was used almost exclusively to challenge election practices that caused outright vote denial, such as literacy tests and poll taxes. [FN96] In recent years, though, courts and voting rights *555 advocates have been preoccupied with the "political thicket" [FN97] of vote dilution--so much so that they have largely neglected the denial of the vote to a class of millions of criminal offenders who are overwhelmingly nonwhite. [FN98] Minority vote dilution should continue to be challenged vigilantly--in fact, as Section B of this Part suggests, dilution claims should be brought against criminal disenfranchisement laws. But the recent, intensive focus of dilution claims on the drawing of electoral district boundaries should not eclipse extant cases of outright vote denial that disproportionately affect minorities. [FN99]

Court opinions often do not distinguish between vote denial and vote dilution, and courts have applied vote dilution standards to cases involving vote denial. [FN100] But, in challenges to criminal disenfranchisement, there are good reasons to allege both vote denial and vote dilution, and to do so in separate counts. For example, scholars across the political spectrum agree that vote denial is, and should be, covered by the Act, but not all of these scholars are willing to say the same about vote dilution. [FN101] Also, in adjudicating vote denial claims, courts can usually ascertain the harmful results of the challenged law directly, as well as the way in which that law affects minorities, because *556 the inability to vote is itself the prohibited result. [FN102] In dilution cases, since the plaintiffs are still allowed to vote, section 2's "totality of the circumstances" analysis is more relevant because courts must rely on indirect evidentiary factors to measure the harmful results of the challenged election scheme. [FN103] Vote dilution claims may nevertheless be advantageous because the plaintiffs in these claims--members of the minority community at large--may have more resources than do disenfranchised offenders, and the plaintiffs also do not suffer from the stigma of having been convicted of crimes.

B. Establishing Vote Denial

A vote denial claim can be brought by one or more nonwhite disenfranchised offenders. [FN104] These plaintiffs should be able to establish that "on account of their race" [FN105]--that is, because they are not white--they are more likely than other citizens to be disenfranchised, and thus they have less opportunity than other citizens to participate in the electoral process. The disparate racial impact of disenfranchising laws can be demonstrated simply with statistics that show the race of disenfranchised offenders in the state in question. [FN106] National

figures indicate that minorities make up an inordinately large percentage of all convicted offenders and, consequently, of those who are *557 denied the right to vote. [FN107] In 1988, blacks made up 41% of all persons convicted of felonies in state courts. [FN108] State statistics should provide plaintiffs with formidable evidence of the disproportionate impact of specific criminal disenfranchisement laws on nonwhite incarcerated and nonincarcerated offenders.

For example, in Illinois, where incarcerated offenders are denied the vote, 63% of prisoners are black. [FN109] Yet, blacks make up only 15% of Illinois's general population. [FN110] In New York, where offenders on parole are prohibited from voting, 49% of parolees are black and 31% are Hispanic. [FN111] At the same time, blacks make up 16%, and Hispanics 12%, of the total population of New York. [FN112] In Florida, where offenders on probation are disenfranchised, 26% of probationers are black, and approximately 50% are Hispanic. [FN113] Florida's general population is 14% black and 12% Hispanic. [FN114] Although comparable figures do not exist for ex-offenders, there is a direct correlation between the racial composition of incarcerated and nonincarcerated populations on the one hand, and ex-offenders on the other. Thus, a plaintiff can challenge a state's law disenfranchising ex-offenders using *558 statistics showing that a disproportionate share of the state's incarcerated and nonincarcerated offenders are nonwhite.

The Senate legislative history of the 1982 amendment to the Voting Rights Act indicates that courts should consider statistical data of the sort presented above: "If the plaintiff proceeds under the 'results test,' then the court would assess the impact of the challenged structure or practice on the basis of objective factors." [FN115] The foregoing statistics are objective factors that directly demonstrate the disproportionate impact of disenfranchisement laws on nonwhites. Therefore, these statistics, on their own, should provide plaintiffs with adequate evidence to satisfy section 2's "totality of the circumstances" analysis. [FN116]

C. Establishing Vote Dilution

Vote dilution claims are conceptually distinct from vote denial claims because dilution claims focus on the overall harm done to a minority group's voting strength. [FN117] Plaintiffs who are not disenfranchised can bring a Voting Rights Act claim alleging that a criminal disenfranchisement law dilutes minority voting power. For example, members of a black community may bring a class action suit challenging a state's criminal disenfranchisement law on the grounds that, even though the law does not deny the vote to any of them as individuals, the law disproportionately weakens the voting strength of their community because blacks are five times as likely as whites to be disenfranchised under the law. [FN118]

Unlike plaintiffs alleging vote denial, plaintiffs alleging vote dilution claim that they have been indirectly harmed by disenfranchisement laws. Therefore, vote dilution plaintiffs may need more than just statistical data to satisfy the "totality of the circumstances" analysis. Toward that end, vote dilution plaintiffs can supplement their statistical evidence by offering evidence of the *559 existence of factors enumerated by the Senate when it amended the Voting Rights Act in 1982. [FN119] These "Senate factors" include: (1) a history of official discrimination in voting; (2) the existence of racially polarized voting; (3) use of certain election schemes, including large districts, majority vote requirements, and anti-single-shot provisions; (4) denial of access to the candidate slating process; (5) discrimination in education, employment, and health care that hinders the ability of minorities to participate in the political process; (6) racial appeals in political campaigns; (7) minority electoral success; (8) elected officials' failure to respond to minority needs; and (9) whether the policy underlying the voting practice is "tenuous." [FN120] Plaintiffs are free to use all, some, or none of these evidentiary factors in the course of trying to establish that the challenged law dilutes minority voting power. [FN121] The relevant factors will vary depending on the nature of the case, though some factors have been found to be generally revealing and useful. [FN122] Lack of minority electoral success, for example, is almost always cited by plaintiffs bringing dilution claims because it suggests that the minority community's voting strength is weaker than it should be and has been diminished by the challenged law. Plaintiffs also routinely point to evidence of racial bloc voting to show that minority electoral success will only come about if minority vote dilution is remedied, because the white majority generally will not vote for minority candidates. In cases challenging criminal disenfranchisement,

minority electoral success and racial bloc voting are again relevant, but two other Senate factors may be particularly persuasive: the history of racial discrimination and, *560 even more, the tenuousness of the state's justifications for disenfranchisement. [FN123]

1. History of Racial Discrimination in Voting

Plaintiffs in most states should be able to prove a general history of racial discrimination in voting, since blacks and other minorities were denied the vote for a substantial portion of this nation's history. Also, as the introduction to this Note suggests, plaintiffs in many parts of the South should be able to establish that their states specifically adopted criminal disenfranchisement laws with racial animus. Thus, the racially discriminatory intent of many Southern states' criminal disenfranchisement laws is relevant not only to constitutional claims, as mentioned in Part I, but as an evidentiary factor in vote dilution claims under the Voting Rights Act. [FN124]

2. Tenuousness of State Justifications for Disenfranchisement

At the evidentiary stage of a Voting Rights Act claim, a state's justification for an electoral qualification is relevant only if it is tenuous. A state's interest in disenfranchisement, or lack thereof, is a factor that can only work to the advantage of the plaintiff. In other words, a state cannot defend a challenge to a voting restriction under the Act simply by claiming that the restriction is justifiable. In the case of criminal disenfranchisement laws, this distinction may not be important because disenfranchising laws are difficult to justify. [FN125] Two decades ago, the Ninth Circuit observed that "[c]ourts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes." [FN126] In 1981, the American Bar Association recommended that "[p]ersons convicted of any offense should not be deprived of the right to vote either by law or by the action or inaction of government officials." [FN127]

*561 Disenfranchisement is most often defined as one of a number of nonpunitive civil disabilities that accompany a criminal conviction. [FN128] Proponents of this view claim that criminal disenfranchisement protects "the purity of the ballot box" in two ways. [FN129] First, it prevents offenders from voting retributively against the criminal justice officials who prosecuted and convicted them. [FN130] However, the Supreme Court has stated that it is unconstitutional for a state to fence out a class of voters because of the way they might vote. [FN131] Second, defenders of the nonpunitive view claim that offenders are more likely to commit election crimes than are other citizens and that disenfranchisement of offenders is necessary, therefore, to safeguard the integrity of voting. [FN132] But courts have noted that states already have more effective ways of deterring election fraud, including penal codes against these offenses. [FN133] Punitive justifications for criminal disenfranchisement are also weak, despite the fact that they have some historical support. [FN134] A state that *562 disenfranchises ex-convicts punishes the ex-convict not for his offense, but for his status. [FN135] He is "continuously 'guilty' of a prescribed offense ... even though he may not have exhibited criminal behavior for many years and may be completely rehabilitated." [FN136] Indeed, according to the American Bar Association, efforts to rehabilitate offenders are thwarted by "counterproductive stigmatization of exoffenders," which may increase recidivism. [FN137] Punitive disenfranchisement of incarcerated and nonincarcerated offenders is constitutionally problematic. [FN138] It also makes little theoretical sense: the same *563 "penalty" of disenfranchisement is applied to a convict spending twenty years in prison for murder and a petty thief who spent five minutes plea bargaining for probation--and the punishment itself suits neither of their crimes. Disenfranchisement may only be appropriate as a response to election crimes. [FN139] Just as a state may legitimately penalize a convicted drunk driver by revoking his driver's license, a state may arguably be justified in depriving a citizen who abuses the voting process of the right to vote. Additionally, only those who commit election offenses can be justifiably disenfranchised to meet the nonpunitive goal of protecting the ballot from future fraud.

D. Applying a Remedy

After a court finds that a violation of section 2 of the Voting Rights Act has occurred, it should, according to

Senate legislative history, "exercise its traditional equitable powers to fashion relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." [FN140] Judges have issued temporary and permanent injunctions to alter election practices, [FN141] but legislatures are also called upon to adopt new laws or procedures consistent with the court's ruling. [FN142]

In light of the varying remedies applied in Voting Rights Act cases and the faulty precedent of *Wesley v. Collins*, this Note proposes the following remedies for cases in which criminal disenfranchisement laws are held to violate section 2 of the Act. First, a court that finds that a disenfranchising law impermissibly denies minority offenders' right to vote should strike down the law and enjoin the state from disenfranchising nonwhite and white offenders alike. Nonincarcerated offenders and ex-offenders would be allowed to register and vote in the same manner as other citizens; incarcerated offenders would be allowed to vote by absentee ballot, as they now are able to do in some *564 states. [FN143] Second, a court that finds that a disenfranchising law impermissibly dilutes a minority community's voting strength should fashion a form of relief for the affected minority community that will compensate the community for the weakness imposed upon it by the violative disenfranchising law. In most cases, this will also mean striking down the disenfranchising law. [FN144]

III. CONCLUSION: THE NEED FOR A JUDICIAL SOLUTION

After *Richardson v. Ramirez*, few plaintiffs--and, more importantly, even fewer voting rights attorneys--are clamoring to attack criminal disenfranchisement in the courts. [FN145] In particular, the negative precedent established by the district court's evisceration of the results test in *Wesley v. Collins* probably has deterred plaintiffs from bringing cases against criminal disenfranchisement under the Voting Rights Act. Opponents of criminal disenfranchisement who have focused their efforts on state legislative reform have made progress, but this piecemeal, incremental reform leaves millions of offenders without the right to vote. [FN146] While federal legislation could mandate the enfranchisement of all offenders relatively swiftly, such legislation would be almost impossible to enact in America's current climate of retributive zeal against convicted criminals, including ex-offenders who have served their time. [FN147] Therefore, the most viable way to break the silence [FN148] imposed *565 upon millions of disenfranchised offenders and ex-offenders is through vigorous litigation under the Voting Rights Act. [FN149]

*566 In part, this litigation strategy is a belated response to the intentionally racist use of criminal disenfranchisement throughout the South a century ago. In practical terms, it is a plan that relies on the fact that criminal disenfranchisement laws have a disproportionate impact on minority offenders. But the goal of this strategy, as stated at the outset of this Note, is not to make disenfranchisement laws "race neutral" or even primarily to reverse the disenfranchisement of nonwhite offenders. Rather, the goal is to harness the power of the Voting Rights Act's results test to attack criminal disenfranchisement laws where they are most vulnerable. If construed properly, the Act could go a long way toward abolishing criminal disenfranchisement and restoring the right to vote to a class of millions of powerless citizens.

One of these citizens, an inmate in a New York state prison, recently wrote a letter to New York City's *Daily News* explaining why he and 300 other prisoners are seeking the right to vote:

We believe that the law that takes away a prisoner's right to vote has a crippling effect on so-called minority communities' attempts at political empowerment.... So-called minorities are more likely than whites to be incarcerated when convicted of the same crimes.... Allowing prisoners to vote would be a plus for black and Hispanic ambitions--and maybe that is why it is not allowed. Moreover, it has rehabilitative attributes, as it gives the prisoner a sense of belonging, instead of confirming isolationist feelings towards society. We believe the [New York] Legislature's decision to deny the incarcerated the right to vote ... is unfair and constitutionally invalid. Given the findings of racial discrimination inherent in the criminal justice mechanism at the accusatory, trial, and punishment phases, to continue to deny prisoners the right to vote perpetuates racial oppression and exploitation. [FN150]

[FN1]. For a brief history of the Southern constitutional conventions, see chapters 6 and 7 of J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* (1974) [hereinafter KOUSSER, *SOUTHERN POLITICS*] and chapter 12 of C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913* (1951). To diminish black voting strength, Southern conservatives had already used violence, voting fraud, corruption, gerrymandering, at-large elections, and statutory suffrage restrictions. See Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING* 7, 10 (Bernard Grofman & Chandler Davidson eds., 1992); Armand Derfner, *Racial Discrimination and the Right To Vote*, 26 *VAND.L.REV.* 523, 534 (1973). Blacks were largely excluded from voting on whether to hold the new Southern constitutional conventions and from becoming delegates to them. J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in *CONTROVERSIES IN MINORITY VOTING*, supra, at 135, 135 [hereinafter Kousser, *Two Reconstructions*]; WOODWARD, supra, at 337. "Blacks" in this context refers only to black men, as women were not guaranteed the right to vote until 1920. U.S. Const. amend. XIX.

[FN2]. 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA 3076 (1906) [hereinafter VIRGINIA PROCEEDINGS] (statement of Carter Glass, delegate). Glass claimed that Virginia's new suffrage plan would "eliminate the darkey as a political factor in this State ... [allowing] for the complete supremacy of the white race." Id. See PAUL LEWINSON, *RACE, CLASS, AND PARTY* 84-86 (Russell & Russell, Inc. 1963) (1932) for discussion of the open racial discrimination at these conventions.

[FN3]. See WOODWARD, supra note 1, at 331-32.

[FN4]. By 1908, all 11 ex-Confederate states had adopted the poll tax, "and the Afro-American was always its chief intended victim." J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in *MINORITY VOTE DILUTION* 27, 34 (Chandler Davidson ed., 1984) [hereinafter Kousser, *Undermining*].

[FN5]. Understanding clauses required voters to show that they understood a given section of the state constitution. If the discriminatory intent of such a discretionary clause was not already obvious, a statement from a delegate to the Virginia constitutional convention made it so: "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." VIRGINIA PROCEEDINGS, supra note 2, at 2972 (statement of William A. Dunning, delegate); see also KIRK H. PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* 218 (1918); WOODWARD, supra note 1, at 332 ("The obvious subterfuge of the understanding clause was offensive to men of conscience.").

[FN6]. Grandfather clauses guaranteed the franchise to men who had voted--or whose fathers or grandfathers had voted--before the Civil War, thus preventing the newly adopted "race-neutral" provisions from disenfranchising poor or uneducated whites, whose votes the Southern conservatives sought. WOODWARD, supra note 1, at 332-35.

[FN7]. The Fifteenth Amendment was ratified in 1870. "The 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." U.S. Const. amend. XV.

[FN8]. See KOUSSER, *SOUTHERN POLITICS*, supra note 1, at 141; VIRGINIA PROCEEDINGS, supra note 2, at 3076 (noting that aim of Virginia convention was, according to one delegate, "to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution") (statement of Carter Glass, delegate); LEWINSON, supra note 2, at 83-84 n.* (discussing Southern delegates' fear that federal courts might strike down their new constitutions for violating Fifteenth Amendment).

[FN9]. Karen M. Arrington, *The Struggle To Gain the Right To Vote: 1787- 1965*, in *VOTING RIGHTS IN AMERICA* 25, 30 (Karen M. Arrington & William L. Taylor eds., 1992).

[FN10]. *Id.*

[FN11]. Kousser, *Two Reconstructions*, *supra* note 1, at 140, Table I.

[FN12]. Kousser, *Undermining*, *supra* note 4, at 35. Kousser claims that ostensibly neutral laws excluding criminals from the electorate provided white supremacists with "a critical line of defense in case other parts of the suffrage plan did not withstand attack." *Underwood v. Hunter*, 730 F.2d 614, 619 n. 9 (11th Cir.1984) (citing deposition of historian J. Morgan Kousser).

[FN13]. The Voting Rights Act of 1965, 42 U.S.C. § 1973b(a)-(d), banned literacy tests on the ground that these tests had at times been used with racially discriminatory purpose and effect. See also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding Voting Rights Act, including its prohibition of literacy tests). In *Harman v. Forssenius*, 380 U.S. 528, 540-54 (1965) (prohibiting poll tax as prerequisite to voting in federal election), the Supreme Court recognized that poll taxes were historically used to disenfranchise blacks. See U.S. Const. amend. XXIV (disallowing denial of the vote in federal elections for failure to pay poll tax); see also *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (prohibiting poll tax as prerequisite to voting in state election). The Supreme Court invalidated understanding clauses in *Louisiana v. United States*, 380 U.S. 145 (1965); grandfather clauses in *Lane v. Wilson*, 307 U.S. 268 (1939), *Guinn v. United States*, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915); and white primaries in *Terry v. Adams*, 345 U.S. 461 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944). The Supreme Court also struck down property tests in *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969), without directly addressing the way in which these laws had been used to disenfranchise blacks disproportionately.

[FN14]. "Incarcerated offenders" refers to convicted offenders who are under correctional supervision in state or federal prisons. Maine, Massachusetts, and Vermont are the only states that generally allow incarcerated offenders to vote. Me. Const. art. II, § 1; Mass.Gen.Laws Ann. ch. 51, § 1, ch. 55, § 42 (West 1991) (disenfranchisement only for election offenses); Vt.Stat. Ann. tit. 28, § 807 (1986) (voting allowed by absentee ballot during incarceration). Responding to a 1989 survey on inmate voting policy in the 50 states, a Maine official said, "Inmates are allowed and encouraged to vote. The prisons in Maine support inmate voting rights." Survey, *Corrections Compendium*, Apr. 1989, at 10. In fact, Maine allows inmates to vote by absentee ballot and permits election officials to visit the prisons to facilitate inmate voting. *Id.* By way of comparison, the former West Germany allowed most common criminals to vote by absentee ballot, and all prisoners in Sweden are permitted to vote. James B. Jacobs, *New Perspectives on Prisons and Imprisonment* 28 (1983).

In October 1992, the U.S. Department of Justice conducted a survey of civil disabilities of convicted felons and reported that "in a number of jurisdictions there was no general agreement as to how the law should be interpreted and applied, and that the law in any event was continually being amended and/or reinterpreted." OFFICE OF THE PARDON ATTORNEY, *CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY*, at "Disclaimer" (1992) [hereinafter *CIVIL DISABILITIES*]. Similarly, the information on different states' criminal disenfranchisement policies provided throughout this Note reflects current law as indicated by state constitutions, and state codes or statutes; actual state practices may vary from the written law.

[FN15]. "Nonincarcerated offenders" refers to convicted criminals under the supervision of a state or federal correctional system who are not incarcerated, including those who are on probation and parole, as well as those who receive suspended sentences. Because plea bargaining and prison overcrowding are so common, nonincarcerated offenders constitute about three-quarters of all those under correctional supervision. LOUIS W. JANKOWSKI, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 1990, at 5 (Bureau of Justice Statistics, U.S. Department of Justice 1992) (62% on probation; 12% on parole). Twenty-one states disenfranchise nonincarcerated offenders who are felons or who have committed infamous crimes or other enumerated offenses. Most of these states automatically restore the right to vote to offenders who have fully completed their sentences. Including the 14 states that disenfranchise all offenders not pardoned, see *infra* note 16, there are 35 states that disenfranchise nonincarcerated offenders. The following state laws disenfranchise incarcerated and nonincarcerated offenders, but not ex-offenders: Alaska Stat. § 15.05.030 (1988), Alaska Stat. §

(Cite as: 103 Yale L.J. 537, *566)

33.30.241 (1986); Ark. Const. art. III, §§ 1-2, amended by Ark. Const. amend. 51, § 11; Colo.Rev.Stat. Ann. § 1-2-103(4) (West Supp.1992); Conn.Gen.Stat. § 9-46(a) (1993); Del. Const. art. V, § 2 (convicted felon's right to vote is restored two years after expiration of sentence); Del. Const. art. V, § 7 (offenders convicted of certain election offenses prohibited from voting for ten years following completion of sentence); Del.Code Ann. tit. 15, § 1701 (1981) (same); Ga. Const. art. II, § 1, para. 3(a); Ga.Code Ann. § 21-2- 219(a)(5)(1) (1993) (felony involving moral turpitude); Idaho Code § 18-310 (Supp.1993); Kan.Stat. Ann. § 21-4615(1), (2) (1988); La. Const. art. I, §§ 10, 20; La.Rev.Stat. Ann. § 18:102(1) (West Supp.1993); Minn. Const. art. VII, § 1; Minn.Stat. Ann. § 201.014, subd. 2(a) (West 1992); Minn.Stat. Ann. § 609.165, subd. 1 (West 1987); Mo.Rev.Stat. §§ 115.133(2)(1)-(2), 561.026(1) (Supp.1993); Mo.Rev.Stat. §§ 115.133(2)(3), 561.026(2) (person convicted of an election offense is forever disqualified from voting) (Supp.1993); Neb.Rev.Stat. §§ 29-112, 29-2264 (1989); Neb.Rev.Stat. § 83-1,118(5) (1987); N.J.Stat. Ann. §§ 2C:51-3, 19:4-1(8) (West 1982); N.Y.Elec.Law § 5- 106(1)-(5) (McKinney 1978); N.C. Const. art. VI, § 2(3); N.C.Gen.Stat. § 13-1 (1992); Okla.Stat. Ann. tit. 26, §§ 4-101(1), 4-120 (West 1991 & Supp.1993); R.I. Const. art. 2, § 1; S.C.Code Ann. § 7-5- 120(4)(b) (Law.Co-op.Supp.1992); Tex. Const. art. VI, § 1; Tex.Elec.Code Ann. § 11.002(4)(A) (West Supp.1993) (convicted felon's right to vote is restored two years after discharge of sentence); W.Va. Const. art. 4, § 1; W.Va.Code § 3-1-3 (1990); Wis.Stat. Ann. § 6.03(1)(b) (West Supp.1992); Wis.Stat. Ann. § 304.078 (West 1991).

[FN16]. "Ex-offenders" refers to convicted criminals who have been fully released from the supervision of a state or federal correctional system. In 14 states, felons or offenders who commit infamous crimes or other enumerated offenses are disenfranchised for life unless the state pardons them or otherwise restores their voting rights. The following state laws disenfranchise ex-offenders, as well as incarcerated and nonincarcerated offenders: Ala. Const. art. VIII, § 182 (but see *infra* notes 54-59, striking down the provision in section 182 disenfranchising offenders convicted of crimes of "moral turpitude"); Ariz. Const. art. VII, § 2; Ariz.Rev.Stat. Ann., §§ 13-912, 16-101(5) (1992) (right to vote automatically restored for first-time offenders after completion of sentence); Fla. Const. art. VI, § 4; Fla.Stat. Ann. ch. 944.292 (Harrison 1991); Iowa Const. art. II, § 5 (infamous crime); Ky. Const. § 145 (felony, high misdemeanor, treason, bribery in an election); Md. Const. art. I, § 2 (larceny or other infamous crime); Md. Ann.Code art 33, §§ 3-4 (1990) (right to vote automatically restored for first-time offenders following completion of sentence); Miss. Const. Ann. art. 12, § 241 (enumerated offenses); Nev. Const. art. II, § 1; N.M. Const. art. VII, § 1; Tenn. Const. art. I, § 5 (infamous crime); Tenn.Code Ann. § 2-19-143 (1985); Tenn.Code Ann. § 40-20-112 (1990); Utah Const. art. IV, § 6 (treason and election offenses); Va. Const. art. II, § 1; Va.Code Ann. § 24.1-42 (Michie 1985); Wash. Const. art. VI, §§ 1, 3 (infamous crime); Wyo.Stat. § 6-10-106 (1988).

[FN17]. This Note estimates that at least four million Americans are denied the right to vote because of their status as criminal offenders or ex-offenders. This estimate is based on the following calculations: In 1991, the most recent year for which the following information is available, federal and state prisons held 824,133 prisoners. TRACY J. SNELL, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1991, at 52 (Bureau of Justice Statistics, U.S. Department of Justice 1993). Excluding prisoners in Maine, Massachusetts, and Vermont—who retain the right to vote, see *supra* note 14--812,281 offenders were, in 1991, incarcerated in states that disenfranchise incarcerated offenders. In 1990, the most recent year for which the following information is available, 2,522,125 offenders were on probation and 456,803 offenders were on parole; 1,627,118 of the probationers and 298,445 of the parolees were under the jurisdiction of states that disenfranchise nonincarcerated offenders. See JANKOWSKI, *supra* note 15, at 25, 117; and see generally *supra* note 15 for a list of states that disenfranchise nonincarcerated offenders. Therefore, an estimated 1,925,563 nonincarcerated offenders on probation and parole are denied the right to vote (not including other nonincarcerated offenders, such as those serving suspended sentences). While it is impossible to tabulate precisely the number of ex-offenders in the United States, let alone the number who are disenfranchised, very rough estimates can be made. Using a conservative formula, a 1987 study calculated that there were more than 14 million convicted felons in the United States. Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State*

(Cite as: 103 Yale L.J. 537, *566)

Statutes, FELONY PROBATION, Sept. 1987, at 52 n. 1. Fourteen states disenfranchise non-pardoned offenders for life. See *supra* note 16. Although these states have relatively small total populations, six of these states are in the South, where a disproportionately large percentage of all Americans under correctional supervision reside. See JANKOWSKI, *supra* note 15, at 5 (noting that Southern states account for 39% of total U.S. adult population under correctional supervision). The conservative estimation that disenfranchised ex-offenders make up one-tenth of the total number of convicts supports the claim that there are about 1.4 million disenfranchised ex-offenders in the United States. Therefore, the total number of disenfranchised offenders--including those who are incarcerated, nonincarcerated, and ex-offenders--is approximately 4.1 million.

[FN18]. See *infra* notes 106-14 and accompanying text for statistical data on the percentage of disenfranchised offenders who are nonwhite.

[FN19]. According to an early historical account, Mississippi's 1890 constitutional convention "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." PORTER, *supra* note 5, at 210. "The Mississippi Plan as the American Way" is the title of one chapter of C. Vann Woodward's history of the era. See WOODWARD, *supra* note 1, at 321-49; see also *id.* at 334 ("State conventions borrowed freely from each other...."). Disenfranchisement of blacks occurred to some extent in at least 11 other states in the region: South Carolina, Louisiana, North Carolina, Alabama, Virginia, Georgia, Oklahoma, Tennessee, Florida, Arkansas, and Texas. *Id.* at 321; see also PORTER, *supra* note 5, at 191-227.

[FN20]. According to the Supreme Court of Mississippi, blacks were more likely than whites to be "convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy." *Ratliff v. Beale*, 74 Miss. 247, 265-66 (1896).

[FN21]. *Id.* at 266-67 (emphasis added). In *Williams v. Mississippi*, 170 U.S. 213 (1898), a black offender convicted by an all-white jury challenged the disenfranchisement provision of the Mississippi Constitution, alleging that blacks were excluded from the jury that tried him because of intentional disenfranchisement (a citizen barred from voting could not be a juror in Mississippi). *Id.* at 214. The U.S. Supreme Court acknowledged the racist intent illustrated by the Mississippi Supreme Court in *Ratliff* but dismissed the claim, stating that the Mississippi disenfranchisement laws "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them." *Id.* at 225.

[FN22]. See Kousser, *Undermining*, *supra* note 4, at 34-35; PORTER, *supra* note 5, at 208-27; John C. Rose, *Negro Suffrage: The Constitutional Point of View*, 1 AM.POL.SCI.REV. 17, 25-27 (1906).

[FN23]. FRANCIS B. SIMPKINS, *PITCHFORK BEN TILLMAN* 297 (1944).

[FN24]. JIMMIE F. GROSS, *ALABAMA POLITICS AND THE NEGRO, 1874-1901*, at 244 (1969). Burns, a justice of the peace, also wanted to disenfranchise "those who are bastards or loafers or who may be infected with any loathsome or contagious disease." MALCOLM C. MCMILLAN, *CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798- 1901*, at 275 n. 76 (1955).

[FN25]. See Kousser, *Undermining*, *supra* note 4, at 45 n. 34. The inclusion of miscegenation as a disenfranchising crime in some states provides further evidence of the racially discriminatory intent of these laws. *Id.* at 35.

[FN26]. An 1899 publication of the American Negro Academy maintained:

The crimes mentioned as disqualifying [sic] 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 disfranchising 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.

(Cite as: 103 Yale L.J. 537, *566)

JOHN L. LOVE, *THE DISFRANCHISEMENT OF THE NEGRO* 16 (1899). Seven years later, an article on black suffrage in the first volume of *The American Political Science Review* included the following observation about the selective uses of criminal disenfranchisement:

In South Carolina a man convicted of fornication or adultery is disfranchised for life. In Maryland the former is not punishable at all, and a ten dollar fine is the maximum penalty for the latter. It is possible that the enumeration of such offenses as fornication, adultery, bigamy, and wife-beating among the crimes which work a forfeiture of citizenship may have been inspired, in part at least, by the belief that they were offenses to the commission of which negroes were prone, and for which negroes could be much more readily convicted than white men.

Rose, *supra* note 22, at 25 (footnotes omitted).

[FN27]. See, e.g., Katharine I. Butler, *Denial or Abridgment of the Right To Vote: What Does It Mean?*, in *THE VOTING RIGHTS ACT* 44, 45 (Lorn S. Foster ed., 1985) ("[V]ague restrictions ... for conviction of certain crimes served as not-so-subtle means to continue to disfranchise blacks...."); John H. Franklin, "Legal" Disfranchisement of the Negro, 26 *J. NEGRO EDUC.* 241, 245 (1957), reprinted in 6 *AFRICAN AMERICANS AND THE RIGHT TO VOTE* 207, 211 (Paul Finkelman ed., 1992) (noting that South Carolina disenfranchised persons convicted of certain crimes, "who were invariably convicted Negroes"); BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 9 (1992) ("[T]he list of disfranchising crimes was expanded to include offenses believed to be committed more frequently by blacks.").

[FN28]. 471 U.S. 222 (1985).

[FN29]. *OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901*, at "Second Day" (1901) [hereinafter *ALABAMA CONVENTION*] (statement of John B. Knox).

[FN30]. Eight years before, in 1977, a federal court had struck down another provision of the Alabama Constitution disenfranchising those convicted of wife-beating. The court held that the law unconstitutionally classified offenders based on their gender: "[T]he [male] plaintiff has been denied the right to vote because of a conviction for assault and battery against his spouse. Yet, women who are convicted of assault and battery against their spouses do not lose their right to vote." *Hobson v. Pow*, 434 F.Supp. 362, 366 (N.D.Ala.1977). In fact, wife-beating provisions were often adopted with the intent of discriminating against blacks. See *supra* notes 24-25 and accompanying text.

In *Allen v. Ellisor*, in 1981, the Fourth Circuit remanded a case on appeal so that a district court could consider a plaintiff's allegations that a South Carolina law disenfranchising criminal offenders was, like the Alabama law struck down four years later in *Underwood*, adopted with a racially discriminatory purpose. *Allen v. Ellisor*, 664 F.2d 391, 399 (4th Cir.1981) (en banc); see also *id.* at 401 (Murnaghan, J., concurring) (noting that "[r]ace is not a crime"); *id.* at 404-05 (Winter, J., dissenting) (citing historical material suggesting that criminal disenfranchisement laws were tailored in South Carolina to disproportionately affect blacks). However, the Supreme Court vacated the case in light of a change to the challenged statute. *Allen v. Ellisor*, 454 U.S. 807, vacating 664 F.2d 391 (4th Cir.1981) (en banc).

[FN31]. Pub.L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971-1073ff-6 (1986 & Supp.1993)).

[FN32]. See *infra* note 71 and accompanying text.

[FN33]. See *infra* notes 72-73 and accompanying text.

[FN34]. *Underwood* was already being litigated when Congress amended the Voting Rights Act in 1982. *Underwood v. Hunter*, 604 F.2d 367 (5th Cir.1979). In the one case in which a criminal disenfranchisement law was challenged under the amended Voting Rights Act, the court misread the Act, placing an unwarranted burden

(Cite as: 103 Yale L.J. 537, *566)

of proof on the plaintiffs. *Wesley v. Collins*, 605 F.Supp. 802 (M.D.Tenn.1985), *aff'd*, 791 F.2d 1255 (6th Cir.1986). For a discussion of the case, see *infra* notes 74-89 and accompanying text. One reason that the Voting Rights Act has not been applied more vigorously to criminal disenfranchisement is that recently voting rights advocates have focused their efforts on challenging districting and apportionment schemes that dilute minority votes and prevent minority candidates from being elected. See *infra* notes 95-99 and accompanying text.

[FN35]. John Buggs summarized the relationship between racial discrimination and criminal disenfranchisement well in 1974, when, as staff director of the U.S. Commission on Civil Rights, he addressed a House Judiciary Subcommittee during a hearing on ex-offenders' voting rights: "In the past, States have carefully selected disfranchising crimes in order to disqualify a disproportionate number of black voters." *Ex-Offenders Voting Rights: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 11 (1974) [hereinafter *Ex-Offenders Voting Rights*] (statement of John A. Buggs, Staff Director, U.S. Commission on Civil Rights). Most importantly, Buggs noted that, looking at the disparate modern conviction rates for whites and nonwhites, "one gets a rather shocking idea of how disfranchising prohibitions based on felony convictions affect minorities." *Id.* at 12. Thus, he concluded, "even in those States where the lists of disqualifying crimes were not selected with the purpose of disfranchising blacks ... [criminal disenfranchisement laws] established an invidious racial discrimination against minority citizens." *Id.* at 13.

[FN36]. Plaintiffs who have evidence that criminal disenfranchisement laws in their state were adopted with racially discriminatory intent should also allege constitutional violations of the Fourteenth Amendment's Equal Protection Clause and of the Fifteenth Amendment.

[FN37]. See *infra* notes 106-14 and 125-39 and accompanying text.

[FN38]. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); see also *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). But see *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir.1983) (claiming that right of felons to vote is not fundamental).

[FN39]. U.S. Const. amends. XV (race), XIX (gender), XXIV (failure to pay poll tax), XXVI (age, for those age 18 and over). The text of the Twenty-Fourth Amendment actually prohibits states from denying the vote to citizens on account of their "failure to pay any poll tax or other tax." U.S. Const. amend. XXIV (emphasis added). Taken literally, these words suggest that states cannot constitutionally disenfranchise offenders convicted of tax evasion and other tax-related crimes.

[FN40]. The notion of strict judicial scrutiny emanates from the renowned footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938). See *Harper*, 383 U.S. at 670 (subjecting poll tax to strict scrutiny); *Dunn*, 405 U.S. at 335 (subjecting durational residence requirements to strict scrutiny).

[FN41]. See, e.g., *Dunn*, 405 U.S. at 342-43; *Oregon v. Mitchell*, 400 U.S. 112, 241-42 (1970); *Kramer*, 395 U.S. at 627.

[FN42]. See *infra* notes 71-73 and accompanying text.

[FN43]. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). Before *Ramirez*, the Supreme Court had summarily affirmed lower court decisions rejecting constitutional challenges to state laws disenfranchising convicted offenders. See *Fincher v. Scott*, 411 U.S. 961 (1973), *aff'g mem.*, 352 F.Supp. 117 (M.D.N.C.1972); *Beacham v. Brateman*, 396 U.S. 12, *aff'g mem.*, 300 F.Supp. 182 (S.D.Fla.1969). The Supreme Court had also suggested in dicta that felons could constitutionally be excluded from the franchise. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959); see also *Green v. Board of Elections*, 380 F.2d 445 (2d Cir.1967).

(Cite as: 103 Yale L.J. 537, *566)

(upholding state statute denying vote to those convicted of federal felonies), cert. denied, 389 U.S. 1048 (1968); *Kronlund v. Honstein*, 327 F.Supp. 71 (N.D.Ga.1971) (holding that statute denying vote to convicted criminals does not violate U.S. Constitution).

[FN44]. 471 U.S. 222 (1985).

[FN45]. *Ramirez v. Brown*, 507 P.2d 1345, 1346 (Cal.1973), rev'd sub nom. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

[FN46]. *Ramirez*, 507 P.2d at 1357.

[FN47]. *Richardson v. Ramirez*, 418 U.S. 24 (1974). While the Court in *Ramirez* held that the California law disenfranchising ex-felons did not, on its face, violate the Equal Protection Clause of the Fourteenth Amendment, the Court remanded the case to the California courts to consider whether the disenfranchising law was applied with "such a total lack of uniformity" that it violated the Equal Protection Clause. *Id.* at 56.

[FN48]. *Id.* at 42. Section 2 of the Fourteenth Amendment reads, in relevant part:

[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 (emphasis added).

Since the 39th Congress was not prepared to consider the Fifteenth Amendment, section 2 of the Fourteenth Amendment was adopted to punish Southern states that refused to allow blacks to vote. Under this provision, states that denied voting rights to male citizens over 21 were supposed to lose representation in Congress in proportion to the number of eligible voters who had been unjustly disenfranchised (but states could disenfranchise citizens who participated in "rebellion" or "other crime"). In practice, this enforcement mechanism was not applied against the Southern states when they disenfranchised blacks following Reconstruction. See GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 515 (1944).

[FN49]. *Ramirez*, 418 U.S. at 55, 54.

[FN50]. See, e.g., Elizabeth Du Fresne & William Du Fresne, *The Case for Allowing "Convicted Mafiosi To Vote for Judges": Beyond Green v. Board of Elections of New York City*, 19 DEPAUL L.REV. 112, 137-38 (1969) ("[I]t is not conceivable that today 'other crime' can possibly be read as any other crime.... [S]ection two only allows disfranchisement of persons who have committed a crime that would rationally be related to the corruption of the electoral system."); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV.L.REV. 293, 303 (1976) ("[T]here is not a word in the fourteenth amendment suggesting that the exemptions in section two's formula are in any way a barrier to the judicial application of section one in voting rights cases, whether or not they involve the rights of ex-convicts.").

[FN51]. See William W. Van Alstyne, *The Fourteenth Amendment, the "Right" To Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP.CT.REV. 33, 58. Another constitutional scholar noted that because the representation formula in section 2 allowed for denial of the vote to those who were not male citizens over 21, but only abridgement of voting rights for those participating in "rebellion, or other crime," the "permanent denial of the right to vote to an ex-convict, who has completed his sentence and thus paid his debt, was not contemplated by the § 2 formula for representation." Shapiro, *supra* note 50, at 303-04 n. 34.

[FN52]. *Ramirez*, 418 U.S. at 75 n. 24 (Marshall, J., dissenting). As Justice Marshall noted, some state statutes actually disenfranchised citizens who had committed these offenses. See Gary L. Reback, *Note, Disenfranchisement of Ex-felons: A Reassessment*, 25 STAN.L.REV. 845, 845-46 (1973) (noting that Alabama disenfranchises offenders convicted of vagrancy and that North Dakota disenfranchises offenders convicted of

breaking a water pipe); see also *Otsuka v. Hite*, 414 P.2d 412, 418 (Cal.1966) (noting that California could disenfranchise offenders convicted of seduction under promise of marriage or conspiracy to operate a motor vehicle without a muffler).

[FN53]. *Ramirez*, 418 U.S. at 75 n. 24 (Marshall, J., dissenting). An offender disenfranchised because of a minor crime such as those mentioned by Justice Marshall would not, after *Ramirez*, have the advantage of holding the state to the Equal Protection Clause's strict scrutiny standard. But such an offender could still allege that a state law disenfranchising a citizen for such a minor offense does not meet the lower equal protection scrutiny standard of rational relation to a legitimate state interest. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

[FN54]. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

[FN55]. *Id.* at 224.

[FN56]. *Id.* The plaintiffs alleged four additional causes of action that were not dispositive. *Underwood v. Hunter*, 730 F.2d 614, 616 (11th Cir.1984).

[FN57]. ALABAMA CONVENTION, *supra* note 29, at "Seventy-Ninth Day," 2 (statement of Mr. Freeman, delegate).

[FN58]. *Underwood*, 471 U.S. at 227-31. The finding of intent to discriminate was critical to the Court's ruling that the Alabama disenfranchising provision violated the Equal Protection Clause; discriminatory impact alone, the Court noted, would not have established a violation. Thus, the *Underwood* Court considered the Alabama provision under the equal protection framework set forth in *Village of Arlington Heights v. Metro Housing Development Corp.*, 429 U.S. 252 (1977). *Underwood*, 471 U.S. at 227-28.

[FN59]. *Underwood*, 471 U.S. at 228. Therefore, a state that argues that criminal disenfranchisement was adopted in order to disenfranchise blacks and poor whites, for example, must show that the law would have been adopted even if the only purpose was to disenfranchise poor whites. See *id.* at 230-33.

[FN60]. Plaintiffs should not ignore the potency of the Fifteenth Amendment in the fight against criminal disenfranchisement. Just as constitutional scholars have recently applied the Thirteenth Amendment to nontraditional scenarios--see, e.g., Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV.L.REV. 1359 (1992)--the potential of the Fifteenth Amendment should be fully explored. See *infra* note 149. Other constitutional strategies against criminal disenfranchisement should also be pursued. For example, since disenfranchisement essentially silences offenders, and voting is one of the most fundamental means by which a citizen can speak or express herself politically, disenfranchising laws may trigger strict scrutiny under the First Amendment. See, e.g., Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 TENN.L.REV. 549 (1985); see also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1948) ("The principle of the freedom of speech ... is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (courts faced with challenges to state election laws must balance "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "precise interests put forth by the State as justifications for the burden imposed by its rule"). But see ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 60 (1970) (in the process of "assimilating the right to vote to First Amendment rights ... there is history, and there are other considerations, to overcome").

[FN61]. The history outlined at the introduction of this Note will not, however, provide all plaintiffs with the evidence of racially discriminatory intent required to support a constitutional challenge to a criminal

disenfranchisement law. Several of the Southern states have changed their disenfranchising provisions since the turn of the century. For example, when Mississippi amended its constitution in 1972, it added murder and rape to, and removed burglary from, the list of disenfranchising crimes. Miss. Const. art. XII, § 241. Also, in some Southern and most non-Southern states, criminal disenfranchisement may have been employed without racially discriminatory intent. Ultimately, though, the results test of the Voting Rights Act means that a plaintiff should not have to rely on intent to prove the illegality of criminal disenfranchisement.

[FN62]. The availability of the results test does not mean that a plaintiff should not try to adduce impermissible intent, but that even a plaintiff with proof of racially discriminatory intent should apply that evidence primarily to a Voting Rights Act claim, for the following reasons: First, courts generally avoid ruling on constitutional questions if they can resolve a legal claim on statutory grounds instead. See, e.g., *Escambia County v. McMillan*, 466 U.S. 48 (1984) (applying the principle set forth by Justice Brandeis in *Ashwander v. Tennessee Valley Authority* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), to a voting rights case). Second, while the Act does not require evidence of discriminatory intent, such evidence can help to establish a violation of the results test. S.REP. NO. 417, 97th Cong., 2d Sess. 27 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205-08 (1981) [hereinafter SENATE REPORT]; see also *infra* text accompanying note 124. Third, the Voting Rights Act allows a plaintiff to proceed by showing either discriminatory intent or discriminatory results, or both, so that a failure to prove one of the two types of discrimination will not be fatal to a claim. SENATE REPORT, *supra*, at 205-08.

[FN63]. For a history of the Fifteenth Amendment's passage, see generally WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* (1965); JOHN M. MATHEWS, *LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT* (1909). For a more explicit discussion of the weakness of the Fifteenth Amendment, see Eric Foner, *From Slavery to Citizenship: Blacks and the Right To Vote*, in *VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY* 55, 63 (Donald W. Rogers ed., 1992) ("[The Fifteenth Amendment's] language left open the possibility of ... ostensibly nonracial requirements that could, and would, be used to disfranchise the vast majority of southern black men.").

[FN64]. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

[FN65]. Though initially aimed at recalcitrant Southern states that continued to maintain barriers to black suffrage, the most important section of the Act--section 2--applies to the whole nation. Section 5 of the Act, which requires preclearance of changes in voting laws, applies only to jurisdictions with the worst histories of racial discrimination, most of which are in the South. A relevant question regarding criminal disenfranchisement is whether states subject to section 5 preclearance since the Act was passed in 1965 have actually precleared changes to their lists of disqualifying crimes with the U.S. Attorney General or a federal court in the District of Columbia, as required. See, e.g., *Allen v. Ellisor*, 664 F.2d 391, 399 (4th Cir.) (en banc) (noting defendant state's claim that changes in electoral law affecting right of criminal offenders to vote were precleared under section 5 by the Attorney General), vacated as moot, 454 U.S. 807 (1981); see also *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969) (holding that even minor changes to voting laws and procedures must be precleared under section 5); *NAACP v. Georgia*, 494 F.Supp. 668, 678 (N.D.Ga.1980) (same); SENATE REPORT, *supra* note 62, at 186-92.

[FN66]. "Between 1964 and 1988 the percentage of voting-age blacks registered in the eleven southern states increased from 43.3 percent to approximately 63.7 percent. Black registrants in the five Deep South states increased in the same period from 22.5 percent to about 65.2 percent." Davidson, *supra* note 1, at 43. Consequently, the Voting Rights Act "is generally regarded as the most successful piece of federal civil rights legislation ever enacted." Drew S. Days III, Section 5 and the Role of the Justice Department, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 1, at 52, 52; see also Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 1, at 85, 86 ("[T]he act has taken on a symbolic importance that extends well beyond the increased numbers of black and Hispanic voters and minority elected officials."). But see DERRICK BELL, *AND WE ARE NOT SAVED*:

(Cite as: 103 Yale L.J. 537, *566)

THE ELUSIVE QUEST FOR RACIAL JUSTICE 75-88 (1987) (chronicle of the "Ultimate Voting Rights Act"); Davidson, *supra* note 1, at 44, 46 (describing the Act as "more successful than its supporters in 1965 had reason to expect," yet noting that "only 1.4 percent of officeholders in the United States are black and 0.8 percent are Hispanic, compared with 12.4 percent and 8.0 percent of their respective proportions of the population"); Alan D. Freeman, Antidiscrimination Law: A Critical Review, in *THE POLITICS OF LAW* 96, 110-14 (David Kairys ed., 1982); Laughlin McDonald, The 1982 Amendments of Section 2 and Minority Representation, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 1, at 66, 82 ("Progress ..., substantial as it has been, is incomplete.").

[FN67]. Pub.L. No. 91-285, 84 Stat. 314 (1970); Pub.L. No. 94-73, 89 Stat. 400 (1975); Pub.L. No. 97-205, 96 Stat. 131 (1982).

[FN68]. 446 U.S. 55 (1980); see also SENATE REPORT, *supra* note 62, at 192.

[FN69]. 446 U.S. at 60-61. The Bolden decision's intent test replaced the de facto results test that had been established by *White v. Regester*, 412 U.S. 755 (1973) (striking down Texas multimember electoral districts), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir.1973) (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). See SENATE REPORT, *supra* note 62, at 193-94.

[FN70]. SENATE REPORT, *supra* note 62, at 192.

[FN71]. *Id.* at 193. The text of section 2 now reads, in pertinent part:

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....

Pub.L. No. 97-205, 96 Stat. 131, 134 (1982) (emphasis added).

[FN72]. Racial and language minorities are "protected" under the Act. 42 U.S.C. § 1973b(f)(2) (1982). See *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir.1988) (Latinos challenging at-large election); *Windy Boy v. County of Big Horn*, 647 F.Supp. 1002 (D.Mont.1986) (Native Americans challenging at-large elections); Su Sun Bai, Comment, Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act, 139 U.P.A.L.REV. 731 (1991).

[FN73]. Pub.L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973(b) (1988)).

[FN74]. "The context of dilution in this case is unique and has not previously been presented before a federal court." *Wesley v. Collins*, 605 F.Supp. 802, 807 n. 4 (M.D.Tenn.1985), *aff'd*, 791 F.2d 1255 (6th Cir.1986). The plaintiffs in *Wesley v. Collins* also alleged that Tennessee's criminal disenfranchisement law violated the Fourteenth and Fifteenth Amendments. *Id.* at 803.

[FN75]. *Wesley* pled guilty to being an accessory after the fact to the crime of larceny. *Id.* at 804.

[FN76]. *Id.*

[FN77]. Congress had explicitly rejected the intent test. See *supra* notes 70-71 and accompanying text.

[FN78]. *Wesley*, 605 F.Supp. at 812. Indeed, the plaintiffs projected-- perhaps somewhat hyperbolically--that if Tennessee's criminal disenfranchisement laws continued unchecked over another 50 years, the result would be the disenfranchisement of one-half of Tennessee's blacks. *Id.* at 813 n. 13.

[FN79]. *Id.* at 811.

[FN80]. *Id.* at 812 (noting that "the historical effects of discrimination against blacks continue to be present").

[FN81]. *Id.*

[FN82]. *Id.* at 812-13. The Court also quoted *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir.1967), cert. denied, 389 U.S. 1048 (1968), for the proposition that "[d]isenfranchising the felon never has been attributed to discriminatory exclusion of racial minorities from the polls." *Wesley*, 605 F.Supp. at 813.

[FN83]. *Id.* at 812.

[FN84]. See *supra* notes 69-73 and accompanying text.

[FN85]. *Wesley v. Collins*, 791 F.2d 1255 (6th Cir.1985), aff'g 605 F.Supp. 802 (M.D.Tenn.1985).

[FN86]. See *supra* note 58 and accompanying text.

[FN87]. *Wesley*, 791 F.2d at 1262-63. Of course, if 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.

[FN88]. *Id.* at 1261.

[FN89]. SENATE REPORT, *supra* note 62, at 207 n. 117. Ignoring this important directive, the appellate court instead adopted the constitutional standard used by the Underwood Court, see note 59 and accompanying text, and considered the defendant's rationale for the challenged law. Cf. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir.) (suggesting that state's rationale for voting restriction is more relevant in cases examining intent than in cases that rely upon results test of Voting Rights Act), cert. denied and appeal dismissed, 469 U.S. 976 (1984).

[FN90]. But the application of the Voting Rights Act to criminal disenfranchisement echoes the metaphorical statement made by President Lyndon Johnson as he signed the Act: "The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men." STEVEN F. LAWSON, *IN PURSUIT OF POWER: SOUTHERN BLACKS AND ELECTORAL POLITICS*, 1965-1982, at 3-4 (1985) (quoting Lyndon Johnson) (emphasis added).

[FN91]. As amended, section 2 covers all voting qualifications, standards, practices, and procedures. Pub.L. No. 97-205, 96 Stat. 131, 134 (1982). "Section 2 remains the major statutory prohibition of all voting rights discrimination." SENATE REPORT, *supra* note 62, at 207. The district court in *Wesley v. Collins* suggested that criminal disenfranchisement laws could not violate the Voting Rights Act because the affected offenders had the same opportunity, before they committed disenfranchising crimes, as any other individual to vote. *Wesley v. Collins*, 605 F.Supp. 802, 813 (M.D.Tenn.1985). The flaw in this argument is that section 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. Nothing in the Act suggests it does not apply to a certain group because of the choices made by its members, including the decision to commit a crime.

Furthermore, nothing in the Voting Rights Act suggests that it does not apply to voting restrictions that affect prisoners, even though disenfranchisement of incarcerated offenders raises issues distinct from those raised by disenfranchisement of nonincarcerated offenders and ex-offenders. Courts regularly give special consideration to issues of security and order in penal institutions. See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350-53 (1987) (upholding restrictions on prisoners' religious freedom, while noting the "deference that the United States Constitution allows for the judgment of prison administrators," and the state's interest in "institutional order and security"); *Turner v. Safley*, 482 U.S. 78, 79 (1987) (citing similar reasons to uphold restrictions on inmate marriages); *Procunier v. Martinez*, 416 U.S. 396, 412 (1974) (citing similar reasons to uphold censorship of inmates' personal correspondence). For a discussion of the merits of extending voting rights to incarcerated

offenders, see *Ex-Offenders Voting Rights*, supra note 35, at 16 (Rep. Robert W. Kastenmeier, Chairman, remarking that "practically this may not now be realizable but I think [allowing incarcerated offenders to vote] ought to be the goal eventually if we are interested in a truly universal franchise").

[FN92]. *Chisom v. Roemer*, 111 S.Ct. 2354, 2368 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

[FN93]. See infra notes 95-100 and accompanying text.

[FN94]. Pub.L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973(b) (1988)). For a longer excerpt from section 2, see supra note 71.

[FN95]. The Supreme Court has ruled that the results test applies to the election of judges. *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S.Ct. 2376 (1991); *Chisom v. Roemer*, 111 S.Ct. 2354, 2356 (1991). Lower courts have liberally applied section 2 to the election of almost all public officials, and to such practices as dual or separate registration and the hiring of poll officials. See *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F.Supp. 1245 (N.D.Miss.1987) (dual registration and satellite registration), aff'd, 932 F.2d 400 (5th Cir.1991); *Harris v. Graddick*, 615 F.Supp. 239 (M.D.Ala.1985) (failure to appoint black poll officials); see also *Lucas v. Townsend*, 908 F.2d 851 (11th Cir.1990), vacated and remanded on other grounds sub nom. *Board of Pub. Educ. and Orphanage for Bibb County v. Lucas*, 111 S.Ct. 2845 (1991) (proposals covering several issues in a single referendum); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir.1987) (sole county commissioner form of government). But see *Butts v. City of New York*, 779 F.2d 141, 148-51 (2d Cir.1985) (40% plurality requirement not covered by section 2).

Indeed, voting rights scholars currently debate the extent to which section 2 litigation can and should be used not only to allow minority voters to elect candidates of their choice, but also to guarantee minorities proportional representation and influence in legislative decisionmaking. See, e.g., Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105 (1992) (advocating application of Act to diluted postelection influence of minority voters); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH.L.REV. 1077, 1126 (1991) (noting prejudice in "third generation" post-election phase); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA.L.REV. 1, 31, 31 n. 112 (1991) [hereinafter, Karlan, *Undoing*] (discussing failure of "influence" claims and citing relevant cases); Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U.L.REV. 449 (1988) (arguing that Act should guarantee minorities not only more electoral success, but more political influence). The scope of the Voting Rights Act briefly became a topic of public interest during the summer of 1993 as a result of President Clinton's controversial decision to withdraw his nomination of Professor Guinier for the position of Assistant Attorney General for Civil Rights. See Neil A. Lewis, *Clinton Abandons His Nominee for Rights Post amid Opposition*, N.Y. TIMES, June 4, 1993, at A1.

[FN96]. See Pub.L. No. 89-110, 79 Stat. 437, 438, 442 (1965) (codified as amended at 42 U.S.C. §§ 1971-1973ff-6 (1986 & Supp.1993)).

[FN97]. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J.).

[FN98]. See, e.g., Butler, supra note 27, at 45 (describing unrestricted ballot access for blacks as a "fait accompli"); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH.L.REV. 1833, 1838-39 (1992) (describing absence of barriers to casting of ballots). Professor Guinier describes efforts to eradicate vote denial and vote dilution as first and second generation challenges, respectively. Guinier, supra note 95, at 1093-94; see also 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, 184 (1989) (noting shift in focus from vote denial to vote dilution); Karlan, *Undoing*, supra note 95, at 30 (describing "[t]he elevation of the ability to elect to talismanic status").

[FN99]. Ironically, because the Voting Rights Act eliminated almost all outright suffrage barriers, it now seems anachronistic to apply the Act to overt disenfranchisement laws--instead of to inscrutable districting schemes that dilute votes. But we should not forget that, before the current focus on vote dilution, the Act was used mostly to remedy cases of vote denial, such as restrictions based on literacy tests and poll taxes. See Pub.L. No. 89-110, 79 Stat. 437, 438, 442 (1965) (codified as amended at 42 U.S.C. §§ 1971- 1973ff-6 (1986 & Supp.1993)). In addition to criminal disenfranchisement, other practices discourage minorities from voting to such an extent that the practices are indistinguishable from those which actually deny the vote outright. These practices include "purges of registration rolls; changing polling places on short notice (or without any notice at all); the establishment of difficult registration procedures; decreasing the number of voting machines in minority areas; and the threat of reprisals." Chandler Davidson, *Minority Vote Dilution: An Overview*, in *MINORITY VOTE DILUTION*, *supra* note 4, at 1, 3 (footnotes omitted).

[FN100]. For example, in *Mississippi State Chapter, Operation PUSH v. Allain*, a federal court ruled that certain restrictive registration policies in Mississippi violated the results test of the Voting Rights Act. The PUSH court certified a class of plaintiffs that included unregistered black voters and registered black voters. *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F.Supp. 1245, 1261 (N.D.Miss.1987), *aff'd*, 932 F.2d 400 (5th Cir.1991). Though the case dealt at least in part with vote denial (i.e., the unregistered voters claimed that the challenged election procedures prevented them from registering and voting), the court applied the Senate evidentiary factors developed for vote dilution cases, see *infra* note 120 and accompanying text, and claimed to be "of the opinion that the same language and analysis is applicable to this voter registration case." *Id.* at 1263.

[FN101]. See, e.g., *ABIGAIL THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987).

[FN102]. See Issacharoff, *supra* note 98, at 1842 (noting that in vote denial cases "the precise harms were easy to identify").

[FN103]. For example, in *Thornburg v. Gingles*, 478 U.S. 30, 64-80 (1986), the Court looked primarily at the extent of minority representation and racial bloc voting.

[FN104]. Although a plaintiff could challenge a state's disenfranchisement law solely in his or her capacity as an individual, this Note assumes that a plaintiff should and probably would bring suit on behalf of all others similarly situated. This was the situation in *Wesley v. Collins*, 605 F.Supp. 802 (M.D.Tenn.1985), *aff'd*, 791 F.2d 1255 (6th Cir.1986). See *supra* notes 74-89 and accompanying text. The offender's capacity to sue under the Act may depend on whether he or she is a member of a minority group protected by the Voting Rights Act. See *supra* note 72. The constitutional challenge to Alabama's disenfranchisement law in *Hunter v. Underwood*, 471 U.S. 222 (1985), was brought by two plaintiffs, one black and one white. The district court certified a plaintiff class of citizens disenfranchised for "nonprison" offenses represented by Underwood, who was white, and Edwards, who was black. In addition, the court treated Edwards as a representative for a subclass of black members of the plaintiff class. *Id.* at 224.

[FN105]. The Act prohibits any "voting qualification ... which results in a denial ... of the right ... to vote on account of race or color." 42 U.S.C. § 1973(a) (1988). The Senate report on the 1982 amendment to the Act declared that "it is patently clear[] that Congress has 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." *SENATE REPORT*, *supra* note 62, at 206 n. 109.

[FN106]. See generally *JANKOWSKI*, *supra* note 15, at 31, 122 (most recent statistics showing racial breakdown of offenders on probation and parole); *SNELL*, *supra* note 17, at 57 (most recent statistics showing the racial breakdown of offenders in prison); *RICHARD SOLARI, NATIONAL JUDICIAL REPORTING PROGRAM*, 1988, at 12 (1992) (most recent statistics showing racial breakdown of felons sentenced in state courts). The disparate racial impact of a criminal disenfranchisement law may be relatively easy to adduce. As the Eleventh

Circuit noted in *Underwood*, "blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement." *Underwood v. Hunter*, 730 F.2d 614, 620 (11th Cir.1984). The Supreme Court also noted that the Eleventh Circuit accepted the claim of an expert witness that "by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites." *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (quoting 730 F.2d at 620).

[FN107]. Some critics of this approach may argue that nonwhites make up a disproportionate share of those who are disenfranchised solely because they commit a disproportionate share of all crimes. However, there is ample evidence of racial discrimination throughout the criminal justice system. For example, Professor Norval Morris notes that the arrest ratio of blacks to whites for serious "index" crimes is about 3.6 to 1, yet the prison ratio is about 7 to 1. Norval Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111, 112 (1988). For a discussion of racial bias throughout the criminal justice system, see *Developments in the Law--Race and the Criminal Process*, 101 HARV.L.REV. 1472 (1988).

Also, observers who are quick to compare the use of statistics to prove discrimination in disenfranchisement cases with the failed use of such statistics in cases such as *McCleskey v. Kemp*, 481 U.S. 279 (1987) (statistical proof of disparate racial impact did not render the death penalty cruel and unusual), should note that *McCleskey* involved constitutional challenges that required proof of discriminatory intent. As incongruous as it seems to prohibit discriminatory results in voting but not in capital punishment, this is the current state of the law.

[FN108]. SOLARI, *supra* note 106, at 12. (This source does not have figures for Latinos). Blacks make up 12.1% of the U.S. population. 111 BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1991, at 22 (1991) [hereinafter STATISTICAL ABSTRACT].

[FN109]. SNELL, *supra* note 17, at 57.

[FN110]. STATISTICAL ABSTRACT, *supra* note 108, at 22.

[FN111]. JANKOWSKI, *supra* note 15, at 121, 122. According to this source's definitions, a person of Hispanic origin may be of any race. *Id.* at 3.

[FN112]. STATISTICAL ABSTRACT, *supra* note 108, at 22. The law-and-order crackdown surrounding the "drug war" is one reason why the population of America's prisons is disproportionately nonwhite. For example, in the State of New York, 886 drug offenders accounted for 11% of all persons committed to prison (7,959) in 1980; in 1992, 11,209 drug offenders accounted for 45% of all persons committed to prison (25,099). Ninety-three percent of the drug offenders in New York state prisons are black or Latino; only 6.3% of drug offenders are white. At the same time, "[s]tudies and experience have shown that the majority of people who use and sell drugs in [New York] and the nation are white." 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) (fact sheet on file with author).

[FN113]. JANKOWSKI, *supra* note 15, at 31-32.

[FN114]. STATISTICAL ABSTRACT, *supra* note 108, at 22.

[FN115]. SENATE REPORT, *supra* note 62, at 205 (emphasis added).

[FN116]. The Senate Report noted that no voting practice would automatically violate the Voting Rights Act. To demonstrate a violation, plaintiffs must show that, under the totality of the circumstances, the challenged law results in "unequal access to the electoral process." *Id.* at 193. If a court holds that statistical proof of a criminal

disenfranchisement law's disproportionate effect on minorities does not satisfy the totality of the circumstances analysis, plaintiffs can resort to the indirect evidentiary factors discussed *infra* notes 119-23 and accompanying text.

[FN117]. However, the Supreme Court has treated allegations of vote denial and vote dilution with equal concern. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."); see also *Reynolds v. Sims*, 377 U.S. 533 (1964); cf. *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Frankfurter, J., noting that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes" of voting discrimination).

[FN118]. This 5:1 ratio is an approximation derived from the following statistics: In 1990, the most recent year for which these data are available, 7.9% of the black adult population and 1.7% of the white adult population were on probation, in jail, in prison, or on parole. JANKOWSKI, *supra* note 15, at 6 (figures based on the resident U.S. population, 18 years of age and older). Obviously, the ratio will vary from state to state.

[FN119]. In explaining the "totality of the circumstances" analysis, the Senate report on the 1982 amendment to the Act listed nine evidentiary factors, which had been derived from the decisions of the Supreme Court in *White v. Regester*, 412 U.S. 755 (1973), and the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir.1973) (*en banc*), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). This list, however, was not intended to be exhaustive or to exclude other evidence that plaintiffs might adduce in attempting to show a violation of the Act. See SENATE REPORT, *supra* note 62, at 207; LITIGATION UNDER THE VOTING RIGHTS ACT OF 1965, at 16 (Morton Stavis ed., 1986).

[FN120]. SENATE REPORT, *supra* note 62, at 206-07.

[FN121]. "While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.... [T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." SENATE REPORT, *supra* note 62, at 207; see also *Major v. Treen*, 574 F.Supp. 325, 350 (E.D.La.1983) ("To the extent that the enumerated factors are not factually relevant, they may be replaced or substituted by other, more meaningful factors.").

[FN122]. For example, in *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court simplified the totality of the circumstances analysis for vote dilution cases challenging at-large and multimember elections. After reviewing the nine Senate factors, the Gingles court decided that two factors were most revealing in these types of cases: the extent of racially polarized voting and minority electoral success. *Id.* at 52, 74. Justice Brennan, writing for the majority, also outlined three criteria that a court should find in order to establish a violation of the Voting Rights Act in such cases: first, the minority group in question had to be "sufficiently large and geographically compact to constitute a majority of a single-member district;" second, the minority had to be "politically cohesive;" and third, the majority had to vote as a bloc so that it "usually ... defeat[ed] the minority's preferred candidate." *Id.* at 50-51. While lower courts have interpreted the three-prong Gingles test in different ways, the test was developed for electoral districting cases and probably does not apply to vote dilution cases that involve other electoral regulations, such as criminal disenfranchisement provisions. See GROFMAN ET AL., *supra* note 27, at 59.

[FN123]. The eighth factor, elected officials' failure to respond to minority needs, may also be relevant, particularly since the disenfranchisement of criminal offenders ensures that they will remain, in the eyes of politicians, a powerless constituency whose interests need not be addressed.

[FN124]. See SENATE REPORT, *supra* note 62, at 205.

[FN125]. Many of the justifications for disenfranchisement have been articulated and critiqued before. See, e.g., Walter M. Grant et al., Special Project, The Collateral Consequences of a Criminal Conviction, 23 VAND.L.REV. 929, 1218-33 (1970); Howard Itzkowitz & Lauren Oldak, Note, Restoring the Ex-Offender's

(Cite as: 103 Yale L.J. 537, *566)

Right To Vote: Background and Developments, 11 AM.CRIM.L.REV. 721 (1973); Reback, *supra* note 52; Douglas R. Tims, Note, The Disenfranchisement of Ex-Felons: A Cruelly Excessive Punishment, 7 SW.U.L.REV. 124 (1975); Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box," 102 HARV.L.REV. 1300 (1989) [hereinafter Note, Citizenship]; Note, The Equal Protection Clause as a Limitation on the States' Power To Disfranchise Those Convicted of a Crime, 21 RUTGERS L.REV. 297 (1967) [hereinafter Note, Equal Protection]; Note, The Need for Reform of Ex-Felon Disenfranchisement Laws, 83 YALE L.J. 580 (1974) [hereinafter Note, The Need for Reform].

[FN126]. *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir.1972).

[FN127]. AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS 145 (1981) (standard 23-8.4). The American Law Institute's Model Penal Code states that "a person who is convicted of a crime shall be disqualified ... from voting ... only so long as he is committed under a sentence of imprisonment." MODEL PENAL CODE § 306.3 (1985). Similar views have been expressed by the National Advisory Commission on Criminal Justice Standards and Goals (recommending that all states repeal mandatory disenfranchisement) and the National Conference of Commissioners on Uniform State Laws (proposing a uniform law to restore voting rights to offenders upon release from incarceration, parole, or probation). See *Ex-Offenders Voting Rights*, *supra* note 35, at 31.

[FN128]. For example, in addition to losing the right to vote, a convicted criminal may be deprived of employment opportunities, professional licenses, and the right to hold office and sit on a jury. See generally CIVIL DISABILITIES, *supra* note 14; Burton et al., *supra* note 17; Grant et al., *supra* note 125. Loss of the right to vote is not the only collateral consequence of a conviction that is difficult to justify. In Wyoming, certain convictions may make an offender ineligible for a professional license to become a barber school operator, a dental hygienist, or a cosmetologist. WYO.STAT.ANN. § 33-7- 311, § 33-12-135, § 33-15-121 (Michie 1992). Supporting the view that disenfranchisement is nonpunitive is the fact that disqualifying provisions typically are located in statutes and constitutional provisions that deal with elections, not criminal law. See laws collected *supra* at notes 14-16. Courts generally have subscribed to this view of disenfranchisement. See, e.g., *Murphy v. Ramsey*, 114 U.S. 15, 42-44 (1885) (holding that disenfranchisement of polygamists is not a criminal punishment, but an application of electoral qualifications); see also cases collected in Itzkowitz & Oldak, *supra* note 125, at 729 n. 71. But see *infra* note 134 (cases describing disenfranchisement as punishment).

[FN129]. The "purity of the ballot box" is a nebulous concept that originated in an Alabama state case decided more than a century ago. *Washington v. State*, 75 Ala. 582, 585 (1884). "The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage ... upon terms of equality with freemen who are clothed by the State with the toga of political citizenship." *Id.*

[FN130]. *Green v. Board of Elections*, 380 F.2d 445, 451-52 (2d. Cir.1967), cert. denied, 389 U.S. 1048 (1968) ("A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.").

[FN131]. *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

[FN132]. See Note, The Need for Reform, *supra* note 125, at 593-94. Given the racially discriminatory use of voting restrictions in the post-Reconstruction South, it is ironic that "[r]epugnance for corrupt elections was put forward everywhere as the primary reason for disfranchisement [of blacks]." WOODWARD, *supra* note 1, at 326.

[FN133]. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 80 (1974) (Marshall, J., dissenting) (noting that the long list of sections in the California code penalizing election fraud "surely demonstrates that there are adequate alternatives to disenfranchisement").

[FN134]. See, e.g., *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir.1967), cert. denied, 389 U.S. 1048 (1968) (noting the "historic exclusion from the franchise of persons convicted of all or certain types of felonies"). For a discussion of the history of disenfranchisement, see Itzkowitz & Oldak, *supra* note 125, at 721-27. Most ancient, medieval, and early modern societies conceived of disenfranchisement as a form of punishment. In Rome, an offender could be deprived of the right to vote if, as part of his censure, the label "infamia" was cast upon him. A.H.J. GREENBRIDGE, *INFAMIA: ITS PLACE IN ROMAN PUBLIC AND PRIVATE LAW* 9 (1894). During the Middle Ages, extreme punishments included deprivation of all civil rights and excommunication from the community; ultimately, society thought of the outlaw as nothing more than a wild animal. CARLO CALISSE, *A HISTORY OF ITALIAN LAW* 300 (1928) (comparing outlaw to "a wolf ... [who] might live like a wild beast in the forests"); 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 449 (Legal Classics Library 1982) (Cambridge University Press, 2d ed. 1899) ("[F]or a wild beast he is; not merely is he a 'friendless man,' he is a wolf."). England's attainder system maintained the loss of civil rights as a penalty, along with forfeiture of property and "corruption of blood" (loss of the right to inherit property or transmit property to one's descendants). Grant et al., *supra* note 125, at 943. The notion of punitive disenfranchisement also has had some currency in American law. At least two states, Delaware and New Jersey, explicitly allow for ex-felon disenfranchisement as an additional penalty. Del. Const. art. V., § 2; N.J.Stat.Ann. § 19:4-1(6)-(7) (West 1989). Some courts have also justified disenfranchisement as punishment. For example, in *Wesley v. Collins*, the circuit court stated that felons are disenfranchisement "because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment." *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir.1986) (emphasis added); see also *Singleton v. State*, 21 So. 21, 23 (Fla.1896) (construing civil disabilities as punishment).

[FN135]. Cf. *Robinson v. California*, 370 U.S. 660 (1962) (holding that state punishment of status as drug addict is unconstitutionally cruel and unusual); see Note, *The Need for Reform*, *supra* note 125, at 600 n. 111 (comparing status as a former addict in *Robinson* with status as a former offender). Though disenfranchisement is often described as retribution for the offender's breach of the social contract, see, e.g., *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir.1967), cert. denied, 389 U.S. 1048 (1968), this justification distorts traditional Lockean contract theory. See Note, *Citizenship*, *supra* note 125, at 1304-07.

[FN136]. Reback, *supra* note 52, at 859-60 (footnote omitted).

[FN137]. *Ex-Offenders Voting Rights*, *supra* note 35, at 30 (statement of John Dunne, Member, American Bar Association Commission on Correctional Facilities and Services). "The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement, a factor that may lead to recidivism." Itzkowitz & Oldak, *supra* note 125, at 732; cf. *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring):

[Deprivation of citizenship is] the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity than to place on him the stigma of derelict....

[FN138]. Disenfranchisement laws may violate the Eighth Amendment's ban on cruel and unusual punishment. See Reback, *supra* note 52, at 858-59 (arguing that the decrease in number of states disenfranchising ex-felons undermines the argument that the practice fails to meet the "unusual" standard). See generally Tims, *supra* note 125. These laws may also violate the Equal Protection Clause because they arbitrarily select certain crimes as disenfranchising offenses. See Note, *The Need for Reform*, *supra* note 125, at 587 (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1943) (invalidating discrimination on basis of illogical distinctions among cases)); see also *Stephens v. Yeomans*, 327 F.Supp. 1182 (D.N.J.1970) (striking down disenfranchisement statute for "haphazard development" and "contrasts in treatment"). States that disenfranchise individuals convicted of federal crimes or crimes committed in another state may also be impermissibly penalizing them for prior offenses. *Otsuka v. Hite*, 414 P.2d 412, 416 (Cal.1966). Moreover, courts have ruled that punishments for those on probation and parole must be "reasonably related to the state's rehabilitation system." *Hyland v. Procunier*, 311 F.Supp. 749, 750

(N.D.Cal.1970). Additionally, these punishments "must relate directly to the offense." *People v. Dominguez*, 64 Cal.Rptr. 290, 294 (Ct.App.1967).

[FN139]. Cf. H.R.9020, 93d Cong., 1st Sess. § 401(a) (1973) (advocating federal voting rights for all former offenders except those who committed election offenses); *Du Fresne & Du Fresne*, supra note 50, at 137-38; Note, *Equal Protection*, supra note 125, at 315; see also Mass.Gen.Laws Ann. ch. 51, § 1, ch. 55, § 42 (West 1991) (disenfranchising only offenders convicted of election crimes).

[FN140]. SENATE REPORT, supra note 62, at 208. In keeping with the Act's provision that minorities do not have a right under the Act to proportional electoral representation, 42 U.S.C. § 1973(a) (1988), the Senate legislative history suggests that the remedy of "racial quotas" should not be available to judges. SENATE REPORT, supra note 62, at 208. However, each group "does have a right to an opportunity, equal to that of other classes, to obtain such representation." *Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir.1985).

[FN141]. See, e.g., *Gingles v. Edmisten*, 590 F.Supp. 345, 350 (E.D.N.C.1984) (enjoining "appellants from conducting elections pursuant to those portions of the [redistricting] plan" held to violate section 2).

[FN142]. See, e.g., *Mississippi State Chapter, Operation PUSH v. Allain*, 674 F.Supp. 1245, 1269 (N.D.Miss.1987) (postponing injunctive relief to allow Mississippi legislature to remedy established violation), aff'd, 932 F.2d 400 (5th Cir.1991) (upholding district court's finding of violation and approving legislature's remedy).

[FN143]. See supra note 14. A court could also limit its remedy by allowing a state to continue to disenfranchise incarcerated offenders or by only requiring the state to extend the franchise to ex-offenders who are fully released from the correctional supervision.

[FN144]. A new question in the vote dilution arena is the extent to which state justifications for disenfranchisement will be considered after the plaintiff has satisfied section 2's results test. Recently, the Supreme Court explained that a state's interest in electing judges on a district-wide basis could affect the remedies that a court might apply if the court found a violation of section 2 (and could even prevent such a finding under the "totality of the circumstances" analysis). *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 111 S.Ct. 2376, 2380-81 (1991). But the Court declared that no interest was sufficient to make the voting restriction immune from section 2's results test. *Id.* Similarly, no state interest in excluding offenders from the electorate would be sufficient to render a state's disenfranchisement law immune from challenge under the results test. Moreover, state justifications for disenfranchisement are too weak to be of any assistance to the defendant at either the liability or remedy stage. See supra notes 125-39 and accompanying text.

[FN145]. Society's continued disdain for criminal offenders may also explain why criminal disenfranchisement is rarely challenged. Members of minority- advocacy groups like the NAACP, for example, may be too preoccupied with trying to protect the rights of law-abiding citizens to commit their organization's limited resources to fighting for the rights of those who have committed crimes.

[FN146]. While studies of state legislatures' reform and/or repeal of criminal disenfranchisement laws do not exist, it appears that as many as 17 states that disenfranchised ex-offenders two decades ago have abandoned the practice. Compare CONGRESSIONAL RESEARCH SERVICE, *DISFRANCHISEMENT OF CONVICTED FELONS* (rev. ed. 1971) with information provided supra note 16. However, there has been substantially less rescission of laws that disenfranchise incarcerated and nonincarcerated offenders. Compare *DISFRANCHISEMENT OF CONVICTED FELONS*, supra, with information provided supra notes 14-15. For an estimate of the number of Americans who are disenfranchised as a result of their past or present status as criminal offenders, see supra note 17.

[FN147]. Nevertheless, I offer two particularly ambitious federal legislative strategies that Congress could pursue.

First, Congress could amend the Voting Rights Act to guarantee the right to vote either to all ex-offenders fully released from the criminal justice system, or to all ex-offenders and all non-incarcerated offenders, or to all offenders including those who are incarcerated. This action would be similar to that taken by Congress in 1970, when it amended the Voting Rights Act to abolish literacy tests throughout the nation. See *supra* note 13. This proposal resembles a bill proposed unsuccessfully in 1973 by Rep. Robert W. Kastenmeier to "amend the Voting Rights Act of 1970 to prohibit the States from denying the right to vote in Federal elections to former criminal offenders who have not been convicted of any offense related to voting or elections and who are not confined in a correctional institution." H.R.9020, 93d Cong., 1st Sess. (1973). The bill stated that disenfranchisement of nonelection offenders "does not bear a reasonable relationship to the criminal offense sufficient to warrant the deprivation of such right to vote ... and does not bear a reasonable relationship to any compelling State interest." *Id.* at 3. During hearings on the bill, Rep. Kastenmeier said that he originally wanted the law to cover state and local elections. Ex-Offenders Voting Rights, *supra* note 35, at 14. Additionally, he expressed interest in doing away with the bill's exceptions for election offenders, *id.* at 15 ("Is it unthinkable that those people, too, should still be able to vote?"), and incarcerated offenders, *id.* ("If we assume that offenders, exoffenders, might vote on the outside, what about those on the inside? ... [W]hat is the real State interest in denying those presently incarcerated from voting?").

Second, and even more ambitiously, Congress could propose for ratification a Universal Suffrage Amendment to cure once and for all the deficiencies of the Constitution with regard to voting rights. An affirmatively worded amendment might read:

Section 1. All citizens of the United States who are eighteen years of age or older have the right to vote.

Section 2. This right shall not be denied or abridged by the United States or by any State.

Section 3. Congress shall have power to enforce this article by appropriate legislation.

Section 1 of this hypothetical amendment starkly contrasts with the Constitution's negatively worded voting amendments, which employ only the "shall not be denied or abridged" language included in section 2 of the proposed amendment. See U.S. Const., amends. XV, XIX, XXIV, XXVI.

[FN148]. The inherent relationship between deprivation of rights and silencing has been articulated by many feminist and critical race theorists. See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV.C.R.-C.L.L.REV. 401, 425-26 (1987) ("One consequence of this broader reconfiguration of rights ... is to give voice to those people or things which ... historically had no voice."). Though securing voting rights for offenders might be seen by some as a mere band-aid on a gaping wound of hopelessness and social stigmatization, the symbolic worth of enfranchisement should not be underestimated. "The concept of rights, both positive and negative, is the marker of our citizenship, our participatoriness, our relation to others." *Id.* at 431.

[FN149]. Other avenues of litigation should also be explored. For example, Justice Rehnquist wrote in *Ramirez* that "how [section 2] became a part of the [Fourteenth] Amendment is less important than what it says and what it means." *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974) (emphasis added); see also *Ramirez*, *id.* at 45 (calling for a "plain reading" of section 2 of the Fourteenth Amendment). The *Ramirez* Court's literalist reading of the Constitution might allow for a creative, literal reading of the Fifteenth Amendment, which says, in relevant part: "The 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." U.S. Const. amend. XV, § 1 (emphasis added). The Fifteenth Amendment's framers almost surely did not intend "previous condition of servitude" to include having "served" time in a state penitentiary, but this interpretation is not entirely inconsistent with Rehnquist's open-ended reading of "other crime." See *supra* notes 48-51 and accompanying text. Before *Ramirez*, commentators pointed out that the Thirteenth Amendment suggests that "punishment for crime" and "servitude" might not be mutually exclusive: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States...." U.S. Const. amend. XIII (emphasis added). Therefore, one commentator noted, "[a]n in pari materia construction of the thirteenth and fifteenth amendments supports the contention that 'previous condition of servitude' includes penal confinement." Grant et al., *supra* note 125, at 1174. See also Itzkowitz & Oldak, *supra* note 125, at 740 n. 128. This rather clever argument was also made unsuccessfully by the defendant in *People v. DeStefano*, 212 N.E.2d 357, 361-62 (Ill.App.Ct.1965), cert. denied,

385 U.S. 821 (1966). Additionally, one bona fide definition of "servitude" is "[c] ompulsory labour as a punishment for criminals." 15 The Oxford English Dictionary 43 (2d ed. 1989). After Ramirez invoked the Fourteenth Amendment to allow states to exclude a whole class of citizens from the electorate, this radical, "plain meaning" reading of the Fifteenth Amendment seems all the more appropriate.

[FN150]. Theodore Baker, Balloting Behind Bars, DAILY NEWS, July 27, 1993, at 32 (letter to the editor).

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