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Comment

*543 REVISITING WESLEY v. COLLINS AND TENNESSEE'S DISENFRANCHISEMENT STATUTE

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I. INTRODUCTION

Recent elections have brought a heightened awareness of the disproportionate impact of state criminal disenfranchisement statutes on minority populations in the United States. [FN1] Disenfranchisement *544 is the act of taking away the right to vote in public elections from a citizen or class of citizens. [FN2] Those challenging criminal disenfranchisement statutes mount claims under (1) the Fourteenth Amendment's Equal Protection Clause [FN3] and (2) Section 2 of the Voting Rights Act. [FN4] To succeed on a claim under the Equal Protection Clause, a plaintiff must show both a disproportionate impact and proof that the state statute was enacted with discriminatory intent. [FN5] Successful challenges under the Equal Protection Clause standard are a rarity because the clause imposes a high burden of proof under its two-part intent-based analysis. [FN6] Section 2 of the Voting Rights Act examines a "denial or abridgment" of the right to vote "on account of race or color" [FN7] and is termed a results-based test because a violation can be proven by showing discriminatory *545 effect alone. [FN8] In accordance with Congressional intent to exercise its power to enforce the Fourteenth and Fifteenth Amendments, [FN9] section 2 of the Voting Rights Act was amended in 1982 to make clear that it was a results test and that proof of intent was not required. [FN10]

This essay appraises the effectiveness of the Equal Protection Clause in challenging state criminal disenfranchisement provisions that disproportionately abridge minority voting rights. This essay then examines the current federal circuits' split on the question of whether section 2 of the Voting Rights Act applies to state criminal disenfranchisement statutes. [FN11] It then examines the history of Tennessee's *546 criminal disenfranchisement statute and *Wesley v. Collins*, [FN12] the first lawsuit to challenge the disproportionate racial impact of Tennessee's criminal disenfranchisement statute, under both the Equal Protection clause and the Voting Rights Act. Notably, Tennessee's statute would likely withstand an Equal Protection challenge because its unique legislative history reveals that its enactment was not motivated by clear racial animus. [FN13] Tennessee's criminal disenfranchisement statute, however, would likely come within the scope of the Voting Rights Act because the Act is not ambiguous and would apply when a voting qualification based on felony status interacts with social and historical conditions to produce a racially discriminatory effect, as it does in Tennessee. [FN14]

Congress clearly intended section 2 of the Voting Rights Act to apply to any state provision that results in disparate impact on minority voting rights. [FN15] In light of the federal circuits' split on whether section 2 is applicable to criminal disenfranchisement statutes that result in disparate impact on minority voting rights, the United States Supreme Court should have granted the *Johnson v. Bush* [FN16] certiorari petition to clarify that it does apply. The Voting *547 Rights Act is not textually ambiguous, and a plaintiff should be allowed to proceed against a state criminal disenfranchisement statute when it disproportionately impacts the voting rights of racial minorities. The social cost of this silent civil rights crisis substantially outweighs any of the claimed benefits reaped from a state's criminal disenfranchisement statute.

II. THE SUPREME COURT CASES: EQUAL PROTECTION CLAUSE AND STATE CRIMINAL DISENFRANCHISEMENT STATUTES

Two important Supreme Court cases directly examine the constitutionality of state criminal disenfranchisement statutes that have a disproportionate effect on minority populations: *Hunter v. Underwood* and *Richardson v. Ramirez*. [FN17] In 1974, in *Richardson v. Ramirez*, [FN18] the United States Supreme Court considered a challenge by residents of California who were former felony convicts seeking re-enfranchisement in the state. [FN19] California's criminal disenfranchisement statute denied convicted felons participation in *548 the election process even after they completed their sentences and paroles. [FN20] The Court held that a criminal record was a factor that a state could consider in determining the qualifications of voters. [FN21] The Court construed the language of section 2 of the Fourteenth Amendment as an affirmative sanction of the practice of depriving felons of voting rights. [FN22] Section 2 of the Fourteenth Amendment provides, in relevant part:

[W]hen the right to vote at any election ... is denied to any of the male inhabitants of such State ... *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 .... [FN23]

The Court reasoned that by exempting disenfranchisement of criminals from its representation, the Amendment's framers explicitly endorsed the then-common practice of felon disenfranchisement. [FN24] *Richardson v. Ramirez* is often cited by courts to support the argument that because the Fourteenth Amendment gives states the right to disenfranchise felony convicts, the Voting Rights Act, as a federal statute, must be inapplicable to state criminal disenfranchisement statutes. [FN25]

*549 First, viewed in its context, Section 2 of the Fourteenth Amendment's purpose was not a general constitutional sanction of a right to disenfranchise citizens convicted under state criminal disenfranchisement laws. Section two's primary purpose was to articulate the formula for apportioning seats in the House of Representative among the states, namely by population count. [FN26] As a general rule, the Amendment reduces this count in proportion to a state's voting age citizenry whose right to vote is denied or abridged under state law, with an exception for denial or abridgement due to participation in "rebellion, or other crime." [FN27] A state's right to deny or abridge was effectively "a right only by implication." [FN28] Though it can be argued that this is an implied state power to enact criminal disenfranchisement statutes, [FN29] this reasoning would not, however, apply to a criminal disenfranchisement statute enacted with the intent to discriminate. [FN30] This has clearly been excepted from a state's right, as articulated by the Supreme Court in *Hunter v. Underwood* when it held that a state does not have the right to employ a racial motive in its methodology for disenfranchising convicted felons. [FN31] Notwithstanding a state's right to disenfranchise convicted felons, the question under the Voting Rights Act is whether a state has the right to continue disenfranchising those convicted of felonies if it results in disproportionately impacting minority voting rights. If answered in the negative, this *550 would effectively create a second exception to a state's right to disenfranchise those convicted of felonies.

In 1985, in *Hunter v. Underwood*, [FN32] the Supreme Court considered a challenge to Alabama's facially neutral constitutional provision that allowed criminal disenfranchisement. [FN33] In *Underwood*, Carmen Edwards, black, and Victor Underwood, white, were blocked from the voter rolls because they were convicted for presenting bad checks, which fell under Alabama's "moral turpitude" provision. [FN34] The district court found for the state; the Eleventh Circuit Court of Appeals reversed, and the United States Supreme Court granted certiorari. [FN35]

Chief Justice Rehnquist, writing for a unanimous bench, affirmed the court of appeals' holding [FN36] and its use of the two-prong *Arlington Heights v. Metropolitan Housing Development Corp.* test in construing whether a facially neutral law violated the Equal Protection Clause. [FN37] Under the first prong of the test, evidence of discriminatory impact from Alabama's statute was indisputable because it disenfranchised approximately ten times as many blacks *551 as whites. [FN38] The second prong was established because the legislative history revealed the clear legislative intent to disenfranchise the state's black population. [FN39] The Supreme Court held that Alabama's facially neutral criminal disenfranchisement statute was unconstitutional because the all-white male delegates to the state constitutional convention were not secretive about their motives. [FN40] Historians testified that the legislative record unveiled proof that the convention's president, John B. Knox, in his opening address to the convention, introduced the act and expressed its intent "to establish white supremacy in this State within the limits of the federal Constitution." [FN41]

Notwithstanding the boldness of Alabama's elected officials in 1901, it is difficult for other plaintiffs to find such an express articulation of the legislature's racial motive in the record. The *Hunter v. Underwood* Court rejected the state's argument that events occurring in the eighty years succeeding the adoption of the constitution had legitimated the provision. [FN42] Since that case, however, the re-enactment of a criminal disenfranchisement statute has been held to remove the provision's earlier taint. The so-called "broken taint" analysis that has emerged was articulated in *United States v. Fordice*. [FN43] The *Fordice* Court held that a state has the burden of proof of showing that a subsequent re-enactment was motivated by independent, legitimate goals. [FN44] In considering a summary judgment motion granted the state in *Johnson v. Bush*, [FN45] the majority erroneously relieved the state of its burden of persuasion and production to

show that its 1968 re-enactment of its *552 criminal disenfranchisement statute broke any taint associated with the 1868 provision. [FN46]

III. SECTION TWO OF THE VOTING RIGHTS ACT AND STATE CRIMINAL DISENFRANCHISEMENT STATUTES

A. Section Two of the Voting Rights Act

Congress gave the Fifteenth Amendment teeth in 1965 by enacting the Voting Rights Act. [FN47] The text of section 2 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 .... [FN48]

*553 That violation "is established if, based upon the totality of the circumstances," the challenged legislation "results" in unlawful dilution. [FN49]

The purpose of the Voting Rights Act is to address the problem of racial discrimination in voting when a state law or procedure disproportionately results in the abridgment or denial of the right to vote of members of a protected class recognized under its provisions. [FN50] Congress amended the act in 1982 to clarify that claims under the act need only apply a "results test." [FN51] The burden of proof under section 2 of the Voting Rights Act is less burdensome on the plaintiff than the Equal Protection Clause challenge because a plaintiff may prevail under a less-stringent "totality of circumstances" analysis under section 2. [FN52] The "totality of circumstances" factors contemplate proof of general historical and socioeconomic discrimination and not specific discriminatory intent in the statute's enactment. These factors appear in the Senate Report as follows:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

*554 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

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

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution. The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other. [FN53]

As previously stated, Congress's intent in amending the Voting Rights Act was to make clear that it was a results test. [FN54] In *Thornburg v. Gingles*, [FN55] the Supreme Court clarified how courts were to implement the amended Voting Rights Act results test in an electoral

districting plan. In a challenge to North Carolina's *555 legislative districting under the Voting Rights Act, the Court set forth three conditions required to prove a prima facie case of vote dilution in violation of the Voting Rights Act. [FN56] Often cited as the *Gingles* factors, the factors are: (1) the minority group is sufficiently numerous and geographically compact to form a majority in a single-member district (compactness); (2) the minority group is politically cohesive (racial bloc voting); and (3) the white majority usually votes as a bloc sufficient to defeat the minority's preferred candidate (racially polarized voting). [FN57]

Since *Thornburg v. Gingles*, decided after *Wesley v. Collins*, the *Gingles* factors apply to establish the plaintiff's prima facie case in a vote dilution claim. [FN58] A plaintiff challenging a practice or procedure under the Voting Rights Act will still need to provide proof under the "totality of the circumstances" factors. [FN59]

B. The Federal Circuit Split on the Voting Rights Act

After *Gingles*, a series of federal appellate decisions have conflicted on whether a challenge to a disenfranchisement statute using the results-based Voting Rights Act is allowed. [FN60] In *Baker v. Pataki* [FN61] in 1996, black and Latino incarcerated felons challenged a New York statute that denied the right to vote to incarcerated and paroled felons because it, *inter alia*, violated the Voting Rights Act. [FN62] The plaintiffs' proof of disproportionate impact included the allegation that although blacks and Latinos were more than 30% of the voting-age population in New York state, they made up more *556 than 80% of the inmates in the state prison system. [FN63] A panel of ten court of appeals judges, sitting *en banc*, faced the question of whether the Voting Rights Act was applicable to felon disenfranchisement statutes generally and to New York's criminal disenfranchisement statute in particular. [FN64] The court deadlocked, and the district court's decision dismissing the plaintiffs' claims was left undisturbed. [FN65]

In *Farrakhan v. Washington*, [FN66] black, Latino, and Native-American inmates disenfranchised under Washington state's criminal disenfranchisement statute challenged the law as a violation of section 2 of the Voting Rights Act. [FN67] The plaintiffs alleged that Washington's criminal disenfranchisement statute had a disproportionate impact on minorities due, in significant part, to racial bias within Washington's criminal justice system. [FN68] Among the evidence proffered by the plaintiffs were statistical data of the disparities in arrest, bail, and pre-trial release rates along with charging decisions and the outcomes of sentencing in Washington's criminal justice system. [FN69] The district court attributed the disproportionate minority impact to "discriminatory activity" in Washington's criminal justice system, but held that this was not significant for purposes of the "totality of the circumstances." [FN70] The district court concluded that there was no evidence that the enactment of Washington's disenfranchisement provision "was motivated by racial animus, or that its operation *by itself* has a discriminatory effect." [FN71]

Appropriately disagreeing with the district court's "totality of the circumstances" analysis, the appellate court in *Farrakhan v. Washington* held that a court's analysis must "consider how a challenged *557 voting practice *interacts with* external factors such as 'social and historical conditions.'" [FN72] The court held that, contrary to the district court's analysis, such evidence may by itself suffice in establishing a causal link between Washington's disenfranchisement statute and minority vote dilution for purposes of a section 2 challenge. [FN73] The court reversed and remanded the case for further proceedings. [FN74]

Florida's constitutional provision permitting disenfranchisement of felons was challenged by Florida citizens as discriminatory in *Johnson v. Bush*. [FN75] The plaintiffs alleged that the provision that required an ex-felon to petition for clemency in a cumbersome procedure violated the Equal Protection Clause and the Voting Rights Act. [FN76] Noting that Florida was one of only seven states that permanently disenfranchised first-time convicted felons for life unless they received clemency, plaintiffs alleged that the provision was adopted with discriminatory intent and had a discriminatory effect. [FN77] The district court entered summary judgment in favor of the state. [FN78] The appeals court reversed and remanded, directing the district court to consider plaintiffs' "evidence of discrimination in the criminal justice system" and to evaluate their Voting Rights Act claim by "looking to the totality of the circumstances." [FN79] In April

2005, the Eleventh Circuit affirmed the district court's grant of the defendant's summary judgment motion under the Equal Protection Clause. [FN80] Additionally, the majority opinion in *Johnson v. Bush* held that the Voting Rights Act was inapplicable to state criminal disenfranchisement statutes. [FN81] Like other circuits denying **558* application of section 2 of the Voting Rights Act to state criminal disenfranchisement statutes, *Johnson v. Bush* relied on Section 2 of the Fourteenth Amendment. As discussed earlier in the *Richardson v. Ramirez* [FN82] case, this argument fails when this Civil War Amendment is placed in its proper context. [FN83]

There has been much activity in the Second Circuit on the question of whether the Voting Rights Act is applicable to criminal disenfranchisement statutes. [FN84] The Second Circuit expressly stated its reluctance to apply the Voting Rights Act to New York's criminal disenfranchisement law absent a federal statute "contain[ing] a plain statement of congressional intent to affect felon disenfranchisement" or the United States Supreme Court expressly clarifying the issue. [FN85] The "plain statement" requirement was articulated by the Supreme Court to apply to a federal statute that alters the balance of power between the states and federal government absent a "clear statement" from Congress that it intended the statute to have such an effect. [FN86] The "plain statement" rule is a canon of statutory interpretation designed to address a statute that is ambiguous on its face. [FN87]

In *Gregory v. Ashcroft*, Missouri's state court judges claimed that the federal Age Discrimination in Employment Act ("ADEA") could invalidate a provision of Missouri's constitution that required judges to retire at age seventy. [FN88] Noting the ambiguity of the relevant federal statutory language, the United States Supreme Court declined to uphold plaintiff's application absent showing **559* Congress' express statutory intent that it be applied in such a context. "'[I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so [clearly].'" [FN89] Additionally, in *NLRB v. Catholic Bishops*, the National Labor Relations Board ("NLRB") sought jurisdiction over lay faculty members at a group of Catholic high schools. [FN90] Because of the First Amendment question involved, the Court required that "an affirmative intention of ... Congress [must] clearly express[]" the statutory interpretation proffered by the NLRB. [FN91]

Further, in the 1996 case of *Baker v. Pataki*, the deadlocked en banc panel decision turned on whether the plain statement rule applied to the Voting Rights Act's application to state criminal disenfranchisement statutes. [FN92] A five-to-five split resulted among the ten judges hearing this question en banc. [FN93] Judge Mahoney's opinion, followed by four judges, found that the "plain statement" rule applied and that a legislative intent to have the Voting Rights Act apply to state disenfranchisement statutes was not sufficiently explicit. [FN94] Judge Feinberg's opinion, followed by four other judges found that the "plain statement" rule did not apply to the Voting Rights Act and that the Act could legitimately be construed as applying to state disenfranchisement statutes. [FN95] Judge Feinberg first looked to *Chisom v. Roemer*, [FN96] decided by the United States Supreme Court the same day as *Gregory v. Ashcroft*, as a clear Supreme Court statement that the plain meaning rule does not apply. In *Chisom*, the Supreme Court did not apply the plain meaning rule when it determined whether the Voting Rights Act applied to the election of judges. [FN97]

**560* Additionally, Judge Feinberg pointed to the Court's statement in *Gregory v. Ashcroft* that the plain meaning rule applied only when the statute was ambiguous. [FN98] It is a reasonable approach to limit the use of the plain meaning rule to facially ambiguous statutes as it was intended. To apply this rule to statutes that are not ambiguous, like the Voting Rights Act, would impose on Congress the heavy task of anticipating and articulating all the future challenges that could apply to a given statute. [FN99]

Five years after *Baker v. Pataki*, however, the *Muntaqim v. Coombe* district court followed Judge Mahoney's faction when it affirmatively held that the Voting Rights Act "does not limit New York's authority to disenfranchise felons." [FN100] The *Muntaqim* court expressed both concerns for federalism and found it important that a felon disenfranchisement statute was enacted before the Civil War Amendments. [FN101]

Notably, after the 1870 ratification of the Fifteenth Amendment to the United States Constitution, which barred a state's denial of the right to vote based on race, states began to rapidly amend their state constitutions to allow for criminal disenfranchisement, as if the states

were anticipating a conundrum. [FN102] Subsequent state laws based on these state constitutional grants, particularly among the southern states, followed in rapid succession in the decades after the Civil War. [FN103] Absent stipulation by the parties *561 in a suit, whether a state disenfranchisement provision's enactment was a reaction to the Civil War Amendments would be a question for the fact finder under the plaintiff's burden to establish a discriminatory motive and an inappropriate finding on a motion for summary judgment. [FN104]

The federalism concern articulated by federal courts is simply a hesitancy to wield power invalidating long-standing provisions, many of which are imbedded in state constitutions. This further supports the need for the Supreme Court to provide guidance. The *Johnson v. Bush* certiorari petition gave the Supreme Court that opportunity, but the Court denied certiorari. [FN105]

IV. THE CRIMINAL DISENFRANCHISEMENT STATUTE IN TENNESSEE

A. The Legislative History

The history of the criminal disenfranchisement statute in Tennessee is a drama in three acts with a prologue. The prologue addresses Tennessee's secession and reconstruction. The first act begins with the appointment of Military Governor Andrew Johnson and the passage of a state constitutional amendment that empowered the General Assembly to impose disenfranchisement in Tennessee upon conviction of a crime. The second act begins with the state government's re-organization in April 1865, the appointment of Governor Parson Brownlow, and the General Assembly's enactment of a law that put the constitutional disenfranchisement provision in action. The third act chronicles the case history of the criminal disenfranchisement statute in Tennessee.

*562 The seed for the criminal disenfranchisement statute in Tennessee was planted when Fort Donelson, in secession-era Tennessee, came under Union occupation on February 15, 1862. [FN106] Andrew Johnson, a leading East Tennessean and staunch Unionist, was a senator who had defied the secessionist Confederate faction in pre-war Tennessee. Johnson was appointed Military Governor of Tennessee by President Abraham Lincoln on March 3, 1862. [FN107] During Johnson's administration, an amendment was passed at the January 1865 constitutional convention giving the General Assembly the power to pass laws to exclude persons from the franchise when convicted by a jury of an "infamous crime." [FN108] Rebels were still active within the state during Johnson's term, and the motive behind the constitutional amendment was to retain the central power of the Union minority in Nashville. [FN109]

William G. Brownlow was the first post-war governor of Tennessee elected by popular vote. [FN110] When Governor Brownlow took office, however, rebel activity still existed in Middle and Western Tennessee and around the state capital in Davidson County. [FN111] The General Assembly, dominated by the Radical Party, [FN112] quickly passed "An Act to Limit the Elective Franchise" on July 5, 1865 under the Johnson-initiated Constitutional amendment. [FN113] Governor *563 Brownlow affirmed the act by executive proclamation dated July 10, 1865. [FN114] In 1860, 145,000 votes were cast in the presidential general election, and in 1865, Tennessee voters cast a mere 25,000 votes, effectively an 80% reduction in the voting rolls. [FN115] Upon the law's passage, nearly three-fourths of the voting age population in Davidson County was disenfranchised. [FN116]

Early in his administration, Brownlow adopted an immigration policy to attract white males from Europe and the northern states to guarantee his party's control in the pending August 1867 election. [FN117] His immigration policy failed in great part, and the question of extending suffrage to blacks came to the table. [FN118] Free blacks had voted under the Tennessee Constitution of 1796, [FN119] but lost the vote in 1834. [FN120] In a public address to the Senate and House in 1866, Brownlow stated that the "General Assembly will not close its present session without the passage of a Bill granting suffrage to *all* loyal males, properly qualified by age and citizenship." [FN121] The prior law expressly stated that only white males were eligible to vote. [FN122] "Now is the time," stated Brownlow, "for Tennessee to show the world that she belong[s] to the advance guard on the question of equal suffrage." [FN123] W.A. Garner of Lawrence County introduced a bill to both Houses after Brownlow's address. [FN124] The bill's

passage extended the franchise to black Americans *564 in Tennessee. [FN125] Tennessee was the only state in the South at this time to extend the franchise to blacks, and the majority of the black votes in the August 1867 election went solidly to incumbent Governor Brownlow.

In 1869, Brownlow vacated the governor's office to join the United States Senate. [FN126] Gubernatorial candidate DeWitt C. Senter won the subsequent election by a wide margin. Senter's victory has been attributed to his support for an amendment to the state constitution to allow for a gradual restoration of the franchise to the Conservatives. [FN127] A constitutional amendment was required because the electoral provisions were in the constitution. Delegates convened in Nashville in January 1870. [FN128] On March 26, 1870, the constitutional amendments were approved by majority vote of the general electorate. [FN129] Many blacks opposed the amendments, primarily because they contained a poll tax provision. [FN130] The current article I, section 5 of the Tennessee Constitution was among the amendments passed at this convention. [FN131]

B. The Case Law

Tennessee's criminal disenfranchisement statute was challenged in court in 1866, one year after it was enacted. Bromfield L. Ridley, a white male Tennessean, challenged the constitutionality of his disenfranchisement under the elective franchise acts. [FN132] In *Ridley v. Sherbrook*, the Tennessee Supreme Court upheld the *565 amendments. [FN133] The *Ridley* court decided that the elective franchise was not a fundamental right in Tennessee, but a political right that the state could limit. [FN134] Dispositive to the *Ridley* court's decision was the fact that the legislative body was acting under an express power under the state constitution. [FN135] In contrast to Tennessee law, federal law provides that the right to vote is clearly a "fundamental right" and any abridgment demands a "strict scrutiny" judicial review. [FN136]

During the 1980s, the Tennessee courts examined a number of disenfranchisement cases. In *Tate v. Collins*, [FN137] a Tennessee prisoner convicted of a non-infamous crime sought declaratory and injunctive relief demanding to cast his vote by absentee ballot. [FN138] The *Tate* court held that the Tennessee statute barring incarcerated non-felons from voting by absentee ballot violated the Equal Protection Clause. [FN139] The court found that prisoners convicted of non-infamous crimes were entitled to voting rights. [FN140]

In *Crutchfield v. Collins*, three registered voters brought action against election officials alleging disenfranchisement upon conviction of an infamous crime not expressly enumerated under Tennessee's 1972 criminal disenfranchisement statute. [FN141] The *566 court held that because the Tennessee Constitution was not self-executing, but expressly dependent upon legislative action, a statute enumerating disenfranchising crimes could not reach those convicted of non-enumerated crimes. [FN142] As a result, the plaintiffs were not disenfranchised. [FN143] The court, however, expressly limited its holding to the three plaintiffs and their "peculiar circumstances." [FN144]

Reacting to *Crutchfield*, the Tennessee legislature amended the language of the disenfranchisement statute so that it would apply to a wider scope of felonies. [FN145] In 1983, the plaintiff in *Gaskin v. Collins* challenged the legislature's 1981 expansion of the definition of infamous crimes and its retroactive application to all felons. [FN146] Tennessee's constitution expressly permitted disenfranchisement by legislative enactment when the categories of crimes are "previously ascertained and declared by law." [FN147] The *Gaskin* court held that the statute as amended violated the constitutional provision against retroactive disenfranchisement when it sought to affect those convicted of a felony under its amendment retroactively. [FN148]

C. Tennessee's Wesley v. Collins *Case*

In February of 1984, Charles Wesley ("Wesley"), a twenty-seven-year-old ex-Marine and resident of Nashville, entered a plea of guilty to the felonious charge of accessory after the fact to larceny. *567 [FN149] Wesley's plea-bargain resulted in the suspension of his sentence, so he served no prison time. [FN150] Six months later, Wesley and the Natural Rights Center, a Tennessee public interest law project, filed suit against the Attorney General and Reporter for the State of Tennessee asserting claims under federal law, namely, violations of the Fourteenth and

Fifteenth Amendments, the Civil Rights Act, and the federal Voting Rights Act. [FN151] Wesley sought injunctive and declaratory relief along with nominal and punitive damages. [FN152] He alleged that the provision of the Tennessee Voting Rights Act [FN153] that disenfranchised Tennesseans convicted of a felony, though facially neutral, was enacted with intent "to further secure the racial purity of the State legislature." [FN154] Wesley additionally alleged that the law results in a disproportionate disenfranchisement of black Tennesseans as compared to white Tennesseans. [FN155] The district court dismissed the case for failure to state a claim. [FN156] Wesley and the Natural Rights Center appealed to the Sixth Circuit Court of Appeals. [FN157] The court of appeals held that the Natural Rights Center lacked standing [FN158] and that the Tennessee statute violated neither the federal Civil Rights Act, the Equal Protection Clause, nor the Voting Rights Act. [FN159]

*568 *D. Tennessee's Statute under the Equal Protection Clause and Voting Rights Act*

Tennessee's criminal disenfranchisement statute clearly has a disproportionate impact on black Tennesseans. The statistics presented in *Wesley* showed that the ratio of white felons to the general population of Tennessee whites was approximately 1 to 1000, while the corresponding black ratio to the general population was 1 to 100. [FN160] These statistics show the first layer of racially disproportionate impact, specifically, that the criminal justice system impacts the black community ten times greater than it impacts the white community. Accordingly, as one might expect, the criminal disenfranchisement statute impacts a significantly greater number of black Tennesseans. Recent empirical data reflects that 97,800 Tennessee residents (2.4% of the total state population) are statutorily disenfranchised. [FN161] At 38,300, more than one-third of Tennessee's disenfranchised are black males, representing 14.5% of Tennessee's total black male population. [FN162] These statistics represent a racial disparity akin to the impact of Alabama's provision in *Hunter v. Underwood*. [FN163] The black male population alone constitutes 39% of the affected class impacted by Tennessee's criminal disenfranchisement statute. [FN164] Clearly, Tennessee's criminal disenfranchisement statute results in discriminatory racial effects, and *Wesley* should have easily met its prima facie burden twenty years ago.

*569 The second prong of the Equal Protection analysis requires proof that the statute was enacted with discriminatory intent. [FN165] Unlike the Alabama provision in *Hunter v. Underwood*, [FN166] whose legislative history clearly revealed its racial motive, Tennessee's criminal disenfranchisement statute does not clearly show a discriminatory racial motivation. First, the statute's legislative history shows that Tennessee's legislative body sought to deny ballot access to Confederates and their supporters immediately after the Civil War. [FN167] Secondly, in 1867, Tennessee was the only southern state to actually extend the franchise to its black citizens. [FN168] Notwithstanding this unique history, Tennessee's disenfranchisement statute does reveal intent to extend the franchise to blacks for the sole purpose of electing white candidates. As noted earlier, enfranchisement of the black population promised 40,000 potential votes in the August 1867 election. [FN169] Conveniently, however, blacks could not run for elected office in Tennessee at that time. [FN170]

The *Wesley* court decision was criticized by the district court in *Johnson v. Bush* as having failed to consider the Supreme Court's approach to racially discriminatory disenfranchisement. [FN171] The *Johnson* court pointed out that the *Wesley* court, in affirming the district court's conclusion, stated in error that "'the disenfranchisement of felons has never been viewed as a device by which a state could discriminatorily exclude a given racial minority from the polls.'" [FN172] The appellate court in *Wesley* stated this despite the United States Supreme Court's invalidating Alabama's criminal disenfranchisement statute the previous year in *Hunter v. Underwood*. [FN173]

*570 The *Wesley* court claimed that its Voting Rights Act results test was less stringent than the Equal Protection clause intent-based test. [FN174] The district court in *Wesley* held that the law did not violate the Voting Rights Act because the offenders had the same opportunity--before committing disenfranchising crimes--as any other citizen to vote. [FN175] In taking this position, the *Wesley* court did not consider the "totality of circumstances" proof of historically-rooted racism in Tennessee. [FN176] Additionally, the district court required the plaintiff to prove a

causal connection between the state's disenfranchisement statute and the history of racial discrimination in Tennessee. [FN177] The district court's requirement that such a nexus be shown placed an unwarranted burden of proof on the plaintiff and should have been held clearly erroneous on appeal. Despite this clear error, the appellate court rejected the plaintiff's Voting Rights Act claim and held that the law was not in violation of the federal Voting Rights Act. [FN178]

V. A LOOK AT THE EMPIRICAL DATA OF DISPROPORTIONATE RACIAL IMPACT BY STATE

The growing challenges to the racially disproportionate impact of states' criminal disenfranchisement statutes may be a result of the empirical data now available showing the extent of the impact. For every state, the rate of disenfranchisement for black males is many times that of the general rate of disenfranchisement.

TABLE 1: RACIAL IMPACT OF DISENFRANCHISED FELONS BY STATE [FN179]

State	Total Felons	Rate for Total	Black Men	Rate for Black Men
Alabama	241,100	7.5%	105,000	31.5%
Alaska	4,900	1.2%	500	6.3%
Arizona	74,600	2.3%	6,600	12.1%
Arkansas	27,400	1.5%	10,700	9.2%
California	241,400	1.0%	69,500	8.7%
Colorado	15,700	0.6%	3,500	6.1%
Connecticut	42,200	1.7%	13,700	14.8%
Delaware	20,500	3.7%	8,700	20.0%
District of Columbia	8,700	2.0%	8,100	7.2%
Florida	647,100	5.9%	204,600	31.2%
Georgia	134,800	2.5%	66,400	10.5%
Hawaii	3,000	0.3%	100	0.9%
Idaho	3,800	0.5%	100	2.7%
Illinois	38,900	0.4%	24,100	4.5%
Indiana	16,800	0.4%	6,800	4.6%
Iowa	42,300	2.0%	4,800	26.5%
Kansas	7,800	0.4%	2,800	5.6%
Kentucky	24,000	0.8%	7,000	7.7%
Louisiana	26,800	0.9%	19,600	4.8%
Maine	0	0.0%	0	0.0%
Maryland	135,700	3.6%	67,900	15.4%
Massachusetts	0	0.0%	0	0.0%
Michigan	42,300	0.6%	22,700	5.4%
Minnesota	56,000	1.6%	7,200	17.8%
Mississippi	145,600	7.4%	81,700	28.6%
Missouri	58,800	1.5%	20,100	11.3%
Montana	2,100	0.3%	0	2.9%
Nebraska	11,900	1.0%	2,100	10.2%
Nevada	16,800	1.4%	4,000	10.0%
New Hampshire	2,100	0.2%	100	3.8%
New Jersey	138,300	2.3%	65,200	17.7%

New Mexico	48,900	4.0%	3,700	24.1%
New York	126,800	0.9%	62,700	6.2%
North Carolina	96,700	1.8%	46,900	9.2%
North Dakota	700	0.1%	0	1.1%
Ohio	46,200	0.6%	23,800	6.2%
Oklahoma	37,200	1.5%	9,800	12.3%
Oregon	7,300	0.3%	900	4.5%
Pennsylvania	34,500	0.4%	18,900	5.2%
Rhode Island	13,900	1.8%	2,800	18.3%
South Carolina	48,300	1.7%	26,100	7.6%
South Dakota	2,100	0.4%	100	3.5%
Tennessee	97,800	2.4%	38,300	14.5%
Texas	610,000	4.5%	156,600	20.8%
Utah	0	0.0%	0	0.0%
Vermont	0	0.0%	0	0.0%
Virginia	269,800	5.3%	110,000	25.0%
Washington	151,500	3.7%	16,700	24.0%
West Virginia	6,700	0.5%	900	4.4%
Wisconsin	48,500	1.3%	14,900	18.2%
Wyoming	14,100	4.1%	400	27.7%
U. S. Total	3,892,400	2.0%	1,367,100	13.1%

*573 State disenfranchisement statutes have a dramatically disproportionate racial impact. Thirteen percent of all adult black men--1.4 million--are disenfranchised, representing one-third of the total disenfranchised population and reflecting a rate of disenfranchisement that is seven times the national average. [FN180] The disproportionate racial impact in certain individual states is worth noting. In Florida and Alabama, 31% of all black men are permanently disenfranchised. [FN181] In the state of Washington, approximately one out of four black men (24%) are disenfranchised permanently. [FN182] Twenty percent of the black men in Delaware are disenfranchised. [FN183] One in four (24 to 28%) of the black men in Iowa, Mississippi, New Mexico, Virginia, and Wyoming are permanently disenfranchised. [FN184] In Texas, one in five black men (20.8%) are currently disenfranchised. [FN185] Sixteen to eighteen percent of the black men in Minnesota, New Jersey, Rhode Island, and Wisconsin are currently disenfranchised. [FN186]

VI. CONCLUSION

Many state criminal disenfranchisement statutes are creating a silent civil rights crisis. Nearly four million Americans are currently disenfranchised due to felon disenfranchisement statutes, [FN187] and one-third of the nation's disenfranchised are black males. [FN188] National studies of the disproportionate impact of these disenfranchisement statutes on Latino and Native American communities are still in their infancy. [FN189] It seems likely, however, that these *574 laws also disproportionately impact minorities because of the social and historical conditions that result in many minority populations coming in contact with the criminal justice system.

As witnesses to Iraq's pursuit to develop a democracy, we are reminded that the integrity of any democracy lies in the integrity of its voting system. The vote is the most powerful instrument ever devised by mankind. It becomes a hammer against the wall of injustice when placed in the hands of the masses and free of the stain of corruption and discrimination. Minority

vote dilution, growing at an alarming rate, substantially outweighs any criminal justice policy goal for retaining state criminal disenfranchisement statutes in their current state.

A narrow question is still ripe for United States Supreme Court review, namely, whether the Voting Rights Act should be construed to apply the results test to state criminal disenfranchisement statutes. The Court must clearly state that the plain statement rule does not apply to 42 U.S.C. § 1973. Additionally, the Court must clarify the evidentiary burden of production and persuasion of the state in proving that it re-enacted a challenged provision for an independent, non-discriminatory purpose under the "broken taint" defense. Furthermore, under the "totality of the circumstances" analysis the Court should clarify the kind of weight courts should give the historical and social discriminatory practices within the state. A court should consider this a weighty factor in analyzing a Voting Rights Act challenge to these long-standing state statutes.

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[FN1]. *See, e.g.*, Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005); Hayden v. Pataki, No. 00 Civ 8586 (LMM), 2004 WL 1335921 (S.D.N.Y. June 14, 2004) (challenging the disenfranchisement statute of New York); NAACP v. Harvey, 885 A.2d 445 (N.J. Super. Ct. App. Div. 2005) (challenging New Jersey's disenfranchisement statute by the ACLU-NJ and Constitutional Litigation Clinic at Rutgers Law School).

[FN2]. BLACK'S LAW DICTIONARY 480 (7th ed. 1999).

[FN3]. U.S. CONST. amend. XIV, § 1.

[FN4]. 42 U.S.C. § 1973 (2000). This article will not address the constitutionality of the black vote dilution under at-large election and reapportionment plans. These have been challenged under the Fourteenth and Fifteenth Amendments and the Voting Rights Act. *See, e.g.*, Taylor v. Haywood County, 544 F. Supp. 1122 (W.D. Tenn. 1982); Sullivan v. Crowell, 444 F. Supp. 606 (W.D. Tenn. 1978); *see also* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976); White v. Regester, 412 U.S. 755 (1973).

[FN5]. Hunter v. Underwood, 471 U.S. 222, 227-28 (1985) ("Presented with a neutral state law that produces disproportionate effects along racial lines, the Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment." (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)).

[FN6]. Currently, *Hunter v. Underwood* is the only case where the Equal Protection Clause has been successfully used by a plaintiff to invalidate a state's criminal disenfranchisement statute. *See Hunter*, 471 U.S. at 227-28.

[FN7]. Chisom v. Roemer, 501 U.S. 380, 394 (1991) ("Under the amended statute, proof of intent is no longer required to prove a § 2 violation.").

[FN8]. The Voting Rights Act of 1965 "reflect[ed] Congress' firm intention to rid the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966). Section 2 of the Voting Rights Act prohibits standards, practices or procedures that result in denial or abridgement of the right of a citizen to vote on account of race, color, or membership in one of the identified groups in Section 4(f)(2) of the Act. Most cases under Section 2 have involved at-large election schemes, but the section can apply to any voting standard, practice, or procedure that discriminatorily effects one of the identified groups. Section 2 has no expiration date as do certain other Voting Rights Act sections, such as Section 5's "preclearance" provision, which is

set to sunset in 2007, unless Congress renews it.

[FN9]. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (acknowledging the power of Congress to enact the Voting Rights Act under the Fifteenth Amendment).

[FN10]. Johnson v. Bush, 405 F.3d 1214, 1236-37 (11th Cir. 2005) (Tjoflat, J., concurring); *see* 42 U.S.C. § 1973 (2000). Compare preamendment 42 U.S.C. § 1973 stating that "[n]o voting qualification ... shall be imposed or applied by any State or political subdivision *to deny or abridge* the right of any citizen of the United States to vote on account of race or color" (emphasis added), with postamendment 42 U.S.C. § 1973(a), stating that "[n]o voting qualification ... shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgment of* the right of any citizen of the United States to vote on account of race or color." (emphasis added). *See Johnson*, 405 F.3d at 1236 (Tjoflat, J., concurring). The *Johnson* court held that the Voting Rights Act could not be used to challenge a states criminal disenfranchisement statute. *Id*. at 1232.

[FN11]. *See Johnson*, at 1232 (holding that § 1973 can not be applied to invalidate a criminal disenfranchisement statute); Muntaqim v. Coombe, 366 F.3d 102, 124 (2d Cir. 2004) (holding § 1973 does not apply to state disenfranchisement statutes); Farrakhan v. Washington, 338 F.3d 1009, 1014-16 (9th Cir. 2003) (deciding that a challenge to the state's disenfranchisement provision was cognizable under § 1973); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (holding that although § 1973 assumed to apply to state felon disenfranchisement statutes, but no violation); *see* Howard v. Gilmore, 205 F.3d 1333, No. 99-285, 2000 WL 203984, at *1 (4th Cir. February 23, 2000) (unpublished table decision) (implying that § 1973 applied to state disenfranchisement statutes).

[FN12]. Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986), *aff'g* 605 F. Supp. 802 (M.D. Tenn. 1985).

[FN13]. *See generally* THOMAS B. ALEXANDER, POLITICAL RECONSTRUCTION IN TENNESSEE (1950).

[FN14]. Thornburg v. Gingles, 478 U.S. 30, 45-47 (1986) (considering the nexus between "past and present reality," such as race bias in the criminal justice system, when examining how a voting qualification interacts with social and historical conditions to produce racially disproportionate effects). The Thornburg Court's analysis focuses on vote dilution under section 2 of the Voting Rights Act. *Id*. Vote dilution occurs when a voting practice diminishes "the force of minority votes that were duly cast and counted." Holder v. Hall, 512 U.S. 874, 896 (1994) (Thomas, J., concurring). Both vote dilution and vote denial, however, are distinct types of discriminatory practices covered by the Voting Rights Act. Burton v. City of Belle Glade, 178 F.3d 1175, 1196 (11th Cir. 1999).

[FN15]. *See* Garza v. Los Angeles, 918 F.2d 763, 755-66 (9th Cir. 1990).

[FN16]. Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 650 (2005). The *Johnson v. Bush* petition for certiorari was filed August 15, 2005, by the attorneys for the Brennan Center for Justice in New York. The Johnson appeal presented two questions:

1. Is a permanent felony disenfranchisement provision--like all other voting qualifications--subject to challenge under Section 2 of the Voting Rights Act on the ground that it results in a denial of the right to vote on account of race?

2. When a provision was enacted by a state for the purpose of disqualifying otherwise eligible black voters, and it has disenfranchised blacks at twice the rate of others for more than one hundred years, does the state bear the evidentiary burdens of production and persuasion in proving that it reenacted the provision for an independent, nondiscriminatory reason sufficient to purge its unconstitutional taint?

Petition for Writ of Certiorari, Johnson v. Bush, 126 S. Ct. 650 (2005) (No. 05-212), 2005 WL 1943599. Within the 2004 Supreme Court term, the Court also denied certiorari on challenges to the state criminal disenfranchisement statutes of Washington State, *Locke v. Farrakhan*, 125 S. Ct. 477 (2004), and New York State, *Muntaqim v. Coombe*, 125 S. Ct. 480 (2004).

[FN17]. Hunter v. Underwood, 471 U.S. 222 (1985); Richardson v. Ramirez, 418 U.S. 24 (1974).

[FN18]. 418 U.S. 24 (1974).

[FN19]. *Id.* at 26-27.

[FN20]. *Id.* at 27-31.

[FN21]. *Id.* at 54-56.

[FN22]. *Id.*

[FN23]. U.S. CONST. amend XIV, § 2 (emphasis added).

[FN24]. *Richardson*, 418 U.S. at 48. This rule of construction provides that a power remains unimpaired unless expressly taken away. Noteworthy to this line of reasoning is the language of the Thirteenth Amendment of the United States Constitution, which states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States ...." Construed in light of the Thirteenth Amendment's dictates, Section 2 of the Fourteenth Amendment should not function as an affirmative sanction of a state's right to continue to hold an ex-felon captive after his sentence has been served.

[FN25]. Judge Mahoney, in *Baker v. Pataki*, 85 F.3d 919, 929 (2d Cir. 1996), relied on *Richardson v. Ramirez* to support the claim that felon disenfranchisement was sanctioned by the Fourteenth Amendment and that "any attempt by Congress to subject felon disenfranchisement provisions to the 'results' methodology of § 1973 would pose a serious constitutional question concerning the scope of Congress' power to enforce the Fourteenth and Fifteenth Amendments." *Id.* at 930.

[FN26]. U.S. CONST. amend XIV, § 2.

[FN27]. *Id.*

[FN28]. Johnson v. Bush, 405 F.3d 1214, 1241 (11th Cir. 2005) (Wilson, J., concurring in part and dissenting in part). Judge Wilson, concurring and dissenting in part, nailed the point that the states have no affirmative grant of power to disenfranchise criminals under section 2 of the Fourteenth Amendment. *Id.* This implied right does not conflict with Congress's enforcement authority when protecting fundamental rights or discrimination based on suspect classifications. *Id.*

[FN29]. *See* Richardson v. Ramirez, 418 U.S. 24, 54 (relying upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms). Justices Marshall, Douglas, and Brennan dissented. *Id.* at 56, 86.

[FN30]. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

[FN31]. *Id.*

[FN32]. 471 U.S. 222 (1985).

[FN33]. *Id.* at 223.

[FN34]. *Id.* at 224. Section 182 of the Alabama Constitution of 1901, and its predecessor, article VIII, section 3, of the Alabama Constitution of 1875, both contained criminal disenfranchisement provisions. ALA. CONST. art. VIII, § 182 (repealed 1996); ALA. CONST. of 1875, art. VIII, § 3. The 1901 Alabama constitutional convention expanded the enumerated crimes of the 1875 constitution to include an expanded list of felonies and the catchall "moral turpitude" provision. ALA. CONST. art. VIII, § 182 (repealed 1996); ALA. CONST. of 1875, art. VIII, § 3. Moral turpitude was not defined in the statute, but was later interpreted by the Alabama Supreme Court in *Pippin v. State*, 73 So. 340, 342 (Ala. 1916), as an act that is "immoral in itself, regardless of the fact whether it is punishable by law." *Id.* (quoting Fort v. Brinkley, 112 S.W. 1084 (Ark. 1908)). A study of the legislative histories behind southern states' disenfranchisement statutes reveals that "vagrancy" and "moral turpitude" were felonies thought to be committed more by blacks than whites. *See Underwood*, 471 U.S. at 227, 229 (citing C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913, 321-322 (1971)).

[FN35]. *Id.* at 223-25.

[FN36]. *Id.* at 229.

[FN37]. *Id.* at 225; *see* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 & n.21 (1977); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

[FN38]. *Underwood*, 471 U.S. at 227.

[FN39]. *Id.* at 229.

[FN40]. *Id.* at 222.

[FN41]. *Id.* at 229 (citing Official Proceedings of the Constitutional Convention of the State of Alabama, May 21, 1901 to Sep. 3, 1901, at 8 (1940)).

[FN42]. *Id.* at 233.

[FN43]. United States v. Fordice, 505 U.S. 717, 739 (1992). The Court examined Mississippi's continued de jure dual university system and did not agree that "the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system." *Id.*

[FN44]. *See id.* at 738-39.

[FN45]. 405 F.3d 1214 (11th Cir. 2005).

[FN46]. Johnson v. Bush, 405 F.3d 1214, 1244-45 (Barkett, J., dissenting). Judge Barkett's dissent from both the summary judgment grant on the Equal Protection and the Voting Rights Act claim properly noted that it is the government's burden to show that its re-enactment was motivated by a non-discriminatory intent and by goals that "broke the chain" to any discriminatory motive behind the earlier provision. *Id.* Judge Barkett also correctly stated

> the majority goes to great lengths to question the sufficiency of plaintiffs' evidence and to offer alternative explanations for each historical fact that suggests a discriminatory motive. I believe that in doing so the majority erroneously views the facts and draws all reasonable inferences, not in favor of the non-moving party, but rather in favor of the state.

Id. at 1245, n.1 (Barkett, J., dissenting).

[FN47]. U.S. CONST. amend. XV, § 1. The Fifteenth Amendment states that the "right of citizens

of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *See also* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

[FN48]. 42 U.S.C. § 1973(a) (2000).

[FN49]. *Id.* § 1973(b).

[FN50]. H.R. REP. NO. 91-397, at 3278-79 (1970).

[FN51]. Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map For the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867, 1872 (1999) (citing Act of June 29, 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973b(c) (2000)) (banning any "test or device" that limits the ability to vote to those with "good moral character")).

[FN52]. *Id.* at 1873; *see* S. REP. NO. 97-417, at 28-29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 205-07.

[FN53]. S. REP. NO. 97-417, at 28-29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 205-07.

[FN54]. *See* H.R. REP. NO. 91-397, at 3278-79 (1970); Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map For the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867, 1872 (1999) (citing Act of June 29, 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973b(c) (2000)).

[FN55]. 478 U.S. 30 (1986).

[FN56]. *Id.* at 49-51.

[FN57]. *Id.* at 50-51.

[FN58]. Recent cases have emphasized that proof of the three *Gingles* factors does not establish vote dilution per se. *See* Johnson v. DeGrandy, 512 U.S. 997, 998 (1994) ("While proof of the *Gingles* factors is necessary to make out a claim that a set of district lines violates § 2, it is not necessarily sufficient.").

[FN59]. *See Gingles*, 478 U.S. at 35. The *Gingles* Court specifically cited the Report of the Senate Judiciary Committee that accompanied the bill amending section 2, which elaborated on probative factors to be given weight in determining a section 2 violation.

[FN60]. *See infra* Part VI.

[FN61]. 85 F.3d 919 (2d Cir. 1996) (en banc) (per curiam).

[FN62]. *Id.* at 920.

[FN63]. *Id.* at 923.

[FN64]. *Id.* at 920-21.

[FN65]. *Id.*

[FN66]. 338 F.3d 1009 (9th Cir. 2003), *rehearing and rehearing en banc denied*, 359 F.3d 1116 (9th Cir. 2004), *cert. denied*, Locke v. Farrakhan, 72 U.S. 3741 (2004).

[FN67]. *Id.* at 1012.

[FN68]. *Id.*

[FN69]. *Id.* at 1013.

[FN70]. *Id.* at 1011.

[FN71]. *Id.*

[FN72]. *Id.* at 1011-12 (citing Thornburg v. Gingles, 478 U.S. 30 (1986)).

[FN73]. *Id.* at 1017.

[FN74]. *Id.* at 1012.

[FN75]. 353 F.3d 1287 (11th Cir. 2003).

[FN76]. *Id.* at 1292.

[FN77]. *Id.* at 1293.

[FN78]. *Id.* at 1287 (citing Johnson v. Bush, 214 F. Supp. 2d 1333, 1343 (Fla. 2002)).

[FN79]. *Id.* at 1306.

[FN80]. Johnson v. Bush, 405 F.3d 1214, 1217, 1232-35 (11th Cir. 2005) (holding that neither the enactment of Florida's 1868 provision nor its 1968 reenactment were racially motivated).

[FN81]. *Id.* at 1234.

[FN82]. 418 U.S. 24 (1974).

[FN83]. *See supra* text accompanying notes 18-30.

[FN84]. *See* Baker v. Pataki, 85 F.3d 919 (1996).

[FN85]. Muntaqim v. Coombe, 366 F.3d 102, 111 (2d Cir. 2004). Muntaqim states, in relevant part, "Although we recognize that this is a difficult question that can ultimately be resolved only by a determination of the United States Supreme Court, we conclude that the Voting Rights Act, which is silent on the topic of state felon disenfranchisement statutes, cannot be applied to draw into question the validity of New York's disenfranchisement statute." *Id.* at 104.

[FN86]. Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991); NLRB v. Catholic Bishops, 440 U.S. 490, 500 (1979).

[FN87]. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (stating that canons of statutory interpretation are only used when ambiguity is found in the statute's text).

[FN88]. *Gregory*, 501 U.S. at 460-61.

[FN89]. *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

[FN90]. *Catholic Bishops*, 440 U.S. at 491.

[FN91]. *Id.* at 506.

[FN92]. Baker v. Pataki, 85 F.3d at 922, *cert. denied*, 516 U.S. 980 (1995).

[FN93]. *Id.* at 934.

[FN94]. *Id.* at 931-32.

[FN95]. *Id.* at 938.

[FN96]. *Id.* (citing Chisom v. Roemer, 501 U.S. 380 (1990)).

[FN97]. *Id.*

[FN98]. *Id.* (citing Gregory v. Ashcroft, 501 U.S. at 470).

[FN99]. *See* Farrakhan v. Washington, 338 F.3d 1009, 1014 (9th Cir. 2003). When exercising its enforcement powers under the Fourteenth and Fifteenth Amendment, Congress is not required to make factual findings as to every potential application of a civil rights statute. *Id.*

[FN100]. Muntaqim v. Coombe, 366 F.3d 102, 111 (2d Cir. 2004) (quoting Muntaqim v. Coombe, No. 94-CV-1237, slip op. at 12 (N.D.N.Y. Jan. 24, 2001)).

[FN101]. *Id.* at 111-12.

[FN102]. *See generally* Jamie Fellner & Mark Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Law in the United States, Human Rights Watch and The Sentencing Project 1998*, http://www.hrw.org/reports98/vote (last visited Jan. 11, 2005). The history of Southern constitutional conventions preceding ratification of the Fifteenth Amendment to the United States Constitution is chronicled in chapters 6 and 7 of J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS (1974).

[FN103]. *Id.*

[FN104]. Presented with a facially neutral state law under an Equal Protection Clause challenge, this question goes towards establishing what the state's intent was when it enacted the challenged provision. The Supreme Court has held that the finding of dilution is a factual matter. *See* Thornburg v. Gingles, 478 U.S. 30, 78 (1986). The weight of a state's interest under a constitutional analysis, however, is a legal question, not a factual one. *See* League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993) (citing, *inter alia*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).

[FN105]. Johnson v. Bush, 126 S. Ct. 650 (2005).

[FN106]. The life of the succession government in Tennessee was short. Though the last state to secede, Tennessee abdicated upon the first battle in the state, which occurred at Fort Donelson on February 16, 1862. *See* JAMES WALTER FERTIG, THE SECESSION AND RECONSTRUCTION OF TENNESSEE 13 (1898); KENNETH M. STAMPP & LEON F. LITWACK, RECONSTRUCTION 54 (1969); *see generally* JAMES W. PATTON, UNIONISM AND RECONSTRUCTION IN TENNESSEE 1860-69 (1934).

[FN107]. PATTON, *supra* note 106, at 30.

[FN108]. TENN. CONST. art. 4, § 2.

[FN109]. *See* FERTIG, *supra* note 106, at 13.

[FN110]. Tennessee's Reconstruction governor was elected in 1865. *See* Past Governors of Tennessee, http://www.state.tn.us/sos/bluebook/online/pastgov.pdf (last visited Jan. 14, 2006).

[FN111]. *See* FERTIG, *supra* note 106, at 13. The Union found its strongest support in East Tennessee, which refused to secede from the Union. *Id.*

[FN112]. The Union faction became politically known as the Radical Party, while the Confederate sympathizers became known as the Conservatives. FERTIG, *supra* note 106, at 14.

[FN113]. TENN. CONST. art. 4, § 2.

[FN114]. FERTIG, *supra* note 106, at 68.

[FN115]. *Id.* at 12; *see also* Report of Executive Department, Nashville, Tenn., Nov. 25, 1865.

[FN116]. Message of Executive Department, Nashville, Tenn., Apr. 13, 1866.

[FN117]. ALEXANDER, *supra* note 13, at 124.

[FN118]. Black enfranchisement promised 40,000 potential votes. The Conservatives, however, hoped to garner half of the black vote from the Radicals. *Id.*, at 40, 130.

[FN119]. The census of the black voting population is found in H.J. 37, 1st Sess., app. at 40-43 (Tenn. 1866).

[FN120]. ALEXANDER, *supra* note 13, at 129.

[FN121]. S.J., 2d Sess., at 167-72 (Tenn. 1866-67); H.J., 2d Sess., at 171-76 (Tenn. 1866-67) (emphasis added).

[FN122]. 5 ROBERT H. WHITE, MESSAGES OF THE GOVERNORS OF TENNESSEE 1857-1869 436-37 (1959) (citing Acts of Tennessee, 1st Sess., chapt. 16, § 1 (1865)).

[FN123]. *Id.*

[FN124]. To Amend an Act to Limit the Elective Franchise, passed May 3, 1866, H.J., 2d Sess., at 179 (Tenn. 1866-67).

[FN125]. Blacks had access to the ballot but were forbidden from running for office or serving on a jury. ALEXANDER, *supra* note 13, at 204.

[FN126]. *Id.* at 198 & 204.

[FN127]. *Id.* at 199.

[FN128]. *Id.* at 233.

[FN129]. *Id.*

[FN130]. *Id.*

[FN131]. TENN. CONST. art. 1, § 5 provides: “The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.”

[FN132]. Ridley v. Sherbrook, 43 Tenn. (3 Cold.) 569 (1866), *available at* 1866 WL 1854, at *1 (Tenn.).

[FN133]. 43 Tenn. (3 Cold.) 569 (1866), 1866 WL 1854 (Tenn.).

[FN134]. *Id.* at *3.

[FN135]. *Id.*

[FN136]. *See* Ramirez v. Brown, 507 P.2d 1345, 1348-49 (Cal. 1973) (providing that the right to vote is a fundamental right under federal law); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Harper v. Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). See generally President Lyndon B. Johnson's statement when he signed the federal Voting Rights 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 3-4 (1985) (quoting Lyndon B. Johnson). *But see, e.g.*, Owens v. Barnes, 711 F.2d 25, 27 (3d Cir. 1983) (stating the right of felons to vote is not fundamental).

[FN137]. Tate v. Collins, 496 F. Supp. 205 (W.D. Tenn. 1980).

[FN138]. *Id.* at 206.

[FN139]. *Id.* at 210-11.

[FN140]. *Id.* at 211.

[FN141]. Crutchfield v. Collins, 607 S.W.2d 478 (Tenn. Ct. App. 1980); *see generally* TENN. CODE ANN. § 40-2712 (1972) (current version at TENN. CODE ANN. § 40-20-112 (2005)).

[FN142]. *Crutchfield*, 607 S.W.2d at 482.

[FN143]. *Id.*

[FN144]. *Id.*

[FN145]. TENN. CODE ANN. § 2-2-139 (2005). The legislature amended the statute on May 18, 1981. TENN. CODE ANN. § 2-2-139 (1981) stated at clause (d) that "[t]he provisions of this section, relative to forfeiture and restoration of the right of suffrage for those persons convicted of infamous crimes, shall also apply to those persons convicted of crimes prior to May 18, 1981, which are infamous crimes after May 18, 1981."

[FN146]. Gaskin v. Collins, 661 S.W.2d 865 (Tenn. 1983).

[FN147]. *Id.* at 867.

[FN148]. *Id.* at 868.

[FN149]. Wesley v. Collins, 605 F. Supp. 802, 804 (M.D. Tenn. 1985).

[FN150]. Wesley v. Collins, 791 F.2d 1255, 1257 (6th Cir. 1986).

[FN151]. *Wesley*, 605 F. Supp. at 804; *see generally* U.S. CONST. amend. XIV; U.S. CONST. amend. XV, § 1; 42 U.S.C. § 1973 (2000); 42 U.S.C. § 1983 (2000).

[FN152]. *Wesley*, 605 F. Supp. at 804.

[FN153]. TENN. CODE ANN. § 2-19-143 (2005) states, in relevant part, that any person convicted of an infamous crime in Tennessee or convicted of an infamous crime in federal court or another state court which would constitute an infamous crime in Tennessee is forbidden to register to vote or to vote in any election until pardon or until restoration of full citizenship is successfully petitioned. Restoration of full citizenship is provided for by TENN. CODE ANN. §§ 40-29-101 to 105. "Infamous crime" means felony per TENN. CODE ANN. § 40-20-112.

[FN154]. *Wesley*, 605 F. Supp. at 804.

[FN155]. *Id.*

[FN156]. *Id.* at 814.

[FN157]. Wesley v. Collins, 791 F.2d 1255, 1257 (6th Cir. 1986).

[FN158]. *Id.* at 1258.

[FN159]. *Id.* at 1262.

[FN160]. *Wesley*, 605 F. Supp. at 804. The source of Wesley's statistics is not cited in the case report.

[FN161]. LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, 50-STATE REPORT ON RE-ENFRANCHISEMENT--A GUIDE TO RESTORING YOUR RIGHT TO VOTE 170 (2004), http://www.lawyerscomm.org/2005website/ep04/ep0920/50stateguide.html (last visited March 18, 2006).

[FN162]. The Sentencing Project, http://www.sentencingproject.org/losing_ 04.cfm (last visited Jan. 31, 2005).

[FN163]. *See* Hunter v. Underwood, 471 U.S. 222, 227 (1985) (stating the criminal disenfranchisement statute impacted blacks ten times greater than whites in Alabama).

[FN164]. LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, *supra* note 161, at 171 (stating that 14.5% of the black male population is disenfranchised in Tennessee).

[FN165]. 471 U.S. 222, 225 (1985).

[FN166]. *Id.* at 233.

[FN167]. *See* FERTIG, *supra* note 106, at 13.

[FN168]. Some states, such as Louisiana, may have continued extension of the franchise to "free persons of color," those enclaves within the black populace that enjoyed freedom before the Civil War.

[FN169]. ALEXANDER, *supra* note 13, at 130.

[FN170]. *Id.* at 204.

[FN171]. *See* Johnson v. Bush, 353 F.3d 1287, 1305 n.24 (11th Cir. 2003).

[FN172]. *Id.* (quoting Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986)).

[FN173]. *See id.* at 1305.

[FN174]. *See* Wesley v. Collins, 605 F. Supp. 802, 809 & n.9 (M.D. Tenn. 1985).

[FN175]. *Id.* at 813.

[FN176]. *See id.* at 812. Previous cases do show the presence of a historical pattern of racially motivated voting and socioeconomic discrimination in Tennessee. *See, e.g.*, Kelley v. Metro. County Bd. of Educ., 615 F. Supp. 1139 (M.D. Tenn. 1985); Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984); Taylor v. Haywood County, 544 F. Supp. 1122 (W.D. Tenn. 1982).

[FN177]. *Wesley*, 605 F. Supp. at 812. ("[T]he nexus between discriminatory exclusion of Blacks from the political process and disenfranchisement of felons simply cannot be drawn").

[FN178]. Wesley v. Collins, 791 F.2d 1255, 1263 (6th Cir. 1986).

[FN179]. The Sentencing Project, *supra* note 162.

[FN180]. *See id.*

[FN181]. *Id.*

[FN182]. *Id.*

[FN183]. *Id.*

[FN184]. *Id.*

[FN185]. *Id.*

[FN186]. *Id.*

[FN187]. MICHAEL P. MCDONALD & SAMUEL L. POPKIN, THE MYTH OF THE VANISHING VOTER 27-28 (2000), http://elections.gmu.edu/APSR%20McDonald%20and_Popkin_ 2001.pdf.

[FN188]. *Id.*

[FN189]. *See generally* MARISA J. DEMEO & STEVEN A. OCHOA, DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES (2003), http://www.maldef.org/pdf/LatinoVotingReport.pdf (reporting the impact of felony disenfranchisement laws by the Mexican American Legal Defense and Educational Fund (MALDEF), a Latino civil rights organization).