

VOTING RIGHTS SEMINAR – SPRING 2012

INSTRUCTOR: ROBERT RUBIN

Voting rights issues are among the most volatile of questions currently before the courts. Questions of race and whether and how it can be used as a remedy are just one issue area. The role of politicians vs. "citizen commissions" in drawing legislative lines is another. Should ex-felons be allowed to vote? Is one majority-minority district more empowering than two influence districts? What is an influence district? How serious are reports of voter fraud and do they justify restrictions on voters' rights?

This seminar examines statutory developments from the Voting Rights Act of 1965 through the "motor voter" law designed to increase and diversify the pool of voters. We will address the Help America Vote Act (HAVA) enacted in the wake of the 2000 Presidential election debacle and touch on recent efforts to reauthorize or "sunset" certain provisions of the 1965 law. Particular emphasis will be placed upon sections 2 (minority vote dilution) and 5 ("preclearance" of voting changes) of the federal Voting Rights Act.

The course will also examine state law and specifically, the California Voting Rights Act that was intended to ease some of the more restrictive elements of the federal law. Students will have the opportunity to discuss cases brought under the state law, including pending litigation.

Finally, students will have the opportunity to participate in mock arguments involving major voting rights cases. Requirements for the seminar include active classroom participation and submission of a 20-page paper on a voting rights topic of your choosing.

Topics To Be Covered:

- I. OVERVIEW, CONTEXT, AND HISTORY OF THE RIGHT TO VOTE
- II. RESTRICTIONS ON RIGHT TO VOTE: NON-CITIZENS AND EX-FELONS
- III. REAPPORTIONMENT, REDISTRICTING & RACE
- IV. FEDERAL VOTING RIGHTS ACT, SECTION 2
- V. FEDERAL VOTING RIGHTS ACT, SECTION 5
- VI. EXPANDING VOTER REGISTRATION – "MOTOR VOTER LAW"
- VII. ELECTION 2000 & ITS AFTERMATH: BUSH V. GORE AND HAVA
- VIII. CALIFORNIA VOTING RIGHTS ACT

1. INTRODUCTION

Since the earliest days of the republic, redrawing the boundaries of legislative and congressional districts after each decennial census has been primarily the responsibility of the state legislatures. Following World War I, as the nation's population began to shift from rural to urban areas, many legislatures lost their enthusiasm for the decennial task and failed to carry out their constitutional responsibility.

For decades, the U.S. Supreme Court declined repeated invitations to enter the “political thicket”¹ of redistricting and refused to order the legislatures to carry out their duty. In 1962, however, in the seminal case of *Baker v. Carr*,² the Court held that the federal courts did have jurisdiction to consider constitutional challenges to redistricting plans. The next year, in *Gray v. Sanders*, Justice Douglas declared: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”³ In 1964, in *Wesberry v. Sanders*, the Court held that congressional districts must be redrawn so that “as nearly as is practicable one man’s vote in a congressional election is ... worth as much as another’s.”⁴ And, in *Reynolds v. Sims*, the Court held that the boundaries of legislative districts must be redrawn and that the “overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.”⁵

¹ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

² 369 U.S. 186 (1962).

³ 372 U.S. 368, 381 (1963).

⁴ 376 U.S. 1, 8 (1964).

⁵ 377 U.S. 533, 579 (1964).

While the courts were striking down redistricting plans for inequality of population, Congress enacted the Voting Rights Act of 1965⁶ to remedy the inequality of opportunity afforded to racial and ethnic minorities to participate in elections. Section 2 of the act prohibited any state or political subdivision from imposing a “voting qualification or prerequisite to voting, or standard, practice or procedure to deny or abridge the right to vote on account of race or color.”⁷ Section 5 required a covered jurisdiction to preclear any changes in its electoral laws, practices or procedures with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia before it could take effect.⁸ The Justice Department began to use this new authority to require that redistricting plans be precleared.

In the 1970s, in *Gaffney v. Cummings*⁹ and *White v. Regester*,¹⁰ the Court developed a standard of population equality that required legislative districts to differ by no more than 10 percent from the smallest to the largest, unless justified by some “rational state policy.”

In 1975, Congress acted to facilitate drawing the new districts with equal populations by enacting Public Law No. 94-171, which required the secretary of commerce to report census results no later than April 1 of the year following the census to the governors and to the bodies or officials charged with state legislative redistricting.¹¹ It also required the secretary to cooperate with state redistricting officials in developing a nonpartisan plan for reporting census tabulations to them.

In the 1980s, in *Karcher v. Daggett*,¹² the Court developed a standard of equality for congressional districts that required them to be mathematically equal, unless justified by some “legitimate state objective.”

Although the Court’s work on rules for population equality was essentially completed in the 1980s, its rules for treatment of racial and ethnic minorities were far from settled. In the 1970s, in *Beer v. United States*,¹³ the Court had said that the Justice Department could refuse to preclear a redistricting plan if it would lead to a retrogression in the position of racial minorities, that is, if the plan would be likely to cause fewer minority representatives to be elected than before. The U.S. Supreme Court began the

⁶ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

⁷ *Id.* at sec. 2 (codified as amended at 42 U.S.C. § 1973 (2006)).

⁸ *Id.* at sec. 5 (codified as amended at 42 U.S.C. § 1973c (2006)).

⁹ 412 U.S. 735 (1973).

¹⁰ 412 U.S. 755 (1973).

¹¹ Coded as amended at 13 U.S.C. § 141 (c).

¹² 462 U.S. 725 (1983).

¹³ 425 U.S. 130 (1976).

1980s with *City of Mobile v. Bolden*,¹⁴ saying that a plan would not be found to violate the 14th Amendment or Section 2 of the Voting Rights Act unless the plaintiffs could prove that its drafters intended to discriminate against them. Congress was swift to react to this new limitation on how to prove racial discrimination. In 1982, after most of the plans based on the 1980 census had already been enacted, Congress amended Section 2 of the Voting Rights Act to make clear that it applied to any plan that results in discrimination against a member of a racial or ethnic minority group,¹⁵ regardless of the intent of the plan's drafters.

How were the courts to determine whether a redistricting plan would have discriminatory results? In the 1986 case of *Thornburg v. Gingles*,¹⁶ the Court set forth three preconditions a minority group must prove in order to establish a violation of Section 2:

1. That the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district;
2. That it is politically cohesive, that is, it usually votes for the same candidates; and
3. That, in the absence of special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.¹⁷

If the minority group could establish those three preconditions, it would be entitled to proceed to the next step: proving a Section 2 violation by "the totality of the circumstances." Those circumstances would have to show that the members of the minority group had "less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice."¹⁸

What did that mean, "less opportunity?" In North Carolina, where *Gingles* arose, it meant that multimember districts where Blacks were in the minority and had been unable to elect candidates to office had to be replaced with single-member districts where Blacks were in the majority. To the rest of the country, and to the state legislatures and commissions that would draw new districts after the 1990 census, it meant that wherever there was a racial or ethnic minority that was "sufficiently large and geographically compact to constitute a majority in a single-member district,"¹⁹ the state would have to

¹⁴ 446 U.S. 55 (1980).

¹⁵ Act of June 29, 1982, Pub. L. No. 97-205, sec. 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(a) (2006)).

¹⁶ 478 U.S. 30.

¹⁷ 478 U.S. at 50-51.

¹⁸ 42 U.S.C. § 1973(b) (2006).

¹⁹ 478 U.S. at 50-51.

draw a district for them or risk having the plan thrown out, even if the state acted without any intent to discriminate.

Being forewarned of the effects of Section 2, drafters of redistricting plans after the 1990 census went to great lengths to draw majority-minority districts wherever the minority population counts seemed to justify it. In states where redistricting plans could not take effect until they had been precleared by the Justice Department, the Justice Department encouraged the state to draw districting plans that created new districts where members of a racial or language minority group (primarily African Americans or Hispanics) were a majority of the population. These new "majority-minority" districts were intended to protect the states from liability under Section 2 for failing to draw districts that the minority group had a fair chance to win. As states drew the plans, they discovered that the Justice Department had little concern that majority-minority districts be compact. In some cases, the department refused to preclear a plan unless the state "maximized" the number of majority-minority districts by drawing them wherever pockets of minority population could be strung together. As the plans were redrawn to obtain preclearance, some districts took on bizarre shapes that caused them to be labeled "racial gerrymanders."²⁰

The racial gerrymanders were attacked in federal court for denying White voters their right to equal protection of the laws under the 14th Amendment.²¹ The U.S. Supreme Court publicly rebuked the Justice Department for its maximization policy in Georgia²² and held that a racial gerrymander must be subjected to "strict scrutiny" to determine whether it was "narrowly tailored" to achieve a "compelling state interest" in complying with Section 2.²³ Many of the racial gerrymanders were struck down by the federal courts because their drafters had not followed "traditional districting principles."²⁴

The states redrew the districts once again. North Carolina, at the center of the political and legal storm over racial gerrymanders, was still in court defending the districts it drew based on the 1990 census after the results of the 2000 census had been released.²⁵

²⁰ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993).

²¹ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *United States v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996); and *Lawyer v. Dept. of Justice*, 521 U.S. 567 (1997).

²² *Miller v. Johnson*, 515 U.S. 900, 924-25 (1995).

²³ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993).

²⁴ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996).

²⁵ See *Easley v. Cromartie*, 532 U.S. 234 (2001).

In the 2000s, race was again the most troubling issue for redistricters, as state legislatures, state courts, federal district courts, the U.S. Supreme Court and Congress disagreed with each other on what the law requires and what it prohibits.

The State of Georgia sought preclearance of its legislative and congressional plans by bringing a declaratory judgment action in district court for the District of Columbia. The district court denied preclearance of the Senate plan because it included a decrease in the Black voting age population in three districts.²⁶ In *Georgia v. Ashcroft*,²⁷ the Supreme Court reversed the district court. Justice O'Connor opined that, "[i]n assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice."²⁸ She said that whether minority incumbents benefit by and support the plan is relevant to whether the plan is retrogressive.²⁹ Congress rejected this interpretation of Section 5. It amended the law to state explicitly that the purpose of Section 5 is "to protect the ability of [racial and language minorities] to elect their preferred candidates of choice."³⁰

North Carolina's constitution requires that legislative districts be composed of whole counties.³¹ In 2003, the General Assembly drew a State House district that divided a county in order to create a district that Blacks had a fair chance to win, on the understanding that failing to do so would be a violation of Section 2 of the Voting Rights Act.³² Black voters were not a majority of the voting age population, but they were a majority of the registered Democrats in a semi-closed primary system, and thus had an effective voting majority in the district. In *Pender County v. Bartlett*, the North Carolina Supreme Court struck the district down.³³ It recognized four distinct types of minority districts: 1) "majority-minority" districts, where a majority of the voting age population are members of a specific minority group, 2) "coalition" districts, where a minority group joins with voters from another minority group to elect a candidate, 3) "crossover" districts, where a minority group has support from a limited but reliable White crossover vote, and 4) "influence" districts, where a minority group is large enough to influence the

²⁶ *Georgia v. Ashcroft*, 195 F. Supp.2d 25 (D. D.C. Apr. 5, 2002).

²⁷ 539 U.S. 461 (2003).

²⁸ *Id.* at 480.

²⁹ *Id.* at 483-84.

³⁰ Pub. L. No. 109-246, sec. 5(d), 120 Stat. 581 (2006) (to be codified as amended at 42 U.S.C. § 1973c); see H.R. REP. NO. 109-478 at 93-94, reprinted in 2006 U.S.C.C.A.N. 618, 678-79.

³¹ N.C. CONST., art. II, §§ 3(3), 5(3).

³² *Pender County v. Bartlett*, No. 103A06, slip op. at 5, 649 S.E.2d 364, 366 (N.C. 2007), *aff'd sub nom. Bartlett v. Strickland*, No. 07-689 (U.S. Mar. 9, 2009).

³³ No. 103A06, 649 S.E.2d 364.

election of candidates but too small to determine the outcome.³⁴ It observed that the courts of appeals in five federal circuits had held that nothing less than a majority-minority district was sufficient to make out a violation of Section 2, and that no circuit had held that Section 2 could be satisfied by the creation of a coalition, crossover or influence district.³⁵ The Court also noted that citizenship must be considered, so that a majority of the voting age population who are citizens is required.³⁶ It found the use of a “bright line rule” would be more practical than one requiring an assessment of past voting behavior and a prediction of future voting trends, and would provide the General Assembly with a safe harbor when drawing districts and foreclose marginal claims by minority groups with smaller populations.³⁷ The Court ruled that, since the district had a Black voting age population of only 39.09 percent, Section 2 did not require its creation.³⁸ On appeal, the U.S. Supreme Court affirmed.³⁹

The 2000s also brought a reminder that an overall range of less than 10 percent is not a safe harbor, even in a legislative plan. Where a court found that the Georgia General Assembly had systematically underpopulated districts in rural south Georgia and inner-city Atlanta and overpopulated districts in suburban areas in order to favor Democratic candidates and disfavor Republican candidates, that the plans systematically paired Republican incumbents while reducing the number of Democratic incumbents who were paired, and that the plans tended to ignore the traditional districting principles used in Georgia in previous decades—such as keeping districts compact, not allowing the use of point contiguity, keeping counties whole, and preserving the cores of prior districts—it struck the districts down as a violation of the Equal Protection Clause.⁴⁰

This book attempts to explain the current state of redistricting law in a way that will help each state’s plan drafters meet their constitutional responsibility to draw new districts after the 2010 census.

Readers should note that the analysis of case law in this book is restricted to federal legal requirements. The case law analysis does not address state constitutional requirements or the decisions of state courts that have interpreted those requirements.

Readers are warned that a state’s constitution often imposes additional requirements beyond the federal law discussed in this book.

³⁴ *Id.*, slip op. at 16-17, 649 S.E.2d at 371.

³⁵ *Id.*, slip op. at 19-20, 649 S.E.2d at 372.

³⁶ *Id.*, slip op. at 14-16, 649 S.E.2d at 370-71.

³⁷ *Id.*, slip op. at 21-23, 649 S.E.2d at 373.

³⁸ *Id.*, slip op. at 24-25, 649 S.E.2d at 374.

³⁹ *Bartlett v. Strickland*, No. 07-689 (U.S. Mar. 9, 2009).

⁴⁰ *Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff’d*, 542 U.S.947 (2004) (mem.).

The law discussed in this book applies to legislative and congressional redistricting plans drawn by state legislatures or by commissions or boards set up under state law. Most of the law in this book applies with equal force to redistricting plans for local government, as explained in chapter 9. Its application to the election of state judges is discussed in chapter 10.

The reader's attention is called to the online publication, *2000s Redistricting Case Summaries*, a state-by-state summary of all the 2000s cases in both state and federal courts relating to legislative and congressional redistricting.

This book, the case summaries and other publications of the Redistricting and Elections Committee can be located online at the NCSL Redistricting web site:

www.ncsl.org/Default.aspx?TabID=746&tabs=1116,115,786#1116

The online version of this book includes hyperlinks to the U.S. Supreme Court cases, the U.S. Code and the Code of Federal Regulations, as well as to many of the state constitutional provisions that set forth traditional districting principles. It is a resource to help democratic legislatures worldwide carry out their constitutional responsibility.

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***1345** BALLOTS AND BULLETS: THE EXCEPTIONAL HISTORY OF THE RIGHT TO VOTE

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In 1917, as the United States entered World War I, Senator Hiram W. Johnson of California [FN1] observed that the "first casualty when war comes is truth." If so, civil liberties are often the second. From the Alien and Sedition Acts of 1798 through President Abraham Lincoln's suspension of habeas corpus to the internment of Japanese Americans and the extraordinary new powers given law enforcement by the spuriously named USA PATRIOT Act, the United States has reacted to threats of foreign attack by cutting back on many of the freedoms guaranteed by the Constitution.

And yet, there is a striking counterexample: the right to vote. At the founding of the Republic, that right was mentioned in the Constitution only in a backhanded way [FN2] and was limited essentially to property-owning, taxpaying white males over the age of twenty-one. As a result of constitutional amendments, political change, and judicial decisions, we have eliminated the first four restrictions and relaxed the fifth. And while the conventional story of the right to vote in America describes a pattern of gradual and inevitable progress—indeed, in 1835 Alexis de Tocqueville termed it "one of the most invariable rules of social behavior" that "[o]nce a people begins to interfere with the voting qualification, one can be sure that sooner or later it will abolish it altogether" [FN3]—that is not what happened. The history of right to vote in America is one of expansion and contraction, of punctuated equilibria, rather than gradual evolution. And that history is bloody, not *1346 just in the sense that individual citizens have died for the right to vote in places from Rhode Island to the Mississippi Delta and Selma, Alabama, but also in the fact that virtually every major expansion in the right to vote was connected intimately to war. [FN4]

Part I of this Article traces that history. War influences the scope of the franchise in several related but distinct ways. First, and most significantly, war has helped to determine who is entitled to vote. Sometimes, this flows from a direct equation of responsibilities and rights: those who fight, or contribute to the war effort, acquire a moral claim to full participation in self-government. Sometimes, the connection is more instrumental: in order to mobilize the necessary support for a war, the franchise has been extended to groups that were previously excluded. And sometimes, the connection has reflected war aims: wars fought to make the world safe for democracy abroad raise questions about democracy at home. Second, war has influenced how voting is conducted. Finally, the intersection of military service and voting rights contributed in an important way to the development of judicial standards for considering claims about the right to vote more generally.

Part II of this Article turns to a piece of unfinished business, and ironically, it too involves a connection of bullets and ballots. Today, the largest—and growing—group of American citizens who remain disenfranchised are people convicted of crimes. As we turn from the war on crime to the war on terrorism, it is time to rethink this exclusion. This Article suggests a new legal avenue for attacking the most draconian form of this disenfranchisement: the lifetime exclusion of former offenders.

I. Soldier Citizens: The Role of War in Expanding the Right to Vote

A. Muster Rolls and Land Books: The Revolutionary War and the Demise of Property Qualifications

The American Revolution—which began the process of dismantling economic restrictions on the right to vote—illustrates several of the ways in which war can create pressure to expand the franchise.

On the eve of the Revolution, every colony restricted the right to vote either to ***1347** freeholders who held a particular amount of land or to taxpayers (and this was in an era long before income taxes brought virtually every adult within this category).

When militiamen began to muster in the spring of 1776, they questioned these limitations on the franchise. In Philadelphia, the Committee of Privates, drawn from the "lower" and "middling sorts" of the city, petitioned the provincial assembly to enfranchise those who had joined the militia although "not entitled to the privileges of freemen electors." [FN5] If one of the self-evident truths on which the colonists based their claim to independence was that governments derive their just powers from the consent of the governed, [FN6] it is hardly surprising that they came to ask why a large part of the governed were excluded from the most visible process of giving consent-elections.

By the middle of the nineteenth century, nearly every state had dropped wealth or property owning qualifications. [FN7] The opening wedge in this development came from the claims of soldiers. The "interweaving of voting and arms" [FN8] produced an argument that those who had risked their lives in the war had thereby earned the right to a ballot: as one editorialist put it, the electorate should consist of "every man who pays his shot and bears his lot." [FN9] One of the most eloquent articulations of this perspective was ironically one of the least successful—the "Memorial of the Non-Freeholders of the City of Richmond" to the Virginia Constitutional Convention of 1829:

In the hour of danger, they have drawn no invidious distinctions between the sons of Virginia. The muster rolls have undergone no scrutiny, no comparison with the land books, with a view to expunge those who have been struck from the ranks of freemen. If the landless citizens have been ignominiously driven from the polls, in time of peace, they have at least been generously summoned, in war, to the battlefield. [FN10]

***1348** Even before states moved to universal white manhood suffrage, they often relaxed requirements for militia members. States as otherwise different as Connecticut and Mississippi, for example, provided that service in the militia was an alternative to taxpayer or freeholder status. [FN11]

The argument for expanding the franchise ultimately had both a fairness and a security component. It was unfair to withhold the vote from men who were asked to put their lives on the line: voting and bearing arms were complementary aspects of running the nation, in peace and in war. [FN12] Moreover, as the equation of the obligation to serve and the right to govern gained wider currency, those who already held power came to worry that the disenfranchised would resist the demand that they serve in the military. The relationship between voting and military service thus became more bidirectional: the obligation for future military service, as much as the performance of past duties, conferred a right to vote.

B. The Cartridge Box and the Ballot Box: The Civil War, Black Enfranchisement, and Absentee Voting

While early state constitutions often conferred the right to vote without regard to race, on the eve of the Civil War, most states had changed their constitutions to restrict the franchise to white men. Only five New England states permitted blacks to vote on the same terms as whites. [FN13]

The Civil War changed that, producing, among other things, the first constitutional provisions that actually protected the right to vote. Once again, military service played a major role. As early as 1862, Ulysses S. Grant observed that black contrabands might ultimately serve in the Union Army and "it would be very easy," if a man "fought well, eventually to put the ballot in his hand and make him a citizen." [FN14] Lincoln's Emancipation Proclamation both proclaimed southern slaves' freedom and issued a call to arms, [FN15] and the President was later to ***1349** endorse black suffrage "on the basis of intelligence and military service." [FN16]

Although General William Tecumseh Sherman observed that "when the fight is over, the hand that drops the musket cannot be denied the ballot," [FN17] black enfranchisement was actually a close call. Despite the rhetorical appeal of a demand for "two more boxes besides the cartridge box—the ballot box and the jury box," [FN18] very few states actually repealed their restrictions on black suffrage. Only when the Republicans realized that their continued hold on the national government was dependent on the enfranchisement of black voters in the South to counterbalance whites' overwhelming support for the Democratic Party did Congress propose the Fourteenth and Fifteenth Amendments.

In the long run, the Equal Protection and Due Process Clauses of the Fourteenth Amendment were to become the primary constitutional sources protecting the right to vote. [FN19] But initially, the major voting rights provision in the Fourteenth Amendment was the Reduction-of-Representation

Clause, which provided that a state's representation in Congress (and hence its electoral college votes as well) would be reduced "when the right to vote in any election . . . is denied to any 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." [FN20]

The clause "express[ed] its protection of the voting population in an idiom invented to express the requirements for the militia": male adult citizens. [FN21] It distinguished between those who had, or might one day, serve in defense of the United States and those who participated in rebellion, that is, those who took up arms against the United States. [FN22] Ironically, its language also implicitly excluded another large group of ***1350** citizens. After the war, Elizabeth Cady Stanton announced that women intended "to avail ourselves of the strong arm and the blue uniform of the black soldier to walk in [to the election booth] by his side." [FN23] But the United States Supreme Court was to rely on the use of the word "male" in the Reduction-of-Representation clause to reinforce its conclusion that nothing in the Fourteenth Amendment was intended to confer the right to vote on women. [FN24]

The Fifteenth Amendment marked the first time that the Constitution affirmatively protected the franchise. It provided that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." [FN25] The Amendment resulted in a huge upsurge of voting as nearly a million freedmen were enfranchised. [FN26] Ironically, the complete return to peacetime-the end of military occupation of the South after the 1876 presidential election-began the period of massive black disenfranchisement, culminating in state constitutional conventions around the turn of the twentieth century that kept blacks from the polls until another war, World War II, revived their struggle for suffrage. [FN27]

The Civil War had another important effect on voting rights. For the first time in American history, massive numbers of citizens-over two million men, many of them voters, enlisted in the Union Army-were away from home on Election Day. [FN28] Republicans were, quite naturally, more likely to enlist than Democrats, and in the elections of 1861 and 1862, the party lost votes. [FN29] Swayed again by the moral equation of the duty to serve and the right to vote, wanting to keep troops in the field, ***1351** and concerned with the partisan effect of soldiers' absence, [FN30] many states enacted absentee voting laws for the first time. [FN31]

The opinion of the Wisconsin Supreme Court upholding that state's "Military Suffrage Act" emphasized the connection between military service, citizenship, and the franchise:

But, whatever else may be said upon the subject, this at least is true, that history has furnished no better example illustrating the capacity of the people for self government, than that furnished under this law, of the citizen soldiers pausing amid the horrors of war to discharge their duties as the primary legislators of the republic, and to guard by an intelligent use of their ballots, to be forwarded to their homes, the welfare of their country, and those principles of civil liberty for which they are ready at any moment to lay down their lives upon the field of battle. [FN32]

While some of the Civil War-era statutes were short-lived-indeed, several were struck down under state constitutions while the war was still raging [FN33]-they reflected a recognition that conditions in a modern nation-state might require modifying the actual mechanism by which votes were cast. During World War I, nearly every state enabled servicemen to vote absentee, [FN34] and during World War II, the federal government enacted legislation to protect soldiers' voting rights. [FN35] Today, the Uniformed and Overseas Citizens Absentee Voting Act [FN36] safeguards the voting rights of military personnel and, as the recent experience with overseas military ballots in the 2000 presidential election suggests, the rhetorical appeal of protecting soldiers' voting rights remains strong. [FN37]

***1352** Moreover, just as the relaxation of property qualifications for soldiers was an opening wedge in the more general abandonment of wealth restrictions, the provision of absentee ballots to soldiers in the field heralded a more widespread availability of absentee ballots. [FN38] At the Massachusetts Constitutional Convention of 1917-18, for example, a delegate from the city of Somerville noted "a very clear-cut analogy" between the votes of soldiers "and such citizens as trainmen and traveling salesmen." Just as the national government might compel military personnel to leave "their place in the body politic," so too, the "industrial system," which is "also in the interest of the public good," might demand workers' absence from home. Even though the soldiers' sacrifices might be "more spectacular" and "more impressive," absent workers were also "toiling and sacrificing" for the common good, and should not therefore lose their ability to vote. [FN39] In the last twenty years, many states have expanded the rationale even further and now provide for "no-

excuse-needed" absentee voting. [FN40]

C. Rocking the Cradle and Rocking the Boat: World War I and the Nineteenth Amendment

If military service provided one of the strongest arguments in favor of extending the franchise to previously excluded groups, it was of course a double-edged sword. During the nineteenth century, opponents of women's suffrage linked their position to women's lack of military service. [FN41] Even supporters of women's suffrage did not invariably dispute that basic premise. As Elaine Scarry notes, suffrage pageants and plays often linked women's capacity to serve in war with the right to vote; in England, "suffragists celebrated soldiers such as Boadicea and Joan of Arc in pageant banners and visual representations of their movement." [FN42] And suffragists often pointed to the ways in which women could provide equivalent service. [FN43] In a perhaps ironic statement, one California politician asked "Is fighting all there is to be done in this country? . . . Look at all the greatest heroes of the wars of *1353 the world, and tell me who of them all did as much as Miss Florence Nightingale?" [FN44]

While women might have hoped that their contributions to saving the Union would have earned them the franchise, that hope was to be frustrated. A half century after the Civil War, the suffrage movement, although it had attained victory in several western states, was bogged down in a state-by-state campaign to gain the right to vote. [FN45] World War I changed that dynamic and ultimately "accelerated the progress of suffrage reform." [FN46] Once again, war played a significant role in extending the franchise. The industrial demands of modern war required women to enter the labor force and contribute to the war effort on the home front. In 1918, President Wilson, who had ignored suffrage completely in his 1916 address to Congress, [FN47] gave an address in which he supported suffrage "as a war measure," noting that the war could not be fought effectively without women's participation. [FN48]

Another more abstract connection was perhaps also at work. If the United States had gone to war to make the world "safe for democracy," [FN49] this raised the question whether America itself was truly democratic. [FN50] Suffragists conscripted the rhetorical claims advanced in favor of the war into the service of arguments in favor of domestic expansion of voting rights. On August 18, 1920, three months after presidential candidate Warren G. Harding called for a return to "normalcy," Tennessee became the thirty-sixth state to ratify the Nineteenth Amendment, which provided that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." [FN51]

*1354 D. Good Enough to Fight and Good Enough to Vote: World War II and the Struggle for Black Enfranchisement

While few women served in the armed forces during World War I, several hundred thousand black men were drafted and sent to Europe, nearly 40,000 serving as combat troops. W.E.B. DuBois urged blacks to serve, in part in the hope that "unstinting patriotism" would result in effective realization of the right to vote. [FN52] In 1919, he wrote:

We return from the slavery of the uniform which the world's madness demanded us to don to the freedom of civilian garb. . . . We sing: This country of ours, despite all its better souls have done and dreamed, is yet a shameful land. . . . It disfranchises its own citizens We return. We return from fighting. We return fighting. [FN53]

While there were a few token legal victories in the struggle for black voting rights during the interwar period, [FN54] it was not until the fighting began again, in World War II, that blacks started to make real the promises of the post-Civil War Amendments.

The opening salvo once again involved the voting rights of soldiers. By 1942, five million citizens were in the armed forces, among them one million black men. [FN55] Rather than rely on state absentee voting statutes, the federal government decided to enact a nationwide Soldier Voting Act. [FN56] The Act created a federal Ballot Commission and authorized it to print, distribute, and collect presidential ballots, and return them to the jurisdictions in which soldiers and sailors were registered, with the requirement that local election officials count and include the ballots in their totals. [FN57] Given the then-prevailing constitutional principle that control over the franchise and elections was essentially a matter for the states, the government relied on the war power, rather than one of the more voting-oriented provisions of the Constitution, to justify its *1355 decision. [FN58] While the 1942 Act and its successor did not explicitly address the question of race, southern legislators

correctly saw them as the "opening wedge for congressional intrusion in the electoral process, with its ultimate implications for breaking down the disenfranchisement of blacks." [FN59]

Their perception was perhaps reinforced by a provision that exempted servicemen from the requirement of paying a poll tax in order to vote. Southern senators found themselves unable to filibuster the bill because it was politically unpalatable to argue in favor of depriving soldiers of the right to vote. [FN60] Thus, the Soldier Voting Act became the first federal legislation passed to expand black voting rights since the end of Reconstruction. [FN61]

Having established an anti-poll tax beachhead, poll tax opponents then sought legislation to eliminate the poll tax for all voters in all elections. In this campaign, they necessarily broadened their arguments beyond the simple claim that those who faced bullets abroad deserved ballots at home. [FN62] They invoked instead the ideological justification for the war itself. For example, Senator Alben Barkley argued that "I know of no more opportune time to try to spread democracy in our country than at a time when we are trying to spread it in other countries and throughout the world." [FN63] While they did not succeed in cutting off a southern filibuster on this broader legislation, the argument that enfranchisement was a matter of strategic importance, as well as morality, was to grow as the war on the battlefield ended and the Cold War began.

The white primary became a judicial casualty of World War II with the Supreme Court's 1944 decision in *Smith v. Allwright*, [FN64] which struck down, as a violation of the Fifteenth Amendment, the Texas white *1356 primary that the Court had upheld only nine years before in *Grovey v. Townsend*. [FN65] The Court's opinion proceeded as if the only relevant change were a doctrinal one: the Court's intervening decision in *United States v. Classic* [FN66] had treated primary elections as an "integral part" of the election process protected by the federal Constitution, thereby undermining the view of primaries as private affairs outside the scope of the Fifteenth Amendment. But a hint that more had changed came in the last paragraph of Justice Owen Roberts's solo dissent:

It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court . . . should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions. [FN67]

Contemporary observers saw the war as playing a pivotal role in the Court's decision. For example, the Washington bureau chief of the *New York Times* remarked that neither side "mentioned the real reason for the overturn [of *Grovey*]. It is that the common sacrifices of wartime have turned public opinion and the Court against previously sustained devices to exclude minorities." [FN68]

Smith v. Allwright "may have been the most practically significant [Supreme Court] ruling" of the first half of the twentieth century with respect to black voting rights, [FN69] since it enabled black citizens to participate in the only election that really counted in the one-party South: the Democratic primary. In 1940, however, few black citizens would have been able to take advantage of the Court's ruling, since only five percent of eligible black citizens were in fact registered to vote. [FN70] By 1947, that figure had more than doubled, and, by 1952, there were over one million black voters in the South.

The increase in black voter registration was a product of direct action, rather than a legal decision. World War II stiffened black citizens' resolve to exercise their constitutional rights, including the right to vote. As one soldier remarked, "If I've got to die for democracy, I might as *1357 well die for some of it right here and now." [FN71] Men who had faced danger on the battlefield were far better equipped to face it at the county courthouse. Medgar Evers, who would later become the Mississippi field secretary of the NAACP and a martyr of the Civil Rights Movement, began his career when he returned from the war. [FN72] On July 2, 1946, he led a group of black veterans who tried to vote in the first post-*Smith v. Allwright* Democratic senatorial primary in Mississippi. A mob prevented them from entering the polling place.

Foiled in their attempts to vote, a number of black voters filed a complaint with the United States Senate, claiming that the demagogic Senator Theodore Bilbo had incited a series of attacks on black voters. The Senate sent a committee to Mississippi to conduct hearings. A majority of the witnesses who showed up (an act of considerable bravery in itself) were veterans, and in historian John Dittmer's words, "[i]n that crowded federal courtroom in Jackson the shock troops of the modern civil rights movement . . . fired their opening salvo." [FN73]

Events like the Mississippi primary and other attacks on black veterans seeking to vote received national attention. [FN74] Moreover, the clash between American ideals of democracy and the reality of massive exclusion received international attention as well. In October 1947, a presidential commission issued a report that highlighted the foreign affairs consequences of race discrimination: the United States' demand that other countries conduct free elections was undermined by the blatant

disenfranchisement of black Americans. [FN75] The Cold War imperative and the struggle to attract the support of the world's emerging nations drove home the idea that achieving democracy domestically was a compelling national interest and therefore a proper topic for federal, as well as state, oversight. Ultimately, this concern contributed to the introduction of the Voting Rights Act of 1965, "one of the most monumental laws in the entire history of American freedom" [FN76] and the statute that effectively accomplished the enfranchisement promised *1358 nearly a century before by the Fifteenth Amendment. In the message that accompanied his request that Congress enact a voting rights bill, President Lyndon Johnson emphasized the foreign policy implications of disenfranchisement:

In the world, America stands for-and works for-the right of all men to govern themselves through free, uninhibited elections. An ink bottle broken against an American Embassy, a fire set in an American library, an insult committed against the American flag, anywhere in the world, does far less injury to our country and our cause than the discriminatory denial of any American citizen at home to vote on the basis of race or color. [FN77]

Secretary of State Dean Rusk was later to remark that nothing Congress did with respect to foreign policy was as valuable as the Civil Rights Act of 1964 and the Voting Rights Act of 1965. [FN78]

E. Old Enough to Fight and Old Enough to Vote: The Vietnam War and the Twenty-Sixth Amendment

African Americans were not the only, or even the largest, disenfranchised group to fight in World War II. After 1942, when Congress lowered the draft age to eighteen, nearly half of the Marine Corps, one-third of the Navy, and one-quarter of the Army consisted of men under the age of twenty-one, [FN79] the constitutionally recognized and then universal age for voting. [FN80] In 1943, Georgia became the first state to lower its voting age to 18. [FN81] That age itself was the product of a link between military service and the right to vote, as a congressional report was later to explain: "[t]he 21 year age of maturity is derived . . . from historical accident. In the eleventh century 21 was the age at which most males were physically capable of carrying armor." [FN82] World War II, like many previous wars, saw the introduction of proposals to lower the voting age to bring it in line with the age at which men became subject to military service. The impetus for these bills reflected the view expressed by former Supreme Allied Commander and future President *1359 Dwight Eisenhower: "If a man is old enough to fight he is old enough to vote." [FN83]

The Vietnam War brought this issue to a head, in part because it was so controversial among the generation that was being asked to fight it. As of 1968, when Congress began hearings on a constitutional amendment, roughly a quarter of the troops, and twenty-nine percent of the casualties, had been soldiers under the age of twenty-one. [FN84] As one witness before the Senate Judiciary Subcommittee explained, in words that echoed the claims of other disenfranchised groups: "Apparently it takes war to open the eyes of America to the injustice she imparts to her young men. For it is surely unjust and discriminating to command men to sacrifice their lives for a decision which they had no part in making." [FN85]

Initially, Congress decided to proceed by statute, rather than constitutional amendment, and in the Voting Rights Act Amendments of 1970, it lowered the voting age to eighteen for all elections. [FN86] A deeply fractured Supreme Court-the case produced five opinions on the point-held, in *Oregon v. Mitchell*, [FN87] that while Congress possessed the power under Article I of the Constitution to set the voting age for elections to federal office, it lacked that power with respect to state and local elections. Congress quickly responded by proposing a constitutional amendment. Perhaps because the Court had upheld the right of eighteen to twenty-one year-olds to vote in congressional elections, there were no dissenting votes in the Senate and only nineteen in the House. "The ratification process was by far the most rapid in the history of the republic," [FN88] and the Twenty-Sixth Amendment became part of the Constitution in 1971.

F. Military Bases and Rational Bases: Citizen Soldiers and the Rise of Strict Scrutiny

The complex relationship between citizen control and military power also played a role in the development of modern equal protection law, the primary constitutional tool for judicial oversight of voting rights. A 1954 amendment to the Texas Constitution continued that state's *1360 consistent practice of limiting soldiers' ability to register to vote. [FN89] As a result of unfortunate experiences following the Battle of San Jacinto in 1836, the short-lived Republic of Texas provided that "regular

enlisted soldiers, and volunteers for during the war, shall not be eligible to vote for civil officers." [FN90] A provision disenfranchising soldiers in the regular army appeared in the 1845 state constitution and in each succeeding constitution until it was replaced by a provision that allowed a member of the armed forces to vote "only in the county in which he or she resided at the time of entering such service so long as he or she is a member of the Armed Forces." [FN91] In short, a soldier who was not a resident of Texas when he enlisted could not register to vote in the state, no matter how long he was stationed there or what his ties to the state became, and a soldier who was a Texas citizen at the time of his enlistment could not change his residence for voting purposes as long as he remained in the military.

Enter Herbert N. Carrington, a sergeant in the United States Army. In 1962, Carrington was stationed in White Sands, New Mexico, and he bought a house and registered his automobile across the border in El Paso, Texas, where he lived with his wife and two children and ran a small business in his off-duty hours. In 1963, the El Paso County Tax Collector levied the county poll tax on Carrington, as a legal resident of the county. [FN92] Carrington paid the tax and then tried to vote in the May 1964 Republican primary. He was excluded because of the Texas constitutional provision and brought suit.

By a seven to one vote (Chief Justice Warren did not participate), the Court struck down the Texas provision. [FN93] Justice Stewart's opinion for the Court held that the provision violated the equal protection clause because it treated members of the armed services differently from all other citizens who became residents of Texas and sought to vote. The Court recognized that normally states were permitted to draw classifications among groups of people. [FN94] And it cited one of its previous voting rights cases, in which it had upheld North Carolina's literacy test against an equal protection challenge because "[t]he ability to read and *1361 write has some relation to standards designed to promote intelligent use of the ballot." [FN95]

But the Court applied a rather different test to Texas's restriction:

We deal here with matters close to the core of our constitutional system. The "right . . . to choose" that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State. *Oyama v. California*, 332 U.S. 633. [FN96]

The Court's citation of *Oyama* is intriguing. *Oyama* involved a challenge to California's Alien Land Law by a young Japanese American, Fred Oyama. His father was Japanese and although he lived in the United States he was ineligible for American citizenship and therefore not permitted to own land. So he bought land in his son's name when Fred was a young child. While the family was interned during World War II, the state sought to seize the land on the grounds that the registration of the land in Fred Oyama's name was a sham designed to evade the Alien Land Law. The Supreme Court held that the law violated Fred Oyama's right to equal protection because "the discrimination is based solely on his parents' country of origin; and there is absent the compelling justification which would be needed to sustain discrimination of that nature." [FN97]

In modern parlance, *Oyama* was a suspect-classification equal protection strict scrutiny case. The normal presumption of constitutionality did not apply because the government classified individuals on a constitutionally impermissible basis. "[A]s a general rule, '[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" [FN98] But surely the Carrington Court was not insisting that members of the armed forces were an immutable, racially defined class. Instead, the Carrington Court was hiking up the level of scrutiny because of the interest involved. Because the right to vote is such an important right, state laws that infringe upon it must be subject to more searching judicial review. In modern terms, Carrington is a fundamental-rights equal protection strict scrutiny case.

Carrington was an early, perhaps the earliest, application of a heightened form of scrutiny to restrictions on the franchise. The Court concluded its opinion by declaring that "[t]he uniform of our country *1362 must not be the badge of disfranchisement for the man or woman who wears it." [FN99] As I have suggested elsewhere, the Warren Court's voting rights cases offered a "double-barreled" form of heightened scrutiny. [FN100] In Carrington, the sense that distinguishing among citizens' rights to vote on the basis of their military status was a particularly unattractive kind of classification may have contributed to the Court's development of a categorical heightened standard of review for restrictions on the franchise. When the Supreme Court articulated the current formula for reviewing restrictions on the franchise—a law that "grants the right to vote to some citizens and denies the franchise to others" is constitutionally permissible only when "the exclusions are necessary to promote a compelling state interest" [FN101]—Carrington was one of the central cases on which it

relied. [FN102]

II. The War on Crime: Rethinking the Lifetime Disenfranchisement of Felons

The doctrinal shift that began with Carrington left one group outside its scope: persons convicted of crimes. Although the practice of disenfranchising criminals had a long, if somewhat checkered pedigree, [FN103] it escaped judicial scrutiny until the 1960s. [FN104] Given the interweaving of voting and arms, it is oddly fitting that the plaintiff in ***1363** the first significant modern case involving felon disenfranchisement, Katsuki Otsuka, had been disenfranchised because of his refusal to serve in the armed forces. [FN105]

During World War II, Otsuka, who was a Quaker, refused induction, even as a noncombatant. Convicted in federal court in New York of violating the Selective Service Act, he served three years in a federal penitentiary. Some twenty years later, when Otsuka tried to register to vote in Los Angeles County, the registrar rejected his application because of this conviction. In *Otsuka v. Hite*, [FN106] the California Supreme Court construed the constitutional provision denying any person convicted "of any infamous crime . . . the privileges of an elector in this State" to avoid what it saw as a potential fundamental-rights equal protection problem. It held that the provision did not apply to Otsuka because, in following his religious and conscientious commitments, Otsuka had not committed an infamous crime, that is, a crime that showed him "to constitute a threat to the integrity of the elective process." [FN107]

In *Richardson v. Ramirez*, [FN108] however, the Supreme Court essentially put an end to equal protection-based attacks on felon disenfranchisement. The Court held that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment." [FN109] This implicit approval of laws disenfranchising individuals convicted of crimes distinguished their exclusion from other limitations on the franchise. [FN110]

At the time *Richardson v. Ramirez* was decided, a majority of the states disenfranchised nearly all felons for life. [FN111] Today, by contrast, only eight states permanently disqualify first-time felons and only thirteen states disqualify significant numbers of individuals who have finished serving their sentences. [FN112] And yet, the actual impact of felon ***1364** disenfranchisement is greater than at any point in our history. Today, we incarcerate proportionally more than six times as many individuals as we did when *Richardson* was being litigated. [FN113] And even with our draconian sentencing policies, which currently imprison nearly two million people, our criminal justice system has produced a staggering number of ex-offenders-9.5 million people-who are once again in the general population. [FN114]

Current laws disenfranchise approximately 3.9 million voting-age citizens, of whom roughly 1.4 million have completed their sentences. [FN115] When disqualified citizens on probation or parole are added to those who have completed their sentences, nearly three-quarters of those excluded are not in prison. [FN116]

The raw numbers do not fully capture the impact of felon disenfranchisement. First, the racial impact is staggering: while 4.6 million black men voted in the 1996 election, 1.4 million were disenfranchised. [FN117] And the problem is even more striking in several of the states that use the most severe form of disenfranchisement-lifetime disqualification. In Alabama and Florida, nearly one-third of all black men are permanently disenfranchised, and in Iowa, Mississippi, Virginia, and Wyoming, roughly a quarter are permanently barred. [FN118]

Second, the interaction of incarceration and disenfranchisement can skew the balance of political power within a state. The Census Bureau counts inmates where they are incarcerated. The population figures the Bureau provides are used by states to draw legislative districts. Because every state but Maine and Vermont disenfranchises individuals while they are incarcerated, people in prison serve as essentially inert ballast in the redistricting process. Especially given the prevalent practice of building prisons far away from the cities where most inmates lived before they were sent to prison, these practices increase the power of ***1365** officials who have no reason to represent these only notional "constituents." [FN119] At the same time, incarceration reduces the population of the communities from which inmates come, and to which most of them return, thereby diminishing those communities' entitlement to legislative seats and legislative clout.

Finally, because a disproportionate number of the disenfranchised are poor people and members of racial minorities, the current system skews electoral outcomes. A recent study by two Northwestern University sociologists suggests that since 1978, the outcomes in seven United States Senate races would have been reversed. [FN120] This may seem like a relatively insignificant shift,

but it would likely have given Democrats control over the Senate throughout the 1990s. [FN121]

The 2000 presidential election offers a particularly powerful illustration of the effects of wholesale disenfranchisement. Florida disenfranchises more people than any other state—approximately 827,000. [FN122] Slightly over 600,000 of those individuals are people who have completed their sentences and been discharged entirely from the criminal justice system. [FN123] Had those individuals been permitted to vote, under the study's most rigorous assumptions regarding turnout and voter preference, Al Gore would have won the Florida election by more than 31,000 votes. [FN124]

For a variety of reasons, the aftermath of Election 2000 seems to have reinvigorated the voting rights restoration movement. The scope of felon disenfranchisement and its disproportionate impact on members of minority groups has received far greater national attention and state-level political efforts have restored the voting rights of nearly a half-million people. [FN125] By contrast, litigation challenging even lifetime felon disenfranchisement has been uniformly unsuccessful. [FN126]

At least that has been true of litigation in the United States. By contrast, constitutional courts in other countries have recently struck ***1366** down not only lifetime bans, but even the exclusion of persons who are currently incarcerated. In 1999, the South African Constitutional Court required the government to provide prisoners with a right to vote. [FN127] In his eloquent opinion, Justice Albie Sachs recognized that "[m]any open and democratic societies impose voting disabilities on some categories of prisoners." [FN128] In the footnote discussing this proposition, Justice Sachs pointed to nations that disqualified either all or some individuals while they were actually imprisoned, such as Australia, Canada, Japan, New Zealand, Sri Lanka, and the United Kingdom; nations where certain particularly subversive crimes triggered disenfranchisement, such as France and Germany; and nations where "trial courts are permitted to order such forfeiture on a case by case basis" such as Greece. [FN129] It is perhaps telling that Justice Sachs did not include American practices on his list. Still, the court stated the following:

[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. [FN130]

Late last year, the Supreme Court of Canada struck down a statute that disenfranchised inmates serving a sentence of two years or more as a violation of the right to vote guaranteed by the Canadian Charter of Rights and Liberties. [FN131] It rejected the government's argument that the disenfranchisement of medium to long-term inmates was a legitimate form of punishment since punishment must serve some purpose: "Neither the record nor common sense supports the claim that disenfranchisement deters crime or rehabilitates criminals. On the contrary, as [John Stuart] Mill recognized long ago, participation in the political process offers a valuable means of teaching democratic values and civic responsibility." [FN132] As for retribution, the court stated that punishment must "reflec[t] the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the ***1367** offender's conduct." [FN133] Wholesale disenfranchisement failed this test because it imposes blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct. It is not individually tailored to the particular offender's act. It does not, in short, meet the requirements of denunciatory, retributive punishment. It follows that it is not rationally connected to the goal of imposing legitimate punishment. [FN134]

Thus, even disenfranchisement that is tied to the length of an individual's prison sentence—for Canadian citizens are disqualified from voting only while they are actually incarcerated—was constitutionally impermissible. [FN135]

Because they first confronted the issue before voting was firmly understood to be a constitutional right, [FN136] American courts have never ***1368** really confronted the question whether disenfranchisement, and in particular lifetime disqualification for individuals who have otherwise completed their sentence, is a constitutionally appropriate punishment.

The Supreme Court's Eighth Amendment jurisprudence suggests that it is not. The Eighth Amendment "succinctly prohibits 'excessive' punishments" and demands that "punishment for crime should be graduated and proportioned to the offense." [FN137] A claim that a particular punishment violates the Eighth Amendment "is judged not by the standards that prevailed in 1685 . . . or when the Bill of Rights was adopted, but rather by those that currently prevail." [FN138] Thus, the amendment "must draw its meaning from the evolving standards of decency that mark the progress

of a maturing society." [FN139]

The Court's recent decision in *Atkins v. Virginia*, which held that the Eighth Amendment forbids the execution of mentally retarded persons (thereby overruling a contrary ruling that was only thirteen years old), [FN140] clarified the framework for considering excessive punishment claims. The clearest and most reliable evidence of contemporary values comes from "the legislation enacted by the country's legislatures." [FN141] Recent legislative decisions and trends may be particularly probative of the current consensus. [FN142] And positions "within the world community" [FN143] can inform the court's assessment. Ultimately, however, a court must bring its own judgment to bear on the question whether the seriousness of a particular offense justifies the harshness of a given punishment. [FN144]

Using that framework, a strong claim can be made that states that impose lifetime disenfranchisement on all felons are violating the Eighth Amendment. Consider the threshold questions of "the gravity of the *1369 offense and the harshness of the penalty." [FN145] The irresistible political pressure toward ever more criminalization means that much not particularly blameworthy conduct is classified as a felony. [FN146] As Justice Marshall trenchantly noted in his dissent in *Richardson v. Ramirez*, crimes such as "conspiracy to operate a motor vehicle without a muffler . . . or breaking a water pipe" [FN147] could trigger felon disenfranchisement provisions. And the fact that many felony convictions do not result in a defendant's imprisonment suggests that the prosecutor and the sentencing judge or jury do not view the defendant's conduct as deeply blameworthy. The very fact that potential sentences for a felony conviction range from one year's imprisonment to death shows that all felonies are not equally serious.

At the same time, disenfranchisement, particularly for the rest of one's life, is undeniably a harsh sanction. It deprives an individual, and the larger communities of which he or she is a member, of the right that is "preservative of all other rights." [FN148] It brands him or her with a permanent stigma as one unworthy of participating in self-government. [FN149] Even incarcerated individuals "do not forfeit all constitutional protections by reason of their conviction and confinement in prison." [FN150] Thus, it is hard to see why every person convicted of a felony, regardless *1370 of the nature of his or her offense, should be deprived for the rest of his or her lifetime of the right to vote.

The same types of objective evidence that swayed the Court in *Atkins* with respect to the contemporary consensus regarding execution of mentally retarded persons are available with respect to lifetime disenfranchisement of felons who have completed serving their sentences. Here, too, since the time of an earlier Supreme Court decision upholding the practice, a significant number of states have amended their laws. While twenty-eight states provided for lifetime disenfranchisement in 1975, only eight continue that practice today. Here, too, "the consistency of the direction of change" provides "powerful evidence" of a national consensus, particularly given "the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime." [FN151] Congress and state governments have imposed new restrictions on ex-offenders with regard to other entitlement programs of various kinds. [FN152] But, since the time of *Richardson v. Ramirez*, no state has enacted legislation barring ex-offenders from voting. [FN153] Here, too, recent public opinion research suggests that "a significant majority of survey respondents and many focus group participants believe that an offender's right to vote should be restored upon release from prison." [FN154] Finally, here, too, consensus "within the world community" is uniformly against lifetime disenfranchisement. [FN155] The states that continue to *1371 exclude all felons permanently are outliers, both within the United States and in the world.

Conclusion

The Stoic philosopher Seneca said that "the good things which belong to prosperity are to be wished, but the good things that belong to adversity are to be admired." [FN156] If so, the history of voting rights in America has been an admirable one. Far from being "almost bloodless, almost completely peaceful, and astonishingly easy," [FN157] the struggle for voting rights has in fact been none of those things. The most significant developments—from the enactment of the Reconstruction, Nineteenth, and Twenty-Sixth Amendments to the abandonment of wealth qualifications—were either directly or indirectly the product of wars. Sometimes, war has emboldened previously excluded groups to demand their right to full citizenship; sometimes, war has brought home to the rest of the nation the injustice of asking people to fight on behalf of a government that excludes them. As much as our military engagements have focused on making the rest of world safe for democracy, they have often been as valuable in helping to achieve democracy at home.

But while American democracy has been enlarged during and because of our wars against external enemies, it has been compromised by our war on crime. In 1870, the Fifteenth Amendment safeguarded the opportunity to vote of slightly less than one million black men. [FN158] Today, felon disenfranchisement statutes deny that opportunity to nearly 1.4 million black men. [FN159]

In his eloquent opinion protecting the ability of prisoners to vote, Justice Albie Sachs of the South African Constitutional Court ***1372** acknowledged that "in a country like ours, racked by criminal violence, the idea that murderers, rapists and armed robbers should be entitled to vote will offend many people." [FN160] Nevertheless, he declared that

[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic . . . nation; that our destinies are intertwined in a single interactive polity. [FN161]

Throughout the twentieth century, the United States sought to export notions of democracy, sometimes through the power of our example and sometimes through the barrel of a gun. Perhaps in the twenty-first century, it is time to import some ideas as well. [FN162]

[FN161]. Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. An earlier version of this article was presented as the 2002 William Howard Taft Lecture in Constitutional Law at the University of Cincinnati College of Law. I thank John Harrison, Mike Klarman, Bill Stuntz, and Viola Canales for many helpful comments and suggestions. A conversation with Elena Saxenhouse (a Stanford law student whom I ran into in an airport waiting room a continent away), and a panel discussion on the rights of ex-offenders at the annual Airlie Conference run by the NAACP Legal Defense and Educational Fund spurred me to think about the Eighth Amendment issues discussed in the second part of this article. These meetings make me grateful once again for the contributions that my students and my colleagues in the civil rights community have made to my scholarship.

[FN1]. Johnson had an ironic connection to Dean-President-Chief Justice Taft: as the vice presidential nominee of the Bull Moose Party in 1912, Johnson had played an important role in preventing him from being elected to a second term.

[FN2]. With respect to the House of Representatives-the only federal body then selected by popular election-the Constitution provided that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2 cl. 1. Thus, the federal right to vote was entirely dependent on the contours of the right to vote provided by state law.

[FN3]. Alexis de Tocqueville, *Democracy in America* 59 (Anchor ed. 1959).

[FN4]. See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* xxi (2000); Michael J. Klarman, *Rethinking the History of American Freedom*, 42 *Wm. & Mary L. Rev.* 265, 273-76 (2000).

[FN5]. Keyssar, *supra* note 4, at 16.

[FN6]. The Declaration of Independence para. 2 (U.S. 1776).

[FN7]. For a summary of these requirements, see Keyssar, *supra* note 4, at 342-47 & table A.2. This is not to say that the right to vote was completely divorced from economic factors. From the middle of the nineteenth century until 1934, at least some states excluded "paupers"-people receiving poor relief-from the franchise. See Samuel Issacharoff, Karlan & Pildes, *The Law of Democracy: Legal Structure of the Political Process* 31-32 (rev. 2d ed. 2001).

[FN8]. Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 *U. Pa. L. Rev.* 1257, 1304 (1991).

[FN9]. Keyssar, *supra* note 4, at 14.

[FN10]. Proceedings and Debates of the Virginia State Convention of 1829-1830, at 25 (1830).

Virginia was one of the few states to retain a property qualification up to the Civil War. See Keyssar, *supra* note 4, at 36.

[FN11]. See Keyssar, *supra* note 4, at 342-43.

[FN12]. See Scarry, *supra* note 8, at 1308.

[FN13]. See Keyssar, *supra* note 4, at 87; Philip A. Klinkner & Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* 20, 29 (1999).

[FN14]. Klinkner & Smith, *supra* note 13, at 66.

[FN15]. The Emancipation Proclamation, Jan. 1, 1863, <http://www.yale.edu/lawweb/avalon/emancipa.htm>. I do order and declare, that all persons held as slaves . . . are and hereafter shall be free . . . and I further declare and make known, that such persons of suitable condition will be received into the armed service of the United States, to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

[FN16]. Klinkner & Smith, *supra* note 13, at 66.

[FN17]. Keyssar, *supra* note 4, at 88.

[FN18]. Klinkner & Smith, *supra* note 13, at 64 (quoting the remark of a black sergeant, Henry Maxwell).

[FN19]. See generally Issacharoff, Karlan & Pildes, *supra* note 7, at 46-72; Pamela S. Karlan, Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment, 33 *McGeorge L. Rev.* 473, 477-80 (2002) [hereinafter Karlan, *Stereoscopic Fourteenth Amendment*] (describing the interaction of the due process and equal protection clauses in Supreme Court decisions protecting the right to vote).

[FN20]. U.S. Const. amend. XIV, § 2. For recent discussions of the reduction-of-representation clause, see, e.g., Pamela S. Karlan, Unduly Partial: The Supreme Court and the Fourteenth Amendment in Bush v. Gore, 29 *Fla. St. U. L. Rev.* 587 (2001); Peter M. Shane, Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors, 29 *Fla. St. U. L. Rev.* 535 (2001).

[FN21]. Scarry, *supra* note 8, at 1307.

[FN22]. It also excluded persons convicted of crimes, a group I discuss in Part II. See *infra* text accompanying notes 103-56.

[FN23]. Keyssar, *supra* note 4, at 177.

[FN24]. See Minor v. Happersett, 88 U.S. 162, 174 (1873):

[I]f suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are . . . counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone?

[FN25]. U.S. Const. amend. XV, § 1.

[FN26]. See *infra* note 158; Keyssar, *supra* note 4, at 103-04.

[FN27]. For a description of the post-Reconstruction disenfranchisement of black voters, see J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910* (1974).

[FN28]. Cf. Frank O. Bowman & Stephen L. Sepinuck, High Crimes and Misdemeanors: Defining the Constitutional Limits of Presidential Impeachment, 72 S. Cal. L. Rev. 1517, 1530 n.53 (1999) (discussing estimates on the size of the Union Army).

[FN29]. See Samuel T. McSeveney, Winning the Vote for Connecticut Soldiers in the Field, 1862-1864: A Research Note and Historiographical Comment, Conn. Hist., Nov. 1985, at 115.

[FN30]. The interaction of partisanship and patriotism is suggested by the fact that the three northern states whose legislatures were controlled by the Democrats did not provide for absentee voting in 1864. See James M. McPherson, Battle Cry of Freedom: The Civil War Era 804-05 (1988).

[FN31]. Professor Keyssar identified nineteen states that made provisions for voting by absent soldiers. See Keyssar, *supra* note 4, at 104.

[FN32]. State ex rel. Chandler v. Main, 16 Wis. 398, 423 (1863).

[FN33]. See, e.g., Bourland v. Hildreth, 26 Cal. 161 (1864) (interpreting the California Constitution as requiring the actual presence of the voter on election day in the county of his residence); Opinion of the Judges of the Supreme Court as to Constitutionality of Soldiers' Voting Act, 30 Conn. 591, 593-94 (1862) (same with respect to the Connecticut Constitution); People ex rel. Twitchell v. Blodgett, 13 Mich. 127 (1865) (same with respect to the Michigan Constitution).

[FN34]. See Keyssar, *supra* note 4, at 150.

[FN35]. See *infra* text accompanying notes 56-61 (discussing the Soldier Voting Acts of 1942 and 1944).

[FN36]. 42 U.S.C. §§ 1973ff to 1973ff-6 (1994).

[FN37]. For some discussions of the way in which military ballots that did not strictly comply with Florida's election laws may have changed the outcome of the 2000 presidential election, see Richard L. Berke, Lieberman Put Democrats In Retreat on Military Vote, N.Y. Times, July 15, 2001, at 16; David Barstow & Don VanNatta, Jr., How Bush Took Florida: Mining the Overseas Absentee Vote, N.Y. Times, July 15, 2001, at 1.

[FN38]. For a general history, see Edward B. Moreton, Jr., Note, Voting by Mail, 58 S. Cal L. Rev. 1261 (1985).

[FN39]. Keyssar, *supra* note 4, at 151.

[FN40]. See States Innovate to Battle Low Turnout, N.Y. Times, Oct. 24, 1994, at B9.

[FN41]. See Keyssar, *supra* note 4, at 191.

[FN42]. Scarry, *supra* note 8, at 1307 & n.158.

[FN43]. See *id.* (noting that "[a]rticles coupled the contribution of women in World War I with the coming vote, both in the United States and in Denmark").

[FN44]. Keyssar, *supra* note 4, at 193. Of course, Florence Nightingale's most famous role was as a battlefield nurse during the Crimean War.

[FN45]. See Sandra Day O'Connor, The History of the Women's Suffrage Movement, 49 Vand. L. Rev. 657, 662-64 (1996). Between the beginning of the century and World War I, neither House of Congress addressed women's suffrage. *Id.* at 666.

[FN46]. Keyssar, *supra* note 4, at 215.

[FN47]. O'Connor, *supra* note 45, at 666.

[FN48]. Keyssar, *supra* note 4, at 216.

[FN49]. In his message asking Congress to declare war, President Wilson stated, "The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty." Woodrow Wilson, *War Messages*, 65th Cong., 1st Sess. Senate Doc. No. 5, <http://www.lib.byu.edu/~rdh/wwi/1917/wilswarm.html>.

[FN50]. For example, "[w]hen the new Russian Republic extended the vote to women following its revolution, suffragists taunted President Wilson with the lack of similar progress in the United States." O'Connor, *supra* note 45, at 666. Interestingly, one of the arguments for female suffrage in Russia came from the creation of volunteer female battalions earlier in the war to replace male deserters. See Anne Wiltsher, *Most Dangerous Women: Feminist Peace Campaigners of the Great War 176-81* (1985).

[FN51]. U.S. Const. amend. XIX, § 1.

[FN52]. See James Clyde Sellman, *World War I and African Americans*, at http://www.africana.com/Articles/tt_980.htm.

[FN53]. W.E.B. DuBois, *The Crisis*, May 1919, quoted in John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi 1* (1994).

[FN54]. In *Nixon v. Herndon*, 273 U.S. 536 (1927), and *Nixon v. Condon*, 286 U.S. 73 (1932), the Supreme Court struck down two versions of the Texas white primary. But in *Grovey v. Townsend*, 295 U.S. 45 (1935), the Court upheld Texas's next effort. As a result, white primaries throughout the South effectively excluded black voters from the only election that mattered—the Democratic primary.

[FN55]. See Keyssar, *supra* note 4, at 244, 246.

[FN56]. For a first-hand, behind the scenes account of the Soldier Voting Act, see Norman Silber & Geoffrey Miller, *Toward "Neutral Principles in the Law: Selections from the Oral History of Herbert Wechsler*, 93 *Colum. L. Rev.* 854, 879-82 (1993).

[FN57]. See *Absentee Voting in Time of War*, Pub. L. No. 78-277, 58 Stat. 136 (1944) (repealed in full 1955).

[FN58]. See Silber & Miller, *supra* note 56, at 880.

[FN59]. *Id.* at 879.

[FN60]. See Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944-1969*, at 66 (1976).

[FN61]. See Klinkner & Smith, *supra* note 13, at 175.

[FN62]. For an excellent discussion of the interaction of political factors and doctrinal development, see Michael Klarman's forthcoming book on race and the Supreme Court in the twentieth century. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (forthcoming 2003). This equation may also have helped Native Americans, who continued to be disenfranchised in many states, on the theory that persons who lived on reservations were not really state citizens because they did not pay the same kind of taxes. When a federal court in New Mexico struck down the disenfranchisement of Native Americans who did not pay state taxes in a case involving a veteran, it remarked, "It is perhaps not pertinent to the question here, but we all know that these New Mexico Indians have responded to the needs of the country in time of war" Keyssar, *supra* note 4, at 254.

[FN63]. Patricia Sullivan, *Days of Hope: Race and Democracy in the New Deal Era* 119 (1996).

[FN64]. 321 U.S. 649 (1944).

[FN65]. 295 U.S. 45 (1935). For a detailed account of the Court's decision making process in *Smith v. Allwright*, see Klarman, *supra* note 62.

[FN66]. 313 U.S. 299, 318 (1941). Classic involved a federal prosecution for ballot-box stuffing in a Louisiana primary election. The question presented by the case was whether the right to vote for congressional representatives secured by Article I, § 2 was undermined by fraud in the conduct of a primary election.

[FN67]. *Allwright*, 321 U.S. at 670 (Robert, J., dissenting).

[FN68]. Klinkner & Smith, *supra* note 13, at 193.

[FN69]. Klarman, *supra* note 62, at 5.1. Thurgood Marshall called *Smith v. Allwright* his most important Supreme Court victory. See Keyssar, *supra* note 4, at 248.

[FN70]. See Klinkner & Smith, *supra* note 13, at 196.

[FN71]. Keyssar, *supra* note 4, at 246.

[FN72]. This account has been taken from John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi 1-9 (1994)*.

[FN73]. *Id.* at 9. Ultimately, although the newly Republican Senate seemed interested in denying Bilbo his seat, the threat of a Democratic filibuster resulted in the issue being tabled while Bilbo sought medical treatment for cancer. He died without the challenge ever being resolved. See also Klarman, *supra* note 62.

[FN74]. See Keyssar, *supra* note 4, at 250.

[FN75]. See President's Commission on Civil Rights, *To Secure These Rights (1947)*. See also Klarman, *supra* note 62 (reporting that Soviet Foreign Minister V.M. Molotov "asked Secretary of State James Byrnes in 1946 how Americans could justify pressing Soviets to conduct free elections in Poland when America did not guarantee them in South Carolina or Georgia").

[FN76]. David Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965*, at 132 (1978) (quoting President Lyndon B. Johnson).

[FN77]. Klinkner & Smith, *supra* note 13, at 277.

[FN78]. *Id.* at 278.

[FN79]. See Keyssar, *supra* note 4, at 278.

[FN80]. See U.S. Const. amend. XIV, § 2 (providing that states that disenfranchised male citizens over the age of 21 would have their representation in Congress and their electoral votes reduced).

[FN81]. See *Lowering the Voting Age to 18: A Fifty-State Survey of the Costs and Other Problems of Dual-Age Voting*, Report of the Constitutional Amendments Subcomm. of the Sen. Judiciary Comm., 92d Cong., 1st Sess. 7 (1971) [hereinafter *Lowering the Voting Age*].

[FN82]. *Id.* at 5.

[FN83]. Keyssar, *supra* note 4, at 278.

[FN84]. *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional*

Amendments of the Sen. Judiciary Comm., 90th Cong., 2d Sess. at 23 (1968) (statement of R. Spencer Oliver) [hereinafter Oliver Statement].

[FN85]. *Id.* at 20-21.

[FN86]. Voting Rights Act Amendments of 1970, § 302, Pub. L. 91-285, 84 Stat. 316.

[FN87]. 400 U.S. 112 (1970).

[FN88]. Keyssar, *supra* note 4, at 281.

[FN89]. For a description of the since-repealed Texas provision, see Carrington v. Rash, 378 S.W.2d 304 (Tex. 1964), *rev'd*, 380 U.S. 89 (1965).

[FN90]. See Carrington v. Rash, 380 U.S. 89, 100 n.2 (1965) (Harlan, J., dissenting) (quoting a provision from the election law).

[FN91]. See Texas Const., art. VI, § 2 (quoted in Carrington, 380 U.S. at 89 n.1).

[FN92]. See Carrington, 378 S.W.2d at 308 (Smith, J., dissenting).

[FN93]. Carrington, 380 U.S. at 96-97.

[FN94]. See *id.* at 91-92 (citing Williamson v. Lee Optical Co., 348 U.S. 483 (1955), one of the Court's canonical rational basis cases).

[FN95]. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51-52 (1959) (emphasis added).

[FN96]. Carrington, 380 U.S. at 96 (citing Oyama v. California, 332 U.S. 633 (1948)).

[FN97]. Oyama, 332 U.S. at 640.

[FN98]. *Id.* at 646 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[FN99]. Carrington, 380 U.S. at 97 (internal quotation marks, ellipses, and brackets omitted).

[FN100]. See Pamela S. Karlan, Just Politics?: Five Not So Easy Pieces of the 1995 Term, 34 Hous. L. Rev. 289, 297-300 (1997). For a more extensive discussion of the relationship of the two strands of heightened scrutiny, see Karlan, Stereoscopic Fourteenth Amendment, *supra* note 19.

[FN101]. Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (internal quotation marks omitted) (quoting Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969)).

[FN102]. See *id.* at 336, 353; Kramer, 395 U.S. at 627; see also Goosby v. Osser, 409 U.S. 512, 419 (1973) (describing Carrington as a "fundamental right" rather than a "suspect classification" case).

[FN103]. Scholars are not entirely in agreement about when these laws began to appear in the United States. A student note cites a provision in the Virginia constitution in 1776 as the first such law. See Douglas R. Tims, Note, The Disenfranchisement of Ex-Felons: A Cruelly Excessive Punishment, 7 Sw. U. L. Rev. 124, 124 (1975). A more recent study identifies the first provision as appearing sometime in the 1810s. See Christopher Uggen & Jeff Manza, Democratic Contraction? Felon Disfranchisement and American Democracy, 67 Am. Soc. Rev. 777, 788 fig.2 (2002), http://www.soc.umn.edu/%7Euggen/felon_disenfranchisement.htm. According to Uggen & Manza, as late as the 1850s, a majority of states had no felon disenfranchisement. See *id.* By the 1860s, however, two-thirds of the states had disenfranchisement provisions, *id.*, and today only two states—Maine and Vermont—have no disenfranchising provision. See Developments in the Law—The Law of Prisons: One Person, No Vote: The Laws of Felon Disenfranchisement, 115 Harv. L. Rev. 1939, 1942 (2002) [hereinafter One Person,

No Vote]. In any event, the complex history shows that "such provisions were neither universal nor uniform." Keyssar, *supra* note 4, at 162.

[FN104]. See Note, The Equal Protection Clause as a Limit on the States' Power to Disfranchise Those Convicted of a Crime, 21 Rutgers L. Rev. 297, 298-99 (1967). The author identifies three nineteenth-century cases, but only one of those—the often-cited *Washington v. State*, 75 Ala. 583 (1884)—actually involved the disenfranchisement of a person convicted of a crime.

[FN105]. *Otsuka v. Hite*, 64 Cal.2d 596 (1966).

[FN106]. *Id.*

[FN107]. *Id.* at 611.

[FN108]. 418 U.S. 24 (1974).

[FN109]. *Id.* at 54.

[FN110]. The Court's opinion left open a small window, which the Court used in *Hunter v. Underwood*, 471 U.S. 222 (1985), to strike down an Alabama misdemeanor disenfranchisement provision on the ground that it was enacted for a racially discriminatory purpose. A recent decision suggests how narrow a window this is. In *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002), the court held that although Florida's lifetime disenfranchisement provision was originally enacted for a racially discriminatory purpose, "[a]s a matter of law, . . . the re-enactment of the felon disenfranchisement provision in 1968 cleansed Florida's felon disenfranchisement scheme of any invidious discriminatory purpose that may have prompted its inception."

[FN111]. See Tims, *supra* note 103, at 126 (reporting that as of 1975, twenty-eight states had lifetime disenfranchisement provisions).

[FN112]. See One Person, No Vote, *supra* note 103, at 1942-43 (noting the "great diversity among the forty-eight states that disenfranchise convicted felons," with twenty-eight states denying the right to vote to incarcerated inmates and individuals on either probation or parole, four states denying the right to vote to incarcerated inmates and parolees but not probationers, and sixteen states and the District of Columbia denying the right to vote only "during the incarceration period" and stating that thirteen states disenfranchise at least some ex-felons, with eight permanently disenfranchising first-time offenders).

[FN113]. Compare Uggen & Manza, *supra* note 103, at 780 (noting that from the 1920s to the early 1970s, the United States incarceration rates hovered around 110 per 100,000 individuals) with Dwight Lewis, When Will We Spend More on Books Than Prison Bars?, *The Tennessean*, Aug. 29, 2002, at 15A (noting that the United States is now "the world leader in the percentage of its population behind bars—690 people per 100,000").

[FN114]. Uggen & Manza, *supra* note 103, at 781.

[FN115]. One Person, No Vote, *supra* note 103, at 1940.

[FN116]. See Jamie Fellner & Marc Mauer, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States (1998), available at <http://www.hrw.org/reports98/vote/>.

[FN117]. *Id.*

[FN118]. *Id.*

[FN119]. See, e.g., Peter Wagner, Census Quirk Sustains New York's Love Affair with Prisons (Aug. 2002), available at <http://www.prisonpolicy.org/articles/clj0802.shtml>; Jonathan Tilove, Minority Prison Inmates Skew Local Populations as States Redistrict, *Newhouse News Serv.*, Mar. 11, 2002,

available on LEXIS, NEXIS library, curnws file.

[FN120]. See Uggem & Manza, *supra* note 103, at 789.

[FN121]. See *id.*

[FN122]. See *id.* at 797.

[FN123]. See *One Person, No Vote*, *supra* note 103, at 1939 n.10, 1943 n.32.

[FN124]. See Uggem & Manza, *supra* note 103, at 793 tbl.4a.

[FN125]. See *Former Felons Have a Right to Vote*, *N.Y. Times*, Oct. 17, 2002, at A32; see also *One Person, No Vote*, *supra* note 103, at 1943 (stating that recently many states "have either softened their regimes or become targets of re-enfranchisement campaigns").

[FN126]. For a summary of recent judicial decisions rejecting both Fourteenth Amendment and Voting Rights Act based claims, see *One Person, No Vote*, *supra* note 103, at 1949-57.

[FN127]. See *August v. Electoral Comm'n*, 1999 (3) SA 1 (CC), [http:// www.concourt.gov.za](http://www.concourt.gov.za).

[FN128]. *Id.* at para. 31.

[FN129]. *Id.* at n.30.

[FN130]. *Id.* at para. 17.

[FN131]. See *Sauve v. Canada*, [2002] 218 D.L.R. 4th 577.

[FN132]. *Id.* at para. 49.

[FN133]. *Id.* at para 50.

[FN134]. *Id.* at para 51.

[FN135]. No other western nation disenfranchises nearly the number, or range, of people that the United States excludes. See Fellner & Mauer, *supra* note 116.

[FN136]. In *Washington v. State*, 75 Ala. 583 (1884), the Alabama Supreme Court upheld the conviction of a defendant who had been charged with voting illegally, given his prior conviction for larceny. The court proceeded from the premise that disenfranchisement was not a "punishment," but rather a means of "preserv[ing] the purity of the ballot box" against corruption by morally or cognitively unfit voters. *Id.* at 585. Since *Washington*, many courts and commentators have treated disenfranchisement as a regulatory, rather than a punitive practice, citing *Washington* and other nineteenth century cases for this proposition. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958); Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 *Minn. L. Rev.* 753, 771 (2000). In describing the prevalence of this justification (Demleitner herself rejects it, seeing disenfranchisement as essentially punitive. See *id.* at 756.) they fail to note that this view of disenfranchisement depends on a long since repudiated view of the nature of an individual's ability to vote. The *Washington* Court treated the disqualification as "withholding an honorable privilege, and not denying a personal right or attribute of personal liberty" *Washington*, 75 Ala. at 585. (By contrast, it saw a regulation that prevented an individual from being admitted to the bar as punitive because "[t]he right to exercise [this] callin[g] was a natural right, which was not conferred by government, but would exist without it It was a valuable attribute of personal liberty in the nature of property, the deprivation of which was punitive in its character." *Id.* at 586.). At the time *Washington* was decided, even the United States Supreme Court treated the ability to vote as subject to virtually limitless regulation by the state. (The only exception was the prohibition on racial discrimination contained in the Fifteenth Amendment.) As the

Idaho Supreme Court explained, because “[t]he right to vote or to exercise the privilege of the elective franchise is neither a natural, absolute, nor vested right, of which a man cannot be deprived but by due process of law, but is purely a conventional right,” the scope of the franchise “may be enlarged or restricted, granted or withheld, at pleasure, with or without fault.” Shepherd v. Grimmet, 31 P. 793, 795 (1892) (quoting Blair v. Ridgely, 41 Mo. 63, 178 (1867)). To reinforce this conclusion, the Idaho court pointed to a passage in the United States Supreme Court’s decision in Murphy v. Ramsey, 114 U.S. 15, 43 (1885), where, in the course of upholding a voter registration oath that required individuals to abjure polygamy, the Court observed that “[i]t would be quite competent for the sovereign power to declare that no one but a married person shall be entitled to vote.” Shepherd, 31 P. at 795. The Supreme Court has squarely repudiated that view of the state’s power to limit the franchise. See Romer v. Evans, 517 U.S. 620, 634 (1996). Today, of course, the Court has recognized the right to vote as a fundamental right. Thus, to the extent that the characterization of disenfranchisement as nonpunitive depends on its depriving individuals of something that is never a right in the first place, that characterization is no longer valid.

[FN137]. Atkins v. Virginia, 536 U.S. 304, 344(2002) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

[FN138]. Id.

[FN139]. Id. (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

[FN140]. See Penry v. Lynaugh, 492 U.S. 302 (1989).

[FN141]. Atkins, 536 U.S. at 344 (quoting Penry, 492 U.S. at 331).

[FN142]. See id. at 346-47 (stating that not only is the number of states that have recently changed their laws important “but the consistency of the direction of change” is also important in assessing contemporary standards).

[FN143]. Id. at 347 n.21; see also Thompson v. Oklahoma, 487 U.S. 815, 830 n.31 (1988) (relying in part on the practices of “other nations that share our Anglo-American heritage, and by the leading members of the Western European community” to determine that sentencing persons under the age of sixteen to death violated the Eighth Amendment).

[FN144]. Atkins, 536 U.S. at 344.

[FN145]. Solem v. Helm, 463 U.S. 277, 290 (1983). Solem also identified two other objective factors: the punishments for other crimes within the same jurisdiction and the punishments other jurisdictions imposed for the same crime. Id. at 290-91. In Harmelin, the Supreme Court transformed the first factor into a threshold inquiry: “[I]ntra-jurisdictional and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” 501 U.S. at 1005. For a discussion of the scope of proportionality review, see Pamela S. Karlan, “Pricking the Lines”: The Due Process Clause, Punitive Damages, and Criminal Punishment (forthcoming 2003) (on file with author).

[FN146]. See George P. Fletcher, Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia, 46 UCLA L. Rev. 1895, 1898 (1999); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505 (2001).

[FN147]. 418 U.S. at 76 n.24.

[FN148]. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); see McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995) (“the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . the disinherited must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family”).

[FN149]. See Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "the Purity of the Ballot Box," 102 Harv. L. Rev. 1300, 1301, 1311-12 (1989). Andrew Schapiro, the anonymous author of this Note, shows that the doctrinal and theoretical arguments treating disenfranchisement as regulatory, rather than punitive, are no longer persuasive, if they ever were. Thus, the current justification for wholesale disenfranchisement must depend on its being an appropriate punishment.

[FN150]. Bell v. Wolfish, 441 U.S. 520, 545 (1979); see also, e.g., Turner v. Safley, 482 U.S. 78, 94-99 (1987) (holding that prisoners retain their constitutional right to marry, although that right may be subject to substantial restriction during their incarceration); Pell v. Procunier, 417 U.S. 817, 822 (1974) (inmates retain some First Amendment protections).

[FN151]. Atkins, 536 U.S. at 347.

[FN152]. For example, people convicted of felonies involving the use or sale of drugs are rendered permanently ineligible for certain kinds of public assistance, such as food stamps and federal education loans. See, e.g., Nora V. Demleiter, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 Stan. L. & Pol'y Rev. 153, 158 (1999); Uggen & Manza, *supra* note 103, at 796.

[FN153]. Two states that had no disenfranchisement provision in 1974 did subsequently bar individuals from voting while they are imprisoned. See Uggen & Manza, *supra* note 103, at 782 n.5 & 795.

[FN154]. See Jeff Manza et al., Civil Death or Civil Rights: Public Attitudes Toward Felon Disenfranchisement in the United States (2003); <http://www.socsci.umn.edu/nuggen/POQ8.pdf>.

[FN155]. See Fellner & Mauer, *supra* note 116 (noting that while some countries disenfranchise people serving criminal sentences, and a few "restrict the vote for several years after completion of sentence" in specific situations, "prisoners may vote in countries as diverse as the Czech Republic, Denmark, France, Israel, Japan, Kenya, Netherlands, Norway, Peru, Poland, Romania, Sweden and Zimbabwe" and that in Germany, "the law obliges prison authorities to encourage prisoners to assert their voting rights and to facilitate voting procedures"). Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides that all citizens shall have the "right and the opportunity" to vote "without unreasonable restrictions." ICCPR, 999 U.N.T.S. 171, entered into force March 23, 1976. The United Nations Human Rights Committee, in a comment on art. 25, stated that "[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence." General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4 of the International Comment on Civil and Political Rights, General Comment No. 25(57), Annex V(1), CCPR/C/21, Rev. 1, Add. 7, August 27, 1996. The Committee "has consistently frowned on and tried to limit the reach of criminal disenfranchisement laws that it has reviewed." Fellner & Mauer, *supra* note 116.

[FN156]. Francis Bacon, Of Adversity, in Essays, Civil and Moral, 16, 16 (Harvard Classics ed. 1909).

[FN157]. E.E. Schattschneider, The Semi-sovereign People: A Realist's View of Democracy in America 100 (1960).

[FN158]. According to the 1870 census, there were approximately 1,083,484 black men over the age of twenty. See Bureau of the Census, U.S. Dept. of Commerce, Historical Statistics of the United States: Colonial Times to 1970, at 17 (1870). Given the then-existing restrictions on the franchise (e.g., property holding and poll tax requirement, pauper exclusions, and other disqualifications), some proportion of these men would have been ineligible to vote even after the Fifteenth Amendment prohibited racial discrimination in the franchise.

[FN159]. Fellner & Mauer report that 1,367,100 black men are disenfranchised by felon disenfranchisement laws. See Fellner & Mauer, *supra* note 116. Overall statistics indicate that nearly three-quarters of the disenfranchised are not in prison and that roughly thirty-six percent are ex-offenders. *Id.* Even taking into account racial disparities in the criminal justice system that result in a

disproportionate number of black felons being sentenced to prison terms, rather than probation or parole, and that result in black felons receiving longer sentences, this means that a huge number of black men who have completed their criminal sentences remain disenfranchised.

[FN160]. August v. Electoral Comm'n, 1999 (3) SA 1 (CC), [http:// www.concourt.gov.za](http://www.concourt.gov.za).

[FN161]. Id. at para. 17.

[FN162]. For another example of ideas we might profitably borrow from other democracies. See Issacharoff, Karlan & Pildes, *supra* note 7, at 1090-99, 1160-72 (discussing alternative election systems).

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