STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
BRANCH 29, HONORABLE RICHARD J. SANKOVITZ

STATE OF WISCONSIN,
Plaintiff,
v. Case No. 10CF1101
MICHAEL S. HENDERSON,
Defendant.

STATE OF WISCONSIN,
Plaintiff,
v. Case No. 10CF1950
OLANDO MACLIN,
Defendant.

DEFENSE BRIEF IN CHIEF IN SUPPORT OF MOTION TO DISMISS BASED UPON UNCONSTITUTIONALITY OF WISCONSIN CONSTITUTION ARTICLE III, SECTION 2, (4) (a), WISCONSIN STATUTE SECTION 12.13 (1)(a), 6.03 (1) (b) AS CHARGED

TO: Mr. Bruce Landgraf, Milwaukee County Assistant District Attorney
Mr. David Maas, Wisconsin Assistant Attorney General

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.
Sir Winston Churchil
'Report of an Inquiry into Prison Disturbance'
HMSO, Command 1456 , London Home Office 1910

People of color receive disparate treatment in the criminal justice system throughout the nation and African-Americans and Hispanics constitute a disproportionate percentage of incarcerated populations in Wisconsin.
Wisconsin Governor Doyle

Racial disparities permeate the entire criminal justice continuum, in the number of arrests, cases charged, sentences and probation and parole revocations.
Wisconsin Office of Justice Assistance

I wonder if because it is blacks getting shot down, because it is blacks who are going to jail in massive numbers, whether we -- the total we, black and white -- care as much? If we started to put white America in jail at the same rate that we're putting black America in jail, I wonder whether our collective feelings would be the same, or would we be putting pressure on the president and our elected officials not to lock up America, but to save America?"
Former Atlanta Police Chief Eldrin Bell. Legal Times, October 10, 1994.

Introduction

The issue presented to this Court by the defense generally raises a fundamental question about Wisconsin's democratic process and specifically about the discriminatory impact of that process on Wisconsin African Americans. Defendants, who are African American, argue that Wisconsin Constitution Article III, Section 2, (4) (a) and Wisconsin Statute Section 12.13 (1)(a) and 6.03 (1) (b) which implement that provision as applied constitute improper race-based vote denial in violation of federal law. "Permitting a citizen, even a convicted felon, to challenge felon disenfranchisement laws that result in either the denial of the right to vote or vote dilution on account of race animates the right that every citizen has of protection against racially discriminatory voting practices." ***Farrakhan v. Washington,*** 338 F.3d 1009, 1016 (9th Cir. 2003), *rev'd* 359 F. 3d 1116, *rev'd* 590 F.3d 989, *rehearing granted* 2010 U.S. App. Lexis 8783. For "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." ***Wesberry v. Sanders*** 376 U.S. 1, 17–18 (1964). As President Lyndon Johnson said in his message that accompanied his request that Congress enact a voting rights bill, "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." Philip A. Klinkner & Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* 277 (1999) To ensure that our citizens enjoy this precious right, the United States Constitution sets forth fundamental principles governing the franchise: equal suffrage based on race (15th Amend.) and poll tax prohibition (24th Amend.).

Table of Contents

A. The first Wisconsin Constitution of 1846 was not passed since it would have extended the vote to African Americans.

B. The second Wisconsin constitutional convention and beyond: discrimination in all aspects of Wisconsin society, including the criminal justice system, causes discriminatory disenfranchisement of African Americans.

C. Wisconsin's historical pattern of discrimination exists today in Wisconsin's criminal justice system causing felony disenfranchisement laws to have a disproportionate impact on African Americans.

2. Can Wisconsin's disenfranchisement law impose a material requirement that a convicted indigent felon pay costs, fees and restitution before being allowed to vote in a federal election?

A. Special problem created for Mr. Maclin by disenfranchising him with a felony conviction where no amount of restitution was specified to complete his sentence before the 2008 election.

Conclusion

Facts

1. Mr. Maclin is African American.

2. Mr. Henderson is an African American.

3. Mr. Maclin lives in the State of Wisconsin.

4. Mr. Henderson lives in the State of Wisconsin.

5. Mr. Maclin is indigent.

6. Mr. Henderson is indigent.

7. The State alleges Mr. Maclin has been previously convicted of a felony in the State of Wisconsin.

8. At the time this alleged offense was committed, the State alleges Mr. Maclin had not finished his felony sentence.

9. Mr. Maclin on July 20, 2007 was placed on probation for three years in Milwaukee County Case No. 2007CF1029.

10. As part of that probation order to complete his sentence of July 20, 2007, Mr. Maclin was required to pay costs and surcharges, pay DNA surcharge and pay restitution to the victims in this matter in the amount stipulated to by the State.

11. *The amount of restitution owed by Mr. Maclin was never determined before the 2008 election.*

12. On June 16, 2010, The Department of Probation requested on extension of probation on Mr. Maclin due to unpaid financial obligations.

13. On June 16, 2010, The Department of Probation requested a restitution determination be conducted to finally determine the amount of restitution Mr. Maclin owed.

14. Almost three years after his right to vote was taken from Mr. Maclin, on June 18, 2010, the Honorable Daniel Konkol, Branch 44, determined that the amount of restitution Mr. Maclin owed was $1488.00

15. On June 18, 2010, without the benefit of the assistance of counsel and without even appearing in court, Mr. Maclin's probation was extended for one year to July 20, 2011.

16. Mr. Maclin's total court assessments came to $398.00, with a balance of $63.00 remaining.

17. The State alleges Mr. Henderson has been previously convicted of a felony in the State of Wisconsin.

18. Mr. Henderson on August 19, 2005 was placed on five years of probation and charged $535.00 in court assessments.

19. At the time this alleged offense was committed, the State alleges Mr. Henderson had not finished his felony sentence.

20. Both Mr. Maclin and Mr. Henderson are citizens who are otherwise qualified to vote but for Wisconsin Constitution Article III, Section 2, (4) (a) and Wisconsin Statute Section 12.13 (1)(a) and 6.03 (1) (b) which implement that provision.

21. The State alleges Mr. Maclin voted in the federal general presidential 2008 election.

22. The State alleges Mr. Henderson voted in the federal general presidential 2008 election.

Procedural History

The defense has filed a motion challenging Wisconsin's felon disenfranchisement laws, Wisconsin Constitution Article III, Section 2, (4) (a) and Wisconsin Statute Section 12.13 (1)(a) and 6.03 (1) (b). In setting the briefing schedule, the defense requested a longer briefing schedule because of the issue of first impression presented and the necessity of the defense retaining expert witness testimony regarding this issue to present to the court. Further, the defense informed this Court that this issue was significant in that at least part of this issue was being currently presented to the United States Supreme Court in ***Simmons v. Galvin,*** 575 F.3d 24 (1st Cir. 2009). The Court informed defense counsel that rather than presenting such expert testimony, it was sufficient if defense counsel presented the information by affidavit.

Issues

1. **Do the Fourteenth and Fifteenth Amendments to the United States Constitution, as well as federal enabling legislation of those amendments, the Voting Rights Acts, prohibit the State of Wisconsin from enforcing its felon disenfranchisement constitutional provision and its enabling legislation in a racially discriminatory manner?**

I. A state's right to control who will cast a ballot in federal elections is limited by the federal constitution and statutes.

> "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect." Sir Guy Mannering. Chap. xxxvii. Walter Scott (Scottish Novelist, Poet,1771-1832)

To understand the issues presented by the defense in this case, this Court must understand the history and literature of states' rights, federalism and voting rights.

Currently, most legal challenges to civil rights are viewed through the lens of United States Supreme Court cases invalidating state laws and procedures in the name of individual constitutional rights. From landmark decisions like ***Brown v. Board of Education*** 347 U.S. 483 (1954) and the second Reconstruction of the 1960's, states are seen as a threat to individual and minority rights; the federal government as the special guardian of those rights. *See, e.g.,* Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction,* 65 B.U.L. REV. 205 (1985). The need for a strong central government was due to the Federalists' dissatisfaction with small-scale politics and their belief that an "enlargement" of the government's geographic "sphere" would improve the caliber of public decisionmaking as expressed in James Madison's *Federalist* No. 10.

The states' rights tradition looked to local governments to protect citizens against abuses by central authorities. Classic statements of this view include Madison's *Federalist* No. 46, his *Virginia Resolutions of 1798,* and his *Report of 1800.* Critically, however, Madison identified the limits of states' rights. While State governments could monitor the federal one, no state could unilaterally nullify those laws or secede from the Union. Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1451-66, 1492-1520 (1987).

Moreover, Madison's scheme gave the federal government a crucial role in protecting citizens from abusive state governments. Later spokesmen for the states' rights position, such as John C. Calhoun, Jefferson Davis, and Alexander Stephens, disregarded these vital limits to states' rights. Not only did their arguments on behalf of nullification and secession misread the Constitution's federal structure, *See id.* at 1451-66, but these arguments were deployed on behalf of slavery, the ultimate vindication of state's rights over human dignity. In the tradition of Jefferson Davis, twentieth-century states'

rightists wax eloquent about the dangers of a national government run rampant, but regularly deploy the rhetoric of states' rights to defend states' wrongs. Sadly, in regards to voting rights, "states' rights" is often a code word for racial injustice and disregard for the rights of local minorities *See, e.g., id.* at 1425-29, 1488 n.252 -- code words for a world view far closer to Jefferson Davis' than James Madison's.

II. Modern felon disenfranchisement laws are different than historical disenfranchisement laws.

In Greece and Rome, criminals declared "infamous" were not allowed to engage in civic functions such as voting. Keller, *Re-enfranchisement laws provide unequal treatment: ex-felon reenfranchisement and the Fourteenth Amendment,* 81 CHI.- KENT L. REV. 199, 201 (2006). Likewise, early American colonies used the English practice of disenfranchising men who were labeled as scandalous or corrupt. Id.[1] Thus, some courts have sought to justify the existence felon disenfranchisement laws, at least in part, because "[t]hese laws are deeply rooted in this Nation's history." ***Johnson v. Governor of the State of Florida,*** 405 F.3d 1214, 1228 (11th Cir. 2005).

However, to justify the current practice of felony disenfranchisement in America because the laws are deeply rooted in America's past is like trying to justify slavery in America today because it was deeply rooted in America's past:

> Civil disabilities of the past differed greatly from those imposed in modern American practice. Early disenfranchisement laws generally only applied to the most serious crimes and were imposed by judges on an individual basis. They were also a visible public punishment, often used to shame those who lacked the moral virtue necessary to be part of the society. Conversely, modern felon disenfranchisement laws are implemented across the board through state election laws, so there is no opportunity for judges to exercise individual discretion. The civil disabilities of today are "automatic, invisible" consequences of conviction; they are not explicitly punitive, nor do they allow for individual discretion. Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon*

[1] 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 late 18th century.. See Behrens, Uggen, Manza, *Ballot Manipulation,* infra., 109 AMER. J.OF SOCIOLOGY at 563. 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). In any event, the complex history shows that "such provisions were neither universal nor uniform." Alexander Keyssar, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES, 162 (2000).

Disenfranchisement, 61 N.Y.U. ANN. SURV. AM. L. 723, 728-29 (2006). Citations omitted.

Clearly, therefore, there are important distinctions between the disenfranchisement laws of early America and disenfranchisement as practiced in modern America. Modern disenfranchisement laws are automatic, invisible in the criminal justice process, considered "collateral" rather than explicitly punitive, and applied to broad categories of crimes with little or no common character – characteristics not in common with early disenfranchisement laws. By contrast, modern German disenfranchisement law appears quite similar to the American colonial model. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 75556 (2000) (showing that in Germany "deprivation of voting rights is limited to serious, legislatively enumerated offenses, must be assessed directly by the sentencing judge at the time of sentencing, and can be imposed only for a limited and relatively short period of time").

"Most state constitutions explicitly gave their legislatures the power to pass laws disenfranchising criminals. Early U.S. disenfranchisement laws drew upon European models and were generally limited to a few specific offenses. Over time, states expanded the scope of such laws to include all felonies, often citing a rationale to "preserve the purity of the ballot box". Many states enacted felon disenfranchisement provisions in the aftermath of the Civil War. Such laws diluted the voting strength of newly enfranchised racial minority groups, particularly in the Deep South but in the North as well." Behrens, Uggen, Manza, *Ballot Manipulation and the "Menance of Negro domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002,* 109 AMER. J.OF SOCIOLOGY 559, 563 (Nov. 2003), http://www.soc.umn.edu/~uggen/Behrens_Uggen_Manza_ajs.pdf Citations omitted. See also, ***Hunter v. Underwood,*** 471 U.S. 222, 229 (1985) (describing the "movement that swept the post-Reconstruction South to disenfranchise blacks"); ***Cotton v. Fordice,*** 157 F.3d 388, 391 (5th Cir. 1998) ("[Felon disenfranchisement statutes were] enacted in an era when southern states discriminated against blacks by disenfranchising convicts for crimes that, it was thought, were committed primarily by blacks."); ***Ratliff v. Beale,*** 20 So. 865, 868 (Miss. 1896) (tracing devices, including criminal disenfranchisement, added to the 1890 Mississippi Constitution to "obstruct the exercise of the franchise by the negro race"); *see also* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 537-42 (1993).

These laws, if not explicit in their racial goals, often singled out crimes for which blacks were more likely to be convicted than whites, with little regard to the severity of the crime or its possible relation to the franchise. Manza and Uggen, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 43, 55 (2006); Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1088-89; Florida Advisory Committee to the United States Commission on Civil Rights *Ex-felon voting rights in Florida*, (August 2008), p. 4, http://www.usccr.gov/pubs/EX-FelonVRFL.pdf

("Nevertheless, despite what appeared to be a clear prohibition on race discrimination in voting, in the ensuing decades most former Confederate states adopted barriers that although neutral on the surface served to prevent many blacks from voting.")

> To address this concern, the drafters of the Fourteenth Amendment included a provision in 2 wherein any state that denied the right to vote to any male citizens over the age of twenty-one suffered reduced representation in proportion to the number of disenfranchised citizens. Later called the "Penalty Clause," this section prevented southern states from unjustly capitalizing on the abolition of slavery through political dominance. It did not, however, confer voting rights upon anyone. Until the passage of the Fifteenth Amendment n44 in 1870, southern states could still legally disenfranchise black voters on the basis of race alone, but, depending on the size of their black populations, they could lose 50% or more of their Congressional representation as a consequence.
>
> The Penalty Clause contained two exceptions. States could disenfranchise people without suffering decreased representation who committed 1) rebellion or 2) other crimes. Later called the "Other Crimes Exception," this ambiguous language is the root of courts subjecting felon disenfranchisement laws to a lower level of scrutiny than other restrictions on voting rights.
>
> Southern lawmakers feared that the newly-enfranchised black voters would threaten their political power, but could not deny them the right to vote without violating the Fifteenth Amendment. Consequently, felon disenfranchisement took on a new racial significance as legislatures used the Other Crimes provision to deny blacks the right to vote without violating the Constitution. The laws disproportionately burdened blacks, and did so legally.
>
> Modern legislatures do not reveal blatantly discriminatory motivations behind felon disenfranchisement laws. Recently, however, scholars have found that "the racial composition of state prisons is firmly associated with the adoption of felon disenfranchisement laws." Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement,* 61 N.Y.U. ANN. SURV. AM. L. 723, 729-31 (2006). Citations omitted.

Today's American disenfranchisement laws are pervasive: no other contemporary democracy disenfranchises felons to the same extent, or in the same manner, as the

United States. Behrens, Uggen, Manza, *Ballot Manipulation*, supra, at 562. See, ***Hirst vs. Attorney General,*** EWHC Admin 239, para 42 (United Kingdom 2001) (describing felon voting ban as a "blunt instrument" which affected a significant category of people in a discriminatory way); ***Sauve vs. Canada,*** 3 SCR 519, 2002 S.C.C. 68 (Supreme Court of Canada 2002) (The legitimacy of the law and the obligation to obey the law flows directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.); Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative,* 84 MINN. L. REV. 753 (2000) (In Germany, deprivation of voting rights is limited to serious, legislatively enumerated offenses, must be assessed directly by the sentencing judge at the time of sentencing, and can be imposed only for a limited and relatively short period of time.) In Germany, a judge may impose disenfranchisement for certain offenses, such as treason, but only for a maximum of five years. Demleitner, supra. France excludes from suffrage only those convicted of election offenses and abuse of public power. Ireland and Spain both allow prisoners to vote, and in Australia a mobile polling staff visits prisons so that inmates may vote (Australian Electoral Commission 2001). In 1999, South Africa's highest court ruled that prison inmates had the right to vote. Behrens, Uggen, Manza, *Ballot Manipulation,* 109 AMER. J.OF SOCIOLOGY at 562 n.3

In America today, by contrast, disenfranchisement laws represent a "crazy quilt of disqualifications and restoration procedures" allowing for disagreement in a single jurisdiction of how the law should be interpreted and applied. Susan M. Kuzma, U.S. Dep't of Justice, Office of the Pardon Attorney, *Civil Disabilities of Convicted Felons: A State-by-State Survey*, at Forward, p.i, and Introduction, p. 1 (1996).

This "crazy quilt of disqualifications" has severe implications. An ex-felon may vote in one state, but his former cellmate may not in a neighboring state; an ex-convict who moves across state lines may gain or lose the right to vote. The federal voting rights of former felons, therefore, depends "solely on where a person lives." H.R. 906: Civic Participation and Rehabilitation Act of 1999, 106th Cong. Section 2 (1999). Many ex-felons therefore are effectively forced to choose between which constitutional right they will waive: the right to interstate travel or the right to vote.

Congress, aware of the discriminatory history of felon disenfranchisement and its application, has passed legislation to stop such discriminatory voting practices in federal elections.

III. The Election Clause, the Reconstruction Amendments, and Congress' Inherent Authority to Regulate Federal Elections

Congress has very broad powers to regulate federal elections under the Election Clause of Article I, section 4. This clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of chosing Senators."

The power of States to regulate elections is also limited by the "Reconstruction Amendments." The 13th Amendment, ratified in 1865 after the Civil War, abolished and prohibited slavery and secured a minimal degree of citizenship to former slaves. The 14th Amendment, ratified in 1868, granted citizenship to all people "born or naturalized in the United States," and included the due process and equal protection clauses. This amendment failed to explicitly prohibit vote discrimination on racial grounds. The 15th Amendment, ratified on February 3, 1870, provided that the right of U.S. citizens 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. The Congress was given the authority to enforce those rights and regulate the voting process.

Congressional power under the enforcement clauses of the Reconstruction Amendments is strongest when protecting fundamental rights, see, e.g., ***Tennessee v. Lane***, 541 U.S. 509, 518 & n.4, 532 n.20 (2004) *see also* ***United States v. Georgia,*** 546 U.S. 151 (2006) (approving the abrogation of state sovereign immunity under Title II of the American with Disabilities Act in cases alleging violations of fundamental rights under the Eighth Amendment), and when providing protection against state practices subject to heightened judicial scrutiny under the Equal Protection Clause, see, e.g., ***Nev. Dep't of Human Res. v. Hibbs,*** 538 U.S. 721, 736, 738 (2003). Enforcement of the Fifteenth Amendment implicates both the most quintessential fundamental of all democratic rights -- voting -- and the paradigmatic "suspect class" -- race. ***Yick Wo v. Hopkins,*** 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."); *see also* ***Kramer v. Union Free Sch. Dist.***, 395 U.S. 621, 626 (1969).

Unsurprisingly, then, Congress's enforcement power was at its zenith in enacting the Voting Rights Act (VRA). See ***Lane,*** 541 U.S. at 518 n.4; ***Hibbs,*** 538 U.S. at 737-38*;* ***Lopez v. Monterey County,*** 525 U.S. 266, 282-85 (1999)*;* ***City of Boerne v. Flores,*** 521 U.S. 507, 530 (1997). It is a well established principle that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." ***Dunn v. Blumstein,*** 405 U.S. 330, 336, (1972). The United States Supreme Court has chosen to apply the strict scrutiny standard to voting because of the significance of the franchise as the guardian of all other rights. ***Harper v. Virginia Bd. of Elections,*** 383 U.S. 663, 667 (1966); ***Reynolds v. Sims,*** 377 U.S. 533, 562 (1964) (quoted in ***Dunn,*** 405 U.S. at 336). In short, the state must show a substantial and compelling reason for restricting the right to vote. ***Dunn,*** 405 U.S. at 335.

Although the text of the Election Clause references regulating the time, place and manner of congressional elections, it has consistently been read more expansively to include Congress' authority to regulate presidential elections, as well as its authority to regulate other voting requirements for federal elections, including voter eligibility. *See, e.g.*, ***Kusper v. Pontikes,*** 414 U.S. 51, 57 n.11 (1973); ***Oregon v. Mitchell,*** 400 U.S. 112, 121, 124 (1970). ***Mitchell*** upheld Congress' ability to lower the voting age in federal

elections. In doing so, the Court clearly endorsed Congress' "ultimate supervisory power" over federal elections, including setting the qualification for voters. 400 U.S. at 124.

Even in those few instances where federal legislation would conflict with a state constitution, the legislation could nevertheless be implemented pursuant to the Supremacy Clause in Article VI of the Constitution, which provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

IV. Congress' Enforcement Powers under the Fourteenth and Fifteenth Amendments are broad and must be given great deference by Courts.

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment both grant Congress the power to enforce the Amendments "by appropriate legislation." The Supreme Court has described this enforcement power as "a broad power indeed" - one that gives Congress a "wide berth" to devise appropriate remedial and preventative measures for unconstitutional actions. ***Tennessee v. Lane,*** 541 U.S. 509, 518, 520 (2004); ***South Carolina v. Katzenbach,*** 383 U.S. 301, 325-26 (1966) ("Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."). This is because Congress, not the judiciary, has the primary role in enforcing the Fourteenth Amendment.. Michael W. McConnell, *Institutions and Interpretations: A Critique of* ***City of Boerne v. Flores,*** 111 HARV. L. REV. 153, 194-95 (1997) ("The historical record shows that the framers of [the Fourteenth Amendment] expected Congress, not the Court, to be the primary agent of its enforcement. . . . [T]he Court should give respectful attention -- and probably the presumption of constitutionality -- to the interpretive judgments of Congress.").

The Court has "compared Congress' Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause." ***Lopez v. Monterey County,*** 525 U.S. 266, 294 (U.S. 1999) (citing ***City of Rome v. United States,*** 446 U.S. 156, 175 (1980); (1970); ***South Carolina v. Katzenbach,*** 383 U.S. 301, 326 (1966)). Legislation enforcing the Fifteenth Amendment is afforded deferential review from the courts because it necessarily protects against racial discrimination and deprivations of the fundamental right to vote, *see* ***Johnson v. California,*** 543 U.S. 499, 505 (2005); ***Boerne,*** 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.") and at 533 (noting that congressional power is heightened when Congress enacts remedial legislation that addresses problems at the convergence of race and fundamental rights); ***Harper v. Va. Bd. of Elections,*** 383 U.S. 663, 670 (1966); ***Reynolds v. Sims,*** 377 U.S. 533, 562 (1964) (holding that "*any*

alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" Emphasis added); ***Korematsu v. United States,*** 323 U.S. 214, 216 (1944) ([A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.) Voters who allege facts showing disadvantage to themselves as individuals have standing to claim a cviolation. ***Baker v. Carr,*** 369 U.S. 186, 206 (1962).

The Supreme Court has established an analysis for determining whether legislation falls within Congress' enforcement powers under the Fourteenth Amendment: the legislation must exhibit "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." ***Boerne v. Flores,*** 521 U.S. 507, 520 (1997).

The first part of this analysis requires identifying the constitutional right that Congress seeks to enforce. ***Lane,*** 541 U.S. at 520. In order for Congress to properly utilize its enforcement powers, its legislation must be clearly remedial in nature - that is, aimed at remedying past constitutional violations - rather than expanding constitutional rights. The second part of the test determines whether the legislation is "an appropriate response" to a "history and pattern of unequal treatment." Id.

Rather than serving as a rigid doctrinal test, the Court's analysis has functioned as a sliding scale - making clear that Congress' enforcement authority is at its most expansive, and that "congruence and proportionality" are most likely to be found, when protecting against discrimination based on suspect classifications, *see e.g.*, ***Nevada Dep't of Human Res. v. Hibbs,*** 538 U.S. 721, 736 (2003), *or* when protecting fundamental rights, *see* ***Lane,*** 541 U.S. at 523.

While the Supreme Court has found that Congress exceeded its Fourteenth Amendment powers when passing legislation requiring states to remedy various forms of discrimination, the concerns animating the Court are not present in legislation designed to combat race discrimination in voting. For example, in ***Boerne,*** the Court found that Congress exceeded its enforcement powers in passing the Religious Freedom Restoration Act (RFRA), which prohibited both federal and state governments from "substantially burdening" a person's exercise of religion, concluding that the law "attempted a substantive change in constitutional protections." 521 U.S. at 532. The Court rejected an attempt by Congress to "say what the law is," ***Boerne,*** 521 U.S. at 537 (citing ***Marbury v. Madison,*** 5 U.S. (1 Cranch) 137 (1803)), the clear province of the courts.

Other cases have similarly been skeptical of Congressional action to combat discrimination *unrelated to racial classifications or fundamental rights*. *See, e.g.* ***Board of Trustees of the Univ. of Alabama v. Garrett,*** 531 U.S. 356, 373 (2001) (concluding that Congress could not enforce the Americans with Disabilities Act against state governments, and explaining that the "ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting Rights Act"); ***Kimel v. Florida Bd. of Regents,*** 528 U.S. 62 (2000) (finding that Congress did not have the power to enforce the Age Discrimination in Employment Act against state governments

and pointing to protection of voting rights as a valid use of congressional enforcement powers).

It is also clear that Section 2 of the Fourteenth Amendment does not limit Congress' enforcement authority. That section provides, "when the right to vote at any election for the choice of electors . . . is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation in rebellion, or other crime* . . . ." (emphasis added). Relying on this language, the Supreme Court rejected a *nonracial* equal protection challenge to California's felony disenfranchisement law in ***Richardson v. Ramirez,*** 418 U.S. 24 (1974). Paradoxically, given the disproportionate percentage of the felon population that is black, ***Richardson*** succeeded in transforming Section 2 "from a shield protecting the freedman's voting rights into a sword for the lifetime disenfranchisement of his descendants." John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement,* 26 T. JEFFERSON L. REV. 157, 169 (2004). ***Richardson*** is thus directly contrary to express Congressional intent.

Regardless, as long as Congressional legislation is aimed at remedying past and current racial discrimination in the voting system, reliance on ***Richardson*** is misguided. In a subsequent decision, the Court clarified that Section 2 of the Fourteenth Amendment does not limit the Equal Protection Clause's prohibition on felony disenfranchisement laws that deny voting rights *on account of race*. ***Hunter v. Underwood,*** 471 U.S. 222, 233(1985) ("[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [felony disenfranchisement laws] which otherwise violate § 1 of the Fourteenth Amendment.").

In ***Hunter,*** the Court struck down Alabama's criminal disenfranchisement law, observing that the "implicit authorization of § 2 [of the Fourteenth Amendment] . . . was not designed to permit the purposeful racial discrimination attending the enactment and operation of [a law] which otherwise violates § 1 of the Fourteenth Amendment," and noting that nothing in ***Richardson*** is to the contrary. Id. Critically important, ***Hunter*** recognized that *the taint of improper purpose persists through time*. The Court held Alabama's criminal disenfranchisement provision -- adopted with discriminatory intent and yielding continuous discriminatory impact -- to be unconstitutionally tainted eighty-four years after its passage. ***Hunter,*** 471 U.S. at 233. Given proof of initial improper intent and continuing discriminatory impact, however, the Court repeated that the burden shifts to the state to establish the tainted policy's legitimacy. Id. at 228.

Thus, ***Hunter*** stands for the proposition that criminal disenfranchisement laws do violate the Constitution when enacted with the intent to deprive one racial group of its fundamental right to participate in the political process. Id. This constitutional taint remains years later if a discriminatory impact can be shown.

Under ***Hunter*** and ***Richardson,*** then, felony disenfranchisement laws are not *per se* unconstitutional; *but* they are unconstitutional if they are implemented in a way to abridge the right to vote on account of race. See ***Richardson,*** 418 U.S. at 55; ***Hunter,*** 471 U.S. at 231-33. This interpretation is mirrored in Congress's exercise of its enforcement power through the Voting Rights Act (VRA): Felony disenfranchisement laws are not

prohibited *per se* in Section 4 of the VRA, but may be evaluated on a case-by-case basis for their discriminatory effects under Section 2. See 42 U.S.C. §§ 1973, 1973b; see also ***Johnson v. Governor of Fla.,*** 405 F.3d 1214, 1249 (11th Cir. 2005) (Barkett, J., dissenting) (criticizing the *en banc* majority for "overlook[ing] the distinction between felon disenfranchisement laws generally and the narrow subset of such laws that result in racial discrimination").

Even if Section 2 were found to somehow limit Congress' power under the Fourteenth Amendment to reach criminal disenfranchisement laws with racially discriminatory results, the Fifteenth Amendment's subsequent broad ban on race discrimination in voting clearly carries no such exception. The language and legislative history of the Fifteenth Amendment reveal that it does not replicate or incorporate Section 2, but replaces it with a clean ban on any disenfranchisement based on race. The Fifteenth Amendment takes a diametrically different approach from the Fourteenth Amendment. A few years after the Fifteenth Amendment was ratified, the Supreme Court explained that the Amendment "invested citizens . . . with a new constitutional right which is within the protecting power of Congress. The right is exemption from discrimination of the elective franchise on account of race, color, or previous condition of servitude." ***United States v. Reese,*** 92 U.S. 214, 218 (1875).

A. States are limited in their ability to regulate the right to vote by African Americans by the privilege and immunities clause.

Section 1 of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. U.S. Const. art. IV, § 2 also reads, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." An examination of the Journal of the Joint Committee on Reconstruction reveals that the addition of the terms "privileges or immunities" was the work of Pennsylvania native and Ohio Congressman John A. Bingham, whom Justice Black called the "Madison of the first section of the Fourteenth Amendment." ***Adamson v. California,*** *332 U.S. 46, 74 (1947)* (Black, J., dissenting). Benjamin Kendrick, the editor of the published Journal, wrote that "had it not been for [Bingham's] untiring efforts the provision for nationalizing civil rights would have not found a place in the fourteenth amendment." Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 184 (1914).

The United States Supreme Court has reinvigorated the privileges and immunities clause in ***McDonald v. City of Chicago,*** ___U.S. ___, 2010 U.S. LEXIS 5523 (2010). Under ***McDonald***, the Fourteenth Amendments privileges and immunities clause incorporates a constitutional right that is fundamental to the Nation's scheme of ordered liberty. ***McDonald,*** p. 19-22. The Fourteenth Amendment's Senate sponsor, Senator Jacob Howard, explained the Privileges or Immunities Clause's incorporating scope:

> To these privileges and immunities, whatever they may be – for they are not and cannot be fully defined in their entire extent and precise nature – to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866)

A right recognized pursuant to the privileges and immunities clause must be regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner. Id. at 30-33.

A powerful way to determine the original significance of the phrase "privilege and immunity" emerges from an analysis of the debates of the state legislatures charged with ratifying the Fourteenth Amendment. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 375 n.130 (1981) ("The intention of the ratifiers, not the Framers, is in principle decisive ... .") It is very clear that whatever the members of the Thirty-Ninth Congress believed, there was "broad belief" in the states that the Amendment would extend the franchise to blacks. Chester James Antieau, *The Intended Significance of the Fourteenth Amendment* 24(1997) In the Pennsylvania Senate, George Landon announced that the Amendment would "guarantee to all persons born on American soil ... *the immunities of impartial suffrage before the law*." Pa. Leg. Record for 1867, app. at vi. His colleague, W. A. Wallace, opposed the Amendment because it would force the states to give up their right to regulate suffrage. Id. at xiii. Likewise, in the Pennsylvania House of Representatives, H.B. Rhoads complained that the "main idea" of the Amendment was to "make a citizen of the Negro and give him the right of suffrage." Antieau, at 24 (citing Pa. Leg. Record, supra, app. at liv)

The belief that the Amendment's "privileges or immunities" language included the franchise extended beyond Pennsylvania. Legislators in Arkansas, Antieau, at 29 (citing Ark. S.J. for 1866, at 259) Florida, Antieau, at 29 (citing Fla. H.J. for 1866, at 76) Indiana, Antieau, at 25 (citing 1 Ind. H.J. for 1867, 101-05) New Hampshire, N.H. S.J. for 1866, 72; New Jersey, Antieau, at 28 (citing Trenton Daily True Am., Sept. 12, 1866) North Carolina, Antieau, at 29 (citing N.C. S.J., 1866, at 96) Ohio, Another Infamy Contemplated, Cleveland Plain Dealer, Jan. 13, 1868 (Early in 1868, Ohioans attempted to rescind their ratification of the Amendment because "one of the objects to be accomplished by said proposed amendment was to enforce negro suffrage and negro political equality in the States."); and Tennessee Antieau, at 29 (citing Tenn. S.J., Extra Sess. 1866, at 23) believed that the proposed Amendment would extend the franchise to blacks as well. The governors of Indiana, Antieau, at 25 (citing 1 Ind. Documentary J. for 1867, at 21) Massachusetts, Antieau, at 26 (citing Legis. Docs. Mass. S. 1867, No. 1, at 67) (Governor Alexander H. Bullock described the Amendment in his message to the

Legislature as "the opportunity of this generation ... to vindicate American ideas by enfranchising a race of men."); New Hampshire N.H. S. & H. Rep. for 1867, app. at 609 (Governor Walter Harriman, in addressing the New Hampshire Legislature on the proposed Amendment, told them, "Not for caste, or race, or color, can any man be debarred from the ballot box ... .") adopted this interpretation. Thus, the great weight of evidence at the state level suggests that those ratifying the Amendment understood that they were enfranchising African Americans. After Reconstruction, in other words, the privilege of citizenship would include the right to vote.

Likewise, the United States Supreme Court has emphatically stated that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." ***Wesberry v. Sanders*** 376 U.S. 1, 17–18 (1964). The United States Supreme Court has chosen to apply the strict scrutiny standard to voting because of the significance of the franchise as the guardian of all other rights. ***Harper v. Virginia Bd. of Elections,*** 383 U.S. 663, 667 (1966); ***Reynolds v. Sims,*** 377 U.S. 533, 562 (1964) (quoted in ***Dunn,*** 405 U.S. at 336).

This means that the privilege and immunities clause provides a constitutional source for the right to vote. Rooting access to the franchise in the privileges or immunities Clause would, of course, subject felon disenfranchisement laws to strict scrutiny analysis as abridgements of a fundamental right. It would be an odd constitutional interpretation to say that the right of African Americans to vote is fundamental and any restriction of that right subject to strict scrutiny which is met by a felon disenfranchisement laws whose origins are racist and at the least have a disproportionate impact on African Americans. Cf., ***Korematsu v. United States,*** 323 U.S. 214, 216 (1944) (the only case in which the Supreme Court has applied the "rigid scrutiny" test to a racial restriction and upheld the restrictive law)

V. The structure of the Fifteenth Amendment requires this Court to find that Wisconsin's felon disenfranchisement law may not be applied in a discriminatory manner.

The final decision of Congress not to include anything relating to the right to vote in the Fourteenth Amendment, aside from the provisions of Sec. 2, left the issue of African American suffrage solely with the States, and Northern States were generally as loath as Southern to grant the ballot to African Americans, both the newly-freed and those who had never been slaves. W. Gillette, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 25-28 (1965)

Thus, prior to the Fifteenth Amendment, federal law did not guarantee the voting rights of any African American. The Fifteenth Amendment was designed to extend African American male enfranchisement as far as Republicans believed possible. Section 1 of the Amendment instituted a self-executing nation-wide ban on racial discrimination in

voting. And Section 2 of the Amendment provided Congress with additional power to enforce the Amendment through "appropriate legislation." U.S. Const. amend. XV, § 2. By its own force, the Fifteenth Amendment placed restrictions on the power of the states to specify the requirements that must be met before a person can vote in state or national elections. Significantly, however, the Amendment also authorizes Congress to enforce their substantive proscriptions "by appropriate legislation."

The ratification of the Fifteenth Amendment, however, is evidence not that the Fourteenth Amendment should not - or could not - preserve access to the ballot for state citizens, but that a subsequent Amendment was required to make that guarantee explicit. The Fifteenth Amendment, therefore, does as much to reinforce the enfranchising elements of Section 1 of the Fourteenth Amendment as it does to dismantle the disenfranchising elements of Section 2.

"The Fifteenth Amendment invested the citizens of the United States with a new constitutional right which is . . . exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." ***United States v. Reese,*** 92 U.S. 214, 217 -18 (1876); ***United States v. Cruikshank,*** 92 U.S. 542, 566 (1876). "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." ***Lane v. Wilson,*** 307 U.S. 268, 275 (1939). The Court went on to hold that "under some circumstances [the Fifteenth Amendment] may operate as the immediate source of a right to vote" [to the colored man] because . . . it annulled the discriminating word white, and this left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which would give the right of voting exclusively to white people. . . ." ***Ex parte Yarbrough,*** 110 U.S. 651, 665 (1884); ***Guinn v. United States*** 238 U.S. 347, 363 (1915). A state constitutional provision limiting the right of suffrage to whites was automatically nullified by ratification of the Fifteenth Amendment. ***Neal v. Delaware,*** 103 U.S. 370 (1881) (confronted with a case where a facially neutral criminal law was administered in a discriminatory manner, Justice Harlan relied upon disparate impact to find intentional discrimination.)

Thus, separate and apart from ***Hunters'*** express recognition of a Fourteenth Amendment right to be free from racially discriminatory criminal disenfranchisement, the text, logic, and history of the Fifteenth Amendment require this Court to find that Wisconsin's felon disenfranchisement law may not be used to cause racial discrimination.

The Fifteenth Amendment makes no exception for criminal disenfranchisement laws. In crafting the Fifteenth Amendment, the Reconstruction Congress repeatedly considered exempting criminal disenfranchisement laws from the general ban on race discrimination in voting and rejected every such exception. See, e.g., 67 H.R.J. 232-37 (1869); Cong. Globe, 40th Cong., 3d Sess. 724 (1869). When disenfranchisement laws result in discrimination, the Fifteenth Amendment supersedes the earlier adopted Penalty Clause of the Fourteenth Amendment-- replacing its structural penalty with an outright

prohibition. Gabriel J. Chin, JD, LLM, Professor of Law, Public Administration, and Policy at the University of Arizona, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L. J. 259 (2004) (concluding that the Fifteenth Amendment repudiated Section 2's theoretical and structural approach to African American suffrage). There is thus no logical reason to assume that the Penalty Clause's race-neutral exemption from its general penalty was implicitly imported into the Fifteenth Amendment's prohibition against discrimination in voting based on race.

This Court must not allow the exemption within the Fourteenth Amendment's Penalty Clause to immunize felony disenfranchisement laws from congressional enforcement of the Fifteenth Amendment's subsequent, specific, and exceptionless ban on race discrimination in voting. As one scholar has argued, even if the ***Richardson*** majority were correct in reading the "other crime" provision in Section 2 of the Fourteenth Amendment as permitting felon disenfranchisement, the Fifteenth Amendment's abolition of restrictions on the right to vote on the basis of "previous condition of servitude" effectively nullified the "other crime" provision of Section 2. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895, 1903-04 (1999)

The Fifteenth Amendment's "previous condition of servitude" language is particularly noteworthy in this context as it should be read to apply to former slaves or indentured servants of any type, including convicted felons. This interpretation flows from those court decisions roughly contemporaneous with the new Fifteenth Amendment that indicated a convicted felon is "in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. *He is for the time being the slave of the State.*" ***Ruffin v. Commonwealth,*** 62 Va. 790, 796 (Va. 1871). Emphasis added.[2] Cf., ***Creswell's Executors v. Walker,*** 37 Ala. 229, 236(Ala. 1861)(blacks are rational human beings capable of committing crime but not persons for exercising civil rights.) The Bill of Rights "govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land. While in this state of penal servitude, they must be subject to the regulations of the institution of which they

[2] From the idea that a convict is a slave of the state developed the idea of convict labor camps. "Between the Emancipation Proclamation and the beginning of World War II, millions of African-Americans were compelled into or lived under the shadow of the South's new forms of coerced labor. Under laws enacted specifically to intimidate blacks, tens of thousands were arbitrarily detained, hit with high fines and charged with the costs of their arrests. With no means to pay such debts, prisoners were sold into coal mines, lumber camps, brickyards, railroad construction crews and plantations. Others were simply seized by southern landowners and pressed into years of involuntary servitude. At the turn of the 20th century, at least 3,464 African-American men and 130 women lived in forced labor camps in Georgia, according to a 1905 report by the federal Commissioner of Labor." See, Douglas Blackmon, *A Different Kind of Slavery*, Wall Street Journal, March 29, 2008, http://online.wsj.com/article/SB120674340028272915.html

are inmates, and the laws of the State to whom their service is due in expiation of their crimes." Id. Cf., ***Reynolds,*** 377 U.S. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen.")

This structural argument draws further support from the text of the Thirteenth Amendment, which in part prohibits "involuntary servitude" except "as a punishment for crime whereof the party shall have been duly convicted." U.S. Const. 13, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). The Thirteenth Amendment thus gives meaning to the phrase "involuntary servitude" in such a way as to empower the Fifteenth Amendment to override conflicting portions of the Fourteenth Amendment, including Section 2's arguable allowance for state felon disenfranchisement schemes. Fletcher, at 1904 (arguing that combining the language of these Amendments thus "generates a plausible reading that the Fifteenth Amendment, on its face, prohibits depriving felons of their voting rights simply because they were subject to "involuntary servitude' as punishment for their crime"). Viewed together, the Reconstruction Amendments should be read not to permit states to disenfranchise felons, but in fact explicitly to prohibit them from doing so.

Such a construction also gives deference to Congressional intent of Section 2, which was to safeguard the rights of newly enfranchised black voters during Reconstruction. Chester James Antieau, *The Intended Significance of the Fourteenth Amendment* 371-72 (1997)

A. To remedy violations of the Fourteenth and Fifteenth Amendment in regards to voting, Congress enacted appropriate legislation: the Voting Rights Acts.

Despite the Fifteenth Amendment's passage, many States devised numerous methods for denying the franchise to racial minorities. "These included grandfather clauses, property qualifications, 'good character' tests," white primaries, literacy tests, racial gerrymanders, and interpretation requirements. ***Katzenbach,*** 383 U.S. at 311. As a result, African-American voting rates in some States dropped precipitously. See, e.g., ***Louisiana v. United States,*** 380 U.S. 145, 147-149 (1965) (noting that beginning with the adoption of the Louisiana Constitution of 1898, the State implemented a policy of denying African-American citizens the right to vote such that from 1898 to 1944, the percentage of registered African- American voters declined from 44% to 0.2%); ***United States v. Mississippi,*** 380 U.S. 128, 144 (1965).

After nearly a century of such disenfranchisement, Congress enacted a series of statutes—the Civil Rights Acts of 1957, 1960, and 1964—each of which sought to "facilitat[e] case-by-case litigation" against voting discrimination. ***South Carolina v. Katzenbach,*** 383 U.S. 301, 313 (1966). In the leading case of ***South Carolina v. Katzenbach***, the Supreme Court rejected the argument "that Congress may do no more than forbid violations of the Fifteenth Amendment in general terms--that the task of fashioning specific remedies or of applying them to particular localities must necessarily

be left entirely to the courts." 383 U.S. at 327. Instead, the Court stressed the "one fundamental principle" that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." Id. at 324.

In response, Congress decided to implement "sterner and more elaborate measures," ***Katzenbach,*** 383 U.S. at 309. In 1964-65, the national exposure of the murders of civil rights workers registering black voters in Mississippi and the violent attack by state troopers against voting rights marchers in Selma, Alabama, spurred passage of the Voting Rights Act of 1965 (VRA). Florida Advisory Committee to the United States Commission on Civil Rights *Ex-felon voting rights in Florida*, (August 2008), p. 5, http://www.usccr.gov/pubs/EX-FelonVRFL.pdf "The VRA was an attempt to fully enfranchise all black citizens, and finally put an end to persistent voting discrimination in many parts of the country. The act prohibited the use of laws and procedures to discriminate against voters on the basis of race, color or their reading or writing knowledge of the English language." Id.

The result was the passage of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, codified as amended at 42 U.S.C. §§ 1973 et seq. (VRA or Act). Congress adopted initially the VRA in 1965 and extended in 1970, 1975, and 1982, and 2006. The VRA is "one of the most effective instruments of social legislation in the modern era of American reform" Hugh Davis Graham, *Voting Rights and the American Regulatory State*, *in* CONTROVERSIES IN MINORITY VOTING 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992). See also, *Voting Rights Act: the Judicial Evolution of the Retrogression Standard: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16-17 (2005) (statement of Theodore Shaw, Director- Counsel, NAACP Legal Defense and Educational Fund, Inc.) (observing that "[t]he VRA and its expiring enforcement provisions have been the primary catalysts for dramatic increases in minority political participation, minority representation in elected bodies at the local, state and federal levels, and for the reductions in barriers to access to the political process for African Americans, Latinos, Asian Americans, and Native Americans." Alexander Keyssar, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000) (chronicling the role of the VRA in the legal and political history surrounding the struggle for suffrage rights among minority voters).

As President Bush signed the 2006 version of the VRA, he stated, "Congress has reaffirmed its belief that *all men are created equal*….The right of ordinary men and women to determine their own political future lies at the heart of the American experiment." *Bush signs Voting Rights Act Extension*, The Associated Press, July 27, 2006, http://www.msnbc.msn.com/id/14059113/ Emphasis added. See also, ***Katzenbach,*** 383 U.S. at 327 ("Whatever legislation is . . . adapted to carry out the objects the Civil War amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and *to secure to all persons the enjoyment of perfect equality of civil rights* and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within . . . congressional power.") (quoting ***Ex parte Virginia,*** 100 U.S. 339, 345-46 (1880)). Emphasis added. Previously, The VRA

bill passed the Senate by a vote of 98-0 and the House 390-33. Id. See, Pub. L. No. 109-246, §§ 4-5, 120 Stat. 577, 580-81 (2006) (codified as amended at 42 U.S.C. §§ 1973b-c (Supp. 2007))

The United States Supreme Court has continuously found the VRA to be exemplary legislation. See, ***League of United Latin American Citizens v. Perry,*** 126 S. Ct. 2594, 2667 (2006) (Scalia, J., dissenting in part and concurring in part) ("We long ago upheld the constitutionality of Section 5 as a proper exercise of Congress's authority under § 2 of the Fifteenth Amendment . . . ."); ***Nev. Dept. of Human Res. v. Hibbs,*** 538 U.S. 721, 738 (2003) (noting various rejections to challenges against Section 5 based on the scope of Congress's enforcement power); ***Bd. of Trs. of the Univ. of Ala. v. Garrett,*** 531 U.S. 356, 373 (2001) (contrasting Section 5 with Title I of the ADA, which the Court determined to be beyond the scope of congressional enforcement powers under the Fourteenth Amendment while identifying Section 5 of the VRA as "a detailed but limited remedial scheme"). After assessing the voluminous legislative history underlying the initial reauthorization of the VRA, the ***Katzenbach*** Court affirmed Congress's judgment regarding the need for the Act's protections. The Court found that "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution" and credited Congress's determination that "the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment." ***Katzenbach,*** 383 U.S. at 309. Likewise, the 2006 version of the VRA was one of the "most extensive considerations of any piece of legislation" by Congress in 27.5 years. Statement of Wisconsin Rep. James Sensenbrenner 152 CONG. REC. H5143 (2006).

B. Plain reading of the Voting Rights Act prohibits a felon disenfranchisement statute from being used to cause a racially discriminatory effect on voting.

The plain reading of Section 2 of the VRA prohibits States from implementing any "*voting qualification* or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language-minority group. 42 U.S.C. § 1973(a) (emphasis added). As amended in 1982, Section 2 *focuses on results and requires no proof of discriminatory intent.* ***Chisom v. Roemer,*** 501 U.S. 380, 383-84 (1991); ***U.S. v. Irvin,*** 127 F.R.D. 169, 171 (C.D. Cal. 1989). In evaluating whether a given practice violates Section 2, courts must inquire whether, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . *are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process* and to elect representatives of their choice." 42 U.S.C. § 1973(b). Emphasis added. "[I]t is well-settled that a [party] can challenge voting qualifications under a 'results' test." ***Johnson v. Governor of the State of Florida,*** 405 F.3d 1214, 1227 (11th Cir. 2005) However, "even if discriminatory legislative intent no longer suffices to prove a Voting Rights Act violation, evidence of

such intent remains relevant. *Proof that a result was intended has some tendency in reason to prove that such result occurred*." ***U.S. v. Irvin,*** id.

The 1982 amendment to section 2 was for the express purpose of making clear that the discriminatory result of the challenged practice--without proof of any kind of discriminatory purpose or intent--is sufficient to establish a violation of the section. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27-30, reprinted in 1982 U.S.C.C.A.N. 177, 204-08. See also, US. Commission on Civil Rights, *Voting Rights Enforcement & Reauthorization* (May 2006), p. 3 ("The 1982 amendment made clear that proof of discriminatory intent is not required….") This is because numerous witnesses testified before Congress explaining that increasingly sophisticated forms of discrimination in the covered jurisdictions made discriminatory intent very difficult to prove. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Sen. Comm. on the Judiciary*, 97th Cong. 1, 1648 (1982) (statement of Hon. Harold Washington, Representative in Congress from Illinois) (observing that intent standard was particularly onerous in the voting rights context given the reality of political decision-making at the local level in which "decisions are often reached at dinner parties, in closed meetings, at private clubs, and in back rooms, in places where . . . no reasons are stated for the decision.")

Even if the federal constitution forbids only intentional discrimination, the United States Supreme Court has found Congress is free to prohibit discriminatory effect in the VRA. In ***City of Rome v. United States***, 446 U.S. 156 (1980) the Supreme Court reviewed a constitutional challenge to Section 5 after Congress's 1975 reauthorization. The challenge brought by officials in Georgia alleged, in part, that Section 5 exceeded Congress's Fifteenth Amendment powers because it reached electoral changes that may only be discriminatory in effect, not in purpose. Id. at 173. The Court determined that Congress's decision to extend the scope of Section 5 to electoral changes that are discriminatory in effect was an appropriate method of promoting the Fifteenth Amendment's purposes, even if it assumed that Section 1 of the Fifteenth Amendment prohibits only intentional discrimination in voting. Id., at 177-78. The Court held that Congress reasonably concluded that it was appropriate to prohibit changes that had a discriminatory effect, given the risk of purposeful discrimination in jurisdictions with a demonstrable history of intentional discrimination. Id. Cf., ***Katzenbach v. Morgan,*** 384 U.S. 641, 656 (1966) (upholding the Act's ban on literacy tests against constitutional challenge, the Court found that: "it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.)

"Two types of discriminatory practices and procedures are covered by section 2: those that result in "vote denial" and those that result in "vote dilution." The plaintiffs' claim here is one of vote denial. Vote denial occurs when a state employs a 'standard, practice, or procedure' that results in the denial of the right to vote on account of race. 42 U.S.C. § 1973(a); ***Burton v. City of Belle Glade,*** 178 F.3d 1175, 1197-98 (11th Cir. 1999). To

prevail, a [party] must prove that 'under the totality of the circumstances,...the political processes...are not equally open to participation by [members of a protected class]...in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' 42 U.S.C. § 1973(b). In making this inquiry, courts consider a non-exclusive list of objective factors (the "Senate factors") detailed in a Senate Report accompanying the 1982 amendments. See S. Rep. No. 97-417, at 28-29, 1998 U.S.C.C.A.N. at 206; ***Thornburg v. Gingles,*** 478 U.S. 30, 36, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986)." ***Johnson v. Governor of the State of Florida,*** 405 F.3d at 1228 n. 26.

Several factors, known as the "Senate factors," (derived from the Senate Report that accompanied the 1982 amendments to Section 2) determine whether, by the totality of the circumstances, a voting requirement violates Section 2. ***Johnson v. De Grandy,*** 512 U.S. 997, 1010-11 & n.9 (1994); S. Rep. No. 97-417, at 28-29 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 206-07. Notably, Congress did not intend for this list to be exclusive or exhaustive, nor did it require plaintiffs to prove a particular number of factors. S. Rep. No. 97-417,. at 29. Instead, courts must consider how the challenged law "interacts with *social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives*." ***Thornburg v. Gingles,*** 478 U.S. 30, 47 (1986). Emphasis added. These factors include: (1) a history of official discrimination touching on the right to vote, (2) racially polarized voting, (3) practices that may enhance the opportunity for discrimination, (4) whether minorities have been denied access to a candidate slating process, if one exists, (5) whether members of minority groups bear the effects of past discrimination, (6) racial appeals in campaigns, (7) the extent to which members of minority groups have been elected to public office, (8) lack of responsiveness by elected officials to minority interests, and - most significantly here - (9) whether "the policy underlying the State's . . . use of the contested practice or structure is tenuous." ***Gingles,*** 478 U.S. at 45. Under this framework, claimants, such as defendants in this case, challenge felon disenfranchisement statutes under the Voting Rights Act. See, e.g., ***Farrakhan v. Washington,*** 338 F.3d 1009 (9th Cir. 2003) (challenging Washington's felon disenfranchisement scheme).

In applying the Voting Rights Act to cases of felon disenfranchisement, courts must use a deferential approach to this plain text of Congress in the Voting Rights Act. The Supreme Court has recognized that Congress, not the judicial branch, bears the primary responsibility for fulfilling the promises embodied in the Guarantee Clause, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4, cl. 1. This is because Congress is best equipped to address such matters as how to ensure political fairness in democratic elections. By contrast, this Court has found "[i]t is hostile to a democratic system to involve the judiciary" in such determinations. ***Colegrove v. Green,*** 328 U.S. 549, 553-54 (1946) (plurality opinion); *see also* ***Vieth v. Jubelirer,*** 541 U.S. 267, 281 (2004) (plurality opinion) (treating political gerrymandering claims as nonjusticiable due to a lack of "judicially discernible and manageable standards for adjudicating" them); ***Luther v. Borden,*** 48 U.S. 1, 42 (1849) (stating that enforcement of the guarantee clause "rests with Congress").

C. A court which refuses to give the Voting Rights Act its plain meaning engages in judicial activism: second-guessing fact-bound empirical assessments of Congress.

Consequently, "in the field of election regulation, the Court in practice defers to empirical legislative judgments." ***Nixon v. Shrink Mo. Gov't PAC,*** 528 U.S. 377, 402 (2000) (Breyer, J., concurring); ***Oregon v. Mitchell,*** 400 U.S. 112, 124(1970) (Congress has ultimate supervisory power over congressional and presidential elections and set qualifications of voters). A court must be careful not to engage in a level of analysis approaching the untenable position of substituting a court's own policy choices for that of Congress. *See* ***City of Los Angeles v. Alameda Books, Inc.,*** 535 U.S. 425, 451 (2002) (Kennedy, J., concurring in the judgment) ("[C]ourts should not be in the business of second-guessing fact-bound empirical assessments of city planners."); ***Barnes v. Glen Theatre, Inc.,*** 501 U.S. 560, 583 (1991) (Souter, J., concurring in the judgment) ("At least as to the regulation of expressive conduct, '[w]e decline to void [a statute] essentially on the ground that it is unwise legislation . . .' " (*quoting* ***United States v. O'Brien,*** 391 U.S. 367, 384 (1968))); ***City of Renton v. Playtime Theatres, Inc.,*** 475 U.S. 41, 52 (1986) (noting that it is not an appropriate function of the Court to appraise the wisdom of a city's policy of regulating its adult theatres).

A court that refuses to follow the textual imperative of Congress in the VRA engages in the worst form of judicial activism and so creates a question of separation of powers. *See* BLACK'S LAW DICTIONARY 850 (7th ed. 1999) (defining "judicial activism" as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions" and noting that adherents of this philosophy "are willing to ignore precedent"); *see also* Hon. Diarmuid F. O'Scannlain, *On Judicial Activism: Judges and the Constitution Today*, 3 OPEN SPACES Q. 20, 23 (2000) ("When a judge is swayed by his own sentiment rather than considerations of deference, predictability, and uniformity, he fails by definition to apply the law faithfully. This is the essence of judicial activism."). This deference is all the more important in questions of voting since that is quintessential exercise of political responsibility involving regulation of the political process that lie within the expertise of politicians. Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 18-19 (2007)

The straight forward text of the VRA makes felony disenfranchisement laws "voting qualification[s]" within the ambit of the Act's ban on any "voting qualification . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race," 42 U.S.C. § 1973(a). ***Farrakhan,*** 338 F.3d at 1016. Because "Section 2 is clear that any voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA," id., the ***Farrakhan*** court reasoned that the plaintiffs' claim of vote denial was cognizable. The court saw no constitutional reason to look beyond the plain meaning of the statute or to create special exemptions for felony disenfranchisement. The ***Farrakhan*** court recognized what was made clear in ***Hunter***: "[S]tates cannot use felon disenfranchisement as a tool to discriminate on the basis of race." Id. (citing ***Hunter,*** 471 U.S. at 233). See also, ***Lopez v. Monterey County,*** 525

U.S. 266, 282 (1999) (noting that the Act "contemplate[s] some intrusion" into areas traditionally reserved to the States). Regarding Congress's intentions, the court pointed to the breadth of Section 2's coverage, noting that "Congress specifically amended the VRA to ensure that, 'in the context of all the circumstances in the jurisdiction in question,' any disparate racial impact of facially neutral voting requirements did not result from racial discrimination." Id. (quoting the Senate Report and citing ***Chisom v. Roemer,*** 501 U.S. 380, 394 & n.21 (1991)), cf. ***In re England,*** 375 F.3d 1169, 1179 (D.C. Cir. 2004) (acknowledging that the Supreme Court has repeatedly instructed that statutes written in broad language should be given broad application) (citations omitted), cert. denied sub nom. ***Chaplaincy of Full Gospel Churches v. England,*** 125 S. Ct. 1343 (2005).

Thus ***Farrakhan*** court expressly treated challenges to felony disenfranchisement laws under Section 2 of the VRA as they would challenges to any other voting qualification. Rather than requiring heightened evidence of legislative intent (which is present in the VRA regardless), they evaluate whether plaintiffs have properly alleged and can prove that in "the totality of circumstances," a challenged provision creates inequality in different racial groups' opportunities "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Additionally, private citizens may bring lawsuits under section 2 to enforce the Act's provisions. U.S. Commission on Civil Rights Briefing Report, *Reauthorization of the Temporary Provisions of the Voting Rights Act,* (April 2006), p. 1.

VI. National social statistics[3] demonstrate that the unwarranted racial disparities in the criminal justice system in the United States (in terms of policing, arrest, sentencing, and incarceration) result in felony disenfranchisement laws having a disproportionate impact on African American.

President Lyndon Johnson formed an 11-member National Advisory Commission on Civil Disorders in July 1967 to explain the riots that plagued cities each summer since 1964 and to provide recommendations for the future. The Commission's 1968 report, informally known as the Kerner Report, concluded that the nation was "moving toward two societies, one black, one white—separate and unequal." *Report of the National Advisory Commission on Civil Disorders,* Summary of Report, p. 1 (1968). The Commission warned that if changes were not made America would be become more polarized resulting in the "destruction of basic democratic values." Id. Looking to the causes of those riots, it was found that "the rioters appeared to be seeking [ ] fuller

[3] The use of these social statistics can hardly be considered in any way a novel submission to a court. James R. Acker, *Social Science in Supreme Court Criminal Cases and Briefs,* 14 LAW AND HUMAN BEHAVIOR 25 (1990). Chief Judge Richard Posner recommends that "the legal profession redirect its research and teaching efforts toward fuller participation in the enterprise of social science, and by doing this make social science a better aid to judges' understanding of the social problems that get thrust at them in the form of constitutional issues." Chief Judge Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1, 12 (1998).

participation in the social order . . . . [r]ather than rejecting the American system, they were anxious to obtain a place for themselves in it." Id. at 7. Specifically, it found that "[w]hite racism is essentially responsible for the explosive mixture which has been accumulating in our cities," id. p. 10, and that this caused a pervasive feeling of powerlessness among Negroes that there is no effective alternative to violence as a means of achieving redress of grievances which include: police practices, unemployment and underemployment, inadequate housing, inadequate educational opportunities, poor recreational facilities, and ineffective grievance mechanisms. Id at 11.

Today, America is two societies: one incarcerated and one not. America is two societies which are separate and unequal, especially regarding the civil right to vote. Nationally, statistics demonstrate African American men are much more likely to be incarcerated than White men, and that a very high proportion of Black men spend some time in prison. Sadly, researchers have determined that one third to two thirds of the 100,000 poorest black male three-year olds of today will eventually end up in prison. Marc Mauer and Tracy Huling, "Young Black Americans and the Criminal Justice System: Five Years," The Sentencing Project[4] (October 1995), http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf See also, Thomas Bonczar and Allen Beck, '*Lifetime Likelihood of Going to State or Federal Prison*', Bureau of Justice Statistics Special Report, Washington, BJS, March 1997, p. 1; http://bjs.ojp.usdoj.gov/content/pub/pdf/Llgsfp.pdf , for a state-by-state analysis, see Marc Mauer, 'Racial Disparities in Prison Getting Worse in the 1990s', Overcrowded Times, vol. 8, no. 1, February 1997, pp. 9–13. It must be recalled that if you have been convicted of a felony and are serving that felony sentence, you cannot vote. This means that a very high proportion of Black men will spend some time in or out of prison with no way to protest political grievances by voting. This creates a feeling of hopelessness mentioned in the Kerner Report.

Michelle Alexander explains the consequences of this disproportionate minority confinement:

> In the era of colorblindness, it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt. So we don't. Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps

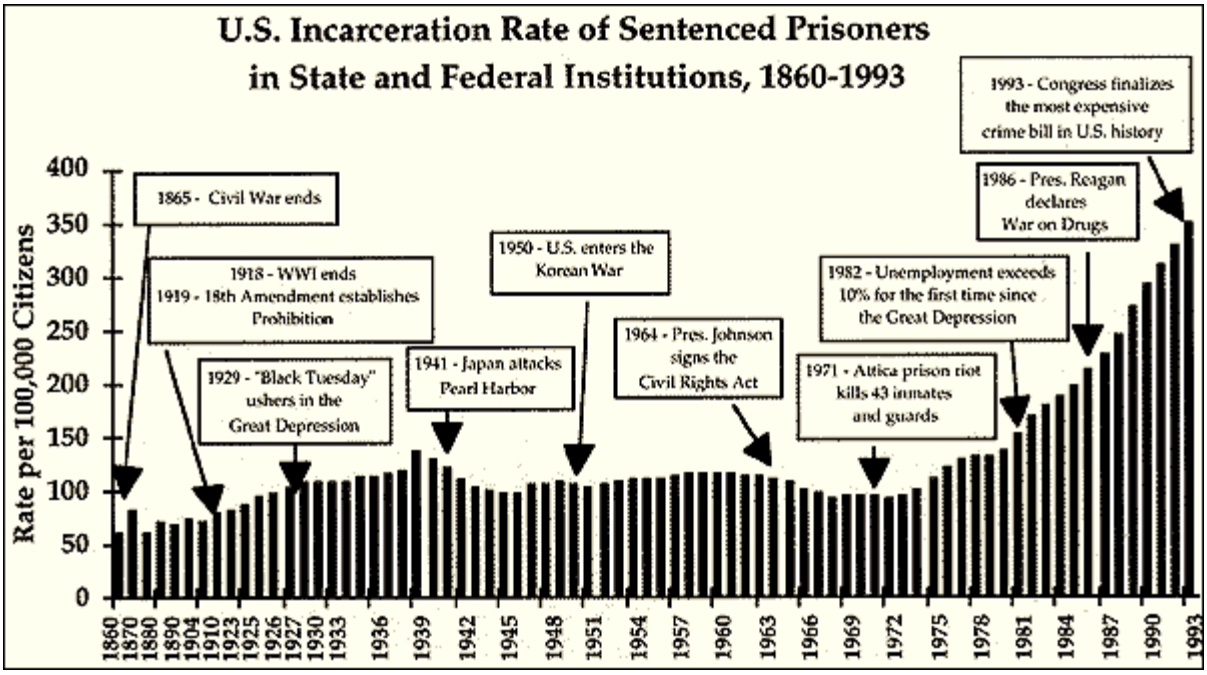
[4] While it is true that the Sentencing Project is a non-profit organization advocating sentencing reform, the Sentencing Project "has built a credible body of objective research" on sentencing. Wisconsin Sentencing Commission, *Race and Sentencing In Wisconsin: A Monograph Series, Report Number 1,* p.6 (November 2004).

> and other public benefits, and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* p.2 (2010)

Ms. Alexander further explained that "mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow." Id at 4. "As is well known, disproportionately many African Americans pass through the justice system, and consequently the impact of disqualification for felony conviction is especially dramatic for the black electorate. Nearly 7 percent of black Americans cannot participate in the electoral process because of felony convictions. Because 95 percent of felons are male, the felony disfranchisement rate for black men is almost double. All but one state, Hawaii, records felony disfranchisement rates for blacks that are larger than disfranchisement rates for whites and others, in most cases several times larger." Florida Advisory Committee to the United States Commission on Civil Rights *Ex-felon voting rights in Florida*, (August 2008), p. 1-2, http://www.usccr.gov/pubs/EX-FelonVRFL.pdf

The following statistics demonstrate the accuracy of these statements.

"Since 1980, the United States has engaged in the largest and most frentic correctional buildup of any country in the history of the world. During this time the number of Americans imprisoned has tripled to 1.5 million. About 50 million criminal records – enough to cover nearly one-fifth of the entire U.S. population – are stuffed into police files. . . . The increase in prison population did not reduce crime, nor did it make Americans feel safer. In fact, some criminologists have argued that the overuse of the penal system for so many small-time offenders has actually created more crime than it prevented." Steven R. Donziger, Ed., *The Real War on Crime: The Report of the National Criminal Justice Commission* (Harper Perennial 1996) p.32-33.



SOURCE:U.S. Department of Justice, Bureau of Justice statistics (1994), Sourcebook of Criminal Justice Statistics-1993, p. 600; U.S. Department of Justice, Bureau of Justice Statistics (June 1994), Prisoners in 1993, p. 2; U.S. Department of Justice, Bureau of Justice Statistics (December 1986), Historical Statistics in the United States, 1850-1984, .34 , reproduced from The Real War on Crime, p.32.

A study by the National Council on Crime & Delinquency predicts that, if all 50 states were to fully implement all of the get-tough measures that now only some have adopted, the prison population would soon rise to 7.5 million at an annual cost of $221 billion—compare the total 1995 U.S. defense budget at $269 billion. Id. at 36. Wisconsin Elections Board Director Kevin Kennedy has indicated that allowing ex -felons to vote would actually save about $13,000 by eliminating the need to generate lists of ex-felons for poll workers to check. Gil Halsted, Wisconsin Public Radio, *Wisconsin voting bill would grant voting privilege to ex-felons*, August 30, 2009, http://fox21online.com/news/wisconsin-voting-bill-would-grant-voting-privilege-ex-felons

Professor of Sociology at the University of Wisconsin Madison Pamela E. Oliver explains:

> The United States now has the highest incarceration rate in the world, 690 people per 100,000—a rate that is four to six times higher than that of most other nations. Incarceration is, moreover, very unevenly spread across the population, and particularly impinges upon blacks and Hispanics. The imprisonment rate of black American men is over eight times greater than that of European Americans. Young black men are even more severely affected. Federal statisticians at the Bureau of Justice Statistics now estimate that the "lifetime expectancy" that a

> young black man will spend time in prison is about 29 percent. For Hispanics, the rate of imprisonment is about three times higher than that of European Americans. . . . The rates of prison admissions as a proportion of population for both races were relatively stable until about 1975. Thereafter, the imprisonment rates of both races rose very rapidly, but far faster for blacks than for whites. . . . . Although nearly everyone in prison has committed a crime, the rise in imprisonment since the 1970s is not explained by crime rates, but by changes in policies related to crime. Pamela E. Oliver, *Racial disparities in imprisonment: Some basic information*, 21 Focus 28 (2001).

In 1990, almost one in four (23%) of African American males in the age group 20-29 was in prison, jail, on probation or on parole. Marc Mauer, "Young Black Men and the Criminal Justice System: A Growing National Problem," The Sentencing Project (February 1990). Last year, the Pew Center on the States clearly stated:

> Three decades of growth in America's prison population has quietly nudged the nation across a sobering threshold: for the first time, more than one in every 100 adults is now confined in an American jail or prison. According to figures gathered and analyzed by the Pew Public Safety Performance Project, the number of people behind bars in the United States continued to climb in 2007, saddling cash-strapped states with soaring costs they can ill afford and failing to have a clear impact either on recidivism or overall crime. *One in 100: Behind Bars in America 2008,* p.3
>
> http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf

Even worse it was found:

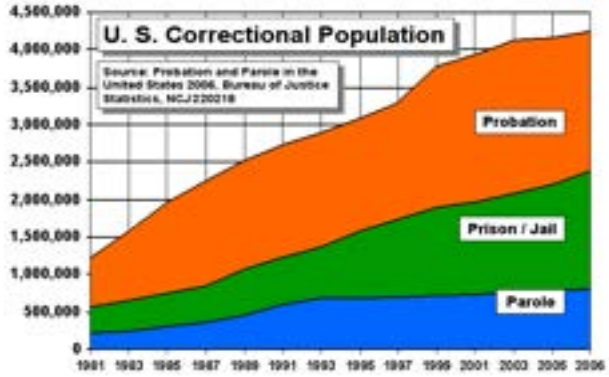
> That statistic masks far higher incarceration rates by race, age and gender. A separate analysis of midyear 2006 data from the U.S. Department of Justice shows that for Hispanic and black men, for instance, imprisonment is a far more prevalent reality than it is for white men. . . . Men still are roughly 10 times more likely to be in jail or prison, but the female population is burgeoning at a far brisker pace. For black women in their mid- to late-30s, the incarceration rate also has hit the 1-in- 100 mark. Id

That is only part of the ugly picture. The preceding statistics refer only to individuals who have been convicted *and confined*. Those numbers fail to take into account individuals who have been convicted *but not confined* being under some form of supervision by a state department of corrections. "The escalation of the prison population has been astonishing, but it hasn't been the largest area of growth in the criminal justice system. That would be probation and parole—the sentenced offenders who are not behind bars." One in 31: The Long Reach of American Corrections, March 2009, p. 1,

http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf With far less media attention to this booming population, the Pew Center on the States found that:

> the number of people on probation or parole has skyrocketed to more than 5 million, up from 1.6 million just 25 years ago. This means that 1 in 45 adults in the United States is now under criminal justice supervision in the community, and that *combined with those in prison and jail, a stunning 1 in every 31 adults, or 3.2 percent, is under some form of correctional control. The rates are drastically elevated for men (1 in 18) and blacks (1 in 11) and are even higher in some high-crime inner-city neighborhoods.* Id. Emphasis added.

This is illustrated by the graph below.

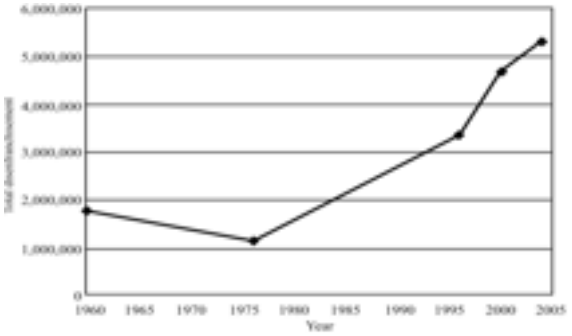


> Over 7.2 million persons on probation or parole or incarcerated in jail or prison at year-end 2006. "About 3.2% of the U.S. adult population, or 1 in every 31 adults, were incarcerated or on probation or parole at year-end 2006.

These statistics by the Pew Center for the States cannot be dismissed or rejected as aberrations. Similar statistical determinations have been found by other social researchers: **Blumstein-Graddy Study** of 1968 to 1977 arrest statistics (*a nonwhite male was three and a half times more likely to have a felony arrest on his record than was a white male*. Whereas only 14% of white males would be arrested, *51% of nonwhite males could anticipate being arrested for a felony at some time during their lifetimes*.); **Tillman Study** of 1974 to 1986 arrest records in California (*two-thirds of the nonwhite adult males had been arrested and jailed before completing their twenty-ninth year (41% for felonies*)); **Rand Corporation Study** of 1985 to 1987 arrest and charging record for the District of Columbia (*The data also permit estimates of the risk that a black male of a particular age (18-29) resident in the District might be charged with a criminal offense, drug or otherwise, in the three-year period 1985-1987. That fraction is almost one-third for persons aged 19 in 1986. It does not decline noticeably over the age range 20-29, as other studies of crime rates in the general population have suggested*); **Sentencing Project Survey** of 1989 (*on an average day in the United States, one of every four African American men age twenty to twenty-nine was either in prison or jail or on probation or parole)* **The National Center on Institutions and Alternatives Studies** of 1991(*on an average day in 1991, more than four in ten (42%) of all the eighteen to thirty-five year-old African American males who lived in the District of Columbia were in jail, in prison, on probation or parole, out on bond, or subjects of arrest warrants*); **The California Commission on the Status of African Americans** of 1960 to 1993 (*one-sixth (104,000) of California's 625,000 black men sixteen and older are arrested each year, thereby "creating police records which hinder later job prospects and 92% of the black men arrested by police on drug charges were subsequently released for lack of evidence or inadmissible evidence. Finally, Black men, who made up only 3% of California's population, accounted for 40% of those entering state prisons. Between 1960 and 1988, the relative proportion of new black felons jumped from 22% to 38%, while the proportion of white felons dropped from*

58% to 31%). Each of these studies are discussed in Miller, *From safety Net to Dragnet: African American Males in the Criminal Justice System*, 51 WASH. & LEE L. Rev. 479 (1994). As Mr. Miller concludes: "The markers for the social disaster that is now overtaking black males in the United States have been there for a long time." Id. at 484.[5]

In recent decades, the disenfranchised population in the United States has experienced significant growth due to both the increase in the number of overall felony convictions and the existence of restrictive state laws that bar individuals with felony convictions from voting. This trend has resulted in the steady expansion of the disenfranchised population in states with permanent disenfranchisement laws, as seen in the figure below.



SOURCE: Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. 777, 782 (2002)

"As one proceeds through the system in this example, it is clear that disparities are most severe at the point of arrest (where African Americans are arrested at a rate twice their share of the general population) and the point of incarceration (where African Americans are 11% more likely to be incarcerated). Conversely, African Americans are *underrepresented* at the stage of probation (0.84), which is not surprising since probation sentences reflect those persons not sentenced to incarceration." *Reducing Racial Disparity in the Criminal Justice System: A Manuel For Practitioners and Policymakers*, p. 22, The Sentencing Project (2008), http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf

This data does not explain if the incarceration is legitimate because of African American crime rates or an illegitimate product of discrimination in the criminal justice system. To make that distinction one must compare the numbers of Black Americans in prison with the number of Black Americans who commit crime. If Black Americans are in prison in

[5] It should be noted to this Court that as of January 1, 2010, there were 1,404,053 persons under the jurisdiction of state prison authorities, 4,777 (0.3 percent) less than on December 31, 2008. This marks the first year-to-year drop in the nation's state prison population since 1972. Pew Survey Shows State Prison Population Dropped in 2009, http://www.pewcenteronthestates.org/news_room_detail.aspx?id=57793

higher proportion to their crime rate, they are victims of discrimination in the criminal justice system.

The National Criminal Justice Commission made this comparison. After two years of study and research by a diverse panel of experts, the Commission concluded:

> Relative to population size, about five times as many African-Americans as whites get arrested for the serious index crimes of murder, rape, robbery, and aggravated assault. About three times as many African-Americans as whites get arrested for less serious crimes, which make up the bulk of arrests and currently flood the criminal justice system. If after arrest there were *no* racial bias in the criminal justice system, the racial makeup of the prison population should at least roughly reflect the racial disparity in arrest rates – if three times as many African-Americans get *arrested* for less serious crimes, then there should be roughly three times as many African-Americans per capita in prison for those crimes. But the racial difference among African-Americans and whites in prison is overwhelmingly wider than arrest rates suggest it should be absent racial bias. *There are seven African-American to each white in prison…*Most studies reveal what most police officers will casually admit: that race is used as a factor when the police decide to follow, detain, search, or arrest…To justify the use of race in forming this suspicion, these officers might point to racial disparities in arrest patterns: if minorities get arrested more often, they argue, then minorities must be committing more crime. This is a self-fulfilling statistical prophecy: racial stereotypes influence police to arrest minorities, thereby creating the arrest statistics needed to justify the racial stereotype. Steven R. Donziger, Ed., *The Real War on Crime: The Report of the National Criminal Justice Commission* (Harper Perennial 1996) 107-09. Emphasis original.

The meaning of these statistics in terms of felon disenfranchisement is clear. The unwarranted racial disparities in the criminal justice system in the United States (in terms of policing, arrest, sentencing, and incarceration) result in felony disenfranchisement laws having a disproportionate impact on African American and Hispanic minority groups. In 2007, thirty-eight percent of the nation's 1.5 million prison inmates were black and twenty-one percent were Hispanic, The Sentencing Project, *Facts About Prisons and Prisoners* (2009) (citing Bureau of Justice Statistics), *available at* http://www.sentencingproject.org/doc/publications/inc_factsaboutprisons.pdf. despite the fact that these groups only represent twelve and fifteen percent of the general population, respectively. U.S. Census Bureau, Population Estimates Program (2007).

"The impact of the separate provisions for felony disqualification can be seen in estimates of the effect of recission. Repeal of permanent disfranchisement would reduce the number excluded from the electorate on account of felony convictions by about a third. Repeal of disfranchisement during probation and parole would have somewhat

larger effect, mostly because it is current policy in more and larger states. Repeal of both provisions would benefit white and other felons a little more than blacks. Overall, felony disfranchisement rates would fall to just 0.6 percent, about 1.2 million people, were disqualifications imposed only upon felons in current custody. Felony disfranchisement rates would remain at 2.5 percent for blacks, well above the felony disqualification rate for whites and others under current law, 1.5 percent." John Mark Hansen, Task Force Report on the Federal Election System: *Disfranchisement of Felons* (July 2001), Chap. 8, p. 2

A. National casualties of the war on drugs: state budgets, deterrence of crime and racial equality.

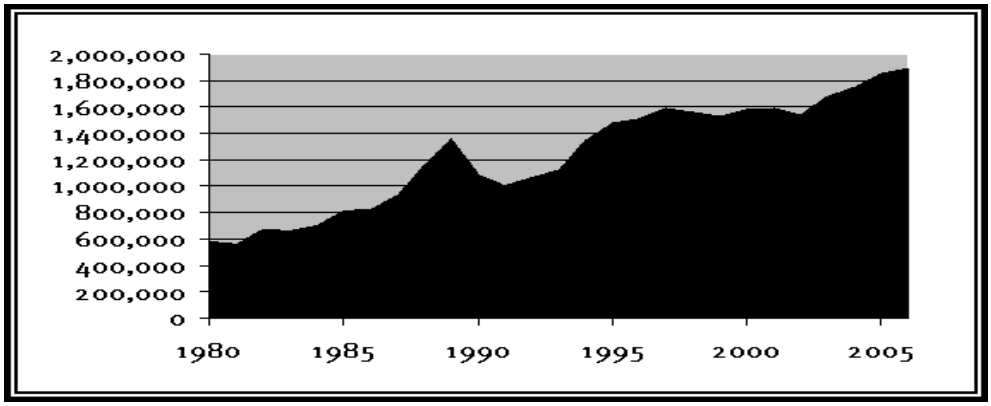
The disparity in felony sentences which cause a person to go to prison and so to be disenfranchised are made crystal clear if one looks specifically at criminal sentencing in drug cases.

The "War on Drugs" is a national policy initiative that includes a set of drug policies of the United States that are intended to discourage the production, distribution, and consumption of psychoactive drugs. The term "war on drugs" originated at a press conference by President Richard Nixon on June 17, 1971 who named drug abuse as "public enemy number one in the United States." Frontline, *Thirty Years of America's Drug War, (*1995-2010 WGBH educational foundation), http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/

At the time President Nixon announced the war on drugs, he also created the Special Action Office for Drug Abuse Prevention (SAODAP), to be headed by Dr. Jerome Jaffe, a leading methadone treatment specialist. During President Nixon's era, for the only time in the history of the war on drugs, the majority of funding goes towards treatment, rather than law enforcement. Id.

However, since the early 1980s, when President Reagan launched his own "war on drugs," federal and state measures to battle the use and sale of drugs have emphasized arrest and incarceration rather than prevention and treatment. Human Rights Watch, *Targeting Blacks: Drug Enforcement and Race in the United States,* (May 2008), p. 9, http://www.hrw.org/en/reports/2008/05/04/targeting-blacks-0 The impact on the criminal justice system has been dramatic. Between 1980 and 2006, arrests for drug offenses more than tripled, rising from 581,000 arrests in 1980 to 1,889,810 in 2006. Id. See, Figure 1.

Fig.1: Drug Abuse Violation Arrests



Source: Drug arrest data for 1980 to 2004 is made available by the BJS, "Drug and Crime Facts: Drug Law Violations- Enforcement," http://www.ojp.usdoj.gov/bjs/dcf/tables/arrtot.htm (accessed April 16, 2008). 2005 and 2006 arrest data is made available by the FBI, "Crime in the United States, 2005," http://www.fbi.gov/ucr/05cius/data/table_29.html, "Crime in the United States, 2006,"http://www.fbi.gov/ucr/cius2006/data/table_29.html (both accessed April 16, 2008)

"One result of the new drug laws was a soaring prison population, as greater proportions of drug offenders received prison sentences and the length of incarceration increased. Between 1980 and 1998 the total number of new admissions of drug offenders to state and federal prison exceeded 1.5 million. Between 1980 and 2003 the number of drug offenders in state prisons grew twelvefold. In 2006 an estimated 248,547 men and women were serving time in state prisons for drug offenses, constituting 19.5 percent of all state prisoners." *Targeting Blacks: Drug Enforcement and Race in the United States*, at 10-11. Citations omitted.

"Few of the men and women who enter prison because of drug offenses are kingpins or major traffickers. The overwhelming preponderance are low-level non-violent offenders, primarily street-level dealers, couriers, and other bit players in the drug trade." Id at 11. A federal survey of state prisoners nationwide revealed that among drug offenders, 58 percent had no history of violence or high-level drug activity; 35 percent had criminal histories limited to drug offenses; 21 percent were serving a sentence for a first-time offense; and 43 percent were convicted of drug possession. Half of the drug offenders who were surveyed reported their drug activity consisted of selling or helping to sell drugs to others for their use, and less than a third (28.5 percent) reported activity that might constitute a higher-level role (for example, distributing or helping distribute drugs to dealers). The Sentencing Project from data in the 1997 Survey of Inmates conducted by the Bureau of Justice Statistics (BJS). Ryan S. King and Marc Mauer, The Sentencing Project, *Distorted Priorities: Drug Offenders in State Prisons*, (September 2002) pp. 2, 4, and 7, http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp_distortedpriorities.pdf, cited in *Targeting Blacks: Drug Enforcement and Race in the United States.* Sadly, after more than two decades of incarcerating drug offenders has apparently

had little impact on the demand for illicit drugs. *Targeting Blacks: Drug Enforcement and Race in the United States,* p. 12.

They are also expensive. The average annual operating cost per inmate in state prison is $22,650. Substance abuse treatment is far less expensive-prison costs five to six times more than non-residential drug treatment. The average daily cost per inmate in a state prison is $62.05. Ibid. The mean cost per client day for outpatient drug treatment was $10.32 (methadone) and $9.17 (non-methadone). Substance Abuse and Mental Health Services Administration (SAMHSA), , "The ADSS Cost Study: Costs of Substance Abuse Treatment in the Specialty Sector," 2003, Table 4.2, p. 21, http://www.oas.samhsa.gov/ADSS/ADSSCostStudy.pdf.

The cost to racial equality by the war on drugs is worse. The anti-drug policies of the last 20 years bear heavy responsibility for the extremely high and disproportionate representation of black Americans in the US prison population. Racial disproportions in US incarceration have been extensively documented. For example, black men are incarcerated under state or federal jurisdiction at 6.2 times the rate of white men, and black women are incarcerated at 3.1 times the rate of white women. Sabol, BJS, "Prisoners in 2006," Table 10, p. 8, http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=908. The rate of sentenced prisoners under state or federal jurisdiction per 100,000 residents is 487 for white men, compared to 3,042 for black men. The rate for white women is 48, compared to 148 for black women. Ibid., Appendix, Table 7, p. 23. About one in every 33 black men is a sentenced prisoner, compared to one in every 205 white men. Ibid., p. 8. Approximately 16.6 percent of adult African American men have been in prison, compared to 2.6 percent of white men. Bonczar, BJS, "Prevalence of Imprisonment in the U.S. Population 1974-2001," p. 1., http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf

No doubt many Americans believe racial differences in imprisonment for drug offenses reflect racial differences in involvement with illegal drug activities-that blacks are sent to prison at higher rates on drug charges because they are more involved in drug offenses than whites. The heightened media and political attention to substance abuse and the drug trade in urban minority neighborhoods has promoted the public perception that illegal drugs are more prevalent in those neighborhoods than in more affluent white neighborhoods. Leonard Saxce, Ph.D., et al., American Journal of Public Health, *"The Visibility of Illicit Drugs: Implications for Community-Based Drug Control Strategies,*" vol. 91 (2001), pp. 1987-1994, http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1446920

The reality has long been the reverse. In absolute numbers, there are far more whites committing drug offenses than blacks. The disproportionate rates at which blacks are sent to prison for drug offenses compared to whites largely originate in racially disproportionate rates of arrest for drug offenses. Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs,* p. 19, fn. 72, http://www.hrw.org/reports/2000/usa/

If someone is using drugs, that mean they possess drugs. Looking at those numbers, whites and blacks use illicit drugs at roughly the same rates. For example, according to the most recent survey, an estimated 49 percent of whites and 42.9 percent of blacks age 12 or older have used illicit drugs in their lifetime; 14.5 percent of whites and 16 percent of blacks have used illicit drugs in the past year; and 8.5 percent of whites and 9.8 percent of blacks have used an illicit drug in the past month (those in this latter category are deemed to be current drug users). Division of Population Surveys, Office of Applied Studies, SAMHSA, RTI (Research Triangle Institute), *Results from the 2006 National Survey on Drug Use and Health:National Findings*, Appendix G: Selected Prevalence Tables, Table G.1, http://www.oas.samhsa.gov/nsduh/2k6nsduh/2k6results.pdf

However, the "white population in the United States is slightly more than six times larger than the black population, and the rate of drug use is roughly comparable between the two, the number of white drug users is significantly higher than the number who are black. For example, according to the 2006 surveys conducted by the federal Substance Abuse and Mental Health Services Administration (SAMHSA), an estimated 111,774,000 people in the United States age 12 or older have used illicit drugs during their lifetime, of whom 82,587,000 are white and 12,477,000 are black. There are also far more whites than blacks among people who have used cocaine in any form in their lifetime, as well as among those who have used crack cocaine. According to the 2006 SAMHSA estimates, there are 27,083,000 whites who have used cocaine during their lifetime, compared to 2,618,000 blacks, and 5,553,000 whites who have used crack cocaine, compared to 1,536,000 blacks. If black and white drug users are combined (and leaving aside other races), blacks account for 13 percent of the total who-according to SAMSHA surveys-have ever used an illicit drug, 8 percent of those who have ever used cocaine, and 21 percent of those who have ever used crack cocaine." *Targeting Blacks: Drug Enforcement and Race in the United States,* p. 42. There is relatively little research on the demographics of drug sellers. But what data is available indicates that low-level drug sellers have a similar racial make-up to drug users. Id. at 43.

If blacks constitute around 13 percent of the total black and white drug users, they should constitute roughly that proportion of the total black and white drug offenders-those possessing, purchasing, and transferring drugs to others. All other things being equal, blacks should constitute a roughly similar proportion of people of both races who are arrested, convicted, and sent to prison for drug law violations. Id. at 44.

But incarceration is not equal. "The growing rate of incarceration for drug offenses is not borne equally by all members of society. African Americans are disproportionately incarcerated for drug offenses in the U.S., though they use and sell drugs at similar rates to whites. As of 2003, twice as many African Americans as whites were incarcerated for drug offenses in state prisons in the U.S. African Americans made up 13 percent of the total U.S. population, but accounted for 53 percent of sentenced drug offenders in state prisons in 2003." Justice Policy Institute Report, *The Vortex: The Concentrated Racial Impact of Drug Imprisonment and the Characteristics of Punitive Counties*, p.2 http://www.justicepolicy.org/images/upload/07-12_REP_Vortex_AC-DP.pdf

The Justice Policy Institute Report found that Dane County in 2002 sent 97 black people to prison for drug offenses for every white person incarcerated for the same category of crimes, for a ratio of racial disparity the survey showed was the third highest in the nation among big counties. The two counties with higher rates of racial disparity than Dane were Forsyth County, N.C., at 164 times, and Onondaga County, N.Y., at 99 times. The study also found that Milwaukee County sent blacks to prison for drug offenses at 15 times the rate of whites, while Waukesha County did so at 24 times the rate of whites, compared to a national average among big counties of 10 times the rate of whites. Id. at Appendix A, p. 23, 24, 26. Clearly, the study 's findings illustrate disproportionate numbers of minorities in Wisconsin's criminal justice system.

B. The ultimate effect of felony disenfranchisement policies in the United States is to exacerbate racial exclusion

What these numbers boil down to regarding this issue of felon disenfranchisement is simple: The ultimate effect of felony disenfranchisement policies in the United States is to exacerbate racial exclusion. Several scholars have traced the enhanced impact of disenfranchisement laws in certain states to a mid-nineteenth century effort to bar newly-freed African Americans from participating in local elections. *See, e.g.* Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 732 (2006); Daniel S. Goldman, *The Modern- Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 626 (2004); Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?* (2004), *available at* http://www.sentencingproject.org/Admin/Documents/publications/fd_fdpolicywhosetime.pdf; Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. 777, 781 (2002) Furthermore, political and financial resources are lost in urban communities with high felony conviction rates when inmates are incarcerated in prisons built in rural areas. The U.S. Census Bureau counts the usual residence of an inmate as the place where they reside during their incarceration, not where they lived. Consequently, "sparsely populated rural communities are artificially enlarged through their inmate population consisting mostly of people of color from urban neighborhoods." Mauer, 2004, p. 6. These rural areas receive additional state and federal funds based upon their prison population.

Due to voter disenfranchisement, the political voice of many African-American men has been muted while incarcerated and when they return to their communities. Perhaps Joe Loya, a disenfranchised former prisoner, best expressed how this feels when he said he was "without a voice. I am a ghost inhabiting a citizen's space." NAACP Legal Defense and Educational Fund, *Free the Vote:Unlocking Democracy in the Cells and on the Streets* (2010), http://www.naacpldf.org/content/pdf/felon_free/Free_the_Vote.pdf

This has tremendously reduced the political power of African-American men and the entire African-American community. This means simply this: "As of 2004, more

African-American men were disenfranchised (due to felon disenfranchisement laws) than in 1870, the year the 15th Amendment was ratified." Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness.* "[T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box * * * disinherited [, he] 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." ***McLaughlin v. City of Canton,*** 947 F. Supp. 954, 971 (S.D. Miss. 1995). A short thirty-five years after the Civil Rights movement finally gained African-Americans effective access to the voting booth, a full century after Abolition, the right to vote is being taken back by the penal system via unjust criminal dispositions

VII. The original intent in drafting the Wisconsin Constitution was to obstruct the franchise of African Americans in Wisconsin.

Wisconsin's image of itself as a racially progressive state has not always matched reality. As Alexis De Tocqueville stated in DEMOCRACY IN AMERICA, http://justice.law.stetson.edu/courses/casedigests/tocqueville.pdf "[R]ace prejudice seems stronger in those states that have abolished slavery than in those where it still exists, and nowhere is it more intolerant than in those states where slavery was never known." It must be remembered that contrary to American public memory slavery was not a problem limited to the South. Menschel, *Abolition without Deliverence: The Law Of Connecticut Slavery 1784-1848,* 111 YALE L.J.. 183 (2001). For that reason Madison, in both *The Federalist* No. 10 and in the First Congress, had argued that state governments were more likely to tyrannize minorities.

Wisconsin is one of a very few states still using its original constitution; in fact, Wisconsin has the oldest state constitution outside of New England. Joseph A. Ranney, *The Making of the Wisconsin Constitution,* Wisconsin Lawyer, http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_s_legal_history&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=35839 The Wisconsin Constitution was enacted in 1848. The only states that have older constitutions are Massachusetts (1780), New Hampshire (1784), Vermont (1793), Maine (1820) and Rhode Island (1843). *See generally* Nick Papastravros, ed., *Constitutions of the United States, National and State* (Dobbs Ferry, N.Y.: rev. ed., 1992). Id, n.1.

Wisconsin is therefore differently situated than a state like Florida where the discriminatory taint to Florida's 1868 disenfranchisement law under the state constitution was miraculously cured by subsequent 1968 reenactment. ***Johnson v. Governor of the State of Florida,*** 405 F.3d 1214, 1223 (11th Cir. 2005) (The plaintiffs introduced no contemporaneous evidence showing that racial discrimination motivated the adoption of the 1868 provision.) Emphasis original.

A. The first Wisconsin Constitution of 1846 was not passed since it would have extended the vote to African Americans.

In 1846 Wisconsin, “negros” were considered a nuisance and considered inferior. Fishel, Leslie H. "*Wisconsin and negro suffrage*" Wisconsin Magazine Of History. Volume: 46 /Issue: 3 (1962-1963). http://content.wisconsinhistory.org/cdm4/document.php?CISOROOT=/wmh&CISOPTR=45302&CISOSHOW=45239. Because African Americans were inferior, White Wisconsinites felt no reason to integrate with African Americans in Wisconsin. Joseph A. Ranney, *Looking Further Than the Skin: A History of Wisconsin Civil Rights Law*, Wisconsin Lawyer, http://www.wislawyer.org/AM/Template.cfm?Section=Home&CONTENTID=35860&TEMPLATE=/CM/ContentDisplay.cfm Some people were “teetotally opposed” to Negro sufferage. Id at 182. Others did not even want an African American person living next to them. See, A speech on emancipation, by Sen. J.R. Doolittle of Wisconsin, March 19, 1862 Congressional Globe, 37th Congress, 2nd session, vol. IV, appendix, p.84, col. 3, http://www.etymonline.com/cw/northrace.htm

Present day statistics demonstrate Wisconsin attitudes towards “negros” are not much different than 1846. According to the 2000 United States Census, the most segregated area in the 2000 census were also the most segregated in 1990, and among the six most segregated in 1980, the number one segregated metropolitan area in the United States is the Milwaukee-Waukesha area. “Residential Segregation of Blacks or African Americans: 1980 to 2000, Chapter 5” U.S. Census Bureau, http://www.census.gov/hhes/www/housing/resseg/ch5.html. See also, Dr. Marc V. Levine, Professor and Director, University of Wisconsin-Milwaukee Center for Economic Development, *The Two Milwaukees: Separate and Unequal*, presentation to The Milwaukee County Task Force on Segregation and Race Relations (April 30, 2003) (demonstrating, *inter alia*, that the racial gap in poverty rates in metro Milwaukee is the largest of any metropolitan area in the country and *twice* the national gap. Also, few black middle-class households live in the Milwaukee suburbs—another sign of segregation), http://www4.uwm.edu/ced/pdf/two_milwaukee.pdf

As debate progressed about Wisconsin’s proposed 1846 constitution, it became clear that a majority of delegates would not support unqualified inclusion of black suffrage in the constitution. For instance, A. Hyatt Smith, the territorial attorney general, indicated so long as the shameful resolution about African American suffrage was attached to the constitution, he would not sign it. *Wisconsin and negro suffrage* at 182. Alexander Randall of Waukesha proposed, as a compromise, that a separate article allowing black suffrage be submitted to the people separate from the rest of the constitution. Id. Randall's proposal narrowly passed by a vote of 53 to 46. The convention concluded its business in December 1846. Many of the delegates openly expressed their uneasiness about the constitution's chances of passage. The delegates' uneasiness proved to be amply justified. In April 1847 Wisconsin voters rejected the proposed constitution by a vote of 20,233 to 14,119 (59 percent to 41 percent). The article on black suffrage was defeated by an even wider margin of 14,615 against to 7,664 for (66 percent to 34 percent). Id at 183.

In the cases before this Court, therefore, the defendants have introduced contemporaneous evidence showing that racial discrimination motivated the rejection of the proposed 1846 Wisconsin constitution provision because it sought to enfranchise African Americans. Moreover, this was not cured in the second constitutional convention.

B. The second Wisconsin constitutional convention and beyond: discrimination in all aspects of Wisconsin society, including the criminal justice system, causes discriminatory disenfranchisement of African Americans.

Even though the voters had decisively rejected black suffrage earlier in the year, its proponents continued to press their case in the 1847 Madison convention. Joseph A. Ranney, *The Making of the Wisconsin Constitution* , supra. The motion to strike the word "white" from the suffrage clause was again defeated, but 21 of 69 delegates voted for the motion (compared to 14 of 125 at the 1846 convention). Id. Near the convention's end, Louis Harvey of Clinton proposed that the Legislature be authorized to allow black suffrage, subject to popular referendum. Harvey's proposal appealed to many delegates because a vote for it could be defended back home as a vote for popular sovereignty rather than black equality or abolitionism. The proposal passed by a vote of 45 to 21. Id.

Though the second constitutional convention produced a document that would eventually be ratified, it was not without its share of detractors. Among those were writers in the Waukesha newspaper, American Freeman. The editors, supporters of the more liberal 1846 constitution, primarily objected to the disenfranchisement of African Americans in the new constitution. See, Exhibit ____. Wisconsin's 1848 stated that white males 21 years or “upwards” could vote in elections. Wis. Const. Article III Section I, 1st. Further, "Laws may be passed excluding from the right of suffrage all persons... convicted of bribery, or larceny, or any infamous crime... and for betting on elections." Wis. Const. Article III Section 6.

“The pattern of weak racial liberalism which Wisconsin established between 1846 and 1866 continued for the next century. Wisconsin never countenanced de jure discrimination, but de facto segregation and discrimination were common.” Joseph A. Ranney, *Looking Further Than the Skin: A History of Wisconsin Civil Rights Law*, Wisconsin Lawyer, State Bar of Wisconsin, http://www.wisbar.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=35860#5

C. Wisconsin’s historical pattern of discrimination exists today in Wisconsin’s criminal justice system causing felony disenfranchisement laws to have a disproportionate impact on African Americans.

The original intent of the Wisconsin Constitution to disenfranchise African Americans has spread across the Wisconsin criminal justice system in the number of arrests, cases charged, sentences and probation and parole revocations. Wisconsin Office of Justice Assistance, *Racial Disparities*, http://oja.wi.gov/section.asp?linkid=1344&locid=97 In Wisconsin there are 42,000 persons that are currently estimated who are prohibited from voting due to a felony conviction. The Sentencing Project[6], *Statement on Senate Bill 240: The Wisconsin Democracy Restoration Act* (October 2009), p.2, http://www.sentencingproject.org/doc/publications/fd_TSPStatementOnSB240_WIDemocracyRestorationAct.pdf "African Americans constitute 39% of those disenfranchised, an estimated 24, 293 persons. One of every nine (11.1%) African Americans in Wisconsin are currently disenfranchised, resulting in the state having the 13th highest rate of black disenfranchisement in the nation. Half (51.9%) of the disenfranchised African American population, is either on probation or parole." Id. at 2-3. "Wisconsin is one 35 states nationally in which a felony conviction can result in the loss of voting rights post-incarceration; while persons are completing their felony probation or parole sentence." Id. at 2.

This data has also been documented by other statistical statements and studies in the public domain.

For instance, The Sentencing Project found that the rate of arrests of white Milwaukeeans for drug offenses decreased 63% from 1980 to 2003. Yet the rate of arrests of black Milwaukeeans increased 206% during those same years. The authors found no corresponding increase of drug use among African Americans to explain the changes in arrest rates. Instead, they conclude that the policies of the War on Drugs have disproportionately targeted African Americans. Ryan S. King, *Disparity by Geography: The war on Drugs in America's Cities*, The Sentencing Project (May 2008) http://www.sentencingproject.org/doc/publications/dp_drugarrestreport.pdf Likewise, Human Rights Watch found that African Americans in Wisconsin are 42.4 times more likely than whites to be incarcerated for drug offenses—*the most disparate ratio in the nation.* Human Rights Watch, *Punishment and Prejudice: Racial Disparities in the War on Drugs*, Vol. 12, No. 2 (May 2000), http://www.hrw.org/reports/2000/usa/index.htm#TopOfPage Emphasis added.

It has been determined that people perceive African Americans are arrested in Wisconsin based not on what they may have done wrong but their race. Ten years ago a state racial profiling task force issued a 105 page report that recommended police start collecting racial profiling data. *Governor's Task Force on Racial Profiling, Report 2000*, http://oja.state.wi.us/docview.asp?docid=15466&locid=97 The Task Force defined racial profiling is "[a]ny police-initiated action that relies upon the race, ethnicity, or national

[6] While it is true that the Sentencing Project is a non-profit organization advocating sentencing reform, the Sentencing Project "has built a credible body of objective research" on sentencing. Wisconsin Sentencing Commission, *Race and Sentencing In Wisconsin: A Monograph Series, Report Number 1*, p.6 (November 2004).

origin of an individual rather than the behavior of that individual, or information that leads the police to a particular individual who has been identified as being engaged in or having been engaged in criminal activity." *Report 2000*, at p. 79. The report, prepared by a 17-member task force, chaired by Milwaukee County Judge Maxine A. White, was created by former Gov. Tommy G. Thompson. *Report 2000,* Executive Summary at 1. The Report set forth sufficient anecdotal evidence of racial profiling existing in Wisconsin to cause Gov. Scott McCallum to sign his first executive order, requiring all law enforcement agencies in the state to ban the controversial practice and to carry out the report's recommendations. Mark Johnson, "*Governor bans racial profiling*" Milwaukee Journal Sentinel, March 7, 2001. Effective January 1st, 2011, all Wisconsin law enforcement officers will be required to collect data at traffic stops that will be used to determine whether vehicles operated or occupied by racial minorities are disproportionately stopped. *Traffic Stop Data Collection*, http://oja.wi.gov/section.asp?linkid=1643&locid=97

The Wisconsin Office of Justice Assistance, a division of the Wisconsin Department of Administration, confirms the perception that racial disparities are found throughout the Wisconsin criminal justice system from arrest to sentencing:

> Various national and state reports have documented and quantified Wisconsin's growing disparity between white and minority citizens in the criminal justice system. A report recently issued by the Human Rights Watch and the national Sentencing Project showed that African-Americans received prison sentences for drug crimes 42 times more frequently than whites. And in Wisconsin's prisons, nearly half of inmates are African-American, yet Blacks represent just 6 percent of Wisconsin's population. *Racial disparities permeate the entire criminal justice continuum, in the number of arrests, cases charged, sentences and probation and parole revocations.* In some offense categories, like drug arrests and minor offenses, the disparity is more pronounced, while in others, like sentences for serious offenses, the disparity is reduced. *Racial Disparities*, http://oja.wi.gov/section.asp?linkid=1344&locid=97 Emphasis added.

Gov. Jim Doyle's Commission on Reducing Racial Disparities in the Wisconsin Justice System noted that "African Americans comprise six percent of the overall population of Wisconsin, but also represent 45% of the population in the adult [Department of Corrections] facilities." *Commission on Reducing Racial Disparities in the Wisconsin Justice System,* Final Report, Prologue, p. 2 (February 2008), ftp://doaftp04.doa.state.wi.us/doadocs/web.pdf

The Racial Disparity Commission heard on more than one occasion the suggestion that "if minorities do not want to be in prison, they shouldn't do crimes." Id. This type of racist and fallacious reasoning has been used to attempt to justify the use of racial

profiling. Florida Volusia County Sheriff Bob Vogel denied that race played any role in his deputies' decisions on whom to stop, suggesting instead that whites are simply less likely than African-Americans or Hispanics to be transporting drug money. See, Steve Berry & Jeff Brazil, "*Blacks, Hispanics Big Losers in Cash Seizures: A Review of Volusia Sheriff's Records Shows that Minorities are the Targets in 90 Percent of Cash Seizures Without Arrests,* Orlando Sentinel, June 15, 1992, at A1.

Much like Vogel, officers who are accused of disproportionately targeting African-Americans or other minorities typically defend their conduct by citing statistics that show higher rates of crime and arrests among minorities. See, "*Developments in the Law--Race and the Criminal Process, Racial Discrimination on the Beat: Extending the Racial Critique to Police Conduct,"* 101 HARV. L. REV. 1494, 1496 (1988) ("[P]olice defend the use of race as a basis for forming suspicion precisely because of racially disparate arrest patterns: because members of racial minorities commit more crimes, police argue, it is not invidious discrimination to treat minorities differently.").

Such argument are reminiscent of those advanced in ***Brown,*** supra., to justify segregated schools. The questionable tendency to seek justification in disproportionate arrest statistics has had the unfortunate effect of perpetuating a fallacy, generating more unbalanced arrest patterns that consequently provide a basis for continued selective enforcement. 101 HARV. L. REV. at 1508-09. This creates a "separate but equal" criminal code- one for blacks and one for whites. Thus a Presidential Council recently concluded:

> Discriminatory behavior on the part of police and elsewhere in the criminal justice system may contribute to blacks' high representation in arrests, convictions, and prison admissions. *Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin* (Council of Economic Advisors For the President's Initiative on Race, September, 1998) 57.

The problem of the self-fulfilling prophecy and profiling was recently addressed by the Attorney General of the State of New Jersey. Attorney General Peter Verniero, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling,* (April 20, 1999)(Verniero Report). After first explaining that racial profiling is a national problem, the report demonstrated the tautological nature of using proactive arrest numbers:

> [S]ome law enforcement executives have argued that it is appropriate for police officers on patrol to rely upon racial characteristics provided that objective crime trend analysis validates the use of these characteristics as risk factors in predicting and responding to criminal activity…Many of the facts that are relied upon to support the relevance of race and ethnicity in crime trend analysis, however, only demonstrate the flawed logic of racial profiling, which largely reflects

> *a priori* stereotypes that minority citizens are more likely than whites to be engaged in certain forms of criminal activity. This form of scientific analysis, in other words, is hardly objective… some of the numbers they rely upon are self-selected and thus inherently misleading. Verniero Report at 65, 66.

The Verniero report proceeds to explain that the fact that a disproportionate percentage of drug arrests are minorities does not mean that any particular minority citizen is more likely than a non-minority citizen to be committing a drug offense. Verniero Report at 67-70. The report than states:

> To the extent that [] police and other law enforcement agencies arrest minority motorists more frequently based on stereotypes, these events, in turn, generate statistics that confirm higher crime rates among minorities, which in turn, reinforces the underpinnings of the very stereotypes that gave rise to the initial stops. In short, police officers may be subjecting minority citizens to heightened scrutiny and more probing investigative tactics that lead to more arrests that are then used to justify those same tactics. This insidious cycle has served to create an ever-widing gap in the perception of fairness that persons of color and whites have about law enforcement and the criminal justice system…[U]sing profiles that rely on racial or ethnic stereotypes is no better, and in many respects is far worse, than allowing individual officers to rely on inchoate and unparticularized suspicions or hunches. Verniero Report at 70-72.

Wisconsin's Racial Disparity Commission draws a conclusion similar to the Verniero report: "[S]erious concerns were expressed that enforcement strategies that target particular neighborhoods or that target open-air drug trafficking are not productive." *Commission on Reducing Racial Disparities in the Wisconsin Justice System,* Final Report, Prologue, p. 2. Likewise, the Wisconsin Sentencing Commission found that "[to the extent that police focus on high-crime neighborhoods, and to the extent that such neighborhoods also happen to be disproportionately minority, arrest over-estimates minority participation in criminal activity." Wisconsin Sentencing Commission, *Race and Sentencing in Wisconsin: A Monograph Series* p.13 (November 2004), http://wsc.wi.gov/docview.asp?docid=1274

Wisconsin Governor Doyle himself unequivocally admitted:

> people of color receive disparate treatment in the criminal justice system throughout the nation and African-Americans and Hispanics constitute a disproportionate percentage of incarcerated populations in Wisconsin. *Relating to the Findings of the Commission on Reducing Racial Disparities in the Wisconsin Justice System and the Creation of the Racial Disparities Oversight Commission*, Governor Jim Doyle, Executive Order 251,

http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=3360.

The Greater Milwaukee Human Rights Coalition in its *Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination* (Feb. 2008) stated:

> Racial discrimination and disparities are apparent within the criminal justice system in Wisconsin. This report explores recent incidents of police brutality and misconduct against people of color in the Milwaukee area. In addition, African Americans are incarcerated at much higher rates in the state than non-Hispanic whites,1 likely due largely to racial profiling and racial disparities in prosecuting and sentencing. As a result, poor prison conditions disproportionately affect people of color. Moreover, the State of Wisconsin's low indigency threshold to qualify for public defense also has a disparate impact on minorities.[i] Disfranchisement of individuals with felony convictions who have completed their prison terms also occurs at a disparate rate for people of color. *Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination, Executive Summary*, p.1 http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/24_Milwaukee.pdf

Further, the Greater Milwaukee Human Rights Coalition found that "Wisconsin has the second highest African American incarceration rate in the US—4,416 per 100,000 African Americans in the state are incarcerated. Wisconsin also has the fifth highest black-to-white ratio of incarceration at 10.6 to 1." Id at 5. The Greater Milwaukee Human Rights Coalition Report went on to detail that discrimination in the Wisconsin Criminal Justice System exists in three areas: minority arrest rates, discrimination in prosecution of cases and discrimination at sentencing. Id. Regarding discrimination based on felon disenfranchisement, the Coalition found the policy "policies have a disparate impact on African-American voters. One out of nine African-American voters is disfranchised in Wisconsin compared to one out of fifty voters overall. African Americans comprise 39 percent of the disfranchised population, even though they make up only 5 percent of the voting population. In June, a bill was introduced in the Wisconsin legislature which, if passed, would restore the right to vote to those who have completed their term of incarceration for an offense." Id. at 8. See also, Mauer and King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, Sentencing Project (July 2007), p.3 http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf (States with the highest black-to-white ratio are disproportionately located in the Northeast and Midwest, including the leading states of Iowa, Vermont, New Jersey, Connecticut, and Wisconsin. Further, Wisconsin and Vermont which have high rates of black incarceration and average rates of white incarceration) and p. 10 (An examination of the ratio of black-to-white incarceration rates by state illustrates not only the

heightened use of imprisonment for African Americans, but also regional differences in how incarceration policies produce disparities. While the national black-to-white ratio of incarceration is 5.6, among the states the ratio ranges from a high of nearly 14-to-1 in Iowa to a low of less than 2-to-1 in Hawaii.13 In seven states – Iowa, Vermont, New Jersey, Connecticut, Wisconsin, North Dakota, and South Dakota – the black-to-white ratio of incarceration is greater than 10-to-1.)

"In addition, a state requirement has the potential to further deter former felons from voting. Since the 2006 fall elections, the state requires that municipalities check the names of people attempting to register to vote on Election Day against a 'Felon Ineligible List.' This list includes the names of those whose terms of confinement have expired, noting that their terms of confinement have been completed. However, the list has the potential for confusion that could lead to inaccurate prevention of registration or to deterrence of former felons from attempting to register." Id at 7-8. This potential is very real in light of observations by a former federal official who helped supervise the federal observer program. The observer provided compelling accounts of disparate treatment of black and white voters at polling places:

> White poll workers treated African American voters very differently from the respectful, helpful way in which they treated white voters . . . . If the [white] voter's name was not found, often he or she either was allowed to vote anyway, with his or her name added to the poll book, or the person was allowed to vote a provisional or challenged ballot . . . . If, however, the voter was black, the voter was addressed by his or her first name and either was sent away from the polls without voting, or told to stand aside until the white people in line had voted. *Voting Rights Act: Sections 6 and 8 — The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. at 30 (statement of Barry H. Weinberg, former Deputy Chief and Acting Chief, Voting Section, Civil Rights Division, U.S. Dep't. of Justice). (2005).

Additionally, requiring a showing of some form of identification at the time of voting has a disparate impact: "African-Americans were asked to present photo ID more often than whites—54 percent of the time versus 46 percent. On average, African-Americans also had to wait somewhat longer in line to vote, though the waiting times were very short for most people. Eighty-five percent of whites reported waiting less than 10 minutes to vote, compared with 75 percent of blacks and 82 percent of Hispanics. Although only 1 percent of voters said they waited over an hour to vote, black voters were more likely to be part of that group." *The first big survey of voter ID requirements—and its surprising findings*, By Prof. Stephen Ansolabehere, Salon, March 16, 2007, http://www.slate.com/id/2161928/

Similar to the Greater Milwaukee Human Rights Coalition, the Wisconsin Sentencing Commission found that "Wisconsin has been at or near the top of national rankings in

terms of disproportionate representation in its state prison system. By mid-year 2001 Wisconsin led the nation with an estimated 4,058 African-American prison and jail inmates per 100,000 African-American state residents. . . . Wisconsin's adult population is just under 10% minority. However, minorities made up about half of the adults prison admissions in 2003." Wisconsin Sentencing Commission, *Race and Sentenci*

Issue

2. Can Wisconsin's disenfranchisement law impose a material requirement that a convicted indigent felon pay costs, fees and restitution before being allowed to vote in a federal election?

In the United States legal financial obligations generally accompany probation or incarceration sentences. R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIMINAL JUSTICE AND BEHAVIOR 243 (2006). Wisconsin's disenfranchisement law requires that before a convicted indigent felon can vote, all conditions of the indigent felon's sentence must be completed. This includes, but is not limited to, payment of the fine, costs, penalty assessment, applicable domestic abuse assessment payment, applicable driver improvement surcharge payment, applicable natural resources assessment or applicable natural resources restitution payment. In other words, for a convicted felon to once again vote, he or she will have to pay money.

Americans have fought long and hard to protect the right to vote and a generation ago emphatically rejected the idea of paying for a right to vote. As the civil rights revolution reached its peak, Congress and the states in 1964 enacted the 24th Amendment, forbidding any "poll-tax or other tax" in federal elections. The Twenty-fourth Amendment, ratified in 1964, provides: "The right of citizens of the United States to vote in any primary or other election … shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax." Const. Amend. XXIV. "One of *the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise. Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax*." ***Harman v. Forssenius***, 380 U.S. 528, 539 (1965). Emphasis added. "[T]he poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner." Id at 540

To enforce that Constitutional provision, Congress enacted Section 10 of the Voting Rights Act of 1965, which also prohibits imposition of a poll tax as a precondition to voting. 42 U.S.C. § 1973h(a) (2000). Importantly, the Twenty- fourth Amendment and Section 10 of the Voting Rights Act are not subject to the Supreme Court's holding in ***Richardson*** because the Twenty-fourth Amendment comes after the Fourteenth Amendment and does not limit its coverage to those who otherwise have a fundamental right to vote. The Twenty-fourth Amendment "nullifies sophisticated as well as simple-minded modes" of impairing the right guaranteed. ***Harman v. Forssenius***, 380 U.S. 528, 541 (1965).

Indigent people face felon voting bans when they are required to pay all the fines, fees, court costs, restitution, and other legal financial obligations associated with a conviction before regaining the right to vote, resulting in the *de facto* permanent disenfranchisement of countless individuals who cannot pay.

The National Institute of Corrections notes that most defendants are charged several of these fees and costs, creating an especially burdensome financial debt. The institute identifies other assessments as well, such as late payment interest fees, charged when legal financial obligations are not paid by the deadline, and victim advocate fees used to support a victim's advocate office in the jurisdiction. Fahy G. Mullaney, National Institute of Corrections, U.S. Department of Justice, Economic Sanctions in Community Corrections p.4 (1988), available at http://nicic.gov/pubs/pre/006907.pdf. These assorted costs and fees only continue to rise as costs shift to defendants so as the public is relieved of bearing the financial responsibility of the criminal justice system and not raise taxes. Id at 2.

This leads to the question: Does requiring the payment of money before a convicted indigent felon can finish his or her sentence and so be allowed to vote violate the absolute ban on all "taxes" imposed by the 24th Amendment? A review of the authorities below require and answer of "yes" to this question.

In ***Harman v. Forssenius,*** Virginia responded to the new 24th Amendment constitutional prohibition by allowing citizens to escape its poll tax if they filed a formal certificate establishing their place of residence. Otherwise, they would be obliged to continue paying a state tax of $1.50 if they wanted to cast a ballot. Lars Forssenius refused to pay the tax or file the residency certificate and brought a class action suit attacking the statute as unconstitutional.

The Supreme Court agreed with Forssenius in 1965, only a year after the amendment came into force. Chief Justice Earl Warren emphasized that Virginia's escape clause for avoiding the $1.50 was unconstitutionally burdensome: "For federal elections," the Court held, "*the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed.*" ***Harman v. Forssenius***, 380 U.S. at 542. Emphasis added. "*One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise.* Congressional hearings and debates indicate *a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax."* Id at 539. The ***Harman*** court wanted it absolutely clear that any poll tax or any substitute could disenfranchise the poor by being unable to pay to vote. This added emphasis to the Court's earlier statement that the rights created by the Twenty Fourth Amendment cannot be "indirectly denied." Id at 540-01.

"Significantly, the Twenty-fourth Amendment does not merely insure that the franchise shall not be "denied" by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be "denied or abridged" for that reason. Thus, like the Fifteenth Amendment, the Twenty-fourth "nullifies sophisticated as well as simple-minded modes"

of impairing the right guaranteed." Id at 540-41. Citations omitted. The word 'abridge', according to The American Heritage Dictionary, Second Edition, means to curtail; to cut short. The American Heritage Dictionary defines "tax" in the legal sense as "[t]o assess (court costs, for example). When the word is used in connection with and following the word 'deny', which means to withhold, to refuse, it was the clear intention and purpose of the Twenty-Fourth Amendment to the Federal Constitution that neither the United States, nor any state should curtail, withhold or refuse in any election for a Federal official 'by reason of failure to pay any poll tax', or any equivalent or milder substitute assessment like court costs. Such a reading is supported by the Congressional and state intent in eliminating a poll tax as a way of disenfranchising the poor, particularly African-Americans. Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws,* 89 GEORGETOWN L. J. 2181, 2208 (2001) ("Congress and the states passed the Twenty-Fourth Amendment to eliminate the poll tax as a means of disenfranchising the poor, particularly African-Americans.)

To demonstrate the constitutional invalidity of a state legislation "*it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax.*" Id. at 541. Nor can a statutory scheme be saved by arguing it serves "some remote administrative benefit to the State." Id at 542.

Prior to ***Harman v. Forssenius,*** indigent criminal defendants were found to have particular disadvantages that require the removal of procedural obstacles in the interest of equal justice in the criminal justice system. In criminal cases, a State can no more discriminate on account of poverty than on account of religion, race, or color**.** ***Griffin v. Illinois,*** 351 U.S. 12, 17 (1956). "Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court." Id. Thus, in the criminal system, there is a "flat prohibition" against conditioning criminal procedures based on an indigent's ability to pay. ***Mayer v. Chicago***, 404 U.S. 189 (1971) "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant." ***Mayer v. Chicago,*** 404 U.S. at 196-97. See also, ***State ex rel. Seibert v. Macht,*** 2001 WI 67, P.11, 244 Wis. 2d 378 (discrimination against indigent individuals on appellate review implicates equal protection and due process concerns.). Significantly, in these cases the Court never applied suspect class analysis or the tri-levels of scrutiny (i.e., strict scrutiny, intermediate scrutiny or rational basis) in its application of the Equal Protection Clause to these criminal procedure cases.

Applying the principles of ***Harman v. Forssenius,*** supra., and ***Griffin v. Illinois,*** supra., one determines that there is a "flat prohibition" against conditioning the end of a criminal sentence based on an indigent's ability to pay costs fees and restitution. Wealth discrimination in voting is no less invidious than ***Brown v. Board of Education's***, supra., racial segregation in schooling.

The correctness of this determination is confirmed by looking to the Supreme Court's subsequent decision in ***Harper v. Virginia Bd. of Elections,*** 383 U.S. 663 (1966). In ***Harper,*** supra., the Court held it was unconstitutional whenever a State makes the affluence of the voter or payment of *any fee an electoral standard*. Id at 666. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Id. "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. *The degree of the discrimination is irrelevant*. In this context -- that is, as a condition of obtaining a ballot -- the requirement of fee paying causes an "invidious" discrimination." Id at 668. Emphasis added. The Court specifically declined to qualify the principle that *all voters should have the opportunity for equal participation in an election.* Id at 670. "For to repeat, wealth *or fee paying* has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." Id. Underlying ***Harper*** is concern that one's monetary status (or lack thereof) should not preclude a citizen from casting a ballot. A poll tax *equivalent or milder substitute may not be imposed* to disenfranchise voters who cannot afford to pay to vote.

Firmly established by ***Harper v. Va. State Bd. of Elections,*** 383 U.S. 663 (1966), this principle has been repeated in numerous cases. *See, e.g.,* ***Lubin v. Panish,*** 415 U.S. 709, 717-18 (1974) (applying strict scrutiny to "moderate" filing fee requirement for ballot access, because "impecunious but serious candidates may be prevented from running"); ***Clements v. Fashing,*** 457 U.S. 957, 964-66 (1982) (observing that "heightened" equal protection scrutiny is more likely to be appropriate in ballot access cases if the classification at issue is "based on wealth"); ***Anderson v. Celebrezze,*** 460 U.S. 780, 793 (1983) ("it is especially difficult for the State to justify a restriction that limits political participation by an identify able political group whose members share a particular viewpoint, associational preference, or *economic status*") (emphasis added). Incidentally, all these cases following ***Harper*** and ***San Antonio Independent Sch. Dist. v. Rodriguez***, 411 U.S. 980 (1973). recognize that burdens on *political participation* by poor people are different.

A. Special problem created for Mr. Maclin by disenfranchising him with a felony conviction where no amount of restitution was specified to complete his sentence before the 2008 election.

Voting implicates First Amendment rights - the right of individuals to associate for the advancement of political beliefs by voting. ***Cal. Democratic Party v. Jones,*** 530 U.S. 567, 574-75 (2000); ***Brown v. Hartlage,*** 456 U.S. 45, 53 (1982); ***NAACP v. Button,*** 371 U.S. 415 (1963); ***NAACP v. Alabama,*** 357 U.S. 449 (1958). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." ***Wesberry* v. *Sanders,*** 376 U.S. 1, 17 (1964).

Laws that chill First Amendment rights by indiscriminately reaching both protected and unprotected activity are invalid under the overbreadth[7] doctrine. ***NAACP v. Button,*** 371 U.S. 415, 432-33 (1963). Legislative enactments that encompass a substantial amount of constitutionally protected activity within the parameters of criminalized conduct will be invalidated even if the statute has a legitimate application. ***City of Houston v. Hill,*** 482 U.S. 451, 458-59 (1987); ***Kolender v. Lawson,*** 461 U.S. 352, 358 n.8 (1983). Criminal statutes must be scrutinized with particular care. ***Hill,*** 482 at 458-59. The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights. ***City of Chicago v. Morales,*** 527 U.S. 41, 52 (1999)

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." ***Kolender v. Lawson*** 461 U.S. at 357. A criminal statute fails to pass constitutional muster if it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits or requires. ***Smith v. Goguen,*** 415 U.S. 566, 573 (1974) ("statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); ***United States v. Bing Sun,*** 278 F.3d 302, 309 (4th Cir. 2002) ("Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, `for no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.")[8]

While the void for vagueness doctrine is concerned with both "actual notice to citizens and arbitrary enforcement," the latter requirement of sufficient guidelines for law enforcement authorities is paramount. ***Kolender,*** 461 U.S. at 358[9]. "Where the legislature

---

[7] The overbreadth and vagueness doctrines are closely related. "[T]he overbreadth doctrine permits the facial invalidation of laws that inhibit the exercises of First Amendment rights if the impermissible applications of the law are substantial when `judged in relation to the statute's plainly legitimate sweep.'" ***City of Chicago v. Morales,*** 527 U.S. 41, 52 (1999) (citing ***Broadrick v. Oklahoma,*** 413 U.S. 601, 612-15 (1973). "[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." Id. "When vagueness permeates the text of such a law, it is subject to facial attack." Id. at 55.

[8] Vague laws offend several important values, each of which are at issue here: (1) Vague laws trap the innocent by not providing fair warning; (2) they fail to provide explicit standards for those who apply them; and (3) vague laws that abut sensitive First Amendment freedoms chill the exercise of those freedoms. ***Grayned v. Rockford,*** 408 U.S. 104, 108-09 (1972).

[9] In ***Kolender***, the Court sustained a facial challenge to a municipal ordinance that required persons who loitered to provide police with "credible and reliable" identification. The Court held that the statute provided no objectively verifiable definition of "credible and reliable" identification; it left the police with unfettered discretion to arbitrarily decide what was "credible and reliable" and therefore to decide whom to arrest. 461 U.S. at 360-61.

fails to provide such minimal guidelines, `a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" Id., *quoting* ***Smith***, 415 U.S. at 574.

When a statute implicates protected First Amendment activity, it may be attacked as void for vagueness on its face. ***Kolender,*** 461 U.S. at 358 n.8; ***Gooding v. Wilson,*** 405 U.S. 518, 520-21 (1972); ***Morales,*** 527 U.S. at 55 (where vagueness permeates the text of law infringing on constitutionally protected rights, it is subject to facial attack). Criminal statutes that implicate First Amendment rights are held to a higher standard because of the chilling effect on the exercise of those rights. See ***Reno v. American Civil Liberties Union,*** 521 U.S. 844, 871-72 (1997) (vagueness of obscenity regulations); ***Button,*** 371 U.S. at 432-33 (vagueness standards are strict in First Amendment areas of free expression and association). In that context, such vagueness may in itself deter constitutionally protected and socially desirable conduct. ***Bing Sun,*** 278 F.3d at 309.
By failing to define the amount of restitution Mr. Maclin was to pay *before* the 2008 election in order to complete his sentence and reinstate his voting rights, the State unjustly inhibited his First Amendment right to vote. The State provided no notice to Mr. Maclin as to the amount he would need to pay in restitution to reinstate his voting rights. The disenfranchisement order at the time of Mr. Maclin's sentencing crafted in his criminal case failed to provide minimal guidelines regarding the amount of restitution to be paid. This permit a standardless sweeping away of Mr. Maclin's voting rights for failing to pay this amount of restitution.

Conclusion

On April 21, 2010, Justice Stephen G. Breyer of the U.S. Supreme Court spoke at the New York Historical Society about the historical and present-day importance of the infamous ***Dred Scott*** decision, which played a critical role in bringing about the Civil War. *Guardian of the Constitution: The Counter Example of* ***Dred Scott,*** New-York Historical Society Lecture, Justice Stephen Breyer, April 21, 2010, http://www.thedefendersonline.com/2010/05/28/justice-breyer-on-the-dred-scott-decision/ Justice Breyer explained that "***Dred Scott*** was a legal and practical mistake. And for that very reason it can tell us something about the more general question, namely, it can tell us what courts cannot and should not do when politics and law overlap." Id.

Roger Taney, Chief Justice of the United States, wrote in ***Dred Scott,*** of course, that Black Americans were considered "subjugated by the dominant race…as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so inferior, that they had no rights which the white man was bound to respect." ***Dred Scott v. Sanford,*** 19 How. 393, 404-07, 15 L.Ed. 691(1857). The ***Scott*** Court initially considered the jurisdictional question. That question, the Chief Justice says, is whether "a negro, whose ancestors were imported into this country, and sold as slaves" is "entitled to sue *as a citizen* in the courts of the United States." The Chief

Justice, and the majority, setting forth highly legalistic arguments, held that the answer to this question is "no." Even if Dred Scott is a free man, he is not a "citizen." *Guardian of the Constitution,* id. The court, Taney concludes, must not "give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted . . . . It must be construed now as it was understood then." Id. Justice Benjamin Curtis, in a powerful dissent, strongly disagreed. Justice Curtis did not care to enter "into an examination of the existing opinions of that period respecting the African race." Id. Justice Curtis argued that a "*calm* comparison" of the assertion in the Declaration of Independence that "all men are created equal" with the "individual opinions and acts" of its authors "would not leave these men under a reproach of inconsistency." It would show that they "were ready and anxious to make" the "great natural rights which the Declaration of Independence asserts . . . . effectual wherever a necessary regard to circumstances would allow."

Justice Breyer went on to explain that ***Dred Scott*** is an important decision because "***Dred Scott*** teaches us the importance of solid reasoning, the dangers of reliance upon rhetoric, the need for practical constitutional interpretation consistent with our Nation's underlying values; and it teaches us the important role that morality and value play – or should play – at the intersection of law and politics."

The issues of this case presented to this Court are at the intersection of law and politics. Once again, a court is confronted with the question of whether African Americans have rights which a white man is bound to respect. This Court is called to decide whether Wisconsin's felon disenfranchisement constitutional provision and enabling statute makes a convicted felon serving a sentence a slave of the state or rather a citizen.

On one side of this issue, highly legalistic arguments akin to the ***Dred Scott*** arguments of whether a "negro" is a citizen can be made to uphold felon disenfranchisement laws. A legalistic argument could be made to once again dismiss the history of the Fifteenth Amendment, the plain language of the Voting Rights Act, the racist origins of the Wisconsin Constitution and the growing body of statistical information showing how the criminal justice system discriminates against African Americans. If this Court accepts such arguments, that would be a legal and practical mistake since it would say a convicted felon is a person but not a citizen.

The defense urges this Court to not accept such legalistic argument. As this case presents issues where politics and law overlap, this Court should look to the Congressional purpose for the enactment of the Voting Rights Act which President Bush found to be "that *all men are created equal*….The right of ordinary men and women to determine their own political future lies at the heart of the American experiment." Felony disenfranchisement laws stand in the way of this national commitment that all men are created equal in voting regardless of race. A convicted felon who cannot vote *has no opportunity to participate in the political process* and to elect representatives of their choice.

The right to vote forms the core of American democracy. It is a fundamental right protected by the privilege and immunties clause, as well as the rest of the Fourteenth and Fifteenth Amendments. Our history is marked by successful struggles to expand the franchise, to include those previously barred from the electorate because of race, class, or gender. As a result our democracy is richer, more diverse, and more representative of the people than ever before. There remains, however, one significant blanket barrier to the franchise. 5.3 million American citizens are not allowed to vote because of a felony conviction. As many as 4 million of these people live, work and raise families in our communities, but because of a conviction in their past they are still denied the right to vote.

Wisconsin is still using its original constitution. Wisconsin's felon disenfranchisement law originated in a constitution which sought to disenfranchise African Americans. The Fourteenth Amendment's Equal Protection Clause prohibits felony disenfranchisement laws that deny voting rights on account of race. The Fifteenth Amendment prohibits discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. As applied, the Wisconsin's felon disenfranchisement law discriminates by being a onerous procedural requirement which effectively discriminates in the exercise of the franchise. That intent is expressed in applying Wisconsin's felon disenfranchisement As applied, Wisconsin's felon disenfranchisement law is being applied to African Americans in a discriminatory fashion and limiting the right of suffrage by felony sentences. This practice was automatically nullified by ratification of the Fifteenth Amendment.

Section 2 of the VRA prohibits States from implementing any voting qualification or prerequisite to voting or standard, practice, or procedure in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language-minority group. In evaluating whether a given practice violates Section 2, courts must inquire whether the political processes leading to nomination or election in the State are not equally open to participation by members of a protected class of citizens in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. It is well-settled that a party can challenge voting qualifications under a 'results' test: a discriminatory result of the challenged practice--without proof of any kind of discriminatory purpose or intent--is sufficient to establish a violation of the section.

Given that the unwarranted racial disparities in the criminal justice system in the United States (in terms of policing, arrest, sentencing, and incarceration) result in felony disenfranchisement laws having a disproportionate impact on African American and Hispanic minority groups, the practice violates Section 2 of the VRA.

Further, the Twenty Fourth Amendment and Section 10 of the Voting Rights Act prohibit any poll tax, or equivalent, milder substitute that assess' court costs as a prerequisite to voting. In criminal cases, a State can no more discriminate on account of poverty than on account of religion, race, or color**.** In the criminal system, there is a flat prohibition against conditioning criminal procedures based on an indigent's ability to pay. Wisconsin's disenfranchisement law requires that before a convicted indigent felon can vote, all conditions of the indigent felon's sentence must be completed. This includes, but is not limited to, payment of the fine, costs, penalty assessment, applicable domestic abuse assessment payment, applicable driver improvement surcharge payment, applicable natural resources assessment or applicable natural resources restitution payment. In other words, for a convicted felon to once again vote, he or she will have to pay money. Indigent people face felon voting bans when they are required to pay all the fines, fees, court costs, restitution, and other legal financial obligations associated with a conviction before regaining the right to vote. Wisconsin makes the affluence of the voter or payment of any fee an electoral standard. Such a procedure violates the Twenty Fourth Amendment. In Mr. Maclin's case, this situation is exacerbated since the sentence by which he was denied the right to vote was unconstitutionally vague.

Felony disenfranchisement serves no legitimate purpose. In Wisconsin, felon disenfranchisement had its origins with the Wisconsin constitutional origins to disenfranchise African Americans. These laws are rooted in the Jim Crow era and were designed to lock freed slaves out of the voting process. Wisconsin's felon disenfranchisement laws violate various federal constitutional provisions as well as their enabling legislation. It is time to remove this last barrier to the franchise and to recognize that all persons are truly created equal, especially when voting.

Dated at Milwaukee, Wisconsin this _____ day of _____, 2010.

Respectfully submitted,
MICHAEL S. HENDERSON, Defendant
OLANDO MACLIN, Defendant

By: _____
PAUL A. KSICINSKI
Attorney for Defendant
Wis. Bar #1001228

P. O. Address:

Office of State Public Defender
819 N. 6th Street, 9th Floor
Milwaukee, Wisconsin 53203
414/227-1800