

# The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty

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## I. INTRODUCTION

Modern constitutional law and scholarship rests on a conceptual mistake: thinking of African Americans as a minority. Scholars<sup>1</sup> and courts<sup>2</sup> routinely characterize African Americans as minorities who, in various ways in the past or present, were discriminated against by a hostile or indifferent majority.<sup>3</sup> Typical is Justice Harlan's reassurance, in his dissent in *Plessy v. Ferguson*, that "[s]ixty millions of whites are in no danger from the presence here of eight millions of blacks."<sup>4</sup> Similarly, the famous Footnote 4 of *Carolene Products* explained that laws affecting "discrete and insular minorities" excluded from "political processes" might be subject to heightened judicial review.<sup>5</sup> But the premise recognized the difficulty: ordinarily, minorities must expect to lose in the political process.<sup>6</sup>

The minority model explains, even justifies, much of African American disadvantage.<sup>7</sup> Even with perfect judicial review and even if all laws had a race-neutral motivation, under the minority model African Americans remain minorities in a majoritarian system. Thus, they must anticipate failure when their interests are at odds with those of the majority. Protection of minorities as to a limited set of fundamental issues or from policies infected with provable bias does not imply that a group outnumbered eight to one will often — or ever — get its way when its preferences diverge from those

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<sup>1</sup> See *infra* notes 27-33 and accompanying text.

<sup>2</sup> See *infra* notes 34-39 and accompanying text.

<sup>3</sup> See *infra* notes 68-71 and accompanying text.

<sup>4</sup> 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

<sup>5</sup> *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938).

<sup>6</sup> See *infra* notes 40-66 and accompanying text.

<sup>7</sup> African Americans as a group generally have lower levels of education, income, home ownership, life expectancy, and voter turnout than other racial groups; they are more likely to be in prison. See, e.g., NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA: PRESCRIPTIONS FOR CHANGE* (2006).

of the majority.<sup>8</sup> Under the minority model, contemporary African American disadvantage is unfortunate, but not necessarily traceable to a legal violation.

The minority model is factually wrong in a way that has distorted the legal system's understanding of the oppression of African Americans. In the darkest days of Jim Crow, African Americans were a minority nationally, but were a majority in the states where their population was most highly concentrated. In 1880, for example, African Americans were an absolute majority in Louisiana, Mississippi, and South Carolina; and were over 40% of the population in Alabama, Florida, Georgia, and Virginia, making African Americans the largest single voting bloc in those states.<sup>9</sup> Allied with Republican whites, African Americans outnumbered conservatives and earned majority control of the electoral system in many states.<sup>10</sup> Through violence, fraud, and what under current understandings of the Fourteenth and Fifteenth Amendments were clearly unconstitutional acts engaged in, not by a white majority, but by a conservative minority, the African American majority was not merely subject to discrimination and segregation, but, far more importantly, was denied its rightful democratic authority.<sup>11</sup>

Recognizing that African Americans had majority political power creates an imperative to rethink segregation and the present condition of African Americans. Jim Crow laws burdened African Americans in ways other than discrimination. The major unrecognized harm that African Americans suffered was the loss of their legitimate domination of the electoral system. African Americans were, indeed, entitled to equal access to whatever schools happened to be available. They were also entitled to decide that educational spending would be 5x instead of x. African Americans were entitled to nondiscriminatory law enforcement and also to the power to decide that, for example, breaking an agricultural contract—a crime invented to keep the freed slaves under the control of the white minority—would not be a crime at all. They could even determine that civil rights violations or fraud against agricultural employees would be punished severely. Under the electoral system contemplated by the Constitution, the African American majority would have shaped educational policy, economic and criminal justice policy, and other aspects of state government in the South.

Recognizing the African American political majority re-opens the question of the consequences of Jim Crow. Under the minority model, disenfranchisement is part of a laundry list of indignities but remains largely symbolic. Disenfranchising Socialists or Libertarians in 2008 would be wrong, but it would not deprive them of many public offices, or significantly change the political system, because they are small minorities. As a majority, however, African Americans were entitled to reshape the states to suit

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<sup>8</sup> See *infra* notes 56-63 and accompanying text.

<sup>9</sup> See *infra* notes 90-91 and accompanying text.

<sup>10</sup> See *infra* notes 95-112 and accompanying text.

<sup>11</sup> See *infra* notes 113-180 and accompanying text.

their views of the public good. While in control in the 1860s and 1870s, they implemented policies designed to lead to economic and social advancement: education and protection against discrimination from private actors.<sup>12</sup> If the Constitution had been obeyed and those policies left in place and strengthened, the social advancement that occurred in the twentieth century might well have occurred in the nineteenth, and African Americans might now enjoy the same economic and social status enjoyed by other ethnic groups taking their place in the American community.

Recognition of African American majority status also sheds new light on the Court, its civil rights jurisprudence, and especially the so-called “counter-majoritarian difficulty.”<sup>13</sup> The task of constitutional law, John Hart Ely wrote in *Democracy and Distrust*, “has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule.”<sup>14</sup> The counter-majoritarian difficulty posits that laws are presumptively legitimate as the fruit of the democratic process and majority will. Judicial interference therefore requires explanation and justification.<sup>15</sup> The modern counter-majoritarian difficulty begins with *Brown*,<sup>16</sup> “arguably the first explicit, self-conscious departure from the traditional view that the Court may override democratic decisions only on the basis of the Constitution’s text, history and interpretive tradition—not on considerations of modern social policy.”<sup>17</sup>

The minority model implies that cases like *Plessy v. Ferguson*<sup>18</sup> were good-faith if wrongheaded efforts to balance majority rule and minority rights.<sup>19</sup> But if African Americans were a majority, then there was no tension between majority rule and constitutional rights; both pointed towards invalidation of the statute. A close reading shows that in *Plessy* and other important decisions,<sup>20</sup> the Court knew it was reviewing laws passed by a minority to oppress the majority. Therefore, the fact that African Americans were a majority shows that the modern counter-majoritarian difficulty was preceded by a majoritarian difficulty. What should courts do when reviewing laws not

<sup>12</sup> See *infra* notes 181-232 and accompanying text.

<sup>13</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986) (introducing the term “counter-majoritarian difficulty”).

<sup>14</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 8 (1980).

<sup>15</sup> See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL’Y 401, 403-04 (2006) (“[T]hose who have pondered the matter have always recognized that the ideal of judicial review has basically antidemocratic and antimajoritarian facets that require some justification in this Nation, which prides itself on being a self-governing representative democracy.”).

<sup>16</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>17</sup> Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949 (1995).

<sup>18</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>19</sup> See, e.g., OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* 361 (1993) (concluding that “liberty” was at issue for the Court in *Plessy*).

<sup>20</sup> See *infra* Section IV(A).

based on the will of the majority but designed to oppress the majority on behalf of a minority?

Recognizing an African American majority means that in *Brown* and other segregation cases, the Court reviewed policies created by a minority to oppress the majority. The criminal justice cases also often involved African Americans oppressed in the South.<sup>21</sup> When the Court failed to protect African American interests, it did not bow to legitimate majorities; instead, it approved oppression of majorities by a minority. When the Court later invalidated some of these laws, it did not act against the will of the majority; rather, it invalidated laws and policies that almost certainly could not have existed as they did had majoritarian politics operated.

Part I outlines the Minority Model of African American disadvantage. It demonstrates that African Americans are characterized as a minority, and therefore, that under majority rule, African Americans were only entitled to protection with respect to a limited set of interests. Accordingly, their current situation is a combination of a bad starting point, private discrimination, and public policy legitimately oriented to the majority, as well as discrimination cognizable by law. But under the Minority Model, there is no reason to think that all disadvantage results from legal violation.<sup>22</sup>

Part II explains why understanding African Americans as a minority in the Jim Crow era is mistaken.<sup>23</sup> It also explains how African American political control was ended. There was a two stage process: force and fraud, cemented in place by constitutional changes designed to ensure permanent African American disenfranchisement.<sup>24</sup> Part III outlines the practical effects of disenfranchising a controlling majority in a large part of the United States.<sup>25</sup> Part IV explores the counter-majoritarian difficulty in light of the African American majority.<sup>26</sup>

## II. THE MINORITY MODEL

### A. *African Americans as a Minority*

Both scholars and courts understand the burden of African Americans as a result of their status as minorities. Historian Henry Steele Commager's *Majority Rule and Minority Rights* is typical: "[T]here has been but one example of a deliberate and sustained effort by a majority to subvert constitutional rights or oppress a minority, the determination of Southern whites to frustrate the Fourteenth and Fifteenth Amendments, in so far as these at-

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<sup>21</sup> See *infra* notes 321-345 and accompanying text.

<sup>22</sup> See *infra* notes 27-86 and accompanying text.

<sup>23</sup> See *infra* notes 87-112 and accompanying text.

<sup>24</sup> See *infra* notes 113-180 and accompanying text.

<sup>25</sup> See *infra* notes 181-261 and accompanying text.

<sup>26</sup> See *infra* notes 262-345 and accompanying text.

tempted to assure political and social rights to Negroes.”<sup>27</sup> Under this view, the Fourteenth and Fifteenth Amendments were designed to protect African Americans as minorities from majority oppression. Thus, Philip Frickey’s article *Majority Rule, Minority Rights and the Right to Vote*, explained: “The core historical purpose of both amendments was, after all, to provide enhanced protections to racial minorities.”<sup>28</sup> Similarly, Emma Coleman Jordan wrote that “the fifteenth amendment is the primary repository of the constitutional value of preserving the political access and participation of blacks and other racial minorities.”<sup>29</sup>

Some scholars describe the historical discrimination experienced by African Americans as happening to a “minority”<sup>30</sup> or identify the purpose of the Fourteenth or Fifteenth Amendment as protecting African Americans and other minorities.<sup>31</sup> Other scholars refer to African Americans as minorities

<sup>27</sup> HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 61 (1943). See also *id.* at 64 (“The determination of the white majority of the South, since the Civil War, to ‘keep the negro in his place’ is again one difficult to reconcile with my theory that democracies are not inimical to freedom . . . [perhaps, among other reasons,] the local majorities do not represent national majorities.”); Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 592 (1999) (“Consistent with Madison’s intuition that majority factions are more likely to dominate weak minorities at lower levels of government, the history of racial subordination in the United States has been marked by a great deal of state sponsorship or acquiescence in racist acts and policies.”); Robert P. Davidow, *George Mason on the Tension Between Majority Rule and Minority Rights*, 10 GEO. MASON L. REV. 1 (1987).

<sup>28</sup> Philip P. Frickey, *Majority Rule, Minority Rights, and the Right to Vote: Reflections Upon a Reading of Minority Vote Dilution*, 3 LAW & INEQ. 209, 234 (1985).

<sup>29</sup> Emma C. Jordan, *The Future of the Fifteenth Amendment*, 28 HOW. L.J. 541, 561-62 (1985).

<sup>30</sup> See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 75 (1980) (pointing out that “minority racial groups . . . were illegally disenfranchised in certain parts of the nation”); ELY, *supra* note 14, at 8; *id.* at 135 (noting pluralist model of democracy sometimes fails, “as the single example of how our society has treated the black minority (even after that minority had gained every official attribute of access to the process) is more than sufficient to prove.”); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Dennis J. Hutchinson, *A Century of Social Reform: The Judicial Role*, 4 GREEN BAG 2d 157, 159 (2001) (discussing “[t]he plight of racial minorities, especially blacks, in the early twentieth century”); Nathaniel R. Jones, *Federal Powers as Used to Protect Minority Rights*, 1987 BYU L. REV. 815, 821 (1987) (stating that after reconstruction, “the blacks lost the only thing that stood between them and the white majority bent on reasserting their domination—the right to vote.”); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1168 (2002) (“‘Suspect classes’ referred to minority groups historically treated with . . . prejudice and hostility.”); Girardeau A. Spann, *Neutralizing Grutter*, 7 U. PA. J. CONST. L. 633, 648 (2005) (“Even after adoption of the Fifteenth Amendment, however, blacks were effectively disenfranchised in many states by devices such as poll taxes, literacy tests, and voting districts which diluted minority voting strength.”).

<sup>31</sup> See, e.g., Akhli Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 HARV. J.L. & PUB. POL’Y 219, 223 (1998) (“[T]he Fourteenth Amendment is about protecting discrete and insular minorities—paradigmatically, black people and Unionists in the South.”); Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 984 (2002) (“The reach of the Fourteenth Amendment, beyond the grant of citizenship to the freed slaves and other Blacks and racial minorities, is murkier than the reach of the Thirteenth.”); Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 93 (1989) (discussing difficulties of originalism; “[f]or example, should the abstract intent of the framers of the fourteenth amendment be seen as protecting former slaves, protect-

without addressing whether that has always been the case.<sup>32</sup> A handful of legal scholars have acknowledged African American majority status in Southern states, but seem not to focus on the potential implications of that fact.<sup>33</sup>

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ing blacks, protecting racial minorities, protecting all 'discrete and insular' minorities, or protecting everyone in society from unjust discrimination?"); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 195 n.52 (2001) ("Ironically, the 15th Amendment was designed to protect the rights of racial minorities, specifically African-Americans, from voting restrictions intended to limit the franchise to the dominant white majority."); Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 114 (1966) ("The thirteenth, fourteenth, and fifteenth amendments express a national commitment to assuring Negroes as well as other minorities equality at the hands of government. Under the conditions and political philosophy of the nineteenth century this meant chiefly the removal of civil and political disabilities and the invalidation of discriminatory legislation."); A. Leon Higginbotham, *United States v. Hays: Brief for the Congressional Black Caucus as Amicus Curiae in Support as Appellants*, 38 HOW. L.J. 665, 671 (1995) ("The Fourteenth and Fifteenth Amendments to the Constitution expressly pledge to eradicate the political exclusion of racial minorities, particularly African Americans."); Jones, *supra* note 30 at 815-16 ("The history of the federal government's role in the protection of minority rights is extensive and varied. . . . President Lincoln's Emancipation Proclamation and the ratification of the thirteenth, fourteenth and fifteenth amendments . . . were the basic federal efforts to ensure the continued vitality of the civil rights statutes previously enacted."); R.A. Lenhardt, *Understanding The Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 883 (2004) ("[T]he prevention and elimination of the racial stigmatization of African Americans and other minorities lay at the heart of the purposes that the Fourteenth Amendment was enacted to achieve."); Max Lerner, *Minority Rule and the Constitutional Tradition*, 86 U. PA. L. REV. 457, 467-68 (1938) (referring to "the Fourteenth Amendment, the heart of the protection of minority rights"); John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1105 (2000) ("When Section 2 of the Fourteenth Amendment failed to spur Southern states to grant black persons the right to vote, there was enough Reconstruction sentiment left in the North for ratification of the Fifteenth Amendment, guaranteeing a right to vote for all persons (at least men) regardless of race and granting Congress the power to take steps to enforce that right in states that were failing to allow minority race persons to vote."); Stephen Reinhardt, *Remarks at UCLA Law School Forum on Affirmative Action: "Where Have You Gone, Jackie Robinson?"*, 43 UCLA L. REV. 1731, 1731 (1996) (arguing that "a great constitutional principle designed to aid historically deprived minorities—or, to speak more bluntly, a historically enslaved minority—to achieve liberty, equality, and justice, and have turned that principle, the Fourteenth Amendment, into a cold, harsh, and inflexible barrier against progress by African Americans."); Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 795 (1996) ("In debates over the Fourteenth Amendment, the Republicans frequently emphasized that they believed all persons, white as well as black, should have the same civil rights, rejecting any notion that the Amendment was intended to protect racial minorities alone.").

<sup>32</sup> See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1296 (1982) (noting that *Carolene Products* identified "the risks in relying upon majoritarian politics to preserve a minority's rights"); Owen M. Fiss, *The Jurisprudence of Busing*, 39 L. & CONTEMP. PROBS. 194, 216 (1975) ("[W]e are dealing with the claim of the racial minority, and . . . the decisional power is generally in the hands of the members of the dominant racial class."); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 231-32 (1991) (noting that a "strand of equal protection cases during this pre-*Brown* era was comprised . . . of governmental action purposefully disadvantaging a racial minority, rather than according formally equal treatment.").

<sup>33</sup> Although he has not written about the issues discussed here, Richard H. Pildes clearly understands the problem. See Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*,

Courts also regard African Americans as minorities; Justice Harlan's dissent in *Plessy* and *Carolene Products* Footnote 4 are notable examples.<sup>34</sup> More recently, Justice Powell's decision in *Bakke* understood the Fourteenth Amendment as adopted to protect a minority: "many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority.'" <sup>35</sup> Similarly, the plurality in *City of Richmond v. J.A. Croson Co.*, explained that "past discrimination" affected "the opportunities enjoyed by minority groups in our society."<sup>36</sup> Justice Stevens' dissent for himself and Justice Ginsburg in *Adarand* distinguished affirmative action from segregation, explaining: "Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society."<sup>37</sup> Other Supreme Court<sup>38</sup> and lower

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17 CONST. COMMENT. 295, 300 & n.18 (2000) (discussing African American population and voting majority in Mississippi); see also Melissa L. Saunders, *Of Minority Representation, Multiple-Race Responses, and Melting Pots: Redistricting in the New America*, 79 N.C. L. REV. 1367, 1378 (2001) (noting African American majority in South Carolina).

<sup>34</sup> See *United States v. Carolene Prod.*, 304 U.S. 144, 152, n.4 (1938); *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896).

<sup>35</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 293 (1978) (opinion of Powell, J.). "Majority" was in quotes because of the diversity of the "white" population: "[d]uring the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle — and to some extent struggles still — to overcome the prejudices not of a monolithic majority, but of a 'majority' composed of various minority groups." *Id.* at 292. Justice Powell also referred to the "continued exclusion of Negroes from the mainstream of American society." *Id.* at 294.

<sup>36</sup> 488 U.S. 469, 476-77 (1989).

<sup>37</sup> *Adarand Constructors v. Pena*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting).

<sup>38</sup> See, e.g., *Smith v. City of Jackson*, 544 U.S. 228, 258 (2005) (O'Connor, J., concurring, joined by Kennedy & Thomas, JJ.) ("No one would argue that older workers have suffered disadvantages as a result of entrenched historical patterns of discrimination, like racial minorities have."); *Abrams v. Johnson*, 521 U.S. 74, 117 (1997) (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.) (referring to "racial minorities in whom historical discrimination has induced apathy" with regard to voting); *Miller v. Johnson*, 515 U.S. 900, 948 (1995) (Ginsburg, J., dissenting, joined by Stevens & Breyer, JJ.) ("A history of exclusion from state politics left racial minorities without clout to extract provisions for fair representation in the lawmaking forum. The equal protection rights of minority voters thus could have remained unrealized absent the Judiciary's close surveillance. [*Carolene Products*.] The majority, by definition, encounters no such blockage.") (citations omitted); *Johnson v. De Grandy*, 512 U.S. 997, 1004 (1994) (noting lower court's finding that "Florida's minorities bore the social, economic, and political effects of past discrimination"); *Holder v. Hall*, 512 U.S. 875, 954 n.6 (1994) (Blackmun, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.) (discussing factors used for determining vote dilution including "the extent of any history of official discrimination . . . that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.") (quoting S. Rep. No. 97-417, at 28-29 (1982)); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) ("We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history."); *United States v. Fordice*, 505 U.S. 717, 754 (1992) (Scalia, J., concurring and dissenting) ("The constitutional evil of the 'separate but equal' regime that we confronted in *Brown I* was that blacks were told to go to one set of schools, whites to another. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). What made this 'even-handed' racial partitioning offensive to equal protection was its implicit stigmatization of minority students"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989)

court<sup>39</sup> opinions understand African Americans as a minority.

### B. Majority Rule and Minority Rights

There is an inherent limit on minority power in a democracy: “in a majoritarian system, numerical minorities lose elections.”<sup>40</sup> This argument is powerful; the principle of majority rule is at the marrow of the Constitution.<sup>41</sup> It is also a widely shared political philosophy. Alexander Hamilton

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(Marshall, J., dissenting, joined by Brennan & Blackmun, JJ.) (noting “the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation’s history and continues to scar our society.”); *Miss. Repub. Exec. Comm. v. Brooks*, 469 U.S. 1002, 1004 (1984) (Stevens, J., concurring) (noting district court finding that “black minority in Mississippi” had impaired political strength because of “a long history of *de jure* and *de facto* race discrimination”); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 609 n.15 (1979) (White, J., dissenting, joined by Marshall, J.) (“Heroin addiction is a special problem of the poor, and the addict population is composed largely of racial minorities that the Court has previously recognized as politically powerless and historical subjects of majoritarian neglect.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 353 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part, joined by White, Marshall & Blackmun, JJ.) (referring to “past societal discrimination against racial minorities such as Negroes”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (noting a suspect class is one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”); *id.* at 109 (White, J., joined by Douglas and Brennan, JJ.) (noting “the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie” equal protection); *Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (Douglas, J., concurring and dissenting) (“[T]he [literacy] tests have been used . . . as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians . . .”).

<sup>39</sup> See, e.g., *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 708 n.2 (2d Cir. 1982) (“Although the original purpose of the 14th Amendment was to protect the civil rights of black persons, [courts] recognized . . . that its protections would extend to members of other minority groups.”); *Kirksey v. City of Jackson, Miss.*, 663 F.2d 659, 664 (5th Cir. 1981) (“The goal of the fourteenth and fifteenth amendments ‘is to assure “effective black minority participation in democracy.”’”) (citations omitted); *Alevy v. Downstate Med. Ctr.*, 348 N.E.2d 537, 544 (N.Y. 1976) (“The Fourteenth Amendment was adopted to guarantee equality for Blacks, and by logical extension has come to include all minority groups.”); *Baker v. State*, 744 A.2d 864, 874 (Vt. 1999) (“Fourteenth Amendment[’s] origin and language reflect the solicitude of a dominant white society for an historically-oppressed African-American minority”).

<sup>40</sup> *Holder v. Hall*, 512 U.S. 874, 901 n.10 (1994) (Thomas, J., concurring, joined by Scalia, J.); *id.* (“I had supposed that the essence of our republican arrangement is that *voting* minorities lose”) (quoting *League of United Latin Am. Citizens v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1507 (5th Cir. 1987) (Higginbotham, J., dissenting)).

<sup>41</sup> E.g., U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of government . . .”). The Court reinforced this principle in *Reynolds v. Sims*, 377 U.S. 533 (1964), holding:

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.

*Id.* at 565. See also Vikram Amar, *The 20th Century - The Amendments and Populist Century*, 47 FED. LAW. 32, 34 (2000) (“[T]he most enduring and central meaning of the republican form of government is the idea of majority rule.”); Michael W. McConnell, *The*

called majority rule “the fundamental principle of free government.”<sup>42</sup> The alternative, minority rule, is unthinkable.<sup>43</sup> Perhaps, it is tolerable to allow a minority of Senators to filibuster legislation or a minority of states to kill a constitutional amendment, but that is quite different than allowing a minority of Senators or states to pass legislation.

Thus, although ideally majorities should respect the interests of minorities,<sup>44</sup> and some fundamental rights should not be subject to majoritarian control, at some point, on some issues, the majority is entitled to have its way.<sup>45</sup> The problem arises particularly in connection with judicial protection of minority rights, because legislative protection of minorities is itself ordinarily the product of majoritarian processes and therefore unlikely to violate the principles of majority rule.<sup>46</sup> But judicial protection of minorities has long been understood to present a potential threat to the legitimate prerogatives of majorities. NYU Law Professor Ralph Bischoff’s 1953 article *Minority Rights and Majority Rule*,<sup>47</sup> expressed a concern with instances “in

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*Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 105 (2000) (“A districting scheme so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government.”).

<sup>42</sup> THE FEDERALIST NO. 58 (Alexander Hamilton).

<sup>43</sup> “Majority rule” assumes an electoral system with the characteristic that those legally eligible to vote can ordinarily do so without unreasonable impediment and that the candidate or legislative proposal with the most votes will not ordinarily lose in favor of one receiving a lesser number. Certainly, majority preferences do not always turn into laws or electoral victories under majority rule as the term is used here. So long as they do so through majoritarian means, that cohesive minorities can achieve political success is consistent with this use of majority rule. See, e.g., HARMON ZEIGLER, *INTEREST GROUPS IN AMERICAN SOCIETY* (1964); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983); Gary S. Becker, *Pressure Groups and Political Behavior*, in *CAPITALISM AND DEMOCRACY: SCHUMPETER REVISITED* 120 (Richard D. Coe & Charles K. Wilber eds., 1985); Gary S. Becker, *Public Policies, Pressure Groups, and Dead Weight Costs*, 28 J. PUB. ECON. 329 (1985); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

<sup>44</sup> The Framers knew the risks of majority oppression of political minorities. See, e.g., Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059, 1065-66 (1974) (discussing work of James Madison).

<sup>45</sup> Lani Guinier’s work demonstrates some of these points. See GUINIER, *supra* note 32. Her suggested use of cumulative or transferable votes makes clear that traditional voting methods lead to disappointing results for minorities. On the other hand, her arguments are deeply majoritarian in several senses. First, her work is addressed ultimately to the majority; her claim is that for the good of society, Congress should (or, perhaps, has to) give minorities more voice in the political process. Second, even if her proposals are adopted into law, they still offer victories to majorities. Thus, if we imagine a jurisdiction of 100,000 electing nine commissioners, and a one-ninth minority, under an at-large system, the minority elects no commissioner; under a transferable cumulative voting system where each voter receives nine votes and can allocate some or all to a single candidate, it would still be the top nine votegetters who win office, and still the eight-ninths majority who will elect most of the commissioners.

<sup>46</sup> See, e.g., John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) (“A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others.”).

<sup>47</sup> 39 VA. L. REV. 607 (1953).

which a decision in favor of a minority is more of an invasion of the civil rights of members of the majority than a protection to the minority.”<sup>48</sup>

In the wake of *Brown v. Board of Education*,<sup>49</sup> decided a year later, the problem Professor Bischoff identified became the “central obsession of modern constitutional scholarship.”<sup>50</sup> Professor Alexander Bickel, author of the term “counter-majoritarian difficulty,” wrote “that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system.”<sup>51</sup> “The root difficulty,” wrote Bickel, “is that judicial review is a counter-majoritarian force in our system. . . . [I]t thwarts the will of the representatives of the actual people here and now; it exercises control, not on behalf of the prevailing majority, but against it.”<sup>52</sup>

In every case where a minority asserts a claim based on constitutional rights, the court faces a dilemma. An erroneous decision against the minority will allow violation of the minority’s rights. But, as Chief Justice Rehnquist explained after criticizing *Plessy* and *Korematsu v. United States*,<sup>53</sup> “there is an equally great danger on the other side that the Court will expand beyond their fair meaning some of the provisions of the Constitution that restrict governmental authority, and thereby impair not individual rights but the principle of majority rule.”<sup>54</sup> Judicial consideration of minority rights inevitably involves balancing legitimate interests on the other side. Therefore, even in the fairest possible system, it would hardly be surprising if on occasion courts erroneously ruled against a minority. In fact, many scholars conclude that the Court rarely intervenes on behalf of minorities against the majority’s will.<sup>55</sup>

Whether judicial review protects minority rights well or poorly, most matters of government policy do not involve fundamental constitutional rights or provable discrimination and are therefore subject to unrestricted majoritarian control. Although the government at all levels spends a great

<sup>48</sup> *Id.* at 612. See also, e.g., Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1163 (1977) (“‘Democracy’ means government by the people, either directly or through representation. Although a commitment to it does not entail acceptance of simplistic majoritarianism, there remains the question why, in a nation generally committed to democratic values, a minority should have a special claim to promote its interests outside the political process.”).

<sup>49</sup> 347 U.S. 483 (1954).

<sup>50</sup> Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998).

<sup>51</sup> BICKEL, *supra* note 13, at 19.

<sup>52</sup> *Id.* at 16-17.

<sup>53</sup> 323 U.S. 214 (1944).

<sup>54</sup> WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 313 (1987).

<sup>55</sup> COMMAGER, *supra* note 27, at 55 (review “reveals no instance (with the possible exception of the dubious Wong Wing case) where the court has intervened on behalf of the underprivileged—the Negro, the alien, women, children, workers, tenant-farmers.”); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996); Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004).

deal of money, minority groups cannot challenge most majoritarian policies in court.<sup>56</sup> Thus, according to the Court, there is no federal constitutional right to education,<sup>57</sup> welfare or public benefits,<sup>58</sup> housing,<sup>59</sup> medical care,<sup>60</sup> or police protection.<sup>61</sup> Although government is deeply involved in all of these areas, its choices are subject to majoritarian rather than judicial control. Laws, even penal laws,<sup>62</sup> with discriminatory impact against a racial or religious minority<sup>63</sup> are not subject to judicial invalidation in the absence of proof that they were intended to harm a particular group. The Federal Constitution as interpreted by the Supreme Court, leaves even discrete and insular minorities to fight these issues out in the majoritarian political process.

### C. *The Nature of the Injury to African Americans*

In order to reach its full potential in society, a particular minority group might need education, health care, and legal protection of access to private opportunities such as public accommodations and private employment, financed through taxation. If the majority rejects these policies not out of provable animus, but in favor of lower taxes or expenditure of available resources on other programs, the minority group may not prosper, but there is no constitutional violation and no legal injury. The law is concerned with injuries attributable to discrimination, to a minority's "discrete and insular" status, not merely to the fact that it is an electoral minority.

In cases like *Washington v. Davis*, where the Supreme Court held that the Fourteenth Amendment invalidated only legislation with a discriminatory purpose, not merely a discriminatory effect, the Court candidly acknowledged that respect for the interests of the majority systematically disadvantaged minorities:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.<sup>64</sup>

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<sup>56</sup> *But see* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED (1997) (arguing for constitutional protection of social rights).

<sup>57</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-39 (1973).

<sup>58</sup> *Atkins v. Parker*, 472 U.S. 115 (1985); *Dandridge v. Williams*, 397 U.S. 471 (1970).

<sup>59</sup> *Lindsey v. Normet*, 405 U.S. 56 (1972).

<sup>60</sup> *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>61</sup> *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005); *DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189 (1989).

<sup>62</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987).

<sup>63</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>64</sup> *Id.* at 248.

Although the democratic process routinely disadvantages some groups who are unable to win the majoritarian game, that the Supreme Court says, is a legitimate and natural fact of politics.<sup>65</sup>

On this view, it is easy to understand what happened to African Americans as largely beyond the concern of the Constitution; as a poor, uneducated minority group when the bulk were freed from slavery, it is hardly surprising that African Americans would face a long journey before reaching the education and income levels of people who had been privileged (or at least not slaves) for generations. Legally cognizable discrimination against African Americans existed as well, but this discrimination was layered on top of an initial situation, a recent experience with slavery, that even those most committed to African American welfare had to admit was bad.<sup>66</sup> Slavery itself was not only not a constitutionally cognizable injury but was specifically acknowledged and recognized in the Constitution.<sup>67</sup>

Decisions of the Supreme Court in the post-Fourteenth Amendment period understood the constitutional injury to African Americans as limited in two ways. First, what happened was “discrimination,” in the sense of segregation, exclusion from equal opportunities, and being barred from the mainstream institutions of society.<sup>68</sup> Consistent with the conception of African Americans as minorities, there is no suggestion in its decisions that the Court believed African Americans were entitled to shape the state governments, legal systems, and economies in which they found themselves. Thus, Justice Ginsburg explained in an affirmative action case: “The racial and ethnic groups to which the College accords special consideration (African-Americans, Hispanics and Native Americans) historically have been relegated to inferior status by law and social practice; their members continue to

<sup>65</sup> The Court revisited the issue three years later, explaining:

The calculus of effects, the manner in which a particular law reverberates in society, is a legislative and not a judicial responsibility. . . . When some other independent right is not at stake and when there is no “reason to infer antipathy,” it is presumed that “even improvident decisions will eventually be rectified by the democratic process.”

*Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979) (citations omitted).

<sup>66</sup> Cf. George R. LaNoue & John Sullivan, “*But For*” Discrimination: How Many Minority-Owned Businesses Would There Be?, 24 COLUM. HUM. RTS. L. REV. 93, 93 (1992-93) (“[T]here can be little disagreement that persons from groups suffering discrimination experienced prejudice if they chose to operate a business. . . . Business disadvantages also stemmed from more indirect problems of inferior education, housing and transportation; or from language deficiencies or cultural preferences that hampered competitive abilities in a market economy.”); William A. Strang, *Minority Economic Development: The Problem of Business Failures*, 36 L. & CONTEMP. PROBS. 119, 119 (1971) (“Past discriminations have placed them in a weak competitive position in terms of capital, experience and entrepreneurial motivation.”).

<sup>67</sup> This issue is not simple, of course. See ALFRED L. BROPHY, *REPARATIONS: PRO & CON* (2006).

<sup>68</sup> See, e.g., Henry P. Monaghan, *Law and the Negro Revolution: Ten Years Later*, 44 B.U. L. REV. 467, 467 (1964) (“The broad goal is readily discernable. The Negro demands admittance to American public life, to the schools, theaters, restaurants, hotels, job opportunities and the like which comprise the ‘public’ sector of our society.”).

experience class-based discrimination to this day.”<sup>69</sup> Justice Brennan’s opinion in *Bakke* for himself and three other justices conceptualized the stakes in similar ways: affirmative action was appropriate to “remedy disadvantages cast on minorities by past racial prejudice.”<sup>70</sup> “After enactment of the Fourteenth Amendment the States continued to deny Negroes equal educational opportunity, enforcing a strict policy of segregation that stamped Negroes as inferior, that relegated minorities to inferior educational institutions, and that denied them intercourse in the mainstream of professional life necessary to advancement.”<sup>71</sup>

Second, the Court generally requires a search not just for discrimination, but for specific forms of illegal discrimination. The justices agree that remedies for unconstitutional discrimination should “restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”<sup>72</sup> For example, in the context of desegregating public schools, the Court has required consideration of “every facet of school operations — faculty, staff, transportation, extra-curricular activities, and facilities.”<sup>73</sup> “The objective [is] to eliminate from the public schools all vestiges of state-imposed segregation.”<sup>74</sup> However, “judicial powers may be exercised only on the basis of a constitutional violation.”<sup>75</sup> The remedy is “determined by the nature and scope of the constitutional violation.”<sup>76</sup>

The difficulty of implementing remedies is complicated by the requirement of precisely identifying the injury caused by the illegal action. Thus, in the Dayton school segregation case, the Court required the District Court to “determine how much incremental segregative effect these violations had on

<sup>69</sup> *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting).

<sup>70</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 325 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part); *id.* at 328 (discussing “minorities who have been historically excluded from the full benefits of American life”); *id.* at 360 (discussing the “hazard of stigma” and the danger of promoting the view that “racial minorities are inherently incapable of succeeding on their own”).

<sup>71</sup> *Id.* at 371. *See also, e.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200, 218 (1995) (plurality opinion) (“Most of the cases discussed above involve classifications burdening groups that have suffered discrimination in our society.”); *id.* at 237 (“The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.”); *id.* at 239 (Scalia, J., concurring) (“To pursue the concept of racial entitlement — even for the most admirable and benign of purposes — is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred.”); *id.* at 240 (Thomas, J., concurring) (“Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society.”).

<sup>72</sup> *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (*Milliken II*) (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (*Milliken I*))). *See also* *Adarand Constructors v. Peña*, 515 U.S. 200, 269-70 (1995) (Breyer, J., dissenting) (collecting cases).

<sup>73</sup> *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 435 (1968). *See also* *Milliken II*, 433 U.S. at 287-88.

<sup>74</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

<sup>75</sup> *Id.* at 16.

<sup>76</sup> *Milliken II*, 433 U.S. at 280 (citing *Swann*, 402 U.S. at 16).

the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations.”<sup>77</sup> The Court refused to assume that all segregation was due to illegal causes, even in a jurisdiction with a formal policy of racial segregation.

Even proven violators have no obligation to remedy circumstances “caused by factors for which the defendants could not be considered responsible.”<sup>78</sup> Thus, according to Justice Stewart, the racial composition of the Detroit public schools was “caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears”; courts cannot intervene without proof of state action.<sup>79</sup> Where a situation is “a product not of state action but of private choices, it does not have constitutional implications. . . . The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless must be so real that they have a causal link to the *de jure* violation being remedied.”<sup>80</sup> More recently, in *Missouri v. Jenkins*, all justices agreed that disappointing student test scores could not automatically be treated as vestiges of the segregated system; “numerous external factors beyond the control of [the state] affect minority student achievement.”<sup>81</sup>

Under the minority model, African American disadvantage flowed partly from unfortunate historical circumstances, partly from private decisions beyond legal regulation, partly from policy decisions within the legitimate authority of the majority, and partly from unlawful discrimination. Only the last of these causes is subject to condemnation under the Fourteenth Amendment, and separating the discrete results of each of these practices is no easy matter.<sup>82</sup> As the Court said in *Wygant v. Jackson Board of Education*:

<sup>77</sup> *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977).

<sup>78</sup> *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976).

<sup>79</sup> *Milliken I*, 418 U.S. at 756 n.2 (Stewart, J., concurring).

<sup>80</sup> *Freeman v. Pitts*, 503 U.S. 467, 495, 496 (1992). *See also id.* at 503 (Scalia, J., concurring) (“Racially imbalanced schools are hence the product of a blend of public and private actions, and any assessment that they would not be [as] segregated, in the absence of a particular one of those factors is guesswork. It is similarly guesswork, of course, to say that they *would* be segregated, or would be as segregated, in the absence of one of those factors.”).

<sup>81</sup> *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995); *id.* at 117 (Thomas, J., concurring) (“District Courts must not confuse the consequences of *de jure* segregation with the results of larger social forces or of private decisions.”); *id.* at 121 (“The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the state does not interfere with their choices on the basis of race.”); *id.* at 153 (Souter, J., dissenting) (“[I]t would be error to require that the students in a school district attain the national average test score as a prerequisite to a finding of partial unitary status, if only because all sorts of causes independent of the vestiges of past school segregation might stand in the way of that goal.”).

<sup>82</sup> *See Shaw v. Hunt*, 517 U.S. 899, 909 (1996); Girardeau A. Spann, *Constitutionalizing and Defining Racial Equality: The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 230 n.53 (2004) (discussing “general societal discrimination” limitation).

No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.<sup>83</sup>

The Court is skeptical that African American disadvantage today is even presumptively linked to unconstitutional discrimination. In 1977, the Supreme Court made statements that, read broadly, implied a belief that a level playing field would ultimately lead African Americans to a roughly proportional share of the desirable parts of American life.<sup>84</sup> But by the 1989 *Croson* decision, a majority of the Court rejected this view.<sup>85</sup> At stake was a preference program designed to ensure that a certain percentage of city contracts went to minority-owned businesses in Richmond, Virginia. The Court held there was no basis to assume that the absence of minority contractors was tied to unconstitutional discrimination:

While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota . . . [i]t is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, just as it was sheer speculation how many minority medical students there would have been admitted at Davis absent past discrimination in educational opportunities. . . . There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.<sup>86</sup>

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<sup>83</sup> 476 U.S. 267, 276 (1986) (plurality); *id.* at 288 (O'Connor, J., concurring) ("I agree with the plurality that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.")

<sup>84</sup> See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977) ("[N]ondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population.") (quoting *Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977)).

<sup>85</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>86</sup> *Id.* at 499, 503; see also *id.* at 507-08 ("But it is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.") (quoting *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring and dissenting)); Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment for Racial Minorities*, 1974 SUP. CT. REV. 1, 17 ("Many groups are underrepresented in various occupations for reasons of taste, opportunity, or aptitude unrelated to discrimination. There is no basis for a

Under the minority model, then, there is no strong reason to believe that present-day African American disadvantage stems from violations of law.

### III. THE TYRANNY MODEL

The minority model naturally and reasonably led to the conclusion that segregation and Jim Crow was a partial and limited cause of African American disadvantage. This section challenges the underlying factual premise of the minority model and argues African Americans were not a minority, but an electoral majority or controlling plurality which dominated Southern states under free elections. They lost their majority power through unconstitutional means. Thus, the disadvantages they experienced were the result not of majoritarian indifference or discrimination, but of minority tyranny.

#### A. *The African American Majority: Population and Politics*

The 1860s brought a rapid improvement in the legal status of enslaved African Americans. The Emancipation Proclamation offered freedom in theory.<sup>87</sup> The Thirteenth Amendment formally ended slavery.<sup>88</sup> The Fourteenth Amendment granted citizenship.<sup>89</sup> The Fourteenth Amendment did not, however, give African Americans a constitutional right to vote. Section 2 of the Fourteenth Amendment threatened to reduce the representation in Congress of any state not allowing African Americans to vote, but the very existence of the penalty implied that states retained the power to disenfranchise on the basis of race. When the carrot did not work (no Southern state enfranchised African Americans in exchange for greater representation in Congress), a big stick followed: in 1867, Congress passed legislation, applicable to the Confederate states under military occupation, allowing African Americans to vote under the protection of the U.S. Army.<sup>90</sup> The ratification of the Fifteenth Amendment in 1870 gave constitutional protection to the reality of African American suffrage throughout the South.<sup>91</sup>

Politically, enfranchisement was good news for African Americans. If the Constitution's words were to be believed, African Americans were in a

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presumption that but for past discrimination, the four minorities favored by the University of Washington Law School would supply 20 percent of the nation's lawyers.”).

<sup>87</sup> JOHN HOPE FRANKLIN, *THE EMANCIPATION PROCLAMATION 96-98* (1963) (reprinting Proclamation). Of course, a U.S. law could have no effect in an area under enemy military control.

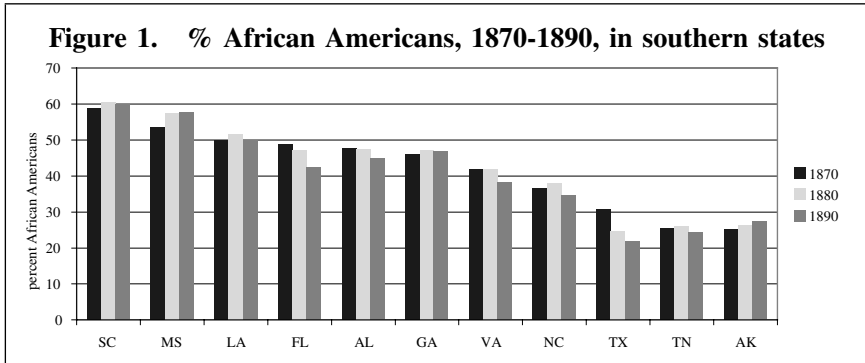
<sup>88</sup> U.S. CONST. amend. XIII.

<sup>89</sup> U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”).

<sup>90</sup> See Gabriel J. Chin, *The “Voting Rights Act of 1867”: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1590-91 (2004).

<sup>91</sup> See Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 271-72 (2004).

dominant position. Simple demographics make the case. The Census of 1870 showed that African Americans made up a majority of the population in three of the former Confederate states, Louisiana, Mississippi, and South Carolina. They were over 40% in Alabama, Florida, Georgia, and Virginia; and more than a third in North Carolina. In no former Confederate state were African Americans less than a quarter of the population. These figures remained fairly consistent for decades. (See Figure 1).



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The implications were obvious: granting a substantial population the right to vote raised the possibility of massive political change. For example, in his 1890 southern travelogue, Reverend Henry Field—Justice Stephen J. Field’s brother and Justice David J. Brewer’s uncle—reported:

In 1865, when the war closed, there were four millions of colored people in the Southern States; to-day there are seven millions — an increase of three millions in twenty-five years, or over a hundred thousand a year! Thus, instead of dying out, the race increases with great rapidity; the Black Belt grows denser and blacker, till it lies like a dark thundercloud along the Southern horizon.<sup>93</sup>

<sup>92</sup> Data for Figure 1 were compiled from HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, Pt. 1, 24-36 (1975); CENSUS REPORTS VOLUME 1: TWELFTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1900: POPULATION, Pt. 1, cci (1901); and NINTH CENSUS: THE STATISTICS OF THE POPULATION OF THE UNITED STATES, Vol. 1, 3-5 (1872). In 1880, 81.5% of African Americans in the U.S. lived in the eleven former Confederate states (5,360,298 of 6,580,793). STATISTICS OF THE POPULATION OF THE UNITED STATES AT THE TENTH CENSUS (JUNE 1, 1880), at 378 (1883).

<sup>93</sup> HENRY M. FIELD, BRIGHT SKIES AND DARK SHADOWS 117 (1890). *See id.* at 120 (“[Political power] is not included in freedom. Alexander II emancipated twenty million serfs in Russia, but that did not give them the right to vote. Neither did it give the right to the freed slaves of America. It is important to keep these two things distinct. Personal liberty may be a natural right, but the privilege of voting certainly is not.”).

The potential for African American political power was realized.<sup>94</sup> As part of Reconstruction, Congress required the Southern states to create new governments<sup>95</sup> and hold constitutional conventions.<sup>96</sup> In the 1867 elections, in which delegates to the state constitutional conventions were selected, African American turnout was high, no less than 70% in any state.<sup>97</sup> The resulting constitutions offered universal manhood suffrage. The Fourteenth Amendment implied that former Confederates could be disenfranchised, but only five states took this step.<sup>98</sup> Political disabilities imposed on ex-Confederates were quickly relieved.<sup>99</sup>

During Reconstruction, “Republicans controlled Southern politics [and] blacks enjoyed extensive political power.”<sup>100</sup> The integrated political coalitions that followed the Voting Rights Act of 1965 were not the first; during Reconstruction, the Republican Party thrived as its white candidates sought the support of African American voters,<sup>101</sup> and African American

<sup>94</sup> ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* 129 (2006) (“By the early 1870s, biracial democratic government, something unknown in American history, was functioning effectively in many parts of the South, and men only recently released from bondage were exercising genuine political power.”).

<sup>95</sup> ROBERT M. GOLDMAN, *RECONSTRUCTION AND BLACK SUFFRAGE: LOSING THE VOTE IN REESE AND CRUIKSHANK* 12 (2001).

<sup>96</sup> ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION: 1863-1877* 276 (1988). Not without complaint, however. South Carolina whites wrote to Congress that their state’s constitution

enfranchised every male Negro over the age of twenty-one, and disfranchised many of the purest and best white men of the State. . . . A superior race—a portion, senators and representatives, of the same proud race to which it is your pride to belong—is put under the rule of an inferior race. . . . And think you there can be any just, lasting reconstruction on this basis? We do not mean to threaten resistance by arms. But the white people of our State will never quietly submit to Negro rule.

FREDERIC A. BANCROFT, *A SKETCH OF THE NEGRO IN POLITICS, ESPECIALLY IN SOUTH CAROLINA AND MISSISSIPPI* 46 (1885).

<sup>97</sup> FONER, *supra* note 96, at 314. Blacks represented a third of Republican delegates. FONER, *supra* note 94, at 143.

<sup>98</sup> FONER, *supra* note 96, at 324 (Alabama and Arkansas constitutions excluded all former confederates; Louisiana, Mississippi, and Virginia excluded some).

<sup>99</sup> President Andrew Johnson pardoned all ex-Confederates in 1868. Proclamation No. 6, 15 Stat. 702 (July 4, 1868); Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868). In 1872 Congress removed the officeholding disability in the Fourteenth Amendment of all but a few oath-breakers. Act of May 22, 1872, 17 Stat. 142, ch. 198. See also James A. Rawley, *The General Amnesty Act of 1872: A Note*, 47 MISS. VALLEY HIST. REV. 480, 481 n.7 (1960); Forrest G. Wood, *On Revising Reconstruction History: Negro Suffrage, White Disenfranchisement and Common Sense*, 51 J. NEGRO HIST. 98, 108 (1966) (noting that analysis of statistics suggests “that there was no widespread, permanent disenfranchisement in the South until late in the nineteenth century when white conservative state governments began the mass disenfranchisement of Negroes.”).

<sup>100</sup> FONER, *supra* note 96, at 587; FONER, *supra* note 94, at 129 (“[P]erhaps two thousand African Americans held public office, from justice of the peace to governor and United States senator. Thousands more headed Union Leagues and local branches of the Republican Party, edited newspapers, and in other ways influenced the political process.”).

<sup>101</sup> *Id.* at 303 (“For most [Southern-born white Republicans or] scalawags, the alliance with blacks remained a marriage of convenience. Yet whatever its origins, this partnership carried with it a further commitment, entirely unprecedented for men reared in a slave society, to defend blacks’ political and civil equality.”).

Republicans were elected in their own right.<sup>102</sup> James Shepard Pike, a northern journalist, observed: “Seven years ago these men were raising corn and cotton under the whip of their overseer. To-day they are raising points of order and questions of privilege. . . . It means escape from the old oppressors. It means liberty.”<sup>103</sup>

Eighteen African Americans served in high positions of state government; hundreds served in state legislatures.<sup>104</sup> “In virtually every county with a sizable black population, blacks served in at least some local office during Reconstruction.”<sup>105</sup> In South Carolina, African Americans became the dominant political force: “[b]y 1873 the Negroes had in the assembly the astounding majority of ninety-four to thirty whites. . . . Below the governorship most of the principal offices were filled by Negroes.”<sup>106</sup>

The results were significant at the federal level as well, where Republicans winning seats did so with African American support. The former Confederate states sent 64 Republicans and 16 Democrats to the 41st Congress, which sat from 1869 to 1871.<sup>107</sup> To the 41st, 42nd, and 43rd Congresses, South Carolina sent not a single Democrat; Mississippi, Louisiana, and Florida sent one each.<sup>108</sup> In 1868, Southern states sent three African Americans to the U.S. House of Representatives;<sup>109</sup> five went in the next election.<sup>110</sup> Empowered African American voters in the Southern states altered presidential electoral politics in the South. In 1860, the Democratic candidate swept the future Confederate states;<sup>111</sup> in 1868 Republican Ulysses S. Grant, won the electoral votes of six. When Grant ran for re-election in 1872, the Democratic Party carried only three Southern states.<sup>112</sup>

*B. Majority Rights versus Minority Rule: Disenfranchisement of the African American Majority*

Republican electoral success in the South achieved through African American enfranchisement was short-lived. By 1880, all Southern states had returned to the Democratic fold. Republican control of the South dissolved as the voting power of African Americans came under assault and dimin-

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<sup>102</sup> James Shepard Pike, *The “Black Parliament” of South Carolina*, in WILLARD THORP, A SOUTHERN READER 454 (1955) (originally published account from 1873).

<sup>103</sup> *Id.* at 457.

<sup>104</sup> FONER, *supra* note 96, at 353, 355.

<sup>105</sup> *Id.* at 356.

<sup>106</sup> BANCROFT, *supra* note 96, at 30.

<sup>107</sup> BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-2005, at 178-82 (2005).

<sup>108</sup> *Id.* at 178-91.

<sup>109</sup> FONER, *supra* note 96, at 352.

<sup>110</sup> *Id.*

<sup>111</sup> No Southern state participated in the 1864 presidential election.

<sup>112</sup> HISTORICAL STATISTICS, *supra* note 92, at Pt. 2, 1075-76 (1975).

ished.<sup>113</sup> It was not that African Americans had lost interest in voting, or that political controversies had ceased to capture public attention. Instead, conservatives<sup>114</sup> carried out a successful counter revolution. Across the South this counterrevolution began with the suppression of the African American vote through force and fraud,<sup>115</sup> and continued in a wave of constitutional changes designed to make African American disenfranchisement permanent. This history is well known and recounted here to emphasize its counter-majoritarian, anti-democratic nature.

In 1896, a unanimous Mississippi Supreme Court reached the surprising conclusion that a tax imposed by law could not be collected through legal process.<sup>116</sup> The Court held that payment of the poll tax was optional because it had a special, limited purpose not related to raising revenue. Al-

<sup>113</sup> See FONER, *supra* note 94, at 199. (“[A]s a distinct era of national history, when Republicans controlled much or all of the South, blacks exercised significant political power, and the federal government accepted the responsibility for protecting the fundamental rights of all American citizens, Reconstruction had come to an end [after 1877].”). See also J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 13-14 (1974) (noting that Democrats carried all Southern states in 1880, though Republican opposition still existed among voters of both races).

<sup>114</sup> Here it should be noted that those who suppressed the African American vote were not whites as a whole, not even Democrats as a whole; both parties were quite diverse on many issues. Of course, white Republicans would suffer greatly if the group with whose help they had a majority were disenfranchised. Also, not all Democrats supported disenfranchisement. The Southern Democratic parties often called themselves “conservative” and always felt free to diverge from the national party. Thus, the late 20th century departure of conservative Southern Democrats to the Republican Party is nothing new. See generally EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2003); WALLACE HETTLER, *THE PECULIAR DEMOCRACY: SOUTHERN DEMOCRATS IN PEACE AND CIVIL WAR* (2001); NICOL C. RAE, *SOUTHERN DEMOCRATS* (1994).

<sup>115</sup> The historian Bancroft wrote in 1885: “All save ignorant and purblind partisans know that the Ku Klux Klan actually existed, and that accounts of the deeds attributed to it, or to those who conducted themselves in a way similar to the members of the Klan, are essentially true. Negroes and white people alike were whipped, intimidated in countless ways, and murdered for political reasons solely.” BANCROFT, *supra* note 96, at 54-55. This story seems not to have penetrated the thinking of the modern Court. A reputed liberal, William O. Douglas, wrote that “the Klan played only a minor role in eliminating the carpetbaggers and the scalawags and in driving the Radical Republicans from office. The graft and corruption were so vast and became so scandalous that public opinion finally forced the Radical Republicans out.” WILLIAM O. DOUGLAS, *MR. LINCOLN AND THE NEGRO: THE LONG ROAD TO EQUALITY* 86 (1963). Compare WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876*, at 81 (2004) (“Republican success [in the South] depended on the votes of the newly freed slaves, and the Fifteenth Amendment forbidding denial of the right to vote on the basis of race was not very effective in securing their franchise. In many places the Ku Klux Klan and similar organizations carried on a successful campaign of violence and threats against these voters, either dissuading or preventing them from going to the polls.”) The historian Kousser broaches and rejects a related rationalization for decline of the African American majority in Southern states: “The myth of Negro apathy in the face of disfranchisement must now be dropped along with the other dogmas of the religion of racial inferiority. The blacks were disfranchised not because they surrendered, but because the Democrats overwhelmed them with superior physical and legal force.” KOUSSER, *supra* note 113, at 250 (footnote omitted).

<sup>116</sup> *Ratliff v. Beale*, 20 So. 865 (Miss. 1896).

though, the Court explained, African Americans were an electoral majority and thus controlled the state, they were a group

unfitted by educational experience for the responsibility thrust upon it. This was succeeded by a semimilitary, semicivil uprising, under which the white race, inferior in number, but superior in spirit, in governmental instinct and in intelligence, was restored to power. The anomaly was then presented of a government, whose distinctive characteristic was that it rested upon the will of the majority, being controlled and administered by a minority of those entitled, under its organic law, to exercise the electoral franchise.<sup>117</sup>

Although necessary to enhance their political power, illegal disenfranchisement was dangerous to whites: “The habitual disregard of one law not only brings it finally into contempt, but tends to weaken respect for all other laws.”<sup>118</sup> Accordingly, the leaders of the conservative minority devised a lawyerly solution in the Constitutional Convention of 1890: “Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race.”<sup>119</sup> The poll tax was one of these. Thus, collection of the tax by force would be exactly contrary to the express legislative goal of having African American voters not pay it, and thus be disenfranchised.

The same story was told at the Alabama Constitutional Convention of 1901. After his election to the convention’s presidency, John B. Knox explained:

After the war, by force of Federal bayonets, the negro was placed in control of every branch of our Government. Inspired and aided by unscrupulous white men, he wasted money, created debts, increased taxes until it threatened to amount to confiscation of our property. . . . The right of revolution is always left to every people. Being prostrated by the effects of war, and unable to take up arms in their own defense, in some portions of this State, white men, greatly in the minority, it is said, resorted to stratagem used their greater intellect to overcome the greater number of their black opponents.<sup>120</sup>

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<sup>117</sup> *Id.* at 867.

<sup>118</sup> *Id.* at 868.

<sup>119</sup> *Id.*; see also, e.g., J.W. Sumners, *The “Grandfather Clause”*, 7 *LAWYER & BANKER & S. BENCH & BAR REV.* 39, 49 (1914) (from a University of Mississippi law professor: “We agree that we first disenfranchised the negro voter by intimidation, fraud, stuffing the ballot boxes, etc. It was a necessity; we had to do it or else move out and leave our homes to the negroes, carpet-baggers, and scalawags.”) (citation omitted).

<sup>120</sup> OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, 9 (1941), available at <http://>

African Americans were targeted not because they were a weak minority, but because they were a powerful majority, at least in coalition with whites who shared their views.<sup>121</sup> Although modern analysts often overlook African American majority status, at the time, it was clear that the most significant oppression of African Americans came because of, not in spite of, their status as an electoral majority.<sup>122</sup> In his 1890 travelogue, Reverend Field wrote:

[To negro suffrage, whites] have no objection when [the negro] is in a hopeless minority, so that his vote “can do no harm.” But the moment he is in the majority, he becomes dangerous. Now there are four Southern States — South Carolina, Alabama, Mississippi, and Louisiana — in which he outnumbers the whites, so that a combination of the black voters would give them the election of the Governor and Legislature, and thus the control of the State. Here in these States any attempt on their part to exercise the right of suffrage on a large scale, and thus to gain political power, is to be resisted to the last extremity.<sup>123</sup>

In 1903, John R. Dos Passos, writing in the *Yale Law Journal*, explained the nature of the “Negro Problem”:

In the North (I am not speaking by the card, but for illustration), there are a hundred whites to one black. In the South, or in portions of it . . . there are a hundred blacks to one white. In the North, the negro vote is submerged in the mass of white voters. In

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[www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901\\_proceedings\\_voll/1901.html](http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901_proceedings_voll/1901.html). As was the Mississippi Supreme Court, President Knox was concerned about ethics: “But if we would have white supremacy, we must establish it by law — not by force or fraud. If you teach your boy that it is right to buy a vote, it is an easy step for him to learn to use money to bribe or corrupt officials or trustees of any class.” *Id.* at 9. *See also, e.g.,* Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 HARV. L. REV. 279, 279 (1899) (noting motivation for revision was that “[f]raud upon the negroes naturally led to fraud upon members of any [opposition] faction, even if nominally of the same party”); Francis Butler Simkins, *Ben Tillman’s View of the Negro*, 3 J. S. HIST. 161, 161 (1937) (noting that Senator “Pitchfork” Ben Tillman “told the nation, in characteristically [strong] language, that white South Carolina had triumphed over black South Carolina by the use of shotguns, election frauds and intimidations, and that white South Carolina was determined, if necessary, to maintain its supremacy by a reapplication of these methods.”).

<sup>121</sup> *See* Cover, *supra* note 32, at 1303 (“Whether in a one, two, or three-party system, the probable losers, who perceived an alliance with Blacks as the road to victory and power, confronted a powerful temptation to cheat on the White bargain. Precisely because that [temptation] was present, racist domination required that the politics of the region be violent and extreme.”). The willingness of whites to join with African Americans when African Americans could vote (before disenfranchisement and decades later after the Voting Rights Act of 1965) suggests that in the Jim Crow era African Americans were disdained because disenfranchised, not because some intrinsic social reason made it impossible for whites to partner with African Americans for political purposes.

<sup>122</sup> As Professor Key noted: “[T]he principal drive for Negro disfranchisement in most states came from those areas in which Negroes constituted a majority of the population.” V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 540 (1949).

<sup>123</sup> FIELD, *supra* note 93, at 169.

the South, the negro vote overwhelms the white vote. . . . In the North, the negro vote is divided between the two parties . . . . In the South, it is a unit—invariably cast as one vote.<sup>124</sup>

From a majoritarian perspective, this is less a problem than an opportunity; a disciplined majority bloc is entitled to assume that government will work in its favor. But Dos Passos argued that this was unacceptable: African Americans could not be “in control and domination over the rights, liberty and property of a large class of cultivated and trained citizens.”<sup>125</sup>

### 1. *Stage One: Force and Fraud*

Conservatives were outraged at African American political success. Reverend Field observed:

[W]hen the blacks were admitted to the polls *en masse*, the whites found themselves swamped . . . by an inundation. This was a complete revolution. Power was taken away from the upper classes, and given to the lower. . . . This, whatever the political necessity that compelled it, I cannot but look upon as anything less than the triumph of barbarism, and a crime against civilization!<sup>126</sup>

Accordingly, opponents of African American suffrage made “skillful use of electoral machinery and outright fraud to prevent the negro vote from being counted.”<sup>127</sup> Techniques included “theft of the ballot boxes, suppression of the ballot boxes, exchanging ballot boxes, removal of the polls to unknown places, doctoring the returns, false certifications, repeating, excising names from the registry book, and illegal arrests before the day of the election.”<sup>128</sup>

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<sup>124</sup> John R. Dos Passos, *The Negro Problem*, 12 YALE L.J. 467, 476-77 (1903). See also, e.g., Cleland Boyd McAfee, *Studies in the American Race Problem*, 8 J. ROYAL AF. SOC. 145, 145 (1909) (“When the whites predominate and no question arises as to control, as in England and . . . New England, the friction does not become acute. But when the negroes predominate or are in such proportion to the whites as to suggest control over the whites, the friction . . . becomes acute, whether in South Africa or in the Southern states of America.”); George H. Haynes, *Representation in State Legislatures III: The Southern States*, 16 AM. ACAD. POL. SCI. 93, 119 (1900) (emphasis added):

As regards representation in Southern legislatures the significant facts are that, although in a number of states the negroes are in a decided majority, they no longer secure place among the representatives, and by process of law, to which they seem to be giving tacit consent, as a race they are being deprived of the suffrage . . . .

<sup>125</sup> Dos Passos, *supra* note 124, at 475.

<sup>126</sup> FIELD, *supra* note 93, at 124-25.

<sup>127</sup> Albert Bushnell Hart, *The Realities of Negro Suffrage*, 2 PROC. AM. POL. SCI. ASS'N 149, 159 (1905).

<sup>128</sup> *Id.*; see also SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2006) (arguing that African American votes continue to be suppressed); J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, 31-36 (detailing techniques, most from the 1870s, used to hamper African American voting), in MINORITY VOTE DILUTION (C. Davidson, ed., 1989).

Conservatives cheerfully employed violence in ways in which the radicals would not.<sup>129</sup> Violent reprisals against Reconstruction governments began as soon as they formed.<sup>130</sup> The Ku Klux Klan carried out a campaign of terror throughout the South, attacking Republicans, both white and African American.<sup>131</sup> “In parts of the South, blacks holding public office daily faced the threat of violence;”<sup>132</sup> many were assaulted or murdered.<sup>133</sup>

Though African Americans voted in 1868, fallout from the violence was evident in electoral results that year. “Klan activity suppressed Republican turnout across the South, and in Georgia and Louisiana it contributed to a Democratic victory.”<sup>134</sup> African Americans made up a majority of the population in Louisiana at the time and were a near-majority in Georgia.<sup>135</sup> In Camilla, Georgia, “400 armed whites, led by the local sheriff, opened fire on a black election parade, and then scoured the countryside for those who had fled.”<sup>136</sup> The Klan had assumed the role of “a military force serving the interests of the Democratic Party, the planter class, and all those who desired the restoration of white supremacy.”<sup>137</sup>

Republican leaders were alarmed, for the party’s national fortunes hinged on Southern African American votes.<sup>138</sup> President Grant and congressional Republicans proposed the Fifteenth Amendment in 1869; it was ratified the next year.<sup>139</sup> The Amendment prohibited denial of the right to vote on the basis of race.<sup>140</sup> Congress passed enforcement legislation, and President Grant carried it out; “[e]xcept for Georgia, whose Democratic admin-

<sup>129</sup> FONER, *supra* note 96, at 436-40. A number of works describe this violence. *See, e.g.,* GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* (1984). There is also work showing the violence in particular states. *See, e.g.,* NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* (2006) (Louisiana and Mississippi). For a contemporary argument about African Americans and gun ownership based on this history, see Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Geo. L.J.* 309 (1991).

<sup>130</sup> FONER, *supra* note 96, at 425.

<sup>131</sup> *Id.*; see also ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* 419 (1971) (discussing role of violence in Democratic victories in Alabama, Georgia and North Carolina in 1870; “[p]erhaps the Klan’s most important effect — politically and otherwise — was to weaken Negro and Republican morale. The fact that it could get by with anything drastically reduced their will and capacity to sustain themselves.”).

<sup>132</sup> FONER, *supra* note 96, at 426.

<sup>133</sup> FONER, *supra* note 94, at 134 (“About 10 percent of black officeholders are known to have been victims of violent threats or assaults. . . . At least thirty-five black officials were murdered by the Ku Klux Klan or kindred terrorist organizations during Reconstruction.”).

<sup>134</sup> GOLDMAN, *supra* note 95, at 14.

<sup>135</sup> *See supra* Part II.A, Figure 1.

<sup>136</sup> FONER, *supra* note 96, at 342.

<sup>137</sup> *Id.* at 425.

<sup>138</sup> GOLDMAN, *supra* note 95, at 15 (“It had thus become clear that the political future of the Republican Party, not only in the South but nationwide, depended on black votes.”).

<sup>139</sup> *Id.*

<sup>140</sup> U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

istration did nothing to deter election day violence, 1872 witnessed the most peaceful election of the entire Reconstruction period."<sup>141</sup> Grant carried eight Southern states, and Republicans gained seats in Tennessee, Virginia, North Carolina, and Alabama.<sup>142</sup>

But federal enforcement of voting rights diminished as violence became a pervasive, acceptable, and effective electioneering method.<sup>143</sup>

Every year brought the downfall of additional Republican governments. This was not the work of scattered Ku Klux Klan bands who continued to prowl in several states, but of open white paramilitary organization and wholesale intimidation backed up on occasion by mob violence and more or less inspired rioting. By these means Alabama was captured in 1874, and Mississippi in 1875. The culmination was in 1876-77, when Rutherford B. Hayes agreed to the conquest of South Carolina, Louisiana and Florida in return for Southern Democratic acquiescence in his election to the Presidency.<sup>144</sup>

Predictably, as the violence became more severe, Democratic strength at the polls increased.<sup>145</sup> Only the most heroic could stand in the face of a "violent crusade to destroy the Republican organization and prevent blacks from voting."<sup>146</sup>

Democrats increased the violence as the 1878 elections approached.<sup>147</sup> The result: a Democratic landslide. In Louisiana, the largest margins for

<sup>141</sup> FONER, *supra* note 96, at 508.

<sup>142</sup> *Id.*

<sup>143</sup> As one historian explained:

The new associations were known as the White League in Louisiana, the White Line in Mississippi, the White Man's Party in Alabama, and the Rifle Clubs or Red Shirts in South Carolina. Their plan of campaign was variously known as the Mississippi plan, or the Straightout, or the Shotgun policy. When persuasion failed to win the votes of the Negroes, threats and violence were used. If riots ensued, the superior discipline and stamina of the former master class was expected to prevail over black numbers. The small number of federal troops on hand for police duty was considered insufficient adequately to protect the Negro's political rights.

FRANCES BUTLER SIMKINS, *A HISTORY OF THE SOUTH* 291 (1947) (3d ed. 1963).

<sup>144</sup> TRELEASE, *supra* note 131, at 420.

<sup>145</sup> GOLDMAN, "A FREE BALLOT AND A FAIR COUNT:" THE DEPARTMENT OF JUSTICE AND THE ENFORCEMENT OF VOTING RIGHTS IN THE SOUTH, 1877-1893 56 (2001).

<sup>146</sup> FONER, *supra* note 96, at 559. As the historian Bancroft stated (or understated) in 1890 about those elections in Mississippi: "Election returns are sometimes significant. In Washington County there were at least six times as many blacks as whites. In this remarkable election of 1875 the Democrats won by more than four hundred majority. In Yazoo County there were three times as many blacks as whites. The Negroes had always been staunch Republicans . . . [but] only seven persons ventured to vote the Republican ticket, whereas in 1873 there were 2,427." BANCROFT, *supra* note 96, at 64. Chief Justice Rehnquist recognized that a free election would likely "have resulted in a substantial majority for Hayes" in Florida. REHNQUIST, *supra* note 115, at 105 (quoting PAUL LELAND HAWORTH, *THE HAYES-TILDEN ELECTION* 76 (1906)).

<sup>147</sup> GOLDMAN, *supra* note 145, at 61.

Democrat victors appeared in parishes where black voters outnumbered whites.<sup>148</sup> By this time, force and fraud had restored all Southern states to Democratic control, notwithstanding large majorities of African American and white citizens who opposed these regimes in at least some states.<sup>149</sup>

## 2. *Stage Two: Constitutional Lock-In*

While the battles for control of the South raged, it became clear that what was at stake for African Americans was not merely the result of a particular election, but whether they would be allowed to participate in the majoritarian political process at all. In 1870, the year the Fifteenth Amendment was ratified, Democrats demonstrated that when they gained control of a state, they would take steps to permanently exclude African Americans from voting.<sup>150</sup>

Years after Reconstruction, there was another wave of positive law disenfranchisement.<sup>151</sup> “Beginning with Mississippi in 1890, most of the Southern states have passed statutes or adopted constitutional provisions, so drafted within limits which are hoped to be permissible under the United States Constitution, as, upon their face, to exclude from the right of suffrage as large a number of the negro race as possible without excluding the whites.”<sup>152</sup> Disenfranchisement techniques included the poll tax,<sup>153</sup> literacy test,<sup>154</sup> criminal disenfranchisement, and voter registration itself. The intro-

<sup>148</sup> *Id.* at 62-63.

<sup>149</sup> FONER, *supra* note 96, at 603 (While political factors affected Republican fortunes, “[n]one of those factors . . . would have proved decisive without the campaign of violence that turned the electoral tide in many parts of the South.”).

<sup>150</sup> *Id.* at 422-23 (“[B]order Democrats developed ingenious methods of limiting black voting power,” including poll tax, residency and registration requirements in Georgia in 1870; poll tax in Tennessee in 1870; poll tax, gerrymandering and criminal disenfranchisement in Virginia).

<sup>151</sup> See generally KOUSSER, *supra* note 113, at 238-39; MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISENFRANCHISEMENT IN THE SOUTH 1888-1908 (2001); Francis G. Caffey, *Suffrage Limitations at the South*, 20 POL. SCI. Q. 53 (1905).

<sup>152</sup> Julien C. Monnet, *The Latest Phase of Negro Disfranchisement*, 26 HARV. L. REV. 42, 42 (1912). See also ALABAMA PROCEEDINGS, *supra* note 120, at 2826 (remarks of Mr. Lowe) (“White supremacy was established in 1874, and has never been threatened.”); John Hope Franklin, “Legal” Disfranchisement of the Negro, 26 J. NEGRO EDUC. 241 (1957). V.O. Key observed, “Law often merely records not what is to be but what is, and ensures that what is will continue to be. Before their formal disfranchisement Negroes had, in most states, ceased to be of much political significance and the whites had won control of state governments.” KEY, *supra* note 122, at 535. But see KOUSSER, *supra* note 113, at 243-44 (“It was not necessary for the disfranchisers to decimate the opposition and end Negro voting entirely before disfranchisement. Rather, they had somehow to reduce dissent to whatever point it took to push a law through the legislature, pass an amendment at a referendum, or call a constitutional convention. Sometimes violence and intimidation alone accomplished the necessary reduction of their adversaries . . . and sometimes, legislative restrictions added to coercion and apathy made disfranchisement possible. . .”).

<sup>153</sup> Frank B. Williams, Jr., *The Poll Tax as a Suffrage Requirement in the South, 1870-1901*, 18 J. S. HIST. 469 (1952).

<sup>154</sup> An oft-repeated joke goes like this:

duction of voter registration “in the South was for the purpose of preventing the Negro from voting.”<sup>155</sup>

The discriminatory intent of the constitutions is evident.<sup>156</sup> Typical are the remarks of the President of the Alabama Constitutional Convention, who

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An attempt was recently made to apply this or a similar law to a well-educated young negro in Virginia, who, to prove his understanding was asked by the election officers: “What clauses of the present Virginia constitution are derived from [the] Magna Charta?” To which he promptly replied, “I don’t know, unless it is that no negro shall be allowed to vote in this commonwealth.”

Hart, *supra* note 128, at 162.

<sup>155</sup> Leo Alilunas, *A Review of Negro Suffrage Policies Prior to 1915*, 25 J. NEGRO HIST. 153, 159 (1940).

<sup>156</sup> As one scholar reported, “subconsciously, if not consciously, the great majority of all the white people of the old slave States have felt and feel that the Fifteenth Amendment had no moral sanction and is not binding on their consciences.” John C. Rose, *Negro Suffrage: The Constitutional Point of View*, 1 AM. POL. SCI. REV. 17, 18 (1906). Discussions of the constitutions of the states include the following:

Alabama: Horace Mann Bond, *Negro Education: A Debate in the Alabama Constitutional Convention of 1901*, 1 J. NEGRO EDUC. 49 (1932); Joseph M. Brittain, *Some Reflections on Negro Suffrage and Politics in Alabama — Past and Present*, 47 J. NEGRO HIST. 127 (1962); Wayne Flynt, *Alabama’s Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67 (2001); Albert E. McKinley, *Two New Southern Constitutions*, 18 POL. SCI. Q. 480, 481-82 (1903) (“The primary purposes of these two conventions were almost identical. It was well recognized in both states that the existing practical disfranchisement of the Negro by means of intimidation and dishonest election methods must give [way] to a constitutional limitation upon Negro suffrage.”).

Arkansas: Tilman C. Cothran & William M. Phillips Jr., *Expansion of Negro Suffrage in Arkansas*, 26 J. NEGRO EDUC. 287 (1957).

Florida: Charles D. Farris, *The Re-Enfranchisement of Negroes in Florida*, 39 J. NEGRO HIST. 259 (1954).

Georgia: ELIZABETH STUDLEY NATHANS, *LOSING THE PEACE: GEORGIA REPUBLICANS AND RECONSTRUCTION, 1865-1871* (1968).

Louisiana: Eaton, *supra* note 120; Frank J. Looney, *Suffrage in the Louisiana Constitution of 1921*, 6 LOYOLA L. J. 75 (1925); J.L.W.W., *Suffrage Limitation in Louisiana*, 21 POL. SCI. Q. 177 (1906).

Mississippi: S.S. Calhoun, *The Causes and Events That Led to the Calling of the Constitutional Convention of 1890*, MISS. HIST. SOC. 105; Albert D. Kirwan, *Apportionment in the Mississippi Constitution of 1890*, 14 J. S. HIST. 234 (1948); William Alexander Mabry, *Disfranchisement of the Negro in Mississippi*, 4 J. S. HIST. 318 (1938); V.L. Wharton, *The Race Issue in the Overthrow of Reconstruction in Mississippi*, 2 PHYLON 362 (1941).

North Carolina: William A. Mabry, “White Supremacy” and the North Carolina Suffrage Amendment, 13 N.C. HIST. REV. 1, 5-6 (1936); I.G. Newton, *Expansion of Negro Suffrage in North Carolina*, 26 J. NEGRO EDUC. 351 (1957).

South Carolina: W. Lewis Burke, *Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina After the Civil War*, 57 S.C. L. REV. 859 (2006); Laughlin McDonald, *An Aristocracy of Voters: The Disfranchisement of Blacks in South Carolina*, 37 S.C. L. REV. 557 (1986); George B. Tindall, *The Question of Race in the South Carolina Constitutional Convention of 1895*, 37 J. NEGRO HIST. 277 (1952); George B. Tindall, *The Campaign for Disfranchisement of Negroes in South Carolina*, 15 J. S. HIST. 212, 212 (1949) (“The constitution of 1868 would still be the supreme law of South Carolina, a prominent lawyer of the state commented in 1905, ‘but for the fact that it conferred the unrestricted right of suffrage upon the negro race.’”).

Tennessee: J. Morgan Kousser, *Post-Reconstruction Suffrage Restrictions in Tennessee: A New Look at the V.O. Key Thesis*, 88 POL. SCI. Q. 655 (1973); Preston Valien, *Expansion of Negro Suffrage in Tennessee*, 26 J. NEGRO EDUC. 362 (1957).

Texas: Henry Allen Bullock, *The Expansion of Negro Suffrage in Texas*, 26 J. NEGRO EDUC. 369 (1957).

explained the purpose of the meeting shortly after his election: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."<sup>157</sup>

The incentives created by the particular tools employed are significant. Fairly applied, literacy tests could be passed by educated citizens of any color. Thus, to educate African Americans well would be to risk that they would vote. Criminal disenfranchisement laws created an incentive to enact laws which could be applied to African Americans in particular and to selectively prosecute them.<sup>158</sup> Poll taxes created an incentive to keep African Americans impoverished. Other forms of oppression of African Americans were linked to disenfranchisement. Some argued that it was in African Americans' interests to exclude them from participating in political controversies best dealt with by whites.<sup>159</sup> But a political system conditioned on degradation of African Americans, a political system that would come apart if they were educated and affluent, could not be to their advantage.

### 3. *Disenfranchisement by the Numbers*

Voter turnout data supports the idea that the problem of African Americans in the South flowed from their power as a majority rather than their weakness as a minority. Figure 2 tracks the decline in voter turnout in presidential elections from post-Civil War era into the twentieth century. The trend in turnout over time is shown for three groups of Southern states, based on the relative percentage of African Americans living there in 1870. Decline in voter turnout was greatest for the group of three states (South Carolina, Mississippi, and Louisiana) where African Americans numbered a majority at the end of the Civil War. This finding makes perfect sense: if

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Virginia: Robert E. Martin, *The Relative Political Status of the Negro in the United States*, 22 J. NEGRO EDUC. 363, 364 (1953) ("It is an open secret that the Negro's vote is rendered nugatory whenever it is sufficiently large to endanger white supremacy. If he votes enough to be effective, the white race circumvents him by the easiest method — fraud, if possible, force, if necessary.") (quoting A.F. THOMAS, *THE VIRGINIA CONSTITUTIONAL CONVENTION AND ITS POSSIBILITIES* 11 (1901)); Albert E. McKinley, *Two New Southern Constitutions*, 18 POL. SCI. Q. 480 (1903).

<sup>157</sup> ALABAMA PROCEEDINGS, *supra* note 120, at 8.

<sup>158</sup> See Burke Marshall, *Federal Protection of Voting Rights*, 27 L. & CONTEMP. PROBS. 454, 458-59 (1962) (noting trumped-up criminal actions brought to prevent African Americans from voting).

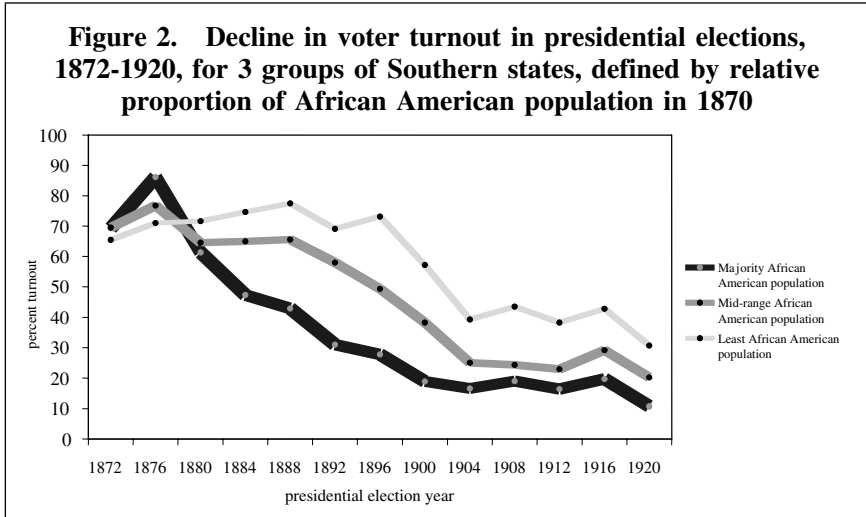
<sup>159</sup> For example, this editorial:

The elimination of the negro from politics in the South means the removal of the chief cause of friction between the two races in this section, and the elimination, also, in large measure of the influences and conditions that are responsible for conduct on the part of the negro that has brought upon him most of his woes. It means better things for the negro in every way, if he will but realize it, and his leaders could not do him a higher service than addressing themselves to the work of inducing him to accept the situation that the restriction of the suffrage will entail.

*The Southern Negro: His Elimination from Politics Means Better Things for Him*, WASH. POST, Sept. 8, 1901, at 16.

decline in overall voter turnout was due to disenfranchisement of African Americans, the steepest decline in overall voting rate during the period of disenfranchisement, as well as the lowest voting rate after accomplishing disenfranchisement, should be found where the greatest number of African Americans lived. Simply, in those states with the most African American voters, disenfranchisement would have the strongest impact on overall voting turnout. During the period when presidential election turnout declined in the Southern states, turnout in states outside the South remained largely stable and in all but a few states very high.<sup>160</sup>

Figure 2 illustrates a second important finding. A decline in voter turnout occurred earlier in the three Southern states where the African American population was greatest. In contrast, in the two groups of Southern states where African Americans composed less than half of all potential voters, average voting turnout levels remained high until the 1890s. Only then did they begin the steep decline identified in the other three states immediately after 1876.



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<sup>160</sup> Turnout averaged across non-Southern states from 1876 to 1904 ran between 70% and 80%. See HISTORICAL STATISTICS, *supra* note 92, at Pt. 2, 1071-72.

<sup>161</sup> Data for Figure 2 were compiled from HISTORICAL STATISTICS, *supra* note 92, at Pt. 2, 1071-72. States with a majority African American population are Louisiana, Mississippi, and South Carolina; mid-range states are Alabama, Florida, Georgia, and Virginia; states with the least African American population are Arkansas, North Carolina, Tennessee, and Texas. Turnout for each group is calculated by averaging the turnout for all states in that group. Turnout is the ratio between votes cast and the eligible electorate in each state. Procedures followed by the Bureau of the Census for compiling and estimating these figures are described in *id.* at 1067-69.

Thus, where African American presence was greatest, the greatest opportunity, or threat, existed for African American majority rule. There, disenfranchisement occurred almost immediately after the African American majority first expressed itself electorally. This analysis is fine-tuned in Figures 3a-c which show the decline in presidential election voter turnout for each Southern state, breaking apart the three groupings of states underlying the prior analysis.

The striking similarity among states within these three groups is notable. For each of the three states with African American majority population—South Carolina, Mississippi, and Louisiana—a steep decline occurred at very nearly the same period—around the 1876 elections—and continued for the next decade.<sup>162</sup> With dispatch, African American majorities in this trio of states were disempowered during the earliest days of Redemption.

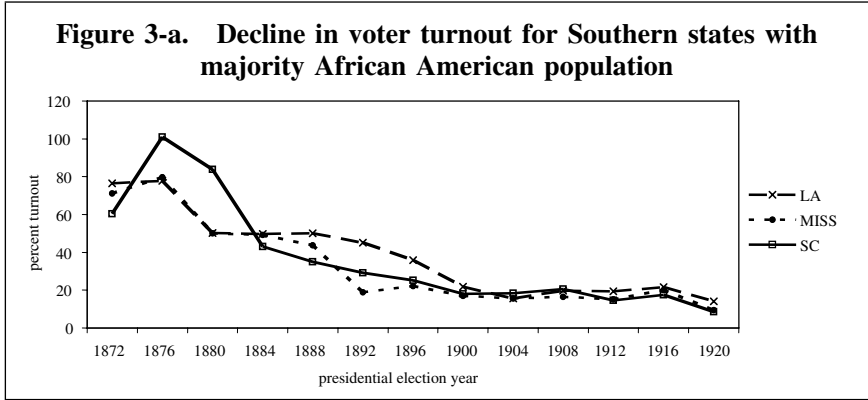
In the other eight states, the steepest declines in voter turnout, a signal of African American disenfranchisement, took place in the 1888-1896 period.<sup>163</sup> This phenomenon is explained by fear of an African American majority. In a two-party system, a 25% or 30% minority may not present an easy or immediate threat of domination; that is, other political groups might not easily be tempted to seek their support. But the rise of a serious third party, the Populist Party, raised the possibility that a third of the voters plus one could win a state election. This may explain the timing of the decline in the midrange and lower population states.<sup>164</sup>

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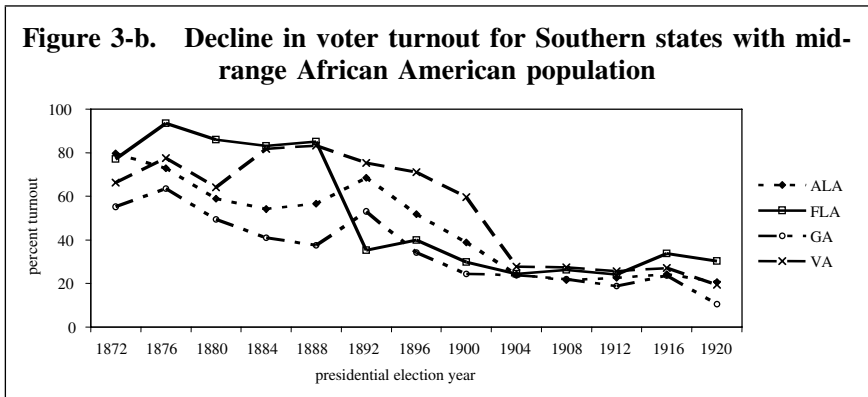
<sup>162</sup> Professor Kousser's pathbreaking work, employing a very different kind of analysis, is consistent with this finding. See KOUSSER, *supra* note 113, at 15. Kousser estimates turnout by race in Southern states using the relationship between county-level total turnout and county-level racial make-up. His estimates indicate that, in the presidential election of 1880, black voter turnout, compared to white turnout, was the most depressed in South Carolina and Mississippi, the two states with the greatest African American population. In the third majority black state, Kousser estimates that black turnout levels exceeded white turnout levels. But, he writes, "there electoral chicanery in the black belt river parishes undoubtedly swelled my estimate of black participation and correspondingly diminished the estimate for whites." *Id.* at 14 (footnote omitted).

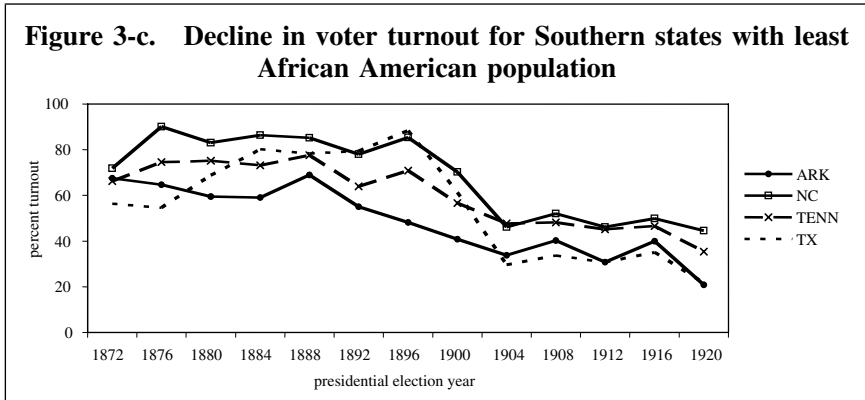
<sup>163</sup> See *id.* at 42. Again, Kousser's estimates are in line with this finding and the inference following from it. He calculates, for key governor's races in the 1890s, that white turnout levels exceeded black turnout levels in eight of the eleven states. Many of these contrasts were great; 33% white to 17% black in South Carolina, 60% to 11% in Florida, 69% to 38% in Georgia, and, in Mississippi, 54% to 0%.

<sup>164</sup> Hart, *supra* note 128, at 160 (noting Populist-Republican fusion with African American voters, and resulting backlash); O. Douglas Weeks, *The White Primary*, 8 Miss. L. J. 135, 136 (1935) ("With the rise of the Populists, particularly in the Southwest, negroes were often encouraged to participate in elections and even in party affairs. In some localities they no doubt held the balance of power between the Democrats and the Populists.").



(Note: The y-axis in Fig. 3-a goes above 100%; 101% of the South Carolina electorate voted in 1876.)





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#### 4. *Disenfranchisement as Constitutional Violation*

The Supreme Court has held that the Fifteenth Amendment is inapplicable to private action.<sup>166</sup> While this interpretation continues to be debated,<sup>167</sup> doctrinally, the issue is clear.<sup>168</sup> As the very point of the organized, violent suppression of African American Republican voters was to obtain power conservatives did not then possess, there is a serious argument that before they obtained it, they were not state actors. Closer examination shows that the disenfranchisement of African Americans in the former Confederate states, did, in fact, constitute state action.

Of course, a state constitutional convention is a state actor, the resulting constitution is state action, and therefore the state constitutional lock-in of disenfranchisement implicates the Constitution.<sup>169</sup> The Court later invali-

<sup>165</sup> Data for Figures 3-a to -c were compiled from HISTORICAL STATISTICS, *supra* note 92, at Pt. 2, 1071-72. Turnout is the ratio between votes cast and the eligible electorate in each state. Procedures followed by the Bureau of the Census for compiling and estimating these figures are described in *id.* at 1067-69.

<sup>166</sup> See, e.g., *Terry v. Adams*, 345 U.S. 461, 473 (1953) (interpreting the Fifteenth Amendment; “The command against such denial or abridgment is directed to the United States and to the individual States. Therefore, violation of this Amendment and the enactments passed in enforcement of it must involve the United States or a State.”); *United States v. Cruikshank*, 92 U.S. 542 (1875).

<sup>167</sup> See, e.g., Charles L. Black, Jr., *The Supreme Court 1966 Term — Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69 (1967); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOUSTON L. REV. 1379 (2006); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995).

<sup>168</sup> See K. G. Jan Pillai, *Societal Discrimination and the Equal Protection Clause of the United States Constitution*, 14 GEO. MASON U. CIV. RTS. L.J. 1, 4-5 (2004).

<sup>169</sup> See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (noting disenfranchisement provision invalid because Alabama Constitutional Convention enacted it with racially discriminatory purpose).

dated the techniques used: the poll tax,<sup>170</sup> grandfather clauses designed to exempt whites,<sup>171</sup> the white primary,<sup>172</sup> discriminatory felon disenfranchisement,<sup>173</sup> and a discriminatory literacy test.<sup>174</sup> Although the disenfranchising constitutions came on the scene after disenfranchisement was an established fact, there is also state action earlier in the process.

The violence was the handiwork of the Democratic Party. The Klan had assumed the role of “a military force serving the interests of the Democratic Party.”<sup>175</sup> In the white primary cases,<sup>176</sup> the Democratic Party was treated as a state actor when it excluded African Americans from participation.<sup>177</sup> However, the rationale of the white primary cases does not always fit; the point there was that the state authorized and regulated the primaries, and, in any event, winning the primary was tantamount to winning an election. Here, the Democratic Party failed at the polls; hence, the need for violent suppression of the majority. However, in many instances, state action existed because Democratic officeholders coordinated the violence.

In addition, federal law can and did protect the right to vote for Representatives in Congress, even from interference by private actors.<sup>178</sup> But a critic might insist that the state offices at issue in an election, often the central motivation for violence, were unprotected.<sup>179</sup>

To the extent that violent or fraudulent disenfranchisement was the result of truly private action, those private citizens or their co-conspirators became officeholders. They continued their policies of disenfranchisement, legal and extralegal. At that point, state action was surely present. Accordingly, all of the disenfranchisement of the African American majority can be fairly attributed to state action and is within the cognizance of the Constitution.<sup>180</sup>

<sup>170</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

<sup>171</sup> *E.g.*, *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (noting that “The Amendment nullifies sophisticated as well as simple-minded modes of discrimination.”); *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>172</sup> *E.g.*, *Terry v. Adams*, 345 U.S. 461 (1953); *United States v. Classic*, 313 U.S. 299 (1941).

<sup>173</sup> *Hunter*, 471 U.S. at 222.

<sup>174</sup> *E.g.*, *Louisiana v. United States*, 380 U.S. 145 (1965).

<sup>175</sup> FONER, *supra* note 96, at 425.

<sup>176</sup> *Terry*, 345 U.S. at 461; *Classic*, 313 U.S. at 299.

<sup>177</sup> See generally Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325 (2004); Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2001).

<sup>178</sup> *Ex parte Yarbrough*, (*The Ku Klux Cases*), 110 U.S. 651, 654 (1884) (upholding the power of Congress to protect and enforce the right to vote in congressional elections from persons who “conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise” of that right).

<sup>179</sup> *But see United States v. Garcia*, 719 F.2d 99 (5th Cir. 1983) (Congress has power to punish bribe to vote for state office when federal offices are also on the ballot).

<sup>180</sup> *E.g.*, *United States v. Saylor*, 322 U.S. 385 (1944) (upholding prosecution for ballot box stuffing); *United States v. Mosley*, 238 U.S. 383 (1915) (upholding prosecution for omitting certain ballots from count; right to vote protectable by Congress includes right to cast ballot and have it counted).

## IV. RETHINKING THE CONSEQUENCES OF JIM CROW

In an oft-cited portion of *Yick Wo v. Hopkins*, the Court explained the centrality of the right to vote: it “is regarded as a fundamental political right, because preservative of all rights.”<sup>181</sup> Later, the Court explained that “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.”<sup>182</sup> Of course, it is not easy to prove the counterfactual situation of what would have happened had African Americans been allowed to vote as the Constitution contemplated, and to some extent, the answer is unknowable.<sup>183</sup> Perhaps the Supreme Court’s cheerful view of the power of suffrage is naïve in this case. Perhaps the vote would have been useless to African Americans in the South because, even under a fair system, they would have been unable to identify their collective interests or the policies and politicians that would advance them. Perhaps none of the harm suffered by African Americans is attributable to their loss of the vote.

Nonetheless, based on what the Reconstruction governments actually did, it is more likely that the Supreme Court’s view of the relationship between the vote and other rights is, in this case at least, correct. The policies that the Reconstruction governments implemented—civil rights laws prohibiting private as well as public discrimination, and providing free public education—are essentially the same ones that modern policymakers believe are helpful to social advancement.<sup>184</sup> These policies were the exact opposite of the state mandated segregation and inferior schools actually offered African Americans in the Southern states. The historical picture suggests an African American political community capable of identifying its interests and voting for politicians, white or not, congenial to those interests.<sup>185</sup> Critics of black

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<sup>181</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see, e.g., *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

<sup>182</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>183</sup> ALBERT BUSHNELL HART, *THE SOUTHERN SOUTH* 175 (1912) (“[N]obody North or South knows what would have been the result of negro suffrage, for in no state longer than eight years, and in some states only about three years, did they actually cast votes that determined the choice of state officers, or any considerable number of local officers.”).

<sup>184</sup> See FONER, *supra* note 94, at 143-44 (noting constitutions produced by the Reconstruction conventions were progressive documents, recognizing or establishing equality in public life; free public education; facilities for prisoners, orphans, and the insane; and public relief for the poor).

<sup>185</sup> See, e.g., MICHAEL K. FAUNTROY, *REPUBLICANS AND THE BLACK VOTE* 3 (2007) (“African Americans, like all Americans, can be very pragmatic in pursuing their dreams and aspirations and will support candidates they believe will use public policy to achieve those ends.”). As Fauntroy has written:

A key variable in understanding African American politics is the notion of a ‘linked fate’ among African Americans of various backgrounds, without regard to geography or socioeconomic status. Linked fate refers to the belief held among a substantial majority of African Americans that what happens generally to black people in America will impact what happens to all black Americans in their individual lives.

suffrage often contended that African Americans could not be trusted with the vote because they were ignorant, and thus liable to vote foolishly.<sup>186</sup> The real problem seems to not have been that they were foolish, but that they were capable of identifying their interests and therefore not inclined to vote for a party that had, as a central goal, the subordination of their race.<sup>187</sup> This section outlines some of the probable consequences of disenfranchising the African American majority.<sup>188</sup>

#### A. *The States*

Disenfranchising African Americans allowed a minority to take over the state governments and thereby to impose Jim Crow. Under Jim Crow, African Americans were segregated, were offered inferior educations, and faced a legal system—and a social and economic system supported by law—that often deprived them of a fair opportunity to earn money or retain capital. In addition, they encountered a criminal justice system designed to keep them in their place. These policies would have been impossible in a majoritarian system.

In the system of government contemplated by the Constitution, arguments advanced by African Americans challenging laws that disadvantaged them would have been raised, if at all, by Southern conservatives challenging laws benefiting the African American majority and others who shared their economic and social interests. During the *Brown* case, then-law clerk William Rehnquist famously wrote, “[I]n the long run, it is the majority who will determine what the constitutional rights of the minority are.”<sup>189</sup> If this is a neutral principle of law, then surely it applied to the African American majority coalition in the South.

This is not to say that normal politics would not have operated. It is unlikely that African Americans would have enjoyed the best of all possible political and economic worlds, that discrimination would have quickly melted away, that white allies would have always been selfless, that conservatives would have been gracious losers and never played the race card —

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<sup>186</sup> *E.g.*, Wade Hampton, *What Negro Supremacy Means*, 5 FORUM 383, 385 (1888) (Hampton, an Ex-Confederate General, South Carolina Governor and U.S. Senator “dreaded the threatened infusion of so large a mass of ignorant voters as universal suffrage would give into our body-politic, and . . . regarded such a result as a great crime against humanity, civilization and Christianity.”).

<sup>187</sup> *Cf.* KEY, *supra* note 122, at 648 (African American voters likely to support candidates who support civil rights, education and public services).

<sup>188</sup> This Article does not engage the question of whether the reconstruction regimes were honest or effective. Even corrupt, ineffective regimes can be beneficial to those controlling them, and corruption and ineffectiveness have not generally been regarded as justifications for armed revolution against Republican states (just as honesty and effectiveness are not justifications for tyranny).

<sup>189</sup> *See* William H. Rehnquist, *A Random Thought on the Segregation Cases 2*, in NOMINATION OF JUSTICE WILLIAM HUBBS REHNQUIST: HEARINGS BEFORE THE S. COMMITTEE ON THE JUDICIARY, 99TH CONG. 315 (1986).

and then thrifty, wise, and ambitious African Americans would have invested their pennies in shares of Berkshire Hathaway. The educational and monetary disadvantages of African American voters would have meant that they could not use the political system as fruitfully as a more educated and affluent group. They would have been outmaneuvered more often than their numbers would imply. But as voters they would have been participants in politics. Perhaps they could have followed the path of immigrants of the era. As a group, immigrants had minimal assets and experienced benign neglect or modest government support. Socially, they had language and cultural disadvantages and faced race-based discrimination. Yet, as a group they made gradual but significant and continued progress, not least because they were part of the political system.<sup>190</sup>

### 1. *Protection of Civil Rights*

Whatever the Supreme Court had to say about the federal government's Constitutional power to protect civil rights against private infringement,<sup>191</sup> the very concept of states' rights implied that the states could do whatever they chose in that area. The Reconstruction governments of the former Confederate states aggressively used their authority to prohibit private discrimination against African Americans. Franklin Johnson, an important early analyst of Jim Crow laws, explained: "During the Reconstruction period of the Southern states, a number of such states enacted Civil Rights laws, which were very full and stringent in their terms. South Carolina was the first state so to provide, being followed by Louisiana, Texas, Arkansas, Florida and Mississippi."<sup>192</sup> The Louisiana and Mississippi Supreme Courts upheld their states' civil rights statutes<sup>193</sup> in accord with the unanimous views of other courts.<sup>194</sup> Accordingly, we know from actual conduct that democratic Southern governments used the law to eliminate private discrimination.

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<sup>190</sup> See e.g., NOAH PICKUS, TRUE FAITH AND ALLEGIANCE: IMMIGRATION AND AMERICAN CIVIC NATIONALISM 161 (2005) ("Immigrants have always come to the United States for a mixture of economic, ideological, and personal reasons. Most have become full participants in American life, committed to the broader community and supportive of its constitutional values. Although many Americans feared earlier waves of immigrants, a significant expansion of democracy has often taken place after the arrival of newcomers, as it did following the surge of immigration early in the last century.").

<sup>191</sup> See *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding the Civil Rights Act of 1875 void because it was applicable to private action, which is in the domain of state legislation).

<sup>192</sup> FRANKLIN JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO 29 (1919) (Greenwood Press reprint 1979). See generally Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1374 (1996).

<sup>193</sup> *Decuir v. Benson*, 27 La. Ann. 1, 1875 WL 263, \*3 - \*4 (1875), *rev'd on other grounds sub nom. Hall v. Decuir*, 95 U.S. 485 (1878); *Donnell v. Mississippi*, 48 Miss. 661 (1873).

<sup>194</sup> The state cases invariably upheld state civil rights statutes as an aspect of the police power. See Annotation, *Constitutionality of "Civil Rights" Legislation by State*, 49 A.L.R. 505 (1927).

“All of these Southern Civil Rights Statutes were repealed either by special enactment to that effect or by omission from the Revised Statutes of their states after the end of the Reconstruction period.”<sup>195</sup> The Jim Crow regime of separation in schools, transportation, and public accommodations followed the overthrow of a democratic decision that much or all of this discrimination should be prohibited by law. Although civil rights laws once enacted are not immune from repeal,<sup>196</sup> the modern Supreme Court has explained: “Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason.”<sup>197</sup> To repeal civil rights laws and replace them with racially discriminatory laws now recognized as unconstitutional certainly constitutes “disadvantag[ing] a racial minority.”

The democratic regimes were willing to promote opportunities for the African American majority by using state power to prohibit private discrimination. If these states were willing to regulate particular contexts, it is reasonable to conclude that they would have expanded the protection to new contexts when necessary to achieve non-discrimination, and would be willing to enforce them once enacted, at least to some extent. For example, the modern Court found interracial marriage too controversial and therefore ducked the issue until 1967.<sup>198</sup> By court decision in Alabama<sup>199</sup> and Louisiana,<sup>200</sup> and by statute in Mississippi and South Carolina,<sup>201</sup> the Reconstruction regimes eliminated this color bar. The majority did not intend to stay its hand in deference to the irrational sensibilities of the conservative minority.

## 2. *Public Education*

The Reconstruction governments made education a priority. Early on, African Americans generated their own educational opportunities. In Mississippi, for example, African Americans “built schools, and collected and spent their own funds for specific educational purposes and their overall

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<sup>195</sup> JOHNSON, *supra* note 192, at 29. *See, e.g.*, MISS. CODE ANN. § 97-23-17 (allowing businesses to exclude customers on any basis).

<sup>196</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967).

<sup>197</sup> *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 539 n.21 (1982).

<sup>198</sup> *Loving v. Virginia*, 388 U.S. 1 (1967); BICKEL, *supra* note 13, at 174 (discussing Court’s avoidance of the issue).

<sup>199</sup> *See Burns v. State*, 48 Ala. 195 (1872), *overruled by Green v. State*, 58 Ala. 190 (1877).

<sup>200</sup> *Hart v. Hoss*, 26 La. Ann. 90 (1874). The prohibition was reinstated no later than 1894. *See State v. Treadaway*, 126 La. 300, 306 (1910) (referring to the miscegenation law (Act No. 54 of 1894, p. 63)).

<sup>201</sup> JOHNSON, *supra* note 192, at 9.

improvement.”<sup>202</sup> These efforts began before the end of the Civil War,<sup>203</sup> and inspired northerners to go south to teach.<sup>204</sup>

African American zeal<sup>205</sup> was fueled by multiple concerns,<sup>206</sup> including the connection between education and effective political participation.<sup>207</sup> Denied both under slavery, African Americans understood their relationship. “Acquiring literacy in conjunction with freedom had the potential to open access to democratic political activity, and that in turn held a promise of enabling them to help shape the civil society in which they had hitherto been considered chattel.”<sup>208</sup>

Accordingly, progressive education policies and mandates were written into Reconstruction constitutions, including the requirement of free schooling provided by a state system and funded by state taxes.<sup>209</sup> As sovereigns, of course, the states enjoy “unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction.”<sup>210</sup> Six states prescribed a minimum school term to receive state aid, six provided for a state board of

<sup>202</sup> Christopher M. Span, “*I Must Learn Now or Not at All*”: *Social and Cultural Capital in the Educational Initiatives of Formerly Enslaved African Americans in Mississippi, 1862-1869*, 87 J. AF. AM. HIST. 196, 200 (2002).

<sup>203</sup> “On abandoned property . . . , free, freed, fugitive and enslaved African Americans, as early as 1862, established churches and schoolhouses for individual and collective improvement.” *Id.* at 197. See also Janet Duitsman Cornelius, *The Education of Blacks in the South, 1869-1935*, 40 EDUC. THEORY 407, 407-408 (1990).

<sup>204</sup> Heather Andrea Williams, ‘*Clothing Themselves in Intelligence*’: *The Freedpeople, Schooling, and Northern Teachers, 1861-1871*, 87 J. AF. AM. HIST. 372, 373 (2002). “The missionary response did not come without a cost, however, as white northerners often sought to impose their will and their vision on a people aiming to become self-determining.” *Id.*

<sup>205</sup> African Americans’ desire and enthusiasm for education in the post-Civil War South is well-documented. See *id.* at 372-76; Cornelius, *supra* note 203; Irving Gershenberg, *Southern Values and Public Education: A Revision*, 10 HIST. EDUC. Q. 413, 416 (1970). One measure of how highly valued was education is the amount and degree of hardship African Americans faced in the quest to get it. See Williams, *supra* note 204, at 375. “African Americans contended with a host of oppositional forces when they attempted to attend school.” See David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236, 242 (1986) (“Southern whites were hostile to schools for blacks when they were conducted by blacks or Northern whites. In many communities they burned schoolhouses, ostracized or beat teachers, and sought to intimidate the families who went to school.”) (citation omitted).

<sup>206</sup> See Cornelius, *supra* note 203, at 408. The author cites respect for narrative device, demonstration of humanness, importance of reading the Bible, and various economic and personal benefits.

<sup>207</sup> Span, *supra* note 202, at 198 (“[C]ountless African Americans purposely sought schooling and literacy, viewing them as the foundation for self-improvement and one means of attaining social and economic parity in the state’s evolving postbellum political economy.”).

<sup>208</sup> Williams, *supra* note 204, at 373.

<sup>209</sup> See Tyack & Lowe, *supra* note 205, at 246.

<sup>210</sup> *Union Pac. R.R. Co. v. Peniston*, 85 U.S. 5, 29 (1873); see also *Lawrence v. State Tax Comm’n. of Miss.*, 286 U.S. 276 (1932) for a discussion of the issue, stating

The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them.

*Id.* at 279-80.

education, and all ten established the position of a state school superintendent.<sup>211</sup> Five states elected African Americans to this post.<sup>212</sup>

Dramatic results followed, and 91,000 African American children were enrolled in public schools in the South in 1866. Four years later, the number was 150,000, and by 1877 enrollment of African Americans had risen to 572,000. Literacy rates among Southern blacks rose from one in five in 1870 to well over half by 1900.<sup>213</sup> Provisions for universal education also benefited poor whites throughout the Southern states.<sup>214</sup> As W.E.B. Du Bois would argue in 1935, credit for the advent of universal public education in the Southern states was due to the Reconstruction conventions, legislatures, and the efforts of blacks serving in both.<sup>215</sup> When a critic conceded that “[s]ome good things were done by these Reconstruction legislatures,” he mentioned “particularly the founding of systems of common schools throughout the South.”<sup>216</sup>

South Carolina and Louisiana’s constitutions prohibited segregation, and no state’s constitution required it.<sup>217</sup> Nonetheless, a dual system quickly took hold in the South, consistent with white and, in some cases, black wishes.<sup>218</sup> Whatever the proximate cause, to establish a dual system of schools was a step toward fixing the social order then developing in the Reconstruction South according to the vision that whites there held.<sup>219</sup>

Resources were fairly evenly distributed between the school systems until the 1890s. In Alabama, for example, for the years 1880 to 1890, the average length of an annual school term was 81.1 days for African American students and 83.3 days for white students.<sup>220</sup> From 1879 until 1891, spending for African Americans’ education was around 40% of the state’s total spend-

<sup>211</sup> Tyack & Lowe, *supra* note 205, at 246.

<sup>212</sup> *Id.* at 248; *see id.* (“Many blacks served as county superintendents and members of school boards.”).

<sup>213</sup> *Id.* at 249.

<sup>214</sup> Poor Southern whites strongly supported public education. *See* Gershenberg, *supra* note 205, at 418.

<sup>215</sup> W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: 1860-1880* 638-42 (1935). *See also* FONER, *supra* note 96, at 319-20.

<sup>216</sup> Hart, *supra* note 128, at 156.

<sup>217</sup> JOHNSON, *supra* note 192, at 32. In other states, calls to segregate the schools constitutionally failed. Tyack & Lowe, *supra* note 205, at 246-48.

<sup>218</sup> Tyack & Lowe, *supra* note 203, at 246-48.

<sup>219</sup> *See* Horace Mann Bond, *The Extent and Character of Separate Schools in the United States*, 4 J. NEGRO EDUC. 321 (1935) for a discussion of the issue, arguing

The inauguration of separate schools, the motivation of the crises which force Negroes to accept, or even to ask for them, are not original with Negroes. The basis for the separate school is apparently an unwillingness of the white population to accept the Negro as a full participant in the life of our Democracy.

*Id.* at 324; *see also* E. Franklin Frazier, *The Status of The Negro in the American Social Order*, 4 J. NEGRO EDUC. 293, 298-99 (1935) (“Although the association of the races in public schools had been tolerated to some extent, separate schools became the rule soon after the beginning of Reconstruction.”).

<sup>220</sup> Irving Gershenberg, *The Negro and the Development of White Public Education in the South: Alabama*, 39 J. NEGRO EDUC. 50, 56 (1970).

ing on education.<sup>221</sup> This distribution was equitable: in 1889-1890, 44% of state education funds were spent in African American schools, and African Americans made up 43.8% of the state's population that year.<sup>222</sup>

But things changed. By the 1907-08 school year, expenditures for African American schooling in Alabama fell to 12.4% of total education spending, and stayed there.<sup>223</sup> That year, African American schools "received only 36 per cent of a fair distribution, while white children received 164 per cent of a similar distribution."<sup>224</sup> The school year lengthened more rapidly for whites than African Americans;<sup>225</sup> as a result, the white advantage increased over time.<sup>226</sup> Decision-making authority shifted from the state to local levels at roughly the same time as disenfranchisement.<sup>227</sup> "Invariably, this meant that a smaller proportion of the school fund would be devoted to supporting Negro schools and, correspondingly, a larger proportion would be made available to provide for white public education."<sup>228</sup>

Disenfranchisement twice contributed to the decline of educational opportunity for African Americans. First, when violence and other extralegal means denied African Americans their constitutional right to vote, they could exert no political pressure on officials who made decisions about school funding. "[W]hites [who] came into power around the nineties . . . paid no heed to the educational needs of the voteless blacks."<sup>229</sup>

Second, when legislative and constitutional changes in the 1890s and 1900s led to declining educational opportunities for blacks, this targeted population became more likely to fail the literacy tests for voting written by the same legislatures and constitutional conventions. Members of the Committee on Education, submitting a minority report to the Alabama Convention of 1901, expressly drew the link between de-funding African American education and denying them the vote: "The divorcement of the white and

<sup>221</sup> *Id.* at 52.

<sup>222</sup> Horace Mann Bond, *Negro Education: A Debate in the Alabama Constitutional Convention of 1901*, 1 J. NEGRO EDUC. 49, 49 (1932).

<sup>223</sup> Gershenberg, *supra* note 218, at 52-53. Note that expenditures by race were not reported from 1891 to 1906. *Id.*

<sup>224</sup> Bond, *supra* note 220, at 49.

<sup>225</sup> Gershenberg, *supra* note 218, at 56.

<sup>226</sup> *Id.*

<sup>227</sup> See Bond, *supra* note 220, at 50.

<sup>228</sup> Gershenberg, *supra* note 220, at 55. See Bond, *supra* note 222, who appreciated that this was a losing game, arguing

From approximate equality in 1890 we have arrived at a situation, within a brief span of forty years, in which the white child in Alabama received in 1930 not only the \$1.00 destined for him on a fair appropriation basis, but also sixty-four cents of the \$1.00 which should have been devoted to the Negro child if equal educational opportunity existed.

*Id.* at 49-50.

<sup>229</sup> Frazier, *supra* note 219, at 299. See also Tyack & Lowe, *supra* note 205, at 250 ("As long as blacks could vote . . . and retained their deep commitment to schooling, it was politically dangerous [for whites in positions of power] to tamper too much with the educational system.").

colored school systems stand side by side in importance with the proper suffrage regulations.”<sup>230</sup>

African Americans got the point. They could not get educational funding, it seemed, because they could not vote, and they could not vote because they did not have access to education. In a petition to their state’s 1895 constitutional convention, Louisiana African Americans wrote: “To punish a man for his ignorance by withholding the right to the ballot, without which the distinction between self-government and a despotism disappears, when that ignorance is due to the neglect of the State, would be a most unnatural crime.”<sup>231</sup>

The Reconstruction governments used state power to break down entrenched patterns of public and private discrimination, and to tax in order to offer education and other public services desired by the voters.<sup>232</sup> If not for the unconstitutional disenfranchisement of African Americans, there is no reason to think that these policy preferences would have changed. Nor is there any reason to doubt that these policies would have had their desired effect. If this is right, then all or almost all of the acts of private discrimination which are now characterized as “general societal discrimination” occurred only because of prior violations of the Fourteenth and Fifteenth Amendments. If so, they are within the power of Congress to remedy.<sup>233</sup>

### B. Federal Race Policy

Disenfranchisement in the former Confederate states had substantial effects on federal law, and therefore on the nation as a whole. Senators, Representatives, and the President are elected in state elections. Presidential and Senatorial elections confer the power to appoint and confirm federal judges. Accordingly, the ability to control state elections influences all branches of

<sup>230</sup> Bond, *supra* note 222, at 53.

<sup>231</sup> Tyack & Lowe, *supra* note 205, at 238.

<sup>232</sup> Michael Selmi argues that the federal spending power offers an independent basis for remedying past discrimination. Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575 (2002).

<sup>233</sup> Thus, even in one of the Court’s restrictive recent cases, it explains:

All must acknowledge that §5 [of the Fourteenth Amendment] is “a positive grant of legislative power” to Congress, *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). In *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880), we explained the scope of Congress’ §5 power in the following broad terms: “Whatever legislation is appropriate, that is, adapted to carry out the objects the 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 the domain of congressional power.” Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ 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.” *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

*City of Boerne v. Flores*, 521 U.S. 507, 517-18 (1997).

national government. With African American support, Republicans won the electoral votes of six Southern states in 1868<sup>234</sup> and 1872.<sup>235</sup> In peaceful elections, the number could have been higher. The seven states in which African Americans were over 40% of the population elected fourteen senators. Thus, fair elections in 1880 and beyond might well have generated an astonishing twenty-eight-seat swing in the Senate — from fourteen conservative Senators, to fourteen Senators who owed their elections at least in large part to the African American vote. Similar effects would have been seen in the House, the Electoral College, and the courts. Minority rule in the South had national political consequences. The minority knew that African American oppression was not merely important or desirable, it was the foundation of the political system. Without it, the system would not just collapse, it would reverse: “bottom rail on top.”<sup>236</sup>

Justice Scalia has opined, without citation of authority, that “racial discrimination against any group finds a more ready expression at the state and local than at the federal level.”<sup>237</sup> However, the remarkably broad range of discrimination in federal programs that followed disenfranchisement suggests that he is mistaken.<sup>238</sup> Congress or the Administration mandated racial discrimination in employment; departments “with the most black employees, the Post Office and Treasury, led the way in imposing segregation in the workplace.”<sup>239</sup> The military was segregated,<sup>240</sup> as were benefit programs, such as federally-backed mortgage loans,<sup>241</sup> public housing,<sup>242</sup> and New Deal

<sup>234</sup> See [PresidentElect.org](http://presidentelect.org), President Elect 1868, <http://presidentelect.org/e1868.html> (last visited Nov. 4, 2007).

<sup>235</sup> See [PresidentElect.org](http://presidentelect.org), President Elect 1872, <http://presidentelect.org/e1872.html> (last visited Nov. 4, 2007). The Republicans wound up with the electoral votes of 8 states in 1876 as a result of the Compromise of 1877. See [PresidentElect.org](http://presidentelect.org), President Elect 1876, <http://presidentelect.org/e1876.html> (last visited Nov. 4, 2007). By 1880, electoral votes from all eleven Southern states went to the Democrat. See [PresidentElect.org](http://presidentelect.org), President Elect 1880, <http://presidentelect.org/e1880.html> (last visited Nov. 4, 2007).

<sup>236</sup> For an example of the use of this metaphor, see Paul Finkelman, “*Let Justice Be Done, Though the Heavens May Fall*”: *The Law of Freedom*, 70 CHI.-KENT L. REV. 325, 351 (1994).

<sup>237</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring in judgment).

<sup>238</sup> See Charles W. Chesnutt, *The Disfranchisement of the Negro*, in *THE NEGRO PROBLEM: A SERIES OF ARTICLES BY REPRESENTATIVE AMERICAN NEGROES OF TODAY* 77, 91 (1903) available at <http://www.gutenberg.org/etext/15041> (“Flushed with their local success, and encouraged by the timidity of the Courts and the indifference of public opinion, the Southern whites have carried their campaign into the national government, with an ominous degree of success.”). See also Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 991 n.74 (2004) (collecting cases that invalidate federal race discrimination).

<sup>239</sup> Michael J. Churgin, *Creating a National Race Commission: A Failed Proposal*, 17 RUTGERS L.J. 591, 601 & n.65 (1986). See also NICHOLAS PATLER, *JIM CROW AND THE WILSON ADMINISTRATION: PROTESTING FEDERAL SEGREGATION IN THE EARLY TWENTIETH CENTURY* (2004).

<sup>240</sup> Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948); see GERALD ASTOR, *THE RIGHT TO FIGHT: A HISTORY OF AFRICAN AMERICANS IN THE MILITARY* (2001).

<sup>241</sup> R. Richard Banks, “*Nondiscriminatory*” *Perpetuation of Racial Subordination*, 76 B.U. L. REV. 669, 682-83 & nn.90-92 (1996) (reviewing MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995)); Adam Gordon, Note, *The Creation of Homeownership: How New Deal Changes in*

relief.<sup>243</sup> So too were federal programs such as agricultural support,<sup>244</sup> immigration,<sup>245</sup> at least some federal prisons,<sup>246</sup> the National Parks,<sup>247</sup> and the schools in the District of Columbia.<sup>248</sup> Laws bearing particularly heavily on non-white races, such as the federal drug laws,<sup>249</sup> were also affected by racial considerations.<sup>250</sup> Once African Americans had been disenfranchised, Southern members of Congress took the opportunity to push the repeal of most of the civil rights laws in the U.S. Code.<sup>251</sup>

It is true that the decision to leave African Americans to their fate was a joint decision of both political parties, and conservatives elected by minorities in the South could not have done it alone. But Republican inaction was tied to the suppression of the African American vote, and they might well not have abandoned African Americans had African Americans remained armed with the ballot. As African Americans continued to lose political power, it became pointless to fight for their votes. Disenfranchisement of African Americans enhanced the malapportionment of Congress in favor of conservatives. In the original Constitution, voteless slaves were counted as three-fifths of a person when apportioning Congressional seats and electoral votes. In 1888, Senator William E. Chandler lamented in his provocatively titled article *Our Southern Masters*: “Then, as now, the negroes entered into the basis of representation. . . . Now, as then, the negroes have no voice or vote; but the white men vote for them and wield their power, and thereby

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*Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186 (2005).

<sup>242</sup> Note, *Discrimination Against Minorities in the Federal Housing Programs*, 31 IND. L.J. 501 (1955-56).

<sup>243</sup> See Guy B. Johnson, *Does the South Owe the Negro a New Deal?*, 13 Soc. F. 100, 103 (1934-35) (“It is clear that there is a connection between the Negro’s political impotence and his inability to command a decent share of the services and benefits of government.”); Timothy B. Smith, *Black Soldiers and the CCC at Shiloh Military Park*, 2 CRM: J. HERITAGE STEWARDSHIP (2006), available at [http://crmjournal.cr.nps.gov/04\\_article\\_sub.cfm?issue=volume%203%20Number%202%20Summer%202006&page=1&seq=2](http://crmjournal.cr.nps.gov/04_article_sub.cfm?issue=volume%203%20Number%202%20Summer%202006&page=1&seq=2).

<sup>244</sup> See *Pigford v. Glickman*, 185 F.R.D. 82, 86 (D.D.C. 1999), *aff’d*, 206 F.3d 1212 (D.C. Cir. 2000); Note, *The Federal Agricultural Stabilization Program and the Negro*, 67 COLUM. L. REV. 1121 (1967).

<sup>245</sup> See generally Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

<sup>246</sup> John W. Roberts, *My Dear Warden*, 1 FED. PRISONS J. No. 4 at 53 (1990) (showing photograph).

<sup>247</sup> See Reed Engle, *Laboratory for Change*, RESOURCE MANAGEMENT NEWSLETTER (Jan. 1996), available at <http://www.nps.gov/shen/historyculture/segregation.htm> (describing segregation at Shenandoah National Park).

<sup>248</sup> See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>249</sup> Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the ‘War on Drugs’ Was A ‘War On Blacks’*, 6 J. GENDER RACE & JUST. 381 (2002); Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25.

<sup>250</sup> See, e.g., Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483 (1997).

<sup>251</sup> Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

rule the North and the nation.”<sup>252</sup> In fact, it was worse; the whole vote of each disenfranchised African American, not just three-fifths of it, was turned against African Americans to protect conservative rule in the South and extend its influence nationally.

### C. Depopulation

Over time, the African American majority declined, and by 1940, the census reported that they were no longer a majority in any state.<sup>253</sup> Under the circumstances, this did not necessarily mean that African American political control was doomed to be temporary in the absence of minority oppression. One major factor was the migration of African Americans northward. Over a million moved from the beginning of World War I through the 1930s,<sup>254</sup> and five million more from 1940 to 1970.<sup>255</sup> The migration was not driven exclusively by the attractions of northern industry and prosperity; “the country negroes are *striking*, and their demands include not only a system which will pay them better wages but also better living conditions especially in housing, protection from violence, and schools.”<sup>256</sup> “Seventy five years after emancipation black forced labor remained common in many areas of the South.”<sup>257</sup>

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<sup>252</sup> William E. Chandler, *Our Southern Masters*, 5 FORUM 508, 508 (1888). He continued: “The excuse offered for thus trampling ruthlessly, by murder and fraud, upon the right of suffrage as guaranteed by the Fifteenth Amendment . . . is, that negro suffrage would produce negro supremacy, and negro supremacy would curse the country. Is this attempted justification of wrong and crime sufficient?” *Id.* Cf. GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER (2003) (discussing pre-Civil War consequences of three-fifths compromise).

<sup>253</sup> HISTORICAL STATISTICS, *supra* note 92, at Pt. 1, 24-37.

<sup>254</sup> ERIC ARNESEN, BLACK PROTEST AND THE GREAT MIGRATION: A BRIEF HISTORY WITH DOCUMENTS 1 (2003).

<sup>255</sup> NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA 6 (1991).

<sup>256</sup> T.J. Woofter, Jr., *The Negro on a Strike*, 2 J. Soc. F. 84, 86 (1923-24); *id.* at 85 (“As one Georgia farmer expresses it: The movement is due as much to the ‘shoving of the South’ as to the ‘pulling of the North.’”). *See also* ARNESEN, *supra* note 254, at 2 (“Black southerners had ample reason for wanting to leave the region of their birth and upbringing”; discussing, *inter alia*, harsh sharecropping system, disenfranchisement and discrimination in the criminal justice system); CAROLE MARKS, FAREWELL — WE’RE GOOD AND GONE: THE GREAT BLACK MIGRATION 16 (1989) (“For black migrants, the South had provided more than enough reason for the exodus with the legal legitimation of segregation.”); *id.* at 14 (whites favoring migration noted “the countervailing effect of getting rid of the Negro majority”) (quoting GEORGE HAYNES, NEGRO MIGRATION IN 1916-1917, at 47 (1919)); Peter Gottlieb, *Rethinking the Great Migration* 72, in THE GREAT MIGRATION IN HISTORICAL PERSPECTIVE: NEW DIMENSIONS OF RACE, CLASS AND GENDER (Joe William Trotter ed., 1991) (“Whites had barred access to adequate education, skilled occupations and the franchise. Segregation and discrimination were often most strictly enforced in the southern towns and cities where African-Americans went in search of wage labor.”).

<sup>257</sup> William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 31 (1976), *reprinted in* 4 RACE, LAW AND AMERICAN HISTORY (Paul Finkelman ed. 1992).

Racial violence meant that the right to life itself was not secure.<sup>258</sup> It is perfectly plausible that the exodus was caused, at least in part, by oppressive conditions allowed by the political system.

#### D. *White and Other Victims*

In the post-Reconstruction South, African Americans experienced intense humiliation, oppression, and violence. Although their suffering was monumental, Indians, Latinos, and Asian Americans were also oppressed. Accordingly, some argued that African Americans were in the same boat as other racial groups. Thus, Justice Powell in *Bakke* observed:

There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications.<sup>259</sup>

Justice Marshall responded with an argument about stigma: "The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by law."<sup>260</sup> But this is debatable, and it is not obvious that the treatment of the Native Americans, for example, was less injurious or stigmatizing on an individual level.

In one way, however, African American oppression was undeniably unique: they alone were denied the opportunity to be a political majority in a state. Nonetheless, the consequences of this unique harm were shared by others. The human suffering was borne primarily by African Americans, but the political effects extended to white Republican Southerners, and other Americans with shared political aims who lost the opportunity to be part of what should have been a winning coalition.<sup>261</sup> Then, as now, white affluent Upper East Siders, Midwestern union members, and other political allies of

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<sup>258</sup> See, e.g., Stewart E. Tolnay & E. M. Beck, *Racial Violence and Black Migration in the American South, 1910 to 1930*, 57 AM. SOC. REV. 103 (1992); Stewart E. Tolnay & E. M. Beck, *Black Flight: Lethal Violence and the Great Migration, 1900 to 1930*, 14 Soc. Sci. HIST. 347 (1990).

<sup>259</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 296-97 (1978) (opinion of Powell, J.); see also *id.* at 296 n.36 ("No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups."); *id.* at 297-98 n.37 (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 339 (1974) (Douglas, J., dissenting) ("the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the . . . policy would almost surely fail, because there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner.")).

<sup>260</sup> *Id.* at 400 (Marshall, J., concurring in part and dissenting in part).

<sup>261</sup> Cf. Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759 (2002-03).

every race, residence, and position in society share the political consequences when the votes of African Americans in the South are for some reason not cast or counted.

## V. THE IRONIC COUNTER-MAJORITARIAN DIFFICULTY

The counter-majoritarian difficulty proposes that when engaging in judicial review, courts should be respectful of the rights of majorities. Part of the concern rests on separation of powers, but fundamentally it is driven by the idea that majority rule is important and democratic enactment is the characteristic that makes legislation legitimate. If that premise is correct, and if a system is going to have judicial review at all, then that a law was passed by a minority should be a particularly powerful reason to look at it skeptically. This section proposes that the Court was not always so concerned with majoritarianism: when African Americans were a majority, protection of majority rule was not a political or legal concern. The Court cheerfully upheld statutes passed by a minority to prevent majorities from exercising their constitutional rights. It would be shocking if it had been otherwise, because the Justices making these decisions were appointed by Presidents and confirmed by Senates who had themselves obtained office through exploitation of or accommodation with the disenfranchisement of the African American majorities of the South.

### A. *The Majoritarian Difficulty*

The idea at the core of the counter-majoritarian difficulty, that judicial review should be restrained lest courts interfere with decisions of majorities, counseled judicial vigor when those seeking help from the courts were in fact majorities. If African Americans were a majority or controlling plurality at the turn of the twentieth century, then judicial decisions failing to defend their interests could not be the result of an effort, correct or not, to balance majority rule and minority rights. Instead, anti-African American decisions sacrificed both the principle of democracy and the letter of the Constitution in favor of some other principle. The Court knew what it was doing when it upheld discrimination and disenfranchisement; it consciously upheld laws passed by minorities, against the will of majorities, who because of their race had been denied the right to vote provided by the Constitution.

As early as *Strauder v. West Virginia*,<sup>262</sup> the Court recognized that there were “[s]tates where the colored people constitute a majority of the entire population.”<sup>263</sup> Given that disenfranchisement of African Americans was one of the great political issues of the Gilded Age, it is impossible that the Justices were ignorant of the stakes in race cases. Just as the Justices of 1944

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<sup>262</sup> 100 U.S. 303 (1879).

<sup>263</sup> *Id.* at 308.

undoubtedly knew that the United States was at war, and the Justices of 1962 were aware of the tensions between the United States and the Soviet Union, the Justices of 1896 must have known of the campaign to disenfranchise African American majorities. The disenfranchisement was frequently reported on Page 1 of the *Washington Post*. There were stories about disenfranchisement in Alabama,<sup>264</sup> Mississippi,<sup>265</sup> and South Carolina.<sup>266</sup> A *Chicago Tribune* editorial reprinted in the *Washington Post* announced: "It is now quite certain that in the near future in Virginia, North Carolina, South Carolina, Alabama, Mississippi and Louisiana, the negro will be eliminated from politics. The only states remaining will be Georgia and Florida and it is not likely that they can long resist the pressure from the other six."<sup>267</sup> Law reviews reported the disenfranchisement movement,<sup>268</sup> as did other elite media. In 1888, in *Forum*, a *Commentary or Public Interest* of the time, former Confederate General, then-U.S. Senator from Alabama John T. Morgan crossed pens with Albion Tourg e, soon to represent Homer Plessy, in a pair of articles on African American suffrage. Both agreed on what was at issue:

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<sup>264</sup> See *Ballot Taken Away: Radical Changes in Alabama Constitution*, WASH. POST, June 30, 1901, at 1; *District Negro Vote: Alabama Will Follow Lead of Other Southern States*, WASH. POST, June 19, 1901, at 10 ("Alabama is following the lead of Louisiana, Mississippi, South Carolina, North Carolina and Virginia and other Southern States in an effort to solve the negro suffrage problem by disfranchising the negro."); *Is a Bar to Progress: Morgan's Comment on Negro Suffrage in the South: Election Frauds Condoned*, WASH. POST, Jan. 9, 1900, at 4 (U.S. Senator Morgan "maintained that there is a natural supremacy in the whites, and a natural deficiency in the blacks, morally, socially and intellectually."); *Jelks is Far Ahead*, WASH. POST, Aug. 26, 1901, at 1 ("To-day's primary was the first held since the adoption of the new constitution by which the negro is eliminated as a political factor in Alabama."); *Ratified by Alabama*, WASH. POST, Nov. 12, 1901, at 1 ("This was the last opportunity they will have to vote, and in many counties they turned out en masse."); *Step Toward Disfranchisement*, WASH. POST, Apr. 24, 1901, at 1 (constitutional convention approved for several purposes "chief among which is esteemed to be the disfranchisement of the ignorant negro."); *Will Fight Disfranchisement*, WASH. POST, Mar. 20, 1901, at 1 (Republicans opposed constitutional convention, "which has as one of its objects the disfranchisement of the ignorant negro.").

<sup>265</sup> See *infra* notes 282-283.

<sup>266</sup> *Excluding the Negro: South Carolina's Plan to Shut Out the Ignorant Voter*, WASH. POST, Nov. 2, 1895, at 1; *Gov. Evans Denies Treason*, WASH. POST, May 16, 1895, at 1 (letter from South Carolina's Governor: "We redeemed our state from negro domination and anarchy in 1876 in spite of Grant's bayonets, restoring order, peace and prosperity, and will preserve our civilization by lawful means, if allowed, but we will preserve it."); *South Carolina's Constitution: The Elections Show that it Will Largely Eliminate the Negro Vote*, WASH. POST, Aug. 21, 1895, at 1.

<sup>267</sup> Editorial, *Disfranchising the Negro*, WASH. POST, May 6, 1900 at 6; see also *The New Nullification*, WASH. POST, Aug. 12, 1900, at 11 ("The avowed purpose of the South is the absolute destruction of Negro suffrage.").

<sup>268</sup> See, e.g., Dos Passos, *supra* note 124; Hart, *supra* note 128; *Disfranchising the Negro*, 12 AM. LAW. 2 (1904) ("The work of disfranchising the negro goes swiftly forward"); *Summary of Legislation by States in 1898*, 59 ALB. L.J. 226, 226 (1899) ("The movement to place on a more satisfactory basis the existing 'white supremacy' throughout the black belt of the south has made considerable progress. . . .") (citation omitted).

Morgan's article was entitled *Shall Negro Majorities Rule?*;<sup>269</sup> Tourgée's rejoinder: *Shall White Minorities Rule?*<sup>270</sup>

### 1. *Plessy*

*Plessy v. Ferguson*<sup>271</sup> is one of the Court's most influential decisions. Upholding racial segregation in Louisiana streetcars, the precedent justified racial discrimination in countless other contexts.<sup>272</sup> Many have criticized *Plessy*, but few have addressed its frank counter-majoritarian content. Streetcar segregation was contrary to the will of a majority of voters in Louisiana; the Reconstruction legislature passed a non-discrimination statute, struck down by the Supreme Court in 1877 in *Hall v. DeCuir*.<sup>273</sup> The Louisiana prohibition invalidated by the Court was no anomaly; Arkansas, Florida, Georgia, Mississippi, and Texas also prohibited discrimination in transportation during their majoritarian interludes.<sup>274</sup> In 1890, African Americans in Louisiana might have been a majority of U.S. citizens over twenty-one years old. Even if only 49%, with white Republicans<sup>275</sup> they would have represented an overwhelming majority in a peaceful, free, and fair election.

The *Plessy* litigation unambiguously raised the issue of majority rule. In arguing for the breadth of the protection of the Fourteenth Amendment, *Plessy*'s brief reminded the Court of the demographic realities of the Southern political situation: "Suppose the colored people . . . secure control of certain states as they ultimately will, for ten cannot always chase a thousand no matter how white the ten or how black the thousand may be [discriminatory laws] would leave the personal rights of a white minority wholly at the mercy of a colored majority."<sup>276</sup>

The Court answered this contention, rejecting the claim that "the enforced separation of the two races stamps the colored race with a badge of inferiority."<sup>277</sup> The Court explained:

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<sup>269</sup> John T. Morgan, *Shall Negro Majorities Rule?*, 6 FORUM 586 (1889).

<sup>270</sup> Albion W. Tourgée, *Shall White Minorities Rule?*, 7 FORUM 149 (1889).

<sup>271</sup> 163 U.S. 537 (1896).

<sup>272</sup> For collections of segregation laws, see JOHNSON, *supra* note 192, covering the laws adopted until World War I, and PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (DAVISON DOUGLAS ed., 1997), collecting laws as of 1950.

<sup>273</sup> 95 U.S. 485, 488 (1877) (reversing judgment of Louisiana Supreme Court, holding that anti-segregation law "impose[d] a direct burden upon inter-state commerce" and thus "does encroach upon the exclusive power of Congress.").

<sup>274</sup> JOHNSON, *supra* note 192, at 34.

<sup>275</sup> Although by 1890 the South was solidly Democratic, in the five presidential elections from 1884 to 1900, the Republicans polled over 20% and averaged over 25%. HISTORICAL STATISTICS, *supra* note 92, Pt. 2, at 1079.

<sup>276</sup> Brief of Plaintiff in Error at 20, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 95-210). See also *id.* (Given the cases suggesting that the Fourteenth Amendment imposed few limits on state authority, "it is little wonder that the white people of the south declare themselves ready to resist even to the death, the domination of a colored majority in any state.").

<sup>277</sup> *Plessy*, 163 U.S. at 551.

The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position.<sup>278</sup>

The Court knew that African Americans had once controlled the legislature, knew from *Hall v. DeCuir* how the majority voted while in control and as evidenced in *United States v. Cruikshank*<sup>279</sup> and other cases, that violence had removed African Americans from power and left them voteless.<sup>280</sup> Nevertheless, the Court upheld the law on the merits.

## 2. *Williams v. Mississippi*

In 1898 in *Williams v. Mississippi*,<sup>281</sup> the Supreme Court unanimously upheld the technique of permanently disenfranchising African Americans by manipulating the suffrage qualifications in the state constitution. The Supreme Court was aware of the political background of the Mississippi Constitution of 1890, which pioneered a number of techniques designed to solve the “negro problem” and was well known to the educated public. A *Washington Post* article had it all in the headline: State action, discriminatory intent, and counter-majoritarianism. It read: *For White Supremacy: A New Franchise Qualification Proposed in Mississippi: Chief Justice Campbell’s Plan: How a Negro Majority of 50,000 May Be Overcome by an Amendment to the State Constitution — It Will Be Urged Upon the Coming Convention*.<sup>282</sup> Later, the *Post* reported: “The registration in Mississippi shows that the . . . new constitution . . . has had the effect expected, namely, the diminution of the negro vote.”<sup>283</sup>

*Williams* was a murder case. The 1890 Constitution made the qualifications for service on a jury identical to those for voting, and it made it much

<sup>278</sup> *Id.* Justice Harlan’s dissent pointedly ignored this issue. He first referred to legislative supremacy in a way that seems out of place in an opinion arguing that an enactment is unconstitutional: “There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature.” *Id.* at 558. He then acknowledged that the “white race deems itself to be the dominant race . . . in prestige, in achievements, in education, in wealth and in power . . . [and] it will continue to be for all time.” *Id.* at 559. Finally, he stated that “sixty millions of whites are in no danger from the presence here of eight millions of blacks,” putting African Americans in the minority. *Id.* at 560.

<sup>279</sup> 92 U.S. 542 (1875). For a discussion of *Cruikshank*, see *infra* notes 304-310 and accompanying text.

<sup>280</sup> See *infra* note 294; *Dubuclet v. Louisiana*, 103 U.S. 550 (1880) (denying removal of case alleging suppression of African American vote).

<sup>281</sup> 170 U.S. 213 (1898).

<sup>282</sup> WASH. POST, Apr. 30, 1890, at 2. The story reported Chief Justice Campbell’s view that “the evil is a large negro majority, the remedy for which is to increase the white vote, so as to overcome it.” *Id.*

<sup>283</sup> *Registration in Mississippi: The Colored Vote Largely Crowded Out by the Poll Tax Clause*, WASH. POST, Aug. 3, 1891, at 4.

more difficult to vote. Williams was indicted and convicted by all white juries, and appealed the death sentence. Williams alleged below that through the 1890 Constitution, “the minority of the voters [in] the State . . . manipulated the election affairs and management so as to deprive the majority of the then qualified electors of their elective franchise.”<sup>284</sup> That the constitution’s suffrage provision was

but a scheme on the part of the framers of that constitution to abridge the suffrage of the colored electors in the state of Mississippi . . . by granting a discretion to the said officers as mentioned in the several sections of the constitution of the State and the statute of the State adopted under the said constitution.<sup>285</sup>

Williams also alleged “that the constitutional convention was composed of 134 members, only one of whom was a negro [and] that under prior laws there were 190,000 colored voters and 69,000 white voters . . . .”<sup>286</sup>

Williams must have thought that his cause would be helped by a Mississippi Supreme Court decision of two years before, *Ratliff v. Beale*.<sup>287</sup> The state court frankly acknowledged that the purpose of the convention was to impose minority rule on the state. In a passage cited by the U.S. Supreme Court, the *Ratliff* court admitted that “[w]ithin the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race.”<sup>288</sup> “But,” said the U.S. Supreme Court, “nothing tangible can be deduced from this.”<sup>289</sup> The laws “do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them.”<sup>290</sup> Among the pleading failures the Court identified were that, although Williams satisfactorily alleged that “to be a juror one must be an elector,”<sup>291</sup> and that “certain officers are invested with discretion in making up lists of electors, and that this discretion can be and has been exercised against the colored race,” he failed to show that the electoral lists prepared by the suspect election officers were used to select jurors.<sup>292</sup>

The unstated and preposterous ground of decision seems to be the possibility that some Good Samaritan might have unilaterally duplicated the

<sup>284</sup> Record at 10-11, *Williams v. Mississippi*, 170 U.S. 213 (1898) (No. 1897-531). The 1890 Census report counted 742,559 African Americans to 544,851 whites in Mississippi. REPORT OF THE POPULATION OF THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, Pt. I, 396-97 (1895).

<sup>285</sup> *Williams*, 170 U.S. at 214.

<sup>286</sup> *Id.* at 215.

<sup>287</sup> For a discussion of this case, see *supra* notes 117-119 and accompanying text.

<sup>288</sup> See *Williams*, 170 U.S. at 222 (quoting *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896)).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 225.

<sup>291</sup> *Id.* at 214.

<sup>292</sup> *Id.* at 223.

work of election officials and created his own list of electors, this time including African Americans. The Samaritan might have provided the list to the jury commissioners, who for some reason decided to use the unofficial list to select jurors. In that event, although not suggested by the record but certainly not precluded by it, there would be no unconstitutional discrimination against African American jurors. Accordingly, in the context of a capital prosecution, the Court upheld laws designed to disenfranchise the majority and discriminate against them in the administration of justice.

### 3. *Giles*

A few years later, it became clear that the alleged pleading failures in *Williams* were precisely what they appeared to be: a pretext for avoiding decision. Williams lost because he did not have enough evidence; the next claimants lost because they had too much. In the 1903 and 1904 cases of *Giles v. Harris*<sup>293</sup> and *Giles v. Teasley*,<sup>294</sup> the Court ingeniously evaded reaching the merits of the allegations that the African American electorate had been disenfranchised. This time, nothing was omitted from the record, which included lengthy excerpts from legislative history<sup>295</sup> and many newspaper reports on registration and voting. Plaintiffs alleged that the 1902 Alabama Constitution “as practically administered and as intended to be administered, let in all [the] whites and kept out a large part, if not all, of the blacks.”<sup>296</sup> At first blush, that seems to implicate the Fifteenth Amendment. But according to the *Harris* decision, closer examination showed that the judiciary should not get involved: “If then we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?”<sup>297</sup> In addition, the Court could not solve the problem: “If the conspiracy and the intent exist, a name on a piece of paper will not defeat them.”<sup>298</sup> Any relief would have to come from Congress or

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<sup>293</sup> 189 U.S. 475 (1903).

<sup>294</sup> 193 U.S. 146 (1904). Professor Pildes makes an irresistible argument that these cases should be in the constitutional law canon. See Pildes, *supra* note 33; Richard H. Pildes, *Keeping Legal History Meaningful*, 19 CONST. COMMENT. 645 (2002).

<sup>295</sup> Delegate Coleman, for example, reasoned: “Mr. President, I believe as strongly as I stand here, not only the fraud, the violence, the bloodshed, but I believe not one of our fair women has been assaulted in this land but that the infamous act may be traced to the Fifteenth Amendment. And I feel shocked as I remember that only a few weeks ago, a fair young lady in the gentlemen’s own county was the victim of an assault from one of these black fiends. That is my opinion of one of the effects of the Fifteenth Amendment.” Record at 398-99, *Giles v. Harris*, 189 U.S. 475 (1903) (Case No. 1902-493).

<sup>296</sup> *Harris*, 189 U.S. at 483.

<sup>297</sup> *Id.* at 486.

<sup>298</sup> *Id.* at 488.

the President.<sup>299</sup> Unfortunately, African Americans were disenfranchised in elections for those offices as well.<sup>300</sup>

*Giles v. Teasley* raised the issue again, but in a case seeking money damages, avoiding the objection to equitable relief advanced in *Harris*: Plaintiffs alleged that the constitution

was intended, designed, and enacted by the constitutional convention to deny and abridge the right of the plaintiff and others of his race in the state to vote, solely on account of race, color, and previous condition of servitude. The convention of the state of Alabama was composed entirely of white men, although the population of the state is composed of 1,001,152 white and 827,545 colored persons.<sup>301</sup>

The money damages claim failed, basically for the same reason as in *Harris*. The Court explained: “[C]onceding the allegations of the petition to be true, and the registrars to have been appointed and qualified under a constitution which has for its purpose to prevent negroes from voting and to exclude them from registration for that purpose, no damage has been suffered by the plaintiff, because no refusal to register by a board thus constituted in defiance of the Federal Constitution could have the effect to disqualify a legal voter, otherwise entitled to exercise the elective franchise.”<sup>302</sup> Thus, although state officials disenfranchised Giles because he was African American, and although no court would intervene, he suffered no damage, because if he were legally entitled to vote, no contrary declaration by anyone, evidently, made any difference.

#### 4. *The Counter-Majoritarian Court*

*Giles v. Teasley* completed the set of principles started by *Williams*: *Williams* lost because he attacked the statute on its face without showing how it was actually applied. *Giles* first lost because he sought equity not law. When *Giles* sought damages, he lost because he attacked the statute as it was actually applied. The Court was unwilling to evaluate the underlying claim, and used any pretext, transparent or otherwise, to avoid doing so.

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<sup>299</sup> *Id.*

<sup>300</sup> See Chestnutt, *supra* note 238, at 88 (“[O]ne-eighth of . . . the whole country, two-fifths of the whole Southern people, and a majority in several States, they are not able, because disfranchised where most numerous, to send one representative to the Congress, which, by the decision in the Alabama case, is held by the Supreme Court to be the only body, outside of the State itself, competent to give relief from a great political wrong.”).

<sup>301</sup> *Teasley*, 193 U.S. at 148. In presidential elections from 1900 to 1908, Republicans polled, on average, more than one-quarter of Alabama’s popular vote, with a high of 35.0% in 1900 and a low of 20.2% in 1904. In 1912, the Republicans and Teddy Roosevelt’s Progressive Party combined to attract 28% of the state’s popular vote. HISTORICAL STATISTICS, *supra* note 92, Pt. 2, 1078-79.

<sup>302</sup> *Teasley*, 193 U.S. at 164.

The Court's passivity was not virtuous. The Supreme Court of 1896, the year *Plessy* was decided, was a product of the Compromise of 1877 which gave a disputed presidential election to the Republican in exchange for a promise to wind down Reconstruction; every justice but the Democrat Field<sup>303</sup> had been appointed after 1877. The election of 1876 itself was influenced by two of the Court's March, 1876 decisions. In *United States v. Reese*,<sup>304</sup> and in *United States v. Cruikshank*,<sup>305</sup> the Court held that Congress was powerless to prevent violence in state or local elections and showed that it would construe broadly neither civil rights statutes nor indictments against those charged with violating them. *Cruikshank* was particularly notable; it voided convictions arising out of the Colfax Massacre — the killing of scores, perhaps hundreds, of African American state militiamen in an election battle in Colfax, Louisiana.<sup>306</sup> The decisions were widely publicized<sup>307</sup> and "almost immediately affected the course of political events"<sup>308</sup> by encouraging political terror.<sup>309</sup>

Moreover, the Compromise of 1877 was itself a product of the Court. Five Justices served on the electoral commission, and their 3-2 split provided the margin of decision,<sup>310</sup> putting a Republican in the White House but with a commitment that federal troops would not protect African American rights.

Thus, *Plessy* and later cases were decided by Justices appointed by Democratic presidents, or Republicans after their party had decided not to keep African American suffrage high on the list of priorities. A Republican in a position to know, future President and Chief Justice William H. Taft, explained: "both parties have wisely decided to let the election problem work itself out, and to await the local solution, which the results of fraud and

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<sup>303</sup> His views of African American political equality and of the reach of the Fourteenth Amendment were expressed in *Virginia v. Rives*, 100 U.S. 313, 335 (1879): "The equality of protection assured by the Fourteenth Amendment to all persons in the State does not imply that they shall be allowed to participate in the administration of its laws, or to hold any of its offices, or to discharge any duties of a public trust."

<sup>304</sup> 92 U.S. 214 (1875).

<sup>305</sup> 92 U.S. 542 (1875).

<sup>306</sup> LEMANN, *supra* note 129, at 21-22.

<sup>307</sup> GOLDMAN, *supra* note 95, at 108.

<sup>308</sup> JOHN R. HOWARD, *THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO Brown* 111 (1999).

<sup>309</sup> FONER, *supra* note 96, at 569 ("[T]he defeat of the 1875 Force bill, the Supreme Court's *Cruikshank* decision, and the President's refusal to send troops to Mississippi—had thoroughly demoralized many Southern Republicans. Feeling themselves 'abandoned to the tender mercies of the Ku Klux Klan,' some abandoned the 1876 campaign.").

<sup>310</sup> See generally CHARLES FAIRMAN, *FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877* (1988); REHNQUIST, *supra* note 115; C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1951); Michael L. Benedict, *Southern Democrats in the Crisis of 1876-1877: A Reconsideration of Reunion and Reaction*, 46 J. S. HIST. 489 (1980); Vincent P. DeSantis, *Rutherford B. Hayes and the Removal of the Troops and the End of Reconstruction, in REGION, RACE AND RECONSTRUCTION* (Morgan Kousser & James McPherson eds., 1982).

violence . . . will compel.”<sup>311</sup> Assuming some correlation between the policy preferences of appointing presidents and appointees’ votes, there was little reason to hope that the Court of 1896 would support the original purpose, meaning, or intent of the Fourteenth or Fifteenth Amendments.

Although *Plessy* may have been “wrong the day it was decided,”<sup>312</sup> the point is not that these cases represented doctrinal error based on current interpretations of the Constitution. Nor is the point that the political views of the justices might have distorted their views of the law, although then-Justice Edward D. White had been directly involved in the combat for conservative white supremacy in Louisiana;<sup>313</sup> perhaps he should have recused himself. The point is that the Court furthered counter-majoritarian politics, and it was itself the product of counter-majoritarian politics.

## B. *The Counter-Majoritarian Difficulty*

### 1. *Segregation*

*Brown* is the archetypical case for the counter-majoritarian difficulty. It was Bickel’s primary example,<sup>314</sup> and has been understood as counter-majoritarian<sup>315</sup> by scholars representing all points on the spectrum.<sup>316</sup> How-

<sup>311</sup> William H. Taft, *Recent Criticism of the Federal Judiciary*, 43 AM. L. REG. 576, 581 (1895).

<sup>312</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 863 (1992) (plurality).

<sup>313</sup> James F. Watts, Jr., *Edward Douglass White at 810*, in III THE JUSTICES OF THE SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS (Leon Friedman & Fred Israel eds., 1997) (“He identified himself totally with the Redeemers who struggled relentlessly to destroy the hated Republican carpetbagger administrations. He spoke out defiantly against reconstructionists, praised confederate loyalists, and once even took to the barricades during a particularly violent clash.”).

<sup>314</sup> See BICKEL, *supra* note 13, at 244 (“I have adverted repeatedly, at about every decisive point in the argument of this book, to the *School Segregation Cases*, for they at once epitomize and challenge all that I have tried to say about the role of the Supreme Court in American government.”).

<sup>315</sup> See, e.g., *Proceedings of Thursday, April 9, 1959*, 4 S. TEX. L.J. 120, 126 (1959) (defending *Brown* on the ground that “Majorities don’t need Bills of Rights. They protect themselves.” comment by Prof. Arthur Harding); Raoul Berger, *The Fourteenth Amendment: Facts vs. Generalities*, 32 ARK. L. REV. 280, 289-90 & n.63 (1978) (“Was ‘desegregation’ a ‘democratic value’ in 1954? An amendment to bar it was unattainable. . . . Judicial desegregation hardly represents ‘responsiveness to majoritarian goals.’”); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 175 (2002) (“*Brown v. Board of Education* involved de jure segregation and thus raised the specific issue of whether trumping a state majority was countermajoritarian.”); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 278 n.160 (1977) (noting that Bickel “himself at times espoused counter-majoritarian applications of implicit majoritarian principles. Integration of the public schools is perhaps the best example.”); Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1803 (1970) (stating after discussing *Brown*: “The Court’s countermajoritarian position, independent of political responsibility, should not always counsel restraint.”); Klarman, *supra* note 55, at 19 (“The conventional assessment of the Court’s countermajoritarian capacity has been distorted, I believe, by a single decision—*Brown*.”); Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705, 709 & n.21 (2004) (“*Brown* cast the Court ‘as a brave and

ever, in a majoritarian system, the problem never would have arisen, at least in the former Confederate states where segregation was most deeply entrenched and its elimination most contentious. Under majoritarian governments, Louisiana and South Carolina banned school segregation.<sup>317</sup> Even if segregation had been allowed, as Michael Klarman has argued, if African Americans voted, their schools would likely never have been allowed to be substantially inferior to the schools attended by whites.<sup>318</sup> Segregated schools would have had an unrecognizably different structure and operation if they had been designed with the consent of a politically powerful group.

The majoritarian explanation also may explain a puzzle of continuing importance in the *Brown* litigation. *Brown* was reargued, and counsel asked to address the intent of the drafters with respect to school segregation; the result was inconclusive. Because “no theory of judging or constitutional interpretation will be taken seriously if it cannot justify *Brown*’s rejection of segregation in the public schools,”<sup>319</sup> this is a question still explored by scholars.<sup>320</sup> However, it should hardly be surprising that the framers of the Fourteenth Amendment did not consider how the Constitution would deal with a situation that was unlikely to occur or be problematic if the Constitution was followed. African American majorities or pluralities would either prohibit segregation by law, or, acknowledging the genuine social and edu-

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progressive countermajoritarian institution”’) (quoting JACK M. BALKIN, *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* (2002)); H. Lee Sarokin, *Thwarting the Will of the Majority*, 20 WHITTIER L. REV. 171, 172 (1998) (“The decision ending the segregation of schools was certainly ‘activist’; it reversed existing precedent and clearly thwarted both the will of the majority and the laws of many states.”); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 280 (1997) (“*Brown* is typically pointed to as the case that established the Supreme Court’s countermajoritarian capacity to protect minority rights in the face of massive political opposition.”); Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1919 (1991) (“The modern preoccupation with the counter-majoritarian difficulty is driven by the anxiety that the Warren Court’s protection of minority rights and individual liberties, which many of us view as a genuine ‘good thing,’ may be indistinguishable in theory from the predations of the *Lochner* Court.”); Mark G. Yudof, *Implementation Theories and Desegregation Realities*, 32 ALA. L. REV. 441, 442 (1981) (“for more than 25 years [desegregation] decisions have sought to [implement] countermajoritarian values”); Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & CIV. RTS. L. REV. 485, 489 n.22 (2003) (“The paradigmatic example of the Court as protector of minorities against majority will is [*Brown*], in which the Court held that segregation of public elementary schools violated the Equal Protection Clause.”).

<sup>316</sup> Bickel rejected the excuse that the Court acted for a national majority; “it is acting against the majority will within a given jurisdiction” and is not a federal branch with “electoral responsibility.” BICKEL, *supra* note 13, at 33.

<sup>317</sup> See JOHNSON, *supra* note 192.

<sup>318</sup> MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 452 (2004) (asking “whether *Brown* might have been unnecessary had southern blacks been fully enfranchised and had one-person, one-vote principles been in operation. . . . [M]ost southern whites were so committed to preserving school segregation that they would probably have outvoted blacks favoring integration. Equalization of black schools would have been a likelier scenario than legislative desegregation.”).

<sup>319</sup> Jordan Steiker, Book Review, *American Icon: Does it Matter What the Court Said in Brown?*, 81 TEX. L. REV. 305, 305 (2002).

<sup>320</sup> See, e.g., McConnell, *supra* note 17.

cational differences between some African Americans and some whites in the years immediately following enactment of the Thirteenth Amendment, would have provided for separate schools, not “equal” in the Jim Crow sense, but fair and equitable, monitored and enforced from their seats in the legislatures and on the school boards.

## 2. *Criminal Justice*

When a federal court discharges a state convict, it undoes the work of a state jury, and often interferes with the policy decisions of the state as to evidence or trial procedure. Accordingly, the Supreme Court’s criminal procedure cases are often assailed as counter-majoritarian or as interferences with state’s rights. But many of these cases (although certainly not all),<sup>321</sup> rather than being due process cases, or even equal protection cases, may be equally justifiable as guarantee clause cases. That is, they may rectify oppression of African Americans which was only possible because they were denied their rightful political authority.

Important first steps in the Court’s criminal procedure jurisprudence involved Southern outrages. In *Powell v. Alabama*,<sup>322</sup> a Scottsboro Boys case, the Court reversed rape convictions and death sentences against men not assisted by counsel at trial. In *Brown v. Mississippi*,<sup>323</sup> the Court reversed the murder conviction based on a confession obtained through torture. Michael Klarman has argued persuasively that these and contemporaneous cases<sup>324</sup> were partly motivated by a recognition that African Americans in the South were discriminated against in the criminal justice system.<sup>325</sup>

But it is also true that a political system in which African Americans played a dominant role would be unlikely to embrace the torture and rail-roading of citizens simply because they were African American. If African Americans and their political allies held their fair share of state supreme court seats, *Brown* and *Powell* would never have made it to any federal court, and the defendants probably never would have been arrested.

Before *Miranda* and *Mapp*, the docket continually reminded the Court that the Southern legal system did not give African Americans a fair shake.<sup>326</sup> There was a steady diet of jury discrimination cases from almost

<sup>321</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Miranda v. Arizona*, 384 U.S. 436 (1966), to name only two enormously important cases, did not originate in the former Confederate states.

<sup>322</sup> 287 U.S. 45 (1932).

<sup>323</sup> 297 U.S. 278 (1936).

<sup>324</sup> *E.g.*, the mob-domination of trial cases. See *Moore v. Dempsey*, 261 U.S. 86 (1923) (Arkansas); *Frank v. Mangum*, 237 U.S. 309 (1915) (Georgia).

<sup>325</sup> See Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

<sup>326</sup> See NEIL McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW* (1990); DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1997).

every former Confederate state.<sup>327</sup> The Court also regularly decided tortured confession cases—Florida in 1940,<sup>328</sup> Texas in 1940 and 1942,<sup>329</sup> Tennessee in 1944,<sup>330</sup> Mississippi in 1948,<sup>331</sup> South Carolina in 1949,<sup>332</sup> Alabama in 1957,<sup>333</sup> and Arkansas in 1958.<sup>334</sup> There were cases from the South about unconstitutional presumptions, not always,<sup>335</sup> but often invalidating presumptions of fraudulent intent,<sup>336</sup> structured to allow the sheriff to arrest sharecroppers who quit work, essentially creating a system of peonage.

Once the criminal procedure work of the Warren Court began in earnest, a number of important cases came out of the South.<sup>337</sup> The Court recognized the right to jury trial in state criminal cases in *Duncan v. Louisiana*,<sup>338</sup> which involved an interracial fight following desegregation of a school. The Court incorporated the speedy trial guarantee in *Klopfer v. North Carolina*,<sup>339</sup> a sit-in case.<sup>340</sup> The Court held that the confrontation clause applied to the states in *Pointer v. Texas*,<sup>341</sup> and the right to compulsory process in *Washington v. Texas*.<sup>342</sup> Perhaps most importantly, the implication of *Powell v. Alabama*<sup>343</sup> that due process required counsel even for those too poor to pay for it was realized in 1963 in *Gideon v. Wainwright*,<sup>344</sup> a case out of Florida, where the Court held that indigent defendants were entitled to counsel when charged with felonies. This was a non-issue for most states which offered

<sup>327</sup> See *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Reece v. Georgia*, 350 U.S. 85 (1955); *Shepherd v. Florida*, 341 U.S. 50 (1951); *Cassell v. Texas*, 339 U.S. 282 (1950); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Norris v. Alabama*, 294 U.S. 587 (1935); *Brownfield v. South Carolina*, 189 U.S. 426 (1903); *Virginia v. Rives*, 100 U.S. 313 (1879); see also *Payne v. Arkansas*, 356 U.S. 560 (1958) (noting claim, reversing on other grounds); cf. *Hale v. Kentucky*, 303 U.S. 613 (1938); *Hollins v. Oklahoma*, 295 U.S. 394 (1935).

<sup>328</sup> *Chambers v. Florida*, 309 U.S. 227 (1940).

<sup>329</sup> *Ward v. Texas*, 316 U.S. 547 (1942); *White v. Texas*, 310 U.S. 530 (1940).

<sup>330</sup> *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

<sup>331</sup> *Lee v. Mississippi*, 332 U.S. 742 (1948).

<sup>332</sup> *Harris v. South Carolina*, 338 U.S. 68 (1949).

<sup>333</sup> *Fikes v. Alabama*, 352 U.S. 191 (1957).

<sup>334</sup> *Payne v. Arkansas*, 356 U.S. 560 (1958).

<sup>335</sup> *Manley v. Georgia*, 279 U.S. 1 (1929) (unconstitutional to presume that bank insolvency was due to fraud).

<sup>336</sup> *Pollock v. Williams*, 322 U.S. 4 (1944); *Taylor v. Georgia*, 315 U.S. 25 (1942); *Bailey v. Alabama*, 219 U.S. 219 (1911); see also *United States v. Reynolds*, 235 U.S. 133 (1914) (Alabama misdemeanor sentencing procedure amounted to peonage).

<sup>337</sup> See MICHAEL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN 1953-1969*, 218-261 (2005).

<sup>338</sup> 391 U.S. 145 (1968).

<sup>339</sup> 386 U.S. 213 (1967).

<sup>340</sup> Jack Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 *YALE L.J.* 1520, 1534 n.55 (1968); Joseph Mosnier, *The Demise of an "Extraordinary Criminal Procedure": Klopfer v. North Carolina and the Incorporation of the Sixth Amendment's Speedy Trial Provision*, 2 *J. SUP. CT. HIST.* 136 (1996).

<sup>341</sup> 380 U.S. 400 (1965); see also *Ferguson v. Georgia*, 365 U.S. 570 (1961) (counsel and testimony).

<sup>342</sup> 388 U.S. 14 (1967).

<sup>343</sup> 287 U.S. 45 (1932).

<sup>344</sup> 372 U.S. 335 (1963).

counsel to the poor as a policy matter. “*Gideon’s* greatest impact was felt by the destitute accused in only five states—Alabama, Florida, Mississippi, North Carolina and South Carolina.”<sup>345</sup>

## VI. CONCLUSION

In violation of the letter and spirit of the Constitution, African Americans were denied the opportunity to control or significantly influence Southern governments following the Civil War. That injury violated the democratic principles that the U.S. Constitution established. That violation directly shaped the American political system until 1965 and has had further consequences since. It is nearly certain, for example, that the presidential elections of 1968 and 2000, among many others, would have come out the other way had African Americans voted in the same numbers as members of other racial groups. This would have been a reasonable possibility absent the long history of violent discouragement from voting and laws designed to prevent them from voting such as the felon disenfranchisement laws of the South.<sup>346</sup>

Other racial injustices in this nation’s history are grave, but are different in part because the injuries were less fundamentally legal in nature. The treatment of Native Americans conceivably led to greater loss of life and wealth to the injured group, it was a grotesque violation of contemporary human rights norms, but it is not obvious that expulsion of Native Americans, the taking of their property, and the killing of those who resisted or protested was illegal or unconstitutional at the time.<sup>347</sup> Similarly, Chinese Exclusion and Japanese Internment were unambiguous, animus-based racial discriminations, but these were authorized by federal statutes that were not clearly unconstitutional at the time, indeed, are not clearly unconstitutional now.<sup>348</sup> By contrast, the counter-revolution accomplished by disenfranchis-

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<sup>345</sup> CHOPER, *supra* note 30, at 97.

<sup>346</sup> If that is correct, the Supreme Court in the early 1970s might have consisted of, say, Chief Justice Arthur Goldberg, Justices Douglas, Brennan, Marshall, Stewart, White, Harlan and a pair of Humphrey appointees—a Court more respectful of individual rights than any other in history. In 2007, the two appointees of President Bush, Chief Justice Roberts and Samuel Alito, are two members of a conservative 5-4 majority in many controversial cases.

<sup>347</sup> See, e.g., ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 317 (1990) (“White society’s exercise of power over Indian tribes received the sanction of the Rule of Law in *Johnson v. McIntosh*. . . . While the tasks of conquest and colonization had not yet been fully actualized on the entire American continent, the originary legal rules and principles of federal Indian law set down by Marshall in *Johnson v. McIntosh* and its discourse of conquest ensured that future acts of genocide would proceed on a rationalized, legal basis.”).

<sup>348</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 351-52 (2003) (Thomas, J., dissenting) (suggesting current validity of *Korematsu v. United States*, 323 U.S. 214 (1944), upholding Japanese-American internment during World War II); Chin, *supra* note 245, at 3-4 (discussing judicial approval of race-based immigration classifications); see generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

ing African Americans was designed to frustrate the core goals of preexisting provisions of the Constitution and federal statutes passed to enforce them. The injury resulted not from constitutional interpretation, right or wrong, but from repudiation of the Constitution, pure and simple. Contemporary constitutional scholars, liberal and conservative, have failed to account for the unconstitutional imposition of minority rule in a majoritarian democracy committed to the rule of law.

The consequences are now largely beyond judicial remedy. Even the broadest species of judicial review would not allow a federal judge to conclude, say, that the African-American preferred presidential candidate should have been elected in 1880, and in many elections thereafter, and therefore issue a series of injunctions remaking American society as it should have been under the Constitution. It is hard to imagine that a judge could, as step one in a legal analysis, conclude that the legal system itself is illegitimate. And yet, the injury suffered by African Americans and their allies was about control of the legal system, and therefore of concern to the legal system today.

Assuming good faith on the part of the Court, it may be that the Justices in ruling against African Americans over the decades were attempting to apply neutral principles of law to achieve justice with fidelity to the Constitution.<sup>349</sup> If so, and if deference to the majoritarian political process was an actual and justifiable basis for the Court's refusal to invalidate acts disadvantaging African Americans, the identical principle offers guidance for the Court's review of other laws that may come before it in the future.

#### A. *The Guarantee Clause and Voting Rights*

As the authors will propose in an essay now being written, African American historical majority status and their present ability to be part of majority coalitions have implications for federal power to protect voting rights. In addition to other textual sources of authority to regulate suffrage, the United States has the duty to guarantee to the states a republican form of government.<sup>350</sup> If in any state a majority of those entitled to cast ballots under the Constitution are denied the right to vote, that is a violation of the guarantee clause the United States may remedy. Accordingly, Congress had power under the Guarantee Clause to protect the rights of African Americans to vote following the Civil War, and has the power to do so now, where their disenfranchisement could lead to a minority group controlling the outcome of an election. The Court has been reluctant to rely on the freestanding Guar-

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<sup>349</sup> Some have persuasively argued that some justices are selectively and inconsistently applying the wide variety of interpretive tools available to them to achieve their own personal policy preferences. See, e.g., Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action during the Rehnquist Era*, 88 VA. L. REV. 1301 (2002).

<sup>350</sup> See U.S. CONST., *supra* note 41.

antee Clause to protect voting rights, on the ground that the Clause is political. If this is a neutral principle of law, then the historical weakness of the Guarantee Clause could represent its strength now: Its application is up to Congress, and the constitutionality of measures adopted under it are not subject to judicial invalidation. This is important in an era where the Court is skeptical of federal power to protect civil rights under the Fourteenth and Fifteenth Amendments.

### B. *Laws from the Tyranny Era*

Facially neutral state statutes or constitutional provisions enacted when the majority was unconstitutionally disenfranchised should be treated as constitutionally doubtful. Modern equal protection doctrine looks for a discriminatory purpose and effect. When subordination of African Americans is the first principle of government, it is reasonable to believe, as a factual matter that no law could be passed unless it was consistent with that aim. As Professor George B. Tindall wrote about the South Carolina Constitutional Convention of 1895:

Almost every issue involved the race question in one aspect or another: a democratic impulse toward home rule in local government foundered on the Negro majority; and the matter of education was inextricably bound to the suffrage, since an educational qualification was the trump card of the white supremacists. Tillman said that he did not intend to build a barrier to the suffrage with one hand and tear it down with the other. The Negro's drinking habits entered the discussion of liquor control; his ownership of "yaller dogs," the debate on taxation; and the distribution of Negro population into the problem of creating new counties.<sup>351</sup>

Courts should not unduly exert themselves to sustain laws passed by a minority to disadvantage the majority.

### C. *Modern Laws Benefiting African Americans*

The reality of African American majority political control and the likely consequences thereof call into question the contemporary Court's suspicion of racially remedial measures. Put simply, it is hard to imagine any affirmative action or reparations law offering benefits that are unreasonably greater than the best guess of what African Americans would have had in a constitutional, majoritarian system. The Court's concerns in *Croson*<sup>352</sup> about the appropriate level of government to make judgments about affirmative action

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<sup>351</sup> George B. Tindall, *The Question of Race in the South Carolina Constitutional Convention of 1895*, 37 J. NEGRO HIST. 277, 303 (1952).

<sup>352</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

are serious, as are the concerns in *Wygant*<sup>353</sup> about programs interfering with vested interests of individuals. However, it is more reasonable to conclude that nearly 150 years of African American political power would have resulted in substantial economic equality than to conclude that freedom and democracy are not useful for economic development or that African Americans simply prefer prison, poverty, and lower levels of educational attainment.

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It is not surprising that the tyrannical nature of the Southern regimes has not been a prominent part of modern constitutional law. During Jim Crow, it would have made no sense to debate the scope of the harm and remedy when the immediate questions of the legality of racial disenfranchisement and discrimination remained unresolved. By the mid-twentieth century, when policymakers seriously considered remedying Jim Crow, African Americans were in fact a minority; judges, legislators, and scholars dealt with the issue as it existed at the time.

But there may be a more fundamental reason. The American color line is deeply ingrained; otherwise good people, such as the Founders, misjudged it. However, what happened to African Americans in the South was a breach not of a controversial principle, but of a settled one. The minority refused to honor the right of a majority of lawful voters to decide elections. This was a rejection not merely of one conception of equality, but of an undisputed principle of democracy. For this decision there can be no excuse, yet it is hard even for supporters of civil rights to recognize that some of our Southern cousins are in the same historical category as King George and his Redcoats.

The law must grapple with the lasting consequences of eight decades of tyranny. The democratic majority of African Americans in coalition with whites is gone forever, at least in part because of minority tyranny. The poll tax, literacy test, grandfather clause, and white primary are gone; the Civil Rights Act of 1964 and the Voting Rights Act of 1965 have replicated some of the democratically enacted civil rights provisions of the 1860s and 1870s, and the playing field of 2007 is more level than it was in the past. But today's African Americans are not in the position they would have been had their ancestors voted. For example, in a nation where inherited wealth is increasingly important, they are decades behind in capital accumulation; their rate of voter participation remains below that of the general population; and they are disproportionately represented in the criminal justice system. The nation and the states that participated in the disenfranchisement of democratic majorities are both entitled and obligated to consider what the law would look like, and what African Americans would look like, had minority tyranny not occurred.

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<sup>353</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

