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African-Americans and Sustained Voting Rights Inequality

Steven I. Friedland*

I. INTRODUCTION

The right to vote is the crown jewel of American liberties, and we will not see its luster diminished.¹

Former President Ronald Reagan

Well they passed a law in '64
To give those who ain't got a little more
But it only goes so far . . .
That's just the way it is
Some things will never change²

Bruce Hornsby and the Range

The disenfranchisement of minorities in the 1990's, particularly African-Americans,³ appears to be more than a matter of ancient legal history. The failure of African-Americans to exercise their right to vote and to elect African-American officials is well-docu-

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³ This article focuses primarily on African-Americans, although its theme and conclusions also apply to many other minority groups in the United States. Because of the unique nature of the history of African-Americans in the United States, however, the comparisons between African-Americans and other minority groups are not identical.
mented and remains disproportionately greater than that of the counter-part majority. The causes of this failure to exercise voting rights can be attributed to social, economic, political, and psychological impediments. Yet, the genesis of the psychic and practical alienation of the African-American community to voting in the 1990’s can be traced to the misuse of legal rules and principles.

The legal history associated with the quest for voting equality reveals an area of the law subject to persistent and malicious abuse. This history is particularly noteworthy because discriminators have attempted to circumvent not only legislative and judicial pronouncements, but the dictates of the Constitution, specifically the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Ironically, one of the first and foremost impediments to the voting rights of African-Americans in the United States was the United States Constitution. Pursuant to this otherwise revolutionary document, non-Whites were relegated to an inferior status in the new polity. This secondary status included a deprivation of voting rights.


5. Such a failure, as expressed in terms of voter apathy, extends to all groups. As one commentator has noted:

America’s electoral participation rate, hitherto easily the lowest among free democratic countries, fell further—from 60.6 percent of the voting-age population in 1968 to 55.6 percent in 1972. Turnout in the South, which had climbed steadily from under 25 percent in 1948 to over half in 1968, dropped back to 45 percent. And turnout in the North, which had fallen by about four percentage points in each presidential election since 1960, fell again by that amount.

In the 1972 presidential election, President Richard M. Nixon scored a landslide victory over Senator George McGovern, accumulating more than 47 million votes to McGovern’s 29 million. But 62 million American did not bother to vote at all, and American voter turnout dropped to 55.6 percent of the voting-age population (VAP). Only 38 percent of the electorate voted in 1974 congressional contests. No developed country has such a low rate of participation.


7. The present U.S. Constitution was adopted in 1787 as our second Constitution. The first Constitution was the Articles of Confederation, which was rejected because it did not provide for strong central control over the economy. As a result, the states were strongly divided by retaliatory taxation.

8. See Louis F. Claiborne, Black Men, Red Men, and the Constitution of 1787: A Bicentennial Apology from a Middle Templar, 15 Hastings Const L Q 269 (1987-88). The Framers’ treatment of the Blacks and Indians demonstrated the common prejudice of the time against non-White people, and the common idea that the Black and Red men were ‘children of nature’ or ‘savages’.” Claiborne, 15 Hastings Const L Q at 271.
Institutionalized discrimination, however, did not begin nor end with the Constitution. Powered by economic imperative, it continued full-force into the 1800's, largely in the form of slavery. The abolition of slavery in 1865 and the adoption of the Fifteenth Amendment did not extinguish voting rights discrimination.

Responding to the widespread and stubborn resistance to voting rights equality, the United States Congress enacted the first of many significant voting rights measures entitled the Voting Rights Act of 1865. This Act was intended to protect minorities from the residual, but still powerful, opposition to voting equality.

While the Reconstruction era witnessed advancements in voting rights suffrage for African-Americans and other minorities, the legal rights remained "paper" rights due to a myriad of counter-measures designed to restrict the exercise of the franchise. Discriminatory techniques included the poll tax, the White primary, and other measures intended to make the exercise of minority voting rights insuperable. One Supreme Court Justice, went so far as to characterize these counter-measures as the "long and sorry history of resistance to the fifteenth amendment."

The 1865 Act, and the many lesser measures that followed, did not achieve the goal of neutralizing voting rights inequities. Instead, voting rights discrimination persisted and flourished. Tolerance of the modest gains achieved by the 1865 Act after a century of application eventually dissipated completely, leading to the passage of a new voting rights bill, the Voting Rights Act of 1965. This Act was considered to be one of the crowning achievements of the 1950's civil rights movement, championed by Dr. Martin Luther King and the National Association for the Advancement of Colored People.

In response to the new voting act, the chameleon-like modes of institutional discrimination simply went further underground. New and clever methods of discrimination were created to neutralize the impact of the Act. As a result, the Act was amended on several occasions to plug loopholes that had negated its efficacy.

Despite such amendments, voting rights discrimination marches on, almost at a faster pace than efforts to eradicate it. Statistical data supports a dismal prognostication. Of those Blacks eligible to

12. Id.
vote in recent years, only a small percentage has exercised this right.\textsuperscript{13} White voters during the same period went to the polls at a

\begin{table}[h]
\centering
\begin{tabular}{lcc}
\hline
Number of persons & 1964 & \multicolumn{1}{c}{Percent voted} \\
(thousands) & Number & \\
\hline
White & 99,761 & 70,204 & 70.7 \\
Black & 10,340 & 6,048 & 58.5 \\
\hline
\end{tabular}
\caption{1964 Voting Statistics}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{lcc}
\hline
Number of persons & 1968 & \multicolumn{1}{c}{Percent voted} \\
(thousands) & Percent registered & \\
\hline
Total, 18 years and Over & & \\
White & 104,521 & 75.4 & 69.1 \\
Black & 10,935 & 66.2 & 57.6 \\
\hline
\end{tabular}
\caption{1968 Voting Statistics}
\end{table}

13. The statistical data on black voting patterns from 1964 to 1988 is set forth in the tables below.

\begin{table}[h]
\centering
\begin{tabular}{lcc}
\hline
Number of persons & 1972 & \multicolumn{1}{c}{Percent voted} \\
(thousands) & Percent registered & \\
\hline
Total, 18 years and Over & & \\
White & 121,243 & 73.4 & 64.5 \\
Black & 13,493 & 65.5 & 52.1 \\
\hline
\end{tabular}
\caption{1972 Voting Statistics}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{lcc}
\hline
Number of persons & 1976 & \multicolumn{1}{c}{Percent voted} \\
(thousands) & Percent registered & \\
\hline
Total, 18 years and Over & & \\
White & 129,316 & 68.3 & 60.9 \\
Black & 14,927 & 58.5 & 48.7 \\
\hline
\end{tabular}
\caption{1976 Voting Statistics}
\end{table}

\begin{table}[h]
\centering
\begin{tabular}{lcc}
\hline
Number of persons & 1984 & \multicolumn{1}{c}{Percent voted} \\
(thousands) & Percent registered & \\
\hline
Total, 18 years and Over & & \\
White & 169,963 & 68.3 & 59.9 \\
Black & 146,761 & 69.6 & 61.4 \\
\hline
\end{tabular}
\caption{1984 Voting Statistics}
\end{table}
higher rate. This is true for voter registration as well. For example, of those Blacks eligible to vote in eleven southern states from 1980 through 1986, 55.8% voted. White voters during the same time period voted at a rate of 71.9%.

This article argues that the institution of slavery, and succeeding years of pernicious and increasingly sophisticated practices of discrimination, have created an inequality that laws such as the Voting Rights Act of 1965 have been unable to eradicate. The article further posits that achieving effective equality in the electoral process will require much more than changes in the law. Impover-

* * * * *

<table>
<thead>
<tr>
<th></th>
<th>1988</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent registered</td>
</tr>
<tr>
<td></td>
<td>of persons (thousands)</td>
<td></td>
</tr>
<tr>
<td>Total, 18 years and Over</td>
<td>178,098</td>
<td>66.6</td>
</tr>
<tr>
<td>White</td>
<td>152,848</td>
<td>67.9</td>
</tr>
<tr>
<td>Black</td>
<td>19,692</td>
<td>64.5</td>
</tr>
</tbody>
</table>


In a recent article, it was noted that:

Of the 116,000 black Broward residents of voting age, only 50,000 are eligible to vote in Tuesday’s presidential preference primary. In 1988, black voter strength numbered almost 59,000 for the general election. But in July 1991, 12,039 African-Americans were among the 97,674 people declared ineligible or purged from registration rolls because they had not voted since the 1988 general election, said Ed Phillips, chairman of the Broward Democratic Party’s affirmative action committee.

U.S. Census Bureau Report at 2.

REGISTERED VOTERS

In Broward County:

For Presidential Primary

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>528,527</td>
<td>562,726</td>
<td>512,070</td>
</tr>
<tr>
<td>Black</td>
<td>49,899</td>
<td>51,551</td>
<td>44,473</td>
</tr>
</tbody>
</table>

For General Election

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
<td>574,996</td>
<td>609,477</td>
<td>561,981</td>
<td>569,181</td>
</tr>
<tr>
<td>Black</td>
<td>54,813</td>
<td>58,906</td>
<td>51,287</td>
<td>52,172</td>
</tr>
</tbody>
</table>

Sun-Sentinel, Sunday, March 8, 1992, at Section B.

14. Id.
15. Id.
ishment, caused by two centuries of voting rights discrimination, has created a psychology of latent helplessness which prevents the effective exercise of the franchise. This psychic disaffection can be overcome through education, the persuasive power of inspirational leaders, changes in socio-economic status, and other forms of empowerment.

Although attempts to effectuate substantive change may be unproductive, such efforts, on both legal and social science fronts, should continue. Any abatement of vigilant opposition to the discrimination merely serves to legitimize the historical norm. At a

<table>
<thead>
<tr>
<th>Year and Race</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980:</td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>24,981</td>
</tr>
<tr>
<td>Black</td>
<td>4,254</td>
</tr>
<tr>
<td>Percent of</td>
<td></td>
</tr>
<tr>
<td>White voting age pop.</td>
<td>71.9</td>
</tr>
<tr>
<td>Black voting age pop.</td>
<td>55.8</td>
</tr>
<tr>
<td>1982:</td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>22,868</td>
</tr>
<tr>
<td>Black</td>
<td>4,302</td>
</tr>
<tr>
<td>1984:</td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>27,999</td>
</tr>
<tr>
<td>Black</td>
<td>5,597</td>
</tr>
<tr>
<td>1986:</td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>27,028</td>
</tr>
<tr>
<td>Black</td>
<td>5,450</td>
</tr>
<tr>
<td>Percent of</td>
<td></td>
</tr>
<tr>
<td>White voting age pop.</td>
<td>69.9</td>
</tr>
<tr>
<td>Black voting age pop.</td>
<td>60.8</td>
</tr>
</tbody>
</table>


See also the following statistics:

<table>
<thead>
<tr>
<th>Reported Voting and Registration for States - November 1988</th>
<th>Reported Registered</th>
<th>Reported Voted</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>69.3</td>
<td>62.9</td>
</tr>
<tr>
<td>Black</td>
<td>59.7</td>
<td>47.0</td>
</tr>
<tr>
<td>New York</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>63.5</td>
<td>57.2</td>
</tr>
<tr>
<td>Black</td>
<td>49.5</td>
<td>41.3</td>
</tr>
<tr>
<td>North Carolina</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>65.6</td>
<td>55.2</td>
</tr>
<tr>
<td>Black</td>
<td>58.2</td>
<td>46.6</td>
</tr>
<tr>
<td>South Carolina</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>61.8</td>
<td>52.3</td>
</tr>
<tr>
<td>Black</td>
<td>56.7</td>
<td>40.7</td>
</tr>
<tr>
<td>Virginia</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White</td>
<td>68.5</td>
<td>61.1</td>
</tr>
<tr>
<td>Black</td>
<td>63.0</td>
<td>47.7</td>
</tr>
</tbody>
</table>

Id.
minimum, the law should spearhead the drive for equality in conjunction with far-reaching non-legal economic, psychological and social measures.

This article is divided into six sections. Following this introduction, Section II presents the legal history of voting rights discrimination and traces the background of the major laws enacted to countermand such discrimination. Section III focuses on the modern era of voting rights inequality, particularly the legislative, judicial, and societal responses to the Voting Rights Act of 1965. Section IV examines the psychological harm resulting from sustained voting rights discrimination. Section V explores potential remedies and different alternatives that may assist in overcoming both the psychological and legal aspects of voting rights inequality. The article then concludes in Section VI.

II. Background

A. Pre-Civil War

The legal foundation for voting rights discrimination in this country is the United States Constitution, one of the most celebrated and democratic of governmental charters. While this document created a blueprint for our country's political organization and governance that still flourishes today, it also legitimized and institutionalized problems that have remained unresolved for centuries.

Perhaps both the greatest weakness and strength of the Constitution lies in the considerable compromise struck between various interest groups. The panoply of conflicting interests included those of a geographic character (north versus south), size (big state versus small state), and the marketplace (particularly owners versus those with less or no economic power, such as slaves and

17. The Articles of Confederation were proposed in 1777 and ratified in 1781. The Articles had numerous defects and were effectively replaced by the Constitution in 1787. D. Farber & S. Sherry, A History of the American Constitution (Wash Pub Co, 1990).

18. See George A. Levesque, Slavery in the Ideology and Politics of the Revolutionary Generation, 1750-1783, 30 Howard L J 759 (1987). The natural rights ideology "spoke at great length about men being created equal, but it also laid great store in the right of property, one of the three sacred and inalienable rights apothesized by John Locke. . . . In the colonial ideology, the right of property was central. . . . Levesque, 30 Howard L J at 767.

19. One commentator noted that for Black Americans, the United States was not an escape from oppression, but instead "was a literal journey from liberty to bondage." Walter L. Gordon, III, War, Blacks and the United States Constitution, 30 Howard L J 775, 776 (1987). Mr. Gordon noted that prior to 1808, "the number of slaves increased from 198,000
women). Despite the flowery language of the Constitution, fashioned by the Framers’ Committee of Style, the altruistic mission of the Founding Fathers appeared particularly inconsistent with their actions towards minorities. One commentator explained the difference in the following manner:

One reason Negroes benefitted less than other groups by the social movement touched off by the American Revolution is encapsulated in the aphorism: ‘politics is the art of the possible; reform the art of the desirable.’ Colonial leaders exempted chattel slavery from their critique of political slavery because the movement for independence required such a distinction.

One clause in the Constitution exemplifies the expedient self-interest underlying the Framers’ intent relating to minorities. Article 1, § 2, Clause 3 does not focus directly on the right to vote. It underscores the extent to which rights, including the right to vote, were not intended to be dispersed equally. That section provides for representation in the House of Representatives in accordance with a democratic system of government. In determining who chooses those representatives, the framers decided to recognize only a limited group of people for selection purposes - only “free persons.” Slaves and others were counted only as three-fifths of

in 1790 to 1,191,000 by 1810.” Gordon, 30 Howard L J at 776. After 1808, approximately 250,000 Black Africans entered the United States. Id. Comparatively, in 1790 there were 60,000 free Black persons, and in 1860 there 488,000. Id at 777.

22. Levesque, 30 Howard L J at 760-67 (cited in note 18). “In the colonial ideology, the right of property was central, and there was hardly a man in all the colonies who would not have seen a serious problem in calling for an end to property in slaves without consent or compensation.” Id at 767.
23. That provision states:
Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

US Const, Art I, § 2, cl 3.
24. Id.
a person. It is not surprising then, that when actual voting rights were disseminated, the holders of the franchise were effectively “free, [W]hite and male.”

Despite the rhetoric, African-Americans were not just unequal under the Constitution, but without any voice at all in the representation of the fledgling democratic government. This dichotomy between the ideals and the reality of the new country was highlighted further by the fact that the slave trade was afforded explicit constitutional protection until 1808. Thus, the tenets of the original United States Constitution carried conflicting messages. One message was that of hope and promise for all, and another message was that of preference. Some constituent groups would be granted rights and privileges that would not be afforded to others.

In the century following the ratification of the Constitution, and particularly the decades leading up to the Civil War, the use of the Constitution and the laws to deny African-Americans their rights, especially the right to vote as a free person, created an ever widening schism between the lofty ideals of the Declaration of Independence and those of the Constitution. As one commentator noted:

25. Id. Interestingly, some individuals, including James Madison, sought to view slaves as “both property and person but not wholly either.” Claiborne, 15 Hastings Const L Q at 272 citing James Madison, The Federalist No. 54, (J. Cooke, ed, 1961).

26. US Const, Art I, § 2, cl 3. This provision, along with two other provisions in the Constitution perpetuating slavery, Art I, § 8, cl 1, and Art IV, § 3, has tarnished our guiding document. For example, the only black member of the United States Supreme Court, Thurgood Marshall, has suggested that the Constitution actively tolerated slavery. See Thurgood Marshall, The Constitution’s Bicentennial: Commemorating the Wrong Document?, 40 Vand L Rev 1337 (1987). In some ways, the Constitution may even be viewed as laying the foundation for the inevitability of the Civil War.

27. Claiborne, 15 Hastings Const L Q at 277 (cited in note 8).

28. The prohibition on interfering with the slave trade until 1808 was known as the “Slave Trade Clause,” and was located in Art I, § 9, cl 1, of the Constitution. That clause was introduced by John Rutledge and although originally based on a date of 1800, was extended by General Charles Cotesworth Pinckney, also from South Carolina, to 1808. It was believed that this provision was adopted because of the threat of many southern states to remain independent of the Union if this clause was not added. Claiborne, 15 Hastings Const L Q at 277 (cited in note 8).


30. One commentator suggests that the Framers of the Constitutional could have resisted the legitimization of slavery in the Constitution. See Claiborne, 15 Hastings Const L Q at 279 (cited in note 8).

31. In a famous passage, that document declared that “[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with
As a descendent of the group enslaved at the time the Constitution of the United States was written, one can view with outrage and shock the pious pronouncements of the persons who sat in the Constitutional Convention and those who signed the Declaration of Independence. It is almost unbelievable that they allowed this vicious system to continue while professing individual liberties and the dignity of the human personality especially when they invoked the blessing of almighty God to support their position.\textsuperscript{33}

One injustice that stands alone among many was committed by the United States Supreme Court in 1857\textsuperscript{34} in \textit{Dred Scott v Sandford}.\textsuperscript{34} Dred Scott was a slave who had sued his owner for freedom.\textsuperscript{35} He claimed that his temporary residence in a free state had made him a free man under the Missouri Compromise of 1820, a law enacted by Congress.\textsuperscript{36} Despite its opportunity to be true to the ideals of the Declaration of Independence, the Supreme Court, through Chief Justice Roger Brooke Taney, declared the Missouri Compromise of 1820 unconstitutional.\textsuperscript{37}

Taney concluded that Dred Scott remained the property of his owner.\textsuperscript{38} Taney wrote that Blacks:

certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence, ¶ 1 US 1776.


33. One commentator understated the significance of \textit{Dred Scott} to the African-American community when he stated, "[t]he \textit{Dred Scott} case, decided by the Court in 1857, was a reason for the ambivalence of the African-American as he considers the Constitution." Bashful, 30 Howard L J at 785 (cited in note 32). That same commentator noted, however, that "[i]t took the Civil War, the Emancipation Proclamation, and [T]hirteenth, [F]ourteenth, and [F]ifteenth [A]mendments to the Constitution to correct the legal effects of this decision." Id at 786.

34. 60 US (19 How) 393 (1856).
35. \textit{Dred Scott}, 60 US at 394.
36. See Missouri Compromise of 1820, 3 Stat 545 (1820).
37. The Court stated:
... the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect in it all future time, if the slave escapes from his owner. This is done in plain words - too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property ...

\textit{Dred Scott}, 60 US at 451-52.

38. The Court concluded that:
Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.
African-American Voting Rights

[A]re not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.\textsuperscript{29}

Taney's opinion went so far as to state that at the time of the Constitution's inception, Blacks "had no rights which the [W]hite man was bound to respect".\textsuperscript{30} Taney went on to add that Blacks were "beings of an inferior order, and altogether unfit to associate with the White race, either in social or political relations".\textsuperscript{41} These bold statements by Taney characterized both the implicit and explicit status of Blacks in the United States prior to the Civil War. Thus, it is not surprising that statesman Frederick Douglass, on Independence Day in 1852 commented:

I say it with a sad sense of the disparity between us. I am not included within the pale of this glorious anniversary. Your high independence only reveals the immeasurable distance between us... A rich inheritance of justice, liberty, prosperity and independence, bequeath by your fathers, is shared by you, not by me.\textsuperscript{42}

B. Reconstruction

The reconstruction era witnessed revolutionary measures adopted to unify a country torn apart by war. These measures included both restrictions on various rights, such as the freedom of speech,\textsuperscript{43} and the creation of additional safeguards like the right to move for habeas corpus in an expedited manner.\textsuperscript{44} These measures were taken to ensure the equality of former slaves and to control adverse reactions by citizens of the southern states.\textsuperscript{45}

These laws, however, did not change attitudes. The pervasive at-

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\textsuperscript{29} Id at 452.
\textsuperscript{30} Id at 404.
\textsuperscript{31} Id at 407.
\textsuperscript{41} Id.
\textsuperscript{42} Philip Sheld Foner, \textit{The Life and Writings of Frederick Douglass}, 114 (International Publishers, 1950).
\textsuperscript{43} See \textit{Ex Parte McCardle}, 74 US (7 Wall) 506 (1873), involving a challenge by a southern newspaper editor to speech restricting in the Military Reconstruction Act.
\textsuperscript{44} See \textit{Ex parte McCardle}, 74 US 506 where the Court stated that: The first question necessarily is that of jurisdiction; for, if the Act of March 1868, takes away the jurisdiction defined by the Act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions. \textit{Ex parte McCardle}, 74 US at 512.
\textsuperscript{45} See, for example, \textit{Ex Parte McCardle}, 74 US at 506, involving a constitutional challenge on freedom of speech grounds to the Military Reconstruction Act by the White editor of the pro-confederate Vicksburg Times.
titude of discrimination was reflected in laws of defiance. For example, the "Black Codes" were enacted in various southern states. These codes were a backlash to the increased protection of voting rights by Congress. To illustrate, in South Carolina the first post-war convention adopted provisions which restricted voting and the holding of office to only free White males. As one commentator noted:

The majority of Whites never acquiesced in the sharing of political power with Blacks, and a violent opposition to Black enfranchisement developed. The Ku Klux Klan became widely active . . . and political intimidation, including assassination, was common place.

Resistance to voting equality was both widespread and effective. The imposition of literacy tests, for example, denied the majority of Blacks the right to vote. For example, two-thirds of all Blacks eligible to vote were illiterate as compared to only one-fourth of similarly situated southern White voters. Thus, the effect of such literacy tests was to greatly diminish the number of Black voters.

The attempt to disenfranchise the former slaves picked up steam in the 1890's. The source of such rekindled disaffection was the concern that the minorities would encourage corruption, and thus divide the White vote to gain political power.

While many of the Southern states wanted the complete disenfranchisement of Blacks, this goal was frustrated by an equal desire to permit poor Whites to vote as well. Because 397,000 Blacks were property owners by 1900 with homes of their own, it was becoming more and more difficult to draw an exclusionary rule that was not either over-or under-inclusive.

Many of the Whites did not attempt to hide their intent to discriminate. United States Senator Carver Glass from Virginia, for

47. McDonald, 37 SC L Rev at 558.
49. Note, 10 BC Third World L J at 383; see also South Carolina v. Katzenbach, 383 US 301, 311 (1966). "The disenfranchisement of [s]outhern [B]lacks was far from temporary; there was little, if any, improvement in the decade that followed. As in the early 1960's, only 6.7 percent [B]lack Mississippians were registered to vote." Note, 10 BC Third World L J at 383 (citations omitted).
50. Lewinson, Race, Class and Party at 79 (cited in note 4).
51. Id.
52. Id at 83.
53. Id.
example, stated:

By fraud, no; by discrimination, yes. But it will be discrimination within the letter of the law . . . discrimination! Why, that is precisely what we propose; that, exactly, is what this [Virginia] convention was elected for - to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every Negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the White electorate . . . It is a fine discrimination, indeed, that we have practiced in the fabrication of this plan.4

According to some commentators, the discrimination was not even based on political underpinnings.5 Rather, it was attributable to what one commentator called the “Southerner’s fear of ‘social equality’.”6 This commentator suggested:

[H. G. Wells] wrote of a Southerner who told how a White man married a White girl and begot coal black offspring: this story about the results of intermarriage was used, not as an argument against intermarriage, but as an argument against the extension of quite rudimentary civilities in man of color. ‘If you eat with them, you’ve got to marry them,’ he said. An entirely post-prandial responsibility. Similarly, if you let them vote, you’ve got to let them marry your daughters.7

This kind of incitement occurred in many different Southern states. Amendments to state constitutions denied Blacks the right to vote.8 Ironically, to avoid controversy or opposition, many of the amendments were adopted by proclamation and not by popular vote.9 The results of these efforts in the Southern states were largely successful. The use of politics, class struggle, and irrational fear worked to disenfranchise Blacks:

In the end, the desire to get rid of the Negro vote triumphed, drowning out the cassandra-like warnings of those irregular politicians who opposed the new Constitutions. Race feeling had always run high among the poor

54. Virginia Debates 1901-02 Vol 2 (2972-73) Mr. Thomas, and 3076-77 (Honorable Carter Glass) respectively as quoted in Lewinson, Race, Class and Party at 86 (cited in note 4).
55. See, for example, Levinson, Race, Class, and Party at 87 (cited in note 4).
56. Id.
57. Id quoting H.G. Wells, Future in America at 270.
58. Id.
59. Lewinson, Race, Class and Party at 96 (cited in note 4) quoting Morton, Natchez Daily Democrat (newspaper). Lewinson stated that “the regular organization of Virginia had good reason to fear rejection of the disenfranchising code. When the convention code was submitted in 1900, the 32 counties west of the Blue Ridge—the strong hold of White Republicanism and Agrarian independence—were all but southern against the holding of the convention. The people must therefore have gone for a convention in the counties which have the larger Negro population . . .” Lewinson, Race, Class and Party at 263 n 57.
Whites. After the war, hatred based on social and economic rivalry increased rather than diminished. 60

1. The Reconstruction Amendments

a. The Fourteenth Amendment

Upon the conclusion of the Civil War, the Constitution was amended. The additions had a dramatic and far-reaching impact, essentially "remaking" salient features of the document to repair the damage to civil rights and liberties wreaked by institutionalized discrimination. 61 The Amendments—the Thirteenth, 62 Fourteenth, 63 and Fifteenth Amendments 64—became known as the Reconstruction amendments. 65 These amendments were primarily and initially intended to protect the newly freed slaves. 66 The Thirteenth Amendment, adopted in 1865, prohibits slavery or "involuntary servitude. . . ." 67 The Fourteenth Amendment defines citizens as "all persons born or

60. Id at 96 quoting W.L. Flemming, Civil War and Reconstruction In Alabama at 767 (Columbia University, 1905), which stated that "poorest Whites felt that the Negro was not only their social or also their economic enemy, and the protection of the owner, the Blacks suffered more these people than ever before". Flemming, Civil War and Reconstruction in Alabama at 767.

61. Claiborne, 15 Hastings Const L Q at 291 (cited in note 8). The Framers of the Constitution enjoyed a rare opportunity in 1787, which would not recur until the post-Civil War Reconstruction, when the Constitution was in some respects remade. Id at 291.

62. The Thirteenth Amendment states:
Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
US Const, Amend XIII.

63. The Fourteenth Amendment states:
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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
US Const, Amend XIV.

64. The Fifteenth Amendment states:
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.
US Const, Amend XV.


66. See the Slaughter House Cases, 83 US (16 Wall) 36 (1873).

naturalized in the United States. . . .” The Fourteenth Amendment also protects citizens of the United States from state actions that abridged “the privileges or immunities of citizens of the United States,” and protects persons from being deprived of “life, liberty, or property without due process of law; nor deny to any person within this jurisdiction the equal protection of the law.” The Fifteenth Amendment protected against voting discrimination based on “race, color, or . . . condition of servitude.”

Significantly, the Fourteenth Amendment was not originally believed to affect the voting rights of minorities. In fact, the passage of the Fifteenth Amendment two years after the Fourteenth Amendment appeared to clear up any doubt about the role of the fourteenth amendment by specifically addressing the equality of voting rights for minorities. Over time, however, the fourteenth amendment became an important vehicle for ensuring voting rights equality.

The equal protection clause of the Fourteenth Amendment, in particular, served to ensure similar treatment of all with respect to voting rights. It was utilized by the United States Supreme Court to enforce the Court’s conceptualization of political equality—namely “one person, one vote.” In 1927, for example, the Supreme Court held that a “[W]hite only” democratic primary in the State of Texas violated the balance ensured by the clause. In the seminal case of Baker v Carr, decided in 1962, the Supreme Court held that the dilution of the right to vote through the misapportionment (or non-apportionment) of a state legislature was a justiciable issue under the equal protection clause. This “anti-di-

68. US Const, Amend XIV, § 1.
69. US Const, Amend XIV, § 1.
70. US Const, Amend XIV, § 1.
71. US Const, Amendment XV.
73. Comment, 29 SLU L Rev at 161.
74. Id.
75. The Equal Protection Clause states that, “. . . no state shall deprive any person within its jurisdiction the equal protection of the Laws.” US Const, Amend XIV, § 1.
76. See Gray v Sanders, 372 US 368, 381 (1963). “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendment can mean only one thing—one person, one vote.” Gray, 372 US at 381.
78. 369 US 186 (1962).
“Dilution” principle was further developed in *Reynolds v Sims*, decided in 1964. In *Reynolds*, the Court clarified its anti-dilution stance by stating that “the overriding objective must be substantial equality of population among the various districts.” The Supreme Court adopted a conceptual framework or “process whereby election laws or practices, either singly or in concert, combine with systematic block voting among an identifiable group to diminish the voting strength of at least one other group” was constitutionally impermissible. The dissenting Justices—Harlan, Stewart, and Clark—argued that the Fourteenth Amendment did not support a principle of substantive justice such as the one implied by the majority.

As a result of the adoption of an anti-dilution standard, however, multi-member districts (districts drawn to discriminate against non-Whites), and at-large elections were all subject to challenge pursuant to the Fourteenth Amendment’s equal protection clause. The fact that such practices were subject to challenge, however, did not mean that the challenges were successful. As one commentator noted: “Although under increasing attack, at-large voting remains common at the municipal, county, and state levels.

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85. Id at 590.
86. Such cases included *Wright v Rockefeller*, 376 US 52 (1964) (holding that plaintiffs claiming discrimination in the formulation of district lines must show that the district was created based on a discriminatory intent, not simply discriminatory impact); *Forston v Dorsey*, 379 US 433 (1965) (holding that a state may have both multi-member districts and single representative districts); *White v Regester*, 412 US 755 (1973) (holding that some multi-member districts, based on their formulation and the intent of those who created them, were unconstitutional in violation of the equal protection clause); *City of Mobile v Bolden*, 446 US 55 (1980) (holding that a discriminatory impact would not establish a claim of improper voter dilution under the equal protection clause, rather discriminatory intent would also have to be shown).
throughout the United States." The Court subsequently held that multi-member districts and at-large voting plans did not automatically dilute the vote. Thus, the Court permitted these approaches despite aspects of substantive inequality. The forms of allowable substantive inequality varied considerably. They included specific seat elections, majority vote requirements, discriminatory annexations, and staggered terms.

In 1980, the Supreme Court drew a new vision of the parameters of substantive equality in City of Mobile v. Bolden. The Court held that at-large voting in the City of Mobile's elections did not unconstitutionally compromise the one person-one vote principle. There was no majority rationale for this decision. Justice Stewart's important plurality opinion, however, concluded that for unconstitutional vote dilution to occur, a discriminatory intent must be shown.

In 1982, the Supreme Court reaffirmed the discriminatory intent limitation in Rogers v. Lodge. Ironically, the Supreme Court had created a different standard of review for cases involving the dilution of a person's vote than for cases involving the failure of a state to apportion its legislature. In the apportionment context, all that is required is a discriminatory impact. In a vote dilution situation,

87. McDonald, 42 Vand L Rev at 1257 (cited in note 83). "In 1980 more than 60% of cities elected some kind, or all of their counsel members at-large." Id at n 36.
88. In a multi-member district, all of the voters in that district elect more than one representative. A multi-member district could comprise several counties or merely a single county. See Whitcomb v Chavis, 403 US 124, 128 (1971) (involving one county). See also Forston, 379 US at 435 (involving more than one county).
89. An at-large voting plan may be described as a particular type of multi-member districting. All the voters within the particular jurisdiction vote for one or sometimes more members of the particular political office, such as county commission. At-large voting plans often vary considerably. See Blacksher and Menefee, 34 Hastings L J at 3 n 11 (cited in note 81).
90. See Rogers v Lodge, 458 US 613, 627 (1982) (indicating that "the requirement that candidates run for specific seats . . . enhances appellees lack of access because it prevents a cohesive political group from concentrating on a single candidate").
91. See City of Port Arthur v United States, 459 US 159, 167 (1982) (indicating that "[i]n the context of racial bloc voting . . . the [majority vote] rule would permanently foreclose a Black candidate from being elected to an at-large seat").
92. City of Port Arthur, 459 US at 159.
93. See City of Rome v US, 446 US 156, 183-85 (1980) (indicating that "staggered terms . . . have the effect of forcing head to head contests between Negroes and Whites and depriving Negroes of the opportunity to elect a candidate by single-shot voting"). See also McDonald, 42 Vand L Rev at 1256-57 (cited in note 83).
96. Id at 74.
a discriminatory intent is required to show that the government acted unconstitutionally. 98 This disparity is as much attributable to constitutional history as to logic. 99

Once the Supreme Court began using the Fourteenth Amendment to resolve voting issues, it served to deflect power from the Fifteenth Amendment. Instead of being the sole bastion of protection for minority voting rights, the Fifteenth Amendment soon became a secondary alternative. Yet, the Fifteenth Amendment was not omitted completely from the voting rights calculus.

b. The Fifteenth Amendment

The Fifteenth Amendment to the United States Constitution was adopted by Congress in 1868. That Amendment, ratified in 1870, states in pertinent part:

Section 1. . . . 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. . . .

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Ironically, the adoption of this Amendment, along with the other reconstruction amendments, the Thirteenth and Fourteenth Amendments, 100 served to underscore the triumph of the Union over the Constitution. These reconstruction amendments recreated the country's approach to certain basic values, namely slavery and equality. 102

The Fifteenth Amendment, on its face, was enacted to counter the lack of institutionalized protection against voting discrimination. 103 At the time of its passage, there existed a lack of clarity about whether the equal protection clause of the fourteenth amendment was intended to serve that function. 104 With the enact-

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98. Rogers, 458 US at 622.
99. Id.
100. US Const, Amend XV.
101. These Amendments were also adopted after the Civil War.
102. Thus, the Fourteenth Amendment protected life, liberty and property for all persons against deprivations without due process, and offered to all the guarantee of equal protection of the law. In the Fourteenth Amendment can be seen as a "new, more promising basis for justice and equality." Marshall, 40 Vand L Rev at 1340-41 (cited in note 26).
African-American Voting Rights

ment of the Fifteenth Amendment, it appeared that the Fifteenth Amendment was to serve as the beacon for equality in suffrage. The legislative history of the Fifteenth Amendment is revealing on this point, both for what was included and what was not.

The House Judiciary Committee draft proposal in the 40th Congress prohibited "discrimination that was based on race, color, or previous condition of servitude." This proposal passed in the House by a 510-42 vote. The Senate, instead of simply adopting the same provision, attempted to expand the scope of prohibited discrimination to include "race, color, nativity, property, education, or religious belief." This addition was quite controversial and the Senate ultimately retracted its proposal. Instead, the Senate passed the proposal prohibiting discrimination based on race, color, or previous condition of servitude.

Significantly, the Fifteenth Amendment, as enacted, does not provide for an express right to vote. While this fundamental right is implied in the Constitution according to the United States Supreme Court in *Reynolds v Sims*, among other cases, the Fifteenth Amendment merely regulates the power of states and the federal government in their dispensation of suffrage. Thus, the amendment itself, much like the United States Constitution before it, was a diluted compromise that served as much to undermine claims of absolute equality in voting as it did to ensure a dispersion of power from White male landowners to others.

Without a threshold affirmation of a constitutional right to vote, the ratification of the Fifteenth Amendment still invited different forms of disenfranchisement. Instead of an absolute ban on Black voters per se, states subsequently were forced to use more subtle, but equally effective, methods of discrimination. These methods

107. Comment, 29 SLU L J at 149 citing Avins, 18 Stan L Rev at 814-16; see also Cong Globe, 40th Cong, 3d Sess 1035 (1869).
108. Comment, 29 SLU L J at 149 citing Avins, 18 Stan L Rev at 816.
111. Thus, the Fifteenth Amendment prohibits the unequal dispensation of voting rights based on race, color, or condition of servitude, but only after the franchise is bestowed by the state. The source of the right to vote, however, emanates from the democratic nature of our constitutional framework. *Reynolds*, 377 US at 533. "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." Id at 561-62.
eventually included literacy, property, or education qualification tests as pre-conditions to the right to vote.¹¹²

Unlike its neighbor, the Fourteenth Amendment, the Fifteenth’s guarantee of voting equality was both more explicit and easier to circumvent. As compared to the Fourteenth’s broad strokes of egalitarianism, the Fifteenth was not as well formed or supported.¹¹³ Instead, from the time of its enactment, the Fifteenth Amendment was met with ambivalence and even outright rejection.¹¹⁴ It was claimed that the adoption of the Fifteenth Amendment offered opponents of racial equality a locus for their animosity, spurring racial hatred and political opposition rather than coercing such hostility to dissipate or disappear.¹¹⁵

The porousness of the Fifteenth Amendment’s protection could not be blamed on poor drafting. Even some of the supporters of the Fifteenth Amendment did not intend for it to eradicate all distinctions between Black and White voters.¹¹⁶ Many people simply were not ready for total substantive equality. Even Abraham Lincoln, for example, at one time held surprising views. In debating Stephen Douglas, he stated:

I am not, nor ever have been, in favor of bringing about, in any way, the social and political equality of the White and Black races; I am not, nor ever have been, in favor of making voters or jurors of Negroes . . . .¹¹⁷

Congress attempted to bolster the Union’s new course with several Reconstruction Acts, including the Voting Rights Act of 1865.¹¹⁸ The new laws granted all people, Black or White, the right to vote.¹¹⁹ Yet, resistance to the voting rights of African-Americans remained strong, particularly in the southern states. After Reconstruction, southern Whites began a tedious but cruel reversal of the intent of the Fifteenth Amendment, effectively negating the

¹¹² Comment, 29 SLU L J at 149 (cited in note 72).
¹¹⁴ Jordan, 28 Howard L J at 541.
¹¹⁵ Jordan, 28 Howard L J at 543-44.
¹¹⁶ Jordan, 28 Howard L J at 547.
¹¹⁷ Jordan, 28 Howard L J at 547 n 28 citing from “Lincoln and Douglas Debates,” at 364. Lincoln also said,
I am not . . . in favor of . . . qualifying them to hold office or intermarry with the White people; and I will say in addition, that there is a physical difference between the White and Black races.
Letter to Editor of New Salem Journal (1836) In Lincoln’s Works, Vol I at 7, as mentioned in Jordan, 28 Howard L J at 547 n 28.
¹¹⁹ Id.
significance of many new laws. Based on the "Mississippi Plan," which was a plan by White democrats to regain control over the state legislatures through terror and violence, southern states enacted various obstacles to African-American voting rights. These obstacles included literacy and comprehension tests, poll taxes, and very strict registration deadlines.

The southern states received help from other sources in their plan to circumvent the prohibitions of the Fifteenth Amendment. These sources included Congress and the federal courts. In 1894, for example, the 53rd Congress repealed many of the statutes that accorded voting rights to Blacks. The goal in executing such repeals was to let the states once again govern their own elections. As the House Committee Report On Repeal of the Federal Elections Law stated, "'Let every trace of the Reconstruction measures be wiped from the statute books, let the States of this great Union understand that the elections are in their own hands.'" The effect was to promote the rise of state-sponsored discrimination. State control meant greater power for states' constituencies, many of whom opposed the tenets of the Fifteenth Amendment. The net result of such action was to permit and even encourage states to continue their staunch opposition to affording equality in suffrage.

The Supreme Court also played a significant role in voting rights discrimination by virtue of its failure to vigorously protect the voting rights of Blacks in the Reconstruction era and the 1900's. The Supreme Court adopted a laissez-faire approach quite dissimilar to its activist stance involving economic regulations, and permitted the states to retain control over the qualifications of those who would vote in state elections. For example, in *Minor v Happersett,* the Supreme Court considered whether there existed a right to vote for particular citizen groups. In rejecting this claim,
the Court essentially relied on Art. 1, § 4 of the Constitution, which states, "[T]he times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof." In effect, the Court held that states may determine who is qualified to vote, noting that the Constitution "does not confer the right of suffrage upon anyone." Ironi-
cally, the fifteenth amendment apparently provided restraints only if the right to vote had been previously conferred by the state; the electorate was expected to take "the bitter with the sweet" granted in the first place.

The Supreme Court’s posture of deference to state regulations coincided with its position in other areas relating to equality. In 1890, for example, the Supreme Court decided the famous case of Plessey v Ferguson, in which it held that “separate but equal” accommodations for White and colored races complied with the Equal Protection Clause of the fourteenth amendment. In practice, this rule promoted a policy of benign neglect. The adoption of such a policy in the voting rights sphere was particularly apparent in the late 1800’s through the early 1900’s. In effect, from 1870 until 1915, the Supreme Court failed to uphold the Fifteenth Amendment against considerable state activity circumventing it.

The Supreme Court occasionally deviated from this approach. In 1915, the Supreme Court acted inappositely, beginning with Guinn v United States. Guinn involved the constitutionality of a literacy test required by an amendment to the Oklahoma Constitution. This amendment contained a “grandfather clause,” permit-

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129. 163 US 537 (1896).
130. Plessey, 163 US at 559. In his dissent, Justice Harlan stated that “the judgment rendered this day will come in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.” Id. Justice Harlan’s prophecy rang true, and it was not until 1954 in Brown v Board of Education, 347 US 483 (1954), that the Plessey wall of segregation began to be dismantled.
133. Guinn, 238 US at 357. The amendment to the Constitution of Oklahoma stated in part:
No person shall be registered as an elector of this state or be allowed vote in any election herein, unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the
ting those individuals who were allowed to vote at any time prior to and including January 1, 1866, to be exempted from the literacy test limitation. The amendment was a transparent attempt to exclude illiterate Blacks from voting by requiring illiterate Blacks—but not counterpart illiterate Whites who had voted prior to 1866—to pass a literacy test before being permitted to vote.

Prior to 1915, literacy tests, as a pre-condition to voting, were not considered to violate the Fifteenth Amendment. The Oklahoma amendment at issue in Guinn, however, contained an exemption specifically designed to advantage Whites at the expense or to the detriment of similarly situated Blacks. The Court in Guinn concluded that the grandfather clause of the Oklahoma Constitution violated the Fifteenth Amendment. The Court stated:

"[T]here seems no escape from the conclusion that to hold that there was even [a] possibility for dispute on the subject would be but to . . . [create] a standard of voting which, on its face, was in substance but a revitalization of conditions which, when they prevailed in the past, have been destroyed by the self-operative force of the [Fifteenth] Amendment."

Thus, in Guinn, as well as in similar cases such as Myers v Anderson and United States v Mosley, the Court drew a line between permissible and impermissible state discretion in suffrage.

Ironically, while the grandfather clause cases were called the "first step in favor of liberty [for Blacks] the Supreme Court has taken," these decisions also provided an imprimatur for methods of permissible discrimination. By inference, the grandfather clause cases stood for the proposition that literacy tests which had a de facto discriminatory impact on illiterate Blacks were acceptable. Such tests only became unacceptable when the law ex-

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right to register and vote because of his inability to so read and write sections of such Constitution.

Id.

134. Id at 360.
135. Id at 363.
137. Guinn, 238 US at 364.
138. Id at 363.
139. Id at 363-64.
140. 238 US 368 (1915).
141. 238 US 383 (1915).
142. Schmidt, 82 Colum L Rev at 879 (cited in note 122) quoting Moorfield Story, a Black leader in the early 1900's.
143. Id at 879-80.
144. Guinn, 238 US at 366.
pressly delineated discrimination in a de jure or otherwise readily patent manner.\textsuperscript{145}

While the grandfather clause cases were a deviation from the "narrow literalism"\textsuperscript{146} of prior Supreme Court interpretations of the fifteenth amendment, the departure was short-lived. The return to judicial deference was apparent from the Court's decision in *Newberry v United States*.\textsuperscript{147} In that case, the Court was asked to interpret Article I, section 4, of the Constitution, which states in pertinent part: "The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof. . . ."\textsuperscript{148} The Court was asked to decide whether Congress had the power to regulate senatorial primaries.\textsuperscript{149} The Court decided that Congress did not have such a power, relying on the word "election" to exclude primaries from Congress' control.\textsuperscript{150} Instead of looking at the effective importance of primaries to the ultimate outcome of an election, the Court continued its "hands-off" interpretivist approach. Thus, states were given further encouragement to continue their massive resistance to the dictates of the fifteenth amendment.

Most early twentieth century voting restrictions were designed to limit Blacks in voting, including grandfather clauses and property qualifications. In Mississippi, the percentage of Blacks eligible to vote dropped from over 50\% to about 5\%.\textsuperscript{151} As of the 1960's, only 6.7\% of eligible Black Mississippians were registered to vote.\textsuperscript{152}

III. THE CIVIL RIGHTS MOVEMENT AND THE VOTING RIGHTS ACT OF 1965

Rosa Parks became the symbol and basis of the Montgomery bus boycott in 1955 by refusing to give up her seat in the front of a public bus.\textsuperscript{153} The resulting bus boycott, along with other forces,

\begin{itemize}
  \item 145. Schmidt, 82 Colum L Rev at 903 (cited in note 122).
  \item 146. Comment, 29 SLU L Rev at 156. "The majority's interpretation was a return to the narrow literalism that had guided the Court since 1870" referring to *Newberry v United States*, 256 US 232 (1921). Comment, 29 SLU L Rev at 156 (cited in note 72).
  \item 147. 256 US 232 (1921).
  \item 148. US Const, Art I, § 4.
  \item 149. *Newberry*, 256 US at 247.
  \item 150. Id at 258.
  \item 151. See Comment, 52 Miss L J at 803 (cited in note 121).
  \item 152. Id.
  \item 153. Taylor Branch, *Parting the Waters: America in the King Years* 1954-63 at 128-29 (Simon & Shuster, 1988).
\end{itemize}
jump-started a movement for equal civil rights led by a young minister named Dr. Martin Luther King, Jr. and the N.A.A.C.P. The growing unrest of African-Americans concerning unequal treatment spilled out of Montgomery, across the South, and perhaps more importantly, into Congress and the courts.\textsuperscript{154} As Dr. King himself noted, "I have had a little something to do with lawyers since the 1955 Montgomery bus boycott."\textsuperscript{155} In fact, one writer called the civil rights movement of 1955 through 1968 the "first revolution in history conducted, so to speak, on advice of counsel."\textsuperscript{156}

Dr. King used the Constitution and the law as a rallying point. On the evening of December 5, 1955, in the Holt Street Baptist Church, Dr. King stated, "We are not wrong," because "if we are wrong, the Supreme Court of this nation is wrong.\textsuperscript{157} If we are wrong, the Constitution of the United States is wrong.\textsuperscript{158} If we are wrong, God almighty is wrong."\textsuperscript{159}

One of the crowning achievements of the civil rights movement was the adoption of the Voting Rights Act of 1965, which guaranteed equality in voting.\textsuperscript{160} Ironically, the Voting Rights Act would have been superfluous had the Fifteenth Amendment served its intended purpose. Unfortunately, the amendment had not. Even former Justice Brennan recognized this failure.\textsuperscript{161} He characterized the Voting Rights Act as a response to the "long and sorry history of resistance to the Fifteenth Amendment."\textsuperscript{162}

The 1965 Act was not originally intended to generate sweeping reform in voting rights. Instead, its initial and limited goal\textsuperscript{163} was to reverse the voting rights status of African-Americans in seven states of the old confederacy—Alabama, Georgia, Louisiana, Mis-

\begin{itemize}
\item \textsuperscript{154} Branch, \textit{Parting the Waters} at 129.
\item \textsuperscript{155} King, "Forward to W. Counselor, Deep in My Heart," at xxi (1966).
\item \textsuperscript{156} Harry Kalven, Jr., \textit{The Negro and the First Amendment} at 124 (Ohio State University Press, 1965).
\item \textsuperscript{157} Speech by Martin Luther King, Jr. at the Holt Street Baptist Church, Montgomery, Alabama, reprinted in Carson et al, eds, \textit{Eyes on the Prize: America's Civil Rights Years - a Reader and Guide}, 45 (Ohio State University Press, 1965).
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} 42 USC § 1971 (1965).
\item \textsuperscript{161} \textit{City of Richmond v United States}, 422 US 358, 379 (1975).
\item \textsuperscript{162} \textit{City of Richmond}, 422 US at 379 (Brennan, J. dissenting).
\item \textsuperscript{163} See Abigail M. Thernstrom, \textit{Whose Votes Count? Affirmative Action and Minority Voting Rights} at 3-4 (Harvard University Press, 1987). "The aim of the Voting Rights Act—the single aim —was black enfranchisement in the South. Obstacles to registration and voting, that is, were the sole concern of those who framed the statute." Id.
\end{itemize}
The Act suspended discriminatory literacy tests and other measures that were used to deny Blacks the right to vote. The Act also tried to prevent future discriminatory practices by requiring affected jurisdictions to clear all proposals initially through federal officials before enacting any laws that might contain hidden discriminatory provisions.

The narrow intention to overcome the systematic discriminatory practices of the old South led to the passage of the 1965 Act and eventually expanded to meet the demands of increasingly vocal minorities. The Act became transformed, focusing on overcoming express obstacles to African-American voting and assuring "meaningful" votes that had an equivalent worth to non-minority votes. Section 5 of the Act, in particular, provided Congress with an "uncommon exercise" of power to meet these changing demands. As one commentator noted, "it was a subtle but important change: the shift from black ballots safe from deliberate efforts to dilute their impact, on the one hand, to a right to a vote that fully counted, on the other." The Voting Rights Act eventually came to stand for equality in voting for African-Americans as well as other minorities throughout the United States.

The Act directly confronted state discretion over the voting process. Jurisdictions which historically and systematically excluded minorities from the voting process were now required to obtain approval for changes in voting practices from the district court sitting in that jurisdiction. The court was required to issue a declaratory judgment stating that the change in the law "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

In some ways, the Act succeeded in eradicating much of the vot-

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165. Id at 2.
167. Thernstrom, Whose Votes Count? at 4. "By acting to avert such rearguard measures, by prohibiting the adoption of county-wide voting and other electoral procedures that threatened to rob black ballots of their expected worth, the Court had implicitly enlarged the definition of enfranchisement. Now there were 'meaningful' and 'meaningless' votes—votes that 'counted' and those that did not." Id (cited in note 163).
170. See, for example, League of United Latin American Citizens v Midland Independent School District, 812 F2d 1494 (5th Cir 1987).
ing rights discrimination of the earlier era. Before 1965, there were fewer than 100 elected black officials in the seven "Old South" states, and fewer than 200 black officials nationwide. By 1987, there were 2,908 black officials in those seven states, and 6,892 nationwide. Thus, the passage of the Voting Rights Act of 1965 gave the Fifteenth Amendment some bite, so that Blacks and other minorities could have effective access to the voting booth.

Yet, the pattern and practice of resistance to equality in voting rights did not end with the adoption of the 1965 Act, nor with its expanded embrace of all minorities. Instead, the type of resistance simply changed and "went underground." Poll taxes and literacy tests were replaced by new forms of covert discrimination. Cities changed their boundaries by annexing or enlarging areas to modify the racial make-up of their populations. These modifications often were intended to dilute the strength of the minority vote. Redistricting also occurred, sometimes with the intent of changing the shape of voting districts, thereby reducing the power of the minority vote.

Discriminatory measures worked in subtle ways. While many more elected governmental officials were African-Americans, as of 1987 more than 80% of elected African-American officials held municipal or county offices while only 23 were members of Congress.

Congress attempted to meet these new challenges by further fortifying the existing law. It amended and strengthened the 1965

172. Lewinson, Race, Class and Party at 199 (cited in note 4).
174. The advances, however, are in some ways illusory. Of those Black elected officials, more than 80% held municipal or county offices. Only 23 served in Congress. See Joint Center for Political Studies, Black Elected Officials: A National Roster, as quoted in McDonald, 42 Vand L Rev at 1252 n 9 (cited in note 83).
175. Note, 10 BC Third World L J at 386 (cited in note 48).
176. Id.
177. Id at 386-87.
178. Id at 387.
179. Howard Ball, The Perpetration of Racial Vote Dilution: An Examination of Some Constraints on the Effective Administration of the 1965 Voting Rights Act, as Amended in 1982, 28 Howard L J 433, 437 (1985). Challenges to the Voting Rights Act have been rebuffed. See South Carolina v Katzenbach, 383 US 301 (1966) in which the state of South Carolina challenged the constitutionality of the Act and specific provisions, including the pre-clearing provision. The Supreme Court concluded that the Act was appropriate under § 2 of the Fifteenth Amendment. Katzenbach, 383 US at 326.
Voting Rights Act at various times during the past several decades. For example, in 1970, Congress extended and nationalized the exclusion of literacy and other tests as a pre-requisite to voting. In 1982, Congress extended the pre-clearance requirement until the year 2007, and extended the Act’s scope of protection by prohibiting voting practices that “result” in discrimination on the basis of race, color, or membership in a minority whose primary language is other than English.

These Congressional amendments responded to Supreme Court opinions which permitted jurisdictions to continue to find ways to circumvent voting rights equality. For example, the 1982 amendment to Section 2 of the Voting Rights Act can be seen as a reaction to the 1980 Supreme Court decision in City of Mobile v Bolden. In that case, a divided Court found that at-large elections held in Mobile were constitutionally permissible. The plurality concluded that in order to find discrimination under the Fourteenth and Fifteenth Amendments, as well as the Voting Rights Act, evidence of a discriminatory purpose must exist.

The discriminatory intent standard had been used in different settings. For example, in Washington v Davis, the Supreme Court held that a showing of discrimination under the equal protection clause of the Fourteenth Amendment required a discriminatory purpose. The adoption of an “intent” standard in the context of voting rights discrimination was indicative of the Supreme Court’s overall treatment of the subject. This standard is much more difficult to establish than a result-oriented approach to discrimination because motivation must generally be proved circumstantially with statistics revealing a significant disparate impact.

Because the statistical impact is often the only evidence of dis-

185. Bolden, 446 US at 60, 74.
186. Id.
189. See Regents of California v Bakke, 438 US 265 (1978) (Powell, J.). Yet a discriminatory purpose standard is considered more administrable because many factors may contribute to a differential impact between races, not just discrimination. Furthermore, if a result oriented standard is applied, many fear that society will become constrained by racial proportionalities, which is inapposite to the merit based system upon which our country is predicated.
African-American Voting Rights

crimination, and the government often can claim its actions were attributable to non-insidious motives, presenting a successful case is difficult. After much debate,\textsuperscript{190} Congress disagreed with the Supreme Court and adopted a result-oriented standard prohibiting voting laws or practices "imposed or implied by any state or political subject in a manner which results in denial or abridgment of the right of any citizen of the United States to vote on account of race or color. . . ."\textsuperscript{191} This standard now asks courts to apply a multiple-factor approach to finding voting rights discrimination, including:

\begin{quote}
Violations based on proof of factors such as racially polarized voting, a past history of official racial discrimination affecting the right to vote, the absence of minority elected officials, and the use of voting mechanisms which restrict the voting potential of minorities.\textsuperscript{192}
\end{quote}

This addition is not without irony. While a multiple-factor approach replaced the intent standard, the difference in its practical

\textsuperscript{190}. Comment, \textit{Vote Dilution, Discriminatory Results}, 32 UCLA L Rev at 1204-5 (cited in note 1).


\textsuperscript{192}. Comment, 32 UCLA L Rev at 1205-06 (cited in note 1). Objective factors a court may evaluate in a "totality of circumstances" analysis include:

1. [t]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance that opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: [a] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the majority group. [b] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.

application remained to be seen. Moreover, the amendment to section 2 could be interpreted as conflicting with the pre-clearance requirements of section 5 of the same Act, particularly if courts fashion a remedy independent of the offending local or state government, without giving that entity an opportunity to offer its own remedial modification.\(^\text{193}\)

While the additions provided increased coverage and protection of minority voting rights, the shallowness of the changes masked the need for deeper, more substantive institutional modification. In fact, some commentators suggest that the fecundity of advances in civil rights in the 1960's and 70's contributed to an attitude of "enough already":

The narrow focus of racial exclusion- that is, the belief that racial exclusion is illegitimate only where the 'Whites Only' signs are explicit- coupled with strong assumptions about equal opportunity, makes it difficult to move the discussion of racism beyond the societal self-satisfaction engendered by the appearance of neutral norms and formal inclusions.\(^\text{194}\)

In essence, the theory and the practice of seeking equality as a normative goal diverged to the extent that narrowing the gap became the ultimate success.\(^\text{195}\) Gains even proved to be chimerical, in that advances often appeared to instigate a reciprocal backlash. Such a backlash appeared to occur in both the rhetoric and substance of Ronald Reagan's presidency, specifically the perceived reluctance of the Reagan administration to promote minority interests. According to one commentator, "most Blacks interpreted Reagan's victories in 1980 and 1984 as 'damaging to their [Black] political interests.'"\(^\text{196}\)

This type of perception provided incentives to mobilize. A reverse backlash occurred, and "[B]lack registration and turnout has increased. . . ."\(^\text{197}\)

The cyclical or dialectical nature of voting rights inequality continues to ebb and flow. The harms caused by the discrimination can be measured in terms of the dearth of African-American elected officials, and perhaps even more importantly, the lack of

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193. For an incisive and well-developed discussion of these issues see Comment, 32 UCLA L Rev at 1203 (cited in note 1).
African-American officials elected to high office. An additional but no less important dimension of the harms caused by voting rights discrimination is psychological. This includes the effect of sustained voting rights discrimination on the hopes, energy and attitude of the African-American community regarding the efficacy and sincerity of the democratic political system. The next section of this article examines this salient but derivative psychological impact.

IV. THE PSYCHOLOGICAL EFFECTS OF DISCRIMINATION

As the first part of this article showed, the adoption of the Fifteenth Amendment and various voting rights acts after the Civil War did not terminate voting rights discrimination, but merely changed its complexion. Discrimination became localized, more clever, and more subtle. However, it remained invidious.

This article posits that the sustained deprivation of voting rights inequality has taken a significant psychological toll on the African-American community. Consequently, the battle for equality-in-fact must be fought in the realm of psychology as much as in the courts or Congress; eliminating the psychological harm is a necessary concomitant to eradicating further discrimination.

To better understand the psychological impact of sustained voting rights discrimination, it is first important to trace and explore its social science foundation. Psychologists have long studied the effects of psychological deprivations on human beings. Psychological, as compared to a biological, deprivation results from a "biologically adequate but psychologically restricted environment." This restricted environment features a loss of hope influencing different outcomes. "When humans find themselves in a situation in which outcomes are uncontrollable, this uncontrollability or helplessness is attributable to some cause. The specific causal at-

198. See notes 100-153 and accompanying text.
200. Langmeier and Matejeck, Psychological Deprivation at 13.
201. Learned helplessness, it has been shown, becomes more chronic over time, is situational, can occur in groups as well as in individuals, and does not affect everyone equally. Learned helplessness affects the sexes differently, and depends on socio-cultural differences. Thus, even if sustained voting rights impoverishment creates a learned helplessness about voting, it would require closer scrutiny to determine its impact on particular individuals. Psychological deprivations may result from a loss of material goods, opportunities, privileges or basic needs. Suraj Mal, Uday Jain, and K. S. Yadav, Effects of Prolonged Deprivation on
tributions determine the generality and [level] of helplessness. . . .” Two Czechoslovakian psychologists have characterized psychological deprivation in a way that coincides with the African-American experience:

[the] . . . inner end product of the prolonged impact of an impoverished environment . . . reached through the deprivating situations - in other words, it is a psychological state resulting from continuing restricted interaction . . . with [the] physical and/or social environment.

African-Americans who have faced years of voting-related rejection are justified in enveloping themselves in a pessimism or even aversion towards participating in the American system as an equal partner. Given such a history, it becomes easy to identify that system as “theirs,” or one that belongs to “them.”

Learned helplessness, however, creates more than just a rejection of the prevailing system which creates that helplessness. It has been shown to

Learned Helplessness, 130(2) J Soc Psychol 191, 192 (1990). Applying this finding to the context of human rights, if individuals were deprived of [a right needs] such as the right to vote for a significant length of time, a psychological manifestation can be expected to eventually occur. As J. Langmeier and Z. Matejcek have stated, “since we initially defined psychological deprivation as inadequate satisfaction of basic psychological needs to a marked degree and for a long enough period of time. . . .” Langmeier and Matejcek, Psychological Deprivation at 305 (cited in note 199). The psychological impact can vary, including depression or learned helplessness. Mal, Jain, and Yadav, Effects of Prolonged Deprivation, 130(2) J Soc Psychol at 192:

This conjecture is derived from studies reporting that deprived subjects display a sense of personal inadequacy, negative self-image, self-blame, pessimism, low achievement motivation, and the expectation of future incompetence compared with their non-deprived counterpart . . .
(citations omitted).

Lyn Abramson, Judy Garber and Martin Seligman, Learned Helplessness in Humans: An Attributional Analysis, in Judy Garber and Martin Seligman, eds, Human Helplessness Theory and Application 3 (Academic Press, 1980) (Abramson, Garber and Seligman, "Learned Helplessness in Humans"). The authors suggest that numerous studies have documented the existence of learned helplessness in humans, and that "learned helplessness plays a part in a wide variety of human conditions, including child development, stomach ulcers, depression, and death. Other investigators have argued that the learned helplessness model is useful in examining intellectual achievement . . ., crowding . . ., victimization . . ., the coronary prone personality . . . and aging . . ..” Abramson, Garber and Seligman, Learned Helplessness in Humans at 4. The authors further state that learned helplessness occurs in different areas, including the motivation, cognitive, and emotional planes. Id.

203. Langmeier and Matejcek, Psychological Deprivation at 13-14 (cited in note 199).
204. In this light, the mere offer to participate in the system through voting takes on a characterization similar to asking Charlie Brown to kick the football just one more time.
create performance deficits, which are reductions in performance on a subsequent task.\textsuperscript{206} Extensive learned helplessness, such as slavery and persistent discrimination, could even result in depression and a reduced expectation of success.\textsuperscript{207} As authors Carol S. Dweck and Barbara G. Licht note, "[i]n achievement situations, then, helpless [persons would] be characterized by cognitions that imply the inevitability or insurmountability of failure, whereas mastery-oriented [persons] would be characterized by cognitions that imply that their successes are replicable and their mistakes rectifiable."\textsuperscript{208} Moreover, individuals with learned helplessness often have reduced self-esteem which affects the way those persons perceive how they can affect the political process. Several commentators have noted that:

The first implication is that the universal versus personal helplessness distinction deduces a fourth deficit of human helplessness—low self-esteem. A major determinant of attitudes toward the self is comparison with others (Clark & Clark, 1939; Festinger, 1954; Morris & Gergen, 1970; Rosenberg, 1965). This analysis suggests that individuals who believe that desired outcomes are not contingent on responses in their repertoire, but are contingent on responses in the repertoires of relevant others, will show lower self-esteem than will individuals who believe that desired outcomes are neither contingent on acts in their own repertoire nor contingent on acts in the repertoire of relevant others. . . .\textsuperscript{209}

These phenomena could help explain the difficulty of the minority community in exercising the right to vote in a cohesive, efficacious manner.\textsuperscript{210}

\textsuperscript{206} Netta K. Dor-Shav and Mario Mikulincer, \textit{Learned Helplessness Causal Attribution, and Response Frustration}, 117(1) J Gen Psychol 47 (1990): "Initial studies of learned helplessness in humans found that exposure to unsolvable problems produced helplessness, that is, an impairment in performance on a subsequent test task . . . ."


\textsuperscript{208} Dweck and Licht, \textit{Learned Helplessness} at 198 (cited in note 205).

\textsuperscript{209} Abramson, Garber, and Seligman, \textit{Learned Helplessness} at 16 (cited in note 201).

\textsuperscript{210} The depression resulting from learned helplessness is sufficiently unique to require a special explanatory theory. This new type of depression has been linked to feelings of hopelessness, and even to "hopelessness depression." This new theory reforms the theory of helplessness depression, suggesting that hopelessness is a somewhat different phenomenon than the helplessness normally associated with learned helplessness. Lyn Y. Abramson, Lauren B. Alloy, and Gerald I. Metalsky, \textit{Hopelessness Depression: A Theory-Based Subtype of Depression}, 96 Psychol Rev 358, 360 (1989). Sustained voting rights discrimination, therefore, could even have lead to an attitude of hopelessness and despair.
A. Racial Discrimination

It is widely accepted that racial discrimination\textsuperscript{211} causes considerable harm,\textsuperscript{212} including psychological scarring.\textsuperscript{213} One commentator stated:

In terms of simple health, it becomes clear that black people will never be able to develop optimal psychological functioning and affirm their cultural heritage and identity, as long as they are relating to the world through an anti-African, anti-self cultural perspective. American society, which is European in perspective, is anti-African in that it devalues African cultural heritage and perspectives and regards them as inferior to American cultural perspectives.\textsuperscript{214}

A study of racism in Colonial times has concluded that “racism [in this era] should not be considered as an individual trait or ‘quirk,’ but rather as the most visible sign of a more systemized oppression.”\textsuperscript{215} This “organized domination”\textsuperscript{216} provokes two responses: “[t]he radicalized group [first] tries to imitate the oppressor. . . .”\textsuperscript{217} Yet, no matter how hard it tries, the group is constantly reminded of its lack of success. This creates the second response: feelings of helplessness and despair.\textsuperscript{218}

The African-American community’s lack of control or belief in self-determination is a foreseeable consequence of systematic discrimination; “[t]o people who live in continuously adverse circumstances, life does not appear to be subject to control through their own efforts. Only through some outside intervention do events seem to be alterable, and such intervention is a rare occurrence.”\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{211} The psychological harm to African-Americans caused by discrimination is perhaps best witnessed through the lens of history. A behavioralist approach emphasizes the role of experience in shaping a person’s psyche. “In fact, a perspective is as essential to an understanding of a people as a longitudinal developmental analysis is to the understanding of individual[s]. . . .” T. Hillard, \textit{Political and Social Action in the Prevention of Psychopathology of Blacks: A Mental Health Strategy for Oppressed People} at 144 (University Press of New England, 1981).
\item \textsuperscript{212} \textit{Brown v Bd of Education}, 347 US 483 (1954) and the famous footnote 11, dealing with the conclusion of psychological studies of the subject.
\item \textsuperscript{213} Joycelyn Landrum-Brown, \textit{Black Mental Health and Racial Oppression} in Dorothy S. Ruiz, ed, \textit{Handbook of Mental Health and Mental Disorder Among Black Americans} 113 (Greenwood Press, 1990) (Landrum-Brown, “Black Mental Health”).
\item \textsuperscript{214} Landrum-Brown, \textit{Black Mental Health} at 114.
\item \textsuperscript{215} Franz Fanon, (1967) as described in T. Hilliard, \textit{Political and Social Action} at 146 (cited in note 211).
\item \textsuperscript{216} Id citing from Franz Fanon.
\item \textsuperscript{217} Id at 35.
\item \textsuperscript{218} Herbert M. Lefcourt, \textit{Locus of Control: Current Trends in Theory and Research} at 15 (Lawrence Erlbaum Associates, 1976).
\item \textsuperscript{219} Lefcourt, \textit{Locus of Control} at 15.
\end{itemize}
This description applies in the modern era, as much as it did to the slaves. In 1962, a black man wrote a letter to the editor of Harper's Magazine drawing an analogy between the black man in America and enlisted men in the army:

Surely no other life open to the American White so closely resembles the Negro's- the world of Them and Us. They with their money, and handsome uniforms, knowledge, organization, and (O God) their power. We with our anonymity ("D'ja ever notice how all [enlisted men] look alike?") dirt, encouraged stupidity, and uselessness. In such a world, only one weapon is available, but it is mighty: The Resolve to Live Up to Our Reputation. We are clods? dolts? animals? Very well. We shall be the clotdiest, most doltish animals on earth. . . . The man who is born an [enlisted man] cannot be rehabilitated. He needs metamorphosis and unlike the fellow in Kafka, he can't do it overnight.\footnote{220}

As evidenced by this letter, a perceived lack of control over one's life and its major events combine to cause a feeling of helplessness by some African-Americans.\footnote{221} This perception could be the source of an entire symptomology. "If one feels helpless to affect important events, then resignation or at least benign indifference should become evident, with fewer signs of concern, involvement, and vitality."\footnote{222}

The impact of racial discrimination may be exacerbated by associated economic and political oppression. In the African-American experience, a wide variety of oppression existed. Each type of oppression constituted a formidable obstacle to voting rights equality: "... [t]he mental health of Blacks is inextricably tied to the overall economic, political, and social status of Black people. Simply stated: unless there is a substantial reduction in the political and economically based oppression, there will not be an overall improvement in mental health."\footnote{223}

While judicial protection of African-American voting rights may provide a theoretical equality, true equality is enmeshed with a psychological perception of that equality. As author Frank Parker


\footnote{221} Fatalism, accompanied by apathy and withdrawal, might very well have permeated the Black American experience to the extent that such an attitude interfered with the community's goals. Lefcourt, Locus of Control at 184 (cited in note 218). Lefcourt states "[w]here fatalism or external control beliefs are associated with apathy and withdrawal, the holding of internal control expectancies presages a connection between an individual's desires and his subsequent actions." Id.

\footnote{222} Id.

\footnote{223} Hilliard, Political and Social Action at 149 (cited in note 211).
noted,

This does not mean that voting rights litigation actually got Black candidates elected, only that it was a necessary precondition to Black political success. The normal rules governing political mobilization and political success still applied: the Black community still had to recruit candidates to run who would appeal to a broad spectrum of the voting public, and these candidates still had to adopt platforms that would appeal to voters, campaign for votes, and win a majority of the votes to be elected to office.\(^\text{224}\)

The failure to exercise the right to vote may occur for many different reasons. The psychological harm caused by years of sustained discrimination is but one impediment. This observation is not intuitively obvious. To some, if a group is aware of the power it has, the group will exercise that power. Historian Steven F. Lawson, in his book *Black Ballots*, attributed African-American voting apathy to a failure of volition: "[w]ith the overt legal barriers destroyed, lack of political consciousness remained a major obstacle on the road toward enfranchisement."\(^\text{225}\) Yet Lawson later reevaluated his position, writing:

\[\text{While most southern jurisdictions comply with the letter of the 1965 law, many attempted to violate its spirit by grafting sophisticated forms of bias onto existing electoral institutions. Unless the underlying structural impediments blocking the franchise are removed, the considerable, but as yet limited, amount of success southern Blacks have enjoyed in pursuit of political power will not go much further.}\(^\text{226}\)

Ironically, the backlash against affirmative action generally has created a similar but smaller scale movement against singling out minorities in the voting rights context. Political scientist Abigail Thernstrom comments that the use of litigation to enforce the one person—one vote principle commenced "the process by which the Voting Rights Act was reshaped into an instrument for affirmative action in the electoral sphere."\(^\text{227}\) In this view, attempts to ensure voting equality through various statutes are being viewed as favoritism, not remedial assistance.\(^\text{228}\) Consequently, exercising the franchise, long considered a symbol of equality in the eyes of some, portrays a tarnished symbol of unjustified preference.\(^\text{229}\)

Despite such characterizations, it seems clear that the psychological analogue to "learned helplessness" has had a considerable adverse impact on


\(^{228}\) Id.

\(^{229}\) Id.
the African-American community's failure to effectively exercise the right to vote. The next chapter explores the options available to ameliorate or rectify such harm.\textsuperscript{230}

V. MINIMIZING VOTING RIGHTS DISCRIMINATION IN THE 1990's

Voting rights discrimination and the psychological harm sustained by discrimination persist. The pertinent question is whether a feasible remedy can be fashioned. In light of the historical framework, there is no ready, confident response. It appears unrealistic to believe that discrimination can be overcome solely through the adoption of any particular legal, social, economic, or other countermeasure. Such discrimination is too entrenched, subtle, and pernicious to be easily or quickly negated. Further, the resources required to impede future discrimination and its effects are unlikely to be allocated for psychological harms such as learned helplessness.\textsuperscript{231}

Yet, the improbability of success should not prevent the formalized consideration and implementation of multi-faceted, multi-disciplinary voting rights safeguards. The mere existence of an opposition to further discriminatory harm predicates hope and faith in change, two important preconditions to substantive improvement. The following suggestions are presented as a dualistic approach, separately focusing on those who are discriminated against, and those who manipulate the rule of law in order to discriminate.\textsuperscript{232}

230. Two commentators have noted:
According to the original theory of learned helplessness, when an organism is exposed to an uncontrollable situation it learns that outcomes are independent of its responses (i.e., are uncontrollable) and forms an expectation that future outcomes also will be response independent. This expectation interferes with the learning of new contingencies and undermines the motivation to initiate activity, resulting in performance (cognitive and motivational) and affective deficits. Hence the theory ascribes helplessness symptoms to the generalization of uncontrollability from helplessness training (i.e., exposure to noncontingency) to subsequent activity. Thus, in this theoretical framework, the critical antecedent of helplessness deficits is exposure to a series of outcomes (positive or negative) that are noncontingently related to behavior.

231. In essence, the most that can be done might be to recognize that voting rights discrimination remains a problem in the 1990's, and that part of the problem is extra-legal, extending to cultural, economic, social, and psychological dimensions, particularly to a chronic learned helplessness.

232. Where the discriminated against were sufficiently powerless that the mere restoration of legal rights would not be enough for an effective enjoyment of those rights.
A. The Discriminated Against

Even when granted the right to vote, it appears as if African-Americans do not exercise that right. To overcome white hegemony and both voluntary and involuntary disenfranchisement, the psychological harm sustained from years of voting rights impoverishment must first be addressed.

Efforts to overcome the psychological disaffection resulting from voting rights deprivation can take several forms. These include an increased flow of information about the political process, general education, enhanced socio-economic status, an increased awareness of African-American history, an improved understanding of psychological deprivation, and the encouragement of inspirational leaders.

Perhaps the most important countermeasure that can be taken by the voting minority is the instillation of the belief that the minority vote counts. It is this empowerment, rather than simply climbing back to a "paper equality," that provides the greatest incentive for African-Americans to utilize the franchise. Arguably, an increase in voter turnout among Black Americans alone can have a positive affect on the community. That is, an increased feeling of community cohesiveness may arise from increased voter turnout, and vice versa. Noted one commentator:

By acting together in the political sphere, a group of apparently disparate individuals may come to appreciate the strength of their common interests, and those already so connected may recognize the power that comes from concerted effort. These benefits may be of particular value to members of minority groups, for whom discrimination has often thwarted control over their own destinies and a capacity to act collectively.

The elimination of White hegemony and the accompanying receipt of voting equality will not likely suffice to eradicate the psychological and sociological effects of over two hundred years of voting rights discrimination. The psychological scars of voting rights discrimination will likely require psychological as well as actual mobilization of African-Americans before their votes can be effectively restored and exercised.

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Yet this same commentator notes that perceived failures over time build up to discourage further action:

If collective efforts fail, over time, to yield the desired change, participants are more likely to be discouraged than elevated by their efforts. Many political observers argue, for example, that the failure of Blacks in New York City to win major policy initia-
Furthermore, African-Americans who believe that voting can enhance their "social and economic status" can rely on voting as a means to a non-political end. Such an instrumental conception of the power of voting may serve as an important tool to persuade individuals to vote.

Perhaps the most pragmatic method of overcoming psychological harms is through the use of inspirational leaders. Individuals of varied political beliefs such as Jesse Jackson, Louis Farakhan, and Douglas Wilder can mobilize and incite action on the part of those people who respect them. Even inspirational leaders like Michael Jordan, Magic Johnson, and Bo Jackson can achieve a following, merely by setting an example. In a book about Mary McLeod Bethune and James Weldon Johnson, the dedication reads: "This series is dedicated to the Black youth who will be inspired to follow in the footsteps of those intrepid black leaders who achieved eminence in spite of almost unsurmountable odds."

Inspirational individuals can have a disproportionate impact on the utilization of voting rights by African-Americans. This may be particularly true if the leader is perceived to have earned achievements on his or her own, overcoming obstacles along the way. Fannie Lou Hamer, who fought for voting rights in Mississippi, has stated:

I’ve worked on voter registration here ever since I went to that first mass meeting. . . . We formed our own party because the Whites wouldn’t even let us register. . . . We followed all the laws the White people themselves made. We tried to attend the precinct meetings and they locked the doors on us or moved the meetings and that’s against the law they made for their own selves. . . . But we learned the hard way that even though we had all the law and all the righteousness on our side, that White man is not going to give up this power to us. . . . The question for black people is not, when is the White man going to give us our rights, or when is he going to give us good education for our children, or when is he going to give us jobs—if the White man gives you anything—just remember when he gets ready he will take it right back. We have to take for ourselves.
B. The Discriminators

To effectively minimize continued voting rights discrimination, a vigorous and aggressive legal response must be maintained. Measures include additional legislation intended to ensure equality in the right to vote, and laws promoting corollary rights involving such matters as redistricting. Close scrutiny should be given by the courts to governmental actions that may dilute the one-person-one-vote principle. Yet, there is no reason to believe that legal measures in the future will have any greater success than in the past.

In addition to laws prohibiting discrimination, a multi-disciplinary approach similar to that suggested for those subjected to discrimination should be adopted to effectively limit the discriminators. This means that as part of the legal response, economic, psychological, and even irrational factors must be considered in the calculus of disenfranchisement.\(^{240}\)

(Kipco, 1967).

240. The legal response can and should come from state legislatures and Congress, as well as the courts. State legislatures can take preventive measures not available to the courts. The courts, on the other hand, have broad powers to enforce the Fourteenth and Fifteenth Amendments, and are not subject to the whims of the electorate.

Unless the courts enforce the rights allocated, such legislative or constitutional rights will mean very little. Thus, zealous enforcement of such rights must occur before the desired results will occur. In essence, enforcement will have a bootstrapping effect, with more specific legislation generating more specific - and consequently enhanced - enforcement by the courts.

Interestingly, the United States Supreme Court, despite its decidedly conservative make-up in the 1990's, has not negated voting rights advancements for the African-American. In two of the more recent voting rights cases, the Supreme Court had the opportunity to make advancements. In Houston Lawyers Association v Attorney General of Texas, 111 S Ct 2376 (1991), the Court held that section two of the Voting Rights Act of 1965 applies to the election of state trial judges. In Chisom v Roemer, 111 S Ct 2354 (1991), the Court held that section two of the Voting Rights Act of 1965 also applies to the election of state supreme court justices. In these six-three decisions, the Court appeared to embrace the activism of an earlier era. Justice Stevens, writing for the Court, interpreted the word "representatives" in the Act to include judges. Chisom, 111 S Ct at 2366. Justice Stevens reasoned that: "If executive officers such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered 'representatives' simply because they are chosen by popular election, then the same reasoning should apply to elected judges." Id. Furthermore, in Clark v. Roemer, 111 S Ct 2096 (1991), the Court unanimously held that a federal court must enjoin state judge elections if the United States Attorney General objects utilizing a valid basis under section five of the Voting Rights Act of 1965. Justice Kennedy, writing for the Court, found that the Louisiana elections at issue did not receive tacit approval by the United States Attorney General as a result of the Attorney General's approval of other, related changes in Louisiana's electoral process. Clark, 111 S Ct at 2104. These cases, in the aggregate, suggest that the United States Supreme Court is paying at least modest, if not vigilant, attention to the voting rights area.

The trend in the Supreme Court cases, however, is not encouraging overall. In fact, more
This expansive approach includes persuading potential discrimi-
nators that increased minority voting will actually serve the major-
ity's own interests as well.\textsuperscript{244} As Blacks enter the middle and upper
classes in increasing number and become more conservative, inter-
est-oriented politicians may see the Black vote as a source of sup-
port and not as an entity to be feared.\textsuperscript{242} An example of such an
individual is Justice Clarence Thomas, who is proving to be a
staunch conservative.\textsuperscript{243}

Similarly, advocates can point out that an increase in the minor-
ity voting rights has rarely threatened the White ruling politi-
cians.\textsuperscript{244} "In no state legislature and in only a few of the most
heavily Black counties and cities have blacks gained a majority of
the legislative seats. In most instances the creation of single-mem-
ber districts or the elimination of gerrymander districts has pro-
duced not black control, but power-sharing among White and
Black legislators."\textsuperscript{245} Ironically, White politicians who object to in-
creased voting rights for African-Americans as reverse discrimina-
tion, or as an "affirmative action" of voting rights, may be the least
sympathetic of individuals to advance such a claim.\textsuperscript{246}

Another expansive consideration that may ameliorate discrimi-
nation is economics. Studies have shown that as economic dispari-
ties between the incomes of Whites and Blacks decrease, the com-
petition between White and Black members of the same social
class decreases.\textsuperscript{247} Consequently, there will be less aversion to
granting Blacks the right to vote. For example, in the South during
the first third of the twentieth century, advances in Black suffrage
appeared as a complement to "increased educational facilities, de-
creasing economic competition as new and more jobs became avail-
able, and a higher standard of living."\textsuperscript{248}

\textsuperscript{241} With the changing face of politics in the 1990's, the Black vote may be perceived
by some politicians as best limited by co-option.

\textsuperscript{242} Lewinson,\textit{ Race, Class and Party} at 216-21 (cited in note 4).

\textsuperscript{243} See, for example, Justice Thomas' dissent in a recent case involving prisoners'\nrights,\textit{ Hudson v McMillan}, 112 S Ct 995, 1004 (1992). In his first 44 cases, Justice Thomas
essentially agreed with Justice Antonio Scalia, one of the most conservative members of the
court.

\textsuperscript{244} Parker,\textit{ Black Votes Count} at 209 (cited in note 224).

\textsuperscript{245} Id.

\textsuperscript{246} "No individual officeholder has an entitlement to elective office." Id.

\textsuperscript{247} Lewinson,\textit{ Race, Class and Party} at 197-98 (cited in note 4).

\textsuperscript{248} Id.
Unfortunately, the economic outlook in the 1990's does not favor these conditions. The gap between the rich and poor is growing.\textsuperscript{249} The trend towards a two-tiered society,\textsuperscript{250} where many of the Blacks share lower class status with Whites and are in competition with each other for a diminishing number of jobs, suggests that the situation is ripe for continued voting discrimination. In essence, the master-servant mentality is more likely to resurface in a conducive environment, which is ironically occurring more and more in urban areas. Columbia University economist Saskia Sassen-Koob has stated:

The growth of the new urban upper middle class stimulates the proliferation of low-wage jobs. We're seeing the growth in the cities of a kind of "servant" that prepares a gourmet plate of food for the wealthy, such as their designer clothes, and helps manufacture their customized furniture.\textsuperscript{251}

Perhaps the greatest obstacle to equal voting rights, however, cuts across political, social, and economic concerns and lies in the irrational. This is the spectre of "Negro domination."\textsuperscript{252} According to this line of thought, increased voting rights upsets a perceived "Negro balance of power."\textsuperscript{253} It is this image of a gain of power by the Black minority that has been used historically to fuel the disenfranchisement movement.\textsuperscript{254} Thus, it appears that this particular obstacle creates a Catch-22: as Black suffrage increases, the spectre of Black domination and an upset of the "balance of power" also increases.

Given these obstacles, it is more important to convince rather than coerce those groups or individuals who may be opposed to a pluralist view of voting rights that the exercise of voting rights does not pose a real threat. According to one commentator:

First, those who do not share minority interests may acknowledge the contribution of racial diversity to the political process. . . Second, non-minority participants may favor enhanced minority participation because of concern for the legitimacy of the governmental system. . . . A system attains one kind of legitimacy by following whatever rules are set down, but this formal legitimacy must be supplemented by a substantive component. Substantive legitimacy requires that the features of the political system, and

\textsuperscript{249} Ehren Reich, \textit{The Worst Years of Our Lives: Irrevent Notes from a Decade of Greed} at 197 (Harper Perennial, 1990) citing Congress Joint Economic Committee Report.

\textsuperscript{250} Reich, \textit{The Worst Years of Our Lives} at 197.

\textsuperscript{251} Id at 204.

\textsuperscript{252} Lewinson, \textit{Race, Class and Party} at 199 (cited in note 4).

\textsuperscript{253} Id.

\textsuperscript{254} Id at iv, depicting a cartoon originally printed in the Raleigh News and Observer (July 4, 1900).
the government that arises from it, appear to be consistent with the com-
monly held premises concerning human nature and the need for a political
society that underlie the system.255

Thus, while responding to discrimination with additional laws
deter somewhat the discriminators from their attempts to disen-
franchise African-Americans in increasingly subtle and clever ways,
such efforts may have little substantive impact. Instead, to be
more effective, it is imperative to persuade the discriminators that
it is actually in their own interests to stop discriminating.

VI. CONCLUSION

Have the Fifteenth Amendment and various Voting Rights Acts
succeeded in obliterating voting rights discrimination? The answer
remains an emphatic “no”.256 Legislatures and other government
bodies have not stopped enacting or considering plans that under-
mine the “one person, one vote” principle, the backbone of voting
rights in this country.257 In response, the courts are confronting
new and invidious forms of voting rights dilution, and are engaged

Consequently, the Fifteenth Amendment still waits for vindica-
tion. Its unfulfilled potential has exacted a significant price. More
than two centuries of voting rights discrimination has taken its toll
on the psyche and hopes of African-Americans. As the promise of
the Fifteenth Amendment remains unfulfilled, the prospect of
utilizing the law to actually engage in the right to vote appears to

that section two of the Voting Rights Act can provide much more than merely additional
representation for minorities, and that the benefits accrue to non-minorities as well as those
minorities directly affected. Id.

256. Voting right equality is still being sought in many jurisdictions. Dade County at-
large elections were recently challenged in Meek v Metropolitan Dade County, 908 F2d
1540 (11th Cir 1990) (reversing the lower court) after applying the three-part test of Thorn-
burg v Gingles, 106 S Ct 2752 (1986). The Gingles standard requires: (1) demonstrate that
the minority group is sufficiently large; (2) show that the group is politically cohesive; and
(3) show the White majority votes as a bloc to regularly defeat the minority interests. Gin-
gles, 478 US at 50-51. But the law is not always moving in the direction of equality. See, for
example, City of Lockhart v United States, 460 US 125 (1983). There the Court confirmed
the retrograde standard developed in Beer v United States, 425 US 130 (1976). The Court
held that regarding redistricting and electoral changes, the intent behind section five of the
Voting Rights Act of 1965 was to preserve the status quo of political representation, even
where voting discrimination continues to exist. See also, City of Mobile v Bolden, 446 US
55, 71 (1980). In Bolden, the court concluded that at-large voting in Mobile city elections
did not unconstitutionally dilute the votes of the Black minority, by undermining the one
person, one vote standard of Reynolds v Sims, 377 US 533, 542 (1964).

dim with each passing day.

In all likelihood, voting rights discrimination will persist in the 1990's and beyond. Current laws are still being circumvented. No easy methods exist by which to overcome the learned helplessness associated with the exercise of voting rights.

Yet, despite the lack of easily implemented countermeasures, some proposals warrant consideration. The discriminators may be deterred through the vigilant enforcement of existing laws, and may be persuaded that the equality of voting rights supports the discriminators' own political interests overall. Furthermore, inspirational leaders and other factors such as an improved socio-economic status may diminish tendencies toward learned helplessness.258

The factor most likely to have an immediate and profound effect upon the psyche of the discriminated is the influence exerted by inspirational leaders. Leaders can provide the motivation and the education necessary to overcome feelings of helplessness and hopelessness. In this way, the effective enjoyment of the right to vote, considered so important to the preservation of our democratic system, can be realized by all.

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258. Despite effective equality, effective enjoyment of voting rights will not occur unless the psychological deprivation of learned helplessness is overcome. This can occur through an increased awareness about the significance of voting, changes in socio-economic status and in community cohesiveness, among other factors.