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# Trampling Whose Rights? Democratic Majority Rule and Racial Minorities: A Response to Chin and Wagner

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Taunya Lovell Banks\*

*“There is no thinking of America except as a body politic haunted by the historic presence of the African. . . . It has always been impossible to vote in the United States . . . without symbolically casting a ballot for or against American racism . . . .”*<sup>1</sup>

## I. INTRODUCTION

In his tribute to the legendary singer James Brown, *New York Times* columnist Bob Herbert wrote that Brown’s 1968 recording *I’m Black and I’m Proud* captured the optimism of that era: “Despite the continuing plague of racism, there were dreams in the 1960s of fabulous days ahead for black Americans, days in which the stereotypes and degradation of the past would be erased by a new era of educational, professional and cultural achievement.”<sup>2</sup> The optimism of black Americans in the late 1960s probably mirrored the optimism of their ancestors following ratification of the Thirteenth<sup>3</sup> and Fourteenth<sup>4</sup> Amendments and anticipation of the Fifteenth Amendment<sup>5</sup> to the United States Constitution a hundred years earlier.

Black nineteenth-century optimism was short-lived. The Reconstruction Era ended abruptly in the mid-1870s along with the promise of full and equal citizenship for black Americans. In explaining the confluence of cir-

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<sup>1</sup> Grant Farred, *America’s Africa: Barack Obama and the Aporia of Race*, 8 SAFUNDI: THE J. OF S. AFR. & AM. STUD. 103, 103 (2007).

<sup>2</sup> Bob Herbert, *Lessons Never Learned*, N.Y. TIMES, Dec. 28, 2006, at A35. He continues:

Those dreams did not include visions of an enormous economically disadvantaged population that would continue to live in poverty, or near-poverty, more than 40 years later; or a perennially ragged public school system, largely segregated in fact, if not by law, that would turn out generation after generation of educationally deprived children; or a black prison population so vast and so enduring it would come to seem normal to legions of black youngsters, actually dictating to a great extent their tastes in fashion, art and music; or a level of sustained violence that has condemned thousands upon thousands of black youngsters to an early grave.

*Id.*

<sup>3</sup> U.S. CONST. amend. XIII.

<sup>4</sup> U.S. CONST. amend. XIV.

<sup>5</sup> U.S. CONST. amend. XV.

cumstances that resulted in “the Nadir” for black Americans,<sup>6</sup> Derrick Bell writes:

Called upon to decide pressing questions concerning the relations of labor and capital, the power of state legislatures, and the rights of big business, the courts foreswore impartiality and came down heavily on the side of economic interests. . . . In the 1880s, American society was rife with social tensions. . . . Immigrants in the North and blacks in the South were seen as corrupting forces or entities to be discounted in the formulation of public policy. Popular democracy and, with it, universal suffrage became suspect, and a return to property and literacy qualification was urged.<sup>7</sup>

In addition, the late nineteenth-century United States Supreme Court, in a series of cases culminating in *Plessy v. Ferguson*,<sup>8</sup> affirmed policies, practices, and legal principles that crushed black Americans’ expectations of full and equal citizenship.<sup>9</sup>

Gabriel Chin and Randy Wagner, in their article, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*,<sup>10</sup> remind us that there were black majorities in Deep South states during Reconstruction, reviving and revivifying that idea.<sup>11</sup> They explain that legal scholars and courts treat allegations of race discrimination by black Americans as minority group claims reachable through the Constitution under the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>12</sup> But non-constitutional claims by minorities “are . . . subject to unrestricted majoritarian control.”<sup>13</sup> Even when constitutional violations are alleged, the Supreme Court asserts that its

<sup>6</sup> DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 44 n.3 (5th ed. 2004) (citing RAYFORD W. LOGAN, *BETRAYAL OF THE NEGRO* (1965), originally published as *THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877-1901* (1954)).

<sup>7</sup> *Id.* at 44-45.

<sup>8</sup> 163 U.S. 537 (1896) (holding racially separate but equal facilities mandated by law do not violate the equal protection clause).

<sup>9</sup> See *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment does not reach private discriminatory acts); *United States v. Harris*, 106 U.S. 629 (1883) (holding that the Fourteenth Amendment does not empower the federal government to criminalize actions by private citizens against fellow state citizens); *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding that the Fourteenth Amendment does not incorporate the Bill of Rights); *United States v. Reese*, 92 U.S. 214 (1875) (holding that the Fifteenth Amendment does not guarantee blacks the right to vote, but only the right not to be excluded from the franchise due to race); *The Slaughter-House Cases*, 83 U.S. 36 (1872) (distinguishing between state and federal citizenship with respect to the Fourteenth Amendment’s Privileges and Immunities Clause).

<sup>10</sup> Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 *HARV. C.R.-C.L. L. REV.* (2008).

<sup>11</sup> Chin and Wagner assert that while blacks were a political minority nationally, in the second half of the nineteenth century they were “an absolute majority” in three southern states (Louisiana, Mississippi and South Carolina) and “the largest single voting bloc” in four other states (Alabama, Florida, Georgia and Virginia), in which blacks constituted “over 40% of the population.” *Id.* at 66.

<sup>12</sup> *Id.* at 80.

<sup>13</sup> *Id.* at 74.

ability to protect minorities in a democracy is limited by concerns about whether the Court's action poses "a potential threat to the legitimate prerogatives of majorities."<sup>14</sup> Alexander Bickel labels this phenomenon the "counter-majoritarian difficulty."<sup>15</sup>

Chin and Wagner describe how southern blacks' hopes for the full benefits of American citizenship in the late nineteenth century were undermined by a combination of private and governmental actions which effectively disenfranchised them through discriminatory laws, force, and fraud.<sup>16</sup> Anti-black policies and practices of the late nineteenth and early twentieth century reflected the political will of southern white pluralities or bare majorities. Southern blacks, although a majority or plurality, were politically powerless, unable to prevent the myriad of racial segregation policies that impaired their ability to prosper into the late twentieth century.

The authors conclude that the disenfranchisement of southern black majorities or pluralities constitutes a form of state action that is cognizable under the Constitution.<sup>17</sup> They posit that given the direction of the Reconstruction governments, Jim Crow policies might not have limited the educational, economic, and political opportunities of black Americans had blacks not been disenfranchised.<sup>18</sup> Thus, they argue that "all or almost all of the acts of private discrimination which are now characterized by . . . the Supreme Court as 'general societal discrimination' occurred only because of prior violations of the Fourteenth and Fifteenth Amendments. If so [private acts of discrimination] are within the power of Congress to remedy."<sup>19</sup>

Chin and Wagner acknowledge the Court's own language about the importance of the vote to political citizenship,<sup>20</sup> but assert that "when the Court upheld race-based discrimination and disenfranchisement" targeting black

<sup>14</sup> *Id.* at 73 (citing Ralph Bischoff, *Minority Rights and Majority Rule*, 39 VA. L. REV. 607, 612 (1953)).

<sup>15</sup> *Id.* at 67 (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986)).

<sup>16</sup> *Id.* at 80-97.

<sup>17</sup> *Id.* at 96-97.

<sup>18</sup> Some might question whether protection of black enfranchisement in the South during the late nineteenth century would have prevented this disadvantage given the hardened racial attitudes of the time and the widespread use of intimidation and violence to expel blacks from towns and counties, or discourage voters. Although black Americans might have been able to elect law enforcement officials, history indicates that hostile whites willingly used intimidation, economic coercion, and violence to undercut the voting power of black Americans, whether majorities or minorities. For a discussion of this point, see generally JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005) (arguing that between 1890 and 1968 thousands of communities across the United States systematically excluded blacks from living in them). Even the authors concede that federal intervention to protect black voters during this period was "diminish[ing]." Chin & Wagner, *supra* note 10, at 89.

<sup>19</sup> Chin & Wagner, *supra* note 10, at 105.

<sup>20</sup> *Id.* at 97 (citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1896)).

Americans it “knew what it was doing.”<sup>21</sup> The Court’s record shows that “it consciously upheld laws passed by [white] minorities, against the will of [black] majorities [or pluralities], who because of their race had been denied the right to vote.”<sup>22</sup>

On the eve of the Second World War, Justice Harlan Stone, writing for the Court in *United States v. Carolene Products Co.*,<sup>23</sup> opened a small door for relief. In the now famous Footnote 4 of that decision, Justice Stone indicated that heightened judicial scrutiny might apply to certain government actions that distort the political process or discriminate against politically powerless “discrete and insular minorities.”<sup>24</sup> From this footnote developed a line of cases where the Court, reluctant to override “democratic decisions” even when they adversely affected the rights of politically powerless minori-

<sup>21</sup> *Id.* at 110. Akhil Reed Amar recounts the Supreme Court’s consistent disregard for the rights of blacks in America. He writes, “[T]he Philadelphia Constitution was pro-slavery, but the Taney Court was far worse, and grossly dismissive of the rights of free blacks. The Waite/Fuller Court damned government-sponsored integration in the *Civil Rights Cases* and blessed government-sponsored segregation in *Plessy v. Ferguson*.” Akhil Reed Amar, *The Supreme Court 1999 Term – Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 65 (2000). He continues, “And the *Civil Rights Cases* remain good law in the year 2000, paving the way for the Court to invalidate yet another congressional civil rights law . . .” *Id.* at 66.

<sup>22</sup> Chin & Wagner, *supra* note 10, at 110. Chin and Wagner use several key late-nineteenth and early-twentieth-century cases to support their point. *Id.* at 110-15 (citing *Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Hall v. DeCuir*, 95 U.S. 485 (1877)).

<sup>23</sup> 304 U.S. 144 (1938).

<sup>24</sup> *Id.* at 152-53, 152 n.4. The pertinent text of the footnote reads:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* For a discussion of Footnote 4, see generally Jack M. Balkin, *The Footnote*, 83 Nw. U. L. REV. 275 (1989); Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982) (discussing earlier drafts of the note, the first of which Lusky wrote as a clerk to Justice Stone); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1092 (1982) (“Professor Fiss . . . has termed Footnote 4 of *Carolene Products* ‘the great and modern charter for ordering the relations between judges and other agencies of government’ . . . . [T]he influence of Footnote 4 cannot be measured accurately by simple enumeration of cases in which it has been cited. Nonetheless, I have counted at least twenty-eight cases in which Footnote 4 has been cited in a majority, concurring, or dissenting opinion of the Supreme Court.”) (citation omitted).

ties, balanced minority rights against those of the political majority.<sup>25</sup> The Court asked in each case whether democratic principles of majority rule must give way in order to prevent the majority from “trampling the rights” of the discrete minority group.

Based on their examination of nineteenth-century black disenfranchisement, Chin and Wagner argue that the contemporary Court, when weighing remedies for the consequences of race discrimination, should not characterize black claimants as a minority whose claims trigger a test that balances their rights against those of the “white majority.” They reason that the “state action” that resulted in the disputed policy or practice subverted the will of the real political majority in those communities.<sup>26</sup> Thus the authors write:

The law must grapple with the lasting consequences of eight decades of tyranny . . . [because] today’s African Americans are not in the position they would have been had their ancestors voted. . . .

The nation and the states that participated in the disenfranchisement of democratic majorities are both entitled and obligated to consider what the law would look like, and what African Americans would look like, had minority tyranny not occurred.<sup>27</sup>

The authors argue persuasively that the constitutional harm blacks experienced, “‘discrimination,’ in the sense of segregation, exclusion from equal opportunities and . . . mainstream institutions of society,”<sup>28</sup> reflects the widespread belief that black “Americans were [not] entitled to shape the state governments, legal systems, and economies in which they found them-

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<sup>25</sup> For a sample of Supreme Court cases citing Footnote 4, *see, e.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200, 218 (1995); *Gregory v. Ashcroft*, 501 U.S. 452, 468-69 (1991); *United States v. Munoz-Flores*, 495 U.S. 385 (1990) (Stevens, J., concurring); *Foley v. Connelie*, 435 U.S. 291, 294 (1978); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102-03 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634, 642-43, 655-58 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>26</sup> Chin & Wagner, *supra* note 10, at 96-97. The authors’ characterization of state action, however, is quite broad. They write: “[T]o the extent that violent or fraudulent disenfranchisement was the result of truly private action, those private citizens or their co-conspirators became officeholders. They continued their policies of disenfranchisement, legal and extralegal.” *Id.* at 97. Some legal scholars might take issue with this conclusion. The Fourteenth and Fifteenth Amendments were intended primarily to protect blacks from “state actions” that denied blacks equal protection of the laws and the right to vote. The Supreme Court in the *Civil Rights Cases* ruled that the Fourteenth Amendment did not apply to private actions. 109 U.S. 3 (1883). This very narrow interpretation of state action initially allowed the Court to characterize political party primaries that excluded black voters as private discriminatory acts. *See Grovey v. Townsend*, 295 U.S. 45 (1935). Then, in a series of cases culminating in *Smith v. Allwright*, the Court developed the “public function” doctrine whereby certain functions traditionally performed by government retain their public character even when performed by private actors. 321 U.S. 649, 659-61 (1944). The private actions Chin and Wagner refer to do not seem to fit even under this broader interpretation of state action.

<sup>27</sup> Chin & Wagner, *supra* note 10, at 125.

<sup>28</sup> *Id.* at 76.

selves.”<sup>29</sup> Thus, one obvious explanation for the political repression of black voters in the nineteenth and early twentieth century comes from a fear of majority rule. The Fifteenth Amendment allowed voters who were previously excluded from the political process to vote as a bloc or as a majority, thereby threatening the governing hierarchy. But Chin and Wagner’s discussion also suggests another explanation.

Today, despite the lack of state-wide black majorities or substantial pluralities, exclusion or disenfranchisement of black voters is a means of maintaining control and denying black voters equal political citizenship rights. While I agree with Chin and Wagner that the counter-majoritarian principle has been misapplied by the Court in race discrimination cases involving black Americans, I take issue with their explanation. Fear of black majority rule was not the sole reason for black disenfranchisement efforts in the late nineteenth and early twentieth century. If it had been, disenfranchisement efforts would have decreased as the percentage of black voters in the states decreased. Yet, as even Chin and Wagner concede, efforts to disenfranchise black voters have continued into the twenty-first century in the absence of black majorities or pluralities in the former states of the confederacy. Thus, I contend that black disenfranchisement on both a local and national level is linked to resistance by white racial conservatives to full political equality for black Americans (and often other non-white racial/ethnic minorities).

Further, Chin and Wagner seem overly optimistic in believing that the problem with the minority model analysis is simply the Court’s unwillingness to recognize the lingering effects of disenfranchised black majorities or pluralities. Continued resistance among white racial conservatives (whose interests are currently favored by the federal courts)<sup>30</sup> to full political equality for black Americans makes it unlikely that “law” will grapple with the consequences of nineteenth- and early-twentieth-century black disenfranchisement anytime in the near future. For as the authors admit, “the Court furthered counter-majoritarian politics, and it was itself the product of counter-majoritarian politics.”<sup>31</sup>

I contend that the Court continues to further the rights of white racial conservative minorities nationally and locally. The key question is how to preserve and protect the political rights of a long-despised racialized minority. One possible approach is to argue that given the long and well docu-

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<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., Paul Butler, *A Symposium on the Legacy of the Rehnquist Court: Rehnquist, Racism and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1029-32, 1039-42 (2006); Dan Carney & Alexander Starr, *New Order in the Court*, BUS. WK., Apr. 23, 2001, at 88; Neil A. Lewis, *Mixed Results for Bush in Battles Over Judges*, N.Y. TIMES, Oct. 22, 2004, at A1; Neil A. Lewis & David Johnston, *Bush Would Sever Law Group’s Role in Screening Judges*, N.Y. TIMES, March 17, 2001, at A1; John Nichols, *Karl Rove’s Legal Tricks: Packing the Judiciary with Right-Wingers*, THE NATION, July 22, 2002, at 11; Roger Clegg, *Picking the Next Justice*, NAT’L REV. ONLINE, Apr. 19, 2002, <http://nationalreview.com/clegg/clegg041902.asp> (last visited Oct. 31, 2007).

<sup>31</sup> Chin & Wagner, *supra* note 10, at 117-18.

mented history of efforts to disenfranchise blacks and suppress the black vote, the Court's minority model analysis is inappropriate in voting rights cases.

More specifically, in this essay I argue that the Court's application of the minority model rule and invocation of counter-majoritarian concerns in cases where black majorities or pluralities in local communities voluntarily attempt to remedy past discrimination, or where they coalesce with whites to achieve this result, suggests continued resistance to guaranteeing black citizens the same rights as white citizens in America.

First, I argue that efforts to disenfranchise black voters locally continue with the Court's approval without regard to the political numbers of black voters. To illustrate this point, I briefly examine the documented disenfranchisement of black voters during the 2000 and 2004 presidential elections. Second, I argue that even where blacks are able to enact policies to remedy the consequences of past disenfranchisement through democratic processes, the Court sides with complaining whites. My examination of two modern cases, *City of Richmond v. J.A. Croson Co.*<sup>32</sup> and *Wygant v. Jackson Board of Education*,<sup>33</sup> suggests that the "democratic majority" the Court protects is the dominant white culture, whose conservative members continue to be hostile to the idea of meaningful black participation in democratic processes.

Finally, I use the quest by black parents for educational equality as a contemporary example of how black political will continues to be thwarted as a result of long-term formal and informal disenfranchisement efforts. I conclude, rather cynically, that it may be of no moment for democratic majoritarian proponents that potential Southern black majorities were disenfranchised in some parts of the country because the situation southern blacks faced mirrored nation-wide attitudes toward the inclusion of black Americans generally in the political community. This attitude continues today. Application of the minority model analysis, therefore, only further undercuts black voting rights.

## II. THE CHIN-WAGNER ARGUMENT EXAMINED

### A. *Disenfranchised Black Political Majorities*

*"[T]he most dangerous threat to democracy is the Negro. . . . The Negro is an uncontrollable objector to our [all-white] ticket."*

— The Commercial, Pine Bluff, Arkansas, 1892<sup>34</sup>

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<sup>32</sup> 488 U.S. 469 (1989).

<sup>33</sup> 476 U.S. 267 (1986).

<sup>34</sup> After the Supreme Court outlawed the all-white primary, this Arkansas newspaper editor urged its white readers to support the poll tax, which would effectively disenfranchise many black voters. See Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 732 (1998) (citing C. Calvin

According to Chin and Wagner, the Fourteenth and Fifteenth Amendments were enacted to protect blacks from white majority oppression.<sup>35</sup> But if their reading of the historical record is accurate, then the failure of the Supreme Court to adequately protect black voters seems puzzling. Some alternate explanation is possible.

This section briefly describes the historical setting of these two amendments. It concludes that evidence about the purpose of the Fourteenth and Fifteenth Amendments is more ambiguous than Chin and Wagner acknowledge. Scholars agree only that the amendments were designed to clarify the legal position of blacks by overruling *Dred Scott v. Sanford*,<sup>36</sup> by declaring black Americans citizens, and by prohibiting any blanket exclusion of blacks from the franchise. Whether a majority of the national legislators and the ratifying states thought these amendments granted black Americans *equal* political status with whites is less clear.

Undoubtedly, some members of Congress intended the amendments to grant blacks equal access to the franchise, but Chin and Wagner overlook the lack of consensus in the Reconstruction Congress on this point. The intent of the ratifying states is no clearer. Instead, the atmosphere surrounding the enactment and ratification of the Fourteenth and Fifteenth Amendments reflected mixed feelings within Congress and the states about the scope of black inclusion into the American body politic.<sup>37</sup>

Books have been written exploring the “original intent” of the Fourteenth Amendment.<sup>38</sup> There is no consensus on what Congress intended

Smith, *The Politics of Evasion: Arkansas' Reaction to Smith v. Allwright, 1944*, 17 J. NEGRO HIST. 40, 41 (1982)).

<sup>35</sup> Chin & Wagner, *supra* note 10, at 68-70.

<sup>36</sup> 60 U.S. 393 (1857).

<sup>37</sup> See CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 3-4 (1997); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1746-48 (2007); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). Desmond King and Stephen Tuck argue forcefully “that Southern white supremacy was constructed *in conjunction with*, rather than *in opposition to* developments in the rest of the country after Reconstruction.” Desmond King & Stephen Tuck, *De-Centering the South: America's Nationwide White Supremacist Order After Reconstruction*, 194 PAST & PRESENT 213, 214 (2007).

<sup>38</sup> See, e.g., CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* (1997); CHESTER JAMES ANTIEAU, *THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT* (1981); JAMES EDWARD BOND, *NO EASY WALK TO FREEDOM: RECONSTRUCTION AND THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1997); FREDERICK P. LEWIS, *THE DILEMMA IN THE CONGRESSIONAL POWER TO ENFORCE THE FOURTEENTH AMENDMENT* (1980); HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT* (1977).

Reflecting disagreement about the intent of the amendment, ratification was not without controversy. Five southern states and two border states (Maryland and Delaware) resisted ratification of the Fourteenth Amendment that required them to guarantee all people, including blacks, equal protection of the law. “The amendment was subsequently ratified by Alabama, July 13, 1868; Georgia, July 21, 1868 (after having rejected it on November 9, 1866); Virginia, October 8, 1869 (after having rejected it on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected it on October 27, 1866); Delaware, February 12, 1901 (after having rejected it on February 8, 1867); Maryland, April 4, 1959 (after having

other than clarification of black Americans' citizenship status.<sup>39</sup> This uncertainty about its meaning and scope left the matter open to interpretation by the Supreme Court. The late nineteenth-century Court severely limited the Fourteenth Amendment's scope by reasoning that the amendment did not reach private acts of discrimination,<sup>40</sup> the most common manifestation of anti-black bias, and by distinguishing between state and federal citizenship with respect to the Amendment's Privileges and Immunities Clause.<sup>41</sup>

The history of the Fifteenth Amendment is similar. Chin and Wagner write that Congress proposed the Fifteenth Amendment in 1869 because the former Confederate states had unanimously refused to enfranchise black Americans in spite of the threat in Section 2 of the Fourteenth Amendment to reduce congressional representation.<sup>42</sup> But resistance to enfranchising black voters was not limited to the South and predated the Civil War.

Although a few northern blacks voted at the end of the eighteenth century,<sup>43</sup> most were quickly disenfranchised during the first half of the nineteenth century as a byproduct of the movement toward universal white male suffrage.<sup>44</sup> "By 1865, at the end of the Civil War, only five states allowed

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rejected it on March 23, 1867); California, May 6, 1959; Kentucky, March 18, 1976 (after having rejected it on January 8, 1867)." National Park Service, 14th Amendment to the U.S. Constitution Proposal and Ratification, *available at* <http://www.nps.gov/archive/malu/documents/amend14.htm> (last visited Oct. 31, 2007). New Jersey, Oregon and Ohio subsequently rescinded their ratifying votes. *Id.*

<sup>39</sup> James Thomas Tucker writes that while it was clear that the Thirteenth Amendment overruled that portion of "the *Dred Scott* decision to the extent it allowed the federal government to deprive slave owners of their 'property' . . . there was widespread disagreement over whether the effects of the Amendment went any further." James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 474 (1999). Tucker goes on to discuss how the Fourteenth Amendment clarified the citizenship status of black Americans and how the privileges and immunities, equal protection and due process clauses "gave specific meaning to American citizenship." *Id.* at 479. Northerners were concerned that the grant of citizenship to blacks, the vast majority of whom resided in the South, would shift even more power to the South than the Three-Fifths Clause of Article I and questioned whether the Fourteenth Amendment gave Congress the right "to prescribe the qualifications of voters in a State, or . . . act directly on the subject." . . . [Further] black suffrage in the northern states was a practical impossibility because of its unpopularity." *Id.* at 480. More importantly, Tucker, quoting John Mabry Mathews, the leading authority on the Fifteenth Amendment for the first half of the twentieth century, writes "that politics not principle was the dominant factor [explaining the enactment of that amendment] . . . . 'The Fifteenth Amendment had a limited object—first, to enfranchise the northern Negro, and second, to protect the southern Negro against disenfranchisement.'" *Id.* at 483-84 (quoting JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 20-21, 77, 50 (1909)).

<sup>40</sup> *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883).

<sup>41</sup> *The Slaughter-House Cases*, 83 U.S. 36 (1872).

<sup>42</sup> Chin & Wagner, *supra* note 10, at 88.

<sup>43</sup> See ALEXANDER KEYSER, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 6 (2000). Of course, these early black voters had to satisfy property and other restrictions. *Id.*

<sup>44</sup> See LEON LITWACK, *NORTH OF SLAVERY* 74, 79 (1961); David Skillen Bogen, *The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks 1776-1810*, 34 AM. J. LEGAL HIST. 381, 396-403 (1990) (discussing the loss of franchise for free blacks in Maryland).

black men to vote on the same basis as white men.”<sup>45</sup> The debate over the Fifteenth Amendment, then, occurred in an atmosphere of considerable antagonism toward black enfranchisement.

Extending the franchise to all adult black men met resistance in all regions of the country, not just in the South.<sup>46</sup> The language of the Fifteenth Amendment reflects the controversy. Rather than guarantee blacks the right to vote outright, Section 1 of the amendment provides: “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.”<sup>47</sup> In other words, the right to vote could be conditioned on things other than race. Property requirements, poll taxes, literacy tests, felony disqualification, or disenfranchisement laws — which Chin and Wagner concede were used to suppress the black vote — were permissible if crafted as race-neutral voting requirements.

Even some northern states resisted ratifying the Fifteenth Amendment.<sup>48</sup> Several years after enactment of the Voting Rights Act of 1965 and more than one hundred years after the adoption of the Fifteenth Amendment, two border states, Maryland and Kentucky, became the last states to ratify the amendment.<sup>49</sup> The ratification history of the Fifteenth Amendment reflects the continued resistance to black enfranchisement in states that were not part of the former confederacy.

The Fifteenth Amendment’s seemingly weak endorsement of the black franchise resonated in Supreme Court decisions. Chin and Wagner discuss how the Court limited the scope of the Fifteenth Amendment by refusing to extend the amendment’s protection to private actors<sup>50</sup> and how the Court in a

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<sup>45</sup> King & Tuck, *supra* note 37, at 220 (citing Leslie H. Fishel, Jr., *Northern Prejudice and Negro Suffrage, 1865-1870*, 39 J. NEGRO HIST. 12 (1954)). King and Tuck continue: “Out West, the four thousand black Californians were barred from voting, jury service, testifying in court, homesteading or marrying across the colour line.” *Id.*

<sup>46</sup> The 39th Congress made enfranchisement of black adult males a requirement for readmission of the former confederate states to the Union. For a discussion of this process, see Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 269-73 (2004). But states outside the Deep South governed by Democrats refused to extend the franchise to blacks. King & Tuck, *supra* note 37, at 220 (citing Leslie H. Fishel, Jr., *Northern Prejudice and Negro Suffrage, 1865-1870*, 39 J. NEGRO HIST. 12 (1954)). Only when the interests of white Republicans were threatened during the 1868 presidential election did the Republican-dominated Reconstruction Congress consider a constitutional amendment to protect black voters. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR EQUALITY* 29 (2004). Members of Congress needed the black vote to counteract a resurrected southern-influenced Democratic party, but they also wanted to control access to the franchise. *Id.* at 29.

<sup>47</sup> U.S. CONST. amend. XV, § 1.

<sup>48</sup> Six states outside the Deep South (California, Delaware, Kentucky, Maryland, Oregon, and Tennessee) rejected the Fifteenth Amendment outright, and New York rescinded its adoption. 14th Amendment to the U.S. Constitution Proposal and Ratification, *available at* <http://www.nps.gov/archive/malu/documents/amend15.htm> (last visited Oct. 18, 2007).

<sup>49</sup> *Id.*

<sup>50</sup> Chin & Wagner, *supra* note 10, at 96 (citing *Terry v. Adams*, 345 U.S. 461, 473 (1953); *United States v. Cruikshank*, 92 U.S. 542 (1875)).

series of cases upheld techniques that permanently disenfranchised black voters.<sup>51</sup> In one of the most egregious cases, *Giles v. Harris*, the Court refused to invalidate an Alabama constitutional provision effectively disenfranchising black voters, explaining that the Court was powerless to remedy the claimed violation.<sup>52</sup>

Chin and Wagner discuss this case, and *Giles v. Teasley*, where the petitioners more clearly spelled out that what was at stake was the right of a controlling plurality.<sup>53</sup> A disingenuous Supreme Court in *Giles v. Harris* told petitioners to seek relief from a southern-dominated Congress or President Theodore Roosevelt.<sup>54</sup> Even worse, despite a record replete with supportive evidence of intent to disenfranchise black voters, the Court in *Giles v. Teasley* wrote that, assuming the allegations were true, the petitioners had not been injured.<sup>55</sup> As Chin and Wagner point out, the Court, in an illogical twist, explained that it would not intervene on behalf of the disenfranchised black voters because no state official could lawfully deny otherwise qualified black voters the franchise.<sup>56</sup> Nevertheless, the authors characterize the Court's action in the *Giles* cases as passive, although "not virtuous."<sup>57</sup>

But as Chin and Wagner point out, the Supreme Court in the late nineteenth century acknowledged "the centrality of the right to vote . . . 'regarded as a fundamental political right . . . preservative of all rights.'"<sup>58</sup> In the 1960s the Court reinforced this idea, explaining that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."<sup>59</sup> Given the importance the Court consistently placed on the right to vote before its decisions in the *Giles* cases, its failure to protect the black petitioner's right to vote seems more than the passive act Chin and Wagner call it. The *Giles*

<sup>51</sup> Chin & Wagner, *supra* note 10, at 114-16 (discussing *Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903); *Williams v. Mississippi*, 170 U.S. 213 (1898)).

<sup>52</sup> 189 U.S. 475 (1903). According to the Court, anyone who had registered to vote before January 1, 1903, was registered for life and would not be subject to the literacy requirements of the later law.

[B]efore 1903 the following male citizens of the State, who are citizens of the United States, were entitled to register, *viz.*: First. All who had served honorably in the enumerated wars of the United States, including those on either side in the 'war between the states.' Second. All lawful descendants of persons who served honorably in the enumerated wars or in the war of the Revolution. Third. 'All persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government.' As we have said, according to the allegations of the bill, this part of the Constitution, as practically administered and as intended to be administered, let in all whites and kept out a large part, if not all, of the blacks, and those who were let in retained their right to vote after 1903 . . .

*Id.* at 482-83.

<sup>53</sup> Chin & Wagner, *supra* note 10, at 115; 193 U.S. 146 (1904).

<sup>54</sup> 189 U.S. at 488.

<sup>55</sup> 193 U.S. at 164.

<sup>56</sup> Chin & Wagner, *supra* note 10, at 116.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 97 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

<sup>59</sup> *Id.* (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)); *see also* *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

cases are illustrative of the Court's knowing and active protection of white political minorities in the South at the expense of blacks, whether actual majorities or minorities.

As explained in following sections, today the Court continues to protect the interests of whites even when black Americans manage to gain political power and attempt to exercise that power. Courts consistently support efforts to deny black political will if it conflicts with the interests of conservative white Americans. Derrick Bell has long argued that black Americans only profit from political participation when their interests converge with those of whites.<sup>60</sup> But "when no such fortuitous arrangements are possible, blacks have found that political participation becomes quite difficult."<sup>61</sup>

### *B. Persistence of Black Disenfranchisement: The 2000 and 2004 Presidential Elections*

Despite a constitutional amendment and congressional legislation, black disenfranchisement continues. It is a national problem, not simply a state one. This section discusses the response of courts and other governmental entities to alleged claims of voter disenfranchisement and suppression targeting black and, in some cases, other non-white voters. It focuses first on the 2000 presidential election and the role that the former confederate state, Florida, played in securing the election of the more conservative presidential candidate. Then this section looks more broadly at voter disenfranchisement during the 2004 elections in support of my contention that suppression of the black vote is not a regional, but a persistent national phenomenon.

#### *1. The 2000 Presidential Election: The Case of Florida*

Chin and Wagner list Florida as one of the states where black Americans were politically numerous in the nineteenth century but effectively disenfranchised. While the authors' analysis stops in the early twentieth century, Florida never ceased its efforts to disenfranchise black voters. In 1989 the federal district court judge in *Bradford County NAACP v. City of Starke* wrote, "[t]he State of Florida has a long and well documented history of discrimination against black individuals."<sup>62</sup> A continuation of this conduct during the 2000 presidential election was unsurprising.

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<sup>60</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>61</sup> DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 472 (5th ed. 2004). Bell continues: "[B]lacks, while citizens, are always subject to 'democratic domination'; their views, aspirations, even basic political rights subject to the prevailing belief that America, and every part of it, must be controlled by whites." *Id.*

<sup>62</sup> 712 F. Supp. 1523, 1537 (M.D. Fla. 1989).

The United States Commission on Civil Rights's investigation of voting irregularities in Florida during that election found that those precincts and counties with the highest percentage of black voters had the highest number of spoiled ballots.<sup>63</sup> Less than one percent of ballot spoilage was attributed to lack of education or other voter deficiencies.<sup>64</sup> The Commission concluded that "the disenfranchisement of Florida's voters fell most harshly on the shoulders of black voters."<sup>65</sup>

Witness testimony supports the Commission's conclusions about the scope of black disenfranchisement.<sup>66</sup> After hearing all the evidence, the Commission concluded that the voting irregularities violated Section 2 of the Voting Rights Act of 1965.<sup>67</sup> It called on the U.S. Attorney General to "begin the litigation process to determine liability under the [Voting Rights

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<sup>63</sup> U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), available at <http://www.usccr.gov/pubs/vote2000/report/main.htm>. The Commission reported: "Nine of the 10 counties with the highest percentage of African American voters had spoilage rates above the Florida average. Of the 10 counties with the highest percentage of white voters, only two counties had spoilage rates above the state average . . . . Where precinct data were available, the data show that 83 of the 100 precincts with the highest numbers of spoiled ballots are black-majority precincts." *Id.* at xiii. According to the Commission these voting irregularities resulted from:

- (1) a general failure of leadership from those with responsibility for ensuring elections are properly planned and executed;
- (2) inadequate resources for voter education, training of poll workers, and for Election Day trouble-shooting and problem solving;
- (3) inferior voting equipment and/or ballot design;
- (4) failure to anticipate and account for the expected high volumes of voters, including inexperienced voters;
- (5) a poorly designed and even more poorly executed purge system; and
- (6) a resource allocation system that often left poorer counties, which often were counties with the highest percentage of black voters, adversely affected.

*Id.* at xvii.

<sup>64</sup> *Id.* at xii. The Executive Summary reads:

Statistical analysis shows that the disparity in ballot spoilage rates—i.e., ballots cast but not counted—between black and nonblack voters is not the result of education or literacy differences. This conclusion is supported by Governor Jeb Bush's Select Task Force on Election Procedures, Standards and Technology, which found that error rates stemming from uneducated, uninformed, or disinterested voters account for less than 1 percent of the problems . . . . Approximately 11 percent of Florida voters were African American; however, African Americans cast about 54 percent of the 180,000 spoiled ballots in Florida during the November 2000 election based on estimates derived from county-level data. These statewide estimates were corroborated by the results in several counties based on actual precinct data.

*Id.*

<sup>65</sup> *Id.* More specifically, the Commission noted that "black voters were nearly 10 times more likely than nonblack voters to have their ballots rejected. . . . [A]pproximately 14.4 percent of Florida's black voters cast ballots that were rejected . . . compare[d] with approximately 1.6 percent of nonblack Florida voters . . . ." *Id.*

<sup>66</sup> *Id.* at xiii ("The magnitude of the disenfranchisement, including the disparity between black and nonblack voters, is supported by the testimony of witnesses at the Commission's hearings. These witnesses include local election officials, poll workers, ordinary voters, and activists.")

<sup>67</sup> *Id.* (citing the Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973bb-1 (2000)).

Act] and appropriate remedies.”<sup>68</sup> The Commission also “recommend[ed] that Florida retain knowledgeable experts to undertake a formal study to ascertain the reason for the racial disparities in vote rejection rates between white voters and persons of color. . . . [and] adopt and publicize procedures to eliminate this disparity.”<sup>69</sup> Florida took no action, perhaps relying instead on an earlier report of a task force created by Governor Jeb Bush, brother of the presidential candidate, to examine the 2000 election. That report made no mention whatsoever of the impact of race on vote rejection rates.<sup>70</sup>

Florida’s electoral votes were crucial to the outcome of the 2000 presidential race. Litigation over the vote count was waged at both the state and federal level.<sup>71</sup> In *Bush v. Gore*, the Supreme Court, mindful of Florida’s long history of black disenfranchisement, intervened to stop the recount of votes in Florida amid claims of black disenfranchised voters.<sup>72</sup> The somewhat incoherent 5-4 ruling effectively delivered the state’s twenty-five electoral votes to the Republican candidate, George W. Bush.<sup>73</sup> These votes allowed him to garner 271 electoral votes, one more than needed to defeat Democratic candidate Albert Gore.<sup>74</sup> The vast majority of black voters in Florida and the nation had supported Gore.<sup>75</sup>

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<sup>68</sup> U.S. COMM’N ON CIVIL RIGHTS, *supra* note 63, at xiii. In 2002, the Commission further reported: “The Justice Department investigated some of the abuses involving access to the polls by individuals with limited English proficiency and individuals with disabilities. However, other irregularities have not been investigated by the department.” U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS IN FLORIDA 2002: BRIEFING SUMMARY 1 (2002), available at <http://www.law.umaryland.edu/marshall/usccr/documents/VotingRightsFla02CRbrief.pdf>; see also Roger Roy, *Orange Is Justice’s 3rd Target: Threat of Lawsuit over Vote Criticized as “Whitewash,”* ORLANDO SENTINEL, May 24, 2002, at A1 (noting that of the investigations and suits brought by the Department of Justice after the 2000 election, “none of the imminent federal suits in Florida deal with complaints from black voters”). The Government Accountability Office also published a report on the Justice Department’s investigations. GOV’T ACCOUNTABILITY OFFICE, DOJ ACTIVITIES TO ADDRESS PAST ELECTION-RELATED VOTING IRREGULARITIES 71, 77 (2004), available at <http://www.gao.gov/new.items/d041041r.pdf> (detailing the investigations generated by complaints about the conduct of the 2000 elections in Florida and other states).

<sup>69</sup> U.S. COMM’N ON CIVIL RIGHTS, *supra* note 63, at xiii-xiv.

<sup>70</sup> See REVITALIZING DEMOCRACY IN FLORIDA: THE GOVERNOR’S SELECT TASK FORCE ON ELECTION PROCEDURES, STANDARDS AND TECHNOLOGY (2001), available at [http://www.collinscenter.org/usr\\_doc/Election%20Report.pdf](http://www.collinscenter.org/usr_doc/Election%20Report.pdf); see also U.S. COMM’N ON CIVIL RIGHTS, *supra* note 63, at 14 (describing the settlement of a lawsuit brought by the NAACP and others against Florida state and local election officials and agencies).

<sup>71</sup> For a discussion of this litigation, see generally ROBERT M. JARVIS ET AL., *BUSH V. GORE: THE FIGHT FOR FLORIDA’S VOTE* (2001); *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (CASS R. SUNSTEIN & RICHARD A. EPSTEIN eds., 2001).

<sup>72</sup> 531 U.S. 98 (2000).

<sup>73</sup> See *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY* xiii-xiv (E.J. DIONNE, JR. & WILLIAM KRISTOL eds., 2001).

<sup>74</sup> Dionne & Kristol, *Introduction to BUSH V. GORE*, *supra* note 73, at 1.

<sup>75</sup> See RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 78 (2001) (noting that in Florida “exit poll data show[ed] blacks favor[ed] Gore by a margin of 93 percent to 7 percent”); Gerald M. Pomper, *The 2000 Presidential Election: Why Gore Lost*, 116 POL. SCI. Q. 201, 206 (2001) (noting the 48 percent “racial gap” between blacks’ support for Gore and whites’ support for Bush) and that “Afri-

The effect of the Court's action in *Bush v. Gore* and the early twentieth-century *Giles* cases was the same: preservation of a status quo that favored the actions of "democratically" elected state officials who were protecting white conservative political interests. The Supreme Court's belief in *Bush v. Gore* that intervention was necessary to save the presidential election from devolving into turmoil ignited by claims of black disenfranchisement ignored the clear constitutional path to be taken in such cases.<sup>76</sup> So instead of passively allowing black disenfranchisement as it did in the *Giles* cases, the Court in *Bush v. Gore* took a more active role in fostering black disenfranchisement.

The conventional legal response to election fraud and irregularities usually is prospective, not immediate.<sup>77</sup> *Bush v. Gore* is unique only in this one respect: It provided immediate relief, but to racially conservative whites, not blacks. Relief for black disenfranchisement, if it comes at all, comes too late to protect the vote in the challenged election. In other words, cheaters win, provided their actions advance the interests of the white conservative political majority. As I discuss in the next section, the circumstances of the 2004 presidential election seem to confirm this point.

## 2. *The 2004 Presidential Election*

In a series of articles written in 2004, New York Times columnist Bob Herbert bemoans attempts by the Republican Party to suppress the black vote leading up to and during the 2004 presidential election.<sup>78</sup> In one of these

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can American support for the Republican candidate was lower than in any election since the 1960s").

<sup>76</sup> See Erwin Chemerinsky, *How Should We Think About Bush v. Gore?*, 34 *LOY. U. CHI. L.J.* 1, 7-9 (2002) (describing the federal laws and constitutional provisions mandating that the matter be resolved by Congress had the Court not stopped the recount process).

<sup>77</sup> See Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud: Learning from Florida's Presidential Election Debacle*, 63 *U. PITT. L. REV.* 159 (2001) (discussing inadequacies of state election fraud remedies); Note, *Elections: Developments in the Law: VI. Postelection Remedies*, 88 *HARV. L. REV.* 1298, 1299 & n.3 (1975) (noting that despite the availability of various remedies, "[h]istorically, political considerations have caused prosecuting attorneys to ignore most election violations"). But see Steven F. Huefner, *Remedying Election Wrongs*, 44 *HARV. J. ON LEGIS.* 265, 305-10 (2007) (describing the increased likelihood of immediate intervention in elections due to recent reforms in election law).

<sup>78</sup> See Bob Herbert, *A Chill in Florida*, *N.Y. TIMES*, Aug. 23, 2004, at A19 (describing additional efforts to suppress the black vote in Florida); Bob Herbert, *Days of Shame*, *N.Y. TIMES*, Nov. 1, 2004, at A25 (describing Republican efforts to suppress the black vote in Philadelphia, Pennsylvania, and Milwaukee, Wisconsin); Bob Herbert, *For Bush, Bad News Is Bad News*, *N.Y. TIMES*, Oct. 25, 2004, at A21 (Republican Party trying to "intimidate" Democratic voters in key states like Ohio and Florida); Bob Herbert, *Protect the Vote*, *N.Y. TIMES*, Sept. 13, 2004, at A23; Bob Herbert, *Sacrifice and Sabotage*, *N.Y. TIMES*, Oct. 1, 2004, at A27 (describing a study by two University of Miami professors of "so-called vote errors in Miami-Dade County" during the 2000 presidential election); Bob Herbert, *Suppress the Vote?*, *N.Y. TIMES*, Aug. 16, 2004, at A15 (describing Florida state police intimidation of elderly black voters in their homes); Bob Herbert, *Voting While Black*, *N.Y. TIMES*, Aug. 20, 2004, at A23 (describing state actors' involvement in black voter suppression in Florida).

articles, he mentions a study by the People for the American Way (“PFAW”) and the NAACP entitled *The Long Shadow of Jim Crow*.<sup>79</sup> The PFAW-NAACP study cites a few examples of recent voter suppression or disenfranchisement efforts targeting black Americans during the 2004 presidential election year. These efforts were not confined to the former confederate states, and black voters, although the primary targets, were not the only racial minority group affected.<sup>80</sup> Further, while conceding that voter suppression is not confined to one political party, the study documents “recent strategies” used by the Republican Party to suppress the black vote across the country.<sup>81</sup>

Just as the Democratic-controlled southern states of the late nineteenth and early twentieth century acted with the tacit approval of the nation’s white racial conservative majority to disenfranchise black adult males,<sup>82</sup> today states with sizeable black minorities use “legal” mechanisms like felony disenfranchisement laws to dilute the black vote,<sup>83</sup> along with illegal meth-

<sup>79</sup> Herbert, *Protect the Vote*, *supra* note 78.

<sup>80</sup> PEOPLE FOR THE AMERICAN WAY FOUNDATION & NAACP, *THE LONG SHADOW OF JIM CROW: VOTER INTIMIDATION AND SUPPRESSION IN AMERICA TODAY* (2004), available at <http://www.pfaw.org/pfaw/general/default.aspx?old=16368>. The study cites reported instances of voter suppression or intimidation in Detroit, Michigan; Kentucky; Florida; Texas; Philadelphia, Pennsylvania; Louisiana; and South Carolina. *Id.* In addition, the study identifies reports of similar activity targeting Hispanic and Native American voters. *Id.*

<sup>81</sup> *Id.* These strategies included distributing misleading voter information in black communities, “implement[ing] . . . a ‘potential felon’ purge list” to remove black voters from the rolls, requiring voters to provide photo identification when not required by state law, using “armed, plainclothes officers . . . to question elderly black voters in their homes,” planning the use of “vote challengers” in heavily black precincts, and trying to prevent qualified black college students from a majority black college from voting in the county where the school was located. *Id.* According to the study, Republican-initiated voter suppression efforts targeting black Americans date back to 1981. *Id.*

<sup>82</sup> Many southern states excluded otherwise qualified black voters from participating in political party primary elections. In most instances, the primary election was the key race since there was no meaningful two-party system in these states. The history of the all-white primary in Texas is particularly instructive. When the all-white primary was challenged, the Supreme Court ruled on Fourteenth Amendment Equal Protection grounds that states could not directly exclude black voters. *Nixon v. Herndon*, 273 U.S. 536 (1927). The Texas legislature, responding to *Herndon*, attempted to maintain the exclusion by giving the Democratic Party power to determine who could participate in its party primary election. The Texas Supreme Court upheld this law, characterizing the party as a “voluntary association,” which had the right to determine its membership and exclude otherwise qualified voters from participating based solely on race. *Bell v. Hill*, 123 Tex. 531, 534 (1934). In a series of decisions, the U.S. Supreme Court ruled both for and against Texas’ versions of the all-white primary. *Nixon v. Condon*, 286 U.S. 73 (1932) (holding all-white primary authorized by state Democratic Executive Committee unconstitutional because the Executive Committee was a state creation); *Grovey v. Townsend*, 295 U.S. 45 (1935) (holding all-white primary authorized by Democratic Party state convention constitutional); *Smith v. Allwright*, 321 U.S. 649 (1944) (finally striking down Texas’s all-white primary relying on the Fifteenth Amendment).

<sup>83</sup> See Chin, *supra* note 46, at 305 (“Many felon voting bans were passed in the late 1860s and 1870s, when implementation of the Fifteenth Amendment and its extension of voting rights to African-Americans were ardently contested.” (quoting Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 559 (2003))); Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon*

ods like those discovered in Florida by the Civil Rights Commission to deny blacks equal and meaningful access to the political decision-making process. Thus, the disenfranchising process described by Chin and Wagner continues today, although in slightly different forms. But, as I point out in the next section, even when black voters are able to exercise political power, the Court frustrates them when their interests threaten the interests of white racial conservatives.

### C. *Recognition and Protection of Black Political Will*

Chin and Wagner also assume that if black citizens had not been disenfranchised they would have been able to realize their political objectives on a local and state level and to influence policies on a national level through their representatives in the Congress. But even assuming blacks had been able to influence public policy, there is no assurance that their decisions would have withstood judicial scrutiny if their preferred policy worked against the interest of hostile whites. Modern cases indicate that courts remain unwilling to enforce the political will of enfranchised black majorities or pluralities when white racial conservative interests might be adversely affected.

Although a detailed discussion of recent Supreme Court decisions on voting and the electoral process is beyond the scope of this Article, the Court's history on racial gerrymandering deserves brief mention. Many scholars argue that the contemporary cases of *Shaw v. Reno*,<sup>84</sup> *Crososn*, and *Wygant*, have undermined the civil rights of black Americans. Modern racial gerrymandering cases date back to *Gomillion v. Lightfoot*, in which the Court found that a redistricting plan developed by the Alabama State Legislature substantially changed the geographic boundaries of Tuskegee to exclude all but four or five blacks and no whites.<sup>85</sup> The Supreme Court, in reversing the lower court's denial of declaratory and injunctive relief, held that the petitioner's allegations, if proven true, meant that the state legislature had deprived black citizens of the municipal franchise and the rights that come with city residency.<sup>86</sup>

In later cases, the Court initially distinguished *Gomillion*-like efforts that diluted the black vote from redistricting plans that protected or enhanced black voting strength through the creation of de facto minority-majority districts when these plans were challenged unsuccessfully by whites using the

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*Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 780 (2002) (noting "1.8 million of the 4.7 million felons and ex-felons currently barred from voting are African Americans . . . [and that] [b]ecause African Americans are overwhelmingly Democratic Party voters, felon disenfranchisement erodes the Democratic voting base by reducing the number of eligible African American voters") (internal citations omitted).

<sup>84</sup> 509 U.S. 630, 642-43 (1993) (striking down a minority-majority district reapportionment plan).

<sup>85</sup> 364 U.S. 339, 341 (1960).

<sup>86</sup> *Id.* at 347.

Fourteenth Amendment's Equal Protection Clause.<sup>87</sup> But in *Shaw v. Reno*, the Court refused to draw a distinction between efforts to dilute and efforts to protect black citizens' rights to participate in the political process on equal footing with white citizens.

The Court in *Shaw* applied strict scrutiny and concluded that the state redistricting plan that had created one black minority-majority district was "so irrational on its face that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race."<sup>88</sup> In so doing, the Court ignored evidence that white voters, especially in the South, tend not to support black candidates — making it difficult for black candidates to get elected in districts where blacks do not constitute a substantial majority of the registered voters.<sup>89</sup>

In a series of increasingly confusing cases, the Supreme Court tried to explain when racial majority-minority districts could survive a strict scrutiny review.<sup>90</sup> The racial gerrymandering cases raise the larger question about the inherent fairness of any kind of gerrymandering, but discussion of this topic is also beyond the scope of this article. I simply use *Shaw* as an example of the Court's willful blindness to the long-term hostility of many white racial conservatives to the exercise of political power by black citizens. The next section examines this point in more detail.

### 1. State and Local Government Attempts to Remedy Race Discrimination

Chin and Wagner note that the modern Court has acknowledged the effects of past race-based discrimination on the "opportunities enjoyed by

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<sup>87</sup> See, e.g., *United Jewish Org., Inc. v. Carey*, 430 U.S. 144 (1977) (upholding the creation of a Jewish minority-majority district); *Beer v. United States*, 425 U.S. 130 (1976) (upholding the creation of a black minority-majority district); *Wright v. Rockefeller*, 376 U.S. 52 (1964) (upholding creation of several nonwhite majority districts). But see, *Davis v. Bandemer*, 478 U.S. 109 (1986) (finding Equal Protection violation where minority-majority district is created in area with no concentration of minority voters); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (holding district that excludes a racial group of its pre-existing municipal franchise violates the Equal Protection Clause).

<sup>88</sup> 509 U.S. at 658. In a later case, *Miller v. Johnson*, the Court, applying strict scrutiny, struck down a state redistricting plan that resulted in the creation of minority-majority districts on the basis that the plan was not narrowly tailored to serve a compelling governmental interest. 515 U.S. 900 (1995).

<sup>89</sup> See Nicholas A. Valentino & David O. Sears, *Old Times There Are Not Forgotten: Race and Partisan Realignment in the Contemporary South*, 49 AMER. J. POL. SCI. 672, 674 (2005) (noting that political parties are divided "quite decisively along racial lines . . . [and that] Republicans are almost all white, and blacks are the dominant core of the Southern Democratic Party").

<sup>90</sup> See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Hunt v. Cromartie*, 532 U.S. 234 (2001); *Sinkfield v. Kelley*, 531 U.S. 28 (2000); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Lawyer v. Dep't of Justice*, 521 U.S. 567 (1997); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996).

minority groups in our society.”<sup>91</sup> Yet the same Court often adopts an ahistorical perspective when reviewing state and local actions aimed at remedying the consequences of long-term black disenfranchisement or vote dilution. In this section, I use *Wygant v. Jackson Board of Education*,<sup>92</sup> involving a race-based teacher lay-off plan, and *City of Richmond v. J.A. Croson*,<sup>93</sup> involving a municipal minority set-aside program, to demonstrate the falsity of the Court’s claim that it traditionally defers to the decisions of democratic majorities.

Both cases involve local decisions made pursuant to a democratic process offering remedial efforts on behalf of black Americans. In both cases, the Court struck down the programs created by those local decisions. The cases show that the Court invokes counter-majoritarian concerns to protect the interests of racially conservative whites, whether majorities or minorities.

Chin and Wagner cite to the plurality opinion in *Croson* as acknowledging that “‘past discrimination’ affected ‘the opportunities enjoyed by minority groups in our society,’”<sup>94</sup> but they fail to acknowledge that the *Croson* decision effectively undermined remedial policies enacted by a black majority in Richmond. Later Supreme Court and lower federal court cases limiting affirmative action efforts cite *Croson* approvingly. As John Nowak writes, there was a brief period during the 1960s and early 1970s when the Court was more amenable to protecting racial minorities, but “since the late 1980s . . . [it] seems to have turned against racial minorities, as it has narrowed earlier rulings concerning the Equal Protection Clause and restricted the efforts of legislatures to help racial minorities.”<sup>95</sup> Just as in the past, whenever black citizens start to exercise their political power to bring about change, the Court intervenes to thwart their efforts, often turning a blind eye to past inequalities.

Chin and Wagner cite *Missouri v. Jenkins* as an example of the Court’s refusal to link the current condition of many black public school students to discriminatory policies made possible due to black voter disenfranchise-

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<sup>91</sup> Chin & Wagner, *supra* note 10, at 7 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 293 (1978) (opinion of Powell, J.)).

<sup>92</sup> 476 U.S. 267 (1986).

<sup>93</sup> 488 U.S. 469 (1989). See Stephen M. Rich, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments After Romer v. Evans*, 109 YALE L.J. 587, 605 n.113 (1999); *Constitutional Scholars’ Statement on Affirmative Action After City of Richmond v. J. A. Croson Co.*, 98 YALE L.J. 1711, 1712 (1989) (signatories included constitutional law notables Paul Brest, Yale Kamisar, John Hart Ely, Kenneth L. Karst, Frank I. Michelman, Geoffrey R. Stone, Cass R. Sunstein, Laurence H. Tribe, Norman Dorsen, and Jesse Choper trying to put a positive spin on the Court’s decision).

<sup>94</sup> Chin & Wagner, *supra* note 10, at 71.

<sup>95</sup> John E. Nowak, *Brown v. Board of Education After Forty Years: Confronting the Promise: The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 349 (1995).

ment.<sup>96</sup> In *Jenkins*, a federal district judge in a long-standing school desegregation lawsuit refused to consider low performance on standardized tests by black students in formerly segregated schools as “vestiges of a segregated system [where] ‘numerous factors beyond the control of [the state] affect minority achievement,’”<sup>97</sup> and released the school district from further court supervision. In *Jenkins*, remedial efforts were the result of legal action, so arguably the district court was forcing the local government to implement certain policies that benefited black school-age children. The case involved no democratically conceived policy decision warranting judicial deference. But this was not the case in *Wygant*,<sup>98</sup> in which blacks, although a minority in their community, used their political power to get the local school to adopt a plan to more fully integrate its teaching staff.

The plan challenged and ultimately struck down by the Supreme Court in *Wygant* involved a voluntary program adopted as part of a collective bargaining agreement between the Jackson Board of Education and the Jackson Education Association, a unit of the Michigan Education Association. The Sixth Circuit described this agreement as an “affirmative action layoff system, subjected to collective bargaining safeguards.”<sup>99</sup> All the parties agreed that the Board of Education employed no black teachers before 1954.<sup>100</sup> Thus, the black teachers were relatively new hires with less seniority than most of their white counterparts.

A majority of the local, predominately white union membership and a majority of the School Board approved the labor contract.<sup>101</sup> When layoffs appeared likely, the School Board refused to enforce the agreement, and the union and two minority teachers who had been laid off sued.<sup>102</sup> After pro-

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<sup>96</sup> Chin & Wagner, *supra* note 10, at 78 (citing *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995)).

<sup>97</sup> *Id.*

<sup>98</sup> 476 U.S. 267 (1986).

<sup>99</sup> *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152, 1158 (6th Cir. 1984). The specific provision read as follows:

[T]eachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.* In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated.

*Id.* at 270.

In response to several complaints by the Jackson NAACP, the Jackson Board of Education in 1969 created an “*ad hoc* committee of teachers, school administrators and faculty union representatives” to study how to remedy school segregation and minority faculty hiring problems. Brief for Lawyers’ Committee for Civil Rights Under Law & ACLU as Amici Curiae Supporting Respondents at 7, *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986) (No. 84-1340). The committee’s recommendations, coupled with an additional NAACP complaint and a racially-motivated explosion at a high school, prompted the School Board to create the provision that was ultimately challenged. *Id.* at 9-10; 476 U.S. at 287-88 (White, J., concurring).

<sup>100</sup> *Wygant*, 746 F.2d at 1156.

<sup>101</sup> *Id.* at 1158.

<sup>102</sup> *Wygant*, 476 U.S. at 271-72.

tracted litigation in both the federal and state courts, the state circuit court concluded that the School Board had breached its contract with the teachers and ordered the Board to comply, which it did.<sup>103</sup> As a result, ten white teachers with more seniority than black teachers were laid off in two separate academic years. The laid off teachers subsequently sued.<sup>104</sup>

In upholding the plan, the lower appellate court wrote that the “local school board and its teacher bargaining representative [voluntarily] . . . adopted a protective collective bargaining contract containing a provision as to teachers in racial minority status. . . . to cure faculty racial imbalance and as a matter of educational policy.”<sup>105</sup> In other words, the challenged provision was the result of a transparent democratic process where whites were in the overwhelming majority. The appellate court reasoned that limited and narrowly tailored voluntary affirmative action programs are permissible even where presumably innocent third parties share some of the burden of “cur[ing] the effects of prior discrimination.”<sup>106</sup> Therefore, a majority of white union members could voluntarily choose to disadvantage themselves to address black under-representation on the teaching staff.

Five members of the Supreme Court disagreed, striking down the layoff provision.<sup>107</sup> Justice Powell, writing for a three-justice plurality and alluding only to some unspecified “racial tension in the community” and school around the time the collective bargaining agreement was adopted,<sup>108</sup> characterized the School Board’s goal as remedying societal — as opposed to the Board’s — past, race-based discrimination. Belatedly, the School Board admitted it had previously discriminated,<sup>109</sup> but Justice Powell dismissed this proffer of evidence. He asserted that even if true, “the layoff provision was not a legally appropriate means of achieving even a compelling purpose.”<sup>110</sup> Justice Powell suggested a more demanding scrutiny is required when the affirmative action efforts apply to existing employees as opposed to potential applicants.<sup>111</sup>

Justice Marshall, dissenting, acknowledged the inadequacy of the record before the Court while reciting evidence of the School Board’s past

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

<sup>104</sup> *Id.* at 272. By the time the Supreme Court agreed to hear the case, all but one of the white teachers had been rehired, but all were seeking back pay. Philip Hager, *Justices Accept Minority Preference Case*, L.A. TIMES, Apr. 16, 1985, § 1, at 10.

<sup>105</sup> *Wygant*, 746 F.2d at 1157.

<sup>106</sup> *Id.* “We believe that it is within the power and authority of the parties to this agreement so to do, and that their action is in no respect in violation of the United States Constitution or federal law.” *Id.* Nonetheless, as the majority of the Supreme Court noted, when teachers were asked individually, “[n]inety-six percent of . . . [those] who responded . . . expressed a preference for the straight seniority system” in the case of a layoff. *Wygant*, 476 U.S. at 270 n.1.

<sup>107</sup> *Wygant*, 476 U.S. 267.

<sup>108</sup> *Id.* at 270.

<sup>109</sup> *Id.* at 277-78.

<sup>110</sup> *Id.* at 278.

<sup>111</sup> *See id.* at 283.

race-based discriminatory practices.<sup>112</sup> He opined that “[t]he real irony of the [plurality’s] argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform[:] . . . integrating schools without taking every school system to court.”<sup>113</sup> Justice Stevens, also dissenting, added that even the meager record before the Court did not contradict the School Board’s claim that its efforts had a “completely sound educational purpose.”<sup>114</sup>

In *Wygant*, five conservative members of the Court seemed suspicious of voluntary, although arguably politically coerced, efforts to remedy past discrimination, even when adopted by whites through transparent and democratic processes.<sup>115</sup> The Court also seemed oblivious to the reluctance of government actors who might have discriminated in the past to acknowledge these acts, and perhaps open themselves to legal liability, when justifying voluntary affirmative action efforts.<sup>116</sup>

The ruling in *Wygant* suggests judicial hostility toward black political minorities who are able to persuade whites to voluntarily join them in enacting policies to correct past racial wrongs. Thus, the outcome in *Wygant* is an example of the ongoing harm to black Americans that Chin and Wagner argue relates to their disenfranchisement in the late nineteenth century. Justice Stevens offered a possible explanation for the Court’s protection of whites in these situations. Describing the real harm whites fear in employment discrimination cases, he wrote, “when an employer simply agrees to recruit minority job applicants more actively, white applicants suffer the ‘nebulous’ harm of facing increased competition and the diminished likelihood of eventually being hired.”<sup>117</sup> Fear of competition with blacks and diminished economic opportunities may explain the continued resistance to racial integration not only in the nation’s public schools, but also in other employment contexts.

Unlike in *Wygant*, where the remedial racial minority preference policy was put in force by a white-dominated local government entity, in *City of Richmond v. J.A. Croson Co.*, the minority set-aside program was enacted by a black majority city council.<sup>118</sup> Here too a majority of the Court, relying

<sup>112</sup> *Id.* at 297-300 (Marshall, J., dissenting).

<sup>113</sup> *Id.* at 305. Marshall continued: “Testimony of both Union and school officials illustrates that the Board’s obligation to integrate its faculty could not have been fulfilled meaningfully as long as layoffs continued to eliminate the last hired.” *Id.* at 307.

<sup>114</sup> *Id.* at 315 (Stevens, J., dissenting).

<sup>115</sup> Granted, some scholars might quibble with my characterization of unions as democratic bodies given the statutory protections granted union members to challenge union decisions. See generally 29 U.S.C. § 158(b) (2000) (proscribing unfair labor practices by unions). I use the phrase “democratic processes” to describe a degree of representativeness that is a cornerstone of American democracy.

<sup>116</sup> For a discussion of the point in the context of the *Regents of University of California v. Bakke*, 438 U.S. 912 (1978), litigation, see JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 81-82, 210-11 (1979).

<sup>117</sup> *Martin v. Wilks*, 490 U.S. 755, 792 n.31 (1989) (Stevens, J., dissenting).

<sup>118</sup> *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989).

heavily on its earlier decision in *Wygant*, found the policy unlawful. Richmond, the capital of Confederacy, had a long and well documented history of discrimination targeting blacks.<sup>119</sup> As recently as the early 1970s, the Court struck down the city's attempt to annex a part of a predominately white portion of the adjacent county to offset the city's growing black population, saying that the plan was "infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office."<sup>120</sup>

But in years immediately preceding *Croson*, there had been signs of change and racial cooperation in city government.<sup>121</sup> By the late 1970s, blacks constituted approximately fifty percent of the city's population<sup>122</sup> and occupied five seats on the nine-person Richmond City Council.<sup>123</sup> However, black-owned or black-controlled businesses were awarded only 0.67 percent of general city construction contracts.<sup>124</sup> Mindful of the federal set-aside provision upheld by the Supreme Court in *Fullilove v. Klutznick*,<sup>125</sup> the City Council proposed a short-term remedial measure, the Minority Business Utilization Plan.<sup>126</sup> The plan required prime contractors with the city to set aside thirty percent of the dollar amount of any city construction contract for minority subcontractors.<sup>127</sup>

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<sup>119</sup> *Id.* at 529 (Marshall, J., dissenting). There is a long history dating back to the colonial era of efforts, often reinforced by law, to discourage blacks from engaging in profitable commercial enterprises. For a discussion of this history, see Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1260-62 (1991).

<sup>120</sup> *Croson*, 488 U.S. at 544 (Marshall, J., dissenting) (citing *Richmond v. United States*, 422 U.S. 358, 373 (1975)).

<sup>121</sup> *Croson*, 488 U.S. at 554-55.

<sup>122</sup> *Id.* at 553.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 534.

<sup>125</sup> 448 U.S. 448 (1980).

<sup>126</sup> The plan was to be in effect for no more than five years. *Croson*, 488 U.S. at 478. The plan was no longer in force by the time the case was argued before the Court in 1988. *Id.* at 478.

<sup>127</sup> *Id.* Congress, based on extensive legislative findings in the 1970s about the lingering effects of these discriminatory laws and practices, enacted the Public Works Employment Act of 1977. Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6701 et seq. (2000)). This Act contained a provision that required state and local governments to set aside ten percent of their federal grants to procure services or supplies for businesses owned or controlled by identified racial minority groups. *Croson*, 488 U.S. at 530-33 (Marshall, J., dissenting).

The City Council broadly defined minority-owned business to include any business owned and controlled by "citizens . . . who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 478 (plurality opinion). Given the city's racial history, the category of beneficiaries was overbroad and thus the Court's antagonism is somewhat understandable. But as Justice Marshall points out, there was ample support for the fact that blacks had been excluded in the past; thus, the majority should have preserved the preference for black entrepreneurs and not have struck down the entire provision. *Id.* at 550 (Marshall, J., dissenting).

The City Council similarly said that the plan was designed to remedy past discrimination that favored white businesses and to prevent the city's present spending decisions from "reinforcing and perpetuating the exclusionary effects of past discrimination." *Id.* at 537.

The set-aside provision applied to any minority business in the United States.<sup>128</sup>

The Richmond City Council held public hearings before enacting the plan. One white council member voted for the plan, another abstained, and the two remaining white council members voted against the measure. All five of the black council members supported the plan.<sup>129</sup>

When the plan was challenged in *Croson*, a divided Supreme Court with a splintered majority struck it down. Justifying the first application of strict scrutiny review to an allegedly benign racial classification,<sup>130</sup> Justice O'Connor, writing for a plurality, invoked Footnote 4 of *Carolene Products* to hold that strict scrutiny was appropriate in this case because of the Court's role to protect "discrete and insular minorities."<sup>131</sup> This constituted an inappropriate application of Footnote 4 since the plan represented the will of a black majority government and populace. As Chin and Wagner point out, traditionally the Court invokes Footnote 4 to protect racial minorities, and other outsiders, from the tyranny of white political majorities.<sup>132</sup>

Justice O'Connor seemed to have little concern for the integrity of the transparent democratic process that produced the measure or the counter-majoritarian tensions inherent in the Court's action. Instead, she expressed concern that the city presented no evidence that it or its prime contractors had discriminated based on race in the awarding of contracts. She accepted unquestioningly the argument that any racial disparity was due to the absence of blacks in the industry and not the result of past discrimination by the city.<sup>133</sup> Justice Marshall, in a vigorous dissent, charged Justice O'Connor with constructing an ahistorical narrative that disrespected findings of a city

<sup>128</sup> *Id.* at 477 (plurality opinion). This provision was designed to remedy the widespread disparities throughout industry catalogued by Congress six years earlier, and not simply discrimination against minority contractors in Richmond. *Id.*

<sup>129</sup> *Id.* at 555 (Marshall, J., dissenting). At public hearings on the merits of the plan, five people spoke in opposition and two in favor. *Id.* at 479 (plurality opinion). The City Council heard testimony that minorities were almost non-existent in the area's major construction trade associations, and that in the past, minorities had been excluded from the local construction industry. *Id.* The virtually all-white contractors' associations in Richmond opposed the measure. *Id.* at 480. But no witness denied that race discrimination had been widespread in the city's construction industry. *Id.* at 534-35. (Marshall, J., dissenting) (citing the federal district court's opinion, Civ. Action No. 84-0021 (E.D. Va., Dec. 3, 1984)). Nor was there any direct evidence during the hearing or the ensuing litigation that the measure was the result of impermissible city council motives. *Id.* at 546, 537.

<sup>130</sup> *Id.* at 551 (Marshall, J., dissenting).

<sup>131</sup> *Id.* at 495 ("If one aspect of the judiciary's role under the Equal Protection Clause is to protect 'discrete and insular minorities' from majoritarian prejudice or indifference . . . some maintain that these concerns are not implicated when the 'white majority' places burdens upon itself . . .") (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

<sup>132</sup> Chin & Wagner, *supra* note 10, at 71.

<sup>133</sup> *Croson*, 488 U.S. at 480. Justice O'Connor wrote: "To a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms . . . . [T]here is no finding—and we decline to assume—that male Caucasian contractors will award contracts only to other male Caucasians." *Id.* at 502 (citing *Assoc. Gen. Contractors of Cal. v. City & County of San Francisco*, 813 F.2d 922, 933 (9th Cir. 1987)).

council whose members “have spent long years witnessing multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents’ voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination.”<sup>134</sup>

In yet another ironic reading of history, Justice O’Connor invoked the Thirteenth and Fourteenth Amendments in support of her claim that their ratification dramatically changed what states and local governments could do in matters of race; thus, a city could not, for example, legislate to eliminate societal discrimination.<sup>135</sup> In response to Marshall’s dissent, she wrote that “[Section] 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race . . . .”<sup>136</sup> Her willingness to remove both the amendment and the case from their historical context — the need to protect politically powerless black Americans from racially tinged laws enacted by hostile white majorities, and the long-term consequences of Richmond’s racial history — is breathtaking.<sup>137</sup>

The lack of traditional judicial deference to decisions by elected bodies in Justice O’Connor’s opinion was quite clear. After noting that blacks constituted fifty percent of Richmond’s population and a bare majority of the city council, she wrote, “[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.”<sup>138</sup> She implied that the bare black political majority on the Richmond City Council was trying to get undeserved spoils of power.<sup>139</sup> To her, and three other justices, a fifty percent

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<sup>134</sup> *Id.* at 529, 544 (Marshall, J., dissenting). Justice O’Connor conceded that Richmond’s long history of both public and private discrimination “contributed to a lack of opportunities for black entrepreneurs,” but she concluded that this history alone is insufficient to justify the set-aside provision. *Id.* at 499 (plurality opinion). She even speculated that “[b]lackness may be disproportionately attracted to industries other than construction.” *Id.* at 503. Of course, if there were no jobs available to blacks, one would not expect them to engage in a futile exercise.

<sup>135</sup> *Id.* at 490-92.

<sup>136</sup> *Id.* at 491.

<sup>137</sup> Justice Marshall countered: “The fact is that Congress’ concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads.” *Id.* at 559. (Marshall, J., dissenting).

<sup>138</sup> *Croson*, 488 U.S. at 495-96. Reginald Oh writes that Justice O’Connor in essence accused the City Council of “acting out of pure racial politics, [and] . . . out of a desire to harm white interests in order to benefit black interests.” Reginald C. Oh, *Mapping a Materialist LatCrit Discourse on Racism*, 52 CLEV. ST. L. REV. 243, 249 (2005).

<sup>139</sup> The *Croson* case reached the Court twice. In the first case the Court vacated the judgment for the City and remanded it in light of a recent decision, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). *J.A. Croson Co. v. Richmond*, 478 U.S. 1016 (1986). Upon rehearing, the appellate court in a split decision struck down the plan. *See J.A. Croson Co. v. Richmond (Croson II)*, 822 F.2d 1335, 1359 (4th Cir. 1987). Justice O’Connor writes that the lower appellate court concluded that the statistical evidence presented to the city council “had little or no probative value in establishing prior discrimination in the relevant market, and

black presence in a city, and a bare majority on the city council translated into a black majority capable of trampling the rights of Richmond's white citizens who were neither an insular minority nor a politically powerless group.

Justice Scalia was more direct. In a concurring opinion he wrote: "[B]lacks have often been on the receiving end of the [racial] injustice. Where injustice is the game, however, turnabout is not fair play."<sup>140</sup>

Justice Stevens, in a concurring opinion, opined that the set-aside provision was so broad it "seem[ed] acceptable to assume that every white contractor covered by the ordinance shares in that guilt."<sup>141</sup> It never occurred to him that all white contractors, whether they actually discriminated or not, are beneficiaries of past and present policies or practices that discourage black businesses. Unlike other successful challenges to affirmative action plans, the program struck down in *Croson* did not trample the existing rights of majority business owners,<sup>142</sup> unless one cynically argues that majority business owners' whiteness confers on them a property interest that trumps black interests or expectations.<sup>143</sup> More importantly, the plan was enacted pursuant to a democratic process where blacks and whites had almost equal political power.

The outcome in *Croson* suggests the Court's unwillingness to invoke the counter-majoritarian principle when considering laws and policies enacted by or on behalf of black majorities or pluralities. One possible explanation is that the minority model is designed not to truly reflect the pluralistic democracy in which we live but to preserve white political domi-

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actually suggested 'more of a political than a remedial basis for the racial preference.'" 488 U.S. at 485 (citing *Croson II*, 822 F.2d at 1359).

<sup>140</sup> *Croson*, 488 U.S. at 524 (Scalia, J., concurring). Justice Scalia characterized racial preferences as attempts to "even the score." *Id.* at 528. Justice Marshall retorted that "[t]he sole . . . circumstance which the majority cites [to justify invoking strict scrutiny] . . . is the fact that blacks in Richmond are a 'dominant racial group[.]' . . . While I agree that the numerical and political supremacy of a given racial group is a factor bearing upon the level of scrutiny to be applied, this Court has never held that numerical inferiority, standing alone, makes a racial group 'suspect' and thus entitled to strict scrutiny review." *Id.* at 553 (Marshall, J., dissenting). Justice Blackmun added "History is irrefutable, even though one might sympathize with those who—though possibly innocent in themselves—benefit from the wrongs of past decades." *Id.* at 561 (Blackmun, J., dissenting).

<sup>141</sup> *Id.* at 516 (Stevens, J., concurring).

<sup>142</sup> Justice Marshall wrote: "[L]ike the federal provision [in *Fullilove*], Richmond's does not interfere with any vested right of a contractor to a particular contract; instead it operates entirely prospectively. Richmond's initiative affects only future economic arrangements and imposes only a diffuse burden on nonminority competitors." *Id.* at 549 (Marshall, J., dissenting) (citations omitted).

See also Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 213 (1992) (arguing against consent decrees that undermine the subsequent property interests of incumbent employees in their jobs). Robert Suggs writes that the Court, by its "focus on past discrimination to the exclusion of current discrimination[,] created the false impression that the beneficiaries of business set-asides occupy a position analogous to the beneficiaries of employment hiring goals." Suggs, *supra* note 119, at 1310.

<sup>143</sup> See generally Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

nance. Chin and Wagner argue that the Court's concern about counter-majoritarian rulings unfairly limits its willingness to protect black voters from disenfranchisement and voter suppression efforts. Yet the Court's decisions in *Wygant* and *Croson* seem inconsistent with its stated concern for the democratic majority. These two decisions are examples of the Court's protective stance toward whites, whether they are a majority or minority, who are disadvantaged or may be disadvantaged in the future by voluntary remedial efforts that favor blacks or other racial minorities. In this sense, *Wygant* and *Croson* suggest the continuing concern with protecting white political rights without regard to whether whites are majorities or minorities.

The foregoing discussion highlights the difficulty black citizens face when they seek to use the political process to remedy the consequences of past disenfranchisement and voter suppression. The next section discusses one of the most pressing long-term consequences of black disenfranchisement: educational inequality. Increasingly, access to education is essential to one's ability to fully exercise politically-related citizenship rights. Since education is not a constitutionally protected right, black Americans continue to be disadvantaged by past and present policies that limit their ability to obtain educational opportunities commensurate with most white Americans.

## 2. *Educational Equality in Public Education: A Case Study of Restrictions on Rights to Work and Property*

Chin and Wagner argue that unless a claimant can establish intent to discriminate based on race, the Court is unwilling to protect blacks from policy decisions by democratic white majorities in an area like education.<sup>144</sup> The authors remind us that during the Jim Crow era disenfranchised blacks were denied the political power to challenge how money was spent on non-constitutional rights like education,<sup>145</sup> but this conclusion assumes that blacks would consistently vote as a bloc and would agree on things like educational policy. The historical record is less clear. While black Americans in the southern states generally favored universal public education, there was some internal disagreement over policy details.<sup>146</sup> As the contemporary debate within the black community about school vouchers suggests, black Americans are not a monolithic voting bloc.<sup>147</sup>

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<sup>144</sup> Chin & Wagner, *supra* note 10, at 15.

<sup>145</sup> *Id.* at 4.

<sup>146</sup> For example, blacks comprised 76 of the 124 delegates at the 1868 South Carolina state constitutional convention and were a clear majority. After lengthy discussions of education, the convention voted for a constitutional right to free public education, but some black delegates disagreed about whether participation in the public education system should be compulsory or voluntary. Similarly, there was some minor disagreement among the black delegates about implementing a literacy requirement for voting. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860-1880*, at 389, 396-98 (1935).

<sup>147</sup> While poor black Americans in urban areas tend to support school voucher plans, "black advocacy groups like the NAACP still oppose vouchers, as do older African Americans — who are more likely to vote . . . [thus] [s]upport for school choice among African Ameri-

Nevertheless, Chin and Wagner argue persuasively that contemporary public education issues reflect the harmful consequences of educational policies of more than a century earlier that grew out of attempts to thwart the political influence of black state majorities and pluralities.<sup>148</sup> The contemporary Court exacerbates this harm when it invokes counter-majoritarian concerns as an “inherent limit on minority power in a democracy”<sup>149</sup> in race discrimination cases. They argue that this practice, which started in reaction to *Brown v. Board of Education*, “naturally and reasonably led to the conclusion that segregation and Jim Crow was a partial and limited cause of the African American disadvantage.”<sup>150</sup> As a result, the full historical record was obscured.

In this section, I contend that Chin and Wagner’s minority model argument helps explain the Supreme Court’s reluctance to link contemporary educational inequalities to past de jure racially segregated schools. By refusing to make this causal linkage and to recognize a constitutional right to public primary and secondary education, the Supreme Court continues to leave black Americans at the mercy of conservative white local majorities. I argue that past un-remedied educational inequalities have locked in advantages for many whites. True educational equality requires both racial integration and equal resource allocation.

*a. The Persistence of Racial Inequality in Public Schools*

The historical record indicates the importance newly freed black Americans placed on education.<sup>151</sup> In fact, the push for public education by black Americans was an important factor in the establishment of an efficient public education system in the South following the Civil War.<sup>152</sup> But whites firmly resisted education benefits for southern blacks. “The American Freedmen’s Commission report[ed] that Negroes’ ‘attempts at education provoked the most intense and bitter hostilities, as evincing a desire to render them [ ] equal to whites.’”<sup>153</sup>

The second-class education blacks received in segregated public schools across the nation, but especially in the Deep South, is well documented. W.E.B. Du Bois, writing in 1935, said, “If the Negro public school

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cans isn’t likely to result in a shift in public policy.” Brian P. Marron, *Promoting Racial Equality through Equal Educational Opportunity: The Case for Progressive School-Choice*, 2002 BYU EDUC. & L.J. 53, 102 & n.219 (2002) (internal citations and quotations omitted).

<sup>148</sup> Chin & Wagner, *supra* note 10, at 66-67.

<sup>149</sup> *Id.* at 72. For a discussion of this point see *supra* notes 50-61 and accompanying text.

<sup>150</sup> *Id.* at 80.

<sup>151</sup> W.E.B. Du Bois writes that in 1860, only 3,651 black children in the South attended school because virtually all the slave-holding states had laws that prohibited teaching slaves to read and write. Enforcement was lax in some states until the 1831 Nat Turner rebellion in Virginia, after which “these laws were strengthened and more carefully enforced.” Du Bois, *supra* note 146, at 638. In contrast, by 1860, approximately three-quarters of free blacks in the United States were literate. *Id.* at 638.

<sup>152</sup> *Id.* at 638-44.

<sup>153</sup> *Id.* at 645.

system had been sustained, guided and supported, the American Negro today would equal Denmark in literacy.”<sup>154</sup> Moreover, during the late nineteenth and early twentieth century, seeking recourse in the courts would have been futile.

The Supreme Court reinforced educational inequality in decisions like *Cumming v. Richmond County Board of Education*.<sup>155</sup> *Cumming*, decided three years after *Plessy v. Ferguson*,<sup>156</sup> illustrated the emptiness of the latter’s promise that separate would be equal. The Court in *Cumming* ruled that closing the black, but not the white, publicly subsidized high school to provide four primary schools for black children did not violate the Equal Protection Clause.<sup>157</sup> It deferred to the political will of the conservative white voting majority in Richmond County, Georgia, a majority arguably not committed to educational equality for black Americans.

Many people continue to think that *Brown v. Board of Education* remedied this problem. However, they overlook the long-term consequences of massive resistance by a majority of whites in the Deep South who opposed desegregation of public schools.<sup>158</sup> In the decades immediately following *Brown*, whites throughout the South fled the public schools.<sup>159</sup> When the Court began to order desegregation of de facto segregated schools outside the South,<sup>160</sup> white families fled large northern and western cities for the suburbs rather than submit to racially integrated schools.<sup>161</sup> As Charles Lawrence writes: “When white parents abandon urban public schools, the segregated suburban and private schools their children attend replace the common school as a marker of community membership and, in excluding poor black and brown children, recreate the injury identified in *Brown*.”<sup>162</sup>

<sup>154</sup> *Id.* at 637. He continues: “The eagerness to learn among American Negroes was exceptional in the case of a poor and recently emancipated folk.” *Id.*

<sup>155</sup> 175 U.S. 528 (1899).

<sup>156</sup> 163 U.S. 537 (1896).

<sup>157</sup> 175 U.S. at 544-45 (accepting the school board’s assertion that the need for primary schools was pressing and the decision to close the black school was based on financial considerations).

<sup>158</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF Brown v. Board of Education and Black America’s Struggle for Equality* 751-78 (1975).

<sup>159</sup> See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court’s Role*, 81 N.C. L. REV. 1597, 1604-09 (2003); Gary Orfield and David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 770-73 (1993); Diane Ravitch, *Desegregation: Varieties of Meaning*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 38-39 (Dertick Bell ed., 1980).

<sup>160</sup> See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

<sup>161</sup> Taunya Lovell Banks, *Brown at 50: Reconstructing Brown’s Promise*, 44 WASHBURN L.J. 31, 54-55 (2004); see NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950’S* 67-81 (1969).

<sup>162</sup> Charles R. Lawrence, III, *On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L. J. 1353, 1360 (2005); see also Banks, *supra* note 161, at 55 n.155 (“In November 1952, South Carolina voters approved a constitutional amendment eliminating the state’s duty to educate all children, thus allowing conversion to a private school system to avoid racial desegregation. The governors of Mississippi and Virginia considered submitting similar proposals . . . Following [*Brown*] states across the south passed tuition grant programs . . .”) (citing Molly Townes O’Brien, *Private*

Today the education of black children remains markedly unequal to that of white children. Fifty years after *Brown* “school-aged children in the [N]ation’s largest and most [racially] diverse cities are most likely to attend highly segregated schools.”<sup>163</sup> Today two-thirds of all black children, but only one-quarter of white children, attend urban schools.<sup>164</sup> The figures are equally stark for poor Latino children who live in large urban areas.<sup>165</sup> Over the past decade, segregation in urban schools along racial lines has increased.<sup>166</sup> The increased resegregation occurred between 1991 and 1995 and is linked to three Supreme Court decisions: *Jenkins*, *Pitts*, and *Dowell v. Oklahoma City*,<sup>167</sup> all of which severely limited school desegregation efforts and facilitated a return to de facto segregated neighborhood schools.<sup>168</sup>

While the harm claimed by the petitioners in *Brown* was the racial isolation of black children from white children,<sup>169</sup> the Court in *Grutter v. Bollinger* belatedly acknowledged that elite white children educated in isolation from non-whites are harmed.<sup>170</sup> A year before *Brown*’s fiftieth anniversary, the Supreme Court in *Grutter* and its companion case *Gratz v. Bollinger*<sup>171</sup> upheld the use of race as a factor in university admissions. Justice O’Connor, writing for the majority in *Grutter*, noted that empirical studies show that “student body diversity promotes [better] learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”<sup>172</sup> However, she warned that race-conscious diversity efforts must be short-term.<sup>173</sup>

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*School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 385 (1997)).

<sup>163</sup> Banks, *supra* note 161, at 32. Students in rural communities and small towns and large urban cities are more likely to attend racially integrated schools. *Id.* at 32 n.10 (citing GARY ORFIELD & CHUNGMEI LEE, *Brown* at 50: King’s Dream or Plessy’s Nightmare? 19 (Jan. 2004), available at <http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf>).

<sup>164</sup> Ryan S. Vincent, *No Child Left Behind, Only the Arts and Humanities: Emerging Inequities in Education Fifty Years After Brown*, 44 WASHBURN L.J. 127, 137 (2004).

<sup>165</sup> See Erica Frankenberg & Chungmei Lee, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 20 (2002), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Race\\_in\\_American\\_Public\\_Schools1.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Race_in_American_Public_Schools1.pdf) (reporting that, in 2000, “some of the largest school districts like New York, Prince George’s County and Miami-Dade [had] the highest levels of Latino segregation . . . [and that,] [s]imilar to black exposure indices, many of the districts . . . where Latino isolation [was] highest [were] central city districts with a small proportion of white students”).

<sup>166</sup> Banks, *Brown* at 50, *supra* note 161, at 43 n.72.

<sup>167</sup> *Dowell v. Oklahoma City*, 498 U.S. 237 (1991).

<sup>168</sup> ORFIELD & LEE, *supra* note 163, at 40.

<sup>169</sup> 347 U.S. 483, 494 (1954).

<sup>170</sup> 539 U.S. 306, 330 (2003).

<sup>171</sup> 539 U.S. 244 (2003) (striking down Michigan’s undergraduate admissions program as not sufficiently narrowly tailored to meet the University’s articulated compelling governmental interest).

<sup>172</sup> 539 U.S. at 330.

<sup>173</sup> *Id.* at 343 (“It has been 25 years since Justice Powell [in *Bakke*] first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”) (citations omitted).

The Court's focus in *Grutter* was racial diversity in higher education — diversity among the leadership class — not racial diversity in primary and secondary schools. Yet as Justice Ginsburg, dissenting in *Gratz*, reminds us, “[t]he stain of generations of racial oppression is still visible in our society.”<sup>174</sup> Continuing racial inequality is most apparent in this nation's public schools. Today the descendants of American slaves continue to be disproportionately concentrated in the worst public schools.<sup>175</sup> Children who receive inadequate education in primary and secondary schools too often lack the skills necessary to gain admittance to the colleges and universities that educate the leadership class.

Some members of the Court acknowledge the linkage between inadequate educational preparation and the absence of blacks (and Latinos) from these institutions of higher education.<sup>176</sup> But a majority refuse to give public school systems that adopt voluntary racial integration plans — plans adopted in the absence of court orders or judicial interventions<sup>177</sup> — the same latitude it gives institutions of higher education. Even though the sharply divided Court, in three opinions written during the last decade of the twentieth century, acknowledged that “local autonomy of school districts is a vital national tradition,”<sup>178</sup> as *Wygant* suggests, school boards are severely limited in their ability to voluntarily remedy racial disparities in their schools.

Recently, a plurality of the Court in *Parents Involved in Community Schools* characterized the school districts' attempt to maintain racially integrated public schools as “racial balancing,” concluding that this goal alone is insufficient to withstand the strict scrutiny review mandated under the Equal Protection Clause.<sup>179</sup> Although five members of the Court disagreed, Justice Kennedy concurred in the judgment because he believed that the race-conscious measures adopted by the school districts were not sufficiently narrowly tailored.<sup>180</sup> The Court's action in *Concerned Parents* seems anti-democratic, rather than protective of the democratic process.

Justice Kennedy suggested several so-called “race-neutral” but “race-conscious” mechanisms to achieve a more diverse student body.<sup>181</sup> Ulti-

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<sup>174</sup> *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting) (citing Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1276-91 (1998)).

<sup>175</sup> ORFIELD & LEE, *supra* note 163, at 40.

<sup>176</sup> See *Gratz*, 539 U.S. at 298-99 (Ginsburg, J., dissenting, joined by Souter, J., and Breyer, J.).

<sup>177</sup> Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K Through 12 Integration Programs*, 9 U. PA. J. CONST. L. 629, 636 n.45 (2007).

<sup>178</sup> *Jenkins*, 515 U.S. at 131 (Thomas, J., concurring); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (quoting *Dayton v. Bd. of Educ.*, 433 U.S. 406, 410 (1977)); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (quoting *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)).

<sup>179</sup> 127 S. Ct. 2738, 2757 (2007).

<sup>180</sup> *Id.* at 2791. Justices Ginsburg, Souter, Stevens and Breyer dissented.

<sup>181</sup> *Id.* at 2792 (Kennedy, J., concurring) (suggesting non-racial mechanisms for achieving diversity that include “strategic site selection of new schools; drawing attendance zones with

mately, the fractured decision in *Parents Involved* may have a chilling effect on efforts to achieve racial diversity in public primary and secondary schools. It also may encourage a few bad actors to more actively pursue measures to promote resegregation.<sup>182</sup>

But in post-*Brown* America, racial integration alone is not the sole measure of true equality in public school. It never was. In discussions about educational equality, race and class tend to get conflated, leaving uninformed people believing that racial integration alone is the measure of equal educational opportunities for black and other non-white children. As a result, many school advocates still tend to focus on ways to achieve racial integration and bemoan the limitations imposed by the Court in decisions like *Parents Involved* in achieving this goal.

A few education advocates focus instead on funding equality. Chin and Wagner suggest that funding inequality in public education is a byproduct of black disenfranchisement. The authors argue that the disenfranchised black voters in the nineteenth and early twentieth centuries were politically powerless to effectuate funding equality for black and white children in public schools.<sup>183</sup> These funding inequalities, not directly addressed by *Brown*, were exacerbated during the almost two decades of resistance to racial desegregation.<sup>184</sup> In addition, the Court's refusal to recognize public elementary and secondary education as a constitutional right thwarted efforts to develop equitable school financing policies.<sup>185</sup> The next section briefly discusses why true educational equality must consist of racial diversity *and* resource equality.

*b. True Equality: Racial Diversity and Resource Equality*

Most Americans still believe that *Brown* stands for the principle of racially integrated public schools. Yet many of the parent-petitioners in the cases consolidated in *Brown* were suing for equal educational opportunity for their children.<sup>186</sup> Over the years education in a racially integrated school became the surrogate for equal educational opportunity. In an earlier article, I explained how the twin goals of *Brown* — equality and integration — got conflated, concluding that the lawyers who litigated *Brown* and its progeny

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general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in targeted fashion; and tracking enrollments, performance and other statistics by race.”).

<sup>182</sup> See, e.g., Sam Dillon, *Alabama School Rezoning Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1 (describing “a sweeping rezoning plan” adopted by Tuscaloosa, Alabama school authorities that resulted in hundreds of black students who attended racially integrated schools being “sent to virtually all-black, low-performing schools”).

<sup>183</sup> Chin & Wagner, *supra* note 10, at 104.

<sup>184</sup> See *infra* notes 185-92 and accompanying text.

<sup>185</sup> See *infra* notes 196-98 and accompanying text.

<sup>186</sup> For a discussion of this point, see Banks, *Brown at 50*, *supra* note 161.

sacrificed educational equality for racial integration because, for them, racial integration was an indicator of equal and full citizenship.<sup>187</sup>

Our public schools remain segregated along racial lines today due to continuing disparities in the socioeconomic status of blacks and whites. Chin and Wagner, along with others, argue that these disparities are consequences of the Jim Crow era. White Americans, not burdened by the legacy of slavery and de jure race segregation, are more affluent as a group than black Americans.<sup>188</sup> Daria Roithmayr refers to this difference as an example of the “lock-in model” of inequality.<sup>189</sup> She writes:

During the days of Jim Crow and slavery, whites acted anti-competitively to exclude non-whites, and thereby gained an unfair ‘early mover’ monopoly advantage. This initial . . . advantage may now have become self-reinforcing, primarily because of the link between early material advantage and future success in schooling, employment, housing and wealth . . . . [R]acial disparities in those areas may now have become locked in permanently, in the absence of any radical institutional restructuring to dismantle the self-reinforcing advantage.<sup>190</sup>

One byproduct of this continuing economic disparity is that black Americans tend to live in urban neighborhoods that have lower tax bases than predominately white suburban neighborhoods, and public school financing is still tied to local property taxes.<sup>191</sup>

Children from low-income neighborhoods enter school needing more resources to perform on par with children from more affluent communities.<sup>192</sup> Yet, because of the higher property tax bases in affluent suburban areas and school financing schemes, the predominately white schools in those areas have more financial resources and better teachers than predominately non-white urban schools.<sup>193</sup> In some states, school financing schemes

<sup>187</sup> *Id.* at 40-41.

<sup>188</sup> See generally George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the “White” Problem in American Studies*, 47 AM. Q. 369 (1995).

<sup>189</sup> See Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 734 (2000); Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL’Y & L. 197 (2004) (discussing continuing residential segregation).

<sup>190</sup> Roithmayr, *Locked in Segregation*, *supra* note 189, at 204.

<sup>191</sup> See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. (2003), reprinted in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 29, 36 (John Charles Boger & Gary Orfield eds., 2005).

<sup>192</sup> See JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 50-62 (2005); see also JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* 122-23 (1991) (describing differences in per pupil expenditures among New York City area public school systems).

<sup>193</sup> See EDUCATION TRUST, *THE FUNDING GAP 2005: LOW-INCOME AND MINORITY STUDENTS SHORTCHANGED BY MOST STATES* 1-2 (2005), available at <http://www2.edtrust.org/NR/rdonlyres/31D276EF-72E1-458A-8C71-E3D262A4C91E/0/FundingGap2005.pdf>.

have been challenged successfully based on state constitutional provisions.<sup>194</sup> But at least one scholar argues that equal funding without economic integration in public schools will not result in substantive equality for poor black and brown children.<sup>195</sup>

Increasingly, educational achievement for children of all races in the United States is tied to socioeconomic status. A few scholars suggest economic diversity rather than racial diversity as a way to achieve educational equality in public schools.<sup>196</sup> This method is used by a few schools to achieve academic success across socioeconomic lines. School systems in Raleigh, North Carolina, and Cambridge, Massachusetts, have successfully used economic integration to achieve both racial integration and improved black student performance.<sup>197</sup>

Some school systems even use economic integration as a facially neutral means of getting more racially diverse student bodies. But other school systems have learned that economic diversity does not necessarily result in racial diversity. “Those [scholars] who have studied [economic diversity plans] say a key to that outcome is how aggressively a plan shifts students around and whether there are many schools that can lure middle-class students from their neighborhoods into poor ones.”<sup>198</sup>

Economic diversity plans are a useful means of coping with existing inequalities in cities with great socioeconomic diversity among their public school populations. But in major cities with large non-white poor families and few affluent families with children in public schools, economic diversity is not an effective tool. There can be no meaningful economic integration unless students are permitted to cross school district boundaries to take advantage of the tangible and intangible benefits available in more affluent school districts.

Two Supreme Court cases make this solution difficult. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court declared that public elementary and secondary education is not a fundamental right and thus financial inequalities in school expenditures do not violate the Constitution.<sup>199</sup> And in *Milliken v. Bradley*, the Court rejected busing across school

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<sup>194</sup> See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 801 N.E.2d 326 (N.Y. 2003).

<sup>195</sup> Christopher E. Adams, Comment, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1620 (2007) (referring to the so-called third wave of educational equity cases, which focuses on the “adequacy” of the education received in public schools where per pupil expenditures are equal).

<sup>196</sup> See Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1335 (2004); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 308 (1999); Angela Ciolfi, Note, *Shuffling the Deck: Redistricting to Promote a Quality Education in Virginia*, 89 VA. L. REV. 773, 776 (2003).

<sup>197</sup> Jonathan D. Glater & Alan Finder, *Diversity Plans Based on Income Leave Some Schools Segregated*, N.Y. TIMES, July 15, 2007, at A24.

<sup>198</sup> *Id.*

<sup>199</sup> 411 U.S. 1 (1973).

system lines to achieve racial integration.<sup>200</sup> *Milliken* and *Rodriguez* effectively consign poor minority children who live in poor urban areas to substandard schools.

Today, many American urban school systems are in crisis. The disparity in the quality of education provided by urban and suburban schools is a legacy of the de jure and de facto racial segregation policies and practices. Abandonment of urban public schools, primarily by affluent white families (and increasingly by affluent black and brown families), and the vestiges of racial segregation policies and practice only partially explain the lack of educational equality.

Federal aid that previously helped fill the financial gaps is declining or being redirected by federal mandates like the No Child Left Behind Act (“NCLB”).<sup>201</sup> NCLB was promoted as helping to bridge the educational gap between poor black and brown children and their white and Asian peers.<sup>202</sup> These goals, while laudable, were flawed in their implementation. According to some scholars, NCLB’s “conception, implementation, and the social meaning revealed by the discourse and rhetoric it has spawned, perpetuate and exacerbate the injuries inflicted upon poor black and brown children by segregation, racism, and poverty.”<sup>203</sup> Charles Lawrence argues that the Act’s “greatest injury [is that it] eras[es] the history and conditions that have caused the achievement gap it ostensibly seeks to close.”<sup>204</sup> He contends that, much like the Supreme Court’s contemporary approach to racially segregated schools, NCLB “builds on the myth of formal equality.”<sup>205</sup>

Ryan S. Vincent claims that NCLB disempowers local communities, especially black political majorities.<sup>206</sup> He argues that NCLB disproportionately increased educational costs to the poorest urban schools because they are the schools most likely to have more subgroups (low-income black and brown students, some with limited English proficiency or disabilities) that trigger accountability under the Act.<sup>207</sup> In practice, NCLB has actually sped

<sup>200</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>201</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

<sup>202</sup> See Press Release, Rod Paige, Secretary of Education, U.S. Dept. of Educ., Paige Cites Progress in Black Education But Notes Achievement Gap has Widened Over Past Two Decades (Nov. 19, 2005), available at <http://www.ed.gov/news/pressreleases/2003/10/10142003b.html> (noting that achievement rates for black and Latino elementary and secondary students lag behind those for white and Asian students).

<sup>203</sup> Charles R. Lawrence, III, *Who is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 Suffolk U. L. Rev. 699, 700 (2006).

<sup>204</sup> *Id.* at 706. Lawrence continues: “[N]owhere does it speak of ending racism or dismantling segregation. The Act’s proponents deplore the disproportionate injury that American schools inflict upon poor black and brown children, but accept no responsibility for that injury . . . . To listen to the discourse on No Child Left Behind is to hear a story of failing schools without a history — a history of segregation, of inadequate funding, of white flight, of neglect, of eyes averted and uncaring while the savage inequalities of American education grew even wider.” *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Vincent, *supra* note 164, at 138.

<sup>207</sup> *Id.*; accord Lawrence, *supra* note 203, at 706.

up privatization of primary and secondary education — an anti-democratic byproduct — and seems to foster resegregation of schools along the lines of race and class.<sup>208</sup>

Finally, in reflecting on what happened to public schools in the fifty years since *Brown*, I must acknowledge that the educational landscape has changed dramatically. Many of the largest urban public school systems in the United States are no longer black and white. Latinas comprise an increasingly significant portion of today's school-age population.<sup>209</sup> Latina children, like black children, tend to be concentrated in the worst urban public schools.<sup>210</sup> Thus, the discussion about educational equality in America today is no longer a black and white issue. In truth, it probably never was.

In an earlier article, I called for renewing the constitutional argument that free public education is a fundamental right, but one that consists of two components: substantive equality and education in a racially diverse environment.<sup>211</sup> If public primary and secondary education is deemed a constitutional right, the Court would be forced to re-examine its decision in *Milliken* rejecting busing across school system lines to achieve racial integration. But legal efforts alone will not result in substantive educational equality for poor minority children.

Without question, future efforts must be directed toward using the courts to more vigorously attack state public school funding formulas. But ultimately the role of courts in achieving *Brown's* twin goals may be limited. In the end, only a nationwide recommitment to free *public* education for all — our noble experiment — will work. Charles Lawrence argues that we need to “[c]reate cultures of excellence and high expectations in schools for black, brown, working class, and poor students.”<sup>212</sup> To do this, communities must “[r]ecruit and nurture school leaders and teachers who believe in their students[,] . . . [p]ay them well[,] . . . [r]educ[e] class size[,] [p]rovide safe, clean, well lighted, aesthetically-pleasing school buildings . . . [and] [r]einstate the war on poverty.”<sup>213</sup>

The long-term consequences of historical black disenfranchisement may help explain the current crisis in public education America now faces. Given the Supreme Court's refusal to make the causal connections needed to help remedy this past wrong, national and local leadership by all racialized

<sup>208</sup> Vincent, *supra* note 164, at 136.

<sup>209</sup> RICHARD FRY, THE CHANGING RACIAL AND ETHNIC COMPOSITION OF U.S. PUBLIC SCHOOLS, at i (2007), available at <http://pewhispanic.org/reports/report.php?ReportID=79> (“Latinos in 2005-06 accounted for 19.8% of all public school students, up from 12.7% in 1993-94.”).

<sup>210</sup> *Id.* (“Roughly three-in-ten Hispanic (29%) and black (31%) students attended schools in 2005-06 that were nearly all-minority(. . . [schools with] fewer than 5% of the students are white), and these percentages were both somewhat higher than . . . 1993-94, when they stood at 25% for Hispanic students and 28% for black students.”).

<sup>211</sup> Banks, *supra* note 161, at 57.

<sup>212</sup> Lawrence, *supra* note 203, at 717.

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

groups is needed to impress upon Americans the importance to our future of ensuring that rich and poor get equal educational opportunities. In the end, the future quality of America's urban public schools is a national, not simply local, social concern.

### III. FUTURE DIRECTIONS: THE NEED FOR NEW LEGAL THEORIES

Chin and Wagner are right to suggest that new foundational theories are needed to challenge racial discrimination. Midway through the last decade of the twentieth century it became painfully apparent to racial justice advocates that the civil rights theories of the 1950s that resulted in *Brown v. Board of Education* and its progeny were outmoded.<sup>214</sup> Civil rights advocate James Farmer, former head of the Congress of Racial Equality, opined that civil rights leaders of the 1960s did not have any long-range plans to capitalize on and preserve the gains of that era and to combat the backlash that followed the civil rights legislation of that decade.<sup>215</sup>

Now, as we near the second decade of the twenty-first century, we are left to confront increasingly sophisticated race discrimination with legal tools designed primarily to combat de jure race-based segregation<sup>216</sup> and a Court that selectively and unevenly applies the counter-majoritarian principle. Whether *Parents Involved* simply limits school boards' options or signals the death-knell of *Brown* and the theories it bred,<sup>217</sup> it is time to step back and reconsider our future goals and the theories needed to achieve racial and social justice.

Daria Roithmayr's call for "a major shift in thinking about anti-discrimination law, away from the individual intent model and more towards the conceptual metaphor of locked-in monopoly."<sup>218</sup> Chin and Wagner, by docu-

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<sup>214</sup> Derrick Bell writes that several decisions during the Court's 1988 term shattered any hope among forward-thinking civil rights advocates that the jurisprudence growing out of *Brown* would withstand continued resistance to full citizenship for black Americans. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 667 (5th ed. 2004).

<sup>215</sup> Bob Herbert, *Lessons Never Learned*, N.Y. TIMES, Dec. 28, 2006, at A35.

<sup>216</sup> Colorism claims are just one example of the more sophisticated race discrimination claims courts face today. See, e.g., Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1744 (2000); see generally Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131 (1997); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000); Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093 (2002).

<sup>217</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2837 (2007) (Breyer, J., dissenting) ("To invalidate the [racial balancing] plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise."). Arguably, if advocates could find a method that Justice Kennedy would approve, he could join with the four dissenters to uphold the use of race as a factor in a future case.

<sup>218</sup> Roithmayr, *Locked in Segregation*, *supra* note 188, at 204. Other theoretical sources include citizenship scholarship, see, e.g., Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493

menting the wholesale disenfranchisement of black voters in the late nineteenth and early twentieth century, provide a useful foundation for an attack on the Court's use of the counter-majoritarian principle whenever it reviews race discrimination claims grounded in past inequities. Ultimately, multiple approaches will be needed to rectify centuries of inequality. But for the moment, litigators should seriously consider using Chin and Wagner's argument and evidence to challenge the invocation of counter-majoritarian concerns in voting rights cases.

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(2007), which asks whether the advancement of racial or social equality should be couched in citizenship terms; international human rights norms, *see, e.g.*, Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an Entirely New Strategy*, 44 HASTINGS L.J. 79 (1992); and perhaps even modern forward-looking constitutions in countries like South Africa, *see, e.g.*, Ziyad Motala, *Constitution Making in Divided Societies and Equality: Reflections on the Israeli-Palestinian and South African Experiences*, 50 HOW. L.J. 471 (2007).