Souls

Imagining Justice

Felony Voting Rights and the Disenfranchisement of African Americans

Christopher Uggen, Jeff Manza, and Angela Behrens

The centrality of race for American political development is by now well understood. Social scientists have traced the interaction between race and the construction of federal political institutions, the class/race (or gender/race) nexus in public policymaking, and the impact of racial attitudes and racism on the political beliefs and policy preferences of citizens and policymakers alike. In recent years, research and theories about the American "racial state" have delved into many of the crevices of U.S. history that had previously ignored, veiled, or underplayed racial factors.[1]

Of particular importance is the development of new investigations of social and political practices with partially, or completely, hidden racial dynamics. Felon disenfranchisement laws, which restrict the voting rights of those convicted of criminal offenses, provide a good example. These laws are facially neutral with regard to race, applying equally to all those convicted of felonies. Nevertheless, given both the historical efforts to deny the franchise to African Americans and the dramatic overrepresentation of persons of color within the criminal justice system, to many observers the racial dimension of felon disenfranchisement seems obvious. For example, when asked why some states might mandate felon disenfranchisement, a young African American probationer we interviewed in Minnesota responded succinctly: "To be honest, I think they just want less blacks to vote."[2] Some scholars have thus begun to examine the role of racial factors in the origins and contemporary impact of felon disenfranchisement.[3]

In contrast, proponents of felon disenfranchisement maintain that these laws are race-neutral, applying equally to all criminal offenders, and that states have the right to regu-

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late access to the ballot box. Federal courts have almost invariably agreed, rejecting claims of disparate racial impact either brought under the Voting Rights Act or on other constitutional grounds. The emergence of a national civil rights campaign to restore the right to vote**,** as well as a growing debate over the question suggest that a thorough examination of the racial history and development of U.S. felon disenfranchisement laws is in order. We offer here a brief summary of our ongoing research and that of other scholars on these questions. Because of the racial origins and disparate impact of felon ballot restrictions, we will argue that claims of race-neutrality cannot withstand close scrutiny.

Racial Origins of Felon Disenfranchisement Law in the U. S.

Felon disenfranchisement laws bar those convicted of felony-level crimes, and in some cases former felons, from the right to vote. The wide variation in state felon disenfranchisement laws reflects the absence of a national standard governing the voting rights of criminal offenders. States generally differentiate between four categories of convicted offenders: (1) felons who are currently incarcerated; (2) previously incarcerated felons who are under parole supervision; (3) convicted felons who were never incarcerated, but were sentenced to probation; and (4) former felons who have completed their sentence and no longer have any official connection with the criminal justice system. At present, two states—Maine and Vermont—allow all felons, including those currently in prison, to vote. At the other end of the spectrum, fourteen states bar some or all former felons from voting for life or until their rights have been formally restored through clemency. Compared with other democracies, such laws are unique: the United States is virtually the only democratic country in the world to disenfranchise large numbers of former felons and current felons under parole or probation supervision. Combined with the very high U.S. rates of incarceration and conviction, the practice of felon disenfranchisement in this country has a much broader overall and race-specific impact than anywhere else in the world.

American history is replete with examples of states and groups attempting to deny nonwhites full citizenship, a status that encompasses the right to vote. Felon disenfranchisement laws can be viewed as part of a larger movement to maintain control over access to the ballot following the gradual establishment of universal white male suffrage after the 1830s. Only four states had disenfranchisement laws prior to 1840, but between 1840 and the beginning of the Civil War in 1861, some fourteen states adopted their first disenfranchisement law. To our knowledge, historians and other social scientists have not yet investigated this era, and thus we have little systematic data concerning the factors that might have driven the first wave of disenfranchisement laws. Since very few states allowed African Americans to vote, however, race was not a primary motivating factor behind these early laws.

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The second wave of adoption is more clearly and decisively linked to racial factors. In the ten years following the Civil War, eleven more states passed a felon disenfranchise-

ment law for the first time or dramatically broadened an existing, but narrowly tailored law. These measures were undertaken as the Fourteenth and Fifteenth Amendments were changing definitions of citizenship and expanding (or threatening to expand) the right to vote. In 1868, the Fourteenth Amendment extended the definition of American citizenship to include all persons born in the United States, thus rejecting the opinion of the Supreme Court in its *Dred Scott* decision a decade earlier.[4] The Amendment also included the equal protection clause and reduced state representation in Congress for states denying any male the right to vote. In 1870, the Fifteenth Amendment explicitly eliminated states' ability to deny the right to vote based on race. Although it has not generally been examined as part of the history of the disenfranchisement of African Americans in this era,[5] both anecdotal and systematic historical evidence from the late-nineteenth and early-twentieth centuries suggests that some political actors made a conscious attempt to dilute African American voting strength through felon disenfranchisement. In 1901, for example, the president of Alabama's constitutional convention used his opening address to advocate using access to the ballot box as a tool for maintaining white supremacy:

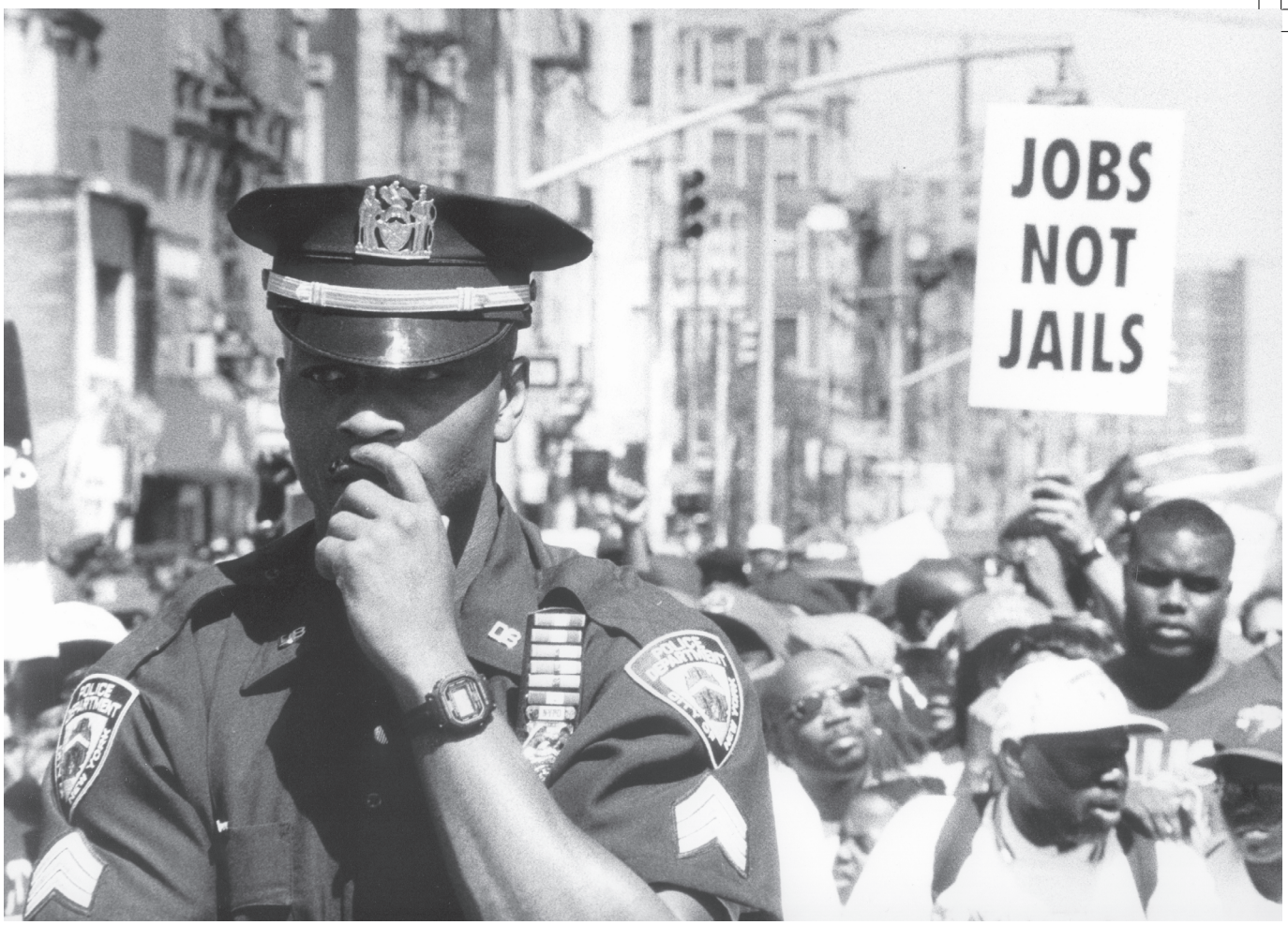
> [I]n 1861, as now, the Negro was the prominent factor in the issue. . . . And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State. . . . The justification for whatever manipulation of the ballot that has occurred in this State has been the menace of Negro domination.[6]

Subsequently, at the same convention, a provision passed to expand the state's felon disenfranchisement law, with its chief proponent estimating that "the crime of wife-beating alone would disqualify sixty percent of the Negroes."[7] The extension of disenfranchisement to minor offenses for which African Americans were primarily charged, such as vague acts of "moral turpitude," was common in a number of Southern states.[8] In an 1896 case later cited approvingly by the U.S. Supreme Court, the Mississippi Supreme Court upheld a disenfranchising measure that singled out such crimes, declaring:

> Restrained by the federal constitution from discriminating against the Negro race, the convention [of 1890] *discriminated against its characteristics and the offenses to which its weaker members were prone*. . . . Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery, murder, and other crimes in which violence was the principal ingredient, were not.[9]

In other words, the higher the proportion of nonwhite inmates in a given state's prison population, the more likely that state was to adopt restrictive felon disenfranchisement measures

While such discourse provides circumstantial evidence of the role race played in motivating disenfranchisement laws, we find striking confirmation when we examine the larger pattern with quantitative evidence. We developed a statistical analysis of the factors that led states to adopt or to extend felon disenfranchisement laws from 1850 to 2002.[10] We found that states having larger proportions of nonwhites in their prison populations were more likely to pass restrictive laws, even when the effects of time, region, economic competition between whites and Blacks,



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partisan control of government, and state incarceration rates were statistically controlled. In other words, the higher the proportion of nonwhite inmates in a given state's prison population, the more likely that state was to adopt restrictive felon disenfranchisement measures.

Historically, felon disenfranchisement has been an effective means of reducing the voting power of African Americans because of racially disparate incarceration rates.[11] The post–Civil War passage of restrictive laws closely paralleled changes in the racial composition of state criminal justice systems, particularly in the South, where the percentage of nonwhite prison inmates nearly doubled in many states between 1850 and 1870. In Alabama, for example, 2 percent of the state's prison population was nonwhite in 1850 compared to 74 percent in 1870.[12] Some suggest that the disproportionate criminal punishment of nonwhites constitutes, in part, a reaction to racial threat, enabling a majority group to reduce a perceived threat to its power or continued dominance.[13]

The extension of such racial threat theories to felon disenfranchisement is straightforward. The linkage of race and crime in relation to the right to vote has a long and unsavory history. Even in the early nineteenth century, campaigns to disenfranchise African Americans invoked racial disparities in incarceration as evidence that African Americans were unworthy of assuming the full rights and duties of citizenship. Consider the remarks of Colonel Samuel Young in the 1821 New York state legislative debate over a measure to disenfranchise African Americans:

> The minds of blacks are not competent to vote. They are too degraded to estimate the value, or exercise with fidelity and discretion this important right. . . . Look to your

> jails and penitentiaries. By whom are they filled? By the very race it is now proposed to clothe with the power of deciding upon your political rights.[14]

In this historical context, our findings concerning the role of race in driving the adoption or extension of disenfranchising measures aimed at felons or former felons fits into a much larger historical pattern: White political elites employed racial stereotypes and fears of crime to eliminate core citizenship rights for large numbers of African Americans.

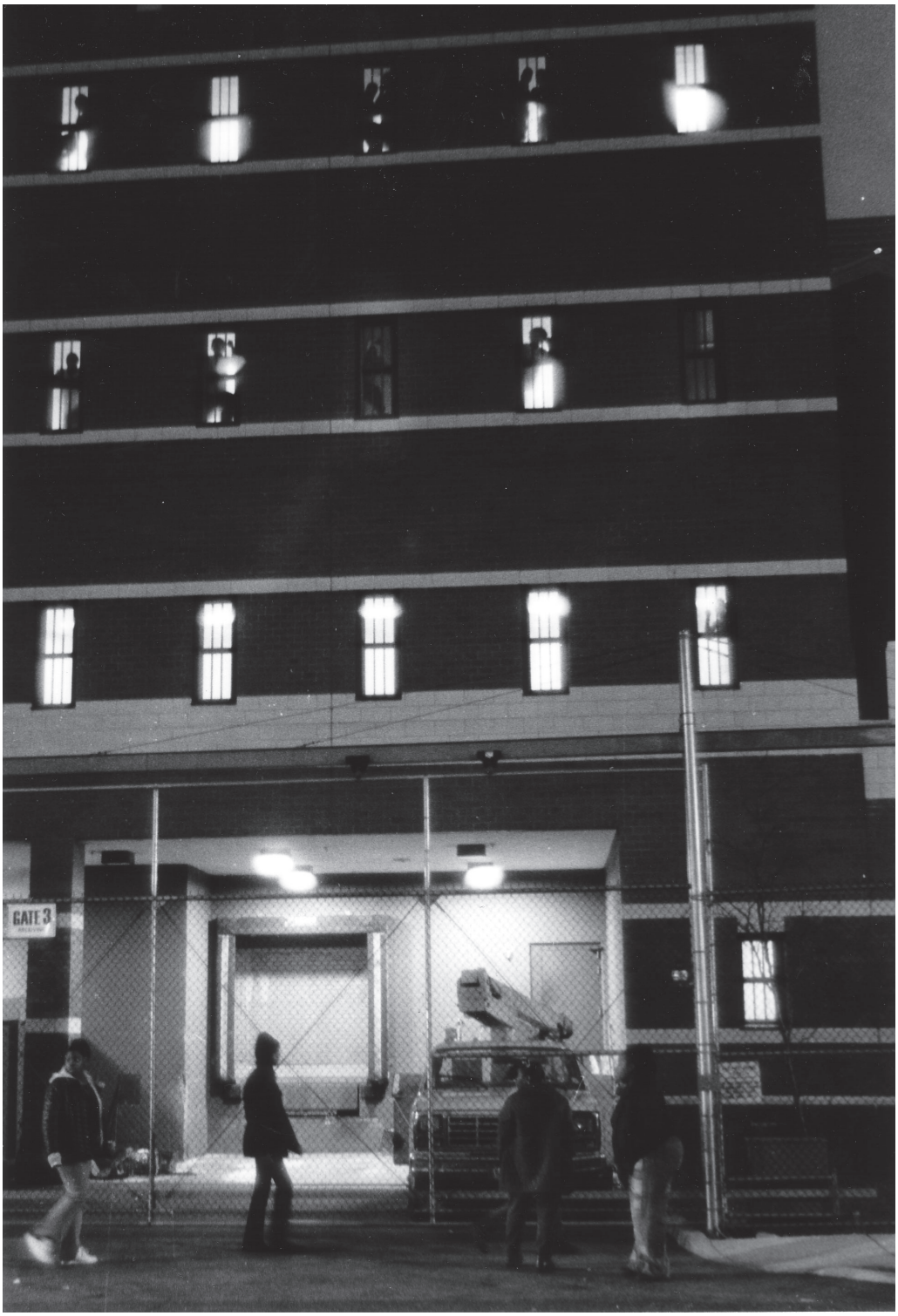
Contemporary Impact of Felon Disenfranchisement

The incarceration rate of African Americans today is about seven times that of whites, and because many Southern states (with large African American populations) maintain the most extensive set of restrictions (including, in many cases, lifetime bans for ex-offenders), African Americans are significantly overrepresented in the disenfranchised population.[15] We estimate that because of a felony conviction more than 4.6 million people are disenfranchised in the United States, representing approximately 2.3 percent of the total voting-age population.[16] However, nearly 7.5 percent of the African American voting-age population is disenfranchised, constituting almost 2 million citizens in all. Since most convicted felons are men, an even more startling one in seven African American men are now ineligible to vote because of a felony conviction.[17] The stark character of these statistics is magnified when we examine the patterns of regional variation. Because voting rights are generally regulated at the state level, as are criminal justice policies, a purely national focus understates the full impact. In a number of states—Florida, Iowa, Kentucky, and Virginia among them—the proportion of the African American electorate that is disenfranchised encompasses more than 15 percent of the entire statewide African American population, and over a quarter of African American men.

Even if felon disenfranchisement were to take voting rights equally from all racial groups, some critics charge that racial bias remains in the process of *restoring* civil rights in states that require ex-offenders to undergo a formal clemency process.[18] Our own detailed investigation of the voting rights restoration process in Florida found that white applicants were more likely to have their clemency applications approved than Black applicants. These racial differences exist even after differences in white and Black applicants are taken into account.[19]

It is possible, even likely, that but for felon disenfranchisement some closely contested elections won by Republicans would have been won by Democrats

The combination of strict felon disenfranchisement laws and their disproportionate impact on the African American electorate has some tangible effects on political elections. In recent years, African American voters have expressed strong preferences for Democratic political candidates, with more than 90 percent supporting the Democratic presidential candidate in the 1996 and 2000 elections.[20] It is possible, even likely, that but for felon disenfranchisement some closely contested elections won by Republicans would have been won by Democrats. We tested this proposition, again using quantitative data



Cagebirds. *Photo © Helen Stummer*

(in this case from national election surveys) to estimate how many of these lost felon voters would have participated in recent elections, and how they might have voted. Our results suggest that as many as seven recent U. S. Senate elections, as well as the 2000 presidential election, likely hinged on the disenfranchisement of some or all felons and former felons.[21] Moreover, if only former felons—who had completed their entire sentences—had been allowed to vote in Florida, the evidence that Al Gore would have carried the election is undeniable.[22]

The origins of felon disenfranchisement laws can be traced to the broader dynamics of racial discrimination and explicit efforts to diminish African American voting strength

The impact of disenfranchisement has been greatest in narrow Republican victories in states with restrictive felon disenfranchisement rules that apply not only to former felons, but to probationers, parolees, and former felons as well. These tend to be states with large African American electorates. If we look, for example, at the seven states where U.S. Senate elections have gone to Republicans in part because of felon disenfranchisement—i.e., in Florida, Georgia, Texas, Virginia, Wyoming, and twice in Kentucky—all except Wyoming are southern states with relatively large Black or minority populations. There is a further geographical impact that we could not investigate: Because of a lack of suitable data, we were unable to systematically examine elections below the state level. Given the concentration of convicted felons and former felons in urban areas**,** however, it is quite likely that the electoral impact is even more significant at local and municipal levels.

Contemporary Legal and Policy Debates

Despite the clear disparate impact of felon disenfranchisement and its capacity to influence political outcomes, past legal challenges have been almost completely unsuccessful. Unless a clear and expressed racial motivation to disenfranchise can be demonstrated, the courts have held that state felon disenfranchisement laws are permissible.[23]

Nevertheless, the political environment is proving somewhat more hospitable to challenges to disenfranchisement, particularly to laws limiting the rights of former felons. Contemporary debates on disenfranchisement often pit arguments pointing to the racial impact and history of disenfranchisement against arguments that the laws apply equally to all felons, and that disenfranchisement is a legitimate choice that states may exercise. In 2001, following heated exchanges concerning a bill to further restrict South Carolina's disenfranchisement law, for example, one of the bill's sponsors rejected a racial motivation, claiming that "If it's blacks losing the right to vote, then they have to quit committing crimes. We are not punishing the criminal. We are punishing conduct."[24] In early 2002, two U.S. Senators who opposed a federal bill to allow all former felons to vote in federal elections noted that "states have a significant interest in reserving the vote for those who have abided by the social contract," and that "each State has different standards based on their moral evaluation, their legal evaluation, their public interest in what they think is important in their States."[25] States' rights arguments have long been invoked to preserve racial inequality, and this debate is no exception.

Despite resistance to liberalizing state disenfranchisement laws, efforts to change the laws through legislative reform have seen some success in recent years, due in part to mobilization within and outside of state legislatures. In 2001, the Connecticut state legislature's Black and Puerto Rican Caucus mobilized around a bill to re-enfranchise probationers. With the strong support and lobbying efforts of fifty organizations in a newly formed Voting Rights Restoration Coalition, the bill passed.[26] Similarly, efforts by the Maryland Legislative Black Caucus were instrumental in re-enfranchising recidivists—previously disenfranchised indefinitely—three years after they completed their sentences.[27] Civil rights groups are contesting these laws in a number of other states as well.[28]

This variety of political mobilization is likely to be particularly important in the effort to restore the vote to former felons. Although more states disenfranchise prisoners than ever before, since the 1950s we find a marked trend toward liberalizing ballot restrictions for former felons who have completed their sentences.[29] Moreover, this trend appears to be consistent with public sentiment on the issue, as most Americans favor the re-enfranchisement. A recent national poll finds that 80 percent favor restoring voting rights to former felons and 60 percent favor restoration of voting rights to current probationers and parolees.[30]

Conclusion

In the most recent presidential election, over 1.8 million African Americans, and a total of more than 4.6 million Americans overall, were barred from voting by the unusually restrictive felon disenfranchisement laws in the United States. In many states, the origins of such laws can be traced to the broader dynamics of racial discrimination and explicit efforts to diminish African American voting strength. Analysis of the contemporary political consequences of felon disenfranchisement laws suggests that they provide a small but clear advantage to Republican candidates, particularly in states that disenfranchise former felons in addition to those currently under supervision.

While other barriers to political participation have fallen, some or all felons remain disenfranchised in forty-eight states. In recent years repeal efforts, often led by African American state legislators, have been successful in several states. Moreover, the overall trend in the last sixty years has been one of re-enfranchisement rather than disenfranchisement. Since 1947, a total of thirty states have liberalized their laws to some degree, with many eliminating restrictions on ex-felons in the 1960s and 1970s. Still, it remains a striking historical fact that no state has ever completely abolished a felon disenfranchisement law. Given the evidence we have reviewed in this article, the racial origins and contemporary racial impact of felon disenfranchisement must be taken into account as the continuing viability of these laws is debated at state and national levels.

Notes

1. For some examples of this burgeoning literature, see Michael Goldfield, *The Color of Politics* (New York: The New Press, 1997); Michael K. Brown, *Race, Money, and the American Welfare State* (Ithaca: Cornell University Press, 1999); Charles Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997); Jill Quadagno, *The Color of Welfare* (New York: Oxford University Press, 1994); Jeff Manza, "Race and the Underdevelopment of the American Welfare State," *Theory and Society* 32 (2000): 819–832.

2. For details on these interviews, see Jeff Manza and Christopher Uggen, *Locking Up the Vote: Felon Disenfranchisement and American Democracy* (New York: Oxford University Press, forthcoming 2005).

3. For some earlier examples of the scholarship linking felon disenfranchisement laws to the broader denial of the franchise to African Americans, see Andrew Shapiro, "Challenging Criminal Disenfranchise-

ment Under the Voting Rights Act: A New Strategy," *Yale Law Journal* 103 (1993): 537–566; Virginia Hench "The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters," *Case Western Law Review* 48 (1998): 727–798; Alice Harvey, "Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look." *University of Pennsylvania Law Review* 142 (1994):1145–2289; and Angela Behrens, Christopher Uggen, and Jeff Manza, "Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850–2002," *American Journal of Sociology* 109 (2003).

4. Scott v. Sandford, 60 U.S. 393 (1857) (holding that African Americans were not citizens within the meaning of the U.S. Constitution).

5. See Alexander Keyssar, *The Right to Vote* (New York, Basic Books, 2000), esp. 162–163, 302–310, for a rare exception.

6. State of Alabama [1901] 2002. "Official Proceedings of the Constitutional Convention of the State of Alabama May 21, 1901, to September 3, 1901." Montgomery: State of Alabama. Retrieved 13 February 2002 (http://www.legislature.state.al.us/misc/history/ constitutions/1901/proceedings/1901_proceedings_vol1/day2.html. Quote at Day 2.

7. Malcolm C. McMillan, *Constitutional Development in Alabama, 1798–1901* (Chapel Hill: University of North Carolina Press, 1955).

8. For example, see Keyssar, *Right to Vote,* 306.

9. *Ratliff v. Beale*, 74 Miss. 247, 266–267 (1896), *cited in Williams v. Mississippi*, 170 U.S. 213, 222 (1898).

10. Behrens et al., "Ballot Manipulation and the 'Menace of Negro Domination.'"

11. U.S. Department of Commerce, Bureau of the United States, *Census of the United States* (Washington, D.C.: Government Printing Office, 1882); U. S. Department of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001* (Washington, D.C.: Government Printing Office, 2002).

12. U.S. Department of Commerce, Bureau of the United States, *Census of the United States* (Washington, D.C.: Government Printing Office, 1853–72).

13. Karen Heimer, Thomas Stucky, and Joseph B. Lang, "Economic Competition, Racial Threat, and Rates of Imprisonment." Paper presented at the Annual Meetings of the American Society of Criminology, Toronto, 1999; Martha A. Myers, *Race, Labor, and Punishment in the New South* (Columbus: Ohio State University Press, 1998).

14. Quoted in Christopher Malone, "'The Mind of Blacks Are Not Competent to Vote': Racial Voting Restrictions in New York," Unpublished manuscript, Pace University, 2003, 19.

15. U.S. Department of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2001* (Washington, D.C.: Government Printing Office, 2002).

16. Christopher Uggen and Jeff Manza, "Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States," *American Sociological Review* 67 (2002): 777–803.

17. Ibid.; see also Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (Washington, D.C.: Human Rights Watch and the Sentencing Project, 1998).

18. Gary Kane and Scott Hiaasen, "Clemency Process Unfair to Blacks?" *Palm Beach Post,* 23 December 2001.

19. See Manza and Uggen, *Locking Up the Vote*, chap. 8.

20. Michael Dawson, *Behind the Mule: Race and Class in American Politics* (Princeton, N.J.: Princeton University Press, 1994); Robert Huckfeldt and Carol W. Kohfeld, *Race and the Decline of Class in American Politics* (Urbana: University of Illinois Press, 1989); U.S. Census Bureau, *Statistical Abstract of the United States: 2002* (Washington, D.C.: Government Printing Office, 2003).

21. Uggen and Manza, "Democratic Contraction?"

22. Ibid., p. 793.

23. The one exception to this generalization is *Hunter v. Underwood*, 471 U.S. 222 [1985], where the U.S. Supreme Court rejected provisions of the Alabama felon disenfranchisement law because of the clear racial bias in the law's origins. The controlling case, *Richardson v. Ramirez* (418 U.S. 24 [1974]), upheld the constitutionality of felon disenfranchisement laws as consistent with the intent of Section Two of the Fourteenth Amendment, which permits the states to disenfranchise those convicted of "rebellion or other crimes."

24. Warren Wise, "House Doesn't Kill Bill to Delay Felons Voting," *The Post and Courier,* 16 February 2001, A3.

25. U.S. Congress, *Congressional Record.* 107th Cong., 2d sess. S.565, pp. S797–S809 (Washington, D.C.: Government Printing Office, 2002), quotations on pp. S802–3.

26. Miles S. Rappoport, "Restoring the Vote," *The American Prospect* 12 (2001): 14.

27. Lori Montgomery and Matthew Mosk, "Md Bill Advances to Let Ex-Criminals Vote," *The Washington Post,* 30 March 2002, B2. For an overview of the emerging campaign to restore felon and former felon voting rights, see Michael Coyle, *State Based Advocacy on Felony Disenfranchisement* (Washington, D.C.: The Sentencing Project, 2003).

28. Steven Kalogeras, *Legislative Changes on Felon Disenfranchisement, 1996–2003* (Washington, D.C.: The Sentencing Project, 2003).

29. Behrens et al., "Ballot Manipulation and the 'Menace of Negro Domination.'"

30. See Jeff Manza, Clem Brooks, and Christopher Uggen, "Civil Death or Civil Rights? Public Attitudes Towards Felon Disfranchisement in the United States." Forthcoming **<<Qu: Update?>>** in *Public Opinion Quarterly*; Brian Pinaire and Milton Heumann, "Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons," *Fordham Urban Law Journal* 30 (2003): 1519–1550.