"A WRONG NEVER RIGHTED": *HARNESS v. WATSON* & THE FIFTH CIRCUIT'S FAILURE TO REPUDIATE JIM CROW

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ABSTRACT

In *Harness v. Watson*, the United States Court of Appeals for the Fifth Circuit upheld the Mississippi Constitution's Jim Crow-era felon disenfranchisement provision, enacted by the infamous 1890 Mississippi Constitutional Convention. The express purpose of those who attended the 1890 Convention was to oppress Black Mississippians and systematically exclude them from the political process. Nevertheless, the Fifth Circuit held the disenfranchisement provision constitutional, claiming that it was reenacted by a 1968 amendment and thus purged of its discriminatory taint. However, even accepting that the reenactment of a discriminatory provision can purge it of its original discriminatory taint, this Note argues that the Fifth Circuit erred in two respects.

First, it adopted a flawed conception of reenactment by failing to consider who participated in the reenactment process. U.S. Circuit Judge James Graves, dissenting in *Harness*, noted the sad irony that the votes that purportedly reenacted this discriminatory provision were cast according to the mandate of the discriminatory provision itself. Building on that observation, this Note argues that Black Mississippians lacked a meaningful voice in the 1968 amendment process, both with respect to choosing the representatives who proposed the amendment and with respect to the ratifying election. Armed with qualitative and quantitative evidence supporting these conclusions, it suggests that under these circumstances, the 1968 amendment could not have purged the provision of its discriminatory taint.

Second, the Fifth Circuit used three problematic doctrinal tools exhibited by the Supreme Court in other areas of voting rights law previously identified by prominent scholars and practitioners. They are (faux) naiveté, the presumption of legislative good faith, and animus laundering. This Note argues that these tools were essential to the holding that the amendment purged the provision of its discriminatory taint. But in using them, the court was able to avoid meaningfully grappling with the history of racism in Mississippi. Its analysis was thus deficient.

Ultimately, this Note concludes that whether it is ever possible for the reenactment of a discriminatory provision to purge the provision's discriminatory taint, such a reenactment could not have occurred with respect to the provision at issue in *Harness*. The plaintiffs in *Harness* filed a petition for a writ of certiorari in the United States Supreme Court, and it refused to hear the case or reverse the Fifth Circuit's decision. But even in the face of this grave injustice, the

importance of voting and democratic organizing remains ever important.

INTRODUCTION

In the August 2022 case *Harness v. Watson*,[1] the United States Court of Appeals for the Fifth Circuit upheld the Mississippi Constitution's Jim Crow-era felon disenfranchisement provision, article 12, section 241. To do so, it applied the Supreme Court's standard for evaluating facially neutral provisions with racially disproportionate effects, articulated in the seminal case *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[2] and extended to felon disenfranchisement laws in *Hunter v. Underwood*.[3] As part of that standard, plaintiffs must show that such provisions were passed with discriminatory intent.[4] However, in *Hunter*, the Supreme Court posed, but did not answer, a hypothetical: whether the Alabama felon disenfranchisement provision at issue there would be permissible if later reenacted without discriminatory intent.[5] That hypothetical was the subject of a line of cases in the Courts of Appeals evaluating other felon disenfranchisement provisions originally enacted with discriminatory intent, but purportedly reenacted in a manner that purged them of their discriminatory taint. *Harness* is the latest in this line.

In *Harness*, the Fifth Circuit held that subsequent amendments to section 241 constituted reenactments sufficient to purge it of its original, discriminatory intent.[6] However, this Note critiques the Fifth Circuit's decision in two respects. Building on an observation of U.S. Circuit Judge James Graves' dissent in *Harness*, it first argues that the court adopted an incomplete conception of reenactment because the majority did not consider who participated in the reenactment process. An examination of voting practices, structures, and census and election data from that era makes clear that those whom the provision originally intended to discriminate against, Black Mississippians, likely had little say in whether to reenact the discriminatory provisions. Second, this Note argues that the Fifth Circuit employed three problematic doctrinal tools identified elsewhere in the voting rights law literature. These tools are faux naiveté, the presumption of legislative good faith, and animus laundering. They emerged in several portions of the

1. 47 F.4th 296 (5th Cir. 2022) (en banc).
2. 429 U.S. 252 (1977).
3. 471 U.S. 222 (1985).
4. *Arlington Heights*, 429 U.S. at 265.
5. *Hunter*, 471 U.S. at 233.
6. *Harness*, 47 F.4th at 311.

Harness majority's reasoning and allowed that majority to avoid grappling with Mississippi's historical experience of racism and voter suppression. As such, the Fifth Circuit's analysis was necessarily deficient.

To provide context for these critiques, Part I of this Note will survey the history of racism and voter suppression in Mississippi before explaining the doctrinal framework and line of cases leading to *Harness*.

Next, Part II will present two prior critiques of the conception of reenactment adopted by the Fifth Circuit. Building on observations made by the principal dissent in *Harness*, it will then examine the circumstances around the 1968 amendment process, including the well-documented instances of racism and voter intimidation, the electoral maps that elected the legislators who proposed the subsequent amendments to section 241, and data from the election that ratified the amendments. Together, these circumstances will demonstrate that Black Mississippians likely did not have an adequate voice in the decision of whether to reenact section 241.

Finally, applying a framework previously identified in the literature, Part III will demonstrate that the Fifth Circuit employed the doctrinal tools of faux naiveté, the presumption of legislative good faith, and animus laundering to avoid the task of grappling with the history of racism and voter suppression in Mississippi. In doing so, its analysis of whether section 241 was purged of its original discriminatory intent was deficient.

Therefore, this Note concludes that, whether or not it is ever possible for the reenactment of a discriminatory provision to do away with past discriminatory intent, it could not have happened in section 241's case. As such, it was a grave injustice for the Supreme Court to refuse to review and reverse the en banc Fifth Circuit's decision in *Harness*.

I. HISTORICAL & DOCTRINAL BACKGROUND

Before critiquing the Fifth Circuit's decision in *Harness*, it is necessary to understand the historical and doctrinal background from which it emerged. Thus, it is important to understand both the history of racism and voting in Mississippi and the line of decisions in the Supreme Court and Courts of Appeals that led the Fifth Circuit to uphold a Jim Crow-era provision in Mississippi's Constitution.

A. The History of Racism and Voter Suppression in Mississippi

The United States' history of racism and voter suppression is well-documented, particularly in Mississippi. It is beyond the scope of this Note to provide a full account of that history.[7] However, it is necessary to recount some to fully understand this Note's critique of *Harness*.

In the era of slavery, Mississippi "was the center of a commercialized cotton kingdom" financed by the labor of enslaved Black Mississippians.[8] In 1860, it was home to 353,899 white residents, and 437,404 Black residents, almost all of whom were enslaved.[9] After the Civil War, the Mississippi plantations were largely undamaged by the carnage, and white landowners were loath to recognize the abolition of slavery and "adamant" in refusing to grant the formerly enslaved civil rights, much less political rights.[10] In an effort to keep a steady supply of labor for this land, the South moved readily from slavery and the slave codes to convict leasing and black codes.[11]

And from the end of Reconstruction through the passage of the Voting Rights Act, the suppression of Black votes was accomplished by violence and voter intimidation, in addition to more formal methods.[12] Mississippians, both Black and white, who attempted to register Black voters were routinely threatened with violence or killed.[13] One political leader told his "red-blooded Anglo-Saxon" followers that "the best way to keep the [Black] from voting . . . was to do it the night before the election."[14] If any Black Mississippian tried to organize to vote, whites would "use the tar and feathers and [not] forget the

7. For more exhaustive accounts, see U.S. CIVIL RIGHTS COMM'N, VOTING IN MISSISSIPPI (1965), https://www2.law.umaryland.edu/marshall/usccr/documents/cr12v94.pdf; JOHN DITTMER, LOCAL PEOPLE (1994); FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 (1990); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880, at 431–86 (Meridian Books 1964) (1935); Gabriel J. Chin, *Rehabilitating Unconstitutional Statutes: An Analysis of* Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998)*, 71 U. CIN. L. REV. 421, 421, 440–52 (2003).

8. DU BOIS, *supra* note 7, at 431.

9. *Id.* (noting that less than one thousand Black Mississippians were not enslaved in 1860).

10. *Id.*

11. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 28–29 (2003); *see also* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (describing the relationship between slavery and convict leasing).

12. DITTMER, *supra* note 7, at 173.

13. *See id.* at 109–10, 173.

14. CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 15 (2018).

matches."[15] One Black veteran was "flogged," and the president of the Gulfport, Mississippi NAACP was "physically assaulted," for trying to vote.[16] After a sheriff beat a Black man in Rankin, Mississippi for trying to vote, he made it clear that he was not just trying to stop that man from voting, but also to send a message that this was the fate for other Black would-be voters.[17] Even so, when courageous Black Mississippians sought to register to vote, they faced more formal methods of suppression.[18]

In 1890, in an act of "legislative evil genius," white legislators passed the Mississippi Plan, including section 241, designed to rid Black Mississippians from the political process.[19] All measures included in the plan were intended to racially discriminate, but they were "dressed up in the genteel garb" of trying to bring integrity to elections.[20] "A dizzying array" of understanding clauses, "newfangled voter registration rules," and good character clauses were imposed.[21] Arbitrary literacy tests were strictly administered to Black Mississippians, while white Mississippians passed under more lenient standards.[22] Under these literacy tests, voters would have to read and explain the Mississippi Constitution; but, as Mississippi Senator Theodore Bilbo bragged, legislators "wrote a constitution that damn few white men and no [Blacks] at all [could] explain."[23] Poll taxes were common, and Mississippi required Black voters to produce receipts for two years of poll taxes when voting.[24] Even after poll taxes were prohibited, Mississippi structured its voting systems to dilute Black votes.[25] Hard-to-meet residence requirements were imposed, and those convicted of certain crimes were deemed unqualified to vote

15. *Id.* at 15–16.
16. *Id.* at 16.
17. *Id.*
18. Chin, *supra* note 7, at 421–22.
19. ANDERSON, *supra* note 14, at 3; Chin, *supra* note 7, at 422.
20. ANDERSON, *supra* note 14, at 3.
21. *Id.*
22. *Literacy Tests*, NAT'L MUSEUM OF AM. HISTORY, https://americanhistory.si.edu/democracy-exhibition/vote-voice/keeping-vote/state-rules-federal-rules/literacy-tests (last visited Feb. 25, 2023).
23. VOTING IN MISSISSIPPI, *supra* note 7, at 5; ANDERSON, *supra* note 14, at 4–5. Literacy tests were particularly potent tools for denying Black citizens the vote because Mississippi refused to educate millions of their citizens, making the population "functionally illiterate." ANDERSON, *supra* note 14, at 5. In Mississippi, more than half of Black adults had fewer than five years of formal education, and twelve percent had none at all. *Id.*
24. ANDERSON, *supra* note 14, at 10.
25. *See* PARKER, *supra* note 7, at 41–56; ANDERSON, *supra* note 14, at 29.

under section 241.[26] Many of the disenfranchising crimes were those thought at the time more likely to be committed by Black residents.[27] "Sheriffs, notorious in the black community for their racism and brutality," became "gatekeepers" to the right to vote.[28] And even after Black Mississippians conquered all of these hurdles, registrars simply refused to register them, solidifying the state's efforts to suppress Black votes.[29]

The experiences of Wilter May Abrams, a Black woman born in July 1927 in Clark County, Mississippi, illustrate these racist tactics.[30] The first time she was able to vote, she took a class at her church to learn the skills to pass the written poll test.[31] After studying hard, her teachers decided she was ready to try to register, and she headed to the polls with a group of other Black Mississippians.[32] She spent all day taking the written test, and with only one person from her group remaining, she passed.[33] But when she brought the passing test to registrar, he had one last question: "How many bubbles [are] in a bar of soap?"[34] She did not give the "right" answer, and the registrar "told her she could not vote."[35] Only "two minutes before," she felt an immense sense of pride; but, in an example of the psychological effects of this racism and oppression, what she remembered most was not the immense amount of "racial slurs . . . and jeering at her," but three white men standing against a wall laughing at her.[36]

That suppression experienced by Ms. Abrams and others took place against the backdrop of the apartheid, Jim Crow regime prevalent in the Mississippi of the first half of the twentieth century.[37] Most

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26. Chin, *supra* note 7, at 421–22.

27. *Id.*

28. ANDERSON, *supra* note 14, at 8. In Tallahatchie County, Mississippi, the sheriff made all first-time poll tax applicants "apply to him personally." *Id.*

29. *See* DITTMER, *supra* note 7, at 242–43.

30. Leslie A. Gardner, *Keynote Address: The Honorable Leslie Abrams Gardner of the U.S. District Court for the Middle District of Georgia*, 23 CHAP. L. REV. 285, 287–88 (2020).

31. *Id.* at 288.

32. *Id.*

33. *Id.*

34. *Id.* This was a common question for Mississippi registrars to ask would-be Black voters. ANDERSON, *supra* note 14, at 7.

35. Gardner, *supra* note 30, at 288.

36. *Id.* Ms. Abrams later exercised her right to vote on every occasion and lived to see one of her granddaughters become a federal judge, and another become a national political figure in Georgia. *Id.* at 287–88.

37. *See* Harness v. Watson, 47 F.4th 296, 326–32 (5th Cir. 2022) (en banc) (Graves, J., dissenting) (describing Mississippi's hostility to civil rights).

Black Mississippians were still in jobs associated with slavery, and economic opportunities were severely limited.[38] The Mississippi courts "were the arbiters of the color line," and their decisions enforced "Jim Crow style [justice]."[39] Corruption in Mississippi state government was also well-documented, and officials proudly defied federal civil rights decrees.[40] Throughout Mississippi's history, the Mississippi Constitution contained at least six discriminatory provisions drawing explicit racial distinctions.[41] And at least forty-one discriminatory state statutes, concerning marriage, transportation, prisons, hospitals, education, and more, drew explicit racial distinctions.[42] One even criminalized "printing, publishing or circulating" printed materials regarding, or "urging or presenting for public acceptance," "arguments or suggestions in favor of social equality or of intermarriage between whites and [Black Mississippians]."[43]

Nor was racial violence relegated to the voting context. Emmet Till was lynched in Mississippi for allegedly whistling at a white woman,[44] and Wharlest Jackson, Sr., a local civil rights leader, was killed when a bomb exploded in his car after he took a promotion other white employees wanted.[45] There have been at least 656 reported lynchings in Mississippi.[46]

Resistance to these racist forces, a rich tradition dating back to before Reconstruction, was common and made a meaningful difference.[47] Still, in response to the civil rights organizing of the early

38. DITTMER, *supra* note 7 at 19–20.

39. *Id.* at 20.

40. *Id.* at 22.

41. *See* STATES' LAWS ON RACE AND COLOR 237–38 (Pauli Murray ed., 1951).

42. *See id.* at 238–50.

43. *Id.* at 247.

44. *See* Adeel Hassan, *Emmett Till's Enduring Legacy*, N.Y. TIMES (Apr. 27, 2023), https://www.nytimes. com/article/who-was-emmett-till.html.

45. *See* Stanley Nelson, *Cold Case: The Night Wharlest Jackson was Murdered — Feb. 27, 1967*, CONCORDIA SENTINEL (June 5, 2008), https://www.hannapub.com/concordiasentinel/frank_morris_murder/cold-case-the-night-wharlest-jackson-was-murdered-feb-27-1967/article_82df3dc8-41ad-11e3-b604-0019bb30f31a.html.

46. *Lynching in America*, EQUAL JUSTICE INITIATIVE, https://lynchinginamerica.eji.org/explore/mississippi (last visited July 9, 2023). There have been at least eight suspected lynchings in Mississippi since 2000. DeNeen L. Brown, *'Lynchings in Mississippi Never Stopped,'* WASH. POST (Aug. 8, 2021), https://www.washingtonpost.com/nation /2021/08/08/modern-day-mississippi-lynchings/?tid=usw_passupdatepg.

47. *See* DITTMER, *supra* note 7, at 173, 125–38 (noting the "explosion of civil rights activity" in 1963 and the various activities of the Student Nonviolent

1960s, Black Mississippians faced white backlash.[48] Even today, the vestiges of that era remain; section 241 continues to disproportionately disenfranchise Black Mississippians.[49] Over one in ten Mississippians (roughly 230,000) are disenfranchised because of a felony conviction, 62% of which are Black; this is largely a result of section 241.[50]

Having briefly explored the history of racism and voter suppression in Mississippi, it is now necessary to explore the doctrinal origins of *Harness*.

B. Harness and Its Doctrinal Origins

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the Supreme Court articulated a standard for evaluating facially neutral laws with disproportionate effects under the Equal Protection Clause of the Fourteenth Amendment.[51] The plaintiffs there challenged the Village of Arlington Heights's decision to deny a housing development corporation's request to rezone an area of the village for federally subsidized housing, alleging that the denial was racially discriminatory in violation of the Equal Protection Clause.[52] However, the Supreme Court held that, because the plaintiffs showed no proof that a racially discriminatory intent or purpose motivated the denial, it did not constitute a violation.[53] In doing so, the Court created a two-part test.[54] First, plaintiffs challenging a facially neutral law under the Equal Protection Clause must prove, by a preponderance of the evidence, that racial discrimination was a substantial or motivating factor for the legislature in enacting the law.[55] Second, if the plaintiffs meet their initial burden, the burden shifts to the defendants to prove, by a preponderance of the evidence, that the provision still would have been enacted without the impermissible purpose.[56] If they cannot, the plaintiffs prevail.[57]

Coordinating Committee in Mississippi); *see also* DU BOIS, *supra* note 7, at 440 (noting the "increasing political importance of [Black Mississippians].").

48. DITTMER, *supra* note 7, at 173.

49. *See* John Hammontree, *One in 10 Mississippians Are Disenfranchised by this Jim Crow-Era Law*, RECKON (July 5, 2022, 5:53 PM), https://www.reckon.news/justice/2022/07/one-in-10-mississippians-are-disenfranchised-by-a-jim-crow-era-law.html.

50. *Id.*

51. 429 U.S. 252, 264–65 (1977).

52. *Id.* at 254.

53. *Id.* at 270–71.

54. *Id.*

55. *Id.*

56. *Arlington Heights*, 429 U.S. at 270 n.21.

57. *Id.*

Subsequently, the Supreme Court extended the *Arlington Heights* test to facially neutral felon disenfranchisement provisions in *Hunter v. Underwood*.[58] There, the Court struck down a provision of the Alabama Constitution that disenfranchised those convicted of crimes implicating moral turpitude because there was a "zeal for white supremacy [that] ran rampant at the [state constitutional] convention," and the provision would not have been adopted or ratified without the discriminatory purpose.[59] In doing so, the Court posed, but did not answer, a hypothetical involving the first step of the *Arlington Heights* test: whether Alabama's felon disenfranchisement provision would have been permissible, notwithstanding its discriminatory origins, if contemporaneously enacted.[60]

That hypothetical was the subject of a line of cases in the Courts of Appeals upholding various felon disenfranchisement provisions. All those provisions were motivated by racially discriminatory intent but later reenacted or amended.[61] The first court to take up this issue was the Fifth Circuit interpreting article 12, section 241 of the Mississippi Constitution, the same provision at issue in *Harness*.[62]

Section 241 first emerged as part of the Mississippi Constitution of 1890, created for the express purpose of excluding Black Mississippians from the political process.[63] As such, the original list of crimes disqualifying citizens from voting contained only those that the 1890 framers believed Black residents were most likely to commit.[64] The list excluded the crimes of rape and murder but included crimes such as perjury, forgery, embezzlement, and bigamy.[65] The Supreme Court rejected a challenge to section 241 in 1898, acknowledging, but expressing "no concern" for the 1890 framers' discriminatory intent.[66] However, the *Cotton* plaintiffs brought another challenge in the late twentieth century under the *Arlington Heights* and *Hunter* framework.[67]

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58. 471 U.S. 222, 227 (1985).
59. *Id.* at 229, 233.
60. *Id.* at 233.
61. Harness v. Watson, 47 F.4th 296, 304 (5th Cir. 2022) (en banc).
62. Cotton v. Fordice, 157 F.3d 388, 389–90 (5th Cir. 1998); *Harness*, 47 F.4th at 299.
63. *Cotton,* 157 F.3d at 391.
64. *Id.*
65. *Harness*, 47 F.4th at 300–01; *see id.* at 301 n.4.
66. Williams v. Mississippi, 170 U.S. 213, 220–23 (1898).
67. *Cotton*, 157 F.3d at 389–90.

Mississippi voters amended the original version of section 241 twice.[68] In 1950, they removed the crime of burglary, and in 1968, they added the crimes of rape and murder.[69] Focusing on the "deliberative process" required to amend section 241, the Fifth Circuit held that it had been sufficiently reenacted to "remove[] the discriminatory taint associated with the original version."[70]

The Eleventh Circuit was the next court to address the *Hunter* hypothetical.[71] In *Johnson v. Governor of Florida*, a felon disenfranchisement provision in the Florida Constitution barred eight Floridians from voting.[72] The Floridians sued, arguing that because Florida enacted the provision in 1868 with racially discriminatory intent, it violated the Equal Protection Clause.[73] However, the defendants argued that a 1968 revision purged any discriminatory taint.[74] The court disagreed.[75] A three-judge panel denied the defendants' motion for summary judgment and, drawing on the Supreme Court's *de jure* segregation caselaw and traditional principles of causation, held that a state must intervene "with sufficient knowledge and purpose" to break "the chain of invidious intent."[76] The court explicitly broke ranks with the Fifth Circuit in *Cotton*, disagreeing "with [its] failure to consider whether . . . reenactment must be accompanied by an independent, non-discriminatory purpose."[77]

However, the full Eleventh Circuit voted to rehear the case en banc and reversed the three-judge panel.[78] The full court first questioned whether the plaintiffs had shown that racial discrimination was a motivating factor in the original enactment of the felon disenfranchisement provision.[79] It then adopted the Fifth Circuit's understanding of discrimination-purging reenactment in *Cotton*, noting that Florida's provision was similarly proposed and ratified in a "deliberative

68. *Harness*, 47 F.4th at 300.
69. *Id.* at 300–01.
70. *Cotton*, 157 F.3d at 391.
71. Johnson v. Governor of Fla., 353 F.3d 1287, 1293 (11th Cir. 2003).
72. *Id.* at 1292.
73. *Id.* at 1293.
74. *Id.* at 1297. The amendment left the disenfranchising provisions essentially unchanged. *Id.*
75. *Id.* at 1302.
76. *Johnson*, 353 F.3d at 1298–1302.
77. *Id.* at 1300–01.
78. Johnson v. Governor of Fla., 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1015 (2005).
79. *Id.* at 1219.

process."[80] It also implicitly rejected the three-judge panel's conception of reenactment by holding that Florida need not "demonstrate that it acknowledged that racial discrimination tainted the 1868 provision, [only that] it knowingly reenacted the . . . provision for nondiscriminatory reasons."[81] Thus, the Eleventh Circuit upheld the Florida disenfranchisement provision and granted the defendants' summary judgment.[82] In dissent, Judge Rosemary Barkett, who wrote the majority opinion for the three-judge panel, expressed concern that "legislatures could continue to utilize statutes originally motivated by racial animus, and that continue to produce discriminatory effects, so long as they re-promulgate the statutes deliberately and without explicit evidence of an illicit motivation."[83]

The Second Circuit was the final court to address the *Hunter* hypothetical before *Harness*.[84] New York enacted felon disenfranchisement provisions into its constitution in 1821, 1846, and 1874, all with racially discriminatory intent.[85] However, the operative provision, a fourth enactment, was added in 1894, and the plaintiffs failed to allege that it too was passed with a racially discriminatory purpose.[86] Before the 1894 provision, the legislature had discretion as to whether to enact disenfranchisement laws; that became mandatory, however, with the passage of the 1894 provision.[87] This substantive change, an "obvious alternative explanation" for the fourth enactment, combined with the failure to allege discriminatory intent in 1894, led the Second Circuit to uphold the provision under the same rationale as the en banc Eleventh Circuit.[88] While the court considered Judge Barkett's concerns about the ability of legislatures to insulate a law enacted "with discriminatory provision by (quietly) reenacting it without significant change," it found that the facts alleged by the plaintiffs did not give rise to such concerns.[89]

In August of 2022, after a three-judge panel applied *Cotton* as binding precedent,[90] the Fifth Circuit, sitting en banc, again examined

80. *Id.* at 1224.
81. *Id.* at 1225.
82. *Id.* at 1227.
83. *Johnson*, 405 F.3d at 1246 (en banc) (Barkett, J., dissenting).
84. Hayden v. Paterson, 594 F.3d 150, 154 (2d Cir. 2010).
85. *Id.* at 164–65.
86. *Id.* at 165–66.
87. *Id.* at 167.
88. *Id.*
89. *Hayden*, 594 F.3d at 167.
90. Harness v. Hosemann, 988 F.3d 818, 821–23 (5th Cir. 2021).

section 241 of the Mississippi Constitution.[91] The court upheld section 241 and affirmed *Cotton*, noting the uniform approach of the other circuits and dismissing the plaintiffs' arguments that voters never had a chance to remove the original language of the provision in 1968.[92] According to the majority, requiring voters "to approve or reject every crime tainted in the original version" would conflict with *Hunter* and *Arlington Heights*.[93] The court also rejected the plaintiffs' contention that there was a question of fact as to the discriminatory intent of the 1968 amendment, pointing to evidence in the legislative history of the 1968 amendment that the legislature was responding to criticisms from a report from the Civil Rights Commission.[94] Thus, because the 1968 amendment constituted a reenactment of section 241 sufficient to purge discriminatory intent, and the plaintiffs failed to show that that amendment was motivated by a discriminatory purpose, the Fifth Circuit affirmed *Cotton*.[95]

II. THE *HARNESS* COURT'S UNDER-INCLUSIVE CONCEPTION OF REENACTMENT

Having provided context for *Harness* and the broader history of voter suppression in Mississippi, it is now appropriate to consider more closely the concept of reenactment and how it can strip a law of discriminatory intent with which it was originally enacted. It is unclear whether such a purging reenactment is tenable as a legal concept, and if it is, whether courts have been sufficiently careful in accounting for how a subsequent reenactment can strip a provision of its discriminatory taint.[96] A variety of scholars have addressed this issue in passing, and others, most notably Professor W. Kerrel Murray, have provoked brilliantly insightful critiques with respect to the time and relevance of reenactment.[97] Others have critiqued the particular brand of purging

91. Harness v. Watson, 47 F.4th 296, 299 (5th Cir. 2022) (en banc).

92. *Id.* at 306, 307–09.

93. *Id.* at 308.

94. *Id.* at 309–10.

95. *Id.* at 311. In August 2023, a Fifth Circuit panel struck down section 241 as unconstitutional under the Eighth Amendment, holding that this form of felon disenfranchisement constitutes cruel and unusual punishment. Hopkins v. Hosemann, 76 F.4th 378, 387–88 (5th Cir. 2023). That decision was vacated by the full Fifth Circuit, and the case will be reheard en banc. Hopkins v. Hosemann, 83 F.4th 312, 313 (5th Cir. 2023) (en banc). In any event, this Note's analysis is limited to the *Arlington Heights* equal protection analysis of section 241.

96. *See* W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1194–95 (2022).

97. *See id.* at 1194–96.

reenactment embraced by the *Harness* majority.[98] Part II.B, however, ultimately presents a narrower, inclusivity-based critique, building on the observations of Judge Graves's dissent in *Harness*. By examining the ways in which section 241 was proposed in the Mississippi legislature and probing who actually participated in the amendment process that purportedly purged section 241 of its discriminatory taint, it questions whether those whom the original section 241 discriminated against had a meaningful voice in the process of whether to reenact the provision. Ultimately, it is at best unclear that the process was sufficiently inclusive to result in a purging of section 241's discriminatory origins.

A. Prior Critiques of the Harness Court's Conception of Reenactment

Before providing that narrower critique, it is first necessary to briefly recount two other critiques of the conception of reenactment adopted by the court. The first critique comes from the principal dissent in *Harness*, authored by Judge Graves, and Professor Gabriel Chin, reacting to the Fifth Circuit's first decision on section 241 in *Cotton*.[99] The second comes from Judge Barkett's panel majority in *Johnson*.[100]

Judge Graves' primary argument respecting the *Harness* majority's conception of reenactment was that the Mississippi voters never had an opportunity to vote up or down on reenactment.[101] In voting on the 1968 amendment, voters had only the choice between adding rape and murder as disenfranchising crimes, or not.[102] Thus, voters were never given the option to approve or disapprove the entire provision, only the option of adding to it.[103] And whichever option the voters chose, some version of section 241 would be in effect.[104] Therefore, Judge Graves and Professor Chin argued, the amendment could not have constituted a reenactment capable of purging past discrimination because the voters never had an actual choice.[105] This contention was

98. *See* Chin, *supra* note 7, at 423.

99. *See id.* at 437–38; *see also Harness*, 47 F.4th at 322–24 (Graves, J., dissenting).

100. Johnson v. Governor of Fla., 353 F.3d 1287, 1301 (11th Cir. 2003).

101. *Harness*, 47 F.4th at 323–24.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*; *see* Chin, *supra* note 7, at 437–38.

rejected by the *Harness* majority, characterizing the argument as requiring an unnecessary vote on each disenfranchising crime.[106]

The second critique stems from Judge Barkett's previously discussed panel majority in *Johnson*, which implicitly rejected the approach taken in *Harness*.[107] According to Judge Barkett's approach, there must be some kind of "independent intervening action" motivating the reenactment sufficient to break the discriminatory chain of causation.[108] As such, intervening action must be made "freely, deliberately, and knowledgeably."[109] When those principles are applied to a purging reenactment analysis, "if an impermissible discriminatory intent is found to be a motivating factor behind" a provision, "and . . . it would have been enacted at that time absent the impermissible discriminatory intent," the state has the burden of showing that it "knowingly and deliberately reenacted it for a non-discriminatory reason."[110] Anything less does not adequately show that the taint of the law's original discriminatory intent has been purged.[111] However, that approach was also rejected by the *Harness* majority.[112]

Having briefly explored these critiques, it is now appropriate to present an inclusivity-based critique of the Fifth Circuit's conception of reenactment in *Harness*.

B. An Inclusivity-Based Critique of the Harness Court's Conception of Reenactment

While many, including those discussed above, have critiqued the concept of reenactment as a method of purging discriminatory taint, this Note's critique is narrower. In his dissent, Judge Graves commented that it is "sadly ironic that although Mississippi and [the majority] agree that § 241 was unconstitutionally adopted in 1890, they rely on votes governed by that provision—one that disproportionately disenfranchises Black Mississippians—to conclude § 241 had been reenacted without a discriminatory purpose."[113] It should be common sense that, in order for the reenactment of a law, originally intended to be discriminatory, to purge that discrimination, those whom the law was intended to discriminate against should have a say in whether it

106. *See Harness*, 47 F.4th at 308.
107. Johnson v. Governor of Fla., 353 F.3d 1287, 1301 (11th Cir. 2003).
108. *Id.* at 1299.
109. *Id.*
110. *Id.* at 1301.
111. *See id.*
112. Harness v. Watson, 47 F.4th 296, 307–08 (5th Cir. 2022) (en banc).
113. *Id.* at 342 n.22 (Graves, J., dissenting).

should be reenacted. However, it is far from clear that this was the case in Mississippi with respect to the 1968 amendment, the controlling reenactment per the *Harness* majority.[114] Thus, the reenactment process was not sufficiently inclusive, and it should not have the effect of purging section 241 of its odious origins.

The amendment process in Mississippi required each house of the state legislature to agree to the amendment by a supermajority, and then that it be presented to voters for their ratification.[115] But in both the process for electing the legislators who proposed the amendment, and the election in which it was ratified, Black Mississippians, the people whom section 241 was deliberately created to discriminate against, lacked a proper voice.[116]

First, Black Mississippians did not have a full voice in the election of the representatives who proposed the amendments.[117] It is beyond the scope of this Note to examine the elections of the precise legislators who participated the proposal process, but they can generally be collected into two groups: those elected before the passage of the Voting Rights Act and those elected after.[118] As recounted in Part I, Mississippi elections prior to the implementation of the Voting Rights Act were riddled with murder, violence, voter intimidation, and more formal methods of excluding Black voters, such as poll taxes and literacy tests.[119] Registrars such as Theron Lynd, a "powerful symbol of white repression," would humiliate and refuse to register Black voters,[120] while "Mississippi officials from top to bottom took pride in blatantly violating federal civil rights decrees."[121] And even with a rise in civil rights organizing in the early 1960s, there was "brutal white repression" resulting "in a summer campaign of white lawlessness."[122] These conditions, including express threats of murder and other retaliation, certainly precluded Black Mississippians from fully participating in the political process that elected officials before the Voting Rights Act.

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114. *Id.* at 306–07.

115. *Id.*

116. DITTMER, *supra* note 7, at 173.

117. *Id.*

118. *Id.*

119. *Id.* at 173–74, 181; *This Day in History: Nov. 1, 1890: Mississippi Constitution*, ZINN EDUCATION PROJECT, https://www.zinnedproject.org/news/tdih/Mississippi-Constitution/ (last visited Sept. 11, 2023, 6:13 AM).

120. *See* DITTMER, *supra* note 7, at 243.

121. Harness v. Watson, 47 F.4th 296, 328 (5th Cir. 2022) (en banc) (Graves, J., dissenting).

122. DITTMER, *supra* note 7, at 173.

However, even with respect to those representatives elected after the passage of the Voting Rights Act, Black Mississippians lacked a full voice in their elections too.[123] To be sure, the situation had improved. Voter registration among the Black voting-age population had increased to 59.8% in 1967 from 6.7% in 1964.[124] Still, the improvements of the Voting Rights Act "did not translate into increased political representation" for Black Mississippians.[125] Only one Black representative served in the Mississippi legislature from 1892 to 1975, and many state offices were modified to be filled by appointment rather than election, violence against voters continued, and Mississippi refused to submit to the preclearance regime until compelled to by the Supreme Court.[126] Despite the mandate of section 5 of the Voting Rights Act that the 1968 amendment itself be precleared, Mississippi refused to submit it to preclearance until 1986 and governed election pursuant to it in the interim.[127] Mississippi often sought to undermine the potency of the Voting Rights Act in court, arguing that it had a limited scope and was only intended "to make minor changes to aid the efficiency of elections."[128]

Even when Black Mississippians resisted these hurdles, the state further hindered their exercise of the franchise by structuring election systems to dilute Black voting power.[129] New districts drawn after the passage of the Voting Rights Act divided traditional Black voting bases and converted districts previously comprised as single member districts to multimember districts.[130] And even when the state's 1966 plan was invalidated by a three-judge district court for violating equal apportionment principles, the court-ordered plan set out in 1967 still employed multimember districts and diluted Black voting power in a manner similar to the original state plan.[131] Thus, even when Black Mississippians were able to vote at all, the effectiveness of their vote was kneecapped by these districting schemes. Given all these conditions, both before and after the passage of the Voting Rights Act, those who section 241 was originally intended to discriminate against surely

123. Chin, *supra* note 7, at 444.
124. PARKER, *supra* note 7, at 31.
125. Chin, *supra* note 7, at 443.
126. *Id.* at 443–44.
127. *Id.* at 444.
128. ANDERSON, *supra* note 14, at 23.
129. *See* PARKER, *supra* note 7, at 41–56; ANDERSON, *supra* note 14, at 29.
130. Chin, *supra* note 7, at 444.
131. *See* PARKER, *supra* note 7, at 107, 110–11.

did not have a full voice in electing the representatives who would propose the amendment.

Second, it is also likely that Black voters in Mississippi had an inadequate say in the ratification of the amendment proposed by the legislature. On June 4, 1968, an election was held on whether or not to ratify the amendment to section 241.[132] In measuring how much Black participation accompanied the ratification of section 241, the essential question is how many Black voters were able to participate in the election deciding whether to adopt the provision. Ideally, then, it would be helpful to know what percentage of the Black voting-age population in Mississippi participated in the election. However, this information is unavailable.[133] Therefore, it is necessary to infer this information from other available data. According to information from the census taken closest to the 1967 election, approximately 30.69% of Mississippi's voting age population was Black.[134] Using that, we can infer that, if the proportion of Black voters who participated in the ratifying election was equal to the proportion of Black voting-age citizens, roughly 15.83% of the total Black voting-age population participated in the election.[135] And taking into account that less than 100% of the Black voting-age population was registered to vote around the same time,[136] in addition to the rampant voter intimidation and racism in the state persisting even after the Voting Rights Act,[137] that number is probably much lower.

Thus, Black voters likely had an inadequate voice in the process of whether to amend section 241. Given that reality, the amendment

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132. 1968-72 MISS. OFF. & STAT. REG. 466.

133. More precisely, if it is available, it was not readily available for the purposes of this Note.

134. According to the 1970 census, at a time when Mississippians had to be twenty-one years old to vote, *see* U.S. Census Bureau, U.S. Dep't of Com., P-25, Estimates of the Population of Voting Age, For States: Nov. 1, 1968, at 2 tbl.A (1968), https://www.census.gov/content/dam/Census/library/publications/1968/demo/p25-406.pdf (explaining that the voting age was twenty-one years old in all but a few states, not including Mississippi), Mississippi's total voting-age population was 1,242,965, and 381,483 of those citizens were Black. *See* U.S. DEP'T OF COM., 1970 CENSUS OF POPULATION CHARACTERISTICS OF THE POPULATION MISSISSIPPI, 43 tbl.19 (1973).

135. Per state records, 196,734 citizens voted in the election to determine whether to amend section 241. *Harness*, 47 F.4th at 301 n.4. If the proportion of Black voters participating in that election is similar to the proportion of Black voting-age Mississippians, approximately 60,377, or roughly 15.83% of the total Black voting-age population, Black voters participated in that election.

136. Chin, *supra* note 7, at 441.

137. *See* DITTMER, *supra* note 7, at 173.

should not have had the effect of purging section 241 of its discriminatory intent because it was not sufficiently inclusive.

III. THE DOCTRINAL TOOLS EMPLOYED BY THE *HARNESS* COURT

In a recent article, Professor Richard Hasen identified three doctrinal tools used by the Supreme Court in its recent partisan gerrymandering cases that have furthered a turn towards partisanship, allowing states to engage in racial and partisan gerrymandering.[138] These tools are: "(faux?) naiveté," the "presumption of legislative good faith," and "animus laundering."[139] Professor Hasen also demonstrated how the tools were used in voting rights cases in the lower federal courts, including the Fifth Circuit with respect to another Mississippi constitutional provision.[140] Part III contends that the tools were also employed in *Harness*, allowing the Fifth Circuit to avoid meaningfully engaging with Mississippi's history. Because these tools were used, the court's analysis was necessarily deficient.

A. Tool One: (Faux?) Naiveté

In describing the doctrinal tool he labels faux naiveté, Hasen refers to the phenomenon of Chief Justice John Roberts "advanc[ing] facially naïve arguments about political behavior that allows greater partisanship in redistricting and elections."[141] Hasen gives several examples; the first involved a Wisconsin partisan gerrymandering case, *Gill v. Whitford*.[142] There, plaintiffs advocated for a mathematical formula, relying on a measure called the "efficiency gap," that would help courts determine when a districting plan was an unconstitutional partisan gerrymander.[143] Importantly, as Hasen notes, this standard was not the same as a proportional representation standard, which would be impermissible.[144] Nevertheless, Roberts decried the formula as "so complex as to be unintelligible to the average person," and described

138. Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 70 (2021).

139. *Id.* at 51–52.

140. *Id.* at 75–79. This case was also decided over the dissent of Judge Graves. Veasey v. Abbott, 888 F.3d 792, 807 (5th Cir. 2018) (Graves, J., concurring in part and dissenting in part).

141. *Id.* at 53.

142. *Id.*

143. Hasen, *supra* note 138, at 53; Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018).

144. Hasen, *supra* note 138, at 53.

the formula as "sociological gobbledygook."[145] According to Hasen, while the formula was certainly complicated, and it may have been true that the average person could not have understood it, Roberts himself seemed to understand it, as evidence by his discourse at oral argument.[146] Moreover, "it is equally true that the average person would not understand the intricacies of even the relatively simple 'one person, one vote' rule," and that does not mean that we throw out the idea, yet Roberts remained skeptical.[147]

The Court went on to punt *Gill* on standing grounds, but Roberts exhibited the same naiveté with respect to *Rucho v. Common Cause*, the case that deemed partisan gerrymandering claims nonjusticiable, and its companion case *Lamone v. Benisek*.[148] Though the plaintiffs there did not advocate for the use of the same equation, they advocated for a similar standard, and Roberts framed the Court's choices as mandated proportional representation or nothing; he did not even raise any of the many standards that had been advanced by experts.[149] And as Hasen again pointed out, Roberts exhibited similar naiveté in cases under section 5 of the Voting Rights Act, declaring that "[t]hings have changed in the South," in *NAMUNDO*, and offering no rebuttal to Justice Ginsburg's famous assertion in *Shelby County* that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[150]

The Fifth Circuit exhibited the same naiveté in *Harness* in holding that there was no genuine dispute of material fact as to whether the 1968 amendment was passed with discriminatory intent. It is plain to everyone that the Mississippi of the 1960s was inundated with racism, and that that racism played a large role in the voting patterns of white voters and legislators.[151] Countless scholars have recounted the Mississippi legislature's efforts to stop the Civil Rights Movement's

145. *Id.* at 54 (citing Transcript of Oral Argument at 40, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161)).

146. *Id.* at 54–55.

147. *Id.*

148. *Id.* at 55.

149. Hasen, *supra* note 138, at 55–57.

150. *Id.* at 59 (first citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009); then citing Shelby Cty. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting)).

151. *See generally*, DITTMER, *supra* note 7, at 59 (detailing racism and white voting patterns in Mississippi in the 1960s).

progress at every turn.[152] Given this reality, it should be unequivocally obvious that, to Judge Graves's point, there is at least a question of fact as to whether the proposal and ratification of the 1968 amendment was done with discriminatory intent.[153]

Alas, it was not. The *Harness* majority failed to give weight to this contention, reducing it to a "sins of the father" argument.[154] But that reduction is inaccurate. The principal dissent was not arguing that the 1968 Mississippi legislators, the metaphorical children, should be punished for the state leaders of 1890, the metaphorical fathers; it argued that the children were committing the same sins that the fathers did (and to the extent that they were not, it was because federal officials, whom they vehemently resisted, forced them to change).[155] Those are meaningfully different claims, and just like the arguments of Chief Justice Roberts, the (faux) naïve reduction of the *Harness* majority framed the issues in a way as to allow the entrenchment of white supremacy.[156] It allowed the majority to easily dismiss the plaintiff's claims that the discriminatory intent was never purged—section 241, which disproportionately disenfranchises Black Mississippians, continues to serve its original purpose.[157] Thus, it appears that this doctrinal tool has moved out of the context of the Supreme Court's redistricting cases and was employed in *Harness*. So too have the others.

B. Tool Two: The Presumption of Legislative Good Faith

The next doctrinal tool discussed by Professor Hasen is the presumption of legislative good faith.[158] This requirement, in its modern iteration, derives from the 2018 Supreme Court case *Abbott v.*

152. *See* Harness v. Watson, 47 F.4th 296, 325–38 (5th Cir. 2022) (en banc) (Graves, J., dissenting) (recounting the history of Mississippi in 1968 to demonstrate that those citizens and legislators had not ceased the racist and oppressive tendencies of their ancestors).

153. *Id.* at 331.

154. *Id*. at 307.

155. *See id*. at 325–38.

156. Moreover, arguably unlike the complicated formulas involved in redistricting, the fact that there was abundant racism in Mississippi in the 1960s is not rocket science. *See* DITTMER, *supra* note 7; VOTING IN MISSISSIPPI, *supra* note 7. There was no "sociological gobbledygook," Transcript of Oral Argument at 40, *Gill*, 138 S. Ct. 1916 (2018) (No. 16-1161), for the Fifth Circuit judges to contend with here. Therefore, this naiveté seems even more inexcusable than the naiveté discussed by Professor Hasen.

157. Hammontree, *supra* note 49.

158. Hasen, *supra* note 138, at 59.

Perez.[159] That case involved a Texas redistricting scheme; the Supreme Court reversed the district court's decision placing the burden on Texas to show that a subsequent redistricting plan purged the original plan of its discriminatory intent.[160] The *Harness* majority explicitly relied on this portion of *Abbott*, noting that "the presumption of legislative good faith persists."[161] In particular, it quoted that the Supreme Court's assertion that "'[t]he allocation of the . . . presumption of legislative good faith [is] not changed by a finding of past discrimination.'"[162]

Hasen notes that a presumption of legislative good faith seems "particularly inappropriate in the context of election laws" because such laws are "often passed with incumbency protection, self-interest, and partisanship in mind."[163] Section 241 is, of course, an election law, so Hasen's critique extends to *Harness*'s use of the presumption. Moreover, though, it seems even more inappropriate to apply it to the Mississippi legislature of 1968 (if, as noted by Justice Ketanji Brown Jackson in her dissent from the denial of certiorari in *Harness*, that is even the correct legislature to analyze), the same legislature that, as Judge Graves recounted, engaged in massive resistance to the Civil Rights Movement at every step.[164] Given this well-documented reality, it is odd to impose an assumption that the 1968 Mississippi legislature was acting in good faith with respect to discriminatory intent. The majority, in discrediting the principal dissent's argument that there was a genuine dispute of material fact with respect to that legislature's intent, tried to argue the opposite, that, in fact, the Mississippi legislature passed the 1968 Amendment because it was attempting to address criticisms in a 1966 Civil Rights Commission report.[165]

Of course, that claim is facially preposterous. Why would anyone give the Mississippi Legislature of that time a presumption of good faith, much less claim that it was trying to fight the racism that it perpetuated?[166] And as to the claim that the legislature was responding to a report by the U.S. Civil Rights Commission, Judge Graves had this to say at the en banc oral argument:

159. 138 S. Ct. 2305, 2325 (2018).

160. *Id.* at 2313.

161. Harness v. Watson, 47 F.4th 296, 307 (5th Cir. 2022) (en banc).

162. *Id.* at 306 (quoting *Abbott*, 138 S. Ct. at 2324).

163. Hasen, *supra* note 138, at 64.

164. *See Harness*, 47 F.4th at 331–33 (describing the Mississippi Legislature's resistance to the Civil Rights Movement); Harness v. Watson, 143 S. Ct. 2426, 2427 (2023) (Jackson, J., dissenting from denial of writ of certiorari).

165. *Harness*, 47 F.4th at 309–10.

166. *See id.*

> And that's what that they were responding to? . . . You believe that the 1968 Mississippi legislature was responding to a 1965 report by the Commission on Civil Rights? Is there some evidence that that's what they were doing? . . . All I'm asking you is what's the evidence that they were taking steps to respond to a Commission on Civil Rights report?[167]

As Judge Stephen Higginson would point out at the same oral argument, a fact finder never had the opportunity to decide whether this was actually the motivation behind the legislature's actions.[168] And there is always the risk, expressed by Judge Barkett, that a legislature could mislead in their legislative records as to their true motivations.[169] To that end, it is "[i]nconceivable" to think that the 1968 Mississippi legislature "wasted no time in responding to" a Civil Rights Commission report after defying a "constitutional amendment for nearly a century," resisting "a landmark Supreme Court order for 20 years," and ignoring "sweeping federal legislation for almost a decade."[170] The legislature certainly had a record, developed over one hundred years, of passing discriminatory laws with racial classifications.[171] However, the majority was able to breeze over all of this by invoking the presumption of legislative good faith.[172]

That is exactly the problem with using the presumption in this context. It allows courts to gloss over and distort history. The *Harness* majority gave lip service to the history of racism in Mississippi; it stated, "[w]e are not blind to the state's deplorable history of racial discrimination, or its delayed response to the end of de jure segregation, or its attempts to suppress [B]lack voter participation during that period."[173] But despite this alleged concern for Mississippi's history, the majority made it seem as though its hands were tied by *Abbott*, noting that the "overall social and political climate . . . fails to carry plaintiffs' burden to prove that the 1968 amendment intentionally discriminated against [B]lack voters."[174] Therefore, by applying this presumption of legislative good faith, developed by the Supreme Court in

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167. Oral Argument at 47:23, *Harness*, 47 F.4th 296 (5th Cir. 2022) (en banc) (No. 19-60632), https://www.youtube.com/watch?v=Y47e55c-g2g.

168. *Id.* at 49:17.

169. Johnson v. Governor of Fla., 405 F.3d 1214, 1246 (11th Cir. 2005) (en banc) (Barkett, J., dissenting).

170. Harness v. Watson, 47 F.4th 296, 338 (5th Cir. 2022) (Graves, J., dissenting).

171. *See* STATES' LAWS, *supra* note 41, at 238–50.

172. *Harness*, 47 F.4th at 307.

173. *Id.* at 309.

174. *Id.*

Abbott, the Fifth Circuit was able to appear as though it cared about Mississippi's past, yet keep in place a provision that entrenches that same past's wrongs.

C. Tool Three: Animus Laundering

The final tool discussed by Professor Hasen is animus laundering, the process by which "a government actor change[s] the rationale for a government action from a discriminatory one to something more palatable to satisfy further judicial review."[175] First coined by attorney Joshua Matz, a classic example of animus laundering is the Trump Administration's various attempts to enact a so-called "travel ban" directed toward Muslim travelers.[176] The original iteration dated back to President Trump's first presidential campaign, where he "call[ed] for total and complete shutdown of Muslims entering the United States."[177] However, after he was elected and the first version of the ban was struck down on religious discrimination grounds, the Administration made slight tweaks to the ban, arguing that such changes stripped the law of its discriminatory taint.[178] The Supreme Court eventually upheld the third iteration of the ban, citing national security concerns as an "independent justification."[179]

According to Professor Hasen, two prominent Supreme Court cases in recent years exemplify animus laundering.[180] The first is *Abbott*, the same case that developed the presumption of legislative good faith.[181] The dissent there extensively outlined the majority's failure to account for numerous district court findings that the 2013 Texas legislature continued to have racially discriminatory intent originating from the 2011 redistricting process.[182] Per Hasen, the *Abbott* majority held that the legislature had "miraculously cured itself of the widespread discrimination [that a federal

175. Hasen, *supra* note 138, at 65.

176. *Id.*

177. Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 4:18 AM), https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/index.html.

178. Hasen, *supra* note 138, at 66.

179. Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018).

180. Hasen, *supra* note 138, at 67; Abbott v. Perez, 138 S. Ct. 2305 (2018); Dep't of Com. v. New York, 139 S. Ct. 2551 (2019). Moreover, as Hasen notes, the Supreme Court has been inconsistent in deciding whether to uphold laws via animus laundering, latching on to two statements made by state officials indicating a potentially unconstitutional motive in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1719 (2018).

181. Hasen, *supra* note 138, at 67.

182. *Abbott*, 138 S. Ct. at 2335–60 (Sotomayor, J., dissenting).

court] found existed just two years" earlier.[183] Hasen took the view that it may hypothetically be possible for a state to "enact a law for good purposes that once might have been proposed for unconstitutional ones."[184] He argued, however, that this was unlikely in *Abbott* given the short turnaround.[185]The other prominent Supreme Court case involving animus laundering, according to Hasen, is *Department of Congress v. New York*.[186] The case involved the Department of Commerce's efforts to include a question on the census regarding U.S. citizenship.[187] The Department claimed that it needed to include the question to better enforce the Voting Rights Act, but the Court held that the Department's reasoning was pretextual.[188] According to documents discovered after oral argument in the Supreme Court, the true purpose of the question, as many suspected, was to decrease responses to the census which would in turn advance partisan objectives.[189] But, despite holding that the Department's reasoning was pretextual, the Court left the door open for animus laundering by holding that, apart from the pretext, the Department's decision was reasonable.[190] As such, if the Department, in effect, lied better, it would be empowered to ask the citizenship question on the census.[191]

The Fifth Circuit also utilized animus laundering in *Harness*.[192] While the situation of section 241 is not identical to most cases of animus laundering, there are significant parallels. In upholding the provision, the Fifth Circuit allowed the 1968 amendment's slight tweaks to section 241 to launder the discrimination of the original 1890 iteration, just as the slight tweaks to the third iteration to President Trump's ban cleansed it of the

183. Hasen, *supra* note 138, at 67 n.95.

184. *Id.*

185. *Id.*

186. *Id.*; 139 S. Ct. 2551 (2019).

187. *Dep't of Com.*, 139 S. Ct. at 2561.

188. *Id.* at 2575–76.

189. Michael Wines, *Deceased G.O.P Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html. For a fascinating overview of this litigation, see generally Strict Scrutiny, *What Would Chief Justice Roberts Do?*, CROOKED MEDIA (Aug. 31, 2020), https://podcasts.apple.com/us/podcast/what-would-chief-justice-roberts-do/id1469168641?i=1000489639989.

190. Hasen, *supra* note 138, at 69; *Dep't of Com.*, 139 S. Ct. at 2576.

191. *See* Hasen, *supra* note 138, at 69; *Dep't of Com.*, 139 S. Ct. at 2576.

192. Harness v. Watson, 47 F.4th 296, 300 (5th Cir. 2022) (en banc) (Graves, J., dissenting).

discrimination from his campaign.[193] Without the 1968 amendment, section 241 would clearly be unconstitutional; the *Harness* majority acknowledged as much.[194] However, according to the majority, adopting reasoning from *Cotton*, the 1968 changes were the result of a deliberative process,[195] necessarily implying that there were other, non-discriminatory rationales for the 1968 iteration of section 241. Additionally, as previously discussed, the majority reasoned that the 1968 amendment was a response to findings from a report of the U.S. Commission on Civil Rights, another permissible rationale for the 1968 iteration.[196] Thus, they essentially contend that the case of section 241 is analogous to Hasen's optimistic hypothetical, where a state reenacts a provision "for good purposes, [even though it] once [was] proposed for unconstitutional ones."[197]

But that is clearly wrong. Just as the *Abbott* majority ignored factual findings by the district court indicating that the legislature had a racially discriminatory intent with respect to a reenacted law, the *Harness* majority ignores significant historical evidence of the 1968 Mississippi legislature's racism and opposition to voting rights.[198] *Harness* may even be more problematic than *Abbott* because, as Judge Higginson noted at oral argument, a fact finder never had any opportunity to make factual determinations as to the purpose of the Mississippi legislature in 1968.[199] Without those findings, as Judge Graves noted, it was surely inappropriate to grant summary judgment.[200] It is simply not enough to look to the legislative history as the majority does; legislatures may easily hide their true intentions by manipulating the legislative history, as Judge Barkett indicated in *Johnson*.[201]

193. Hasen, *supra* note 138, at 65.

194. *Harness*, 47 F.4th at 301.

195. *Id.* at 302–03.

196. *Id.*

197. Hasen, *supra* note 138, at 67 n.95.

198. Abbott v. Perez, 138 S. Ct. at 2346–60 (2018) (Sotomayor, J., dissenting); *Harness*, 47 F.4th at 324–25 (Graves, J., dissenting).

199. Transcript of Oral Argument at 49:17, *Harness*, 47 F.4th 296 (5th Cir. 2022) (en banc) (No. 19-60632), https://www.youtube. com/watch?v= Y47e55c-g2g.

200. Harness v. Watson, 47 F.4th 296, 339 (5th Cir. 2022) (en banc) (Graves, J., dissenting).

201. *See* Johnson v. Governor of Fla., 405 F.3d 1214, 1246 (11th Cir. 2005) (en banc) (Barkett, J., dissenting).

Moreover, application of Hasen's optimistic hypothetical is particularly inappropriate here because of the short passage of time between the 1968 reenactment and other documented acts of racial oppression taken by the Mississippi legislature. It is true that a half a century passed in between the 1968 amendment and the passage of the Mississippi Constitution of 1890, making it marginally plausible that there was another permissible rationale for section 241's reenactment.[202] But, as poignantly described by Judge Graves and others, the Mississippi legislature defied a "constitutional amendment for nearly a century," resisted "a landmark Supreme Court order for 20 years," and ignored "sweeping federal legislation for almost a decade."[203] This overwhelming racism and oppression ran rampant before and throughout 1960s Mississippi.[204] Therefore, while the passage of the 1890 iteration and 1968 iteration were not close in time, other acts of the notoriously racist Mississippi legislature resisting civil rights suggest that it did not "miraculously [cure] itself" in 1968 by hastily responding to a report from the Commission on Civil Rights.[205]

Further, sanctioning section 241 via animus laundering in this context sets a dangerous precedent, similar to the one implied in *Department of Commerce v. New York*.[206] By looking just to legislative history materials, without allowing a fact finder to make necessary determinations regarding the discriminatory intent of the legislature, it encourages future legislatures to lie better in the legislative history. As long as legislatures can think of at least one reason to pass a law that is not discriminatory, they can indicate that rationale in the legislative history and the law will be upheld. Thus, the fears of Judge Barkett would be realized on a larger scale. Additionally, legislatures of the past have hidden their true incentives with misdirection in legislative history,[207] meaning that discriminatory laws of the past could continue to be upheld. This

202. *See Harness*, 47 F.4th at 300–01.

203. *Harness*, 47 F.4th at 338 (Graves, J., dissenting); *See* Chin, *supra* note 7, at 440–52 (describing various actions of the Mississippi Legislature exhibiting racism that was "deeper than religion itself."); *see also* STATES' LAWS, *supra* note 41, at 237–50.

204. *See* Chin, *supra* note 7, at 440–52.

205. Hasen, *supra* note 138, at 67.

206. *See generally* Dep't of Com. v. New York, 139 S. Ct. 2551 (2019) (leaving a door open for the Trump administration to engage in animus laundering).

207. Danielle Lang & J. Gerald Herbert, *A Post*-Shelby *Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.R.F. 779, 785 (2018).

would facilitate entrenchment of past laws while absolving courts of the responsibility to engage with, and right, past wrongs.

D. The Cumulative Effect of the Tools in Harness

It is now clear that the emergence of each tool brought on unfortunate consequences, giving the *Harness* majority a path to uphold section 241. And what all three tools have in common is their ability to absolve the Fifth Circuit of the responsibility of meaningfully engaging with Mississippi's history of racism, especially with respect to the Mississippi of the 1960s. In essence, they allowed the court to give lip service to the horrors of that experience, but ultimately ignore it for purposes of its analysis.

Hasen warns that these tools are prone to be used by conservative courts in redistricting and voting rights cases in the American South.[208] Even so, they seem particularly problematic in this context—when deciding whether a law designed with discriminatory intent has been purged of that taint by subsequent reenactment. If a law, originally designed to discriminate, is to be declared purged of discrimination, a meaningful shift must have occurred. In the case of Mississippi, and the broader American South, there is significant evidence and documentation of continued discrimination.[209] And any serious argument contending that a shift took place in that context must necessarily engage with that history. But the fact that these tools emerged in the Fifth Circuit's reasoning means that that it did not so engage. Thus, regardless of whether a meaningful reenactment actually took place with respect to the 1968 amendment, though significant doubts remain, the Fifth Circuit's analysis was necessarily inadequate. And the fact that it was bound, in part, by Supreme Court precedent to apply some of tools suggests that there are even more significant consequences than Hasen originally predicted.

CONCLUSION

Concluding his dissent, Judge Graves, himself a Black Mississippian, powerfully recounts his experiences growing up during the Jim Crow Era.[210] He describes early memories of a cross burned on his grandmother's lawn.[211] He lists the effects of the Supreme Court's

208. Hasen, *supra* note 138, at 70.

209. *See generally* DITTMER, *supra* note 7; VOTING IN MISSISSIPPI, *supra* note 7; Harness v. Watson, 47 F.4th 296, 326–38 (5th Cir. 2022) (en banc) (Graves, J., dissenting).

210. *Harness*, 47 F.4th at 341–42 (Graves, J., dissenting).

211. *Id.* at 341.

decision forcing Mississippi to commence desegregation, leaving his school with few of the best Black teachers and many of the worst white teachers.[212] He recalls rising through the ranks of the Mississippi and federal judiciaries, constantly flanked by the Mississippi flag with its Confederate emblem, "a haunting reminder that a wrong never righted touches us all."[213]

In upholding section 241, the Fifth Circuit failed to right the wrongs of Mississippi's past by declining to repudiate the vestiges of Jim Crow. It also failed to repudiate what Professor Michelle Alexander has coined the new Jim Crow, as felon disenfranchisement works hand in hand with the detrimental system of mass incarceration.[214] Because section 241 was meant to oppress their vote, Black Mississippians must have had a say in any reenactment process purporting to purge it of past discrimination. But they had no say in the process that proposed and adopted section 241, and the Fifth Circuit nevertheless held it constitutional.[215] It was able to do so using tools that helped it avoid truly grappling with the history of racism in Mississippi and its consequences, making its analysis deficient. Thus, if the *Hunter* hypothetical is ever possible, it did not occur here.

In October 2022, the plaintiffs in *Harness* filed a petition for a writ of certiorari in the Supreme Court of the United States.[216] And in June 2023, after upholding section 241 over a century earlier, the Supreme Court too failed to repudiate Jim Crow and denied the petition, missing "yet another opportunity to learn from its mistakes."[217] But even in the face of this grave injustice, in the deep tradition of Wilter May Abrams and countless others, those dedicated to a truly pluralistic and democratic society can "leave no power on the table."[218] Voting and democratic organizing remain ever important. In the words of the

212. *Id.* at 341–42.

213. *Id.* at 342.

214. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 192–93 (2010) (citing Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998)).

215. *Harness*, 47 F.4th at 311.

216. Petition for a Writ of Certiorari at 1, Harness v. Watson, No. 22-412, 2022 WL 16699076, at *1 (U.S. Oct. 28, 2022).

217. Harness v. Watson, 143 S. Ct. 2426, 2426, 2428 (2023) (Jackson, J., dissenting from denial of writ of certiorari); Williams v. Mississippi, 170 U.S. 213, 225 (1898).

218. Sherrilyn Ifill (@SIfill_), TWITTER (Oct. 25, 2021, 9:11 AM), https://twitter.com/SIfill/status/14526238 97954824197.

third Justice Jackson, "[c]onstitutional wrongs do not right themselves."[219]

219. *Harness*, 143 S. Ct. at 2428 (Jackson, J., dissenting from denial of writ of certiorari).