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## FELON DISENFRANCHISEMENT: LAW, HISTORY, POLICY, AND POLITICS

*George Brooks\**

### INTRODUCTION

George W. Bush became the forty-third President of the United States when he won the state of Florida by 537 votes in the 2000 election.<sup>1</sup> Because the election was so close, hotly-contested, and divisive, aspects of our electoral system long relegated to dusty books suddenly became topics of water cooler conversation and cocktail party chatter. Some Democrats speculate that if the nearly 600,000 felons in Florida<sup>2</sup> had been allowed to vote, Al Gore would have been elected President.<sup>3</sup>

Felon disenfranchisement<sup>4</sup> has thus become a cause célèbre among liberals.<sup>5</sup> There are approximately four million felons who cannot vote nationwide.<sup>6</sup> They are disproportionately black and Hispanic<sup>7</sup>—

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\* Dedicated to the memory of Alan El Naboulsy. I miss you terribly. The author would like to acknowledge the support and understanding of Professor Robert Kaczorowski.

1. *Gore v. Harris*, 772 So.2d 1243, 1247 (Fla. 2000).

2. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1293 (11th Cir. 2003).

3. Rebecca Perl, *The Last Disenfranchised Class*, THE NATION, Nov. 24, 2003, at 11, 14, available at <http://www.thenation.com/doc/20031124/perl>.

4. For the purposes of this note, the term “felon disenfranchisement” includes any convicted felon currently incarcerated or ex-felon now on parole or probation who cannot vote.

5. “Civil rights advocates predict that voting rights for prisoners and ex-prisoners will be the next [U.S.] suffrage movement, as lawyers, prison advocates, voting rights groups and foundations have recently begun to join forces and take up the cause.” Perl, *supra* note 3, at 11.

6. *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1940 (2002) [hereinafter *One Person, No Vote*]; accord Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1520 (2003). Some estimates for the number of disenfranchised felons run as high as five million. See Perl, *supra* note 3, at 11.

7. Tanya Dugree-Pearson, *Disenfranchisement—A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLIN J. PUB. L. & POL’Y 359, 364 (2002). This note focuses almost exclusively on felon disenfranchisement and African-Americans because of their history of enslavement and discrimination.

constituencies that have traditionally been Democratic strongholds.<sup>8</sup> Embittered by the 2000 elections, Democrats have seized on the goal of extending suffrage to felons in hopes of increasing their traditional voter base, thus helping them win close elections.<sup>9</sup> They face an uphill battle, however, as history, law, and policy weigh against allowing felons to vote.

Part I of this note places felon disenfranchisement in a historical context, highlights significant cases and jurisprudence under the Fourteenth Amendment and the Voting Rights Act, and reviews the scope of its impact today. Part II considers the divergent interpretations of law that have led to uncertainty in the circuits as to whether the Voting Rights Act reaches felon disenfranchisement and when felon disenfranchisement statutes originally enacted with discriminatory intent have been cleansed of that taint. The confusion in the circuits stems from conflicting views of what the history of felon disenfranchisement means and whether there are legitimate underlying policy rationales. Part III argues that the Voting Rights Act does not reach felon disenfranchisement and thus the Fourteenth Amendment is controlling, therefore these laws are only susceptible to attack on constitutional grounds if they were enacted with discriminatory intent. Thus, we are left with policy arguments, which are properly decided in state legislatures.

## I. BACKGROUND: HISTORY, JURISPRUDENCE AND IMPACT

### A. Early Origins

Felon disenfranchisement has a long history, with origins in ancient Greece.<sup>10</sup> In medieval Europe, it was expressed in the concept of “civil death.”<sup>11</sup> In Britain, “outlawry” stripped a criminal of his right to

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8. See Pinaire et al., *supra* note 6, at 1545-46.

9. See *id.* at 1545-47. As many as three-quarters of disenfranchised felons could be expected to vote for Democrats. CHRISTOPHER UGGEN & JEFF MANZA, THE POLITICAL CONSEQUENCES OF FELONY DISFRANCHISEMENT LAWS IN THE UNITED STATES 22 (2001), at <http://www.northwestern.edu/ipr/publications/papers/2000/disfranchise.pdf> (last visited Sept. 30, 2005).

10. See Nathan P. Litwin, Note, *Defending an Unjust System: How Johnson v. Bush Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida*, 3 CONN. PUB. INT. L.J. 236, 237 (2003). In ancient Greece, “[c]riminals pronounced infamous were prohibited from appearing in court, voting, making speeches, attending assemblies, and serving in the army.” *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and ‘The Purity of the Ballot Box’*, 102 HARV. L. REV. 1300, 1301 (1989) [hereinafter *The Disenfranchisement of Ex-Felons*] (quoting Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941 (1970)).

11. Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENTENCING REP. 248, 248 (2000).

protection of the laws for his life and property.<sup>12</sup> The first disenfranchisement laws in America appeared in the 1600s, typically as punishment for morality crimes such as drunkenness,<sup>13</sup> and were present from the earliest times of the Republic.<sup>14</sup>

The power of the states to establish voter qualifications is found in Article I, Section Two of the United States Constitution, which provides that “the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”<sup>15</sup> States have “broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns.”<sup>16</sup> The “wide scope” of power held by the states to set qualifications includes “[r]esidence requirements, age, [and] previous criminal record.”<sup>17</sup>

From 1776 to 1821, eleven states adopted constitutions that disenfranchised felons or permitted their statutory disenfranchisement.<sup>18</sup> Virginia was the first in 1776, followed by Kentucky in 1799, Ohio, in 1802, Louisiana, in 1812, Indiana, in 1816, Mississippi, in 1817, Connecticut and Illinois in 1818, Alabama, in 1819, Missouri, in 1820, and New York in 1821.<sup>19</sup> Eighteen more states had followed suit by the time the Fourteenth Amendment was ratified in 1868.<sup>20</sup>

These early laws rested on John Locke’s concept that those who break

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12. The theory behind outlawry was that

“[h]e who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a ‘friendless man,’ he is a wolf.”

Carlos M. Portugal, Comment, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 U. MIAMI L. REV. 1317, 1318-19 (2003) (quoting SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 448 (photo. reprint 1923) (2d ed. 1898)).

13. Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004).

14. See Roger Clegg, *Perps and Politics*, NAT’L REV. ONLINE (Oct. 18, 2004), at <http://www.nationalreview.com/clegg/clegg200410180844.asp>.

15. U.S. CONST. art. I, § 2.

16. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50-51 (1959).

17. *Id.* at 51.

18. *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 450 (2d Cir. 1967).

19. *Id.* at 450 n.4.

20. These states were Delaware (1831), Tennessee (1834), Florida (1838), Rhode Island (1842), New Jersey (1844), Texas (1845), Iowa (1846), Wisconsin (1848), California (1849), Maryland (1851), Minnesota (1857), Oregon (1857), Kansas (1859), West Virginia (1863), Nevada (1864), South Carolina (1865), Georgia (1868), and North Carolina (1868). *Id.* at 450 n.5.

the social contract should not be allowed to participate in the process of making society's rules.<sup>21</sup> Other justifications included the prevention of election fraud, the fear that criminals would weaken laws and their enforcement, and a "purity of the ballot box" concept that felons lack the "moral competence" needed to vote.<sup>22</sup> The Alabama Supreme Court vindicated felon disenfranchisement in *Washington v. State*<sup>23</sup> on the theory that:

It is quite common also to deny the right of suffrage, in the various American States, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny. The evil infection of the one is not more fatal than that of the other. The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship.<sup>24</sup>

### B. Civil War and Reconstruction

The aftermath of the Civil War wrought enormous changes, in both society and the law. The Thirteenth Amendment, which banned slavery and involuntary servitude (except as punishment for a crime), was enacted in 1865.<sup>25</sup> The Fourteenth Amendment was passed in 1868; Section One contained the Equal Protection Clause and Section Two sanctioned the disenfranchisement of those who participated in rebellion or were convicted of "other crime[s]".<sup>26</sup> The last of the Reconstruction

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21. *Id.* at 451. Social contract theory states that "freely choosing" persons come together to create a society and government system that "protect[s] and promote[s] their basic rights and interests" by forming rules which each individual agrees to abide by. A violation of the contract disturbs "the balance of rights and responsibilities," leading to punishment, including the loss of the right to participate in the rule-making process. Pinaire et al., *supra* note 6, at 1525-26.

22. See *The Disenfranchisement of Ex-Felons*, *supra* note 10, at 1302-03.

23. 75 Ala. 582 (1884).

24. *Id.* at 585.

25. The full text of the Thirteenth Amendment reads, "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII.

26. The Fourteenth Amendment reads in pertinent part,

Section 1. All persons born or naturalized in the United States, and subject to the

Amendments was the Fifteenth, which was ratified in 1870 and extended the franchise to blacks.<sup>27</sup>

While all three amendments are important for civil rights, the Fourteenth stands out as perhaps the most important constitutional amendment ever passed.<sup>28</sup> Section One provides that,

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>29</sup>

The Equal Protection Clause in Section One has been the basis on which modern courts have been able to strike down laws and practices that intentionally discriminate on the basis of race, as stated or as applied.<sup>30</sup> Section Two diminishes state representation in Congress as a punishment for states that infringe voting rights, unless those rights are abridged “for participation in rebellion, or other crime.”<sup>31</sup>

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jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

U.S. CONST. amend. XIV.

27. The full text of the Fifteenth Amendment reads,

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

28. Bernard Schwartz, *The Amendment in Operation: A Historical Overview*, in THE FOURTEENTH AMENDMENT CENTENNIAL VOLUME, 29 (Bernard Schwartz ed., 1970). Accord WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 1-2 (1988).

29. See *supra* note 26.

30. See Schwartz, *supra* note 28, at 32; NELSON, *supra* note 28, at 2.

31. See *supra* note 26.

Due to ambiguities in Section One, Section Two lends itself to dual interpretation. First, it can be viewed as a “remedy,”<sup>32</sup> or perhaps more accurately as a punishment, by reducing a state’s representation in Congress when it violates a right protected in Section One.<sup>33</sup> Alternatively, it can be construed as an implicit authorization to deny black suffrage; the “remedy” does not prevent a violation, it only provides a punishment for the occurrence.<sup>34</sup> Politically, either construction would have been acceptable to the Republicans of the Reconstruction era. Either blacks would have been enfranchised and would presumably have voted for Lincoln’s Republican party,<sup>35</sup> or they would not have been allowed to vote, which would have reduced Southern—and predominately Democrat—representation in Congress by invoking Section Two; thus increasing Northern—and mostly Republican—representation in Congress.<sup>36</sup>

Union troops occupied the Confederacy during Reconstruction and despite enfranchising nearly one million former slaves,<sup>37</sup> they continued to enforce laws denying the vote to convicted felons. The Military Reconstruction Act of 1867 specifically exempted convicted felons from exercising the franchise.<sup>38</sup> Before former Confederate states were readmitted to the Union, they were required to ratify the Fourteenth Amendment<sup>39</sup> and bring their state laws into “conformity with the Constitution of the United States in all respects.”<sup>40</sup> Upon meeting these requirements, Congress then passed enabling acts which formally

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32. NELSON, *supra* note 28, at 57-58.

33. *Id.*

34. *Id.* at 50-51.

35. *Id.* at 47, 59 (noting an argument in favor of conferring the franchise on Southern blacks that “[i]t was expected that blacks would vote in favor of those who had given them their freedom and that . . . their votes would bring about the election of loyal candidates to Congress and the state legislatures,” and emphasizing that “[t]he Fourteenth Amendment must be understood as the Republican party’s plan for securing the fruits both of the war and of the three decades of antislavery agitation preceding it”).

36. *See id.* at 50-51, 57-58.

37. Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 *Geo. L.J.* 259, 271 (2004).

38. *See id.* at 270.

The Reconstruction Act enfranchised male citizens of [any former Confederate] State, twenty-one years old and upward, of whatever race, color or previous condition, who have been resident in said State for one year previous to the day of such election, except as may be disenfranchised for participation in the rebellion or for felony at common law.

Act of Mar. 2, 1867, ch. 153, § 5, 14 Stat. 428, 429.

39. Chin, *supra* note 37, at 270.

40. § 5, 14 Stat. at 429, *quoted in* *Richardson v. Ramirez*, 418 U.S. 24, 49 (1974).

readmitted a state to the Union.<sup>41</sup> These acts placed “fundamental condition[s]” on states regarding suffrage.<sup>42</sup> Arkansas provides a typical example, being the first former Confederate state to be readmitted to the Union, in June 1868.<sup>43</sup> The Act of June 22, 1868 provided in relevant part:

That the State of Arkansas is entitled and admitted to representation in Congress as one of the States of the Union upon the following fundamental condition: That the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, *except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State. . . .*<sup>44</sup>

Despite the lofty goals of the Reconstruction era, Jim Crow came to dominate the South as Reconstruction ended, and blacks were socially and politically excluded from full participation in the life of the nation.<sup>45</sup> Their right to vote was systematically denied through use of poll taxes,<sup>46</sup> grandfather clauses,<sup>47</sup> and property tests,<sup>48</sup> as well as literacy tests<sup>49</sup> and intimidation.<sup>50</sup>

The Supreme Court participated in this process by dismantling what Congress had accomplished in the Reconstruction Amendments.<sup>51</sup> The Court construed the Amendments very narrowly in the *Slaughter-House Cases*,<sup>52</sup> concluding that the Thirteenth Amendment was intended only to combat discrimination against former slaves and gutting the privileges and

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41. Chin, *supra* note 37, at 270.

42. *Richardson*, 418 U.S. at 52.

43. *Id.* at 51.

44. Act of June 22, 1868, ch. 69, 15 Stat. 72 (emphasis added), *quoted in Richardson*, 418 U.S. at 51. Variations of this “fundamental condition” were also imposed on North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida, Virginia, Mississippi, and Texas. *Richardson*, 418 U.S. at 52.

45. HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865-1901* at ix-x (2001).

46. CHARLES S. MANGUM, JR., *THE LEGAL STATUS OF THE NEGRO 389-90* (1940).

47. Grandfather clauses were considered advantageous because unlike literacy tests and polls taxes, they disenfranchised blacks but not illiterate whites. *Id.* at 391-92.

48. Pinaire et al., *supra* note 6, at 1525.

49. MANGUM, *supra*, note 46, at 390-91.

50. *Id.* at 394.

51. HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE 77-89* (1973); *see also* LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 180-81* (1966).

52. 83 U.S. 36 (1872).



immunities clause of the Fourteenth Amendment.<sup>53</sup> In 1883, the *Civil Rights Cases*<sup>54</sup> held that the Fourteenth Amendment applied only to state action, thus declaring the Civil Rights Act of 1875 unconstitutional.<sup>55</sup> The Court also restricted Congress's power under the Thirteenth Amendment by ruling that the refusal to serve a black person in a public accommodation was not a "badge of slavery" and thus was beyond Congress's reach.<sup>56</sup> Justice Harlan's dissenting argument that Congress could reach public accommodations under the Fourteenth Amendment would have to wait until the so-called Second Reconstruction began in the 1950s.<sup>57</sup> Finally, in *Plessy v. Ferguson*<sup>58</sup> in 1896, the Court validated the concept of "separate but equal" under the Fourteenth Amendment.<sup>59</sup>

Felon disenfranchisement was sometimes used as a tool by the states to disenfranchise blacks.<sup>60</sup> Some Southern states passed laws disenfranchising those convicted of what were considered to be "black" crimes, while those convicted of "white" crimes did not lose their right to vote.<sup>61</sup> For example, South Carolina disenfranchised criminals convicted of "thievery, adultery, arson, wife beating, housebreaking, and attempted rape," but not those convicted of murder or fighting.<sup>62</sup> Mississippi modified its broad, earlier law—which disenfranchised convicts of "any crime"—to specifically target "black" crimes.<sup>63</sup>

Although five Southern states passed felon disenfranchisement laws targeting blacks from 1890 to 1910, more than eighty percent of states

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53. See MILLER, *supra* note 51, at 104-07.

54. *United States v. Stanley*, 109 U.S. 3 (1883).

55. See MILLER, *supra* note 51, at 138-39.

56. CLAUDINE L. FERRELL, *RECONSTRUCTION* 58 (2003).

57. *Id.*

58. 163 U.S. 537 (1896).

59. MORROE BERGER, *EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS* 76-77 (rev. ed. 1967).

60. Mauer, *supra* note 11, at 3.

61. Theft was often considered a "black" crime and led to felony disenfranchisement, while murder was viewed as a "white" crime and did not lead to disenfranchisement. See Litwin, *supra* note 10, at 238.

62. *Id.* See also Chin, *supra* note 37, at 305 (quoting *Ratliffe v. Beale*, 20 So. 865, 868 (Miss. 1896), where the Mississippi Supreme Court described blacks as "a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites." It therefore held that the state constitutional convention "discriminated against . . . 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 and murder and other crimes in which violence was the principal ingredient were not.").

63. Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 *YALE L.J.* 537, 540 (1993).

nationwide *already* had felon disenfranchisement laws by that time.<sup>64</sup> “[O]utside the [S]outh, disenfranchisement laws ‘lacked socially distinct targets and generally were passed in a matter-of-fact fashion.’”<sup>65</sup> The Supreme Court twice upheld felon disenfranchisement as a punishment for polygamy in the late nineteenth century, noting it “is not open to any constitutional or legal objection.”<sup>66</sup>

### C. Modern Era

The full realization of equal rights, including voting rights for black Americans, would have to wait for nearly a century.<sup>67</sup> As the Civil Rights movement progressed, various obstacles that had prevented blacks from voting were eliminated. The Twenty-Fourth Amendment, ratified in 1964, eliminated poll taxes.<sup>68</sup> New life was breathed into the Reconstruction Amendments—the Fourteenth Amendment became a “potent tool” in achieving justice for minorities.<sup>69</sup>

To correct the past failure of the Reconstruction Amendments to enfranchise African-Americans in practice, particularly in the South, Congress passed the Voting Rights Act of 1965, which outlawed discriminatory voting devices such as literacy tests.<sup>70</sup> Section Two of the Act prohibited any “voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.”<sup>71</sup> Congress used its enforcement powers under Section Five of the Fourteenth Amendment<sup>72</sup> and Section Two of the Fifteenth Amendment<sup>73</sup> to enact the Voting Rights Act.<sup>74</sup> The Act was tremendously

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64. Clegg, *supra* note 14. The five states are Mississippi (1890), South Carolina (1895), Louisiana (1898), Alabama (1901), and Virginia (1901-02). Shapiro, *supra* note 63, at 540-41.

65. Clegg, *supra* note 14.

66. *Davis v. Beason*, 133 U.S. 333, 346-47 (1890); *see also* *Murphy v. Ramsey*, 114 U.S. 15 (1885).

67. *See supra* note 57 and accompanying text.

68. U.S. CONST. amend. XXIV, § 1.

69. William J. Brennan, Jr., *Landmarks of Legal Liberty*, in *THE FOURTEENTH AMENDMENT 10* (Bernard Schwartz ed., 1970).

70. Martine J. Price, Note, *Addressing Ex-felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL’Y 369, 384 (2002).

71. Section Two of the Voting Rights Act of 1965 reads in full, “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C. § 1973(a) (1965) (amended 1975).

72. *See supra* note 26 for the full text of the Fourteenth Amendment.

73. *See supra* note 27.

successful in extending suffrage to black Americans.<sup>75</sup>

Despite facing judicial scrutiny under the Fourteenth Amendment and the Voting Rights Act in the 1960s and 70s, felon disenfranchisement laws were almost always found to be constitutional.<sup>76</sup> *Stephens v. Yeomans* was the one exception, which found New Jersey's felon disenfranchisement law unconstitutional under the Fourteenth Amendment.<sup>77</sup> In *Yeomans*, the court could "perceive no rational basis for the . . . classification" of felons as a group that could not vote.<sup>78</sup> In the subsequent case of *Fincher v. Scott*,<sup>79</sup> however, a district court in North Carolina openly mocked the *Yeomans* court's holding and reasoning.<sup>80</sup> The Supreme Court itself seemed to acknowledge the validity of felon disenfranchisement but did not rule on the issue directly.<sup>81</sup>

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74. See Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 727 (1998).

75. From 1965 to 1968, the percentage of blacks who were registered to vote increased from 6.7 percent to 59.8 percent in Mississippi, from 19.3 percent to 51.6 percent in Alabama, from 27.4 percent to 52.6 percent in Georgia, and from 31.6 percent to 58.9 percent in Louisiana. FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* 308 (1978).

76. See *Perry v. Beamer*, 933 F. Supp. 556, 558 (E.D. Va. 1996) (citing *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1972), *aff'd*, 411 U.S. 961 (1973); *Kronlund v. Honstein* 327 F. Supp. 71 (N.D. Ga. 1971); *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), *aff'd*, 396 U.S. 12 (1969)). Challenges have also been made under other theories, but none have been very successful. See *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984 (4th Cir. Feb. 23, 2000) (affirming dismissal of a felon disenfranchisement claim under the First Amendment because there is no private right of action therein for canceled voting rights and dismissing under the Twenty-Fourth Amendment because plaintiff's restoration of his civil rights was conditioned on paying a fee, not his right to vote); *Kronlund*, 327 F. Supp. 71 (holding that felon disenfranchisement does not violate the Eighth Amendment because it is a non-penal exercise of the state's power to set voter qualifications and thus is not cruel and unusual punishment).

77. 327 F. Supp. 1182 (D.N.J. 1970).

78. *Id.* at 1188.

79. 352 F. Supp. 117.

80. *Id.* at 118.

Holmes must have had in mind this sort of case when he penned his aphorism that the life of the law is not logic but experience. For an excellent example, indeed, the only example, of the equal protection logic of plaintiff's position, see *Stephens v. Yeomans*. We admire the technique and would be persuaded by it but for what seems to us the compelling argument of history.

*Id.* (citations omitted).

81. See *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("Minors, felons, and other classes may be excluded [from choosing senators]."); see also *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (holding that one "who commits a bank robbery, for instance, loses his right to liberty and often his right to vote . . . . [T]he purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.").

#### D. Judicial Challenges Under the Fourteenth Amendment

The tension between Sections One and Two<sup>82</sup> of the Fourteenth Amendment was settled when the Supreme Court decided *Richardson v. Ramirez*<sup>83</sup> in 1974.<sup>84</sup> Three convicted felons who had served their sentences and completed probation brought a class action suit when they were not allowed to register to vote.<sup>85</sup> The California Supreme Court held that disenfranchisement of felons who had served their time and completed parole—under provisions of the state constitution of 1879<sup>86</sup>—was a violation of equal protection under Section One of the Fourteenth Amendment because California could not assert a compelling state interest to justify the practice.<sup>87</sup>

The U.S. Supreme Court reversed, citing the plain language of Section Two of the Fourteenth Amendment, and its historical and judicial interpretation.<sup>88</sup> The Court held that the framers of the Amendment intended to exclude felons from the franchise.<sup>89</sup> After an initial draft was rejected by the Senate, the language, “except for participation in rebellion, or other crime,” was not changed despite several debates and proposed revisions.<sup>90</sup> More specifically, although it granted that the legislative history bearing on the words “or other crime” was scant, the Court found it consistent with the clear wording of the section.<sup>91</sup> Senator Henderson of Missouri felt that Section Two was an improvement on the earlier draft because disenfranchisement would follow for black and white alike.<sup>92</sup> Likewise, Senator Drake of Missouri had introduced the modifying phrase “under laws equally applicable to all the inhabitants of said State” to the Act readmitting Arkansas<sup>93</sup> so that felon disenfranchisement laws would not be used to disenfranchise blacks.<sup>94</sup>

Despite contemporaneous decisions by the Court striking down state

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82. See *supra* notes 28-36 and accompanying text.

83. 418 U.S. 24 (1974).

84. “The decision in *Richardson* is generally recognized as having closed the door on the equal protection argument.” *Allen v. Ellisor*, 664 F.2d 391, 395 (4th Cir. 1981).

85. *Richardson*, 418 U.S. at 26-27.

86. See CAL. CONST. of 1879, art. II, § 1; art. XX, § 11.

87. *Richardson*, 418 U.S. at 27, 54.

88. *Id.* at 54.

89. *Id.*

90. *Id.* at 43-45.

91. *Id.* at 43.

92. *Id.* at 47-48.

93. See *supra* notes 43-44 and accompanying text.

94. *Richardson*, 418 U.S. at 52.

voter qualifications on equal protection grounds,<sup>95</sup> felon disenfranchisement was distinguishable because it receives an “affirmative sanction” in Section Two of the Fourteenth Amendment.<sup>96</sup> *Richardson* held the framers’ intent to be of “controlling significance” in distinguishing felon disenfranchisement from other state laws restricting the franchise that the Court had struck down as violating the Equal Protection Clause.<sup>97</sup> Section One of the Fourteenth Amendment could not have been meant to bar a form of disenfranchisement expressly permitted in Section Two.<sup>98</sup>

In his dissent, however, Justice Marshall emphasized that there was no clear purpose behind Section Two and speculated that it was included in the Fourteenth Amendment for “political exigency” by Republicans who wished to either benefit from the votes of black Southerners or, if only white Southerners were allowed to vote, to dilute Democratic strength once Confederate states were readmitted to the Union.<sup>99</sup> The majority’s reliance on coeval laws such as the Reconstruction Act showed nothing more than that felon disenfranchisement was a common practice at the time.<sup>100</sup> “[C]onstitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber,”<sup>101</sup> however, thus allowing one-year residency requirements, specifically permitted in the Reconstruction Act, to be struck down by the Supreme Court in modern times.<sup>102</sup> Because voting is a “‘fundamental’ right,”<sup>103</sup> any restriction must rise to the level of a compelling state interest under the Equal Protection Clause.<sup>104</sup> Marshall

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95. *See id.* at 54; *see also* *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down state residency minimums for voting as violating the Equal Protection Clause); *Bullock v. Carter*, 405 U.S. 134 (1972) (holding Texas primary election filing fee is a violation of the Equal Protection Clause); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (holding restriction allowing only taxpaying property owners to vote on municipal bonds violates equal protection); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (declaring school district limits on franchise to property owners or lessees or the parents of school-age children violated the Equal Protection Clause).

96. *Richardson*, 418 U.S. at 54.

97. *Id.*

98. *Id.* at 55.

99. *Id.* at 73-74 (quoting William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 43-44 (1965) (quoting JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 14 (1909))).

100. *Id.* at 75.

101. *Id.* at 76 (quoting *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972)).

102. *Id.* *See supra* note 95 for a brief description of *Dunn v. Blumstein*, 405 U.S. 330 (1972), where the Court struck down residency requirements.

103. *Richardson*, 418 U.S. at 77 (quoting *Dunn v. Blumstein*, 405 U.S. 330 at 336 (1972)).

104. *Id.* at 77-78.

wrote that felon disenfranchisement did not meet this standard because it was not sufficiently narrowly tailored to prevent voter fraud and because groups of voters could not be excluded based upon presumptions of how they might vote.<sup>105</sup>

Both the majority and the dissent claim the mantle of the democratic process. Marshall observed that when the suit was filed, twenty-three states allowed ex-felons to vote.<sup>106</sup> By the time of their decision, four more states had done so.<sup>107</sup> Justice Rehnquist, writing for the majority, opined that whatever the merits of the policy arguments against felon disenfranchisement, it was for state legislatures to pass judgment on the persuasiveness of those claims.<sup>108</sup>

The ability of the states to bar criminals from voting under Section Two, however, is not without limit. In *Hunter v. Underwood*, two plaintiffs—one black, one white—challenged their disenfranchisement for crimes of moral turpitude, a misdemeanor, on the grounds that section 182 of the Alabama Constitution of 1901 was adopted with the purpose of disenfranchising blacks and that it had had that effect.<sup>109</sup> Alabama contended that intervening decades and the removal of egregiously racist provisions of section 182, such as the ban on miscegenation, had erased the original discriminatory taint.<sup>110</sup>

On appeal, the Supreme Court held that nothing in Section Two of the Fourteenth Amendment permits intentional racial discrimination which otherwise violates Section One.<sup>111</sup> Although section 182 was facially

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105. *Id.* at 79-83.

106. *Id.* at 83.

107. *Id.*

108. *Id.* at 55.

109. 471 U.S. 222, 223-25 (1985). The district court found that the disenfranchisement of blacks was a “major purpose” of the state’s constitutional convention, but did not find that it was the specific motive for the enactment of section 182 and thus found for the defendants. *Id.* at 224. On appeal, the Eleventh Circuit held that the proper standard for a violation of the Fourteenth Amendment in the context of mixed motives was proof by a preponderance of the evidence that discrimination was a “substantial or motivating factor,” unless it could be shown the same law would have been enacted in any case. *Id.* at 225. The Eleventh Circuit found that discriminatory intent was a motivating factor and that there was no other alternative explanation. *Id.* Therefore, Alabama’s constitutional provision as applied to the plaintiffs was a violation of the Fourteenth Amendment. *Id.*; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

110. *Hunter*, 471 U.S. at 232-33. Alabama also claimed that section 182 had an additional, permissible motivation of disenfranchising poor whites; the Court rejected that argument. *Id.* at 230-32.

111. *Id.* at 233.

neutral as to race and was equally applied,<sup>112</sup> it had been explicitly enacted with the purpose of furthering white supremacy, and continued to have that effect.<sup>113</sup> Alabama had curtailed suffrage prior to 1901, but the state's constitutional convention that year expanded the list of enumerated "black" crimes and added the phrase "crimes of moral turpitude" to broaden criminal disenfranchisement.<sup>114</sup> This had the intended discriminatory effect: by 1903, ten times as many blacks as whites had been disenfranchised.<sup>115</sup>

The Court rejected an argument that intervening decades and the removal of explicit racism had legitimated the statute because the original intent and effect were still present.<sup>116</sup> It left open the possibility, however, that a facially neutral law "might overcome its odious origin" by amendment.<sup>117</sup> Notably, the Court declined to decide whether section 182 would be constitutional if it were enacted today without any discriminatory intent.<sup>118</sup>

The *Hunter* court left open the possibility that a law enacted with discriminatory intent could be subsequently cleansed of that taint by amendment.<sup>119</sup> In *Cotton v. Fordice*, the Fifth Circuit addressed the opening when it denied a *Hunter*-based challenge to Mississippi's felon disenfranchisement law.<sup>120</sup> Although the facially neutral Mississippi law in question was enacted with discriminatory intent,<sup>121</sup> the court found it had been cleansed of that intent.<sup>122</sup> The court distinguished Mississippi's law

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112. *Id.* at 227.

113. *Id.* at 233. At Alabama's constitutional convention in 1901, the convention's president, John B. Knox, said in his opening address to the delegates, "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." *Id.* at 229 (quoting John B. Knox et al., 1 OFFICIAL PROC. OF THE CONST. CONVENTION OF THE STATE OF ALA. 8 (1940)).

114. *Id.* at 226-27. The convention specifically targeted those crimes it believed blacks were more likely to commit, which resulted in disenfranchisement due to crimes of moral turpitude or other enumerated minor offenses that were "black," while a conviction of second-degree manslaughter, a "white" crime, did not lead to disenfranchisement. *Id.*; see also *supra* notes 60-63 and accompanying text.

115. *Hunter*, 471 U.S. at 227.

117. *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998).

118. *Hunter*, 471 U.S. at 233.

119. *Fordice*, 157 F.3d at 391.

120. *Id.* at 390. Appellant Keith Brown was denied the right to vote while serving a prison term for armed robbery. *Id.* at 389-90. He challenged his disenfranchisement on the grounds that armed robbery was not specifically enumerated in the applicable statute and that the law in question was enacted with a racially discriminatory intent. *Id.*

121. *Id.* at 391. The state did not dispute this contention.

122. *Id.*

from the Alabama law in *Hunter* because Mississippi voters had affirmatively expanded their state's law without discriminatory intent, whereas the Alabama provision was shorn of discriminatory-intent crimes by the courts.<sup>123</sup>

The Fourth Circuit is in accord on this point. In *Allen v. Ellisor*, the court held that South Carolina's felon disenfranchisement laws were constitutional because they had been revised and amended since being enacted eighty years earlier.<sup>124</sup> The court was also persuaded by the defendant's argument that the amended laws post-date the Voting Rights Act and had thus been cleared by the Attorney General.<sup>125</sup> Similarly, in *Howard v. Gilmore*,<sup>126</sup> the court dismissed on appeal all claims brought by a convicted felon attempting to regain his right to vote.<sup>127</sup> The plaintiff could not show that the state acted with intent to discriminate on the basis of race as the Virginia statute in question was enacted in 1830, predating black enfranchisement, nor could the plaintiff demonstrate any connection between felon disenfranchisement and race.<sup>128</sup> Finally, in *Perry v. Beamer*,<sup>129</sup> the district court observed that Virginia had disenfranchised felons since 1830, and had agreed upon readmission to the Union in 1870, that

the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, *except as a punishment for such crimes as are now felonies at common*

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123. *Id.*

124. 664 F.2d 391, 399 (4th Cir. 1981). The court stated that the plaintiff had not only failed to introduce any evidence regarding discriminatory intent in the original statute, but also neglected to address the state's felon disenfranchisement laws as amended, referring only to the original provision. *Id.*

125. *Id.* Section Five of the Voting Rights Act includes a pre-clearance provision whereby certain jurisdictions with a history of discrimination and low voter registration figures must submit any changes to a voting "qualification, prerequisite, standard, practice, or procedure" to the Attorney General or U.S. District Court for the District of Columbia. 42 U.S.C. § 1973(c) (2000); *see also* Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69, 69 & n.5 (2003) (explaining the requirements of pre-clearance).

126. 205 F.3d 1333 (4th Cir. 2000) (unpublished table decision).

127. *Howard v. Gilmore*, No. 99-2285, 2000 WL 203984, at \*1 (4th Cir. Feb. 23, 2000) (emphasis added). Plaintiff brought claims under the First, Fourteenth, Nineteenth, and Twenty-fourth Amendments, as well as under the Civil Rights Act of 1964 and the Voting Rights Act of 1965. *Id.*

128. *Id.*

129. 933 F. Supp. 556 (E.D. Va. 1996).



law . . . .<sup>130</sup>

Following the Fourteenth Amendment by just two years, the framers were silent if they objected, not just to Virginia's provision, but to the "similar, or identical" provisions imposed on each Confederate state upon readmission.<sup>131</sup>

The Supreme Court addressed how a plaintiff may establish a violation of the Fourteenth Amendment in *White v. Regester*.<sup>132</sup> In 1973, plaintiffs challenged Texas's redistricting plan for the state House of Representatives on the basis that it diluted the voting strength of minorities by creating large variations in the size of populations between districts and by establishing multi-member districts in two counties.<sup>133</sup> The claims were grounded in the equal protection guarantee of the Fourteenth Amendment.<sup>134</sup> *White* required the plaintiffs to produce proof of invidious discrimination; it was their

burden . . . to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.<sup>135</sup>

The Court did not find invidious discrimination in the population variances,<sup>136</sup> but upheld the dismantling of the multi-member districts given the history of discrimination and its lingering effects on "education, employment, economics, health, [and] politics" in those localities.<sup>137</sup>

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130. *Id.* at 559 (quoting Act of Jan. 26, 1870, ch. 10, 16 Stat. 62, 63). *See supra* notes 39-44 and accompanying text.

131. *Perry*, 933 F. Supp. at 559.

132. 412 U.S. 755 (1973).

133. *Id.* at 756.

134. *Id.* at 763.

135. *Id.* at 765-66.

136. *Id.* at 763.

137. *Id.* at 767-69. The court wrote:

Surveying the historic and present condition of the Bexar County Mexican-American community . . . the Bexar community, along with other Mexican-Americans in Texas, had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about twenty-eight contiguous census tracts in the city of San Antonio. Over seventy-eight percent of Barrio residents were Mexican-Americans, making up twenty-nine percent of the county's total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult,

*Nipper v. Smith* elaborated on the *White* decision, remarking that,

the Supreme Court approved the district court's use of several objective factors to determine whether the plaintiffs had met this burden of proof. Those factors included the state's history of official racial discrimination; the use of certain voting structures that, although not in themselves improper or invidious, nevertheless enhanced the opportunity for racial discrimination; the influence of all-white political organizations over the process; and the use of overt racial campaign tactics to defeat candidates supported by the black community.<sup>138</sup>

The issue of the scope of Congress's remedial powers under the Fourteenth Amendment arose in *City of Boerne v. Flores*<sup>139</sup> in 1993.<sup>140</sup> The Landmark Commission and City Council of Boerne, Texas denied a building permit to the Archbishop of San Antonio to expand a mission-style church because it was part of a historic district.<sup>141</sup> The Archbishop sued under the Religious Freedom Restoration Act (RFRA),<sup>142</sup> which prohibited "[g]overnment" from "substantially burden[ing]" free exercise of religion absent proof the burden was a compelling interest and was the "least restrictive means of furthering" the interest.<sup>143</sup> Congress relied on its enforcement powers under the Fourteenth Amendment to impose RFRA on the states.<sup>144</sup> The Court noted that Congress was not reacting to and did not document any "widespread pattern of religious discrimination."<sup>145</sup> For Congress to act, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."<sup>146</sup> The Court thus struck down RFRA.<sup>147</sup>

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particularly, the court thought, with respect to the political life of Bexar County. "(A) cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas . . ."

*Id.* at 767-68 (quoting *Graves v. Barnes*, 343 F. Supp. 704, 728-31 (W.D. Tex. 1972)).

138. 39 F.3d 1494, 1519 (11th Cir. 1994).

139. 521 U.S. 507 (1997).

140. Karlan, *supra* note 74, at 725.

141. *Boerne*, 521 U.S. at 511-12.

142. 42 U.S.C. § 2000bb (1993).

143. *Boerne*, 521 U.S. at 515-16 (quoting § 2000bb-1).

144. *Id.* at 516.

145. *Id.* at 531. The Court elaborated further on this point in *Board of Trustees of University of Alabama v. Garrett*, stating that Congress must "identify the "history and pattern" of unconstitutional . . . discrimination" to be remedied. 531 U.S. 356, 368 (2001), discussed in *Muntaqim v. Coombe*, 366 F.3d 102, 120 (2d Cir. 2004).

146. *Boerne*, 521 U.S. at 520.

147. *Id.* at 511.

### E. Judicial Challenges Under the Voting Rights Act and Congressional Action

The Supreme Court limited the effect of the Voting Rights Act in 1980 when it required intent to be proven for a violation.<sup>148</sup> In *City of Mobile, Alabama v. Bolden*, the city's black residents challenged the at-large voting system for electing city commissioners on the grounds that it diluted their voting strength.<sup>149</sup> The Supreme Court held that Section Two of the Voting Rights Act "no more than elaborates" on the Fifteenth Amendment.<sup>150</sup> The Amendment did not confer a new right of suffrage on anyone; rather, it granted a new right to vote that cannot be infringed due to discrimination based on race, which Congress is empowered to protect.<sup>151</sup> It was already well established that a facially neutral law is only a violation of the Fifteenth Amendment if it is motivated by discriminatory intent.<sup>152</sup> The same holds true for claims brought under the Fourteenth Amendment; it is a "basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause."<sup>153</sup> Thus, in its decision, the Court read an intent requirement into Section Two of the Voting Rights Act.<sup>154</sup>

The new intent requirement established in *Bolden* was unpopular because of the burden it placed on plaintiffs.<sup>155</sup> Reaction in Congress came

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148. Price, *supra* note 70, at 385.

149. 446 U.S. 55, 58 (1980).

150. *Id.* at 60-61.

151. *Id.* at 61-62; *see also Ex parte Yarbrough*, 110 U.S. 651 (1884); *Neal v. Del.* 103 U.S. 370 (1880); *United States v. Cruikshank*, 92 U.S. 542 (1875).

152. *See Bolden*, 446 U.S. at 62-63; *see also Wright v. Rockefeller*, 376 U.S. 52 (1964) (upholding a gerrymander because discriminatory intent was not proven); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (deeming racially gerrymandered election districts unconstitutional because they were intended to dilute the black vote); *Guinn v. United States*, 238 U.S. 347 (1915) (striking down a grandfather clause because it lacked any reasonable basis and had no purpose but to avoid the Fifteenth Amendment).

153. *Bolden*, 446 U.S. at 66.

154. *See Price*, *supra* note 70, at 385.

155. *See Portugal*, *supra* note 12, at 1328. The Senate Report accompanying the 1982 amendments to the Voting Rights Act comments on the changes:

The proposed amendment to Section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*. In pre-*Bolden* cases plaintiffs could prevail by showing that a challenged election law or procedure, in the context of the total circumstances of the local electoral process, had the result of denying a racial or language minority an equal chance to participate in the electoral process. Under this results test, it was not necessary to demonstrate that the challenged election law or procedure was designed or maintained for a discriminatory purpose. In *Bolden*, a plurality of the Supreme Court broke with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring

in the form of an amendment to the Voting Rights Act just two years later, in 1982.<sup>156</sup> The revised Section Two has a “results test”:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .<sup>157</sup>

A violation is proven if “based on the totality of the circumstances, it is shown that . . . members [of protected racial minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>158</sup> This may be due to either an individual’s denial of the vote based on race or dilution of a group’s vote based on race.<sup>159</sup>

The Senate Report accompanying the 1982 amendments included a list of “typical factors” that may be relevant in determining whether Section Two has been violated in the totality of the circumstances.<sup>160</sup> These include any history of official discrimination related to voting rights; racial

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proof of discriminatory purpose. The committee has concluded that this intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives. In our view, proof of discriminatory purpose should not be a prerequisite to establishing a violation of Section 2 of the Voting Rights Act. Therefore, the committee has amended Section 2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process, i.e., by meeting the pr[e]-*Bolden* results test.

S. REP. NO. 97-417, at 15-16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 192-93.

156. Portugal, *supra* note 12, at 1328.

157. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973(a)) (emphasis added).

158. 42 U.S.C. § 1973(b) (1965). Subsection (b) reads in full:

A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b) (1965).

159. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671 (2001).

160. *Muntaqim v. Coombe*, 366 F.3d 102, 114 n.14 (2d Cir. 2004).

polarization in voting; voting laws or practices such as large election districts that can be used for discrimination; access to the candidate slating process; ongoing effects of discrimination in “education, employment and health” affecting political participation; racial appeals in campaigns; election of minorities to public office; lack of responsiveness by elected officials to minority concerns; and the policies underlying any voting law or practice.<sup>161</sup> These factors were derived from *White*.<sup>162</sup>

The Supreme Court had the opportunity to consider the 1982 amendments in *Thornburg v. Gingles*.<sup>163</sup> Black voters in North Carolina challenged the use of multi-member districts in a reapportioned legislative districting plan, claiming it violated their ability to “elect representatives of their choice” in violation of the amended Section Two of the Voting Rights Act.<sup>164</sup> After the suit was filed, but before trial, Congress amended Section Two of the Act to remove any intent requirement established by *Bolden* and instead allow a violation to be proven by discriminatory effect.<sup>165</sup> When examining the totality of the circumstances for an alleged Section Two violation of the Act, the Court in *Thornburg* cautioned that the “typical factors” identified by the Senate were not exhaustive.<sup>166</sup> The 1982 amendments returned the legal standard to the pre-*Bolden* “results test” of *White*.<sup>167</sup> Except for one district, the Court affirmed the lower court’s ruling that the totality of the circumstances and multi-member voting districts constituted a violation of Section Two of the Voting Rights Act because it impaired the ability of black voters to “elect representatives of

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161. S. REP. NO. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07.

162. “These factors are derived from the analytical framework used by the Supreme Court in *White*, as articulated in *Zimmer*.” S. REP. NO. 97-417, at 28 n.113. See *supra* notes 132-138 and accompanying text for a discussion of *White v. Regester*, 412 U.S. 755 (1973); see also *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

163. 478 U.S. 30 (1986).

164. *Id.* at 34-35.

165. *Id.* at 35.

166. *Id.* at 45. *Thornburg* distilled the Senate report factors to the two most important for vote dilution claims in the context of multi-member electoral districts: “[R]acially polarized voting and minority electoral success.” Shapiro, *supra* note 63, at 559 n.122. It established a three-prong test for establishing a violation under the Voting Rights Act: (1) the minority group must be “sufficiently large and geographically compact to constitute a majority of a single-member district,” (2) the group must be “politically cohesive,” and (3) the “majority had to vote as a bloc so that it ‘usually . . . defeat[ed] the minority’s preferred candidate.’” *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. at 50-51). The *Gingles* test, however, probably only applies to the context of districting, not felon disenfranchisement. *Id.* (citing BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 59 (1992)).

167. *Thornburg*, 478 U.S. at 40 n.8.

their choice.”<sup>168</sup> The Court considered socioeconomic factors such as income, education, and living conditions.<sup>169</sup>

The same year as *Thornburg*, the Sixth Circuit directly examined felon disenfranchisement in the totality of the circumstances context. In *Wesley v. Collins*,<sup>170</sup> an African-American convict brought suit challenging his disenfranchisement under Tennessee law as a violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act.<sup>171</sup> The Sixth Circuit found no violation of the Voting Rights Act despite the presence of some plus factors—including disparate impact on blacks and a history of discrimination—cutting in favor of discriminatory effect, but not in the totality of the circumstances.<sup>172</sup> Other factors tipped the balance in the other direction, foremost among which was the fact that there was a “legitimate and compelling rationale” for disenfranchising felons.<sup>173</sup> After all, a felon’s right to vote is not fundamental.<sup>174</sup>

#### F. The Status and Impact of Felon Disenfranchisement Today

Today, forty-eight states have some sort of felon disenfranchisement law

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168. *Id.* at 80.

169. *Id.* at 65-66.

To illustrate, assume a racially mixed, urban multimember district in which blacks and whites possess the same socioeconomic characteristics that the record in this case attributes to blacks and whites in Halifax County, a part of Senate District 2. The annual mean income for blacks in this district is \$10,465, and 47.8% of the black community lives in poverty. More than half— 51.5%—of black adults over the age of 25 have only an eighth-grade education or less. Just over half of black citizens reside in their own homes; 48.9% live in rental units. And, almost a third of all black households are without a car. In contrast, only 12.6% of the whites in the district live below the poverty line. Whites enjoy a mean income of \$19,042. White residents are better educated than blacks—only 25.6% of whites over the age of 25 have only an eighth-grade education or less. Furthermore, only 26.2% of whites live in rental units, and only 10.2% live in households with no vehicle available. As is the case in Senate District 2, blacks in this hypothetical urban district have never been able to elect a representative of their choice.

*Id.* (citations omitted).

170. 791 F.2d 1255 (6th Cir. 1986).

171. *Id.* at 1257.

172. *Id.* at 1261.

173. *Id.* The court noted the early Lockean rationale of many felon disenfranchisement laws, to explain that it is rational to exclude lawbreakers from the selection of lawmakers and law enforcers. *Id.* at 1261-62 (quoting *Green v. Board of Elections of New York*, 380 F.2d 445, 450 (2d Cir. 1967)).

174. *Id.* at 1261; see also *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (“Plaintiff’s argument fails because the right of convicted felons to vote is not ‘fundamental’.” That was precisely the argument rejected in *Richardson*”).

on their books; only Maine and Vermont have no such restriction.<sup>175</sup> The laws range from permanent disenfranchisement in Alabama<sup>176</sup> to automatic restoration of voting rights upon completion of prison time, parole or probation in New Mexico.<sup>177</sup> Three states permanently disenfranchise felons, ten temporarily disenfranchise them, and thirty-six deny the vote to paroled felons.<sup>178</sup> Even states that “permanently” disenfranchise convicted felons provide a mechanism for restoration of those rights, however, usually by application to a board of the executive branch.<sup>179</sup>

Currently, approximately 3.9 million people nationwide cannot vote due to felony convictions;<sup>180</sup> about one in fifty adults.<sup>181</sup> A side effect of high minority crime rates<sup>182</sup> is that those disenfranchised are disproportionately black or Hispanic.<sup>183</sup> Nearly 1.4 million black Americans (thirteen percent of all black men) cannot vote due to felon disenfranchisement.<sup>184</sup> In Florida and Alabama, nearly one-third of black men cannot vote.<sup>185</sup>

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175. See *One Person, No Vote*, *supra* note 6, at 1942. Convicted felons currently serving prison sentences can vote in Maine and Vermont. *Id.*

176. See *id.* at 1943-44.

177. *Id.* at 1949.

178. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (Sept. 2005), at <http://www.sentencingproject.org/pdfs/1046.pdf>.

179. See *One Person, No Vote*, *supra* note 6, at 1943. This comment does not explore the subject of restoration of voting rights and the process entailed therein, but it should be noted that such an option may be or have been available to many of the plaintiffs discussed here. See, e.g., *Muntaqim v. Coombe*, 366 F.3d 102, 106-07 n.6 (2d Cir. 2004); *Farrakhan v. Washington*, 338 F.3d 1009, 1021 (9th Cir. 2003); *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1307 (11th Cir. 2003); and *Wesley*, 791 F.2d at 1257.

180. See *supra* note 6 and accompanying text.

181. Pinaire et al., *supra* note 6, at 1520.

182. Causation of high crime rates by minorities is arguable, whether attributed to poverty, lack of education, or discrimination. But the statistics clearly establish that African Americans are arrested at disproportionate rates; in 2003, blacks accounted for 27.0 percent of arrests. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2003: UNIFORM CRIME REPORTS 288 (Oct. 27, 2004), available at [http://www.fbi.gov/ucr/cius\\_03/pdf/03sec4.pdf](http://www.fbi.gov/ucr/cius_03/pdf/03sec4.pdf). African Americans are also disproportionately victims of crime; for example, 47.8 percent of murder victims in 2003 were black. See *id.* at 17. African Americans, however, accounted for 12.3 percent of the American population in 2000. U.S. CENSUS BUREAU, 2000 U.S. CENSUS: PEOPLE QUICKFACTS, at <http://quickfacts.census.gov/qfd/states/00000.html> (last revised Sept. 30, 2005). “These disparities are probably due in part to underlying disparities in criminal behavior.” ADVISORY BOARD TO THE PRESIDENT’S INITIATIVE ON RACE, ONE AMERICA IN THE 21ST CENTURY: FORGING A NEW FUTURE: THE PRESIDENT’S INITIATIVE ON RACE: THE ADVISORY BOARD’S REPORT TO THE PRESIDENT 77 (Sept. 1998), at <http://clinton2.nara.gov/Initiatives/OneAmerica/PIR.pdf>.

183. Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 86 (2004); see also Price, *supra* note 70, at 374-75 & n. 17.

184. See Dugree-Pearson, *supra* note 7, at 370.

185. See Price, *supra* note 70, at 375.

African American men as a group account for nearly thirty-six percent of all those disenfranchised nationwide.<sup>186</sup>

## II. CONFLICT AND CHAOS IN THE CIRCUITS

### A. Second Circuit: *Baker v. Pataki* and *Muntaqim v. Coombe*

The Second Circuit first examined the issue of felon disenfranchisement in the context of the Voting Rights Act in *Baker v. Pataki*.<sup>187</sup> The district court refused to apply the results test of the 1982 amendments to the Voting Rights Act, and dismissed the case for failure to state a claim.<sup>188</sup> On appeal, five judges concluded that the results test of Section Two did not reach New York's law due to concerns that it would "raise serious constitutional questions regarding the scope of Congress' authority to enforce the Fourteenth and Fifteenth Amendments."<sup>189</sup> The court was evenly split, five-to-five.<sup>190</sup>

Judge Mahoney wrote that the framers of the Voting Rights Act and its 1982 amendments did not intend to outlaw felon disenfranchisement<sup>191</sup> and had not found that felon disenfranchisement laws were a pretext for racial discrimination.<sup>192</sup> The legislative history from 1965 of both houses of Congress was explicit on this point: "[The Voting Rights Act] 'does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony.'"<sup>193</sup> Further, applying Section Two's results test to a felon disenfranchisement statute would raise constitutional issues.<sup>194</sup> Although the test was enacted using the enforcement mechanisms of the Fourteenth and Fifteenth Amendments, it is "settled" that those amendments can be violated only where there is purposeful discrimination.<sup>195</sup> Where a statute may act to upset the normal balance of Constitutional federalism, a "clear statement" from Congress is required that that is in fact the intended

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186. *Id.* at 374-75.

187. 85 F.3d 919 (2d Cir. 1996) (5-5 decision).

188. *Id.* at 921. See *Baker v. Cuomo*, 842 F. Supp. 718 (S.D.N.Y. 1993); Portugal, *supra* note 12, at 1329. When the litigation began, then-Governor Mario Cuomo was the defendant; he was replaced by Governor George Pataki. *Baker*, 85 F.3d at 923 n.4.

189. *Baker v. Pataki*, 85 F.3d at 922.

190. *Id.* at 921.

191. *Id.* at 932.

192. *Id.* at 929.

193. *Id.* (quoting H.R. REP. NO. 89-439, at 11-12 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457).

194. *Id.* at 922.

195. *Id.* at 926.



result.<sup>196</sup> Applying the “plain statement rule,” since Congress was not unmistakably clear that it wanted to alter the balance between the state and federal governments, the Voting Rights Act should not be so construed.<sup>197</sup>

Judge Feinberg took the opposing view.<sup>198</sup> He contended that Congress is empowered to take remedial action under the Fourteenth Amendment where there is a racially discriminatory result.<sup>199</sup> Since the Court had already struck down a felon disenfranchisement law based on race under the Fourteenth Amendment in *Hunter v. Underwood*, he saw no reason why Congress could not use its enforcement powers under the Fourteenth and Fifteenth Amendments to “bar racially discriminatory results” under the Voting Rights Act.<sup>200</sup> The Reconstruction Amendments were meant to upset the balance between the state and federal governments and had already had that effect.<sup>201</sup> This renders the “plain statement rule” question moot, since the federal balance had already been altered.<sup>202</sup> Moreover, the Supreme Court has already said that the “plain statement rule” does not apply to Section Two of the Voting Rights Act and would, in any case, would only apply if the statute were vague, which it is not.<sup>203</sup>

The split in the *Baker* decision left the status of felon disenfranchisement unsettled in the Second Circuit. In *Muntaqim v. Coombe*, Jalil Muntaqim, a black felon, brought suit against New York State Correctional Services for denying him the right to vote.<sup>204</sup> He claimed New York’s statute violated Section Two of the Voting Rights Act because it “results in a denial or

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196. *Id.* at 930; see *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979); see also *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“[I]f Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’”) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

197. *Baker*, 85 F.3d at 922.

198. *Id.* at 934.

199. *Id.* at 937.

200. *Id.* For a discussion of the *Hunter* decision, see *supra* notes 109-118 and accompanying text.

201. *Baker*, 85 F.3d at 938; see *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *City of Rome v. United States*, 446 U.S. 156 (1980).

202. *Baker*, 85 F.3d at 938-39.

203. *Id.*; see also *Chisom v. Roemer*, 501 U.S. 380, 390-404 (1991) (interpreting of the Voting Rights Act without reference to the plain statement rule). Judge Mahoney’s response in *Baker* was that

[i]n light of the unequivocal language in *Gregory* that the plain statement rule does apply in the context of legislation passed pursuant to the enforcement clauses of the Civil War Amendments, we decline to interpret this omission—made without any attempt to distinguish *Gregory*—as an instruction to the lower courts to refrain from applying *Gregory* in the context of the Voting Rights Act.

85 F.3d at 932.

204. 366 F.3d 102, 104-05 (2d Cir. 2004).

abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>205</sup> In a unanimous decision, the court held that the Voting Rights Act did not reach New York’s felon disenfranchisement law, based on the Fourteenth Amendment’s explicit validation of the practice in Section Two, its widespread use since before the Civil War, and the principle that laws should not be construed to alter the balance of federalism unless Congress demands so explicitly.<sup>206</sup>

The court reasoned that the Voting Rights Act did not totally eliminate the need to show purposeful discrimination because the 1982 amendments eliminated the intent requirement of *Bolden* and returned to the pre-*Bolden* standard, which required proof of invidious discrimination, as the court held in *White v. Regester*.<sup>207</sup> Under *White*, the plaintiff does not have to show subjective discriminatory intent on the part of lawmakers, but instead “objective factors” are used to demonstrate an “electoral scheme interacts with racial bias in the community and allows that bias to dilute the voting strength of the minority group.”<sup>208</sup> Applying this standard, the court found that the statistics proffered by the plaintiff did not prove there was a relationship between being black and being disenfranchised; they only showed that a disproportionate number of blacks have been disenfranchised on the basis of their status as felons.<sup>209</sup> It cautioned, however, that evidence of discrimination in the “prosecution or sentencing of felons” might prove that felons have been disenfranchised on account of race.<sup>210</sup>

The Supreme Court denied certiorari in 2004.<sup>211</sup> After initially denying

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205. *Id.* at 104 (quoting Section Two of the Voting Rights Act, 42 U.S.C. § 1973(a)). Specifically, Muntaqim asserted that even if the New York legislature did not intend to discriminate, the statute violates the Voting Rights Act because it results in a “dilution” of black and Hispanic voters in New York City. He also claimed that the disparity in prison populations—blacks and Hispanics are 30% of the state’s population, but constitute eighty percent of its prisoners—is caused by discriminatory sentencing. Furthermore, he asserted that because more than eighty percent of blacks and Hispanics in state prisons hail from New York City and its vicinity, not only is he disenfranchised, but the minority vote in New York City is diluted; both are in violation of the Voting Rights Act. *Id.* at 105.

206. *Id.* at 104.

207. *Id.* at 116-17. The court cited the following statement to the Senate Judiciary Committee: “The proposed amendment to section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court’s decision in *Bolden*.” *Id.* at 117-18 (quoting S. REP. NO. 97-417, at 15 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 192).

208. *Id.* at 117 (quoting *Nipper v. Smith*, 39 F.3d 1494, 1520 (11th Cir. 1994) and discussing *White v. Regester*, 412 U.S. 755, 766-67 (1973)). See *supra* notes 132-138 and accompanying text.

209. 366 F.3d at 116-17.

210. *Id.* at 117.

211. *Muntaqim v. Coombe*, 125 S. Ct. 480 (2004), denying cert. to 366 F.3d 102 (2d Cir. 2004).

the petition,<sup>212</sup> the Second Circuit agreed in December 2004 to a rehearing en banc.<sup>213</sup>

### B. Ninth Circuit: *Farrakhan v. Washington*

The previous year, the Ninth Circuit came to a different conclusion in *Farrakhan v. Washington*.<sup>214</sup> In *Farrakhan*, minority felons in Washington sued the state for a violation of Section Two of the Voting Rights Act, claiming that the state's felon disenfranchisement law was a race-based denial of their right to vote.<sup>215</sup>

The district court granted summary judgment for the state because, although minorities were disproportionately disenfranchised, the cause of that disparity was "external" to the . . . law" and thus was not the causal link between the voter's qualification and the discriminatory result.<sup>216</sup> It found that while there was evidence of discrimination in the criminal justice system, it was insignificant in the totality of the circumstances because the statute was not enacted with discriminatory intent and the provision itself did not have that effect.<sup>217</sup> The felons appealed.<sup>218</sup>

In its analysis, the Ninth Circuit emphasized the totality of the circumstances, noting that the 1982 amendments to the Voting Rights Act had been intended by Congress to remove the plaintiff's burden of proving discriminatory intent.<sup>219</sup> If the felon disenfranchisement provision had to be discriminatory itself, there would be no point in examining the totality of the circumstances.<sup>220</sup> Such a standard would, in effect, reinsert a discriminatory intent requirement into the Voting Rights Act.<sup>221</sup> The court accepted the plaintiff's contention that the state had "tenuous policy justifications" for its felon disenfranchisement law.<sup>222</sup> It held that Section

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212. *Muntaqim v. Coombe*, 385 F.3d 793 (2d Cir. 2004), *denying reh'g en banc to* 366 F.3d 102 (2d Cir. 2004).

213. *Muntaqim v. Coombe*, 396 F.3d 95 (2d Cir. 2004), *granting reh'g en banc to* 366 F.3d 102 (2d Cir. 2004).

214. 338 F.3d 1009 (9th Cir. 2003).

215. *Id.* at 1011.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 1014-15.

220. *Id.* at 1018.

221. *Id.* at 1019.

222. *Id.* at 1020 n.15. The court noted with approval the district court's citation of *Dillenburg v. Kramer*, 469 F.2d 1222, 1224-26 (9th Cir. 1972), for its discussion of the policies underlying felon disenfranchisement. The court also agreed with the district court that although *Dillenburg* is no longer good law, it remains "applicable" in terms of its policy analysis. *Farrakhan*, 338 F.3d at 1020, n.15.

Two of the Voting Rights Act does reach felon disenfranchisement because it is a voting qualification and Section Two covers *any* voting qualification denying the right to vote in a discriminatory manner.<sup>223</sup> States may disenfranchise felons without violating the Fourteenth Amendment under *Richardson*, but when it results in the denial of the right to vote or in a vote dilution based on race, the Voting Rights Act provides a remedy for disenfranchised persons on that basis.<sup>224</sup> The court remanded the case to the district court for a re-examination of the interplay between discrimination in the criminal justice system and felon disenfranchisement within the totality of the circumstances.<sup>225</sup>

When the petition for a rehearing was denied,<sup>226</sup> Judge Kozinski noted in his dissent that the plaintiffs never produced any evidence except statistical disparities,<sup>227</sup> which was insufficient for a Section Two claim because “causation cannot be inferred from impact alone.”<sup>228</sup> Moreover, he argued that the Voting Rights Act did not reach felon disenfranchisement because Congress had no such intent, and applying it that expansively would raise constitutional questions about Congress’s remedial reach under the Fourteenth and Fifteenth Amendments.<sup>229</sup>

The intensity of Judge Kozinski’s dissent was fueled by his perception that the court had endangered the constitutionality of the Voting Rights Act.<sup>230</sup> He pointed out that while Section Two has been presumed constitutional, it has never actually been held to be so by the Supreme Court has never ruled on this question.<sup>231</sup> The Court has traditionally interpreted the Voting Rights Act narrowly based on constitutionality

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223. *Id.* at 1016.

224. *Id.* For a discussion of *Richardson v. Ramirez*, see *supra* notes 83-108 and accompanying text.

225. *Id.* at 1011-12.

226. *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004), *denying reh’g to* 338 F.3d 1009 (9th Cir. 2003).

227. *Id.* at 1117 (Kozinski, J., dissenting).

228. *Id.* at 1118; see *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586 (9th Cir. 1997) (requiring plaintiffs to prove more than statistical disparities in unrelated areas for a Section Two violation); *Ortiz v. City of Phila. Office of the City Comm’rs*, 28 F.3d 306 (3d Cir. 1994) (requiring a “causal connection” between the electoral qualification law and the discrimination resulting in a denial of voting rights); *Salas v. S.W. Tex. Junior Coll. Dist.*, 964 F.2d 1542 (5th Cir. 1992) (rejecting a Section Two claim because the disparity in school board voter turnout rates was not caused by discrimination).

229. *Farrakhan*, 359 F.3d at 1120-24.

230. *Id.* at 1124.

231. *Id.*; see *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O’Connor, J., concurring) (noting that the Court has assumed, without directly addressing, the constitutionality of the Voting Rights Act, and citing *Johnson v. De Grandy*, 512 U.S. 997 (1994) (Kennedy, J., concurring), and *Chisom v. Roemer*, 501 U.S. 380 (1991) (Kennedy, J., dissenting)).

concerns.<sup>232</sup>

### C. Eleventh Circuit: *Johnson v. Governor of Florida*

Litigation in the Eleventh Circuit has been closely scrutinized because the *Johnson*<sup>233</sup> case implicates election law in Florida, where President Bush clinched the presidency by such a small margin in 2000.<sup>234</sup> Unlike *Muntaqim* in New York and *Farrakhan* in Washington, *Johnson* was decided in a southern state whose history and laws are more likely to exhibit manifestations of past racism.

The Eleventh Circuit considered claims under both the Voting Rights Act and the Fourteenth Amendment in *Johnson v. Governor of Florida*.<sup>235</sup> The plaintiffs<sup>236</sup> alleged that the felon disenfranchisement provision in the Florida Constitution of 1868 was adopted with discriminatory intent, continues to carry that intent despite its re-enactment in 1968, and continues to have the intended discriminatory effect.<sup>237</sup>

For a violation of the Fourteenth Amendment to be established, discriminatory intent must be proven as a “substantial or motivating factor”;<sup>238</sup> disparate impact alone is not enough.<sup>239</sup> Because past intent can carry into the future despite amendment or lack of current intent, where current impact is still evident,<sup>240</sup> the court launched into an extensive

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232. *Farrakhan*, 359 F.3d at 1124; see *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 321-22 (2000) (refusing to adopt appellants’ interpretation of Section 5 of the Voting Rights Act because such a reading would exacerbate “federalism costs” to the point of raising constitutionality concerns).

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

234. See generally Litwin, *supra* note 10.

235. 353 F.3d at 1292.

236. A New York civil rights group, The Brennan Center, and Florida attorneys filed the case on behalf of disenfranchised felons in Florida. Litwin, *supra* note 10, at 236.

237. *Johnson*, 353 F.3d at 1293.

238. *Id.*; see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

239. *Johnson*, 353 F.3d at 1293. The court dramatically illustrated the disparate impact felon disenfranchisement has in Florida: More than 600,000 people cannot vote, and 10.5 percent of voting age black Floridians are in this group, as opposed to 4.4 percent of the non-black population. In all, one in six black men in Florida is disenfranchised. *Id.*

240. *Id.* at 1294. The decision cites a number of cases, most of which regard school desegregation, to make its point about original intent surviving through time. *Id.* at 1294 n.5 (citing *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1997); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989); *Brown v. Bd. of School Comm’rs*, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff’d*, 706 F.2d 1103 (11th Cir. 1983), *aff’d*, 464 U.S. 807 (1983); and *McMillan v. Escambia County*, 638 F.2d 1239 (5th Cir. 1981)). These cases can be distinguished on a number of grounds. For example, *Kirksey*, *Irby*, and *Brown* all imply “neutral” action or lack of serious amendment of the law in question. See *id.* The *Feeney* case “impl[ies], in an equal

discussion of the history of Florida's felon disenfranchisement provision.<sup>241</sup>

The *Johnson* court savaged Florida's 1868 felon disenfranchisement provision. It noted that when the state's constitutional convention was initially controlled by Radical Republicans, felon disenfranchisement was omitted.<sup>242</sup> However, moderate Republicans subsequently gained control of the convention and reinstated it.<sup>243</sup> The court noted that two convention delegates bragged about their restriction of the black vote, though it acknowledged that it was debatable whether these boasts referred to the Constitution as a whole or to the felon disenfranchisement provisions specifically.<sup>244</sup>

As Judge Kravitch pointed out in her dissent, however, Florida first denied felons the vote in 1838.<sup>245</sup> Almost thirty years later, in 1865, the state's first post-Civil War Constitution still denied blacks the vote and thus had to be replaced in 1868.<sup>246</sup> At least five black delegates at the 1868 convention supported the felon disenfranchisement provision.<sup>247</sup> Kravitch considered the racist comments of a few delegates to the 1868 convention as not contextually relevant to the specific provision in question.<sup>248</sup>

The majority's Voting Rights Act analysis used the results test, in view of the totality of the circumstances, including "social and historical conditions."<sup>249</sup> The court held that the district court erred when it rejected plaintiffs' voting rights claims by misapplying the totality of the

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protection claim, that the purpose of the current Massachusetts veterans preference law may be located in its 1896 origins despite a number of amendments, including eliminations and extensions." *Id.* The Massachusetts law was frequently amended only to include the veterans of new wars and conflicts being fought, however, but was otherwise "substantially the same." *Feeney*, 442 U.S. at 267. Further, the "purpose of the current . . . law" as regards the "women's requisitions" exemption, "dates back to the 1896 veterans' preference law and was retained in the law substantially unchanged until it was eliminated in 1971." *Id.* at 266 n. 22. *Johnson*, however, is distinguishable because it involved a law that was neither initially discriminatory nor was it substantially unchanged over time. *See infra* notes 340-347 and accompanying text. Furthermore, Judge Kravitch's dissent points out that these cited cases are inapposite because "this circuit has been reluctant to extend the education line of cases to other areas. As this court stated in *Burton v. City of Belle Glade*, 178 F.3d 1175 (11th Cir. 1999), school desegregation jurisprudence is unique and thus difficult to apply in other contexts." *Johnson*, 353 F.3d at 1313.

241. *Johnson*, 353 F.3d at 1294-96.

242. *Id.* at 1295.

243. *Id.*

244. *Id.* at 1296.

245. *Id.* at 1308.

246. *Id.* at 1309 (noting that the 1868 replacement still denied felons the right to vote).

247. *Id.*

248. *Id.* at 1309 n.2.

249. *Id.* at 1303-04.

circumstances standard to the evidence.<sup>250</sup> Thus, its conclusion that their disenfranchisement was due to their conviction as felons—not racial discrimination—was incorrect.<sup>251</sup>

The court rejected the contention that the Voting Rights Act does not reach felon disenfranchisement.<sup>252</sup> It explained that Section Two of the Fourteenth Amendment and the Voting Rights Act are compatible because non-discriminatory felon disenfranchisement laws that are racially neutral both on their face and as applied would pass muster.<sup>253</sup> In remanding the case, the court concluded that the taint of racism behind Florida's 1868 felon disenfranchisement provision constituted a violation of equal protection, unless it could be shown that it was cleansed by subsequent amendment.<sup>254</sup> It suggested that this could not be demonstrated, as there was no "legitimate policy reason" to have kept felon disenfranchisement in the 1968 constitution.<sup>255</sup>

Judge Kravitch's dissent attacked the majority's ruling on both Fourteenth Amendment and Voting Rights Act grounds.<sup>256</sup> She wrote that Florida's felon disenfranchisement law had been cleansed of any racist intent when it was reenacted by the constitutional convention of 1968.<sup>257</sup> She echoed *Muntaqim* and Judge Kozinski's dissent in the Eleventh District in stating that the Voting Rights Act was never intended to reach felon disenfranchisement—in either its 1965 or 1982 incarnations—and that the majority's interpretation would allow a statute to trump a constitutional amendment.<sup>258</sup>

The Eleventh Circuit vacated *Johnson* in July 2004 and granted a rehearing en banc.<sup>259</sup>

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250. *Id.* at 1304-05.

251. *See id.* at 1305.

252. *Id.* at 1306.

253. *Id.*

254. *Id.* at 1301.

255. *Id.* at 1301 n.16. The opinion claims that "a few courts" have proffered non-discriminatory reasons to deny suffrage to felons and cites *Green v. Board of Elections of New York*, 380 F.2d 445, 451 (2d Cir. 1967), and *Washington v. State*, 75 Ala. 582, 585 (1884). It then says "others" have questioned those rationales, citing Marshall's dissent in *Richardson v. Ramirez*, 418 U.S. 24, 79-82 (1974) (Marshall, J., dissenting), *Farrakhan v. Locke*, 987 F. Supp. 1304, 1312 (E.D. Wash. 1997), and *Stephens v. Yeomans*, 327 F. Supp. 1182, 1188 (D.N.J. 1970). It goes on to cite a number of law review articles, but no Supreme Court cases. *Id.*

256. *Johnson*, 353 F.3d at 1308.

257. *Id.* at 1309-14.

258. *Id.* at 1314-15.

259. *Johnson v. Governor of Fla.*, 377 F.3d 1163 (11th Cir. 2004), *granting reh'g to and vacating* 353 F.3d 1287 (11th Cir. 2003).

#### D. Current Status of the Conflict

In 2004, the Supreme Court denied certiorari to the *Farrakhan*<sup>260</sup> and *Muntaqim*<sup>261</sup> cases. Meanwhile, the Eleventh Circuit vacated its holding in *Johnson* and has granted a full rehearing en banc.<sup>262</sup> The Second Circuit followed suit in December 2004, granting a rehearing en banc for *Muntaqim*.<sup>263</sup> Whatever the outcome in the Eleventh Circuit, *Johnson* will almost assuredly reach the Supreme Court.<sup>264</sup> Indeed, while the Court was considering *Farrakhan* and *Muntaqim*, briefs were filed with the Court asking it to deny certiorari and instead wait for the *Johnson* case, as it may present a clearer presentation of the issue.<sup>265</sup>

### III. ANALYSIS

The confusion in the circuits reveals some of the underlying controversies regarding felon disenfranchisement. It is well established that felon disenfranchisement is permissible under the Fourteenth Amendment unless a law was enacted with discriminatory intent.<sup>266</sup> Less clear are the issues of whether the Voting Rights Act reaches felon disenfranchisement<sup>267</sup> and what is the proper standard for measuring when a felon disenfranchisement law has been cleansed of prior discriminatory intent. Opponents of felon disenfranchisement may well be disappointed in the results of their litigation strategy.<sup>268</sup> Such a failure will then refocus the

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260. *Farrakhan v. Wash.*, 125 S. Ct. 477 (2004), *denying cert. to* 338 F.3d 1009 (9th Cir. 2003).

261. *Muntaqim v. Coombe*, 125 S. Ct. 480 (2004), *denying cert. to* 366 F.3d 102 (2d Cir. 2004).

262. *Johnson*, 377 F.3d at 1163-64.

263. *Muntaqim v. Coombe*, 396 F.3d 95 (2d Cir. 2004), *granting reh'g in banc to* 366 F.3d 102 (2d Cir. 2004).

264. See Linda Greenhouse, *Supreme Court Declines to Hear 2 Cases Weighing the Right of Felons to Vote*, N.Y. TIMES, Nov. 9, 2004, at A19.

265. *Id.*

266. *Baker v. Pataki*, 85 F.3d 919, 923 (2d Cir. 1996). Judge Feinberg agreed on this point in his dissent, noting that "States have the right to disenfranchise felons; § 2 of the Fourteenth Amendment makes that clear. States, however, do not have the right to disenfranchise felons on the basis of race." *Id.* at 937 (Feinberg, J., dissenting).

267. See *Muntaqim v. Coombe*, 366 F.3d 102, 104 (2d Cir. 2004).

268. "To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is . . . unexceptionable." *Romer v. Evans*, 517 U.S. 620, 634 (1996) (citing *Davis v. Beason*, 133 U.S. 535 (1886)). Perhaps the first appearance of the strategy for eliminating felon disenfranchisement under the Voting Rights Act is Andrew Shapiro's note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, published in the 1993 Yale Law Journal. See generally Shapiro, *supra* note 63 (emphasis added). In his Note, Shapiro elucidated his "new litigation strategy." *Id.* at 543.

In part, this litigation strategy is a belated response to the intentionally racist use



issue on the policy rationales for the practice and move the issue back to its proper forum in the state legislatures.

#### A. The Voting Rights Act Does Not Reach Felon Disenfranchisement

The question is not whether Congress had the power to enact the Voting Rights Act, but whether the Voting Rights Act reaches felon disenfranchisement under Congress's powers.<sup>269</sup> States have primary responsibility for criminal law and for regulating elections.<sup>270</sup> If the provision in question is just a way of punishing felons, allowing the Voting Rights Act to reach it would invade the states' traditional jurisdiction.<sup>271</sup> In addition, it would be inconsistent for the framers of the Fourteenth Amendment to permit felon disenfranchisement in Section Two, but allow Congress to prohibit it without evidence of discrimination or discriminatory intent.<sup>272</sup>

Congress must have been aware of felon disenfranchisement when it passed the Voting Rights Act; thus, its silence cannot be interpreted as an intent to reach these laws.<sup>273</sup> Congressional reports from 1965 provide that tests for morality or good standing with regard to voting should be scrutinized, but felon disenfranchisement laws should not.<sup>274</sup> The Judiciary Committee stated that the "ban on historically discriminatory 'tests or devices,' including the prohibition on tests for 'good moral character'" did not implicate felon disenfranchisement laws.<sup>275</sup> Senator Tydings of Maryland remarked that felon disenfranchisement is of a different character than literary tests or other such tools. "Let me emphasize that [the Voting

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of criminal disenfranchisement throughout the South a century ago. In practical terms, it is a plan that relies on the fact that criminal disenfranchisement laws have a disproportionate impact on minority offenders. But the goal of this strategy, as stated at the outset of this Note, is not to make disenfranchisement laws "race neutral" or even primarily to reverse the disenfranchisement of nonwhite offenders. Rather, the goal is to harness the power of the Voting Rights Act's results test to attack criminal disenfranchisement laws where they are most vulnerable. If construed properly, the Act could go a long way toward abolishing criminal disenfranchisement and restoring the right to vote to a class of millions of powerless citizens.

*Id.* at 566. Roger Clegg describes Shapiro's article as a "key movement source." Clegg, *supra* note 14.

269. *Munqim*, 366 F.3d at 121.

270. *Id.* at 121-22.

271. *Id.* at 122.

272. *Id.*

273. *Id.* at 123-24.

274. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1316-17 (11th Cir. 2003).

275. *Baker v. Pataki*, 85 F.3d 919, 929 (2d Cir. 1996) (quoting S. REP. NO. 89-162, at 24 (1965), *reprinted in* U.S.C.C.A.N. 2508, 2562).

Rights Act] does not include a requirement that an applicant for voting or registration for voting be free of conviction of a felony or mental disability . . . . [t]hese grounds for disqualification are objective, easily applied, and do not lend themselves to fraudulent manipulation.”<sup>276</sup>

*Richardson*’s emphasis on the “controlling significance” of the framers’ intent<sup>277</sup> should be no less true in construing the Voting Rights Act than in construing the Fourteenth Amendment.

Critics point to Congress’s reaction after *Bolden* in amending the Voting Rights Act to eliminate any intent requirement for Section Two claims;<sup>278</sup> yet *Bolden* was not a felon disenfranchisement case.<sup>279</sup> Furthermore, nothing in the legislative history of the 1982 amendments indicates that Congress intended Section Two to reach felon disenfranchisement.<sup>280</sup>

Applying the Voting Rights Act to felon disenfranchisement does indeed “raise serious constitutional questions.”<sup>281</sup> In *Boerne*, the Supreme Court struck down a law because it expanded the scope of Congress’s remedial abilities under the Fourteenth Amendment.<sup>282</sup> Similarly, the results test of Section Two of the Voting Rights Act was enacted using the enforcement mechanisms of the Fourteenth and Fifteenth Amendments, yet it is “settled” that those amendments can only be violated where there is purposeful discrimination.<sup>283</sup> If the Voting Rights Act reaches felon disenfranchisement and Section Two of the Act does not require a showing of purposeful intent, its scope is broader than the Fourteenth or Fifteenth Amendments; consequently, the results test would reach conduct that does not necessarily violate those amendments.

Judge Feinberg wrote in *Baker* that Congress is empowered to take remedial action under the Fourteenth Amendment where there is a racially discriminatory result.<sup>284</sup> Further, he stated the Reconstruction Amendments were meant to upset the balance between the state and federal

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276. *Id.* at 930 (quoting 111 CONG. REC. S8,366 (1965)).

277. *See supra* note 97 and accompanying text.

278. *See supra* notes 154-162, 165 and accompanying text.

279. *Bolden* concerned an at-large voting system in municipal elections. *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 58 (1980).

280. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1317-18 (11th Cir. 2003). In *Baker v. Pataki*, Judge Mahoney stated that the framers of the Voting Rights Act of 1965 and of the 1982 amendments did not intend to outlaw felon disenfranchisement and did not find that felon disenfranchisement laws were a pretext for racial discrimination. *Baker*, 85 F.3d at 929-32; *accord Farrakhan v. Wash.*, 359 F.3d 1116, 1120 (9th Cir. 2004) (Kozinski, J., dissenting); *Muntaqim v. Coombe*, 366 F.3d 102, 115 (2d Cir. 2004).

281. *Baker*, 85 F.3d at 922.

282. *See supra* notes 139-147 and accompanying text.

283. *Baker*, 85 F.3d at 926 (Feinberg, J., concurring).

284. *Id.* at 937.

governments and already had that effect.<sup>285</sup> Yet *Boerne* instructs us that Congress may exercise its enforcement powers under the Reconstruction Amendments only when addressing a pattern of violations with a remedy that is congruent and proportional.<sup>286</sup> First, there must be a judicially protected right with a history and pattern of violations, documented by Congress, before Congress can enact appropriate legislation aimed at remedying it.<sup>287</sup> Congress has put forth no such evidence concerning felon disenfranchisement, or even claimed that such laws discriminate.<sup>288</sup> Instead, when Congress passed the National Voter Registration Act of 1993<sup>289</sup> to facilitate voter registration, it explicitly recognized felon status as a legitimate basis for a state to deny voting rights.<sup>290</sup> Second, the remedy must be congruent and proportional.<sup>291</sup> The Voting Rights Act as applied to felon disenfranchisement laws is too broad, too blunt and too attenuated.<sup>292</sup> Judge Kozinski's dissent in *Farrakhan*, stating that the majority has endangered the constitutionality of the Voting Rights Act, may prove prescient.<sup>293</sup>

### **B. Felon Disenfranchisement Passes Muster Under the Voting Rights Act**

Even assuming that the Voting Rights Act reaches felon disenfranchisement, denying felons suffrage would still pass muster because statistical evidence of disparate impact alone is not enough for a violation. Moreover, a causal connection between felon disenfranchisement laws and discrimination based on race cannot be demonstrated in the totality of the circumstances.

#### *1. Causation*

As stated in *Farrakhan*, "causation cannot be inferred from impact alone."<sup>294</sup> Although the word "results" does appear in the Voting Rights

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285. *Id.* at 938; see *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996); *City of Rome v. United States*, 446 U.S. 156, 179 (1980).

286. *Muntaqim*, 366 F.3d at 120; see *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

287. *Muntaqim*, 366 F.3d at 120; see *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

288. *Muntaqim*, 366 F.3d at 125.

289. 42 U.S.C. §§ 1973gg (1993).

290. *Muntaqim*, 366 F.3d at 125-26.

291. *Id.* at 120.

292. *Id.* at 124-25.

293. *Farrakhan v. Washington*, 359 F.3d 1116, 1116-17 (9th Cir. 2004) (Kozinski, J., dissenting).

294. *Id.* at 1118; see *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109

Act, it does not proscribe all voting qualifications which have a racially disproportionate impact.<sup>295</sup> There must be a connection between the voter qualification and the alleged discrimination that results in the denial of the right to vote.<sup>296</sup>

None of the recent circuit cases have demonstrated this connection. *Farrakhan* and *Johnson* both purported to, but the rancorous dissents to both decisions cast doubt on these claims.<sup>297</sup> For example, the plaintiffs in *Farrakhan* did not dispute five of the eight claims the state made in its statement of material facts to support its motion for summary judgment.<sup>298</sup> Instead, “[t]o substantiate their vote denial claim . . . [p]laintiffs presented statistical evidence of the disparities in arrest, bail and pre-trial release rates, charging decisions, and sentencing outcomes in certain aspects of Washington’s criminal justice system.”<sup>299</sup>

There may be a correlation between being black and being a disenfranchised felon but that does not mean it is because of race, only that more African-Americans are disenfranchised on account of their status as felons.<sup>300</sup> Felons are disenfranchised upon their “conscious decision” to break the law, “for which they assume the risks of detection and punishment,” not because of their race.<sup>301</sup> This is the fundamental point—it is felons, not minorities, that are disenfranchised by these laws. The high percentage of minorities in prison is a cause for serious concern, but the “ability of the judiciary to confront the underlying reasons for this phenomenon is limited.”<sup>302</sup>

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F.3d 586 (9th Cir. 1997).

295. *Muntaqim*, 366 F.3d at 116. “A violation of § 1973 occurs only when ‘a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.’” *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

296. *Farrakhan*, 359 F.3d at 1118 (Kozinski, J., dissenting).

297. Kozinski’s dissent in *Farrakhan* claimed that the plaintiff had “produced only evidence of statistical disparities in an area external to voting.” *Farrakhan*, 359 F.3d at 1117 (Kozinski, J., dissenting). In *Johnson*, Kravitch’s dissent responded to the majority’s extensive recitation of the racial impact of felon disenfranchisement in Florida by emphasizing that plaintiff’s evidence was entirely comprised of statistical disparities, insufficient to establish a causal connection. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1318 n.16 (11th Cir. 2003) (Kravitch, J., dissenting).

298. *Farrakhan v. Washington*, 338 F.3d 1009, 1013 (9th Cir. 2003). The claims disputed by the plaintiff regarded the operation of felon disenfranchisement laws and American Indians. *Id.*

299. *Id.*

300. *Muntaqim*, 366 F.3d at 116-17.

301. *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

302. *Baker v. Cuomo*, 842 F. Supp. 718, 720 (S.D.N.Y. 1993).

## 2. Totality of the Circumstances

Because a causal connection between felon disenfranchisement laws and intentional discrimination resulting in a loss of the right to vote or voting dilution on account of race is difficult to establish, some courts have attempted to shoehorn their analyses into the rubric of “totality of the circumstances” analysis. This, however, is entirely vague,<sup>303</sup> and leads to incongruous results depending on what is encompassed within the meaning of the phrase “totality of the circumstances.”

The Senate Report provides a list of “typical factors” to be considered in the totality of the circumstances test, but it is not exhaustive and is lacking a mechanical formula for applying them.<sup>304</sup> Further, the list is not controlling, leading to analyses which are highly individualistic and fact-intensive.<sup>305</sup> *Johnson* noted that the plaintiffs produced evidence as to racially-polarized voting, a history of official discrimination, the use of voting procedures to reduce minority participation, and disparate effects from education, employment, and health.<sup>306</sup> In contrast, the *Farrakhan* court considered discrimination in the criminal justice system in the context of the discrimination under the “education, employment, and health” factor.<sup>307</sup> It found a violation given how the challenged voting practice “interacts with external factors such as ‘social and historical conditions’” that result in disenfranchisement on the basis of race.<sup>308</sup>

While the Senate Report’s list of “typical factors” are not exhaustive, if discrimination in the criminal justice system is as pervasive as alleged, it is worth noting that Congress did not include it on the list.<sup>309</sup> Even if there is evidence of discrimination in the criminal justice system, felon disenfranchisement laws would not violate Section Two of the Voting Rights Act because the discrimination would be in the criminal justice system, not in the disenfranchisement statutes themselves. Discrimination in the criminal justice system does not establish that blacks have “less opportunity . . . to elect legislators of their choice.”<sup>310</sup> In *White*<sup>311</sup> and

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303. See *Goosby v. Town Bd.*, 180 F.3d 476, 500 (2d Cir. 1999) (Leval, J., concurring) (noting that “[t]his standard is exceptionally vague. . . . [And the] specified factors [in the Senate Report] . . . give little guidance as to what constitutes a violation of the act.”), *cert. denied*, 528 U.S. 1138 (2000).

304. *Wesley*, 791 F.2d at 1260.

305. *Id.*

306. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1306 (11th Cir. 2003).

307. *Farrakhan v. Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003).

308. *Id.* at 1011-12.

309. *Muntaqim v. Coombe*, 366 F.3d 102, 113-14 (2d Cir. 2004) (noting that the criminal justice system was not “isolated” as a factor by Congress).

310. See 42 U.S.C. § 1973(b) (2005).

*Gingles*, the Supreme Court recognized that discrimination in education, employment, and health can lead to violations of the Voting Rights Act.<sup>312</sup> Both of these cases are more than twenty years old, neither was a criminal case, and both had a multitude of other factors present.<sup>313</sup> In contrast, in *Muntaqim*, *Farrakhan* and *Johnson*, none of the plaintiffs pleaded other factors. Indeed, they could not have done so because a quick survey of typical factors such as racially-polarized voting, access to candidate slating procedures, large election districts, racial appeals in campaigns, and the responsiveness of elected officials *inter alia*, reveals them to be substantially related to elections and voting directly—not to crime or the criminal justice system. *White* and *Gingles* each dealt with the effects of discrimination on voting and elections directly, not through an intermediate step, such as the criminal justice system.<sup>314</sup>

The “totality of the circumstances” analyses employed in *Johnson* and *Farrakhan* were less than total. Both courts failed to consider that the history of felon disenfranchisement makes it fundamentally different than voting qualifications which were expressly used to deny black suffrage.<sup>315</sup> As the *Baker* court noted, “Prior to 1890, apparently no Southern State required proof of literacy, understanding of constitutional provisions or of the obligations of citizenship, or good moral character, as prerequisites to voting. . . . However . . . these tests and devices were soon to appear in most of the States with large Negro populations.”<sup>316</sup> Yet at the time the

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311. *White v. Regester*, 412 U.S. 755, 767-69 (1973).

312. *Thornburg v. Gingles*, 478 U.S. 30, 65-66 (1986); see *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977).

As proof of denial of access to the Hinds County political process, the plaintiffs presented substantial unrefuted evidence showing a past record of racial discrimination engaged in by the county and of official unresponsiveness to the needs of the county’s black citizens . . . . We will not restate [the evidence] but briefly note that it included the existence of these factors: no black’s [sic] ever having been elected to Hinds County office; poll taxes and literacy tests as impediments to voting; segregation principles adopted by political parties; property ownership requirements to run for offices; disproportionate education, employment, income level and living conditions between whites and blacks in Hinds County; alleged bloc voting; requirement of a majority for election; prohibition against single-shot voting; systematic exclusion of blacks from juries; levy and maintenance of taxes for a dual school system. In short plaintiffs proved the presence in Hinds County of almost every significant factor indicative of denial of access to the political process.

*Kirksey*, 554 F.2d at 143-44.

313. For discussions of *White* and *Gingles*, see *supra* notes 132-138, 163-169 and accompanying text.

314. See *id.*

315. See *supra* notes 219-229, 245-251 and accompanying text.

316. *Baker v. Pataki*, 85 F.3d 919, 929 (2d Cir. 1996) (quoting H.R. REP. NO. 89-439, at

Fourteenth Amendment was ratified in 1868, eighty percent of all states had already disenfranchised felons.<sup>317</sup> The purpose of those laws could not have been to evade the Amendment.<sup>318</sup> Further, there are “legitimate and compelling rationale[s]” for disenfranchising felons.<sup>319</sup>

Opponents of felon disenfranchisement portray the practice as originating *sui generis* in the South as part of an overarching and continuing scheme to subjugate blacks.<sup>320</sup> They are willfully misrepresenting history.<sup>321</sup> Today, twelve states fully disenfranchise felons, and only four are former Confederate states.<sup>322</sup> Some of the “harshest” of these laws are in states that were never part of the Confederacy and have very small black populations.<sup>323</sup> For example, Wyoming’s population is only 0.8 percent black<sup>324</sup> and Iowa’s only 2.1 percent.<sup>325</sup> Moreover, none of the laws that were enacted in the South after

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11-12 (1965), reprinted in U.S.C.C.A.N. 2437, 2443).

317. Clegg, *supra* note 14.

318. Muntaqim v. Coombe, 366 F.3d 102, 123 (2d Cir. 2004).

319. Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986). For a discussion of *Wesley*, see the text accompanying notes 170-174.

320. See, e.g., *One Person, No Vote*, *supra* note 6, at 1944 (“Florida, like Alabama, has denied the franchise to convicted felons since Reconstruction.”). While perhaps technically true, this proposition ignores the promises regarding felon disenfranchisement in Florida’s 1838 and 1865 constitutions. See *supra* notes 245-246. Additionally, felon disenfranchisement in Alabama dates back to 1819. See *supra* note 19.

321. See Clegg, *supra* note 14.

Brent Staples, the ‘Editorial Observer’ for the New York Times, wrote recently that ‘legal scholars attribute [felon disenfranchisement] to this country’s difficulties with race.’ This summer the Washington Post said these laws ‘are a vestige of a time when states sought to discourage blacks from voting.’ USA Today had earlier editorialized, ‘Voting bans are rooted in the nation’s racist past.’ And recently a Reuters story (corrected after I talked with them) asserted that these laws ‘have roots in the post-Civil War 19th century and were aimed at preventing black Americans from voting.’ But it is simply not true that the reason felons are disenfranchised in the United States is because of a desire to keep blacks from voting. The reason our *bien pensants* are making assertions to the contrary is perhaps because they are being misled by the well-funded and ubiquitous felon-reenfranchisement movement.

*Id.*

322. Bill “to Secure the Federal Voting Rights of Persons Who Have Been Released from Incarceration”: Hearing on H.R. 906 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. (1999) (statement of Roger Clegg, Vice President and General Counsel, Center for Equal Opportunity), [hereinafter Clegg, *H.R. 906 Statement*], available at <http://www.ceousa.org/clegg2.html> (Oct. 21, 1999).

323. See Clegg, *supra* note 14.

324. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: WYOMING, available at <http://quickfacts.census.gov/qfd/states/56000.html> (last revised Sept. 30, 2005).

325. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: IOWA, available at <http://quickfacts.census.gov/qfd/states/19000.html> (last revised Sept. 30, 2005).

Reconstruction with the intent to disenfranchise blacks are still on the books today.<sup>326</sup>

### B. The Fourteenth Amendment is Controlling

If the Voting Rights Act does not reach felon disenfranchisement, then the Fourteenth Amendment is the controlling standard for such laws. The definitiveness of the *Richardson* court's "affirmative sanction" seems to have foreclosed all challenges under the Fourteenth Amendment, unless discriminatory intent can be shown.<sup>327</sup>

The proper balance has already been struck between legitimate felon disenfranchisement and that which is unconstitutionally motivated by racial bias. *Richardson v. Ramirez* allows the states to enact felon disenfranchisement laws as expressly provided for in the Fourteenth Amendment.<sup>328</sup> *Hunter v. Underwood* constrains this practice, so that where a state has disenfranchised felons as a method of surreptitiously denying black people the right to vote, it can be struck down.<sup>329</sup> Prior intent, however, can be undone by subsequent amendment.<sup>330</sup> This is not only a reasonable approach, but one that is consistent with the letter and the spirit of the Fourteenth Amendment, our history, and with so-called "evolving standards of decency."<sup>331</sup> It is important to note that "past discrimination . . . in the manner of original sin, [cannot] condemn governmental action that is not itself unlawful,"<sup>332</sup> and that forty-eight states currently practice felon disenfranchisement.<sup>333</sup> It should continue as the constitutional standard.

The question then becomes: "When has a racially tainted law been cleansed of prior discriminatory intent?" In *Hunter v. Underwood*, the Supreme Court affirmed a lower court ruling that the proper standard for a

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326. See Clegg, *supra* note 14.

327. See Price, *supra* note 70, at 383-84.

328. 418 U.S. 24 (1974). See *supra* notes 95-98 and accompanying text.

329. 471 U.S. 222 (1985). See *supra* notes 109-118 and accompanying text.

330. See generally Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998). For a discussion of *Fordice*, see *supra* notes 119-123 and accompanying text.

331. Trop v. Dulles, 356 U.S. 86, 101 (1958). Interestingly, the now familiar phrase "evolving standards of decency" originates in a case that cites felons as an example of a permissible reason for disenfranchisement. *Id.* at 96-97 ("A person who commits bank robbery, for instance, loses his right to liberty and often his right to vote . . . [B]ecause the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a[n] . . . exercise of the power to regulate the franchise."); *cf. supra* note 76 and accompanying text.

332. City of Mobile, Ala. v. Bolden, 446 U.S. 55, 74 (1980).

333. See *supra* note 175 and accompanying text.



violation of the Fourteenth Amendment in the context of mixed motives was a preponderance of the evidence that discrimination was a “substantial or motivating factor,” unless it can be shown the same law would have been enacted regardless.<sup>334</sup>

Because *Hunter* did not decide whether or not revisions to Alabama’s felon disenfranchisement law by the courts had expunged the original taint of racism, this question was left open.<sup>335</sup> *Fordice* used this opening to find that Mississippi’s felon disenfranchisement law had been sanitized of the discriminatory intent evident at the time of its enactment.<sup>336</sup> The court focused on the fact that the law was broadened in 1968 when “white” crimes, such as rape and murder, were added to the list.<sup>337</sup> This change was approved by both houses of the state legislature and subsequently by the voters.<sup>338</sup>

The *Johnson* court used *Hunter* to set an impossibly high bar for cleansing discriminatory intent.<sup>339</sup> Florida’s original felon disenfranchisement law predates black enfranchisement, thus precluding any racial intent in the original law as only white men had the franchise at that time.<sup>340</sup> Yet the court glossed over the law’s 1838 origins and its inclusion in the 1865 constitution and instead discussed the law as it dated from the state constitution of 1868, merely remarking that a law can be infected with discriminatory intent at any stage.<sup>341</sup> Despite the temporary omission of felon disenfranchisement from the early drafts of the 1868 convention, it is reasonable to view its subsequent inclusion as a continuation of the 1838 and 1865 laws.

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334. 471 U.S. at 224-25 (1985).

335. *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998).

336. *Id.* at 391-92. *See supra* notes 119-123 and accompanying text.

337. *Fordice*, 157 F.3d at 391.

338. *Id.*

339. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1311-12 (11th Cir. 2003) (Kravitch, J., dissenting).

340. *Id.* at 1309.

341. *Id.* at 1294-95. Judge Kravitch, in dissent, stated that the court decided the wrong issue: It was Florida’s constitution of 1968, not 1868, that was before the court. *Id.* at 1311 n.4. Moreover, she stated that the majority’s interpretation of the 1868 constitution is flawed, though it can be assumed there was “some racial animus” present in 1868. *Id.* at 1310. She noted that Florida first denied felons the vote in 1838, which precludes any racial intent as only white men had the franchise at that time. *Id.* at 1309. Florida’s first post-Civil War Constitution in 1865 still denied blacks the vote and thus had to be replaced in 1868, but both also denied felons the vote. *Id.* Further, at least five black delegates at the 1868 convention supported the felon disenfranchisement provision. *Id.* She also pointed out that the racist comments of a few delegates to the 1868 convention, to the effect that they had been successful in their enterprise to deny suffrage to blacks, are not contextually relevant to the specific provision in question. *Id.* at 1309 n.2.

Even if discrimination was a motivating factor in 1868, however, Florida reenacted its felon disenfranchisement law in its 1968 constitution. The majority in *Johnson* characterized the re-enactment as a casual discussion by a subcommittee of the convention, which was not enough to cleanse the 1868 constitution's intentional discrimination; it is not an "independent, non-discriminatory purpose."<sup>342</sup> The operative principle was that the state must break the "causal chain of discrimination."<sup>343</sup>

But the reenactment of felon disenfranchisement in 1968 "conclusively demonstrates" that the legislature would have enacted the same law absent discriminatory motives.<sup>344</sup> The provision was actively and adequately considered in committee.<sup>345</sup> The 1968 provision eliminated enumeration of specific crimes resulting in disenfranchisement and instead broadly excluded felons from suffrage.<sup>346</sup> This breaks any "causal chain of discrimination" whereby "black" crimes were targeted and instead indicates intent to disenfranchise all felons regardless of race, which is consistent with the intent of the framers of the Fourteenth Amendment.<sup>347</sup> The majority claims the provision was inadequately considered in committee.<sup>348</sup> Applying this "consideration-in-committee" standard to felon disenfranchisement as it was considered in 1868, would the court find that if the consideration given to this issue was inadequate, then the statute had never been infected with discriminatory intent as claimed?<sup>349</sup>

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342. *Id.* at 1301.

343. *Id.* at 1298; *see also* *Knight v. Ala.*, 14 F.3d 1534, 1550-51 (11th Cir. 1994) (reversing the district court's ruling that current allocation of grants was not a vestige of segregation, due to the absence of a break in the causal chain).

344. *Johnson*, 353 F.3d at 1311 (Kravitch, J., dissenting).

345. *Id.* at 1314.

The 1968 Constitution's felon disenfranchisement rule was first actively considered by the Suffrage and Elections Committee. The record reflects that the committee discussed the provision, debated proposed changes, and ultimately decided to adopt the present provision, which is different from the 1868 provision. The committee also considered an alternative motion that would have eliminated the disenfranchisement rule to felons released from incarceration. After discussion, the alternative motion failed. The new constitution was then accepted by the full committee, approved by both legislative houses, and affirmed by a state-wide referendum—all without any allegation of racial bias.

*Id.*

346. Portugal, *supra* note 12, at 1335.

347. *Johnson*, 353 F.3d at 1308-11 (Kravitch, J., dissenting); *see also supra* notes 92-94 and accompanying text.

348. *Johnson*, 353 F.3d at 1301-02.

349. *Id.* at 1308 (Kravitch, J., dissenting).

The plaintiffs' expert states voter apportionment and the appointment (rather than election) of many political posts were the most significant and well-known issues of [the] 1868 Constitutional Convention, while felon disenfranchisement was a

Regardless, the political machinations—absent discriminatory intent—behind how this provision of the Florida state constitution was adopted are not part of a proper analysis; the Supreme Court rejected a “political exigency” argument in *Richardson*.<sup>350</sup>

Not only does *Johnson* examine the wrong law, it misapplies the *Hunter* standard, which requires only that “legislators would have enacted the felon disenfranchisement provision if they did not have an impermissible motive.”<sup>351</sup> The *Johnson* majority uses a different standard which would require a consideration of whether the constitutional convention knew both of the prior discriminatory intent and effect and then reenacted the provisions for different reasons.<sup>352</sup>

The Supreme Court in *Hunter* found that judicial amendments did not cleanse discriminatory laws of prior intent.<sup>353</sup> In contrast, like the Mississippi law in *Fordice*, the 1968 Florida provision at issue in *Johnson* was the product of a constitutional convention and was subsequently approved by both houses of the legislature and in a voter referendum; it is not a mere statute or judicial decree.<sup>354</sup> *Hunter* is also distinguishable because in that case the Alabama legislature acted quickly after the end of *de jure* segregation to try to perpetuate it in another form.<sup>355</sup> Florida’s law, however, was amended and reenacted a century after the provision may have been infected with discriminatory intent.<sup>356</sup> There was no discriminatory intent present in reenacting felon disenfranchisement in Florida in 1968; none was even alleged by the plaintiff.<sup>357</sup>

**Comment [C.E.L1]:** I also found these sentences confusing, and perhaps not needed for the larger argument. The last sentence, if you want to keep it, I think might benefit from unpacking to tie it into the rest of the paragraph.

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relatively minor issue. In fact, the plaintiffs’ expert acknowledged that the historical record is mixed on the felon disenfranchisement provision.

*Id.* at 1309 n.2.

350. *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

Nor can we accept respondents’ argument that because [Section Two] was made part of the Amendment “largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment,” we must not look to it for guidance in interpreting [Section One]. It is as much a part of the Amendment as any of the other sections, and how it became a part of the Amendment is less important than what it says and what it means.

*Id.*

351. *Johnson*, 353 F.3d at 1311.

352. *Id.* at 1311-12.

353. *Id.* at 1312 n.6; *see also* *Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985).

354. *Johnson*, 353 F.3d at 1314; *see also* *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998); *supra* notes 121-123 and accompanying text.

355. *Johnson*, 353 F.3d at 1313; *see Hunter*, 471 U.S. at 228-30.

356. *Johnson*, 353 F.3d at 1309.

357. *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1340 (S.D. Fla. 2002); *see also Johnson*, 353 F.3d at 1309.

### C. Felon Disenfranchisement is a Policy Matter That Belongs in State Legislatures

The right to vote is not unqualified.<sup>358</sup> The establishment of specific electoral qualifications for voters is delegated by the Constitution to the states.<sup>359</sup> Courts have repeatedly upheld the power of the states to make appropriate qualifications.<sup>360</sup> The real issue is whether disenfranchising felons is an appropriate policy. That is a question that is better suited for state legislatures than the courts.<sup>361</sup>

#### 1. Felon Disenfranchisement Serves Legitimate Policy Ends

A number of policy reasons have been advanced by proponents to justify felon disenfranchisement. Some of these are vulnerable to legitimate criticism. One frequently cited justification is that because felons have already shown their willingness to break the law, allowing them to vote would increase the likelihood of voter fraud.<sup>362</sup> This is a weak justification as there is little evidence to show that felons are more likely to engage in voter fraud than anyone else.<sup>363</sup>

Supporters also claim that the exclusion of felons from the voting booth is necessary to prevent harmful changes to the law.<sup>364</sup> The *Green* court

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358. See *supra* notes 16-17 and accompanying text. Additionally, children, the insane, and aliens may not vote.

359. U.S. CONST. art. I, § 2. See *supra* note 15 and accompanying text. Art. I, § 4 provides in relevant part, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.” U.S. CONST. art. I, § 4. The argument that Section Four provides a way for Congress to circumvent the states’ powers to make voter qualifications given in Section Two fails because Section Four only gives Congress authority to prescribe conditions for “holding” elections, not for electors. See Clegg, *H.R. 906 Statement*, *supra* note 322.

360. See e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“Th[e] ‘equal right to vote,’ is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.”) (internal citations omitted); *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (“There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise.”); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (“The Constitution does not in so many words confer a right to vote, though it has been held to do so implicitly. Rather, it confers on the states broad authority to regulate the conduct of elections, including federal ones.”) (internal citation omitted).

361. *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

362. See *The Disenfranchisement of Ex-Felons*, *supra* note 10, at 1303.

363. Dugree-Pearson, *supra* note 7, at 386.

364. See *The Disenfranchisement of Ex-Felons*, *supra* note 10, at 1302-03.

used the specter of “mafiosi” voting to justify the practice.<sup>365</sup> While at first glance this claim seems spurious, opponents of felon disenfranchisement have pointed out how concentrated felons are in a handful of inner city communities.<sup>366</sup> Especially when the issue is vote dilution, it is not unimaginable that a large block of criminals in a district could swing an election to a candidate who does not tout the “tough on crime” line. Indeed, Democrats rely on the assumption that convicted felons will affect election outcomes as they seek to enfranchise millions of sympathetic voters.<sup>367</sup> Further, allowing millions of convicted felons into the voting booths of a small number of predominately minority districts would aggravate this impact and could conceivably infringe on the ability of law-abiding “members [of a protected class in those districts] . . . to elect representatives of their choice,”<sup>368</sup> in contravention of the Voting Rights Act.<sup>369</sup> The Supreme Court, moreover, has already made it clear that legislatures cannot seek to “fence out” a group of voters based upon how they might vote.<sup>370</sup>

A third justification offered is the purity of the ballot box: “A State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society’s aims.”<sup>371</sup> Critics respond by arguing that being convicted of a felony does not necessarily diminish one’s “moral competence” and that in any event, the result is to fence out groups of minority voters.<sup>372</sup> The *Green* court found that denying felons the right to vote was reasonable, in light of the Lockean

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365. *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 451-52 (2d Cir. 1967).

366. Muntaqim’s vote dilution claim was partially based on the fact that eighty percent of black and Hispanic inmates in New York State (who account for more than eighty percent of all inmates) come from the New York City area. *Muntaqim v. Coombe*, 366 F.3d 102, 105 (2d Cir. 2004). In *Baker*, plaintiffs alleged that seventy-five percent of New York State’s prison population came from fourteen assembly districts in New York City. *Baker v. Pataki*, 85 F.3d 919, 923 (2d Cir. 1996).

367. Nearly seventy percent of disenfranchised felons may be Democrats. UGGEN & MANZA, *supra* note 9, at 25. That *enfranchised* felons could decide the outcome of close elections has been recognized since at least the Nineteenth Century. See *Washington v. State*, 75 Ala. 582, 583 (1884).

368. See *supra* note 158 and accompanying text.

369. See *id.*; see also Clegg, *supra* note 14.

370. “‘Fencing out’ a sector of the population from the franchise because of the way they may vote is constitutionally impermissible.” *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (citations omitted).

371. *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971). See *supra* note 24 and accompanying text.

372. See Dugree-Pearson, *supra* note 7, at 390-91.

conception of the social contract<sup>373</sup> as well as on more practical grounds since,

it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime.<sup>374</sup>

As a policy justification, Locke's social contract theory has withstood the test of time; it served as a rationale for the enactment of felon disenfranchisement laws in the past,<sup>375</sup> and remains a compelling argument today. When someone commits a crime, he commits it not just against the victim, but against our entire society.<sup>376</sup> Protests that time served is enough, and that society should prioritize the rehabilitation and reintegration of felons should fall on deaf ears. Opponents of disenfranchisement claim that the inability to vote stymies felons' "remittance into a law-abiding society."<sup>377</sup> Yet they neglect to explain why the tonic of voting did not curtail felons from committing crimes initially.

Moreover, felon disenfranchisement is not the only collateral consequence society has imposed on felons. Felons may be banned from holding elective office.<sup>378</sup> They may also be barred from holding certain jobs,<sup>379</sup> serving on juries,<sup>380</sup> and receiving government benefits such as welfare and food stamps in certain circumstances.<sup>381</sup> Sex offenders have to register with local authorities in some communities.<sup>382</sup> Congress has also enacted laws that bar felons from owning handguns.<sup>383</sup> If qualifications

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373. *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 451 (2d Cir. 1967).

374. *Id.*

375. *See Wesley v. Collins*, 791 F.2d 1255, 1261-62 (6th Cir. 1986); *see also supra* notes 21, 173 and accompanying text.

376. *See supra* note 21 and accompanying text.

377. *See Dugree-Pearson, supra* note 7, at 385.

378. *See generally* Andrea Steinacker, Note, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801.

379. "Ex-offenders are formally excluded from many employment opportunities that require professional licenses. Such positions range from lawyer to bartender, from nurse to barber, from plumber to beautician. . . . The Supreme Court has upheld the right of states to establish qualifications for entry into certain employment." *Nora v. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 156 (1999).

380. *Id.* at 157.

381. *Id.* at 158.

382. 16B AM. JUR. 2D *Constitutional Law* § 657 (2005).

383. *See United States v. Farrow*, 364 F.3d 551 (4th Cir. 2004).

can be placed on a felon's constitutional rights to free association and to bear arms, voting should not be any different.<sup>384</sup>

Opponents claim that felon disenfranchisement is "anachronistic"<sup>385</sup> and "outmoded."<sup>386</sup> They argue that "constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber,"<sup>387</sup> because "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."<sup>388</sup> Yet they attempt to freeze felon disenfranchise laws in a particular time and place; namely, the South, between Reconstruction and the Civil Rights movement. They do not explain why centuries of prior non-discriminatory intent, non-discriminatory laws enacted outside the South and recent, non-discriminatory laws in liberal states like Massachusetts<sup>389</sup> count for nothing. It can be conceded that felon disenfranchisement was a component of a few states' systematic endeavor to subordinate African-Americans,<sup>390</sup> but that does not mean these laws should be dispensed with wholesale. After all, the Reconstruction Amendments themselves were twisted to the same end: the Supreme Court used the Thirteenth and Fourteenth Amendments in *Plessy v. Ferguson* to uphold the "separate but equal" doctrine,<sup>391</sup> yet we have not dispensed with them. Moreover, none of these laws is in place today and *Richardson-Hunter* already provides a tool whereby purposefully discriminatory felon disenfranchisement laws can be eliminated.<sup>392</sup>

Justifications for felon disenfranchisement and arguments against the practice are policy arguments, which are the proper province of the legislatures.<sup>393</sup> At least some of the angry commentators get one thing

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384. The Constitution does not explicitly grant the right to vote; rather, it does so "implicitly." *Hall v. Simcox*, 766 F.2d 1171 (7th Cir. 1985). The right of free association is expressly provided for in the Constitution as "the right of the people peaceably to assemble". U.S. CONST. amend. I. The right to bear arms is also explicitly guaranteed by the Second Amendment of the Constitution which provides "the right of the people to keep and bear Arms, shall not be infringed". U.S. CONST. amend. II.

385. Portugal, *supra* note 12, at 1338.

386. *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974) (referring to the contentions of anti-disenfranchisement amici).

387. *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972); *see generally* Portugal, *supra* note 12.

388. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966).

389. *See* Behrens, *supra* note 13, at 255 n.129.

390. *See supra* notes 60-63 and accompanying text.

391. *See supra* notes 58-59 and accompanying text.

392. *See supra* notes 83-98, 109-118 and accompanying text.

393. *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974); *see* *Allen v. Ellisor*, 664 F.2d 391, 396 n.5 (4th Cir. 1981) (en banc).

right: The way to change felon disenfranchisement laws is to campaign in state legislatures.<sup>394</sup> Such approaches have had some effect. For example, in 2000, Connecticut restored voting rights to convicted felons on probation, and Delaware amended its constitution so that it now re-enfranchises felons five years after completion of their sentences, except for those convicted of murders, sex offenses and certain other crimes.<sup>395</sup> Not all news is good news on that front, however, for opponents of the practice—Kansas disenfranchised probationers in 2002, and Utah and even Massachusetts both recently expanded their felon disenfranchisement laws through voter approval of constitutional amendments.<sup>396</sup> If Florida's felon disenfranchisement law is struck down, it can be—and should be—reenacted, just as Alabama's law was after *Hunter*.<sup>397</sup> As the *Richardson* court wisely noted more than thirty years ago:

Pressed upon us by the respondents, and by *amici curia*, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the exfelon [sic] that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.<sup>398</sup>

### CONCLUSION

Felon disenfranchisement is plainly constitutional and consistent with the intent of the framers of both the Fourteenth Amendment and the Voting Rights Act. It is a practice with deep roots in history that continues to be widely utilized today. It is fundamentally different than voter qualifications used in the past to suppress black voting.

That African-Americans are disproportionately disenfranchised is a

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394. See Dugree-Pearson, *supra* note 7, at 397; *One Person, No Vote*, *supra* note 6, at 1957-59; Price, *supra* note 70, at 407-08.

395. See Price, *supra* note 70, at 401.

396. See Behrens, *supra* note 13, at 255 n.129.

397. Alabama currently disenfranchises felons in prison, parolees, probationers, and certain ex-felons, although ex-felons can apply for reinstatement of voting rights. FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 178, at 2-3.

398. *Richardson*, 418 U.S. at 55.



matter of grave concern, but it is a side effect of high crime rates. It flows from their status as felons, not from their race. “Felons [are not] disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment.”<sup>399</sup> If there is discrimination in the criminal justice system, activists should attack that phenomenon directly instead of focusing on a symptom. Their fixation instead on disenfranchisement belies their political bias and motivation.<sup>400</sup>

Opponents of felon disenfranchisement claim the practice is part of a Republican strategy to suppress the predominately Democratic minority vote.<sup>401</sup> Yet, clearly, opponents and their Democratic allies have something to gain from the outcome of this issue as well.<sup>402</sup> That recognition reinforces the notion that this is a political issue, and political issues belong before *qualified* voters and their elected representatives.<sup>403</sup>

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399. *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

400. “[T]he number of Republican candidates that are being elected by only marginal leads is . . . *alarming*.” Dugree-Pearson, *supra* note 7, at 374 (emphasis added).

401. *See* Chin, *supra* note 37, at 306-07. *Contra* Miles, *supra* note 183, at 122 (asserting that felon disenfranchisement has no discernible impact on voter turnout, and thus has few consequences for election results).

402. *See generally* UGGEN & MANZA, *supra* note 9.

403. *Richardson*, 418 U.S. at 55.