A VOTE FOR DEMOCRACY: CONFRONTING THE RACIAL ASPECTS OF FELON DISENFRANCHISEMENT

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INTRODUCTION

November 2, 2000, was the day of the closest election in American history—537 votes effectively decided the presidency.[1] On that day, Florida's felony disenfranchisement laws[2] barred from voting an estimated 600,000 ex-felons who had already completed their sentences.[3] Although there is no way of ascertaining how these disenfranchised ex-felons would have voted, a recent study estimated that if Florida had allowed them to vote, the Democratic Party would have won by more than 60,000 votes.[4]

This example illustrates the potentially outcome-determinative effects of felon disenfranchisement laws in the United States. American states are unique among post-industrial democracies (except with respect to those convicted of treason or election-related crimes) in permanently disenfranchising ex-felons and convicts and thus disenfranchises felons at an exceptional rate.[5] More than four

1. *See* STEVEN CARBÓ ET AL., DEMOCRACY DENIED: THE RACIAL HISTORY AND IMPACT OF DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 n.1 (2003) (citing GREG PALAST, THE BEST DEMOCRACY MONEY CAN BUY (2003)). Despite the incredibly narrow margin, Republican candidate George W. Bush successfully persuaded the Supreme Court to halt the recount process in the state of Florida, leaving him ahead by 537 votes. Marshall Camp, Bush v. Gore: *Mandate for Electoral Reform*, 58 N.Y.U. ANN. SURV. AM. L. 409, 409–414 (2002).

2. The Florida state constitution provides in relevant part: "No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability." FLA. CONST. art. VI, § 4. Unless Florida's ex-felons who have already completed their sentences can overcome the significant obstacle of obtaining clemency, they are barred from voting for life. *See* Fla. R. Exec. Clemency, § 4G, *at* http://www.state.fl.us/fpc/Policies/ExecClemency/ROEC12092004.pdf.

3. Marc Mauer, *Disenfranchising Felons Hurts Entire Communities*, FOCUS, May/June 2004, at 5, 6. Many of these voters had no felony convictions; they had been mistakenly identified as felons and banned from voting.

4. Christopher Uggen & Jeff Manza, *Democratic Contraction?: Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792–93 (2002). This study estimated voter turnout and party preferences for felons and ex-felons. It showed that, from 1972 to 2000, on average, 35% of disenfranchised felons would have voted. The study also indicated that felon voters would have had a strong Democratic Party preference. For the same time period, on average 77% of felon voters would have voted Democratic. *Id.* at 786–87.

5. *Id.* at 778. The United States is the only country that denies the right to vote to non-incarcerated felons and ex-felons. Most other countries that currently disenfranchise criminals do so in a much more limited way. Many countries have

million Americans are currently unable to vote due to these laws.[6] Prisoners cannot vote in forty-eight states and the District of Columbia.[7] Parolees cannot vote in thirty-six states, and thirty-one states also prohibit probationers from voting.[8] Thirteen states deny the right to vote to some or all ex-offenders, even though they have already paid their debts to society.[9] The dramatic expansion of our criminal justice system and the "tough on crime"[10] policies of the past thirty years have drastically increased the impact of felon disenfranchisement laws.[11] Minorities bear the brunt of the impact of these laws; for example, felon disenfranchisement bars black men from voting at a rate seven times higher than the national average rate of disenfranchisement.[12]

This Note begins with a brief history of felon disenfranchisement. Section II explains the racial dimensions of felon disenfranchisement. It details how disenfranchisement cannot be adequately explained in non-racial terms and provides evidence of discriminatory intent underlying the original versions of many of these laws. It describes how a new type of racism has emerged, which is indirect or unconscious.[13] The theory of unconscious discrimination also reveals the inconsistencies of color-blind constitu-

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eradicated criminal disenfranchisement altogether: Ireland, Spain, Sweden, Denmark, Greece, Australia, and South Africa all allow inmates to vote even while in prison. *Id.*

6. STEVEN KALOGERAS, LEGISLATIVE CHANGES ON FELONY DISENFRANCHISEMENT, 1996–2003 1 (Marc Mauer ed., 2003).

7. *Id.* Maine and Vermont are the only states that allow prisoners to vote. *Id.* at [ii]; *see also* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2005) [hereinafter FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES] .

8. FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 1.

9. *Id.*

10. The election of Richard Nixon in 1968 marked the beginning of an era characterized by overwhelming support for "tough on crime" politics, which continues today. Nixon won the presidency partly by capitalizing on the white working class's racially tinged fears and negative reaction to the progressive social policies of the 1960s. His slogan was "law and order." This philosophy still dominates American politics: in the past thirty years, America has experienced a 500% increase in the prison population. Steven M. Kalogeras, The U.S. Prison Boom: An Examination of Mass Incarceration in American History 44–54 (June 10, 2002) (unpublished B.A. honors thesis, Stanford University) (on file with author).

11. Tough on crime politics have led to a sharp increase in prison population. This increasing population is disproportionately composed of racial minorities. For a more detailed discussion and statistical analysis see Section II, *infra*.

12. FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 1.

13. *See generally* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 321–23, 329–44 (1987).

tionalism,[14] which has become a significant barrier to Equal Protection[15] claims. Today's felon disenfranchisement laws egregiously impact the ability of minority groups, including felons and non-felons alike, to participate in the political process. Commentators have argued and some courts have been willing to accept the idea that the interaction of racial discrimination in the criminal justice system with felon disenfranchisement laws is part of the reason that minorities are losing their political power compared to whites.[16] Viewed with historical perspective, an understanding of direct and indirect forms of racism, and an awareness of how these laws hinder the minority vote today, the racial dimensions of felon disenfranchisement become apparent.

Section III addresses the Voting Rights Act[17] ("the Act" or "§ 1973"), which is probably the most feasible way for minorities to challenge disenfranchisement laws as discriminatory. A special constitutional provision relating to felons,[18] combined with color-blind Equal Protection jurisprudence, nearly precludes Equal Protection

14. *See* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1005–14 (1993). "Color-blind" constitutionalism is an ideology that has governed the Supreme Court's Equal Protection analysis for more than a generation. It originated from Justice Harlan's famous dissent in *Plessy v. Ferguson*, in which he stated that "our Constitution is color-blind." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954). Generally, color-blind jurisprudence prohibits unequal application of the laws. While it sounds noble, in practice courts have used the doctrine to strike down remedial civil rights legislation that classifies people based on race. *See* Section III, *infra*.

15. U.S. CONST. amend. XIV, § 1.

16. For commentary see, for example, John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 169 n.56 (2004); Tanya Dugree-Pearson, *Disenfranchisement—A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL'Y 359, 371–77 (2002); Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1148, 1156–57 (1994); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 765–68 (1998); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1158–60 (2004). For judicial decisions, *see, e.g.*, Hunter v. Underwood, 471 U.S. 222, 233 (1985); Johnson v. Governor of Florida, 353 F.3d 1287, 1293–1307 (11th Cir. 2003), *vacated, reh'g en banc granted*, 377 F.3d 1163 (11th Cir. 2004); Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003); Baker v. Pataki, 85 F.3d 919, 934–41 (2d Cir. 1996) (Feinberg, J., dissenting).

17. 42 U.S.C. § 1973 (2000).

18. U.S. CONST. amend. XIV, § 2.

claims.[19] Congress intended the Voting Rights Act to burden plaintiffs less than Equal Protection, as it requires only proof of discriminatory results, rather than intentional bias.[20] Some courts, however, hold that remedies under the Voting Rights Act are not available to felons.

Section IV describes how the Second and Ninth Circuits[21] disagree as to whether the Voting Rights Act applies to felons. This Note explains how these circuits actually agree on most of the substantive legal issues. It then demonstrates how and where they disagree, showing that the disagreement essentially boils down to a difference in ideological perspective. The Ninth Circuit confronts the race issue head-on and easily applies the Voting Rights Act to felon disenfranchisement.[22] Conversely, the Second Circuit disregards the racial impact of felon disenfranchisement, holding that the remedies under the Voting Rights Act are not available to state felons.[23] Both circuits, however, recognize that this "difficult question . . . can ultimately be resolved only by a determination of the United States Supreme Court."[24] The Supreme Court has nonetheless denied certiorari,[25] so the debate continues.

This Note argues that once courts adopt the proper perspective—that felon disenfranchisement cases involve racial, as well as criminal, status—the question of the Voting Rights Act's applicability to such statutes is clearly answered in the affirmative.

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19. There may, however, be valid Eighth Amendment claims based on the principle that felon disenfranchisement is a disproportionately harsh punishment. *See* Karlan, *supra* note 16, at 1164–69; Mark E. Thompson, Comment, *Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 198–204 (2002); *see also infra* text accompanying note 73.

20. *See* 42 U.S.C. § 1973(a)–(b) (2000); S. REP. NO. 97-417, at 27 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 205.

21. This Note will focus on the split between the Second and Ninth Circuits, but other courts are divided on the issue as well. *See, e.g.*, *Johnson*, 353 F.3d 1287 (holding there are sufficient genuine issues of material fact about the discriminatory impact of felon disenfranchisement statutes to survive summary judgment on both Equal Protection and Voting Rights Act claims).

22. Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003).

23. Muntaqim v. Coombe, 366 F.3d 102, 130 (2d Cir. 2004), *reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004).

24. *Id.* at 104; *see* Farrakhan v. Washington, 359 F.3d 1116, 1126 (9th Cir. 2004) (Kozinski, J., dissenting).

25. The Supreme Court denied certiorari on November 8, 2004. Muntaqim v. Coombe, No. 04-175, 2004 WL 2072975 (U.S. Nov. 8, 2004); Locke v. Farrakhan, No. 03-1597, 2004 WL 2058775 (U.S. Nov. 8, 2004).

I.
A BRIEF HISTORY OF FELON DISENFRANCHISEMENT

Felon disenfranchisement developed as a form of punishment in ancient and medieval times. In ancient Greece and Rome, criminals declared to be "infamous" were unable to participate in basic civic functions; they could not vote, appear in court, hold office, or even make public speeches.[26] Under the English concept of "outlawry," criminals were viewed as being outside the law, so they were deprived of the benefits of the law.[27] Later, the same function was performed by "attainder" or "civil death," which stripped criminals of all their civil protections and left them unable to perform any legal functions.[28] Early American colonies adopted the English practice of imposing civil disabilities on criminals.[29] Newly-settled towns generally based citizenship on "religious conformity, property ownership, and moral qualifications,"[30] so law-makers chose to disenfranchise men who they labeled as scandalous or corrupt.[31]

Civil disabilities of the past differed greatly from those imposed in modern American practice. Early disenfranchisement laws generally only applied to the most serious crimes and were imposed by judges on an individual basis.[32] They were also a visible public punishment, often used to shame those who lacked the moral virtue necessary to be part of the society.[33] Conversely, modern felon disenfranchisement laws are implemented across the board through state election laws, so there is no opportunity for judges to exercise individual discretion.[34] The civil disabilities of today are "automatic, *invisible*" consequences of conviction; they are not explicitly punitive, nor do they allow for individual discretion.[35]

26. ALEC EWALD, PUNISHING AT THE POLLS: THE CASE AGAINST DISENFRANCHISING CITIZENS WITH FELONY CONVICTIONS 17 (2003).

27. Thompson, *supra* note 19, at 172–73.

28. *Id.* at 173.

29. *See* JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2 (1998).

30. EWALD, *supra* note 26, at 18.

31. BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606–1660, at 54 (1983).

32. EWALD, *supra* note 26, at 17.

33. *See id.*

34. *Id.* at 10, 17.

35. *Id.* at 18 (emphasis added).

After independence, the Constitution banned the use of bills of attainder to achieve certain civil disabilities,[36] but allowed states to disenfranchise criminals.[37] It is important to note that prior to the adoption of the Reconstruction Amendments,[38] the Constitution contained no guarantees of suffrage, so states commonly disenfranchised many groups of people, including blacks, women, and criminals. Thus, early American felon disenfranchisement laws were probably not driven by discriminatory intent, as explicit racial disenfranchisement was legal.

Racial discrimination began to motivate disenfranchisement laws after the Civil War, and constitutional provisions enacted at that time contained loopholes allowing such discrimination as a political compromise. The abolition of slavery by the Thirteenth Amendment in 1865 nullified the Three-Fifths Clause, under which states counted three-fifths of their slave population in determining the number of members of the House of Representatives to which they were entitled.[39] In 1868, the 39th Congress drafted § 2 of the Fourteenth Amendment to ensure that representatives would be apportioned according to the population of each state.[40] States were required to count each black man just as they counted each white man. The fifteen southern states with large ex-slave populations gained substantially increased representation in Congress after the passage of the Fourteenth Amendment.[41]

This increased representation of the southern states concerned the Republican members of the 39th Congress because it threatened their political dominance.[42] The southern states could

36. U.S. CONST. art. III, § 3, cl. 2.

37. FELLNER & MAUER, *supra* note 29, at 2–3.

38. The term "Reconstruction Amendments" generally refers to the Thirteenth Amendment, passed in 1865, which abolished slavery, U.S. CONST. amend. XIII; the Fourteenth Amendment, passed in 1868, which, *inter alia,* guaranteed citizenship and Equal Protection under the law to blacks, U.S. CONST. amend. XIV; and the Fifteenth Amendment, passed in 1870, which guaranteed blacks the right to vote, U.S. CONST. amend. XV.

39. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV.

40. U.S. CONST. amend. XIV, § 2.

41. Cosgrove, *supra* note 16, at 165.

42. Richardson v. Ramirez, 418 U.S. 24, 73 (1974) (Marshall, J., dissenting) (citing Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 109 (1960); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 98, 126 (1908); B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 290–91 (1914); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 185 (1956); William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress,* 1965 SUP. CT. REV. 33, 44 (1965)).

benefit from increased representation from their large former slave population and yet deny blacks—with their political sympathies toward the north—the right to vote. The result would have been increased southern representation based on a population that had no voice in the political process.

To address this concern, the drafters of the Fourteenth Amendment included a provision in § 2 wherein any state that denied the right to vote to any male citizens over the age of twenty-one suffered reduced representation in proportion to the number of disenfranchised citizens.[43] Later called the "Penalty Clause," this section prevented southern states from unjustly capitalizing on the abolition of slavery through political dominance. It did not, however, confer voting rights upon anyone. Until the passage of the Fifteenth Amendment[44] in 1870, southern states could still legally disenfranchise black voters on the basis of race alone, but, depending on the size of their black populations, they could lose 50% or more of their Congressional representation as a consequence.[45]

The Penalty Clause contained two exceptions. States could disenfranchise people without suffering decreased representation who committed 1) rebellion or 2) other crimes.[46] Later called the "Other Crimes Exception," this ambiguous language is the root of courts subjecting felon disenfranchisement laws to a lower level of scrutiny than other restrictions on voting rights.[47]

43. *See* U.S. CONST. amend. XIV, § 2. The section provides in whole:

> But when the right to vote at any election for the choice of electors for President and for 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.

44. The Fifteenth Amendment prohibits denial or abridgement of the right to vote on account of race. U.S. CONST. amend. XV.

45. *See* Cosgrove, *supra* note 16, at 166–67.

46. U.S. CONST. amend. XIV, § 2.

47. *See, e.g.*, *Richardson*, 418 U.S. at 54–55; Woodruff v. Wyoming, 49 F. App'x 199, 202–03 (10th Cir. 2002); Baker v. Pataki, 85 F.3d 919, 929 (2d Cir. 1996); Wesley v. Collins, 791 F.2d 1255, 1261 n.7 (6th Cir. 1986); Allen v. Ellisor, 664 F.2d 391, 394 (4th Cir. 1981), *vacated by* Allen v. Ellisor, 454 U.S. 807 (1981); Johnson v. Bush, 214 F. Supp. 2d 1333, 1337–38 (S.D. Fla. 2002), *aff'd in part, rev'd in part and remanded sub nom.* Johnson v. Governor of State of Florida, 353 F.3d 1287 (2003), *vacated, reh'g en banc granted,* 377 F.3d 1163 (2004).

Southern lawmakers feared that the newly-enfranchised black voters would threaten their political power,[48] but could not deny them the right to vote without violating the Fifteenth Amendment. Consequenly, felon disenfranchisement took on a new racial significance as legislatures used the Other Crimes provision to deny blacks the right to vote without violating the Constitution.[49] The laws disproportionately burdened blacks, and did so legally.[50]

Modern legislatures do not reveal blatantly discriminatory motivations behind felon disenfranchisement laws. Recently, however, scholars have found that "the racial composition of state prisons is firmly associated with the adoption of felon disenfranchisement laws."[51] The more nonwhites in a state's prison population, the more likely the state is to ban felons from voting. America currently incarcerates over two million people, and a disproportionate amount of the prison population consists of people of color.[52] Moreover, felon disenfranchisement is a widespread practice; all but two American states bar prison inmates from the polls.[53]

Fortunately, Americans have recently taken notice of the problem and there has been some legislative reform of felon voting rights. Some efforts to repeal state felon disenfranchisement laws have succeeded.[54] In March 2005, the Nebraska legislature voted (by overruling the governor's veto) to end the state's permanent disenfranchisement of felons. The law also provides for automatic reinstatement of voting rights two years after completing one's sentence, rather than a mandatory ten-year wait before even being able

48. Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 597–98 (2003).

49. *See, e.g.*, Hench, *supra* note 16, at 738–43.

50. Behrens et al., *supra* note 48, at 569; *see also* EWALD, *supra* note 26, at 26–27; FELLNER & MAUER, *supra* note 29, at 3; Hench, *supra* note 16, at 738–43.

51. Behrens et al., *supra* note 48, at 596.

52. *See infra* Section II.

53. FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 1.

54. *See generally* KALOGERAS, *supra* note 6. More recently, Tennessee's Democratic state senator, Steve Cohen, introduced a bill in March 2005 to restore felon voting rights after completion of sentence and parole period or a year of probation. Sheila Burke, *Bill to Restore Felons' Rights Stir Debate*, THE TENNESSEAN, Mar. 1, 2005, at 1B, *available at* http://www.tennessean.com/government/archives/05/01/66276372.shtml.

to file an application.[55] There have also been movements toward federal reform: Senator Hillary Clinton sponsored the Count Every Vote Act in February 2005 which, among other things, ensures that people convicted of felonies can vote in federal elections even if barred from voting in state elections.[56] Nonetheless, this country has a long way to go toward more equitable felon disenfranchisement practices.

II.
THE RACIAL DIMENSIONS OF FELON DISENFRANCHISEMENT

Current criminal disenfranchisement laws tend to burden racial minorities disproportionately more than the general population.[57] Felon disenfranchisement has evolved from a public, individual punishment concerned primarily with one's status as a criminal, to a hidden, faceless practice inextricably bound up with racial discrimination.

This section describes the racial dimensions of modern American felon disenfranchisement, recognition of which is necessary to successfully challenge such laws that may function unfairly. First, it explains why the laws fail to satisfy the non-racial justifications generally raised by their proponents. Then it describes the proof of purposeful discrimination behind felon disenfranchisement laws during Reconstruction and explains the concept of unconscious racism, which offers insight into why de facto discrimination is still so prevalent today. Finally, this section describes the huge scope of these laws and reveals how discrimination in the criminal justice system interacts with these laws to produce inequality in minority access to the political process.

A. Race-neutral justifications do not fully explain felon disenfranchisement

Modern felon disenfranchisement does not live up to its non-racial justifications. Fundamentally, it does not further the goals of the criminal justice system: deterrence, incapacitation, rehabilita-

55. Nate Jenkins, *Legislature Overrides Veto*, LINCOLN J. STAR, Mar. 11, 2005, *available at* http://www.journalstar.com/articles/2005/03/10/local/doc4231011b86575214372611.txt.

56. Matthew Cardinale, *Congresswoman Who Challenged Ohio Votes Explains "Count Every Vote Act*," THE RAW STORY, Feb. 23, 2005, http://rawstory.com/news/2005/index.php?p=118.

57. *See* FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 1.

tion, or retribution.[58] Revoking a person's right to vote is not a strong deterrent to crime. It is highly unlikely that someone who commits a crime in the face of a prison sentence, fines, or probation would be dissuaded by the loss of voting rights.[59] Most offenders are not even aware of this collateral consequence when they commit their crimes.[60] Also, many offenders are politically alienated; losing the right to vote would be of little practical consequence to the majority of offenders.[61]

Disenfranchisement does not further incapacitation goals, as it cannot prevent an offender from committing future crimes. Only in a small subset of convictions for breaking election laws can disenfranchisement incapacitate, but "almost all offenders 'incapacitated' at the ballot box are convicted of non-electoral crimes."[62]

Felon disenfranchisement is not rehabilitative, as it ostracizes criminals from the political process rather than reintegrating them into society. When excluded from voting, a person may feel stigmatized as a second-class citizen, even if nobody else knows about the civil disability. When rehabilitation emerged as a dominant penal goal, many states relaxed or temporarily abandoned their felon disenfranchisement laws.[63] Recognizing this principle, the Supreme Court of Canada has held that disenfranchising prisoners is unconstitutional:[64]

> Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order.[65]

58. The fundamental goals of punishment in the criminal justice system are retribution, deterrence, incapacitation, and rehabilitation. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 101 (7th ed. 2001). These goals together are one important (though I argue insufficient) non-racial justification for felon disenfranchisement.

59. EWALD, *supra* note 26, at 29; Karlan, *supra* note 16, at 1166.

60. EWALD, *supra* note 26, at 29; *see also* Karlan, *supra* note 16, at 1166.

61. *See* EWALD, *supra* note 26, at 29; Karlan, *supra* note 16, at 1166.

62. EWALD, *supra* note 26, at 29; Karlan, *supra* note 16, at 1167.

63. Karlan, *supra* note 16, at 1166.

64. Suave v. Canada (Chief Electoral Officer), [2002] S.C.R. 520.

65. *Id.* at 548.

A chain reaction results, because people who do not feel included in society may commit more crimes.[66] In fact, the Supreme Court in *Richardson v. Ramirez* suggested that there might be some value in the argument that "essential to the process of rehabilitating the ex-felon [is] that he be returned to his role in society as a fully participating citizen."[67] The American Law Institute has stated that "disenfranchisement excluded offenders from society and thus increased the likelihood of recidivism."[68] At least one commentator even suggests that "citizens with a strong commitment to shaping convicts' character—and a proud belief in the power and importance of American democratic politics—should consider *forcing* inmates to vote."[69]

A retributive justification for felon disenfranchisement must focus on the proportionality between the gravity of the defendant's conduct and the harshness of the penalty imposed.[70] Lifetime loss of a so-called "fundamental" right after a person has paid his debt to society violates this principle. Even temporary disenfranchisement is often disproportionate, as most laws categorically exclude from the vote all felony offenders, "lump[ing] together crimes of vastly different gravity."[71] The "tough on crime" policies of the past generation have caused many relatively minor crimes to be classified as felonies.[72] Some felonies carry sentences of death or life in prison, whereas others require only parole. Crimes underlying disenfranchisement are not equally grave, but their consequences are equally severe. The asymmetry of disenfranchisement has prompted scholarship suggesting that it raises serious Eighth Amendment concerns.[73] Eighth Amendment claims against dispro-

66. *See* Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1602–03 (2004).

67. 418 U.S. 24, 55 (1974).

68. Saxonhouse, *supra* note 66, at 1603.

69. EWALD, *supra* note 26, at 30.

70. Karlan, *supra* note 16, at 1167.

71. *Id.*

72. *Id.*

73. U.S. CONST. amend. VIII; *see* Karlan, *supra* note 16, at 1164–69; Thompson, *supra* note 19, at 186–205 (arguing that plaintiffs should bring Eighth Amendment claims against felon disenfranchisement laws, since such laws are clearly punitive and disproportionate to the crime committed). In 1967, the court in *Green v. Bd. of Elections*, 380 F.2d 445, 450 (2d Cir. 1967), dismissed an Eighth Amendment claim in part because it saw felon disenfranchisement laws as nonpunitive. Recent scholarship, such as the articles cited above, however, provides support for the notion that such laws are in fact punitive, and thus encourages new Eighth Amendment challenges to felon disenfranchisement.

portionate punishment are judged against evolving standards of decency.[74] Taking away a so-called "fundamental" right as an across-the-board consequence for the broad range of crimes currently classified as felonies is excessive punishment in today's context.[75]

A second purported justification for felon disenfranchisement is the "subversive voting theory," which holds that felons or ex-felons would vote in a subversive way. In practice, however, the evidence runs counter to the subversive voting theory: there is no data suggesting that criminals would vote differently than non-criminals,[76] but there is evidence that offenders actually support the existence of the laws they have broken.[77] Criminal offenders would need to vote for a politician running on a pro-crime platform to erode criminal laws by voting. But politicians do not promote pro-crime agendas, which "engender little support from the majority, including criminals, who realize the utility and necessity of the criminal code."[78] Additionally, "the ability to influence or frustrate the outcome of elections is not contingent on possessing the right to vote."[79] The subversive voting theory also violates the principle that discriminating against voters based on their viewpoint is unconstitutional.[80] According to the Supreme Court: "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions' cannot constitutionally be obliterated because of a fear of the political views of a particular group . . . ."[81] The Supreme Court of Canada has expanded this concept, stating that criminal disenfranchise-

74. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100–01 (1958); Atkins v. Virginia, 536 U.S. 304, 311 (2002).

75. Karlan, *supra* note 16, at 1169.

76. FELLNER & MAUER, *supra* note 29, at 15 (stating "[t]here is no reason to believe that all or even most ex-offenders would vote to weaken the content or administration of criminal laws.").

77. EWALD, *supra* note 26, at 33. Ewald cites research conducted by political scientist Jonathan D. Casper, which found that convicts almost exclusively "believed that they had done something 'wrong,' that the law they violated represented a norm that was worthy of respect and that ought to be followed." Further, the study noted that criminal defendants thought that the elimination of the laws they had violated would be "a bad thing" because the illegal behavior the laws prevented would become rampant.

78. Thompson, *supra* note 19, at 196.

79. *Id.*

80. Carrington v. Rash, 380 U.S. 89, 94 (1965).

81. *Id.* (quoting Schneider v. State, 308 U.S. 147, 161 (1939)).

ment "erodes the basis of its right to convict and punish lawbreakers."[82]

The third non-racial justification for felon disenfranchisement, the "purity of the ballot box" theory, fails for similar reasons as the subversive voting theory. Proponents suggest that offenders lack the moral judgment to vote responsibly. Because viewpoint discrimination is unconstitutional,[83] the theory that a felon's vote will taint the election process quickly breaks down. The "purity of the ballot box" theory relies on the outdated and illegal policy of state exclusion from voting rights for citizens who lack certain qualities of mind or character.[84] Contemporary voting rights doctrine, codified in the Voting Rights Act, explicitly bans standards of voting competency such as literacy tests and requirements that citizens possess "good moral character" in order to vote.[85]

Fourth, some proponents believe that convicted felons are more likely to commit electoral fraud because they have demonstrated a general tendency to break the law. However, this theory falls short because there is no evidence that felons are more likely to commit electoral fraud than any other voter.[86] If felon disenfranchisement laws are meant to prevent electoral fraud, then they are overinclusive, as they apply across the board though the vast majority of crimes leading to disenfranchisement are not related to elections.[87] They are also, ironically, underinclusive, as some states classify election fraud as a misdemeanor and thus do not disenfranchise the people who do break voting laws.[88] Most election-related crimes can be committed without possessing the right to vote, so denying a felon that right does not further any purported interest in preventing voting-related crimes.[89] Moreover, felon dis-

82. Suave v. Canada (Chief Electoral Officer), [2002] S.C.R. 545.

83. *See generally Carrington*, 380 U.S. at 88.

84. Karlan, *supra* note 16, at 1152–53; Saxonhouse, *supra* note 66, at 1630.

85. 42 U.S.C. § 1973aa(a)–(b) (2000) (providing that states cannot deny citizens the right to vote because of "failure to comply with any test or device," which is defined to mean "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class").

86. Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting).

87. EWALD, *supra* note 26, at 36; Dugree-Pearson, *supra* note 16, at 386.

88. EWALD, *supra* note 26, at 36.

89. Thompson, *supra* note 19, at 194:

> Crimes such as intimidating voters, disrupting a polling place, or tampering with election equipment, for example, can be committed by any citizen, regardless of his eligibility to vote. The only crime that . . . is dependent upon

enfranchisement is not necessary to prevent voter fraud because there are already laws in place to prevent and punish it.[90] According to one commentator, America imposes "perhaps the most burdensome registration requirements in the democratic world, supposedly aimed at preventing fraud" and "[i]t mocks those mechanisms . . . to argue that the only way to prevent fraud is to bar people from voting altogether."[91]

The fifth purported justification for felon disenfranchisement is based on the social contract, which holds that by entering into society every person authorizes the legislature to make laws for general social benefit.[92] Theoretically, each participant in society benefits from these laws and so must aid in the execution of these laws. A violation of this social contract means losing the benefits enjoyed by law-abiding citizens, like the right to vote. However, this justification ignores the socio-economic realities in America by assuming the people being disenfranchised receive equal benefits from society initially. One may also conclude that the disadvantaged have less to reciprocate for, so are less blameworthy for breaking the social contract, and therefore it makes no sense to punish them severely.[93]

Finally, modern felon disenfranchisement cannot be justified by a modern application of the historical principles of *infamia* or "civil death," under which criminals lose all civil rights as if they are dead.[94] As George P. Fletcher explains, civil death may have been appropriate during Roman times when all felons were subject to capital punishment, as they were grateful simply to be alive.[95] However, "[t]his rationale obviously has little basis for application in a time when the concept of felony implies simply that the offense is subject to punishment by a year or more in prison."[96]

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possession of the vote for its commission is the sale of that vote. Yet it cannot be seriously contended that the possibility of the ex-felon selling his one vote necessitates the blanket exclusion of all ex-felons from the franchise in order to assure the validity of elections.

90. *See, e.g.*, FLA. STAT. ch. 104.011–104.42 (2001); WYO. STAT. ANN. §§ 22-26, 22-101–121 (2001).

91. EWALD, *supra* note 26, at 35.

92. Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

93. Jeffrie Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973), *reprinted in* KADISH & SCHULHOFER, *supra* note 58, at 110–12.

94. CARBÓ ET AL., *supra* note 1, at 8 (2003).

95. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1899 (1999).

96. *Id.*

B. Historical invidious racism

Many American felon disenfranchisement statutes were motivated by purposeful racial discrimination at some point in their history. Though the laws were facially race-neutral after Reconstruction, the evidence of discriminatory intent is abundant. Carter Glass, delegate to the Virginia Convention of 1906, explicitly admitted, "We are here to discriminate to the very extremity of permissible action under the limitation of the Federal Constitution, with a view to the eliminating of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate."[97]

An examination of the racial composition of prisons during Reconstruction is evidence that felon disenfranchisement was a direct response to the political threat of newly enfranchised blacks. The rapid adoption of these laws during Reconstruction went hand-in-hand with a dramatic increase in black imprisonment. Between 1850 and 1870, the nonwhite prison populations of many southern states nearly doubled. For example, "whereas 2% of the Alabama prison population was nonwhite in 1850, 74% was nonwhite in 1870, though the total nonwhite population increased by only 3%."[98] Through felon disenfranchisement laws, states could target a portion of the population pre-selected to over-include blacks.[99]

Lawmakers wrote disenfranchisement statutes that consciously targeted crimes more likely to be committed by blacks than whites or amended existing statutes to achieve the same goal. For example, Mississippi's original felon disenfranchisement constitutional provision denied the right to vote to men convicted of any crime.[100] In 1890, however, the legislature narrowed the law to target only those convicted of specific crimes—crimes for which blacks were more often convicted than whites.[101]

Selective disenfranchisement had substantial racial impact. As the Supreme Court noted in *Hunter v. Underwood*, just two years af-

97. HARRISONBURG-ROCKINGHAM HISTORICAL SOCIETY, JIM CROW, http://www.heritagecenter.com/Museum/Exhibits/blackedu/jimcrow.htm (last visited Feb. 16, 2006).

98. Behrens et al., *supra* note 48, at 598.

99. *See id.*

100. EWALD, *supra* note 26, at 27; CARBÓ ET AL., *supra* note 1, at 4.

101. EWALD, *supra* note 26, at 27; *see also* CARBÓ ET AL., *supra* note 1, at 4; Behrens et al., *supra* note 48, at 569. The 1890 Mississippi constitution disenfranchised people convicted of "bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy." Ratliff v. Beale, 20 So. 865, 867 (1896).

ter passing its racially biased disenfranchisement law, the Alabama legislature had succeeded in excluding ten times as many blacks as whites from voting, mostly for non-prison offenses.[102]

Today's disenfranchisement laws are facially neutral, making them hard to challenge when plaintiffs must prove discriminatory intent. But because of their discriminatory past, a historical perspective is essential.

C. A modern, unconscious racism

America is obviously very different today than during Reconstruction, so a new form of racism has naturally developed. While explicit discrimination was widespread from Reconstruction into the twentieth century, racism today is indirect, or de facto. While the Civil Rights Act of 1964 and the Voting Rights Act of 1965 "served as an 'authoritative legal and political rebuke of the Jim Crow social order,'" the influence of racism in policy-making still persists.[103] The legacies of slavery and blatant racism reverberate through our institutional systems; "[w]hereas structural and economic changes have reduced the social acceptability of explicit racial bias, current 'race-neutral' language and policies remain socially and culturally embedded in the discriminatory actions of the past."[104]

Facial neutrality is especially significant for felon disenfranchisement laws because they are not part of the criminal justice system. They are uniformly-imposed state election laws, with which most people are not familiar, and are thus easier to characterize as facially neutral. The election law system and the criminal justice systems have both "been used independently to discriminate against people of color for much of American history."[105] The election law system used means such as literacy tests and poll taxes to discriminate silently, and the criminal justice system has "punished blacks more severely than whites . . . both before and after the Civil War."[106] Felon disenfranchisement statutes may appear race-neutral, but the unconscious racism of two interacting institutions have had a combined influence on the practice.

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102. Hunter v. Underwood, 471 U.S. 222, 227 (1985).

103. *See* Behrens et al., *supra* note 48, at 568 (quoting Lawrence D. Bobo & Ryan A. Smith, *From Jim Crow Racism to Laissez Faire Racism: The Transformation of Racial Attitudes*, *in* BEYOND PLURALISM 182, 209 (W.F. Katkin et al. eds., 1998)).

104. *Id.*

105. CARBÓ ET AL., *supra* note 1, at 2 (emphasis omitted).

106. EWALD, *supra* note 26, at 37.

Charles Lawrence III has developed a theory of "unconscious racism."[107] He explains that "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role," and that because of this shared experience we also share many beliefs "that attach significance to an individual's race and induce negative feelings and opinions about nonwhites."[108] Importantly, we are often unaware that these unconscious influences affect our beliefs and actions; "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."[109] Unconscious racism may show itself through ideas of cultural inferiority, incessant negative stereotypes, Americans' tendency to blame minorities for minorities' lower socio-economic status, and a general resistance to legislative and policy efforts designed to remedy institutional discrimination.[110]

Two theories explain unconscious racism. First, a Freudian theory holds that the mind defends itself from experiencing the unpleasant guilt of racism by excluding those thoughts from consciousness when they conflict with modern notions of what is politically correct.[111] Second, cognitive psychology holds that culture (media, parents, peers, authority figures) transmits beliefs, including racism, that become part of an individual's rational ordering of the world even though not learned as explicit lessons.[112] The idea that blacks are more likely to commit crime is a perfect example: "the institutionalization of large racial disparities in criminal punishment both reflects and reinforces tacit stereotypes about young African-American men that are intensified through media coverage."[113]

This shift to unconscious racism appears in modern discourse about felon disenfranchisement laws. It was a far cry from the openly racist explanations of the past when the district court in *Wesley v. Collins* expressed a facially race-neutral justification for disenfranchisement: "Felons are not disenfranchised based on any immutable characteristic, such as race, but on their conscious decision to commit an act for which they assume the risks of detention and punishment."[114] Similarly, Representative John Graham Alt-

107. *See* Lawrence, *supra* note 13.
108. *Id.* at 322.
109. *Id.*
110. *See generally id.*
111. *Id.* at 322–23.
112. *Id.* at 323.
113. Behrens et al., *supra* note 48, at 569.
114. Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986).

man III, advocate for more restrictive felon disenfranchisement laws, stated: "If it's [sic] blacks are losing the right to vote, then they have to quit committing crimes."[115] By focusing on criminal status, Altman overlooks the influence of racial status on felon disenfranchisement: the socio-economic inequalities and institutionalized racism that plague our justice system.

Today courts and legislatures often justify upholding these laws as "widespread historical practice[s],"[116] despite the fact that invidious discrimination permeates their history. In 2002, Senator Jeff Sessions of Alabama opposed a bill to re-enfranchise all ex-felons for federal elections:

> I think this Congress, with this little debate we are having on this bill, ought not to step in and, with a big sledge hammer, *smash something we have had from the beginning of this country's foundation*—a set of election laws in every State in America—and change those laws. To just up and do that is disrespectful to them . . . . *Each State has different standards based on their moral evaluation*, their legal evaluation, their public interest in what they think is important in their States.[117]

This is especially ironic, as Sessions' state of Alabama had its felon disenfranchisement law explicitly declared unconstitutional by the Supreme Court in 1985 for its historical invidious intent.[118] The Second Circuit was also concerned with maintaining the status quo in *Muntaqim v. Coombe*.[119]

The tendency of policy-makers to ignore race as a factor in felon disenfranchisement epitomizes unconscious racism: it "appear[s] to accept a legacy of historical racial discrimination uncritically and to oppose reforms by appealing to the legal and popular foundations of a system devised to benefit whites during the slavery and Jim Crow eras."[120] In viewing felon disenfranchisement as based on felon status without accounting for race, one may avoid the guilt associated with blatant racism, yet still perpetuate discrimination. The desire to avoid uncomfortable topics is unacceptable when it means taking no action in the face of a problem.

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115. Behrens et al., *supra* note 48, at 570 (emphasis omitted).

116. *See, e.g.*, Baker v. Pataki, 85 F.3d 919, 928 (2d Cir. 1996) (using this justification to hold that the Voting Rights Act does not apply to New York's disenfranchisement law).

117. Behrens et al., *supra* note 48, at 571.

118. *See generally* Hunter v. Underwood, 471 U.S. 222 (1985).

119. *See generally* Muntaqim v. Coombe, 366 F.3d 102, 130 (2d Cir. 2004), *reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004).

120. Behrens et al., *supra* note 48, at 573.

Unconscious racism may help explain color-blind constitutionalism, discussed below, which prohibits the unequal application of the law based on race. If society shuns racial discrimination, courts will consider state actions that "judge a person by the color of his skin" to be unsavory.[121] Racial classifications have historically subordinated minorities, so rejecting classification seems like a "natural avenue to reversing [the] history of oppression and achieving racial justice."[122] The social stigma against racial classification makes it seem acceptable for courts to skirt difficult racial issues rather than to correct any inequalities.

Color-blindness requires proof of discriminatory intent for facially race-neutral laws to be deemed unconstitutional but does not catch unconscious racism, its most common form. According to Lawrence, "requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works."[123] The intent requirement is inconsistent with the character of racism today. A decision can cause the same harm to minorities whether its effect is intentional or not.

D. Racial impact of felon disenfranchisement today

The 2000 presidential election in Florida revealed the negative impact of felon disenfranchisement laws on our democratic system and how these laws can egregiously affect racial minorities. George W. Bush won the vote by a narrow margin of 537 votes in Florida.[124] On election day, Florida banned from voting over 600,000 non-incarcerated felons who had already paid their debt to society.[125] These people represented more than 1,000 times the margin which decided the presidency, exposing the potential significance of criminal disenfranchisement on election outcomes. Of those disenfranchised in 2000, 28% were black—double their representation in Florida's overall population.[126] Another 17% were Latino.[127] Florida disenfranchised around 10.5% of the state's voting-age blacks, but only 4.4% of its voting-age members of all other races.[128] By 2003, approximately 16% of Florida's black men were disen-

121. *See* Flagg, *supra* note 14, at 1010.
122. *Id.* at 1013.
123. Lawrence, *supra* note 13, at 323.
124. Mauer, *supra* note 3, at 6.
125. *Id.*; Uggen & Manza, *supra* note 4, at 793.
126. CARBÓ ET AL., *supra* note 1, at 1.
127. *Id.*
128. Johnson v. Governor of Florida, 353 F.3d 1287, 1293 (11th Cir. 2003), *vacated, reh'g en banc granted,* 377 F.3d 1163 (11th Cir. 2004).

franchised for life, even though they had already completed their sentences.[129] Denying the racial aspect of felon disenfranchisement is hard given these disparities.

Florida's election system had the collateral effect of disenfranchising tens of thousands of innocent people who had never been convicted of a felony, most of whom were minorities. The process of removing felons and ex-felons from the voter rolls was "plagued by false positives."[130] An investigative journalist later discovered that 57,700 Floridians were wrongly purged from voter registries, 90.2% of whom had no prior criminal record at all, and 54% of whom were black or Hispanic.[131]

Felon disenfranchisement is pervasive nationwide: in forty-eight states and the District of Columbia, all incarcerated persons are disenfranchised (only Maine and Vermont allow prisoners to vote). Thirty-six states bar parolees from voting, and thirty-one exclude probationers from the polls as well. In thirteen states, some or all felony convictions can mean losing the right to vote for life.[132] These laws are not uniform, but rather form "a national crazy-quilt of disqualifications and restoration procedures."[133] This unpredictable system of laws denies the right to vote to almost five million Americans, or one in forty-three adults.[134] The vast majority of disenfranchised felons are not incarcerated, and 1.7 million of them have completed their entire sentences, including probation and/or parole.[135] The United States bars more offenders indefinitely from voting than any other democracy.[136] This widespread denial of suffrage harms the democratic process: "So many Americans are now disenfranchised that our overall voter-turnout figures are distorted,

129. *Id.*

130. Karlan, *supra* note 16, at 1158.

131. CARBÓ ET AL., *supra* note 1, at 1 n.1 (citing GREG PALAST, THE BEST DEMOCRACY MONEY CAN BUY (2003)).

132. FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 1. Of the states that permanently disenfranchise ex-felons, three deny the right to vote to all ex-offenders who have completed their sentences. Ten others disenfranchise only certain categories of ex-felons for life and/or permit them to apply for restoration of rights for specified offenses after a waiting period (e.g., five years in Delaware and Wyoming and three years in Maryland). *Id.*

133. EWALD, *supra* note 26, at 15 (quoting SUSAN M. KUZMA, OFFICE OF THE PARDON ATTORNEY, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE BY STATE SURVEY I (1996)).

134. Uggen & Manza, *supra* note 4, at 797; FELON DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 1.

135. FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 1.

136. EWALD, *supra* note 26, at 13.

because a significant percentage of the voting-age population is not eligible to vote."[137]

TABLE 1: CATEGORIES OF FELON DISENFRANCHISEMENT LAWS BY STATE[138]

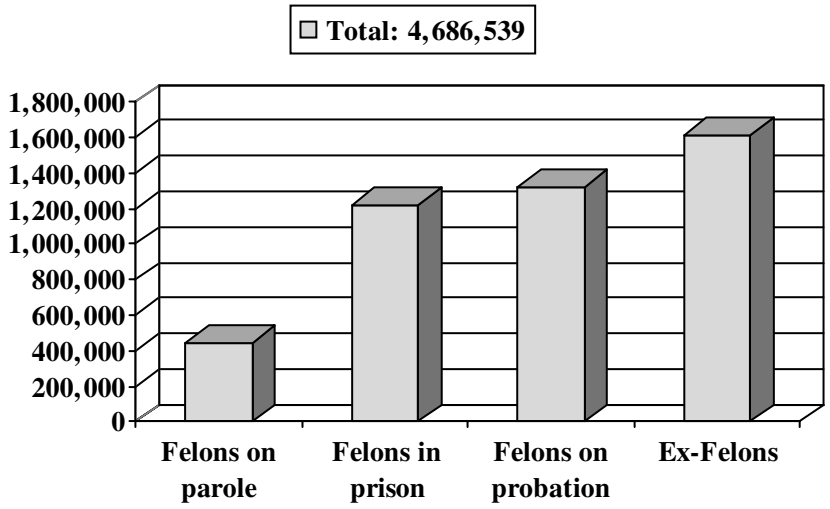
State	Prison	Probation	Parole	Ex-felons	
				All	Partial
Alabama	X	X	X		X (certain offenses)
Alaska	X	X	X		
Arizona	X	X	X		X (2nd felony)
Arkansas	X	X	X		
California	X		X		
Colorado	X		X		
Connecticut	X		X		
Delaware	X	X	X		X (5 years)
D.C.	X				
Florida	X	X	X	X	
Georgia	X	X	X		
Hawaii	X				
Idaho	X	X	X		
Illinois	X				
Indiana	X				
Iowa	X	X	X		
Kansas	X	X	X		
Kentucky	X	X	X	X	
Louisiana	X	X	X		
Maine					
Maryland	X	X	X		X (2nd felony, 3 years)
Massachusetts	X				
Michigan	X				
Minnesota	X	X	X		
Mississippi	X	X	X		X (certain offenses)
Missouri	X	X	X		
Montana	X				
Nebraska	X	X	X		X (2 years)
Nevada	X	X	X		X (except first time non-violent)
New Hampshire	X				
New Jersey	X	X	X		
New Mexico	X	X	X		

137. *Id.*

138. Reproduced from FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 3.

New York	X		X		
North Carolina	X	X	X		
North Dakota	X				
Ohio	X				
Oklahoma	X	X	X		
Oregon	X				
Pennsylvania	X				
Rhode Island	X	X	X		
South Carolina	X	X	X		
South Dakota	X				
Tennessee	X	X	X		X (post-1981)
Texas	X	X	X		
Utah	X				
Vermont					
Virginia	X	X	X	X	
Washington	X	X	X		X (pre-1984)
West Virginia	X	X	X		
Wisconsin	X	X	X		
Wyoming	X	X	X		X (5 years)
US Total	**49**	**31**	**36**	**3**	**10**

TABLE 2: FELONS DISENFRANCHISED IN THE UNITED STATES[139]



139. Reproduced from Uggen & Manza, *supra* note 4, at 797; *see also* FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 1.

Florida was simply one example of how criminal disenfranchisement bans proportionally more minorities than whites from voting nationwide. These laws disenfranchise black men at a rate seven times the national average rate of disenfranchisement.[140] 13% of the black male population, 1.4 million men, cannot vote because of a felony conviction. In Alabama, Florida, Iowa, Mississippi, Virginia, and Wyoming, at least one in four black men is barred from the polls indefinitely; and in Florida and Alabama the rate is approximately 31%.[141] At the current rate of incarceration, three in ten black men in the next generation may lose the right to vote at some point during their lives; and some states may disenfranchise 40% of black men.[142] An estimated 16% of Hispanic men will enter prison in their lifetime; and Hispanics lose their vote due to a conviction approximately five times more often than whites.[143] In Alaska, Native Americans are only 16% of the state's population, but over 30% of the state's prison population is Native American.[144]

TABLE 3: DISENFRANCHISED POPULATION BY STATE: DECEMBER 31, 2000[145]

State	Total	Blacks	State	Total	Blacks
Alabama	212,650	111,755	Montana	3,265	48
Alaska	7,390	966	Nebraska	53,428	9,240
Arizona	140,870	17,700	Nevada	66,390	17,970
Arkansas	50,416	21,686	New Hampshire	2,416	138
California	288,362	114,644	New Jersey	143,106	78,920
Colorado	23,300	6,063	New Mexico	78,400	9,128
Connecticut	45,184	18,417	New York	131,273	84,236
Delaware	30,006	15,058	North Carolina	70,653	40,910
D.C.	7,599	7,513	North Dakota	1,143	29
Florida	827,207	256,392	Ohio	47,461	25,549
Georgia	286,277	161,685	Oklahoma	52,089	15,283
Hawaii	3,703	208	Oregon	11,307	1,580

140. FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 7, at 1.

141. EWALD, *supra* note 26, at 37.

142. *Id.* This ratio actually underestimates the probability of a black man receiving a felony conviction, and subsequent disenfranchisement, because it does not include those sentenced to felony probation. RYAN KING & MARC MAUER, THE SENTENCING PROJECT, THE VANISHING BLACK ELECTORATE: FELONY DISENFRANCHISEMENT IN ATLANTA, GEORGIA 2 (2004), http://www.sentencingproject.org/pdfs/atlanta-report.pdf.

143. EWALD, *supra* note 26, at 37; CARBÓ ET AL., *supra* note 1, at 1.

144. EWALD, *supra* note 26, at 37.

145. Reproduced from Uggen & Manza, *supra* note 4, at 797–98.

Idaho	16,064	280	Pennsylvania	36,847	23,104
Illinois	46,992	33,895	Rhode Island	18,295	4,419
Indiana	21,458	9,297	South Carolina	52,210	32,756
Iowa	100,631	11,192	South Dakota	2,727	119
Kansas	12,599	4,694	Tennessee	91,149	41,759
Kentucky	147,434	35,955	Texas	525,967	164,873
Louisiana	37,684	28,690	Utah	8,896	676
Maine	0	0	Vermont	0	0
Maryland	139,565	85,251	Virginia	310,661	161,559
Massachusetts*	0	0	Washington	158,965	22,075
Michigan	49,318	27,802	West Virginia	8,875	1,188
Minnesota	41,477	8,865	Wisconsin	54,025	20,805
Mississippi	119,943	76,106	Wyoming	17,850	567
Missouri	83,012	30,471			
Total					**4,686,539**
Total Blacks					**1,841,515**
* Massachusetts now disenfranchises incarcerated felons					

The exploding rate of incarceration resulting from "tough on crime" politics helps to explain why felon disenfranchisement has such a significant effect on minority voting power.[146] In 1850, twenty-nine people per 100,000 were incarcerated, and by 1870 the rate was still only 85.3 per 100,000.[147] Through the 1970s, the incarceration rate remained below 120 per 100,000,[148] but by 1990 it had increased by almost two and a half times, reaching 292 per 100,000.[149] In 1997, the rate rose to 445 per 100,000,[150] and by mid-year 2003 it had exploded to 715 sentenced inmates per 100,000 residents, which translates into over two million incarcerated people.[151] In 2004, one out of every 138 American people was locked up.[152] Scholars have described "tough on crime" politics as

146. *See* EWALD, *supra* note 26, at 39; Dugree-Pearson, *supra* note 16, at 369–70; Hench, *supra* note 16, at 766.

147. Dugree-Pearson, *supra* note 16, at 368 (citing BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 28 (1986)).

148. *Id.*

149. *Id.* (citing OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *Prisoners in 1997*, BUREAU OF JUSTICE STATISTICS BULLETIN NCJ 170017, 1 (Aug. 1998)).

150. *Id.*

151. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, *Prison and Jail Inmates at Midyear 2003*, BUREAU OF JUSTICE STATISTICS BULLETIN NCJ 203947, 2 (May 2004) [hereinafter D.O.J. 2003], *available at* www.ojp.usdoj.gov/bjs/.

152. THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS 1 (2004) [hereinafter FACTS ABOUT PRISONS AND PRISONERS], http://www.sentencingproject.org/pdfs/1035.pdf.

a "crackdown on African Americans."[153] At midyear 2003, 899,200 black inmates[154] comprised almost 43% of the total prison population, but blacks represented only 12.3% of the total American population.[155] Hispanics in prison or jail numbered 392,200,[156] almost 19% of the incarcerated population, but Hispanics constitute only 12.5% of the total population.[157] At the opposite extreme, there were only 741,200[158] whites in the prison system in 2003, filling only 37% of prisons, yet the population as a whole was 75% white.[159] Black men have a 32% chance of serving time in prison at some point during their lives and Hispanic men have a 17% chance, but whites only have a 6% chance.[160]

The disproportionate number of racial minorities in the criminal justice system is not due to a minority predilection for crime, but rather to racial discrimination, specifically "disparate targeting by law enforcement and disparate treatment in the criminal justice system."[161] First- and second-time minority offenders are more likely to receive prison time than whites, and the sentences they receive are usually longer than those whites receive.[162] As discussed in section III below, this is the type of social or historical condition that interacts with disenfranchisement to violate the Voting Rights Act: "[T]aken together, the drug war and felony disenfranchisement have done more to turn away black voters than anything since the poll tax."[163]

The war on drugs, which is largely responsible for the high incarceration rates of minorities, illustrates that those rates are not due to increased criminality. During the war on drugs in New York between 1980 and 1997, there was a 93% increase in drug offenses for whites, and 1,615% and 1,311% increases for Hispanics and

153. Hench, *supra* note 16, at 766.

154. *See* D.O.J. 2003, *supra* note 151, at 11.

155. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 CENSUS OF POPULATION AND HOUSING 1 (2001) [hereinafter 2000 Census Demographics], *available at* http://www.census.gov/Press-Release/www/2001/tables/dp_us_2000.pdf.

156. *See* D.O.J. 2003, *supra* note 151, at 11.

157. 2000 Census Demographics, *supra* note 155, at 1.

158. *See* D.O.J. 2003, *supra* note 151, at 11.

159. 2000 Census Demographics, *supra* note 155, at 1.

160. FACTS ABOUT PRISONS AND PRISONERS, *supra* note 152, at 1.

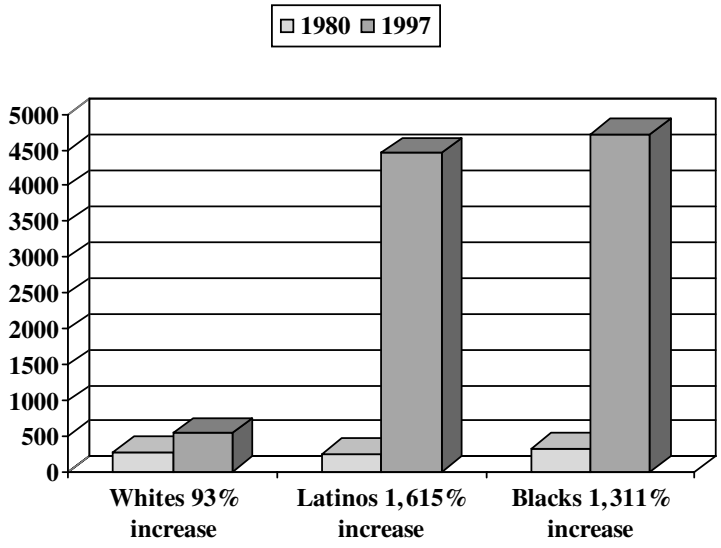
161. EWALD, *supra* note 26, at 39; *see also* Dugree-Pearson, *supra* note 16, at 369–70; Hench, *supra* note 16, at 766–67.

162. EWALD, *supra* note 26, at 39.

163. David Cole, *Denying Felons Vote Hurts Them, Society*, USA TODAY, Feb. 3, 2000, at 17A.

blacks respectively.[164] Minority communities have experienced greater impact from the war on drugs compared to whites,[165] though "[s]tudies and experience have shown that most people who use and sell drugs in [New York] and the nation are white."[166] Evidence shows that 14% of illegal drug users are black, yet blacks represent 55% of those convicted and 74% of those sentenced for drug possession.[167] According to the U.S. Sentencing Commission, 65% of crack cocaine users are white, but 90% of people prosecuted for crack-related crimes in federal court are black.[168]

TABLE 4: CHANGES IN ANNUAL DRUG OFFENSE COMMISSIONS IN NEW YORK BY RACE[169]



164. CENTER ON JUVENILE AND CRIMINAL JUSTICE, NEW YORK STATE OF MIND?: HIGHER EDUCATION VS. PRISON FUNDING IN THE EMPIRE STATE, 1988–1998, at 2 (2002).

165. This Note does not attempt to argue for the de-criminalization of drugs. But, if the legislature is going to enact strict criminal laws, the officials charged with enforcing and interpreting them should do so across the board. One racial group should not be affected disproportionately more than their contribution to the crime committed.

166. Hench, *supra* note 16, at 767 (quoting Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 557 n.112 (1993)).

167. EWALD, *supra* note 26, at 39.

168. *Id.*

169. Reproduced from CENTER ON JUVENILE AND CRIMINAL JUSTICE, *supra* note 164.

Discrimination is not limited to drug charges; it runs throughout the criminal justice system. Randall Kennedy notes the discriminatory effects of the practice of racial profiling, which former President Bill Clinton has condemned as a "morally indefensible, deeply corrosive practice."[170] Most Americans today "accept that systemic discrimination exists in the criminal-justice process."[171] Because of this widespread discrimination, in some cities, "half of young black men are under the supervision of the criminal justice system at any one time, two-thirds will be arrested by age thirty, and more are in prison than in college."[172]

Felon disenfranchisement negatively impacts the innocent minority community in addition to the people who actually commit the crimes. According to Pamela Karlan, the right to vote "has come to embody a nested constellation of concepts: participation (the ability to cast a ballot and have it counted); aggregation (the ability to join with like-minded voters to achieve the election of one's preferred candidates); and governance (the ability to pursue policy preferences within the process of representative decision-making)."[173] The right to representation must necessarily be asserted by groups, not individuals, so exclusion of large numbers of felons depletes the voting strength of entire minority communities.[174] For example, Lumumba Bandele, a law-abiding citizen and school teacher living in Bedford-Stuyvesant, suffers the effects of felon disenfranchisement, because "[w]ith so many of his neighbors unable to vote because they are in prison or on parole, Bandele feels that he, too, has lost political influence."[175] Neighborhoods where many people have been disenfranchised lose voting power, as "[a]ll residents . . . not just those with a felony conviction, become less influential than residents of more affluent neighborhoods."[176]

Another way in which felon disenfranchisement harms innocent people is through the process of redistricting. The Census Bureau counts prisoners as residents of the jurisdiction where they are incarcerated rather than of the jurisdictions in which they resided before incarceration, and in many states, many prisons are located

170. Randall Kennedy, *Suspect Policy*, THE NEW REPUBLIC, Sept. 13/20, 1999, at 30, 31.

171. EWALD, *supra* note 26, at 37.

172. CARBÓ ET AL., *supra* note 1, at 2.

173. Karlan, *supra* note 16, at 1156.

174. *See* Hench, *supra* note 16, at 767.

175. Mauer, *supra* note 3, at 5.

176. *Id.* at 6.

in largely white rural areas.[177] The effects of this "reallocation of population" are twofold. First, rural areas get a disproportionately large share of federal funds for roads, schools, and social services, while minority communities lose revenue as they lose people to the prison system. Second, white rural areas are apportioned more legislative districts based on the prison population, even though these "phantom" residents cannot vote. The redistricting process increases the political power of white rural areas at the expense of urban minority communities.

The impact of felon disenfranchisement laws on racial minorities is not surprising in light of the historical discrimination behind many of these laws and the evolution of unconscious racism. A recent study has found that "the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws. States with greater nonwhite populations have been more likely to ban convicted felons from voting than states with proportionately fewer nonwhites in the criminal justice system."[178] Even while controlling for all other relevant factors, "a larger nonwhite prison population significantly increases the odds that more restrictive felon disenfranchisement laws will be adopted."[179] Further, "one of the reasons that felon disenfranchisement laws persist may be their compatibility with modern racial ideologies. The laws are race neutral on their face, though their origins are tainted by strategies of racial containment."[180] However, the only way we can fully understand the negative impact of felon disenfranchisement on our democratic system is by facing the pain and guilt of racism head-on.

III.
THE ROLE OF THE VOTING RIGHTS ACT

Because of various obstacles to success on Equal Protection grounds, the most feasible strategy to attack felon disenfranchisement laws is through the Voting Rights Act.[181] Congress passed the

177. Karlan, *supra* note 16, at 1159.

178. Behrens et al., *supra* note 48, at 596.

179. *Id.* The study controlled for "timing, region, economic competition, partisan political power, state population composition, and state incarceration rate." *Id.*

180. *Id.* at 598.

181. Note that commentators have also urged plaintiffs to bring claims under the Eighth Amendment, though the Second Circuit has dismissed such a claim based on its view that felon disenfranchisement is regulatory rather than punitive. Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967); *see also* Karlan, *supra* note 16, at 1164–69; Thompson, *supra* note 19, at 186–205.

Act in 1965, at least in part in response to the inequitable results stemming from the color-blind approach to voting rights challenges under the Fourteenth Amendment.[182] Aiming to achieve truly equitable voting results, the Voting Rights Act has been called "the most successful piece of federal civil rights legislation ever enacted."[183]

A. Why Equal Protection has not worked for felons

The Supreme Court has long recognized that voting is a fundamental right,[184] and has thus subjected any state laws infringing on this right to strict scrutiny.[185] However, the Court has adopted a restrictive reading of § 2 of the Fourteenth Amendment that drasti-

182. In *Wright v. Rockefeller*, for example, the Supreme Court rejected the black plaintiffs' claims that New York County's racially segregated districts violated Equal Protection. True to the color-blind tradition, the Court looked past evidence of racial motivations and disparate impact and upheld the plan because such evidence could be subject to other interpretations. While not explicitly saying so, the Court essentially required proof of invidious intent—twelve years before *Davis* made it the law. 376 U.S. 52, 57 (1964).

183. Hench, *supra* note 16, at 744 (quoting Drew S. Days III, *Section 5 and the Role of the Justice Department*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 52 (Bernard Grofman & Chandler Davidson eds., 1992)).

184. Americans consider suffrage not a privilege reserved for a select few, but a broadly held right. The Supreme Court explicitly recognized this concept soon after Reconstruction, stating that voting is "a fundamental political right, because preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). In 1964, the oft-cited case of *Reynolds v. Sims* reiterated this sentiment, stating that "the right of suffrage is a fundamental matter in a free and democratic society." 377 U.S. 533, 561–62 (1964). For over one hundred years, the Supreme Court has held fast to the principle that suffrage is not merely a privilege, but a fundamental right. *See, e.g.*, Cook v. Gralike, 531 U.S. 510, 524 (2001); Burson v. Freeman, 504 U.S. 191, 214 (1992) (Kennedy, J., concurring); Burdick v. Takushi, 504 U.S. 428, 433 (1992); Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979); Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976); Roudebush v. Hartke, 405 U.S. 15, 24–25 (1972); O'Brien v. Skinner, 409 U.S. 1240, 1242 (1972); Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966).

185. Equal Protection claims requiring strict scrutiny use a two-tiered "compelling state interest" test to determine the constitutional validity of challenged state actions. Under this test, the state bears the burden of proving two points. First, the state must demonstrate that the challenged law or policy is necessary to support a compelling state interest. Second, it must show that the law or policy is narrowly tailored to meet that interest, meaning that it does not affect too many people who should not be affected and that there are no other reasonable ways to achieve this compelling state interest. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343, 360 (1972); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

cally limits Equal Protection by exempting felon disenfranchisement laws per se from strict scrutiny review. It has also adopted color-blind constitutionalism, making Equal Protection claims harder to win for felons challenging disenfranchisement laws.

1. Equal Protection of voting rights for non-felons

The Supreme Court has recognized that the disenfranchisement of any persons or group of persons should be judged against the standards of the Equal Protection Clause of the Fourteenth Amendment.[186] The Equal Protection analysis begins with the Court's observation that "[t]he right to vote . . . is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[187] Beginning in the 1960s, an overwhelming number of Supreme Court decisions have affirmed the idea that each "citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction,"[188] that voting is a fundamental right.[189]

Because of the judicially-recognized importance of the right to vote, any state voting practice that enfranchises some citizens while disenfranchising others must properly pass strict scrutiny. This means such practice is only constitutional if it is the least restrictive means necessary to support a compelling state interest.[190] In order to satisfy this compelling-state-interest test, a state bears the burden of proving two points. First, the state must prove that the challenged disenfranchisement is necessary to achieve a legitimate and

186. U.S. CONST. amend. XIV, § 1. For decisions recognizing that suffrage is a right subject to Equal Protection, see, e.g., Bush v. Gore, 531 U.S. 98, 105 (2000); *Dunn*, 405 U.S. at 337; Evans v. Cornman, 398 U.S. 419, 422 (1970); Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966); Williams v. Rhodes, 393 U.S. 23, 29 (1968).

187. *Reynolds*, 377 U.S. at 555.

188. *Dunn*, 405 U.S. at 336; *see also Gore*, 531 U.S. at 105; Hadley v. Junior Coll. Dist., 397 U.S. 50, 52 (1970); *Evans*, 398 U.S. at 422; City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970); Cipriano v. City of Houma, 395 U.S. 701, 704 (1969); Avery v. Midland County, 390 U.S. 474, 478–79 (1968); *Harper*, 383 U.S. at 667; Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964); *Reynolds*, 377 U.S. at 555; Gray v. Sanders, 372 U.S. 368, 380 (1963).

189. Notably, one scholar recently argued that courts treating felon disenfranchisement laws differently than non-felon voting restrictions (under both Equal Protection and the Voting Rights Act) detracts from the principle that voting is a fundamental right. She argued that courts must act to invalidate felon disenfranchisement law because voting is a fundamental right. Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement*, 89 MINN. L. REV. 231, 272–75 (2004).

190. *See, e.g.*, *Dunn*, 405 U.S. at 337.

substantial state interest;[191] second, that the disenfranchisement is narrowly tailored to meet that interest, meaning that it does not exclude too many people who should not be excluded.[192] Narrow tailoring also requires the state to demonstrate that there are no other less-restrictive reasonable ways to achieve this compelling and substantial state interest.[193] As the Supreme Court noted in *Dunn v. Blumstein*, voting practices may not discriminate against a group or groups of citizens unless such abridgement is *the least restrictive means necessary*.[194]

2. Constitutional amendments regarding felon disenfranchisement

Laws that disenfranchise felons are not subject to strict scrutiny because there are special constitutional amendments (the Penalty Clause and Other Crimes Exception in § 2 of the Fourteenth Amendment) that arguably apply to felon disenfranchisement. These amendments do not apply to voting restrictions placed on non-felons. The Supreme Court explained:

> Unlike most claims under the Equal Protection Clause, for the decision of which we have only the language of the Clause itself as it is embodied in the Fourteenth Amendment, respondents' claim implicates not merely the language of the Equal Protection Clause of § 1 of the Fourteenth Amendment, but also the provisions of the less familiar § 2 of the Amendment.[195]

The 1973 case of *Richardson v. Ramirez* is the Supreme Court's seminal interpretation of § 2 of the Fourteenth Amendment. In *Richardson*, three convicted felons who had completed their sentences and paroles brought non-racial Equal Protection claims challenging California's permanent disenfranchisement laws.[196]

191. Grutter v. Bollinger, 539 U.S. 306, 326–28 (2003); *Dunn*, 405 U.S. at 342; Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969).

192. *Grutter*, 539 U.S. at 333–34; *Dunn*, 405 U.S. at 343; *Shapiro*, 394 U.S. at 631; United States v. Robel, 389 U.S. 258, 265 (1967); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

193. *See* Richardson v. Ramirez, 418 U.S. 24, 78 (1974) (Marshall, J., dissenting); *Dunn*, 405 U.S. at 343; *Shelton*, 364 U.S. at 488.

194. *Dunn*, 405 U.S. at 343.

195. *Richardson*, 418 U.S. at 41–42 (recognizing the special constitutional provisions applicable to felons, which do not apply to non-felon Equal Protection challenges to discriminatory voting rights practices).

196. *Id.* at 26–31. Interestingly, one of the challenged state constitutional provisions, art. II, § 1, was repealed at general election after the plaintiffs brought their suit. The original art. II, § 1 provided in part that:

> no alien ineligible to citizenship, no idiot, no insane person, no person convicted of any infamous crime, no person hereafter convicted of the embezzle-

The California Supreme Court ruled for the plaintiffs, finding that the state's disenfranchisement laws violated Equal Protection.[197] It applied strict scrutiny and found that the laws did not pass the compelling-state-interest test because they were not necessary or narrowly tailored to achieve the stated goal of combating election fraud.[198]

The Supreme Court of the United States, however, reversed.[199] It acknowledged that strict scrutiny is normally the standard of review for voting rights challenges, but distinguished felon disenfranchisement laws based on the Other Crimes exception to the Penalty Clause.[200] Despite the dearth of legislative history and ambiguous language of "other crimes," the Court attached enormous weight to the Other Crimes exception.[201] It found that § 1 of the Fourteenth Amendment "could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement."[202] Thus, the majority held that felon disenfranchisement laws were not subject to

ment or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State.

CAL. CONST. art. II, § 1 (1894). The provision enacted in 1972 to replace the repealed law read: "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state." CAL. CONST. art. II, § 3 (1972), *amended by* CAL. CONST. art. II, § 4. Substantively, the provisions are the same; the re-enactment seems merely to embody slightly less offensive language. *See Richardson*, 418 U.S. at 28, n.2. The second constitutional provision challenged in *Richardson*, which at the time of trial had not been amended since its original enactment in 1879, provided: "'Laws shall be made' to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, 'or other high crimes.'" *Richardson*, 418 U.S. at 27 (citing CAL. CONST. art. XX, § 11 (1879)). Four years after the *Richardson* litigation, however, article XX, § 11 was in fact amended. Now, participation in the ambiguous "high crimes" is not outright grounds for disenfranchisement, but merely prevents one from serving on juries. CAL. CONST. art. VII, § 8 (1976).

197. Ramirez v. Brown, 507 P.2d 1345, 1357 (Cal. 1973).

198. *Id.*

199. *Richardson*, 418 U.S. at 56.

200. *Id.* at 54–55. The Court stated that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise." *Id.* at 54.

201. *Id.*

202. *Id.* at 55.

the same strict scrutiny as non-felon voting restrictions, so they need not be necessary to serve a compelling state interest.[203]

Justices Thurgood Marshall and William Brennan disagreed. They were not convinced by the majority's reliance on an "unsound historical analysis which has already been rejected by this Court."[204] To Justices Brennan and Marshall, the Other Crimes exception was the result of political compromise and should not have controlling significance.[205] They suggested that the failure to apply strict scrutiny to felon disenfranchisement statutes is at odds with modern notions of equality embodied in the evolving concept of Equal Protection: "Disenfranchisement for participation in crime, like durational residence requirements, was common at the time of the adoption of the Fourteenth Amendment. But 'constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber.'"[206] Ultimately, they concluded that the fundamental nature of the right to vote required that all restrictions on suffrage, including felon disenfranchisement, must be subject to strict scrutiny and that California had not met its burden under the compelling state-interest test.[207]

3. Color-blind Equal Protection jurisprudence

As mentioned above, the *Richardson* decision does not bar Equal Protection claims against felon disenfranchisement laws outright. While *Richardson* held that such statutes do not in and of themselves violate the Fourteenth Amendment, the Supreme Court and federal courts of appeals have subsequently held that states may not intentionally disenfranchise felons on the basis of race.[208] States will still violate Equal Protection if they use felon disenfranchisement as a tool for racial discrimination. However, color-

203. *See id.* at 54.

204. *Id.* at 56.

205. *Id.* at 73–74.

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

207. *Id.* at 78.

208. Hunter v. Underwood, 471 U.S. 222, 233 (1985); Johnson v. Governor of Florida, 353 F.3d 1287, 1306 n.27 (11th Cir. 2003), *vacated, reh'g en banc granted,* 377 F.3d 1163 (11th Cir. 2004). Many other circuit courts have acknowledged the validity of intentional discrimination Equal Protection claims for felons, but distinguished their cases on the facts. *See, e.g.*, Farrakhan v. Washington, 359 F.3d 1116, 1121 (9th Cir. 2004); Muntaqim v. Coombe, 366 F.3d 102, 123 n.20 (2d Cir. 2004), *reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004); Baker v. Pataki, 85 F.3d 919, 937 (2d Cir. 1996).

blind constitutionalism has made it hard for felons and non-felons alike to succeed when challenging discriminatory practices.

The color-blind ideal most drastically impacts felons via its intent requirement. Equal Protection requires proof of purposeful discrimination on the part of the government.[209] This is a difficult burden for felons challenging modern disenfranchisement laws because legislatures will not include politically unsavory, discriminatory terms in their statutes. According to the Supreme Court, "[p]roving the motivation behind official action is often a problematic undertaking."[210] As Derrick Bell notes, "[a] corollary to the intent principle is that government enforcement of a facially neutral law that has a disproportionate burden on a particular racial group does not give rise to a cognizable equal protection violation."[211]

Multiple forces work against successful Equal Protection challenges to felon disenfranchisement. Because of *Richardson*'s interpretation of § 2 of the Fourteenth Amendment, states need not prove such laws are necessary to achieve a compelling state interest in order to constitutionally deprive felons of the right to vote. At the same time, the color-blind intent requirement has imposed an extremely difficult burden of proof upon potential plaintiffs.

B. Congress intended the Voting Rights Act to stop indirect as well as direct barriers to minority voting

Congress originally passed the Voting Rights Act to stop racial bias in the American political process. Particularly, its drafters were concerned with how lawmakers had been indirectly denying suffrage to blacks without violating Equal Protection.[212] Congress found that, despite laws barring racial discrimination in voting, bias continued to pervade our country because states could evade the law through indirectly biased legislation.[213] The Supreme Court has even described state legislators' actions as an "unremitting and ingenious defiance of the Constitution."[214] Thus, the 89th Congress created the Voting Rights Act as a stronger, more detailed prohibition on racial discrimination in voting than had existed previously. Two years after its passage, the Supreme Court upheld the

209. Washington v. Davis, 426 U.S. 229, 239–47 (1976).

210. Hunter v. Underwood, 471 U.S. 222, 228 (1985).

211. DERRICK BELL, RACE, RACISM AND AMERICAN LAW 138 (4th ed. 2000).

212. H.R. REP. NO. 89-439, at 8–16 (1965); S. REP. NO. 89-162, pt. 8, at 3–16 (1965).

213. *See id.*

214. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

Voting Rights Act's constitutionality, stating that it "reflect[ed] Congress' firm intention to rid the country of racial discrimination in voting."[215]

However, the 1964 enactment was not firm enough. The original text of § 2 of the Voting Rights Act provided:

> 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.[216]

In *City of Mobile v. Bolden*,[217] the Supreme Court construed this language to reflect the same onerous intent requirement that Congress passed the Act to alleviate. It held that in order for a facially neutral state action to violate the Voting Rights Act, a plaintiff must prove that it was "motivated by a discriminatory purpose."[218] In keeping with the trend of color-blind constitutionalism, the Court strayed far from Congress's goal for the Voting Rights Act.

C. The 1982 amendments

Congress amended the Voting Rights Act in 1982 in response to the Supreme Court's insertion of an intent requirement.[219] The amended language helps the Act achieve its remedial goal and reflects Congress's acknowledgement of the barriers that the color-blind approach imposes on minorities. Section 2 of the Voting Rights Act, as amended, reads:

> 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 . . . .[220]

With this language, Congress substituted a results-based methodology in place of the intent requirement. Since then, the Supreme Court has expressly recognized that Congress amended the Act to relieve plaintiffs of the burden of proving discriminatory intent.[221] Further alleviating the burden on disenfranchised plaintiffs, § 2(b) allows plaintiffs to show violations based on the totality of circumstances. Section 2(b) reads:

215. *Id.* at 315.
216. 42 U.S.C. § 1973 (1965).
217. 446 U.S. 55 (1980).
218. *Id.* at 62.
219. Thornburg v. Gingles, 478 U.S. 30, 35 (1986).
220. 42 U.S.C. § 1973(a) (2000) (emphasis added).
221. Chisom v. Roemer, 501 U.S. 380, 394 (1991).

> A violation . . . is established if, based on the totality of 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 . . . 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.[222]

Under the amended Voting Rights Act, plaintiffs can challenge voting practices by showing, through the totality of circumstances, that they have a disparate impact on minority voting participation. Two types of claims are available: vote denial, which occurs when the ability to vote is denied on account of race; and vote dilution, which occurs when "a voting practice diminishes 'the force of minority votes that were duly cast and counted.'"[223] The Supreme Court has interpreted the totality of circumstances test to mean "that 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."[224] It has also held this test to be flexible, but uses several factors set out by the Senate Judiciary Committee as guideposts, including "the extent to which minority group members bear the effects of past discrimination . . . which hinder their ability to participate effectively in the political process."[225] Note that the

222. 42 U.S.C. § 1973(b) (2000).

223. Muntaqim v. Coombe, 366 F.3d 102, 105 n.5 (2d Cir. 2004), *reh'g en banc granted,* 396 F.3d 95 (2d Cir. 2004) (quoting Holder v. Hall, 512 U.S. 874, 896 (1994)).

224. *Gingles*, 478 U.S. at 47 (emphasis added).

225. *Gingles*, 478 U.S. at 45. The Senate Report factors, listed in full, include:

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

Court has expressly declared that these factors are "neither comprehensive nor exclusive."[226]

In *Wesley v. Collins*, the first circuit court to review a challenge to felon disenfranchisement laws based on the amended Voting Rights Act failed to properly grasp Congress's intention that the relevant inquiry should be results-based. Instead, it focused on whether racial minorities "have equal access to the process of electing their representatives."[227] A black plaintiff brought vote denial and vote dilution claims against Tennessee's disenfranchisement law as a condition of a guilty plea. In color-blind fashion, the court rejected his Fourteenth Amendment claims based on lack of intent.[228] It also failed to give the relief that should have been available under the Voting Rights Act. While the court admitted the presence of certain factors (i.e., the state's history of discrimination) that the Senate and the Supreme Court have considered relevant in the totality of circumstances test, it gave no rationale for disregarding this test altogether and holding that the law did not violate the Voting Rights Act.[229] The court failed to consider whether the admitted history of racial bias interacted with felon the disenfranchisement law to "cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[230]

The *Wesley* court also brushed aside Congress's intent to guarantee equal access to the political process for minority groups as a whole by conflating individual and community interests.[231] In addressing the vote dilution claim, the court found that felons were only denied the right to vote because of their felon status; race was

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

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

S. REP. NO. 97-417, at 28–29 (1982).

226. *Gingles*, 468 U.S. at 45.

227. S. REP. NO. 94-417, at 36 (1982).

228. Wesley v. Collins, 791 F.2d 1255, 1262–63 (6th Cir. 1985).

229. *Id.* at 1262.

230. According to the Supreme Court, this is the proper inquiry under the Voting Rights Act. *Gingles*, 478 U.S. at 47.

231. *See* Hench, *supra* note 16, at 750.

not an issue. It reasoned that the law did not, "*ab initio*," deny any citizen access to the ballot.[232] In neglecting the racial issue, the Sixth Circuit adopted a color-blind ideology, foreshadowing the Second Circuit's reasoning on the issue in *Muntaqim v. Coombe*. Not only does this perspective disregard the totality of the circumstances test required by the Supreme Court and Congress, but it misses the point of the vote dilution claim. As one commentator notes: "[T]he . . . violation was not the outright disenfranchisement of the particular individuals convicted of the specified offenses. Rather, the violation was the dilution of the innocent minority community's voting strength."[233]

Notwithstanding the Sixth Circuit's misinterpretation in *Wesley*, the Voting Rights Act's current results-based methodology and totality of circumstances test stand. While the courts have come to accept this remedial approach in a broad range of voting contexts, the debate is still unsettled over how the Voting Rights Act affects felon disenfranchisement statutes. The following section describes the tension that exists between the Second and Ninth Circuits regarding Congress's power to restore the vote to felons claiming their states' disenfranchisement laws are racially biased.

IV.
THE CURRENT DEBATE

A debate over felon disenfranchisement laws revolves around whether or not the amended Voting Rights Act applies to felons. Despite its misgivings, the *Wesley* court and subsequent circuits have assumed, without expressly stating, that the Voting Rights Act does apply to felon disenfranchisement.[234] However, not all circuits are willing to make this assumption. Though they have accepted the results-based methodology and totality of circumstances test in non-felon claims, circuits split over whether the Voting Rights Act reaches felon disenfranchisement. This is a crucial debate, given

232. *Wesley*, 791 F.2d at 1262.

233. Hench, *supra* note 16, at 750.

234. *See, e.g.*, Johnson v. Governor of Florida, 353 F.3d 1287, 1306 (11th Cir. 2003) (accepting that the totality of the circumstances test should apply to Voting Rights Act challenges against felon disenfranchisement laws), *vacated, reh'g en banc granted,* 377 F.3d 1163 (11th Cir. 2004); Howard v. Gilmore, No. 99-2285, 2000 WL 203984 (4th Cir. Feb. 23, 2000) (dismissing plaintiff's claim for failure to plead that the felon disenfranchisement law in question was either enacted with discriminatory purpose or that there was any nexus between denying felons the right to vote and race).

that the Voting Rights Act may be the only feasible way to attack facially race neutral disenfranchisement laws.

The Second and Ninth Circuits disagree on whether the Voting Rights Act applies to felons.[235] In *Farrakhan v. Washington*,[236] the Ninth Circuit reversed the district court's grant of summary judgment against black, Hispanic, and Native American felons who claimed that Washington's felon disenfranchisement law[237] violated the Voting Rights Act. Initially, the plaintiffs brought vote dilution and vote denial claims under § 1973, as well as Equal Protection claims.[238] The District Court rejected the constitutional claims because the plaintiffs could not prove invidious intent.[239] It also rejected the vote dilution claim because the plaintiffs had not alleged any factors of voter cohesiveness, such as a geographically compact voting district.[240]

The Ninth Circuit held that the district court had misinterpreted the results-based methodology and totality of the circumstances test of the Voting Rights Act. Although it determined that the plaintiff's evidence of racial bias in the criminal justice system was "compelling," it found that the lower court had wrongly held that such evidence was irrelevant and a law must "by itself" cause the discriminatory effect to violate the Act.[241] The Ninth Circuit agreed with the district court that the Voting Rights Act applies to felon disenfranchisement laws, but found that it had improperly disregarded evidence of racial bias in the criminal justice system. The Ninth Circuit held that in either a vote dilution or vote denial claim, the court must "consider the way in which the disenfranchisement law interacts with racial bias in Washington's criminal justice system to deny minorities an equal opportunity to participate in the state's political process."[242] Generally, courts apply the totality of the circumstances test correctly, so the signifi-

235. The Eleventh Circuit has also recently considered this issue and decided in favor of the Voting Rights Act's applicability to felon disenfranchisement statutes. However, the court vacated the decision and granted rehearing en banc, on July 20, 2004. Johnson v. Governor of Florida, 377 F.3d 1163 (11th Cir. 2004). Therefore, this Note focuses on the Second and Ninth Circuits, whose outcomes on the matter are clear.

236. 338 F.3d 1009 (9th Cir. 2003).

237. WASH. CONST. art. VI, § 3 (1988).

238. Farrakhan v. Locke, 987 F. Supp. 1304, 1307 (E.D. Wash. 1997).

239. *Id.* at 1314.

240. *Id.* at 1313.

241. *See Farrakhan*, 338 F.3d at 1011–14 (discussing the district court's misunderstanding of the totality of the circumstances test).

242. *Id.* at 1014.

cance of the Ninth Circuit holding is the affirmation that the Voting Rights Act applies to felons who have been denied the right to vote based on race.

The Second Circuit disagreed in *Muntaqim v. Coombe*. In *Muntaqim*, a black inmate serving a life sentence brought vote dilution and vote denial claims against several officials in the New York State Department of Correctional Services. He alleged that the state's disenfranchisement law[243] violated the Voting Rights Act because it resulted in unlawful minority vote dilution and vote denial caused by racial discrimination in the criminal justice system and disparity in the prison population.[244] He set out a classic § 1973 claim: that felon disenfranchisement laws interact with racial bias in the criminal justice system to create an inequality in the minority population's ability to participate in the political process. The Second Circuit conceded that the plaintiff in *Muntaqim* would have stated a valid § 1973 claim were the Voting Rights Act to apply to felons, but held that it does not.[245]

Both the Second and Ninth Circuits have recognized the significance of the issue.[246] Judge José Cabranes noted that it "can ultimately be resolved only by a determination of the United States Supreme Court."[247] The Court, however, denied certiorari as to both cases on November 8, 2004, giving no reason for its denial.[248] Thus, the debate continues.

A. Where the courts agree

Despite their opposite results, a close examination of the *Muntaqim* and *Farrakhan* opinions reveals that the Second and

243. N.Y. ELEC. LAW § 5-106 (Consol. 1982). This law states that no person convicted of a felony "shall have the right to . . . vote at any election" unless his maximum prison sentence has expired, he has been discharged from parole, or he has received a pardon from the governor of New York.

244. Muntaqim v. Coombe, 366 F.3d 102, 105 (2d Cir. 2004), *reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004).

245. *Id.* at 118, 130.

246. In the Second Circuit, Judge Cabranes explicitly called for Supreme Court review: "all three judges on this panel believe that the issues presented in this case are significant and, in light of the differing perspectives among and within the courts of appeals, warrant definitive resolution by the United States Supreme Court." *Id.* at 130. In the Ninth Circuit, Judge Kozinski dissented upon the majority decision to deny rehearing of the state's summary judgment claim, stating the "panel's decision has far-reaching consequences." Farrakhan v. Washington, 359 F.3d 1116, 1125 (9th Cir. 2004) (Kozinski, J., dissenting).

247. *Muntaqim*, 366 F.3d at 104.

248. Muntaqim v. Coombe, No. 04-175, 2004 WL 2072975 (U.S. Nov. 8, 2004); Locke v. Farrakhan, No. 03-1597, 2004 WL 2058775 (U.S. Nov. 8, 2004).

Ninth Circuits' agreement on the legal aspects is broad, while their disagreement is actually quite narrow. This subsection describes where the courts agree, and the next subsection details their split in reasoning.

1. Felon disenfranchisement may not violate Equal Protection

Both the Second and the Ninth Circuits agree that § 2 of the Fourteenth Amendment cannot insulate felon disenfranchisement laws from Equal Protection where such laws are motivated by purposeful racial discrimination.[249] In other words, states "cannot use felon disenfranchisement as a tool to discriminate on the basis of race."[250]

The Supreme Court held in *Hunter v. Underwood* that felon disenfranchisement will violate Equal Protection if the plaintiff can prove discriminatory intent. The plaintiffs in this case had been denied the right to vote because they had been convicted of writing worthless checks.[251] Article VIII, § 182 of the Alabama Constitution disenfranchised people who had committed, among other offenses, crimes of "moral turpitude" such as check fraud.[252] (Various nonfelony offenses such as petty larceny and check fraud fell under § 182, while much more serious offenses like second-degree manslaughter and assaulting a police officer did not.) The plaintiffs claimed that the legislature in 1901 had passed § 182 to purposefully disenfranchise blacks, and that it continued to have the effect of disproportionately denying blacks a political voice.[253]

The Supreme Court agreed, based on substantial evidence, that the Alabama legislature had designated crimes of "moral turpitude" to include those most often committed by blacks.[254] In addressing the Board of Registrars' defense that the Other Crimes provision of § 2 of the Fourteenth Amendment authorized the law, the Court declared bluntly, "[W]e are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment."[255] As one commentator notes, however, "*Underwood* still serves to limit a plaintiff's case in any suit

249. *See* Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003); *Muntaqim*, 366 F.3d at 126.

250. *Farrakhan*, 338 F.3d at 1016.

251. Hunter v. Underwood, 471 U.S. 222, 224 (1985).

252. *Id.* at 223–24.

253. *Id.* at 227–31.

254. *Id.*

255. *Id.* at 233.

challenging franchise stratagems for which evidence of intent is not so readily available."[256] The protection it affords is finite.

Despite the constitutional limitations of the decision, *Hunter* represents an important common ground for the circuits. It affirms that *Richardson* should not be read to approve all felon disenfranchisement laws as constitutionally valid. Felon disenfranchisement can be illegal.

2. The Voting Rights Act's results-based methodology can be a valid use of Congress's enforcement power under 14th & 15th Amendments

The circuits also agree on another important issue: Congress does have the authority, pursuant to its enforcement power under § 5 of the Fourteenth Amendment[257] ("§ 5") to use a results-based methodology in the Voting Rights Act—at least in some contexts.[258] The issue of Congressional authority arises because a results-based method reaches conduct not directly prohibited by the Fourteenth Amendment. The Voting Rights Act bars voting practices with disparate results, whereas Equal Protection requires proof of discriminatory intent. Therefore, Congress is using its enforcement powers to regulate racial bias in states' voting practices.

The Ninth Circuit supported the proposition that § 1973 is a valid exercise of Congressional power by holding that the Voting Rights Act applies to felon disenfranchisement.[259] It stated that "Congress enacted the VRA for the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting,'"[260] and that "Congress amended Section 2 of the VRA in 1982 to relieve plaintiffs of the burden of proving discriminatory intent."[261] The Act was Congress's response "'to the increasing sophistication with which the states were denying racial minorities the right to vote.'"[262] The *Farrakhan* court does not question Congress's power to prohibit conduct that does not violate Equal Protection.

256. Hench, *supra* note 16, at 764.

257. U.S. CONST. amend. XIV, § 5 provides in full that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

258. *See* Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003); *see also* Muntaqim v. Coombe, 366 F.3d 102, 119 (2d Cir. 2004), *reh'g en banc granted,* 396 F.3d 95 (2d Cir. 2004).

259. *Farrakhan*, 338 F.3d at 1016.

260. *Id.* at 1014 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966)).

261. *Id.*

262. *Id.* (quoting Farrakhan v. Locke, 987 F. Supp. 1304, 1308 (E.D. Wash. 1997)).

The Second Circuit agrees that "Congress may enforce the substantive provisions of the Reconstruction Amendments by regulating conduct that does not directly violate those provisions."[263] It also expressly states that the results-based test of the Voting Rights Act is constitutional in the non-felon context.[264] While *Muntaqim* held that applying the Act's results-based methodology to felon disenfranchisement would exceed the scope of Congress's § 5 enforcement power, it also explicitly said that "§ 1973 . . . may be constitutionally applied to other facially neutral voting restrictions."[265]

Several Supreme Court cases have affirmed Congress's authority to substitute a results-based test for an intent requirement in the Voting Rights Act. The scope of this authority, however, has been refined over the years. In *South Carolina v. Katzenbach*, the Court upheld many sections of the Voting Rights Act as appropriate means to carry out Congress's responsibilities under the Reconstruction Amendments.[266] It stated the intended impact of its decision to uphold the § 1973 provisions:

> Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly "(t)he 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."[267]

While *Katzenbach* upheld Congress's enforcement authority under § 5 of the Fourteenth Amendment, it did not address the scope of such authority.[268]

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263. *Muntaqim*, 366 F.3d at 119.

264. The Second Circuit agreed with the conclusions of *Mixon v. Ohio*, 193 F.3d 389, 398–99 (6th Cir. 1999), *United States v. Marengo County Commission*, 731 F.2d 1546, 1556–63 (11th Cir. 1984), and *Jones v. City of Lubbock*, 727 F.2d 364, 372–75 (5th Cir. 1984), that § 1973, on its face, meets the requirements for constitutionally "appropriate legislation" that Congress may use its § 5 enforcement powers to enact. *Id.* at 121.

265. *Id.* at 124.

266. 383 U.S. 301, 337 (1966). The provisions before the Court were: suspension of eligibility tests or devices, review of proposed alteration of voting qualifications and procedures, appointment of federal voting examiners, examination of applicants for registration, challenges to eligibility listings, termination of listing procedures, and enforcement proceedings in criminal contempt cases.

267. *Id.*

268. *See also* City of Rome v. United States, 446 U.S. 156, 173 (1980) (noting the constitutional validity of Congress's power to enact § 1973 generally, but not specifically delineating the outer boundaries of this power).

In the late 1990s, the Supreme Court began to delineate more specific boundaries of Congress's § 5 enforcement power. In *City of Boerne v. Flores*, the Court held that when remedial legislation proscribes conduct not violative of the Fourteenth Amendment, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[269] Then the Court, in *Board of Trustees of the University of Alabama v. Garrett*, held that Congress must identify "a history and pattern of unconstitutional . . . discrimination" that it seeks to redress.[270] An act that passes both of these tests is deemed "appropriate legislation" under Congress's § 5 enforcement powers. Both *Boerne* and *Garrett* singled out the Voting Rights Act as "appropriate legislation" because it passed the "congruence and proportionality" test, and its legislative history revealed an extensive record of racial bias in voting practices.[271]

Thus, the Second and Ninth Circuits must agree that the Voting Rights Act, at least as applied to non-felons, is a constitutional exercise of Congress's § 5 enforcement power. The Act, on its face, is not an unlawful intrusion into state's authority.

B. Where the courts disagree

The substantive dispute between the circuits is rather narrow. The dividing issue is whether the Voting Rights Act applies in the specific context of felon disenfranchisement statutes. This dispute can be broken into two inquiries: first, whether the results-based method of the Voting Rights Act is an improper exercise of Congress's enforcement power as applied to felons; second, whether the application of the Voting Rights Act to felon disenfranchisement requires a clear statement from Congress (and, if so, whether such a clear statement exists). The Ninth Circuit answered both questions in the negative, allowing felons to use the Act to challenge laws that interact with racial bias in our society to produce disparate results.[272] The Second Circuit answered both questions

269. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

270. Bd. of Trustees v. Garrett, 531 U.S. 356, 368 (2001).

271. *Garrett*, 531 U.S. at 373 (distinguishing the Voting Rights Act from the Americans With Disabilities Act, which was an illegitimate exercise of Congressional authority); *City of Boerne*, 521 U.S. at 526–27, 529–30 (holding that the Religious Freedom Restoration Act was not a valid exercise of Congress's § 5 power, but distinguishing the Voting Rights Act as valid, and citing its vast historical record of racial bias in voting rights).

272. Farrakhan v. Washington, 338 F.3d 1009, 1016, 1020 (9th Cir. 2003).

in the affirmative, refusing to extend the protections of the Voting Rights Act to felons.[273]

The difference between these opinions is fundamentally a difference in approach: the Ninth Circuit viewed the issue as mainly about race, so it held that the Voting Rights Act—passed to eliminate racial bias in our political process—applied to anyone, including felons, subject to a discriminatory voting restriction. It found that "[p]ermitting a citizen, even a convicted felon, to challenge felon disenfranchisement laws that result in either the denial of the right to vote or vote dilution on account of race animates the right that every citizen has of protection against racially discriminatory voting practices."[274] The Ninth Circuit accepted that felon disenfranchisement can have racial dimensions, thus implicating the Voting Rights Act. It also concluded that allowing felons to use the results test is a valid exercise of Congressional power. Accordingly, there was no need for a clear statement from Congress of its intent for such application. This Note agrees with the Ninth Circuit that felon disenfranchisement often raises racial issues, so the Voting Rights Act should apply to felons.

The Second Circuit focused mainly on felon status, which lead it to conclude that the Voting Rights Act does not apply to criminal disenfranchisement.[275] This point of view overlooks the biased history behind many felon disenfranchisement laws, as well as the discriminatory effects discussed in section II.

1. Is applying the § 1973 results-based test to felons a valid exercise of Congress's authority or does it upset the balance in our federal system?

In order for Congress to prohibit conduct not directly prohibited by the Fourteenth Amendment, it must satisfy the "congruence and proportionality" test from *Boerne* and the requirement of an identified "history and pattern of unconstitutional discrimination"

273. Muntaqim v. Coombe, 366 F.3d 102, 130 (2d Cir. 2004), *reh'g en banc granted,* 396 F.3d 95 (2d Cir. 2004).

274. *Farrakhan*, 338 F.3d at 1016.

275. Johnson v. Bush, 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002), *aff'd in part, rev'd in part and remanded sub nom.* Johnson v. Governor of Florida, 353 F.3d 1287 (11th Cir. 2003), *vacated, reh'g en banc granted,* 377 F.3d 1163 (11th Cir. 2004); *accord sub nom.* Johnson v. Bush, 353 F.3d 1287, 1308–19 (11th Cir. 2003) (Kravivh, J., dissenting). The Second Circuit, in *Muntaqim*, cites the Eleventh Circuit's dissent in *Johnson* extensively and ultimately agrees with its conclusion that the Voting Rights Act should not apply to felons. This dissent supports the view of the *Johnson* district court that the issue is not a racial one, but instead is mainly about felons. *See Muntaqim*, 366 F.3d at 112–13, 122, 123, 126, 127–28.

from *Garrett*. Only if it meets these criteria is the legislation an "appropriate" exercise of Congress's § 5 enforcement powers. Inappropriate legislation unlawfully intrudes into state authority, disturbing the balance of power between state and federal governments. As explained below, when viewed as an issue merely about felons, it is easier to conclude that the Voting Rights Act is not "appropriate" legislation in the felon disenfranchisement context and thus implicates our federal system. However, when courts correctly recognize the racial issues at play in felon disenfranchisement challenges, it becomes apparent that the Voting Rights Act is "appropriate" legislation as applied to felons, and is thus consistent with our federal system.

The Ninth Circuit found that applying the § 1973 results test to felons was a valid exercise of Congress's § 5 enforcement powers that did not disturb the balance of power between the state and the federal government. It did not require a Congressional record specifically identifying discrimination in felon disenfranchisement laws in order for § 1973 to apply to felons.[276]

The *Farrakhan* court held that Congress, in adopting the totality of circumstances test, encouraged courts to consider racial discrimination. It considered "'the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health,'" one of the Senate Report factors.[277] According to the Ninth Circuit, "[t]his factor underscores Congress's intent to provide courts with a means of identifying voting practices that have the effect of shifting racial inequality from the surrounding social circumstances into the political process."[278] The court held that "racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section 2 [of the Voting Rights Act]."[279] The court therefore rejected the argument that, because Congress did not isolate racial bias in the criminal justice system when it passed the Voting Rights Act, the Act could not be applied to felons.[280]

The Ninth Circuit's recognition of the racial dimensions of felon disenfranchisement drove its decision. The Ninth Circuit agreed with the district court and the Supreme Court in *Boerne* that

276. *See generally Farrakhan*, 338 F.3d 1009.
277. *Id.* at 1020 (quoting S. REP. NO. 97-417, *supra* note 225, at 29).
278. *Id.*
279. *Id.*
280. *Id.*

the Voting Rights Act is "appropriate" legislation under Congress's § 5 enforcement power.[281] It did not distinguish felon disenfranchisement laws from other facially neutral voting practices that clearly fall under the ambit of the Voting Rights Act. It did, however, distinguish the Act from inappropriate legislation such as the Religious Freedom Restoration Act[282] at issue in *Boerne*. The district court explained that "discrimination on the basis of race is a far deeper problem that has been recurrent throughout our history," emphasizing that Congress deemed the results test necessary to remedy such discrimination.[283] Also, the district court held that the results test is "properly limited" because it requires a nexus between societal discrimination and the challenged disenfranchisement law.[284] Because the underlying issue is racial, § 1973 can apply to felon disenfranchisement as a proportional and congruent response to the general pattern of discrimination Congress has identified in the Act's legislative history.

The court also rejected the argument that applying the Voting Rights Act to felons would undermine the Other Crimes exception in § 2 of the Fourteenth Amendment.[285] It acknowledged that felon disenfranchisement is not per se unconstitutional,[286] but emphasized the Supreme Court's holding in *Hunter v. Underwood* that "states cannot use felon disenfranchisement as a tool to discriminate on the basis of race."[287] According to the *Farrakhan* court, it follows from *Hunter* that "Congress also has the power to protect against discriminatory uses of felon disenfranchisement statutes through the VRA."[288] Strengthening this analysis is the fact that Congress specifically amended the Voting Rights Act to ensure that, in the totality of the circumstances, "'any disparate racial impact of facially neutral voting requirements did not result from racial discrimination.'"[289] A synthesis of the above principles reveals that applying the Voting Rights Act to discriminatory felon disenfranchisement laws is a constitutional execution of Congress's responsibility to enforce the Reconstruction Amendments. Accordingly, the Ninth Circuit held that "when felon disenfranchisement

281. Farrakhan v. Locke, 987 F. Supp. 1304, 1310–11 (E.D. Wash. 1997).
282. 42 U.S.C. § 2000bb (2000) (effective Nov. 16, 1993).
283. Farrakhan v. Locke, 987 F. Supp. at 1311.
284. *Id.*
285. *See Farrakhan*, 338 F.3d at 1016.
286. *Id.* (citing Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974)).
287. *Id.* (citing Hunter v. Underwood, 471 U.S. 222, 233 (1985)).
288. Farrakhan v. Locke, 987 F. Supp. at 1310.
289. *Farrakhan*, 338 F.3d at 1016 (citing S. REP. NO. 97-417, *supra* note 25, at 27).

results in denial of the right to vote or vote dilution on account of race or color, Section 2 [of the Voting Rights Act] affords disenfranchised felons the means to seek redress."[290]

The Ninth Circuit did not dispute the material facts, which included the fact that blacks constituted 3% of Washington's overall population, yet accounted for 37% of the "persistent offender" sentences handed down by state courts.[291] After the court acknowledged the racial effects of felon disenfranchisement, the question of Congress's enforcement power essentially resolved itself: the Voting Rights Act was passed to end racial discrimination in voting, extensive legislative history indicates such bias, and the results test is properly limited in scope. Thus, it is a valid exercise of Congress's § 5 powers to apply the Voting Rights Act to felons.

Conversely, in *Muntaqim*, the Second Circuit held that Congressional power to enforce the Reconstruction Amendments by the § 1973 results test does not extend to the felon context.[292] The court started from the premise that the Voting Rights Act's results-based test prohibits a broader range of state action than does the intent requirement of Equal Protection.[293] The court reasoned that unless this extension of protections can be justified as a valid exercise of Congress's § 5 enforcement powers, applying § 1973 to felon disenfranchisement laws would disturb the balance of power between the states and the federal government.[294] After applying the "congruence and proportionality" test and the requirement that Congress identify "a history and pattern of discrimination," the court found that the history of racial bias in voting in the Act's legislative history was not specifically focused on felon disenfranchisement. Because Congress did not specifically identify felon disenfranchisement as a possible context for voting discrimination when passing the Act, the Second Circuit concluded that extending the law to felons would be an invalid exercise of Congress's power over state action that would be inconsistent with our federal system.[295]

Close examination of the Second Circuit's rationale reveals that its view that the issue is about felon status rather than race drove its decision. As a preliminary matter, if the *Muntaqim* court

290. *Id.*

291. *Id.* at 1013 n.5.

292. Muntaqim v. Coombe, 366 F.3d 102, 126, 130 (2d Cir. 2004), *reh'g en banc granted,* 396 F.3d 95 (2d Cir. 2004).

293. *Id.* at 118–19.

294. *Id.* at 119–21.

295. *Id.* at 126.

had adequately recognized the racial dimensions of felon disenfranchisement, it would likely have held the Voting Rights Act, even in the felon disenfranchisement context, to be "appropriate" legislation under *Boerne* and *Garrett*. As described above, from a racial perspective § 1973 is a proportional and congruent response to a pattern of constitutional violations that has been explicitly identified by Congress.

The Second Circuit took great efforts to distinguish felon disenfranchisement laws from other facially neutral voting requirements to which the Supreme Court has held § 1973 applies. First, it emphasized that "'under our federal system, the States possess primary authority for defining and enforcing the criminal law.'"[296] It noted the states' original responsibility for regulating state and federal elections.[297] Then it discussed *Oregon v. Mitchell*,[298] in which the Supreme Court upheld Oregon's disenfranchisement of eighteen-year-olds in state elections despite the fact that the Voting Rights Act allowed eighteen year olds to vote. *Mitchell* was a plurality decision that generated five separate opinions. The Second Circuit's choice of passages reveals its separation of race from the felon disenfranchisement issue:

> Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections.[299]

The court equated felon disenfranchisement laws with voting age restrictions as being unrelated to Equal Protection's ban on racial discrimination. By sidestepping the racial effects of these laws, the court could conclude that applying the Voting Rights Act to felons was not part of Congress's responsibility to enforce Equal Protection, but rather would infringe on states' power over criminal justice and voting regulations.

The second attempt by the Second Circuit to distinguish felon disenfranchisement laws from other voting restrictions regulated by the Voting Rights Act was based on *Richardson v. Ramirez*. The court applied *Richardson*'s logic—that the framers could not have meant to use Equal Protection to prohibit the Other Crimes exception that was explicitly exempted from the Penalty Clause—to § 5 en-

296. *Id.* at 121 (quoting United States v. Lopez, 514 U.S. 549, 561 n.3 (1995)).

297. *Id.* at 122.

298. 400 U.S. 112 (1970).

299. *Muntaqim*, 366 F.3d at 122 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970)).

forcement powers. It reasoned that it would be "anomalous" for the drafters to have exempted felon disenfranchisement laws from the penalty of reduced representation and also allow Congress to prohibit such laws, unless there is a clear record of intentional voting discrimination through felon disenfranchisement in the Act's legislative history.[300] This conclusion disregarded the fact that *Richardson* was a non-racial Equal Protection claim, while the case at bar alleged racial discrimination. It also overlooked the significance of *Hunter v. Underwood*'s holding that the Other Crimes exception does not allow states to use felon disenfranchisement as a tool for racial discrimination. Finally, it noted the "longstanding practice in this country of disenfranchising felons as a form of punishment,"[301] revealing again its focus on criminal status.

The color-blind perspective that allowed the *Muntaqim* court to hold that the Voting Rights Act cannot apply to felons without threatening the federal-state balance of power seems to disregard the plaintiff's factual assertions of discriminatory results. The court did not challenge the plaintiff's assertion that blacks and Hispanics constituted less than 30% of the voting-age population in New York, yet made up over 80% of inmates in the state's prisons.[302] Nonetheless, it implicitly denied that the case was about race.

2. Should courts construe the Voting Rights Act to apply to felons?

The circuit split regarding whether or not the Voting Rights Act applies to felons turns largely on differing opinions as to whether the Act alters the constitutional balance of power. This is because there are special rules for interpreting statutes that disturb the balance in our federal system.

When an ambiguous piece of legislation appears to alter the federal balance of power, the Supreme Court requires that Congress "must make its intention to do so unmistakably clear in the language of the statute."[303] This canon of construction is known as the "clear statement rule," "the super strong clear statement rule," or the "plain statement rule." The rationale is that "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[304] Accordingly, courts will not construe a

300. *Id.* at 122.

301. *Id.* at 123.

302. *Id.* at 105.

303. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (internal citation omitted).

304. *Id.* at 461 (internal citation omitted).

statute to alter the federal balance unless Congress has made its intention to do so unmistakably clear.

Before the clear statement rule becomes relevant, the court must decide whether the statute raises federalism concerns. As discussed above, the circuit split on federalism issues is largely due to a difference in approach. Accounting for disenfranchisement's racial effects, the Ninth Circuit applied § 1973 to felons without raising constitutional questions. Choosing not to account for the racial effects of these laws, the Second Circuit found that the Act altered the balance of power when applied to felons.

Because the Ninth Circuit agreed with the district court that "this case is about race,"[305] and because Congress has the authority to enforce Equal Protection through a results-based test to stop discrimination in voting, it held that the Voting Rights Act applied to felons without disrupting the federal system. Thus, it did not apply the clear statement rule. The district court explained that the clear statement rule should not apply to the Voting Rights Act because the Reconstruction Amendments have already altered the balance of power between the state and federal governments.[306] Congress legitimately passed the Voting Rights Act pursuant to its power to enforce the Reconstruction Amendments.[307] Because the Reconstruction Amendments, upon which the Voting Rights Act is based, inherently alter the federal balance of power, "the 'plain statement' rule is simply inapplicable in the context of the VRA."[308] The Supreme Court recognized this concept in *Gregory*, when it distinguished the Age Discrimination in Employment Act, which did require a clear statement, from legislation enacted under Congress's power to enforce the Reconstruction Amendments.[309] For example, in *Chisom v. Roemer*, Justice Antonin Scalia said he did not think the clear statement rule applied to legislation enacted under Congress's Fourteenth Amendment[310] enforcement powers.

Another reason why the clear statement rule should not apply is because § 2 of the Voting Rights Act is not ambiguous.[311] The Ninth Circuit held: "Felon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies

305. Farrakhan v. Locke, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997) (agreeing with the plaintiff's response memorandum).

306. *See id.* at 1309; *see also* Baker v. Pataki, 85 F.3d 919, 942 (2d Cir. 1996).

307. Farrakhan v. Locke, 987 F. Supp. at 1309.

308. *Id.*; Farrakhan v. Washington, 338 F.3d 1009, 1014–16 (9th Cir. 2003).

309. *Gregory*, 501 U.S. at 468.

310. Chisom v. Roemer, 501 U.S. 380, 412 (1991) (Scalia, J., dissenting).

311. *See Gregory*, 501 U.S. at 470.

citizens the right to vote in a discriminatory manner violates the VRA."[312] Also, felons are citizens, so they fall within the precise language of the statute, which applies to "any citizen." In construing the unambiguous Act, passed under Congress's power to enforce the Reconstruction Amendments, the Ninth Circuit saw no reason to apply the clear statement rule.

Of course, acknowledging racial discrimination in felon disenfranchisement does not automatically invalidate the practice. Rather, it allows the Voting Rights Act to apply to felons, giving them the chance to prove that the disenfranchisement laws create racially discriminatory results. When courts are blind to race, plaintiffs lose an important means by which to challenge discrimination. Every citizen, including felons, should at least have the chance to develop a full record to prove the state has wrongfully denied him the right to vote.

The Second Circuit, however, overlooking the racial bias in felon disenfranchisement, and finding no specific reference to felons in the Congressional record, held that the Voting Rights Act's application to felons threatened federalism. Based on this rationale, the court applied the clear statement rule.[313] Paradoxically, it held that the Act satisfied *either* the ambiguity or balance-altering formulations of the clear statement rule,[314] even while admitting that the Act "does not seem ambiguous."[315]

In grasping for ambiguity as a reason to apply the clear statement rule, the Second Circuit focused on the legislative history of an entirely different section of the Voting Rights Act, § 4(c).[316] Section 4 banned the use of any "test or device" that limited the ability to vote to people "with good moral character," and § 4(c) defined those "tests and devices." The legislative history behind § 4(c) is clear that the prohibition against good moral character

312. Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003).

313. Muntaqim v. Coombe, 366 F.3d 102, 126 (2d Cir. 2004), *reh'g en banc granted,* 396 F.3d 95 (2d Cir. 2004).

314. *Id.* at 127.

315. *Id.* at 128 n.22.

316. Section 4(c) of the Voting Rights Act provides:

> The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) posses any good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

42 U.S.C. § 1973 (b)(c) (2000).

tests does not prohibit felon disenfranchisement statutes.[317] However, the argument that the legislative history of § 4(c) can create an unwritten exception to § 2 is tenuous at best, considering the different purposes of the sections. A state's use of tests or devices as defined in § 4(c), together with low voter turnout, subjects that state to § 5. Section 5 serves to prevent any future changes in the voting systems of these jurisdictions with demonstrated discriminatory effects. Section 2, quite differently, applies nationwide and covers all voting practices that result in denial or abridgement of voting rights "on account of race." The Supreme Court has held that by including the terms "standard, practice, or procedure" in § 2 Congress meant to give it "the broadest possible scope."[318] The different purposes of § 4(c) and § 2 preclude applying the legislative history of § 4(c) to § 2, especially where the text of § 2, in the Second Circuit's own words, "does not seem ambiguous."

There is also Supreme Court precedent indicating that the clear statement rule should not be applied to the Voting Rights Act. In *Chisom v. Roemer*, handed down the same day as *Gregory*, the Court chose not to apply the clear statement rule to the Voting Rights Act. *Chisom* held that the results test of § 1973 applied to the election of state judges without requiring a clear statement from Congress.[319] Even Justice Scalia in his dissent in *Chisom* said that he was "content to dispense with the 'plain statement' rule" in *Chisom*, and that "the possibility of applying that rule never crossed [the Court's] mind."[320] The *Muntaqim* court disregarded the weight of this authority, stating that *Chisom* "cannot be construed to mean that the rule should never be applied."[321] The court seemed determined to apply the clear statement rule to the Voting Rights Act. It then held that there was no clear statement that Congress meant the Act to apply to felons. Accordingly, it denied felons the right to bring § 1973 claims.[322]

The Second Circuit's holding reflects a significant effort to avoid racial issues. In conflating § 2 and § 4(c) to find ambiguity where it did not exist, the court overlooked the broad remedial pur-

317. *Muntaqim*, 366 F.3d at 128 (citing S. REP. NO. 89-162, *supra* note 212, at 24; H. REP. NO. 89-439, *supra* note 212, at 25–26).

318. Allen v. State Bd. of Elections, 393 U.S. 544, 566–67 (1969).

319. Chisom v. Roemer, 501 U.S. 380, 404 (1991). Five judges in the Second Circuit have found this to be a highly persuasive argument in holding that the clear statement rule does not apply to the Voting Rights Act. *See* Baker v. Pataki, 85 F.3d 919, 938–39 (1996).

320. *Chisom*, 501 U.S. at 412 (Scalia, J., dissenting).

321. *Muntaqim*, 366 F.3d at 128.

322. *Id.* at 129.

pose of § 2—"to *rid the country* of racial discrimination in voting."[323] In disregarding the significance of *Chisom*'s explicitly not requiring a clear statement, the court also disregarded the Supreme Court's reasoning that "the Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination."[324]

V.
CONCLUSION

Racism is deeply ingrained in American culture today, but whereas for most of our history this bias has been shown outwardly, modern discrimination is mostly indirect. This unconscious racism pushes uncomfortable racial issues further into the back of our country's proverbial closet. It has diminished Equal Protection to the point where it is nearly impossible for minorities to successfully challenge facially neutral laws, especially in the felon disenfranchisement context. The Voting Rights Act is thus the most feasible protection against the injustice to minority offenders and the diminution of innocent minority voting power that often results from the disenfranchisement of felons.

The circuit split as to whether the Act even applies to felons increases the unpredictability and inequity of this "crazy quilt" of voting restrictions. Courts that hold that the Voting Rights Act does not apply to felons blind themselves to the racial discrimination involved in felon disenfranchisement. This may be the more comfortable approach in a society that shuns race classifications, but it is the wrong one. Facing the reality that racism is still alive and well in America—and may exist indirectly through felon disenfranchisement laws—may be difficult for courts to do, but it enables the Voting Rights Act to better serve its remedial purpose. In light of the historical discrimination behind criminal disenfranchisement, the development of unconscious racism, and the statistics revealing grossly unequal impact on racial minorities today, felon disenfranchisement emerges as a racial, as well as a criminal, issue. Therefore, courts should follow the Ninth Circuit's example, and face racism head on. This is not to say that all such laws will be stricken as racially discriminatory, but allowing felons to bring claims under the Voting Rights Act gives them the chance to prove

323. South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) (emphasis added).

324. *Chisom*, 501 U.S. at 403 (citing Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).

that discrimination has deprived them of a fundamental right. No American citizen should be denied this opportunity.

It took the brutality of the Civil War to awaken the collective American conscience enough to pass the Reconstruction Amendments, an undoubtedly crucial step in the road toward equality. Though the current bias is largely indirect, felon disenfranchisement laws disproportionately burden minorities more than whites. These statistics—our proof of modern American discrimination—show that history repeats itself. We must face the uncomfortable moral question of the racial effects of felon disenfranchisement laws because, as demonstrated by the 2000 election, these laws can have a significant impact on the democratic system.