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A STRIKE AT THE HEART OF DEMOCRACY: WHY LEGAL CHALLENGES TO FELON DISENFRANCHISEMENT LAWS SHOULD SUCCEED

Alysia Robben*

INTRODUCTION

The ability to vote is considered a fundamental right, "preservative of all rights." The essence of a republican democracy is to choose one's representatives and, thus, have a voice in the collective governance of our society. The right is both revered as sacred and feared – it is constantly under attack precisely because of the power it has. Since the enfranchisement of freed slaves, the African-American vote in particular has been viewed as a threat to dominant political forces, and in turn significant efforts have been made to suppress that vote. Due to the protection of the right to vote afforded by the Constitution, Congress, and the courts, many barriers to African-American suffrage have been struck down, but one substantial disenfranchisement measure remains lawful: criminal disenfranchisement. The felon and ex-felon population represents "the largest single group of American citizens who are barred by law from participating in elections." African-Americans make up a disproportionately large amount of that group. One report estimates that based on current rates of incarceration, "three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime."

In response to the passage of the Fifteenth Amendment, states created clever, facially neutral barriers to impede the African-American vote. These efforts included the poll tax, which claimed to be an effort to raise money; the literacy test, which was a supposed effort to raise the quality of the electorate; and, felon disenfranchisement, which claimed "to preserve the purity of the ballot box." To-

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5 Keyssar, supra note 3, at 163 (citing Washington v. State, 75 Ala. 582 (Ala. 1884)).
day a tool used commonly to squelch political voices of minority groups is
gerrymandering. While many scholars consider this a violation of the Equal Pro-
tection Clause of the Fourteenth Amendment, the ruling party in state after
state consistently uses this tool to disenfranchise African-Americans.

The same is true for felon disenfranchisement laws. While the most obvious
restrictions to the franchise have been eliminated by the Voting Rights Act of
1965, the most prevalent stays in tact: two percent of Americans cannot vote
because of a felony conviction – over 1.4 million have finished serving their time
– and one-third of that population is composed of black men. While this is by
definition disenfranchisement, challenges to these laws have been unsuccessful.
Courts have ruled that the Equal Protection Clause just simply does not prevent
this particular form of disenfranchisement. The Voting Rights Act (VRA), and its
guarantee of universal suffrage, has yet to alleviate these discriminatory results
because the applicability of the statute has been questioned. Though the states
are divided on the VRA issue, the Supreme Court remains silent.

The most recent case to appeal to the Supreme Court with a challenge to crim-
nal disenfranchisement laws was Johnson v. Bush. This Note argues that the
Court should review this case for two reasons.

First, the Court should review it to have the opportunity to overrule its deci-
sion in Richardson v. Ramirez, and determine that felon disenfranchisement
laws should be subject to strict judicial scrutiny despite the Rebellion Clause –
the mention of criminal disenfranchisement in Section 2 of the Fourteenth
Amendment. Second, the Court should settle the conflict among states on
whether the VRA applies to felon disenfranchisement laws that disproportio-
nately affect African-Americans, and find that Congress’s interest in preventing
racial discrimination outweighs any right a state has to punish criminals with
disenfranchisement.

In Part I, this Note will survey the history of the right to vote, felon disen-
franchisement laws, and the racial impact of such laws. Part II will explore three
legal challenges to felon disenfranchisement laws through claims based on viola-
tions of the Equal Protection Clause and the Voting Rights Act. Part III presents
the Note’s argument and analysis through a discussion of the Supreme Court’s
rationale in Richardson and the Eleventh Circuit’s decision in Johnson v. Bush.

6 Gerrymandering is the deliberate manipulation of electoral district boundaries to the advan-
tage of particular parties.
7 Dan Eggen, Justice Staff Saw Texas Districting As Illegal, WASHINGTON POST, Dec. 2, 2005, at
A1.
8 Jamie Fellner & Marc Mauer, Losing the Vote: The Impact of Felony Disenfranchisement 1
9 405 F.3d 1214 (11th Cir. 2005).
10 Although the Court denied certiorari in Johnson as this Note went to print, the analysis in
the Note remains relevant. See discussion infra Part V.
I. Background

A. A Fundamental Right to Vote

A republican democracy — like the United States — is defined by its representative government. As Chief Justice Warren wrote, “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” He characterizes this right as fundamental because it is preservative of all other rights. The Supreme Court has repeatedly affirmed that voting is a fundamental political right.

While states are afforded the power to qualify access to the poll, restrictions on the franchise require a heightened form of judicial review, strict scrutiny. A strict scrutiny review, under the Fourteenth Amendment’s Equal Protection Clause, would find unconstitutional the denial of rights to a particular group where the exclusion is not necessary to promote a compelling state interest. To exclude a group or class of individuals from the franchise, a state would need to demonstrate that the restriction advances a compelling interest and that, in pursuing that interest, the state has chosen narrowly tailored and least restrictive means to achieving it. The means chosen cannot “unnecessarily burden or restrict constitutionally protected activity.”

Congress sought to protect the right to vote with the Voting Rights Act of 1965. Although the Fourteenth and Fifteenth Amendments extended the right to vote to males regardless of race, the barriers created since Reconstruction to keep African-Americans from voting are well-documented. These measures in-
cluded physical intimidation and violence, literary tests, the poll tax, and felon disenfranchisement. The Voting Rights Act was passed to ensure access to the polls and enforce the promise of the Fifteenth Amendment. The language used in the Act was purposely expansive, “[i]ndicative of an intention to give the Act the broadest possible scope.” When Congress passed the amended VRA in 1982, it “recogniz[ed] the near impossibility of proving deliberate and purposeful discrimination” and “put greater emphasis on effects than on intent.” The amended language, therefore, was even broader, prohibiting any “voting qualifications or prerequisite to voting, or standard, practice, or procedure . . . which results in a denial or abridgment of the right . . . to vote on account of race or color.” Adjudication of a “results claim” – a claim alleging a voting qualification resulted in racial discrimination – disregards the state legislature’s intent or lack thereof to discriminate; “the only relevant inquiry is whether racial minorities ‘have equal access to the process of electing their representatives.’” Further, this test looks to the “totality of the circumstances” to determine if the franchise is open to participation by members of a protected class (i.e. citizens of a particular race or color).

B. Exclusion from the Franchise

Despite the highly protected right to vote, the United States disenfranchises over 2% of its voting-age citizens due to a previous felony conviction. Disenfranchisement for a felony or an “infamous” crime has a long history in English and European law and therefore found a place in American law from the beginning. States began to incorporate criminal disenfranchisement provisions in

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22 KEYSSAR, supra note 3, at 293.
23 The Act further reads, in pertinent part:
    (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color. . . . (b) A violation of subsection (a) of this section 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 protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
26 The Sentencing Project, supra note 4.
27 KEYSSAR, supra note 3, at 162 (at common law, an “infamous” crime, was “one that prohibited the perpetrator from testifying under oath in court”).
28 Id. at 162-63.
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their constitutions in the late eighteenth century. By 1920, nearly all states had some sort of law denying the vote to convicted criminals. In southern states, the vote was withheld for offenses less severe than the traditional infamous crime, in an effort to target African-Americans.

The use of disenfranchisement laws is widespread, but "there has never been a particularly persuasive or coherent rationale for disfranchising felons and ex-felons." Though traditionally the sanction was thought of as punitive, there is no evidence that disenfranchisement deters crime, and states began to use the rationale that disenfranchisement of felons was necessary to "preserve the purity of the ballot box." States still express the view that ex-felons could create a voting bloc threatening to eliminate criminal laws. The persistent idea behind these claims, however, is simply that a convicted felon does not have the moral standing to exercise the franchise; disenfranchisement "was a symbolic act of political banishment."

C. Racist Origins of Modern Criminal Disenfranchisement Laws

The use of criminal disenfranchisement laws rose significantly after the Civil War, obviously attributable to the new citizenship status and disfranchisement of freed slaves. Southern Democrats during Reconstruction especially feared the political weight of the African-American vote. In response to the "menace of negro domination," violence and intimidation were commonly perpetrated against African-American voters, but felon voting restrictions were among the first widespread legal barriers used. States used criminal disenfranchisement to target "certain peculiarities of habit, of temperament, and of character" thought to distinguish African-Americans from whites. The "menace" remained through the Jim Crow era; Alabama in 1901 amended its criminal disenfranchisement law to include "all crimes of moral turpitude," in an effort to target crimes purported to be committed by African-Americans.

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29 Ballot Manipulation, supra note 2, at 563.
30 KEYSSAR, supra note 3, at 162.
31 Id.
32 Id.
33 Id. at 163 (citing Washington v. State, 75 Ala. 582 (Ala. 1884)).
34 Id.
35 Id.
36 See generally Ballot Manipulation, supra note 2.
37 Ballot Manipulation, supra note 2, at 597 ("[A]ll nine of the Southern states that restricted felon voting rights in the 10 years following the Civil War were governed by Democrats.").
38 Id. at 569 (quoting John B. Knox, president of Alabama's 1901 all-white Constitutional Convention, referring to the justification for the "manipulation of the ballot" in the state).
39 Id. (noting the racist intent of Mississippi's criminal disenfranchisement law, as stated in Williams v. Mississippi, 170 U.S. 213, 222 (1898)).
40 See id. The bill was introduced by John Field Bunting, who expressed the estimation that "[t]he crime of wife-beating alone would disqualify sixty percent of the Negroes."
Conjuring the chicken-or-the-egg quandary, it is significant to note that African-American incarceration rates have consistently exceeded that of whites since the Civil War era and remains seven times higher today.41 The jump in rates parallels the increased felon voting restrictions during the Reconstruction. For example, while 2% of the Alabama prison population was nonwhite in 1850, 74% was nonwhite in 1870 – though the nonwhite population in Alabama only increased by 3%.42 In the years since, states with greater nonwhite prison populations have been more likely to disenfranchise felons than states with a lower proportion of imprisoned nonwhites.43

D. Disenfranchisement Today

Today, criminal disenfranchisement is imposed in a variety of ways in the United States. All but two states take the right to vote away from those currently incarcerated for a felony offense.44 With the high rate of incarceration in this country, that amounts to nearly 1.5 million US citizens.45 However, only twelve states and the District of Columbia limit disenfranchisement to the incarceration period; in the remaining 36 states, parolees remain disenfranchised.46 Additionally, thirteen of those 36 states take the franchise from ex-felons47 – in some states, only those convicted of particular offenses; in others, the franchise is restored after a certain period of time.48 In three states, ex-felons who have completely served their sentences cannot vote for the rest of their free lives.49

No country surpasses the United States in the number of felons disenfranchised per capita.50 In total, about 4.7 million citizens have currently or permanently lost their right to vote as a result of a felony conviction.51 This amounts to 2% of American adults, but the percentage of disenfranchised adults reaches 4% in Alabama, Florida, Mississippi, New Mexico, Virginia, and Wyoming.52 Of all those previously convicted of a crime who cannot vote, nearly three-fourths are not in prison.53

41 Id. at 560.
42 Id. at 598.
43 Id. at 596.
44 The Sentencing Project, supra note 4. Only Maine and Vermont allow prisoners to vote.
46 The Sentencing Project, supra note 4.
47 Throughout this Note, the term “ex-felon” is used for persons who have been convicted of a felony but have completed incarceration and parole periods.
48 The Sentencing Project, supra note 4.
49 Id.
50 Handelsman, supra note 17, at 1881.
51 Id.
52 Fellner & Mauer, supra note 8.
53 Id.
E. Racial Impact of Felon Disenfranchisement Laws

The impact of these staggering numbers disproportionately affects black communities — exactly the original intention of the expansion of many felon disenfranchisement laws. While over 2% of American adults cannot vote due to a felony conviction, nearly 7.5% of black American adults are disenfranchised.\textsuperscript{54} It is specifically African-American men that lose the right to vote in droves — over one-third of the total disenfranchised population is black men.\textsuperscript{55} Of black American men, 13% could not vote in 2002.\textsuperscript{56} According to The Sentencing Project, “given current rates of incarceration, three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime.”\textsuperscript{57}

In a country with a history of Congressional intervention to protect the African-American’s access to the poll, it unfortunately gets even worse. Black men lose the right to vote for life at alarming rates in several states. Nearly one in three African-American men is permanently disenfranchised in both Florida and Alabama.\textsuperscript{58} In Virginia, Mississippi, Wyoming, and Iowa: one in four.\textsuperscript{59}

This high rate of disenfranchisement among black men comes from the fact that African-American communities face “an incarceration epidemic.”\textsuperscript{60} Several discriminatory practices lead to disenfranchisement. These include: a disparate impact in drug policy, racial profiling, higher arrest rates among African-Americans, higher conviction rates, and discretionary sentencing.\textsuperscript{61} Racial discrimination throughout the criminal justice system leads to a disproportionate number of minority felons.

The disparate impact of felon disenfranchisement laws on African-Americans has a significant effect on their collective voice in American politics. Consider the 2000 presidential election in the state of Florida. Over 600,000 Floridians could not vote due to past felony convictions, while the margin of victory was a mere

\textsuperscript{54} Developments in the Law, \textit{supra} note 24, at 1941 (citing Christopher Uggen \& Jeff Manza, \textit{The Political Consequences of Felon Disenfranchisement Laws in the United States} 23, 50-51 tbs.1-2 (2001)).
\textsuperscript{55} \textit{Id.} at 1940 (citing Fellner \& Mauer, \textit{supra} note 8).
\textsuperscript{57} The Sentencing Project, \textit{supra} note 4.
\textsuperscript{58} \textit{See} Developments in the Law, \textit{supra} note 24, at 1945 (citing Fellner \& Mauer, \textit{supra} note 8).
\textsuperscript{59} \textit{See} Ballots and Bullets, \textit{supra} note 15, at 1364 (citing Fellner \& Mauer, \textit{supra} note 8).
\textsuperscript{60} Finzen, \textit{supra} note 56, at 300.
537 votes.\textsuperscript{62} There is little question that black enfranchisement would have changed the outcome of the election. According to a study by two sociologists, Al Gore would have won the Florida election by more than 31,000 votes.\textsuperscript{63} The study also suggests that “since 1978, the outcomes in seven United States Senate races would have been reversed [which] would likely have given Democrats control over the Senate throughout the 1990s.”\textsuperscript{64}

In the end, the effect of disenfranchising such large numbers of citizens, with such a disparate impact, is that “more black men are disqualified today by [these laws] than were actually enfranchised by the passage of the Fifteenth Amendment in 1870.”\textsuperscript{65} This is not a result the framers of the Civil War Amendments likely anticipated. Yet, few ex-prisoners have been successful at using these voting rights Amendments to challenge felon disenfranchisement laws.

II. LEGAL CHALLENGES TO FELON DISENFRANCHISEMENT LAWS

A. Constitutional Challenge: Richardson v. Ramirez

Richardson v. Ramirez\textsuperscript{66} was the first case in which the Supreme Court gave plenary consideration to the question of whether a state may constitutionally exclude some or all convicted felons from the franchise.\textsuperscript{67} The three plaintiffs, who were convicted of felonies and had completed their sentences and parole, were denied registration to vote in California because of their convictions.\textsuperscript{68} The plaintiffs challenged the California constitutional provisions that disenfranchised felons, arguing that the restrictions were a denial of equal protection to ex-felons in violation of the Fourteenth Amendment.\textsuperscript{69} The Court held that a state may constitutionally deny the vote to ex-felons and, further, exempted felon disenfranchisement laws from the scrutiny required of other limitations on the franchise by the Equal Protection Clause. Thus, a state need not show a compelling state interest to justify the exclusion of ex-felons.\textsuperscript{70} The Court based its reasoning on Section 2 of the same Amendment which permits states to disenfranchise on the basis of “participation in rebellion, or other crime,” without


\textsuperscript{63} Id. at 792-93 tbl.4a.

\textsuperscript{64} Ballots and Bullets, supra note 15, at 1365 (citing Uggen & Manza, supra note 62, at 789).


\textsuperscript{66} 418 U.S. 24 (1974).

\textsuperscript{67} Id. at 53.

\textsuperscript{68} Id. at 24.

\textsuperscript{69} Id.

\textsuperscript{70} Id. at 54.
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losing congressional representation. From this language, the Court concluded that “the exclusion of felons from the vote has an affirmative sanction in § 2,” which distinguishes felon disenfranchisement from other state limitations on the franchise.

The Court determined, through a survey of the legislative history of Section 2 and historical facts about felon disenfranchisement in the states, that Congress could not have intended Section 1, “in dealing with voting rights as it does . . . to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which section 2 imposed for other forms of disenfranchisement.” Many scholars have criticized this “unsound historical analysis” and the Court’s interpretation of the Fourteenth Amendment, noting, for example, the critical difference between the common law definition of a felony (subject to capital punishment) and the modern definition (subject to a year or more in prison). Regardless, most lower courts have interpreted Richardson “as having closed the door on the equal protection argument” in a challenge to state criminal disenfranchisement laws.

B. Race-based Equal Protection Claim: Hunter v. Underwood

Despite the holding in Richardson, an equal protection argument did succeed against criminal disenfranchisement in 1985 with a claim based on racial discrimination in the case of Hunter v. Underwood. The case arose in Alabama in 1977-1978 when the plaintiffs, Carmen Edwards and Victor Underwood, were barred from registering to vote. They were denied voting privileges under Article VIII, section 182, of the Alabama Constitution of 1901, which disqualifies from voting citizens convicted of any of a list of particular crimes, which included numerous felonies, nonfelonies, and “any infamous crime or crime involving moral turpitude.” The plaintiffs, one black and one white, had each been convicted of

71 Section 2 provides in pertinent part: “But when the right to vote . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.” U.S. CONST. amend. XIV, § 2.
72 Richardson, 418 U.S. at 54.
73 Id. at 55.
74 Id. at 56 (Marshall, J., dissenting).
75 Voting, supra note 20, at 256.
76 Developments in the Law, supra note 24, at 1950 (citing Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1981) (stating that Richardson clarified “once and for all . . . that the power of the states to disqualify for crime under §2 of the fourteenth amendment was not subject to the equal protection constraints of §1 of the amendment”), vacated by 454 U.S. 807 (1981) (mem.)); see also Farrakhan v. Locke, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997) (“Richardson suggests that the facial validity of felon disenfranchisement may be absolute.”).
78 Underwood v. Hunter, 730 F.2d 614, 615 (11th Cir. 1984).
79 Hunter, 471 U.S. at 222.
presenting a worthless check – a misdemeanor that the Board of Registrars determined involved moral turpitude.\textsuperscript{80} The plaintiffs sought a declaration invalidating section 182 as it pertained to misdemeanors, claiming the provision was adopted to intentionally disenfranchise blacks and that the provision had the intended discriminatory effect.\textsuperscript{81} One expert estimated that “by January 1903 section 182 had disfranchised approximately ten times as many blacks as whites. This disparate effect persists today. . . . [B]lacks are . . . at least 1.7 times as likely as whites to suffer disenfranchisement under section 182 for the commission of nonprison offenses.”\textsuperscript{82}

The racially discriminatory impact of the provision was “indisputable,”\textsuperscript{83} but to find a violation of the Equal Protection Clause, the Court required a showing that the provision was enacted with a discriminatory intent or purpose, citing \textit{Arlington Heights v. Metropolitan Housing Development Corp.}\textsuperscript{84} The District Court found that disenfranchisement of blacks was a major purpose for holding the convention at which the Alabama Constitution of 1901 was adopted,\textsuperscript{85} but the state’s permissible motive of “governing exercise of the franchise by those convicted of crimes” was enough to validate the provision.\textsuperscript{86} The Supreme Court upheld the Court of Appeals’ reversal, holding that in a mixed-motive case such as this, where discrimination was a “substantial” or “motivating” factor, the burden shifts to the law’s defenders to show the law would have been enacted without that factor.\textsuperscript{87} Ultimately, the Court had no difficulty finding that racial discrimination was the sole purpose for this provision of the Alabama Constitution due to evidence offered by historians about the movement to disenfranchise blacks in the post-Reconstruction South and the “zeal for white supremacy [that] ran rampant at the convention.”\textsuperscript{88}

The defendants’ final argument was that Section 2 of the Fourteenth Amendment authorized the State to disenfranchise criminals, including those who commit misdemeanors of moral turpitude. The Court agreed that there is an implicit authorization in Section 2 to deny the vote based on “participation in rebellion, or other crime” – per its decision in \textit{Richardson}.\textsuperscript{89} However, the Court did not believe that Section 2 was “designed to permit the purposeful racial discrimina-

\textsuperscript{80} \textit{Id.} at 224.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.} at 22 (emphasis added).
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.} at 227-28. The Court in \textit{Arlington Heights} stated, “[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.” \textit{Id.} at 264-65.
\textsuperscript{85} \textit{See} discussion \textit{supra} Part I, § C.
\textsuperscript{86} \textit{Hunter}, 471 U.S. at 225.
\textsuperscript{87} \textit{Id.} at 228.
\textsuperscript{88} \textit{Id.} at 228-29.
\textsuperscript{89} \textit{Id.} at 233 (citing \textit{Richardson v. Ramirez}, 418 U.S. 24 (1974)).
tion. . .which otherwise violates § 1 of the Fourteenth Amendment." As the Court asserted, "nothing [in the opinion in Richardson] suggests the contrary." 


The problem with the exception the Court carved out in Hunter was that, as one scholar writes, "[t]he reach of Hunter was limited, since few states – and none outside the South – had legal codes and track records that demonstrated intent as clearly as did Alabama's." The plaintiffs in Johnson v. Bush encountered this problem as they attempted to challenge racially discriminatory criminal disenfranchisement provisions in Florida's constitution. They broadened their complaint, however, from an Equal Protection claim to include the argument that the provision violated Section 2 of the Voting Rights Act of 1965 as amended in 1982.

The plaintiffs filed a class action suit on behalf of all Florida citizens who cannot vote in Florida because of a past felony conviction, though they are finished serving time. For their Equal Protection claim, the plaintiffs attempted to show that, like in Hunter, racial animus was the motivation for the criminal disenfranchisement provision in Florida's constitution, originally adopted in 1868, which states that "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights . . ." Florida revised its constitution in 1968, however, and altered and reenacted the disenfranchisement provision. The plaintiffs did not allege the adoption of the provision in 1968 was motivated by racial discrimination, but they did claim that the racial animus in 1868 remained legally operative despite the 1968 re-enactment. In accordance with the procedural posture of the case, the Eleventh Circuit court assumed racial discrimination motivated the adoption of the 1868 provision, and concerned itself with the 1968 provision. The court thus found that the precise question before it was "whether a subsequent legislative re-enactment can eliminate the taint from a law that was originally enacted with discriminatory intent."

Ultimately, the court found that the plaintiffs' Equal Protection claim failed under the two-part test in Hunter. According to the court, the plaintiffs proved neither a discriminatory motive in the 1968 re-enactment of the constitutional provision nor - assuming there was a discriminatory motive - that the legislature would not have passed the provision without the discriminatory motivation. As a

90 Id.
91 Id.
92 KEYSSAR, supra note 3, at 306.
93 405 F.3d 1214 (11th Cir. 2005).
94 Id.
95 FLA. CONST. art. VI, § 4 (1968).
96 Johnson, 405 F.3d at 1223.
97 Id.
98 Id. at 1224.
result, despite the severely disparate impact of Florida’s felon disenfranchisement provision, plaintiffs could not meet the narrow Equal Protection test as established in Hunter, descending from Richardson’s exclusion of felon disenfranchisement laws from the strict scrutiny required by the Equal Protection Clause. Because racial animus was unproven, the court looked no further in scrutinizing the law on those grounds.

For their Voting Rights Act claim, the plaintiffs alleged the disenfranchisement provision violated Section 2 of the Act by denying African-Americans suffrage based on race. The plaintiffs attempted to show that regardless of motive behind the adoption of Florida’s felon disenfranchisement provision, the provision violates the VRA under the “results test” of Section 2 of the Act because the state is enforcing a “qualification” on voting that “results in a denial . . . of the right of any citizen . . . to vote on account of race or color.” The court refused to apply the Act to the felon disenfranchisement provision, again relying on the “affirmative sanction” in the Fourteenth Amendment of the exclusion of felons from the franchise. Interpreting the VRA “to deny Florida the discretion to disenfranchise felons raises serious constitutional problems,” according to the court, because this interpretation would allow “a congressional statute to override the text of the Constitution.” Additionally, the court found that Congress had expressed an intent “to exclude felon disenfranchisement provisions from VRA scrutiny.”

III. Analysis

The Supreme Court should review the Eleventh Circuit’s decision in Johnson v. Bush for two reasons. The Court should do so, first, to take the opportunity to overrule its decision in Richardson and recognize that there is not an affirmative sanction of felon disenfranchisement laws in Section 2 of the Fourteenth Amendment, and therefore such laws require a compelling state interest. Second, the Court should address the conflict among states on the applicability of the VRA to felon disenfranchisement laws, finding that it is appropriate and necessary to apply the VRA to these laws when, coupled with a strong history of discriminatory purpose, the laws result in the disproportionate disenfranchisement of African-Americans.

99 See discussion supra Part I, § E.
101 Johnson, 405 F.3d at 1229.
102 Id.
103 Id. at 1234.
A. Equal Protection Claim: A “Constitutionally Protected Right”?  

Since Richardson, the argument against the applicability of the Equal Protection Clause has been that Section 2 of the Fourteenth Amendment permits the states to disenfranchise felons. The mere mention of criminal disenfranchisement, however, is not an affirmative sanction of the practice. Section 2 and its Rebellious Clause were included in the Fourteenth Amendment “largely through the accident of political exigency.” As Justice Marshall asserted in his Richardson dissent, the Republican 39th Congress feared increased congressional representation of the southern states due to the abolition of slavery. Straddling the two goals of decreased southern representation and increased enfranchisement of Republican-voting African-Americans, Congress gave southern states a choice—they could give African-Americans the right to vote, or lose representation. Because the purpose of Section 2 was the enfranchisement of freed slaves, the exclusion of other contemporary and traditional forms of disenfranchisement was to be expected. But the embedding of a concurrent practice in the Constitution does not guarantee its eternal place in our country’s notions of justice and liberty. Noting the reasoning by Frederick Douglass that the Framers of the Constitution fully expected the eventual abolition of slavery even as they wrote provisions which acknowledged its existence, one scholar writes that “[the Framers] were not merely concerned with creating a government and laying down static concepts for its immediate maintenance, but also with the elucidation of principles that would be applicable to generations of citizens to come.”

Furthermore, it is unnecessary to entirely refuse to apply the Equal Protection Clause to felon disenfranchisement. The petitioner, and the Court, in Richardson asserted that the Framers could not have intended to “prohibit outright” in Section 1 a practice which was expressly exempted from the lesser sanction of reduced representation imposed by Section 2. This completely disregards the role of the Equal Protection Clause. The clause does not “bar outright” any practices—instead, the Supreme Court has established modes of review for state practices to determine their constitutionality under this clause. Application of the Equal Protection Clause to any disenfranchisement measure requires strict scrutiny by the court. Whether strict scrutiny applies to a particular practice, as Justice Marshall asserted in his Richardson dissent, is only a “threshold question.”

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106 Id. at 73.
107 Id. at 73-74.
109 Richardson, 418 U.S. at 43.
110 Id. at 78 (Marshall, J., dissenting).
Once answered in the positive, the court assesses whether the state has presented a compelling interest in excluding the particular group, whether the restriction is necessary to further that "legitimate and substantial state interest," whether the restriction is narrowly tailored to serve that interest, and whether there are other reasonable means which are less burdensome on a constitutionally protected interest.\(^\text{111}\) The greatly important, otherwise constitutionally-protected interest at issue here – the right to vote – deserves at least this judicial evaluation in any situation. Therefore, even without a racially discriminatory motivation for the implementation of felon disenfranchisement provisions, the provisions must withstand strict scrutiny. In Johnson, Florida must present a compelling interest in denying ex-felons the right to vote.

As a result, the Supreme Court should find that the law in Florida cannot withstand such scrutiny. The state's rationale for disenfranchising ex-felons cannot outweigh the disparate impact in Florida. The circuit court found that "Florida has a valid public policy reason for disenfranchising felons," but does not state what that reason is, only noting that "[s]everal courts have recognized the propriety of excluding felons from the franchise."\(^\text{112}\) The defendants point to both a theoretical purpose based on Locke's theory of the social contract and simply state that it is reasonable that "perpetrators of serious crimes" should not take part in electing law-makers and law enforcers.\(^\text{113}\) This rationale is commonly used but is unsound. First, it rests on the incorrect view that the Florida felon disenfranchisement laws touch only the "serious" criminals, rather than the reality that those convicted of less serious crimes are also disqualified.\(^\text{114}\) Second, the defendant's reason voices a reminiscent concern for the "purity" of the ballot box.\(^\text{115}\) The Supreme Court rejected "the premise that we can disenfranchise people based on predictions of how they will vote" saying that a subclass of voters could not be "fenced out" based on their likely voting choices.\(^\text{116}\) Third, the professed reason imposes on the criminally convicted a lifetime of conviction as a "perpetrator" and political banishment, even when they have finished serving their debt to society. This harsh result particularly exceeds any legitimate interest the state might have in excluding "serious" criminals from the polls.

\(^{111}\) Id.
\(^{112}\) Johnson v. Bush, 405 F.3d 1214, 1225 (11th Cir. 2005).
\(^{113}\) Brief for the Defendant at 2, Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (No. 02-14469C) (quoting Green v. Board of Elections, 380 F.2d 445, 451-52 (2d Cir. 1967)).
\(^{114}\) See Balloons and Bullets, supra note 15, at 1369 ("The irresistible political pressure toward ever more criminalization means that much not particularly blameworthy conduct is classified as a felony.").
\(^{115}\) See discussion supra Part II, § B.
Neither this rationale, nor other reasons for criminal disenfranchisement, demonstrate the necessity of these laws to secure a compelling state interest. Disenfranchisement laws do not prevent voter fraud, create an informed electorate,\textsuperscript{117} or deter crime. They are not rehabilitative, nor are they necessary or adequate for punishment, since they are imposed on all convicts “regardless of the character of their offense.”\textsuperscript{118} Furthermore, while these goals may be valid, there are other means to achieve them that are less restrictive of a constitutionally-guaranteed right.

The Court should recognize that Section 2 of the Fourteenth Amendment “provides no warrant for circumscribing the reach of the equal protection clause,” because the Court has previously emphasized that the Equal Protection Clause is “not bound to the political theories of a particular era but draws much of its substance from changing social norms and evolving conceptions of equality.”\textsuperscript{119} Florida cannot present a compelling state interest that necessitates the mass disenfranchisement of African-Americans, and such a result should not be sustained by the Civil War Amendments that originally guaranteed the African-American vote. Some states have recognized that the history of disenfranchisement cannot justify the current state of such laws.\textsuperscript{120} Unfortunately, we cannot rely on the states to take care of this situation in a piecemeal fashion. The Supreme Court should, therefore, reverse its holding in \textit{Richardson} that has kept the Equal Protection Clause from applying in situations other than those with obvious racially discriminatory intent. The states have been allowed to broadly disenfranchise without a scrutinizing eye for too long.

\textbf{B. Voting Rights Act Claim}

In \textit{Johnson}, the Eleventh Circuit refused to apply the Voting Rights Act’s results test to Florida’s felon disenfranchisement law. It based its decision on a few weak arguments. First, it offhandedly referred to the fact that such laws “are deeply rooted in this Nation’s history and are a punitive device stemming from criminal law,” again citing \textit{Richardson}.\textsuperscript{121} On the contrary, such laws as they are currently executed do not have such deep roots in our history. Whereas 96\% of states had broad felon disenfranchisement laws in 2002, only 35\% of states did in 1850.\textsuperscript{122} Traditionally, the degree of disenfranchisement varied according to the particular crime – some warranted permanent disenfranchisement, while others

\begin{thebibliography}{9}
\item \textsuperscript{117} Laurence H. Tribe, \textit{American Constitutional Law}, § 13-16 (1978 ed.).
\item \textsuperscript{118} Raskin, \textit{supra} note 116.
\item \textsuperscript{119} Tribe, \textit{supra} note 117 (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966)).
\item \textsuperscript{120} See \textit{Ballot Manipulation}, \textit{supra} note 2, at 599 (“Connecticut, New Mexico, Nevada, and Maryland have all liberalized their felon voting laws since 2001.”).
\item \textsuperscript{121} Johnson v. Bush, 405 F.3d 1214, 1228 (11th Cir. 2005).
\item \textsuperscript{122} \textit{Ballot Manipulation}, \textit{supra} note 2, at 564.
\end{thebibliography}
brought on only a temporary exclusion.\textsuperscript{123} Also, felonies were traditionally punishable by capital punishment,\textsuperscript{124} while today only one year of served time warrants the felon label. Current incarceration rates are comparatively high, as noted above. Additionally, criminal disenfranchisement laws serve no punitive function. Not even the defendants in this case referred to a penal rationale for disenfranchisement. Instead, the state interest put forth tends to revolve around maintaining the "purity of the ballot box"\textsuperscript{125} and the fear that convicted criminals will vote to weaken criminal laws.

Second, the court asserts that "all states except two have some form of criminal disenfranchisement provision."\textsuperscript{126} While this is true, the court is using this fact in a misleading manner to assert that Florida's law is typical of the nation. In fact, Florida's law is atypical. Only thirteen states take the right to vote from a felon who has completed their sentence – which is the action the plaintiffs in this case are challenging. Furthermore, Florida is one of only three states that disenfranchise all ex-felons for life. What makes Florida's law even more disturbing is the unusually large incarcerated population in the state. In 2004, Florida had the third-highest number of prisoners, fourth counting the federal prison system, with nearly 85,000 prisoners.\textsuperscript{127} This reflects in the number of disenfranchised. While the national average is a 2% disenfranchisement rate, Florida disenfranchises 4% of its adult population. Moreover, in light of the claim – racially discriminatory disenfranchisement – the unusual racial impact in Florida further discounts the court's assertion. In Florida, one in three black men is permanently disenfranchised. Therefore, the court's reasoning for its argument that felon disenfranchisement is presumptively a valid state action is amiss.

Even if these arguments were strong enough to support felon disenfranchisement, they are out of place in a discussion of the applicability of the VRA to Florida's felon disenfranchisement law. Though an action may be both deeply rooted in American tradition and widely used today, a showing of racially discriminatory impact warrants prohibition by the VRA. Nothing in the VRA asserts that the length of time a disenfranchising tool has been in use, or the extent to which it is used, overcomes the desire of Congress to eliminate practices that deny or abridge the right to vote. The circuit court pointed to the Supreme Court in \textit{Chisom v. Roemer}\textsuperscript{128} when it stated that "Congress amended § 2 of the Voting Rights Act to make clear that \textit{certain} practices and procedures" are forbidden.\textsuperscript{129}

\textsuperscript{123} Voting, supra note 20, at 236.
\textsuperscript{124} Developments in the Law, supra note 24, at 1939 (citing George P. Fletcher, Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia, 46 UCLA L. REV. 1895, 1899 (1999)).
\textsuperscript{125} Handelsman, supra note 17, at 1882.
\textsuperscript{126} \textit{Johnson}, 405 F.3d at 1228.
\textsuperscript{127} \textit{Harrison & Beck}, supra note 45.
\textsuperscript{129} \textit{Johnson}, 405 F.3d at 1228 (citing \textit{Chisom}, 501 U.S. at 383).
However, the court only points to the weak arguments outlined above as proof that this particular practice by Florida was not one of the "certain" practices that are forbidden, and to one additional argument: that Section 2 of the Fourteenth Amendment affirmatively sanctions use of felon disenfranchisement laws.

The court sees an express constitutional permission given to the states to disenfranchise convicted criminals, as discussed above. Denying the state this "discretion to disenfranchise" raises serious constitutional questions, according to the court, because it would allow a congressional statute (the VRA) to "override the text of the Constitution."130 Here, the court is misstating the interpretation that the plaintiffs are urging, and therefore raising a constitutional question that may not have to be raised. The difference between the plaintiffs' interpretation and the court's parallels the difference between the plaintiffs' claims in Johnson and the claims in Richardson.

The plaintiffs in Richardson alleged that provisions of California's constitution which disenfranchised ex-felons (those who had completed their sentences and paroles) were unconstitutional because they did not afford the plaintiffs equal protection under the law - namely, that the provisions discriminated against the plaintiffs as ex-felons. The plaintiffs in Johnson, however, are adding a claim to this one - that the provisions in Florida's constitution discriminate against the plaintiffs as African-Americans. Therefore, the VRA claim in this case ultimately had nothing to do with the state's discretion to impose felon disenfranchisement, and it does not challenge the constitutionality of discriminating against felons. Instead, the VRA claim challenges the state's use of any means to effectively discriminate against black citizens' access to the franchise, and the means in this case are felon disenfranchisement provisions. The racially discriminatory "result" of Florida's felon disenfranchisement provisions is a result that is prohibited by the VRA - the denial of the right to vote to racial minorities.

The court goes on to say that despite the fact that felon disenfranchisement laws are "constitutionally protected," the provision could still be challenged.131 It refers to the decision in Hunter that outlaws the use of such laws to intentionally discriminate on the basis of race.132 Therefore, the plaintiffs "have a remedy if the state's provision violates the Equal Protection Clause."133 Again, the court is merging two distinct claims. Arguably, according to Richardson and followed ever since then, Section 2 of the Fourteenth Amendment affirmatively sanctions the exclusion of felons in granting the franchise; arguably because of that, a felon cannot challenge her disenfranchisement under the Equal Protection Clause. The felon would have no problem proving the elements; clearly the disenfranchise-

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130 Id. at 1229.
131 Id. at 1230.
132 Id. (citing Hunter v. Underwood, 471 U.S. 222, 233 (1985)).
133 Id.
ment law intentionally took the right to vote – a protected right – away from one class of persons. However, Section 2 of the same Amendment – arguably – permits this form of discrimination, and the felon would not win her case. This is indeed what happened in *Richardson.*

A felon who can show that she is purposely disenfranchised based on race, however, could win her case. If she proved that the state passed a law or a constitutional provision disenfranchising felons, with the purpose of taking the vote away from black citizens, she has again proven intentional discrimination, and a form of discrimination that is apparently not sanctioned by the Rebellion Clause, according to *Hunter.*

If a felon brings a case claiming that her right to vote has been denied because of her race, not intentionally, but as a result of a voting qualification, she will not win her case. This is not because she needs to prove intent – the Voting Rights Act provides for disparate impact claims. So, why would she lose? According to the court in *Johnson,* it is because Section 2 of the Fourteenth Amendment protects states’ right to disenfranchise felons. But if the Rebellion Clause does not sanction racial discrimination, again, as asserted in *Hunter,* why would it sanction the racial discrimination targeted by the Voting Rights Act? This result is clearly erroneous. If a felon can bring a discriminatory intent claim under the Equal Protection Clause – despite the Section 2 sanction of felon disenfranchisement – then a felon should be able to bring a disparate impact claim under the VRA. If a plaintiff claims she is being denied the right to vote based on race, under the totality of the circumstances, she does not have to prove intent. If the VRA effectively replaced the Fourteenth Amendment in terms of federal protection of the right to vote, then the Fourteenth Amendment § 2’s sanction of felon disenfranchisement should affect the VRA in the same way it affects the Equal Protection Clause – namely, that it does not allow states to discriminate on the basis of race despite their felon status intentionally, under the Equal Protection Clause, or effectively, under the VRA.

The Eleventh Circuit also argues that interpreting the VRA to apply to felon disenfranchisement despite Section 2's “affirmative sanction” of such laws would allow a federal statute to limit “a state’s delegated power,” instead of the Constitution doing so (through the Equal Protection Clause), as in *Hunter.* As the court discusses, however, Congress enacted the VRA pursuant to its power to enforce the Fourteenth and Fifteenth Amendments. The Constitution gives Congress the authority to enforce that same Amendment that arguably sanctions felon disenfranchisement, but which also prohibits racial discrimination in voting. By allowing Congress to enforce the Amendment’s prohibition of racial

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134 *Id.* at 1228-29.
135 *Id.* at 1227.
136 U.S. CONST, amend. XIV, § 5.
discrimination, monitoring felon disenfranchisement laws through the VRA has no direct conflict with the supposed affirmative sanction of such laws in Section 2 of the Amendment.

Furthermore, Congress's interest in protecting the right to vote should outweigh any state's interest in punishing criminals. Voting is the most fundamental of all rights in a democracy. In *Bob Jones University v. U.S.*, the Supreme Court decided that the federal government's "fundamental, overriding interest in eradicating racial discrimination in education . . . substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." The Court is called upon in this situation to also weigh competing values: Congress' interest in protecting the right of all citizens to vote, and a state's interest in punishing felons. Here, too, the Court must determine that Congress does have a "fundamental, overriding interest" in enforcing the Equal Protection Clause's prohibition of racial discrimination that outweighs the supposed discretion given to states to disenfranchise felons.

When Congress passed the amended Voting Rights Act in 1982, it "recogniz[ed] the near impossibility of proving deliberate and purposeful discrimination" and "put greater emphasis on effects than on intent." The plaintiffs in *Johnson* experienced that near-impossibility but should be able to rely on the Voting Rights Act to correct this wrong, as the Act was intended to do. The Court should defer to Congress's enforcement powers as well as recognize the importance of eliminating racial discrimination affecting citizens' right to vote, and thereafter apply the Voting Rights Act to felon disenfranchisement laws.

**IV. Conclusion**

The national disenfranchisement of African-Americans signifies a crisis for democracy. The Constitution and Congress both provided tools to eliminate racially discriminatory barriers to the franchise, but felon disenfranchisement remains largely unchecked. The traditional usage of criminal disenfranchisement laws alone does not shield them from current conceptions of equality, and that tradition is further marred by the racial animus that provoked the increased implementation of the laws. Citizens must have the right to vote, and the Supreme Court should make a broad sweep across the national landscape of criminal disenfranchisement and declare that these laws must be closely scrutinized. Further, the Voting Rights Act should protect African-Americans' equal access to the polls as it was intended to do. To that end, the Supreme Court must find that the VRA applies to the nation's felon disenfranchisement laws that have a racially discriminatory impact.

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138 *Id.*
139 *Keyssar, supra* note 3, at 293.
V. ADDENDUM

As this Note was going to press, the Supreme Court denied certiorari in the Florida case, Johnson v. Bush.140 Although the argument that the Court should hear the case is now moot, the analysis in this Note remains entirely relevant. A challenge to felon disenfranchisement laws requires strict scrutiny of the laws in question, and those laws with a racially disparate impact warrant application of the Voting Rights Act. By denying certiorari, the Court declined an opportunity to reconcile sections of the Constitution, by overruling its decision in Richardson, and, further, it missed the opportunity to settle a national debate on the application of the Voting Rights Act to felon disenfranchisement laws. The Court should take the opportunity to hear a similar case when the occasion arises in order to address these issues and prioritize the tools of democracy.