Blind v. Colorblind: The Injustice of State Felon Disenfranchisement Schemes

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State policies which disenfranchise ex-felons, those who have served their complete sentences, have a long history. While “civil death” was a common punishment for convicts in Europe prior to the colonization of North America, ex-felon disenfranchisement statutes were adopted by several states, primarily in the South after the Civil War. There is substantial evidence that these statutes were created to exclude racial minorities. These discriminatory effects can still be seen today. Racial minorities in the United States, primarily African Americans, are incarcerated at a much higher rate than their white peers. Once convicted, these persons are often subject to disenfranchisement. Because of the racial disparities in conviction and incarceration, minority communities are often left with a diminished voice in the electoral process. Under the Voting Rights Act, as amended in 1982, any voting qualifications established by a state that result in disproportionate disadvantages for minorities are illegal. As a result, African American voters, who consistently vote for Democratic candidates 90% of the time, suffer from vote dilution due to felon disenfranchisement. Precedent suggests that courts analyzing such state statutes should consider a totality of circumstances, including the historical reasons for enactment and other harms suffered by the community. Because of this, ex-felon disenfranchisement schemes are not only a bad policy, but also are incompatible with equal voting rights as embodied in the 15th Amendment, and therefore invalid under law.

INTRODUCTION

Since ratification of the 15th Amendment, legislators have worked to systematically keep African Americans disenfranchised through a series of laws pertaining to voter registration qualifications. Some were bold and clearly intentioned, such as literacy tests and the grandfather clause, which prevented anyone who did not descend from a registered voter from casting a ballot. Others were more subtle, not unlike what we see today, disenfranchising felons and ex-felons alike, creating a disproportionately disadvantaged minority. Congress modified the original Voting Rights Act (VRA) in 1982 to prohibit any voting qualifications which result by diminished electoral participation. I argue that felon disenfranchisement provisions are a violation of the Voting Rights Act and are therefore not permissible by law.

For many Americans, voting is the pinnacle of political activity. Social Contract theory, particularly formulated by John Locke, remains the core of American political tradition, including the right to elect officials believed to represent the voters’ interests. However, throughout American history, many groups, including blacks, Native Americans, poor uneducated whites, and women, have found themselves excluded from this traditional political act. Some of the methods used to disenfranchise these demographics were blatant – written into the Constitution and the law books of every state. Over time, as the responsibility began to move toward enfranchising all people in American society, the methods became more subtle. Poll taxes kept those of the lowest economic status from voting, grandfather clauses ensured that whites could continue to vote while barring blacks, and the threat of violence as a deterrent prevented many.

The focus of this thesis is on the continued disenfranchisement of African Americans. This thesis seeks to show how modern felon disenfranchisement laws are merely an extension of previous methods used to prevent African Americans from voting. I will argue that felon disenfranchisement practices have a racially disproportionate effect, thus violating the Voting Rights Act as amended in 1982. Specifically this paper addresses ex-felon disenfranchisement – the continuing disenfranchisement of those having completed their sentences. For brevity’s sake, I will use the term felon disenfranchisement, or FD. I do not, however, intend to tackle the issue of voting rights for currently incarcerated convicts. The issues of apportionment, residential status, and what constitutes a domicile, among other things, are too complex to be dealt with here, and warrant their own thorough investigation independent of ex-felon disenfranchisement.
The early years in the United States saw little evidence of equality of opportunity. Though the U.S. Constitution allowed the states to devise their own voting qualifications, most saw it the same way. Women, slaves, and black free persons had very limited political rights, even non-property holding free men could not cast a ballot. Over time, the restrictions on white men who were not wealthy enough to own property diminished. By around 1860 nearly all white men were enfranchised, regardless of their financial portfolio (Library of Congress, retrieved 8/24/2008).

The first 80 years of American history were less kind to blacks. Without regard to their status of emancipation, non-whites were largely excluded from participation in the electoral process. Even after the Civil War and the Emancipation Proclamation that granted freedom to black slaves, the battle continued over the issue of Negro suffrage. Though the 15th amendment, ratified in 1870, guaranteed that the right to vote could not be denied on the basis of color or previous condition of servitude, the creative ingenuity of racist political leaders, especially those in the Southern states, ensured that large numbers of African Americans would be kept from the polls for what is now almost another 140 years.

In response to the perpetuation of policies that effectuated the disenfranchisement of hundreds of thousands of people based on the color of their skin, Congress passed the Voting Rights Act of 1965. This comprehensive legislation aimed at political practices and institutions that prevented black Americans from voting. This initial passage of the Voting Rights Act (VRA) was intended to prevent racially biased gerrymandering practices and voter qualification laws. If plaintiffs could prove that a voter qualification was fashioned with a biased motivation, the statute thus deemed illegal would be invalid.

Proving racially motivated intent is a difficult and tenuous task. Recognizing this, Congress revised the VRA in 1982 to include a results test. Under this provision in Section 2 of the Act, plaintiffs need only prove that a voter qualification results in a racially disproportionate impact. Since that time, only a handful of cases have made their way through the court system contesting felon disenfranchisement statutes under Section 2’s results test. There is no consensus on the VRA’s application to felon disenfranchisement, nor whether these statutes are permissible under federal law.

Wesley v. Collins was the first major case to be considered under the results test legislation. In 1986, the 6th Circuit Court of Appeals sided with the state of Tennessee writing that, while a disproportionate number of blacks were disenfranchised under the felon/ex-felon statute, the disenfranchisement was not due to the state’s provision. Concurring with Tennessee, the Court argued that some ethnicities are simply more likely to commit crimes than others.

The second case, Farrakhan v. Washington, was decided in favor of the defendants by the Ninth Circuit Court, which stated that an analysis of the totality of the circumstances encompassing any biases in the criminal justice system must be accounted for by the lower court. Upon remand, however, the lower court ruled in favor of the State, noting that there were not enough factors established by the Senate to support the plaintiffs position. The Senate Report which lists the factors, intended to demonstrate possible ways to determine institutionalized racial inequality, however, explicitly states that the factors are not intended to be a numerical “point counting” device and the list is no way exhaustive (Senate Report 29, n. 118).

The third case relevant to felon disenfranchisement under Section 2 of the VRA was Johnson v. Florida. The case was filed by a group of ex-felons who had completed their sentences, yet had not been able to restore their voting rights. The 11th Circuit Court found that, despite history of racially motivated disenfranchisement, the state’s provision was legal. The Court noted that the law was re-affirmed in a constitutional convention after the Civil War which included both whites and blacks in the delegation. Additionally, without a clear statement of intent from Congress, the Court was not persuaded that the results test of Section 2 was intended to apply to felon disenfranchisement.

A fourth case, Baker v. Pataki, is also relevant, although the case deals with currently incarcerated inmates who would, theoretically, regain their voting rights upon completion of their sentences. Baker gives the issue of felon and ex-felon disenfranchisement some context because the 2nd Circuit Court, which decided the case, deadlocked in 1995 – affirming the lower court’s decision in favor of the State, but generating some ideas for discussion on the issue nonetheless. The half of the court who sided with the plaintiffs argued that Section 2 of the VRA applies to felon disenfranchisement provisions because Congress is granted the authority in the 15th Amendment. The other half of the court disagreed, holding that such an application was beyond the scope of authority of Congress.

The opinions in these cases agree that Congress both has the authority to enact federal legislation concerning voting qualifications, including those pertaining to felons, and that current state provisions of these kinds might fall under the jurisdiction of the Voting Rights Act. Though Congress never expressly stated the intent that the VRA applied to these statutes, many researchers maintain that the 15th Amendment grants Congress the authority to pass federal legislation to guarantee equal political rights for minorities.

Congress having the constitutional authority to legislate over such matters, the issue becomes whether or not such felon disenfranchisement statutes truly result with a racially disproportionate impact. State by state comparisons show a dramatic increase in the incarceration rates for almost all non-whites, the majority of those African Americans. The Sentencing Project has estimated “the national black-to-white ratio of incarceration” at 5.6 to 1 (Mauer & King, 2007, p. 10). In some states, the disparity is even greater, the black-
to-white ratio reaching near 14 to 1 (Mauer & King, 2007, p. 10).

Not only does felon disenfranchisement have a racially disproportionate effect, evidence points to racial animus within the criminal justice system itself. Non-whites are more likely to be imprisoned than whites, because they are less likely to be offered alternative sentencing. They are also more likely to be prosecuted for a more serious offense, while a white defendant charged with the same crime stands a greater chance of being offered a plea bargain (Provine, 2007). Non-whites also statistically endure more severe sentences than their white counterparts (Provine, 2007).

Since the 1970s, punitive crime policies, which target African Americans, such as laws concerning drug use and distribution, have been more than “merely an exercise in crime fighting; it both responded to and moved the agenda on racial equality” (Weaver, 2007, p. 230). In addition, a state’s black population is directly correlated to the use of capital punishment; that is, the larger a state’s African American population, the more likely the death penalty is used as punishment for certain offenses (Provine, 2007). Studies show that among aggravating factors – those significantly increasing the penalty for the crime committed – being black and using a handgun are on par with one another (Provine, 2007).

Currently one in three black males will become disenfranchised at some point in their lifetime due to a felony conviction (Provine, 2007). African Americans constitute less than 14% of the population; black males, a narrower subset, constitute about half of that. If, like the rate of crime, felony convictions were proportioned by racial identity, then researchers would see an incarceration rate of considerably less than 33% for African Americans. Estimates range from 15-20%, and being nearly the same for whites, it would produce a much larger absolute population of white felons (Manza & Uggen, 2006). Though this analysis fails to account for all relevant variables, like the difference in age distribution between races, it indicates the law enforcement and the judicial system are disproportionately more inclined to target people of color, both in crime policy and criminal sentencing.

There are 5.3 million people disenfranchised under state felon disenfranchisement statutes in the U.S. (Manza & Uggen, 2006, p. 94). Not only is the racial proportion of those disenfranchised severely misrepresented of the American population, it is also damaging to minority voting blocs, one of which is African Americans. Over the past 25 years, blacks have consistently voted for Democratic candidates 9 out of 10 times (Persons, 1997, p. 123). Disregarding race, felons and ex-felons (if they were allowed to vote) would vote in favor of Democratic candidates, with an average of 70% preferring these candidates since the mid-1970s (Uggen & Manza, 2006, p. 190). This would have affected the outcome of the 2000 Presidential election definitively, and given a simple majority to the Democratic party “in every presidential and senatorial election from 1972 to 2000” (Manza & Uggen, 2006, p. 191).

Proponents contend that states do have legitimate reasoning for the continuation of FD practices. However, such arguments, including those of retribution, rehabilitation, and deterrence, have little empirical support. The anecdotal evidence documented by so many researchers over the past few decades (including contemporary researchers Manza and Uggen) indicates that disenfranchisement policies simply reiterate to former offenders that society holds them in disregard; that they are second class citizens. The sheer disparate impact on minorities warrants a thorough analysis of these practices. Having yet to achieve full political equality for all, policy makers in the United States must further level the playing ground for U.S. citizens.

Ultimately, the arguments favoring the continuation of current disenfranchisement regimes are empty when compared to the 1 in 40 age appropriate adults kept from voting. Little can be said to rationalize the archaic provisions responsible. Historically, it is evident that state provisions were formed with racial biases, keeping particular demographics out of the polls. There is in fact no reasonable method by which to legitimize FD as a state’s interest.

**History**

The collective history of minorities in the United States is one of marginalization in social, economic and political spheres. Both those who immigrated to this country with hopes of a better life, and those brought involuntarily, destined for lives of servitude, experienced difficulty in gaining equal rights of U.S. citizenship. Until 1850, only property-holding (white and usually literate) men voted. Women, racial and language minorities, and men from the lower economic classes were not allowed to exercise their political voice through the staple of democracy – voting. Those captured in Africa and brought to the Western hemisphere as slave labor had little chance for basic human rights and no chance for political rights.

Those setting the qualifications for voting early in U.S. history made little effort to justify the exclusion of blacks from the U.S. political process. Higginbotham (2001) has identified what he terms the “Ten Precepts of American Slavery Jurisprudence” that “formed the logical and precedential foundation for the American slavery culture,” and which continues to provide a platform for the unjust marginalization of blacks today. These include the ideas that blacks are inferior, that slaves are mere property to be disposed of at their owner’s will, the minimization of the number of free blacks, and the denial of religious freedom. Lasting effects continue and can be seen emanating from the other “universalities”: there should be no recognition of the rights of black families, education should be denied to blacks, while racial purity maintained, and all blacks should be kept powerless in all aspects.
of life, including civil liberties or the ability to resist at (lastly) any cost and “by any means possible” (Higginbotham, 2001).

Upon the Union’s victory in the Civil War, Reconstruction began with federal oversight of Constitutional Conventions in the former Confederate states. The platform for post-slavery disenfranchisement was built at these conventions. New means had to be devised to keep African Americans from the polls. In Origins of the New South, C. Vann Woodward (1951) shows the numerical effect in Louisiana. Prior to the ratification of Louisiana’s new constitution in 1867, 130,344 African Americans were registered to vote. It is probable that votes cast by African Americans during this time period were not reflective of their own interests, but were manipulated by whites. However, the ratification of this new constitution marked the decline of African American voters to a mere 3,320; in 1904, the first Presidential election year in which a poll tax was required, only 1,342 blacks registered (Woodward, 1951). Subsequent provisions ensured that no African American would be eligible to vote after 1900: educational qualifications, property qualifications, and the grandfather clause (making eligible only those who were allowed to vote prior to 1867 or who were descended from someone who could vote that year, effectively protecting poor, illiterate whites) combined with poll taxes prevented African Americans in Louisiana from electoral participation (Woodward, 1951).

Southern states mimicked one another in the devices used to qualify voters, disenfranchising minorities. Carter Glass, attending the Virginia Constitutional Convention declared “Discrimination! Why that is precisely what we propose; that exactly is what this convention was elected for” (Woodward, 1951, p. 333). Directly following the end of the Civil War, many Southern states adopted felon disenfranchisement laws, which is relevant to the VRA’s analysis of the totality of the circumstances. These include Alabama (1867), Arkansas (1868), Florida (1868), Georgia (1868), Mississippi (1868), Missouri (1875), North Carolina (1876), South Carolina (1868), Tennessee (1871) and Texas (1869) (Behrens, Uggen & Manza, 2003).

Believing blacks more likely to commit some crimes than whites, felon disenfranchisement provisions were carefully constructed so, the drafters believed, they, like grandfather clauses, would bar blacks from the polls, but allow whites to cast their votes. The man behind FD provisions for Alabama’s 1901 Constitutional Convention, John Fielding Burns, was clear about which crimes blacks were more apt to commit (Hench, 1998). For instance, he reasoned that under the constitutional provision, 60% of black voters would be disenfranchised for “wife-beating” (Hench, 1998). Crimes which were, in the minds of the men at the Convention, just as likely to be committed by members of either race, like murder, were not included in the felon disenfranchisement provision (Hench, 1998).

In the mid-20th century, the Civil Rights Movement championed the dismantling of grandfather clauses, poll taxes and other forms of race based vote denial in the United States. Called “Jim Crow’s last Hurrah” by Virginia Hench (1998), felon disenfranchisement outlasted other voting qualifications that had a history of racial animus and an ability to disenfranchise minority voters.

The Voting Rights Act of 1965 has been heralded as one of the most successful advances for the political rights of minorities in U.S. history. Withstanding challenge by states’ rights supporters in South Carolina v. Katzenbach, the Voting Rights Act was used in numerous cases to protect the voting rights of minority individuals and communities (Hench, 1998). The principal reasoning was clearly articulated by Justice Douglas in Harper v. Virginia Board of Elections in 1966: “the right to vote is too precious, too fundamental to be so burdened or conditioned” (Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)).

While Harper dealt the death blow to poll taxes, the opinion made clear that voting qualifications must have a clear and reasoned purpose, such as proof of residence and age. Minors lack legal capacity; it is less likely they’ll comprehend the issues at hand enough to make a responsible decision. The residency requirement protects the one person – one vote system. However, as the population of felons and ex-felons rises in the U.S., the responsibility should belong to the states to prove this voting disqualification necessary or reasonable.

**CASES**

Interpreting the application of the Voting Rights Act and the results test of the 1982 amendments, federal courts disagree over the application’s legality. Section 2 of the amended VRA states that any voting qualification must not result in a discriminatory impact on minorities. Opponents of felon disenfranchisement argue that this includes racial disparities among those disenfranchised due to racially disparate felony convictions and should invalidate such provisions under the Voting Rights Act. Others maintain that the ability to disenfranchise felons is a state’s right protected under the second clause of the 14th Amendment. These constitutional arguments have been presented in the courts, leaving much of the historical and contemporary contexts open to interpretation.

Four significant cases have been decided in federal court dealing with the legality of felon disenfranchisement since the 1982 amendment of the VRA. The decisions either narrowly upheld felon disenfranchisement statutes or dismissed the complaints for a lack of standing. Many argue that Supreme Court intervention is warranted (Handelsman, 2005). A fifth case Montajim v. Coombe, lacks any real significance because the plaintiff was never a voter-eligible resi-
dent in the state in which he was later incarcerated; though the majority of judges in the case noted that the VRA may apply to felon disenfranchisement statutes.

The Sixth Circuit U.S. Court of Appeal decided the case of Wesley v. Collins (hereafter known as Wesley) in 1986. Charles Wesley, an African American in Tennessee, was convicted of being an accessory after the fact to the crime of larceny and received a suspended sentence (791 F.2d 1255). Subsequent to his guilty plea, Wesley was disenfranchised under a Tennessee state law which mandates that anyone convicted of a felony in any state or federal court cannot vote until being pardoned or upon restoration of full civil rights as permitted by state law, making Tennessee one of fourteen states to disenfranchise both ex-felons and felons.

Attorneys for Wesley argued that minority ex-felons were victims of both vote denial and vote dilution, both illegal under the amended VRA, as a result of the disenfranchisement policies in Tennessee. In addition, they argued that the law violated the 14th Amendment’s Equal Protection Clause. The State argued that there was a legitimate and compelling reason for the disenfranchisement provision. The Court concluded that the provision was not the result of racial animus; the reason for disparity was that more minorities than whites commit serious crimes, “the disproportionate impact suffered by black Tennesseans does not ‘result’ from the State’s qualification of the right to vote on account of race and color and thus the Tennessee Act does not violate the Voting Rights Act” (791 F.2d 1255). The Equal Protection Clause was also not violated by the statute, because Wesley could not prove intent to discriminate.

In a second case, Baker v. Pataki, argued en banc in the U.S. Second District Court of Appeals in December 1995, felons of minority race or ethnicity alleged that New York’s felon disenfranchisement laws “disproportionately deprived African-Americans and Hispanics of the right to vote, resulting in a violation of section 2 of the VRA” (Handelsman, 2005, p. 1913). New York’s felon disenfranchisement provision applies only to “those serving felony sentences, including prison terms, probation or parole” according to the Ford Foundation (2004, p. 4). Baker’s argument included two assertions: that felon disenfranchisement in New York had a racially disparate impact, and that New York had a racially biased criminal justice system. Baker noted that while “African-Americans and Hispanics comprise approximately 22% of the New York state population” the groups constitute 82% of the state’s prison population (Handelsman, 2005, p. 1913). According to Baker, the felon disenfranchisement law violated the VRA based on the results test.

The second assertion made by Baker was based on a study that “revealed that there was a racial disparity in conviction rates and sentence types” in the New York’s court system (Handelsman, 2005, p. 1913). This argument sought to establish discriminatory intent by demonstrating that felon disenfranchisement provisions, along with discriminatory patterns in sentencing, had placed disproportionate numbers of minorities behind bars, stripping them of the right to vote. As noted in Wesley, discriminatory intent constitutes a violation of the Equal Protection Clause of the 14th Amendment.

The District Court held that it was not the appellants’ race that deprived them of the right to vote, it was their decisions to commit felony crimes. The court found unconvincing the study showing the racial bias in conviction and sentencing in New York. Deciding that the study could not prove whether the system was biased or if simply more minorities were caught and charged for criminal acts, the 2nd Circuit Court of Appeals deadlocked on the issue, affirming the lower court’s decision.

Evenly divided, half the court found the application of section 2 of the VRA to felon disenfranchisement went beyond the scope of the 14th and 15th Amendments. They found that the plaintiffs had failed to state a claim “[b]ecause it is not unmistakably clear that, in amending § 1973 in 1982 to incorporate the ‘results’ test, Congress intended that the test be applicable to felon disenfranchisement statutes” (85 F.3d 919). This is an example of the plain statement rule, requiring that Congress’ intent should be clearly recognizable, leaving little or no room to interpretation.

The remaining members of the 2nd Circuit Court of Appeals argued that “the Supreme Court has already decided that section 2 of the Voting Rights Act is not subject to the plain statement rule” (85 F.3d 919). These judges also contended that the results test of section 2 of the VRA “is a valid exercise of Congressional power, at least in some, though not necessarily all, circumstances” (85 F.3d 919). Using the basis that this application of the VRA is permissible and Congress’ authority legitimate, the judges who supported the appellants’ claims expressed regretfully that, from their interpretation, the second clause of the 14th amendment (which they believed was intended to ensure enfranchisement of previously enslaved blacks) was now being used to disproportionately dilute the voting strength of minority voters.

Farrakhan v. Washington (hereafter Farrakhan I), decided in 2003 in the Ninth Circuit U.S. Court of Appeals distanced itself ever so slightly from the Wesley opinion. Under Washington state law, even some who have completed their sentences may remain disenfranchised. This policy is applicable to ex-felons “who have been convicted of violent or multiple offenses” (Ford Foundation Report, 2004, p. 4). Released after serving an adequate portion of their sentences, ex-felons in Washington, regardless of the amount or type of offenses, are theoretically rehabilitated and ready for re-integration in the community.

The Farrakhan plaintiffs contested their disenfranchisement under section 2 of the VRA as amended in 1982 “because the criminal justice system was biased against minorities, causing a disproportionate minority representation among those being disenfranchised” (338 F.3d 1009).
The District Court found that felon disenfranchisement was not the result of racism, but more likely a result of discrimination in Washington's criminal justice system. The Court also stated that the appellants had no standing by failing to show their eligibility to regain voting rights.

While the 9th Circuit agreed with the lower court that the appellants lacked standing, the case was remanded for further proceedings regarding the claim of racial bias. The previous standard had not been to look at a voter qualification alone, but to analyze the totality of the circumstances. Totality of the circumstances, a doctrine of analysis named in §2 of the VRA and defined in Gingles v. Edmisten, inquires about the "interaction of the challenged legislation with those historical, social, and political factors" that relate within the jurisdiction, including the inherent biases asserted to exist in the criminal justice system (791 F.2d 1255).

The 9th Circuit panel's majority wrote that "[s]ection 2 plainly provides that a voting practice or procedure violates the VRA when an appellant is able to show, based on the totality of the circumstances, that the challenged voting practice results in discrimination on account of race" (338 F.3d 1009). The State argued that Congress did not intend for section 2 to be applied to felon disenfranchisement statutes, made evident from its lack of mention of typical factors identified by Congress. Also irrelevant was any alleged racial bias in the criminal justice system because it was unidentified by Congress in its renewal and amendment of the VRA in 1982. The 9th Circuit found, contrary to the interpretation of the district court, that "Congress did not intend for the section 2 to be applied to felon disenfranchisement statutes, made evident from its lack of mention of typical factors identified by Congress. Also irrelevant was any alleged racial bias in the criminal justice system because it was unidentified by Congress in its renewal and amendment of the VRA in 1982. The 9th Circuit found, contrary to the interpretation of the district court, that "Congress did not intend for the section 2 to be applied to felon disenfranchisement statutes, made evident from its lack of mention of typical factors identified by Congress. Also irrelevant was any alleged racial bias in the criminal justice system because it was unidentified by Congress in its renewal and amendment of the VRA in 1982. The 9th Circuit found, contrary to the interpretation of the district court, that "Congress did not intend for the section 2 to be applied to felon disenfranchisement statutes, made evident from its lack of mention of typical factors identified by Congress. Also irrelevant was any alleged racial bias in the criminal justice system because it was unidentified by Congress in its renewal and amendment of the VRA in 1982. The 9th Circuit found, contrary to the interpretation of the district court, that "Congress did not intend for the"

 Judge Koziński, dissenting, noted that the courts are deeply divided on the issue, and declared that "[t]his is a very dark day for the Voting Rights Act" because "[i]n adopting a constitutionally questionable interpretation of the Act, the panel lays the groundwork for the dismantling of the most important piece of civil rights legislation since Reconstruction" (Handelsman, 2005, p. 1916). Koziński argued that any application of the Voting Rights Act to states' FD practices would seriously intrude upon congressional power. States, he argued, have a constitutional right to disenfranchise those convicted of crimes under the second section of the 14th Amendment. That provision explicitly excludes any subsequent legislation from overruling it, unless Congress has clearly declared that they intended to raise a constitutional question, which it has never done.

Upon remand, Farrakhan became Farrakhan v. Gregoire (Farrakhan II) and was retried in the U.S. District Court for Eastern Washington. Plaintiffs cited numerous expert reports documenting the racial disparities in every stage in the criminal justice system. According to expert reports submitted by both sides in the case, minorities are more likely to have charges filed against them after arrest, more likely to be searched by police, and are far more likely to be convicted of selling hard-core narcotics, even though most dealers in Washington are white (No. CV-96-076-RHW, Document 234). Whites charged with crimes of any sort in Washington are more likely to be released on their own recognizance and are more likely to be given alternative sentences, often preventing a felony charge from becoming a part of their records if they complete mandatory requirements such as counseling or community service (No. CV-96-076-RHW, Document 234). "[E]ven after legally relevant characteristics, such as offense seriousness, offenders' criminal histories, and weapons charges, are taken into account" substantial disparities remain between how white and minority offenders are treated (No. CV-96-076-RHW, Document 234).

Chief Justice Robert H. Whaley of the U.S. District Court did not interpret the evidence in the same way. Despite the Plaintiffs argument that Allen v. State Board of Elections found that application of the VRA should be done so that it offers "the broadest possible scope in combating racial discrimination," the district court's are relying on the Senate Factors, created in conjunction with the 1982 amendments, in greater weight favoring of the State (393 U.S. 544, 567). The plaintiffs contended that there is no magic number of factors that have to be proven to win a claim, nor is the list exhaustive, so that there may be a section 2 claim despite its identifying features not being named in the Senate Factors. Furthermore, according to the 2nd Circuit Court's reading of Senate Report 29, n. 118, the factors identified were not meant to be a "mechanical 'point counting' device" (791 F.2d 1255). The District Court relied heavily on its opinion in Farrakhan I, and ordered a summary judgment for the state, saying that "[a]lthough the evidence of racial bias in Washington's criminal justice system is compelling, it is simply one factor in the totality of the circumstances the Court must consider when evaluating Plaintiffs § 2 claim" and that the totality of the circumstances, really the nine Senate Factors, do not support the claim that "Washington's felon disenfranchisement law results in discrimination in its electoral process on account of race" (338 F.3d 1009).

Farrakhan I is fundamentally different from Wesley because not only did the Court find that Congress had the authority to create the VRA and force states to comply, but also that the VRA could apply to felon disenfranchisement statutes. The Farrakhan decision, similar to the dissenting opinion in Baker, set the first precedent for a serious challenge to a felon disenfranchisement statute under the Voting Rights Act.

The fourth case, Johnson versus Governor of Florida (Johnson), was heard by the 11th Circuit Court of Appeals in 2003 and then vacated in 2004. It differs from the first two cases because it was filed by and on behalf of ex-felons. Florida is one of the few states that does not automatically restore rights to those who have completed their sentences,
but requires that ex-offenders apply to the Governor for a reinstatement of voting rights. The Governor may not (though he once could) delegate the responsibility, but must decide each case himself. The process is painstakingly slow and an ex-offender is lucky to have his application considered, let alone have his rights restored.

The Court in Johnson, agreeing with the Baker decision, argued that without a clear-intent statement from Congress, the amended § 2 of the VRA could not be interpreted as applying to felon disenfranchisement statutes (353 F.3d 1287). The majority believed that felon disenfranchisement practices were permitted under the 14th Amendment and wrote in Johnson "It is a long-standing rule of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding" (353 F.3d 1287). Ultimately, the majority noted, felon disenfranchisement should be analyzed cautiously because it is "deeply rooted in our nation's history" (353 F.3d 1287).

The majority's analysis of the historical background found that there was simply not enough reason to assume that the felon disenfranchisement provision in Florida's Constitution was motivated by "racial animus" (353 F.3d 1287). Justice Kravitch, writing for the majority, argued that the constitutional revision that took place in 1868 was conducted under federal supervision and should not be considered to have been constructed with racial bias because "a racially mixed delegation produced a constitution granting suffrage to men of all races" (353 F.3d 1287). However, when the plaintiffs pointed to one of the leaders of the convention claiming "that he had kept Florida from becoming 'niggerized,'" Justice Kravitch argued that this most likely referred to the legislative apportionment system and a stipulation that allowed the state's governor to appoint county officials (353 F.3d 1287). Judge Kravitch believed that federal oversight and a racially mixed constitutional delegation were enough to ensure that Florida's felon disenfranchisement policies were race-neutral, but couldn't chasten the racist whims of the majority when it came to issues of apportionment. Reasoning such as this becomes difficult to justify and weakens a proper analysis of totality of the circumstances.

The dissenters contended that the totality of the circumstances should have prevailed, and that, given the social and historical context, "race bias in the criminal justice system" which produces "a racially discriminatory effect" is very much within the scope of the VRA (353 F.3d 1287). Judge Wilson, who concurred in part and dissented in part, stated in his opinion that when creating the VRA "Congress found specifically that it was impossible to predict the variety of means that would be used to infringe on the right to vote" (353 F.3d 1287). Judge Wilson recognized another element "deeply rooted in our nation's history" – that of racial discrimination and creative efforts to block minorities from exercising the franchise (343 F.3d 1287).

All four cases have been denied certiori by the Supreme Court, leaving subsequent cases to be open to new interpretation. While it may seem that the issue of felon disenfranchisement and the VRA has been settled in the federal court system, it is far from it. It may be merely coincidence that, for the most part, decisions were in favor of the state's disenfranchisement policies. Within each Court, the judges were split, leaving room for doubt about whether felon disenfranchisement is excluded from § 2 of the VRA because of the 14th Amendment.

The 14th and 15th Amendments altered the balance between federal and state powers, and empowered Congress to enact legislation to enforce the Civil War amendments. While voter qualifications are still within the state's control, the 14th and 15th Amendments allow for federal intervention when necessary to protect the rights of minorities, which includes the creation of legislation like the Voting Rights Act. Despite the lack of a clear declaration of application to FD statutes, the VRA may very well apply to such provisions. During discussion of the design and reach of the amendment to section 2 of the Act, the Senate recognized that it could not possibly list all applications of the results test, but that any application not listed should not be excluded from judicial review under the VRA.

Case law set by the Supreme Court in Allen v. State Board of Elections dictates that the Voting Rights Act should be interpreted as broadly as needed to prevent racial discrimination. Thus, with the congressional record of violations and the shift of power from the states to the federal government to protect racial and linguistic minorities' voting rights, there is adequate authority for section 2 of the VRA to apply to state felon disenfranchisement practices. In addition, Hunter v. Richardson stated that the 14th Amendment never granted states "unfettered discretion to disenfranchise felons" (353 F.3d 1287). These two cases lay some of the groundwork for challenging felon disenfranchisement under section 2 of the Voting Rights Act. There is an incontestable and disparate racial impact from felon disenfranchisement schemes, Allen found that the VRA results test should be interpreted to favor protecting the electoral voice of both minority voters and communities. Meanwhile, states retain the right to set voter qualifications, so long as it serves legitimate interests.

The majorities in the preceding cases interpreted the VRA narrowly, redefining the totality of the circumstances analysis. While the Senate Report that accompanied the 1982 amendments to the VRA noted that legislation must be analyzed to see how it interacts with other social and historical contexts, a majority of the judges in each case did not recognize the a history in the United States (and documented in almost each state in question) of using both bold and subtle means to disenfranchise minorities; means including felon disenfranchisement. In Johnson, the majority opinion conceded that, while there likely were racially motivated reasons for the inclusion of a felon disenfranchisement provision in
the Constitution, the subsequent constitutional convention in which it was renewed (without any documented discussion, according to Judge Barkett) voided the necessity of looking at the racial motivations in the past. The violence, intimidation and creative disenfranchisement policies used to keep minority voters from the polls in Florida should have carried more weight in the analysis of the provision, as required in section 2's totality analysis.

The totality of the circumstances analysis should have also included the functionality of the criminal justice systems in each case. Plaintiffs in Farrakhan II submitted contemporary empirical evidence that suggested institutional racism in each step of the process. The State agreed with the evidence's validity and the Court found the evidence “compelling,” yet the District Court decision, upon remand from Ninth Circuit (with direction to take into account the inherent bias in the criminal justice system), found that this bias was only one relevant Senate Factor and noted that “[i]t is Plaintiffs’ burden to show the Senate Factors weigh in their favor” (Farrakhan II). Senate Report 29 explicitly says that Senate Factors are (a) not an exhaustive list, and (b) are not intended to be used as a counting mechanism; it doesn’t matter if there is one side with more Factors proven or not, they are simply to help identify instances of when application of § 2 is warranted.

The majority opinions in the four cases under scrutiny here agreed with the states that there are legitimate and compelling reasons for disenfranchising ex-felons. Only one of these reasons is listed. One opinion, relying on John Locke’s social contract theory, argues that, by acting feloniously, these individuals voluntarily surrendered the civil liberties afforded them by government (9791 F.2d 1255). This becomes a slippery slope, however, as Justice Marshall reasoned in his dissent in Richardson v. Ramirez, “[e]ven a jaywalking or traffic conviction could conceivably lead to disenfranchisement, since § 2 (of the 14th Amendment) does not differentiate between felonies and misdemeanors” (418 U.S. 24). The worry that ex-felons may vote those they believe contributed to their incarceration out of office is neither compelling nor legitimate. As the Supreme Court said in Carrington v. Rash, no one can be kept from voting because of how they might vote. The essential point in both arguments is that, without a compelling state interest, a qualification requiring eligible voters to have clean criminal records has little legal justification.

Divisions in the federal appellate courts have left the issue of VRA application to felon disenfranchisement provisions far from settled. Questions over Congress’ authority to apply voting rights legislation to aspects traditionally seen as within the authority of state remain unsettled. The arguments against applying the VRA are often made without proper analysis of the totality of the circumstances. The history of marginalization of minorities, unequal sentencing practices in criminal justice systems, and the disparate impact of felon disenfranchisement statutes on minorities should be analyzed together when reviewing such state statutes. Though courts may be wary of pursuing claims of racially discriminatory justice systems, it is unjust to those disenfranchised under such laws to refuse to consider other factors, such as the history of the statutes.

**Populations**

From 1989 to 2002, the U.S. prison population more than doubled to over 2 million people. In 2006, the Department of Justice reported that the combined total of prison and jail inmates in all 50 states and federal penitentiaries was 2,245,189 people (2007). As the populations of felons and ex-felons continue to grow, electoral effects become clear. Because of felon and ex-felon disenfranchisement policies in the United States, 5.3 million people, or one in forty adults, cannot currently vote (Manza & Uggen, 2006). Incarceration rates for every demographic are on the rise in most states, but the increase is even greater for black men and women. Subsequently, the numbers of those who have finished their sentences but who are disenfranchised as ex-felons is also on the rise.

Statistics supporting the idea that persons of color commit more crimes than whites are rare, and critics have well documented evidence suggesting that institutional racism created much of the racial disparities seen in correctional systems across the country today. The plaintiffs in Farrakhan II cited numerous expert reports showing that, although nearly 70% of all drug dealers in Washington state are white, more than half of those convicted for distribution of narcotics are minorities (No. CV-96-076-RHW, Document 234). Other evidence, including the increased statistical likelihood that a search will occur during a routine traffic stop if the driver is not white (controlling for all other variables), and the discriminatory treatment of non-whites in every stage of the criminal justice system after arrest, pointed to an inherent bias against minorities in the criminal justice system (No. CV-96-076-RHW, Document 234). However, the District Court found that the more immediate cause for the disenfranchisement of the plaintiffs was their decisions to commit felonies, rather than the institutionalized racism that targets Minorities.

The more than 100% increase in the number of inmates in just over a decade deserves inquiry. This rapid growth in convictions of prison and jail sentences coincides with the start of President Reagan’s War on Drugs. Prior to the 1980’s the primary methods for combating addiction and drug use rested on treatment methods and efforts to drive down demand; the political atmosphere in the late 70’s and early 80’s saw policymakers from both sides of the aisle begin to push for more stringent drug control efforts, with a greater emphasis on punitive instead of the rehabilitative (Provine, 2007).
The Reagan administration encouraged the media to focus its attention on crack to gain popular support for its efforts, especially the $1.7 billion Drug Free America Act (Provine, 2006). Crack was easily obtained, highly addictive, and relatively inexpensive; meanwhile the media broadcasted images that solidified the connection between crack and black, inner-city neighborhoods (Provine, 2006). Increased police attention in these neighborhoods resulted with more severe sentences for offenders and larger budgets for drug enforcement.

While the policies were presumed by the public to be race-neutral, the enhancement of penalties for crack users by Congress targeted minority groups. Crack is derived from cocaine. A major difference between the two is that cocaine was viewed as a drug of choice for Caucasians, while crack was viewed as the scourge of black communities. Both substances are equally addictive and dangerous, and one would expect a similar range of tactics against the two: similar police efforts, funding for programs, and sentencing.

Congress enacted enhanced penalties for crack-cocaine possession in the 1980’s, effectively creating a 100-to-1 difference for offenders when compared to those found guilty of possession of cocaine. Possessing five grams of crack resulted in a mandatory minimum sentence of 5 years, while possession of 500 grams of cocaine received the same sentence. In a 1995 U.S. Sentencing Commission report, Congress sent a clear message to law enforcement agencies to “focus as many resources as possible on crack arrests, including arrest and prosecution of small-time users and sellers” (Provine, 2006, p. 120).

The War on Drugs is undoubtedly linked to the increased prison population. From 1980 to 2002 the rate of incarceration jumped 12 times for drug offenders. Elizabeth Hull writes “in 1980 one out of fifteen people in jails or prisons was incarcerated for a drug offense; by 2002 the number was one out of four” (2006, p. 25). However, during the same period there was a decrease in violent crime; a decline that has been consistent since the early 1990’s (Manza & Uggen, 2006). Property crime has also decreased, though not with the same consistency as violent crimes (Manza & Uggen, 2006). In fact, drug use hasn’t increased in the last decade or so, a period which has seen twice as many felony convictions (1986 compared to 2002) (Manza & Uggen, 2006). While crime is not increasing, more Americans are convicted; more often those convicted are minority men.

These policies have a racially disparate effect. Though white offenders have always been more numerous in absolute figures, they have also been less likely to be convicted or given serious sentences than their minority counterparts. The 1991 National Drug Abuse Survey estimated that, of those who reported using crack-cocaine at some point during their lifetime, 65% were white, 26% were African American, and 9% were Hispanic. In 1992, there were more than 904 drug task forces across the country, all aggressively pursuing crack busts; that same year the Sentencing Commission reported that in 16 states every defendant prosecuted for either possession or distribution of crack was a member of a racial minority – not a single defendant was Caucasian (Provine, 2006, p. 120).

Even with the creation of mandatory minimum sentences by Congress, white defendants were far more likely to receive alternative sentences, such as drug treatment, in lieu of jail or prison time. Barbara Meierhoefer (1992), a researcher for the Federal Judicial Center, documented that “In 1990 lower-scale drug offenders who were black were
more than twice as likely as others to receive a sentence of five or more years” and “black offenders were twenty-one percent and Latino offenders were twenty-eight percent more likely than whites to receive a sentence of at least the minimum term” (p. 391).

The disproportionate results are far from paralleling the general populations of the United States, even though rates of crime commission remain constant across racial lines (Provine, 2007). Leading researchers on the subject, Marc Mauer and Ryan King (2007), write that “African Americans are incarcerated at nearly six (5.6) times the rate of whites” (p. 3). The rate is nearly double for Hispanics compared to their white counterparts (Mauer & King, 2007).

Five states with the nation’s harshest disenfranchisement laws – Iowa, Florida, Mississippi, Alabama and Virginia – show racially disproportionate felon populations when compared to the states’ general populations. These states have instituted felon disenfranchisement provisions which require that felons be pardoned (sometimes, by the governor personally, such as in Florida) or apply to have their voting rights restored. These application processes for vote restoration tend to be difficult to navigate and there are few resources available to ex-felons after they return to the community (Manza & Uggen, 2006).

Iowa, which has a relatively small African American population (approximately 2% of the state’s population is black), has a total felon and ex-felon population of 121,418 (U.S. Census Bureau, 2000). Most of these individuals, 98,311, have served their full sentences and have been integrated back into the community (U.S. Census Bureau, 2000). Ten thousand seven hundred and fifty ex-felon population (Manza & Uggen, 2006). Yet, because Alabama, like the others, continues disenfranchisement even after the completion of an individual’s sentence, these people remain voiceless in the electoral process.

In Virginia, with similar felon disenfranchisement provisions, 19.6% of the population and 54% of the ex-felon population is African American, giving it the greatest rate of racial disparity (Manza & Uggen, 2006).

Despite the alleged reasons for the racially disproportionate ex-felon populations in the United States, the most important fact remains simply that they are disproportionate. Though the prevailing opinion in the federal court system is that a party must demonstrate that a state’s policy stems from a racially motivated intent to prove a claim under the VRA, there is some sentiment, both among government officials and Americans in general, that not only is ex-felon disenfranchisement an inappropriate policy, but that the resulting dilution of minority voting strength makes it invalid.

**The Future of FD Policies**

Prior to 1982, Section 2 of the Voting Rights Act required that those contesting a voting qualification or procedure prove that it was created with the intent to disadvantage language, racial and/or ethnic minorities. The United States Commission on Civil Rights detailed several of these instances in a report to the President, President of the Senate and Speaker of the House. The Commission argued that the VRA, though it had made significant progress in advancing the participation of minority voters, had yet to fulfill its goals in their entirety. Additionally, the Commission recommended that Congress amend Section 2 of the VRA to prohibit voting practices “that have the ‘effect’ of discriminating on the basis of race, color, or inclusion in a minority language group” (U.S. Commission on Civil Rights, 1981, p. 92). The Commission recognized that intent is difficult to prove for many claims of race based vote denial and dilution.

One such example was the passage of a bill by the Texas State Legislature in 1975 and its subsequent submission to the Department of Justice for preclearance under § 5 (the section of the VRA that requires those areas with a history of discriminatory voting procedures to have any changes to voting law approved in advance by the DOJ), which would have completely purged the voter rolls. Citizens would then have to re-register by a certain date or their registration would be terminated. The U.S. Attorney General, while noting there was no evidence that the legislation was created with a discriminatory intent but was meant to remove ineligible voters, opposed the change, citing the possible detrimental impact on minority groups (United States Commission on Civil Rights, 1981). The Attorney General found that given the history of these minority groups – the difficulty their members had in the past trying to register to vote – the requirement to re-register could create “voter apathy”, and given the fact that
county officials were not planning on sending any notice by mail of the requirement, most may not even be aware of the change (United States Commission on Civil Rights, 1981, p. 27).

While in a few of the examples the U.S. Attorney General was able to stave off changes based on the anticipated effect on minority voters, such as the proposed purging in Texas, the evidence makes it clear that an intent-based claim is ineffective in combating many instances of attempted or actual discrimination. Often proof of intentional discrimination is impossible to acquire, though the effects are still the same. Historical evidence showing considerable effort and success in disenfranchising minorities has motivated officials in the U.S. government, from the Justice Department to Congress and the U.S. Supreme Court, to err on the side of caution when dealing with potential threats to the political and civil liberties guaranteed to racial, ethnic, and language minorities by the 14th and 15th Amendments.

There are two arguments that contend that felon disenfranchisement is illegal under Section 2 of the VRA as amended in 1982. One is vote denial, in which an individual is denied the right to vote based on his race and color. Policymakers and judges have often rebutted this argument, claiming that large numbers of minorities are disenfranchised under such provisions because of their higher propensity to commit crimes. Data compiled over the past several decades does not support this claim, however, and most scholars generally agree that crime rates tend to maintain stability across racial lines (Provine, 2006).

Voter dilution, a second possible VRA claim, which occurs when a racial, ethnic or language minority group is disadvantaged in the process because of any “voting qualification, or prerequisite to voting, or standard, practice[,] or procedure” imposed by the State, may work as a more effective argument against felon disenfranchisement. African Americans vote for Democratic candidates consistently 90% of the time, having a significant percentage of the population disenfranchised lowers the ability for the community as a whole to elect their candidates of choice, a right recognized by the Senate during the creation of the Voting Rights Act and something which the Act is meant to protect (Persons, 1997, p.129).

This has been a primary concern for civil rights activists who maintain that subtle methods of redistricting, setting voter qualifications and other practices may seem race-neutral at face value, but in effect take a toll on the voting rights of minority groups. Under the logic of the VRA, it does not matter why a qualification disenfranchises minority voters disproportionately, only that it does. Congress, in amending the VRA in 1982 to incorporate a results test, set forth a guiding principle – a voter qualification is not acceptable if it, in any way, disadvantages a minority population disproportionately.

Establishing a vote dilution claim rests largely on a totality of the circumstances analysis, including the history of minority disenfranchisement, the size of the minority community, and the number of those disenfranchised. The racial animus that guided many disenfranchisement policies, including felon disenfranchisement statutes, especially in Southern states, is one of the Senate Factors listed (though it need not necessarily be) and would serve as a significant part of the analysis in those states where it can be shown. Other factors, such as the size of a minority population compared to the size of a minority prison population, are much easier. Crime victimization surveys could be utilized to show how criminal activity tends to cut across racial lines. If available, details regarding the likelihood of alternative sentencing for whites as compared to minorities would be exceedingly relevant to a totality of the circumstances analysis.

Vote denial has proved largely unsuccessful, despite the 1982 amendment of the VRA. Andrew Shapiro (1993), writing for the Yale Law Journal, argues that a vote denial claim could be brought by a minority based on the idea that s/he is more likely to suffer disenfranchisement under FD provisions than are white offenders. However, if the plaintiff has yet to suffer a harm, the Court will likely rule that s/he lacks standing. If they have been disenfranchised, the U.S. Appellate Court System has ruled previously, as in Wesley and Baker, that it is not because of race that an individual’s ability to vote has been rescinded, but because of a personal choice to commit a felony crime. While the courts in Johnson and Farrakhan seem willing to entertain these arguments, it has yet to be seen what the outcome will be since the vacation of the Johnson opinion and the remand to the district court for further proceedings in Farrakhan.

**Normative Section**

Denying any person the right to vote based on a past felony conviction that did not include voter fraud or treason is an inappropriate punishment. Robert Dahl wrote in Democracy and Its Critics that “Throughout the process of making binding decisions, citizens ought to have an adequate opportunity, and an equal opportunity, for expressing their preferences as to the final outcome” (Conway, et al., 2005, p. 87). Voting should be an inalienable right for all citizens, including those reintegrated into society upon sentence completion. The arguments in favor of felon disenfranchisement fail to show the results they claim, and public opinion does not favor felon disenfranchisement policies, combined with racially disproportionate negates the justification of FD practices.

Proponents of felon disenfranchisement generally cite as reasoning for the continuation of such practices: the history of the punishment, disenfranchisement as retribution, deterrence, and disenfranchisement as a form of incapacitation and rehabilitation. While each of these reasons has some merit, each has problems.

Disenfranchisement as a punishment for crime is a practice with deep roots in history, "at least as far back as ancient Greece or Rome" (Hull, 2006, p.16). Such forms of “civil death” were common practices throughout Europe and England, and disenfranchisement was often coupled with the
loss of other previously held privileges, like the ability to inherit property or enter into a contract (Hull, 2006, p. 17). While the colonies permitted civil death for those convicted of certain crimes, typically those deemed most morally reprehensible, the states did away with most of this practice, with the exception of disenfranchisement (Hull, 2006).

Some states, such as Virginia, had felon disenfranchisement statutes in effect long before the Civil War; key statutes were adopted or significantly modified after the Civil War. Despite some politically motivated uses of felon disenfranchisement during this period in the United States, proponents point to the fact that more states have adopted similar policies since the end of Reconstruction, indicating the usefulness of the policy in the criminal justice system. These uses will be discussed momentarily. One of the key arguments utilizing the history of felon disenfranchisement is “if it ain’t broke, don’t fix it.” However, as Supreme Court Justice Felix Frankfurter noted, “people have a tendency to confuse the familiar with the necessary” (Hull, 2006, p. 16). A particular form of punishment’s deep seated roots in history does not necessitate its appropriateness, usefulness, or legality.

Retribution is a second argument in favor of felon disenfranchisement. Proponents of this type of argument contend that a punishment should fit the crime, and that felons, by committing more serious offenses, should face more severe punishment, of which disenfranchisement could reasonably be a part (Manza & Uggen, 2006, p.35). This argument fails, however, to show that society’s need for retribution for a crime is adequate reasoning for disenfranchisement. The principle of proportionality, a legal maxim aimed at connecting the ends with the means, demands that any intrusion on the rights or civil liberties of any citizens must be justified by need. Retribution does not give adequate cause to disenfranchise all felons, regardless of any other circumstances. As researchers Jeff Manza and Christopher Uggen (2006) note “the blanket disenfranchisement of all felons – murderers and petty thieves alike – violates the principle of proportionality” (p. 35). Elizabeth Hull (2006), professor of Political Science at Rutgers, argues that the notion of retribution is not effective as a punishment that fits most crimes, but instead serves as a way to ostracize and exclude former offenders for an indefinite period after the completion of their sentences.

Advocates of felon disenfranchisement policies also cite the practice’s usefulness as a deterrent. While to an extent this claim is legitimate, it is ineffective as compared to other deterrents, and usually does not add to those deterrents. Many former offenders who are now disenfranchised because of their convictions value the right to vote, and wish they still had it. It is unlikely, however, that this is a greater deterrent than the possibility of being incarcerated again. One of the key problems with disenfranchisement as a deterrent is that many potential or actual offenders are unaware of such statutes; even those working for the State in the criminal justice system or legislative branch have inaccurate information about voting restrictions that accompany criminal convictions (Manza & Uggen, 2006). Researcher Elizabeth Hull (2006) writes “certainly states that disenfranchise ex-felons experience no less crime or recidivism than states that do not” (p. 44).

A fourth argument in favor of felon disenfranchisement asserts that these policies have the ability to reduce the capacity of criminals to commit later crimes. Similar to incarceration, proponents maintain that preventing criminals from casting ballots will prevent them from committing voting-related offenses. This is probably true, however, voter fraud represents only a tiny fraction of the crime committed by recidivists in the United States. Additionally, disenfranchisement only prevents offenses with an actual ballot. “Felons convicted of making illegal campaign contributions… would not be restrained from doing so by restricting their rights to cast ballots on election day” (Manza & Uggen, 2006, p. 36).

Lastly, a primary argument in favor of felon disenfranchisement is that it aids in an offender’s rehabilitation (Manza & Uggen, 2006). While disenfranchisement policies could be utilized in a carrot-stick approach, re-enfranchisement post conviction is rarely granted on merit or as a reward for good behavior. Often the offender must undergo a tedious application process in order to restore his voting rights, instead of having them automatically granted after a pre-determined period of appropriate behavior. Furthermore, Manza and Uggen (2006) state that “there are reasons to conclude disenfranchisement hinders rehabilitative efforts. Disenfranchisement cannot help to foster the skills and capacities that will rehabilitate offenders and help them become law-abiding citizens” (p. 37).

Public opinion has also steered away from favoring felon disenfranchisement practices. A study conducted by Manza, Uggen, and Clem Brooks (2004) in Public Opinion Quarterly shows that while Americans disapprove of enfranchising incarcerated offenders, a majority now approves of restoring voting rights for ex-felons, probationers, and parolees.

According to this study, a majority of Americans support the restoration of voting rights to offenders who are no longer incarcerated. Support varies depending on what stage of the criminal justice system offenders are in and the types of offenses committed. In the case of “generic ex-felons,” 80% of Americans support re-enfranchisement (Manza, Uggen & Brooks, 2004, p. 283). This is the highest level of support recorded; however, 66% of Americans support the restoration of voting rights for ex-felons previously convicted of a violent offense. The lowest level of support for re-enfranchisement, 52%, is reserved for ex-felons convicted of a sex crime (Manza, Uggen & Brooks, 2004).

Findings from the study indicate that 60% support voting rights for parolees and between 60 and 68% support re-enfranchisement for probationers (Manza, Uggen & Brooks, 2004). The evidence in this report shows that policies that disenfranchising criminal offenders are contrary to general public sentiment. State legislators should look to their indi-
vidual constituencies to see if felon disenfranchisement poli-
cies serve the public interest. If not, legislative action should
be taken quickly and remedy the damages already done to the
electoral strength of minority communities.

Lastly, felon disenfranchisement does not constitute an
appropriate punishment for offenders who have completed
their sentences because of the racial disparity that exists in
the criminal justice system. The Voting Rights Act was
intended to protect the voting rights of minorities and the
electoral strength of minority voting blocs. While states’
rights are protected in the American federalist system, the
exercise of states’ rights has led to the disproportionate disen-
franchisement of nonwhites in the U.S. that violates individ-
ual liberties protected by the 14th and 15th Amendments.

In 2002, the U.S. Supreme Court affirmed that the 1965
VRA was intended to end “racial discrimination in voting”
(Ochs, 2006, p. 81). This purpose, combined with the 1982
amendment which changed the burden of proof from proof of
intent, to the demonstration of a racially discriminatory effect
caused by voting qualification or practices, indicates Congress’ intention to create minimal racial disparities in the
electoral process. Though States retain the right to mandate
voting qualifications, the 15th Amendment gives Congress
the ability to place restrictions on States’ abilities in this area.

Felon disenfranchisement has had a substantial impact
on the outcome of America’s elections over the last 37 years.
With a population so closely politically divided, Ochs (2006)
estimates that “the disenfranchisement of even 2 percent of
the population likely distorts the electoral process,” (p. 81).
Using inferential statistics, Manza and Uggen (2006) have
estimated that felon disenfranchisement has given the
Republican party a measurable advantage in every national
election since 1972.

According to Manza and Uggen (2006), if felon disen-
franchisement practices had not been in effect in 2000, Al
Gore would have won the Presidency. In U.S. Senate elec-
tions since 1972, the most conservative estimation, puts at
least seven seats, which were won by Republicans, under
Democratic control in the absence of state ex-felon disenfran-
chisement practices, and it is likely that the U.S. Senate
would have been more left-leaning throughout the mid to late
nineties through the 2006 elections (Manza & Uggen, 2006).

Given Americans’ public opinion disapproval of such
policies, and the disparate impact on racial minorities, legis-
lators have little reason to maintain felon disenfranchisement
practices. Policymakers on both a state and national level
should work to eliminate unfair voting qualifications such as
felon disenfranchisement. Not only is this a more pragmatic
and fair system for all voters, but it is also a huge step in sat-
sifying the intent of the 14th Amendment and the Voting
Rights Act, strengthening the electoral voice of minority

CONCLUSION

In the United States, a struggle has been waged by minorities
and activists to gain social and political equality for racial and
ethnic minorities, especially African Americans. One can see
through the statistical data alone that these citizens are dis-
proportionately adversely affected by felon disenfranchise-
ment practices. The use of felon disenfranchisement began
during Reconstruction as a reaction to federal oversight and
control of southern constitutional conventions. Such provi-
sions are seriously destructive to the political strength of
minority communities.

The modern practice of felon disenfranchisement con-
tinues to rely on this archaic framework for its foundation,
though the practice has undergone judicial scrutiny several
times. The four cases that have been heard in the federal
courts since the VRA was amended in 1982 failed to establish
a clear legal precedent. While the 6th Circuit Court, in
Wesley v. Collins, maintained that any discriminatory impact
resulted not from the felon disenfranchisement provision itself,
but rather from an increased propensity for African
Americans to commit crimes, the other cases did not go so far
as to generalize the criminality of an entire race. In Baker v.
Pataki the 2nd Circuit Court’s split decision reaffirmed the
lower court’s decision in favor of New York State, which
decided that the Voting Rights Act could not be used to
invalidate felon disenfranchisement. The Appellate Court
agreed that states have the right to disenfranchise felons
under the 14th Amendment, and half of the judges contend-
ed that the application of the VRA’s second section went
beyond the scope of the 14th and 15th Amendments, how-
ever, the other half of the judges argued that section 2 was a
legitimate exercise of Congressional power. The dissenting
judges wrote that it was regretful that the 14th Amendment,
which was meant to guarantee blacks’ suffrage, was now being
interpreted to dilute their voting strength.

Likewise, the 11th Circuit Court of Appeals decided in
Johnson v. Florida that the second section of the 14th
Amendment permits felon disenfranchisement statutes, and
that given the long history of its use, should not be subject to
analysis under the Voting Rights Act unless Congress directs
the court to do so. It has yet to be seen what will happen to
Johnson since the Court’s decision was vacated in 2004.

The single case in which an appellate court sided with
the convicted felons was Fanahian v. Washington. Though
the lower court had ruled in favor of the state of Washington,
the 9th Circuit Court found that not only are felon disen-
franchisement statutes well within the scope of the Voting
Rights Act, but also that Congress’ direction to the courts
when amending the Act in 1982 demands a thorough analy-
sis of the totality of the circumstances. The 9th Circuit
argued that such an analysis would have included alleged bias
in Washington’s criminal justice system.
Currently, one in forty adults in the U.S. is unable to vote due to felon disenfranchisement provisions. With over two million people incarcerated, the number of disenfranchised will steadily increase. Law enforcement policies, the War on Drugs, and unequal educational opportunities among other reasons, have had a racially disparate impact on those entering state and federal criminal justice systems. Though the courts have viewed the demographic results of felon disenfranchisement to stem from a difference in rates of crime commission by race, the statistical data does not unequivocally prove this. U.S. prison populations do not mirror the general population in terms of race. The War on Drugs has only increased the disproportionate percentages of minorities disenfranchised under FD policies.

Dilution of minority voting power holds the greater promise for success as an argument against felon disenfranchisement practices than the improper denial of an individual right to vote. While vote denial considers individual instances, vote dilution analyzes the ability of minority communities to elect representatives of their choice. Because FD policies affect language and racial minorities at a disproportionate rate, these voting blocs have proportionally less strength. Under the amended language of section 2 of the Voting Rights Act, petitioners must provide evidence to show that state FD practices negatively affect certain classes more than others. When and where possible, petitioners should also provide empirical data to demonstrate other racial inequalities, such as in public education and criminal justice systems. Those challenging FD statutes in states with histories of racially motivated policy making should include evidence establishing the institutionalization of biased lawmaking and enforcement.

Felon disenfranchisement is also questionable policy. Public support for these practices is dwindling, and between 60 and 80 percent of Americans believes that voting rights should be automatically restored upon completion of prison time, even if an offender continues to be on probation or parole. The most common arguments in favor of felon disenfranchisement fail to represent the actual results of the practice.

Supporters argue that these policies are an effective form of retribution. However, American legal standards, relying on the principle of proportionality, reject this notion. Punishments including felon disenfranchisement do not always fit the crime, and should not be used in such a broad manner. There is no empirical evidence to support that felon disenfranchisement fits the crime.

Because felon disenfranchisement has a lengthy history in the United States, state and federal policy makers are less inclined to tamper with the policies. A history of use does not equate to appropriateness or effectiveness. Though losing the right to vote may prevent a felon convicted of voter fraud from further offenses, it is unlikely to prevent the millions of offenders from recidivism of other types, especially since many offenders are unaware that disenfranchisement is a part of their sentences. Furthermore, arguments suggesting that felon disenfranchisement is useful as a rehabilitation technique are also unsupported. While such practices could be used to encourage offenders to comply with the law, no state attempts this approach. Instead, felons and ex-felons are often forced to navigate difficult and highly technical processes to regain their voting rights.

The racial disparity that results from felon disenfranchisement practices is enough reason for state legislatures to reformulate criminal justice policies. The intention of the 14th Amendment and the Voting Rights Act was to protect the voting rights of minorities. Using the 14th Amendment’s second clause to shield felon disenfranchisement provisions from the VRA’s jurisdiction counters Congress’ intention in passing the Act.

**REFERENCES**


Johnson v. Governor of Florida, 353 F.3d 1287 (11th Circuit April 12, 2005).


