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Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida

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I.

The United States prescribes democracy like a pill that cures nations from centuries of corruption, ill governance and religious conflict. Nonetheless, even the U.S. version of democracy has its faults. Even in the 21st century, significant numbers of U.S. citizens who are contributing to society are permanently excluded from the democratic process. Felons[1] are the only class of mentally competent citizens still denied the fundamental right to vote by the U.S. Constitution.[2] The most alarming effect of permanent felon disenfranchisement is the success with which it accomplishes both discrimination against racial minorities and the exclusion of an increasingly significant population from the vote.

The philosophical rationales offered throughout modern history for felon disenfranchisement were conspicuously absent from the hallmark United States Supreme Court case upholding the practice in 1974, *Richardson v. Ramirez*.[3] In *Richardson*, the Court constructed a constitutional sanctuary for the handful of remaining states that permanently disenfranchise felons. The Court read section 2 of the Fourteenth Amendment as authorizing the disenfranchisement of felons irrespective of the equal protection issues implicated by such a "stale" reading of the Constitution.[4] The post-*Richardson* era has seen a number of unsuccessful attempts to challenge felon disenfranchisement under the Voting Rights Act of 1965[5] rather than on constitutional grounds. I suggest that felon disenfranchisement, specifically in Florida, deserves renewed con-

1. The term "felons" includes all individuals convicted of a felony and subsequently released from prison.

2. The Fifteenth Amendment made it illegal to deny the right to vote on "account of race, color, or previous condition of servitude." U.S. CONST. amend. XV. The Nineteenth Amendment enfranchised women, and the Twenty-Fourth eliminated poll taxes, thereby enfranchising the poor and frugal. U.S. CONST. amend. XIX, XXIV. The Twenty-Third Amendment gave residents of the District of Columbia a real vote in presidential elections and a phantom vote in the legislature. U.S. CONST. amend. XXIII. Finally, the Twenty-Sixth Amendment gave the right to vote to all adults "who are eighteen years of age or older." U.S. CONST. amend. XXVI.

3. 418 U.S. 24 (1974).

4. *Id.*

5. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (2000)) [hereinafter the Act].

sideration under the Voting Rights Act and, more importantly, modern principles of equal protection.[6]

On a global level, the United States is the champion of government elected by the people. But in our own country the permanent disenfranchisement of felons strips away the fundamental right to vote from many citizens contributing to our society. Once convicted of a felony, these citizens are forever denied the right to vote. Permanent disenfranchisement eternalizes every felon's sentence without regard to the severity and nature of the crime committed. Narrow margins of victory in national elections highlight the need to ensure increased participation in the democratic process. It is long past time that the Supreme Court, Congress, and the states realize that to permit the permanent disenfranchisement of felons to continue is to support the unconstitutional exclusion of an outcome-determinative number of voters.[7]

II.

A.

Felons are deprived of several benefits accorded to non-felons. Collateral sentencing consequences include prohibitions on holding public office, serving on a jury, possessing handguns and gaining certain occupational licenses.[8] Policymakers and citizens alike may agree that felons should lose certain rights after completing their sentences. However, the right to vote is so fundamental to our democratic society that voting should receive special protection.[9]

The disenfranchisement of convicts has a long history dating to ancient Greece, where "[c]riminals pronounced infamous were prohibited from appearing in court, voting, making speeches, attending assemblies, and serving in the army."[10] The ancient English concept of

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6. *See, e.g.*, Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "the Purity of the Ballot Box,"* 102 HARV. L. REV. 1300 (1989); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).

7. The United States would not be the trailblazer of reform, as other industrialized democracies have evolved functional alternatives already. *See* Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753 (2000).

8. For further discussion regarding collateral sentencing, *see* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999).

9. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938).

10. Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941 (1970) (footnotes omitted).

outlawry, where a person branded an outlaw was stripped of the right to seek legal protection for his life or property, promoted the belief that:

> He who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a "friendless man," he is a wolf.[11]

Society became more civilized, yet felon disenfranchisement persisted. During the European Enlightenment:

> [C]riminals lost civil rights under bills of attainder, and were stripped of the power to transfer property through the doctrine of corruption of the blood, which was based on the fiction that the criminal's act was evidence that he and his entire family were corrupt and therefore unworthy of being feudal tenants.[12]

Unfortunately, the subtle influences of the "corruption of the blood" theory linger in contemporary racial profiling techniques that are fundamentally based on similar propensity rationales. The criminal justice system, through profiling, tends to allow the acts of persons of a certain race to speak for all members of that race—a corruption of the skin.

There are four classical justifications for disenfranchising felons that can be separated into a pair of policy and a pair of social theory rationales. The policy reasons, as enunciated by the Ninth Circuit Court of Appeals, emanate from a belief that "a state has an interest in preventing persons who have been convicted of serious crimes from participating in the electoral process or a quasi-metaphysical invocation that the interest is preservation of the 'purity of the ballot box.'"[13] From a policy perspective, a state's fear in preventing a felon from participating in the democratic process can arise from the substantive issues for which a felon may vote. It may also reflect the idea that, having proven themselves to be criminals, they cannot be trusted to adhere to the laws governing the voting process. Thus, the two policy concerns are a belief or fear that ex-convicts might use their votes to alter the substantive content or administration of the criminal law and a belief that the disqualification of felons is necessary to guard the democratic process against voter fraud and election offenses.[14]

Even if society truly fears that persons planning to hijack the United States will do so through the voting process, that fear does not justify the practice of felon disenfranchisement because denying citizens

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11. SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 448 (photo. reprint 1923) (2d ed. 1898).

12. Special Project, *supra* note 10, at 943.

13. Dillenburg v. Kramer, 469 F.2d 1222, 1224 (9th Cir. 1972) (citations omitted).

14. *See, e.g.*, Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971).

the right to vote in order to prevent them from voting for certain candidates is repugnant to the Constitution. In *Carrington v. Rash*,[15] the Supreme Court clearly held that "fencing out" from the vote a sector of the population because of the way that sector may vote is unconstitutional.[16] As we will see, however, *Carrington* does not control the present discussion because of the equal protection exception for felon's voting rights created in section 2 of the Fourteenth Amendment.[17]

Although disenfranchisement on the basis of how someone may cast his ballot is plainly unconstitutional in certain contexts, felon disenfranchisement is arguably a unique category with its own considerations. In *Green v. Board of Elections*,[18] Judge Friendly argued persuasively that felon disenfranchisement was necessary to prohibit organized crime from participating in the election of New York district attorneys and judges empowered with hearing the felons' cases. But the actual offense dealt with in *Green* was conspiracy to organize a Communist party for the purpose of teaching and advocating the overthrow of the United States government.[19] Judge Friendly surely understood the First Amendment effects of basing his opinion on the rationale that certain political parties could be excluded from the political process. Furthermore, there is no evidence to suggest that felons base their votes solely, or even partially, on a candidate's positions on criminal law. Even if felons did base their votes on issues of substantive criminal law, it does not follow that felons necessarily would be more likely to vote for more lenient laws than would the population as a whole, unless one assumes that all felons are potential recidivists.

Equally unconvincing is the second policy proffered by supporters of felon disenfranchisement. Having once broken the law, the argument suggests, felons are more likely to commit election fraud. The blanket exclusion of all felons for the protection of the ballot box from those who might commit electoral crimes is severely over-inclusive. Moreover, every state already has established penalties for election crimes.[20] In *Dunn v. Blumstein*,[21] the Court conceded that modern systems of voter registration are sufficient to protect against and to deter fraudulent evasion of election laws.[22]

Two social theory reasons also buttress the policy reasons, but they

15. 380 U.S. 89 (1965).
16. *Id.* at 94.
17. *See* Richardson v. Ramirez, 418 U.S. 24, 54-55 (1974).
18. 380 F.2d 445 (2d Cir. 1967).
19. *Id.* at 447.
20. *See* Note, *supra* note 6, at 1303 (citations omitted).
21. 405 U.S. 330 (1972).
22. *Id.* at 345-54.

add only token legitimacy to felon disenfranchisement. The social theory reasons derive from the social contract theory and the theory of democratic competence, both creatures of distinctly Western philosophical perceptions of citizenship, society, and individual identity.[23] Thus, the first social theory reason justifies disenfranchising felons because they breached the social contract. Social contract theory explains the formation and maintenance of society by reference to a hypothetical contract through which individuals agree to come together under a particular system of government.[24] Judge Friendly in *Green v. Board of Elections*,[25] citing John Locke, argued that the origins of disenfranchisement could be found in the idea that "a man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact."[26] The foundation to many disenfranchisement opinions citing the social contract theory is the deliberate nature of a felon's choice to breach the social contract.[27]

The fundamental premise of social contract theory requires free-willed individuals to design a society from an ideal bargaining position, perhaps even assenting to the particular law in question.[28] Admittedly, "felons are not disenfranchised based on any immutable characteristic, such as race, but on their conscious decision to commit an act for which they assume the risks of detection and punishment."[29] Yet, it is reasonable for a person to reject any contract under which a single breach would void the entire contract.[30]

Disenfranchisement is imposed equally on all felons without regard for the relative severity of their crimes. It cannot, therefore, be wholly proportionate to every single violation. The sentencing period of a trial properly determines the damages for a breach of the social contract. Disenfranchisement for life equates to permanent expulsion from the political community. Moreover, it is doubtful that disenfranchisement

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23. For examples of classical liberal political theory, *see, e.g.*, JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (J.W. Gough rev. ed., 1976); JOHN STUART MILL, *On Liberty, in* THREE ESSAYS (1975); JOHN RAWLS, A THEORY OF JUSTICE (1971).

24. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 141-86 (J. Plamenatz ed., 1963) (1651); LOCKE, *supra* note 23, at 366; RAWLS, *supra* note 23, at 11-12, 118-92.

25. 380 F.2d 445 (1967).

26. *Id.* at 451.

27. *See, e.g.*, Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978); Wesley v. Collins, 605 F. Supp. 802 (M.D. Tenn. 1985).

28. *See* Rawls, *supra* note 23, at 118-92.

29. *Wesley*, 605 F. Supp. at 813.

30. *Cf.* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (arguing that "it is hardly likely" that free individuals would enter into a contract in which a single failure to execute payment by one party would constitute a forfeiture of all goods previously obtained under the contract).

as a punitive measure significantly deters lawbreakers given its extremely low visibility.[31] The criminal code normally does not mention felon disenfranchisement; instead it appears in those sections of the constitution or statutory code addressing voter qualifications.[32]

A second social theory reason asserts that felons must be excluded because only the virtuous are morally competent to participate in governing society. Under this rationale, felons lose the right to vote because they have demonstrated an inherent lack of virtue on which the survival of society depends. According to this civic republican theory, political competence has a moral dimension.[33] Confining fault to only the individual obscures the complexity of separating the roots of crime from their entanglement with social structures. Felons cannot be excluded because they are forever incapable of casting votes in accordance with the common good, when no such common good exists beyond the subjective morals determined through particular religious and cultural values. Our Constitution envisions no such common good beyond what the democratic process produces. By disenfranchising felons, we guarantee that they will not cast votes for the common good.

The diversity of cultures and religions in the United States requires determining the common good through a democratic process that incorporates the full spectrum of political beliefs by permitting all citizens to vote. "Our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles."[34]

Nevertheless, the second social reason appears in one of the most frequently cited cases on felon disenfranchisement, *Washington v. State*.[35] After recognizing that the right to vote is denied "almost universally to idiots, insane persons, and minors, upon the ground that they

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31. *See* Trop v. Dulles, 356 U.S. 86, 112 (1958) (Brennan, J., concurring) ("[a]s a deterrent device this sanction [loss of citizenship] would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation.").

32. *See* Note, *supra* note 6, at 1307 n.39; ALA. CONST. art. VIII, § 182; ARIZ. CONST. art. VII, § 2; ARIZ. REV. STAT. ANN. §16-101.5 (1979); DEL. CONST. art. V, § 2; DEL. CODE ANN. tit. 15, § 1701 (1981); FLA. CONST. art. VI, § 4; FLA. STAT. ANN. § 97.041 (West 1982); IOWA CONST. art. 2, § 5 (infamous crimes); KY. CONST. § 145; MD. CONST. art. I, § 4; MD. ELEC. CODE ANN. art. 33, § 3-4 (1984) (second offense only); MISS. CONST. art. 12, § 241 (murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy only); NEV. CONST. art. 2, § 1; N.H. CONST. pt. I, art. 11 (treason, bribery, and election offenses only); N.M. CONST. art. VII, § 1; TENN. CONST. art. I, § 5 (infamous crimes); UTAH CONST. art. IV, § 6 (treason and election offenses only); VA. CONST. art. II, § 1; WYO. CONST. art. 6, § 6.)

33. *See, e.g.*, BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 82-143 (1967); Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 38, 49-50 (1986).

34. JOHN HART ELY, DEMOCRACY AND DISTRUST 54 (1980).

35. 75 Ala. 582 (1884).

lack the requisite judgment and discretion which fit them for the exercise," the court declared that:

> [T]he manifest purpose of denying suffrage to felons is to preserve the purity of the ballot box. A person convicted of a felony, or other base offense indicative of great moral turpitude, is unfit to vote upon terms of equality with freemen who are clothed by the State with the toga of political citizenship.[36]

First, this point of view demonstrates an arrogance that oversimplifies the virtues of democracy. Every offender of a crime of great moral turpitude is not convicted or even arrested because law enforcement is arguably prejudiced against those with less political and economic stature. Felon disenfranchisement is an ineffective guardian of the ballot box because the alleged purity of the ballot box is a fiction.

In the same vein, in *Kronlund v. Honstein*,[37] a Georgia federal district court reasoned that a state has an interest in preserving the integrity of the electoral process by excluding those persons with "proven antisocial behavior whose behavior can be said to be destructive of society's aims."[38] Accordingly, a state "may prohibit idiots and insane persons, as well as, those convicted of certain offenses from participating in her elections."[39] The Fifth Circuit likewise concluded that a state may exclude ex-offenders because they, "like insane persons, have raised questions about their ability to vote responsibly."[40] This trend stereotypes felons as lacking sanity despite an illogical connection between committing a crime and sanity.

Furthermore, the contemporary rejection of systematic exclusion is exemplified in the Supreme Court's holding that "fencing out" from the vote a sector of the population because of the way they may vote is unconstitutional.[41] Given this and other precedent, the Supreme Court cleverly avoided relying on the quartet of policy and social theory reasons that are inadequate justifications for felon disenfranchisement laws, in light of modern equal protection jurisprudence.[42] After all, "[n]ot everything that was assumed to be constitutional in 1868 remains immune to the Equal Protection Clause (assuming it ever was)."[43]

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36. *Id.* at 585.

37. 327 F. Supp. 71 (N.D. Ga. 1971).

38. *Id.* at 73.

39. *Id.*

40. Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978).

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

42. The Court has explicitly held that "differences of opinion cannot justify for excluding (any) group from . . . 'the franchise.'" *See* Cipriano v. City of Houma, 395 U.S. 701, 705-706 (1969); *see also* Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974); Evans v. Cornman, 398 U.S. 419, 423 (1970).

43. John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1195 (2001).

B.

The Court in *Richardson v. Ramirez*[44] concluded it was the intent of the post-Civil War Congress to immortalize felon disenfranchisement in section 2 of the Fourteenth Amendment.[45] Justice Rehnquist, writing for the Court, deduced an implied affirmation of felon disenfranchisement from a clause that enunciates the penalty of reduced Congressional representation for states that deny the right to vote to every man of twenty-one years, except men convicted of treason or *other crime*.[46] Justice Rehnquist determined that if Congress was willing to provide an exception to the penalty of reduced representation under section 2 so long as states enfranchised everyone except felons and traitors, Congress could not have intended to render felon disenfranchisement an unconstitutional violation of equal protection under section 1. However, "Section 2 says nothing stronger on the subject of denying felons the franchise than in 1868 it was assumed to be constitutional."[47] The failure of the Court in *Richardson* lay in its refusal to apply a modern constitutional analysis in accord with contemporary equal protection standards.

By carving a constitutional haven, the Court avoided the strict scrutiny typically due denials of the vote.[48] Justice Rehnquist eliminated the need to offer a compelling state interest and instead concluded that it was Congress' intent to immunize felon disenfranchisement.[49] Even in 1868, though, people clearly perceived the potential threat to equal pro-

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44. 418 U.S. 24 (1974).

45. *Id.* at 25.

46. Section 2 of the Fourteenth Amendment reads as follows:

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives of Congress, the Executive or Judicial officers of a state, or the members of the Legislature thereof, is *denied* to any inhabitants of such state, being twenty one years of age, and citizens of the United States, or in any way *abridged*, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

U.S. CONST. amend. XIV, § 2. (emphasis added). It may also be significant that the oft-used phrase 'deny or abridge' in this clause is split, unlike the other amendments (XV, XIX, XXIV, XXVI) which seem to use the words interchangeably. The phrase which Justice Rehnquist relies upon for Congressional sanction of felon disenfranchisement appears after 'abridge,' possibly indicating that the *permanent* disenfranchisement of felons was not what Congress intended in drafting this section of the Amendment. Behind the word 'denial' are the specific qualifications – males and twenty-one years of age – that were later modified by Constitutional amendments.

47. Ely, *supra* note 43, at 1195.

48. *See* Demleitner, *supra* note 7.

49. *See Richardson*, 418 U.S. at 41-56.

tection of permitting states to disenfranchise felons. In 1868, one prescient senator from Missouri requested that the phrase "under laws equally applicable to all the inhabitants of said State" be introduced in an amendment to the enabling act readmitting Arkansas to the Union shortly after passage of the Fourteenth Amendment.[50] The Senator expressed alarm that, without the language, Arkansas might misuse the exception for felons to disenfranchise Negroes:

> The bill authorizes men to be deprived of the right to vote "as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted." There is one fundamental defect in that, and that is that there is no requirement that the laws under which men shall be duly convicted of these crimes shall be equally applicable to all the inhabitants of the State. It is a *very easy* thing in a State to make one set of laws applicable to white men, and another set of laws applicable to colored men.[51]

Absent a Constitutional amendment, constitutional approval of felon disenfranchisement in section 2 forever precludes felons from invoking equal protection under section 1, even where the criminal justice system enforces its laws in a racially discriminatory fashion.

In *Richardson,* authors of numerous amicus briefs argued that felon disenfranchisement is outmoded and suggested that the more modern view favors a process of rehabilitation returning the felon to his role in society as a fully participating citizen.[52] The Court concluded, however, that these points should be addressed to a legislative forum that could properly "weigh and balance them against those advanced in support of California's present constitutional provisions."[53] Justice Rehnquist hurdled the potentially contentious equal protection issue stating:

> But it is not for us to choose one set of values over the other . . . if the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.[54]

Yet, without Federal intervention the southern States may never have

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50. CONG. GLOBE, 40th Cong., 2d Sess., 2600 (1868).

51. *Id.*

52. Memorandum of the Secretary of State of California in Opposition to Certiorari, in Class of County Clerks and Registrars of Voters of California v. Ramirez, No. 73—324; National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 16.17, p. 592 (1973); President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 89—90 (1967); California League of Women Voters, Policy Statement, Feb. 16, 1972.

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

54. *Id.*

"come around" to abolish slavery, desegregate schools, or permit African-Americans to vote. Most importantly, deferring to a democratic process that fails to include all voters misses the entire point. Without the right to vote, felons are unable to voice their views even if any such popular referendum on the issue occurred. Moreover, the majority of states (and the California Supreme Court in *Richardson*) determined that permanently disenfranchising felons is disloyal to democracy and modern conceptions of a moral penal system.[55]

Justice Marshall, in his *Richardson* dissent, stated that disenfranchisement "doubtless has been brought forward into modern statutes without fully realizing the effect of its literal significance or the extent of its infringement upon the spirit of our system of government."[56] Unfortunately, this effect was both intended and realized. The legislative history of the Fourteenth Amendment indicates that a proposed section 2 of the Amendment went to a joint committee containing only the phrase "participation in rebellion" but emerged with "participation in rebellion or other crime" tacked on.[57] Justice Marshall concluded that excluding a class of citizens from the franchise is constitutional if the state can show that the exclusion is necessary to promote a compelling state interest. The state interests that California proffered were prevention of subversive voting and prevention of voter fraud. Justice Marshall reasoned that felon disenfranchisement was not necessary to promote either state interest.[58]

The Supreme Court has observed that the Equal Protection Clause is not shackled to the political theory of a particular era.[59] Furthermore, the Court has "never been confined to historic notions of equality, any more than it has restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."[60] Since voting is a fundamental right and the meaning of the Equal Protection Clause can evolve, the *Richardson* Court should have applied strict scru-

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55. *Id.* at 24. The Sentencing Project maintains a complete list detailing how and which states disenfranchise felons *at* http://www.sentencingproject.org. Alabama, Florida, Iowa, Kentucky, Mississippi and Virginia are the only states that continue to disenfranchise all felons. Several other states have qualified disenfranchisement that depends on how many felonies have been committed prior or how long the felon has been released from prison.

56. *Richardson*, 418 U.S. at 86 (Marshall, J., dissenting) (quoting *Byers v. Sun Savings Bank*, 41 Okla. 728 (1914)).

57. *Id.* at 73. *See also* Howard Itkowitz & Lauren Oldak, Note, *Restoring the Ex-offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 746-47 n.158 (1973).

58. *Richardson*, 418 U.S. at 78-83 (Marshall, J., dissenting).

59. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966); *see also* Dillenburg v. Kramer, 469 F.2d 1222, 1226 (9th Cir. 1972) (holding that "constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber.").

60. *Harper*, 383 U.S. at 669 (citation omitted).

tiny. This would have required California to rely on the traditional but currently suspect reasons for felon disenfranchisement.

Finally, in *Hunter v. Underwood*,[61] the Supreme Court struck down section 182 of the 1901 Alabama Constitution, which disenfranchised felons because it violated the Equal Protection Clause. However, the *Hunter* Court explicitly declined to reconsider *Richardson*'s holding that felons may be constitutionally disenfranchised.[62] Though the Court struck down the "moral turpitude" section of Alabama's 1901 disenfranchisement provision after holding the impact and the intent of the section was to prevent blacks from voting, what oddly emerged from the opinion was a general acceptance of the practice. This legacy is especially troubling because the Court agreed that the Alabama constitutional provision discriminated against African-Americans. However, the provision's effect was not the Court's reason for finding it violated the Equal Protection Clause. Rather, the Court stated the provision was unconstitutional because the legislature intended to use it to discriminate against African-Americans. Thus, under *Hunter*, a state law that merely has the effect of disenfranchising felons does not violate the Equal Protection Clause.

Like Alabama and other southern states, Florida adopted its original disenfranchisement provision after enactment of the Civil War Amendments. In some states during that period, only the conviction of crimes believed to be committed more often by African Americans resulted in disenfranchisement.[63] For example, South Carolina legislators determined that the following were crimes "which [the Negro] was especially prone": theft, arson, attempted rape, adultery, "wife beating," and "housebreaking."[64] On the other hand, crimes supposedly committed equally or more frequently by whites, such as murder, did not result in disenfranchisement.[65]

Only six states continue to disenfranchise felons for life. The political parity born of our dual party system magnifies the need for States to remedy the racially discriminatory impact of felon disenfranchisement so that every potential vote is counted. Each new challenge to felon disenfranchisement laws highlights the impunity of states that straddle the line between equal protection and racial discrimination. State disenfranchisement laws overtly moonlighting as electoral mechanisms

61. 471 U.S. 222 (1985).

62. *See id.* at 233.

63. UNITED STATES COMMISSION ON CIVIL RIGHTS, *Report on Voting Irregularities in Florida during the 2000 Presidential Election*, *at* http://www.uccr.gov/pubs/vote2000/report/ch5.htm (June 2001).

64. *Id*

65. *Id.*

geared to produce racially discriminatory results face invalidation after *Hunter*. Unfortunately, *Hunter* places a high burden on plaintiffs to prove that the state intended to racially discriminate through its felon disenfranchisement laws. Transparently incriminating statements like those of the Alabama Convention cannot speak for the legislature of every state. It is very difficult for a plaintiff today to prove that a state's legislature from the early 20th century had a particular intention. Congress responded to this difficulty with the Voting Rights Act of 1965[66] to protect voters against ingenious, sophisticated or facially unintentional racial discrimination.

C.

Since ratification of the Civil War Amendments, the Amendments have provided inadequate protection from facially neutral voting requirements that perpetuate the denial of the right to vote on the basis of race. Nearly a century passed before Congress enacted the Voting Rights Act of 1965 to respond to the increasing sophistication with which racial minorities were denied the right to vote. Although Congress intended for the Voting Rights Act to put an end to the states' "unremitting and ingenious defiance of the Constitution,"[67] only the 1982 Amendments cemented the possibility of challenging felon disenfranchisement under the Act.[68]

The impetus for the 1982 Amendments was the Supreme Court's plurality opinion in *Mobile v. Bolden*,[69] which placed a burden of proving discriminatory intent on plaintiffs challenging a state election law.[70] Congress reacted because proof of intent was unacceptably difficult for plaintiffs to obtain in most voting rights cases and because the states for too long had undermined the spirit of the Civil War Amendments.[71] Under the 1982 "results test," a state election law violates the Act:

> [I]f, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect represent-

66. Act, *supra* note 5.

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

68. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205 (codified at 42 U.S.C. § 1973(b) (2000)).

69. 446 U.S. 55 (1980).

70. *Id.*

71. S. REP. No. 97-417, at 15 (1982), *reprinted in* U.S.C.C.A.N 177, 192 (1981).

atives of their choice.[72]

African-Americans are a class of citizens protected by section 1973(a) because subsection (a) prohibits any "standard . . . imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .."[73]

To prove a state violated the Act, a plaintiff "must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result."[74] The "results test" permits challenging racial discrimination when proof of intent is unavailable. Discriminatory vote dilution is a step removed from outright vote denial because it succeeds in diminishing "the force of minority votes that were duly cast and counted."[75] Where, as in Florida, a state draws lines for its voting districts according to population figures that exclude disenfranchised felons the actual number of voters in a district may be significantly lower than projected. Thus, the potential number of minority voters in a district will be inflated and, as a result, the minorities who can vote will have their votes diluted. If a particular state's felon disenfranchisement law causes a racially discriminatory result such as vote dilution, the Act should apply.

In *Baker v. Cuomo,*[76] a felon challenging New York's felon disenfranchisement statute alleged that it disproportionately deprived African-Americans and Latinos of their right to vote, and thus violated the Act.[77] The district court refused to apply the Act's "results test" to the New York statute and dismissed the complaint. On appeal,[78] the Second Circuit, sitting *en banc*, agreed that the "results test" could not apply to the New York statute because it would raise "serious constitutional questions regarding the scope of Congress' authority to enforce the Fourteenth and Fifteenth Amendment," and would "alter the usual constitutional balance between the States and the Federal Government."[79] The court argued that in order for Congress to constitutionally alter this balance, it must be "unmistakably clear" that Congress intended the "results test" to apply to New York's felon disenfranchisement statutes.[80]

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72. *Id.*

73. *See id.* § 1973(a).

74. Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997) (citation omitted).

75. Holder v. Hall, 512 U.S. 874, 896 (1994) (Thomas, J., concurring).

76. 842 F. Supp. 718 (S.D.N.Y. 1993).

77. N.Y. ELEC. LAW § 5-106(2)-(5) (1982).

78. Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996).

79. *Id.* at 922.

80. *Id.*

Similarly, in *Wesley v. Collins*,[81] the Sixth Circuit rejected a vote dilution challenge to Tennessee's felon disenfranchisement statute. The *Wesley* court held that although the complaint alleged numerous factors relevant to the totality of the circumstances, the district court correctly dismissed the complaint. To the *Wesley* Court, the chief, and therefore determinative, factor to consider in the case was the important social goal proffered to justify felon disenfranchisement.[82] Unlike the Second Circuit's concern for federalism, to justify felon disenfranchisement the Sixth Circuit relied on the first social theory reason above, Locke's social contract theory.[83]

To be sure, Congress understood that the "results test" might prohibit a practice traditionally permitted in the United States. In fact, when Congress enacted the Voting Rights Act, both Judiciary Committees explained that felon disenfranchisement laws were not affected by the ban on historically discriminatory "test[s] or device[s]," including the prohibition on tests for "good moral character."[84] Congress to date has not issued a legislative finding that felon disenfranchisement is a pretext or proxy for racial discrimination. Arguably, for purposes of challenging felon disenfranchisement under the Act, the lack of a Congressional finding might be determinative.[85] But, in each specific challenge a district court confronts peculiar facts and statistics that, if individually reviewed by Congress, might warrant such a legislative finding.

For instance, had the *Baker* court reviewed the statute under the "results test," the facts would demonstrate that Blacks and Latinos combined account for approximately twenty-two percent of New York's population, but account for eighty-two percent of New York's prison population.[86] Furthermore, approximately seventy-five percent of New York's prison population consists of persons from fourteen different

81. 791 F.2d 1255 (6th Cir. 1986).

82. *Id.* at 1261.

83. *Id.*

84. 42 U.S.C. § 1973(b)(c); *See* S. REP. No. 89-162, at 24, *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (joint views of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott, and Javits) ("This definition [of the impermissible 'good moral character' test] would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony . . . . It applies where lack of good moral character is defined in terms of conviction of lesser crimes."); H.R. REP. No. 89-439, at 25-26, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457 (The Act "does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony.").

85. *Cf.* Oregon v. Mitchell, 400 U.S. 112, 130 ("Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race.").

86. *See* Baker v. Pataki, 842 F. Supp. 718 (S.D.N.Y. 1993).

state assembly districts that are situated in New York City.[87] On their face, these statistics suggest a strong vote dilution case, but the Second Circuit disagreed.

In *Farrakhan v. Locke*,[88] a district court disagreed with the Second Circuit's holding that the plain statement rule applied to the Act. Under this rule, if legislation could alter the usual constitutional balance between the federal government and the states, Congress's intention regarding the application of the statute must be made "unmistakably clear."[89] Even if the 1965 Congress did not intend for the Act to apply to felon disenfranchisement statutes, it is well accepted that enforcement of the Civil War Amendments changed the usual constitutional balance between the states and the federal government.[90] The Fourteenth Amendment was specifically created to enable the federal government to police states for violations of the constitutional rights of racial minorities.

The plain statement rule is inapplicable to the Voting Rights Act because the Supreme Court consistently has recognized that Congress has the power to enforce the Fourteenth and Fifteenth Amendments through the Voting Rights Act, "despite the burdens those measures placed on the states."[91] Furthermore, the 1982 Amendments were a congressional response to the Court's effort to make proving a violation under the Act more difficult. The Voting Rights Act is a byproduct of the Civil War Amendments, which inevitably altered the federal/state balance of power as contemplated by the original Constitution. Additionally, since the Civil War there have been six Constitutional amendments specifically designed to increase participation in the vote.[92]

Given the constitutional foundation upon which the Act relies, I suggest the "plain statement" rule is redundant as applied to the Voting Rights Act.[93] But even if a district court were persuaded that the "plain statement" rule is inapplicable, a further question arises regarding whether the Act's "results test" as applied to felon disenfranchisement laws is a constitutional exercise of Congress's remedial powers. The power to enforce the guarantees of the Civil War Amendments is not

87. *Id.*

88. 987 F. Supp. 1304 (E.D. Wash. 1997).

89. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (citations omitted).

90. *See Mitchell*, 400 U.S. at 127-28.

91. City of Boerne v. P.F. Flores, 521 U.S. 507 (1997); *see also* City of Rome v. United States, 446 U.S. 156 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

92. *See supra* note 2. Further evidence of a trend towards popularizing our democracy is the Seventeenth Amendment which provides for election of Senators "by the people." U.S. CONST. amend. XVII.

93. *See* Chisom v. Roemer, 501 U.S. 380 (1991) (Scalia, J., dissenting) (recognizing that the "plain statement" rule should not apply to the Act's "results test").

unlimited. There are at least three limitations.[94] First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the states of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation."[95]

The interclausal immunity[96] relied upon by Justice Rehnquist in *Richardson* seemingly leads to the conclusion that application of the Act's "results test" to felon disenfranchisement would contradict section 2 of the Fourteenth Amendment. As a result, stripping an individual of the right to vote for conviction of a felony is constitutional unless *Richardson* is overruled. In *Hunter*, the Supreme Court clarified that states intentionally cannot use felon disenfranchisement as a tool to discriminate on the basis of race.[97] After the Civil War, states began cloaking racial discrimination in facially neutral statutes. Congress eventually enacted the Voting Rights Act to protect against the racially discriminatory impact of specific electoral laws. Thus, specific challenges alleging egregiously discriminatory impact require that courts reevaluate the particular constitutional implications and legality under the Voting Rights Act of state felon disenfranchisement laws that persist in serving the duplicitous goal of excluding a significant percentage of a suspect class.

D.

Florida is ripe for judicial intervention under both the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment because of the unusually large population of minority voters that are disenfranchised. In 2002, however, the United States District Court for the Southern District of Florida disagreed and granted summary judgment to prevent a class of felons from proving that Florida's disenfranchisement provision perpetuates racial discrimination.[98] In *Johnson v. Bush*, the plaintiffs alleged that felon disenfranchisement in Florida spawned from an intent to discriminate against African-Americans and that it had produced a racially discriminatory impact by diluting the minority vote.[99] The district court, like the Supreme Court before it,

94. *Mitchell*, 400 U.S. at 266-67.

95. *Id.*

96. *See* Ely, *supra* note 43. Professor Ely criticizes Rehnquist's reasoning of the relationship between the first two sections of the Fourteenth Amendment.

97. *See* Hunter v. Underwood, 471 U.S. 222, 236 (1985).

98. Johnson v. Bush, 214 F. Supp. 2d 1333, 1339 (S.D. Fla. 2002).

99. Plaintiff's Complaint at ¶¶ 64, 69, Johnson v. Bush, 214 F. Supp. 2d 1333 (S.D. Fla.

declined to explore the current effect of felon disenfranchisement and its relationship to progressive notions of equal protection.

The statistics in Florida are disturbing. The *Johnson* plaintiffs alleged that nine percent of voting-age African-Americans and fifteen percent (twenty-four percent counting inmates) of voting-age African-American males in Florida are disenfranchised as a result of a felony conviction.[100] Of all the felons disenfranchised in Florida, nearly thirty percent are African-Americans, although African-Americans make up only fifteen percent of Florida's population.[101] Furthermore, nearly five percent of voting-age citizens in Florida are denied the vote as a result of a felony conviction.[102]

The history of felon disenfranchisement in Florida is equally disturbing. Florida legislators after the Civil War, through the 1868 Constitution, extended permanent disenfranchisement to all felons.[103] Despite the gradual repeal over the next century of similar disenfranchisement provisions in 42 states, in 1968 the Florida legislature instead redrafted its constitution to eliminate the appearance that it continued to support its racist past. Section 4(a) of Article VI of the current Florida Constitution provides that "no person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability."[104] The historical motivations underlying the original provision outlive the nominal redraft whose sole purpose was to eliminate the appearance of discrimination in the original provision without changing its practical effect.

The district court in *Johnson* reasoned that "a facially neutral provision . . . might overcome its odious origin"[105] and "remove the discriminatory taint associated with the original version."[106] History demonstrates, however, that southern states confronted with federal mandate to eradicate racism will engineer less conspicuous methods to accomplish racial discrimination.[107] The likelihood of a continued effort at racial discrimination seems just as plausible as the instantaneous dis-

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2002) (No. 00-3542), *available at* http://www.brennancenter.org/programs/downloads/flacomplaint92100.pdf.

100. *Id.* at ¶ 46.

101. *Id.* at ¶ 48.

102. *Id.* at ¶ 45.

103. *Id.* at ¶ 30.

104. FLA. CONST. art. VI, §4(a).

105. Johnson v. Bush, 214 F. Supp. 2d 1333, 1339 (S.D. Fla. 2002) (*quoting* Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998)).

106. *Id.*

107. Literacy tests, poll taxes, and white-only primaries eventually were abolished as indirect means of racial indiscrimination. *See* Voting Rights Act of 1965; Rice v. Cayetano, 528 U.S. 495, 513 (2000).

appearance of institutionalized racism after the mere redraft of a provision that had been used for a century to accomplish constitutionally unacceptable results. Felon disenfranchisement in Florida is rooted deeply in racial discrimination.

Following the Civil War, the Florida legislature convened to draft a new constitution. The 1865 Constitution did not permanently disenfranchise felons, but it granted suffrage only to white men.[108] Defeat in the Civil War and Congressional abolition of slavery had little impact on Florida's willingness to integrate blacks. William Marvin, the provisional governor after the Civil War, succeeded in persuading the 1865 convention that, while blacks were free, freedom did not include the right to vote.[109] The legislative efforts to disenfranchise newly freed slaves were widespread. For instance, the year slaves were set free, the 1865 convention and the legislature authorized the arrest of vagrants and able-bodied persons with no visible means of support.[110] Both crimes were punishable by up to a year of hard labor. As a result, ex-slaveholders regained the benefit of free labor as a result of these crimes, which represented transparent institutional attempts to perpetuate slavery.

When a new governor was elected, he reiterated the government's determination to "never accede to the demand for Negro suffrage."[111] In 1866, the Florida legislature rejected ratification of the Fourteenth Amendment specifically because it provided that congressional representation would be reduced in proportion to the adult men denied the right to vote.[112] Only in 1867, after Congress placed Florida under military control, commanded suffrage to all men, and required ratification of the Fourteenth Amendment, did Florida accede to the conditions for readmittance to the Union.[113]

The 1868 Constitution contained a list of disenfranchising crimes that included larceny, whereas earlier constitutions disenfranchised people convicted only of bribery, perjury and other infamous crimes.[114] Even though blacks represented a small percentage of Florida's prison population before the Civil War, between 1872 and 1888 black men represented from seventy-seven to eighty-eight percent of persons in state prisons.[115] Moreover, between fifty-one and sixty percent of individuals

108. Plaintiff's Complaint at 32, Johnson v. Bush, 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (No. 00-3542).

109. *Id.*

110. *Id.* ¶ 33.

111. *Id.* ¶ 34.

112. *Id.*

113. *Id.* ¶ 35.

114. *Id.* ¶ 39.

115. *Id.* ¶ 41.

incarcerated in state prisons from 1872 to 1878 were convicted of larceny and felony theft—the very crimes intended by the post-Civil War legislature to target and disenfranchise newly freed slaves.[116] In 1885, Florida voters approved yet another constitution. Unfortunately, the criminal disenfranchisement provisions of the 1868 Constitution remained virtually untouched while similar racially discriminatory "codes" were added, such as a poll tax.[117]

The 1965 redraft eliminated the list of disqualifying crimes, but replaced it with the broad exclusion of all felons.[118] Under *Hunter,* a state's disenfranchisement law can be invalidated if there is proof of racially discriminatory intent. In *Hunter,* intent was demonstrated by reference to transcripts from the Alabama constitutional convention adopting the statute, where delegates vociferously announced their intent to disenfranchise African-Americans through any means constitutionally acceptable. Transcripts from the 1865 Florida constitutional convention also express a desire to deny the vote to African-Americans.[119]

Furthermore, Florida shares Alabama's history of racial discrimination in the franchise, applying such devices as poll taxes, educational tests, and lists of disqualifying crimes targeted at African-Americans. Only four years before the redrafting of the felon disenfranchisement provision, Florida argued to the U.S. Supreme Court in *McLaughlin v. Florida*[120] that the Fourteenth Amendment had been improperly ratified and therefore was not part of the Constitution.[121] Still, the district court suggested the 1968 redraft eradicated all remnants of racism in the felon disenfranchisement provision and observed that any current racial impact due to the law was a result of at most "a flaw with the criminal justice system, not the disenfranchisement provision."[122]

In contrast to the district court, the Ninth Circuit Court of Appeals in 2003 reversed a lower court decision refusing to consider evidence of discrimination in the criminal justice system because it was not significant for purposes of the "totality of the circumstances" analysis used in determining whether a challenged voting practice results in a denial of

116. *Id.*

117. *Id.* ¶ 43.

118. Fla. Stat. Ann. §§ 97.041(2), 98.093, 98.0975 (repealed 2001), 944.292.

119. Plaintiff's Complaint at 34, Johnson v. Bush, 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (No. 00-3542).

120. 379 U.S. 184 (1964).

121. John Hart Ely, *If at First You Don't Succeed, Ignore the Question Next Time? Group Harm in* Brown v. Board of Education *and* Loving v. Virginia, 15 CONST. COMMENT. 215, 219 n.12 (1998).

122. Johnson v. Bush, 214 F. Supp. 2d 1333, 1342 (S.D. Fla. 2002) (*quoting* Farrakhan v. Locke, No. 96-76-RHW, 2000 U.S. Dist. LEXIS 22212 (E.D. Wash. Dec. 1, 2000)).

minority voting rights under section 2.[123] The Ninth Circuit concluded that a section 2 "totality of the circumstances" inquiry requires courts to consider how a challenged voting practice *interacts with* external factors such as "social and historical conditions" to result in denial of the right to vote on account of race or color. All branches of the Government are potential violators of civil rights. The courts' role is to ensure that no component of the state perpetuates racism.

In Florida, the executive branch also plays a role in determining the racial impact of felon disenfranchisement. A felon can petition the Florida Clemency Board for the restoration of his civil rights.[124] Although, technically, restoration is available, it is illusory. As of 2002, a backlog of over 40,000 petitions clogged the process of restoring civil rights.[125] Under Florida's Rules of Executive Clemency, a felon is entitled to automatic restoration of civil rights if he has served his sentence, demonstrated that he is not a capital or habitual felon, and paid restitution to the victim.[126] But in the end, the Clemency Board retains absolute discretion to grant or even review an application. Pressure from various groups, including the ACLU, persuaded Florida during the summer of 2003 to enter into a settlement that would reinstate voting rights for at least 30,000 felons whose petitions were previously denied through the application process. In addition, the settlement simplifies the clemency procedure, ensures that the Florida Department of Corrections automatically reinstates voting rights of the felons who qualify to have their rights restored without a hearing and, most importantly, requires that eligible felons be mailed an application. Prior to the settlement, felons were not informed of the process, which reinstates fewer than a thousand felons a year.[127]

After incidents of voter fraud in the 1997 Miami mayoral election, including votes cast in the names of deceased persons, the Florida legislature employed a private agency to assist in purging the voter rolls.[128] The United States Commission on Civil Rights investigated the performance of the private agency during the 2000 election and concluded that "[t]he Florida legislature's decision to privatize its list maintenance procedures without establishing effective clear guidance for these private

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

124. FLA. R. EXEC. CLEMENCY 5(I)(E), 5(II), 9(A)(2), 9(A)(3), *available at* http://www.state.fl.us/fpc/execlem/rulesofexecutiveclemency3-27-03.pdf.

125. *Restore Felons' Right To Vote*, MIAMI HERALD, March 4, 2002, at 6B.

126. FLA. R. EXEC. CLEMENCY 5(I)(E), 5(II), 9(A)(2), 9(A)(3), *available at* http://www.state.fl.us/fpc/execlem/rulesofexecutiveclemency3-27-03.pdf.

127. Andrea Robinson, *Ex-felons May See Voting Rights Restored*, MIAMI HERALD, July 25, 2003, at 1A.

128. *See* Report on Voting Irregularities, *supra* note 63.

efforts from the highest levels, coupled with the absence of uniform and reliable verification procedures, resulted in countless eligible voters being deprived of their right to vote."[129] Thus, the Florida legislature succeeded in indirectly preventing individuals from participating in the 2000 election, even those who had regained their civil rights.

Several actions would exhibit a legislative intent to remedy the racially discriminatory impact of permanent felon disenfranchisement. At a minimum, more money could be appropriated for the Clemency Board to clear the backlog of applications.[130] Alternatively, the Florida legislature might have utilized the 2002 decennial redistricting process to apportion Florida's voting districts to compensate for the vote dilution created by permanent felon disenfranchisement. Of course, reapportionment is not the preferred method because it again requires accounting for race.[131] One solution stands out - complete enfranchisement.

III.

The disenfranchisement of felons "necessarily depletes a minority community's voting strength over time by consistently placing a greater proportion of minority than majority voters under a voting disability at any given time."[132] Traces of the intentional discrimination that originally motivated felon disenfranchisement linger in the United States. In Florida, racial bloc voting and partisan parity characterize current electoral politics, and history has proved that even the slightest electoral error may alter the future of our country or world.[133] The long history of election failures in Florida support the conclusion that the 2000 presidential election is unlikely to be the last time Florida's electoral system is exposed for its embarrassing failures and miserable inadequacies.[134]

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129. *Id.*

130. In the 2002 Florida Senate budget proposal, State Sen. Kendrick Meek earmarked $2.5 million specifically to pay for an additional 25 workers in the Clemency Board in an effort to remedy the bureaucratic injustice. *Restore Ex-Felons' Right To Vote*, MIAMI HERALD, Mar. 4, 2002, at 6B.

131. For a complete description of the methodology used in the 2002 Florida redistricting process, *see* Florida House Redistricting Committee, *at* http://www.floridaredistricting.org.

132. Virginia E. Hench, *"The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters,"* 48 CASE W. RES. L. REV. 727, 767 (1998).

133. USA TODAY, in conjunction with several Florida newspapers, conducted a final vote tally that depending on the methodology had either George Bush or Al Gore winning by a margin under 500 votes. *See* Dennis Cauchon & Jim Drinkard, *Florida Voter Errors Cost Gore the Election,* USA TODAY, May 11, 2001, at 1A, *available at* http://www.usatoday.com/news/washington/2001-05-10-recountmain.htm.

134. *See* Scheer v. City of Miami, 15 F. Supp. 2d 1338 (S.D. Fla. 1998); Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720 (Fla. 1998); Flack v. Graham, 453 So. 2d 819 (Fla. 1984); Bolden v. Potter, 452 So. 2d 564 (Fla. 1984); Broward County Canvassing Bd. v. Hogan, 607 So. 2d 508 (Fla. 4th DCA 1992).

Simply, felon disenfranchisement is anachronistic. The policy and social rationales supporting it in the past are today unconstitutional. Contemporary notions of justice and morality progressively replace legal relics of ages that embraced inequality, racial discrimination, and human rights abuses. Perhaps for Justice Rehnquist it is sufficient that the drafters of the Fourteenth Amendment accepted the disenfranchisement of felons. They also accepted the exclusive enfranchisement of men. The Equal Protection Clause has evolved with society,[135] and the time has arrived to nullify the felon disenfranchisement laws that perpetuate purposes offensive to modern constitutional values.

The traditional reasons for supporting felon disenfranchisement rest on an irrational fear that ultra-lenient and sinister laws will result from enfranchising felons. People understandably argue that enfranchising felons might cause the defeat of certain candidates who otherwise would win. People in power are predictably reluctant to concede even a modicum of power. But perfecting the democratic process is anathema only to those attempting to freeze the 19th century in Devonian amber.

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135. *See generally*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967).

* J.D. candidate 2003.