Michigan State University College of Law
Digital Commons at Michigan State University College of Law

Faculty Publications

1-1-2007

# Article I, Section 4 of the Constitution, the Voting Rights Act, and Restoration of the Congressional Portion of the Election Ballot: The Final Frontier of Felon Disenfranchisement Jurisprudence?

Daniel Martin Katz
*Michigan State University College of Law*, katzd@law.msu.edu

Follow this and additional works at: http://digitalcommons.law.msu.edu/facpubs

Part of the Constitutional Law Commons, Jurisprudence Commons, Legal History, Theory and Process Commons, and the Other Law Commons

Recommended Citation
Daniel M. Katz, Article I, Section 4 of the Constitution, the Voting Rights Act, and Restoration of the Congressional Portion of the Election Ballot: The Final Frontier of Felon Disenfranchisement Jurisprudence?, 10 J.L. & Soc. Change 47 (2007)

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.

# ARTICLE I, SECTION 4 OF THE CONSTITUTION, THE VOTING RIGHTS ACT, AND RESTORATION OF THE CONGRESSIONAL PORTION OF THE ELECTION BALLOT: THE FINAL FRONTIER OF FELON DISENFRANCHISEMENT JURISPRUDENCE?

DANIEL M. KATZ[1]

## I. INTRODUCTION

The United States enjoys a peaceful, constitutional and democratic government. However, for some Americans, there is a predicament: they are subject to the laws enacted by the peoples' Representatives, yet are excluded from the electoral process. Due to a felony conviction, many citizens are barred from the ballot box, sometimes for life. This process of withdrawing an individual's voting privileges as a collateral consequence of a criminal conviction is known as disenfranchisement.[2] A single criminal transgression by a teenager can permit disenfranchisement, even into his or her senior years. In some cases, a felony conviction eliminates the right to vote in one state, while a neighboring state does not even designate the offense as particularly grave. The

[1] Daniel M. Katz, J.D., M.P.P. University of Michigan. Ph.D. Pre-Candidate, Political Science and Public Policy, University of Michigan Department of Political Science and Gerald R. Ford School of Public Policy. The author would like to thank Pamela Brandwein, Gabriel Chin, Richard Hasen, Pamela Karlan, Ellen Katz , Marvin Krislov, James Klonoski, Jennifer Miller-Gonzales and Steven Ochoa for their contributions and comments. Special thanks to the Brennan Center for Justice at New York University Law School for its assistance.

[2] Felon disenfranchisement has a lengthy history dating back to the Roman practice of *infamia*. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 23 (2006); Symposium, *The Future of Punishment, Disenfranchisement as a Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1899 (1999). *Infamia juris* resulted from violations of the law. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291, 328 (1983). "Under Roman tradition, honor implied possessing all rights of a citizen, i.e., the panoply of political rights available. The loss of honor, therefore, connoted the loss of one's position as a citizen." Nora A. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 757 (2000). *Infamia juris* indicated such a loss of honor, and subsequently the loss of complete rights of citizenship. The tradition of *infamia* traveled to the new world and became prevalent in the United States, beginning in the middle of the Nineteenth Century. Angela Behrens et al., *Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOCIO. 559, 561 (2003). The first instances of disenfranchisement occurred in late colonial times; beginning in 1818, Connecticut appears to have been one of the first states to impose ballot restrictions. *Id.* at 565. The next two decades saw dramatic increases in the number of disenfranchisement statutes; by the end of the 1840s, more than one-third of the states imposed disenfranchisement upon felons residing within their borders. *Id.* at 567. The period following the American Civil War ushered in a variety of ballot restrictive mechanisms, including an ever-expanding range of criminal disenfranchisement statutes. "Upon adoption of the Reconstruction amendments, Southern states developed means to disenfranchise blacks without violating the language of the Fourteenth Amendment . . . Among other methods . . . [these states] passed legislation barring those with certain criminal convictions from voting." Demleitner, *supra* at 776. Frequently there was disparate treatment between what was viewed as "white" crime as opposed to "black" crime. *Id.*

HeinOnline -- 10 J.L. & Soc. Change 47 2007

variety of felon disenfranchisement policies present among differing American jurisdictions implicates questions of consistency and proportionality, as well as aids in determining whether individuals and communities are marked for inclusion or exclusion.

In addition to challenging other restrictive voting regulations such as literacy tests and poll taxes, litigants have lodged a host of claims seeking to end the practice of felon disenfranchisement. Early commentary[3] and litigation[4] designed to attack felon disenfranchisement pursued a constitutional theory, an approach to which the Supreme Court dealt a serious blow in *Richardson v. Ramirez*.[5] In *Richardson*, Justice Rehnquist crafted a blanket rule holding that the Fourteenth Amendment[6] did not reach felon disenfranchisement.[7] While the Court clarified its position in *Hunter v. Underwood*,[8] an opinion also authored by Justice Rehnquist, by holding states' schemes violative of the Fourteenth Amendment if discriminatory intent motivated the passage of the statute,[9] the current Court has provided little indication that it intends to revisit this core constitutional question.

The combined holdings of *Richardson* and *Hunter*, however, did not end challenges to disenfranchisement. Instead, a second-order wave of commentators continues to address the legality of these state statutes.[10] Their efforts no longer directly

---

[3] *See, e.g.*, Stephen B. Moldof, Note, *Constitutional Law–Disenfranchisement of Felons–Felon's Challenge to State Law Disenfranchising Felons Held Not to Raise Substantial Federal Question*, 3 HARV. C.R.–C.L. L. REV. 423, 424 (1968); Gary L. Rebeck, Note, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 STAN. L. REV. 845, 846 (1973); Note, *The Need for Reform of Ex-Felon Disenfranchisement Laws*, 83 YALE L.J. 580, 585-88 (1974).

[4] *E.g.*, Stephens v. Yeomans, 327 F. Supp. 1182, 1188 (D.N.J. 1970) (indicating New Jersey disenfranchisement statute violates equal protection).

[5] 418 U.S. 24 (1974).

[6] U.S. CONST. amend. XIV.

[7] *See Richardson*, 418 U.S. at 56.

[8] 471 U.S. 222, 233 (1985).

[9] *Id.*

[10] *See generally* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004) (discussing courts' reliance upon Section 2 of the Fourteenth Amendment to restrict the VRA and thus provide authority for felon disenfranchisement laws, and arguing that ratification of the Fifteenth Amendment effectively repealed Section 2, removing any such constitutional authority for disenfranchisement); John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157 (2004) (arguing that felon disenfranchisement laws may violate the Equal Protection, Due Process, Full Faith and Credit, and Bill of Attainder clauses of the Constitution, as well as the Nineteenth Amendment's prohibition on denial of the right to vote based on sex); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727 (1988) (arguing that racial bias in the criminal justice system and the United States Supreme Court's color-blind jurisprudence combine with felon disenfranchisement laws to violate the Equal Protection clause and effectively nullify the VRA); Angela Behrens, Note, *Voting-Not Quite A Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Law*, 89 MINN. L. REV. 231 (2004) (arguing that the persistence of felon disenfranchisement laws undermines the classification of voting as a fundamental right); *Developments in the Law-One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002) (highlighting disproportional disenfranchisement of African Americans); Tanya Dugree-Pearson, *Disenfranchisement–A Race Neutral Punishment For Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL'Y 359 (2002) (discussing the history of felon disenfranchisement laws and arguing that as such laws serve to diminish the minority vote, they are in violation of the VRA and are unconstitutional violations of the Fourteenth and Fifteenth Amendments); Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and its Influence on the Black*

concentrate on the Reconstruction Amendments;[11] instead, more recent focus surrounds use of the Voting Rights Act of 1965 (VRA).[12] Specifically, many scholars and litigants argue that when Congress amended Section 2 of the VRA in 1982, thereby adopting a flexible and fact intensive totality of the circumstances test,[13] it created a statutory scheme that could allow for the invalidation of certain state disenfranchisement laws.[14]

In the federal courts, cases pursuing this VRA approach generally have been unsuccessful.[15] Many reviewing courts resist VRA claims by questioning not only whether the federal Congress possesses the constitutional authority under the Reconstruction Amendments to implement a statute designed to strike a state-level felon disenfranchisement scheme, but also whether Congress so exercised that authority through the VRA.[16] The collective failure of more than thirty years of constitutional and

---

*Vote: The Need for a Second Look,* 142 U. PA. L. REV. 1145 (1994) (examining the statistical impact of felon disenfranchisement laws on the black vote, examines possible causes for disproportionate imprisonment rates of African Americans, and proposing a framework for evaluation of ex-felon disenfranchisement statutes under the VRA); Afi S. Johnson-Parris, Note, *Felon Disenfranchisement: The Unconscionable Social Contract Breached,* 89 VA. L. REV. 109 (2003) (arguing that the stigma attached to the reduced level of citizenship resulting from statutes permanently disenfranchising felons breaches the social contract by preventing the integration of ex-felons into society); Nathan P. Litwin, Note and Comment, *Defending an Unjust System: How Johnson v. Bush Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida,* 3 CONN. PUB. INT. L.J. 236 (2003) (arguing that *Johnson v. Bush,* 214 F. Supp. 2d 1333 (S.D. Fla. 2002), was wrongly decided in light of the felon disenfranchisement statute's disproportionate impact on African Americans, particularly in the 2000 Presidential election); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy,* 103 YALE L.J. 537 (1993) (discussing the shift from a discriminatory intent inquiry to a results-based inquiry in evaluation of validity of felon disenfranchisement laws in the wake of the VRA).

[11] *See* U.S. CONST. amend. XIII, XIV, XV (amending United States Constitution during post-Civil War reconstruction).

[12] Pub. L. No. 99, 79 Stat. 445, *current version codified at* 42 U.S.C. § 1973 (2003). "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right on any citizen of the United States to vote on account of race or color . . . . " *Id.* at § 1973(a).

[13] *See id.* at § 1973(b) ("A violation . . . is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice . . . . ")

[14] *See generally,* Hench, *supra* note 10; Shapiro, *supra* note 10.

[15] *See* Hayden v. Pataki, 449 F.3d 305, 315-17 (2d Cir. 2006) (finding that VRA's prohibition of denial of voter qualification based on race does not apply to state felon disenfranchisement); Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005) (*en banc*), *cert. denied sub nom.* Johnson v. Bush, 126 S. Ct. 650 (2005) (prohibiting denial of vote based on race under the VRA does not apply to state felon disenfranchisement); Farrakhan v. Washington, 338 F. 3d 1009, 1014 (9th Cir. 2003), *remanded sub nom. to* Farrakhan v. Gregoire, 2006 WL 1889273, *1 (E.D. Wash. July 7, 2006) (granting defendant's motion for summary judgment as VRA Section 2 totality of circumstances test indicates Washington's felon disenfranchisement law does not result in racial discrimination); Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986) (holding Tennessee felon disenfranchisement law does not violate VRA based on totality of circumstances test).

[16] *Cf.* City of Boerne v. Flores, 521 U.S. 507 (1997). In *City of Boerne,* the Supreme Court held Congress exceeded its authority under Section 5 of the Fourteenth Amendment when it adopted the Religious Freedom Restoration Act. *Id.* at 534-35. Although Congress must have wide latitude, the enforcement provision of the Fourteenth Amendment does not include the right for Congress to decide what constitutes a violation of the Constitution. *Id.* at 518-20. *But see* Pamela S. Karlan, *Two Section Twos and Two*

statutory based litigation leads some scholars to conclude that a judicial based restoration strategy should be abandoned in favor of appeal to political authorities.[17]

This article attempts to save the litigation based approach by advancing a new analysis, arguing that the VRA does in fact serve as the proper mechanism to invalidate disenfranchisement statutes for at least the Congressional portion of the ballot. Rather than predicate the scope of the VRA upon the reach of enabling provisions of the Fourteenth and Fifteenth Amendments, this article narrowly focuses upon Congress's power under Article I, Section 4 of the Constitution[18] and the passage of the 1982 amendments to Section 2 of the VRA. Current legal challenges have ignored Article I, Section 4, despite its position as an authority cited by the framers of the VRA.[19] It is the contention of this article that the Elections Clause should no longer be overlooked, as it is this Constitutional provision that extends the reach of the VRA to felon disenfranchisement.

Part II of this article steps back from an analysis of potential legal challenges to disenfranchisement and considers the various powers that Congress could employ to implement a statute aimed at preventing felon disenfranchisement; these sources of authority include the Fourteenth Amendment, the Fifteenth Amendment, and Article I, Section 4 of the United States Constitution, as mentioned above. This section demonstrates the significant limitations inherent in using the enabling provisions of the Reconstruction Amendments as the basis for federal legislation. However, Part I concludes by emphasizing Congress's Article I, Section 4 power, and argues that pursuant to a long line of Supreme Court precedents,[20] including, but not limited to, Justice Black's opinion in *Oregon v. Mitchell*,[21] Congress has the unambiguous constitutional authority to pass a statute which enfranchises felons for the Congressional portion of the election ballot.

---

*Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998) (arguing that the VRA continues to be valid following *City of Boerne*).

[17] *See* Jason Belmont Conn, *Felon Disenfranchisement Laws: Partisan Politics in the Legislatures*, 10 MICH. J. RACE & L. 495, 496 (2005) ("[T]hese lawsuits rarely succeed, and because many state courts and federal circuit courts have now rejected the strongest constitutional arguments against felon disenfranchisement, voluminous case law fortifying felon disenfranchisement laws has developed . . . . In contrast, significant potential for change exists in the state legislatures."). While concerned primarily with an appeal to legislative authorities, the basic crux of this 2005 article has been bolstered by recent developments in Florida, where appeals to the Governor resulted in franchise restoration of a significant number of its ex-felons. *See* Abby Goodnough, *In a Break From the Past, Florida Will Let Felons Vote*, NEW YORK TIMES, April 6, 2007, at A14.

[18] "The Times, Places and manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any Time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators," U.S. CONST. art I, § 4, cl. 2. This provision is commonly referred to as the Elections Clause.

[19] "The [VRA] is designed primarily to enforce the 15th amendment . . . and is also designed to enforce the 14th amendment and article 1, section 4." H.R. REP. NO. 89-439, at 1 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437. The 1982 amendments eliminated the intent standard and provided a results test, again relying, in part, on Article 1, Section 4. S. REP. NO. 97-417, at 39 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 217. "The proposed amendment modifying a results test to Section 2 is a clearly constitutional exercise of Congressional power under Article I and the Fourteenth and Fifteenth Amendment." *Id.*

[20] *See infra* notes 30-33.

[21] 400 U.S. 112 (1970).

HeinOnline -- 10 J.L. & Soc. Change 50 2007

Part III reviews the history of the VRA and argues that the 1982 amendments to Section 2 of the VRA allow that statute to reach felon disenfranchisement laws. Namely, the amended VRA's invocation of Article I, Section 4 as a basis of authority[22] to formulate the wide-reaching totality of circumstances standard[23] acts to immunize this portion of a disenfranchisement challenge from the pitfalls that have previously doomed VRA cases.[24] Specifically, the fusion of the Article I, Section 4 enabling power together with the broad language of the VRA sidesteps the plain statement doctrine that doomed several prior VRA cases. As a result, the invigorated Section 2 of the VRA reaches state schemes that deny felons the Congressional franchise.

Part IV carries forward this theory, arguing that statutes imposing lifetime disenfranchisement on all felons are per se violative of the totality of the circumstances test. The article concludes with a brief review of empirical scholarship for the purpose of describing the potential impacts upon electoral outcomes that might follow from Congressional franchise restoration.

## II. CONGRESS'S AVAILABLE POWERS TO REGULATE FELON DISENFRANCHISEMENT

While this article ultimately concerns whether Congress intended to or otherwise reached felon disenfranchisement through passage of the VRA, two initial inquiries must be addressed. First, does any constitutional provision act as a per se bar to felon disenfranchisement? Second, and most relevant, does the Congress possess sufficient constitutional power to limit state efforts to restrict the political participation of criminal offenders, if Congress were to so choose?[25]

With respect to the first question, it does not appear that under the current interpretative paradigm any constitutional provision will act as a per se bar.[26] Thus, the majority of this section focuses upon Congress's authority to regulate voting, and highlights several different Constitutional provisions that either explicitly or implicitly enable Congressional action.[27] Inquiries into Congress's power to regulate elections typically center upon the enabling provisions contained within the Civil War Reconstruction Amendments.[28] This approach is sensible, because these amendments vastly altered the relative balance of the federal bargain by reallocating significant legislative power in favor of Congressional authority. While the Fourteenth and Fifteenth Amendments are certainly worthy of focus for opponents of felon disenfranchisement, the section describes how recent decisions have limited the reach of the enabling powers of both of these amendments.[29] Despite the limitations placed on these approaches, this

---

[22] S. REP. NO. 97-417, at 39 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, at 217.

[23] See 42 U.S.C. § 1973(b) (establishing totality of circumstances to be used in determination of a violation of the VRA).

[24] *See supra* note 15, *infra* notes 135-39, and accompanying text.

[25] *See* Richard L. Hasen, *The Uncertain Congressional Power to Ban State Disenfranchisement Laws*, 49 HOWARD L.J. 767 (2006) (addressing this question by raising concern about Congress's regulatory power in light of the Supreme Court's New Federalism jurisprudence).

[26] For an argument to change the interpretative paradigm *see* Chin, *infra* notes 88-102 (arguing that the Fifteenth Amendment properly understood might act as a per se limitation upon felon disenfranchisement).

[27] *See* H.R. REP. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437 (citing Article I, § 4, and the Fourteenth and Fifteenth Amendments as Constitutional power to regulate voting).

[28] *E.g.*, U.S. CONST. amend. XIV § 5; U.S. CONST. amend. XV, § 2.

[29] *See infra* notes 68-89 and accompanying text.

section also examines an additional vehicle, Article I, Section 4, which has received no limiting treatment. Bolstered by a series of historical precedents, including *Oregon v. Mitchell*,[30] *United States v. Classic*,[31] Chief Justice Hughes's unanimous opinion in *Smiley v. Holm*,[32] and *Ex Parte Yarbrough*,[33] it is clear Congress possesses unambiguous power under Article I, Section 4 to enfranchise criminal offenders for the Congressional portion of the voting ballot.

### *A. The Fourteenth Amendment*

#### 1. Section 1 versus Section 2

As noted above, the initial search for constitutional enabling provisions often leads to the Reconstruction Amendments, adopted immediately following the Civil War. The proffered goal of these Amendments was to expand civil rights and extend the franchise to populations formerly denied the vote.[34] To further that end, subsequent judicial interpretation of the amendments permits federal intervention into a substantial amount of previously untouchable state conduct. Specifically, both the Equal Protection[35] and Due Process[36] clauses, as well as the enabling provision contained in Section 5 of the Fourteenth Amendment,[37] served as vehicles for a significant redistribution of relative federal and state power. In all, these amendments represented such a dramatic reformulation that some commentators have called them America's Second Constitution.[38]

Various provisions of the Fourteenth Amendment explicitly and implicitly relate to voting. The Amendment's Equal Protection and Due Process clauses tacitly include voting, while Section 2 of the Fourteenth Amendment contains the most direct reference. Section 2 provides: "[W]hen the right to vote . . . is denied to any male inhabitants of such State, being twenty one years of age, and citizens of the United States, or in anyway abridged, except for participation in rebellion *or other crime,* the basis for representation therein shall be reduced . . . ."[39]

The debate in felon disenfranchisement jurisprudence begins with the words "or other crime." This language may implicitly support the right of the states to engage in disenfranchisement. Yet, the historical and jurisprudential record that supports this language argues the provision contains some latent ambiguity. For example, does this

---

[30] 400 U.S. 112 (1970).
[31] 313 U.S. 299 (1941).
[32] 285 U.S. 355 (1932).
[33] 110 U.S. 651 (1884).
[34] *See generally,* Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda,* 71 FORDHAM L. REV. 981 (2002); Wayne D. Moore, *The Fourteenth Amendment's Initial Authority: Problems of Constitutional Coherence,* 13 TEMPLE POL & CIV.RTS. L. REV. 515 (2004); Xi Wang, *Black Suffrage and the Redefinition of American Freedom 1860-1870,* 17 CARDOZA L. REV. 2153 (1996).
[35] U.S. CONST. amend. XIV, § 1.
[36] *Id.*
[37] U.S. CONST. amend. XIV, § 5.
[38] *See generally,* GEORGE FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY (2003); ERIC FORNER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988).
[39] U.S. CONST. amend. XIV, § 2 (emphasis added).

HeinOnline -- 10 J.L. & Soc. Change 52 2007

specific language in Section 2 preempt the general concepts of Equal Protection and Due Process as required in Section 1 of the Fourteenth Amendment? Furthermore, does the specificity of this language in the Amendment somehow limit the reach of Section 5? After all, Section 5 provides Congress with general authority to enforce the provisions of the balance of the Amendment. However, given the "or other crime" language, may Congress adopt a statute designed to preempt the very act that Section 2 appears to authorize? While some of these questions remain unclear, others received judicial gloss from the Court's decision in *Richardson v. Ramirez*.[40]

In *Richardson*, the Court considered whether the Equal Protection Clause contained in Section 1 of the Fourteenth Amendment served as any limitation on the state's power to disenfranchise offenders. Section 1 states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection* of the laws.[41]

On its face, the Equal Protection Clause appears to preclude disenfranchisement of criminal offenders. Felons have a strong liberty interest in voting; the statutes in question treat persons unequally by allowing some people the right to vote while denying others that right. Therefore, although the Constitution did not initially contemplate this form of federal involvement in voting, the plaintiffs in *Richardson* argued the Reconstruction Amendments modified the relative balance of state and federal power so as to permit this very form of intervention.

The *Richardson* Court disagreed, instead reading Section 1 together with the language contained in Section 2. In other words, the Court considered the Equal Protection Clause in the context of the "or other crime" clause, and argued the framers of the Amendment could not have intended to prohibit voting disenfranchisement when another section authorizes it with only a lesser sanction of reduced representation.[42] To hold otherwise, argued Chief Justice Rehnquist, would leave Section 2 an empty vehicle, thus violating the general axiom of reading Constitutional provisions in such a manner as to provide each with operative meaning.[43]

To further solidify its view, the Court reviewed the legislative history to determine whether a deviation from the standard interpretative rule was justified. Rehnquist found that although it was scant, nothing in the record countered his initial reading of the text.[44] Additionally, he considered state practice in the era during the passage of the Fourteenth Amendment and found wide use of disenfranchisement at the time of the Amendment.[45] Finally, the opinion looked to other Reconstruction Era legislation to interpret the interaction between these constitutional sections. It reviewed

---

[40] 418 U.S. 24 (1974).
[41] U.S. CONST. amend. XIV, § 1 (emphasis added).
[42] *Richardson*, 418 U.S. at 42-43, 55.
[43] *Id.* at 55.
[44] *Id.* at 41-52.
[45] *Id.* at 48.

the Reconstruction Act of 1867, an act adopted by virtually the same Congress that adopted the Fourteenth Amendment.[46] The Court found its language strongly favored the continued permissibility of state disenfranchisement schemes.[47] The 1867 statute mandated that states adopt constitutional provisions to prevent definitional manipulation of felonies.[48] Essentially, Congress did not want state legislatures prospectively to disenfranchise minority populations, so it conditioned reentry into the Union upon a variety of measures. These included adopting provisions which limited criminal disenfranchisement to the definitions of crimes at common law.[49]

For Justice Rehnquist, the 1867 Act clearly implied that states retained a general power to disenfranchise following the passage of the Reconstruction Amendments.[50] Specifically, to require states to limit disenfranchisement to the common law felonies meant those states still possessed the Constitutional power to disenfranchise. Taken together, the *Richardson* Court held the Equal Protection Clause of the Fourteenth Amendment failed to reach felon disenfranchisement.[51]

Twelve years after *Richardson*, the Court returned to the topic of felon disenfranchisement and thereby complicated its previously clear pronouncement regarding the boundaries of the Fourteenth Amendment. In *Hunter v Underwood*,[52] Justice Rehnquist authored his second majority opinion on the topic, this time choosing to craft a limiting exception to the blanket rule previously pronounced in *Richardson*.

At issue in *Hunter* was Section 182 of the 1901 Alabama Constitution,[53] a section which disenfranchised those convicted of a variety of crimes including "any crime punishable by imprisonment in the penitentiary."[54] The constitutional provision contained an unusual list of enumerated crimes. For example, the list included several misdemeanors[55] while failing to capture more serious crimes such as second-degree manslaughter.[56] Furthermore, it captured those convicted of "any . . . crime involving moral turpitude."[57] The term "moral turpitude" was left undefined; however, subsequent cases in the Alabama courts provided a broad construction.[58]

The *Hunter* Court reviewed the post-*Richardson* Fourteenth Amendment jurisprudence, including such notable cases as *Washington v. Davis*[59] and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[60] Those decisions

---

[46] *Id.* at 49.
[47] *Id.* at 54.
[48] *Id.* at 51-52.
[49] *Id.* at 52.
[50] *Id.* at 49-53.
[51] *Id.* at 56.
[52] 471 U.S. 222 (1985).
[53] *See id.* at 224 (discussing ALA. CONST. Art. VIII, § 182 (1901)). Section 182 has subsequently been repealed but recreated as ALA CONST. Art. VIII, § 177 (1996), which works to disenfranchise one convicted of "felonies involving moral turpitude."
[54] Hunter, 471 U.S. at 224.
[55] *Id.* at 226.
[56] *Id.* at 227.
[57] *Id.*
[58] *E.g.*, Pippin v. State, 197 Ala. 613, 616 (1916) (holding that selling cocaine is not *mala prohibita* and, therefore, not a crime of moral turpitude).
[59] 426 U.S. 229 (1976).
[60] 429 U.S. 252 (1977).

HeinOnline -- 10 J.L. & Soc. Change 54 2007

require litigants to show either a state statute constitutes an outright racial classification or that state action creates disproportionate impacts and is motivated by a discriminatory intent.[61]

Initially, the Supreme Court had to determine whether this evolution in Fourteenth Amendment jurisprudence was applicable to the inquiry in question. In *Richardson*, Justice Rehnquist previously determined felon disenfranchisement was entirely outside the domain of the Fourteenth Amendment.[62] He had ruled the "or other crime" language of Section 2 meant the Equal Protection Clause did not apply to felon disenfranchisement. However, while the *Hunter* Court could have ended its argument there, Rehnquist changed course by co-opting the standard presented through *Arlington Heights* and *Washington v. Davis*. Thus, Rehnquist negated his prior language in *Richardson* which stated the "or other crime" language of Section 2 preempted any application of equal protection;[63] rather, he claimed the Equal Protection Clause applied to disenfranchisement. Accordingly, Justice Rehnquist stated "we are confident that Section 2 was not designed to permit purposeful racial discrimination . . . nothing in our opinion in *Richardson v. Ramirez* suggests to the contrary."[64]

With this new understanding in place, the Court turned to the record in *Hunter*. The Court quickly found that the statute did not reflect a racial classification, yet, when considering the nature of the historical record, the Court still determined the statute to be unconstitutional.[65] Specifically, the record of the Alabama Constitutional Convention contained direct evidence of intentional racial animus in the enactment of Section 182, and on these grounds the Court found the provision to violate the Fourteenth Amendment.[66]

Following *Hunter*, the issue of felon disenfranchisement returned to the State of Alabama through a de facto "legislative remand."[67] In response, Alabama re-enacted a wide-reaching, facially neutral, disenfranchisement provision with a new legislative history that contained no evidence of racial animus. Thus, the statute was subsequently immunized from further Fourteenth Amendment review under the post-*Hunter* standard.

Without doubt, the *Hunter* intent standard is difficult to reach. Even if this exacting standard is met, a litigant may find only a de minimis change in the substantive law should a current legislature select to reinstate similar legislation merely lacking the record of racial animus. With only cosmetic changes and a new legislative history, post-*Hunter* courts have little choice but to deem such a statute both facially neutral and without a discriminatory intent. Therefore, for opponents of felon disenfranchisement seeking to make lasting change via the Fourteenth Amendment, the Equal Protection Clause appears to be unhelpful.

---

[61] *Id.* at 255, 256; Washington v. Davis, 426 U.S. at 242.
[62] *Richardson*, 418 U.S. at 56.
[63] *Hunter*, 471 U.S. at 233.
[64] *Id.*
[65] *Id.* at 227.
[66] *Id.* at 231.
[67] *See generally*, Guido Calabresi, *The Supreme Court, 1990 Term: Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80 (1991); Nash E. Long, *The "Constitutional Remand": Judicial Review of Constitutionally Dubious Statutes*, 14 J.L. & POL. 667 (1998).

HeinOnline -- 10 J.L. & Soc. Change 55 2007

2. Use of the Enabling Provision of Section 5 of the Fourteenth Amendment

Neither *Richardson* nor *Hunter* directly addresses the limitations Congress would face in implementing statutory standards for criminal disenfranchisement. They merely address whether the Fourteenth Amendment Equal Protection Clause is a per se bar to felon disenfranchisement. The Court provided a negative answer in *Richardson* because of the specificity of the language in Section 2 of the Fourteenth Amendment and the Court's desire to provide each constitutional provision with some operational meaning. Nevertheless, the remaining and most difficult question raised by *Richardson* and its progeny for utilizing the VRA is whether this specificity in Section 2 also prevents Section 5 of the Fourteenth Amendment from reaching felon disenfranchisement.

Section 5 of the Fourteenth Amendment provides "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[68] The *Richardson* holding suggests Congress could not use its Section 5 power with disenfranchisement schemes. However, *Hunter* supports a contrary view. It places a caveat to *Richardson's* general reading and holds state disenfranchisement statutes enacted for a discriminatory purpose are invalid. Thus, it is possible that Congressional legislation passed pursuant to Section 5 and aimed at regulating discriminatory purposes would be constitutionally valid under the Fourteenth Amendment. Nonetheless, Congress's use of the Section 5 power to regulate felon disenfranchisement is potentially subject to other notable hurdles. Specifically, the Supreme Court's *City of Boerne v. Flores*[69] decision significantly curtails the scope of Congress's Section 5 power.[70]

*City of Boerne* involved a challenge to the Religious Freedom Restoration Act (RFRA), a statute passed pursuant to Congress's power under Section 5 of the Fourteenth Amendment.[71] Justice Kennedy, for the Court, found RFRA to be a wide-sweeping act that potentially included regulating conduct which was inherently constitutional.[72] This was not unprecedented as the Court had a history of sustaining "[l]egislation which deters or remedies constitutional violation . . . even if in the process it prohibits conduct which

[68] U.S. CONST. amend. XIV, § 5.

[69] City of Boerne v. Flores, 521 U.S. 507 (1997).

[70] The proper reach of the Congress's power in the post-*City of Boerne* world was recently confronted in debate over the reauthorization of Section 5 of the VRA. For notable commentary on the subject, *see* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1 (2007) (arguing Boerne is inapplicable to reauthorized Section 5 of the VRA because it fundamentally differs from statutes invalidated through the Court's Boerne jurisprudence); *but see* Ellen D. Katz, *Congressional Power to Extend Pre-Clearance: A Response to Professor Karlan*, 44 HOUS. L. REV. 33 (2007) (arguing the "City of Boerne standard of review remains applicable to reauthorization . . . . but that application of this standard must be adjusted to reflect the status of section 5 as an operational statute."); Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. (forthcoming 2007) (asserting the Elections Clause provides an alternative basis through which Section 5 re-authorization might be sustained).

[71] *City of Boerne*, 521 U.S. at 507-516. In *Boerne*, a local church sought a building permit to expand its size, which required pre-approval by the City's Historic Landmark Commission. The changes were not been pre-approved, and the construction permit was denied. The church challenged the denial decision under the RFRA. *Id.*

[72] *Id.* at 532. Justice Kennedy noted RFRA was a direct Congressional response to the Court's previous opinion in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), acting directly to overrule *Smith*. Kennedy was troubled by the noted intent of Congress deliberately to overrule *Smith*. *City of Boerne*, 521 U.S. at 512-516.

HeinOnline -- 10 J.L. & Soc. Change 56 2007

is not itself unconstitutional and intrudes into 'legislative spheres of authority previously reserved to the states.'"[73] However, Justice Kennedy emphasized "as broad as the Congressional enforcement power is, it is not unlimited."[74] The Fourteenth Amendment, Section 5 power is designed to be "remedial."[75] In order to be remedial, there must be congruence and proportionality between the injury and the means adopted to prevent such harm.[76]

Justice Kennedy argued the RFRA failed this congruence and proportionality standard. In reviewing the legislative findings, he noted how the record contained a lack of recent examples of discrimination,[77] suggesting the harm in question was minor. At the same time, he characterized the Congressional response as legislation with a nationwide scope ensuring its "intrusion at every level of government."[78] Because the RFRA imposed substantial costs to federalism and did so to prevent only a speculative and unsubstantiated harm, the statute was invalidated.

The invalidation of the RFRA casts doubt upon Congress's enforcement power under Section 5 of the Fourteenth Amendment.[79] Regardless, following *Boerne*, it still may be possible for Congress to adopt a voting statute consistent with the congruence and proportionality standard.[80] Namely, since a statute aimed at voting regulations is more discrete than the vast reach of the RFRA, the Court may deem a franchise related statute to have a greater degree of congruence and proportionality. At the same time, the Court may find Congress cannot use Section 5 of the Fourteenth Amendment to craft a statute aimed at preventing felon disenfranchisement. Nevertheless, this would not end the inquiry as Congress enjoys multiple enabling powers within the voting domain, including authority under the Fifteenth Amendment and Article I, Section 4.

### *B. The Fifteenth Amendment*

#### 1. A Unitary Reading?

The Fourteenth Amendment is not the only Reconstruction Amendment that concerns voting. In fact, the Fifteenth Amendment actually contains the most specific language on the topic. Section 1 of the Fifteenth Amendment states: "[t]he right of the citizens of the United States to vote shall not be denied . . . on account of race . . . ."[81]

[73] *Id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).
[74] *Id.* at 518-19 (quoting Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).
[75] *Id.* at 519 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).
[76] *Id.* at 520.
[77] *See id.* at 530 (finding no cited episodes of religious bigotry in forty years).
[78] *Id.* at 532.
[79] For the discussion of these limitations in the recent VRA § 5 reauthorization, *see* Karlan, *Section Five Squared, supra* note 70; Katz *supra* note 70.
[80] *See* Karlan, *Two Section Twos and Two Section Fives, supra* note 16 (describing why the VRA might not meet the same fate as RFRA); *see also* Katz, *Congressional Power to Extend Pre-Clearance, supra* note 70, at 52-63 (arguing for an approach whereby long existing statutes such as Section 5 of the VRA could be analyzed under a modified version the *Boerne* standard); Ellen Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L.REV. 2341, 2388 (2003) (explaining a degree of targeted federal intrusion into state and local affairs might be justified when it helps ensure that sub-national electoral markets operate effectively).
[81] U.S. CONST. amend. XV, § 1.

The core question presented in an analysis under the Fifteenth Amendment is if a petitioner need only demonstrate a state has unconstitutionally denied or abridged the right to vote. On its face, the Fifteenth Amendment concerns itself not with intent or design of a governmental action, but rather with the result of such governmental action.

As applied to criminal disenfranchisement, the wide construction afforded Section 2 of the Fourteenth Amendment in *Richardson* leaves open the question of whether that section acted to remove criminal disenfranchisement from not only the balance of the Fourteenth Amendment, but also from the other Reconstruction Amendments. In other words, in construing the Fifteenth Amendment, it is unclear whether it is proper to afford all three post-Civil War Amendments a unitary reading such that the "or other crime" language of Section 2 of the Fourteenth Amendment influences the meaning of the subsequent Reconstruction Amendment.

In the few available cases, a unitary construction has received at least some implicit support. For example, in *City of Mobile v. Bolden*,[82] the Court essentially interpreted the scope of the enforcement provisions of the Fourteenth and Fifteenth Amendments as co-extensive.[83] Specifically, regarding the Fifteenth Amendment, the Court crafted a requirement that intent to discriminate be demonstrated.[84] This requirement is identical to the standard the Court previously adopted in Fourteenth Amendment cases such as *Washington v. Davis*[85] and *Arlington Heights*,[86] and later adopted in *Hunter*.[87] While subsequent congressional actions have brought other parts of the *City of Mobile* holding into serious question,[88] *City of Mobile*'s coextensive treatment is not the only basis supporting a unitary reading of the Reconstruction Amendments; rather, a unitary reading is arguably supported by the history of the Reconstruction Amendments. As virtually the same Congress adopted each of the Reconstruction Amendments, the inference may be drawn that Amendments should be read together by their plain text in the absence of a specific textual removal by a subsequent amendment. Specifically, supporters of disenfranchisement would argue that the Fourteenth Amendment's explicit recognition of state power to disenfranchise should continue to operate irrespective of the language of the subsequent Fifteenth Amendment. Additionally, the unitary reading theory argues that not only the language of the Fifteenth Amendment but also its enforcement provision[89] can reach no further than the aforementioned and now potentially limited post-*Boerne* Fourteenth Amendment.

2. An Alternative Construction?

---

[82] 446 U.S. 55 (1980).

[83] *See id.* at 65-66 (treating Fourteenth and Fifteenth Amendments as co-extensive); *but see* Chin, *infra* notes 90-101 (arguing that the Fifteenth Amendment was not co-extensive, but rather amended the Fourteenth Amendment).

[84] *City of Mobile*, 446 U.S. at 65.

[85] 426 U.S. 229 (1976).

[86] 429 U.S. 252 (1977).

[87] 471 U.S. 222 (1985).

[88] The 1982 amendments to the Voting Rights Act eliminated the intent standard and substituted an effects test. S. Rep. 97-417, 15-17, 1982 U.S.C.C.A.N. 177, 192-94 (1982).

[89] U.S. CONST. amend. XV, § 2.

HeinOnline -- 10 J.L. & Soc. Change 58 2007

Professor Gabriel Chin offers a contrasting construction of the Reconstruction Amendments,[90] one that might allow the enabling provision of the Fifteenth Amendment to reach further than its Fourteenth Amendment counterpart. In passing the Fifteenth Amendment, he argues its framers intended to alter Section 2 of the Fourteenth Amendment.[91] This idea is derived from the theory of statutory interpretation of *leges posteriores priores contrarias abrogant*—"last in time controls"[92]—which, in general terms, asserts that more recent amendments to the Constitution invariably must alter previous amendments. This theory of statutory construction is based on the notion that otherwise, earlier inconsistent provisions would nullify the amendment, or at least create inconsistent results. Under this theory, when the framers crafted the Fifteenth Amendment, they also intended to amend the partial remedy contained in Section 2 of the Fourteenth Amendment in favor of the more complete remedy offered in the later amendment.[93]

This approach certainly is persuasive; however, it is not without its own interpretive difficulties. One resultant problem resides in the fact that the drafters of the Fifteenth Amendment failed to include an explicit repeal clause, as featured in other portions of the Constitution. This creates ambiguity with regards to the "later in time" construction, and thus forces one to argue that Section 2 of the Fourteenth Amendment is voided implicitly, rather than by explicit Constitutional statement.[94] A stringent presumption generally stands against implied repeal, but such a reading prevails when the new provision clearly acts as a substitute.[95] Professor Chin seeks to satisfy this exacting standard by arguing that the dissimilarity in remedies offered by the two amendments makes them incompatible.[96] Namely, Section 1 of the Fifteenth Amendment provides a greater remedy than Section 2 of the Fourteenth Amendment as "there is no circumstance in which the remedy of Section 2 can be applied instead of the remedy of the Fifteenth Amendment."[97] Effectively, the Fifteenth Amendment completely occupies the remedial field which it shares with the Fourteenth Amendment, leading to the conclusion that the Fourteenth Amendment remedy must have been repealed by implication.[98]

In addition to the structural theory, Professor Chin offers additional evidence, arguing that the continuity argument advanced by proponents of unitary construction is not dispositive. He notes it is the very same set of framers who failed to include an explicit repeal of Section 2 of the Fourteenth Amendment that also specifically failed to repeal other portions of the Constitution—most notably the infamous three-fifths compromise.[99] Given that Congress failed to include this important explicit repeal, it is

[90] Chin, *supra* note 10.
[91] Chin, *supra* note 10, at 272-75.
[92] BLACK'S LAW DICTIONARY 899 (6th ed. 1990).
[93] Chin, *supra* note 10, at 275-78.
[94] *Id.*
[95] *Id.* at 275, fn. 92.
[96] *Id.* at 278-80.
[97] *Id.* at 278.
[98] *Id.* at 277-78.
[99] *See id.* at 266-69 (noting that despite the Reconstruction Era Congress's obvious intent to terminate slavery and its appendages, the Thirteenth Amendment neglected explicitly to repeal the controversial three-fifths compromise).

conceivable that the Reconstruction Congress sought to repeal Section 2 of the Fourteenth Amendment but correspondingly failed to elucidate an explicit repeal.

A review of legislative history supports this possibility. Professor Chin quotes several Reconstruction Amendment framers who argued that the failure of the "carrot and stick" approach of the Fourteenth Amendment necessitated the outright "stick" contained in the Fifteenth Amendment.[100] Their views are supported by a variety of prominent nineteenth century legal scholars such as Justice Story, Thomas Cooley and Edward Corwin, all of whom raise the possibility of implicit repeal.[101]

While no court has embraced this alternative construction of the Fifteenth Amendment, it nonetheless presents an approach worthy of further judicial inquiry. In the meantime, however, given Congress's authority under the enabling provisions of the Fifteenth Amendment appears co-extensive with that of the now limited post-*City of Boerne* Fourteenth Amendment, opponents of felon disenfranchisement seeking to find a clear constitutional mechanism by which to further their cause might be better suited to look elsewhere within the Constitution.

### *C. Congress's Article I, Section 4 Authority—A Forgotten Power?*

Opponents of felon disenfranchisement should remember Congress possesses constitutional authority to effect voting regulations pursuant to Article I, Section 4:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations* . . . .[102]

On its face, this provision allows Congress to displace state voting regulations which effect the time, place or manner of holding Congressional elections. This ability to "alter such Regulations" concerning time, place and manner may appear to fall outside of the domain of felon disenfranchisement; however, a significant line of jurisprudence argues otherwise. For example, following Justice Black's interpretation of Article I, Section 4 from *Oregon v. Mitchell*[103]—an interpretation bolstered by a variety of historical precedents[104]—suggests Congress has sufficient constitutional authority to invalidate existing state voting regulations and enfranchise offenders for the Congressional portion of the election ballot.

In *Mitchell*, the Court addressed whether Congress possessed the constitutional authority to lower the voting age from 21 to 18 for both federal and state elections.[105] Justices Black, Douglas, Brennan, White and Marshall held that Congress could lower

---

[100] *Id.* at 272.
[101] *Id.* at 272-76.
[102] U.S. CONST. art. I, §4. (emphasis added).
[103] 400 U.S. 112 (1970). The substantive holding of *Mitchell* was overruled by the Twenty Sixth Amendment. However, the structural holding regarding the reach of the Article I, Section 4 power remains unaffected by the subsequent constitutional provision.
[104] *See generally* United States v. Classic, 313 U.S. 299 (1941); Smiley v. Holm, 285 U.S. 355 (1932); Ex Parte Yarbrough, 110 U.S. 651 (1884).
[105] *See generally Mitchell*, 400 U.S. 112.

HeinOnline -- 10 J.L. & Soc. Change 60 2007

the voting age for national elections.[106] However, Justice Black simultaneously joined Chief Justice Burger, Justices Harlan, Stewart and Blackmun to create a different five-member majority prohibiting federal authorities from lowering the voting age for the state portion of the election ballot.[107] While other Justices were not in complete agreement regarding his rationale, Justice Black's opinion became of critical importance as his vote acted as the ever-important fifth vote twice, creating the unique situation of a decision with two majority opinions.[108]

In his *Mitchell* opinion, Justice Black explained how Article I, Section 4 reflected a compromise at the Constitutional Convention; while some framers favored exclusive authority of the states over all aspects of elections, "those who favored national authority over national elections prevailed."[109] Several delegates, among them Henry Cabot, appearing at the constitutional ratifying conventions, argued that if state legislatures were to control national elections, they would have the ability to "annihilate" the authority of the federal government.[110] While agreeing that unfettered state authority would empower state legislatures to effect federal elections, Theophilus Parsons indicated greater fears about the proposed state-regulated elections, asserting that states could "even disqualify [as many as] one third of the electors."[111] Parsons thus feared that without the federal power reserved to control federal elections, "the people [would] have no remedy" against states' activity in that area; these fears were quelled as "the 4th section [Article I, Section 4] provide[d] a remedy" by granting Congressional power to regulate in the election process.[112]

The most prominent speaker on the topic for federal power in elections was James Madison. Madison highlighted the concern raised by state control of federal elections that a lack of uniformity in the election process might be problematic: "It was thought that the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent. Some States might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be

---

[106] *Id.* at 117-18.
[107] *Id.*
[108] As described later, a host of cases cited by Justice Black, as well as others not referenced in his opinion, provide ample support for his position. Justice Black's opinion contains significant historical insight into the Elections clause. *See also* William J. Brennan, Jr., *Foreword* to HUGO LAFAYETTE BLACK, MR. JUSTICE BLACK AND MRS. BLACK, THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK (1986) ("The place of Hugo Lafayette Black in the pantheon of great Justices of the Supreme Court grows more and more secure with each passing year. His fiercely asserted constitutional views . . . reflected his awe for the scheme of government devised by the Framers, and the intense patriotism and unbounded faith in his country that highlighted his every performance in public office.") As reflected in his dissenting opinion in *Adamson v. California,* 332 U.S. 46, 68 (1948) (Black, J. dissenting), Justice Black believed the Fourteenth Amendment made the Bill of Rights applicable to the states. Though the position failed to carry the majority of the Court, by the 1960s, virtually all individual rights protected by the first eight amendments had been applied against the states. *See* Akhil Reed Amar, *2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame,* 53 ALA L. REV. 1221, 1234-35 (2002).
[109] *Mitchell,* 400 U.S. 112 at fn. 2.
[110] *Id.*
[111] *Id.*
[112] *Id.*

obviously unjust."[113] Justice Black's citation to Madison stood as a direct rebuke to Justice Harlan who cited alternative language from Madison to support his dissent.[114]

Concerns were raised by other members of the Court regarding whether this area of election regulation was controlled by Article I, Section 2, which provides, in relevant part: "[T]he electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[115] Although this could be interpreted to imply that states possess exclusive authority over all electoral qualifications, Justice Black disagreed. He argued that the framers designed a shared arrangement whereby Article I, Section 2 would be read simultaneously with Article I, Section 4 and the Necessary and Proper Clause,[116] thus permitting state regulations over Congressional elections only to the extent Congress failed to take contrary action.

Justice Black found ample support for his expansive and integrated reading of Article I, Section 4 not only from its framers, but also from several notable Supreme Court decisions; a careful reading of jurisprudential history demonstrates that Black's construction, although often overlooked,, is completely supportable. For example, his opinion cites *United States v. Classic,*[117] in which Justice Stone argued that the states' ability to set qualifications pursuant to Article I, Section 2 operated only to the extent Congress had not restricted such action under either Article I, Section 4 or the Necessary and Proper Clause. Justice Stone's interpretation may appear odd initially, as it all but reads the qualifications clause out of the constitution. For this reason, it is important simultaneously to consider *Smiley v. Holm*[118]—a case cited by both Justices Black and Stone—where Chief Justice Hughes, writing for a unanimous Court, held that

> [T]hese comprehensive words [of Article I, Section 4] embrace authority to provide a complete code for congressional elections, not only as to the times and places but in relation to notices, *registration*, supervision of voting, protection of voters, duties of inspectors and canvassers and the making and publication of election returns . . . .[119]

This language from the *Smiley* opinion certainly bolsters the views of both Stone and Black.

The Court's reading in *Classic* and *Smiley* is further supported by Reconstruction Era cases such as *Ex Parte Siebold,*[120] *Ex Parte Clarke*[121] and *Ex Parte Yarbrough.*[122]

---

[113] *Id.* at fn. 5 (*citing* 3 J. ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 367 (1876)).
[114] *Id.* at 210-11.
[115] U.S. CONST. art. I, § 2.
[116] "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ." U.S. CONST. art. I, § 8, cl. 18.
[117] 313 U.S. 299 (1941).
[118] 285 U.S. 355 (1932).
[119] *Id.* at 366. (emphasis added); *see also* Cook v. Gralike, 531 U.S. 510, 523-24 (2001) (quoting of *Smiley v. Holm* language by the Rehnquist Court); Karlan, *Section 5 Squared, supra* note 70, at fn. 77 (listing additional practices that the Supreme Court has found to fall within the range of Congress's Election Clause power).
[120] 100 U.S. 371 (1879).
[121] 100 U.S. 399 (1879).
[122] 110 U.S. 651 (1884).

HeinOnline -- 10 J.L. & Soc. Change 62 2007

Among these cases, the latter may be the most significant.[123] In *Yarbrough*, Justice Samuel Miller, often maligned for his decision in the *Slaughter House Cases*,[124] found clear federal authority to prevent private violence against individuals attempting to exercise their federal franchise.[125] The *Yarbrough* opinion represented a break from prior Reconstruction era cases, such as *United States v. Harris*,[126] where the Court "held that the Fourteenth and Fifteenth Amendments reached state action, not private violence."[127] For Justice Miller in *Yarbrough*, the critical distinction became Congress's invocation of Article I Section 4.[128] He fused this provision together with the Fifteenth Amendment "to permit strong national protection of the electoral process."[129]

Time and time again, the Court has found Article I, Section 4 allows the Congress to do what other constitutional provisions cannot. It is this long line of jurisprudence that fueled Justice Black's position in *Mitchell*. By relying on these aforementioned cases and with respect to the question of voting by eighteen year olds, Black secured his fragile coalition. However, even jettisoning *Mitchell*, the available jurisprudence clearly supports two positions: states may regulate their own voting qualifications, but the federal legislature can insist on federal qualifications for Congressional elections.[130]

It is with this understanding of Congress's available powers that this article addresses whether the Voting Rights Act as amended in 1982 reaches felon disenfranchisement. As described herein, because current interpretations of the Reconstruction enabling provisions do not provide an unambiguous legal foundation for the federal government to regulate felon disenfranchisement, Article I, Section 4 is critical. While Article 1, Section 4 might not assist in the restoration of the purely state

[123] *Id.* For an intriguing discussion of these cases and era, *see* RICHARD VALELLY, THE TWO RECONSTRUCTIONS (2004) 68-71, 243-250, 245 ("[I]n these rulings, a majority of the Court adopted a nationalist reading of article I, section 4. The Court literally took the view that nothing prevented Congress from regulating federal elections in any way it chose."); Pamela Brandwein, *A Judicial Abandonment of Blacks?: The Supreme Court and Reconstruction, Reconsidered*, 41 L. & SOC'Y REV. (forthcoming 2007) (arguing the common narrative of the Supreme Court's abandonment of the freeman is at odds with both the jurisprudential and historical record).

[124] 83 U.S. 36 (1873).

[125] *See Yarbrough*, 110 U.S. at 660-62 ( Responding to notion that Congress lacked such authority to act, Justice Miller noted "[I]t is only because the [C]ongress of the United States, through long habit and long years of forbearance has, in deference and respect to the states, refrained from the exercise of these powers that they are now doubted.").

[126] 106 U.S. 629 (1883).

[127] *See* VALELLY, *supra* note 123, at 244.

[128] *Id.* at 245.

[129] *Id.* at 246.

[130] Professor Karlan notes "[T]he Supreme Court's recent decisions under the Elections Clause have confirmed the longstanding interpretation of the clause as a grant of essentially plenary authority." *See* Karlan *Section 5 Squared*, *supra* note 70, at 16. Professor Karlan cites a number of cases, including *Cook*, 531 U.S. at 523-24, and *Foster v. Love*, 522 U.S. 67,69 (1997) (quoting U.S. Term Limits v. Thornton, 514 U.S. 779, 832-33 (1995)). Professor Katz, while otherwise challenging Professor Karlan, appears to agree to Congress's plenary Elections Clause authority in so much as it concerns Congressional elections. *See* Katz, *supra* note 70, at 46 (noting "[P]rofessor Karlan reads this precedent as establishing that Article I grants Congress 'essentially plenary authority' when it regulates Congressional elections and that may well be right.") (citations omitted).

portion of the ballot,[131] this constitutional provision provides ample authority for the federal regulation of Congressional elections,[132] thus ensuring Congress the ability to reach—and in some instances eliminate—the practice of disenfranchisement.

## III. REVIVING A VRA DRIVEN FELON FRANCHISE RESTORATION STRATEGY

As discussed above, while the extent of Congress's enforcement powers under the Reconstruction Amendments is the subject of serious debate, Congress's Article I, Section 4 power is far less ambiguous. Even ignoring *Mitchell* and focusing on other cases, it is clear that Congress may displace all state-level time, place or manner regulations imposed upon Congressional elections, including felon disenfranchisement. The language of Article I, Section 4, however, demonstrates that actual congressional action in favor of this end is required; nevertheless, the framers of the 1982 Amendments cited Article I, Section 4 as a basis for the statute's authority.[133] Thus, with the inclusion of Article I, Section 4 as a partial authority supporting the 1982 amendments to the VRA, a core question becomes whether Congress intended, or otherwise allowed, the VRA to regulate felon disenfranchisement.

So far, not a single court has considered this narrow Article I, Section 4 based question. Further, the Supreme Court has uniformly refused to consider any VRA-driven felon franchise restoration claim. However, several leading cases in the Circuit Courts have reviewed the more general VRA-based restoration question. Although centering upon different rationales, not a single VRA-led restoration case has survived appellate review. Instead, several arguments have undermined current VRA-led litigation.

---

[131] It is worth noting that in the context of mixed elections (i.e. simultaneous state and federal elections) Article I, Section 4 might allow the Congress to reach disenfranchisement from state elections through the VRA. However, as applied to felon disenfranchisement, this direct question will be left for future research.

[132] *See generally,* Jeffrey Rosen, *Divided Suffrage,* in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge & Sanford Levinson eds., 1999); Robert Alexander Schwartz, *The Nature of Consent in the American Republic: Substance or Procedure? The Elections Clause and Single-Member Congressional Districts,* 38 U. S. F. L. REV. 467, 470-76 (2004); Francine Miller, Note, *Fairness in the Election Arena: Congressional Regulation of Federal Ballot Access,* 32 N.Y.L. SCH. L. REV. 903, 923-34 (1987).

[133] *See* H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2462 (indicating Congressional power to affect even local elections to prevent intimidation and corrupt influences).

On the one hand, the Second Circuit[134] and Eleventh Circuit[135] invoke a default presumption, called the plain statement rule, arguing that there is a lack of evidence in the record confirming Congress's intent to allow the VRA to reach and restrict the practice of felon disenfranchisement. The Sixth Circuit[136] and Ninth Circuit,[137] perhaps implicitly concerned about the VRA's reach, apply the VRA to felon disenfranchisement, but have still found the disenfranchisement statute in question to survive the totality of the circumstances test. Notwithstanding these pitfalls, of supreme importance is that none of these VRA-based cases consider—let alone refute—the notion that the VRA's citation to Article I, Section 4 of the United States Constitution operates to allow Section 2 of the Voting Rights Act to regulate state restrictions involving the Congressional portion of the election ballot.

### *A. Merging the Outlooks of VRA Felon Disenfranchisement Cases*

A threshold question confronted by reviewing courts is whether Congress intended to, or otherwise allowed, the VRA to reach disenfranchisement statutes when it amended the VRA in 1982. The VRA and its legislative history are silent, neither

[134] *See* Baker v. Pataki, 85 F.3d 919 (2d Cir.1996) (en banc) (holding Section 2 of the VRA should not be construed to include felon disenfranchisement because the VRA lacks a clear statement of Congressional intent to raise a constitutional challenge, or to disturb the typical balance of state and federal power. Precedential value of this case was weakened by split of en banc Circuit); *but see* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (holding that VRA should not encompass prisoner disenfranchisement because Congress made no clear or plain statement of such intent).

[135] The Court in *Johnson v. Governor of Florida*, 405 F.3d. 1214 (11th Cir. 2004) (en banc) *cert. denied sub nom. Johnson v. Bush*, 126 S.Ct. 650 (2005), invokes the plain statement doctrine to dismiss plaintiffs' evidence of racial discrimination via felon disenfranchisement because Congress had not made a plain statement of intent to create a constitutional challenge through Section 2 of the VRA. The court noted concern regarding the boundaries of the VRA resulting from *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court argued findings within the record accompanying the 1982 Amendments to the VRA as cursory and "without a record of constitutional violations, applying Section 2 of the Voting Rights Act to Florida's felon disenfranchisement law would force us to address whether Congress exceeded its enforcement powers under the Fourteenth and Fifteenth Amendment." *Johnson*, 405 F.3d at 1231. Given the lack of a plain statement in the congressional record, as well as Congress's tacit authorization of states to purge felons from the voter rolls through the 1993 Motor Voter Act, the Johnson Court, much like their Second Circuit counterparts, was unwilling to engage in the VRA analysis.

[136] *See* Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (applying the VRA, the Court held that a balance of factors listed in the VRA Senate Report supported upholding a felon disenfranchisement statute despite claims the statute violated Section 2 of the VRA).

[137] In *Farrakhan v. Locke*, 987 F.Supp. 1304 (E.D. Wash. 1997), the court found allegations of vote denial and dilution under Section 2 of the VRA due to a felon disenfranchisement statute inadequate to dismiss, but the court left open the possibility of a violation of the VRA for vote denial based on the VRA's results test. The District Court found the "plain statement rule" not to apply to the VRA. *Id.*, at 1308-09. Though the Court of Appeals agreed with the District Court's finding that a vote denial claim can be brought based upon felon disenfranchisement under the VRA, the Court criticized the lower court for its misapplication of the totality of the circumstances test. Farrakhan v. Locke, 338 F.3d 1009 (9th Cir. 2003). Specifically, the Court stated that evidence of racial bias within the criminal justice system can be considered to support a vote denial claim. *Id.* at 1016. Much like the *Wesley* Court, *supra* note 136, the District Court, on remand, granted summary judgment after determining that, despite sufficient evidence of racial discrimination hindering the ability of minorities to be active in the political process, there was insufficient proof the felon disenfranchisement statute resulted in racial discrimination in the electoral process. Farrakhan v. Gregoire, 2006 WL 1889273, *1 (E.D. Wash. July 7, 2006).

HeinOnline -- 10 J.L. & Soc. Change 65 2007

favoring nor disfavoring inclusion, thus forcing some courts to review subsequent Congressional action for insight.[138] These courts have found language tacitly supporting disenfranchisement; however, there is no direct indication whether the 1982 Congress intended the VRA to apply to felon disenfranchisement.[139]

The legislative history of the 1982 amendments indicates that Congress responded to the Supreme Court's restrictive decision in *City of Mobile v. Bolden* by crafting a wide-reaching, flexible, and fact-intensive standard designed to reach a significant amount of state conduct.[140] Section 2 of the VRA contemplates substantial judicial involvement, allowing individuals whose voting rights are denied or abridged to seek redress.

Despite the expansive reach of Section 2, some circuit courts apply the plain statement rule and thus hold the VRA inapplicable to felon disenfranchisement.[141] The plain statement rule is a default presumption, which, if applied, requires Congress to state clearly its intention to create a constitutional challenge[142] or to disturb the relative balance between state and federal power.[143] These courts argue that with respect to felon disenfranchisement, the VRA lacks such a plain statement, and, thus, neither engage in the totality of the circumstances analysis as set forth in the VRA, nor do they allow for the presentation of any evidence.[144]

Commentators have criticized courts for applying this default presumption without conducting a further analysis. While such a frontal critique may ultimately prove successful, all commentators and courts have ignored the most specific analytical problem with the court's invocation of the plain statement rule. Specifically, plaintiffs in each of the major VRA cases sought total restoration of their voting rights. In other words, they sought access to both federal and state level electoral contests. While both

[138] *See Hayden*, 449 F.3d at 322 ("Subsequent Congressional actions provide additional evidence that Congress has not understood the Voting Rights Act to cover felon disenfranchisement laws. For example, the National Voter Registration Act, enacted in 1993, explicitly provides for 'criminal conviction' as a basis upon which voters' names may be removed from lists of eligible voters. The Help America Vote Act of 2002 directs States to remove disenfranchised felons from their lists of those eligible to vote in federal elections.") (citations omitted).

[139] Several scholars applying the work of Nobel Laureate Kenneth Arrow argue legislative intent is ultimately indeterminate. *See generally*, Kenneth A. Shepsle, *Congress is a "They" Not an "It": Legislative Intent as Oxymoron*, 12 INTL. REV. L. & ECON. 239 (1992); *but see* Arthur Lupia & Mathew D. McCubbins, *Lost in Translation: Social Choice Theory is Misapplied Against Legislative Intent*, 14 J. CONTEMP. LEGAL ISSUES 585 (2005) (arguing that outputs of social choice models do not prove that legislative intent is irrelevant). For Arrow's General Possibility Theorem,*see* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d Ed. 1963).

[140] *See generally*, S. REP. NO. 97-417, at 39 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 204-05.

[141] *See Hayden*, 449 F.3d at 305 (finding of no clear statement by the Second Circuit); *Johnson*, 405 F.3d at 1214 (dismissing claim because of lack of Congressional clear statement).

[142] *See* DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568, 575 (1988) (requiring Congress to state plainly its decision to create a constitutional challenge; without such a plain statement, courts should construe a statute to avoid such a direct constitutional challenge).

[143] *See* Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (congressional interference with Missouri's decision to establish a qualification for their judges would upset the usual constitutional balance of federal and state powers; the court will not assume such an intent unless Congress makes its intention to so disturb unmistakably clear in the language of the statute).

[144] *Id.*

HeinOnline -- 10 J.L. & Soc. Change 66 2007

federal and state elections appear on the same ballot, the Constitutional framework surrounding these electoral contests significantly differs.

A VRA claim purely aimed at a Congressional franchise restoration is qualitatively distinct from a claim for complete ballot restoration. In justifying the passage of the VRA, Congress invoked the Reconstruction Amendments,[145] but it also cited another authority, Article I, Section 4.[146] This citation is critical for, as the unanimous decision in *Smiley v. Holm* provides, Article I, Section 4 allows Congress the authority to craft "a complete code for Congressional elections."[147] The provision grants Congress specific power to pass legislation regulating the Congressional ballot, and therefore the plain statement rule is simply inapplicable to this piece of the inquiry. Specifically, with respect to an original power of Congress, there is neither any issue about disturbing the balance of state and federal power, nor is a constitutional challenge created. Legislation neither inherently upsets the state and federal balance of power nor creates a constitutional challenge where Congress's authority is clear.

This point was recently emphasized by Justice Scalia in the otherwise unrelated case of *Pennsylvania Department of Corrections v. Yeskey.*[148] At issue in *Yeskey* was whether Title II of the Americans with Disabilities Act (ADA) covered inmates in state prisons. Justice Scalia, for the Court, quoted *Gregory*: "[A]bsent an 'unmistakably clear' expression of intent to 'alter the usual constitutional balance between the States and the Federal Government,' we will interpret a statute to preserve rather than destroy the States' 'substantial sovereign powers.'"[149] Regardless, this language in *Gregory* did not alter Justice Scalia's application of the federal statute to state prisoners.

Understanding the impact of *Gregory* on the reach of the VRA starts with the phrase "States' substantial sovereign powers."[150] Sovereign implies supreme in rank. Article I, Section 4 of the United States Constitution states, "Congress may at any time by Law make or alter such Regulations [of Congressional elections]. . . ."[151] This language taken together with the host of historical precedents discussed herein argues that in the area of Congressional elections, Congress is supreme and cannot be deemed to have imposed its power improperly upon the states when such authority was constitutionally granted to the federal legislature.

Furthermore, the argument may be presented that in passing the VRA, Congress never directly considered felon disenfranchisement, and therefore its reach is the mere by-product of the statute's broad language. However, in *Yeskey*, Justice Scalia addressed a similar issue involving the ADA:

> [Assuming as true] that Congress did not "envisio[n] that the ADA would be applied to state prisoners" . . . in the context of an unambiguous statutory text that is irrelevant. As we have said before, the fact that the

[145] *See* S. REP. 97-417, at 27-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177 205-209 (directly implicating a challenge to state regulation of voting rights).
[146] *Id.*, at 39.
[147] Smiley v. Holm, 285 U.S. 355, 366 (1932).
[148] 524 U.S. 206 (1998).
[149] *Id.*, at 208-09 (citations and internal quotation marks omitted).
[150] *Gregory*, 501 U.S. at 460-461.
[151] U.S. CONST. art. I § 4, cl 1.

> statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.[152]

In the VRA context, Congress's failure specifically to foresee the disenfranchisement question should be irrelevant. The primary issue is whether the text of the statute is unambiguously broad enough to include disenfranchisement, and courts should not employ techniques to render plain language ambiguous. Justice Scalia cautioned, "[t]hat doctrine [of the plain statement rule] enters in only 'where a statute is susceptible of two constructions . . . . '"[153] He later added, "[b]ecause the plain text of Title II of the ADA unambiguously extends to state prison inmates, the judgment of the Court of Appeals is affirmed."[154]

Following this logic, Congress need not justify or enumerate every element of a decision. Again, in the narrow domain of Congressional elections, Congress has absolute and final authority. Specifically, the federal legislature should not be required to justify its action via a plain statement rule so far as it concerns Congressional elections because Congress is constitutionally authorized to make final determinations regarding federal elections, and has thus chosen, through Section 2 of the VRA, to create a flexible, fact intensive totality of the circumstances test.

The Second and Eleventh Circuit Courts of Appeal, as well as several District Courts that considered the VRA and felon disenfranchisement, have analyzed the presented cases as if the passage of the VRA was merely predicated upon the Reconstruction Amendments.[155] This is unfortunate because *Mitchell*, *Smiley*, *Ex Parte Yarbrough* and *Classic*, together hold Congress to have absolute and ultimate authority to legislate concerning Congressional elections. The assertions of the plain statement rule are inapplicable in the Article I, Section 4 context because there are minimal federalism implications when Congress exercises a legislative authority specifically granted to it by the original constitution.

A narrow claim of Congressional ballot restoration not only differs from the *Gregory*-style plain statement decision,[156] but it is also immune from invocations of the *DeBartolo* version of the plain statement rule.[157] Congress, through exercise of its Article I, Section 4 power, did not create a constitutional challenge because the Congressional power to displace state voting regulations as to the federal ballot is an original power vested in the Congress and provided for by the framers of the Constitution.

In their treatment of the ballot restoration claims, the Second and Eleventh Circuits failed to apply the VRA to any part of the ballot restoration claims and instead broadly invoked the plain statement rule.[158] At a minimum, these courts could have bifurcated the inquiry, thereby dismissing the state ballot restoration claim while ruling on the substantive merits of the embedded claim for restoration of the federal portion of the ballot. The final substantive ruling on the merits of the federal ballot claim might

[152] 524 U.S. at 212 (citations omitted).
[153] *Id.* (citations omitted).
[154] *Id.* at 213.
[155] For a list of these cases, *see supra* note 15.
[156] *See supra* note 143.
[157] *See supra* note 142.
[158] *Id.*

HeinOnline -- 10 J.L. & Soc. Change 68 2007

prove to be unsuccessful, as it did for the plaintiffs in the Sixth and Ninth Circuits; these courts broadly applied the VRA but found the local statutes still passed muster in the totality of the circumstances.[159] These decisions, however, do little to preclude future claims as the VRA's totality of the circumstances test is a fact intensive inquiry, and there is substantial variation between states concerning their policies as well as historical treatment of minority populations.[160]

There is reason to believe a court presented with a pure or embedded federal voting rights claim could find the VRA applicable and apply the required totality of the circumstances test and strike down a particular statute. When the facts and the history of particular state disenfranchisement laws are reviewed, an appropriate record might lead a court to find a VRA violation and restore access to the federal portion of the electoral ballot. Section IV of this article, *infra*, briefly entertains this question, arguing state systems which permanently restrict all ex-felons from voting fail the VRA's totality of the circumstances test. Section IV completes a review of the empirical literature demonstrating how federal ballot restoration could produce a significant effect on political outcomes.

## IV. SCHEMES THAT FAIL THE VRA AND THEIR IMPACT UPON ELECTORAL OUTCOMES

As a by-product of the federal bargain, historical practice, and policy experimentation, state disenfranchisement laws display a high level of interstate variance.[161] This extends to a host of relevant parameters including the severity of a given state's criminal law, the range of crimes subject to disenfranchisement and the duration of the collateral consequence.[162] A reduced-form coding of the duration of such statutes places them into three major classifications, which are to be adopted by this article for the sake of simplification.[163] In the least restrictive case, states either forego disenfranchisement or limit the disenfranchisement to the actual period of incarceration.[164] This approach has the lowest electoral impact since only incarcerated felons are denied the vote. In the intermediate case, states disenfranchise offenders through periods of incarceration and during periods of supervision, such as while on parole or probation.[165] Finally, the most restrictive form removes the ability to vote for a period beyond sentence completion, including permanent denial of the franchise.[166] Among this latter group, there is a gradation across jurisdictions. For example, certain

[159] *Id.*
[160] *See generally*, Robert Preuhs, *State Felon Disenfranchisement Policy*, 82 SOC. SCI. Q. 733 (2001). *See also* Daniel M. Katz, *A Cobblestone of Eligible Electorates: The Elections Clause and the Variance and Comity in Criminal Disenfranchisement Policy* (Paper Presented at the 2007 Annual Meeting of the Midwest Political Science Association, Chicago, IL) (manuscript on file with author).
[161] *Id.*
[162] *Id.*
[163] *See* Aman McLeod et al., *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL'Y & L. 66, 74-75 (2003) (analyzing disenfranchisement schemes by placing existing statutes into three categories); *see also* Katz, *supra* note 160 (arguing that a true understanding of the severity of felon disenfranchisement policy requires a review of the interaction between various elements of state law.)
[164] McLeod, *supra* note 163, at 75.
[165] *Id.*
[166] *Id.*

states remove the right to vote for a fixed period beyond parole and probation, while others permanently remove the franchise. Additionally, some jurisdictions that permanently remove the franchise do so following conviction for a single felonious offense, while others require a series of violations. For purposes of reduced-form classification, these schemes will be treated as analogous. However, litigants should emphasize to reviewing courts these important differences across jurisdictions.

### *A. Schemes that Fail the VRA*

Born out of Selma and the violent images from that "Bloody Sunday" on the Edmund Pettis Bridge,[167] the VRA was created to further equity related goals, most notably, the protection of voting rights within minority communities. The VRA assists in securing opportunities for political participation and, by necessity, enhances the political capital needed to secure those rights. By design, the VRA, as amended in 1982, requires a fact-intensive, totality of the circumstances inquiry. Therefore, it is difficult to make general predictions regarding the factual threshold required by the VRA in specific cases. For example, while the history of voting rights is replete with examples of discriminatory practices aimed at the suppression of minority voting interests, these incidents are not uniformly distributed across jurisdictions.[168]

The VRA provides specific guideposts for courts rendering decisions based upon the totality of the circumstances. The Senate report accompanying the VRA enumerates the following nine factors which reviewing courts might consider in deciding whether election processes are "equally open to participation"[169] by members of the protected classes:

[167] Leaders within the civil rights community chose Selma, Alabama, because it represented the epitome of minority disenfranchisement. As of the 1960 census, the voting age population had reached nearly 30,000 persons, distributed as approximately 14,000 whites and 15,000 blacks. Yet, of the 9,877 registered voters only 335 were black. Prior voter registration efforts in Selma and surrounding communities largely failed. Following the death of Jimmie Lee Jackson, a young African-American man killed by an Alabama State Trooper during a march dispersal, the Southern Christian Leadership Conference and the Student Nonviolent Coordinating Committee organized a march from Selma to Montgomery in order to take their grievances directly to the state capitol. Although the March 7, 1965 march made it no further than six blocks, it has been called the political and emotional peak of the American civil rights movement. With reporters and photographers present, state and local law officials proceeded to disband the ostensibly non-violent march using night sticks, tear gas and bullwhips. That evening, photos of the incident reached the country and the world, with the attack upon the Selma marchers soon termed "Bloody Sunday." The State of Alabama's crackdown quickly returned civil rights policy to the forefront. The brutality of the violence inflicted shock not only on the nation, but also President Johnson, who on March 15, 1965 spoke to a joint session of Congress, proposing the legislation that ultimately produced the 1965 Voting Rights Act. This legislation that was born out of Selma produced significant changes in the electoral landscape of the United States. For a small slice of extensive discussion of Selma and its historical and political significance, *see generally*, CHARLES FAGER, SELMA 1965 72-98 (1974); DAVID GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 368-409 (1986); ROBERT MANN, THE WALLS OF JERICHO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS 460-462 (1996); VALELLY, *supra* note 123, at 193, 198.

[168] *Id.* The legislative findings that accompanied the passage of the Voting Rights Act contain such evidence. *See e.g.* S. REP. NO. 97-417, at 39 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 217.

[169] 42 U.S.C. § 1973(b) (2007).

HeinOnline -- 10 J.L. & Soc. Change 70 2007

1) a history of official discrimination;
2) extent of racially polarized voting;
3) extent to which the district has used practices that may increase the opportunity for discrimination;
4) denials of access to the slating process;
5) discrimination in other areas, such as education, employment or health;
6) political campaigns characterized by overt or subtle racial appeals;
7) extent of minority representation in elected office;
8) lack of elected official responsiveness to needs of a particular minority group; and
9) a tenuous link between the disputed practice and state policy.[170]

These factors are not exhaustive[171] and, for the reasons stated above, several of these factors are so fact specific they can only be analyzed in discrete cases. For a claim to succeed, the disputed process must cause members of the protected class to have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[172]

A blanket prohibition of all felon disenfranchisement pursuant to the Article I, Section 4 enabled VRA could prove illusive. When courts apply the effects test to disenfranchisement schemes that restrict access to the federal portion of the election ballot, at least some statutes likely will pass muster under the VRA. The least restrictive state schemes, such as those that operate over a limited set of crimes and remove the franchise only during the period of incarceration, are the most likely to survive VRA analysis. Specifically, the arguments traditionally proffered in support of felon disenfranchisement are at their strongest when individuals currently incarcerated seek to exercise the franchise. For example, proponents often cite an interest in restricting voting to those members of society who will intelligently use the ballot.[173] Additionally, states claim an interest in limiting the exercise of the voting privilege to those who have adhered to the laws crafted from the established democratic process of the United States.[174] Taken together, and placed against the interests of those currently incarcerated, courts may be willing to accept these traditional arguments in favor of franchise denial.

As state schemes increase in severity, the strength of the state interest supporting the removal of the franchise invariably wanes. At the very same time, the magnitude of the deprivation imposed upon the felon intensifies. Therefore, it is those schemes that

[170] S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-207.
[171] *See id.* (noting that these factors are not exhaustive, and further that no specific number of factors need by proven).
[172] 42 U.S.C. § 1973(b). *See* Thornburg v. Gingles, 478 U.S. 30, 47 (1986) (stating that the essence of a disenfranchisement claim is that the disputed process causes "an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives").
[173] For a discussion of the rationales used to support disenfranchisement, *see generally* Demleitner, *supra* note 2, at 771-74. The arguments forwarded are that those convicted of felonious offenses cast a pale over their ability to vote intelligently, that although some subset of the offender population could intelligently exercise their franchise, there is sufficient probability of unintelligent use to justify a blanket ballot prohibition.
[174] *Id.*

permanently deny the franchise to all felons that are most likely to fail under the VRA. In these instances, the aforementioned traditional arguments become tenuous[175] and the loss of liberty for the felon becomes substantial, often disproportionate to the initial unlawful conduct. Thus, based on a consideration of the remaining factors and some non-enumerated factors, there is substantial reason to believe a comprehensive VRA analysis could invalidate schemes which impose lifetime disenfranchisement for all felony offenders.

Lifetime disenfranchisement schemes are particularly troubling because they have a massively disproportionate impact on minority populations.[176] The harm is not only visited on the individual but upon entire voting communities. Because voting is the right that makes "all other rights significant,"[177] when a state provision hinders the ability of historically disadvantaged groups to participate equally, the explicit factors in the Senate Report imply that a careful VRA analysis is warranted. Although courts have held disproportionate impacts alone do not create a per se violation of the VRA, their presence certainly cannot be completely divorced from the totality of the circumstances inquiry.

Lifetime disenfranchisement schemes are especially problematic because they lack a basic notion of offense proportionality. While the removal of the franchise represents the denial of a civil right, this collateral restriction cannot be completely removed from its penal nature. Under current state criminal justice structures, many more crimes have felony designations than were historically felonies at common law.[178]

---

[175] *Id.*
[176] *See* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States,* 67 AM. SOCIO. REV. 777, 797-798 (2002) (reprinted below), (demonstrating the disproportionate impact of schemes that disenfranchise beyond sentence completion). The disproportionate impact can be seen by comparing the percent of blacks disenfranchised to the percentage of the overall population that is disenfranchised:

| State | Afr. Amer. Ex-felons | Total Afr. Amer. Felons | Total Afr. Amer. Pop. | Percent Afr. Amer. Disenfranchised | Total Ex-felons | Total Felons | Total Voting Pop. | Percent Disenfranchised |
|---|---|---|---|---|---|---|---|---|
| AL | 77,932 | 111,755 | 800,000 | 13.97 | 148,830 | 212,650 | 3,333,000 | 6.38 |
| AZ | 8,651 | 17,700 | 137,000 | 12.92 | 58,936 | 149,870 | 3,625,000 | 3.89 |
| FL | 167,413 | 256,392 | 1,600,000 | 16.02 | 613,514 | 827,207 | 11,774,000 | 7.03 |
| KY | 24,632 | 35,955 | 207,000 | 17.37 | 109,132 | 147,434 | 2,993,000 | 4.93 |
| MS | 50,035 | 76,106 | 675,000 | 11.27 | 82,002 | 119,943 | 2,047,000 | 5.86 |
| NE | 7,164 | 9,240 | 49,000 | 18.86 | 44,001 | 53,428 | 1,234,000 | 4.43 |
| NV | 11,514 | 17,970 | 105,000 | 17.11 | 43,395 | 66,390 | 1,390,000 | 4.78 |
| NM | 7,750 | 9,128 | 37,000 | 24.67 | 63,565 | 78,400 | 1,263,000 | 6.21 |
| TN | 11,946 | 41,759 | 635,000 | 6.58 | 28,720 | 91,149 | 4,221,000 | 2.16 |
| VA | 121,737 | 161,559 | 1,005,000 | 16.08 | 243,902 | 312,661 | 5,263,000 | 5.90 |

Note that these percentages remain roughly unchanged if one considers merely disproportionate impacts upon the ex-felon population.
[177] *Id.* at 777 (quoting FRANCES F. PIVEN & RICHARD A. CLOWARD, WHY AMERICANS STILL DON'T VOTE: AND WHY POLITICIANS WANT IT THAT WAY 2 (Beacon Press 2000)). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, *nevertheless it is regarded as a fundamental political right, because preservative of all rights.*") (emphasis added).
[178] *See* Richardson v. Ramirez, 418 U.S. 24, 49-52 (1973) (writing for the Court, Justice Rehnquist notes that the Reconstruction Era Congress sought to limit state disenfranchisement to felonies at common law).

HeinOnline -- 10 J.L. & Soc. Change 72 2007

These felonious crimes vary substantially, from simple drug possession to homicide. Courts might have difficulty with the idea that it is proportional to treat crimes with such variance in severity as equal for purposes of disenfranchisement.

Proportionality is not an explicit factor contained in the Senate Report;[179] however, factor nine asks a court to consider whether there is a tenuous link between the disputed practice and the state policy.[180] This factor seems perfectly tailored to considerations of proportionality. Proportionality requires a comparative relationship, an investigation for reasonable symmetry or balance among the involved factors. The lack of proportionality in a state system may help to establish the questionable nature of the state scheme. Today, many felonies routinely result in probation. Further, some states designate comparatively minor offenses as felonious.[181] It appears inconsistent to deem a person safe enough to interact daily in society but simultaneously untrustworthy in the exercise of the franchise. Whether considered through the lens of factor nine or a non-enumerated VRA factor, the decision to maintain lifetime disenfranchisement raises serious questions regarding the motivation of state actors who adopted such a system.

Finally, and equally important, substantial research within the criminal justice field provides additional evidence that lifetime schemes fail factor nine, listed above. Disenfranchisement statutes do not consider the age of the offender; therefore, offenses committed even in the late teen years result in the denial of the right to vote for life. Supporters of felon disenfranchisement often argue the ballot box should remain pure and thus be reserved for those who will intelligently use the ballot.[182] Yet, even at a mere summary statistical level, empirical studies on offense commission argue that as an offender grows older, the probability of new felony offenses, conditioned upon prior offense history, rapidly converges upon the unconditioned probability of offense commission.[183] In other words, as an offender grows older, the chance of committing a new felony becomes roughly equal to the probability for one who never committed a prior offense. This suggests that a state policy permanently removing the franchise is only tenuously related to its stated goals of ballot box purity and intelligent use of the franchise.

The disproportionate impact upon minority voting communities, taken together with the lack of proportionality present in lifetime schemes, gives rise to a strong argument supporting the invalidation of blanket lifetime disenfranchisement. Following this reasoning, the courts, in search of a bright line rule, should declare that state schemes may, at most, remove the Congressional franchise until an offender has completed all terms of incarceration, parole and probation. This holding would embed a degree of proportionality currently unrepresented in many state schemes. Specifically, because the

---

[179] S. REP. NO. 97-417, *supra* note 164, at 28-29.

[180] *Id.*

[181] In Florida, for example, numerous less serious transgressions are classified as felonies, including: trespassing on posted "commercial horticultur[al]" property, FLA. STAT. § 810.09(2)(e) (2006) killing, capturing, injuring, or possessing an alligator, FLA. STAT. § 372.663(1) (2006); and removing certain property encumbered by a lien and valued over $50.00, FLA. STAT. § 713.69 (2006).

[182] *See* Demleitner, *supra* note 2, at 771-74 (noting that states and courts, including the Supreme Court, have defended felon disenfranchisement by arguing that it preserves the "purity of the ballot box").

[183] *See generally*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, 355, tbl. 4.4 (Ann L. Pastore & Kathleen Maguire, eds., U.S. Dept. of Justice, Bureau of Justice Statistics 2001) (displaying the percentage distributions of persons arrested, as compared to the total U.S. population, by age group).

total time of incarceration, parole and probation may reflect the underlying seriousness of the offense, the decision to peg disenfranchisement schemes to gradations already reflected in the penal law should reduce the taint of the disproportionate impacts created by the scheme. Simply put, disenfranchisement pegged to the existing system of offense severity achieves proportionality while still precluding the worst societal offenders from exercising the franchise. Furthermore, it effectuates the goals of the VRA on the Congressional ballot while still preserving important notions of state and local autonomy for the non-federal ballot.

### *B. The Direct, Indirect and Collateral Impacts Upon Political Outcomes*

The return of the Congressional voting franchise to this subset of the felony offender population may result in important changes in political outcomes. The likely changes are a function of direct, indirect, and collateral mechanisms. The direct consequence of ballot restoration is the change in political participation reflected in the ballots cast by the formerly disenfranchised offender population. The indirect effect of the return of the franchise encompasses the change in political participation by members of the non-disenfranchised population. For example, if a family member regains the right to vote, other family members may elect to join the offender during voting process. The collateral effect of federal restoration is the possibility that a state may follow the federal lead by returning the franchise to the same offenders who previously were disenfranchised under the state law. States may decide it is not practical to have two sets of ballots, one for the federal offices and the other for the state. The result could be a new uniform approach merging the state into the Congressional ballot thereby facilitating the ex-felon's full return to voting. In all, a complete participation model must account for all of these potential mechanisms in order to speculate thoughtfully on the complete electoral impacts of federal franchise restoration.

#### 1. Direct Impacts

Modeling the direct change in political outcomes is complicated because it is unlikely the offender population features a level of political participation equivalent to the non-offender population.[184] Thus, a participation model must first capture the predicted level of political participation within the offender population and then determine the distribution of party preferences across this population subset. Attempts to determine both participation rates and party preferences face potential measurement error. They typically rely upon survey research, pre-conviction participation rates or multiple regression analysis of cross-state voting patterns.[185] However, assuming these

[184] *See* Uggen & Manza, *supra* note 176, at 783 (noting that presumption of unit homogeneity in disenfranchised felon population and their potential voting patterns is oversimplified and a dubious presumption); *see also*, Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 115 (2004) (noting the ways in which the participation rates of disenfranchised felons differ from the rates of other groups).

[185] Various methods are typically used to measure voter participation. *See* Uggen & Manza, *supra* note 176, at 783-84. However, each approach is potentially problematic: survey research faces measurement error associated with respondent misreporting; models built upon pre-conviction treatment rates may fail to

HeinOnline -- 10 J.L. & Soc. Change 74 2007

difficulties can be overcome, the additional number of net votes available for a given candidate can be compared to pre-existing margins of victory to determine predicted changes in political outcomes. If the previous margins of victory were relatively close, there is a greater likelihood of an impact provided that the ex-felon population tends to vote against this margin of victory.

In their recent study, Professors Christopher Uggen and Jeff Manza create a rough estimate of the upper bound of offender political participation using data collected by the Current Population Survey (CPS).[186] That rate is then reduced using an inflation factor obtained from the CPS.[187] This method allows Uggen and Manza to derive conservative predicted levels of turnout for the offender population.[188]

With a participation rate in place, the authors run a logistic regression on data from the National Election Study to determine the distribution of party preferences among the disenfranchised population.[189] This yields a multiplier that can be applied against the total number of felons residing within a given jurisdiction in order to determine the number of net votes available in that jurisdiction.[190]

Uggen and Manza applied this framework to each U.S. Senate Election between 1972 and 2000 and calculated the number of net Democratic votes lost in each of these races.[191] In other words, they looked at how many votes were needed to alter the margin of victory in those races. In many cases, the large differential between these net votes and the margin of victory led to the conclusion that felon disenfranchisement was not outcome determinative.[192] However, the authors identify at least seven U.S. Senate races for which the outcome might have been changed by the presence of enfranchised ex-felons.[193] Most importantly for purposes of this article, they note that in six of these seven races, the net votes of ex-felons would have been sufficient to alter outcomes.[194]

---

capture the post-treatment effects of the criminal sanction; and participation models crafted from cross-state voting tract patterns face additional measurement errors.

[186] *See id.* at 784, fn. 6 (indicating CPS data as preferable to the National Election Study (NES), as the NES "typically overestimates turnout by 18 to 25 percent").

[187] *Id.* at 784.

[188] *See id.* (noting with respect to the use of the inflation factor that because turnout is most overrepresented among the better-educated, inflation rates for disenfranchised felons are likely lower, so this procedure may produce a conservative estimate).

[189] *Id.* at 785, app. 799. Categorical models such as the logistic regression are often preferable to the regression model of ordinary least squares or the linear probability model because its functional form helps capture the non-linearity present in many empirical phenomena.

[190] *Id.* at 787.

[191] *See id.* at 788-89 (stating that there have been over 400 senate elections since 1978).

[192] *Id.* at 789.

[193] *Id.* at 788-789. The seven Senate races in question are:

| Year | State | Result of Senate Race | | |
|---|---|---|---|---|
| 1978 | Virginia | J. Wagner (R) | defeated | Miller (D) |
| 1978 | Texas | Tower (R) | defeated | Krueger (D) |
| 1984 | Kentucky | McConnell (R) | defeated | Huddleston (D) |
| 1988 | Florida | Mack (R) | defeated | Mackay (D) |
| 1988 | Wyoming | Wallop (R) | defeated | Vinich (D) |
| 1992 | Georgia | Coverdell (R) | defeated | Fowler (D) |
| 1998 | Kentucky | Bunning (R) | defeated | Baesler (D) |

The finding of felon disenfranchisement as directly affecting Senatorial elections is significant. While only reaching a small subset of elections, the literature discussing the effects of senatorial incumbency argues that these elections may have produced more lasting change.[195] Additionally, there could be an effect as to candidate selection and, perhaps, the balance of power within the Congress.[196]

It is important to note that while the work of Uggen and Manza is certainly strong, it is not the only empirical scholarship on the subject of outcomes. In contrast to Uggen and Manza, Professor Thomas Miles employs a slightly different methodological approach. Using the triple differences framework,[197] Miles finds current disenfranchisement schemes do not create discernable, direct political consequences.[198] In support of this empirical finding, the author provides a theoretical offering: he argues the correlation between socioeconomic factors that lead to criminal activity and low levels of political participation are such that electorally significant political participation among the re-enfranchised population is improbable.[199] In other words, although the aggregate disenfranchised population is theoretically sufficient to create significant changes in some political outcomes, their predicted level of political participation under the Miles framework is so small that outcome determinative changes are unlikely to follow.

Thus, there is a split of authority on the direct impacts question.[200] Although Presidential elections are not the focus of this article, it is an area worth noting; the 2000 Presidential election represents at least one example where the presence of this particular type of felon disenfranchisement scheme was almost certainly outcome determinative.[201] The 2000 Presidential election featured the closest race in modern election history. With just a few electoral votes and only 535 popular votes in the key state of Florida separating the respective candidates the mantra of every vote in the State of Florida rang with

---

Only in the 1992 race between Coverdell (R) and Fowler (D) would the ex-felon population have been insufficient to impact the predicted candidate selection. *Id.*

[194] *Id.* at 789.

[195] The incumbency effect hypothesis argues that incumbent candidates have a far higher probability of electoral success than their non-incumbent challengers. For a survey of the extant literature, *see* MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1989). Recent work indicates that the incumbency effect applies beyond senatorial elections; *see also* Stephen Ansolabehere & James Snyder, *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECT L. J. 213 (2002) (finding statistically significant evidence that since the 1940s, the incumbency advantage has climbed steadily for all state and federal elections).

[196] *See generally,* Uggen & Manza, *supra* note 176 (finding restoration of felon franchise might have had both an effect on candidate selection as well as in power structure in Congress).

[197] *See* Miles, *supra* note 184, at 100 (using the triple differences framework to compare "the turnout of African-Americans and whites (the first difference) and of males and females (the second difference) in states with and without laws permanently disenfranchising ex-felons (the third difference)").

[198] *See id.* at 115 (finding that state disenfranchisement does not limit African-American male voter turnout).

[199] *Id.* at 115-16.

[200] The State of Florida recently restored the voting rights of nearly one million residents. *See* Goodnough, *supra* note 17. This should allow for future research that will help adjudicate between these competing empirical claims.

[201] *See* Uggen & Manza, *supra* note 176, at 792 (finding that the small margin of victory in the 2000 Presidential election would likely have been a small loss if felon re-enfranchisement would have been adopted).

HeinOnline -- 10 J.L. & Soc. Change 76 2007

particular strength. Florida law, during the 2000 election, provided for permanent removal of the franchise following the commission of a single felonious offense.[202] Only a relatively small number of ex-felons achieved the return of the franchise, as, prior to recent events,[203] state law required specific clemency from the Governor.[204] Thus, although virtually all of the scholarship available recognizes that offenders feature lower levels of political participation, the preclusion of a predicted 800,000 or more persons from the 2000 Florida voting rolls[205] lead to the unambiguous conclusion that disenfranchisement changed the electoral outcome of the 2000 Presidential Election. Specifically, if just one percent of this denied population participated in the election and split their votes 57 percent to 43 percent in favor of Vice President Al Gore, this margin would have been sufficient to change the outcome.[206]

### 2. Indirect Impacts

Neither the Miles nor the Uggen and Manza models capture the indirect changes in political participation. However, a complete model should capture both the direct and indirect impacts. Specifically, the restoration of federal voting rights could create a multiplier or network effect upon political participation which is not captured by a model focused exclusively upon direct impacts.[207] For example, since many individuals vote as part of other sub-units such as families and communities, the restoration of the franchise to one member of the sub-unit may act as the marginal inducement necessary to produce political participation by other members of the unit. In short, a family member who has newly regained the vote may encourage other family members to vote.[208]

Recent empirical scholarship has made initial attempts to determine the presence, as well as the magnitude, of this indirect impact upon political participation.[209] The authors focused their attention on the indirect impacts imposed upon the African-

---

[202] FLA. STAT. § 97.041(2)(b) (2006).

[203] *See* Goodnough, *supra* note 17.

[204] FL. CONST. art. VI, § 4, art. IV, § 8(a). To encourage restoration of franchise, the Florida legislature passed a statute, FLA. STAT. § 944.293, directing that upon discharge from supervision, ex-felons would be assisted in obtaining and completing forms necessary to request clemency from the Governor. This was fought by the Governor's Office, finally resulting in a 2004 court order directing the assistance. Florida Caucus of Black State Legislators, Inc. v. Crosby, 877 So. 2d 861, 864 (Fla. Dist. Ct. App. 2004). This order was subsequent to the 2000 Presidential election.

[205] *See* Uggen & Manza, *supra* note 176, at 792 (indicating that the large number of disenfranchised could have had a large impact upon the results from Florida in the 2000 election).

[206] These vote shares and rates of participation are exceedingly conservative. For example, the scholarship of Miles, as well as Uggen and Manza, supports political participation thresholds that far exceed one percent.

[207] *See generally,* Robert Huckfeldt, *Political Participation and Neighborhood Social Context,* 23 AM. J.POL. SCI. 579 (1979) (asserting that the political process does not operate in isolation, but that participation has effects beyond the simple direct effect of casting a vote); Scott D. McClurg, *Social Networks and Political Participation: The Role of Social Interaction in Explaining Political Participation,* 56 POL. RES. Q. 449(2003) (noting influence of social networks on political participation); M. Stephen Weatherford, *Interpersonal Networks and Political Behavior,* 26 AM. J. POL. SCI. 117(1982) (indicating broader context of political participation than direct voting effects).

[208] The recent restoration of ex-felons in Florida should provide an opportunity to test these important questions empirically. *See* Goodnough, *supra* note 17.

[209] *See generally,* McLeod et al., *supra* note 163.

American community by states with restrictive felon disenfranchisement schemes. The study controlled for a variety of factors previously determined to have impacts on an individual's propensity to vote. Included in these factors was a proxy variable reflecting the amount of political oppression within a given jurisdiction. With these controls in place, the study was able to isolate the indirect impact upon political participation created by existing disenfranchisement statutes.

This recent research has found strong evidence of a relationship between restrictive criminal disenfranchisement statutes and turnout among non-disenfranchised communities.[210] While the exact causal relationship is difficult to isolate, this evidence suggests that removal of franchise creates a network effect that downwardly adjusts the propensity for non-disenfranchised members of the same family or community to cast a ballot. This is an indication that the vote from non-disenfranchised people may be suppressed by relation or close social connection to a disenfranchised individual. Despite this evidence, it is certainly possible that a network effect will not follow; the recent restoration of nearly one million ex-felons in Florida should help to enlighten this particular empirical debate.

### 3. The Collateral Return of the State Franchise

In addition to the direct and indirect impacts upon political participation created by the restoration of the federal franchise, there also remains a genuine potential for the ancillary return of the state franchise. First, momentum created by a court's decision might persuade state legislatures that sentence expiration is the appropriate upper bound to place upon individuals seeking to vote on the state portion of the election ballot. Second, the administrative complexities associated with the potential management of two voting rolls and two ballots could cause states legislatures to embrace a common approach for voting in state elections. Since the federal ballot would have specific requirements, the state simply may conform, possibly for reasons as pedestrian as ease and expense of maintaining a single ballot process.

## V. CONCLUSION

The return of the Congressional franchise is a partial–but by no means total–solution to complete franchise restoration. Because significant questions remain regarding the VRA's ability to reach the state ballot, and the Supreme Court has yet to address the question fully, this article focuses on a narrow matter, what could be called the low hanging fruit of this line of jurisprudence. It advances a construction that both lower courts and the Supreme Court could find to be the principled intermediate option that eliminates the least justifiable forms of disenfranchisement while still preserving some commitment to federalism in those instances of a more justifiable basis to disenfranchise.

The limited remedy sought in this article, if successful, still represents the return of Congressional voting rights to well over seven hundred thousand Americans.[211]

---

[210] *Id.*

[211] *See* Uggen & Manza, *supra* note 176, at 796 (noting 1.8 million disenfranchised African-Americans as of December 31, 2000); *see also* JEFF MANZA & CHRISTOPHER UGGEN, *supra* note 2, at 7 (estimating that

Therefore, litigants who argue for the total elimination of criminal disenfranchisement should also explicitly present this alternative or lesser included argument. Namely, a long line of historical precedents, the text of Article I, Section 4 of the United States Constitution, and the history surrounding the 1982 amendments to the VRA, as well as basic notions of proportionality and justice, all require that with respect to the Congressional portion of the election ballot, courts should use the Voting Rights Act to eliminate state schemes which disenfranchise individuals beyond the end of their criminal sentences.

---

over 5 million adults in the United States are disenfranchised). Even if these estimates are downwardly adjusted by the recent restoration in Florida, the estimated ex-felon population still exceeds seven hundred thousand.

HeinOnline -- 10 J.L. & Soc. Change 79 2007