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FELON DISENFRANCHISEMENT: A CALL FOR LEGISLATIVE REFORM

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Introduction

The United States is imperfect and our country's history of racial inequality is, at best, sordid. Over the past forty-five years, we have made great strides towards achieving a truly color blind society, yet this goal has remained elusive. As a country that prides itself as the land of opportunity, President Obama's ascent to the White House gives substance to a sometimes hollow claim. The election of President Barack Obama as this country's first African-American President has etched a new high-water mark for racial relations and could serve as a catalyst for changing the perceptions of those communities furthest removed from the benefits of opportunity.

One of the greatest strengths of the United States is the creativity, industriousness and ambition of its citizens. However, these individual qualities rise or fall with one's sense of hope and opportunity. Participation within local, state, and federal elections is an important aspect of establishing oneself as a member of a greater community of friends, neighbors, and fellow citizens. The particularly harsh effects of felon disenfranchisement on the African-American community seem increasingly unjustified, especially given the policy's marginal benefits. This is an opportune moment for states to reexamine the practice of excluding convicted felons from the electoral process.

After the razor thin 2000 presidential election, a number of civil rights groups began advocating for the reform of state felon disenfranchisement laws.[1] Pursuing a two-prong strategy, civil rights groups campaigned for legislative reform and also mounted a series of legal challenges arguing that felon disenfranchisement violated the Constitution or existing federal law. Legislative reform efforts have enjoyed considerable support from a wide cross-section of Americans and political parties.[2] Court challenges, however, have been markedly less successful.

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[1] *See* AMERICAN CIVIL LIBERTIES UNION, VOTING RIGHTS FOR PEOPLE WITH CRIMINAL RECORDS: 2008 STATE LEGISLATIVE AND POLICY CHANGES (2008), http://www.aclu.org/votingrights/exoffenders/statelegispolicy2008.html; *see also* RYAN S. KING, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997-2008, http://www.sentencingproject.org/Admin/Documents/publications/fd_statedisenfranchisement.pdf.

[2] *Id.*

This comment examines why this second approach has proven unsuccessful and why meaningful reform must come from the state and federal legislatures. Part I provides a brief history of felon disenfranchisement and contrasts it with previous discriminatory attempts to suppress African-American voters. Part II discusses why court challenges have been unsuccessful and the difficulties faced by plaintiffs in establishing a violation of the Voting Rights Act or the Fourteenth Amendment to the United States Constitution. Part III examines the current fit (if any) between disenfranchisement laws and the stated justifications and policies goals they purport to advance. Lastly, this comment concludes with the position that felon disenfranchisement is neither unconstitutional nor inherently racist. However, given the particularly harsh effects of felon disenfranchisement and the policy's marginal benefits, the wholesale exclusion of felons from the polls is no longer justifiable.

A Brief Overview of Felon Disenfranchisement

The Supreme Court has consistently held that the right to vote is fundamental and infringements upon it are to be analyzed under strict scrutiny.[3] Felon disenfranchisement stands out as the odd exception to this general rule and, for the most part, has withstood constitutional challenge.

The Greek Empire provides one of the earliest examples of democratic government and of the practice of felon disenfranchisement.[4] Judge Friendly summarized the underlying justification for the policy: "[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce the laws, . . . [or the] prosecutors, . . . or judges who are to consider their cases."[5] This statement articulates a Lockean theory of social contract, whereby criminals who breach their covenant with society relinquish the benefit to influence their community at the ballot box.[6] English common law and colonial Americans understood that this protection was necessary to prevent corruption of the electoral process and to preserve the people's confidence in that system. At the start of the Civil War, over two dozen states practiced some form of felon disenfranchisement.[7]

Today, state laws relating to the scope and duration of felon disenfranchisement vary greatly and reflect the country's increasingly mixed

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[3] *See* Harper v. State Bd. of Elections, 383 U.S. 663, 667 (1966) (stating "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . . and alleged infringement[s] . . . must be carefully and meticulously scrutinized[]").

[4] JAMIE FELLNER, MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, HUMAN RIGHTS WATCH, (Oct. 1998), http://www.hrw.org/reports98/vote/index.html.

[5] Green v. Bd. of Elections, 380 F.2d 445, 451-52 (1968).

[6] *Id.*

[7] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 63 (Basic Books ed., 2000).

sentiment towards this policy. Kentucky and Virginia represent one end of the ideological spectrum and disenfranchise all convicted felons while incarcerated, or while on parole or probation.[8] Conversely, Maine and Vermont have chosen to allow all felons the opportunity to vote, even while incarcerated.[9] Nationally, the trend seems to fall towards a middle ground. From 1997 to September 2008, an estimated 760,000 felons have had their voting rights restored as a result of nineteen states amending existing felon disenfranchisement laws.[10]

For a myriad of reasons African-Americans are disproportionably affected by the proscription of felons from the polls. Felon disfranchisement has been compared to the literacy tests and poll taxes once used by southern states to suppress African-American votes. Such comparisons are not entirely inaccurate. According to the Bureau of Justice Statistics (hereinafter "BJS"), of the seventy-five most populous counties in the country, 42% percent of felony defendants in 2004 were "non-Hispanic blacks."[11] As of June 30, 2007, 2.1 million males were held in local jails or prison and of this population, 35.4% were African-American.[12] To put these numbers into perspective, African-Americans comprise less than 13% of the country's total population.[13]

Clearly, any voting restriction based upon prior criminal conviction will have a *predictably* disproportionate impact on the African-American community's ability to influence the political process. In this regard, felon disfranchisement, literacy tests, and poll taxes produce a similar result. However, literacy tests and poll taxes were enacted for the specific purpose of suppressing the African-American vote, while felon disenfranchisement predates the Fifteenth Amendment to the United States Constitution.[14] At the time of the Fourteenth Amendment's ratification,[15] twenty-

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[8] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 3 (2008), http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf.

[9] 21 ME ST T. 21-A § 751. In Maine "any voter who requests an absentee ballot" is permitted to receive and cast that ballot. *Id*. *See also* 28 Vt. Stat. Ann. § 807(a) (providing "[a] person who is convicted of a crime shall retain the right to vote by . . . absentee ballot . . . during the term of his commitment").

[10] RYAN S. KING, EXPANDING THE VOTE STATE FELONY DISENFRANCHISEMENT REFORM 1997-2008,1-2(2008), http://www.sentencingproject.org/Admin/Documents/publications/fd_statedisenfranchisement.pdf.

[11] TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTSINLARGEURBANCOUNTIES1-2(2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc04.pdf.

[12] William J. Sabol & Heather Couture, Bureau of Justice Statistics, *Prison Inmates at Midyear 2007 1* (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf.

[13] U.S. Census Bureau, Census 2000 (2008), http://censtats.census.gov/data/US/01000.pdf.

[14] *See* U.S. Const. amend. XV § 1 (*ratified* February 3, 1870). The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id*.

[15] *See* U.S. Const. amend. XIV (*ratified* July 9, 1868).

nine out of thirty-six states already had some form of felon disenfranchisement.[16] More significantly, the policies advanced by felon disenfranchisement remain largely viewed as legitimate and worthy of pursuit.[17]

These observations do little to resolve this debate, but they illustrate a philosophical divide. Some believe disenfranchisement is racially discriminatory; others consider it evenhanded because punishment is only contingent upon one's criminal status. These positions are not mutually exclusive. Each obscures the question of whether felon disenfranchisement's demonstrably adverse affect on racial minorities is justified by its benefits.

Felon Disenfranchisement Challenges in the Courts

In *Richardson v. Ramirez*,[18] the Supreme Court of the United States explained the historical roots of felon disenfranchisement and the reasons for its continued acceptance. In *Richardson*, the Court held that the Equal Protection Clause of the Fourteenth Amendment was not violated by a California constitutional provision that denied felons who have completed their sentences and parolees the right to vote.[19] This decision was influenced, in large part, by the fact that Section Two of the Fourteenth Amendment affirmatively sanctions the disenfranchisement of felons.[20] Section Two explicitly permits citizens barred from voting because of "participation in rebellion, or other crime[s]," to be counted as citizens of the state for the purpose of congressional representation.[21] This provision is an exception to the Fourteenth Amendment's command that a state's disqualified voters may not be counted for the purpose of congressional representation. The framers of the Fourteenth Amendment were aware that some states might intentionally disqualify their own citizens from voting in order to suppress those citizens' political influence. Section Two was intended as a disincentive for a state to disenfranchise its citizens, because doing so would proportionately reduce the state's representation in Congress and the Electoral College.

In *Richardson*, the Supreme Court reasoned, "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [Section One] . . . that which was expressly exempted from the lesser sanction of reduced representation imposed by [Section Two] of the Amendment."[22] The Court also found it convincing that, at the time the Fourteenth Amendment was adopted, most

[16] *See* KEYSSAR, *supra* note 7, at 62-63. Prior to adoption of the Fifteenth Amendment there would be no need to use felon disenfranchisement as a pretext for discrimination of African-American voters. *Id.*
[17] The Twenty-Fourth Amendment now prohibits poll taxes and Congress has proscribed literacy tests pursuant to 42 U.S.C. § 1971(a)(2)(C) (2005).
[18] 418 U.S. 24 (1974).
[19] *Id.* at 54.
[20] *Id.* at 41-42.
[21] *Id.* at 42.
[22] *Id.* at 43.

states already had constitutional provisions that either restricted or permitted the restriction of felons from voting.[23] This evidence, in the Court's view, was proof that the framers could not have intended to invalidate such a widely accepted practice.

The Supreme Court found the policy goals advanced by felon disenfranchisement legitimate and impliedly endorsed by Section Two. Consequently, the Court took the position that such laws were presumptively constitutional, and held that "the Supreme Court of California erred in concluding that California may no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles."[24] The *Richardson* Court did not address a second argument, that the law could still be in violation of the Equal Protection Clause of the Fourteenth Amendment based on its selective enforcement.[25] The Court conceded that there may be validity to the argument that "it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen."[26] However, in the absence of any constitutional violation, such arguments must be reserved to the legislature.[27]

In *Richardson,* the California law was facially neutral and did not appear to be the product of a discriminatory purpose. However, in *Hunter v. Underwood,*[28] the Supreme Court of the United States reviewed a provision within the Alabama State Constitution that prohibited individuals from voting if convicted of certain crimes involving "moral turpitude."[29] The Court held that the challenged state amendment was in violation of the Equal Protection Clause of the Fourteenth Amendment.[30] This case differed from *Richardson*[31] in one important respect; the Alabama restriction was undoubtedly the product of the drafter's discriminatory intent to exclude African-Americans from the polls.[32] At the time

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[23] *Richardson*, 418 U.S. at 48.
[24] *Id.* at 56.
[25] *Id*. ("The California court did not reach respondents' alternative contention that there was such a total lack of uniformity in county election officials' enforcement of the challenged state laws as to work a separate denial of equal protection, and we believe that it should have an opportunity to consider the claim before we address ourselves to it.")
[26] *Id*. at 55.
[27] 418 U.S. 24, 55 (1974) ("[T]he legislative forum which may properly weigh and balance [these social arguments] . . . . But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view.")
[28] 471 U.S. 222 (1985).
[29] *Id*. at 224.
[30] *Id*. at 233.
[31] 418 U.S. 24 (1974).
[32] *Id*. at 230. The Court noted that even the counsel for the state admitted as much during oral argument before the Court. Conceding, "I would be very blind and naive [to] try to come up and stand before this Court and say that race was not a factor . . . [or] that race did not play a part in the decisions of those people who were at the constitutional convention of 1901 and I won't do that." *Id*.

of the 1901 Alabama Constitutional Convention, the president of the convention rhetorically asked the delegates, "What is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[33] As demonstrated by *Hunter*, Section Two of the Fourteenth Amendment does not place felon disenfranchisement laws beyond the reach of the courts. However, plaintiffs need to establish the requisite discriminatory intent to prevail on a Fourteenth Amendment claim. *Hunter* illustrates the well- settled rule that facially neutral laws violate the Due Process Clause if a discriminatory effect was intended.[34] But Fourteenth Amendment claims are largely ineffective against contemporary felon disenfranchisement laws; it is unlikely that a modern law will be facially discriminatory or passed under circumstances similar to *Hunter,* where discriminatory intent can be inferred.[35]

Given the great difficulty of proving disenfranchisement laws were the product of discriminatory intent, challengers to these laws had to find an alternative basis for their arguments. In 1982, Congress amended Section Two of the Voting Rights Act[36] (hereinafter "VRA") to provide that, "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed . . . in any matter *which results* in a denial or abridgment of the right . . . to vote on account of race or color . . . ."[37] The VRA now specifies that courts must ask if "based on the *totality of circumstances*," minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[38] This practical test was intended to assist plaintiffs in meeting their burden of proving intentional discrimination by allowing a plaintiff to challenge a policy or practice if it "results" in an infringement on account of race -- irrespective of whether that result was intended. There is a split among the circuits on the issue of whether Congress intended the VRA to apply to felon

[33] *Id*. at 229.
[34] *See* Arlington Heights v. Metro. House Dev., 429 U.S. 254, 264-65 (1977) (stating that "action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . [p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause").
[35] *See e.g.*, Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (holding that in the absence of discriminatory intent, the state's practice of felon disenfranchisement did not violate the Equal Protection Clause); Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998) (holding that a Mississippi disenfranchisement provision, once tainted with racial animus, no longer violated the Fourteenth Amendment after it was reenacted without discriminatory intent); *Buckner v. Schaefer*, 36 F.3d 1091 (4th Cir. 1994) (unpublished opinion) (Maryland statute did not violate the Fourteenth Amendment as it was not intended to have a discriminatory effect and was not applied in a discriminatory manner); Tennessee, Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (a violation of the Equal Protection Clause of the Fourteenth Amendment is established only where there is proof of a racially discriminatory intent or purpose); Hayden v. Pataki, 2004 WL 1335921 (S.D. N.Y. 2004), (finding that the plaintiffs failed to establish a sufficient "basis, even under the liberal standards of a Rule 12(c) motion, from which to draw the inference that [the challenged disenfranchisement provisions] were enacted with discriminatory intent").
[36] 42 U.S.C. § 1973 (2008).
[37] *Id*. (emphasis added).
[38] The National Voting Rights Act § 2(b), 42 U.S.C. § 1973 - 1973aa-6 (emphasis added).

disenfranchisement. For those circuits that have found the VRA applicable to felon disenfranchisement, it remains unsettled how these claims should be evaluated.[39]

To illustrate this divide, the Eleventh Circuit has held that the VRA was not applicable to Florida's felon disenfranchisement provision.[40] The court acknowledged that Congress' remedial powers under the Fifteenth Amendment could possibly permit Congress to proscribe state felon disfranchisement.[41] However, the court found the statute's ambiguous language and absence of a clear congressional mandate, to be proof that Congress did not intend that result.[42] The court noted that when Congress intrudes upon "a decision of the most fundamental sort for a [State], . . . 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment."[43] In its decision the court explained that even if the VRA were applicable to the challenged law, the plaintiffs would still fail because they have not provided sufficient evidence to demonstrate that the argued voting infringements were on account of their race.[44]

The Second Circuit has also held the VRA inapplicable to felon disfranchisement.[45] The court explained that to rule otherwise, "would alter the traditional balance of power between the states and the federal government[.]"[46] Such an infringement on the "well-established" discretion of the states to restrict felon voting rights must come from an "unmistakably clear" statement from Congress."[47]

The VRA prohibits "voting qualification[s] . . . which *result*[] in a denial or abridgment of the right . . . to vote on account of race or color . . . ."[48] What is unclear from this language is whether the legislature intended to do away with the traditional requirement of discriminatory intent. The Sixth Circuit recognized the possible application of a VRA challenge to felon disfranchisement. In *Wesley v.*

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[39] *See* Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003) (ruling felon disenfranchisement provisions are cognizable under the VRA); *see also* Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (explaining intentional discrimination within the criminal justice system may amount to a violation of the VRA if the discriminatory actions effect a standard, practice or procedure with respect to voting); *but see* Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (holding the disproportionate impact suffered by African-Americans did not "result" from the state's qualification of the right to vote on account of race or color and does not violate the VRA).
[40] Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 650 (2005).
[41] *Id.* at 1229.
[42] *Id.* at 1234-35.
[43] *Id.* (citing Atasscadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985)).
[44] The court clarified "assuming *arguendo* that Section 2 of the VRA applies to Florida's provision, a review of the record strongly suggests that the plaintiffs' Section 2 claim would still fail. The plaintiffs would have to demonstrate that specific and relevant racial biases in society interact with the felon disenfranchisement rule, resulting in a denial of the franchise '*on account of race or color*.'' *Id*. at 1230.
[45] Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004), *vacated*, 449 F.3d 371 (2d Cir. 2006).
[46] *Id.* at 104.
[47] *Id.*
[48] 42 U.S.C. § 1973(a) (emphasis added).

Collins,[49] the plaintiffs offered evidence establishing that African-Americans were disproportionately subjected to disenfranchisement.[50] However in its decision upholding a state constitutional amendment, the court explained, "a showing of disproportionate racial impact alone does not establish a per se violation of the Voting Rights Act."[51] The court reviewed the challenged amendment and the circumstances surrounding its ratification. However, it determined there was no evidence to support the finding of discriminatory purpose.[52] In *Wesley*, the plaintiffs also failed to provide any evidence of specific discriminatory acts which resulted in the abridgment of the plaintiffs' voting rights.[53] The Sixth Circuit, citing *Richardson*, concluded "it is undisputed that a state may constitutionally disenfranchise convicted felons."[54] The *Wesley* court then evaluated the evidence and found the felon disenfranchisement amendment to be rationally related to the state's legitimate interest in preserving the integrity of its electoral process.[55]

It seems the Sixth Circuit would allow specific evidence of discrimination not directly related to voting rights, if the discriminatory practice had some causal connection to an abridgment of voting rights.[56] The Ninth Circuit cited *Wesley* in reversing a district court's grant of summary judgment against a group of disenfranchised felons who also asserted a VRA claim.[57] The Ninth Circuit held that the plaintiffs could offer statistical evidence to prove discriminatory state action if those actions resulted in a greater likelihood that the plaintiffs were convicted and subsequently disenfranchised on account of their race.[58]

The Need for Legislative Reform

There is little evidence that Congress intended for its amendment to the VRA to apply to felon disenfranchisement.[59] If Congress had intended for the VRA to apply to felon disenfranchisement, the statute appears ill equipped to handle all but

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[49] 791 F.2d 1255 (6th Cir. 1986).
[50] *Id*. at 1260.
[51] *Id*. at 1262.
[52] *Id*.
[53] "In the instant case, plaintiffs argue that the Tennessee Act disproportionately impacts on blacks because a significantly higher number of black Tennesseans are convicted of felonies than whites. It is well-settled, however, that a showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting." *Id*. at 1261.
[54] *Id.* at 1261.
[55] *Id.*
[56] *Wesley*, 791 F.2d at 1260-61.
[57] Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003).
[58] *Id.* at 1020.
[59] *See Farrakhan*, 338 F.3d at 1116 (Kozinski, J., dissenting) (discussing the absence of any language within the 1982 amendment or it legislative history); *see also* 42 U.S.C. § 1977gg-6(a)(3)(B) (2008) (National Voter Registration Act requires prosecutors to give notice to state election official upon the felony conviction of a person in federal court).

the most blatant violations.[60] The Supreme Court has made clear that statistical data alone is insufficient for Fourteenth Amendment claims; there is little reason to believe it would find otherwise for Fifteenth Amendment challenges.[61] As it relates to VRA claims,[62] the circuits are also in agreement that race based disparities alone are insufficient.[63] An evaluation of these cases using the "totality of the circumstances" test, would not negate this requirement.[64] If other circuits adopted the Ninth Circuit's position, plaintiffs challenging their disenfranchisement would not be worse off. However, as a practical matter, it seems unlikely that many plaintiffs could prove that their convictions and subsequent disenfranchisement resulted from a state's impermissible discriminatory intent.

There appears to be no appreciable benefit gained from the wholesale exclusion of every ex-convict from the polls. Conversely, there are justifiable reasons for excluding some felons from the electoral process. Restoring voting rights to most first time convicted felons and individuals convicted of drug offenses could largely ameliorate the harsh impacts of felon disenfranchisement. In 2004, 34% of state felony convictions were for drug offenses and, of this number, African-Americans represent 41% of the offenders.[65] In another study of large urban areas, African-Americans represented 51% of felony drug convictions.[66] A policy that

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[60] In similar cases where the Supreme Court has had the occasion to interpret the VRA's application to state laws, it has been reluctant to read the statute with the breadth asked of it by challengers to various state laws. *See* Reno v. Bossier Parish School Bd., 528 U.S. 320, 336 (2000) (stating that it applying Section 5 of the VRA would undermine principals of federalism and raise constitutional concerns); *see also* Miller v. Johnson, 515 U.S. 900, 927 (1995) (stating that the Congress did not intend Section 5 to have the "far-reaching" application as was argued by the Justice Department).

[61] McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (holding racially correlated discrepancies alone did not establish bias absent some proof of discriminatory action by an authority involved with defendant's case).

[62] This paper has left aside the unresolved question of whether Congress could use its Fifteenth Amendment remedial powers to proscribe felon disenfranchisement given its presumption of constitutionality and that establishing voter qualification is a right traditionally reserved to the states. While Congress has outlawed literacy tests, these laws never had deep historical roots or the presumption of constitutionality.

[63] Ortiz v. City of Philadelphia Office of City Comm'rs., 28 F.3d 306 (3d Cir. 1994) (stating a law which purged voters from registration after two years did not violate VRA because plaintiffs failed to present evidence establishing discriminatory intent); Salas v. Sw. Texas Junior Coll. Dist., 964 F.2d 1542 (5th Cir. 1992) (holding disparities in voter turnout were insufficient to establish proof of intentional discrimination); Irby v. Virginia State Bd. of Elections, 889 F.2d 1352 (4th Cir. 1989) (finding plaintiffs could not establish discrimination with only evidence of disparities between African-American and white representatives); Wesley v. Collins, 791 F.2d 1260 (6th Cir. 1986) (finding the VRA applicable to felon disenfranchisement; however, the plaintiff's bare statistical evidence alone was insufficient to prove discrimination).

[64] *Bush*, 405 F.3d at 1235.

[65] MATHEW DUROSE, BUREAU OF JUSTICE STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS 2004 (2007), http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04202tab.htm.

[66] TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 1-2 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc04.pdf.

relies exclusively on one's status as a felon, rather then considering the underlying crime appears to be unduly punitive and ineffective.[67]

Compare the following two examples: Defendant A is convicted for possession of one ounce of cocaine, and Defendant B is a trial court judge convicted of receiving bribes. Depending on the circumstances, it is possible that Defendant A could spend as much (if not more) time in prison then the judge. There are justifiable policy considerations for imposing harsh sentences on convicted drug traffickers. However, Defendant A's illegal conduct does not seem to undermine any principle of democracy or harm the public's perception of its elected offices. Conversely, the disenfranchisement of Defendant B would seem to advance the state's interest in preserving these goals. If both defendants are disenfranchised, the policy goals are achieved, but this result comes with the added consequence of dashing any hope Defendant A might have of fully reentering society.

A policy where only incarcerated felons are restricted from voting might allow for a clear line of demarcation, but it fails to take into account the nature of the crime and its impact on the electoral process. Should the judge in this hypothetical have his voting rights restored if he makes parole, while Defendant A remains in prison?

Conclusion

Felon disenfranchisement should be significantly narrowed in scope, though not eliminated. Although some crimes justify this restriction, it is not entirely clear whether abandoning felon disenfranchisement would help or hurt some of the poorest of communities. Most crimes take place in the same low income neighborhoods and communities that these reforms are intended to benefit. A disproportionate number of felons reside in low income communities. This larger representation of a felon voting class could dilute the voices of law abiding citizens, who are the most likely victims of crime particularly in state and local elections.[68] This effect might be insignificant in senate and presidential elections and would likely go unnoticed in most middle class and affluent districts.[69] However, it would be shortsighted not to

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[67] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf. (last visited, November 22, 2008) ("1.4 million African American men, or 13% of black men, are disenfranchised, a rate seven times the national average.").

[68] ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, BLACK VICTIMS OF VIOLENT CRIME 1 (2007), http://www.ojp.usdoj.gov/bjs/pub/pdf/bvvc.pdf. "Homicides against blacks were more likely than those against whites to occur in highly populated areas, including cities and suburbs. About 53% of homicides against blacks in 2005 took place in areas with populations of at least 250,000 people, compared to about 33% of homicides of white victims." *Id*.

[69] SHANNAN M. CATALANO, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2005 8 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/cv05.pdf. For example, the rates of violent crime and personal theft amongst individuals in households earning less than $7,500 per year is 37.7 victimizations for every 1,000 persons. This number is in stark contrast to the 16.4 victimizations for every 1,000 persons experienced by members of a household earning $75,000 or more. *Id.*

consider the unique effects that might result from lifting disenfranchisement laws on all felons for elections in high crime and impoverished communities.

These points are intended to illustrate that considerations concerning the reform of felon disenfranchisement are community oriented, policy based and best for the legislature to assess. A ruling that felon disenfranchisement violates the Constitution would not adequately address these practical and policy concerns. The individual state legislatures will need a free hand in tailoring their own policies. The United States was founded on the principle that government must remain accountable to its citizens. A representative republic's actions can only be guided by the collective wisdom and experience of its citizens. This sometimes justifies the need for citizens to guard the electoral process from those who would corrupt it from within, but the policies to affect that end should not be overly and needlessly restrictive in a way that estranges certain communities from the political process.