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Disenfranchisement of People with Felony Records and the Racial Discrimination Behind It

Giovanni Padilla

The 2020 United States Presidential election was one of the most critical elections in our history. It was an election that exposed many of our system’s flaws. An election that ended with the current president challenging the results and alleging widespread fraud. In 2020 our democracy was bent but not broken. To avoid catastrophe in the future, we must address issues that lead to inequality in the way American voters are represented. One major issue to address is felon disenfranchisement laws.

Before getting into disenfranchisement laws, we must face a reality that has often been ignored. Judges are people just like everyone else. They have political ideologies; they have backgrounds and life lessons that formed their opinions, and ultimately judges are put in their positions to advance political ends. To ignore this is to fight a losing battle where one side gives the other the benefit of the doubt, where one side tries to take things at face value and view the other side as a good-faith actor, while the other does not. In turn, this has led to the current state of inequality in America, which can never engender true democracy.

This piece aims to address past court decisions on felon disenfranchisement laws. It will then address the history behind those laws and the current effect. Finally, I will present an argument for using the Voting Rights Act to address these laws. Ultimately, the goal is to critique the decisions that have put us in this position where millions of Americans do not have the most fundamental right to a democratic society.

Felon disenfranchisement in the United States is a barrier to having a real equal democracy. As of 2016, 6.1 million Americans have dealt with disenfranchisement due to felony convictions.\(^1\) 77 percent of those disenfranchised voters live in their communities, either under probation, parole supervision, or have completed their sentences.\(^2\) An estimated 3.1 million people have experienced disenfranchisement due to state laws restricting voting rights even after


\(^2\) Id.
Black Americans represent 2.2 million of those disenfranchised voters.\textsuperscript{4}

Mass incarceration is a reality of Black America. The racial disparity has persisted for several reasons, including the war on drugs, sentencing laws, and discretionary prosecution.\textsuperscript{5} As of 2016, in four states – Florida (21 percent), Kentucky (26 percent), Tennessee (21 percent), and Virginia (22 percent) – more than one in five Black adults was disenfranchised.\textsuperscript{6} By the end of 2015, 9.1 percent of young Black men (ages 20–34) were incarcerated, which is 5.7 times that of young White men (1.6%).\textsuperscript{7}

The greater the nonwhite prison population, the more likely a state will ban convicted felons from voting.\textsuperscript{8} There are currently only two states with no voting restrictions for those convicted of a felony: Vermont and Maine. These two states are outliers for various reasons — one of which is that unlike a vast majority of states, a majority of the prison population in both these states are white.\textsuperscript{9} In Maine and Vermont, Black people still represent a larger share of prisoners than their share of the general population.\textsuperscript{10} Studies have shown that disenfranchisement laws also have the effect of keeping eligible voters away from the polls.\textsuperscript{11} Many states’ disenfranchisement policies are so complex that election officials often misunderstand and misrepresent them, causing many would-be voters to believe they are ineligible to vote.\textsuperscript{12} A 2009 study found that eligible and registered Black voters were nearly 12 percent less likely to cast ballots if they lived in states with lifetime disenfranchisement policies — while White voters’ probability of voting decreased by only 1 percent in such states.\textsuperscript{13}

\textsuperscript{3} Chung, supra note 1.  
\textsuperscript{4} Id.  
\textsuperscript{6} Chung, supra note 1.  
\textsuperscript{9} Pettit & Sykes, supra note 7 at 2.  
\textsuperscript{10} Id.  
\textsuperscript{12} Id.  
\textsuperscript{13} Id.
A. Court Decisions

The right to vote is not specifically mentioned in the Constitution, but *Reynolds v. Sims* has addressed this issue and stated that voting is a right of all citizens:

“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote.”14

*Reynolds* was decided in 1964, a year before the Voting Rights Act of 1965, and the court made clear that voting was a right but left it open to discussion. Using the word qualified, the court left open the interpretation that residents, non-residents, felons, etc., could be removed from the electorate through different eligibility requirements imposed by states.

i. Dunn v. Blumstein

The first voting rights case to consider is the 1971 case of *Dunn v. Blumstein*, where the Supreme Court held that all adult citizens possess the right to vote under the Equal Protection Clause. All qualifications of that right would be subject to strict scrutiny.15 *Dunn* was a case involving a Tennessee law that authorized voting registration only to people who, at the time of the next election, would have been residents of Tennessee for a year and residents of the specific county within Tennessee for three months.16 The plaintiff was a professor that had recently moved to teach at Vanderbilt University and had not yet met the residency requirement to register.17 The court noted that durational residency laws penalize those who have traveled from one place to another to establish a new residence.18 Those laws divide residents into two classes, old residents and new residents, and discriminate against new residents to the extent that they cannot register to vote.19

The Court in *Dunn* noted the decision in *Drueding v. Devlin*. *Drueding* was a decision upholding a durational residency requirement in the state of

16 Id. at 331.
17 Id.
18 Id. at 334.
19 Id.
Maryland.20 There, the District Court had tested those requirements by the equal protection standard of rational basis: whether the exclusions are reasonably related to a permissible state interest.21 The Court in Dunn went on to differentiate between Drueding and apply strict scrutiny analysis stating: “Due rational residency laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest.”22 By raising the standard from rational basis to strict scrutiny, the state’s burden will be higher.23 In unambiguous terms, the Court established that strict scrutiny should be used for instances where qualifications are placed on a person’s right to vote. Hence, Dunn should have been a precedent for all voting rights cases going forward.

ii. Richardson v. Ramirez

The Dunn decision came three years before Richardson v. Ramirez. Richardson has been used to establish a precedent in all felon disenfranchisement cases. In Richardson, the plaintiffs were three convicted ex-felons who had completed their sentences. They filed a class action for a writ of mandate from the California Supreme Court declaring refusal of their voter registration unconstitutional.24 They relied on the Court’s most recent voting-rights cases.25 They argued that a compelling state interest must be found to justify excluding the right to vote for felons and that California could assert no such interest concerning ex-felons.26

The court should have looked towards the decision in Dunn and applied strict scrutiny since this case involved a question of qualifications on a person’s right to vote. Instead, the Court chose to abandon the standard set just three years prior and analyzed this statute using only Section 2 of the 14th amendment to claim valid disenfranchisement. The Court in Richardson never denies that there is a fundamental right to vote, nor does it deny that it should be subject to equal protection and strict scrutiny; it merely chose to address the constitutionality of felon disenfranchisement provisions as a whole. The Court noted that Section 2 of the Fourteenth Amendment made it clear that states could disenfranchise people based on a criminal record: “those who framed

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21 Dunn, 405 U.S 330 at 337.
22 Id. at 342.
23 Id. at 343.
25 Id.
26 Id. at 33.
and adopted the Fourteenth Amendment could not have intended to prohibit outright in Section 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by Section 2 of the Amendment.\textsuperscript{27} Section 2 of the 14th amendment was meant to penalize states for disenfranchisement, but the Supreme Court uses the provision to enable minority disenfranchisement. Section 2 imposes a penalty on states that deny the vote to male citizens 21 years or older, except for those who participated in rebellion or crime, by reducing that state’s congressional delegation. The problem with the Court’s analysis is that it does not just remove felons from the calculation of a state’s voting strength; it chooses to outright remove them from the protection of section 1 of the 14th amendment, all while never addressing the specific issue of California’s voting qualification, nor subjecting the California law to strict scrutiny, and abandoning the precedent of Dunn altogether.

iii. Hunter v. Underwood

\textit{Hunter v Underwood} is the only other case regarding felon disenfranchisement that the Supreme Court has heard. In an 8-0 decision, the Court in Hunter struck down Section 182 of the Alabama constitution that provides for the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, including “any crime involving moral turpitude.”\textsuperscript{28} The Court was presented with evidence that this law, specifically the words “moral turpitude” were put in place to disenfranchise African-American voters.\textsuperscript{29} Further, the 1901 Alabama convention went so far as to mention that their goal was to advance white supremacy.\textsuperscript{30} John B. Knox, president of the convention, stated in his opening address: “And 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.”\textsuperscript{31} The Southern Democrats sought these provisions as a way to stem the resurgence of Populism which threatened their power:

“Q. The aim of the 1901 Constitution Convention was to prevent the resurgence of Populism by disenfranchising practically all of the blacks and a large number of whites; is that not correct?

“A. Yes, sir.”

\textsuperscript{27} Richardson, 418 U.S. 24 at 43.
\textsuperscript{29} \textit{Id}. at 229.
\textsuperscript{30} \textit{Id}. at 230.
\textsuperscript{31} \textit{Id}.
"Q. The idea was to prevent blacks from becoming a swing vote and thereby powerful and useful to some group of whites such as Republicans?"

"A. Yes, sir, that’s correct."

"Q. The phrase that is quite often used in the Convention is to, on the one hand limit the franchise to [the] intelligent and virtuous, and on the other hand to disenfranchise those [referred] to as ‘corrupt and ignorant,’ or sometimes referred to as the ignorant and vicious?

"A. That’s right."

"Q. Was that not interpreted by the people at that Constitutional Convention to mean that they wanted to disenfranchise practically all of the blacks and disenfranchise those people who were lower class whites?"

"A. That’s correct."

That court’s opinion presents a thorough analysis of the evidence and demonstrates conclusively that Section 182 was enacted with the intent of disenfranchising Black citizens. By increasing the number of Black people in prisons and stripping their right to vote, the Southern Democratic party could maintain power.

Richardson and Hunter establish the main precedent for felon disenfranchisement used today. Richardson states that disenfranchisement laws are not on their face unconstitutional. The issue with Richardson is that the court never addressed how these laws have been used, the potential disparate impact, or the Voting Rights Act’s potential violations. It merely stated that in a vacuum, these laws are not inherently a violation of the constitution. Hunter, on the contrary, was a case on the complete end of the opposite spectrum. The Court in Hunter held that disenfranchisement laws could not be made for the specific purpose of diluting the Black vote. Hunter has not been expanded broadly, largely because no other legislator has declared outright their intent to further white supremacy. Nevertheless, the issue with Hunter is that the qualifications are too specific, requiring an undeniable showing of clear racial intent. We are left to believe that abandoning Dunn was reasonable. We are also led to believe that Alabama law in Hunter was specifically egregious, but because no other state explicitly stated the reasoning, there could not be similar motives? The main takeaway that is constantly forgotten is that the Alabama constitution discussed in Hunter was not strictly based on racial motives, but had political reasoning as well. That political goal of maintaining power has never been addressed as a reason for felon disenfranchisement provisions. In all, these two cases leave us with an unclear guideline for evaluating felon disenfranchisement provisions in any meaningful way.

32 Hunter, 471 U.S at 231.
B. District Court decisions

i. Ninth District

In *Farrakhan v. Washington*, people with felony records in Washington challenged their disenfranchisement using section 2 of the Voting Rights Act. The court noted: “Section 2 is clear that any voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.” 42 U.S.C. § 1973. “Congress specifically amended the VRA to ensure that, “in the context of all the circumstances in the jurisdiction in question,” any disparate racial impact of facially neutral voting requirements did not result from racial discrimination.” “When felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress.”

The Ninth Circuit found that internal biases in the criminal justice system should be part of the totality of circumstances analysis.

“Certainly, plaintiffs must prove that the challenged voter qualification denies or abridges their right to vote on account of race, but the 1982 Amendments and subsequent case law make clear that factors outside the election system can contribute to a particular voting practice’s disparate impact when those factors involve race discrimination. Therefore, under Salt River and consistent with both Congressional intent and well-established judicial precedent, a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances.”

Consequently, the Ninth Circuit remanded the case and instructed the district court to consider this evidence when analyzing the claim.

This case eventually made its way back to the Ninth Circuit where the court reversed the decision. In 2010, in *Farrakhan v. Gregoire (Farrakhan II)*, the court held that “plaintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law based on the operation of a state’s criminal justice system must at least show that the criminal justice system is infected by discrimination or that the felon disenfranchisement law was enacted with such...
intent.” In Farrakhan I, the court held that statistical evidence of racial disparities in Washington’s criminal justice system could provide evidence of a Section 2 violation, but Farrakhan II held that Farrakhan v. Washington (Farrakhan I) “swept too broadly.” Further, based on the statistical evidence presented by plaintiffs, the district court on remand found that “there is discrimination in Washington’s criminal justice system on account of race.” But the court in Farrakhan II reasoned that this was only one relevant factor in section 2’s “totality of circumstances” balancing test. The court stated:

“There is an additional reason to be skeptical that felon disenfranchisement laws can be challenged under section 2 of the VRA. By definition, felon disenfranchisement takes effect only after an individual has been found guilty of a crime. This determination is made by the criminal justice system, which has its own unique safeguards and remedies against arbitrary, invidious or mistaken conviction.”

“In light of these considerations, we hold that plaintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law based on the operation of a state’s criminal justice system must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent.”

First, the court finds that racial bias in the criminal justice system can be used along with the Voting Rights Act to challenge felon disenfranchisement. The court then goes on to admit that evidence exists for that bias but that it’s only one of the factors before ultimately concluding that “the criminal justice system has its own unique safeguards and remedies against arbitrary, invidious or mistaken conviction.” How can the criminal justice system have both racial bias and its own safeguards against arbitrary conviction? Further, the Farrakhan II court never addresses what other factors could or should be considered in the totality of the circumstances test. Still this district leaves us with knowledge that the Voting Rights Act could be used to challenge Felon Disenfranchisement and racial bias in the criminal justice system could be a factor in showing this, even if the conclusion was not the one sought.

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40 Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010).
41 Id.
42 Id.
43 Id.
ii. Sixth District

The Sixth circuit court in *Wesley v. Collins* came to similar conclusions as to the Ninth District. *Wesley* was a case about a black man who had been disenfranchised by pleading guilty to a charge of accessory after the fact to the crime of larceny.44 He challenged the Tennessee disenfranchisement provisions based on the Equal Protection Clause of the Fourteenth Amendment, requiring Tennessee to demonstrate a compelling state interest justifying disenfranchisement since the classification impacts on the fundamental right to vote.45 Further, the plaintiff disputed that the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act forbid disenfranchisement of people with felony records.46 Such state action results in the unlawful dilution of the Black community’s voting strength since so many more Black people are convicted of felonies than are whites.47 The district court dismissed the lawsuit, and the Sixth Circuit Court of Appeals affirmed the dismissal.48 The court stated that the plaintiff had not presented sufficient evidence to prove that the Tennessee legislature had acted with discriminatory intent to violate the Fourteenth Amendment, nor had he shown that the disproportionate impact on Black voters had resulted from any state “qualifications of the right to vote on account of race or color” so as to violate Section 2 of the VRA.49

The Sixth Circuit Court of Appeals decision essentially increased the proof required for a Section 2 violation from a “results” test into a “totality of the circumstances” analysis with an intent requirement. “It is well-settled, however, that a showing of disproportionate racial impact alone does not establish a per se violation of the Voting Rights Act.”50 Rather, such a showing merely directs the court’s inquiry into the interaction of the challenged legislation “with those historical, social and political factors generally probative of dilution.”51 This essentially makes section 2 useless without direct evidence of racial discrimination, as seen in the Hunter case. The district also admitted that there is a history of racial discrimination behind some of these practices stating “While the district court ascertained the presence in Tennessee of certain factors enumerated in the legislative history of Section 2, such as a history of racial dis-

45 *Id.*
46 *Id.*
48 *Id.* at 814.
49 *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).
50 *Id.* at 1260–6.
51 *Wesley*, 791 F.2d at 1260–6.
crimination, the effects of which continue to the present day, such evidence of past discrimination “cannot, in the manner of original sin, condemn action that is not in itself unlawful.” The Sixth District did not outright say that these challenges to Felon Disenfranchisement are impossible, nor did they state that the plaintiff’s claims of racial discrimination could not be considered as a factor. In this instance, the court chose to raise the requirements and force the plaintiff to prove intent behind those factors.

iii. First District

_Simmons v Galvin_ was a 2001 case where several incarcerated felons in state custody, challenged Massachusetts felon disenfranchisement provisions by suing the Secretary of the Commonwealth in federal court. Article 120 was a provision that had been passed in 2000 and amended the state constitution to disqualify incarcerated felons from voting in certain elections. This amendment was shortly thereafter extended to disqualify inmates from voting in all Massachusetts elections. The First District found that felon disenfranchisement does not fall under Section 2 of the Voting Rights Act. In holding that Felon Disenfranchisement cannot be challenged through the use of the Voting Rights Act the court stated:

“For example, it is logical to understand the state law disenfranchisement of incarcerated felons as not “resulting” in a denial “on account of race or color” but on account of imprisonment for a felony, and thus not within the text of section 2 at all.”

The court goes on to say Congress enacted the Voting Rights Act with the intent to:

“banish the blight of racial discrimination in voting, which had infected the electoral process in parts of our country for nearly a century. By excluding felon disenfranchisement laws from the scope of section 4 of the Voting Rights Act, Congress took the view that it did not consider such laws to be a discriminatory voter qualification or a “tool of black disenfranchisement.”

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52 _Id._
54 _Id._
55 _Id._
56 _Id._
57 _Id._ at 35.
58 _Simmon_, 575 F.3d at 35.
The court chose to analyze that felon disenfranchisement should not be considered because it was not specifically written into the Voting Rights Act. Regardless of whether there may be racial discrimination, they themselves state the Voting Rights Act was specifically intended to address discriminatory voting practices. The court also never cites congress stating that their list was definitive of what should and should not be covered by the Voting Rights Act. Further, by stating denial is based on the imprisonment for a felony and not on account of race, the court ignores that there is rampant discrimination throughout every facet of our criminal punishment system. The court chose not to address that reality, or the fact that there are political motivations behind these laws.

iv. 11th District

The Eleventh Circuit in Johnson v. Governor of Florida determined that a Voting Rights Act challenge to Florida’s statutory scheme should not be allowed. In Johnson the court considered a provision that had been re-enacted that disenfranchised felons. The court held that Florida’s re-enactment of the provisions in the 1968 Constitution demonstrates that the state would enact this provision even without an impermissible motive and did enact the provision without an impermissible motive. The court noted that by substantively reenacting the law for race-neutral reasons, the state of Florida had met their burden. Also, the court stated that neither the text nor the legislative history of the 1982 amendment declared Congress’s intent to extend the Voting Rights Act to felon disenfranchisement provisions. The senate report mentioned many specific practices and discriminatory techniques used by certain jurisdictions. But because there was no mention of felon disenfranchisement provisions specifically, the court reasoned that this meant the Voting Rights Act did not extend to such laws. Further, the Court understands that it was conceivable that certain legislators may have wanted the Voting Rights Act to encompass felon disenfranchisement provisions, but that assumptions should not be made from Congressional intent to produce a statute contrary to the plain text of the Fourteenth Amendment.

59 Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005).
60 Id. at 1224.
61 Id.
62 Id. at 1234.
63 Id.
64 Johnson, 405 F.3d 1234 at 1234.
65 Id.
The majority reasoned that statutory interpretation should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding. The dissent, on the contrary, argued that by its very nature, felon disenfranchisement provisions unquestionably create a “voting qualification or prerequisite to voting” that is “applied by [the] state.” 42 U.S.C. § 1973(a) (2005). Further, whether or not felon disenfranchisement results in vote denial “on account of race or color” under the totality of the circumstances is a question that should be addressed by the facts. The dissent states that the majority’s reasoning stems from its failure to distinguish between felon disenfranchisement laws generally and those that result in racial discrimination. Refusing to address disenfranchisement of people with felony convictions because that scenario was not expressly enumerated in the statute the way that other discriminatory practices were, misses the entire point of passing the Voting Rights Act in the first place. The Act was passed during the Civil Rights era in large part to try to ensure African-Americans equal access to the polls.

v. Second District

Similarly, in Hayden v. Pataki, was a 2006 case that challenged felon disenfranchisement laws in New York under the Voting Rights Act’s “results” test. The court was presented with evidence that New York disproportionately penalized black and Hispanic felons. There, the Second Circuit Court of Appeals held that the Voting Rights Act did not “encompass felon disenfranchisement laws.” The court gave several reasons, mainly focusing on the facts that the Fourteenth Amendment gave explicit approval, the long history of such laws, the absence of any affirmative consideration of felon disenfranchisement laws in the text of the Voting Rights Act, and the fact that Congress has never attempted to include Felon Disenfranchisement when reauthorizing the act. Further, the court noted that a literal reading of the text of the Voting Rights Act would likely apply to felon disenfranchisement laws. By stating that Felon Disenfranchisement is not covered by the Voting Rights Act, the Court

66 Johnson, supra note 64, at 1229.
67 Id. at 1248.
68 Id.
69 Id.
70 Hayden v. Pataki, 449 F.3d 305, 323 (2d Cir. 2006).
71 Hayden v. Pataki, 449 F.3d 305, 323 (2d Cir. 2006).
72 Id. at 315.
73 Id.
threw out the plaintiffs’ claims for vote dilution and evidence based on the “disproportionate disenfranchisement of Black and Latino persons who are incarcerated or on parole for a felony conviction”. Current Supreme Court Justice Sotomayor wrote in dissent:

“It is plain to anyone reading the Voting Rights Act that it applies to all “voting qualifications.” And it is equally plain that Section 5-106 disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis.”

What the circuits have said varies, but each of these decisions creates challenges to addressing disenfranchisement of people with felony records. For example, the 1st Circuit stated that disenfranchisement laws classified people not on account of race, but rather on account of being imprisoned. The 11th circuit similarly reasoned that the felon disenfranchisement provision challenged was race-neutral. The 6th circuit went further and seemed to require intent to discriminate based on race, similar to Hunter. The 2nd circuit rested their analysis primarily on the belief that the 14th amendment allows felon disenfranchisement provisions. The only circuit allowing any form of challenge to the practice of felon disenfranchisement is the 9th, which allows the consideration of racial discrimination, only as a factor in the totality of the circumstances.

The truth is that the circuits make it virtually impossible to challenge the practice of felon disenfranchisement. The standard set by Hunter is one that will likely never be met by plaintiffs. Society has changed and the racial inequality gap is narrowing, but that gap certainly still exists, and we should continue to change laws to address these long standing social inequalities. Where provisions once outright said they were meant to attack African Americans, there is now more subtlety and nuance. The courts and the people should not accept this. Most discrimination today is not out in the open, you rarely hear people calling each other slurs, and it is uncommon that someone is told that they won’t be considered for a position because they are Black. But because society has advanced does not mean that discrimination is no longer present.

C. History Behind Felon Disenfranchisement

Understanding how felon disenfranchisement provisions came to be is key to seeing past the precedent that courts have established. The history of felon

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74 Hayden, supra note 70, at 328.
75 Id. at 367.
disenfranchisement dates back to Ancient Greece and the common law practice of “civil death,” criminal penalties that included voting rights revocation.76 Before the Civil War, a majority of states had disenfranchisement provisions in their state constitutions.77 These early colonial disenfranchisement provisions were limited to certain offenses directly related to voting or violations considered “egregious violations of the moral code.”78 At the time, felon disenfranchisement provisions were not intended to have a substantial impact because neither women nor Black Americans were a part of the electorate.

It was not until the Reconstruction era (1865-77) that felon disenfranchisement was expanded to limit Black participation in society. The ending of slavery constituted a threat that millions of people would enter the electorate and potentially shift the balance of power. Disenfranchisement provisions thus became a tool to maintain the white supremacist power structure that had always existed. It is written into the very amendment that gave enslaved people their freedom. “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”79

When the Civil War ended, the South’s economy based on slave labor was threatened, so plantation owners sought state and local government officials to promulgate legislation and ordinances that would again bind African-Americans to plantations.80 There were no limitations in place to restrict laws affecting the newly freed slaves, especially in the south, which resulted in the oppressive “black codes.”81 For example, curfews and vagrancy laws were passed to limit African Americans’ ability to travel or leave the plantations.82 As a result of these “black codes,” African-Americans were harshly treated by state sentencing laws, prohibited from voting, restricted from traveling, denied

76 Kelly, supra note 11 at 3.
77 Id.
78 Chung, supra note 1 at 2.
79 U.S. CONST. amend. XIII, §1.
81 Id.
82 Id.
equal education opportunities, and subject to racist police, prosecutors, and judges.\textsuperscript{83}

The maintaining of economic control was one of but not the only goal of increasing incarceration. During Reconstruction, the threats posed by the possible incorporation of African American men into the political system were ardently debated.\textsuperscript{84} In fact, during Reconstruction, the Democratic Party’s ability to win elections in the South often hinged on outright intimidation of African American voters.\textsuperscript{85} Further, all nine of the Southern states that Democrats governed restricted voting rights for people convicted of criminal offenses in the 10 years following the Civil War.\textsuperscript{86}

After the Civil War, disenfranchisement provisions were significantly expanded, imposing disenfranchisement as a consequence for all felonies, rather than only a few select crimes.\textsuperscript{87} Between 1865 and 1880, at least 13 states enacted broad felony disenfranchisement laws in rapid succession.\textsuperscript{88} A common theme of disenfranchisement provisions passed during Reconstruction attempted to find petty reasons to throw African-Americans in jail and take away their ability to represent themselves in government.

One of the most egregious examples of this was Mississippi’s constitution, which was designed to attack Black Americans. In 1896, the Supreme Court of Mississippi acknowledged that there was racist intent throughout the constitutional convention but still chose to uphold its disenfranchisement law.\textsuperscript{89} The court stated:

“It is in the highest degree improbable that there was not a consistent, controlling, directing purpose governing the convention by which these schemes were elaborated and fixed in the constitution. Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expediency to obstruct the exercise of the franchise by the negro race.”\textsuperscript{90}

The State of Mississippi sought to block voting rights by targeting “certain peculiarities of habit, of temperament, and of character” thought to distinguish

\textsuperscript{83} Weatherspoon, \textit{supra} note 80.
\textsuperscript{84} Behrens, Uggen, Manza, \textit{supra} note 8 at 2.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 598.
\textsuperscript{87} Kelly, \textit{supra} note 11 at 3.
\textsuperscript{88} Id.
\textsuperscript{89} Ratliff v. Beale, 20 So. 865 (Miss. 1896).
\textsuperscript{90} Id. at 868.
African-Americans from whites. The U.S. Supreme Court later cited this Mississippi decision, maintaining that the law only took advantage of “the alleged characteristics of the negro race” and reached both “weak and vicious white men as well as weak and vicious black men.” The Supreme Court, in essence, decided that intent behind the laws do not matter if they can be considered facially neutral.

While Mississippi may have been one of the most obviously discriminatory states, there are many more examples. In 1850 Alabama had a prison population that was two percent nonwhite. By 1870, this percentage rose to 74 while the overall nonwhite population only rose three percent. Similarly, by 1860, New York required property ownership for Black voters — and Black voters only. Further, in 1876, Virginia broadened its felon disenfranchisement law to encompass petty theft, or “petit larceny:” a crime which White politicians believed Black citizens could be easily convicted of. Overall, every Western state other than Montana and Utah adopted a felon disenfranchisement law within a decade of statehood. The quick timing of states adopting these provisions has made it clear that felon disenfranchisement offered an easy solution for addressing perceived racial threats in the political realm. The reasoning behind the expansion of felon disenfranchisement provisions includes racism, economic benefit, and political benefit for white people.

Moreover, felon disenfranchisement was merely one of many white supremacist tactics used during Reconstruction and Jim Crow eras to preserve the country’s racial hierarchy. However, a number of other policies, such as literacy tests and poll taxes, were eventually banned. These tests and taxes became a problem because many poor, southern whites were also at risk of losing their rights if they could not meet such requirements. Consequently, a half-dozen states passed laws that made men eligible to vote if they had been able to vote before African-Americans were given the franchise (pre-Civil War), or if they were the lineal descendants of voters back then. This was called the grandfather clause. It is undeniable that racism was one of the driving forces behind these tactics to stop Black people from voting. However, another reason was

91 Id.
93 Behrens, Uggen, Manza, supra note 8 at 2.
94 Id.
95 Id.
96 Id.
97 Id.
98 Id.
simply the understanding that Black voters were more likely to vote for one party, and it was in the benefit of the other party to stop that from happening.

Courts came to understand that while those laws did not explicitly target Black voters, in reality Black people were clearly disproportionately affected. Eventually, the 24th amendment was passed, banning poll taxes, and the Voting Rights Act later made many of the Jim Crow era voter suppression tactics illegal. There was an understanding that explicitly targeting black voters was unnecessary to understand certain policies’ practical effects. That precedent has not been extended to felon disenfranchisement provisions, but it should be.

D. Recent history

Today, the United States stands alone both in the level of incarceration and the amount of people who have been disenfranchised as a result of criminal records. In Canada, Israel, and South Africa, constitutional courts have ruled that any conviction-based restriction of voting rights is unconstitutional.99 Further, almost half of European countries allow all incarcerated individuals to vote, facilitating voting within the prison or by absentee ballot.100

Many of the reasons behind expanding felon disenfranchisement after the Civil War are the same today, including political benefits. In 2001, Representative John Altman (R-Charleston), while advocating a more restrictive disenfranchisement provision in South Carolina, stated:

“If it’s blacks losing the right to vote, then they have to quit committing crimes. We are not punishing the criminal. We are punishing conduct. You need to tell people to stop committing crimes and not feel sorry for those who do.”101

In 2002, a measure to restore the ballot to all ex-felons in federal elections was introduced to the U.S. Senate and was ultimately voted down.102 In opposing the bill, Senator Mitch McConnell invoked imagery of the most heinous criminals, stating “we are talking about rapists, murderers, robbers, and even terrorists or spies,”103 “those who break our laws should not dilute the vote of law-abiding citizens.”104

99 Chung, supra note 1 at 2.
100 Id.
101 Behrens, Uggen, Manza, supra note 8 at 2.
102 Id.
103 Id.
104 Id.
Republican elected officials paint the picture that disenfranchisement is about deterring crime, that punishment comes with a jail sentence, and that they don’t want hardened criminals voting. The reality is that 64.8 percent of federal prisoners are in prison for drug or weapons charges. Whether those people should or should not be incarcerated is up for debate. However, McConnell recognizes the reality that felon disenfranchisement benefits him and the Republican party and thus frames it as if every prisoner is a murderer. In agreement, Senator Jeff Sessions stated the following:

“I think this Congress, with this little debate we are having on this bill, ought not to step in and, with a big sledge hammer, smash something we have had from the beginning of this country’s foundation—a set of election laws in every State in America—and change those laws. To just up and do that is disrespectful to them... Each State has different standards based on their moral evaluation, their legal evaluation, their public interest in what they think is important in their States.”\(^{105}\)

All of these statements ignore the legacy of historical racial discrimination and oppose reforms by appealing to the legal and popular foundations of a system devised to benefit whites during the slavery and Jim Crow eras.\(^{106}\)

Today, Senator Mitch McConnell is Senate Majority leader. These are people at the highest positions within the Republican party that hold these views; to say there is no motivation for racial bias or, at the very least political motivation to benefit their own party is laughable. This is not to say all Republicans are racist, but at the end of the day, the job of the Republican party is to win elections, and one of the ways they do that is disenfranchising Black Americans.

To put further perspective on just how much racial prejudice can affect the passing of these laws, a recent study covering the time period of 1850-2002 showed disenfranchisement laws were most likely to be passed in national recession years.\(^{107}\) State population composition and all other racial threat measures became much more closely correlated with the passage of felon voting restrictions after the passage of the Fifteenth Amendment.\(^{108}\) Fear is a motivator for these provisions. It is why restrictive laws tend to pass during years of recession. The greater the increase in voter turnout among people of color and low-income voters, the more likely it is for a state to enact legislation that

\(^{105}\) Behrens, Uggen, Manza, supra note 8 at 2.

\(^{106}\) Id.

\(^{107}\) Id.

\(^{108}\) Id.
curtails voting rights.\textsuperscript{109} According to a 2014 study conducted by the Brennan Center for Justice, more than 63 percent of states with the highest African-American turnout in the 2008 election passed laws making it harder to vote.\textsuperscript{110} Clearly, there is political motivation attached to the existence of these provisions.

E. Why the Voting Rights Act of 1965 is relevant

The Voting Rights Act of 1965 was a landmark piece of legislation that was intended to get rid of voting discrimination, specifically against minorities. Section 2 of the Voting Rights Act prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups identified in Section 4(f)(2) of the Act. This has been interpreted as both outright vote denial and even vote dilution. Due to the historical clash between state legislatures and the federal government when regulating or protecting voting rights, the Voting Rights Act is an intentionally broad and prophylactic statute that prevents discriminatory voting regulations.\textsuperscript{111} Consistent with that intent, the Supreme Court held that courts should interpret and apply the Voting Rights Act as broadly as possible.\textsuperscript{112}

The major benefit of using the VRA to address felon disenfranchisement is that unlike suits brought under the Fourteenth Amendment, where plaintiffs must prove not just discriminatory impact but the discriminatory intent of state actors, a plaintiff challenging a voting law under section two need only prove the less burdensome argument that a given law “results in a denial or abridgment” of the right to vote “on account of race.”\textsuperscript{113} Plaintiffs can establish such a denial or abridgment if, under the totality of circumstances, members of the affected racial group “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”\textsuperscript{114}


\textsuperscript{110} Id.


\textsuperscript{113} 52 U.S.C. § 10301(a)

\textsuperscript{114} 52 U.S.C. § 10301(b)
Thornburg v. Gingles established how the Voting Rights Act should be used in analyzing vote dilution. In its analysis of the Voting Rights Act claim, the Court stated that vote dilution claims should be considered under a three-part test. First, the Court will ask whether the minority group is sufficiently large and geographically compact such that the minority group constitutes a majority in at least one district. Second, the Court will consider whether that minority group is politically cohesive (i.e., that members of that minority group generally vote for the same candidates). Finally, the Court will determine whether the majority group is sufficiently politically cohesive as to enable it to usually defeat the minority group’s preferred candidate. The test considers the minority group’s power and cohesion, and whether the interests of the minority group are being submerged by a more powerful group. “Satisfaction of the three Gingles factors serves as strong evidence that a jurisdiction employs a test or device that is discriminatory in purpose or effect.”

Felon disenfranchisement dilutes the population of racial minorities from voting pools because much higher percentages of racial minorities are barred from voting through felon disenfranchisement. It has been argued that vote denial and vote dilution are fundamentally different concepts, but their eventual result is the same: a minority group’s voting interests are submerged to a majority group through voting requirements. Analogous to the literacy tests Congress has struck down under its Fifteenth Amendment powers, felon disenfranchisement can be seen as a racist device and regulated as such. Many felon disenfranchisement laws were passed, as in Hunter, with demonstrable racist intent, much like the literacy tests whose ban the Court upheld in 1975. Moreover, just as racism in the educational system made it more likely that Black Americans would fail literacy tests, racism in the criminal justice system makes it more likely that Black Americans will be disenfranchised for crimes for which a white person is unlikely to be arrested or tried. Finally, much like literacy tests in the south, processes for enforcing

116 Id.
117 Id.
119 Id.
120 Id.
122 Id. at 628.
and granting relief from these laws are prone to racial bias.\textsuperscript{123} It is apparent that Congress can make the case that felon disenfranchisement is a racist device tending to deny or abridge the right to vote on account of race.

F. Using the Gingles Factors

The first factor is whether the minority group is sufficiently large and geographically compact such that the minority group constitutes a majority in at least one district. This will vary state to state but generally speaking, because of segregation, Black Americans tend to live in compact areas. The United States maintains high levels of segregation throughout the country and specifically in major metropolitan cities.\textsuperscript{124} How sufficiently large of a group they must make in each state will be up for debate and interpretation, but compactness should not be a difficult thing to prove in most cases.

The court will then consider whether that minority group is politically cohesive. A substantial majority of Black Americans tend to vote for Democrats; only one percent of Black Americans identify as Republicans, fifty-nine percent identify as Democrats, but a proportion much higher than fifty-nine percent of Black Americans vote for Democrats.\textsuperscript{125} The 2016 national election showed just how polarized the Black vote is, a mere eight percent of Black Americans voted for Donald Trump to be president.\textsuperscript{126} The 2018 elections further solidified this split when Black Americans voted overwhelmingly (90\%) for the Democratic candidate.\textsuperscript{127} The polarization of the Black vote is very clear. Since 1968, no Republican presidential candidate has received more than thirteen percent of the African American vote. Black voters generally share a support for the Democratic party.

There are a few reasons as to why the Black vote is so polarized, one being an understanding that in order to maximize their potential as a group, they

\textsuperscript{123} Goldman, supra note 121, at 640.


\textsuperscript{126} Id.

must vote together. After the Civil War, newly enfranchised Black men supported Republicans en masse, believing that Abraham Lincoln’s party would protect the freedom of African Americans. The emergence of the Jim Crow system bound African Americans together once again, this time in the need to survive racial terror and resist legalized segregation. The organized protest of the civil-rights movement was the fruit of that collective effort. Historically Black Americans have had to survive and struggle collectively. Another reason Black Americans overwhelmingly vote Democrat is because of segregation. A recent study found that 72 of every 100 people with whom a Black person interacts would also be Black; meanwhile Black Americans were only thirteen percent of the U.S. population that year. Because of racial isolation, most Black and White Americans have few opportunities for meaningful cross-racial social interaction. Black Americans are politically cohesive, state by state these numbers will hold up, which is a major reason why disenfranchisement provisions are popular among the white supremacist Republican party. Republicans know that they will likely not win nonwhite voters over in significant numbers, and therefore Republicans work to restrict the ability to vote altogether for minorities.

Lastly, the court will determine whether the majority group is sufficiently politically cohesive as to enable it to defeat the minority group’s preferred candidate. A recent study estimates that the enfranchisement of felons and ex-felons would likely have changed the result of seven Senate elections from 1978 to 2002, which could have changed the majority party in the Senate over that time. The study relied on data showing that, from 1972 to 2000, on average, thirty-five percent of disenfranchised felons would have voted. The study also indicated that felon voters would have had a strong Democratic

129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
134 White, supra note 128.
135 Id.
137 Id.
Party preference. For the same period, on average seventy-seven percent of felon voters would have voted Democratic.

Since the passage of the VRA in 1965, Republicans have won at least a plurality of the White vote and Democrats have overwhelmingly won the Black vote in every presidential election. Democratic candidate Andrew Gillum lost a bid to become Florida’s first Black governor by less than 100,000 votes. In the same state, incumbent Democratic Sen. Bill Nelson trailed in his re-election bid by a narrower count, though he stopped short of conceding. According to 2016 data from The Sentencing Project, more than one in every four people disenfranchised in Florida is Black, and more than one in five Black people in Florida are disenfranchised. By some estimates, continued disenfranchisement paired with state trends in mass incarceration were predicted to soon yield a Florida “democracy” with 40 percent of Black men barred from the ballot box. An even more recent example is Stacey Abrams losing her bid for the Georgia governorship. Felony disenfranchisement prevented over 265,000 Georgians from voting in 2018. Eighty-five percent of those disenfranchised were living in the community under correctional supervision. Abrams never conceded, and that case is being litigated over voter purging by the Georgia Secretary of State. Had the disenfranchisement not been in place, or the provision been altered to allow those no longer in prison to vote, Georgia would likely have had their first Black governor.

138 Uggen, supra note 136.
139 Id. at 786.
142 Id.
143 Taylor, supra note 141.
144 Id.
146 Id.
November 2, 2000 was the day of the closest election in American history — 537 votes effectively decided the presidency. On that day, Florida’s felony disenfranchisement laws barred from voting an estimated 600,000 ex-felons who had already completed their sentences. Although there is no way of ascertaining how these disenfranchised ex-felons would have voted, a recent study estimated that if Florida had allowed them to vote, the Democratic Party would have won by more than 60,000 votes. Senate elections are frequently lost by acceptable margins. Gubernatorial elections like the one Andrew Gillum mounted are lost by fine margins. Less than 1,000 votes have decided presidential elections. The majority can vote as a bloc to defeat the minority’s preferred candidate, and it has happened time and time again. In 2016, White voters backed Donald Trump over Hillary Clinton by a 21-point margin, and Black voters preferred Clinton by an 80-point margin.

G. Conclusion

Overall, when considering the racial history of this country, the reality of imprisonment rates for Black Americans, and the history behind the passing of many of these laws, a Voting Rights Act challenge should be heard by the Supreme Court. I have no faith the current Court will view it in favor of striking down provisions, but there is context and nuance to these provisions that are often thrown out altogether. Whether it be for strictly political reasons, racial biases, or a mixture of both, felon disenfranchisement provisions have had the effect of keeping Black Americans in limited positions of power with limited ability to elect politicians of their choice and with little opportunity to be a part of the democracy that was promised to them.

148 Uggen, Manza, supra note 136 at 31.