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CONVICTIONS AND DOUBTS: RETRIBUTION, REPRESENTATION, AND THE DEBATE OVER FELON DISENFRANCHISEMENT

Pamela S. Karlan *

The tenor of the debate over felon disenfranchisement has taken a remarkable turn. After a generation of essentially unsuccessful litigation,¹ two federal courts of appeals have recently reinstated challenges to such laws.² A conservative Republican governor of Alabama signed legislation making it easier for ex-offenders to regain their voting rights.³ Several other states have made the restoration of voting rights automatic upon completion of an offender's sentence or within a short period of time.⁴ Recent public opinion surveys find that over eighty percent of Americans believe that ex-offenders should regain their right to vote at some point, and more than forty percent would allow offenders on probation or parole to vote.⁵ Voting rights restoration has become an issue in the presidential

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¹ In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court upheld California's then-lifetime ban on voting by persons convicted of a felony, finding that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment." *Id.* at 54. Following *Ramirez*, the only successful constitutional challenges to criminal disenfranchisement statutes involved claims of impermissible discrimination in the definition of disenfranchisement-triggering offenses. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985); *McLaughlin v. City of Canton*, 947 F. Supp. 954 (S.D. Miss. 1995). Challenges to disenfranchisement statutes under the Voting Rights Act were also unsuccessful. See, e.g., *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc) (upholding, by an equally divided court, the dismissal of the plaintiffs' challenge to New York's criminal disenfranchisement statute); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986).

² See *Johnson v. Bush*, ___ F.3d ___ (11th Cir. 2003) (2003 U.S. App. LEXIS 25859); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003).

³ See 2003 Ala. Acts 415, § 2 (to be codified at Ala. Code § 15-22-36.1).

⁴ For discussions of recent state legislative developments, see Christopher Uggen & Jeff Manza, *Summary of Changes to State Disenfranchisement Laws, 1865-2003*, at 2 (April 2003), available at <http://www.sentencingproject.org/pdfs/UggenManzaSummary.pdf>; Martine J. Price, Note, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 *J.L. & Pol'y* 369, 399-405 (2002).

⁵ See Brian Pinaire, Milton Heumann, & Laura Bilotta, *Public Attitudes Toward the Disenfranchisement of Felons*, 30 *Fordham Urb. L.J.* 1519, 1540 (2003); Jeff Manza, Clem Brooks, & Christopher Uggen, "Civil Death" or Civil Rights?: *Public Attitudes Towards Felon Disfranchisement in the United States* 21-23 (2003) available at <http://www.socsci.umn.edu/~uggen/POQ8.pdf>.

campaign⁶ and in grass-roots efforts across the nation.⁷ And on the international front, the supreme courts of Canada and South Africa issued decisions requiring their governments to permit even incarcerated citizens to vote.⁸

⁶ See Edward Wyatt, In Southern Stop, Clark Promises to Enforce Voting Rights, *N.Y. Times*, Dec. 29, 2003, at A19 (reporting that Wesley Clark supports restoring the right to vote to offenders who have completed their sentences); Meet the Press, Nov. 9, 2003 (Howard Dean and John Edwards supporting restoring voting rights).

Former presidents have also supported reinstatement. See William Jefferson Clinton, *Erasing America's Color Line*, *N.Y. Times*, Jan. 14, 2001, § 4 at 17 (Week in Review) (arguing that “it is long past time to give back the right to vote to ex-offenders who have paid their debts to society”). A blue-ribbon commission chaired by former Presidents Ford and Carter also recommended the restoration of voting rights. See National Commission on Federal Election Reform, *To Assure Pride and Confidence In the Electoral Process* 44-45 (2001).

⁷ See, e.g., Mark Donald, *Cell-Bloc Voting: A New Effort Tries to Unlock Former Felons' Votes*, *Dallas Observer*, Dec. 18, 2003 (describing the nationwide Right to Vote Campaign organized by eight civil rights groups).

⁸ See *Sauve v. Canada*, [2002] 218 D.L.R. 4th 577 (holding that the disenfranchisement of all prisoners serving terms of more than two years – prisoners serving shorter sentences were already permitted to vote – violates the Canadian Charter of Rights and Liberties); *August v. Electoral Comm'n*, 1999 (3) SA 1 (CC) (holding that the government must permit incarcerated individuals to register to vote without appearing at registration facilities). South Africa later enacted a statute that seems to preclude voting by incarcerated individuals. See Alec C. Ewald, “Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Laws in the United States, 2002 *Wis. L. Rev.* 1045, 1047 n.4. Ewald provides a relatively up-to-date list of other countries that permit voting by inmates, including Israel, which sets up polling places in prisons and detention centers and Germany, where the government is affirmatively obligated to facilitate voting by eligible prisoners. See *id.*

Needless to say, there has also been a spate of recent scholarship. See, e.g., Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the “Menace of Negro Domination”*: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002, 109 *Am. J. Soc.* 559 (2003) [hereafter Behrens, *Ballot Manipulation*]; Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 *J. Gender Race & Just.* 253 (2002); Roger Clegg, *Who Should Vote?*, 6 *Tex. Rev. Law & Pol.* 159 (2001); Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 *Minn. L. Rev.* 753 (2000); Ewald, *supra*; Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 *U. Cin. L. Rev.* 1345 (2003) [hereafter Karlan, *Ballots and Bullets*]; Jeff Manza, Clem Brooks, & Christopher Uggen, “Civil Death” or Civil Rights?: Public Attitudes Towards Felon Disfranchisement in the United States 21-23 (2003) available at <http://www.socsci.umn.edu/~uggen/POQ8.pdf>. Pinaire, *supra* note 5; Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 *Am. Soc. Rev.* 777 (2002) [hereafter Uggen & Manza, *Democratic Contraction*]; *Developments in the Law, One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 *Harv. L. Rev.* 1939 (2002) [hereafter *One Person, No Vote*]; Afi S. Johnson-Parris, *Note, Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 *Va. L. Rev.* 109 (2003); Martine J. Price, *Note, Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 *J.L.*

This essay discusses some of the causes and consequences for the way in which we now approach the question of criminal disenfranchisement. Parts I and II suggest that the terms of the contemporary debate reflect an underlying change both in how we conceive the right to vote and in how we understand the fundamental nature of criminal disenfranchisement. Once voting is understood as a fundamental right, rather than as a state-created privilege, the essentially punitive nature of criminal disenfranchisement statutes becomes undeniable. And once the right to vote is cast in group terms, rather than in purely individual ones, criminal disenfranchisement statutes are seen not only to deny the vote to particular individuals but also to dilute the voting strength of identifiable communities and to affect election outcomes and legislative policy choices. The 2000 presidential election and the popular and scholarly discussion that followed the debacle in Florida powerfully demonstrated the outcome-determinative effects of criminal disenfranchisement laws even as the 2000 census drove home other representational consequences of the mass incarceration that triggers much of the disenfranchisement.

Part III suggests that if we conclude that criminal disenfranchisement statutes are essentially punitive, rather than regulatory – as I think we must – this opens an additional legal avenue for attacking such laws beyond the equal protection- and Voting Rights Act-based challenges that courts are now entertaining. Blanket disenfranchisement statutes also raise serious questions under the Eighth Amendment, even under the Supreme Court’s recent cramped reading of the proportionality principle in *Ewing v. California*.⁹

& Pol’y 369 (2002); Elena Saxenhouse, The Unequal Protection of Votes and Vocation: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination, ___ Stan. L. Rev. ___ (2004); Jill E. Simmons, Note, Beggars Can’t Be Voters: Why Washington’s Felon Re-Enfranchisement Law Violates the Equal Protection Clause, 78 Wash. L. Rev. 297 (2003); Mark E. Thompson, Comment, Don’t Do the Crime If You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment, 33 Seton Hall L. Rev. 167 (2002).

⁹ 123 S.Ct. 1179 (2003).

I. DISENFRANCHISEMENT AS PUNISHMENT

Constitutional limits on the government's power to inflict hardships often turn on whether the government's action is punitive or regulatory: the government's ability to punish individuals is significantly more constrained, both procedurally and substantively, than its ability to regulate them.¹⁰ One of the linchpins of current doctrine regarding criminal disenfranchisement statutes is the assumption that these laws are essentially regulatory, rather than punitive. That assumption is no longer tenable, if indeed it ever was. The view that disenfranchisement is not punitive rests on a long-since-repudiated conception of the right to vote. The current conception so undercuts originally regulatory justifications for disenfranchising offenders that only penal justifications remain. Thus, if felon disenfranchisement is to be justified, it must be justified as a permissible form of punishment.

The canonical statement of disenfranchisement as regulatory rather than punitive comes in *Trop v. Dulles*:¹¹

[A] statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. . . . The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of

¹⁰ See, e.g., *Smith v. Doe*, 538 U.S. 84 (2003) (holding that the ex post facto clause did not forbid the retroactive imposition of a registration requirement on persons previously convicted of certain sex crimes because the requirement was regulatory rather than punitive); *United States v. Salerno*, 481 U.S. 739 (1987) (holding that preventative detention under the Bail Reform Act was permissible because it was regulatory and preventative, rather than punitive); *Flemming v. Nestor*, 363 U.S. 603 (1960) (upholding the denial of government benefits to otherwise eligible aliens who have been deported as a regulatory, rather than a punitive, measure).

¹¹ 356 U.S. 86 (1958).

the power to regulate the franchise.¹²

Notably, Chief Justice Warren omitted to identify particular legitimate, nonpenal purposes served by disenfranchising offenders: he never explained *why* eligibility to vote should turn on one's not having robbed a bank. Instead, he simply relied on two nineteenth-century decisions – *Davis v. Beason*¹³ and *Murphy v. Ramsey*¹⁴ – in which the Court had upheld the denial of voting rights to polygamists as a simple regulation of the franchise.¹⁵ Those decisions, however, rested on the proposition that a state's power to restrict the ability to vote was plenary, that is, that virtually any restriction on eligibility for voting was legitimate. In *Murphy*, for example, the Supreme Court treated the disenfranchisement of polygamists as nonpunitive because restriction of suffrage on the basis of marital status generally would raise no problem: “It would be quite competent,” the Court declared, “for the sovereign power to declare that no one but a married person shall be entitled to vote.”¹⁶ It was not the criminality of polygamists that justified denying them the right to vote – indeed, the Court noted that none of the plaintiffs had been convicted of the crime of polygamy and several were not even alleged to have engaged in polygamy since enactment of the disenfranchisement statute – but rather their immorality and hence their unfitness to vote. The reason for disqualifying supporters and practitioners of polygamy was to “withdraw all political influence from those who [were] practically hostile” to prevailing notions of appropriate family structure.¹⁷

The Supreme Court has squarely rejected the conception of the franchise that underlies the Mormon disenfranchisement cases. Although nineteenth-century

¹² Id. at 96-97 (opinion of Warren, C.J.). Ironically, the Chief Justice made this observation in the course of distinguishing laws that strip individuals of their citizenship, which the Court held was not only punitive, but so punitive as to violate the Eighth Amendment's prohibition on cruel and unusual punishments.

¹³ 133 U.S. 333 (1890).

¹⁴ 114 U.S. 15 (1885).

¹⁵ Trop, 358 U.S. at 97.

¹⁶ *Murphy*, 114 U.S. at 43.

¹⁷ Id. at 45.

courts may have seen the ability to vote as “purely a conventional right,” which “may be enlarged or restricted, granted or withheld, at pleasure, with or without fault,”¹⁸ the Warren Court and its successors took quite a different approach. In *Reynolds v. Sims*,¹⁹ the Court described “[t]he right to vote freely” as “the essence of a democratic society,” and declared that “any restrictions on that right strike at the heart of representative government.”²⁰ In subsequent cases, the Court has held that because voting is a “fundamental” right,²¹ laws that deny citizens the right to vote must be “necessary to promote a compelling” – and not merely a legitimate – “state interest.”²² Accordingly, in *Romer v. Evans*,²³ the Court deemed it “most doubtful” that laws like the one at issue in *Murphy* denying groups of citizens the right to vote “because of their status” could survive strict scrutiny.²⁴

Moreover, at least since *Carrington v. Rash*,²⁵ what we might call “viewpoint discrimination” is also no longer a legitimate basis for disqualifying voters:

¹⁸ *Shepherd v. Grimmet*, 3 Idaho 403, 410 (1892). In *Washington v. State*, 75 Ala. 583 (1884) – perhaps the most widely cited case for the proposition that criminal disenfranchisement laws are nonpunitive, see *id.* at 585 (explaining that disenfranchisement was not a “punishment,” but rather a means of “preserv[ing] the purity of the ballot box” against corruption by morally or cognitively unfit voters) – the court treated the disqualification as “withholding an honorable privilege, and not denying a personal right or attribute of personal liberty....” *Id.* at 585. By contrast, it saw regulation that prevented an individual from being admitted to the bar as punitive because “[t]he right to exercise [this] call[ing] was a natural right, which was not conferred by government, but would exist without it It was a valuable attribute of personal liberty in the nature of property, the deprivation of which was punitive in its character.” *Id.* at 586.

¹⁹ 377 U.S. 533 (1964).

²⁰ *Id.* at 555. See also *Bush v. Gore*, 531 U.S. 98, 104 (2000); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Harper v. State Bd. of Elections*, 383 U.S. 663, 667 (1966).

²¹ See, e.g., *Dunn v. Blumstein*, 405 U.S. at 336 (1972); *Reynolds v. Sims*, 377 U.S. at 562.

²² *Kramer*, 395 U.S. at 627; *Dunn*, 405 U.S. at 337.

²³ 517 U.S. 620 (1996).

²⁴ *Romer v. Evans*, 517 U.S. 620, 634 (1996) (internal citations omitted).

²⁵ 380 U.S. 89, 94 (1965).

“Fencing out” from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. “The exercise of rights so vital to the maintenance of democratic institutions” cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.²⁶

Thus, the Supreme Court has explained, “[t]o the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law.”²⁷ And that is so even though the plaintiffs in *Davis* were not just advocating “a certain practice”; they were advocating, and perhaps engaging in, a practice – polygamy – that was a felony. The repudiation of *Davis* means that denying individuals the right to vote either because they endorse criminal behavior or because they would vote to change existing criminal laws²⁸ is constitutionally impermissible.

More generally, contemporary voting rights doctrine casts a serious shadow on the central traditional nonpenal justification for felon disenfranchisement: the claim that ex-offenders should not be permitted to vote because they lack the qualities of mind or character voters ought to possess.²⁹ While the Supreme Court has never expressly overruled its decision in *Lassiter v. Northampton County Board*

²⁶ Id. at 94 (quoting *Schneider v. State*, 308 U.S. 147, 161 (1939)). See also *Dunn v. Blumstein*, 405 U.S. 330, 354-56 (1972) (rejecting arguments in favor of durational residency requirements that rested on claims about the desirability of ensuring that citizens understood, and shared, community values before they were permitted to vote and noting that such requirements had often been used in the past to exclude people who were outsiders or who had different political views).

²⁷ *Romer v. Evans*, 517 U.S. 620, 634 (1996).

²⁸ This was the rationale provided by Judge Henry Friendly in *Green v. Board of Elections*, 380 F.2d 445, 451-52 (2nd Cir. 1967), cert. denied, 389 U.S. 1048 (1968):

[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 these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime. . . . A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.

²⁹ See, e.g., *Shepard v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (felons have, by engaging in antisocial conduct, “raised questions about their ability to vote responsibly”).

*of Elections*³⁰ upholding the use of literacy tests because they “ promote intelligent use of the ballot,”³¹ that decision antedated the identification of voting as a fundamental constitutional right the limitation of which was subject to strict scrutiny.³² Since then, the Court has consistently rejected restrictions on the franchise as a reasonable means of promoting intelligent or responsible voting.³³ And the same federal statute that permanently bans the use of literacy tests nationwide – based on Congress’ s conclusion that such tests served no compelling interest and perpetuated the exclusion of minority citizens³⁴ – also barred denying the right to vote to citizens who could not establish that they “ possess good moral character.”³⁵

³⁰ 360 U.S. 45 (1959).

³¹ *Id.* at 51.

³² *Lassiter* clearly applied rationality review to the challenged statute: “The ability to read and write likewise has *some* relation to standards designed to promote intelligent use of the ballot.... Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.” *Id.* at 51-52 (emphasis added).

³³ In *Dunn*, the Court explained that it is not enough for a state to show that eligibility requirements (going beyond citizenship, residency, and age) simply “further a very substantial state interest.” Rather, the restrictions “must be drawn with ‘precision,’ and must be ‘tailored’ to serve their legitimate objectives.” Thus, “if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity,” a state must use those “less drastic means.” *Dunn*, 405 U.S. at 344. So even if promoting intelligent and responsible voting is a weighty state interest – and the Court’s ballot access cases suggest it might be, see, e.g., *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) – the state cannot further that goal by disenfranchising the less intelligent or the irresponsible. See *Dunn*, 405 U.S. at 356; *Kramer* 395 U.S. at 632. Cf. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 *Stan. L. Rev.* 893, 905-11 (1998) (describing the demise of restrictions on the franchise based on the desire to restrict voting to “virtuous” citizens and suggesting that the dominant understanding of voters today in many contexts is that they are “civic slackers”).

³⁴ See S. Rep. 94-295, pp. 23-24 (1975), reprinted in 1975 U.S. Code Cong. & Ad. News 774.

³⁵ See 42 U.S.C. § 1973aa (1994) (providing that citizens cannot be denied the right to vote because of “failure to comply with any test or device” and defining “test or device” to mean “any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class”).

The one surviving vestige of the Mormon disenfranchisement cases is the proposition that denying convicted felons the right to vote is “unexceptionable.”³⁶ Felon disenfranchisement laws have been exempted from standard fundamental rights equal protection analysis since the Supreme Court’s decision in *Richardson v. Ramirez*.³⁷ There, the Court held that section 2 of the Fourteenth Amendment provided an “affirmative sanction” for the disenfranchisement of felons.³⁸

As Alec Ewald recently noted, the “quintessentially textual” nature of the Court’s analysis in *Ramirez* short circuited any discussion of *why* states might disenfranchise offenders:³⁹ the Court simply held that they *could*. But the necessity that states have some legitimate reason for enacting and maintaining such laws flows from the Court’s subsequent decision in *Hunter v. Underwood*.⁴⁰ In *Underwood*, the Court unanimously struck down an Alabama offender disenfranchisement law that barred individuals convicted of misdemeanors involving “moral

³⁶ Romer v. Evans, 517 U.S. at 634.

³⁷ 418 U.S. 24 (1974).

³⁸ Ramirez, 418 U.S. at 54. Section 2 of the Fourteenth Amendment provides:

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

(Emphasis added). The Court concluded that the more general language of the equal protection clause “could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.” Ramirez, 418 U.S. at 55.

³⁹ Ewald, *supra* note 8, at 1066.

The Court’s decision in *Ramirez* has long been subject to withering criticism. For some other representative examples, see David L. Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293, 302-04 (1976); Adam Winkler, Note, Expressive Voting, 68 N.Y.U.L. Rev. 330 (1993).

⁴⁰ 471 U.S. 222 (1985).

turpitude” on the grounds that the provision was tainted by a racially discriminatory purpose. The Court rejected the state’s claim that the equal protection clause was categorically trumped by section 2 of the Fourteenth Amendment:

Without again considering the implicit authorization of § 2 to deny the vote to citizens “ for participation in rebellion, or other crime,” see *Richardson v. Ramirez*, 418 U.S. 24 (1974), we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the Alabama law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* suggests the contrary.⁴¹

In short, even if criminal disenfranchisement statutes are presumptively constitutional because of section 2 – as opposed to most other restrictions on the franchise, which are presumptively unconstitutional – their constitutionality is only *presumptive*: they still must serve *some* legitimate purpose and they cannot rest on an impermissible one.⁴²

Given current voting rights doctrine, it is untenable to argue that the nonpenal rationales traditionally advanced for disqualifying offenders support the practice. If neither good character nor intelligent use of the ballot nor support for existing criminal laws are generally permissible prerequisites for voting, then it would be perverse to rely on criminal convictions as evidence that individuals lack qualities that voters are not required to have. The justification for disenfranchising offenders must rest not on concerns about the effect their participation will have on the political process, but elsewhere. The obvious alternative is to conclude that disenfranchisement is indeed punitive and that if it is to be justified, it must be

⁴¹ Id. at 233.

⁴² In a variety of other contexts, the Supreme Court has made clear that even when restrictions on the franchise do not trigger strict scrutiny, they still must satisfy general rationality review: the challenged law must be rationally related to some legitimate government purpose. See, e.g., *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60 (1978); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

Elena Saxenhouse observes that even if strict scrutiny does not apply to restrictions on offenders’ voting rights, the nature and scope of restrictions still must be tied to some legitimate purpose. See Saxenhouse, *supra* note 8.

justified as a legitimate form of punishment, rather than as a species of political regulation.⁴³

II. DISENFRANCHISEMENT AS DILUTION

Another strand of modern voting rights law has also played an important role in shaping the current debate over offender disenfranchisement. Although fundamental rights are generally conceived of in individual terms, the right to vote is different. It has come to embody a nested constellation of concepts: participation (the ability to cast a ballot and have it counted); aggregation (the ability to join with like-minded voters to achieve the election of one's preferred candidates); and governance (the ability to pursue policy preferences within the process of representative decisionmaking).⁴⁴ In a variety of contexts, courts, legislatures, and the public have come to see that any right to genuinely meaningful political participation implicates groups of voters, rather than atomistic individuals. As Justice Powell succinctly observed: "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."⁴⁵

While the first round of the Reapportionment Revolution contented itself with announcing a rule cast entirely in individualistic terms – one-person, one-vote – the Court almost immediately recognized the potential for group-based claims: "[i]t might well be that, designedly or otherwise, [particular election rules might] . . . operate to minimize or cancel out the voting strength of racial or political elements of the voting population."⁴⁶ Most voting rights litigation over the past

⁴³ Outside the domain of constitutional argument, most commentators and partisans in the debate over felon disenfranchisement have always seen it as fundamentally punitive. See Ewald, *supra* note 8, at 1058-59.

⁴⁴ I discuss this taxonomy most fully in Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *Tex. L. Rev.* 1705, 1709-19 (1993) [hereafter *Karlan, Rights to Vote*].

⁴⁵ *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part). See also Samuel Issacharoff, *Groups and the Right To Vote*, 44 *Emory L.J.* 869, 882-84 (1995);

⁴⁶ *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

forty years has involved precisely such claims of group-based dilution. Especially after passage and amendment of the Voting Rights Act of 1965,⁴⁷ the central questions in voting rights law have centered on whether electoral structures have provided minority citizens with a fair opportunity to participate in the political process and elect candidates of their choice. Voting rights law has thus become both racially sensitized and focused on electoral outcomes.

Virtually every contemporary discussion of criminal disenfranchisement in the United States begins by noting the sheer magnitude of the exclusion, and its racial salience. The actual impact of felon disenfranchisement is greater than at any point in our history.⁴⁸ Current laws disenfranchise approximately 3.9 million voting-age citizens, of whom roughly 1.4 million have completed their sentences. When disqualified citizens on probation or parole are added to those who have completed their sentences, nearly three-quarters of the excluded are not in prison.⁴⁹

And felon disenfranchisement has hit minority groups particularly hard: while 4.6 million black men voted in the 1996 election, 1.4 million were disenfranchised.⁵⁰ In fact, more black men are disqualified today by the operation of criminal disenfranchisement laws than were actually enfranchised by the passage of the Fifteenth Amendment in 1870.⁵¹ The problem is especially striking in states

⁴⁷ See 42 U.S.C. §§ 1973, 1973c (1994). For discussion of the requirements of the Voting Rights Act, see generally Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 546-671, 713-866 (rev. 2d ed. 2002).

⁴⁸ Today we incarcerate proportionally more than six times as many individuals as we did when *Richardson* was being litigated. Compare Uggen & Manza, *Democratic Contraction*, supra note 8, at 780 (noting that from the 1920's to the early 1970's, the United States incarceration rates hovered around 110 per 100,000 individuals) with Dwight Lewis, *When Will We Spend More on Books Than Prison Bars?*, *The Tennessean*, Aug. 29, 2002, at 15A (noting that the United States is now "the world leader in the percentage of its population behind bars - 690 people per 100,000").

⁴⁹ For statistics, see generally Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998) available on line at <http://www.hrw.org/reports98/vote/>; Uggen & Manza, *Democratic Contraction*, supra note 8; *One Person, No Vote*, supra note 8, at 1940.

⁵⁰ Fellner & Mauer, supra note 49.

⁵¹ According to the 1870 census, there were approximately 1,083,484 black men in the United States over the age of 20. See U.S. Dept. of Commerce, Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970*, at 17 (Series A 119-134). No state allowed

with lifetime disqualification laws. In Alabama and Florida, nearly a third of all black men are permanently disenfranchised and in Iowa, Mississippi, Virginia, and Wyoming, roughly a quarter are permanently barred.⁵²

The potential effects of this massive exclusion were driven home by the agonizingly close 2000 presidential race in Florida. Florida disenfranchises more people than any other state – approximately 827,000. Slightly over 600,000 of those individuals are people who have completed their sentences and have been discharged entirely from the criminal justice system.⁵³ Approximately 10.5% of the state’s adult black population was disenfranchised compared with 4.4% of the non-black population.⁵⁴ A recent study estimated that, had ex-offenders who had completed their sentences been permitted to vote, Al Gore would have carried Florida by more than 31,000 votes.⁵⁵

But one need not indulge in counterfactual hypotheticals or mathematical modeling to see how felon disenfranchisement laws distorted the 2000 election. Florida’s law not only excluded hundreds of thousands of ex-offenders from the polls; they disenfranchised significant numbers of eligible voters as well due to a profoundly flawed purge process.⁵⁶ The process was plagued by false positives: for example, individuals were removed because their names resembled those of convicted felons or despite the fact that their convictions did not trigger disenfran-

women to vote in 1870. Given then-existing restrictions on the franchise (e.g., property holding and poll tax requirement, pauper exclusions, and other disqualifications), some proportion of these men would have been ineligible to vote even after the Fifteenth Amendment prohibited racial discrimination in the franchise and thus the total number of black men sets an upper boundary on the number of potential black voters.

⁵² Fellner & Mauer, *supra* note 49.

⁵³ See One Person, No Vote, *supra* note 8, at 1943 n. 32 & 1939 n.10.

⁵⁴ See Johnson v. Bush, 2003 U.S. App. LEXIS 25859 *5 (11th Cir. 2003).

⁵⁵ See Uggen & Manza, Democratic Contraction, *supra* note 8, at 793 (table 4a). Their study estimated voter turnout and candidate preferences for ex-offenders in light of the political behavior of individuals of similar socioeconomic status.

⁵⁶ For accounts of the process, see, e.g., U.S. Comm’n on Civil Rights, Voting Irregularities in Florida During the 2000 Presidential Election, ch. 5 (2001), available at <http://www.usccr.gov> [hereafter Voting Irregularities]; Paul M. Schwartz, Voting Technology and Democracy, 77 N.Y.U.L. Rev. 625, 645-47 (2002).

chisement under Florida law⁵⁷ or even though their voting rights had been restored. Statewide, the purge removed 8,456 black voters from the rolls; after the election, of the 4,847 people who appealed, 2,430 were restored to the list as eligible voters.⁵⁸ In one large county, the supervisor of elections later estimated that fifteen percent of the people purged were in fact eligible to vote and a majority of those purged were African American.⁵⁹ In short, Florida showed, in a particularly striking form, the “collateral damage” that the “collateral consequence” of criminal disenfranchisement can cause – denying absolutely qualified citizens the ability to participate and wholly blameless communities the ability to elect the candidate of their choice. And as my colleague Rick Banks has recently explained with respect to the other most notably successful recent critique of race and the criminal justice system – the attack on racial profiling – claims by “innocent” victims are especially morally compelling and politically potent.⁶⁰

And it’s not only the Supreme Court that “follows th’ iliction returns.”⁶¹ In *Johnson v. Bush*,⁶² the Eleventh Circuit revived a legal challenge to Florida’s disenfranchisement policy. In granting summary judgment for the state, the district court had held that although the disenfranchisement provision in Florida’s 1868 constitution⁶³ had been enacted “with the particular discriminatory purpose of

⁵⁷ Persons convicted of felonies in Florida are not permitted to vote without pursuing a complicated restoration process, but Florida allows persons convicted of felonies in other states to vote in Florida if the state of conviction automatically restores the right to vote upon completion of one’s sentence. See Schwartz, *supra* note 56, at 646. Nonetheless, the company Florida hired to provide lists of felons convicted in other states did not delete these individuals’ names from the lists it provided to local election officials.

⁵⁸ See John O. Calmore, *Race Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C.L. Rev. 1253, 1275 (2001).

⁵⁹ See *Voting Irregularities*, *supra* note 56, at text accompanying note 207.

⁶⁰ R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 Stan. L. Rev. ____, ____ (2003).

⁶¹ Finley Peter Dunne, *Mr. Dooley’s Opinions* 26 (1901).

⁶² 2003 U.S. App. LEXIS 25859 (11th Cir. 2003).

⁶³ Fla. Const. art. XIV, § 2 (1868).

keeping blacks from voting,”⁶⁴ the plaintiffs had failed to show that the decision to retain felon disenfranchisement in the state’s 1968 constitution was itself purposefully discriminatory. By contrast, the court of appeals recast the inquiry in an important way, holding that the state bore the burden of demonstrating a “break in the causal chain of discrimination” linking the contemporary disenfranchisement of offenders to the racism of 1868. Relying on school desegregation cases that had imposed an affirmative duty to dismantle past discrimination “root and branch,”⁶⁵ the court found a similar burden “when the right to vote - a citizen’s most basic right in a democracy - has been impermissibly abrogated.”⁶⁶ Retaining the policy of disenfranchising felons “to preserve continuity, or out of deference to tradition, or simply due to inertia does not amount to an independent purpose sufficient to break the chain of causation between the original racial animus and the provision’s continuing force as law.”⁶⁷ The court of appeals found no evidence in the summary judgment record to suggest a “legitimate motive” for the 1968 provision, and expressed some skepticism as to whether any “non-racially discriminatory public policy rationales for disenfranchising felons” actually exist.⁶⁸

The year 2000 involved another event that highlighted the racially salient political consequences of the war on crime and its attendant disenfranchisement of large numbers of minority citizens. Under the “usual residence rule,” the Census Bureau counts incarcerated individuals as residents of the jurisdiction in which they are incarcerated.⁶⁹ In many states, this results in largely white, rural communities having their population totals increased at the expense of the heavily urban,

⁶⁴ Johnson v. Bush, 214 F. Supp. 2d 1333, 1339 (S.D. Fla. 2002).

⁶⁵ See Johnson, 2003 U.S. App. LEXIS 25859 * 20 (quoting Knight v. Alabama, 14 F.3d 1534, 1552 (11th Cir. 1994)).

⁶⁶ Id. *21.

⁶⁷ Id. *30.

⁶⁸ Id. * 29 n.16.

The court of appeals also reversed the district court’s grant of summary judgment on the plaintiffs’ Voting Rights Act claims, an issue I discuss *infra* text accompanying notes 84-88.

⁶⁹ See District of Columbia v. U.S. Dep’t of Commerce, 789 F. Supp. 1179, 1180-81 (D.D.C. 1992).

overwhelmingly minority communities from which most inmates come.⁷⁰ This reallocation of population has at least two important effects. First, because a substantial amount of federal and state aid to localities is based on population, heavily minority communities lose revenue: Chicago, for example, stands to lose \$88 million over the next decade because roughly 26,000 Chicagoans, 78 percent of them black, were serving time in downstate prisons at the time of the 2000 census.⁷¹ Second, because electoral districts are also based on population, people in prison serve as essentially inert ballast in the redistricting process. They enable the underpopulation of rural, overwhelmingly white districts relative to urban, heavily minority ones, thereby potentially changing the overall composition of legislative bodies. For example, in New York State, seven conservative upstate Republicans represent state senatorial districts that comply with one-person, one-vote only because incarcerated prisoners are included within the population base.⁷² But these officials are neither descriptively nor substantively “representative” of their inmate “constituents.”⁷³ As a result, many commentators have compared the inclusion of incarcerated inmates in the population base of the jurisdictions where they are incarcerated to the notorious “three fifths” clause in the original Constitution, which enhanced the political clout of slave-holding states by including slaves in the population base for calculating congressional seats and electoral

⁷⁰ Although rural counties contain only 20% of the U.S. population, 60% of new prison construction occurs in rural counties. In New York State, for example, 66 percent of state prison inmates are from New York City but every prison built in the state since 1982 has been located upstate. See Peter Wagner, *Importing Constituents: Prisoners and Political Clout in New York* 4 (2002), available at http://www.prisonpolicy.org/importing/importing_body.pdf

⁷¹ See Molly Dugan, *Census Dollars Bring Bounty to Prison Towns*, *Chicago Reporter*, July/Aug. 2000, available at <http://www.chicagoreporter.com/2000/8-2000/prison/prison.htm>.

⁷² See Wagner, *supra* note 70. New York’s state legislative redistricting is currently being challenged in part because of its overrepresentation of upstate communities relative to downstate ones.

⁷³ For example, one of the upstate districts is represented by Dale Volker. There are more than 11,000 inmates at eight state correctional facilities in his district. Given the economic benefits prisons provide to otherwise economically hard-hit rural communities, it is hardly surprising that Senator Volker is a leading defender of New York’s draconian drug laws, which have resulted in a huge prison population. It is hard to imagine Senator Volker as anything other than the most notional “representative” of his inmate constituents: as a reporter explained, Volker “says it’s a good thing his captive constituents can’t vote, because if they could, ‘They would never vote for me.’” Jonathan Tilove, *Minority Prison Inmates Skew Local Populations as States Redistrict*, *Newhouse News Service*, Mar. 12, 2002, available at <http://www.newhousenews.com/archive/story1a031202.html>.

votes.⁷⁴

Criminal disenfranchisement laws thus operate as a kind of collective sanction: they penalize not only actual wrongdoers but the communities from which incarcerated prisoners come and the communities to which ex-offenders return by reducing their relative political clout.⁷⁵ It is impossible to calculate the overall political effect of criminal disenfranchisement laws,⁷⁶ in part because of complex political dynamics: candidates choose to run and shape their campaigns in part based on the potential electorate and elected officials are most responsive to the policy preferences of groups that have the power to keep them in, or remove them

⁷⁴ The three-fifths clause calculated population for purposes of congressional representation “by adding to the whole Number of free Persons ... three fifths of all other persons.” U.S. Const. art. I, 2, cl. 3. As a result, the representational base for slave states included slaves, even though they could not vote. Ironically, *the* central purpose of section 2 of the Fourteenth Amendment was to repeal the three fifths clause and to ensure that states that continued to disenfranchise black men would lose representation in the House and influence over presidential elections. See Henry L. Chambers, Jr., Colorblindness, Race Neutrality, and Voting Rights, 51 Emory L.J. 1397, 1417 n.78 (2002).

For representative invocations of the functional equivalence of the three fifths clause and the inclusion of inmates in the population base of rural communities in which they are incarcerated, see, e.g., Lani Guinier, What We Must Overcome, Am. Prospect, Mar. 4, 2001 (“Because inmates can’t vote in 48 states, including Massachusetts, counting their bodies for political districting and federal funding is reminiscent of the Constitutional three-fifths clause that counted enslaved Africans as three-fifths of a person for reapportionment even though they weren’t allowed to vote.”); Paul Street, “Those People in that Prison Can’t Vote Me Out”: The Political Consequences of Racist Felony Disenfranchisement, The Black Commentator, Dec. 11, 2003, available at http://www.blackcommentator.com/68/68_street_prisons.html (“In a disturbing re-enactment of the notorious three-fifths clause of the US Constitution, whereby 60 percent of the ante-bellum South’s non-voting and un-free (slave) black population counted towards the congressional representation of Slave states, 21st century America’s very disproportionately black and urban prisoners count towards the political apportionment (representation) accorded to predominantly white and rural communities that tend to host prisons.”).

⁷⁵ For a comprehensive recent discussion of the range of collective sanctions, see Daryl J. Levinson, Collective Sanctions, ___ Stan. L. Rev. ___ (2004). Although Levinson discusses some of the collective consequences of incarceration, neither he nor the sources he cites on the spillover effects of high incarceration rates discuss the dilution of political strength as a collective sanction on the communities from which offenders come.

⁷⁶ There are, however, some telling suggestions: Uggen and Manza also estimated that, since 1978, the outcomes in seven U.S. Senate races would have been reversed had offenders been permitted to vote. This shift would likely have given Democrats control over the Senate throughout the 1990’s. Uggen & Manza, Democratic Contraction, *supra* note 8, at 790-91

from, office.⁷⁷ But it is at least suggestive that the states that disenfranchise the largest number of citizens also have some of the most draconian criminal codes, and it is not entirely clear in which direction the causal arrows run. It may well be that it is precisely because their electorates are skewed that they enact increasingly harsh laws that reinforce the skew. This may be especially true to the extent that the criminal law is enforced in a racially biased or disproportionate way: if the burden of criminal sanctions falls primarily on a group that is underrepresented within the electorate, even the relatively weak political safeguards against overcriminalization may disappear.⁷⁸

Recognition of this dynamic relationship between racial discrimination within the criminal justice system and minority political power has played a key role in two recent decisions resuscitating challenges to felon disenfranchisement under section 2 of the Voting Rights Act, which forbids the use of voting qualifications that disproportionately exclude minorities from participating in the political process and electing the candidates of their choice.⁷⁹

⁷⁷ For a discussion of how this dynamic played out as an historical matter with respect to the early twentieth-century restrictions on voter registration and their effect on class-based political mobilization and government policy, see Frances Fox Piven & Richard Cloward, *Why Americans Don't Vote* (1989).

For a more recent example, consider Senator Mitch McConnell of Kentucky, one of the leading opponents of a recent federal bill to reinstate ex-offenders' voting rights. McConnell's initial election to the Senate in 1984 was attributable to the disenfranchisement of a significant pool of voters who would otherwise have supported his opponent thereby tipping the election. See Behrens, *Ballot Manipulation*, supra note 8, at 572. See also Clegg, supra note 8, at 17 (arguing against reinstatement of ex-offenders' voting rights because in some communities "there accordingly exists a voting bloc that could create real problems by skewing election results").

⁷⁸ A recent study argues that perceived "racial threat" is a major explanatory variable in predicting a state's disenfranchisement practices, and concludes that "the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws. States with greater nonwhite prison populations have been more likely to ban convicted felons from voting than states with proportionally fewer nonwhites in the criminal justice system." Behrens, *Ballot Manipulation*, supra note 8, at 596. States with a small proportion of African-American prisoners are most likely to abolish ex-felon voting restrictions. *Id.* at 599.

⁷⁹ As amended in 1982, section 2 provides, in pertinent part:

- (a) 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 of any citizen of the United States to vote on account of race or color

In its seminal decision interpreting section 2, the Supreme Court had explained that “[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”⁸⁰ In the early cases challenging felon disenfranchisement under section 2, courts had rejected the plaintiffs’ claims, holding in essence that it was individual offenders’ “conscious decision to commit a criminal act for which they assume the risks of detention and punishment,”⁸¹ rather than social or historical conditions that had caused whatever deprivation had occurred.⁸² Based on those precedents, district courts in both Washington and Florida granted summary

(b) A violation of subsection (a) of this section 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1994). In *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986), the Supreme Court explained that Congress amended section 2 in 1982 to eliminate the requirement that minority voters challenging a voting practice or election procedure prove a discriminatory purpose as well as a disparate impact.

Section 2 prohibits both practices that deny the right to vote outright and practices that dilute the voting strength of minority communities. Dilution cases by their very nature are group based and outcome focused. See Karlan, *Rights to Vote*, *supra* note 44, at 1712-15.

⁸⁰ *Thornburg v. Gingles*, 478 U.S. at 47.

⁸¹ *Wesley v. Collins*, 791 F.2d 1255, 1962 (6th Cir. 1986).

⁸² See also *Jones v. Edgar*, 3 F.Supp. 2d 979, 980 (C.D. Ill. 1998) (relying on *Wesley* to dismiss a challenge to Illinois’s felon disenfranchisement statute); *Baker v. Cuomo*, 842 F. Supp. 718, 721-23 (S.D.N.Y. 1993), *aff’d* by an equally divided court *sub nom. Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (*en banc*) (*per curiam*). A new challenge to New York State’s felon disenfranchisement statute, which disenfranchises individuals who are incarcerated or on parole, but not those on probation, is currently pending in federal district court. See *Hayden, et al. v. Pataki*, Civ. Act. No. 00-8586 (first amended complaint available at http://www.naacpldf.org/whatsnew/hayden_pataki/hayden_v_pataki_complaint.pdf) The complaint in *Hayden* raises claims on behalf of three subclasses: black and Latino citizens who are disqualified from voting because they are currently incarcerated because of a felony conviction; black and Latino citizens who are disqualified from voting because they are currently on parole for a felony conviction; and black and Latino voters whose voting strength is diluted by the disproportionate disenfranchisement of blacks and Latinos.

judgment for the defendants in section 2 challenges to their states' disenfranchisement provisions.⁸³

Both the Ninth and the Eleventh Circuits reversed, remanding the cases for further proceedings.⁸⁴ Both courts saw the criminal justice system as a key component of the social and historical situation confronted by the minority community as it engaged in the political process. They recognized that the plaintiffs had produced significant evidence of racial discrimination within the criminal justice system.⁸⁵ Thus, to the extent that racial bias and discrimination within the criminal justice system “contribute to the conviction of minorities . . . , such discrimination would clearly hinder the ability of racial minorities to participate effectively in the political process. . . , rendering it simply another relevant social and historical condition to be considered” in the section 2 inquiry.⁸⁶

Moreover, both courts recognized the group interest at stake. The *Farrakhan* court described the consequence of the disproportionate disenfranchisement of minority citizens as a “disproportionate impact on minority voting power”

⁸³ See *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002); *Farrakhan v. Locke*, 2000 U.S. Dist. LEXIS 22212 (E.D. Wash. 2000).

⁸⁴ *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003); *Johnson v. Bush*, 2003 U.S. App. LEXIS 25859 (11th Cir. 2003).

⁸⁵ In the *Washington* case, the plaintiffs provided statistical evidence of disparities in arrest, bail and pre-trial release rates, charging decisions, and sentencing outcomes, and expert reports discussing underlying bias. See *Farrakhan*, 338 F.3d at 1013. The district court found that evidence “compelling.” See *Farrakhan v. Locke*, 2000 U.S. Dist. LEXIS 22212 *14 (E.D. Wash. 2000). In the *Florida* case, the court of appeals noted that the evidence, taken in the light most favorable to the plaintiffs showed “a nexus between disenfranchisement and racial bias in other areas, such as the criminal justice system.” *Johnson v. Bush* 2003 US App LEXIS 25859 *43 (describing the conclusion of the Florida Supreme Court's Racial and Ethnic Bias Study Commission that “differential treatment results, at least in part, from racial and ethnic bias on the part of enough individual police officers, prosecutors, and judges to make the system operate as if it intended to discriminate against non-whites”). The court of appeals also pointed to “the historical use of criminal justice in Florida as a tool to subjugate African Americans,” *id.* *43 n.26, and pointed to evidence that, using arrest rates as a proxy for criminal involvement, a significant part of the racial disproportionality in felony convictions could not be explained by differential crime rates, *id.* *5-6.

⁸⁶ *Farrakhan*, 338 F.3d at 1020; see *Johnson*, 2003 U.S. App. LEXIS 25859 * 38.

and “ minority underrepresentation in Washington's political process.”⁸⁷ The *Johnson* court similarly characterized the question posed by the case as “ whether felon status ‘interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.’ ”⁸⁸

The felon disenfranchisement cases offer an attractive vehicle for courts concerned with the staggering burdens the war on drugs and significantly disparate incarceration rates have imposed on the minority community. The cases generally involve the voting rights of individuals who have completed their sentences –“ paid their debt to society.” Thus, they do not ask courts to hold any particular prosecution constitutionally illegitimate. Nor do they require dismissing criminal charges and leaving individual malefactors unpunished. Instead, they permit courts to express their concern at a more abstract and bloodless level, one that recognizes that the costs of the war on crime are felt not only by the guilty.⁸⁹

III. THE CONSTITUTIONALITY OF PUNITIVE DISENFRANCHISEMENT

Given contemporary voting rights doctrine, if disenfranchisement is to be justified at all, it must be justified as an appropriate punishment. Thus, it is impossible to avoid the question *Trop v. Dulles* set to one side: is disenfranchisement consistent with the Eighth Amendment’s prohibition on cruel and unusual punishment?

The Eighth Amendment “ succinctly prohibits ‘excessive’ punishments”

⁸⁷ Farrakhan, 338 F.3d at 1011, 1017 n.14. The court of appeals did not explicitly distinguish between the plaintiffs’ individual and their collective claims. The district court addressed the plaintiffs’ claim under the rubric of both vote denial and vote dilution. See *Farrakhan v. Locke*, 2000 U.S. Dist. LEXIS 22212 *5 n.1.

⁸⁸ *Johnson*, 2003 U.S. App. LEXIS 25859 * 38. The court of appeals also held that the district court had erred in refusing to consider evidence of racially polarized voting as part of its totality of the circumstances inquiry. See *id.* * 42 n.25. Such evidence is really relevant only to a group-based dilution claim.

⁸⁹ At the same time, supporters of criminal disenfranchisement have also shifted *their* arguments casting them to express “a concern with the vote dilution of ‘law-abiding citizens.’” See Behrens, *Ballot Manipulation*, *supra* note 8, at 573.

and demands that “punishment for crime should be graduated and proportioned to the offense.”⁹⁰ In recent Terms, the Supreme Court has issued two important decisions construing this principle: in *Atkins v. Virginia*,⁹¹ the Court held that execution of mentally retarded individuals violated the cruel and unusual punishment clause. In *Ewing v. California*,⁹² the Court upheld California’s “three strikes” law, which mandates the imposition of life sentences on certain recidivists. In an earlier article, published after the Court’s decision in *Atkins* but before its decision in *Ewing*, I argued that the analytic framework set out in *Atkins* for assessing whether a particular punishment violates contemporary standards provided strong support for an Eighth Amendment-based challenge to lifetime offender disenfranchisement laws.⁹³ Ironically, in the course of rejecting the constitutional challenge in *Ewing*, the Supreme Court may have strengthened the case for voting rights restoration.

Ewing, of course, was not a case about the harshness of the punishment – there was agreement about the severity of imprisoning an individual for twenty-five years to life – but rather a case about the justifications harsh punishment. The linchpin of the decision is the principle that the Constitution “does not mandate adoption of any one penological theory.”⁹⁴ Justice O’Connor’s opinion mentioned the four standard justifications that might inform a state’s sentencing scheme: rehabilitation, deterrence, incapacitation, and retribution.⁹⁵ She located

⁹⁰ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

⁹¹ 536 U.S. 304 (2002).

⁹² 123 S.Ct. 1179 (2003). See also *Lockyer v. Andrade*, 123 S.Ct. 1166 (2003) (applying the analysis announced in *Ewing* in the context of federal habeas review).

⁹³ See Karlan, *Ballots and Bullets*, supra note 8, at 1368-71.

⁹⁴ *Ewing v. California*, 123 S. Ct. 1166, 1187 (2003) (opinion of O’Connor, J.) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). Justice O’Connor announced the judgment of the Court in *Ewing* and her opinion was joined by the Chief Justice and Justice Kennedy. Justices Scalia and Kennedy concurred in the judgment, both asserting that the Eighth Amendment contains no proportionality principle with respect to criminal sentences. Justices Stevens, Souter, Ginsburg, and Breyer dissented, arguing that the punishment inflicted on *Ewing* was constitutionally disproportionate to his crime.

⁹⁵ *Ewing*, 123 S.Ct. at 1187.

the justification for three-strikes laws in states' determinations that " individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety."⁹⁶ In short, the legitimacy of such punishments stemmed from their furthering the goals of deterrence and incapacitation. With respect to retribution, while Justice O' Connor' s opinion paid lip service to the idea that grand theft was a serious offense, she quickly turned away from the gravity of the instant criminal behavior (Ewing had stolen three golf clubs worth about \$1200) to reliance on his recidivism: he deserved a harsher punishment than would otherwise be authorized (or perhaps constitutionally permissible) because he had shown that he was " simply incapable of conforming to the norms of society as established by its criminal law."⁹⁷

By contrast to imprisonment, however, disenfranchisement really can be justified only under a retributive theory of criminal punishment. Neither rehabilitation nor deterrence plays any plausible role at all in justifying the disenfranchisement of former offenders. It is impossible to see how lifetime or extended post-incarceration disenfranchisement rehabilitates anyone;⁹⁸ indeed, the very message of such exclusion is to suggest that ex-offenders are beyond redemption.⁹⁹ It is telling that the period when rehabilitation was a dominant goal of criminal punishment coincided with an era in which many states either abandoned or relaxed their disenfranchisement provisions because disenfranchise-

⁹⁶ Id.

⁹⁷ Id. at 1190. Justice O'Connor explained that "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." Id. In a footnote appended to this sentence, she noted that the California legislature "made a deliberate policy decision ... that the gravity of the new felony should not be a determinative factor in triggering the application of the Three Strikes Law." Id. at 1190 n.2 (internal quotation marks omitted). Thus, the Court's decision cannot be read as suggesting that the offense of grand theft generally – or the particular theft Ewing committed – was so grave an offense standing alone as to justify a twenty-five year to life sentence.

⁹⁸ See Ewald, *supra* note 8, at 1105.

⁹⁹ See Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "the Purity of the Ballot Box,"* 102 Harv. L. Rev. 1300, 1316 (1989).

ment was “viewed as impeding rehabilitation.”¹⁰⁰ Restoration of voting rights can help ex-offenders reintegrate into the community, a significant factor in avoiding future criminal behavior.¹⁰¹

Nor can disenfranchisement be explained as a realistic deterrent of criminal behavior.¹⁰² It seems unlikely that an individual who is not deterred by the prospect of imprisonment or fines or other restrictions on his liberty will be dissuaded by the threat of losing his right to vote, even if he were aware that permanent disenfranchisement is a collateral consequence of a criminal conviction.¹⁰³ Moreover, the years of early adulthood in which criminal behavior is most likely are precisely the years in which political participation is at its lowest. Thus, large numbers of individuals are likely to be disenfranchised before they have actually exercised the right to vote.

Incapacitation is similarly unsatisfying. If incapacitation is the rationale for disenfranchisement, then we need to identify what future bad acts disqualification from voting will prevent an ex-offender from accomplishing. Incarceration, of course, is the paradigmatic incapacitating punishment: it prevents an offender from committing (most) crimes during its duration. But disenfranchisement cannot incapacitate an ex-offender from committing future criminal offenses, except, perhaps, from committing an extraordinarily narrow subset of voting-related crimes such as vote selling.¹⁰⁴ To the extent that disenfranchisement is intended to disable ex-offenders from influencing the political process in what would be otherwise non-

¹⁰⁰ Demleitner, *supra* note 8, at 771.

¹⁰¹ See Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, ___ *Ann. Rev. Soc.* ___ (2003).

¹⁰² See, e.g., *Sauve v. Attorney General of Canada* ¶49, (Sup. Ct. of Canada Oct. 31, 2002) available at <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/sauve2.en.html>; Demleitner, *supra* note 8, at 787-88; Ewald, *supra* note 8, at 1105-06.

¹⁰³ See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *Cornell L. Rev.* 697 (2002) (suggesting that even when pleading guilty, many individuals may be unaware that permanent disenfranchisement is a consequence of criminal conviction).

¹⁰⁴ See Thompson, *supra* note 8, at 189-91 (arguing that even with respect to voting related crimes, such as vote fraud or vote buying, current disenfranchisement statutes are often both under- and overinclusive).

criminal ways, incapacitation simply collapses into the traditional, and now-discredited justifications for excluding individuals who lack particular sorts of virtue.¹⁰⁵

That leaves retribution. When retribution is the sole function of a criminal punishment, proportionality analysis necessarily focuses on the gravity of a defendant's conduct and the harshness of the penalty imposed. A claim that a particular punishment violates the Eighth Amendment "is judged not by the standards that prevailed in 1685 ... or when the Bill of Rights was adopted, but rather by those that currently prevail."¹⁰⁶ Thus, the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁰⁷

A categorical disenfranchisement of all ex-offenders convicted of a felony lumps together crimes of vastly different gravity. The irresistible political pressure toward ever more criminalization means that much not particularly blameworthy conduct is classified as a felony.¹⁰⁸ That potential sentences for a felony conviction range from crimes for which the statutory maximum is one year's imprisonment to ones for which the maximum is death shows that all felonies are not equally serious. And the fact that many individuals convicted of felonies are permitted to remain in the community – either on probation or parole or after paying fines or restitution – suggests that the prosecutor and the sentencing judge or jury do not invariably view a defendant's conduct as deeply blameworthy.¹⁰⁹

¹⁰⁵ See supra text accompanying notes 25-35.

¹⁰⁶ *Atkins v. Virginia*, 536 U.S. at 311.

¹⁰⁷ *Id.* at 311-12 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

¹⁰⁸ See George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 *UCLA L. Rev.* 1895, 1898 (1999). William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505 (2001).

For a discussion of the range of crimes that trigger disenfranchisement, see Saxenhouse, *supra* note 8.

¹⁰⁹ In *Sauve*, the Supreme Court of Canada concluded that wholesale disenfranchisement even of incarcerated individuals fails to "reflec[t] the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct" because it "imposes blanket

The severity of the punishment is undeniable: “ the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . disinherited must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family.”¹¹⁰ As other restrictions on the franchise have been abandoned, the severity of continuing to exclude ex-offenders has strengthened.

Atkins pointed to two types of objective evidence that might inform a court’s assessment of whether a punishment offends contemporary standards: recent legislative decisions and trends and approaches “ within the world community.”¹¹¹ In the case of lifetime ex-offender disenfranchisement, both types of evidence support the conclusion that the punishment is inconsistent with contemporary notions of appropriate punishment.

Thirty years ago, when the Supreme Court upheld lifetime disqualification, in *Richardson v. Ramirez*, twenty-eight states inflicted lifetime disenfranchisement. Only eight continue that practice today. Since *Richardson v. Ramirez*, no state has enacted legislation barring ex-offenders from voting.¹¹² “ [T]he consistency of the direction of change” provides “ powerful evidence” of a national consensus, particularly given “ the well-known fact that anti-crime legislation is far more popular than legislation providing protections for persons guilty of violent crime.”¹¹³ Similarly, consensus “ within the world community” is uniformly

punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct.” Thus even disenfranchisement tied to the length of an individual’s prison sentence – for Canadian citizens were disqualified from voting only while they are actually incarcerated – was constitutionally impermissible.

¹¹⁰ McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

¹¹¹ See *Atkins*, 536 U.S. at 313-16.

¹¹² Two states that had no disenfranchisement provision in 1974 did subsequently bar individuals from voting while they are imprisoned. In fact, no state has passed a broad ex-offender disenfranchisement law since Hawaii did at the time of statehood in 1959. And Hawaii later amended its provision to disenfranchise only individuals in prison. See Behrens, *Ballot Manipulation*, supra note 8 at 564.

¹¹³ *Atkins*, 536 U.S. at 315.

against lifetime disenfranchisement.¹¹⁴ Thus, the states that continue to exclude all felons permanently are outliers, both within the United States and in the world.

At one time, the prevailing notions of what constituted a felony, or ideas of “civil death” might have justified retributive disenfranchisement. But given contemporary notions about the fundamentality of the right to vote and an expansive, indeed overbroad, criminal code, the excessive and disproportionate character of blanket post-incarceration disenfranchisement is obvious. As Oliver Wendell Holmes observed, “[it] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”¹¹⁵

CONCLUSION

The legitimacy of criminal punishment, at least within our system, depends on the legitimacy of the process that produces and enforces the criminal law. The legitimacy of that process in turn depends on the ability of citizens to participate equally in choosing the officials who represent them. Lifetime disenfranchisement of ex-offenders short circuits this process in a pernicious and self-reinforcing way. It is a relic of an era in which exclusion from self-government was the norm for

¹¹⁴ See Ewald, *supra* note 8, at 1046-47; Fellner & Mauer, *supra* note 49 (noting that while some countries disenfranchise people serving criminal sentences, and a few “restrict the vote for several years after completion of sentence” in specific situations, “prisoners may vote in countries as diverse as the Czech Republic, Denmark, France, Israel, Japan, Kenya, Netherlands, Norway, Peru, Poland, Romania, Sweden and Zimbabwe” and that in Germany, “the law obliges prison authorities to encourage prisoners to assert their voting rights and to facilitate voting procedures”).

Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides that all citizens shall have the “right and the opportunity” to vote “without unreasonable restrictions.” ICCPR, 999 U.N.T.S. 171, entered into force March 23, 1976. The United Nations Human Rights Committee, in a comment on Art. 25, stated that “[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence.” General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4 of the International Comment on Civil and Political Rights, General Comment No. 25(57), Annex V(1), CCPR/C/21, Rev. 1, Add. 7, August 27, 1996. The Committee “has consistently frowned on and tried to limit the reach of criminal disenfranchisement laws that it has reviewed.” Fellner & Mauer, *supra* note 49.

¹¹⁵ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

most citizens.¹¹⁶ Today, it operates primarily to punish. And it punishes not only individual citizens, most of whom have otherwise paid their debt to society and reentered the free world, but the communities which bear the brunt of the criminal laws the political system enacts. Far from safeguarding “ the purity of the ballot box,” the continuing disenfranchisement of ex-offenders taints our politics.

¹¹⁶ See Richard Briffault, *The Contested Right to Vote*, 100 Mich. L. Rev. 1506, 1524 (2002) (reviewing Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000)) (observing, with respect to *Ramirez* that “a remnant of the nineteenth century vision of the vote as state-granted privilege was carried forward by the late-twentieth century Court”); cf. *Lawrence v. Texas*, 123 S.Ct. 2472, 2484 (2003) (“ Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”).