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

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INTRODUCTION

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

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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, 353 F.3d 1287 (11th Cir. 2003); Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003), *reh'g en banc denied*, No. CV-96-00076-RHW, 2004 U.S. App. LEXIS 3399 (9th Cir. 2004).

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 thereafter.[4] Recent public opinion surveys find that over 80% of Americans believe that ex-offenders should regain their right to vote at some point, and more than 40% would allow offenders on probation or parole to vote.[5] Voting rights restoration has become an issue in the presidential campaign[6] and in grassroots 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]

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3. *See* ALA. CODE § 15-22-36.1 (2003).

4. For discussions of recent state legislative developments, see CHRISTOPHER UGGEN & JEFF MANZA, SUMMARY OF CHANGES TO STATE DISENFRANCHISEMENT LAWS, 1865-2003, at 2, *available at* http://www.sentencingproject.org/pdfs/UggenManzaSummary.pdf (last visited Mar. 15, 2004); Martine J. Price, *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) (unpublished manuscript), *available at* http://www.socsci.umn.edu/~uggen/POQ8.pdf (last visited Mar. 15, 2004) [hereinafter Manza et al., "Civil Death"].

6. *See* Edward Wyatt, *In Southern Stop, Clark Promises to Enforce Voting Rights*, N.Y. TIMES, Dec. 30, 2003, at A19 (reporting that Wesley Clark supported restoring the right to vote to offenders who have completed their sentences); *Meet the Press* (NBC television broadcast, Nov. 9, 2003) (reporting that Howard Dean and John Edwards supported restoring voting rights).

Former presidents have also supported reinstatement. *See* William Jefferson Clinton, *Erasing America's Color Lines*, N.Y. TIMES, Jan. 14, 2001, § 4, at 17 (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* NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 45-46 (2002).

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 (Chief Electoral Officer) [2002] 3 S.C.R. 519 (Can.), *available at* http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol3/html/2002scr3_0519.html (last visited Mar. 15, 2004) (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). Following *August,* South Africa's Parliament enacted a statute that barred voting by incarcerated individuals, *see* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1046 n.4, but the South African Constitutional Court recently held the statute unconstitutional. *See* Minister of Home Affairs v. Nat'l Inst. for Crime Prevention and the Re-Integration of Offenders (NICRO) (S. Afr. Const. Ct. Mar. 3, 2004), *available at* http://www.sentencingproject.org/pdfs/southafrica-decision.pdf (last visited Mar. 15, 2004). 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

This Article discusses some of the causes and consequences of 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 of 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 can be 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

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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) [hereinafter Behrens et al., *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. L. & 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*; Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109 (2003); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV 1345 (2003) [hereinafter Karlan, *Ballots and Bullets*]; Manza et al., "Civil Death," *supra* note 5; *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002) [hereinafter *One Person, No Vote*]; Pinaire et al., *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) [hereinafter Uggen & Manza, *Democratic Contraction*]; Price, *supra* note 4; Elena Saxonhouse, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. (forthcoming 2004); Jill E. Simmons, *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, *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).

reading of the proportionality principle in *Ewing v. California*.[9]

I. DISENFRANCHISEMENT AS PUNISHMENT

Constitutional limits on the government's power to inflict hardships often turn on whether the government's action is categorized as punitive or as 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*:

> [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 the power to regulate the franchise.[11]

Notably, Chief Justice Warren identified no 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

9. 538 U.S. 11 (2003).

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. Trop v. Dulles, 365 U.S. 86, 96-97 (1958) (Warren, C.J., plurality opinion). Ironically, the Chief Justice made this observation in the course of distinguishing laws that strip individuals of their citizenship, which the Court held were not only punitive, but so punitive as to violate the Eighth Amendment's prohibition on cruel and unusual punishments.

simply relied on two nineteenth-century decisions—*Davis v. Beason*[12] and *Murphy v. Ramsey*[13]—in which the Court had upheld the denial of voting rights to polygamists as a simple regulation of the franchise.[14] Those decisions, however, rested on the proposition that a state's power to restrict the ability to vote is plenary, that is, that virtually any restriction on eligibility for voting is 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 in any form 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."[15] 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 participate in self-government. 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.[16]

The Supreme Court has squarely rejected the conception of the franchise that underlies the Mormon disenfranchisement cases. Although nineteenth-century 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,"[17] the Warren Court and its successors took quite a different approach. In *Reynolds v. Sims*,[18] 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."[19] In

12. 133 U.S. 333 (1890).

13. 114 U.S. 15 (1885).

14. *Trop*, 356 U.S. at 97.

15. *Murphy*, 114 U.S. at 43.

16. *Id.* at 45.

17. Shepherd v. Grimmett, 3 Idaho 403, 410 (1892). In *Washington v. State*, 75 Ala. 582 (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 a regulation that prevented an individual from being admitted to the bar as punitive because "[t]he right to exercise [this] calling[] 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.

18. 377 U.S. 533 (1964).

19. *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 Sch. Dist., 395 U.S. 621, 626 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966).

subsequent cases, the Court has held that because voting is a "fundamental" right,[20] laws that deny citizens the right to vote must be "necessary to promote a compelling"—and not merely a *legitimate*—"state interest."[21] Accordingly, in *Romer v. Evans*, 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.[22]

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

> "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.[23]

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."[24] 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 laws[25] 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.[26]

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20. *See, e.g.*, *Reynolds*, 377 U.S. at 562; *Dunn*, 405 U.S. at 336.

21. *Kramer*, 395 U.S. at 627; *Dunn*, 405 U.S. at 337 (emphasis omitted).

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

23. Carrington v. Rash, 380 U.S. 89, 94 (1965) (quoting Schneider v. State, 308 U.S. 147, 161 (1939)); *see also Dunn*, 405 U.S. at 354-56 (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).

24. *Romer*, 517 U.S. at 634.

25. This was the rationale provided by Judge Henry Friendly in *Green v. Bd. of Elections*, 380 F.2d 445, 451-52 (2d 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.

26. *See, e.g.*, Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978) (holding that felons have, by engaging in antisocial conduct, "raised questions about their ability to vote

While the Supreme Court has never expressly overruled its decision in *Lassiter v. Northampton County Board of Elections* upholding the use of literacy tests because they "promote intelligent use of the ballot,"[27] that decision antedated the identification of voting as a fundamental constitutional right, the limitation of which was subject to strict scrutiny.[28] Since then, the Court has consistently rejected restrictions on the franchise as a reasonable means of promoting intelligent or responsible voting.[29] 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 citizens[30]—also barred denying the right to vote to citizens who could not establish that they "possess good moral character."[31]

The one surviving vestige of the Mormon disenfranchisement cases seems to be the proposition that denying convicted felons the right to vote is "unexceptionable."[32] Felon disenfranchisement laws have been exempted from standard fundamental rights equal protection analysis since the Supreme

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responsibly").

27. Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

28. *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).

29. 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." Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (internal citations omitted). 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.'" *Id.* 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, for example, 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 v. Union Free Sch. Dist., 395 U.S. 621, 632 (1969); *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").

30. *See* S. REP. NO. 94-295, at 23-24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774.

31. *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").

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

Court's decision in *Richardson v. Ramirez*.[33] There, the Court held that the reduction-in-representation clause in Section 2 of the Fourteenth Amendment, which reduces a state's representation in Congress if it abridges the right to vote "except for participation in rebellion, or other crime," provided an "affirmative sanction" for the disenfranchisement of felons.[34]

But there is a striking irony in relying on Section 2 to uphold disenfranchisement as a nonpunitive, regulatory act: Jack Chin has pointed out that the post-Civil War statutes restoring the readmitted southern states' representation in Congress consistently

> included the "fundamental condition" that the state constitution 'shall never be so amended or changed as to deprive any citizen or class of citizens of the United States who are entitled to vote by the constitution herein recognized, *except as a punishment for such crimes as are now felonies at common law*, whereof they shall have been duly convicted . . . ."[35]

Thus, the Reconstruction Congress that ostensibly authorized offender disenfranchisement saw disenfranchisement as an aspect of punishment.

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:[36] 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*.[37] In *Underwood*, the Court unanimously struck down an Alabama

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33. 418 U.S. 24 (1974).

34. *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.

U.S. CONST. amend. XIV, § 2 (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.

35. Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. (forthcoming 2004) (quoting Act of June 22, 1868, 15 Stat. 72 (readmitting Arkansas)) (emphasis added).

36. 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, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993).

37. 471 U.S. 222 (1985).

law that disenfranchised individuals convicted of misdemeanors involving "moral 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.[38]

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.[39]

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 justified as a legitimate form of punishment, rather than as a species of political regulation.[40]

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

38. *Id.* at 233.

39. 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. City of Tuscaloosa, 439 U.S. 60 (1978); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); *see also* Saxonhouse, *supra* note 8 (extending this observation to restrictions on ex-offenders' voting rights).

40. 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.

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).[41] 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 only atomistic individuals. As Justice Powell succinctly observed, "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."[42]

While the first round of the Reapportionment Revolution contented itself with announcing a rule articulated in individualistic terms—one-person, one-vote—the Court almost immediately recognized the potential for group-based claims: "It 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."[43] Most voting rights litigation over the past forty years has involved precisely such claims of group-based dilution. Especially after passage and amendment of the Voting Rights Act of 1965,[44] the key 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 to elect candidates of their choice. Voting rights law has thus become both racially sensitized and focused on electoral outcomes.

Offender disenfranchisement implicates both these concerns. 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.[45] Current laws disenfranchise approximately 3.9 million

41. 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) [hereinafter Karlan, *Rights to Vote*].

42. 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).

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

44. *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).

45. 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 781 (noting that from the 1920s to the early 1970s, 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").

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 those excluded are not in prison.[46]

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.[47] 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.[48] The problem is especially striking in states 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.[49]

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.[50] Approximately 10.5% of the state's adult black population was disenfranchised compared with 4.4% of the non-black population.[51] 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.[52]

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; it also disenfranchised significant numbers of eligible voters as well

46. JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998), *available at* http://www.hrw.org/reports98/vote/ (last visited Mar. 15, 2004); *One Person, No Vote*, *supra* note 8, at 1940; Uggen & Manza, *Democratic Contraction*, *supra* note 8.

47. FELLNER & MAUER, *supra* note 46.

48. According to the 1870 census, there were approximately 1,083,484 black men in the United States over the age of 20. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 17 (1975). No state allowed women to vote in 1870. Given then-existing restrictions on the franchise (e.g., property holding and poll tax requirements, 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.

49. FELLNER & MAUER, supra note 46.

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

51. *See* Johnson v. Bush, 353 F.3d 1287, 1293 (11th Cir. 2003).

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

due to a profoundly flawed purge process.[53] 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 disenfranchisement under Florida law,[54] or even though their voting rights had been restored. Statewide, the purge removed 8456 black voters from the rolls; after the election, of the 4847 people who appealed, 2430 were restored to the list as eligible voters.[55] 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.[56] 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.[57]

And it's not only the Supreme Court that "follows th' iliction returns."[58] In *Johnson v. Bush*,[59] 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 constitution[60] had been enacted "with the particular discriminatory purpose of keeping blacks from voting,"[61] 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

53. For accounts of the process, see, for example, U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, ch. 5 (2001) [hereinafter VOTING IRREGULARITIES], *available at* http://www.usccr.gov (last visited Mar. 20, 2004); Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 645-47 (2002).

54. Persons convicted of felonies in Florida are not permitted to vote without pursing 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 53, 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.

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

56. *See* VOTING IRREGULARITIES, *supra* note 53, at ch. 5, text accompanying n.207.

57. R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 601 (2003).

58. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

59. 353 F.3d 1287 (11th Cir. 2003).

60. FLA. CONST. art. XIV, § 2 (1868).

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

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,"[62] the court found a similar burden "when the right to vote—a citizen's most basic right in a democracy—has been impermissibly abrogated."[63] 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."[64] The court of appeals found no evidence in the summary judgment record to suggest an independent "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.[65]

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.[66] In many states, this results in largely white, rural communities having their population totals increased at the expense of the heavily urban, overwhelmingly minority communities from which most inmates come.[67] 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% of them black, were serving time in downstate prisons

62. *See Johnson*, 353 F.3d at 1298 (quoting Knight v. Alabama, 14 F.3d 1534, 1540 (11th Cir. 1994)).

63. *Id.*

64. *Id.* at 1302.

65. *Id.* at 1302 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.

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

67. 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% 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 (last visited Mar. 15, 2004). Wagner operates a website, www.prisonersofthecensus.org, that is a treasure trove of information about the interaction of incarceration and political representation. For another recent discussion of this issue, see Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote"*, 11 VA. J. SOC. POL'Y & L.229 (2004).

at the time of the 2000 census.[68] Second, because electoral districts are also based on population, people in prison serve as essentially inert ballast in the redistricting process.[69] 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.[70] But these officials are neither descriptively nor substantively "representative" of their inmate "constituents."[71] 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

68. *See* Molly Dugan, *Census Dollars Bring Bounty to Prison Towns*, CHI. REPORTER, July/Aug. 2000, *available at* http://www.chicagoreporter.com/2000/8-2000/prison/prison.htm (last visited Mar. 15, 2004).

69. At the same time, the presence of disenfranchised ex-offenders may distort the composition of electoral districts: A community in which a substantial number of adults are ineligible to vote will have less influence at the polls than a community in which all adults are eligible to participate. Even if a majority of a district's citizens of voting age are members of a minority group—a conventional measure for determining whether the district is likely to elect a representative responsive to minority concerns—it may be that minority *voters* are too small a group to elect the candidate the community prefers.

70. *See* WAGNER, *supra* note 67, at 11. New York's state legislative redistricting is currently being challenged in part because of its overrepresentation of upstate communities relative to downstate ones.

71. 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 (last visited Mar 15, 2004).

Stinebrickner-Kauffman conducted a survey in which she asked members of the Indiana House of Representatives the following question:

> Which inmate would you feel was more truly a part of your constituency?
>
> a) An inmate who is currently incarcerated in a prison located in your district, but has no other ties to your district.
>
> b) An inmate who is currently incarcerated in a prison in another district, but who lived in your district before being convicted and/or whose family lives in your district.

Of the 40 respondents, *every single one* picked answer *b*. Stinebrickner-Kauffman, *supra* note 67, at 302.

and electoral votes.[72]

Criminal disenfranchisement laws thus operate as a kind of collective sanction: They penalize not only actual wrongdoers, but also the communities from which incarcerated prisoners come and the communities to which ex-offenders return by reducing their relative political clout.[73] It is impossible to calculate the overall political effect of criminal disenfranchisement laws,[74] 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 from, office.[75] 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

72. 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 Lani Guinier, *Locking Up the Vote*, AM. PROSPECT, Mar. 12-26, 2001 ("[I]nmates can't vote in 48 states, so counting their bodies for political districting and federal funding but not for the franchise is reminiscent of the constitutional 'three-fifths clause' that counted enslaved Africans as three-fifths of a person for reapportionment even though they couldn't 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_streetprisons.html (last visited Mar. 20, 2004) ("In a disturbing re-enactment of the notorious three-fifths clause of the U.S. 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 . . . .").

73. For a comprehensive recent discussion of the range of collective sanctions, see Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345 (2003). 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.

74. 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 1990s. Uggen & Manza, *Democratic Contraction*, *supra* note 8, at 789.

75. 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 A. CLOWARD, WHY AMERICANS DON'T VOTE (1988).

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.[76]

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.[77]

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

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76. 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 et al., *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.

In addition, because jury lists are compiled largely (and in the federal system almost exclusively) from voter registration rolls, the disenfranchisement of ex-offenders also skews the jury pool away from members of minority communities. *See* Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U. L. REV. 65 (2003).

77. 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 . . . .
>
> (b) A violation of subsection (a) 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) 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 41, at 1712-15.

preferred representatives."[78] 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,"[79] rather than social or historical conditions that had caused whatever deprivation had occurred.[80] Based on those precedents, district courts in both Washington and Florida granted summary judgment for the defendants in Section 2 challenges to their states' disenfranchisement provisions.[81]

Both the Ninth and the Eleventh Circuits reversed, remanding the cases for further proceedings.[82] 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.[83] Thus, to the extent that racial bias and discrimination

78. *Thornburg*, 478 U.S. at 47.

79. Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986).

80. *See also* Jones v. Edgar, 3 F. Supp. 2d 979, 981 (C.D. Ill. 1998) (relying on *Wesley* to dismiss a challenge to Illinois' felon disenfranchisement statute); Baker v. Cuomo, 842 F. Supp. 718, 721-23 (S.D.N.Y. 1993), *aff'd en banc by an equally divided court sub nom.* Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (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 v. Pataki, No. 00-8586 (S.D.N.Y. first amended complaint filed January 15, 2003), *available at* http://www.naacpldf.org/whatsnew/hayden_pataki/hayden_v_pataki_complaint.pdf (last visited Mar. 15, 2004). 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.

81. *See* Johnson v. Bush, 214 F. Supp. 2d 1333 (S.D. Fla. 2002); Farrakhan v. Locke, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212 (E.D. Wash. 2000).

82. Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003), *reh'g en banc denied*, No. CV-96-00076-RHW, 2004 U.S. App. LEXIS 3399 (9th Cir. 2004); Johnson v. Bush, 353 F. 3d 1287 (11th Cir. 2003).

83. In the Washington case, the plaintiffs provided statistical evidence of disparities in arrest, bail, and pretrial 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*, 2000 U.S. Dist. LEXIS 22212 at *14. 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*, 353 F.3d at 1306 (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," *id.* 1306 n.26). The court of appeals also pointed to "the historical use of criminal justice in Florida as a tool to subjugate African Americans," *id.* at 1306, 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.* at 1293.

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.[84]

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" and "minority underrepresentation in Washington's political process."[85] 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.'"[86]

The felon disenfranchisement cases offer an attractive vehicle for courts to express their concern 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 voice their reservations 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.[87]

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' sanctions," and

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84. *Farrakhan*, 338 F.3d at 1020; *see also Johnson*, 353 F.3d at 1305.

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

86. *Johnson*, 353 F.3d at 1305 (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)). 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.* at 1306 n.25. Such evidence is really relevant only to a group-based dilution claim.

87. 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 et al., *Ballot Manipulation*, *supra* note 8, at 573 (describing this shift).

demands that "punishment for crime should be graduated and proportioned to the offense."[88] In recent Terms, the Supreme Court has issued two important decisions construing this principle: In *Atkins v. Virginia*, the Court held that execution of mentally retarded individuals violated the cruel and unusual punishment clause.[89] In *Ewing v. California*, the Court upheld California's "three strikes" law, which mandates the imposition of life sentences on certain recidivists.[90] 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.[91] Ironically, in the course of rejecting the constitutional challenge in *Ewing*, the Supreme Court may have strengthened the case against lifetime ex-offender disenfranchisement.

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 for harsh punishment. The linchpin of the decision is the principle that the Constitution "does not mandate adoption of any one penological theory."[92] Justice O'Connor's opinion mentioned the four standard justifications that might inform a state's sentencing scheme: rehabilitation, deterrence, incapacitation, and retribution.[93] She located 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."[94] 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

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

89. 536 U.S. 304 (2002).

90. 538 U.S. 11 (2003); *see also* Lockyer v. Andrade, 538 U.S. 63 (2003) (applying the analysis announced in *Ewing* in the context of federal habeas review).

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

92. *Ewing*, 538 U.S. at 25 (2003) (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 Thomas 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.

93. *Id.*

94. *Id.* at 24.

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."[95]

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 postincarceration disenfranchisement rehabilitates anyone;[96] indeed, the very message of such exclusion is to suggest that ex-offenders are beyond redemption.[97] 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 disenfranchisement was "viewed as impeding rehabilitation."[98] Restoration of voting rights can help ex-offenders reintegrate into the community, a significant factor in avoiding future criminal behavior.[99]

Nor can disenfranchisement be explained as a realistic deterrent of criminal behavior.[100] 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.[101] 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.

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95. *Id.* at 29. 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 29 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 25 year to life sentence.

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

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

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

99. *See* Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANN. REV. SOC. 89 (2003).

100. *See, e.g.*, Sauve v. Canada (Chief Electoral Officer) [2002] 3 S.C.R. 519, ¶ 49 (Can.), *available at* http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol3/html/2002scr3_0519.html (last visited Mar. 15, 2004); Demleitner, *supra* note 8, at 787-88; Ewald, *supra* note 8, at 1105-06.

101. *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).

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. By contrast, incarceration 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.[102] To the extent that disenfranchisement is intended to disable ex-offenders from influencing the political process in what would be otherwise noncriminal ways, incapacitation simply collapses into the traditional, and now-discredited, justifications for excluding individuals who lack particular sorts of virtue.[103]

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, since retribution is about imposing on an offender the punishment he deserves. The claim that a particular punishment violates the Eighth Amendment because it is disproportionately severe "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."[104] Thus, the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[105]

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.[106] 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.[107]

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102. *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 over-inclusive).

103. *See supra* text accompanying notes 23-31.

104. Atkins v. Virginia, 536 U.S. 304, 311 (2002).

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

106. *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, 507 (2001).

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

107. In *Sauve v. Canada (Chief Electoral Officer)*, the Supreme Court of Canada concluded that wholesale disenfranchisement even of incarcerated individuals fails to

At the same time, the severity of the punishment of disenfranchisement is undeniable: "[T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . disinherited[, he] 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."[108] The fact that most other restrictions on the franchise have been abandoned makes continuing to exclude ex-offenders an even more severe punishment, as it leaves them in a uniquely excluded position.

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."[109] 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 penal sanctions.

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.[110] "[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."[111] Similarly, consensus "within the world community" is uniformly against lifetime disenfranchisement.[112] Thus, the states that

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"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 punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct." [2002] 3 S.C.R. 519, ¶ 50-51 (Can.), *available at* http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol3/html/2002scr3_0519.html (last visited Mar. 15, 2004). 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. *Id.*.

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

109. *See Atkins*, 536 U.S. at 313-16.

110. 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 et al., *Ballot Manipulation*, *supra* note 8, at 564.

111. *Atkins*, 536 U.S. at 315.

112. *See* FELLNER & MAUER, *supra* note 46, at ch. VI (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"); Ewald, *supra* note 8, at 1046-47.

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 postincarceration 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."[113]

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 in deciding what behavior to outlaw, which individuals to prosecute, and how to punish persons convicted of a crime. 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 most citizens.[114] Today, it operates primarily to punish. And it punishes not only

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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." International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 25, 999 U.N.T.S. 171 (entered into force March 23, 1976). The United Nations Human Rights Committee, in a comment on Article 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 Covenant on Civil and Political Rights, General Comment No. 25(57), Annex V(1), UN Doc. 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 46, at ch. VIII.

113. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

114. *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 *Richardson v. Ramirez*, 418 U.S. 24 (1974), 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

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.

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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.").