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The Courts' Failure to Re-Enfranchise "Felons" Requires Congressional Remediation

Otis H. King*
and
Jonathan A. Weiss**

I. Introduction

This article is partisan. In these terribly troubling times for the participatory democracy on which our Republic is founded, we demand aggressive advocacy for the basic principles our Constitution commands. Law review articles traditionally focus on legal principles and their interplay with the Constitution, statutes, regulations, and the common law. However, the current administration has so shredded the Constitution and evaded the laws it has pledged to uphold for its own political purposes, that we find it necessary not only to base our position regarding the perniciousness of felony disenfranchisement on traditional legal arguments, but also to address the blatant partisanship that has motivated the administration's actions.¹ The general destruction includes, but clearly is not

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1. Some former elected representatives have called for President Bush's impeachment. See, e.g., Elizabeth Holtzman, *The People's Case for Impeaching Bush*, WASH. SPECTATOR, Nov. 15, 2006, available at http://www.washingtonspectator.com/articles/20061115impeachment_1.cfm (arguing that Democrats have a constitutional duty to impeach President Bush). See also Elizabeth Holtzman, *Impeachment: The Case in Favor*, THE NATION, Feb. 12, 2007, at 20, available at <http://www.thenation.com/doc/20070212/holtzman> (updating her argument in favor of

limited to, the demolition of due process, the scissoring out of Habeas Corpus² from both the Magna Carta and the Bill of Rights, and the annihilation of the First Amendment guarantees of freedom of speech, freedom of assembly, and the separation of church and State.³ Of course, the xenophobic “war on terror” has also infringed on the connected guarantee of freedom of religion. Consider, for example, the arrest of six Muslim religious leaders, led off an airplane in handcuffs, because some of their members prayed in front of the departure gate.⁴

How did all of this occur? Volumes have been and will be written about the devastation wrought by the current administration. Why were these practices not stopped?⁵ We leave it to others to answer the bulk of these questions, as we will focus on only one aspect of the current deprivation of fundamental rights—the denial of the franchise to millions of Americans who, by every right, should be permitted to vote. The history of this practice of disenfranchisement is founded in explicit racism, and it has been perpetuated by people in power for their

impeachment in response to Sanford Levinson’s contention that the constitutional usage of “high crimes and misdemeanors” . . . must be . . . of a certain gravity.” (quoting Sanford Levinson, *Impeachment: The Case Against*, THE NATION, Feb. 12, 2007, at 21, available at <http://www.thenation.com/doc/20070212/levinson>). For a thorough and concise review of the destruction of civil liberties and privacy, see Joe W. Pitts, *Under Surveillance: The End of Illegal Domestic Spying? Don’t Count On It*, WASH. SPECTATOR, Mar. 15, 2007, at 1-3, available at http://www.washingtonspectator.com/articles/20070315surveillance_1.cfm.

2. See Caleb Crain, *Bad Precedent*, NEW YORKER, Jan. 29, 2007, at 78 (reviewing MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW* (2006) (discussing the law before the age of Jackson)). Warshauer argued that only Congress could suspend Habeas Corpus, and that this sacred and ancient right should continue as an important check on executive power. *Id.* Warshauer further argued that President Bush should not be able to maneuver to take away a civil right. *Id.*

3. For instance, the current administration has destroyed the separation of church and State by favoring “faith based” institutions. Compare Jonathan Weiss, *Privilege, Posture and Protection: “Religion” in the Law*, 73 YALE L.J. 593 (1964).

4. Libby Sander, *6 Imams Removed From Flight For Behavior Deemed Suspicious*, N.Y. TIMES, Nov. 22, 2006, at A18.

5. The Security Administration has admitted that at least fifty percent of those listed on the “No Fly List” and the “Selectee List” used, respectively, for banning people from commercial flights and subjecting them to special scrutiny, should not have been considered “dangerous.” See Thomas Claburn, *Watch the Watch List*, INFORMATION WEEK, Jan. 22, 2007, at 17.

own purposes.⁶ This racism tragically undergirds the improper constriction of the fundamental base of our democracy, which instead deserves Constitutional protection by those charged with constitutional duties.

In particular, the unfettered right to vote and to have one's vote counted properly—the linchpins of a free society—do not exist in this country.⁷ Again, we leave it to others to specify the effectuation and consequences of gerrymandering and preventing people from reaching the polls, and the use, in some States, of devices such as photo identification to eliminate the votes of minorities and the poor.⁸ In this article, we will deal with the deliberate wholesale elimination of nearly five million people from the voting polls. We are compelled to mention these other issues only to make clear that what we do address and will propose, while clearing a major bar to full participation, does not address all the existing evils in the system. For instance, in addition to the legislatively-structured disenfranchisement during the last national election, the government employed "dirty tricks" like "push polling" and jamming phone lines to interfere with transportation to the polls.⁹ For those who think the results of the 2006 election demonstrate that these practices have been sufficiently curtailed, the answer is, that they have not.¹⁰

6. The clear racial impact has long been noted. See, e.g., Posting by Mickey Kaus to KAUSFILESblog, <http://www.slate.com/id/2154243/> (Nov. 20, 2006, 23:55 EST); *U.S. Prison Population Sets Record*, WASH. POST, Dec. 1, 2006, at A03.

7. The authors have explored this matter in Otis King & Jonathan A. Weiss, *We Are Mad as Hell and We Do Not Intend To Get Over It: Where Were The Troops?*, 22 PACE L. REV. 269 (2002) [hereinafter *Where Were The Troops?*].

8. See Mark Crispin Miller, *The GOP Playbook: How to Steal the Vote*, WASH. SPECTATOR, Oct. 15, 2006, available at http://www.washingtonspectator.com/articles/20061015playbook_1.cfm; MARK CRISPIN MILLER, *FOOLED AGAIN: HOW THE RIGHT STOLE THE 2004 ELECTION AND WHY THEY'LL STEAL THE NEXT ONE TOO (UNLESS WE STOP THEM)* (2005).

9. See, e.g., *Senators Ask Ashcroft to Let Phone-Jamming Suit Go Forward*, USA TODAY, Oct. 19, 2004, available at http://www.usatoday.com/news/politics/elections/nation/2004-10-19-phone-jamming_x.htm.

10. Many commentators have addressed this phenomenon, detailing the widespread abuses of the voting process. See, e.g., Greg Gordon, *U.S. Attorneys: Campaign Against Alleged Voter Fraud Fuels Political Tempest*, McCLATCHY NEWSPAPERS, April 19, 2007, available at <http://www.realcities.com/mld/kwashington/17102317.htm>; Andrew Gumbel, *Fixing Elections*, THE NATION, Nov. 27, 2006, at 5-6, available at <http://www.thenation.com/docpremi.html?i=20061127&s=gumbel>; Andrea Stone, *Candidates, Voters Still Await Results in Some Races*, USA TODAY, Nov. 17, 2006, at 6A. Only one hundred House seats were

In Arizona, which imposes "identification requirements" for voting, the Inter Tribal Council of Arizona, in a memorandum issued on November 4, 2006, stated its intention to file a lawsuit against that practice based upon exit polls taken in its twenty tribes.¹¹ Yet, the proponents of widespread disenfranchisement continue to be vigorously vocal. In election-infamous Florida, Attorney General elect, Bill McCollum, stated in the *Orlando Sentinel*: "I can just suggest to you there's a whole range of people . . . who should not have their voting rights or civil rights restored."¹² Notwithstanding all of the devices which have been employed by this administration and the Re-

really contested, primarily because of gerrymandering. See Posting by Mickey Kaus to KAUSFILESblog, <http://www.slate.com/id/2154243/> (Nov. 20, 2006, 23:55 EST); *Still Trying to Clean Up the Mess in Florida*, Posting of Ralph Neas to HUFFINGTON POST blog, http://www.huffingtonpost.com/ralph-neas/still-trying-to-clean-up_b_35358.html (Dec. 1, 2006, 15:23 EST); Andrea Stone, *Candidates, Voters Still Await Results in Some Races*, USA TODAY, Nov. 17, 2006 (explaining that many races where State's disenfranchised ex-"felons" were very close, and that many races were also marred by "irregularities" in assembling and counting the votes).

Many commentators have discussed the problems with Diebold machines and their manufacture. See, e.g., Warren Stewart, *Our Election System is Broken. Can the New Congress Fix It?*, WASH. SPECTATOR, Jan. 15, 2007, available at http://www.washingtonspectator.com/articles/20070115unverifiable_1.cfm (noting the importance of a system that creates a paper trail); Abby Goodnough & Christopher Drew, *Florida to Shift Voting System With Paper Trail*, N.Y. TIMES, Feb. 2, 2007, at A1 (describing Florida Governor Charlie Crist's plans to abandon touch-screen voting machines, a move which was precipitated by the fact that more than 18,000 people who voted in other races had no votes recorded for any of the Congressional candidates). Twenty-eight States have adopted legislation requiring paper ballots to be used in local polling locations, and New Jersey Representative Rush D. Holt has recently reintroduced his Voter Confidence and Increased Accessibility Act, which would require that every vote have a verifiable paper record. H.R. 550, 109th Cong. (2005). The critics of Congressman Rush Holt's Legislative Proposal (HR 811) urge using only paper ballots, arguing effectively that a "paper trail" is insufficient protection against the possible defects and manipulation of electronic voting. See Ari Berman, *The Bush Administration Has Two Full-Fledged Scandals on Its Hands*, WASH. SPECTATOR, Mar. 17, 2007, at 4, available at <http://www.washingtonspectator.com/articles/20070315fyi.cfm>.

11. The Supreme Court has continued to resist, albeit on suspicious, technical grounds, measures excluding voters by imposing additional burdens. See *Purcell v. Gonzalez*, 127 S. Ct. 5 (2006) (per curiam) (Stevens, J., concurring) (requiring proof of citizenship not only when they register, but also when they vote).

12. John Kennedy, *Issue of Felons' Rights Proves Divisive*, ORLANDO SENTINEL, Nov. 17, 2006, at B5. See also Editorial, *Revote and Verify*, THE NATION, Dec. 18, 2006, at 6, available at <http://www.thenation.com/doc/20061218/editors2> (describing a Florida election with a Republican margin of victory of 369 votes, in which 18,000 votes disappeared).

publican Party, we will focus on just one of them, that of which Bill McCollum spoke—the disenfranchisement of those convicted of “felonies.” Specifically, we will primarily focus on those ex-felons who continue to be denied the right to vote long after they have served their sentences, a period which can extend throughout a convicted felon’s entire life. It becomes ever more critical that some action is taken, as the prison population and those subject to disenfranchisement grows larger every day.¹³ Recent reports indicate that the number of individuals incarcerated and on probation and parole is getting worse, rather than better.¹⁴

We start by suggesting that there are different types of felonies, which should be kept in mind throughout our discussion.¹⁵ Felonies can be divided into several different categories—common law felonies, common law felonies of a specifically-defined heinous nature, statutory felonies, and statutory felonies characterized as immoral or dangerous, particularly to society or the State. Furthermore, convicted felons can be classified as those who received no jail sentences, those currently incarcerated, those on parole, those who have had their parole revoked, and those who have survived the imposition of all these possible sanctions. These distinctions should be kept in mind as we proceed.

13. A number of States already allow incarcerated individuals to vote. See *U.S. Prison Population Sets Record*, WASH. POST, Dec. 1, 2006, at A03.

14. See *id.* The article explains that: “A record 7 million people—one in every 32 U.S. adults—were behind bars, on probation or on parole by the end of last year,” according to a Justice Department report. Of those, “2.2 million were in prison or jail, an increase of 2.7 percent over the previous year More than 4.1 million people were on probation and 784,208 were on parole at the end of 2005.” *Id.*

15. See *Where Were The Troops?*, *supra* note 7, at 294 (discussing the expansion of disenfranchisement to include “misdemeanors,” in addition to felonies, as was done in Florida de facto). See also Elizabeth Holtzman, *The People’s Case for Impeaching Bush*, WASH. SPECTATOR, Nov. 15, 2006, available at http://www.washingtonspectator.com/articles/20061115impeachment_1.cfm (explaining that the phrase “high crimes and misdemeanors” is an “archaic phrase that the framers borrowed from British terminology dating back to the fourteenth century,” defined as “an injury to the state or system of government.” As Alexander Hamilton explained in No. 65 of the Federalist Papers, offenses that reach the level of impeachment relate “chiefly to injuries done to society itself.”).

We note in this connection what a “crazy quilt” the current State-by-State disenfranchisement of felons presents.¹⁶ In particular, we would like to emphasize that the majority of individuals affected by disenfranchisement were classified as “felons” in a plea bargain, not in a conviction. When a defendant accepts a plea bargain, the consequences of a possible lifetime disenfranchisement are not mentioned in negotiation or allocution, and the resulting exclusion is not confined to State or local elections, but also operates in federal elections.¹⁷ It is, of course, conceptually possible to separate, in time or in the polling booth, local elections from federal elections; however, this option is impractical and it has never been suggested. It is also susceptible to the Constitutional infirmities so clear in the disenfranchisement now practiced for elections including both federal and local offices and issues.¹⁸

A. *The Fundamental Right to Vote*

The right to vote is the most sacred and fundamental principal of a participatory democracy.¹⁹ It is the foundation upon which the concept of a representative government is premised. It is an inherent right of citizenship in a civilized society. Universal suffrage provides the engine which empowers the popu-

16. See PATRICIA ALLARD & MARC MAUER, *REGAINING THE VOTE: AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS* (2000), available at http://www.sentencingproject.org/Admin/Documents/publications/fd_regainthetvote.pdf; JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELONY DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006); JAMIE FELLNER & MARC MAUER, *LOSING THE VOTE: THE IMPACT OF DISENFRANCHISEMENT LAWS IN THE UNITED STATES*, tbl. 1 (The Sentencing Project & Human Rights Watch 1998), available at <http://www.hrw.org/reports98/vote/usvot98o.htm#FELONY>.

Some States, however, do not impose any disenfranchisement even when in prison, e.g., Maine, Massachusetts, Utah and Vermont. See FELLNER & MAUER, *supra* note 16, at tbl. 1 (listing all the state laws regarding disenfranchisement).

17. “For these reasons and others, and despite its many critics, plea bargaining is very common. More than 90% of convictions come from negotiated a plea [sic], which means that less than 10% of criminal cases result in a trial.” Legal Pundits International Services, http://www.legalpundits.indiatimes.com/_nl_january_2006.html (last visited March 19, 2007).

18. See *infra* pp. 6-8 (discussing the practice of States avoiding the establishment of dual systems and conforming their voting processes in local elections with the process mandated by federal law).

19. *Baker v. Carr*, 369 U.S. 186 (1962). See also Jonathan Weiss, *An Analysis of Wesberry v. Sanders*, 38 S. CAL. L. REV. 67 (1965).

lace. Yet, in *Richardson v. Ramirez*,²⁰ the Supreme Court held that because Section 2 of the Fourteenth Amendment permitted the States to deny the right to vote "for participation in rebellion, or other crime,"²¹ California could prohibit all persons from voting who had been convicted of felonies, even after they had successfully and fully served their sentences. This decision is wrong. We will explore this egregious error below. First, however, we will describe what the correct position should have been.

B. *The Right to Vote is Federal*

The "chief source of Congress' authority over government in the States is the national guaranty in Article IV of the Constitution, of a 'Republican Form of Government' to 'every State.'"²² The "representative character of any government necessarily depends upon the popular right to vote . . . the thing to which this national guaranty most essentially appertains."²³ Congress's "possession of ultimate power over voters' qualifications in *State* elections of the more popular branches of the several State legislatures is strongly implied by the power over *national* elections that is specifically given to Congress."²⁴ This proposition that voting is a national right should be obvious on its face—to imagine the obverse, where a State forbids any voting in federal elections, makes this clear beyond a reasonable doubt.

In this connection, we can draw an analogy to the Commerce Clause. In *Freeman v. Hewit*,²⁵ the Court held that the Clause "by its own force created an area of trade free from interference by the States."²⁶ In *Wickard v. Filburn*,²⁷ Justice Jackson found that growing corn in a backyard for one's own

20. 418 U.S. 24 (1974).

21. U.S. CONST. amend. XIV, § 2.

22. WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 522 (Univ. of Chicago Press 1953). This impressive, idiosyncratic, once influential work, is now mistakenly neglected. Yet, many of the arguments are still sound and Crosskey's achievement is prescient about the effect of racism in Constitutional adjudication affected by politics.

23. *Id.* at 523.

24. *Id.* at 533.

25. 329 U.S. 249 (1946).

26. *Id.* at 252.

27. 317 U.S. 111 (1942).

use was an act in "interstate commerce."²⁸ If the Commerce Clause establishes a national system immune from intrusion by the States, it would follow logically (and from the general purpose of the Constitution "to establish domestic Tranquility . . . to promote the general Welfare, and secure the Blessings of Liberty" for "We the People")²⁹ that the right to vote is a national right, which requires uniform standards. For example, just this term, the Supreme Court has emphasized the importance of nationalization of the banking field.³⁰

The Supreme Court recognized this national right to vote in *Oregon v. Mitchell*,³¹ where it upheld the amendment to the Voting Rights Act granting all eighteen-year-olds the right to vote. Justice Black, speaking for the Court, concluded that Congress has the authority to permit eighteen-year-old citizens to vote in national elections, under Article I, Section 4, Article II, Section 1, and the Necessary and Proper Clause of the Constitution, since those provisions fully empower Congress to make or alter regulations in national elections, to supervise such elections, and to set the qualifications for voters.³²

Given the Court's broad approval of Congress's power to prescribe "the qualifications" for "citizens to vote in national elections," there can be no doubt that the *Oregon* case, in speaking directly to the congressional reach in this area, empowered Congress to specify who would be eligible to vote for its own members. Indeed, as a consequence of this decision, the Twenty-Sixth Amendment, permitting eighteen-year-olds to vote in all elections, was added to the Constitution. It is but a small step for Congress to provide that all persons over eighteen years old within any State must be permitted to vote in all national elections regardless of prior incarceration. While Congress's power pursuant to the Supreme Court's pronouncement in *Oregon* is limited to federal elections, the National Voter Re-

28. For an account of how the interpretation of the Commerce Clause has expanded, see EDWARD H. LEVI & ROSCOE T. STEFFEN, *THE ELEMENTS OF THE LAW* (U. Chicago Press, 4th ed. 1950).

29. U.S. CONST. pmbl.

30. See *Watters v. Wachovia Bank*, No. 05-1342, 550 U.S. ___, 2007 U.S. LEXIS 4336 (April 17, 2007); Linda Greenhouse, *Ruling Limits State Control of Big Banks*, NY TIMES, April 17, 2007, B1.

31. 400 U.S. 112 (1970).

32. *Id.* at 117, 119-24.

gistration Act ("Motor Voter Act") of 1993³³ demonstrates the power of such legislation to effect compliance in local elections. The States have followed the Motor Voter Act in both State and federal elections to avoid the necessity of maintaining two sets of voter registration rolls.³⁴

II. The Right to Vote is a Constitutional Right

From the foregoing discussion, it should be clear that the source of this "national right" is in the Constitution itself. Some commentators have contended that the Constitution contained the Bill of Rights implicitly. In fact, the Federalists argued that since it would be impossible to list all rights, it would be dangerous to list some, because the omission of others would be seized upon to assert that the government did not have to respect any rights that were not enumerated.³⁵ In *Barron v. Baltimore*,³⁶ it was argued, unsuccessfully, that the Bill of Rights (which, by traditional rules of construction, replaces or supersedes the text it modifies) applies to the States.³⁷ Fortunately, this archaic case is no longer relevant. After the Civil War was fought to preserve the union, the Thirteenth, Fourteenth, and Fifteenth Amendments and the Civil Rights Acts³⁸ were passed.

In their dissenting opinions in *Adamson v. California*,³⁹ Justices Black and Murphy argued historically and effectively (against a majority opinion by Justice Frankfurter, which appeared to rest only upon respect for previous judges who sat on their benches and chairs) that the Bill of Rights was incorpo-

33. National Voter Registration Act, 42 U.S.C. § 1973 (2006).

34. See Kevin Sack, *Mississippi Legislature Accepts Bill to Ease Voter Registration*, N.Y. TIMES, Feb. 20, 1998, at A12 (noting that Mississippi was the last State to accept the federal mandate provided by the Motor Voter Act).

35. See generally ALEXANDER HAMILTON ET AL., THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (Modern Library ed., 1937).

36. 32 U.S. 243 (1833).

37. See CROSSKEY, *supra* note 22, at 1056-82 (arguing that *Barron* was wrongly decided, and that the Ninth and Tenth Amendments should protect national rights).

38. Civil Rights Act of 1886, Ch. 31, 14 Stat. 27 (1886) (codified as amended at 42 U.S.C. §§ 1981-1986 (2006)).

39. 332 U.S. 46, 68-92 (1957) (Black, J., dissenting). See also *id.* at 123-25 (Murphy, J., dissenting) (arguing for "selective incorporation plus," which would go even further to prevent State abridgement of rights not enumerated in the Bill of Rights).

rated through the Fourteenth Amendment to be effective against the States. Even if all the rights in the Bill of Rights do not apply to the States, and the only rights that apply are those deemed to be important to a civilized society, it still should follow logically that the right to vote is a constitutional right, not to be abridged. Justice Marshall (joined by Justice Brennan) in his persuasive dissent in *Richardson v. Ramirez*, stated what our relevant rule of law should be:

In my view, the disenfranchisement of ex-felons must be measured against the requirements of the Equal Protection Clause of Section 1 of the Fourteenth Amendment. That analysis properly begins with the observation that because the right to vote 'is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,' voting is a 'fundamental' right.⁴⁰

III. The Central Racist Factor in Federal Exclusion of "Felons" from Voting

Two parallel lines of cases appear to recognize or deny the relevance of racial intent or the impact of statutes and regulations.⁴¹ In the first line of cases, courts have invalidated enactments as unconstitutional because of racial intent.⁴² Furthermore, in *Griggs v. Duke Power Co.*,⁴³ the Supreme Court held that employment testing which was intended to exclude blacks violated Title VII of the Civil Rights Act of 1964, designed to implement the Constitutional panorama of protec-

40. 418 U.S. 24, 77 (1974) (Marshall, J., dissenting) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

41. Of course, parallel lines need not always remain equally separate. The Einsteinian theories of relativity rely on the Reimannian mathematics where parallel lines converge; Lobachevsky's important mathematical system has them diverge.

42. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating a local ordinance regarding laundries, which almost exclusively effected the Chinese); *Thompson v. Louisville*, 362 U.S. 199 (1960) (overturning the arrest of a black man for shuffling his feet, when there was "no evidence" of any crime); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (invalidating a Civil Rights Worker's arrest for "failure to move on").

43. 401 U.S. 424 (1971).

tions.⁴⁴ Similarly, the Minnesota Supreme Court held that a statute applying much higher sanctions for convictions for using "crack" than using "cocaine" was unconstitutional because of its disparate impact on blacks as opposed to wealthy whites.⁴⁵

In the second line of cases, the court ignored, or even enshrined, racial intent.⁴⁶ Of note, in the disgraceful case of *Wards Cove Packing Co. v. Atonio*,⁴⁷ the Supreme Court, per Justice White, upheld hiring and employment practices which had an intentionally racially disparate impact on Alaskan Indians, Chinese, and black toilers in the dreadful conditions of the fish canning industry—in apparent contradiction of *Griggs v. Duke Power Co.*⁴⁸ In a country where it is more likely for a young black man between the ages of eighteen and twenty-five to be in jail for a felony than to be in college, many courts and commentators have considered the geographical spread of felony disenfranchisement and its disparate impact upon blacks

44. In explaining the reach of Section 2 of the Voting Rights Act, the United States Department of Justice, Civil Rights Division, posted the following statement on its Voting Section Home Page:

Section 2 of the Voting Rights Act of 1965 prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups identified in Section 4(f)(2) of the Act. Most of the cases arising under Section 2 since its enactment involved challenges to at-large election schemes, but the section's prohibition against discrimination in voting applies nationwide to any voting standard, practice, or procedure that results in the denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group. Section 2 is permanent and has no expiration date as do certain other provisions of the Voting Rights Act.

U.S. Department of Justice, Civil Rights Division, Voting Section Home Page, http://www.usdoj.gov/crt/voting/sec_2/about_sec2.html (last visited March 12, 2007).

45. See *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). Of course, many criminal law principles are applied primarily against the poor and minorities. See, e.g., Jonathan Weiss, *Confessions under the Influence of Alcohol or the Case of the Shrunkun Drunken Man*, 2 TEX. S.U. L. REV. 1 (1972).

46. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

47. 490 U.S. 642 (1989).

48. 401 U.S. 424 (1971).

and other minorities.⁴⁹ Again, we note the analogy to laws designed to affect the working poor.⁵⁰

One would hope that the Supreme Court would have seen that felony disenfranchisement was practically always based on race.⁵¹ Yet, it repeatedly failed to do so. Despite the Court's failure to recognize the issue of race, in *Hunter v. Underwood*,⁵² the Court did hold an Alabama felony disenfranchisement statute unconstitutional on the grounds that "an impermissible racial motivation and a racially discriminatory impact [were] demonstrated."⁵³ While this decision recognized the nefarious underpinnings of disenfranchisement acts, it was based on this *proven* discriminatory motivation; it did not fully reject *Ramirez*. Therefore, after *Hunter*, it became clear that a tortuous, not always successful, litigation strategy would have to be employed in a State-by-State, statute-by-statute, case-by-case attack on these laws, and that such a strategy would have to reflect the various categories we have distinguished.⁵⁴

49. See Erick Eckholm, *Plight Deepens for Black Men, Study Warns*, N.Y. TIMES, March 20, 2006, at A1 (noting the disparate impact on African Americans in the enforcement of drug laws); Ben Leapman, *Three in Four Young Black Men on the DNA Database*, SUNDAY TELEGRAPH, May 11, 2006, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/05/nrace05.xml> (noting that in England, all arrested crime suspects have their DNA taken and their profile stored for life, even if they are later cleared or the arrest is found to have been a case of mistaken identity—a system which might perpetuate discrimination against black men). See also *Why So Many Black Women Are Behind Bars*, Posting of Earl Ofari Hutchinson to HUFFINGTON POST blog, http://www.huffingtonpost.com/earl-ofari-hutchinson/why-so-many-black-women-a_b_35409.html (Dec. 2, 2006, 12:33 EST) (describing how black women are also being swept up into the punitive system).

50. See *Anderson v. Burson*, 300 F. Supp. 401 (N.D. Ga. 1968) (requiring women to accept suitable employment or face the loss of welfare payments). For a dramatization of the arrests and use of people not only for cheap labor in prison, but also in chain gangs, see the film *I AM A FUGITIVE FROM A CHAIN GANG* (Warner Bros. Pictures 1932), starring Paul Muni, and the film *THE BALLAD OF THE SAD CAFE* (Home Vision Entertainment 1991), based on the short story by Carson McCullers.

51. See John Lantigua, *How the GOP Gamed the System in Florida*, THE NATION, Apr. 30, 2001, at 14, available at <http://www.thenation.com/doc/20010430/lantigua> (explaining how the Republicans set out on a deliberate course to disenfranchise voters who were likely to vote for the Democrats).

52. 471 U.S. 222 (1985).

53. *Id.* at 232.

54. See, e.g., Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 536-37 (1973). A Mississippi disenfranchisement statute was upheld on the ground that changes to the provision since 1890 had "cured" the

Each attack on a State disenfranchisement statute would require the plaintiffs to prove that "an impermissible racial motivation" existed—a simple task in Alabama, given that disenfranchisement of blacks was one of the principle reasons for the Alabama Constitutional Convention of 1901, when the particular provision under attack was adopted. In other cases, however, even a showing of racial motivation at the inception of the statute would not be sufficient, since it also must be proved that the provision has had a "racially discriminatory impact."⁵⁵

Even the *New York Times* editorial staff has pointed out that race is the basis of "felony" disenfranchisement: "Felon disenfranchisement is a relic of another America. It was often done to keep blacks from voting, or to stigmatize ex-offenders."⁵⁶ The Supreme Court, unfortunately, did not and does not heed such editorials. At this point, therefore, we urge the human and historical basis of the legal case which should have resulted in the striking down of "felony" disenfranchisement.

IV. The Goal of Rehabilitation Is Served by "Felons' Re-enfranchisement"

Although rehabilitation is currently cited as a popular goal of sentencing, it often does not seem as if rehabilitation is taken as seriously as it has been in the past, and as it should be

discrimination. *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). The Eleventh Circuit reached the same result in *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). Even in States with statutes redolent with racism, a State-by-State, cumbersome process would not cure this national disgrace.

55. Compare *Hunter v. Underwood*, 471 U.S. 222 (holding Alabama's felony disenfranchisement statute unconstitutional based on a finding of impermissible racial motivation), with *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (holding that even though plaintiffs proved that defendant employers racially motivated in their hiring practices, plaintiffs also had to prove racially discriminatory impact).

56. Editorial, *Building Better Citizens*, N.Y. TIMES, Oct. 28, 2006, at A14. The Equal Protection Clause and revulsion against racism forbid the exclusion practiced, but other infirmities, such as violation of Section 2 of the Voting Rights Act, have been rejected. See, e.g., *Johnson v. Governor of Florida*, 405 F.3d 1214; *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003); *Allen v. Ellisor*, 454 U.S. 807 (1981) (ignoring arbitrariness). Consequently, litigants have been frustrated in attempts to solve this festering problem by proceeding State-by-State. Presumably, the *New York Times* and others recognize these deficiencies, but the courts have not.

taken.⁵⁷ The Civic Participation and Rehabilitation Act of 1999 set forth the following in its findings: "The right to vote is the most basic constitutive act of citizenship and regaining the right to vote reintegrates offenders into free society."⁵⁸ Some governors have emphasized this aspect. For instance, when Texas Governor Ann Richards visited sessions with prisoners in a successful rehabilitation system she had established, she would start by announcing, "I am an alcoholic," thereby establishing immediate rapport with the prisoners. It is difficult enough to reenter society after serving a prison sentence, and the process is even more difficult when one is not permitted to participate in a basic right that society provides.⁵⁹

In *Cunningham v. California*,⁶⁰ the United States Supreme Court recently held that a court could not increase a child molester's sentence based on evidence the jury had not witnessed. It would follow *a fortiori* that denying the right to vote when such a penalty was never mentioned to the defendant is also an impermissible penalty. The United States houses one-fourth of the prisoners in the world;⁶¹ the racial component of prisoners has been discussed above. Additionally, ex-felons' health and mortality rates are much worse than the health and mortality

57. See FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY* (1964); Jonathan A. Weiss, *The Justification of Punishment*, 25 REV. OF METAPHYSICS 527 (1972).

58. H.R. 906, 106th Cong. (1999). See also Walter Mosley, *The Sounds of Silence*, THE NATION, Feb. 12, 2007, available at <http://www.thenation.com/doc/2007/0212/mosley> (stating the issue precisely as: "Every living, breathing citizen of this land regardless of race, gender, intelligence or criminal history" should be eligible to vote. The denial of the right to vote "is possibly a worse sentence than the one they have already served Allowing prisoners and ex-convicts to vote will keep us honest.").

59. Recently, in a case dealing with convicted sex predators, the New York Court of Appeals held that the State could not eliminate protections against transfers to mental institutions. *New York v. Consilvio*, 859 N.E.2d 508 (N.Y. 2006). The court held that the Correction Law's statutory scheme was meant to "protect an inmate throughout the evaluation process leading to involuntary commitment, absent an emergency as contemplated by Correction Law's § 402(9)." *Id.* at 511-12. If individuals convicted of what currently would be considered a "heinous" crime of "moral turpitude" should receive "due process" rights, then it would follow *a fortiori* that those convicted of any crime labeled as a "felony" should be protected by the Privilege and Immunities Clause and the Equal Protection Clause, which would protect their right to vote.

60. 127 S. Ct. 856 (2007).

61. *Life After Prison Can Be Deadly, A Study Finds*, N.Y. TIMES, Jan. 11, 2007, at A29.

rates of prisoners and the general population.⁶² Six percent of prisons in the United States are now privately owned, thereby adding a profit motive.⁶³ One step towards improving the political and personal health of prisoners would be to give them the opportunity to function in society by allowing them to exercise the franchise that all Americans should cherish.⁶⁴

V. *Richardson v. Ramirez* Is Wrongly Decided

The *Richardson v. Ramirez*⁶⁵ decision, written by Justice Rehnquist, expressed the view of only six members of the court; Justices Marshall and Brennan dissented on the ground that a blanket disenfranchisement could not withstand Constitutional scrutiny. Simply put, we believe that the six justices who chose to uphold the denial of the fundamental right to vote, "the essence of a democratic society," intentionally overlooked the reason for, and the context in which, the right to vote was created. By relying on such a tenuous thread as the exception provided in the rarely invoked Section 2 of the Fourteenth Amendment, the majority blatantly abandoned any pretense of normal constitutional construction.

The majority opinion exhibits not only a disregard for the appropriate conceptual Constitutional considerations we have

62. *Id.*

63. See *Locking in the Best Price*, *ECONOMIST*, Jan. 27, 2007, at 60.

64. We note that Salt Lake City Mayor Rocky Anderson is currently undertaking efforts to rehabilitate those who committed crimes, rather than to banish them from society. See Sasha Abramsky, *The Other Rocky*, *THE NATION*, Jan. 1, 2007, at 11, 14, available at <http://www.thenation.com/doc/20070101/abramsky>; *New York State Bar Ass'n Calls for Sweeping Reform to Help Integrate Former Offenders Back into Society*, N.Y. BAR ASS'N (N.Y. State Bar Ass'n, Albany, N.Y.), Nov. 9, 2006, available at <http://www.nysba.org> (follow "News Center" hyperlink; then follow "News Releases" hyperlink; then follow "New York State Bar Association Calls for Sweeping Reform to Help Integrate Former Offenders Back into Society" hyperlink). See also National Employment Law Projects, *Major U.S. Cities Adopt New Hiring Policies Removing Unfair Barriers to Employment of People with Criminal Records*, Jan. 3, 2007, available at http://www.nelp.org/nwp/second_chance_labor_project/citypolicies.cfm. The report explains that: "Several major cities across the United States (including Boston, Chicago, Minneapolis, San Francisco, St. Paul and the County of Alameda) have adopted significant new policies to limit discrimination in city jobs against people with criminal records." The right to vote should receive no less consideration in the process of rehabilitation than what is being afforded in the area of employment.

65. 65. 418 U.S. 24 (1974).

outlined, but also fails any scrutiny for logical or plausible reading.⁶⁶ One need not winnow out all the folly, rhetoric, and tortured jurisdictional analysis found in Rehnquist's opinion to see that it is without foundation in law or reason, but some highlights do deserve mention. The case dealt with exclusion of ex-felons, whose terms of incarceration and parole had expired, but who were disenfranchised because they were convicted of an "infamous crime."⁶⁷ Neither the State nor the Court ever attempted to define this category of crime, even though a statute must be narrowly construed if it is to pass Constitutional scrutiny.⁶⁸ Surely judicial construction requires precision in definition for exclusion from such a fundamental right as voting.

The convicted felons sought a writ of mandate against this exclusion on the ground that there was no "compelling state interest."⁶⁹ Instead of suggesting what this "state interest" might be, Chief Judge Rehnquist's opinion noted that California's Secretary of State decried the lack of consistency in the application of the exclusion and stated that "authoritative guidelines from either the legislature or the courts are urgently needed."⁷⁰ This urgent need was ignored, leaving no conceivable "state interest."

Justice Rehnquist instead referred to Section 2 of the Fourteenth Amendment, which provides that States will be penalized for exclusion of voters, "except for participation in rebellion, or other crime."⁷¹ Assuming, *arguendo*, that this rarely invoked phrase permits the States to avoid penalization for imposing conditions of voting, rather than to ensure that the

66. It is a shame that a court of last resort reaches for excuses to condone unconstitutional procedures that undermine democracy, rather than expounding in ringing tones the rejection of racism and the affirmation of the basic rights required for the proper functioning of a representative democracy.

67. In Alabama, the Supreme Court restored the right to vote for formerly incarcerated individuals who did not commit crimes of "moral turpitude," but the registrars were then confused about who could re-register to vote. Sentencing Project, *Disenfranchisement News*, Nov. 1, 2006, available at <http://www.sentencingproject.org/NewsDetails.aspx?NewsID=279>.

68. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960).

69. See *supra* Part IV (arguing that the State's real interest should be the rehabilitation of ex-felons).

70. *Ramirez*, 418 U.S. at 34.

71. U.S. CONST. amend. XIV, § 2. See also CROSSKEY, *supra* note 22, at 540-41 (criticizing this language and its apparent permission to allow the State's to abridge rights).

States do not act in an arbitrary, discriminatory, racist manner,⁷² it in no way grants to the States the freedom to act without the required precision. For instance, it is a crime in New York, which can lead to imprisonment, not to appear in court to answer a summons for riding a bicycle in a park. Could all people who then pay the fine be disenfranchised? Such a penalty might be permissive, but it cannot be unconstitutionally vague.

In fact, the *Ramirez* Court acknowledged that there was a better argument. "Defendant ex-felons argued that Section 2 of the Fourteenth Amendment "should be read in conjunction with Section 1 the Fourteenth Amendment, so that the Privileges and Immunities Clause would not apply to "ex-felons." The feeble answer is to rip the words out of that context and nothing more. Justice Marshall refuted this subterfuge succinctly in his dissenting opinion: "[A] discrimination to which the penalty provision of Section 2 is inapplicable must still be judged against the Equal Protection Clause of Section 1 to determine whether judicial or congressional remedies should be invoked."⁷³ Furthermore, even if this were not enough, the term "crimes," in the context in which it is used in the Fifteenth Amendment, must be considered under the well-established doctrine of *ejusdem generis* (the general must follow the specific). For a criminal act to meet that requirement, it must be at the level of "rebellion" as well.

Clutching at Constitutional straws, Justice Rehnquist then relies on the fact that felony disenfranchisement clauses were contemporaneous with the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments and the passage of the accompanying Civil Rights Acts.⁷⁴ As noted above, the States which had sought admission with such statutes in place had passed them with racial motivations, now forbidden, and the complex statute Congress enacted was designed to eradicate the

72. See generally CROSSKEY, *supra* note 22 (arguing that this provision of the Fourteenth Amendment led to the adoption of the Fifteenth and Nineteenth Amendments).

73. *Ramirez*, 418 U.S. at 64-75 (Marshall, J., dissenting).

74. Civil Rights Act of 1886, Ch. 31, 14 Stat. 27 (1886) (codified as amended at 42 U.S.C. §§ 1981-1986 (2006)). The 13th, 14th, and 15th Amendments were passed in concert with the enforcement package of the Civil Rights Acts in order to exirpate past (and to prevent possible future) racist acts and enactments of the sort which Justice Rhenquist instead erroneously shielded in *Ramirez*.

application of such laws. Their existence, well known at the time, argues for the opposite. If Congress had wanted to define “crimes” by any other method than putting it in conjunction with “rebellion” it would have so stated. For example, Congress could have defined “crimes” as “felonies of moral turpitude.” By negative implication, these racist statutes were not included in that language and should not have been stretched out of context and sense to include them. In fact, the Thirteenth, Fourteenth, and Fifteenth Amendments and the accompanying Civil Rights Acts⁷⁵ were designed to get rid of the very acts Justice Rehnquist cites for support.⁷⁶

Karl Marx is reported to have said that he found Hegel standing on his head and corrected Hegel’s idealistic philosophy by putting him back on his feet. Justice Rehnquist found the Amendments and enforcement statutes standing on their feet and stood them on their head. These enactments were designed to eradicate and extirpate racism and its execrable results, rather than to accept and further such a blot on democracy and civilization.

Absent any real Constitutional or statutory support, the Chief Justice relied on previous cases disqualifying bigamists and polygamists from the franchise, suggesting that as long as the statute facially applied to all races, there was no problem.⁷⁷ However, bigamy and polygamy were particular crimes and the precedential value of these cases is dubious, as they were di-

75. *Id.*

76. See Frank Askin, *Barred From the Ballot Box*, LEGAL TIMES, Feb. 26, 2007, available at <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1171965778363>. Askin explains that: “It was Rehnquist’s opinion in 1974, in *Richardson v. Ramirez*, that has allowed 48 of our 50 States and the District of Columbia to bar anyone convicted of a crime from voting. Thirty-five of those States continue the practice even after the offender has completed his sentence.” Askin goes on to attack Rehnquist’s “cynical sleight of hand” in reinterpreting Section 2 of the Fourteenth Amendment as

an affirmative authorization for the States to disenfranchise blacks—and anyone else—so long as the States first convicted them of a crime As Justice Thurgood Marshall said in dissent in *Ramirez*, this was in direct disregard of the ‘historical purpose’ of the Section 2 proviso, which was to ‘put Southern States to a choice—enfranchise Negro voters or lose congressional representation.’

Id.

77. *Ramirez*, 418 U.S. at 53 (citing *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Davis v. Beason*, 133 U.S. 333 (1890)).

rected against religious groups. Additionally, the Court overlooked the fact that "disenfranchisement" must be considered a "punishment." In the words of the Lord High Executioner in the Mikado, "make the punishment fit the crime."⁷⁸ This policy is central to a civilized rational criminal law.

First, "notice" is an important component of criminal law.⁷⁹ Before a punishment is applied, the law that has allegedly been violated must clearly specify what conduct is forbidden. This is necessary in order to ensure both that there is no arbitrariness by the State as to whom will be punished and also to give individuals the clear opportunity to conform their conduct to the law's dictates. This principle also extends to sanctions. Specific sanctions are attached to specific forbidden conduct in order not only to indicate the amount of societal disapproval and the necessity for societal protection, but also to advise people how much "time" they must serve if they commit the "crime." "The purpose of notice is to encourage deterrence in the individual's calculus of chosen activities."⁸⁰ Generic sanctions are, by definition, not specific. Disenfranchisement is generic. It even raises the specter of a bill of attainder.⁸¹ To permit the imposition of such a non-specified and non-anticipated general sanction applied erratically across an entire nation is to condone arbitrary infliction of harm, which violates both due process and equal protection.

Disenfranchisement applies to a broad category of ex-felons. Unless, as noted above, a statute (which still might be unconstitutional) includes disenfranchisement as its "punish-

78. That this epigram is not always followed should be a cause for alarm to the Bar, not an invitation to extend punitive effects against fundamental rights with neither notice nor reason. See Kristin Choo, *Run-On Sentences: ABA, Others Focus on Easing the Added Punishments for Those Convicted of Crimes*, 93 A.B.A. J. 64 (2007).

79. See ALLEN, *supra* note 57.

80. As we have noted elsewhere, such sanction-specific attachment is abused by overcharging to force a plea bargain to a "lesser included" crime. See Jonathan A. Weiss, *A Road Not Taken*, 26 SETON HALL LEGIS. J. 415 (2002) [hereinafter *A Road Not Taken*].

81. See generally *United States v. Brown*, 381 U.S. 437, 458 n.32 (1965) (invalidating the Labor-Management Reporting and Disclosure Act of 1959, which made it a crime for a member of the Communist Party to serve as an officer of a labor union, was void as a bill of attainder) (citing Note, 72 YALE L.J. 330, 339-40 (1972)).

ment,” and the felon is informed in his allocution that he will lose the right to vote following his release from prison, disenfranchisement cannot be characterized as “punishment” in the normal sense. Instead, it must be characterized as an improper infliction of the deprivation of democratic rights on those who have already undergone the judicial process and its consequences.

Wrongly decided as we believe *Ramirez* to have been, it is not our intent or purpose, at this time, to construct a more detailed argument for its overruling. We have already established its invalidity, and we believe, based on the current makeup of the Court, that there will not be any judicial relief in the distant future. Therefore, we now propose the only practical solution for Congress—to take action and exercise its legislative power as a remedy to the travesty visited on so many by the Supreme Court in its *Ramirez* decision.

A. *Congress Must Act To Prevent Disenfranchisement*

The National Commission on Federal Election Reform, headed by former Presidents Carter and Ford, “has urged that states restore the vote to those who have completed their sentences. More recently, 31 U.S. Senators voted for a measure that would have restored suffrage, at least for participation in federal elections, to ex-felons.”⁸²

Congress has the power and it has the duty to deconstruct these myriad statutes in one action, which would be applicable across the nation and would provide uniformity to the voting process. It must act now. We emphasize that while the Supreme Court has arrogated to itself the position and status of final arbiter as to Constitutional issues involved in disputes,⁸³ Congress is designed by the Constitution to protect and further Constitutional principles. Congress is designed to protect ac-

82. Sasha Abramsky, *At the Corner of Prison Row and Polling Place*, FT. WORTH-STAR TELEGRAM, Nov. 6, 2006, at B11. The United States is in the bottom one-fifth of democracies in the world for turnout of voters (48%). Mark Green, *How to Fix Our Democracy*, THE NATION, March 12, 2007, at 20, 21. We hope that the current court and executive effect upon the United States Constitution will not reduce it to the hoax of a Constitution (a parody) described in ALEXANDRE DUMAS, CAPTAIN PAMPHILE (Hesperus Press 2006) (1892).

83. See *Marbury v. Madison*, 5 U.S. 137 (1803).

cess now denied to voters—an important companion to the franchise being properly extended on a national basis.⁸⁴

At least half of the people in the United States believe that Congress is corrupt and disapprove of the way in which it is doing its job.⁸⁵ This is primarily based on the manner in which that body is failing to carry out its Constitutional responsibilities. Congress is failing to respond to the fundamental needs of the people as that branch of government is meant to do and, instead, is shamelessly pandering to the special money interests in the country. Congress is not truly a body representative of the populous for many reasons, including its destruction of the right to vote. Congress has failed to provide effectively for its own election, leaving that important decision to a hodgepodge of State processes, many of which, unfortunately, have been designed to restrict the very voter participation which would insure that the Congress would be a more representative body and, thus more responsive to its constituency. This constitutes an abdication of Congress's Constitutional duty now in *pari delictu* with the Supreme Court's denial of its duties.⁸⁶

Along with fulfilling its duty to prescribe the qualifications for voting in national elections, there also is a great need for Congress to protect the integrity of those elections by mandating that all voting systems be capable of undergoing a manual determination of their accuracy.⁸⁷ There is absolutely no doubt that Congress has the power to remedy the travesty wrought by those States which still practice disenfranchisement, so far as it prevents these ex-felons from voting in federal elections or to others sanctioned as an unstated additional penalty. Article I,

84. See Katrina Vanden Heuvel, *Top 10 for a More Perfect Union*, THE NATION, Jan. 22, 2007, at 18, available at <http://www.thenation.com/doc/20070122/kvh> (describing the benefits of the Voter Confidence and Increased Accessibility Act).

85. For many years, Jim Hightower has detailed corruption in Texas and Washington, D.C. However, in December 2006, he spotted some rays of hope so that the current Congress might be able to pass some decent legislation, such as that we suggest. See Jim Hightower, *Reasons to Be Cheerful. . . and Vigilant: It Was a "Throw the Bums Out" and "Change America's Direction" Election*, HIGHTOWER LOWDOWN, Dec. 2006, available at <http://www.hightowerlowdown.org/node/982>.

86. See Derfner, *supra* note 54.

87. See *supra* notes 57 and 58.

Section 4 of the Constitution provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, *Shall be prescribed in each State by the Legislature thereof . . .*”⁸⁸ Most importantly, it goes on to state that “the Congress may at any time by Law *make or alter such Regulations . . .*”⁸⁹ That wording, coupled with the additional Constitutional power given Congress to prevent the denial or abridgement of the right to vote based on a “previous condition of servitude,”⁹⁰ would sound Congress’s action in the Fifteenth Amendment.⁹¹

Having clearly established that Congress has the power to remedy disenfranchisement, we will address the main point—Congress has the pressing obligation, and a compelling duty, to enact such legislation.

B. *Why Congress Must Act*⁹²

It should be unthinkable that a country, in which approximately 4.7 million citizens are prohibited from voting by the States in which they reside as a result of felony convictions, 1.7 million of which have completed their sentences, can hold itself out to the rest of the world as a model democracy.⁹³ This seems to constitute not only the height of hypocrisy, but also an abandonment of the commitment to extend the “essence of democracy” to all free citizens. Yet, this is precisely the posture in which the United States finds itself. This has been brought about as a result of Congress’s abdication of its Constitutional responsibility to provide for a comprehensive system of voting in federal elections. Instead, Congress has acquiesced, thus far, by silence, to a lifetime of disenfranchisement for any crime labeled a felony by the States, regardless of the nature of the

88. U.S. CONST. art. I, § 4 (emphasis added).

89. *Id.* (emphasis added).

90. U.S. CONST. amend. XV, § 1.

91. *See also supra* Part II; *Oregon v. Mitchell*, 400 U.S. 112 (1970).

92. We hope that articles like this may help. *See, e.g.,* Jonathan Weiss & Oscar Chase, *The Case for Repeal of Section 383 of New York Social Services Law*, 4 COLUM. HUM. RTS. L. REV. 325 (1972). After this article was cited subsequently in *Organization of Foster Families v. Dumpson*, 425 U.S. 988 (1976), it provided the rationale for father’s rights in *Stanley v. Illinois*, 405 U.S. 645 (1972), and ultimately led to the repeal of Section 838. *See generally A Road Not Taken, supra* note 77 (seeking a call for legislation in another area where the courts have failed).

93. *See The Case Against Felony Disfranchisement*, DEMOS, Oct. 24, 2006, available at http://www.demos.org/pubs/CFE_felonydis_102406.pdf.

crime, the length of jail time to which a convicted individual is sentenced or the fact that the prescribed time has been served.

This hypocritical pretense came to international attention in July of this year in an action by the United Nations' Human Rights Committee. After a review of the United States' compliance with a treaty governing civil and political rights, the Committee concluded that the United States' practice of denying the vote to people with felony convictions was discriminatory and violated international law. The Committee called for the restoration of "voting rights to citizens who have fully served their sentences and those who have been released on parole."⁹⁴

These disenfranchisements have a profound effect on the outcome of elections. For instance, in the 2000 election, Florida allegedly denied the vote to approximately 614,000 "ex-felons."⁹⁵ No one can doubt or deny the impact this had upon the selection of George W. Bush as president in an election decided by five hundred votes.⁹⁶ Similarly, more than 200,000 potential voters

94. *ACLU of Mississippi Shares U.N. Concerns About Human Rights Violations*, HUMAN RTS. UPDATE, (ACLU/Human Rts. Project, New York, N.Y.), Aug. 2, 2006, available at <http://www.aclu.org/intlhumanrights/gen/26358prs20060802.html>. See also *Hirst v. United Kingdom*, 16 Eur. Ct. H.R. 409 (2004) (holding that denying prisoners the right to vote was in breach of Article III of Capital Protocol Number One of the Capital Convention on Human Rights).

In its August 25, 2006, newsletter, the American Civil Liberties Union (ACLU) published the following statement concerning the United Nations Action:

If the U.N. recommendations are implemented, 36 States would change their laws and nearly four million Americans would have their voting rights restored. Internationally, adopting the U.N. recommendations would bring the U.S. in line with the voting rights standards of nations such as Switzerland, Austria, and Ireland whose laws already allow for post-prison restoration of voting rights.

U.N. Committee Says U.S. Bans on Former Prison Voting Violate International Law, VOTING RTS. UPDATE (ACLU/Voting Rts. Project, New York, N.Y.), Aug. 25, 2006, available at <http://www.aclu.org/votingrights/exoffenders/26546res20060825.html>. The recommendations follow hearings held on July 17 and 18, 2006 in Geneva, Switzerland, where United States compliance with the International Covenant on Civil and Political Rights (ICCPR) was assessed. Voting rights emerged as an area of particular concern for committee members.

95. See Juan Gonzalez, *Never Again: The Real Election Scandal was the Disenfranchisement of Black Voters*, IN THESE TIMES, Jan. 8, 2001, at 14.

96. See Dan Keating & Dan Balz, *Florida Recounts Would Have Favored Bush*, WASH. POST, Nov. 12, 2001, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A12623-2001Nov11.html>.

were disenfranchised in Alabama in 2000.⁹⁷ Nearly half of these were African American.⁹⁸ Given the tradition of blacks in this country, particularly in the south, to vote for Democratic candidates, and given the fact that many non-black ex-felons are also from groups likely to vote in that way, there is no doubt that their participation in the election would have directly impacted the outcome, at both the local and national levels.⁹⁹ Common sense dictates that national elections not be affected by local practice.¹⁰⁰

VI. Conclusion: Congress Should Act Now

More and more States, such as Rhode Island, which recently changed its law on disenfranchisement, have acted to remove these restrictions.¹⁰¹ Yet, far too many still impose voting restrictions and the removals are too piecemeal and uncertain for Congress to continue to ignore its Constitutional responsibility.¹⁰² Some enlightened States have acted, but the Supreme Court has failed, and the nation has been penalized. Now is the

97. See Sasha Abramsky, *Barring Democracy*, MOTHER JONES, Oct. 17, 2000, available at <http://www.motherjones.com/news/feature/2000/10/felonvote.html>.

98. *Id.*

99. *Id.*

100. For example, Maryland has a law that makes their Presidential Electoral College vote for whomever wins the popular vote, thus federalizing the state election of presidential candidates. See Editorial, *An American Way to Elect a President*, WASH. POST, April 15, 2007, B6. On this same note, the Supreme Court has recently expressed similar concerns in protecting national bank subsidiaries from local regulation. See *Watters v. Wachovia Bank*, No. 05-1342, 550 U.S. ___, 2007 U.S. LEXIS 4336 (April 17, 2007).

101. See ALLARD & MAUER, *supra* note 16 (discussing and updating state progress on disenfranchisement issues); see also *Rhode Islanders Applauded for Passing Initiative Restoring Vote to Citizens on Parole and Probation*, ASCRIBE NEWswire, Nov. 10, 2006 (on Nov. 7, 2006 Rhode Island voter approved Question 2 restoring voting rights to ex-felons). Other states, such as, Florida, have also made progress on re-enfranchisement of felons. The Florida legislature recently reversed an old "Jim Crow" law, restoring voting rights to all but the most violent felons. See Tonyaa Weathersbee, *Crist Restored Civil Rights and Ended Effects of Jim Crow Law*, TIMES-UNION (Jacksonville, Fla.), April 14, 2007. Maryland's Governor recently signed into law the "Voting Registration Protection Act," restoring voting rights to over 50,000 Maryland residents who have completed their prison sentences or parole. See Andrew A. Green, *Felons Gain Right to Vote*, BALTIMORE SUN, April 25, 2007, N1. Congress can and should make this trend National.

102. See Sentencing Project, *Disenfranchisement News: Year in Review*, Dec. 19, 2006, available at <http://www.sentencingproject.org/NewsDetails.aspx?NewsID=307>.

time for Congress to recognize its constitutional command and further the functioning of a representative democracy. The time is now to fulfill the possibility available.

Representative John Conyers previously introduced the following bill:

The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election.¹⁰³

The Conyers' bill is simple and straightforward (marking the first step towards satisfying one category of our distinctions). Moreover, it is extremely difficult to understand Congress's resistance to the enactment of this legislation, given that a survey conducted by Harris Interactive in July 2002 indicated that eighty percent of respondents believed that all ex-felons, individuals who have served their entire sentences and are now living in the communities, should have the right to vote.¹⁰⁴

Senator Hillary Rodham Clinton has recently reintroduced the Count Every Vote Act, a section of which provides for the automatic restoration of ex-offenders in all federal elections.¹⁰⁵ Hopefully, it will pass during this session of Congress and fi-

103. Civic Participation and Rehabilitation Act, H.R. 1300, 109th Cong. (2005).

104. Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275 (2004).

105. On March 7, 2007, New York Senator Hillary Rodham Clinton and Ohio Representative Stephanie Tubbs Jones reintroduced the Count Every Vote Act in both houses of Congress. The statement released by Senator Clinton included the following statement concerning the re-enfranchisement of ex-offenders:

To ensure that citizens have the ability to vote in a timely and efficient manner, the Count Every Vote Act requires states to work to reduce wait times for voters at polling places. It also designates Election Day a federal holiday and requires early voting in each state in order to encourage more citizens to exercise their right to vote. The bill also enacts "no-excuse" absentee balloting, enacts fair and uniform voter registration and identification, and requires states to allow citizens to register to vote on Election Day. *In addition, the legislation restores voting rights for ex-offenders who have repaid their debt to society.*

Press Release, Senator Hillary Clinton, Senator Clinton, Representative Tubbs Jones Announce Reintroduction of Major Election Reform Bill (March 7, 2007), available at <http://clinton.senate.gov/news/statements/record.cfm?id=270254> (emphasis added).

nally exorcise *Ramirez* and its evil progeny from our society. We certainly have seen two steps backward, now let us hope we take one step forward for democracy.