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ESSAY

DISFRANCHISING FELONS  
(OR, HOW WILLIAM REHNQUIST EARNED HIS STRIPES)

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Section 2 of the Fourteenth Amendment threatened the former slave states with reduction in their congressional representation if they denied voting rights to otherwise eligible inhabitants for any reason other than "participation in rebellion, or other crime."<sup>1</sup> The loss-of-representation provision has never been enforced despite a century of almost total exclusion of blacks from the ballot box by the former Confederate states. Prior to the passage of the Voting Rights Act more than a hundred years after the Civil War, Southern whites were able to dominate the United States House of Representatives in the absence of any retaliation for black disfranchisement under Section 2.

Then, in 1974, the United States Supreme Court found a use for Section 2. In *Richardson v. Ramirez*, the majority, in an opinion by then-Justice William Rehnquist, held that Section 2 authorized the states to deny voting rights to any person convicted of a "crime"<sup>2</sup> even

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1. In toto, Section 2 states:

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 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.

2. See 418 U.S. 24, 54-56 (1974).

though the consequence of such laws was to sharply reduce the voting power of the black community because of the disproportionate conviction rate between racial minorities and whites.

The Rehnquist opinion turned Section 2 on its head. A provision intended to protect the voting rights of the freed slaves was transformed into an authorization for the former Confederate states to continue to disfranchise freed slaves and their descendants through arrest and conviction. Even though Congress subsequently passed the Voting Rights Act to prohibit standards or practices that have the effect of making it more difficult for racial minority groups to elect representatives of their choice<sup>3</sup> (which felon disfranchisement laws clearly do), the Rehnquist opinion in *Richardson v. Ramirez* remains a formidable stumbling block to challenging such laws.

In recent years, there have been three significant challenges to felon disfranchisement laws under § 2 of the Voting Rights Act. Split opinions in two federal courts of appeals, the Eleventh Circuit<sup>4</sup> and Second Circuit,<sup>5</sup> have rejected such challenges, while the Ninth Circuit has endorsed the argument and remanded the case against the State of Washington to the district court for further proceedings.<sup>6</sup> The United States Supreme Court denied certiorari in the Eleventh and Ninth Circuit cases, leaving the Florida decision to stand, and allowing the Washington case to proceed to trial.

Although the Second and Eleventh Circuits based their rulings in part on interpretation of the Voting Rights Act, they did so under clear compulsion from *Richardson*. As the Second Circuit opinion in *Hayden v. Pataki* put it: "The starting point for our analysis is the explicit approval given felon disfranchisement provisions in the Constitution. . . . The Supreme Court has ruled that, as a result of this language, felon disfranchisement provisions are *presumptively constitutional*."<sup>7</sup>

A similar constitutional analysis undergirded the Eleventh Circuit decision upholding Florida's disfranchisement law in *Johnson v. Governor of Florida*. Relying on *Richardson*, the court stated that "the plaintiffs' interpretation creates a serious constitutional question by interpreting the Voting Rights Act to conflict with the

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3. 42 U.S.C. § 1973(b) (2006).

4. *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc), cert. denied, 546 U.S. 1015 (2005).

5. *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc), clarified by No. 04-3886-pr, 2006 U.S. App. LEXIS 13922 (2d Cir. June 1, 2006).

6. *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), reh'g denied, 359 F.3d 1116 (9th Cir. 2004) (en banc), cert. denied sub. nom., *Locke v. Farrakhan*, 543 U.S. 984 (2004).

7. 449 F.3d at 316 (citing *Richardson*, 418 U.S. at 24) (emphasis added).

text of the Fourteenth Amendment.”<sup>8</sup> In order to avoid such constitutional conflict, both the Second and Eleventh Circuits invoked some formulation of the “clear statement” rule, which the Second Circuit described as “a canon of interpretation which requires Congress to make its intent ‘unmistakably clear’ when enacting statutes that would alter the usual constitutional balance between the Federal Government and the States.”<sup>9</sup>

Some of the judges who addressed the issue of the legality of felon disfranchisement laws under the Voting Rights Act were even more blunt as to the impact of *Richardson*. Judge Alex Kozinski, for example, in dissenting to the Ninth Circuit’s remand of *Farrakhan v. Washington*, said applying the Voting Rights Act to such provisions “seriously jeopardizes its constitutionality. . . . If Congress had intended the VRA to reach felon disfranchisement laws, the only constitutional violations it had authority to remedy are the type recognized in *Hunter*: the purposeful, invidious use of those laws to deprive minorities of the right to vote.”<sup>10</sup>

Thus, there can be little doubt that efforts to challenge felon disfranchisement laws under the Federal Voting Rights Act run smack up against Rehnquist’s indefensible opinion in *Richardson*. The fact that Rehnquist’s subsequent opinion in *Hunter v. Underwood* allowed for Equal Protection challenges on disfranchisement laws enacted with invidious intent by a legislature offers no succor. As Judge Kozinski noted:

*Hunter* violations are exceedingly rare. . . . *Hunter* involved a provision of the Alabama Constitution of 1901 that denied the right to vote to persons who had committed crimes of “moral turpitude.” The 1901 Constitution was an egregious example of post-Reconstruction disfranchising constitutions. Accordingly, plaintiffs were able to produce a mountain of evidence of discriminatory intent in its passage, together with evidence of continuing discriminatory effect in its application . . . .<sup>11</sup>

No modern legislature would allow itself to be caught so red-handed. Indeed, Florida escaped a *Hunter* challenge by reenacting its 1868 disfranchisement provisions in 1968 with some relatively minor changes.<sup>12</sup>

In the 2000 presidential election, more than 4.5 million otherwise eligible voters were denied the franchise because of

8. *Johnson*, 405 F.3d at 1230.

9. *Hayden*, 449 F.3d at 323.

10. 359 F.3d at 1121 (citing *Hunter v. Underwood*, 471 U.S. 222, 233 (1985)).

11. *Id.* at 1121-22.

12. *Johnson*, 405 F.3d at 1224.

criminal convictions.<sup>13</sup> Because each state decides whether and for how long to disfranchise convicted persons, the percentages vary greatly from state to state. Florida and Alabama, which enforce what are essentially lifetime bans, have the highest percentage, 6.24% and 6.21%, respectively. Vermont and Maine debar no one, allowing even incarcerated felons to vote from prison.<sup>14</sup>

Not surprisingly, the racial disparities are equally stark. In thirteen states, more than ten percent of the black population is disfranchised.<sup>15</sup> Is it merely fortuitous that the two states that eschew felon disfranchisement are among the whitest in the country? Perhaps not coincidentally, of the six states in which more than five percent of the voting age population is debarred as a result of conviction, four were part of the Confederacy—Alabama, Florida, Mississippi, and Virginia.<sup>16</sup> But such is the consequence of the flawed analysis in *Richardson*.

While Justice Rehnquist offered scant historical support for his strained interpretation of Section 2, Justice Thurgood Marshall was much more persuasive as to the purpose of Section 2 in his dissent:

The historical purpose for § 2 itself is, however, relatively clear and, in my view, dispositive of this case. The Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance. There were two alternatives available—either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time. Section 2 of the Fourteenth Amendment was the resultant compromise. It put Southern States to a choice—enfranchise Negro voters or lose congressional representation. . . .

It is clear that § 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment. Section 2 provides a special remedy—reduced representation—to cure a particular form of electoral abuse—the disenfranchisement of Negroes. There is no indication that the framers of the provisions intended that

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13. Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIOLOGICAL REV. 777, app. tbl. A at 797 (2002).

14. ELIZABETH A. HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* 10 (2006).

15. *Id.* at 11-12.

16. *See id.*

special penalty to be the exclusive remedy for all forms of electoral discrimination.<sup>17</sup>

Whether or not Justice Marshall got the legislative history absolutely right, it is illogical to find—as did Justice Rehnquist—that Section 2 *authorized* the states to do indirectly what they could not do directly under Section 1 of the Fourteenth Amendment, or under the later-adopted Fifteenth Amendment: bar freed slaves from voting by charging and convicting them of crimes. The furthest that interpretation of Section 2 can logically carry is to say that congressional representation of a state could not be reduced because voters had been excluded for conviction.

Interestingly, four years before *Richardson* was decided, the State of New Jersey posited a similar argument under Section 2 before a three-judge district court panel in a case challenging the state's then-existing felon disfranchisement statute.<sup>18</sup> A unanimous opinion by Judge John Gibbons, later chief judge of the Third Circuit, dismissed the argument out of hand.<sup>19</sup> Relying on United States Supreme Court decisions protecting voting rights under the Equal Protection provisions of Section 1 of the Fourteenth Amendment, Judge Gibbons wrote:

The defendant argues that there appears in section 2 of the fourteenth amendment the language 'except for participation in rebellion, or other crime', and that this language is an express recognition of the right of the states to disenfranchise convicted criminals. The quoted language does not advance the defendant's position however. It is an express exception or proviso in section 2, which in its general terms imposes a penalty on those states which disenfranchised for reasons other than rebellion or crime. Since it is now clear that the entire section 2 imposes no limitation on section 1, it can hardly be argued that the exception or proviso in section 2 was intended to impose such a limitation.<sup>20</sup>

It is hard to envision how objective, nonpartisan decision makers could have come to any other conclusion than did Justice Marshall and Judge Gibbons.

As the so-called War on Drugs has escalated over the past twenty years, the racially disparate impact of felon disfranchisement has increased exponentially, even though survey research indicates

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17. *Richardson v. Ramirez*, 418 U.S. 24, 73-74 (1974) (Marshall, J., dissenting) (footnotes omitted).

18. See *Stephens v. Yeomans*, 327 F. Supp. 1182, 1184 (D.N.J. 1970).

19. *Id.* at 1186-87.

20. *Id.* (footnote omitted).

little disparity in drug use among racial groups.<sup>21</sup> In New Jersey, for example, the percentage of the prison population incarcerated for drug offenses rose from twelve to thirty-four percent from 1982 to 2001, while the percentage of inmates who were white dropped from thirty-two to eighteen percent.<sup>22</sup> These figures are not surprising in light of everything we have learned in recent years about police profiling. Unlike crimes with an identifiable victim (e.g., murder, rape, or assault), drug arrests typically result from proactive police investigation. So, who is investigated and arrested (and prosecuted and convicted) depends largely on where police look and who they look at. The natural tendency of police to target vulnerable individuals and communities was augmented by the 1986 Comprehensive Drug Reform Act, which led to the targeting of inner city neighborhoods where the population is overwhelmingly minority.<sup>23</sup>

But while the negative impact of felon disfranchisement laws on the political clout of the racial minority community grows and grows, even as our prisons burst at the seams, the *Ramirez* and *Hunter* opinions seem to make it all but impossible for the minority community to find relief in the courts unless they can do the impossible and prove that the legislators who enacted those laws deliberately intended to undermine the voting strength of the minority community.

Opponents of judicial intervention invariably argue that proponents should take their case to the legislatures. Such arguments are little short of demagoguery. Representatives from predominantly white voting districts realize that it is nigh to political suicide to support reenfranchisement bills, which are regularly introduced by African American and Latino legislators. Since the common perception is that criminals are predominantly members of minority groups, many white voters can be manipulated fairly easily by veiled racial campaigning against anyone who backs such proposals. (Think Willie Horton!)

The fact is that felon disfranchisement is the paradigmatic issue that demonstrates the logic and necessity of the historic footnote four of the United States Supreme Court's decision in *United States v.*

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21. See CIVIL RIGHTS COALITION FOR THE 21ST CENTURY, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 38 (Apr. 2000), <http://www.civilrights.org/publications/reports/cj/justice.pdf>.

22. See VINCENT SCHIRALDI & JASON ZEIDENBERG, JUSTICE POLICY INST., COSTS AND BENEFITS?: THE IMPACT OF DRUG IMPRISONMENT IN NEW JERSEY 10, 13 (Oct. 2003), [http://www.justicepolicy.org/images/upload/03-10\\_REP\\_NJCostBenefits\\_DP.pdf](http://www.justicepolicy.org/images/upload/03-10_REP_NJCostBenefits_DP.pdf).

23. See MICHAEL COYLE, THE SENTENCING PROJECT, RACE AND CLASS PENALTIES IN CRACK COCAINE SENTENCING 8-9 (2002), <http://www.sentencingproject.org/pdfs/5077.pdf>.

*Carolene Products*,<sup>24</sup> the origin of modern strict scrutiny doctrine. As explained by Chief Justice Stone, normal doctrines of deference to the majoritarian legislative process may be inappropriate in situations where "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . ." <sup>25</sup> It is hard to imagine an issue more in need of strict judicial scrutiny than one that results in the dilution of the political power of racial minorities in the guise of punishing criminals. Yet *Richardson* appears to prohibit strict scrutiny.

There are, of course, those who would argue that disfranchisement of convicted criminals is an appropriate penalty for lawbreakers. And there is at least a rational argument that, so long as felons are incarcerated, disfranchisement is both an appropriate part of their punishment and an administratively necessary regulation.<sup>26</sup>

But, once offenders are presumptively rehabilitated and released back into society, there appears to be no clear public policy as to why voting rights should not be restored along with most other civil rights.<sup>27</sup> This is strikingly demonstrated by the disagreement among the other forty-eight states as to when reenfranchisement should occur. In fifteen states and the District of Columbia, voting rights are restored immediately upon release from prison.<sup>28</sup> In three other states, probationers can vote.<sup>29</sup> In some fifteen other states, the franchise is reinstated after completion of parole.<sup>30</sup> The remaining fifteen states have some form of lifetime disbarment absent some type of executive reinstatement proceeding.<sup>31</sup> The absence of any political consensus on the issue is in sharp contrast to the general consensus among professional criminologists and penologists that disfranchisement serves no legitimate goals of punishment and is detrimental to the rehabilitative goals of parole and probation.<sup>32</sup>

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24. 394 U.S. 144, 152 n.4 (1938).

25. *Id.*

26. Although even that argument runs up against the fact that in two states (Maine and Vermont), as well as in many other industrialized nations, incarcerated felons may vote. See *infra* notes 34-36.

27. This case is made quite convincingly by Professor Pamela Karlan and her arguments will not be repeated here. See generally Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004).

28. Hull, *supra* note 14, at 7-8 tbl. 2.

29. *Id.*

30. *Id.*

31. *Id.*

32. See Brief for Certain Criminologists as Amici Curiae Supporting Petitioners, *New Jersey State Conference-NAACP v. Harvey*, 895 A.2d 450 (N.J. 2006), *denying cert.*

United States practices in this regard are also highly inconsistent with those of most other nations. And while we are, of course, not bound by the practices of other nations, a "decent respect to the opinions of mankind"<sup>33</sup> does not allow us to completely ignore them either.

Among European nations, denial of voting rights to anyone not actually incarcerated is extremely rare, and is usually only imposed by a court deliberately, for very specific offenses. Seventeen European countries allow all incarcerated prisoners to vote, and only eleven have a blanket ban, most of them being in Eastern Europe where democratic traditions are largely absent.<sup>34</sup> Even those prohibitions are now in doubt, as a result of a ruling by the European Court of Human Rights that the United Kingdom's blanket ban on prisoner voting was unacceptable "in light of modern day penal policy and of current human rights standards."<sup>35</sup>

On this side of the Atlantic, the Canadian Supreme Court came to a similar conclusion, holding that felon disfranchisement "has no place in a democracy built upon principles of inclusiveness, equality, and citizen participation."<sup>36</sup> The Canadian high court also reminded us of an elementary principle of the cherished American notion of due process of law: "[P]unishment must not be arbitrary and must serve a valid criminal law purpose."<sup>37</sup>

Considering the variety of policies adopted by the fifty states and the District of Columbia, it is hard to conclude that the disfranchisement policies of the various states are anything but arbitrary. While it is next to impossible to definitively prove empirically for whom the disfranchised would have voted if they had been allowed to vote, there can be little argument that reducing electoral participation by minority voters redounds to the benefit of Republican candidates.<sup>38</sup> As Chief Justice William Howard Taft once wrote, "[A] court must be blind not to see [that which] . . . [a]ll others

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to 885 A.2d 445 (N.J. Super. Ct. App. Div. 2005) (No. C-522). A petition for review is pending in the Inter-American Commission on Human Rights (IACHR), claiming that New Jersey's disfranchisement law violates the American Declaration of the Rights and Duties of Man.

33. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

34. A catalog of practices in other countries is contained in a recent ACLU report. See AMERICAN CIVIL LIBERTIES UNION, OUT OF STEP WITH THE WORLD 5, [http://www.aclu.org/images/asset\\_upload\\_files825\\_25663.pdf](http://www.aclu.org/images/asset_upload_files825_25663.pdf).

35. *Hirst v. United Kingdom* (No. 2), 681 Eur. Ct. H. R. at 25 (2005).

36. *Sauvé v. Canada*, [2002] 218 D.L.R. 4th 577, 579 (Can.).

37. *Id.* at 607.

38. The only academic researchers who have actually studied the issue do believe that the evidence for this proposition is quite compelling. See Jeff Manza and Christopher Uggen, LOCKED OUT 192 (2006).



can see and understand . . .”<sup>39</sup> Especially in the case of Florida, in the 2000 presidential election, there is little doubt that if tens of thousands of predominantly African American ex-felons (and alleged ex-felons) had not been turned away from the polls, Florida’s decisive electoral votes would have gone to Albert Gore, Jr., the Democratic candidate.<sup>40</sup> Some might even say that President Bush owes his election to then–Justice Rehnquist’s decision in *Richardson v. Ramirez*.

In this regard, it might also be relevant to recall that, according to a number of witnesses who testified at the 1971 and 1986 Senate hearings on his nomination as Associate Justice and Chief Justice, respectively, William Rehnquist aggressively challenged and harassed black and Hispanic voters as a Republican poll worker in the 1960 and 1962 elections in Phoenix, Arizona.<sup>41</sup>

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39. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922).

40. *Manza and Uggen*, *supra* note 38, at 192.

If disenfranchised felons in [Florida] had been permitted to vote, Al Gore would certainly have carried the state and thus the election. There are more disenfranchised felons in Florida than in any other state (approximately 827,000 in 2000). Had they participated at our estimated rate of Florida turnout (27.2 per cent) and national Democratic preference (68.9 per cent), Gore would have carried the state by more than 80,000 votes. But even if we make drastically more conservative assumptions, Gore would still win.

*Id.*

41. *See Nomination of William Hubbs Rehnquist to be Chief Justice of the United States Before the Senate Judiciary Committee*, 99th Cong. 144-49, 156-63, 170, 984-86 (1986). The most damning testimony was presented by James Brosnahan, who in 1962 was an Assistant United States Attorney in Phoenix. He testified that in November 1962 he was assigned the task of receiving complaints alleging illegal interference with the voting process on election day. When he and an FBI agent, in response to complaints, went to one of the polling places, Rehnquist, who he knew personally, was there challenging voters. Brosnahan testified:

I do recall that the complaints had to do with him. And on one point, I am very clear. I showed him my identification coming from the Department of Justice. On that day, we were investigating under the then existing law, which included 18 U.S.C. § 594, which made it a misdemeanor to intimidate, threaten coerce, or attempt to intimidate, threaten or coerce any other person for the purpose of interfering with the right of such other person to vote.

*Id.* at 985 (statement of James Brosnahan). Noting that Rehnquist denied he had ever attempted to challenge the qualifications of any voter, Brosnahan testified: “This does not comport with my recollection of the events I witnessed in 1962, when Mr. Rehnquist did serve as a challenger.” *Id.* at 986. The issue surfaced again early in 2007 with the release, under the Freedom of Information Act, of the FBI’s files relating to Rehnquist’s confirmation hearings. Therein it was revealed for the first time that the FBI had been instructed to question witnesses prepared to testify about Rehnquist’s poll-watching activities in Phoenix in what some felt was an effort to intimidate the witnesses. *See Tony Mauro, Rehnquist Revisited*, *LEGAL TIMES*, Jan. 8, 2007.

Could it thus be said that Chief Justice Rehnquist earned those gold stripes on his black robe from the Republican National Committee?