THE BULLET AND THE BALLOT?
THE CASE FOR FELON DISENFRANCHISEMENT STATUTES

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New York City patrolmen Waverly Jones and Joseph A. Piagentini
seemed like police partners from a Hollywood movie: Jones, a thirty-
three-year-old African-American, lived in the Bronx, while Piagentini,
twenty-eight and white, grew up in Long Island. Both had graduated
from the same Police Academy class and joined the force on the same

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Piagentini, the Center for Equal Opportunity, and the Criminal Justice Legal Founda-
tion in the Munoz v. Coenme Second Circuit en banc appeal. Many of the argu-
ments set forth in this article were presented in that amici brief.
day, and were assigned to the same squad car. And they would die together on the streets of Harlem on the same warm spring evening in 1971.\(^1\)

After responding to a domestic violence call at a housing project, Jones and Piagentini were walking back to their car when Anthony Bottom and an accomplice snuck up behind them and began shooting at point-blank range. Jones was dead before he hit the ground, .45-caliber slugs having ripped through his skull, his spine, his diaphragm, and one of his kidneys. One of the gunman shot Piagentini several times with a long-barreled .38 and continued to fire as the officer lay writhing on the ground. When the gun ran out of bullets, Piagentini was still alive. So his assailant, refreshed Piagentini’s loaded service revolver and fired it at him until weapon, too, was empty. Patrolman Piagentini died on the way to Harlem Hospital.\(^2\)

A New York County jury convicted Bottom on two counts of murder in the first degree. At trial, Bottom and his co-defendants declared that “they were at war with the United States.”\(^3\) Bottom received two concurrent prison terms of twenty-five years to life, and he has since been denied parole. While incarcerated in an upstate New York prison, Bottom has waged an eleven-year legal battle challenging New York’s felon disenfranchisement statute on the ground that its alleged discriminatory effect on racial minorities violates the Voting Rights Act of 1965 (“VRA”).\(^4\) In 2002, a panel of the United States Court of Appeals for the Second Circuit affirmed the district court’s denial of Bottom’s claim that he has the right to vote while incarcerated.\(^5\) The Second Circuit denied rehearing en banc, and the Supreme Court then denied his writ of certiorari. In a highly unusual action after the denial of certiorari, however, the Second Circuit granted an en banc hearing, and oral arguments were heard in June 2004.\(^6\) Legal observers again expect a very close vote, noting that the Second Circuit en banc panel had previously split five-to-three on this very same

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\(^1\) See, e.g., [Two] Staten Patrolmen Join Department on Same Day, N.Y. TIMES, May 23, 1971, at 57.


\(^4\) See Muntaqin v. Coombe, 366 F.3d 102, 130 (3d Cir. 2002) (declining to apply § 1975 to the felon disenfranchisement statutes because doing so would alter the constitutional balance between the states and the federal government).

\(^5\) See Hurdin v. Patki, No. 00-8886, 2004 U.S. Dist. LEXIS 10863 (S.D.N.Y. 2004) (consolidating another felon disenfranchisement case with the en banc appeal by Bottom, who also goes by the name Jalil Abdul Muntaqin).


\(^7\) See Christopher Uggen & Jeff Manza, Democratic Convictions? Political Consequences of Felon Disenfranchisement in the United States, 87 AM. SOCIOLOGICAL REV. 777, 781-82 (2002) (noting that only Vermont and Maine permit incarcerated felons to vote). Of the forty-eight states that bar felons from voting, thirteen of them continue to disenfranchise felons who have been released or are on parole, while the remaining states permit the retention of felons’ voting rights if they have finished their prison terms or are on probation. Id.

\(^8\) The current felon disenfranchisement laws in D.C., which is sixty percent African-American [ROSE MCKinnon, U.S. CENSUS BUREAU, THE BLACK POPULATION 2000 (2001), http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf], were enacted by its locally elected Council after the introduction of home rule in 1974, and they were submitted to, and not objected to, by the Congress of the United States, the very body claimed here to have outlawed felon disenfranchisement. Before granting home rule to the District, Congress established permanent disenfranchisement of fel­ on’s (D.C. Election Act, Pub. L. No. 88-376, § 201(c) (1) (A), 86 Stat. 399 (1970)) but later determined felons to vote upon probation, parole, pardon or the expiration of a fixed period after release from incarceration (Act of Dec. 23, 1971, Pub. L. 92-220, § 4, 85 Stat. 780). With home rule, Congress gave the D.C. Council plenary power over voter qualifications in the District (D.C. CODE ANN. § 1-2007.52 (2005)) but retained the power to disapprove the Council’s enactments on any subject (id. at § 1- 2007.51(1)). The D.C. Council amended the election code to disenfranchise felons only during incarceration. Id. at § 1-2007.02(1)(A)-(B), 1-2007.08(1)(1), 15-6).

\(^9\) See Mass. CONST, amend. III, as amended by Mass. CONST, amend. CXIX (rendering “persons who are incarcerated in a correctional facility due to a felony conviction” ineligible to vote); see also Mass. GEN. LAWS ch. 51, § 1 (2001) (decreed the same law).

franchise. The proposition passed virtually by acclamation, eighty-two percent to eighteen percent.

Although forty-eight states have already spoken in their support for felon disenfranchisement, the legal and political left has championed felon voting rights as its latest cause célèbre. The issue gained additional traction recently after several academics noted that Democratic presidential candidate Al Gore would have triumphed in Florida in 2000 and won the presidency had felons been permitted to vote in that state. And the bid by Anthony Bottom, the convicted double-cop-killer, to vote in prison has the support of over a dozen amici curiae, consisting of many prominent liberal and left-wing organizations such as the ACLU, the NAACP Legal Defense Fund, and the Brennan Center for Justice.

Despite the volume of Bottom's support, the case for letting him and other felons vote is unconvincing and problematic both as a legal and policy matter. As explained in Section I of this Article, felon disenfranchisement laws have long been accepted in the American legal system and easily pass constitutional muster. Indeed, the Fourteenth Amendment explicitly permits states to adopt disenfranchisement statutes, and many such laws were enacted long before African-Americans enjoyed suffrage. Section II explains why these laws are beyond the reach of the Voting Rights Act of 1965. The legislative history of the VRA and its 1982 amendments, as well as common sense, makes it perfectly clear that the statute was not intended to cover felon disenfranchisement laws. As detailed in Section III, the VRA cannot be construed to encompass felon disenfranchisement laws because it would then exceed the enforcement powers of the Fourteenth and Fifteenth Amendments. Finally, Section IV discusses the policy rationales for such laws: society deems felons to be less trustworthy than non-felon citizens, and those who do not follow the law should not participate in the passing of laws that govern law-abiding citizens.

11. See Utah Const. art. IV, § 6 (declaring that "any person convicted of a felony . . . may not be permitted to vote . . . until the right to vote . . . is restored as provided by statute"); see also Utah Code Ann. § 304-2-302.5 (1993) (permitting restoration of franchise to felons on probation, discharged from incarceration, or pardoned).

12. See http://governor.state.ut.us/ultgover/98GenPropView.htm (detailing the election results for statewide proposition number four).


In the late eighteenth century, several states began incorporating felon disenfranchisement statutes. Between 1776 and 1821, eleven states disenfranchised persons convicted of certain “infamous” crimes. For instance, New York’s Constitution of 1821 authorized the Legislature to pass laws “excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes.” By the eve of the Civil War, more than two dozen states out of thirty-four had enacted laws preventing those convicted of committing serious crimes from casting a vote. And by the time the Fourteenth Amendment was adopted, twenty-nine states had established felony disenfranchisement laws.

That long history refutes any suggestion that felony disenfranchisement provisions are racially motivated. Their antebellum origins show that they were aimed at whites and were maintained for race-neutral reasons: before the ratification of the Fourteenth Amendment, the states were free to, and the vast majority did, impose direct and express racial qualifications on the franchise.

As the en banc Eleventh Circuit observed in upholding Florida’s felony disenfranchisement law, “at that time, the right to vote was not extended to African-Americans, and, therefore, they could not have been the targets of any [felon] disenfranchisement law.” Over seventy percent of the states in the Union in 1861 had felony disenfranchisement laws—at a time when most African-Americans were still enslaved and did not have the right to vote. The pre-Civil War source of these laws “indicates that felony disenfranchisement was not an attempt to evade the requirements of the Civil War.

Amendments or to perpetuate racial discrimination forbidden by those amendments. The framers of the Civil War Amendments saw nothing racially discriminatory about felony disenfranchisement. To the contrary, they expressly recognized the power of the states to prohibit felons from voting. Section 2 of the Fourteenth Amendment provides that a state’s denial of voting rights “for participation in rebellion, or other crime” could not serve as a basis for reducing their representation in Congress. As the Supreme Court held in Richardson v. Ramirez, Section 2 is thus “an affirmative sanction” by the Constitution of “the exclusion of felons from the vote”—even felons who, like the plaintiffs in Ramirez, had finished their sentences. This conclusion rests on the demonstrably sound proposition that §1 [the Equal Protection Clause], in dealing with voting rights as it does, 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.

Thus, Section 2 of the Fourteenth Amendment “expressly permits states to disfranchise convicted felons.” Nor did the Reconstruction Congress see any conflict between felony disenfranchisement and the Fifteenth Amendment. As the Supreme Court observed at length in Ramirez, Congress, in readmitting states to the Union, consistently approved state constitutions that excluded felons from the franchise. In fact, the Forty-third Congress—the very same Congress that proposed the Fifteenth Amendment—approved such constitutions, and the next Congress did so both before and after the Fifteenth Amendment was ratified.

In light of their historical origin, felony disenfranchisement laws

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20. Kisias, supra note 17, at 63.
22. Kisias, supra note 17, at 65.
sions, 380 F.2d 445, 450 (2d Cir. 1967).
24. See Kisias, supra note 17, at 162 (arguing that late nineteenth century disen
franchisement laws outside the South “lacked socially distinct targets and generally
were passed in matter-of-fact fashions”); Ugen & Mann, supra note 7, at 795 (ex
plaining that some southern states from 1850 to 1910 did act with racial intent in
passing laws that disenfranchised persons who were convicted of crimes, but by that
time, over eighty percent of the states in the U.S. already had felony disenfran
schisement laws); Alexander Keyssar, Debating the Voting Rights of Felons: The
franchisement provisions were first enacted [97] — Republican governments that
supported black voting rights).
25. See Keyssar, supra note 17, at 155-56 & Figure 3.1 (explaining that by 1855,
seventy-nine of the thirty States had express “race exclusions” that prevented blacks
from voting, and the five that did not contained only [four] percent of the free black
population).
30. Id. at 55.
31. Johnson, 404 F.3d at 1217 (emphasis added).
32. Accord id. at 1218 (discussing the long history of Florida’s criminal disenfran
chisement); see Ramirez, 418 U.S. at 48-52 (noting the approving congressional atti
dute toward state constitutional disenfranchisement provisions at the time of the Re
construction).
33. See Ramirez, 418 U.S. at 51-52 (citing readmission statutes enacted in June
1868 and January, February, March, and May 1870). The Fifteenth Amendment was
ratified on February 26, 1870 by the Forty-third Congress (which began on March 4, 1867 and ended on March 3, 1869), and was ratified on February 3, 1870 during the
Forty-Five Congress. See LexisNexis, Timeline for Ratifications of Constitutional
(last visited Sept. 3, 2005).
easily pass constitutional muster. As any student of constitutional law knows, the Constitution bars only laws that are facially discriminatory or are motivated by intentional discrimination. But it appears that all of the felon disenfranchisement statutes on the books today were enacted or amended with a race-neutral purpose. Not surprisingly, the Supreme Court has consistently held not only that "the states had both a right to disenfranchise [felons and ex-felons]," but also that they had "a compelling interest in doing so." As early as 1890, for example, the Supreme Court held that a territorial legislature's statute that "excluded[d] from the privilege of voting . . . those who have been convicted of certain offenses" was "not open to any constitutional or legal objection." A unanimous Warren Court decision recognized that a "criminal record" is one of the "factors which a State may take into consideration in determining the qualifications of voters." Today's Court agrees: the holding "that a convicted felon may be denied the right to vote remains "unexceptional." And federal circuit courts recently have rejected constitutional challenges to felon disenfranchisement laws based on racially disparate impact arguments.

54. See, e.g., Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that the Fourteenth Amendment bars only intentional discrimination by the state). This same standard is almost certainly applicable to its sister Reconstruction Amendments, the Fifteenth Amendment. See, e.g., City of Mobile v. Bolden, 446 U.S. 55, 62-65 (1980) (plurality opinion) (holding that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote on account of race, color, or previous condition of servitude").

55. See REYNOLDS, supra note 17, at 65 (explaining that a felon disenfranchisement law that is facially non-discriminatory can still be unconstitutional if it was motivated by racial discrimination); cf. Burdick v. Gardner, 387 U.S. 505, 506-07 (1967) (striking down a Jim Crow-era, disestablishment disenfranchisement statute in Alabama that had been enacted with the intent to discriminate against blacks).

56. See KESSLER, supra note 17, at 162 (discussing the rationale and widespread support for the disenfranchisement laws).

57. See Davis v. Beason, 153 U.S. 333, 345-47 (1893) (holding that territorial legis- latures had a right to impose "reasonable qualifications" on voters so long as they were "not inconsistent with the constitution or laws of the United States").

58. See LAXALT v. NORTHERN NEVADA Bd. of Elections, 360 U.S. 45, 51 (1959) (comparing the use of constitutionally allowable factors, such as a criminal record, with the constitutionality of using literacy as a voting requirement).

59. See ROMER v. Evans, 517 U.S. 620, 634 (1996) (finding that while some voting requirements are no longer constitutional, a coerced felon still may be denied the right to vote); see also, e.g., Green v. Bd. of Elections, 390 F.3d 446, 451 (2d Cir. 2005) (noting that the Supreme Court "frequently recognized" the "propriety of excluding felons from the franchise,") and United States v. Board of Elections of City of St. Louis, 263 F.2d 919 (8th Cir. 1959) (holding that a convicted felon "may be deprived of his right to vote").

60. See, e.g., Johnson v. Governor of Fla., 405 F.3d 1214, 1239 (11th Cir. 2005) (holding that the disenfranchisement provisions were not intended to discriminate against minority voters and that there was no evidence that the Voting Rights Act was intended to reach the disenfranchisement provision); see also, e.g., Munoz v. Crawford, 966 F.3d 102, 130 (2d Cir. 2004) (deciding that the Voting Rights Act did not apply to the New York disenfranchisement statutes).
do not lend themselves to fraudulent manipulation." 44 The House Judiciary Committee report agreed: "[The VRA] does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony ...." 45

These are the only references to felon disenfranchisement made in reports to the Voting Rights Act of 1965. 46 Thus, its legislative history shows that: "Congress did not intend ... the Voting Rights Act to cover felon disenfranchisement provisions[;]" 47 "tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not[;]" 48 "legislators intended to exempt the voting restrictions of felons from the statute's coverage[;]" 49 "the Voting Rights Act was not designed to reach felon disenfranchisement provisions[;]
and "neither house of Congress intended to include felon disenfranchisement within the statute's scope." 50

In 1982, Congress amended Section 2 of the VRA to bar procedures that "result" in the denial or abridgment of voting rights "on account of race or color." 51 The purpose of this amendment was to overrule certain Supreme Court decisions that Congress believed were contrary to the original intent of the statute. The amended statutory text, however, is notably ambiguous, and so "[u]nfortunately, it is exceedingly difficult to discern what [Section 2] means." 52 While the

44. See 111 CONG. REC. S8966 (1965) (statement of Sen. Tydings) (clarifying that the felon disenfranchisement laws are designed "solely for objective purposes of determining qualifications for voting and are not subjective such as the good moral character requirement").
46. See Johnson, 405 F.3d at 1253 (reviewing congressional statements in the House and Senate reports for the Voting Rights Act's application to states' disenfranchisement provisions).
47. Id. at 1231-34 (emphasis in original).
48. The 1982 amendments to the Voting Rights Act changed the statute such that it now reads:

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 abridgment of the right of any citizen of the United States to vote on account of race or color.

49. 42 U.S.C. § 1973a (1982) (emphasis added). It has previously read: "No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

50. Accord Johnson, 405 F.3d at 1220 (discussing the ambiguity in Section 2 of the Voting Rights Act in its application to the felon disenfranchisement provisions and thereby creates a constitutional question) (quoting Goosby v. Town Bd., 180 F.3d 476, 490 (2d Cir. 1999)) (Lien, J., concurring).

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11 introduction of the word "result" arguably indicates that it might cover state actions not motivated by racial animus, the statute also incorporates the critical language in the Fifteenth Amendment's prohibition of intentional racial discrimination—"[d]en[i][d] or abridg[ement]"—of the right to vote "on account of race [or] color." 53 As discussed more fully in Section II.B, the use of the words "on account of" means that "[t]he existence of some form of racial discrimination ... remains the cornerstone of [Section 2]'s claims," and shows that Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982. 54

The tension between "results in" and "on account of" renders the provision ambiguous. Indeed, it is precisely because of this ambiguity that the Supreme Court relied upon the 1982 legislative history to come up with the so-called Gingles factors 55 in order to give content to Section 2. Ironically, the litigants who have launched VRA challenges to felon disenfranchisement laws seek to rely on this legislative history, which does not specifically deal with felon disenfranchisement, while ignoring the extensive legislative history that specifically dealt with the subject.

The legislative history of the 1982 amendments reflects not the slightest suggestion that Congress changed the original intent to preserve felon disenfranchisement. Indeed, even though it "details many discriminatory techniques used by certain jurisdictions," "[t]here is simply no discussion of felon disenfranchisement in the legislative history surrounding the 1982 amendments." 56 Given that forty-six states in 1982 had felon disenfranchisement laws, it seems inconceivable that Congress would sub silentio amend the Voting Rights Act to invalidate the laws of forty-six states, many of which have had such statutes since the founding of the Republic. 57
Overturning felon disenfranchisement remains unfathomable to Congress to this very day. The VRA’s utterly “one-sided legislative history is buttressed by subsequent Congressional acts. Since 1982, Congress has made it easier for states to disenfranchise felons. The National Voter Registration Act of 1993 not only provides that a felony conviction may be the basis for canceling a voter’s registration, but requires federal prosecutors to notify state election officials of federal felony convictions. The Help America Vote Act of 2002 actually instructs state election officials to purge disenfranchised felons “on a regular basis” from their computerized voting lists. The enactment of these provisions plainly “suggests that Congress did not intend to sweep felon disenfranchisement laws within the scope of the VRA.

Not only that, in considering what ultimately became the Help America Vote Act, the Senate actually voted on a floor amendment that would have required states to allow felons to vote after they had completed their terms of incarceration, parole, or probation. The proposal would only have applied to federal elections—and its sponsors emphasized they had no quarrel with denying the franchise to convicts who were still serving their sentences. In the words of the principal sponsor, Senator Reid, who was then the majority whip, “We have a saying in this country: ‘If you do the crime, you have to do the time.’ I agree with that... [The amendment] is narrow in scope. It does not extend voting rights to prisoners. I don’t believe in that. It does not extend voting rights to ex-felons on parole, even though eighteen States do that.

Despite being “narrow in scope,” the amendment was rejected by a large bipartisan majority: thirty-one yes, sixty-three nays.

that Congress would silently amend the Voting Rights Act in a way that would affect them).

56. See Johnson, 405 F.3d at 1254 (emphasis in original).
60. See Johnson v. Governor of Fla., 555 F.3d 1297, 1318 n.15 (11th Cir. 2009) (Kraitch, J., dissenting), panel opinion vacated and remanded en banc granted, 377 F.3d 1153 (11th Cir. 2004), judgment of district court affirmed, 405 F.3d 1214 (11th Cir. 2005) (en banc majority opinion by Kratich, J. upholding Florida’s permanent disenfranchisement status).
61. “nay.”

B. The “Results” Test and the Claim of Disparate Impact

As set forth above, there is absolutely no indication in the legislative history of the 1982 amendments of the Voting Rights Act that the introduction of the word “results” was intended to create a simple disparate impact test. And the very language of the VRA as well as common sense undercuts any such claim of disparate impact: the continued requirement in the statute that the denial or abridgement of the right to vote be “on account of race or color” mimics the key phrase used in the Fifteenth Amendment’s prohibition of intentional racial discrimination. Indeed, the plain meaning of “on account of” is “for the sake of” or “by the reason of”—underscoring that “Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982.”

The inclusion of the phrase “on account of race or color” appears to modify the word “results,” thereby requiring some causal linkage between intentional racial discrimination and “results.” Simply put, felon disenfranchisement laws may have a disproportional impact on certain racial minorities, but they do not violate the VRA because the impact is not on “account of,” “for the sake of,” or “by the reason of”
race or color. As the Sixth Circuit said in rejecting a disparate impact-type VRA claim, felons are not "disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment."67 Likewise, the Eleventh Circuit explained that Section 2 of the VRA explicitly retains racial bias as the gravamen of a . . . claim. The existence of some form of racial discrimination therefore remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color. The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to those experienced by voters "on account of race or color," not on account of some other racially neutral cause.68

Accordingly, because the causation of the denial of the right to vote to felons . . . consists entirely of their conviction, not their race,69 it "does not result from the state's qualification of the right to vote on account of race or color and thus . . . does not violate the Voting Rights Act."70 The "mere fact that many incarcerated felons happen to be black and [L]atino is insufficient grounds to implicate the Fifteenth Amendment and the Voting Rights Act," even under Section 2.71

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67. Accord Johnson v. Bush, 214 F. Supp. 2d 1305, 1341 (S.D. Fla. 2002) (holding that disenfranchisement provisions do not deny a right to vote due to a constitutional characteristic, here the fact that felons are still criminals), aff'd, 9 F.3d 698 (11th Cir. 1993) (holding that a bestfracketes could conclude under the totality of circumstances that the plaintiff's evidence demonstrates intentional racial discrimination behind Florida's felon disenfranchisement provisions), vacated and reh'g en banc granted, 377 F.3d 1153 (11th Cir. 2004), aff'd, 405 F.3d 1214 (11th Cir. 2005) (en banc) (holding that the Voting Rights Act's prohibition against voting qualifications that result in abridgment of the right to vote on account of race does not apply to Florida's felon disenfranchisement provision); see Wesley v. Collins, 791 F.2d 1255, 1262 (11th Cir. 1986) (concluding that the disproportionate impact on Tennessee's black population did not result from Tennessee's qualification of the right to vote on account of race or color); see also Jones v. Edgar, 55 F.3d 970, 981 (C.D. Ill. 1998) (holding that the plaintiff failed to show any connection between historical discrimination against blacks and the felon disenfranchisement provision).


69. See Johnson v. Governor of Fla., 405 F.3d 1014, 1299 (11th Cir. 2005) (Tjoflat, J., specially concurring) (holding that the facts presented in this case show no other causation than the criminal activity of the ex-felons for the denial to their right to vote).

70. Wesley, 791 F.2d at 1262 (emphasis added).

71. See, e.g., Jones v. Sipes, 5 F.3d 81, 87 (D.C. Cir. 1993).

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68. See, e.g., Fortapak & Co., 366 F.3d 102, 118 (2d Cir. 2004) (emphasis by the Court) (quoting felon-appellant's brief).

72. See Farrell & Washington, 359 F.3d 1116, 1117 (9th Cir. 2004) (Kozinski, J., dissenting) (arguing that statistical disparities are not enough to establish vote denial under Section 2 of the Voting Rights Act).


claim to overturn a criminal conviction or sentence; a defendant must show that he himself or she herself suffered discrimination on the basis of race, and must show that on the basis of things that happened in his or her case.87 Because discretion is essential to the criminal justice process, statistical evidence is clearly insufficient to support any inference that any of the decision-makers in [a particular] case acted with discriminatory purpose.88 This is so even in a capital case, as McCleskey was.

If the Voting Rights Act were construed to ban felon disenfranchisement, then convicted felons could invoke the very same racial statistics that they cannot invoke to assert the right to walk the streets. That result alone would be odd, to say the least. And this "logic" moves swiftly from the incongruous to the unimaginable: the VRA would probably abolish capital punishment nationwide because if similar statistical disparities appear in capital sentences, then the execution of such sentences, which plainly effect a permanent denial of the right to vote, would necessarily result in a denial or abridgment of the right . . . to vote on account of race or color.89

C. Any Prima Facie Showing of Adverse "Results" Is Easily Rebutted

Even assuming for the sake of argument that the 1982 amendments to the Voting Rights Act established some form of a pure disparate impact standard, states could easily rebut any prima facie case of disproportional impact because of their strong and legitimate interests in maintaining their own electoral laws.81 As discussed in Section IV, states have substantial reasons to limit the right to vote to persons deemed trustworthy, and thereby exclude children, aliens, the mentally incompetent, and those who have been convicted of serious crimes. The Supreme Court has held that "the State's interest in maintaining an electoral system . . . is a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a [Section] 2 violation [of the 1965 Act] has occurred."82 Thus, for example, the en banc Fifth Circuit rejected a challenge to Texas's county-wide election system for its district court judges—notwithstanding alleged disproportionate impact on minority candidates—on the grounds that the state had a "substantial interest" in linking jurisdiction and electoral base, and thereby promoting "the fact and appearance of judicial fairness."88

There is little doubt that the states have an equally substantial interest in preventing felons, especially those still incarcerated, from voting and potentially affecting elections. Thus, the Sixth Circuit held that the state's "legitimate and compelling interest" in disenfranchising felons outweighed any supposed racial impact.89 Indeed, the Framers of the Reconstruction Amendments found state authority to disenfranchise felons to be of such importance that they expressly permitted it in the text of the Fourteenth Amendment.85

As the Supreme Court put it, "[t]he function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices . . . ."86

D. The Clear Statement Rule: A Caution Against Preamendment of States' Powers

An expansive and unreasonable reading of the Voting Rights Act to cover felon disenfranchisement statutes not only is contrary to the intent of Congress, but it also upsets the delicate balance between federal and state powers. The "clear statement" rule—which applies when the statutory text is ambiguous as in the case of the VRA—cautions courts to tread lightly in interpreting vague statutes to avoid impinging upon the traditional spheres of the states: "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute . . . [Congress must] make its intention clear and manifest if it intends to pre-empt the historic powers of the States."86

87. See 481 U.S. 279, 313 (1987) (ruling that the evidence failed to show that any decision maker in defendant's case acted with a discriminatory purpose, and that the statistical racial-disproportionality discrepancy did not show a significant risk of racial bias in Georgia's capital sentencing process).
88. Id. at 297.
This rule of construction controls whenever a federal statute touches on "traditionally sensitive areas, such as legislation affecting the federal balance."88 And when it applies, the rule requires that, absent a clear statement, courts must "interpret a statute to preserve rather than destroy the States' substantial sovereign powers."89

In Gregory v. Ashcroft, the Supreme Court faced the question of whether the Age Discrimination in Employment Act prohibited Missouri from enlisting a mandatory retirement age for state judges.90 The Court held that it did not. It applied the clear statement rule because the case implicated "the authority of the people of the States to determine the qualifications of their government officials."91 The fact that Congress's intent on the issue was "at least ambiguous" was enough to resolve the question: under the clear statement rule, it could not "give the state-displacing weight of federal law to mere congressional ambiguity."92

Felon disenfranchisement involves authority that is at least as important as the State's power to determine "the qualifications of their government officials," as it involves the power to determine who gets to choose those officials and their qualifications. If defining the qualifications of important government officials lies at the heart of representative government, then surely defining who decides what those qualifications will be is equally, if not more, important. That by itself suffices to require a clear statement, but even more is involved here: the fundamental state power to "define[e] and enforc[e] the criminal law," for which, of course, "the States possess primary authority."93

The confluence of these two fundamental lines of state authority, indeed, expressly appears in the Constitution's text. Thus, not only does the Constitution defer to the States to set voter qualifications even for federal elections,94 but, as noted above, the Constitution affirmatively sanctions the States' historic authority to disenfranchise people "for participation in rebellion, or other crime."95 The States have the primary, if not exclusive, authority to decide whether felons should vote. That is what the Constitution provides.

Accordingly, if it is to disturb the federal-state balance in the area of voter qualifications, Congress must be clear—ummistakably clear—about it. And Congress certainly knows how to be quite clear when it comes to voting rights: it was clear about literacy tests,96 clear about educational-attainment requirements,97 clear about knowledge tests,98 clear about moral character tests,99 clear about vouching requirements,100 clear about English-language requirements,101 clear about English-only elections,102 and clear about poll taxes103 to give just a few examples.

But the text of the VRA makes no unmistakably clear statement—it makes no statement at all—about felon disenfranchisement. And so it cannot be construed "to pre-empt the historic powers of the States"104 and "to destroy the States' substantial sovereign powers"105 by prohibiting felon disenfranchisement.

III. THE ENFORCEMENT POWERS OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

There is yet another reason why Section 2 of the Voting Rights Act cannot be read to bar felon disenfranchisement laws: such an interpretation would exceed Congress's enforcement powers under

98. Id. at 461 (citations and internal quotation marks omitted).
100. See generally Gregory, 501 U.S. 452.
101. See id. at 463.
102. Id. at 464, 467 (emphasis in original; citation and internal quotation marks omitted).
104. See U.S. CONST. art. I, sec. 2, cl.1 (requiring that those who elect United States Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislatures").
the Fourteenth and Fifteenth Amendments.

These two Reconstruction Amendments contain parallel grants of power to Congress to "enforce" the amendments' substantive provisions "by appropriate legislation."106 But as the Supreme Court has emphasized in recent years, Congress cannot rewrite the constitutional provisions, as "Congress does not enforce a constitutional right by changing what that right is."107 It has no power to engage in a "substantive redefinition of the . . . right at issue,"108 and can only "enact prophylactic legislation"—"legislation that "proscribes facially constitutional conduct"—to the extent necessary "in order to prevent and deter unconstitutional conduct."109

Accordingly, the Supreme Court has insisted that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."112 To meet that test, Congress must do two things: (1) "identify conduct transgressing . . . substantive provisions" of the amendments and (2) "tailor its legislative scheme to remedying or preventing such conduct."113

The first requirement demands that Congress develop a "legislative record" that demonstrates a "history and pattern" of unconstitutional state conduct.114 In other words, "[f]or Congress to enact proper enforcement legislation, there must be a record of constitutional violations."115 To meet the second requirement, the purportedly prophylactic legislation must not be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."114 Congress thus must narrowly "tailor its legislative scheme to remedying or preventing such conduct."115

There can be no dispute: Section 2 would fail both tests if it were construed to prohibit felon disenfranchisement. To begin with, "when Congress enacted the VRA and its subsequent amendments, there was a complete absence of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters.116 That is enough to doom any construction of Section 2 that reaches felon disenfranchisement. In Oregon v. Mitchell, for example, the Supreme Court struck down the 1970 amendments to the VRA that, among other things, tried to lower from twenty-one to eighteen the minimum voting age throughout the Nation.117 The Court struck down the voting-age provision to the extent it applied to state elections. In announcing the Court's judgment, Justice Black noted that "Congress made no legislative findings that the twenty-one-year-old vote requirement was used by the States to disenfranchise voters on account of race."118 Congress has not made any such legislative findings about felon disenfranchisement, either.119

Not only has Congress not found that felon disenfranchisement has produced "any significant pattern of unconstitutional discrimination,"120 and not only does "the legislative record . . . simply fail to show that Congress did in fact identify such a pattern,"121 the record actually shows that Congress found the opposite. Congress saw nothing wrong with the "frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony,"122 because it found that this requirement was "objective, easily applied, and do[es] not lend [itself] to fraudulent manipulation."123 It found that "tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not."124 In short, "not only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext . . . for racial discrimination[,] it has

106. U.S. CONST. amend. XIV, § 5; id. at amend. XV, § 2.
110. Flores, 521 U.S. at 520.
114. Flores, 521 U.S. at 532.

116. Johnson, 405 F.3d at 1231 (emphasis added).
118. Id. at 150 (emphasis added).
119. See Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369 (2001) (striking down application of the Americans with Disabilities Act against State employers because "[t]he legislative record . . . simply fails to show that Congress did in fact identify a pattern" of unconstitutional discrimination by States against the disabled); United States v. Morrison, 529 U.S. 598, 626 (2000) (striking down civil remedy for gender-motivated violence because "Congress's findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"); Kimsel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (striking down application of the Age Discrimination in Employment Act against State employers because of "Congress's failure to uncover any significant pattern of unconstitutional discrimination here").
120. Kimsel, 528 U.S. at 91.
121. Garret, 531 U.S. at 369.
123. 113 CONG. REC. S8366 (1965) (remarks of Sen. Tydings).
effectively determined that it is not.125

To apply Section 2 to strike down all felon disenfranchisement laws, including those enacted and enforced without a discriminatory purpose, would be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."126 Instead, it would "attempt a substantive change in constitutional protections"127—something the Constitution simply does not allow.128

IV. THE POLICY REASONS FOR FELON DISENFRANCHISMENT

During a 2000 presidential debate in Iowa, the frontrunner candidate explicitly endorsed the ban on felon voting: "The principle that convicted felons do not have a right to vote is an old one, it is well-established," he said, adding that "felonies—certainly heinous crimes—should result in a disenfranchisement."129

That candidate was Vice President Al Gore, and, as set forth below, he had good policy reasons for supporting the ban on felon voting. But this issue has become heavily politicized in recent years, in large

127. Id. at 509.
128. The Supreme Court's decision in Hunter v. Underwood, 471 U.S. 222 (1985), does not change the analysis here. Even apart from the fact it came after the 1982 Voting Rights Act amendments, Hunter actually demonstrates that the congruence and proportionality test could never be met in the context of felon disenfranchisement laws. Hunter was not a felon disenfranchisement case. It was a much narrower disenfranchisement case. It struck down a Jim Crow-era provision, unquestionably enacted and applied by Alabama with racial animus and discriminatory intent, that denied the franchise to those who committed "any . . . crime involving moral turpitude," a phrase that referred to "many misdemeanors," including "[v]arious minor nonfelony offenses such as presenting a worthless check and petty larceny," often specifically selected for inclusion by Alabama's 1901 constitutional convention because they "were believed by the delegates to be more frequently committed by blacks." Id. at 226-27. It was that sort of provision, not a traditional felon disenfranchisement provision, that was challenged and invalidated in Hunter as being an "encumbrance . . . motivated by a desire to discriminate against blacks." Id. at 235.

Even the findings of racial animus in Hunter could not possibly support the construction of Section 2 to include felon disenfranchisement laws: it would go far beyond a remedy for the specific form of intentional discrimination found in one Southern state in Hunter. "Given that racial minorities are overrepresented in the felon populations" throughout the Nation, "the plaintiffs' theory would tend to do more than felon disenfranchisement laws in this country," Johnson, 495 U.S. at 1251. But that case, involving a completely different kind of provision in a single State, simply cannot be "sufficient to support the regulation of felon disenfranchisement statutes."[140, n. 6] in Goode, 365 F.3d 102, 126 (2d Cir. 2002) (emphasis added in part). For under the congruence and proportionality test, Congress may not create "remedies . . . applying [to] a remedy throughout the Nation" when unconstitutional conduct "does not exist in all States, or even most States." United States v. Morrison, 529 U.S. 598, 626 (2000).


part due to the contested results in Florida in 2000. However, if it is soberly analyzed outside the prism of partisan politics, there are reasonable justifications for felon disenfranchisement, particularly for those who have committed serious crimes or are still incarcerated.

First, felon disenfranchisement laws are justified on the basis of the Lockean notion of a social contract: as Judge Henry Friendly once put it, someone "who breaks the laws" may "fairly have been thought to have abandoned the right to participate" in making them.130 Furthermore, it 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.131

That same reasoning motivated Massachusetts then-governor Paul Cellucci in 2000 to support a ballot initiative stripping incarcerated felons of the right to vote after prisoners began to organize a political action committee.132 A Massachusetts state legislative leader commented about the State's now-abandoned practice of allowing incarcerated felons to vote: "It makes no sense. We incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run our lives."133

Second, disenfranchisement has traditionally been deemed a part of a punishment for committing a crime.134 Criminal punishment can be meted out in various ways, including imprisonment, fines, probation, and, yes, the withdrawal of certain rights and privileges. To the American system, it has long been established that "the States possess primary authority for defining and enforcing the criminal law."135

Third, society considers convicts, even those who have completed their prison terms, to be less trustworthy than non-convicted citizens.136 In other areas of the law, full rights and privileges are not

131. Id.
132. Clegg, supra note 81, at 172-73.
133. Id. at 172 (emphasis added; quoting Editorial, Jailhouse Vote, WALL ST. J., Dec. 7, 1999, at 24S (quoting Massachusetts State Rep. Francis Marlin)).
136. Clegg, supra note 81, at 174.
always restored to convicts, even though they may have "paid their
debt to society."  
143 For example, federal law prohibits the possession
of a firearm for anyone indicted for or convicted of a felony
by at least one year in prison. 
144 Also under federal law, anyone who has a "charge pending" or has been convicted of a crime
punishable by imprisonment for one year or more cannot serve on a
jury. 
145 So if someone who has a "charge pending" against him is
deemed incapable of sitting in judgment of the fate of a single
litigant, it hardly seems unreasonable to say that someone convicted
of a felony cannot help shape the fate of a city, a state, or the entire
country. 
146 Even outside the realm of civic rights and privileges, society
recognizes that an ex-convict may be less reliable than others. For
example, employers routinely ask prospective employees whether they
have been arrested (let alone convicted of a felony) because they
suspect that the mere fact of an arrest may be an indication of
untrustworthiness. 

Critics of felon disenfranchisement laws note that these laws have a
disproportionate impact on certain racial minority groups. 
147 While society can be sensitive to such concerns, it is not a sufficient reason
to abolish longstanding and justifiable laws in the attempt to achieve
some form of racial balance. As W.E.B. DuBois once wrote, "Draw
lines of crime, of incompetency, of vice, as tightly and
uncompromisingly as you will, for these things must be proscribed;
but a color-line not only does not accomplish this purpose, but
thwarts it."  
148 In fact, the abolition of felon disenfranchisement laws
may have the unintended effect of creating "anti-law enforcement
voting blocs and victimizing the vast majority of law-abiding minority
citizens who live in high-crime urban areas.
149 Ultimately the real
solution is to deter and prevent the crimes from being committed, not
to create loopholes and exceptions for punishments.

Yet there may be some room for reasonable compromise on the
issue of felon disfranchisement. Not all crimes are equal, and some crimes are
more reprehensible and more likely to suggest

137. Id.
sentencingproject.org/s ascent/03.cfm (last visited Oct. 16, 2005); NAACP, Re-
141. Clegg, supra note 81, at 176.
142. Id. at 177.
The people of New York, as well as forty-seven other states, have made their voices clear in support of laws that disenfranchise felons like Anthony Bottom. As explained in this Article, neither the Constitution nor the Voting Rights Act of 1965 provides plausible grounds to invalidate the felon disenfranchisement laws that are on the books today. And it would be a crime to distort the Constitution or the intent of Congress to overturn the will of the people of forty-eight states via judicial fiat.