Felon Disenfranchisement Laws: The Silencing of the African-American Voice

* INTRODUCTION

The United States was founded on the principle that diverse views and opinions contribute to the marketplace of ideas and create a robust and healthy democracy. However, early voting qualifications made our “marketplace” look a lot more like the orchestra section to Beethoven’s *Emperor Concerto,* where access was dependent on social status*.* The political history of the United States chronicles a consistent fight to expand suffrage, which began as a very simple question: whom do we want to vote? As our democracy began to mature and root itself in the social fabric of our citizens, so too did this question of suffrage. Courts and political leaders began to realize that the solution to this question lies in the acceptance of two fundamental principles. First, a healthy marketplace of ideas exists only when *all* citizens are allowed and encouraged to participate in the political process. Second, that the attainment of universal suffrage is about those who we have excluded in the past. The question is now not who we want to vote, but rather, how we can provide those previously excluded from suffrage with the appropriate and functional mechanisms not only to gain access to vote but to seek redress if their voice is denied. These mechanisms now exist through the Fourteenth, Fifteenth, and Nineteenth Amendments, and congressional acts like the Voting Rights Act (VRA).

The Supreme Court has sustained these enforcement mechanisms since their original enactment. A panoply of voting qualifications have been challenged through these mechanisms. The Voting Rights Act was created to provide disenfranchised minorities the opportunity to seek redress. This paper will argue that when felon disenfranchisement laws result in the abridgment of a racial minority’s right to vote they become cognizable under Section 2 of the Voting Rights Act. I will prove this through an analysis of judicial interpretation of the Voting Rights Act and the Senate Judiciary Committee Reports during the passage of the 1982 Amendments to the VRA and the “clear statement rule.” Then I will discuss the application of the specific factors listed for consideration in a totality of circumstances test to be used to determine whether voting qualifications result in the abridgment of a minority’s vote.

II. BACKGROUND

[T]he slave went free; stood a brief moment in the sun; then moved back again toward slavery.

-W.E.B Du Bois, *Black Reconstruction in America*

* The History of Felon Disenfranchisement Laws

Felon disenfranchisement laws deny citizens convicted of felonies the right to vote. Many states feature disenfranchisement laws in their constitutions. Article VI, Section 3 of Washington State’s Constitution, for example, includes the following disenfranchisement provision: "[A]ll persons convicted of an infamous crime ... are excluded from the elective franchise." Felon disenfranchisement laws are not new to the American political landscape. In the wake of the Civil War, twenty-nine states enacted felon disenfranchisement laws. There is an inextricable link between the original enactment of many states’ felon disenfranchisement provisions and the political tensions that surrounded the abolition of slavery. During the post-Reconstruction era, many states in the South “...tailored their disenfranchisement laws in order to bar black male voters, targeting those offenses believed to be committed most frequently by the black population.” Offenses such as burglary, arson, and theft—crimes typically associated with former slaves—implicated disenfranchisement, while robbery and murder did not.

In 1974, in *Richardson v. Ramirez (1974),* the Court held that felon disenfranchisement laws are affirmatively sanctioned in the Fourteenth Amendment*.* The Court reasoned that Section 2 of the Fourteenth Amendment exempted felon disenfranchisement laws from the heightened scrutiny necessary for other vote restriction claims. A decade after *Richardson*, the Court considered the application of the Equal Protection Clause of the Fourteenth Amendment to felon disenfranchisement laws in *Hunter v. Underwood (1985).* Here, the Court addressed whether article VIII, section 182 of the Alabama constitution of 1901 violated the Equal Protection Clause of the Fourteenth Amendment. Section 182 prohibited individuals found guilty of crimes of “moral turpitude” from participation in the political process. They determined that section 182 of Alabama’s felon disenfranchisement law was originally enacted with the intent to disenfranchise African-Americans. The majority held that this section of the Alabama constitution was unconstitutional because it was enacted with discriminatory intent. *Hunter v. Underwood* was the last equal protection clause challenge to a felon disenfranchisement law.

Suits against felon disenfranchisement laws can be brought under two types of violations: the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act. After the decision in *Underwood,* it became fairly clear that facial challenges to felon disenfranchisement laws on Equal Protection grounds were not likely to be successful. Once opponents of felon disenfranchisement laws realized they would be unsuccessful pursuing Equal Protection claims, they began to bring claims under the VRA. However, as this paper will argue, this was not an arbitrary shift done simply to maximize the potential to overturn felon disenfranchisement laws.Thekey difference between cases brought under the Equal Protection Clause rather than the Voting Rights Act is the standard of judicial review employed. Challenges against facially race-neutral laws, laws that do not overtly discriminate on the basis of race, must be executed under strict scrutiny. Courts must use strict scrutiny to evaluate both the presence of a discriminatory intent and effect. Statutory claims, on the other hand, do not require proof of intentionality. Although claims brought under the Voting Rights Act also demand strict scrutiny, they do not need to demonstrate proof of discriminatory intent.

The Brennan Center For Justice, The Sentencing Project, and the American Civil Liberties Union have all published extensive data on state-by-state felon disenfranchisement practices and effects. The ACLU cites approximately 5.85 million American citizens who are currently denied the right to vote due to a felony conviction. However, the extent of disenfranchisement varies by state. Some states restore a felon’s right to vote upon completion of probation and/or parole. Maine and Vermont are the only states that do not disenfranchise anyone on the basis of a prior felony conviction. Inversely, Kentucky, Florida, and Iowa permanently disenfranchise all persons with felony convictions.

Felon disenfranchisement laws can affect the outcome of contested political elections and criminal recidivism rates. For example, the narrow margin of the popular vote in Florida during the 2000 presidential election drew special attention to Florida’s disenfranchised population. After the popular vote was announced, some Democrats argued “that if the nearly 600,000 felons in Florida had been allowed to vote, Al Gore would have been elected President.” The exclusion of ex-felons from civic participation can also lead to higher recidivism rates. The *Columbia Human Rights Law Review* published data that signified that “voting appears to be part of a package of pro-social behavior that is linked to desistance from crime.” High recidivism rates have serious economic consequences, in some cases costing states hundreds of millions of dollars. The societal effects of felon disenfranchisement laws are complex and widespread.

* The Disparate Racial Effect of Felon Disenfranchisement Laws

Jim Crow featured various race-neutral devices, such as poll taxes and grandfather clauses, which targeted and succeeded in the exclusion of African-Americans from the political process. Litigation and legislation dismantled all of these devices, save one, following the collapse of Jim Crow. To this day, felon disenfranchisement laws remain a constitutionally sanctioned, race-neutral device that effectively excludes thirteen percent of African-American men in the United States.

The vast racial disparity in disenfranchisement rates comes as a consequence to the racial disparity in incarceration rates. There currently exists a racial bias in the criminal justice system that results in a prison population that is nearly half African-American, when African-Americans make up only 12.8% of the national population. The racial disparity in national incarceration rates consequently causes a racial disparity in the affected population of felon disenfranchisement laws. Michelle Alexander addresses the causal relationship between mass incarceration and felon disenfranchisement in her book *The New Jim Crow.* She argues that these “...laws have been more effective in eliminating black voters in the age of mass incarceration than they were during Jim Crow. Less than two decades after the War on Drugs began, one in seven black men nationally had lost the right to vote, and as many as one in four in those states with the highest African-American disenfranchisement rate.” The Brennan Center For Justice reported that “nationwide, 13 percent of African-American men have lost the right to vote, a rate that is seven times the national average.” The extent of the racially disparate effect of felon disenfranchisement laws varies by state.Three states, for example, currently disenfranchise more than twenty-percent of their African-American voting-age population. Alexander elucidates that the estimates of the disparate impact writ large, however, “...may understate the impact of felony disenfranchisement because they do not take into account the millions of ex-felons who cannot vote in states that require ex-felons to pay fines or fees before their voting rights can be restored.”

* Statutory History and Judicial Interpretation of the Voting Rights Act

The Voting Rights Act was originally signed into law by President Lyndon B. Johnson during the Civil Rights Movement in 1965. After its initial enactment, Congress amended the VRA five times to expand the protection of rights guaranteed by the Fourteenth and Fifteenth Amendments. Congress enacted the VRA for the explicit purpose of “...rid[ding] the country of racial discrimination in voting.” The VRA contains five sections, each aimed at dismantling different mechanisms that result in the dilution or abridgment of a minority’s vote. The Supreme Court has consistently articulated that Congress intended the VRA to have the “broadest possible scope.” Within the scope of the VRA, many distinct claims can be brought against certain voting qualifications. Section 5 of the VRA established a “coverage formula” to identify certain jurisdictions with a history of racial discrimination that are especially susceptible to voting laws or practices (such as gerrymandering) that have the effect of discriminating against a racial minority. These “covered” districts needed to receive pre-clearance from the U.S. Attorney General or District Court before official implementation of any law or procedure that could effect voting.

Section 2 of the Voting Rights Act deals generally with voting qualifications that have a discriminatory effect on minorities. The text reads:

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.

Section 2 claims typically deal with at-large elections schemes that dilute minority voting strength. In *City of Mobile v. Bolden (1980),* the Court interpreted Section 2 to be an extension of the Fifteenth Amendment. The Court decided *Bolden* in response to a Fifth Circuit Court decision in the case *Zimmer v. McKeithen (5th Cir. 1973).* The court in *McKeithen* created a series of factors, commonly referred to as the *“*Zimmer factors” that should be employed by courts when evaluating vote dilution claims. The “Zimmer factors” did not require a clear showing of discriminatory intent; rather, proof of a disparate racial impact combined with other relevant factors would satisfy a vote dilution claim. The court responded to the Fifth Circuit’s “Zimmer factors” in *Bolden.* The Court held that, consistent with *Washington v. Davis (1976),* plaintiffs bringing vote dilution claims must prove discriminatory intent as well as a discriminatory effect.

In 1982, Congress amended the Voting Rights Act to reaffirm its commitment “...not only to correct an active history of discrimination, the denying to Negroes of the right to register and vote, but also to deal with the accumulation of discrimination...to do something about accumulated wrongs and the continuance of the wrongs.” Congress was compelled to amend Section 2 after what they deemed to be the Supreme Court’s erroneous application of an intent standard to the voting qualifications in *Bolden.* The Court’s decision in *Bolden* effectively undermined the “results test” by placing an undue burden on plaintiffs and requiring they prove discriminatory intent. The Senate Judiciary Committee Report accompanying the 1982 Amendments explained “the intent test focuses on the wrong question and places an unacceptable burden upon plaintiffs in voting discrimination cases.” Along with the removal of the intent standard, the 1982 Amendments included a list of typical factors that may be proven to establish a violation of Section 2. Proof of all nine factors is not requisite for a Section Two claim; rather, they were intended to provide a structural context to a totality of circumstances test. These factors were codified into a totality of circumstances test by the Court in *Thornburg v. Gingles (1986).* The Court held that “the essence of a Section 2 claim is that certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” Drawing on congressional intent during the passage of the 1982 amendments, the Court explained that the “original intent requirements involved charges of racism and an inordinately difficult burden of proof on plaintiffs” which undermines the integrity of Section 2. Vote dilution does not necessarily need to be a product of racism for it to be unconstitutional; the mere effect of minority vote dilution violates Section 2.

The Supreme Court has not granted certiorari to felon disenfranchisement claims brought under Section 2. Four circuit courts, however, have heard felon disenfranchisement cases in the past decade. Although all four circuits ultimately agreed that such claims are not cognizable under Section 2, they did not all employ the same reasoning. Moreover, three of the courts remanded the decision several times and reheard the case en banc before they reached their final judgment. *Farrakhan v. Gregoire (9th Cir.2010),* a felon disenfranchisement case from the Ninth Circuit first began in 2001; the final decision was not actually handed down until 2010. The final decision in *Farrakhan III (9th Cir.2010)* was heavily influenced by the concurrent rulings of three other circuit courts that held felon disenfranchisement laws to be categorically exempted. The Ninth Circuit explained that “in light of those opinions, we conclude that the rule [that felon disenfranchisement laws can be challenged under Section 2] in *Farrakhan I (2006)* sweeps too broadly.” Although reasoned on slightly different grounds, the unanimous circuit court ruling that felon disenfranchisement laws are exempted from Section 2 remains unchallenged by the Supreme Court. In *Gregory v. Ashcroft (1991),* the Court explained that the clear statement rule exists to confirm that Congress intentionally expanded legislative powers.

* ARGUMENT

A. The 1982 Senate Factors

In *Thornburg v. Gingles (1986)*, the Court created a totality of circumstances test to aid courts with the identification of voting practices that have the effect of diluting a racial minority’s vote. The totality of circumstances test created in *Gingles* includes some of the “Zimmer factors” (officially transcribed in the 1982 Senate Factors) from the 1972 Fifth Circuit Court case, *Zimmer v. McKeithen (5th Cir. 1973).* The totality of circumstances test requires courts to “consider how a challenged voting practice interacts with external factors such as social and historical conditions that result in denial of the right to vote on account of race.” The totality of circumstances test and inclusive factors help understand how a felon disenfranchisement law could have the potential effect of racial discrimination. Felon disenfranchisement laws potentially meet three of the factors relevant to a totality of circumstances test. The specific historic and social context surrounding a specific state’s felon disenfranchisement law could change the relevance of certain factors. The argument that follows will draw on examples from different states and the nation at large to prove the general application of felon disenfranchisement laws that disparately impact minorities.

The first factor from the 1982 Senate Factors reads as follows: “The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.” Florida, one of three states that permanently disenfranchises all people with a felony conviction, is a perfect example of a state that explicitly meets this criteria.An extremely racially discriminatory political and social context surrounded the enactment of Florida’s felon disenfranchisement provision in 1868. Early drafts of the Florida constitution did not include a felon disenfranchisement provision but rather a restriction of ex-Confederate white suffrage. A political battle between moderate republicans and Radical Republicans resulted in the addition of a felon disenfranchisement provision in an effort to appeal to white ex-Confederates opposed to black suffrage. In 1881, one of the delegates reported that criminal disenfranchisement provisions were being used to decrease black voting. In support of the final Florida Constitution, a moderate Republican leader explained that he prevented Florida from becoming “niggerized” (*Johnson v. Florida I*). These facts make it abundantly clear that Florida has a “history of official discrimination in the state or political subdivision.”

Historic and modern examples of racial disparities in the healthcare, education, and criminal justice systems against African-Americans that exist across the nation give credence to the fifth senate factor. The fifth factor asks “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder the ability to participate effectively in the political process.” African-Americans continue to “bear the effects of discrimination” socially, economically, and within the criminal justice system. In 2010, The Agency for Healthcare Research and Quality released a report on racial disparities in the quality of healthcare and access to healthcare in the United States. They found that African-Americans received a lesser quality of care than Whites for approximately forty-percent of health procedures. The American Psychiatric Association has also published extensive research on the racial disparities in education quality, socioeconomic status, and health in the United States. The APA reported the following racial disparities:

African-American children are three times more likely to live in poverty than Caucasian children...The unemployment rates for African Americans are typically double those of Caucasian Americans. African American men working full time earn 72 percent of the average earnings of comparable Caucasian men...African Americans are at higher risk for involuntary psychiatric commitment than any other group. African Americans and Latinos in low-poverty areas were more likely to be referred for commitment by a law enforcement official than any other racial group.

In addition to the disparate negative impact on African-Americans in the socioeconomic and educational spheres, racial disparities within the criminal justice system potentially show the greatest effects of historical and modern racial discrimination. This racial bias disproportionately affects African-Americans and renders them unable to effectively seek redress.

To return to the example of Florida, the state’s average unemployment rate in 2011 was 10.7%. The unemployment rate of the African-American population in Florida was 18.1%. Florida cannot exactly paint an image of racial equality to counterbalance the widespread racial disparities in the state’s felon disenfranchisement rates.

Finally, the eighth Senate factor asks “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.” Elected officials in Florida have not demonstrated a lack of responsiveness to the needs of their African-American population. On the contrary, they have actively endorsed policies that lead to racially discriminatory effects. Florida’s Stand Your Ground and traffic stop-and-frisk policies have been condemned as legal racial profiling.

Although several states have begun to loosen their felon disenfranchisement laws, none have specifically targeted aspects of the law that may augment the racially disparate effect of such laws. As previously stated, because felon disenfranchisement laws alone are not unconstitutional, elected officials must address their racially disparate effects to properly respond to the “particularized needs of the members of the minority group” affected by these laws.

B. Clear Statement Rule

The Second Circuit heavily relied on the application of the “clear statement rule” in their majority opinion in *Hayden v. Pataki (2006).* The Supreme Court created the “clear statement rule” in *Gregory v. Aschroft.* The Court explained that “‘if Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so unmistakably clear in the language of the statute.’” In *Hayden,* the Second Circuit applied the clear statement rule and argued that the extension of the Voting Rights Act to felon disenfranchisement “provisions would introduce a change in the federal balance not contemplated by the framers of the Fourteenth Amendment.” However, the clear statement rule does not apply to the extension of Section 2 to felon disenfranchisement provisions for the following three reasons.

First, the alteration of the constitutional balance between the states and the federal government articulated by the majority in *Hayden* did not occur during the 1982 amendments or the initial enactment of the VRA. Rather, the Fourteenth and Fifteenth Amendments altered the balance of power with the express purpose of expanding legislative power to give them the ability to effectively address and dismantle laws that have the effect of racial discrimination. *South Carolina v. Katzenbach* *(1966)* specifically addressed the broad expanse of congressional power with regard to the Voting Rights Act and the Fifteenth Amendment. The opinion stated that the pre-clearance requirement “may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate.” The correction of the United States’ active history of discrimination in the electoral process has consistently been interpreted as an exceptional condition that merits broad discretionary enforcement.

The Court in *Gregory* highlighted this shift in the power balance and explained that the Fourteenth and Fifteenth Amendments “were specifically designed as an expansion of federal power and an intrusion on state sovereignty.” Judge Parker’s dissent in *Hayden* vigorously defended the intentional expansion of congressional power through the Fourteenth and Fifteenth Amendments. With reference to *Tennessee v. Lane* *(2004)*, Parker explained that the Fifteenth Amendment authorized congress to “enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent.” The dissent in *Johnson v. Florida II* also articulated that “the Fourteenth and Fifteenth Amendments altered the constitutional balance between the two sovereigns–not the Voting Rights Act, which merely enforces the guarantees of those amendments.” The Fifteenth Amendment purposely expanded Congress’s enforcement power without reference to the breadth of enforcement on specific standards/qualifications because they could not foresee what forms discrimination would take. The VRA and subsequent case law make explicit that a racial minority’s right to an effective vote is fundamental and thus demands protection by any means of legislative enforcement.

Second, the expansion of legislative power granted by the Fifteenth Amendment, as used in enforcement of the Voting Rights Act, is not permanent. Rather, this legislative power exists only through the enforcement of discriminatory voting practices. Any shift in the balance of power between the States and the Federal Government readjusts once suits are no longer brought under the Voting Rights Act. Members of the Senate Judiciary Committee expressed concern with the concept that exceptional conditions justify the “...permanent extension of this ‘uncommon exercise’ of legislative power” because “exceptional circumstances, by very definition, cannot exist in perpetuity.” Therefore, their argument hinges on what they believe is a permanent extension of legislative power. However, it matters that the exceptional circumstances expire, not that the powers enumerated to respond to these circumstances expire. Once there ceases to be voting qualifications that result in a racially disparate impact, Congress no longer possesses the opportunity to even use this expansion of power. The circumstance surrounding this breadth of legislative power exists as long as voting practices that have the effect of discriminating against a racial minority persist. A 2013 Supreme Court case, *Shelby County v. Holder (2013)*, addressed the timeline of the exceptional circumstances enumerated within the Voting Rights Act that grant an uncommon extension of legislative power. The Court held that Section 4(b) of the Voting Rights Act, the coverage formula, exceeds the Congressional authority granted by the Fourteenth and Fifteenth Amendments. The Court argued that the coverage formula is no longer constitutional because the violation of state sovereignty and federalism is based on outdated facts of voting conditions in the states in question. The *Shelby* decision signifies the ability of the States to ensure the exceptional circumstances that originally warranted broad congressional power still exist. Any state that believes their sovereignty is being infringed upon by antiquate applications of the Voting Rights Act may challenge the law as Alabama did.

Third, the clear statement rule is only relevant when the text of the statute in question is ambiguous. As the following section will explain, the text of the Voting Rights Act, and of Section 2 in particular, is unambiguous. Moreover, as argued by Judge Barkett in his dissenting opinion to *Johnson v. Florida II,* felon disenfranchisement laws “fall squarely within the VRA’s textual prohibition on any ‘qualification or prerequisite...which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”

* Plain Text of Section 2 of the VRA

The Supreme Court has consistently reasoned that statutory interpretation should not be determined by Congressional intent. In *Harrison v. PPG Indus. (1980)* the Court explained that “it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.” Regardless of the ambiguity of Congress’s intent, felon disenfranchisement laws are still cognizable through the plain text of Section 2.

The majority opinions of the Circuit Court felon disenfranchisement cases argue that because Congress did not explicitly list felon disenfranchisement laws as potentially discriminatory voting qualifications, or make their intent clear in the Senate Report, felon disenfranchisement laws are exempt from VRA challenges. No section of the Voting Rights Act lists specific types of voting practices that could potentially result in a disparate racial impact. Racial gerrymandering cases, for example, were the most common suits filed under Section 5 of the Voting Rights Act. Gerrymandering was not specifically mentioned or referenced as a procedure that effects voting anywhere in the original text of Section 5; yet, many successful gerrymandering suits were brought under Section 5. Congress did not articulate every potential voting practice that could result in racial discrimination because they “could not even have begun to identify every potential discriminatory voting qualification that would be subject to the VRA, given the ‘increasing sophistication with which states were denying racial minorities the right to vote.’” Moreover, the Supreme Court has previously determined that the “fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”

The majority opinion in *Johnson v. Florida II* further argues that Congressional enactments after passage of the Voting Rights Act that make provisions for felon disenfranchisement prove that Congress purposely excluded felon disenfranchisement laws from Section 2 coverage. However, felon disenfranchisement laws are not per se unconstitutional. Only a subset of felon disenfranchisement laws that result in racial discrimination would be a Section 2 violation.

Felon disenfranchisement laws are unequivocally voting qualifications. The qualification that must be met to vote is the lack of a felony conviction. Section 2 deals with a voting qualification that abridges “the right of *any* citizen of the United States to vote.” Nowhere within the text of Section 2 are individuals convicted of a crime exempted from protection and the Court previously determined that “citizenship is not a license that expires upon misbehavior.” Therefore, any practice or procedure that results in the abridgment of a minority’s right to vote when that individual has a felony, is by its very definition, a voting qualification.

IV. CONCLUSION

Felon disenfranchisement laws are cognizable under Section 2 of the Voting Rights Act for the following reasons. The clear statement rule does not apply to the extension of Section 2 to felon disenfranchisement laws because Section 2 is unambiguous as to the definition of a voting qualification. Voting qualifications that have a racially disparate impact on minorities, like felon disenfranchisement laws, fall squarely under Section 2. The effects of racial discrimination can be observed throughout all layers of American society and continue to affect the ability of African Americans to participate in the political process. Felon disenfranchisement laws perpetuate racial discrimination through the abridgment of a disproportionate percentage of African-Americans’ right to vote.