VOTING RIGHTS AND THE HISTORY OF INSTITUTIONALIZED RACISM: CRIMINAL DISENFRANCHISEMENT IN THE UNITED STATES AND SOUTH AFRICA

Brock A. Johnson

TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 403

II. BACKGROUND [U.S.] ................................................................................................. 412
   A. The Changing Face and Form of Felon Disenfranchisement Laws in the United States ................................................................. 412
      1. Criminal Disenfranchisement Prior to the Civil War ...... 414
      2. In the Aftermath of the Civil War: Reconstruction and the Introduction of Race in Laws of Criminal Disenfranchisement ........................................................................ 415
      3. The Current State of Felon Disenfranchisement in the United States ................................................................................. 418
      4. The Unique Nature of Felon Disenfranchisement Laws in the United States ........................................................................ 420
   B. The Disparate Racial Impact of Felon Disenfranchisement Laws in the United States ........................................................................ 423
   C. Efforts to Challenge Felon Disenfranchisement Laws in the United States ........................................................................ 424
      1. Fourteenth Amendment Challenges ........................................ 424
      2. Previous Challenges to Felon Disenfranchisement under the Voting Rights Act .......................................................... 427
      3. The Ninth Circuit Changes the Game (And Then Changes Its Mind) .................................................................................. 430

III. BACKGROUND [SOUTH AFRICA] .............................................................................. 433
   A. History, Content, and Structure of the South African Constitution ................................................................................... 433
   B. The Constitutional Court of South Africa ........................................ 437

* J.D., University of Georgia, 2016; B.A., University of North Carolina at Chapel Hill, 2010. I would like to thank my family for their continued support; I am particularly grateful for my grandfather’s persistent and longstanding encouragement.
C. Transformative Constitutionalism.................................438
D. Criminal Franchise in South Africa: August and NICRO......439

IV. ANALYSIS .............................................................................444
   A. A Shared History of Racial Discrimination ..................444
   B. Transformative Constitutionalism, Felon
      Disenfranchisement, and the Weight and Influence of
      History..................................................................................446
   C. A New Vision of Felon Disenfranchisement Reform in the
      Federal Courts of the United States.................................448

V. CONCLUSION ............................................................................450
I. INTRODUCTION

In the United States, 5.85 million people were disenfranchised because of felony convictions as of 2010.\(^1\) No other democratic country in the world disenfranchises more people, in both total numbers and population percentage, because of criminal convictions.\(^2\) Unlike countless other voting restrictions and regulations contested in the courts,\(^3\) felon disenfranchisement laws have long been a constitutionally viable method of limiting suffrage in the United States.\(^4\) Further, discussion of felon disenfranchisement—until recently—has escaped thorough debate.\(^5\) Yet, despite the long history of criminal disenfranchisement in the United States, and the possible value such laws provide to the democratic process, any category of law that restricts suffrage to such a significant extent should be subject to heightened judicial review and vigorously debated.

Like most voting regulations in the United States, felon disenfranchisement provisions are made at the state level.\(^6\) Two states, Maine and Vermont, allow individuals to vote while they are in prison, placing virtually no regulation on suffrage relative to criminal convictions.\(^7\)

---


3 See generally Thornburg v. Gingles, 478 U.S. 30 (1986) (holding all states are prohibited from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (holding a poll tax was “invidious discrimination” that violated the Equal Protection Clause of the Fourteenth Amendment); Reynolds v. Sims, 377 U.S. 533, 583, 586 (1964) (affirming the district court’s decision to invalidate existing and proposed plans for the apportionment of Alabama’s bicameral legislature because the plans violated the Equal Protection Clause of the Fourteenth Amendment).

4 CHUNG, supra note 1, at 1.

5 U.S. CONST. amend. XIV, § 2.

6 CHUNG, supra note 1, at 2–3.

In the United States, these states are outliers. The majority of states place voting restrictions on individuals who are not incarcerated but continue to be under state supervision through probation or parole. A significant minority of states continue to restrict voting rights after an individual has completely served his sentence; a subset of these states prohibit access to the ballot indefinitely for individuals convicted of a felony.

Although voting regulations continue to be firmly within the competence of state governments, significant and unprecedented federal oversight of such regulations became a unique hallmark of modern voting laws beginning in the Civil Rights Era. Significantly, the Voting Rights Act of 1965 and the Supreme Court’s changing view of constitutional protections resulted in numerous federally required changes to state election law in the latter half of the twentieth century. Central to such new federal regulation was the notion of the necessity to protect voting rights for marginalized minorities, particularly African-Americans, who had previously been subject to discriminatory treatment under the election laws of many states.

Like many facially neutral state election regulations invalidated by the Voting Rights Act, felon disenfranchisement laws share the quality of disproportionately affecting minority populations in the United States. This is an unavoidable consequence of the current American criminal justice system, a system that continues to disproportionately convict and incarcerate racial minorities.

---

8 Id. at 3 tbl.1.
9 Id.
10 Id.
11 Id. (listing Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming as states that disenfranchise all convicted felons and do not have waiting periods).
15 UGGEN, SHANNON & MANZA, supra note 7, at 10–11.

Almost 3% of black male U.S. residents of all ages were imprisoned on December 31, 2013 (2,805 inmates per 100,000 black male U.S. residents), compared to 1% of Hispanic males (1,134 per 100,000) and 0.5% of white males (466 per 100,000). . . . Black males had higher imprisonment rates across all age groups than all other races and Hispanic males. In the age
local police departments target crime to systemic failures of due process such
as the misuse of preemptory strikes in jury selection and a currently
overstrained right to effective assistance of counsel—the American criminal
justice system convicts and incarcerates a greater relative portion of African-
Americans than any other subset of the population. Thus, this group is
most acutely impacted by felon disenfranchisement. Whether this should be
accepted by a nation with a living memory of state mandated differential
treatment of minority populations, considering further the implications and
context of such treatment, is a matter deserving of significant political
debate.

Although the Civil Rights movement in the United States launched
changes and reforms in race relations that continue to this day, no democratic
country has confronted the effects of the differential treatment of citizens
based on race and group status in the modern era like South Africa. When
the death knell of Apartheid was finally heard, South Africa became a nation
reborn. Political leaders in South Africa enacted an entirely new
constitutional regime, premised primarily on the need to end the historic
oppression of minorities and to construct a new democracy free of the
discrimination central to the Apartheid government. This process required
nothing short of near total re-invention. The modern reimagining and
reconstruction of the democratic ideal seen in the South African
Constitution—and subsequent interpretive jurisprudence—presents a
powerful point of comparison to the aging Western model, itself subject to
the unfortunate warts and bruises of history.

range with the highest imprisonment rates for males (ages 25 to 39), black
males were imprisoned at rates at least 2.5 times greater than Hispanic males
and 6 times greater than white males. For males ages 18 to 19—the age
range with the greatest difference in imprisonment rates between whites and
blacks—black males (1,092 inmates per 100,000 black males) were more
than 9 times more likely to be imprisoned than white males (115 inmates per
100,000 white males).

pcw/98678.htm.
19 MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE
UNITED STATES 29–30 (2009).
In April 1994, South Africa held universally free, open democratic elections for the first time since the rise of Apartheid. It was the first election in the country’s history in which all races could freely participate. The presidential candidate elected, Nelson Mandela, had been released from prison only four years earlier, after being incarcerated for twenty-seven years and stripped of his fundamental rights, including his right to vote, by the then reigning Apartheid regime. This powerful symbol was not lost on the new South African government. In the wake of Apartheid, the South African government tackled its history of racial oppression by drafting a new, transformative, non-discriminatory constitution to govern their republic. Brought into law in 1996, the Constitution of South Africa protects an impressively expansive array of political and social rights; it is now considered a high-water mark among democratic constitutions throughout the world.

Section 19(3) of the Constitution of South Africa provides that “every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution.” This bedrock of universal suffrage has allowed the South African Constitutional Court to consistently protect access to the ballot. Two landmark Constitutional Court cases involving prisoners’ right to vote have given further support to the strength of universal suffrage. In August v. Electoral Commission, the South African Constitutional Court wrote:

---

22 Id.
23 Kende, supra note 19, at 34 (describing the “Interim Constitution”).
24 Id. at 6–7 (characterizing the South African Constitution as more progressive than the U.S. Constitution because it provides for and protects certain rights and liberties that are not within the direct scope of the U.S. Constitution such as prohibiting discrimination based on sexual orientation, authorizing affirmative action, and providing a right to healthcare and a right to unionize).
The achievement of the franchise [of universal adult suffrage] has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood . . . The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.28

Although neither August nor subsequent case law stand for the notion that the right to vote is absolute and can never be limited by government regulation, South African case law evidences support for a high bar to the lawful imposition of any such limitation.29

The South African approach to criminal disenfranchisement is admirable and instructive. Rejecting the institutionalized racial discrimination of its recent past, South Africa has embraced the modern variant of the democratic ideal.30 Since its formation, the South African Constitutional Court has conducted thorough and careful interpretation of their constitution—and the rights afforded and protected therein—with regard to many issues and areas of the law.31 In South Africa’s constitutional backdrop, if not always explicitly or emphatically mentioned, rests the notion of an important vigilance in ensuring that any formal vestiges of racial oppression are identified and eradicated.32

Imprisonment has a particularly complex and unfortunate history in South Africa. Under Apartheid, imprisonment was routinely used as a means to organize society along racial lines, impose social control, and restrict political reform and debate.33 Perhaps in part because of an awareness of this

29 Id.
30 KENDE, supra note 19, at ix, 8.
31 See id. at 9–10 (describing South Africa’s progressive approach to many human rights issues).
32 See, e.g., S. AFR. (INTERIM) CONST., 1993 art. 251, available at http://www.gov.za/docu me nts/constitution/constitution-republic-south-africa-act-200-1993 (“This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”).
history, the Constitutional Court of South Africa has applied a careful rigor to their task of judicial upkeep of South Africa’s constitutional guarantees. The Constitutional Court has not sought to provide quick judgments in atonement for its recent past but rather has issued opinions offering a careful and balanced analysis of contested law and its relation to the rights protected under their new constitution.34 Pointedly, the Constitutional Court, while not establishing an absolute right to vote, has consistently invalidated attempts to place restrictions on access to the ballot, even for individuals currently incarcerated.35

The judicial approach generally used by the United States in evaluating issues of constitutionality is quite similar to that employed by South Africa. In the realm of felon disenfranchisement, however, the end result of those similar approaches has been markedly different.36 The highest courts of both countries have allowed, or allowed for the possibility of, the restriction of voting rights in some circumstances. Thus, both courts recognize and affirm the principle that in democratic society the right to vote is not absolute. The engines of these limitations are unique to their respective countries, but it is relevant that both regard the legitimacy of criminal disenfranchisement to depend on a balance of qualified constitutional rights and a potentially legitimate, limited government interest in their restriction.37

Many similarities exist between the major social and political battles fought over race in the United States and South Africa in the twentieth century.38 The countries share a long, common history of racial subjugation

34 KENDE, supra note 19, at 10.
37 See Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that a California felon disenfranchisement law did not violate the Equal Protection Clause of the Fourteenth Amendment); Minister of Home Affairs v. NICRO (3) SA 280 (CC) paras. 65–67 (S. Afr.) (holding that without more justification the felon disenfranchisement law at issue was unconstitutional).
and purposeful marginalization of racial minority groups. In both countries, law sanctioned overt discrimination while presiding governments took an explicit and active role in the practice of racial oppression. Fortunately, both countries have also fought to overcome this shameful history and assert the existence of a nation reborn, its institutions no longer afflicted by the racial discrimination of its past. Yet, despite these laudable aspirations, the modern political reality of both South Africa and the United States indicates that this shared dream of equality has not been fully realized.

In addition to this common social and political backdrop, there are also informative commonalities between the governmental structures of both nations. South Africa and the United States are constitution-based democratic republics. The Constitution of South Africa was modeled in part on the United States Constitution, but would ultimately further advance the notion of what constitutes fundamental and inalienable democratic rights. Indeed, the Constitution of South Africa is considered by some scholars to provide the most expansive constitutional protections in the world. The Constitutional Court of South Africa is also roughly analogous to the Supreme Court of the United States, with a similar political role, multi-member composition, and judicial process. Both countries’ highest courts have been actors in social change through the process of interpreting the boundaries of the fundamental rights afforded by their respective constitutions. Thus, these commonalities present a functional and instructive backdrop that encourages effective comparative analysis between

39 Id. at 486–87.
40 Id. at 545–46, 573–82.
41 Id. at 573–82.
42 KENDE, supra note 19, at 6.
43 Id. at 4 (citing CASS SUNSTEIN, DESIGNING DEMOCRACY, WHAT CONSTITUTIONS DO 261 (2001)).
44 Id. at 8–10. One importance difference between the courts is that the Constitutional Court of South Africa decides only constitutional questions. In this way, it has a more narrow and specific focus than the U.S. Supreme Court. Id. at 10.
45 See generally Gideon v. Wainwright, 372 U.S. 335 (1963) (holding states are required to provide indigent criminal defendants with legal counsel pursuant to the Fifth, Sixth, and Fourteenth Amendments); Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.) (holding that the state is constitutionally obligated to provide affirmative assistance to those experiencing extreme poverty and homelessness, including but not limited to assistance in the provision of adequate housing); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (holding state laws establishing separate but equal segregated public schools unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).
the criminal disenfranchisement case law, and corresponding constitutional bedrock, of the United States and South Africa.

Importantly, South Africa—though committed to its constitution and the ideals of freedom, dignity, and equality—is not a democratic utopia. South Africa continues to experience high unemployment, high levels of violent crime, and general economic contraction. The latter two of these conditions have both been cited by South Africa legislators in defense of restrictions on prisoners’ rights to vote. Nonetheless, the South African Constitutional Court has recognized that the right to vote exists above such state interests—above mere partisan, political maneuvering to appear tough on crime or cognizant and protective of economic interests—and can only be restricted with substantial factual findings of state necessity. In South Africa, the right to vote seemingly rests on particularly intractable, though not completely impenetrable, constitutional ground.

The situation in the United States is very different. Although there is a considerable amount of federal law protecting the right to vote, felon disenfranchisement has essentially been accepted by the federal courts. This Note argues that this unquestioned acceptance should not stand. Though these restrictions are based, at least in part, on enumerated allowances within the Constitution, the ideals of democracy demand a reexamination of the legal framework used to analyze current felon disenfranchisement provisions. In recent years, the American political landscape has again been increasingly embroiled in a highly visible political debate questioning the racial neutrality of both the criminal justice system

49 Minister of Home Affairs v. NICRO, 2005 (3) SA 280 (CC) paras. 40, 54 (S. Afr.).
50 Id. paras. 65–67.
51 Id.; August v. Electoral Comm’n, 1999 (3) SA 1 (CC) (S. Afr.).
53 U.S. CONST. amend. XIV, § 2.
2016] VOTING RIGHTS 411

and various state electoral laws. Felon disenfranchisement laws touch both of these issues. Moreover, these laws are highly relevant in their potential to distort the composition of the voting electorate and perversely influence the governing political agenda.

The United States could benefit from utilizing an approach similar to that of South Africa—by balancing the individual’s rights to vote and the state’s ability to limit that right—when analyzing constitutional challenges to criminal disenfranchisement laws. Specifically, the federal courts of the United States should recognize the democratic value of the strong suffrage rights supported by the Constitution of South Africa. The sheer number of persons affected by criminal disenfranchisement laws in the United States provides further urgency to this matter. The ongoing discriminatory impact of criminal disenfranchisement in the United States collides with the notion of an evolving democratic ideal to provide compelling cause to re-evaluate these laws and to consider the judgment of other, similarly situated democratic countries. Finally, with the ever-present backdrop of race, it is vital to consider the practical consequences, however unpleasant or politically and socially stigmatized, of felon disenfranchisement.

This Note argues the current state of felon disenfranchisement laws in the United States fails to satisfy the modern democratic ideal and should be freshly assessed, debated and, ultimately, reformed. Further, this Note posits that—in an area of law dominated by history, race, and fundamental notions of democracy—the relatively recent transformation in South Africa provides a particularly vital and effective point for comparative analysis of the legal structure that supports criminal disenfranchisement in the United States.

Part II of this Note examines felon disenfranchisement laws in the United States, including their evolution through the Reconstruction Era to the modern form of facially race neutral laws currently classified as non-punitive regulation only secondarily linked to criminal conviction. Part II further illustrates that the United States is an outlier among democratic nations regarding the prevalence and severity of felon disenfranchisement laws.

54 See generally Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (holding the state interests in support of an Indiana statute requiring voters to present state issued identification to vote outweighed the potential impositions on voters); Frank v. Walker, 768 F.3d 744 (7th Cir. 2014) (holding a Wisconsin voter identification requirement did not violate the Equal Protection Clause or the Voting Rights Act).
55 CHUNG, supra note 1, at 5 (“One study found that disenfranchisement policies likely affected the results of seven U.S. Senate races from 1970 to 1998 as well as the hotly contested 2000 Bush–Gore presidential election.”).
56 Id. at 3 (stating that the criminal disenfranchisement rate rose to 5.85 million by 2010).
Finally, Part II enumerates and analyzes the traditional legal claims pursued by individuals in the United States attempting to challenge felon disenfranchisement laws as unconstitutional.

Part III of this Note focuses on the re-invention of the democratic ideal in post-Apartheid South Africa; specifically discussing the effect this process has had on criminal disenfranchisement laws. Part III begins with an overview of the content and structure of the Constitution of South African and discusses how South Africa’s Constitutional Court interprets this document. This section devotes specific attention to the notion of transformative constitutionalism emphasized by leading judicial authorities in South Africa. Finally, Part III examines two important decisions by the Constitutional Court of South Africa concerning criminal disenfranchisement and will analyze the implications of these holdings within the broader framework of the modern democratic ideal.

Part IV of this Note argues that there is a useful comparison between both the history of racial discrimination and the current state of criminal disenfranchisement in the United States and South Africa. Part IV begins with a brief assessment of why this shared history of racial oppression allows for effective comparative analysis. Next, this section discusses the relationship between the South African notion of transformative constitutionalism and the influence and weight of history. Finally, Part IV proposes a new path forward for the consideration of criminal disenfranchisement laws by the federal courts of the United States.

II. BACKGROUND [U.S.]

A. The Changing Face and Form of Felon Disenfranchisement Laws in the United States

Criminal disenfranchisement laws have changed considerably in character and application throughout the history of the United States. Criminal disenfranchisement laws were originally intended to be individualized and explicitly punitive measures used to protect the perceived purity of the electorate.\(^{57}\) After the Civil War, felon disenfranchisement laws took on a new, more nefarious shape. Many states, particularly those in the former Confederacy, used criminal disenfranchisement as a tool to maintain the

---

white-dominated, political status quo and to insulate white southerners from
the political influence of newly freed blacks. The position of state election
laws within the dual sovereign system of the United States also made it so
this practice would be largely immune from federal intervention, particularly
in the years after the Supreme Court’s dismantling of the Civil Rights Act of
1875. Criminal disenfranchisement provisions were thus used in this
manner for nearly a century throughout the American South.

The overtly racist implementation and restructuring of felon
disenfranchisement laws in the years following the Civil War is no longer the
norm; yet, because of the historical prevalence of these laws and the modern
inequities of the criminal justice system, they continue to have a startlingly
discriminatory effect. At present, this empirically proven reality has not
persuaded the federal courts. The current position of the Supreme Court
(originating in oft-repeated dicta) is that criminal disenfranchisement is a
collateral consequence of criminal conviction and is not inherently
punitive. The Supreme Court has upheld the constitutionality of felon
disenfranchisement on all but one occasion. With this considerable hurdle,
litigants have still attempted to challenge criminal disenfranchisement in
federal and state courts, almost uniformly without ultimate success.

---

58 Id. at 1090.
59 See United States v. Cruikshank, 92 U.S. 542 (1875) (holding Enforcement Act penalties
for depriving or conspiring to deprive the right to vote cannot be enforced against private
citizens).
60 CHUNG, supra note 1, at 2–3.
61 One example of the Supreme Court’s position can be found in a case involving
citizenship rights following military desertion. In Trop v. Dulles, Chief Justice Warren, in
dicta, stated

A person who commits a bank robbery, for instance, loses his right to liberty
and often his right to vote. If, in the exercise of the power to protect banks,
both sanctions were imposed for the purpose of punishing bank robbers, the
statutes authorizing both disabilities would be penal. But because the
purpose of the latter statute is to designate a reasonable ground of eligibility
for voting, this law is sustained as a nonpenal exercise of the power to
regulate the franchise.

disenfranchisement law unconstitutional because it was enacted with a racially discriminatory
intent and had a correspondingly discriminatory impact).
63 See, e.g., Farrakhan v. Gregoire (Farrakhan III), 623 F.3d 990 (9th Cir. 2010) (en banc)
(per curiam) (holding a state disenfranchisement statute did not violate the Voting Rights Act
because the plaintiffs did not present evidence of intentional discrimination in the state’s
criminal law system); Danielson v. Dennis, 139 P.3d 688 (Colo. 2006) (en banc) (holding a
disenfranchisement laws in the United States today are automatic and invisible machinations of the criminal justice system—vis-à-vis electoral regulations enacted by the state—making them particularly difficult to challenge constitutionally. Yet, despite this reality, it is imperative that such a significant and intractable form of disenfranchisement does not escape careful review.

1. Criminal Disenfranchisement Prior to the Civil War

Criminal disenfranchisement had a vastly different form in the early history of the United States.\textsuperscript{64} Disenfranchisement, seen as a discrete punishment, applied only to those serious crimes that indicated an individual lacked the moral virtue to be a participating member of society.\textsuperscript{65} The judiciary, on an individualized basis, primarily dictated the terms and imposition of this punishment; this judicial autonomy was consistent until later reform in the time immediately prior to and following the Civil War.\textsuperscript{66}

Although the application of felon disenfranchisement laws was limited in the early history of the United States, the ability to disenfranchise because of certain criminal convictions was nearly ubiquitous among the several states.\textsuperscript{67} By 1821, eleven of the original colonies had adopted some form of felon disenfranchisement laws in their individual state constitutions.\textsuperscript{68} Importantly, a wide variety of disenfranchisement was the norm at this time. Voting was regarded as a selective privilege—women, men without property, blacks, and other marginalized groups were commonly excluded from participation in the political process.\textsuperscript{69} Despite the ubiquity of voting restrictions in the early history of the United States, wholesale criminal

\textsuperscript{64} See Ewald, supra note 57, at 1061–66 (discussing the history of criminal disenfranchisement laws prior to the Civil War).
\textsuperscript{65} Id. at 1061–64.
\textsuperscript{66} Id. at 1062, 1065–66.
\textsuperscript{67} Id. at 1062–63.
\textsuperscript{69} Ewald, supra note 57, at 1064.
disenfranchisement as practiced today was completely foreign to early American society.\textsuperscript{70}

The practice of selective suffrage indicates that racial discrimination was not at the core of pre-Civil War criminal disenfranchisement.\textsuperscript{71} Instead, criminal disenfranchisement was viewed as a unique punishment enacted to protect against undue corruption of the qualified and upstanding electorate by excluding individuals who lacked moral virtue.\textsuperscript{72} For this reason, most state criminal disenfranchisement laws focused on crimes demonstrating serious violation of the moral code: crimes that were “infamous,” “notoriously scandalous,” or otherwise indicative of personal corruption or moral bankruptcy.\textsuperscript{73}

\textbf{2. In the Aftermath of the Civil War: Reconstruction and the Introduction of Race in Laws of Criminal Disenfranchisement}

The end of the Civil War brought profound change to the legal order of voting rights in the United States, particularly in the former Confederate states. In the “relatively brief but extraordinary period of black advancement known as the Reconstruction Era,” landmark federal legislation abolished slavery, bestowed full citizenship upon African-Americans, mandated due process and equal protection of the laws for all citizens, and prohibited the denial of the right to vote on the basis of race.\textsuperscript{74} This was a major change for the entire country, but was felt most acutely in the Southern states. Indeed, with the creation of a new, numerous, and potentially powerful black electorate, the still-embedded ruling power structure of the Southern states sought new methods for maintaining political and social control.\textsuperscript{75} Eventual Secretary of Treasury Carter Glass, while serving as a delegate to the Virginia convention in 1906, stated “[w]e are here to discriminate to the very

\textsuperscript{70} See generally \textit{id.} at 1064–65 (noting the changes in criminal disenfranchisement in the late 1800s that led to the use of criminal disenfranchisement as a means of racial discrimination).


\textsuperscript{72} \textit{Id.} at 728–29.

\textsuperscript{73} Ewald, supra note 57, at 1063–64.

\textsuperscript{74} \textit{MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS} 29–30 (2010).

\textsuperscript{75} John Ghaelian, \textit{Restoring the Vote: Former Felons, International Law, and the Eighth Amendment}, 40 HASTINGS CONST. L.Q. 757, 762–63 (2013) (“Southern states used disenfranchisement to deny African Americans the vote and as a means of curtailing the rights they had gained after the Civil War.”).
extremity of permissible action under the limitation of the Federal Constitution, with a view to the eliminating of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.”  

Historical records indicate this was a common sentiment among the governing white power structure of the South in the post-Reconstruction era.

This behavior would continue, subject to only occasional restriction, until the passing of the Voting Rights Act in 1965. Nearly all of the many methods employed to promote segregation and discrimination during the Reconstruction Era and beyond have been declared unconstitutional or abandoned as indefensible. Only criminal disenfranchisement has the distinction of continued and persistent existence.

In the wake of Reconstruction, lawmakers began to write and amend criminal disenfranchisement statutes to specifically target crimes deemed more likely to be committed by blacks than whites. This rewriting of classifications in the criminal code was widespread in the South. For example, in 1869, Mississippi had a constitutional provision disenfranchising those guilty of “any crime.” In 1890, this provision was limited to enforce disenfranchisement only those with convictions for specific crimes—crimes for which blacks were specifically targeted and more likely to be prosecuted. Numerous other examples convey that “between 1890 and 1910, several Southern states altered their criminal disenfranchisement laws with the express intent of removing blacks from the rolls.”

Georgia and Alabama, in 1877 and 1901 respectively, passed similar laws at state constitutional conventions permanently barring those convicted of a crime of “moral turpitude” from voting, regardless of whether that crime mandated

---

77 Id.; see also Hunter v. Underwood, 471 U.S. 222, 229 (1985) (“[T]he Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.”).
79 Ewald, supra note 57, at 1122–27.
80 Id. at 1065–66, 1122–27.
81 Id. at 1090–91.
82 Id. at 1091.
83 Id.
84 Id.
incarceration. Many misdemeanors became crimes of moral turpitude; particularly those crimes associated with the widespread dislocation of landless, newly freed African-Americans and with the socio-economic realities of being poor and marginalized in the post-Reconstruction American South. Though some linguistic subterfuge was involved, the intent and expectation of these laws was clear: discrimination on account of race would continue in the South and it would be pushed to the outermost, constitutionally permissible limits.

Though the Southern power structure changed the language it used to effect discriminatory disenfranchisement out of constitutional necessity, lawmakers made little effort to conceal racial motivation. Chief Justice Cooper, writing for the Mississippi Supreme Court in 1896, wrote:

Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites, a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.

In addition to this change regarding the underlying intent of criminal disenfranchisement statutes, the post-Civil War modification of criminal disenfranchisement laws also transformed the manner in which these laws were applied. Individual deliberation by the judiciary was largely eliminated. Instead, criminals were automatically disenfranchised upon

---

85 Id. at 1094.
86 Id. at 1094–95.
87 Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896).
88 See Ewald, supra note 57, at 1062 (describing the differences between “colonial and contemporary criminal disenfranchisement”).
89 Id.
conviction—rendering mandated disenfranchisement separate from direct and individualized punitive sentencing. The effect of the change is hard to overstate. The automatic and invisible nature of criminal disenfranchisement laws has significantly contributed to the number of people so disenfranchised and the inability of such disenfranchised persons to challenge the relevant laws under the protections afforded by the Constitution. Further, this automatic application is a residual effect of legal changes driven by racism and a want for political oppression. Despite this history, criminal disenfranchisement laws continue to exist and operate in the United States.

3. The Current State of Felon Disenfranchisement in the United States

Although the explicit discriminatory intent of the post-Civil War era is gone, felon disenfranchisement remains pervasive, legal, and nearly unimpeachable. Following the enactment of the Voting Rights Act, legislators amended felon disenfranchisement laws to remove any expression of discriminatory intent. Nonetheless, these policies of disenfranchisement continue to have a clearly disproportionate impact on racial minorities. As will be discussed further in Part IV, the automatic application of disenfranchisement resulting from criminal conviction is at the core of this disparity.

There are numerous differences in the scope and structure of state disenfranchisement laws; most have withstood various challenges to their legality in the federal courts. Indeed, as will be discussed further, the

90 Id.
91 See generally Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that individuals with felony convictions can be barred from voting without violation of the Fourteenth Amendment); Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (holding that plaintiffs seeking to challenge felon disenfranchisement laws under the VRA based on a showing of racial discrimination within the criminal justice system must show intentional discrimination within the criminal justice system driving the enactment of a felon disenfranchisement statute).
93 UGGEN, SHANNON & MANZA, supra note 7, at 1–2.
94 See Ghaelian, supra note 75, at 766–73 (discussing the common challenges to criminal disenfranchisement laws).
Supreme Court has rejected challenges made to felon disenfranchisement laws alleging an impermissibly discriminatory racial effect.95

As of 2010, 5.85 million people were disenfranchised in the United States because of a felony conviction.96 Felon disenfranchisement accounts for 2.5% of the voting age population—one in every forty adult American citizens.97 Six of the ten states with the highest percentage of disenfranchised felons are former Confederate states.98 Florida and Mississippi, the states with the highest felon disenfranchisement rates, disenfranchise 10.4% and 8.2% of their respective, otherwise voting eligible electorate.99

There is considerable variety in the scope, structure, and severity of state felon disenfranchisement laws. Forty-eight states provide for some form of felon disenfranchisement; only two states, Maine and Vermont, have no such voting restriction.100 Thirty-four states prohibit individuals on parole from voting; thirty of those states also deny voting access to individuals on probation.101 Twelve states ban felons from voting either permanently for particular offenses or for a specified time following the completion of their sentence (including probation or parole).102

Spanning the inconsistent patchwork of felon disenfranchisement laws, there are two near-constants: (1) cumbersome, financially demanding, and time intensive restoration procedures for regaining the right to vote, and (2) rapid growth of those affected as a percentage of the otherwise eligible electorate.103 While most states eventually allow individuals to regain their right to vote, they must do so through a process that is often arduous and unclear, causing many ex-offenders to never restore their voting eligibility.104 Some states additionally impose financial penalties on ex-offenders, making the restoration process “a bureaucratic maze [requiring] the payment of fines or court costs.”105

95 Id. at 766–69 (discussing challenges to criminal disenfranchisement under the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act).
96 UGGEN, SHANNON & MANZA, supra note 7, at 1.
97 Id.
98 Id. at 16 tbl.3.
99 Id.
100 Id. at 2, 3 tbl.1.
101 CHUNG, supra note 1, at 1 tbl.1.
102 Id.
103 ALEXANDER, supra note 74, at 154–55; see also CHUNG, supra note 1, at 3 fig.B.
104 ALEXANDER, supra note 74, at 154.
105 Id.
The character and construction of state felon disenfranchisement laws make for a varied and complex legal framework. The ultimate outcome of this framework has neither quality—the results are clear. Throughout the United States, in the decades concurrent with its “War on Drugs,” there has been a steady and dramatic rise in the number of people affected by felon disenfranchisement laws.\footnote{106} An estimated 1.17 million people were disenfranchised because of felony convictions in 1976; by 2010, that number had more than quadrupled.\footnote{107}

Although modern felon disenfranchisement law is clearly related to the explosive expansion of the criminal justice system in the late twentieth century, in the eyes of the federal courts these laws exist apart and distinct from the machinations of criminal law.\footnote{108} This understanding has proved difficult for litigants to overcome in the federal courts.\footnote{109} Particularly, this unique interpretive framework has made it difficult to challenge felon disenfranchisement either through traditional channels protecting minority voting rights or on the grounds of constitutional guarantees of equal protection under law.\footnote{110}

4. The Unique Nature of Felon Disenfranchisement Laws in the United States

The American policy regarding felony disenfranchisement stands in stark contrast to the like policies of European nations and other constitutional democracies across the world. No European state has a blanket voting prohibition, for any duration, for convicted criminals who have fully served their sentence.\footnote{111} Indeed, “[t]here are disagreements and debates within
European nations over disenfranchisement—but the debate is *which prisoners* should be barred from voting. In almost all cases, the debate stops at the prison walls.\footnote{Id. at 4 (emphasis in original).} The United States is alone amongst similarly free nations in its use of disenfranchisement laws where “disqualification is automatic, pursues no defined purpose, and affects millions.”\footnote{Id. at 6.} Two influential, recent decisions from the European Court of Human Rights and the Canadian Supreme Court highlight this disparity.

In 2005, the European Court of Human Rights (ECtHR) issued its decision in *Hirst v. United Kingdom (Hirst No. 2)*, affirming that “an absolute bar on voting by any serving prisoner in any circumstance” was an unlawful violation of Article 3 of Protocol 1 of the European Convention of Human Rights.\footnote{Hirst v. United Kingdom (No. 2), 2005 Eur. Ct. H.R. 681, ¶ 41, 99(1) (2005), available at http://www.bailii.org/eu/cases/ECHR/2005/681.html.} While the ECtHR recognized that nations have some discretion to limit prisoner voting in specific and limited circumstances, the court noted that “universal suffrage has become the basic principle.”\footnote{Id. ¶ 59.} The *Hirst No. 2* opinion stressed that the United Kingdom could not provide a legitimate and proportional rationale for imposing an automatic and absolute voting ban on incarcerated individuals.\footnote{Id. ¶¶ 73–85.} The ECtHR made clear that “the ballot is a right, not a privilege, and that the presumption in democratic states must be in favor of inclusion.”\footnote{ISPANI, supra note 2, at 17.}

The Canadian Supreme Court, like the ECtHR, has also allowed some level of governmental discretion in restricting access to the ballot but has generally favored a basic presumption in support of robust voting rights. In *Suave v. Canada (Suave No. 2)*, the Canadian government argued that the Supreme Court of Canada should uphold a federal electoral law that disenfranchised prisoners serving sentences longer than two years.\footnote{Suave v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2010/index.do.} The Canadian government had expressly amended the law to be permissible under the notwithstanding clause in Section 33 of the Canadian Charter of Rights and Freedoms.\footnote{Id.} In the Charter, the notwithstanding clause “allows certain fundamental rights to be limited by Parliament.”\footnote{Id.}

\footnote{Id., supra note 2, at 12.}
The Canadian Supreme Court struck down the amended electoral law.\textsuperscript{121} The court ruled that the right to vote was of special importance and not subject to the provisions of the notwithstanding clause.\textsuperscript{122} Thus, for a restriction on the right to vote to be legitimate, the court held that the limitation must be “demonstrably justified,” according to Section 1 of the Charter.\textsuperscript{123} In short, to satisfy the demonstrable justification requirement, the government must prove that the aims of the law justified the voting right restriction.\textsuperscript{124} Instead, the court found there was: (1) not sufficient evidence of a rational connection between crime and punishment, (2) restriction of voting rights was not an effective educational tool, (3) disenfranchisement was inconsistent with the democratic rule of law, and (4) that, as punishment, disenfranchisement was arbitrary and excessively disproportionate in scope.\textsuperscript{125} On the irrationality of prisoner disenfranchisement, the Canadian Supreme Court wrote: “depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility.”\textsuperscript{126} Finding all arguments provided by the state unsuccessful in defeating the presumption of unrestricted franchise, the court wrote: “Denying a citizen the right to vote denies the basis of democratic legitimacy . . . Denying prisoners the right to vote . . . removes a route to social development and rehabilitation . . . and it undermines the correctional law and policy directed toward rehabilitation and integration.”\textsuperscript{127}

It is important to note that in both these cases the issue was the voting rights of currently incarcerated prisoners. For both courts, the idea of an automatic ban on voting for ex-offenders would presumably be an impermissible violation of electoral law, beyond the scope of reasonable debate. This brief comparative analysis supports the notion that, in the realm of criminal disenfranchisement, the United States is an outlier among modern democratic nations.

\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{127} Id.
B. The Disparate Racial Impact of Felon Disenfranchisement Laws in the United States

The scale of vote-denial permitted by felon disenfranchisement laws should be worrisome for the world’s oldest constitutional democracy. Further, the disparate effect these laws have on historically oppressed and marginalized racial minorities should be cause for immediate concern.

Overwhelmingly, felon disenfranchisement laws disproportionately affect African-Americans. Over 2 million African-Americans are currently disenfranchised because of a felony conviction. This results in the disenfranchisement of 7.7% black adults otherwise eligible to vote, compared to the 1.8% criminal disfranchisement rate of the non-black population. These figures are national averages; in three states—Florida, Kentucky, and Virginia—one in five black adults are disenfranchised because of a felony conviction.

The numbers are even worse for black men. Thirteen percent of the adult black male population, 1.4 million people, is disenfranchised because of a felony conviction. This is seven times the national average rate of criminal disenfranchisement. Research indicates that if the current incarceration rates remain steady, in the next generation, three out of every ten black men can expect to be disenfranchised during their lifetime.

In states that disenfranchise ex-offenders, 40% of the adult black male population may permanently lose their voting rights.

128 CHUNG, supra note 1, at 2.
129 Id.
131 Id. See also BRENNAN CENTER FOR JUSTICE, VOTING RIGHTS RESTORATION EFFORTS IN VIRGINIA (Oct. 14, 2016), available at https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-virginia (“Virginia is one of four states whose constitution permanently disenfranchises citizens with past felony convictions but grants the state’s governor the authority to restore voting rights. After a July 2016 Virginia Supreme Court decision invalidated an executive order restoring voting rights to over 200,000 citizens, the state’s governor announced his plan to issue individual restorations for citizens who have completed the terms of their sentence, including probation and parole.”).
133 Id.
134 FACT SHEET: FELONY DISENFRANCHISEMENT, supra note 130, at 1–2.
135 Id.
The disproportionate impact of felon disenfranchisement laws along racial lines is undeniable and pervasive. This is true despite the fact that no standing state disenfranchisement law has any express racial element in either intent or form. It is impossible to view the phenomenon of felon disenfranchisement without considering the radical transformation of the criminal justice system in size, scope and, sentencing structure that has been enacted across partisan divides and presidential administrations over the past thirty-five years. The modern criminal justice system, like the felon disenfranchisement laws with which it is inherently intertwined, operates without explicit racial discrimination, and yet has an overwhelmingly disproportionate effect on the black population.

C. Efforts to Challenge Felon Disenfranchisement Laws in the United States

Federal disenfranchisement laws are ubiquitous in the United States but they have not gone unchallenged. Affected individuals, political policy groups, and a minority of nationally visible politicians have sought reform of felon disenfranchisement. Several types of legal challenges have been brought against felon disenfranchisement laws in the United States. To date, these challenges have been largely unsuccessful. This section will explore the various channels claimants have used in the past to challenge felon disenfranchisement laws in the federal courts. Specifically, this section will highlight challenges to criminal disenfranchisement provisions previously brought under the Fourteenth Amendment and the Voting Rights Act of 1965, and will examine the current relevant governing law in the several federal circuits.

1. Fourteenth Amendment Challenges

The Fourteenth Amendment is perhaps the strongest constitutional source for contesting impermissibly discriminatory election laws. Yet, ironically, challenges to felon disenfranchisement laws brought under the protections of

---

136 See supra Part II.A.3 (describing the changes to disenfranchisement laws following the Voting Rights Act and the current state of felon disenfranchisement laws in the U.S.).
137 See ALEXANDER, supra note 74, at 153–56 (describing how criminal disenfranchisement fits into the modern criminal justice system and affects the African-American population).
138 CARSON, supra note 16.
139 Ghaelian, supra note 75, at 766–73.
140 Id. at 767, 769–70.
the Fourteenth Amendment have been almost completely denied by modern rulings of the Supreme Court.\textsuperscript{141}

In \textit{Richardson v. Ramirez}, the Supreme Court first encountered the issue of felon disenfranchisement and its constitutionality under the Fourteenth Amendment.\textsuperscript{142} The plaintiffs in \textit{Richardson}, three individuals barred from voting because of previous convictions constituting “infamous crimes” under California’s Constitution, brought a class petition asserting that this restriction on suffrage was a violation of a fundamental right under the Equal Protection Clause of the Fourteenth Amendment, and thereby subject to strict scrutiny analysis.\textsuperscript{143} Petitioners argued that the State of California must prove that it has a compelling state interest for the felon disenfranchisement provision if the provision was to withstand a test of constitutionality.\textsuperscript{144} Justice Rehnquist, writing for the majority of the Court, dismissed this argument, reversing the prior decision by the California Supreme Court, and upheld the constitutionality of California’s expansive felon disenfranchisement provisions.\textsuperscript{145}

In a strident dissent, Justice Marshall urged that the Court follow the typical Equal Protection framework.\textsuperscript{146} Justice Marshall noted that a disparate classification of individuals regarding a fundamental right is necessarily subject to a tripartite analysis.\textsuperscript{147} According to this framework, when a fundamental right is restricted by the state, that state has the significant burden of proving that (1) the challenged law is necessary to a “legitimate and substantial state interest,” (2) the classification involved is precisely drawn, and (3) that “there are no other reasonable ways to achieve the State’s goal with a lesser burden on the constitutionally protected interest.”\textsuperscript{148} In \textit{Richardson}, the majority never conducted this analysis. Instead, the Court held that the affirmative sanction of criminal

\textsuperscript{141} See generally Richardson v. Ramirez, 418 U.S. 24 (1974) (holding individuals with felony convictions may be barred from voting without violation of the Fourteenth Amendment). \textit{But see} Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating the criminal disenfranchisement provision of the Alabama Constitution as impermissible under the constitutional guarantee of equal protection because evidence demonstrated it was enacted with a discriminatory purpose).

\textsuperscript{142} 418 U.S. 24 (1974).

\textsuperscript{143} \textit{Id}. at 26–27, 54.

\textsuperscript{144} \textit{Id}. at 33, 54.

\textsuperscript{145} \textit{Id}. at 56.

\textsuperscript{146} \textit{Id}. at 77 (Marshall, J., dissenting).

\textsuperscript{147} \textit{Id}. at 78.

\textsuperscript{148} \textit{Id}.
disenfranchisement in Section 2 of the Fourteenth Amendment made the normal Equal Protection analysis unnecessary. Justice Rehnquist provided an exhaustive legislative history of the Fourteenth Amendment to support the Court’s reasoning that:

[T]he understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of Sec. 2 and in the historical and judicial interpretation of the Amendment’s applicability to state laws disenfranchising felons, [distinguishes] such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.

The Court thereby found explicit congressional approval of felon disenfranchisement and held it unnecessary for the state to carry the burden of typical Equal Protection analysis. Always the unbending advocate for a more fully realized and consistently applicable American equality, Justice Marshall ardently disagreed, writing: “The ballot is the democratic system’s coin of the realm. To condition its exercise on support of the established order is to debase the currency beyond recognition.”

The Supreme Court’s holding in Richardson has prevented Fourteenth Amendment challenges to state felon disenfranchisement laws in all instances except those involving a clear demonstration that the law was enacted with an impermissibly racially discriminatory intent. In Hunter v. Underwood, the Supreme Court held, for the first—and only—time, that a state felon disenfranchisement law was unconstitutional under the Fourteenth Amendment. In Hunter, the petitioners alleged that a criminal disenfranchisement provision in the Alabama Constitution was enacted with a racially discriminatory purpose and that it had such an impact. The Court held that the law was facially race neutral and that therefore a racially discriminatory purpose and intent must be proven to establish a violation of the Equal Protection Clause. The burden of proof rested on a two-part test

---

149 Id. at 54 (majority opinion).
150 Id. at 41–52, 54.
151 Id. at 54–54.
152 Id. at 83 (Marshall, J., dissenting).
154 Id. at 223–24.
155 Id. at 227–28.
requiring (1) the challengers show that racial discrimination was a “substantial or motivating factor” in the legislature’s choice to disenfranchise criminals and, if this is established, (2) the state to prove that the provision would have been enacted in the absence of any racially discriminatory motive.\textsuperscript{156}

After review of the historical record of Alabama’s Constitutional Convention, including the rare smoking gun of an intact legislative record detailing the rampant racially discriminatory animus behind the provision, the Court held that the legislative record indicated the intent necessary to render the provision unconstitutional under the Fourteenth Amendment.\textsuperscript{157} Despite the positive result for the petitioners in \textit{Hunter}, the case does little to improve a prospective claimant’s ability to challenge felon disenfranchisement under the Fourteenth Amendment. Indeed, the combination of the \textit{Richardson} endorsement of the “affirmative sanction” of felon disenfranchisement found in Section 2 of the Fourteenth Amendment\textsuperscript{158} and the \textit{Hunter} requirement of intentional discrimination has created a significant impediment for litigants attempting to challenge the constitutionality of felon disenfranchisement provisions.

2. \textit{Previous Challenges to Felon Disenfranchisement under the Voting Rights Act}

The roadblocks to litigation under the Fourteenth Amendment have led recent challengers of felon disenfranchisement laws to pursue claims under Section 2 of the Voting Rights Act (VRA). Section 2 provides:

\begin{quote}
No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.\textsuperscript{159}
\end{quote}

A key fact distinguishing claims made under Section 2 of the VRA is that, unlike Fourteenth Amendment claims, “proof of discriminatory intent is not

\begin{itemize}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.} at 229–31.
\item \textsuperscript{158} \textit{Richardson v. Ramirez}, 418 U.S. 24, 54 (1974).
\item \textsuperscript{159} 52 U.S.C. § 10301(a) (2014).
\end{itemize}
required to establish a violation of Section 2.”160 This lesser burden was made explicit by the amendments to the VRA passed by Congress in 1982 and has subsequently been affirmed by the Supreme Court.161

As mandated by Congress, to successfully challenge a felon disenfranchisement provision under Section 2, a plaintiff must establish (1) that Section 2 is applicable and allows a challenge to felon disenfranchisement, and (2) felon disenfranchisement “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”162 The key hurdle for litigants pursuing a Section 2 claim is the threshold of applicability of the VRA to felon disenfranchisement provisions. There is currently a significant circuit split arising from this first threshold requirement.163

The Eleventh Circuit, in Johnson v. Governor, rejected the plaintiffs’ claim that Section 2 of the VRA permitted challenges to felon disenfranchisement laws.164 The plaintiffs in Johnson, convicted felons who had fully served their prison sentences, sought to overturn Florida’s felon disenfranchisement provisions under both the Fourteenth Amendment and Section 2 of the VRA.165 The Eleventh Circuit rejected the Fourteenth Amendment claim based on the Supreme Court precedent of Richardson v. Ramirez.166 Ultimately, the Eleventh Circuit held that Section 2 could not be applicable because it would create a conflict with the Fourteenth Amendment and its affirmative sanction of criminal disenfranchisement.167 The Johnson court held that Section 2 could only be a proper channel to challenge felon disenfranchisement laws if there was “a clear statement from Congress endorsing [that] understanding.”168 Finding no such statement—and weary of Congress potentially exceeding its enforcement powers under the Fourteenth Amendment in passing the VRA, if the Act was indeed applicable

161 See Thornburg v. Gingles, 478 U.S. 30 (1986) (holding proof of discriminatory intent was not necessary to establish a violation of Section 2 of the VRA and providing a tripartite framework of the necessary elements for a vote dilution claim under the Act).
163 See Ghaelian, supra note 75, at 768–70 (summarizing the typical claims made under the VRA to undermine state felon disenfranchisement laws and noting that the Richardson decision forecloses many potential arguments against these laws).
164 405 F.3d 1214, 1232, 1234 (11th Cir. 2005).
165 Id. at 1216–17.
166 Id. at 1217–18, 1226–27.
167 Id. at 1228–29, 1234.
168 Id. at 1230.
to felon disenfranchisement laws—the Eleventh Circuit rejected the petitioners’ claims.\(^{169}\)

The Second Circuit soon encountered the same issue in *Hayden v. Pataki*.\(^ {170}\) The plaintiffs in *Hayden* sought to overturn New York’s felon disenfranchisement statute under the VRA; their claim was rejected.\(^ {171}\) The court, like the Eleventh Circuit, performed a thorough statutory analysis of the VRA in deciding its applicability to the felon disenfranchisement statute.\(^ {172}\) The court concluded that if read out of context, the plain language of the VRA could be read to include felon disenfranchisement provisions.\(^ {173}\) Thus, given the context of history and congressional intent, the court held that felon disenfranchisement statutes are presumptively constitutional, citing the Fourteenth Amendment’s “explicit approval.”\(^ {174}\) The Second Circuit, like the Eleventh Circuit in *Johnson*, emphasized the clear statement rule, holding that unless a statement from Congress made it unmistakably clear that it intended to alter the federal balance (by indirectly adjusting the provisions of the Fourteenth Amendment), Congress did not intend the VRA to apply to felon disenfranchisement laws.\(^ {175}\) The only door left open by the *Hayden* Court to challenge felon disenfranchisement laws was the Fourteenth Amendment and the corresponding proof of intentional discrimination, per *Hunter*.

Three years later, in *Simmons v. Galvin*, the First Circuit issued a nearly identical holding—in both analysis and result—as found in *Hayden*.\(^ {176}\) In *Simmons*, the court held that felon disenfranchisement provisions are

\(^{169}\) *Id.* at 1234–35. Notably, the court offered the following in the penultimate paragraph of its decision:

> Several amici curiae argue that, as a policy matter, felons should be enfranchised, particularly those who have served their sentences and presumably paid their debt to society. Even if we were to agree with the amici, this is a policy decision that the United States Constitution expressly gives to the state governments, not the federal courts. Florida has legislatively reexamined this provision since 1868 and affirmed its decision to deny felons the right to vote. Federal courts cannot question the wisdom of this policy choice.

\(^{170}\) *Id.* (internal citations omitted).

\(^{171}\) 449 F.3d 305 (2d Cir. 2006) (en banc).

\(^{172}\) *Id.* at 309–10.

\(^{173}\) *Id.* at 312–13.

\(^{174}\) *Id.* at 315.

\(^{175}\) *Id.* at 315–16.

\(^{176}\) 575 F.3d 24 (1st Cir. 2009).
presumptively constitutional, but that the VRA’s broad and ambiguous language allows and encourages judicial inquiry beyond the text. After reviewing the legislative history of the VRA, the 1982 amendments, and post-1982 Congressional action, the First Circuit held that “Congress has excepted from the reach of the VRA protections from vote denial for claims against a state which disenfranchises incarcerated felons.” The three decisions above from the First, Second, and Eleventh Circuits all found the Supreme Court’s interpretation of the Fourteenth Amendment’s “affirmative sanction” on criminal disenfranchisement to preclude applicability of similar claims under the VRA; the Ninth Circuit, however, did not.

3. The Ninth Circuit Changes the Game (And Then Changes Its Mind)

The Farrakhan cases from the Ninth Circuit currently constitute the most successful challenges made to felon disenfranchisement statutes under Section 2 of the Voting Rights Act. The Farrakhan line of cases began with a challenge made to Washington’s felon disenfranchisement statute by several minority citizens denied the right to vote on account of previous felony convictions. The core of the plaintiffs’ complaint alleged, “minorities are disproportionately prosecuted and sentenced, resulting in their disproportionate representation among the persons disenfranchised under the Washington Constitution.” To support this allegation, the plaintiffs offered an abundance of factual evidence, citing studies indicating that African-Americans were nine times more likely to be incarcerated despite a 3.72:1 arrest ratio of African-Americans to whites, and 70% more likely to be searched. Despite the strong factual record presented, the district court granted summary judgment to the state and held that the plaintiffs’ evidence was legally insufficient because it involved discrimination in the criminal justice system only, not discrimination within the felon disenfranchisement provision itself. Importantly, the district court held that while the evidence was insufficient, challenges to felon

---

177 Id. at 32, 35.
178 Id. at 41.
179 Farrakhan v. Washington (Farrakhan I), 338 F.3d 1009, 1011 (9th Cir. 2003).
180 Farrakhan v. Gregoire (Farrakhan II), 590 F.3d 989, 993 (9th Cir.), rev’d en banc 623 F.3d 990 (9th Cir. 2010) (per curiam).
181 Id. at 1009–10.
182 Farrakhan I, 383 F.3d at 1011.
disenfranchisement provisions were indeed cognizable under Section 2 of the VRA.\textsuperscript{183}

On appeal, in \textit{Farrakhan I}, the Ninth Circuit affirmed the district court’s finding that challenges to felon disenfranchisement provisions were cognizable under Section 2,\textsuperscript{184} but ultimately reversed and remanded the case back to the district court.\textsuperscript{185} Importantly, the Ninth Circuit reversed the district court as to the sufficiency of the evidence claim, holding evidence of discrimination in the criminal justice system relevant under the “totality of the circumstances” analysis required by Section 2.\textsuperscript{186} To support this view, the Ninth Circuit relied heavily on the nine factors included in a Senate Report issued with the 1982 amendments to the Voting Rights Act—specifically factor 5, which advised consideration of the “social and historical conditions” related to a law being challenged and analyzed under the VRA.\textsuperscript{187} On remand, the district court found that plaintiffs’ evidence regarding discrimination within the criminal justice system was “admissible, relevant, and persuasive,”\textsuperscript{188} but nevertheless held that a totality of the circumstances analysis, including an analysis of the nine Senate Report factors, did not support the claim that Washington’s felon disenfranchisement provision resulted in discrimination within the “electoral process on account of race.”\textsuperscript{189} The district court therefore affirmed its earlier ruling and granted the defendant’s motion for summary judgment.\textsuperscript{190}

The case was again heard on appeal before the Ninth Circuit,\textsuperscript{191} this time in the wake of sister circuit decisions denying the applicability of the VRA felon disenfranchisement provisions. Nonetheless, in \textit{Farrakhan II}, the Ninth Circuit found no reason to overturn its holding in \textit{Farrakhan I} that felon disenfranchisement provisions were cognizable under the VRA.\textsuperscript{192} Indeed, the court—rather remarkably in the face of the holdings of its sister

\textsuperscript{183} \textit{Id.} at 1016.
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.} at 1023.
\textsuperscript{186} \textit{Id.} at 1016–20.
\textsuperscript{187} \textit{Id.} at 1010–12, 1015–16, 1020.
\textsuperscript{188} \textit{Id.} at 1010–12, 1015–16, 1020.
\textsuperscript{189} \textit{Id.} at 9.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Farrakhan v. Gregoire} \textit{(Farrakhan II)}, 590 F.3d 989 (9th Cir.), \textit{rev’d en banc}, 623 F.3d 990 (9th Cir. 2010) (per curiam).
\textsuperscript{192} \textit{Id.} at 999.
circuits—went farther. In *Farrakhan II*, the court held that compelling, direct evidence within the bounds of a single Senate Report factor could be enough, in some instances, to be controlling in a totality of the circumstances analysis. The court thereby re-examined the extensive factual record of the lower court and held the plaintiffs had met their burden of proof—Washington’s felon disenfranchisement law stood in violation of the Voting Rights Act and constituted racially discriminatory vote denial.

The rather momentous holding in *Farrakhan II*, the first decision in the country of its kind, did not remain good law in the Ninth Circuit for long. Just a few months later, the Ninth Circuit Court of Appeals ordered the case to be reheard en banc. In *Farrakhan III*, a per curiam opinion, the Ninth Circuit altered its previous holding on the relationship between felon disenfranchisement provisions and the VRA. The en banc court acknowledged the significantly different views taken by the First, Second, and Eleventh Circuits, and also recognized the long history of felon disenfranchisement laws in the United States. In recognition of these decisions and in deference to the underlying rationale, the court in *Farrakhan III* held that their previous decision had “swe[pt] too broadly” and could not stand. From here, the Ninth Circuit did something unusual: referencing *McCleskey v. Kemp* and *Hunter v. Underwood*, both cases involving Fourteenth Amendment claims, the court held that plaintiffs seeking to challenge felon disenfranchisement laws under the VRA based on a showing of racial discrimination within the criminal justice system must show intentional discrimination driving the enactment of a felon disenfranchisement statute. The court then held that the plaintiffs failed to carry the burden of evidence, and affirmed the summary judgment awarded to the defendants by the district court.
Notably, *Farrakhan III* did not overturn the Ninth Circuit’s prior rulings holding Section 2 of the VRA applicable to felon disenfranchisement provisions. For this reason, the circuits remain split. Nevertheless, the Supreme Court has refused to grant certiorari on this issue.204

III. BACKGROUND [SOUTH AFRICA]

Suffrage in post-Apartheid South Africa is considered a fundamental right and any attempt to limit the suffrage of citizens must pass a strict test of constitutionality.205 To facilitate a proper comparison between criminal disenfranchisement in the United States and South Africa, it is necessary to consider the history, purpose, and content of the new South African Constitution of 1996, and how it is interpreted by the Constitutional Court of South Africa. Secondly, this section will examine decisions made by the Constitutional Court in two landmark cases concerning the voting rights of prisoners. The United States can learn from the example of South Africa.

A. History, Content, and Structure of the South African Constitution

The current South African Constitution emerged out of a period of political transformation marked by a transition from the National Party controlled Apartheid era to the sweeping electoral victories of Nelson Mandela and the African National Congress (ANC) in 1994.206 In the late 1980s, back channel negotiations took place between the leaders of both the National Party and the ANC to either draft a Bill of Rights to the Constitution or draft of a wholly new constitutional document.207 A major breakthrough occurred in 1990, when the ruling South African government freed political prisoners, including Nelson Mandela, and lifted the ban on adverse political parties.208 Sensing the weakness of the National Party and the environment of potentially transformative change, numerous interested groups including the ANC, the National Party, the South African Law

---

204 Feinberg, *supra* note 68, at 78.
205 S. AFR. CONST. § 19, 1996.
206 KENDE, *supra* note 19, at 34 (discussing the Interim Constitution and the legal and political landscape surrounding the birth of the South African Constitution).
207 Id. at 30.
208 Id.
Commission, the Inkatha Freedom Party, and a group of liberal academics, submitted draft constitutions.\(^{209}\)

With the backdrop of change, caution, and spurs of violence, the Multi-Party Negotiating Process (MPNP) officially began in 1993 in Johannesburg.\(^{210}\) A system of working groups, including a Negotiating Council and a series of Technical Committees, were informed by the opinions of party leaders, political activists, legal scholars, and constitutional experts from around the world.\(^{211}\) After the 1994 elections, a Constitutional Assembly consisting of members from the new, democratically elected National Assembly and Senate began working on the final Constitution;\(^{212}\) the Assembly eventually “reached a compromise on the final draft, now the Constitution of the Republic of South Africa, in 1996, after over two years of debate.”\(^{213}\)

The South Africa Parliament asserts that its constitution “lays the foundation for an open society based on democratic values, social justice and fundamental human rights.”\(^{214}\) As with the U.S. Constitution, the South African Constitution is considered the supreme law of the land; its provisions must be followed by everyone, including the government.\(^{215}\) Notably, the South African Constitution was created in direct response to the need for radical change and new levels of equality in South Africa. The South African government asserts

[b]efore its transition to a democratic, constitutional state, South Africa was known as a country in which the rights and freedoms of the majority of people were denied. To prevent this from ever happening again, our Constitution contains a Bill of Rights which can only be changed if two thirds of the members of the National Assembly and six of the nine provinces in the National Council of Provinces agree to such a change.\(^{216}\)

\(^{209}\) Id.
\(^{210}\) Id. at 32.
\(^{211}\) Id. at 30–31.
\(^{213}\) Id.
\(^{214}\) Id.
\(^{215}\) KENDE, supra note 19, at 6–7.
\(^{216}\) Our Constitution, supra note 212.
The South African Constitution diverges from the U.S. Constitution in that it goes significantly further in its bestowing of enumerated constitutional rights.\textsuperscript{217} Both countries assure the protection of speech, suffrage, association, political assembly, religious preference, and other well-established democratic rights.\textsuperscript{218} The South African Bill of Rights, however, has a broader conception of equality than its American counterpart.\textsuperscript{219} The South African Bill of Rights prohibits discrimination based on sexual orientation, sanctions affirmative action, protects labor rights and the ability to unionize, and guarantees human dignity as a fundamental right.\textsuperscript{220} The South African Constitution also endows citizens with so-called “second and third-generation rights,” including socioeconomic provisions establishing the right to education, health care, housing; and solidarity rights, including the right to a clean environment and cultural membership.\textsuperscript{221}

Finally, two practical points are important to mention in a comparative legal analysis involving South African Constitutional law. First, unlike the U.S. Constitution, the South African Constitution provides explicit interpretive instructions within its own text.\textsuperscript{222} There is no battle in South African judicial thought directly analogous to the debate between conservative originalism and the progressive view of a living, dynamic constitution as found in the United States; instead, there is explicit direction.\textsuperscript{223} For example, Section 39 of the South African Constitution provides:

(1) When interpreting the Bill of Rights, a court, tribunal or forum —
   a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   b. must consider international law; and
   c. may consider foreign law.\textsuperscript{224}

\textsuperscript{217} KENDE, supra note 19, at 6.
\textsuperscript{218} Id. at 6–7.
\textsuperscript{219} Id.
\textsuperscript{221} KENDE, supra note 19, at 6–7.
\textsuperscript{222} Id. at 8.
\textsuperscript{223} Id.
\textsuperscript{224} S. Afr. Const. § 39, 1996.
This Section effectively mandates that South Africa engage with its constitution in a progressive manner, largely foreign to the American judicial process of constitutional interpretation. This provision has contributed to the Constitutional Court undertaking “a more communitarian and dignity-oriented approach unlike the individualistic and liberty-oriented U.S. Supreme Court.”

A second major doctrinal difference in the South African Constitution is found in Section 36, which provides:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
   a. the nature of the right;
   b. the importance of the purpose of the limitation;
   c. the nature and extent of the limitation;
   d. the relation between the limitation and its purpose; and
   e. less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The framework articulated in Section 36 of the South African Constitution is nearly identical to the tripartite analysis advocated for by Justice Marshall. Indeed, the idea of some restriction on fundamental rights is inherent in any ordered, democratic society. It is intuitive that at some point individual rights must bow to the common good and protection of others in society at large. This explicit limitation clause in Section 36 of the South African Constitution finds several other close analogues in the numerous constitutional tests that have been developed by the U.S. Supreme Court. Again, as with the interpretive instructions of Section 39, the primary

---

225 KENDE, supra note 19, at 8.
226 Id. at 9.
227 S. AFR. CONST. § 36, 1996.
228 See Richardson v. Ramirez, 418 U.S. 24, 78 (1974) (Marshall, J., dissenting) (describing the three-part test that the state must prove when it makes a law that restricts a fundamental right).
difference in the limiting provision employed by the South African Constitutional Court is that the necessary judicial calculus regarding the limitation of fundamental rights is explicitly described in the South African Constitution. Both Sections 36 and 39 of the South African Constitution are integral to the analysis of criminal disenfranchisement in South Africa, and to the broader notion of what the United States can learn from that country’s constitutional process.

B. The Constitutional Court of South Africa

The Constitutional Court is South Africa’s highest court for cases that involve questions and issues involving the application and interpretation of the South African Constitution. Unlike the U.S. Supreme Court, which has a broader grant of substantive jurisdiction, the Constitutional Court of South Africa has jurisdiction only on issues related to the provisions of the South African Constitution.

Given the inherently progressive tendencies in the South African Constitution outlined above, the jurisprudence of the Constitutional Court has been noteworthy in its pragmatism and exercise of judicial restraint. Reflecting pragmatic concerns over the danger of heavy-handed political instruction and a want for institutional integrity, the South African Constitutional Court has often sidestepped some of the most potentially controversial constitutional issues by limiting the scope of their opinions, at times in an effort to avoid strictly defining bright lines regarding the outer limits of free speech and religious expression.

Although there are differences, both substantively and procedurally, between the Constitutional Court of South Africa and the U.S. Supreme Court, there are significant similarities in the judicial process and authoritative source of law used by both courts that make a comparison valuable and potentially instructive.

229 KENDE, supra note 19, at 9–10.
231 Id.
232 KENDE, supra note 19, at 10.
233 See, e.g., Christian Educ. South Africa v. Minister of Educ. 2000 (4) SA 757 (CC) (S. Afr.) (choosing not to decide an underlying religious issue in a case involving a religious school’s right to discipline students); Case v. Minister of Safety 1996 (3) SA 617 (CC) (S. Afr.) (declining to define the criteria for obesity).
C. Transformative Constitutionalism

From its earliest stages, the South African Constitution was explicitly written to be socially transformative. It is not just its design but also its ongoing implementation that is meant to achieve this end. Chief Justice Pius Langa has stated that “[i]t is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution.”

Chief Justice Langa has identified the Epilogue of the Interim Constitution of South Africa as providing perhaps the greatest source for defining transformative constitutionalism. The Epilogue provides that the South African Constitution serve as a “historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.” Indeed, the Chief Justice has stated that the central idea of transformative constitutionalism is that “we must change,” and that the constitution’s purpose should be “to heal the wounds of the past and guide us to a better future.”

Chief Justice Langa notes that one of the fundamental characteristics of the new rule of law in South Africa is that the constitution now demands all decisions “be capable of being substantively defended in terms of the rights and values [the constitution] enshrines.” The importance of this characteristic is tremendous for a nation previously defined by a dearth of legislative accountability and a system of law that was often arbitrary, commonly capricious or, at times, outright evil.

---


235 See id. at 4 (“The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines.”).

236 Id. at 1.

237 Id. at 2.


239 Langa, supra note 234, at 2, 3.

240 Id. at 3.

241 See, e.g., Higginbotham, supra note 38, at 515–16 (describing accounts of the disparate treatment of minorities in courtrooms in South Africa).
Notably, this view of transformative constitutionalism is not confined to the period of transition in South Africa from Apartheid, nor will it be satisfied when all South Africans enjoy equal rights and access to services and resources. Chief Justice Langa explains:

Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional constitution. This is a perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.²⁴²

The idea of ready adaptation and transformation central to the South African constitutional construct can be seen throughout the jurisprudence of the South African Constitutional Court. The case law concerning criminal disenfranchisement, discussed below, is demonstrative of the ongoing implementation of this transformative ideal.

D. Criminal Franchise in South Africa: August and NICRO

In both August and NICRO,²⁴³ the two landmark Constitutional Court cases supporting prisoners’ rights to vote, the judicial decision making process concerned the justification for and legitimacy of government legislation and action against the positive right of universal suffrage established in Section 19(3) of the South African Constitution.²⁴⁴ Notably, these decisions involved a prisoner’s right to vote. No attempt has been

²⁴² Langa, supra note 234, at 5.
made by the South African government to disenfranchise individuals no longer incarcerated.

_August_ was the first of these seminal cases and constituted a relatively confined judicial decision.245 _August_ did not affirmatively answer the question of whether it would be constitutional for the legislature to affirmatively limit a prisoner’s right to vote in a national election.246 _NICRO_ was decided after the Election Act was amended in the wake of _August_.247 _NICRO_ ultimately invalidated these amendments, going further than _August_ and emerging as the stronger doctrinal case.248 Both cases are important in their own right and this subsection will examine each in turn.

Just prior to the National Parliamentary elections in 1999, a group of prisoners lobbied the Electoral Commission for an affirmative declaration that prisoners would be allowed to vote in the upcoming election.249 The governing piece of legislation, the Electoral Act of 1998, did not expressly prohibit or limit suffrage for the incarcerated at the time.250 The Electoral Commission’s policy, however, was not supportive of prisoner voting rights and took no affirmative action to provide prisoners with the capability to participate in elections.251 Challengers alleged this policy served to restrict their right to vote, a fundamental right, and the issue soon came before the Constitutional Court.252

The Electoral Commission argued to the Constitutional Court that its inaction alone had done nothing to positively disenfranchise prisoners.253 Further, the Commission argued that it was a situation created by the prisoners themselves that resulted in the loss of franchise rather than a failure of an obligation held by the Electoral Commission.254 The Commission argued it did not have a positive responsibility to seek out registration and

245 See _August_ 1999 (3) SA 1 (CC) paras. 33–36 (holding the legislature could not prevent prisoners from voting without taking legislative action because the South African Constitution guaranteed them the right to vote).
246 Id.
247 _NICRO_ 2005 (3) SA 280 (CC) paras. 1–2 (describing the issue of the case given the amendments to the Electoral Act).
248 Id. paras. 65–67.
249 ISPAHANI, _supra_ note 2, at 13.
250 Id.
251 Id. (“[T]he Constitutional Court defined the issue as whether the Electoral Commission, by not providing the means and mechanisms to allow to vote, had breached the prisoners’ right to vote.”).
252 Id.
253 _August_ 1999 (3) SA 1 (CC) para. 13.
254 Id. paras. 13, 20.
provide ballot access to prisoners; such an imposition of responsibility would be too costly.\footnote{255}{Id. para. 13.}

The Constitutional Court rejected each of the Commission’s arguments.\footnote{256}{Id. paras. 21–22, 28.} The court found that the Electoral Commission had an obligation to citizens to provide for “the secrecy of the ballot and the machinery established for managing the [voting] process.”\footnote{257}{Id. para. 16.} The court further held that the Electoral Commission did not have the statutory or constitutional authority to only provide a “system of registration and voting which would effectively disenfranchise all prisoners”; doing so was a violation of the Commission’s “obligation to take reasonable steps to create the opportunity to enable eligible prisoners to register and vote.”\footnote{258}{Id. para. 22.} The court also rejected the government’s pragmatic arguments involving cost, and dismissed the notion that incarceration alone sufficed as a constitutionally adequate prohibition on voting.\footnote{259}{Id. paras. 18, 28, 30.}

In August, the Constitutional Court did not expressly grant franchise to prisoners or declare an affirmative legislative disenfranchisement of prisoners unconstitutional, but the tone of the opinion strongly suggested the future likelihood of a more expansive decision. The court wrote:

> The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood . . . The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.\footnote{260}{Id. at 23 para. 17.}

In response to the August decision, the South African Parliament amended the Electoral Act in 2003.\footnote{261}{ISPANIANI, supra note 2, at 14.} The relevant part of the legislation curtailed the rights of prisoners to vote in two ways. First, the Act stated that prisoners who were serving a “sentence of imprisonment without the option of a fine” were prohibited from voting.\footnote{262}{Id. at 14–15.} Second, the Act prohibited
prisoners serving such a sentence from registering to vote while in prison, thus leaving open the possibility that a prisoner could be released and still disenfranchised if the voter roll had already been closed. In the wake of August, it was predictable that the constitutionality of these amendments would soon be challenged.

In Minister of Home Affairs v. National Institute for Crime Prevention (NICRO), the Constitutional Court duly took up the issue. In NICRO, the government altered its legal argument, and squarely identified the South African Constitution’s Section 36 limiting provision as providing a constitutionally legitimate allowance for this legislation.

The Department of Home Affairs made three primary points in arguing for the limitation on the right to vote. First, the government made an argument based on cost: it would be too complicated and expensive to provide the necessary apparatus for voting in prisons. Secondly, the government drew a comparison between prisoners and other people who may have difficulty getting to polling stations by arguing it would be inadvisable and illegitimate to favor prisoners over lawful citizens to the extent that immediate access to readily available polling stations would be afforded to prisoners and not all citizens. Finally, and apparently most distasteful to the court, was the government’s argument that it had a legitimate right to prohibit prisoners from voting so as to denounce crime and uphold the ideals of lawfulness.

A majority of the Constitutional Court ultimately disagreed with all of these arguments and held the relevant law invalid. Central to the court’s decision was an examination of means and ends. The court proceeded through the government’s arguments in an attempt to prove or disprove a legitimate connection between the limitation of voting rights and an adequate government interest. Against this backdrop was also the court’s understanding that “[i]n the light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great

263 Id.
265 Id. para. 32.
266 Id. paras. 39–40.
267 Id. para. 45.
268 Id. paras. 46, 55–56.
269 Id. paras. 65–67.
majority of the people of our country, [the right to vote] is for us a precious right which must be vigilantly respected and protected.”

In reaching its decision the court first reiterated its holding in August that the government has a positive obligation, in any circumstance, to provide its citizens with the machinery necessary to participate in the voting process. For these reasons, the court held that any argument involving cost must be dismissed, writing “[t]here is nothing to suggest that expanding [voting] arrangements to include prisoners sentenced without the option of a fine will in fact place an undue burden on the resources of the Commission.” The government’s argument involving the favoring of prisoners over lawful citizens was also quickly rejected as illogical.

The Constitutional Court then reached the more fundamental question of whether a rational connection existed between voting prohibition for prisoners and the government’s interest in regulating and preventing crime. In analyzing this question, the court drew heavily from the Canadian Supreme Court case Suavé No. 2. In Suavé No. 2, the Canadian Supreme Court held that the government had failed to establish a rational connection between legislation prohibiting prisoners from voting and the government interest in regulating unlawful conduct and providing appropriate punishment. The NICRO court endorsed Suavé, quoting its holding that “a government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardises its claims to representative democracy, and erodes the basis of its right to convict and punish lawbreakers.”

Ultimately, the court held that a blanket ban on the right of prisoners to vote was unconstitutional, and that the government failed to establish evidence sufficient to show there was an adequate interest in disenfranchisement. In addition, the court found the government’s arguments regarding public perception of crime and punishment to be particularly distasteful. In response to the notion that allowing prisoners to

271 Id. para. 47.
272 Id. para. 28.
273 Id. para. 49.
274 Id. paras. 51–52.
275 Id. paras. 58–64.
276 Id. para. 61.
277 Id.
278 Id. paras. 65, 67.
279 Id. para. 56.
vote might result in an appearance of the government being soft on crime, the court held the government may not “disenfranchise prisoners in order to enhance its image” or to “correct a public misconception as to its true attitude to crime and criminals.”

While not completely closing the door to voting limitations for some prisoners, NICRO firmly established an exceptionally high bar the government would have to pass if it wished to restrict access to the ballot. Thus, the universal suffrage provision of the South African Constitution has held firm when confronted with attempts to limit the criminal franchise.

IV. ANALYSIS

This Note begins with the premise that a shared history of racial oppression links the United States and South Africa. In both countries, there is the shared legacy of racial discrimination being afforded legitimacy and means for effectuation through legal mechanisms. In both countries, racism was once rule of law. It is in this harsh light of history that this Note asserts the United States should follow the South African approach to the constitutional analysis of criminal disenfranchisement. Ideally, the United States would guarantee suffrage for nearly all citizens, incarcerated or otherwise. For now, it would be a significant, and vital, improvement to restore the right to vote to those currently disenfranchised because of prior criminal convictions. After exploring the common history of the United States and South Africa, this Section will propose lessons that may be learned from the South African notion of transformative constitutionalism. Additionally, this Section will demonstrate how U.S. federal courts should address criminal disenfranchisement in the future, both within the current framework and with an unblinking eye in regard to the shared experience of racial oppression and the accompanying institutional machinations that continue to effect citizens in both the United States and South Africa.

A. A Shared History of Racial Discrimination

The institutionalized racism of the recent past is a mark of disgrace on both the United States and South Africa. Historical error is a difficult issue to contend with, especially when citizens and politicians still grapple with that error’s residual effects. This reality can often make thorough and open-

\[280\] Id.
minded discussion of race difficult, particularly in the United States. For this reason, it can be useful to consider the experience of other countries, countries similarly situated but lacking the emotional resonance regarding similar matters of domestic debate. This Note argues that the United States and South Africa share enough common history to allow the debate on felon disenfranchisement in the United States to become more robust by examining both how and why South Africa has decided issues involving the voting rights of prisoners.

Among the most glaring images of Apartheid was the physical separation of races that existed in all aspects of life in South Africa and was positively mandated by law. Until 1954, such de jure racial segregation was common throughout much of the United States, particularly in the American South.\(^{281}\) Beyond mere separation, both countries implemented systems designed to uphold the oppressive status quo. In the pre-Civil Rights era, state-imposed voting restrictions effectively disenfranchised large numbers of African-Americans by imposing literacy tests, poll taxes, and moral character tests that served to prevent African-Americans from accessing the ballot.\(^{282}\) South Africa similarly employed a number of legislative methods to either limit the influence of—or outright disenfranchise—the minority electorate.\(^{283}\) Transformative legislation was first passed during the period of democratic transition in South Africa. After reforming the voting process, in 1994 South Africa was able to hold open democratic elections for the first time in its history.\(^{284}\) It was only thirty years prior that the United States had sought to end racial discrimination in the voting process by passing the Voting Rights Act of 1965.

Many scholars have written important works on the subject of institutionalized racism in the United States and South Africa. It is an important subject, now more than ever. Although the explicit, external shell of discrimination is gone, the legacy and effect of the errors of the past continue to exist. Much more should be written about this latter topic, particularly given its great importance for the ongoing health of a modern democracy. For the purposes of this Note, it is enough to recognize there is


\(^{282}\) ALEXANDER, supra note 74, at 187.


\(^{284}\) Our Constitution, supra note 212.
sufficient similarity between the systems, and legacies, of racial oppression employed by the United States and South Africa so that a comparative analysis is useful and instinctive.

B. Transformative Constitutionalism, Felon Disenfranchisement, and the Weight and Influence of History

In seeking to define transformative constitutionalism, Chief Justice Pius Langa has stated:

Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.\(^\text{285}\)

It is clear why this notion of change was so integral to the South African experience. The National Party-dominated status quo was deeply entrenched in South African society for decades. The political elite used this entrenchment to further dominate and control those populations it chose to subjugate. It was an unbending and unbroken cycle of oppression. With this recent history, the ability to have a venue for principled and well-reasoned debates on legislative and constitutional change continues to be central to South Africa. This necessity for and protection of change is at the core of the idea of transformative constitutionalism.

The United States could stand to learn from the sanctity of the notion of change in South Africa. One of the primary grounds cited by U.S. federal courts to prevent legal challenges to felon disenfranchisement laws is the affirmative sanction for some form of these laws found in the Fourteenth Amendment.\(^\text{286}\) The Fourteenth Amendment allows the government to restrict the right to vote for those who “participat[e] in rebellion, or other crime.”\(^\text{287}\) This language alone has been used by several federal courts to uphold the validity of the sprawling, discriminatory patchwork of felon disenfranchisement laws within the United States.\(^\text{288}\) There is conflicting

\(^{285}\) Langa, supra note 234, at 5.
\(^{286}\) See supra Part II.C.1 (discussing Fourteenth Amendment challenges to felon disenfranchisement in the U.S.).
\(^{287}\) U.S. CONST. amend. XIV, § 2.
analysis on the importance and relevance of this provision at the time the
Fourteenth Amendment was drafted.\textsuperscript{289} It appears likely that it was
specifically targeted at protecting against rebellious movements within the
former Confederacy, and thus does not stand for the proposition of broad
support for criminal disenfranchisement.\textsuperscript{290} Further, analysis of the intent of
key drafters and architects of the Fourteenth Amendment provides strong
support for the notion that the drafters would find its current role as an
impediment to challenges of discriminatory criminal disenfranchisement
provisions to be morally and constitutionally repugnant.\textsuperscript{291}

In any event, the example in South Africa suggests that it is inapposite to
rely blindly on the strict language of a constitutional amendment that was
passed in 1868 and has been subject to subsequent revisionist interpretation
by both legislation and judicial decision. It is unlikely that the drafters of the
Fourteenth Amendment could have foreseen that those six words would
allow the disenfranchisement of over 7\% of the African American
population.\textsuperscript{292}

Putting aside the notion of drafting intentions and accepting for argument
that there is a deep history of disenfranchising convicted criminals in the
United States, there is still much to absorb from the South African example
and its approach to history inherent within transformative constitutionalism.
The drafters of the South African Constitution recognized it was necessary to
carefully but authoritatively handle the weight of the past, and to
affirmatively provide for the rights of those previously discriminated against.
Similarly, the United States should not block legal avenues for questioning
the history of racial subjugation or for contesting modern remnants thereof.
These are important questions. Our society, with help if necessary from the
judicial process, needs to have these debates. Although reform of the
criminal justice system may be the larger issue, the disproportionate effect of
felon disenfranchisement on racial minorities should be a major point of
concern for the United States.

\textsuperscript{289} See Ewald, \textit{supra} note 57, at 1104–05.
\textsuperscript{290} \textit{Id.}
\textsuperscript{291} \textit{Id.} at 1104–07.
\textsuperscript{292} \textit{FACT SHEET: FELONY DISENFRANCHISEMENT, supra} note 130, at 1.
C. A New Vision of Felon Disenfranchisement Reform in the Federal Courts of the United States

As discussed above, an embracement of the ideals of transformative constitutionalism, particularly in the realm of legislation that retains the unavoidable residue of a shameful history, would work significantly to help change the status quo of criminal disenfranchisement in the United States. This is not a wholly foreign concept. Although the issue is subject to persistent and zealous debate, the jurisprudence of the Supreme Court consistently indicates their opinion, at least implicitly, of the Constitution as a document capable of change and growth. The Fourteenth Amendment needs reassessment, particularly the so-called “affirmative allowance” regarding criminal disenfranchisement. No law that disenfranchises such a staggering proportion of the electorate should be considered unimpeachably constitutionally valid in the United States.

Even if the Fourteenth Amendment restriction is taken at face value, U.S. federal courts could learn from the more explicit limitation clause analysis the South African Constitutional Court employs when deciding on issues involving restrictions of fundamental rights. The Constitutional Court has held the essential proportionality analysis at the heart of the Section 36 limitation clause is “one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.”

In the United States, proportionality is not part of the constitutional equation regarding criminal disenfranchisement. No state government has yet been forced to provide a detailed factual record of the governmental interest in, or the purpose of, felon disenfranchisement laws. So far, courts have held the affirmative sanction of the Fourteenth Amendment alone provides sufficient constitutional cover. Thus, state governments escape the necessity of engaging in a thorough proportionality analysis regarding criminal disenfranchisement. This lack of proportionality is unique. No other restriction on a fundamental right in the United States exists with a similarly slight explicit rationale. Like all fundamental rights, membership in civilized society mandates an eventual curtailment of personal liberty.

294 See supra Part IV.C.
The right to vote is such a fundamental right in the United States, and it is no doubt subject to reasonable restrictions by state governments. Yet, it is not acceptable that the voting restrictions inherent in felon disenfranchisement could exist on such impenetrable ground so as to avoid any test of compelling rationality or narrowly tailored purpose and application.

At present, criminal disenfranchisement in the United States exists as an outright prohibition of varying duration on a fundamental and deeply democratic right. Even worse, criminal disenfranchisement laws have an ill-defined and arguably nonexistent regulatory purpose. There is little doubt that any state interest served by felon disenfranchisement provisions could be achieved in ways that impose significantly less restriction on an individual’s fundamental right to vote. This quality of American felon disenfranchisement law would force invalidation under the limitation clause in Section 36 of the South African Constitution. The law is too broad, the right too important, the relationship between ends and means too tangential, and the availability of alternate measure so apparent that the law could not conceivably pass constitutional muster.

Without adopting the exact provisions of the South African Constitution, the courts of the United States would be wise to heed its logic. The right to vote is paramount in a free, democratic society. Any restriction on suffrage must survive close scrutiny. There is a clear danger in subversion and distortion of the political process if portions of citizens, and the interests they represent, are allowed to be roundly disenfranchised. As quoted in NICRO, the Canadian Supreme Court has written:

A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.295

The United States must re-examine the effect and purpose of criminal disenfranchisement laws. If our country wants to embody the ideal of democratic legitimacy that we espouse, the current form of felon disenfranchisement must be recognized as destructive, illegitimate, and unacceptable.

Felon disenfranchisement is exceedingly unique in the United States in that it is a voting restriction that has steadfastly resisted change in the fifty years of voting reform promulgated by the legislation and judicial opinions of the Civil Rights Era. This is particularly exceptional given that felon disenfranchisement laws harshly and disproportionately affect minority populations, particularly African-Americans.

While the larger issue of the criminal justice system remains in flux, there is evidence the pendulum may be shifting in regard to an over-burdened and out of control system of criminal conviction and incarceration in the United States. Reform of felon disenfranchisement laws will help speed this shift. By restricting convicted criminals from voting, state governments are suppressing the political voice of the very population most affected by the skyrocketing rates of incarceration of the past thirty-five years. Felon disenfranchisement has effectively ensured that those most affected by our current age of mass incarceration have no political voice in the United States.

Further, there is the ever-present and complex element of race in both the felon disenfranchisement laws of the United States and in the rationale behind the firm protection of voting rights in South Africa. For numerous reasons—many relating to unfortunate but enduring vestiges of the American criminal justice system’s racially discriminatory past—African-Americans are affected significantly and disproportionately by felon disenfranchisement laws. This should not be ignored. The United States must reconcile its tarnished history with its admirable aspirations for the future. Our country must recognize that even absent intentional discrimination, any law that has such effect must be questioned. In a country that fifty years ago disenfranchised black voters by overt machinations of law, the impact and rationale of felon disenfranchisement must be revisited and more closely interrogated.