RE-ENFRANCHISEMENT LAWS PROVIDE UNEQUAL TREATMENT: EX-FELON RE-ENFRANCHISEMENT AND THE FOURTEENTH AMENDMENT

CHERISH M. KELLER*

> For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.
>
> *Harper v. Virginia Board of Elections*[1]

INTRODUCTION

The last two elections have been decided by slim margins. In 2000, George W. Bush gained Florida's Electoral College votes by a margin of 537 popular votes.[2] In 2004, Bush again achieved the presidency, gaining Ohio's Electoral College votes by a margin of 118,599 popular votes.[3] When such small numbers of votes can determine the presidency of the United States, it is all the more apparent that the right to vote is precious and that every vote counts.

In this political atmosphere, laws concerning felony disenfranchisement have again become a popular topic of debate. Approximately 4.7 million Americans have temporarily or permanently lost the right to vote as a consequence of felony convictions.[4] Of those individuals, 1.7 million have completed their criminal sentences.[5] And while public opinion does

* J.D. candidate 2006, Chicago-Kent College of Law. The author thanks Professors Sarah Harding and Mark Rosen for all their comments and suggestions and Owen Brugh for his invaluable support.

1. 383 U.S. 663, 670 (1966).

2. *See* U.S. National Archives and Records Administration, 2000 Presidential Election: Popular Vote Totals, http://www.archives.gov/federal-register/electoral-college/2000/popular_vote.html (providing data that in Florida Bush earned 2,912,790 votes and Gore earned 2,912,253 votes) (last visited July 31, 2005).

3. *See* U.S. National Archives and Records Administration, 2004 Presidential Election: Popular Vote Totals, http://www.archives.gov/federal-register/electoral-college/2004/popular_vote.html (last visited July 31, 2005) (providing data that in Ohio Bush earned 2,859,764 votes and Kerry earned 2,741,165).

4. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2, *available at* http://www.sentencingproject.org/pdfs/1046.pdf (last visited July 31, 2005).

5. *Id.*

not tend to support voting rights for prisoners, the majority of the public favors voting rights for ex-felons.[6]

Provisions exist by which many ex-felons can regain the right to vote, even in states where most ex-felons are by default permanently disenfranchised.[7] The potential impact of ex-felons exercising their right to vote is significant. In the 2000 election, approximately 614,000 ex-felons were disenfranchised in Florida.[8] One statistical model indicates that if 27.2% of those ex-felons had voted, approximately 68.9% would have chosen Al Gore, and Gore would have gained Florida by a margin of more than 62,000 votes, thereby achieving the presidency.[9]

This Note addresses the current state of ex-felon re-enfranchisement laws—how ex-felons can reclaim their right to vote. Part I of this Note provides background information in several different areas: the history of felon voting laws, related normative arguments, and the leading Supreme Court case that addressed felon and ex-felon voting rights. Part II of this Note surveys analogous challenges to poll taxes and literacy tests, and it examines wealth discrimination jurisprudence. Ex-felon re-enfranchisement laws are similar in several respects to poll taxes and wealth discrimination, particularly as some of these laws require ex-felons to fully pay restitution costs before voting again. Part III of this Note describes past and current challenges to ex-felon re-enfranchisement laws through the Fourteenth Amendment. These cases provide insight to the necessary components of a successful challenge to re-enfranchisement laws. Part IV of this Note examines current re-enfranchisement laws. The current laws are often unclear and contain unrealistic requirements for many ex-felons. Finally, Part V of this Note focuses on the ability of the federal government to intervene and standardize ex-felon voting rights and briefly discusses recent proposed legislation that addresses this issue.

I. FELONY DISENFRANCHISEMENT LAWS

The right to vote is not *per se* a fundamental right. In its 2000 *Bush v. Gore* opinion, the Supreme Court recounted its view on the right to vote, stating that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the

6. Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL. 491, 500 (2004).

7. For instance, some individuals may be eligible to apply for a pardon or a restoration of their civil rights. *See infra* Part IV.

8. Manza & Uggen, *supra* note 6, at 497.

9. *Id.* at 497–99.

state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."[10] But, the Court continued, "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . . ."[11] While evaluating a state literacy test, the Court plainly stated that the right to vote is *guaranteed* by the Constitution, but it is also subject to standards established by individual states, provided those standards are not discriminatory and do not contravene any restriction that Congress has imposed on the states.[12] Essentially, "the political franchise of voting" is "a fundamental political right, because [it is] preservative of all rights."[13] It is "a bedrock of our political system."[14]

A. History of Felony Disenfranchisement

Voting is a fundamental right that has historically been curtailed for an array of groups,[15] including those convicted of felony offenses. Felony disenfranchisement is not a new concept, and it is not unique to America.[16] Certain criminals were barred from civic participation in ancient Greece and Rome, medieval Europe, and later in England and colonial America.[17] This prohibition generally meant that after certain criminal convictions, an individual could no longer participate in legal matters in the community—including voting.[18] But as this prohibition evolved over time, what was once a judicially directed, public punishment for severe crimes is now not within judicial discretion, not a matter of public pronouncement, and can be a consequence of minor crimes.[19]

10. 531 U.S. 98, 104 (2000) (citing U.S. CONST. art. II, § 1).

11. *Id. See also* Reynolds v. Sims, 377 U.S. 533, 554 (1964) (stating that "[i]t has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted") (internal citations omitted).

12. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 47, 51 (1959).

13. *Reynolds*, 377 U.S. at 562 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

14. *Id.*

15. For example, African Americans were only guaranteed the right to vote in 1870. U.S. CONST. amend. XV. Women were only guaranteed the right to vote in 1920. U.S. CONST. amend. XXI.

16. Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–62 (2002). Further, as states began to incorporate felony disenfranchisement laws in their constitutions in the late eighteenth century, such laws were "neither universal nor uniform." ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 63 (2000) (footnote omitted).

17. Ewald, *supra* note 16, at 1059–61.

18. *Id.* at 1059–60.

19. *See id.* at 1059–61; *see also* Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 779–81 (2000). Demleitner notes in particular that the list of felonies has grown simply as "an outgrowth of the regulatory state." *Id.* at 780. Because loss of the right to vote is a collateral offense and not part of the punishment, it is not subject to a judge's discretion to impose it. *See id.* (noting that

Despite the general expansion of voting rights between 1790 and the 1850s,[20] states began denying those who had committed infamous crimes or felonies the right to vote during this period as well.[21] The passage of such laws, either through explicit exclusion of ex-felons in state constitutions or through constitutional authorization for exclusion by statutes, typically generated little debate.[22] Out of the twenty-six states that existed in 1840, only four had passed disenfranchisement statutes; however, beginning in the 1840s, many other states adopted new restrictions or broadened existing restrictions on felon and ex-felon voting rights.[23] Behind these laws and similar laws that denied paupers and migrants the right to vote was a desire to exclude individuals who occupied "the social margins of the community" and engaged in undesirable behavior.[24] These laws served both a retributivist and a deterrent function[25] by punishing convicted felons for their offenses and by attempting to preclude potential felons through fear of losing the right to vote.

As part of an electoral reform movement between the Civil War and World War I, many states revisited their voting laws.[26] Around this period, and for some time before the Civil War, many states expanded their criminal disenfranchisement laws.[27] The rationale behind these laws shifted to preserving the "purity of the ballot box"[28] and preventing ex-felons from influencing elections—these laws were motivated by a generally unspoken belief that voters should be moral people.[29] In addition, felony disenfran-

disenfranchisement is automatic). The potential of this loss is not well-known, let alone publicly pronounced. *Id.* at 788. In addition, with the expansion of crimes that qualify as "felonies," crimes punishable by death or more than a year in prison, more and more offenses result in disenfranchisement, including many drug offenses. *See id.* at 780; JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 11–12 (1998), http://www.sentencingproject.org/pdfs/9080.pdf.

20. KEYSSAR, *supra* note 16, at 28–33.

21. *Id.* at 62.

22. *Id.* at 63.

23. Manza & Uggen, *supra* note 6, at 492.

24. KEYSSAR, *supra* note 16, at 61–62.

25. *Id.* at 63.

26. *Id.* at 127.

27. *Id.* at 162.

28. *Id.* at 163. In the oft-quoted decision *Washington v. State*, the Alabama Supreme Court explained:

> It is quite common also to deny the right of suffrage, in the various American States, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny.

75 Ala. 582, 585 (1884).

29. KEYSSAR, *supra* note 16, at 163.

chisement was supported on a social contract theory: because ex-felons had broken the social contract by breaking the law, they no longer deserved the vote.[30] And in the South, some state felony disenfranchisement laws were intentionally crafted to deprive more African Americans than whites of the right to vote.[31]

While these traditional rationalizations are analytically dubious[32] and have been roundly criticized by scholars,[33] the sentiments have not died even in more modern times. One widely-cited example of this thinking is Judge Friendly's reasoning in *Green v. Board of Elections*:

> [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. . . . A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.[34]

Spurred by a focus on rehabilitation, the apparent weaknesses of the prior justifications, and a movement to expand the franchise in the 1960s and 1970s, many states again re-evaluated their felony disenfranchisement laws between 1960 and 1988.[35] During that period, more than fifteen states eliminated lifetime disenfranchisement, and other states either eliminated inconsistencies in the laws or reduced the list of crimes that resulted in disenfranchisement.[36]

30. *See, e.g.*, Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1304–05 (1989).

31. Ewald, *supra* note 16, at 1065; Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 738–43 (1998).

32. No studies have shown that ex-felons are more likely to engage in voting fraud than other individuals. *See* Ewald, *supra* note 16, at 1099–1101. Breaking one law does not logically lead to the conclusion that an individual has repudiated the *entire* social contract:

> The idea that a single criminal transgression constitutes a repudiation of the entire social contract conjures up raw Hobbesian ideas of the compact, in which one is either fully inside the body or completely outside it. This view might have made sense in the walled cities of the Renaissance, but today it is an anachronism.

Id. at 1103.

33. *See, e.g.*, Demleitner, *supra* note 19, at 782–95 (critiquing current justifications); FELLNER & MAUER, *supra* note 19, at 14–17 (same); Mark E. Thompson, *Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 195–98 (2002) (same; also suggesting that even if ex-felons wanted to support a dishonest candidate, there are many ways to do that besides voting).

34. 380 F.2d 445, 451–52 (2d Cir. 1967).

35. KEYSSAR, *supra* note 16, at 302–03.

36. *Id.* at 303.

Still, significant restrictions on felons and ex-felons remain. The Sentencing Project[37] recently reported that seventeen states disenfranchise inmates, parolees, and probationers;[38] five disenfranchise inmates and parolees;[39] and twelve others disenfranchise only current inmates.[40] Two states have no restrictions and allow all convicted criminals, including inmates, to vote.[41] But fourteen other states continue to disenfranchise inmates, parolees, probationers, and some or all ex-felons for life.[42]

37. The Sentencing Project is a nonprofit organization that is a "nationally recognized source of criminal justice policy analysis, data, and program information." *See generally* The Sentencing Project, http://www.sentencingproject.org (last vistited Sept. 22, 2005).

38. *See* THE SENTENCING PROJECT, *supra* note 4, at 3. The seventeen are Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin. *Id.*

Notably, Iowa's Governor Tom Vilsack issued an executive order on July 4, 2005, that restored voting rights to Iowa residents who have completed their felony sentences. Kate Slusark, *Vilsack Gives Felons Right to Vote*, DES MOINES REG., July 5, 2005, at 1B. An article in the Des Moines Register reported that Vilsack said he wanted to help ex-felons rejoin society and become productive citizens. *See* Jonathan Roos, *Voter Registration Planned in D.M.*, DES MOINES REG., July 21, 2005, at 1B. Vilsack's executive order has not been without contention, however. Muscatine County Attorney Gary Allison has challenged the validity of the order, and, because it is an executive order, it is not necessarily permanent. Thomas Beaumont, *Governor's Action Could Be Reversed*, DES MOINES REG., July 4, 2005, at 6A. If this is made permanent, Iowa would become the eighteenth state on this list.

In addition, Rhode Island may change its status after the next election; both the Rhode Island Senate and House of Representatives have approved legislation to place a constitutional amendment on the ballot that would extend voting rights to individuals on probation and parole. Liz Anderson et al., *Restoring Felons' Right to Vote Tops Legislative Proposals*, PROVIDENCE J., June 24, 2005, at A14.

39. *See* THE SENTENCING PROJECT, *supra* note 4, at 3. The five are California, Colorado, Connecticut, New York, and South Dakota. *Id.*

40. *See id.* The twelve are Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, and Utah. *Id.*

41. *See id.* These states are Maine and Vermont. *Id.*

42. *See id.* at 2–3. These states include Alabama, Arizona (disenfranchises recidivists), Delaware (requires a five-year waiting period), Florida, Iowa (per current law, it is still a lifetime disenfranchisement state), Kentucky, Maryland (disenfranchises certain felons and ex-felons), Mississippi (disenfranchises for certain offenses), Nebraska, Nevada (disenfranchises recidivists and those convicted of violent felonies), Tennessee (disenfranchisement depends on date of conviction and type of crime), Virginia, Washington (disenfranchisement depends on date of conviction), and Wyoming (disenfranchisement depends on type of crime—some convictions require a five-year waiting period and others permanently prevent an individual from voting). *See id.*; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, 50-STATE REPORT ON RE-ENFRANCHISEMENT—A GUIDE TO RESTORING YOUR RIGHT TO VOTE: A RESOURCE FOR INDIVIDUALS WITH FELONY CONVICTIONS AND ADVOCATES WHO WORK WITH DISENFRANCHISED COMMUNITIES [hereinafter 50-STATE REPORT] §§ Md., Tenn., Wash., Wyo., http://www.lawyerscomm.org/ep04/50stateguide.pdf (last visited July 31, 2005) (providing additional details on those states).

Nebraska changed its laws in March, 2005. *See* Nate Jenkins, *Lawmakers Override Felon Voting Veto*, LINCOLN J. STAR, Mar. 11, 2005, at B1. The state legislature overrode the governor's veto to implement new legislation and replaced the old law that required ex-felons to wait ten years before applying to have the right to vote restored. *Id.* Now, ex-felons' voting rights are automatically restored two years after completion of their sentences. L.B. 53, 99th Leg., 1st Reg. Sess. (Neb. 2005), *available at* http://www.unicam.state.ne.us/legal/SLIP_LB53.pdf.

B. Normative Arguments Against Disenfranchisement

States should not deny ex-felons the right to vote for several normative reasons. First, disenfranchisement is a collateral consequence of a conviction, not part of any sentence,[43] and is contrary to the retributivist theory of criminal law.[44] As one scholar noted, "[s]uch an excessive collateral consequence, especially when combined with the magnitude and frequency of prison sentences in the Untied States, belies the lip service paid to retribution as the primary punishment goal."[45] Further, disenfranchisement is not a response to the severity of the offense, as would be appropriate for a proper retributivist measure;[46] instead, it is a response to the perceived dangerousness of the offender.[47]

Second, denying voting rights creates a political and social sub-class[48] of state-mandated non-voters, thereby working against rehabilitation. Ex-felons in general already comprise a "permanent undercaste," as they are stigmatized by being ex-felons.[49] In addition to the other challenges ex-felons face, such as in employment qualifications, denial of voting rights is symbolic, for it denies the right to political participation.[50] As one commentator observed, "[t]hose who have served their time are left with the message that they are inherently unreliable members of the democracy. Whether they would vote regularly or not, they are treated as though they were permanently banished from the political community."[51] Voting is a vital part of civic participation,[52] and this marginalization of ex-felons can impede their efforts to rejoin their communities.[53] Allowing ex-felons the right to vote, on the other hand, would potentially increase their sense of social or civic consciousness and encourage them to become law-abiding community members.[54]

The length of the disenfranchisement also sends a social message to ex-felons. A short-term exclusion, such as temporarily denying the right to

43. Because disenfranchisement is not part of any sentence, it is considered a "collateral consequence" of conviction. Ewald, *supra* note 16, at 1057.

44. *See, e.g.*, Demleitner, *supra* note 19, at 774–75.

45. *Id.*

46. Ewald, *supra* note 16, at 1103.

47. *See* George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1896 (1999).

48. Demleitner, *supra* note 19, at 775.

49. Fletcher, *supra* note 47, at 1897.

50. Demleitner, *supra* note 19, at 775.

51. Fletcher, *supra* note 46, at 1898–99.

52. *See* Ewald, *supra* note 16, at 1087.

53. Note, *supra* note 30, at 1315.

54. *See* Ewald, *supra* note 16, at 1110–12.

vote while incarcerated, expresses the state's confidence in the individual's ultimate rehabilitation and reintegration into the community.[55] Long-term exclusions, like permanent or permanent-by-default[56] disenfranchisement, are more punitive and dishonorable.[57] Further, disenfranchisement can create feelings of guilt, which may lead to further alienation and exclusion from society.[58]

Third, disenfranchisement is a dubious deterrent.[59] Because disenfranchisement is not a well-known consequence of felony convictions, it cannot actually function as a deterrent.[60] Perhaps disenfranchisement worked as a shaming penalty earlier in our nation's history, when only a small percentage of the population could vote and the right to vote was stripped publicly, announced in court as part of the sentence.[61] However, in today's very different political atmosphere, "when half of eligible Americans do not care to vote, the silent disenfranchisement of felons does not send much of a public message."[62]

C. The Fourteenth Amendment and Richardson v. Ramirez

While normative arguments direct that all ex-felons should be able to vote, Supreme Court jurisprudence[63] and the literal language of the Constitution[64] allow states to disenfranchise ex-felons. On its face, the Equal Protection Clause of the Fourteenth Amendment appears to prohibit felony disenfranchisement laws, mandating that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[65] However, Section 2 of the Fourteenth Amendment explicitly addresses disenfranchisement for crimes, stating, "But when the right to vote at any election . . . is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation in rebellion, or other crime*, the

55. Demleitner, *supra* note 19, at 782.

56. Disenfranchisement can be permanent by default if ex-felons are unaware of their ability to regain their right to vote.

57. Demleitner, *supra* note 19, at 781.

58. *Id.* at 786. Such exclusion is implicit in disenfranchisement, as it underscores the socially constructed image of the criminal as an outsider. *See* Note, *supra* note 30, at 1311–13.

59. Demleitner, *supra* note 19, at 788.

60. *Id.* (supporting proposition that existence of disenfranchisement provisions is not well known).

61. *Id.* at 787; Ewald, *supra* note 16, at 1118–19.

62. Ewald, *supra* note 16, at 1119.

63. *See* Richardson v. Ramirez, 418 U.S. 24, 55 (1974).

64. *See* U.S. CONST. amend. XIV, § 2.

65. *Id.* § 1.

basis of representation therein shall be reduced . . . ."[66] Prior to the seminal Supreme Court case *Richardson v. Ramirez*,[67] most scholars concluded that it was not appropriate to apply a narrow reading of this language to current felony disenfranchisement laws. The likely intent of the enactors of that Constitutional provision was not simply to disenfranchise felons and ex-felons;[68] instead, Congress likely inserted the crimes language of Section 2 to allow states to disenfranchise those who had participated in the Civil War.[69] However, states rarely used the provision for this purpose.[70]

As part of Reconstruction after the Civil War, Section 2 was an attempt to change the South's treatment of African American suffrage—to promote the right to vote, not limit it.[71] The Fourteenth Amendment was strongly condemned in the southern states, however, and Congress realized that Section 2 would not actually increase African American voting rights.[72] The Fifteenth Amendment, passed soon thereafter, did outright what the Fourteenth was intended to encourage, and made African American suffrage both national and permanent.[73] After Reconstruction, commentary of scholars and those involved in the Reconstruction Amendments reflected Congress's intent for the Fifteenth Amendment to undermine or repeal Section 2 of the Fourteenth Amendment.[74] However, in 1974, the Supreme Court in *Richardson v. Ramirez*[75] concluded that disenfranchisement laws are not inconsistent with the Equal Protection Clause,[76] because

66. *Id.* § 2 (emphasis added). The full text reads:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Id.

67. 418 U.S. 24.

68. *Id.*

69. Ewald, *supra* note 16, at 1104.

70. *Id.*

71. Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 264 (2004). For an in-depth discussion of Section 2 and the subsequent drafting of the Fifteenth Amendment, see *id.* at 264–72.

72. *Id.* at 269.

73. *Id.* at 272.

74. *Id.* at 272–75.

75. 418 U.S. 24 (1974). The decision has garnered much criticism. *E.g.*, *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1939, 1950 & n.99 (2002) (also referenced as *One Person, No Vote: The Laws of Felon Disenfranchisement*).

76. 418 U.S. at 55. Earlier in the opinion, Justice Rehnquist noted that:

of the express language of Section 2, the legislative history of the section and similar contemporary laws, and prior judicial interpretation of the amendment's applicability to state laws.[77] The Court stated:

> [W]e may rest on the demonstrably sound proposition that § 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement. Nor can we accept respondents' argument that because § 2 was made part of the Amendment "'largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment,'" we must not look to it for guidance in interpreting § 1.[78]

Yet this decision did not mean that the Equal Protection Clause never could be applied to felony disenfranchisement laws. In 1985, the Supreme Court held that a section of the Alabama Constitution that disenfranchised individuals convicted of certain felonies and misdemeanors, including "any crime . . . involving moral turpitude," violated the Equal Protection Clause because the section was originally enacted to be racially discriminatory.[79] The Court declined to analyze Section 2's "implicit authorization" of states to disenfranchise individuals convicted of crimes, but stated that "we are

> Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of the last century, the Court approved exclusions of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho. *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Davis v. Beason*, 133 U.S. 333 (1890). Much more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision.

Id. at 53 (citing Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959)). In addition to the two cases decided more than a century ago and some dicta, Rehnquist cited several summary affirmations, then noted that these cases present "*settled . . . judicial understanding* of the Fourteenth Amendment's effect on state laws disenfranchising convicted felons . . . ." *Id.* at 53–54 (emphasis added).

Other Supreme Court cases had mentioned disenfranchising felons in dicta, but none had expressly addressed the constitutionality of doing so. For example, in *Gray v. Sanders*, the Court stated:

> The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators . . . . Minors, felons, and other classes may be excluded. But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.

372 U.S. 368, 380–81 (1963) (citations omitted). In addition, in *Trop v. Dulles*, the Court noted:

> 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.

356 U.S. 86, 96–97 (1958) (plurality opinion) (footnotes omitted).

77. 418 U.S. at 54.

78. *Id.* at 55 (emphasis added).

79. Hunter v. Underwood, 471 U.S. 222, 223, 233 (1985).

confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the disenfranchisement section of the Alabama Constitution] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* suggests the contrary."[80] Thus, while Section 2 of the Fourteenth Amendment influences the application of section one, it does not preclude the Equal Protection Clause from being applied in at least one other context.

II. ANALOGOUS EQUAL PROTECTION CHALLENGES, WEALTH DISCRIMINATION, AND RESTRICTIONS ON FUNDAMENTAL RIGHTS

> Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal.
>
> *Griffin v. Illinois* [81]

Generally, the Equal Protection Clause limits the types of classifications states may make. When a classification denies access to a fundamental right, equal protection principles mandate that the classification withstand strict scrutiny:

> In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. This "equal right to vote" is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. But, as a general matter, "before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet *close constitutional scrutiny*."[82]

To survive strict scrutiny review, the classification must be narrowly tailored to achieve a compelling state interest.[83] Further, the Court has stated that strict scrutiny review is required "because some resident citizens are permitted to participate [through voting] and some are not"—it is not a result of the subject of the election.[84]

While this strict scrutiny requirement might seem contrary to the states' prerogative to determine conditions under which citizens may

80. *Id.* at 233 (citation omitted).

81. 351 U.S. 12, 16 (1956) (plurality opinion) (footnote omitted).

82. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (citations omitted) (alteration in original) (emphasis added).

83. *See, e.g.*, *id.* at 335; Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 633 (1969).

84. *Kramer*, 395 U.S. at 629.

vote,[85] the restrictions that the Supreme Court has upheld typically withstand strict scrutiny or are exceptions to the rule. For instance, the Court held that durational requirement laws, mandating how long an individual must reside in a state before being eligible to vote, must be "measured by a strict equal protection test" and struck down unless they are necessary to further a compelling state interest.[86] And while the Court upheld a statute that extended the franchise for water storage district elections exclusively to property owners in the district, the Court identified that situation as an exception to the rule.[87]

A. Unacceptable Restrictions on the Right to Vote: Poll Taxes and Literacy Tests

The Equal Protection Clause has long limited the ability of states to restrict the right to vote.[88] States have the ability to determine the conditions for the exercise of the right to vote, but only as long as those conditions are not unconstitutionally discriminatory.[89]

Poll taxes and literacy tests exemplify two areas where the Equal Protection Clause has limited the states' ability to define qualifications for their electorate. While not initially deemed *per se* unconstitutional, literacy tests were held to violate the Fourteenth Amendment when applied unequally to different races,[90] as were "interpretation tests," which were used to make a subjective judgment about an individual's understanding of the

85. *See* U.S. CONST. art. I, § 2 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); U.S. CONST. amend. XVII ("The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

86. *Dunn*, 405 U.S. at 342. *See also* Marston v. Lewis, 410 U.S. 679, 681 (1973) (per curiam) (recognizing compelling reasons for the state to have a fifty-day residency requirement); *Dunn*, 405 U.S. at 360 (striking down one-year residency requirement).

87. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728 (1973). *Kramer* struck down laws that restricted the franchise to owners or lessees of taxable property, their spouses, and parents or guardians of public school children, because no narrowly tailored, compelling interest existed which could justify such a restriction. 395 U.S. at 633. In contrast, in *Salyer Land Co.*, the Court concluded that enfranchising only landowners in the water storage district was a permissible exception to the rule regarding vote apportionment, considering the water district's special limited purpose and the disproportionate effect of its activities on landowners. 410 U.S. at 728. The Court distinguished *Salyer Land Co.* from *Kramer*, noting that while *Kramer* opened the franchise to all residents and then excluded some, *Salyer Land Co.* extended the franchise only to the owners of the land that benefited. *Id.* at 729–30. Thus, because of these special considerations, the Court did not use strict scrutiny analysis. *See id.* at 728–30.

88. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–51 (1959).

89. *Id.*

90. *Id.* at 53. The Court concluded that while a literacy test could not be used to perpetuate discrimination, that was not the case at hand, and states could legitimately consider the ability to read and write as having some relation to promoting the intelligent use of the ballot. *Id.* at 51–52.

state or federal constitution.[91] Poll taxes were similarly analyzed under the Equal Protection Clause.[92] In holding that poll taxes violate the Equal Protection Clause, the Court proclaimed that "we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process."[93]

The pertinent equal protection principles that apply to poll taxes and literacy tests logically apply in other contexts. The Supreme Court recently noted that "[e]qual protection applies as well to the manner of [the franchise's] exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[94] And in 1966, the Court noted that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[95] While the rights of felons and ex-felons to vote may be taken away by the states pursuant to *Richardson*,[96] the mechanisms by which states extend a way to regain the right to vote should logically be governed by equal protection principles.

B. Wealth Discrimination Alone

Wealth alone is not a suspect class, and thus discrimination based only on wealth is not protected by the Equal Protection Clause.[97] Yet wealth discrimination does not entirely evade scrutiny, and, considering past juris-

91. Louisiana v. United States, 380 U.S. 145, 153 (1965). In *Louisiana*, the Court held that subjective tests that required potential voters to interpret parts of the state or federal constitution as a prerequisite to voting were unconstitutional because the tests were being applied subjectively and in an arbitrary manner. *Id.* at 152–53. (Because illiterate individuals could have the passages read to them, *id.* at 149 & n.8, interpretation tests were not explicitly literacy tests.) The Fifteenth Amendment was also a strong basis for these determinations. The *Louisiana* Court generally held that the subjective tests "violate[d] the Constitution" and specifically noted that the tests violated the Fifteenth Amendment because they discriminated on the basis of race. *Id.* at 153. When the Court upheld an amendment to the Voting Rights Act that prohibited the use of literacy tests, a majority of the justices based Congress's enactment power in the Fifteenth Amendment. *See* Oregon v. Mitchell, 400 U.S. 112, 132 (1970) (opinion of Black, J.) (citing Fifteenth Amendment power for literacy test prohibition); *id.* at 216 (Harlan, J., same); *id.* at 235–36 (Brennan, White, & Marshall, JJ., same); *id.* at 282 (Stewart & Blackmun, JJ., & Chief Justice, same). Only Justice Douglas reasoned that the provision was valid under the Fourteenth Amendment. *Id.* at 140 (Douglas, J., dissenting) (citing Fourteenth Amendment power for literacy test prohibition).

92. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that states that use affluence or the payment of a fee as a voting requirement violate the Equal Protection Clause).

93. *Id.* at 668.

94. Bush v. Gore, 531 U.S. 98, 104–05 (2000) (citing *Harper*, 383 U.S. at 665).

95. *Harper*, 383 U.S. at 665. This is the quote that the *Bush* Court referenced from *Harper* to support the previous statement. *See Bush*, 531 U.S. at 104–05.

96. *See* 418 U.S. 24, 55–56 (1974).

97. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

prudence, the use of wealth discrimination as a barrier to exercising the fundamental right to vote should be analyzed using strict scrutiny.[98]

In *San Antonio Independent School District v. Rodriguez*, the Court declined to use heightened scrutiny to evaluate Texas's school financing system based purely on the poverty of school districts within an area with a relatively lower tax base.[99] However, as the Court pointed out, the situation in *San Antonio* lacked several essential factors that had been present in earlier wealth discrimination cases.[100] In the earlier cases, "because of [the individuals' or groups'] impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[101] In *San Antonio*, children in districts with lower property values received an education with lesser funding, but they did not receive *no education*.[102] And appellees had not, according to the Court, demonstrated that the Texas school financing system "operate[d] to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level."[103] The Court went on to propose that it was not necessarily true that the poorest people lived in the poorest districts, noting that studies in another state had found that poor people had clustered around areas with commercial and industrial tax bases.[104] Thus while the *San Antonio* Court declined to apply strict scrutiny because of wealth discrimination, that rejection was primarily due to the lack of the essential factors that were present in previous cases.

The factors that were missing in *San Antonio* are present when ex-felons are unable to pay fees (including outstanding restitution) that are necessary to recover their right to vote or muster the political and financial resources that are necessary to convince the legislature or governor to restore their civil rights. Ex-felons who are unable to pay restitution[105] or who are unable to gather financial and political resources are likely poor. Considering that ex-felons typically face difficulty in finding employ-

98. *See infra* Part II.C.

99. 411 U.S. at 40.

100. *Id.* at 18–22 (discussing, *inter alia*, Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); and Williams v. Illinois, 399 U.S. 235 (1971)).

101. *Id.* at 20.

102. *Id.* at 23.

103. *Id.* at 22–23.

104. *Id.* at 23.

105. This is not to suggest that ex-felons should not pay restitution, but rather that conditioning restoration of the right to vote on completed payment of restitution puts poor ex-felons at a particular disadvantage and in a situation that similarly situated wealthy ex-felons would not experience.

ment,[106] it is not a leap of logic to conclude that ex-felons, as a group, are more likely to be poor than the average member of society. Finally, there is an "absolute deprivation" of the right at issue, the right to vote. Until ex-felons have their civil rights restored, or the right to vote specifically restored, they simply cannot vote.

C. Wealth Discrimination in Conjunction with Restrictions on a Fundamental Right

Once given to the people of a state, the right to vote is a fundamental right.[107] State-imposed restrictions on the right to vote, such as literacy tests and poll taxes, violate the Equal Protection Clause.[108] State-imposed obstacles to ex-felons trying to regain their right to vote belong in the same category and merit strict scrutiny analysis. Such state-imposed obstacles fail this analysis.

Placing a condition on an ex-felon's eligibility for restoration of civil rights in order to provide an incentive to pay restitution does not withstand strict scrutiny. The Supreme Court expressed its disapproval of such a rationale in *Zablocki v. Redhail*,[109] a case involving a state statute that conditioned the right of individuals who were subject to child support payments to marry and required a showing that the applicant had satisfied the child support obligations and that the children involved would not become public charges.[110] The Court specifically noted that relying on the condition as an incentive to make child support payments was not a compelling justification for restricting the right to marry: "This 'collection device' rationale cannot justify the statute's broad infringement on the right to marry."[111] The Court ultimately struck down the statute on equal protection grounds.[112] Like the right to marry, the right to vote, once granted, is a fundamental right. If a "collection device" rationale failed to justify restrictions on the right to marry, it should similarly fail in conjunction with the right to vote. Just as with child support payments in *Zablocki*, there are

106. *See, e.g.*, Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, FED. PROBATION, Sept. 1996, at 10, 13 (noting that in 1996, a few states barred convicted felons from public employment, several left the decision to the employer, and several applied a "direct relationship test" to determine whether the conviction would influence job performance).

107. *See supra* notes 10–12 and accompanying text.

108. *See supra* Part II.A.

109. 434 U.S. 374 (1978).

110. *Id.* at 389.

111. *Id.*

112. *Id.* at 382.

other means that the state can use to encourage payment of restitution and court costs, such as wage garnishments.[113]

Conditioning eligibility for restoration of civil rights on the payment of fines is also akin to a poll tax. Poll taxes, like the one struck down in *Harper v. Virginia Board of Elections*,[114] demanded that individuals pay a fee before being allowed to vote. One commentator analogized today's disenfranchisement laws to poll taxes because of disenfranchisement laws' effect on so many people and their disproportionate effect on African Americans.[115] Two courts that have explicitly rejected this analogy[116] miss the heart of the matter. Simply put, when ex-felons must meet certain criteria (e.g., full payment of restitution or petitioning the governor for a pardon) before being able to vote, meeting these criteria almost invariably requires money (as well as time and resources), and thus, this money must be paid before being able to vote.

The Supreme Court has repeatedly struck down on equal protection grounds other obstacles that prevented indigent individuals from accessing fundamental rights. In *Griffin v. Illinois*, the Court held that Illinois' refusal to provide a transcript to indigent appellees was unconstitutional, based on Due Process and Equal Protection Clause principles.[117] The Court noted that Illinois was not required to provide appellate review, but that once it did, it could not do so in a manner that discriminated against those convicted defendants who were indigent.[118] The Court succinctly stated, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[119] Seven years later, in *Douglas v. California*, the Court held that an indigent defendant, appealing as of right, has

113. The *Zablocki* Court suggested this as one means of collecting child support. *Id.* at 389–90. Garnishment was also suggested in *Williams v. Illinois* as a way to collect money owed to the court. 399 U.S. 235, 245 (1970).

114. 383 U.S. 663, 666 (1966). In 1964, poll taxes were made unconstitutional by the Twenty-fourth Amendment. U.S. CONST. amend. XXIV.

115. *See* J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435, 436–37 (2001). Mondesire is the President of the Philadelphia Branch of the NAACP. *Id.* at 435 n.*.

116. The courts are *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002), *aff'd sub nom* Johnson v. Governor of Fla., 353 F.3d 1287 (11th Cir. 2003), *vacated for reh'g en banc*, 377 F.3d 1163 (11th Cir. 2004), *aff'd en banc* 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3301 (U.S. 2005) (No. 05-212), and *Howard v. Gilmore*, 205 F.3d 1333 (unpublished table decision), No. 99-2285, 2000 WL 203984 (4th Cir. 2000). *See also* discussion *infra* Part III.B.

117. 351 U.S. 12, 14, 18 (1956) (plurality opinion, with a fifth Justice concurring). The Court noted that "[w]e do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants." *Id.* at 20.

118. *Id.* at 18.

119. *Id.* at 19.

the right to counsel.[120] The Court repeated that whether denying a transcript or denying counsel, "the evil is the same: discrimination against the indigent."[121]

The logic in *Williams v. Illinois* also directs that conditioning re-enfranchisement on the ability to pay (whether restitution, court costs, or costs to maneuver a political solution) is not constitutional.[122] In *Williams*, the Court held on equal protection grounds that the state could not imprison an indigent person beyond the statutory maximum for a crime simply because he could not pay the fees and court costs levied in the case.[123] Instead, "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[124] To arrive at its holding, the Court acknowledged that it had to defy a longstanding tradition and judicial adherence to that tradition,[125] and that its ruling would cause a further burden on the state's administration of criminal justice.[126] The Court, however, held that because incarceration beyond the statutory maximum applied only to individuals without the financial resources to satisfy the monetary part of any judgment, the state had imposed different consequences on two categories of individuals based on their financial resources.[127] One year later, the Court reiterated its conclusion in *Williams* and extended it to hold that converting a fines-only punishment into imprisonment for an indigent defendant also violated the Equal Protection Clause.[128]

Because voting is a fundamental right, and because restrictions on fundamental rights that disproportionately affect the poor have been held to violate the Equal Protection Clause, obstacles to restoration of the right to vote should be struck down. Section 2 of the Fourteenth Amendment provides for optional disenfranchisement of ex-felons, and thus a state can choose to disenfranchise all or some of its ex-felons.[129] However, when a state provides a mechanism by which ex-felons can regain the right to vote,

120. 372 U.S. 353, 357–58 (1963).

121. *Id.* at 355. The Court then quoted the language it used in *Griffin v. Illinois*, stating, "For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" *Id.* (citing *Griffin*, 351 U.S. at 19).

122. *See* 399 U.S. 235, 242–45 (1970).

123. *Id.* at 243–44.

124. *Id.* at 244 (footnote omitted).

125. *Id.* at 239–40.

126. *Id.* at 245.

127. *Id.* at 242 (citing Griffin v. Illinois, 351 U.S. 12, 17 n.11 (1956).

128. Tate v. Short, 401 U.S. 395, 398–99 (1971). The Court also suggested that there were alternative methods of collecting fines, such as installment plans. *Id.* at 400 & n.5.

129. *See supra* notes 75–78 and accompanying text.

then a fundamental right is at stake. Then, Section 2 no longer applies and courts should focus on the re-enfranchisement mechanism. Strict scrutiny is the appropriate level of review for that analysis because of the fundamental right involved, because of past treatment of the indigent in the cases discussed above when a fundamental right was at stake, and because indigence is often the barrier that prevents ex-felons from regaining the right to vote.[130]

III. FOURTEENTH AMENDMENT CHALLENGES TO RE-ENFRANCHISEMENT LAWS

A. Past Challenges

During the last several decades, a handful of cases involving Equal Protection and Due Process Clause claims against the laws that provide for ex-felon re-enfranchisement have been raised in the federal courts.[131] None of the courts that addressed these claims analyzed them under strict scrutiny, which is the appropriate level of review for classifications that restrict access to a fundamental right.[132] However, most of the courts recognized the importance of the right, and these cases provide guidance for future challenges to re-enfranchisement laws.

William Bynum, an ex-felon convicted of statutory burglary, brought one such case, challenging a Connecticut statute that required ex-felons to pay a five dollar fee before being allowed to petition the Commission on Forfeited Rights to have their voting rights reinstated.[133] In 1969, in *Bynum v. Connecticut Commission on Forfeited Rights*, the Second Circuit reversed the lower court's refusal to convene a three-judge court, reasoning that Bynum presented a "substantial issue" that required review by such a court.[134]

Bynum did not challenge the propriety of ex-felon disenfranchisement,[135] and the court suggested that its decision in *Green v. Board of*

130. *See infra* note 213 and accompanying text.

131. *See* Williams v. Taylor, 677 F.2d 510 (5th Cir. 1982); Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); Bynum v. Conn. Comm'n on Forfeited Rights, 410 F.2d 173 (2nd Cir. 1969).

132. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (noting that the denial of the right to vote is the denial of a fundamental right; stating that "before that right to vote can be restricted, the purpose of the restriction . . . must meet close constitutional scrutiny").

133. *Bynum*, 410 F.2d at 175.

134. *Id.* at 177. No subsequent history indicates whether Bynum was ultimately successful.

135. *Id.* at 175.

Elections[136] precluded such a challenge.[137] Instead, the court recognized the issue as "whether Connecticut, once having agreed to permit ex-felons to regain their vote and having established administrative machinery for this purpose, can then deny access to this relief, solely because one is too poor to pay the required fee."[138] In part, the court recognized Bynum's claim as substantial because he framed it as an arbitrary and unreasonable condition—one based on his financial condition.[139] However, because the merit of the claim itself was not before the court, the court did not rule on whether his argument would ultimately succeed.[140]

Nine years later, in *Shepherd v. Trevino*, the Fifth Circuit held that when providing a mechanism for re-enfranchisement, distinguishing between convictions for state and federal felonies did not violate the Equal Protection Clause.[141] The two plaintiffs in *Shepherd* had been convicted of federal felonies and had been automatically disenfranchised by a Texas statute.[142] In Texas at the time, an individual convicted of a state felony who had satisfactorily completed probation could apply to the court that convicted the individual to restore his or her civil rights, including the right to vote.[143] Individuals convicted of federal crimes had no comparable remedy; they could only regain their voting rights in Texas through a presidential pardon.[144] Plaintiffs argued that Texas violated the Equal Protection Clause when it treated ex-felons convicted in a state court differently than ex-felons convicted in a federal court.[145]

136. 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968).

137. *See Bynum*, 410 F.2d at 175.

138. *Id.* at 175–76.

139. *Id.* at 176.

140. *Id.* at 177.

141. 575 F.2d 1110, 1115 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

142. *Id.* at 1111.

143. *Id.* at 1115. Technically, the court of conviction had the power to set aside the ex-felon's conviction, which would remove him or her from the class of persons who have been convicted of a felony. *Id.* at 1113. However, the Fifth Circuit called that line of reasoning disingenuous, because the individual's conviction—which had been *set aside*—could still be presented to a court if he or she was subsequently convicted of another offense, and the Texas Attorney General had concluded that an individual whose conviction had been set aside could not truthfully tell an employer that he or she had never been convicted of a felony. *Id.* The court concluded that "[u]nder Texas law the main distinction between felons whose convictions have been set aside and all other felons is that the former can exercise their civil rights, including the right to vote, while the latter cannot." *Id.* at 1114. Thus, while it is true that Texas state courts likely would not have been able to set aside federal convictions, the essence of the matter was that the statutory scheme that Texas set up allowed only individuals convicted of a state felony to apply to have their right to vote restored. *See id.* at 1113, 1115.

144. *Id.* at 1113.

145. *Id.* at 1111.

The *Shepherd* court interpreted *Richardson v. Ramirez*[146] broadly, noting that while a narrow reading of the case might have supported the plaintiffs' allegations, the court believed that Section 2 "blunt[ed] the full force of section 1's equal protection clause with respect to the voting rights of felons."[147] Thus the court concluded that strict scrutiny did not apply and that laws concerning selective disenfranchisement or re-enfranchisement of ex-felons only had to be rationally related to achieving a legitimate state interest.[148] Further, the court recognized that while Texas could have established a similar system to provide for the re-enfranchisement of individuals convicted of a federal felony, any such administrative agency would not be as familiar with the individual's trial, conviction, and behavior while on probation as the state court would be with an individual whom it had tried and convicted of a state felony.[149]

However, the *Shepherd* court missed the mark when it came to the proper level of scrutiny. Because a fundamental right was at stake, legitimacy was not the proper standard,[150] and strict scrutiny should have been employed. While *Richardson* does allow states to disenfranchise some or all convicted felons,[151] as the *Shepherd* court noted,[152] the state's *disenfranchisement* scheme was not at issue. Instead, the *re-enfranchisement* provisions were in question. Texas allowed some ex-felons to get their right to vote back—which is akin to the state again extending the right to vote to its residents, and is similar to Illinois' decision to provide appellate review that the Supreme Court addressed in *Griffin v. Illinois*.[153] Even

146. 418 U.S. 24 (1974).

147. 575 F.2d at 1114.

148. *Id.* at 1114–15.

149. *Id.* at 1115. In addition, although administrative convenience is a dubious justification in Equal Protection jurisprudence and does not withstand strict scrutiny, administrative concerns appear to be the crux of the Fifth Circuit's justification. In *Frontiero v. Richardson*, Justice Brennan, writing for the plurality, admonished against using administrative convenience as a justification for dissimilar treatment, stating that "any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .'" 411 U.S. 677, 690 (1973) (plurality opinion) (three Justices concurring in the result) (alteration in original) (citation omitted). While this rational applied to discrimination based on a suspect class (sex), it is logical to extend it to discrimination that affects access to a fundamental right.

150. The *Shepherd* court cited *McGowan v. Maryland*, 366 U.S. 420 (1961), for its standard of scrutiny. 575 F.2d at 1115. However, *McGowan* addressed Sunday Closing laws—the case did not involve a fundamental right. *See* 366 U.S. 420. Because the classification in *Shepherd* interfered with a fundamental right, a higher standard should have been used. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978).

151. *See* 418 U.S. at 55–56.

152. 575 F.2d at 1114.

153. 351 U.S. 12 at 18 (1956) (plurality opinion); *see* discussion *supra* text accompanying notes 117–19.

though Texas did not need to extend the right to vote at all, when it did so, it was required to do so under methods that withstand strict scrutiny.[154] Thus, the distinction between treatment for ex-felons convicted under state laws and ex-felons convicted under federal laws had to be narrowly tailored to achieve a compelling state interest,[155] which it was not.

And in 1982, the Fifth Circuit in *Williams v. Taylor* briefly addressed the pardon procedure by which ex-felons could regain the right to vote.[156] Neither of the two primary claims in the case concerned re-enfranchisement,[157] and only in the conclusion did the court address the petitioner's claim that the governor and the state legislature administered pardons in an arbitrary and capricious manner, thus violating due process under the Fourteenth Amendment.[158] The *Williams* court affirmed the lower court's summary judgment against the plaintiff because he lacked standing.[159] Further, the court noted that there was no evidence that the plaintiff tried to obtain a pardon, "[n]or [was] there any competent evidence to support appellant's assertion that only the rich and influential in the state are able to obtain pardons."[160] With evidence of such a trend, the implication is that the claim could succeed.[161]

B. Present Challenges

Similar issues to those presented in *Bynum*, *Shepherd*, and *Williams* have emerged in the last few years.[162] Again, challenges to re-enfranchisement procedures have not been the primary claim in any of the

154. *See supra* notes 10–12 and accompanying text.

155. *See* Dunn v. Blumstein, 405 U.S. 330, 336, 342 (1972).

156. 677 F.2d 510 (5th Cir. 1982).

157. The case centered on a procedural due process claim to a pre-disenfranchisement hearing and a claim of selective enforcement of the disenfranchisement provisions. *Id.* at 514–17. The court primarily addressed these claims, concluding that the due process claim was without merit, *id.* at 515, and remanding the case for further consideration of the selective enforcement claim, *id.* at 517.

158. *Id.* at 517.

159. *Id.*

160. *Id.*

161. The court also concluded:

> [A]ppellant's argument . . . is an attack on the state's ability to determine that felons should not be allowed to vote. Since the Supreme Court and this court have upheld the state's power to classify felons separately with respect to the right to vote, as having an affirmative sanction in § 2 of the Fourteenth Amendment, appellant's argument must fail.

Id. at 518 (internal citations and footnote omitted). However, this argument addresses the validity of *dis*enfranchisement, not measures that provide *re*-enfranchisement.

162. *See* Johnson v. Bush, 214 F. Supp. 2d 1333, 1342–43 (S.D. Fla. 2002), *aff'd en banc* 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3301 (U.S. 2005) (No. 05-212); Hayden v. Pataki, No. 00 Civ. 8586(LMM), 2004 WL 1335921 (S.D.N.Y. June 14, 2004); Farrakhan v. Washington, 338 F.3d 1009, 1011 (9th Cir. 2003), *cert. denied sub nom.* Locke v. Farrakhan, 125 S. Ct. 477 (2004).

following cases, but the following courts' approaches to the claims provide guidance for future challenges.

In *Farrakhan v. Washington*, the plaintiffs based their primary claim on the Voting Rights Act[163] and alleged that Washington's felony disenfranchisement laws constituted race-based vote denial.[164] The plaintiffs also alleged that the restoration process was "cumbersome, excessively complex, and place[d] difficult burdens on offenders seeking restoration of voting rights"; however, the court held that without evidence that minorities were less able to complete requirements for re-enfranchisement, the claim failed.[165] Citing *Bynum*, though, the court recognized an alternate route:

> Plaintiffs also argue that the statutory requirement that they repay their monetary obligations in order to be eligible for restoration amounts to a *de facto* poll tax. Although this argument might be cognizable as an equal protection claim, *see Bynum v. Conn. Comm'n of Forfeited Rights*, 410 F.2d 173, 176–77 (2nd Cir.1969), we do not consider it here because Plaintiffs have not asserted any equal protection claims.[166]

The fact that the court specifically mentioned an avenue of relief that the plaintiffs had not raised suggests that such a route could be successful.

Subsequently, in *Hayden v. Pataki*, a New York district court analyzed several claims that challenged New York's disenfranchisement laws.[167] Of particular note, one claim challenged the practice of disenfranchising only felons who were incarcerated or who were on parole, and not disenfranchising probationers.[168] The court noted that the plaintiffs were correct that Section 2 of the Fourteenth Amendment did not eliminate all equal protection considerations relating to felons and the right to vote.[169] It cited *Williams v. Taylor* for that proposition and the "finding that '[n]o one would contend that section 2 permits a state to disenfranchise all felons and then re-enfranchise only those who are, say, white.'"[170] But the court asserted that distinctions may be drawn between similarly situated individuals when

163. 42 U.S.C. § 1973 (2000).

164. 338 F.3d at 1011.

165. *Id.* at 1021–22.

166. *Id.* at 1022 n.19.

167. 2004 WL 1335921. The Right to Vote: Campaign to End Felony Disenfranchisement website notes that this case is being appealed from the dismissal on the pleadings. Pending Litigation, http://www.righttovote.org/legal_pending.asp (last visited Aug. 6, 2005). The Second Circuit heard oral argument on *Hayden* (combined with another case) on June 22, 2005. *See* NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., SECOND CIRCUIT SCHEDULED TO HEAR LANDMARK VOTING RESTORATION CASES (June 21, 2005), http://www.naacpldf.org/content.aspx?article=632.

168. *Hayden*, 2004 WL 1335921, at *4–5.

169. *Id.* at *4.

170. *Id.* (citing Williams v. Taylor, 677 F.2d 510, 516 (5th Cir. 1982)) (alteration in original).

the distinctions are rational and not arbitrary.[171] Accordingly, the court held that a distinction between prisoners and parolees on the one hand, and probationers on the other hand, was rational because members of the first group have received more severe punishments (considering that parolees are still technically serving prison sentences).[172]

While the court was correct in noting that rational distinctions may be drawn between similarly situated groups in most instances,[173] rational distinctions are not enough when the classification restricts access to a fundamental right.[174] The broad reading of *Richardson v. Ramirez* that the Fifth Circuit utilized in *Shepherd*[175] would likely direct that such a classification can stand, because states are permitted to completely disenfranchise ex-felons. But considering that the classification between prisoners and parolees as one group and probationers as another group restricted access to the fundamental right to vote, strict scrutiny was appropriate.[176] Regardless of the level of scrutiny applied, however, the classification and restriction at issue in *Hayden* would likely stand. As the *Hayden* court noted, members of the first group are still technically serving prison sentences,[177] and thus the distinction is likely narrowly tailored to achieve the compelling state interest of punishing convicted felons. Although the court did not apply the appropriate level of scrutiny to a restriction on the right to vote, the result would likely be the same under any level of scrutiny.

Plaintiffs in *Johnson v. Bush* again raised the issue of wealth discrimination.[178] The larger questions at issue were whether there was an impermissible discriminatory intent behind the felony disenfranchisement provision in Florida's constitution and whether there was a Voting Rights Act violation.[179] However, the plaintiffs also alleged that Florida's Rules of Executive Clemency were unconstitutional as a poll tax or form of wealth discrimination.[180]

171. *Id.*

172. *Id.*

173. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (noting that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship [another fundamental right] may legitimately be imposed").

174. *Id.* at 386–87.

175. 575 F.2d 1110, 1114 (5th Cir. 1978).

176. *See Zablocki*, 434 U.S. at 388. The Court stated that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Id.*

177. 2004 WL 1335921, at *4.

178. 214 F. Supp. 2d 1333, 1342–43 (S.D. Fla. 2002), *aff'd sub nom* Johnson v. Governor of Fla., 353 F.3d 1287 (11th Cir. 2003), *vacated for reh'g en banc*, 377 F.3d 1163 (11th Cir. 2004), *aff'd en banc* 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3301 (U.S. 2005) (No. 05-212).

179. *Id.* at 1338–42.

180. *Id.* at 1342–43.

The district court concluded that Florida's requirement that ex-felons pay victim restitution before they are eligible for restoration of their civil rights (including the right to vote) was not a poll tax because ex-felons had already lost the right to vote as a result of being convicted.[181] The court distinguished between the original grant of the right to vote and the reinstatement of the right to vote, noting that the state was under no obligation to re-enfranchise *any* ex-felons.[182] The district court further concluded that the condition was not an unconstitutional denial of the right to vote because Florida provided an administrative mechanism by which the requirement to pay victim restitution could potentially be waived.[183]

The first Eleventh Circuit decision affirmed the resolution of this claim.[184] Like the lower court, it concluded that because restoration of civil rights could be granted to ex-felons who could not afford to pay full restitution via a waiver, the restoration process was not unconstitutional.[185] The second Eleventh Circuit decision (*en banc*) summarily addressed the issue in a footnote, stating without citation that under Florida's Rules of Executive Clemency, felons who could not afford to pay restitution could still regain the right to vote.[186]

Indeed, when both the lower court and first Eleventh Circuit court decisions were released, the Florida Rules on Executive Clemency included a procedure by which ex-felons could obtain a waiver of some of the prereq-

181. *Id.* at 1343. The court also implied that payment of the restitution was part of the plaintiffs' sentences, stating that "[t]he Court finds that victim restitution is a crucial part of the debt the convicted felon owes to both the victim and society." *Id.*

182. *Id.* The court stated:

> [T]he State has permissibly stripped Plaintiffs of their right to vote along with other civil rights pursuant to their felony convictions. The State is not constitutionally obligated to return this right to them on completion of their sentence. The victim restitution requirement, then, does not unduly burden the exercise of their right to vote given that that right has already been stripped from them. The victim restitution requirement is not a special fee that they must pay in order to exercise a right already existing in them, but a requirement made within the authority of the State to begin the process of having their civil rights fully restored. It is not Plaintiffs' right to vote which payment of a victim restitution is being conditioned but rather it is the restoration of his civil rights which is being conditioned.

Id. (citation and footnote omitted).

183. *Id.* The court also noted that Florida's Clemency Rules had recently changed:

> At the time this case was filed, the State's rules predicated clemency on payment of criminal fines in excess of $1,000, and on payment of all victim restitution. In June, 2001, the Clemency Rules were modified to eliminate the prerequisite that fines in excess of $1,000 be paid prior to restoration of civil rights but retained the requirement that victim restitution be paid before clemency can be granted and voting rights restored.

Id. at 1342.

184. Johnson v. Governor of Fla., 353 F.3d 1287, 1308 (11th Cir. 2003), *vacated for reh'g en banc*, 377 F.3d 1163 (11th Cir. 2004), *aff'd en banc* 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3301 (U.S. 2005) (No. 05-212).

185. *Id.*

186. *Johnson*, 405 F.3d at 1216 n.1.

uisites of restitution.[187] The second Eleventh Circuit decision appears to rely on the same provision.[188] However, the Rules were revised between the two Eleventh Circuit decisions, and when the second decision was decided, the Rules effectively prevented individuals who owe restitution from being eligible for the waiver.[189] This change casts doubt on the *Johnson* decisions that relied upon the possibility of a waiver in holding that the restitution was not akin to a poll tax. Further, even the old version of the rules included no guarantee that the waiver would ever be granted. In fact, Rule 8(I)(B) indicates that if the Clemency Board does not act on waivers within ninety days, the waivers are summarily denied.[190] Thus the generalization that the requirement for restitution to be paid can be waived, and therefore does not deny access to the right to vote, was not entirely accurate at the time, and is no longer correct after the revisions to the Florida Rules. While the successive *Johnson* decisions did not directly address whether such payment is a poll tax, as each court pointed to the waiver provision, the fact that the courts did not discredit or dismiss the analogy supports the proposition that a poll tax claim could be successful. As the second Eleventh Circuit court decision noted in affirming the district court's decision for the defendants on this claim, "we say nothing about whether condition-

187. *See* Fla. R. Exec. Clem. 8(I)(A) (eff. June 20, 2003), *available at* https://fpc.state.fl.us/Policies/ExecClemency/ROEC06202003.pdf. New rules were released in December of 2004. *See* Fla. R. Exec. Clem. (eff. Dec. 9, 2004), *available at* http://www.state.fl.us/fpc/Policies/ExecClemency/ROEC12092004.pdf.

188. The court did not provide a citation for its statement, "Under Florida's Rules of Executive Clemency, however, the right to vote can still be granted to felons who cannot afford to pay restitution." *Johnson*, 405 F.3d at 1216 n.1.

189. The (new) Florida Rules of Executive Clemency provide that individuals applying for restoration of civil rights must meet several criteria, including that:

> A person may not apply for the restoration of his or her civil rights unless he or she has completed all sentences imposed and all conditions of supervision have expired or been completed, including, but not limited to, parole, probation, community control, control release, and conditional release. *In addition, the applicant may not have any outstanding victim restitution*, including, but not limited to, restitution pursuant to a court order or civil judgment, or obligations pursuant to Chapter 960, Florida Statutes.

Fla. R. Exec. Clem. 5(I)(E) (eff. Dec. 9, 2004) (footnote omitted) (emphasis added).

The rules were updated on December 9, 2004. The old version of Rule 8(I)(A) instructed, "If an applicant cannot meet the requirements of Rule 5, he or she may seek a waiver of the rules so long as at least two years have elapsed since the applicant was first convicted." Fla. R. Exec. Clem. (eff. June 20, 2003).

While the old rule did not reference outstanding restitution, *id.*, the new rule does, stating, "If an applicant cannot meet the requirements of Rule 5, he or she may seek a waiver of the rules so long as at least two years have elapsed since the applicant was first convicted and, except for waivers for commutation of sentence, no restitution is owed by applicant," Fla. R. Exec. Clem. 8(I)(A) (eff. Dec. 9, 2004) (emphasis added).

190. Fla. R. Exec. Clem. 8(I)(B) (eff. June 20, 2003). The 2004 version of that rule is identical. Fla. R. Exec. Clem. 8(I)(B) (eff. Dec. 9, 2004).

ing an application for clemency on paying restitution would be an invalid poll tax."[191]

C. *Going Forward*

The few cases that have included challenges to re-enfranchisement provisions present a potential strategy for raising an equal protection claim. Importantly, the plaintiff must have sufficient standing: the plaintiff must otherwise meet all conditions of eligibility and should have attempted to initiate re-enfranchisement proceedings.[192] To support an arbitrary enforcement claim, statistical data should be compiled and presented, as suggested in *Williams v. Taylor*.[193] While complete records comparing all applications with applications granted and reasons behind granting applications are likely not easily acquired, the available evidence should be compiled.[194] Similarly, to support a poll tax claim, analyses of fees are essential. If, as was the case with the old Florida Rules,[195] restitution must be paid but a potential waiver exists, then the degree of frequency with which the waiver is granted may indicate whether the restitution in actuality functions as a fee or not.

IV. CURRENT RE-ENFRANCHISEMENT LAWS

Most states do not have re-enfranchisement statutory schemes—the majority of the states either disenfranchise only incarcerated felons or disenfranchise incarcerated felons, probationers, and parolees.[196] Yet, fourteen states disenfranchise at least some of their ex-felons for life or require a waiting period.[197] Those states do provide at least some ex-felons with a method for regaining the right to vote. But the procedures by which ex-

191. *Johnson*, 405 F.3d at 1216 n.1.

192. The *Farrakhan v. Washington* court stated that "[t]he court further concluded that Plaintiffs lacked standing to challenge the process for restoration of civil rights under Section 9.94A.220, because no Plaintiff had yet qualified for such relief or had *even attempted* to regain his civil rights." 338 F.3d 1009, 1014 n.9 (9th Cir. 2003) (emphasis added), *cert. denied sub nom* Locke v. Farrakhan, 125 S. Ct. 477 (2004).

193. 677 F.2d 510, 517 (5th Cir. 1982) (stating, "[n]or is there any competent evidence to support appellant's assertion that only the rich and influential in the state are able to obtain pardons").

194. Recently, the Sentencing Project released a report containing such statistics for the states that permanently disenfranchise ex-felons or impose waiting periods. *See* MARC MAUER & TUSHAR KANSAL, THE SENTENCING PROJECT, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES (2005), *available at* http://www.sentencingproject.org/pdfs/barredforlife.pdf.

195. *See supra* note 189.

196. *See supra* notes 38–42 and accompanying text.

197. *See supra* note 42. The fourteen states are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Maryland, Mississippi, Nebraska, Nevada, Tennessee, Virginia, Washington, and Wyoming.

felons may have their right to vote restored vary widely from state to state and may depend on the type of crime, when it was committed (and thus which statutory scheme applies), and the application guidelines established by statute.

A. Unclear Requirements and Distinctions Between In-State, Out-of-State, and Federal Convictions

Laws governing re-enfranchisement vary widely in the fourteen life-time or waiting-period disenfranchisement states. The processes by which ex-felons can regain the right to vote are often unclear and are likely difficult to navigate.[198] In addition, distinctions between state and federal convictions do not withstand strict scrutiny.

Not all states officially codify or outline their requirements. In Delaware, there is no official application form, and the guidance available is a set of suggested steps that an individual can follow to apply for a pardon from the Board of Pardons.[199] Similarly, while there is no statutory mandate that an ex-felon must wait a certain amount of time after finishing his or her sentence before applying for a pardon, the Lawyers' Committee for Civil Rights Under Law reports that the Board typically requires a three to five year waiting period and demonstrated good behavior.[200] An individual

198. *See* MAUER & KANSAL, *supra* note 194, at 6. Mauer and Kansal provide data comparing the number of felons disenfranchised to the number who attained restoration, shown in Table 1.

TABLE 1 Number of Felons Disenfranchised and Number Attaining Restoration

State	Number Disenfranchised	Restorations
Alabama	148,830	1,697 (est., 2004)
Arizona	58,936	N/A
Delaware	14,384	800 (est., 2000)
Florida	613,514	48,000 (1998–2004)
Iowa	80,257	2,210 (1999–2004)
Kentucky	109,132	1,320 (2002–2004)
Maryland	78,206	147 (1996–2003)
Mississippi	82,002	107 (1992–2004)
Nebraska	44,001	343 (1993–2004)
Nevada	43,395	50 (est., 2004)
Tennessee	28,720	393 (2001–2004)
Virginia	243,902	5,043 (1982–2004)
Washington	32,856	53 (1996–2004)
Wyoming	12,797	17 (1995–2002)

Id.

199. 50-STATE REPORT, *supra* note 42, § Del.

200. *Id.*

may also wait five years after completing all terms of his or her sentence, including paying any financial obligations.[201]

Some states hinge procedures on the jurisdiction of the court of conviction. Individuals convicted of certain crimes in Mississippi lose the right to vote.[202] It may only be regained through a pardon or executive order issued by the governor, or through a two-thirds vote in the state legislature.[203] Individuals convicted of those crimes in federal courts or courts in other states, however, do not lose their voting rights in Mississippi.[204] In addition, ex-felons in Washington who were convicted in a Washington state court after July 1, 1984, automatically receive a certificate of discharge after completing their sentence, which they may present to register to vote.[205] Conversely, Washington ex-felons who were convicted in a federal court or in another state must petition the Clemency and Pardons Board to regain their right to vote.[206]

This type of different treatment does not withstand strict scrutiny, just as the statutory scheme at issue in *Shepherd v. Trevino* would not have withstood strict scrutiny.[207] Neither of the traditional justifications for excluding ex-felons from the franchise applies here, where regaining the right to vote can depend on the jurisdiction of the court of conviction. The purity of the ballot box cannot be protected from any defined negative influence if crimes inside or outside of the state are treated differently and in opposite ways, and the same is true for crimes prosecuted by a federal court, as opposed to a state court. While there is a technical difference between the initial grant of the right to vote and the reinstatement of the right to vote (after the right had been taken away legitimately after a felony conviction), the fundamental nature of the right to vote is identical. Because access to the fundamental right to vote is the same, once a state institutes a mecha-

201. *Id.*

202. *Id.* § Miss.

203. MISS. CONST. art. XXII, § 253; MISS. CODE ANN. § 47-7-41 (1999); 50-STATE REPORT, *supra* note 42, § Miss.

204. 50-STATE REPORT, *supra* note 42, § Miss.

205. Re-enfranchisement procedures vary in Washington, depending on the date of conviction. *See* WASH. REV. CODE ANN. § 9.96.050 (West 2003); *see also* MAUER & KANSAL, *supra* note 194, at 22. For those convicted before July 1, 1984, and who completed their sentences before 1993, the right to vote is not automatically restored, and those ex-felons must apply to the Indeterminate Sentence Review Board. *Id.* Beginning in 1993, those convicted before July 1, 1984, automatically receive a certificate of discharge (which they need to register to vote), three years after completing their sentence. *Id.* Individuals convicted in a Washington state court after July 1, 1984, automatically receive a certificate of discharge after completing their sentence. *Id.* However, certain sex offenders have no procedure by which they may regain the right to vote. *Id.*

206. *See* WASH. REV. CODE ANN. § 9.94A.885 (West 2003); *see also* MAUER & KANSAL, *supra* note 194, at 22.

207. *See* 575 F.2d 1110 (5th Cir. 1978); *supra* text accompanying notes 150–55.

nism to regain the right to vote, then that mechanism must provide equal treatment.[208]

Neither does this legal distinction find justification in the second traditional basis for felony disenfranchisement, preventing ex-felons from influencing elections.[209] Hinging the sheer possibility of regaining the right to vote on the jurisdiction in which a crime was committed bears no apparent relation to the fear of unwanted influence of elections—it is difficult to imagine that ex-felons' voting trends differ depending on the jurisdiction in which they were convicted. In addition, Supreme Court jurisprudence does not condone acting on such a fear. To the contrary, the Court has directed that "fencing out" a section of the population from voting because of their political views and the way they may vote is constitutionally impermissible.[210] Further, research demonstrates that ex-felons are not unanimously intent on destroying criminal law, but rather generally support it and believe in the importance of the existing criminal laws.[211]

B. Almost Unrealistic Requirements

The ex-felon re-enfranchisement laws in these fourteen states do not survive equal protection analysis for additional reasons. Many of these laws require ex-felons to persuade the governor or similar authority to grant a pardon or a restoration of the right to vote.[212] Realistically, this option ap-

208. *See supra* notes 10–12 and accompanying text.

209. The "purity of the ballot box" concept focuses on both morality and voting trends that are colored by morality. Thus it encompasses both preserving the franchise for moral voters, *see* Wash. v. State, 75 Ala. 582, 585 (1884), and preventing assumedly non-moral ex-felons from influencing elections with their votes (which assumedly flow from non-moral viewpoints), *see supra* notes 32–34 and accompanying text.

210. *See* Carrington v. Rash, 380 U.S. 89, 94 (1965).

211. Ewald, *supra* note 16, at 1100–01 (discussing a study by political scientist Jonathan D. Casper).

212. The fourteen states require individuals to apply to a variety of executive bodies:

Individuals must apply to the Board of Pardons and Paroles in Alabama. MAUER & KANSAL, *supra* note 194, at 7.

In Arizona, individuals must submit applications to the superior court in an individual's county of residence. *Id.* at 8.

Persons convicted of certain crimes must apply to the Board of Pardons in Delaware or wait until five years after the expiration of their sentences. 50-STATE REPORT, *supra* note 42, § Del. Expiration includes the completion of imprisonment, probation, and parole, as well as satisfaction of all financial obligations. *Id.*

In Florida, individuals must apply to the Clemency Board, which includes the governor and members of his or her cabinet. MAUER & KANSAL, *supra* note 194, at 10.

Per permanent law in Iowa, individuals may either apply to the governor for a pardon or to the Board of Parole for a Restoration of Citizenship. *Id.* at 12.

Residents of Kentucky must submit an Application for Restoration to civil rights to the Division of Probation and Parole. *Id.* at 14. Those applications are then forwarded to the governor for his or her consideration. *Id.*

pears unachievable. Ex-felons who do not have the time and money to invest in such an undertaking would be at a severe disadvantage. The resulting situation—where individuals with more resources could access a fundamental right, and less wealthy individuals could not access that right—is akin to a poll tax or *de facto* wealth discrimination. Moreover, as a joint publication of Human Rights Watch and The Sentencing Project suggests,

> In theory, ex-offenders can regain the right to vote. In practice, this possibility is usually illusory. . . . Released ex-felons are not routinely informed about the steps necessary to regain the vote and often believe—incorrectly—that they can never vote again. Moreover, even if they seek to have the vote restored, few have the financial and political resources needed to succeed.[213]

Statistics and examples also reflect this. For example, out of 12,797 disenfranchised ex-felons in Wyoming, *seventeen* had their voting rights

Persons permanently disenfranchised in Maryland must apply to the governor for a pardon. *Id.* at 15.

In Mississippi, individuals can either apply for a pardon from the governor, apply for an executive order from the governor to restore civil rights, or convince a two-thirds majority of the state legislature to pass a bill of suffrage on their behalf. *Id.* at 16.

In Nebraska, individuals must wait two years after completing their sentences. *See* L.B. 53, 99th Leg., 1st Reg. Sess. (Neb. 2005), *available at* http://www.unicam.state.ne.us/legal/SLIP_LB53.pdf (last visited Aug. 10, 2005).

In Nevada, individuals must either obtain a pardon from the Board of Pardons Commissioners (which includes the governor, who must approve all pardons) or petition the court of conviction for restoration of civil rights. MAUER & KANSAL, *supra* note 194, at 18.

Tennessee has a complex re-enfranchisement scheme, and depending on the date of conviction and type of crime, an individual should either apply to his or her local circuit court, the court of conviction, or the Board of Probation and Parole. *Id.* at 19. An individual may also petition the governor for a pardon. *Id.*

In Virginia, individuals must either apply to the local circuit court, the court of conviction, or the governor through the Office of the Secretary of the Commonwealth. *Id.* at 20.

In Washington, individuals must apply to the Indeterminate Sentence Review Board or the Clemency and Pardons Board (if the conviction was in another state or a federal court). Decisions by the Clemency and Pardons Board are not reviewed by the governor. *Id.* at 22.

Finally, in Wyoming, individuals convicted of a first-time non-violent felony can apply to the Board of Parole, and other ex-felons must apply to the governor for a pardon or restoration of civil rights. *Id.* at 24.

Note that not all ex-felons in each of these states needs to apply for restoration—some ex-felons in these states are automatically re-enfranchised, such as individuals with a single felony conviction in Arizona. *See id.* at 8.

213. FELLNER & MAUER, *supra* note 19, at 5. Findings for a proposed federal bill, H.R. 1300, discussed *infra* Part V, included similar comments:

> In those States that disenfranchise ex-offenders, the right to vote can be regained in theory, but in practice this possibility is often illusory. . . . In some States, Federal offenders cannot use the State procedure for restoring their civil rights. The only method provided by Federal law for restoring voting rights to ex-offenders is a Presidential pardon. Few persons who seek to have their right to vote restored have the financial and political resources needed to succeed.

Civic Participation and Rehabilitation Act of 2005, H.R. 1300, 109th Cong. § 2 para. 5 (2005).

restored between 1995 and 2002.[214] In Mississippi, an ex-felon may either apply for a pardon or executive order from the governor, or convince two-thirds of the legislature to pass a private bill.[215] In Alabama, certain ex-felons applying for a gubernatorial pardon in order to regain their right to vote may be required to provide a DNA sample[216]—an additional indication that the re-enfranchisement laws are arbitrary. And in Virginia, the length of time before an ex-felon can apply for a restoration of civil rights (such as the right to run for office and the right to vote) increases from three years to five years if the crime was violent or involved drug manufacturing or distribution; however, those individuals are entirely prohibited from using the separate court procedure by which an ex-felon can regain only the right to vote.[217]

The politics of the governor of a state, or an individual's political clout, may determine whether that individual's right to vote will be restored. In Virginia, Democratic Governor Mark Warner has granted petitions to restore voting rights for 1,892 ex-felons since he took office in January 2002, rejecting only 114 petitions.[218] Two prior governors, both Republicans, restored the votes of 238 and 460 ex-felons, respectively.[219] In contrast, a Democratic governor before them granted restoration to 1,180 individuals.[220] The House Majority Leader (usually an opponent of Warner) indicated that he believed that Warner's actions were not politically motivated, and in the same vein, the governor's spokesperson reported that the governor wanted to speed up the process because of the upcoming election (so more residents could vote).[221] However, considering the Secretary of the Commonwealth's comment that governors have "total discretion" in granting, denying, or ignoring restoration requests,[222] the process may be

214. MAUER & KANSAL, *supra* note 194, at 24.

215. MISS. CONST. art. XXII, § 253; MISS. CODE ANN. § 47-7-41 (1999); 50-STATE REPORT, *supra* note 42, § Miss.

216. ALA. CODE § 36-18-25 (2001); PATRICIA ALLARD & MARC MAUER, THE SENTENCING PROJECT, REGAINING THE VOTE: AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS 5 (2000), *available at* http://www.sentencingproject.org/pdfs/9085.pdf. The 50-STATE REPORT also notes this requirement:

> Certain persons applying for a pardon, including felons convicted after May 6, 1994 and felons incarcerated as of that date, must submit a DNA sample as a mandatory condition of the pardon. If you are unsure whether your DNA sample is on file with the Alabama Department of Forensic Sciences, contact your probation or parole officer.

50-STATE REPORT, *supra* note 42, § Ala.

217. *Id.* § Va.

218. Christina Bellantoni, *Warner Gives Rights Back to 1,892 Felons*, WASH. TIMES, Oct. 21, 2004, at A1. A backlog of 732 requests existed when the governor took office. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

somewhat politically driven in general, or at least driven by personal preferences of the granting authority. Practically, this means that regaining the right to vote can depend not only on one's state of residence, the type of crime, the jurisdiction in which the crime was committed, and the procedures established by statute, but regaining the right to vote may also depend heavily on the unfettered discretion of the granting authority. These factors combine to create restricted access to the right to vote for ex-felons in these states, which results in disparate treatment of similarly situated individuals—the antithesis of equal protection.

V. FEDERAL LAWS VS. STATE LAWS

Felony disenfranchisement has garnered attention at a national level. The social ramifications of lifetime disenfranchisement, such as further excluding ex-felons from society and impairing their ability to reintegrate, are cause for national concern; these ramifications run counter to rehabilitation, one of the goals of the criminal justice system,[223] and do not function properly as retribution.[224] In addition, there is a severely disproportionate impact on African American men overall.[225] And with the addition of harsh sentencing policies such as "three strikes" laws,[226] the number of offenders sent to prison for more than a year—and thus disenfranchised—has increased.[227] For instance, individuals arrested for drug offenses were almost five times as likely to be sent to prison in 1992 as in 1980.[228]

Such problems have prompted repeated proposals of federal bills that would address voting rights of ex-felons in elections for federal offices. U.S. Representative John Conyers, Jr.[229] has introduced such a bill several

223. *See, e.g.*, Demleitner, *supra* note 19, at 786–88; Fletcher, *supra* note 47, at 1907 (commenting that instead "we should be encouraging inmates to begin thinking of themselves as useful members of society with all the attendant responsibilities. Having the responsibility to vote should be the minimal condition for inculcating the sense that felons too are citizens").

224. *See, e.g.*, Demleitner, *supra* note 19, at 788–92; Fletcher, *supra* note 47, at 1896.

225. In 1998, the statistics clearly reflect a heavy impact on black men. FELLNER & MAUER, *supra* note 19, at 8. Thirteen percent of all adult black men were disenfranchised in 1998—1.4 million individuals, at a rate seven times the national average. *Id.* In Alabama and Florida, for instance, thirty-one percent of all black men are permanently disenfranchised. *Id.* In Delaware, one in five black men is currently disenfranchised. *Id.*

226. For instance, in *United States v. Washington*, the Seventh Circuit upheld the constitutionality of the federal "three strikes" law that made a sentence of life imprisonment mandatory for a defendant who was convicted of a "serious, violent felony" after having been convicted of two or more serious, violent felonies in the past. 109 F.3d 335, 337–38 (7th Cir. 1997), *cert. denied*, 522 U.S. 847 (1997). *See also* FELLNER & MAUER, *supra* note 19, at 11.

227. *Id.*

228. *Id.*

229. (D-MI). *See* United States House of Representatives, Congressman John Conyers, Jr. Biography Page, http://www.house.gov/conyers/news_biography.htm (last visited July 17, 2005).

times, with the most recent bill, H.R. 1300, entitled "Civic Participation and Rehabilitation Act of 2005."[230] Both this bill and its predecessors, H.R. 259 in 2003[231] and H.R. 906 in 1999,[232] include the following core section:

> The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election.[233]

The power of Congress to enact this bill was the subject of a subcommittee hearing when the bill was proposed in 1999, where attendees discussed various sources of authority, including the Fourteenth Amendment and the Elections Clause.[234] An attorney from the Brennan Center for Justice at NYU School of Law, Gillian Metzger, argued that the Election Clause provided authority under reasoning similar to that used in *Oregon v. Mitchell*.[235] In *Mitchell*, the Supreme Court upheld certain amendments to the Voting Rights Act, including one that enfranchised individuals aged eighteen years and over for federal elections.[236] Justice Black, announcing the judgment of the Court on this issue, reasoned that the Election Clause allowed Congress to set the age qualification for national elections, stating, "[I]t is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."[237] However, Richard Clegg, vice president and general counsel of the Center for Equal Opportunity,[238] presented a counterargument at the subcommittee hearing, arguing that the Elections Clause simply does not provide authority because it applies only to time, place, and manner regulations.[239]

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

231. Civic Participation and Rehabilitation Act of 2003, H.R. 259, 108th Cong. (2003).

232. Civic Participation and Rehabilitation Act of 1999, H.R. 906, 106th Cong. (1999).

233. H.R. 1300 § 3; H.R. 259 § 3; H.R. 906 § 3.

234. *See Civic Participation and Rehabilitation Act of 1999: Hearing Before the Subcommittee on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999), *available at* http://commdocs.house.gov/committees/judiciary/hju62486.000/hju62486_0f.htm (last visited July 31, 2005) [hereinafter *1999 Hearing*].

235. *See* Oregon v. Mitchell, 400 U.S. 112 (1970) (plurality opinion); *1999 Hearing* at 22–24 (statement of Gillian Metzger, Staff Attorney, Brennan Center for Justice at NYU School of Law).

236. 400 U.S. at 117–18 (opinion of Black, J.).

237. *Id.* at 124 (footnote omitted).

238. Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159 n.* (2001). The Center for Equal Opportunity is a research and educational organization based in Washington, D.C. *Id.*

239. *1999 Hearing*, *supra* note 234, at 17–18 (statement of Clegg).

In addition, Metzger also proposed that because some disenfranchisement laws had a discriminatory basis, Congress could decide to enforce the Equal Protection Clause's ban on racial discrimination by granting ex-felons the right to vote in federal elections across the board.[240] Clegg countered that there must be a discriminatory intent, not just a disparate impact, for Congress to exercise its power under the Fourteenth or Fifteenth Amendments.[241] Yet, the Court has suggested otherwise. In both *Griffin v. Illinois* and later in *Williams v. Illinois*, cases clearly not involving discriminatory intent, the Court admonished, "[A] law nondiscriminatory on its face may be grossly discriminatory in its operation."[242]

The Court's directive in *Richardson v. Ramirez* that the case be remanded to evaluate the possibility of a lack of uniformity in the enforcement of the disenfranchisement law,[243] plus the outcome of *Hunter v. Underwood*, where the Court struck down a provision in the Alabama Constitution because it had a discriminatory intent,[244] also suggest that felony disenfranchisement laws, and thus ex-felon re-enfranchisement provisions, are governed by section one of the Fourteenth Amendment, and hence are subject to section five's enforcement power.[245] Additionally, in *Oregon v. Mitchell*, Justices Brennan, White, and Marshall contended that while there may have been an Equal Protection claim in the age restriction on voting for the courts to address,[246] the three Justices decided the issue instead on the enforcement power of Congress under the Fourteenth Amendment, when Congress found discrimination against individuals between eighteen and twenty-one years old.[247] Similarly here, there is discrimination against

240. *Id.* at 26 (statement of Metzger).

241. *Id.* at 18 (statement of Clegg).

242. In a footnote in *Griffin v. Illinois*, which addressed access to trial transcripts for indigent parties, Justice Black noted, "Dissenting opinions here argue that the Illinois law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation." 351 U.S. 12, 17 n.11 (1956) (plurality opinion) (opinion of Black, J.). The majority opinion in *Williams v. Illinois* recounted the latter part while analyzing a case where appellant had been subject to a longer prison sentence because he was indigent and could not pay court costs and a fine that had been levied as punishment. 399 U.S. 235, 242 (1970).

243. 418 U.S. 24, 56 (1974).

244. 471 U.S. 222, 233 (1985).

245. *See 1999 Hearing*, *supra* note 234, at 25 (statement of Metzger).

246. 400 U.S. 112, 246 (1970) (Brennan, White, & Marshall, JJ., concurring in result) (stating that "we are faced with an admitted restriction upon the franchise, supported only by bare assertions and long practice, in the face of strong indications that the States themselves do not credit the factual propositions upon which the assertion is asserted to rest"). Justice Douglas went further and opined that "Congress might well conclude that a reduction in the voting age from 21 to 18 was needed in the interest of equal protection." *Id.* at 141 (opinion of Douglas, J.) (agreeing with the Court to uphold the reduction in the voting age). Justice Harlan disagreed with basing Congress' power on the Equal Protection argument in this context, due to the history of the Fourteenth Amendment and the intent behind its enactment. *Id.* at 154. (Harlan, J., concurring in part and dissenting in part).

247. The Justices continued:

ex-felons in certain states, where they may be denied the right to vote, depending on the various circumstances discussed above, while other ex-felons can regain the right to vote.

Representative Conyers' bill is not the only proposed federal legislation that would re-enfranchise ex-felons. In February 2005, U.S. Senators Hillary Rodham Clinton and Barbara Boxer announced election reform legislation that, among other things, would restore voting rights to all ex-felons.[248] As introduced in the Senate, the pertinent part of this proposed bill reads:

> (d) Rights of Citizens.—The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless, at the time of the election, such individual—
>
> (1) is serving a felony sentence in a correctional institution or facility; or
>
> (2) is on parole or probation for a felony offense.[249]

In addition to this bill, numerous other bills have been introduced to address voting rights of ex-felons, including the Ex-Offenders Voting Rights Act of 2005[250] and an act to amend the Help America Vote Act of 2002 to prevent states from disenfranchising ex-felons who are also veterans.[251]

CONCLUSION

Felony disenfranchisement laws have been present throughout our nation's history, and the controlling law, *Richardson v. Ramirez*, says that on their face, they are not unconstitutional. However, they are not given blan-

> But there is no reason for us to decide whether, in a proper case, we would be compelled to hold this restriction a violation of the Equal Protection Clause. For as our decisions have long made clear, the question we face today is not one of judicial power under the Equal Protection Clause. The question is the scope of congressional power under § 5 of the Fourteenth Amendment.

Id. at 246 (Brennan, White, & Marshall, JJ., concurring in age restriction result).

248. Statement, Senator Hillary Rodham Clinton, Senators Clinton and Boxer, Representative Tubbs Jones and Others to Unveil Major Election Reform Bill (Feb. 17, 2005), http://clinton.senate.gov/news/statements (last visited July 31, 2005); Mary Curtius & Richard Simon, *Bills Would Alter Election Procedures*, L.A. TIMES, Feb. 18, 2005, at A23.

249. Count Every Vote Act of 2005, S. 450, 109th Cong. § 701 (2005).

250. H.R. 663, 109th Cong. § 4 (2005). Section four contains language identical to the language quoted from S. 450.

251. H.R. 4479, 108th Cong. § 1(a)(6)(A) (2004). The pertinent proposed language reads:

> (A) IN GENERAL.—No State may prohibit any individual who is a veteran from registering to vote for any election for public office, or from voting in any election for public office, on the grounds that the individual has been convicted of a felony if (at the time the individual seeks to register to vote or vote) the individual is no longer in the custody of, or subject to supervision by, the State or the Federal government as a result of the individual's conviction.

Id.

ket approval. They can be struck down, at least for discriminatory intent, and the Supreme Court has noted that "the Equal Protection Clause is not shackled to the political theory of a particular era."[252] While it may have been unthinkable decades ago to even provide ways for ex-felons to regain the right to vote, now that these laws exist, the manner in which the laws operate must meet equal protection standards. The "crazy-quilt"[253] of ex-felon re-enfranchisement law is riddled with unequal treatment, both inside individual states and among the several states.[254] These laws violate the basic tenets of the Fourteenth Amendment, should be analyzed with strict scrutiny, and must be simplified and clarified or ultimately struck down.

252. Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966).

253. A report issued by the Department of Justice even used this term, noting, "Our research revealed that the laws governing the same rights and privileges vary widely from state to state, making something of a national crazy-quilt of disqualifications and restoration procedures." Susan M. Kuzma, U.S. Dep't of Justice, *Civil Disabilities of Convicted Felons: A State-by-State Survey*, at i (1996), *available at* http://www.usdoj.gov/pardon/forms/state_survey.pdf (last visited July 31, 2005).

254. Unequal treatment exists among the several states in the context of national elections.