

## Defending an Unjust System: How *Johnson v. Bush* Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida

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In 2002 the United States District Court for the Southern District of Florida decided the case of *Johnson v. Bush*. The case was brought by local Florida attorneys and the Brennan Center, a civil rights organization based in New York, on behalf of a class of disenfranchised ex-felons in Florida. The class action challenged Article VI § 4 of Florida's Constitution and additional Florida regulations that denied convicted felons the right to vote. Under the state constitution, disenfranchisement is permanent after commission of a felony unless a pardon is granted by the Governor with the approval of three members of the cabinet.<sup>1</sup> The Plaintiffs asserted that these laws violated the First, Fourteenth, Fifteenth, and Twenty-fourth Amendments of the United States Constitution, Sections 2 and 10 of the Voting Rights Act of 1965, and 42 U.S.C. § 1983.<sup>2</sup> The plaintiff's claims of law were denied and the case is currently on appeal.<sup>3</sup>

Previous cases have been brought, often on similar grounds, against other state felon disenfranchisement laws.<sup>4</sup> The striking aspect of *Johnson v. Bush* is that despite evidence of the effect of Florida's felon disenfranchisement law on the outcome of the Bush/Gore 2000 election and the heightened awareness this context brought to the *Johnson* case, the court relied on old arguments to justify felon disenfranchisement law and consciously adopted decisions from other jurisdictions that upheld disenfranchisement. In analyzing *Johnson v. Bush* I will first present the background and history of felon disenfranchisement, then present the law and claims of law raised by the

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1 FLA. CONST. art. VI § 4 and FLA. CONST. art. 8(a).

2 Complaint ¶ 2, *available*

at [http://www.brennancenter.org/programs/dem\\_vr\\_lit\\_johnson.html](http://www.brennancenter.org/programs/dem_vr_lit_johnson.html).

3 *Johnson v. Bush*, 214 F.Supp. 2d 1333, 1343-44 (S.D.Fla. 2002).

4 *See* *Hunter v. Underwood*, 471 U.S. 222 (1985); *Richardson v. Ramirez*, 418 U.S. 24 (1974); *Howard v. Showalter*, No. 99-2285, 2000 U.S. App. LEXIS 2680 (5th Cir. 2000); *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998); *Green v. Board of Elections*, 380 F.2d 445 (2d Cir. 1967); *Farrakhan v. Locke*, 987 F. Supp. 1304 (E.D.W.A. 1997); *Stephens v. Yeomans*, 327 F.Supp. 1182 (D.N.J. 1970); *Beacham v. Brateman*, 300 F. Supp. 182 (S.D.F.L. 1969); *Bailey v. Baronian*, 394 A.2d 1338 (D.R.I. 1978).

plaintiffs in the case, and finally present arguments why *Johnson v. Bush* was incorrectly decided.

### I. BACKGROUND

The practice of felon disenfranchisement has existed in some form since Greek and Roman times and has been adopted through the centuries.<sup>5</sup> In England, after a person committed a crime, they could be subject to forfeiture of property, stripped of the ability to inherit or bequeath property and were considered to have undergone “civil death”, where the felon was unable to bring suit or participate in any other legal function.<sup>6</sup> The practice of felon disenfranchisement was adopted by American colonists but was largely unquestioned during the formative years of the United States because a felon existed alongside many other groups such as African-Americans, Native-Americans, and women who also could not vote.<sup>7</sup>

After the civil war the South used the law of felon disenfranchisement to exclude black voters.<sup>8</sup> States enacted laws that disenfranchised felons for crimes such as intent to steal, using insulting gestures or language, or preaching the gospel without a license.<sup>9</sup> Often states targeted their disenfranchisement statutes to include crimes committed predominately by blacks, such as theft and fraud, while white crimes, such as murder, were excluded from disenfranchisement.<sup>10</sup> For example, during this time South Carolina made thievery, adultery, arson, wife beating, housebreaking, and attempted rape, felonies, while murder and fighting were not.<sup>11</sup>

Currently it is estimated that the total population of disenfranchised felons is 3.9 million and of this number one third is composed of black men.<sup>12</sup> In the United States, forty-eight states have

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5 JAMIE FELNER AND MARK MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAW IN THE UNITED STATES, Human Rights Watch and The Sentencing Project 1998 available at <http://www.hrw.org/reports/98/vote>.

6 *Id.*

7 *Id.* at 3

8 Tanya Dugree-Pearson, Comment, *Disenfranchisement – A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL’Y 359, 361 (2002).

9 Sasha Abramsky, *The Other Election Scandal*, ROLLING STONE, Aug. 30, 2000 at 50.

10 Pearson, *supra* note 7, at 361.

11 *Id.* at 362.

12 The Harv. L. Rev. Association, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1940 (2002).

some form of a felon voter disenfranchisement law.<sup>13</sup> Among these state laws there is a great deal of diversity.<sup>14</sup> Of the forty-eight states, eight states are “permanent disenfranchisement states” because they deny voting rights either permanently or until pardoned after conviction of a felony; five states are “modified permanent disenfranchisement states” because these states disenfranchise a large number of ex-felons but they also provide some exception to permanent disenfranchisement; and the rest of the states vary between disenfranchising felons only when in prison or disenfranchising felons while in prison and on parole or probation.<sup>15</sup>

A. *Felon Disenfranchisement in Florida*

In Florida the state constitution imposes the law of felon disenfranchisement. This Constitution reads, “No person convicted of a felony shall be qualified to vote or hold office until restoration of civil rights or removal of disability.”<sup>16</sup> The term “felony” is also defined under the constitution and means, “any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or imprisonment in the state penitentiary.”<sup>17</sup>

The eight representative class members in *Johnson v. Bush* are a good example of how far Florida’s law reaches in imposing felon disenfranchisement. Of the eight representative class members, two members committed a felony outside the state, three members were convicted of a felony under federal law, and the rest committed a felony in Florida.<sup>18</sup> All of the class members are unable to vote in Florida because of their felony convictions.<sup>19</sup> The representatives are white and black, mothers and fathers.<sup>20</sup> They served sentences as long as seven years to sentences as little as six months in prison.<sup>21</sup> In addition, two of these representatives were convicted over thirty years ago.<sup>22</sup> One of

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13 *Id.* at 1942. The two states without disenfranchisement laws are Maine and Vermont.

14 *Id.*

15 *Id.* at 1942-1949

16 FLA. CONST. Art. VI § 4(a)

17 FLA. CONST. Art. X § 10.

18 Complaint, *supra* note 2, ¶¶ 5-12

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 8, 10.

these representatives, Omali Yeshitala, as part of a political protest, removed a canvas mural caricaturing African-Americans from Saint Petersburg City Hall in Florida in 1966 and served thirty months in prison.<sup>23</sup> Other members of the representative class currently direct residential programs for recently released criminal offenders or have jobs in insurance, as truck drivers, or as paramedics.<sup>24</sup>

The representatives named in the Complaint are all examples of people who, despite serving time as felons, are currently productive members of society. The eight plaintiffs in *Johnson v. Bush* represent a class of 613,514 ex-felons in Florida.<sup>25</sup> Although all these ex-felons in Florida may not live as productive lives as the eight representative class members, these representatives demonstrate that reformed, positive members of Florida society are disenfranchised.

Of particular concern to the plaintiffs and of legal significance in the case is the disproportionate number of African Americans who cannot vote in Florida because of the State's disenfranchisement laws. Out of 1,600,000 total estimated voting age African Americans in Florida, 256,392 are disenfranchised.<sup>26</sup> Proportionally over 16% of voting age African Americans in Florida cannot vote.<sup>27</sup> The plaintiffs in the case relied on data compiled and analyzed by Christopher Uggen, a professor of Criminology at the University of Minnesota.<sup>28</sup> Professor Uggen's data asserts that, "approximately 10.5% of voting age African Americans . . . in Florida are disenfranchised as ex-felons, as compared to 4.4% of the non-African American population."<sup>29</sup> Therefore, African-Americans are disenfranchised at higher rate in Florida than non-African Americans.

The truly shocking aspect of disenfranchisement in Florida is the impact that it has had on recent elections. "While the outcome of the extraordinary close 2000 presidential election could have been altered by a large number of factors, it would almost certainly have been reversed had voting rights been extended to any category of disfranchised

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23 *Id.* at 8.

24 *Id.* at 5, 6, 7, 11.

25 Christopher Uggen and Jeff Manza, *Democratic Contraception? Political Consequences of Felon Disenfranchisement in The United States*, 67 *Am. Sec. Rev.* 777, Appendix Table A (2002).

26 *Id.*

27 *Id.*

28 *Id.*; Plaintiff's Memorandum of Law in Support of Plaintiffs' Cross-Motion for Summary Judgment and in Opposition to Defendants' Clemency Board Member's Motion for Summary Judgment at 3-4 [hereinafter "Plaintiffs' Memorandum"].

29 Plaintiff's Memorandum, *supra* note 28, at 3.

felons.<sup>30</sup> Florida has a total of approximately 827,000 disenfranchised felons, more than any other state.<sup>31</sup> It is also estimated that this group of disenfranchised felons has a strong democratic preference (approximately 68.9 percent). Therefore, a change in Florida disenfranchisement laws could have resulted in a different outcome in the 2000 Presidential election.<sup>32</sup> This estimate holds true even when voter turnout for the group of disenfranchised felons is estimated to be very low.<sup>33</sup> Although the issue of the 2000 Bush/Gore election was never raised as an issue in *Johnson v. Bush* the effect that disenfranchisement had on Florida election outcomes was raised in the media while the case was pending.<sup>34</sup> The case is currently on appeal and the 2000 election continues as a backdrop to the case emphasizing the need for change in Florida disenfranchisement laws.

## II. CLAIMS OF LAW IN JOHNSON V. BUSH

Disenfranchisement laws have been attacked in other cases and other states on multiple different legal grounds and theories. *Johnson v. Bush* reflects many of these attempts to challenge disenfranchisement laws by raising multiple legal theories under the First, Fourteenth, Fifteenth and Twenty-Fourth Amendments of the United States Constitution and Sections 2 and 10 of the Voting Rights Act of 1965. In the following sections the claims of law made by the plaintiffs will each be analyzed.

### A. *Intentional Race Discrimination*

The difficulty of proving a case against a state disenfranchisement law is that the Supreme Court has held that the language of Section Two of the Fourteenth Amendment expressly grants

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30 Uggen and Manza, *supra* note 25, at 792.

31 *Id.*

32 *Id.*

33 *Id.*

34 Abramsky, *supra* note 9; Press Release, Florida Law Denying Vote to Ex-Felons Faces Critical Court Date May 24 Summary Judgment Hearing in *Johnson v. Bush* (May 21, 2002) available at [http://www.brennancenter.org/programs/programs\\_lit\\_johnson.html](http://www.brennancenter.org/programs/programs_lit_johnson.html); Op-ed, Brennan Center, Votes that Will Never Be Counted (November 12, 2000) available at [http://www.brennancenter.org/programs/programs\\_lit\\_johnson.html](http://www.brennancenter.org/programs/programs_lit_johnson.html); Press Release, Brennan Center Challenges Florida Law That Denies Ex-Felons' Right to Vote (September 21, 2000) available at [http://www.brennancenter.org/programs/programs\\_lit\\_johnson.html](http://www.brennancenter.org/programs/programs_lit_johnson.html).

states the right to enact these laws.<sup>35</sup> However, a window of opportunity to challenge existing disenfranchisement laws under the Fourteenth Amendment still exists. In the case *Hunter v. Underwood*, the Supreme Court held that an Alabama felon disenfranchisement law was invalid under the Fourteenth Amendment because the law was enacted with an impermissible racial motivation and proof of a racially discriminatory impact was demonstrated.<sup>36</sup>

1. *Background: Richardson v. Ramirez and Ramirez v. Brown*

In analyzing how a claim of intentional racial discrimination can prevail under *Hunter v. Underwood* it is useful to first understand *Richardson v. Ramirez* and the precursor case of *Ramirez v. Brown*. In *Richardson* the United States Supreme Court overturned the decision of the California Supreme Court. The California Supreme Court, in this precursor case, *Ramirez v. Brown*, viewed the right to vote as a fundamental right that applied to felons and that required the State of California to have a compelling interest to restrict this right.<sup>37</sup> State precedents in California had justified disenfranchising felons under the argument that there was a compelling interest in protecting against voter fraud.<sup>38</sup> The court in *Ramirez v. Brown*, overturned this case law when they found that disenfranchising felons was not the least restrictive method of safeguarding against voter fraud.<sup>39</sup> The California court believed that new technologies and procedures in their state's election system sufficiently reduced the risk that ex-felon voters would misuse the right to vote.<sup>40</sup> Therefore, California's law restricting felon's right to vote was unconstitutional for it was unnecessary and overbroad to safeguard against voter fraud.<sup>41</sup>

Among current felon disenfranchisement cases, the argument that states have an interest in disenfranchising felons to protect against voter fraud is still given weight and validity. However, in 1973, when *Ramirez* was decided, the California court struck a significant blow to the justification of voter fraud. This case had the power to influence the

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35 *Richardson*, 418 U.S. at 54.

36 *Hunter*, 471 U.S. at 224-230.

37 *Ramirez v. Brown*, 507 P.2d 1345, 1348-1349 (1973).

38 *Id.* at 1349.

39 *Id.* at 1357.

40 *Id.* at 1355.

41 *Id.* at 1357.

law of felon disenfranchisement across the country and spur Fourteenth Amendment lawsuits against the disenfranchisement laws of other states.

Unfortunately, this case was granted certiorari and overturned by the United States Supreme Court in *Richardson v. Ramirez*.<sup>42</sup> Chief Justice Rehnquist delivered the majority opinion and found that a compelling state interest was not required to disenfranchise felons because Section Two of the Fourteenth Amendment expressly allows states to disenfranchise felons.<sup>43</sup> The applicable language reads, “except for participation in rebellion, or other crime[.]”<sup>44</sup> In analyzing what “other crime” meant under the Fourteenth Amendment Rehnquist looked to legislative history, the practices of the other states, and the Reconstruction Act of 1867.<sup>45</sup> His findings were sufficient to conclude that Section Two’s express language allowed felon disenfranchisement.<sup>46</sup> This finding and decision has effectively nailed the lid on the coffin of many Fourteenth Amendment challenges to felon disenfranchisement.

## 2. Hunter v. Underwood

As a ray of hope Rehnquist wrote another majority opinion in 1985 in the decision of *Hunter v. Underwood*. *Hunter* found that an Alabama disenfranchisement law was unconstitutional because the law was originally enacted with intentional racial discrimination.<sup>47</sup> Rehnquist wrote:

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<sup>42</sup> *Richardson*, 418 U.S. at 27.

<sup>43</sup> *Id.* at 41-42, 54.

<sup>44</sup> U.S. CONST. Amend. XIV, § 2. (emphasis added). The full text of section two of the fourteenth amendment 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.

<sup>45</sup> *Id.* at 43-50.

<sup>46</sup> *Id.* at 54.

<sup>47</sup> *Hunter*, 471 U.S. at 229.

[w]ithout again considering the implicit authorization of §2 to deny the vote to citizens ‘for participation in rebellion or other crime,’ . . . we are confident that §2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates §1 of the Fourteenth Amendment.<sup>48</sup>

At issue was Article VIII, §182 of the Alabama Constitution of 1901. This section of the constitution disenfranchised persons convicted of, among other offenses, “any crime . . . involving moral turpitude.”<sup>49</sup> In analyzing the Alabama Constitution the Supreme Court looked to findings of the law’s effect and its legislative history.<sup>50</sup> First, non-felony offenses such as presenting a worthless check fell within the law while crimes such as second-degree manslaughter, assault on a police officer, or mailing pornography did not.<sup>51</sup> The appellate court, before the case was raised to the Supreme Court, found that the crimes included under §182 were believed by the delegates to the Alabama Constitutional Convention to be more frequently committed by blacks.<sup>52</sup> The Supreme Court agreed and the disenfranchisement law was overturned.

### 3. *The Plaintiff’s Claim and Evidence of Intentional Race Discrimination*

The pleadings for the plaintiff’s in *Johnson v. Bush* appropriately included statistical evidence of a current disparate impact and historical evidence of discriminatory intent.<sup>53</sup> This evidence provides a claim of intentional racial discrimination under the standard of *Hunter v. Underwood* and attempts to prove that Florida’s law violates the Fourteenth Amendment.

For allegations of discriminatory intent the plaintiffs provide in their complaint and motion to dismiss a history of Florida’s felon disenfranchisement law, which traces an original enactment of discriminatory intent through subsequent amendments.<sup>54</sup> Florida’s

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48 *Id.* at 233.

49 ALA. CONST. Art. VIII § 182.

50 *See Hunter*, 471 U.S. at 228-229.

51 *Hunter*, 471 U.S. at 226-227.

52 *Id.* at 227.

53 Complaint, *supra* note 2, ¶¶ 30 – 51, Plaintiffs’ Memorandum, *supra* note 28, at 4-8.

54 *Id.* ¶¶ 30-44; Plaintiffs’ Memorandum, *supra* note 53, at 4-6.

constitution was amended in 1865, 1868, 1885, and 1968.<sup>55</sup> The 1865 constitution enacted Florida's "black codes" which only granted suffrage to white men and contained a list of racist laws to control blacks.<sup>56</sup> The 1868 constitutional amendments were passed after two political parties positioned for control of the constitutional convention.<sup>57</sup> The radical republicans, some of whom were African-American, were in favor of equality between the races.<sup>58</sup> The moderate and conservative republicans were in favor of the status quo and gaining the support of ex-confederates.<sup>59</sup> In a midnight coup the moderate republicans took control of the constitutional convention<sup>60</sup> and enacted a new constitution with a broad reaching felon disenfranchisement law targeted against blacks.<sup>61</sup> The 1868 Constitution disenfranchised anyone convicted of bribery, perjury, larceny or an infamous crime and authorized the legislature to impose education requirements for voting.<sup>62</sup> In 1885, amendments were made to the constitution but the language of the disenfranchisement clause was retained almost verbatim.<sup>63</sup> A final set of

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55 *Id.* ¶¶ 32, 37, 43, and 44. See also FLA. CONST. of 1968, art. VI § 4; FLA. CONST. of 1885, art. VI § 4; FLA. CONST. of 1868, art. XIV §§ 2, 4; FLA. CONST. of 1865, art. VI § 1.

56 *Id.* ¶¶ 32-33; See FLA. CONST. of 1865, art. VI § 1. The applicable section of the 1865 Constitution that excluded black voters reads: "Every free white male person of the age of twenty-one years and upwards . . . shall be deemed a qualified elector at all elections under the Constitution, *and none others . . .*" (emphasis added).

57 Complaint, *supra* note 2, ¶ 37.

58 *Id.* ¶ 35, 37; Plaintiffs' Memorandum, *supra* note 28, at 4.

59 *Id.* ¶¶ 35, 37; Plaintiffs' Memorandum, *supra* note 28, at 4-5.

60 Plaintiffs' Memorandum, *supra* note 28, at 5.

61 Complaint, *supra* note 2, ¶ 38. Section 2 of the Article XIV of Florida's 1868 Constitution reads: "No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election, nor shall any person convicted of felony be qualified to vote at any election unless restored to civil rights." FLA. CONST. of 1868, art. XIV, §2.

62 Complaint, *supra* note 2, ¶¶ 38-39.

FLA. CONST. of 1868, art. XIV § 4 reads: "The Legislature shall have power and shall enact the necessary laws to exclude from every office of honor, power, trust, or profit, civil or military, within the State, and from the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime . . ." FLA. CONST. of 1868, art. XIV, §4. FLA. CONST. of 1868, art. XIV § 7 reads: "The Legislature shall enact laws requiring educational qualifications for electors after the year one thousand eight hundred and eighty, but no such laws shall be made applicable to any elector who may have registered or voted at any election previous thereto." FLA. CONST. of 1868, art. XIV, §7.

63 *Id.* ¶ 43. The only change in the 1885 Constitution to the language of article XIV § 2 of the 1868 Constitution was the addition of, "by a court of record." Otherwise the law remained unchanged. FLA. CONST. of 1885, art. VI, §4.

amendments were made to the Florida Constitution in 1968, which changed the language of the disenfranchisement law to, “[n]o person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights.”<sup>64</sup>

Intentional discrimination is one of the few claims against felon disenfranchisement laws that has gained some ground against the broad endorsement made in *Richardson v. Ramirez*. The plaintiffs’ in *Johnson v. Bush* appropriately devote a great deal of their pleadings to the evidence and argument that Florida’s law was historically enacted with intentional discrimination.

#### A. *Voting Rights Act Claim*

A second claim for relief made in *Johnson v. Bush* is that Florida’s Disenfranchisement Law violates §2 of the Federal Voting Rights Act (VRA).<sup>65</sup> The central purpose of this law is to enforce the Fifteenth Amendment of the United States Constitution.<sup>66</sup> The fifteenth Amendment states, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”<sup>67</sup> The Supreme Court has stated that the VRA was enacted for the purpose of “rid[ding] the country of racial discrimination in voting.”<sup>68</sup> Because of

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<sup>64</sup> *Id.* ¶ 43.

<sup>65</sup> 42 U.S.C. § 1973 (2002).

§ 1973(a) reads in part:

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

§1973(b) reads in part:

A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

<sup>66</sup> *Chisom v. Roemer*, 501 U.S. 380, 383 (1991)

<sup>67</sup> U.S. CONST. amend. XV §1.

<sup>68</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

this purpose the VRA should be interpreted to provide, the broadest possible scope “in combating racial discrimination.”<sup>69</sup>

The standard to prove a violation of the VRA exists in section 2 of this statute and is essentially a “results test” to determine if racial minorities have unequal opportunity to participate in elections.<sup>70</sup> Plaintiffs must show, “a causal relationship between the challenged voting procedure and the discriminatory effect, based on the totality of the circumstances.”<sup>71</sup>

The plaintiffs in *Johnson v. Bush* rely on historical evidence of discrimination and statistical evidence of discriminatory impact as proof that Florida’s disenfranchisement law violates the VRA.<sup>72</sup> Although this evidence is extensive to satisfy the results test as it appears in the statute, courts around the country have questioned the applicability of the VRA to claims against felon disenfranchisement laws.<sup>73</sup> These cases fall back on the holding of *Richardson v. Ramirez*, common law, legislative intent, and the rationale that a felon has chosen to commit a crime and become disenfranchised.<sup>74</sup> Further analysis of these rationales used in *Johnson v. Bush* will be explored later in refuting the court’s holding against the plaintiffs’ VRA claim.

#### B. *Additional Claims Under the Fourteenth Amendment*

The plaintiffs also put forth claims of substantive due process and equal protection under the Fourteenth Amendment.<sup>75</sup> Plaintiffs use their statistical evidence to argue that a disproportionate impact is caused on black voters by Florida’s disenfranchisement law. The plaintiffs assert that of the ex-felon population of 525,000, 20% of this number, or 139,000 people, are African-American.<sup>76</sup> Of the total of approximately 710,000 disenfranchised felons, 30% are African American.<sup>77</sup> These proportions are significantly greater than the proportion of Florida’s 15% total African-American population.<sup>78</sup>

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69 *Allen v. State Bd. Of Elections*, 393 U.S. 544, 567 (1969).

70 42 U.S.C. § 1973(b) (2002).

71 *Farrakhan*, 987 F. Supp. at 1313.

72 *Supra*, note 51 at 24-25.

73 *See Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996); *Wesley v. Collins*, 605 F.Supp. 802 (M.D. Tenn. 1985).

74 *Baker*, 85 F.3d. at 928-929; *Wesley*, 605 F.Supp. at 813.

75 *Johnson*, 214 F.Supp. 2d at 1337.

76 Complaint ¶ 48.

77 *Id.*

78 *Id.*

The facts the plaintiff's assert in their disproportionate impact claim point to a significant undercutting of the black vote. Legally, *Richardson v. Ramirez* has largely undercut this claim. Regardless, the claim is worth arguing if only to highlight the inequality of felon disenfranchisement on black voters and prick the consciousness of the court. The number of disenfranchised felons has grown in Florida since *Richardson* was considered and the plaintiffs argue that, at some point, the numbers become large enough to overcome the express provision of Section Two of the Fourteenth Amendment and violate its guarantee of equal protection.<sup>79</sup>

The plaintiffs also challenge Florida's disenfranchisement law as arbitrary and irrational and therefore a violation of due process. The arbitrary and irrational challenge has evolved from the Supreme Court's attempts to balance the Fourteenth Amendment's equal protection promise with the practical necessity and purpose of enacted legislation.<sup>80</sup> Therefore, a law must bear a, "rational relation to some legitimate end."<sup>81</sup> This challenge to disenfranchisement laws has been argued before and was successful in *Ramirez v. Brown* before being overturned by *Richardson*.

### C. *The Twenty-Fourth Amendment Claim: Unlawful Poll Tax*

The plaintiffs argue that Florida's felon disenfranchisement law violates the Twenty-Fourth Amendment. Under this amendment a United States citizen's right to vote cannot be denied or abridged by a failure to pay a poll tax.<sup>82</sup> Florida's Rules of Executive Clemency § 9(a)(2) require that disenfranchised felons have, "no outstanding pecuniary penalties or liabilities if such penalties or liabilities are attributed to victim restitution[.]"<sup>83</sup> In addition, under these rules disenfranchised felons must submit an application to the Clemency

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<sup>79</sup> Plaintiffs' Memorandum, *supra* note 28, at 32.

<sup>80</sup> *Romer v. Evans*, 517 US. 620, 631 (1996)

<sup>81</sup> *Id.*

<sup>82</sup> U.S. CONST. Amend. XXIV § 1. The full text of section one reads:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.

<sup>83</sup> Fla. R. Exec. Clem. § 9(a)(2) available at <http://www.state.fl.us/fpc/RULES-6-14-01.pdf>.

Board,<sup>84</sup> fulfill any requirements asked by the Florida Parole Commission in investigating the application,<sup>85</sup> and pass the judgment of the Clemency Board.<sup>86</sup> The Clemency Board is comprised of the Governor and requires an additional approval of three members of the Governor's cabinet to restore an ex-felon's civil rights.<sup>87</sup>

The details of fulfilling these requirements has been expressed by, Jim Greene, a co-counsel for the plaintiffs in the lawsuit against Florida:

The detail and paperwork required by the clemency board would fill two cabinets, with fifty sources spanning twenty to fifty years of a person's life. Applicants hoping to get their rights restored have to provide copies of their birth certificate, driver's license and Social Security card; any education certificate attained; a complete and detailed twenty-year residential history; a complete employment history of the past twenty years, including the names of all supervisors; copies of all bank, mortgage and credit detailing the previous three years' worth of income-tax returns; copies of all court documents pertaining to the applicable copies of all traffic tickets ever received, along with proof of payment; and character-reference letters.<sup>88</sup>

In addition, after this application process is complete the decision whether to restore a felon's voting rights is entirely left up to the Governor and his Cabinet.<sup>89</sup> The process is estimated to take two years and results in a large expense due to travel time to the capital city, lost wages due to taking time off from work<sup>90</sup>, and fulfillment of paying all victim restitution fees.

### III. THE RATIONAL OF THE COURT

Despite the numerous claims of law raised in *Johnson v. Bush* the court granted defendant's motion for summary judgment and denied plaintiffs' cross-motion for summary judgment in each area of the law.

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84 *Id.* at § 6.

85 *Id.* at § 7.

86 *Id.* at § 11.

87 FLA. CONST. art. IV § 8(a) (2002).

88 Abramsky, *supra* note 9, at 3

89 *Id.* at 3-4

90 *Id.* at 4

In their reasoning the court relied on past arguments and past decisions justifying felon disenfranchisement. The court's cited case law and reasoning for each claim will be analyzed and counter arguments defending the plaintiffs' claims will be presented.

*A. Intentional Race Discrimination*

The court in *Johnson* found that Florida's last revision to their constitution in 1968, "cleansed Florida's felon disenfranchisement scheme of any invidious discriminatory purpose[.]"<sup>91</sup> Therefore, regardless of the discriminatory intent that had been present in previous amendments to the Constitution, the changes made in 1968 were sufficient to alter Florida's historical link between felon disenfranchisement and discrimination. In making this determination the court did two things: first, they adopted the law and reasoning of the Fifth Circuit's decision in *Cotton v. Fordice* and, second, they analyzed the proposed revisions to Florida's disenfranchisement law in 1968 to determine that "substantial revision" had been made to previous law.<sup>92</sup>

The changes made in 1968 to the Florida Constitution and the Legislative history give no discussion of felon disenfranchisement and the impact on racial minorities.<sup>93</sup> Without any guidance from the legislature the court in *Johnson v. Bush* had to evaluate the changes made in 1968 to the Florida Constitution on their face.<sup>94</sup> For this reason the court adopted the ruling of *Cotton v. Fordice*, which said that a facially neutral voter disenfranchisement law "might overcome its odious origin."<sup>95</sup> Under *Cotton*, a law that substantively does not violate equal protection can still be found to overcome a discriminatory past history.<sup>96</sup> The court in *Johnson* also added to this rule that, "a new provision may supersede the previous provision and remove the discriminatory taint associated with the original version."<sup>97</sup> In the court's view either a facially neutral statute or a statute that has been replaced by a new provision may overcome its discriminatory origin.

In *Cotton v. Fordice*, the Fifth Circuit Court of Appeals affirmed a District Court decision that denied a discriminatory intent challenge to a

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91 *Johnson*, 214 F.Supp.2d. at 1339.

92 *Id.* at 1338-1340.

93 *Id.* at 1340; Plaintiffs' Memorandum, *supra* note 51, at 18-19.

94 *Johnson*, 214 F.Supp. 2d. at 1340-1341.

95 *Cotton*, 157 F.3d at 391.

96 *Id.*

97 *Johnson*, 214 F. Supp. 2d. at 1339.

Mississippi disenfranchisement law.<sup>98</sup> The court in *Cotton* looked to *Hunter v. Underwood* for guidance.<sup>99</sup> The court believed *Hunter* had not decided if a facially neutral disenfranchisement law could overcome its odious origin.<sup>100</sup> Because the court in *Cotton* believed this issue was open they decided that a facially neutral provision could be valid and the court in *Johnson* agreed.

However, *Cotton* misinterprets *Hunter*. The court in *Hunter*, contemplating § 182 of the Alabama Constitution, which disenfranchised state felons, said:

Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect.<sup>101</sup>

The Alabama law at issue in *Hunter* originally had clear racial motivation behind its enactment.<sup>102</sup> The Alabama legislature had removed the more blatantly discriminatory sections and the defense in *Hunter* argued that the removal of these discriminatory sections sufficiently changed the law to make the remaining provisions valid.<sup>103</sup> The Supreme Court in *Hunter* disagreed with this argument. *Hunter* recognized that despite the removal of the worst provisions of the original the law, Alabama's disenfranchisement law still contained original language enacted with discriminatory intent. This language that remained, because it was facially neutral, may have been valid if the Alabama legislature originally enacted the law with no discriminatory intent, however, because the language had been enacted with discriminatory intent it was invalid.

In both *Cotton* and *Johnson* the courts deal with disenfranchisement laws that are facially neutral, but both these laws contain language that was originally enacted with discriminatory intent. These two courts, therefore, misapply *Hunter*'s authority in finding these laws are valid. In *Cotton v. Fordice* the court was interpreting § 241 of the Mississippi Constitution, which disenfranchised felons.<sup>104</sup> The court

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98 *Id.*; see also *Cotton*, 157 F.3d 388.

99 *Cotton*, 157 F.3d at 391.

100 *Hunter*, 471 U.S. at 233.

101 *Id.*

102 *Id.* at 231

103 *Id.* at 232-233

104 *Cotton*, 157 F.3d at 389-390.

found that the original law was enacted with discriminatory intent, but that the law had subsequently gone through sufficient changes to clear the law of its original racist motivation.<sup>105</sup> Among the changes to the law's original enactment in 1890 was an amendment in 1950 to remove "burglary" from a list of disenfranchisement crimes.<sup>106</sup> Also, in 1968 Mississippi added "murder" and "rape" to the constitution as disenfranchisement crimes.<sup>107</sup> To make these amendments both houses of the legislature had to approve the changes by a two-thirds vote and then a majority of voters in Mississippi had to approve the revisions.<sup>108</sup> The court in *Cotton* claims that this process was sufficiently stringent and the revisions substantive enough to clean the Mississippi law of its original discriminatory intent.<sup>109</sup>

Despite the changes of some of the wording of the law, much of the original language that was enacted in 1890 with clear discriminatory intent still existed in the Mississippi Constitution in 1968. This fact pattern is almost identical to that of *Hunter* where some words were changed to Alabama's Constitution, but the Supreme Court found that the original wording enacted with discriminatory intent still existed. The court in *Cotton* tries to distinguish this similarity between the two cases by saying Mississippi's law broadened their voter disenfranchisement law by adding language while Alabama only removed parts of their law.<sup>110</sup> *Cotton* also says Mississippi's legislative changes were approved by a statewide vote while Alabama used only the judicial process.<sup>111</sup> These differences in the cases are not sufficient to affect the essential holding of *Hunter* that disenfranchisement laws enacted with discriminatory intent are invalid.

In *Johnson v. Bush* a similar problem exists. In 1968 Florida's constitution was amended and the disenfranchisement law changed. The judge puts a great deal of emphasis on the quality and depth of the revision process and the fact that Florida voters approved the changes as evidence that Florida's disenfranchisement law was cleansed of discriminatory intent.<sup>112</sup> The changes in 1968 consisted of deleting specific crimes from the disenfranchisement law, including some

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105 *Id.* at 391.

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.* at n.10.

111 *Id.*

112 *Johnson*, 214 F. Supp. 2d. at 1340.

misdemeanors.<sup>113</sup> The entire language of the original discriminatory law was not changed, and the changes did occur, “without any evidence of discussion of discriminatory intent based on race.”<sup>114</sup> Without any discussion of discriminatory intent it is impossible to discover if the legislature was remorseful of Florida’s discriminatory history and honestly wished to create a law washed of discriminatory intent. Because original language that was enacted with discriminatory intent still exists in Florida’s disenfranchisement law and because the legislature has never clearly tried to remedy this past wrong *Johnson v. Bush* incorrectly held that the law was cleansed of discriminatory intent.

*B. The Voting Rights Act: Johnson’s Old Answer to a Worsening Problem*

Voting Rights claims have been raised against disenfranchisement laws in the past.<sup>115</sup> Therefore, it should not be surprising that the court in *Johnson* took their pick among cases that have overturned Voting Rights Act challenges to disenfranchisement laws and adopted one of these decisions. *Johnson* is surprising, however, considering the rising rates of disenfranchisement among African-Americans in Florida and the effect this disenfranchisement has had on Florida and national politics.

*1. Wesley v. Collins*

In *Johnson v. Bush* the court obstinately held to a principle adopted from *Wesley v. Collins*<sup>116</sup>, that, “The African-American ex-felons Plaintiffs have not been denied the right to vote because [of] an immutable characteristic but because of their own criminal acts.”<sup>117</sup> This policy view overturns VRA claims because disenfranchisement results from a felon’s own action and not from a, “denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>118</sup>

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113 *Id.*

114 *Id.*

115 See *Baker*, 85 F.3d at 919; *Wesley*, 605 F.Supp. at 802; (These are two cases, among others, that have found voting rights act claims are unpersuasive to overturn a disenfranchisement statute).

116 *Wesley*, 605 F.Supp. 802

117 *Johnson*, 214 F.Supp. at 1341; *Wesley*, 605 F.Supp. at 813.

118 42 U.S.C. § 1973(a) (2002)

In *Wesley v. Collins* a convicted felon, Charles Wesley, brought suit against Tennessee officials for unlawfully denying him his rights.<sup>119</sup> Wesley argued that the Tennessee Voting Rights Act of 1981<sup>120</sup> violated the Voting Rights Act. In deciding this claim the court held that the VRA results test required a “causal connection” between the, “indicia of historically-rooted discrimination and the statute disenfranchising felons.”<sup>121</sup> The court in *Wesley* goes on to find that no causal connection exists between Tennessee’s history in enacting their disenfranchisement law and discrimination.<sup>122</sup> Rather the court finds that historically people in Tennessee have become disenfranchised for their decision to commit a crime.<sup>123</sup>

The court in *Johnson*, in addition to citing and relying on *Wesley* as a non-authoritative case, relies on the Eleventh Circuit case, *Nipper v. Smith*, as persuasive authority that a causal connection is required in asserting a VRA claim.<sup>124</sup> Under *Nipper v. Smith* a causal connection between historical discrimination and disenfranchisement is required to win a VRA claim.<sup>125</sup> The plaintiffs in *Johnson v. Bush* have successfully satisfied this requirement. The Plaintiffs in *Johnson* have traced the law of felon disenfranchisement in Florida from Florida’s first Constitution in 1838.<sup>126</sup> They have shown how Florida’s disenfranchisement law has undergone changes, but, regardless of these changes, original language enacted in 1868 with discriminatory intent remains in the constitution today.<sup>127</sup> In addition, the plaintiffs have presented statistical evidence and data that shows more African-American’s are being disenfranchised in Florida than non-African-Americans.<sup>128</sup> Therefore, original language of a statute enacted with discriminatory intent exists in Florida’s constitution today and is causing a disproportionate impact on African-American felons. The plaintiff’ evidence should be deemed sufficient to overcome the standard of *Nipper v. Smith* and prevail on a VRA claim.

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119 *Wesley*, 605 F.Supp. at 804.

120 F.C.A. § 2-19-143 (1983 Supp.).

121 *Wesley*, 605 F.Supp. at 812; *See Johnson*, 214 F. Supp. at 1341. The applicable language of *Wesley* reads: “The underlying premise of the result test’s ‘totality of the circumstances’ analysis is that a causal connection must be established between the indicia of historically-rooted discrimination and the Tennessee statute disenfranchising felons.”

122 *Wesley*, 605 F.Supp. at 813.

123 *Id.*

124 *Nipper v. Smith*, 39 F.3d. 1494, 1515 (11th Cir. 1994).

125 *Id.*

126 Complaint, supra note 2, ¶ 30.

127 *Id.* at 35-44.

128 Complaint ¶ 48.

2. *Adopted Authority: Why not Farrakhan v. Locke?*

An additional rationale I would question is why the court in *Johnson v. Bush* adopted the non-persuasive authority of *Wesley v. Collins* in denying the plaintiff's VRA claim. The United States District Court for the southern district of Florida resides under the Eleventh Circuit Court of Appeals. The decision of *Wesley v. Collins* was decided by a Tennessee district court outside of the Eleventh Circuit.<sup>129</sup> The decision to adopt outside authority to solve *Johnson v. Bush* appears arbitrary especially when, *Farrakhan v. Locke*, has decided that a disenfranchisement law can be invalid under a VRA challenge.<sup>130</sup> I would like to present *Farrakhan v. Locke* as an alternative case the court could have adopted to support the plaintiff's VRA claim.

In *Farrakhan v. Locke*, a United States District Court in Washington refuted several of the common justifications of why the VRA cannot be used to invalidate a disenfranchisement law.<sup>131</sup> The court first looked at the defense's argument that the VRA cannot be applied to disenfranchisement law challenges because it falls under the "plain statement rule" as held in *Baker v. Pataki*.<sup>132</sup> Under this argument, "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"<sup>133</sup> The concern is that the courts may impermissibly authorize a transfer of power from the states to the federal government without clear authority. In *Baker v. Pataki* the court found that such an express grant of power was not placed in the VRA, therefore, the Act cannot be applied to invalidate a state's voter disenfranchisement laws.<sup>134</sup>

*Farrakhan v. Locke* presents a different view. In this case the court found that the "plain statement rule" that mandates express Congressional language does not apply to the VRA.<sup>135</sup> The court found that the Fourteenth and Fifteenth Amendments to the United States Constitution had already shifted the balance between the state and federal government and therefore, the "plain statement rule is simply

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129 See *Wesley*, 605 F.Supp. at 802.

130 The Harvard Law Review Association, *supra* note 12, at 1955.

131 *Farrakhan*, 987 F.Supp. at 1308-1310.

132 *Baker*, 85 F.3d at 930.

133 *Id.* at 931. (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

134 *Id.* at 934.

135 *Farrakhan*, 987 F.Supp. at 1309.

inapplicable in the context of the VRA.”<sup>136</sup> In *Farrakhan* the court noted that the dissent in *Baker* applied this same argument<sup>137</sup> and that, “[t]he Supreme Court has consistently recognized that Congress has the power to enforce the Fourteenth and Fifteenth Amendments through the VRA, despite the burdens those measures placed on the states.”<sup>138</sup>

The court in *Farrakhan* also responded to the argument that Section Two of the Fourteenth Amendment expressly allows states to enact felon disenfranchisement laws.<sup>139</sup> The court acknowledged that *Richardson v. Ramirez* found that § 2 authorized states to have felon disenfranchisement laws, but also acknowledged that *Hunter v. Underwood* did not allow these laws to be enacted with intentional discrimination.<sup>140</sup> Therefore, “Congress also has the power to protect against discriminatory uses of felon disenfranchisement statutes through the VRA.”<sup>141</sup> The court further found that the VRA was narrowly tailored to specific geographic areas and subject matter so that preclusion of some felon disenfranchisement laws under the VRA would not impermissibly broaden constitutional protections.<sup>142</sup>

The court in *Farrakhan* finally looked to and dispelled the argument against the VRA in *Wesley v. Collins* that felon’s choose disenfranchisement through their own lawless conduct.<sup>143</sup> This argument is based on John Locke’s social contract theory that, “individuals who do not abide by society’s rules cannot participate in their promulgation.”<sup>144</sup> This theory has its roots in the common law tradition of felon disenfranchisement and the public policy argument of protecting the

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136 *Id.* at 1309. (Internal quotation marks omitted).

137 *Baker*, 85 F.3d. at 938.

138 *Farrakhan*, 987 F.Supp. at 1309, quoting *City of Boerne v. P.F. Flores*, 521 U.S. 507 (1991) and relying on *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970), and *City of Rome v. United States*, 446 U.S. 156 (1980).

139 *Id.* at 1309-1310.

140 *Id.* at 1310.

141 *Id.*

142 *Id.* at 1310-1311. In this analysis the court addressed a claim made by the defense that, under *City of Boerne v. P.F. Flores*, 117 S.Ct. 2157 (1997), a law that seeks to protect constitutional rights must exhibit, “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Boerne*, 117 S.Ct. at 2164. *Boerne* overturned Congress’ Religious Freedom Restoration Act (RFRA) as an impermissible expansion of constitutional protections while it distinguished the VRA, as lawful, because it was narrowly tailored to a particular geographic areas and racially discriminatory subject matter. *Farrakhan*, 987 F.Supp. at 1310-1311.

143 *Farrakhan*, 987 F.Supp. at 1312.

144 *Id.*; see *Green*, 380 F.2d at 451.

purity of the ballot box. However, the court in *Farrakhan* looks to authority that dispels the argument as “overly academic and empirically unfounded.”<sup>145</sup> It is questionable that courts should overturn a Congressionally enacted VRA claim against felon disenfranchisement laws on the assumption that the felon chose there unlawful behavior and therefore chose to have no voting rights in civil society for the rest of their life. The court’s assumption that citizens choose felonious behavior and that disenfranchising felons preserves the purity of the ballot box lacks statistical proof. In the next section I will introduce data that suggest that other factors such as race and class contribute to rates of felon convictions. This data makes the assumption that felon’s choose there own behavior more difficult to justify.

In *Farrakhan* the court, after finding that the VRA could be used to challenge disenfranchisement laws, found that plaintiffs lacked sufficient evidence to prove that Washington’s disenfranchisement law caused a dilution of the Black vote.<sup>146</sup> Although the plaintiffs in *Farrakhan* failed to allege this causation link between the law and vote dilution, the plaintiffs in *Johnson* have sufficiently alleged and supplied evidence to this effect. As previously explained, under the “results test” of the VRA, plaintiffs must show a causal relationship between the challenged voting procedure and the discriminatory effect, based on the totality of the circumstances.<sup>147</sup> In *Farrakhan*, the court looked to three factors that the Supreme Court identified in *Thornburg v. Gingles* as necessary to succeed on a vote dilution claim under the VRA.<sup>148</sup> These factors are:

- 1) the minority group in question must be sufficiently large and geographically compact to constitute a majority in a voting district;
- 2) the group must be politically cohesive; and
- 3) the white majority group must vote sufficiently as a bloc so as to enable it to usually defeat the minority group’s preferred candidate.<sup>149</sup>

The plaintiffs in *Johnson v. Bush* have relied in their Cross Motion for Summary Judgment on the statistical analysis of Christopher

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145 *Id.* at 1312; see *Dillenburg v. Kramer*, 469 F.2d 1222, 1245-1225 (1972).

146 *Id.* at 1313.

147 *Id.*

148 *Id.*; See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

149 *Id.*

Uggen.<sup>150</sup> This statistical data proves the three specific criteria outlined by the Supreme Court. First, The group of disenfranchised black felons in Florida is both sufficiently large and geographically compact. The number of African American disenfranchised felons in Florida has grown over time from 13,000 in 1976 to 139,000 in 1998.<sup>151</sup> Second, Uggen's statistics make a credible case that disenfranchised black felons would make a politically cohesive group. Based on National Election Study data Uggen has found that, if allowed to vote, felons would turn out to vote in significant numbers and vote predominantly for the democratic candidate.<sup>152</sup> The most striking set of data Uggen presents is the impact felons in Florida would have had on the 2000 presidential election.<sup>153</sup> Based on voter statistics Uggen estimated that 27.2 percent of felons, if allowed to vote, would have turned out and, of this group, 68.9 percent would have voted democrat.<sup>154</sup> Using these variables Gore would have taken Florida in the election by over 80,000 votes.<sup>155</sup> If only ex-felons voted and only 13.6 percent of this group voted, Gore would have still won the election in Florida by over 30,000 votes.<sup>156</sup> Although Uggen does not present data on voter rates and preferences specifically for African-American ex-felons in Florida, he does show that 167,413 out of 613,514 ex-felons are African American.<sup>157</sup> Therefore, it is reasonable to assume that black voters, as felons, would vote predominantly democratic and that the number of black ex-felons in Florida represents a significant number to make a difference in Florida elections. Third, the Bush/Gore election was a prime example of how when more blacks are disenfranchised than non-blacks the remaining majority are able to vote into office the Republican candidate and defeat the Democratic candidate whom the majority of Black voters preferred. Even a small change in the numbers of disenfranchised African-American felons allowed to vote could have effected the Bush/Gore election.

With rising incarceration rates and a greater concern over disenfranchisement, particularly in Florida after the last election, more data has arisen showing that disenfranchisement affects election outcomes and disproportionately affects African-Americans. With this

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150 Plaintiffs' Memorandum, *supra* note 28, at 3-4.

151 Complaint, *supra* note 2, ¶ 50.

152 Uggen and Manza, *supra* note 25 at 784, 786-787.

153 *Id.* at 793, table 4a.

154 *Id.*

155 *Id.*

156 *Id.* at 792-793.

157 *Id.* comparing the data of table 4a on page 793 with appendix table B.

data it is easier to prove, based on the totality of the circumstances, a link between disenfranchisement and the discriminatory effect on African Americans. If the court in *Bush* adopted the more favorable law of *Farrakhan v. Locke* the plaintiffs' evidence would have satisfied the "results test" of the VRA.

3. *Is There a Choice? Questioning Johnson v. Bush's Assumption that Felons Choose Disenfranchisement*

As a final topic under *Johnson v. Bush's* denial of the plaintiff's VRA claim I would like to question the court's central argument that felons choose disenfranchisement through their illegal acts, and therefore disenfranchisement is not imposed by the state but by the citizen. The belief that citizens choose whether to become disenfranchised is a broad generalization, which does nothing to address the social and racial factors that may contribute to arrest and conviction.<sup>158</sup> In the Cross Motion for Summary Judgment plaintiffs challenged the defendants to rebut their statistical evidence that showed that African-Americans were proportionally incarcerated at higher rates than whites.<sup>159</sup> The same challenge should be addressed to the court in *Johnson*. Although the court said citizens could choose to commit a criminal act the court did not address why 167,413 out of 613,514, or approximately 27 percent, of ex-felons are black.<sup>160</sup> This number is disproportionate to the 14.6 percent of the Florida population that are African-American.<sup>161</sup>

Additionally, plaintiffs alleged, based on 1990 census data, that 43.6% of African Americans age 25 or older had not graduated from high school, only 9.8% of African Americans age 25 or over had received a college or graduate degree, that African Americans in Florida had the lowest per capita income for 1989 of all census groups, and that the 26.3% of African American's age 18 or older are living below the poverty level.<sup>162</sup> The rates of education and poverty for African-Americans based on this census data were much lower than comparable categories for whites.<sup>163</sup> Although all these statistics were present in the

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158 Plaintiffs' Memorandum, *supra* note 28, at 9.

159 *Id.* at 26.

160 Uggan and Manza, *supra* note 25, comparing appendix table A to appendix table B.

161 United States Census Data Statistics: 2000, table DP-1, Profile of General Demographic Characteristics: 2000, available at [http://factfinder.census.gov/servlet/BasicFactsTable?\\_lang=en&\\_vt\\_name=DEC\\_2000\\_SF1\\_V\\_DP1&\\_geo\\_id=04000US12](http://factfinder.census.gov/servlet/BasicFactsTable?_lang=en&_vt_name=DEC_2000_SF1_V_DP1&_geo_id=04000US12).

162 Plaintiffs' Memorandum, *supra* note 28, at 9.

163 *Id.*

plaintiff's memorandum the court did not address whether these factors contributed to the disproportionate level of disenfranchised African-American felons in Florida or whether these social factors limited whether a "choice" could be made by African-American felons in Florida to become disenfranchised.

*C. Other Fourteenth Amendment Claims*

The courts reasoning in *Johnson* for granting Defendant's summary judgment against all Fourteenth Amendment claims is the hardest to refute. The court grounds its opinion on, "clear precedent established by this court and the Supreme Court of the United States."<sup>164</sup> Specifically, the court relies on the Supreme Court case of *Richardson v. Ramirez* and the District Court decision of *Beacham v. Braterman*, which was decided by the same district as *Johnson v. Bush* and affirmed by the Supreme Court.<sup>165</sup> Because *Beacham* was decided before *Richardson*, the *Beacham* court decided that Florida had the constitutional power to exclude convicted felons from the right to vote because of common law precedent.<sup>166</sup> In the *Beacham* court's words, "the propriety of excluding felons from the franchise has been so frequently recognized – indeed put forward by the Justices to illustrate what the state may properly do – that such expressions cannot be dismissed as unconsidered dicta."<sup>167</sup>

Although *Richardson* and *Beacham* rest their arguments on the Constitution and the common law, these precedents are not so strong that felon disenfranchisement does not deserve a second look in the face of growing rates of incarceration and impact to minority voters. Plaintiff's combined claims under the Fourteenth and Fifteenth Amendments that voting constitutes a substantive due process right and that Florida's disenfranchisement law is arbitrary and irrational provide a compelling argument to change the status of the law in the face of growing numbers of disenfranchised felons and increasing harm to voting rights and democracy.

First, the numbers of disenfranchised voters is increasing as incarceration rates and felon conviction rates in Florida rise. This number of disenfranchised voters had a striking impact on the last

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<sup>164</sup> *Johnson*, 214 F.Supp. 2d. at 1337.

<sup>165</sup> *Id.* See *Beacham v. Braterman*, 300 F.Supp. 182 (1969); affirmed by *Beacham v. Braterman*, 396 U.S. 12 (1969).

<sup>166</sup> *Beacham*, 300 F.Supp. at 183.

<sup>167</sup> *Id.*; (quoting *Green*, 380 F.2d 445).

presidential election and likely impacts other local elections.<sup>168</sup> The plaintiffs in *Johnson* argue that 5% of the voting population of Florida is disenfranchised currently while the court in *Richardson* addressed a disenfranchisement law that affected only 0.75% of the California's voting population.<sup>169</sup> The levels of disenfranchisement in Florida have reached levels where the due process and equal protection guarantees in Section One of the Fourteenth Amendment overpower the express language of section two that allows states to disenfranchise felons.<sup>170</sup>

Second, in light of the growing numbers of disenfranchisement in Florida, the state should demonstrate a rational purpose for their disenfranchisement law. The original arguments in *Ramirez v. Brown*, that California's disenfranchisement law served no rational purpose and was not narrowly tailored in protecting against voter fraud, are still persuasive arguments to overturn disenfranchisement laws. In the face of new technologies to protect against voter fraud and the stories of class representatives such as Omali Yeshitala<sup>171</sup>, who remains disenfranchised after a felony conviction thirty-five years ago, Florida's disenfranchisement law appears ludicrous.

*Richardson* was decided in 1974. Courts today should be sensitive to the fact that current felon disenfranchisement law challenges may present more egregious circumstances of Constitutional infringement and require new scrutiny of a disenfranchisement law's purpose.

#### D. *Unlawful Poll Tax*

The court in *Johnson v. Bush* denied the plaintiff's Twenty-Fourth Amendment, unlawful poll tax claim largely on the rationale that Florida can permissibly strip a felon of the right to vote and has no legal obligation to return the right to vote to an ex-felon.<sup>172</sup> The court further notes that, "[t]he Clemency Board's requirement that applicants pay all victim restitution furthers rehabilitation and readiness for return to the electorate."<sup>173</sup>

In response to these justifications for allowing Florida's Clemency Board process to stand, I would first like to argue that the

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168 Uggen and Manza, *supra* note 29, at 786–793.

169 Plaintiffs' Memorandum, *supra* note 29, at 32.

170 *Id.* at 31-32.

171 Complaint, *supra* note 2, ¶ 8.

172 *Johnson*, 214 F. Supp. 2d. at 1342-1343

173 *Id.* at 1343

court's logic is circular. The court in *Johnson* first has determined that Florida has the right to allow felon disenfranchisement under section two of the fourteenth amendment. However, Florida has created a system that allows ex-felons to regain the right to vote, but this system is ineffective for the majority of felons who apply because it is complicated, difficult, and expensive. The court in *Johnson*, therefore, must decide if this system, which pretends to give ex-felons a way to regain their right to vote, is legal. To justify Florida's clemency process the court returns to their original argument that Florida has the right to disenfranchise felons, so it does not matter if the Clemency Process burdens applicants. Ex-felons in Florida are caught in a catch-22 where they have lost their right to vote, can regain their right to vote under the Clemency process, but can not regain their right to vote because the Clemency process is too burdensome.

Finally, although the court argues that paying victim restitution serves a rehabilitative purpose to the ex-felon, the court has ignored the harm placed on felons when they are returned to society with their rights as citizens removed. As Justice Marshall argued in his dissent in *Richardson v. Ramirez*:

The individual involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.<sup>174</sup>

As disenfranchisement was once viewed in Britain, a type of "civil death" imposed on felons when society tells them they can no longer vote.<sup>175</sup> Disenfranchisement relegates felons to a marginal role in society that can encourage recidivism and hinders rehabilitation. Although forcing felons to pay compensation to victims may serve some rehabilitative purpose, the complicated Clemency Board process is a mockery of ex-felon's honest efforts to accept a positive role in society.

#### IV. CONCLUSION

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<sup>174</sup> *Richardson*, 418 U.S. at 78-79.

<sup>175</sup> Felner and Mauer, *supra* note 5, at 2.

*Richardson v. Ramirez*, along with case law from other jurisdictions, gives the court in *Johnson v. Bush* the ammunition to shoot down the plaintiff's arguments against Florida's felon disenfranchisement law. However, the court in *Johnson* fails to acknowledge the growing levels of incarceration in Florida that is leading to increased disenfranchisement rates, greater erosion of the black vote in Florida, and significant violations of, in particular, the Voting Rights Act and the Fourteenth and Fifteenth Amendments. As a whole, the historical and statistical evidence presented by the plaintiffs in *Johnson v. Bush* is compelling evidence that Florida has maintained a discriminatory law that today is effectively marginalizing black voting strength and has changed the outcomes of major elections such as the 2000 Bush/Gore election.