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INVOKING THE PENALTY: HOW FLORIDA'S FELON DISENFRANCHISEMENT LAW VIOLATES THE CONSTITUTIONAL REQUIREMENT OF POPULATION EQUALITY IN CONGRESSIONAL REPRESENTATION, AND WHAT TO DO ABOUT IT

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I. INTRODUCTION

Who should be allowed to vote?

Viewed through a certain lens, American history has supplied a series of answers to this question, each sweeping more broadly than the last.[1] On

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[1] Alexander Keyssar provides a succinct overview of this "progressive model" of voting rights history:

> [A]t the nation's founding, the franchise was sharply restricted, but thereafter one group of citizens after another acquired the right to vote. Most propertyless white men were enfranchised during the first half of the nineteenth century; then came African Americans; then women; then African Americans again; and finally . . . eighteen-year-olds.

this view, our trajectory has largely borne out Tocqueville's famous observation that "[w]hen a nation begins to modify the elective qualification, one can be sure that sooner or later it will abolish it altogether."[2]

Against this backdrop of steady progress toward a more inclusive polity, the practice of felon disenfranchisement presents a striking anomaly.[3] Nearly five million citizens in the contemporary United States are ineligible to vote as a result of a criminal conviction.[4] The explosion in criminal prosecutions and convictions over the last three decades[5] has led to a striking increase in the percentage of disenfranchised Americans: While less than 1% of the electorate was unable to vote because of a criminal conviction in 1976, by 2000 the figure was 2.3%,[6] and it is by some estimates significantly higher today.[7]

ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES xviii (2000).

[2] Christopher Uggen & Jeff Manza, *Democratic Contraction?: The Political Consequences of Felon Disenfranchisement in the United States*, 2002 AM. SOC. REV. 777, 780 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 57 (J.P. Mayer ed., George Lawrence trans., Doubleday 1969) (1835)). The Tocqueville quote continues:

> There is no more invariable rule in the history of society: the further electoral rights are extended, the greater is the need of extending them; for after each concession the strength of the democracy increases, and its demands increase with its strength. The ambition of those who are below the appointed rate is irritated in exact proportion to the great number of those who are above it. The exception at last becomes the rule, concession follows concession, and no stop can be made short of universal suffrage.

TOCQUEVILLE, *supra*, at 57.

[3] *See* Uggen & Manza, *supra* note 2, at 778 (characterizing felon disenfranchisement as "a rare and potentially significant counter-example to the universalization of the franchise in democratic societies").

[4] The Sentencing Project estimates that approximately 4.7 million Americans are currently disenfranchised as a result of a current or prior criminal sentence. *See* SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2005), http://www.sentencingproject.org/pdfs/1046.pdf. Of that 4.7 million, approximately 1.7 million are disenfranchised as a result of sentences they have fully completed. *Id.* In a forthcoming book, Professor Jeff Manza places the number well over five million. E-mail from Jeff Manza, Professor of Sociology, Northwestern Univ., to author (January 6, 2006, 02:48 AM CST) (on file with author) [hereinafter Manza E-mail]; *see also* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (forthcoming Mar. 2006).

[5] *Id.* (noting the rapid rise in criminal punishment since the 1970s in the United States); *see also* MARC MAUER, RACE TO INCARCERATE 16–23 (1999) (noting that in 1972 federal and state jails and prisons in the United States held a total of 326,000 prisoners, for a total incarceration rate of 160 inmates per 100,000 population, while in 1995 the total figures had risen to over 1.7 million, for a rate of 645 inmates per 100,000 population). The trend has continued in the years since Mauer's book was published; according to figures compiled by the Sourcebook of Criminal Justice Statistics, federal and state jails and prisons in 2004 held a total of 2,130,901 inmates. *See* Sourcebook of Criminal Justice Statistics Online, Adults on Probation, in Jail or Prison, and on Parole, http://www.albany.edu/sourcebook/pdf/t612004.pdf (last visited Mar. 29, 2006). Using Census population estimates for 2004, this resulted in an incarceration rate of approximately 737 inmates per 100,000 population. *See* ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2004 (2004), http://www.census.gov/popest/states/tables/NST-EST2004-01.pdf.

[6] Uggen & Manza, *supra* note 2, at 782.

[7] Manza E-mail, *supra* note 4; *see also* MANZA & UGGEN, *supra* note 4.

States' felon disenfranchisement practices vary dramatically: Maine and Vermont permit even incarcerated individuals to cast votes,[8] while most states engage in some limited form of disenfranchisement—either permanent disenfranchisement for a list of enumerated offenses, or limited-duration disenfranchisement, with voting rights restored upon sentence completion or following some post-sentence waiting period.[9] Exclusion from the vote is by far the most extreme in the state of Florida, which today disenfranchises close to one million current and former felons.[10] Florida's practice differs from that of other states in both kind and degree: its disenfranchisement laws deny the vote for life to any individual convicted in any state of any felony—making it the harshest disenfranchisement regime in the country[11]—and it is also home to the greatest number of disenfranchised felons and ex-felons.[12]

Although Florida's harsh disenfranchisement laws have provoked much criticism, both popular and scholarly,[13] no commentator has yet noted

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[8] *See* ME. CONST. art. II, § 1; VT. STAT. ANN. tit. 28, § 807(a) (2000); *see also One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1942 (2002) [hereinafter *One Person, No Vote*].

[9] SENTENCING PROJECT, *supra* note 4, at 3.

[10] Professor Pamela Karlan places the number around 827,000, *see* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004), but there are signs that it may be still higher. In a forthcoming book, Professor Jeff Manza estimates that the figure is now above one million. Manza E-mail, *supra* note 4; *see also* MANZA & UGGEN, *supra* note 4.

[11] FLA. CONST. art VI, § 4; *see infra* note 230 and accompanying text.

[12] Karlan, *supra* note 10, at 1157–58. In 1998, a staggering 31.2% of Florida's black voting-age population was unable to vote as a result of the state's disenfranchisement regime. *See* JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 9 (1998).

[13] For scholarly criticism, see, for example, Uggen & Manza, *supra* note 2; Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003); Debra Parks, *Ballots Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71 (2003). Critiques from the popular press abound as well. The recount following the 2000 presidential election focused national attention on Florida's election practices, particularly its disenfranchisement laws. When it became clear that, had even a small fraction of Florida's disenfranchised citizens been permitted to cast votes, the state, and thus the presidency, would have gone to Al Gore rather than George Bush, an outpouring of critical editorials followed. *See, e.g.*, Christopher Solochek, *Allow Ex-Felons to Vote*, ST. PETERSBURG TIMES, Feb. 19, 2001, at 1B; Sasha Abramsky, *Let Felons Cast Ballots and Others Will Follow*, L.A. TIMES, Oct. 31, 2004, at M2; Martin C. Evans, *Suffering in Political Silence*, NEWSDAY, Oct. 27, 2004, at A33; Editorial, *Felons and the Right to Vote*, N.Y. TIMES, July 11, 2004, at 412.

It should be noted here that a challenge to Florida's felon disenfranchisement regime was recently rejected by the Eleventh Circuit Court of Appeals. In *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002), a group of Florida ex-felons challenged the state's disenfranchisement law under a variety of theories—primarily the 1st, 14th, 15th, and 24th Amendments to the United States Constitution and section 2 of the Voting Rights Act of 1982, 42 U.S.C. § 1973 (2000). The State of Florida moved for summary judgment on all counts, and the United States District Court for the Southern District of Florida granted the motion. *Johnson*, 214 F. Supp. at 1343–44. The plaintiffs appealed, and a divided panel of the Eleventh Circuit found that summary judgment had been improperly granted with respect to the

that a potentially powerful constitutional violation inheres in its current arrangement. While Florida bars from its polling places any citizen with a prior felony conviction, it continues to count such persons for purposes of allotment of seats in the United States House of Representatives and the electoral college.[14] This practice, I will argue, constitutes a violation of the well-settled constitutional principle, developed by the Supreme Court over the last forty years, that every citizen possesses the right to an equally weighted vote—that is, "one person, one vote."[15] The deep disparity between Florida's disenfranchisement regime and the regimes in place in the majority of states produces an unconstitutional overweighting of the votes of Florida's citizens—a clear violation of the one-person, one-vote principle.[16]

Articulated in a series of decisions by the Warren Court, "one person, one vote" has become one of our bedrock constitutional principles. The principle lies, in a sense, at the intersection of two foundational constitutional provisions: Article I, Section 2, Clause 1, which sets forth that "the House of Representatives shall be composed of Members chosen every second year by the People of the Several States,"[17] and the Equal Protection Clause of the Fourteenth Amendment, which prevents a state from denying to any person within its borders "the equal protection of the laws."[18] Through a series of decisions on challenges to unequally populated legislative districts, the Supreme Court has developed a jurisprudence of popula-

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plaintiffs' claims under the Equal Protection Clause of the Fourteenth Amendment and vote-denial claims under section 2 of the Voting Rights Act; the court thus reinstated those claims. *Johnson v. Governor*, 353 F.3d 1287, 1302, 1306 (11th Cir. 2003). The panel opinion was vacated almost immediately, however, and the case was set for a rehearing en banc. Johnson v. Governor, 377 F.3d 1163 (11th Cir. 2004). The en banc opinion, issued over a year later, reversed the panel and affirmed the district court's grant of summary judgment on all counts. Johnson v. Governor, 405 F.3d 1214 (11th Cir. 2005). On November 14, 2005, the Supreme Court denied the plaintiffs' petition for a writ of certiorari. Johnson v. Bush, 126 S. Ct. 650 (2005).

The *Johnson* case seems to make clear that, at least at the moment, neither constitutional nor statutory challenges by residents of Florida are likely to succeed in bringing about a change in Florida's disenfranchisement regime. For that reason, the time is ripe for proposals for new challenges, particularly of the sort that will be outlined here: one brought by citizens of a state other than Florida.

[14] Census materials make clear that persons disenfranchised for any reason continue to be counted in Census totals, and are thus included in the apportionment calculation which follows each decennial Census. *See* KAREN M. MILLS, CONGRESSIONAL APPORTIONMENT: CENSUS 2000 BRIEF (2001), http://www.census.gov/prod/2001pubs/c2kbr01-7.pdf. These calculations also form part of the basis for allotment of electors in the electoral college. *Id.*; *see also* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint . . . a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.").

[15] Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

[16] The Floridians whose votes are unconstitutionally overweighted as a result of the state's disenfranchisement laws are, of course, citizens who have not been convicted of any felony.

[17] U.S. CONST. art. I, § 2, cl. 1.

[18] U.S. CONST. amend. XIV, § 1.

tion equality in legislative districting, commanding that just as a state may not give to some of its citizens "two, five, or 10 times" the vote of other citizens,[19] neither may a state achieve the same result through indirect means—by allowing legislators to be chosen, for example, by 10,000 citizens in one district and 1000 in another. The Supreme Court has held that the right to an equally weighted vote in the selection of state legislators derives from the Equal Protection Clause of the Fourteenth Amendment,[20] while the right to an equally weighted vote in the selection of representatives in the United States House of Representatives springs from Article I, Section 2, Clause 1.[21] And although the Supreme Court has never expressly held that the one-person, one-vote principle applies interstate as well as intrastate, it has strongly suggested that it does;[22] the logic of representational equality to which the Court has consistently adhered appears to permit no other result.[23]

The practice of felon disenfranchisement has been sharply criticized by a range of commentators. Most scholars who address the topic arrive at the conclusion that the practice is utterly indefensible in terms of any theory of just punishment.[24] Scholars approaching the practice from a historical per-

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[19] *Reynolds*, 377 U.S. at 562.

[20] *Gray*, 372 U.S. 368.

[21] Wesberry v. Sanders, 376 U.S. 1 (1964). It should be noted that beyond simply locating the right in different constitutional provisions, the Court has held that somewhat more deviation from the ideal of perfect population equality may be allowed in the state than the federal apportionment context. In *Reynolds v. Sims*, the Court remarked that "[s]omewhat more flexibility may . . . be constitutionally permissible with respect to state legislative apportionment than in congressional districting." *Reynolds*, 377 U.S. at 578; *see also* Brown v. Thompson, 462 U.S. 835 (1983) (setting forth the general rule that, in state districting cases, population variances of less than ten percent are generally per se permissible.) See *infra* Part II.A for a fuller discussion of the principle.

[22] U.S. Dep't of Commerce v. Montana, 503 U.S. 442 (1992). This case is discussed at length *infra* notes 105–133 and accompanying text.

[23] It should be noted here that my concern with districting does not extend to partisan redistricting, or "gerrymandering." Partisan gerrymandering presents a host of complex issues, and its constitutional status remains wholly unresolved. *See* Vieth v. Jubelirer, 541 U.S. 267 (2004). While the issues raised by political gerrymandering are certainly related to the larger representational principles with which this Comment is concerned, their full treatment is simply beyond the scope of this discussion.

[24] *See, e.g.*, George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1899 (1999) (describing one official explanation of the disqualification of former felons from the vote as "necessary to maintain the 'purity of the ballot box,'" and finding that such a rationale cannot "withstand a minute of rational argument"). Fletcher also argues that the rationale that felons, by virtue of their crimes, have "forfeit[ed]" their right to participate in the political process" and "are simply not entitled to the ordinary rights of political participation enjoyed by other people," may have had some force "when all felons were in principle subject to capital punishment," but is no longer valid "in a time when the concept of felony implies simply that the offense is subject to punishment by a year or more in prison." *Id.*; *see also* KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA (2005); Angela Behrens, Note, *Voting: Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Disfranchisement*, 89 MINN. L. REV. 231, 259–66 (2004) (surveying and rejecting some of the arguments advanced in favor of felon disenfranchisement, including the argument that such laws are necessary to maintain the "purity of the ballot box," and the

spective have persuasively demonstrated that the restriction was conceived—and, they argue, continues to be deployed—with the express purpose of restricting the voting power of African Americans.[25] Social scientists Jeff Manza and Chris Uggen go so far as to suggest that the practice has created a crisis in contemporary American democracy.[26] Yet despite this broad scholarly consensus, constitutional challenges to state disenfranchisement laws have been few and largely unsuccessful, due in substantial part to the formidable precedent of the 1974 Supreme Court decision in *Richardson v. Ramirez*.[27]

In *Richardson*, the Court found in the language of Section 2 of the Fourteenth Amendment, the so-called Penalty Clause, an affirmative sanction of the practice of felon disenfranchisement.[28] The Court thus concluded that the challenged California disenfranchisement law did not constitute a per se violation of former felons' rights under the Equal Protection Clause.[29]

This Comment attempts to inject into the disenfranchisement debates a proposal for a new challenge to the practice. It argues that *Richardson* need not stand, as many have taken it to for thirty years, as an absolute bar to constitutional challenges to felon disenfranchisement.[30] *Richardson* has been read to prove far too much. The case clearly does stand for the proposition that the Equal Protection Clause does not mandate the vote for current and former felons.[31] However, properly construed, its holding need not control the type of claim proposed here—one that asserts the rights of citizens of *other* states to votes that are not impermissibly diluted by Florida's disenfranchisement regime. *Richardson* in no way forecloses such a claim, as the 1985 case *Hunter v. Underwood*[32] makes clear.

In *Hunter*, a unanimous, Rehnquist-authored opinion, the Court found that a challenge to a state constitutional disenfranchisement provision—a provision which had clearly been enacted with discriminatory intent—

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argument that such laws are necessary to protect against electoral fraud, which individuals previously convicted of other crimes might be more likely to commit); Karlan, *supra* note 10, at 1157.

[25] *See* Fletcher, *supra*; Karlan, *supra* note 13; Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).

[26] *See* Uggen & Manza, *supra* note 2.

[27] 418 U.S. 24 (1974).

[28] *Id.* at 54–55.

[29] *Id.*

[30] Criticism of *Richardson* has become something of a cottage industry in the pages of law journals, and with good reason. This Comment, however, takes as given that *Richardson* (deserving of criticism though it may be) remains controlling law. Against that backdrop, this Comment endeavors to propose a limited challenge, one that does *not* require a court to repudiate *Richardson*. This is, to be sure, a second-best alternative. Persuading a court to overrule *Richardson*, and to invalidate all disenfranchisements laws (at least for former felons) would be the first.

[31] *Richardson*, 418 U.S. at 49.

[32] 471 U.S. 222 (1985).

stated a claim for a violation of the Equal Protection Clause.[33] The claim outlined here thus flows naturally from *Hunter*—that is, it appears that if a state's felon disenfranchisement law violates *another* constitutional requirement, including, perhaps, the Article I right to an equally weighted vote in the House of Representatives,[34] *Richardson* does not foreclose such a claim. And if such a claim may be stated, two remedial possibilities present themselves. First, a court could invalidate, wholesale, Florida's disenfranchisement law. Second, it may be argued that the proper remedy to this constitutional violation lies in a novel invocation of Section 2 of the Fourteenth Amendment, the so-called Penalty Clause.[35] Section 2 provides that

> 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 members of the legislature thereof, is denied to any of the male inhabitants of the 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.[36]

In effect, this provision operates to penalize any state that disenfranchises otherwise qualified voters by reducing that state's congressional representation by the number of disenfranchised persons—with the exception, it appears, of persons disenfranchised for their participation in "rebellion or other crime."[37]

The Fourteenth Amendment's penalty provision has been referred to as a "historical curiosity";[38] it has also been cast as an unsuccessful attempt to achieve through soft pressure what the Fifteenth Amendment ultimately accomplished by direct command: the enfranchisement of African Americans.[39] In contrast to the Equal Protection and Due Process Clauses of the

[33] *Id.* at 225.

[34] Wesberry v. Sanders, 376 U.S. 1 (1964).

[35] Both remedial possibilities proposed here are discussed more fully *infra* Part IV.

[36] U.S. CONST. amend. XIV, § 2.

[37] *Id.* Of course, on its face the Amendment seems only to apply to male inhabitants at least twenty-one years of age, but it is clear that the Nineteenth and Twenty-Sixth Amendments modified those provisions, so that women and individuals eighteen years and older are now included within its reach. *Id.* amend. XIX; *id.* amend. XXVI.

[38] Mark R. Killenbech & Steve Sheppard, *Another Such Victory?: Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 HASTINGS L.J. 1121, 1123 (1994). The authors of this piece do not endorse, but rather remark on, this view. For purposes of their argument regarding the constitutionality of congressional term limits, Section 2 is not a "historical oddity" or "idle comment," but firm constitutional command. *Id.* at 1190.

[39] Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the 15th Amendment Repeal Section 2 of the 14th Amendment?*, 92 GEO. L.J. 259 (2004).

first section of the Fourteenth Amendment,[40] the Penalty Clause has received scant attention in either scholarship or litigation.[41] In the context of scholarship on felon disenfranchisement, most commentators have attempted to read away or minimize, rather than make use of, Section 2 of the Fourteenth Amendment. Professor Gabriel Chin, for example, has argued that the Fifteenth Amendment constructively repealed Section 2 of the Fourteenth Amendment,[42] while Professor George Fletcher reasons that Section 2, like Sections 3 and 4 of the same Amendment,[43] grew out of the particular circumstances of the Civil War and its aftermath and should therefore be given no weight today.[44]

This Comment takes a different tactic. In addition to proposing a new theory of the constitutional violation represented by Florida's current practice, I argue that one possible remedy to this violation may actually be to apply Section 2's penalty of reduced representation to Florida, removing one of its seats in the United States House of Representatives and the electoral college.[45]

It does, of course, appear from the face of Section 2 of the Fourteenth Amendment that individuals rendered ineligible to vote by virtue of their "participation in rebellion or other crime," are excluded from the reach of the Amendment's prescribed penalty.[46] This Comment offers three arguments in this regard. First, as outlined above, the Section 2 exemption does not accord constitutional imprimatur to *all* felon disenfranchisement practices, as *Hunter v. Underwood*[47] makes clear—faced with an adequate

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[40] U.S. CONST. amend. XIV, § 1.

[41] This is not to say that there has been no legal scholarship on the topic. In a provocative piece written at the height of the term limits controversy before *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), settled the question of the constitutionality of state imposition of congressional term limits, authors Mark Killenbech and Steve Sheppard made the argument that the imposition of term limits "denied" or "abridged" the right to vote (abridging or denying the ability to vote *for* a particular candidate, rather than denying or abridging the vote *to* any citizen) such that it raised "the disquieting specter of Section 2 sanctions against the state." Killenbech & Sheppard, *supra* note 38, at 1124. As it turned out, the Supreme Court relied on a different rationale in striking down Arkansas's term limits, finding that the list of qualifications for congressional representatives contained in Article I, Section 2, Clause 2, was an exhaustive list to which states could not add. *Thornton*, 514 U.S. at 837–38.

[42] Chin, *supra* note 39.

[43] The third section of the Fourteenth Amendment prohibits individuals who have engaged in "insurrection or rebellion" against the United States from holding office in any state or the federal government. U.S. CONST. amend. XIV, § 3. The fourth section provides for the invalidity of any debt incurred in aid of the rebellion. U.S. CONST. amend. XIV, § 4.

[44] Fletcher, *supra* note 24, at 1906. ("[Section 2] was designed merely to address a problem posed by the war. It was not meant to provide lasting constitutional guidance.").

[45] As the last two presidential elections have made clear, a single vote in the electoral college could, in fact, be the deciding factor in a close presidential election. *See* Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 NW. U. L. REV. 121, 123 (2006).

[46] U.S. CONST. amend. XIV, § 2.

[47] Hunter v. Underwood, 471 U.S. 222 (1985).

showing of an independent constitutional violation, post-*Richardson* courts have shown themselves willing to invalidate state felon disenfranchisement laws, and if invalidation may be proper, so too may be reduced representation. Second, it argues, beginning from the dissenting opinion in *Richardson*, that the history of the framing of the Fourteenth Amendment suggests that "rebellion or other crime" was never intended to extend to the range of crimes included within the reach of Florida's contemporary disenfranchisement laws, particularly when the majority of states now practice far more limited disenfranchisement. Although this argument was rejected by the *Richardson* majority, it is offered here in the context of an entirely different type of claim than that before the *Richardson* Court. Because the *Richardson* Court used the language of the penalty proviso only as an interpretative aid in its evaluation of an Equal Protection Clause claim brought by disenfranchised former felons, a fresh look at the historical materials may be warranted in the context of a challenge brought by citizens of another state. Finally, this Comment argues that even if the *Richardson* Court was correct in its construction of the penalty proviso in 1974, the logic of the decision has been seriously undermined in the intervening decades. Over the last thirty years, the "evolving standards of decency that mark the progress of a maturing society"[48] have brought us to a point where Florida's practice is so far out of line with the emerging consensus of other states regarding the permissible scope of disenfranchisement of former felons that its laws require a new, and comparative, examination.

This Comment proceeds in four parts. Part II provides an overview of the development of the principle of one person, one vote. Part III then delves into the argument just outlined: Part III.A engages with *Richardson v. Ramirez*[49] and *Hunter v. Underwood*,[50] while Part III.B challenges the Court's historical analysis of the Fourteenth Amendment in *Richardson*. Part III.C describes Florida's current practice in the context of the disenfranchisement regimes in other states and shows that the consistent movement among the states in the direction of more limited disenfranchisement regimes has rendered Florida an extreme outlier, and one that is impermissibly benefited by the overweighting of its citizens' votes. Part IV describes the logistical components of the type of claim proposed here, and Part V concludes.

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[48] Trop v. Dulles, 356 U.S. 86, 101 (1958).
[49] 418 U.S. 24 (1974).
[50] 471 U.S. 222 (1985).

II. ONE PERSON, ONE VOTE

A. Development of the Principle

Beginning with the 1962 case *Baker v. Carr*,[51] the Supreme Court has consistently held that unequally populated legislative districts, and the unequal weighting of citizens' votes which results from such variation, is unconstitutional. The Court has located the constitutional mandate of equally populated legislative districts—what the Court has referred to as the requirement of "one person, one vote" and what is sometimes described as the "equipopulation rule"—in two distinct constitutional provisions: Article I, Section 2, in which the Court has found the right to an equally weighted vote in congressional elections,[52] and the Equal Protection Clause of the Fourteenth Amendment, from which the right to an equally weighted vote in elections for state representatives is derived.[53] These two provisions comprise the constitutional foundation on which the Court has built its jurisprudence of population equality in representation.[54]

Before the 1960s, the Supreme Court refused to rule on challenges to legislative apportionment schemes, taking the position that such controversies presented nonjusticiable political questions.[55] In one such case, *Colegrove v. Green*,[56] a group of Illinois plaintiffs challenged the state's vastly unequally populated congressional districts. Although there appeared no dispute regarding the population inequality in the challenged districting scheme,[57] the Supreme Court refused to intervene, reasoning that "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people."[58] The Court pointed to Article I, Section 4 of the Constitution, which assigns to each state legislature the task of prescribing the "Times, Places, and Manner of holding Elections for Representatives . . . but the Congress may at any time or by Law alter such Regulations."[59] Invoking separation-of-powers principles, the Court wrote:

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[51] 369 U.S. 186 (1962).

[52] Of course, there is no such right in the case of representation in the United States Senate, a body which, by design, defies strict representational equality principles.

[53] John Hart Ely suggests that the "Guaranty Clause" (also known as the "Republican Form" Clause) is also implicated in the one-person, one-vote principle. JOHN HART ELY, DEMOCRACY AND DISTRUST 122 (1980) ("[T]o be intelligible, *Reynolds v. Sims* . . . must be approached as the joint product of the Equal Protection and Republican Form Clauses.").

[54] In the line of cases discussed in this Part, the Court often treats the principle of one person, one vote as if it transcends the particular constitutional provision being invoked. Although this Comment is concerned exclusively with federal representation, the Court has transferred reasoning and language between the two types of cases, so both are discussed here.

[55] DANIEL LOWENSTEIN & RICHARD HASEN, ELECTION LAW: CASES AND MATERIALS 113 (2001).

[56] 328 U.S. 549 (1946).

[57] *Id.* at 552.

[58] *Id.* at 553–54.

[59] *Id.* at 554.

> Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress . . . . To sustain this action would cut deep into the very being of Congress. Courts ought not to enter the political thicket. The remedy for unfairness in districting is to secure state legislatures that will apportion properly, or to invoke the ample powers of Congress.[60]

Sixteen years after *Colegrove*, the Court departed sharply from this position in the landmark case *Baker v. Carr*.[61] The *Baker* plaintiffs filed suit under the Fourteenth Amendment, arguing that Tennessee's 1901 apportionment statute, which divided the state into state legislative districts of grossly unequal populations,[62] denied them the equal protection of the laws "by virtue of debasement of their votes."[63] The lower court dismissed the complaint, acknowledging that the plaintiffs' allegations appeared meritorious,[64] but invoking *Colegrove* as setting forth that "the federal rule . . . is that federal courts . . . will not intervene in cases of this type to compel legislative reapportionment."[65]

After a lengthy discussion of the contours and purposes of the political-question doctrine, the Supreme Court in *Baker* concluded that the apportionment challenge did *not* present a nonjusticiable political question; the Court ultimately held that "the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of the Fourteenth Amendment."[66]

In opening up an entirely new sphere to judicial review, *Baker* left a great many questions unanswered.[67] Although the majority held that the plaintiffs' Equal Protection Clause challenge was justiciable, it remanded the case without making any pronouncements about the ultimate constitutionality of the malapportioned districts.[68] It also declined to suggest how

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[60] *Id.* at 554, 556.

[61] 369 U.S. 186 (1962).

[62] Although the majority opinion offers scant details, Justice Douglas's concurrence clarifies just how stark the disparities in question were: "[A] single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County . . . ." *Id.* at 245 (Douglas, J., concurring).

[63] *Id.* at 188.

[64] *Id.* at 196.

[65] *Id.* at 209.

[66] *Id.* at 237.

[67] Heather Gerken, criticizing what she argues is a lack of any robust theory of equality in the one-person, one-vote cases, notes that "*Baker* does little to flesh out the right being vindicated; its primary concern is to overcome the justiciability hurdle erected by *Colegrove v. Green*." Heather Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and its Progeny*, 80 N.C. L. REV. 1411, 1419 (2002).

[68] LOWENSTEIN & HASEN, *supra* note 55, at 113.

the lower court should evaluate the apportionment scheme's constitutionality, or fashion a remedy if a violation were found.[69]

Following the Court's entry into the sphere of legislative districting, suits challenging apportionment schemes were filed in a number of states;[70] these suits required the Court to supply answers to some of the questions it had left open in *Baker*. One year after *Baker*, the Court in *Gray v. Sanders*[71] reached the merits of an apportionment challenge brought under the Equal Protection Clause,[72] finding unconstitutional Georgia's "county unit system," a primary system that resembled a state-level version of the electoral college.[73] Because this method weighted some votes more heavily than others in the selection of representatives in the state's legislature,[74] the Court invalidated the scheme, stating forcefully: "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[75]

The 1964 case *Wesberry v. Sanders*[76] extended the reasoning of *Gray* to the context of federal congressional apportionment and further elaborated on the operation of the one-person, one-vote principle. The *Wesberry* plaintiffs brought a challenge, under Article I, Section 2 of the Constitution, to congressional districts which varied in population from 272,000 to 823,000.[77] The Supreme Court reversed the lower court's dismissal of the plaintiffs' complaint. In a decision that relied heavily on original intent, the

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[69] The Court framed its decision to offer only minimal guidance as a proper exercise of judicial restraint: "Beyond noting that we have no cause at this stage to doubt that the District Court will be able to fashion relief if violations of Constitutional rights are found, it is improper now to consider what remedy would be the most appropriate if appellants prevail at the trial." *Baker*, 368 U.S. at 198.

[70] *See* Reynolds v. Sims, 377 U.S. 533, 356 n.30 (1964) (noting that within nine months of *Baker*, litigation was filed in thirty-four states challenging legislative apportionment).

[71] 372 U.S. 368 (1963).

[72] The *Gray* plaintiffs actually brought equal protection, due process, and Seventeenth Amendment claims, but for purposes of doctrinal evolution, only the equal protection challenge is of interest here. *Gray*, 372 U.S. at 370.

[73] *Id.* at 370–71.

[74] *Id.* at 379.

[75] *Id.* at 381. Justice Harlan dissented, arguing that "one person, one vote" had "never been the universally accepted political philosophy in England, the American colonies, or in the United States." *Id.* at 384 (Harlan, J., dissenting). Election law scholar Richard Hasen agrees that there is some truth to Harlan's objection, noting that "[t]he Electoral College and the United States Senate are two longstanding American institutions that violate the principle by treating states—rather than people—as appropriate units for allocation of political power." RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 22 (2003).

[76] 376 U.S. 1 (1964).

[77] This meant, in effect, that the votes of individuals in the least populated districts were weighted approximately three times as heavily as those of voters in the most populated districts. *Id.* at 2–3.

Court found in the phrase "by the People"[78] strong evidence of the Framers' intention that each vote be of equal weight in the selection of congressional representatives.[79] Stopping short of ordering that districts be drawn "with mathematical precision,"[80] the Court affirmed that the goal of the Constitution was to provide "equal representation for equal numbers of people";[81] in practice, this goal was to be achieved by ensuring that "as nearly as is practicable" each vote was to be worth as much, in the selection of congressional representatives, as every other vote.[82]

The next major case in this line, *Reynolds v. Sims*,[83] came before the Court later in 1964 under the theory that an Alabama state legislative apportionment scheme, which resulted in some state Senate districts with forty-one times the population of others,[84] violated the Equal Protection Clause. The Court proceeded to elaborate on how exacting it intended to be in evaluating acceptable population variation under the Equal Protection Clause: "[T]he Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[85]

In two subsequent cases, *Kirkpatrick v. Preisler*[86] and *White v. Weiser*,[87] the Court clarified the boundaries of acceptable population variation in federal congressional districts. In *Kirkpatrick*, the Court, for the first time, delved into detail regarding the precise requirements and standard of review of the "as nearly as practicable" standard it had pronounced in *Wes-*

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[78] The relevant language of Article I reads: "The House of Representatives shall be composed of Members chosen every second year *by the People* of the Several States . . . ." U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

[79] Citing the text of the debates at the Constitutional Convention, the Court noted that "[o]ne principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress." *Id.* at 10. The Court held:

> [C]onstrued in its historical context, the command of Art. I, § 2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. . . . To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected "by the People," a principle tenaciously fought for and established at the Constitutional Convention.

Id. at 7–8. The Court continued:

> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.

Id. at 14.

[80] *Id.* at 18.

[81] *Id.*

[82] *Id.* at 7–8.

[83] 377 U.S. 533 (1964).

[84] *Id.* at 545.

[85] *Id.* at 577.

[86] 394 U.S. 526 (1969).

[87] 412 U.S. 783 (1973).

berry.[88] Affirming that "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," the Court made clear that it would enforce equal representation not as an abstract ideal, but as a nearly absolute mathematical imperative, categorically rejecting the assertion that there is any size variation in legislative districts that is de minimis and thus per se satisfies the "as nearly as practicable" standard.[89] The Court maintained that any population variation between districts whatsoever would require a showing that the state had made a good-faith effort to create districts with precisely equal populations.[90] In *White*, the Court proceeded to apply the new *Kirkpatrick* standard to invalidate Texas's legislative apportionment scheme.[91]

Karcher v. Daggett[92] has been described as the second "bookend" of the line of cases comprising the Court's jurisprudence of one person, one vote.[93] At issue in *Karcher* was the constitutionality, under Article I, Section 2, of a New Jersey apportionment scheme. Following the 1980 Census, and the subsequent determination that the number of congressional representatives to which New Jersey was entitled had dropped from fifteen to fourteen, the New Jersey legislature redrew the state's federal legislative districts.[94] The new districts varied in population only very slightly: the population of the state's most populous district was less than one percent larger than the population of the least populous.[95] The lower court nonetheless found the scheme unconstitutional.[96] Applying the now-familiar formula, the Supreme Court affirmed that, because the state could make no showing that it had made a good-faith effort to achieve *precise* equality of

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[88] Wesberry v. Sanders, 376 U.S. 1 (1964).

[89] *Kirkpatrick*, 394 U.S. at 530.

[90] The Court explained:

> The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practically be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives," the "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts can be shown to have resulted despite such effort, the State must justify each variance, no matter how small. . . . Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from those purposes. Therefore, the command of Art. I § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.

Id. at 530–31 (citations omitted).

[91] *White,* 412 U.S. 783 (1973).

[92] 462 U.S. 725 (1983).

[93] *Baker v. Carr*, 369 U.S. 186 (1962), represents the first. *See* Gerken, *supra* note 67, at 1419.

[94] *Karcher*, 462 U.S. at 727.

[95] *Id.* at 728–29.

[96] *Id.* at 729.

population between districts, the plan was unconstitutional.[97] Having committed itself to population equality in federal legislative districts, the Court's earlier cases compelled the "logically unassailable" if "slightly formalistic" result in *Karcher*.[98] *Karcher* thus represents the extension of the one-person, one-vote principle to its logical conclusion: a variation in size of ten people, or even one person,[99] if not the result of a good-faith attempt at absolute equality between districts, will be held unconstitutional.[100]

B. One Person, One Vote in the Interstate Context

The cases just surveyed, the leading and much-debated enunciations of the principle of one person, one vote, are all limited to the intrastate context: they all involve unequally populated state or federal legislative districts *within* a state, such that one citizen's vote is debased or diluted compared to the vote of another citizen in the same state. But it appears that the principle of one person, one vote may well apply in the interstate, as well as the intrastate, context—that is, it may operate to protect the rights of a state citizen to a vote that is weighted equally both to that of another citizen of the same state and, as nearly as practicable and abiding by all other constitutional limits, to the vote of a citizen of a different state.[101]

It is clear that the Court's vision of precise mathematical equality, or good faith so to achieve, cannot realistically be enforced when creating legislative districts interstate. Each state's population is defined at the time of every decennial Census, and each congressional district must be located entirely within a single state.[102] The 435 Representatives that have comprised the House of Representatives since 1911[103] simply cannot be divided among the states so that each official represents a perfectly equal number of constituents. Further, the Constitution's requirement that no state have less

[97] The population variations in *Karcher* were quite small: the average population per district, following the 1980 Census, was determined to be 526,059; the difference between the largest and smallest of the districts in question was 0.6984% of the population of the average district, for a total variation of 3674 people. *Id.* at 728.

[98] Gerken, *supra* note 67, at 1419.

[99] It should be emphasized that *Karcher* dealt with federal congressional districts, and its stringent standard applies only in the federal districting context. *See infra* note 100.

[100] Note that the same year that the Court decided *Karcher*, it came to a vastly different conclusion in *Brown v. Thompson*, 462 U.S. 835 (1983). In *Brown*, a districting challenge to Wyoming's *state* legislative districts, the Court upheld a state legislative districting plan that produced districts with very unequal populations, on the logic that Wyoming's "unique qualities" so required. *Id.* at 843–44. The Court also suggested that it would be willing to extend a presumption of legitimacy to population variations of less than ten percent in the case of state legislative districts. *Id.* at 842. But because the case involved state legislative districting, it is of limited use for the purposes of this argument.

[101] U.S. Dep't of Commerce v. Montana, 503 U.S. 442 (1992). *See infra* notes 106–128 and accompanying text.

[102] MILLS, *supra* note 14, at 1; *see also infra* note 117 and accompanying text.

[103] MILLS, *supra* note 14, at 1.

than one Representative[104] makes perfect interstate population equality impossible—the least populous states end up inevitably over represented.[105] But all this notwithstanding, the Court has suggested, and our practice strongly supports the conclusion, that the principle of one person, one vote applies with the same force interstate as intrastate.

The clearest statement of this position can be found in the Court's decision in *United States Dep't of Commerce v. Montana*,[106] a case which required the Court to consider the constitutionality of a congressional districting decision made following the 1990 Census. Demographic shifts revealed by that Census necessitated the reassignment of seats in the House, with several states gaining seats and others losing seats accordingly.[107] The state of Montana challenged the removal of one of its two seats, arguing that because the new apportionment scheme produced a greater population deviation from the average congressional district size[108] than had the pre-1990 scheme, the new apportionment scheme violated Article I, Section 2, because "it '[did] not achieve the greatest possible equality in the number of individuals per representative.'"[109] The district court agreed, finding that the principle of equal representation for equal numbers of people within a state, as articulated in *Wesberry v. Sanders*,[110] should also apply to apportionment decisions among the states.[111] The new scheme made the state of Montana a single congressional district, so that its population of 803,655 exceeded by 231,189 the "ideal congressional district."[112] Under the old scheme, Montana would have retained two districts of approximately 401,827 people apiece, so that each would have been smaller by 170,638 people than the ideal district. The lower court found that the second plan, which Montana advocated, would have produced less absolute difference from the ideal district than the first;[113] it thus entered an order enjoining the challenged reapportionment from proceeding.[114]

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[104] U.S. CONST. art. I, § 2, cl. 3 ("[E]ach State shall have at least one Representative.").

[105] As will become relevant later in this Comment, following the 2000 Census, each seat in the United States House of Representatives represented approximately 646,952 people. But some states—in 2000, Alaska, North Dakota, Vermont, and Wyoming—have total populations below this average. Each of those states has one congressional seat, but that seat represents fewer people than the national average. *See* MILLS, *supra* note 14, at 2.

[106] 503 U.S. 442 (1992).

[107] *Id.* at 445.

[108] *Id.* at 446. The *Montana* Court noted that, at the time it was decided, the average population of a federal congressional district was 572,466. *Id.* at 445.

[109] *Id.* at 446 (citation omitted).

[110] 376 U.S. 1 (1964).

[111] *Montana*, 503 U.S. at 446.

[112] *Id.* at 445.

[113] *Id.* at 445–46.

[114] *Id.* at 447.

Reviewing the district court's decision, the Supreme Court first noted that the Article I, Section 2 requirement that Representatives be apportioned among the states according to their respective numbers was "constrained by three requirements": that the number of Representatives be no more than one per 30,000 persons;[115] that each state have at least one Representative;[116] and that each district be fully contained within a single state.[117] The Court then surveyed the history of congressional approaches to federal legislative apportionment.[118] Thomas Jefferson's approach, which guided the first four Censuses, was to disregard fractional remainders entirely, so that even if a state were entitled, for example, to 7.9 Representatives according to its population, it would only receive seven.[119] In 1842, Congress discarded that method in favor of one advocated by Daniel Webster, which essentially rounded the remaining fraction, up or down, to the nearest integer.[120] In 1850, Congress began using what was known as the Hamilton/Vinton method.[121] Under that method, each state would first receive the whole number of Representatives to which it was entitled by population. The remaining seats (of the then-total of 233) would then be allocated to the states with the largest remainders.[122] Finally, following the 1920 Census, Congress asked the National Academy of Scientists to review the issue of apportionment methodology;[123] the Academy evaluated the existing approaches and ultimately recommended a "method of equal proportions"[124] which seemed to minimize the problems inherent in the other methods.[125] Congress accepted the Academy's recommendation and adopted the method of equal proportions.

After surveying this history, the Court turned to the specifics of Montana's complaint, which, in brief, challenged Congress's decision to apply

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[115] *Id.* at 447–48 (citing U.S. CONST. art. I, § 2, cl. 3).

[116] *Id.* at 448 (citing U.S. CONST. art. I, § 2, cl. 3).

[117] *Id.* (citing the U.S. CONST. art. I, § 2, cl. 3). The third requirement, the Court noted, was an implicit rather than explicit one. *Id.*

[118] *Id.* at 448–52.

[119] *Id.* at 449–50.

[120] *Id.* at 450–51.

[121] *Id.* at 451.

[122] *Id.* This meant that a state entitled by population to 4.9 Representatives would get a fifth, followed by a state entitled to 3.7 Representatives receiving a fourth, and so on.

[123] *Id.* Meanwhile, in 1911, the size of the House of Representatives was set at 435 pending the entry into the United States of New Mexico and Arizona. Aside from a brief increase by two representatives when Alaska and Hawaii became states, it has remained the same size since. *Id.* at 451 n.24.

[124] *Id.* at 451.

[125] *Id.* at 455. As the Court noted in *Burns v. Richardson*, 384 U.S. 73, 77 n.4 (1966), the method of equal proportions is extremely mathematically complex. In essence, it borrows aspects from all of the other methods discussed here, but has the overall effect of minimizing the discrepancy between district sizes. *Montana*, 503 U.S. at 454. For more information, see U.S. CENSUS BUREAU, COMPUTING APPORTIONMENT (2001), http://www.census.gov/population/www/censusdata/apportionment/computing.html.

the method of equal proportions rather than a novel method it advocated—the "harmonic mean" method—to determine its allotment of Representatives.[126] The Supreme Court referenced the lower court's reliance on *Wesberry v. Sanders*, and agreed that there was force to the argument that

> the same historical insights that informed our construction of Article I, § 2 . . . should apply here as well. As we interpreted the constitutional command that Representatives be chosen "by the People of the several States" to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned *among* the several States "according to their respective Numbers" would also embody the same principle of equality.[127]

The Court avoided taking any definite stand on the applicability of the *Wesberry* logic to the context of interstate apportionment by finding that "[i]t is by no means clear that the facts here establish a violation of the *Wesberry* standard."[128] This framing, however, creates a strong inference that the Court did accept the argument that the *Wesberry* standard was the appropriate one with which to evaluate the challenge before it.

In the end, the Court declined to invalidate the districting plan on the ground that the need for compromise in the post-Census apportionment process required that Congress be accorded a measure of discretion.[129] It found the plan resulted from a "good faith"[130] attempt to allocate Representatives fairly by a method supported by "independent scholars" and "after decades of experience, experimentation, and debate."[131]

The discussion in *United States v. Montana* makes several things clear. First, the case strongly suggests that, taking into account the above-enumerated necessary modifications to the application of the principle of perfect representational equality interstate,[132] the Court accepted the argument that one person, one vote applies interstate as well as intrastate. This is evinced particularly by the Court's reference to the congressional scheme as having satisfied the "good faith" requirement the Court has repeatedly

126 *Montana*, 503 U.S. at 455–56.

127 *Id.* at 461 (emphasis added).

128 *Id.*

129 *Id.* at 464.

130 *Id.*

131 *Id.* at 465.

132 *Id.* at 463. The Court remarked that

> [t]he constitutional guarantee of a minimum of one Representative for each state inexorably compels a significant departure from the ideal. In Alaska, Vermont, and Wyoming, where the statewide districts are less populous than the ideal district, every vote is more valuable than the national average. Moreover, the need to allocate a fixed number of indivisible Representatives among 50 States of varying population makes it virtually impossible to have the same size district in any pair of states, let alone in all 50.

Id. The Court then remarked that the goal of perfect equality pronounced in *Kirkpatrick* appeared "illusory" in the interstate context. *Id.* But this statement, it seems, simply means that the equality ideal must be modified—not jettisoned—in the interstate context.

invoked in the intrastate one-person, one-vote cases.[133] Second, the Court's historical excursus makes clear that Congress, through its decennial Census and subsequent apportionments, has been seeking interstate population equality in representation since long before *Baker* and its progeny pronounced the equipopulation rule as a constitutional imperative. And, while the Court's ultimate deference to Congress in this case may suggest to some a retreat from judicial enforcement of the equality principle, in fact it seems clear that the Court's willingness to defer in *Montana* grew out of the case's particular facts—namely, Congress's good-faith attempt to achieve equality and the uncertainty surrounding whether Montana's preferred standard would have actually ameliorated the problem—not by an unwillingness to extend the basic logic of *Wesberry* to interstate apportionment.[134]

C. One Person, One Vote and Political Equality

The concept of one person, one vote is now one of our bedrock constitutional principles, and *Baker* and its progeny are widely heralded as having "brought about massive, nationwide political reform where before prospects for change had been hopeless."[135] John Hart Ely is a strong defender of the principle, writing approvingly of the Court's decision to enter the apportionment sphere through the *Baker* line of cases[136]: "[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage."[137] Ely suggests that once the Court entered the sphere, "one person, one vote" was the only reasonable end point.[138]

Despite this consensus on the positive effects of the one-person, one-vote rule on the legitimacy of our democratic system, some commentators

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[133] *Id.* at 464. For a discussion of the good-faith standard intrastate, see *supra* notes 88–99 and accompanying text.

[134] *Montana*, 503 U.S. at 455–56.

[135] Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. ILL. L. REV. 683, 685; *see also* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1104–06 (2002).

[136] ELY, *supra* note 53, at 117–25.

[137] *Id.* at 117. Ely does, however, part ways with the Court on the precise constitutional provisions responsible for the equipopulation mandate; he suggests that the representational equality ideal derives from the intersection of the Republican Form of Government or Guaranty Clause, U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."), and the Equal Protection Clause, U.S. CONST. amend. XIV, § 1. ELY, *supra* note 53, at 122. According to Ely, courts and commentators since *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), have mistakenly concluded that the *Luther* Court's refusal to enter the political thicket by choosing the rightful government of Rhode Island suggests that *all* cases arising under the Republican Form of Government Clause present nonjusticiable political questions. *Id.* at 118. Ely proceeds to argue that "it seems likely that this unfortunate doctrine—that all Republican Form cases are necessarily cases involving political questions—will wholly pass from the scene one of these days." *Id.* at 120–25.

[138] ELY, *supra* note 53, at 120–25.

have been critical of the conceptual ambiguities of the principle. One of the most common attacks on the principle is that it is undertheorized—that it fails to adequately articulate the ideal of political equality that compels the requirement of equally populated legislative districts.[139] Sanford Levinson, who calls one person, one vote "a mantra in need of a meaning," has written that "[i]t is quite remarkable how incoherent certain aspects of this Supreme Court doctrine remain almost four decades after the confident assertions in both *Baker* and *Reynolds* about the application of the Equal Protection Clause to the complex issue of drawing legislative districts."[140] Critic Heather Gerken argues that the Supreme Court, in *Baker* and its progeny, has failed to offer "a robust, fully developed conception of what equality should mean in a democracy."[141] She outlines several theoretical justifications for the Court's decisions in these cases and concludes that, although the Court has made gestures toward each, it has never made clear what precisely it feels compels the one-person, one-vote rule.[142]

Judge Alex Kozinski of the Ninth Circuit Court of Appeals, in his dissent and concurrence in the 1990 case *Garza v. County of Los Angeles*,[143] provides one of the clearest articulations yet of the uncertainties and inconsistencies in the Supreme Court's one-person, one-vote jurisprudence. Judge Kozinski surveys the one-person, one-vote cases and notes in them a deep tension between the ideal of electoral equality—the idea that every *vote* must count as much as every other vote—and representational equality—the idea that every representative serves an *equal number of constituents*.[144] Judge Kozinski ultimately concludes that, although the Court has been far from clear in many instances,[145] the principle of *electoral* equality—that is, the number of actual *voters* represented by every elected representative—"lies at the heart" of the one-person, one-vote principle.[146]

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[139] Stanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1270 (2002).

[140] *Id.* Levinson discusses what he feels is the inadministrability of the ideal, but goes further, questioning it as a normative ideal to which we should even aspire. *Id.* at 1295–96. Levinson argues, in fact, that there may be good reasons for weighting some votes more heavily than others—giving lawyers two votes in the election of judges (and ordinary citizens only a single vote) is one suggestion he offers. *Id.* at 1276.

[141] Gerken, *supra* note 67, at 1420; *see also id.* at 1413–14.

[142] *Id.*

[143] 918 F.2d 763 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part).

[144] *Id.* at 779–85.

[145] Katherine Irene Pettus makes a similar observation in her new book *Felony Disenfranchisement in America*. PETTUS, *supra* note 24, at 112–15.

[146] *Garza*, 918 F.2d at 785. Kozinski elaborates:

> It is very difficult, in my view, to read the Supreme Court's pronouncements in this area without concluding that what lies at the core of one person one vote is the principle of electoral equality. . . . To begin with, the name by which the Court has consistently identified this constitutional right—one person one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five, or ten.

Kozinski points to a lesser known one-person, one-vote case, *Burns v. Richardson*,[147] to bolster his position. *Burns*, Kozinski notes, remains the only case in which the Supreme Court has been required to choose between the competing principles of electoral equality and representational equality.[148] In that case, the Court approved of the use of voters, rather than pure population base, for state legislative apportionment purposes.[149] This, Kozinski argues persuasively, establishes the primacy of the ideal of electoral equality;[150] that is, using pure population as the basis for apportionment of representatives does not sufficiently effectuate the goals of one person, one vote.[151]

For purposes of this Comment, Judge Kozinski's conclusion is central. If one person, one vote requires that congressional representatives be chosen by equal numbers of *voters*, then it is clear that Florida's current arrangement fails to satisfy this requirement; the fact that Florida's representatives are chosen by far fewer actual voters than are the representatives from states with limited disenfranchisement regimes compels the conclusion that Florida's current practice violates the right of citizens of other states to equally weighted votes in the selection of congressional representatives.

III. Felon Disenfranchisement

A. Richardson v. Ramirez *and Beyond*

The 1974 Supreme Court case *Richardson v. Ramirez*,[152] which upheld California's felon disenfranchisement law against an Equal Protection Clause challenge,[153] appeared to some to close the door completely to con-

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Id. at 782. He continues: "[T]he Court has repeatedly expressed its concern with equalizing the voting power of citizens as an ultimate constitutional imperative . . . ." *Id.* at 783.

[147] 384 U.S. 73 (1966).

[148] *Garza*, 918 F.2d at 784.

[149] *Id.*

[150] *Id.*

[151] Certainly, others have addressed the question of the relevant measure of whether the equality sought by the one-person, one-vote ideal has been achieved, and the Supreme Court has never squarely answered the question. Justice Thomas, dissenting in the denial of certiorari in a municipal districting challenge in the 2001 case *Chen v. City of Houston*, registered his belief that the question was an open one. 532 U.S. 1046, 1046–48 (2001) (Thomas, J., dissenting from denial of certiorari). At issue in *Chen* was a local districting decision, so it is of limited use here, but Justice Thomas did note that "[w]e have never determined the relevant 'population' that States and localities must equally distribute among their districts." *Id.* at 1047. He continued: "The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means." *Id.* at 1048.

[152] 418 U.S. 24 (1974).

[153] *Id.* at 54–56.

stitutional challenges to felon disenfranchisement.[154] This Part demonstrates that such resignation is unwarranted. *Richardson* in fact does *not* foreclose the type of challenge outlined here—one brought on behalf of citizens of other states, challenging Florida's extreme disenfranchisement laws as violative of the one-person, one-vote principle.

In *Richardson*, the Court considered an Equal Protection Clause challenge to a California constitutional provision that denied the vote for life to any individual convicted of, among other things, any "infamous crime."[155] The *Richardson* plaintiffs, former felons who had been barred from registering to vote on the basis of their prior convictions,[156] argued that the state's disenfranchisement provision denied them the equal protection of the laws, as guaranteed by the Fourteenth Amendment of the United States Constitution.[157] The California Supreme Court agreed with the plaintiffs, holding that the state could "no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles."[158] The state sought review of the decision in the U.S. Supreme Court.

Although the plaintiffs brought their claim under Section 1's Equal Protection Clause, the majority, in an opinion authored by then-Justice Rehnquist, devoted much of its discussion to Section 2 of the Fourteenth Amendment, the so-called Penalty Clause, particularly the Section's exclusion from the operation of the penalty any denial of the vote on the basis of "rebellion or other crime."[159] The Court focused on the phrase "or other crime": although it conceded that "[t]he legislative history bearing on the meaning of the relevant language of § 2 is scant indeed,"[160] it reasoned that

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[154] *See, e.g.*, Fletcher, *supra* note 24, at 1902; Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 96 (2005); Daniel S. Goldman, Note, *The Modern-day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 650 (2004).

[155] *Richardson*, 418 U.S. at 27.

[156] *Id.* at 32.

[157] *Id.* at 33. The plaintiffs also argued that the lack of uniformity in counties' interpretation of the state Constitutional provision at issue denied them due process of law; that claim is not treated here.

[158] *Id.* at 56.

[159] *Id.* at 41–54. The full text of Section 2 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.

U.S. CONST. amend. XIV, § 2.

[160] *Richardson*, 418 U.S. at 43.

the Framers would not have prohibited in Section 1 what they appeared to allow for in Section 2 of the same Amendment.

The Court also noted that, "at the time of the adoption of the Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes."[161] Even more persuasive to the Court than either of the foregoing, however, was the text of the Reconstruction Act, which allowed for the readmission of Confederate states once

> the people of any . . . rebel State[] shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disenfranchised for participation in the rebellion or for felony at common law.[162]

Ultimately, the Court found that "the understanding of those who adopted the Fourteenth Amendment . . . is of controlling significance in distinguishing [disenfranchisement] from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause."[163] Within this framework, the Court declined to subject the California constitutional provision to the strict scrutiny normally applied to laws restricting the right to vote (or infringing any fundamental right).[164] At the end of its opinion, the Court seemed to come close to endorsing the myriad arguments from democratic theory and theories of punishment against the practice of felon disenfranchisement, but suggested that such arguments be "addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present Constitutional provisions."[165]

Although *Richardson* certainly presents precedent to be reckoned with, it is important to note that the Court rendered a holding on the challenge before it only: that is, an assertion of the voting rights of *former felons* under the Equal Protection Clause. Because the challenge outlined in this Comment would be brought on behalf of individuals eligible to vote in other states, rather than on behalf of disenfranchised Florida citizens, the *Richardson* holding does not directly control; the claim can in fact coexist with *Richardson*'s pronouncement that felon disenfranchisement does not constitute a per se violation of felons' or former felons' rights to the equal protection of the laws.

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[161] *Id.* at 48.
[162] *Id.* at 49.
[163] *Id.* at 54.
[164] *See* Wilkins, *supra* note 154, at 88.
[165] *Richardson*, 418 U.S. at 55.

Moreover, if *Richardson* appeared to some to have closed the door to constitutional challenges to the practice of felon disenfranchisement,[166] the 1985 case *Hunter v. Underwood* flung it unmistakably back open, showing that the Court was clearly willing under some circumstances to hold particular felon disenfranchisement laws unconstitutional.[167] In *Hunter*, a group of disenfranchised Alabama citizens brought an Equal Protection Clause challenge to section 182 of the Alabama Constitution, which ordered disenfranchisement for, among other things, crimes of "moral turpitude."[168] The Court examined the historical record surrounding the passage of the provision and found that it had been enacted with discriminatory intent, with the express purpose of disenfranchising as many of Alabama's African-American citizens as possible.[169] This evidence, the Court felt, sufficed to state a claim for a violation of the Equal Protection Clause.[170]

The Court then referenced *Richardson* in a quote that, while somewhat inscrutable, appears to suggest a retreat from *Richardson*'s reading of Section 2:

> Without 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 [the Alabama law] which otherwise violates § 1 of the 14th Amendment. Nothing in our opinion in *Richardson v. Ramirez* . . . suggests the contrary.[171]

The *Hunter* holding thus makes clear that there are circumstances in which the exception "for rebellion or other crime" does not insulate felon disenfranchisement laws from constitutional scrutiny if such laws violate *another* constitutional requirement. In *Hunter*, the Court found that the "rebellion or other crime" proviso did not sanction Alabama's intentional discrimination in violation of the Equal Protection Clause. In the situation at issue in this Comment, it likewise should not protect the state of Florida in its violation of the one-person, one-vote principle. Furthermore, there is no suggestion anywhere in *Hunter* that the Court will only strike down felon disenfranchisement laws when they constitute intentional discrimination. *Hunter* may thus support the proposition that when felon disenfran-

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[166] *See, e.g.*, *One Person, No Vote*, *supra* note 8, at 1950.

[167] 471 U.S. 222 (1985).

[168] *Id.* at 223.

[169] *Id.* at 229. The president of the 1901 Alabama Constitutional Convention stated in his opening address that the goal of the convention was, "within the limits imposed by the Federal Constitution, to establish white supremacy in the State." *Id.* Beyond these general expressions of racist sentiments, evidence from the convention indicated that one of the methods by which the delegates intended to achieve their white-supremacist goal was the disenfranchisement of as many African Americans as possible. *Id.* at 229–31.

[170] *Id.* at 233.

[171] *Id.* (citation omitted).

chisement laws violate another constitutional provision recognized by the Supreme Court as conferring a substantive right—as the Court has recognized the right to be free from intentional discrimination on the basis of race under the Equal Protection Clause of the Fourteenth Amendment,[172] or the right to an equally weighted vote for congressional representatives, mandated by Article I, Section 2—such felon disenfranchisement laws may be deemed unconstitutional.[173]

B. *Troubling* Richardson*'s History of the Fourteenth Amendment*

The *Richardson* majority found that by exempting the disenfranchisement of felons from the reach of Section 2 of the Fourteenth Amendment, the Framers manifested their belief that such disenfranchisement could not be said to violate Section 1's Equal Protection Clause.[174] This section argues there are strong indications that the Court's conclusion was mistaken. It also argues that even if the *Richardson* majority's historical analysis will control any future attempts by former felons to vindicate their right to vote under the Equal Protection Clause, the historical sources may tell a different story when viewed from the perspective of the type of claim proposed in this Comment.

The 39th Congress was convened in December of 1865 and faced a daunting mission: "to reorganize the government after a destructive Civil War that had fundamentally altered our institutions."[175] The assembled members—representatives of the states that had remained in the union—faced the immediate problem of creating a representation scheme that did not result in the readmitted southern states' total control of the Congress.[176] This was a very real concern: with the Thirteenth Amendment's abolishment of slavery, the southern population, which formed the basis of congressional representation under Article 1, Section 2, would increase by forty percent.[177]

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[172] Washington v. Davis, 426 U.S. 229 (1976).

[173] It should be noted here that the Court could arrive at this conclusion without taking the step, advocated persuasively by some commentators, of treating felon disenfranchisement laws the same way it has treated other infringements on fundamental rights—that is, by subjecting them to strict scrutiny. *See, e.g.*, Behrens*, supra* note 24, at 273.

[174] Richardson v. Ramirez, 418 U.S. 24 (1974).

[175] BENJAMIN B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 141 (1914).

[176] KENDRICK, *supra* note 175, at 198; Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L.Q. 108, 109 (1960). Space constraints preclude any real discussion of the debates about the Section 1 of the Fourteenth Amendment, but it is important to note that while the members of the committee struggled with the question of apportionment, they were simultaneously considering how to extend an affirmative grant of citizenship and rights to African Americans through the first provision of the Amendment.

[177] George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 94 (1961). This, of course, is because the original

Immediately following the convening of the 39th Congress, Representative Thaddeus Stevens of Pennsylvania introduced a resolution proposing the creation of a committee of fifteen members, drawn from both the House and the Senate, to oversee the Reconstruction effort.[178] The stated goal of the committee was to "inquire into the condition of the states which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress."[179] After some modifications, the bill passed both houses and the committee assembled.[180] While debates regarding apportionment and representation began on the floor of Congress, the Joint Committee of Fifteen on Reconstruction simultaneously began its debates on the issues.[181]

It seems clear from the historical materials that the committee's primary goal was to "depriv[e] the South of the representation which is based on the colored population until that population is enfranchised."[182] There was significant difference in opinion, however, about how best to accomplish this goal, and, so far as they exist, the records of the debates surrounding the passage of the Fourteenth Amendment reflect a fascinating blend of partisan political considerations, structural concerns about national organization and federalism, and deep philosophical considerations of the role of the franchise and the goals of representation.[183] Some Radical Republicans, most notably Charles Sumner, were deeply committed to the principle of immediate suffrage for African Americans, maintaining that it must be granted before any representation was extended to the southern states.[184] Others advocated suffrage as an abstract ideal, but proclaimed their reluctance to extend full suffrage before institutions like schools had been constructed to educate newly freed African Americans and effectuate the promise of citizenship.[185] Still others expressed fears that a full grant of suffrage (like that eventually contained in the Fifteenth Amendment) would never achieve the support it needed, even among the northern states, most of which did not yet themselves permit African Americans to vote.[186]

Constitution provided that slaves were to be counted as three-fifths of free persons for purposes of representation. U.S. CONST. art. I, § 2, cl. 3.

[178] KENDRICK, *supra* note 175, at 142–43.

[179] *Id.* at 143.

[180] *Id.* at 144–46. There was a good deal of disagreement between the House and the Senate regarding precisely how much power ought to rest with the committee, but ultimately the Senate limited its powers to determining the question of apportionment, while not allowing it to restrict the two houses of Congress from taking any action but on its consent. *Id.*

[181] Zuckerman, *supra* note 177, at 96.

[182] *Id.* at 95 (quoting Representative James G. Blaine of Maine).

[183] *See, e.g.*, KENDRICK, *supra* note 175, at 199–220.

[184] *Id.* at 206.

[185] *Id.*

[186] *Id.*

The committee's first proposal for a constitutional amendment, submitted by Thaddeus Stevens in January of 1866, stated that "Representatives shall be apportioned among the several States, which may be included within this Union, according to the number of respective legal voters."[187] This proposal failed, in part because of strong opposition from New England Representatives. Due to substantial westward migration, New England was heavily populated by women, who did not exercise the franchise;[188] limiting representation to legal voters would have adversely affected those states.[189]

The committee then considered another proposal, which provided:

> Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, counting the whole number of citizens of the United States in each State; provided that, whenever the elective franchise shall be denied in any State on account of race, creed, or color, all persons of such race, creed, or color, shall be excluded from the basis of representation.[190]

Under this proposal, a state's denial of the vote to any citizen on the basis of race would result in a reduction, in the amount of the full population of persons of that race, in the state's representation.[191] In other words, the disenfranchisement of a single African American would result in the exclusion of all African Americans from the population base used to calculate a state's representatives. Objections were raised to this formulation as well: because it only reduced representation for disenfranchisement "on account of" race, it seemed to leave open the possibility that southern states might, with immunity, impose obstacles to voting such as property requirements. Such disqualifications, of course, would have resulted in the disenfranchisement of southern African Americans as surely as race-based disqualification.[192] These and other concerns led to the failure of this version of the amendment.[193]

Several months after these first failed versions, and several other interim attempts,[194] the Joint Committee began drafting what would eventually become the text of the Fourteenth Amendment.[195] The central goal remained to "produce an amendment which would encourage the extension

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[187] *Id.*

[188] *Id.* at 208–09.

[189] Zuckerman, *supra* note 177, at 95. Kendrick also points out that because many New England states imposed educational qualifications for voting, suffrage was not as broad there as it was in many other states. KENDRICK, *supra* note 175, at 199.

[190] KENDRICK, *supra* note 175, at 50–51.

[191] *Id.*

[192] Bonfield, *supra* note 176, at 110.

[193] Zuckerman, *supra* note 177, at 101.

[194] KENDRICK, *supra* note 175, at 84–101.

[195] *Id.* at 102.

of suffrage to Negroes without directly regulating suffrage within the states."[196] By this time, the committee had decided that limiting the scope of the amendment to race and color would fail to reach such tactics as property qualifications, and so the language would need to be general.[197] Another consideration on the minds of the drafters was the special problem of Missouri, where "large numbers of the population had been disfranchised for participating in rebellion. To placate Missouri, the disfranchised rebels must not cost that state a loss in congressional representation."[198]

In May of 1866, Thaddeus Stevens began discussion of a new version of the amendment, which he noted would "either . . . compel the States to grant universal suffrage or so . . . shear them of their power as to keep them forever in a hopeless minority in the national Government."[199] The balance of considerations that had led to earlier failures produced a document that guaranteed proportional representation but did not require states to extend suffrage to African Americans: states that failed to extend suffrage to African Americans would be penalized proportionately for their failure to do so, but the choice remained for each state to make. The language that emerged was virtually identical to the language of the Fourteenth Amendment.[200]

This version of the apportionment section of the amendment passed overwhelmingly in the House, and debate on it began in the Senate.[201] The text of the Senate debates makes clear that members of the Joint Committee understood the penalty provision to apply not just to exclusion on account of race; it was explained that exclusion for other reasons, like "want of intelligence" would also result in reductions.[202] A concern was raised, however, about the effect of the proposed amendment on states' rights to impose additional qualifications on voters in municipal elections, so the second sentence was successfully amended to include only elections for "the choice of electors for President and Vice President of the United

[196] Zuckerman, *supra* note 177, at 101.

[197] *Id.*

[198] *Id.*

[199] *Id.* at 102.

[200] It read:

> Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But whenever, in any state, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in anyway abridged except for participation in rebellion or other crime, the basis of representation in such state shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.

Id. at 101–02.

[201] *Id.* at 103.

[202] *Id.* at 103–04. Jacob Howard, a Senator from Michigan and a member of the Joint Committee, stated that "[n]o matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion." *Id.* at 104.

States, Representatives in Congress, the executive and judicial officers of a state, or members of the legislature thereof."[203] This section was then approved by a majority of the Senate.[204] On June 13, 1866, the proposed amendment was submitted to the states for ratification,[205] and it was eventually deemed to have been ratified by the constitutionally required three-fourths of the states.[206]

As discussed above, the Joint Committee's desire to avoid reducing the representation of the State of Missouri seems to have figured prominently in the decision to include the exception for disenfranchisement for "participation in rebellion or other crime" within the Penalty Clause. There is also some suggestion in the historical record that Thaddeus Stevens,[207] Section 2's principle architect, advocated treating the southern states as territories, for which Congress is empowered to set voter qualifications.[208] The voters whose participation he would have allowed, under this arrangement, were "all males over twenty-one years of age without regard to race or color, who had not given aid or comfort to the rebellion."[209] Notably absent from this list was any mention of commission of *other* crime—that is, crimes not tied to the rebellion. These two facts, while not dispositive, certainly point to the conclusion that the Framers of the Amendment may have inserted the "rebellion or other crime" exception within Section 2 with the specific purpose of allowing southern states to disenfranchise "rebels"—individuals who had actively participated in the rebellion, or given it "aid or comfort"—rather than all individuals who had committed crimes.

As the *Richardson* Court itself noted, though, the history of Section 2 may simply be too scant to truly resolve the question of what the Amendment's Framers intended through their insertion of "other crime."[210] But what *is* clear from the foregoing history is that this provision of the Amendment was designed to prevent states with inclusive enfranchisement practices from being disadvantaged, in the form of decreased power in the House of Representatives, by the exclusionary practices of other states. In other words, the Framers intended that no state should gain competitive advantage, vis-à-vis the other states, by excluding some of its citizens from the vote and thereby overweighting its enfranchised citizens' votes. The

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[203] *Id.* at 106.

[204] *Id.* at 107.

[205] *Id.*

[206] *See generally* HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 161–209 (1965). Flack's text provides an overview of the complex procedural history of the ratification of the Fourteenth Amendment, which is outside the scope of this Comment.

[207] Other members of the Joint Committee made valuable contributions to the Amendment—John Bingham is largely if not solely responsible for much of the substance of Section 1. *See* KENDRICK, *supra* note 175, at 183–84. But Stevens appears to have been the force behind Section 2.

[208] *Id.* at 165.

[209] *Id.*

[210] Richardson v. Ramirez, 418 U.S. 24, 43 (1974).

purpose of the provision is thus betrayed when states are permitted to disenfranchise large swaths of their population while including the disenfranchised in representational calculations. It is entirely clear from the limited history of Section 2 that the Framers intended for votes to determine representation; that is, no state was to benefit in congressional representatives from the presence within its borders of individuals unable to participate in the selection of those representatives. This is precisely the arrangement from which Florida currently benefits. Disenfranchisement for criminal convictions may have escaped the operation of the penalty when all states practiced limited but roughly equivalent disenfranchisement, but the situation today is markedly different.

The next section builds on this argument, showing that, at the time of the Amendment's framing, states' felon disenfranchisement practices were largely uniform. But whatever disenfranchisement practices may have existed at the time of the framing, most states' practices have moved so uniformly away from allowing lifetime disenfranchisement for the commission of any felony that Florida is now an extreme outlier.

C. Contemporary Florida Law in Context

The widespread practice of felon disenfranchisement is actually of fairly recent advent.[211] Under early common law, most felonies were punishable by death, so the disenfranchisement of current and former felons was a comparatively minor issue.[212] By the time of the adoption of the Fourteenth Amendment, however, such laws had become common. The *Richardson* court noted that at the time of the Amendment's ratification, twenty-nine states had constitutional provisions either prohibiting former felons from voting, or authorizing legislatures to enact such prohibitions.[213] In 1868, there were only thirty-seven states in existence—both those that had remained in the Union, and those that had not—so twenty-nine states represented a very significant majority.[214] And even those states not referenced by the *Richardson* majority quickly joined the ranks of the others. In 1868, Arkansas enacted a Constitution with a provision allowing the legislature to deprive persons convicted of felonies of the right to vote.[215] Both North and South Dakota enacted constitutions containing disenfranchisement provisions in 1889.[216] Washington included such a provision in its

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[211] *One Person, No Vote*, *supra* note 8, at 1939.

[212] Fletcher, *supra* note 24, at 1899; *One Person, No Vote*, *supra* note 8, at 1939.

[213] *Richardson*, 418 U.S. at 48.

[214] *The Transformation of American Society, 1865–1900*, *in* THE NEW ENCYCLOPEDIA BRITANNICA 241 (2002).

[215] KEYSSAR, *supra* note 1, at tbl.A.15; Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States*, 109 AM. J. SOC. 559, 565 tbl.2 (2003).

[216] KEYSSAR, *supra* note 1, at tbl.A.15; Behrens et al., *supra* note 215, at 565 tbl.2.

constitution, created that same year, and Idaho and Wyoming followed suit in 1890.[217] All of this means that during the period in which the Fourteenth Amendment was enacted and in the decades immediately thereafter, states' practices with respect to the voting rights of convicted felons were largely uniform.

The situation today is markedly different. As has been noted, states' contemporary disenfranchisement practices vary significantly. On one end of the spectrum, Maine and Vermont permit even incarcerated individuals to cast votes.[218] On the other end, three states engage in the minority practice of totally and permanently disenfranchising all current and former felons, including first-time offenders.[219]

It is undeniably the case that the trend among states in recent decades has been away from permanent disenfranchisement and toward the full restoration of voting rights upon completion of an offender's sentence.[220] As early as 1974, Justice Marshall, dissenting in *Richardson*, noted that "When this suit was filed, 23 States allowed ex-felons full access to the ballot. Since that time, four more States have joined their ranks."[221] Justice Marshall's observation of the trend has been borne out in recent years; a number of states with moderate disenfranchisement regimes have recently made restoration of voting rights substantially easier.[222] In 2001, Delaware significantly scaled back its disenfranchisement laws: while it had previously disenfranchised former felons for life, it now restores voting rights automatically after five years (or earlier with an executive pardon).[223] Both Washington and Tennessee have passed laws in the last five years under which felons may regain voting rights upon completion of their sentences.[224]

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[217] *See supra* note 216.

[218] ME. CONST. art. II, § 1; VT. STAT. ANN. tit. 28, § 807(a) (2000); *see also One Person, No Vote*, *supra* note 8, at 1942.

[219] SENTENCING PROJECT, *supra* note 4, at 3. Those three states are Florida, Kentucky, and Virginia. *Id.* Nine other states engage in partial disenfranchisement of former felons, either permanent disenfranchisement of repeat offenders, permanent disenfranchisement of individuals convicted of one of a list of enumerated offenses, or limited-duration disenfranchisement. *Id.* Note that all of these states provide for some type of restoration process upon application to the governor or a clemency board. *One Person, No Vote*, *supra* note 8, at 1943. For a discussion of some of the problems states' reenfranchisement regimes present, see Melissa Chiang, Comment, *Some Kind of Process for Felon Reenfranchisement*, 72 U. CHI. L. REV. 1331 (2005).

Thomas J. Miles suggests that eleven states practice permanent disenfranchisement, but his discussion fails to distinguish between total disenfranchisement regimes like that of Florida, and that of a state like Arizona, which disenfranchises for life, but only after a second felony conviction. *See* SENTENCING PROJECT, *supra* note 4, at 3; Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 85 (2004).

[220] *See* SENTENCING PROJECT, SUMMARY OF CHANGES TO STATE FELON DISENFRANCHISEMENT LAW, 1865–2003 (2003), http://www.sentencingproject.org/pdfs/UggenManzaSummary.pdf.

[221] Richardson v. Ramirez, 418 U.S. 24, 83 (1974) (Marshall, J., dissenting).

[222] SENTENCING PROJECT, *supra* note 220, at 2.

[223] *One Person, No Vote*, *supra* note 8, at 1948.

[224] *Id.* at 1948–49.

A New Mexico law requiring permanent disenfranchisement was recently repealed and replaced by a law allowing immediate restoration upon completion of a sentence. Texas has passed virtually identical legislation.[225]

Of the states with the harshest disenfranchisement laws, several recently made it far easier for ex-felons to regain voting rights: Nevada now requires restoration of voting rights for former felons upon application,[226] and Kentucky recently simplified its restoration process, making it easier for persons who have been convicted to regain their right to vote.[227] In 2001, a third state, Virginia, modified its previous felon-disenfranchisement regime to allow former felons to apply for restoration after a five-year waiting period.[228] It is now undeniably the case that states which disenfranchise all first-time felons, while denying to all former felons any opportunity to regain the ability to vote, are in the extreme minority.[229]

The Florida constitutional provision mandating disenfranchisement states that "[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."[230] As a result of this provision, Florida currently disenfranchises well over 827,000 people on the basis of felony convictions.[231] Of that number, at least 613,000 have completed their sentences in full.[232]

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[225] *Id.* at 1949.

[226] *Id.* at 1946.

[227] *Id.* at 1946–47.

[228] *Id.* at 1947.

[229] Even of the permanent-disenfranchisement regime states, Florida's practice is the most extreme, in that it excludes even first-time offenders, regardless of the state in which they were first convicted. No other permanent-disenfranchisement-regime state goes this far. *See* SENTENCING PROJECT, *supra* note 220. It should be noted that there have been changes in the other direction as well, but only in the direction of disenfranchisement of *current* inmates; no state, since *Richardson* was decided, has introduced the penalty of disenfranchisement of former felons, nor has any made it more difficult for former felons to regain the vote. Both Massachusetts and New Hampshire passed laws restricting the vote for current felons in 2000; several other states in the 1990s took steps restricting the vote for felons who are incarcerated or under a sentence of parole or probation. But there has been no movement toward further restricting the vote of former felons—and there have been *significant* trends in the opposite direction. *See id.*

[230] FLA. CONST. art VI, § 4. The provision continues, "until restoration of civil rights or removal of disability." *Id.* This restoration of voting rights may occur after application to a state executive review board, but the practice has been harshly criticized as allowing for very few clemencies and providing no clear standards. *See* Jason Grotto & Debbie Cenziper, *Clemency System Veiled in Secrecy*, MIAMI HERALD, Nov. 14, 2004, at 16A. Governor Jeb Bush, acknowledging the flaws in the current system, recently proposed hiring forty additional staff members, and increasing the Clemency Board's annual budget by $1.8 million in an attempt to deal with the flawed system; so far, however, these proposals have not been implemented. Gary Fineout, *Felons' Rights: Bush Requests More for Clemency Appeals*, MIAMI HERALD, Dec. 7, 2005, at B6.

[231] Karlan, *supra* note 10, at 1157. As noted *supra* note 10, estimates place the 2005 figures over one million.

[232] Johnson v. Governor of Fla., 353 F.3d 1287, 1293 (11th Circ. 2003), *vacated*, 377 F.3d 1163 (11th Cir. 2004); *see also* Karlan, *supra* note 10, at 1157.

The deep disparity between Florida's disenfranchisement practice and the practices of the majority of states today suggests that, if *Richardson* ever did constitute a proper interpretation of Section 2, that time has passed. The reasoning of the recent Supreme Court case *Atkins v. Virginia*[233] may supply a powerful argument by analogy regarding the current status of Florida's practice.

In *Atkins*, the Court examined whether a "national consensus" against the execution of the mentally retarded had emerged in the thirteen years since it had held that that practice did not violate the Eighth Amendment's Cruel and Unusual Punishment Clause in *Penry v. Lynaugh*.[234] In answering that question, the Court looked to recent legislative activity in a number of states, all of it designed to ban the execution of the mentally retarded where no such bans has previously existed.[235] The Court noted that the Eighth Amendment's meaning is drawn from "the evolving standards of decency that mark the progress of a maturing society."[236] Surveying the national scene, the Court noted: "It is not so much the number of these States that is significant, but the consistency of the direction of change."[237] The Court ultimately found, based largely on these legislative trends, that a national consensus had developed against the practice of executing mentally retarded offenders, and that it was thus barred by the Eighth Amendment.[238]

The Court has used this "emerging consensus" reasoning to strike down other laws—not just under the Eighth Amendment, but under other constitutional provisions as well. In *Tennessee v. Garner*,[239] for example, the Court relied on an evolving-standards-of-decency argument to find the use of deadly force to apprehend a fleeing suspect "constitutionally unreasonable" under the Fourth Amendment, where the suspect posed no threat to the police officer or anyone else.[240] The Court examined the history of the common law rule permitting the use of deadly force to capture a fleeing suspect; it ultimately found that, even if the rule might have withstood constitutional scrutiny when most felonies were punishable by death, it had no place in contemporary practice, with the proliferation of felonies punishable by short sentences or mere fines.[241] The Court also looked to trends around the practice, finding that "the long-term movement has been away from the

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[233] 536 U.S. 304 (2002).

[234] *Id.* at 316; *see* Penry v. Lynaugh, 492 U.S. 302 (1989).

[235] *Atkins*, 536 U.S. at 314–16.

[236] *Id.* at 312 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[237] *Id.* at 315.

[238] *Id.* at 321. *Roper v. Simmons*, 543 U.S. 551 (2005), used substantially similar reasoning to arrive at the conclusion that the execution of sixteen- and seventeen-year-old offenders had become a violation of the Eighth Amendment.

[239] 471 U.S. 1 (1985).

[240] *Id.* at 9–11.

[241] *Id.* at 10–14.

rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States."[242]

The Court's methodology in these cases is equally applicable to the felon disenfranchisement context. It is quite clear that there has been, in recent years, a steady and consistent move away from total disenfranchisement of former felons. Because there appears to be a growing consensus that the practice no longer comports with the "'evolving standards of decency that mark the progress of a maturing society,'"[243] a court could accept the argument that the type of total disenfranchisement practiced by Florida is no longer permitted by the Constitution. Thus, even if "other crime," *were* originally intended to reach beyond that narrow category of offenses related to the rebellion, such a reading, given the purposes of Section 2, is only intelligible in the context of disenfranchisement for rebellion or other crime that the *majority* of states practice. Otherwise, a state could in theory define "crime" in any way it chose, exclude those convicted from participation in the franchise, benefit in inflated representation from the population of its excluded citizens, and suffer no penalty. Given that the majority of states no longer practice the extreme lifetime disenfranchisement in effect in Florida, Florida's practice appears no longer to be shielded by the Section 2 exemption.

IV. INVALIDATION OR REDUCED REPRESENTATION: THE CLAIM AND THE REMEDIES

I have argued that Florida's extreme disenfranchisement regime results in a concrete injury, in the form of vote dilution, of the citizens of other states. The claim contemplated here would thus be brought on behalf of residents of a state other than Florida, alleging actual injury suffered in the form of vote dilution (in both the House of Representatives and the electoral college) as a result of Florida's felon disenfranchisement laws.

The first—and most obvious—type of relief sought would be the invalidation of Florida's disenfranchisement law as violative of the one-person, one-vote principle. But relief could also be requested, in the alternative, in the form of the reduction, by one seat, of Florida's allotted representatives in the House of Representatives and in the electoral college. If, as this Comment has demonstrated, the *Richardson* construction of Section 2 does not control the type of claim contemplated here, it may be possible not only to surmount the *Richardson* hurdle, but actually to invoke Section 2's penalty of reduced representation. The reduction requested would be a single seat; this is because the average population per representative, at the time of the 2000 Census, was approximately 646,952;[244] this nearly per-

[242] *Id.* at 18.

[243] *Atkins*, 536 U.S. at 311–12 (quoting *Trop*, 356 U.S. at 101).

[244] MILLS, *supra* note 14.

fectly reflects the number of former felons excluded from the vote for life by Florida's extreme disenfranchisement practices—at least 613,000.[245]

This figure does not reflect the several hundred thousand more Floridians under current sentence. Because the gravamen of the vote-dilution claim would be the deep divergence between Florida's total disenfranchisement regime and the more moderate disenfranchisement regimes of most other states, the disenfranchisement of Florida felons *under current sentences* could not be said to result in any constitutionally offensive dilution of the votes of citizens of other states, many of which also disenfranchise individuals under current sentence. But Florida's permanent denial of its former felons' right to vote *should* result in the penalty contemplated by Section 2 of the Fourteenth Amendment—a reduction in Representatives.

The scholar Arthur Bonfield once wrote:

> The second section of the Fourteenth Amendment is one of the few provisions of the Constitution which no one has seriously attempted to enforce through judicial action. It is potentially one of the most powerful sections of our fundamental law available to counter the wholesale disenfranchisement of many classes of our population, and stands as a powerful inducement to the achievement of universal suffrage among our adult citizenry.[246]

Bonfield made this statement before the passage of the Voting Rights Act of 1965; he clearly envisioned the Penalty Clause functioning to enforce the right to vote of the millions of southern African Americans constructively denied that right.[247] He wrote this, too, before the Supreme Court appeared to approve the practice of felon disenfranchisement in *Richardson*.[248] But his words continue to ring true, and they remain apposite to the context of felon disenfranchisement.

Although Bonfield is correct that the Penalty Clause has mostly remained dormant since the Fourteenth Amendment's ratification, there have been scattered previous attempts to enforce the provision. None appears to have been successful, although a 1965 federal court dismissal of such a claim contains language that may in fact be favorable to the type of claim described here.[249] In that case, *Lampkin v. Connor*,[250] a group of individuals rendered unable to vote by literacy tests and poll tax requirements filed suit in the District Court for the District of Columbia. The *Lampkin* plaintiffs attempted to compel the Secretary of Commerce to recalculate the states' populations—taking into account the number of persons disenfranchised by such requirements—and then reapportion seats in the House of Representa-

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[245] *See supra* note 232.

[246] Bonfield, *supra* note 176, at 108.

[247] *See id.* at 108–09.

[248] Richardson v. Ramirez, 418 U.S. 24 (1974).

[249] *See* Lampkin v. Connor, 239 F. Supp. 757 (D.D.C. 1965).

[250] *Id.*

tives.[251] The Court dismissed the claim on the grounds that the plaintiffs lacked standing to sue,[252] reasoning that, compared with *Gray v. Sanders*[253] or *Wesberry v. Sanders*,[254] the injury alleged, and the remedies sought, were too "remote and speculative" to admit of relief.[255]

The claim outlined here involves both a plaintiff class and requested relief that are far more precisely defined than was the case in *Lampkin*. Here, a group of eligible voters from a state with no or minimal disenfranchisement of ex-felons would bring the suit;[256] the relief sought would be either the invalidation of Florida's disenfranchisement law, or, alternatively, the reduction, by one representative, of Florida's slate of legislators in the House, and electors in the electoral college. The flaws the court found fatal to the *Lampkin* plaintiffs' claim—primarily, the vagueness of the injury and the speculativeness of the relief sought—would thus not exist in the type of claim described here. And, significantly, the *Lampkin* court never suggested that the plaintiffs had invoked the wrong constitutional provision; the dismissal turned on the breadth of the class of plaintiffs and the vague and general nature of the relief requested (the group essentially sought to overhaul the congressional allotment scheme, in its entirety). Because the claim described here would involve a well-defined class and seek precise relief, it would not be vulnerable to the same attacks.

For a court to find the requisite injury in the type of claim described here, the suit would need to be brought by citizens of a state that lost one or more seats in the House (while Florida gained two seats) following the 2000 Census.[257] Those states are: Connecticut,[258] Illinois,[259] Indiana,[260] Michigan,[261] Mississippi,[262] New York,[263] Ohio,[264] Oklahoma,[265] Pennsylvania,[266] and Wisconsin.[267] We will choose here the state of Illinois. Like

[251] *Id.* at 758–59.
[252] *Id.* at 763.
[253] 372 U.S. 368 (1963).
[254] 376 U.S. 1 (1964).
[255] *Lampkin*, 239 F. Supp. at 761.
[256] The group might also include an official representing the state.
[257] MILLS, *supra* note 14, at 2.
[258] Connecticut lost one seat in 1990, receiving five instead of six. *Id.*
[259] Illinois went from twenty to nineteen seats. *Id.*
[260] Indiana went from ten to nine seats. *Id.*
[261] Michigan went from sixteen to fifteen seats. *Id.*
[262] Mississippi went from five to four seats. *Id.*
[263] New York went from thirty-one to twenty-nine seats. *Id.*
[264] Ohio went from nineteen to eighteen seats. *Id.*
[265] Oklahoma went from six to five seats. *Id.*
[266] Pennsylvania went from twenty-one to nineteen seats. *Id.*
[267] Wisconsin went from nine to eight seats. *Id.*

many states, Illinois disenfranchises all currently incarcerated individuals. But it permits parolees, probationers, and ex-offenders to vote.[268]

First, let us consider Florida at the time of the 2000 Census. Florida's population was then 16,028,890.[269] But because in the year 2000 at least 613,000 individuals who had completed their sentences in full were unable to vote,[270] the voting-eligible population base was actually only 15,415,890. And since Florida received 25 seats in the House following that recalculation, each of the seats represented an average of 616,636 eligible voters.[271]

Illinois's population at the time of the 2000 Census was 12,439,042. After that Census, Illinois lost a seat, dropping from twenty to nineteen. This means that following the Census, each representative from the state of Illinois actually represented 654,686 eligible voters—a difference of nearly 40,000 individuals per representative from Florida's representational figures. In other words, each vote for a congressional representative cast in Illinois, following the 2000 Census, is worth 15/16ths of a Florida vote. Given that the Court has invalidated apportionment schemes resulting in significantly less disparity—the *Karcher v. Daggett*[272] Court, for example, struck down a scheme in which the difference between the largest and smallest congressional district was less than 4000 votes—a court might well find such gross disparities violative of the one-person, one-vote rule.

The proper reassignment of the 435th seat in the House of Representatives, if Florida were successfully penalized through the removal of one of its seats, is beyond the scope of this Comment. The Penalty Clause itself gives no clear answer to that question; it may even be argued that the Penalty Clause does not require its reassignment at all. It may simply be that the enforcement of this long-dormant provision would require, at least temporarily, a reduction in the number of Representatives in the House, from 435 to 434. This seems unlikely, however, as the size of the House has been stable since 1911.[273] More likely, Congress would proceed to reassign the removed seat following the next Census. As Congress reassigns seats following the decennial Census as a matter of common practice, this added requirement of one further seat would seem to impose a truly mini-

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[268] 10 ILL. COMP. STAT. 5/3-5 (2005) ("No person who has been legally convicted . . . of any crime, and is serving a sentence of confinement in any penal institution, . . . shall vote, offer to vote, attempt to vote or be permitted to vote at any election until his release from confinement.").

[269] MILLS, *supra* note 14, at 2.

[270] *See supra* note 232 and accompanying text.

[271] As discussed *infra* at text following note 275, this may not be entirely true—Census totals include children and noncitizens, groups which are categorically ineligible to vote in federal elections. But, as I explain, because Illinois and Florida have identical practices in this regard—that is, neither children nor noncitizen residents are permitted to vote in congressional elections in either state—neither enjoys any sort of competitive advantage.

[272] 462 U.S. 725 (1983); *see supra* notes 92–100 and accompanying text.

[273] MILLS, *supra* note 14, at 1.

mal burden.[274] Of course, if Florida in the meantime elected to modify its laws such that it would not be subject to the penalty, no relief would be required.[275]

A possible objection to the argument presented here involves this theory's implications regarding the practice of counting for apportionment purposes, but denying the franchise to, noncitizen populations within states. Interestingly, the state of Florida, in addition to containing more disenfranchised former and current felons than any other state, also contains a large noncitizen population; this population's inclusion in the state's population for purposes of allotment of Representatives is potentially distorting as well. Should Florida be penalized for this reason? Should all states?

While this question cannot be addressed exhaustively here, there are several possible responses to the objection. First, while it is undoubtedly true that the inclusion of noncitizens in representative calculations defies strict representational equality ideals, practices regarding noncitizens are virtually identical (at least in this regard) in every state: No state allows its noncitizen residents to vote in national elections,[276] and thus no state, through state action, enjoys the unfair advantage of inflated representational numbers vis-à-vis any other state. The same is true for children: No state enfranchises children, and all states are permitted to count children for purposes of representation.[277] The same holds true for individuals eligible to vote, but who do not exercise that right.[278] Because states' practices are basically uniform in this regard, no state enjoys any unfair advantage in a comparative context, and so the same representational inequality issues do not appear to be implicated.

V. CONCLUSION

This Comment has attempted to inject into the disenfranchisement debate a proposal for a new challenge to the practice. The challenge outlined here is an entirely new one, and the propriety of a court making the sort of determination such a challenge would require may not be immediately evident. Indeed, a number of disenfranchisement reformers have advocated

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[274] *Id.*

[275] What precise type of modification would have the effect of rendering the suit moot is an interesting question; it is likely the case that if Florida brought its practice into line with that of other states—that is, disenfranchisement during an active sentence, and then reenfranchisement upon completion of that sentence, or after some reasonable waiting period—it would probably suffice.

[276] But some municipalities have recently begun allowing their noncitizen residents to vote in local elections. *See* Levinson, *supra* note 139, at 1273 (noting that in 1992, Tacoma Park, Maryland, "amended its municipal charter . . . to allow resident aliens to vote in local elections, joining several smaller localities in Maryland in allowing non-citizen voting," and that "in New York City, resident aliens with children in the school system are apparently allowed to vote in elections for local school boards." (internal citations omitted)).

[277] MILLS, *supra* note 14, at 6.

[278] *Id.*

and pursued legislative change, rather than litigation-based reform, in the felon disenfranchisement sphere. But, at least in this instance, there is a strong argument that the courts are in fact the only proper venue in which to address the injustices inherent in Florida's current scheme. Because the voters of the state of Florida enjoy the benefit of overweighted votes, the legislative processes and players directly answerable to those voters are unlikely to move to enact measures which would result in the lessening of the power of their constituents' votes. And because felons and former felons, the only Florida group likely to advocate for reform, cannot themselves make their voices heard in the legislative branch, there is virtually no incentive for Florida to modify the existing scheme from which its voters benefit. Voters from other states, however, are uniquely positioned to challenge this unconstitutional arrangement, and appropriately so—for it is an arrangement that injures them by diluting their power to select, and have their interests served by, representatives in the federal government. This seems thus to be the type of situation in which the Elyan principle of judicial review—that is, review designed primarily to unblock stoppages in the political processes—is most appropriate.

If the second remedial route is successful, the text of the Constitution makes clear that the application of the penalty would result not only in reduced representation in the House, but a corresponding loss of seats in the electoral college.[279] If Florida were penalized through the removal of a seat in the House of Representatives, it would accordingly lose a seat in the electoral college. This, I believe, would be the proper enforcement of the Fourteenth Amendment's penalty provision. Unless and until Florida joins the other states in a more reasonable approach to the voting rights of former felons, its disenfranchisement laws must fall, or, alternatively, it must suffer the loss of representation the Constitution compels.

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[279] U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint . . . a Number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.").