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Constitutional Law - Fourteenth Amendment - Equal Protection - Voting Rights of Ex-Felons

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ments inherent in remedy-making.[89] *Butler* is at least the third[90] decision since *Bivens* to expand the concept that was shaped there. The extension appears appropriate in light of the relevant considerations discussed here, and is consistent with *Bivens*.

Yet, the judiciary is not institutionally equipped, as is the legislature, to step into each and every perceived breach, weigh the delicate balancing policies and weave its remedial web. It is true that the courts can analyze policy and that they can and should fashion remedies where remedies are required and justified. However, the judicial power is qualitatively different from the legislative power, and the courts are unquestionably more restricted in terms of time and resources available for remedy-making than is the Congress. The judiciary should shoulder its responsibility for the protection of the individual and vindication of the Constitution willingly, but should never do so without a clear understanding of what is required for the vindication of the constitutional rights involved and of the limitations of its own energies and talents. Evidence of such an understanding is not obvious on a reading of *Butler*, and this, as well as the actual decision rendered by the court, is significant. As the court demonstrated by its own reliance on the *Moore* holding, the effects of any holding, even one lacking a verbalized rationale, can have quite far-reaching effects in this developing area of the law.

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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—EQUAL PROTECTION—VOTING RIGHTS OF EX-FELONS—The United States Supreme Court has held that California's disenfranchisement of convicted felons who have completed their sentences and paroles did not violate the equal protection clause of the fourteenth amendment.

Richardson v. Ramirez, 94 S. Ct. 2655 (1974).

When, in 1972, the individual respondents Ramirez, Lee and Gill attempted to register to vote in their respective counties, their ap-

89. *Id.*

90. It joins United States *ex rel.* Moore v. Koelzer, 457 F.2d 892 (3d Cir. 1972) and Bethea v. Reid, 445 F.2d 1163 (3d Cir. 1971).

plications were refused by local election officials solely on the basis of prior felony convictions.[1] All three respondents were charged with their respective offenses some years ago and have successfully terminated their paroles.[2] Upon denial of their registration petitions, they sought relief on behalf of themselves and others similarly situated by way of peremptory writ of mandate,[3] claiming that certain provisions of the California Constitution,[4] and the election code statutes[5] implementing these provisions, denied them their federally constituted rights under the equal protection clause of the fourteenth amendment.[6] In *Ramirez v. Brown*,[7] the California Supreme Court held that the constitutional and statutory provisions challenged by the plaintiffs Ramirez, Lee, and Gill, as ex-felons who had success-

1. Richardson v. Ramirez, 94 S. Ct. 2655 (1974).

2. Respondent Ramirez was convicted twenty-two years ago of robbery by assault and spent three months in jail, followed by parole. Respondent Lee spent two years in prison for possession of heroin, for which he was convicted nineteen years ago. Respondent Gill was convicted on three different occasions for the felonies of burglary and forgery, and, after serving some time in prison for each of these offenses, was successfully paroled.

3. In California, a writ of mandate is the equivalent of a writ of mandamus.

4. CAL. CONST. art. II, § 3, provides, *inter alia*:

> The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state.

Id. art. XX, § 11, provides:

> Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices.

See also CAL. CONST. art. XI, § 18 (1849).

5. *See, e.g.*, CAL. ELEC. CODE § 383 (West Supp. 1974); *Id.* §§ 389, 390 (West 1961), which direct county election officials to cancel the registration of all voters convicted of infamous crimes. For a complete listing of the election code statutes at issue see Ramirez v. Brown, 9 Cal. 3d 199 n.3, 507 P.2d 1345, 1348 n.3, 107 Cal. Rptr. 137, 140 n.3 (1973) [hereinafter cited as *Ramirez*].

6. U.S. CONST. amend. XIV, § 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

7. 9 Cal. 3d 199, 507 P.2d 1345, 107 Cal. Rptr. 137 (1973). This is the same case as the one presently under discussion. For a brief explanation of its renaming see note 10 *infra*.

fully completed their paroles,[8] violated the equal protection clause of the fourteenth amendment. The United States Supreme Court granted Richardson's petition for certiorari to determine the constitutional validity of state disenfranchisement provisons.[9]

After determining that the unusual procedural history of the case did not render it moot,[10] the Supreme Court reached the substantive issue: Did California's disenfranchisement of convicted felons constitute a violation of the equal protection clause? Justice Rehnquist, writing for the majority,[11] entered into a discussion of both the legislative and judicial history which he believed compelled the holding that state disenfranchisement statutes and provisions as applied to convicted ex-felons are constitutionally permissible.[12] The Court asserted that the fourteenth amendment explicitly sanctions such state action and differentiated state disenfranchisement of ex-felons from other voting limitations previously held invalid by the Supreme Court on equal protection grounds.[13] The majority cited the

8. The California Supreme Court cautiously confined its holding in *Ramirez* to persons who have completed their sentences and paroles. 9 Cal. 3d at 217 n.18, 507 P.2d at 1357 n.18, 107 Cal. Rptr. at 149 n.18.

9. Ramirez v. Brown, 414 U.S. 816 (1973).

10. Before analyzing the substantive constitutional issues presented by the petitioners, the Supreme Court entered into a complex and lengthy discussion of two fundamental procedural issues: first, whether the acquiesence of the three named electoral officials rendered the lower case moot; and second, whether the failure of the California court to issue the relief requested, *i.e.*, the peremptory writ of mandate, made that decision, in effect, an advisory opinion and, as such, outside the purview of article III. Since the Supreme Court is bound by the directive of article III, which requires a case and controversy, the Court conceded that a present controversy would not exist if the case were limited to the named parties alone; however, the introduction of the petitioner, Viola Richardson, was given considerable weight by the majority who found that this action, although not technically labeled as such, was a class action. Viola Richardson, as County Clerk of Mendocino County, had filed a complaint of intervention in the lower court case of *Ramirez*, asserting that she was a defendant in a similar suit brought by an ex-felon, and that the *Ramirez* suit would be dispositive of the litigation then pending against her. The California court added petitioner Richardson to the list of named defendants, by implication making her opponent an unnamed member of the class of ex-felons cited in the original complaint. The Supreme Court further concluded that the judgment of the California court was a declaratory judgment and not an advisory opinion as argued by Justice Marshall in his dissent. 94 S. Ct. at 2672 (Marshall, J., dissenting). The Court declared:

> The mere failure of a state court to award peremptory relief in a proceeding which it treats as one for a declaratory judgement is not an "adequate state ground" which precludes our review of its federal constitutional holding.

Id. at 2665 n.13.

11. He was joined by Justices Burger, Stewart, White, Blackmun, and Powell. Justices Marshall and Brennan filed a dissenting opinion in which Justice Douglas joined in part.

12. 94 S. Ct. at 2671.

13. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (equal protection clause used suc-

apportionment formula of § 2 of the fourteenth amendment[14] as controlling in the present case, accepting the proposition argued by the petitioner that the express language of this section specifically excludes ex-felons from the more general protective principles enunciated in the equal protection clause.

Justice Rehnquist's argument was simple and direct: first, that § 2 deals directly with state voting qualifications; second, that it specifically exempts criminal offenders from the sanctions on voting restrictions; and third, that the clear meaning of this language ought to govern unless it can be shown that Congress intended otherwise.[15] In attempting to resolve the dilemma of history[16] and reach the meaning and intent of this language, the Court firmly asserted that the purposes and motives behind the passage of § 2 are insignificant. Although the Court does not elaborate, a distinction is drawn between purpose and motive on the one hand, and meaning and intent on the other. Purpose and motive would be the social, political, and economic factors which caused the 39th Congress to draft and pass this section of the amendment, while meaning and intent

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cessfully to strike down durational residency requirements for voters); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (successful challenge to a state franchise qualification allowing only real property taxpayers to vote on certain issues); Evans v. Cornman, 396 U.S. 419 (1970) (Maryland voting law denying the right to vote to a resident of a federal reservation violates the fourteenth amendment); Cipriano v. City of Houma, 395 U.S. 701 (1969) (per curiam) (equal protection clause used to void a Louisiana law giving only property taxpayers the right to vote on the issue of revenue bonds for the city utility system); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (New York statute denying the vote to those members in a school district who did not own or lease property or were not parents of enrolled school children violated the equal protection clause).

14. U.S. CONST. amend. XIV, § 2, provides:

> 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 in 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 the 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.

15. 94 S. Ct. at 2671.

16. Justice Rehnquist admits that historical interpretation is a difficult task. *Id.* at 2666. The value of historical arguments is often questionable. *See, e.g.*, C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); Friedrich, *Law and History*, 14 VAND. L. REV. 1027 (1961); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

refer directly to the language employed. The Court concludes that unless the framers and ratifiers of the fourteenth amendment can be found to have intended more than the literal meaning of the language "except for participation in rebellion or other crime," it is committed to accepting a straight, unambiguous reading of this provision. Underlying purpose and motive will not be used by the majority to limit the apparent meaning and intent of this language.

In its effort to better understand the meaning behind § 2, the Court recounted the legislative history surrounding its passage and considered the intentions of both drafters and ratifiers. Handicapped by the sparse legislative history of § 2,[17] the Court, in an attempt to gain insight into the meaning intended by the framers, relied primarily upon the deliberations of the Joint Committee of Fifteen on Reconstruction, which drafted what ultimately became the fourteenth amendment.

Reviewing the history of the bill, Justice Rehnquist noted the introduction of a draft amendment by Senator Williams on April 28, 1866, which was later approved by a lopsided margin in the the Joint Committee on Reconstruction.[18] The Court then considered a random sampling of comments by some of the chief architects of § 2. The Court admitted the paucity of debate, but nevertheless felt committed to examine the record in the hope that they might better understand the meaning and intent behind these words. Remarks by the liberal Congressmen John Bingham of Ohio, Thomsal Eliot of Massachusetts, and Ephraim Eckley of Ohio, as well as some floor discussion by the Senate, were offered by the Court as evidence that the intentions of the framers and proponents of § 2 would only be realized by a plain and simple reading.[19]

A constitutional amendment is rarely the work of a single congressional committee or a few leading statesmen; rather, it is the expressed intent of many Americans. Recognizing this, the Court attempted to understand how the various states of the union interpreted the language of § 2 when they ratified it.[20] Reviewing the

17. 94 S. Ct. at 2666. For some original source material see CONG. GLOBE, 39th Cong., 1st Sess. (1866); VIRGINIA COMM'N ON CONSTITUTIONAL GOVERNMENT, THE RECONSTRUCTION AMENDMENT'S DEBATES (1967).

18. 94 S. Ct. at 2666.

19. 94 S. Ct. at 2666-67.

20. The historical analysis and approach employed by the majority opinion closely parallels the dissents by Justice Harlan in Carrington v. Rash, 380 U.S. 89, 97-100 (1965), and Reynolds v. Sims, 377 U.S. 533, 593-614 (1964).

Reconstruction Act of 1867[21] and other readmission statutes, and looking briefly at state constitutional provisions,[22] the Court reasoned that the states, too, meant exactly what they appeared to be saying when they ratified § 2 of the fourteenth amendment. The readmission statutes to which the Court referred are a series of enabling acts, passed during 1868 and 1870, readmitting the Southern states to representation in Congress. These acts uniformly contained a provision closely akin to § 2 of the fourteenth amendment. The majority cites these enabling statutes as further confirmation of its position that the ratifiers, as well as the framers, intended a literal reading of this amendment.

Finally, the Court took a brief look at the judicial history of state disenfranchisement provisions and was persuaded that this history supports their constitutionality and the Court's interpretation of the fourteenth amendment as recounted above. The Court relied primarily upon two nineteenth century cases, *Murphy v. Ramsey*[23] and *Davis v. Beason*.[24] Both cases dealt with the constitutional propriety of territorial laws which precluded bigamists and polygamists from registering to vote. In *Murphy*, the petitioner unsuccessfully challenged a law which prohibited polygamists from registering to vote. He claimed it was unconstitutional as an *ex post facto* law, since disenfranchisement applied only to persons who were practicing polygamy at the time they attempted to register.[25] In *Davis*, the petitioner claimed that an Idaho law disenfranchising members of organizations which supported and taught polygamy was a violation of his first amendment rights.[26] Here, too, the petitioner was unsuccessful. Two recent summary affirmances issued by the Supreme Court were used by the majority to update its argument and demonstrate that judicial precedent, both old and new, supports its conclusion. In *Fincher v. Scott*,[27] a memorandum decision, the Court

21. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428. The act's relevance is in its conditional tone: for readmission to the Union, all states must provide male citizens twenty-one years or older with the franchise, exluding from that protection any citizen disenfranchised for participation in rebellion or other felony at common law.

22. Most of these state constitutional provisions openly disenfranchised those convicted of crime, or at least directed their legislatures to do so if they saw fit.

23. 114 U.S. 15 (1885).

24. 133 U.S. 333 (1890).

25. 114 U.S. at 40-41.

26. 133 U.S. at 336-37.

27. 411 U.S. 961 (1973).

affirmed a lower court ruling[28] dismissing an ex-felon's constitutional challenge to state legislative provisions which denied him the right to vote. Similarly, in *Beacham v. Braterman*,[29] the Court affirmed a district court ruling[30] that a state may constitutionally exclude convicted felons from the vote.[31] Both petitioners in *Fincher* and *Beacham* failed in their efforts to convince the Court of the merits of their fourteenth amendment claims.

Policy considerations and arguments were found unconvincing and bore no influence on the Court's decision.[32] Rather, the Court felt bound by the clear and precise meaning of § 2 of the fourteenth amendment, which affirmatively sanctions the exclusion of felons from the vote. Conceding that the policy arguments presented by respondents may have some merit, the Court declared its reluctance to step into the shoes of the legislature, which was better prepared to weigh and balance the values in question.[33]

Justice Marshall dissented on procedural grounds,[34] but since the majority reached the merits of the claim, he recorded his dissent on substantive grounds as well. To Justice Marshall, the special political character of § 2 and its general overriding objectives[35] were clear and dispositive of the issues in the case. He regarded § 2 as purely a penalty provision, wholly independent of the equal protection

28. Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972).

29. 396 U.S. 12 (1969).

30. Beacham v. Braterman, 300 F. Supp. 182 (S.D. Fla. 1969).

31. However, the Florida Legislature has since changed its statutory provision disenfranchising criminal elements; *see* FLA. STAT. ANN. § 940.05 (1973).

32. The majority, in assessing policy considerations, declared that "it's not for us to choose one set of values over the other." 94 S. Ct. at 2671.

33. *Id.*

34. *Id.* at 2672-86 (Marshall, J., dissenting). For Justice Marshall the case was both moot and advisory in nature. *See* note 10 *supra*.

35. Justice Marshall is in full accord with the views of Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33 [hereinafter cited as Van Alstyne]. Van Alstyne, in discussing the political objectives of § 2 said:

> On the whole record . . . it seems quite impossible to conclude that there was a clear and deliberate understanding in the House that § 2 was the sole source of national authority to protect voting rights, *or that it expressly recognized the states' power to deny or abridge the right to vote.* It may be closer to the mark to suggest that: (1) Section 2 left the disputed respective powers of the state and federal government over the franchise unaffected. (2) It was concerned with overcoming the apportionment formula of Article I, the better to assure the power of Congress to reduce southern representation in the House and Electoral College.

Id. at 65 (emphasis added).

clause, and never intended as a limitation on any other sections of the fourteenth amendment. The essence of the dissent's argument was that § 2, with its peculiar legislative history and purposes, was a political maneuver by a liberal, Republican Congress to maintain political hegemony by forcing the Democratic South to enfranchise the Negro voters or lose its congressional representation. Once Justice Marshall resolved the language problem presented by § 2, he went on to employ an equal protection analysis similar to that used by the Supreme Court of California in the *Ramirez*[36] decision. He measured the disenfranchisement of ex-felons against the requirements of the equal protection clause, as that clause has been interpreted in a variety of recent voting rights cases,[37] and found that the state failed to meet its burden of justifying such a wholesale restriction on suffrage. Since other less restrictive means were available,[38] he concluded, the state was compelled under recent case law[39] to choose the path which is least burdensome on our constitutionally protected rights.

Background of the Decision

As Justice Rehnquist pointed out,[40] the courts have traditionally approved the disenfranchisement of felons,[41] confirming that the power to set voting qualifications is specifically reserved to the states.[42] The usual rationale for supporting such exclusions has been

36. 9 Cal. 3d at 206-17, 507 P.2d at 1349-57, 107 Cal. Rptr. at 141-49.

37. *See* cases cited note 13 *supra*.

38. 94 S. Ct. at 2683.

39. *Id.*, *citing* Rosario v. Rockefeller, 410 U.S. 752 (1973) (Powell, J., dissenting); Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

40. 94 S. Ct. at 2670.

41. *Id.*, *citing* Lassiter v. Northampton Co. Bd. of Elections, 360 U.S. 45, 51 (1959) (dictum); David v. Beason, 133 U.S. 333, 346-47 (1890); Murphy v. Ramsey, 114 U.S. 15 (1885); Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968). *See also* Gray v. Sanders, 372 U.S. 368, 380 (1963) (dictum); Trop v. Dulles, 356 U.S. 86, 96-97 (1958) (dictum); Estep v. United States, 327 U.S. 114, 122 n.13, (1946) (dictum); Hayes v. Williams, 341 F. Supp. 182 (S.D. Tex. 1972).

42. U.S. Const. art. II, § 1 provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .

See also Pope v. Williams, 193 U.S. 621 (1904), in which the court said:

> In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem

the protection of the purity of the ballot box[43] although various other reasons have been offered and accepted throughout history.[44] Many of the states continue to feel these same needs today and have either enacted or maintained legislation depriving the criminal offender of the right to vote.[45] While twenty-five states automatically restore the vote upon completion of either sentence or parole, almost fifty

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proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.

Id. at 632. More recently the Court has said:

> We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record, are obvious examples indicating factors which a State may take into consideration in determining the qualification of voters.

Lassiter v. Northhampton Co. Bd. of Elections, 360 U.S. 45, 51 (1959) (footnotes omitted). But for cases which have held that the general approval of state prerogative is always subject to other constitutional standards see Oregon v. Mitchell, 400 U.S. 112 (1970); Williams v. Rhodes, 393 U.S. 23 (1968); Katzenbach v. Morgan, 384 U.S. 641 (1966); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

43. The oft-quoted leading state case on the subject of felon disenfranchisement and its underlying objective is Washington v. State, 75 Ala. 582, 51 Am. R. 479 (1884): "The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty . . . ." *Id.* at 585, 51 Am. R. at 481. *See also* Application of Marino, 23 N.J. Misc. 159, 42 A.2d 469 (C.P. Essex Co. 1945) (the purity of the electoral process was presumed to be enhanced by legislation which denied felons the right to vote); State *ex rel.* Barrett v. Sartorius, 351 Mo. 1237, 175 S.W.2d 787 (1943).

44. Precedent may be found which supports the position that the underlying purpose behind most voter disqualification statutes is Lockian at base—the maintenance of a prudent and responsible electorate through the exclusion of parties who have shown themselves to be contemptuous of our lawful processes; *see* Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967), "A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact . . . . "; Boyd v. Mills, 53 Kan. 594, 37 P. 16, 17 (1894), where the court declared:

> In determining who shall exercise the right of suffrage, may not the people exclude classes who have shown themselves unfaithful to a public trust, or who have engaged in hostilities against either the state or federal government?

Id. at 603, 37 P. at 17. *See also* Anderson v. Baker, 23 Md. 532, 578-79 (1865). For a general discussion of legislative purpose and disenfranchisement statutes see Du Fresne, *The Case for Allowing 'Convicted Mafiosi to Vote for Judges': Beyond Green v. Board of Elections of New York City*, 19 DE PAUL L. REV. 112, 121-27 (1969); Comment, *The Collateral Consequences of Criminal Conviction*, 23 VAND. L. REV. 929, 982-83 (1971). Delaware is apparently the only state which clearly permits the legislature to disenfranchise criminals as additional punishment; *see* DEL. CONST. art. V, § 2. *But see* Trop v. Dulles, 356 U.S. 86 (1958), denying by way of dictum that such disenfranchisement statutes are legitimate exercises of a state's penal authority.

45. Only four states, Maine, Michigan, Tennessee and Arkansas, do not deny the vote to convicted criminals. Twenty-three states automatically revoke the privilege upon conviction, but restore it upon successful completion of sentencing or parole. For a complete breakdown of each state's approach to this problem see Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721 (1974).

percent continue to disenfranchise the ex-offender for the rest of his life,[46] denying him forever an effective political voice. The opinion rendered by this Court will immediately affect numerous ex-offenders[47] who want to exercise the franchise and will eventually affect the voting rights of all persons presently incarcerated.

INTER-RELATION OF THE EQUAL PROTECTION CLAUSE AND § 2

The majority believed that the express language of § 2 of the fourteenth amendment specifically excludes ex-felons from the more general protective principles of the equal protection clause. This same proposition, so critical to the central issues of the case, was first advanced in *Green v. Board of Elections of the City of N.Y.*[48] There a federal court held that the petitioner had not presented a substantial federal question, and found no violation of the equal protection clause, reading that clause in conjunction with the more detailed and specific language of § 2. The court in *Green* declared that the framers of the fourteenth amendment could not have intended the broad language of the equal protection clause to forbid a discrimination which § 2 obviously allowed.[49] As in *Green*, the majority in the present case considered § 2 to be the only relevant provision; its legislative history was felt to be critical to a thorough understanding of its meaning.

But the legislative history the majority found so essential to its analysis was given only a cursory treatment. The selective nature of the Court's legislative accounting becomes obvious when we realize that the draft amendment cited by Justice Rehnquist as having been introduced in April, 1866, was actually introduced in January of that year[50] and did not include the critical language relied on by the petitioner.[51] Furthermore, the earlier draft of § 2 met with over-

46. *Id.* at 727.

47. The California Supreme Court in *Ramirez* estimated that there are at least 100,000 ex-felons in the state of California alone. 9 Cal. 3d at 203 n.2, 507 P.2d at 1347 n.2, 107 Cal. Rptr. at 139 n.2 (1973).

48. 380 F.2d 445 (2d Cir. 1967). However, since the decision in *Green*, New York has amended its election statutes to provide for automatic restoration of voting rights to all felons who have successfully completed their sentence or parole; *see* N.Y. ELECTION LAW § 152 (McKinney Supp. 1973).

49. 380 F.2d at 452.

50. For a complete chronology of the bill see Van Alstyne, *supra* note 35, at 86.

51. It will be recalled that § 2 provides:

whelming approval in the House,[52] but failed to muster the requisite two-thirds vote for passage in the Senate.[53] These facts surrounding the earlier draft of the amendment were inconsequential to the majority, who obviously felt that the intent of the drafters of § 2 was to be gleaned more from a twentieth century dictionary understanding of the language than from a thorough investigation into the events which produced the final amendment.

The central difference between the historical approaches of the dissent and majority opinions was in the weight given to the legislative purposes and motives behind the passage of § 2. According to Justice Marshall and most constitutional historians, the political exigencies of the times were the chief factors behind the drafting and passage of § 2.[54] The only real dispute over the purposes behind the passage of § 2 is this: Did the drafters have the loftier ideal in mind of encouraging and extending suffrage to the newly emancipated slaves who, in turn, would then support the Republican North as their benefactors and liberators;[55] or was § 2 simply a move to

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> Representatives shall be apportioned among the several States according to their respective numbers . . . . But when the right to vote at any election . . . 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 . . . .

U.S. CONST. amend. XIV, § 2. However, the Joint Committee's original proposal took the following form:

> Representatives shall be apportioned among the several States . . . : Provided, that whenever the elective franchise shall be denied or abridged in any State on account of race or color, the persons therein of such race or color shall be excluded from the basis of representation.

AMES, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 1789-1889, at 52. There was no mention of excluding criminal elements from the franchise in this original draft.

52. The House overwhelmingly approved this draft amendment with 120 yeas to 46 nays; CONG. GLOBE, 39th Cong., 1st Sess. 538 (1866).

53. *Id.* at 1289. In late April, the bill was amended and revised to meet its current form, passing the House on May 10th and the Senate, with minor changes, on June 8th, and was finally accepted by House concurrence on June 13th. Van Alstyne, *supra* note 35, at 86.

54. H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1965) [hereinafter cited as FLACK]; JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956) [hereinafter cited as JAMES]; Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORN. L.Q. 108 (1960) [hereinafter cited as Bonfield]; Van Alstyne, *supra* note 35, at 65; Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93 (1961) [hereinafter cited as Zuckerman].

55. JAMES, *supra* note 54, at 129. James feels that § 2 was aimed at state laws which retard suffrage: "[W]here the state has consciously decided . . . that a group of citizens are unfit to exercise the right to vote—that the penalty of § 2 should be applied." *Id.*

humble and punish the South, with no forethought given to the expansion of suffrage?[56] The Thirty-Ninth Congress, convened in the wake of war, had recently abolished slavery through the thirteenth amendment. Its passage had tremendously upset the delicate balance of power between a Republican North and a Democratic South, a balance which had been maintained through article I of the Constitution.[57] Indeed, the legislative history of § 2, as well as the fact that it has lain idle for over a century,[58] point to a conclusion that this section was nothing more than the by-product of a strained political atmosphere, and that our illustrious forefathers were more concerned with partisan matters than great principles of government. Nevertheless, the majority opinion ignored these facts, and focused solely on the express language of § 2, giving no consideration to the actual purposes of this provision.[59]

COMMENTARY ON PRIOR CASE LAW

The decisional law relevant to the issues presented by respondents appears to be split, at least in the lower courts,[60] and what

56. FLACK, *supra* note 54, at 105. A slightly different emphasis is taken by Flack, who feels that § 2 was drafted to reduce Southern leadership and representation, a result which would naturally follow when the Negro was denied the vote. This reduced representation would then offset any possible gains that a Democratic South would glean from the thirteenth amendment and the abolition of the old three-fifths status of the former slaves. A third position, assumed by Zuckerman, *supra* note 54, has been suggested as an underlying objective of § 2. At the time § 2 was proposed, a large number of citizens had lost the vote by their participation in rebellion, particularly in the border states like Missouri. Section 2, he argues, was an assurance by Congress that these disenfranchised rebels would not cost the state any loss in representation.

57. U.S. CONST. art. I, § 2, provides in pertinent part:

> Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . three fifths of all other Persons.

58. Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946), was one of the few attempts ever made to enforce the penalty provision of § 2. The petitioner in *Saunders* unsuccessfully challenged the validity of the Virginia poll tax which disenfranchised 60 per cent of Virginia's residents. He argued that Virginia's representational base should be reduced accordingly as mandated by § 2 of the fourteenth amendment. *See also* Bonfield, *supra* note 54, at 108, for a clever suggestion on implementing § 2 in order to expand suffrage.

59. It should be recalled that § 2 is couched in the language of an enumeration principle, with reapportionment its obvious objective.

60. Two lower court cases which have upheld state disenfranchisement provisions are Hayes v. Williams, 341 F. Supp. 182 (S.D. Tex. 1972), and Kronlund v. Honstein, 327 F.

little case law the Supreme Court has produced seems to be of dubious merit. The earlier nineteenth century cases relied upon, *Murphy v. Ramsey*,[61] and *Davis v. Beason*,[62] were decisions handed down before the fourteenth amendment was used to invalidate state voter qualifications.[63] Furthermore, the proposition for which these cases stand, that a state may disenfranchise a group of voters in order to protect the established order from hostile elements, has been recently eroded by the Court.[64] While the nineteenth century saw minority opinion as a threat to the status quo, this century has witnessed a far more sophisticated and libertarian view of minority voices. The Supreme Court has repeatedly reaffirmed its position that citizens may not be excluded from the franchise because of the way they might cast their ballots.[65]

The two recent decisions relied on by the majority, *Fincher v. Scott*[66] and *Beacham v. Braterman*,[67] were summary affirmances, and as such their precedential value is somewhat limited. Justice Rehnquist himself has only recently informed us that summary affirmances are clearly not of the same value as cases decided on the merits and given plenary consideration by the Court.[68] And Justice Rehnquist's own findings have found support in a recent Washington case[69] challenging provisions of state law which deprived paroled ex-felons of the right to vote.

Supp. 71 (N.D. Ga. 1971). Two cases which have struck down disenfranchisement statutes are Stephens v. Yeomans, 327 F. Supp. 1182 (D.N.J. 1970), and Dillenburg v. Kramer, 469 F.2d 1222 (9th Cir. 1972).

61. 114 U.S. 15 (1885).

62. 133 U.S. 333 (1890).

63. It will be recalled that the petitioner in *Murphy* claimed that the particular law in question was *ex post facto*; in *Davis* the claim was based on the first amendment.

64. Cases cited note 65 *infra*.

65. *See* Communist Party v. Whitcomb, 414 U.S. 441 (1974); Evans v. Cornman, 396 U.S. 419, 423 (1970); Cipriano v. City of Houma, 395 U.S. 701, 705-06 (1969) (per curiam); and Carrington v. Rash, 380 U.S. 89, 94 (1965) where the Court explicitly held that "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."

66. 411 U.S. 961 (1973).

67. 396 U.S. 12 (1969).

68. Edelman v. Jordon, 94 S. Ct. 1347 (1974), where Justice Rehnquist himself noted:

> Equally obviously [Shapiro v. Thompson, 394 U.S. 168, and three summary affirmances thereof] are not of the same precedential value as would be an opinion of this Court treating the question on the merits. Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law.

Id. at 1359.

69. Dillenburg v. Kramer, 469 F.2d 1222 (9th Cir. 1972). The *Dillenburg* court took the

Even conceding that *Davis*, *Murphy*, *Beacham* and *Fincher* should be paid homage by the Court, the case law in the area of voting rights generally compels a very different interpretation than that employed by the majority. The history of suffrage in the United States might easily be described as a move from privilege to right—from a privileged ten percent voting in the nineteenth century to a voting base which now includes nearly all Americans over the age of eighteen.[70] Sex, color, property holdings, conditions of past servitude, and age[71] have been abolished as criteria. As early as 1886, in *Yick Wo v. Hopkins*,[72] the Court recognized that the franchise is a fundamental right because it acts to preserve and maintain all other rights.[73] It was not until the Warren era, however, that the Court worked actively to give content and meaning to the constitutional platitudes of the nineteenth century.[74] In recent judicial history, the franchise has been considerably expanded[75] and weighted,[76] with the Court regarding any infringement upon that

position that "[a] summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction has very little precedential significance." *Id.* at 1225. *See also* Serrano v. Priest, 5 Cal. 3d 600, 487 P.2d 1241, 96 Cal. Rptr. 610 (1971); Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 14 (1930).

70. R. STOREY, OUR INALIENABLE RIGHTS 47 (1965); Kirby, *The Constitutional Right to Vote*, 45 N.Y.U.L. REV. 995 (1970) (discussing the tremendous expansion of political equality in this country as the courts have gradually brought the right to vote within the ambit of first amendment guarantees).

71. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970); Kramer v. Union Free School Dist., 395 U.S. 612 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); U.S. CONST. amend. XIX, XV, XXVI.

72. 118 U.S. 356 (1886).

73. *Id.* at 370.

74. *See, e.g.*, the reapportionment decisions of the Warren Court: Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U. S. 368 (1963). *See also* Katzenbach v. Morgan, 384 U.S. 641 (1966); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965).

75. For cases involving expansion of the right to vote see Dunn v. Blumstein, 405 U.S. 330 (1972); Oregon v. Mitchell, 400 U.S. 112 (1970); Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969) (per curiam). For cases involving pretrial detainees and expansion of the right to vote see O'Brian v. Skinner, 414 U.S. 524 (1974) (invalidated a New York election scheme which denied convicted misdemeanants and pretrial detainees the right to register or vote by absentee ballot); Goosby v. Osser, 409 U.S. 512 (1973) which involved an absolute denial of the vote to pre-trial detainees and, therefore, was not governed by the Court's earlier holding in McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969). The petitioners in *McDonald* failed because they could not demonstrate that they were absolutely prohibited from voting, but could only show that they were denied access to absentee ballots.

76. *See* the reapportionment cases cited note 74 *supra*; Westbrook v. Mihaly, 403 U.S. 915 (1971) (vacated on other grounds); Rimarcik v. Johansen, 310 F. Supp. 61 (D. Minn.

right with meticulous scrutiny.[77] Nor has this expansion of suffrage been limited to the judicial sphere of governmental action, for Congress, too, has seen and attested to the need for this country to include all elements in the electoral processes of government,[78] be they the young, the dissident or the illiterate.

CONCLUSIONS

In assuming a position which levels all articles and amendments of the Constitution to a position of equal weight and merit, the Court took the simpler interpretive route, but one which overlooked the historical complexities which surround any given event. In deciding that § 2 alone governs the issues of this case, the majority not only ignored the immediate history surrounding the passage of the fourteenth amendment but denied over one hundred years of judicial and legislative interpretation which has developed and refined our understanding of the equal protection clause—a clause which has helped to build a more egalitarian society, one which responds to the needs of all its members by giving them a real and effective voice in its governing processes.

Futhermore, the Court openly ignored the practical ramifications of this decision,[79] claiming that such considerations belong solely to the legislative branch. This decision enlarges an already enormous gulf which exists between the ex-offender and society. It overlooks not only recent advances in voting rights generally, but also this century's changing concepts of criminal justice.[80] The medieval atti-

1970). Both *Westbrook* and *Rimarcik* dealt with dilution of the voting power of affirmative voters when state laws required over 50% approval of the electorate on certain issues.

77. The Supreme Court has repeatedly articulated a rigid standard of review in cases where state laws grant the vote to some, while denying it to others. Goosby v. Osser, 409 U.S. 512 (1973); Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

78. Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973(a) (1970), *amending* Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (1965), where age, residency and literacy requirements were all considerably altered and reduced.

79. *See, e.g.*, Galloway v. Council of Clark, 92 N.J. Super. 409, 223 A.2d 644 (1966), where a city councilman found himself in the anomalous situation of being able to vote on city ordinances as part of his official duties, yet unable to vote in regular public elections due to his disenfranchisement for an offense committed while in office.

80. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ch. 8 (1967), in which the Commission adopted the ALI MODEL PENAL CODE § 306.3, denying criminal offenders the vote only while under sentence.

tude of vindictiveness and retribution is shifting to a more enlightened, humanitarian stance, and the goals of incarceration are now rehabilitative and corrective, not penal. But the decision taken by this Court could hardly be described as one which will be conducive to re-incorporating the ex-offender into society as a full and participating member. Ideally, these issues should be raised and settled by the legislature, but it is naive to suppose that state legislatures across the country are going to take the time and effort to alter existing legislation, and in many cases repeal and draft constitutional amendments, when their constituents care little for the lot of the ex-offender. In turning its back on the ex-felon and denying him the only realistic path for redress of his grievances, the Court makes a mockery of the concept of rehabilitation, leaving the "mark of Cain" indelibly impressed upon the ex-offender for life.

Anne M. Nelson

MONOPOLIES—COMBINATION AND CONSPIRACY—INDUCING GOVERNMENT ACTION—CONSTITUTIONAL LAW—FIRST AMENDMENT—RIGHT OF PETITION—The United States Supreme Court has held, in a private action under the Clayton Act, that a cause of action was stated where it was alleged that a group of interstate motor carriers conspired to monopolize trade and commerce in the transportation of goods by engaging in concerned activities to institute actions in state and federal courts and agencies to resist and defeat plaintiff's applications for operating licenses.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

The respondents, highway carriers in California and plaintiffs below, filed a civil action under section 4 of the Clayton Act.[1] They sought injunctive relief and damages against petitioners, who are

1. 15 U.S.C. § 15 (1970) provides:
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendent resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.