BYU Law Review

Volume 2003 | Issue 2 Article 14

5-1-2003

# The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office

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## I. INTRODUCTION

The 2002 race for Ohio's 17th District congressional seat included three candidates: Democrat Tim Ryan of Niles, Ohio; Republican Ann Womer Benjamin of Aurora, Ohio; and Independent James A. Traficant Jr. of Federal Prison, Pennsylvania.[1] On April 9, 2002, Ohio Congressman James Traficant was convicted of ten counts of bribery, racketeering, filing false tax returns, and forcing aides to do chores around his Ohio farm.[2] As a result of these convictions, on July 24, 2002, Traficant was kicked out of Congress by a vote of 420 to 1.[3] On July 30, Traficant was sentenced to eight years in a federal prison in White Deer, Pennsylvania.[4] Throughout the trial and congressional hearings, Traficant maintained his innocence and threatened to run for office from his prison cell. "I'm running," he said, "and I wouldn't be surprised if I'm elected from a jail cell because people know I got railroaded back here."[5] True to his word, Traficant was on the ballot when the citizens of Ohio went to the polls on November 5, 2002.[6] Although Traficant was defeated, one looming question remains: had he been elected, could Traficant have legally taken his seat in Congress?

1. Tom Diemer & Martin Stolz, *It's Likely Traficant Can Run, Research Arm of Congress Says*, PLAIN DEALER (Cleveland), Aug. 16, 2002, at A2, *available at* 2002 WL 6375648.

2. *Traficant Guilty of Bribery, Racketeering* (Apr. 12, 2002), *at* http://www.cnn.com/2002/LAW/04 /11/traficant.trial/index.html.

3. Matt Smith et al., *House Gives Traficant the Boot: Prison Might Be Next for Former Lawmaker* (July 25, 2002), *at* http://www.cnn.com/2002/ALLPOLITICS/07/24/traficant.expulsion/. The only vote against expulsion came from Representative Gary Condit of California. *Id.*

4. Associated Press, *Traficant Gets 8 Years on Corruption Charge* (July 30, 2002), *at* http://www. usatoday.com/news/nation/2002-07-30-traficant_x.htm.

5. Smith et al., *supra* note 3.

6. Ryan won the election with 51.14% of the vote. Benjamin came in second with 33.67% of the vote, and Traficant received 15.19% of the vote. *See* OHIO SEC'Y OF STATE, VOTES FOR U.S. CONGRESS, *at* http://www.state.oh.us/sos/2002General/02GenUS Congressional.htm (last visited Apr. 18, 2003) (2002 election returns).

Many Americans may not realize that jail time is not the only possible consequence of a felony conviction. Currently, millions of Americans are denied access to the polls under state laws that preclude convicted felons from voting. These state voter disenfranchisement[7] laws have come under attack in recent years; opponents of the laws argue that they have an unconstitutional effect on the political process, including denying the vote to over ten percent of the African-American population.[8] Along with voter disenfranchisement laws, many states have candidate disenfranchisement laws, which do not allow convicted felons to run for political office. This particular aspect of disenfranchisement laws has received little attention, but the 2002 Ohio congressional race had the potential to bring this issue to the forefront.

An analysis of disenfranchisement laws reveals that, while Traficant could not have voted in an election or held a state-elected office in Ohio, he very likely could have represented the people of Ohio in the federal government. In other words, the State of Ohio can deny Traficant the right to vote for his representative in Congress, but it cannot keep him from *being* that representative. This perplexing result arises out of the Supreme Court's interpretation of the Qualifications Clauses of the Constitution.[9] While courts have consistently upheld voter disenfranchisement and state candidate disenfranchisement laws, Supreme Court precedent suggests that a convicted felon could run for federal office. However, the history and policy behind both voter and candidate disenfranchisement laws support federal candidate disenfranchisement laws as well.

7. For the purposes of this paper, "voter disenfranchisement" refers to laws denying a convicted felon the right to vote, "candidate disenfranchisement" refers to laws precluding a convicted felon from running for public office, and "felony disenfranchisement" or "disenfranchisement" alone refers to both types of laws.

8. *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1950–52 (2002).

9. The Qualifications Clause for representatives provides: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2. The Qualifications Clause for senators provides: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." *Id.* § 3, cl. 3.

This paper compares the judicial interpretation of and the policies behind voter and candidate disenfranchisement laws. Part II summarizes the felony disenfranchisement laws of the fifty states and the District of Columbia. Part III reviews the judicial interpretation of those laws. Part IV analyzes whether Traficant could have taken office if elected, concluding that while Ohio law prohibits convicted felons from holding office, the Supreme Court's interpretation of the Constitution likely would allow a convicted felon to hold federal office. Part V analyzes the purposes behind voter and candidate disenfranchisement laws, asserting that policy may not support denying an ex-felon the right to vote after completion of the sentence but concluding that the states' interest in protecting their citizens does support at least a partial ban on allowing ex-felons to hold public office. Part VI suggests a possible compromise to solve the disparity between voter and candidate disenfranchisement laws. A brief conclusion follows in Part VII.

## II. DISENFRANCHISEMENT LAWS

Losing the right to vote as a result of a felony conviction and losing the right to hold public office as a result of that conviction are inextricably linked. Consequently, in order to understand the policies and implications of losing the right to hold public office, both aspects of felony disenfranchisement laws must be addressed.

### *A. The Right to Vote*

Most states have some restriction on the right of convicted felons to vote. Maine and Vermont are the only states that have no restrictions, currently allowing felons to vote from prison.[10] Fifteen states and the District of Columbia deny the right to vote only while the felon is in prison.[11] The remaining states have varying degrees of disenfranchisement. Sixteen states disenfranchise both probationers and parolees.[12] Four states disenfranchise parolees but not

10. SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2002), http://www.sentencingproject.org/brief/pub1046.pdf.

11. *Id.* (Hawaii, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, and Utah).

12. *Id.* (Alaska, Arkansas, Georgia, Kansas, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin).

probationers.[13] Thirteen states disenfranchise some categories of ex-felons who have completed their sentences.[14] Only eight of those thirteen states permanently disenfranchise first-time offenders, which means that voting rights can only be restored through a pardon or other order.[15]

### *B. The Right to Hold Office*

State law regarding whether a convicted felon can run for office varies widely. However, the states can be grouped according to essential characteristics.

#### *1. States that do not deny the right to hold office*

Some states essentially do not bar convicted felons from running for office. For example, New York disenfranchises inmates and parolees, but the law does not pose any requirement that a candidate have a clean criminal record.[16] Kansas law allows for forfeiture of public office upon conviction but does not explicitly preclude convicted felons from running.[17] Other states included in this category are Vermont,[18] Oregon,[19] Tennessee,[20] and Massachusetts.[21]

13. *Id.* (California, Colorado, Connecticut, and New York).

14. *Id.* Arizona and Maryland disenfranchise second-time offenders, but automatically restore voting rights to first-time offenders. Delaware disenfranchises some ex-felons for only five years. Tennessee and Washington no longer disenfranchise ex-felons, but after amending their laws, they failed to provide a way to restore voting rights to those disenfranchised under prior law. *See Developments in the Law—The Law of Prisons*, *supra* note 8, at 1948–49.

15. SENTENCING PROJECT, *supra* note 10. Those eight states are Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, Virginia, and Wyoming.

16. *See* N.Y. CONST. art. III, § 7 (amended 2001) (qualifications of a legislator are U.S. citizenship and residency in New York for five years).

17. KAN. STAT. ANN. § 25-2432 (2000).

18. Vermont only requires a candidate to get enough signatures to be put on the ballot. VT. STAT. ANN. tit. 17, § 2353 (2002).

19. Oregon law is unclear on whether convicted felons can run for office. A public officer can be removed from office for conviction, OR. REV. STAT. § 236.010 (2001), but does not seem to specifically require a candidate to be an eligible voter. *But see id.* § 249.020 (2001) ("An eligible elector may become a candidate for nonpartisan office . . . .").

20. Tennessee law is also unclear on whether convicted felons can run. *See* TENN. CODE ANN. § 40-20-112 (1996).

21. The Massachusetts constitution gives all citizens equal right to hold office. *See* MASS. CONST. pt. 1, art. IX.

*2. States that automatically restore the right to hold office*

Three states simply require that the person's sentence be completed before running for office. Hawaii law states, "A person sentenced for a felony, from the time of the person's sentence until the person's final discharge, may not . . . [b]ecome a candidate for or hold public office."[22] The other two states that automatically restore the right to hold office once a person's sentence is completed are Montana[23] and North Dakota.[24] These states essentially grant a convicted felon the right to run for office immediately upon completion of the sentence.

*3. States that only restore the right to hold office after restoration of civil rights*

Eleven states require that in order to run for office, a felon must have received a pardon or otherwise have had his civil rights restored. For example, the Florida constitution states, "No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights . . . ."[25] Other states in this category include Idaho,[26] Illinois,[27] Iowa,[28] Kentucky,[29] Mississippi,[30] North Carolina,[31] Ohio,[32] Texas,[33] Utah,[34] and Wisconsin.[35] Procedures for having civil rights restored vary from state to state.[36]

22. HAW. REV. STAT. § 831-2(a)(2) (1993).

23. MONT. CONST. art. IV, § 4.

24. N.D. CENT. CODE § 12.1-33-01 (1997).

25. FLA. CONST. art. VI, § 4.

26. IDAHO CONST. art. VI § 3.

27. 10 ILL. COMP. STAT. ANN. 5/29-15 (West 1993).

28. IOWA CODE ANN. § 57.1(2)(c) (West 1999).

29. KY. CONST. § 150.

30. MISS. CODE ANN. § 99-19-35 (2000).

31. N.C. CONST. of 1970, art. VI, § 8.

32. OHIO CONST. art. V, § 4 (amended 1976); OHIO REV. CODE ANN. § 2961.01 (West 1997) (granting felons on probation or parole the right to vote but denying the right to hold public office unless restored by full pardon).

33. TEX. ELEC. CODE ANN. § 141.001 (Vernon 1986); *see also* TEX. CONST. of 1876, art. XVI, § 2 (laws shall be made to exclude felons from office).

34. UTAH CONST. art. IV, § 6.

35. WIS. CONST. art. XIII, § 3 (amended 1996).

36. *See infra* Part II.C.

*4. States that link qualification for office to voter qualifications*

Seventeen states and the District of Columbia[37] link the right to run for office directly to the right to vote. Thus, if the right to vote is automatically restored, so is the right to run for office. Maine, for example, requires the candidate to be a registered voter, but since inmates can vote, no one convicted of a felony is barred from running for office.[38] Some states, on the other hand, do not automatically restore the right to vote. Arizona requires a candidate to be a qualified elector (voter),[39] and a convicted felon in Arizona must go through certain procedures to have his right to vote restored.[40] Other states linking qualification for office to voter qualifications include Alaska,[41] California,[42] Colorado,[43] Connecticut,[44] Maryland,[45] Michigan,[46] Minnesota,[47] Missouri,[48] Nebraska,[49] Nevada,[50] New Jersey,[51] New Mexico,[52] Virginia,[53] Washington,[54] and Wyoming.[55] In these states, the right to run for public office depends on whether the convicted felon is restored the right to vote.

37. D.C. CODE ANN. §§ 1-1001.02(7), 1-1001.08(b)(1) (2001 & Supp. 2002).

38. ME. REV. STAT. ANN. tit. 21-A, § 333 (West 1993).

39. ARIZ. CONST. art VII, § 15.

40. *See Developments in the Law—The Law of Prisons*, *supra* note 8, at 1948 n.74 (must wait two years and then have vote restored at discretion of judge). Arizona automatically restores the right to vote to first-time offenders. *Id.* at 1948.

41. ALASKA STAT. §§ 15.05.030, 15.25.030(a)(10) (Michie 2002).

42. CAL. CONST. of 1879, art. II, § 4 (amended 1974); CAL. ELEC. CODE § 201 (West 1996).

43. COLO. CONST. art. VII, §§ 6, 10.

44. CONN. GEN. STAT. ANN. §§ 9-46, 9-46a (West 1989 & Supp. 2002).

45. MD. CODE ANN., ELEC. LAW §§ 3-102, 5-203 (2002).

46. MICH. COMP. LAWS ANN. § 46.411 (West 1991) (amended 2002); *id.* § 168.51 (West 1989).

47. MINN. CONST. art. VII, § 6.

48. MO. CONST. of 1945, art. III, §§ 4, 6.

49. NEB. REV. STAT. § 32-602 (1998).

50. NEV. CONST. art. II, § 1 (civil rights must be restored to vote); NEV. REV. STAT. ANN. 281.040 (Michie 2001) (candidate must be a qualified elector).

51. N.J. CONST. of 1947, art. IV, § 1, para. 2.

52. N.M. CONST. art. VII, § 2.

53. VA. CONST. of 1971, art. II, §§ 1, 5.

54. WASH. CONST. art. II, § 7; *id.* art. VI, § 1 (amended 1974); *id.* art. VI, § 3 (amended 1988).

55. WYO. CONST. art. VI, § 6 (amended 1996); *id.* § 15 (amended 1999).

*5. States with a waiting period*

Five states add additional time requirements. Georgia, for example, requires a felon to have his civil rights restored and ten years to pass since the completion of the sentence.[56] South Carolina law states that a felon cannot run for office until pardoned or until fifteen years after the completion of the sentence.[57] Louisiana[58] and Oklahoma[59] have similar provisions. In Rhode Island, a felon cannot run for office until three years after the completion of the sentence, including probation and parole.[60]

*6. States that deny convicted felons the right to hold office*

Five states simply deny convicted felons the right to hold office. These states include Alabama,[61] Arkansas,[62] Delaware,[63] Indiana,[64] and Pennsylvania.[65] These states do not provide restoration of the right to hold office even if the right to vote is restored.

*7. Other states*

The final three states do not fall into any of the above categories. New Hampshire[66] and West Virginia[67] only deny the right to hold office to those convicted of bribery or treason in obtaining office.[68] South Dakota law is the most unique; it pertains only to a potential candidate who has been convicted of an "infamous crime," and that

56. GA. CONST. art. II, § 2, para. 3.

57. S.C. CONST. art. VI, § 1.

58. LA. CONST. of 1974, art. I, § 10 (amended 1997).

59. OKLA. STAT. ANN. tit. 26, § 5-105a (West 1997).

60. R.I. CONST. art III, § 2. Interestingly, in Rhode Island, anyone convicted of a misdemeanor resulting in jail time of six months or more is also subject to this rule. *Id.*

61. ALA. CODE § 36-2-1 (2001).

62. ARK. CODE ANN. § 16-90-112(b) (Michie 1987).

63. DEL. CONST. of 1897, art. II, § 21.

64. IND. CODE ANN. § 3-8-1-5 (West 1997).

65. PA. CONST. art. II, § 7.

66. N.H. CONST. pt. 2, art. 96.

67. W. VA. CODE ANN. §§ 6-5-5, 61-5A-9 (Michie 2000).

68. Other states have similar provisions for election law violations, but a discussion of those laws is beyond the scope of this paper.

convict merely needs to have "accounted for and paid over, according to law, all such moneys due from him."[69]

### *C. Restoring the Right to Vote*

The procedure for restoring a convicted felon's right to vote or to hold public office varies from state to state. The varying complexity of these restoration schemes is important for convicted felons who wish to run for office because restoration of the right to run for office is often contingent on restoration of the right to vote.[70] As noted above, some states, such as Alaska, automatically restore the right to vote upon completion of the sentence.[71] Other states, such as Nevada, have a relatively simple restoration scheme. Nevada, while classified as a permanent disenfranchisement state, recently passed a law that restores the right to vote simply upon application, provided that the applicant has been released from prison.[72] Alabama is an example of a complex restoration scheme. A convicted felon in Alabama must receive a pardon from the Board of Pardons and Paroles before his right to vote can be restored. Before applying for a pardon, the felon must have completed three years of parole, and even if a pardon is granted, the board must vote unanimously to restore the ex-felon's voting rights.[73] Some applicants must also provide a DNA sample to the Alabama Department of Forensic Sciences as part of the restoration process.[74] Complex procedures such as those in Alabama can mean that even though it is possible for an ex-felon to be restored the right to vote, the likelihood of success is slim.[75]

## III. JUDICIAL REVIEW OF DISENFRANCHISEMENT LAWS

State voter disenfranchisement laws have been repeatedly challenged in the courts. The federal courts have addressed

69. S.D. CONST. art. III, § 4; *see also* S.D. CODIFIED LAWS § 22-30A-11 (Michie 1998) (person convicted of theft must have repaid debt).

70. *See supra* Part II.B.

71. ALASKA STAT. § 15.05.030 (Michie 2002).

72. *Developments in the Law—The Law of Prisons*, *supra* note 8, at 1946.

73. *Id.* at 1944.

74. SENTENCING PROJECT, *supra* note 10.

75. Alabama has one of the highest disenfranchisement rates at 6.75% of the voting age population. *Developments in the Law—The Law of Prisons*, *supra* note 8, at 1943–44.

numerous federal challenges under Section 2 of the Fourteenth Amendment and section 2 of the Voting Rights Act of 1965.[76] While the federal courts have never explicitly addressed state candidate disenfranchisement laws, an examination of the voter disenfranchisement cases gives some insight into the way federal courts might address the issue. Furthermore, state courts have interpreted federal court precedent to support state candidate disenfranchisement laws.

### *A. Fourteenth Amendment Challenges*

In the most significant case dealing with voter disenfranchisement laws, the Supreme Court rejected a challenge brought under the Fourteenth Amendment.[77] In *Richardson v. Ramirez*,[78] three convicted felons challenged California's laws disenfranchising persons convicted of a felony, claiming that the laws denied them the right to equal protection under the Constitution.[79] All three plaintiffs had been unable to register to vote because of their felony convictions.[80] The Supreme Court found this equal protection challenge unique in that it implicated both Section 1 and the "less familiar" provisions of Section 2 of the Fourteenth Amendment.[81] Section 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 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

76. *Id.* at 1949–50.

77. U.S. CONST. amend. XIV.

78. 418 U.S. 24 (1974).

79. *Id.* at 26–27, 29.

80. *Id.* at 32.

81. *Id.* at 42. Section 1 of the Fourteenth Amendment 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.

U.S. CONST. amend. XIV, § 1.

> 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.[82]

The Court examined the legislative history and found that "[t]hroughout the floor debates in both the House and the Senate, in which numerous changes of language in [Section] 2 were proposed, the language 'except for participation in rebellion, or other crime' was never altered."[83] The Court found that the legislative history suggested that this language was meant to include convicted felons, and furthermore stated that "[t]his convincing evidence of the historical understanding of the Fourteenth Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons."[84] The Court concluded, "[Section] 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which [Section] 2 imposed for other forms of disenfranchisement."[85] Thus, the California laws disenfranchising convicted felons were constitutional.[86] After almost thirty years, the *Richardson* holding that voter disenfranchisement laws are constitutional under the Fourteenth Amendment is still valid.[87]

82. U.S. CONST. amend. XIV, § 2 (emphasis added).

83. *Richardson*, 418 U.S. at 45.

84. *Id.* at 53. The Court cited the following cases: Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959) ("Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." (citation omitted)); Davis v. Beason, 133 U.S. 333 (1890) (approving exclusion of bigamists and polygamists from the right to vote); Murphy v. Ramsey, 114 U.S. 15 (1885); Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1973); Beacham v. Braterman, 300 F. Supp. 182 (S.D. Fla. 1969) (affirming district court decisions rejecting constitutional challenges to state disenfranchisement laws).

85. *Richardson*, 418 U.S. at 55.

86. *Id.* at 56.

87. *See Developments in the Law—The Law of Prisons*, *supra* note 8, at 1951–52. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court did invalidate an Alabama disenfranchisement regime because the laws had been enacted with discriminatory intent. This holding could be seen as contradictory to *Richardson*, but courts have read this decision to

### *B. Voting Rights Act Challenges*

Since *Richardson* all but foreclosed the possibility of challenging felony disenfranchisement laws under the Fourteenth Amendment, litigants have been turning to the Voting Rights Act ("VRA")[88] to challenge the laws under the theory of disparate impact. Section 2 of the VRA provides, in relevant part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[89]

One of the most comprehensive cases dealing with the VRA is *Baker v. Pataki*,[90] holding that the VRA did not apply to the plaintiffs' claim.[91] In *Baker*, the plaintiffs brought suit alleging that the New York law disenfranchising incarcerated felons deprived them of their voting rights under the VRA.[92] The plaintiffs' contention was that there was "evidence of race-based disparity in the State Courts' conviction rate and sentence type,"[93] thus violating the "results" standard of section 2 of the VRA.[94]

The court examined prior VRA precedent and concluded that none of those cases supported the application of the VRA to the

mean that "states may disenfranchise felons in any way they desire so long as they do not act on the basis of race." *Developments in the Law—The Law of Prisons*, *supra* note 8, at 1951–52.

88. Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973ff-6 (1994).

89. 42 U.S.C. § 1973(a)–(b).

90. 85 F.3d 919 (2d Cir. 1996) (en banc), *aff'g by an equally divided court* Baker v. Cuomo, 842 F. Supp. 718 (S.D.N.Y 1993).

91. *Id.* at 921.

92. *Id.* at 923.

93. *Id.*

94. *Id.* at 924.

New York disenfranchisement law: "[F]elon disenfranchisement is a very widespread historical practice that has been accorded explicit constitutional recognition in [Section] 2 of the Fourteenth Amendment."[95] In light of this recognition and the history of disenfranchisement laws, "it is unsurprising that when Congress enacted the Voting Rights Act in 1965, both Judiciary Committees affirmatively stated that felon disenfranchisement laws were not affected" by the provisions of the VRA, "including the prohibition on tests for 'good moral character.'"[96] The court found that voter disenfranchisement laws were "generally enacted for compelling, nondiscriminatory reasons"[97] and thus did not "present the risk of discretionary and discriminatory application."[98]

The court also found that subjecting voter disenfranchisement laws to section 2 of the VRA would upset the balance of power between the states and the federal government. "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[99] The court found that application of the VRA to voter disenfranchisement laws would upset the balance, reasoning that "an *explicit* constitutional balance has been struck by the mandate in [Section] 2 of the Fourteenth Amendment that the adverse consequence of reduced congressional representation shall not follow from the enactment and enforcement of state felon disenfranchisement statutes."[100]

Other cases have challenged disenfranchisement laws under the VRA, but so far, challengers have experienced little success.[101] Even when courts have found that the VRA applies, the courts have required plaintiffs to show a causal connection between the disenfranchisement laws and the racial discrimination, which has yet

95. *Id.* at 928.

96. *Id.* at 929 (referring to provisions of 42 U.S.C. § 1973(b) prohibiting application of a "test or device" that results in discrimination, *i.e.*, literacy tests, education tests, or requirements of good moral character).

97. *Id.*

98. *Id.* at 930.

99. *Id.* at 931 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991)).

100. *Id.*

101. *Developments in the Law—The Law of Prisons*, *supra* note 8, at 1954.

to be done.[102] Because of this precedent, future challenges of disenfranchisement laws under the VRA seem unlikely to succeed.[103]

### *C. The Ban on the Right to Hold Public Office*

The Supreme Court has held that states can impose procedural limitations on who can appear on a ballot.[104] The Court has recognized that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[105] Such restrictions may infringe on a citizen's right to vote or First Amendment right to freedom of association,[106] but the states' interests generally support the imposition of reasonable, nondiscriminatory restrictions.[107] The Court has found that restrictions such as requiring a candidate to make a showing of substantial support[108] or requiring a candidate to pay a filing fee[109] are reasonable restrictions.

While the Supreme Court has never explicitly addressed the issue of whether candidate disenfranchisement laws are a reasonable ballot restriction, other courts have interpreted Supreme Court precedent to mean that states can preclude convicted felons from running for office. For example, the West Virginia Supreme Court, in considering whether term limits could be imposed on the Governor, recognized a difference between ballot restrictions that serve a valid

102. *Id.* at 1955.

103. *But see id.* at 1954 n.125 ("[T]wo pending cases offer opportunities for the first plaintiff 'victories' under Section 2." (citing Farrakhan v. Locke, 987 F. Supp 1304 (E.D. Wash. 1997), *appeal docketed*, No. CS-96-076-RHW (9th Cir. Jan. 12, 2001); Johnson v. Bush, No. 00-3542-CIV-King (S.D. Fla. Sept. 21, 2000))). Since *Developments in the Law—The Law of Prisons* was written, however, the Florida district court heard the *Johnson* case and found that Florida's disenfranchisement laws did not violate either the Constitution or the VRA. Johnson v. Bush, 214 F. Supp. 2d 1333 (S.D. Fla. 2002).

104. *See, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974).

105. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

106. U.S. CONST. amend. I.

107. *Anderson*, 460 U.S. at 788.

108. *Id.* at 788 n.9 (citing Jenness v. Fortson, 403 U.S. 431 (1971); Am. Party of Tex. v. White, 415 U.S. 767 (1974)).

109. *See, e.g.*, *Lubin*, 415 U.S. at 709 (1974) (ruling that imposition of a filing fee, while generally permissible, was not permissible in this case because of the absence of an alternative means of gaining access to the ballot).

public purpose and restrictions that do not.[110] Restrictions that do not serve a valid public purpose are unconstitutional. Restrictions of the franchise that do serve a valid public purpose are:

> those which restrict its exercise only with regard to office seekers who fail to meet objective qualifications, established on a rational basis, in a valid attempt to insure wisdom, dignity, responsiveness, and competence in public officials. Examples of this type of limitation include requirements that candidates be of a certain age, *not be under conviction for a felony*, or be members of the bar.[111]

The West Virginia court ruled that such provisions were constitutional.[112] Other states have also upheld the ban on the right to hold office.[113] However, such case law has only dealt with the ban as imposed on state officials. Because former Congressman James Traficant was running for United States Congress, he probably would not have been precluded from holding office despite his felony convictions.

## IV. TRAFICANT, OHIO LAW, AND SUPREME COURT PRECEDENT

Despite the courts' conclusions that state disenfranchisement laws are constitutional, James Traficant likely could have taken office if he had prevailed in the 2002 election. Under Ohio candidate disenfranchisement laws, Traficant could not have held a state office; however, Supreme Court precedent suggests that he could have held a federal office.

### *A. Ohio Law*

The Ohio Constitution states: "The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to

110. State *ex rel.* Maloney v. McCartney, 223 S.E.2d 607, 611 (W. Va. 1976), *appeal dismissed sub nom.* Moore v. McCartney, 425 U.S. 946 (1976).

111. *Id.* (emphasis added).

112. *Id.* at 612–13.

113. *See, e.g.*, Cook v. Skipper, 749 So. 2d 6 (La. Ct. App. 1999); Mauney v. State *ex rel.* Moore, 707 So. 2d 1093 (Miss. 1998); State *ex rel.* Gains v. Thomas, 713 N.E.2d 1123 (Ohio Ct. App. 1998); Commonwealth *ex rel.* Baldwin v. Richard, 751 A.2d 647 (Pa. 2000); State v. Johnson, 79 S.W.3d 522 (Tenn. 2002); Swan v. LaFollette, 605 N.W.2d 640 (Wis. Ct. App. 1999).

office, any person convicted of a felony."[114] The legislature exercised that power by enacting a statute which states:

> A person convicted of a felony under the laws of this or any other state or the United States, unless the conviction is reversed or annulled, is incompetent to be an elector or juror or to hold an office of honor, trust, or profit. When any person convicted of a felony under any law of that type is granted probation, parole, judicial release, or a conditional pardon or is released under a post-release control sanction, the person is competent to be an elector during the period of probation, parole, or release or until the conditions of the pardon have been performed or have transpired and is competent to be an elector thereafter following final discharge. The full pardon of a convict restores the rights and privileges so forfeited under this section, but a pardon shall not release a convict from the costs of the convict's conviction in this state, unless so specified.[115]

Under this law, a convicted felon may vote while on probation or parole, but a convicted felon may not hold public office unless granted a full pardon.[116] This section also applies to federal felony convictions.[117]

Denial of the right to hold public office in Ohio was affirmed in *State ex rel. Gains v. Thomas*.[118] In *Thomas*, the Mahoning County Prosecuting Attorney brought an action against a city councilman who had been elected to office. The councilman had been convicted ten years earlier of a federal drug crime and sentenced to eighteen months in prison.[119] Citing the Ohio statute, the court granted the state's motion for summary judgment and the councilman was removed from office.[120]

Under Ohio law, Traficant could not hold public office. He had been convicted of a federal felony, and the Mahoning County Board of Elections had cancelled his voter registration.[121] However, the Congressional Research Service, a branch of the Library of Congress,

114. OHIO CONST. art V, § 4 (amended 1976).
115. OHIO REV. CODE ANN. § 2961.01 (West 1997).
116. *See id*. (commentary).
117. *See* State *ex rel*. Corrigan v. Barnes, 443 N.E.2d 1034 (Ohio Ct. App. 1982).
118. 713 N.E.2d 1123 (Ohio Ct. App. 1998).
119. *Id*. at 1123.
120. *Id*. at 1123–24.
121. Diemer & Stolz, *supra* note 1.

submitted a report that said Traficant would likely be able to run for Congress, citing only three qualifications: age, residency, and citizenship.[122] This disparity arises from the difference between running for state office and running for federal office. Since Traficant was running for Congress, it is possible that, despite Ohio law, he could have taken office if elected.[123]

### *B. Qualifications for United States Congress*

The United States Constitution sets out only three qualifications to be elected to the United States Congress: age, residency, and citizenship.[124] The Constitution also provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members."[125] The Supreme Court has interpreted these provisions to mean that states cannot add qualifications to members of Congress.

In *U.S. Term Limits, Inc. v. Thornton*,[126] the Supreme Court struck down an amendment to the Arkansas Constitution "that prohibit[ed] the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate ha[d] already served three terms in the House of Representatives or two terms in the Senate."[127] The Court held "that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress . . . ."[128]

In coming to this conclusion, the Court relied heavily on *Powell v. McCormack*.[129] In *Powell*, the Court ruled that a duly elected member could not be excluded from Congress because of prior misconduct while in office. Based on findings that Powell had wrongfully diverted House funds for his own use and had made false reports while serving in the Eighty-ninth Congress, the Ninetieth

122. *Id.* Traficant's residency was in question, since he was serving time in Pennsylvania, but the report indicated that Traficant would likely still qualify since he maintained a residence in Ohio. *Id.*

123. How Traficant would have been able to fulfill his duties as a Congressman while in federal prison is another question which is beyond the scope of this article.

124. U.S. CONST. art. I, §§ 2, 3.

125. *Id.* § 5.

126. 514 U.S. 779 (1995).

127. *Id.* at 783.

128. *Id.* at 800–01.

129. 395 U.S. 486 (1969).

Congress refused to seat Powell and declared his seat vacant.[130] The Court ruled that "Congress has no power to alter the qualifications in the text of the Constitution."[131] The *Thornton* Court approved the historical analysis presented by the *Powell* Court and further added:

> We noted that allowing Congress to impose additional qualifications would violate that "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'"
>
> Our opinion made clear that this broad principle incorporated at least two fundamental ideas. First, we emphasized the egalitarian concept that the opportunity to be elected was open to all. We noted in particular Madison's statement in The Federalist that "'[u]nder these reasonable limitations [enumerated in the Constitution], the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.'"[132]

In *Thornton*, the Court found that not only could Congress not add to the qualifications for office, the states could not either. The Court rejected the argument that the power to add qualifications was reserved to the states under the Tenth Amendment, reasoning that "no such right existed before the Constitution was ratified."[133] The Court then found that even if the states possessed some control over qualifications as part of their original powers, "the text and structure of the Constitution, the relevant historical materials, and, most importantly, the 'basic principles of our democratic system' all

130. *Thornton*, 514 U.S. at 788–89.

131. *Id.* at 789 (quoting *Powell*, 395 U.S. at 522). It must be noted here that the *Powell* Court emphasized that they were only dealing with *exclusion*, not *expulsion*. *Thornton*, 514 U.S. at 789 n.5. While it appears from the *Powell* decision that Congress could not have refused to seat Traficant had he been elected, it is likely that it could have seated Traficant and then expelled him according to the provisions of Article I, § 5: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." U.S. CONST. art. I, § 5, cl. 2. The decision to expel Traficant was based on his violation the Code of Official Conduct. H.R. REP. NO. 107-594, vol. 1, at 1 (2002). The Code of Official Conduct is House Rule XXIII and is available at http://www.house.gov/rules/ RXXIII.htm.

132. *Thornton*, 514 U.S. at 793–94 (quoting *Powell*, 395 U.S. at 540 n.74 (quoting THE FEDERALIST NO. 52 (James Madison))).

133. *Id.* at 803.

demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution."[134]

Under the rationale of *Thornton*, states could not require their federal officers to have a clean criminal record. Indeed, a few states have explicitly recognized this limitation.[135] The Supreme Court has left the states with two divergent principles: the principles of federalism and the history of the Constitution give the states the ability to deny a convicted felon the right to vote[136] or to hold state office,[137] but those same principles and history also declare that states cannot deny a convicted felon the right to run for federal office. In other words, the State of Ohio can deny Traficant the right to vote for his representative in Congress, but it cannot keep him *being* that representative. However, analyzing the purposes of disenfranchisement laws leads to the conclusion that the state has an even greater interest in denying a convicted felon the right to hold office than in denying a convicted felon the right to vote.

## V. PURPOSE OF DISENFRANCHISEMENT LAWS

The four generally recognized purposes of punishment are deterrence, rehabilitation, retribution, and incapacitation. While the purposes of deterrence, rehabilitation, and retribution do not adequately justify disenfranchisement laws, incapacitation provides some insight into the justification behind these laws. As the following discussion will illustrate, the justifications behind voter disenfranchisement laws have weaknesses. Despite these problems, however, states have still chosen to enact these laws. Consequently, these arguments provide an even more compelling justification for candidate disenfranchisement laws.

134. *Id.* at 806.

135. *See, e.g.*, IND. CODE ANN. § 3-8-1-5 (West 1997) (provision that convicted felon cannot run for office does not apply to federal office); MD. CODE ANN., ELEC. LAW § 5-203 (2002) (requirement that candidate be a qualified voter does not apply to candidates for federal office).

136. *See supra* Part III.A (discussing Richardson v. Ramirez, 418 U.S. 24 (1974)).

137. *See supra* Part III.C.

### *A. Deterrence*

Deterrence is not likely one of the main purposes of disenfranchisement laws.[138] Deterrence is generally separated into two categories: "Punishment acts as a *general deterrent* insofar as the threat of punishment deters potential offenders in the general community. It acts as a *specific deterrent* insofar as the infliction of punishment on convicted defendants leaves *them* less likely to engage in the crime."[139] Losing the right to vote is unlikely to act as a general deterrent since most citizens probably are not aware that they can lose the right to vote if convicted of a felony, and even if the citizen was aware, it is doubtful that it would be a major concern to the person about to commit a felony. Losing the right to vote cannot act as a specific deterrent in those states that permanently disenfranchise convicted felons because the right to vote has already been lost. In those states that disenfranchise offenders until completion of their sentence, it is unlikely that losing the right to vote would be more of a specific deterrent than the threat of more prison time. With regard to deterrence, the right to vote and the right to hold public office are indistinguishable. The threat of losing the right to hold public office would likely only deter someone who knows about that particular consequence and plans to be a career politician.

### *B. Rehabilitation*

Rehabilitation is certainly not one of the purposes behind felony disenfranchisement laws. Rehabilitation is "the purposeful reduction or elimination of an offender's subsequent criminal behavior through a program of planned intervention."[140] While someone who has been convicted of a felony may regret the loss of his or her civil rights (as evidenced by the litigation attempting to restore the right to vote), the loss of the right to vote or the right to hold public office probably would not be a principle motivation for reform.

138. *See* Steven B. Snyder, Note, *Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office*, 4 J.L. & POL. 543, 571–72 (1988).

139. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 116 (7th ed. 2001).

140. Richard D. Schwartz, *Rehabilitation*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1364, 1364 (Sanford H. Kadish ed., 1983).

### *C. Retribution*

The theory of retribution applies equally to both the right to vote and the right to hold public office. The main theory behind retributive punishment is that "someone who has violated the rights of others should be penalized, and punishment restores the moral order that has been breached by the original wrongful act."[141] Retribution is also seen in terms of fairness to the law-abiding citizen.[142] Under John Locke's concept of the social compact, "[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."[143] Under the retributive theory of punishment, those who break the law should not be allowed to participate in making the law, whether as a voter or as a political officer. However, this theory may not provide justification for denying the right to vote or hold public office after completion of the prison sentence. In those eight states with lifetime voter disenfranchisement,[144] conviction of a crime classified as a felony can mean permanent loss of the right to vote, no matter how long the sentence.[145] As one commentator has noted, "a criminal sentence must be proportionate to the crime for which the defendant has been convicted," and "[p]ermanent disqualification does appear excessive for one felonious infraction."[146]

### *D. Incapacitation*

While incapacitation provides the most compelling justification for disenfranchisement laws, it arguably provides a more compelling justification for candidate disenfranchisement than for voter disenfranchisement. Incapacitation "refers to the crimes averted in the general society by isolation of the identified offenders *during*

141. Kent Greenawalt, *Punishment*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 140, at 1336, 1338.

142. *Id.* at 1339.

143. Green v. Bd. of Elections of N.Y., 380 F.2d 445, 451 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968).

144. *See supra* note 15 and accompanying text.

145. For example, a person convicted of a minor felony at age eighteen who then lives to the age of eighty has actually received a sixty-two-year sentence. However, those in favor of retributive punishment may argue that such a denial is justified.

146. Snyder, *supra* note 138, at 572 (citing Solem v. Helm, 463 U.S. 277, 290 (1983)).

their periods of incarceration."[147] In the case of felony disenfranchisement laws, the isolation can continue after the period of incarceration is over. Still, this accords with the rationale behind incapacitation. The idea is that the convicted felon be removed from the political process. As the Second Circuit recognized:

> [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.[148]

However, as discussed below, there is little evidence that giving a convicted felon the right to vote will harm the political process.

One justification for removing a convicted felon from the political process is to protect against voter fraud.[149] "Supporters of disenfranchisement argue that because an ex-felon has shown a propensity to break the law, they are also more likely to violate particular prohibitions against election fraud."[150] However, there is no evidence to show that someone convicted of a felony—a drug crime, for example—is more likely than the average citizen to commit voter fraud.[151]

Another justification is to prevent harmful changes to the law.[152] "The advocates for disenfranchisement believe that most, if not all, ex-felony offenders would vote to weaken the content and administration of criminal laws."[153] Once again, however, there is no evidence that this would occur. Just because someone has been convicted of one felony does not mean they will continue to commit crimes, and it does not mean that the ex-felon will automatically vote to weaken the criminal law.[154]

147. Alfred Blumstein, *Incapacitation*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 140, at 873–74.

148. *Green*, 380 F.2d at 451.

149. Tanya Dugree-Pearson, Comment, *Disenfranchisement–A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL'Y 359, 385 (2002).

150. *Id.*

151. *Id.* at 386.

152. *Id.* at 387.

153. *Id.*

154. *Id.* at 387–88.

A third justification for denying the right to vote is to protect the purity of the ballot box.[155] Like the Second Circuit, many courts have argued that a convicted felon does not possess the requisite moral character to vote responsibly.[156] But as one commentator has noted, "[t]he 'purity of the ballot box' argument is nothing more than a moral competency argument to support the idea that the franchise should be limited to people who will 'vote right.'"[157]

Denying a convicted felon the right to vote can be justified as punishment until the completion of the period of incarceration or even until the completion of probation or parole, but the justification diminishes after the sentence has been completed. There is no evidence that convicted felons are banding together to debase the election process or undermine the criminal law. If a convicted felon were using his or her vote to try to make harmful changes in society, that one vote would be overshadowed by the votes of law-abiding, responsible citizens. The arguments for incapacitation, or removal from the political process, simply do not adequately justify voter disenfranchisement beyond completion of the sentence, let alone voter disenfranchisement for life. Most states seem to have recognized this argument, since only eight states permanently disenfranchise voters for life.[158] Yet states have chosen to enact voter disenfranchisement laws despite the weaknesses in the policy arguments. This fact provides an even more compelling justification for candidate disenfranchisement laws.

The theory behind incapacitation may provide the most convincing policy arguments in favor of candidate disenfranchisement. Moral character in our elected officials is arguably more important than the character of the voters. The Delaware Supreme Court discussed this justification:

> In our view, [the provision of the Delaware Constitution banning convicted felons from office] is essentially a character provision, mandating that all candidates for State office possess high moral qualities. It is not a provision designed to punish an offender. While conviction of an infamous crime does not imply than [sic] an offender is incapable of functioning as a respected and productive

155. *Id.* at 390.

156. *Id.* at 390, 390 n.210.

157. *Id.* at 391 (citations omitted).

158. *See supra* note 15.

> member of society, it is irreversible evidence that the offender does not possess the requisite character for public office. It is important to emphasize that we are not concerned here with the standard of compassion which should govern daily interpersonal relationships. We deal, rather, with a norm established by our Constitution for those who seek to govern us. Without question, it is a demanding norm.[159]

The concern here is not that one voter will use his or her vote to weaken society, it is that one voter who represents thousands of citizens will use that vote to make laws that weaken society. This justification is not simply a concern, as one commentator has suggested, "that ex-felons will not do the job right."[160] Rather, it is an expression of the state's interest in protecting its citizens. "The State has a valid interest in ensuring that the rules of its society are made by those who have not shown an unwillingness to abide by those rules."[161] Such restrictions on who can hold state office have been repeatedly upheld by courts,[162] but the results in *Powell* and *Thornton* would suggest that such limitations would not be upheld for candidates for federal office. However, the history of the Constitution and the policies attendant to the rule might be interpreted to suggest the opposite outcome.

In *Powell* and *Thornton*, the Supreme Court relied heavily on the statements of the founding fathers and the history of the Constitution to come to the decision that neither Congress nor the states can add to those qualifications of members of Congress enumerated in the Constitution.[163] However, constitutional history would suggest that the framers might have considered a felony conviction a bar to holding federal office.

In *Thornton*, the Court quoted Madison's statement in *The Federalist No. 57*:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or

159. State *ex rel.* Wier v. Peterson, 369 A.2d 1076, 1080–81 (Del. 1976).

160. Snyder, *supra* note 138, at 566.

161. Tex. Supporters of Workers World Party Presidential Candidates v. Strake, 511 F. Supp. 149, 153 (S.D. Tex. 1981).

162. *See supra* Part III.C.

163. *See supra* Part IV.B.

> of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.[164]

The key word in this passage is "merit." Further examination of Madison's writing makes clear that the merit of those who represented the people was of utmost concern. Representatives ought to be "men who possess most wisdom to discern, and most virtue to pursue, the common good of the society," and that the government should "take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."[165] In listing qualifications that should not be considered—wealth, birth, and profession—Madison may have been addressing the concern that the legislature of the new nation not be like the government of Britain, which favored "the pretensions of rank and wealth."[166] This concern, as well as the focus on merit, suggests that Madison may not have intended to include a felony conviction in his list of qualifications that should not be considered.

The historical discussion of the Fourteenth Amendment provided by the Court in *Richardson* provides a further basis for the argument that convicted felons should not be allowed to hold office. The Court found that the text and history of Section 2 supported the disenfranchisement of citizens who had committed a felony.[167] Just a few years earlier, the Second Circuit had recognized that "eleven state constitutions adopted between 1776 and 1821 prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons. Moreover, twenty-nine states had such provisions when the Fourteenth Amendment was adopted, and the total has now risen to forty-two [now forty-eight]."[168] This history suggests that the framers would have recognized voter disenfranchisement as proper. However, as Justice Thomas, in his dissent in *Thornton*, recognized:

> Today's decision also means that no State may disqualify congressional candidates whom a court has found to be mentally incompetent, who are currently in prison, or who have past vote-

164. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 819 (1995).

165. THE FEDERALIST NO. 57, at 365 (James Madison) (Robert Scigliano ed., Random House Inc. 2000).

166. *Id.* at 369.

167. Richardson v. Ramirez, 418 U.S. 24, 43–54 (1974).

168. Green v. Bd. of Elections of N.Y., 380 F.2d 445, 450 (2d Cir. 1967).

> fraud convictions. Likewise, after today's decision, the people of each State must leave open the possibility that they will trust someone with their vote in Congress even though they do not trust him with *a* vote in the election for Congress.[169]

It seems implausible that the framers would have supported taking away an ex-felon's right to vote for his representative while allowing an ex-felon to *be* the representative.

In his dissent, Justice Thomas found troubling the majority's assumption that the Qualifications Clauses[170] were meant to be exclusive. He argued that the "logical conclusion" drawn from the evidence was "simply that the Framers did not want the people of the States and their state legislatures to be constrained by too many qualifications imposed at the national level."[171] Justice Thomas found that the majority's conclusion—that the rule that Congress could not add qualifications means that states could not add qualifications—was an incorrect interpretation of the Constitution.[172] Using a different analysis of history, Justice Thomas rejected the majority's argument that "restrictions on eligibility for office are inherently undemocratic" and concluded that "the Qualifications Clauses themselves prove that the Framers did not share this view; eligibility requirements to which the people of the States consent are perfectly consistent with the Framers' scheme."[173] Under Justice Thomas's interpretation, the Qualifications Clauses and the Constitution do support a state's right to preclude convicted felons from running for office.[174]

169. *Thornton*, 514 U.S. at 917 (1995) (Thomas, J., dissenting) (citations omitted). Justice Thomas was joined in his dissent by Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia. *Id.* at 845.

170. U.S. CONST. art. I, §§ 3, 5.

171. *Thornton*, 514 U.S. at 875 (Thomas, J., dissenting).

172. *Id.* at 875–85. It could be argued that Congress can add qualifications to its members as a result of the expulsion power contained in Article I, § 5 of the Constitution. This Section appears to give Congress the power to expel a member for any reason as long as there is a two-thirds vote. *See supra* note 131.

173. *Id.* at 878–79.

174. A footnote in the *Thornton* decision suggests that the Qualifications Clauses may include more that just age, residency, and citizenship:

> "In addition to the three qualifications set forth in Art. I, § 2, Art. I, § 3, cl. 7, authorizes the disqualification of any person convicted in an impeachment proceeding from 'any Office of honor, Trust or Profit under the United States'; Art. I, § 6, cl. 2, provides that 'no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office'; and § 3 of the

Ultimately, however, Justice Thomas' argument did not win the day. In *Thornton*, the majority repeatedly emphasized the principle that "the people should choose whom they please to govern them."[175] Followers of this principle would suggest that democratic principles mandate that if people want to elect a convicted felon they should be allowed to do so.[176] Yet others would argue that "notwithstanding representative government, the people [do] not have the right to 'destroy their own liberties, by filling Congress with men who, from their conduct, show themselves capable of the destruction of the Government.'"[177] While it may be true that responsible citizens are presumed to vote for the best representative, that assumption is perhaps belied by the Ohio congressional race.

Traficant, who had been convicted of corruption while in office, received a somewhat surprising fifteen percent of the vote in Ohio's 17th District.[178] While those citizens may have had legitimate reasons for voting for Traficant, the state legislature, elected by the people, arguably has "the right to protect citizens from their own bad choices."[179] The Committee on Standards of Official Conduct, the congressional committee assigned to investigate and recommend

> 14th Amendment disqualifies any person 'who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.' It has been argued that each of these provisions, as well as the Guarantee Clause of Article IV and the oath requirement of Art. VI, cl. 3, is no less a 'qualification' within the meaning of Art. I, § 5, than those set forth in Art. I, § 2."

*Id.* at 787 n.2 (quoting Powell v. McCormack, 395 U.S. 486, 520 n.41 (1969)). The Court continued:

> In *Powell*, we saw no need to resolve the question whether those additional provisions constitute "qualifications," because "both sides agree that Powell was not ineligible under any of these provisions." We similarly have no need to resolve that question today: Because those additional provisions are part of the text of the Constitution, they have little bearing on whether Congress and the States may add qualifications to those that appear in the Constitution.

*Id.* at 787–88 n.2 (quoting *Powell*, 395 U.S. at 520 n.41). If the history and text of both the Constitution and the Fourteenth Amendment would support precluding convicted felons from holding public office, it could be said that this preclusion is also part of the Qualifications Clauses. Admittedly, this would be a novel approach for a court to take.

175. *Id.* at 793 (citations omitted).

176. *See* Snyder, *supra* note 138.

177. ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 466 (2d ed. 2002) (quoting Congressman John A. Logan in opposition to the seating of Whittemore, a representative-elect who had been charged with selling admissions to military academies).

178. *See* OHIO SEC'Y OF STATE, *supra* note 6.

179. MIKVA & LANE, *supra* note 177, at 473.

sanctions for Traficant's misconduct, cited a "need to preserve public confidence in the legislative process when a Member of Congress has been convicted of ten felony offenses relating directly to his misuse of public office."[180] Nowhere is the need to preserve public confidence in the legislative process more important than in the national legislature, yet states' ability to preserve this public confidence is diminished since they have no control over who can be elected to Congress.

## VI. POSSIBLE SOLUTIONS

Allowing states to prohibit convicted felons from holding office would likely require the Supreme Court to overrule *Thornton*, a step that the Court would not take lightly. However, since *Thornton* was a five-to-four decision, as the composition of the Court changes, the views of the Court could change as well. Since *Thornton* dealt with term limits rather than disenfranchisement, the Court could also simply distinguish *Thornton*. Change in this area could also come from a constitutional amendment allowing the states to impose federal candidate disenfranchisement laws.[181] Such an amendment would require a careful examination of the policies behind such a rule.

The weaknesses in the policies behind voter disenfranchisement laws suggest that a lifetime ban on the ability of ex-felons to vote may not be justified.[182] Consequently, those policies probably do not support a lifetime ban on the ability to run for public office. It does seem harsh to penalize someone for life for one mistake or one moment of foolishness. It must be recognized that a prior felony conviction does not necessarily mean that a person would not be a good representative.[183] The states' interest in protecting their citizens and the citizens' interest in electing whomever they choose would probably be adequately served by additional time requirements such as those imposed by Georgia, Oklahoma, South Carolina, and Louisiana.[184] Requiring someone convicted of a felony to wait ten or fifteen years after the completion of the sentence before running for

180. H.R. REP. NO. 107-594, vol. 1, at 125 (2002).

181. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837 (1995).

182. *See supra* Part V.D.

183. *See* Snyder, *supra* note 138.

184. *See supra* Part II.B.5.

office would allay fears that the person might commit another felony while ensuring that a citizen who is otherwise qualified to be a good representative is not forever banned from office.

## VII. CONCLUSION

While the Supreme Court has ruled that state felony disenfranchisement laws are constitutional, as the law now stands, a state cannot prevent a convicted felon from representing its citizens in the United States Congress. While this perplexing situation may have been avoided by James Traficant's defeat in the 2002 election, the issue may arise in the future. If the issue does arise, we will be forced to deal with two competing concerns: first, the right of the people to elect the person of their choice, and second, the right of the state to protect its citizens from making a potentially harmful choice. The Supreme Court has declared that the principles of democracy favor the first concern. However, if the policy considerations behind voter disenfranchisement laws are legitimate, the application of those considerations would be even more important in the case of candidate disenfranchisement. As evidenced by state candidate disenfranchisement laws, many states have made the decision that moral character is important in elected officials. However, unless the current law changes, states are not allowed to make that decision with regard to their federal officials. Thus, we will have to continue to hope that the citizens of every state will exercise their right to vote in a responsible manner to preserve the "fundamental principles of our representative democracy."[185]

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185. *Thornton*, 514 U.S. at 795 (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969)).