Two years ago the world watched as officials in Florida struggled to explain the mishaps and shoddy practices that had denied thousands of Floridians a chance to vote. They focused on butterfly ballots and hanging chads, but neglected a critical part of the problem: over half a million Florida residents had been prevented from voting by a state law that permanently disenfranchises almost anyone ever convicted of a felony, even those who haven't committed a crime since serving their terms, have jobs and are paying taxes. For like many Southern states, Florida had cemented felony disenfranchisement into its constitution in the post-Civil War years, when legislators used any means to keep the vote in white hands.

Following the 2000 presidential election, several states changed their suffrage laws. New Mexico, Delaware and Maryland either abandoned or curtailed their disenfranchisement provisions; Connecticut enfranchised people on probation; and lawyers in Washington State are working on a case to overturn that state's disenfranchisement laws. Iowa, Arizona, Nevada and Wyoming retain their catch-all, permanent disenfranchisement laws. But the bulk of the disenfranchised live in southern states —Florida, Alabama, Mississippi, Kentucky, Tennessee and Virginia — and in several of these conservative legislators are fighting efforts at enfranchisement. Some experts estimate that in Alabama, Mississippi and Florida a quarter or more of black men are now permanently barred from voting.

On July 18, Judge James Lawrence King of the Federal District Court for the Southern District of Florida dismissed a lawsuit against Florida's disenfranchisement laws. The lawsuit had been filed by the Brennan Center for Justice at New York University School of Law on behalf of seven plaintiffs, first among them one Thomas Johnson, who weren't allowed to vote in the last presidential election. In his brief opinion, Judge King began by misnaming the lead plaintiff as Thomas Jefferson. From there, it only got worse.

Brennan Center lawyers argued that the history of the South's felony disenfranchisement laws — along with studies indicating minorities are at particular risk of getting arrested and more likely than whites to receive felony convictions for comparable crimes — meant permanent disenfranchisement violated the 14th Amendment's equal protection clauses. They also argued that Florida was violating the 1965 Voting Rights Act.

Judge King disagreed, deciding that Florida had the right to disenfranchise people as long as the motive was to deny felons, rather than a specific racial group, the vote. Because Florida had rewritten its post-Civil War state constitution in the 1960's, he held felony disenfranchisement to be no longer racially biased. He cited as precedent a 1969 Florida case and a 1974 Supreme Court decision that upheld individual state disenfranchisement laws.
The recent court decision neglected two important factors. The first is that Congress amended the Voting Rights Act in 1982 to remove "intent" as a necessary precondition for a finding of racial discrimination, and to replace it with a results-based test. A voting qualification that interacts with social conditions to cause an inequality in voting opportunities violates the Voting Rights Act. Because nonwhites are more likely to be arrested and convicted than whites, relative to their participation in criminal activity, felony disenfranchisement cannot but disproportionately affect African-American and Latino access to the ballot box.

The second neglected factor is that, since the 1974 ruling, America's prison population has quintupled. A recent study estimated that disenfranchisement laws now deprive as many as five million Americans of the right to vote. Numbers this large really matter. At the last election, if even a small proportion of Florida's disenfranchised population had voted, and if they had broken 60-40 in Al Gore's favor — a highly conservative estimate given the demographics of this group — George Bush would not have won an Electoral College majority. Felony disenfranchisement, coupled with very high incarceration rates, has become a major challenge to our democratic values. In a self-confident democracy, such laws simply have no place. The Brennan Center is appealing Judge King's decision. Meanwhile, state legislators must speedily abolish these vestiges of Jim Crow.

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