Preparation for the 2012 Write On Competition:

HOW TO WRITE A CASE COMMENT

Prepared by:

THE TAX LAWYER

Contributing Journals:

AMERICAN CRIMINAL LAW REVIEW
GEORGETOWN IMMIGRATION LAW JOURNAL
GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW
GEORGETOWN JOURNAL OF GENDER AND THE LAW
GEORGETOWN JOURNAL OF INTERNATIONAL LAW
GEORGETOWN JOURNAL OF LAW & MODERN CRITICAL RACE PERSPECTIVES
GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY
GEORGETOWN JOURNAL OF LEGAL ETHICS
GEORGETOWN JOURNAL ON POVERTY LAW & POLICY
GEORGETOWN LAW JOURNAL
Introduction

This guide is to be used as a reference for the 2012 Write On competition. The guide is divided into three parts:

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I. Part One: Procedure and Write On Competition Requirements

All students are advised to read the material in Part One. This section describes the process for the competition and will likely answer many of your questions.

A. PACKET PURCHASE: Available at or around May 5, 2012

This year students will purchase their packets through the Write On website, available at http://www.law.georgetown.edu/writeon/, using VISA, Mastercard, or American Express. The packets will cost $40.00. Students can log on to the website using their netID and password, and all transactions will be conducted on secure servers. There will be no cutoff date for purchasing a
packet prior to the actual end of the competition. Students will be able to purchase their packets right up until the last day of the competition itself, but will not be granted any extra time if they choose to do so.

**Note for Deferred Exam Students:** You should notify the Office of Journal Administration (“OJA”) that you have a deferred exam as soon as you are aware of it, but you must notify OJA of your deferred exam prior to May 18, 2012, the opening of the Write On competition website. You must wait twenty-four (24) hours after you finish your last deferred exam before starting the Write On. However, you will have the same total time period as provided to GULC students without a deferred exam.

**B. PACKET AVAILABILITY: May 18, 2012**

Write On packets will be available at 9:00 a.m. on Friday, May 18, 2012 for both day and evening division students. The packet will be available on the competition website at: http://www.law.georgetown.edu/writeon/, which you can access using your netID.

You may enter the site anytime between May 18 at 9:00 a.m. and mid-July. (All times are ET only.) However, please be aware that the competition ends at precisely 8:00 p.m. E.T. on May 29. All case comments, bluebook test, and personal statement materials will need to be uploaded to the website, hand-delivered, or mailed by that time in order to be accepted. You will be able to log in to the site through mid-July to adjust your preferencing, but no additional materials may be submitted past the May 29th deadline. The preferencing deadline will be announced later in the summer.

If you have special constraints or have a serious medical problem documented by a physician, you must contact the Office of Journal Administration at writeon@law.georgetown.edu prior to the beginning of the Write On competition.

*If, to participate on the Write On, you need any accommodations for a disability, please contact Laura Cutway, the Associate Director of Disability Studies at Georgetown Law, at (202) 662-4042 or lmc228@law.georgetown.edu.*

**C. TURNING IN SUBMISSIONS: May 29, 2012**

Students may upload their completed papers and any supplemental materials such as personal statements or résumés to the competition website up until the 8:00 p.m. ET deadline on May 29, 2012. OJA suggests that students upload their papers early so that in the unlikely event of a server failure their paper is received in a timely manner. Students may upload their completed papers to the competition website, hand-deliver the paper to the Office of Journal Administration, or mail their papers to OJA via FedEx, UPS, or USPS Express Mail. All papers must be hand-delivered, uploaded, or mailed by 8:00 p.m. ET on May 29, 2012. Detailed mailing instructions will be found in the competition package.

If you chose to hand-deliver or mail your paper you must submit **FOUR COPIES** of your Write On competition case comment. **A word of warning**—budget time and money for printing and photocopying, and **DO NOT** count on the machines on campus being available the day of the deadline. The paper length will be limited. In past years it has been seven pages of double-spaced
text and about three pages of single-spaced endnotes. To ensure uniformity, fonts and margins will also be specified in the packet.

D. PACKET CONTENTS AND RESTRICTIONS:

The Write On competition packet will consist of (1) a case and associated research materials for writing a case comment and (2) instructions for completing the online Bluebook test.

Using the case and supplementary materials provided in the packet, you will be expected to write a case comment subject to the limitations discussed in Part I.C. You are **NOT ALLOWED TO DO ANY OUTSIDE RESEARCH** when writing your submission. (If a source in the packet quotes a second source that is not in your packet, you may only use that second source to the extent it is used in the included source.) You must rely entirely upon the materials provided in the packet, plus the following sources: a dictionary, a legal dictionary, a thesaurus, and the Bluebook (19th ed.). You may **not** refer to any law journals during the Write On period unless they are part of the packet materials. You may **not** discuss the contents of the packet with anyone during the Write On period, and you may not receive editing or proof-reading assistance from anyone else. While writing, you may use a spell-check and grammar-check program, as these programs are widely available.

In addition to a case comment, students will also be required to complete a forty-question, true/false Bluebook test on the Write On website. Instructions for completing the Bluebook test will be included in the packet.

There will be additional procedural requirements to follow for turning in your papers. Read them carefully in advance to make sure you have fully complied with all requirements. **READ ALL OF THE WRITE ON PACKET INSTRUCTIONS VERY CAREFULLY!**

II. Part Two: Technical Aspects of Writing a Case Comment

A. **WHAT YOU WILL BE GIVEN**

1. The principal case on which you are to comment
2. *Maybe* a lower court decision
3. Cases that bear on the principal case
4. *Maybe* statutes and legislative history, if appropriate
5. *Maybe* law review articles
6. *Maybe* newspaper, magazine, or other periodical articles

Do not confuse the lower court case with the case you are supposed to be analyzing. The other cases are included only to give you some basis for commenting on the principal case. Also, do not feel that you have to cite everything in the packet in your comment. Your thesis might be narrowly defined to eliminate the need to cite to everything, and some of the cases might be superfluous. However, you should be aware that cases are there for a reason. We do not use a checklist when going over the footnotes to make sure you cite to everything, but a dearth of sources will be recognized and noted.

B. **READING THE PACKET**

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1. **Devote one or two days just to reading, more if you are planning on briefing the cases that you receive.**
   
   You do not need all twelve days to complete the competition. If you spend two days reading the packet, becoming familiar with it, and mulling over ideas for a strong thesis, that still leaves you eight days to write ten pages—not a Herculean pace.

2. **Decide how you want to read it.**
   
   a. **Chronologically**
      
      Makes the most intuitive sense, so you can get an idea of the development of the law.
   
   b. **In order of importance**
      
      Also makes sense, but you will not have a very good idea of the order of importance until you read a few cases.
   
   c. **Order in which the cases are given to you**
      
      Takes less thought.

3. **Brief the cases.**
   
   You need to be very familiar with the cases to write a coherent comment so brief them once you have finished the packet as a quick refresher. If ideas occur to you as you read, note them for later, but you will want to finish the entire packet before you finalize a thesis, as future materials may cause you to rethink your argument.

**C. SELECTING A TOPIC**

A case comment lays out, reflects on, and critiques the decision in a particular case. You can take any of several approaches:

1. **The case was decided incorrectly, and you explain why.**
   
   This method is common, but be careful. You do not want to simply mirror a dissent or get into the rut of saying “The court’s wrong here” again and again. What you need to do is attack the court’s analysis and explain why, even though the court applied the correct law, it applied it incorrectly when compared with other precedential cases.

2. **The court is correct, but for the wrong reasons.**
   
   While you agree with the court’s decision, you believe that the court used the wrong approach to reach it. This approach means that while the decision is correct, the court applied the wrong law. You will need to identify for the reader what the proper law was, where you identified it in precedent, and why it is more proper for use in a given court.

3. **This whole area of law is a mess, and you can do better.**
   
   This is the most ambitious approach, but you really must know the material to suggest a whole new type of approach to the area. New approaches to the law should be logical, yield consistent results, and have public policy support. Use the principal case to illustrate how the new method would work and compare it to the prior, flawed outcome.
4. *The court missed the point.*
   Maybe the court missed an important issue that courts facing the issue in the future should consider. You may want to argue that policy or equity considerations override a given law or otherwise influence the outcome in a way that the court itself did not decide.

5. *The court is correct.*
   It is possible that you just mightagree wholeheartedly with the court’s decision and to criticize it at all would violate your conscience. To go through your comment agreeing with the court is extremely dangerous; the only way to do it without writing a book report is to write from a defensive posture, anticipating any counterarguments and demonstrating to the reader why they are without merit.

6. *Some creative, dynamic idea of your own.*
   If you feel confident in using the case and the assignment as a springboard for some legal pyrotechnics, you might want to do something creative and original. Such an approach entails risks, but we do read a lot of these papers.

**REMEMBER:** Whatever you do, the focus of your case comment should be your original contribution. Do not simply rehash the court’s opinion point by point or mimic the dissent. The heart of your paper is your own analysis. Also, remember that judges will be more impressed with clear, competent writing than with extraordinarily deft leaps of logic into uncharted waters. In past years, some of the highest-scoring case comments have been those that thoroughly develop a single issue well, explaining its nuances to legal, but non-expert, readers.

### D. ELEMENTS AND FORMAT OF A CASE COMMENT

A case comment should include the following elements:

1. **Facts of the Case** (approx. 2 pages or less)
   Include the relevant facts and the procedural history of the case.

2. **Holding** (approx. 1 page or less)
   Your analysis of the court’s holding in the principal case.

3. **Roadmap** (1/2 page)
   Explain the structure of the comment.

4. **Analysis** (whatever is left)

5. **Conclusion** (approx. 1/2 page)

Generally, the structure of the comment will follow one of two patterns:

1. **Introduction**
   The introductory portion of the comment includes the three elements listed below. The introduction must catch the reader’s interest and let the reader know what the comment is about and why it is important. The introduction will introduce and state how you will prove your thesis. Remember that you are writing for someone who, presumably, does not yet know the problem as well as you do, and may in fact have no knowledge of the area of law you are addressing.
a. **Statement of Facts**
   Starting with the facts is effective when the facts are important to the outcome of a case, provide a good illustration of the problem, or are simply exciting.

b. **Holding**

c. **Roadmap**
   The roadmap is a necessary part of the comment. It is perfectly appropriate to say, “This comment will argue” or “Part one of the comment will analyze.” The roadmap never comes first. It explains why the issue is important and describes the discussion and thesis. Its primary purpose is to inform the reader about what is coming so that subsequent material will seem relevant and fall into place.

**OR**

a. **Holding**
   You may want to use this structure if the facts are not crucial to the comment, or the general rule of law overshadows the importance of the specific facts.

b. **Statement of Facts**

c. **Roadmap**

2. **Detailed Discussion of Facts and Holding**
3. **Analysis**
4. **Conclusion**

**E. OTHER SOURCES**

Two texts that provide additional information about scholarly writing are: Eugene Volokh, *Academic Legal Writing* (3d ed. 2007) and Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students* (3d ed. 2005). You may want to review these sources before the beginning of the Write On competition; but you may NOT consult them during the competition.

**F. FOOTNOTES**

In case comments, you have to use a footnote-based method of citation, as opposed to the textual citations you have used in briefs and memoranda. There are several ways to use a footnote:

1. **To give a citation**
   This is the simplest footnote. When you cite an authority in the text, you must include a footnote with the technical citation. You do not need to give the name of the case in the citation if you have given the full name in the text. When appropriate include a pinpoint or jump cite in the citation.

2. **When necessary to back up a proposition**
   You are accustomed to giving a proposition of law and then having to refer to some other source to back it up. In a comment, you do that with footnotes. Pay
attention to proper use of Bluebook signals to indicate how the source relates to the proposition, and use parentheticals when appropriate.

3. **To make ancillary points**
   Often, you have an insight into a useful but tangential point that would take up lots of space in the text and distract from your main theme. Here, use a footnote to briefly develop that sub-issue.

Footnotes are the best place to:

1. show familiarity with the packet, by citing many cases;
2. display an understanding of closely related legal issues;
3. include facts that either take up space or are tangential;
4. show off your hours of memorizing arcane Bluebook rules.

The **most important** thing about your footnotes, though, is to make sure that they are **technically correct**. Any second-year journal staff member can pick out most Bluebook errors so make sure you know the rules when editing.

**G. BLUEBOOK TIPS**

One good way to ensure that your comment will comply with Bluebook conventions is to pick up a copy of one of the journals **before** the competition and check out the various footnote formats. Remember, however, that you **cannot** refer to any journals once the competition has started. The forms used in the case comment are the same as those used by most journals. For a general overview, please refer to the Quick Reference Guide on the front cover of the Bluebook. You are probably not familiar with this form of writing, and some time spent learning its intricacies is advisable. You may also encounter various documents with varying citation rules, such as constitutional provisions, law review articles, periodicals, and perhaps statutes. These rules are not difficult. Most of your questions will probably be answered by re-reading Bluebook Rules 1-8, 10.2, 10.6, 10.9, 11, 12, 15, and 16, and consulting the relevant tables referred to in those rules. The index is also a helpful place to start when encountering a source that you have never worked with before.

Here are a few Bluebook tips for common problems you might encounter:

1. When citing a case in the text, you have to **italicize** (if you cannot italicize, you can underline) the full name of the case. The first time you cite it, you must use the full name. After that, you can use an identifying name (i.e., *Lemon*).

2. When citing a case in footnotes, you **do not italicize** the case name if giving the case name in full along with the citation. You only italicize the name if:
   a. you are giving a **partial case name**, or
   b. you are giving the case name in full, but without a citation.

3. Review Rule 10.9 on **short cites**. Note that to use a short cite of a case already cited, you have to have cited the case in the same general textual discussion or within one of the preceding **five** footnotes. If you cite a case in footnote #6, do not short cite it thirty footnotes later.
4. Review Rule 3.5 on internal cross references, Rule 4.1 on short cites, and Rule 4.2 on the use of supra and hereinafter. These rules cause a lot of problems. Note that you can only use id. if the preceding footnote has only one case in it. Also note the proper form for a supra cite, which you will mainly use when citing a law review article.

   Ex.: See Smith, supra note XX, at XXX.
   That form is a lot easier than giving the whole cite again.

5. Review the signals at Rule 1.2 and order of signals at Rule 1.3. You do not need to get fancy with your signals. Maybe you can show off with a compare . . . with cite somewhere. Just remember that proper use of signals is important.

III. Part Three: Sample Case Comments

Attached is a brief summary of the cases used in the 2010 and 2011 competitions and two case comments submitted in those competitions. These comments scored highly and should be used as a reference, but are not a definitive guide for how to write your case comment. The structure of a good 2012 note is not necessarily the same as that of a good 2010 or 2011 note. The Write On packet contents from the 2010 and 2011 competitions are on reserve in the library. The case comments will also be available on reserve at Williams Law Library so that you can familiarize yourself with this type of legal writing.

Remember that these samples are not the definitive source of proper Bluebook and grammar rules. Use them as a rough guide and not as a template. In particular, be aware that there are uncorrected errors and that there is no substitute for using the Bluebook. Students preparing prior to the competition for the Write On may also want to look at actual student notes published in academic journals to get a sense of style, format, and technical requirements. Make sure that the journal to which you refer follows the 19th edition of the Bluebook. However, remember that you are strictly forbidden to conduct outside research on a topic or to look at a journal during the competition.

Although we have described some of the conventional forms of legal academic writing, we do not wish to discourage students who elect to employ another form of legal academic writing. However, note that these forms of legal writing can be more difficult to master, that students have an artificially limited set of materials, and that many of the student judges who read submissions may not be familiar with these forms of writing. The Georgetown law journals, in our role as a vital forum for legal scholarship in the Georgetown Law Center community, are committed to being receptive to all forms of legal academic writing.

2010 WRITE ON COMPETITION

Case Synopsis

The central theme in the 2010 Write On competition was whether prisoner disenfranchisement laws violated the Voting Rights Act. In particular, the issue discussed in the case comments was whether prisoner disenfranchisement laws led to a diminution or dilution of minority voting, and if interpreting the VRA to extend to prisoner disenfranchisement laws would violate section two of the Fourteenth Amendment. The principle case in last year’s Write On was Johnson v. Governor of the State of Florida 405 F. 3d 1214 (11th Cir. 2005) (en banc), an Eleventh Circuit case addressing the Fourteenth Amendment limitations on extending the Voting Rights Act to apply to prisoner disenfranchisement laws.
One of the highest-scoring case comments submitted for the 2010 Write On Competition follows.

2011 WRITE ON COMPETITION
Case Synopsis

The theme of last year’s Write On competition was whether the canons of judicial conduct for electoral campaigns violated the First Amendment. Particularly, the canons at issue were those against publically endorsing or opposing other candidates for public office, against soliciting funds for them, and against personally soliciting or accepting campaign funds. The principle case discussed was *Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010), which determined that such canons violated the First Amendment, and that recusal mechanisms should be sufficient to police judicial conflicts of interest.

Again, one of the highest-scoring case comments submitted for the 2011 Write On Competition follows.
Prevalence is Irrelevant:

The Eleventh Circuit’s overreliance on the constitutional significance and long history of felon disenfranchisement laws in *Johnson v. Governor of Florida*
I. Introduction

Criminal voter disenfranchisement laws have existed for centuries. Such provisions were ubiquitous in early State constitutions, and every State has adopted some form of felon disenfranchisement law that remains in effect today. These laws serve a punitive function, rooted in the rationale that those who cannot obey the laws should not be permitted to take part in the process of making them. This rationale is cited as rational public policy justification for upholding modern challenges to felon disenfranchisement laws. Additionally, The Supreme Court has held that Section 2 of the Fourteenth Amendment explicitly leaves discretion to enact felon disenfranchisement laws to the States, and that felon disenfranchisement provisions may only be held in violation of the Equal Protection clause with a showing of discriminatory intent.

Racial animus was certainly present, especially in southern States, after the Civil War. In spite of the Fourteenth and Fifteenth Amendments, many States enacted facially neutral voter qualification laws, including felon disenfranchisement laws, with the intent to suppress African American votes. Such voting practices continued for nearly a century after the Civil War, and it became difficult for Congress to predict the ways in which States could circumvent Equal Protection, and further difficult for challengers to show the requisite discriminatory intent.

In response to these difficulties, Congress enacted the Voting Rights Act (VRA) in 1965, pursuant to its Fifteenth Amendment enforcement powers. Congress further amended Section 2 of the VRA in 1982 to make clear that a violation can be established by a showing, based on the totality of the circumstances, that a voter qualification practice results in the denial of the right to vote on account of race. Thus, as amended, Section 2 of the VRA encompasses challenges to voting qualifications that cannot be brought under the Equal protection clause.

The Supreme Court has held that the VRA is to be construed in a way that provides the
“broadest possible scope” in combating racial discrimination. As such, judicially created limitations are difficult to justify, and possibly wholly unacceptable. Despite this, the circuits are split on the question of whether felon disenfranchisement challenges may be brought under Section 2 of the VRA. The Ninth Circuit explicitly allows such challenges, the Sixth Circuit implicitly allows them, and the Second and Eleventh Circuits deny them.

The Eleventh Circuit addressed the issue in Johnson v. Governor of Florida. Florida’s felon disenfranchisement law provides that “[n]o person convicted of a felony…shall be qualified to vote or hold office until restoration of civil rights or removal of disability.” In Johnson, the plaintiffs filed a class action on behalf of Florida ex-convicts against the members of Florida’s clemency board, challenging the provision on racial discrimination and improper poll tax grounds, in violation of the First, Fourteenth, Fifteenth, and Twenty-fourth Amendments, and Section 2 of the VRA.

Both parties moved for summary judgment, which the district court granted in favor of the defendants on all claims. On appeal to the Eleventh Circuit, a divided panel reversed and remanded on the Equal Protection and VRA claims. The court then vacated the panel opinion and granted a rehearing en banc to address both claims. On appeal, the plaintiffs alleged that Florida’s 1868 felon disenfranchisement provision had been adopted with discriminatory intent, a taint not erased by the subsequent reenactment of the provision in 1968, in violation of the Equal Protection clause. Plaintiffs further contended that racially discriminatory practices in Florida’s criminal justice system interact with the felon disenfranchisement law to result in vote denial on account of race, in violation of Section 2 of the VRA.

After rehearing en banc, the Eleventh Circuit affirmed the district court’s summary judgment on both claims. On the Equal Protection Claim, the court relied on Cotton v.
Fordice\textsuperscript{33} in holding that, even if Florida had adopted its felon disenfranchisement provision with discriminatory intent in 1868, such intent was erased by the subsequent non-discriminatory reenactment of the provision in 1968.\textsuperscript{34} On the VRA claim, the court relied on Richardson v. Ramirez\textsuperscript{35} and the “prevalence” of felon disenfranchisement laws\textsuperscript{36} in finding that allowing felon disenfranchisement challenges under Section 2 of the VRA would be in conflict with Section 2 of the Fourteenth Amendment, creating a constitutional question.\textsuperscript{37} The court cited Florida’s strong public policy reasons for enacting felon disenfranchisement laws, and reasoned that a denial of the ability to enact such provisions would infringe on Florida’s explicit grant of discretion found in the Fourteenth Amendment. Thus, the court concluded that the VRA could not be read to encompass felon disenfranchisement challenges.\textsuperscript{38}

This Comment will argue that the Eleventh Circuit erred in barring felon disenfranchisement challenges under Section 2 of the VRA by relying too heavily on a finding that States would be “denied” the ability to enact felon disenfranchisement laws if such challenges were permitted. First, the Comment will demonstrate how the court drastically overstates the constitutional consequences of allowing felon disenfranchisement challenges under the VRA. Namely, the court goes too far in taking the Supreme Court’s holding in Richardson v. Ramirez to mean that Section 2 of the Fourteenth Amendment provides an express and unqualified grant of power to the States to adopt felon disenfranchisement laws. Second, this Comment will argue that the long history and prevalence of felon disenfranchisement laws cannot save such laws from challenges under the VRA, as the VRA was intended to be expansive, and reach any voting practices that result in discriminatory effects.

\textbf{II. Analysis}
A. The Fourteenth Amendment does not grant the States an unqualified power to adopt felon disenfranchisement laws.

After glossing through a finding of ambiguity in Section 2 of the VRA the court goes on to hold that allowing felon disenfranchisement challenges would create a constitutional question. The court relies heavily on the finding that “the plaintiffs’ interpretation calls for a reading of the statute which would prohibit a practice that the Fourteenth Amendment permits Florida to maintain.” The court exaggerates the constitutional conflict in two ways. First, the provision creating a criminal disenfranchisement exception to the sanction of reduced representation in Congress in Section 2 of the Fourteenth Amendment is not an express grant of authority. Second, even if it does constitute an express grant of authority, it is clearly not an unqualified one, and is subject to scrutiny when employed to create discriminatory effects. In short, allowing felon disenfranchisement challenges under the VRA does not mean that the court is denying the practice. It simply means it is subjected to scrutiny for impermissible effects.

In Richardson v. Ramirez, the Supreme Court was careful not to overstate the implication of Section 2 of the Fourteenth Amendment. The Court stated that the framers “could not have intended to prohibit outright that which was…exempted from…sanction.” Such language cannot be read inversely to mean that the framers intended to grant the right to disenfranchise felons outright. However, this is just what the Eleventh Circuit does in reading Richardson to mean that the States have an unqualified right to enact felon disenfranchisement laws. Such a reading is erroneous. Declining to prohibit something is not the same as explicitly endorsing it. In fact, the Supreme Court’s holding in Hunter v. Underwood, proves that felon disenfranchisement laws are not awarded unfettered discretion. If such provisions were enacted with discriminatory intent, for example, they are not saved by the exemption in Section 2 of the
Thus, Hunter demonstrates that the broader purpose of the Fourteenth Amendment does not permit a reading of an unqualified right for States to enact felon disenfranchisement laws.

The court further overstates the constitutional question by assuming that allowing challenges under the VRA would completely deny States the ability to enact voter disenfranchisement laws. This assumption misses a key distinction between felon disenfranchisement laws and felon disenfranchisement laws that are discriminatory in effect. Allowing disenfranchisement laws to be challenged under VRA does not mean that they are automatically stricken. It means they are subjected to a “totality of the circumstances” analysis, which serves as a safeguard for legitimate felon disenfranchisement laws. However, if the State’s criminal justice system can be found, in fact, to be biased on account of race, then disenfranchisement of minorities in a discriminatory criminal justice system would naturally occur on account of race.

The Eleventh Circuit has created a judicial limitation on the reading of the VRA, which the Supreme Court has held to be in conflict with the purpose of the Act. However, if such challenges were permitted, it would further Congress’s expansive intent in enacting the VRA. If courts were able to strike felon disenfranchisement laws due to the way they interact with discrimination in the criminal justice system, it would encourage State governments to evaluate their criminal justice regimes, and serves the important goal of eliminating racism in areas outside of voter disenfranchisement. Opponents may rebut this proposition by claiming that such an evaluation is impossible, and allowing felon disenfranchisement challenges would solve no problems, and simply have the ultimate effect of denying States the ability to enact them. This argument is misplaced. First, discrimination in the criminal justice system cannot be justified in
any context, and cannot be dismissed as a problem without a remedy. Second, if a State can show, for example, that minorities are punished more harshly in the criminal justice for a reason other than race, then that would be folded into the totality of the circumstances analysis under the VRA. If the State makes this showing, the felon disenfranchisement law would not be found to be in violation of the VRA. Further, even if a State’s criminal justice system is found to be biased on account of race, the plaintiff still bears the burden of demonstrating a causal connection between that bias and a disparate impact in the disenfranchisement of felons. Such a burden of proof is a high threshold to meet, and serves an important role in protecting legitimate felon disenfranchisement laws.

B. Congress intended Section 2 of the VRA to encompass any voter qualification that results in discriminatory effects.

The court relies heavily on the long history and prevalence of felon disenfranchisement laws to bolster its argument that Congress could not have meant for the amended Section 2 to encompass challenges to those laws. Judge Parker points out the oddity of this argument in his dissent in Hayden: “[T]he very purpose of [Section] 2(a) was to address long-standing, widely-used devices that impacted minority voting.” Congress intended Section 2 of the VRA to encompass laws that were not previously reachable by the traditional routes. Further, in Farrakhan v. Washington, the Ninth Circuit found that Section 2 is clear: any voting qualification that denies the right to vote in a discriminatory manner is a violation. Felon disenfranchisement provisions are certainly voting qualifications, and they can result on discriminatory effects. By the plain meaning of Section 2, felon disenfranchisement provisions are covered.

In holding that felon disenfranchisement laws are not encompassed by Section 2 of the
VRA, the Eleventh Circuit ignores Congress’s expansive intent to curtail discriminatory voting practices. The court erroneously relies on evidence of contrary intent.\(^5^4\) The court cites congressional statements that address felon disenfranchisement in regards to Section 4 of the VRA\(^5^5\) as proof that Congress treats felon disenfranchisement laws specially, and therefore could not have meant to silently limit them in the VRA. First, in an Act as broad as the VRA, statements made about one provision cannot be translated to apply to a different section. Further, this argument again ignores the difference between felon disenfranchisement laws in general and felon disenfranchisement laws that produce discriminatory effects. It is accepted that felon disenfranchisement laws are not insulated in all instances,\(^5^6\) but prevalence and Congressional approval cannot serve as a fallback justification for finding that they are wholly exempted from challenge under the VRA, especially when they produce discriminatory effects.

### III. Conclusion

In barring felon disenfranchisement challenges under Section 2 of the VRA, the Eleventh Circuit drastically overstates the constitutional consequences of allowing such challenges. The Fourteenth Amendment does not grant an affirmative and unqualified right to the States to enact felon disenfranchisement laws. Thus, it is judicially recognized that there are limits to the States’ discretion to make use of such laws. Further, the long history and prevalence of felon disenfranchisement laws cannot save them from challenges under the VRA. The VRA, especially as amended in 1982, is intended to be read broadly, and reaches any voter qualification that results in vote denial on the basis of race. The Eleventh Circuit’s conclusion that felon disenfranchisement laws are exempt from the VRA is contrary to this intent, and closes an important door to challenging laws that, historically, have produced discriminatory results.
See Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (Parker, J., dissenting) (“[I]t all started in Athens, we are told.”).


See, e.g. Wesley v. Collins, 791 F.2d 1255, 1261-62 (6th Cir. 1986) (“it 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.” (quoting Green v. Board of Elections of City of New York, 380 F.2d 445, 451 (2d Cir.1967))).

The Supreme Court employs rational basis review for felon disenfranchisement provision challenges. See Varnum, supra note 2 at 119.

U.S. CONST. amend. XIV § 2.

Richardson v. Ramirez, 418 U.S. 24, 54-55 (1974) (finding that Section 1 of the Fourteenth Amendment “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.”).

See U.S. CONST. amend. XIV § 1.


See, e.g. Hunter, 471 U.S. at 229 (discussing the “zeal for white supremacy” at the Alabama Constitutional Convention of 1901).

U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

See, e.g., Cotton v. Fordice, 157 F.3d 388, 390 (5th Cir. 1998) (discussing the way in which southern States discriminated against black citizens by disenfranchising convicts for crimes thought to be committed “primarily by blacks”).

See Johnson v. Governor of Florida, 405 F.3d 1214, 1243 (11th Cir. 2005) (Wilson, J., dissenting) (describing 1965 Congressional findings of State use of racially discriminatory voter registration tests).

See id. at 1244 (Wilson, J. dissenting) (“Congress has found that racial discrimination in voting has a long history in our country.”).

See U.S. CONST. amend. XV § 2.


17 Id.

18 See Varnum, supra note 2 at 134.


20 See Wesley v. Collins, 791 F.2d 1255, (6th Cir. 1986) (allowing felon disenfranchisement challenge under Section 2, but finding no violation).

21 See Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006); Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005).

22 Johnson v. Governor of Florida, 405 F.3d 1214, 1227 (11th Cir. 2005).

23 Id. at 1216 (quoting FLA. CONST. art.VI § 4).

24 Id. at 1214-16.

25 Id. at 1217.

26 Id. at 1217 (citing Johnson v. Governor of Florida, 353 F.3d 1287 (11th Cir. 2003), vacated 377 F.3d 1163).

27 Id.

28 Id. at 1218.

29 Id. at 1219.


31 Johnson, 405 F.3d at 1227.

32 Id. at 1227, 1234.

33 Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998).

34 Johnson, 405 F.3d at 1224.

The court’s finding of ambiguity is questionable, but is uncontested for purposes of this Comment.


Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (Parker, J., dissenting).


See Johnson, 405 F.3d at 1238 (Tjoflat, J., concurring).

Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (Parker, J., dissenting).

Chisom, 501 U.S. at 383-84.

Farrakhan v. Washington, 388 F.3d 1009, 1016 (9th Cir. 2003).

Johnson, 405 F.3d at 1232-34 (detailing legislative history of the VRA in 1965 and 1982).

Striking the Wrong Balance:
The Eighth Circuit’s Misapplication of Strict Scrutiny Review in *Wersal v. Sexton*

Packet Number: [Redacted]

Exam Number: [Redacted]
I. Introduction

Thirty-nine states employ some form of judicial elections.\(^1\) Supporters of a popularly-elected judiciary argue that judicial elections are more democratic than a system of appointed judges and that elections ensure judges remain connected with the electorate.\(^2\) Regardless of their merits, judicial elections create a tension between judicial candidates’ First Amendment rights to freedom of speech\(^3\) and association\(^4\) and the government’s interest in regulating conduct in judicial elections to maintain an impartial judiciary.\(^5\) In attempting to maintain judicial impartiality, states have enacted a wide range of restrictions preventing judges and judicial candidates from pre-committing to certain issues and positions, personally soliciting campaign contributions, engaging in partisan activities, and endorsing other candidates for political office.\(^6\)

The Supreme Court first addressed the tension between free speech concerns and state regulation of judicial elections in *Republican Party of Minnesota v. White*,\(^7\) holding unconstitutional a clause of the Minnesota Code of Judicial Conduct prohibiting judicial candidates from announcing their views on disputed legal and political issues.\(^8\) Because of the prohibition’s direct burden on protected speech, the Court analyzed it under a strict scrutiny standard.\(^9\) On remand, the Eighth Circuit used similar reasoning to: (1) strike a clause of the Code prohibiting judicial candidates from associating with partisan political groups and (2) limit Minnesota’s authority to prohibit judicial candidates from personally soliciting campaign donations.\(^10\) In the wake of *White I* and *White II*, lawsuits nationwide have challenged the constitutionality of laws restricting the campaign conduct of judges and judicial candidates.\(^11\)

The Eight Circuit further expounded on its *White II* reasoning in *Wersal v. Sexton*.\(^12\) Gregory Wersal, a 2008 and 2010 candidate for the Minnesota Supreme Court, wished to endorse other judicial and congressional candidates during his candidacies and also hoped to
personally solicit campaign funds by requesting donations door-to-door and over the phone.\textsuperscript{13} However, the Minnesota Code of Judicial Conduct’s endorsement clause prohibited judges and judicial candidates from publicly endorsing or opposing other candidates for public office.\textsuperscript{14} Moreover, the Code’s solicitation clauses, rewritten after \textit{White II}, prevented judicial candidates from personally soliciting campaign contributions from groups smaller than twenty and prevented judges and candidates from soliciting funds for political organizations or candidates for public office.\textsuperscript{15} Accordingly, Wersal brought suit against members of Minnesota’s judicial ethics and professional responsibility boards challenging the endorsement and solicitation clauses on First Amendment grounds.\textsuperscript{16} The district court granted summary judgment to the defendants, holding that Wersal’s challenge was not ripe and that, regardless, the clauses at issue satisfied constitutional muster under the strict scrutiny standard.\textsuperscript{17} Wersal appealed, and the Eighth Circuit reversed, holding the challenged clauses unconstitutional in an opinion dated July 29, 2010.\textsuperscript{18}

Under the strict scrutiny standard, a regulation may restrain free speech only when it “‘advances a compelling state interest and is narrowly tailored to serve that interest.’”\textsuperscript{19} In determining whether Minnesota’s asserted interest in maintaining judicial impartiality was sufficiently compelling to uphold the restrictions at issue, the court noted that of several potential interpretations of the term “impartiality,” the only interpretation sufficiently compelling to satisfy strict scrutiny was Minnesota’s interest in ensuring that judges were \textit{unbiased} with respect to parties appearing in proceedings before them.\textsuperscript{20}

Despite finding Minnesota’s interest in an unbiased judiciary compelling, the court nonetheless held the challenged clauses unconstitutional as applied to Wersal because they were not narrowly tailored to protect that interest.\textsuperscript{21} In order to be narrowly tailored, the Eighth Circuit
requires that a regulation be necessary, not overinclusive, not underinclusive, and the least restrictive alternative available. The appellees argued the endorsement clause was necessary to prevent a judge from expressing bias in favor of candidates she endorsed, since those candidates might someday appear as litigants in the judge’s court. The court rejected this argument and held the endorsement clause was not narrowly tailored because: (1) it prevented prospective judges from endorsing many candidates who might never litigate an issue in court (was overinclusive), (2) it did not prevent judicial candidates from endorsing sitting public officials not running for office (was underinclusive), and (3) recusal provided a less restrictive means of ensuring an unbiased judiciary. Along similar lines, the court found the challenged solicitation clauses were not narrowly tailored and hence failed strict scrutiny review.

This comment will argue that, instead of relying on a strict scrutiny standard, the Eighth Circuit should have adopted a more deferential balancing test when analyzing the constitutionality of Minnesota’s endorsement clause. This approach would have allowed the court to uphold the endorsement clause and brought the Eighth Circuit in line with the unanimous authority of state and federal courts upholding the constitutionality of judicial endorsement prohibitions. First, in summarily applying strict scrutiny review to the clause at issue, the Eighth Circuit ignored the underlying rationale for the strict scrutiny standard set forth in White I. Second, any argument that the balancing test employed in other jurisdictions is inapplicable because Wersal was a judicial candidate rather than a sitting judge fails, as the original logic justifying application of a balancing test to speech restrictions requires no such distinction between the two categories. Finally, recusal alone is not a sufficiently strong safeguard for Minnesota’s interest in maintaining an impartial judiciary. The Wersal decision therefore significantly undermined this interest when it struck the Minnesota endorsement clause.
II. Analysis

In analyzing the endorsement clause at issue in *Wersal*, the Eighth Circuit did not have to use a strict scrutiny standard. Instead, it could have followed the Seventh Circuit and the Supreme Court of New Mexico and applied a more deferential balancing test. In *Siefert v. Alexander*, a sitting Wisconsin judge brought a First Amendment challenge against a Wisconsin rule prohibiting judges and judicial candidates from publicly endorsing partisan candidates or platforms. In *In re Vincent*, a New Mexico judge who was the subject of a disciplinary action for endorsing a mayoral candidate in violation of a New Mexico rule argued that the rule violated the First Amendment. Both the *Siefert* and *In re Vincent* courts applied a balancing test in which the value to the judge of engaging in the prohibited speech was weighed against the interest of the state in regulating that speech. In each case, the state’s judicial endorsement prohibition was upheld because the state’s strong interest in maintaining an impartial judiciary was found to outweigh the importance of preserving judges’ ability to freely endorse other candidates for public office. The *Wersal* court should have used a similar balancing test to uphold the Minnesota endorsement clause.

A. The *Wersal* Court’s Application of Strict Scrutiny Misapplies the Rationale of *White I*.

In failing to consider a balancing test as an alternative to strict scrutiny review when analyzing Minnesota’s endorsement clause, the Eighth Circuit stripped the *White I* holding of its original rationale. It is undisputed that the freedom of speech “‘has its fullest and most urgent application precisely to the conduct of campaigns for political office.’” However, the *White I* Court emphasized that the protected speech at issue necessitated strict scrutiny review because it prevented judicial candidates from speaking about *their own* qualifications for public office. While the announce clause struck down in *White I*, which prohibited judicial candidates from
speaking about legal or political issues, plainly prevented candidates from discussing their qualifications for office, the judicial endorsement prohibition at issue in Wersal does not. A judicial candidate’s endorsement of another candidate is primarily an effort to affect a separate political campaign, rather than a communication of the judicial candidate’s own qualifications.\(^{36}\)

Before applying strict scrutiny, the Eighth Circuit should have recognized the distinction between the need to allow judges to speak freely on the issues of the day,\(^{37}\) and the state’s interest in maintaining a judiciary uninvolved in the political machinations that accompany political endorsements.\(^{38}\)

Because Minnesota’s endorsement clause is aimed at prohibiting judicial candidates from becoming caught up in political machinations, rather than at prohibiting candidates from speaking freely on the issues of the day,\(^{39}\) White I did not require the Wersal court to apply strict scrutiny.

B. Wersal’s Application to a Judicial Candidate Rather Than a Sitting Judge Does Not Necessitate a Different Standard of Review Than That Employed in Other Jurisdictions.

While it could be argued that the balancing test employed by the Seifert and In re Vincent courts should not be applied to Wersal because the former cases involved sitting judges rather than judicial candidates, the rationale for application of the balancing test requires no such distinction. The balancing test employed in Seifert and In re Vincent is rooted in a line of Supreme Court jurisprudence which used balancing tests to uphold restrictions on the speech of government employees.\(^{40}\)

For instance, a balancing test was used to uphold the constitutionality of a law prohibiting certain federal employees from participating in political campaigns in United States Civil Service Commission v. National Ass’n of Letter Carriers.\(^{41}\) While Letter Carriers involved a regulation of then-current government employees, the Court’s purpose in allowing a restriction on protected speech was to preserve public confidence in governmental
integrity. Pursuant to this rationale, there should be no distinction between judicial candidates and sitting judges. Judicial elections are a primary means by which public opinion of the judiciary is formed, and a judicial candidate’s endorsement of another candidate can just as easily undermine public confidence in the judiciary as can endorsement by a sitting judge. Therefore, the distinction between judicial candidates and sitting judges was no bar to the Eighth Circuit’s adoption of the balancing test set forth in Seifert and In re Vincent.

C. A Balancing Test is Preferable Because Recusal Alone is an Insufficient Safeguard.

The Wersal court’s striking of the Minnesota endorsement clause was premised on the Eighth Circuit’s belief that recusal presented a less restrictive and sufficiently effective means of satisfying the state’s interest in judicial impartiality, but this reliance on recusal is misguided. Judicial recusal rules are generally self-enforced by the judges they constrain, which can lead to under-enforcement, as illustrated by the Supreme Court’s decision in Caperton v. A.T. Massey Coal Co. In Caperton, a West Virginia jury found Massey liable for $50 million in damages and, while appeal was pending, Massey’s Chairman and Chief Executive Officer spent $2.5 million supporting Brent Benjamin’s campaign for a seat on West Virginia’s highest court. Benjamin won the election, refused to recuse himself in the Caperton appeal, and cast the deciding vote reversing the $50 million verdict. While the Supreme Court ultimately held that the Due Process Clause required Benjamin’s recusal, the case illustrates that recusal is not an infallible safeguard because judges do not always recuse themselves when required. Moreover, by the time a judge’s actions are sufficiently flagrant to violate due process, the state’s interest in preserving judicial impartiality has already been severely compromised.

The Wersal court’s argument that recusal is a sufficient safeguard because states are free to employ stricter recusal standards than those required by due process is flawed. First, the
Minnesota Code of Judicial Conduct’s recusal provision is identical to that of West Virginia, which suggests Minnesotans would have to rely on due process protection to obtain recusal even in extreme situations similar to that in *Caperton*. Second, state recusal laws which go beyond due process requirements are themselves susceptible to First Amendment challenges. In addition, reliance on recusal as the sole protector of judicial impartiality is impractical as a matter of state policy. If unregulated, judges will be free to endorse local prosecutors or other government officials who appear frequently in court. In small jurisdictions with few judges, recusal in all cases in which the endorsed party appears may be an unworkable solution. In sum, recusal is insufficient to protect judicial impartiality both as a matter of law and from a policy perspective. The *Wersal* court should have used a balancing test rather than strict scrutiny, as this would have allowed it to uphold Minnesota’s judicial endorsement prohibition and ensure the protection of judicial impartiality that recusal is ill-equipped to provide on a standalone basis.

**III. Conclusion**

In analyzing Minnesota’s judicial endorsement prohibition in *Wersal*, the Eighth Circuit should have used a balancing test, as articulated by the Seventh Circuit and the New Mexico Supreme Court, instead of a strict scrutiny standard. The Eighth Circuit’s use of strict scrutiny was a misapplication of the Supreme Court’s holding in *White I*. Moreover, the difference between the judicial candidate at issue in *Wersal* and the sitting judges at issue in the Seventh Circuit and New Mexico Supreme Court cases did not necessitate a distinct standard of review. By applying a balancing test rather than strict scrutiny, the Eighth Circuit could have upheld Minnesota’s judicial endorsement prohibition and in doing so preserved the state’s strong interest in judicial impartiality. As it stands, recusal will not be enough to preserve judicial impartiality in Minnesota in the absence of a prohibition on judicial endorsements.


See U.S. CONST. amend. I.

Inherent in the First Amendment freedom of speech is a corresponding right to freely associate with others. See Wersal v. Sexton, 613 F.3d 821, 828 (8th Cir. 2010) (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).


536 U.S. 765.

Id. at 788.

See id. at 774.

Republican Party of Minn. v. White (White II), 416 F.3d 738, 766 (8th Cir. 2005) (en banc).

See Gray, supra note 6, at 26.

Wersal, 613 F.3d 821.

Id. at 827.

See id. (citing MINN. CODE OF JUDICIAL CONDUCT Canon 4.1(A)(3)).

See id. (citing MINN. CODE OF JUDICIAL CONDUCT Canons 4.1(A)(4)(a), 4.1(A)(6)).

See id.

See id. at 828.

Id. at 842. A rehearing en banc was granted October 15, 2010, although this comment will focus on the Eighth Circuit’s panel decision. The panel decision rejected the district court’s ripeness analysis and focused on the constitutionality of the contested clauses. Id. at 831-42.

Id. at 829 (quoting White II, 416 F.3d at 749).
See id. at 832-33. As to other interpretations of the state’s interest in judicial “impartiality,” the court held that Minnesota had no compelling interest in preventing impartiality defined as judicial preconceptions on legal issues. See id. at 832. Further, even if Minnesota did have a compelling interest in impartiality defined as judicial openmindedness, the challenged clauses were not narrowly tailored to this interest sufficient to withstand strict scrutiny. See id. at 833.

Id. at 833.

Id. at 832 (citing White II, 416 F.3d at 751).

See id. at 834.

See id. at 835-36.

See id. at 839-41 (holding the challenged solicitation clauses underinclusive, because the provisions did not prevent judicial candidates from learning the identities of donors, and not the least restrictive means available, because recusal provided a more narrowly tailored solution).

This comment will focus on the Eighth Circuit’s analysis of Minnesota’s endorsement clause rather than on its analysis of Minnesota’s personal solicitation bans. While legal challenges to personal solicitation bans are widespread, courts analyzing solicitation bans have generally applied strict scrutiny and are not as divided as those analyzing judicial endorsement bans. See, e.g., Carey v. Wolnitzek, 614 F.3d 189, 204-07 (6th Cir. 2010) (holding Kentucky personal solicitation ban unconstitutional under strict scrutiny); Weaver v. Bonner, 309 F.3d 1312, 1319-22 (11th Cir. 2002) (holding Georgia personal solicitation ban unconstitutional under strict scrutiny). But see Seifert v. Alexander, 608 F.3d 974, 988-90 (7th Cir. 2010) (upholding Wisconsin personal solicitation ban based on closely drawn scrutiny, although also concluding the ban would have survived strict scrutiny).

See Wersal, 613 F.3d at 851 (Bye, J., dissenting).

608 F.3d 974.

Id. at 977-79.

172 P.3d 605 (N.M. 2007).

Id. at 605-06.

See Seifert, 608 F.3d at 985; In re Vincent, 172 P.3d at 607.

See Seifert, 608 F.3d at 986-87; In re Vincent, 172 P.3d at 607.

Wersal, 613 F.3d at 828 (quoting Buckley v. Valeo, 424 U.S. 1, 15 (1976)).

See White I, 536 U.S. at 774.
See In re Vincent, 172 P.3d at 608 (citing In re Raab, 793 N.E.2d 1287, 1290 (N.Y. 2003)).

See White I, 536 U.S. at 778 (emphasizing the importance of protecting a judicial candidate’s ability to speak freely on relevant issues by noting that “[p]roof that a Justice’s mind . . . was a complete tabula rasa . . . would be evidence of lack of qualification”).

See Seifert, 608 F.3d at 986.

Indeed, the endorsement clause does not prevent a judicial candidate from publicizing his agreement with another candidate’s views. See Wersal, 613 F.3d at 848 (Bye, J., dissenting).

See Seifert, 608 F.3d at 984; In re Vincent, 172 P.3d at 607-08.

See 413 U.S. 548, 564-68 (1973) (finding the rights of employees to participate in political campaigns were outweighed by the government’s interest in maintaining efficient governmental operations free from improper influence).

See id. at 565 (“[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it.”).

See Mohr & Harris, supra note 2.

See Wersal, 613 F.3d at 836-37.

Carey, 614 F.3d at 194.

129 S. Ct. 2252 (2009).

See id. at 2257.

See id. at 2257-58.

See id. at 2265.

See Wersal, 613 F.3d at 854 (Bye, J., dissenting).

See id. at 837.

Compare Caperton, 129 S. Ct. at 2266 (recusal required in cases where “the judge’s impartiality might reasonably be questioned”), with Wersal, 613 F.3d at 836 (same).

See, e.g., Duwe v. Alexander, 490 F. Supp. 2d 968, 977 (W.D. Wis. 2007) (striking on First Amendment grounds a Wisconsin provision requiring a judge to recuse himself from a proceeding if he had previously committed himself to an issue or controversy in the proceeding).

See Seifert, 608 F.3d at 986.