

---

COMMENT

---

---

DISENFRANCHISEMENT, DEMOCRACY, AND  
INCARCERATION: A LEGISLATIVE END  
TO FELONY DISENFRANCHISEMENT  
IN UNITED STATES PRISONS

---

TEDDY OKECHUKWU†

INTRODUCTION .....1304

I. THE LANDSCAPE OF FELONY DISENFRANCHISEMENT IN THE  
UNITED STATES .....1306

    A. *History of Voting and Disenfranchisement* ..... 1306

    B. *Current Disenfranchisement Laws*..... 1308

    C. *The Pernicious Effects of Contemporary Disenfranchisement Laws*..... 1312

II. THE FLAWED JUSTIFICATIONS BEHIND FELONY  
DISENFRANCHISEMENT LAWS ..... 1316

    A. *Purity of the Ballot Box* ..... 1317

    B. *Partisanship* .....1318

III. IMPORTANT LEGAL PRECEDENTS AND CHALLENGES TO FELONY  
DISENFRANCHISEMENT ..... 1319

    A. *Judicial Challenges to Felony Disenfranchisement Under the  
    Equal Protection Clause* ..... 1320

---

† Senior Editor, Volume 170, *University of Pennsylvania Law Review*; J.D. Candidate, 2022, University of Pennsylvania Law School; M. Sc., Social Policy, 2022, University of Pennsylvania School of Social Policy and Practice; M., Management Studies, 2014, Duke University, The Fuqua School of Business; A.B., Public Policy Studies, 2013, Duke University. I would like to thank my advisor, Deuel Ross, for teaching the Voting Rights Seminar that inspired this Essay, and for his invaluable guidance, insight, and feedback throughout the drafting of this Comment. Thank you to my friends and family for being constant sources of encouragement. Thank you to Olympia Feil for her willingness to review my writing, and for her patience and unrelenting support throughout my time in Law School. Finally, I would like to express sincere gratitude to each and every editor and staff member of the *University of Pennsylvania Law Review Volumes 169 and 170* who dedicated time to work on this Comment and see it through to its completion.

B. <i>Judicial Challenges to Felony Disenfranchisement Under the Voting Rights Act</i> .....	1322
IV. NOTABLE STATE ENFRANCHISEMENT EFFORTS .....	1324
A. <i>Florida</i> .....	1325
B. <i>California</i> .....	1327
C. <i>Maine, Vermont, and Washington, D.C.</i> .....	1328
V. HOW TO ACHIEVE FULL ENFRANCHISEMENT .....	1329
A. <i>Proposed and Potential Federal Legislation</i> .....	1330
B. <i>State Legislation</i> .....	1332
VI. ANTICIPATING LEGAL CHALLENGES .....	1334
CONCLUSION .....	1339

## INTRODUCTION

“I believe that everyone, and I mean everyone, deserves their right [to vote].”<sup>1</sup> Antonio Lancaster, voting for the first time in the November 2020 election, has been incarcerated since 2003 following an armed robbery conviction.<sup>2</sup> At age nineteen, he lost his right to vote before he was ever able to use it.<sup>3</sup> Then, Lancaster became one the first Washington D.C. residents to cast an absentee ballot while incarcerated following the July 2020 passage of emergency criminal justice reform legislation.<sup>4</sup> This legislation ended the practice of felony disenfranchisement—the practice of barring an individual who has been convicted of a felony from casting a vote in political elections<sup>5</sup>—in the District of Columbia.<sup>6</sup> Because D.C. has no federal prison, residents convicted of felonies are sent to federal prisons across the country.<sup>7</sup> Lancaster, currently serving his sentence in a Kansas prison, noted that fellow inmates

---

<sup>1</sup> Kira Lerner, *What It's Like to Vote from Prison*, SLATE (Oct. 28, 2020, 2:08 PM), <https://slate.com/news-and-politics/2020/10/dc-prisoners-voting-first-time-felony-disenfranchisement.html> [<https://perma.cc/28RJ-GP7W>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See *Felony Disenfranchisement Explained*, DEMOCRACY DOCKET (Oct. 19, 2021), <https://www.democracydocket.com/explainers/felony-disenfranchisement-explained/> [<https://perma.cc/897U-VURX>] (noting that disenfranchisement refers to the ability and process of states to remove the voting rights of individuals convicted of serious criminal offenses).

<sup>6</sup> Lerner, *supra* note 1 (discussing the passage of the emergency criminal justice reform legislation in D.C. that allows incarcerated citizens to vote and marks a significant stride towards ending felony disenfranchisement).

<sup>7</sup> See *id.* (“[R]esidents convicted of felonies . . . are sent to federal prisons hundreds of miles from their home.”).

are jealous of his reinstated right to vote: “When we talk about [voting], they’re like, ‘You don’t know how lucky you are.’”<sup>8</sup>

Lancaster, and other D.C. residents who are currently incarcerated, should indeed feel lucky to have their right to vote restored. “While a growing number of states have restored rights to people who have completed their sentences or who are currently on parole, currently incarcerated people have largely been left behind.”<sup>9</sup> Only two states, Maine and Vermont, and the District of Columbia, have extended the right to vote to every citizen, regardless of any prior criminal convictions.<sup>10</sup> The United States, however, bars nearly 5.3 million Americans from voting on the grounds that they have a criminal conviction.<sup>11</sup>

The United States is uniquely restrictive in its usage of disenfranchisement laws.<sup>12</sup> “No other democratic country in the world denies as many people—in absolute or proportional terms—the right to vote because of felony convictions.”<sup>13</sup> This is in large part attributed to the “direct connection between racial politics and felon disenfranchisement.”<sup>14</sup> In a country where Black and brown Americans make up the majority of people who are currently, or will be, incarcerated,<sup>15</sup> and more Black men are in prison currently than during slavery,<sup>16</sup> felony disenfranchisement laws silence the

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See *De Facto Disenfranchisement: Introduction*, ACLU, <https://www.aclu.org/other/de-facto-disenfranchisement-introduction> [<https://perma.cc/DPQ3-52ZV>] (illustrating that convictions present a considerable barrier to the fundamental right to vote).

<sup>12</sup> See THE SENT’G PROJECT, HUM. RTS. WATCH, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 17* (1998) [hereinafter *LOSING THE VOTE*] (“The United States may have the world’s most restrictive criminal disenfranchisement laws.”); LALEH ISPAHANI, ACLU, *OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 6* (2006) (“Seventeen European states have no ban whatever on voting by anyone, serving prisoners included.”).

<sup>13</sup> *LOSING THE VOTE*, *supra* note 12, at 1.

<sup>14</sup> See ANGELA Y. DAVIS, *THE MEANING OF FREEDOM: AND OTHER DIFFICULT DIALOGUES 177* (2012) (“[B]etween 1850 and 2002, states with larger proportions of people of color in their prison populations were more likely to pass laws restricting their rights to vote . . .”).

<sup>15</sup> See Saki Knafo, *1 In 3 Black Males Will Go to Prison in Their Lifetime, Report Warns*, HUFFINGTON POST, [https://www.huffpost.com/entry/racial-disparities-criminal-justice\\_n\\_4045144](https://www.huffpost.com/entry/racial-disparities-criminal-justice_n_4045144) [<https://perma.cc/3SP3-JMW3>] (Oct. 4, 2013, 3:24 PM) (“One in every three black males born today can expect to go to prison at some point in their life . . .”); ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. JUST., *AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 2* (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/K52A-CGYU>] (“Black people are represented in the American criminal justice system in unwarranted numbers given their share of the population.”).

<sup>16</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 180* (2012) (“More African American adults are under correctional control

voices of those who are most affected by the criminal justice system, leaving the disenfranchised without a say in choosing the representatives of the system and the very conditions in which they live.

Although states like Florida<sup>17</sup> and California<sup>18</sup> have made some change to their felony disenfranchisement laws in recent years, only one jurisdiction, Washington D.C., has restored the right to vote to everyone.<sup>19</sup> Unfortunately, incremental change continues to leave room for disenfranchisement. There is no evidence that disenfranchising formerly and presently incarcerated citizens aids in rehabilitation or deterrence. Felony disenfranchisement policies have served as a means of retribution, used to stigmatize and alienate people who have been incarcerated. The remaining forty-eight states that still employ felony disenfranchisement must adopt legislation that guarantees the right to vote to all citizens, regardless of their criminal record. Only then can America ensure that it is living up to its founding democratic principles.

## I. THE LANDSCAPE OF FELONY DISENFRANCHISEMENT IN THE UNITED STATES

### A. *History of Voting and Disenfranchisement*

The United States Supreme Court has repeatedly venerated the right to vote. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>20</sup> The disenfranchisement of incarcerated citizens runs in direct opposition to this stated ideal.

The act of disenfranchising a person convicted of a felony has roots dating back to ancient Greece.<sup>21</sup> “Civil death” involved various punishments,

today—in prison or jail, on probation or parole—than were enslaved in 1850, a decade before the Civil War began.”)

<sup>17</sup> Voting Rights Restoration for Felons Initiative (Amendment 4), Citizen’s Initiative (Fla. 2018).

<sup>18</sup> See Voting Rights Restoration for Persons on Parole Amendment (Prop. 17), Citizen’s Initiative (Cal. 2020).

<sup>19</sup> See Restore The Vote Amendment Act Of 2020, 67 D.C. Reg. 13867 (Apr. 27, 2021) (allowing residents of the District of Columbia to vote while incarcerated for felonies who are otherwise qualified).

<sup>20</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); see also *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo v. Hopkins*, . . . the Court referred to ‘the political franchise of voting’ as ‘a fundamental political right, because preservative of all rights.’” (citation omitted)).

<sup>21</sup> See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059-60 (“[C]riminals pronounced infamous were

including “the forfeiture of property, loss of right to appear in court, prohibition on entering into contracts, . . . [and] the loss of voting rights.”<sup>22</sup> In the United States, following the American Revolution, the proliferation of felony disenfranchisement laws ushered in “civic death” for many citizens of the newly established nation.<sup>23</sup> Article I, Section Two of the United States Constitution granted states the power to establish their own voter qualifications.<sup>24</sup> By the outset of the Civil War in 1861, over twenty of the existing thirty-four states either had enacted statutes that barred people with felony convictions from voting or had amendments within their respective state constitutions with disenfranchisement provisions.<sup>25</sup> This trend continued in the thirty-five years after the Civil War, as nineteen states adopted or amended laws restricting the right to vote for citizens with criminal records.<sup>26</sup>

In particular, disenfranchisement laws burgeoned as white Southerners sought ways to prevent Black citizens, who had recently gained the right to vote, from attaining political power. While the Thirteenth Amendment abolished slavery in the United States, it allowed for slavery to remain as a form of punishment for those convicted of a crime.<sup>27</sup> States took advantage of this provision to disenfranchise Black voters through various methods, including “tying the loss of voting rights to crimes alleged to be committed primarily by [B]lack while excluding offenses held to be committed by whites.”<sup>28</sup>

---

unable to appear in court or vote in the assembly, to make public speeches, or serve in the army.” (internal quotation marks omitted)).

<sup>22</sup> Patsy Brumfield, *They're Locked Up, but Not Locked Out of Voting*, SUN HERALD (Oct. 10, 2016, 5:00 AM), <https://www.sunherald.com/news/politics-government/article107128112.html> [<https://perma.cc/8Q7E-MSKU>].

<sup>23</sup> William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 617 (2007) (“Although felony disenfranchisement was present from the time that the first colonists arrived in America, it was not until after the American Revolution that the felony disenfranchisement laws were first codified as statutes.”).

<sup>24</sup> See U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

<sup>25</sup> See Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 781 (2002) (“[B]y the eve of the Civil War some two dozen states had statutes barring felons from voting or had felon disenfranchisement provisions in their state constitutions.” (citations omitted)).

<sup>26</sup> See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 55 (2006) (noting that nineteen states diminished voting rights for criminal offenders between 1865 and 1900).

<sup>27</sup> See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

<sup>28</sup> Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed*, 31 HUM. RTS. 16 (2004); see also MANZA & UGGEN, *supra* note 26, at 55 (noting that South Carolina, for example, passed legislation that triggered disenfranchisement on the basis of “crimes of thievery, adultery,

Pervasive disenfranchisement laws persisted across the country throughout the twentieth century. While the Civil Rights Movement of the mid-twentieth century brought enormous changes to the disenfranchisement landscape—notably through the passage of the Voting Rights Act in 1965—felon disenfranchisement remained rampant.<sup>29</sup> As Michelle Alexander observed, “[f]ollowing the collapse of Jim Crow, all of the race-neutral devices for excluding [B]lack from the electorate were eliminated through litigation or legislation, except felon disenfranchisement laws.”<sup>30</sup> Today, felon disenfranchisement laws continue to exist in nearly every state, and the prevalence of these laws have far-reaching and detrimental consequences for people in overpoliced and hyper-criminalized communities.

### B. Current Disenfranchisement Laws

Although eleven states and the District of Columbia have expanded voting rights for currently and formerly incarcerated citizens since 2016,<sup>31</sup> forty-eight states still have statutes or constitutional provisions on the books that disenfranchise Americans with felony convictions.<sup>32</sup> About three-quarters of those disenfranchised by these laws are not currently incarcerated, while the remaining quarter are people who are currently imprisoned.<sup>33</sup> The restrictiveness of these laws varies by state. In twenty-four states

---

arson, wife-beating, housebreaking, and attempted rape,” while excluding murder (internal quotation marks omitted)).

<sup>29</sup> See generally Terrye Conroy, *The Voting Rights Act of 1965: A Selected Annotated Bibliography*, 98 LAW LIBR. J. 663 (2006) (discussing the history and reauthorization of the Voting Rights Act of 1965).

<sup>30</sup> ALEXANDER, *supra* note 16, at 192.

<sup>31</sup> See Brittany Renee Mayes & Kate Rabinowitz, *Since 2016, 11 States and D.C. Have Expanded Voting Rights for the Currently and Formerly Incarcerated*, WASH. POST (Aug. 12, 2020), <https://www.washingtonpost.com/politics/2020/08/12/since-2016-11-states-dc-have-expanded-voting-rights-currently-formerly-incarcerated/?arc404=true> [<https://perma.cc/2H9Z-DCCB>]; COLLATERAL CONSEQUENCES RES. CTR., PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019, at 1 (2020) (“In 2019, 43 states, the District of Columbia, and the federal government enacted an extraordinary 153 laws aimed at reducing barriers faced by people with criminal records in the workplace, at the ballot box, and in many other areas of daily life.”).

<sup>32</sup> See *Felon Voting Rights*, NAT’L CONF. OF STATE LEGISLATURES (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/L9JW-SJJY>] (providing data on states that limit the right to vote for incarcerated individuals in some way).

<sup>33</sup> See LOSING THE VOTE, *supra* note 12, at 8-10 (“Nearly three-quarters (73 percent) of the disenfranchised are not in prison, but are on probation, or parole or have completed their sentences.”).

(California,<sup>34</sup> Colorado,<sup>35</sup> Connecticut,<sup>36</sup> Hawaii,<sup>37</sup> Illinois,<sup>38</sup> Indiana,<sup>39</sup> Louisiana,<sup>40</sup> Maryland,<sup>41</sup> Massachusetts,<sup>42</sup> Michigan,<sup>43</sup> Montana,<sup>44</sup> Nevada,<sup>45</sup> New Jersey,<sup>46</sup> New Hampshire,<sup>47</sup> New York,<sup>48</sup> North Carolina,<sup>49</sup> North

---

<sup>34</sup> See Patrick McGreevy, *Prop. 17, Which Will Let Parolees Vote in California, is Approved by Voters*, L.A. TIMES, <https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-17-results> [<https://perma.cc/WU7X-7HCB>] (Nov. 4, 2020, 6:58 AM) (noting that on November 3, 2020, California voters approved Proposition 17 which allowed people on parole to vote).

<sup>35</sup> See Alex Burness, *As of Today, 11,467 Colorado Parolees Can Register to Vote. Will They?*, COLO. INDEP. (Jul. 1, 2019), <https://www.coloradoindependent.com/2019/07/01/parolee-felon-voting-rights> (“Colorado passed a new state law [in 2019] to re-enfranchise people convicted of felonies who are out on parole....”).

<sup>36</sup> See *Felon Voting Rights*, *supra* note 32 (“In 2021, Connecticut passed SB 1202 restoring voting rights to citizens on parole.”).

<sup>37</sup> See *State Felon Voting Laws & Policies*, PROCON, <https://felonvoting.procon.org/state-felon-voting-laws> [<https://perma.cc/B2UU-Y7UK>] (Aug. 24, 2021).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See BRENNAN CTR. FOR JUST., CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES (2022), <https://www.brennancenter.org/sites/default/files/2022-01/Criminal%20Disenfranchisement%20Laws%20Map%2001.01.22.pdf> [<https://perma.cc/VDN4-3HMY>] (“Voting rights are restored for those on probation or parole who have not been incarcerated during the last five years. Practically speaking, this means many if not most people on probation are eligible to vote and a small number of people on parole for more than five years are eligible.”).

<sup>41</sup> See *id.* (“As of March 10, 2016, voting rights are restored automatically after release from court-ordered sentence of imprisonment. People who are convicted of buying or selling votes are permanently disenfranchised.”).

<sup>42</sup> *State Felon Voting Laws & Policies*, *supra* note 37.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See Vanessa Romo, *New Jersey Governor Signs Bills Restoring Voting Rights to More Than 80,000 People*, NPR (Dec. 18, 2019, 6:29 PM), <https://www.npr.org/2019/12/18/789538148/new-jersey-governor-signs-bills-restoring-voting-rights-to-more-than-80-000-peop> [<https://perma.cc/LNB2-72U5>] (chronicling New Jersey Governor Phil Murphy’s signing of a bill in 2019 that would restore the right to vote to people on probation or parole starting in March of 2020).

<sup>47</sup> *State Felon Voting Laws & Policies*, *supra* note 37.

<sup>48</sup> See *id.* (“On May 4, 2021, Governor Cuomo signed a bill into law that automatically restores voting rights upon release from prison, even if the person is on parole.”).

<sup>49</sup> See *id.* (“On Aug. 23, 2021, a three-judge panel in North Carolina issued a preliminary injunction declaring that people convicted of felonies who have completed their prison time must be allowed to register to vote immediately.”).

Dakota,<sup>50</sup> Ohio,<sup>51</sup> Oregon,<sup>52</sup> Pennsylvania,<sup>53</sup> Rhode Island,<sup>54</sup> Utah,<sup>55</sup> Virginia,<sup>56</sup> and Washington<sup>57</sup>), people with felony convictions lose their voting rights only for the period of time in which they are incarcerated, and their voting rights are automatically restored upon release.<sup>58</sup> In fifteen states (Alaska,<sup>59</sup> Arkansas,<sup>60</sup> Georgia,<sup>61</sup> Idaho,<sup>62</sup> Kansas,<sup>63</sup> Minnesota,<sup>64</sup> Missouri,<sup>65</sup> Nebraska,<sup>66</sup> New Mexico,<sup>67</sup> Oklahoma,<sup>68</sup> South Carolina,<sup>69</sup> South Dakota,<sup>70</sup> Texas,<sup>71</sup> West Virginia,<sup>72</sup> and Wisconsin<sup>73</sup>) citizens with felony convictions lose their voting rights during incarceration as well as during their parole and

---

<sup>50</sup> *Id.*

<sup>51</sup> *But see* CRIMINAL DISENFRANCHISEMENT LAWS, *supra* note 40 (“Persons [in Ohio] who have been twice convicted of a violation of Ohio’s elections law are permanently disenfranchised.”).

<sup>52</sup> *But see* Alex Zielinski, *Bill to End Felony Disenfranchisement Stalls in Oregon Legislature Again*, PORTLAND MERCURY (Feb. 15, 2022, 9:12 AM), <https://www.portlandmercury.com/blogtown/2022/02/15/38468936/bill-to-end-felony-disenfranchisement-again-stalls-in-oregon-legislature> [https://perma.cc/TP4A-AFH5] (“Oregon, like nearly every other state in the country, bans people imprisoned for felony conviction from voting while incarcerated.”).

<sup>53</sup> *State Felon Voting Laws & Policies*, *supra* note 37.

<sup>54</sup> *See id.* (discussing Rhode Island).

<sup>55</sup> *See id.* (discussing Utah).

<sup>56</sup> *See id.* (“On Mar. 16, 2021, Governor Ralph Northam took executive action to restore the right to vote to all Virginians who are not currently incarcerated, and he has stated his intention of continuing this practice going forward for all Virginians upon their release from prison.”).

<sup>57</sup> *See id.* (“On April 7, 2021, [Washington State] Gov. Inslee signed a law that will automatically restore voting rights upon release from prison when it goes into effect in January 2022.”); Joseph O’Sullivan, *Bill Restores Voting Rights to Washingtonians With Felonies Upon Release From Prison*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/politics/inslee-signs-bill-restoring-voting-rights-to-washingtonians-with-felonies-upon-release-from-prison> [https://perma.cc/Z2PU-XVT5] (Apr. 7, 2021, 7:09 PM).

<sup>58</sup> *State Felon Voting Laws & Policies*, *supra* note 37 (listing states that restore voting rights to at least a portion of those previously incarcerated); *Felon Voting Rights*, *supra* note 32 (same).

<sup>59</sup> *See State Felon Voting Laws & Policies*, *supra* note 37 (discussing Alaska).

<sup>60</sup> *See id.* (discussing Arkansas).

<sup>61</sup> *See id.* (discussing Georgia).

<sup>62</sup> *See id.* (discussing Idaho).

<sup>63</sup> *See id.* (discussing Kansas).

<sup>64</sup> *See id.* (discussing Minnesota).

<sup>65</sup> *See id.* (discussing Missouri).

<sup>66</sup> *See id.* (“In Nebraska, voting rights are restored two years after the completion of sentence. Nebraska disenfranchises persons with treason convictions until they have their civil rights individually restored.”).

<sup>67</sup> *See id.* (discussing New Mexico).

<sup>68</sup> *See id.* (“In Oklahoma, citizens are disenfranchised for the time period set out in their original sentence. Voting rights are restored once this time period has elapsed.”).

<sup>69</sup> *See id.* (discussing South Carolina).

<sup>70</sup> *See id.* (discussing South Dakota).

<sup>71</sup> *See id.* (discussing Texas).

<sup>72</sup> *See id.* (discussing West Virginia).

<sup>73</sup> *See id.* (discussing Wisconsin).



probation.<sup>74</sup> Voting rights are then automatically restored after this time period.<sup>75</sup> Formerly incarcerated people “may also have to pay outstanding fines, fees or restitution before their rights are restored . . . .”<sup>76</sup> In nine states (Alabama,<sup>77</sup> Arizona,<sup>78</sup> Delaware,<sup>79</sup> Florida,<sup>80</sup> Iowa,<sup>81</sup> Kentucky,<sup>82</sup> Mississippi,<sup>83</sup> Tennessee,<sup>84</sup> and Wyoming<sup>85</sup>), people with felonies lose their voting rights

---

<sup>74</sup> See *id.* (listing states where voting rights are restored after prison, parole, and probation are completed).

<sup>75</sup> *Id.*

<sup>76</sup> *Felon Voting Rights*, *supra* note 32.

<sup>77</sup> See CRIMINAL DISENFRANCHISEMENT LAWS, *supra* note 40 (noting that individuals who commit certain crimes of “moral turpitude,” like murder and treason, are permanently disenfranchised in Alabama).

<sup>78</sup> See *id.* (“People convicted of one felony can have their voting rights restored upon completion of sentence, including all prison, parole, and probation terms and payment of all restitution. People convicted of two or more felonies are permanently barred from voting unless pardoned or restored by a judge.”).

<sup>79</sup> See *id.* (“People with most felony convictions have their voting rights restored automatically after completion of sentence, including prison, parole, and probation. People who are convicted of certain disqualifying felonies—including murder, bribery, and sexual offenses—are permanently disenfranchised. People convicted of election offenses are disenfranchised for 10 years following their sentences.”).

<sup>80</sup> See *id.* (“Florida voters approved a November 2018 constitutional amendment which automatically restores the right to vote to 1.4 million individuals with felony convictions in their past. The amendment restores the right to vote for people with felony convictions, except individuals convicted of murder or felony sexual offenses, once they have completed the terms of their sentence, including probation and parole.”).

<sup>81</sup> See *id.* (“Iowa is one of three states whose constitution permanently disenfranchises citizens with past felony convictions, but grants the state’s governor the authority to restore voting rights. On August 5, 2020, Governor Reynolds signed an executive order to automatically and prospectively restore the right to vote to tens of thousands of Iowans with past convictions, except individuals convicted of felony homicide offenses, once they have completed their terms of incarceration, probation, parole, or special sentence.”).

<sup>82</sup> See *id.* (“Kentucky is one of three states whose constitution permanently disenfranchises citizens with past felony convictions, but grants the state’s governor the authority to restore voting rights. On December 12, 2019, Governor Beshear signed an executive order to automatically restore the right to vote to more than 140,000 Kentuckians with past convictions for non-violent offenses if they have completed incarceration, probation, and parole. The order is both retrospective and prospective.”).

<sup>83</sup> See *id.* (“People who are convicted of specified disqualifying offenses are permanently disenfranchised unless pardoned by the governor or their right to vote is restored by a two-thirds vote of both houses of the legislature.”).

<sup>84</sup> See *id.* (“Tennessee has one of the most complex disenfranchisement policies in the country. People completing sentences for some felony convictions, who have paid all restitution and court costs, and are current with child support payments may apply for rights restoration. Individuals with certain types of convictions, including rape, murder, and bribery, among others, are permanently disenfranchised.”).

<sup>85</sup> See *id.* (“Voting rights automatically restored after five years to people who complete sentences for first-time, non-violent felony convictions in 2016 or after. Applications are required from people who completed sentences for first-time, non-violent felony convictions before 2016, and from people convicted outside Wyoming, or under federal law. People with violent convictions or

indefinitely for some crimes or require a governor's pardon to restore their voting rights, while others face an additional waiting period after completion of their sentence (including parole and probation) or require additional actions before voting rights can be restored.<sup>86</sup> In Tennessee, for example, in lieu of a governor's pardon, a person convicted of an infamous crime may petition for a restoration of their voting rights after completing their sentence.<sup>87</sup>

### C. *The Pernicious Effects of Contemporary Disenfranchisement Laws*

Felony disenfranchisement laws have detrimental impacts that reverberate across communities throughout the United States. The effects of these laws are particularly glaring when they are presented in the context of their racially disparate impacts. Between 1976 and 2016, the number of Americans disenfranchised due to a felony conviction grew from 1.17 million people to 6.11 million people.<sup>88</sup> Because Black Americans are significantly overrepresented in the criminal legal system compared to other groups, they are disproportionately affected by disenfranchisement laws. Black Americans are incarcerated at nearly six times the rate of white Americans,<sup>89</sup> and while Black Americans comprise a little over 13% of the United States population,<sup>90</sup> they make up a staggering 40% of the population of Americans who have lost the right to vote due to a criminal conviction.<sup>91</sup> According to one Sentencing

---

with multiple felony convictions are permanently disenfranchised, unless pardoned by the governor.”).

<sup>86</sup> See *Felon Voting Rights*, *supra* note 32 (stating that current state approaches to felony disenfranchisement vary).

<sup>87</sup> See TENN. CODE ANN. § 40-29-101(c) (2021) (“Those convicted of an infamous crime may petition for restoration upon the expiration of the maximum sentence imposed for the infamous crime.”).

<sup>88</sup> CHRIS UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, SENT’G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 4 (2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/> [https://perma.cc/UEG6-D4P3] (highlighting the increase in disenfranchised people before states enacted new policies to reduce the number of people disenfranchised due to a felony conviction).

<sup>89</sup> John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison> [https://perma.cc/B4R2-RLHZ] (stating that “[i]n 2017, there were 1,549 black prisoners for every 100,000 black adults” and 272 white prisoners for every 100,000 white adults).

<sup>90</sup> *Quick Facts*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [https://perma.cc/J587-25L9] (choose “Browse by Topic”; then choose “Race”; then scroll to the bottom under “You May Be Interested In” and select “Quick Facts”).

<sup>91</sup> LOCKED OUT 2020, *supra* note 88, at 15 (“Despite significant legal changes in recent decades, about 5.2 million Americans are disenfranchised in 2020. When we break these figures down by race and ethnicity, it is clear that disparities in the criminal justice system are linked to disparities in political representation. The distribution of disenfranchised individuals . . . also bears repeating:

Project report, “[o]ne in 16 African Americans of voting age is disenfranchised, a rate 3.7 times greater than that of non-African Americans,” and more than “6.2 percent of the adult African American population is disenfranchised compared to 1.7 percent of the non-African American population.”<sup>92</sup> These statistics illuminate the far-reaching, discriminatory ramifications of disenfranchisement laws, and they inspire many questions as to how the high rates of incarceration and disenfranchisement among the Black population contribute to overall inequality.<sup>93</sup>

These consequences create conditions that perpetuate the vicious cycle of entry and re-entry into the criminal justice system, as well as a disproportionate underrepresentation in democracy. One consequence of disenfranchisement laws is that they undermine the efficacy of the criminal legal system because they hinder, rather than promote, the reintegration of formerly incarcerated people back into their communities. By denying formerly incarcerated people the ability to directly participate in the political process of voting, disenfranchisement isolates those reentering society and exacerbates the issues that contribute to recidivism.<sup>94</sup> The public shame associated with the stripping of this fundamental right, as the Secretary of State of California once noted, “is a hindrance to the efforts of society to rehabilitate [formerly incarcerated people] and convert them into law-abiding and productive citizens.”<sup>95</sup> Using that same train of thought, “scholars argue that the deprivation of voting rights through felony disenfranchisement hinders the reintegration of people with felony convictions. The ability to vote is an important marker of community standing and belonging.”<sup>96</sup> Furthermore, empirical studies have indicated that felony disenfranchisement laws may contribute negatively to recidivism rates.<sup>97</sup> One study demonstrated that “[a]mong former arrestees, about twenty-seven percent of the nonvoters

---

about one-fourth of this population is currently incarcerated, and about 4 million adults who live in their communities are banned from voting. Of this total, 1.3 million are African Americans.”).

<sup>92</sup> *Id.*

<sup>93</sup> See, e.g., Robert D. Crutchfield, *Abandon Felon Disenfranchisement Policies*, 6 CRIMINOLOGY & PUB. POL’Y 707, 712 (2007) (pointing to various research highlighting how felony disenfranchisement policies contribute to and exacerbate racial inequality).

<sup>94</sup> See James M. Binnall, *A “Meaningful” Seat at the Table: Contemplating Our Ongoing Struggle to Access Democracy*, 73 SMUL. REV. F. 35, 41-42 (2020) (discussing the impacts of civic exclusion on recidivism).

<sup>95</sup> *Richardson v. Ramirez*, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting) (internal quotations omitted) (quoting Memorandum of the Secretary of the State of California in Opposition to Certiorari, in *EVELLE J. YOUNGER, EDMUND G. BROWN & DONALD G. GREEN, CLASS OF COUNTY CLERKS AND REGISTRARS OF VOTERS V. RAMIREZ (ABRAN)*: U.S. SUPREME COURT TRANSCRIPT OF RECORD WITH SUPPORTING PLEADINGS (2011)).

<sup>96</sup> Expert Report of Dr. Traci Burch at 41-42, *Cnty. Success Initiative v. Moore*, No. 331P21-1 (N.C. May 8, 2020).

<sup>97</sup> See *id.* at 42 nn.56-58 (citing literature that opines as to the effects of felony disenfranchisement laws on recidivism rates).

were rearrested, relative to twelve percent of the voters.”<sup>98</sup> Another study analyzed data collected by the Department of Justice Bureau of Justice Statistics to demonstrate that there was a significant association between state disenfranchisement laws and recidivism.<sup>99</sup> Disenfranchisement is correlated with continued interactions with the criminal legal system, which incarceration and criminal punishment purport to prevent and reduce.

Disenfranchisement laws not only impact an individual’s direct ability to participate in the democratic process through voting, but they also decrease the voting power of minority communities through prison-based gerrymandering. Prison gerrymandering “is the practice of counting incarcerated people as residents of the district in which [they are] imprisoned, rather than as residents of their regular home communities.”<sup>100</sup>

Article I, Section 2 of the Constitution tasks Congress with conducting a census count of the population every ten years.<sup>101</sup> Using the census data, legislative seats are apportioned, and electoral district lines are drawn.<sup>102</sup> The Census Bureau has adopted the practice of counting incarcerated people not where they were living before their incarceration, but instead where the person lives and sleeps most of the time, which is where they are imprisoned.<sup>103</sup> Starting with the 2010 Census, the Census Bureau allowed for, but did not require, population adjustments for incarcerated people.<sup>104</sup> “The

---

<sup>98</sup> MANZA & UGGEN, *supra* note 26, at 131-33.

<sup>99</sup> Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L. J. 407, 408 (2012).

<sup>100</sup> Paige Trubatch, *Census 2020: What Is Prison Gerrymandering?*, ANDREW GOODMAN FOUND. (Aug. 20, 2019), <https://andrewgoodman.org/news-list/prison-gerrymandering/> [<https://perma.cc/9P3T-PQJR>].

<sup>101</sup> See U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”).

<sup>102</sup> See *Our Census*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/censuses.html> [<https://perma.cc/WY2Z-ZYJW>] (“The data collected by the decennial census determine the number of seats each state has in the U.S. House of Representatives and is also used to distribute hundreds of billions of dollars in federal funds to local communities . . . . It is also used to draw the lines of legislative districts and reapportion the seats each State holds in Congress.”).

<sup>103</sup> Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5526 (Feb. 8, 2018) (“The state in which a person resides and the specific location within that state is determined in accordance with the concept of ‘usual residence,’ which is defined by the Census Bureau as the place where a person lives and sleeps most of the time. This is not always the same as a person’s legal residence, voting residence, or where they prefer to be counted. This concept of ‘usual residence’ is grounded in the law providing for the first census, the Act of March 1, 1790, expressly specifying that persons be enumerated at their ‘usual place of abode.’”).

<sup>104</sup> See Robert Groves, *So, How Do You Handle Prisons?*, U.S. CENSUS BUREAU (Mar. 1, 2010), <https://www.census.gov/newsroom/blogs/director/2010/03/so-how-do-you-handle-prisons.html> [<https://perma.cc/G77R-MWRF>] (describing a reworking of the counting and categorization system for incarcerated people).

Bureau released the population data of ‘group quarters,’ which includes prisons, hospitals, nursing homes, college dormitories, military barracks, group homes and shelters, early”<sup>105</sup> to give states the option to “‘leave the prisoners counted where the prisons are, delete them from redistricting formulas, or assign them to some other locale.’”<sup>106</sup>

As a result, in forty-four states<sup>107</sup> across the country, incarcerated Americans “are treated as residents of their prison cell for the purposes of creating electoral districts, although they themselves cannot vote, and are likely to return to their home community after serving their term of incarceration.”<sup>108</sup> This practice increases the voting power of predominantly white rural areas where many prisons are located.<sup>109</sup> This practice works in conjunction with post-release disenfranchisement to dilute the voting power of localities to where formerly incarcerated people return. Because formerly incarcerated people are not allowed to vote in most states—with the exception of Maine, Vermont, and D.C.—upon release from prison, formerly incarcerated people become non-voting residents within a district,

---

<sup>105</sup> Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners’ Political Representation*, 45 *FORDHAM URB. L.J.* 323, 347 (2017).

<sup>106</sup> *Id.*

<sup>107</sup> See *Nevada Governor Steve Sisolak Signs Law Ending Prison Gerrymandering*, PRISON POL’Y INITIATIVE: PRISON GERRYMANDERING PROJECT (May 31, 2019), <https://www.prisonersofthecensus.org/news/2019/05/31/nevada-gov> [https://perma.cc/3MBE-E95Q] (noting that Washington and Nevada became the fifth and sixth states, respectively, to pass legislation to end the practice).

<sup>108</sup> Ebenstein, *supra* note 105, at 371.

<sup>109</sup> See ALEXANDER, *supra* note 16, at 193 (“Under the usual-residence rule, the Census Bureau counts imprisoned individuals as residents of the jurisdiction in which they are incarcerated. Because most new prison construction occurs in predominately white, rural areas, white communities benefit from inflated population totals at the expense of the urban, overwhelmingly minority communities from which the prisoners come. This has enormous consequences for the redistricting process. White rural communities that house prisons wind up with more people in state legislatures representing them, while poor communities of color lose representatives because it appears their population has declined. This policy is disturbingly reminiscent of the three-fifths clause in the original Constitution, which enhanced the political clout of slaveholding states by including 60 percent of slaves in the population base for calculating Congressional seats and electoral votes, even though they could not vote.”); cf. John M. Eason, *Why Prison Building Will Continue Booming In Rural America*, CONVERSATION (Mar. 12, 2017, 8:44 PM), <https://theconversation.com/why-prison-building-will-continue-booming-in-rural-america-71920> [https://perma.cc/NY4E-XGMJ] (“[T]he number of prisons in the U.S. swelled between 1970 and 2000, from 511 to nearly 1,663. Prisons constructed during that time cover nearly 600 square miles, an area roughly half the size of Rhode Island. More than 80 percent of these facilities are operated by states, approximately 10 percent are federal facilities and the rest are private. The prison boom is a massive public works program that has taken place virtually unnoticed because roughly 70 percent of prisons were built in rural communities. Most of this prison building has occurred in conservative southern states like Florida, Georgia, Oklahoma and Texas.”); see also *Impact on Demographic Data*, PRISON POL’Y INITIATIVE: PRISON GERRYMANDERING PROJECT, <https://www.prisonersofthecensus.org/problem/statistics.html> [https://perma.cc/94TL-8J SU] (“According to Department of Agriculture Demographer Calvin Beale, although most prisoners are from urban areas, 60% of new prison construction takes place in non-metro regions.”).

“represented” by a legislator over whom they hold no electoral influence. The combination of an incarcerated person’s restriction on the right to vote, the 500% increase in the United States’ prison population since 1970,<sup>110</sup> and prison-based gerrymandering has skewed legislative apportionment and the distribution of political power away from predominantly low-income communities and communities of color to predominately white, affluent communities.<sup>111</sup>

## II. THE FLAWED JUSTIFICATIONS BEHIND FELONY DISENFRANCHISEMENT LAWS

If felony disenfranchisement laws are shown to produce gross racially disparate impacts amongst the electorate, why do they still exist? This Part examines some of the common justifications for felony disenfranchisement. First, some proponents argue that felony disenfranchisement laws are necessary for protecting the sanctity of the American electoral process, participation in which should be reserved for only morally responsible citizens. Second and relatedly, people who have been convicted of breaking the law have shown that they have no respect for the law, making them more likely—so the argument goes—to engage in practices such as voter fraud which corrupt the sanctity of the electoral process. Finally, policy advocates, convinced that currently and formerly incarcerated people would vote as a monolith, fear the partisan ramifications of restoring their political voices. Many, if not all, of these arguments supporting disenfranchisement laws, however, fail to consider how structural racism infiltrates the criminal justice system, resulting in a system that applies the law unequally, and thus also applies voting rights unequally.<sup>112</sup> Because felony disenfranchisement laws have disproportionately impacted Black Americans, to operate as a true democracy, legislators must reject such disenfranchising efforts and guarantee a meaningful right to vote to every American.

---

<sup>110</sup> *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/5ZX5-MRS8>].

<sup>111</sup> See Ebenstein, *supra* note 105, at 335 (“By relocating a concentration of disenfranchised citizens from primarily urban areas to rural areas where they do not have a representative accountable to their interests, the combination of felony disenfranchisement and prison districting severely disrupts representational democracy.”).

<sup>112</sup> See also Clinton Smith (@ClintSmithIII), TWITTER (Oct. 29, 2020, 11:10 AM), <https://twitter.com/clintsmithiii/status/1321831792240971777?s=21> [<https://perma.cc/W7LX-225R>] (“A big reason people think [that incarcerated people should not vote] is [because] of decades, really centuries, of fear-mongering that connects carcerality to blackness [and] blackness to underservedness.”).

### A. *Purity of the Ballot Box*

Morality should not be a deciding factor in an American citizen's ability to vote. Unfortunately, the preeminently adopted justification for felony disenfranchisement policies across the United States is the idea of maintaining the "purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption . . ." <sup>113</sup> People with felony convictions must be excluded from the electorate to maintain the purity of the ballot box—so the argument goes—because their civic participation would lead to the election of candidates and the adoption of laws that "hazard the welfare of communities, if not that of the State itself . . ." <sup>114</sup> By preventing people with criminal records from voting, states ensure that the electorate excludes those who would look to weaken the content and administration of criminal law, threatening the safety and well-being of law-abiding citizens. <sup>115</sup>

More recently, Roger Clegg, president of the conservative think tank Center for Equal Opportunity, stated that "[i]f you're not willing to follow the law, then you should not have a role in making the law for everyone else, which is what you do when you vote . . ." <sup>116</sup> This contention rests on the idea that people with criminal records "lack . . . the virtue necessary to responsibly participate in the determination of those that will govern." <sup>117</sup> It also assumes that the criminal justice system that formally labels people as criminals is comprehensive and infallible. <sup>118</sup>

<sup>113</sup> *Washington v. State*, 75 Ala. 582, 585 (1884); see also *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972) ("[A] state has an interest in preventing persons who have been convicted of serious crimes from participating in the electoral process . . . or a quasi-metaphysical invocation that the interest is preservation of the 'purity of the ballot box.'" (citations omitted)).

<sup>114</sup> *Washington*, 75 Ala. at 585.

<sup>115</sup> But see Carl N. Frazier, Note, *Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them*, 95 KY. L.J. 481, 484 (2006) (stating that this argument for criminal disenfranchisement is weak given that the content of an individual's vote or reasons for casting a ballot are inconsequential in determining whether a person should have the right to vote initially).

<sup>116</sup> Roger Clegg & Hans A. von Spakovsky, *There Are Good Reasons for Felons to Lose the Right to Vote*, HERITAGE FOUND. (Apr. 10, 2018), <https://www.heritage.org/election-integrity/commentary/there-are-good-reasons-felons-lose-the-right-vote> [<https://perma.cc/S52F-HU2M>].

<sup>117</sup> Mark E. Thompson, Comment, *Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 195 (2002).

<sup>118</sup> See SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, NAT'L REGISTRY EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017) ("African Americans are only 13% of the American population but a majority of innocent defendants wrongfully convicted of crimes and later exonerated. They constitute 47% of the 1,900 exonerations listed in the National Registry of Exonerations (as of October 2016), and the great majority of more than 1,800 additional innocent defendants who were framed and convicted of crimes in 15 large-scale police scandals and later cleared in 'group exonerations.'").

This argument is both logically and legally flawed. In reality, “[e]very offender of a crime of great moral turpitude is not convicted or even arrested because law enforcement is arguably prejudiced against those with less political and economic stature.”<sup>119</sup> The disenfranchisement of people convicted of crimes, therefore, does not effectively exclude those who “lack the virtue necessary” to vote responsibly from the electorate—exposing the concept of maintaining “the purity of the ballot box” as nothing more than a myth. Similarly, there is little empirical evidence to support the charge that people convicted of felonies support laws and policies that endanger the welfare of others.<sup>120</sup> Regardless, even if people with criminal records did vote with the intention of supporting these types of candidates or policies, legislatures are constitutionally barred from basing voting rights on the potential voting preference of a group of people. In *Carrington v. Rash*, the Supreme Court held that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”<sup>121</sup> Justifying the exclusion of people convicted of crimes from the electorate based on assumptions about their supposedly irresponsible or immoral voting practices is untenable.

### B. Partisanship

Party politics play an inextricable role in shaping the discourse regarding felony disenfranchisement laws. One example arises from the significant backlash that Senator Bernie Sanders received after stating that he believed all Americans, whether incarcerated or not, should be able to vote.<sup>122</sup>

---

<sup>119</sup> Carlos M. Portugal, Comment, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 U. MIAMI L. REV. 1317, 1323 (2003); see also John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s> [<https://perma.cc/9LGP-RY4C>] (noting that the majority of violent crimes are not reported to authorities and that the majority of reported crimes are not solved).

<sup>120</sup> See Frazier, *supra* note 115, at 493-94 (“[T]here is little, if any, evidence to indicate convicted criminals disrupt elections.”).

<sup>121</sup> 380 U.S. 89, 94 (1965).

<sup>122</sup> See Cleve R. Wootson Jr., *Sanders Faces Heat for Saying People Should Be Able to Vote From Prison*, WASH. POST (Apr. 23, 2019), [https://www.washingtonpost.com/politics/sanders-faces-heat-for-saying-people-should-be-able-to-vote-from-prison/2019/04/23/44bd4d98-65e0-11e9-a1b6-b29b90efa879\\_story.html](https://www.washingtonpost.com/politics/sanders-faces-heat-for-saying-people-should-be-able-to-vote-from-prison/2019/04/23/44bd4d98-65e0-11e9-a1b6-b29b90efa879_story.html) [<https://perma.cc/2ET6-UKD9>] (“I think the right to vote is inherent to our democracy—yes, even for terrible people—because once you start chipping away . . . you’re running down a slippery slope,” Sanders said. ‘I do believe that even if they are in jail paying their price to society, that should not take away their inherent American right to participate in our democracy.’”); Chandra Bozelko, *Bernie Sanders Wants Incarcerated People to Vote. Here’s Why He’s Right.*, NBC NEWS (Apr. 11, 2019, 3:21 PM), <https://www.nbcnews.com/think/opinion/bernie-sanders-wants-incarcerated-people-vote-here-s-why-he-ncna993476> [<https://perma.cc/H5VB-2PMY>] (discussing Sanders’ statements on granting all incarcerated individuals the right to vote). It should be noted that Bernie Sanders is a



Opponents of Senator Sanders' line of thinking argued in response that restoring the right to vote to millions of currently disenfranchised Americans will disproportionately benefit Democrats during elections.<sup>123</sup> Although a study conducted by Christopher Uggen and Jeff Manza suggests that this may be the case,<sup>124</sup> other studies indicate that this conclusion may overstate the potential reality.<sup>125</sup> Nevertheless, as emphasized in *Carrington v. Rash*,<sup>126</sup> voter preference cannot and should not be a determinative criteria when it comes to stripping one of the most fundamental American rights from millions of people. Actively restricting peoples' access or right to voting based on their assumed political party would rig the system that undermines democracy.

### III. IMPORTANT LEGAL PRECEDENTS AND CHALLENGES TO FELONY DISENFRANCHISEMENT

Despite the vapid justifications for felony disenfranchisement laws, several key judicial decisions have solidified their legality. Most notably, the Supreme Court decision in *Richardson v. Ramirez* established the constitutionality of felony disenfranchisement laws.<sup>127</sup> A state's implemented disenfranchisement scheme may stand if it has a discriminatory intent or

---

senator from Vermont, one of two states that allows for incarcerated people to cast votes in federal elections.

<sup>123</sup> Bozelko, *supra* note 122 ("Those who argue against felony re-enfranchisement and in-prison voting often rely on the theory that a prison constituency would automatically be a Democratic constituency."). In a 2004 interview with the *Washington Post*, then Alabama Republican Party Chair Marty Connors stated that "As frank as I can be . . . we're opposed to [restoring voting rights] because felons don't tend to vote Republican." Kevin Krajick, *Why Can't Ex-Felons Vote?*, WASH. POST (Aug. 18, 2004), <https://www.washingtonpost.com/archive/opinions/2004/08/18/why-cant-ex-felons-vote/53a30460-1bb1-4cd9-9d05-17016c8fea96> [<https://perma.cc/P6VB-43T5>] (internal quotations omitted). Bernie Sanders, in a separate interview, is quoted as saying "[D]on't be naïve and think that there is not another purpose here as well. If you have large numbers of African American men and women not being able to vote, somebody benefits from that." Michael McIntee, *Sanders: Felons Should Be Able to Vote*, YOUTUBE 2:10 (Feb. 16, 2016), <https://www.youtube.com/watch?v=u-avkoMc2dg> [<https://perma.cc/AGG3-GFAX>] (filming Senator Bernie Sanders discussing felon disenfranchisement at 2 minutes and 10 seconds).

<sup>124</sup> See, e.g., Uggen & Manza, *supra* note 26, at 786 ("According to our analysis of party choice . . . our hypothetical felon voters showed strong Democratic preferences in both presidential and senatorial elections.").

<sup>125</sup> See, e.g., Marc Meredith & Michael Morse, *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 220, 222 (2014) ("Subsequent work questions whether these models overstate the turnout propensities and Democratic preferences of the disenfranchised population."); see also Traci Burch, *Did Disfranchisement Laws Help Elect President Bush? New Evidence on the Turnout Rates and Candidate Preferences of Florida's Ex-Felons*, 31 POL. BEHAV. 1, 21 (2012) ("This paper provides startling evidence that even in the absence of ex-felon disfranchisement policies, George W. Bush would have defeated Vice-President Gore in Florida's 2000 Presidential election.").

<sup>126</sup> 380 U.S. at 94.

<sup>127</sup> 418 U.S. 24, 25 (1974).

discriminatory impact, as long as it does not contain both.<sup>128</sup> With limited levels of success, challenges have generally fallen into two categories: those based on the Equal Protection Clause of the Fourteenth Amendment, and those under Section Two of the Voting Rights Act. As the following summary of felony disenfranchisement litigation makes clear, courts' hostility to these challenges indicates that opponents of felony disenfranchisement must embrace legislation, rather than litigation, in their efforts to end the practice.

A. *Judicial Challenges to Felony Disenfranchisement Under the  
Equal Protection Clause*

The Equal Protection Clause of the Fourteenth Amendment is the primary litigation tool used by people challenging felony disenfranchisement laws. The argument rests on the idea that felony disenfranchisement laws fail to provide them with "equal protection of the laws."<sup>129</sup> For these cases, the court needs to determine if "the government's classification [is] justified by a sufficient purpose."<sup>130</sup>

*Richardson v. Ramirez* was the first case to explicitly establish the constitutionality of felony disenfranchisement laws in the United States.<sup>131</sup> In *Ramirez*, three formerly incarcerated Californians, who were disenfranchised by a provision of the California constitution that excluded every person who had been convicted of a felony from voting, petitioned for a writ of mandamus.<sup>132</sup> They argued that the California policy amounted to a violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>133</sup> In its examination of the legislative history of the Fourteenth Amendment, the Court highlighted the fact that "the language 'except for participation in rebellion, or other crime' was never altered."<sup>134</sup> Writing for the Court, Chief Justice William Rehnquist determined that "the exclusion of felons from the vote has an affirmative sanction in [Section Two] of the Fourteenth

---

<sup>128</sup> See *Washington v. Davis*, 426 U.S. 229, 238-44 (1976) (discussing discriminatory intent versus discriminatory impact in the context of the Fourteenth Amendment); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979) (same).

<sup>129</sup> U.S. CONST. amend. XIV, § 1.

<sup>130</sup> Liles, *supra* note 23, at 618 (internal quotations omitted)(alterations in original) (quoting ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES § 9.1.2, at 669 (3d ed. 2006)).

<sup>131</sup> 418 U.S. at 56.

<sup>132</sup> *Id.* at 26. See also *Mandamus*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/mandamus> [<https://perma.cc/M435-K96S>] ("A (writ of) mandamus is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion." (punctuation in original)).

<sup>133</sup> *Ramirez*, 418 U.S. at 26-27.

<sup>134</sup> *Id.* at 45.

Amendment” and, thus, allowed for states to pass laws that disenfranchised people with felony convictions.<sup>135</sup>

While *Ramirez* significantly narrowed the pathways for challenges to felony disenfranchisement laws under the Equal Protection Clause, a few avenues remain, as the Court explained in *Hunter v. Underwood*.<sup>136</sup> Similar to the Californian constitutional provision challenged in *Ramirez*, *Underwood* focused on an Alabama state constitutional provision that disenfranchised any Alabamian convicted of a crime of alleged “moral turpitude.”<sup>137</sup> In this case, the two plaintiffs were disenfranchised under Alabama law for writing bad checks, which constituted a misdemeanor.<sup>138</sup> Although misdemeanors, the crimes nevertheless fell within the scope of the disenfranchisement statute.<sup>139</sup> The plaintiffs argued that the Alabama provision was purposely broad in order to disenfranchise Black Americans and, therefore, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>140</sup> The Court agreed with the plaintiffs, and eschewed any claims of inconsistencies with their *Ramirez* holding by noting “[confidence in] that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 [of the Alabama provision] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in . . . *Richardson v. Ramirez* suggests the contrary.”<sup>141</sup>

In so holding, the Court explained that under the Equal Protection Clause, a disenfranchised citizen can potentially establish a violation of the Fourteenth Amendment if they are able to demonstrate that the

<sup>135</sup> *Id.* at 54. In writing the decision, Chief Justice Rehnquist focused on Section 2 of the Fourteenth Amendment, specifically the phrase “except for participation in rebellion, or other crime.” He supported his reading of Section 2 by pointing out that “[t]hroughout the floor debates in both the House and the Senate, in which numerous changes of language in § 2 were proposed, the language ‘except for participation in rebellion, or other crime’ was never altered. The language of § 2 attracted a good deal of interest during the debates, but most of the discussion was devoted to its foreseeable consequences in both the Northern and Southern States, and to arguments as to its necessity or wisdom. What little comment there was on the phrase in question here supports a plain reading of it.” *Id.* at 45.

<sup>136</sup> 471 U.S. 222 (1985).

<sup>137</sup> *See id.* at 223 (identifying the Alabama constitutional provision that disenfranchises individuals convicted of certain felonies, including crimes of “moral turpitude”); *id.* at 226 (“The drafters [of the Alabama constitutional provision] retained the general felony provision—‘any crime punishable by imprisonment in the penitentiary’—but also added a new catchall provision covering ‘any . . . crime involving moral turpitude.’ This latter phrase is not defined, but it was subsequently interpreted by the Alabama Supreme Court to mean an act that is ‘immoral in itself, regardless of the fact whether it is punishable by law . . . .’” (internal quotations omitted) (quoting *Pippin v. State*, 197 Ala. 613, 616 (1916))).

<sup>138</sup> *Id.* at 224.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 233.

disenfranchising policy meets one of these three conditions: it is not uniformly distributed amongst people with felony convictions, it is deemed to be so unjustifiably broad that it cannot be reasonably related to a legitimate state purpose, or it is blatantly racially motivated in purpose and effect.<sup>142</sup>

While *Underwood* highlighted a potential avenue for challenges to state disenfranchisement policies under the Equal Protection Clause, success has been limited.<sup>143</sup> This led subsequent challenges to lean on the Voting Rights Act, particularly Section Two.

### B. *Judicial Challenges to Felony Disenfranchisement Under the Voting Rights Act*

The Voting Rights Act was amended in 1982 to include a provision that prevented the enactment of voting regulations that have a racially discriminatory impact.<sup>144</sup> Given that felony disenfranchisement laws disproportionately impact racial minorities, litigants argue that these laws violate the amended protections of the Voting Rights Act.<sup>145</sup>

Unlike challenges to felony disenfranchisement laws under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has yet to hear a case that challenges these policies under the Voting Rights Act. But circuit courts have heard several notable challenges to felony disenfranchisement laws under Section Two of the Voting Rights Act.

One of the first cases to invoke the Voting Rights Act to challenge the validity of felony disenfranchisement laws was *Wesley v. Collins*.<sup>146</sup> The Sixth Circuit's decision foreshadowed the uphill battle future challenges to felony

---

<sup>142</sup> *Id.* at 225 (discussing inquiries into potential racial motivations for and the established purposes of such laws).

<sup>143</sup> See Liles, *supra* note 23, at 624 (“The holding of *Hunter v. Underwood* seemed to indicate that any disenfranchisement law enacted with a discriminatory purpose would be unconstitutional. However, the Fifth Circuit Court of Appeals found some wiggle room and determined that, even if a law were enacted with discriminatory intent, the law can still be constitutional as long as actions have been taken since the enactment that show such intent no longer exists . . . . Thus, a facial challenge to a felony disenfranchisement law on equal protection grounds is unlikely to be successful.”); Alysia Robben, *A Strike at the Heart of Democracy: Why Legal Challenges to Felon Disenfranchisement Laws Should Succeed*, 10 UDC/DCSL L. REV. 15, 25 (2007) (“The problem with the exception the Court carved out in *Hunter* was that, as one scholar writes, “[t]he reach of *Hunter* was limited, since few states—and none outside the South—had legal codes and track records that demonstrated intent as clearly as did Alabama’s.”); see, e.g., *Cotton v. Fordice*, 157 F.3d 388, 392 (5th Cir. 1998) (holding that *Hunter* did not condemn a felon disenfranchisement law that ostensibly did not have a discriminatory motive).

<sup>144</sup> See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982).

<sup>145</sup> See, e.g., *Johnson v. Gov. of Fla. (Bush)*, 405 F.3d 1214, 1228-33 (11th Cir. 2005) (framing an argument against a felony disenfranchisement law on the grounds that it violates the 1982 amendments to the Voting Rights Act).

<sup>146</sup> 791 F.2d 1255 (6th Cir. 1986).

disenfranchisement laws under the Voting Rights Act would face. In this case, the *Wesley* plaintiffs, disenfranchised by a prior felony that fell within the scope of an “infamous crime” in the Tennessee constitution, argued that Tennessee’s policy disproportionately impacted Black Tennesseans as they were convicted of felonies at a significantly higher rate than white Tennesseans.<sup>147</sup> While the Sixth Circuit agreed that the Tennessee policy contributed to discrepancies between Black and white enfranchised people in Tennessee, it ultimately held that the statute did not constitute a violation of the Voting Rights Act.<sup>148</sup> The appellate court justified this decision by noting that Tennessee had a “legitimate and compelling rationale” for instituting the policy and that there was no evidence indicating that the state legislature used a citizen’s status as a felon as a proxy for race.<sup>149</sup> While the decision did not completely slam the door on using the Voting Right Act as a vehicle to challenge state disenfranchisement laws, it is telling that nearly a decade passed after *Wesley* before another challenge under the Voting Rights Act was heard at the circuit level.<sup>150</sup>

That next case, *Baker v. Pataki*, differed from past felony disenfranchisement litigation in that the plaintiff challenged New York’s laws under both the Equal Protection Clause and Section Two of the Voting Rights Act.<sup>151</sup> The Second Circuit conveyed concerns regarding Section Two, noting that its application would be improper as it could potentially authorize a transfer of power from states to the federal government without proper authority.<sup>152</sup> The Second Circuit drove the point home by declaring that if Congress had intended Section Two of the Voting Rights Act to apply to people with felony convictions, it would have explicitly said so.<sup>153</sup>

One of the most recent and notable cases involving a section 2 Voting Rights Act challenge to felony disenfranchisement laws is *Johnson v. Bush*.<sup>154</sup> The plaintiffs, all previously convicted of felonies in Florida, filed a class action lawsuit against the state’s clemency board and governor at the time, Jeb Bush.<sup>155</sup> The plaintiffs argued that the permanent felony

---

<sup>147</sup> *Id.* at 1257, 1260.

<sup>148</sup> *Id.* at 1261.

<sup>149</sup> *Id.*

<sup>150</sup> See *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (per curiam) (hearing a claim under the Voting Rights Act regarding a state’s felony disenfranchisement law).

<sup>151</sup> *Id.* at 921-22.

<sup>152</sup> See *id.* at 931 (“In the present case, the application of [Section Two of the Voting Rights Act] to state felon disenfranchisement statutes would at least as clearly undermine the constitutional balance between the federal and state governments.”)

<sup>153</sup> See *id.* at 932 (“[N]either the statutory language nor the legislative history of [Section Two of the Voting Rights Act] suggests Congress’ affirmative intention to apply [Section Two] to felon disenfranchisement statutes.”)

<sup>154</sup> *Johnson v. Governor of Fla. (Bush)*, 405 F.3d 1214 (11th Cir. 2005).

<sup>155</sup> *Id.* at 1216.

disenfranchisement provisions of the Florida constitution and similar statutes had a significantly disproportionate impact on Black Americans and unconstitutionally denied them the right to vote based on race, which violated section 2 of the Voting Rights Act.<sup>156</sup> After originally reversing the lower court's summary judgment decision in favor of the defendant, the Eleventh Circuit, sitting en banc, vacated the panel decision and affirmed the summary judgment grant.<sup>157</sup> The en banc Eleventh Circuit ultimately held that Florida's felony disenfranchisement policies did not violate the Voting Rights Act's prohibition against qualifications that result in abridgement of the right to vote on the basis of race.<sup>158</sup>

These failed challenges to felony disenfranchisement laws, under both the Equal Protection Clause of the Fourteenth Amendment and section 2 and the Voting Rights Act, make it clear that legislation, not litigation, is the only viable path toward the elimination of felony disenfranchisement laws in the United States.<sup>159</sup>

#### IV. NOTABLE STATE ENFRANCHISEMENT EFFORTS

In recent years, many states have bypassed the judiciary and passed legislation to restore the right to vote to *some* of their previously disenfranchised citizens.<sup>160</sup> Florida, California, and Washington, D.C. are all examples of recent legislative successes—though to varying degrees. These legislative victories demonstrate how the ultimate eradication of felony disenfranchisement can be achieved. Unfortunately, as is especially the case in Florida, they also highlight the pitfalls to which states leave themselves susceptible by enacting legislative half-measures that leave room for challenges in court.

---

<sup>156</sup> *Id.* at 1217.

<sup>157</sup> *Id.* at 1235.

<sup>158</sup> *Id.* at 1234-35.

<sup>159</sup> See Portugal, *supra* note 119, at 1325 (“Absent a Constitutional amendment, constitutional approval of felon[y] disenfranchisement in section [2 of the Fourteenth Amendment] forever precludes [people with felony convictions] from invoking equal protection under section 1, even where the criminal justice system enforces its laws in a racially discriminatory fashion.”).

<sup>160</sup> See Margaret Love & David Schlusel, *New 2019 Laws Restore Voting Rights in 11 States*, COLLATERAL CONSEQUENCES RES. CTR. (Jan. 22, 2020), <https://ccresourcecenter.org/2020/01/22/new-2019-laws-restore-voting-rights-in-11-states-2> [<https://perma.cc/X5XC-CU99>] (listing states that passed recent laws dismantling felony disenfranchisement).

## A. Florida

Following the conclusion of the Civil War, Florida established one of the country's strictest felony disenfranchisement laws.<sup>161</sup> In 1968, the state's constitution was amended to say that "[n]o person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability."<sup>162</sup> In 2010, over 1.5 million Floridians were barred from voting due to past felony convictions, the highest disenfranchised population in the country.<sup>163</sup> This equated to about 10.4% of the state's voting age population and a quarter of the entire country's disenfranchised population.<sup>164</sup>

Prior to 2018, Florida was one of the few states to maintain a policy of permanently barring citizens with a felony conviction from voting.<sup>165</sup> The legislature did maintain the discretionary power to restore voting rights on a case-by-case basis through the Florida Clemency Board,<sup>166</sup> but the restoration of the right to vote by application to the Clemency Board was an onerous process. Before they could apply for clemency, formerly incarcerated people were required to wait five to seven years after completing their sentence.<sup>167</sup> Then, they were required to file a written application to the Clemency Board made up of the governor and three cabinet members.<sup>168</sup> This small group led to a massive backlog of more than 10,000 cases.<sup>169</sup> Most applicants were then required to appear in person before the board, which only met four times a

---

<sup>161</sup> See FLA. CONST. art. VI, § 2 (1868) ("No person under guardianship *noa compos mentis*, or insane, shall be qualified to vote at any election, nor shall any person convicted of felony be qualified to vote at any election unless restored to civil rights."); see also ERIKA L. WOOD, BRENNAN CTR. JUST., FLORIDA: AN OUTLIER IN DENYING VOTING RIGHTS 4-5 (2016) (discussing the political maneuvering utilized by Florida legislators to enact discriminatory disenfranchisement policies following the end of the Civil War).

<sup>162</sup> FLA. CONST. art. VI, § 4 (1968).

<sup>163</sup> CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA, SENT'G PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 16 (2012), <https://www.sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf> [<https://perma.cc/8EPN-EQDP>].

<sup>164</sup> *Id.*

<sup>165</sup> See German Lopez, *Florida Votes to Restore Ex-Felon Voting Rights with Amendment 4*, VOX (Nov. 7, 2018, 1:15 PM), <https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results> [<https://perma.cc/F3CL-U8PM>] (noting that Kentucky and Iowa were the only remaining states to continue the practice of barring people from voting even after completing their sentences following Florida's ballot initiative).

<sup>166</sup> See PBS NewsHour, *Florida Could Soon Restore Voting Rights to 1 Million Felony Offenders*, YOUTUBE (Oct. 13, 2018), <https://www.youtube.com/watch?v=bIHwxFtQqw8> [<https://perma.cc/GBL3-9SZE>] (detailing the operation of the Florida Clemency Board).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

year.<sup>170</sup> The Board was held to no standards and could ask any question on any subject before making a decision.<sup>171</sup> Questions targeting an applicant's propensity to attend church and how many partners they had conceived children with were even commonly asked.<sup>172</sup> From 2011–2017, Governor Rick Scott restored the rights of about 3,000 of over 30,000 applicants. “[In] contrast, his predecessor . . . restored the rights of more than 155,000 [applicants].”<sup>173</sup>

Amendment 4 sought to change this process. Under Amendment 4, introduced in 2018, those citizens convicted of a felony, other than murder or a sexual offense, would have their voting rights “restored upon completion of all terms of a sentence including parole or probation.”<sup>174</sup> The amendment did not, however, explicitly define what it means to complete “all terms of a sentence.” In November 2018, Amendment 4 passed by referendum with a 64% majority vote.<sup>175</sup> The legislation was expected to reinstate the right to vote for 1.4 million Floridians, which would become the country's largest franchisee effort since the passage of the Voting Rights Act.<sup>176</sup>

Amendment 4 almost immediately came under siege by Republican lawmakers.<sup>177</sup> The Republican-controlled Florida Legislature passed a bill which “specified that a felony sentence is not complete, and therefore [a formerly incarcerated person was] not eligible to vote, until all fines, fees and restitution are paid in full.”<sup>178</sup> In the eyes of many, this amounted to nothing more than a thinly-veiled, modern-day poll tax.<sup>179</sup> The amendment was at the center of multiple legal battles, culminating in September 2020 when the Eleventh Circuit ruled that the requirement for formerly incarcerated people to pay fines did not violate the Equal Protection Clause of the Fourteenth

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> FLA. CONST. art. VI, §4.

<sup>175</sup> Alejandro De La Garza, ‘Our Voice Will Count.’ *Former Felon Praises Florida Passing Amendment 4, Which Will Restore Voting Rights to 1.4 Million People*, TIME (Nov. 7, 2018, 12:34 AM), <https://time.com/5447051/florida-amendment-4-felon-voting/> [<https://perma.cc/2AD3-D4P3>].

<sup>176</sup> *Id.*

<sup>177</sup> FLA. STAT. §98.0751(2)(a) (2019); *see also* Dalia Figueredo, *Affording the Franchise: Amendment 4 & the Senate Bill 7066 Litigation*, 72 FLA. L. REV. 1135, 1138 (2020) (noting that during the Spring 2019 legislative session, the Florida state legislature passed SB 7066, which “defines ‘terms of a sentence’ not merely as the term of imprisonment and supervision, but also as the payment of all fines, fees, restitution, and court costs the judge imposed at the time of sentencing”).

<sup>178</sup> Sue Carlton, *The Florida Governor's Bold Move on Amendment 4. Or Is That Against Amendment 4?*, TAMPA BAY TIMES (Aug. 13, 2019), <https://www.tampabay.com/opinion/columns/the-florida-governors-bold-move-on-amendment-4-or-is-that-against-amendment-4-20190814/> [<https://perma.cc/2BMD-FJFV>].

<sup>179</sup> Anton Marino, *Amendment 4 is Back in Court as Florida Fights Our Victory Over its Modern-Day Poll Tax*, ACLU (Aug. 7, 2020), <https://www.aclu.org/news/voting-rights/amendment-4-is-back-in-court-as-florida-fights-our-victory-over-its-modern-day-poll-tax/> [<https://perma.cc/DH2C-CH5Q>].



Amendment.<sup>180</sup> The uncertainty surrounding Amendment 4 led to large-scale de-facto disenfranchisement. By the deadline to register to vote for the November 2020 election, “fewer than 8% of Florida’s felons ha[d] registered to vote since Amendment 4 passed.”<sup>181</sup>

The state legislative response to Florida’s enfranchising ballot initiative exemplifies how the flawed justifications in favor of disenfranchisement operate. Instead of facilitating a formerly incarcerated person’s reintegration into society by allowing Amendment 4 to be fully enacted, the state legislature sought to maintain a punitive element by adding additional barriers to restoring their right to vote. Furthermore, the Eleventh Circuit’s decision to uphold the legislature’s caveat to the Amendment demonstrates yet again how courts are inadequate venues for vindicating the right to vote for formerly incarcerated people.

### B. California

Prior to the most recent general election, California was “one of three states that require[d a citizen] convicted of [a felony] to complete their prison *and* parole sentences before regaining the right to vote.”<sup>182</sup> The Voting Rights Restoration for Persons on Parole Amendment, commonly referred to as Proposition 17, “amended the state constitution to allow people with felonies who are on parole to vote; therefore, the ballot measure kept imprisonment as a disqualification for voting but removed parole status.”<sup>183</sup> Before the November 2020 election, “[n]early 50,000 Californians who have completed their prison sentences pay taxes at the local, state, and federal levels. However, they are not able to vote at any level of government.”<sup>184</sup> By every measure, these citizens were actively contributing members of society, except

---

<sup>180</sup> Patricia Mazzei, *Ex-Felons in Florida Must Pay Fines Before Voting, Appeals Court Rules*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rights.html> [<https://perma.cc/6HXR-X852>] (“The U.S. Court of Appeals for the 11th Circuit in Atlanta ruled that a Florida law passed in 2019 was constitutional, reversing the lower court ruling in May that said it discriminated against people who had been convicted of felonies, many of whom are indigent, by imposing an unlawful ‘pay-to-vote system.’”).

<sup>181</sup> Lawrence Mower & Langston Taylor, *In Florida, the Gutting of a Landmark Law Leaves Few Felons Likely to Vote*, PROPUBLICA (Oct. 7, 2020, 5:00 AM), <https://www.propublica.org/article/in-florida-the-gutting-of-a-landmark-law-leaves-few-felons-likely-to-vote> [<https://perma.cc/2WA7-WGUM>].

<sup>182</sup> *California Proposition 17, Voting Rights Restoration for Persons on Parole Amendment* (2020), BALLOTEDIA (emphasis added), [https://ballotpedia.org/California\\_Proposition\\_17\\_Voting\\_Rights\\_Restoration\\_for\\_Persons\\_on\\_Parole\\_Amendment\\_](https://ballotpedia.org/California_Proposition_17_Voting_Rights_Restoration_for_Persons_on_Parole_Amendment_) [<https://perma.cc/AG62-L79Q>].

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (quoting CAL. SEC’Y STATE, CALIFORNIA GENERAL ELECTION NOV. 3, 2020 OFFICIAL VOTER INFORMATION GUIDE: PROP 17 RESTORES RIGHT TO VOTE AFTER COMPLETION OF PRISON TERM. LEGISLATIVE CONSTITUTIONAL AMENDMENT 32 (2020)).

for their inability to participate in the political process due to their status as parolees.

Proposition 17 was a legislatively referred constitutional amendment that was approved by over 58 percent of the vote.<sup>185</sup> The amendment automatically restored the right to vote to the nearly 50,000 Californians on parole.<sup>186</sup>

While Proposition 17 was an incredible and significant step in the right direction, it did not go nearly far enough as the hundreds of thousands of Californians currently incarcerated remain disenfranchised.<sup>187</sup> While advocating for the passage of the amendment, Taina Vargas-Edmond, executive director of Initiate Justice, observed that “[t]he removal of the right to vote is not based in an interest in public safety . . . . Rather, it is rooted in a punitive justice belief system that intentionally attempts to rob marginalized people of their political power.”<sup>188</sup> This was a strong and persuasive argument in favor of extending the right to vote to Californians on parole—and is just as applicable to the idea of returning the right to vote to *all* Californians.

### C. Maine, Vermont, and Washington, D.C.

Of all the states in the Union, only Maine, Vermont, and the District of Columbia allow all formerly and currently incarcerated people to vote.<sup>189</sup> Unlike Maine and Vermont, which have never enacted felony disenfranchisement legislation,<sup>190</sup> the District of Columbia is unique in that it previously disenfranchised people convicted of felonies but recently passed legislation to restore this right.

In 1955, Washington D.C. passed legislation that automatically stripped people of their right to vote upon felony conviction.<sup>191</sup> On the heels of the

---

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See McGreevy, *supra* note 34 (“Under Proposition 17, people convicted of felonies who are still in prison will continue to be disqualified from voting. The state Constitution allows people on probation to vote.”).

<sup>188</sup> Hannah Wiley, *Initiative to Restore Voting Rights to Californians on Parole Heads to November Ballot*, SACRAMENTO BEE (June 24, 2020, 3:52 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article243775077.html> [<https://perma.cc/9GLM-H6QC>] (internal quotations omitted).

<sup>189</sup> See *State Felon Voting Laws & Policies*, *supra* note 37 (listing states that have no felony disenfranchisement laws).

<sup>190</sup> See Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here's Why Few Do*, MARSHALL PROJECT (June 11, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do> [<https://perma.cc/M5KA-73S8>] (“In Maine and Vermont, the state constitutions guarantee voting rights for all citizens, interpreted to include incarcerated people from the earliest days of statehood . . .”).

<sup>191</sup> Martin Austerhuhle & Mayowa Aina, *D.C. To Consider Expanding Voting Access to Incarcerated Felons, Vote-By-Mail*, WAMU (June 4, 2019), <https://wamu.org/story/19/06/04/d-c-to-consider-expanding-voting-access-to-incarcerated-felons-vote-by-mail/> [<https://perma.cc/P75R->

nationwide civil unrest stemming from several high-profile deaths at the hands of police, such as George Floyd and Breonna Taylor, the D.C. Council passed D.C. Act 23-336, which provided “for comprehensive policing and justice reform for District residents . . . .”<sup>192</sup> This legislation included the Restore the Vote Amendment, which restored the right to vote to all incarcerated District residents and aimed to work with the Federal Bureau of Prisons to provide every qualified person with an absentee ballot.<sup>193</sup>

Florida and California have made unquestionable progress, but it should not be deemed a total victory. Thousands of people in both states, and millions more across the country, remain disenfranchised because of a felony conviction. A true victory will require adopting the Washington, D.C. approach to enfranchisement, which will require state and federal efforts.

## V. HOW TO ACHIEVE FULL ENFRANCHISEMENT

Florida, California, and Washington D.C. have shown that legislation is the most effective response to felony disenfranchisement and the associated harms to democratic norms given the inadequacies of traditional litigation avenues. On a federal level, congressional Democrats have exhibited an interest in expanding the right to vote through the passage of H.R. 1 in the House of Representatives.<sup>194</sup> Additional language needs to be incorporated to further expand that right to all Americans by adopting language that prevents states from disenfranchising citizens due to a prior felony conviction. This issue also presents Congress with an opportunity to amend the Constitution for the first time in nearly 30 years by striking language from Section Two of the Fourteenth Amendment that permits felony disenfranchisement laws. If Congress fails, individual state legislatures have an opportunity to adopt Washington D.C.’s model and extend the right to vote to every citizen.

---

KBMZ] (“While D.C. felons automatically regain the right to vote once they leave prison, a law dating back to 1955 automatically strips that right upon conviction.”).

<sup>192</sup> Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, 67 D.C. Reg. 9148 (July 22, 2020).

<sup>193</sup> *Id.* The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 expired October 19, 2020. The “Restore the Vote Amendment Act of 2020” made the restored voting rights provision permanent effective April 27, 2021. 67 D.C. Reg. 13867 (Apr. 27, 2021).

<sup>194</sup> See Clare Foran & Annie Grayer, *House Passes Sweeping Election Bill That Would Counter GOP Efforts to Restrict Voter Access*, CNN, <https://www.cnn.com/2021/03/03/politics/house-democrats-hr1-vote/index.html> [<https://perma.cc/89QC-U643>] (Mar. 4, 2021, 11:47 AM) (“The Democratic-led House on Wednesday approved HR 1, a sweeping government, ethics and election bill that, among other things, would counter state-level Republican efforts to restrict voting access.”).

### A. Proposed and Potential Federal Legislation

Federal legislation is the most appropriate path forward, and recent efforts in the House of Representatives appear promising. In particular, H.R. 1 is aimed at expanding access to voting in federal elections, including for those with felony convictions, and ending the practice of prison gerrymandering, among other provisions to strengthen democratic institutions.<sup>195</sup>

First introduced in March 2019, H.R. 1 initially passed in the Democrat-controlled House of Representatives—though it never received a vote in the Republican-controlled Senate.<sup>196</sup> Two years later, the House reintroduced a similar version of the bill in the 117<sup>th</sup> Congress.<sup>197</sup>

In 2021, Democratic Representatives Cori Bush of Missouri and Mondaire Jones of New York introduced several amendments to H.R. 1, which were aimed at restoring the franchise to currently incarcerated people.<sup>198</sup> In particular, Amendment 14 sought to include language in the bill to clarify that “felony convictions do not bar any eligible individual from voting in federal elections, including individuals who are currently incarcerated.”<sup>199</sup> Although the bill passed along party lines, the amendment failed to pass by a vote of 97-328.<sup>200</sup> Because of this, H.R. 1 lacks language nullifying felony disenfranchisement for currently incarcerated individuals. Without the language of Amendment 14, H.R. 1, as currently constituted, would make monumental strides for voting rights in the United States—but it would not go nearly far enough.

---

<sup>195</sup> See For the People Act of 2019, H.R. 1, 116th Cong. § 1402 (2019) (“The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election.”).

<sup>196</sup> Savannah Behrman, *The House Passed a Sweeping Voting Rights Act. What’s in it?*, USA TODAY, <https://www.usatoday.com/story/news/politics/2021/03/03/whats-in-for-the-people-act-election-reform-legislation/6891622002/> [<https://perma.cc/SRG9-K2WR>] (Mar. 3, 2021, 11:20 PM) (“The bill had no chance of becoming law when Republicans controlled the Senate, with then-Senate Majority Leader Mitch McConnell, R-Ky., calling it a ‘terrible bill’ and not giving it any floor time.”).

<sup>197</sup> *Id.*

<sup>198</sup> Alex Woodward, *Progressive Democrats’ Landmark Amendment to Extend Voting Rights to Prisoners Fails in House*, INDEPENDENT (Mar. 3, 2021, 7:59 AM), <https://www.independent.co.uk/news/world/americas/us-politics/prisoners-voting-rights-democrats-cori-bush-b181162.html> [<https://perma.cc/HY59-4EX8>].

<sup>199</sup> 167 CONG. REC. H1001 (daily ed. Mar. 2, 2021) (statement of Rep. Jackson Lee). The amendment would have removed the “unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election” exception to felony enfranchisement. 167 CONG. REC. H999 (daily ed. Mar. 2, 2021).

<sup>200</sup> 167 CONG. REC. H1002 (daily ed. Mar 2, 2021).

If H.R. 1 clears the Senate and is signed into law,<sup>201</sup> Representative Bush's amendment should be reintroduced as its own bill to end felon disenfranchisement.

In addition to introducing H.R. 1, Congress has recently attempted to amend the Voting Rights Act, but these efforts are also insufficient to address the problem of felony disenfranchisement. In the 2013 case of *Shelby County v. Holder*, the Supreme Court struck down the coverage formula<sup>202</sup> that required certain states to seek preclearance review of voting law changes.<sup>203</sup> The Court determined that the formula was premised on data that was no longer relevant.<sup>204</sup> Without the coverage formula, Section 5 of the Voting Rights Act is effectively inoperable.<sup>205</sup> The House of Representatives responded to this decision by passing the Voting Rights Advancement Act of 2019, a bill to update the coverage formula.<sup>206</sup> The bill did not receive a vote in the Senate and died when the 116th Congress adjourned sine die.<sup>207</sup> But it is not enough to simply restore the Voting Rights Act. As the decisions in *Pataki* and *Johnson* highlighted, courts have interpreted the Voting Rights Act in a manner that ensures that there is essentially no path to overturning felony disenfranchisement laws under the Act, as currently written.<sup>208</sup> Congress could, however, amend the Voting Rights Act to make clear that felony disenfranchisement laws are also subject to Section Two litigation.

Congress must use the opportunity presented in H.R.1 and H.R. 4 to include explicit language stating that the protections afforded to citizens under the Voting Rights Act extend to incarcerated citizens as well. As the per curiam opinion noted in *Pataki*, if Congress intended to cover people with felony convictions with the Voting Rights Act, they would have said so in the

---

<sup>201</sup> See Makini Brice, *U.S. House Passes Sweeping Election Bill, Senate Prospects Unclear*, REUTERS (Mar. 3, 2021, 2:31 PM), <https://www.reuters.com/article/us-usa-election-house/u-s-house-passes-sweeping-election-bill-senate-prospects-unclear-idUSKCN2AV2JM> [<https://perma.cc/A3RD-NUYD>] (stating that the bill passed the House on partisan lines, and likely lacks the 60 votes necessary to overcome a filibuster in the Senate).

<sup>202</sup> L. PAIGE WHITAKER & R. SAM GARRETT, CONG. RSCH. SERV., IF11908, VOTING RIGHTS ACT AND H.R. 4 (117TH CONGRESS): AN OVERVIEW 1 (2021) (noting that the coverage formula was criteria, established by Section 4 of the Voting Rights Act, used to determine which jurisdictions would be required to obtain approval before making changes to voting laws).

<sup>203</sup> 570 U.S. 529, 557 (2013) (“The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.”). The coverage formula of Section 4(b) was used to determine which jurisdictions were covered by Section 5 of the Voting Rights Act. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4(b), 5, 79 Stat. 437, 438, 439.

<sup>204</sup> *Shelby Cnty.*, 570 U.S. at 554 (holding that Congress erred by relying on a “formula based on 40-year-old facts having no logical relation to the present day”).

<sup>205</sup> *Id.* at 559 n.1 (Ginsburg, J., dissenting).

<sup>206</sup> Voting Rights Advancement Act of 2019, H.R. 4, 116<sup>th</sup> Cong. (2019).

<sup>207</sup> *H.R.4—Voting Rights Advancement Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bills/116th-congress/house-bill/4/text> [<https://perma.cc/C754-DX2C>].

<sup>208</sup> See discussion *supra* Section III.B.

legislation.<sup>209</sup> Explicit language in legislation will, however, give disenfranchisement opponents a necessary tool to be on the winning side of these outcomes going forward.

Alternatively, Congress can propose an amendment to the United States Constitution. Removing the words “or other crime” from Section Two of the Fourteenth Amendment would eliminate the widely used justification for felony disenfranchisement laws across the country.<sup>210</sup> While removing “or other crime” would effectively blunt states’ legal bases for felony disenfranchisement, it seems unlikely that Congress will seek to amend the Fourteenth Amendment.<sup>211</sup>

### B. State Legislation

If the federal government is not willing or able to pass felony enfranchisement legislation, the onus would fall on each individual state to do so. Every state has its own unique set of political hurdles to clear when it comes to passing legislation, especially for contentious issues such as who “deserves” the right to vote. Furthermore, seeking felony disenfranchisement through state-by-state legislation and constitutional amendment is an inherently piecemeal and tedious approach. Despite these challenges and drawbacks, attaining the abolition of felon disenfranchisement at the state level is a goal worth pursuing, and certain state processes lend themselves to this solution better than others.

Processes for amending state constitutions vary. There are several amendment procedures, however, that could be utilized for the purposes of ending felony disenfranchisement, with legislative amendments and initiated amendments being the most tenable options.

---

<sup>209</sup> See *Baker v. Pataki*, 85 F.3d 919, 932 (2d Cir. 1996) (per curiam) (“[I]n this case, neither the statutory language nor the legislative history of [Section Two of the Voting Rights Act] suggests Congress’ affirmative intention to apply [Section Two] to felon disenfranchisement statutes.”).

<sup>210</sup> U.S. CONST. amend. XIV, § 2; see e.g., *Richardson v. Ramirez*, 418 U.S. 24, 73-74 (1974) (Marshall, J., dissenting) (discussing the clear language of “or other crime”); *Shepherd v. Trevino*, 575 F.2d 1110, 1113-15 (5th Cir. 1978) (same).

<sup>211</sup> Unfortunately, as trivial as removing three words may appear, amending the United States Constitution is a tall task that requires the buy in of two-thirds of both houses of Congress and three-fourths of states. See U.S. CONST. art. 5. Amending the Constitution is also a relatively rare occurrence, having only been amended seventeen times since the certification of the Bill of Rights in 1791. See U.S. CONST. amend. XXVII. It has been twenty-eight years since the last constitutional amendment. See *id.* Given these hurdles, this is currently not an avenue worth exploring further in detail.

Besides Delaware,<sup>212</sup> every state allows its legislature to propose what are known as legislatively referred constitutional amendments.<sup>213</sup> Of these forty-nine eligible states, ten allow a referred amendment to go on the ballot after a majority vote in one respective state's legislature.<sup>214</sup> Nine states allow a referred amendment to be placed on the ballot after a supermajority vote (at least 60 percent) in one session of the respective state legislature.<sup>215</sup> Seventeen states allow a referred amendment to be placed on the ballot after a two-thirds vote in one session.<sup>216</sup> Twelve states require proposed amendments to be considered in two successive sessions of their respective state legislatures.<sup>217</sup>

Additionally, eighteen states allow for initiated constitutional amendments, which is an amendment to a state constitution resulting from the petitioning of its citizens.<sup>218</sup> Initiated constitutional amendments seem like the best way to restore the franchise in all applicable states, as they allow citizens to bypass politicians uninterested in abolishing felony disenfranchisement laws.

Unfortunately, full enfranchisement is not a particularly popular issue today. While nearly two-thirds of Americans supported restoring the right to vote to people who have been convicted of felonies upon completion of their sentences,<sup>219</sup> a 2019 Hill-HarrisX survey found that sixty-nine percent of

<sup>212</sup> The Delaware Constitution can only be amended by a two-thirds vote by two consecutive legislatures. The state is unique in that it does not allow for a ratifying vote by the people. See *Amending State Constitutions*, BALLOTEDIA, [https://ballotpedia.org/Amending\\_state\\_constitutions](https://ballotpedia.org/Amending_state_constitutions) [<https://perma.cc/JM7M-PUPU>].

<sup>213</sup> *Id.* A legislatively referred constitutional amendment is a proposed constitutional amendment that appears on a state's ballot as a ballot measure because the state legislature in that state voted to put it before the voters. *Legislatively Referred Constitutional Amendment*, BALLOTEDIA, [https://ballotpedia.org/Legislatively\\_referred\\_constitutional\\_amendment](https://ballotpedia.org/Legislatively_referred_constitutional_amendment) [<https://perma.cc/LP9L-NSB2>].

<sup>214</sup> *Id.* The following states meet this criterion: Arizona, Arkansas, Minnesota, Missouri, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island and South Dakota. *Id.*

<sup>215</sup> *Id.* These states include Alabama, Florida, Illinois, Kentucky, Maryland, Nebraska, New Hampshire, North Carolina and Ohio. *Id.*

<sup>216</sup> *Id.* These states include Alaska, California, Colorado, Georgia, Idaho, Kansas, Louisiana, Maine, Michigan, Mississippi, South Carolina, Texas, Utah, Washington, West Virginia, and Wyoming. Oklahoma is a unique case. *Id.* ("In general, it only takes a majority vote of the Oklahoma State Legislature to place a proposed amendment on the ballot. However, if the state legislature wants the proposed amendment to go on a special election ballot, it has to approve the amendment by a two-thirds vote.")

<sup>217</sup> *Id.* These states include Indiana, Iowa, Massachusetts, Nevada, New York, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin. *Id.*

<sup>218</sup> *Initiated Constitutional Amendment*, BALLOTEDIA, [https://ballotpedia.org/Initiated\\_constitutional\\_amendment](https://ballotpedia.org/Initiated_constitutional_amendment) [<https://perma.cc/4DG6-HMMQ>]. These states include Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *Id.*

<sup>219</sup> See Sam Levine & Ariel Edwards-Levy, *Most Americans Favor Restoring Felons' Voting Rights, But Disagree on How*, HUFFINGTON POST (Mar. 21, 2018, 6:56 PM), [https://www.huffpost.com/entry/felons-voting-rights-poll\\_n\\_5ab2c153e4b008c9e5f3c88a](https://www.huffpost.com/entry/felons-voting-rights-poll_n_5ab2c153e4b008c9e5f3c88a) [<https://perma.cc/SF7E-YKV3>] ("Some 63 percent of the

registered voters were opposed to currently incarcerated people obtaining the right to vote.<sup>220</sup> While a whopping eighty-five percent of surveyed registered Republicans were in opposition, a majority of surveyed Democratic voters (sixty-one percent) also opposed enfranchising incarcerated people.<sup>221</sup> Although a lack of support from the majority of Americans poses a problem regarding the abolition of felony disenfranchisement laws, it does not deliver a death knell. Grassroot efforts can be used to put pressure on politicians, raise awareness amongst the electorate and ultimately form the groundswell that will lead to the legislative change necessary to eliminate these policies once and for all.

## VI. ANTICIPATING LEGAL CHALLENGES

One important aspect of potential federal legislation is its susceptibility—or, ideally, its lack thereof—to constitutional challenges via litigation. States may look to preemptively defeat a constitutional justification by pointing out that the H.R. 1 remedy falls outside of the scope of the powers bestowed to Congress under the Elections Clause.<sup>222</sup> In particular, the Elections Clause does not contain explicit language granting Congress the authority to alter voter qualifications.<sup>223</sup> States might argue that the narrow scope of the Elections Clause indicates that federal legislation prohibiting felony disenfranchisement is outside the scope of Congress's power. Congress should prepare for this kind of challenge and develop a record that explicitly explains why they have the authority to enact such legislation.

Congress . . . has [the] authority to legislate to eliminate racial discrimination in voting and the democratic process pursuant to both section 5 of the Fourteenth Amendment . . . and section 2 of the Fifteenth Amendment,

---

public say that individuals who've committed a felony should have their right to vote restored after they have entirely completed their sentences.”).

<sup>220</sup> Matthew Sheffield, *Poll: 69 Percent of Americans Say Prisoners Shouldn't Be Allowed to Vote*, THE HILL (May 2, 2019), <https://thehill.com/hilltv/what-americas-thinking/441863-poll-69-percent-of-voters-say-prisoners-shouldnt-be-allowed-to> [<https://perma.cc/VNV8-SLUG>].

<sup>221</sup> Catherine Kim, *A Majority of Americans Don't Want to Give Imprisoned Felons the Right to Vote*, VOX (May 3, 2019, 2:30 PM), <https://www.vox.com/2019/5/3/18528319/poll-felons-right-to-vote> [<https://perma.cc/4ZQF-H69S>] (“One of the poll’s notable findings is that while Republicans were more likely to be against allowing imprisoned felons to vote than Democrats—85 percent and 61 percent, respectively—a majority of both party members were still against the idea.”).

<sup>222</sup> U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.”).

<sup>223</sup> See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (“Prescribing voting qualifications, therefore, forms no part of the power to be conferred upon the national government by the Elections Clause, which is expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections.” (internal quotation marks omitted)).



which explicitly bars denial or abridgment of the right to vote on account of race, color, or previous condition of servitude.<sup>224</sup>

Nevertheless, restoring the franchise to all current and formerly incarcerated people is an act of Congress that would assuredly face legal challenges.

Congress would be on solid ground enacting felony enfranchisement legislation because, as advocates have argued, “universal voting for people with felony convictions would prevent racial disparities in the criminal legal system from causing disparities in political representation.”<sup>225</sup> To fend off potential attacks, Congress should compile a sizeable record of the disproportionate racial impacts of felony disenfranchisement.

Felony disenfranchisement laws were crafted with the intent to disenfranchise as many Black Americans as possible after the Civil War.<sup>226</sup> Racial disparities in disenfranchisement due to felony convictions are particularly stark.<sup>227</sup> About 5.2 million Americans (one in forty-four adults) could not vote in 2020 due to a felony conviction.<sup>228</sup> More than six percent of the Black American voting-age population, or 1,800,000 Black Americans, are disenfranchised.<sup>229</sup> One in 16 Black Americans of voting age is disenfranchised, a rate 3.7 times greater than non-Black Americans.<sup>230</sup> In some Southern states—such as Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia—where the legacy of Jim Crow looms large, “more than one in seven African Americans is disenfranchised, twice the national average for African Americans.”<sup>231</sup>

Congressional fact findings made in support of H.R. 1 demonstrate the kinds of facts that Congress should seek to include in the record of forthcoming legislation prohibiting felon disenfranchisement. H.R. 1 already contains some necessary findings to support Congress’s constitutional authority to enact such legislation. For example, in H.R. 1,

Congress [found] that felony disenfranchisement was one of the tools of intentional racial discrimination during the Jim Crow era. Congress further

---

<sup>224</sup> See 167 CONG. REC. H890 (daily ed. Mar 2, 2021).

<sup>225</sup> *Support H.R. 1 Amendment #14—Provisions to Restore Voting Rights to All People with a Criminal Conviction*, SENT’G PROJECT (Mar. 2, 2021), <https://www.sentencingproject.org/publications/support-h-r-1-amendment-14-provisions-to-restore-voting-rights-to-all-people-with-a-criminal-conviction> [<https://perma.cc/362H-ZMJA>].

<sup>226</sup> 167 CONG. REC. H1000 (daily ed. Mar. 2, 2021) (statement of Rep. Mondaire Jones) (emphasizing that disenfranchisement laws were created in response to the political success of Black individuals following Reconstruction).

<sup>227</sup> 167 CONG. REC. H903 (daily ed. Mar 2, 2021) (“State disenfranchisement laws disproportionately impact racial and ethnic minorities.”).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> 167 CONG. REC. H891 (daily ed. Mar 2, 2021).

[found] that current racial disparities in felony disenfranchisement are linked to this history of voter suppression, structural racism in the criminal justice system, and ongoing effects of historical discrimination.<sup>232</sup>

Congress should also investigate how this intentionally racist history is affecting Black Americans now. For example, “[n]ationally, 39% of people disenfranchised in prisons are [Black], whereas [Black Americans] make up 13% of the nation’s population.”<sup>233</sup> This disparity diminishes the voting power of the Black electorate as a whole. Furthermore, the individual effects of this systemic disparate treatment showcase that individuals lose their voices in the voting process at a higher rate due to their race.<sup>234</sup>

Latino Americans are also disproportionately impacted by these laws in comparison to their white counterparts due to their disproportionate representation in the criminal justice system.<sup>235</sup> Congressional findings in support of the Democracy Restoration Act—a subsection of H.R. 1 that prohibits felony disenfranchisement “unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election”—highlight the disparate effects of disenfranchisement laws on Latino citizens.<sup>236</sup> According to the House of Representatives, “Latinos have been imprisoned at 2.5 times the rate of Whites,” and “[m]ore than 2 percent of the voting-age Latino population, or 560,000 Latinos, are disenfranchised due to a felony conviction.”<sup>237</sup> Among the states that disenfranchise people convicted of felonies, in thirty-four of those states, “Latinos are disenfranchised at a higher rate than the general population.”<sup>238</sup>

States may also assert that Congress lacks the authority under the Fourteenth and Fifteenth Amendments to bar felony disenfranchisement laws at the state level. They will likely note that *Ramirez* confirmed that “Section [Two] of the Fourteenth Amendment specifically provides that states may abridge the right to vote of citizens ‘for participation in rebellion,

---

<sup>232</sup> *Id.*

<sup>233</sup> See Tawna Sanchez, Andrea Salina & Amy Fettig, *Sanchez, Salinas and Fettig: Don’t Disenfranchise People Who Want to Vote*, PORTLAND TRIBUNE (June 22, 2021), <https://pamplinmedia.com/pt/10-opinion/512791-410203-sanchez-salinas-and-fettig-dont-disenfranchise-people-who-want-to-vote> [https://perma.cc/PM6A-VLDB].

<sup>234</sup> See *id.* (“[I]ndividuals of color are prosecuted and sentenced at much higher rates than whites for comparable behavior.”).

<sup>235</sup> 167 CONG. REC. H903 (daily ed. Mar 2, 2021) (discussing the impacts of felony disenfranchisement laws on Latino Americans).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> See *id.* (“In 11 states 4 percent or more of Latino adults are disenfranchised due to a felony conviction (Alabama, 4 percent; Arizona, 7 percent; Arkansas, 4 percent; Idaho, 4 percent; Iowa, 4 percent; Kentucky, 6 percent; Minnesota, 4 percent; Mississippi, 5 percent; Nebraska, 6 percent; Tennessee, 11 percent; Wyoming, 4 percent), twice the national average for Latinos.”).

or other crime.”<sup>239</sup> Because the Supreme Court has already blessed felony disenfranchisement, opponents will argue that congressional legislation that promotes felony enfranchisement directly conflicts with constitutional precedent.

This argument, however, is misguided considering the history of the Fourteenth Amendment. Antislavery advocates used very intentional language and writing to express their desires as they pertained to the Fourteenth Amendment.<sup>240</sup> While compromises from more moderate legislators led to the inclusion of additional language that watered down the final text, the intended goals of the Amendment were clear.<sup>241</sup> This context demonstrates another reason why the *Ramirez* decision is troubling. In *Ramirez*, the Supreme Court ignored this history of Section Two and failed “to consider the provision in light of the other provisions of the [Fourteenth] Amendment as they were first contemplated, or to read it in light of the purpose it was designed to achieve.”<sup>242</sup> As Richard W. Bourne argued, “[w]hen read in light of the goals its language was designed to advance, Section 2 should not be construed as an explicit endorsement of felon disenfranchisement statutes, much less as an authorization for the states to adopt them.”<sup>243</sup>

Even if it were established that Congress has the authority under Section Five of the Fourteenth Amendment or Section Two of the Fifteenth Amendment to bar felony disenfranchisement laws, challengers would argue that abolishing state felony disenfranchisement laws under H.R. 1 would not pass the test established in the Court’s *Boerne* decision. In *Boerne*, the Court articulated that Congress can pass laws burdening states only when Congress demonstrates that there is admissible evidence of significant unconstitutional conduct being undertaken by the states.<sup>244</sup> Moreover, the Court held that

---

<sup>239</sup> Hans von Spakovsky & Roger Clegg, *Felon Voting and Unconstitutional Congressional Overreach*, HERITAGE FOUND. (Feb. 11, 2015), <https://www.heritage.org/crime-and-justice/report/felon-voting-and-unconstitutional-congressional-overreach> [<https://perma.cc/SW3U-UKCM>].

<sup>240</sup> See Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 63 (2019) (“The language of the Fourteenth Amendment can be traced to specific speeches and writings of leading antislavery advocates who developed an abolition constitutionalism in the preceding decades . . . Radical Republican leaders, like Charles Sumner and Henry Wilson in the Senate and James Ashley and Thaddeus Stevens in the House, urged incorporating their vision of slavery eradication and free labor in the rewritten Constitution’s text.”).

<sup>241</sup> See *id.* at 65-66 (discussing early anti-slavery advocates’ expressed disappointment with the moderate compromises to the text of the Thirteenth and Fourteenth Amendments).

<sup>242</sup> Richard W. Bourne, *Richardson v. Ramirez: A Motion to Reconsider*, 42 VAL. U. L. REV. 1, 1 (2007) (citations omitted).

<sup>243</sup> *Id.*

<sup>244</sup> Richard Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), <https://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race> [<https://perma.cc/DPK5->

“[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>245</sup> Opponents would likely argue that federal legislation prohibiting state felony disenfranchisement laws is not a valid exercise of Congress’s Section Five power to enforce the Fourteenth Amendment’s prohibition on unconstitutional racial discrimination in voting for two reasons. First, there is no extensive pattern of states employing felony disenfranchisement laws to engage in unconstitutional racial discrimination. Second, Congress’s chosen remedy of enfranchising everyone regardless of their criminal record is not congruent and proportional to its objective of eliminating racial discrimination from the right to vote.

A challenge to a reform bill under the *Boerne* test would be inconsistent with the goal of H.R. 1, which seeks to restore the franchise to incarcerated Americans. As previously noted, over five million Americans are currently disenfranchised due to their criminal records.<sup>246</sup> Several states, such as Florida, have been particularly far-reaching in their use of felony disenfranchisement laws to suppress the vote. Because of this, a congressional ban on felony disenfranchisement laws would be congruent and proportional and thus fall within Congress’s powers under Section Five of the Fourteenth Amendment or Section Two of the Fifteenth Amendment.

The first part of the *Boerne* test would be met, as Congress can establish that states demonstrate a pattern of using felony disenfranchisement laws to unconstitutionally discriminate against Black Americans. In the past, the Court recognized the relevance of racial discrimination in education when it upheld the constitutionality of literacy tests.<sup>247</sup> The Court can likewise rely on Congress’s findings of a history of discrimination in the criminal justice system, and the original language and intent of felony disenfranchisement laws, to uphold the constitutionality of the ban on felony disenfranchisement laws. As scholars have observed, “[i]n the 1870s, every state under Reconstruction except Texas changed its laws to deny the vote to individuals convicted of petty theft and misdemeanor larceny—a change consciously designed to remove [B]lack voters from the rolls.”<sup>248</sup> Congress must build out

---

77WP] (emphasizing the portion of the *Boerne* test requiring “admissible evidence (to the satisfaction of the Court, not [Congress]) . . . of significant unconstitutional conduct being undertaken by the states”).

<sup>245</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

<sup>246</sup> LOCKED OUT 2020, *supra* note 88, at 4.

<sup>247</sup> See *Oregon v. Mitchell*, 400 U.S. 112, 235-36 (1970) (“We have since held [Section Two of the Fifteenth Amendment’s] power ample to cover the proscription of fair literacy tests, fairly administered, which nevertheless operate to disenfranchise racial minorities because of previous governmental discrimination against them in education.”).

<sup>248</sup> Pippa Holloway, *A History of Stolen Citizenship*, OHIO STATE UNIV.: ORIGINS (May 2019), <https://origins.osu.edu/article/voting-crime-and-race-history-stolen-citizenship-disenfranchisement-felony> [<https://perma.cc/9LJ4-X2B8>]; see also Brent Staples, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES

the extensive record of racial discrimination through the use of felony disenfranchisement laws and within the criminal justice system to justify this legislation. Congress can lean heavily on the record to establish these claims and meet the criteria set forth by the first prong of the *Boerne* test.

Congress has the authority to per se bar racially discriminatory voting rules under the second prong of the *Boerne* test. The paradigmatic example of Congress's authority to bar facially constitutional voter qualifications is the federal ban on literacy tests.<sup>249</sup> The Court has "repeatedly affirmed that 'Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.'"<sup>250</sup> With a meticulously curated record of how racial discrimination is promoted and maintained by felony disenfranchisement laws, Congress can establish that it has a compelling federal interest to ban felony disenfranchisement practices. If Congress can produce this record, this legislation should withstand future legal challenges.

#### CONCLUSION

In the 1958 *Trop v. Dulles* decision, Justice Earl Warren wrote that "[c]itizenship is not a license that expires upon misbehavior."<sup>251</sup> While *Dulles* was not a felony disenfranchisement challenge, the sentiments expressed by Justice Warren apply perfectly to the felony disenfranchisement context. If someone who is incarcerated remains a citizen and retains their civic status throughout their sentence, then it follows they should be able to exercise their most fundamental civil right: the right to vote. Voting is a basic and essential

---

(Nov. 18, 2014), <https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html> [<https://perma.cc/YB6X-CJK7>] ("In 1894, a white South Carolina newspaper argued that voting laws needed to be amended, lest whites be swept away at the polls by the black vote. In 1901 Alabama amended its Constitution to expand disenfranchisement to all crimes involving 'moral turpitude'—a vague term that was applied to misdemeanors and even acts not punishable by law. The president of the constitutional convention argued that manipulating the ballot to exclude blacks was warranted, because they were inferior to whites and because the state needed to avert the 'menace of Negro domination.'").

<sup>249</sup> See *Boerne*, 521 U.S. at 518 (explaining that the Court has repeatedly upheld suspensions of literacy tests and similar voting qualifications under Congress' power to enforce the provisions of the 15th Amendment to combat racial discrimination in voting, despite the facial constitutionality of the tests and collecting cases).

<sup>250</sup> *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (quoting *Nevada Dept. of Hum. Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003)). Recently, the Supreme Court has upheld blanket bans on discrimination against people with disabilities in a variety of areas, *Lane*, 541 U.S. at 528-29, and broad requirements that employers offer familial leave to combat sex-based discrimination, *Hibbs*, 538 U.S. at 728-33.

<sup>251</sup> 356 U.S. 86, 92 (1958).

right only effective when citizens of all races, classes, religions, and genders can employ it.<sup>252</sup>

Felony disenfranchisement laws in conjunction with racially discriminatory policies have disproportionately impacted the Black community, leading to political underrepresentation and a hushed voice in the democratic process. Moreover, proponents of felony disenfranchisement laws fail to put forth any persuasive arguments, and purposely fail to recognize that the pervasiveness of these policies only undermine democracy. While many states have made steps in the right direction by passing legislation to extend the right to vote to more of its citizens, there is a long road ahead. If the United States wishes to operate as a *true* democracy, legislation that explicitly nullifies the legality of felony disenfranchisement policies and extends the right to vote to every American needs to be written and passed into law.

---

<sup>252</sup> Erin Kelly, Comment, *Do the Crime, Do the Time—And Then Some: Problems with Felon Disenfranchisement and Possible Solutions*, 51 U. TOL. L. REV. 389, 420 (2020).