MASS INCARCERATION & THE MINORITY VOTE: THE CASE FOR A FEDERAL BAN ON FELON DISENFRANCHISEMENT

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INTRODUCTION

Prisoners in Maine and Vermont enjoy uninterrupted voting privileges while serving time behind bars.[1] To Foster Bates, an inmate at Maine State Prison, this privilege allows him to "assess the best candidate for [his] values, [his] family's values, and the values of the country."[2] Moreover, Bates views the right to vote behind bars as a means of having a say in his own future.[3] Bates's attitude towards voting and civic engagement is incredibly refreshing, considering eighty-million Americans neglected to hit the polls in the most recent presidential election.[4] As inspiring as Bates's story is, the reality is that his circumstances are the exception and not the rule. In the United States, a lengthy prison sentence often entails an equally lengthy period of disengagement from the political process. Some view this forced abstinence from voting as a just punishment for crimes committed. On the contrary, we believe that individuals like Bates prove that this sentiment could not be farther from the truth.

Additionally, the United States has slowly evolved into a carceral state, with many of those caught in the criminal justice system being black and brown minorities.[5] Combine the increased incarceration of minorities with the deprivation of voting rights for those same minorities, and reasonable fear of race-based voter disenfranchisement is created.[6] One solution to this problem is to remedy the criminal justice system to systemically correct the over-incarceration of

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1. Daniel A. Gross, *Why Shouldn't Prisoners Be Voters?*, NEW YORKER (Feb. 27, 2020), https://www.newyorker.com/news/the-future-of-democracy/why-shouldnt-prisoners-be-voters.

2. *Id.*

3. *Id.*

4. Domenico Montanaro, *Poll: Despite Record Turnout, 80 Million Americans Didn't Vote. Here's Why*, NPR (Dec. 15, 2020), https://www.npr.org/2020/12/15/945031391/poll-despite-record-turnout-80-million-americans-didnt-vote-heres-why.

5. *See generally* Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1693 (2006) ("Over the past three decades, the United States has built a carceral state that is unprecedented among Western countries and in U.S. history . . . Nearly one in fifty people in the United States, excluding children and the elderly, is behind bars today.").

6. *See infra* Part III (detailing the relationship between voter disenfranchisement laws and race).

minorities. As time has proven, the fact that minorities—especially African Americans—are incarcerated at higher rates than their non-minority counterparts is not so simple to correct. So, another solution is needed. One remedy could be a nationwide ban on the disenfranchisement of felon voting rights. As this paper suggests, such a remedy is not only desirable from a moral standpoint but may also be required in accordance with the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments of the United States Constitution.[7]

In making the case for a nationwide ban on felon disenfranchisement, Part I explores the relevant history behind the Voting Rights Act and the effects of subsequent amendments on the Act. Namely, the Fourteenth Amendment, and the Fifteenth Amendment. This history is then examined in relation to the mass incarceration epidemic that has plagued the United States. Part II examines the history and impact felony disenfranchisement has had on America and its elections, taking an especially hard look at the effect on African Americans to better understand if felony disenfranchisement has the type of effect on minorities that would require the type of government intervention contemplated by the enactors of the Voting Rights Act. Lastly, Part III outlines the parallels and shared struggles between early American colonists and present-day disenfranchised felons, touching on how today's government can implement principles taken up by the founding fathers to create a legally sound framework under the Fourteenth Amendment principles and the Voting Rights Act.

I. HISTORY & BACKGROUND

No story on voting rights and mass incarceration is complete without ample digging into the relevant history. While we certainly do not claim to recount the entire history of voting rights and the advocacy thereof, we recognize that there is great use in briefly exploring the evolution of voting rights. This is especially true of the history after the passage of the Voting Rights Act of 1965 ("the Act"). History plays an essential function on at least three levels in this paper. First, examining the history will help contextualize our analysis as significant developments to voting rights and the mass incarceration phenomenon occurred at separate stages. Second, history is vital to providing crucial counterpoints to the stances we take throughout our analysis. And finally, knowing and understanding the history surrounding these issues is a prerequisite to avoiding future repetition. We hope that Part I serves as a high-level introduction to some of the more significant events in the history of the Act and mass incarceration. Later sections build upon this foundation more precisely to frame the history of felon voter disenfranchisement.

With that said, Part I weaves its way through the Act's history, examining and analyzing the Act's purpose. Whether the Act achieves its purpose despite alleged over imprisonment in this country is an important, perhaps even necessary, question to consider. The section then surveys the current state of mass incarceration in the United States, gauging whether contemporary prison abolitionists are hyperbolic in their rhetoric or conscious of systemic problems in the nation's justice system. Lastly, this section contemplates key counterarguments

7. *See generally* 42 U.S.C. § 1973 *et seq.*; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

to *why* and *if* alleged disenfranchisement of the imprisoned is acceptable. Scrutinizing the constitutionality of voter disenfranchisement should illuminate the question(s) this country has been repeatedly faced with: Is the eradication of felons voting rights constitutionally permissible? If yes, should this disenfranchisement be morally and ethically acceptable? Exploring these questions provides a normative basis for the arguments made after that.

A. The Voting Rights Act of 1965

The Fifteenth Amendment, the last of the Reconstruction Amendments, purported to "remove[] racial barriers"[8] in the voting process by providing that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[9] Despite the clear textual mandate, some states continued to use their power to limit minority voter registration and voter participation.[10] In response, the federal government tripled down on the Fifteenth Amendment's promise by passing the Civil Rights Acts of 1957, 1960, and 1964. Abigail Thernstrom has noted that the Civil Rights Act and its subsequent versions "had done little more than allow county-by-county injunctions against prejudiced registrars" and "case-by-case adjudication … [of these overtly racist registrars] had proven largely ineffective."[11]

Thernstrom captured the dire state of minority voting in the South through the story of three murdered Black men: "In 1964 James Chaney, Andrew Goodman, and Michael Schwerner were murdered while participating in a voter-registration drive in Neshoba County, Mississippi. In that year less than [seven] percent of Mississippi's adult [B]lacks were registered to vote."[12] Born from an accumulation of tragedies like the deaths of Chaney, Goodman, and Schwerner was the Voting Rights Act of 1965.[13] On its face, the Act's purpose was simple, "[t]o enforce the fifteenth amendment to the Constitution of the United States."[14] And, at least initially, the Act appeared to push the needle toward anti-discrimination effectively. Mississippi jumped from seven percent adult Black registration to roughly sixty percent by 1967.[15] Moreover, Mississippi now had "191 black elected officials," a stark increase considering that "prior to the passage

8. *Voting Rights Act of 1965*, NAACP, https://perma.cc/5GWU-KM9J (last visited Jan. 28, 2022).

9. U.S. CONST. amend. XV, § 1.

10. *See generally* Steven L. Lapidus, *Eradicating Racial Discrimination in Voter Registration: Rights and Remedies under the Voting Rights Act Amendments of 1982*, 52 FORDHAM L. REV. 93, 93 (1983) (including "literacy tests and poll taxes" among the "most obvious impediments" to voter registration shortly after the Voting Rights Act was enacted).

11. Abigail M. Thernstrom, *The Odd Evolution of the Voting Rights Act*, 55 PUB. INT. 49, 49 (1979).

12. *Id.*

13. Chisom v. Roemer, 501 U.S. 380, 383 (quoting Pub. L. No. 89-110, 79 Stat. 437, 42 U.S.C. § 1973 *et seq*.); *see also* NAACP, *supra* note 8 (cataloguing the effect civil rights advocates like Martin Luther King Jr. had in bringing the Voting Rights Act of 1965 to fruition through various forms of advocacy. Including, but not limited to, the now-famous peaceful civil rights march in Selma, Alabama.).

14. *Id.*

15. Thernstrom, *supra* note 11, at 53.

of the [A]ct, there had been fewer than 100 [black elected officials] in the entire South."[16]

Merely passing the Act wasn't enough to crush all attempts at voter disenfranchisement in the South.[17] The Act's evolution over the years has been as important as its initial signage into the laws of this country. At bottom, the Act "provides an administrative process which operates independently of the judiciary in locating and terminating discriminatory practices, thus assuring immediate registration of Negroes heretofore deprived of their right to vote."[18] In 1965 specifically, the Act concentrated on "literacy tests and other devices that had been used as a means of suppressing the right to vote in jurisdictions with a history of discrimination."[19] Originally, under Section 5 of the Act, the restrictions and voter protections were limited to jurisdictions with "a history of discrimination" that "used a test to deny the right to vote" and "registered less than 50 percent of the voting age population by November 1, 1964."[20] These jurisdictions—almost exclusively found in the South—were not permitted to "make any changes to election laws or voter registration and voting procedures without the preclearance of the U.S. attorney general."[21] Additional protections included federal examiners for voter registration and federal election observers.[22]

The 1970s saw different kinds of challenges and, as a result, the Act saw additional changes. Recognizing that the challenges faced by minorities were not limited to just the South, Congress amended the Act to effectuate a nationwide ban on literacy tests. The best evidence of how effective these literacy tests were in disenfranchising the black vote is found in the amount of litigation that followed the 1970 amendment of the Act.[23] In a way, the 1970s saw the Act's transcendence from its original purpose of equal voting rights for one specific demographic, Blacks in the South, on to a loftier goal, voting equality generally. The explanation for this broadening of the Act's purpose? A growing coalition of minorities was determined to ensure the government protected their voting rights as well.[24] Boyd

16. *Id.*

17. *See, e.g.*, Patty Ferguson-Bohnee, *The Struggle for Equal Voting Rights: 45 Years of the Voting Rights Act*, 47 ARIZ. ATT'Y 26, 27 (2010) (examining the struggle of non-Black minorities in the West, and how that struggle continues to be monitored today: "[I]n the West, states such as Arizona had prohibited Native Americans and Hispanic Americans from voting. As a result of voter discrimination against those groups, Arizona still must request preclearance for proposed voting changes, under Section 5 of the [A]ct.").

18. *Voting Rights Act of 1965*, 1966 DUKE L.J. 463, 468 (1966).

19. Elizabeth M. Yang, *Still Relevant Today: The Voting Rights Act: The Voting Rights Act Since 1965*, 12 INSIGHTS ON L. & SOC'Y 4, 5 (2012).

20. *Id.*

21. *Id.*

22. *Id.*

23. *See, e.g.*, Or. v. Mitchell, 400 U.S. 112, 118 (1970) (finding that Congress was constitutionally permitted to require a State lower its voting age to the national requirement (18) and dispose of literacy tests in enforcing the Voting Rights Act).

24. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1350 (1983) (noting that "Hispanics, Asian-Americans,

and Markman observe, "[s]ince Hispanics were often the objects of discriminatory voting tactics, they properly argued that the formulas that triggered administrative preclearance for blacks should protect them as well."[25] In successfully arguing their logic, the minority coalition of the 1970s successfully extended the Act to even more than originally intended:

> A new Title II broadened the sweep of the Act to establish a nationwide requirement that entire states and local governments provide bilingual "registration of voting notices, forms, instructions, assistance, or other materials of information relating to the electoral process, including ballots." Eligibility for special bilingual treatment essentially was based on the heritage of the voter, and not on his or her inability to speak or read English.[26]

The next decade of the Act focused on finetuning the method with which courts analyzed alleged discriminatory behavior. Congress responded to the Supreme Court's decision in *Mobile v. Bolden*, making the Act's requirements and overarching purpose clear.[27] In *Bolden*, the Plaintiffs challenged the election of three Mobile, Alabama commissioners.[28] The Plaintiffs successfully demonstrated a clear history of discrimination—this proved relatively simple to do, considering no African American had ever been elected for this position before—but the Court still ruled against them due to the lack of any apparent hindrance on the ability of African Americans to register and vote for these elections.[29] In the Court's eyes, the Act was violated only if there was proof of a "discriminatory purpose" on behalf of the State, not just discriminatory results.[30] Congress wasted little time responding to the *Mobile* decision, amending the Act just two years later:

> In 1982, Congress extended certain provisions of the Act such as Section 5 that were set to expire, and added protections for voters who required assistance in voting. At the same time, it examined the history of litigation under Section 2 since 1965 and concluded that Section 2 should be amended to provide that a plaintiff could establish a violation of the section if the evidence established that, in the context of the "totality of the circumstance of the local electoral process," the standard, practice, or procedure being challenged had the result of

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Native Alaskans, and Native Americans (Indians), formed a coalition with black civil rights organizations to be included under the umbrella of the Act.").

25. *Id.*

26. *Id.* at 1351 (footnote omitted).

27. Mobile v. Bolden, 446 U.S. 55 (1980).

28. *Id.* at 58.

29. *See id.* at 73.

30. *Id.* at 62 ("Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."); *Id.* at 66 ("We have recognized . . . that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

> denying a racial or language minority an equal opportunity to participate in the political process.[31]

Then-President Reagan deemed the 1982 amendment "the crown jewel of American liberties," emphasizing that the "legislation proves our unbending commitment to voting rights . . . [and] that differences can be settled in the spirit of good will and good faith."[32] To others, the amendment also transformed the Act's purpose from merely protecting participation by historically disenfranchised populations in the political process to ensuring representation of those parties.[33]

Following another reauthorization of the Act in 2006, challenges to the Act rested largely on federalism grounds. The argument by these states was that section 5 of the Act intruded on state sovereignty. One example is *Northwest Austin Municipal Utility District Number One v. Holder*.[34] The *Holder* Court:

> questioned the constitutionality of the Act based on the tension between federal preclearance requirements and the protection of state sovereignty. The Court expressed skepticism about the coverage formula under section 5, which had gone unchanged in the 2006 reauthorization, indicating that preclearance "imposes current burdens and must be justified by current needs."[35]

Although *Holder* was decided in favor of constitutionality, the popular move by states following the decision was to continue to poke holes in the Act through the federal preclearance mandate.[36] The states in opposition to preclearance finally got their way in 2013 when the Court "struck down the heart of the Voting Rights

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31. U.S. DEP'T OF JUST., *Section 2 of the Voting Rights Act*, https://www.justice.gov/crt/section-2-voting-rights-act (last visited Jan. 28, 2022).

32. Herbert H. Denton, *Reagan Signs Voting Rights Act Extension*, WASH. POST § A, at 1 (June 30, 1982), https://www.washingtonpost.com/archive/politics/1982/06/30/reagan-signs-voting-rights-act-extension/b59370f1-fc93-4e2f-b417-2b614ea55910/.

33. *See* Bill Montague, *The Voting Rights Act Today*, 74 A.B.A. J. 52 (1988).

> Congress clearly intended from the beginning that the law do more than just guarantee the right to cast a vote,' says McDonald. 'It also ensures that black voters have the opportunity to elect the persons they want to represent them. That is also a basic right.' The assertion of that right has become a steadily growing practice for civil rights attorneys. Spurred by the 1982 amendments to the Voting Rights Act, and by the Supreme Court's interpretation of those changes, private plaintiffs have stepped up their attacks on election systems which they say allow whites to consistently defeat minority candidates by voting as a racial bloc.

Id.

34. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).

35. J. Gerald Herbert, *The Future of the Voting Rights Act*, 64 RUTGERS L. REV. 953, 960 (2012) (footnotes omitted).

36. *Id.* at 963. Noting that:

> Over the past few years, the Voting Rights Act has been subject to concerted efforts to undermine the constitutionality of section 5. Challenges to the preclearance requirement have been brought alongside redistricting plans by Alaska, Arizona, and Florida; and Texas has challenged the law as a part of its suit to preclear its new law requiring voters show photo identification at the polls.

Id. (footnotes omitted).

Act of 1965 . . . freeing nine states, mostly in the South, to change their election laws without advance federal approval."[37]

One could view *Shelby Cnty. v. Holder* as the first real setback to the Voting Rights Act; Liptak appears to do so in his New York Times piece, at least.[38] However, if we take Chief Justice Roberts's words literally, we might also interpret *Shelby Cnty.* to be more of a call for action to Congress than a knife in the back of the Act. Fast forward to today, and it would seem that Congress has begun to take the Chief's call seriously. The John Lewis Voting Rights Advancement Act ("JLVRAA") and Freedom to Vote Act ("FVA"), although not in effect yet, have brought renewed vigor in the fight for voting equality.[39] The JVRAA focuses on codifying solutions to the problems *Shelby Cnty.* identified, while the FVA goes a step farther by taking more intentional steps towards voter turnout like: making election day a national holiday, guaranteeing and protecting early voting prior to election day, permitting excuse-free mail-in voting nationwide, ensuring disabled individuals can access polling locations, and broadening the types of IDs permitted by States that require ID to vote.[40] Naylor succinctly captures the crux of both sides of the political debate surrounding these two proposed Acts:

> Democrats and their allies say these bills would block states from making it harder for people, especially people of color, to cast their ballots. Dozens of states have enacted over 200 measures changing voting laws since the 2020 election, including some changes that expanded ballot access.
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> Republicans argue that many of the new laws passed by states are attempts to prevent voter fraud, and that the legislation before

37. Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html (quoting Chief Justice Roberts) ("Our country has changed . . . . While any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."); *see also* Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (holding that § 4(b) of the Act was unconstitutional because of its reliance on 40-year-old facts that had no relation to present day circumstances. The Court stated that its decision did not affect the permanent, nationwide ban on racial discrimination in voting that was found in § 2 of the Act, and it issued no ruling on § 5 specifically).

38. Liptak, *supra* note 37.

39. *See* John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (2021); Freedom to Vote Act, S. 2747, 117th Cong. (2021-2022).

40. Brian Naylor, *The Senate is Set to Debate Voting Rights. Here's What the Bills Would Do*, NPR (Jan. 18, 2022), https://www.npr.org/2022/01/18/1073021462/senate-voting-rights-freedom-to-vote-john-lewis-voting-rights-advancement-act. Specific to the JVRAA, Naylor argues:

> [t]hat law required several states with a history of voting rights discrimination, largely in the South, to get preclearance from the Department of Justice for any changes to voting laws. The Lewis act would restore the requirement and update the formula used to determine which states must get preclearance. Other changes to voting laws in any state, such as relocating polling places and imposing strict voter ID requirements, would also be subject to preclearance.

Id.

> Congress amounts to a federal take over of what has been a state responsibility.[41]

While neither Act is specific to the Voting Rights Act, both depend primarily on the Act's purpose and structure to move the needle forward. Passage of these two pieces of legislation is where advocates of expanded voting rights find themselves stuck today. With no clear result in sight, history sits—to some, frustratingly so—waiting to be made.

So, what can we take away from the history of the Voting Rights Act and today's lively and ongoing political debate? We argue that the most significant takeaway must be that throughout all of the Act's amendments, debates, and changes, its purpose has always been simple: to ensure enforcement of the Fifteenth Amendment. In the context of this paper, we'll continue to explore the Voting Rights Act and the Fifteenth Amendment in relation to prisons and especially minorities in prison. Underlying this examination are essential questions of election integrity, human rights, federalism, and constitutional continuity.

B. Mass Incarceration

To narrow our focus from all potentially disenfranchised voters, we have specifically focused on the prison population. Many find felons to be a perplexing, perhaps even unintuitive, population of people to focus on when advocating *for* rights. However, we believe they merit a great degree of advocacy because of the prison population's weak position within the food chain of rights-bearing individuals. From a numbers standpoint, the United States makes sense because it "is not only the country with the highest incarceration rate worldwide, but it is also home to the largest number of prisoners."[42] Still, one may wonder how the Act and mass incarceration intertwine. A brief review of the history should bring this relationship to light.

Modern-day scholars coincidentally track the beginning of the carceral state in the United States back to early 1970, shortly after the Act went into effect in 1965.[43] The incarceration rate, in general, is undoubtedly alarming; however, what

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41. *Id.*

42. *Countries With the Largest Number of Prisoners Per 100,000 of the National Population, as of May 2021*, STATISTA, https://perma.cc/DBV3-K4GS (last visited Jan. 28, 2022) (noting that "[r]oughly 2.12 million people were incarcerated in the U.S. in 2020.").

43. *See, e.g.*, Jonathan Simon, *Is Mass Incarceration History*, 95 TEX. L. REV. 1077, 1078 (2017) (noting that "the recent wave of historical analysis of mass incarceration . . . began in the 1970s"); *see also* Anne Morrison Piehl, *The Challenge of Mass Incarceration*, 3 CRIMINOLOGY & PUB. POL'Y 303 (2004) (noting that "[a]s is well known, this [current] rate [of incarceration has] increased dramatically over the past 30 years, and it is perhaps leveling off or at least slowing in its rate of increase."); *see also* James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration (examining the explosion of inmates from the 1970s forward).

> The prison population began to grow in the 1970s, when politicians from both parties used fear and thinly veiled racial rhetoric to push increasingly punitive policies. Nixon started this trend, declaring a "war on drugs" and justifying it with speeches about being "tough on crime." But the prison population truly exploded during President Ronald Reagan's

brings mass incarceration into the purview of the Act is the effect mass incarceration has on minority communities, especially Black communities. Piehl also notes that "[a]lthough it is not surprising that [mass incarceration] is concentrated, its extent is staggering: For black males in central cities and urban areas, the level of incarceration approaches 10% on a given day."[44]

So, how did we get here? The history behind mass incarceration tells a troubling and circular problem. The problem is a bipartisan creation, and those affected have been silenced in the democratic process by widespread voter disenfranchisement. The 1970s may have been the only time an organic increase in criminalization occurred; scholars like Marc Mauer have opined that this was due to the Baby Boomers coming of age, widespread urbanization, and a "tough on crime" mindset by the country's political leadership.[45] The 1980s saw a more deliberate and policy-based approach to incarceration, focused on ending the "war on crime" or "war on drugs."[46] This proved especially disastrous for minority communities plagued with harsh sentences for crack cocaine.[47] Democrats often blame the Republicans that were in power for much of the 1970s and 1980s for the state of mass incarceration United States society plunged into; however, the 1990s and most of the 2000s demonstrate that Democrats not only did little to stop the momentum of the carceral state but propelled it forward.

The 1990s and 2000s brought destructive policy selections, like "truth-in-sentencing" ("TIS"). In Mississippi, TIS regimes required anyone convicted of a

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> administration. When Reagan took office in 1980, the total prison population was 329,000, and when he left office eight years later, the prison population had essentially doubled, to 627,000.

Id.

44. Piehl, *supra* note 43, at 303; *see also* Cullen, *supra* note 43 ("This staggering rise in incarceration hit communities of color hardest: They were disproportionately incarcerated then and remain so today.").

45. Marc Mauer, *Race to Incarcerate: The Causes and Consequences of Mass Incarceration*, 21 ROGER WILLIAMS U. L. REV. 447, 449–50 (2016).

> One might think if we have about seven times as many people in prison today as we did four decades ago, maybe we have seven times as much crime and that is what explains it. "You do the crime, you do the time," that's why we lock up so many people now. If we go back to the early years of the prison buildup, there is a bit of truth in that explanation. There was a rise of crime from the mid-60s to the mid-70s. Part of this was due to the Baby Boom generation coming into the high crime rate years, part of this was increasing urbanization, which is often associated with crime, as well as other factors. So, we had an initial rise in crime rates that probably contributed to some of this increase, beginning in the 1970s.

Id.

46. *See generally* Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs (analyzing the effect the government's "war on" campaign had on the mass incarceration of the populace).

47. Kristin Zimmerman, *The Unfair Sentencing Act: Racial Disparities and Fiscal Consequences of America's Drug Laws*, 2 THEMIS: RSCH. J. JUST. STUD. & FORENSIC SCI. 160, 160 (2014) ("In 1986, the United States government attempted to combat the perceived war on drugs by enacting mandatory drug laws, with a primary focus on incarcerating crack offenders. The result of this was a mass influx of African Americans to US penitentiaries and minimal to zero reduction of crack convictions.").

felony to serve at least 85% of their prison sentence.[48] In defense of its existence, TIS supporters chose to understand the policy regime to champion "the delivery of proportionate punishments and promote stability and predictability in administering criminal justice."[49] The 1990s and 2000s didn't stop there though,[50] former President Bill Clinton,[51] and current president Joe Biden, also took a stab at increasing the prison population through federal crime bills that included controversial provisions, such as the "three strikes and you're out" rule.

History demonstrates that mass incarceration was no mistake: it was an intentional effort to solve genuine problems that stemmed from a ballooning population. The problem grew uncontrollably when the government refused to see the effect of the response to epidemics like drugs and crime on minority communities. The result was a carceral state trying to dig its way out in more contemporary times. Great strides have been made, and the curve has flattened and stagnated, but much work is required to make up for decades of poor policy judgments. The effect of mass incarceration has contributed to the disenfranchisement of millions of felons over the years, with a high impact on minorities that was often the target of many of these policy considerations.

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48. Peter B. Wood & R. Gregory Dunaway, *Consequences of Truth-in-Sentencing: The Mississippi Case*, 5 PUNISHMENT & SOC'Y 139, 139 (2003).

49. *Id.*

50. *See* Adela Flidrova, *Three Strikes and You're Out*, 7 COMMON L. REV. 5, 5 (2006) (Fildrova also notes the—albeit unlikely—Eighth Amendment claim that might be made in response to the three strikes provision).

> In extreme cases, the defendant may argue that the sentence imposes an unconstitutionally cruel and unusual punishment forbidden by the Eight Amendment and to demand review by the US Supreme Court. As far as the attitude framed in the existing case-law is concerned, this possibility is rather hypothetical. The Court ruled that the constitutional principle does not require strict proportionality between crime and sentence and even found two consecutive terms of 25 years to life of imprisonment, imposed for two thefts of videotapes in worth of $150, not to be unconstitutional.

Id. at 6. *See generally* Joe D. Whitley, *Three Strikes and You're Out: More Harm Than Good*, 7 FED. SENT'G REP. 63, 63 (1994).

51. *Bill Clinton Regrets 'Three Strikes' Bill*, BBC (July 16, 2015), https://www.bbc.com/news/world-us-canada-33545971 ("Former US President Bill Clinton has admitted his three strikes crime bill introduced in the 1990s contributed to the problem of overpopulated prisons. Speaking to a civil rights group, he said: I signed a bill that made the problem worse and I want to admit it.") (internal quotations omitted); *see also 10 Reasons to Oppose "3 Strikes, You're Out",* ACLU, https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out (last visited Jan. 28, 2022) (noting that the federal government codified a system that was already in place before the three strikes bill).

> Although its supporters act as if it is something new, "3 Strikes" is really just a variation on an old theme. States have had habitual offender laws and recidivist statutes for years. All of these laws impose stiff penalties, up to and including life sentences, on repeat offenders. The 1987 Federal Sentencing Guidelines and mandatory minimum sentencing laws in most states are also very tough on repeaters.

Id.

II. POPULAR CONSTITUTIONAL & POLITICAL COUNTERARGUMENTS

Many of the arguments for and against mass incarceration appear black and white. The Thirteenth Amendment provides an explicit textual basis for the revocation of voting rights for felons, and policymakers have routinely relied on this provision in the enforcement of legislation that strips felons of their voting rights.[52] Still, we suggest that there is hardly any moral basis to support the idea that felons deserve no representation in the democratic process. Felons typically reenter society and, as such, deserve to have a say in the world they will ultimately be forced to live. We believe that the spirit of the Act supports this conclusion as well.

A. Constitutional Arguments

Ava DuVernay's award-winning film *13th* revived the debate that the Thirteenth Amendment effectively exchanged the title of *slave*, as the primary mechanism for fundamental right deprivation, for *criminal* to accomplish the same.[53] Critics of the film claim that it rests on "faulty foundational history" and incorrectly blames historical parties, like the Framers, for today's carceral state.[54] Whether one sides with Duvernay or Rael on the intention behind the Thirteenth Amendment, its effects cannot be denied. Alexander captured the impact of the Thirteenth Amendment in explaining that "[o]nce a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits."[55] Many of the same arguments also extend to the Fourteenth Amendment.

As has been touched on earlier in this section, the primary constitutional argument *against* felon disenfranchisement has been that it constitutes an "excessive fine" or a "cruel and unusual punishment" under the Eighth Amendment.[56] The litigation has yielded the same result repeatedly: Courts have no place in this decision, and legislators must step up to the plate to change what is currently the law. For example, in *Theiss,* a federal district court held that:

> [T]he penalty of disenfranchisement is one specifically recognized by the Fourteenth Amendment, an amendment enacted subsequent to the Eighth. In addition, Mr. Chief Justice Warren's words . . . suggest a

52. *See generally* U.S. CONST. amend. XIV.

53. *See* 13TH (Kandoo Films 2016) (The film rests on the premise that the U.S. prohibited citizens from being deprived of their fundamental liberties, aside from one critical exception: they could now be imprisoned and subjected to a new legitimate method of right deprivation.).

54. Patrick Rael, *Demystifying the 13th Amendment and Its Impact on Mass Incarceration*, AAIHS (Dec. 9, 2016), https://www.aaihs.org/demystifying-the-13th-amendment-and-its-impact-on-mass-incarceration/.

55. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 94 (2010); *see also* Benjamin Levin, *Inmates for Rent, Sovereignty for Sale: The Global Prison Market*, 23 S. CAL. INTERDISC. L.J. 509, 547 (2014) ("The new penology . . . embraces a total separation of prisoner from society, drawing stark lines between the community, and a new subclass or underclass of criminals.").

56. U.S. CONST. amend. VIII.

> marked difference in severity between total political expatriation and the more limited deprivation of the right to vote. . . . [I]t may be that modern legislators should conclude that the concept of disenfranchisement is outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. Be that as it may, as a Court, we cannot conclude that such disenfranchisement as has been decreed by the State of Maryland is a punishment so grossly disproportionate to the crime as to be proscribed by the Eighth Amendment.[57]

While contemporary scholars like Professor Karlan have chosen a view opposing the historical approach of the *Theiss* court, the fact remains that the Legislative branch (state and federal), not the courts, has the final say on felon voting rights.[58] The Constitution, at least to the courts, already says enough.

B. Challenging History—On the Basis of Morality/Humanity

We find it essential to not simply learn from the history and interrelation of mass incarceration and the Voting Rights Act. Instead, society must use this history to find new ways to challenge it; in so doing, we might aspire to strengthen the spirit of the Voting Rights Act and make headway in the continued demolition of the carceral state. For us, we call for the academy, legislators, and even the courts to examine felon disenfranchisement from a more moral and humanity-based perspective. We recognize that arguments from morality are mostly policy-based; however, given the judiciary's decision to punt legislators on prison disenfranchisement matters, we believe that a policy-based argument is the most effective method for this type of problem.

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57. Thiess v. State Admin. Bd. of Election Laws, 387 F. Supp. 1038, 1042–43 (D. Md. 1974) (internal quotations and citations omitted); *see also* Rummel v. Estelle, 445 U.S. 263, 307 n.24 (1980) ("The District Courts in the Fourth Circuit also have applied the Eighth Amendment carefully. Although one District Court has held that a sentence of 48 years for safecracking is constitutionally disproportionate, other District Courts have found no constitutional infirmity in the disenfranchisement of convicted persons.") (internal citation omitted).

58. *See, e.g.*, Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1164–69 (2004). Karlan argues that:

> [T]he Eighth Amendment succinctly prohibits excessive sanctions, and demands that punishment for crime should be graduated and proportioned to the offense . . . .
>
> . . . .
>
> . . . The claim that a particular punishment violate[d] the Eighth Amendment because it is disproportionately severe is judged not by the standards that prevailed in 1685… or when the Bill of Rights was adopted, but rather by those that currently prevail . . . .
>
> . . . .
>
> . . . Thus, the states that continue to exclude all felons permanently are outliers, both within the United States and in the world.

Id. (internal quotations and citations omitted).

The premise of our moral argument is modest: felons maintain certain rights entitled to members of a republic government. At a high level, this entails prominent rights like the right to live. But on a narrower level, we maintain that something like the right to vote must be taken seriously. The right to vote has proven to be as fundamental as any other right anchored in this nation's Constitution, so why is society so quick to accept that a run-in with the law is enough of an excuse to throw that right to the wayside? We are not so idealistic or naïve to believe that *every* felon should be rushed to the polls. For example, there may not be a strong enough case—on moral grounds or any other—for advocating for voting rights for felons sentenced to lifelong terms. These felons would be voting for change in a world they will never again inhabit.

But still, the ideals of a republican form of government can directly service felons with lifelong sentences; maybe a legislative candidate is a former convict that wishes to address some of the harsh conditions many inmates face, or perhaps an inmate has grandchildren that could benefit from a candidate focused on making college education accessible, or maybe there is a candidate that promises to work towards the eradication of the death penalty. Shouldn't the inmate on death row have as much chance to engage in the self-gratification that comes with participation in the democratic process in seeking to improve their situation? No matter how one feels about the constitutional or political debate that surrounds these types of questions, we should be able to see that a large chunk of society has routinely been excluded from critical national decisions. History proves it, as the next section will demonstrate, statistics prove it, and as the last section argues, society can change it for the future.

III. FELONY DISENFRANCHISEMENT

A. *Brief History*

"Felony disenfranchisement is the removal of the right to vote following a felony conviction."[59] Felon disenfranchisement is rooted in ancient Greek and Roman traditions that carried into Europe. In medieval Europe, offenders were subject to "civil death which entailed the deprivation of all rights."[60] The civil death intended to cut offenders off from the community. Anyone convicted of a felony was "subject to forfeiture of property, stripped of the ability to inherit or bequeath property and considered . . . dead—unable to bring a suit or perform any legal function."[61] The English colonists brought these civil disabilities to North America. While the newly formed states rejected some of the European civil disabilities, criminal disenfranchisement was retained.[62] Twenty-four of the thirty-four existing states excluded serious offenders from voting in the mid-nineteenth

59. Bridgett A. King & Laura Erickson, *Disenfranchising the Enfranchised: Exploring the Relationship Between Felony Disenfranchisement and African American Voter Turnout*, 47 J. BLACK STUD. 799, 799 (2016).

60. *Overview and Summary*, SENT'G PROJECT, https://www.hrw.org/legacy/reports98/vote/usvot98o.htm (last visited Jan. 28, 2022) [hereinafter Disenfranchisement Origin] (internal quotation marks omitted).

61. *Id.*; *see also* King & Erickson, *supra* note 59, at 801.

62. *Id.*; *see also* King & Erickson, *supra* note 59, at 801.

century. Serious felons, African Americans, illiterates, and people without property made up the group of individuals who did not have the right to vote.[63]

After the Civil War and the passage of the Fourteenth Amendment, "[s]outhern opposition to black suffrage led to . . . decisions to use numerous ostensibly race-neutral voting barriers—e.g., literacy and property tests, poll taxes, grandfather clauses and criminal disenfranchisement provision—with the explicit intent of keeping as many blacks as possible from being able to vote."[64] States began tailoring disenfranchisement provisions to include what was perceived as "black crime"[65] and avoided violating the Fifteenth Amendment.[66] Crimes such as adultery, arson, wife-beating, housebreaking, and attempted rape were considered more likely to be committed by African Americans than white Americans. As a result, these crimes disqualified individuals from voting.[67] On the other hand, robbery and murder were considered more likely to be committed by white Americans and did not lead to disenfranchisement.[68]

B. The Impact of Mass Incarceration

As mass incarceration took hold in the United States, the number of people disenfranchised because of a felony conviction increased from 1.17 million in 1976 to 6.1 million by 2016.[69] In 2021, The United States imprisoned more than two million people.[70] Since 1970, state and federal prisoners have grown by over 600 percent, from less than 200,000 to nearly 1.4 million. Similarly, felony probationers and parolees have quadrupled from 1976 to 2000.[71] Since 1980, the incarceration rate has nearly quadrupled due to three-strike laws[72] and the war on drugs.[73] The United States disenfranchises more convicted felons than any other democratic

63. Disenfranchisement Origin, *supra* note 60; *see also* King & Erickson, *supra* note 59, at 802.

64. U.S. CONST. amend. XIV. *See* Disenfranchisement Origin, *supra* note 60; King & Erickson, *supra* note 59, at 802.

65. *See generally* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 541 (1993).

66. U.S. CONST. amend. XV. *See* Andrew Shapiro, *The Disenfranchised*, AM. PROSPECT (Dec. 19, 2001), https://prospect.org/power/disenfranchised/. *See generally* Daniel S. Goldman, *Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611–55 (2004).

67. Shapiro, *supra* note 65, at 541.

68. *Id.*

69. Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENT'G PROJECT 3 (July 28, 2021), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

70. John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/.

71. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777, 781 (2002).

72. Robert Heglin, Note, *A Flurry of Recidivist Legislation Means: "Three Strikes and You're Out"*, 20 J. LEGIS. 213, 214 (1994).

73. The war on drugs in the United States began in the 1980s and resulted in a "tenfold" increase in the number of federal and state prisoners between 1980 and 1993. *See Winning the War on Drugs: A "Second Chance" for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1487 (2000).

nation.[74] The United States maintains the highest incarceration rate and largest prison population in the world.[75] Once convicted of a felony, a citizen is denied the right to vote unless the jurisdiction that issued the conviction restores their civil rights.[76] The term felony is usually reserved for serious crimes punishable by imprisonment for more than one year or by death. However, it has been expanded to include crimes that are not serious[77] nor result in imprisonment.[78] A California court observed, "since conspiracy to commit a misdemeanor is itself a felony, disenfranchisement would automatically follow from conviction of conspiracy to operate a vehicle without a muffler . . . ."[79]

IV. DISENFRANCHISEMENT AT PLAY

A. Current Felony Disenfranchisement Policies

As of 2020, 5.2 million citizens were prohibited from voting, accounting for 2.3% of the voting-age population.[80] Each state has the authority and autonomy to implement a wide range of disenfranchisement policies. Forty-eight out of fifty states generally fall into one of the following four categories:

(1) No restrictions on voting rights;

(2) People in prison or jail cannot vote;

(3) People in prison or jail, on parole or probation, cannot vote; or

(4) People in prison or jail, on parole, probation, and post-sentence are permanently disenfranchised.[81]

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74. Disenfranchisement Origin, *supra* note 60; *see also* Goldman, *supra* note 66, at 627–30.

75. Kevin Muhitch & Nazgol Ghandnoosh, *Expanding Voting Rights to All Citizens in the Era of Mass Incarceration,* SENT'G PROJECT (Mar. 2, 2021), https://www.sentencingproject.org/publications/expanding-voting-rights-to-all-citizens-in-the-era-of-mass-incarceration/.

76. Disenfranchisement Origin, *supra* note 60. "For example, Abran Ramirez was denied the ability to vote for life in California because of a twenty-year old robbery conviction, even though he had served only three months in jail and had successfully completed ten years of parole." *Id.*

77. *See* TENN. CODE ANN. § 40-20-112.

78. Disenfranchisement Origin, *supra* note 60. "Sanford McLaughlin was disenfranchised for life in Mississippi because he pled guilty to the misdemeanor of passing a bad $150 check." *Id.* Many young first-time offenders who accept a guilty plea in exchange for no prison time sacrifice their right to vote. *Id.*

79. Otsuka v. Hite, 414 P.2d 412, 418 (Cal. 1966) (citations omitted).

80. Chung, *supra* note 69, at 1; *see also* Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT (Oct. 30, 2020) [hereinafter *Locked Out*], https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/.

81. *Locked Out*, *supra* note 80. Category 2 is comprised of the following states: California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, and Washington. *Id.* Category 3 includes Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. *Id.*

Eleven states restrict voting rights for some or all individuals after they have served their prison sentence and are no longer on probation or parole. These individuals make up over 58% of the disenfranchisement population.[82] Vermont and Maine are the only two states that do not restrict the voting rights of anyone with a felony conviction or currently in prison.[83] The states with the highest levels of felon disenfranchisement are Mississippi (10.6%), Tennessee (9.1%), Alabama (8.4%), Florida (7.7%), and Virginia (6%).[84] Interestingly, the prison population only accounts for a minority of the disenfranchised population. More than 75% of the disenfranchised population are individuals who have reentered society and are either under probation or parole supervision or have completed their sentences.[85] More than 2.2 million people who have completed their sentences are disenfranchised across the country. One out of every forty-four adults are disenfranchised due to a current or previous felony conviction.[86]

B. Impact on African Americans

Marc Mauer, one of the country's leading experts on sentencing policy, race, and the criminal justice system, notes that the "racial impact of disenfranchisement policies is sometimes justified as an inevitable, if unfortunate, aspect of a race-neutral criminal justice system: if members of a particular racial or ethnic group are more involved in crime, the consequent disproportionate loss of voting rights is merely a result of their activity."[87] The chance of becoming a felon is not evenly distributed across the United States. Race, class, and gender are essential indicators in predicting the chances of arrest, conviction, and sentence length. In lower-class communities of color, especially African American communities, "the coercive arm of the law is felt most strongly."[88] Thus, felons overwhelmingly come from and return to poor, African American neighborhoods. This reality makes felon disenfranchisement most damaging because communities with restrictions on voting by felons are less likely to be represented politically in proportion to their populations.[89] Disenfranchisement has real effects in terms of resource allocation and causes particular groups to be underrepresented or not represented at all in the political process. Attempting to control the electorate to influence elections is not

82. *Id.* These states are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming. *Id.*

83. *Id.* Washington, DC and Puerto Rico also do not have restrictions on the voting rights of convicted felons or anyone in prison. *Id.* In 2020, Washington, DC became the first jurisdiction in the country to restore voting rights for people in prison. *Id.* at 3.

84. *Id.* at 16.

85. Chung, *supra* note 69, at 1.

86. *Locked Out*, *supra* note 80, at 4.

87. Anthony Jamal Phillips & Natalie Deckard, *Felon Disenfranchisement Laws and the Feedback Loop of Political Exclusion: The Case of Florida*, 20 J. AFR. AM. STUD. 1, 4 (2016) (citations omitted); *see also* Goldman, *supra* note 66, at 629 (arguing that even if African Americans committed more crimes that still would not explain "the degree of disproportional treatment nonwhites endure in the criminal justice system").

88. Phillips & Deckard, *supra* note 87, at 2.

89. *Id.* at 2–3.

a new phenomenon in the United States.[90] This phenomenon began with the Three-Fifths Compromise and was reinforced by the poll taxes and literacy tests that allowed Jim Crow legislation to dominate the U.S. South from Reconstruction until the passage of the Civil Rights Act of 1964.[91]

Racial minorities and the poor are significantly overrepresented in the U.S. criminal justice system. According to the Bureau of Justice Statistics Bulletin, in 1990, African Americans represented 47% of the 829,344 convicted felons and 48% of felons convicted of violent crimes despite making up only 12.1% of the U.S. adult population.[92] The global campaign of the war on drugs was the primary reason for African American imprisonment, and in 1990, African Americans represented 56% of convicted felons charged with drug trafficking.[93] A study conducted by the Federal Judicial Center revealed that federal sentences for drug trafficking and firearms were 49% higher for African Americans than for white Americans.[94] The study found that:

> For the same criminal behavior, poor and/or non-white people are more likely to be arrested; if arrested, they are more likely to be convicted; if convicted, they are more likely to be sentenced to prison; if sentenced to prison, they are more likely to be given longer terms, than well off and/or white people.[95]

This disparity highlights that activities associated with African Americans are more likely to be criminalized, and African Americans are more likely to be severely punished for engaging in them. Scholars argue that felony disenfranchisement laws are likely to be more strenuous in states with the most political interest in "neutralizing the threat of African-American voters . . . rather than those with the most crime."[96]

Disenfranchisement has undoubtedly had the most disproportionate impact on the African American community.[97] In the states with a lifetime ban on citizens with a felony conviction, "an estimated 40% of the next generation of African American males may suffer permanent disenfranchisement."[98] An estimated 1.4 million African American men (13% of all black adult males) are currently or permanently excluded from voting.[99] African Americans are four times as likely to lose their voting rights than the rest of the population.[100] One in every sixteen

90. *Id.* at 4.

91. *Id.*

92. *Id.*; *see also* Alice E. Harvey, Note, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1150 (1994).

93. Phillips & Deckard, *supra* note 87, at 4; *see also* Goldman, *supra* note 66, at 630–32.

94. Phillips & Deckard, *supra* note 87, at 4.

95. King & Erickson, *supra* note 59, at 800 (quoting JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 135 (4th ed. 1995)).

96. Phillips & Deckard, *supra* note 87, at 4.

97. *See* Harvey, *supra* note 92, at 1150–59; *see also* Goldman, *supra* note 66, at 632–35.

98. *See* Harvey, *supra* note 92, at 1150–59.

99. Disenfranchisement Origin, *supra* note 60.

100. Chung, *supra* note 69, at 2.

African American adults is disenfranchised nationally.[101] In seven southern states (Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming) more than one in seven (1.8 million) African American adults are disenfranchised.[102]

Of the 5.2 million individuals with felony convictions that are disenfranchised, African Americans account for 34.8%, with 1.81 million individuals subject to disenfranchisement laws.[103] 1.81 million individuals represent over 6.2% of the African American voting-age population.[104] In Mississippi, Tennessee, Alabama, Florida, and Virginia, the percentage of disenfranchised African Americans with felony convictions is 16%, 21.5%, 15.6%, 15.4%, and 15.9%, respectively.[105] Notably, 15% of African Americans in Kentucky are disenfranchised, which is nearly three times higher than its overall rate of 5.9%.[106] These state variables are important because 56% of the Black U.S. population lives in the South.[107] Historically, the high levels of disenfranchisement in the South have increased the averages in the United States.[108] Poor African American males are more likely to be affected than their middle and upper-class counterparts. These statistics prove that across the country, notably in the South, "the effects of felony disenfranchisement fall disproportionately on African Americans and the African-American community."[109]

C. Future Voter Turnout & Democratic Contraction

When an avenue for participating in public life is removed, "a diminished or limited civic disposition has the potential to form among returning citizens."[110] This impact is felt beyond felons who are legally disenfranchised. In fact,

> [t]he diminished capacity for participation experienced by returning citizens in turn reduces the likelihood of participation norm transmission to the returning citizen's family and broader community. Consequently, not only do citizens with felony convictions not participate due to his or her legal status but those who are eligible to vote are less likely to participate as well. Thus, when a significant portion of the population is denied access to vote through interaction with the criminal justice system, the civic disposition that is formed by citizens with felony convictions may affect the civic disposition of the proximate population by contributing to the reinforcement or

101. *Locked Out*, *supra* note 80, at 4.

102. *Id.*

103. *Id.* at 16–17.

104. *Id.* at 17.

105. *Id.*

106. *Id.* at 16–17.

107. Christine Tamir, *The Growing Diversity of Black America,* PEW RSCH. CTR. (Mar. 25, 2021), https://www.pewresearch.org/social-trends/2021/03/25/the-growing-diversity-of-black-america/.

108. Phillips & Deckard, *supra* note 87, at 5.

109. *Id.* at 6.

110. King & Erickson, *supra* note 59, at 803.

> creation of apathy which could lead to decreased political participation among those who are legally eligible to vote.[111]

In light of arrest, prosecution, and sentencing trends, African Americans' diminished or limited disposition is even more profound.[112] While our country has become more diverse, African Americans are more likely to be in closer proximity to citizens who have had carceral contact than Americans with other racial and ethnic identities.[113] Thus, African Americans are less likely to participate politically and vote.[114] In the states with the most restrictive disenfranchisement laws, voter turnout is lower, especially among African Americans, even among citizens who are not themselves disenfranchised.[115] Additionally, the negative impacts of disenfranchisement for African Americans persist in states with less stringent disenfranchisements policies and states with small African American populations.[116] Thus, the consequences of disenfranchisement at all levels of severity cannot be ignored. Many African American communities lack the community socialization that fosters participation in the political process.[117]

In the United States, participation in the electoral process is described as "vital to the maintenance of [its] democratic institutions."[118] Initially, participation in the electoral process was viewed as a privilege granted by the state. However, the right to vote has expanded through amendments,[119] legislative action,[120] and judicial opinions over the last century.[121] This expansion suggests that certain restrictions on the right to vote can no longer be tolerated in a truly democratic society. However, this expansionist view has not been entirely extended to ex-felons, as some remain permanently excluded from the electoral process.[122] Despite paying their debts to society, ex-felons in these states are treated as sub-citizens on election day. On election day, ex-felons watch their fellow citizens exercise their fundamental rights and choose those who will govern them and the laws they must obey. This alienation from the electoral process should make us question whether a fundamental right should be taken away for a crime committed

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111. *Id.* at 804.

112. *Id.*

113. *Id.* at 809.

114. *Id.* at 804.

115. *Id.*

116. *Id.* at 806.

117. *Id.*

118. Carrington v. Rash, 380 U.S. 89, 94 (1965) (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939)).

119. *See, e.g.*, U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV.

120. *See, e.g.*, Voting Rights Act of 1965, 42 U.S.C. § 1971 (2001); *supra* Part I.

121. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 676 (1966) ("[t]he right to vote is . . . precious, . . . fundamental . . . ."); Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (the right to vote is fundamental "because [it is] preservative of all rights") (alteration added).

122. *Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map (last visited Jan. 28, 2022).

years ago. If so, does that constitute cruel and unusual punishment?[123] While cruel and unusual punishment is not the focus of this comment, it represents another constitutional issue with voter disenfranchisement.

The United States's disenfranchisement policies are an outlier in the international context. In 2005, the European Court of Human Rights determined that any blanket ban on voting from prison violates the European Convention on Human Rights because it inhibits the right to free and fair elections.[124] Nearly half of the European countries allow incarcerated individuals to vote and use absentee ballots to facilitate voting within prisons.[125] Similarly, in Canada, Israel, and South Africa, the constitutional courts have ruled that any conviction-based restriction of voting rights is unconstitutional.[126]

The detrimental effects that disenfranchisement has on ex-felons are readily apparent. Instead of allowing individuals to reestablish themselves as viable participants in the community, disenfranchisement labels felons and ex-felons as politically insignificant.[127] Psychologists have argued that "no more fiendish punishment could be devised" than to treat people as if they were nonexistent.[128] Felons are already facing adversity trying to secure equal employment[129] and education[130] opportunities. The denial of the right to vote serves as a reminder to the individual of their sub-citizen status.[131] The reality is:

> Extensive disenfranchisement increases the degree to which minorities generally, and African-Americans specifically, are unrepresented in the political process. It reduces the likelihood that programs African-Americans believe to be important will become, or remain, law. Importantly, felony disenfranchisement reduces the circumstances of the African-American community—which may drive the creation of more felons. Most important, however, is the way that political

123. For more on the cruel and unusual punishment argument, see Mark E. Thompson, *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 (2011).

124. Neil Johnson, *Prisoners' voting rights: developments since May 2015*, HOUSE OF COMMONS LIBR. 3 (Nov. 18, 2020), https://researchbriefings.files.parliament.uk/documents/CBP-7461/CBP-7461.pdf.

125. Chung, *supra* note 69, at 6.

126. *Id.*

127. McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995) (The disenfranchised population is "severed from the body politic and condemned to the lowest form of citizenship.").

128. WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 293 (1890).

129. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), https://www.prisonpolicy.org/reports/outofwork.html.

130. Lucius Couloute, *Getting Back on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Oct. 2018), https://www.prisonpolicy.org/reports/education.html.

131. *See* Thompson, *supra* note 123, at 177.

> disenfranchisement may fuel ejection from the community of citizens.[132]

Without recognition of full citizenship and inclusion in the nation-state, the human being is "vulnerable to violence and exploitation—living a 'bare life' instead of that of a counted person."[133] As the number of disenfranchised felons expands, the electorate contracts. The contracted electorate can produce outcomes that differ from the ones that a fully enfranchised electorate can produce. Thus, "mass incarceration and felon disenfranchisement have clearly impeded, and perhaps reversed, the historic extension of voting rights."[134]

V. CASE STUDY: 2000 PRESIDENTIAL ELECTION (BUSH V. GORE)

Before 2006, Florida permanently disenfranchised all individuals with felony convictions.[135] Florida is an important battleground between Republicans and Democrats, making it the perfect state for a case study in the racialization of felony disenfranchisement legislation. Although the close outcome of the 2000 Presidential election between George W. Bush and Al Gore may have been decided or altered by a myriad of factors, Florida's disenfranchisement laws may have determined the election. Despite winning the popular vote by 500,000,[136] Al Gore lost in the electoral college because Florida held the balance of power. The final vote count in Florida was 2,912,790 (48.85%) for George W. Bush and 2,912,253 (48.84%) for Al Gore. Al Gore lost by 0.009% and a total of 537 votes.[137]

Christopher Uggen[138] and Jeff Manza[139] studied the possible consequences of voter disenfranchisement on national presidential and senatorial outcomes, and the results were telling.[140] The study found that the 2000 Presidential election results "would almost certainly have been reversed had voting rights been extended to any category of disenfranchised felons."[141] They calculated the number of felons and ex-felons affected, then estimated voter turnout and vote choice based on their known characteristics (i.e., gender, race, age, income, labor force status, marital status, and education). The research adjusted for over-reporting voting to

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132. Phillip & Deckard, *supra* note 87, at 13.

133. *Id.*

134. Uggen & Manza, *supra* note 71, at 795.

135. Traci Burch, *Did Disenfranchisement Laws Help Elect President Bush? New Evidence on the Turnout Rates and Candidate Preferences of Florida's Ex-Felons*, 34 POL. BEHAV. 1, 2 (2012).

136. Uggen & Manza, *supra* note 71, at 792.

137. *Did Florida's Laws That Disenfranchised People with Felony Convictions Cause Al Gore to Lose 2000 Presidential Election?*, PROCON (Aug. 8, 2021), https://felonvoting.procon.org/questions/did-floridas-felon-disenfranchisement-laws-cause-al-gore-to-lose-the-2000-presidential-elections/.

138. Christopher Uggen is the Regents Professor and Distinguished McKnight Professor of Sociology and Law at the University of Minnesota.

139. Jeff Manza is a Professor of Sociology at New York University.

140. Uggen and Manza did not explore the possible consequences of felon disenfranchisement on state, local, district, or U.S. House of Representatives elections.

141. Uggen & Manza, *supra* note 71, at 792. *But see* Burch, *supra* note 135. Burch argues that the white felon population would have swung towards Bush. Regardless of whom the votes would have turned towards, it is undeniable that felony disenfranchisement was an essential factor in this presidential race.

determine the number of votes lost/gained by both Republican and Democratic candidates. Uggen and Manza estimate that Gore's margin in the popular vote would have exceeded 1 million votes.[142] At that time, Florida had approximately 827,000 disenfranchised felons, more than any other state.[143] Of the 827,000, African Americans accounted for 30% (256,392) of that group. In total, 16% of the African American population was disenfranchised.[144] If African American felons had participated in the election at the estimated 27.2% turnout rate and consistent with a 68.9% democratic preference, Uggen and Manza predict that Gore would have won Florida by more than 80,000 votes.[145]

Uggen and Manza even ran their model to account for reduced turnout, and their estimates suggest that the Democratic margin would still have been more than 40,000.[146] The reduced model found:

> [E]ven if only ex-felons had been enfranchised in Florida, they would have yielded an additional 60,000 net votes for Gore, more than enough to overwhelm Bush's narrow victory margin (and to reverse the outcome in the Electoral College). And even if we halve the estimated turnout rate, Gore's margin of victory would have exceeded 30,000 votes. We can thus conclude that the outcome of the 2000 presidential race hinged on the narrower question of ex-felon disenfranchisement rather than the broader question of voting restrictions on felons currently under supervision.[147]

Additionally, the results prove that "[b]y removing those with Democratic preferences from the pool of eligible voters, felon disenfranchisement has provided a small but clear advantage to Republican candidates in every presidential and senatorial election from 1972 to 2000."[148] Since African Americans are overwhelmingly Democratic voters, "felon disenfranchisement erodes the Democratic voting base by reducing the number of eligible African Americans voters."[149] Of the more than 400 Senate elections since 1978, the outcomes of seven may have been different if the right to vote had been given to felons and ex-felons.[150] While this percentage is small, it could have had a significant long-term impact due to the advantage of incumbency. Felon disenfranchisement undoubtedly affects African American communities and their political standing, the electoral landscape, and our political reality. In the 2000 presidential election, votes not cast by felons would have been enough to influence the outcomes of the election and precisely shape the way that Florida and other states address felon disenfranchisement. It is important to note that the disenfranchisement of felons currently in prison alone is unlikely to alter elections. However, that changes when

142. Uggen & Manza, *supra* note 71, at 792.

143. *Id.*

144. *Id.* at 797–98.

145. *Id.* at 792.

146. *Id.*

147. *Id.* (emphasis omitted).

148. *Id.* at 786–87.

149. *Id.* at 780.

150. *Id.* at 789.

you include ex-felons supervised in the community. In the 2000 presidential election and many others, the impact of felon disenfranchisement likely would have been reduced had ex-felons, probationers, and parolees been permitted to vote in Florida and other states.[151]

While this case study is far from perfect, it emphasizes that the right to vote is indispensable. Additionally, it highlights that felony disenfranchisement affects the individual's political power and the collective political power of communities and states to which they return after completing their sentences.[152] To this day, felon disenfranchisement represents structural inequality with consequences that extend far beyond the population of citizens with felony convictions. Mass incarceration and felony disenfranchisement represent a system that "continually excludes large segments of the American citizen population and even larger segments of the African American citizen population from political participation. Although felony disenfranchisement laws are race-neutral on the surface, historical and contemporary disparities in prosecution, sentencing, and incarceration suggest that racism underlies the practice of felony disenfranchisement."[153] The result of felon disenfranchisement is a political contradiction.[154]

VI. THE IMPORTANCE OF THE VOTE

The question of fairness of the vote is far from nascent. It is an issue cemented into American history as a catalyst for the country's independence.[155] When the British passed The Stamp Act of 1765, imposing a tax on the colonies after the Seven Years' War, colonists complained of unfair taxation:[156] "[t]hey rejected the British government's argument that all British subjects enjoyed virtual representation in Parliament, *even if they could not vote for members of Parliament*."[157] Dr. T.H. Breen,[158] an Early American historian, has described the tone of public discourse in the colonies at the time as a "popular fear that the English were systematically relegating Americans to second-class standing within the empire."[159]

151. *Id.* at 794.

152. King & Erickson, *supra* note 59, at 815–16.

153. *Id.* at 815.

154. Felons are currently being counted when drawing electoral districts that determine political representation despite the fact that they lack the right to vote. Moreover, in some jurisdictions "people in prison are counted in the jurisdiction where they are incarcerated, rather than the jurisdiction they call home." Muhitch & Ghandnoosh, *supra* note 75.

155. *See* Patrick J. Kiger, *7 Events that Enraged Colonists and Led to the American Revolution*, HIST. (Aug. 20, 2019, 2020), https://www.history.com/news/american-revolution-causes.

156. *Id.*

157. *Stamp Act*, HIST. (July 31, 2019), https://www.history.com/topics/american-revolution/stamp-act (emphasis added).

158. *See T.H. Breen*, NW. U.: DEP'T HIST., https://history.northwestern.edu/people/faculty/emeriti/timothy-harris-breen.html (last visited Jan. 28, 2022). T.H. Breen (Ph.D., Yale University, 1968) is the William Smith Mason Professor of American History at Northwestern University. *Id.*

159. James F. Hrdlicka, *"The Attachment of the People": The Massachusetts Charter, the French and Indian War, and the Coming of the American Revolution*, 89 NEW ENG. Q. 384, 387 (2016) (quoting Timothy

These sentiments that resulted from withholding the vote from a disenfranchised group helped facilitate the American Revolution. At the height of the Revolutionary War, a growing majority favored independence from the British.[160] In July of 1776, the Continental Congress voted to adopt the Declaration of Independence.[161]

In the Declaration of Independence, Thomas Jefferson wrote that the King refused to pass laws for large districts of people "unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only."[162] That was proof of Great Britain's "absolute Tyranny."[163] To protect against this, the thirteen United States of America famously decided "[t]hat to secure [the rights granted to all men], Governments are instituted among Men, deriving their just powers from the consent of the governed."[164] The foundation of American democratic principles stems directly from the call for independence. Amongst the chief concerns with the crown was the tyranny that accompanied forcing society to live within decisions made without fair representation. The parallels between the colonists' concern and the right of the vote of felons are multiple. First, the right to vote is linked with the right to be governed and is, at least in theory, guaranteed to citizens.[165] Second, the importance of the vote should never be diluted. It was of the utmost importance to the Founding Fathers.

Today, the seeds of rebellion born from the colonial importance of the vote have flowered into a modern society rich in varying theories of democracy. The Center for Civic Education explains the difference between a true democracy and a constitutional democracy:

> Democracy is government of, by, and for the people. It is government of a community in which all citizens, rather than favored individuals or groups, have the right and opportunity to participate. In a democracy, the people are sovereign. The people are the ultimate source of authority.
>
> In a constitutional democracy the authority of the majority is limited by legal and institutional means so that the rights of individuals and minorities are respected. This is the form of democracy practiced in Germany, Israel, Japan, the United States, and other countries.[166]

H. Breen, *Ideology and Nationalism on the Eve of the American Revolution: Revisions Once More in Need of Revising*, 84 J. AM. HIST. 31 (1997)).

160. *Revolutionary War*, HIST. (Dec. 16, 2021), https://www.history.com/topics/american-revolution/american-revolution-history.

161. *Id.*

162. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

163. *Id.* at para. 2.

164. *Id.*

165. This is not an absolute right. Constitutional exceptions to the right to have a vote, specifically in the context of rebels and convicted criminals, exist in Constitutional Amendments.

166. *Constitutional Democracy*, CTR. FOR CIVIC EDUC., https://www.civiced.org/lesson-plans/constitutional-democracy (last visited Jan. 28, 2022) (emphasis omitted).

The term "democracy" in this section of the article is used to denote democratic principles that the United States values, rather than to define the form of government employed. Instead, the United States government describes itself as a "constitutional federal republic."[167] The government's definition of the term republic, "a form of government in which the people hold power, but elect representatives to exercise that power,"[168] is consistent with the Center for Civic Education's description of a constitutional democracy.[169]

Recall section IV *supra*, where we established that race, class, and gender are essential factors in predicting arrest, conviction, and incarceration length. Because African Americans experience a more coercive criminal law compared to their white counterparts, African American communities are less likely to be represented in proportion to their population. It is clear here that the current state of the country's disparate disenfranchisement laws disproportionately affect and deprive significant numbers of minority groups of the American citizenry from enjoying the principles guaranteed at our founding. Martin Luther King Jr. ("MLK") presented the problems that arise with unbalanced representation succinctly in his 1963 Letter from Birmingham Jail:

> *A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law.* Who can say that the legislature of Alabama which set up that state's segregation laws was democratically elected? Throughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered. Can any law enacted under such circumstances be considered democratically structured?[170]

MLK penned his letter two years before the passing of the Act, but still—fifty-nine (or 246, if you count from the time America's founding fathers enumerated the importance of the vote) years later—the sentiment remains. Today, with most of the African American population residing in the South and the southern states historically having the highest amounts of felon disenfranchisement,[171] MLK's question remains relevant and unanswered.

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167. See *U.S. Government*, U.S. EMBASSY IN ARG., https://ar.usembassy.gov/education-culture/irc/u-s-government (last visited Jan. 28, 2022)., for a description of a constitutional federal republic, see

> Constitutional refers to the fact that government in the United States is based on a Constitution which is the supreme law of the United States . . . Federal means that there is both a national government and governments of the 50 states. A republic is a form of government in which the people hold power, but elect representatives to exercise that power.

Id. (internal quotation marks omitted).

168. *Id.*

169. *See* CTR. FOR CIVIC EDUC, *supra* note 156.

170. *Letter from Birmingham Jail [King, Jr.]*, U. PA. AFR. STUD. CTR., https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (last visited Jan. 28, 2022) (emphasis added).

171. *See supra* section IV.

Whether felon disenfranchisement is enough to raise democratic concerns for the method of government in the United States is beyond the scope of this paper. However, to escape the adverse effects of disenfranchisement discussed in Section IV, this article takes the position that the United States government should employ a procedural implementation of its constitutional democracy. In advocating for a procedural implementation of democratic principles, Maria Paula Saffon and Nadia Urbinati outline the importance of every citizen's participation:

> Since its classic Athenian origins, what characterizes democracy as a distinct form of government is the pursuit of equal liberty, defined as the (direct or indirect) participation of all citizens in the process of making the laws they obey through their equal contribution to the establishment of the majority view. The proceduralist vision insists that equal political liberty is the most important good for which democracy should strive. And it posits that *the modern democratic procedure—based on every individual's equal participation in fair and competitive elections for selecting political representatives and thereby contributing to the production of decisions via majority rule—is the best way of respecting equal liberty in a context of pluralism and dissent. Equal liberty implies not only the right to participate in politics via voting and freely expressing one's mind but doing so under equal conditions of opportunity, which entails protecting civil, political, and basic social rights with the aim of ensuring a meaningful and equal participation.*[172]

To be aligned with this democratic mandate and as a matter of public policy, the federal government should at least reconsider the status of felon voters in light of the changing tides of public perception of the morality of a legal criminal conviction.[173] Nonetheless, when speaking of the Constitutional guarantee of equality, it is necessary to note at the outset that various Constitutional amendments set out specific exemptions for persons found to have committed crimes. The Fourteenth Amendment is of chief concern in this respect when discussing the issues inherent in voter disenfranchisement.[174]

VII. LEGAL LIMITS OF VOTER DISENFRANCHISEMENT

A. Constitutional Limits: The Fourteenth Amendment

Constitutional challenges to the Voting Rights Act and its equivalent state provisions have been argued since the Act's passing in 1965.[175] Disenfranchised voters—namely felons and other people convicted of crimes—use the Fourteenth Amendment and the text of the Voting Rights Act to allege that the state action

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172. Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 POL. THEORY 441, 442 (2013) (emphasis added) (internal footnotes omitted).

173. See *supra* section II(B), for a discussion on how the public perception of morality has changed.

174. *See* U.S. CONST. amend. XIV.

175. *See, e.g.*, Jones v. Governor of Fla., 975 F.3d 1016 (11th Cir. 2020) (holding that requiring felons to pay fees before regaining the right to vote does not violate Equal Protection); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (finding that a state law that disenfranchises people committed of crimes does not violate the Voting Rights Act).

that disenfranchises the incarcerated vote is unconstitutional. Section 1 of the Act[176] holds that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303 (f)(2) of this title, as provided in subsection (b).[177]

Thus, section 1 proscribes states and their subdivisions from enforcing any qualification, prerequisite, or practice on the right to vote, which undermines minority voting strength. Equal protection of the citizen is also guaranteed in section 1 of the Fourteenth Amendment.[178] There, the Constitution secures the right for groups of individuals making up an identifiable class of society to be treated like a similarly situated class.[179] The analytical framework of the Equal Protection clause is a multi-tier system that assigns a different level of scrutiny depending on the classification of the government action.[180]

Voting regulations are generally considered to be within the highest tier of scrutiny and thus governed by the "strict scrutiny" standard derived from section 1 of the Fourteenth Amendment.[181] To prevail under this standard, the state must show that the challenged restriction is necessary for achieving a legitimate and substantial state interest, is narrowly tailored, and is the least restrictive means of achieving the end.[182] However, the Supreme Court has ruled that voting regulations as they apply to convicted felons fall into another class. In *Richardson v. Ramirez*, the Supreme Court considered whether the California Constitution and implementing statutes that disenfranchised persons convicted of an infamous crime denied them the right to equal protection of the laws under the Federal Constitution.[183] Respondents, former felons denied the right to vote, argued that California's felon disenfranchisement provision discriminated against the ex-felon class of citizens and could not withstand strict scrutiny under the Equal Protection Clause.[184] The petitioners contended that section 2 of the Fourteenth Amendment should control the analysis.[185] Section 2 provides that:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right

176. 52 U.S.C. § 10301(a).

177. *Id.*

178. *See* U.S. CONST. amend. XIV, § 1.

179. Melanie E. Meyers, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184, 1185 (1986).

180. *Id.*

181. *VII. Constitutionality of Criminal Disenfranchisement*, HUM. RTS. WATCH (1998), https://www.hrw.org/legacy/reports98/vote/usvot98o-05.htm (last visited Apr. 27, 2022).

182. *Id.*

183. Richardson v. Ramirez, 418 U.S. 24, 27 (1974).

184. *Id.* at 33.

185. *Id.* at 43.

> to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.[186]

Petitioners argued that section 2's language expressly excluding citizens who participate in rebellion or other crime exempts voting regulations targeting felon and ex-felon classes from strict scrutiny under the Equal Protection Clause.[187] Justice Rehnquist considered the legislative history of the Fourteenth Amendment to determine whether the language in section 2 was intended to be applied in a manner consistent with the petitioner's argument. He relied on Senate and House arguments made while the amendment was being debated,[188] laws in existence at the time of the adoption of the amendment,[189] and judicial precedent to find for the petitioner.[190] Ultimately, Justice Rehnquist

> [held] that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [section] 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.[191]

Accordingly, voter disenfranchisement challenges on the grounds of criminal conduct are exempt from strict scrutiny under the Equal Protection Clause. Eleven years after the Court decided *Ramirez*, Justice Rehnquist contemplated a similar question in *Hunter v. Underwood*. In *Hunter*, the Court considered the constitutionality of an Alabama constitutional provision that disenfranchised persons convicted of, among other offenses, any crime involving moral

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

187. *Ramirez*, 418 U.S. at 43.

188. *See id.* at 47 (noting Senator Johnson of Maryland's comments in opposition of the Fourteenth Amendment).

189. *See id.* at 48.

> Further light is shed on the understanding of whose who framed and ratified the Fourteenth Amendment, and thus on the meaning of [section] 2, by the fact that at the time of the adoption of the Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.

Id.

190. *See id.* at 53 ("This convincing evidence of the historical understanding of the Fourteenth Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons.").

191. *Id.* at 54.

turpitude.[192] It is important to note here that the respondents, Alabamians prevented from voting because they were convicted of presenting a worthless check, were challenging the constitutionality of a state law disenfranchising persons guilty of crimes *not punishable by jail time*—namely, misdemeanors.[193] At trial, the parties argue whether the misdemeanors encompassed in the Alabama Constitution were intentionally adopted to disenfranchise African Americans on account of their race and whether the misdemeanor's inclusion in the statute had that intended effect.[194] The district court found that the disenfranchisement of African Americans was a "major purpose for the convention at which the Alabama Constitution of 1901 was adopted, but that there had not been a showing that 'the provisions disenfranchising those convicted of crimes [were] based upon the racism present at the constitutional convention.'"[195] On appeal, the Eleventh Circuit found that:

> [U]nder the evidence discriminatory intent was a motivating factor in adopting [the statute], that there could be no finding of a permissible intent, that accordingly it would not have been adopted in the absence of the racially discriminatory motivation, and that the section as applied to misdemeanants violated the Fourteenth Amendment.[196]

In affirming the Eleventh Circuit, the Supreme Court ruled that section 2 scrutiny does not exempt disenfranchisement that reflects purposeful racial discrimination.[197] Although *Hunter* is factually distinguishable from the case and argument this article purports to advance, there are significant takeaways from the Court's reasoning that are applicable to the case of felon disenfranchisement today and its seeming direct effect on minority citizen classes. As it stands today under the Fourteenth Amendment, a valid challenge to the disenfranchisement provisions can be brought if a plaintiff class can show purposeful racial discrimination.

B. Challenges Under the Voting Rights Act

Challenges to state felon disenfranchisement provisions have also alleged wrongdoing under the Voting Rights Act in addition to the Fourteenth Amendment claim. Section 1(b) of the Voting Rights Act holds that:

> *A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice*. The extent to which members of a protected class have been elected to office in the State or political

192. Hunter v. Underwood, 471 U.S. 222, 223 (1985).

193. *Id.* at 224.

194. *Id.*

195. *Id.* (quoting Hunter v. Underwood, CV 78-M-704, 1981 WL 763979, at *2 (N.D. Ala. Dec. 23, 1981)) (alteration in original).

196. *Id.* at 222.

197. *Id.* at 233.

> subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[198]

In recent years, the felon and ex-felon classes have attempted to use the protections provided in this provision of the Voting Rights Act to attack the validity of felon disenfranchisement. There is a dynamic circuit split for whether such challenges can be successful. The Sixth Circuit first acknowledged a history of racial discrimination in voting regulations and its persistence through present times but nevertheless held that in view of the totality of the circumstances espoused in section 1(b) of the Act, felon disenfranchisement does not violate the Voting Rights Act.[199] Still, whether the Voting Rights Act has the authority to strike down felon disenfranchisement is a question that remains in flux. The Courts of Appeals have considered the issue at length.

The Ninth Circuit held in *Farrakhan v. Washington* that felon disenfranchisement laws could be challenged under the Voting Rights Act if the plaintiffs introduced evidence that either the law was enacted for the purpose of denying minorities the vote or that their convictions and resulting disenfranchisement resulted from intentional racial discrimination in the operation of the state's criminal justice system.[200] Seven years later, the scope of *Farrakhan* was narrowed. In a per curiam opinion, the Ninth Circuit established that "plaintiffs bringing a [Voting Rights Act] challenge to a felon disenfranchisement law based on the operation of a state's criminal justice system must at least show that the criminal justice system is infected by *intentional* discrimination or that the felon disenfranchisement law was enacted with such intent."[201]

In contrast, the Eleventh Circuit has blanketly held that the Voting Rights Act does not apply to felon disenfranchisement. In *Johnson v. Governor of Fla.*, the class of plaintiffs were all Florida citizens who have been convicted of a felony and have completed all terms of their incarceration, probation, and parole but are barred from voting under Florida's disenfranchisement law.[202] The court considered whether the Voting Rights Act applies to felon disenfranchisement as a threshold question. Ultimately, the Eleventh Circuit relied on the text of the Fourteenth Amendment and legislative history of the Act to hold that "the plaintiffs' interpretation calls for a reading of the statute which would prohibit a practice that the Fourteenth Amendment permits Florida to maintain. As a matter of statutory construction, we should avoid such an interpretation."[203]

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198. 52 U.S.C. § 10301(b) (emphasis added).

199. *See* Wesley v. Collins, 791 F.2d 1225 (6th Cir. 1986).

200. Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003).

201. Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010) (per curiam) (emphasis omitted).

202. Johnson v. Governor of Fla., 405 F.3d 1214, 1216–17 (11th Cir. 2005).

203. *Id.* at 1234. *See also* Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009), *cert denied*, 562 U.S. 980 (2010) (using congressional intent and textual analysis to determine that the Voting Rights Act does not reach incarcerated felons or felon disenfranchisement); Hayden v. Pataki, 449 F.3d 305, 323 (2d Cir. 2006) (finding that the Act does not apply to voter disenfranchisement because Congress made no clear statement of an intent to reach felons).

These decisions are representative of the three branches that make up the circuit split. The first question is whether the felon disenfranchisement classes pass the threshold inquiry to be able to challenge under the Voting Rights Act: does the Act apply to felons and ex-felons? The Eleventh Circuit holds that it does not, and thus the claim cannot move forward. In contrast, it can be inferred that the Sixth and Ninth Circuits held that the Act does apply because they decided the cases on the merits. The Sixth and Ninth Circuits go further and split on whether evidence of racial discrimination is enough to prevail. For the Ninth Circuit, as long as the plaintiff class shows intent on the part of the state, the claim can go forth. In the Sixth Circuit, intent alone is not enough on its own to go forth, given the statute's totality of the circumstances standard.

C. Questioning the Policy Rationale for Disenfranchisement

> The rationale for felon disenfranchisement is based upon John Locke's social contract theory. According to Locke's theory, as interpreted by the Second Circuit in *Green v. Board of Elections*, those individuals who do not abide by society's rules cannot participate in their promulgation. By disenfranchising felons, states are thought to protect the sanctity of the ballot box, and therefore ensure the continued viability of the democratic process.[204]

Interestingly, the foundation for disenfranchising the vote has remained despite the states' perception and treatment of felons changing drastically over the years. Many of the states have independently moved towards lightening the effect of voter disenfranchisement.[205] Recent events like Florida's reinstatement plan discussed above and three states expanding voting rights in 2020 for people with felony convictions show that the issue is relevant and timely.[206] Today, no state's felon disenfranchisement follows the theory that "individuals who do not abide by society's rules cannot participate in their promulgation."[207] Instead, the states implement divergent provisions, each one recognizing the importance of the vote for the American citizen.[208]

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204. Farrakhan v. Locke, 987 F. Supp. 1304, 1312 (E.D. Wash. 1997) (citing Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967)) (internal citation omitted).

205. *See, e.g.,* MARGARET LOVE & DAVID SCHLUSSEL, THE REINTEGRATION AGENDA DURING PANDEMIC: CRIMINAL RECORD REFORMS IN 2020 2 (2021).

> Overall, in the last five years a total of 19 states have taken steps to restore the right to vote and to expand awareness of voting eligibility, 13 by statute, four by executive order, and two by ballot initiative. At present, there are only a handful of states in which a felony conviction results in permanent disenfranchisement, in most cases based on outstanding court debt.

Id. (internal footnote omitted).

206. *Id.* at 10. (In 2020, the District of Columbia repealed its felony disenfranchisement law completely, California restored the right to vote to parolees, and Iowa used the executive power to restore the right to vote to felons after the completion of incarceration).

207. *Farrakhan*, 987 F. Supp. at 1312.

208. *See infra* Appendix, at 764.

CONCLUSION

Given the fifty states' independent action to follow the changing tides of public perception of felons, the moral turpitude that created the foundation to justify disenfranchisement must be revisited. The parameters of what today's American public is willing to accept as moral and legal regarding felon disenfranchisement is a live debate on all fronts. On the judicial front, a dynamic circuit split presents the ideal opportunity for the Supreme Court to reconsider the Voting Rights Act in a new light, given the changing social and political climate. Politically, states have made the importance of the felon vote apparent with changing laws and, when necessary, using the power of the executive to restore the right to vote to the felon and ex-felon classes.[209] What remains to be considered on the federal legislative level is if providing a federal minimum for felon voting rights—whether within the Voting Rights Act or in a new Act addressing the matter—would be advantageous. Given the states' divergent attempts to restore voting rights, the Founding Fathers' emphasis on the importance of the vote for every citizen, the consequences of withholding the vote from a large population of minorities, and the lack of unison in the judiciary, we argue that Congress should enumerate the rights of the felon class and provide a federal blanket within the bounds of the Fourteenth Amendment.

209. *See, e.g.,* Laura Vozzella, *Va. Gov. McAuliffe Says He has Broken U.S. Record for Restoring Voting Rights*, WASH. POST (Apr. 27, 2017), https://www.washingtonpost.com/local/virginia-politics/va-gov-mcauliffe-says-he-has-broken-us-record-for-restoring-voting-rights/2017/04/27/55b5591a-2b8b-11e7-be51-b3fc6ff7faee_story.html (In Virginia, where felons are banned from voting and required to obtain individual exemptions for voting restoration, Virginia Governor Terry McAuliffe has used his executive power to restore the voting rights to a record number of felons). *See also Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUST. (Apr. 20, 2018), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia (In 2021, Governor Ralph Northam took executive action to restore the right to vote to all Virginians who are not currently incarcerated).

APPENDIX

Table 1: Restoration of Voting Rights After Felony Conviction.[210]

Never Lose Right to Vote	Lost Only While Incarcerated | Automatic Restoration After Release	Lost Until Completion of Sentence (Parole and/or Probation) | Automatic Restoration After	Lost Until Completion of Sentence | In Some States a Post-Sentencing Waiting Period | Additional Action Required for Restoration (1)
District of Columbia	California	Alaska	Alabama
Maine	Colorado	Arkansas	Arizona
Vermont	Connecticut	Georgia	Delaware
	Hawaii	Idaho	Florida (3)
	Illinois	Kansas	Iowa
	Indiana	Louisiana	Kentucky
	Maryland (2)	Minnesota	Mississippi
	Massachusetts	Missouri	Nebraska
	Michigan	New Mexico	Tennessee
	Montana	North Carolina	Virginia
	Nevada	Oklahoma	Wyoming
	New Hampshire	South Carolina	
	New Jersey	South Dakota	
	New York	Texas	
	North Dakota	West Virginia	
	Ohio	Wisconsin	
	Oregon		
	Pennsylvania		
	Rhode Island		
	Utah		
	Washington		

(1) Details on the process for restoration of rights is included in Table 2 below.

(2) In Maryland, convictions for buying or selling votes can only be restored through pardon.

(3) An initiated constitutional amendment in 2018 restored the right to vote for those with prior felony convictions, except those convicted of murder or a felony sexual offense, who must still petition the governor for restoration of voting rights on a case by case basis. In July 2019, SB 7066 was signed by the governor of Florida which defined "completion of sentence" to include: release from imprisonment, termination of any ordered probation, fulfillment of any terms ordered by the courts, termination of any ordered supervision, full payment of any ordered restitution and the full payment of any ordered fines, fees or costs.

210. *Felon Voting Rights*, NAT'L CONF. STATE LEGISLATURES (June 28, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.