A UNIFORM APPROACH TO FELON DISENFRANCHISEMENT: IS THE MULTI-STATE SYSTEM AN ARTIFACT OF SLAVERY?

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ABSTRACT

The disenfranchisement of felons in America is a growing social issue that severely impacts black citizens' ability to exercise their fundamental right to vote. In the era of institutionalized slavery, giving blacks suffrage rights was unfathomable. While blacks have increased voting rights today, states, particularly in the South, continue to disenfranchise their black communities through the use of the criminal justice system. Flawed rationales combined with progressive societal views require a new remedy to address the impact felon disenfranchisement has had on our democratic process. Inconsistent state felon disenfranchisement laws disproportionately affect black citizens' ability to exercise a fundamental civic duty to vote. Congress should enforce, by way of an amendment to the Voting Rights Act, an evenhanded, consistent approach to the disenfranchisement of convicted felons and eliminate the need for a patchwork set of state laws that strip the right to vote from millions of black citizens.

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I. Introduction

Felony voter disenfranchisement laws have disproportionately prevented blacks from exercising their fundamental right to vote. Despite social progress in America regarding slavery and racism toward blacks, disenfranchisement laws continue to perpetrate a form of discrimination. These laws violate equal protection because they disproportionately affect the black voting population.

In Section II, I provide a historical overview of the legal and social barriers that prevented blacks from exercising their fundamental right to vote, including the racial origins of felon disenfranchisement. These barriers included race qualifications, poll taxes, literacy tests, and grandfather clauses. Further, I discuss Congress's attempt to remedy systematic racial discrimination in voting through constitutional amendments and the Voting Rights Act of 1965.

In Section III, I explain the policy rationales state lawmakers invoke when defending felon disenfranchisement. I will also discuss the constitutional basis allowing disenfranchisement of convicted felons and examine case law interpreting individual state disenfranchisement laws under both equal protection and statutory claims.

I will address the current impacts of felon disenfranchisement in Section IV by highlighting incarceration rates in the United States and the disproportionate population of blacks who have been convicted of felonies. I will also point out the wide array of state provisions regarding the disenfranchisement of convicted felons and the inconsistencies among them that lead to disparate racial impacts.

In Section V, I will argue that these inconsistent state disenfranchisement provisions violate equal protection because they disproportionately hinder the right for blacks to vote. Because felon disenfranchisement provisions are not traditionally afforded heightened judicial scrutiny, Congress should act to protect convicted felons' right to vote after they have served their sentence.

In Section VI, I propose that a uniform federal law addressing felon disenfranchisement as an amendment to the Voting Rights Act will eliminate the need for such inconsistent state provisions and will reduce disparate impacts on racial minorities by allowing them to fully reintegrate back into society and participate fully in the democratic process.

II. A History of Denying the Black Vote

America has a long history of denying or discouraging blacks from voting, much of which is rooted in institutional slavery. Granting former slaves the right to vote did not come easily, and for many years after the end of slavery, both ends of the political spectrum opposed granting such rights.[1] The Republican party was "the first major political party in American history that directly challenged the legitimacy and legality of American slavery."[2] Although the Republican party supported the abolishment of slavery, their platform failed to grant blacks' suffrage.[3] The party's

[1] *See generally* Xi Wang, *Bondage, Freedom & The Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography: Emancipation and the New Conception of Freedom: Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153 (1996).
[2] *Id.* at 2155.
[3] *Id.* at 2158.

more conservative members "disavowed black rights and any other activities that might bring blacks into American political life."[4] Several abolitionists during President Lincoln's term believed slavery was inhumane, but ultimately did not think it was as important to give blacks other rights of citizenship, such as the right to vote.[5]

As Lincoln and other Republicans saw it, even though they had basic rights, blacks would never be fully equal.[6] This was in part because Republicans saw natural and political rights differently, viewing political rights, specifically the right to vote, as a privilege granted to those who could appreciate the nature and meaning of voting.[7] Essentially, slaves would never rise to the same intellectual level as whites, and thus, could not appreciate or understand the value of voting.[8]

Emboldened by the Emancipation Proclamation and the Gettysburg Address which proclaimed, "that this Nation, Under God, shall have a new birth of freedom,"[9] many black-led groups started advocating for black suffrage.[10] One of the leading advocates was Frederick Douglass, who, at the National Convention of Colored Men, warned that without the right to vote, permanent freedom for blacks could not be

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[4] *Id.*
[5] *Id.* at 2159.
[6] *Id.*
[7] Wang, *supra* note 1, at 2161.
[8] *Id.*
[9] President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *reprinted in* ABRAHAM LINCOLN ONLINE: SPEECHES & WRITINGS, http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm (last visited January 15, 2019).
[10] Wang, *supra* note 1, at 2169.

maintained.[11] In a profound speech given at the American Anti-Slavery Society, Douglass said:

> Will you mock those bondmen by breaking their chains with one hand, and with the other giving their rebel masters the elective franchise, and robbing them of theirs? I tell you the Negro is your friend. You will make him your friend by emancipating him. But you will make him not only your friend in sentiment and heart by enfranchising him, but you will make him your best defender, your best protector against the traitors and the descendants of those traitors, who will inherit the hate, the bitter revenge which will crystallize all over the South, and seek to circumvent the Government that they could not throw off. You will need the black man there, as a watchman and patrol; and you may need him as a soldier. You may need him to uphold in peace, as he is now upholding in war, the star-spangled banner.[12]

Douglass pointed out the contradictory nature of Republicans' stance on blacks' rights by highlighting the limited and selective nature of the rights the party chose to grant blacks.[13] Members of both the House of Representatives and the Senate, mainly radical Republicans, proposed legislation that would give blacks the right to vote by trying to integrate the right into the passage of the Thirteenth Amendment.[14] The language of "equality before the law," however, was too extreme for the more conservative members of the Republican party, so the Thirteenth Amendment, although abolishing slavery, remained silent on blacks' political rights.[15]

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[11] *Id.* at 2163, 2170.
[12] Frederick Douglass, Our Work is Not Done, Address Before the Annual Meeting of the American Anti-Slavery Society (Dec. 3-4, 1863), *in* UNIV. OF ROCHESTER FREDERICK DOUGLASS PROJECT, https://rbscp.lib.rochester.edu/4403 (last visited Jan. 18, 2019).
[13] *Id.*
[14] *Id.*
[15] Wang, *supra* note 1, at 2177; *see also* U.S. CONST. amend. XIII.

Many of the Northern states held firm in their belief that suffrage was a matter for the states to resolve, and several members of Congress still believed that blacks were not intelligent enough to vote.[16] The Constitution, which gives voting qualification powers to the several states,[17] gave rise to the next barrier to suffrage facing newly freed slaves. The Fourteenth Amendment originally tried to cure this by containing language granting "political rights and privileges;" but the phrase "privileges and immunities," replaced it, reflecting the Republican party's continued apprehension of enfranchising newly freed black men.[18] After the passage of the Fourteenth Amendment, radical Republicans were disappointed that suffrage had not been expressly granted to blacks, but felt that compromise was the safest route to ensuring continued change in America.[19]

It soon became clear to more moderate Republicans that Northern states and the Republican party needed black votes to secure their political power.[20] In relying on blacks to vote Republican, the party finally gave way to the political rights of blacks through the passage of the Fifteenth Amendment in 1870.[21] It prohibited denial of the right to vote based on "race, color, or previous condition of servitude."[22] Members of both political parties strongly resisted granting suffrage rights to blacks in the years leading up to the passage of the Fifteenth Amendment, demonstrating

[16] Wang, *supra* note 1, at 2185.
[17] U.S. CONST. art. 1, § 2 ("Electors in each state shall have the qualifications requisite . . . .").
[18] Wang, *supra* note 1, at 2191.
[19] *Id.* at 2195.
[20] *Id.* at 2215.
[21] *Id.*
[22] U.S. CONST. amend. XV.

the inherent racism facing the nation during Reconstruction— racism that still plagues America today through modern forms of disenfranchisement.

A. Origins of Race-Based Felon Disenfranchisement Laws

Felon disenfranchisement laws were among the most powerful tools used by whites to limit the black vote.[23] These laws can be traced to ancient Europe, where punishment was "civil death,"—the complete loss of citizenship rights—if convicted of an infamous crime.[24] In the seventeenth century, early Americans largely adopted these ideas in colonial legislation.[25] By the late 1800s, a large majority of the states had adopted some form of a felony disenfranchisement law that "encompass[ed] all felonies, without attention to the underlying crime."[26] Southern states, however, used felon disenfranchisement laws to specifically exclude black voters by differentiating between "black crime" and "white crime," only disenfranchising those convicted of crimes thought to be committed more frequently by blacks.[27] "Black crimes," like theft, fraud, and arson, disenfranchised those who committed them, while "white crimes," like murder and fighting, had no disenfranchising effect.[28] Differences like

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[23] *See generally* Jennifer Rae Taylor, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 GONZ. L. REV. 365, 369 (2012).
[24] *Id.*
[25] *Id.*
[26] Angela Behrens, Note, *Voting--Not Quite A Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 237 (2004).
[27] George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 858 (2005).
[28] *Id.*; *see also* Nathan P. Litwin, *Defending an Unjust System: How* Johnson v. Bush *Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida*, 3 CONN. PUB. INT. L.J. 236, 238 (2003).

these demonstrate the South's continued attempts to oppress blacks even after they became free citizens.

These early examples of race-based felon disenfranchisement had devastating effects on the black voting population.[29] "In Alabama, for example, 2% of the prison population was nonwhite in 1850, yet, by 1870, 74% of the prison population was nonwhite, even though the total nonwhite population increased by only 3%."[30]

B. Other Race-Based Tactics Used to Disenfranchise Blacks

Poll taxes, literacy tests, and grandfather clauses were used in addition to felon disenfranchisement laws as the primary methods whites used to disenfranchise blacks.[31] "[I]n the Jim Crow South, . . . [laws were] designed, and subsequently functioned, to permit and encourage racial discrimination."[32] Several Southern states implemented economic and educational requirements that were intended to suppress the black vote.[33] "These conventions used various techniques for disenfranchising blacks, including force, restrictive and arbitrary registration practices, lengthy residence requirements, [and] confusing multiple-voting-box arrangements,"[34] but among the most common and effective were poll taxes, literacy tests, and grandfather clauses.

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[29] Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 626 (2004).
[30] *Id.*
[31] *See generally* Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362 (2014).
[32] *Id.* at 374.
[33] Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. L. REV. 1023, 1041 (2009).
[34] Goldman, *supra* note 29, at 616.

Several features of the typical poll tax made it extremely burdensome for a black man to access his ballot.[35] The tax was cumulative, meaning "[a] potential voter had to have paid his or her poll taxes for a period of one to three years prior to the period when he desired to vote before being allowed to proceed to the registrar."[36] Sometimes, the taxes had to be paid up to eighteen months in advance of the election, and, if such a tax was paid, the receipt had to be maintained and shown to the registrar on election day.[37] These cumbersome procedures, along with the expense itself,[38] prevented thousands from voting in the Southern states.[39] For example, Alabama's eligible black voting population was less than two percent, while Virginia's eligible white voting population was around eighty percent.[40]

The Court in *Breedlove v. Suttles* upheld a challenge to Georgia's poll tax in 1937 on the grounds that states were free to condition the privilege of voting subject to certain conditions, thus ignoring implications of racial discrimination.[41]

> To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, *the state may condition suffrage as it deems appropriate*.[42]

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[35] Ellis, *supra* note 33, at 1041-42.
[36] *Id.* at 1042.
[37] *Id.*
[38] *Id.* at 1041-42.
[39] *Id.* at 1042.
[40] *Id.* at 1042-43.
[41] Breedlove v. Suttles, 302 U.S. 277, 283 (1937) (referencing the holding from Minor v. Happersett, 88 U.S. 162 (1874)), *overruled by* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).
[42] *Breedlove*, 302 U.S. at 283 (emphasis added).

Eleven years later, a black voter challenged Virginia's poll tax in *Butler v. Thompson*.[43] She asserted that the tax was administered in a discriminatory manner, disenfranchising more blacks than whites.[44] The Court was unpersuaded by this argument and held that it could not "declare the Virginia poll tax laws invalid . . . [nor come to the] conclusion that there is obvious discrimination in the administration of Virginia Poll tax laws against the Negroes for the purpose of preventing Negroes from voting."[45] In both cases, the Court reasoned that "if the basis is rational and the law is neutral on its face (notwithstanding the discriminatory intent of the law) and the law is enforced fairly, then it would meet constitutional muster."[46] Effective poll tax laws remained on the books until the 1960s, when the Voting Rights Act was passed and the Court overruled its prior decisions.[47]

"[T]he literacy test, if not as effective as physical violence and threats, was perhaps 'the most popular method of constricting the electorate.'"[48] During the height of the literacy test's popularity, over fifty percent of blacks in America were illiterate; in the South, black illiteracy was over sixty-nine percent.[49] White Southerners justified literacy tests based on their belief that excluding illiterate blacks from voting was permissible "because the black population was ignorant, uneducated, and

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[43] *See* Butler v. Thompson, 97 F. Supp. 17 (E.D. Va.), *aff'd*, 341 U.S. 937 (1951).
[44] *Butler*, 97 F. Supp. at 23.
[45] *Id.*
[46] Ellis, *supra* note 33, at 1047.
[47] *See generally* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); *see also* Voting Rights Act of 1965, 52 U.S.C.A. §§ 10301-10702 (West 2018).
[48] Goldman, *supra* note 29, at 616-17 (quoting Alexander Keyssar, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 111, 142 (2000)).
[49] *Id.*

inferior."[50] Even well into the 1960s, several scientists and psychologists believed that blacks were biologically inferior to whites and that the vote should be preserved for those who were fit to "participate in the political process."[51] Many professors and academics at that time also subscribed to this view, further bolstering its merit.[52]

The implementation and administration of literacy tests was subjective and discretionary, with enforcement power resting entirely with the registrar in each county.[53] This discretion had the effect of discouraging blacks from even attempting to register, for fear that they would be turned away no matter how literate they were.[54] As a result, fewer than three out of ten Southern blacks were registered to vote during the 1960 presidential election.[55]

The Supreme Court initially condoned literacy tests as a permissible qualification placed on the right to vote.[56] In *Lassiter v. Northampton Cty.*, the Court upheld North Carolina's literacy test by crediting the state's power to impose conditions on the right to vote.[57] "[W]hile the right of suffrage is established and guaranteed by the Constitution," the Court said, "it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed."[58] The test at issue in *Lassiter* required that voters "be able to read and

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[50] *Id.* at 621.
[51] *Id.* at 622.
[52] *Id.*
[53] *Id.* at 620.
[54] Goldman, *supra* note 29, at 620.
[55] *Id.* at 618.
[56] Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 47 (1959).
[57] *Id.* at 50.
[58] *Id.* at 51.

write any section of the Constitution of North Carolina in the English language."[59] To the Court, this was "one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen,"[60] demonstrating its willingness to ignore the ongoing blatant racial discrimination regarding access to the ballot box.

While many voting restrictions were aimed at disenfranchising blacks, some of the requirements encompassed a number of poor or illiterate whites as well, thus allowing courts to find them race-neutral.[61] To protect the white vote, the Southern states created "loopholes" in the form of grandfather clauses that allowed whites to circumvent the racially motivated tactics, while still systematically excluding blacks.[62] A common grandfather clause provided that:

> [A]nyone who could vote at a certain period, the date being set at a time when the Negro could not legally vote, *or a descendant of such person*, would be able to qualify as a permanent voter at any time previous to a given date *without submitting to educational or other tests* prescribed by the constitutions.[63]

Illustrating the powerful impact of this loophole, Louisiana's grandfather clause shrunk the percentage of registered black voters "from 44.8 percent . . . to just 4 percent four years later."[64] These primary methods of racial disenfranchisement persisted until strong constitutional provisions and legislation attempted to remedy them.

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[59] *Id.* at 53-54.
[60] *Id.* at 54.
[61] Ellis, *supra* note 33, at 1041.
[62] *Id.*
[63] CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 391 (1940), HathiTrust (emphasis added).
[64] *A History of the Voting Rights Act*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/issues/voting-rights/voting-rights-act/history-voting-rights-act (last visited Jan. 18, 2019) [hereinafter *Timeline of the Voting Rights Act*].

C. Remedies Attempting to Restore Black Voting Rights

Congress was forced to enact stronger legislation to remedy the historically unequal access to the right to vote due to the South's fierce opposition and resistance to the Reconstruction Era Amendments for almost an entire century.[65] Such resistance to the Reconstruction Amendments began taking a violent turn, ultimately persuading President Lyndon B. Johnson to call for stronger protection of voting rights.[66] Congress passed the Voting Rights Act of 1965 (VRA) to more effectively enforce the Fifteenth Amendment.[67] The VRA contained many special provisions aimed at protecting voting rights for Southern blacks in particular.[68] Specifically, Sections Two and Five were influential in changing the way Southern states conducted elections. Section Two mirrored the language in the Fifteenth Amendment, stating:

> 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…[69]

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[65] *History of Federal Voting Rights Laws*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/history-federal-voting-rights-laws (last updated July 28, 2017) [hereinafter *History of Federal Voting Rights Laws*]. The Thirteenth Amendment states, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The states ratified the Thirteenth Amendment in December of 1865, with Congress conditioning the Confederate states' federal representation on ratification. The Fourteenth Amendment, ratified in July of 1868, guaranteed due process and equal protection for all citizens, including former slaves as having been "naturalized." Finally, the Fifteenth Amendment explicitly gave African Americans the right to vote when it was ratified in 1870. "The 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."

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Voting Rights Act of 1965, 52 U.S.C.A. § 10301(a) (West 2018).

At the heart of the VRA is Section Five, a much more controversial enactment by Congress. Section Five acted as a check on "covered jurisdictions," by requiring approval before any new election procedures could take effect.[70] Section Four devised a formula to determine which jurisdictions were covered; the formula largely accounted for Southern states.[71] The formula covered states that implemented a "test or device" that restricted access to voting.[72] The Act defined "test or device" to mean:

> [A]ny requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.[73]

Any state covered under Section Five was required to obtain clearance from the District Court for the District of Colombia or the Attorney General before they could implement any changes to their voting procedures.[74] The jurisdictions had to prove that the, "proposed voting change [did] not deny or abridge the right to vote on account of race, color, or membership in a language minority group."[75] If proof was not established, the change could not be legally enforced.[76]

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[70] *About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/about-section-5-voting-rights-act (last updated Dec. 4, 2017) [hereinafter *About Section 5*].
[71] *Id.*; *see also* 52 U.S.C.A. §§ 10303–10304 (West 2018). When it was enacted, the entirety of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia became covered jurisdictions. *About Section 5*, *supra* note 70.
[72] *See* 52 U.S.C.A. § 10303.
[73] 52 U.S.C.A. § 10303(c).
[74] *About Section 5*, *supra* note 70.
[75] *Id.*
[76] *Id.*

In 1966, less than one year after the VRA took effect, South Carolina challenged it after its version of a literacy test was deemed unenforceable under Section Five by the Attorney General.[77] The Court held that the enactment of the VRA, specifically Sections Four and Five, were within Congress' constitutional power under the Fifteenth Amendment.[78] It noted that "Section Two of the Fifteenth Amendment expressly declares that 'Congress shall have power to enforce this article by appropriate legislation.'"[79]

After the Supreme Court affirmed its constitutionality, the VRA proved to be particularly effective in protecting equal voting rights. Percentages of registered black voters in the South increased, as did the number of blacks elected to public office.[80] Although the VRA's special enforcement provisions were set to expire five years after its enactment, several presidents signed extensions leaving the law in place for many years to come.[81]

In addition to the Reconstruction Era Amendments and the VRA, an ever-progressing society provided for other Constitutional amendments that expanded voting rights. The Twenty-Fourth Amendment officially prohibited the use of poll

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[77] South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966).
[78] *Id.* at 353.
[79] *Id.* at 325.
[80] Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 748-49 (1998).
[81] *Timeline of the Voting Rights Act*, *supra* note 64. President Nixon signed a five-year extension in 1970, President Ford signed a seven-year extension in 1975, President Reagan signed a 25-year extension in 1982, and President George W. Bush signed a 25-year extension in 2006. *Id.* In *Shelby County v. Holder*, the Supreme Court struck down Section Five of the VRA as unconstitutional, due to changed "current needs" in society. *See* 570 U.S. 529, 556 (2013). This decision has had major impacts throughout the country where new barriers to voting have been implemented without preclearance. These issues are outside the scope of this article.

taxes in 1964 because of the Southern States' reluctance to abide by the Reconstruction Amendments.[82] In 1920, the States ratified the Nineteenth Amendment, which gave women the right to vote,[83] and in 1971, the Twenty-Sixth Amendment lowered the qualifying voting age to eighteen.[84]

Although the VRA addressed many of the racially motivated barriers in place at the time, the legislation failed to touch on the racially disparate impact of felony disenfranchisement laws. In fact, since the VRA was originally enacted, several states have left their current disenfranchisement policies in place, implicitly acknowledging that the VRA had no effect on those types of laws.[85]

III. Felon Disenfranchisement Policies Today

A. Rationales and Policy Justifications for Disenfranchising Felons

A wide array of policy rationales exists to justify disenfranchising felons. These rationales include violations of the social contract, moral competence, the preservation of the purity of the ballot box, fear of laws being weakened by criminals, and prevention of voter and election fraud.[86]

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[82] U.S. CONST. amend. XXIV, § 1; *see also The 24th Amendment*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/HistoricalHighlight/Detail/37045 (last visited Jan. 18, 2019).
[83] U.S. CONST. amend. XIX, § 1.
[84] U.S. CONST. amend. XXVI, § 1.
[85] *See generally Felon Voting Rights*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx (last visited Dec. 21, 2018).
[86] Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1302-03 (1989) [hereinafter *Purity of the Ballot Box*]; *see also* Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration, in* 12 FED. SENT. R. 248, § IV (2000).

The first and most widely relied upon rationale concerns John Locke's "social contract."[87] Violations of this metaphorical contract, "disrupt[] the balance of rights and responsibilities," among cooperating citizens and "strips the individual of her right to participate in the political process."[88] This argument, while popular among state lawmakers who enact felon disenfranchisement provisions, relies on too narrow a reading of Locke's contract.[89] Disenfranchisement fails to take into account the severity of crimes committed by most, and is "wholly disproportionate to a single violation."[90] It also fails to act as a deterrent, one of the fundamental principles of the Lockean social contract.[91]

Next, a moral competence rationale argues that those with a propensity to commit crime lack the same moral compass a law-abiding voter possesses.[92] Preserving the "purity of the ballot box . . . is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption."[93] This "civic republican" argument values exclusion of those who do not use their vote to benefit the "common good."[94] The exclusionary regime of this rationale does not mirror modern society's "commitment to equality and inclusion" of all groups and opinions and is outdated in that respect.[95]

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[87] Brooks, *supra* note 27, at 853-54.
[88] Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1526 (2003).
[89] *Purity of the Ballot Box*, *supra* note 86, at 1305-06.
[90] *Id.* at 1307.
[91] *Id.*
[92] Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 HOW. L. J. 549, 556-57 (2011).
[93] Brooks, *supra* note 27, at 854.
[94] *Purity of the Ballot Box*, *supra* note 86, at 1307.
[95] *Id.* at 1309.

Proponents of felon disenfranchisement also argue that convicted felons are neither loyal nor trustworthy voters.[96] If felons were allowed to exercise their right to vote, defenders argue, they would vote for pro-criminal candidates and policies.[97] For example, a felon who has previously served a mandatory minimum sentence of five years for possession of marijuana would likely vote for political candidates who dislike mandatory minimums or laws that criminalize marijuana.[98] To supporters of felon disenfranchisement, previously convicted felons would vote in similar pro-criminal or "[dis]loyal" ways.[99]

This argument is difficult to sustain, however, because there is no evidence that current or ex-felons would vote entirely based on their stance regarding criminal law or penal issues.[100] The entire purpose behind a democratic society is that citizens will vote for those who represent their views. In addition, the population of current or ex-felons represents a small fraction of the voting population as a whole, thus rendering their political motives less than significant.[101]

Furthermore, defenders of felon disenfranchisement argue that allowing current or ex-felons to vote would undermine the electoral process as a whole.[102] Those who have previously broken the law are, "more likely to violate the particular prohibition against election fraud."[103] This argument fails because of its dramatic

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[96] Mauer, *supra* note 86, at § IV.
[97] *Id.* at § IV.A.
[98] *See generally id.*
[99] *Id.* at § IV.B.
[100] *Purity of the Ballot Box*, *supra* note 86, at 1303.
[101] *Id.*
[102] *See generally* Mauer, *supra* note 86, at § IV.
[103] *Purity of the Ballot Box*, *supra* note 86, at 1303.

over-inclusiveness.[104] Only a small percentage of felons have committed election or voter fraud, and when it does occur, it is usually not inside the ballot box itself.[105] Enacting disenfranchisement laws specifically targeted at those who have committed election fraud accomplishes the same goal in a much narrower fashion than blanket disenfranchisement for all convicted felons, regardless of the crime.

Finally, proponents of felon disenfranchisement argue that losing the right to vote is "merely a component of the punishment that is imposed upon conviction."[106] This justification is without merit because, unlike the traditional aspects of punishment, such as deterrence and rehabilitation, disenfranchisement, "is [not] even acknowledged in the courtroom."[107] It is unlikely that stripping a convicted felon's right to vote will deter him from committing robbery or help him reintegrate into his community, for example.

The justifications for disenfranchising felons are flawed. They are either based on historical bigotry or rooted in faulty criminological premises. Whatever a state's reason for disenfranchising its felons, state legislatures should question these underlying rationales and should ask themselves what policies are being furthered other than generic and aging societal views about criminals.

B. Constitutional Basis for Disenfranchising Felons

Article I, Section 2 of the United States Constitution states that "[t]he House

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[104] *Id.*
[105] Mauer, *supra* note 86, at § IV.C.
[106] Mauer, *supra* note 92, at 556.
[107] *Id.*

of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the *Electors in each State shall have the Qualifications requisite for Electors* of the most numerous Branch of the state Legislature."[108] This constitutional provision allows states to put in place qualifications citizens must meet before they may exercise their right to vote.[109] Section 2 of the Fourteenth Amendment gives further discretion to State governments to exclude certain classes of people from voting by carving out an exception based on, "participation in rebellion, or other crime."[110] These constitutional provisions can be interpreted as implicit approval for felony disenfranchisement laws because of their broad, sweeping language, and it provides the basis for all felon disenfranchisement laws.[111]

To overcome this so-called "Penalty Clause,"[112] several scholars urge a narrower reading of the phrase, "other crime."[113] This narrow reading of the clause implies that the framers of the Fourteenth Amendment did not intend to create blanket approval of felon disenfranchisement laws of all types.[114] Rather, it was intended to be read in the context of the word "rebellion," meaning it does not apply to all felonies, only those which go hand in hand with rebellion of some form.[115]

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[108] U.S. CONST. art. 1, § 2, cl. 1 (emphasis added).
[109] *Id.*
[110] U.S. CONST. amend. XIV, § 2.
[111] Brooks, *supra* note 27, at 856.
[112] Abigail M. Hinchcliff, Note, *The "Other" Side of* Richardson v. Ramirez*: A Textual Challenge to Felon Disenfranchisement*, 121 YALE L. J. 194, 196 (2011).
[113] *See id.*; *see also* Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-Examining* Richardson v. Ramirez, 13 TULSA J. COMP. & INT'L L. 279 (2006).
[114] Morgan-Foster, *supra* note 113, at 284.
[115] Hinchcliff, *supra* note 112, at 234.

Because the Penalty Clause cuts against the plight of convicted felons seeking to gain back their right to vote, Congress should use their legislative power to overcome such an expansive reading of this clause and restore voting rights of convicted felons who have served their sentence.

C. Interpretation of State Felon Disenfranchisement Laws

Convicted felons have disputed the validity of state felon disenfranchisement laws in the courts for decades,[116] and there is one thing that remains consistent among them: their ability to withstand constitutional challenges. The most considerable barrier to those claiming equal protection violations for state felon disenfranchisement laws is a plaintiff's showing of "racial discrimination [as] a substantial or motivating factor," in the passage of such a provision.[117] Because the right to vote is fundamental, strict scrutiny should guide the Court's analysis of felon disenfranchisement claims. When disparate racial impact is also factored in, strict scrutiny is even more necessary in interpreting felon disenfranchisement claims.

i. The Fundamental Nature of the Right to Vote

The Supreme Court has long regarded fundamental rights as having been afforded the highest level of judicial scrutiny to ensure that they are not unconstitutionally infringed upon.[118] This so-called "strict" scrutiny is justified because certain rights are "central to providing a check on the power of the

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[116] The courts in the cases mentioned in this section held or recognized that a state criminal disenfranchisement provision is not a per se violation of the Fourteenth Amendment requirement of equal protection of the laws. Robin Miller, Annotation, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R. 6th 31 (2006).
[117] Hunter v. Underwood, 471 U.S. 222, 225 (1985).
[118] *See generally* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL'Y 143, 147 (2008).

government to infringe on particular realms of individual autonomy."[119] A right is given "fundamental" status if it is "explicitly or implicitly guaranteed by the Constitution."[120] It is essential to principles of self-governance that voting be included among these fundamental rights.[121] Although not enumerated in the Constitution, the Supreme Court has deemed the right to vote as fundamental.[122] That being said, the Court does not always preserve it as such under the veil of strict scrutiny, even though it has never been categorized as anything other than fundamental.[123]

In the early case of *Yick Wo v. Hopkins*, the Court makes a subtle nod to the fundamental nature of the right to vote.[124] Voting is not a natural right, but "a privilege merely conceded by society . . . regarded as a fundamental political right."[125] In *Wesberry v. Sanders*, the Court more explicitly emphasized the importance of the right to vote.[126]

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[127]

Again, in *Reynolds v. Sims*, the Court concluded that "[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."[128] The Court

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[119] *Id.*
[120] Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 148 (1989).
[121] *Id.* at 149.
[122] *See generally supra* Section III.C.i.
[123] Douglas, *supra* note 118, at 149.
[124] 118 U.S. 356, 370 (1886).
[125] *Id.*
[126] 376 U.S. 1, 17-18 (1964).
[127] *Id.*
[128] 377 U.S. 533, 561-62 (1964).

went on to state that a potential infringement on this right must be "carefully and meticulously scrutinized,"[129] again implying a strict scrutiny analysis. Although voting is a fundamental right, the Supreme Court does not treat it as such in the context of felon disenfranchisement laws.

ii. Equal Protection and Judicial Scrutiny

Equal protection principles require that any infringement of a fundamental right be subject to the strictest scrutiny by reviewing courts.[130] Laws that discriminate based on race are subject to strict scrutiny as well and carry a heavy presumption of unconstitutionality.[131] As a threshold issue, those asserting equal protection claims based on race discrimination must demonstrate that the state acted with a discriminatory purpose, usually a very high burden.[132]

Under a typical strict scrutiny analysis, if a fundamental right is abridged by government action, it must be necessary to further a compelling state interest.[133] An interest is compelling when it is "essential or necessary rather than a matter of choice, preference, or discretion."[134] There are seemingly more examples of what does not constitute a compelling state interest than what does. In employing a strict scrutiny analysis, the Supreme Court has repeatedly struck down laws for failing to

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[129] *Id.* at 562.
[130] Galloway, *supra* note 120, at 125.
[131] *Id.* at 133.
[132] *Id.* at 131.
[133] *Id.* at 125 (explaining that the Fundamental Rights Equal Protection track differs slightly from traditional Equal Protection).
[134] Ronald Steiner, *Compelling State Interest*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest (last visited Feb. 17, 2019).

provide a compelling state interest.[135] Historical examples of recognized compelling state interests include remedying past racial discrimination,[136] avoiding a military catastrophe,[137] and reducing the appearance of political corruption.[138] In the context of laws restricting voting rights, the Court has held that the state has several compelling interests, including "avoiding voter confusion and deception, maintaining the stability of the political system, maintaining the integrity of elections, and requiring a preliminary showing of substantial support."[139] Compared to the policy rationales that back current felon disenfranchisement laws discussed in Section III.A, these compelling state interests do not align with state lawmakers' decisions to disenfranchise convicted felons after completion of their sentence.[140]

Unfortunately, key exceptions carved out by the courts have prevented felon disenfranchisement laws from being afforded this same level of scrutiny. Because disproportionate applications of felon disenfranchisement laws implicate both race and the exercise of a fundamental right, these laws should be afforded the same level of judicial scrutiny as other laws that classify based solely on race.

Such restrictions are admittedly "presumed to be constitutional and will be upheld unless the claimant proves it is not rationally related to any legitimate government interest."[141] Analyzing such restrictions under rational basis scrutiny, rather than strict scrutiny, is a large hurdle convicted felons face when they seek to

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[135] Galloway, *supra* note 120, at 134.
[136] *Id.* at 136.
[137] *Id.* at 134.
[138] Steiner, *supra* note 134.
[139] Galloway, *supra* note 120, at 153 (footnotes omitted).
[140] *See supra* Section III.B.
[141] Galloway, *supra* note 120, at 152.

regain their right to vote. Due to the Court's failure to apply strict scrutiny in this setting, Congress must bolster protection for voting rights because of the link between felon disenfranchisement and racial discrimination in voting laws.

Proving discriminatory intent is the biggest challenge for any convicted felon bold enough to request relief from the courts.[142] State lawmakers can easily veil their support for felon disenfranchisement laws in rationales discussed in Section III.A, so arguing that a legislature acted with racial animus in pursuing disenfranchisement policies is nearly impossible.[143]

iii. The Supreme Court's Willingness to Allow Felon Disenfranchisement Without Employing Strict Scrutiny

The Supreme Court has given its stamp of approval to disenfranchising felons.[144] In *Richardson v. Ramirez*, the Court ultimately held that the continued disenfranchisement of convicted felons who had completed their sentences did not violate equal protection.[145] The petitioners in *Richardson* were denied the right to vote in California under a constitutional provision that only restored a convicted felon's voting rights by "court order after the completion of probation, or, if a prison term was served, by executive pardon after completion of rehabilitation proceedings."[146]

Before making its way to the Supreme Court, the California Supreme Court held for the convicted felons, declaring that the California law could not withstand

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[142] *See* Lauren Latterell Powell, Note, *Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement,* 22 MICH. J. RACE & L. 383, 396 (2017).
[143] *See supra* Section III.B.
[144] *See* Richardson v. Ramirez, 418 U.S. 24 (1974).
[145] *Id.* at 56.
[146] *Id.* at 30.

strict scrutiny.[147] They reasoned that the original "compelling state interest" behind disenfranchising felons, protecting "the purity of the ballot box,"[148] and preventing election fraud, were no longer justified under an equal protection analysis because of the increasingly advanced methods for conducting elections.[149] The California Supreme Court ultimately held that enforcing modern election procedures, rather than a blanket ban on felons' exercise of the right to vote, was the "least burdensome on the right of suffrage."[150]

After granting certiorari, the Supreme Court reversed California's decision.[151] Instead of upholding the provision on traditional equal protection grounds (i.e. a strict scrutiny analysis), the Court focused on legislative intent and a textual interpretation of the Fourteenth Amendment.[152] The Court relied on statutory interpretation grounds and asserted that the framers of the Fourteenth Amendment left the language "participation in rebellion or other crime" alone because they "were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which [they were] concerned here."[153]

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[147] Ramirez v. Brown, 507 P.2d 1345, 1349 (1973), *rev'd sub nom.* Richardson v. Ramirez, 418 U.S. 24 (1974).
[148] *Id.*
[149] *Id.* at 1351.
[150] *Id.* at 1357. The "least burdensome means" application by the California Supreme Court mirrors the argument that old policy rationales for disenfranchising felons fail to hold up in modern society. Enforcing current election laws protects the so-called "purity of the ballot box" more effectively than stripping the rights of convicted criminals.
[151] Richardson v. Ramirez, 418 U.S. 24, 27 (1974).
[152] *Id.* at 54.
[153] *Id.* at 43.

Neither the California Supreme Court nor the U.S. Supreme Court's opinion in *Richardson* considered the disparate impact on racial minorities caused by California's statute; rather, they focused on the distinction between felons and non-felons in the equal protection context. This is significant because the Supreme Court has not taken up a felon disenfranchisement case claiming disparate racial impacts since *Richardson* was decided, leaving circuit courts to interpret *Richardson* freely.

In his dissent, Justice Marshall agreed with the California Supreme Court that the Court should use a strict scrutiny standard.[154] Quoting the Court's opinion in *Dunn v. Blumstein* he noted, "if a challenge[d] statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'"[155]

Thus, the proper analysis for determining whether felon disenfranchisement statutes violate equal protection lies within the compelling government interest realm, but the Supreme Court's rejection of that analysis makes states' current disenfranchisement laws more relevant in terms of their impacts on society at large. The analysis employed by the California Supreme Court in *Ramirez v. Brown* mirrors the level of judicial scrutiny courts traditionally employ regarding the denial of a fundamental right,[156] but unfortunately, the Supreme Court's textual analysis of the Equal Protection Clause opened the door for several lower courts to

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[154] *Id.* at 77-78.
[155] *Id.* at 78 (Marshall, J., dissenting) (quoting Dunn v. Blumstein, 405 U.S. 330, 337 (1972)).
[156] Ramirez v. Brown, 507 P.2d 1345, 1357 (Cal. 1973), *rev'd sub nom.* Richardson v. Ramirez, 418 U.S. 24 (1974).

justify their state's version of a felon disenfranchisement law without employing strict scrutiny.

This decision has led to the states' systematic disenfranchisement of convicted felons. Some courts have interpreted *Richardson* to mean that a convicted felon has no fundamental right to vote.[157] This interpretation is flawed at best. The Court in *Richardson* neglected to even undertake a strict scrutiny analysis, instead relying on the Framers' intent and the plain text of the Fourteenth Amendment.[158] A constitutional provision allowing states to enact laws with the effect of denying a fundamental right to millions should be analyzed using strict scrutiny; not doing so departs from the Court's traditional manner of interpreting laws that impair fundamental rights. "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[159] This powerful sentiment, expressed in *Reynolds v. Sims*,[160] reflects the level of judicial scrutiny that should be given to state felon disenfranchisement laws.

Since *Richardson*, several circuit courts have weighed in on the constitutionality of state felon disenfranchisement laws. In 1985, a Tennessee court explicitly acknowledged that, despite the higher number of blacks convicted of

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[157] Owens v. Barnes, 711 F.2d 25, 27 (3d Cir. 1983) ("Plaintiff's argument fails because the right of convicted felons to vote is not 'fundamental.'").
[158] 418 U.S. at 42-44.
[159] Reynolds v. Sims, 377 U.S. 533, 562 (1964).
[160] *Id.* (establishing the "one person, one vote" principle).

felonies in the state, the provision disenfranchising felons did not violate equal protection.[161] In *Wesley v. Collins*, the court "conclude[d] that Tennessee may disqualify convicted felons from the voting public without unlawfully interfering with the equal opportunity of blacks to participate in the political process and to elect representatives of their choice."[162] This holding was affirmed by the Sixth Circuit in 1986.[163]

The Ninth Circuit ruled on the issue of whether Washington state's felon disenfranchisement provision violated Section 2 of the Voting Rights Act in 2003.[164] In *Farrakhan v. Washington*, the court held that a state's felon disenfranchisement law *could* violate Section 2, but only if "it results in a racially disparate denial of voting rights."[165] Ultimately, the court found that Washington's provision did not rise to that level, despite a convincing showing by the petitioners.[166] This case is relevant because it recognizes that a cognizable claim exists under the VRA regarding felon disenfranchisement laws:[167] "Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA."[168]

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[161] Wesley v. Collins, 605 F. Supp. 802, 803 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).
[162] *Id.*
[163] *See* Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986).
[164] *See* Farrakhan v. Washington, 338 F.3d 1009, 1017 (9th Cir. 2003).
[165] Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. RACE & L. 109, 122 (2008).
[166] *Farrakhan*, 338 F.3d at 1013 (noting that plaintiffs presented statistical studies demonstrating racial disparities in Washington's criminal justice system, expert testimony, and tenuous policy rationales behind Washington's felon disenfranchisement policy).
[167] *Id.* at 1016.
[168] *Id.*

Interestingly, not all courts agree that the VRA applies to felon disenfranchisement provisions.[169] In *Hayden v. Pataki*, petitioners alleged that New York's felon disenfranchisement provision was racially discriminatory.[170] The Second Circuit held that a challenge of the provision could not be sustained under the VRA.[171] In so holding, it relied "primarily on [its own] interpretation of the Voting Rights Act."[172] Under the guise of statutory interpretation, the court held that "Congress in 1965 did not intend or understand the Voting Rights Act (or its subsequent amendments) to apply to felon disenfranchisement provisions."[173] Further, the Second Circuit also acknowledged that, "absent Congressional clarification, [the issue posed] will only be definitively resolved by the Supreme Court."[174] Circuit courts recognize that issues regarding felon disenfranchisement claims are subject to change by either the Supreme Court or Congress.

The Eleventh Circuit agreed with the Second Circuit in *Johnson v. Governor of the State of Florida*, holding that Florida's felon disenfranchisement law did not violate either equal protection or Section 2 of the Voting Rights Act.[175] The court held that the Florida provision disenfranchising felons was not enacted with racial animus or discriminatory intent, thus stripping the petitioners of a cognizable equal protection claim.[176] Further, in regards to the VRA claim, it also relied on statutory

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[169] *See* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006).
[170] *Id.* at 310.
[171] *See id.*
[172] *Id.* at 314.
[173] *Id.* at 319.
[174] *Id.* at 310.
[175] 405 F.3d 1214, 1224, 1234 (11th Cir. 2005).
[176] *Id.* at 1219.

interpretation and constitutional avoidance to hold that the VRA did not encompass felon disenfranchisement provisions.[177] When the Supreme Court denied certiorari, it essentially approved Florida's scheme for denying its citizens voting rights, while at the same time implicitly acknowledging that felon disenfranchisement laws do not violate the VRA.[178] Because the Supreme Court has thus far avoided this circuit split, Congress should address the discrepancies among the courts by amending the VRA to explicitly apply to felon disenfranchisement laws, especially because of the growing impacts state felon disenfranchisement laws have on blacks' ability to vote.

These cases are just a few examples of the many times courts, including the Supreme Court, have turned down the opportunity to restore the right to vote to millions of disenfranchised felons. Seemingly settled law, state felon disenfranchisement statutes have been an effective tool, especially for Southern states,[179] for limiting the power of the black vote. The fact that Southern states, who historically played the largest role in racial disenfranchisement, utilized state felon disenfranchisement laws to limit the black vote demonstrates a correlation between racial discrimination and felony disenfranchisement laws today.

In *Hunter v. Underwood*, petitioners from the state of Alabama successfully challenged a constitutional provision disenfranchising those convicted of crimes involving "moral turpitude" after having been convicted of writing bad checks.[180]

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[177] *Id.* at 1234.
[178] *See* Johnson v. Bush, 546 U.S. 1015 (2005) (denying certiorari); *see also infra* Section VI.
[179] *See generally* Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 599 (2007).
[180] 471 U.S. 222, 223 (1985).

The Court laid out the threshold requirement for an equal protection claim: "[P]laintiffs must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor in the adoption of [the constitutional provision]."[181] The Court was forced to acknowledge the damaging legislative history of Alabama's adoption of the constitutional provision.[182] The president of Alabama's Constitutional Convention in his opening address notably said, "it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[183] Having conceded the fact that racial discrimination was, in fact, a substantial and motivating factor behind Alabama's disenfranchisement of blacks, the Court struck down the provision as a violation of equal protection.[184]

This case presents an extraordinary example of proving a state's racial motivation for implementing a disenfranchisement law for convicted felons. Although the law was, on its face, racially neutral (because it denied the right of suffrage to *all* those convicted of crimes of moral turpitude), because of evidence demonstrating the state's racial bias at the time of enactment, the Court had no choice but to strike it down.[185] *Hunter* is a rare example of the Court striking down a felon disenfranchisement law, and it demonstrates the considerable barrier

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[181] *Id.* at 225.
[182] *Id.* at 229 (noting that the provision was adopted as "part of a movement that swept the post-Reconstruction South to disenfranchise blacks").
[183] *Id.*
[184] *Id.* at 233 ("[W]e are confident that §2 [of the Equal Protection Clause] was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the constitutional provision at issue] which otherwise violates §1 of the Fourteenth Amendment.").
[185] *Id.* at 227.

convicted felons face when they seek access to the franchise. Demonstrating the required racial animus is difficult since most laws are facially neutral; thus, court challenges may not be the best remedy to restore convicted felons' suffrage rights. Legislatures, rather than courts, can rely on statistical data and progressing societal views, and can take a more proactive approach, rather than the passive response the Supreme Court must take to decide the fate of millions of disenfranchised black felons.

Because equal protection jurisprudence is so solidified, another avenue of relief needs to be available to those who seek to have their fundamental right to vote restored. Given the growth of incarcerated populations and society's changing attitudes toward convicted felons,[186] it is time for novel arguments challenging the enforcement of felon disenfranchisement laws. Equal protection concerns are at their peak when racial minorities enjoy fewer fundamental rights and those rights are disproportionately infringed. The intersection of race discrimination along with the denial of a fundamental right requires a strict application of equal protection principles, which, if not enforced by courts, should be protected by Congress.

IV. Current Impacts of Felon Disenfranchisement Laws

A. Blacks are Disenfranchised Significantly More than Whites

The United States continues to lead the world in incarceration rates.[187] In July

[186] *See* discussion *infra* Section VI.

[187] *Countries with the Largest Number of Prisoners per 100,000 of the National Population, as of July 2018*, STATISTA, https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/ (last visited Feb. 7, 2019) [hereinafter *National Prison Population*].

of 2018, the United States incarcerated 655 individuals per 100,000.[188] The closest industrialized nation, Russia, trails behind at a mere 451 individuals per 100,000.[189] In addition to egregious numbers of incarcerated citizens, the U.S. has nearly 7 million citizens under the wing of the criminal justice system.[190] Although a report from the Bureau of Justice Statistics suggests that prison populations in the U.S. are dropping,[191] this representation is misleading for communities of color. In 2017 the total black population made up just 12% of the United States, while the total black prison population more than doubled that at 33%.[192] In comparison, the total white population in the U.S. is 64%, with the white prison population sitting at just 30%.[193]

As of 2016, approximately 6.1 million Americans may not vote due to a felony conviction.[194] This translates to 2.5% of the nationwide voting population.[195] Individuals who have served their sentences and are no longer incarcerated make up 50% of the disenfranchised population, over 3.1 million people in twelve states.[196] The fact that only a fraction of the states contain the largest numbers of those who have

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[188] *Id.* The nation's total incarcerated population is only 2.3 million, emphasizing the fact that more than two-thirds of disenfranchised felons have already served their sentence. *See* Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), https://www.prisonpolicy.org/reports/pie2018.html.
[189] *National Prison Population*, *supra* note 187.
[190] Wagner & Sawyer, *supra* note 188. This includes probation (3.6 million) and parole (840,000).
[191] DANIELLE KAEBLE & MARY COWHIG, U.S. DEP'T OF JUSTICE, NCJ 251211, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, (2018), https://www.bjs.gov/content/pub/pdf/cpus16.pdf.
[192] John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, PEW RES. CTR. (Jan. 12, 2018), http://www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/.
[193] *Id.*
[194] Christopher Uggen et al.*, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement 2016*, THE SENT'G PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/ [hereinafter *6 Million Lost Voters*].
[195] *Id.*
[196] *Id.*

been disenfranchised for at least some period of time emphasizes the discrepancies across the country. Further, the overwhelming majority of states with the highest population of disenfranchised felons are in the South.[197] While Americans like to forget about the racial turmoil the South is historically known for, it is hard to ignore the racial bias that still persists there today, implicit or otherwise.

Among states with the most severe felon disenfranchisement laws, black populations have disproportionately lost their right to vote as compared to whites.[198] According to a 2016 report by the Sentencing Project, over 7.4% of the adult black population cannot vote.[199] This number sharply contrasts with the 1.8% of non-African Americans who cannot vote.[200] Today, twenty-three states disenfranchise over 5% of their black adult population.[201]

B. A Patchwork of Inconsistent State Laws Implicitly Motivated by Race

The several states are granted powers to make their own laws and govern their own citizens.[202] Almost every state in the U.S. has its own statute governing felons' voting rights.[203] This section presents these statutes according to their varying degrees of severity. Some states have adopted very harsh approaches to the re-

[197] Jean Chung, *Felony Disenfranchisement: A Primer* 2, THE SENT'G PROJECT (2019), https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf.
[198] *See generally 6 Million Lost Voters*, *supra* note 194.
[199] *Id.* at 3.
[200] *Id.*
[201] *Id.* at 11.
[202] U.S. CONST. amend. X; *see also* U.S. CONST. art. 1, § 2, cl. 1; *see also supra* Section III.B.
[203] *See Felon Voting Rights*, *supra* note 85.

enfranchisement of convicted felons, while a small minority of states have no restrictions at all.[204]

The strictest felon disenfranchisement laws extend disenfranchisement post-sentence.[205] As of 2016, twelve states restricted convicted felons' right to vote after they had fully completed their sentence.[206] This includes time spent incarcerated, time spent on parole, and time spent on probation.[207] Arizona, for example, disenfranchises those convicted of two or more felonies permanently.[208] Wyoming requires a five-year waiting period after the completion of a first-time sentence for a non-violent felony conviction.[209]

Eighteen states restrict felons from voting during incarceration, parole, and probation.[210] One of these states, South Dakota, began disenfranchising individuals on felony probation just seven years ago, in 2012,[211] departing from the general trend among states to liberalize their felon disenfranchisement laws.

Four states restrict felons who are incarcerated or on parole from voting,[212] and finally, fourteen states only restrict voting for those who are currently incarcerated for a felony.[213] Shockingly, only two states, Maine and Vermont, do not

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[204] *See id.* While states are beginning to modify these laws in favor of convicted felons, it is a slow process. This article uses data from 2016 to 2018 and any recent policy changes in individual states are noted for clarity.
[205] *See 6 Million Lost Voters*, *supra* note 194; Chung, *supra* note 197, at 1.
[206] *6 Million Lost Voters*, *supra* note 194, at 4. These states are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming. *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *6 Million Lost Voters*, *supra* note 194, at 4.
[213] *Id.*

restrict convicted felons' right to vote at all.[214]

Even after completion of a sentence, some states impose laborious procedures for restoration of civil rights, the right to vote included.[215] These procedures include waiting periods of up to several years, petitions to the court for restoration of civil rights, pardons from state governors, and even a two-thirds vote in both houses of the respective state's legislature.[216] These practices vary so widely, the discrepancies themselves violate the fundamental right to have equal access to the ballot box.

Because the state laws vary, their effects also vary. In the states with the most severe disenfranchisement laws, roughly *one in five* black adults are disenfranchised.[217] That is equivalent to 20% of the black voting population in some areas. Compared to other regions in the country, including states in the Northeast and Midwest, states in the Southeastern region of the country are affected the most severely.[218] The South's history of disenfranchising blacks during Reconstruction presents itself in the form of felon disenfranchisement today.

Motivations also vary between the individual states for why they choose to enact their disenfranchisement policies. One author suggests that these differences in policy are due to overt racial politics, state culture, dominant political ideologies,

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[214] *Id.*
[215] *Felon Voting Rights*, *supra* note 85.
[216] *Id.* Nebraska requires a two-year waiting period before allowing the restoration of voting rights, Nevada allows an individual to petition the court for a restoration of rights, Tennessee requires a pardon from the Governor, and Mississippi allows for restoration after a two-thirds vote in both houses of its state legislature. *Id.*
[217] Chung, *supra* note 197, at 2. In 2016, Florida, Kentucky, Tennessee, and Virginia disenfranchised between 21% and 26% of their black voting-age populations. *Id.*
[218] *6 Million Lost Voters*, *supra* note 194, at 8. The cartogram displays the shocking inconsistencies between states in terms of the number of felons affected by disenfranchisement laws. *Id.*

professionalism in the legislature, party competition within the state, and socioeconomic factors.[219] In concluding that race plays the most central role in the making of state disenfranchisement policies, one scholar encourages a closer look at policymaking at the macro level, including criminal policy regimes that target racial minorities implicitly.[220] State lawmakers must be more critical of criminal law policies passed in their legislatures by taking into account each of these factors, and most importantly implicit racial bias.

V. Inconsistent State Felon Disenfranchisement Laws Violate Equal Protection

A. Geographic Discrimination of Convicted Felons

Although the Supreme Court and several lower courts have ruled on the constitutionality of individual state felon disenfranchisement laws, no court has determined the extent to which these laws violate equal protection at the federal level. Because of their inconsistency, convicted felons' voting rights are determined by the state in which they are convicted.[221] Thus, an individual convicted of a felony in Maine, for example, where a criminal conviction does not affect voting rights at all, could lose his right to vote simply upon moving to Wyoming within five years upon completing his sentence.[222] These geographic discrepancies violate equal protection because the right to vote remains fundamental regardless of state residency.

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[219] Robert R. Preuhs, *State Felon Disenfranchisement Policy*, 82 SOC. SCI. Q. 733, 737-41 (2001).
[220] *Id.* at 745 (noting that harsh drug laws, racial profiling, and "tough on crime" policies have contributed to the dramatic increase in incarceration rates of minorities).
[221] *Id.* at 735.
[222] *See, e.g.*, *id.*

Geographic discrimination, or techniques employed that "vary [our rights] depending on where we are or where we live,"[223] generally meet constitutional standards. But what about when they are applied to the "legal regulation of constitutionally protected activities,"[224] such as the right to vote? The piecemeal approach taken by the states nationwide to address convicted felons' voting rights is a form of geographic discrimination in that a convicted felon's right to vote depends upon the state in which he is convicted.[225] "[T]erritorial discriminations impinging upon fundamental rights should presumptively be subject to the same heightened scrutiny as any other fundamental rights discriminations."[226] The fundamental rights branch of equal protection focuses on "discrimination[] in the *distribution* of fundamental rights."[227]

> The state may justifiably restrict the exercise of fundamental rights, but it must do so *evenhandedly*. A state restriction on the exercise of a fundamental right that might have survived direct substantive review of [a uniform application] may violate equal protection if it restricts only the exercise of the right by a particular group, or the exercise of the right in particular contexts.[228]

Expanding this analysis of territorial discrimination to federal, rather than state policymaking, if lawmakers want to restrict convicted felons' right to vote, they

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[223] Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 263 (1987).
[224] *Id.*
[225] *See* Chung, *supra* note 197, at 1; *see also* Preuhs, *supra* note 219, at 735.
[226] Neuman, *supra* note 223, at 265.
[227] *Id.* at 279.
[228] *Id.* (emphasis added).

must do so evenhandedly. This would require one uniform system, presumably employed by Congress, that governs all convicted felons across the country.

The text of the Equal Protection Clause reads, "Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[229] As applied to the states, this provision, "addresses only actions taken by an individual state, not differences between states."[230] This reading generally presents no constitutional problems when states' laws vary, but there needs to be a new reading of the clause. Where differing state laws infringe upon fundamental rights, the courts or Congress should step in by way of heightened judicial scrutiny or legislation to remedy the discrepancies in state laws. In the case of felon disenfranchisement, Congress should use its power to override competing state laws and amend the VRA to include a provision that directly applies to the disenfranchisement of felons.

Several lower courts, including some circuit courts, have disagreed on whether the VRA even applies to felon disenfranchisement laws.[231] By denying review in many of these cases, the Supreme Court has remained silent on the specific issue of whether state felon disenfranchisement laws violate Section 2 of the Voting Rights Act. Because of the Court's silence and the unresolved circuit split, Congress should amend Section 2 of the VRA to expressly apply to felon disenfranchisement statutes. Further, Congress should enact one law, applicable to all state and federally convicted felons, that reconciles differing state provisions,

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[229] U.S. CONST. amend. XIV.
[230] Neuman, *supra* note 223, at 313.
[231] Comment, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 627 (2007).

especially considering the devastating impacts these laws have on voting rights among minorities.

VI. A Uniform System of Felon Disenfranchisement as a Solution to Discriminatory Laws

"Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change."[232] Although courts nationwide have approved of felon disenfranchisement statutes under a wide array of legal and policy justifications, we need a stricter application of equal protection principles that the Constitution promises. Because case law implies that traditional equal protection frameworks can do nothing for convicted felons' right to vote, absent a rare showing of intentional racial discrimination,[233] new means of redress should be considered. Societal changes and decades old case law call for an updated look at disenfranchisement laws across the nation. Congress should enforce, by way of an amendment to the Voting Rights Act, an evenhanded, consistent approach to the disenfranchisement of convicted felons on a national basis, thus eliminating the need for a patchwork set of state laws that disproportionately strip the right to vote from millions of citizens, an inordinate number of whom are black.

The classic equal protection analysis seemingly will never work to strike down a felony disenfranchisement law, except in the rare circumstance that discriminatory intent is all but obvious from relevant legislative history.[234] Because

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[232] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966).
[233] *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985).
[234] *Id.*; *see also supra* Section III.C.ii.

of societal changes in America, a new approach to felon disenfranchisement laws is becoming increasingly necessary.

Society's views on disenfranchising felons has shifted in the past decade.[235] Many Americans understand that "successful reintegration is crucial for strong communities and public safety," and restoring voting rights is an integral part of that reintegration.[236] Participating in the democracy by voting encourages acting responsibly within a convicted felon's community.[237] Excluding convicted felons from the franchise, on the other hand, leaves them feeling like second-class citizens, with little incentive to refrain from further commission of crimes.[238]

Several state lawmakers on both ends of the political spectrum have taken steps to reduce the negative impacts of felony disenfranchisement to align with their constituents' views.[239] In 2014, a study reported that 65% of voters in America believed that if a convicted felon served their sentence, their right to vote should be restored.[240] An illuminating example comes from the state of Florida. Florida has historically enforced one of the country's harshest felon disenfranchisement laws. It only allowed convicted felons' voting rights to be restored after applying for a

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[235] *See* Myrna Perez et al., *The Sustained Momentum and Growing Bipartisan Consensus for Voting Rights Restoration*, NAT'L ELECTION DEF. COALITION (July 6, 2015), https://www.electiondefense.org/democracynews/2015/10/27/the-sustained-momentum-and-growing-bipartisan-consensus-for-voting-rights-restoration.
[236] *Id.*
[237] Estelle H. Rogers, *Restoring Voting Rights for Former Felons* 5, PROJECT VOTE (2014), http://www.projectvote.org/wp-content/uploads/2014/03/POLICY-PAPER-FELON-RESTORATION-MARCH-2014.pdf.
[238] *Id.*
[239] *See* Perez et al., *supra* note 235.
[240] *65% Think Felons Should be Able to Vote After Completing Jail Time*, RASMUSSEN REPS. (Feb. 14, 2014), http://www.rasmussenreports.com/public_content/politics/general_politics/february_2014/65_think_felons_should_be_able_to_vote_after_completing_jail_time.

hearing in front of an Executive Clemency Board, which had the power to deny restoration of voting rights at its discretion.[241]

In the midterm elections in November of 2018, voters in Florida passed Amendment 4, known as the Voting Rights Restoration for Felons Initiative, restoring convicted felons' right to vote upon completion of their sentence beginning in 2019.[242] This amendment will restore over one million citizens' voting rights, over 400,000 of whom are black.[243] This figure represents almost 18% of Florida's eligible black voting population.[244] Florida's recent change is just one of many examples of states relaxing their felony disenfranchisement laws.[245] Expanding public and political support and willingness to engage in criminal justice reform is a step in the right direction for felon disenfranchisement laws.

Empirical data further back up the need to liberalize convicted felons' voting rights.[246] A 2019 study indicates that blacks are 4% more likely to vote if felon disenfranchisement laws were relaxed at the state level.[247] This number reflects not only those with a previous felony conviction that barred them from voting, but also other members of communities who can be affected by harsh disenfranchisement

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[241] *See Clemency Overview*, FLA. COMMISSION ON OFFENDER REV., https://www.fcor.state.fl.us/clemencyOverview.shtml (last visited Feb. 17, 2019); *see also Last Week Tonight with John Oliver, Felony Disenfranchisement* (HBO Sept. 9, 2018).
[242] German Lopez, *Florida Votes to Restore Ex-Felon Voting Rights with Amendment 4*, VOX, https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results (last updated Nov. 7, 2018).
[243] *Id.*
[244] *Id.*
[245] *See* Perez et al., *supra* note 235.
[246] *See* Arpita Ghosh & James Rockey, *On the Political Economy of Felon Disenfranchisement* (Feb. 7, 2019), https://ssrn.com/abstract=3330565.
[247] *Id.* at 8.

policies.[248] While 4% may seem insignificant, many recent elections have been decided by closer margins.[249] Recent political polarization has made each vote critical to the outcome of elections, midterms or otherwise. The fact that state lawmakers across the country have entertained the idea of cutting back on disenfranchisement policies and that a majority of the public believes disenfranchisement policies are too harsh gives Congress the momentum it needs to create a federal disenfranchisement policy. A uniform federal felon disenfranchisement law that restores convicted felons' right to vote immediately upon completion of their sentence would not only facilitate reintegration and reduce the stigma facing convicted felons, it would also reflect society's changing attitudes toward those convicted of crimes.[250]

VII. Conclusion

The long history of racism toward blacks in America will only persist until the courts or Congress act to protect all members of their communities. Convicted felons who have served their debt to society should be given the opportunity to not only effectively reintegrate without stigma, but also to become an active voice in their community by exercising one of America's most cherished rights: the right to vote. A uniform law enacted by Congress through the Voting Rights Act is one

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[248] *Id.*

[249] *See generally* Ed Kilgore, *All the Midterm Races that Remain Unresolved*, N.Y. MAG.: INTELLIGENCER (Nov. 9, 2018), http://nymag.com/intelligencer/2018/11/all-the-midterm-races-that-remain-unresolved.html.

[250] *See* JAMIE FELLNER ET AL., HUM. RTS. WATCH, THE SENT'G PROJECT, LOSING THE VOTE, THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES § IX (1998), https://www.hrw.org/legacy/reports98/vote/usvot98o-07.htm#P118_2910; *see also* Rogers, *supra* note 237, at 5.

change America needs to not only facilitate the reintegration of black citizens back into their communities, but to also afford them true equal protection of the laws.