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FELONY DISENFRANCHISEMENT LAWS: PAYING AND RE-PAYING A DEBT TO SOCIETY

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ABSTRACT

Ex-felons are routinely denied the right to vote after successful completion of their sentences. Over six million people are currently denied the right to vote because of a prior felony conviction. This undermines the principles of democracy, the goals of the criminal justice system, and the political process. In Richardson v. Ramirez, *the Supreme Court found an express textual warrant for denying the right to vote to those convicted of crimes in Section 2 of the Fourteenth Amendment. This Article argues that people of color are disproportionately impacted by felony disenfranchisement laws because of the disproportionate impact of mass incarceration on communities of color. This Article then examines the tools voting rights advocates use to challenge felony disenfranchisement laws, including state constitutions, Section 2 of the Voting Rights Act, and the Equal Protection Clause. It ultimately concludes that these tools have failed to produce widespread, replicable success because courts generally require a showing of intentional racial discrimination, which is difficult to prove. Further, there is a circuit split as to whether the Voting Rights Act applies to felony disenfranchisement laws. Because of the inadequacies of the available legal tools, this Article concludes that Congress should adopt a federal statute which provides that states cannot disenfranchise people on the basis of a prior felony conviction or prior felony convictions for which they have completed their sentences.*

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INTRODUCTION

> Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service—are suddenly legal. As a criminal, you have scarcely more rights . . . than a black man living in Alabama at the height of Jim Crow.
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> — Michelle Alexander[1]

"1994. Miami. I was snatching a gold chain. And I did 31 months."[2] Justin was sixteen years old at the time.[3] In Florida, prior to the November 2018 elections, during which Florida voters approved a constitutional amendment that restored voting rights to over one million people with prior felony convictions,[4] ex-felons had to petition the state government in order to restore their voting rights.[5] After a mandatory waiting period, Justin filed to restore his right to cast a ballot in 2004.[6] Not long after he filed to restore his voting rights, Justin earned a master's degree in accounting and found a stable job.[7] In 2015, after waiting nearly eleven years to see the clemency

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1 MICHELLE ALEXANDER, THE NEW JIM CROW 2 (2d ed. 2012).

2 Renata Sago, *Ex-Felons Fight to Restore Their Right to Vote*, NPR (Dec. 11, 2015, 5:22 PM), http://www.npr.org/2015/12/11/459365215/ex-felons-fight-to-restore-their-right-to-vote.

3 *Id.*

4 *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (Nov. 7, 2018), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida.

5 Sago, *supra* note 2.

6 *Id.*

7 *Id.*

board, his voting rights were finally restored.[8] Kelli Griffin, a mother of four in Iowa, lost her right to vote in 2008 after a conviction for a nonviolent drug offense.[9] In 2013, on Election Day, she registered to vote and cast her ballot in a local election.[10] Two months later, she was arrested and charged with voter fraud.[11] Her defense attorney at the time of her conviction told her that she would be eligible to vote after she served her probation, which was true at the time.[12] Then, the law changed so that all people with a felony conviction on their record in Iowa lose their voting rights permanently.[13] She told the local county attorney that she did not know about the law change, but her case was not dismissed, and a jury acquitted her after forty minutes.[14] Although Griffin still cannot vote, she says she is a changed person and that she should "be able to vote in things regarding [her] child's school, regarding [her] community, regarding things [that are] happening in [her] life because it affects [her]."[15]

In spite of popular misconceptions about who is affected by felony disenfranchisement laws, the President of the Florida Rights Restoration Coalition, Desmond Meade, notes that "[w]hen you think of the typical person that cannot vote . . . it's not the African-American guy who murdered a million people. It's not that crazed killer or rapist, no . . . [t]he typical person who cannot vote was, probably years ago, convicted of some low-level offense."[16] According to a report by The Sentencing Project, "6.1 million Americans are forbidden to vote because of 'felony disenfranchisement,' or laws restricting voting rights for those convicted of felony-level crimes."[17] The problem is pervasive: one out of every forty adult citizens or 2.5 percent of the total U.S. voting age population is unable to vote because of a current

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8 *Id.*

9 *Griffin v. Pate*, AM. CIV. LIBERTIES UNION (June 30, 2016), https://www.aclu.org/cases/griffin-v-pate.

10 Kelli Jo Griffin, *I Was Arrested for Voting*, AM. CIVIL LIBERTIES UNION (Nov. 7, 2014, 12:00 PM), https://www.aclu.org/blog/speakeasy/i-was-arrested-voting.

11 *Id.*

12 *Id.*

13 *Id*.

14 *Id.*

15 Am. Civil Liberties Union, *Mom Arrested for Voting in Iowa*, YOUTUBE (Nov. 7, 2014), https://www.youtube.com/watch?15=&v=1uAZTAX0Jp4.

16 Sago, *supra* note 2.

17 CHRISTOPHER UGGEN ET AL., 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 3 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf (quotation marks omitted). According to The Sentencing Project, this number has increased drastically in recent years. *Id.* In 1976, there were only 1.17 million people similarly disenfranchised, and, in 1996, there were only 3.34 million. *Id.*

or past felony conviction.[18] Although currently only three states permanently disenfranchise all people with prior felony convictions,[19] numerous other states disenfranchise at least some people with criminal convictions.[20] In total, approximately a third of all states deny voting rights to some or all of those who have successfully completed their sentences, "unless they obtain reinstatement of voting rights."[21]

Additionally, there is a disparate impact on black Americans specifically. Over 7.4 percent of African-Americans are disenfranchised.[22] One out of every thirteen African-Americans is unable to vote, a number which is four times higher than the disenfranchisement rate of non-African-American voters.[23] Only 1.8 percent of non-African-American voters are unable to vote, or one out of every fifty-six non-black voters.[24]

This Article examines felony disenfranchisement laws in the United States, including analyses of the various tools used by attorneys to challenge felony disenfranchisement statutes. This Article also considers the weaknesses of each of those tools and the importance of finding new and innovative ways to use those tools to challenge felony disenfranchisement laws through the courts. This Article further considers the importance of alternate routes of advocacy outside of the courtroom through the legislative branch and the political process, ultimately concluding that legislation is necessary to re-enfranchise citizens whose ability to vote is unfairly withheld by their states' laws.

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18 *Id.*

19 Chris Kenning, *Locked Out: Critics Say it's Time to End Kentucky's Ban on Felon Voting*, LOUISVILLE COURIER J. (Nov. 12, 2018, 10:03 AM), https://www.courier-journal.com/story/news/2018/11/11/kentucky-among-last-permanently-ban-felons-voting-rights/1924690002/. The state constitutions of Iowa, Kentucky, and Virginia permanently disenfranchise all people with felony convictions unless the government provides an individual pardon. Editorial, *Florida Restored Voting Rights to Former Felons. Now the GOP Wants to Thwart Reform*, WASH. POST (Jan. 13, 2019), https://wapo.st/2FoflYh. Notably, Virginia's former Governor, Terry McAuliffe, signed an executive order which restored voting rights to former felons in Virginia who had completed their sentences, but the Virginia Supreme Court held that the executive order violated their state constitution. Howell v. McAuliffe, 788 S.E.2d 706, 724 (Va. 2016). Still, during Governor McAuliffe's four-year term, he restored voting rights to nearly 200,000 ex-felons. Editorial, *Virginia Should Do More to Restore Felons' Voting Rights*, VIRGINIAN–PILOT (Nov. 12, 2018), https://pilotonline.com/opinion/editorial/article_1ddcf28c-e3bd-11e8-9a7f-270adefbc95c.html.

20 *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATORS (Dec. 21, 2018), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx/.

21 DANIEL P. TOKAJI, ELECTION LAW IN A NUTSHELL 30–31 (2013).

22 UGGEN ET AL., *supra* note 17, at 3.

23 *Id.*

24 *Id.*; *Felony Disenfranchisement*, SENTENCING PROJECT http://www.sentencingproject.org/issues/felony-disenfranchisement/ (last visited Mar. 4, 2019).

Part I examines the history of felony disenfranchisement laws and analyzes *Richardson v. Ramirez,*[25] the landmark Supreme Court decision that upheld the practice of disenfranchising felons, even those who have completed their sentences. Part II examines the effect of mass incarceration on voting rights, including an analysis of the disparate impact of felony disenfranchisement laws on people of color. This Part concludes that the rehabilitative goals of the criminal justice system in a democracy are best served by promoting true reintegration into society through active citizenship, including voting.

Part III then explores litigation challenging felony disenfranchisement laws since *Richardson v. Ramirez*. This Part analyzes the ways in which various courts have ruled in response to those challenges, including challenges under state constitutions, Section 2 of the Voting Rights Act, and the Equal Protection Clause of the United States Constitution. Part IV ultimately argues that Congress should enact a federal statute which provides that the rights of citizens of the United States to vote in federal elections shall not be denied or abridged by the individual states on account of a prior felony conviction or prior felony convictions for which they have completed their sentences. This Part notes that Congress may not have the authority to legislate regarding felony disenfranchisement but nonetheless concludes that federal legislation is the best option.

I. THE HISTORY OF FELONY DISENFRANCHISEMENT LAWS

In *Reynolds v. Sims*, Chief Justice Warren wrote:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . .[26]

As inspirational as Chief Justice Warren's words may be, and as vital as the right to vote is in a representative democracy, it is important to note one phrase in particular: all *qualified* citizens to vote. Supreme Court jurisprudence on the right to vote has allowed for several qualifications in determining eligibility to vote, and not everyone is qualified. The Constitution does not affirmatively grant or deny anyone the right to vote, and, generally, the right to vote is restricted for "noncitizens, nonresidents,

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25 418 U.S. 24 (1974).

26 377 U.S. 533, 554 (1964).

minors, people deemed incompetent, and [depending on state law,] people convicted of felonies."[27] Disenfranchising felons is not a new idea and is not unique to the United States. The practice of felony disenfranchisement has a long global history.[28] The following Sections examine the history of felony disenfranchisement laws and the Supreme Court case which established their constitutionality.

A. The Idea of Civil Death

The idea of "civil death" dates back to at least ancient Greece and Rome.[29] Civil death deprived citizens of basic civil rights, including the right to vote, when they committed crimes and broke the social contract of a political body.[30] In Greece, criminal offenders lost citizenship rights, "including the right to participate in the *polis* (polity)."[31] In Rome, those who committed infamous crimes lost "the right to vote, participate in court proceedings, or defend the homeland."[32] Even after the fall of the Roman Empire, the practice remained popular throughout medieval Europe and eventually became part of English common-law tradition.[33] Proponents of civil death statutes believed that they deterred undesirable, unlawful, and corrupt behaviors and served the retributive goals of a criminal justice system.[34]

Disenfranchisement laws were also used in colonial-era America, although it is unclear how well-enforced or prevalent they were.[35] One disenfranchisement statute in Connecticut stated that "if any person within these Libberties have been or shall be fyned or whipped for any scandalous offence, hee shall not bee admitted after such time to have any voate in Towne or Commonwealth, nor to serve in the Jury, until the courte shall

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27 TOKAJI, *supra* note 21, at 13.

28 Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 562 (2003).

29 *See, e.g.*, ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 16 (2006) (discussing the Greek and Roman practices of "infamia" which subjected to "civil death" members of the polity who committed crimes); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 23 (2008) (describing the "civil death" practices of Ancient Greece and Rome and Medieval Europe); KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA 28–29 (2d ed. 2013) (discussing the evolution of the Roman practice of "infamia").

30 HULL, *supra* note 29, at 16; MANZA & UGGEN, *supra* note 29, at 23; PETTUS, *supra* note 29, at 28.

31 MANZA & UGGEN, *supra* note 29, at 23.

32 HULL, *supra* note 29, at 16.

33 *Id.*; MANZA & UGGEN, *supra* note 29, at 22.

34 HULL, *supra* note 29, at 16; Behrens et al., *supra* note 28, at 562.

35 MANZA & UGGEN, *supra* note 29, at 24.

manifest theire satisfaction."[36] Massachusetts denied the right to vote for "any shamefull and vitious crime."[37] Maryland imposed loss of political rights as a punishment for "multiple incidences of public drunkenness."[38] Virginia also had a law forbidding former felons from exercising the right to vote,[39] and disenfranchisement laws ultimately became common; "[b]efore the Civil War, nineteen of the thirty-four states in the Union had adopted [legislation to prevent ex-felons from voting], and by 1869 twenty-nine had done so."[40]

During the formative years of the United States, only white male property owners were allowed to vote; thus, it is clear that the early versions of "civic death" statutes were not motivated by racial animus.[41] However, after the Civil War, legislators responded to the extension of the right to vote to black males through the Reconstruction Amendments by adopting new disenfranchisement laws or creating harsher disenfranchisement laws, seeming to purposefully restrict voting rights of black Americans.[42] Between 1890 and 1910, many states in the South held "disenfranchising" constitutional conventions[43] at which they adopted new laws aimed at disenfranchising black voters, including felony disenfranchisement laws, "literacy tests, grandfather and 'understanding' clauses, property qualifications, and poll taxes."[44]

According to "the president of Alabama's all-white 1901 convention," "the purpose of these various measures . . . was 'within the limits imposed by the Federal Constitution to establish white supremacy.'"[45] In 1901, Alabama altered its state constitution and added "wife-beating" to the list of crimes which warranted disenfranchisement.[46] One legislator reasoned that "[t]he crime of wife-beating alone would disqualify 60 percent of the Negroes."[47]

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36 *Id.*

37 *Id.*

38 *Id.*

39 HULL, *supra* note 29, at 17.

40 *Id.*

41 *Id.* at 17–18.

42 *See id.* at 18 (citing statistical analysis that shows most of the disfranchisement laws adopted after the Civil War were adopted as a result of backlash against the ratification of the Fifteenth Amendment); Behrens et al., *supra* note 28, at 566–68 (showing a massive increase in the number of states that disenfranchise, and that disenfranchise felons in the run up to, as well as after, the Civil War).

43 PETTUS, *supra* note 29, at 34.

44 HULL, *supra* note 29, at 18; PETTUS, *supra* note 9, at 34.

45 HULL, *supra* note 29, at 18.

46 *Id.* at 20.

47 Editorial, *A Meaningful Move on Voting Rights in Alabama*, N.Y. TIMES (May 31, 2017), http://www.nytimes.com/2017/05/31/opinion/alabama-governor-felons-voting.html; *see also*

In 1877, Georgia added a "moral turpitude" clause to the disenfranchising clause of its state constitution.[48] In Mississippi, nearly three-quarters of eligible black voters were registered voters in 1867.[49] However, after the state adopted its new criminal code, the number of eligible registered black voters dropped to less than six percent.[50] At Mississippi's constitutional convention in 1890, the legislature "replaced an 1869 provision disenfranchising citizens convicted of 'any crime' with a narrower one barring only those found guilty of certain petty offenses for which [they believed] blacks had an apparent proclivity."[51] Further, Mississippi allowed convicted rapists and murderers to exercise the right to vote, along with those convicted of "'robust' crimes to which whites were susceptible."[52] However, those convicted of "'furtive offenses' to which blacks were reputedly inclined—such as bribery, perjury, bigamy, or miscegenation—forfeited their voting privileges into perpetuity."[53] Thus, for nearly a hundred years, those convicted of rape and murder could exercise the right to vote in Mississippi, but those convicted of violating the ban against interracial marriage could not.[54] In 1850, only about a third of states prevented ex-felons from voting.[55] By 1920, more than three-fourths of states had adopted felony disenfranchisement laws.[56] However, in spite of the prevalence of felony disenfranchisement statutes and circuit court splits on their legality, the Supreme Court did not address felony disenfranchisement laws or constitutional provisions directly until 1974.[57]

HULL, *supra* note 29, at 20.

48 PETTUS, *supra* note 29, at 34.

49 HULL, *supra* note 29, at 21 ("Almost 70 percent of eligible blacks were registered to vote in Mississippi in 1867 . . . .").

50 *Id.*

51 *Id.* at 19.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 22.

56 *Id.*

57 Richardson v. Ramirez, 418 U.S. 24, 53 (1974). In 1885, the Supreme Court indirectly addressed felony disenfranchisement by unanimously upholding the Edmunds Act, "which outlawed bigamy and polygamy in the territories and disenfranchised anyone convicted of either." MANZA & UGGEN, *supra* note 29, at 28 (describing *Cannon v. United States*, 116 U.S. 55, 59, 79 (1885)). In 1890, the Supreme Court upheld an Idaho state constitutional provision which "allow[ed] the state to disenfranchise bigamists." MANZA & UGGEN, *supra* note 29, at 28–29 (describing *Davis v. Beason*, 133 U.S. 333, 347 (1890)). The Court concluded that the Idaho statute was "not open to any constitutional or legal objection." *Davis*, 133 U.S. at 347.

B. Affirming States' Rights to Punish in Perpetuity

In *Richardson v. Ramirez*, the Supreme Court issued a six-to-three opinion written by Justice Rehnquist in which it upheld disenfranchising provisions of the California Constitution and several sections of the California Elections Code that disenfranchised felons.[58] The Court reversed the California Supreme Court's decision applying strict scrutiny to the California restrictions which held that "the enforcement of . . . statutes regulating the voting process and penalizing its misuse—rather than outright disenfranchisement of persons convicted of crime—[was] . . . the method of preventing election fraud which [was] the least burdensome" on the right to vote.[59] According to the California Supreme Court, denying the right to vote to "ex-felons whose terms of incarceration and parole [had] expired" violated the Fourteenth Amendment's Equal Protection Clause.[60] However, the Supreme Court focused on Section 2 of the Fourteenth Amendment, which notes that representation for states that deny the right to vote to male citizens "except for participation in rebellion, or other crime . . . 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."[61] The Court accepted the defendant's argument that "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in [Section 1] of that Amendment that which was expressly exempted from the lesser section of reduced representation imposed by [Section 2] of the Amendment."[62] The Court also noted that, at the time of the adoption of the Fourteenth Amendment, over half of the states included provisions in their state constitutions that disenfranchised those convicted of felonies or other infamous crimes.[63]

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58 *Richardson*, 418 U.S. at 26–31.

59 Ramirez v. Brown, 507 P.2d 1345, 1357 (Cal. 1973), *rev'd sub nom*. *Richardson*, 418 U.S. 24 (1974).

60 *Id.*

61 U.S. CONST. amend. XIV, § 2.

62 *Richardson*, 418 U.S. at 43.

63 *See id.* at 48 ("[A]t 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.").

The Court examined the legislative history of the Fourteenth Amendment, noting that the legislative history of Section 2 was scarce but also that "[w]hat little comment there was on the phrase in question . . . support[ed] a plain reading of it."[64] Even though several alterations to the language of Section 2 were suggested during the floor debates in the House and the Senate, "the language 'except for participation in rebellion, or other crime' was never altered."[65] Still, the Court noted the lack of relevant legislative history. Although the wording of Section 2 was discussed at length, "most of the discussion was devoted to its foreseeable consequences in both the Northern and Southern States, and to arguments as to its necessity or wisdom."[66]

The Court also noted that a legislative solution was more appropriate than a judicial one to address the issue of felony disenfranchisement, stating that "it is not for [the Court] to choose one set of values over the other."[67] The Court reasoned that if a "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," then the Court would not "discount [those] arguments if addressed to the legislative forum which may properly weigh and balance them."[68] Thus, the Court held that Section 2 of the Fourteenth Amendment contains an express sanction of states' rights to strip ex-felons of the right to vote.[69] The Court reversed the Supreme Court of California's judgment, concluding that the California court had erred in holding that California could not disenfranchise convicted felons who had completed their sentences.[70] However, Justice Marshall wrote a fervent dissent, and many others have criticized the Court's decision and analysis.[71]

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64 *Id.* at 45.

65 *Id.*

66 *Id.*

67 *Id.* at 55.

68 *Id.*

69 *Id.* at 54.

70 *Id.* at 56.

71 *Id.* (Marshall, J., dissenting); *see, e.g.*, Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 313–15 (2004); Anthony Gray, *Securing Felons' Voting Rights in America*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 3, 9–10 (2014); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1368–69 (2003); David J. Zeitlin, *Revisiting* Richardson v. Ramirez*: The Constitutional Bounds of Ex-Felon Disenfranchisement*, 70 ALA. L. REV. 259, 281 (2018).

Justice Marshall reasoned that voting is a fundamental right,[72] noting that "neither the fact that several States had ex-felon disenfranchisement laws at the time of the adoption of the Fourteenth Amendment, nor that such disenfranchisement was specifically excepted from the special remedy of § 2, [could] serve to insulate such disenfranchisement from equal protection scrutiny."[73] He noted that there was minimal legislative history regarding "the crucial words 'or other crime.'"[74] He argued that the purpose of Section 2 was to create a remedy of reduced representation to address a specific problem, the denial of the right to vote to eligible black voters, and that just "because Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by § 2 does not necessarily imply congressional approval of this disenfranchisement."[75] He stated that "[t]he ballot is the democratic system's coin of the realm"[76] and argued that there is no reason to think that "ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected" by the government's actions.[77] He reasoned that modern equal protection jurisprudence is constantly evolving and that "laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society."[78] He also argued that felony disenfranchisement marginalizes ex-felons and conflicts with the rehabilitative goals of the criminal justice system.[79] Thus, Justice Marshall concluded that "the blanket disenfranchisement of ex-felons" violated the Equal Protection Clause.[80]

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72 *See Richardson*, 418 U.S. at 56 (Marshall, J., dissenting) ("The Court today holds that a State may strip ex-felons . . . of their fundamental right to vote without running afoul of the Fourteenth Amendment.").

73 *Id.* at 77.

74 *Id.* at 72–73.

75 *Id.* at 75.

76 *Id.* at 83.

77 *Id.* at 78.

78 *Id.* at 82.

79 *See id.* at 79 ("[T]he denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens." (quoting Memorandum of the Sec'y of State of Cal. in Opposition to Certiorari, Class of Cty. Clerks & Registrars of Voters of Cal. v. Ramirez, 418 U.S. 904 (1974) (No. 73-324))).

80 *Id.* at 86.

Others have posed additional criticisms. Section 2's language mentions vaguely "participation in rebellion, or other crime," but at the time the Framers adopted that language, the phrase was more commonly "understood to mean 'such crimes as are now felonies at common law,'"[81] and common law felonies were narrower and fewer than the offenses which qualify as felonies today.[82] Additionally, the Court's opinion shows how a purely textualist approach to interpretation sometimes leads to absurd results. The literal reading of Section 2's language did not allow for the Court to take into account context or changing circumstances.[83] The literal reading also failed to take into account the purpose behind the Fourteenth Amendment, which was "to *expand* voting rights . . . *not* to allow the states to add new restrictions."[84] When the Fourteenth Amendment was adopted, it was "understood as seeking to turn vague natural rights into something concrete and defendable for African Americans, and to nationalize citizenship to override state-level biases."[85]

Interestingly, in spite of the fact that Section 2's language "was designed to encourage the former Confederate states to enfranchise African-Americans by excluding former slaves from the state's population for purposes of apportioning Congress if former slaves were denied the right to vote" after the Civil War, "no discriminating state [has ever] lost even a single seat in the House of Representatives."[86] No court has ever ruled to exclude disenfranchised black voters from a state's population count, even though states in the South methodically and purposefully denied black people the right to vote for decades after Reconstruction, during Jim Crow and beyond.[87] Thus, the representation-reducing language of Section 2 is

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81 HULL, *supra* note 29, at 101 (quoting *Richardson*, 418 U.S. at 51).

82 *See, e.g.*, HULL, *supra* note 29, at 101; MANZA & UGGEN, *supra* note 29, at 31 ("When the Fourteenth Amendment was adopted, disenfranchisement applied only to those convicted of felonies at common law, a far more limited class of offenses than the modern conception of 'felony.'"); John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1195 (2001) (arguing that "[a]ll Section 2 tells us is that a state can deny felons the vote without opening itself to a congressional reduction of its representation in Congress"). *But see, e.g.*, Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1635–38 (2012) (noting that many radicals at the time of the adoption of the Fourteenth Amendment endorsed criminal disenfranchisement but argued against disenfranchisement based on immutable characteristics such as race and class).

83 MANZA & UGGEN, *supra* note 29, at 31.

84 *Id.* at 32.

85 *Id.*

86 Chin, *supra* note 71, at 259–60; Richard Kreitner, *This Long-Lost Constitutional Clause Could Save the Right to Vote*, NATION (Jan. 21, 2015), https://www.thenation.com/article/any-way-abridged/.

87 *Id.*

essentially historical artifact[88] and is not actually used to discourage states from discriminating against voters on the basis of race as was its original purpose.[89] Instead, the *Ramirez* decision ironically allows Section 2 of the Fourteenth Amendment to be used to disenfranchise potential voters, disproportionately people of color,[90] the very group of people the Fourteenth Amendment originally aimed to protect.[91] *Ramirez* essentially legalized discrimination, as long as the target of that discrimination has been convicted of a felony.[92]

II. FELONY DISENFRANCHISEMENT: UNDEMOCRATIC, COUNTERPRODUCTIVE, AND DISCRIMINATORY

The United States imprisons its population at a higher rate than any other country in the world, even surpassing the incarceration rates of "highly repressive regimes like Russia, China, and Iran."[93] Germany incarcerates 93

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88 Congress has never used the representation-reducing language to lessen representation when it apportions itself, and courts have declined to enforce the clause. *See, e.g.*, Saunders v. Wilkins, 152 F.2d 235, 238 (4th Cir. 1945); Chin, *supra* note 71, at 274 n.84 (noting that the Section 2 Clause could be interpreted to force Southern States to choose between giving enfranchisement to all citizens or suffer reduced representation in Congress). In 1945, the Supreme Court denied certiorari on a Fourth Circuit Court of Appeals Case in which Saunders, a potential candidate for Congress, argued that Virginia's representation in Congress should be reduced because of Virginia's poll tax, which had the purpose and effect of discriminating on the basis of race. *Saunders*, 152 F.2d at 236–37. Saunders alleged that if Virginia's representation was reduced as it should be according to Section 2 of the Fourteenth Amendment, then Virginia would be forced to elect its remaining members of Congress in an at-large election. *Id.* at 236. The Fourth Circuit Court of Appeals rejected this argument, holding that Saunders' challenge presented a nonjusticiable political question which could only be decided by the legislative branch. *Id.* at 237.

89 *See, e.g.,* TOKAJI, *supra* note 21, at 17–18 (stating that while not explicitly protecting blacks in the Reconstruction South, the immediate passage of the Fifteenth Amendment suggests this intent); Chin, *supra* note 71, at 260 (stating that no court has ever declared that disenfranchised African-Americans would be excluded from a state's population from the *Plessy* era to present day).

90 *See infra* Section II.A.

91 *See, e.g.*, TOKAJI, *supra* note 21, at 31 (explaining how the Supreme Court used the phrase "other crime" to uphold felony disenfranchisement under the Fourteenth Amendment); Chin, *supra* note 71, at 259 (explaining how the second sentence of Section 2 of the Fourteenth Amendment was meant to "put Southern States to a choice—enfranchise Negro voters or lose congressional representation" (quoting Richardson v. Ramirez, 418 U.S. 24, 73–74 (Marshall, J., dissenting))).

92 *See* ALEXANDER, *supra* note 1, at 6.

93 *Id.*; *see also* Lorna Collier, *Incarceration Nation*, MONITOR ON PSYCHOL., Oct. 2014, at 56, 58; Michelle Ye Hee Lee, *Yes, U.S. Locks People Up At a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015), http://wapo.st/1fjs79L; Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html. Even though the United States "has less than 5 percent of the world's population . . . [i]t has almost a quarter of the world's prisoners." *Id.*

out of every 100,000 children and adults.[94] The United States' incarceration rate is nearly eight times greater than Germany's at a rate of 750 out of every 100,000 children and adults.[95] The United States also imprisons its racial and ethnic minorities at a rate higher than any other country in the world.[96] The United States is the only modern democracy which allows broad voting bans on ex-felons through state laws which disenfranchise former criminals seemingly irrespective of the types of crimes they committed.[97] The following Section examines the United States' felony disenfranchisement practices in light of mass incarceration, which places a large percentage of the United States population under control of the criminal justice system and disproportionately impacts people of color. The next Section considers the goals of the criminal justice system and argues that felony disenfranchisement laws are counterproductive and undemocratic.

A. Mass Incarceration: Legally Stripping Away the Voting Rights of People of Color

In June 1971, President Richard Nixon announced a war on drugs.[98] In 1973, President Nixon created the Drug Enforcement Administration ("DEA").[99] In October 1982, President Ronald Reagan proclaimed his Administration's commitment to the war on drugs, even though "at the time . . . less than 2 percent of the American public viewed drugs as the most important issue facing the nation."[100] President Reagan's Administration increased Federal Bureau of Investigation anti-drug funding by nearly twelve times "from $8 million to $95 million."[101] Largely as a result of the war on drugs and the criminalization of nonviolent drug offenses, over the past few decades, the United States' rates of incarceration have greatly increased: "between 1980 and 2000, the number of people incarcerated in [the United States'] prisons and jails soared from roughly 300,000 to more than 2 million. By the end of 2007, more than 7 million Americans . . . were behind bars, on probation, or on parole."[102] The United States incarcerates its population at

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94 ALEXANDER, *supra* note 1, at 6.

95 *Id.*

96 *Id.* Notably, the United States incarcerates more "of its black population than South Africa did at the height of apartheid." *Id.*

97 Behrens et al., *supra* note 28, at 562 n.3.

98 Editorial, *The War on Drugs*, HISTORY, (May 31, 2017), http://www.history.com/topics/the-war-on-drugs.

99 *Id.*

100 ALEXANDER, *supra* note 1, at 49.

101 *Id.*

102 *Id.* at 60.

> [Most people] arrested for drug crimes are *not* charged with serious offenses, and most of

a rate "six to ten times" more than "other industrialized nations."[103]

Mass incarceration has disproportionately impacted people of color, especially African-Americans and Latinos. Even though white people are more likely than black people to sell drugs, black people are more likely to end up incarcerated for selling drugs.[104] Black people are over five times more likely than white people to be incarcerated in state prisons throughout the United States, and in some states, the disparity between white and black people is even higher.[105] Maryland's prison population is nearly 75% black,[106] even though black people only comprise about 30% of Maryland's total population.[107] Latinos "are imprisoned at a rate that is 1.4 times the rate of whites" in state prisons throughout the United States.[108] In Massachusetts, Latinos are over four times more likely than white people to be imprisoned.[109] In New York, Connecticut, and Pennsylvania, Latinos are over three times more likely to face incarceration than white people.[110]

Because of felony disenfranchisement laws, the disparities in incarceration rates by race ultimately become disparities in voting rights. Regardless of the reasons for the disparities, if targeted criminal justice reforms are not made, the disproportionate impact on African-Americans and Latinos will only increase.[111] If existing trends continue, "one in six

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the people in state prison on drug charges have no history of violence or significant selling activity. Those who are "kingpins" are often able to buy their freedom by forfeiting their assets, snitching on other dealers, or becoming paid government informants.

Id. at 209.

103 *Id.* at 7–8.

104 *Id.* at 7; Christopher Ingraham, *White People Are More Likely to Deal Drugs, but Black People Are More Likely to Get Arrested for It*, WASH. POST (Sept. 30, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-black-people-are-more-likely-to-get-arrested-for-it/.

105 ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

106 *Id.*

107 *QuickFacts: Maryland*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/MD (last visited Mar. 7, 2019).

108 Nellis, *supra* note 105, at 3.

109 *Id.*

110 *Id.*

111 *See generally* Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, 37 HUM. RTS. 14–16 (Fall 2010) (explaining that criminal justice reform activists have put forth numerous hypotheses to explain the cause of racial disparities in the criminal justice system, including inequitable access to resources, legislation which disproportionately impacts black and brown people, overt racial bias, and higher crime rates); *see also* THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 5–9 (2008) (proposing there is a notable difference between rates of offending and rates of arrest); *id.* at 5 (arguing that figures which only report arrests "reflect

Latino men"[112] and "[o]ne in three young African-American men will serve time in prison . . . and in some cities more than half of all young adult black men are [already] under correctional control—in prison or jail, on probation or parole."[113] Thus, because mass incarceration disproportionately affects African-Americans and Latinos, the voting strength of both groups is diluted because of felony disenfranchisement laws.[114]

B. How Felony Disenfranchisement Laws Undermine the Principles of Democracy and the Goals of the Criminal Justice System

In 1964, Justice Warren wrote "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."[115] In a democracy, the right to vote is protective of all other rights. It is antidemocratic to "hold citizens to account for violating our laws while denying them a say over those laws."[116] Recognizing that disenfranchising large swaths of the population is undemocratic, Israel, Canada, South Africa, and other modern democracies around the world have recently restored voting rights to inmates and ex-inmates.[117] Like the United States, South Africa has a history of segregation.[118] The South African government's policy of apartheid, which officially segregated white and nonwhite South Africans, officially ended in 1991.[119] In 1999, the South African

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the frequency with which crimes are reported, police decisions regarding offenses on which they will concentrate their attention and resources, and the relative vulnerability of certain crimes to arrest."); *id.* at 6 (noting that while some people allege that the racial disparities in the criminal justice system are because people of color commit more crimes, "empirical analyses do not support this claim").

112 Mauer, *supra* note 111, at 14.

113 ALEXANDER, *supra* note 1, at 9.

114 *Id.* at 9; *see also id.* at 4–9 (hypothesizing that mass incarceration and felony disenfranchisement laws "function . . . in a manner strikingly similar to Jim Crow."); Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875, 1886 (2005) (explaining the history of disenfranchisement statutes that were implemented and enforced after the Civil War); Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for A Second Look*, 142 U. PA. L. REV. 1145, 1159 (1994) ("After such discrimination removes more blacks from society than whites, disenfranchisement serves to remove them from the ranks of black voter, the numbers of which are already comparatively lower than whites.").

115 Reynolds v. Sims, 377 U.S. 533, 562 (1964).

116 Gideon Yaffe, *Give Felons and Prisoners the Right to Vote*, WASH. POST (July 26, 2016), http://wapo.st/2a7jHRD.

117 MANZA & UGGEN, *supra* note 29, at 38 (comparing U.S. disenfranchisement with other countries).

118 *See generally Apartheid,* HISTORY, http://www.history.com/topics/apartheid (last visited May 14, 2019) (stating segregation in South Africa started long before Apartheid).

119 *Id.*

Constitutional Court wrote:

> The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power . . . exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.[120]

Especially in countries like the United States and South Africa with histories of government-sponsored segregation, a democracy should be inclusive. Ex-felons constitute a large group of people in the United States,[121] and their exclusion from the political process is undemocratic and unjust. The United Nations Human Rights Committee has even "charged that U.S. disenfranchisement policies are discriminatory and violate international law."[122] Without the ability to vote and make their voices heard, ex-felons will "continue to be denied decent housing, tuition vouchers, professional licenses, secured loans, and even some parental privileges until they are able to protect themselves through the electoral process."[123] Without the right to vote, ex-felons will continue to face marginalization in every facet of society through severe collateral consequences, which makes it extremely difficult for ex-felons, as a group, to reenter society.[124]

One of the primary goals of the criminal justice system is rehabilitation.[125] A criminal justice system which is purely retributive "introduces offenders to long-term risks that . . . increase their chances of repeating the same problematic behaviors."[126] Effective rehabilitation has been shown to decrease recidivism by 10–25%.[127] Felony disenfranchisement conflicts with the rehabilitative goals of the criminal

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120 *August v. Electoral Comm'n* 1999 (3) SA 1 (CC) at 10 para. 17 (S. Afr.).

121 *See supra* notes 17–21 and accompanying text.

122 ALEXANDER, *supra* note 1, at 158.

123 HULL, *supra* note 29, at 35–36. One student comment proposed that ex-offenders should be treated as a suspect class, arguing that the political process failures which plague ex-offenders as a class make them politically powerless and especially vulnerable to prejudicial action by the government. Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1226–29 (2006) (describing the degree of discreteness and insularity of ex-felons).

124 Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 204–05 (2004) (showing the correlation between voting and incarceration).

125 *See generally* Mark R. Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697 (2015); Beth M. Huebner, *Rehabilitation*, OXFORD BIBLIOGRAPHIES (Dec. 14, 2009), http://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0046.xml.

126 Fondacaro et al., *supra* note 125, at 710.

127 JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW CASES AND MATERIALS 41 (7th ed. 2015).

justice system by discouraging civic participation. Political theorist John Stuart Mill hypothesized that democracy promotes active citizenship and that regular participation in politics allows citizens to identify with society's norms and values.[128] Accordingly, restoring voting rights to ex-felons may "facilitate reintegration efforts" and perhaps even improve public safety.[129]

According to one study, there is a notable correlation between political participation and rates of arrest, incarceration, and recidivism: "[a]mong former arrestees, about 27% of . . . non-voters were re-arrested, relative to 12% of . . . voters."[130] The authors of the study noted their small sample size and acknowledged that their ideas are "largely speculative" regarding voting and its connection to crime.[131] Still, they argued that "[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime" and that "the right to vote remains the most powerful symbol of stake-holding in our democracy."[132] When ex-felons become engaged in their communities by participating in the political process, "there is [at least] some evidence that they will bring their behavior into line with the expectations of the citizen role, avoiding further contact with the criminal justice system."[133]

III. CHALLENGING FELONY DISENFRANCHISEMENT LAWS: WHY LEGISLATION IS THE BEST ANSWER

Since *Richardson v. Ramirez* in 1974, voting rights advocates and criminal justice activists have attempted to utilize numerous tools to challenge felony disenfranchisement laws with little long-term, widespread, or replicable success, including the Equal Protection Clause's prohibition on intentional racial discrimination, the Voting Rights Act[134] (the "VRA"), and state constitutions. However, all of these tools are inadequate and have failed to produce systemic change. Thus, this Article argues that Congress should adopt a federal statute which provides that states cannot disenfranchise people on the basis of a prior felony conviction or prior felony convictions for which they have completed their sentences.

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128 Uggen & Manza, *supra* note 124, at 198.

129 *Id.* at 194.

130 *Id.* at 205.

131 *Id.* at 195 ("Establishing a causal relationship between voting . . . and recidivism would require a large-scale longitudinal survey that tracked released felons in their communities and closely monitored changes in their political and criminal behavior. At present, no such data exist.").

132 *Id.* at 214–15.

133 MANZA & UGGEN, *supra* note 29, at 163.

134 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

A. The Equal Protection Clause and Section 2 of the Voting Rights Act

In most challenges to felony disenfranchisement laws, plaintiffs make claims under both the Fourteenth Amendment's Equal Protection Clause and Section 2 of the VRA. Section 2 has been a "source of considerable—and ultimately unsuccessful—litigation in recent years."[135] Section 2 was not particularly significant at first because it simply reaffirmed the guarantees of the Fifteenth Amendment's ban on racial discrimination in voting.[136] Congress amended Section 2 in 1982 to include a "results" test which bars voting practices with racially discriminatory results with no intent requirement, which transformed Section 2 into a powerful tool in and of itself.[137] The Supreme Court has never specifically addressed the applicability of Section 2 of the VRA to felony disenfranchisement laws.[138] Thus, circuits are split as to how they apply it in the context of felony disenfranchisement lawsuits.[139]

The only successful challenges to felony disenfranchisement laws have been constitutional challenges based on intentional racial discrimination, specifically "claims of impermissible discrimination in the definition of disenfranchisement-triggering offenses."[140] Although challenges to felony disenfranchisement laws under the Equal Protection Clause have had more success than challenges under Section 2 of the VRA, the Equal Protection

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135 SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 887 (5th ed. 2016).

136 TOKAJI, *supra* note 21, at 26–27.

137 *See generally id.* at 112–36 (discussing the "results" test and successive cases interpreting it). There are two types of Section 2 claims: 1) vote dilution claims and 2) vote denial claims. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006). A vote dilution claim addresses "practices that diminish minorities' political influence in places where they are allowed to vote. Chief examples of vote-dilution practices include at-large elections and redistricting plans that keep minorities' voting strength weak." *Id.* A vote denial claim addresses "practices that prevent people from voting or having their votes counted. . . . [E]xamples [include] literacy tests, poll taxes, all-white primaries, and English-only ballots." *Id.* Voting rights advocates continue to find new and innovative ways to utilize the VRA. *Id.* "The first generation of VRA enforcement focused mainly on vote denial, while the second generation . . . focused mainly on vote dilution. The application of the VRA to practices such as felon disenfranchisement, voting machines, and voter ID laws represents a new generation of VRA enforcement." *Id.* at 691–92.

138 *See* Tokaji, *The New Vote Denial*, *supra* note 137, at 700–01 (noting that three federal courts of appeal have considered questions regarding felony disenfranchisement laws). Because the Supreme Court has never specifically articulated a standard for Section 2 claims in the context of felony disenfranchisement laws, "the legal standard applicable to felon disenfranchisement and other voter qualifications under Section 2 of the VRA is anything but clear." *Id.* at 701.

139 Johnson v. Bush, 405 F.3d 1214, 1227 (11th Cir. 2005); Roger Clegg et al., *The Case Against Felon Voting*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 1, 6 (2008).

140 ISSACHAROFF ET AL., *supra* note 135, at 887.

Clause is still an ineffective tool for challenging most felony disenfranchisement laws because it requires proof of intentional racial discrimination, which is notoriously difficult to prove.[141]

The Supreme Court addressed the Equal Protection Clause as applied to felony disenfranchisement laws in *Hunter v. Underwood* in 1985.[142] In *Hunter,* the Court issued a unanimous opinion, holding that Section 182 of the Alabama Constitution, which disenfranchised those convicted of numerous enumerated crimes and "crimes involving moral turpitude," was unconstitutionally adopted to intentionally discriminate on the basis of race.[143] The Court acknowledged that deciphering legislative intent is a difficult task but noted that the Alabama Constitutional Convention of 1901 "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks" and that "[t]he delegates to the all-white convention were not secretive about their purpose."[144] The President of the convention even "stated in his opening address: 'And what is it that we want to do? . . . [T]o establish white supremacy in this State.'"[145] Further, "the suffrage committee [of the convention] selected such crimes as vagrancy, living in adultery, and wife beating that were thought to be more commonly committed by blacks."[146] The Court limited the *Hunter* holding and reasoned that it did not conflict with the holding in *Ramirez* because Section 2 of the Fourteenth Amendment was not created to allow for intentional racial discrimination, which violates Section 1 of the Fourteenth Amendment.[147] The Court noted that the *Ramirez* opinion did not suggest otherwise.[148]

After *Hunter,* voting rights advocates brought additional challenges to felony disenfranchisement laws under the Equal Protection Clause, but circuit courts have only rarely found state laws to have been adopted with discriminatory intent. In 1995 in *McLaughlin v. City of Canton,* a district court in Mississippi found that the plaintiff's assertion that the Mississippi Constitution's disenfranchising provision was adopted with racially discriminatory intent had "credible support," but it did not rule specifically

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141 *See infra* text accompanying notes 151–70. *But see* McLaughlin v. City of Canton, 947 F. Supp. 954, 978 (S.D. Miss. 1995) (noting that the plaintiff's equal protection disenfranchisement attack had credible merit).

142 471 U.S. 222, 232–33 (1985).

143 *Id.*

144 *Id.* at 229.

145 *Id.* (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, at 8 (1940)).

146 *Id.* at 232.

147 *Id.* at 233.

148 *Id.*

on this issue because "the key points of this attack were not briefed, nor argued."[149] However, the court applied strict scrutiny to Mississippi's disenfranchisement law and concluded that it violated the Equal Protection Clause to disenfranchise the plaintiff because of a misdemeanor conviction since the state had not demonstrated a substantial and compelling reason for its law.[150]

By contrast, the Fifth Circuit rejected a similar claim. In *Cotton v. Fordice*, a then-incarcerated inmate challenged his disenfranchisement under the Mississippi Constitution, arguing that the provision which disenfranchised him was originally adopted with racially discriminatory intent.[151] The Fifth Circuit held that "the state was motivated by a desire to discriminate against blacks," but the subsequent amendments to the provision "removed the discriminatory taint associated with the original version."[152] Thus, while the Equal Protection Clause has produced more success than other litigation tools in the context of felony disenfranchisement laws, it is still an unreliable tool, along with Section 2 of the VRA.

The Natural Rights Center filed a lawsuit in Tennessee, the birthplace of the Ku Klux Klan,[153] a year after the Supreme Court's ruling in *Hunter*, in the first felony disenfranchisement case after the VRA's 1982 amendment.[154] The Natural Rights Center alleged violations of both the Equal Protection Clause and Section 2 of the VRA.[155] In *Wesley v. Collins*, Charles Wesley, a black male who had been disenfranchised by pleading guilty "to a charge of accessory after the fact to the crime of larceny,"[156] made similar claims to those in *Hunter*.[157] He argued that a Tennessee statute that disenfranchised those convicted of "infamous crimes"[158] was intentionally racially discriminatory in violation of the Equal Protection Clause.[159] Wesley also

149 947 F. Supp. 954, 978 (S.D. Miss. 1995).

150 *Id.* at 976.

151 157 F.3d 388, 389–90 (5th Cir. 1998).

152 *Id.* at 391.

153 *Ku Klux Klan*, HISTORY, http://www.history.com/topics/ku-klux-klan (last updated Mar. 13, 2019).

154 *See supra* notes 136–137, 142, 144 and accompanying text.

155 *Ku Klux Klan*, *supra* note 153.

156 Wesley v. Collins (*Wesley I*), 605 F. Supp. 802, 804 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

157 *See id.* (discussing the plaintiffs' claims alleging that the Tennessee Voting Rights Act of 1981 denied them Fourteenth and Fifteenth Amendment Rights and rights secured under the Voting Rights Act Amendments of 1982).

158 *Id.* at 804. The phrase "infamous crimes" was defined as felony convictions. Wesley v. Collins (*Wesley II*), 791 F.2d at 1258.

159 *Wesley I*, 605 F. Supp. at 804.

argued that the statute violated Section 2 of the VRA because it "result[ed] in the unlawful dilution of the black community's voting strength."[160] However, a district court dismissed the lawsuit,[161] and the Sixth Circuit Court of Appeals affirmed the dismissal, noting that Wesley had not presented sufficient evidence to prove that the Tennessee legislature had acted with discriminatory intent so as to violate the Fourteenth Amendment, nor had Wesley shown that the disproportionate impact on black voters had resulted from any state "qualification[s] of the right to vote on account of race or color" so as to violate Section 2 of the VRA.[162] The district court noted that the statute at issue did not deny ex-felons the right to vote based on race but instead based on a "conscious decision to commit an act for which they assume the risks of detection and punishment."[163]

In affirming the district court's holding, the Sixth Circuit Court of Appeals went so far as to say that "the further discovery requested by plaintiffs would be in the nature of a fishing expedition for unspecified evidence,"[164] even though Wesley had provided evidence of a history of official state-sanctioned discrimination and mistreatment of black people in Tennessee "marked by limited access to and segregation in the provision of health care, housing and education, and by sustained efforts to prevent blacks from registering to vote."[165] Wesley also showed that, as a result of the lasting legacy of that discrimination, "the ratio of white felons to the general population of Tennessee whites [was] approximately 1 to 1000, while the corresponding black ratio [was] 1 to 100."[166]

Critics of the *Wesley II* decision have noted that "[b]y demanding proof that a disputed electoral practice was motivated by racial discrimination, [the] court reintroduced the 'intent' requirement that Congress enacted the [Voting Rights Act's] 1982 amendments expressly to disavow."[167] In *Wesley II,* the Sixth Circuit Court of Appeals basically increased the proof requirement for a Section 2 violation from a "results" test into a variation of the Equal Protection Clause's intent requirement, which renders Section 2 essentially useless without evidence of a smoking gun, like the Equal Protection Clause.[168] The Fourth Circuit followed suit in *Howard v. Gilmore*,

160 *Id.*
161 *Id.* at 814.
162 *Wesley II*, 791 F.2d at 1262–63.
163 *Wesley I*, 605 F. Supp. at 813.
164 *Wesley II*, 791 F.2d at 1262–63.
165 *Wesley I*, 605 F. Supp. at 804.
166 *Id.*
167 HULL, *supra* note 29, at 108.
168 *Id.*

reasoning that:

> [A Section 2] plaintiff must establish that [the government's] act either was intended to, or had the effect of . . . denying the right to vote based upon race. . . . Virginia's exclusion of felons from the franchise pre-dates the enfranchisement of African-Americans. . . . [and the plaintiff] failed to plead any nexus between the disenfranchisement of felons and race.[169]

A causal "nexus" requirement is arguably a restatement of the intent requirement of the Equal Protection Clause.[170]

The Ninth Circuit Court of Appeals expressly requires a showing of intentional discrimination for a Section 2 violation.[171] In 2010, in *Farrakhan v. Gregoire (Farrakhan II)*, the court held that "plaintiffs bringing a section 2 VRA 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."[172] In *Farrakhan I,* the court held that "statistical evidence" of "racial disparities" in "Washington's criminal justice system" could provide evidence of a Section 2 violation, but *Farrakhan II* held that *Farrakhan v. Washington* (*Farrakhan I*) "swe[pt] too broadly."[173] The court noted that felony disenfranchisement "takes effect only after an individual has been found guilty of a crime," and that the criminal justice system "has its own unique safeguards and remedies against arbitrary, invidious or mistaken conviction."[174] The court went so far as to note that even the required showing of intent as applied to a felony disenfranchisement law might not "*necessarily* establish" a Section 2 violation.[175]

Several circuit courts have held that Section 2 does not even apply to felony disenfranchisement laws. In *Johnson v. Bush*, a 2005 challenge to Florida's felony disenfranchisement provision of the Florida Constitution, a district court granted summary judgment to defendants, members of Florida's Clemency Board.[176] Plaintiffs claimed that Florida's law had been adopted with racially discriminatory intent in violation of the Equal Protection Clause and had a racially disproportionate effect in violation of

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169 Howard v. Gilmore, 205 F.3d 1333 (4th Cir. 2000) (internal citations omitted).

170 HULL, *supra* note 29, at 108.

171 Farrakhan v. Gregoire (*Farrakhan II*), 623 F.3d 990, 993 (9th Cir. 2010).

172 *Id.*

173 *Id.* at 992–93 (quoting and citing *Farrakhan v. Washington* (*Farrakhan I*), 338 F.3d 1009 (9th Cir. 2003)).

174 *Id.* at 993.

175 *Id.* at 993–94.

176 405 F.3d 1214, 1215–17 (11th Cir. 2005).

Section 2 of the VRA.[177] The Eleventh Circuit Court of Appeals affirmed the district court's judgment, holding that plaintiffs were unable to provide the requisite showing of intent for the Equal Protection Clause claim.[178] As proof of racial animus, plaintiffs had provided statements made *after* the 1868 Constitutional Convention at which Florida's felony disenfranchisement provision was adopted, but the court found that those racially biased statements were not adequately contemporaneous enough to prove racially discriminatory intent.[179] Further, the court relied heavily on the fact that Florida amended and re-enacted its disenfranchisement provision in 1968, narrowing it to disenfranchise only those with felony convictions.[180] Like the Fifth Circuit Court of Appeals in *Cotton*,[181] the Eleventh Circuit Court of Appeals reasoned that, even if Florida's disenfranchisement provision had been originally adopted with racially discriminatory intent, its re-enactment had cleansed it from "allegedly discriminatory" motives.[182] The court declined to apply Section 2 to Florida's law, reasoning that Congress had intended to "*exclude* felon disenfranchisement provisions from Voting Rights Act scrutiny."[183] The court distinguished felony disenfranchisement laws from other laws creating voting qualifications by noting that felony disenfranchisement laws are "deeply rooted in this Nation's history and are a punitive device stemming from criminal law."[184] The court cited *Ramirez* and noted that "despite [Section 2's] broad language, [it] does not prohibit all voting restrictions that may have a racially disproportionate effect."[185] Under the Fourteenth Amendment, the court found that Florida had "discretion to deny the vote to convicted felons," regardless of the impact.[186]

177 *Id.* at 1217.
178 *Id.* at 1219–23.
179 *Id.* at 1219–20.
180 *Id.* at 1224.
181 *See supra* notes 151–52 and accompanying text.
182 *Johnson*, 405 F.3d at 1224.
183 *Id.* at 1234.
184 *Id.* at 1228.
185 *Id.*
186 *Id.*

Similarly, in *Hayden v. Pataki*, a 2006 case which challenged felon disenfranchisement laws in New York under the VRA's "results" test, the Second Circuit Court of Appeals held that the VRA did not "encompass felon disenfranchisement laws."[187] In spite of evidence that New York disproportionately "penalize[d] black and Hispanic felons far out of proportion to their numbers,"[188] the court reasoned that, even though a literal reading of the text of the VRA would likely apply to felony disenfranchisement laws, "[h]ere, there are persuasive reasons to believe that Congress did not intend to include felon disenfranchisement provisions within the coverage of the Voting Rights Act."[189] As evidence of Congress's alleged intent to exclude felons from VRA coverage, the court mentioned:

> (1) the explicit approval given such laws in the Fourteenth Amendment; (2) the long history and continuing prevalence of felon disenfranchisement provisions throughout the United States; (3) the statements in the House and Senate Judiciary Committee Reports and on the Senate floor explicitly excluding felon disenfranchisement laws from provisions of the statute; (4) the absence of any affirmative consideration of felon disenfranchisement laws during either the 1965 passage of the Act or its 1982 revision; (5) the introduction thereafter of bills specifically intended to include felon disenfranchisement provisions within the VRA's coverage; (6) the enactment of a felon disenfranchisement statute for the District of Columbia by Congress soon after the passage of the Voting Rights Act; and (7) the subsequent passage of statutes designed to facilitate the removal of convicted felons from the voting rolls.[190]

In a notable dissenting opinion, Judge Parker noted a relationship between mass incarceration, forbidden race discrimination, and voting, arguing that "the fact that felon disenfranchisement statutes may sometimes be constitutional does not mean they are always constitutional."[191] The district court granted defendants' motion for judgment on the pleadings rather than allowing for a summary judgment record, as Judge Parker preferred.[192] Judge Parker argued that plaintiffs should at least be able to develop a substantive record.[193] He reasoned as follows:

> Suppose, for example, [plaintiffs] were able to demonstrate that the dramatically different incarceration rates for minorities and Whites in New York were largely driven by drug convictions and reflected the manner in which law enforcement resources were deployed in the "war on drugs." Suppose they showed that law enforcement officials (and task forces)

187 Hayden v. Pataki (*Hayden II*), 449 F.3d 305, 323 (2d Cir. 2006).

188 HULL, *supra* note 29, at 108–09.

189 *Hayden II*, 449 F.3d at 315.

190 *Id.* at 315–16.

191 *Id.* at 345 (Parker, J., dissenting).

192 Hayden v. Pataki (*Hayden I*), No. 00-CV-8586, 2004 WL 1335921, at *8 (S.D.N.Y. June 14, 2004).

193 *Hayden II*, 449 F.3d at 344–345 (Parker, J., dissenting).

> concentrated resources on street-level users/dealers of heroin and crack cocaine in minority neighborhoods (because the problems were worse and arrests were easier in such areas) but, at the same time, devoted comparatively little attention to areas where Whites were abusing those same illegal drugs at the same rates (and powder cocaine at higher rates). Suppose they also showed that Whites received probation three times as frequently as similarly situated Blacks or Latinos for similar crimes. Neither showing is remotely beyond the realm of possibility in New York, and I believe this type of proof could constitute some evidence of a VRA violation.[194]

Judge Parker further cited the plain meaning of the statute as evidence that the VRA should apply to felony disenfranchisement claims,[195] but the majority rejected Parker's argument, reasoning that they "must . . . look beyond the plain text of the statute in construing the reach of its provisions"[196] because the literal reading of the text would conflict with the intentions of those who drafted it.[197]

The First Circuit Court of Appeals agreed with the *Hayden II* majority in *Simmons v. Galvin*.[198] In 2000, voters in Massachusetts adopted Article 120, which altered the Massachusetts Constitution to disenfranchise "currently incarcerated felons."[199] A group of incarcerated felons challenged the statute under Section 2.[200] The court held that Section 2 did not apply to felony disenfranchisement laws, reasoning that "[w]hen we look at the terms of the original VRA as a whole, the context, and recognized sources of congressional intent, it is clear [that Section 2] . . . was not meant to create a cause of action against a state which disenfranchises its incarcerated felons."[201] When Congress amended the VRA in 1982, it did so "'to make clear that *certain* practices and procedures . . . are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge' . . . . Felon disqualification was not" one of them, the court reasoned.[202] The court expressly stated that it agreed "with the Second Circuit in *Hayden* that the seven circumstances[203] it identifie[d] all necessitate

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194 *Id.* at 345.

195 *Id.* at 346–48.

196 *Id.* at 315 (majority opinion).

197 *See id.* at 322–23 ("[W]e deem this one of the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (second alteration in original) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989))).

198 Simmons v. Galvin (*Simmons I*), 575 F.3d 24, 35 (1st Cir. 2009).

199 *Id.* at 26.

200 *Id.*

201 *Id.* at 35–36.

202 *Id.* at 39 (quoting Chisom v. Roemer, 501 U.S. 380, 383–84 (1991)).

203 *See supra* note 190 and accompanying text.

the conclusion that . . . this claim is not actionable."[204] Notably, in 2010, the Supreme Court issued a one-sentence certiorari denial and declined to hear the *Simmons I* plaintiffs' appeal.[205] Thus, it seems unlikely that the Supreme Court will resolve the circuit split on Section 2 anytime soon.

Accordingly, both the Fourteenth Amendment's Equal Protection Clause and Section 2 of the Voting Rights Act as applied to felony disenfranchisement laws are ineffective tools which have not worked to create mass systemic change. The Equal Protection Clause's intent requirement basically necessitates a smoking gun to prove purposeful and intentional racial animus as applied to felony disenfranchisement laws; the standard of racially discriminatory intent is extremely burdensome.[206] As a result, very few challenges to felony disenfranchisement laws under the Equal Protection Clause have succeeded.[207] In the Fourth and Sixth Circuits, proof of a Section 2 violation arguably requires an onerous variation of proof of intent in the form of a causal nexus.[208] At the very least, both circuits have declined to invalidate felony disenfranchisement laws under Section 2 of the VRA.[209] The Ninth Circuit expressly requires a showing of intentional discrimination as proof of a Section 2 violation.[210] In the First, Second, and Eleventh Circuits, Section 2 does not even apply to felony disenfranchisement laws, regardless of the disproportionate impact the laws may or may not have on protected minority groups.[211] Both the Equal Protection Clause and Section 2 require a fragmented and disconnected fact-specific approach to challenge felony disenfranchisement laws, and most courts have repeatedly shown a reluctance to invalidate the laws under either approach.

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204 *Simmons I*, 575 F.3d at 42.

205 Simmons v. Galvin (*Simmons II*), 562 U.S. 980 (2010).

206 *See supra* text accompanying notes 151–70.

207 *See supra* notes 140–52 and accompanying text.

208 *See supra* notes 156–70 and accompanying text.

209 *See* Howard v. Gilmore, No. 99-2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000) (per curiam) (affirming the lower court's summary disposition rather than questioning felony disenfranchisement provisions); *Wesley II*, 791 F.2d 1255, 1263 (6th Cir. 1986) (affirming the lower court's summary disposition rather than questioning felony disenfranchisement provisions).

210 *See supra* notes 171–75 and accompanying text.

211 *See supra* notes 176–205 and accompanying text.

B. State Constitution Challenges

Challenges to felony disenfranchisement laws under state constitutions have fared similarly. In a challenge to New Jersey's felon disenfranchisement law, plaintiffs argued that New Jersey's disenfranchisement statute, which disenfranchised "all people on parole or probation for indictable offenses," violated the state's equal protection doctrine under the state constitution.[212] Plaintiffs did not argue that the statute had been adopted with discriminatory intent but argued only that the New Jersey criminal justice system discriminated against African-Americans and Hispanics, "thereby disproportionately increasing their population among parolees and probationers and diluting their political power."[213] The Appellate Division of New Jersey's Superior Court affirmed the lower court's dismissal of the complaint, reasoning that there was an express textual warrant for felon disenfranchisement in the New Jersey Constitution.[214] The court noted that, if the statute had been adopted with racially discriminatory intent, it would violate New Jersey's equal protection doctrine, but disparate impact related to a facially neutral statute was "an insufficient basis for relief."[215]

In Iowa, Kelli Griffin challenged the loss of her voting rights after her conviction for delivery of a controlled substance.[216] The Iowa Constitution disenfranchises those convicted of an "infamous crime."[217] She argued that her nonviolent drug offense did not qualify as an "infamous crime."[218] However, the Iowa Supreme Court affirmed the district court's ruling and concluded that Iowa's Constitution allows for disenfranchisement of felons "until pardoned or otherwise restored to the rights of citizenship."[219] The court noted that felony disenfranchisement disproportionately impacts black people and other racial groups but stated that "this outcome is tied to our criminal justice system as a whole and is not isolated to the use of the infamous-crime standard."[220] Further, there was no evidence that the state had adopted the "infamous crimes" language with the intent to discriminate based on race.[221] The court said that it would be up to Iowa's "future

212 N.J. State Conference-NAACP v. Harvey, 885 A.2d 445, 446 (N.J. Super. Ct. App. Div. 2005).
213 *Id.*
214 *Id.* at 446–48.
215 *Id.* at 448.
216 Griffin v. Pate, 884 N.W.2d 182, 183 (Iowa 2016); *see supra* notes 9–15 and accompanying text.
217 *Griffin*, 884 N.W.2d at 183.
218 *Id.*
219 *Id.*
220 *Id.* at 203.
221 *Id.*

democracy" to address the issues associated with felony disenfranchisement laws.[222]

Like challenges to felony disenfranchisement laws under the Fourteenth Amendment's Equal Protection Clause and Section 2 of the VRA, state constitutional challenges have failed to produce widespread systemic change. Additionally, even if future challenges under state constitutions led to restoration of voting rights for ex-felons in that particular state, it is unlikely that those results would be replicable because state constitutions vary widely. Thus, the necessity for nationwide uniform relief for ex-felons in the form of a federal statute is all the more imperative.

C. The Necessity of a Federal Statute

The traditional litigation tools used to challenge infringements on the right to vote have not succeeded at providing relief from archaic felony disenfranchisement laws. The Fourteenth Amendment's Equal Protection Clause has resulted in a few victories, but the standard of proof of intentional discrimination is extremely difficult to meet. Although some cases may present facts allowing for an Equal Protection challenge, those cases are few and far between. Section 2 of the VRA held promise after the 1982 amendments which altered the proof requirement from an intent standard to a "results" test. However, courts have chipped away at Section 2 in subsequent litigation in the context of felony disenfranchisement laws so that, depending on the circuit in which a challenge is brought, Section 2 either does not apply to felony disenfranchisement laws at all, or the standard of proof is basically or expressly one of intent. Challenges under state constitutions have also failed to provide long-term or replicable solutions, and a state-by-state approach is inefficient regardless of the potential relief under individual state constitutions. Highly tailored litigation under each state's constitution does not provide comprehensive relief. Even legislation on a state-by-state basis is problematic; the issue of felony disenfranchisement should not be left to the states to individually legislate because it would likely result in a patchwork of relief from felony disenfranchisement laws which would leave ex-felons in certain areas of the United States with no solution.[223]

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222 *Id.* at 205.

223 *See, e.g.*, HULL, *supra* note 29, at 91 (arguing that "Congress alone can overcome the obstructionist and parochial interests that historically have prevented individual states from democratizing their voting procedures"); Lynn Eisenberg, *States As Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 539, 582 (2012) (arguing that the theory of states as "laboratories of democracy" encourages states to seek regional solutions rather than national ones and that the federal government is best suited to address the issue of felony

Thus, the best solution with the most potential for a comprehensive and uniform approach, the solution which would have the greatest impact by restoring voting rights to the most people, is a federal statute.[224]

In recent years, criminal justice reform has gained momentum and bipartisan support. In the United States' current political climate, there are very few substantive areas where Democrats and Republicans agree, but the importance of criminal justice reform is one of them.[225] However, felony disenfranchisement laws are still a polarizing issue with laws varying widely depending on the state. A few politicians have recognized the injustice of felony disenfranchisement laws and have voiced support for restoring voting rights to ex-felons. In 2014, Republican Senator Rand Paul told a Kentucky State Senate committee debating an amendment to the Kentucky Constitution which would restore voting rights to some ex-felons that "[k]ids do make mistakes. White kids make mistakes. Black kids make mistakes. Brown kids make mistakes . . . [b]ut when you look at the prison population, three out of the four people in prison are black or brown."[226] Democratic

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disenfranchisement). *But see, e.g.*, Martine J. Price, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL'Y 369, 399–400 (2002) (arguing that a federal statute restoring voting rights would face practical and logistical issues and that "local legislators may be more likely to change state disenfranchisement laws because they operate on a smaller, more flexible scale and are less likely" to face public scrutiny).

224 Another option is a constitutional amendment, but a constitutional amendment is extremely unlikely. The Constitution has been amended only seventeen times since 1791. *Additional Amendments of the Constitution*, BILL OF RTS. INST., https://www.billofrightsinstitute.org/founding-documents/additional-amendments/ (last visited Feb. 24, 2019). Many of the amendments to the Constitution have expanded voting rights. *Id.* The Fifteenth Amendment extended the franchise to ex-slaves, and the Nineteenth and Twenty-Sixth Amendments did the same for women and citizens eighteen and older, respectively. *See* HULL, *supra* note 29, at 82. Still, it is unlikely that restoration of the right to vote to ex-felons would garner the requisite support for a constitutional amendment because a constitutional amendment requires "a two-thirds majority vote in both the House of Representatives and the Senate or . . . a constitutional convention called for by two-thirds of the State legislatures." *Constitutional Amendment Process*, NAT'L ARCHIVES, https://www.archives.gov/federal-register/constitution (last visited Feb. 24, 2019). At the beginning of each new legislative session during the 2000s, Representative Jesse Jackson Jr. proposed a right-to-vote constitutional amendment, which would have guaranteed the franchise to every American citizen over eighteen years old. *See* HULL, *supra* note 29, at 87. The proposed amendment eventually gained over fifty co-sponsors, but it still did not get much attention. John Nichols, *Time for a 'Right to Vote' Constitutional Amendment*, NATION (Mar. 5, 2013), https://www.thenation.com/article/time-right-vote-constitutional-amendment/.

225 Noah Atchison, *Bipartisan Efforts on Criminal Justice Reform Continue*, BRENNAN CTR. FOR JUST. (June 27, 2017), https://www.brennancenter.org/blog/bipartisan-efforts-criminal-justice-reform-continue.

226 Halimah Abdullah, *Rand Paul Fights for Felon Voting Rights,* CNN (Feb. 19, 2014, 7:38 PM), http://www.cnn.com/2014/02/19/politics/rand-paul-felon-voting/index.html. Rand Paul's efforts "stalled in the legislature." Zachary Roth, *Kentucky Restores Voting Rights to Ex-Felons*, CNN (Nov. 24, 2015, 11:39 AM), http://www.msnbc.com/msnbc/kentucky-restores-voting-rights-ex-

Senator Cory Booker's website notes that "[p]unishment is a vital component of our criminal justice system, but once someone has paid their debt to society, their rights as citizens should be restored. Our country is strongest when all Americans have a say in the political process."[227] Several states have also made important reforms over the past few years. Legislatures in both Maryland and Wyoming recently adopted legislation which automatically restores voting rights to ex-felons.[228] Still, legislators' past attempts at enacting a federal statute were unsuccessful, but as public support for restoration continues to increase, hopefully a federal statute will become a real possibility, although the constitutionality of such a statute is unclear.[229]

Congress may or may not have the authority to enact a statute which restores voting rights to ex-felons. In 1999, Michigan Representative John Conyers introduced the Civic Participation and Rehabilitation Act of 1999, which aimed to restore the franchise to ex-felons.[230] The Act never made it out of the Judiciary Committee.[231] However, at a subcommittee hearing, Gillian Metzger, an attorney at the Brennan Center for Justice at New York University School of Law, reasoned that Congress has broad authority to regulate federal elections under the Elections Clause of Article I, Section 4 of the Constitution and the enforcement clauses of the Fourteenth and Fifteenth Amendments.[232] She argued that Congress has the power to restore voting

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felons. Kentucky continues to have some of the harshest felony disenfranchisement laws in the United States. *Voting Rights Restoration Efforts in Kentucky*, BRENNAN CTR. FOR JUST., (Nov. 7, 2018), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-kentucky.

227 *Civil Rights*, U.S. SEN. CORY BOOKER: PRIORITIES, https://www.booker.senate.gov/?p=issue&id=77 (last visited Mar. 4, 2019).

228 *Felon Voting Rights,* NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx (last visited Dec. 17, 2017).

229 HULL, *supra* note 29, at 86–89 (describing unsuccessful legislative attempts and constitutional uncertainty surrounding restoring felon voting rights). While most Americans are opposed to allowing currently incarcerated inmates to cast a ballot, 60% of Americans support restoring the right to vote to ex-felons who have completed their sentences and are out on parole. Christopher Uggen, *What Americans Believe About Voting Rights for Criminals*, SCHOLARS STRATEGY NETWORK (Apr. 1, 2012), http://www.scholarsstrategynetwork.org/brief/what-americans-believe-about-voting-rights-criminals. Nearly 70% support restoring voting rights to those "under supervised probation in the community." *Id.* The movement to restore voting rights to ex-felons who have completed their sentences is gaining traction around the United States but remains politically polarizing. Zachary Roth, *Push to Restore Voting Rights for Felons Gathers Momentum*, MSNBC (Mar. 20, 2015, 6:56 AM), http://www.msnbc.com/msnbc/push-restore-voting-rights-felons-gathers-momentum.

230 Price, *supra* note 223, at 396 (documenting recent federal legislative attempts to reform felon voting rights).

231 *Id.*

232 *Civic Participation and Rehabilitation Act of 1999: Hearing Before the S. Comm. on the Constitution of the Comm. on the Judiciary on H.R. 906*, 106th Cong. 19–28 (1999) (statement of Gillian Metzger, Staff Attorney,

rights to ex-felons in federal elections through the Elections Clause because that clause "has been interpreted consistently to give Congress an extraordinarily broad power to regulate Federal elections."[233] Metzger further argued that the right to vote is a fundamental right, and that Congress "clearly has the authority to enact laws to protect the rights protected by [the Fourteenth and Fifteenth] amendments."[234] She emphasized the importance of considering the history of felony disenfranchisement laws and their usage after the Civil War, "along with poll taxes [and] literacy tests" and argued that "history combined with the extraordinary disparate impact that these provisions have today should . . . clearly sustain a basis for concluding that Congress has the power to" enact legislation restoring voting rights to ex-felons.[235]

However, Viet Dinh, former U.S. Assistant Attorney General under George W. Bush, maintains that Congress only has the authority to legislate the time, place, and manner of elections rather than voter qualifications.[236] According to Dinh, Article I:

> [E]xpressly differentiates between the "qualifications" of voters in House elections, stipulated in Section 2, which must be the same as the qualifications for voters for the most numerous body in the state legislature, and the "Times, Places and Manners" of such elections that is addressed in Article I, Section 4.[237]

Whether or not a federal statute restoring voting rights to ex-felons would be constitutional, reservations about the constitutionality of a federal statute should not stop Congress from taking action. In *Richardson v. Ramirez,* the Supreme Court acknowledged that arguments about felon disenfranchisement should be "addressed to the legislative forum."[238] The constitutionality of a law restoring voting rights to ex-felons would likely depend on the particular text of the law, and a federal statute is still the best solution for comprehensive reform.

Brennan Center for Justice at N.Y.U.).

233 *Id.* at 19.

234 *Id.* at 20.

235 *Id.*

236 HULL, *supra* note 29, at 94.

237 *Id.*

238 418 U.S. 24, 55 (1974).

CONCLUSION

Although the history of felony disenfranchisement laws may be lengthy, the history of a practice does not establish its legality or righteousness. When felony disenfranchisement laws were originally implemented in the American colonies, and after the Reconstruction era when disenfranchisement laws became more widespread, the incarceration rate in the United States was much lower.[239] Thus, even if the Drafters of the Reconstruction Amendments originally approved of felony disenfranchisement laws and purposefully provided an express textual warrant for the practice in Section 2 of the Fourteenth Amendment, as the Supreme Court held in *Richardson v. Ramirez*,[240] it is unclear whether or not the drafters of the Fourteenth Amendment would approve of the practice of disenfranchising felons today in light of the realities of mass incarceration. It is unlikely that the Drafters of the Reconstruction Amendments would have imagined the federal government or the states' governments criminalizing such a wide variety of behaviors, especially nonviolent behaviors.[241] It is also unlikely that the Drafters would have anticipated that so many people would end up incarcerated and therefore vulnerable to the loss of the right to vote. Over 6 million people are currently prohibited from voting,[242] which is more than the entire populations of Wyoming, Vermont, Alaska, North Dakota, South Dakota, Delaware, and Montana combined.[243]

Mass incarceration disproportionately affects people of color.[244] People of color are more likely than white people to lose their right to vote because of felony disenfranchisement laws.[245] In a democracy, the disproportionate effect of mass incarceration on people of color, and the subsequent loss of

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239 *See generally* ALEXANDER, *supra* note 1, at 40–58 (detailing the history of mass incarceration in the United States).

240 *See supra* Section I.B.

241 MANZA & UGGEN, *supra* note 29, at 31 (noting that "[w]hen the Fourteenth Amendment was adopted, disenfranchisement applied only to those convicted of felonies at common law, a far more limited class of offenses than the modern conception of 'felony'"). The majority of ex-felons who have lost the right to vote were not convicted of violent offenses. *Id.* at 8. "Murderers and rapists make up about 4 percent of the felons convicted in recent years." *Id.* Approximately a third of ex-felons were convicted of drug offenses. *Id.* Other ex-felons were "convicted of property crimes (such as burglary), various white-collar offenses (such as fraud or forgery), and even driving-related offenses (such as multiple drunk driving incidents)." *Id.*

242 UGGEN ET AL., *supra* note 17.

243 *US States - Ranked by Population*, WORLD POPULATION REV., http://worldpopulationreview.com/states/ (last visited Dec. 16, 2018).

244 *See supra* Section II.A.

245 *Id.*

voting rights which incarceration involves, should not be tolerated. Thus, whether felony disenfranchisement laws are intentionally racist or not, they are objectionable in unjustly diluting the votes of people of color. Even though courts have generally held that disparate impact is not enough to challenge felony disenfranchisement laws,[246] Congress should consider that disparate impact and adopt a federal statute that eliminates it.

People who have completed their sentences should not have to keep paying and repaying a debt to society in perpetuity. If one of the main purposes of the criminal justice system is rehabilitation and eventual reintegration into society as a contributing member of society, the right to vote should not be restricted permanently. Former felons should not need a law degree or an attorney in order to navigate the path to restoring their right to vote, and until the day the Supreme Court decides to revisit its ruling in *Richardson v. Ramirez,* it falls to Congress to develop a federal solution.

246 *See supra* Section III.A.