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Felon Voting: The Call for an Australian Compromise

Kevin Lineberger

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FELON VOTING: THE CALL FOR AN AUSTRALIAN
COMPROMISE

Kevin Lineberger*

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* Kevin Lineberger received his Bachelor's in Criminal Justice from University of North Georgia and his Juris Doctor from Stetson College of Law. He served as Research Editor of *Stetson Law Review*, Editor in Chief of *Stetson's Journal of Advocacy and the Law*, and graduated with a concentration in Social Justice Advocacy.

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I. INTRODUCTION

The United States is experiencing expanding international criticism¹ for its felon disenfranchisement laws, which leave millions of voices silent in the democratic process.² Domestically, the United States’ disenfranchisement laws are balanced between conservative politicians calling for retribution against criminals and progressive politicians looking to advance rehabilitation goals in the criminal justice system. With no easy compromise, both sides must think adaptively about felon disenfranchisement to develop laws that ameliorate international pressure and domestic strife.

A. *Retribution v. Rehabilitation*

America’s cultural focus on punishment stems from an instinctual need for vengeance.³ Vengeance is foundational to retribitional punishment, analogizing to *jus talionis*.⁴ Looking

1. Nora v. Demleitner, *U.S. Felon Disenfranchisement: Parting Ways With Western Europe*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PROSPECTIVE 79, 99 (Alec C. Ewald and Brandon Rottinghaus eds., 2009).

2. See Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENT’G PROJECT (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/> (“As of 2016, an estimated 6.1 million people are disenfranchised due to felony convictions.”).

3. See E. PASHUKANIS, LAW AND MARXISM, IN INTRODUCTION TO JURISPRUDENCE 1199, 1206–07 (Thomson Reuters, 8th ed., 2008).

4. *Jus talionis*, “an eye for an eye, a tooth for a tooth.” *Id.* at 1206.

toward “the past rather than the future,”⁵ retribution has a well-documented history of embodying multiple forms of punishment that emphasize a proportional response to criminals’ actions.⁶ The justification for this approach originates in social contract theory.⁷ Essentially, once a person commits a crime, the social contract has been broken and the function and safety of society has been attacked.⁸ Society then has an interest in enacting vengeance on the law-breaker, because society has been harmed.⁹ In order to restore safety and order the perpetrator must suffer consequences.¹⁰

While retribution looks toward the past, rehabilitation looks to the future.¹¹ Rehabilitation focuses on re-acclimation into society and reinstating people to “a former position or rank.”¹² Rehabilitation became popularized in the late nineteenth century, developing from religious roots.¹³ Over the next hundred years, rehabilitation efforts developed in several fields, among them medicine,¹⁴ psychology,¹⁵ and education.¹⁶ These initiatives focus attention on felons’ reentry into society, as opposed to revenge.

The issue of felon disenfranchisement is central to the debate on which theory should inform the criminal justice system. To advance retribution, disenfranchisement¹⁷ works to punish felons by removing their participation in influencing society and the

5. ELLEN S. PODGOR, PETER J. HENNING, ANDREW E. TASLITZ & ALFREDO GARCIA, *CRIMINAL LAW: CONCEPTS AND PRACTICE* 5 (3d ed. 2013).

6. See Jon’a F. Meyer, *Retributive Justice*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/retributive-justice> (last visited Feb. 10, 2019).

7. Eli L. Levine, Note, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JURISPRUDENCE REV. 193, 203-18 (2009).

8. *Id.* at 208.

9. *Id.*

10. *Id.* at 211–12.

11. Podgor, *supra* note 5, at 6.

12. Kathryn M. Campbell, *Rehabilitation Theory*, 831, <https://marisluste.files.wordpress.com/2010/11/rehabilitation-theory.pdf> (last visited Feb. 10, 2019).

13. *Id.*

14. See Timothy Leary, *The Effects of Consciousness-Expanding Drugs on Prisoner Rehabilitation*, 10 PSYCHEDELIC REV. 29 (1969).

15. See D.A. Andrews, James Bonta & R.D. Hoge, *Classification for Effective Rehabilitation Rediscovering Psychology*, 17 CRIM. JUST. & BEHAV. 19 (1990).

16. See Mary Ellen Batiuk, Paul Moke & Pamela Wilcox Rountree, *Crime and Rehabilitation: Correctional Education as an Agent of Change—A Research Note*, 14 JUST. Q. 167 (1997).

17. See Hearing on *Former Convict Voting Rights Restoration Before the Subcommittee on Constitution, Civil Rights, Civil Liberties, Committee on the Judiciary*, 111th Cong. (2nd, 2010) [hereinafter *Former Convict Voting Rights Restoration*] (paying particular attention to Rep. James Senbrenner Jr. quoting Judge Henry Friendly, and Roger Clegg’s statements).

government.¹⁸ Rehabilitation advocates argue disenfranchisement¹⁹ hinders felons' reentry into society by deeming them unworthy to vote,²⁰ therefore perpetuating their status as a lower class of people.

B. "Civil Death" Internationally

Countries around the world have developed fundamentally different structures for felon voting,²¹ despite an international consensus on the importance of voter participation.²² Countries emphasize rehabilitation over retribution, expanding the right to vote to more felons²³ while abandoning older practices of a "civil death,"²⁴ through disenfranchisement.

The trend of increasing felon voting rights can be traced to the adoption of the International Covenant on Civil and Political Rights (ICCPR).²⁵ The purpose of the ICCPR and similar covenants, like the Universal Declaration of Human Rights, is "to promote universal respect for, and observance of, human rights and freedoms."²⁶ The ICCPR's influence on felon disenfranchisement is made apparent in

18. Levine, *supra* note 7, at 218.

19. *Former Convict Voting Rights Restoration*, 111th Cong. (looking at the statements of Carl Wicklund, Hans A. Von Spakovsky, and Andres Idarraga).

20. Levine, *supra* note 7, at 223.

21. An increasing number of countries allow any non-violent felons to vote, while others have increased the girth of these freedoms. In Canada, polls are brought to prisons in some instances. Additionally, only four countries out of the forty-five largest and most industrialized have post release restrictions. In fact, twenty-one out of the forty-five countries on this list have no restrictions on felon voting. *International Comparison of Felon Voting Laws*, PROCON.ORG, <https://felonvoting.procon.org/view.resource.php?resourceID=000289> (last updated Apr. 11, 2018).

22. See ALLAN J. LICHTMAN, *THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT*, 3 (2018) ("As the pioneers of modern democracy, the founders understood that the right to vote grounds all other rights, that is empowers Americans to become participants in government, rather than mere petitioners.").

23. *Id.* at 232–35.

24. The idea of a civil death has long existed in human history. It continues today in the form of felon disenfranchisement, even though punishments that can be categorized as civil death have disappeared. Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 MINN. L. REV. 1913 (2015).

25. International Covenant On Civil and Political Rights, art. 25, Dec. 19, 1966, 999 U.N.T.S. 172, 179 [hereinafter ICCPR] (the ICCPR was adopted in order "to codify the rights embodied in the Universal Declaration of Human Rights."); See also Timothy G. Joesph, *A Brief History of the International Covenant on Civil and Political Rights*, J.L. & INT'L AFF. AT PENN. ST. L., Dec. 2015, <https://sites.psu.edu/jlia/a-brief-history-of-the-international-covenant-on-civil-and-political-rights/> (the ICCPR has slowly gained more signatories, "as of 2015, there are seventy-four signatories and one hundred sixty-eight parties to the covenant.").

26. ICCPR at 173.

Canada²⁷ and Australia,²⁸ where courts have struck down restrictive felon disenfranchisement laws citing the ICCPR. Courts specifically cite Article 25 of the ICCPR, which states “[e]very citizen shall have the right and opportunity . . . [t]o vote and to be elected at genuine periodic elections.”²⁹ The United States remains a country that has yet to abide by the ICCPR, despite ratifying the ICCPR in 1992.³⁰

C. Disenfranchisement in the United States

The United States lacks uniformity on the issue of felon voting rights. Out of the fifty states, two have no restrictions on felon voting.³¹ Fourteen states reinstate voting rights back automatically once inmates are released from incarceration.³² Twenty-two states restore the right to vote once felons have completed the full term of their sentence, probation, and parole.³³ The remaining twelve states provide more variation.³⁴ Of these, few policies are consistent with one another, except that they can, and often do, lead to permanent disenfranchisement.³⁵ This variance in policy leads to a disproportionate number of felons who are allowed to vote in each state. For example, in 2016, Florida³⁶ had 10.43% of its voting

27. See *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, 593 (Can.).

28. See *Roach v Electoral Commissioner* [2007] HCA 43, 58 (Austl.).

29. ICCPR at 179.

30. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> (last visited Feb. 10, 2019).

31. Maine and Vermont. *Felon Voting Rights*, NCSL (Oct. 14, 2019), www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx; see also, VT. STAT. ANN. § 807(a) (2018) (“a person who is convicted of a crime shall retain the right to vote . . .”).

32. D.C., Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah. *Id.*

33. Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Washington, West Virginia. *Id.*

34. Alabama, Arizona, Delaware, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, Wisconsin, Wyoming. *Id.*

35. Greg Allen, *Felons in Florida Want Their Voting Rights Back Without A Hassle*, NPR (July 5, 2018) <https://www.npr.org/2018/07/05/625671186/felons-in-florida-want-their-voting-rights-back-without-a-hassle> (“More than 150,000 Floridians had their voting rights restored during Crist’s four years in office. In the seven years since then, Rick Scott has approved restoring voting rights to just over 3,000 people.”).

36. In 2018, Florida voters ratified an amendment to the Florida Constitution that sees more than 1 million felons have their voting rights restored. Alejandro De La Garza, ‘Our Voice Will Count.’ *Former Felon Praises Florida Passing Amendment 4, Which Will Restore Voting Rights to 1.4 Million People*, TIME, (Nov. 7, 2018) <http://time.com/5447051/florida-amendment-4-felon-voting/>.

population disenfranchised due to its felon voting laws.³⁷ New York, which had around the same number of citizens who were of voting age,³⁸ disenfranchised less than 1%³⁹ of its voting population. Florida's status as a swing state makes such a statistical difference significant. Disallowing 10% of the population to vote is disingenuous to the federal election process. If Florida had New York's disenfranchisement laws, a significant portion of the 10% of Florida⁴⁰ felons would be allowed to vote,⁴¹ potentially changing the outcome of federal elections.⁴²

D. Suggestions For The United States

The solution to international concerns surrounding human rights, and domestic concerns about fully representative election outcomes, is for the United States to adopt a uniform federal election system for felon disenfranchisement. Although there are logistical issues that must be addressed before implementation, the main issue is balancing the two sides of the debate. Considering the balancing of ideals, it is unforeseeable that the United States could adopt a progressively modeled disenfranchisement system, such as that of Canada,⁴³ which imposes very few limitations on felon voting.⁴⁴ Nor can the United States hold on to its current system, given international and internal pressures for reform.

37. *Number of People by State Who Cannot Vote Due to a Felony Conviction: State Felon Disenfranchisement Totals, 2016*, PROCON.ORG (Oct. 4, 2017) [hereinafter *State Felon Disenfranchisement Totals*] <https://felonvoting.procon.org/view.resource.php?resourceID=000287>

38. *Id.* (New York had 15,584,974 people in voting age, compared to 16,166,143 people in voting age in Florida during the 2016 election).

39. *Id.*

40. See Daniel Rivero, *Felons Might Have to Pay Hundreds of Millions Before Being Able to Vote in Florida*, VLRN (Jan. 20, 2019), <http://www.wlrn.org/post/felons-might-have-pay-hundreds-millions-being-able-vote-florida> (describing the push not to allow felons to vote if they have not paid their fees and fines associated with their interaction with the criminal justice system).

41. *Id.* (New York only imposes limitations on felons in prison, once released, felons can vote. Had Florida imposed the same law, close to 90,000 felons would have been eligible to vote in 2016.)

42. There is some debate about how many felons would participate in voting even if they had the right restored. Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 122 (2004) (noting “[t]he absence of an effect is consistent with the view that on average felons belong to demographic groups that, although eligible to vote, infrequently exercise that right.”).

43. See Susan Munroe, *Voting in Canadian Elections*, THOUGHTCO. (Apr. 19, 2019) <https://www.thoughtco.com/who-can-vote-in-canadian-elections-510183>.

44. *International Comparison of Felon Voting Laws*, *supra* note 21.

This Comment urges the United States to adopt a federal felon disenfranchisement system mirroring that of Australia.⁴⁵ The Australian system is a compromise in terms of the United States' debate on felon disenfranchisement. It is a compromise because it balances the competing arguments while providing a uniform approach. It also stays within the constitutional framework of the United States. Australia's voting system disqualifies a felon from voting in a federal election if they are "serving a sentence of three years or more."⁴⁶ Once released, Australia imposes no federal voting restrictions on former inmates,⁴⁷ but each state and territory is given discretion in allowing felons to vote in local elections.⁴⁸

Part II of this Comment addresses the historical context behind the United States' system. Part II will look at the case law surrounding felon disenfranchisement and briefly touch on the trends in felon disenfranchisement. Additionally, Part II addresses the historical context behind the current Australian system by looking at how case law shaped it. Part III examines the Australian system in the context of these arguments in favor of and against voter disenfranchisement, analyzing the Australian model in view of both sides. Part III will also demonstrate why Australia's system is the middle ground in the United States felon disenfranchisement debate. Part IV catalogues the practical aspects of implementing a federal felon voting system, specifically, how to register incarcerated felons, where the felons should be registered to vote, and how incarcerated felons will cast their vote. Part V will conclude by urging the United States to adopt more progressive felon voting laws by not only fixing problems surrounding current laws, but by keeping the United States up to date with international trends.

II. THE HISTORY OF UNITED STATES AND AUSTRALIAN FELON DISENFRANCHISEMENT LAWS

The United States and Australia have an extended history of felon disenfranchisement. Both began with restrictive

45. Additionally, the Australian government is set up similarly to the United States, possessing three distinct branches of government (legislature, judiciary, executive), while adhering to principles of federalism. *See Australian Democracy: an overview*, MOAD, <https://www.moadoph.gov.au/democracy/australian-democracy/> (last visited on Jan. 3, 2019).

46. *The Right to Vote is Not Enjoyed Equally by all Australians*, AUSTL. HUM. RTS. COMMISSION (Feb. 2010), <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/right-vote-not-enjoyed-equally-all-australians>.

47. *International Comparison of Felon Voting Laws*, *supra* note 21.

48. *Prisoners*, AUSTL. ELECTORAL COMMISSION, https://www.aec.gov.au/Enrolling_to_vote/Special_Category/Prisoners.htm (last visited Feb. 10, 2019).

disenfranchisement laws that have changed over time, due in part to holdings of their highest courts.

A. *The United States History of Felon Disenfranchisement*

Disenfranchisement laws were commonplace throughout the world⁴⁹ well before settlers came to North America. They started in Greece, were adopted in medieval Britain, and eventually were adopted in the United States.⁵⁰ Given felon disenfranchisement's long history, coupled with the United States' history of disenfranchising other people on the basis of race,⁵¹ gender,⁵² and religion,⁵³ it is unsurprising that many states adopted felon disenfranchisement laws at the founding of the United States.⁵⁴

As disenfranchisement based on race, gender, and religion have been declared unconstitutional, doing so on the basis of status as a felon has remained constitutional. Proponents argue disenfranchisement on the basis of gender, race, or religion is different from felon status, because felons committed wrongs against society to earn their status, and society should be able to receive its retributive justice.⁵⁵ Opponents argue felons should be receiving equal protection,⁵⁶ and by not doing so, rehabilitation efforts are being significantly hampered.⁵⁷

49. Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Viocelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 408–10 (2015).

50. George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 101, 102–03 (2005).

51. Derrick A. Jr. Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 7–11 (1976).

52. Ann-Marie Imbornoni, *Women's Rights Movement in the U.S.: Timeline of Key Events in the American Women's Rights Movement*, http://www.bmhs-la.org/ourpages/auto/2011/4/19/61865317/Timeline_of_Womens_Rights_Movement.pdf (last visited Feb. 10, 2019).

53. Gerard V. Bradley, *Religious Test*, THE HERITAGE GUIDE TO THE CONST., <https://www.heritage.org/constitution/#!/articles/6/essays/135/religious-test> (last visited Feb. 10, 2019).

54. Brooks, *supra* note 50, at 103 (“From 1776 to 1821, eleven states adopted constitutions that disenfranchised felons or permitted their statutory disenfranchisement. Virginia was the first in 1776, followed by Kentucky in 1799, Ohio, in 1802, Louisiana, in 1812, Indiana, in 1816, Mississippi, in 1817, Connecticut and Illinois in 1818, Alabama, in 1819, Missouri, in 1820, and New York in 1821. Eighteen more states had followed suit by the time the Fourteenth Amendment was ratified in 1868.”).

55. Roger Clegg & Hans A. von Spakovsky, *There are Good Reasons for Felons to Lose the Right to Vote*, THE HERITAGE FOUNDATION (Apr. 10, 2018), <https://www.heritage.org/election-integrity/commentary/there-are-good-reasons-felons-lose-the-right-vote>.

56. U.S. CONST. amend. XIV, § 1.

57. See *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974) (“[N]otions are outmoded, and that the modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society.”).

B. The United States Courts and Felon Disenfranchisement

This section will discuss *Richardson v. Ramirez*,⁵⁸ in which the United States Supreme Court found felon disenfranchisement constitutionally valid. In *Richardson*, the Supreme Court found that a California law disenfranchising felons did not violate the Equal Protection Clause of the Fourteenth Amendment. The Court read section two of the Fourteenth Amendment as an endorsement of felon disenfranchisement by the drafters of the Amendment.⁵⁹

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.⁶⁰

Specifically, the Court read section two’s language “except for participation in rebellion, or other crime” as an authorization for the states to disenfranchise their felon populations.⁶¹ The Court also considered the historical context surrounding the amendment, particularly at the legislative notes during ratification of the amendment. The legislative notes emphasized desires to not allow criminals to vote,⁶² stating “[u]nder a congressional act persons convicted of a crime against the laws of the United States, the penalty for which is imprisonment in a penitentiary, are now and always have been disenfranchised. . . .”⁶³ With this history in mind, the Court found that the Framers intended to permit felon disenfranchisement,⁶⁴ and the Court did not find felon

58. *Id.*
 59. *Id.* at 50–56.
 60. U.S. CONST. amend. XIV, § 2.
 61. *Richardson*, 418 U.S. at 54.
 62. *Id.* at 45–49.
 63. *Id.* at 46.
 64. *Id.* at 54.

disenfranchisement laws to violate the Fourteenth Amendment's Equal Protection.⁶⁵

In his dissent, Justice Marshall was livid at the majority's interpretation and reliance on the Framers' intention, stating, "Constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber."⁶⁶ Furthermore, Justice Marshall echoed what opponents against felon disenfranchisement have long held that "[t]he individuals involved in the present case are persons who have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making."⁶⁷ Thus, Justice Marshall argued that the Framers' intent did not include disenfranchising felons in violation of the Equal Protection Clause.⁶⁸

Despite opposition to felon disenfranchisement,⁶⁹ since *Richardson*, courts have been reluctant to invalidate felon disenfranchisement laws on the basis of equal protection, and have given states the ability to determine their own disenfranchisement laws, so long as there is no racial motivation.⁷⁰ Opponents have yet to concede the fight, as First⁷¹ and Eighth⁷² Amendment arguments persist.

65. *Id.* 55–56. "We therefore hold that the Supreme Court of California erred in concluding that California may no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles." *Id.* at 56.

66. *Id.* at 76.

67. *Id.* at 79.

68. *Id.* at 76–79.

69. *Id.* at 55.

70. *See generally* *City of Mobile, Ala. v. Bolden*, 446 U.S. 55 (1980) (holding only acts taken with "racially discriminatory motivation" were unconstitutional under the voting rights act); *see also* *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding states have the right to disenfranchise criminals as long as there is no racially discriminatory intent).

71. *Hand v. Scott*, 315 F. Supp. 3d 1244 (N.D. Fla. 2018), stay granted, *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018) (the District Court found the Florida disenfranchisement structure unconstitutional under the First and Fourteenth Amendment and ordered the state of Florida to enjoin the enforcement of the scheme. The Appellate Court then ordered a stay on the injunctions "pending the resolution of the appeal"). *See also* Janai S. Nelson, *The First Amendment, Equal Protection, and Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (2013).

72. *Graham v. Florida*, 560 U.S. 48 (2010) (an Eighth Amendment challenge to Florida's sentencing structure, that has given hope to advocates of abolishing Florida felon disenfranchisement through the Eighth Amendment's cruel and unusual punishment). *See also* Sarah C. Grady, *Civil Death is Different: An Examination of a Post-Graham Disenfranchisement Under the Eighth Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 441 (2012).

C. The Australian History of Felon Disenfranchisement

The modern felon disenfranchisement system in Australia can be traced back to the Commonwealth Franchise Act 1902.⁷³ The 1902 Act “disqualified from voting those convicted and under sentence for any offence punishable by imprisonment for one year or longer.”⁷⁴ The Commonwealth Franchise Act of 1902⁷⁵ has been modified from its inception, interchanging between restrictive and less restrictive disenfranchisement, as evident from the 1990s through the early 2000s. Felon disenfranchisement laws in Australia were made less restrictive in the mid-1990s,⁷⁶ by allowing prisoners to vote if serving sentences less than five years,⁷⁷ but became increasingly restrictive in the early 2000s.⁷⁸ In 2006, laws were expanded to include all prisoners “serving a sentence of three or more years or anyone unpardoned of treason or treachery.”⁷⁹ This ultra-restrictive use of disenfranchisement proved too staunch for Australia’s High Court to ignore, despite the Court’s reluctance to interfere with legislative matters.⁸⁰

D. Australia Case Law: *Roach v. Electoral Commissioner*

The Australian High Court heard the merits of the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act of 2006 in *Roach v. Electoral Commissioner*.⁸¹ The High Court struck down the legislation, citing the ICCPR⁸² while explicitly recognizing the important, symbolic meaning of voting.⁸³ The Court reasoned that voting is important enough in a democracy that Parliament needs a “substantial reason” to disenfranchise.⁸⁴ The Court also found that disenfranchising serious criminal offenders

73. Lisa Hill & Cornelia Koch, *The Voting Rights of Incarcerated Australian Citizens*, 46(2) AUSTL. J. POL. SCI. 213, 216–17 (2011).

74. Jerome Davidson, *Prisoners and the Right to Vote in Australia*, PARLIAMENT OF AUSTL. (May 24, 2004), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0304/04cib12.

75. Commonwealth Franchise Act 1902, § 4.

76. Davidson, *supra* note 74.

77. *Id.*

78. *Id.*

79. Lisa Hill & Cornelia Koch, *supra* note 73 at 216 (citing *Roach v. Electoral Commissioner* (2007) 239 ALR 1).

80. Andrew C. Banfield, *Prisoner Voting in Canada and Australia: The Construction of Constitutional Decisions* (June 4-6, 2008) (Manuscript prepared for Annual Meetings of the Canadian Political Science Association)

81. *See generally* *Roach v. Electoral Commissioner* (2007) 43 HCA 162 (Austl.), available at <http://eresources.hcourt.gov.au/downloadPdf/2007/HCA/43>.

82. ICCPR, *supra* note 25, at 179.

83. *Roach*, *supra* note 81, at ¶ 12.

84. *Id.* at ¶ 7.

was the only defensible “substantial reason.”⁸⁵ Disenfranchisement “serves to deliver a message to both the community and the offenders themselves that serious criminal activity will not be tolerated.”⁸⁶ Being incarcerated, however, does not mean an individual has committed a serious criminal activity.⁸⁷ Therefore a blanket ban on inmate voting makes no distinction on which crimes Parliament considers to be the most severe.⁸⁸ As a result, the 2006 legislation disenfranchising all inmates was deemed unconstitutional for failing to make a distinction.

Simultaneously, the Court upheld the Electoral and Referendum Amendment (Prisoner Voting and Other Measures) Act of 2004, allowing the restriction of voting to prisoners serving a sentence of three or more years.⁸⁹ The Court swiftly found that committing a serious crime was a substantial enough reason to disenfranchise.⁹⁰ In the case of the 2006 legislation, the Court only took issue with Parliament not distinguishing between serious crimes by issuing a blanket ban. Therefore, the 2004 legislation was acceptable, because it showed a logical distinction between serious and less serious crimes by drawing a clear line from which inmates were allowed to vote.⁹¹ From this distinction, Parliament showed it considered inmates serving three years or more to have committed a serious crime.

Roach only impacted federal elections, as states in Australia are allowed to create their own guidelines for local elections.⁹² As of the 2018 election, every inmate who was not serving a prison sentence of more than three years was allowed to vote in federal elections. Once an inmate is released from prison, they are permitted to vote in federal elections.⁹³ Qualifications for voting in local elections are determined by the individual states and territories.⁹⁴

85. *Id.*

86. *Id.* at ¶ 18.

87. *Id.* at ¶ 11.

88. *Id.*

89. *Id.* at ¶ 102.

90. *Id.*

91. *Id.* at 39 (reasoning that the 2004 legislation “is appropriate and adapted to serve an end consistent or compatible with the maintenance of the prescribed system of representative government.”)

92. *See generally* Hill & Koch, *supra* note 73, at 217.

93. Prisoners, *supra* note 48.

94. *Chapter 3: Who Can Vote*, ST. LIBR. OF NEW SOUTH WALES, <https://legalanswers.sl.nsw.gov.au/hot-topics-84-voting-and-elections/who-can-vote> (last visited Feb. 9, 2019). “Some states have a different threshold, for example, prisoners are excluded from voting in Victorian elections if they are serving sentences of more than five years, whereas there is no prisoner disenfranchisement in the Australian Capital Territory or South Australia.” *Id.*

E. Conclusion: Historical Comparison

Although the histories of Australia's and United States' felon disenfranchisement have similar roots, in the past decade and a half they have substantially differed. Australia found a balance in its system for felon disenfranchisement in the aftermath of *Roach*. The Australian Court upheld disenfranchisement as a valid punishment, but limited its scope by requiring Parliament to be specific about what crimes it deemed to be serious enough to disenfranchise. Although *Roach* did not completely satisfy either side of the argument, it created a compromise from which both sides gained. Using the Australian model, compromise and uniformity can be achieved in the United States as well.

III. THE AUSTRALIAN MODEL AS THE SOLUTION

This Part will look at the Australian model through the lens of three contentious points of the United States felon disenfranchisement debate: (1) the balancing of retribution and rehabilitative theories of punishment; (2) the validity of the electoral system; and (3) the structural constitutional arguments.

A. Why Congress

It seems unlikely the United States Supreme Court would invalidate disenfranchisement laws given its long standing precedent,⁹⁵ and the Court's reluctance to interfere with political matters⁹⁶ or matters it deems the legislature should handle.⁹⁷ As a result, decreasing felon disenfranchisement in the United States must come from Congress, but, given the current political climate of extreme partisanship,⁹⁸ it is hard to imagine Congress reaching a

95. *Richardson*, 418 U.S. at 77.

96. "The legitimacy of the judicial branch rests entirely on its promise to be fair and impartial, and if the public loses faith in that . . . there's no reasons to respect judge's opinions any more than the opinions of the real politicians representing the electorate." Adam Skaggs, *Judges and Politics Don't Mix*, BRENNAN CENTER FOR JUST. (Feb. 12, 2010), available at <https://www.brennancenter.org/blog/judges-and-politics-dont-mix>.

97. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Thomas, J., dissenting); see also *Political Questions, Public Rights, and Sovereign Immunity*, 130 HARV. L. REV. 723, 744 (2016) ("Indeed, a core feature of popular government is its power to grant remedies through political processes above and beyond the reach of the courts. In that tradition political question doctrine was forged . . .").

98. Jacob Westfall, Leaf Van Boven, John R. Chambers & Charles M. Judd, *Perceiving Political Polarization in the United States: Party Identity Strength and Attitude Extremity Exacerbate the Perceived Partisan Divide*, 10(2) ASS'N PSYCHOL. SCI. 145 (2015). See *Former Convict Voting Rights Restoration*,

compromise. The consistent and widespread criticism of United States disenfranchisement laws,⁹⁹ coupled with a lack of uniformity,¹⁰⁰ creates a clear need for new policies.

Recently proposed legislation in the United States has been almost identical to the Australian system, differing only with felons voting from prison.¹⁰¹ As previously noted, the Australian system has three major components: (1) it allows inmates to vote who are serving a sentence of three years or less;¹⁰² (2) every inmate is allowed to vote once released from prison;¹⁰³ and (3) states decide the parameters of voting in local elections.¹⁰⁴

B. *Balancing Retribution and Rehabilitation*

Typically, proponents of retribution and felon disenfranchisement argue a felon has committed a crime against society, and some crimes are so reprehensible that even after the offender is released, he or she should not be allowed fully back into society.¹⁰⁵ Advocates of rehabilitation argue this approach cannot be fully effective if rehabilitation cannot occur when felons are not allowed to meaningfully participate in society.¹⁰⁶ If a felon is treated as less of a citizen, not deemed worthy to vote, then rehabilitation efforts of reintroducing a felon as functional member of society are less effective.¹⁰⁷ People like Norman Parker, who was convicted for “selling an ounce of cocaine, possessing drugs and a firearm” in 2002,¹⁰⁸ begin to feel less like they have any voice in the world. In an interview, Norman points out:

111th Cong. (noting House Republicans contesting felon enfranchisement, while House Democrats supporting felon enfranchisement).

99. *ACLU Responds to U.N. Human Rights Committee's Criticism of U.S. Felon Voting Ban Policies*, ACLU FL (Mar. 27, 2014), <https://www.aclufl.org/en/press-releases/aclu-responds-un-human-rights-committees-criticism-us-felon-voting-ban-policies>.

100. *Felon Voting Rights*, *supra* note 31.

101. Democracy Restoration Act of 2017, S. 1588, 115th Cong. § 3 (2017).

102. AUSTL. HUM. RTS. COMMISSION, *supra* note 46.

103. See *International Comparison of Felon Voting Laws*, *supra* note 21.

104. AUSTL. ELECTORAL COMMISSION, *supra* note 48.

105. Roger Clegg, George T. Conway III & Kenneth K. Lee, *The Case Against Felon Voting*, 2 U. ST. THOMAS L.J. & Pub. Pol'y 1, 18–19 (2008).

106. Levine, *supra* note 7, at 223 (“It is hard to develop a rationale explaining how the stripping of voting rights from ex-offenders will have any positive impact on their process of rehabilitation and reentry into society.”).

107. *Id.*

108. Michael Wines, *Why So Many Kentuckians Are Barred From Voting on Tuesday, and for Life*, N.Y. TIMES (Nov. 4, 2018), <https://www.nytimes.com/2018/11/04/us/felony-vote-disenfranchisement-kentucky-florida.html>.

They [the government] don't take away your right to pay taxes . . . They're taking money from me, but not giving me the right to say what my money is used for. It makes all the difference, because you feel as if your voice don't matter, know what I'm saying? And that's the mind-set of a lot of people. They feel their voice doesn't matter.¹⁰⁹

1. Crimes Against Society

In 2002, Senator Mitch McConnell voiced his opposition to proposed federal enfranchisement legislation, saying:

Voting is a privilege; a privilege properly exercised at the voting booth, not from a prison cell. States have a significant interest in reserving the vote for those who have abided by the social contract that forms the foundation of a representative democracy . . . Those who break our laws should not have a voice in electing those who make and enforce our laws. Those who break our laws should not dilute the vote of law-abiding citizens.¹¹⁰

The social contract theory asserts that “a person who breaks the law has broken his bond to the rest of society and the government, and has abandoned civilized, law-abiding society.”¹¹¹ In regards to voting, some commentators suggest such assertions seem “almost intuitive,” recognizing, “a man who cannot abide by the basic tenets and values of society should not be entrusted with selecting our nation's leaders or voting on policy initiatives.”¹¹² This theory points out that it is the criminal who has made the choice to break their contract with society, and as a result, should not be allowed to participate in society at their choosing, because by breaking the contract, they are attacking society, “threaten[ing] public order and need to be punished.”¹¹³ Senator McConnell's statement asserts that breaking the social contract merits punishment consistent with a retributive approach, pontificating where someone has chosen to leave society through criminal actions, society then has a retributive

109. *Id.*

110. 148 CONG. REC. S802 (daily ed. Feb. 14, 2002) (statement of Sen. McConnell).

111. Levine, *supra* note 7, at 203.

112. *Id.*

113. *Id.* at 218.

interest in not allowing the criminal back among their ranks through voting.¹¹⁴

Summarizing, society has a right to retribution once someone has broken the social contract. By breaking the law, the person in question has wronged society, and given the history of punishment,¹¹⁵ coupled with the historical acceptance of felon disenfranchisement,¹¹⁶ society has deemed disenfranchisement as an acceptable way to gain retribution.

2. Rehabilitation: The Importance of Civic Engagement

Rehabilitation advocates argue the use of disenfranchisement is ineffective, because using post release disenfranchisement debilitates any semblance of a felon's re-entrance into society, which is at the heart of the rehabilitation theory.¹¹⁷ When a felon is not allowed to vote upon release from prison, the felon is being told two things: (1) that they are never able to fully pay their debt to society;¹¹⁸ and (2) that because of the crime they committed, they can never be trusted again, and is considered less of a citizen.¹¹⁹

a. Felon's Debt to Society

If a felon has their vote restricted upon release, they are told that no matter what they do,¹²⁰ their debt cannot be repaid.¹²¹ Essentially, no matter the positive changes a person makes in life,¹²² or in the lives of others,¹²³ society has deemed their actions unforgivable. The psychological effect of this can lead a felon to

114. 148 CONG. REC. S802 (daily ed. Feb. 14, 2002) (statement of Sen. McConnell).

115. Levine, *supra* note 7, at 218.

116. Clegg, *supra* note 105, at 2–5.

117. Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 416–17 (2012).

118. Levine, *supra* note 7, at 224.

119. Clegg, *supra* note 105, at 18.

120. Last Week Tonight with John Oliver, *Felony Disenfranchisement*, at 9:15-10:05 (Sep. 9, 2018), <https://www.youtube.com/watch?v=NpPyLcQ2vdI&t=604s>.

121. Levine, *supra* note 7, at 224 (“[L]ifetime sanctions insult the principle that the offender can repay his debt to society.”).

122. Jane C. Timm, *Most States Disenfranchise Felons. Maine and Vermont Allow Inmates to Vote From Prison*, NBCNEWS (Feb. 26, 2018), <https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406>.

123. Julie Montanaro, *Reverend Greg James: Pulpit to Prison to Pulpit*, WCTV.TV (July 26, 2008), <http://www.wctv.tv/home/headlines/25873499.html>. Once convicted for the distribution of cocaine in the early 1990s, Reverend James has become a role model for local youth, focusing on “getting men to step up in their roles as husbands, fathers and mentors.” *Id.*

have less of an incentive to change their life for the better,¹²⁴ resulting in increased recidivism rates.¹²⁵

b. Lack of Trust, Lack of Citizenship

The cultural perception that felons are inherently untrustworthy¹²⁶ and lack the level of responsibility to vote,¹²⁷ perpetuates felons as being a lesser class of people.¹²⁸ Commentators note that “[m]any advocates of prisoner voting rights argue that the deprivation of those rights exacerbates the alienation of prisoners from the wider community, fostering a bitterness that is detrimental to their social recognition.”¹²⁹

3. The Meeting Point of the Retribution and Rehabilitation: The Australian Model

The middle point of rehabilitation and retribution is found in prisoners being allowed to vote upon release, and during imprisonment over a specified number of years.

a. Potential Problem

If Congress were to enact a statute that said, “all felons serving sentences less than five years¹³⁰ are eligible to vote while in prison,” there would still be a lack of uniformity within the voting system, because states have different sentences and thresholds for crimes.¹³¹ For example:

Stealing a neighbor’s \$300 purse in Georgia is a misdemeanor that might get you a fine or short stint

124. After release, felons have a difficult time finding jobs, housing, and access to adequate healthcare. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> (stating that after release, felons have a difficult time finding jobs, housing, and access to adequate healthcare.).

125. Levine, *supra* note 7, at 223.

126. Clegg, *supra* note 105, at 18.

127. Levine, *supra* note 7, at 212.

128. *Id.* at 223.

129. *Id.* (citing John Kleinig & Kevin Murtagh, *Disenfranchising Felons*, 22 J. OF APPLIED PHIL. 220–26 (2005)).

130. *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations*, JUST. POL’Y INST. (Apr. 2011), <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf>.

131. Marella Gayla, *What’s the Punishment for Theft? Depends on What State You’re In*, THE MARSHALL PROJECT (Aug. 9, 2017), <https://www.themarshallproject.org/2017/08/09/what-s-the-punishment-for-theft-depends-on-what-state-you-re-in>.

in county jail. But if you take that same item next door in Florida, you've committed a felony: you could end up serving time in state prison and lose your right to vote. When it comes to felony theft, there is no uniform national threshold . . . To face a felony charge in Georgia for the handbag caper, for example, you'd have to steal five of those same purses: the felony minimum there is \$1,500.¹³²

The ability of state legislatures to change thresholds and sentence lengths allows states to impact the amount of felons voting by making penalties for crimes more or less severe, or thresholds for some crimes lower, depending on the perceived effect felon voting.

Although states would have different amounts of felons eligible to vote, the difference would be significantly diminished compared to the current parity among felon voting levels.¹³³ This is in part because states must make punishment proportionate to the crime.¹³⁴ Not doing so will subject the state to lawsuits, and legislatures could be voted out if they are viewed as suppressing votes. Essentially, although state legislatures might have an incentive to affect the number of felons voting in their state for federal elections, they are forced to act reasonably due to legal and political consequences.

b. Compromise

For an advocate of rehabilitation, permitting felons to vote once their prison sentence is over, and during shorter stints in prison has two benefits. First, voting once released from prison acknowledges the felon has paid their debt to society, allowing felons to further put their past behind them, and focus more on reentry into society.¹³⁵ In addition, allowing a felon to vote in prison can help a felon see how he or she is still a productive member of society, expediting their reentry through civic engagement. As for advocates of retribution, felons are still being punished for breaking the social contract, by virtue of being incarcerated. Imposing a year requirement for voting eligibility offers no confusion to society, or the felon, the consequences of breaking the law.

c. Maintaining the Validity of the Electoral System

Advocates of felon disenfranchisement argue that allowing more felons to vote, especially while incarcerated, will lead to anti-law

132. *Id.*

133. *See generally* State Felon Disenfranchisement Totals, *supra* note 37.

134. *See* Grady, *supra* note 72, at 460.

135. Levine, *supra* note 7, at 224. *See also* Couloute & Kopf, *supra* note 124.

voting blocs¹³⁶ and ultimately chaos in the United States' system. On the other side, advocates for enfranchisement argue that by not allowing felons to vote, the validity of the electoral system is already compromised¹³⁷ because a significant portion of the population is not being heard. The Australian system makes a compromise lying within the impact that it has on felons only voting in federal elections.

4. Disenfranchisement and Preserving Electoral Integrity

Disenfranchisement advocates argue that allowing felons to vote will cause more harm than good to the integrity of the electoral system¹³⁸ because of the potential for anti-law voting blocs¹³⁹ that will vote for anti-law candidates.

As previously discussed, disenfranchisement advocates are concerned with the trustworthiness of felons.¹⁴⁰ They argue that given the opportunity to vote, felons will vote for candidates who are not as tough on crime.¹⁴¹ Therefore, allowing more felons to vote is creating “loopholes and exceptions for punishments,”¹⁴² rather than trying to “deter and prevent the crimes from being committed.”¹⁴³ Further, disenfranchisement advocates believe felons will aim to weaken the criminal justice system which will result in more crime, hurting the law-abiding members of society.¹⁴⁴

Disenfranchisement advocates are further concerned that allowing felons to vote will skew election results in favor of the

136. Clegg, *supra* note 105, at 18.

137. Amber Daniels, *Felon Disenfranchisement: The Scarlet Label and Its Deep Roots in Facilitating Vote Dilution in America*, 11 CHARLESTON L. REV. 525, 547 (2017).

138. Legislators have long been concerned with the integrity of the electoral system when it comes to allowing criminals to vote:

But suppose the mass of the people of a State are pirates, counterfeiters, or other criminals, would gentlemen be willing to repeal the laws now in force in order to give them an opportunity to land their piratical crafts and come on shore to assist in the election of a President or members of Congress because they are numerous?

Richardson, 418 U.S. at 46 (1974).

139. Clegg, *supra* note 105, at 18.

140. Levine, *supra* note 7, at 203.

141. Aimee Tecla Canty, *A Return to Balance: Federal Sentencing Reform After the “Tough-on-Crime” Era*, 44 STETSON L. REV. 893, 899-901 (2015).

142. Clegg, *supra* note 105, at 18.

143. *Id.*

144. *Richardson*, 418 U.S. at 81 (1974) (Marshall, J., dissenting) (asserting another reason to keep former felons from voting is their tendency to vote “subversive of the interests of an orderly society.”).

candidates who are less tough on crime,¹⁴⁵ presumably the democratic candidate.¹⁴⁶ As a result, election results will end up being based on nothing more than the candidates' views on punishment,¹⁴⁷ which will lead to the detrition of the electoral process to little more than one issue.

5. Making the Electoral Process Great Again

Opponents to disenfranchisement argue that by not allowing felons to vote, the integrity of the electoral system has already diminished. An estimated 6.1 million felons of voting age were not allowed to vote in 2016,¹⁴⁸ but yet, are still taxed and represented in Congress. The voting booth is the most influential way in which the public dictates the ways the government affects their lives.¹⁴⁹ Silencing voices is not only unfair to felons, but to society as a whole. When so many voices are unheard, the candidates elected may not represent the true majority.

Felon disenfranchisement also has significant impact on minority voters. For example, an estimated 21% of the black population in Florida were barred from voting due to felon disenfranchisement in state and federal elections during 2016.¹⁵⁰ This number demonstrates that felon disenfranchisement is another form of discrimination against minority voters.¹⁵¹ As a result, opponents of felon disenfranchisement argue that concurrent with the felon population, the black population will regain a significant portion of its voice in the United States.¹⁵²

145. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 786–90 (2002). “Without felon disenfranchisement, our cumulative counterfactual suggests that Democrats may well have controlled the Senate throughout the 1990s. Although it is possible that both parties may have shifted course or that other factors could have arisen to neutralize this impact.” *Id.* at 790.

146. Former Convict Voting Rights Restoration, 111th Cong. (noting the supporters of felon voting rights were democratic representatives).

147. *Id.*, see also *Civic Participation and Rehabilitation Act of 1999*, Hearing on H.R. 906 Before the Comm. on the Judiciary House of Representatives, 106th Cong. 17 (1999). “Much has been made of the high percentage of criminals—and, thus, disenfranchised people—in some communities. But this is an argument against re-enfranchisement, because there accordingly exists a voting bloc that could create real problems by skewing election results.”

148. Elena Holodny, *Millions of American Adults are Not Allowed to Vote — and They Could Change History*, BUS. INSIDER (Jan. 3, 2018), <https://www.businessinsider.com/what-if-felons-could-vote-2017-7>.

149. Joshua A. Douglas, *The Foundational Importance of Participation: A Response to Professor Flanders*, 66 OKLA. L. REV. 81 (2013).

150. Holodny, *supra* note 148.

151. *Id.*

152. *Id.* (stating “An estimated 2.2 million black citizens [were] barred from voting in total” in 2016).

6. The Australian Compromise

By requiring felons to be allowed to vote only in federal elections, the Australian model limits the effect of anti-law voting blocs while allowing elections to be more representative of the whole population, particularly in minority communities.

As pointed out, disenfranchise advocates are concerned with the felon population forming voting blocs whose goal and purpose would be to weaken the criminal justice system. This Comment argues anti-law voting blocs would only have a major effect on local elections, while their effect on federal elections would be *de minimis*.

In a federal election, in order to significantly influence an outcome, felons would have to organize on a national scale, which is difficult given the strong two party system in the United States.¹⁵³ Additionally, even if an anti-law voting bloc were to succeed in electing an anti-law candidate, their representative would be drowned out by other representatives, given the propensity for a successful politician to be tough on crime.¹⁵⁴

For enfranchise advocates, they will have to compromise from total enfranchisement, to felons voting in only federal elections. However, giving an estimated 3.1 million citizens the ability to vote in federal elections is no small victory.¹⁵⁵

Although under the Australian model, proponents of disenfranchisement would give up the ability to disenfranchise felons in federal elections. States are left to determine their own disenfranchisement laws, which are the elections that anti law voter blocs would have the most substantial effect in. Simultaneously, enfranchise advocates would gain a more representational federal election process, by giving more citizens the ability to be heard in at least one level of the government.¹⁵⁶

153. See generally Aaron Blake, *Why Are There Only Two Parties in American Politics?*, WASH. POST (Apr. 27, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/04/27/why-are-there-only-two-parties-in-american-politics/?hpid=hp_hp-top-table-main-politics:only-two-parties-in-american-politics/?noredirect=on&utm_term=.cf3abd8857e5.

154. See generally Marc Mauer, *Why Are Tough on Crime Policies So Popular*, 11 STAN. L. & POL'Y REV. 9, 14 (1999).

155. Uggen et al., *supra* note 2.

156. *Id.*; Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 122 (2004) (showing there is empirical evidence that despite being allowed to vote, voter turnout might not dramatically increase because felons typically belong to demographics that historically do not vote).

C. Voter Disenfranchisement in the United States' Constitutional Structure

Advocates of felon disenfranchisement hold that it was the intention of the Framers of the Fourteenth Amendment to leave disenfranchisement in the states' power,¹⁵⁷ barring an amendment to the Constitution.¹⁵⁸ Opponents of felon disenfranchisement argue the "except for participation in rebellion, or other crime"¹⁵⁹ language of the Fourteenth Amendment is inconsistent with the interpretation of the rest of the Constitution. Surmising it is illogical to read section two of the Fourteenth Amendment as giving states complete discretion when it comes to felon disenfranchisement.¹⁶⁰

1. Intention of the Framers

The Framers of the Constitution were concerned with limiting the power of the federal government over the states,¹⁶¹ embodied by the Tenth Amendment.¹⁶² This concern has trickled down in the United States' history,¹⁶³ and has been a constant balancing act for the legislatures and courts to operate around.¹⁶⁴ Typically, the federal government stays out of criminal law, and leaves the states to decide their own criminal laws.¹⁶⁵ Due to disenfranchisement being seen as a form of punishment, it is within the states' control to decide the parameters of felon disenfranchisement because "[t]he

157. Clegg, *supra* note 105, at 4.

The framers of the Civil War Amendments saw nothing racially discriminatory about felon disenfranchisement. To the contrary, they expressly recognized the power of the states to prohibit felons from voting. Section 2 of the Fourteenth Amendment provides that a state's denial of voting rights "for participation in rebellion, or other crime" could not serve as a basis for reducing their representation in Congress.

158. Hans A. Von Spakovsky & Roger Clegg, *Felon Voting and Unconstitutional Congressional Overreach*, THE HERITAGE FOUND. (Feb. 11, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM145.pdf.

159. U.S. CONST. amend. XIV.

160. Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-Examining Richardson v. Ramirez*, 13 TULSA J. COMP. & INT'L L. 279, 319 (2006) ("[W]e should care about felon disenfranchisement because it inherently contradicts the rest of our constitutional jurisprudence on the right of every citizen to vote.").

161. THE FEDERALIST No. 51, at 136, 139 (James Madison) (Jack N. Rakove ed., 2003).

162. U.S. CONST. amend. X.

163. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 75–76 (2001).

164. *Id.*

165. Clegg, *supra* note 105, at 13 (quoting U.S. v. Lopez, 514, 561 n.3 (1995) ("States possess primary authority . . . [to] define and enforce the criminal law")).

States possess primary authority for defining and enforcing the criminal law.”¹⁶⁶ Couple the states’ authority with defining criminal laws, and the Supreme Court’s interpretation of section two of the Fourteenth Amendment¹⁶⁷ where states arguably have full authority to decide whether and when to disenfranchise felons.

As a result, for there to be a change in the felon voting system, it would have to come from an amendment to the Constitution, the same way suffrage has occurred for other groups.¹⁶⁸ It is generally understood, the only way to replace an amendment is through another amendment,¹⁶⁹ and the later amendment controls because it is the “latest expression of the will of the people.”¹⁷⁰

2. This Section is an Outlier

Opponents of disenfranchisement argue the Supreme Court’s interpretation of the Fourteenth Amendment is incorrect,¹⁷¹ focusing on the inconsistencies with the rest of the Constitution.¹⁷² Specifically, commentators argue that the Constitution has expanded voting rights,¹⁷³ while the *Richardson* interpretation of the Constitution restricts voting rights,¹⁷⁴ thus leading to an inconsistency within the Constitution that the Court should reexamine. Apart from this argument, opponents have to struggle to find an additional constitutional argument for why felons should be allowed to vote, given the current interpretations of the Constitution.¹⁷⁵

As for a change through Congress, opponents argue Congress would be within its power to enact legislation, rather than propose

166. *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

167. *Richardson*, 418 U.S. at 24. (“We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of s 2 and in the historical and judicial interpretation of the Amendment’s applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.”).

168. U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXVI.

169. Mia So, *Resolving Conflicts of Constitution: Inside the Dominican Republic’s Constitutional Ban on Abortion*, 86 IND. L. J. 713, 719–20 (2011).

170. *Id.* at 719.

171. *Richardson*, 418 U.S. at 73–76 (Marshall, J., dissenting).

172. See Angela Behrens, *Voting—Not Quite a Fundamental Right—A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 232–35 (2004).

173. *Id.* at 232.

174. See *id.* at 275.

175. *Richardson*, 418 U.S. at 55.

an amendment, because the Supreme Court's interpretation¹⁷⁶ of the Qualifications Clause has held that state and federal legislatures need not have the same voting qualifications.¹⁷⁷ Therefore, because of this power, Congress does not need to propose an amendment for the states to ratify, as long as the legislation only affects federal elections.¹⁷⁸

3. The Australian Model finding its way through the United States' Constitution

The pro-disenfranchisement argument is surrounded by the need for states to have sovereignty from the United States' federal government. Basically, because criminal punishment is generally left to the states, the federal government should not be able to intrude unless there is an amendment. On the other side, opponents of disenfranchisement argue Congress has the ultimate authority in the federal election process, and therefore, Congress is well within its power to regulate federal elections.

The Australian model leaves the decision of whether to allow felons to vote in local elections within the respective state, allowing the federal government to control the qualifications of who votes in federal elections. The Australian model stays within section two of the Fourteenth Amendment by keeping disenfranchisement power within the states, while the Qualification's Clause allows the federal government to regulate federal elections. By adopting the Australian model, proponents of disenfranchisement would retain their individual state right, while giving up control of who votes in their federal elections. However, keeping the ability to dictate local elections keeps significant power in the voting process with the states.

In sum, the Australian model is a compromise for the advocates for disenfranchisement and enfranchisement. Rationally, both sides should realize a compromise needs to occur in order for the United States to stay with advancing international human rights laws and provide more uniformity to the United States system. Optimistically, to be able to compromise on an issue as controversial and long standing as felon disenfranchisement, could show the citizens of the

176. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 229 (1986) (holding that the qualifications to vote for lower state legislatures did not need to be the same as the qualifications voting in federal elections, in terms of party affiliation); *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970).

177. U.S. CONST. art I, § 2.

178. Erika Wood, *Legal Analysis of Congress' Constitutional Authority to Restore Voting Rights to People with Criminal Histories*, BRENNAN CENTER FOR JUST. (Aug. 3, 2009), <https://www.brennancenter.org/analysis/legal-analysis-congress'-constitutional-authority-restore-voting-rights>.

United States that an intense time of partisanship is coming to an end.

IV. IMPLEMENTATION OF THE AUSTRALIAN MODEL

The successful acclimation of millions of new voters, some of whom will still be in prison, can be logistically difficult when considering how felons are registered, where they are registered to vote, and how they vote.

A. Registration

Registering people to vote is a difficult task for political activists.¹⁷⁹ Peoples' lack of enthusiasm, knowledge, or the mere inconvenience of registering causes a significant portion of the population to not register to vote, despite being eligible.¹⁸⁰ This requires activists to canvas, and be present at public events, signing people up to vote close to election time. In addition, people are encouraged to register to vote in places such as the DMV, government buildings, or social service agencies.¹⁸¹ With that in mind, registering incarcerated felons to vote presents its own challenges on top of the reasons a non-incarcerated citizen is difficult to register to vote.

For a prisoner, options are limited when it comes to their ability to register to vote. The only government buildings they enter are prisons, jails, and courthouses. Additionally, in some states, internet access is limited and monitored during incarceration.¹⁸² In Australia, one way prisoners can register to vote (besides postal registration) is through mobile voting teams that come to the prison and register inmates.¹⁸³

Registration teams going to prisons presents an efficient way to register incarcerated felons, but may pose security and participation problems.¹⁸⁴ The security problems stem from gathering prisoners

179. See generally *Why are Millions of Citizens not Registered to Vote?*, PEW (June 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote>. (“All [focus] groups, except the most frequent voters, reported that the rules of government are difficult to understand . . .”).

180. *Id.*

181. *Id.*

182. See *Multimedia Tablets and Kiosks*, FL. DEPT. OF CORRECTIONS, <http://www.dc.state.fl.us/ci/tablets.html> (last visited Feb. 9, 2019).

183. *Voting Options*, AUSTRAL. ELECTORAL COMMISSION, https://www.aec.gov.au/voting/ways_to_vote/ (last visited Mar. 9, 2020).

184. See Tom Joyner, *Potentially Thousands of Prisoners Prevented from Voting in Federal Elections, FOI Documents Reveal*, ABC (July 5, 2017), <http://www.abc.net.au/news/2017-07-05/prisoners-left-disenfranchised-in-successive-federal-elections/8461316>.

in one area, which adds another instance of prisoners outnumbering correctional officers.¹⁸⁵ Prison security and safety is often the most important factor when a prison adopts a policy.¹⁸⁶ Therefore, registering prisoners to vote must be done in a manner that is least compromising to security. Practical ways of doing so range from limiting the number of prisoners registering at one time, to increasing the amount of correctional officers present during registration.

An activist may want to go to a place where they can register a large number of people. However, the perception that prisons are inherently dangerous¹⁸⁷ might dissuade some activists. One solution would be to heavily incentivize activists to be the ones who go to prisons, even paying commission for each registered voter. Another solution would be acclimating activists to the prison environment through progressive immersion, allowing activists to be more comfortable in a prison, and with prisoners, before registration.

While having teams entering the prison to register felons may not be the most prudent in terms of prison safety, there are multiple ways to ensure prison safety during this process. Given the experience and expertise of correctional officers, there is little reason to believe prison personnel will not be able to handle this situation as long as correctional officers are given deference in deciding the best way to go about registering incarcerated felons, while keeping in mind the importance of voting.

In Victoria, Australia, disseminating candidate information is left up to the candidates themselves, leading to a prison voting population that is often under-informed.¹⁸⁸ In order for the United States to avoid a similar problem, the mobile registration teams should carry candidate information with them.¹⁸⁹ Doing so will limit the amount of uninformed prisoners voting, or at least present prisoners with the opportunity to become informed.

185. Jill Gordon & Thomas Baker, *Examining Correctional Officers' Fear of Victimization by Inmates: The Influence of Fear Facilitators and Fear Inhibitors*, 28 CRIM. J. POL. R. 462, 462–63 (2015).

186. See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 343, 348 (1987) (holding correction officials maintain a penological interest in prison security).

187. See Anders Kaye, *Dangerous Places: The Right to Self-Defense in Prison and Prison Conditions Jurisprudence*, 63 U. CHI. L. REV. 693, 695–99 (1996) (discussing the violent nature of prisons).

188. *Prisoners and Voting*, VICTORIAN ELECTORAL COMMISSION, 5 <https://www.vec.vic.gov.au/files/RP-PrisonersVoting.pdf> (last visited Jan. 2019).

189. Before entering the prisons, the mobile registration teams would reach out to registered candidates to solicit information, and candidates would be encouraged to reach out to these mobile voting teams in order to get their information to prison voters.

B. Where Prisoners are Registered to Vote

The United States prison system is expansive, with a prison population of 1.5 million in 2016.¹⁹⁰ Due to prison overcrowding,¹⁹¹ not all prisoners can be incarcerated in the state where their permanent address is.¹⁹² This presents the challenge of what to do with prisoners in terms of where they are registered to vote.

Counting prisoners in the state they are incarcerated has advantages such as easy registration and sticking with the way the census operates.¹⁹³ In 2020, the census will continue to count prisoners in the state in which they are incarcerated.¹⁹⁴ Electoral votes for each state are “equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”¹⁹⁵ Every state gets two senators, while the number of representatives in the House “are apportioned among the states by population, as determined by the census, every ten years.”¹⁹⁶

An example of how this could be problematic is if a prisoner is registered to vote at their permanent address in Florida but counted in the census towards Georgia’s population (because that is where the prisoner incarcerated). Consequently, the prisoner is impacting the number of representatives in Georgia, but not voting for Georgia representatives, because they are registered to vote in Florida. This could incentivize states to have higher prison populations, thereby gaining more representatives without adding more voters. This can

190. Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016* U.S. DEPT. JUST., 2 (Apr. 2018) <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> (Table 1).

191. *Highest to Lowest—Occupancy Level (based on official capacity)*, World Prison Brief, http://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All (last visited Jan. 4, 2019) (United States ranks 111); See also Gaby Galvin, *Underfunded, Overcrowded State Prisons Struggle with Reform*, U.S. NEWS (July 26, 2017), <https://www.usnews.com/news/best-states/articles/2017-07-26/understaffed-and-overcrowded-state-prisons-crippled-by-budget-constraints-bad-leadership> (describing state and federal efforts to reduce the effects of prison overcrowding on prison safety).

192. See Martin Austermuhle, *D.C. Inmates Serve Time Hundreds of Miles from Home. Is it Time to Bring Them Back?*, WAMU 88.5 (Aug. 10, 2017), <https://wamu.org/story/17/08/10/d-c-inmates-serving-time-means-hundreds-miles-home-time-bring-back/>.

193. See U.S. CONST. art. I § 2.

194. Sam Levine, *2020 Census Will Continue to Count Prisoners Where They are Incarcerated*, HUFF. POST (Feb. 8, 2018), https://www.huffingtonpost.com/entry/2020-census-prison-population_us_5a7cb966e4b044b3821b0507.

195. U.S. CONST. art. II § 1.

196. U.S. CONST. art. I § 2.

be particularly appealing to a state looking to increase¹⁹⁷ the number of representatives it has, without taking the risk of changing the typical party outcomes of a state.¹⁹⁸

Assigning a prisoner's voter registration to their permanent address¹⁹⁹ creates no added incentive for a community to flood their prisons in hopes of gaining more representatives.²⁰⁰ At the same time, it allows prisoners to vote in their own communities where they are likely to be more invested in the outcome.²⁰¹ On the other hand, the logistics of bringing out-of-state registration ballots seems burdensome on the registers, because of the added effort of doing so, and the reliance on someone from another state to successfully register a felon in the felon's home state.²⁰²

Considering the possibilities, to ensure a more ethical, fair, and constitutional voting process, the best option for the United States is to register felons in the same state in which they are counted towards the census. Although states with high prison populations can gain more representatives,²⁰³ they will not be gaining representatives without adding more voters in federal elections.

C. How Prisoners Vote

The best options available for a prisoner to vote would be a mail-in ballot or by bringing the voting booth to the prison. A mail-in ballot would be the simplest option logistically. The ballot would be sent to the prison, the prisoner would fill it out, and then send it back. However, prisoners have considerably fewer resources once in prison, and can be completely destitute by the time they are

197. See Rebecca Tippet, *2020 Congressional Reapportionment: An Update*, CAROLINA DEMOGRAPHY (Dec. 21, 2017), <https://demography.cpc.unc.edu/2017/12/21/2020-congressional-reapportionment-an-update/>.

198. See generally Jeffrey M. Jones, *Red States Outnumber Blue for First Time in Gallup Tracking*, GALLUP (Feb. 3, 2016), <https://news.gallup.com/poll/188969/red-states-outnumber-blue-first-time-gallup-tracking.aspx>.

199. The Australian government does not include a "prison or other penal or corrective institution" as a "private dwelling" for the census. *Census and Statistics Regulation 2016*, Part 1 § 5(d). By doing so, the Australian government has made sure that there is no political incentive for a legislature to build a prison in a particular place, or for elected officials to try to influence criminal justice in a way that is more or less tough on crime.

200. See Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 102–03 (2003).

201. See *Id.* at 89.

202. *Id.* at 105. ("[P]risoners from, for example, Michigan, would be eligible to vote in a Michigan election (since Michigan was their place of ordinary residence), yet they may be housed in a prison in Ohio and may have to enlist the Ohio prison officials to assist them in registering to vote in Michigan.").

203. See U.S. CONST. art. I § 2.

released.²⁰⁴ A lot of prisoners are never allowed to work,²⁰⁵ and for those that are, the average prison wage per day is 86 cents²⁰⁶ while postage in some states requires multiple stamps in order to mail in a ballot.²⁰⁷ Not being able to work, or working for meager wages, can hamper a felon's ability to mail in his or her vote. Therefore, the more effective option for voting is bringing the voting booth to the prison, at no cost to the prisoner.

Bringing the voting booths to prisons has been shown to increase voter participation in Australia and Canada,²⁰⁸ and conceivably would do the same for the felon population in the United States. The security concerns of having prisoners congregated in one area is important to remember. However, as previously discussed with registration, there are ways of lessening the security risks and the burden on correctional officers. Overall, despite the concerns of bringing polls to the prison, the increased voter participation outweighs any concerns, especially considering the potential remedies to mitigate security issues.

V. CONCLUSION

The United States' system of felon disenfranchisement is in desperate need of a new framework. Australia has a model representing the middle of the disenfranchisement argument in the United States. This Comment urges Congress to adopt and implement that model. There will be growing pains in assimilating a whole new population into the electoral process but enfranchising a majority of the felon population will allow the United States to stay current with international human rights law. More progressive felon voting laws will provide uniformity in the United States' electoral process, which will lead to better representation and fairer results.

204. See Tanzina Vega, *Costly Prison Fees are Putting Inmates Deep in Debt*, CNN BUS. (Sep. 18, 2015), <https://money.cnn.com/2015/09/18/news/economy/prison-fees-inmates-debt/index.html>.

205. Wendy Sawyer, *How Much do Incarcerated People Earn in Each State*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

206. *Id.*

207. In Pinellas County, Florida, mail-in ballots require two stamps to be mailed in.

208. "The presence of a polling booth in the [jail] increase the likelihood of elector participation and enables prisoners to feel more a part of the electoral process. It also removes the possibility of any allegations (however unjustified) of interference by prison authorities with postal votes." Parkes, *supra* note 200, at 107.

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