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Tyler Knutson

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DEBTS PAID: ENDING CRIMINAL DISENFRANCHISEMENT

*Tyler Knutson**

INTRODUCTION

In Western Societies, deterrent models of crime and punishment that utilize institutional methods of labeling wrongdoers have been a historically popular means of regulating crimes against the state, the ruling class, and society. In these systems, an offender who commits a crime will be deemed an outlaw, labeled by society as such, and punished accordingly in order to discourage the repetition of their acts for both the benefit and punishment of the wrongdoer—and any others who might think to perpetrate similar crimes. These systems of punishment have historically entailed a loss of substantive rights thought to be granted by citizenship. In the United States, the right to vote is considered to be one of the most fundamental rights. However, states have leveraged their constitutional powers to continually disenfranchise millions of voters by modifying qualifications to vote and forbidding felons and ex-felons from participating in the electoral process. Today, over 6.1 million Americans cannot vote because of a felony conviction.¹ This phenomenon disproportionately impacts African Americans, who have lost their rights to vote at a proportion of one out of every thirteen (1:13), compared to one out of every fifty-six (1:56) non-black voters.²

This Note explores the dynamics of voting disenfranchisement and its relationship to potential discriminatory practices by the states. This Note will argue that disenfranchisement is antithetical to the democratic values held in the United States. This issue will be examined through the lens of over-incarceration as it relates to protected classes under the Civil Rights Act (“CRA”) and Voting Rights Act (“VRA”). Additionally, this Note will examine the discriminatory effects that over-incarceration has had on these protected classes, in direct contradiction to the intentions of the VRA, and will argue for a uniform national standard of disenfranchisement and the transfer of control over the vote to the federal government.

Part I of this Note will provide an exploration of the deep history behind the practice of voter disenfranchisement. Part II will discuss the Voting Rights Act, including a more in-depth discussion of its history and purpose, and the specific provisions relevant to a discussion of the potentially unconstitutional principles upheld by modern disenfranchisement practices. Part III will discuss the discriminatory impact of the principles discussed in Part II, while Part IV will examine the different approaches and effects of policy adopted by the various states. Part V will examine the most practical solution to ending the practice of criminal disenfranchisement and examine the legality of federal legislation seeking to achieve that end.

* J.D. Candidate, Notre Dame Law School, 2020

¹ See JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 3 (2018).

² *Id.* at 6. The 1 in 13 figures is national and varies by state. African Americans are disenfranchised at a rate of 1 in 5 in Florida, Kentucky, Tennessee, and Virginia. *Id.*

I. HISTORY BEHIND THE PRACTICE OF VOTER DISENFRANCHISEMENT

From 1100 B.C. to the 16th century, societies in Ancient Greece, Rome, and Medieval Europe implemented the punishment of “Civil Death.”³ In Ancient Greece, this punishment changed a criminal offender’s societal standing to “Atimia,” or “without honor.”⁴ A criminal status in Greece resulted in the loss of most rights of citizenship, including the right to participate in “polis,” the collective political body of democratic Greek society.⁵ Rome employed a similar punishment known as “infamia,” which principally involved a Roman citizen’s loss of the right to vote and his right to serve in the Roman Legions—the most prominent mode of advancement for a Roman citizen.⁶ European societies of the 16th century continued to use these punishments, stripping wrongdoers of their citizenship rights. In Medieval societies, this status was potentially dangerous for those who carried the label, as many societies allowed an outlaw to be killed and his or her property seized without punishment.⁷

The civil punishments of ancient and medieval societies formed the roots of English law, and these legal principles were carried to the Americas through the British colonies. During the revolutionary period, there was great debate over whether the vote was a right or privilege in the colonies, which would eventually form the United States.⁸ Suffrage laws were, at this time, applied without any set of cohesive standards and varied by colony. Many felt voting was a privilege that could be granted or taken away by the State, and argued that the treatment of voting as a natural right would cause harm to society.⁹ If the right to suffrage was indeed a natural one, then each individual in society would have the right to it, including indentured servants, men who did not own land, and potentially slaves.¹⁰ Many of America’s founders would later argue against the vision of voting as a natural right, citing it as a path toward “rule by the mob.”¹¹

After the Revolutionary War, the Constitution delegated the right to vote in national elections to state suffrage laws.¹² This stance was a compromise meant to uphold principles of federalism. Citizenship in the newly formed United States would be controlled by a federal government, but states would retain control over the right to vote and, thus, control who represented their interests in the newly formed federal government.¹³ There was no effort to create a more inclusive national system, as it

³ See JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 22–23 (1996).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 7–9 (2000) (“One [consideration] was the ‘stake in society’ notion inherited from the colonial period. Only men with property . . . were deemed to be sufficiently attached to the community and sufficiently affected by its laws to have earned the privilege of voting.”).

⁹ *Id.* at 9.

¹⁰ *Id.* at 12–13 (“[T]here was no way to argue that voting was a right . . . without opening a Pandora’s box. If voting was a natural right, then everyone should possess it. Did this mean that not just every man . . . should vote, but women as well?”).

¹¹ *Id.* at 2.

¹² *Id.* at 8.

¹³ *Id.* at 18–19.

was not a popular view at the time to make the system of government increasingly democratic.¹⁴

On April 19, 1792, the state of Kentucky became the first to include criminal disenfranchisement provisions in its state constitution.¹⁵ Other states would follow suit. By 1869, twenty-nine states had ratified provisions establishing the ability of the state to revoke a citizen's privilege to vote.¹⁶ Notably, the federal government would encroach on the state's monopoly on voting rights with the Fifteenth Amendment of the U.S. Constitution—prohibiting disenfranchisement based on race.¹⁷ However, criminal disenfranchisement would continue to remain in the hands of the states, some of which exploited their power to maintain racial supremacy or achieve other goals against undesired classes of voters.¹⁸ The federal government attempted to take action against such methods in 1957 when President Eisenhower signed the Civil Rights Act into law.¹⁹

The federal government would continue to expand voting rights through the Voting Rights Act of 1965 (“VRA”).²⁰ The VRA “applied a nationwide prohibition against the denial or abridgement of the right to vote on the literacy [and other] tests on a nationwide basis.”²¹ It specifically targeted many states that Congress believed to be using discriminatory voting practices. The VRA was designed to expand the electorate in these states by prohibiting what the government perceived as unfair mechanisms for disenfranchisement used to constrict the electorate in states with discriminatory agendas.²² The passage of the VRA would enable more African Americans to register to vote than at any other time in American history, but it did not reduce or modify state powers over criminal disenfranchisement.²³

Although the VRA was initially enacted as a prohibition against narrowly defined discriminatory voting practices, such as literacy tests, it became the centerpiece for arguments against criminal disenfranchisement—especially after its language was changed in 1982 to prohibit voting restrictions with a racially discriminatory impact.²⁴ This change in language sparked the creation of numerous contradicting court opinions on the matter. In the first landmark case on the issue, *Green v. Board of Elections*, the

¹⁴ *Id.* at 19.

¹⁵ KY. CONST. of 1792, ART. VIII, § 2 (1792) (“Laws shall be made to exclude from . . . suffrage those who . . . be convicted of bribery, perjury, forgery, or other high crimes and misdemeanors.”).

¹⁶ See JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 3 (2018).

¹⁷ U.S. CONST. amend. XV, § 1.

¹⁸ See Eric Holder, Jr., *Voting Rights: The Struggle of Our Lifetime*, HARV. L. REV. BLOG (Oct. 18, 2017), <https://blog.harvardlawreview.org/voting-rights-the-struggle-of-our-lifetime/> (Discussing the laws passed by states “imposing poll taxes, literacy tests, and property requirements as prerequisites to voting.”).

¹⁹ Civil Rights Act of 1957, Pub. L. No. 85-315 §104(a), 71 Stat. 634 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.) (creating a commission which would “investigate allegations . . . that certain citizens of the United States are being deprived of their right to vote . . . by reason of their color, race, religion, or national origin[.]”). Importantly, the Civil Rights Act of 1957 allowed African Americans to sue through the authority of the U.S. Attorney General if their right to vote was unjustly denied.

²⁰ Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (hereinafter, VRA of 1965).

²¹ *History of Federal Voting Rights Laws: The Voting Rights Act of 1965*, DEPT. OF JUSTICE, <https://www.justice.gov/crt/history-federal-voting-rights-laws> (last visited Oct. 20, 2018).

²² *Id.*

²³ VRA of 1965 §2 (forbidding the implementation of standards that “deny or abridge the right of any citizen of the United States to vote on account of race or color”) (The bill’s narrower standard of specific discriminatory voting practices made it difficult for plaintiffs to link racially discriminatory law enforcement practices with the VRA).

²⁴ Voting Rights Act Amendments of 1982, Pub. L. 97-205 §2(b)(A), 96 Stat. 131, 134 (1982).

New York Supreme Court held that such disenfranchisement statutes are constitutional.²⁵ The court stated that:

[A] man who breaks the laws . . . could fairly have been thought to have abandoned the right to participate in further administering the compact It can scarcely be deemed reasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws²⁶

However, the Ninth Circuit in its 1972 case, *Dillenburg v. Kramer*, was the first to hold that laws disenfranchising criminals were no longer “immune from attack.”²⁷ The court noted that the concepts enshrined in the Constitution should continue to develop alongside modern ideals of justice.²⁸ It also noted that the state interest in disenfranchisement of criminals is difficult to define, and that the age-old practice of disenfranchisement is not necessarily held to be rational by modern principles of punishment.²⁹

In 1974, the Supreme Court responded in *Richardson v. Ramirez* and held that the disenfranchisement of convicted felons, who have completed their sentences and paroles, did not violate the Equal Protection Clause.³⁰ The Supreme Court maintained its emphasis on racial discrimination as the sole basis for disenfranchisement being held unconstitutional. In *Mobile v. Bolden*, the Court held that actions must be taken with “racially discriminatory motivation” to be determined unconstitutional under the Voting Rights Act.³¹ The Court reinforced its decision in *Bolden* through its 1985 decision in the case of *Hunter v. Underwood*, where it ruled 8-0 that states maintained their uncontested right to disenfranchise criminals “[without] racially discriminatory intent.”³²

Some states took matters into their own hands by passing provisions to restore the voting rights of felons, but by the year 2000, it seemed clear that criminal disenfranchisement was firmly beholden to the states. The Supreme Court has been reluctant to try the issue, and the federal government has made few significant attempts to address it.³³

²⁵ *Green v. Board of Elections*, 380 F.2d 445, 452 (2d Cir. 1967).

²⁶ *Id.* at 451.

²⁷ *Dillenburg v. Kramer*, 469 F.2d 1222, 1225 (9th Cir. 1972).

²⁸ *Id.* (“[C]onstitutional concepts . . . are not immutably frozen like insects trapped in Devonian amber.

‘Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.’”) (citing *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966)).

²⁹ *Id.* at 1224 (“Courts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes.”).

³⁰ *Richardson v. Ramirez*, 418 U.S. 24, 75-76 (1974) (noting that the practice of criminal disenfranchisement has been historically practiced and accepted and is therefore not discriminatory).

³¹ *Mobile v. Bolden*, 446 U.S. 55, 62 (1979) (discussing an electoral system that was organized such that no African American ever served as a City Commissioner. The Court held that a voting system is not unconstitutional unless intentionally designed to minimize minority voting power without separate proof of specific discriminatory intent.).

³² *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977)).

³³ *E.g. MANZA & UGGEN, supra* note 3, at 48-49 (discussing a 2002 vote in the U.S. Senate in which amendments to federal voting reform legislation intended to restore voting rights to ex-felons in federal elections was struck down sixty-three to thirty-one. The author noted that “senators from the eleven former confederate states voted eighteen to four against the provision, and that the most passionate speeches against it were made by southerners . . .”).

The developments in this area of law are troubling. The rights granted by the VRA to protected classes have come under an indirect line of fire: criminal incarceration. Arguably, the increasing rates of minority incarceration serve as a new substitute for the racially based means of voting discrimination that have been used historically in the United States. As the Ninth Circuit in *Dillenburg* noted,³⁴ constitutional concepts change. It is time to question the modern efficacy of allowing the states to have total control of criminal disenfranchisement.

II. THE EFFECTS OF THE VOTING RIGHTS ACT

Following the passage of the Civil Rights Act of 1866, native-born Americans were unilaterally granted citizenship, ending the practice of chattel-slavery nationwide.³⁵ The Act would secure Lincoln's legacy as the president who freed the slaves, but it failed to secure the right to vote for an entirely new demographic of American citizens. Congress remedied this issue in 1869 with the passage of the Fifteenth Amendment to the U.S. Constitution, granting African American men the right to vote.³⁶

The successful passage of the Fifteenth Amendment was a momentous achievement in U.S. history, but African Americans in the South would continue to face tremendous obstacles as they attempted to exercise their newfound right to vote. State governments in the South employed numerous restrictions to deny African Americans the right to vote, such as poll taxes and literacy tests.³⁷ These states also enacted grandfather clauses, which allowed White voters who already held voting rights to circumvent new voting requirements.³⁸ Voting registration figures for former slaves were significantly reduced after these clauses were passed, dropping in Louisiana from 44.8 percent in 1896 to 4 percent in 1900.³⁹ By 1940, only 3 percent

³⁴ *Dillenburg v. Kramer*, 469 F.2d 1222, 1225 (9th Cir. 1972).

³⁵ Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of 1870, ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981-1982 (1987) ("That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and territory in the United States to make and enforce contracts; to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . .")).

³⁶ U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

³⁷ See LA. CONST. of 1898, ART. CXCVII, § 3 (1898) ("He shall be able to read and write, and shall demonstrate his ability to do so when he applies for registration . . . in the English language, or his mother tongue . . . application shall contain the essential facts necessary to show that he is entitled to register and vote, and shall be entirely written, dated and signed by him, in the presence of the registration officer . . . without assistance or suggestion from any person . . ."); see also *id.* at § 4 (specifying that individuals who cannot read and/or write may still vote if he possesses more than three hundred dollars of property with all applicable taxes paid); LA. CONST. of 1898, ART. CXCVIII (1898) (instituting a poll tax for all state citizens under the age of 60); VOTING RIGHTS ACT: MAJOR DATES IN HISTORY, *A History of the Voting Rights Act* (last visited Nov. 12, 2018), <https://www.aclu.org/issues/voting-rights/voting-rights-act/history-voting-rights-act> (hereinafter, ACLU VRA TIMELINE).

³⁸ ACLU VRA TIMELINE, *supra* note 37; see also VOTING RIGHTS ACT (1965) PUB. L. 89-110, 79 STAT. 437, <https://www.ourdocuments.gov/doc.php?flash=false&doc=100> (providing a PDF copy of the VRA of 1965 and offering additional insights and information about the history of the document).

³⁹ See sources cited *supra* note 38.

of eligible African Americans in the South were registered to vote.⁴⁰ Additionally, physical violence directed toward African Americans at polling locations was not uncommon in the South.

Voting rights would become a central issue in the American Civil Rights Movement of the 1950s and 1960s. The issue rose to national prominence in 1964, after an attack by state troopers on marchers in Selma, Alabama—an incident which ultimately prompted both President Lyndon B. Johnson and Congress to draft and pass legislation that would guarantee voting rights for African Americans.⁴¹ The Voting Rights Act of 1965 was passed and signed quickly. It banned literacy tests and implemented a statistical formula⁴² to appoint federal examiners in jurisdictions that were considered to be at a high risk of utilizing voter suppression tactics.⁴³ Importantly, the Act's Fifth Section required these jurisdictions to request permission from the U.S. Attorney General or the District Court for the District of Columbia to enact new practices or procedures relating to the right to vote.⁴⁴ The Act's Second Section prohibited the denial or abridgement of voting rights on the basis of race or color, mirroring the language of the Fifteenth Amendment.⁴⁵ Additionally, while poll taxes had been abolished in the Twenty-Fourth Amendment to the U.S. Constitution, the VRA required the Attorney General to challenge the use of poll taxes in state and local elections.⁴⁶ After the Supreme Court's 1966 ruling in *Harper v. Virginia State Board of Elections*, poll taxes became an unconstitutional violation of the Fourteenth Amendment,⁴⁷ which ensured that they would never again be put to use.

The VRA granted the federal government significant leverage over the right to vote, a vestige of power that had long been held by the states. The Act would face its share of challenges in court. From 1965-1969, the Act was the subject of high-profile litigation.⁴⁸ In these cases, the Supreme Court upheld the Act's constitutionality. Specifically, the Court upheld Section Five's permission provision, thereby clarifying and upholding the wide range of voting practices that required preclearance.⁴⁹ The Act

⁴⁰ ACLU VRA TIMELINE, *supra* note 37.

⁴¹ US House History, *Bridging History: Selma and the Voting Rights Act of 1965*, YOUTUBE (Aug. 3, 2015), <https://www.youtube.com/watch?v=URMb2D3kFZQ>.

⁴² VOTING RIGHTS ACT OF 1965, *supra* note 38 (discussing public pressures leading to the creation of the VRA).

⁴³ *Section 4 of the Voting Rights Act*, DEPT. OF JUSTICE, <https://www.justice.gov/crt/section-4-voting-rights-act> (last visited Nov. 12, 2018) (explaining that prior to *Holder*, the formula in § 4 of the VRA determined whether a state in question utilized a test or device to reduce registration or voting and/or registered under 50% of eligible voters. States that met these criteria would be supervised by appointed Federal Examiners to ensure that they did not attempt to undermine the VRA.).

⁴⁴ VRA of 1965 § 5 (requiring covered jurisdictions to request permission for any potential changes to voting requirements or law from the federal government).

⁴⁵ VRA of 1965 § 2 (“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”).

⁴⁶ *Id.* (providing that a State seeking to enact new voting qualifications or standards is subject to a declaratory judgement that the qualification or standard does not have the purpose or effect of denying or abridging voting rights on account of race, and that a declaratory judgement is not necessary only if the State seeking to enact those qualifications submits them to the Attorney General for approval).

⁴⁷ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding that voter eligibility has no connection to individual wealth, and that a poll tax could not pass Constitutional muster when voting is viewed as a fundamental right under the Fourteenth Amendment).

⁴⁸ *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966); *see* *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

⁴⁹ *See* *Katzenbach*, 383 U.S. at 327-28 (holding that the 15th amendment gave Congress full power to prevent discrimination in voting); *see generally* *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (holding

was an immense success. Within a year of its passage, two-hundred-and-fifty thousand African American voters were registered. The number of registered voters increased most significantly in the South, where over half of Black voters were registered to vote in a majority of the southern states.⁵⁰

The VRA remains a cornerstone of American voting legislation, having been extended and expanded in 1970, 1975, 1982, and 2006.⁵¹ The VRA secured the right to vote for oppressed peoples and effectively increased the federal government's power over determining who was eligible to vote.

However, while the VRA has generally expanded voting rights, these expansions are not irreversible. The VRA fails to recognize voting as a natural right, and thus, voting remains a right that can be taken away—should the rhetoric toward voting at the federal level change. And recent decisions in the Supreme Court have indicated a less favorable position toward the protections offered in the VRA, returning a significant amount of policy-autonomy to the states.

In *Alabama v. Holder*, the Supreme Court effectively rendered Section Five of the VRA inapplicable by holding that the coverage formula in Section 4(b), used to determine which states must ask for preclearance, was an unconstitutional violation of the Tenth Amendment's guarantee of state autonomy.⁵² After the decision in *Holder*, thirty-four states modified voter identification laws. These laws have created potential obstacles for demographics that some scholars identify as primarily democratic, notably minorities, low-income individuals, and college students.⁵³ In Texas, college students cannot vote using their college ID, but can use it to purchase guns.⁵⁴ North Carolina eliminated same-day voting registration as well as weekend and early voting.⁵⁵ Some states have moved polling precincts to areas without access to public transportation.⁵⁶ Others have enacted laws requiring a driver's license to display an exact name, an issue for recently divorced or married women.⁵⁷ Such changes affect minority voters more than other demographics, since they tend to be lower-income and face difficulties in, first, becoming informed of these changes and, second, being able to adapt to them.⁵⁸

Most importantly, the VRA left state dominance in the realm of criminal disenfranchisement virtually unchanged,⁵⁹ a balance of power that some scholars have

that Congress intended for even minute changes in voting practices to be subject to VRA § 5 permission and approval).

⁵⁰ VOTING RIGHTS ACT OF 1965, *supra* note 38 (discussing the impact of the VRA on voter registration in the South).

⁵¹ ACLU VRA TIMELINE, *supra* note 37.

⁵² *Shelby County v. Holder*, 570 U.S. 529 (2013) (holding that VRA § 4's coverage formula used to determine which states must ask for preclearance before changing voting qualifications is unconstitutional by virtue of being based on data that is no longer responsive to current needs. VRA § 5 was not stricken but cannot be applied until a new coverage formula is approved by Congress).

⁵³ Maxine Bryant & Becky K. da Cruz, *Felon Disenfranchisement: The Voting Rights Act Fifty Years Later*, LAW ENFORCEMENT EXECUTIVE FORUM, 64, 67 (2016).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *Same Day Voter Registration*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> (last visited Jan. 25, 2018) (concluding that there is significant evidence that same day registration increases turnout for voters, acknowledging that the extent of that effect is difficult to conclude, summarizing the process for same-day registration in each state that allows the practice).

⁵⁹ See VRA of 1965 § 2 (The second section of the VRA has been central to disenfranchisement litigation).

argued has been used to suppress the vote. The United States leads industrialized nations in restrictive disenfranchisement policies for criminals.⁶⁰ The current practice of mass incarceration, characterized as the long-term and large-scale imprisonment of Americans for generally non-violent offenses, has led to the revocation of voting rights for millions of American citizens.⁶¹ Disenfranchisement penalties are codified primarily through the Fourteenth Amendment's Second Section, a provision the Supreme Court held to be constitutional in the 1975 case of *Richardson v. Ramirez*.⁶² Such policies allow governments at both the state and federal level to create punishments beyond incarceration, often extending punishments for felonies past the confines of the criminal justice system, a tradition that has long included a revocation of voting rights.⁶³

Disenfranchisement has been linked to racial factors. Statistics have demonstrated that African-Americans are punished at a higher rate and severity than White citizens committing identical crimes.⁶⁴ Multiple research organizations have found that incarceration is focused, primarily, on males belonging to minority cultures or ethnicities.⁶⁵ Within this demographic, Black males are incarcerated at the highest rate. Black females are incarcerated at a higher proportion as well.⁶⁶ African Americans compose roughly 50 percent of the total population of incarcerated Americans.⁶⁷ That figure increases when accounting for individuals who remain under supervision outside of prison, such as individuals on parole.⁶⁸

These findings are troubling, as states with a higher percentage of minority prisoners adopt felon disenfranchisement policies at a higher rate.⁶⁹ Policymakers have denied that such policies have any racial bias, but statistics continue to demonstrate that Black people and other minorities are put in prison at a consistently higher rate than White people. Voting is simply more difficult in the South for those who have been incarcerated and, by extension, minority voters. Southern states have large populations of Black voters, incarcerate minorities at a higher rate, are more likely to restrict voting demographics through policy,⁷⁰ and have now been given free license by the Supreme Court to institute such policies after *Holder*.

Thus far, the Supreme Court has looked beyond the plain text of the statute and cites numerous external reasons for the acceptability of criminal disenfranchisement.)

⁶⁰ See MANZA & UGGEN, *supra* note 3.

⁶¹ See Ronnie B. Tucker, Sr., *The Color of Mass Incarceration*, 37-38 SHIPPENSBURG UNIVERSITY ETH. STUD. REV. 135, 136-37 (2016) (providing a comprehensive definition of mass incarceration while noting that the term is broad and inclusive).

⁶² *Richardson v. Ramirez*, 418 U.S. 24 (1974) (discussing three felons who argued that they had the right to register to vote after repaying their debt to society by completing the requirements of their prison sentences).

⁶³ Angela Behrens, Jeff Manza, & Christopher Uggen, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States*, 1 AMERICAN JOURNAL OF SOCIOLOGY, 1850-2002 (2002) (utilizing "theories of group threat" in order to test "whether racial threat influenced [state felon disenfranchisement provision's] passage, finding that "large nonwhite prison populations increase the odds of passing restrictive laws. . .").

⁶⁴ Bryant & Cruz, *supra* note 53, at 69 (citing a PEW study disclosing these statistics confirmed by a separate NAACP study).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* African Americans account for roughly 1 million out of the 2.3 million persons in the prison population. *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Alabama's plans to close nearly half of its driver's license offices primarily in poor areas where residents lacked public transportation access and drivers' licenses. The closures disproportionately affected Democratic counties and counties which voted for President Obama in the 2012 election. *Id.* at 68.

Additionally, there is racial bias in re-enfranchisement practices and vote-counting. In states which offer a voting-restoration process without a guarantee of acceptance for such requests, White applicants were granted approval at a higher rate than persons of color.⁷¹ Further, felons, both incarcerated and released, are counted in the U.S. census among the population in the voting district where the prison is located rather than as citizens of the state or township in which they lived prior to incarceration.⁷² Such practices create difficulty for minority populations through gerrymandering. These policies weaken the power of minority voters in gerrymandered districts by decreasing their represented population, while distributing their population through the prison system to other, often more conservative, districts where the prisons are located.⁷³

In their totality, the practices and policies discussed in this section have been devastating for certain demographics of American voters. Nearly 5.3 million Americans cannot vote due to a past felony conviction.⁷⁴ Importantly, disenfranchisement occurs unequally due, in large part, to the uneven nature of incarceration in United States prisons—where African Americans compose nearly 40 percent of the incarcerated population.⁷⁵ Disenfranchisement practices in the U.S. have also run contrary to the popular global view on voting rights, where the right to vote tends to be viewed as a natural rather than a granted right.⁷⁶ Most importantly, disenfranchisement practices have arguably undermined American democracy, leaving enormous swathes of U.S. citizens without a voice or means of representation in a political climate, which is already polarized and increasingly unrepresentative of even the average American.

III. THE STATES AND CRIMINAL DISENFRANCHISEMENT

While public opinion on disenfranchisement has become less favorable, it is impossible to deny that the practice of disenfranchisement has been utilized for centuries in the United States. Courts have incorporated the traditional roots of disenfranchisement into Western and U.S. jurisprudence, a primary reason for its acceptance as a practice, calling back to the concerns of the Founders—voting as a privilege rather than as a right.⁷⁷ More recently, there have been calls from opponents of criminal disenfranchisement⁷⁸ to change our views on voting, and to modify our understanding of the right to vote with the current values of society—a society which

⁷¹ *Id.* at 70.

⁷² Ben Peck, *Testimony of Ben Peck, Senior Legislative and Policy Associate Demos Before the National Advisory Committee on Racial, Ethnic and Other Populations of the U.S. Census Bureau on: The Census Count and Prisoners: The problem, the solutions, and what the Census can do*, DEMOS, 2 (Oct. 22, 2012), https://www.demos.org/sites/default/files/publications/BenPeck_Testimony_PrisonBasedGerrymandering101212.pdf.

⁷³ *Id.* (stating that, at the state level, “[c]rediting incarcerated persons from all over the state to the predominately rural districts that contain large prisons enhances the weight of a vote in those districts, diluting all other votes in the state” and that “[i]ncarcerated persons are disproportionately Black and Latino, and . . . most prisons are built in disproportionately white areas. Using Black and Latino prisoners to pad the populations of white legislative districts dilutes minority voting strength state-wide.”).

⁷⁴ Bryant & Cruz, *supra* note 53, at 66.

⁷⁵ FED. BUREAU OF PRISONS, INMATE STATISTICS: INMATE RACE, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last visited Mar. 8, 2018).

⁷⁶ Bryant & Cruz, *supra* note 53, at 71 (stating that the basis of the right to vote as a human right is codified in United Nations Article 21 of the *Universal Declaration of Human Rights*).

⁷⁷ See KEYSSAR *supra* note 8, at 7-10.

⁷⁸ See sources cited *infra* note 102.

no longer bans indentured servants, slaves, women, and men without land from voting. While many states have abused their power over the vote in the past, most states now offer a pathway for felons to regain voting rights, through the process of re-enfranchisement.⁷⁹ However, this process varies significantly from state to state. A uniform national standard of re-enfranchisement would both be accepted by the majority of states and more efficient but has not yet been enacted.

State approaches to felon disenfranchisement fall into four general categories. First, two states never revoke the right of felons to vote, at any point.⁸⁰ Second, fourteen states and the District of Columbia disenfranchise felons for the duration of their incarceration, but automatically restore their right to vote upon release.⁸¹ Third, in twenty-two states, felons do not have the right to vote while incarcerated and for a varying time-period after their release.⁸² Most states denote this time-period as the duration of a felon's parole or probation, with their rights being restored after that time period has been expired. Some of these states also denote a requirement that a felon pay any applicable fines or restitution before regaining their right to vote.⁸³ Finally, in twelve states, felons lose their right to vote indefinitely for crimes of certain severity—only a pardon from the governor allows a felon who has committed one of these crimes to vote.⁸⁴ Some states in this category also require that felons face a waiting period post-sentence, beginning only after their parole or probation.⁸⁵ These waiting periods vary in duration but can be significant. Additionally, some states that fall within this category allow the possibility of re-enfranchisement but require felons to request the re-instatement of their ability to vote, providing no constitutional or statutory guarantees that those rights will be restored by any means other than a gubernatorial pardon.⁸⁶

It is this last category of twelve states, which permanently ban felons who commit certain crimes from voting, that form the primary basis of concern for the inequality of disenfranchisement jurisprudence in the United States.⁸⁷ The states that fall within the “possibility of re-enfranchisement” category are a varying patchwork of policy; some define a handful of serious violent felonies, white collar crimes, or sexual

⁷⁹ BRENNAN CENTER FOR JUSTICE, *Criminal Disenfranchisement Laws Across the United States*, https://www.brennancenter.org/sites/default/files/legal-work/2019.5.31_Criminal_Disfranchisement_Map.pdf (last visited Nov. 26, 2018) (hereinafter BRENNAN CENTER *Disenfranchisement Map*) (differentiating between (1) states that disenfranchise permanently, (2) disenfranchise at some individuals with criminal convictions, (3) restore voting rights upon completion of sentence requirements, (4) restore voting rights automatically after release from prison and discharge from parole, (5) restore voting rights after release from prison, and (5) do not disenfranchise any individuals with criminal convictions).

⁸⁰ Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, 4 THE SENTENCING PROJECT (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>; see also BRENNAN CENTER *Disenfranchisement Map*, *supra* note 79 (noting that this category amounts to permanent disenfranchisement for all individuals with felony convictions).

⁸¹ Uggen et al., *supra* note 80, at 4.

⁸² *Id.*

⁸³ NATIONAL CONFERENCE OF STATE LEGISLATURES, *Felon Voting Rights: Restoration of Voting Rights for Felons*, <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last visited Nov. 26, 2018).

⁸⁴ In these states, felons are entitled to ask for reinstatement of their voting rights, but the state has no obligation to grant their request. Felons in these states generally remain disenfranchised unless there are special circumstances. Uggen et al., *supra* note 80, at 4.

⁸⁵ *Id.* at 4, 12.

⁸⁶ BRENNAN CENTER FOR JUSTICE, *Disenfranchisement Map*, *supra* note 79.

⁸⁷ These states are Alabama, Arizona, Delaware, Florida, Maryland, Missouri, Mississippi, Tennessee, Wyoming, Iowa, and Kentucky. Of these twelve states, Iowa and Kentucky permanently disenfranchise all individuals with felony convictions. *Id.*

offenses, while others use loose and undefined terminology.⁸⁸ For example, the Alabama Constitution states that “[n]o person convicted of a felony involving moral turpitude . . . shall be qualified to vote until restoration of civil and political rights”⁸⁹ The reasons for the vague phrasing used in the document were discriminatorily motivated, allowing the government to loosely define crimes in such a way that minorities could be incarcerated and disenfranchised.⁹⁰ There have historically been numerous instances of debate in both Alabama and other jurisdictions as to what constitutes a crime of moral turpitude. An issue that Alabama sought to resolve by defining the crimes that fit under this designation in House Bill 282.⁹¹ The bill defines numerous violent felonies and serious crimes, such as certain types of child abuse, that entail a permanent revocation of voting rights.⁹² However, the statute also mandates permanent disenfranchisement for nonviolent offenses, ranging from the “[t]rafficking in cannabis, cocaine, or other illegal drugs . . . [.]” to theft of lost property and theft of trademarks or trade secrets.⁹³ Kentucky and Iowa are examples of states that have the strictest disenfranchisement policies in this fourth category, which revoke voting rights for any “treason, felony . . . or [] . . . high misdemeanor . . . [.]”⁹⁴ and any “infamous crime[.]”⁹⁵ respectively. In these two states, conviction of any felony imposes what is essentially an irrevocable lifetime ban on voting. These bans are here to stay as well. In 2016, Iowa’s policy was affirmed by the state supreme court.⁹⁶ These vaguely phrased policies remain a consistent issue for felons, who have continuously found themselves at the mercy of the subjective and often politically motivated interpretations of legislators.

The issue with these varying state approaches rests primarily in their unpredictability, which has prevented states from changing their own laws even when branches of the state governments desire to do so. For instance, when the Governor of Iowa attempted to change the law via executive order,⁹⁷ felons with completed sentences were told that their rights had been restored only for those rights to be revoked again six years later when a new governor rescinded that executive order.⁹⁸ Moreover, the current patchwork system of disenfranchisement practices in the U.S. creates different standards in fifty different jurisdictions—standards which are in an unpredictable state of flux, changing as the political climates change, harming national uniformity in voting laws and voters in the process. These issues create additional

⁸⁸ See NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 83.

⁸⁹ ALA. CONST. amend. 579(b).

⁹⁰ See *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (holding that Alabama’s moral turpitude provision was discriminatory motivated by noting “the delegates to the all-white [1901] convention were not secretive about their purpose,” to “establish white supremacy in this State”).

⁹¹ See generally H.B. 282, 2017 Leg., Reg. Sess. (Ala. 2017).

⁹² *Id.* at §2(c)(10)-(15), (32), (38)-(39).

⁹³ *Id.* at §2(c)(35), (43), (44).

⁹⁴ *Id.* See also KY. CONST. § 145 (stating “[p]ersons convicted . . . of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage . . .”).

⁹⁵ *Id.* See also IOWA CONST. art. 2, § 5 (stating “[n]o . . . person convicted of any infamous crime[] shall be entitled to the privilege of an elector.”).

⁹⁶ *Griffin v. Pate*, 884 N.W.2d 182, 205 (Iowa 2016) (upholding ban on felon voting by holding that all felonies are categorized as “infamous crime[s]” meriting permanent disenfranchisement).

⁹⁷ See *State v. Richardson*, 890 N.W.2d 609 (Iowa 2017) (upholding the ability of the governor to restore voting rights to persons convicted of infamous crimes through pardoning power—his holding does not prevent future governors from revoking those restorations at their discretion).

⁹⁸ BRENNAN CENTER FOR JUSTICE, *Voting Rights Restoration Efforts in Iowa*, <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-iowa> (last visited Nov. 26, 2018).

difficulties for felons, who are being sent mixed messages about the status of their right to vote. Such issues could potentially lead to voter apathy in a demographic that accounts for nearly five million Americans.

Additionally, permanent and effectively permanent disenfranchisement practices have genuine and harmful effects in local communities. In Iowa, one in five African Americans are ineligible to vote due to a past felony.⁹⁹ These individuals are prohibited from voting regardless of their completion of incarceration and probation. They hold jobs and are taxpayers, but yet are entirely unable to influence the policy direction of their children's schools, local taxation, and policing practices. They are entirely unable to hold public officials accountable, and are chronically unrepresented in political discussions, owing largely to their lack of power at the polls. Such effects trickle down to families, where parents are unable to act as proper role models for children and demonstrate proper participation in the political process.¹⁰⁰ Furthermore, the effects of underrepresentation are amplified in jurisdictions where minorities are already marginalized. Incarceration practices, which disproportionately impact minorities, also weaken their share of representation in districts where minority communities face already-low proportions of demographic representation.¹⁰¹

But public opinion is changing on this issue.¹⁰² Support for national uniformity of disenfranchisement provisions has gained significant national momentum, with the rapid growth of incarceration rates causing more Americans to challenge what had once been a settled area of law. In 2018, there had been a push to restore voting rights to felons at the state level. For example, executive actions restored the right to vote for parolees in New York.¹⁰³ In Florida, a grassroots campaign succeeded in amending the state constitution, removing the permanent ban on voting for felons in that state and restoring the rights of nearly 1.4 million disenfranchised Floridians after accumulating over 800,000 signatures.¹⁰⁴

Further, Louisiana passed a law restoring rights to felons who are on probation or parole but remained un-incarcerated for five years.¹⁰⁵ Importantly, the law allows citizens who served probation without being imprisoned to vote. Re-enfranchisement organizations in Louisiana have also sought to expand voting rights for felons in the

⁹⁹ Bonnie Pitz, *Permanent Disenfranchisement Hurts Families and Communities*, THE DES MOINES REGISTER (Sept. 23, 2016, 2:56 PM) <https://www.desmoinesregister.com/story/opinion/abetteriowa/2016/09/23/permanent-disenfranchisement-hurts-families-and-communities/90848580/> (last visited Nov. 26, 2018).

¹⁰⁰ *Id.* See also Eric Plutzer, *Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood*, 96 AM. POL. SCI. REV. 41 (2002) (discussing the effect of habitual voting by parents on young children's development of active voting habits).

¹⁰¹ U.S. CENSUS BUREAU, *IOWA 2010: SUMMARY POPULATION AND HOUSING CHARACTERISTICS: 2010 CENSUS OF POPULATION AND HOUSING*, 116-117 (2012) <ftp://ftp2.census.gov/library/publications/2012/dec/cph-1-17.pdf> (noting that Iowa is racially composed of 88.7% non-Hispanic Caucasians compared to 2.9% Black or African American residents).

¹⁰² Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 275 PUB. OPINION Q., VOL. 68 NO. 2, 280-281 (2004) (finding a rate of over 60% support for re-enfranchising parolees and/or probationers); see also John Laloggia, *Conservative Republicans are least supportive of making it easy for everyone to vote*, PEW RESEARCH CENTER: FACT TANK (Oct. 31 2018), <http://www.pewresearch.org/fact-tank/2018/10/31/conservative-republicans-are-least-supportive-of-making-it-easy-for-everyone-to-vote/> (noting that "[t]wo thirds of Americans (67%) say everything possible should be done to make it easy for every citizen to vote").

¹⁰³ BRENNAN CENTER FOR JUSTICE, *VOTING RIGHTS RESTORATION EFFORTS IN NEW YORK*, <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-new-york> (last visited Nov. 26, 2018).

¹⁰⁴ BRENNAN CENTER FOR JUSTICE, *VOTING RIGHTS RESTORATION EFFORTS IN FLORIDA*, <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida> (last visited Nov. 26, 2018).

¹⁰⁵ See H.B. 265, 2018 Leg., Reg. Sess. (La. 2018).

state by challenging the meaning of the word “imprisonment” as it is defined in the state constitution.¹⁰⁶ These organizations argued that numerous disenfranchised citizens do not fall within the plain meaning of “imprisonment” as stated in the disenfranchisement provisions of the state constitution.¹⁰⁷ Though the case arguing this position ultimately lost on appeal, the Chief Justice of the Louisiana Supreme Court noted in her dissenting opinion that she disagreed with the state’s practices, noting that the Plaintiff’s argument was indeed sufficient on the merits.¹⁰⁸

These examples serve a simple purpose. They demonstrate that the climate is optimal for the federal government to create a uniform national standard for voter disenfranchisement practices. Laws at the state level are confusing and disunified. They serve a historical purpose, which is no longer acceptable and lies in foundations of discriminatory policy from an era where inclusiveness was a threat to those in power. These provisions have been used to oppress and disempower minority groups, ensuring that their voice in government is limited and their ability to participate in the civic process reduced.

The federal government is more receptive to a change in dynamic as well, with House Democrats prioritizing significant reforms for voting rights, such as voter registration, intended to restore much of the VRA’s power that was lost in the Supreme Court’s 2013 decision in *Holder*.¹⁰⁹ Advocacy organizations have begun pushing the federal government for the revision of disenfranchisement practices as well, endorsing legislation at the federal level that seeks to restore the voting rights of felons at the national level in federal elections.¹¹⁰

IV. REMEDYING THE ISSUE

While federal control of criminal disenfranchisement practices in federal elections is an ideal solution to the historical, racial, and communal issues arising from state control over disenfranchisement, the form that such a solution might take is itself an important topic of analysis. Though its history and past purposes are controversial, the designation of disenfranchisement powers has played an important historical role in regulating the balance of power between the federal government and the states. Allowing the states to determine how they composed their electorates was seen as key to ensuring that a more powerful federal government was appointed only by state-endorsed electors.¹¹¹ Unfortunately, a long history of state-level abuse of these powers

¹⁰⁶ *Voice of the Ex-Offender v. State*, 249 S.3d 857 (La. App. 2018), *writ denied*, 255 So. 3d 575.

¹⁰⁷ *Voice of the Ex-Offender*, 249 S.3d 857; *see also* Kwame Akosah, *Fighting for the Right to Vote in Louisiana*, BRENNAN CENTER FOR JUSTICE (Nov. 26 2018), <https://www.brennancenter.org/blog/fighting-right-vote-louisiana>.

¹⁰⁸ *Voice of the Ex-Offender v. State*, 255 So. 3d 575, 576-78 (La. App. 2018) (The Chief Justice wrote in dissent: “There is no legitimate reason for disenfranchising these citizens. Voting is a fundamental right in America, yet tens of thousands of Louisiana citizens are impact by Louisiana’s felony disenfranchisement Laws.” and that “[T]he clear language of [the Louisiana] constitution already provides the right to vote to *all* probationers and parolees because they are not incarcerated.”).

¹⁰⁹ Zach Montellaro, *House passes sweeping election reform bill*, POLITICO (Mar. 8, 2019, 11:23 AM) <https://www.politico.com/story/2019/03/08/house-passes-sweeping-election-reform-bill-1212693> (last visited Nov. 20, 2019) (detailing the “For the People Act” passed by House Democrats in 2019 which, among other measures, expanded early voting, instituted redistricting reform, and sought to implement automatic voter registration, while noting the unlikelihood of the bill’s passage in the Senate).

¹¹⁰ BRENNAN CENTER FOR JUSTICE, *Democracy Restoration Act Fact Sheet*, <https://www.brennancenter.org/sites/default/files/analysis/DRA%20Fact%20Sheet.pdf> (discussing proposed Senate Bill 772 and House Bill 1459).

¹¹¹ *See* KEYSSAR, *supra* note 8, at 18-20.

as well as more evolved societal and legal conceptions toward voting rights provide a convincing argument for the application of broader federal regulation of criminal disenfranchisement. While states have retained their power to disenfranchise voters, they have done so only at the behest of Congress, who is under no legal compulsion to allow states to maintain these powers. Should it choose to do so, Congress holds constitutional authority to regulate elections and remedy the violation of rights as it sees appropriate.

Legislative action is the clear path to successful, longstanding reform. Without considering potential questions of constitutionality that would arise from an executive order, executive action is unreliable. It shares similar inconsistent traits with state attitudes towards disenfranchisement and is vulnerable to sudden revocation at the behest of any new president. Judicial action is also unreliable. Judicial authority lies primarily in interpretation and has largely disfavored the federal government in questions of statewide powers to disenfranchise criminals. However, while the judiciary has largely endorsed states' power to disenfranchise, it has also largely endorsed congressional authority to legislate on electoral matters—including legislative decisions involving the right to vote.¹¹²

Legislation to remedy this issue has already been introduced in Congress. In 2015, Senator Ben Cardin and Representative John Conyers introduced the Democracy Restoration Act of 2015 (“DRA”) as S. 772¹¹³ and H.R. 1459¹¹⁴ respectively. The bill is specifically intended to reinstate voting rights for former criminal offenders in federal elections, after incarceration.¹¹⁵ The Second Section¹¹⁶ of the bill establishes congressional authority to legislate on disenfranchisement, and details congressional findings as to the numerous injustices and negative effects of statewide disenfranchisement practices. The most important provisions of the DRA are located in Section 3 of the text. They read:

The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election.¹¹⁷

¹¹² See BRENNAN CENTER FOR JUSTICE, *Legal Analysis of Congress' Constitutional Authority to Restore Voting Rights*, (Aug. 3, 2009).

<https://www.brennancenter.org/sites/default/files/legacy/Democracy/Brennan%20Center%20analysis%20of%20DRA%20federal%20authority%208-10-09.pdf> (hereinafter BRENNAN DRA *Legality Analysis*); see also Kasper v. Pontikes, 414 U.S. 51, 57 n.11 (1973); see also Oregon v. Mitchell, 400 U.S. 112, 121, 124 (1970).

¹¹³ Democracy Restoration Act, S. 772, 114th Cong. (2015).

¹¹⁴ Democracy Restoration Act, H.R. 1459, 114th Cong. (2015) (stating, among other findings, that (1) the right to vote is a basic act of citizenship, (2) Congress has ultimate power to supervise federal elections, (3) stating the constitutional bases of those powers, (4) identifying three areas where State laws regarding criminal convictions make elections unfair, (5) evaluating the types of disenfranchisement used by states and criticizing them, (6) acknowledging and statistically supporting the link between disenfranchisement and race and, (7) expanding on the negative future impact of such practices) (Hereinafter DRA OF 2015).

¹¹⁵ BRENNAN CENTER FOR JUSTICE, *Democracy Restoration Act Fact Sheet*, *supra* note 110.

¹¹⁶ DRA OF 2015, § 2 (establishing the right to vote as a basic act of citizenship, Congressional power to supervise elections, basic principles of fairness embodied in the constitution forbidding abridgement of the right to vote, discussing discrepancies in State disenfranchisement laws, discussing racial disparities in incarceration, discussing disproportionate effect on minorities, and discussing negative impact of criminal disenfranchisement on communities).

¹¹⁷ DRA OF 2015, § 3.

While Congress has historically delegated the power of choosing eligible voters to the states, the federal legislature does have the authority to ultimately rescind those powers. Congressional ability to regulate federal elections is historically expansive, and is grounded primarily in the Election Clause of the Constitution,¹¹⁸ which reads:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of chusing [sic] Senators.

The Election Clause has been interpreted broadly by courts,¹¹⁹ and “include[s] Congress’ authority to regulate presidential elections, as well as its authority to regulate other voting requirements for federal elections, including voter eligibility.”¹²⁰ In *Oregon v. Mitchell*,¹²¹ the Supreme Court held that Congress has a universal power to supervise the federal election process, which includes its choice of criteria for voter eligibility.¹²² Additionally, where the DRA directly conflicts with state laws regarding criminal-disenfranchisement, the Constitution’s Article VI Supremacy Clause¹²³ would apply—ensuring that any conflicting provisions in state statutes or constitutions are stricken and replaced by DRA provisions. Potential limitations on broad congressional authority to regulate voter-eligibility have been interpreted more narrowly by courts,¹²⁴ and would have no significant limiting effect on the federal legislature’s authority to implement a uniform national standard for criminal-disenfranchisement practices. Thus, federal legislation banning the use of criminal disenfranchisement practices would not be found unconstitutional on these grounds.

Should Congress’s power to pass the DRA under the Election Clause be challenged, Congress has a second avenue of passage. Congress has been given a broad mandate by the Fourteenth and Fifteenth Amendments to remedy the ills of racism in our voting practices,¹²⁵ undertones, and overt exercises of which have been discussed extensively in the previous sections of this Note. Congress has the power to

¹¹⁸ U.S. CONST. art. I, § 4(2)

¹¹⁹ See, e.g., *Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); see also BRENNAN CENTER FOR JUSTICE, *Legal Analysis of Congress’ Constitutional Authority to Restore Voting Rights* at 1, (Aug. 3, 2009) <https://www.brennancenter.org/sites/default/files/legacy/Democracy/Brennan%20Center%20analysis%20of%20DRA%20federal%20authority%208-10-09.pdf> (hereinafter *BRENNAN DRA Legality Analysis*).

¹²⁰ *BRENNAN DRA Legality Analysis* at 1.

¹²¹ *Oregon v. Mitchell*, 400 U.S. 112, 121, 124 (1970). The court was divided between Congressional enforcement powers or the Election Clause as the source of Congressional authority in this case but were not divided on the ultimate finding of Congressional authority to regulate voting requirements. *Id.*

¹²² *Id.* at 124.

¹²³ U.S. CONST. art. VI (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . .”).

¹²⁴ *BRENNAN DRA Legality Analysis* at 2 (examining arguments against the DRA utilizing the scope of the Qualifications Clauses of Article I in the constitution providing that “qualifications of voters in congressional elections must be the same as the qualifications for voters in . . . the state legislature[.]” explaining that such arguments contradict Supreme Court precedent regarding the scope of the Qualifications Clause); see also U.S. CONST. art. I, *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (holding that the Qualifications Clause was not drafted to limit congressional power and interpreting the clause to mean that any voters eligible to vote in a state election should also be permitted to vote in Federal elections).

¹²⁵ *BRENNAN DRA Legality Analysis* at 2 (stating that the right to vote without racial discrimination is a fundamental right, emphasizing that Supreme Court precedent grants broad authority to remove racially-motivated discrimination in voting practices).

enforce its provisions “by appropriate legislation.”¹²⁶ This power has been interpreted broadly by the Supreme Court,¹²⁷ and grants Congress significant leverage in deciding the appropriate measures of voter-eligibility. These broader interpretations of congressional authority in setting voter-eligibility requirements are arguably owed to the changed perception of what voting “really is.” Public and practical understandings of the voting process view it as a fundamental right of all Americans, rather than a privilege to be arbitrarily manipulated by the states.

Because voting rights are now largely viewed as fundamental, especially when issues of racial discrimination are involved, legislation which demonstrates a “proportionality between the injury to be prevented . . . and the means adopted to that end”¹²⁸ falls well within the federal legislature’s prerogative to implement and enforce. In order to pass judicial tests of enforcement authority, Congress need only to: (1) identify a constitutional right which requires enforcement, and (2) provide remedial legislation to remedy past violations of this constitutional right that are appropriate and proportional to the rights that have been violated as well as the manner in which they are violated.¹²⁹ Court analyses in this area of law are traditionally on a “sliding scale” rather than rigidly applied.¹³⁰ However, Congress’s authority to enforce its laws has been most expansive when its intention is to remedy discriminatory or racially motivated practices.¹³¹

Importantly, congressional power to remedy past constitutional violations under the Fourteenth and Fifteenth Amendments is generally limited to constitutionally protected classes or fundamental rights.¹³² Legislative authority to remedy constitutional violations stemming from grounds other than discrimination against protected classes and fundamental rights are often evaluated more strictly and less favorably by courts.¹³³ In implementing any legislation to combat the issue of criminal disenfranchisement, especially legislation forbidding the practice entirely at the state and federal level, it is vital that Congress compile and presents evidence linking the historical use of both incarceration and criminal disenfranchisement to the disempowerment of minority groups and communities (this link is established and acknowledged extensively in the text of the DRA¹³⁴).¹³⁵ The legislature must

¹²⁶ U.S. CONST. amend. XIV § 2; *see also* U.S. CONST. AMEND. XV § 5.

¹²⁷ *See, e.g.*, *Tenn. v. Lane*, 541 U.S. 509, 518, 520 (2004) (describing Congressional enforcement powers as broad).

¹²⁸ *See, e.g.*, *Boerne v. Flores*, 521 U.S. 507, 520 (1997).

¹²⁹ *Lane, supra* note 127, at 520 (elaborating on the test utilized by courts to evaluate when Congressional authority is most and least expansive).

¹³⁰ *Id.* at 523.

¹³¹ *See, e.g.* *S.C. v. Katzenbach*, 383 U.S. 301, 326 (1966) (stating that Congressional powers to enforce are at their height when legislation acting on the 15th Amendment is centered upon fundamental rights, such as the right to vote, and the rights of protected classes).

¹³² *See* BRENNAN *DRA Legality Analysis* at 3 (citing *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 373 (2001) (holding that the Americans with disabilities act is unenforceable against state governments when its aims were incomparable to the Voting Rights Act)).

¹³³ *See, e.g.* *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62 (2000) (holding that Congress did not possess the authority to enforce provisions of the Age Discrimination Act against state-level governments, using voting rights protection as an example of legitimate use of Congressional powers).

¹³⁴ *See* DRA OF 2015 at § 2 (“State disenfranchisement laws disproportionately impact racial and ethnic minorities. Eight percent of the African-American population . . . are disenfranchised. Given current rates of incarceration . . . 1 in 3 of the next generation of African-American men will be disenfranchised as some point during their lifetime.”).

¹³⁵ BRENNAN *DRA Legality Analysis* at 3, *see generally* *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (invalidating an Alabama statute and holding that there was an improper motivation regarding race and a

demonstrate that race-based discrimination was a motivating factor in adopting specific felon disenfranchisement laws at the state level, or in the absence of race-based motivation, that facially neutral laws are enforced discriminatorily. Legislators can easily satisfy these requirements through even a cursory look to past renditions of these laws, their legislative histories, and the historical contexts surrounding their promulgation.

In sum, any legislation that intends to remedy the wrongs of past practices in felon-disenfranchisement laws can most likely be implemented through the Election Clause. If Election Clause powers are interpreted more narrowly, Congress can still implement re-enfranchisement legislation through its enforcement powers in the Fourteenth and Fifteenth Amendments. However, to do so, the Legislature must prove a link between state disenfranchisement laws and racially discriminatory intentions behind the implementation of those laws or, in the case of facially neutral laws, their enforcement. Congress must also specify the right being enforced, such as a specific fundamental right to vote and participate in American democracy. Before the passage of the Fourteenth and Fifteenth Amendments, such arguments would have been more difficult to make. However, the passage of these amendments established the right to vote as a fundamental American right that must not be denied on the basis of race. The amendments' intentions are apparent from an interpretation of the plain meaning of their texts, which specifically connote voting as a right rather than a privilege. The phrasing of these amendments should be rightly construed as a direct constitutional endorsement of the legislature's authority to enforce that right.

Though the DRA (and other legislation like it) is likely to withstand legal scrutiny, reform legislation would still face significant political challenges in securing passage through Congress and, ultimately, the president's desk. Reform legislation for disenfranchisement has gained traction nationally but is still largely opposed by Republicans.¹³⁶ Under a Republican president and Senate, the DRA would face significant challenges—it is unlikely that it would be passed in its current form, but Republicans have shown a willingness to reform criminal policies. With the passage of the First Step Act¹³⁷ in December of 2018, Republicans signaled that they may be willing to participate in criminal justice and prison reform. However, disenfranchisement is a more controversial issue for Republicans. Democrats may find themselves waiting for successful campaigns in 2020 before approaching the issue in full force. Additionally, the priority that reform legislation will take for Democrats remains an active question. The party has previewed an ambitious and expansive legislative agenda, seeking to tackle a variety of high-profile issues ranging from healthcare to wealth inequality.¹³⁸

Reform is a difficult and often controversial process. The Fourteenth and Fifteenth Amendments are themselves a direct contravention of the views of our Founders on the nature of voting, serving as an important reminder that the views of the Founders are not infallible. As attitudes change, laws must change with them. More modern conceptions of voting rights should rightfully be seen as a positive evolution of

demonstrated racially discriminatory impact).

¹³⁶ See Laloggia, *supra* note 102.

¹³⁷ FIRST Step Act of 2018, Pub. L. 115-391 (2018) (Bipartisan legislation passed by a Senate vote of 87-12 with goal of reducing recidivism, including numerous provisions aimed at doing so).

¹³⁸ In word searches of Democratic presidential candidate social media account, top issues include Health Care, Foreign Policy, Climate Change and Social Justice. In a Washington Post survey, voting reform did not appear as an individual policy item. See Kevin Schaul & Kevin Uhrmacher, *The issues 2020 Democrats are running on, according to their social media*, THE WASHINGTON POST (June 24, 2019) <https://www.washingtonpost.com/graphics/politics/policy-2020/priorities-issues/> (last visited Nov. 20, 2019).

American perception on what it truly means to participate in our democracy and, ultimately, what it means to be an American.

V. CONCLUSION

The concepts and values behind criminal disenfranchisement run deep in human history. They have evolved from ancient classical societies, adapted to European models of governance and, ultimately, been applied in the United States. Just as disenfranchisement practices have evolved for good and for ill, so too have societal attitudes about what it means to vote. For much of history, voting was seen not as a fundamental right, but as a privilege granted by the state. This conception was carried over by the Founders upon the creation of the United States. That conception, one which was deeply rooted in a fear of the common man and slave, has changed significantly.

Disenfranchisement powers were granted to states as a component of federalism, allowing them to have an indirect say in the composition of the federal government that would ultimately control them. Unfortunately, many states abused these great powers, utilizing them to marginalize and silence the voices of minority groups—often not as an unintended side-effect, but as a purposeful consequence of policy. Statewide policies continue to have a disproportionate impact on minorities, who have been targeted by discriminatory policies of incarceration and face lasting negative impacts in their communities and generations.

State disenfranchisement powers are impractical and fickle. They are subject to change on the whims of governors, legislatures, and judiciaries, each with their own competing agendas. Further, the difficulty of limiting the variance in state election laws is effectively multiplied by fifty as individual states constantly change disenfranchisement policies—making a uniform national standard nearly impossible to achieve. States are absolutely entitled to autonomy in their own matters and in deciding who may vote in statewide elections. However, in federal elections with national implications that affect each and every state in the Union, disenfranchisement powers are best allocated to the federal government. Principles of federalism are not compromised here—Congress remains a composition of state-elected representatives and senators.

The United States continues its march towards a vision of equality worthy of the words on its founding document. Positive attitudes toward the implementation of national standards on felon disenfranchisement have increased nationally. Congress is poised to do just so, with bills such as the Democracy Restoration Act having been introduced and, post-2018 midterms, facing probable consideration in the House of Representatives. As discussed in Part III of this Note, Congress has well-documented legal grounds to regulate federal elections, especially when Constitutionally guaranteed rights are being compromised, rights which have long been undermined by state-controlled disenfranchisement policy. The political challenges of passing legislation like the DRA are far less certain in our modern political landscape, which is anything but predictable.

Ultimately, it is time for disenfranchisement policies to adapt for more modern definitions of voting as a right. If incarceration is seen as a debt paid to society for crimes committed, those debts must be considered paid-in-full after the sentence is fully served. Felons are still citizens, and deserve to be treated as such, including a full restoration of their right to participate in the democratic processes that serve as a cornerstone of our uniquely American democratic process. As it stands, committing a

felony in the United States amounts to what is essentially a life sentence of half-citizenship. Disenfranchisement practices are at the center of these unfair standards, serving to erode democracy by marginalizing disproportionately represented minorities in the criminal justice system.

While it was not a central vision of the Founders to acknowledge voting as a right rather than a privilege, their goal was to create a nation of equal men and women, each working to create a nation composed of equal and just laws. Attitudes of rights and privileges evolve and change through the mechanisms of government implemented by the Founders for exactly that purpose. Just as the VRA secured the rights of oppressed minorities to participate in the democratic process, the time has come for new legislation and policy that ensures Americans who have paid their debts to society are welcomed back to their country, society, and civic processes wholeheartedly—not as felons, but as fully-fledged American citizens.