NOTES

CRIMINAL DISENFRANCHISEMENT: DECONSTRUCTING ITS JUSTIFICATIONS AND CRAFTING STATE-CENTERED SOLUTIONS

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INTRODUCTION

In 1976, an estimated 1.17 million people were barred from voting due to a criminal conviction.[1] By the night of the 2016 presidential election, that number had increased to 6.1 million.[2] While many states liberalized their voting laws in favor of restoring voting rights to convicted persons between 1996 and 2008, the years after saw some legislative backlash, with some states returning to more restrictive criminal disenfranchisement[3] laws.[4] Today, even though sixteen states and the District of Columbia either allow people to continue voting while in prison or automatically restore voting rights upon release,[5] more people than ever are barred from voting due to a criminal conviction.[6] In addition, criminal disenfranchisement laws have recently gained renewed public attention, particularly with the passage of Amendment 4 in Florida and the resulting pushback from the Florida legislature,[7] as well as the inclusion of questions about voting rights in the 2020 presidential race.[8]

Criminal disenfranchisement has a complicated history.[9] The various justifications that have supported the practice over several centuries may seem strange to the modern eye.[10] Over the past several decades, disenfranchisement has been met with resistance from many points on the political spectrum.[11] Some of this resistance has been in the form of federal constitutional challenges to disenfranchisement laws, particularly under the Eighth and Fourteenth Amendments to the U.S. Constitution.[12] However,

1. Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENTENCING PROJECT 3 (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/ [https://perma.cc/XA69-E868].

2. *Id.*

3. This note uses the term "criminal disenfranchisement" rather than "felon disenfranchisement" because some states also disenfranchise persons for misdemeanor criminal convictions. *See* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 59 n.12 (2019).

4. *Felon Voting Rights*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 21, 2018), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/GV4W-W6YJ].

5. *Id.*

6. Uggen et al., *supra* note 1.

7. *See infra* Section VI.A.

8. *See infra* notes 296–99.

9. *See infra* Part I.

10. *See infra* Part II.

11. *See, e.g.*, Benjamin Wallace-Wells, *Midterms 2018: Restoring Voting Rights to Ex-Felons Is a Rare Bipartisan Issue*, NEW YORKER (Nov. 5, 2018, 4:09 PM), https://www.newyorker.com/news/current/midterms-2018-restoring-voting-rights-to-ex-felons-is-a-rare-bipartisan-issue [https://perma.cc/YM7A-394R].

12. *See infra* Part V.

federal litigation efforts are unlikely to succeed under Section 2 of the Fourteenth Amendment and current Supreme Court precedent.[13]

Therefore, those wishing to challenge the practice of disenfranchisement should concentrate their efforts at the state level.[14] The most desirable avenue for this type of change is state legislation or state constitutional amendments, but there is additional fertile ground to explore in state constitutional challenges and executive action by governors.[15] Changes to disenfranchisement laws can be fraught with compromise, as it can be difficult to get past the political optics of restoring voting rights to those convicted of crimes that society considers serious or disgusting.[16] However, automatic restoration of voting rights after release from prison, regardless of the crime committed, ultimately preserves the integrity of our democratic system and encourages those convicted of crimes to reintegrate into society, which reduces the risk that a person will re-offend.[17] Advocates of re-enfranchisement should take a careful look at the state-centered approaches available in challenging criminal disenfranchisement and should craft solutions that can withstand later political and legal challenges.[18]

Part I of this note gives a brief overview of the history of criminal disenfranchisement in the United States. Part II examines the most common rationales that have historically supported the practice. Part III explores whether and how various states disenfranchise convicted persons. Part IV evaluates how the justifications for criminal disenfranchisement hold up today, including problems with the rationales underlying criminal disenfranchisement and the unique barriers to reintegration that disenfranchisement creates for those recently released from prison. Part V considers past federal challenges to criminal disenfranchisement laws and discusses why these challenges have not succeeded in the past and are unlikely to do so in the future. And finally, Part VI reviews the most promising paths towards ending criminal disenfranchisement at the state level and discusses the importance of crafting a long-lasting solution.

13. *See infra* Part V.

14. *See infra* Part VI.

15. *See infra* Part VI.

16. *See* Paul Wright, *Editorial: The Case Against Florida's Amendment 4 on Felon Voting Rights*, PRISON LEGAL NEWS (Oct. 8, 2018), https://www.prisonlegalnews.org/news/2018/oct/8/editorial-case-against-floridas-amendment-4-felon-voting-rights/ [https://perma.cc/GD2S-DDWG].

17. *See infra* Section IV.C. This note does not consider the merits of allowing in-prison voting, but advocates of re-enfranchisement may also want to consider if such an approach could be politically possible and desirable in their states. *See infra* notes 107–16 and accompanying text.

18. *See infra* Part VI.

I. A BRIEF HISTORY OF CRIMINAL DISENFRANCHISEMENT IN THE UNITED STATES

The founding generation of the United States imported the concept of criminal disenfranchisement from its English heritage.[19] In England, convicted criminals lost their civil rights through bills of attainder and were thereafter powerless to transfer property.[20] The rationale for this punishment was "that the criminal's act was evidence that he and his entire family were corrupt and therefore unworthy of being feudal tenants" under the "doctrine of corruption of blood."[21] Though the newly formed colonies abandoned the doctrine of corruption, the founding generation retained the practice of disenfranchisement:

> In the seventeenth and eighteenth centuries, the removal of voting rights had a visible and known dimension in America. For example, in the Massachusetts Bay Colony, loss of voting rights was permitted as an additional penalty for "any shamefull and vitious crime," such as sexual relations. In Maryland, the law declared that a third conviction for intoxication incurred loss of suffrage. The reasoning behind a disenfranchisement statute in Plymouth Colony in 1658 was stated in the law as: "some corrupt members may creep into the best and purest societies." In addition, early colonial law dealt directly with the time period for the loss of the right to vote. For instance, in Plymouth the penalty seems to have been permanent, but Connecticut law stated that "good behaviour shall cause restoration of the privilege." Furthermore, in both Massachusetts and Connecticut, the decision to restore voting rights was left to the court.[22]

After the Revolutionary War, the Framers gave the states the power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives" via Article I, Section 4 of the U.S. Constitution.[23] Article II, Section 1 contains the parallel requirement for election of the president: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors."[24] These clauses delegate the

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19. *See* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1301–02 (1989).

20. *Id.*

21. *Id.* at 1302 (quoting Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941 (1970)).

22. Robin L. Nunn, Comment, *Lock Them Up and Throw Away the Vote*, 5 CHI. J. INT'L L. 763, 765–66 (2005).

23. U.S. CONST. art. I, § 4, cl. 1.

24. U.S. CONST. art. II, § 1, cl. 2.

power to the states to fix the process by which federal elections are to take place.[25] When drafting the Constitution, the Framers considered prescribing uniform qualifications for voting in federal elections.[26] Instead, they decided to defer to state franchise laws, mandating only that the same qualifications for voting in state elections also qualify a person to vote for members of the House of Representatives (the same requirement language was later applied to electing members of the Senate by popular process via the Seventeenth Amendment).[27] This requirement was "a compromise, an outgrowth both of an ideologically divided constitutional convention and the practical politics of constitutional ratification."[28] Ironically, the Framers were concerned that any federal qualifications specified in the Constitution would *restrict* the franchise for those who had previously been able to vote under state law, which could have been fatal to the Constitution's ratification.[29] Specifically, the delegates who advocated uniform federal qualifications wanted to impose a property ownership requirement.[30] By allowing state qualifications for suffrage to supplant a uniform federal rule, the Framers thought they had solved "a potentially explosive political problem."[31] While this compromise at first appeared to allow states to be more liberal in their franchise laws, the other side of the coin was that they could also make the franchise more restrictive:

> The Constitution adopted in 1787 left the federal government without any clear power or mechanism, other than through constitutional amendment, to institute a national conception of voting rights . . . . Although the Constitution was promulgated in the name of "We, the people of the United States," the individual states retained the power to define just who "the people" were. . . . [C]itizenship in the new nation—controlled by the federal government—was divorced from the right to vote, a fact that was to have significant repercussions for almost two centuries.[32]

Armed with this power to determine who "the people" were, more than a third of the states retained colonial-era restrictions on the right to

25. *See* U.S. Term Limits v. Thornton, 514 U.S. 779, 805 (1995).
26. ALEXANDER KEYSSAR, THE RIGHT TO VOTE 21 (2000).
27. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.
28. KEYSSAR, *supra* note 26.
29. *Id.* at 23–24 ("As Oliver Ellsworth of Connecticut observed during the 1787 Constitutional Convention, 'the right of suffrage was a tender point, and strongly guarded by most of the state constitutions. The people will not readily subscribe to the national Constitution, if it should subject them to be disenfranchised.'").
30. *Id.* at 22.
31. *Id.* at 24.
32. *Id.*

vote.[33] These restrictions generally limited suffrage to white, property-owning males.[34] Other states broadened the franchise, but the increase in persons who were able to vote was somewhat offset by socioeconomic changes that reduced the number of property-owning men in more restrictive states.[35] By 1790, roughly sixty to seventy percent of white, adult men could vote, but virtually no one else could.[36]

Several states also used the unique allocation of federal and state power regarding voting rights to pass criminal disenfranchisement laws.[37] Virginia was the first state to pass a statute that barred ex-felons from voting, but more states soon followed.[38] "[B]y the eve of the Civil War some two dozen states had statutes barring felons from voting or had felon disenfranchisement provisions in their state constitutions."[39] Since there were only thirty-four states that had been admitted to the Union at that time, this meant that over seventy percent of the states had enacted criminal disenfranchisement laws prior to the Civil War.[40] After the war, the passage of the Fourteenth Amendment limited the reasons for which a state could disenfranchise its citizens, while appearing to affirm the practice of criminal disenfranchisement.[41] Section 2 of the amendment provides that "when the right to vote . . . is denied to any of the male inhabitants of [a] 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 state's representation in Congress shall be proportionally diluted.[42]

During the post-Civil War era, disenfranchisement laws became even more visible.[43] First, states along the Confederate-Union border enacted laws that disenfranchised ex-Confederate soldiers unless they met certain conditions.[44] For example, some states required voters to "swear they would support the federal Constitution and [that they] had been active supporters of the Union and opponents of the Confederacy during the war" in order to be eligible to vote.[45] This type of oath was known as an "ironclad oath" because it demanded both a future pledge of loyalty and a certification that the voter

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33. *Id.*
34. *Id.* at 5.
35. *Id.* at 24.
36. *Id.*
37. William Walton Liles, Comment, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 617 (2007).
38. *Id.*
39. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 781 (Dec. 2002).
40. Liles, *supra* note 37, at 617.
41. U.S. CONST. amend. XIV, § 2; *see* Richardson v. Ramirez, 418 U.S. 24 (1974).
42. U.S. CONST. amend. XIV, § 2 (emphasis added).
43. JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW 36 (2006).
44. *Id.*
45. *Id.* at 37.

had been loyal in the past.[46] The Tennessee legislature went a step further than the ironclad oath by passing a law that barred Confederate conscripts from voting unless they could find two qualified voters to vouch for their loyalty to the United States.[47] Other Confederates were barred from voting for either five or fifteen years, depending on the rank they held in the Confederate Army during the war.[48]

In practice, however, "election officials in all Southern states had great leeway in determining whether voters met statutory suffrage requirements," and Tennessee law encouraged election officials to allow persons to vote who were "well known to the judges of the election to have been unconditional Union men."[49] Across the former border states, these oath laws "provided a good measure of the nation's postwar mood. They flourished while the passions roused by the war were still fresh; they died quickly and signaled the coming end of Reconstruction as the passions of war started to recede."[50] The ratification of the Fifteenth Amendment in 1870 marked the decline of loyalty oaths and suffrage restrictions for ex-Confederate soldiers.[51] Many Unionists believed the amendment would effectively guard the suffrage rights of African-American persons in the South and guarantee that ex-Confederates could not regain political control.[52] Unionists and conservatives even found common ground in their quest for suffrage for both former slaves and ex-Confederates.[53] By 1872, ex-Confederates had been fully re-assimilated into the electorate.[54]

However, just as the passage of the Civil War amendments convinced Unionists to relax the restrictions on ex-Confederate voting, others in the former slave-holding states began to consider increasing the reach of criminal disenfranchisement laws as an avenue to restrict African-American voter turnout.[55] In 1869, twenty-nine of the thirty-seven states then in existence had passed criminal disenfranchisement laws.[56] Between 1890 and 1910, some Southern states "tailored their criminal disenfranchisement laws, along with other preexisting voting qualifications, to increase the effect of these laws on black citizens."[57] Many of these states accomplished this goal

46. *Id.* at 36.
47. *Id.* at 37.
48. *Id.*
49. *Id.* at 37–38.
50. *Id.* at 41.
51. *Id.* at 40.
52. *Id.*
53. *Id.*
54. *Id.*
55. Susan E. Marquardt, Comment, *Deprivation of a Felon's Right to Vote: Constitutional Concerns, Policy Issues and Suggested Reform for Felony Disenfranchisement Law*, 82 U. DET. MERCY L. REV. 279, 281 (2005); Nunn, *supra* note 22, at 767.
56. Liles, *supra* note 37, at 617.
57. Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 540 (1993).

by attaching disenfranchisement to crimes thought to be committed primarily by African-American persons, but not to "white" crimes:

> For instance, in Alabama, under state disenfranchisement laws, a man convicted of vagrancy would lose his right to vote, but a man convicted of killing his wife would not. In the state of South Carolina, lawmakers made thievery, adultery, arson, wife beating, housebreaking, and attempted rape into felonies accompanied by the deprivation of voting rights, while murder and fighting were excluded from disenfranchisement.[58]

Some Southern lawmakers were explicit about their racist intentions as well.[59] In his opening address at Alabama's 1901 constitutional convention, John B. Knox, the convention's president, asserted, "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[60] The convention that year amended the Alabama Constitution to add "any . . . crime involving moral turpitude" to the list of enumerated crimes that resulted in disenfranchisement upon conviction.[61]

Criminal disenfranchisement laws also swept across the Northern states during this time period.[62] By 1912, forty-two of the forty-eight states then in existence had enacted criminal disenfranchisement provisions, either by statute or as part of their state constitutions.[63] All states, except for Vermont and Maine, eventually adopted a criminal disenfranchisement law.[64]

By 1974, challenges to these laws had begun to wind their ways through the federal courts.[65] On June 24, 1974, the Supreme Court held that California's criminal disenfranchisement law did not violate the U.S. Constitution in *Richardson v. Ramirez*.[66] Later that same year, California passed Proposition 10:

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58. Nunn, *supra* note 22, at 767–68.

59. Jamelle Bouie, *The Ex-Con Factor*, AM. PROSPECT (Aug. 20, 2013), https://prospect.org/article/ex-con-factor [https://perma.cc/34PV-JEFS].

60. OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901 TO SEPTEMBER 3RD, 1901, 8 (1901).

61. Hunter v. Underwood, 471 U.S. 222, 226 (1985).

62. Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 565 (2003).

63. *Id.* at 565–66.

64. *Id.* at 565. Note that Maine and Vermont never disenfranchise persons with criminal convictions, even while in prison. *See infra* notes 108–16 and accompanying text.

65. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24 (1974).

66. *Id.* at 56.

> which effectively restored voting rights to former felons. California thus joined a growing number of states that removed permanent voting restrictions for people convicted of felonies, 'infamous' crimes and a variety of lesser offenses. While this measure received little fanfare in the media, its impact was substantial due to California's dramatic increase in incarceration rates beginning in the 1970s. Over the next 30 years, this change restored voting rights for hundreds of thousands of citizens who otherwise would have been disenfranchised.[67]

In 2001, other states began to roll back their criminal disenfranchisement laws via legislative and executive action as well.[68] This trend toward allowing persons to vote upon completion of their sentences continued for the next ten years.[69] In 2002, the U.S. Senate considered an amendment to an earlier statute that would have restored the right to vote to ex-felons participating in federal elections.[70] The measure failed by a vote of 31–63.[71] Nevertheless, states continued to relax their criminal disenfranchisement laws on their own,[72] which allowed persons to regain the right to vote in both state and federal elections.[73] From 2001 to 2010, seven states restored voting rights to some persons with criminal convictions by either legislative or executive action.[74]

But in 2011, the landscape became more varied.[75] Some states continued to follow the trend of liberalizing disenfranchisement laws, while others passed more restrictive measures or rescinded actions that had allowed ex-felons to vote.[76] Today, while at first glance it seems that criminal disenfranchisement laws are more lenient than they have ever been before, a record number of potential voters are kept away from the polls by these laws,

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67. Michael C. Campbell, *Criminal Disenfranchisement Reform in California: A Deviant Case Study*, 9(2) PUNISHMENT & SOC'Y 177, 177–78 (Apr. 2007).

68. *Historical Timeline—U.S. History of Felon Voting/Disenfranchisement*, PROCON.ORG [hereinafter *Historical Timeline*], https://felonvoting.procon.org/view.timeline.php?timelineID=000016 (last updated June 25, 2013, 1:42:43 PM) [https://perma.cc/K3PG-UY95].

69. *Id.*

70. 148 CONG. REC. S798 (Feb. 14, 2002) ("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, at the time of the election, such individual— (1) is serving a felony sentence in a correctional institution or facility; or (2) is on parole or probation for a felony offense.").

71. *Id.* at S809.

72. *Historical Timeline*, *supra* note 68.

73. *See supra* notes 23–36 and accompanying text.

74. *Historical Timeline*, *supra* note 68.

75. *Id.*

76. *Id.*

likely owing to the increase in the number of people charged with and convicted of crimes in the U.S. in recent years.[77]

II. COMMON JUSTIFICATIONS FOR CRIMINAL DISENFRANCHISEMENT LAWS

Broadly speaking, three policy justifications support criminal disenfranchisement: the punishment rationale, the social-contract rationale, and the election-integrity rationale. This part will address each in turn.

The punishment rationale is perhaps the most obvious justification for disenfranchisement laws:

> Criminal punishment can be meted out in various ways, including imprisonment, fines, probation and the withdrawal of certain rights and privileges. . . . In other areas of the law, full rights and privileges are not always restored to convicts, even though they may have "paid [their] debt to society." For example, federal law prohibits the possession of a firearm for anyone indicted for or convicted of a felony punishable by at least one year in prison.[78]

For those supporting this theory, temporary or permanent disenfranchisement is part of measuring out justice to those who have violated the rules of social order.[79]

Tied in the with the punishment justification is the notion that those who have broken criminal laws have violated the Lockean social contract and should not continue to benefit from that contract.[80]

> According to traditional social contract rationale, freely choosing individuals begin from an original bargaining position and design a system of neutral arrangements that will protect and promote their basic rights and interests. Central to this reasoning is the idea that all people have basic needs and that they form a community and institute rules of governance in order to provide security and

77. *See Overcriminalization*, HERITAGE FOUND.: SOLUTIONS 2018, https://solutions.heritage.org/protecting-the-rule-of-law/over-criminalization (last visited Aug. 14, 2019) [https://perma.cc/3NF9-C6HZ]; *Overcriminalization*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, https://www.nacdl.org/overcrim (last visited Aug. 14, 2019) [https://perma.cc/XS5X-SD9L].

78. Roger Clegg, George T. Conway III & Kenneth K. Lee, *The Case Against Felon Voting*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 1, 17–18 (2008).

79. Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1521 (2003).

80. Clegg et al., *supra* note 78, at 17.

> a structure that will allow them to enjoy their liberty. A violation of the terms of the "contract" disrupts the balance of rights and responsibilities, invites a punitive response according to pre-determined rules, and essentially (at least temporarily) strips the individual of her right to participate in the political process.[81]

Then-governor of Massachusetts, Paul Celluci, articulated a similar rationale in 2000 in support of a ballot initiative that took the right to vote away from incarcerated felons, saying, "It makes no sense. We incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run our lives?"[82] Similarly, writing for the majority in *Green v. Board of Elections*, Judge Henry Friendly of the Second Circuit opined that a "man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact."[83]

A third common rationale behind criminal disenfranchisement is the concern that ex-offenders will threaten the integrity of elections by forming a voting bloc in favor of officials who would be more lenient in prosecuting crimes or in defining crimes at the legislative level.[84] In *Green*, Judge Friendly also touched on this rationale:

> [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime.[85]

Supporters of this rationale might also be concerned that those who have been punished by the criminal justice system will resent it more and that this resentment might skew the results of elections, which are supposed to help determine the public's attitude toward the current system of crime and punishment.[86]

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81. Pinaire et al., *supra* note 79, at 1525–26.

82. Clegg et al., *supra* note 78, at 17.

83. Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

84. Clegg et al., *supra* note 78, at 18 ("[T]he abolition of felon disenfranchisement laws may have the unintended effect of creating 'anti-law enforcement' voting blocs . . . .").

85. *Green*, 380 F.2d at 451. Ironically, current evidence, discussed *infra*, suggests that allowing persons convicted of crimes to regain the right to vote is actually one step towards decreasing recidivism.

86. George P. Fletcher, *Disenfranchisement As Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1906 (1999).

Perhaps all three rationales can be distilled into a more general distrust of persons who have been convicted of crimes.[87] Supporters of disenfranchisement laws may feel that society considers convicted persons, "even those who have completed their prison terms, to be less trustworthy and responsible than non-convicted citizens."[88] In particular, the social-contract theory and the less-trustworthy theory have been cited as the prevailing schools of thought undergirding criminal disenfranchisement laws over the last several decades.[89]

As mentioned in Part I, in 2002 the United States Senate debated an amendment to the Equal Protection of Voting Rights Act of 2001 that would have restored the right to vote in federal elections to persons convicted of crimes upon completion of their sentences, including any probation or parole.[90] During the floor debate, Senator Mitch McConnell of Kentucky articulated several of the prevalent rationales underlying criminal disenfranchisement laws in a few passionate paragraphs:

> 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. We are talking about rapists, murderers, robbers, and even terrorists or spies. Do we want to see convicted terrorists who seek to destroy this country voting in elections? Do we want to see convicted spies who cause great damage to this country voting in elections? Do we want to see "jailhouse blocs" banding together to oust sheriffs and government officials who are tough on crime?[91]

During the same debate, then-Senator Jeff Sessions of Alabama echoed similar concerns, though perhaps in a more reserved way:

> As a prosecutor for 15 years, I wonder about how those people I helped put in the slammer feel about me. I do not care about them voting on my election. Would it intimidate or discourage or diminish the ability of judges who run for election? Or would a prosecutor who runs for election in some way not be as aggressive? Would it be a concern to them? Would it allow votes to occur against a strong law-

87. Clegg et al., *supra* note 78, at 18.

88. *Id.*

89. *See* Hadar Aviram, Allyson Bragg & Chelsea Lewis, *Felon Disenfranchisement*, 13 ANN. REV. L. & SOC. SCI. 295, 298–99 (2017); Clegg et al., *supra* note 78, at 17–19; Note, *supra* note 19, at 1304–09.

90. 148 CONG. REC. S798 (Feb. 14, 2002).

91. *Id.* at S802.

> and-order candidate that might not otherwise occur? I do not know. . . . Frankly, I do not think the American debate and American policy is going to be better informed if we have a bunch of felons in this process as opposed to them not being in this process. That is my 2 cents' worth.[92]

Senator George Allen from Virginia also mentioned several of the rationales supporting disenfranchisement in his remarks during the floor debate. But before he did this, he pointed out that many states already had a system in place to restore voting rights and that, in theory, any person could regain his or her voting rights though petition to the governor.[93] According to Senator Allen, this process, time-consuming and cumbersome as it may be, is part of the punishment for having committed a crime:

> Sometimes it can be cumbersome, and it is time consuming for the Governor as well as those in the Secretary of the Commonwealth's office, the attorney general's office, the Governor's staff and others to assemble this information, and also for the petitioner, as well.
>
> That is part of the price one pays when they commit a felony and they are convicted beyond a reasonable doubt by a judge and a jury of that crime. This is one of the many rights one gives up. . . . Many of the felony cases were vile, premeditated, deliberate acts to commit a felony—not a misdemeanor, a felony—and this is one of the prices and penalties that one pays.[94]

Senator Allen also articulated federalism concerns with the idea of restoring federal voting rights, which could undercut the goals a state may be trying to achieve through its system of disenfranchisement:

> A person loses their liberty, obviously, while incarcerated. To get all of their liberties and rights back, they have to demonstrate good behavior. In each State, that demonstration may be slightly different. But these are State laws being violated. It is a proper role of the people in the States to determine when these rights should be restored, as well as, under what conditions and circumstances the rights are restored.[95]

92. *Id.* at S804.
93. *Id.* at S807.
94. *Id.*
95. *Id.*

The United States Supreme Court has also had occasion to weigh in on the policy rationales behind criminal disenfranchisement but has not done so with the clarity that many would prefer. The lead Supreme Court case on state felon disenfranchisement laws, *Richardson v. Ramirez*,[96] declined to articulate a modern policy rationale for continuing this practice. The Court instead wrote:

> Pressed upon us by the respondents, and by amici curia, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.[97]

The Court, however, did not indicate what the other side of the argument might be. Eleven years later, in *Hunter v. Underwood*, the Court considered a challenge to the "catchall" provision in Alabama's state constitution that disenfranchised anyone convicted of a crime of "moral turpitude."[98] However, the Court refrained from discussing the basis for disenfranchisement laws in general, holding only that the moral turpitude provision at issue was unconstitutional because its "original enactment was motivated by a desire to discriminate against blacks on account of race and the section [continued] to have that effect" and thus violated equal protection principles.[99] The Court also declined to revisit its *Richardson* holding, signaling that it still accepted the practice of criminal disenfranchisement as constitutional in the abstract.[100]

At least in theory, the asserted rationales for disenfranchisement have stayed consistent over the years.[101] However, a survey conducted in

96. 418 U.S. 24 (1974).

97. *Id.* at 55.

98. *See supra* note 60 and accompanying text.

99. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

100. *Id.*

101. *See, e.g.*, Roger Clegg & Hans A. von Spakovsky, *There Are Good Reasons for Felons to Lose the Right to Vote*, HERITAGE FOUND. (Apr. 10, 2018), https://www.heritage.org/election-integrity/commentary/there-are-good-reasons-felons-lose-the-right-vote [https://

2003 found that the leading reason members of the public supported criminal disenfranchisement laws was that "felons have proven that they should not be treated as citizens" (selected by 32.7% of the survey respondents), but this option was closely followed by the "none of the above/some other category" selection (31.1%).[102] This data suggests that that lay persons in favor of criminal disenfranchisement laws, like the U.S. Supreme Court, have a hard time articulating exactly why.[103]

III. STATE APPROACHES TO VOTING RIGHTS FOR PERSONS CONVICTED OF CRIMES

A state's criminal disenfranchisement laws affect its citizens for purposes of voting in both state and federal elections.[104] There is currently no federal statute on voting with respect to the rights of persons convicted of crimes.[105] The Supreme Court has indicated at least twice that criminal disenfranchisement laws are constitutional.[106] Because the states have wide latitude in this area, various approaches to criminal disenfranchisement have developed across the country.

First, in Maine and Vermont, persons convicted of crimes never lose their right to vote, even while incarcerated.[107] For example, in Vermont, prison staff inform inmates about their rights to vote in an upcoming election ninety days before that election takes place.[108] Prison staff then post voter guidelines in the prison library that include information on how the process operates.[109] Inmates who wish to vote register, request an absentee ballot, and mail it in.[110] Prisoners must register wherever they most recently lived, and those with out-of-state residency are unable to participate in the prisoner-voting process.[111] Those with residency in Vermont who are housed in an out-of-state prison are still able to vote using this procedure.[112] In 2016,

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perma.cc/Z4GN-ZGBN] (articulating many of the same rationales for criminal disenfranchisement as have been discussed in this note, including the social contract theory).

102. Pinaire et al., *supra* note 79, at 1541.

103. *Id.* The authors of the study also opine that they may have missed a popular option. The other options were "Felons are not punished enough by the criminal justice system"; "There are some rights that should be revoked permanently;" "Those who commit felony offenses are not good citizens"; and "All of the above." *Id.* at 1535.

104. *See supra* notes 23–36.

105. *See supra* notes 23–36.

106. *See* Hunter v. Underwood, 471 U.S. 222 (1985); Richardson v. Ramirez, 418 U.S. 24 (1974).

107. *Felon Voting Rights*, *supra* note 4.

108. Jane C. Timm, *Most States Disenfranchise Felons. Maine and Vermont Allow Inmates to Vote from Prison*, NBC NEWS (Feb. 26, 2018, 3:43 AM), https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406 [https://perma.cc/G4FR-NCUZ].

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

California began to implement a similar process for those convicted of felonies who are serving their time in county jails, but not those incarcerated in state or federal prison.[113]

Because the process is completed by absentee ballot, it is hard to track how many prisoners in Vermont and Maine actually take advantage of the right to vote while incarcerated.[114] However, advocates for prisoner voting cite the powerful restorative effects it can have, including combatting the isolation and loneliness often experienced by those in prison and preparing prisoners to reengage in civic life after their release.[115] Notably, prisoner voting in Maine and Vermont has enjoyed bipartisan support, with a spokesman for the Vermont Republican Party telling NBC News in February 2018, "The last thing we want to do is start putting up insurmountable barriers to participation in civic life because someone may have been convicted of a crime. People's right to vote is sacred."[116]

Second, some states have relatively permissive processes for allowing persons convicted of crimes to regain the right to vote upon release from prison. In fourteen states and the District of Columbia, persons released from prison have their voting rights automatically restored.[117] These states include Illinois, Indiana, Ohio, Montana, and Maryland.[118] However, it is worth noting that in Maryland, a conviction for voting fraud by buying or selling votes can only be restored through a pardon from the governor.[119]

Third, in twenty-two other states, persons are eligible for automatic restoration of voting rights upon completion of their sentence, including any parole or probation.[120] However, some of these states have the added hurdle of requiring a person to pay any outstanding fines, fees, or restitution before their rights are restored.[121] While these restrictions may seem like a reasonable extension of the requirement that a person complete their entire sentence before regaining the right to vote, opponents of these restrictions have criticized them as setting up a "fines and fees" regime that disproportionately affects persons of color and persons of limited means.[122] Opponents of these more restrictive laws charge that they create "an

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113. *Felon Voting Rights*, *supra* note 4; Patrick McGreevy, *Felons in County Jails to Be Allowed to Vote in California Elections*, L.A. TIMES (Sept. 28, 2016, 1:42 PM), https://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-felons-in-jails-to-be-allowed-to-vote-1475094969-htmlstory.html [https://perma.cc/KU5C-YCGC].

114. Timm, *supra* note 108.

115. *Id.*

116. *Id.*

117. *Felon Voting Rights*, *supra* note 4.

118. *Id.*

119. MD. CODE ANN., ELEC. LAW § 3-102(b)(3) (West, Westlaw through 2018 Reg. Sess. of Gen. Assemb.).

120. *Felon Voting Rights*, *supra* note 4.

121. *Id.*

122. Edward Burmila, *How to Fight Voter Suppression in 2018*, DISSENT MAG. (July 11, 2018), https://www.dissentmagazine.org/online_articles/how-to-fight-voter-suppression-tactics-2018-practical-guide [https://perma.cc/R9X6-2A8V].

underclass of thousands of people who are unable to vote because they do not have enough money."[123] Opponents point out that those convicted of crimes often have a hard time finding work and thus paying off any fees or restitution they owe.[124] In addition, interest on these debts may accumulate the longer a person goes without paying them off.[125] If a person has more than one conviction on his or her record, these fees, fines, restitution, and interest can stack up.[126] For example, a recent study of criminal convictions in Washington State found that the median lifetime assessment of fines, fees, and restitution for persons convicted of multiple crimes was $7,234.[127] Fines are usually assessed without considering a person's income level, so these obligations likely create a particularly acute problem in low-income communities.[128] While states that provide for automatic voting rights restoration upon completion of all sentencing and financial obligations may seem to have fairly permissive processes for restoration of voting rights, in many cases the financial obligations become tantamount to a lifetime ban from the ballot box.[129]

Fourth, in twelve states, a person with a criminal conviction may be required to wait a period of time after completion of his or her sentence (including any probation or parole) before regaining the right to vote, to seek a pardon from the governor of his or her state, or may even lose his or her voting rights indefinitely upon conviction of certain categories of crime.[130] For example, persons convicted of any felony in Kentucky must individually apply with the Governor to have their voting rights restored.[131] In 2015, former Kentucky governor Steve Beshear restored voting rights to persons with non-violent felony convictions via executive order.[132] However, in the same year, newly-elected governor Matt Bevin reversed this executive order, writing:

> It is inappropriate to view this issue in partisan terms, especially since the restoration of civil rights is fundamentally a question of democracy and fairness,

123. Connor Sheets, *Too Poor to Vote: How Alabama's "New Poll Tax" Bars Thousands of People from Voting*, AL.COM, https://www.al.com/news/index.ssf/2017/10/too_poor_to_vote_how_alabamas.html (last updated July 24, 2018) [https://perma.cc/R9X6-2A8V].

124. *Id.*

125. *Id.*

126. Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 313 (2017).

127. *Id.* at 313–14.

128. *Id*.

129. *See* Sheets, *supra* note 123 (profiling Alabama woman who was convicted of credit card fraud in 2011, owes the state more than $11,500 in restitution, fines, fees, and interest, and believes she will never be able to pay this debt off in full because she is disabled and recovering from drug addiction, and her only income is $722 from Social Security).

130. *Felon Voting Rights*, *supra* note 4.

131. KY. REV. STAT. ANN. § 196.045(1)(e) (West 2006 & Supp. 2018).

132. KY. EXEC. ORDER 2015-871 (2015).

> constitutes a public policy issue, and is an issue that should be determined based on what we, the people of this state, think is appropriate and fair, and not on the opinions of certain individuals.[133]

Now, the Kentucky Department of Corrections is required to promulgate regulations for restoration of civil rights to persons with felony convictions.[134] These regulations currently prevent an estimated 9.1% of persons in Kentucky from voting—a dramatic increase from 2.2% in 1980.[135] Similarly, under Mississippi's constitution, persons convicted of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy" may never vote again unless they can convince the governor to grant them a pardon or convince two-thirds of both houses of the state legislature to restore their voting rights.[136] Between the years 2000 and 2015 only an estimated 335 persons had their voting rights restored in Mississippi.[137]

Finally, many states have carve-outs for categories of persons who may never regain the right to vote. For example, the Alabama Constitution states, "No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability."[138] While Alabama law defines which crimes qualify as "of moral turpitude," certain crimes are excepted from the process to apply for restoration of voting rights.[139] These crimes include murder, rape, incest, certain sexual offenses, and treason.[140] Persons convicted of these crimes must receive a pardon for them before they are eligible to apply for restoration of voting rights.[141] In Delaware, persons convicted of murder, bribery, and certain sexual offenses are also permanently disenfranchised.[142]

Similarly, the Iowa constitution bars anyone convicted of an "infamous crime" from voting.[143] In 2016, the Iowa Supreme Court ruled that all felonies are "infamous crimes" within the meaning of the constitutional provision and thus a conviction for any felony could result in permanent

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133. KY. EXEC. ORDER 2015-052 (2015).

134. KY. REV. STAT. ANN. § 196.045(1) (West 2006 & Supp. 2018).

135. Ben Carter, *Voting Rights for Kentucky Felons May Get New Life After Florida Case*, COURIER J. (May 9, 2018, 12:53 PM), https://www.courier-journal.com/story/opinion/columnists/2018/05/09/kentucky-felons-voting-rights-back-after-florida-case/594252002/ [https://perma.cc/4V7S-AFS7].

136. MISS. CONST. art. 12, §§ 241, 253; MISS. CODE ANN. § 47-7-41 (2002).

137. Uggen et al., *supra* note 1.

138. ALA. CONST. art. VIII, § 177.

139. ALA. CODE § 15-22-36.1(g) (2018).

140. *Id.*

141. *Id.*

142. DEL. CONST. art. 5, § 2.

143. IOWA CONST. art. 2, § 5.

disenfranchisement.[144] The only way for a person with a felony conviction in Iowa to regain the right to vote is to receive executive clemency from the governor.[145] In 2005, then-governor Tom Vilsack used an executive order to restore voting rights to persons with felony convictions.[146] His successor, Terry Branstad, rescinded this executive order in 2011, citing his belief that filling out the application for restoration of voting rights and paying any restitution, court costs, and other fees are important steps in the process of a person's reintegration into society.[147]

IV. DISENFRANCHISEMENT AS A CRIMINAL CONSEQUENCE

Criminal disenfranchisement is an inappropriate form of criminal punishment in today's world. The justifications for the practice have been weak since their inception and have only deteriorated over time.[148] In addition, any benefit derived from continuing to disenfranchise those who have committed crimes is far outweighed by the harms disenfranchisement works.[149] As this section will discuss, disenfranchisement sets up collateral consequences for those released from prison that inhibit their successful reintegration.[150] It also poses further barriers to rehabilitation and can contribute to recidivism.[151]

A. Rationale Problems

The most common theories advanced in favor of criminal disenfranchisement laws have little application in today's world. First, the less-trustworthy rationale for disenfranchisement laws was at its strongest just after the Civil War, when Unionists were worried that ex-Confederates might band together to defeat the goals of the Reconstruction Era.[152] This fear was at least partly justified by the fact that the ex-Confederate soldiers had just participated *in an armed uprising* against the United States.[153] However, today there is no evidence that persons who have been convicted of crimes would be motivated to form the kind of voting bloc that Senators McConnell and Sessions worried about in 2002.[154]

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144. Griffin v. Pate, 884 N.W.2d 182, 205 (Iowa 2016) ("In the end, we are constrained to conclude that all objective indicia of today's standard of infamy supports the conclusion that an infamous crime has evolved to be defined as a felony.").

145. *Executive Clemency*, OFFICE OF THE GOVERNOR OF IOWA, https://bop.iowa.gov/executive-clemency (last visited Jan. 26, 2019) [https://perma.cc/V8NF-GR95].

146. IOWA EXEC. ORDER 42 (2005).

147. IOWA EXEC. ORDER 70 (2011).

148. *See infra* Section IV.A.

149. *See infra* Sections IV.B–C.

150. *See infra* Section IV.B.

151. *See infra* Section IV.C.

152. *See supra* notes 43–54 and accompanying text.

153. *See supra* notes 43–54 and accompanying text.

154. *See supra* notes 91–92 and accompanying text.

In fact, the studies and data are mixed on how much even total re-enfranchisement of persons convicted of crimes would affect the outcome of elections.[155] Even if persons do immediately begin exercising their restored rights, there is little evidence of how this would affect the electorate in terms of political persuasion.[156] Some studies suggest that re-enfranchisement could swing particularly tight races,[157] while others suggest that the turnout among persons with criminal convictions would be relatively low and the political make-up of the group would be similar to the rest of the electorate.[158]

There is even less evidence that persons would use their newly restored rights to form an anarchist voting bloc or that such efforts would be successful.[159] In any event, disenfranchising persons because they *might* form a renegade coalition that *could* impact the results of an election would be preemptive punishment, which is inconsistent with the *nullum crimen sine lege* principle that underlies our justice system.[160] In addition, there is no constitutional justification for punishing someone for voting "the wrong way."[161] In a 1965 case regarding the right of soldiers stationed in Texas to vote in Texas elections, the Supreme Court wrote, "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[162] Nor is there a justification for excluding a person from voting due to his or her personal biases.[163] The less-trustworthy rationale also assumes that a person's status as a convicted person is what

155. Elena Holodny, *Millions of American Adults Are Not Allowed to Vote—And They Could Change History*, BUS. INSIDER (Jan. 3, 2018, 2:00 PM), https://www.businessinsider.com/what-if-felons-could-vote-2017-7 [https://perma.cc/AF2F-M5DU] ("It's difficult to predict how felon and ex-felon disenfranchisement affects election results for several reasons, including, for example, that it's hard to estimate how many ex-felons would turn out to vote if their voting rights were restored."); Joshua Replogle & Adriana Gomez Licon, *Florida Felons Rejoice After Regaining Their Right to Vote*, ASSOCIATED PRESS (updated Jan. 8, 2019, 4:56 PM), https://www.apnews.com/a0086670a6df42c9a3d2857d1606e027 [https://perma.cc/BH55-E3S2] ("There is very little evidence that individuals who have the opportunity to have their rights restored [would] immediately take advantage of that opportunity.").

156. *See* Spencer Macnaughton, *Will Florida Measure Restoring Vote to 1.4 Million Ex-Prisoners Swing State?*, WALL STREET J. (Oct. 30, 2018, 5:30 AM), https://www.wsj.com/video/will-florida-measure-restoring-vote-to-14-million-ex-prisoners-swing-state/35F5F552-EACA-485D-9E37-CAA6CE34DB3D.html [https://perma.cc/QR2S-37AP]; Replogle & Licon, *supra* note 155.

157. Marc Meredith & Michael Morse, *The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa*, 10 Q.J. POL. SCI. 41, 43 (2015).

158. *Id.*

159. Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 112 (2005).

160. This is also known as the legality principle and frequently translated as "no crime without law." *See* Stefan Glaser, *Nullum Crimen Sine Lege*, 24 J. COMP. LEGIS. & INT'L L. 29, 30 (1942) ("The principle, *nullum crimen sine lege*, was invoked as a guarantee of civic liberty against the omnipotence and despotism of the State and of the judge.").

161. Wilkins, *supra* note 159, at 112.

162. Carrington v. Rash, 380 U.S. 89, 94 (1965).

163. Fletcher, *supra* note 86, at 1906.

drives his or her voting choices, rather than the lived experience, habit, or instinct to which we attribute the voting decisions of other persons.[164]

Second, the social-contract rationale is similarly unavailing. The underlying theory of this rationale would seem to indicate that convicted persons are not entitled to any of the rights and privileges that accompany being part of society, but this is not the outcome of a criminal conviction today.[165] As the Supreme Court wrote in 1958, "[c]itizenship is not a license that expires upon misbehavior."[166] Since the government still retains obligations towards citizens, even after they have committed crimes, then a criminal conviction does not "cancel" the social contract.[167] "If [the social contract theory] is not a legitimate justification for denying convicted felons police protection or access to the courts, then it strains belief to assert it is a valid reason for denying them the vote."[168]

Finally, while disenfranchisement may seem justifiable as part of the punishment for the crime committed, it is unclear what goal of punishment disenfranchisement serves. Disenfranchisement may seem consistent with a retributive theory of criminal punishment.[169] Retribution prioritizes making an offender experience pain in return for the pain they have caused.[170] The theory also teaches that there must be a connection between the punishment and the wrongdoing.[171] However, disenfranchisement has little or no connection to the vast majority of crimes committed today:

> [T]here is a vast range of offenses that constitute a felony, and most bear little resemblance to the electoral process at all. Also, there is little indication that those who have been previously convicted of tampering with an election would automatically try it again upon parole. And even if there was such an indication, criminal sentences are designed to detain someone until they are no longer the threat to society and can reenter society and resume being innocent until proven guilty. A drunk driver is not forever prohibited from driving again, nor is a spousal abuser prevented from dating and marriage.[172]

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164. *See id.* ("[B]ias does not disqualify people from voting. Indeed voting is precisely about expressing biases, loyalties, commitments, and personal values.").

165. Wilkins, *supra* note 159, at 112.

166. Trop v. Dulles, 356 U.S. 86, 92 (1958).

167. Wilkins, *supra* note 159, at 112.

168. *Id.* at 112–13.

169. Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JURIS. REV. 193, 218–20 (2009).

170. *Id.* at 218.

171. *Id.*

172. *Id.* at 217.

With this essential link broken, disenfranchisement does not fulfill the retributive function of punishment.[173] Moreover, applying lengthy or lifetime disenfranchisement to all persons with felony convictions, regardless of the relationship of this punishment to the offense or its severity, is neither rational nor proportional.[174]

The arguments for disenfranchisement as a deterrent or a form of rehabilitation are even weaker.[175] To begin, a person on the brink of committing a crime is unlikely to pause to consider "the sacredness of participating in the political process" and what it would mean to lose his right to vote.[176] In addition, persons tend to commit crimes when they are young and tend to become more appreciative of the right to vote as they get older.[177] Thus, it is illogical to punish someone for a right they will likely not appreciate until they are older and less likely to be engaging in criminal behavior.[178] Finally, disenfranchisement is a particularly ineffective form of rehabilitation.[179] The goal of rehabilitation is "to restore and develop the morality of a criminal so that he may rejoin society as a decent, law-abiding citizen."[180] It is hard to conceive of a rationale that would connect disenfranchisement with any positive impact on a person's reentry into society.[181]

B. Collateral Effects to a Collateral Consequence

A less-discussed, but pressing, issue with criminal disenfranchisement laws is the effect of the collateral consequences that accompany not being a registered voter. Disenfranchisement itself is considered a collateral consequence to a criminal conviction because it is not part of a person's sentence.[182] It is also referred to as a "civil disability" triggered by the state as a consequence of the conviction.[183] However, this civil disability carries with it its own set of further consequences.

For example, the federal court system selects potential jurors from state lists of registered voters.[184] These lists may be supplemented by lists of driver's license holders in the state, but those with felony convictions whose civil rights have not been restored are barred from jury service regardless.[185]

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173. *Id.* at 218.
174. *Id.* at 220.
175. *Id.* at 220–24.
176. *Id.* at 221.
177. *Id.*
178. *Id.*
179. *Id.* at 223.
180. *Id.* at 222.
181. *Id.* at 223.
182. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 370 (2012).
183. *Id.* at 371.
184. *See* 28 U.S.C. §§ 1863, 1866, 1869 (2014).
185. *See* § 1865(b)(5).

The majority of states have similar provisions that bar persons with felony convictions from serving on juries.[186] This reality becomes more troubling given the disparate racial impact of voter disenfranchisement.[187] Twenty-three states currently disenfranchise five percent or more of their African-American adult population, compared to only nine states that did so in 1980.[188] In Kentucky, Florida, Tennessee, and Virginia, the rate is over twenty percent.[189] While these percentages seem like they would have a relatively small impact on the racial make-up of juries, the effect of criminal disenfranchisement intersects with other trends in the racial make-up of juries.[190] This impact is difficult to measure because of the variables created by choice of venue, the make-up of jury pools, and preemptory challenges, but "given the sheer magnitude of the estimated number of individuals with felony convictions (especially among African-Americans), it is difficult to imagine that felon jury exclusion has no impact on the persistent underrepresentation of African-American jurors."[191] One 2011 study conducted in Georgia found that approximately fourteen percent of African-American persons in the state were excluded from juries due to their felon status.[192] While areas with both high and low African-American populations had high levels of African-American exclusion, the study found higher levels of exclusion tended to occur in rural areas.[193] This is significant because of the "ripple effect" that racial jury exclusion can create, where "inequalities in the jury selection system ultimately lead to greater levels of racial inequality throughout the criminal justice system itself."[194]

In addition to jury service, presence on a state's voter roll may be necessary to participate in civic life even before election day. Twenty-four states allow voters to bypass their state legislatures to enact proposed statutes and, in some states, constitutional amendments, by placing initiatives on the state election ballots.[195] Most of these states require organizers of a ballot initiative to obtain a certain number of signatures from registered voters who support the initiative.[196] These initiatives are powerful avenues for change because they do not require legislative approval.[197] However, criminal

186. Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J. 335, 336 (2011).

187. *See* Uggen et al., *supra* note 1, at figs. 6–7.

188. *Id.*

189. *Id.* at 3.

190. Wheelock, *supra* note 186, at 336.

191. *Id.*

192. *Id.* at 347.

193. *Id.*

194. *Id.* at 353–54.

195. *Initiative, Referendum and Recall*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 20, 2012), http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx [https://perma.cc/CNZ7-28TC].

196. *Id.*

197. *See infra* Section VI.A.

disenfranchisement keeps persons with criminal convictions from participating in this avenue, possibly for the rest of their lives.

This situation can produce ironic results. For example, a petition for a local ballot initiative that benefits persons with felony convictions—such as changing the hiring procedure for public jobs so that an applicant has a chance to interview before disclosing their felon status—could only be signed by persons without felony convictions or those who have had their voting rights restored. However, restoration may be a practical impossibility in some states.[198] This further disadvantages persons with criminal convictions by making them subject to the political desires of others.[199] Disenfranchisement has an extreme impact on the individual by "directly limit[ing] participation in critical areas of life" and prolonging the consequences of the conviction, potentially for the rest of a person's life.[200]

Finally, criminal disenfranchisement has collateral consequences not only for the individuals affected by it, but also for the communities that surround them.[201] During the 2010 census, the U.S. Census Bureau counted incarcerated persons at the addresses of the prison facilities, rather than their previous addresses in their home communities.[202] This means that

> [d]istricts with prisons are constructed on the backs of "ghost voters," packing in prisoners who count toward the district size but who, with few exceptions, are not permitted to vote, and who, with few exceptions, have no connection whatsoever to the other residents of the district. This artificially inflates the political power of residents in prison districts, and artificially deflates the power of residents everywhere else.[203]

This has a particularly harsh effect on the neighborhoods the incarcerated persons originated from, which leads to "a systemic distortion of the population picture," which is in turn built into the distribution of democracy.[204] In some districts:

> The skew can become quite extreme: in 2006, for example, voters in three of the city council wards of Anamosa, Iowa, were busily engaged in the democratic process. But 1300 of the 1358 individuals allotted to ward 2 were incarcerated —

198. *See supra* Part III.

199. *See infra* Section IV.C.

200. Cammett, *supra* note 182, at 371–72.

201. *Id.* at 366.

202. *Id.*

203. *U.S. Census and Incarceration*, BRENNAN CTR. FOR JUST. (Jan. 27, 2010), https://www.brennancenter.org/analysis/us-census-and-incarceration [https://perma.cc/RX9E-M4MP].

204. *Id.*

> and so the city councilman was elected with one write-in vote from his wife and one from his neighbor.[205]

While most communities will not experience such extreme consequences, this example illustrates how denial of voting rights can have a "profound influence on entire communities through vote dilution and further economic displacement from the redistribution of federal resources."[206] Thus, criminal disenfranchisement imposes collateral consequences on entire communities.[207]

C. Roadblocks to Rehabilitation

In addition to the collateral consequences that follow disenfranchisement, the feelings of helplessness and disconnect from civic life that may accompany life after prison can contribute to recidivism.[208] As the view that punishment should serve to rehabilitate a person continues to enjoy widespread popularity,[209] criminal disenfranchisement laws send the message that complete rehabilitation in the wake of a criminal conviction is not possible.[210] Thus, scholars hypothesize that

> such alienation and isolation can only serve to increase further incidences of criminal activity. In other words, if one has no stake in the community of which they are a part, then there is little incentive to behave in a pro-social manner other than avoidance of punishment in the form of [reincarceration] – a deterrent which, for many individuals, may be a threat that is more rote than daunting.[211]

While perhaps not the intention of all proponents of voter disenfranchisement laws, these laws communicate to convicted persons that they are excluded from the "basic building blocks of everyday life," entrenching their status as "outsiders."[212]

In this way, disenfranchisement may appropriately be considered a modern form of outlawry[213]—one of the harshest penalties in early Germanic

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205. *Id.*

206. Cammett, *supra* note 182, at 366.

207. *Id.*

208. Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J.C.R. & C.L. 237, 251 (2015).

209. *See supra* Part II.

210. Guy Padraic Hamilton-Smith & Matthew Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 413 (2012).

211. *Id.* at 413–14.

212. Jones, *supra* note 208, at 251.

213. Hamilton-Smith & Vogel, *supra* note 210, at 414.

law—which declared a person outside the protections and benefits of the law. In fact, then-Senator Jeff Sessions categorized disenfranchisement this way in his 2002 floor speech to the Senate as legislators considered a Constitutional amendment allowing disenfranchised persons to regain the right to vote in federal elections:

> Historically, we have referred to [people with felony convictions] as being outside the law or, in short, outlaws. All the way through the beginning of the United States of America, we have believed that a person who violates serious laws of a State or the Federal Government forfeits their right to participate in those activities of that government, that their judgement and character is such that they ought not to be making decisions on the most important issues facing our country.[214]

While the empirical research of the effect of criminal disenfranchisement laws on recidivism is limited,[215] there is evidence that voting behavior is inversely correlated with incarceration, rearrest, and self-reported criminality.[216] When a person is barred from voting due to a criminal conviction, not only is the retributive function of punishment extended beyond its logical end, but the rehabilitative function is also undercut.[217] Though it is in society's best interest to foster the successful reentry of persons coming out of incarceration and encourage their return to the civic process, restricting the franchise is one roadblock (of many) that makes performing the duties of citizenship difficult.[218]

V. FEDERAL CHALLENGES TO DISENFRANCHISEMENT LAWS

"There are so many constitutional arguments against the disenfranchisement of felons that one can only wonder at the survival of the practice."[219] Yet survive it does. One important factor enabling the survival of disenfranchisement is the uncertainty around whether voting is a right or a privilege.[220] The Fourteenth Amendment does not explicitly guarantee the

214. 148 CONG. REC. S1495 (Feb. 14, 2002).

215. Hamilton-Smith & Vogel, *supra* note 210, at 414.

216. *Id.*

217. *See supra* Section IV.A.

218. Cammett, *supra* note 182, at 400. Other widely recognized roadblocks are "significant limitations on employment, restrictions on occupational licenses, barriers to public and private housing, thwarted access to legal immigration, ineligibility for public benefits, limited access to educational loans, the inability to maintain parental rights or act as a foster parent, qualifications for jury service, and child support enforcement for debt accrued during a period of incarceration." *Id.* at 371–72.

219. Fletcher, *supra* note 86, at 1903.

220. Wilkins, *supra* note 159, at 103.

ability of all persons to vote, but rather affords implicit protection by penalizing states who deny or abridge the ability to vote.[221] Although the amendment describes the ability to vote as the "right to vote,"[222] early Supreme Court precedent indicates that voting was conceived of as a privilege, even after the passage of the Reconstruction Amendments.[223] In *Murphy v. Ramsey*, the Court upheld a law that barred persons practicing polygamy from voting in Utah territory.[224] The Court characterized a state's right to limit the franchise as broad, going so far as to say that states could limit the franchise based on any status "made necessary by law," including marital status as an example.[225] Just five years later, in *Davis v. Beason*, the Court went even further by declaring that a state could limit the franchise by using any "reasonable qualification."[226]

Of course, this understanding of the ability to vote did not survive.[227] Justices Marshall and Brennan cast doubt on the viability of *Murphy* and *Beason* in later years, writing that the decisions were "surely of minimal continuing precedential value."[228] In addition, "[c]onstitutional amendments, statutes, and court decisions all have transformed the character of suffrage: once considered a privilege, it is now a *right* of adult citizenship."[229] Since *Murphy* and *Beason* were decided, the Nineteenth and Twenty-Sixth Amendments were passed—giving women the right to vote and reducing the voting age to 18.[230] The Supreme Court also struck down poll taxes and compelled states to loosen their residency requirements.[231] The Court has also emphasized suffrage as a right that safeguards the other rights of citizenship, writing in *Reynolds v. Sims*:

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

221. U.S. CONST. amend. XIV, § 2; *see* Uggen & Manza, *supra* note 39, at 779 and accompanying text.

222. U.S. CONST. amend. XIV, § 2.

223. *See* Uggen & Manza, *supra* note 39, at 779–80.

224. 114 U.S. 15, 44–45 (1885).

225. Wilkins, *supra* note 159, at 103.

226. 133 U.S. 333, 346 (1890), *abrogated by* Romer v. Evans, 517 U.S. 620, 634 (1996).

227. Wilkins, *supra* note 159, at 103.

228. Richardson v. Ramirez, 418 U.S. 24, 81 (1974) (Marshall, J., dissenting).

229. Wilkins, *supra* note 159, at 103 (emphasis added).

230. U.S. CONST. amends. XIX, XXVI.

231. *See* Dunn v. Blumstein, 405 U.S. 330, 358, 360 (1972) (residency requirements); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666–67 (1966) (poll taxes).

> classification of people in a way that unnecessarily abridges this right.[232]

However, the Court flatly declared a few decades later in *Bush v. Gore* that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."[233] Thus, the "right" to vote lies in a "constitutional no man's land."[234] This uncertainty has led to a system in which many different exercises of state discretion are permissible: from allowing persons to continue voting while incarcerating to disenfranchising certain persons for the rest of their lives.[235]

In the federal courts, numerous constitutional challenges to criminal disenfranchisement laws have been attempted.[236] *Hunter v. Underwood*, which held that Alabama's "moral turpitude" catchall provision violated the Equal Protection Clause, was an example of one of these successful challenges.[237] But Alabama quickly corrected the constitutional problem by passing a statute defining which crimes are those of "moral turpitude."[238] In addition, the *Hunter* holding was largely based on documents from the Alabama Constitutional convention of 1901, during which the delegates openly expressed racial animus and their racist reasoning behind the state's criminal disenfranchisement provision.[239] Legislators who passed later disenfranchisement laws, even if they were motived by racial bias, likely did not make the same mistake.[240] Racial bias is also notoriously difficult to prove, as evidenced by challenges to other voting laws, with the Court holding that disparate racial effect may "trail" the primary purpose of the law, as long as there is no evidence that race was the motivation behind the law.[241]

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232. Reynolds v. Sims, 377 U.S. 533, 560 (1964) (quoting Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964)) (internal quotation marks omitted).

233. Bush v. Gore, 531 U.S. 98, 104 (2000).

234. Wilkins, *supra* note 159, at 87.

235. *See supra* Part III.

236. *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967) (disenfranchisement laws are not bills of attainder nor cruel and unusual punishment); Hayden v. Pataki, No. 00 Civ. 8586(LMM), 2004 WL 1335921 (S.D.N.Y. June 14, 2004) (not violative of the First Amendment); King v. City of Boston, No. Civ.A.04–10156–RWZ, 2004 WL 1070573 (D. Mass. May 13, 2004) (not ex post facto law).

237. 471 U.S. 222 (1985).

238. ALA. CODE § 15-22-36.1(g) (2019).

239. *See supra* notes 60–61 and accompanying text.

240. *See* Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1620 (2012) ("As Senator Mitch McConnell put it while discussing laws that disenfranchise felons, 'states have a significant interest in reserving the vote for those who have abided by the social contract that forms the foundation of representative democracy . . . those who break our laws should not dilute the votes of law-abiding citizens.'").

241. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 553 (1999) ("Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other

This is a high bar to clear. Opponents of criminal disenfranchisement laws have also tried other avenues, including the Eighth Amendment and other sections of the Fourteenth Amendment besides the Equal Protection Clause.[242]

Challenges to criminal disenfranchisement laws under the Eighth Amendment face two hurdles: the plaintiff must first prove that disenfranchisement is truly a form of "punishment" under the amendment and second, that this punishment is considered cruel and unusual under "evolving standards of decency."[243] Most recent challenges to criminal disenfranchisement laws have failed on the first prong.[244] Notwithstanding the Supreme Court's recognition of the right to vote as central to guarding all other rights,[245] lower courts typically find that state disenfranchisement laws are "nonpenal exercise[s] of the right to regulate the franchise."[246] Further complicating the first prong of the test are the various "civil" justifications for disenfranchisement laws.[247] These civil justifications include the social-contract and less-trustworthy rationales that underlie support for criminal disenfranchisement laws.[248] Courts have pointed to these justifications as evidence that disenfranchisement is properly thought of as a civil collateral consequence, rather than a criminal punishment.[249] Though many members of the public may perceive disenfranchisement as part of the punishment for a crime committed,[250] the courts have been unwillingly to accept this view as a legal argument.

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evidence. Summary judgment in favor of the party with the burden of persuasion, however, is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.").

242. *See infra* notes 244, 258. In the interest of length, this note will address primarily Eighth and Fourteenth Amendment challenges as examples of the difficulties in bringing federal challenges to criminal disenfranchisement laws. However, the Eighth and Fourteenth Amendments have not been the only source of these challenges by any means. *See, e.g.*, Johnson v. Governor of State of Fla., 405 F.3d 1214 (11th Cir. 2005) (holding that Voting Rights Act's prohibition against voting qualifications that result in abridgment of right to vote on account of race does not apply to criminal disenfranchisement provision); Hayden v. Pataki, No. 00 Civ. 8586(LMM), 2004 WL 1335921 (S.D.N.Y. June 14, 2004) (holding that New York criminal disenfranchisement provisions did not violate the First Amendment); Jones v. Edgar, 3 F. Supp. 2d 979 (C.D. Ill. 1998) (holding that Illinois constitutional provision disenfranchising persons convicted of felonies did not violate the Fifteenth Amendment).

243. *See* Trop v. Dulles, 356 U.S. 86, 101–02 (1958) (accepting interpretation of the Eighth Amendment that would allow a court to consider what actions are cruel and unusual based on what society at that point in time finds cruel and unusual).

244. Wilkins, *supra* note 159, at 99–100.

245. *See* Reynolds v. Sims, 377 U.S. 533, 560 (1964).

246. *Trop*, 356 U.S. at 97; *see also* Mixon v. Commonwealth, 759 A.2d 442, 448 (Pa. Commw. Ct. 2000) ("Modern thought perceives disenfranchisement of convicted felons, not as punishment, but rather as a 'nonpenal exercise of the power to regulate the franchise.'" (quoting *Trop*, 356 U.S. at 97)).

247. Wilkins, *supra* note 159, at 100.

248. *See supra* Section IV.A. *See generally* Wilkins, *supra* note 159, at 109–16.

249. Wilkins, *supra* note 159, at 109.

250. *See supra* Section IV.A.

As to the second prong, opponents of disenfranchisement laws face an additional high hurdle.[251] While the majority of Eighth Amendment litigation is focused on physical punishment or the death penalty,[252] the Supreme Court has used the Eighth Amendment to strike down non-traditional forms of punishments in three cases: *Weems v. United States* (twelve years in chains while performing hard labor); *Trop v. Dulles* (expatriation); and *Robinson v. California* (imprisonment for narcotics addiction).[253] However, as the Second Circuit explained in *Green v. Board of Elections*, the Framers would not have considered criminal disenfranchisement "cruel and unusual" when the Eighth Amendment was ratified because nearly all felonies were punishable by a sentence of death in eighteenth-century England.[254] In addition, the "the great number of states excluding felons from the franchise forbids a conclusion that this is a 'cruel and unusual punishment' within the context of 'evolving standards of decency that mark the progress of a maturing society.'"[255] The widespread adoption of state disenfranchisement laws tends to undercut any claim that the practice is cruel and unusual.[256]

The Fourteenth Amendment has been a source of various types of challenges to criminal disenfranchisement laws, including challenges under the Equal Protection, Due Process, and Privileges and Immunities Clauses.[257] Once a state grants someone the right to vote, that right is protected by the Constitution.[258] And generally, state laws that restrict voting rights must survive strict scrutiny under the Equal Protection Clause.[259] But in *Richardson v. Ramirez*, the Supreme Court seemed to affirmatively authorize

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251. *See* Amy Heath, *Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote After Serving Their Sentences*, 25 AM. U. J. GENDER SOC. POL'Y & L. 327, 335–36 (2017).

252. Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419 (1995); *see, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463–64 (1947) (second attempt at electrocution); *In re* Kemmler, 136 U.S. 436, 444 (1890) (hanging); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) (firing squad). In later cases, the constitutionality of the death sentence itself was at issue. *See* Gregg v. Georgia, 428 U.S. 153, 158 (1976); Furman v. Georgia, 408 U.S. 238, 239 (1972).

253. *See* Robin Miller, Annotation, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R.6th § 7, at 31 (2006).

254. Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967).

255. *Id.* at 451 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

256. Heath, *supra* note 251, at 337.

257. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24 (1974) (equal protection); Tex. Supporters of Workers World Party Presidential Candidates v. Strake, 511 F. Supp. 149 (S.D. Tex. 1981) (due process); State *ex rel.* Olson v. Langer, 256 N.W. 377 (N.D. 1934) (privileges and immunities as well as due process).

258. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966) ("We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

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

the practice of denying persons convicted of crimes the right to vote based on Section 2 of the Fourteenth Amendment, which the Court acknowledged is a less-familiar portion of the Constitution.[260] *Richardson* held that a state law that disenfranchised persons convicted of felonies even after they had completed their sentences and parole terms did not violate the Fourteenth Amendment.[261] Section 2 of the Fourteenth Amendment prescribes the apportionment of state representatives among the states and dictates that

> 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.[262]

In analyzing this less-familiar section, the Court first engaged in an extensive review of the amendment's legislative history.[263] The Court relied on the fact that, at the time of the Fourteenth Amendment's adoption, "29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes."[264] As part of the readmission process during Reconstruction, states had to submit their state constitutions for Congressional approval, and the Court found it particularly persuasive that states had been readmitted to the Union with disenfranchisement provisions written into their state constitutions.[265] This historical evidence confirmed for the Court that criminal disenfranchisement laws were not prohibited by the Fourteenth Amendment.[266] Notably, the Court did not consider the possibility that these provisions existed to allow states to continue to disenfranchise ex-Confederates, as discussed in Part I of this note.

The *Richardson* decision effectively closed the door on attacking criminal disenfranchisement laws under the Equal Protection Clause unless

260. *Richardson*, 418 U.S. at 42.
261. *Id.* at 56.
262. U.S. CONST. amend. XIV, § 2 (emphasis added).
263. *Richardson*, 418 U.S. at 42–52.
264. *Id.* at 48.
265. *Id.* at 48–49.
266. *Id.* at 53.

the challenger can prove racial animus.[267] Lower courts have relied on *Richardson*'s understanding of the Fourteenth Amendment to foreclose challenges to disenfranchisement laws on Due Process grounds as well.[268]

VI. STATE-CENTERED APPROACHES TO ENDING CRIMINAL DISENFRANCHISEMENT

In the absence of a viable federal constitutional solution that will end criminal disenfranchisement, advocates of re-enfranchisement should focus on solutions at the state level. In states that already have somewhat permissive processes for regaining voting rights upon release from prison,[269] advocates should seek to relax these laws even further. Advocates should pursue solutions that at least allow persons to have their voting rights restored automatically upon release from prison. Conditioning restoration of rights upon completion of any parole, probation, or payment of fees can set up an inequitable system that prevents persons of modest means from regaining their voting rights and reaping the collateral and rehabilitative benefits of being re-enfranchised.[270]

A state-centered solution to the problem of disenfranchisement could take several forms, including legislation, a state constitutional amendment, litigation under the state constitution, or even executive action by the state's governor. Legislation and state constitutional amendments provide ideal avenues because of their permanency and their ability to shift political attitudes.[271] In addition, state constitutional challenges have met with some success in striking down disenfranchisement laws.[272] However, the viability of a state constitutional challenge necessarily depends on the language used in the constitution.[273] Finally, executive action by governors is the least desirable path to restore voting rights because these orders are reversible by a subsequent governor with different views on criminal disenfranchisement.[274] Executive action is also highly discretionary and can lead to piecemeal and arbitrary restoration of rights.[275]

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267. Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1588 (2012).

268. *See, e.g.*, Tex. Supporters of Workers World Party Presidential Candidates v. Strake, 511 F. Supp. 149 (S.D. Tex. 1981).

269. *See supra* notes 117–29 and accompanying text.

270. *See supra* notes 121–29 and accompanying text.

271. *See infra* Section VI.A.

272. *See infra* notes 328–41.

273. *See infra* notes 328–41.

274. *See infra* Section VI.C.

275. *See infra* Section VI.C.

A. Legislation and State Constitutional Amendments: A Florida Case Study

Legislation and state constitutional amendments are the most desirable avenues toward re-enfranchisement. However, these avenues also present unique challenges. First, drafters of these amendments and statutes may be tempted to include carve-outs for certain types of crimes because the drafters fear that the public will not support a law that restores the right to vote to the "terrible few."[276] These carve-outs undercut the theoretical arguments behind re-enfranchisement and dilute support from more progressive groups who would likely vote for the measures otherwise.[277] Second, drafters of state constitutional amendments must anticipate potential challenges if the amendments pass and be as precise with the language of the amendments as possible in order to guard them from future attacks.[278]

As support for re-enfranchisement laws has grown over the past few years, several states have recently enacted or are currently considering changes to their criminal disenfranchisement laws through legislation or state constitutional amendments.[279] As of this writing, roughly 130 bills on criminal disenfranchisement are working their way through thirty state legislatures.[280] Florida's recent experiment in re-enfranchisement has attracted the most attention of these efforts.[281] Voters in the state recently passed a constitutional amendment that restored the right to vote to most persons who had been disenfranchised due to a criminal conviction.[282] However, the state legislature balked at implementing the amendment and used its vague language to justify narrowing the number of persons who can benefit from the amendment.[283] Thus, Florida offers crucial lessons to advocates seeking to change their state's re-enfranchisement laws—both about the effectiveness of a state-centered solution and how to craft such a solution.[284]

Florida's state constitution originally denied voting rights to all persons convicted of felonies until they petitioned the state's Executive Clemency Board for restoration of their rights.[285] The Clemency Board is

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276. *See* Wright, *supra* note 16; *see also infra* note 302.

277. *See* Wright, *supra* note 16.

278. *See infra* notes 310–19 and accompanying text.

279. *See, e.g.*, Joi Dukes, *Tennessee Lawmakers Introduce Bill to Restore Voting Rights to Felons*, WRCBTV (Jan. 16, 2019, 8:35 PM), http://www.wrcbtv.com/story/39803360/tennessee-lawmakers-introduce-bill-to-restore-voting-rights-to-felons [https://perma.cc/7MHH-CJM8]; Replogle & Licon, *supra* note 155.

280. Sydney Ember & Matt Stevens, *Bernie Sanders Opens Space for Debate on Voting Rights for Incarcerated People*, N.Y. TIMES (Apr. 27, 2019), https://www.nytimes.com/2019/04/27/us/politics/bernie-sanders-prison-voting.html [https://perma.cc/QC7H-GLJW].

281. *See* Replogle & Licon, *supra* note 155.

282. *Id.*

283. *See infra* notes 310–19.

284. *See infra* pp. 156–61.

285. Replogle & Licon, *supra* note 155.

comprised of the state's Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture.[286] Until recently, an estimated 1.68 million Floridians remained disenfranchised, and as of March 2017 over 10,000 were still waiting for a hearing before the Clemency Board.[287] The Board conducted hearings on restoration of voting rights at an estimated rate of fifty-two cases per quarter.[288] In March 2017, nine plaintiffs who had been denied restoration of their voting rights by the Board filed a class action in federal court.[289] The plaintiffs relied on the First and Fourteenth Amendments to the U.S. Constitution to argue that the lack of any rules or standards to guide the Board in making restoration decisions violated equal protection principles and unduly burdened their right to vote.[290] The plaintiffs won a permanent injunction ordering the state of Florida to draft a new voting rights restoration process,[291] but the Court of Appeals for the Eleventh Circuit stayed the injunction in April 2018 in *Hand v. Scott*.[292] Mirroring the *Richardson* reasoning, the Eleventh Circuit held:

> The Fourteenth Amendment expressly empowers the states to abridge a convicted felon's right to vote. U.S. Const. amend. XIV, § 2. Binding precedent holds that the Governor has broad discretion to grant and deny clemency, even when the applicable regime lacks any standards. And although a reenfranchisement scheme could violate equal protection if it had both the purpose and effect of invidious discrimination, appellees have not alleged—let alone established as undisputed facts—that Florida's scheme has a discriminatory purpose or effect.[293]

In the meantime, a nonprofit called Second Chances Florida circulated a petition that garnered enough signatures to place a proposed amendment to the Florida Constitution on the November 2018 ballot.[294] The initiative grew out of a grassroots campaign called the Florida Rights Restoration Coalition, which was started in 2014 by a group of formerly

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286. *Clemency*, FLA. COMM'N ON OFFENDER REVIEW, https://www.fcor.state.fl.us/clemency.shtml (last visited Aug. 14, 2019) [https://perma.cc/9SFP-ABFJ].

287. Hand v. Scott*: Florida Former Felon Voting Rights Restoration (Ongoing)*, FAIR ELECTIONS LEGAL NETWORK, http://fairelectionsnetwork.com/hand-v-scott/ (last visited Aug. 14, 2019) [https://perma.cc/8Y3Z-AR9G].

288. First Am. Class Action Compl. for Declaratory and Injunctive Relief at 5, Hand v. Scott, 315 F. Supp. 3d 1244 (N.D. Fla. 2018) (No. 4:17-cv-00128-MW-CAS).

289. *Id.* at 2.

290. *Id.* at 60–66.

291. Order Directing Entry of J. at 21, Hand v. Scott, 315 F. Supp. 3d 1244 (N.D. Fla. 2018) (No. 4:17-cv-00128-MW-CAS).

292. Hand v. Scott, 888 F.3d 1206 (11th Cir. 2018).

293. *Id.* at 1207.

294. *Who We Are*, SECOND CHANCES FLA., https://secondchancesfl.org/about/who-we-are/ (last visited Aug. 14, 2019) [https://perma.cc/4X2L-R2NY].

convicted persons.[295] The amendment, called the Voting Restoration Amendment, proposed to amend Article IV, Section 4 of the Florida Constitution to read as follows:

> (a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.
>
> (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.[296]

The proposed amendment garnered nationwide support, including support from prominent progressive organizations—like United We Dream and the Southern Poverty Law Center—in the form of publicity and calls for volunteers to phone-bank or door-knock in support of the amendment.[297] However, the amendment also drew criticism from other progressive organizations like the Human Rights Defense Center because it excluded persons convicted of murder or sexual offenses from regaining the right to vote. [298] Critics of the amendment charged that

> [i]f Amendment 4 passes it will enshrine into Florida's constitution discrimination against convicted murderers and sex offenders that will make enfranchising them virtually impossible. While some may point to the serious nature of their offenses, those offenses have nothing to do with voting; the punishment of disenfranchisement does not fit the crime.[299]

This conflict illustrates one of the problems inherent in trying to end criminal disenfranchisement through political means. To make the measure more palatable to voters, advocates may be tempted to exclude those convicted of certain crimes. As discussed above, disenfranchisement does

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295. *Id.*

296. *Voting Restoration Amendment*, SECOND CHANCES FLA., https://secondchancesfl.org/about/voting-restoration-amendment/ (last visited Aug. 14, 2019) [https://perma.cc/6SGQ-EP3R] (emphasis omitted).

297. E-mail from Southern Poverty Law Center, to author (Oct. 16, 2018, 18:29 CST) (on file with author); E-mail from United We Dream Action to author (Oct. 6, 2018, 15:52 CST) (on file with author).

298. Wright, *supra* note 16.

299. *Id.*

not further appropriate goals of either rehabilitation or retribution and may even increase the likelihood of recidivism.[300] In addition, it is not constitutionally defensible to prevent persons from voting out of fear of how they will vote.[301] So it is unclear, from a logical and legal standpoint, why a person convicted of murder or a sexual offense should be disenfranchised while others are not. However, it is clear from an emotional and political standpoint that a re-enfranchisement law may be more palatable to voters or legislators if it includes a carve-out for "the terrible few."[302]

The issue of palatability and "the terrible few" was illustrated in a Democratic townhall, broadcast in April 2019, when Senator Bernie Sanders was questioned about his support of voting rights for incarcerated persons.[303] An audience member asked the senator, "Does this mean you would support enfranchising people like the Boston Marathon Bomber, a convicted terrorist and murderer?"[304] Senator Sanders responded in part, "I think the right to vote is inherent to our democracy. Yes, even for terrible people."[305] After the audience applauded the senator's answer, CNN's Chris Cuomo pushed back: "You're writing an opposition ad against you by saying you think the Boston Marathon Bomber should vote . . . . Are you sure about that?"[306] Senator Sanders confirmed his answer, which set off a wave of further discussion and op-eds criticizing his position.[307]

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300. See *supra* Part IV.

301. *See* Carrington v. Rash, 380 U.S. 89, 94 (1965).

302. *See* Ruth Wilson Gilmore, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 15 (Earl Lewis et al. eds., 2007) ("The 'terrible few' are a statistically insignificant and socially unpredictable handful of the planet's humans whose psychopathic actions are the stuff of folktales, tabloids (including the evening news and reality television), and emergency legislation. When it comes to crime and prisons, the few whose difference might horribly erupt stand in for the many whose difference is emblazoned on surfaces of skin, documents, and maps—color, credo, citizenship, communities, convictions.").

303. Emily Larsen, *Bernie Sanders Says Boston Bomber Should Be Able to Vote from Prison*, WASH. EXAMINER (Apr. 22, 2019, 10:17 PM), https://www.washingtonexaminer.com/news/bernie-sanders-says-boston-bomber-should-be-able-to-vote-from-prison [https://perma.cc/2Z4F-TCFH].

304. GOP War Room, *Bernie Sanders Says That He Would Let Boston Marathon Bomber Vote from Jail*, YOUTUBE (Apr. 22, 2019), https://www.youtube.com/watch?v=QMyrChsBG68 (footage from a CNN broadcast).

305. *Id.*

306. *Id.*

307. *Id.*; *see, e.g.*, Rebecca Buck, *Cory Booker Swipes at Bernie Sanders over Restoring Voting Rights for Felons in Prison*, CNN: POLITICS (Apr. 30, 2019, 8:47 PM), https://www.cnn.com/2019/04/30/politics/cory-booker-bernie-sanders-felons-voting-rights/index.html [https://perma.cc/MA7Q-EZBZ]; Ellie French, *Bernie Sanders Set Off a Firestorm over Prisoners Voting, but His Facts Are Straight*, POLITIFACT (Apr. 24, 2019, 5:27 PM), https://www.politifact.com/vermont/statements/2019/apr/24/bernie-sanders/sanders-set-firestorm-over-prisoners-voting-his-fa/ [https://perma.cc/4SRH-6NG9]; *Sen. Sanders Faces Backlash for Saying Convicted Felons Have Right to Vote*, CBS BOS. (April 23, 2019, 11:10 PM), https://boston.cbslocal.com/2019/04/23/bernie-sanders-backlash-felons-voting-right-marathon-bomber/ [https://perma.cc/BUG7-E9G3].

This controversy illuminates what drafters of laws like Florida's Amendment 4 were likely afraid of—that the public will not support a law offering a benefit to a small number of persons who have committed especially heinous crimes. In reality, including carve-outs for "the terrible few" in re-enfranchisement laws undermines many of the theoretical arguments in favor of re-enfranchisement.[308] However, some advocates may feel that carve-outs are a necessary practical reality in order to pass any kind of re-enfranchisement legislation. Ultimately, Amendment 4 passed in November of 2018 with almost sixty-five percent of Florida voters in favor of passage.[309]

After the amendment's passage, some Florida officials insisted that the amendment required an implementing statute and would not take effect until the legislature passed one.[310] The Florida Constitution specifies that new amendments take effect "on the first Tuesday after the first Monday in January following the election," unless the amendment language specifies otherwise.[311] Accordingly, some county election commission officials began accepting voter registrations from persons who regained their right to vote under the amendment in January of 2019.[312] But other legislative hurdles soon appeared as lawmakers argued over the meaning of vague terms in the amendment, including "murder," "felony sexual offense," and completion of "all terms" of a person's sentence.[313] In April 2019, the Florida legislature passed a bill that would require persons to pay all fines, fees, and restitution before regaining their voting rights under the "all terms" clause.[314] To justify the bill, legislators "pointed to testimony by a lawyer for Amendment 4 before the Supreme Court and information on the Florida Rights Restoration Coalition's website that states that 'all terms of sentence' includes all court

308. *See supra* Part IV.

309. *November 6, 2018 General Election Official Results—Constitutional Amendment*, FLA. DEP'T OF STATE, https://floridaelectionwatch.gov/Amendments (last visited Aug. 14, 2019) [https://perma.cc/JWF5-NTUJ].

310. Replogle & Licon, *supra* note 155 ("It is still not clear how [new] registrations will be treated in the state capitol. Gov. Ron DeSantis said on Monday that he believes the Legislature still needs to pass an implementing bill spelling out the [voting rights] restoration process.").

311. FLA. CONST. art. XI, § 5(e).

312. Langston Taylor, *Amendment 4 Is Happening: Ex-Felons Can Register to Vote Tuesday*, TAMPA BAY TIMES: THE BUZZ (Jan. 4, 2019), https://www.tampabay.com/florida-politics/buzz/2019/01/04/amendment-4-is-happening-ex-felons-can-register-to-vote-tuesday/ [https://perma.cc/WNV3-MM3Q].

313. Dara Kam, *Amendment 4: Florida Senate Moves Away from Stricter Provisions on Ex-Felon Voting*, ORLANDO SENTINEL (Apr. 9, 2019, 11:20 AM), https://www.orlandosentinel.com/politics/os-ne-amendment-4-senate-changes-20190409-story.html [https://perma.cc/M8BE-WVR3].

314. Lawrence Mower, *Florida Legislature Approves Amendment 4 Bill That Creates Hurdles for Voting Felons*, TAMPA BAY TIMES: THE BUZZ (May 3, 2019), https://www.tampabay.com/florida-politics/buzz/2019/05/03/florida-legislature-approves-amendment-4-bill-that-creates-hurdles-for-voting-felons/ [https://perma.cc/TY8C-ZCXB].

fees, fines and restitution."[315] Opponents of the bill decried it as new form of poll tax and pointed out that requiring full restitution will add significant delays to the restoration of rights because the state does not have a system to track restitution payments.[316] Desmond Meade, the chief architect of the amendment, indicated that he would ask Florida Governor Ron DeSantis to veto the bill.[317] However, the governor signed the bill into law during the summer of 2019.[318] In response, more than a dozen persons with felony convictions promptly sued in federal court.[319]

Florida's passage of Amendment 4 and the subsequent legislative struggle offer a pair of important lessons to advocates of re-enfranchisement. The first lesson is that political challenges to disenfranchisement—in the form of state constitutional amendments or legislation—are often more fruitful than challenges in the federal court system. Examples of successful federal court challenges to state disenfranchisement laws are few and far between.[320] However, political challenges to these laws remain viable and can usually happen quicker than protracted legislation. For example, Florida's passage of Amendment 4 may have effectively mooted the *Hand v. Scott* lawsuit regarding disenfranchisement that had been pending for almost two years.[321] Political challenges have the added benefit of demonstrating popular support for persons with criminal convictions regaining their rights to vote and help to dispel narratives about the general public wanting the law to be tougher on criminals.[322] Amendment 4 passed with almost sixty-five percent of the vote and has enjoyed widespread support across the nation.[323] Its passage also inspired other state legislators to consider similar changes in their states.[324] Advocates for re-enfranchising persons with criminal

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315. *Id.*

316. Noreen Marcus, *Amendment 4 in Florida Yields Voting Rights and Confusion*, U.S. NEWS & WORLD REP. (Apr. 11, 2019, 9:38 AM), https://www.usnews.com/news/best-states/articles/2019-04-11/amendment-4-in-florida-restores-voting-rights-and-confusion [https://perma.cc/RRD6-DD3D].

317. Mower, *supra* note 314.

318. Lawrence Mower, *What Now? Amendment 4, Felon Voting Move to Florida Courts*, TAMPA BAY TIMES: THE BUZZ (July 2, 2019), https://www.tampabay.com/florida-politics/buzz/2019/07/01/what-now-amendment-4-felon-voting-moves-to-the-courts/ [https://perma.cc/2H4W-GDBR].

319. *Id.* As of this writing, the lawsuit is still pending.

320. *See* Heath, *supra* note 251, at 334–37.

321. News Service of Florida, *Court Battle over Felon Rights Could End*, FLAPOL (Dec. 24, 2018), https://floridapolitics.com/archives/284100-court-battle-over-felon-rights-could-end [https://perma.cc/6HWS-KYV9].

322. *See generally* KAREN GELB, SENTENCING ADVISORY COUNCIL, MYTHS AND MISCONCEPTIONS: PUBLIC OPINION VERSUS PUBLIC JUDGMENT ABOUT SENTENCING (2006), https://www.sentencingcouncil.vic.gov.au/publications/myths-and-misconceptions-public-opinion-versus-public-judgment-about-sentencing [https://perma.cc/2T2Z-S5C3].

323. *See supra* notes 297, 309.

324. Jon Kamp, *Push to Give Felons the Vote Shifts to Iowa and Kentucky*, WALL STREET J. (Jan. 23, 2019, 11:00 AM), https://www.wsj.com/articles/push-to-give-felons-the-vote-shifts-to-iowa-and-kentucky-11548259251 [https://perma.cc/UFN7-DSDU].

convictions can capitalize on the momentum of recent political changes to disenfranchisement laws to argue that their states should join the reform effort rather than waiting for sweeping, yet unlikely, reform to be handed down from the federal courts.[325]

However, the second lesson to be gleaned from Amendment 4 is that state legislators may resist re-enfranchisement provisions if they are passed as ballot initiatives.[326] Advocates must be careful in drafting state constitutional amendments so that the purpose of the amendment is not undercut by later legislation. Vague language included in the amendment and even extraneous statements made by supporters of the amendment can be used later to undermine the amendment's purpose.[327] Advocates in other states should take note of the success of Florida's state-centered solution and also be wary of the potential pitfalls.

B. State Constitutional Challenges

Another path to ending criminal disenfranchisement that holds more promise than federal litigation, though perhaps not as much as political change, is state constitutional challenges.[328] The federal constitution does not explicitly guarantee a right to vote,[329] but every state constitution either explicitly or implicitly guarantees the right.[330] Therefore, advocates of re-enfranchisement may be able to use their state constitutions to challenge disenfranchisement laws entirely or at least to limit their scope, depending on the constitutional language.[331] For example, in *Mixon v. Commonwealth*, the plaintiffs challenged Pennsylvania statutes that barred incarcerated persons from voting absentee and released persons from registering to vote for five years after release.[332] The plaintiffs argued these laws were unconstitutional under various provisions of the state's constitution, including its Free and Equal Elections Clause.[333] While the Pennsylvania appellate court held (and the Pennsylvania Supreme Court affirmed) that disenfranchising incarcerated persons did not violate the state's constitution, the court also held that the statute requiring released persons to wait five

325. *See* Stephen Spiker, *Virginia Needs to Join the Rest of the Nation and End Felony Disenfranchisement*, BEARING DRIFT (Jan. 17, 2019), https://bearingdrift.com/2019/01/17/virginia-needs-to-join-the-rest-of-the-nation-and-end-felony-disenfranchisement/ [https://perma.cc/29Q8-ZS3L].

326. *See* Mower, *supra* note 314.

327. *Id.*

328. *See* Miller, *supra* note 253, at § 26.

329. *See* Uggen & Manza, *supra* note 39, at 780.

330. *See, e.g.*, CAL. CONST. art. II, § 2; MD. CONST. art. I, § 1; N.Y. CONST. art. II, § 1; TENN. CONST. art. IV, § 1; WASH. CONST. art. VI, § 1 (explicit); *see also* ARIZ. CONST. art. II, § 21 (implicit).

331. *See, e.g.*, Crothers v. Jones, 120 So. 2d 248 (La. 1960); Mixon v. Commonwealth, 759 A.2d 442 (Pa. Commw. Ct. 2000), *aff'd without opinion*, 783 A.2d 763 (2001).

332. *Mixon*, 759 A.2d at 445.

333. *Id.* at 445–47.

years before registering to vote failed even rational basis scrutiny.[334] Because the law only barred *registration* for five years after release, it disenfranchised those who were not registered prior to incarceration but had no effect on those who registered before their incarceration.[335] Pointing out several of the rationale problems with criminal disenfranchisement discussed in part IV of this note, the court wrote:

> We can conceive of no rationale for permitting those who were registered previous to incarceration to vote on their release, while those who were not previously registered, cannot. Such a statute has the appearance of penalizing ex-incarcerated felons for their status. Moreover, implicit in a presumption that an unregistered individual who commits a crime, and is punished therefor, remains civilly corrupt for five years following release, is the unwarranted assumption that there was no possibility of rehabilitation during that period of incarceration and for five years thereafter**.** There is nothing of which we are aware to support this logic and underpin the implication that, after five years have elapsed following a convicted felon's release from confinement, that individual has magically acquired the wherewithal to be a responsible, qualified elector. We therefore conclude that the prohibition against registration for five years after release from confinement is constitutionally infirm.[336]

Though the court did not rely on specific language from the state constitution in striking down the law, the state constitutional provisions provided the vehicle for the successful challenge to one of the disenfranchisement laws.[337]

In other states, constitutional language has been used to reduce the impact of state disenfranchisement laws.[338] For example, in *Crothers v. Jones*, the Supreme Court of Louisiana held that a state statute disenfranchising persons "convicted of any crime, either in any of the courts of Louisiana or in any of the courts of the United States, which may be punishable by imprisonment in the penitentiary," violated the state constitution, which limited disenfranchisement to persons convicted by Louisiana courts.[339] And in *Gaskin v. Collins*, the Tennessee Supreme Court held that a state statute expanding the definition of "infamous crime" was unconstitutional as applied to a person convicted of manufacturing marijuana

334. *Id.* at 451.
335. *Id.*
336. *Id.* at 451–52.
337. *See id.* at 445–46.
338. *See, e.g.*, Crothers v. Jones, 120 So. 2d 248 (La. 1960); Gaskin v. Collins, 661 S.W.2d 865 (Tenn. 1983).
339. *Crothers*, 120 So. 2d at 256.

when that crime had not been defined as infamous at the time of conviction.[340]

However, state constitutional challenges are still a limited solution to the problem of disenfranchisement because they depend entirely upon the language used in the constitution. In addition, some state constitutions expressly grant the legislature the power to disenfranchise convicted persons.[341] Therefore, advocates of re-enfranchisement should carefully consider the language in their state constitutions to discern if a challenge is viable, either as a way to limit the scope of disenfranchisement laws or invalidate them altogether.

C. Executive Action

Finally, advocates of re-enfranchisement may lobby their state governors to sign executive orders that restore voting rights. For example, in April 2018, New York governor Andrew Cuomo signed an executive order that appeared to restore voting rights to parolees.[342] However, the executive order actually requires the Department of Corrections and Community Supervision to send the governor's office a monthly list of persons currently released on parole for a case-by-case consideration of whether their voting rights should be restored.[343] This may have been an attempt to avoid the fate of then-Virginia Governor Terry McAuliffe's executive order on felon disenfranchisement, which was struck down by the state's supreme court as a violation of the state constitution.[344] Unfortunately, the structure of Governor Cuomo's executive order makes it unclear whether the order actually secures re-enfranchisement of all parolees in the absence of legislative action.[345] These recent executive actions regarding re-enfranchisement demonstrate the common pitfalls of this strategy. Executive orders are vulnerable to challenges as an improper exercise of authority,[346] are reversible by subsequent governors,[347] and may be granted on an arbitrary, piecemeal basis.[348] Governors may also be reluctant to pursue executive action on this issue since doing so may expose a sitting governor

340. *Gaskin*, 661 S.W.2d at 867–68.

341. *See* Behrens, *supra* note 62, at 563.

342. *Governor Cuomo Signs Executive Order to Restore Voting Rights to New Yorkers on Parole*, N.Y. STATE (Apr. 18, 2018), https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-restore-voting-rights-new-yorkers-parole [https://perma.cc/9PWC-GPAJ].

343. Victoria Law, *Did Gov. Cuomo Grant New York Parolees the Right to Vote? Not Exactly*, THE APPEAL (Apr. 23, 2018), https://theappeal.org/did-gov-cuomo-grant-new-york-parolees-the-right-to-vote-not-exactly-ed17ef0be52e/ [https://perma.cc/HKF6-XZHX].

344. *Id.*; Howell v. McAuliffe, 788 S.E.2d 706, 723–24 (Va. 2016).

345. *See* Law, *supra* note 343.

346. *See, e.g.*, *Howell*, 788 S.E.2d at 710.

347. *See, e.g.*, KY. REV. STAT. ANN. § 196.045(1)(e) (2018).

348. *See* Law, *supra* note 343.

to attacks from political opponents.[349] However, in a state where the legislature is unwilling to consider a re-enfranchisement law, the state constitution does not offer any helpful language, and a ballot initiative is impossible or unlikely to succeed, executive action may be the only path toward re-enfranchising more persons. In such cases, advocating for executive action may still be a better path than pursuing federal litigation, which is almost certain to fail under current precedent.[350]

CONCLUSION

The rationales underlying criminal disenfranchisement laws are no longer supportable.[351] There is no constitutional justification for preventing a person from voting the "wrong" way,[352] and disenfranchisement makes little sense as a form of punishment for a crime because it is almost always unconnected to the underlying offense.[353] Disenfranchisement communicates to a person that they are no longer welcome in or accepted by the rest of society and can have far-reaching collateral consequences, such as barring a person from jury service and participation in other forms of civic life.[354] Re-enfranchisement is linked to better outcomes in rehabilitation and encourages a person released from prison to reintegrate into society through participation in the democratic process.[355] Therefore, advocates should push for laws that at least automatically restore voting rights upon release from prison and are not conditioned on payment of fines and fees or on the offense committed.[356]

Advocates of re-enfranchisement have frequently sought recourse through the federal courts, but these courts are unlikely to strike down disenfranchisement laws.[357] Thus, advocates should concentrate their efforts on changing state laws through legislation or amendments to their state constitutions.[358] Though it may be tempting to compromise to make the law or amendment more politically palatable, broader re-enfranchisement laws are ultimately more consistent with the goals of rehabilitation.[359] If legislative change by statute, constitutional amendment, or ballot initiative is not possible in a certain state, advocates may turn to state constitutional challenges or executive action until such a time as broader and more

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349. *See, e.g.*, Jimmy Vielkind, *Republicans Attack Cuomo's Plan to Restore Felons' Voting Rights*, WALL STREET J. (Oct. 2, 2018, 6:42 PM), https://www.wsj.com/articles/republicans-attack-cuomos-plan-to-restore-felons-voting-rights-1538520147 [https://perma.cc/7BNE-X5TY].

350. *See supra* Part V.

351. *See supra* Section IV.A.

352. Carrington v. Rash, 380 U.S. 89, 94 (1965).

353. *See* Levine, *supra* note 169, at 217.

354. *See supra* Section IV.B.

355. *See supra* Section IV.C.

356. *See supra* notes 120–29 and accompanying text.

357. *See supra* Part V.

358. *See supra* Part VI.

359. *See supra* Section IV.C.

permanent change is possible.[360] No matter which state-centered solution advocates of re-enfranchisement pursue, they must carefully craft the solution to preserve its spirit against future legislative or political attacks.[361]

360. *See supra* Sections VI.B–C.
361. *See supra* Section VI.A.