Washington Law Review

Volume 98 | Number 1

3-1-2023

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EVALUATING CONGRESS'S CONSTITUTIONAL BASIS TO ABOLISH FELONY DISENFRANCHISEMENT

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Abstract: In the past three years, members of Congress unsuccessfully introduced a series of federal voting rights legislation, most recently the Freedom to Vote Act. One goal of the legislation is to abolish felony disenfranchisement. Felony disenfranchisement is the practice of revoking a citizen's right to vote due to a prior felony conviction. The Freedom to Vote Act aims to restore voting rights for every citizen who has completed their prison sentence. A ban on felony disenfranchisement would be historic, as the practice stretches back to ancient Greece and Rome. Moreover, the United States Supreme Court consistently upholds the practice by placing great weight on the Fourteenth Amendment's allowance of disenfranchisement for "rebellion, or other crimes."

The modern practice of felony disenfranchisement disproportionately impacts communities of color and recently prohibited over five million Americans from voting in the 2020 national election. This Comment analyzes the two most prominent constitutional arguments for Congress's power to abolish felony disenfranchisement. Ultimately, this Comment concludes that neither the Fourteenth Amendment nor the Elections Clause is an appropriate basis for ending felony disenfranchisement. However, this Comment introduces three alternative constitutional arguments for Congress to end felony disenfranchisement.

INTRODUCTION

"[E]x-offenders are expected to pay fines and court costs, and submit paperwork to multiple agencies in an effort to win back a right that should never have been taken away in a democracy." — Michelle Alexander[1]

The 2020 election was the most litigated federal election in United States history.[2] In response, both political parties began modifying voting laws at the federal and state level. State legislatures across the country are passing legislation that would make it more difficult to vote.[3] On the other

* J.D. 2023, University of Washington School of Law. My sincerest gratitude to all my *Washington Law Review* colleagues for their diligence and great company. Thank you to my partner, Kaia, and my friends for their endless support.

1. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 154 (2010).

2. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 502 (2021).

3. *See, e.g.*, H. 1112, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (implementing strict voter ID requirements by removing sworn affidavit as an alternative to photo identification); S. 1, 87(2) Leg. Sess. (Tex. 2021) (restricting voting by mail); S. 90, 2021 Sess. (Fla. 2021) (revising voter registration, voter identification requirements, and restricting voting by mail).

hand, federal legislation, like the Freedom to Vote Act and the For the People Act, aims to expand access to the polls.[4]

In the United States, many citizens cannot vote in federal elections due to a prior felony conviction.[5] In other words, a nation founded on the ideals of a representative democracy continues to disenfranchise millions of its voters year after year.[6] Depending on a voter's state of residence, they may lose the right to vote for years—or for forever—after completing their sentence.[7] This revocation of the right to vote is known as felony disenfranchisement. Felony disenfranchisement, employed in forty-eight states, follows a felony conviction and can apply to state and federal elections.[8]

Felony disenfranchisement, an ancient practice rooted in classical Greece and Rome, came to the United States through English common law.[9] But the United States stands out in the international community as a country that continues disenfranchisement after a citizen completes their sentence.[10] The Freedom to Vote Act and For the People Act would bar states from disenfranchising voters who complete their felony sentences.[11]

However, both acts failed to pass in the Senate.[12] Conservative politicians and commentators provide a simple explanation for their objection to voting rights legislation: the bills exceed Congress's constitutional authority. They argue that current federal voting rights legislation would overstep Congress's power and amount to a "federal takeover" of national elections.[13] Specifically, objectors argue that the

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4. H.R. 1, 117th Cong., 1 (2021); *see also* Daniel I. Weiner, Martha Kinsella & Will Wilder, *Key Differences Between the For the People Act and the Freedom to Vote Act*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021), https://www.brennancenter.org/our-work/research-reports/key-differences-between-people-act-and-freedom-vote-act [https://perma.cc/5Y4M-2TZC] (outlining changes from the For the People Act to the Freedom to Vote Act).

5. CHRIS UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 8 (Oct. 30, 2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction [https://perma.cc/8SCP-2FGX].

6. *Id.* at 8.

7. *Id.* at 7–10.

8. *See* ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 6 (2006).

9. *See infra* Part II.

10. *See infra* section II.C.

11. S. 2747, 117th Cong. § 1703 (2021); H.R. 1, 117th Cong., 22–23 (2021).

12. Jaclyn Belczyk, *US Voting Rights Bill Fails in Senate*, JURIST (Jan. 20, 2022, 7:07 PM), https://www.jurist.org/news/2022/01/us-voting-rights-bill-fails-in-senate/ [https://perma.cc/5MAV-X297].

13. 165 CONG. REC. S776 (daily ed. Jan. 31, 2019) (statement of Sen. Mitch McConnell).

Constitution gives states the primary power to dictate federal elections.[14] Mitch McConnell, the then Senate Majority leader, argued that the For the People Act improperly allowed Congress to make "[d]ecision after decision that our Constitution properly leaves to the States."[15] J. Christian Adams, a former Department of Justice official, characterized the For The People Act as "grotesquely offensive to the Constitution that vests power in the state legislatures to determine the manner of [elections]."[16]

While any federal voting legislation will face constitutional challenges, does legislation like the Freedom to Vote Act and the For the People Act actually exceed Congress's power? Is abolishing felony disenfranchisement within Congress's legislative power? Using the felony disenfranchisement provisions in 2021's Freedom to Vote Act as a model, this Comment answers the latter question by analyzing Congress's powers under the Fourteenth Amendment and the Elections Clause.

This Comment proceeds in seven parts. It begins with a brief history of felony disenfranchisement. Starting in the classical era, Part II traces the history of felony disenfranchisement through English Common Law, the Reconstruction era, and the modern day. Additionally, this Comment surveys felony disenfranchisement laws in Australia, Canada, and the United Kingdom, which add perspective to the United States' uniquely broad felony disenfranchisement regime. Part III describes the current impact of felony disenfranchisement in the United States, especially its disproportionate impact on communities of color. Part IV discusses the right to vote and the law's protection of it as a fundamental right through the Equal Protection Clause. A discussion of Congress's power to abolish felony disenfranchisement through the Fourteenth Amendment and Elections Clause follows in Parts V and VI, respectively. Finally, Part VII analyzes whether Congress has the power to end felony disenfranchisement in the United States. This Comment answers that question negatively for both the Elections and Equal Protection Clauses before outlining alternative constitutional sources of power.

14. Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 3 (2021).

15. 165 Cong. Rec. S776 (daily ed. Jan. 31, 2019) (statement of Sen. Mitch McConnell).

16. *Testimony of J. Christian Adams Before the H. Judiciary Comm.*, 116th Cong. 6 (2019) (statement of J. Christian Adams, President and General Counsel, Public Interest Legal Foundation).

I. THE HISTORICAL ROOTS OF FELONY DISENFRANCHISEMENT

A. Civil Death in English Common Law and the Pre-Reconstruction United States

Felony disenfranchisement involves the revocation or denial of the right to vote upon conviction of a felony.[17] A felony is "a serious crime usually punishable by imprisonment for more than one year or by death."[18] Felony disenfranchisement's deep roots go back to antiquity.[19]

Specifically, felony disenfranchisement grew from the idea of "civil death" in ancient Greece and Rome.[20] Classical governments imposed civil death on those who committed "infamous" crimes.[21] Civil death denied the individual the "perquisites of citizenship, such as the right to vote, participate in court proceedings, or defend the homeland."[22] This practice spread throughout Europe after the fall of the Roman Empire, "manifesting itself in the German practice of 'outlawry'" and in English common-law as "attainder."[23] An English citizen who was "attainted" (i.e., convicted of a heinous crime) suffered three penalties: (1) forfeiture; (2) "corruption of the blood," which disallowed them "from retaining, inheriting, or passing on an estate to [their] heirs"; and (3) loss of their civil rights, including the right to vote.[24]

With their seventeenth-century arrival to North America, English settlers imported much of their common-law heritage, including "attainder."[25] Although the framers of the Constitution rejected England's severe common-law strictures, including specifically prohibiting forfeiture and "corruption of the blood" as punishment for crimes outside of treason, they retained one aspect of civil death—disenfranchisement.[26] At the time, only white men who owned property were allowed to vote.[27]

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17. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 7 (2006).

18. *Felony*, BLACK'S LAW DICTIONARY (11th ed. 2019). A felon is defined as "[s]omeone who has been convicted of a felony," also sometimes termed as a "state criminal" or "(redundantly) convicted felon." *Felon,* BLACK'S LAW DICTIONARY (11th ed. 2019).

19. HULL, *supra* note 8, at 16.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 17.

26. *Id.*

27. *Id.*

Felony disenfranchisement was thus not widely practiced except in cases where a member of the voting class committed an offense that was presumably "deleterious to the commonwealth."[28]

B. Reconstruction and the Origin of Race-Based Felony Disenfranchisement

Modern felony disenfranchisement and its racial disparities spring from the Reconstruction era.[29] Disenfranchisement laws before Reconstruction were not entirely motivated by racial animus, but their proliferation among the southern states during the Reconstruction era indicates that their widespread adoption was the direct result of the sweeping changes brought by the Fourteenth and Fifteenth Amendments. Prior to the Civil War, nineteen of the thirty-four states in the Union prevented ex-felons from voting; by 1869 twenty-nine states did.[30] States excluded women, people of color, slaves, and non-property-owning free people from casting votes as electors.[31] Voting was reserved only for the dominant political and socioeconomic class of the time.[32] Because only property-owning, white men could vote before the Civil War, it is apparent that Pre-Reconstruction era disenfranchisement laws were not entirely motivated by racial animus.

Adopted in 1868, the Fourteenth Amendment granted citizenship and equal rights to all, including newly freed slaves.[33] Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[34] Moreover, the Fourteenth Amendment mandates that no state shall "deprive any person of life, liberty, or property, without due process of law."[35] Functionally, Section 1 of the Fourteenth Amendment protects a citizen's enumerated and unenumerated rights from infringement by any state or state actor.

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28. *Id.*

29. Reconstruction refers to the period of U.S. history between 1862 and 1877 "during which the United States sought to bring order from the tremendous social, political, economic, physical, and constitutional changes wrought by secession and the Civil War." RICHARD ZUCZEK, ENCYCLOPEDIA OF THE RECONSTRUCTION ERA: GREENWOOD MILESTONES IN AFRICAN AMERICAN HISTORY, at xxxi (Richard Zuczek ed., Greenwood 2006).

30. Christina Beeler, *Felony Disenfranchisement Laws: Paying and Re-Paying a Debt to Society*, 21 U. PA. J. CONST. L. 1071, 1077 (2019) (citing HULL, *supra* note 8, at 27).

31. HULL, *supra* note 8, at 17.

32. *Id.*

33. U.S. CONST. amend. XIV.

34. *Id.* § 1.

35. *Id.*

While the Fourteenth Amendment ostensibly addressed racial disparities that lingered after the Civil War, it also paved the way for race-based felony disenfranchisement, specifically through Section 2.

Section 2 of the Fourteenth Amendment incongruously created a way for states to abridge a person's right to vote.[36] Section 2 of the Fourteenth Amendment allows states to deny the right to vote to anyone following their "participation in rebellion, or other crime."[37] This language allowed many states to circumvent the Fourteenth Amendment's very purpose and disproportionately deny communities of color their newfound right to vote.[38] This circumvention runs counter to the Fifteenth Amendment to the U.S. Constitution. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[39] While felony disenfranchisement did not grow from race-based policies, Missouri Senator Charles D. Drake's observation in 1868 that "it is a very easy thing in a State to make one set of laws applicable to white men, and another set of laws applicable to colored men" proved tragically accurate.[40]

Modern felony disenfranchisement arose from the backlash against the Fifteenth Amendment, which extended suffrage to Black males in 1870.[41] In response to the Fifteenth Amendment and Black males gaining suffrage, "[s]outhern states used felony disenfranchisement laws to specifically exclude [B]lack voters by differentiating between '[B]lack crime' and 'white crime,' only disenfranchising those convicted of crimes thought to be committed more frequently by [B]lacks."[42] Of the many forms of political oppression in the South following Reconstruction, felony disenfranchisement "has proven the most enduring and long lasting, largely due to its explicit constitutional endorsement."[43]

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36. *See id.* § 2.

37. *Id.*

38. HULL, *supra* note 8, at 18–19; U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny any person within its jurisdiction the equal protection of the laws.").

39. U.S. CONST. amend. XV, § 1.

40. CONG. GLOBE, 40th Cong., 2d Sess., 2600 (1868) (statement of Sen. Charles Drake).

41. HULL, *supra* note 8, at 18.

42. Kierra W. Mai, *A Uniform Approach to Felon Disenfranchisement: Is the Multi-State System an Artifact of Slavery?*, 13 IDAHO CRITICAL LEGAL STUD. J. 1, 8 (2020) (citing George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 858 (2005)).

43. Jennifer Rae Taylor, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 GONZ. L. REV. 365, 371 (2012). Congress points out in the Freedom to Vote Act that "[m]any felony disenfranchisement laws today derive directly

C. Status of Felony Disenfranchisement in Commonwealth Countries

Comparing the United States' use of felony disenfranchisement to other modern democracies' disenfranchisement regimes highlights the United States' unique status in the international arena. The United Kingdom, Canada, and Australia all have legal traditions similar to the United States, and thus provide useful examples of how other countries grappled with felony disenfranchisement.

In the United Kingdom, those convicted of a felony can vote following their release from a correctional facility.[44] In *Hirst v. United Kingdom (No. 2)*,[45] the United Kingdom balanced its disenfranchisement laws with European Union mandates prohibiting such punishment. In *Hirst*, the European Court of Human Rights ruled that disenfranchising prisoners violated article 3 of Protocol 1 of the European Court of Human Rights.[46] Article 3 of Protocol 1 mandates a right to free elections in the European Union.[47] However, the future of felony disenfranchisement in the United Kingdom is unclear. In the last two decades, prisoners' rights in the United Kingdom centered more on compliance with European Union rulings and less on the issue of felony disenfranchisement.[48] In the wake of the United Kingdom's departure from the European Union, it remains unclear whether the United Kingdom will keep its current prisoner voting rights laws or revert to a pre-*Hirst* regime.[49]

In Canada, prisoners "serving a sentence of two years or more" were disenfranchised under section 51(e) of the Canada Elections Act.[50] However, section III of the Canadian Charter of Rights and Freedoms guarantees the right to vote to Canadian citizens, and section XV, which is similar to the United States' Fourteenth Amendment, guarantees equality under the law without discrimination based on race and national

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from post-Civil War efforts to stifle the Fourteenth and Fifteenth Amendments." S. 2747, 117th Cong. § 3(2) (2021).

44. Neil Johnston, *Prisoners' Voting Rights: Developments Since May 2015*, HOUSE OF COMMONS LIBR. (No. 07461), Nov. 19, 2020, at 7.

45. Hirst v. United Kingdom (No. 2), 681 Eur. Ct. H.R. (2005).

46. *Id.* at 18; Anthony Gray, *Securing Felons' Voting Rights in America*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 3, 14–15 (2014).

47. Eur. Conv. on H. R., art. 3, protocol 1 ("The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.").

48. Yujin Chun, Comment, *Felony Disenfranchisement in the U.K. & the U.S.*, 1 CORNELL INT'L L.J. ONLINE 86, 89 (2013).

49. *See* Johnston, *supra* note 44, at 7.

50. Sauvé v. Canada, 3 S.C.R. 519, 532 (2002) (quoting Canada Elections Act, R.S.C. 1985, c E-2, *repealed by* Canada Elections Act, S.C. 2000, c 9, s 576).

origin, among other classes.[51] In 2002, the Canadian Supreme Court found that felony disenfranchisement "undermine[s] respect for the law and democracy" and that the "government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation."[52] Further, the Court stated that "[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy."[53] Accordingly, the Court held that section 51(e) "is of no force or effect,"[54] resulting in enfranchisement of inmates in Canada.

Australia does not have a bill of rights. Yet, Australia's High Court found something akin to a right to vote in the country's constitutional mandate that required Parliament be directly chosen by the people.[55] Vicki Lee Roach, an Aboriginal Australian, challenged 2006 amendments to the Australian Constitution disenfranchising anyone currently serving a prison sentence.[56] Chief Justice Gleeson rejected the idea that disenfranchisement could be a punishment, finding that the 2006 amendments went too far.[57] The plurality held that a prisoner's notions of citizenship and membership in the Australian federal politic did not end with imprisonment.[58]

In comparison to the moral and democratic principles expressed by the above countries, Anthony Gray, a Professor of Law at the University of Southern Queensland, proposes that felony disenfranchisement in the United States violates separation of powers.[59] All three jurisdictions above adhere to similar separation of powers principles as the United States, but Gray emphasizes that felony disenfranchisement is a legislative infliction

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51. Canadian Charter of Rights and Freedoms, §§ 3, 15 (U.K.). Section three provides that "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." Section fifteen provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Id.*; Gray, *supra* note 46, at 15–16.

52. Sauvé v. Canada, 3 S.C.R. 519, 522 (2002).

53. *Id.* at 522.

54. *Id.* at 557.

55. *Roach v Electoral Comm'r*, (2007) 233 CLR 162 (Austl.).

56. *Id.* at 163.

57. *Id.* at 175; Gray, *supra* note 46, at 13.

58. *Roach*, 233 CLR at 182; Gray, *supra* note 46, at 13.

59. Gray, *supra* note 46, at 26.

of punishment, a power normally reserved for the judicial branch.[60] In short, Gray summarizes that "[s]uch a power should not, consistent with the separation of powers principle, be exercised by the legislature."[61] The above reasoning from the United Kingdom, Canada, and Australia underlines the importance of voting rights to the United States' representative democracy. Nonetheless, the United States stands alone in depriving a significant portion of its population of their right to vote based on prior felony convictions.

III. CURRENT IMPACT OF FELONY DISENFRANCHISEMENT IN THE UNITED STATES

The revocation or denial of the right to vote based upon a felony conviction barred an estimated 5.17 million voters from participating in the 2020 election.[62] The United States "has one of the most stringent disenfranchisement policies in the world" and "is the only known country to disenfranchise felons after sentence completion."[63] In conjunction with the expansion of federal offenses and mass incarceration, felony disenfranchisement bars a large segment of the U.S. citizenry from the voting populace.[64]

The right to vote is fundamental to a representative democracy. In the landmark election law case *Reynolds v. Sims*,[65] the Supreme Court explained that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[66] However, as of October 2015, the United States had the largest population of incarcerated people in the world—just over 2.2 million individuals—and the second

60. *Id.* at 18.

61. *Id.*

62. *See* UGGEN ET AL., *supra* note 5, at 10.

63. Nick Harpster & Michael S. Vaughn, *Felon Disenfranchisement Laws: A Review of Current Policies, Challenges of Disenfranchisement Laws, and Recent Trends in Legislative and Legal Change*, 52(4) CRIM. LAW BULL. 1 (2016) (citing Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, AM. BAR ASS'N HUM. RTS. MAG., Jan. 2004, at 16–17); *see also* S. 2747, 117th Cong. § 1702(14) (2021) ("The United States is one of the only Western democracies that permits the permanent denial of voting rights for individuals with felony convictions.").

64. As Michelle Alexander aptly states, "[o]nce a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits." ALEXANDER, *supra* note 1, at 118.

65. 377 U.S. 533 (1964).

66. *Id.* at 555.

highest rate of imprisoned people per capita.[67] Consequently, a significant portion of otherwise eligible voters cannot take part in federal and state elections due to a felony conviction.

Felony disenfranchisement significantly reduces the eligible voting populace. The number of disenfranchised voters in 1976 was approximately 1.17 million.[68] This number peaked in 2016 at 6.1 million disenfranchised voters.[69] Reform efforts in multiple states following the 2016 election likely played a role in decreasing the number of people disenfranchised due to a felony conviction.[70] Between the 2016 and 2020 elections, the total number of voters disenfranchised due to a felony conviction decreased by approximately 928,000.[71]

Efforts to reform felony disenfranchisement vary by state. Colorado and Nevada reinstated the voting rights of residents on parole in 2019.[72] Executive orders in Kentucky and Iowa reinstated civil rights, specifically voting and the right to hold public office, to residents who completed their sentences,[73] and New York codified a 2018 executive order[74] restoring voting rights to people on parole in 2021.[75] California restored voting rights to people serving sentences for felonies in jail but not prison.[76] In 2018, the Florida Legislature passed amendment 4,[77] restoring the right to vote for most people who completed their sentences,[78] but an estimated

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67. ROY WALMSLEY, WORLD PRISON POPULATION LIST 2, 5 (11th ed. 2015), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf [https://perma.cc/E384-YYA8].

68. UGGEN ET AL., *supra* note 5, at 4.

69. *Id.* at 10.

70. *Id.* at 13.

71. *Id.* at 8, 10.

72. H.B. 19-1266, 70th Sess. (Colo. 2019); Assemb. Bill No. 431, 80th Sess. (Nev. 2019).

73. Ky. Exec. Order No. 2019-003 (Dec. 12, 2019); Iowa Exec. Order No. 7 (Aug. 5, 2020).

74. N.Y. Exec. Order No. 181 (Apr. 18, 2018).

75. S. 830B, 2021-2022 Reg. Sess. (N.Y. 2021).

76. Assemb. Bill No. 2466, 2016 Gen. Assemb., Reg. Sess. (Cal. 2016). As part of the 2020 election, California legislators proposed a state constitutional amendment that would re-enfranchise voters on parole. Assemb. Const. amend. 6, 2020 Gen. Assemb., Reg. Sess. (Cal. 2020). The Amendment was subsequently approved by voters on November 3, 2020. Patrick McGreevy, *Prop. 17, Which Will Let Parolees Vote in California, Is Approved by Voters*, L.A. TIMES (Nov. 4, 2020), https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-17-results [https://perma.cc/8MVY-H6T9].

77. *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (May 31, 2019), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida [https://perma.cc/WV73-E743]; *see also* FLA. CONST. art. VI, § 4(b) (providing "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").

78. *See* FLA. CONST. art. VI, § 4(a)–(b) (stating people convicted of murder or a felony sexual offense would not have voting rights restored).

900,000 people remain disenfranchised due to outstanding legal financial obligations, including fines, fees, and restitution in the state.[79] Markedly, the Governor of Virginia individually restored the voting rights of 173,000 people after the Supreme Court of Virginia ruled that an executive order meant to restore the voting rights of 200,000 citizens who had completed their sentences unconstitutional.[80] Whether these reforms will reach states with the strictest disenfranchisement laws remains unclear. However, proposed federal legislation, most recently The Freedom to Vote Act, may make these basic reforms unnecessary.[81]

Despite state reforms, an estimated 5.17 million people were disenfranchised from voting in 2020 due to a felony conviction.[82] For reference, the combined population of Wyoming, Vermont, the District of Columbia, Alaska, North Dakota, South Dakota, and Delaware is 5,381,081.[83] Of the estimated 5.17 million disenfranchised voters, approximately one-fourth are currently in prison or jail.[84] The remaining three-fourths are people living in their communities who either completed their sentence or are supervised while on probation or parole.[85] Despite state efforts to scale back their felony disenfranchisement provisions, the total number of disenfranchised voters has grown since the expansion in the U.S. correctional population in the 1970s.[86]

Loss of voting rights due to a past or current felony conviction disproportionately impacts communities of color. As of 2020, an estimated one in sixteen African Americans of voting age are disenfranchised—a rate 3.7 times that of non-African Americans.[87] This equates to 6.2% of the United States' African American population being disenfranchised in contrast to 1.7% of the non-African American

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79. UGGEN ET AL., *supra* note 5, at 13; *see also* Molly Crain, Note, *Fines, Fees, & Felon Disenfranchisement: An Unjust Punishment Barring a Fundamental Right*, 110 KY. L.J. 381, 382 (2022) (discussing the use of legal financial obligations to disenfranchise citizens).

80. UGGEN ET AL., *supra* note 5, at 13; Laura Vozzella, *Va. Gov. McAuliffe Says He Has Broken U.S. Record for Restoring Voting Rights*, WASH. POST (Apr. 27, 2017), https://www.washingtonpost.com/local/virginia-politics/va-gov-mcauliffe-says-he-has-broken-us-record-for-restoring-voting-rights/2017/04/27/55b5591a-2b8b-11e7-be51-b3fc6ff7faee_story.html [https://perma.cc/Y82A-RRUV].

81. S. 2747, 117th Cong. § 1703 (2021); *see also* H.R. 1, 117th Cong., at 22–23 (2021) (proposing a broad disallowance of felony disenfranchisement).

82. UGGEN ET AL., *supra* note 5, at 10 ("Roughly the same number of voters will be disenfranchised in the 2020 presidential election as in 2004.").

83. *US States – Ranked by Population 2022*, http://worldpopulationreview.com/states/ [https://perma.cc/LW65-FYM4].

84. UGGEN ET AL., *supra* note 5, at 8.

85. *Id.*

86. *Id.* at 10.

87. *Id.* at 4.

population.[88]

Moreover, in seven states, more than one in seven African Americans is disenfranchised, twice the national average for African Americans.[89] While reports on the population of incarcerated Latinx individuals are uneven, an estimated 560,000 Latinx Americans—over 2% of the total voting eligible population in the United States—are disenfranchised.[90] In tension with the ideals of a representative democracy, felony disenfranchisement leads to a cyclical inability on the part of affected communities to vote for policy changes that would affect the existing disproportion in conviction and arrest rates.

Because states dictate their own felony disenfranchisement laws, rates of disenfranchisement due to past or current felony convictions vary widely between states. In three states at the extreme, one out of every thirteen adults are disenfranchised.[91] In Florida, a key electoral state, The Sentencing Project estimates that "900,000 Floridians who have completed their sentences remain disenfranchised" as of 2020.[92] Moreover, many states demonstrate no apparent intentions to reform their voting rights laws.

In sum, 2.27% of the U.S. voting eligible population—one out of every forty-four adults—cannot vote in state or federal elections due to a current or previous felony conviction.[93] Comprehensive reforms to felony disenfranchisement "must be seen in the context of a racially skewed, vast, and punitive criminal justice system, as well as ongoing efforts to suppress the right to vote."[94] While our society might hold the right to vote as essential to our democracy, the right to vote is not held by a significant portion of Americans.[95]

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88. *Id.*

89. *Id.* The seven states are Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming.

90. UGGEN ET AL., *supra* note 5, at 4. Additionally, felony disenfranchisement laws may disproportionately affect an older segment of the population. *See* Jeffrey Z. Raines, Note, *Barred for Life: How State Felony Disenfranchisement Laws Ban Elderly Ex-Cons from the Voting Booth*, 30 ELDER L.J. 169, 215 (2022).

91. UGGEN ET AL., *supra* note 5, at 4 ("[In] Alabama, Mississippi, and Tennessee more than 8 percent of the adult population . . . is disenfranchised.").

92. *Id.* at 4 ("Florida thus remains the nation's disenfranchisement leader in absolute numbers, with over 1.1 million people currently banned from voting – often because they cannot afford to pay court-ordered monetary sanctions or because the state is not obligated to tell them the amount of their sanction.").

93. *Id.*

94. Nora V. Demleitner, *Criminal Disenfranchisement in State Constitutions: A Marker of Exclusion, Punitiveness, and Fragile Citizenship*, 26 LEWIS & CLARK L. REV. 531, 531 (2022).

95. *See also* Jaylen Amaker, Danielle M. Lyn & Marquan Robertson, *Mass Incarceration & the*

IV. THE RIGHT TO VOTE AND THE EQUAL PROTECTION CLAUSE

Despite the Fourteenth Amendment's guarantee of equal protection under the law, the Amendment usually does not bar felony disenfranchisement. In fact, Section 2 of the Fourteenth Amendment explicitly allows it. Section 2 allows states to disenfranchise anyone who "participat[es] in rebellion or other crime."[96] The Supreme Court has declined to subject felony disenfranchisement to strict scrutiny, despite the fundamental nature of the right to vote, because of Section 2's explicit language. Consequently, felony disenfranchisement is generally carved out of the Fourteenth Amendment's guarantee of equal protection.[97]

The U.S. Constitution does not explicitly guarantee a right to vote. However, all qualified voters have a constitutionally protected right to vote[98] and to have their votes counted.[99] Only two states have no restrictions on the rights of people convicted of felonies to vote: Maine[100] and Vermont.[101] The remaining forty-eight states restrict the voting rights of people convicted of felonies to some degree.[102] Even though Americans venerate the right to vote and celebrate it as a foundation of our democracy, those convicted of a felony remain one of the last groups of citizens who cannot take part.

The Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person . . . the equal protection of the

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Minority Vote: The Case for a Federal Ban on Felon Disenfranchisement, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 731, 754–57 (2022) (explaining that the right to vote is a tenet of American democracy yet felony disenfranchisement denies that right to many Americans).

96. U.S. CONST. amend. XIV, § 2.

97. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

98. The Ku Klux Cases, 110 U.S. 651, 663 (1884).

99. United States v. Mosley, 238 U.S. 383, 388 (1915).

100. ME. CONST. art. II, § 1 ("Every citizen of the United States of the age of 18 years and upwards, excepting persons under guardianship for reasons of mental illness, having his or her residence established in this State, shall be an elector for Governor, Senators and Representatives."). Interestingly, section 2 of article II exempts electors from some forms of arrest on election days. ME. CONST. art. II, § 2 ("Electors shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest on the days of election, during their attendance at, going to, and returning therefrom.").

101. VT. CONST. ch. II, § 21 ("Every man of the full age of twenty one years, having resided in this State for the space of one whole year next before the election of Representatives, and is of a quiet and peaceable behaviour, and will take the following oath or affirmation, shall be entitled to all the privileges of a freeman of this State.").

102. *Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATURES (June 28, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights [https://perma.cc/FHH6-U9FN].

laws."[103] Under the Fourteenth Amendment and caselaw interpreting it, laws that impact certain suspect classes or infringe on a fundamental right must pass strict scrutiny review.[104] Courts consider three factors to determine whether a group of individuals constitutes a suspect class: "immutability, political powerlessness, and a history of class-based discrimination."[105] Existing suspect classes include race, nationality, and alienage.[106]

Assuming a class is suspect, courts apply strict scrutiny to laws that distinguish between suspect classes and the general populace. If laws impose a classification based on a suspect class, strict scrutiny review requires a showing by the government that the laws are "narrowly tailored measures that further compelling governmental interests."[107] Laws that directly burden fundamental rights must also pass strict scrutiny analysis.[108]

Certain forms of expression, action, or opportunity are regarded as the constituents of freedom and are thus considered "fundamental rights."[109] In addition to the "specific freedoms protected by the Bill of Rights,"[110] fundamental rights include the right to marry,[111] to procreate,[112] to interstate travel,[113] and sometimes to vote.[114] Fundamental rights receive constitutional protection through the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.[115]

The Supreme Court has declared that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental

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103. U.S. CONST. amend. XIV, § 1.

104. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944). *But see* Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229 (2006) (arguing that strict scrutiny is not always applied when fundamental rights are constrained by the government).

105. Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1206 (2006).

106. Graham v. Richardson, 403 U.S. 365, 372 (1971).

107. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

108. Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 147, 153 (2008).

109. *Id.* at 147 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 770 (Foundation Press 1990) (1978)).

110. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

111. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

112. *See* Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 536–37 (1942).

113. *See* United States v. Guest, 383 U.S. 745, 759 (1966).

114. *See* Wesberry v. Sanders, 376 U.S. 1, 6–7 (1964).

115. *Glucksberg*, 521 U.S. at 719–20.

right," and that otherwise a court should use a lower level of scrutiny.[116] Typically, strict scrutiny applies to voting right cases because the right to vote is fundamental.[117] However, felony disenfranchisement has avoided strict scrutiny review as the Supreme Court permits felony disenfranchisement under the language of Section 2 of the Fourteenth Amendment.[118]

Richardson v. Ramirez[119] illustrates the Supreme Court's approval of felony disenfranchisement. In *Richardson*, the Court heard a challenge to California's felony disenfranchisement laws under the Equal Protection Clause.[120] At the time, article II, section 1 of the California Constitution provided that "no person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State."[121] The Court held that the Fourteenth Amendment explicitly authorizes states to deny the vote on the basis of the "participation in rebellion, or other crime" language in the Fourteenth Amendment.[122] Accordingly, the Court instructed that voting restrictions disenfranchising felons do not violate the Fourteenth Amendment, and upheld California's disenfranchisement laws.[123]

In contrast, the Alabama Supreme Court held Alabama's constitutional provision disenfranchising those convicted of "crime[s] . . . involving moral turpitude" unconstitutional because it contained racially discriminatory intent.[124] The Alabama Supreme Court interpreted moral turpitude as an act "that is 'immoral in itself, regardless of the fact whether it is punishable by law.'"[125] The United States Supreme Court then

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116. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976).

117. Douglas, *supra* note 108, at 143.

118. Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974).

119. 418 U.S. 24 (1974).

120. *Id.* at 33 (contending that "California's denial of the franchise to the class of ex-felons could no longer withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment").

121. *Id.* at 27–28.

122. U.S. CONST. amend. XIV, § 2; *Richardson*, 418 U.S. at 53–54. *But see* Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1655 (2012) (proposing a narrow reading of *Richardson* and the Fourteenth Amendment based on the guiding political philosophy of the Reconstruction era that results in an understanding of Section 2 "as an endorsement of disenfranchisement only for crimes of sufficient moral gravity to constitute renunciation of one's political allegiance to the state").

123. *Richardson*, 418 U.S. at 53–56.

124. Hunter v. Underwood, 471 U.S. 222, 223–24 (1985) (quoting ALA. CONST. art. VIII, § 182).

125. *Id.* at 226 (quoting Pippin v. State, 197 Ala. 613, 616 (1916)). The Restatement (Second) of Torts defines "moral turpitude" as "inherent baseness or vileness of principle in the human heart. It means, in general, shameful wickedness, so extreme a departure from ordinary standards of honesty, good morals, justice or ethics as to be shocking to the moral sense of the community." RESTATEMENT (SECOND) OF TORTS § 571 cmt. g (1977).

stepped in. Chief Justice Rehnquist found that the provisions, while facially neutral, were intended to disenfranchise African American voters.[126] The Court held that while Section 2 of the Fourteenth Amendment authorizes felony disenfranchisement, it "was not designed to permit . . . purposeful racial discrimination . . . which otherwise violates [Section] 1 of the Fourteenth Amendment."[127]

However, in many other cases, because of a lack of "firm proof that [disenfranchisement] laws were actually intended to take [B]lacks and Hispanics off the voting rolls, courts have uniformly rejected these claims even when the plaintiff could show that the laws had a strong discriminatory effect."[128] While the Equal Protection Clause and strict scrutiny generally prohibit restrictive voting regulations, neither will invalidate felony disenfranchisement laws without a showing of discriminatory intent.[129]

V. THE EQUAL PROTECTION CLAUSE AS A CONSTITUTIONAL BASIS TO ABOLISH FELONY DISENFRANCHISEMENT

Despite the Supreme Court's approval in *Richardson v. Ramirez*, calls for reform to felony disenfranchisement and for unity among the states is growing; some in Congress are listening and have repeatedly proposed voting law reforms that would address felony disenfranchisement. The Freedom to Vote Act's preamble begins with "[a] Bill [t]o expand Americans' access to the ballot box."[130] While electoral reform in the realm of enfranchising voters has been championed almost entirely by the national Democratic Party, research shows that 81.7% of Americans favor restoring felons' voting rights at some point after sentencing.[131] Less than 16% of Americans favor lifetime-voting bans.[132] Electoral reform, specifically in response to discriminatory practices, is not a new idea.

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126. *Hunter*, 471 U.S. at 229.

127. *Id.* at 233.

128. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 16:12 (5th ed. 2022) (first citing Howard v. Gilmore, 205 F.3d 1333 (4th Cir. 2000); then citing Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998); then citing Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986); then citing Perry v. Beamer, 933 F. Supp. 556 (E.D. Va. 1996); then citing Hayden v. Pataki, No. 00 Civ. 8586(LMM), 2004 WL 1335921 (S.D. N.Y. 2004); and then citing Clark v. California, No. C 96-3811 VRW, 1996 WL 682022 (N.D. Cal. 1996)).

129. *See infra* section V.B.

130. Freedom to Vote Act, S. 2747, 117th Cong., pmbl. (2021); *see also* For the People Act of 2021, H.R. 1, 117th Cong., pmbl. (2021) (preceding the Freedom to Vote Act).

131. Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1545 (2003).

132. *Id.*

Racial disparities in voter representation have been a call to action for reformists for decades, including from former President Bill Clinton, who in 2001 wrote an editorial in the *New York Times* ten days before leaving office that said:

> We must do more to ensure that more people vote and that every vote is counted. To that end I urge the new administration to appoint a nonpartisan presidential commission on electoral reform . . . [to] gather facts and determine the causes . . . of voting disparities, including those involving race, class and ethnicity. . . . It should also work to prevent voter suppression and intimidation and to increase voter participation.[133]

Short of a constitutional amendment, Congress has at least two tools to address the racial and electoral disparities caused by felony disenfranchisement: the Enforcement Clause of the Fourteenth Amendment[134] and the Elections Clause.[135]

A. The Enforcement Clause of the Fourteenth Amendment

While the Equal Protection Clause itself has done little to strike down felony disenfranchisement, the Fourteenth Amendment's Enforcement Clause provides another potential basis for a federal prohibition on felony disenfranchisement. Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[136] However, this positive grant of power to Congress is not unlimited.[137] In *City of Boerne v. Flores*,[138] the Supreme Court provided a framework with which to analyze whether Congress's use of its Section 5 powers is constitutional.[139] The first step in the Enforcement Clause analysis asks

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133. William Jefferson Clinton, *Erasing America's Color Lines*, N.Y. TIMES (Jan. 14, 2001), https://www.nytimes.com/2001/01/14/opinion/erasing-america-s-color-lines.html [https://perma.cc/ZX29-9BV5].

134. U.S. CONST. amend. XIV, § 5.

135. *Id.* art. I, § 4; *see also* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. F. 171 (2019) [hereinafter *The Elections Clause*] (discussing Congress's powers under the Elections Clause to pass many aspects of the For the People Act).

136. U.S. CONST. amend. XIV, § 5.

137. *See e.g.*, Oregon v. Mitchell, 400 U.S. 112, 128 (1970) ("As broad as the congressional enforcement power is, it is not unlimited."); City of Boerne v. Flores, 521 U.S. 507, 518–19 (1997) (reiterating the limitation on Congress's enforcement power established in *Mitchell*, 400 U.S. at 112).

138. 521 U.S. 507 (1997).

139. *Id.* at 520. Notably, Franita Tolson has argued that the congruence and proportionality test of *City of Boerne* should not apply to federal voting rights legislation. Franita Tolson, *Enforcing the Political Constitution*, 74 STAN. L. REV. ONLINE 88 (2022).

whether the legislation regulates state action.[140] For purposes of the Fourteenth Amendment, state action is an "exertion[] of state power in all forms."[141] As felony disenfranchisement is inherently a state matter, any exercise of Enforcement Clause power against felony disenfranchisement would meet the first step.

The next step in the Enforcement Clause analysis requires a court to consider Congress's findings and determine whether their response, the use of their Equal Protection Clause power, is appropriate.[142] While courts defer to legislative findings, Congress's justification for exercising its enforcement power must provide a theory and evidence of actual constitutional violations.[143] Having identified a constitutional violation, "prophylactic legislation under [Section 5 of the Fourteenth Amendment] must have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[144] To simplify this analysis, Congress typically provides their findings in the bill enforcing the guarantees of the Fourteenth Amendment.

Here, the Freedom to Vote Act provided numerous congressional findings justifying congressional action and the banning of felony disenfranchisement. For example, Congress found "that it has authority to legislate to eliminate racial discrimination in voting and the democratic process pursuant to both [S]ection 5 of the Fourteenth Amendment, which grants equal protection of the laws, and [S]ection 2 of the Fifteenth Amendment."[145] Further, Congress states that the racial disparities in voters disenfranchised "due to past felony conventions [are] particularly stark."[146] Congress explicitly pointed out the racial disparities in felony disenfranchisement, including that "[o]ne in 16 African Americans of voting age is disenfranchised, a rate 3.7 times greater than that of non-African Americans."[147] Additionally, Congress found that "Latino citizens are also disproportionately disenfranchised based upon their disproportionate representation in the criminal justice systems" at a

140. Shelley v. Kraemer, 334 U.S. 1, 10 (1948).

141. *Id.* at 20.

142. *See, e.g.*, *City of Boerne*, 521 U.S. at 519–20 (providing the congruence and proportionality test for exercise of Congress's enforcement power).

143. *Id.* at 519–20, 536.

144. United States v. Morrison, 529 U.S. 598, 625–26 (2000) (first citing Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999); and then citing *City of Boerne*, 521 U.S. at 526).

145. Freedom to Vote Act, S. 2747, 117th Cong. § 3(4)(A) (2021).

146. *Id.* § 3(4)(D).

147. *Id.*

rate "2.5 times the rate of Whites."[148]

Echoing the historical roots and post-Reconstruction era application of felony disenfranchisement, Congress found that "felony disenfranchisement was one of the tools of intentional racial discrimination during the Jim Crow era."[149] Moreover, legislators pointed out what might not be facially apparent on felony disenfranchisement laws, that "racial disparities in felony disenfranchisement are linked to this history of voter suppression, structural racism in the criminal justice system, and ongoing effects of historical discrimination."[150]

While Congress's power to enforce the Equal Protection Clause has withered over the last few decades, the drafters of the Freedom to Vote Act believed their findings empowered Congress to end felony disenfranchisement through Section 5. Congress laid the foundation for its Enforcement Clause authority in its findings in the Freedom to Vote Act, but the Supreme Court will determine if those findings permit banning felony disenfranchisement. As discussed in section VII.A, it is very unlikely that the Supreme Court will permit Congress to rely on its Enforcement Clause authority to end felony disenfranchisement.[151]

B. Textual Restrictions from Section 2 of the Fourteenth Amendment

Section 2 of the Fourteenth Amendment specifically contemplates the disenfranchisement of "citizens of the United States" following "participation in rebellion, or other crime."[152] As discussed above, the Supreme Court points to the "rebellion, and other crimes" language within Section 2 as justification for empowering states to disenfranchise voters with felony convictions.[153] Notwithstanding the meaning of "other crimes" at the time of the Amendment's ratification, the Fourteenth Amendment provides a strong textual basis for allowing states to limit the right to vote of people previously convicted of or currently serving sentences for felonies.[154] While the Court has never taken an unqualified stance on felony disenfranchisement through the

148. *Id.* § 1702(11).

149. *Id.* § 3(4)(D).

150. *Id.*

151. *See infra* section VII.A.

152. U.S. CONST. amend. XIV, § 2 ("[W]hen the right to vote at any election . . . 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.").

153. *Id.*

154. *Id.*

Fourteenth Amendment, it has indicated that the practice is constitutional.[155]

Chief Justice Rehnquist interpreted the Fourteenth Amendment to mean that the drafters of the Constitution authorized states to exclude felons from taking part in elections. In *Richardson v. Ramirez*, Chief Justice Rehnquist stated the "convincing evidence of the historical understanding of the Fourteenth Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons."[156] He went further to approve the constitutionality of felony disenfranchisement himself:

> Although the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions . . . . [T]he framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here.[157]

When plaintiffs challenge legislation disallowing felony disenfranchisement, they will have precedent and a strong textual basis in the Fourteenth Amendment for disenfranchising people convicted a felony on their side.

Franita Tolson, in analyzing the history of the Section 2 of the Fourteenth Amendment, summarizes that Section 2 "embraces a nondiscrimination principle rather than an explicit right to vote" that provides a baseline for Congress's use of Section 5.[158] As a result, "states can still choose the qualifications of electors, so long as they do so in a nondiscriminatory manner."[159] While the Supreme Court has struck down discriminatory voter qualifications before, it will likely not find unconstitutional conduct in the evidence presented by the Freedom to Vote Act.[160]

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155. *See* Richardson v. Ramirez, 418 U.S. 24 (1974).

156. *Id.* at 53.

157. *Id.* at 43, 53.

158. Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 412 (2014).

159. *Id.*

160. *See infra* section VII.A.

VI. THE ELECTIONS CLAUSE AS A CONSTITUTIONAL BASIS TO ABOLISH FELONY DISENFRANCHISEMENT

Congress has the power to regulate many aspects of federal elections through the Elections Clause.[161] The Freedom to Vote Act first cites the Elections Clause as one of the enumerated powers authorizing Congress to pass the Act.[162] The Elections Clause provides that: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[163] "Times, [p]laces," and in particular, "[m]anner" are the empowering words in the clause.[164] The Elections Clause only applies to federal elections. However, federal legislation usually impacts state election processes as they are often held jointly with federal elections.[165]

The extent of Congress's Elections Clause power is debatable. Some view the Elections Clause as a federal mechanism to protect against the entrenchment of state legislatures and disenfranchisement of voters in individual states. Eliza Sweren-Becker and Michael Waldman, of the Brennan Center for Justice, assert that "[t]he historical record of the Elections Clause—at the nation's founding, in early Congresses, and in the courts—demonstrates that Congress and states have the power to deliver on the promise of free and fair elections that the Framers intended."[166] Others interpret the language and history of the Elections Clause, as well as separate sections of the U.S. Constitution, as limiting the scope of the Elections Clause.[167]

The Elections Clause has played an important role in partisan gerrymandering claims.[168] In ruling that gerrymandering claims based on

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161. U.S. CONST. art. I, § 4.

162. Freedom to Vote Act, S. 2747, 117th Cong. § 3(1) (2021).

163. U.S. CONST. art. I, § 4.

164. Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1026–27 (2021).

165. Notably, the Supreme Court has held that the Constitution "do[es] not require a perfect symmetry of voter qualifications in state and federal legislative elections." Tashjian v. Republican Party of Conn., 479 U.S. 208, 229 (1986).

166. Sweren-Becker & Waldman, *supra* note 164, at 1066.

167. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 29–33 (2013) (Thomas, J., dissenting) (justifying limitations on the Elections Clause power through textual and historical analysis); *Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on Const. of the H. Comm. on the Judiciary*, 106th Cong. 49 (1999) [hereinafter *Hearing on H.R. 906*] (statement of Gillian E. Metzger, Staff Att'y, Brennan Ctr. for Just.) (pointing to the Qualifications Clause as a limitation on the Elections Clause).

168. Rucho v. Common Cause, __ U.S. __, 139 S. Ct. 2484, 2506–09 (2019).

partisan malapportionment[169] were non-justiciable, the Supreme Court in *Rucho v. Common Cause*[170] pointed specifically to the For the People Act of 2019 as an example of proposed legislation that could create districting regulations and noted that the avenue for reform "remains open" in Congress.[171] However, redistricting is closer to the "[t]ime[], [p]lace[], and [m]anner" of the Elections Clause than determining the qualifications of voters in federal elections. Moreover, use of the Elections Clause to prescribe federal voter qualifications faces far more textual and historical challenges than redistricting reform.

The 1932 decision of *Smiley v. Holm*[172] demonstrates the Supreme Court's historical endorsement of a broad Elections Clause power. In reference to the wording of the Elections Clause, the Court stated:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[173]

Writing for a unanimous court, Chief Justice Hughes concluded that the "such regulations"[174] language in the Elections Clause "plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections."[175] In exercising its Election Clause power, "Congress may supplement [] state regulations or may substitute its own."[176] Simply put, Congress "has a general supervisory power over the whole subject."[177] The Court's view of the Elections Clause granting expansive power over federal elections was reinforced by the Clause's single restriction that Congress could not

169. Partisan gerrymandering is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015).

170. __ U.S. __, 139 S. Ct. 2484 (2019).

171. *Id.* at 2508.

172. 285 U.S. 355 (1932).

173. *Id.* at 366.

174. *Id.*; U.S. CONST. art. I, § 4.

175. *Smiley*, 285 U.S. at 366.

176. *Id.* at 366–67.

177. *Id.* at 367 (quoting *Ex parte* Siebold, 100 U.S. 371, 387 (1879)).

choose the place for electing Senators.[178] Moreover, the Court held that Congress may supplement state regulations or even substitute its own.[179]

Building upon *Smiley*'s broad interpretation of the Elections Clause, Justice Black interpreted the clause as granting Congress extensive lawmaking power in the 1970 decision of *Oregon v. Mitchell*.[180] The Supreme Court found that it was constitutional for Congress to lower the required voting age for federal elections and prohibit states from disqualifying voters in presidential elections who had not met state residency requirements.[181] Justice Black, in the controlling opinion, endorsed "[t]he breadth of power granted to Congress to make or alter election regulations in national elections, *including the qualifications of voters*."[182] Further, Justice Black wrote that "[a]ny doubt about the powers of Congress to regulate congressional elections, including the age and other qualifications of the voters, should be dispelled by the opinion of this Court in *Smiley v. Holm*."[183]

However, a majority of the Court in *Mitchell* did not support such a broad reading of the Elections Clause. Justice Harlan refused to read the Elections Clause as empowering Congress to control parts of federal elections that other constitutional provisions explicitly regulate, specifically Article I, Section 2 ("Qualifications Clause") of the U.S. Constitution and the Seventeenth Amendment.[184]

In 1999, future U.S. Assistant Attorney General Viet Dinh echoed Justice Harlan and argued for removing voter qualification from the Elections Clause via the Qualifications Clause[185] and Seventeenth Amendment.[186] In hearings for the Civic Participation and Rehabilitation Act of 1999, Dinh maintained that Congress only has the authority to legislate the time, place, and manner of elections and not voter qualifications.[187] According to Dinh, Article 1 of the U.S. Constitution differentiates "qualifications" of voters in House elections and the "Times, Places and Manner" of such elections that is addressed in the

178. *Id.* at 366–67.

179. *Id.*

180. Oregon v. Mitchell, 400 U.S. 112 (1970).

181. *Id.* at 134–35.

182. *Id.* at 121–22 (emphasis added).

183. *Id.* at 122.

184. *Id.* at 210 ("Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.").

185. U.S. CONST. art. I, §§ 2, 4.

186. *Id.* amend. XVII.

187. *Hearing on H.R. 906*, *supra* note 167, at 49 (statement of Viet D. Dinh, Associate Professor of Law, Georgetown Univ. L. Ctr.) ("I think article 1, section 4's time, place, and manner language does not give Congress the ability to regulate the substantive qualifications of electors themselves.").

Elections Clause.[188]

Gillian E. Metzger, Staff Attorney at the Brennan Center for Justice, added that any legislation granting Congress the power to prescribe voter qualifications through the Elections Clause is "directly [] limited by the Qualifications Clause[]."[189] Metzger elaborated that

> [t]he fundamental purpose of the Qualifications Clauses contained in Article I, [section] 2, and the Seventeenth Amendment is satisfied if all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and Members of the House of Representatives.[190]

Dinh and Metzger's view would be solidified in the Supreme Court's 2013 decision of *Arizona v. Inter Tribal Council of Arizona, Inc.*[191]

Justice Scalia, writing for a majority of the Court, held in *Arizona v. Inter Tribal* that both the history and text of the Elections Clause granted Congress a broad power over the form of congressional elections, but not over the qualifications of the electorate.[192] In the Court's view, "[p]rescribing voting qualifications [] 'forms no part of the power to be conferred upon the national government' by the Elections Clause."[193] Justice Thomas, in dissent, went further and asserted that the Voter Qualification Clause of Article 1, Section 2 of the Constitution barred Congress from interfering with the states' "free reign over federal voter qualifications."[194]

While many of the provisions in The Freedom to Vote Act are presumptively within Congress's power to regulate federal elections, abolishing felony disenfranchisement faces additional hurdles as an intrusion on states' ability to set voter qualifications. Given the Court's current composition, *Arizona v. Inter Tribal* likely acts as the end of the road for any expression of the Elections Clause that interferes with the

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188. *Id.* at 30–31 (statement of Viet D. Dinh, Associate Professor of Law, Georgetown Univ. L. Ctr.); *see* HULL, *supra* note 8, at 94 (summarizing Dinh's and others' constitutional concerns around Congress ending felony disenfranchisement).

189. *Hearing on H.R. 906*, *supra* note 167, at 20 (statement of Gillian E. Metzger, Staff Att'y, Brennan Ctr. for Just.).

190. *Id.* at 23 (statement of Gillian E. Metzger, Staff Att'y, Brennan Ctr. for Just.) (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 228–29 (1986)).

191. 570 U.S. 1 (2013).

192. *Id.* at 8–9, 17–18.

193. *Id.* at 17 (quoting THE FEDERALIST No. 60, at 369 (Alexander Hamilton) (Clinton Rossiter ed., 2003)).

194. *Id.* at 27 (citing THE FEDERALIST No. 52, at 323 (James Madison) (Clinton Rossiter ed., 2003)).

states' ability to set voter qualifications.

VII. CONGRESS'S INABILITY TO ABOLISH FELONY DISENFRANCHISEMENT UNDER THE FOURTEENTH AMENDMENT AND ELECTIONS CLAUSE

As Congress continues to propose voting rights legislation and considers removing barriers to change like the Senate filibuster,[195] serious consideration of the constitutionality of Congress's prohibition on felony disenfranchisement is necessary now more than ever. As reflected in the state reforms of felony disenfranchisement between the 2016 and 2020 elections and in popular opinion, the desire for national felony disenfranchisement reform is growing and will likely survive the legislative failure of the Freedom to Vote Act and the For the People Act.[196]

As progress in restoring voting rights to citizens who have completed their sentences moved forward in many states, several states remain steadfast in felony disenfranchisement.[197] To address the disparity in felony disenfranchisement laws across the states, a federal law is likely the "best solution for comprehensive reform."[198] However, any law abolishing felony disenfranchisement would face significant constitutional hurdles, and "[t]he constitutionality of a law restoring voting rights to ex-felons would likely depend on the particular text of the law."[199] This Part discusses how Congress's most recent proposal, the Freedom to Vote Act, would not be a proper exercise of the powers granted to it by Section 5 of the Fourteenth Amendment and the Elections Clause. Additionally, this Part provides an overview of alternative federal and state avenues for alleviating the burden of felony disenfranchisement.

Before discussing the constitutionality of proposed federal legislation, it is valuable to discuss why it is still worthwhile to pass legislation advancing the voting rights of people previously convicted of felonies, even if the Court strikes down the voting rights legislation. In a sense, failure at the Supreme Court may be a success for election reformists in

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195. *See generally* Brian Slodysko, *EXPLAINER: Why Is Filibuster Such a Barrier to Voting Bill?*, U.S. NEWS (Jan. 19, 2022), https://www.usnews.com/news/politics/articles/2022-01-18/explainer-why-is-filibuster-such-a-barrier-to-voting-bill (last visited Jan. 22, 2023) (providing an overview of the U.S. Senate filibuster).

196. *See supra* Part III.

197. *See supra* Part III.

198. Beeler, *supra* note 30, at 1102.

199. *Id.*

the long run. Reformists could gain a great deal from the adjudication of the Elections Clause and the Equal Protection Clause and how they relate to felony disenfranchisement. Even if the provision is struck down, reformists would gain justiciable standards to use in the next election reform bill. Moreover, proposed federal legislation against felony disenfranchisement could be a momentum builder for state reformists who could gain traction from the national attention on a popular reform.

A. A Prohibition on Felony Disenfranchisement Is Not a Proper Exercise of Section 5 of the Fourteenth Amendment

Congress has made an abundance of findings related to the disparate racial impacts of felony disenfranchisement. Nonetheless, the deference given to Congress by the Supreme Court is not absolute. As discussed in section V.B, *supra*, the Court places significant requirements on an exercise of Congress's enforcement power through the Fourteenth Amendment. As Congress continues to rely on its enforcement clause powers, proposed reforms to felony disenfranchisement laws will likely not survive challenges at the Supreme Court without additional justification.

Up front, the disproportional impact of felony disenfranchisement in states may not be unconstitutional conduct in the eyes of the Court. Congress has presented evidence of the discriminatory impact of felony disenfranchisement, but nothing in the Freedom to Vote Act shows discriminatory intent by state legislatures.[200] Moreover, it is likely that any disenfranchisement statutes that contain evidence of discriminatory intent have already been challenged through direct application of the Equal Protection Clause.[201]

Assuming the Freedom to Vote Act identifies unconstitutional conduct, prohibiting felony disenfranchisement for those not actively serving a sentence for a felony conviction may not meet the congruence and proportionality requirements. A law that applies to all states may be disproportional if most states do not exhibit significant discrimination in Congress's findings.[202] Forty-eight states have some form of felony disenfranchisement, weighing in favor of upholding Congress's exercise

200. Freedom to Vote Act, S. 2747, 117th Cong. §§ (3)(4)(B)–(D) (2021).

201. *See* Hunter v. Underwood, 471 U.S. 222 (1985); *see also* Harness v. Watson, 47 F.4th 296 (5th Cir. 2022) (upholding the felony disenfranchisement provision in the Mississippi Constitution against a recent challenge).

202. *See* United States v. Morrison, 529 U.S. 598, 625–26 (2000); *see also* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding remedial measures of the Voting Rights Act of 1965 that only applied to some states).

of Section 5 of the Fourteenth Amendment.[203] However, in its findings, Congress only identified the eleven states with the most significantly impactful felony disenfranchisement laws.[204]

Congress's proposed legislation prohibits felony disenfranchisement for anyone not actively serving a felony sentence in a correctional institution.[205] This would further reduce the number of impacted states from forty-eight to thirty.[206] In addition, many states prescribe felony disenfranchisement for certain crimes. For example, in Delaware, some crimes like murder, manslaughter, or a felony sexual offense require a pardon to be enfranchised, but others convicted of lesser crimes regain their right to vote after completion of their full sentence.[207] It is possible that a nationwide rule could be seen as disproportional when some of the remaining thirty states narrowly apply their felony disenfranchisement laws. Additionally, the Court may point to the growing number of states reforming felony disenfranchisement laws and the decrease in disenfranchised voters[208] overall as evidence of a lack of need to completely overhaul felony disenfranchisement at the national level, at least to the current level of reform proposed.

Accordingly, even if Congress can sufficiently show unconstitutional conduct by the states in their felony disenfranchisement laws, it is likely that the Court would find that the Freedom to Vote Act is not proportional as it applies a nationwide rule to a problem exasperated in a minority of states.[209] If a nationwide rule is disproportional, Congress may still find a way to remedy the most aggressive felony disenfranchisement laws. Congress could tailor legislation to the states with the strictest felony disenfranchisement laws and the greatest racial disparity in voters disenfranchised for a prior felony conviction.[210]

Assuming the laws in those states are found unconstitutional, it would be proportional for Congress to enforce the Equal Protection Clause through federal legislation against those states' felony disenfranchisement laws. While this may not achieve the broad goals of Congress, it would

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203. *See supra* Part III.

204. Freedom to Vote Act, S. 2747, 117th Cong. § 1702(9) (2021).

205. *Id.* § 1703 (2021) ("The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election.").

206. For the People Act of 2021, H.R. 1, 117th Cong. § 1402 (2021).

207. DEL. CONST. art. V, § 2.

208. *See supra* Part III.

209. *See supra* Part III.

210. *See generally* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding remedial measures of the Voting Rights Act of 1965 that only applied to some states).

alleviate some of the most disparate impacts of felony disenfranchisement laws. However, this raises the principle of equal sovereignty among the states.[211] Whether the impacts of felony disenfranchisement are geographically disparate enough to justify different treatment among the states is uncertain and beyond the scope of this Comment.[212]

B. A Prohibition on Felony Disenfranchisement Is Not a Proper Exercise of the Elections Clause

While never the object of plenary consideration, previous Supreme Courts upheld the constitutionality of felony disenfranchisement by states.[213] It is relatively undisputed that states have the power to disenfranchise people convicted of felonies under the Fourteenth Amendment. But is this power reserved exclusively for the states? Is an exercise of the Elections Clause overriding the "other crimes" language of the Fourteenth Amendment a violation of the Constitution? Can felony disenfranchisement be substituted with federal voting regulations through the Elections Clause? This Comment argues that a federal ban on felony disenfranchisement would be an unconstitutional exercise of the Elections Clause.[214]

As discussed in Part VI, *Arizona v. Inter Tribal* stands for the rule that while Congress may create a code for federal elections, states should determine voter qualifications.[215] Simply, "the Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them."[216] The Freedom to Vote Act sets out to enfranchise all ex-felons, but felony disenfranchisement, next to citizenship, is a core voter qualification enforced by the states. Under *Inter Tribal*, it is doubtful the current Court would allow Congress to enfranchise ex-felons.

The only two dissenters in *Inter Tribal* were Justices Thomas and

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211. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 542 (2013) (citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

212. *See id.*; *see also* Franita Tolson, *The Equal Sovereignty Principle as Federalism Sub-Doctrine: A Reassessment of* Shelby County v. Holder, *in* CONTROVERSIES IN AMERICAN FEDERALISM AND PUBLIC POLICY 171–86 (Christopher P. Banks ed., 2018) (arguing that the legislative history of the Fourteenth and Fifteenth Amendments constitutionalized the unequal treatment of states that violated the equal sovereignty principle in *Shelby County*).

213. *E.g.*, Richardson v. Ramirez, 418 U.S. 24, 53 (1974).

214. *See* THE FEDERALIST No. 59 (Alexander Hamilton).

215. Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16–17 (2013).

216. *Id.* at 16.

Alito.[217] Justice Thomas would vote against the constitutionality of the Freedom to Vote Act's provision banning felony disenfranchisement. In *Inter Tribal*, Justice Thomas was clear that the states have "exclusive authority to set voter qualifications."[218] Similarly, Justice Alito held that only the states can set voter qualifications.[219]

However, in response to the critiques of recent federal voting rights legislation, leading constitutional scholars endorse ending felony disenfranchisement through the Elections Clause. Franita Tolson highlights the Supreme Court's failure to address whether the Elections Clause permits the federal government to regulate felony disenfranchisement when states abuse "their power in a way that . . . affects turnout and participation in federal elections."[220] This extra consideration may allow Congress to reach past voter qualifications to "'protect the elections on which existence depends' and 'to protect the citizen in exercise of rights conferred by the Constitution.'"[221]

Nicholas Stephanopoulos went further to say that the Elections Clause "enables Congress to regulate essentially all aspects of congressional elections, including being able to vote after completing a prison sentence."[222] The majority did not share this view in *Inter Tribal*, and it is unlikely that the Supreme Court will share the support these commentators find in the Elections Clause.

As stated in *Richardson v. Ramirez* decades prior, the Court will likely hold that arguments about felony disenfranchisement should instead be "addressed to the [state] legislative forum" and strike down the felony enfranchisement provision of the Freedom to Vote Act.[223] However, several legal avenues beyond the Fourteenth Amendment and Elections Clause may empower Congress to abolish felony disenfranchisement.

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217. *Id.* at 1. The majority in *Arizona v. Inter Tribal* comprised Justice Scalia, Chief Justice Roberts, Justice Sotomayer, Justice Ginsburg, Justice Breyer, Justice Kagan, and Justice Kennedy (in part and concurring in part). *Id.*

218. *Id.* at 37 (Thomas, J. dissenting).

219. *Id.* at 42–43 (Alito, J. dissenting).

220. *See* Tolson, *The Elections Clause*, *supra* note 135, at 178; *see also* Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211 (2018) (critiquing the application of prevailing theories of federalism to the Elections Clause).

221. *See* Tolson, *The Elections* Clause, *supra* note 135, at 179 (quoting *Ex parte* Yarbrough, 110 U.S. 651, 658 (1884)).

222. Stephanopoulos, *supra* note 14, at 9. Notably, Stephanopoulos goes further and proposes that the Guarantee Clause authorizes Congress to ban felony disenfranchisement in state elections. *Id.* at 74–75; *see supra* section VII.C.

223. Richardson v. Ramirez, 418 U.S. 24, 55 (1974).

C. Congress Has Other Novel Legal Theories for Abolishing Felony Disenfranchisement

Turning away from the Fourteenth Amendment and Elections Clause, the Supreme Court may soon test several other constitutional arguments provided by Congress to justify its power to end felony disenfranchisement.[224] Three other powers in the Freedom to Vote Act are highlighted here: (1) Article 1, Section 4 of the U.S. Constitution; (2) the Eighth Amendment; and (3) the Fifteenth Amendment.[225]

Article 1, Section 4 of the U.S. Constitution, commonly referred to as the Guarantee Clause, provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[226] In the Freedom to Vote Act, Congress found "that it has both the authority and responsibility, as the legislative body for the United States, to fulfill the promise of [A]rticle IV, [S]ection 4, of the Constitution."[227] Moreover, Congress found "that its authority and responsibility to enforce the Guarantee Clause is clear given that Federal courts have not enforced this clause because they understood that its enforcement is committed to Congress by the Constitution."[228]

Generally, enforcement of the Guarantee Clause is a nonjusticiable political question.[229] Nicholas Stephanopoulos asserts that Congress could determine that disenfranchising ex-felons in state and federal elections, deprives citizens of a republican form of government.[230] Functionally, this judgment would empower Congress to pass a nonreviewable law that would end felony disenfranchisement.[231] It remains to be seen whether the

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224. While the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise," Congress has recited several other powers in the Freedom to Vote Act. *See* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948).

225. Freedom to Vote Act, S. 2747, 117th Cong. § (3)(5)(A) (2021). The Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments are also cited in the Freedom to Vote Act but not discussed in this Comment.

226. U.S. CONST. art. IV § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

227. Freedom to Vote Act, S. 2747, 117th Cong. § 3(2) (2021).

228. *Id.*

229. *See, e.g.*, Luther v. Borden, 48 U.S. 1 (1849) (holding Guarantee Clause is non-justiciable); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (providing that the enforcement of the Guarantee Clause is exclusively committed to Congress).

230. Stephanopoulos, *supra* note 14, at 9.

231. *Id.*; *see also* Franita Tolson, *"In Whom Is the Right of Suffrage?": The Reconstruction Acts as Sources of Constitutional Meaning*, 169 U. PA. L. REV. 2041 (2021) (discussing the blueprint for a republican government provided by Section 2 of the Fourteenth Amendment and the

Supreme Court would leave enforcement of the Guarantee Clause to the other two branches and permit Congress to use the Guarantee Clause as an enumerated power to end felony disenfranchisement.

The Freedom to Vote Act also asserts that felony disenfranchisement is a cruel and unusual punishment under the Eighth Amendment.[232] Congress found that "[m]any State disenfranchisement laws" run afoul of the Eighth Amendment, as they "are grossly disproportional to the offenses that lead to disenfranchisement."[233] Notably, the Eighth Amendment's proportionality analysis does not rely on historical standards but instead "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[234] Thus, has society moved past felony disenfranchisement?[235] Further, does the Eighth Amendment grant Congress positive power to end felony disenfranchisement? Assuming the Eighth Amendment does not grant Congress the power to end felony disenfranchisement, the Eighth Amendment may nonetheless be fertile ground for state reformers to challenge the most stringent felony disenfranchisement laws.

Section 1 of the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." In the Freedom to Vote Act, Congress invoked its power to enforce Section 1 of the Fifteenth Amendment under Section 2.[236] Nicholas Stephanopoulos asserts that the "for participation in rebellion, or other crime" language of the Fourteenth Amendment "has no bearing on Congress's enforcement power under the Fifteenth Amendment."[237] Instead, Congress would only need "a rational basis to think that its chosen policy will fight racial discrimination in voting," which Stephanopoulos believes would be a reasonable basis for enfranchising ex-felons.[238]

Guarantee Clause in the context of Florida's 2018 constitutional amendment attempting to end felony disenfranchisement).

232. For the People Act, S. 2747, 117th Cong. § 1702(15) (2021).

233. *Id.*

234. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1167–68 (2004) (quoting Atkins v. Virginia, 536 U.S. 304, 311–12 (2002)).

235. *Id.* at 1168; *see supra* Part III.

236. U.S. CONST. amend. XV; For the People Act, S. 2747, 117th Cong. § 3(4)A (2021).

237. Stephanopoulos, *supra* note 14, at 75.

238. *Id.* at 74; *see also* John Crain, *How Congress Can Craft a Felon Enfranchisement Law that Will Survive Supreme Court Review*, 29 B.U. PUB. INT. L.J. 1, 42–63 (2019) (discussing combining the enforcement powers of the Fourteenth and Fifteenth Amendments to abolish felony disenfranchisement).

Indeed, it is imperative to recognize the importance of state reformers and how they may be more crucial now than ever. Until federal voting rights legislation is passed, the impetus remains on state reformers to continue pushing for bills and state amendments that alleviate the burden of felony disenfranchisement.[239] With the Supreme Court's grant of certiorari to *Moore v. Harper*,[240] the Court could soon adopt the independent state legislature doctrine.[241] Simply, the independent state legislature doctrine would prohibit states from limiting their legislature's authority to regulate federal elections.[242] Many states' felony disenfranchisement laws are prescribed or authorized in their respective constitutions.[243] The independent state legislature doctrine may nullify these constitutional provisions. Accordingly, reformers must be prepared to address this wave of uncertainty to avoid the reinstatement, through the state legislatures, of felony disenfranchisement laws.

CONCLUSION

Felony disenfranchisement is a unique burden on U.S. democracy that disproportionately impacts people and communities of color. Despite commendable efforts to ban felony disenfranchisement in the current era of political hyperpolarization, Congress cannot be relied upon for comprehensive progress toward ending felony disenfranchisement. If a future iteration of the Freedom to Vote Act passes, Congress's ability to abolish felony disenfranchisement will be challenged.

Due to the unique nature of states' ability to set voter qualifications and the lack of evidence of discriminatory intent in states' felony disenfranchisement laws, the Court likely will not permit Congress to disallow felony disenfranchisement under the Fourteenth Amendment or Elections Clause. More research needs to be done on the untested constitutional powers proposed by Congress to abolish felony disenfranchisement, like the Guarantee Clause, and the possible impacts

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239. *See generally Amending State Constitutions*, BALLOTPEDIA, https://ballotpedia.org/Amending_state_constitutions [https://perma.cc/5Q86-TLW9] (detailing the amendment process for each state's constitution); *see also* Harness v. Watson, 47 F.4th 296 (5th Cir. 2022) (challenging Mississippi's felony disenfranchisement provision under the Equal Protection Clause).

240. Harper v. Hall, 868 S.E.2d 499 (N.C. 2022), *cert. granted sub nom.* Moore v. Harper, __ U.S. __, 142 S. Ct. 2901 (2022).

241. *Id.*; Eliza Sweren-Becker & Ethan Herenstein, Moore v. Harper*, Explained*, BRENNAN CTR. FOR JUST. (Oct. 16, 2022), https://www.brennancenter.org/our-work/research-reports/moore-v-harper-explained [https://perma.cc/RR5X-LAS2].

242. Morley, *supra* note 2, at 516.

243. Nora V. Demleitner, *Criminal Disenfranchisement in State Constitutions: A Marker of Exclusion, Punitiveness, and Fragile Citizenship*, 26 LEWIS & CLARK L. REV. 531, 531 (2022).

of the independent state legislature doctrine. For now, the impetus remains on state reformers to continue to push against their states' respective felony disenfranchisement laws.