CRIMINAL DISENFRANCHISEMENT IN STATE CONSTITUTIONS: A MARKER OF EXCLUSION, PUNITIVENESS, AND FRAGILE CITIZENSHIP

by
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Many states prominently include criminal disenfranchisement provisions in their constitutions, which powerfully, and more permanently than state laws, convey the states' values. These provisions also underscore the ease with which the protected status of citizenship, most pronounced in the right to vote, can be lost. Using the debate in Virginia over how to change the state's constitution to limit disenfranchisement as a starting point, this Article highlights the need for inclusive voting provisions in state constitutions to reflect a broad conception of citizenship rights and the expansion of the franchise over the last century. Reform demands 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.

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INTRODUCTION

The Commonwealth of Virginia has one of the broadest criminal disenfranchisement provisions in the United States. Lifetime loss of voting rights is enshrined in the state constitution. Those convicted of any felony are barred from voting unless the governor restores their civil rights.[1] Until 2016, the vast majority of those with a felony conviction lost the franchise forever. Most never applied for restoration of rights as the process was cumbersome, expensive, and time-consuming.[2]

In 2016, then-Governor Terry McAuliffe, through executive order, restored the voting rights of over 200,000 individuals who had served their sentence.[3] Virginia's Supreme Court declared this exercise of executive power unconstitutional.[4] After its decision, the Governor individually restored voting rights to those who had been released from criminal justice supervision.[5] His successor initially continued the practice. In March 2021, Governor Northam took a further step by re-enfranchising all Virginians not currently incarcerated even if they were on parole or probation.[6] Yet, the state constitution continues to proclaim its broadly exclusionary message.

During the 2021 session, the state legislature debated how to change Virginia's constitution to limit disenfranchisement. Some proposed removing any reference to

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[1] VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.").

[2] *See, e.g.*, Editorial Board, Opinion, *From Felon to Voter in Virginia,* WASH. POST (Jan. 22, 2014), https://www.washingtonpost.com/opinions/from-felon-to-voter-in-virginia/2014/01/22/cc72d6f4-7fcc-11e3-95c6-0a7aa80874bc_story.html; Carson Whitelemons, *Virginia's Step Forward On Voting Rights*, BRENNAN CTR. FOR JUST., (June 11, 2013), https://www.brennancenter.org/our-work/analysis-opinion/virginias-step-forward-voting-rights.

[3] Howell v. McAuliffe, 788 S.E.2d 706, 710–11 (Va. 2016). In 2019, Governor Andy Beshear of Kentucky followed the Virginia governor's example. Kentucky also has constitutionally mandated lifetime disenfranchisement, and the governor, through executive order, restored the civil rights of those whose records did not include violent or other specified offences. KY. OFF. OF THE GOVERNOR, EXEC. ORDER NO. 2019-003, RELATING TO THE RESTORATION OF CIVIL RIGHTS FOR CONVICTED FELONS (Dec. 12, 2019).

[4] *Howell*, 788 S.E.2d at 724; *see also* Camila Domonoske, *Virginia Court Overturns Order that Restored Voting Rights to Felons*, NPR (July 22, 2016, 8:05 PM), https://www.npr.org/sections/thetwo-way/2016/07/22/487107922/virginia-court-overturns-order-that-restored-voting-rights-to-felons.

[5] *See Gov. McAuliffe Announces Restoration of Voting Rights to Thousands of Felons*, WHSV3, https://www.whsv.com/content/news/Gov-McAuliffe-to-make-announcement-regarding-restoration-of-rights-390928611.html (Aug. 22, 2016, 12:24 PM).

[6] *See* Press Release, Va. Governor Ralph S. Northam, Governor Northam Restores Civil Rights to Over 69,000 Virginians, Reforms Restoration of Rights Process (Mar. 16, 2021), https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-893864-en.html.

felon disenfranchisement in the constitution while others suggested retaining it during imprisonment.[7] Ultimately, both Houses passed an amendment that explicitly mandated disenfranchisement during incarceration.[8] Even though this is the practice the governor adopted subsequently, the constitutional change faced several additional hurdles. The legislature would have to pass the amendment again after the 2021 election, and then a majority of voters would have to approve it.[9] Political turnover following the 2021 state elections ended the constitutional reform project in Virginia, at least for some time.[10]

Though state constitutions are easier to amend than the federal Constitution,[11] as the Virginia process demonstrates, even in the states, hurdles to constitutional amendments are substantial. Still, in recent years several states have amended their state constitutions to expand the franchise and allow (some) felons to vote.[12]

Despite the importance of state constitutions in setting out voter qualifications, most of the research on felon disenfranchisement focuses on the combined effect of state laws and constitutions without disaggregating the two different sources of

[7] S.J. Res. 272, Gen. Assemb., Spec. Sess. I (Va. 2021) (as introduced); Jackie DeFusco, *Virginia Senate Proposal Lets Inmates Vote While Incarcerated, House Version Restores Rights Upon Release*, WJHL11, https://www.wjhl.com/news/regional/virginia/virginia-senate-proposal-lets-inmates-vote-while-incarcerated-house-version-restores-rights-upon-release/ (Feb. 2, 2021, 8:39 PM). For proposals in other states to expand voting rights to the incarcerated, see, for example, *#SecondChanceMonth: Unlock the Vote*, SENT'G PROJECT (Apr. 11, 2022), https://www.sentencingproject.org/news/secondchancemonth-unlock-the-vote/.

[8] H.J. Res. 555, Gen. Assemb., Spec. Sess. I, art. II § 1(a)(1) (Va. 2021).

[9] For background on the law and developments in Virginia, see *Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia (Mar. 16, 2021). For a history of the constitutional amendment's passage (as of April 2021), see Va. H.J. Res. 555.

[10] *See, e.g.*, *Virginia Felon Voting Rights Restoration Amendment (2022)*, BALLOTPEDIA, https://ballotpedia.org/Virginia_Felon_Voting_Rights_Restoration_Amendment_(2022) (last visited July 7, 2022); Graham Moomaw, *Va. House Republicans Kill Proposal on Felon Voting Rights Despite Bipartisan Support*, VA. MERCURY (Feb. 8, 2022), https://www.virginiamercury.com/2022/02/08/va-house-republicans-kill-felon-voting-rights-proposal-despite-bipartisan-support/.

[11] For a description of the federal constitutional amendment process, see *Constitutional Amendment Process*, NAT'L ARCHIVES, https://www.archives.gov/federal-register/constitution (Aug. 15, 2016).

[12] *See infra* notes 81–82 and accompanying text (discussing changes in California and Florida).

law.[13] The exceptions are historical studies that analyze the evolution of felon disenfranchisement provisions in state constitutions.[14]

This Article focuses on the current role of state constitutions in signaling the fragility of citizenship. Despite changes state constitutional provisions have undergone, almost all have retained powerful exclusionary concepts, which are reinforced in felon disenfranchisement laws. They conflate status as an offender with loss of the franchise and highlight the ease with which the protected status of citizenship, most pronounced in the right to vote, can be lost.

Instead of providing broadly for the right to vote, many states prominently include criminal disenfranchisement provisions in their constitutions, which powerfully, and more permanently than state laws, convey the states' values. This Article uses the Virginia debate as a foil to highlight the exclusionary provisions prevalent in state constitutions. In contrast to the federal Constitution, states set out who has the right to vote but many feature, in the same provision, exclusions that continue to set limits on the voting rights of citizens, including on those with a criminal record. The urgency of reforming not only state laws but also constitutional provisions emanates from the ongoing restrictions on voting rights, whose impact is magnified by the vast and punitive U.S. criminal justice system and results in fragile citizenship.[15] Reform demands must be seen in the context of a racially skewed criminal justice system and ongoing efforts to suppress the right to vote.[16]

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[13] Much of the literature focuses on the federal constitution and the Voting Rights Act. *See, e.g.*, David J. Zeitlin, Note, *Revisiting* Richardson v. Ramirez*: The Constitutional Bounds of Ex-Felon Disenfranchisement*, 70 ALA. L. REV. 259 (2018); Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584 (2012); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004). Others have written on the possibility of federal legislation to reinstate the voting rights of all those with a criminal record who would otherwise be disenfranchised under state laws. *See, e.g.*, Daniel M. Katz, *Article 1, Section 4 of the Constitution, the Voting Rights Act, and Restoration of the Congressional Portion of the Election Ballot: The Final Frontier of Felon DISenfranchisement Jurisprudence?*, 10 U. PA. J.L. & SOC. CHANGE 47 (2007); Amanda Wong, Note, *Locked up, Then Locked out: The Case for Legislative - Rather than Executive - Felon Disenfranchisement Reform*, 104 CORNELL L. REV. 1679 (2020); BRENNAN CENTER FOR JUSTICE, DEMOCRACY: AN ELECTION AGENDA FOR CANDIDATES, ACTIVISTS, AND LEGISLATORS 10–11 (Wendy Weiser & Alicia Bannon eds., 2018).

[14] *See, e.g.*, John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates*, 19 J. POL'Y HIST. 282 (2007).

[15] For the scope of the entire criminal justice process, see Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022,* PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html.

[16] On racial disparities in the US criminal justice system, see, for example, Shasta N. Inman, *Racial Disparities in Criminal Justice,* AM. BAR ASS'N, https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-

Virginia's constitutional debate presented a case study of the struggle surrounding access to the franchise and highlights different perspectives on voter qualifications. The distinct constitutional proposals put forth during the amendment process reflect the intertwined struggles over voting access and criminal justice reform in a political system shaped by structural and legalized racism.[17]

In Part I, this Article sets out a short history of felon disenfranchisement. It emphasizes its, at least indirect, connection to the history of racism and white supremacy during the nineteenth century whose vestiges continue through today. With the enormous expansion of the criminal justice system during the late twentieth century and its considerable racial imbalance, criminal disenfranchisement has fallen upon the African American community, exactly as some Southern state legislators had intended a century earlier.[18] The seed for criminal disenfranchisement is planted through state constitutions though the details are in voting provisions, which are often administered through local election boards.

In recent years, voters and state legislators have shown some appetite for rolling back lengthy and disproportionate disenfranchisement based on a criminal conviction.[19] Governors have used their executive powers to reinstate voting rights. Legal commentary has also consolidated around the abolition of felon disenfranchisement in its entirety, or at least at limiting it to the time of incarceration.[20]

Part II provides details on the voting provisions included in state constitutions, which emphasize restrictions on the right to vote, including those imposed through

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lawyers-can-help/; *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet (last visited July 7, 2022).

[17] Felon disenfranchisement sits uneasily between electoral issues and questions of punishment. Neither lens has provided a fully satisfactory analytical approach. *See, e.g.*, Susan Easton, *Electing the Electorate: The Problem of Prisoner Disenfranchisement*, 69 MOD. L. REV. 443, 443 (2006).

[18] *See infra* notes 33–42 and accompanying text.

[19] *See, e.g.*, *infra* notes 81–84 and accompanying text (Florida, District of Columbia). *See generally* Alec C. Ewald, *Collateral Consequences in the American States*, 93 SOC. SCI. Q. 211, 221 (2012). The tendency to re-enfranchise and expand access to the franchise for those with a criminal record is not restricted to the United States. It includes Canada, South Africa, and Hong Kong, though many of these cases pertained to the voting rights of prison inmates. *See, e.g.*, Legis. Council Panel on Const. Affs., *Practical Arrangements for Voting by Prisoners*, LC Paper No. CB(2)1533/08-09(01) (May 2009), https://www.legco.gov.hk/yr08-09/english/panels/ca/papers/ca0518cb2-1533-1-e.pdf (Hong Kong). Similarly, many European countries have displayed a "pro-enfranchisement" tendency. MILENA TRIPKOVIC, PUNISHMENT AND CITIZENSHIP: A THEORY OF CRIMINAL DISENFRANCHISEMENT 152 (2018).

[20] *See, e.g.*, MODEL PENAL CODE: SENT'G § 6x.03(1) (AM. L. INST., Proposed Final Draft 2017). The American Law Institute's Model Code permits the option of disenfranchisement during imprisonment but clearly notes it is disfavored. To effectuate the right to vote in prisons, a Model Penal Code Comment notes the need to provide "adequate opportunity to exercise the right to vote." *Id.* § 6x.03 cmt. c.

criminal convictions. Many states included such language as they entered the Union. Southern states added or expanded the list of offenses triggering criminal disenfranchisement after Reconstruction. In the last few decades, a few states have amended their state constitutions to cut back on loss of the franchise. Changes in California and Florida reflect popular support for re-enfranchisement, but with limitations that mirror both punitive notions and concerns about the makeup of the electorate.

Part III highlights the need for inclusive voting provisions in state constitutions to reflect a broad conception of citizenship rights and the expansion of the franchise over the last century. Even without constitutional restrictions on the franchise, implementing laws may set out some limited exclusions from the ballot box.[21] This Part analyzes the legitimacy of potential constitutional restrictions. One set of popular exclusions from the ballot pertains to offenses that aim at destroying the state, such as treason, or the integrity of elections, which include intentional election offenses. If a state opts for such limited, crime-specific exclusions, those call for individual imposition as punishment at sentencing rather than automatic imposition by law or through an administrative agency.[22] Punishment would allow the judge to fashion an exclusion at a length proportionate to the severity of the offense. Considering the small number of defendants convicted of crimes that fall into these categories, the number of such disenfranchised would be in the double digits rather than the tens of thousands.

In light of popular support for disenfranchisement during incarceration, some states may want to enshrine that blanket option in their constitutions. Yet, racial inequities in the U.S criminal justice system and especially in imprisonment raise serious concerns about the racially disparate impact of that exclusion. It may also hamper offenders' reintegration and their ability to develop a stake in the broader community. Denial of the right to vote, the most direct expression of participating in democracy, is proportionate only when the offender's actions presented a direct attack on democracy and the franchise itself rather than when the individual committed a regular offense, however heinous. Ultimately, the right to vote should not be tied to criminal justice decisions but instead to a meaningful and broad conception of citizenship.

State constitutions that promise broad-based political and civic access express a lasting re-conception of membership in the polity, one that would present a pow-

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[21] *See* OKLA. CONST. art III, § 1 ("Subject to such exceptions as the Legislature may prescribe, all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state, are qualified electors of this state."); PA. CONST. art. VII, § 1.

[22] For a definition and discussion of "collateral consequences," see AM. BAR ASS'N, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 6 (Mar. 2018), https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf.

erful message of inclusion for all. Variation in state laws, therefore, could supplement a fundamental and inclusive reframing of citizenship in state constitutions.[23] Even if states continued to restrict access to the franchise based on a conviction in regular laws, the exclusionary message would resonate less strongly. After all, state laws can be altered easily once the political climate changes.

I. FELON DISENFRANCHISEMENT MEETS MASSIVE AND UNEQUAL PUNISHMENT

Disenfranchisement of those who violate the law is not a modern-day invention but goes back at least to Roman Law and can be found in medieval England. It stems from the concept of civil death which preserved the physical life of an offender but deprived him of all civil rights, which included all rights of political participation. From English law, it creeped into the law of the colonies, and later the states, not as a criminal sanction, but as an automatic consequence of a criminal conviction.[24]

The first inclusion of felon disenfranchisement in state constitutions goes back to the eighteenth century. In some states it took the form of empowering state legislatures to remove the right to vote from criminals.[25] Fewer states enumerated a few crimes that would lead to disenfranchisement, which followed pre-existing European models. Among those crimes were election offenses but also crimes like bribery or perjury.[26] Over time the list expanded—sometimes to include all felonies[27]—as

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[23] *See* Lisa Miller, *The Invisible Black Victim: How American Federalism Perpetuates Racial Inequality in Criminal Justice*, 44 L. & SOC'Y REV. 805, 806 (2010) ("[N]o general account of race, inequality, crime, and punishment in the United States is complete without an understanding of the distinctive character of American federalism."). To complicate this area of law even further, the rules and procedures put in place after the passage of the federal Help America Vote Act from 2002 have, to some extent "*formalized* local officials' role in policing this formal boundary of the American franchise." Alec C. Ewald, *Criminal Disenfranchisement and the Challenge of American Federalism*, 39 PUBLIUS: J. FEDERALISM 527, 541 (2009).

[24] For an in-depth discussion about the historical origins and current manifestation of collateral sanctions in European and U.S. law, see Alessandro Corda, *The Collateral Consequence Conundrum: Comparative Genealogy, Current Trends, and Future Scenarios*, 77 STUDIES IN L., POLITICS, & SOC'Y (SPECIAL ISSUE) 69 (2019). There remains a substantial debate and disagreement about the precise historical antecedents of felon disenfranchisement. *See, e.g.*, Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–66.

[25] 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. SOCIO. 559, 563 (2003).

[26] *See* Ewald, *supra* note 24, at 1061–63 (noting only election offenses resulted in disenfranchisement in Vermont).

[27] By the middle of the nineteenth century, states had begun to include felony convictions generally in their state constitutions when setting out voting disqualifications. *See* Lindsay Dreyer,

did the number of states that disenfranchised felons. By the mid-nineteenth century, a third of all states had constitutional disenfranchisement provisions; by 1920, it was three-quarters,[28] as the number of U.S. states had grown from 31 to 48.[29]

Primarily, three different sets of arguments have been used to justify felony disenfranchisement over time.[30] Preservation of the "purity of the ballot box," which is often co-terminus with the republican theory of citizenship, was frequently cited as a rationale, followed by concerns about voting fraud and the election of criminal-friendly public officials.[31] Some of these concerns often are grouped under social contract theory, based on Locke, which implies both that the offender broke their contract with society and can no longer be trusted to exercise the franchise responsibly.[32]

The "purity" argument may have been as much racially- as character-driven. After all, states noticeably increased criminal disenfranchisement provisions after the Civil War, and especially after passage of the Fifteenth Amendment.[33] Yet, felon disenfranchisement laws are frequently overlooked in discussions about Jim Crow-era tools used by states, especially in the South, to exclude African Americans from voting, often permanently. In contrast to widespread vigilante terror against Black citizens, these laws, often based on the state's constitution, were the first explicitly legal mechanisms to prevent them from voting.[34] These voting provisions attached a permanent marker of moral failing and lack of virtuous character to those convicted of crimes, even when the offenses were relatively minor or the laws were discriminately enforced.[35] Essentially these laws left it to police, prosecutors, and judges to decide who had the right to vote.

Felon Disenfranchisement: What Federal Courts Got Wrong and How State Courts Can Address It, 48 MITCHELL HAMLINE L. REV. 1, 3–4 (2022).

[28] Behrens et al., *supra* note 25, at 564.

[29] Aaron O'Neill, *Total Number of US States, at the End of Each Year, Since the Declaration of Independence in 1776*, STATISTA (July 6, 2020), https://www.statista.com/statistics/1043617/number-us-states-by-year/.

[30] *See, e.g.*, Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300 (1989).

[31] Sometimes these arguments have taken on a flavor specific to their times. In the early 1970s, for example, concern about the pressure organized crime may exert on former prisoners was noted. *See* ELIZABETH YADLOSKY & THOMAS M. DURBIN, CONG. RSCH. SERV., 636/109(R), DISENFRANCHISEMENT OF CONVICTED FELONS ii–iii (1977). For a discussion of the often-unsatisfactory explanations used to justify felon disenfranchisement, see generally, TRIPKOVIC, *supra* note 19.

[32] Some cases reflect these discussions. *See, e.g.*, Priscilla Nyokabi Kanyua v. Att'y Gen., (2010) e.K.L.R. (Interim Const. Disp. Resol. Ct.) (Kenya).

[33] Behrens et al., *supra* note 25, at 563–64.

[34] *Id.* at 563.

[35] *See* Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSPS. ON POL. 491, 492–93 (2004); George

Alabama's constitutional convention is the only one in which the legislative debates clearly created a connection between race and criminal disenfranchisement.[36] In most other state conventions on which records exist,[37] at least the officially recorded debates centered around race-neutral grounds.

Even though there is only limited direct evidence that felon disenfranchisement was designed to exclude African Americans from the franchise,[38] the statistical analysis of these laws provides a more telling account. Some datasets indicate that these laws were closely tied to the racial composition of the incarcerated population.[39] The size of a state's non-white prison population heavily impacted the extension of disenfranchisement laws beyond imprisonment.[40] Others argue that in addition to the percentage of the non-white population in a state and its prisons, the professional character of a legislature impacted the severity of felon disenfranchisement laws.[41] The less professional a state's legislature when the state registers between 25% and 60% of the non-white population, the more likely lifetime disenfranchisement becomes. A disproportionate share of non-white prisoners leads to more severe disenfranchisement laws, while a minority population in the low single digits generally insulates a state from passing disenfranchisement laws.[42]

The popularity of select justifications for criminal disenfranchisement has waxed and waned over time. The "purity of the ballot box" argument, for example, was raised more frequently before the 1960s and seemed particularly popular from the post-Civil War years on. It asserts that some individuals essentially lack the character to participate in political governance.[43] This claim of "moral" disqualification allowed legislators to decouple disenfranchisement from the criminal sanctioning

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Brooks, Comment, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 858–59 (2005).

[36] *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 228–31 (1985); Dinan, *supra* note 14, at 295–96. There seems to be substantial evidence that the offenses the Mississippi state legislature chose to disenfranchise were also selected to exclude African Americans from the franchise. *See* Andrew L. Shapiro, *The Disenfranchised*, 35 AM. PROSPECT 60, 61 (1997).

[37] *See* Dinan, *supra* note 14 (analyzing statements on felon disenfranchisement provisions made at state constitutional convention debates between 1818 and 1984).

[38] *See, e.g.*, *Hunter*, 471 U.S. 222 (holding that, as racism motivated passage of the disenfranchisement provision in the Alabama Constitution, it violates the Equal Protection Clause of the Fourteenth Amendment); Dinan, *supra* note 14.

[39] *See generally* Behrens et al., *supra* note 25, at 586.

[40] *See id.* at 588.

[41] *See generally* Robert R. Preuhs, *State Felon Disenfranchisement Policy*, 82 SOC. SCI. Q. 733 (2001).

[42] *See id.* at 744. Vermont and Maine both fall into this category.

[43] Some commentators see this argument grounded in the republican notion of civic virtue and the public good. *See* Ewald, *supra* note 24, at 1051.

process. Disenfranchisement was not punishment but merely an inevitable civil consequence of a finding of guilt.[44] Other advocates of the virtue argument argued the impossibility of having lawbreakers make law, and the beneficial effect on other citizens that would flow from keeping them from voting.[45] Today's defenders of felon disenfranchisement often highlight the volitional nature of crime which is supposed to render the denial of the franchise an appropriate response.[46]

The "purity of the ballot box" argument, with its demand that voters be of appropriate moral character, was only one of the primary reasons given. Another one, that resembles the claim in recent years that the ballot needs to be protected, centered on allegations of election fraud. During the late nineteenth century, when this rationale was the most popular, allegations of vote buying and betting on the outcome of elections were widespread, and likely accurate at least in poor urban neighborhoods with powerful political machines.[47] For that reason, some legislators suggested temporary or permanent disenfranchisement for those involved in "bribery at elections." Such exclusion would also serve to deter others and restore faith in election integrity. While some proponents of this argument restricted their focus to election-specific crimes, others proposed disenfranchisement be tied to conviction of any felony or infamous crime since any serious offender was "inherently untrustworthy, and therefore particularly susceptible to participation in voter fraud."[48] It was too risky, the argument went, to permit felons to participate in elections.

The third claim was much less common and largely restricted to the years following the Civil War. It emphasized the dangers offenders posed to election outcomes as they might put in charge officials, especially judges, who would share their anti-social goals.[49] This rationale assumed that common interests bound together a disparate group of offenders. That may not have been unreasonable in small towns where large prisons were located and the convicts may have been in a position to elect the local sheriff, for example.[50] The argument continues to resonate today in states where prison inmates are counted as residents at the prison's location. The current trend of allocating them to their last prior residence and of expanding absentee balloting, however, would invalidate that concern.[51] The modern corollary of

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[44] *See* Dinan, *supra* note 14, at 287–88.

[45] *See id.* at 289–90. This argument was more persuasive in pre-Revolutionary days when disenfranchisement carried with it public shaming. *See* Ewald, *supra* note 24, at 1062, 1083–84.

[46] *See* Behrens et al., *supra* note 25, at 572.

[47] *See, e.g.*, Howard W. Allen & Kay Warren Allen, *Vote Fraud and Data Validity, in* ANALYZING ELECTORAL HISTORY: A GUIDE TO THE STUDY OF AMERICAN VOTER BEHAVIOR 153 (Jerome M. Clubb, William H. Flanigan & Nancy H. Zingale eds., 1981).

[48] Dinan, *supra* note 14, at 291–93.

[49] *See id.* at 293.

[50] *See id.* at 293–94.

[51] *See, e.g.*, Wanda Bertram, *State Legislatures, Members of Congress, and National Newspapers Push for an End to Prison Gerrymandering in 2021*, PRISON POL'Y INITIATIVE (Apr. 16, 2021),

the argument about the potential impact of felon voting on election outcomes is the concern that felons would "dilute the vote of law-abiding citizens."[52] Yet, also in the past, some retorted that even those with a criminal record should be able to change laws peacefully through the ballot box.[53]

Historically, there has been little agreement about the rationale that justified disenfranchisement. Post-Civil War, some state legislators were concerned about the legitimacy of the sanction since it was not judicially imposed. Disputed were also the length of disenfranchisement beyond imprisonment and the types of offenses that would justify deprivation of the right to vote.[54]

Some delegates added punishment theories, such as deterrence and retribution, to rationalize disenfranchisement. Others argued that disenfranchisement was devoid of a punishment rationale, permanent disenfranchisement lacked proportionality and would forgo an incentive to rehabilitate. Even though there was no empirical evidence (yet) for the argument, at past constitutional conventions some noted that disenfranchisement beyond imprisonment would lead to further criminality as it expressed society's lack of confidence in an offender's ability to change.[55] Indeed, "post-sentence disenfranchisement policies might actually encourage the commission of crimes."[56] As debates about disenfranchisement veered into broader justifications for criminal punishment, they mirrored attitudes about punishment and (lack of) faith in the state's ability to rehabilitate, at select points in history.

Though race was undeniably a crucial factor in the adoption of felon disenfranchisement provisions, developments in the criminal justice arena and other societal developments may also have supported the post-Civil War adoption of these laws. Then the debate about prison's ability to rehabilitate was hopelessly deadlocked between advocates of the two primary prison models in the United States, which did not do much for public confidence and supported a turn toward harsher punishment. By the late 1970s the goal was no longer to change and reform offenders but merely to confine them.[57] The public's vacillation between these two sentiments is a recurring feature of U.S. sanctions policy. After the Civil War, it contributed to the further exclusion of those with a criminal conviction. In addition to

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https://www.prisonersofthecensus.org/news/2021/04/16/nyt-2021/; *Legislation*, PRISON POL'Y INITIATIVE, https://www.prisonersofthecensus.org/legislation.html (Mar. 16, 2022) (noting that 14 states have enacted "legislation ending prison gerrymandering").

[52] *See* Behrens et al., *supra* note 25, at 573.

[53] *See* Dinan, *supra* note 14, at 301.

[54] *See, e.g.*, *id.* at 286–87, 294–95, 299.

[55] *See id.* at 299–300.

[56] *Id.* at 300. For confirmation of these concerns, see *infra* notes 75–77 and accompanying text.

[57] *See* Nora V. Demleitner, *Good Conduct Time: How Much and for Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777, 777–78 (2009).

racial politics, the growth in immigration and the portrayal of some immigrant groups as part of the dangerous classes further supported disenfranchisement.[58]

Despite the lack of a cohesive argument, by the 1960s, most state constitutions included disenfranchisement provisions, but they varied in scope and breadth. By the 1960s and 1970s, in the wake of the Civil Rights movements and the passage of the Voting Rights Act, states began to roll back some of these voting restrictions.[59] Research indicates that it took distinct political alignments to make such change happen as the restoration of felon voting rights is widely perceived to benefit the Democratic Party.[60]

With the extension of the franchise to those 18 and older, some advocated for federal legislation to end felon disenfranchisement. Those opposed countered only states had the authority to remove such restrictions.[61] In 1973, the U.S. Supreme Court, in interpreting the Fourteenth Amendment to allow denial of the suffrage "for participation in rebellion, or other crime," ended questions about the constitutionality of felon disenfranchisement.[62]

Despite the expansion of the franchise during those decades, contractions followed during the 1990s and the early 2000s. Those coincided with increasing punitiveness, which resulted from mandatory minimums, three-strikes laws, and guideline sentencing, during the 1990s and early 2000s, and resulted in mass imprisonment and a vast regime of penal supervision.[63] In both Massachusetts and Utah, which had long allowed in-prison voting, constitutional referendums took the franchise away from those in prison convicted of a felony.[64]

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[58] *See, e.g.*, Matthew W. Meskell, Note, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 862–63 (1999).

[59] *See* Behrens et al., *supra* note 25, at 564; *see also* Reuven (Ruvi) Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 213–14 (2011) (discussing changes in Supreme Court's rhetoric and jurisprudence on voting rights).

[60] *See, e.g.*, Antoine Yoshinaka & Christian R. Grose, *Partisan Politics and Electoral Design: The Enfranchisement of Felons and Ex-Felons in the United States, 1960–99*, 37 STATE & LOCAL GOV'T REV. 49 (2005) (finding the alignment most favorable for re-enfranchisement of those with a criminal record is Democratic Party in control of a state's legislative and executive branches, but low level of in-state support for the Democratic presidential contender). For a discussion of the beneficiaries of felon re-enfranchisement, see, for example, JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 69–94 (2006).

[61] *See* Behrens et al., *supra* note 25, at 573. These arguments continue to have salience.

[62] Richardson v. Ramirez, 418 U.S. 24 (1974); U.S. CONST. amend. XIV, § 2.

[63] *See, e.g.*, Kevin R. Reitz, *American Exceptionalism in Crime and Punishment: Broadly Defined*, *in* AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT 1 (Kevin R. Reitz ed., 2018).

[64] *See* Preuhs, *supra* note 41, at 736–37.

Only two states, Vermont and Maine, both with small non-white populations, never disenfranchised because of a criminal conviction, though both state constitutions permit such disenfranchisement.[65] Today all adult citizens in those states, independent of whether they are or ever were under a criminal justice sanction, including those in state prisons, can vote.

In the rest of the United States, disenfranchisement became a further marker of exclusion for those with a criminal justice record.[66] As millions began to fill prisons and jails, mass imprisonment turned into mass disenfranchisement. Despite changes to reduce the disenfranchised population, in fall 2020 over five million Americans were still denied voting rights, which amounts to 2.3% of the voting age population.[67] That was well over twice the percentage in the mid-1970s, before the onset of mass imprisonment. The impact was particularly pronounced for African Americans. Today, every 16th potential African American voter remains disenfranchised because of a criminal record.[68]

It may not be too far-fetched to assume that "[o]ne plausible consequence of these laws is the accentuation of a perception of illegitimacy of our legal system

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[65] *Id.* at 734; VT. CONST. ch. II, § 42; ME. CONST. art. IX, § 13.

[66] CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 10 fig. 4 (2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/. Marie Gottschalk has described how mass imprisonment and mass disenfranchisement impact conceptions of citizenship and have created new categories of "'partial citizens.'" *See* Marie Gottschalk, *The Carceral State and the Politics of Punishment*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 205, 221–22 (Jonathan Simon & Richard Sparks eds., 2013) (quoting MANZA & UGGEN, *supra* note 60, at 9).

[67] *See* UGGEN ET AL., *supra* note 66, at 4. These figures are a substantial decrease from the prior presidential election, when over six million were disenfranchised. *Id*. In addition to those formally disenfranchised, a substantial number of people who are legally eligible to vote are informally disenfranchised because of their inability to understand or access the process to regain voting rights. *See* ERNEST DRUCKER & RICARDO BARRERAS, SENT'G PROJECT, STUDIES OF VOTING BEHAVIOR AND FELONY DISENFRANCHISEMENT AMONG INDIVIDUALS IN THE CRIMINAL JUSTICE SYSTEM IN NEW YORK, CONNECTICUT, AND OHIO 10 (2005), https://www.prisonpolicy.org/scans/sp/fd_studiesvotingbehavior.pdf.

[68] *See* UGGEN ET AL., *supra* note 66, at 13. The first major study to highlight the racial impact of felon disenfranchisement in all 50 states was JAMIE FELLNER & MARC MAUER, HUM. RTS. WATCH & SENT'G PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998). These studies may underestimate the practical impact of felon disenfranchisement on others held in detention. Pre-trial inmates should have access to the franchise, but often do not. In some states those serving misdemeanor sentences also are eligible to vote but practically excluded from ballot access. *See, e.g.*, Ginger Jackson-Gleich & S. Todd Yeary, *Eligible, but Excluded: A Guide to Removing the Barriers to Jail Voting* (Oct. 2, 2020), https://www.prisonpolicy.org/reports/jail_voting.html.

among minority citizens."[69] Disenfranchisement laws also undermine the voting power of African American communities and perpetuate false and racially tinged perceptions. The low voting rate of Black men, for example, may be used to paint a picture of political disengagement or lack of interest while it could be ascribed to systematic exclusion.

With the increasing focus on race-based exclusions and the impact of felon disenfranchisement on the outcome of elections,[70] over the last two decades states have begun to change some of their policies.[71] Some states re-enfranchised those released from incarceration, even while they were on parole. Others scrapped the denial of the franchise for those on probation. In many states, the executive branch used its authority to drop some re-enfranchisement requirements; in others, legislative action was required.

The legal changes were often confusing, leading many newly eligible to vote believing themselves excluded. Still, the United States is not the only country with a federal structure in which voting rights for those with a criminal conviction are confusing. Australian states vary in whether to permit prisoner voting from open access to allowing only those who serve less than a 12-month sentence to vote.[72]

Racial equity demanded a yet broader re-enfranchisement regime.[73] Disenfranchisement impacted overall political engagement and voting power in select urban communities where a disproportionate number of residents have criminal records and are imprisoned. In those neighborhoods, the drop in political participation affects even those without a record. [74]

Because the public's view of democratic values has become frayed, tying re-enfranchisement to criminal justice reform seemed more successful than persuading voters that democratic values demanded it. Increasingly, re-enfranchisement seemed like smart criminal justice policy. As some nineteenth century legislators correctly

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[69] *See* Preuhs, *supra* note 41, at 746.

[70] *See generally* UGGEN ET AL., *supra* note 66 (providing estimates of felon disenfranchisement during recent presidential elections and Senate races that indicate disenfranchisement could have impacted the outcome of some of those elections).

[71] For a timeline on felon disenfranchisement that includes major state executive action and litigation, see *Historical Timeline: US History of Felon Voting / Disenfranchisement*, PROCON.ORG, https://felonvoting.procon.org/historical-timeline/ (Sept. 23, 2020).

[72] *See* MARTIN CHURCHILL, C.L. AUSTL., VOTING RIGHTS IN PRISON: ISSUES PAPER 4 (2020), https://law.uq.edu.au/files/60196/REP_PBC_MsP_Voting_Rights_Australian_Prisons_FIN_20200715.pdf. In *Roach v Electoral Commissioner* (2007) 233 CLR 162 (Austl.), Australia's high court declared a blanket ban on prisoner voting to be disproportionate and in violation of the constitution.

[73] *See* Ewald, *supra* note 23, at 531–34, 536–37.

[74] *See, e.g.*, TRACI BURCH, TRADING DEMOCRACY FOR JUSTICE: CRIMINAL CONVICTIONS AND THE DECLINE OF NEIGHBORHOOD POLITICAL PARTICIPATION 102 (2013).

predicted, exclusion from the ballot box hinders reintegration and presents an ongoing stigma. Restoring the franchise became a marker of and a reward for rehabilitation.[75] With researchers finding voting rights to reduce recidivism,[76] re-enfranchisement presents community benefits and becomes a public safety issue. That communitarian argument may present a persuasive reason for quick re-enfranchisement or possibly even the retention of voting rights during punishment.[77] Yet, the notion of disenfranchisement as part of punishment remains a profound countervailing sentiment even though the sanction is classified as non-punitive. That may explain why change seems erratic, with no clearly predictive variables.[78]

Despite recent rollbacks of felon disenfranchisement, progress has been spotty. Numerous states now restrict the time of disenfranchisement to incarceration only.[79] In many others, however, voting rights are restored only at the end of a criminal justice sentence, which may include payment of all financial sanctions.[80] That demand often proves impossible to meet for those with a criminal record.

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[75] *See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 130–33 (2003); KY. OFF. OF THE GOVERNOR, *supra* note 3 (gubernatorial restoration of voting rights for large group of non-violent offenders who have completed probation, parole, or a prison sentence partially because "research indicates that people who have completed their sentences and who vote are less likely to re-offend and return to prison" and because "restoration of the right to vote is an important aspect of promoting rehabilitation and reintegration into society to become law-abiding and productive citizens"). *See generally* Christopher Uggen & Jeff Manza, *Disenfranchisement and the Civic Reintegration of Convicted Felons, in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 67, 76 (Christopher Mele & Teresa A. Miller eds., 2005).

[76] *See, e.g.*, Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193 (2004); Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 423–28 (2012).

[77] *Cf.* Dirk van Zyl Smit, *Civil Disabilities of Former Prisoners in a Constitutional Democracy: Building on the South African Experience*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 75, at 255, 269 ("[I]t is communitarian arguments . . . rather than claims rooted in individual rights, that are likely to be more successful in limiting the civil disabilities of former prisoners . . . .").

[78] *Cf.* Ewald, *supra* note 19 (studying a set of variables that may impact state levels of collateral sanctions, including felon disenfranchisement, and finding liberal citizen ideology and higher percentage of African Americans in the state legislature to have a modulating influence). Because of the slow and unsteady decline in both imprisonment and the extent of disenfranchisement laws, Burch recommends invigoration of political activism and participation at the neighborhood level as a more reliable counter to the massive loss in voting power in those communities. BURCH, *supra* note 74, at 136–37.

[79] Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 79 (2019).

[80] *Id.* at 71–74.

Among the most high-profile recent developments in this area was Florida's popular referendum, which ended permanent disenfranchisement for most offenders.[81] After extensive litigation in both state and federal courts, restoration of voting rights now demands completion of all sentence conditions, including all financial obligations. That ruling resulted in the continuing disenfranchisement of hundreds of thousands of Florida residents.[82]

In 2020, the District of Columbia became the first jurisdiction to re-enfranchise those imprisoned.[83] With D.C. inmates largely held in federal institutions, the Bureau of Prisons had to assure that they could be registered to vote and receive mail-in-ballots.[84] So far at least, prison re-enfranchisement has not caught on in other states, though legislation is under consideration in several.[85]

Despite the focus on re-enfranchisement, relatively little attention has been paid to the number and scope of disenfranchisement provisions in state constitutions. Even post-Amendment 4's changes, Florida's voting provision, for example,

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[81] For some background on Florida's Amendment 4, see *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida (Sept. 11, 2020). In 1974 California ended permanent disenfranchisement through referendum. Proposition 10 restored the franchise once a criminal justice sentence ended. For a discussion of the passage of Proposition 10 at a time when crime had become a highly salient election topic, see Michael C. Campbell, *Criminal Disenfranchisement Reform in California: A Deviant Case Study*, 9 PUNISHMENT & SOC'Y 177 (2007).

[82] Jones v. Governor of Fla. 975 F.3d 1016 (11th Cir. 2020) (en banc). For a discussion of the litigation surrounding Amendment 4, see *Litigation to Protect Amendment 4 in Florida:* Gruver v. Barton *(consolidated with* Jones v. DeSantis*)*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/court-cases/litigation-protect-amendment-4-florida (Sept. 11, 2020). For broader insight into the exclusionary role of fees, fines, and other financial sanctions in voting, see Colgan, *supra* note 79.

[83] *See, e.g.*, Kira Lerner, *What It's Like to Vote from Prison*, SLATE (Oct. 28, 2020, 2:08 PM), https://slate.com/news-and-politics/2020/10/dc-prisoners-voting-first-time-felony-disenfranchisement.html. The District of Columbia ranks among the top five jurisdictions among states in percentage of residents imprisoned. *Fact: DC Has a Mass Incarceration Problem*, SENT'G PROJECT (Sept. 11, 2019), https://www.sentencingproject.org/news/fact-dc-mass-incarceration-problem/.

[84] *See, e.g.*, Julie Zauzmer Weil & Ovetta Wiggins, *D.C. and Maryland Have New Policies Allowing Prisoners to Vote. Making it Happen is Hard.*, WASH. POST, (Sept. 28, 2020), https://www.washingtonpost.com/dc-md-va/2020/09/28/dc-maryland-prisoners-voting/ (noting that nonprofit groups and the Board of Elections aided in the process of "getting ballots to D.C.'s newly enfranchised prisoners").

[85] *See, e.g.*, *Relating to Voting by Adults in Custody; Prescribing an Effective Date: Hearing on H.B. 2366 Before the H. Comm. on Rules*, 2021 Reg. Sess., Ex. 1 (statement of Nicole D. Porter, Director of Advocacy, Sentencing Project) (regarding a bill which would "mostly eliminate felony disenfranchisement" in Oregon, following the examples of Maine and Vermont). *See also #SecondChanceMonth: Unlock the Vote*, *supra* note 7.

continues to exclude many potential voters because of their criminal convictions[86] and the proposed change to Virginia's constitution did the same.[87] The debates about these constitutional amendments demonstrate flaws in values messaging that lay the foundation for future exclusions.

Voting restrictions based on criminal convictions lurk in all state constitutions. In some jurisdictions, they may prove a barrier to broader and more permanent legal change; in all jurisdictions, they continue to send a strong signal of exclusion from society once someone runs afoul of the law.

II. STATE CONSTITUTIONS: GUARDIANS OF FELON DISENFRANCHISEMENT

Without a federal constitutional right to vote, it is state constitutions that grant the right to vote though with limitations that include U.S. citizenship, state residency, and age.[88] State constitutions may set out detailed rules with respect to voter registration or absentee ballots[89] or leave those issues to implementing legislation and administrative rules.

Many state constitutions do not simply announce voting rights but also restrict them. Many explicitly state in their general voting provision that criminal convictions and mental incompetence serve as disqualifiers.[90] Similarly, in the U.S. Constitution, Section 2 of the Fourteenth Amendment, which comes closest to providing comprehensive adult male voting rights, also allows for the denial of the franchise "for participation in rebellion, or other crime."[91] That provision reflects the prevailing attitude of the time and the exclusionary provisions in many state constitutions. Even though disenfranchisement based on a criminal conviction had been rare in the early decades of the United States, it increased in popularity from the 1820s on before it became ubiquitous after the Civil War.[92] Still, the term "crime" used in the post-Civil War Amendment was broader and more ambiguous than the multiplicity of offenses delineated in state constitutions.

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[86] FLA. CONST. art. VI, § 4.

[87] H.J. Res. 555, Gen. Assemb., Spec. Sess. I, art. II, ¶1 (Va. 2021).

[88] Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–02 (2014).

[89] *Id.* at 102.

[90] *Id.* The combination of these two categories begs the question whether the drafters considered mental incompetence a character flaw or rather equated a criminal record with mental incompetence.

[91] U.S. CONST. amend. XIV, § 2.

[92] Behrens et al., *supra* note 25, at 563–64.

The denial of the franchise exemplifies U.S. federalism.[93] Just like state laws differ in the ways in which they limit, and restore, the franchise based on criminal record, state constitutions diverge in their approaches to voting rights and their limits. Restrictions based on criminal convictions run the gamut. Most allow the state legislature to deny the franchise to those convicted of some or all felonies, or "such crimes as it may designate."[94] Many provisions detail the need for a conviction.[95] Usually, they also indicate how the right to vote may be regained. Restoration of voting rights is as varied, and as confusing as their loss may be.[96] Often restoration requires a pardon or some other, largely undefined mechanism. Despite the differing language and style, which are functions of the time during which these provisions were adopted, they can be grouped into a few broad categories.

Kirk H. Porter's 1919 article on suffrage provisions in state constitutions included a comprehensive analysis of felon disenfranchisement provisions and provided categorizations that prove helpful even today.[97] At the time, state constitutions explicitly excluded not only those convicted of crimes from the franchise but also the poor if they were in a public asylum and the insane if institutionalized.[98]

Historically, felon disenfranchisement provisions differed in scope. States chose different types of offenses to trigger loss of the franchise. In addition, exclusions differed in length. Some states restricted loss of voting rights to imprisonment while

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[93] The Center for Public Integrity called its listing of state disenfranchisement laws "50 States of Disenfranchisement." *See 50 States of Disenfranchisement* CTR. FOR PUB. INTEGRITY (Oct. 15, 2020), https://publicintegrity.org/politics/elections/ballotboxbarriers/50-states-of-voting-disenfranchisement/.

[94] *See, e.g.*, N.J. CONST. art. II, § 1, para. 7.

[95] *See, e.g.*, ARK. CONST. art. III, § 2 ("No power . . . shall ever interfere to prevent the free exercise of the right of suffrage . . . except for the commission of a felony, upon lawful conviction thereof."); TENN. CONST. art. I, § 5 ("[T]he right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction."); *id.* art. IV, § 2 ("Laws may be passed excluding from the right of suffrage persons who may be convicted of infamous crimes.").

[96] *See, e.g.*, Colgan, *supra* note 79, at 71–74 (noting that in some states even automatic restoration requires payment of all economic sanctions; others do not impose the same requirement).

[97] *See* Kirk H. Porter, *Suffrage Provisions in State Constitutions*, 13 AM. POL. SCI. REV. 577 (1919).

[98] *See id.* at 585. State constitutions continue to exclude the third group of individuals, though described differently today, from the franchise. *See* Douglas, *supra* note 88, at 102. *See, e.g.*, N.J. CONST. art. II, § 1, para. 6 ("No person who has been adjudicated . . . to lack the capacity to understand the act of voting shall enjoy the right of suffrage."); CAL. CONST. art. II, § 4 ("The Legislature . . . shall provide for the disqualification of electors while mentally incompetent . . . .").

others extended it in perpetuity.[99] Virginia's current constitution presents one of the last vestiges of the latter. With the proliferation of non-incarcerative sanctions, disenfranchisement can take on even broader and more confusing nuances.

In the early twentieth century, state constitutions listed a broad array of crimes that triggered loss of the franchise. "Penitentiary offenses, infamous crimes, larceny, perjury, forgery and duelling [sic], appear most frequently."[100] Dueling seemed to be a favorite for inclusion in disenfranchisement provisions throughout the nineteenth century and a number of commentators at the time defended its listing on deterrence grounds.[101] Of all the crimes, dueling was, after all, a preplanned offense, and therefore the most deterrable.[102]

Some states had lengthy lists of excludable offenses, and Southern states were fond of including "wife-beating and rape," Porter noted.[103] Others included election-related offenses. Porter rejected their specific mentioning as he considered them an aspect of the "purity of the ballot box" that should be addressed legislatively.[104] Yet, even today state constitutions list election-related offenses specifically as worthy of disenfranchisement.[105] Some limit them to "intentional" election crimes, others retain old descriptions of bribing or receiving bribes in conjunction with voting. In some state constitutions, those offenses are listed separately; in others, they appear in conjunction with other crimes that impact the existence or the foundations of government, such as treason.[106] Even though some states still retain specific offenses as a basis for disenfranchisement in their constitutions, many reference "crimes" or "felonies," sometimes implying that all offenses in that category should result in disenfranchisement.

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[99] *See* Porter, *supra* note 97, at 585–86.

[100] *Id.* at 586.

[101] *See* Dinan, *supra* note 14, at 286–87.

[102] For a discussion of the historic background and ultimate demise of dueling in the United States, see *The History of Dueling in America*, PBS, https://www.pbs.org/wgbh/americanexperience/features/duel-history-dueling-america/ (last visited July 7, 2022). "Formal dueling, by and large, was an indulgence of the South's upper classes, who saw themselves as above the law—or at least some of the laws—that governed their social inferiors." Ross Drake, *Duel!*, SMITHSONIAN MAG., (March 2004), https://www.smithsonianmag.com/history/duel-104161025/. Ultimately a change in public opinion, not disenfranchisement legislation, put an end to dueling. *The History of Dueling in America*, *supra* note 102.

[103] Porter, *supra* note 97, at 586.

[104] *See id.* at 589.

[105] *See, e.g.*, PA. CONST. art. VII, § 7 (anyone bribing a voter and any voter receiving a bribe "shall thereby forfeit the right to vote at such election").

[106] *See, e.g.*, N.H. CONST. pt. I, art. XI ("No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery or any willful violation of the election laws of this state or of the United States; but the supreme court may, on notice to the attorney general, restore the privilege to vote to any person who may have forfeited it by conviction of such offenses."). New Hampshire added that constitutional provision in 1912. *Id.*

Porter bemoaned logical inconsistencies in these listings. One pertained to the explicit listing of offenses that were already included in a broader category such as "penitentiary offenses."[107] Yet, a reclassification of offenses at a later point may assure that the specific crimes listed continue to trigger disenfranchisement. Porter also flagged his concern about the enumeration of less serious offenses, which implicitly excluded more serious but unlisted crimes. If he realized that these states' decisions may have been animated by racial animus,[108] he did not mention it.

State constitutions vary in the way in which they frame disenfranchisement as mandatory or optional. A few states explicitly note that state legislators *shall* pass legislation to disenfranchise individuals based on criminal convictions. Porter critiqued those provisions as superfluous if the constitutional clause operates independently of legislative action. Alternatively, they cannot force legislative actions, making "the clause in the constitution . . . nothing but a wish, a mere piece of advice to the legislature."[109] Those concerns remain and call for legislative change, at least in states in which constitutional provisions are framed as orders. Porter seemed to fear that articles that require legislative action may be subject to abuse and regular policy changes.[110] Those apprehensions appear to have been misplaced as change has been slow in state laws.

In the end, Porter suggested omitting references to legislative actions or, "if criminals [were] to be excluded at all," choosing broad and generic categories of offenses for disenfranchisement.[111] Largely, states seemed to have followed his latter advice by adopting the term "felony." On the other hand, there are currently 14 states whose constitutions grant legislators the power to disenfranchise based on any criminal conviction irrespective of the level of offense.[112] When California's constitution recently ended, through a referendum, the practice of disenfranchisement

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[107] *See* Porter, *supra* note 97, at 586.

[108] *Cf.* Hunter v. Underwood, 471 U.S. 222 (1985) (holding that article VII, section 182 of the Alabama Constitution of 1901 violated the Fourteenth Amendment of the U.S. Constitution because racial discrimination motivated its enactment).

[109] Porter, *supra* note 97, at 586. Michigan's constitution explicitly notes that "[t]he legislature may by law exclude" the incarcerated from the franchise. MICH. CONST. art. II § 2. New Jersey's constitution is phrased similarly. N.J. CONST. art. II, § 1, para. 7.

[110] Porter, *supra* note 97, at 586–87.

[111] *Id.* at 587.

[112] California, Oklahoma, and Pennsylvania grant the legislature the power to delineate qualifications for electors. The other 11—Arkansas, Connecticut, Indiana, Maryland, Michigan, New Jersey, New Mexico, Ohio, South Dakota, Tennessee, and Wisconsin—explicitly mention legislative power to bar individuals convicted of crimes from voting. *See, e.g.*, CONN. CONST. art. VI, § 3 ("The general assembly shall by law prescribe the offenses on conviction of which the privileges of an elector shall be forfeited and the conditions on which and methods by which such rights may be restored.").

throughout the entire criminal justice sentence, it continued to mandate that legislators disenfranchise those convicted of felonies while imprisoned. The question has been raised whether the term imprisonment is restricted to penitentiaries or includes jails as some felony-offenders serve their time there.[113]

In addition to the types and numbers of offenses that could lead to disenfranchisement and the mandatory or hortatory character of provisions, many state constitutions mentioned the length of disenfranchisement and ways to cut it short. A hundred years ago, most states chose lifetime disenfranchisement unless governors pardoned the individual.[114] That practice, however, was inherently disproportionate, a fixed penalty without relationship to the seriousness of the offense.[115] Yet, with a substantially more vibrant pardon practice than today, many offenders did regain voting rights.[116] A few states opted to disenfranchise offenders only during their time of imprisonment.[117] Today's limitations are more varied and more ambiguous. Disenfranchisement may end with release from confinement or extend into parole. It may include those with a probationary sentence or take the franchise from anyone with post-sentence obligations.[118]

Racial disparities that accumulate with lifetime disenfranchisement may not have raised eyebrows a hundred years ago because of the panoply of extralegal and legal measures of exclusion that played more decisive, and visible, roles in disenfranchisement. Yet Porter already noted the curious impact of lifetime disenfranchisement on young offenders. Even if they had completed their sentences before the age

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[113] *See* CAL. CONST. art. II, § 2(b) (amended 2020) ("An elector disqualified from voting while serving a state or federal prison term, as described in Section 4, shall have their right to vote restored upon the completion of their prison term."); *id.* § 4 ("The Legislature . . . shall provide for the disqualification of electors while mentally incompetent or serving a state or federal prison term for the conviction of a felony."). Some commentators have questioned whether those held in California's jails for a felony offense should be considered as imprisoned or rather should be reenfranchised during that time period. *See, e.g.*, Hadar Aviram & Jessica L. Willis, *Reintegrating Citizens: Felon Enfranchisement, Realignment, and the California Constitution*, 27 J. CIV. RTS. & ECON. DEV. 619 (2015).

[114] Porter, *supra* note 97, at 586.

[115] *Id.* at 587.

[116] While governors' use of the pardon power is not as well documented as presidential pardons, select examples highlight the frequent use of pardons in the states in the past. Between 1893 and 1894, Oregon's governor granted 97 full pardons, commuted 46 sentences, and restored to full citizenship 48 individuals who had served their sentences. Those figures may seem unremarkable but for the fact that the state prison population during those years was below 400. *See* Aliza B. Kaplan & Venetia Mayhew, *The Governor's Clemency Power: An Underused Tool to Mitigate the Impact of Measure 11 in Oregon*, 23 LEWIS & CLARK L. REV. 1285, 1296 (2020).

[117] Porter, *supra* note 97, at 586.

[118] JEAN CHUNG, SENT'G PROJECT, VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER 1 tbl.1, https://www.sentencingproject.org/wp-content/uploads/2015/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf (July 2021).

of 21, which was then the voting age, they would never have been able to vote.[119] Eighty years later, reformers echoed that concern but added the disproportionate racial impact of lifetime disenfranchisement on young African American men.[120]

Porter weighed in on the side of abolishing lifetime disenfranchisement, a reflection of the Progressive movement and its belief in human improvement. He wanted to allow for individual change and highlight the government's role in bringing about such change. Even though he recognized that reality might be different, he advocated for a presumption that release implied that the person "is once more fit to resume normal civic relationships. If he is not fit he ought not to be released; if he is fit he ought not to be deprived of the franchise."[121] Porter believed both that the person had the right to a fresh start without being reminded of his past failings and that lifetime disenfranchisement amounted to "unscientific lawmaking,"[122] a charge reflective of the Progressives' emphasis on science. Those considerations led him to recommend, in 1919, to exclude from the franchise only those imprisoned.[123] It has taken Virginia and Florida 100 years to begin to follow that recommendation. It remains the progressive default to this day. Yet, reformers and the District of Columbia have challenged that orthodoxy.[124]

Porter also found a practical problem with post-sentence disenfranchisement. After all, citizens with criminal records could move across state lines and vote in a different jurisdiction.[125] Today, national criminal records databases have essentially erased that concern. The focus is not on those with a criminal record who move to a less exclusionary jurisdiction but on those enfranchised who lose their voting rights with a move across state lines.[126]

Florida's recent constitutional amendment exemplifies many of the problems Porter noted and introduces additional shortcomings. Before the passage of Amendment 4, the state disenfranchised all felony offenders for life unless the governor

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[119] Porter, *supra* note 97, at 586.

[120] Shapiro, *supra* note 36.

[121] Porter, *supra* note 97, at 587.

[122] *Id.*

[123] *Id.* at 587–88. Beyond disenfranchisement based on criminal convictions, Porter also recommended that "[n]o person who is insane, and no person while being maintained at public expense in any almshouse, hospital, or asylum" be permitted to vote. *See id.* at 588.

[124] *See supra* notes 83–84 and accompanying text.

[125] Porter, *supra* note 97, at 587.

[126] Disenfranchisement provisions and their implementation vary widely when out-of-state and federal convictions are at issue. *See, e.g.*, Colgan, *supra* note 79, at 66 (noting administrative officials in some states have the power to decide whether federal and out-of-state convictions will serve as the basis for disenfranchisement); Ewald, *supra* note 23, at 542–45 (documenting the wide variety of approaches in the states).

pardoned them.[127] With the rise in felony convictions over the last three decades and restrictive pardon policies,[128] the number of disenfranchised in the state climbed to nearly 1.7 million.[129] The new constitutional provision was designed to end lifetime disenfranchisement except for those convicted of murder and sex offenses.[130] The exemption was devoid of a persuasive rationale but was included to facilitate passage of the amendment. Just as Porter flagged "wife-beating" as a curious addition to the list of offenses that merited disenfranchisement, future historians may wonder about today's carve-outs.

All other offenders in Florida, including anyone convicted of treason or election offenses, will now regain the franchise at the end of their criminal justice sentence, which explicitly includes parole or probation.[131] Even though the focus was on stages during which the offender was under the state's supervision—still a more extensive period of time than incarceration alone—Florida's governor and state legislators subsequently interpreted the provision to also require fulfillment of all other sentence conditions, including payment of all financial sanctions, before a citizen would regain the vote. With the proliferation of modern, non-incarcerative punishments, Florida has found another way to extend the period of disenfranchisement, and it has successfully reinscribed exclusionary mechanisms into its state constitution.

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[127] Over the last two decades, Florida's pardon practice varied widely. *See, e.g.*, Matthew S. Schwartz, *Old Florida Clemency System Was Unconstitutional, Racially Biased*, NPR, https://www.npr.org/2019/01/08/683141728/old-florida-clemency-system-was-unconstitutional-racially-biased (Jan. 8, 2019, 9:05 AM).

[128] *See supra* notes 66–68 and accompanying text.

[129] CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, SENT'G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 12, 15 tbl. 3 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf ("In 2016, more people were disenfranchised in Florida than in any other state . . ."); *see also* UGGEN ET AL., *supra* note 66, at 4 ("We estimate that nearly 900,000 Floridians who have completed their sentences remain disenfranchised despite a 2018 ballot referendum that promised to restore their voting rights. Florida thus remains the nation's disenfranchisement leader in absolute numbers, with over 1.1 million people currently banned from voting . . . .").

[130] The new provision states that:

> No person convicted of a felony . . . 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 . . . . No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

FLA. CONST. art. VI, § 4(a)–(b).

[131] *See id.*

Even Porter questioned whether state constitutions should address felon disenfranchisement at all or rather leave the issue to the legislature.[132] A hundred years later the answer should be obvious.

III. THE NEED FOR STATE CONSTITUTIONAL REFORM: FROM CRIMINAL JUSTICE REFORM TO PROTECTION OF CITIZENSHIP RIGHTS

Despite a vast array of literature on felon disenfranchisement, there has been little discussion about both the signaling effect and the practical impact of state constitutional provisions on criminal disenfranchisement. Some governors have employed broad constitutional language of pardons and restoration of civil rights to re-enfranchise or, in some cases, refused to do so. Yet, the fundamentally exclusionary language present in most state constitutions has been left either undisturbed or merely trimmed back rather than excised. Reasons may be found both in the difficulty of changing state constitutions and the cost-benefit analysis entailed in such change, which might also be achievable through executive or legislative action. Yet, as discussions about the scope of voting rights and of the meaning of equity and inclusion in the law have played a greater role in public discourse, the time for constitutional change is ripe.

Most state constitutions note the length of disenfranchisement, the types of offenses that lead to disenfranchisement, and ways to re-enfranchise. Eleven states either explicitly discuss restoration of civil rights or imply them. Florida's new constitutional provision allows those convicted of sex offenses or murder to regain voting rights upon "restoration of civil rights."[133] Some states similarly reference being "pardoned or otherwise restored by law to the right of suffrage."[134] These provisions have allowed the executive branch to control reinstatement of the franchise.

Before the 2018 constitutional change, all those with a felony record needed a gubernatorial pardon in Florida to have their voting rights reinstated. Governor Scott made anyone who was not at least five years past the expiration of their criminal justice sentence ineligible for consideration. The Clemency Board, of which the

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[132] Porter, *supra* note 97, at 586–87.

[133] FLA. CONST. art. VI, § 4(b); *see also* IDAHO CONST. art. VI, § 3 ("No person is permitted to vote . . . who has . . . been convicted of a felony, and who has not been restored to the rights of citizenship."); NEB. CONST. art. VI, § 2 ("No person shall be qualified to vote . . . who has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights.").

[134] N.J. CONST. art. II, § 1, para. 7. *But see* N.H. CONST. pt. I, art. XI ("[B]ut the supreme court may, on notice to the attorney general, restore the privilege to vote to any person who may have forfeited it by conviction of such offenses.").

Governor and his cabinet were members, then demanded a personal appearance, and rarely granted petitions for restoration of rights.[135]

In contrast, Virginia Governors McAuliffe and Northam pursued dramatically different paths. Governor McAuliffe initially tried to use the pardon power to automatically re-enfranchise anyone with a criminal record upon the end of their sentence.[136] When the Virginia Supreme Court declared the practice unconstitutional,[137] he re-enfranchised people individually but also without requiring them to petition.[138] Governor Northam took the practice a step further by reinstating voting rights to individuals once they leave prison.[139] His practice resembled Porter's 1919 recommendation, as well as the constitutional amendment previously pending before Virginia's legislature.

As Progressives believed in the state's ability to help humans change for the better, in recent years, at least some jurisdictions, including Virginia, have come to re-embrace rehabilitation. Governor Northam's practice partially reflects that. Curiously, criminal disenfranchisement is apparently so deeply ingrained in U.S. law and society that it has survived even as the purpose of punishment and its manifestations have morphed over time.

Additional motivations for Governors Northam's expanded rights restoration can be found in the racial disparity in Virginia's criminal justice system and in pandemic efforts to facilitate voting. Still, currently in Virginia re-enfranchisement hinges solely on the governor's willingness to restore an individual's civil rights. The state constitution provides that power,[140] though the immense discretion placed in a governor appears questionable when the denial of a core characteristic of citizenship is at issue.[141] Yet, so far there has been no broad-based movement for constitutional change to limit the breadth of this gubernatorial power.

Comparative studies may provide some insight as to why state constitutions in the United States limit the franchise based on criminal convictions. A broad analysis

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[135] For an extensive discussion of Governor Scott's pardon scheme, see Schwartz, *supra* note 127. Later reviews of the petitions granted indicated that, compared to the make-up of the applicant group, white applicants fared substantially better as did those who indicated a Republican party affiliation. *See* Lulu Ramadan, Mike Stucka & Wayne Washington, *Florida Felon Voting Rights: Here's Who Got Theirs Back Under Scott*, PALM BEACH POST, https://www.palmbeachpost.com/story/news/politics/elections/2018/10/25/florida-felon-voting-rights-who-got-theirs-back-under-scott/5886930007/ (Oct. 26, 2018, 1:01 PM) (reporting on an investigation into pardon grants).

[136] Howell v. McAuliffe, 788 S.E.2d 706, 710 (Va. 2016).

[137] *Id.* at 724.

[138] *Gov. McAuliffe Announces Restoration of Voting Rights to Thousands of Felons*, *supra* note 5.

[139] Press Release, Va. Governor Ralph S. Northam, *supra* note 6.

[140] VA. CONST. art. II, § 1.

[141] For a further example of gubernatorial decisions restricting or expanding criminal disenfranchisement, see Colgan, *supra* note 79, at 82–83 (discussing New York).

of disenfranchisement in 43 European countries details the level of variation in exclusions from the franchise based on a criminal conviction.[142] Criminal disenfranchisement is not unprecedented in other highly industrialized Western democracies. Yet, the extent to which the United States has taken it, in conjunction with the unprecedented size of its penal system, remains singular. Several European countries allow for disenfranchisement based on a criminal conviction in their constitutions. Italy's Constitution, for example, states that the franchise can "be restricted [only] for civil incapacity or as a consequence of an irrevocable penal sentence or in cases of moral unworthiness as laid down by law."[143] The Polish Constitution disenfranchises those "who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights."[144] Incarceration or explicit judicial denial lead to the loss of voting rights in a substantial number of European countries. The European Court of Human Rights has weighed in on the compatibility of criminal disenfranchisement with European human rights values. Despite judicial attempts to narrow such disenfranchisement, many European governments have insisted on keeping that option, many explicitly in their constitutions.[145] Yet, there is a substantial international discourse outside the United States that surrounds felon disenfranchisement. It includes the U.N. Human Rights Council, supra-national courts, such as the European Court of Human Rights, and constitutional courts.[146]

Two arguments most frequently advanced to rationalize defenses of these exclusionary regimes pertain to a country's level of democracy and the harshness of its penal system. The European study found little support for the argument that stronger democracies disenfranchise less.[147] Though in a global review of the loss of the vote by those incarcerated, another study found "a country's internal political and civil freedoms" relevant in predicting the voting rights of the incarcerated specifically.[148] In Europe, there is some validity to the claim that countries with more

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[142] *See* TRIPKOVIC, *supra* note 19, at 33–45.

[143] Art. 48 COSTITUZIONE [COST.] (It.).

[144] KONSTYTUCJA RZECZYPOSPOLITEJ POLSKEIJ [CONSTITUTION], art. 62, § 2 (Pol.).

[145] *See, e.g.*, Hirst v. United Kingdom, (No. 2), 2005-IX Eur. Ct. H.R. 187 (ruling that the United Kingdom's blanket ban on prisoners' right to vote "risk[ed] undermining the democratic validity" of the law and violated the rights guaranteed by the Council of Europe). Even though the United Kingdom has long defied the European Court's decision, in recent years Scotland has permitted those with a less than 12-month prison sentence to vote. In Wales, plans to extend the franchise to those serving less than four years have been shelved, at least temporarily. PRISONERS' VOTING RIGHTS: DEVELOPMENTS SINCE MAY 2015, 2020, HC 07461, at 5–6 (UK).

[146] *See, e.g.*, Ziegler, *supra* note 59, at 221–23, 238–39.

[147] *See generally* TRIPKOVIC, *supra* note 19.

[148] *See* Brandon Rottinghaus & Gina Baldwin, *Voting Behind Bars: Explaining Variation in International Enfranchisement Practices*, 26 ELECTORAL STUD. 688, 694 (2007). Former English

punitive systems are more likely to disenfranchise. In fact, the public's beliefs about crime and the portrayal of offenders may be a driving force behind disenfranchisement. Yet, a more comprehensive argument that may help explain the broad exclusionary provisions in state constitutions centers around the "value of citizenship."[149]

The value of one's citizenship remains uncertain and easily denied under state constitutions that allow for the deprivation of the franchise based on criminal convictions.[150] Contrast the Canadian Supreme Court, which in striking down disenfranchisement during imprisonment, declared a citizen's right to vote the basis of democracy and the legitimacy of a government.[151] Most citizens, including those with a criminal record, would agree as they consider the franchise an essential component of citizenship.[152] Excluded from the franchise, the offender becomes a "temporary outcast[]" from citizenship,[153] which increases the social distance between those convicted of crimes and other citizens.[154] When one applies the "value of citizenship" scheme to U.S. states, it becomes obvious that only a few states provide a broad inclusionary sense of citizenship as they do not restrict the franchise in its definition of voters. Yet even those states have potential exclusions based on criminal convictions for select crimes in other parts of their constitutions.[155] Maine's constitution, for example, permits for disenfranchisement for two distinct election-related

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colonies are equally as likely as non-British colonies to disenfranchise their citizens during incarceration. *Id.* at 695.

[149] This paragraph is based on Tripkovic's analysis of European regimes. *See* TRIPKOVIC, *supra* note 19, at 33–45. Others have focused on dignity as a distinguishing factor between the United States and select other common law countries. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 519–27 (2010).

[150] *Cf.* TRIPKOVIC, *supra* note 19, at 67–68 (arguing that disenfranchisement has the "purpose of diminishing the value of one's citizenship status," as it "sanction[s] the offender in her role as a citizen").

[151] Sauvé v. Canada, [2002] 3 S.C.R. 519, ¶ 34 (Can.).

[152] *See* Uggen & Manza, *supra* note 75, at 76 (surveying individuals with criminal records who note how disenfranchisement regularly reminds them of their past offense and furthers a sense of exclusion).

[153] Sauvé, [2002] 3 S.C.R. at ¶ 40.

[154] *See* TRIPKOVIC, *supra* note 19, at 69–87.

[155] Both Maine and Vermont's constitutions allow for disenfranchisement upon conviction of select election-related offenses. ME. CONST. art. IX, § 13; VT. CONST. ch. II, § 42. Both provisions are tucked away in less prominent places of the state constitutions and have not been implemented. Similarly, Kenya's constitution prohibits disenfranchisement only upon "convict[ion] of an election offence during the preceding five years." CONSTITUTION art. 83(1)(c) (2010) (Kenya). This means disenfranchisement is automatic, but for a limited time, upon conviction of a singular category of offenses. *See also* Kituo Cha Sheria v. Indep. Electoral & Boundaries Comm'n (2013) e.K.L.R. para. 7–8 (H.C.K.) (Kenya).

offenses, for a maximum period of ten years.[156] Yet, both Maine and Vermont are the only two U.S. states that have been steadfast in their refusal to disenfranchise anyone based on a criminal conviction. For these reasons they should be categorized as different from the states that limit the franchise in the same provisions that define voters. Those states continue the tradition of "civil death," even if they limit it now to the time of incarceration.[157]

An offender's sense of being an outcast as they are denied citizenship rights and protections during incarceration may be shared by the public and explain public apathy toward widespread abuses during incarceration. Disenfranchisement based on a criminal conviction implies a test of moral worthiness. With constitutional grants of disenfranchisement during incarceration, an incarcerative sentence signals even more strongly an absence of moral worth and ultimately denies citizenship. In a criminal justice system that is beset with racial and class inequities and a legal system imbued with the vestiges of systemic racism, exclusions from citizenship reinscribe the meaning of citizenship. Voting is a privilege, not a right, reflective of a society that easily excludes its own members. State constitutions powerfully convey that message.

Thirty-four state constitutions explicitly disenfranchise individuals who are convicted of at least some felonies.[158] Most of these state constitutions allow all felonies to trigger exclusion. Alabama's and Arkansas's constitutions disenfranchise those convicted of "crimes involving moral turpitude."[159] For decades, Alabama left it to the election officials in its 67 counties to determine which crimes were included in that definition.[160] Following litigation, in 2017, Alabama legislatively defined moral turpitude to include over 40 felonies. They include offenses as disparate as forgery, rape, burglary, treason, and theft of trademarks or trade secrets.[161] Indiana's

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[156] ME. CONST. art. IX, § 13 ("The Legislature may enact laws excluding from the right of suffrage, for a term not exceeding 10 years, all persons convicted of bribery at any election, or of voting at any election, under the influence of a bribe."). Vermont's constitution includes broad election provisions, VT. CONST. ch. I, art. 8, though a requirement of "quiet and peaceable behavior," *id.* ch. II, § 42, appears to allow for felon disenfranchisement if the legislature so chose. Section 55 mirrors Maine's provision regarding election-related bribery but mandates exclusion from the franchise for the person bribed for the election at issue only and indicates that the person providing the bribe "be rendered incapable to serve for the ensuing year." *Id.* ch. II, § 55. This provision explicitly allows for further punishment as outlined in law.

[157] *See* Easton, *supra* note 17, at 446, 451 (rejecting the notion of prisoners as second-class citizens, which disenfranchisement implies).

[158] *See also* MORGAN MCLEOD, SENTENCING PROJECT, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORMS 3 (2018), https://www.sentencingproject.org/wp-content/uploads/2018/10/Expanding-the-Vote-1997-2018.pdf.

[159] *See* ALA. CONST. art. VIII, § 177. Georgia speaks of "a felony involving moral turpitude." GA. CONST. art. II, § 1, ¶ III(a).

[160] *See* Colgan, *supra* note 79, at 57.

[161] *See* ALA. CODE § 17-3-30.1(c) (2019).

constitution disenfranchises based on conviction of an "infamous crime," as does Iowa's.[162] Only two states provide a narrow list of specific crimes in their constitutions. One is New Hampshire which limits its exclusions to treason, bribery, and election law violations.[163] Mississippi's constitution, by contrast, includes a longer list of crimes that trigger disenfranchisement.[164]

Disenfranchisement during incarceration has long been taken for granted and, even in the reform movement of the last two decades, has rarely been questioned. If release from imprisonment implies reform, that means during incarceration, at best, offenders are in a limbo state with respect to their moral qualification for citizenship. Some political theorists, however, assert that the right to vote is an inherent right of citizenship that should not be lost automatically upon a term of imprisonment. In addition, in light of the racial inequality prevalent in the criminal justice system, a state's denial of the franchise during imprisonment treats African Americans in particular as "unworthy outcast[s]," a point the Canadian Supreme Court made about the denial of the franchise to Aboriginal inmates.[165]

Abolishing all mention of criminal disenfranchisement in a state constitution may raise concern with respect to offenses that do not target individual victims but the state itself. Treason and some intentional election offenses may fall into that category.

Even though state criminal codes include the crime of treason, states have not prosecuted anyone for treason since before the Civil War. Virginia then executed John Brown and his compatriots after the raid on Harper's Ferry for treason against the state.[166] Since then, the U.S. government has taken over treason cases. Even federal courts have heard fewer than 100, and perhaps even less than 50, such cases since the inception of the country.[167] Exclusion of convicted traitors in a state constitution may therefore be important symbolically but is ultimately merely performative.

A second group of offenses noted specifically in many state constitutions are election related. Despite claims of rampant voter fraud in the United States, even

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[162] IND. CONST. art. 2 § 8; IOWA CONST. art. II, § 5.

[163] *See* N.H. CONST. pt. I, art. XI.

[164] *See* MISS. CONST. art. XII, § 241 (prohibiting those "convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy" from being qualified electors).

[165] *See* Efrat Arbel, *Contesting Unmodulated Deprivation:* Sauvé v Canada *and the Normative Limits of Punishment*, 4 CAN. J. HUM. RTS. 121, 126 (2015) (quoting Sauvé v. Canada, [2002] 3 S.C.R. 519, ¶ 48 (Can.)). Similarly, the current Australian disenfranchisement "regulations disproportionately impact upon Indigenous Australians." CHURCHILL, *supra* note 72, at 8.

[166] *See, e.g.*, Heather Cox Richardson, *John Brown: The First American to Hang for Treason*, WE'RE HISTORY (Dec. 2, 2014), http://werehistory.org/john-brown/.

[167] *See, e.g.*, Matthew Walther, *A Brief History of Treason in the United States*, WEEK (Oct. 3, 2019), https://theweek.com/articles/869173/brief-history-treason-united-states.

extensive investigations have not found any evidence for such claims.[168] In recent years, prosecutions for voting or election-related offenses ran barely in the double digits. When Georgia's state Elections Board referred 35 cases of alleged election law violation to state officials for criminal prosecution, they covered a span of five years. None of them presented a serious threat to the integrity of elections. Ironically, four of the cases involved illegally registering or voting while serving a felony sentence.[169]

It may seem defensible, or even advisable, to include crimes that attack the foundation of government as disenfranchising in a state constitution. Yet, since the time the original state constitutions were drafted, the number of election-related offenses has multiplied, many with different mens rea requirements and punishment exposures. Mandating disenfranchisement may be overinclusive.

If a state were concerned about the level of threat a crime constitutes to the foundation of its government, the criminal code could provide the court with disenfranchisement as a sentence option, either as the primary, the sole, or an additional sanction. It may allow the state to disenfranchise those who pose a "direct threat to the democratic process" with a narrowly and proportionately tailored sanction.[170]

Florida's new constitutional provision, which ends disenfranchisement once the criminal justice sentence has been lifted, imposes lifetime disenfranchisement for two categories of offenders, those convicted of murder and felony sexual offenses.[171] These offender groups, chosen to prevent opposition to the passage of the amendment, reflect in part the ongoing public hysteria about sex offenders. In many respects, the inclusion of sex offenses mirrors the ethos of our times as did dueling throughout the nineteenth century and wife-beating in the South during the Jim Crow era. The exclusion belies criminal justice data and increasing knowledge about

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[168] *See, e.g.*, LORRAINE MINNITE & DAVID CALLAHAN, DĒMOS, SECURING THE VOTE: AN ANALYSIS OF ELECTION FRAUD (2003), https://www.demos.org/sites/default/files/publications/EDR_-_Securing_the_Vote.pdf (discussing history and definition of voter fraud and analyzing existing data on voter fraud, including some high-profile cases). In its extensive database, the Heritage Foundation lists 1,173 criminal convictions for election-related offenses over the last 40 years. *See A Sampling of Recent Election Fraud Cases from Across the United States*, HERITAGE FOUND., https://www.heritage.org/voterfraud (last visited July 7, 2022) (the database includes felony and misdemeanor cases as well as non-criminal judicial actions). *See generally The Myth of Voter Fraud*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud (last visited July 7, 2022) (arguing that election fraud is very rare as alleged fraud is often due to error).

[169] *Secretary of State Refers 35 Cases of Election Law Violations for Criminal Prosecution*, WSB-TV ATLANTA CHANNEL 2 (Feb. 11, 2021, 11:53 AM), https://www.wsbtv.com/news/local/atlanta/secretary-state-refers-35-cases-election-law-violations-criminal-prosecution/5EJ3PYEPWJGQ7D23AYEOVBXC2Y/.

[170] van Zyl Smit, *supra* note 77, at 262.

[171] FLA. CONST. art. VI, § 4.

the types of treatment that work for different groups of sex offenders. They are visceral rejections of certain types of offenders, and essentially declare these offenders as unworthy of citizenship.

If constitutions are more than mere reflections of their time, but instead transcend permanent values, such exclusions are misplaced. They may find sufficient expression in lower levels of laws that are more easily altered as public sentiment changes. Yet, their judicious use is crucial, as disenfranchisement may be, symbolically, the most devastating sanction the state could impose.

Most of the public does not support permanent disenfranchisement, though the current patchwork of laws reflects public uncertainty about the appropriate regime. Only a small minority appears to support enfranchisement during incarceration.[172] With the increasing focus on re-enfranchising those released from imprisonment, however, those incarcerated, if not granted voting rights, may be subjected to even greater losses of rights.[173] Goals of inclusion and the expansion of citizenship counsel in favor of broad voting rights provisions without exclusions, especially in state constitutions. Examples abound.

The German Constitution grants the right to vote to anyone who has reached the age of 18.[174] It leaves all further details to a federal law.[175] German criminal law allows for the loss of the franchise as part of a criminal sentence, but only for up to five years and for a small select group of offenses that involve either election violations or serious attacks on the foundations of government.[176] In more guarded language, the French Constitution grants voting rights to all French citizens over 18 who "are in possession of their civil and political rights."[177] Without providing any details, this provision implies that some French citizens may not possess civil and political rights. Canada's declaration of the "[d]emocratic rights of citizens" is yet more inclusive as it declares plainly "[e]very citizen of Canada has the right to vote."[178] At the time the Canadian Constitution was adopted, the incarcerated were

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[172] *See* Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 280 (2004); Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1540 (2003).

[173] *See* Debra Parkes, *Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts, in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 75, at 237, 247–49.

[174] Grundgesetz [GG] [Basic Law], art. 38(2), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

[175] *Id.* art. 38(3).

[176] *See, e.g.*, Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 760–61 (2000).

[177] 1958 CONST. art. 3 (Fr.).

[178] Canadian Charter of Rights and Freedoms, Part I, § 3, of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

not allowed to vote. In 1993 the legislature granted voting rights to those with incarcerative sentences below two years, and in 2002 the Canadian Supreme Court declared loss of the vote behind bars violative of the Canadian Charter of Human Rights.[179] Because criminal disenfranchisement was not constitutionally enshrined, its abolition did not require a constitutional change. Similarly, in 2009, Hong Kong's high court declared unconstitutional restrictions on the franchise based on imprisonment or a criminal conviction. Subsequently, the Legislative Council developed rules for the registration of all those imprisoned.[180]

South Africa's Supreme Court, in a much-hailed opinion on felon disenfranchisement, highlighted the importance of the franchise in post-apartheid South Africa. Universal voting rights, the court held, are important "for nationhood and democracy." The franchise is a "badge of dignity and of personhood. Quite literally, it says that everybody counts."[181] Justice Sachs highlights the equalizing nature of the franchise and the meaning it carries in a democracy ripe with division and a long history of legalized racism. For those reasons, South Africa's broad enfranchisement approach may be instructive.[182] As divided as the United States is by race and class, and also by party and geography, the franchise has become a powerful tool in the struggle for political power. Broad constitutional suffrage provisions would send the message that "everybody counts."

Even though the U.S. Supreme Court upheld the states' rights to disenfranchise based on a criminal conviction under the Fourteenth Amendment, it cannot mandate the states to do so. State constitutions can roll back this practice and signal the inclusion of all resident citizens above the age of majority. Such a change would remove vestiges of Jim Crow and earlier views of citizenship and symbolize the inclusive nature of American democracy.

Some have argued that because those convicted of an offense, and especially those serving time would not vote, the scope of the constitutional provision, and even the implementing laws, is irrelevant. Despite disagreement over the percentage of convicted individuals who vote,[183] a substantial percentage wants to—and will—

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[179] Sauvé v. Canada, [2002] 3 S.C.R. 519 (Can.). For more background on criminal disenfranchisement around the globe, see CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE (Alec C. Ewald & Brandon Rottinghaus eds., 2009).

[180] *See* Legis. Council Panel on Const. Affs., *supra* note 19, at 2.

[181] *August v. Electoral Commission* 1999 (4) BCLR 363 (CC) at para. 17 (S. Afr.).

[182] *See* Brock A. Johnson, Note, *Voting Rights and the History of Institutionalized Racism: Criminal Disenfranchisement in the United States and South Africa*, 44 GA. J. INT'L & COMP. L. 401, 407 (2016).

[183] *See, e.g.*, Randi Hjalmarsson & Mark Lopez, *The Voting Behavior of Young Disenfranchised Felons: Would They Vote if They Could?*, 12 AM. L. & ECON. REV. 356, 357–59 (2010) (disagreeing with Uggen and Manza's predictions of the level of ex-felon voting). For Uggen and Manza's predictions, see Christopher Uggen & Jeff Manza, *Democratic Contraction in*

participate in the political process, as should be their right. But the practical impact of a change in criminal disenfranchisement is merely a small aspect of the debate about voting rights. Constitutional provisions have broader symbolic meaning and impact all of us. In this case, change would reflect a broadly inclusive conception of citizenship that no longer threatens exclusion for a failing.

Practically, broader post-pandemic absentee voting and generally greater accessibility of the franchise open the doors to in-prison voting. Vermont and Maine have long provided absentee balloting options. With the change in D.C. law, state legislators are no longer able to belittle the two New England states as outliers whose small prison populations did not mandate disenfranchisement. With D.C. prisoners located in federal prisons around the country, providing them with the practical ability to cast their ballot presented greater hurdles than other states would face.[184]

After D.C.'s decision, other states need to confront the question of whether to dispense with disenfranchisement during incarceration. The answer will depend on attitudes toward both voting rights and the criminal justice system. States have the opportunity—and the obligation—to treat all citizens as worthy of the markers of citizenship. And that change should start at the top, with constitutional amendments.

CONCLUSION: VIRGINIA'S UNFINISHED CONSTITUTIONAL REFORM

As a federal constitutional voting rights amendment is difficult to imagine in the current political climate, some states may be better targets for such a drive. National pay-off from state constitutional change is slow but change in a single state may change the discourse.

Even though quantitative research provides only limited indication of what factors have moved states to change their disenfranchisement provisions, the severity of the existing policy and a liberal citizen ideology matter.[185] Virginia has both. Its constitutional provision that enshrines lifetime disenfranchisement places the restoration of civil rights entirely in the governor's hands.[186] Faced with the choice between re-inscribing more limited felon disenfranchisement in the constitution or

the U.S.: The Political Impact of Felon Disenfranchisement, 67 AM. SOCIO. REV. 777, 782 fig.1, 787 tbl.1 (2002).

[184] *See, e.g.*, Scott MacFarlane, Rick Yarborough & Steve Jones, *Efforts to Register and Provide Ballots to DC Felons in Federal Prisons Face Hurdles*, NBC4 WASH., https://nbcwashington.com/investigations/efforts-to-register-and-provide-ballots-to-dc-felons-in-federal-prisons-face-hurdles/2444413/ (Oct. 14, 2020, 5:08 PM).

[185] *See* Ewald, *supra* note 23.

[186] The changing policies of Florida's governors on the restoration of civil rights tell a cautionary tale. *Compare* Ewald, *supra* note 23, at 533, *with supra* notes 81–82 and accompanying text.

adopting inclusive voting rights, Virginia seemed poised to take the former path. Yet, a change in party has brought even limited constitutional change to a standstill and instead the broad exclusionary provision in the state constitution threatens to survive again. After Virginia became the first state in the South and one of the most prolific users of the death penalty to abolish capital punishment,[187] the broad felon disenfranchisement provision in the state constitution seemed like a likely step in a broad set of criminal justice reforms. Yet, at least for now, Virginia has abandoned the path toward constitutional change. Reliable guarantees of political participation for those with a criminal record, let alone those under a criminal justice sanction, will remain far from becoming a reality, at least for now.

[187] *See Virginia Becomes 23rd State and the First in the South to Abolish the Death Penalty*, DEATH PENALTY INFO. CTR. (Mar. 24, 2021), https://deathpenaltyinfo.org/news/virginia-becomes-23rd-state-and-the-first-in-the-south-to-abolish-the-death-penalty.