

NOTE

LOCKED UP, THEN LOCKED OUT: THE CASE FOR LEGISLATIVE—RATHER THAN EXECUTIVE— FELON DISENFRANCHISEMENT REFORM

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A cohesive anti-felon disenfranchisement perspective has gained traction over the last two decades in America. Scholars have harshly criticized disenfranchisement provisions for their insulation and perpetuation of nonwhite marginalization à la Jim Crow. Other critics have also decried felon disenfranchisement for barring prior felons from full social integration. Still more critics point to how disenfranchisement provisions inequitably affect election outcomes. State leaders, recognizing the prevalent attitude against felon disenfranchisement, have taken significant measures to mitigate disenfranchisement laws—for example, some state governors have issued executive orders categorically re-enfranchising ex-felons. These types of actions are the focus on this Note. Certainly, unilateral executive action is efficient and has been effective in the short-term. However, this Note contends that there are distinct political efficacy and consent theory concerns that emerge when broad felon disenfranchisement reform comes from unilateral executive action. Moreover, this Note argues, gubernatorial action is by and large an inconsistent solution that ultimately fails to address the systemic civic deprivation of nonwhite communities. This Note concludes by proposing federal legislative action—specifically, the Democracy Restoration Act—as a more favorable method of felon disenfranchisement reform.

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INTRODUCTION

Forty-four-year-old Keith Sellars lives in Alamance County, North Carolina, with his five children. He was born and raised in Alamance County¹—there is no other place in the world that he would call home.² He is an established member of the community and has voted in the county many times before.³ Mr. Sellars' fixed position in the Alamance County community is what makes his arrest and jailing for merely voting so concerning; there appears to be no place more appropriate for him to vote than Alamance. "I didn't know . . . I thought I was practicing my right," he told the *New York Times* when describing his

¹ Keith Sellars, *Keith Sellars: Threatened with Prison for Voting*, FAYETTEVILLE OBSERVER (Nov. 3, 2018, 4:00 PM), <https://www.fayobserver.com/article/20181103/OPINION/181109470> [<https://perma.cc/DDH9-YXCN>]; see Jack Healy, *Arrested, Jailed and Charged with a Felony. For Voting.*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html> [<https://perma.cc/N97V-L3M9>].

² Sellars, *supra* note 1.

³ *Id.*

arrest.⁴ Mr. Sellars was one of twelve people in Alamance County who were charged with violating North Carolina's felon disenfranchisement law during the 2016 election.⁵ The state's law bars people on felony probation or parole from voting.⁶ Moreover, nine of the twelve were black, which drew the nation's attention to North Carolina's history of suppressing black votes.⁷ "It smacks of Jim Crow," commented Barrett Brown, the head of Alamance County's NAACP.⁸

Mr. Brown's comment is far from the first to compare that modern felon disenfranchisement to Jim Crow. For years, felon disenfranchisement has been hotly criticized for being a government-sanctioned tool of white supremacy. Critics contend—with substantial empirical support—that "[f]elony disenfranchisement policies have a disproportionate impact on communities of color."⁹ Consider that black citizens are over four times more likely to be disenfranchised than nonblack citizens, and that one of every thirteen black citizens in the United States has been or is currently subject to disenfranchisement.¹⁰ The racialized effects of disenfranchisement are painful on both macro- and micro-levels. Not only does felon disenfranchisement siphon political power from communities, it curtails civic engagement on the individual level. Taranta Holman, who was also arrested for voting in Alamance County, had never voted before 2016.¹¹ Now, regardless of whether Mr. Holman is found guilty of illegal voting, he says he will never vote again—it will always be "too much of a risk."¹²

The American public has taken notice of felon disenfranchisement's negative effects. Polls indicate that citizens across the United States strongly support extending the vote to ex-felons living within the community.¹³ And rightfully so, given the large volume of legal and academic scholarship criticizing felon disenfranchisement policies.¹⁴ In response to pub-

⁴ Healy, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ JEAN CHUNG, THE SENTENCING PROJECT, FELON DISENFRANCHISEMENT: A PRIMER 2 (2018), <https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf> [<https://perma.cc/P523-E56P>].

¹⁰ *Id.*

¹¹ Healy, *supra* note 1.

¹² *Id.*

¹³ Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 283 (2004).

¹⁴ There is substantial criticism against felon disenfranchisement policies specifically for preserving historic structures of white supremacy. See, e.g.,

lic pressure to re-enfranchise felons, state actors have made significant mitigating changes to their disenfranchisement policies. As of 2018, twenty-three states have made alterations to their laws that re-enfranchised thousands of citizens.¹⁵

Many of these alterations have come from leading state executives. For example, New York Governor Andrew Cuomo issued Executive Order No. 181 in April 2018 which restored the right to vote to 35,000 New York parolees.¹⁶ Former Kentucky Governor Steve Beshear¹⁷ granted over 9,000 restoration requests between 2007 and 2015, while former Iowa Governor Tom Vilsack¹⁸ issued Executive Order No. 42, which restored voting rights to an estimated 115,000 Iowans for over six years.¹⁹ Current Iowa governor Kim Reynolds has made restoring voting rights to felons one of her administration's key priorities.²⁰ She called for Iowan legislators to amend the state constitution's disenfranchisement provision in her 2019 Condition of the Address, stating:

Shadman Zaman, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 223 (2015) (contending that felon disenfranchisement should be challenged on Thirteenth Amendment grounds). *But see* Roger Clegg et al., *The Case Against Felon Voting*, 2 U. ST. THOMAS J.L. & PUB. POLY 1 (2008) (arguing in favor of felon disenfranchisement laws).

¹⁵ MORGAN MCLEOD, THE SENTENCING PROJECT, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORM 3 (2018), <https://www.sentencing-project.org/wp-content/uploads/2018/10/Expanding-the-Vote-1997-2018.pdf> [<https://perma.cc/K3BP-BXFQ>].

¹⁶ N.Y. Exec. Order No. 181 (Apr. 18, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_181.pdf [<https://perma.cc/4LE2-AVJL>]; *see* Sasha Abramsky, *At Long Last, Andrew Cuomo Restores the Vote for New York Parolees*, NATION (Apr. 26, 2018), <https://www.thenation.com/article/at-long-last-andrew-cuomo-restores-the-vote-for-new-york-parolees/> [<https://perma.cc/X35U-YYPA>].

¹⁷ Morgan Watkins, *Gov. Bevin Restores Ex-Felons' Civil Rights for the First Time*, COURIER JOURNAL (Apr. 3, 2017, 7:03 PM), <https://www.courier-journal.com/story/news/politics/2017/04/03/gov-bevin-restores-felons-civil-rights/99982776/> [<https://perma.cc/G8M8-PEJJ>].

¹⁸ Kate Zernike, *Iowa Governor Will Give Felons the Right to Vote*, N.Y. TIMES (June 18, 2005), <https://www.nytimes.com/2005/06/18/us/iowa-governor-will-give-felons-the-right-to-vote.html> [<https://perma.cc/GJ4G-7CUB>].

¹⁹ Executive Order 42 was rescinded by former governor Vilsack's successor Terry Branstad. Makeda Yohannes, *Voting Rights Restoration Efforts in Iowa*, BRENNAN CTR. FOR JUSTICE (Nov. 7, 2018), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-iowa> [<https://perma.cc/8ST9-LBHZ>] [hereinafter Yohannes, *Iowa*].

²⁰ Barbara Rodriguez & Stephen Gruber-Miller, *Iowa Poll: Nearly Two-thirds of Iowans Say Felons Should Regain Voting Rights After Completing Sentence*, DES MOINES REGISTER (Feb. 16, 2019), <https://www.desmoinesregister.com/story/news/politics/iowa-poll/2019/02/17/iowa-poll-felon-voting-rights-restore-prison-crime-vote-election-2020-kim-reynolds-ia-constitution/2875580002/> [<https://perma.cc/2H76-V8BJ>].

Through the power of clemency, the governor can restore those rights, and I have done that 88 times since taking office. But I don't believe that voting rights should be forever stripped, and I don't believe restoration should be in the hands of a single person. . . . Our founders gave us a process to amend the constitution, should the passage of time change our view. Let's begin that process now. I believe Iowans recognize the power of redemption; let's put this issue in their hands.²¹

And in 2016, former Virginia Governor Terry McAuliffe immediately and categorically re-enfranchised all ex-felons in Virginia.²² Although this order was ultimately overturned, McAuliffe's office subsequently restored the voting rights of over 172,000 impacted Virginia citizens on an individual basis.²³

State legislatures have also been active in re-enfranchising felons. In 2016, California amended Section 2101 of the Elections Code to allow convicted felons sentenced to county jails to vote while in custody.²⁴ And on November 6, 2018, Florida voters restored voting rights to over one million Florida felons via a constitutional amendment, which automatically restored voting rights for the majority of people who have completed their felony sentences.²⁵ Florida's amendment, in particular, was a cheering victory for disenfranchisement reformists. Previously, Florida took a hardline stance against felon political participation, permanently removing the right to vote from all Floridians with prior felony convictions.²⁶

²¹ READ: Gov. Kim Reynolds' Full 2019 Condition of the State, DES MOINES REGISTER (Jan. 15, 2019), <https://www.desmoinesregister.com/story/news/politics/2019/01/15/iowa-gov-kim-reynolds-full-2019-condition-state-transcript-felons-budget-republican-education-ia/2580202002/> [<https://perma.cc/9HZ4-2VVN>].

²² Vann R. Newkirk II, *How Letting Felons Vote Is Changing Virginia*, ATLANTIC (Jan. 8, 2018), <https://www.theatlantic.com/politics/archive/2018/01/virginia-clemency-restoration-of-rights-campaigns/549830/> [<https://perma.cc/JD8K-M59D>].

²³ *Id.*

²⁴ See A.B. 2466, 2016 Leg., Reg. Sess. (Cal. 2016), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2466 [<https://perma.cc/J993-RCYD>].

²⁵ See Nicole Chavez, *Florida Restores Voting Rights to More Than 1 Million Felons*, CNN (Nov. 7, 2018, 4:07 AM), <https://www.cnn.com/2018/11/07/politics/florida-felons-voting-rights/index.html> [<https://perma.cc/3CDS-L9DE>].

²⁶ See Makeda Yohannes, *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUSTICE (Nov. 7, 2018), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida> [<https://perma.cc/E4NE-XQCA>] [hereinafter Yohannes, *Florida*].

However, few states have endorsed comprehensive felon disenfranchisement reform. Many still bar ex-felons from the ballot box. Alabama, Mississippi, and Tennessee maintain lifetime voting bans for felons convicted of murder or rape, regardless of whether such individuals complete their sentence.²⁷ Furthermore—in spite of their efforts at reform—Kentucky and Iowa still maintain permanent voting bans for all prior and current felons, although Iowa appears to be strongly considering amending its constitution's disenfranchisement provision.²⁸ Only Maine and Vermont fully enfranchise felons, even while they are incarcerated.²⁹

America requires sweeping felon re-enfranchisement, and the time for reform is nigh. Felon disenfranchisement laws perpetuate structural racism ingrained within the American electoral system and criminal justice system by disproportionately affecting people of color, particularly those in the black and Latinx communities. State amendments and public polling strongly suggest that the American public recognizes these effects and favors re-enfranchisement. Thus, progressive reformists ought to strike now and push for re-enfranchisement now, while the iron is hot.

The thesis of this Note is that felon disenfranchisement is a modern Jim Crow regime whose reform has overwhelming public support, and that mere state gubernatorial reform à la Cuomo, McAuliffe, and Beshear has dangerous consequences for governmental legitimacy and interstate consistency. Because of this, reformists ought to pursue a federal legislative solution—specifically, the Democracy Restoration Act—which is constitutional under Article I of the Constitution, as well as the Fourteenth and Fifteenth Amendments.

Part I lays out a broad history of American felony disenfranchisement law. Part II argues that felon disenfranchisement laws need to be repealed as they disparately affect marginalized, nonwhite communities and threaten the integrity of the American electoral and criminal justice systems. Part II then discusses the substantial empirical evidence that Americans recognize these detriments and are strongly in favor of felon disenfranchisement reform. Part III then uses a close

²⁷ *State Felon Voting Rights*, PROCON (Nov. 7, 2018), <https://felonvoting.procon.org/view.resource.php?resourceID=000286> [<https://perma.cc/HGV5-9JN5>].

²⁸ Yohannes, *Florida*, *supra* note 26; see Rodriguez & Gruber-Miller, *supra* note 20.

²⁹ *Felon Voting Rights*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 21, 2018), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/NEQ6-M5ZG>].

examination of previous Virginia governor Terry McAuliffe's 2016 Executive Order enacting mass re-enfranchisement to illustrate that—while gubernatorial action has been the dominant mode of felon disenfranchisement reform for the past two decades—organizers ought to consider federal legislative action for a more legitimate, more permanent solution. Part IV will then advocate for and argue the constitutionality of the Democracy Restoration Act.³⁰

I

BACKGROUND: FELON DISENFRANCHISEMENT LAW

As a preliminary matter, this Note's discussion benefits from a broad understanding of felon disenfranchisement law's history. A fuller understanding of disenfranchisement's problematic entrenchment in America's political and societal structures at large bolsters this Note's argument that the nation requires a comprehensive *federal legislative* solution to the problem of disenfranchisement.³¹

A. Felony Disenfranchisement's Roots in Jim Crow Law

Felon disenfranchisement law is primarily a Western construct, stemming from the Greek and Roman traditions of "civil death," which penalized criminals by removing their political rights, such as the right to vote in the general assembly.³² Great Britain called their system of disenfranchisement "outlawry" and imported the penalty to their American colonies, which typically used disenfranchisement as a punishment for "morally repugnant" crimes.³³

Following the American Revolution, the vast majority of state constitutions maintained felon and other disenfranchisement provisions intended to preserve "the purity of the ballot

³⁰ Democracy Restoration Act of 2018, H.R. 6612, 115th Cong. (2018).

³¹ See *infra* Part III.

³² See, e.g., *Hayden v. Pataki*, 449 F.3d 305, 316 (2d Cir. 2006) ("Indeed, the practice of disenfranchising those convicted of crimes is of ancient origin. . . . [I]n ancient Athens, the penalty for certain crimes was placement in a state of 'infamy,' which entailed the loss of those rights The Roman Republic also employed infamy as a penalty").

³³ See, e.g., Jason Schall, *The Consistency of Felon Disenfranchisement with Citizen Theory*, 22 HARV. BLACKLETTER L.J. 53, 54–56 (2006) (describing pre-American methods of felon disenfranchisement); George Brooks, Comment, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 852–53 (2005) ("The first disenfranchisement laws in America appeared in the 1600s, typically as punishment for morality crimes such as drunkenness, and were present from the earliest times of the Republic." (footnote omitted)).

box.”³⁴ These laws were legitimized by Article I, Section 2 of the Constitution, reading “the People of the several States, and the Electors in each States shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”³⁵

In the late 1800s, states—especially those in what would become the Jim Crow South—began to weaponize felon disenfranchisement laws in response to the 1870 ratification of the Fifteenth Amendment, which attempted to extend the vote to male citizens regardless of “race, color, or previous condition of servitude.”³⁶ The following excerpted material from the 1868 Constitutional Convention of South Carolina following the Civil War illustrates white supremacy’s mobilization of felon disenfranchisement to obstruct nonwhite votes.

The Legislature of 1865 . . . enacted laws which made the most trivial offence a felony, and the intent of those laws was to deprive every colored man of their [sic] right of citizenship. If a colored man struck a white man, all he had to do was go before an officer of the law, and declare that the colored man struck him with intent to kill, and that offence, according to the law of 1865, constituted a felony.³⁷

At this time, South Carolina had disenfranchised criminals who had been convicted of what were considered “black crimes” including “thievery, adultery, arson, wife beating, housebreaking, and attempted rape,” but not including murder or fighting.³⁸ Likewise, Mississippi politicians reframed state disenfranchisement laws that had previously disenfranchised all convicts to specifically and exclusively target people convicted of minor “black crimes” including burglary, theft, and

³⁴ *Washington v. State*, 75 Ala. 582, 585 (1884) (affirming conviction for illegal voting in violation of Alabama’s felon disenfranchisement provision).

³⁵ U.S. CONST. art. I, § 2.

³⁶ U.S. CONST. amend. XV; see also Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 733 (1998) (describing the cycle of minority disenfranchisement); Kamala Kelkar, *This Year, Laws with Roots to the Civil War Prevented 6.1 Million from Voting*, PBS NEWS HOUR (Nov. 13, 2016), <https://www.pbs.org/newshour/nation/civil-war-laws-prevented-voting> [<https://perma.cc/VT4Y-C4PE>] (discussing history of American felon disenfranchisement reform); Brooks, *supra* note 33, at 857 (recounting the use of disenfranchisement tools in the Jim Crow South).

³⁷ 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 540 (J. Woodruff ed., Charleston, Denny & Perry, 1868) (statement of Delegate T.J. Robertson).

³⁸ Brooks, *supra* note 33, at 858 (quoting Nathan P. Litwin, Note, *Defending an Unjust System: How Johnson v. Bush Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida*, 3 CONN. PUB. INT. L.J. 236, 238 (2003)).

arson.³⁹ And in Virginia, state delegate and future United States Senator Carter Glass asserted that the purpose of the state's felon disenfranchisement law was to "eliminate the darkey as a political factor in this State . . . so that in no single county of the Commonwealth will there be the least concern felt for the complete supremacy of the white race in the affairs of government."⁴⁰

Suffice to say that felon disenfranchisement policies, along with poll taxes, grandfather clauses, and literacy tests, became means for white supremacists to "socially and politically exclude[] [African Americans] from full participation in the life of the nation."⁴¹ Even more dangerously, felon disenfranchisement provisions enacted to comprehensively bar black Americans from the ballot box were facially legal—both the Thirteenth and Fourteenth Amendments explicitly allow for the disenfranchisement of felons.⁴² Indeed, while most Jim Crow laws were ultimately found to be unconstitutional, covertly racialized felon disenfranchisement laws were and still continue to be held constitutional by courts.⁴³

This is not to say that felon disenfranchisement laws stayed static *per se*. The Civil Rights Movement of the 1960s placed particular emphasis on the right to vote as a means of

³⁹ See CHUNG, *supra* note 9, at 3 (citing Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 50–58 (Marc Mauer & Meda Chesney-Lind eds., 2002)).

⁴⁰ 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF VIRGINIA 3076 (1906) [hereinafter *VIRGINIA PROCEEDINGS*] (statement of Delegate Carter Glass).

⁴¹ Brooks, *supra* note 33, at 857; see Hench, *supra* note 36, at 733–37.

⁴² See U.S. CONST. amend. XIII § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States"); U.S. CONST. amend. XIV, § 2 ("But when the right to vote at any election . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced").

⁴³ See, e.g., *Lassiter v. Northampton Cty. Bd. of Elec.*, 360 U.S. 45, 51–53 (1959) (listing a previous criminal record in a list of factors states may consider when determining voter qualifications); *Green v. Bd. of Elec. of N.Y.C.*, 380 F.2d 445, 449 (2d Cir. 1967) (holding that disenfranchisement was not a punishment, but rather "a nonpenal exercise of the power to regulate the franchise"). See generally Robin Miller, Annotation, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R.6th 31 (2006) (analyzing all federal and state cases up to 2006 discussing the validity of felony disenfranchisement laws). In writing the majority opinion for *Green*, Second Circuit Judge Henry Friendly contended that criminals did not elect government actors that would pass laws in their favor especially given "the heavy incidence of recidivism and the prevalence of organized crime." *Green*, 380 F.2d at 451.

political participation.⁴⁴ In response, many legislatures moved to mitigate the effects of their felon disenfranchisement provisions by either eliminating lifetime disenfranchisement or narrowing the range of qualifying felonies.⁴⁵ In spite of the shift in public policy, courts remained staunch in their refusal to directly address the discriminatory effects of disenfranchisement.

Even in cases where felon disenfranchisement provisions were struck down, courts shied away from discussing the racialized impact of disenfranchisement. Consider for instance the 1970 New Jersey District Court case *Stephens v. Yeoman*, which struck down the state's felon disenfranchisement statute but skirted the discussion of race entirely.⁴⁶ The majority opinion held that the statute violated the Equal Protection Clause⁴⁷ of the Fourteenth Amendment, relying on the Supreme Court's holding in *Kramer v. Union Free School District* that disenfranchising classifications must be tailored with an "exacting standard of precision" necessary to achieve an articulable state goal.⁴⁸ The court found that the statute's "haphazard development" had led to "totally irrational and inconsistent classification[s]" that could not meet the exacting standard of precision required by the Equal Protection Clause.⁴⁹ Likewise, the Supreme Court of California eschewed the opportunity to discuss the racial impact of felon disen-

⁴⁴ See Abigail M. Hinchcliff, Note, *The "Other" Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement*, 121 YALE L.J. 194, 203 (2011) (describing the Civil Rights movement and its effects on voting rights law).

⁴⁵ *Id.*

⁴⁶ *Stephens v. Yeomans*, 327 F. Supp. 1182, 1188 (D.N.J. 1970) (striking down N.J. STAT. ANN. § 19:4-1(2)-(5)).

⁴⁷ The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The clause has been read to mandate that, while the government may classify individuals based on group characteristics, these classifications must relate to legitimate government purposes. See, e.g., Beth A. Deverman, *Fourteenth Amendment—Equal Protection: The Supreme Court's Prohibition of Gender-Based Peremptory Challenges*, 85 J. CRIM. L. & CRIMINOLOGY 1028, 1029 (1995) (discussing the Equal Protection Clause in the context of *J.E.B. v. Alabama*, 511 U.S. 127 (1994), a case prohibiting the exercise of preemptory challenges based on the gender of potential jurors).

⁴⁸ *Yeomans*, 327 F. Supp. at 1186 (quoting *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 632 (1969)) ("[T]he classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Section 2012 [of New York Education Law] does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise.").

⁴⁹ See *Yeomans*, 327 F. Supp. at 1188. For example, an individual convicted of murder under N.J. Stat. Ann. § 19:4-1 would be disenfranchised, whereas an individual convicted of attempted murder would still be eligible to vote. See *id.*

franchisement laws when striking down California's disenfranchisement law in the 1973 case *Ramirez v. Brown*.⁵⁰

In conclusion, there was virtually zero judicial discussion of striking down felon disenfranchisement laws on racial discrimination grounds prior to *Richardson v. Ramirez*, in spite of their clear roots in Jim Crow law and other antiblack policies. And once *Richardson v. Ramirez* was announced, a successful challenge to felon disenfranchisement law on racial discrimination grounds became even more improbable.

B. *Richardson v. Ramirez* (1974) and Subsequent Cases

Richardson v. Ramirez—decided by a divided Supreme Court in 1971⁵¹—is the most important case for any pro-disenfranchisement defender and the largest hurdle for any disenfranchisement reformist.⁵² *Richardson v. Ramirez* holds that felon disenfranchisement in and of itself is constitutional under the Section 2 of the Fourteenth Amendment. Justice Rehnquist, delivering the opinion of the Court, began his review by noting that felon disenfranchisement challenges implicate both the Equal Protection Clause⁵³ and Section 2 of the Fourteenth Amendment, otherwise known as the Penalty

⁵⁰ *Ramirez v. Brown*, 507 P.2d 1345 (Cal. 1973), *overruled by* *Richardson v. Ramirez*, 418 U.S. 24 (1974). Rather, the California Supreme Court found that the state's broad disenfranchisement of the state's current and previous felons violated the equal protection clause when such disenfranchisement was not necessary to achieve the state's goal of minimizing voter fraud. *Ramirez*, 507 P.2d at 1356–57.

⁵¹ 418 U.S. 24 (1974). The Supreme Court also decided *O'Brien v. Skinner* in 1974, another felon voting rights case. In *O'Brien*, plaintiffs were jailed New York citizens who were legally eligible to vote—they either had not been convicted of a crime yet or else had been merely convicted of a misdemeanor. Despite their eligibility, correctional and election officials refused to provide them with absentee ballots, registration equipment, or transportation to the polls per the direction of New York statutes. The Supreme Court found that the statutes were unconstitutional, as they created an unconstitutionally onerous burden on the New York citizens' ability to vote. See *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974); see also Margaret Barthel, *Getting Out the Vote From the County Jail*, ATLANTIC (Nov. 4, 2018), <https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783/> [<https://perma.cc/5QAE-SAY9>] (describing the modern hurdles that individuals held without a felony conviction face in order to vote).

⁵² *Richardson v. Ramirez* is still good law today, four decades later. Hinchcliff observes “[G]iven that the Court has shown no interest in reconsidering the *Ramirez* ruling, strategies that seek to overturn the decision are likely to fail. Post-*Ramirez* legal challenges to disenfranchisement have generally been unsuccessful, as courts have found the topic to be a ‘settled issue.’” Hinchcliff, *supra* note 44, at 197 (footnote omitted).

⁵³ U.S. CONST. amend. XIV, § 1.

Clause.⁵⁴ The Court first found that the language of the Penalty Clause expressly carved out an exemption for states that disenfranchised participants “in rebellion, or other crime.”⁵⁵ The Court then held that the Equal Protection Clause “could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction[s]” of the Penalty Clause.⁵⁶

When *Richardson v. Ramirez* was decided in 1974, the majority of states had lifetime felon disenfranchisement provisions.⁵⁷ The effect of the case was to cement the constitutionality of those bans, especially given the Supreme Court’s decision in *Mobile v. Bolden*.⁵⁸ Although *Mobile* did not involve felon disenfranchisement,⁵⁹ it held that the disproportionate effects of racial discrimination alone were irrelevant to finding a provision unconstitutional, unless there was evidence that such discrimination was purposeful.⁶⁰ The cumulative effect of *Richardson v. Ramirez* and *Mobile* was that plaintiffs wishing to challenge specific felon disenfranchisement provisions on the grounds of racial discrimination had to prove purposeful discrimination in the drafting of such provisions. That is to say, disparate effects—no matter how shocking—would not be enough to support a felon disenfranchisement challenge. Indeed, the nation saw such a challenge play out in *Hunter v. Underwood*,⁶¹ which challenged section 182 of the Alabama Constitution disenfranchising those convicted of crimes “involving moral turpitude” as determined by the State Attorney General.⁶² The Court held that section 182 was unconstitutional under the Equal Protection Clause, as it not only had a disproportionate impact on black citizens, but was

⁵⁴ The relevant section of the Penalty Clause reads: “But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime” U.S. CONST. amend. XIV, § 2.

⁵⁵ *Ramirez*, 418 U.S. at 42–43.

⁵⁶ *Id.* at 55.

⁵⁷ See Hinchcliff, *supra* note 44, at 208.

⁵⁸ 446 U.S. 55 (1980).

⁵⁹ *Mobile v. Bolden* held that disproportionate discriminatory effect alone—without evidence of purposeful discrimination—would not support a claim of racial voting discrimination. See *id.*

⁶⁰ See *id.* at 65.

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

⁶² *Id.* at 223.

overtly and explicitly adopted with racially discriminatory intent during the Jim Crow era.⁶³

C. The Current State of U.S. Felon Disenfranchisement Law

Today, forty-eight out of the fifty states retain some form of felon disenfranchisement.⁶⁴ Only Maine and Vermont allow convicted populations to vote without any restriction.⁶⁵ Although the Supreme Court has not addressed the constitutionality of felon disenfranchisement since *Richardson v. Ramirez* and *Hunter*, challenges to felon disenfranchisement have continued to come before the lower courts.

In particular, the Voting Rights Act of 1965 (VRA)⁶⁶ has been carefully considered by scholars as a potential tool to challenge felon disenfranchisement policy.⁶⁷ Reformists have not shrunk from testing the VRA's viability as a point of reform. For instance, the Ninth Circuit heard *Farrakhan v. Washington*,⁶⁸ which examined the constitutionality of Washington State's felon disenfranchisement law under section 2 of the VRA.⁶⁹ Although the circuit court did not find that the law violated the VRA, the court did use the act as a framework

⁶³ See *id.* at 233 (“[W]e are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 [of the Alabama Constitution] which otherwise violates § 1 of the Fourteenth Amendment.”); see also Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 547 (1993) (“The plaintiffs [in *Underwood*] brought an action in federal court claiming that section 182 of the Alabama Constitution, under which they had been disenfranchised, violated the Fourteenth Amendment’s Equal Protection Clause because it was adopted with intent to discriminate against blacks and was fulfilling its intended effect.”).

⁶⁴ CHUNG, *supra* note 9, at 2.

⁶⁵ *Id.* Additionally, Maine and Vermont do not restrict the voting rights of felons while they are serving their sentences in prison.

⁶⁶ 42 U.S.C. § 1973. The Voting Rights Act of 1965 (VRA) protects minority communities from discriminatory voting practices by prohibiting literacy tests, requiring non-English ballots and voting instructions, and authorizing other non-discrimination measures. See, e.g., *Voting Rights Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/voting_rights_act [<https://perma.cc/5NDW-BFZK>].

⁶⁷ Many academics have considered how the VRA may be used to challenge felon disenfranchisement policies. See, e.g., Matthew E. Feinberg, *Suffering Without Suffrage: Why Felon Disenfranchisement Constitutes Vote Denial Under Section Two of the Voting Rights Act*, 8 HASTINGS RACE & POVERTY L.J. 61 (2011); Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875 (2005); Thomas G. Varnum, *Let’s Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. RACE & L. 109 (2008).

⁶⁸ 338 F.3d 1009 (9th Cir. 2003).

⁶⁹ See *id.* at 1014.

within which to consider how the challenged law engaged with social and historical evidence of racial bias against the state's black voters.⁷⁰ But not all courts have been willing to consider striking down felon disenfranchisement policies. Consider the Eleventh Circuit's case *Johnson v. Governor of the State of Florida*.⁷¹ There, the court essentially defanged *Hunter* when considering Florida's felon disenfranchisement provision by contending that a modern revision of the original felon disenfranchisement provision "removed the discriminatory taint" from said original, even if the original provision had been motivated by racial animus in violation of the Equal Protection Clause.⁷²

In sum, it is unclear whether federal courts will ever in practice strike down a felon disenfranchisement provision for racial discrimination on either *Hunter* or VRA-based grounds. As of now, no post-*Hunter* courts have struck down *any* felon disenfranchisement provision, on any grounds. Therefore, felon disenfranchisement reformists ought not to rely on the courts, even post-*Hunter*, for relief. However, the absence of judicial action does not mean that reform should slow, not by any means. The deleterious effects of felon disenfranchisement laws on America's institutions are too serious to be ignored. This leads this Note to its next section, which contends first that felon disenfranchisement has particularly injurious effects on communities of color and second that the nation is ready to remedy such effects via mass re-enfranchisement.

II

AMERICA, READY FOR FELON DISENFRANCHISEMENT REFORM?

A. Felon Disenfranchisement is a Modern Jim Crow Law

Imagine the State of Missouri. Missouri is the eighteenth-largest state by population in the nation, with a citizenship of

⁷⁰ See *id.* at 1016 ("As a preliminary matter, we agree with the district court that Plaintiffs' claim of vote denial is cognizable under Section 2 of the VRA. Felon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.").

⁷¹ 405 F.3d 1214 (11th Cir. 2005).

⁷² *Id.* at 1224 ("Florida's re-enactment of the felon disenfranchisement provision in the 1968 Constitution conclusively demonstrates that the state would enact this provision even without an impermissible motive and did enact the provision without an impermissible motive.").

slightly over six million.⁷³ Missouri makes up nearly two percent of the nation's entire population and receives eight seats in the House of Representatives.⁷⁴ Now, consider the numerical effect of banning Missouri's entire population from the voting booth. Consider the *visual* effect of removing that large of a group from the voting pool. It should shock you.

This figure approximates the effects of felon disenfranchisement, albeit focused in one geographical area. As of 2018, felon disenfranchisement policies remove the ability to vote from over six million Americans across the nation—a population larger than that of Missouri.⁷⁵ It easily constitutes the largest population of the disenfranchised in the world.⁷⁶ As Angela Behrens, Christopher Uggen, and Jeff Manza note, “no other contemporary democracy disenfranchises felons to the same extent, or in the same manner, as the United States.”⁷⁷ Approximately one in every forty Americans within the voting-age population has lost the right to vote—either temporarily or permanently—by felon disenfranchisement policies.⁷⁸ Over three-quarters of the disenfranchised population are not even physically in prison; some are on parole or probation, while others have already completed their sentences.⁷⁹

America's six million disenfranchised citizens is one of the most tangible consequences springing from the nation's mass incarceration philosophy. The United States produce nearly a quarter of the globe's prisoners, despite making up only five

⁷³ *Population Estimates*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045217?#> [<https://perma.cc/9UPW-UPYE>] (last visited Nov. 9, 2018) (search “Missouri”).

⁷⁴ *Missouri Population 2019*, WORLD POPULATION REVIEW (Nov. 30, 2018), <http://worldpopulationreview.com/states/missouri-population/> [<https://perma.cc/USQA-VMPC>].

⁷⁵ *See Directory of Representatives*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/representatives> [<https://perma.cc/K9LY-VPPW>] (“The number of voting representatives in the House is fixed by law at no more than 435, proportionally representing the population of the 50 states.”) (last visited Jan. 21, 2019).

⁷⁶ *See* Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 560 (2003).

⁷⁷ *Id.* at 562 (citing JAMIE FELLNER & MARC MAUER, *THE SENTENCING PROJECT, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998)).

⁷⁸ Elena Holodny, *Millions of American Adults Are Not Allowed to Vote – And They Could Change History*, BUS. INSIDER (Jan. 3, 2018), <http://www.businessinsider.com/what-if-felons-could-vote-2017-7> [<https://perma.cc/N5K8-DHCD>].

⁷⁹ *Id.*

percent of the world population,⁸⁰ and the nation easily has the highest rate of incarceration in the world.⁸¹ Today, there are 2.3 million people imprisoned in the United States.⁸² Annually, approximately 650,000 of these men and women are freed each year—many of whom are then left without the ability to vote, despite being “restored” to their communities.⁸³ In fact, over ninety-five percent of those incarcerated will eventually be released.⁸⁴ No wonder then, given these statistics, there are so many ex-felons in the United States subjected to disenfranchisement. Moreover, although mass incarceration rates show signs of declining, albeit slightly, researchers expect the number of *ex-felons* to increase as individuals are released. However, even more problematic is the stark racialization of mass incarceration, and hence the same racialization of felon disenfranchisement. Certainly, felon disenfranchisement policies are race-neutral on their face. But their effects are far from neutral.

In order to fully comprehend the disparate effects of felon disenfranchisement law on nonwhite communities, it behooves us to first look at statistics illustrating the way in which mass incarceration unduly affects nonwhite individuals. There has been much academic discussion of racism in the American imprisonment scheme.⁸⁵ Michelle Alexander writes:

⁸⁰ See *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/Z8H7-ZKZK>] (last visited Aug. 9, 2019).

⁸¹ See DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 22 (2007) (examining the impact of mass incarceration on ex-felons).

⁸² Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POLICY (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/3TEQ-59YU>].

⁸³ *Prisoners and Prisoner Re-Entry*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/archive/fbci/progmenu_reentry.html [<https://perma.cc/2DND-9SEG>] (last visited Aug. 9, 2019).

⁸⁴ Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, BUREAU OF JUSTICE STATISTICS (Aug. 9, 2019), <https://www.bjs.gov/content/reentry/reentry.cfm> [<https://perma.cc/R5NR-AVM7>] (reflecting that at least 95% of all state prisoners will be released from prison at some point); see also PAGER, *supra* note 81, at 22 (“Apart from the small number of offenders imprisoned for life, the vast majority are released back into the community after a few years of confinement.”)

⁸⁵ See, e.g., Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010) (contending that election of Barack Obama did not necessarily translate to a shift in racial attitudes within the context of mass incarceration); Michael O'Hear, *Mass Incarceration: The Fiscal & Social Costs*, STATE BAR OF WIS. (June 1, 2018), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91&Issue=6&ArticleID=26397> [<https://perma.cc/95CW-WXAS>] (discussing

No other country in the world imprisons so many of its racial or ethnic minorities. The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid. In Washington, D.C., . . . three out of four young black men (and nearly all those in the poorest neighborhoods) can expect to serve time in prison. Similar rates of incarceration can be found in black communities across America.⁸⁶

There is overwhelming evidence that black- and Latinx-identified individuals are disparately represented in prison populations.⁸⁷ The 2010 Census found that black Americans were five times more likely to be incarcerated than their white counterparts.⁸⁸ Indeed, while black Americans comprise around thirteen percent of the nation's overall population, they make up a shocking forty percent of the federal and state prison population.⁸⁹ Compare this statistic to parallel figures for white Americans. White Americans comprise approximately sixty-four percent of the nation's overall population but make up a mere thirty percent of the same federal and state prison population.⁹⁰ Black men are incarcerated at a rate of 4,340 per 100,000 Americans.⁹¹ Black women are incarcerated at a rate of 260 per 100,000 Americans.⁹² These figures average out to approximately 2,303 black individuals incarcerated per

Wisconsin's prison system in light of the "spatial inequality of incarceration" appearing in main cities, such as Milwaukee); Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX. WESLEYAN L. REV. 559 (2007) (exploring how the mass incarceration of black men is a modern reconception of involuntary servitude).

⁸⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6–7 (rev. ed. 2012).

⁸⁷ See Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1796–99 (2017); see, e.g., Weatherspoon, *supra* note 85; PAGER, *supra* note 81; ALEXANDER, *supra* note 86 (discussing the effects of mass incarceration on black communities and the way in which "colorblindness" minimizes such effects).

⁸⁸ Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLY (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/8HJF-XQWN>].

⁸⁹ *Id.*; see also Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (July 10, 2018), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html> [<https://perma.cc/T9XH-PHCV>] (reporting similar figures).

⁹⁰ Sakala, *supra* note 88.

⁹¹ Ta-Nehisi Coates, *Mapping the New Jim Crow*, ATLANTIC (Oct. 17, 2019), <https://www.theatlantic.com/politics/archive/2014/10/mapping-the-new-jim-crow/381617/> [<https://perma.cc/EG23-BZ4Z>].

⁹² *Id.*

100,000 Americans.⁹³ This trend is historically grounded; black imprisonment rates have exceeded white rates *at least* since the Civil War, if not for far longer.⁹⁴

Latinx- and Afro-Latinx identifying people face similar treatment from the America criminal justice system. According to the 2010 Census, Latinx people are twice as likely to be incarcerated as whites. Although they make up sixteen percent of the population, they constitute nearly twenty percent of the U.S. incarcerated population. Moreover, Latinx individuals face a starkly increased likelihood of drug conviction. A shocking majority of persons convicted of federal marijuana crimes identify as Latinx, making up seventy-seven percent of marijuana sentences, despite constituting less than twenty percent the nation's population.⁹⁵ Thus, we conclude that mass incarceration is critically racialized, in a way that unfairly and disparately affects black and Latinx-identified citizens.

The data on *felony* convictions shows a similarly problematic trend. A study⁹⁶ conducted by sociology professors across the United States found that black persons in particular are disparately affected by felony conviction.

By 2010, *all but one* state (Maine) had a felony conviction rate of at least 5 % of adult African Americans. . . . Most strikingly, rates in five states exceeded 20 %, meaning that one in five African American adults in these states had at some point been under felony supervision (California, Florida, Indiana, Massachusetts, and Washington). . . . Where state rates are higher, a greater share of the population will be subject to the formal and informal collateral consequences of felony conviction. . . . These discriminatory effects are amplified for African American communities⁹⁷

The statistics regarding both mass incarceration and felony conviction unequivocally demonstrate the racialized nature of the criminal justice system.

The consequences of disparate treatment of nonwhite—and especially black—individuals at the conviction and imprisonment stages unsurprisingly results in parallel results post-

⁹³ Sakala, *supra* note 88.

⁹⁴ Behrens et al., *supra* note 76, at 560.

⁹⁵ Steven Nelson, *Latinos Got 77 Percent of Federal Pot Sentences Last Year*, U.S. NEWS (Mar. 15, 2017), [<https://perma.cc/T9TW-EHLK>]. Nelson also notes that about eighty percent of crack cocaine sentences have African American defendants.

⁹⁶ Shannon et al., *supra* note 87, at 1811.

⁹⁷ *Id.* at 1811–12. This Note recognizes that Shannon et al. were unable to provide estimates for Latinx people and felony convictions, as there were significant gaps within criminal justice data series for such individuals.

conviction. According to the Sentencing Project, one in every thirteen adult black citizens is affected by felony disenfranchisement laws.⁹⁸ This is four times the rate at which nonblack persons are disenfranchised.⁹⁹ Behrens, Uggen, and Manza conducted an empirical study in 2003 noting the relationship between “racial threat,” or white anxieties that nonwhite voters would achieve political parity, and the continued existence of felon disenfranchisement laws.¹⁰⁰

In considering political parity, it is important to keep focus on the fundamental importance of the right to vote. That is, when nonwhite individuals are barred from the vote, they have diminished electoral power that affects their ability to engage with and influence state and national legislation. Behrens, Uggen, and Manza comment that “disenfranchisement rates can affect elections by diminishing the electoral power of minority groups, the results of which affect a state’s—and the nation’s—” electorate, political movement, and legislation as a whole.¹⁰¹ Moreover, they note that states with higher rates of imprisoned citizens have lower access and quality of health care for *all* citizens.¹⁰² There is a similar detrimental effect that occurs on a more microscale within individual communities. Giovanna Shay notes the long-term effect of disenfranchisement on these communities beyond the loss of voting rights to individual felons:

Disenfranchisement is not the only way that mass incarceration reduces the political power of poor communities; because the incarcerated are counted as residents in the jurisdictions where they are imprisoned for the purposes of legislative reapportionment, their home districts lose political influence.¹⁰³

Moreover, felon disenfranchisement contributes to the psychological effects of incarceration that push ex-felons towards recidivism. There is extensive research indicating that ex-felons who receive strong community support and who can re-enter society with employment and social ties are less likely to

⁹⁸ CHUNG, *supra* note 9, at 2.

⁹⁹ *See id.* (“Black Americans of voting age are more than four times more likely to lose their voting rights than the rest of the adult population . . .”).

¹⁰⁰ *See* Behrens et al., *supra* note 76, at 598.

¹⁰¹ *See* Shannon et al., *supra* note 87, at 1811.

¹⁰² *Id.*

¹⁰³ Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 362 (2010) (footnote omitted).

re-engage in criminal activities.¹⁰⁴ Consequences of a felony conviction can contribute to stigmatization that cuts against an ex-felon's ability to fully re-enter society.¹⁰⁵ Guy Padraic Hamilton-Smith and Matt Vogel assert that "[m]any individuals who are subject to disenfranchisement laws speak of disenfranchisement as a symbol that they do not belong, and that they are outsiders in their own community."¹⁰⁶

In conclusion, felon disenfranchisement laws have a long and storied history rooted in racism, that today manifests itself in disparate and dangerous consequences for nonwhite ex-felons. In particular, black and Latinx Americans are subject to political inequity and increased bars to re-entering society.

B. Americans Support Felon Disenfranchisement Reform

This Note moves to argue that, despite the ubiquity of felon disenfranchisement provisions across the states, there is robust evidence—both empirical and sociological—indicating that the American public is overwhelmingly in favor of mitigating, if not abolishing, felon disenfranchisement entirely.

Consider first that felon disenfranchisement laws have undergone substantial modification in recent years. Since 1997, twenty-four states have made mitigating changes to their felony disenfranchisement laws.¹⁰⁷ In 1997, Texas repealed the two-year waiting period for ex-felons to have their rights restored.¹⁰⁸ Between 2000 and 2010, Delaware, Maryland, Nebraska, and New Mexico repealed their lifetime disenfranchisement provisions, replacing them with less harsh alternatives.¹⁰⁹ And in November 2018, Florida restored the right of one million ex-felons to vote by amending the Florida

¹⁰⁴ See, e.g., JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006); Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 *BERKELEY LA RAZA L.J.* 407 (2012); Nancy Leong, *Allowing Felons to Vote Could Prevent Crime*, TAKE CARE (July 27, 2017), <https://takecareblog.com/blog/allowing-felons-to-vote-could-prevent-crime> [<https://perma.cc/U3M4-NCBS>].

¹⁰⁵ Hamilton-Smith & Vogel, *supra* note 104, at 408 ("A frequently-made argument made against disenfranchisement is that it further isolates and segregates ex-felons re-entering into society by denying them the ability to participate in the political process. This isolation and segregation, in turn, is counterproductive to the rehabilitative ideals of the criminal justice system. If, *arguendo*, the primary goal of the American criminal justice system is to reduce crime, then policies that result in increased crime rates make little sense." (footnote omitted)).

¹⁰⁶ *Id.* at 414.

¹⁰⁷ See CHUNG, *supra* note 9, at 4–6.

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *Id.*

constitution to re-enfranchise those who “complete all terms of their sentence including parole or probation.”¹¹⁰ These changes have led to an estimated 1,840,000 citizens being re-enfranchised.¹¹¹

This Note contends that increased mitigation to felon disenfranchisement laws directly reflects the American public’s shift in favor towards re-enfranchising felons and ex-felons. A study conducted by Uggen, Manza, and Behrans found via a recent national poll that eighty percent of Americans favor restoring voting rights to former felons and that sixty percent of Americans favor restoring voting rights to current individuals on probation or parole.¹¹² Manza, Uggen, and Clem Brooks, in a separate article, describe how, over time, a “civil liberties view” has developed within the American public that “prevails over a punitive view that would deny political rights to nonin-carcerated felons.”¹¹³ Manza, Uggen, and Brooks continue:

For all categories of felons who are not currently in prison, relatively large majorities . . . favor enfranchisement. Additionally, we find evidence that between 60 and 68 percent of the public believes that felony probationers . . . should have their voting rights restored. Moreover, 60 percent support voting rights for parolees . . . and 66 percent support voting rights for even ex-felons convicted of a violent crime who have served their entire sentence.¹¹⁴

What is the reason for the public’s warming towards felon disenfranchisement reform? This Note proffers several arguments. Firstly, empirical evidence indicates that there is increased public attention towards civil rights and race issues. According to Gallup, the number of Americans who “worry a ‘great deal’ about race relations” has gone from seventeen percent to forty-two percent between 2014 and 2017.¹¹⁵ According to Gallup polls:

¹¹⁰ See Olivia B. Waxman, *As Florida Restores Ex-Felons’ Right to Vote, Here’s the Dark History Behind Their Disenfranchisement*, TIME (Nov. 8, 2018), <http://time.com/5448284/ex-felon-voting-rights-amendment-4-history-disenfranchisement/> [<https://perma.cc/H85Z-FKFB>] (citing the text of the Voter Restoration Amendment).

¹¹¹ See Holodny, *supra* note 78.

¹¹² See Christopher Uggen et al., *Felony Voting Rights and the Disenfranchisement of African Americans*, 5 SOULS 48, 55 (2003).

¹¹³ Jeff Manza et al., *supra* note 13, at 283.

¹¹⁴ *Id.*

¹¹⁵ Art Swift, *Americans’ Worries About Race Relations at Record High*, GALLUP (Mar. 15, 2017), <http://news.gallup.com/poll/206057/americans-worry-race-relations-record-high.aspx> [<https://perma.cc/2PLP-ARR7>].

Race relations or racism has emerged as one of the top issues on Gallup's most important problem list, rising from 1% to 3% of Americans mentioning the issue throughout much of 2014 to 18% doing so in July 2016 after incidents of violence between police and black men Mentions of this issue have stayed at a monthly average of 9% since then.¹¹⁶

Consider also the increased attention given to individual voting habits, as galvanized by the elections of the last two decades. Recent years have been characterized by a series of tightly-contested United States elections.¹¹⁷ In 2000, the presidential election between Republic George W. Bush and Democrat Al Gore was incredibly close.¹¹⁸ The state that swung the vote to Bush was Florida, which had and continues to have extremely restrictive felon voting provisions.¹¹⁹ Many scholars, including Manza and Uggen, contend that “[i]f disenfranchised felons in Florida had been permitted to vote, Democrat [presidential-candidate] Gore would certainly have carried the state, and the election.”¹²⁰ Manza and Uggen also point to disenfranchisement's possible influence on past elections, stating that it would be likely that “some closely contested Democratic political victories of the recent past might have gone to the Republicans had contemporary rates of disenfranchisement prevailed at the time.”¹²¹ The modern emphasis and approach towards voting and civic duty implicitly shines a light on who is able to vote and who is not, especially when un-incarcerated parolees and ex-convicts are barred from voting, despite being otherwise functioning members of society. This Note acknowledges that there likely are other factors contributing to the nation's attitudes to re-enfranchisement. Suffice to say, however, there has been a substantial increase in felon disenfranchisement reform in recent years.

¹¹⁶ *Id.*

¹¹⁷ Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 779 (2002).

¹¹⁸ *Id.* at 792.

¹¹⁹ *See id.* (“[T]here are more disenfranchised felons in Florida, approximately 827,000, than in any other state.”).

¹²⁰ *Id.*

¹²¹ *Id.*

III

THE PROBLEM WITH REFORM VIA GUBERNATORIAL
EXECUTIVE ORDER

Much of modern felon disenfranchisement reform has taken place via state executive action. More specifically, through state governors' executive action and pardon powers.¹²² For example, Governor Cuomo—in response to the New York legislature's failure to re-enfranchise state felons—announced that New York felons would be extended the right to vote once they completed their sentence.¹²³ This order allowed New York felons on parole to vote. No doubt there is much to admire about the governors who have used their offices' powers to re-enfranchise state felons. Supporters of Virginia ex-governor Terry McAuliffe's 2016 blanket executive order re-enfranchising Virginia felons lauded him for embodying “the powerful leadership needed across the nation to combat vestiges of de jure racial discrimination and recent retrenchment on voting rights.”¹²⁴

This Note asserts, however, that significant complications emerge when governors exercise unilateral authority to re-enfranchise felons. In order to illustrate this, the following section closely interrogates McAuliffe's executive order and the political drama that subsequently ensued. This case study concludes that, while McAuliffe achieved short-term felon disenfranchisement reform, it impaired the ability of Virginia's state governance to encourage political efficacy and bipartisanship. Moreover, McAuliffe's executive order was a mere band-aid skirting the actual issues of race and marginalization entrenched within the state's felon disenfranchisement provision.

A. Case Study: The McAuliffe Executive Order (2016)

Terry McAuliffe¹²⁵ is a staunch figure within the Democratic establishment. An established party candidate and close

¹²² See Sam Levine, *New York Gov. Andrew Cuomo Is Restoring Voting Rights to Felons on Parole*, HUFFINGTON POST (Apr. 19, 2018), https://www.huffingtonpost.com/entry/andrew-cuomo-new-york-voting-rights-parole_us_5ad76d92e4b0e4d0715c9a63 [<https://perma.cc/ZVY4-VYU2>]; see also *supra* INTRODUCTION (discussing voting restoration efforts by governors in Iowa and Kentucky).

¹²³ See Levine, *supra* note 122.

¹²⁴ Janai S. Nelson, *Felon Disenfranchisement Is Anti-Democratic*, N.Y. TIMES (Apr. 22, 2016, 7:24 PM), <https://www.nytimes.com/roomfordebate/2016/04/22/should-felons-ever-be-allowed-to-vote/felon-disenfranchisement-is-anti-democratic> [<https://perma.cc/KZH8-9WHP>].

¹²⁵ McAuliffe would serve as governor from 2014 to 2018, at which time he was succeeded by fellow Democrat Ralph Northam.

friend of Bill and Hillary Rodham Clinton, he was narrowly elected the seventy-second governor of Virginia in 2013.¹²⁶ At the time of McAuliffe's election, Virginia—like the aforementioned states of Kentucky, Iowa, and Florida—maintained highly-punitive lifetime felon disenfranchisement policies. Furthermore, the state had one of the nation's highest levels of disenfranchisement: 7.3 percent of the state's population could not vote in 2010.¹²⁷ Unsurprisingly, Virginia's disenfranchisement policies have strong ties to Jim Crow legislation.¹²⁸ Prior to McAuliffe's election, his predecessors, both Democrat and Republican, spent significant effort mitigating the state's felon

¹²⁶ See Trip Gabriel, *Terry McAuliffe, Democrat, Is Elected Governor of Virginia in Tight Race*, N.Y. TIMES (Nov. 5, 2013), <https://www.nytimes.com/2013/11/06/us/politics/mcauliffe-is-elected-governor-in-virginia.html> [https://perma.cc/AL96-MS2P].

¹²⁷ See Danielle Kurtzleben, *Virginia's Governor Just Gave 206,000 People the Right to Vote*, NPR (Apr. 22, 2016), <https://www.npr.org/2016/04/22/475297932/virginias-governor-just-gave-206-000-ex-felons-the-right-to-vote> [https://perma.cc/2UGT-A9CC].

¹²⁸ In 1902, in trend with the neighboring Southern states, Virginia repealed its previous constitution, which placed very little restrictions on the electorate, and replaced it with a far more restrictive document. This document was explicitly intended to politically disenfranchise black citizens; the president of the constitutional convention and a former Confederate colonel, John Goode, contended that black citizens "had no capacity to participate in the functions of government." Matt Ford, *The Racist Roots of Virginia's Felon Disenfranchisement*, ATLANTIC (Apr. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/04/virginia-felon-disenfranchisement/480072/> [https://perma.cc/LD96-7X8U]. Virginia delegate R.L. Gordon stated, "I told the people of my county before they sent me here that I intended, as far as in me lay, to disenfranchise every negro that I could disenfranchise under the Constitution of the United States, and as few white people as possible." *Id.* Virginia delegate Carter Glass argued that felony disenfranchisement laws would "eliminate the darkey as a political factor in this State in less than five years, so that in no single county . . . will there be the least concern felt for the complete supremacy of the white race in the affairs of government." VIRGINIA PROCEEDINGS, *supra* note 40, at 3076; see also Dale E. Ho, *Virginia Needs to Fix Its Racist Voting Law*, N.Y. TIMES (July 19, 2016), <https://www.nytimes.com/2016/07/19/opinion/virginia-needs-to-fix-its-racist-voting-law.html> [https://perma.cc/XJD2-MYJQ] ("They were not shy about their intentions. Virginia's new constitution would 'eliminate the darkey as a political factor,' explained [Delegate] Carter Glass . . ."). As these quotes suggest, Virginia's delegates—much like their counterparts in the other Southern states—used the "racial imbalances in the state's criminal-justice system" to tailor their disenfranchisement laws to crimes they thought would affect black voters: "treason . . . any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery, or perjury." Ford, *supra*. This, combined with literacy tests and poll taxes, affected Virginia's black voters profoundly: "By the end of 1902, determined registrars and literacy tests had eliminated all but 21,000 of an estimated 147,000 blacks of voting age from the registration lists; three years later, the new poll tax cut that number in half." J. DOUGLAS SMITH, MANAGING WHITE SUPREMACY: RACE, POLITICS, AND CITIZENSHIP IN JIM CROW VIRGINIA 26 (2002).

disenfranchisement provision.¹²⁹ Former Virginia governor Tim Kaine re-enfranchised over 4,400 felons between 2006 and 2010, and—towards the end of his term—conducted substantial research towards the possibility of granting a blanket restoration of felon voting rights.¹³⁰ In 2010, Kaine's successor, Republican Robert F. McDonnell, removed the application process for individuals convicted of nonviolent felonies to have their rights restored and eliminated the two-year waiting period for restoration, in line with his campaign promise to re-enfranchise more felons than any other governor in Virginian history.¹³¹ In 2013, McDonnell also proposed an amendment to the Virginia Constitution to automatically restore voting rights to nonviolent felons.¹³² Although this proposal was killed by the state's House of Delegates, McDonnell managed to restore voting rights to over 5,000 nonviolent ex-offenders and former felons over his four-year term as governor.¹³³

Thus, it was not entirely unprecedented when, in April 2016, McAuliffe issued an aggressive and comprehensive executive order calling for the categorical pardon of all Virginia ex-felons and a blanket restoration of ex-felon political rights.¹³⁴ McAuliffe's order relied on the powers enumerated in article V, section 12 of the Virginia Constitution stating:

¹²⁹ See Errin Whack, *Va. Ramps Up Restoration of Voting Rights for Some Ex-Felons*, WASH. POST (July 15, 2013), https://www.washingtonpost.com/local/virginia-politics/restoring-voting-rights-of-some-va-ex-felons-ramping-up-at-end-of-mcdonnells-term/2013/07/15/62455f4a-ed69-11e2-a1f9-ea873b7e0424_story.html?utm_term=.b8dfd3894f6a [<https://perma.cc/4VJ6-J2HC>].

¹³⁰ See Letter from Mark E. Rubin, Counselor to the Governor, to Kent Willis, American Civil Liberties Union of Virginia 1 (Jan. 15, 2010).

¹³¹ See Errin Haines, *Virginia's McDonnell on Pace to Restore Voting Rights to Record Number of Felons*, WASH. POST (Sept. 30, 2012), https://www.washingtonpost.com/local/virginia-politics/mcdonnell-on-pace-to-restore-voting-rights-to-record-number-of-felons/2012/09/30/7dfd902a-08bf-11e2-858a-5311df86ab04_story.html?noredirect=on&utm_term=.845e6f9e3323 [<https://perma.cc/HW8Y-6P5H>].

¹³² See Josh Israel, *Virginia Governor Automatically Restores Voting Rights to Nonviolent Felons*, THINK PROGRESS (May 29, 2013), <https://thinkprogress.org/virginia-governor-automatically-restores-voting-rights-to-nonviolent-felons-bfa4baa3ce5a/> [<https://perma.cc/2DNU-DSTM>].

¹³³ See Whack, *supra* note 129.

¹³⁴ See Alexander Pringle, Comment, *The Limits of Executive Clemency: How the Virginia Supreme Court Blocked the Restoration of Felons' Political Rights in Howell v. McAuliffe*, 37 B.C. J.L. & SOC. JUST. 61, 61–62 (2016); see also *Civil Rights Groups File Amicus Brief in Virginia Restoration of Voting Rights Case*, ADVANCEMENT PROJECT (June 28, 2016) <https://advancementproject.org/news/civil-rights-groups-file-amicus-brief-in-virginia-restoration-of-voting-rights-case/> [<https://perma.cc/SCS7-YQ34>] (discussing Virginia's felon disenfranchisement policies prior to the McAuliffe executive action).

The Governor shall have power . . . to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; [and] to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution.¹³⁵

However, this was the first time in Virginia's history that a governor attempted to use the state's pardon power "on a categorical basis."¹³⁶ The order immediately generated statewide excitement. Supporters of the order applauded McAuliffe for openly denouncing felon disenfranchisement's disproportionate effects on black Virginians.¹³⁷ Detractors from the order responded that the order was motivated by McAuliffe's desire to exploit the Democratic "felon vote" for then-Democratic presidential nominee Hillary Clinton.¹³⁸ CNN reporter Kayleigh McEnany noted:

Adding . . . extra voters could most certainly make the difference in a state with just over 5 million registered voters. As Politico reports, as of June 30, just 8,170 convicted felons have taken the step of registering to vote, and these voters tend to lean Democratic. This addition of new voters, however minute, could very well make a difference. As most recall, the 2000 election in Florida was determined by just a few hundred votes, suggesting that the addition of thousands of new voters could have a determinative effect on the electoral outcome this fall.¹³⁹

Others resisted McAuliffe's argument that re-enfranchising felons was necessary to address the racist after-effects of Vir-

¹³⁵ VA. CONST. art. V, § 12; see also Sheryl Gay Stolberg & Erik Eckholm, *Virginia Governor Restores Voting Rights to Felons*, N.Y. TIMES (Apr. 22, 2016), <https://www.nytimes.com/2016/04/23/us/governor-terry-mcauliffe-virginia-voting-rights-convicted-felons.html> [<https://perma.cc/36M3-VBHJ>] (discussing McAuliffe's use of executive power to restore voting rights by "effectively overturn[ing] a Civil War-era provision in the state's Constitution aimed . . . at disenfranchising African-Americans").

¹³⁶ L. Michael Berman, Comment, *Howell v. McAuliffe*, 52 U. RICH. L. REV. 251, 267 (2017), (citing *Howell v. McAuliffe*, 788 S.E.2d 706 (Va. 2016)).

¹³⁷ Graham Moomaw, *Republicans Plan to Sue McAuliffe Over Order Restoring Rights to Felons*, RICHMOND TIMES-DISPATCH (May 2, 2016), http://www.richmond.com/news/virginia/government-politics/article_6f17684a-2425-5b3c-a3b9-2aa9c3d4670a.html [<https://perma.cc/5KP5-P2JT>].

¹³⁸ See, e.g., Cal Thomas, *The Felon Vote*, WASH. TIMES (Apr. 25, 2016), <https://www.washingtontimes.com/news/2016/apr/25/cal-thomas-the-felon-vote-in-virginia/> [<https://perma.cc/H7C7-M7JK>].

¹³⁹ Kayleigh McEnany, *The Court Case That Could Decide the 2016 Election*, CNN (July 18, 2016) <http://www.cnn.com/2016/07/18/opinions/howell-v-mcauliffe-virginia-election-case-mcenany/index.html> [<https://perma.cc/XFD5-47BT>].

ginia's Jim Crow laws. A scathing opinion piece in the *Washington Post* lambasted McAuliffe for forcing protesters of the executive order "to run a phony . . . racial gauntlet."¹⁴⁰

The McAuliffe executive order provoked a strong political backlash from the state's Republican-led legislature. The Republican Speaker of the House, William J. Howell, and the Republican Majority Leader of the Senate, Thomas Norment, Jr., quickly mobilized to file a lawsuit seeking writs of mandamus and prohibition against McAuliffe's categorical pardon.¹⁴¹

After much public tension and debate, the Virginia Supreme Court struck down the McAuliffe order in the case of *Howell v. McAuliffe*.¹⁴² The court asserted that sweeping re-enfranchisement was an unconstitutional use of the executive branch's clemency power.¹⁴³ The Court's holding was an empty victory, however, for McAuliffe's opponents. Mere months after the Court's decision, McAuliffe—amidst severe backlash from Virginia republicans—successfully implemented an alternative re-enfranchisement process that individually restored the thousands of Virginia felons.¹⁴⁴ McAuliffe described his office's aggressive restoration of felon voting rights as "an issue of basic justice," stating:

I personally believe in the power of second chances in the dignity and worth of a single human being These [disenfranchised felons] are gainfully employed. They send their children and their grandchildren to our schools. They shop at our grocery stores and they pay taxes. And I am not content to condemn them for eternity as inferior, second-class citizens.¹⁴⁵

¹⁴⁰ Norman Leahy & Paul Goldman, *Let's Take Race Out of the Felon Voting Rights Issue*, WASH. POST (May 17, 2016), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/05/17/lets-take-race-out-of-the-felon-voting-rights-issue/?utm_term=.c6a2dad1499b [<https://perma.cc/4A2J-WDK8>].

¹⁴¹ See Pringle, *supra* note 134, at 62; see also *Verified Petition for Writs of Mandamus and Prohibition and Memorandum in Support of Verified Petition*, BRENNAN CTR. FOR JUSTICE (May 23, 2016), <https://www.brennancenter.org/sites/default/files/analysis/Howell%20v%20McAuliffe%20-%20Petition.pdf> [<https://perma.cc/LJ2P-J6D4>].

¹⁴² *Howell v. McAuliffe*, 788 S.E.2d 706 (Va. 2016).

¹⁴³ See Pringle, *supra* note 134, at 64–65.

¹⁴⁴ Laura Vozzella, *Virginia's McAuliffe to Announce Restoration of Voting Rights to 13,000 Felons*, WASH. POST (Aug. 21, 2016), https://www.washingtonpost.com/local/virginia-politics/virginias-mcauliffe-to-announce-restoration-of-voting-rights-to-13000-felons/2016/08/20/590b43ee-6652-11e6-96c0-37533479f3f5_story.html?utm_term=.feb6a248f28 [<https://perma.cc/KH88-9XGC>].

¹⁴⁵ Laura Vozzella, *McAuliffe Restores Voting Rights to 13,000 Felons*, WASH. POST (Aug. 22, 2016), <https://www.washingtonpost.com/local/virginia-politics/mcauliffe-restores-voting-rights-to-13000-felons/2016/08/22/2372bb72-6878->

This process undoubtedly mitigated some of the racial effects of Virginia's felon disenfranchisement policies.¹⁴⁶ Forty-five percent of those affected by McAuliffe's orders were African American.¹⁴⁷ Certainly, McAuliffe's acts to halt felon disenfranchisement was effective. And for that, McAuliffe and all other executive actors following in his footsteps are admirable. Truly, this Note does not mean to critique their intentions or detract in any way from the importance of their work. However, the remainder of this section contends that—while McAuliffe ultimately realized his goal of broadly restoring felon rights—his executive action came at substantial cost to the political and social legitimacy of Virginia's governorship, as well as to the working relationship between the state's executive and legislative branches.

B. Lessons from the McAuliffe Executive Order

1. *Political Efficacy*

This section applies principles of political efficacy and consent theory to the events surrounding McAuliffe's executive order to demonstrate that the executive order came at significant cost to McAuliffe's political legitimacy. Firstly, this section engages with a brief discussion of political efficacy and consent theory as they relate to this Note's argument. Then, this Note will move to applying it to McAuliffe's executive order.

There has been extensive research and commentary on the relationship between the public conception of government legitimacy and executive branch actions on both state and federal levels. Legitimacy, in the context of political science, is the public's belief that an institution has a founded right to govern society at large.¹⁴⁸ Such trust “produces distinctive collective

11e6-99bf-f0cf3a6449a6_story.html?utm_term=.a57f7736cf6d [https://perma.cc/7C2N-BQNU].

¹⁴⁶ Norman Leahy & Paul Goldman, *It's McAuliffe's Choice on Individual Rights Restoration*, WASH. POST (Aug. 31, 2016), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2016/08/31/its-mcauliffes-choice-on-individual-rights-restoration/?utm_term=.9d2dda6716cc [https://perma.cc/GA7Z-78PX].

¹⁴⁷ Stolberg & Eckholm, *supra* note 135.

¹⁴⁸ See Ian Hurd, *Legitimacy*, ENCYCLOPEDIA PRINCETONIESIS (2007) <https://pesd.princeton.edu/?q=node/255> [https://perma.cc/W9NR-YKZT]; Fabienne Peter, *Political Legitimacy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2017) <https://plato.stanford.edu/entries/legitimacy/> [https://perma.cc/PM2A-PA32] (“According to [Max] Weber, that a political regime is legitimate means its participants have certain beliefs or faith In contrast to Weber's descriptive concept, the normative concept of political legitimacy refers to some . . . justification of political power or authority”)

effects in society, including making collective social order more efficient, more consensual, and perhaps more just.”¹⁴⁹ The broad concept of this “trust” reappears in academic consent theory, which follows the basic premise that the legitimization of political authority necessitates the consent of the governed.¹⁵⁰

Inquiry into a government’s legitimacy and whether such government has the consent of its citizens fundamentally engages with the tide of public opinion. James Stinson advances the thesis that while *static* public opinion does not usually have great power over government, a *change* in public opinion critically affects government and its actors.¹⁵¹ Moreover, such changes do not require large numbers of the public to engage politically; he writes, “Great movements to left or right, to Democrat or Republican, or to approval or disapproval are produced by the systematic change of a quite small number of people.”¹⁵² Public opinion surrounding executive action fluctuates based on two principals, according to Eileen Braman.¹⁵³ That is to say, individuals determining the legitimacy of an executive action rely on two factors—one objective and one subjective.

Firstly, citizens consider whether an executive action objectively complies with the U.S. Constitution or with procedure. Secondly, citizens consider their prior subjective satisfaction with the executive actor at hand. Braman concludes that:

¹⁴⁹ See Hurd, *supra* note 148.

¹⁵⁰ See Peter, *supra* note 148 (discussing consent as one potential source of political legitimacy).

¹⁵¹ See JAMES A. STIMSON, *TIDES OF CONSENT: HOW PUBLIC OPINION SHAPES AMERICAN POLITICS* 158 (2004).

¹⁵² *Id.* at 158–59. This is not to say that public opinion is necessarily the ultimate arbiter of an executive action’s legitimacy. Many times, federal executive action has been used to merely bring media attention to subjects outside of the legislature’s focus. SUSAN PRICE, OFFICE OF LEGISLATIVE RESEARCH, *EXECUTIVE ORDERS AND SEPARATION OF POWERS* (2005) <https://www.cga.ct.gov/2005/rpt/2005-R-0579.htm> [<https://perma.cc/4BDZ-A4ED>]. And in some cases, executive action that at first is challenged by public outrage is later lauded for its effects. For instance, President Grover Cleveland’s decision to preserve forest reserves in Colorado was initially castigated as federal overreach. His action was denounced as “arbitrary” and a “menace to the interests of the Western States.” John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 289 (2001). Yet later, much scholarship contends that “[w]ithout . . . bold executive actions, the federal lands would probably be much diminished in both size and quality today.” *Id.* at 291.

¹⁵³ Eileen Braman, *Exploring Citizen Assessments of Unilateral Executive Authority*, 50 L. & SOC. REV. 189, 220 (2016). While Braman’s research sits within a federal context—the executive officer at hand in the study was President Barack Obama—it is not unreasonable for this Note to apply the same concepts to the state level, as both occupy similar positions (albeit on different scales) as executive branch leaders.

[W]hile individuals may be willing to extend latitude to presidents they like and/or legislative actions they agree with in judging the appropriateness of government deeds, that latitude is not unlimited. It is bound by conceptions of appropriate behavior across the different branches of government. Clearly, citizens pay very close attention to whether government actors are following prescribed rules in evaluating the legitimacy of state action.¹⁵⁴

A baseline understanding of political efficacy and consent theory gives this Note context within which to understand how McAuliffe's executive order affected his office's legitimacy. The crux of this section's argument is that McAuliffe's executive order damaged the legitimacy and credibility of his governorship by swaying public opinion beyond the "appropriate" latitude, to use Braman's terminology.¹⁵⁵

Following *Howell v. McAuliffe*,¹⁵⁶ polls from the *Washington Post* reflect division over what the Virginia public believed were McAuliffe's motivations for issuing the executive order.¹⁵⁷ Forty-five percent of the state believed that McAuliffe was motivated out of his own altruism, while forty-two percent of the state believed that McAuliffe was motivated because he wanted to help Democrats with elections.¹⁵⁸ There is significant dissonance between these two motivations and Braman's factors. That is to say, Virginians believed that McAuliffe was acting based on his administration's interests—not the objective factor of procedure or constitutionality. In Braman's model, this cuts against a finding of legitimacy.

Consider next Braman's second factor, subjective prior satisfaction. The findings of the *Washington Post* were highly partisan. Over seven in ten Republicans stated that McAuliffe wanted to boost his party's voting pool while, similarly, over seven in ten Democrats stated the opposite.¹⁵⁹ At best, this factor appears neutral. However, this assumes that governorship baseline satisfaction levels run along party lines. In actuality, McAuliffe's approval ratings were not only weaker, but far

¹⁵⁴ *Id.* at 219–20.

¹⁵⁵ *Id.* at 189–92.

¹⁵⁶ 788 S.E.2d 706 (Va. 2016).

¹⁵⁷ See Laura Vozzella et al., *Majority of Virginians Approve of Terry McAuliffe, But Less So Than His Predecessors*, WASH. POST (Aug. 20, 2016) https://www.washingtonpost.com/local/virginia-politics/gov-terry-mcauliffe-is-less-popular-more-polarizing-than-recent-va-governors/2016/08/19/67c7af7a-6581-11e6-be4e-23fc4d4d12b4_story.html?utm_term=.170b82dc740f [https://perma.cc/72UT-N49C].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

more partisan, than virtually all of Virginia's past governors over the past two decades.¹⁶⁰ For McAuliffe to buck Virginia's established approval trends suggests that—like Stinson discusses—the tide of public opinion stemming from the drama of his executive order has had an effect on McAuliffe's individual legitimacy before the Virginian public.

In light of McAuliffe's potential presidential bid in 2020, further research may want to consider whether *Howell v. McAuliffe* affects the way in which his campaign engages with partisan lines across the states.¹⁶¹ McAuliffe's approval among registered voters was seventy-seven percent for Democrats, fifty-three for independents, and twenty-seven percent for Republicans. The fifty-point spread between the Democrats and Republicans is larger than the gaps for the previous four governors.¹⁶² The *Washington Post* notes that “[o]nly [then-President] Obama has ratings that are more polarized along partisan lines than McAuliffe's.”¹⁶³ Julian Zelizer, a professor of history and public affairs at Princeton University, hypothesizes that “there is too much Clinton” in McAuliffe for a successful presidential bid and argues that “he doesn't have the kind of fire power on the campaign trail people will need to really rally the base.”¹⁶⁴ On the other hand, however, perhaps McAuliffe's executive action will benefit his ability to engage with progressives outside of the establishment.¹⁶⁵ Jennifer Duffy of the Cook Political Report notes, “In 2016, [the Democratic Party] nominated a well-known, establishment candidate and that didn't go so well My guess is they sort of make a

¹⁶⁰ *Id.* Fifty-three percent of voters approve of McAuliffe, according to a new *Washington Post* poll, and thirty-three percent disapprove. *Id.*

¹⁶¹ McAuliffe's intent to run for the presidency in 2020 “is widely assumed around Richmond” and he has since been traveling around the country in an effort to bolster the Democratic Party's status and assist in his fellow party members' elections. Gregory Schneider, *McAuliffe May Be on His Way Out in Va., But Nationally He's Just Arriving*, WASH. POST (Nov. 13, 2017), https://www.washingtonpost.com/local/virginia-politics/terry-mcauliffe-may-be-on-his-way-out-in-va-but-nationally-hes-just-arriving/2017/11/12/a94034ec-c58c-11e7-afe9-4f60b5a6c4a0_story.html?noredirect=on&utm_term=.0c17baae5897 [https://perma.cc/BY9A-9URA]. This is perhaps most evident in his campaigning for his successor, Ralph Northam, who won by nearly nine percent in 2017. See Matthew Bloch et al., *Virginia Election Results: Northam Defeats Gillespie in Governor Race*, N.Y. TIMES (Dec. 20, 2017) <https://www.nytimes.com/elections/results/virginia-governor-election-gillespie-northam> [https://perma.cc/CZ4M-CUPG].

¹⁶² See Vozella et al., *supra* note 157.

¹⁶³ *Id.*

¹⁶⁴ Amie Parnes, *McAuliffe 'Seriously' Considering 2020 Run*, HILL (Nov. 30, 2017), <http://thehill.com/homenews/campaign/362460-mcauliffe-seriously-considering-2020-run> [https://perma.cc/9QJD-Y3G6].

¹⁶⁵ See Schneider, *supra* note 161.

180 in 2020, and the establishment Democrats may struggle. And I think that given McAuliffe's long past in Democratic politics he'd probably fall into that category."¹⁶⁶

In sum, an examination of public opinion following the McAuliffe executive action through the lens of Braman's two-factor test indicates that the public saw its issuance as a partisan act, rather than a legal one. Because of this, it ultimately hurt the legitimacy of McAuliffe's administration as it gave the impression that his administration's agenda was to roll out personal policy agendas, rather than a more neutral, legitimate goal.

2. *Bipartisanship and Separation of Powers*

Consider the concepts of bipartisanship and separation of powers—both of which are fundamental to both state and federal government. True, founding father James Madison envisioned the two as distinct and at times at odds: A Madisonian conception of the separation of powers relies on an “invisible-hand dynamic” to robustly constrain each branch's and each party's powers.¹⁶⁷ Over time, however, American political trends have moved away from the Madisonian ideal towards a more cooperative vision based on the concepts of party dominance and allegiance.¹⁶⁸ This sort of cooperation has become a necessary part of American governance; in many instances, there must be cooperation between parties to some extent in order for legislation to pass. Scholarship has found that bipartisanship is key to legislative effectiveness, albeit conditionally.¹⁶⁹ Volden and Wiseman's Bipartisan Index model, which tracks legislative cosponsorship activities as a way to understand the nature of bipartisanship, found that minority party members receive more benefit from bipartisanship activities than majority party members as “the former require the support of the [opposing] party for their bills to survive the committee process and pass the House.”¹⁷⁰

In applying these concepts to McAuliffe's executive order, this Note contends that McAuliffe's actions constructed an en-

¹⁶⁶ *Id.*

¹⁶⁷ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2317 (2006).

¹⁶⁸ *See id.*

¹⁶⁹ *See, e.g.*, Craig Volden & Alan E. Wiseman, *Are Bipartisan Lawmakers More Effective?* (Ctr. for the Study of Democratic Insts., Working Paper: 4-2016, 2016), https://www.vanderbilt.edu/csdi/includes/WP_4_2016_final.pdf [<https://perma.cc/2ADV-NJFT>].

¹⁷⁰ *Id.* at 5.

vironment in which cooperation between Virginia's Democratic executive branch and Republican legislative branch was no longer viable. The hostility between the two branches impeded the ability of McAuliffe's office to push forward its individual agenda, resulting in a heavy reliance on the governor's executive order power.¹⁷¹ As the *Washington Post* noted, "With 17 months left in office, McAuliffe enter[ed] the home stretch of his four-year term with big goals in health care, economic development and felon-rights restoration still uncertain or unmet."¹⁷² Republicans, led by the plaintiffs of *Howell*, "blocked most of the governor's legislative priorities, including expanding Medicaid under the Affordable Care Act," leading McAuliffe to turn "to executive order to get around the legislature."¹⁷³ The *Weekly Standard* reported, "Over the past four years, McAuliffe accomplished little as governor. He was stymied by the house of delegates, which is controlled by Republicans and led by McAuliffe's nemesis, speaker William Howell."¹⁷⁴ Moreover, Volden and Wiseman's model indicates that the hostility was more dangerous for the Democratic minority party rather than the Republican majority.¹⁷⁵ Therefore, it is reasonable to wonder whether McAuliffe's agendas would have had more traction without the effects of the executive order.

Furthermore, McAuliffe's executive order hurt the felon disenfranchisement reform by polarizing re-enfranchisement and aligning the movement with voter gamesmanship for the 2016 election. McAuliffe's Republican critics spilled much ink criticizing the executive order as a ploy to boost votes for then-candidate Hillary Clinton. This perception—accurate or not—refocused felon disenfranchisement reform as a partisan issue dealing more with voter fraud and ballot counting, rather than civic rights and racial justice

¹⁷¹ There is extensive dialogue showing the deterioration of their relationship. For example, Virginia Senate Majority Leader Norment scathingly called McAuliffe "blatant in his complete and unconscionable disregard for an obviously unconstitutional overreach of executive authority." Travis Fain, *Va. Supreme Court Throws Out McAuliffe's Felon Restoration Orders*, DAILY PRESS (July 22, 2016, 9:18 PM), <https://www.dailypress.com/news/politics/dp-nws-scova-felon-voting-20160722-story.html> [<https://perma.cc/3ECV-8KR4>].

¹⁷² See Vozzella et al., *supra* note 157.

¹⁷³ *Id.*

¹⁷⁴ Fred Barnes, *A Fight in Virginia Over the Proper Role of a State AG.*, WEEKLY STANDARD (Oct. 25, 2017), <https://www.weeklystandard.com/fred-barnes/a-fight-in-virginia-over-the-proper-role-of-a-state-ag-2010191> [<https://perma.cc/UY2W-HZUG>].

¹⁷⁵ See Volden & Wiseman, *supra* note 169, at 1, 5–6.

3. *Resolution of Systematic Marginalization*

McAuliffe's executive order at first glance did address the marginalization of Virginia's black population. Additionally, the adage "all news is good news" has its place within the American body politic.¹⁷⁶ And certainly, McAuliffe's executive order did attract the national spotlight to felon disenfranchisement as a policy concern. Moreover, McAuliffe's executive order also re-enfranchised a substantial number of felons. However, this Note contends McAuliffe's executive order failed to affect the systematic marginalization as created by Virginia's felon disenfranchisement policies. Virginia, as discussed in Part II.A of this Note, has a lifetime ban for felons. Felons in Virginia, once their sentences are completed, are still subjected to disenfranchisement until they may receive pardon; assuming they apply for such.¹⁷⁷ This means that the state's treatment of felon disenfranchisement is subject to reversal with the change of power. True, the current Governor, Democrat Ralph Northam¹⁷⁸ intends to continue issuing restorations through his term.¹⁷⁹ However, the Virginia Democratic party's efforts to support Virginia felon disenfranchisement reform will likely halt if and when a Republican governor is elected to office. Moreover, executive action "can be invalidated by the courts or undone by legislation,"¹⁸⁰ as occurred in *Howell v. McAuliffe*.¹⁸¹ Felon disenfranchisement requires a more permanent solution.

One possible solution may come from state legislative reform. An example of state legislative reform is Senate Bill 340/House Bill 980 in Maryland.¹⁸² In the spring of 2016, the legislature of Maryland restored voting rights to 40,000 citizens in

¹⁷⁶ See PRICE, *supra* note 152.

¹⁷⁷ See Newkirk II, *supra* note 22.

¹⁷⁸ In February 2019, Northam admitted to being in a racist photo found in a yearbook page from Eastern Virginia Medical School, although he later denied being in the photo. His approval rating is at a mere 40 percent—19 points lower than it was in December. See Marie Albiges, *Ralph Northam is Now Less Popular than Trump in Virginia — But Democrats Hold an Edge in Fall Elections*, VIRGINIAN-PILOT (Apr. 9, 2019), https://pilotonline.com/news/government/politics/virginia/article_51c2e6b2-5a2b-11e9-b132-cfea8dc8bd79.html [<https://perma.cc/6CWF-8K58>].

¹⁷⁹ *Id.*

¹⁸⁰ Tom Murse, *Executive Actions Versus Executive Orders*, THOUGHT CO. (Mar. 26, 2018), <https://www.thoughtco.com/executive-actions-versus-executive-orders-3367594> [<https://perma.cc/72VY-75W8>].

¹⁸¹ See 788 S.E.2d 706 (Va. 2016).

¹⁸² *Voting Rights Restoration Efforts in Maryland*, BRENNAN CTR. FOR JUSTICE (Mar. 10, 2016), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-maryland> [<https://perma.cc/PS4T-RFRD>].

the process of completing their probation or parole periods¹⁸³ via SB 340. The legislative bill replaced previous Maryland law that disenfranchised felons until they completed their entire sentences, regardless of their status of incarceration.¹⁸⁴ Longevity is not the only benefit promised by legislative felon disenfranchisement reform. Consider the transparency that the legislative procedure would bring to felon disenfranchise reform; this may address the first Braman factor as discussed in Part II.A of this Note, where citizens consider whether an executive action objectively complies with the Constitution or with procedure.¹⁸⁵ The layered, procedural elements inherent in legislation—the voting of citizens for their representatives and the subsequent voting of legislators for amending disenfranchisement provisions—lends legislation legitimacy under the first Braman factor. The second Braman factor, discussed in Part II.A, also cuts more in favor of legislation compared to gubernatorial action, as the bipartisan nature of legislative branches makes members of Congress less likely to face the same concentrated backlash that governors would receive. Certainly, there would be concerns over the toxification of bipartisanship in the state assembly. However, the effect would be more diffused.

With that being said, this Note contends in Part IV that *federal* legislation—contrasted with state legislation—is the most efficient and most consistent means of reform given its nationwide effect.

IV

THE CASE FOR REFORM VIA FEDERAL LEGISLATION

A more appropriate means to enact broad felon disenfranchisement reform lies in the hands of the federal government: specifically, the legislative branch. This Note briefly argues for the passage of the Democracy Restoration Act (DRA). The DRA was first introduced to Congress in 2008 by Democratic Senator Russ Feingold of Wisconsin, with the cosponsorship of Senators Sheldon Whitehouse of Rhode Island and Ben Cardin of Maryland.¹⁸⁶ The bill as introduced to the House of Representatives declared that

The right of an individual who is a citizen of the United States to vote in any election for Federal office shall not be denied or

183 *Id.*

184 *Id.*

185 *See supra* subpart II.A.

186 Democracy Restoration Act of 2008, H.R. 7136, 110th Cong. (2008).

abridged because that individual has been convicted of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election.¹⁸⁷

Hence, the Democracy Restoration Act (DRA) would make it such that no state could disenfranchise ex-felons, whether they completed their entire sentence or were on parole or probation. Moreover, the Democracy Restoration Act requires that ex-felons be notified regarding their right to vote once leaving prison, sentenced to probation, or convicted of a misdemeanor.

Since the DRA's introduction a decade ago, it has failed to pass. In 2011, 2014, 2016, and 2018 the DRA has been re-introduced for Congress' appraisal. The most recent iteration of the bill was introduced in the Second Session of the 115th Congress by Congressman Jerrold Nadler of New York.¹⁸⁸ This Note contends that the legislature should seriously consider the passage of the Democracy Restoration Act as a response to the significant increase in felon disenfranchisement reform among the states. This Part begins by enunciating the constitutionality of the DRA and then moves into exploring the practical benefits of the DRA as a tool for felon disenfranchisement reform.

A. A Legislative Solution is Constitutional

Currently, the federal government has no laws governing felon voting rights. And certainly, the Constitution allocates substantial governance over election to the individual states. Article 1 of the Constitution explicitly gives the states the power to oversee federal elections. Section 4 of Article 1—also known as the Election Clause—reads:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time make or alter such Regulations, except as to the Place of chusing [sic] Senators.¹⁸⁹

Article 1, however, also gives Congress the power to legislate to protect the right to vote, and scholars have contended that Section 4 of Article 1 extends Congress the power to enact felon

¹⁸⁷ *Id.* at § 3 (entitled "Rights of Citizens").

¹⁸⁸ Democracy Restoration Act of 2018, H.R. 6612, 115th Cong. (2018).

¹⁸⁹ U.S. CONST. art. I, § 4.

re-enfranchisement.¹⁹⁰ For example, in *Oregon v. Mitchell*,¹⁹¹ the Supreme Court upheld the legislature's ability to lower the voting age in federal elections.¹⁹² Moreover, the Supremacy Clause of the Constitution¹⁹³ grants Congress the power to pass legislation superseding state constitutional provisions, such as those that codify felon disenfranchisement law. Felon disenfranchisement reform thus would be a congressional exercise of its Article 1 powers.

Scholars also contend that the Fourteenth and Fifteenth Amendments extend congressional authority to permit nonincarcerated ex-felons to vote in federal elections.¹⁹⁴ Section 5 of the Fourteenth Amendment as well as Section 2 of the Fifteenth Amendment allow Congress enforcement power via "appropriate legislation."¹⁹⁵ This power is "broad."¹⁹⁶ Within the context of racial reparations, legislative bills re-enfranchising felons may be able to use the Fourteenth and Fifteenth Amendment as well as *Hunter*¹⁹⁷ to secure constitutionality.

B. A Legislative Solution is Effective

There are considerable benefits that accompany a federal legislative solution to felon disenfranchisement, as this Note contends. This Note's prior discussion of state disenfranchisement policies has illustrated that there are significant discrepancies among the states regarding felon voting rights. The diversity in state disenfranchisement policies has caused significant confusion over which citizens are eligible to vote, and where.

¹⁹⁰ See, e.g., Daniel M. Katz, *Article I, 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).

¹⁹¹ 400 U.S. 112 (1970).

¹⁹² *Id.* at 121, 124.

¹⁹³ U.S. CONST. art. VI, cl. 2. The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

¹⁹⁴ See *Legal Analysis of Congress' Constitutional Authority to Restore Voting Rights*, BRENNAN CTR. FOR JUSTICE (Aug. 3, 2009), <https://www.brennancenter.org/analysis/legal-analysis-congress%E2%80%99-constitutional-authority-restore-voting-rights> [<https://perma.cc/VP4K-4V3H>].

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; see also *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (describing the power as a "broad power indeed").

¹⁹⁷ *Hunter v. Underwood*, 471 U.S. 222 (1985).

Moreover, it has given rise to situations in which an individual has a right to vote in a state without felon disenfranchisement but does not receive that same right in an adjacent state that does maintain felon disenfranchisement. On a sociological level, this scenario presents a problematic value judgment in the latter state that does not exist in the former, thus contributing to national felon stigmatization. It would also negatively affect the second state's accountability levels in comparison to the first, as the second state could vote on and pass laws that affect ex-felon individuals—despite ensuring that ex-felons had no say or engagement with the process.

This hypothetical illustrates some of the ways in which states who disenfranchise felons fail to meet basic equity and fairness conceptions built into the ideals of statehood and governance. A federal solution would provide a comprehensive scheme for electoral officials in federal elections, thus creating more equity and public accountability within the states. Moreover, it would deliver a comprehensive end to felon disenfranchisement's racialized effects by halting the process entirely, even in states that are slower to achieve reform, truly eradicating Jim Crow laws once and for all.

A federal solution would also eliminate substantive issues with application of state disenfranchisement law. Research from the ACLU indicates that state election officials do not understand their own voter eligibility laws, or how to treat voters with previous convictions,¹⁹⁸ and suggests that there is pervasive ignorance over how eligibility affects individuals on probation or parole, whether misdemeanor crimes can disqualify voters, and how to re-register previously-disenfranchised individuals.¹⁹⁹ Lee Rowland and Myrna Perez describe the “administrative confusion” surrounding felon disenfranchisement policy:

Every individual with a past conviction is allowed to vote in Maine and Vermont, while one in Kentucky or Virginia faces permanent disenfranchisement unless he or she is granted discretionary clemency. The vast majority of states fall somewhere in between these two extremes, leading to complex eligibility requirements that often bewilder local election officials and create misconceptions among people with prior

¹⁹⁸ ERIKA WOOD & RACHEL BLOOM, *DE FACTO DISENFRANCHISEMENT* 1–2 (2008), <http://www.aclu.org/votingrights/exoffenders/36992pub20081001.html> [<https://perma.cc/3LZW-PJBN>].

¹⁹⁹ *Id.* at 2–7.

criminal records about their own eligibility. It is an inequity to which we cannot subject citizens any longer.²⁰⁰

A federal standard would greatly address the ambiguity of voting laws by replacing the current patchwork of felon disenfranchisement laws with a bright-line standard. Moreover, the provision of the DRA mandating voting-rights education for convicted persons and released persons would address problems surrounding information inequity.

Why then, does the DRA continue to stall? The lack of support for the DRA boils down to partisan lines; indeed, the entirety of the support for the House and Senate versions of the bill is Democratic.²⁰¹ Many Republican statesmen contend that the DRA is a veiled attempt by Democrats to unfairly acquire votes.²⁰² Certainly, the population of incarcerated, as discussed earlier in this Note, skews strongly minority and is thus more likely to vote Democratic.²⁰³ However, there are significant concessions within the DRA that should quell conservative concerns. Firstly, the DRA does not affect state elections, thus addressing federalism concerns. Moreover, the DRA only applies to ex-felons; felons who are still serving their sentences are excluded from enfranchisement. Beyond that, one can only surmise that partisanship—much like that of Virginia's legislature following McAuliffe's executive order—motivates part of the legislative animus against the bill.

CONCLUSION

This Note contends that there is a critical need for broad felon disenfranchisement reform across the United States and that the American public is more than willing to adopt such reform. This reform ought to take place via federal legislation rather than gubernatorial action, as has been the national trend. While former Virginia governor Terry McAuliffe laudably attempted to use his executive order powers to achieve blanket disenfranchisement, his actions came at significant costs to

²⁰⁰ Lee Rowland & Myrna Pérez, *Democracy Restoration Act Would Restore Voting Rights to Millions*, HUFFINGTON POST (June 25, 2012), https://www.huffingtonpost.com/lee-rowland/democracy-restoration-act_b_1453413.html [<https://perma.cc/SC5N-Q2B4>].

²⁰¹ *Democracy Restoration Act Would Allow Several Million Ex-Felons to Vote in Federal Elections*, GOVTRACK.US (May 11, 2016), <https://govtrackinsider.com/democracy-restoration-act-would-allow-several-million-ex-felons-to-vote-in-federal-elections-226d061de2bc> [<https://perma.cc/VUN2-J4MR>].

²⁰² *Id.* Note that these arguments closely track arguments against granting Washington D.C. statehood.

²⁰³ See *supra* notes 81–88 and the accompanying text.

Virginia's political efficacy and bipartisanship, and they did not resolve the systematic racism inherent in felon disenfranchisement. A better solution would be the passage of the federal Democracy Restoration Act. Looking forward, this Note contemplates the future of felon disenfranchisement reform upon the national stage. Given the nation's willingness to achieve reform—for example, Florida's November 2018 passage of major felon re-enfranchisement via constitutional amendment—the author anticipates that broad reform is upon the horizon and with it the final death rattle of Jim Crow.