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Dilution of the Black Vote: Revisiting the Oppressive Methods of Voting Rights Restoration for Ex-Felons

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Dilution of the Black Vote: Revisiting the Oppressive Methods of Voting Rights Restoration for Ex-Felons

Tara A. Jackson

“[A] nation that is afraid to let its people judge the truth and falsehood in an open market is a nation that is afraid of its people.”

– John F. Kennedy¹

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¹ John F. Kennedy, *Remarks on the 20th Anniversary of the Voice of America, 26 February 1962* (Feb. 26, 1962), http://archive2.jfklibrary.org/JFKWHA/1962/JFKWHA-075-005/JFKWHA-075-005-AUdctm_pm_81156201.mp3.

I. INTRODUCTION

In the midst of election season, as we are bombarded with constant updates on political propaganda, and cynical and analytical commentary on those vying for the title of 45th President of the United States of America, many are blissfully ignorant of the fact that a large number of African Americans have been muted in the democratic process.

The right to vote, “[t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless . . . is regarded as a fundamental political right, because [it preserves] all rights.”² This ability to cast a ballot and have a say in the political process is one that African Americans have fought, bled and died for.³ However, many ex-felons have essentially lost the right to vote because felon disenfranchisement laws have stripped them of this right.

Since the early 1970s, the nation’s prison population has quadrupled to 2.2 million, making it the world’s biggest.⁴ That is five to ten times the incarceration rate in other democracies.⁵ This in itself, though alarming, is not a hard pill for many to swallow. However, coupled with the fact there are many institutional structures in American Society that ensure a steady flow of African Americans into the prison system, there is cause for concern.

African Americans make up a large percent of the prison population, and not only are they faced with racial disparities in the federal sentencing guidelines,⁶ but upon release they stand on shaky ground when it comes to exercising their political power by voting. Sentencing, though not racially neutral, is an adequate means of punishing felons for the crimes they have committed. This paper aims to highlight the impact of ex-felon disenfranchisement laws on the political power of African Americans, debunk the myths justifying such laws, and propose a

² Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

³ See Keesha M. Middlemass, *The Need To Resurrect Section 5 Of The Voting Rights Act Of 1965*, 28 J. CIV. RTS. & ECON. DEV. 61, 102 (2015). “Black voters had to fight to the death for their voting rights under an umbrella that they were illegitimate voters based on their skin color.” *Id.*

⁴ See THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (Jeremy Travis et al. eds, 2014).

⁵ *Id.* at 2.

⁶ See Tushar Kansal, *Racial Disparity in Sentencing: A Review of the Literature* (2005), <https://www.opensocietyfoundations.org/sites/default/files/disparity.pdf>.

solution that will not “over punish” ex-felons or subject them to arbitrary classification as second class citizens.

Part II of this paper will briefly discuss the history of black voting rights and methods of black voter suppression as well as the nexus between the school to prison pipeline, the number of blacks that are currently incarcerated, and the difficulty faced by ex-felons to reinstate their voting rights. Part III will discuss felon disenfranchisement in Florida, Iowa and Kentucky as well as the severely restrictive measures adopted by each state for voter reinstatement and how this disproportionately impacts African American political power.

There is a great deal of scholarship supporting the reinstatement of ex-felon voting rights as a means of rehabilitation and as such, Part IV will propose a national uniform system that automatically reinstates voting rights for ex-felons after completion of their sentences, discuss a sliding scale approach that makes federal intervention constitutional and Eight and Fourteenth Amendment justifications for federal government intervention. Part IV will also present arguments for reconsidering the current precedence that would present roadblocks for invalidating felon disenfranchisement laws. Part V will conclude by showing how ex-felon disenfranchisement laws represent a badge of slavery, reiterate the importance of voting rights as a function of citizenry, and the need to eliminate hurdles that prohibit the exercising of political will of the black community.

II. WE CAME, WE MARCHED, BUT HAVE WE CONQUERED?

A. *Return for Repackaging: Tools for Voter Suppression.*

To fully understand the implications of ex-felon disenfranchisement on black voting power, we must take a few steps back in time. From its inception, the franchise of voting in America was limited to white male property owners.⁷ It was in 1869 that the African American man got his right to vote through the passage of the Fifteen Amendment, which guaranteed the right to vote to all male citizens regardless of “race, color or previous condition of servitude.”⁸ Less than thirty years later, creative devices such as grandfather clauses, literacy tests and poll taxes began to surface. These ‘laws’ were specifically designed and used to suppress the black vote.

⁷ DANIEL H. LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 26 (5th ed. 2012).

⁸ U.S. CONST. amend. XV, § 1.

The Supreme Court made attempts to guard the black vote on occasion. In *Guinn v. United States* for instance, grandfather clauses in the constitutions of Maryland and Oklahoma were deemed unconstitutional because they were repugnant to the Fifteenth Amendment.⁹ However, each time the Supreme Court invalidated those discriminatory laws, states continued to develop new, seemingly race-neutral methods of black voter suppression to ensure that black political power remained diluted. The Supreme Court's zealotry faded in 1937 when the Court deemed Georgia's poll taxes constitutional in *Breedlove v. Suttles*¹⁰, which remained good law until *Harper v. Virginia State Bd. Of Elections*¹¹ in 1966, after the passage of the Civil Rights Act and the Voting Rights Act.

B. *Selma: Voting Rights for All.*

The infamous march from Selma to Montgomery, Alabama in 1965 is seen as one of the most critical campaigns in the quest for meaningful voting rights for blacks. Participants in the peaceful march for voting rights were met with tear gas, whips and nightsticks when they refused to turn back. These efforts of black activism, and the outrage at how protesters were being treated, led to the passage of the Voting Rights Act of 1965, which prohibited any election practice that denied the right to vote to citizens on the basis of race.¹² It essentially forced jurisdictions with histories of voter discrimination to submit any changes to its election laws to the government for federal approval prior to taking effect.¹³ Unfortunately, this was not the end of black voter suppression.

Provisions of the Voting Rights Act were constantly extended and amended to deal with new injustices as they arose. Notably, in *Mobile v. Bolden*,¹⁴ the Supreme Court read the Fourteenth and Fifteenth Amendments, and the Voting Rights Act very narrowly, requiring discriminatory intent to be established before a voting practice could be deemed a violation. In response to this narrow reading, in 1982, the amendments to the Voting Rights Act overturned this ruling, noting that it was not necessary to establish discriminatory intent.

History shows that the black vote has continuously been suppressed through creative mechanisms designed to circumvent anti-discrimination laws, and accordingly, any mechanism that disproportionately affects

⁹ See *Guinn v. United States*, 238 U.S. 347 (1915).

¹⁰ *Breedlove v. Suttles*, 302 U.S. 277 (1937).

¹¹ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

¹² Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

¹³ *Id.*

¹⁴ *Mobile v. Bolden*, 446 U.S. 55 (1980).

black voting power must be met with the utmost suspicion. With each amendment to the Voting Rights Act ending prior injustices, it is not expected that more modern forms of black voter suppression will manifest themselves as blatantly as they would have prior to the march in Selma. However, the systematic forces that result in mass black voter suppression remain alive and well.

C. Ex-Felon Disenfranchisement: Same Product, Different Packaging.

In 1974, the Supreme Court presented states with a new opportunity to suppress the black vote when the Court in *Richardson v. Ramirez* held that it was constitutional for states to deny convicted felons the right to vote.¹⁵ At first glance this ruling may seem racially neutral, but there are many institutional structures in place that ensure a steady inflow of blacks to prison, and therefore, ex-felon disenfranchisement laws must be examined closely.

The School to Prison Pipeline¹⁶ is one such structure, which is known to disproportionately impact students of color. By prioritizing incarceration over education, many schools serving predominantly black communities have zero-tolerance policies that do not allow students the ‘luxury’ of a trip to the principal’s office as a response to undesirable behavior. For black students, violating school rules can easily land them in prison. The “historical inequalities in the education system—segregated education, concentrated poverty, and longstanding stereotypes—influence how school officials and law enforcement both label children and treat students who present challenging behavior.”¹⁷ A 2014 report from Department of Education Office for Civil Rights showed that school administrators expelled, and law enforcement arrested, African American students in startlingly disproportionate numbers compared to white students.¹⁸ These students who are unnecessarily forced out of school become stigmatized and as a result,

¹⁵ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

¹⁶ “The ‘school-to-prison pipeline’ refers to the policies and practices that push our nation’s schoolchildren, especially our most at-risk children, out of classrooms and into the juvenile and criminal justice systems.” What Is The School-To-Prison Pipeline?, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/racial-justice/what-school-prison-pipeline> (last visited Dec. 15, 2015).

¹⁷ *School to Prison Pipeline*, NAACP LEGAL DEF. & EDUC. FUND, <http://www.naacpldf.org/case/school-prison-pipeline> (last visited Dec. 12, 2015).

¹⁸ U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> (noting that Black students are suspended and expelled at a rate three times greater than white students).

frequently fall behind in their academics, drop out of school and/or resort to committing crimes in their communities.¹⁹

On that note, it is no surprise that black men are incarcerated at a much higher rate than any other race in America. Although mass incarceration can be attributed to public policy, it is institutionalized racism that ensured the sustenance of these policies over time. As of 2012, one in seven African Americans were disenfranchised by felony convictions and in five states more than twenty percent of blacks could not vote because of their criminal records.²⁰ In a stark comparison with times long gone, it was noted that in 2012, more African American men were “in the grip of the criminal-justice system - in prison, on probation, or on parole - than were in slavery.”²¹ More recently, in 2014, it was again noted that black males had higher imprisonment rates than prisoners of other races or Hispanic origin within every age group. Imprisonment rates for black males were 3.8 to 10.5 times greater at each age group than white males and 1.4 to 3.1 times greater than rates for Hispanic males.²² With these details in mind, the race neutral façade of the ex-felon disenfranchisement laws is exposed. The issue of mass incarceration began to raise cause for concern in the 1970s, around the same time period of *Richardson v. Ramirez*, but is far worse now than ever.²³ The fact that there is overrepresentation of blacks in the prison population is no accident, and “felon disenfranchisement laws, which trace back to the post-Reconstruction era when former Confederates and white Southern Democrats rolled back the political gains made by free slaves after the war”²⁴, have been conveniently manipulated to constantly dilute the black vote.

If one needs further evidence of the disproportionate impact that ex-felon disenfranchisement laws have on the black vote, a quick

¹⁹ Carla Amurao, *Fact Sheet: How Bad Is the School-to-Prison Pipeline?*, PBS, <http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/school-to-prison-pipeline-fact-sheet/> (last updated Mar. 28, 2013).

²⁰ George Lipsitz, *In an Avalanche Every Snowflake Pleads Not Guilty: The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights*, 59 UCLA L. REV. 1746, 1783 (2012).

²¹ Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america?currentPage=all>.

²² BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 15 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

²³ See Editorial, *End Mass Incarceration Now*, N.Y. TIMES (May 24, 2014), http://www.nytimes.com/2014/05/25/opinion/sunday/end-mass-incarceration-now.html?_r=0.

²⁴ See Janelle Bouie, *The Ex-Con Factor*, THE AM. PROSPECT (Aug. 20, 2013), <http://prospect.org/article/ex-con-factor>.

comparison to prior suppression mechanisms is useful. Literacy tests, like the current felon disenfranchisement laws, were initially regarded race neutral. However, the method of application and disproportionate impact on black voting power lead to the abolition of literacy tests. In one article, it was noted that felon disenfranchisement laws mirror the discriminatory nature of literacy tests in two significant ways: (1) they each depend on racial discrimination in other relevant areas of American society to produce a racially disparate impact, and (2) the racial bias associated with the discretionary implementation of each regulation serves to exclude minorities, particularly African Americans, from the political process.²⁵ In recognition of the fact that some whites would inevitably fail the literacy tests, grandfather clauses were created, essentially permitting anyone who could vote on January 1, 1867, and his sons and grandsons, to continue to vote without passing the required literacy test. One may confidently infer that the invention of the grandfather clause shows that literacy tests were meant to be a catchall for blacks because it essentially allowed those whites that could potentially be deemed 'illiterate' to still participate in the democratic process because of their lineage. Clearly, blacks were unable to take advantage of the grandfather clauses because they were unable to vote until 1869, two years after the grandfather clause cut off.

Also, the felon disenfranchisement laws also bare stark similarity to the poll taxes, which were utilized to filter out black voters from the political process. Although also viewed as a race neutral measure, operationally it excluded a large number of black voters because many were unable to pay the tax levied due to financial constraints. Essentially, most blacks were excluded from the democratic process based on their economic circumstances. Felon disenfranchisement is similar in that it also excludes a large number of blacks from the democratic process because of their incarceration, the result of the institutional racist mechanisms such as over prosecution and disproportionately harsher sentencing for crimes compared to their white counterparts. However, the passage of the Twenty-fourth Amendment prevented states from continuing to use poll taxes to exclude blacks from the ballot.²⁶

One common misconception is that the Voting Rights Act of 1965 coupled with the Fourteenth and Fifteenth Amendments completely dismantled all the voting restrictions of the Jim Crow era, but felony disenfranchisement is arguably the last remaining strand of the web of laws carefully crafted to keep blacks from the ballot that remains

²⁵ Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 614 (2004).

²⁶ U.S. CONST. amend. XXIV, § 1 (addressing right to vote without poll tax).

unscathed by the Voting Rights Act.²⁷ Recently, in *Shelby County v. Holder*, the Supreme Court essentially struck down key provisions in the Voting Rights Act and urged Congress to pass legislation that reflects the current conditions in America.²⁸ One article perfectly encapsulated the gravity of this holding, noting

“The voting rights that were fought for in the events of “Selma” are today under attack from state governments across the country . . . whether through simple gerrymandering, the intimidations of stringent voter-I.D. requirements . . . or the simple calculated scarcity of polling places . . . and even from the grossly disproportionate rate of incarceration, where felony convictions often result in disenfranchisement.”²⁹

This holding gives us a glimpse of the Supreme Court’s indifference towards the impact that certain voting rights laws have on the black community. A look back at the history books will reveal the true motives of passing felony disenfranchisement laws. In Florida, while granting suffrage to black citizens in 1868 with its rewritten constitution, the state simultaneously disenfranchised many of its new citizens by restricting all felons from voting for life.³⁰ In Mississippi, disenfranchisement laws were modified to apply only to those convicted of certain petty crimes considered to be far more prevalent among black offenders than white.³¹ Today’s version of felony disenfranchisement, although not as narrowly tailored, “still disproportionately affects black citizens, diluting the power of the collective black vote in elections, and thus [still] explicitly fulfill[s] the legacy of the Jim Crow era.”³²

Over-policing of black neighborhoods, mass incarceration of blacks and the school to prison pipeline that remains entrenched in black communities represent some of the current ‘conditions’ that need to be remedied, but the majority in *Shelby County v. Holder* casually dismissed the effects of these realities when deeming the Voting Rights Act as ‘outdated.’ However, with the state of the Supreme Court in flux due to

²⁷ See Elizabeth Simson, *Justice Denied: How Felony Disenfranchisement Laws Undermine American Democracy*, AM. FOR DEMOCRATIC ACTION FUND 16 (2002), <http://www.adaction.org/media/lizfullpaper.pdf>.

²⁸ See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (noting “Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”).

²⁹ Richard Brody, *The Crucial Lessons of Democracy in “Selma”*, THE NEW YORKER (Dec. 29, 2014), <http://www.newyorker.com/culture/richard-brody/crucial-lessons-democracy-selma>.

³⁰ See Simson, *supra* note 27.

³¹ *Id.*

³² *Id.*

the sudden passing of the esteemed Justice Scalia,³³ the attitude of the Court may very well shift with the appointment of a less conservative successor. The decision in *Shelby County v. Holder*, was 5-4 and the dissenting justices had no reservations when stating their vehement opposition, noting that while the majority acknowledged that voting discrimination still existed, it “terminates the remedy that proved to be best suited to block that discrimination.”³⁴ Also, in response to the majority’s call for more modern legislation, the dissent highlighted that Congress, recognizing the progress that the Voting Rights Act has facilitated but noting that discrimination still pervaded the democratic process, decided that section 5 of the Voting Rights Act should continue in force.³⁵ It appears that the dissent had a view that was more focused on the current state of American society than the majority, so it is not farfetched to assume that the new makeup of the Court is likely to become more receptive to the arguments being proposed in this note.

III. THE ROCKY ROAD TO REINSTATEMENT

Mercedes Harris was a young ex-Marine who was arrested in 1990 for drug possession in Virginia at the age of twenty-seven.³⁶ In prison, he earned his GED and upon release in 2003, he found a job and started to rebuild his life.³⁷ He recounted that one especially difficult obstacle for him was that he could no longer vote.³⁸ He noted, “It was important to [him] to have a place in this democracy, and to have a say, too.”³⁹ With that he began the voting rights restoration process, which for him, lasted for four years.⁴⁰ Thankfully, he was persistent enough to see it through.

In 2014, then Attorney General Eric Holder pleaded with states to remove the restrictions on voting rights for ex-felons.⁴¹ The approach to ex-felon disenfranchisement varies tremendously from state to state. In some states, most ex-felons gain an automatic right to vote after completing their sentence. In others states, ex-felons have a waiting

³³ See, e.g., Brett Kendall, *Scalia’s Absence Shifts Dynamic of Supreme Court*, WALL ST. J. (Feb. 14, 2016, 12:27 AM), <http://www.wsj.com/articles/scalias-absence-shifts-dynamics-of-supreme-court-1455419151>.

³⁴ See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting).

³⁵ *Id.* at 2632-33.

³⁶ Bouie, *supra* note 24.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Eric Holder, *Remarks on Criminal Justice Reform*, U.S. DEP’T OF JUSTICE (Feb. 11, 2016), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarkson-criminal-justice-reform-georgetown>.

period before their voting rights can be restored. The most extreme states require ex-felons to go through an application process to have their rights restored. Even in the most lenient states, where voting rights are automatically restored, inconsistent communication, lack of information, massive backlogs and complicated paperwork can make the restoration process an overwhelming one.

A. Florida

On numerous occasions, Florida has been called the harshest state in relation to ex-felon disenfranchisement laws. It is important to highlight that statistics reported in 2010 noted that African Americans comprise half of the state's prison population, but represent only fifteen percent of the state's overall population.⁴² Under the Florida Constitution, a convicted felon **cannot vote, serve on a jury, or hold public office** until civil rights have been restored.⁴³ Additionally, the state requires ex-felons to wait five years after completing their sentences before applying for restoration of rights without a hearing, and seven years for applications requiring a hearing. Assuming an ex-felon waits the requisite time, navigates through the complicated application process, and finally makes it to a hearing, he bears the burden of proving that he has become a "good citizen". If he does the right things, says the right things and becomes a pillar in his community, he still runs the risk of having his restoration application arbitrarily denied, without any reason.

To understand how real the impact of these laws are on the democratic process and more specifically, black voting power, we can look back at the November 2000 presidential election. Florida's felony disenfranchisement laws at that time excluded 600,000 ex-felons from participating in the electoral process. Many of these "ex-felons" were in fact mistakenly identified as such and banned from voting.⁴⁴ This was due to a profoundly flawed purge process plagued by false positives.⁴⁵ A study that estimated voter turnout and party preferences for felons and ex-felons showed that, from 1972 to 2000, around thirty-five percent of

⁴² *Inmate Population, FLA. DEP'T OF CORR.*, http://www.dc.state.fl.us/pub/annual/0910/stats/im_pop.html (last visited Dec. 18, 2015).

⁴³ FLA. CONST. art. VI, § 4.

⁴⁴ See Marc Mauer, *Disenfranchising Felons Hurts Entire Communities*, JOINT CTR. FOR POLITICAL AND ECON. STUDIES 6 (May/June 2004), http://www.sentencingproject.org/doc/publications/fd_focus.pdf.

⁴⁵ See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1158-59 (2004) ("For example, persons were removed because their names resembled those of convicted felons, or despite the fact that their convictions did not trigger disenfranchisement under Florida law, or even though their voting rights had been restored.").

disenfranchised felons would have voted, and on average seventy-seven percent of felon voters would have voted Democratic.⁴⁶ Professor Uggen's data also asserted that, "approximately 10.5% of voting age African Americans . . . in Florida are disenfranchised as ex-felons, as compared to 4.4% of the non-African American population."⁴⁷ These statistics clearly demonstrate that disenfranchisement laws are most lethal to the African America community.

B. Iowa

According to the Iowa Constitution, "no idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector."⁴⁸ The State defines an infamous crime as "a crime that may be punishable by imprisonment in a penitentiary for a period of one year or more" and is not limited to felonies but "may include aggravated misdemeanors."⁴⁹ In order for an individual to have his voting rights restored, he must submit a streamlined application, a signed release, documentation verifying payments of court costs, fines and restitution and his Iowa criminal history record.⁵⁰ Although Governor Terry Branstad simplified the application's instructions, removed the credit check, and eliminated the requirement to fully pay off all restitution, fines, and court costs before applying for voting rights restoration, the process remains laborious.

The ACLU challenged Iowa's felon-voting laws, noting, "[t]he widespread denial of voting rights on the basis of a felony conviction is the single biggest denial of civil rights in Iowa. It has kept thousands of Iowans from voting."⁵¹ Additionally, before these restrictive laws were adopted, an earlier policy allowed Iowa offenders automatically regain their voting rights when they left state supervision.⁵² Unsurprisingly, this

⁴⁶ Christopher Uggen & Jeff Manza, *Democratic Contraction?: Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792-93 (2002).

⁴⁷ Karlan, *supra* note 45, at 1157.

⁴⁸ IOWA CONST. art. II, § 5.

⁴⁹ CITIZENSHIP RIGHTS FAQs, OFFICE OF THE GOVERNOR OF IOWA (Feb. 22, 2013), <https://governor.iowa.gov/sites/default/files/documents/Citizenship-Rights-FAQ.pdf>.

⁵⁰ *Id.*

⁵¹ Ryan J. Foley, *ACLU files lawsuit challenging Iowa felon-voting laws*, THE DES MOINES REGISTER (Nov. 8, 2014), <http://www.desmoinesregister.com/story/news/crime-and-courts/2014/11/07/aclu-lawsuit-iowa-xfelon-voting-law/18654785/>.

⁵² When Governor Terry Branstad took office in Iowa in January 2011, he rescinded Executive Order 42 that had restored voting rights to Iowa citizens who had completed their sentences. See Rod Boshart, *Branstad Rescinds Labor, Voting Orders*, SIOUX CITY J. (Jan. 15, 2011), http://siouxcityjournal.com/news/state-and-regional/iowa/branstad-rescinds-labor-voting-orders/article_af6e450c-b77f-5026-935b-b055d42cc167.html.

drastic policy change created confusion, which ultimately led to many perjury charges for ex-felon who casted ballots believing they were able to vote.⁵³ Iowa, like Florida, is considered one of the harsher states with regards to felon disenfranchisement, and ex-felons in both states have had considerable confusion when attempting to navigate the road to reinstatement. It is safe to say that the various state structures in place for reinstatement of voting rights for ex-felons are so convoluted that many simply opt out of the reinstatement process altogether. Those who decide to walk the rocky road to reinstatement do so with the hope that they will be given fair treatment, but of course, if such is not the case, their only recourse is to try and try again, as most states do not have safeguards to prevent arbitrary denial of petitions to restore voting rights.

C. *Kentucky*

Kentucky is another state that permanently disenfranchises ex-felons from voting. It is estimated that 243,842 Kentuckians with felony convictions were barred from voting in 2010 and of those, 180,984 had already completed their sentences.⁵⁴ Under the state constitution, former felons have to petition the governor in order to have their voting rights restored. The process for doing so is a very tricky and lengthy one, and doesn't guarantee a result, partly because each governor sets up his own procedure during his or her tenure. In 2014, as a substitute for automatic restoration, a Kentucky constitutional amendment that would restore most felons' voting rights after a five-year waiting period passed in the senate.⁵⁵

However, the status of felon disenfranchisement in the state appears to have been in flux since then. Interestingly, the state's current and previous governors appear to disagree on the issue of whether felon disenfranchisement is beneficial for the state.

Steve Beshear, who was the Governor of Kentucky until late 2015, set up a process for restoration of voting rights for ex-felons shortly

⁵³ See Foley, *supra* note 51 (One such person, stay-at-home mother Kelli Jo Griffin, was the plaintiff in the 2014 ACLU lawsuit challenging Iowa's felon voting laws).

⁵⁴ *Background information on restoration of voting rights in Kentucky*, KENTUCKIANS FOR THE COMMONWEALTH (2013), https://www.kftc.org/sites/default/files/docs/resources/background_information_on_voting_rights_in_ky.pdf.

⁵⁵ Sam Youngman, *Bill restoring felons' voting rights passes Senate with five-year waiting period*, LEXINGTON HERALD LEADER (Feb. 19, 2014), <http://www.kentucky.com/2014/02/19/3097375/senate-panel-okays-amendment-to.html#storylink=cpy>.

before he departed office.⁵⁶ This step in the right direction was quickly undone by his successor, Matt Bevin, who believed that the issue of restoration of voting rights would be better addressed through the legislature.⁵⁷ It is obvious that political friction has resulted in these inconsistencies and sadly, ex-felons attempting to navigate the path to reinstatement are left at the whim of each new governor. Like all other states that disenfranchise felons, Kentucky's policy disproportionately impacts blacks. It is estimated that one in five African Americans in Kentucky are disenfranchised, compared to one in thirteen nationally.⁵⁸ Essentially black voting power is more diluted in Kentucky than it is nationwide. Also, noteworthy is the fact that Kentucky has the second highest African American disenfranchisement rate in the country.⁵⁹ Currently, in order for an ex-felon to have his or her voting rights restored in Kentucky, the individual must fill out a form⁶⁰ requesting voting rights restoration through the Governor's executive pardoning power. While this form itself is not as cumbersome to complete, the inconsistencies regarding the process for voting rights restoration is cause for concern.

IV. THE CASE FOR AUTOMATIC RESTORATION OF VOTING RIGHTS

“Without a vote, I am a ghost inhabiting a citizen's space . . . “

⁵⁶ *Kentucky Governor Creates New Process to Help Restore Voting Rights to 170,000 Citizens*, BRENNAN CTR. FOR JUST. (Nov. 24, 2015), <https://www.brennancenter.org/press-release/kentucky-governor-creates-new-process-help-restore-voting-rights-170000-citizens> [hereinafter *170,000 Citizens*].

⁵⁷ *Voting Rights Restoration Efforts in Kentucky*, BRENNAN CTR. FOR JUST. (Dec. 24, 2015), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-kentucky>.

⁵⁸ *170,000 Citizens*, *supra* note 56.

⁵⁹ *Felony Disenfranchisement in Kentucky*, AM. CIV. LIBERTIES UNION OF KY., http://innovise.me:8080/aclu/wp-content/uploads/2013/10/hb_70_handout-for-new-website.pdf (last visited Jan. 4, 2016).

⁶⁰ See Civil Rights Application, KY. DEP'T OF CORRECTIONS (2015), <http://corrections.ky.gov/communityinfo/Documents/Civil%20Rights/Civil%20Rights%20Application%20Rev%2011-25-2015.pdf> (It is apparent that keeping ex-felon rights restoration information is not high on the State's list of priorities because at the time of writing this article, the form that is widely available for ex-felons to complete for restoring voting rights was still not updated with information reflecting the reversal of the Governor B's executive order.)

– Joe Loya, disenfranchised ex-felon.⁶¹

A. IS FELON DISENFRANCHISEMENT WARRANTED?

Based on the statistics presented thus far, it is evident that a very large percent of the black population is funneled through the criminal justice system, and, as a result, temporarily or permanently lose their political power. Some of the earliest felon disenfranchisement laws rest on the Lockean theory that those who break the social contract should not be allowed to participate in the society's rule making process.⁶² This social contract theory rests on the premise that all persons who break the 'social contract' are convicted, and, simply put, that is false. What remains true, however, is the fact that without any voice in the political process, these ex-felons will essentially be demoted to 'second class citizens' and are more likely to reoffend.⁶³ Further, if we are to stay true to the social contract theory, in the purest sense, we must content with the notion that obligations are conditioned on benefits. To follow the social contract theory would mean that those who "break the contract" would, in addition to losing access to certain benefits, be free of some obligations to society. Such an inference would clearly lead to havoc so social contract theory as a justification for felon disenfranchisement is inherently flawed.

There is no convincing explanation as to how allowing felons to vote disrupts imprisonment, nor is there any solid argument for how stripping an ex-felon of his right to vote furthers the goal of criminal rehabilitation. To the contrary, disenfranchisement shows how far away the American justice system has drifted from its focus on rehabilitation. Proponents of these disenfranchisement laws sometimes argue that making ex-felons go through a process to restore these rights will decrease recidivism. Yet, the shortfalls of the restoration process often lead ex-felons to abandon the process altogether. "Research indicates that re-enfranchising ex-felons cuts the rate of recidivism by at least ten percent, which could save and reroute millions of dollars a year toward education or other useful purposes."⁶⁴

Roger Clegg, a proponent of felon disenfranchisement, argues that two characteristics – trustworthiness and loyalty – are required in order

⁶¹ Christine Thompson, *Losing the Vote*, PRISON ISSUES (1999).

⁶² See *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967); see also *Wesley v. Collins*, 605 F. Supp. 802 (M.D. Tenn. 1985).

⁶³ See Susan Greenbaum, *Restore voting rights to ex-felons*, ALJAZEERA AM. (Feb. 24, 2014), <http://america.aljazeera.com/opinions/2014/2/voting-rights-felondisenfranchisementericholdercriminaljustice.html>.

⁶⁴ *Id.*

to vote.⁶⁵ However, not much creativity is needed to refute this claim. One federal statute unmistakably runs counter to Clegg's theory in that it prohibits denying citizens the right to vote because they fail to demonstrate that they "possess good moral character."⁶⁶ This federal statute clearly recognizes Isaiah Berlin's notion of "the crooked timber of humanity" which suggests that no individual is either wholly moral or immoral,⁶⁷ and as such proving morality should never be required for one to participate in the democratic process.

One other argument for the constitutionality of these disenfranchisement laws is the "purity of the ballot box" rationale, that is, a state's interest "in preserving the integrity of [its] electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims."⁶⁸ However, this argument fails to consider the disproportionate treatment that blacks get as opposed to their white counterparts for the same "anti-social behavior." Martin Luther King correctly recognized the effects of denying blacks the right to vote noting, "the denial of the vote not only deprives the Negro of his constitutional rights - but what is even worse - it degrades him as a human being."⁶⁹ The purity of the ballot box argument perpetuates the blaming and shaming of blacks, which has historically proved to be an effective means for white supremacists to preserve their racial privileges without referring directly to race, and to disguise discrimination as family protection and moral uplift.⁷⁰

It is my submission that continued disenfranchisement serves no purpose other than to over-punish ex-felons. These people have already been through the judicial process, which punished them in a manner deemed appropriate based on the crime that was committed. They have paid their debt to society and as such, rehabilitation and assimilation back into the community upon release are the goals that should be furthered instead of permanently inking them with the "stain of prior imprisonment." Additionally, since disenfranchisement is not conferred by a judge as part of the sentencing process, it unfairly penalizes all convicted felons without regard to the severity of their offenses or any mitigating facts brought out in their trials. Simply put, felon

⁶⁵ Roger Clegg, *Who Should Vote?*, 6 TEX. REV OF L. & POL'Y. 159, 174 (2001).

⁶⁶ 52 U.S.C. § 10501(b) (3) (2012).

⁶⁷ See ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* (Henry Hardy ed., 2nd ed. 2013).

⁶⁸ Alice T. Harvey, Comment, *Ex-Felon Disenfranchisement and Its Influence On The Black Vote: The Need For A Second Look*, 142 U. PA. L. REV. 1145, 1162-63 (1994).

⁶⁹ DR. MARTIN LUTHER KING, JR. ET AL., *THE PAPERS OF MARTIN LUTHER KING, JR.: THRESHOLD OF A NEW DECADE, JANUARY 1959-DECEMBER 1960* 188 (2005).

⁷⁰ Lipsitz, *supra* note 20.

disenfranchisement laws have no place in modern American society and as Justice Thurgood Marshall noted, disenfranchisement “doubtless has been brought forward into modern statutes without fully realizing the effect of its literal significance or the extent of its infringement upon the spirit of our system of government.”⁷¹

B. Legal Challenges: Tried and Failed.

While there have been numerous legal challenges to felony disenfranchisement laws in the United States, most have been unsuccessful because courts have declined to apply the same legal principles regarding the fundamental right to vote to ex-felons. In an attempt to get any form of justice, some claims have even been brought regarding the misapplication of these disenfranchisement laws, vagueness in defining which crimes are disenfranchising, and the racial inequities inherent in the criminal justice system that result in minorities being disproportionately disenfranchised. It is evident, however, that any attempt to reshape felon disenfranchisement statutes at a federal level must surpass significant hurdles before they are even given serious consideration.

Currently, in order to prevail under the Equal Protection Clause, “plaintiffs must make two showings.⁷² They must first show that the voting law has a disproportionate impact and then demonstrate that discriminatory intent was a substantial or motivating factor in its enactment.”⁷³ However, the requirement to prove discriminatory intent unfairly places the burden on the victims to obtain information that oppressors will not likely provide them with. To prevent victims from successfully challenging these laws, lawmakers only need a facially neutral reason, such as the purity of the ballot argument, to pass muster.

We live in a world where the concentrated poverty in Black and Latino neighborhoods has essentially been criminalized. Persistent surveillance, over-policing and prosecution of what are essentially crimes of condition rather than crimes of conduct also function in concert to create a new category of people of color whose rights can be restricted or disposed of completely without having to acknowledge any racist intent.⁷⁴ Therefore, in the interest of fairness, in determining whether such laws are contrary to the equal protection clause, it is the racially

⁷¹ Richardson v. Ramirez, 418 U.S. 24, 86 (Marshall, J., dissenting) (quoting Byers v. Sun Savings Bank, 139 P. 948 (Okla. 1914)).

⁷² Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 90 (2004).

⁷³ *Id.*

⁷⁴ *Id.*

discriminatory impact, not intent, that should be the central focus in analysis.

The Voting Rights Act, recognized and addressed this issue in its 1982 amendment stating, “no voting qualification . . . or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color.”⁷⁵ With renewed confidence that the legislature’s clarity could not be misinterpreted, challenges to felon disenfranchisement laws resurfaced. In *Wesley v. Collins*, the court, after noting a history of discrimination with continuing present-day effects, held that other social and political factors, such as the state’s legitimate purpose for enacting the statute, led to the conclusion that there was no violation of the VRA.⁷⁶ And so, courts continued to chip away at the VRA.⁷⁷ More recently, as discussed in Part II.C the Court in *Shelby County v. Holder* signaled its discontent with the VRA, and encouraged Congress to make it “up to date.” This note proposes that states should be mandated to automatically reinstate ex-felon voting rights after their sentences have been served. Because of the racially disproportionate impact that felon disenfranchisement laws have on the exercise of Black political power, the federal government should intervene to create a uniform system for automatic restoration of voting rights for ex-felons. This should be a key consideration in the updating of the Voting Rights Act.

C. *Revisiting the Idea of Federal Intervention*

While there have been many unsuccessful attempts to invalidate disenfranchisement laws on constitutional grounds, the continued dilution of black political power will only ensure the preservation of

⁷⁵ 52 U.S.C. § 10301(a) (2012).

⁷⁶ See *Wesley v. Collins*, 791 F.2d 1255, 1261-62 (6th Cir. 1986).

⁷⁷ See *Simmons v. Galvin*, 575 F.3d 24, 26, 35 (1st Cir. 2009) (holding that Congress exempted felon disenfranchisement from reach of § 2) (“We agree with the Second Circuit that the language of § 2(a) is both broad and ambiguous and that judicial interpretation of a claim concerning felon disenfranchisement under the VRA may not be limited to the text of § (2)(a) alone”), *cert. denied*, 131 S. Ct. 412 (2010). See also *Hayden v. Pataki*, 449 F.3d 305, 315-16 (2d Cir. 2006) (listing reasons to conclude that Congress did not intend to include felon disenfranchisement provisions within coverage of VRA). See also *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (per curiam) (requiring proof of intentional discrimination) Here, noting long history of felon disenfranchisement, legislative history, affirmative sanction of Fourteenth Amendment, and safeguards of criminal justice system, the Ninth Circuit improperly ignored both the plain language of the Act and established Supreme Court precedent in requiring discriminatory intent to succeed on such a claim.

institutional racism.⁷⁸ Arguments supporting felon disenfranchisement laws must be reconsidered in the context of the mass incarceration that has taken place in the last few decades.

i. The Fourteenth Amendment Argument

One theory that describes the states as “laboratories of democracy,” posits that powers reserved for each state, when exercised, can foster a diverse set of laws and those that are most successful will spread across the nation so citizens don’t vote with their feet and move to states with laws that are more aligned with their interests.⁷⁹ Besides the almost commonsensical reality that this theory has not played out as neatly as suggested,⁸⁰ there is yet another issue. Most ex-felons, who have been stripped of their right to vote, are often also legally prohibited from travelling between states.⁸¹ Additionally, they encounter even more confusion about laws and processes of a new state if they decide to move across states. For instance, no state has a systematic mechanism set up to address ex-felon immigration, and scholars have observed that there is “no consensus among indefinite-disenfranchisement states on whether the disqualification is properly confined to the state of conviction, or should be considered in the new state of residence.”⁸² An ex-felon who attempts to weave through this maze of confusion must also contend with some state laws that make fraudulent voter registration a felony.

Although the Supreme Court has not held that felon disenfranchisement is unconstitutional, it has suggested that arguments that felon disenfranchisement laws are outmoded are well founded but

⁷⁸ See Miles, *supra* note 72, at 86-87 (collecting observations on the disproportionality in disenfranchisement).

⁷⁹ See Lynn Eisenberg, Note, *States As Laboratories For Federal Reform: Case Studies In Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 539, 575 (2012).

⁸⁰ Interestingly, applying the states as laboratories theory in the context of felon disenfranchisement would suggest that the “most successful laws” are those that at the very least, allow ex-felons to vote after their post-incarceration parole or probation ends. See *State Felon Voting Laws*, PRO CON (Feb. 9, 2016), <http://felonvoting.procon.org/view.resource.php?resourceID=286> (showing that fourteen states restore voting rights after incarceration and nineteen states restore voting rights after incarceration, parole and probation is completed.).

⁸¹ Eisenberg, *supra* note 79, at 580. (“Under the rules of the Interstate Commission for Adult Offender Supervision (Interstate Compact) regarding transfers of persons on parole or probation, discretionary transfers require the transferring state to provide sufficient documentation to justify a request to transfer and the receiving state has the right to accept or reject such a transfer request.”).

⁸² *Id.* at 581.

are to be addressed by the legislature.⁸³ The Fourteenth Amendment is often resorted to as a means of challenging felon disenfranchisement statutes because, section 2⁸⁴ of the Fourteenth Amendment was originally written with the purpose of discouraging states from disenfranchising their constituents. One author has proposed a sliding scale approach for dealing with VRA challenges to felon disenfranchisement,⁸⁵ much like that taken in *Burdick v. Takushi*.⁸⁶ He proposes that courts consider the totality of the circumstances by combining factors that other courts and scholars currently discuss when addressing felon disenfranchisement challenges. The proposed sliding scale would require plaintiffs to prove three elements: (1) he cannot vote due to the state's disenfranchisement laws, (2) develop a record of statistical data suggesting racial bias in the state criminal justice system, and (3) show that his race faces a bias in the justice systems.⁸⁷

The sliding scale comes into play after the prima facie case is made. "When a plaintiff establishes significant racial bias and the challenged statute is expansive in scope, courts should apply strict scrutiny."⁸⁸ "Conversely, when a plaintiff fails to show significant bias and the law is limited in scope, courts should apply rational basis review to the statute."⁸⁹ "If both the level of racial bias and the scope of the law are moderate, courts should apply intermediate scrutiny."⁹⁰ This sliding scale approach rests on solid ground and also preemptively addresses any potential constitutionality concerns⁹¹ in that it

[E]nables courts to distinguish the legally valid laws from the impermissible laws by focusing on the burden

⁸³ See *Richardson v. Ramirez*, 418 U.S. 24, 55-56 (1974) (holding "that the Supreme Court of California erred in concluding that California may no longer, consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles.").

⁸⁴ See U.S. CONST. amend. XIV, §2..

⁸⁵ See Thomas G. Varnum, *Let's Not Jump To Conclusions: Approaching Felon Disenfranchisement Challenges Under The Voting Rights Act*, 14 MICH. J. RACE & L. 109, 128 (2008).

⁸⁶ *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (instructing courts to weigh character and magnitude of burden, without identifying specific factors). Some courts require significant statistical evidence to show the burden is severe, but many courts seem to determine the severity of the burden instinctively.

⁸⁷ Varnum, *supra*, note 85, at 128-29.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ One such concern was mentioned in *Hayden v. Pataki*, 449 F.3d 305, 326 (2d Cir. 2006) (deciding that, because of explicit approval for felon disenfranchisement statutes in Section 2 of Fourteenth Amendment, VRA would alter federal-state balance if it covered these laws).

imposed on minority voting rights. This distinction enables section 2 of the VRA to parallel the Fourteenth Amendment's minority rights protection, while respecting that Amendment's limited authorization for felon disenfranchisement. Thus, allowing courts to strike specific felon disenfranchisement statutes under the VRA would neither conflict with the Fourteenth Amendment, nor unconstitutionally alter the federal-state balance.⁹²

This approach rests on very solid footing and serious consideration must be given to revisiting the idea of federal intervention to protect the rights of these citizens from continuously being abridged. The sliding scale approach treads delicately so as not to compromise state sovereignty without there being a serious constitutional issue warranting federal intervention.

ii. The Eight Amendment Argument

One other viable option to justify federal intervention that has generated far less attention is that felon disenfranchisement laws are cruel and usual punishment and as such, violate the Eight Amendment. The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments."⁹³ This argument is worthy of far more scholarship because constitutional limits on punishment are more restrictive than limits on regulations, so if it can be proved that felon disenfranchisement laws are punitive, they will be scrutinized under a more demanding set of legal standards. The first hurdle one must overcome when making such a bold assertion is proving that disenfranchisement is indeed punishment. As mentioned before, the social contract theory upon which felon disenfranchisement laws are based rests on the notion that bad actors that break the social contract should be removed from the rule making process. One author discussing felon disenfranchisement noted, "it punishes not only individual citizens, most of whom have otherwise paid their debt to society and reentered the free world, but the communities which bear the brunt of the criminal laws the political system enacts."⁹⁴

However, in *Trop v. Dulles*, Chief Justice Warren classified these laws as a "non penal exercise of the power to regulate the franchise."⁹⁵

⁹² Varnum, *supra*, note 85, at 140.

⁹³ U.S. CONST. amend. VIII.

⁹⁴ Karlan, *supra* note 45, at 1169-70 (concluding felon disenfranchisement is fundamentally punitive).

⁹⁵ *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958).

Interestingly, Chief Justice Warren never gave adequate support for this conclusion and in dealing with the issue of *Trop* he noted, “a statute that prescribes the consequence that will befall one who fails to abide by . . . regulatory provisions is a penal law.”⁹⁶ This seems to directly conflict with his conclusion about disenfranchisement laws simply because the basis of these laws serve no other purpose than to put offenders in the ‘naughty corner’ on voting day until they convince the state that they will behave.

Additionally, the federal statute that bans the use of literacy tests nationwide because such tests served no compelling interest and perpetuated the exclusion of minority citizens, also barred denying the right to vote to citizens who could not establish that they “possess good moral character.”⁹⁷ Moreover, *Trop*’s classification of disenfranchisement as regulatory does not hold up against all the statutes, later decisions and constitutional amendments that have transformed suffrage from being considered a privilege to now becoming a right of adult citizenship.⁹⁸ Consequently, it is my submission that the dicta in *Trop* that currently bars Eighth Amendment claims stands on very shaky ground.⁹⁹

Assuming one is successful in characterizing disenfranchisement as punishment, the second hurdle to overcome is proving that this punishment is in fact cruel and unusual. Innate in the term cruel and unusual is a level of fluidity. As society’s values change, so too will the meaning of cruel and usual punishment because it must be measured against what society deems appropriate punishment. In *Weems v. United States*, the court provided that a state-imposed punishment may not be excessive, but must be “graduated and proportioned to [the] offense.”¹⁰⁰

Given that the level or length of felon disenfranchisement is never lessened or increased based on the severity of a crime or any mitigating factors, some disenfranchised ex-felons who commit less serious crimes

⁹⁶ *Id.* at 97.

⁹⁷ See 52 U.S.C. § 10501 (2012) (providing that citizens cannot be denied the right to vote because of “failure to comply with any test or device” and defining “test or device” to mean “any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class”).

⁹⁸ Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons And The Constitutional No Man’s Land*, 56 SYRACUSE L. REV. 85, 104 (2005).

⁹⁹ See *id.* at 106 (suggesting that courts grant little credence to *Trop*’s statement that the disenfranchisement of felons simply constitutes part and parcel of the states’ broad power to delimit the franchise).

¹⁰⁰ *Weems v. United States*, 217 U.S. 349, 367 (1910).

may have a viable Eighth Amendment claim. First, they may argue that as a form of punishment, disenfranchisement violates the country's current standards of decency.¹⁰¹ Second, petitioners may argue that disenfranchisement is a "grossly disproportionate" punishment for a particular offense.¹⁰²

To support an argument that felon disenfranchisement violates the country's current standards of decency, one can present statistics such as a public opinion poll designed by sociologists from Northwestern University, Indiana University, and the University of Minnesota which suggests that approximately 80% of the American public supports restoration of voting rights for most ex-felons.¹⁰³ While this evidence carries less weight than legislation and judicial precedence, it recognizes the fluidity of the ever-changing concept of cruel and unusual punishment. In proving that disenfranchisement is grossly disproportionate punishment, it is easy to see that "categorical disenfranchisement of all ex-offenders convicted of a felony [that] lumps together crimes of vastly different gravity"¹⁰⁴ is inherently disproportionate for those convicted of less serious offences. Additionally, since, disenfranchisement runs counter to the goals of rehabilitation and deterrence, instead of being categorized as a legitimate means to an end, it can appropriately be deemed cruel.

iii. Obstacles to Overcome

Both the Fourteenth Amendment argument and the Eighth Amendment argument present the Supreme Court with ample support to inquire about and assess the constitutionality of each state's disenfranchisement laws. In reviving these arguments, it is my hope that these laws will continue to be challenged with both arguments so the Court can reassess its stance on the issue. Fairness, integrity and democracy demand it. It must be noted that the doctrine of stare decisis¹⁰⁵ mandates that for these and any other arguments challenging felon disenfranchisement laws, they must contend with the Supreme Court's decisions in *Richardson v. Ramirez* and *Trop v Dulles*. The

¹⁰¹ Wilkins, *supra* note 98, at 137.

¹⁰² *Id.*

¹⁰³ Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 280-81 (2004), http://www.soc.umn.edu/uggen/Manza_Brooks_Uggen_POQ_04.pdf.

¹⁰⁴ Karlan, *supra*, note 45, at 1167.

¹⁰⁵ Stare decisis, a Latin term meaning "to stand by that which is decided," dictates that precedential decisions are given great weight. See BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

factors providing a basis for reconsidering precedence were discussed in *Planned Parenthood v. Casey*, which noted,

“[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”¹⁰⁶

The Court explained that it would first examine whether the central rule of the case in question has proven unworkable, or whether “the rule’s limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by [the rule in question].”¹⁰⁷ Also, the Court explained that it would look to see whether the doctrine in question has been abandoned by society and, whether the factual premises supporting the holding have fundamentally changed such that the central holding of the precedent is unjustifiable or irrelevant.¹⁰⁸

In considering whether to revise the holding in *Richardson v. Ramirez*, it wouldn’t be difficult to argue the impracticability of felon disenfranchisement laws. In Part III, the inherent issues with the current framework for reinstatement of voting rights and felon classification, coupled with the discussion in part IV.A of the failure of these disenfranchisement statutes in preventing recidivism or promoting rehabilitation, clearly shows that felon disenfranchisement is an impractical means of furthering any legitimate state interests. Also, it is clear from the discussions in this part IV regarding public opinion of these disenfranchisement statutes, which most persons disagree with felon disenfranchisement¹⁰⁹ so it can be inferred that society has abandoned the social contract theory upon which felon disenfranchisement is based. Finally, it is a fact that over the last 40 years, the rate of incarceration has grown at an extraordinary rate.¹¹⁰ “[H]istorical estimates of the imprisonment rate in state and federal facilities . . . demonstrates that from 1925 until about the middle of the 1970s the rate did not rise above 140 persons imprisoned per 100,000 of the population.”¹¹¹ However, by 2011, the incarceration rate had raised to

¹⁰⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

¹⁰⁷ *Id.* at 855.

¹⁰⁸ *Id.*

¹⁰⁹ Manza et al., *supra* note 103.

¹¹⁰ See Robynn J. A. Cox, *Where Do We Go from Here? Mass Incarceration and the Struggle for Civil Rights*, *ECON. POL’Y INST.* 5 (Jan. 16, 2015), <http://www.epi.org/publication/where-do-we-go-from-here-mass-incarceration-and-the-struggle-for-civil-rights/>.

¹¹¹ *Id.*

423 persons per 100,000 of the population.¹¹² Given that the rate of incarceration has risen so drastically, the implications of felon disenfranchisement are far more devastating, as evidenced by its impact on the 2000 general election, and consequently, the holding in *Richardson v. Ramirez* is ripe for reconsideration due to its grave implications that have only recently become evident.

While arguments for reconsideration of the dicta in *Trop v. Dulles* were mentioned in Part IV.C.ii, we must also consider arguments in the context of deciding whether the factors for reconsidering that precedent have been met. In regards to the first factor, it appears that the classification of disenfranchisement statutes as regulatory and not punitive was not the central issue in *Trop*. The central issue was actually whether a forfeiture of citizenship comports with the Constitution¹¹³ and the resulting rule was that “denationalization as punishment is barred by the Eighth Amendment”¹¹⁴ and it results in a “total destruction of the individual’s status in organized society.”¹¹⁵ This ruling, as mentioned before, is laced with inconsistencies, and consequently, can either be reconsidered or merely “reinterpreted”¹¹⁶ to fit squarely with a new decision invalidating felon disenfranchisement laws. If however we consider Justice Warren’s dicta as controlling, because the franchise of voting has evolved significantly since 1958, the denial of the franchise is akin to punishment, so Justice Warren’s sentiments simply don’t reflect the current reality of felon disenfranchisement. Additionally, the statistics mentioned earlier also support the idea that felon disenfranchisement is in fact a means of punishment as society is in strong opposition of such laws. While *Trop* was already standing on very shaky ground, it appears that the factors for reconsidering its holding have been met and accordingly, the Supreme Court has a clear opening to reconsider its decision in *Trop*.

¹¹² *Id.*

¹¹³ *Trop v. Dulles*, 356 U.S. 86, 87 (1958).

¹¹⁴ *Id.* at 101.

¹¹⁵ *Id.*

¹¹⁶ Many parts of the opinion arguably support the notion that felon disenfranchisement laws are punishment, and so, had Justice Warren not explicitly categorized felon disenfranchisement as regulatory, the opinion would fit neatly with an Eighth Amendment challenge to these disenfranchisement statutes.

V. WILL WE CONTINUE TO KEEP THE BLACK MAN FROM THE BALLOT?

“Keep the black man from the ballot and we’ll treat him as we please, with no means for protection, we will rule with perfect ease.”¹¹⁷

The right to vote is a fundamental function of citizens in the democratic process. It gives each person a voice, a choice and a sense of belonging. For African Americans, it also represents a badge of freedom that many of their ancestors fought and died for. In 1965, Dr. Martin Luther King, Jr. described voting as the foundation stone for political action. He noted, “With it the Negro can eventually vote out of office public officials who bar the doorway to decent housing, public safety, jobs, and decent integrated education. It is now obvious that the basic elements so vital to Negro advancement can only be achieved by seeking redress from government at local, state, and federal levels. To do this the vote is essential.”¹¹⁸

The plight of Black America has lasted from the days of slavery to 2016, and the clock is still ticking. Before Blacks could taste the true victory of freedom, they were again enslaved by institutional structures carefully designed to keep them oppressed. From the point of being granted the right to vote, there were literacy tests, polling taxes, grandfather clauses and now with mass incarceration for essentially “living while Black,”¹¹⁹ continued use of the device of felon disenfranchisement ensures that the full potency of the Black vote will never be a reality. Unless something is done to cure this societal defect, we can be sure that America will never reach its ideal as a post racial society. Because African Americans have historically been oppressed, the right to vote is one of the most powerful tools with which they can effect change that will bring them closer to true equality in America. It is with that right that they can “begin breaking down injustice and destroying the terrible walls which imprison men because they are different from other men.”¹²⁰

¹¹⁷ See Lizelia A. Jenkins Moorer, *The Negro Ballot, In Prejudice Unveiled And Other Poems*, UNIV. OF MICH. HUMAN. TEXT INITIATIVE, AM. VERSE PROJECT 47 (1907), <http://www.hti.umich.edu/a/amverse>.

¹¹⁸ Martin Luther King, Jr., *Civil Right No. 1: The Right to Vote*, N.Y. TIMES MAG., Mar. 14, 1965, at 26-27, reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 183 (James M. Washington, ed., 1991).

¹¹⁹ This term is used to illustrate the fact that blacks are incarcerated at a much higher rate than their white counterparts for the same crimes.

¹²⁰ Lyndon B. Johnson, Remarks at the signing of the Voting Rights Act, in the Capitol Rotunda before the U.S. Congress and Members of the Cabinet, *THE LEADERSHIP CONF.* (Aug. 6, 1965), <http://www.civilrights.org/voting-rights/vra/johnson-speech.html>.

By no means do I believe that crimes should go unpunished. I fully support the notion that those who engage in criminal conduct must be held accountable under the rule of law. However, it is the criminal justice system that is best situated to undertake the task of ensuring that individuals, armed with their constitutional rights, can state their case, be evaluated and, if necessary, punished according to the severity of their crime. Disenfranchisement after an individual has been released into society serves only as blanket over-punishment that disproportionately affects Black America by diluting its political power. If we are to believe that post-incarceration rehabilitation is truly a goal of America's justice system, stripping ex-felons of their right to vote seems to directly undermine that goal. By demoting ex-felons to second-class citizens, we are reminding them that they are not truly ever welcome back into the community. We remind them that they are not equal. Any threat to achieving true equality is really a threat to the entire democracy, and consequently, federal intervention is absolutely necessary to ensure that America continues towards its quest to "form a more perfect union."¹²¹

¹²¹ U.S. CONST. pmbl.