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A Life Sentence: An Evaluation of Voter Disenfranchisement Through a Constitutional Lens

Miranda Janssen

An Honors Thesis

Submitted for partial fulfillment of the requirements
for graduation with honors in the Legal Studies Department
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ABSTRACT

As the number of incarcerated pupils has increased in the United States, so has the number of pupils who cannot vote, due to a felony conviction. This paper is organized , (i) the history of felon voter disenfranchisement,¹ (ii) statistics on state and federal levels, (iii) the collateral consequences of felon voter disenfranchisement, (iv) different perspectives about felon voter disenfranchisement, (v) understanding suspect classification and voting as a fundamental right, (vi) understanding strict scrutiny,² (vii) examining past court rulings, (viii) identifying why

¹ The definition of Disenfranchisement is "taking away of voting rights."

Disenfranchisement, USLegal (2016). <https://definitions.uslegal.com/d/disenfranchisement/>

² The definition of Strict Scrutiny is "a form of judicial review that courts use to determine the constitutionality of certain laws. Strict scrutiny is often used by courts when a plaintiff sues the government for discrimination. To pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest. Strict scrutiny is the highest standard of review which a court will use to evaluate the constitutionality of governmental discrimination. The other two standards are intermediate scrutiny and rational basis review."

Strict Scrutiny, Legal Dictionary (2019). https://www.law.cornell.edu/wex/strict_scrutiny

the United States needs to change its current laws on felon voter disenfranchisement, an (ix) the proposal of a new legal argument. In conclusion, this paper will demonstrate why felon voter disenfranchisement for non-incarcerated pupils is unconstitutional.

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“You are safe enough to be in society, but not to cast a vote,” Jason Sole.³

INTRODUCTION

“I’m working, I’m paying taxes, I’m raising a family, I think I should be able to have a voice in the laws that is going on. I think I should be able to vote,” said Reverend Demetrius Jifuza.⁴ Demetrius Jifuza served four years behind bars for armed robbery when he was 18 years old.⁵ Nearly 20 years out of prison, Demetrius Jifuza is now a reverend but he is still being punished for his crime.⁶ Rev. Demetrius Jifuza cannot participate in federal, state, or county elections because he was convicted of a felony. Not being able to vote in the United States leaves convicted felons feeling alienated and marginalized.⁷

The right to vote in the United States is what unites citizens in a republic.⁸ It gives people the opportunity to voice their opinions and allows citizens to make an impact on the direction and administration of the country.⁹ The right to vote has expanded over the years, as is seen in the

³ Jason Sole, *About Jason*, Jason Sole Consulting (last visited Apr. 7, 2019), <https://www.jasonsole.com>. Jason Sole has been a Criminal Justice educator at Hamline University and Metropolitan State. He is a national keynote speaker and trainer on biases. He has served as the President of the Minneapolis NAACP. In 2014, he published his memoir, *From Prison to Ph.D.: A Memoir of Hope, Resilience, and Second Chances*. He most recently served as the Community First Public Safety Initiatives Director for the City of Saint Paul. Finally, Jason Sole is the co-founder of the Humanize My Hoodie Movement.

⁴ Bianca Graulau, *1.5 million Floridians can't vote because they committed a felony*, 10 News, (August 22, 2018). <https://www.wtsp.com/article/news/local/15-million-floridians-cant-vote-because-they-committed-a-felony/67-586225453> (last visited Dec. 26, 2018).

⁵ *Id.*

⁶ *See Id.*

⁷ Tanya Whittle, *Felony Collateral Sanctions Effects on Recidivism: A Literature Review*, SAGE, *Crim. Just. Pol. Rev.* Vol. 29(5) 507, 2016.

⁸ Carl Amritt, *A Quick History Lesson on Voter Disenfranchisement*, ROOSEVELT INSTITUTE. (May 22, 2017), <http://rooseveltinstitute.org/quick-history-lesson-voter-disenfranchisement/>.

⁹ Ruth, T., Matusitz, J., & Simi, D. (2017). *Ethics of disenfranchisement and voting rights in the U.S.: Convicted felons, the homeless, and immigrants*. *American Journal of Criminal Justice*, 42(1), 56-68. doi:10.1007/s12103-016-9346-6

Amendments to the Constitution.¹⁰ However, for one group of citizens, this right has been restricted.¹¹

In 2010, an estimated 5.85 million legal citizens could not vote in the United States due to a felony conviction.¹² Since then, this number has grown exponentially; in 2016, 6.1 million legal citizens were restricted from voting.¹³ Not only have some states restricted convicted felons from voting in prison but also, many states have gone further to restrict convicted felons from voting after they have served their entire sentence, so they cannot vote while on probation or parole, or in some states after they have completed their entire sentence.¹⁴ The latter is an example of Florida's laws before the November 6, 2018 election, where the state voted to pass Florida Amendment 4, the Voting Rights Restoration for Felons Initiative.¹⁵

Dating back to the Civil Death era,¹⁶ felon voter disenfranchisement has succeeded in silencing a large group of citizens, and this is only one burden that ex-felons face in their

¹⁰ Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconstitutional Social Contract Breached*, 89 Va. L. Rev. 109 (2003).

¹¹ Christopher Uggen, Sarah Shannon, Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*. THE SENTENCING PROJECT, (201

¹² Miller, B. L., & Agnich, L. E. (2016). *Unpaid debt to society: Exploring how ex-felons view restrictions on voting rights after the completion of their sentence*. *Contemporary Justice Review*, 19(1), 69-85. doi:10.1080/10282580.2015.1101685

¹³ The Sentencing Project Staff, *Fact Sheet: Trends in U.S. Corrections*, The Sentencing Project, (2016), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>

¹⁴ *Supra* Uggen, Shannon, Manza

¹⁵ Ballotpedia, *Florida Amendment 4, Voting Rights Restoration for Felons Initiative*, Ballotpedia (last visited Apr. 8, 2019), [https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_(2018)) The amendment would automatically restore the right to vote for people with prior felony convictions, except those convicted of murder or a felony sexual offense, upon completion of their sentences, including prison, parole, and probation.

¹⁶ Historical Timeline, *Should Felons Be Allowed to Vote? FELON VOTING-PROCON*, (June 25, 2013.) <https://felonvoting.procon.org/view.timeline.php?timelineID=000016> Civil death refers to when an individual is convicted of a felony and loses the rights and privileges normally granted to citizens.

communities.¹⁷ Felons are stigmatized through all three reintegrative domains at the same time.¹⁸ These domains are socioeconomic, familial, and civic.¹⁹

In recent years, many people, citizens, and lobbyists have brought cases to the courts to change felon voter disenfranchisement laws.²⁰ Some of these arguments have included the Equal Protection Clause of the Fourteenth Amendment, voting as a “fundamental right,” the Eighth Amendment, cruel and unusual punishment, and many more.²¹ In spite of these cases, all of these challenges have one common theme, the courts are resistant to change the laws surrounding felon voter disenfranchisement.²²

The right to vote was intended to give a voice to the voiceless, not to give political leaders the right to decide who has a voice and who does not.²³ The right to vote is in part what it means to be an American.²⁴ However, the courts have created confusion around whether the right to vote is a “fundamental” right, as in some cases the courts have held that the right to vote is a “fundamental” right, using strict scrutiny to review these cases, while in other cases the court has failed to provide the same status to voting by using a lower level of scrutiny.²⁵ In order for the United States to be the republic that it has labeled itself, a republic that represents the people, the United States needs to make it unconstitutional to restrict felons from voting, once they are out of prison.

¹⁷ Miller & Agnich *Supra*

¹⁸ *Id.*

¹⁹ *See Id.*

²⁰ Mauer, M. (2000). Felon voting disenfranchisement: A growing collateral consequence of mass incarceration. *Federal Sentencing Reporter*, 12(5), 248-251. doi:10.2307/20640279

²¹ Grady, S. C. (2012). Civil death is different: An examination of a post-graham challenge to felon disenfranchisement under the eighth amendment. *The Journal of Criminal Law and Criminology (1973-)*, 102(2), 441-470. Retrieved from <http://www.jstor.org/stable/23415239>

²² *Id.*

²³ Christopher Haner, Felon Disenfranchisement: An Inherent Injustice, 26 J. C.R. & Econ. Dev. 911 (2013).

²⁴ Joshua A. Douglas, Is the Right to Vote Really Fundamental, 18 Cornell J. L. & Pub. Pol'y 143 (2008).

²⁵ *Id.*

DEFINITION OF A FELONY

This paper uses the term “felony” to refer to a crime, involving violence and non-violence, regarded as more serious than a misdemeanor, and usually punishable by imprisonment for more than a year or by death.²⁶ Examples of violent felonies are murder, rape, burglary, kidnapping, or arson,²⁷ while examples of non-violent felonies involve drugs and property crimes.

HISTORY

A. THE “CIVIL DEATH ERA”

Voter disenfranchisement started in a time period when discriminatory policies were commonplace.²⁸ For example, losing the right to vote dates back to the ‘Civil Death’ era, found in Greek city-states, imposing disenfranchisement on deviant elites who were criminal offenders.²⁹ During the ‘Civil Death’ era, voting rights were only given to the elites,³⁰ better known as a small group of people who held a disproportionate amount of privilege, political power, or skill in society.³¹ The “elites” often resisted extending voting rights to other groups such as women, youth, workers, poor people, racial groups, ethnic groups, and others.³² However, elites could lose their right to vote for committing morality crimes.³³

²⁶ *Felony*, Legal Dictionary (2019). <https://legaldictionary.net/felony/>

²⁷ *Id.*

²⁸ *Armitt Supra*

²⁹ *Historical Timeline Supra*

³⁰ *Id.*

³¹ *Elites*, Merriam-Webster (1828).

³² Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, *American Sociological Review*, Vol. 67, No. 6 (Dec. 2002), pp. 777-803

³³ *Jonson-Parris Supra*

B. FIRST APPEARANCE IN THE US

In the United States as early as the early 1600s,³⁴ states began establishing criminal disenfranchisement laws to their own Constitution.³⁵ Since 1787, this power that is given to states is found in Article I, Section Two of the United States Constitution.³⁶ Felon voting rights are state specific,³⁷ which allows for different laws among states. Between 1776 and 1821, eleven states adopted constitutions that disenfranchised felons.³⁸ Beginning with Virginia in 1776, followed by Kentucky in 1799, 27 states adopted these laws by the time the Fourteenth Amendment was ratified in 1868.³⁹

C. THE FOURTEENTH AMENDMENT

In January 1866, Senator Lyman Trumbull, the drafter of the Thirteenth Amendment, introduced the Civil Rights Act of 1866.⁴⁰ The purpose of this bill was to void state statutes, specifically in the South, that denied the freedman his fundamental rights that belonged to every free person.⁴¹ Due to beliefs that this bill could easily be repealed if the Democrats gained power, Congress decided to embody the Act as an amendment of the Constitution.⁴² The original wording of Section One of the Fourteenth Amendment stated,

"The Congress shall have the power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the

³⁴ *Id.*

³⁵ *Supra* Historical Timeline

³⁶ U.S. Const. art. I, § 2.

³⁷ *Supra* Uggen & Manza

³⁸ *Supra* Jonson-Parris

³⁹ *Id.*

⁴⁰ Alfred Avins, State Action and the Fourteenth Amendment, 17 Mercer L. Rev. 352 (1966)

⁴¹ *Id.*

⁴² *See Id.*

several States, and to all persons in the several States equal protection in the rights of life, liberty and property."⁴³

This wording immediately created a backlash among House Republicans and Democrats, because they believed it gave the federal government too much power.⁴⁴ Soon after, the language was revised and Section One of the Fourteenth Amendment was passed in 1868 with the intent to correct unjust legislation created by the states and protect white and colored persons of their fundamental rights.⁴⁵ Section One of the Fourteenth Amendment is considered the Equal Protection Clause, granting legal citizens, life, liberty, and property.⁴⁶

On the other hand, Section Two of the Fourteenth Amendment is one of the most powerful sections of the Constitution's fundamental laws, allowing for disenfranchisement and suffrage among many. Section Two states, ". . . 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 . . ."⁴⁷ This section allows for the disenfranchisement of those who participated in rebellion or other crimes.⁴⁸ One opinion of Section Two of the Fourteenth Amendment is that this section ". . . is not directed solely at the Negro or the South. . . . It is aimed at inducing the enfranchisement of all citizens over twenty-one, regardless of their race, literacy or economic status." However, despite the intent of this section, the current way the laws in the criminal justice system are set up, this section allows for the disproportionate effect on African Americans.

As Justice Warren said in *Trop v. Dulles* when discussing the scope of the words of the Eighth Amendment of "cruel and unusual," "[t]he Amendment must draw its meaning from the

⁴³ *Supra Avins*

⁴⁴ *Id.*

⁴⁵ *See Id.*

⁴⁶ U.S. Const. amend. 14 § 1.

⁴⁷ U.S. Const. amend. 14 § 2.

⁴⁸ *See* U.S. Const. amend. 14 § 2.

evolving standards of decency that mark the progress of maturing society.”⁴⁹ The *evolving standard of decency* is to say that as society evolves, so too must the laws governing society evolve. *Evolving standard of decency* must be used when discussing Section Two of the Fourteenth Amendment relating to Felon Voter Disenfranchisement.

Many beliefs about felon disenfranchisement rested on John Locke’s concept that “those who break the social contract should not be allowed to participate in the process of making society’s rules.”⁵⁰ Other beliefs included the prevention of election fraud, fear that criminals would weaken laws and their enforcement, and that felons lacked the ‘moral competence’ needed to vote.⁵¹ Many of these beliefs are still held by society today.

D. POST-CIVIL WAR

After the Civil War, the 15th Amendment was ratified, which was used as justification for the Civil Rights Movement in the 1950s and 60s.⁵² This movement created the Voting Rights Act of 1965, which aimed at overcoming legal barriers that prevented African Americans from exercising their right to vote.⁵³ Shortly after, in 1966, courts began to rule on the language involving voting as put in the Constitution.⁵⁴ For example, in the California Supreme Court ruling, *Otsuka v. Hite* (1966) the court defined the term *infamous crimes* as “. . . a conviction of crimes involving moral corruption and dishonesty.”⁵⁵ Thus branding the person as a threat against the integrity of the elective process,⁵⁶ a label that is continuously put on disenfranchised felons.

⁴⁹ *Trop v. Dulles*, 356 U.S. 86, (1958).

⁵⁰ Johnson-Parris *Supra*

⁵¹ *Id.*

⁵²History.com Staff, *Voting Rights Act of 1965*, HISTORY.COM. (2009)
<https://www.history.com/topics/black-history/voting-rights-act>

⁵³ *Id.*

⁵⁴ *See Id.*

⁵⁵ *Otsuka v. Hite*, 64 Cal. 2d 596 (1996).

⁵⁶ *See Otsuka v. Hite*

F. TODAY'S BELIEFS

Although disenfranchisement laws have changed over time,⁵⁷ the principles today are still the same; it is beneficial to punish those who commit a crime because the crime is not just against the victim, but against the entire society.⁵⁸ However, due to the debate about voter disenfranchisement, voting rights restoration has become a topic in many political campaigns both state and federally.⁵⁹ This debate has also been voiced publicly with past surveys reporting that over 80% of Americans believe convicted felons should have their voting rights back at some point, and more than 40% of Americans would allow offenders on probation or parole to vote.⁶⁰ The time for the voiceless to have a voice is now.

INCARCERATION STATISTICS ON STATE AND FEDERAL LEVELS

In 2015 the United States had 1,476,847 people incarcerated in state and federal prisons.⁶¹ The increase in incarceration began in the mid-1970s when the rehabilitative model shifted to the incapacitation model.⁶² Beginning in the 1980s, Presidents; Reagan, Bush, and Clinton campaigned to “get tough on crime,”⁶³ which meant harsher punishments for offenders.⁶⁴ These harsher punishments created longer sentences and mandatory minimums among a variety of states,⁶⁵ which forced the United States incarceration population to increase 500% over the last 40

⁵⁷ Joint Religious Legislative Coalition, *Improving Reentry: Restore the Vote*, (2016). <https://jrlc.org/wp-content/uploads/2017/09/ImprovingReentryRestoreTheVote.pdf>

⁵⁸ *Id.*

⁵⁹ Pamela Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*. 56 Stan. L. Rev. 1147 (2004).

⁶⁰ *Supra* Karlan

⁶¹ The Sentencing Project Staff, *Fact Sheet Trend in U.S. Corrections* *Supra*
This is only those in prison. This does not include those serving probation or parole.

⁶² *Supra* Uggen & Manza

⁶³ The Sentencing Project Staff, *Criminal Justice Facts*, THE SENTENCING PROJECT, (2017), <https://www.sentencingproject.org/criminal-justice-facts/>

⁶⁴ *Id.*

⁶⁵ *Supra* Uggen & Manza

years and made the United States the world leader for incarcerated pupil per capita.⁶⁶ Figure 1,⁶⁷ represents the United States has the highest incarceration rates in the world.

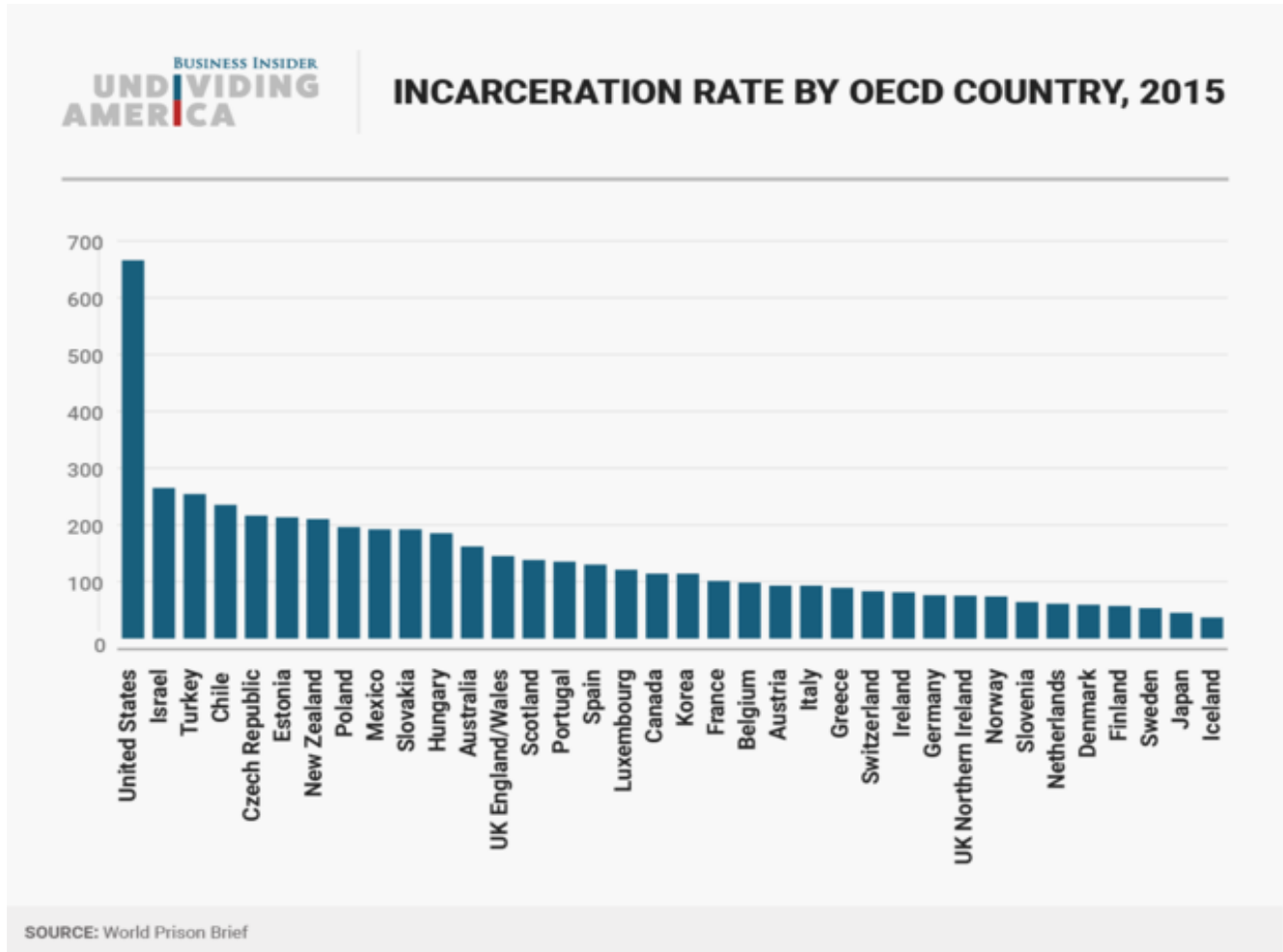


Figure 1

A. MILLIONS OF CITIZENS CANNOT VOTE

In 1976, an estimated 1.17 million Americans were to forbidden to vote due to a felony conviction.⁶⁸ By 1996, that number increased to 3.34 million Americans.⁶⁹ In 2010, a whopping

⁶⁶ The Sentencing Project Staff, *Criminal Justice Facts Supra*

⁶⁷ Elena Holodny, *Millions of American adults are not allowed to vote — and they could change history*, Business Insider (Jan. 3, 2018). <https://www.businessinsider.com/what-if-felons-could-vote-2017-7>

⁶⁸ Uggen, Shannon & Manza *Supra*

⁶⁹ *Id.*

5.85 million Americans could not vote due to a felony conviction.⁷⁰ Today that number has risen to an appalling 6.1 million,⁷¹ Americans who are unable to vote because of voter disenfranchisement,⁷² and this number will continuously increase.

B. THE RACIAL IMPACT

Justice Earl Warren's vision, from his opinion of the Supreme Court Case *Reynolds v. Sims* was to ensure that "elections would reflect the collective public interest."⁷³ However, with millions of Americans not being able to vote due to a felony conviction, Justice Warren's vision has been abandoned. More importantly, this "collective public" will never exist when most of the disenfranchised felons are citizens of color.⁷⁴ Due to the Voting Rights Act of 1965, literacy tests and other legal barriers are unconstitutional because of the impact they had on African Americans exercising their right to vote.⁷⁵ Nonetheless, today's laws surrounding felon disenfranchisement are in many ways compared to past literacy test laws, with the most important being that they both exclude minorities, notably African Americans, from the political process.⁷⁶

Although felon disenfranchisement is among the oldest laws in the United States, it was not until after the Civil War that felon disenfranchisement started to have racial undertones.⁷⁷ The non-white prison population nearly doubled between 1850 and 1870, with states like Alabama aggressively imprisoning nonwhites with numbers growing from 2% of the prison population

⁷⁰ *See Id.*

⁷¹ Sentencing Project Staff, *Criminal Justice Facts Supra*

⁷² The Sentencing Project Staff, *Fact Sheet: Trends in U.S. Corrections Supra*

⁷³ Daniel S. Goldman, The Modern-Day Literacy Test: Felon Disenfranchisement and Race Discrimination, 57 Stan. L. Rev. 611 (2004).

⁷⁴ *Id.*

⁷⁵ History.com, *Voting Rights Act of 1965*, HISTORY (2009). <https://www.history.com/topics/black-history/voting-rights-act>

⁷⁶ Goldman *Supra*

⁷⁷ *Id.*

being non-white in 1850 expanding to 74% of the prison population being non-white in 1870.⁷⁸ By 1996, black men in the United States were imprisoned at a rate of 8.5 times that of white men.⁷⁹

C. “GET TOUGH” & THE “WAR ON DRUGS”

The biggest factor in the growth of African American incarceration started in the 1980s, during the "Get Tough" and "War on Drugs" campaigns and legislation.⁸⁰ Between 1980 and 1995, drug arrests nearly tripled, with further data reporting that the increase in drug arrests was not a result of greater drug use.⁸¹ This increase in drug arrests was a huge contributor to the mass incarceration crisis, reporting that “in 1980, 25% of federal prisoners were in prison for drug offenses; by 1995, that percentage had escalated to 60%.”⁸² Meanwhile, these drug arrests were disproportionately affecting African Americans.⁸³

A staggering 50% of the prison population is African American, which is drastically out of proportion to the numbers of African Americans in the general population.⁸⁴ In 2004, four out of every five drug offenders in state prison were either African American or Latino.⁸⁵ A 1997 study showed that African Americans were 39 times more likely than whites to be incarcerated due to a drug offense, while whites make up three-fourths of all drug users.⁸⁶ The “War on Drugs” disproportionately affected African Americans simply by creating laws that were more likely to incarcerate African Americans for drug use, possession, and distribution.

⁷⁸ *See Id.*

⁷⁹ *Supra* Goldman

⁸⁰ *Id.*

⁸¹ *See Id.*

⁸² *Supra* Goldman

⁸³ *Id.*

⁸⁴ *See Id.*

⁸⁵ *Supra* Goldman

⁸⁶ *Id.*

Due to African Americans being imprisoned at significantly higher rates than other races, they are banned from voting at a rate of four times greater than all other racial groups combined.⁸⁷ According to a study done by the Sentencing Project, “1 of every 13 African Americans has lost their voting rights due to felony disenfranchisement laws, vs. 1 in every 56 non-black voters.”⁸⁸ As a result of this racial impact, felon voter disenfranchisement needs to be reviewed with a heightened level of scrutiny; strict scrutiny.

STATE LAWS OF CONVICTED FELONS VOTING

States have been given the power to restrict the voting rights of those convicted of a felony,⁸⁹ which has led to a variety of laws among states.⁹⁰ There are five categories that states are grouped into depending on the state’s restriction. These restrictions are as follows, i.) no restrictions, ii.) inmates only, iii.) inmates and parolees, vi.) inmates, parolees, and probationers, and v.) ex-felons.⁹¹ For example, up until November 2018, in Florida, those convicted of a felony would never be given their voting rights back,⁹² while those convicted of a felony in Maine or Vermont would never lose their right to vote, even while in prison.⁹³ The variety of laws among states allows for confusion and inconsistency among the United States political system. This inconsistency is another reason why it should be a federal law rather than a state law that makes felon voter disenfranchisement unconstitutional.

⁸⁷ Jennifer Rae Taylor, *Jim Crow’s Lasting Legacy at The Ballot Box*, The Marshall Project (Aug. 20, 2018). <https://www.themarshallproject.org/2018/08/20/jim-crow-s-lasting-legacy-at-the-ballot-box>

⁸⁸ The Sanders Institute, *Felon Disenfranchisement*, The Sanders Institute <https://www.sandersinstitute.com/blog/felon-disenfranchisement>

⁸⁹ Marc Meredith & Michael Morse, *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?* ANNALS, AAPSS, 651 (2014).

⁹⁰ *Supra* Uggen, Shannon & Manza

⁹¹ *Id.*

⁹² *Supra* Amritt

⁹³ *Supra* Uggen, Shannon & Manza

From the most recent data available, in 2016 an estimated 6.1 million, 1 in 45,⁹⁴ United States citizens could not vote due to a felony conviction.⁹⁵ In 48 states and the District of Columbia, convicted felons cannot vote while incarcerated.⁹⁶ In 2 states, Iowa and Kentucky,⁹⁷ convicted felons will never receive their voting rights back unless approved individually by the governor,⁹⁸ which is very rare. Up until November 2018, this was the same for Florida. Since the vote in Florida, the law has been returned to the pre-2011 law, which “automatically restores voting rights to people convicted of felonies who have completed their sentences, with exceptions for murder and serious sex offenses.”⁹⁹ In 7 states, some convicted felons with certain criminal convictions will permanently lose their right to vote.¹⁰⁰ These crimes may consist of rape, murder, bribery,¹⁰¹ while some states like Arizona depend on how many felony convictions a person has. Figure 2¹⁰² shows a breakdown of how states are divided.

⁹⁴ *Supra* The Sentencing Project Staff, *Criminal Justice Facts*

The recent data excludes the November 2018 change in the law to Florida felon voter disenfranchisement laws.

⁹⁵ *Id.*

⁹⁶ The Sentencing Project Staff, *Felony Disenfranchisement Laws in The United States*, THE SENTENCING PROJECT, (2014), <https://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/>

⁹⁷ Florida approved a constitutional amendment on November 6, 2018, automatically restoring the right to vote to 1.4 million individuals with felony convictions in their past. The amendment restores the right to vote for people with felony convictions, except individuals convicted of murder or felony sexual offenses, once they have completed the terms of their sentence including probation and parole.

⁹⁸ Brennan Center for Justice, *Criminal Disenfranchisement Laws Across the United States*, New York University School of Law, (2018). <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>

⁹⁹ Scott Neuman, *Voting Rights Process for Florida Felons Unconstitutional, Judge Says*, NPR, (Feb. 2, 2018). <https://www.npr.org/sections/thetwo-way/2018/02/02/582600802/voting-rights-process-for-florida-felons-unconstitutional-say-judge> Last visited (Jan. 28, 2019).

¹⁰⁰ *Id.*

¹⁰¹ *See Id.*

¹⁰² NCSL, *Restoration of Voting Rights for Felons*, National Conference of State Legislatures (Dec. 21, 2018). <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> This is not the best representation as it does not break it down to the precise law of each state.

NEVER LOSE RIGHT TO VOTE	LOST ONLY WHILE INCARCERATED AUTOMATIC RESTORATION AFTER RELEASE	LOST UNTIL COMPLETION OF SENTENCE (PAROLE AND/OR PROBATION) AUTOMATIC RESTORATION AFTER	LOST UNTIL COMPLETION OF SENTENCE IN SOME STATES A POST-SENTENCING WAITING PERIOD ADDITIONAL ACTION REQUIRED FOR RESTORATION
Maine	District of Columbia	Alaska	Alabama
Vermont	Hawaii	Arkansas	Arizona
	Illinois	California	Delaware
	Indiana	Colorado	Florida
	Maryland	Connecticut	Iowa
	Massachusetts	Georgia	Kentucky
	Michigan	Idaho	Mississippi
	Montana	Kansas	Nebraska
	New Hampshire	Louisiana	Nevada
	North Dakota	Minnesota	Tennessee
	Ohio	Missouri	Virginia
	Oregon	New Jersey	Wisconsin
	Pennsylvania	New Mexico	Wyoming
	Rhode Island	New York	
	Utah	North Carolina	
		Oklahoma	
		South Carolina	
		South Dakota	
		Texas	
		Washington	
		West Virginia	

STATISTICS IN MINNESOTA

From the time that Minnesota became a state in 1858, the laws regarding felon voter disenfranchisement have essentially remained the same.¹⁰³ In the 1860s there were less than 75 felony crimes in statute.¹⁰⁴ There were roughly 30 people in prison, which was .02 percent of the voting age population.¹⁰⁵ During that time, there was no probation which meant a felony conviction was completed by serving prison time.¹⁰⁶ From a 2017 report, in the United States, there are now more than 368 felony crimes and sentences of probation to serve.¹⁰⁷ This change in statute has increased the voting disenfranchisement rate over four times what it was 40 years ago; it is currently at 1.5 percent.¹⁰⁸

From data recorded in 2016, there were 57,000 Minnesotans unable to vote due to a felony conviction. That 57,000 makes up about 1.5 percent of the voting age population, and 47,000 of those 57,000 live in communities; serving sentences of parole or probation.¹⁰⁹ Minnesota also has disproportionately more African Americans and Native Americans affected by felon voter disenfranchisement, at 7.7 percent of African Americans, 5.9 percent of Native Americans, while only 1.1 percent are white/Caucasian.¹¹⁰ If Minnesota changed its laws to allow those convicted of a felon on probation or parole to vote, the number would drop from 57,000 to about 10,000.¹¹¹ This would also significantly drop the percentage of African Americans who cannot vote due to a

¹⁰³ *Supra* Joint Religious Legislative Coalition

¹⁰⁴ Mark Haase & Sarah Walker, *Felony Disenfranchisement in Minnesota*, Restore the Vote MN, (2017). <https://restorethevotemn.files.wordpress.com/2017/02/legislative-fact-sheet-2017.pdf>

¹⁰⁵ *Id.*

¹⁰⁶ *See Id.*

¹⁰⁷ *Supra* Haase & Walker

¹⁰⁸ *Id.*

¹⁰⁹ *Supra* Joint Religious Legislative Coalition

¹¹⁰ *Id.*

¹¹¹ *See Id.*

felony conviction from 7.7 percent to 2.8 percent.¹¹² Minnesota is only one state that represents the racial impact that felony convictions hold.

PUNISHMENTS FOR A FELONY IN THE UNITED STATES

In the United States criminal justice system, there are five justifications for incarceration; restoration, retribution, deterrence, rehabilitation, and incarceration.¹¹³ Retribution is defined as a punishment inflicted on someone as vengeance for a wrong or criminal act.¹¹⁴ While probation and parole are meant to reintegrate citizens back into society by accountability and responsibility, felon voter disenfranchisement sabotages these goals by denying convicted felons their civic duty as Americans.

COLLATERAL CONSEQUENCES OF A FELONY CONVICTION

Felon voter disenfranchisement is a second punishment. Convicted felons face many collateral consequences or “invisible punishments” when they are re-integrated into society.¹¹⁵ These collateral consequences are “formal policies, provisions, and laws that impede ex-felon reentry into various social institutions.¹¹⁶ In 2002, the American Bar Association (ABA) “included disenfranchisement, deportation, loss of professional licenses, felon registration, and ineligibility for many welfare benefits,” as collateral consequences.¹¹⁷ Along with those, other important rights convicted felons lose are voting, traveling abroad, the right to bear arms or own guns, jury service, employment in certain fields, public social benefits and housing, and parental benefits.¹¹⁸

¹¹² *Supra* Joint Religious Legislative Coalition

¹¹³ Rebecca Bernstein, *Addressing Transgressions: Types of Criminal Punishment*, Point Park University (Nov. 28, 2016). <https://online.pointpark.edu/criminal-justice/types-of-criminal-punishment/>

¹¹⁴ *Retribution*, Merriam-Webster (1828).

¹¹⁵ Darren Wheelock, *Collateral Consequences and Racial Inequality*, *Journal of Contemporary Criminal Justice*, Vol. 21 No. 1, 82-90 (2005). <http://journals.sagepub.com/doi/pdf/10.1177/1043986204271702>

¹¹⁶ *Id.*

¹¹⁷ *See Id.*

¹¹⁸ J. Hirby, *What Rights Do Convicted Felons Lose?* Black's Law Dictionary Free 2nd Ed. and The Law Dictionary <https://thelawdictionary.org/article/what-rights-do-convicted-felons-lose/>

A. SOCIAL CONSEQUENCES

Through reentry processes in the United States many ex-felons who have completed their prison sentence, find privileges revoked and many opportunities blocked.¹¹⁹ They are forced to navigate through mandatory exclusions, making their hopes of success in society more difficult.¹²⁰ In states like Florida, before their most recent change of law, even though these citizens are not in prison serving a life sentence,¹²¹ they are living in their communities serving a political life sentence. They are second class citizens.

One major social consequence is employment rights, this right varies among federal and state levels. At the federal level, the "employer is not allowed to use a prior conviction as a reason not to hire someone, unless the crime directly relates to the job." Some of these public positions include working for the U.S. Military, law enforcement, teachers, childcare professionals, along with, other jobs that require a professional license. Whereas, at the state level, the "employer is allowed to consider a convicted felon's criminal history when deciding whether or not to hire him or her." This social consequence occurs when anyone is applying to a job and filling out an application.

Similarly, to job applications, housing applications often ask for criminal history. Along with housing applications, convicted felons are "not allowed to apply for federal or state grants, live in public housing, or receive federal cash assistance, SSI or food stamps, etc."

The biggest privilege revoked is the right to vote. In some states, citizens who are convicted of a felony find it harder to regain their right to vote than to find employment, housing, schooling, etc.

¹¹⁹ *Supra* Wheelock

¹²⁰ Deborah N. Archer and Kele Stewart, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. Rev. L. & Soc. Change 527 (2006).

¹²¹ *Supra* Brennan Center for Justice

This consequence is the same for states like Minnesota which, prohibits convicted felons on parole or probation from voting.¹²² The majority of those barred from voting are not incarcerated and more shocking, in 2002, one million of the non-incarcerated people had completed their sentences.¹²³

A major concern is when ex-felons are in states where they can vote, or have the option to ask the governor to allow them to vote, but they are misinformed or not given information to do so.¹²⁴ Due to having a variety of laws from state to state, there are nuanced details for each specific crime of conviction or date of discharge.¹²⁵

B. CIVIL CONSEQUENCES

“The civil penalties imposed with a criminal conviction effectively deny felons the full rights of citizenship. This denial, in turn, makes performing the duties of citizenship difficult.”¹²⁶ First, convicted felons lose their right to bear arms as granted in the Second Amendment of the US Constitution.¹²⁷ Similarly to voting rights, convicted felons can receive this right back in some states.¹²⁸ The process to receive this right back is similar to the process of receiving voting rights back. Convicted felons have multiple options to do so. For example, convicted felons may, apply for felony expungement, write a petition for restoration of firearm rights, receive a governor’s pardon, or receive a federal pardon in order to have the right to purchase a gun again.¹²⁹

¹²² *Supra* NCSL

¹²³ Alec C. Ewald, “*Civil Death*”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, Wisc. L. Rev. (2002).

¹²⁴ *Supra* Joint Religious Legislative Coalition

¹²⁵ *Supra* Meredith & Morse

¹²⁶ Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, ANNALS, AAPSS, 605, (2006).

¹²⁷ *Supra* Hirby

¹²⁸ *Id.*

¹²⁹ *See Id.*

C. RECIDIVISM RATES

One prominent consequence that felon disenfranchisement places on ex-felons is the high recidivism rate for those who are not in prison.¹³⁰ One of the biggest influences on recidivism rates is the environment one returns to after being incarcerated.¹³¹ In 2011, “. . .ex-prisoners who had their voting rights restored had recidivism rates of 11 percent compared to 33 percent for those who did not have their voting rights restored.”¹³² Although recidivism rates are not the only consequences to voter disenfranchisement, it is significantly important. We are continuously setting ex-felons up to fail.

FAITH PERSPECTIVE OF FELON VOTER DISENFRANCHISEMENT

From a faith perspective, the U.S. Catholic Bishops in 2000 said,

“[j]ust as God never abandons us, so too we must be in covenant with one another. We are all sinners, and our response to sin and failure should not be abandonment and despair, but rather justice, contrition, reparation, and return or re-integration of all into the community.”¹³³

This perspective encourages people to keep an open mind, to give ex-felons opportunities for them to rejoin the community.¹³⁴ The Bishops go further to say, “[d]isenfranchisement for those who are on parole and probation denies them an important opportunity to help govern, belong, and fully participate in community life.”¹³⁵ Forgiveness is a virtue, I would hope since we are all sinners.

¹³⁰ *Supra* Whittle Recidivism is re-arrest, new crime, or technical violation of the condition of their release charges, and/or re-incarceration.

¹³¹ *Id.*

¹³² *Supra* Joint Religious Legislative Coalition This research was determined by the Florida Parole Commission.

¹³³ *Id.*

¹³⁴ *See Id.*

¹³⁵ *Supra* Joint Religious Legislative Coalition

SUSPECT CLASSIFICATION AND VOTING AS A FUNDAMENTAL RIGHT

Under the Equal Protection Clause, there are two classifications that the Court can use to determine strict scrutiny.¹³⁶ The first is *suspect classification*, such as race or ethnicity and the second is a *fundamental right*, such as the right to vote.¹³⁷ First, we will examine why, under the Equal Protection Clause, felon voter disenfranchisement can be argued under *suspect classification* based on race. Then we will examine why, under the Equal Protection Clause, felon voter disenfranchisement can be argued under a *fundamental rights* analysis.

First, there are three principles that can be analyzed in order to apply the Equal Protection Clause with heightened scrutiny under *suspect classification*; a history of past discrimination, political powerlessness, and relevance.¹³⁸ These principles play an important role in felon voter disenfranchisement because all three can be met.

A. HISTORY OF PAST DISCRIMINATION

It is important that the history of past discrimination is demonstrated when analyzing suspect classification because it establishes “. . . a lack of political power over time and a failure of the legislative process to provide adequate protection against discrimination,” which can suggest bias or prejudice by lawmakers and other government officials.¹³⁹ When establishing a history of past discrimination, there needs to be proof of qualitatively and quantitatively similar suffrage to that by former slaves.¹⁴⁰ Establishing this principle will require the government to justify its actions of treatment to that particular individual or group.¹⁴¹ History of past discrimination is proven when

¹³⁶ Exploring Constitutional Conflicts, *Equal Protection and The Right to Vote*, Exploring Constitutional Conflicts <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/righttovote.html>

¹³⁷ *Id.*

¹³⁸ Lauren Sudeall Lucas, Functionally Suspect: Reconceptualizing Race as a Suspect Classification, 20 Mich. J. Race & L. 255 (2015).

¹³⁹ *Id.*

¹⁴⁰ *See Id.*

¹⁴¹ *Supra* Sudeall Lucas

it comes to felon voter disenfranchisement because the legislative process of the United States has failed to prove adequate protection against discrimination for African Americans, thus creating a lack of political power over time.¹⁴²

B. POLITICAL POWERLESSNESS

In order for an individual or group to establish political powerlessness as a principle, the individual or group needs to demonstrate how they ". . . lack access to the political process by virtue of [their] circumstances or aspects of [their] identity . . ."¹⁴³ Political powerlessness is deemed as the denial of equal treatment.¹⁴⁴ The denial of equal treatment of disenfranchised felons is shown by their circumstances. They have a felony conviction and cannot vote, but they pay taxes, live in our society, have children, etc. just as non-felon voters do. Felon voter disenfranchisement establishes the principle of political powerless because each person who has a felony conviction and is not in prison can demonstrate how they lack access to the political process by virtue of their circumstances.¹⁴⁵

C. RELEVANCE

The final principle that a Court may consider when establishing suspect classification is relevance. The principle of relevance is met when “. . . the group’s definitive trait bears on its members’ ability to contribute to or participate in society.”¹⁴⁶ Due to felon disenfranchisement, those convicted of a felony that are on probation or parole cannot participate or contribute to society which creates several collateral consequences. The Equal Protection Clause applies to felon voter disenfranchisement with strict scrutiny under *suspect classification*.

¹⁴² *Supra* sections “Get Tough” & “War on Drugs,” Racial Impact, Literacy Tests give an in-depth analysis of the history of discrimination that African Americans have faced over time.

¹⁴³ *Supra* Sudeall Lucas

¹⁴⁴ *Id.*

¹⁴⁵ *Supra* section Collateral Consequences; A. B. C.

¹⁴⁶ *Supra* Sudeall Lucas

Finally, felon voter disenfranchisement can be examined using strict scrutiny under the Equal Protection Clause because voting is a *fundamental right*. Unlike suspect classification, where there is an analysis of the basis of the classification, the fundamental rights analysis examines the nature of the activity.¹⁴⁷ According to the Supreme Court in *Harper v. Virginia Board of Elections*, there is no ". . . fixed catalog of what was at a given time deemed to be the limits of fundamental rights,"¹⁴⁸ meaning that the list of fundamental rights is constantly evolving. This is similar to the *Trop v. Dulles* language when Justice Warren said, "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁴⁹ Just as our society evolves, so too must our laws evolve. Felon voter disenfranchisement can be examined with strict scrutiny under the Equal Protection Clause, using both the *suspect classification* and the *fundamental rights* analysis.

UNDERSTANDING STRICT SCRUTINY

A. THE "LOCHNER ERA"

In order to pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest.¹⁵⁰ From 1897 to 1937, the Supreme Court created a judicial review that would later strike down many statutes that violated individuals' freedom of contract.¹⁵¹ In 1905, the Supreme Court held in *Lochner v. New York*, that the only legal interference with one's freedom of contract could be done by a valid exercise of state's police power.¹⁵² One case that came out of the Lochner Era

¹⁴⁷ Deborah S. James, Voter Registration: A Restriction on the Fundamental Right to Vote, 96 Yale L.J. 1615 (1987).

¹⁴⁸ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966).

¹⁴⁹ *Supra Trop v. Dulles*

¹⁵⁰ Cornell Law School, *Strict Scrutiny*, Cornell Law School.
https://www.law.cornell.edu/wex/strict_scrutiny

¹⁵¹ Todd W. Shaw, Rationalizing Rational Basis Review, 112 NW U.L. Rev. 487 (2017). Freedom of contract is a judicial concept that holds that contracts are based on mutual agreement and free choice.

¹⁵² *Id.*

was *Muller v. Oregon* (1908),¹⁵³ “. . .in which the Court upheld state law, the phrase “Brandeis brief” came to refer to legal arguments stressing social and economic and not simply legal facts and arguments.”¹⁵⁴ This new idea of legal arguments is subject to argument as Justice Frankfurter delivered in the opinion of *Goesart v. Cleary* 335 U.S. 464 (1948), “[t]he Constitution does not require legislatures to reflect sociological insight or shifting social standards. . .”¹⁵⁵ However, to argue felon voter disenfranchisement as unconstitutional stressing social and economic as the legal argument is only part of the argument. The next part requires an understanding of the “New Deal Era.”

B. THE “NEW DEAL ERA”

In *Nebbia v. New York* (1934), the Court held that decisions on government regulations will no longer be decided on the concept of those affected by public interest, and instead would depend on the reasonableness of all of the facts.¹⁵⁶ This decision led to the beginning of the “New Deal Era” Then in 1938, a significant case came before the Court which led the way to a higher standard of review when considering different types of legislation; *United States v. Carolene Products Co.*¹⁵⁷ This Supreme Court decision guaranteed a heightened form of review than other cases that had been ruled under the Equal Protection Clause.

In the case of *United States v. Carolene Products Co.*, the court was required to decide whether a different standard was mandatory for evaluating government action under the Equal

¹⁵³ *Muller v. Oregon*, 208 U.S. 412, (1908).

¹⁵⁴ David Schultz, John R. Vile., & Michelle D. Deardorff, *Constitutional law in contemporary America: Institutions, politics, and process*. St. Paul, MN: West Academic Publishing. p. 446, (2017).

¹⁵⁵ *Goesart v. Cleary*, 335 U.S. 464 (1948).

¹⁵⁶ *Supra* Schultz, Vile, Deardorff

¹⁵⁷ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

Protection Clause of the Fourteenth Amendment.¹⁵⁸ As Justice Stone stated in footnote number four,

“ . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”¹⁵⁹

Meaning, there are groups in our society that cannot participate fully and effectively in the political process, therefore these political processes cannot protect these groups of citizens the way it protects others.¹⁶⁰ Justice Stone gives examples of these discrete and insular minorities as religious, national, or racial minorities.¹⁶¹ This language from Justice Stone thus affirms that felon voter disenfranchisement needs to be examined under strict scrutiny because it burdens a racial minority group.

PAST COURT RULINGS ON FELON VOTER DISENFRANCHISEMENT

There have been many arguments that Felon Voter Disenfranchisement is unconstitutional. For example, the right to vote is a fundamental right, voter disenfranchisement is cruel and unusual punishment, voter disenfranchisement violates the Voting Rights Act of 1965, it violates the Fourteenth Amendment, etc. However, laws that have allowed for the disenfranchisement of felons have continuously been upheld.¹⁶²

¹⁵⁸ *Id.*

¹⁵⁹ *See Id.*

¹⁶⁰ *See United States v. Carolene Products Co.*

¹⁶¹ *Id.*

¹⁶² *Richardson v. Ramirez*, 418 U.S. 24, 43, 55 (1974).

Multiple cases have challenged Felon Voter Disenfranchisement under the Fourteenth Amendment.¹⁶³ Although, political suffrage, under the Fourteenth Amendment, is not considered an absolute or natural right; giving states the right to regulate their constitutions and statutes.¹⁶⁴ Along with this, the Supreme Court held in *Richardson v. Ramirez*, that a plain reading of the Fourteenth Amendment Section 2, allows for a state to prohibit felons from voting.¹⁶⁵ Other cases have proposed that Felon Voter Disenfranchisement violates Section 2 of the Voting Rights Act.¹⁶⁶

A. INVIDIOUS DISCRIMINATION

In *Harper v. Virginia Board of Elections (1966)*, the plaintiff filed suit against the state of Virginia for requiring payment of a state-imposed voting tax prior to voting. The United States Supreme Court reversed the District court's holding, holding that the state could not disqualify a voter based on wealth or paying taxes or fees. The court held that the state cannot set voter qualifications that "invidiously discriminate" and that the state ". . . must show a compelling interest in abridging the right, and that in any event such restrictions must be drawn with narrow specificity."¹⁶⁷ The court went further to say that race, creed, color and wealth cannot restrict a person from voting.¹⁶⁸ *Harper v. Virginia* sets one of the first qualifications to meet when ruling on strict scrutiny; race or color. Using Justice Stone's opinion that the list of fundamental rights constantly evolves, voting, as a fundamental right to the Fourteenth Amendment, any restrictions to this right need to pass strict scrutiny.

¹⁶³ Amy Heath, *Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote After Serving Their Sentences*, American University Journal of Gender, Social Policy and the Law Vol. 25, (2017).

¹⁶⁴ *Id.*

¹⁶⁵ *Supra* Haner

¹⁶⁶ *See Id.*

¹⁶⁷ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

¹⁶⁸ *Id.*

B. “MORAL CORRUPTION AND DISHONESTY”

Otsuka v. Hite 64 Cal. 2d 594 (1966), the plaintiff filed a Class Action suit against the defendant for his refusal to register them to vote due to their prior convictions. This refusal to register the plaintiffs was based on the California Constitution barring voters convicted of an "infamous crime."¹⁶⁹ The California Supreme Court ruled in favor of Otsuka, holding that the wording of “infamous crime” was too broad and should be narrowed to “moral corruption and dishonesty.”¹⁷⁰ This essentially branded the criminal as a threat to the integrity of the elective process.

C. SOCIETY’S MODERN CONCEPTS

Following in 1972, in *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (1972), the plaintiff challenged Washington’s felon disenfranchisement laws on the grounds that these laws violated the United States Constitution Equal Protection Clause of the Fourteenth Amendment.¹⁷¹ The 9th Circuit Court of Appeals questioned the states interest in disenfranchising felons, however, the court also recognized the general idea that states have an interest in disenfranchising those convicted of serious crimes from voting.¹⁷² Although, the ruling in *Dillenburg v. Kramer*, contends with the court's holding in *Goesart*, by stating that “. . . constitutional concepts can change over time, and laws disenfranchising felons should evolve along with society’s modern concepts of justice and punishment.”¹⁷³ Understanding this language in *Dillenburg v. Kramer* allows for the courts to apply this language to all felon disenfranchisement laws. Although felon disenfranchisement laws may have been created to keep the integrity of the electoral box, the laws

¹⁶⁹ *Supra Otsuka v. Hite*

¹⁷⁰ *Id.*

¹⁷¹ *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (1972).

¹⁷² *Id.*

¹⁷³ *See Id.*

have evolved over time disenfranchising African Americans and Native Americans at extraordinary higher rates than White Americans. The evolved felon disenfranchisement laws are discriminative based on race.

D. INTENT V. IMPACT

One critical argument to address is the concept that just because a law has a disproportionate racial impact does not exclusively mean that it is unconstitutional. The Court held in *Washington v. Davis* that,

“[al]though the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the Government from invidious discrimination, it does not follow that a law or other official act is unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose.”¹⁷⁴

Nonetheless, it can be determined that felon voter disenfranchisement laws have a history of being discriminatory intentionally, thus discussing the disproportionate racial impact is only advantageous to the argument as to why felon voter disenfranchisement needs to be reviewed under strict scrutiny to be determined unconstitutional.

WHY THE NEED FOR CHANGE?

A. THE DECLARATION OF SENTIMENTS

In 1848, Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage created the *Declaration of Sentiments*, mirroring the *Declaration of Independence* but from a female perspective.¹⁷⁵ The *Declaration of Sentiments* states, “[h]e has compelled her to submit to laws, in

¹⁷⁴ *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁷⁵ Katharine Bartlett, Deborah Rhode, Joanna Grossman, and Samantha Buchalter, *Gender Law and Policy*, Wolters Kluwer Law and Business, 13,14,15 (2014).

the formation of which she had no voice.” Not only was this oppressive to women but changing the wording slightly can explain felon disenfranchisement. “[the Government] has compelled [African Americans] to submit to laws, in the formation of which [African Americans] have no voice.” As the Women’s Suffrage Movement progressed and society’s viewpoints evolved, women received the right to vote in 1920 from the 19th Amendment of the United States Constitution. History is quickly repeating itself and for us to stop this racial discrimination the courts need to examine felon disenfranchisement under strict scrutiny to determine that it is unconstitutional.

B. COMPARISON OF OTHER COUNTRIES DISENFRANCHISEMENT LAWS

It is necessary to understand that, “[t]he United States is the only democracy that indefinitely bars so many offenders from voting, and it may be the only country with such sweeping disenfranchisement policies.”¹⁷⁶ The United States is one of only four countries that have bans felons from voting once they are released from prison.¹⁷⁷ In spite of this, the United States is the only country that has a lifetime ban on felons from voting once they are released from prison.¹⁷⁸ For example, Belgium only bans felons from voting after they are released if their sentence was over seven years.¹⁷⁹ Iceland is similar to Belgium, but instead of seven years, Iceland bans felons from voting after they are released if their prison sentence is at least four years.¹⁸⁰ Finally, Germany has court-ordered bans on felons from voting after release.¹⁸¹ By allowing for felon voter disenfranchisement to be constitutional, the Court is allowing for the United States to stay the leader in racial discrimination.

¹⁷⁶ *Supra Ewald*

¹⁷⁷ ProCon.org, *International Comparison of Felon Voting Laws*, Felon Voting, (2018).
<https://felonvoting.procon.org/view.resource.php?resourceID=000289> The other countries are Belgium, Germany, and Iceland.

¹⁷⁸ *Id.*

¹⁷⁹ *See Id.*

¹⁸⁰ *Supra* ProCon.org

¹⁸¹ *Id.*

PROPOSAL OF NEW LEGAL ARGUMENT

One crucial point to consider when creating a legal argument for why felon voter disenfranchisement is unconstitutional is to understand the history and the policy's deep roots in the American political system.¹⁸² Since felon voter disenfranchisement laws have been upheld repeatedly, it will need to be judged in a way that the courts have not yet been forced to do, or the courts will need to be convinced that past precedent was in error, demanding them to be overruled. Felon voter disenfranchisement needs to be heard by the United States Supreme Court and be examined with strict scrutiny. Felon voter disenfranchisement needs to be reviewed with a heightened scrutiny standard, strict scrutiny, because the current laws on the state level are unconstitutional. Felon voter disenfranchisement should be examined with strict scrutiny based on race, analyzing the Equal Protection Clause of the Fourteenth Amendment using both suspect classification and voting as a fundamental right.

When the Fourteenth Amendment was passed in June 1868, it was designed to give those born in the United States natural citizenship.¹⁸³ This meant that freed African American slaves could now claim citizenship in the United States, which further extended freed slaves the right to vote.¹⁸⁴ However, even though freed slaves were given this citizenship, they were continuously turned away from the voting polls.¹⁸⁵ This was done because many states used their police power to change their state constitutions to only allow those who could pass a literacy test the right to

¹⁸² *Supra* Ewald

¹⁸³ History.com, *14th Amendment*, HISTORY, (2018). <https://www.history.com/topics/black-history/fourteenth-amendment>

¹⁸⁴ *Id.*

¹⁸⁵ *See Id.*

vote.¹⁸⁶ During this time, further changes to state constitutions allowed for stricter drug laws that were created to discriminate against African Americans.¹⁸⁷

Then in July 1868, section two of the Fourteenth Amendment was passed, which stated that a state cannot deny a person the right to vote, except for rebellion or crime.¹⁸⁸ This amendment gave states the ability through police power to create new laws that incarcerated African Americans and kept them away from the voting polls.¹⁸⁹ Although Section Two of the Fourteenth Amendment may not have been created to discriminate against African Americans, the courts have allowed time and time again the discrimination of African Americans through legal precedent.

A. RICHARDSON V. RAMIREZ

In the case of *Richardson v. Ramirez* (1974), three individuals brought a class action stating that under California's Constitution, the restrictions of them voting due to a previous conviction of an "infamous crime," was a violation of their fundamental right under the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁰ Justice Rehnquist writing for the majority of the Court held that Section Two of the Fourteenth Amendment says what it means and the Equal Protection Clause in Section One of the Fourteenth Amendment could not intend to prohibit felon disenfranchisement in Section Two because of the language in section two that says, ". . . except for participation in rebellion, or other crime."¹⁹¹ In the dissent, Justice Marshall put simply that criminal disenfranchisement ". . . must be measured against the requirements of the Equal Protection Clause of Section 1 of the Fourteenth Amendment."¹⁹² The interpretation of Section

¹⁸⁶ *Supra* Goldman

¹⁸⁷ *See Id. Supra* section "Get Tough" & "War on Drugs"

¹⁸⁸ *Supra* History.com, *14th Amendment*

¹⁸⁹ *Id.*

¹⁹⁰ *Supra* *Richardson v. Ramirez*

¹⁹¹ *Id.*

¹⁹² *See Id.*

Two by the Court focuses narrowly on what the Fourteenth Amendment meant in the nineteenth century but failed to interpret what it meant in the twentieth century.¹⁹³

The Court, however, did not dismiss the respondent's argument that the law was outdated. Instead, the Court held,

“Pressed upon us by the respondents, . . . are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other.”¹⁹⁴

This concept of a law being outdated is similar to *Stanton v. Stanton*, ruled only one year later, in which a Utah law required parents to support their female children until the age of 18, and their male children until the age of 21.¹⁹⁵ The Supreme Court invalidated this law and held that it was unconstitutional because it was an outdated and stereotypical notion of gender roles.¹⁹⁶

The Court has said it is up to the legislatures to change the law, although, the Court can change this law by using Justice Warren's evolving decency language and Justice Stone's concept that the list of fundamental rights is constantly evolving to overturn this legal precedent that has allowed for African Americans to be grossly overrepresented through felon voter disenfranchisement.

¹⁹³ *Supra* Edwald

¹⁹⁴ *Supra* *Richardson v. Ramirez*

¹⁹⁵ *Stanton v. Stanton*, 421 U.S. 7 (1975).

¹⁹⁶ *Id.*

B. TROP V. DULLES

In *Trop v. Dulles*, (1958), the Court prevented Congress from taking away citizenship due to a conviction by court-martial.¹⁹⁷ One significant problem that *Trop v. Dulles* has caused future disenfranchisement cases is the dicta by Justice Warren about a hypothetical case concerning the disenfranchisement of felons.¹⁹⁸ The dicta *Trop v. Dulles* suggests that under the Eighth Amendment of the Constitution it is not a punishment to disenfranchise convicted felons, rather these provisions are viewed by judges as regulatory instead of penal statutes.¹⁹⁹ This problem is significant for two reasons. First, the Courts have failed to cite this dictum stated by Justice Warren as persuasive, rather than binding.²⁰⁰ Second, with the views of an evolving society, felon voter disenfranchisement laws can no longer be regulatory.²⁰¹ These laws are punishment. They give convicted felons a life sentence of collateral consequences that will continue to ruin their life after they have served their time in prison.

The language in *Trop v. Dulles* gives a strong legal precedent that should have been used in the 1974 case of *Richardson v. Ramirez*. The court held in *Trop v. Dulles* that “Citizenship is not a license that expires upon misbehavior.”²⁰² Since voting is a fundamental right to a United States citizen, taking away a person's voting rights upon misbehavior is today's modern view of taking away one's citizenship.

Trop v. Dulles, when talking about the death penalty goes further to say, “But it is equally plain that the existence of the death penalty is not a license to the Government to devise any

¹⁹⁷ *Supra Trop v. Dulles*

¹⁹⁸ *Supra Haner*

¹⁹⁹ *Id.*

²⁰⁰ *See Id.*

²⁰¹ *Supra Haner*

²⁰² *Supra Trop v. Dulles*

punishment short of death within the limit of its imagination.”²⁰³ The civil, social, and familial consequences of felon voter disenfranchisement is a life sentence, short of death, designed by the imagination of the government.

The second section of the Fourteenth Amendment allows for felon voter disenfranchisement, which disproportionately affects African Americans. By using Justice Warren’s language on the evolving standards of decency the court can overturn *Richardson v. Ramirez* and hold that Section Two of the 14th Amendment is in today’s, modern society, unconstitutional. The government cannot prove that the legislature passed the law to further a "compelling governmental interest," and that the legislature narrowly tailored the law to achieve that interest.

CONCLUSION

“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”
Reynolds v. Sims, 377 U.S. 533 (1964)²⁰⁴

The right to vote was intended to give a voice to the voiceless, not to give political leaders the right to decide who has a voice and who does not.²⁰⁵ Felon voter disenfranchisement has created a second wave of slavery and has extraordinarily affected African Americans at disproportionately higher rates than other races. Felon voter disenfranchisement needs to be declared unconstitutional by the United States Supreme Court under strict scrutiny on suspect classification based on race and voting as a fundamental right. When the court is forced to examine felon voter disenfranchisement under strict scrutiny and the government must explain what

²⁰³ *Id.*

²⁰⁴ The Sentencing Project, *LOSING THE VOTE: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch (1998).

²⁰⁵ *Supra* Introduction *Supra* Haner

“compelling state interest” they have in disenfranchising felons from voting, the Court will determine that under the Equal Protection Clause of the Fourteenth Amendment, felon voter disenfranchisement is unconstitutional.