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# Lifting the Fog: Ending Felony Disenfranchisement in Virginia

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# COMMENT

## LIFTING THE FOG: ENDING FELONY DISENFRANCHISEMENT IN VIRGINIA

*The disenfranchisement of ex-felons had "its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government."*<sup>1</sup>

### I. INTRODUCTION

The 2008 presidential election has been widely recognized as one of historic proportions. With more than 130 million votes cast, more Americans participated in this election than in any other presidential contest in United States history.<sup>2</sup> The surge was particularly pronounced in the Commonwealth of Virginia, as 67.6 percent of the estimated voting-eligible population showed up at the polls to cast their ballots.<sup>3</sup> Turnout among African American voters was also unprecedented at sixty-eight percent, a whopping sixteen points higher than in the 2004 election.<sup>4</sup> Virginia's remarkable turnout, which was ranked fifteenth highest in the nation, far surpassed the national average of 62.2 percent.<sup>5</sup>

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1. *Richardson v. Ramirez*, 418 U.S. 24, 85–86 (1974) (Marshall, J., dissenting) (quoting *Byers v. Sun Sav. Bank*, 139 P. 948, 949 (Okla. 1914)).

2. Andy Barr, *2008 Turnout Shatters All Records*, POLITICO (Nov. 5, 2008, 4:19 AM), <http://www.politico.com/news/stories/1108/15306.html>.

3. *2008 General Election Turnout Rates*, UNITED STATES ELECTION PROJECT, [http://elections.gmu.edu/Turnout\\_2008G.html](http://elections.gmu.edu/Turnout_2008G.html) (last visited Oct. 15, 2012).

4. Christopher Young, *2008 Presidential Election: Voter Turnout for Virginia*, RICH. TIMES-DISPATCH, July 21, 2009, [http://www2.timesdispatch.com/news/2009/jul/21/2008\\_presidential\\_election\\_voter\\_turnout\\_for\\_virgi-ar-36615/](http://www2.timesdispatch.com/news/2009/jul/21/2008_presidential_election_voter_turnout_for_virgi-ar-36615/).

5. UNITED STATES ELECTION PROJECT, *supra* note 3.

A less-reported statistic is the number of Virginians who were unable to cast a vote in that historic election because of a criminal conviction. Currently, Virginia is one of only four states to permanently bar citizens from voting if they have been convicted of a felony offense.<sup>6</sup> To reinstate voting rights in Virginia, a person convicted of a felony must petition the governor for clemency, but may do so only after he satisfies all sentencing requirements and a mandatory waiting period, during which he must remain free of further convictions.<sup>7</sup> This state constitutional ban affects approximately 378,000 Virginians, or 6.8 percent of Virginia's entire population.<sup>8</sup> Astonishingly, one out of every five African Americans in the Commonwealth has lost his or her right to vote due to a felony conviction.<sup>9</sup>

Most Virginia felony convictions (sixty percent) do not merit jail time, and many are for nonviolent offenses.<sup>10</sup> Yet those who commit such infractions continue to be punished by society long after they have paid the criminal penalties assigned to them. This comment explores how Virginia's disenfranchisement law originated, how it has managed to survive throughout Virginia's history, and whether it may be vulnerable to various legal challenges.

Part II outlines the history of felony disenfranchisement in Virginia. Part III analyzes common policy justifications for the current law and discusses the widely held beliefs about the role of race in the law's inception. Part IV examines legal challenges to similar laws in the federal courts and evaluates the potential for success of comparable challenges in Virginia. Part V looks to recent attempts at enacting solutions at the state level. Part VI offers thoughts and recommendations for the future.

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6. See *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/page/-/Democracy/USA%20MAP%203.23.2011.pdf> (last visited Oct. 15, 2012). The other states are Kentucky, Florida, and Iowa. *Id.*

7. Monica Robbers, *Ramifications of Felony Disenfranchisement on the Voting Population in the Commonwealth of Virginia*, 11 RICH. J.L. & PUB. INT. 1, 3 (2008) (citing VA. CODE ANN. § 53.1-231.2 (Repl. Vol. 2009)).

8. See *Virginia*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/map/statedata.cfm?abbrev=VA&mapdata=true> (last visited Oct. 15, 2012).

9. See *id.*

10. See Edward Hailes, Jr., *It's Time to Give Felons Back Their Right to Vote*, WASH. POST, July 27, 2008, at B8.

## II. HISTORICAL CONTEXT

It is possible to trace the roots of felony disenfranchisement as far back as ancient Greek civilization.<sup>11</sup> In ancient Greece, convicted criminals essentially were cast out of society—they were not allowed to vote, make speeches, attend public assemblies and court proceedings, or serve in the army.<sup>12</sup> However, the modern American concept owes its origin to the British common law tradition of “civil death.”<sup>13</sup> Through a process called “attainder,” the British government imposed various civil consequences on offenders, which were collateral to their criminal convictions.<sup>14</sup> In addition to losing the right to vote, convicts could neither transfer nor inherit property under this policy.<sup>15</sup>

Though American lawmakers generally rejected the policy of complete civil death, they retained criminal disenfranchisement.<sup>16</sup> Virginia was the first new American state to pass a law preventing persons with felony convictions from voting, but other states soon followed.<sup>17</sup> By the eve of the Civil War, roughly twenty-four states had some type of law restricting the suffrage of criminal offenders.<sup>18</sup> Some states have elected to suspend voting rights for the length of incarceration or until all other requirements of the sentence (parole, probation, fines, and restitution) have been satisfied.<sup>19</sup> In contrast, Virginia’s lifetime voting rights ban is one of the strictest in the nation.<sup>20</sup>

Virginia’s felony disenfranchisement provision is codified in article II, section 1 of the Virginia Constitution, which states, in

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11. Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box,”* 102 HARV. L. REV. 1300, 1301 (1989).

12. *See id.*

13. Carl N. Frazier, Note, *Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them,* 95 KY. L.J. 481, 483 (2006–07).

14. *Id.*

15. *Id.* (citations omitted); *see also* Note, *supra* note 11, at 1301–02 (citations omitted) (discussing the doctrine of “corruption of the blood” in feudal England, which denied criminals the right to pass property because one’s bad act was thought to reflect upon the character of his entire family).

16. Frazier, *supra* note 13.

17. William Walton Liles, Comment, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future,* 58 ALA. L. REV. 615, 617 (2007).

18. *Id.*

19. JOHN DINAN, *THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE* 77 (G. Alan Tarr, ed., 2006).

20. *Id.*

pertinent part: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority."<sup>21</sup> Section 1, which generally governs the qualifications of voters, has been amended numerous times throughout history, and each revision (with one exception in 1902) has had the effect of removing obstacles to voting.<sup>22</sup> However, the felony restriction essentially has remained unchanged since its inception in 1830.<sup>23</sup>

### III. POLICY JUSTIFICATIONS

#### A. *Theoretical Arguments*

Supporters of felony disenfranchisement laws often base their arguments on John Locke's social contract theory.<sup>24</sup> The Second Circuit articulated this justification in *Green v. Board of Elections*,<sup>25</sup> one of the earlier cases to deal with denial of the franchise to criminal offenders. According to Locke and the court, a social contract is formed when an individual chooses to belong to and participate in society.<sup>26</sup> By virtue of their participation, all citizens implicitly authorize society's government to make laws for the public good and agree to abide by those laws.<sup>27</sup> Therefore, if a citizen breaks the law, it is reasonable to conclude that she has abandoned any right to take part in further administration of the contract.<sup>28</sup>

Thus, the social contract theory reasons that the act of the individual, not the state, forecloses the free exercise of suffrage. It "emphasizes the deliberate nature of the criminal's decision to breach the social charter" and contrasts it with a passive government institution.<sup>29</sup> As the Sixth Circuit noted in another case, felony disenfranchisement provisions do not operate to deny citizens

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21. VA. CONST. art. II, § 1.

22. DINAN, *supra* note 19, at 76. The 1902 Constitution imposed several restrictions specifically aimed at disenfranchising African American voters, which have since been repealed. *See id.*

23. *Id.* at 76-77.

24. *See Note, supra* note 11, at 1304.

25. 380 F.2d 445, 451 (2d Cir. 1967).

26. *See id.*

27. *Id.*

28. *Id.*

29. Note, *supra* note 11, at 1304-05.

their rights ab initio; rather, citizens themselves make the "conscious decision to commit a criminal act for which they assume the risks."<sup>30</sup>

Critics of the social contract theory argue that this justification, with its reliance on traditional contract principles, is simply an inadequate way of describing the complex relationships between a society and its citizens. A contract requires a bargain, yet if the citizenry were armed with complete information and actual bargaining power vis-à-vis their government, they probably would not consent to such a law.<sup>31</sup> Furthermore, how many citizens would be capable of fully understanding the life-long ramifications of a single breach from the moment they were able to commit one? Finally, the theory plainly assumes away any democratic notion that a society's members have a right to participate in the process that creates the laws with which they must comply.<sup>32</sup>

Another argument in support of felony disenfranchisement is that felons are unable to comprehend the public good and therefore should not be allowed to influence the political process.<sup>33</sup> The courts have used this notion of political competence to liken felony disenfranchisement to the widely accepted practice of denying suffrage to minors and the mentally insane.<sup>34</sup>

Critics note that the competence justification is based on a principle of exclusion, which is completely at odds with modern social norms of integration and equality.<sup>35</sup> The Supreme Court has held that the government cannot exclude an entire segment of the population based on the way they might vote, yet the competence theory persists in doing just that.<sup>36</sup> The Ninth Circuit opined about this antiquated doctrine as long ago as 1972:

Search for modern reasons to sustain the old governmental disenfranchisement prerogative has usually ended with a general pronouncement that a state has an interest in preventing persons who have been convicted of serious crimes from participating in the elec-

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30. *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).

31. *See Note, supra* note 11, at 1305.

32. *See id.* at 1306.

33. *Id.* at 1308.

34. *Id.* at 1307-08 (citing *Washington v. State*, 75 Ala. 582, 585 (1884); *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971); *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978)).

35. *Id.* at 1309.

36. *See id.* (citing *Carrington v. Rash*, 380 U.S. 89, 94 (1965)).

toral process . . . or a quasi-metaphysical invocation that the interest is preservation of the "purity of the ballot box."<sup>37</sup>

Any theory that assumes the commission of a single transgression makes a citizen morally deficient per se, and therefore an undesirable voter for life, ignores the idea of rehabilitation upon which our criminal justice system is founded.<sup>38</sup> Surely, the mark of success of any penal system is the ability of its criminals to become productive members of society after serving their sentences.<sup>39</sup> Not only does the incompetence theory neglect this important aim, it actually may work against it. Restoration of voting rights is one of the easiest ways to facilitate the reintegration of former delinquents into the community, and community involvement is crucial for preventing recidivism.<sup>40</sup>

### B. *The Role of Race*

Opponents of Virginia's felony disenfranchisement law often cite racial discrimination, specifically a desire to prevent African American citizens from voting, as the primary motivation for the original enactment.<sup>41</sup> After 1870, many Southern lawmakers responded to the passage of the Fourteenth and Fifteenth Amendments by creating new restrictions on voting—including poll taxes, literacy tests, and grandfather clauses—aimed at disenfranchising racial minorities.<sup>42</sup> Around the turn of the century, some Southern states also attempted to accomplish this goal by amending their criminal disenfranchisement provisions to "target crimes for which African Americans were prosecuted most often."<sup>43</sup> The effects of these changes were quite pronounced.<sup>44</sup> In Reconstruction-era Louisiana, forty-four percent of registered

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37. *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972); see also Note, *supra* note 11, at 1302.

38. Frazier, *supra* note 13, at 485.

39. See *id.*

40. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1166 (2004) (citation omitted).

41. See, e.g., Rob Poggenklass, Op-Ed., *Take Jim Crow Out of the Virginia Constitution: Restore Voting Rights for All*, STATE OF ELECTIONS (Dec. 16, 2009), <http://electls.blogs.wm.edu/2009/12/16/op-ed-take-jim-crow-out-of-the-virginia-constitution-restore-voting-rights-for-all/>.

42. Frazier, *supra* note 13, at 484.

43. *Id.*

44. *Id.*

voters were African American, compared to less than one percent in 1920.<sup>45</sup> Likewise, in Mississippi, seventy percent of African Americans were registered to vote in 1867, but by 1892, that percentage had fallen to less than six percent.<sup>46</sup>

Virginia's record of racial integration during this time in history similarly was tainted by legislative efforts to keep African American citizens from exercising the right to vote. Lawmakers convened the now-infamous Constitutional Convention of 1901 to 1902 primarily with that specific purpose in mind.<sup>47</sup> As Alfred P. Thom, a delegate to the convention noted: "We do not come here prompted by an impartial purpose in reference to negro suffrage. We come here to sweep the field of expedients for the purpose of finding some constitutional method of ridding ourselves of it forever."<sup>48</sup> The delegates adopted a new system of voter registration requirements, including, among other provisions, a poll tax and a controversial "understanding" provision, under which individuals must show "an ability to understand and explain any section of the Constitution submitted to them by a registration officer."<sup>49</sup>

It is not surprising that such an invidious history of using voting restrictions as a means to discriminate on the basis of race would lead to the widely circulated assumption that Virginia's felony disenfranchisement provision was enacted with the same sentiment. However, that notion is not entirely accurate. This particular law became part of the Virginia Constitution in 1830, long before slavery was abolished and African Americans were given the right to vote.<sup>50</sup> Because the right did not yet exist, the framers of the provision could not have manifested intent to deny it.<sup>51</sup>

However, there is some evidence that lawmakers subsequently attempted to tailor the felony disenfranchisement provision to target African American voters. In 1876, an amendment was add-

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45. *Id.* (citation omitted).

46. *Id.*

47. DINAN, *supra* note 19, at 15.

48. John Dinan, *The Development of the Virginia Constitution*, in THE CONSTITUTIONALISM OF THE AMERICAN STATES 384, 389 (George E. Connor & Christopher W. Hammons eds., 2008) (internal quotation marks omitted).

49. DINAN, *supra* note 19, at 16.

50. *Howard v. Gilmore*, No. 99-2285, 2000 U.S. App. LEXIS 2680, at \*2, \*3 (4th Cir. Feb. 23, 2000) (unpublished decision) (citing VA. CONST. of 1830, art. III, § 14 (1830)).

51. *See id.*

ed to include "petit larceny" in the list of qualifying offenses, which at the time also included election fraud, embezzlement, and treason.<sup>52</sup> This amendment clearly had the purpose of denying the vote to newly enfranchised African Americans; though, when the Constitution was rewritten in 1971, the drafters removed the tainted petit larceny provision as well as all other non-felony offenses.<sup>53</sup>

While Virginia's disenfranchisement provision may not have been enacted with racial animus, and while the Commonwealth has attempted to remedy the racially motivated amendments of the Jim Crow era, one cannot ignore the actual disparate impact the law has had on minority voters.<sup>54</sup> By exploring potential legal challenges in the federal courts in Part IV, I turn to the question of whether solutions exist that could lead to a more equitable policy.

#### IV. CHALLENGES TO FELONY DISENFRANCHISEMENT UNDER FEDERAL LAW

##### A. *Equal Protection—The Fourteenth and Fifteenth Amendments*

The first legal challenges to the constitutionality of felony disenfranchisement laws claimed that such provisions violated the Fourteenth Amendment's Equal Protection Clause.<sup>55</sup> The Equal Protection Clause dictates that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>56</sup> Plaintiffs thus argue that criminal disenfranchisement laws treat them unequally by denying them the right to vote,<sup>57</sup> which often is considered one of the most fundamental rights of our democracy.<sup>58</sup>

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52. DINAN, *supra* note 19, at 92 n.2 (citations omitted).

53. *Id.* (citations omitted).

54. *See supra* text accompanying note 9.

55. Liles, *supra* note 17, at 618 (citing *Richardson v. Ramirez*, 418 U.S. 24, 26-27 (1974); *Johnson v. Bush*, 405 F.3d 1214, 1216 (11th Cir. 2005); *Owens v. Barnes*, 711 F.2d 25, 25-26 (3d Cir. 1983)).

56. U.S. CONST. amend. XIV, § 1.

57. *See, e.g., Richardson*, 418 U.S. at 26-27.

58. *See Frazier, supra* note 13, at 481.

### 1. *Richardson* and Its Critics

The Supreme Court first addressed the Equal Protection argument in *Richardson v. Ramirez*.<sup>59</sup> The three original plaintiffs in *Richardson* had prior felony convictions in California, but had completed the requirements of their respective sentences.<sup>60</sup> The individuals were denied voter registration pursuant to a California law that required an executive pardon to restore voting rights to anyone who was convicted of a felony and served a term in prison as a result of that felony.<sup>61</sup> The plaintiffs then challenged the law on two grounds. First, they claimed the law could not withstand the strict scrutiny required under the Equal Protection Clause.<sup>62</sup> Second, they alleged that the law was unevenly applied from county to county, which operated to deny due process and equal protection across jurisdictions.<sup>63</sup>

The Supreme Court held that although voting generally is considered a fundamental right, felony disenfranchisement could be distinguished from other voting rights restrictions, because Section 2 of the Fourteenth Amendment expressly creates an exception for felony convictions.<sup>64</sup> At the time the Fourteenth Amendment was enacted, Section 2 imposed a penalty of decreased congressional representation upon any state that denied franchise to any qualified voters for any reason "except for participation in rebellion, or other crime."<sup>65</sup> According to the *Richardson* majority, because Section 2 expressly exempts felony disenfranchisement from sanction, the framers of the amendment could not possibly have intended for Section 1 to prohibit it.<sup>66</sup> Therefore, because they are affirmatively sanctioned by the Fourteenth Amendment, felony disenfranchisement laws are patently constitutional and not subject to strict scrutiny like other voting restrictions.<sup>67</sup>

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59. 418 U.S. at 26–27.

60. *Id.* at 26.

61. *Id.* at 29–30.

62. *Id.* at 33.

63. *Id.*

64. *See id.* at 54.

65. U.S. CONST. amend. XIV, § 2.

66. *See* 418 U.S. at 43.

67. *See* Frazier, *supra* note 13, at 489.

Justice Thurgood Marshall disagreed with the *Richardson* majority's interpretation of Section 2. In his dissent, he argues that the legislative history of the amendment does not conclusively demonstrate that its drafters intended to endorse the states' right to disenfranchise voters based on prior convictions.<sup>68</sup> Instead, he posits that the section was really the product of Republicans in Congress, who were worried that the addition of Southern states' representatives in the legislature would "weaken their own political dominance."<sup>69</sup> African Americans in the South would have been more sympathetic to Republican legislative priorities, so the Republicans wanted to ensure their enfranchisement; however, an explicit requirement of African American suffrage would have been "politically unpalatable."<sup>70</sup> Thus, Section 2 was a political compromise, ironically intended to provide a remedy that would expand the right to vote for African Americans during Reconstruction. With that purpose in mind, Marshall suggests it is unlikely that the drafters understood Section 2 to have the weight of bestowing express unconditional authority to the states to limit the right to vote guaranteed by other sections of the amendment.<sup>71</sup>

Marshall goes on to suggest that any discrimination to which the specific remedy of loss of representation in Section 2 does not apply still must pass muster under the Equal Protection Clause.<sup>72</sup> Such discrimination is "not forever immunized from evolving standards of equal protection scrutiny."<sup>73</sup> To illustrate his argument, Marshall notes that other voting requirements expressly authorized by the framers at the time, such as the one-year residency requirement, have been subsequently declared unconstitutional by the courts.<sup>74</sup>

Other critics have cited structural objections to the *Richardson* decision based on a holistic reading of all three "Civil War" amendments to the Constitution. Such arguments note that the

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68. 418 U.S. at 74 (Marshall, J., dissenting); see also John Benjamin Schrader, Note, *Reawakening "Privileges or Immunities": An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws*, 62 VAND. L. REV. 1285, 1293 (2009).

69. *Richardson*, 418 U.S. at 73 (Marshall, J., dissenting).

70. *Id.* (citations omitted).

71. See *id.* at 74.

72. *Id.*

73. *Id.* at 76.

74. *Id.* (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)).

subsequent passage of the Fifteenth Amendment rendered the penalty provision of Section 2 of the Fourteenth Amendment practically obsolete.<sup>75</sup> The Fifteenth Amendment states that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”<sup>76</sup> Thus, because the Fifteenth Amendment imposes an absolute ban on disenfranchisement for those classes listed, it creates a direct conflict with Section 2 of the Fourteenth Amendment, which allows such disenfranchisement, subject to the loss of representation penalty.<sup>77</sup> Since the Fifteenth Amendment is the more recent enactment, it has the practical effect of repealing Section 2.

Further, the Fifteenth Amendment may be read to prohibit felony disenfranchisement entirely, as it proscribes all restrictions on the right to vote based on “previous condition of servitude.”<sup>78</sup> Of course, this prohibition was drafted with former slaves and indentured servants in mind, but the Framers chose not to include an express authorization for disenfranchisement of former prisoners, as they had in Section 2 of the Fourteenth Amendment.<sup>79</sup>

The language of the Thirteenth Amendment gives further credence to an interpretation of the phrase “previous condition of servitude” that also applies to former prisoners. The Thirteenth Amendment provides that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>80</sup> By including criminal punishment within the definition of “involuntary servitude,” the Thirteenth Amendment “empower[s] the Fifteenth Amendment to override” any sanction for felony disenfranchisement one may interpret from the Fourteenth Amendment.<sup>81</sup>

Though *Richardson's* holding has been criticized widely by various scholars, it still represents the prevailing jurisprudence with regard to facial Equal Protection challenges. Thus, the United

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75. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1903, 1904 (1999) (citations omitted).

76. U.S. CONST. amend. XV, § 1.

77. See Schrader, *supra* note 68, at 1294–95.

78. U.S. CONST. amend. XV, § 1.

79. Compare *id.*, with *id.* amend. XIV, § 2.

80. U.S. CONST. amend. XIII, § 1.

81. Schrader, *supra* note 68, at 1295.

States District Court for the Eastern District of Virginia has sustained the Commonwealth's disenfranchisement provision against such a challenge, citing the *Richardson* opinion.<sup>82</sup> The court went on to discuss the history of the law, noting that the disenfranchisement provision was in the Virginia Constitution at the time the Commonwealth was readmitted to the United States after the end of the Civil War.<sup>83</sup> Its readmission was conditioned upon congressional review of the state constitution, so Congress had the opportunity to reject the provision.<sup>84</sup> The court observed, "[i]f the Framers of the Fourteenth Amendment had intended to preclude states like Virginia from disenfranchising their convicted felons, they remained silent."<sup>85</sup>

## 2. Beyond *Richardson*: Challenges Based on Discriminatory Intent

In addition to their facial challenge to California's criminal disenfranchisement provision, the plaintiffs in *Richardson* alleged that the provision had been applied unevenly among different counties within the state.<sup>86</sup> They cited evidence from a report from the secretary of state which admitted that county registrars adopted different policies based on their own varied interpretations of the law.<sup>87</sup> In fact, the problem was so widespread that "a person convicted of almost any given felony would find that he is eligible to vote in some California counties and ineligible to vote in others."<sup>88</sup>

The Supreme Court refused to rule on the plaintiffs' claims of discriminatory application of the law because the California Supreme Court, in holding that the law was itself unconstitutional, had not yet taken up the issue.<sup>89</sup> However, the language the Court used in declining to decide the issue left the lower courts room to

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82. *Perry v. Beamer*, 933 F. Supp. 556, 558 (E.D. Va. 1996) (quoting *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974)).

83. *See id.* at 559.

84. *See id.*

85. *Id.*

86. *Richardson*, 418 U.S. at 33.

87. *Id.* at 33 & n.12.

88. *Id.* at 34 n.12.

89. *Richardson*, 418 U.S. at 56; *see also* Liles, *supra* note 17, at 620.

infer that such a challenge might have merit.<sup>90</sup> This opened the door for further actions in various circuits.<sup>91</sup>

The issue again reached the Supreme Court in *Hunter v. Underwood*, a case which challenged an Alabama constitutional provision barring individuals guilty of crimes of “moral turpitude” from voting.<sup>92</sup> The Court found that the provision would be violative of the Fourteenth Amendment if the plaintiffs could show not only that it had a disproportionate impact on a protected class, but also that it was enacted with discriminatory intent.<sup>93</sup>

While some Equal Protection challenges to state felony disenfranchisement laws based on discriminatory intent or application have been successful,<sup>94</sup> the threshold to prove intentional discrimination is a high bar to meet. Further, while one easily could make a case that Virginia’s law has had a practical discriminatory impact on the African American voting age population, there is no evidence that the law, in its current form, was enacted with a discriminatory purpose.<sup>95</sup> Thus, as long as the Supreme Court’s ruling in *Richardson* remains an obstacle, a constitutional challenge based on the Fourteenth Amendment is unlikely to be successful in the Commonwealth.

### B. Voting Rights Act

Most recent challenges to state criminal disenfranchisement laws have focused on section 2 of the Voting Rights Act of 1965 (“VRA”).<sup>96</sup> Section 2 provides in part:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .<sup>97</sup>

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90. Liles, *supra* note 17, at 620 & n.53 (citing *Richardson*, 418 U.S. at 56).

91. *Id.* at 620; *see, e.g.*, *Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982); *Allen v. Elisor*, 664 F. 2d 391 (4th Cir. 1981), *vacated as moot*, 454 U.S. 807 (1981).

92. 471 U.S. 222, 223 (1985).

93. *See id.* at 232–33.

94. *See, e.g., id.* at 222.

95. *See supra* Part III.B.

96. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 42 U.S.C. § 1973 (2006)).

97. 42 U.S.C. § 1973(a) (2006).

In 1982, Congress amended section 2 to abolish a requirement that plaintiffs alleging discrimination under the VRA prove the law was enacted with discriminatory intent.<sup>98</sup> Instead, the law, as amended, forbids any voting procedure that has a discriminatory impact on a protected class.<sup>99</sup>

### 1. Discriminatory Impact and *Farrakhan*

VRA challenges to state felony disenfranchisement laws seem promising in light of the 1982 amendments, as statistics show such provisions often disproportionately impact members of minority communities.<sup>100</sup> However, successful section 2 claims have traditionally involved discrimination via government designation of voting districts, and federal circuit courts disagree widely over whether and how to apply section 2 prohibitions to felony disenfranchisement.<sup>101</sup>

In the various VRA challenges that the courts have heard, the Second Circuit and Eleventh Circuit have held that VRA claims were invalid and therefore could not proceed, whereas the Sixth Circuit and Ninth Circuit have found the opposite.<sup>102</sup> However, to date, no law has been overturned based on a VRA violation.<sup>103</sup> The Supreme Court continues to refuse to resolve the circuit split (it has denied certiorari to every case so far), and because the circuit alignments are so strange, it can be difficult to predict what any given court will rule on this issue.<sup>104</sup>

To date, the most successful VRA challenge has been *Farrakhan v. Washington*.<sup>105</sup> In *Farrakhan*, minority prison inmates discovered research that showed that racial disparities in the state criminal justice system did not adequately reflect the rate of

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98. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (1982) (codified as amended at 42 U.S.C. § 1973 (2006)); see also *Farrakhan v. Washington*, 338 F.3d 1009, 1014 (9th Cir. 2003).

99. *Id.* at 1015.

100. Frazier, *supra* note 13, at 494–95 (citations omitted).

101. *Id.* at 495; see Liles, *supra* note 17, at 624.

102. Liles, *supra* note 17, at 627–28 (citing *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 650 (2005); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986)).

103. *Id.* at 628.

104. *Id.* at 627–28.

105. 338 F.3d 1009 (9th Cir. 2003).

actual instances of minority crime.<sup>106</sup> When considered in light of the fact that felony convictions automatically resulted in loss of the right to vote, the plaintiffs argued that state law enforcement's systemic inequalities naturally had a discriminatory impact on their right to vote.<sup>107</sup>

The court held that challenges based on section 2 of the VRA should be evaluated using a "totality of circumstances" inquiry.<sup>108</sup> This standard requires courts to assess the ways in which the challenged provision "interacts with external factors such as 'social and historical conditions' to result in denial of the right to vote on account of race or color."<sup>109</sup> It found the plaintiffs had provided "compelling" evidence of discriminatory impact.<sup>110</sup>

After years of litigation and two separate appeals, the Ninth Circuit decided to rehear *Farrakhan* en banc, which ultimately resulted in reversal of both Ninth Circuit panel decisions.<sup>111</sup> The court introduced a new test to apply to VRA challenges, whereby the plaintiff must at least show either: (i) that the criminal justice system had been "infected by intentional discrimination" or (ii) that the state's disenfranchisement provision was enacted with discriminatory intent.<sup>112</sup> Though the court did not go so far as to overrule the validity of the VRA challenge, it effectively read an intent element back into section 2, thus ignoring the plain language of the amended statute.<sup>113</sup>

In 2000, the Fourth Circuit addressed (and summarily rejected) a VRA challenge to Virginia's felony disenfranchisement law in the case of *Howard v. Gilmore*.<sup>114</sup> The court noted that a VRA claim must show that the voting procedure either "intended to, or had the effect of abridging or denying the right to vote based upon race."<sup>115</sup> It then held that the plaintiff's challenge failed to show

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106. Ryan P. Haygood, *Disregarding the Results: Examining the Ninth Circuit's Heightened Section 2 "Intentional Discrimination" Standard in Farrakhan v. Gregoire*, 111 COLUM. L. REV. 51, 52–53 (2011).

107. *Farrakhan*, 338 F.3d at 1013.

108. *Id.* at 1011–12.

109. *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

110. *Id.* at 1013–14, 1020.

111. Haygood, *supra* note 106, at 56.

112. *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc).

113. *See* Haygood, *supra* note 106, at 57–58.

114. No. 99-2285, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000) (unpublished).

115. *Id.* at \*3 (citing *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986)).

racially discriminatory intent because the constitutional provision pre-dated minority enfranchisement.<sup>116</sup> Further, the plaintiff failed to show “any nexus between the disenfranchisement of felons and race.”<sup>117</sup>

While the Virginia case ultimately failed, at least one aspect of the Fourth Circuit panel’s decision was encouraging: the court did not reject the challenge on the ground that the VRA is not applicable to felony disenfranchisement claims, as three of its sister circuits have.<sup>118</sup> Rather, it left open the possibility that a case may arise in which the plaintiff, upon a showing of evidence of the required nexus, may succeed in exposing the discriminatory impact of the law.

## 2. Minority Vote Dilution

A unique aspect of the VRA is that it also protects the equal opportunity of members of a class to participate collectively in the political process.<sup>119</sup> By its enactment, Congress seems to acknowledge that the concept of voting rights implicates not only those rights of an individual, but also the collective ability of a community to join together to impact the political process.<sup>120</sup> As Justice Lewis F. Powell, Jr., stated, “The concept of ‘representation’ necessarily applies to groups: groups of voters elect representatives, individual voters do not.”<sup>121</sup>

Felony disenfranchisement profoundly impacts the political opportunity available to minority communities. Using a procedure called the “usual residence rule,” the Census Bureau counts prisoners as residents of the district in which they are incarcerated.<sup>122</sup> The result is often artificially inflated population totals in rural, majority white communities at the expense of the (largely minority) communities the inmates ordinarily would call home.<sup>123</sup> Of

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116. *Id.*

117. *Id.*

118. See *Simmons v. Glavin*, 575 F.3d 24, 41 (1st Cir. 2009); *Johnson v. Bush*, 405 F.3d 1214, 1234 (11th Cir. 2005); *Muntaqim v. Coombe*, 366 F.3d 102, 115 (2d Cir. 2004).

119. See 42 U.S.C. § 1973(b) (2006).

120. See *Karlan*, *supra* note 40, at 1155–56.

121. *Id.* at 1156 (quoting *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part)).

122. *Id.* at 1159.

123. *Id.* at 1159–60.

course, government funding and political representation are both functions of population, as determined by the Census, so the inmates quite literally increase the value of prison communities without reaping any of the benefits, while leaving their families and neighbors underrepresented. Critics of this system have compared its practical effects to the “Three-Fifths” Compromise in the original United States Constitution, which gave slave-owning states more political influence by including slaves in the population tallies for determining congressional representation.<sup>124</sup>

The effects of this type of vote dilution could be particularly prominent in a state like Virginia, where criminal voting bans are not rescinded automatically. As more (disproportionately minority) voters become disenfranchised, and comparatively few rejoin the political process, the distribution of political power becomes increasingly disparate. The decrease in political power leads to lack of resources, which in turn leads to more crime, and a vicious cycle develops, one with little chance of reform.<sup>125</sup> Thus, Virginia’s criminal disenfranchisement laws operate as a collective sanction, penalizing not only the offenders, but everyone in the community.<sup>126</sup> As 2012 marks the first presidential election since the latest Census tally, clearer measures of the precise impacts of these policies likely are to become available soon.

### C. *Eighth Amendment*

Laws like Virginia’s, which prohibits voting long after the sentence is complete, result in criminal defendants who continue to pay in some form, even after their “debt to society” has officially been settled.<sup>127</sup> These effects have prompted some critics to argue that the laws violate the Eighth Amendment’s prohibition against cruel and unusual punishment.<sup>128</sup>

The Eighth Amendment test begins with a determination of whether a government action is penal or regulatory in nature, as regulatory actions are not subject to Eighth Amendment scruti-

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124. *Id.* at 1160–61.

125. *See, e.g.*, ELIZABETH A. HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* 27 (2006).

126. Karlan, *supra* note 40, at 1161.

127. Frazier, *supra* note 13, at 492.

128. *Id.*

ny.<sup>129</sup> The purpose of a penal provision is punishment, reprimand, or deterrence, while a non-penal provision is motivated by some other legitimate government purpose.<sup>130</sup> To illustrate the difference, Chief Justice Earl Warren used a hypothetical example of a felony disenfranchisement provision as “a non-penal exercise of the power to regulate the franchise.”<sup>131</sup> Warren gives no further explanation as to the “legitimate government purpose” served by such a law, yet courts have since relied on that one-line characterization, and thus never have conducted an Eighth Amendment analysis on the subject.<sup>132</sup>

Given the fact that courts have yet to entertain the notion that felony disenfranchisement provisions are more akin to punishments than regulations, such a case would be difficult to make.<sup>133</sup> However, much of the relevant scholarship on the issue suggests that these statutes do in fact penalize.<sup>134</sup> Furthermore, as courts have an affinity for citing congressional acts to readmit the Southern states to the Union as evidence that the framers of the Civil War Amendments approved of felony disenfranchisement, they should also take note that these statutes view such disenfranchisement as a punishment.<sup>135</sup> The “Act to admit the State of Virginia to Representation in the Congress of the United States” states that, as a condition of admittance to the Union:

[T]he Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State.<sup>136</sup>

If one were successful in convincing a court that felony disenfranchisement laws are primarily punitive, the next step would be to show the provisions are cruel and unusual. The test itself is not static; rather, courts use a measure of the “evolving standards

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129. *Id.*

130. *See Trop v. Dulles*, 356 U.S. 86, 96 (1958) (citations omitted).

131. *Id.* at 96–97.

132. *See Karlan, supra* note 40, at 1150; *Green v. Bd. of Elections*, 380 F.2d 445, 450 (2d Cir. 1967).

133. *See, e.g.,* 380 F.2d at 449–50; *Kronlund v. Honstein*, 327 F. Supp. 71, 73–74 (N.D. Ga. 1971).

134. *Karlan, supra* note 40, at 1150; *Frazier, supra* note 13, at 493–94.

135. *See Perry v. Beamer*, 933 F. Supp. 556, 559 (E.D. Va. 1996).

136. Act of Jan. 26, 1870, ch. 10, 16 Stat. 62.

of decency” to determine what is cruel and unusual.<sup>137</sup> One easily could argue that America’s standards have evolved to the point where the continued disenfranchisement of convicted persons after their release and parole no longer is acceptable. Over eighty percent of the general public now opposes revoking the right to vote for life.<sup>138</sup> In light of such strong public opinion, the extended length of rights deprivation in the Commonwealth, and the burdensome procedures for restoring the right (at least among violent and drug-related felonies),<sup>139</sup> the time may be right for Virginia courts to reassess its standards.

## V. STATE LAW SOLUTIONS

Though Virginia’s constitutional voting restrictions have not evolved significantly over the years, the restoration process has become more easily navigable, thanks to the efforts of Virginia governors throughout the past decade. In 2002, Governor Mark Warner streamlined the process for non-violent, non-drug-related offenders by shortening the required application from thirteen cumbersome pages to one.<sup>140</sup> Governor Warner also reduced the waiting period for these comparatively minor offenders from five years to three, and rescinded the requirement that they submit three letters of reference with their application.<sup>141</sup> Governor Bob McDonnell further streamlined the process, reducing the waiting period for non-violent offenders to two years and shortening an application’s administrative turnaround time to sixty days.<sup>142</sup>

In contrast, the restoration process for violent offenders, drug offenders, and individuals convicted of election fraud remains arduous. In these cases, the applicant must submit: (i) a completed, notarized twelve-page application, (ii) certified copies of all felony sentencing orders and proof of payment of all fines, restitution,

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137. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

138. Liles, *supra* note 17, at 628.

139. See *supra* notes 136–37 & accompanying text.

140. Ryan S. King, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997–2008*, THE SENTENCING PROJECT 27 (2008), [http://www.sentencingproject.org/doc/publications/fd\\_statedisenfranchisement.pdf](http://www.sentencingproject.org/doc/publications/fd_statedisenfranchisement.pdf).

141. *Id.* See also Robbers, *supra* note 7, at 7 (detailing previous eligibility requirements).

142. Press Release, Office of the Governor, Governor McDonnell Announces Restoration of Civil Rights Procedures (May 20, 2010), available at [www.governor.virginia.gov/news/viewRelease.cfm?id=183](http://www.governor.virginia.gov/news/viewRelease.cfm?id=183) [hereinafter Press Release].

and court costs, (iii) a letter from the applicant's most recent parole or probation officer describing the period of supervision, (iv) a signed petition letter, (v) three letters of recommendation from "reputable citizens," and (vi) a letter to the governor detailing the circumstances of the offense and resulting sentence, as well as any community service or other information that would help show why rights should be restored.<sup>143</sup> Furthermore, the applicant must wait five years from the time he completes his sentence, during which time he must remain free of misdemeanors and any other pending convictions.<sup>144</sup>

The simpler application processes have resulted in rights restoration for a record number of Virginias over the last ten years. Governor Tim Kaine restored more rights for residents with felony convictions than any other Virginia governor at 4402 restorations over the years 2006 to 2010, followed by Governor Warner, who restored rights for 3486 individuals from 2002–2006.<sup>145</sup> Governor McDonnell, Virginia's sitting governor, restored rights for more than 1100 offenders in his first year in office, which places him on pace to meet or exceed Governor Kaine's totals.<sup>146</sup>

Recently, various civil rights organizations have asked the governor to go a step further by issuing an executive order providing for automatic restoration of rights to "most or all felons in Virginia who have completed their sentences."<sup>147</sup> Because the governor has plenary authority "to remove political disabilities consequent upon conviction for offenses committed,"<sup>148</sup> this method could ef-

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143. FIVE-YEAR APPLICATION FOR RESTORATION OF RIGHTS, VA. SEC'Y OF THE COMMONWEALTH, <http://www.commonwealth.virginia.gov/judicialsystem/clemency/5-Year-RoRApplication-UpdatedJuly2010-2.pdf> (last visited Oct. 15, 2012).

144. *Id.*

145. Anita Kumar, *More Va. Felons Get Rights Restored*, WASH. POST, Sept. 26, 2010, at C4. Governors of the past ten years have made particularly great strides when compared to the enfranchisement efforts of previous governors. *See id.* Governor James Gilmore and Governor George Allen, who both served in the 1990s, restored rights for 238 and 460 ex-felons, respectively. *Id.*

146. Olympia Meola, *1,100 Felons Regain Rights in McDonnell's First Year*, RICH. TIMES-DISPATCH, Mar. 9, 2011, at A1. While these numbers indicate the restoration program currently is more effective than in years past, the Commonwealth has a long way to go to make a meaningful impact on its disenfranchised population, which still comprises more than 375,000 Virginians. *See* THE SENTENCING PROJECT, *supra* note 8.

147. Press Release, Am. Civil Liberties Union, Groups Ask Governor to Issue Executive Order Restoring Voting Rights of Virginians with Felony Convictions (Jan. 5, 2010), *available at* <http://www.aclu.org/racial-justice-voting-rights/groups-ask-governor-issue-executive-order-restoring-voting-rights-virgi>.

148. VA. CONST. art. V, § 12.

fectively bypass the General Assembly and the constitutional amendment process. Such an avenue would be a quick and cost-effective way of achieving the goal of enfranchisement, if the governor were willing to make such a bold political move.<sup>149</sup>

The Virginia legislature also has taken measures to facilitate rights restoration for individuals with felony convictions where they were convicted or in their current place of residence, for restoration of voter eligibility.<sup>150</sup> If the court approves an individual's petition, it must then communicate its order to the secretary of the Commonwealth subject to the approval or denial of the petition by the governor.<sup>151</sup> This provision provides additional convenience to the applicants, who may find it easier to access the court system where they were convicted than to navigate the state administrative process.<sup>152</sup>

The General Assembly also has enacted legislation that requires the Virginia Department of Corrections to give notice to all convicted persons of the loss of their rights. Furthermore, upon completion of the individual's incarceration, probation, or parole, the department must inform him or her of the specific processes required to restore those rights.<sup>153</sup>

Other efforts by the General Assembly have not been so successful. On multiple occasions, it has proposed an amendment to the Virginia Constitution to expressly permit the legislature to provide for the automatic restoration of voting rights for nonviolent offenders.<sup>154</sup> Additionally, legislators have introduced legislation that would bypass the amendment process altogether, and

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149. See Press Release, *supra* note 142. In 2005, Iowa Governor Tom Vilsack used this method to get around Iowa's similar constitutional disenfranchisement provision. Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012*, BRENNAN CTR. FOR JUSTICE 35 (2011), available at [http://brennan.3cdn.net/92635dda4bc09e8d88\\_i3m6bjdeh.pdf](http://brennan.3cdn.net/92635dda4bc09e8d88_i3m6bjdeh.pdf). As a result, Iowa restored rights to more than 80,000 of its citizens from 2005 to 2011. *Id.* However, Republican Governor Terry Branstad rescinded the order immediately after taking office last year, returning Iowa to the company of Virginia and the few other states which impose a lifetime ban. *Id.* at 34–35.

150. H.B. 1080, Va. Gen. Assembly (Reg. Sess. 2000) (enacted as Act of Apr. 9, 2000, ch. 969, 2000 Va. Acts 2136).

151. *Id.*

152. See DINAN, *supra* note 19, at 78.

153. Ch. 969, 2000 Va. Acts 2136.

154. See S.J. Res. No. 273, Va. Gen. Assembly (Reg. Sess. 2009); DINAN, *supra* note 19, at 77.

simply enact a procedure for restoring rights to individuals convicted of non-violent felonies upon completion of their sentences.<sup>155</sup>

The Constitution currently allows rights to be restored “by the Governor or other appropriate authority.”<sup>156</sup> While various state attorneys general have held consistently that the meaning of the phrase “other appropriate authority” is limited to “the President of the United States, other governors, and pardoning boards with such authority,”<sup>157</sup> some members of the General Assembly have disagreed. In Senate Bill 254, which was introduced in 2000, the patrons included specific findings in support of an alternative reading of the provision.<sup>158</sup> The findings asserted that, as a matter of statutory construction, “a specific grant of authority in this Constitution upon a subject shall not work a restriction” on the authority of the legislature; therefore, a grant of the Governor’s clemency power to restore voting rights does not limit the authority of the General Assembly.<sup>159</sup> Further, the findings state that because the phrase “other appropriate authority” has been interpreted by the Executive Branch to honor the voting rights and restoration statutes of other states, it also may be properly construed to include statutes passed in the Commonwealth.<sup>160</sup> Thus, the debate is ongoing as to whether the state legislature may pass a law with respect to the restoration of voting rights for persons with felony convictions as a proper exercise of its legislative powers.<sup>161</sup>

## VI. CONCLUSION

Strategies for challenging Virginia’s outdated felony disenfranchisement provisions will depend largely on the balance between available resources, ease of implementation, and chances of success. Court challenges are costly, and litigation could take years. In light of the Fourth Circuit’s jurisprudence, mounting a suc-

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155. H.B. 16, Va. Gen. Assembly (Reg. Sess. 2012); S.B. 254, Va. Gen. Assembly (Reg. Sess. 2000); H.B. 2065, Va. Gen. Assembly (Reg. Sess. 1999).

156. VA. CONST. art. II, § 1.

157. 1999 Va. Op. Atty. Gen. 48; *see also* 1999 Va. Op. Atty. Gen. 50; 1979-80 Va. Op. Atty. Gen. 153; 1976-77 Va. Op. Atty. Gen. 201.

158. S.B. 254, Va. Gen. Assembly (Reg. Sess. 2000).

159. *Id.*

160. *Id.*

161. *See* VA. CONST. art. IV, § 14.

cessful challenge would likely be an uphill battle. However, there are some potential cases to be made using the theory of minority vote dilution under the VRA or even the Eighth Amendment. Furthermore, any successes in the courts would have greater chances of providing lasting benefits, as legislative enactments or executive orders can be easily overturned.

In the meantime, while developing and testing strategies for long-term solutions, the Commonwealth can and should provide rapid and effective relief for disenfranchised non-violent offenders who have paid their debts to society. It can help ameliorate the negative impacts of the law by further streamlining and standardizing the restoration process. Applications for rights restoration should use the least restrictive means possible, and the state should provide free assistance to help applicants understand and navigate every step of the process.<sup>162</sup>

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162. Frazier, *supra* note 13, at 502–03.

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