

3-29-2023

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Recommended Citation

Claudia Leonor, *State-Sanctioned Displacement: An Interstate Examination of Felon Disenfranchisement*, 26 RICH. PUB. INT. L. REV. 75 (2023).

Available at: <https://scholarship.richmond.edu/pilr/vol26/iss2/6>

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STATE-SANCTIONED DISPLACEMENT: AN INTERSTATE
EXAMINATION OF FELON DISENFRANCHISEMENT

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ABSTRACT

In his dissent of New State Ice Co. v. Liebmann, Justice Louis Brandeis referred to the constituent states of the country as “laboratories for democracy.” He noted that, as sovereign entities within the United States, states are empowered to “try novel social and economic experiments without risk to the rest of the country.” In postbellum American society, states have grappled with Reconstruction and the concomitant dismantlement of a caste system hinging on racism. In convening constitutional assemblies, the states experimented with racism and succeeded. In Southern jurisdictions, racial animus enabled the creation of constitutional frameworks and legislation that would have a disabling impact on the civil rights of convicted felons for generations to come. This article begins with an overview of the political marginalization of criminal felony offenders and how it disempowers Black communities, and it proceeds to examine the inconsistent political standing of convicted criminal felons in three American jurisdictions: Vermont, Texas, and Virginia. Because of the vastly differential outcomes for convicted felons across these jurisdictions, this article concludes with a proposal for federal legislation that enfranchises convicted felons upon completion of federal supervision.

INTRODUCTION

For violators of criminal law, the process of stigmatization begins with arrest and conviction.¹ Arrest and conviction create “a panoply of economic, social, and political post-conviction penalties . . . intended to assure that the shame of incarceration is not forgotten or avoided.”² A felony conviction, in particular, carries collateral civil consequences that condemn a criminal offender to a lifetime of second-class citizenship.³ Convicted felons are postured towards permanent civic disenfranchisement: they lose the right to vote, suffer diminished employment prospects following release, and are disqualified from federal financial aid programs, among other civil penalties that endure long after a sentence has been served.⁴ This article explores the tenuous

¹ Regina Austin, “The Shame of it All:” Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons, 36 COLUM. HUM. RTS. L. REV. 173, 175 (2004).

² *Id.*

³ See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 25 (2012).

⁴ See JAMIE FELLNER ET AL., LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2 (1998); *Researchers Examine Effects of a Criminal Record on Prospects for Employment*, THE COUNS. OF STATE GOV'TS (Sept. 23, 2014), <https://csgjustice-center.org/2014/09/23/researchers-examine-effects-of-a-criminal-record-on-prospects-for-employment/>; *Eligibility for Students with Criminal Convictions*, U.S. DEP'T OF EDUC., <https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions> (last visited Jan. 19, 2023).

political standing of convicted felons in three American jurisdictions: Vermont, Texas, and Virginia. Because of the vastly different outcomes for convicted felons across these jurisdictions, this article concludes with a proposal for federal legislation that restricts the ability of states to pass felon disenfranchisement laws specific to voting.

Part I of this article will address how the marginalization of persons convicted of felonies significantly impacts the political economy of the country. This section will discuss the proliferation of felon disenfranchisement laws and how these laws, while primarily affecting rates of civic engagement, permeate into the economic strata of society. Part II of this article will then provide a descriptive analysis of three states—Vermont, Texas, and Virginia—to evaluate how each state has determined how a felony conviction would affect an offender’s life. Part III will critique the approaches of the three jurisdictions and propose how a felony conviction should affect the life of a convicted felon. This section will conclude with a proposal for a federal solution to felon disenfranchisement and evaluate the feasibility of such legislation under the U.S. Constitution.

I. POLITICAL MARGINALIZATION OF CRIMINAL OFFENDERS

The right to vote is celebrated as a quintessential hallmark of American citizenship. Courts have remarked that “any possible infringement on a citizen’s right to vote must be ‘closely scrutinized and carefully confined.’”⁵ Although the ability to vote remains a threshold prerequisite for civic engagement, a significant number of Americans are prohibited from voting due to felon disenfranchisement laws.⁶ Felon disenfranchisement laws in the United States depart from the paradigm of universal suffrage and deny formerly incarcerated individuals the right to vote, regardless of whether the conviction was based on a federal or state crime and regardless of the conviction’s relation to the offender’s ability or competency to vote.⁷

A. The Relationship between Race and Felon Disenfranchisement

An estimated 5.2 million Americans are prevented from voting each year

⁵ Erin Kelly, *Do the Crime, Do the Time—and Then Some: Problems with Felon Disenfranchisement and Possible Solutions*, 51 U. TOL. L. REV. 389, 395 (2020) (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1996)).

⁶ *See id.*

⁷ *Id.*

due to felon disenfranchisement laws.⁸ Among these Americans, “7.4% of the adult African-American population is disenfranchised compared to 1.8% of other Americans.”⁹ Given the significant impact of felon disenfranchisement laws on Black Americans, it is evident that the issue is complicated and apportioned along racialized lines. Alarming, modern felon disenfranchisement laws disproportionately affect communities of color. In turn, the political power of minority communities is significantly diluted.¹⁰

Black Americans have been particularly affected by the criminal justice system, which compels racial disparities in felon disenfranchisement.¹¹ The Reagan administration’s War on Drugs was the genesis of modern mass incarceration in the United States.¹² Reagan increased funding for federal anti-drug investigation resources from \$8 million to nearly \$100 million.¹³ As a result of the criminalization of non-violent drug offenses, the number of incarcerated persons between 1980 and 2000 exponentially increased from about 300,000 to more than two million.¹⁴ Although “white people are more likely than black people to sell drugs,” Black Americans are much more likely to be prosecuted and incarcerated for selling and possessing drugs.¹⁵

Racial disparities in incarceration are inextricably linked to the issues of voting rights and felon disenfranchisement. Black Americans are imprisoned in state prisons at nearly five times the rate of white Americans.¹⁶ In the federal correctional system, Black inmates comprise approximately 40% of the incarcerated population.¹⁷ Given the substantial population of Black Americans in the prison population, Black Americans are “nearly four times as likely to lose their voting rights than the rest of the adult population, with one

⁸ Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENT’G PROJECT 2 (July 2021) <https://www.sentencingproject.org/app/uploads/2022/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf>; see also Jason Belmont Conn, *Felon Disenfranchisement Laws: Partisan Politics in the Legislatures*, 10 MICH. J. RACE & L. 495, 497 (2005).

⁹ Arpita Ghosh & James Rockey, *On the Political Economy of Felon Disenfranchisement*, SSRN 1 (Feb. 7, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330565.

¹⁰ Nancy Leong, *Felon Reenfranchisement: Political Implications and Potential for Individual Rehabilitative Benefits* STAN. CRIM. JUST. CTR. 11, https://law.stanford.edu/index.php?webauth-document=child-page/266901/doc/slspublic/NLeong_06.pdf (last visited Jan. 19, 2023).

¹¹ See Kevin Muhitch & Nazgol Ghandnoosh, *Texas Should Restore Voting Rights to 500,000 Citizens*, SENT’G PROJECT 1 (Feb. 2021), <https://www.sentencingproject.org/app/uploads/2022/08/TX-Voting-Brief.pdf>.

¹² See Christina Beeler, *Felony Disenfranchisement Laws: Paying and Re-paying a Debt to Society*, 21 U. PA. J. CONST. L. 1071, 1084 (2019).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT’G PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

¹⁷ *Inmate Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Jan. 7, 2023).

of every 16 Black adults disenfranchised nationally.”¹⁸ In fact, approximately 13% of all Black men in the country are disenfranchised by felon disenfranchisement laws.¹⁹ In seven states—Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming—“more than one in seven Black adults are disenfranchised.”²⁰ In total, an estimated 1.8 million Black Americans are currently banned from voting due to felon disenfranchisement laws.²¹

B. The Racialized Origins of Felon Disenfranchisement

The idea of felon disenfranchisement originated in medieval Europe.²² Common law distinguished between “high crimes” and “lesser” offenses, known as misdemeanors.²³ High crimes, which were known as “felonies,” were punished by forfeiture: felons were forced to forfeit “life and member and all that he had” due to his crimes against humanity.²⁴ In the Roman Empire, felony offenders were additionally subject to a penalty of “civil death” following their conviction and sentence—they were prohibited from “appearing in court, attending assemblies, serving in the army, and voting.”²⁵ Similarly, criminal offenders in England were denied legal protections for their lives and property.²⁶ When English colonists came to America, they imported their common law traditions, including the philosophy of “civil death.”²⁷

Throughout the centuries, the salience of civil death has persisted and has formed the basis for modern United States felon disenfranchisement laws.²⁸ The European tradition of civil death gained momentum in the United States in the wake of the Civil War. In the late nineteenth century, pro-slavery politicians passed legislation as an instrument of white supremacy. Compelled by racial animus, legislators passed statutes designed to criminalize actions and behaviors that “blacks supposedly committed more frequently than whites and to exclude crimes [that] whites were believed to commit more

¹⁸ Chung, *supra* note 8.

¹⁹ Belmont Conn, *supra* note 8, at 499.

²⁰ Chung, *supra* note 8.

²¹ *Id.*

²² FELLNER ET AL., *supra* note 4.

²³ JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 69 (2006).

²⁴ *Id.*

²⁵ *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and ‘The Purity of the Ballot Box’* 102 HARV. L. REV. 1300, 1301 (1989).

²⁶ *Id.*

²⁷ William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 616 (2007).

²⁸ Kelly, *supra* note 5, at 391.

frequently.”²⁹ Legislators obfuscated the distinction between felony and misdemeanor offenses, reclassifying minor crimes—like petty crimes and loitering—as higher crimes.³⁰ Legislators also criminalized arbitrary and innocuous behaviors; African Americans who were jobless, used “insulting gestures or language,” or “preach[ed] the Gospel without a license” were subject to arrest and felony convictions.³¹

These statutes served as a proxy for state-sanctioned slavery. By providing a legal and political avenue for racially motivated arrest and prosecution, politicians were able to institute new forms of control and governance over African Americans after the Civil War.³² In the postbellum southern United States in particular, many states convened constitutional assemblies to create and enforce laws intended to disenfranchise Black voters. These laws included felon disenfranchisement laws and other pernicious forms of voter suppression, such as “literacy tests, grandfather and ‘understanding’ clauses, property qualifications, and poll taxes.”³³

C. Modern-day Disempowerment of Black Communities

The right to vote can be understood as a constellation of several different concepts: participation (“the ability to cast a ballot and have it counted”); aggregation (“the ability to join with like-minded voters to achieve the election of one’s preferred candidates”); and governance (“the ability to pursue policy preferences within the process of representative decision-making”).³⁴ Felon disenfranchisement laws operate within this constellation, diluting the ability of Black Americans to exercise their civic rights and reintegrate into society following a term of incarceration.

Restrictions on civic engagement deprive convicted felons of redemption and rehabilitation in the eyes of their communities. Felon disenfranchisement laws operate as a collective sanction that punishes individual wrongdoers and the communities from which they hail. In fact, the sanction nurtures a “policy gridlock [that] . . . further[s] the affliction faced by urban minorities and their

²⁹ FELLNER ET AL., *supra* note 4. (“For example, in South Carolina, ‘among the disqualifying crimes were those to which [the Negro] was especially prone: thievery, adultery, arson, wife-beating, housebreaking, and attempted rape’ . . . In 1901, Alabama lawmakers—who openly stated that their goal was to establish white supremacy—included a provision in the state constitution that made crimes of “moral turpitude” the basis of disenfranchisement.”).

³⁰ Juan F. Perea, *Echoes of Slavery II: How Slavery’s Legacy Distorts Democracy*, 51 U.C. D. L. REV. 1081, 1098 (2018).

³¹ *Id.*

³² FELLNER ET AL., *supra* note 4; Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 923 (2019).

³³ Beeler, *supra* note 12 (quoting ELIZABETH A. HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* 18 (2006)); *Griffin v. Pate*, <https://www.aclu.org/cases/griffin-v-pate> (last updated June 30, 2016).

³⁴ Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1156 (2004).

communities.”³⁵ Felony offenders are diverse: not only in “culture, religion, ethnicity, and class, but also in the experiences which led to each individual’s incarceration.”³⁶ As such, restrictions on returning citizens’ right to vote compels civic disengagement and ultimately prevents these citizens from sharing experiences affecting judgment and decision-making that are unfamiliar to predominantly white audiences.³⁷

Reducing ex-felons to their status as “convicted felons” regardless of the crime of conviction erodes an ex-felon’s already tenuous connection to society and further complicates the rehabilitative journey.³⁸ Disenfranchisement laws deny ex-felons the opportunity to “build social capital for the individual and for the community” through participation in political avenues.³⁹ Because political participation is such a critical instrument of reconnecting to society, restrictions on a felony offender’s ability to exercise their right to vote further alienates them from their community.⁴⁰ According to sociologists Christopher Uggen and Jeff Manza, convicted felons often feel stigmatized by their felony conviction, and “losing the right to vote, in particular, [is] a powerful symbol of their status as ‘outsiders’” to their community.⁴¹

In contrast, enfranchisement—and broadly, empowerment of felons upon release from incarceration—permits ex-felons to reimagine how law and policy should shape their communities. The idea of felon enfranchisement is closely linked to “empowerment theory,” which examines how individuals who possess fewer social resources attain societal power.⁴² The political dimension of empowerment is particularly relevant to the study of felon enfranchisement, as it “refers to the ability to influence society and create community or larger scale social change.”⁴³

Given the racialized dimensions of incarceration and felon disenfranchisement, there are serious concerns about the ability of minority citizens to “participate in the political process and elect candidates of their choice.”⁴⁴ Felon disempowerment is a cancer to urban communities, denying them the

³⁵ Marie Pryor, *The Unintended Effects of Prisoner Reentry Policy and the Marginalization of Urban Communities*, 34 *Dialectical Anthropology* 513, 515 (2010).

³⁶ *Id.* at 513.

³⁷ Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 *HOW. L. J.* 587, 606 (2011).

³⁸ Karlan, *supra* note 34, at 1167.

³⁹ Thompson, *supra* note 37, at 607.

⁴⁰ Pryor, *supra* note 35.

⁴¹ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 *COLUM. HUM. RTS. L. REV.* 193, 212 (2004).

⁴² Jennifer Fritz et al., *Prisoner Re-entry: An Assets-based, Capacity Building Community Practice Pilot Program*, 5 *INT’L J. OF INTERDISC. SOC. SCI.*, 579, 581 (2010).

⁴³ *Id.* at 582.

⁴⁴ Karlan, *supra* note 34, at 1162.

opportunity to support laws and policies that would positively affect their lives. Disempowerment further denies ex-felons the opportunity to elect officials who have their best interests in mind during the legislative process. Because Black Americans overwhelmingly vote Democratic, felon disenfranchisement erodes the political power of the Democratic voting base by decreasing the number of eligible voters.⁴⁵ Absent the significant number of disenfranchised Black voters, “the political process in the United States disproportionately favors the center and the right of the political spectrum.”⁴⁶

II. PARTISAN INFLUENCE ON FELON DISENFRANCHISEMENT LAWS

Felon disenfranchisement laws in the United States are largely influenced by partisan politics in state government. In fact, the United States is the only modern democracy that permits its constituent states to maintain felon disenfranchisement laws irrespective of the type of crime committed.⁴⁷ Since the passage of the Articles of Confederation in 1777, states have retained absolute discretion over the passage of election laws.⁴⁸ As a “fundamental condition” for readmission into the United States, postbellum federal statutes stipulated that state constitutions “shall never be so amended or changed to deprive any citizen or class of citizens of the United States who are entitled to vote by the constitution herein recognized, *except as a punishment for such crimes as are now felonies at common law.*”⁴⁹ As such, while Congress did not expressly endorse felon disenfranchisement laws, it did leave the door open for state legislatures to determine how a felony conviction should affect a person’s participation in civic life after a term of incarceration.

Regardless of whether the conviction was imposed in state or federal court, state legislatures are responsible for imposing civil disabilities following felony convictions.⁵⁰ Accordingly, “the ideological differences and partisanship evident in state government play a significant role in determining whether an ex-offender may vote in a certain state.”⁵¹ The sections that follow examine

⁴⁵ Thompson, *supra* note 37, at 608.

⁴⁶ *Id.*

⁴⁷ Beeler, *supra* note 12.

⁴⁸ Ghosh & Rockey, *supra* note 9, at 4; *see also* U.S. CONST. art. I, § 5 (“The Times, Places and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof . . .”).

⁴⁹ Karlan, *supra* note 34, at 1154 (citing Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581, 1591 (2004)) (emphasis added).

⁵⁰ Belmont Conn, *supra* note 8, at 503.

⁵¹ *See id.* at 497.

how three jurisdictions—Vermont, Texas, and Virginia—have approached felon disenfranchisement and the extent to which each jurisdiction, if at all, has attempted to re-integrate convicted felons into the fabric of democratic society. As the following section will demonstrate, reintegration often takes place along racialized lines, as manifest in each state’s constitutional framework. While states that were once party to the Confederacy immortalized the racialized caste system created by slavery, states that were party to the Union eternalized values of a truly participatory democracy, notwithstanding racial demographics.

A. Vermont

i. Historical Background

The Constitution of Vermont served as a rebellious declaration of statehood amid a turbulent New England climate. Having recognized the need to assert its independence from both Great Britain and New York, the occupants of the territory known as Vermont sought to “form themselves into an independent body politic through their voluntary consent.”⁵² The territory of Vermont was originally known as the “New Hampshire Grants;” the land had initially been property of New Hampshire and New York, the former of which sold their acres to the latter.⁵³ The sale effectively redistributed land belonging to the settlers of the New Hampshire Grants territory, and in retaliation, the settlers launched a guerilla war against New York.⁵⁴ The people of Vermont, having suffocated under the miasma of tyranny, wanted to claim the right of self-government, and immortalize the principles of popular sovereignty—thus, the Vermont Constitutional Convention of 1777 convened.⁵⁵

The Vermont Constitution provides, in pertinent part, that “every person who will attain the full age of eighteen years by the date of the general election . . . shall be entitled to vote in the primary election.”⁵⁶ Notably, in ratifying its 1777 Constitution, Vermont was the first in the nation to abolish slavery and grant the right to vote to all adult males—including African Americans.⁵⁷ At the time of ratification, Vermont had seventeen African American residents, out of a total population of 12,254.⁵⁸ Nevertheless, the

⁵² *Vermont Declares Independence from Colony of New York*, HISTORY, <https://www.history.com/this-day-in-history/new-connecticut-vermont-declares-independence> (last updated Jan. 13, 2020); Gary J. Aichele, *Making the Vermont Constitution: 1777-1824*, 56 VT. HIST. 166, 181 (1988).

⁵³ Sophie Jaeger, *The Vermont Constitution of 1777*, J. OF THE AM. REV. (July 14, 2021), <https://all-thingsliberty.com/2021/07/the-vermont-constitution-of-1777/>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ VT. CONST. ch. 2, § 42.

⁵⁷ *Vermont Declares Independence from Colony of New York*, *supra* note 52.

⁵⁸ Lyman S. Hayes, *The Connecticut River Valley in Southern Vermont and New Hampshire*, 276-78 (1929), <https://archive.org/details/connecticutriver00haye/page/n7/mode/2up>.

people of Vermont chose to provide an absolute and unqualified right to vote for all its citizens.⁵⁹ As a result, incarcerated people in Vermont never lost their right to vote.

ii. Voter Accessibility Initiatives

In addition to its constitutional provisions codifying universal suffrage, Vermont currently takes additional measures in pursuit—and protection—of a participatory democracy. The state actively encourages its incarcerated population to vote. In fact, the Vermont Department of Corrections has endeavored to “ensure that inmates are made aware of their right to vote while incarcerated, and to encourage inmates to vote.”⁶⁰ With the help of volunteers, correctional officers “actively promot[e] voter registration . . . drives in Vermont correctional facilities” and “designat[e] staff to act as voter coordinators.”⁶¹ To maximize voter accessibility during the ongoing COVID-19 pandemic, Vermont’s Secretary of State established a universal mail-in ballot process through which the Department of State mailed all registered voters—including incarcerated citizens—a ballot for the general election.⁶²

While Vermont’s incarcerated populations are not legally denied the right to vote, they do encounter myriad obstacles that impede their full exercise of this right. One such obstacle is the fettered access to information within prisons. The use of technology in prisons is zealously guarded; incarcerated individuals are often disconnected from news in their local communities.⁶³ Additionally, incarcerated individuals are not permitted to display signs of political partisanship within the facility, meaning that they are not able to display political posters or otherwise campaign for candidates.⁶⁴ Despite significant efforts to empower and enfranchise incarcerated individuals in Vermont, the ability of this population to fully participate in the political franchise is dubious.

B. Texas

i. Historical Background

The Constitution of Texas was ratified in 1876, forged in the crucible of

⁵⁹ Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here’s Why Few Do.*, MARSHALL PROJ. (June 11, 2019), <https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do>.

⁶⁰ 28 V.S.A. § 807; 17 V.S.A. §§ 2121, 2122; *see also Inmate Voting*, STATE OF VERMONT AGENCY OF HUM. SERV. DEPT. OF CORR. (2017), <https://doc.vermont.gov/sites/correct/files/documents/policy/correctional/324.01-inmate-voting.pdf>.

⁶¹ Katie Wynn & Ryan Joseph, *Vermont Prison Voting: A Model for the Nation?*, UNIV. OF VT. (Oct. 20, 2020), <https://www.uvm.edu/news/cas/vermont-prison-voting-model-nation>.

⁶² *Id.*

⁶³ Pryor, *supra* note 35.

⁶⁴ Lewis, *supra* note 59.

the postbellum South. After the Civil War, former Confederate states were required to draft and adopt new constitutions pledging their allegiance to the United States.⁶⁵ As a former Confederate state that still clung to antebellum values, Texas struggled to produce a constitution that satisfied the radical Republicans in Washington overseeing Reconstruction efforts in the South.⁶⁶ Among the constituent states of the Confederacy, Texas expressly seceded from the Union because it sought to “maintain and protect the institution known as negro slavery . . . a relation that had existed from the settlement of [America’s] wilderness by the white race, and which her people intended should exist in all future time.”⁶⁷ In turn, federal attempts to dismantle slavery were seen as attempts to infringe upon and erode Texas’ sovereign right to maintain its socio-economic institutions.⁶⁸ After three attempts to draft a sufficiently “equal” Constitution, the Texas Constitutional Convention of 1876 finally produced an enduring document.⁶⁹

In relevant part, the Texas Constitution provides that “persons convicted of any felony, subject to such exceptions as the legislature may make,” are not allowed to vote within the state.⁷⁰ The Constitution of 1876 was largely designed to reaffirm the principles of self-government and therefore restrict the power of elected government officials, as citizens attempted to govern themselves with the least amount of interference.⁷¹ The impact was severe: state salaries and spending powers were cut, and the governor was stripped of his powers to appoint state officers and declare martial law.⁷²

Interestingly, in spite of these restrictions on the power of elected officials, the Texas Constitution of 1876 affirmed that the right to vote could not be restricted on the basis of race.⁷³ This was not to say, however, that Texas guaranteed its citizens the right to live freely—the Constitution of Texas empowers the state legislature to decide voter qualifications and eligibility.⁷⁴ This constitutional provision ultimately formed the basis for felon

⁶⁵ *The Texas Constitution of 1876*, TEX. STATE LIB. AND ARCHIVES COM., <https://www.tsl.texas.gov/treasures/constitution/index.html> (last updated Dec. 5, 2017).

⁶⁶ *Id.*

⁶⁷ *Declaration of Causes: February 2, 1861 - A Declaration of the Causes Which Impel the State of Texas to Secede From the Federal Union*, TEX. STATE LIB. AND ARCHIVES COM., <https://www.tsl.texas.gov/ref/abouttx/secession/2feb1861.html> (last modified Aug. 25, 2011).

⁶⁸ *Id.*

⁶⁹ *The Texas Constitution of 1876*, *supra* note 65.

⁷⁰ TEX. CONST. art. VI, § 1.

⁷¹ *The 1870s: The Constitutional Convention of 1875*, TEX. STATE LIB. AND ARCHIVES COMM., <https://www.tsl.texas.gov/exhibits/forever/representation/page5.html> (last updated Apr. 22, 2015).

⁷² *Issues and Delegates at the Constitutional Convention of 1875*, TEX. POL. PROJECT. AT THE U. OF TEX. AT AUSTIN, <https://texaspolitics.utexas.edu/educational-resources/constitutional-convention-1875> (last visited Jan. 15, 2023).

⁷³ *The 1870s: The Constitutional Convention of 1875*, *supra* note 71.

⁷⁴ TEX. CONST. art. VI, § 1.

disenfranchisement laws in Texas, which provided a legal means through which legislators could force ex-felons to assume a subaltern status in society.

ii. Status of Rights Restoration

Absolute lifetime felon disenfranchisement persisted in Texas until 1983, when House Bill (“HB”) 718 was passed in the state legislature.⁷⁵ The bill restored voting rights to convicted felons eight years after the completion of their sentence.⁷⁶ In campaigning for HB 718, Representative El Franco Lee affirmed the importance of rehabilitation: “Either you have served your time for a mistake in the past and vindicated yourself, and we forgive you, or we don’t.”⁷⁷ Lee, who was the primary architect of the bill, was an ardent proponent of reintegrating felons into the fabric of participatory democracy upon completion of their sentence.⁷⁸ In 1997, then-Governor George Bush signed a bill that eliminated waiting periods altogether, paving the way for automatic rights restoration.⁷⁹

Still, felony offenders who have not yet completed their sentence or who have otherwise been placed on community supervision remain disenfranchised. In February 2019, Representative Senfronia Thompson proposed a bill—HB 1419—that would expand voting rights for convicted felons who were placed on parole or probation.⁸⁰ Currently, Representative Thompson’s bill has been left pending in committee, since March 25, 2019.⁸¹ In one county alone, Thompson’s bill—if passed—would have rendered more than 30,000 Texans on community supervision eligible to vote.⁸²

While the Texas state legislature was in the process of dismantling lifetime felon disenfranchisement in 1983, it was concurrently legislating penalties

⁷⁵ Christie Sennott & John F. Galliher, *Lifetime Felony Disenfranchisement in Florida, Texas, and Iowa: Symbolic Instrumental Law*, 33 SOC. JUST. 79, 82 (2006).

⁷⁶ *Id.*

⁷⁷ *Id.* (quoting Texas House Tentatively Approves Bill to Restore Voting Rights to Ex-Convicts, HOUSTON CHRONICLE, May 13, 1983).

⁷⁸ *Id.*

⁷⁹ Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, THE SENT’G PROJECT (Oct. 17, 2018), <https://www.sentencingproject.org/reports/expanding-the-vote-two-decades-of-felony-disenfranchisement-reforms/>.

⁸⁰ Heather Leighton, *Convicted Felons on Parole Could Vote if Texas Bill Passes. These are the Potential Voter Demographics in Harris County*, KINDER INST. FOR URB. RSCH. (Apr. 9, 2019), <https://kinder.rice.edu/urbanedge/convicted-felons-parole-could-vote-if-texas-bill-passes-these-are-potential-voter>.

⁸¹ HB 1419 Relating to Qualifications and Registration of Certain Voters Convicted of a Felony, TX. LEGIS. ONLINE, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB1419> (last visited Jan. 15, 2023).

⁸² *Can I Vote in Texas While on Parole?*, L. OFF. OF GREG TSIOROS (Jan. 29, 2020), <https://txparole-law.com/can-i-vote-in-texas-while-on-parole/>.

for non-violent drug offenses.⁸³ Interestingly, when confronted with the paradox between rehabilitative rights restoration legislation and increasingly retributive measures for non-violent drug crimes, Lee redoubled his commitment to tough-on-crime policies.⁸⁴ He claimed that the drug penalties do not “restrict or relax any existing laws with respect to offenders.”⁸⁵

In the decades following the repeal of lifetime felon disenfranchisement in Texas, the state began to invigorate capital punishment within its criminal justice system. Texas led the nation in the number of executions. “In 1993 alone, Texas accounted for more than three times as many executions as any other state and carried out almost half of the death sentences in the country.”⁸⁶ Between 1996 and 1997, Texas alone executed 144 individuals.⁸⁷ The tension between progressive rehabilitative legislation that re-enfranchises felons, and such aggressive retributive penalties for crime, reveal a certain primal dimension to Texan politics: there is a finite amount of redemption and forgiveness that Texans allow its criminals, and once that amount is exhausted, there is no more opportunity for mercy.

C. Virginia

i. Historical Background

The Constitution of Virginia empowers the governor, rather than the General Assembly, to decide the process of voting rights restoration.⁸⁸ The Virginia Constitution provides that “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.*”⁸⁹ A person convicted of a felony is only able to petition for clemency after he has “satisfie[d] all sentencing requirements and a mandatory waiting period, during which he must remain free of further convictions.”⁹⁰ As of 2012, Virginia was one of four states⁹¹

⁸³ Sennott & Galliher, *supra* note 75, at 83.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *The Future of the Death Penalty in the Texas-Sized Crisis*, DEATH PENALTY INFO. CTR. (May 1, 1994) <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-future-of-the-death-penalty-in-the-u-s-a-texas-sized-crisis>.

⁸⁷ Sennott & Galliher, *supra* note 75, at 83.

⁸⁸ Claire F. Gastañaga, *ACLU Urges Governor to Issue Executive Order Restoring Rights of Virginians with Felony Convictions*, ACLU OF VA. (Jan. 21, 2013), <https://www.acluva.org/en/press-releases/aclu-urges-governor-issue-executive-order-restoring-voting-rights-virginians-felony>. Should the General Assembly desire, it may pass a Constitutional amendment to remove this power from the Governor. *Id.*

⁸⁹ See VA. CONST. art. II, § 1 (emphasis added).

⁹⁰ Dori E. Martin, *Lifting the Fog: Ending Felony Disenfranchisement in Virginia*, 47 U. RICH. L. REV. 471, 472 (2012).

⁹¹ Gastañaga, *supra* note 88; see generally Christopher Uggen et al., *Locked Out 2022: Estimates of People Denied Voting Rights* tbl.1, SENT’G PROJ. (Oct. 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/>.

in the country—with Kentucky, Iowa, and Florida—that maintained a constitutional rule eternalizing felon disenfranchisement.⁹²

The constitutional provision can be traced back to the 1901 Virginia Constitutional Convention, which eternalized post-Reconstruction efforts to reinvigorate white supremacy within the state.⁹³ The predominant political question at the Convention was how to effectuate the disenfranchisement of African Americans without technically violating the U.S. Constitution.⁹⁴ Delegates actively campaigned to extinguish Black suffrage and reaffirm white hegemony over the social caste system.⁹⁵

The impetus for active disenfranchisement of African Americans came from popular discontent with the Reconstruction-era Underwood Constitution of 1869.⁹⁶ Judge John C. Underwood, who was an abolitionist and a Republican judge for the Eastern District of Virginia in the late nineteenth century,⁹⁷ dominated the 1869 Constitutional Convention and advocated for universal suffrage for all men aged twenty-one years or older—including Black men.⁹⁸ For the first time in Virginia history, Black men were able to participate in politics: they could reimagine a world where they could vote and make laws.⁹⁹ Republican lawmakers, operating in Underwood's legacy, “expanded access to the ballot box, enacted criminal legal reforms and built Black political power from the ground up.”¹⁰⁰

The promise of a fully participatory and multiracial democracy, however, only endured for a generation. By the late nineteenth century, pro-slavery politicians and former Confederate soldiers in Virginia began to mobilize under the banner of the redemptive Democratic Party.¹⁰¹ During Virginia's 1901-1902 Constitutional Convention,¹⁰² Democrats condemned the passage

⁹² Jane Timm, Gov. McDonnell: ‘I’ve restored more rights than any governor in Virginia History’, MSNBC (May 30, 2013), <https://www.msnbc.com/morning-joe/gov-6-msna59497>; Press Release, Office of Former Governor Ralph Northam, *Governor Northam Restores Civil Rights to Over 69,000 Virginians, Reforms Restoration of Rights Process* (Mar. 16, 2021), <https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-893864-en.html>.

⁹³ Susan Breitzer, *Constitutional Convention, Virginia (1901-1902)*, ENCYCLOPEDIA VA. (Mar. 23, 2021), <https://encyclopediavirginia.org/entries/constitutional-convention-virginia-1901-1902/Virginia-Constitutional-Convention-1901-1902>, VA. CTR. FOR DIGITAL HIST., <http://www2.vcdh.virginia.edu/afam/politics/convention.html> (last visited Jan. 13, 2023).

⁹⁴ Breitzer, *supra* note 93. See also *Virginia Constitutional Convention 1901-1902*, *supra* note 93.

⁹⁵ Breitzer, *supra* note 93. See also *Virginia Constitutional Convention 1901-1902*, *supra* note 93.

⁹⁶ Breitzer, *supra* note 93.

⁹⁷ Brent Tarter, *Underwood, John C. (1809-1873)*, ENCYCLOPEDIA VA. (Dec. 22, 2021), <https://encyclopediavirginia.org/entries/underwood-john-c-1809-1873/>.

⁹⁸ Breitzer, *supra* note 93.

⁹⁹ See Phuong Tran, *The Racist Roots of Felony Disenfranchisement in Virginia*, ALCU OF VA. (Feb. 28, 2020), <https://www.acluva.org/en/news/racist-roots-felony-disenfranchisement-virginia>.

¹⁰⁰ *Id.*

¹⁰¹ Breitzer, *supra* note 93. See also *Virginia Constitutional Convention 1901-1902*, *supra* note 93.

¹⁰² Breitzer, *supra* note 93.

of the 14th and 15th Amendments, the latter of which enfranchised African Americans following the Civil War. The 15th Amendment in particular was lambasted as “‘a stupendous blunder [and] . . . a crime against civilization and Christianity,’ ratified by southern states only ‘under the rule of bayonet.’”¹⁰³ In the words of John Goode, President of the Constitutional Convention and a former colonel in the Confederate Army, freed slaves had no education, no experience in the duties of citizenship, and ultimately “no capacity to participate in the functions of government.”¹⁰⁴ To bestow universal suffrage upon African Americans, according to Goode, was a “grievous wrong to both races” and would pervert the sanctity of the ballot box.¹⁰⁵

ii. Status of Rights Restoration

While the Constitution of the state has historically disenfranchised convicted felons, a bipartisan coalition of Virginia politicians has endeavored to restore the voting rights of convicted felons. The journey towards rights restoration began in 2013, with Republican Governor Bob McDonnell. On May 29, 2013, McDonnell issued an executive order to terminate Virginia’s policy of permanent felon disenfranchisement for non-violent offenders.¹⁰⁶ Prior to his actions, felons who were convicted of non-violent crimes were required to wait two years following their term of imprisonment before applying for re-enfranchisement.¹⁰⁷ McDonnell’s re-enfranchisement policy eliminated the two-year waiting period and restored the voting rights of an estimated 100,000 non-violent convicted felons in Virginia.¹⁰⁸

In the following years, Democratic Governor Terry McAuliffe expanded his Republican predecessor’s restoration endeavors. McAuliffe further streamlined the restoration process in 2014 by expanding the category of non-violent felony offenders who would automatically regain their right to vote upon completion of their sentence.¹⁰⁹ Additionally, McAuliffe began the

¹⁰³ *Id.*

¹⁰⁴ Matt Ford, *The Racist Roots of Virginia’s Felon Disenfranchisement*, THE ATLANTIC (Apr. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/04/virginia-felon-disenfranchisement/480072/>.

¹⁰⁵ *Id.*

¹⁰⁶ *Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia> (last updated Aug. 16, 2022); *It’s Not All Bad: Felony Disenfranchisement and Preclearance Aftermath in Virginia*, WM. & MARY ELECTION L. SOCIETY (Nov. 25, 2013), <https://stateofelections.pages.wm.edu/2013/11/25/9832/> (please note that, while both citations lend support to the same assertion, each offers different dates of when the executive order was passed. This paper opts for May 13, 2013, date offered by the Brennan Center because of the citations offered by the author of the piece. The author of the William and Mary piece did not provide such citations).

¹⁰⁷ Carson Whitelemons, *Virginia’s Step Forward on Voting Rights*, BRENNAN CTR. FOR JUST. (June 11, 2013), <https://www.brennancenter.org/our-work/analysis-opinion/virginias-step-forward-voting-rights>.

¹⁰⁸ Timm, *supra* note 92.

¹⁰⁹ *Voting Rights Restoration Efforts in Virginia*, *supra* note 105.

process of rights restoration for people convicted of violent felonies, shortening the waiting period for restoration applications from five years to three years.¹¹⁰

In April 2016, McAuliffe enacted an executive order to restore voting rights to felony offenders who had, as of the date of issuance, completed their terms of incarceration *and* any term of community supervision.¹¹¹ That summer, the Supreme Court of Virginia (“SCOVA”) invalidated McAuliffe’s Executive Order on the grounds that it contravened the language of the Virginia Constitution.¹¹² SCOVA opined that the executive order reconstructed the constitutional powers of the governor: where the Constitution of Virginia permits the Governor to restore civil rights on an individual basis,¹¹³ McAuliffe’s Order stipulated that, “[n]o person who has been convicted of a felony shall be *disqualified* to vote *unless* the convicted felon is incarcerated or serving a sentence of supervised release.”¹¹⁴ Ultimately, SCOVA invalidated the executive order. The Court held that the Executive Order effectively legislated and ordained a “new principle of voter qualification that ha[d] not received the ‘consent of the representatives of the people.’”¹¹⁵ Also in 2016, McAuliffe announced a new initiative to restore voting rights on a case-by-case basis to Virginians convicted of felonies, provided that they had completed both the terms of their incarceration and any applicable period of supervised release.¹¹⁶ In furtherance of this program, the Secretary of the Commonwealth was empowered to identify individuals who met these criteria and make recommendations to the Governor for complete restoration.¹¹⁷

Voter re-enfranchisement efforts culminated in 2021, when Democratic Governor Ralph Northam and legislators worked in tandem to restore full voting rights to convicted felons upon release from prison. In March 2021, the Virginia state legislature approved a constitutional amendment to revise the language of the 1901 Constitution.¹¹⁸ The constitutional amendment provides, in relevant part, that a person who has been convicted of a felony is entitled to the right to vote upon completion of the term of imprisonment *and*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Howell v. McAuliffe, 788 S.E.2d 706, 723-24 (Va. 2016).

¹¹³ *Id.*

¹¹⁴ *Id.* at 723.

¹¹⁵ *Voting Rights Restoration Efforts in Virginia*, *supra* note 105.

¹¹⁶ Howell 788 S.E.2d at 716-17.

¹¹⁷ *Id.* at 724-25.

¹¹⁸ Jennifer Fritz et al., *Prisoner Re-entry: An Assets-based, Capacity Building Community Practice Pilot Program*, 5 INT’L. J. OF INTERDISCIPLINARY SOC. SCIENCES 579, 581 (2010).

any term of community supervision.¹¹⁹ On March 16, 2021, Northam took executive action, subsequent to the constitutional amendment, to grant automatic restoration of civil rights upon release from incarceration.¹²⁰ In doing so, Northam leveraged his constitutional power to redefine voter qualifications, engineering new eligibility criteria that automatically restored voting rights to felons upon completion of a term of incarceration.¹²¹ Furthermore, Northam's executive order codified the myriad bipartisan efforts made towards restoration of voting rights.¹²²

III. THE FUTURE OF FELON RE-ENFRANCHISEMENT LEGISLATION

Because the constitutional framework of each jurisdiction produces vastly different political outcomes for its convicted felons,¹²³ the most tenable and stabilizing solution to disenfranchisement may be a federal statute that standardizes the rights afforded to felons upon release from prison. The differential treatment of convicted felons among jurisdictions, often compelled by racial animus, is deeply antithetical to the promise of universal suffrage in America. It is “counterproductive to the rehabilitation and reintegration into society of those released from prison.”¹²⁴ Disenfranchisement reduces felony offenders to a past crime and denies them the opportunity to redeem and vindicate themselves in the eyes of society. Federal legislation that would re-enfranchise felony offenders upon release from prison would encourage continued participation in civic life and help cultivate strong relationships with the communities from which offenders leave and return.¹²⁵

One such piece of federal legislation is currently pending before the 117th

¹¹⁹ Mamie E. Locke et al., *SJ 272 Constitutional Amendment: Qualifications of Voters and the Right to Vote*, VA.'S LEG. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+SJ272> (last visited Jan. 30, 2023); Charmiele L. Herring, *HJ 555 Constitutional Amendment: Qualifications of Voters and the Right to Vote*, VA.'S LEG. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+HJ555> (last visited Jan. 30, 2023).

¹²⁰ Gregory S. Schneider, *Northam Restores Voting Rights for 69,000 with Felony Convictions*, WASH. POST (Mar. 16, 2021), https://www.washingtonpost.com/local/virginia-politics/virginia-voting-felons-northam/2021/03/16/b171271e-868d-11eb-82bc-e58213caa38e_story.html.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004).

¹²⁴ Deborah J. Vagins & Erika Wood, *The Democracy Restoration Act: Addressing A Centuries-Old Injustice*, AM. CONST. SOC'Y 3 (Mar. 2010), <https://www.acslaw.org/wp-content/uploads/2018/04/ACS-Issue-Brief-Vagins-and-Wood.pdf>.

¹²⁵ *Id.* at 8.

Congress.¹²⁶ On February 25, 2021, Senator Benjamin Cardin proposed Senate Bill (“SB”) 481, seeking to “secure the Federal voting rights of persons when released from incarceration.”¹²⁷ Cardin’s bill proposes automatic re-enfranchisement of persons released from a term of imprisonment to a term of community supervision; under his bill, Americans who have been released from prison and who are currently serving a term of probation or parole would be eligible to vote.¹²⁸ In campaigning for his bill, Cardin cites the vast differentiation among U.S. jurisdictions in felon disenfranchisement laws.¹²⁹

This bill, however, is likely to be challenged on the basis of the Elections Clause in the U.S. Constitution. Cardin’s bill cites Article I, Section 4 of the Constitution as one such basis for authorizing a federal statute enfranchising convicted felons.¹³⁰ The Elections Clause of the Constitution delegates the power to determine “the Times, Places and Manner of holding Elections for Senators and Representatives . . . [to] each State by the Legislature thereof.”¹³¹ At the same time, the Elections Clause affirms congressional discretion in “mak[ing] or alter[ing] such Regulations.”¹³² While the Elections Clause does afford Congress extraordinarily broad discretion to regulate the manner of federal elections, it has not yet been interpreted to afford the legislative body discretion to regulate voter qualifications and eligibility.

In fact, the Supreme Court affirmed in *Arizona v. Inter Tribal Council of Ariz. Inc.* that Article I of the Constitution does not empower Congress to legislate the minutiae of voter qualifications; rather, that is an issue for state, not federal, legislative forums.¹³³ The Court expressly held that the Elections Clause of the Constitution does not confer upon Congress the ability to prescribe voter qualifications.¹³⁴ Moreover, an attempt to create a federal statute “preclud[ing] a State from obtaining the information necessary to enforce its voter qualifications” may raise concerns about federalist preemption of state sovereignty.¹³⁵

¹²⁶ Democracy Restoration Act of 2021, S. 481, 117th Cong. (2021).

¹²⁷ *Id.*

¹²⁸ *Democracy Restoration Act*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/policy-solutions/democracy-restoration-act> (last updated Aug. 5, 2022).

¹²⁹ *Cardin Leads Senate Call for Restoring Voting Rights to Formerly Incarcerated Individuals*, BEN CARDIN U.S. SENATOR FOR MD. (Feb. 25, 2021), <https://www.cardin.senate.gov/press-releases/cardin-leads-senate-call-for-restoring-voting-rights-to-formerly-incarcerated-individuals/>.

¹³⁰ *Legal Analysis of Congress’ Constitutional Authority to Restore Voting Rights to People with Criminal Histories*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/sites/default/files/legal-work/DRA%20Constitutionality%20Analysis.pdf> (last visited Jan. 12, 2023).

¹³¹ U.S. CONST. art. I, § 4, cl. I.

¹³² *Id.*

¹³³ *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 16-17 (2013).

¹³⁴ *Id.*

¹³⁵ *Id.* at 17.

To circumvent federalist concerns, the bill would likely have to distinguish between a “qualification” and a “right.” Section three of Cardin’s proposed bill provides that “the *right* of an individual who is a citizen of the United States to vote in any election . . . shall not be denied or abridged because that individual has been convicted of a criminal offense.”¹³⁶ The particular text of Cardin’s bill does not seem to necessarily impinge upon the sovereign rights of the States to design voter eligibility. While the bill does, at face value, appear to prescribe voter qualifications on a federal level, it also appears to reaffirm the right of American citizens to vote. Ultimately, the constitutionality of Cardin’s bill—and of any federal statute seeking to re-enfranchise felony offenders—would be a fact-specific inquiry that would hinge on the text of the statute.

CONCLUSION

In his dissent in *New State Ice Co. v. Liebmann*, Justice Louis Brandeis referred to the constituent states of the country as “laboratories for democracy.”¹³⁷ He noted that, as a sovereign entity within the country, states are empowered to “try novel social and economic experiments without risk to the rest of the country.”¹³⁸ In postbellum United States society, states have grappled with Reconstruction and the concomitant dismantlement of a caste system hinging on racism. In Southern jurisdictions specifically, racial animus motivated the creation of constitutional frameworks that would have a lasting impact on the civil rights and abilities of generations to come.

Given the pernicious and systemic nature of racism within state constitutional frameworks, the most sustainable solution to felon disenfranchisement is federal legislation. A federal statute that enfranchises convicted felons upon completion of federal supervision would permit an ex-felon to return to the community from which he left and enable him to contribute to his society in meaningful ways. The current state of felon disenfranchisement laws across states do not universally permit an ex-felon to do so. Effectively, these laws disempower and disenfranchise convicted felons upon their release from prison: once they have paid off their “debt” to society, they continue to do so—again and again.

While such a piece of legislation may not be wholly insulated from constitutional challenges, the efficacy of such a bill would depend on the specific language of the bill. One such piece of legislation—Senator Benjamin

¹³⁶ Democracy Restoration Act of 2021, *supra* note 125, at § 3.

¹³⁷ Bradley Blakeman, *States are the Laboratories of Democracy*, THE HILL (May 7, 2020), <https://thehill.com/opinion/judiciary/496524-states-are-the-laboratories-of-democracy/>.

¹³⁸ *Id.*

Cardin’s Democracy Restoration Bill—is currently pending before the 117th Congress, though it has been stalled at the Judiciary Committee. Undoubtedly, the Committee is evaluating the constitutionality of Cardin’s bill: he cites the Elections Clause, enumerated in Article I, Section Four of the Constitution, in support of his bill. But as the Supreme Court has observed, Congress can only legislate the “time, manner, and place” of elections, not voter eligibility and qualifications. Ultimately, the constitutionality of Cardin’s bill—and any future pieces of federal legislation that cite the Elections Clause—would depend on how the bill defends against allegations of preemption, as based in the language of the bill itself.