DRAFT [NOT FOR CITATION WITHOUT PERMISSION]

CRIMINAL DISENFRANCHISEMENT IN STATE CONSTITUTIONS: A MARKER OF EXCLUSION, PUNITIVENESS AND FRAGILE CITIZENSHIP

Nora V. Demleitner*

I. INTRODUCTION

The Commonwealth of Virginia has one of the broadest criminal disenfranchisement provisions in the United States. Lifetime loss of voting rights is enshrined in the state constitution. Those convicted of any felony are barred from voting unless the governor restores their civil rights.[1] Until 2017 the vast majority of those with a felony conviction lost the franchise forever. Most never applied for restoration of rights as the process was cumbersome, expensive, and time-consuming.

In 2017 then-Governor Terry McAuliffe, through executive order, restored the voting rights of over 200,000 individuals who had served their sentence. Virginia's Supreme Court declared this exercise of executive power unconstitutional. After its decision, the Governor individually restored voting rights to those who had been released from criminal justice supervision.[2] His successor initially continued the practice. In March 2021, Governor Northam took a further step by reinfranchising all Virginians not currently incarcerated even if they are

[1] VA. CONST. art. II, Sec. 1 ("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.").

[2] *See, e.g.*, *Gov. McAuliffe announces restoration of voting rights to thousands of felons*, CNN Wire (Aug. 22, 2016), at https://www.whsv.com/content/news/Gov-McAuliffe-to-make-announcement-regarding-restoration-of-rights-390928611.html; Camila Domonoske, *Virginia Court Overturns Order That Restored Voting Rights to Felons*, NPR (July 22, 2016), at https://www.npr.org/sections/thetwo-way/2016/07/22/487107922/virginia-court-overturns-order-that-restored-voting-rights-to-felons.

on parole or probation.[3] Yet, the state constitution continued to proclaim its exclusionary message.

During the last session, the legislature debated changing Virginia's constitution to limit disenfranchisement. Some proposed removing any reference to felon disenfranchisement in the constitution while others suggested retaining it during imprisonment. Ultimately, both Houses passed an amendment that explicitly mandated disenfranchisement during incarceration. Even though this is the practice the governor adopted subsequently, constitutional change will face several additional hurdles. The legislature must pass the amendment again after the 2021 election and then a majority of voters has to adopt it.[4]

Though state constitutions are easier to amend than the federal constitution,[5] as the Virginia process demonstrates, even in the states hurdles to constitutional amendments are more substantial than for legislative change. Yet, in recent years several states have amended their state constitutions to expand the franchise and allow (some) felons to vote.[6]

Despite the importance of state constitutions in setting out voter qualifications, most of the research on felon disenfranchisement focuses on the combined effect of state laws and constitutions without disaggregating the two different sources of law.[7] The exception are

---

[3] *See Governor Northam Restores Civil Rights to Over 69,000 Virginians, Reforms Restoration of Rights Process* (Mar. 16, 2021), at https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-893864-en.html.

[4] For background on the law and developments in Virginia, see Brennan Center for Justice, *Voting Rights Restoration Efforts in Virginia* (updated Mar. 16, 2021), at https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia. For a history of the constitutional amendment's passage (as of April 2021), see 2021 Special Session I, *HJ 555 Constitutional amendment; qualifications of voters and the right to vote (first reference)*, at https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+HJ555.

[5] For a description of the constitutional amendment process, see National Archives, *Constitutional Amendment Process*, at https://www.archives.gov/federal-register/constitution.

[6] *See infra* notes __ - __ (discussing changes in California and Florida).

[7] Much of the literature discusses the federal constitution and the Voting Rights Act. *See, e.g.*, David J. Zeitlin, *Revisiting* Richardson v. Ramirez: *The Constitutional Bounds of Ex-Felon Disenfranchisement*, 70 ALA. L. REV. 259

historical studies that analyze the evolution of felon disenfranchisement provisions in state constitutions.[8]

This essay focuses on the current role of state constitutions in signaling the fragility of citizenship. Despite changes that felon disenfranchisement laws, including some state constitutional provisions have undergone, almost all have retained powerful exclusionary concepts. They conflate status as an offender with loss of the franchise and highlight the ease with which the protected status of citizenship, most pronounced in the right to vote, can be lost.

Instead of providing broadly for the right to vote, many states prominently include criminal disenfranchisement provisions, which powerfully and more permanently than state laws convey the states' values. This essay uses the Virginia debate as a foil to highlight the exclusionary provisions prevalent in state constitutions. In contrast to the federal constitution, states set out who has the right to vote but many feature, in the same provision, exclusions that continue to note limits on the voting rights of citizens with a criminal record. The urgency of reforming not only state laws but constitutional provisions emanates from the ongoing restrictions on voting rights, which are a reflection of the vast and punitive U.S. criminal justice system and the related fragility of citizenship. Reform demands must be seen in the context of

(2018); Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584 (2012); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004). Others have written on the possibility of federal legislation to reinstate the voting rights of all those with a criminal record who would otherwise be disenfranchised under state laws.

[8] *See, e.g.*, John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Debates*, 19 (3) J. POL'Y HISTORY 282 (2007).

modern racism, with a racially skewed criminal justice system, and ongoing efforts to suppress the right to vote.

Virginia's current constitutional debate presents a case study of the struggle surrounding access to the franchise and highlights different perspectives on voter qualifications. The distinct constitutional proposals put forth during the amendment process reflect the intertwined struggles over voting access and criminal justice reform in a political system shaped by structural and legalized racism.

In Part II the essay sets out a short history of felon disenfranchisement. It emphasizes its, at least indirect, connection to the American history of racism and white supremacy during the 19th century but with its vestiges continuing through today. With the enormous expansion of the criminal justice system during the late 20th century and its considerable racial imbalance, criminal disenfranchisement has fallen upon the African American community, exactly as some Southern state legislators had intended a century earlier.[9] The seed for criminal disenfranchisement is planted through state constitutions though the details are in voting provisions, which are often administered through local election boards.

In recent years voters and state legislators have shown some appetite for rolling back lengthy and disproportionate disenfranchisement based on a criminal conviction.[10] Governors have used their executive powers to reinstate voting rights. Legal commentary has also

[9] *See infra* notes __-__ and accompanying text.

[10] *See, e.g., infra* notes __-__ and accompanying text (Florida, District of Columbia). *See generally* Alec C. Ewald, *Collateral Consequences in the American States*, 93 SOC. SCI. Q. 211, 221 (2012). The tendency to reinfranchise and expand access to the franchise for those with a criminal record is not restricted to the United States. It includes Canada, South Africa, and Hongkong. *See, e.g.*, Legislative Council Panel on Constitutional Affairs, Practical Arrangements for Voting by Prisoners (Hongkong, Oc.t 30, 2009). Similarly, many European countries have displayed a "pro-enfranchisement tendency." MILENA TRIPKOVIC, PUNISHMENT AND CITIZENSHIP *58 (2018).

consolidated around the abolition of felon disenfranchisement in its entirety, or at least at limiting it to the time of incarceration.[11]

Part III details on the voting provisions included in state constitutions, which emphasized restrictions, including those imposed through criminal convictions, on the right to vote. Many states included such language as they entered the Union. Southern states added or expanded the list of offenses triggering criminal disenfranchisement after Reconstruction. In the last few decades, a few states have amended their state constitutions to cut back on loss of the franchise. Recent changes in California and Florida reflect popular support for re-enfranchisement, but with limitations that mirror both punitive notions and concerns about the makeup of the electorate.

Part IV highlights the need for inclusive voting provisions in state constitutions to reflect a broad conception of citizenship rights and the expansion of the franchise over the last century. Even without restrictions on the franchise in the constitution, implementing laws may set out some limited exclusions from the ballot box. This Part analyses the legitimacy of potential restrictions. One set of popular exclusions from the ballot pertain to offenses that aim at destroying the state, such as treason, or the integrity of elections, which includes intentional election offenses. If a state opts for such limited, crime-specific exclusions, those require individual imposition as punishment at sentencing rather than automatic administrative exclusion. Punishment allows the judge to fashion an exclusion whose length is proportionate to the severity of the offense. Considering the small number of defendants convicted of these

[11] *See, e.g.,* MODEL PENAL CODE: SENTENCING 6x.03(1).

offenses and the even smaller number who commit serious crimes that fall into these categories, it should be possible to count the number of such disenfranchised on one hand.

In light of popular support for disenfranchisement during incarceration, some states may want to elect that option. Yet, racial inequities in the U.S criminal justice system and especially in imprisonment raise serious concerns about the racially disparate impact of that exclusion. It may also hamper an offender's reintegration and developing a stake in the community. Denial of the right to vote, the most direct expression of participating in democracy, is proportionate only when the offender's actions presented a direct attack on democracy and the franchise itself rather than when the individual committed a regular offense, however heinous. Ultimately, the right to vote should not be tied to criminal justice decisions but instead to a meaningful and broad conception of citizenship.

Even if states continued to restrict access to the franchise based on a conviction, state laws can be altered easily once the political climate changes. State constitutions that promise broad-based political and civic exclusions, however, would express a lasting re-conception of membership in the polity, one that would present a powerful message of inclusion for all.

II. Felon Disenfranchisement Meets Massive and Unequal Punishment

Disenfranchisement of those who violate the law is not a modern-day invention but goes back at least to Roman Law and can be found in medieval England. It stems from the concept of civil death which preserved the physical life of an offender but deprived him of all civil rights, which included all rights of political participation. From English law, it creeped into the law of

the states, not as a criminal sanction, but as an automatic consequence of a criminal conviction.[12]

The first inclusion of felon disenfranchisement in state constitutions goes back to the eighteenth century. In some states it took the form of empowering state legislatures to remove the right to vote from criminals.[13] Fewer states enumerated a few crimes that would lead to disenfranchisement, which followed pre-existing European models. Among those crimes were election offenses but also crimes like bribery or perjury.[14] Over time the list expanded as did the number of states that disenfranchised felons. By the mid-nineteenth century, a third of all states had constitutional disenfranchisement provisions; by 1925 it was three quarters,[15] as the number of U.S. states had grown from thirty-one to forty-eight.[16]

Primarily three different sets of arguments were used to justify felony disenfranchisement. Preservation of "the purity of the ballot box" was frequently heard, followed by concerns about voting fraud and the election of criminal-friendly public officials.

The "purity" argument may have been as much racially- as character-driven. After all, states noticeably increased criminal disenfranchisement provisions after the Civil War, and especially after passage of the Fifteenth Amendment. Yet, felon disenfranchisement laws are frequently overlooked in discussions about Jim Crow-era tools states, especially in the South, used to

---

[12] For an in-depth discussion about the historical origins and current manifestation of collateral sanctions in European and U.S. law, see Alessandro Corda, *The Collateral Consequence Conundrum: Comparative Genealogy, Current Trends, and Future Scenarios*, 77 STUDIES IN L., POLITICS, & SOC'Y 69 (2019).

[13] Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850- 2002*, 109 AM J. SOC. 559, 563 (2003).

[14] *See* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WISC. L. REV. 1045, 1062-63 (2002) (election offenses only in Vermont).

[15] Behrend, Uggen & Manza, *supra* note 13, at 564.

[16] Aaron O'Neill, *Number of US states by years since 1776*, STATISTA (July 6, 2020), at https://www.statista.com/statistics/1043617/number-us-states-by-year/.

exclude African Americans from voting. In contrast to widespread vigilante terror against black citizens, these laws, often based on the state's constitution, were the first explicitly legal mechanism to prevent them from voting. In contrast to other measures, these voting provisions attached a permanent marker of moral failing and lack of virtuous character to those convicted of crimes, which were often relatively minor or discriminately enforced. Essentially these laws left to police, prosecutors, and judges the decision on who had the right to vote.

Alabama's constitutional convention is the only one in which the legislative debates clearly created a connection between race and criminal disenfranchisement.[17] In most other state conventions on which records exist,[18] at least the officially recorded debates centered around race-neutral grounds.

Even though there is only limited direct evidence that felon disenfranchisement was designed to exclude African Americans from the franchise,[19] the statistical analysis of these laws provides a more telling account. Some datasets indicate that these laws were closely tied to the racial composition of the incarcerated population.[20] The size of a state's non-white population heavily impacted the extension of disenfranchisement laws beyond imprisonment.[21] Others argue that in addition to the percentage of the non-white population in a state and its prisons, the professional character of a legislature impacted the severity of felon

[17] *See, e.g.,* Hunter v. Underwood, 471 U.S. 222 (1985); Dinan, *supra* note 8, at 295-96. There seems to be substantial evidence that the offenses the Mississippi state legislature chose to disenfranchise were also selected to exclude African Americans from the franchise. *See* Andrew L. Shapiro, *The Disenfranchised*, 35 THE AMERICAN PROSPECT 60, 61 (Nov. – Dec. 1997).

[18] *See* Dinan, *supra* note 8 (analyzing statements on felon disenfranchisement provisions made at state constitutional convention debates between 1818 and 1984).

[19] *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985) (holding that as racism motivated passage of the disenfranchisement provision in the Alabama Constitution, it violates the Equal Protection Clause of the Fourteenth Amendment); Dinan, *supra* note 8.

[20] *See generally* Behrens, Uggen & Manza, *supra* note 13, at 586.

[21] *See* Behrens, Uggen & Manza, *supra* note 13, at 588.

disenfranchisement laws.[22] The less professional a state's legislature when the state registers between a quarter and sixty percent non-white population, the more likely does life-time disenfranchisement become. Similarly, a disproportionate share of non-white prisoners, leads to more severe disenfranchisement laws. On the other hand, a minority population in the low single digits generally insulated a state from passing disenfranchisement laws.[23]

The popularity of select justifications for criminal disenfranchisement has waxed and waned over time. The "purity of the ballot box" argument, for example, was raised more frequently before the 1960s and seemed particularly popular from the post-Civil War years on. It asserts that some individuals essentially lack the character to participate in political governance.[24] This claim of "moral" disqualification allowed legislators to decouple disenfranchisement from the criminal sanctioning process. Disenfranchisement was not punishment but merely an inevitable civil consequence of a finding of guilt.[25] Other advocates of the virtue argument argued the impossibility of having lawbreakers make law, and the beneficial effect on other citizens that would flow from keeping them from voting.[26] Today's defenders of felon disenfranchisement often highlight the volitional nature of crime which is supposed to render the denial of the franchise an appropriate response.[27]

The "purity of the ballot box" argument, with its demand that voters be of appropriate moral character, was only one of the primary reasons given. Another one, that resembles the

---

[22] *See generally* Robert R. Preuhs, *State Felon Disenfranchisement Policy*, 82 SOC. SCI. Q. 733 (2001).
[23] *See* Preuhs, *supra* note 22, at 744. Vermont and Maine both fall into this category.
[24] Some commentators see this argument grounded in the republican notion of civic virtue and the public good. *See* Ewald, *supra* note 14.
[25] *See* Dinan, *supra* note 8, at 287-288.
[26] *See* Dinan, *supra* note 8, at 289-90. This argument was more powerful in pre-Revolutionary days when disenfranchisement carried with it public shaming. *See* Ewald, *supra* note 14.
[27] *See* Behrens, Uggen & Manza, *supra* note 13, at 572.

claim in recent years that the ballot needs to be protected, centered on allegations of election fraud. During the late nineteenth century, when this rationale was the most popular, allegations of vote buying and betting on the outcome of elections were widespread, and likely accurate. For that reason, some legislators suggested temporary or permanent disenfranchisement for those involved in "bribery at elections." Such exclusion would also serve to deter others and restore faith in election integrity. While some proponents of this argument restricted their focus to election-specific crimes, others proposed disenfranchisement be tied to conviction of any felony or infamous crime since any serious offender was "inherently untrustworthy, and therefore particularly susceptible to participation in voter fraud."[28] It was too risky, the argument went, to permit felons to participate in elections.

The third claim that was much less common and largely restricted to the years following the Civil War. It emphasized the dangers offenders posed to election outcomes as they might put in charge officials, especially judges, who would share their anti-social goals. This rationale assumed that common interests bound together a disparate group of offenders. That may not have been unreasonable in small towns where large prisons were located and the convicts may have been in a position to elect the local sheriff, for example.[29] The argument continues to resonate today in states where prison inmates are counted as residents at the prison's location. The current trend of allocating them to their last prior residence and of expanding absentee balloting, renders that concern invalid.[30] The modern corollary of the argument about the

[28] Dinan, *supra* note 8, at 291-93.
[29] *See* Dinan, *supra* note 8, at 293-94.
[30] *See, e.g.,* Wanda Bertram, *State legislatures, members of Congress, and national newspapers push for an end to prison gerrymandering in 2021* (Apr. 16, 2021), at https://www.prisonersofthecensus.org/news/2021/04/16/nyt-2021/ .

potential impact of felon voting on election outcomes is the concern that felons would "dilute the vote of law-abiding citizens."[31] On the other hand, even in the past, some delegates retorted that even those with a criminal record should be able to change laws peacefully through the ballot box.[32]

There was little agreement about the rationale that justified disenfranchisement. Some legislators were even concerned about the legitimacy of the sanction since it was not judicially imposed. In addition, disputed were the length of disenfranchisement beyond imprisonment and the types of offenses that would justify deprivation of the right to vote.[33]

Some delegates added punishment theories, such as deterrence and retribution, to rationalize disenfranchisement. Others argued that disenfranchisement was devoid of a punishment rationale, permanent disenfranchisement lacked proportionality and would forgo an incentive to rehabilitate. Even though there was no empirical evidence (yet) for the argument, at past constitutional conventions some noted that disenfranchisement beyond imprisonment would lead to further criminality as it expressed society's lack of confidence in an offender's ability to change.[34] Indeed, "post-sentence disenfranchisement policies might actually encourage the commission of crimes."[35] As debates about disenfranchisement veered into broader justifications for criminal punishment, they mirrored attitudes about punishment and (lack of) faith in the state's ability to rehabilitate, at select point in history.

---

[31] *See* Behrens, Uggen & Manza, *supra* note 13, at 573.
[32] *See* Dinan, *supra* note 8, at 301.
[33] *See, e.g.*, Dinan, *supra* note 8, at 286, 294-95, 299.
[34] *See* Dinan, *supra* note 8, at 299-300.
[35] Dinan, *supra* note 8, at 300. For confirmation of these concerns, see *infra* notes __-__.

Though race was undeniably a crucial factor in the adoption of felon disenfranchisement provisions, developments in the criminal justice arena and other societal developments may also have supported the post-Civil War adoption of these laws. The debate about prison's ability to rehabilitate was hopelessly deadlocked between advocates of the two primary prison models in the United States, which did not do much for public confidence and supported a turn toward harsher punishment. By the late 1970s the goal was no longer to change and reform offenders but merely to confine them. The public's vacillation between these two sentiments is a recurring feature of U.S. sanctions policy. After the Civil War it contributed to the further exclusion of those with a criminal conviction. In addition to racial politics, the growth in immigration and the portrayal of some immigrant groups as part of the dangerous classes further supported disenfranchisement.[36]

Despite the lack of a cohesive argument, by the 1960s the vast majority of state constitutions included disenfranchisement provisions, but they varied in scope and breadth. By the 1960s and 1970s, in the wake of the Civil Rights movements and the passage of the Voting Rights Act, states began to roll back some of these voting restrictions.[37] Research indicates that it took distinct political alignments to make such change happen as the restoration of felon voting rights is widely perceived to benefit the Democratic party.[38]

---

[36] *See, e.g.,* Matthew W. Meskell, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 862 (1999).

[37] *See* Behrens, Uggen & Manza, *supra* note 13, at 564. *See also* Reuven (Ruvi) Ziegler, *Legal Outlier, Again? US Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 BOSTON U. INT'L L.J. 197, 213-14 (2011) (discussing changes in Supreme Court's rhetoric and jurisprudence on voting rights).

[38] *See, e.g.,* Antoine Yoshinaka & Christian R. Grose, *Partisan Politics and Electoral Design: The Enfranchisement of Felons and Ex-Felons in the United States, 1960-99*, 37 STATE & LOCAL GOV'T REV. 49 (2005). For a discussion of the beneficiaries of felon re-enfranchisement, see, for example, JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2008).

With the extension of the franchise to those eighteen and older, some advocated for federal legislation to end felon disenfranchisement. Those opposed countered with states' rights.[39] In 1973, the U.S. Supreme Court, in interpreting the Fourteenth Amendment to allow denial of the suffrage "for participation in rebellion, or other crime," ended questions about the constitutionality of felon disenfranchisement.[40]

Despite the expansion of the franchise during those years, contractions followed during the 1990s and the early 2000s. Those coincided with increasing punitiveness, which resulted from mandatory minimums, three-strikes laws, and guideline sentencing, during the 1990s and early 2000s, and resulted in mass imprisonment and a vast regime of penal supervision. In both Massachusetts and Utah, which had long allowed in-prison voting, constitutional referendums took the franchise away from those in prison.[41]

Only two states, Vermont and Maine, both with small non-white populations, never disenfranchised because of a criminal conviction. Today all adult citizens in those states, independent of whether they are or ever were under a criminal justice sanction, including those in state prisons, can vote.

In the rest of the United States disenfranchisement became a further marker of exclusion for those with a criminal justice record.[42] As millions began to fill prisons and jails, mass imprisonment turned into mass disenfranchisement. Despite changes to reduce the

---

[39] *See* Behrens, Uggen & Manza, *supra* note 13, at 573. These arguments continue to have salience.
[40] Richardson v. Ramirez, 418 U.S. 24 (1973); U.S. Constitution, Amend. XIV, Sec. 2.
[41] *See* Preuhs, *supra* note 22, at 736-37.
[42] Chris Uggen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction* Figure 4 (Oct. 30, 2020), at https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/

disenfranchised population, in fall 2020 over five million Americans were still denied voting rights, which amounts to 2.3 percent of the voting age population.[43] That was well over twice the percentage in the mid-1970s, before the onset of mass imprisonment. The impact was particularly pronounced for African Americans. Today every sixteenth potential African American voter remains disenfranchised because of a criminal record.[44]

It may not be too far-fetched to assume that "[o]ne plausible consequence of these laws is accentuation of a perception of illegitimacy of our legal system among minority citizens."[45] Disenfranchisement laws also undermine the voting power of African American communities and perpetuate false and racially tinged perceptions. The low voting rate of black men may be used to paint a picture of political disengagement or lack of interest while it should be ascribed to systematic exclusion.

With the increasing focus on race-based exclusions and the impact of felon disenfranchisement on the outcome of elections,[46] states began to change some of their policies.[47] Some states began to reinfranchise those released from incarceration even during a

---

[43] *See* Uggen, Larson, Shannon & Pulido-Nava, *supra* note 42. These figures are a substantial decrease from the prior presidential election, when over six million were disenfranchised. *Id*. In addition to those formally disenfranchised, a substantial number of people who are legally eligible to vote, are informally disenfranchised because of their inability to understand or access the process to regain voting rights. *See* Ernest Drucker & Ricardo Barreras, The Sentencing Project, *Studies of Voting Behavior and Felony Disenfranchisement Among Individuals in the Criminal Justice System in New York, Connecticut, and Ohio* (Sept. 2005), at https://www.prisonpolicy.org/scans/sp/fd_studiesvotingbehavior.pdf. For that reason, many states have opted to restore voting rights automatically.

[44] See Uggen, Larson, Shannon & Pulido-Nava, *supra* note 42. The first major study to highlight the racial impact of felon disenfranchisement was Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felon Disenfranchisement Laws in the United States* (1998).

[45] *See* Preuhs, *supra* note 22, at 746.

[46] *See generally* Uggen & Manza, *supra* note 42 (projecting impact of felon disenfranchisement on outcome of narrow presidential elections and Senate races).

[47] For a timeline on felon disenfranchisement that includes major state executive action and litigation, see ProCon.org, *Historical Timeline: US History of Felon Voting/Disenfranchisement* (last updated Sept. 23, 2020), at https://felonvoting.procon.org/historical-timeline/.

parole. Others scrapped the denial of the franchise for those on probation. In many states the executive branch alone could drop some reinfranchisement requirements; in others legislative action was required. Racial equity demanded a broader reinfranchisement regime.[48] Disenfranchisement impacted overall political engagement and voting power in select urban communities. Because the public's view of democratic values has been frayed,[49] tying reinfranchisement to criminal justice reform seemed more successful than persuading voters that democratic values demanded it.

Increasingly reinfranchisement seemed like smart criminal justice policy. As some nineteenth century legislators correctly predicted, exclusion from the ballot box hinders reintegration and presents an ongoing stigma. Restoring the franchise became a marker of and a reward for rehabilitation.[50] With researchers finding voting rights to reduce recidivism,[51] reinfranchisement presents community benefits and becomes a public safety issue. That communitarian argument may present a persuasive reason for quick reinfranchisement or possibly even the retention of voting rights during punishment.[52] Yet, the notion of

---

[48] *See* Alec Ewald, *Criminal Disenfranchisement and the Challenge of American Federalism*, 39 J. FEDERALISM 527, 531-534 (2009).

[49] *See, e.g.*, TRACI BURCH, TRADING DEMOCRACY FOR JUSTICE: CRIMINAL CONVICTIONS AND THE DECLINE OF NEIGHBORHOOD POLITICAL PARTICIPATION (2013).

[50] *See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 130-133 (2003); Ky. Exec. Order 2019-003 (Dec. 12, 2019), at https://www.brennancenter.org/sites/default/files/2019-12/Executive%20Order%202019-003.pdf (gubernatorial restoration of voting rights for large group of non-violent offenders who have completed probation, parole, or a prison sentence partially because "research indicates that people who have completed their sentences and who vote are less likely to re-offend and return to prison" and because "restoration of the right to vote is an important aspect of promoting rehabilitation and reintegration into society to become law-abiding and productive citizens"); *see generally* Christopher Uggen & Jeff Manza, *Disenfranchisement and the Civic Reintegration of Convicted Felons, in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 67, 76 (Christopher Mele & Teresa A. Miller eds., 2005).

[51] *See, e.g.*, Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193 (2004).

[52] *Cf.* Dirk van Zyl Smit, *Civil Disabilities of Former Prisoners in a Constitutional Democracy: Building on the South African Experience*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 50, at 255, 269.

disenfranchisement as part of punishment, remains a profound countervailing sentiment despite the sanction's legal classification as non-punitive.

Despite recent rollbacks of felon disenfranchisement, progress has been spotty. Numerous states now restrict the time of disenfranchisement to incarceration only. In many others, however, voting rights are restored only at the end of a criminal justice sentence, which may include all financial sanctions.

Among the most high-profile recent developments was Florida's popular referendum, which ended permanent disenfranchisement for most offenders.[53] After extensive litigation in both state and federal courts, restoration of voting rights now demands completion of all sentence conditions, including all financial obligations. That ruling resulted in the continuing disenfranchisement of hundreds of thousands of Florida residents.[54]

In 2020 the District of Columbia became the first jurisdiction to re-enfranchise those imprisoned.[55] With D.C. inmates largely held in federal institutions, that meant that the Bureau of Prisons had to assure that they could registered to vote and receive mail-in-ballots.[56] So far

---

[53] In 1974 California ended permanent disenfranchisement through referendum. Proposition 10 restored the franchise once a criminal justice sentence ended. For a discussion of the passage of Proposition 10 at a time when crime had become a highly salient election topic, see Michael C. Campbell, *Criminal disenfranchisement in California*, 9 PUNISHMENT & SOC'Y 177 (2007).

[54] For a discussion of the litigation surrounding Amendment 4, see Brennan Center for Justice, *Litigation to Protect Amendment 4 in Florida* (last updated Sept. 11, 2020), at https://www.brennancenter.org/our-work/court-cases/litigation-protect-amendment-4-florida; Jones v. Gov. of Florida ,975 F.3d 1016 (11th Cir. 2020). For a broader discussion of the exclusionary role of fees, fines, and other financial sanctions in voting, see Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VANDERBILT L. REV. 101(2019).

[55] *See, e.g.,* Kira Lerner, *What It's Like to Vote From Prison*, SLATE (Oct. 28, 2020), at https://slate.com/news-and-politics/2020/10/dc-prisoners-voting-first-time-felony-disenfranchisement.html. The District of Columbia ranks among the top five jurisdictions among states in percentage of residents imprisoned. *Fact: DC has a mass incarceration problem* (Sept. 11, 2019), at https://www.sentencingproject.org/news/fact-dc-mass-incarceration-problem/.

[56] *See, e.g.*, Julie Zauzmer & Ovetta Wiggins, *D.C. and Maryland have new policies allowing prisoners to vote. Making it happen is hard.*, WASH. POST (Sept. 28, 2020), at https://www.washingtonpost.com/dc-md-va/2020/09/28/dc-maryland-prisoners-voting/.

at least, prison reinfranchisement has not caught on in other states though legislation is under consideration in several.[57]

Despite the focus on re-enfranchisement, relatively little attention has been paid to the number and scope of disenfranchisement provisions in state constitutions. Despite Amendment 4's changes, Florida's voting provision continues to exclude many potential voters because of their criminal convictions and the proposed change to Virginia's Constitution does the same. The debates about these constitutional amendments demonstrate flaws in values messaging that lay the foundation for future exclusions.

Voting restrictions based on criminal convictions lurk in all state constitutions. In some jurisdictions they may prove a barrier to broader and more permanent change, in all they continue to send a strong signal of exclusion from society once someone runs afoul of the law.

III. STATE CONSTITUTIONS: GUARDIANS OF FELON DISENFRANCHISEMENT

Without a federal constitutional right to vote, it is state constitutions that grant the right to vote though with limitations that include U.S. citizenship, state residency, and age.[58] State constitutions may set out detailed rules with respect to voter registration or absentee ballots[59] or leave those issues to implementing legislation and administrative rules.

Many state constitutions take as much as they grant voting rights. Many explicitly state in the same provision that criminal convictions and mental incompetence serve as disqualifiers.[60]

---

[57] *See, e.g.,* Nicole D. Porter, *Testimony to Oregon's House Rules Committee in Support of Universal Suffrage Act* (Mar. 22, 2021), at https://www.sentencingproject.org/publications/testimony-to-oregons-house-rules-committee-in-support-of-universal-suffrage-act/.
[58] Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VANDERBILT L. REV. 89, __-102 (2014).
[59] Douglas, *supra* note 58, at 102.
[60] Douglas, *supra* note 58, at 102.

Similarly, in the U.S. Constitution Section 2 of the Fourteenth Amendment, which comes closest to providing comprehensive adult male voting rights, allows for the denial of the franchise "for participation in rebellion, or other crime."[61] That provision reflected the prevailing attitude of the time and the exclusionary provisions in many state constitutions. Even though disenfranchisement based on a criminal conviction had been rare in the early decades of the United States, they increased in popularity from the 1820s on before they became ubiquitous after the Civil War. Still, the term "crime" used in the post-Civil War Amendment was broader than the multiplicity of offenses delineated in the state constitutions.

The denial of the franchise exemplifies U.S. federalism.[62] Just like state laws differ in the ways in which they limit, and restore, the franchise based on criminal record, state constitutions diverge in their approach to voting rights and their limits. Restrictions based on criminal convictions run the gamut. Most allow the state legislature to deny the franchise to those convicted of some or all felonies, or "such crimes as it may designate."[63] Many provisions detail the need for a conviction.[64] Usually, they also indicate how the right to vote may be regained. Often restoration requires a pardon or some other, largely undefined mechanism. Despite the differing language and style, which are functions of the time during which these provisions were adopted, they can be grouped into a few large categories.

---

[61] U.S. CONST., Amendment XIV, Sec. 2.

[62] The Center for Public Integrity called its listing of state disenfranchisement laws, *50 states of disenfranchisement* (Oct. 15, 2020), at https://publicintegrity.org/politics/elections/ballotboxbarriers/50-states-of-voting-disenfranchisement/.

[63] *See*, *e.g.*, N.J. CONST. art. II, § 1, para. 11.

[64] *See, e.g.*, ARK. CONST., art. III, § 2 ("for the commission of a felony, upon lawful convictions thereof"); TENN. CONST., art. I, § 5 ("the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.") & art. IV, § 2 ("Laws may be passed excluding from the right of suffrage person who may be convicted of infamous crimes.").

Kirk H. Porter's 1919 article on suffrage provisions in state constitutions included a comprehensive analysis of felon disenfranchisement provisions and provided categorizations tht prove helpful even today.[65] At the time states constitutions explicitly excluded not only those convicted of crimes from the franchise but also the poor if they were in a public asylum and the insane if institutionalized.[66]

Felon disenfranchisement provisions differed in scope. States chose different types of offenses to trigger loss of the franchise. In addition, exclusions differed in length. Some states restricted loss of voting rights to imprisonment while others extended it in perpetuity.[67] Virginia's present constitution presents one of the last vestiges of the latter. With the proliferation of non-incarcerative sanctions, disenfranchisement can take on even broader and more confusing nuances.

In the early twentieth century state constitutions listed a broad array of crimes that triggered loss of the franchise. "Penitentiary offense, infamous crimes, larceny, perjury, forgery and duelling, appear most frequently."[68] Dueling seemed to be a favorite for inclusion in disenfranchisement provisions throughout the nineteenth century and a number of commentators at the time defended its listing on deterrence grounds.[69] Of all the crimes, dueling was after all a preplanned offense, and therefore the most deterrable.[70]

---

[65] *See* Kirk H. Porter, *Suffrage Provisions in State Constitutions*, 13 AM. POL. SCI. REV. 577 (1919).
[66] *See* Porter, *supra* note 65, at 585. State constitutions continue to exclude the latter category of individuals, though described differently today, from the franchise.
[67] *See* Porter, *supra* note 65, at 585-86.
[68] Porter, *supra* note 65, at 586.
[69] *See* Dinan, *supra* note 8, at **.
[70] For a discussion of the historic background and ultimate demise of dueling in the United States, see *The History of Dueling in America*, PBS, at https://www.pbs.org/wgbh/americanexperience/features/duel-history-dueling-america/. "Formal dueling, by and large, was an indulgence of the South's upper classes, who saw themselves as above the law—or at least some of the laws—that governed their social inferiors." Ross Drake, *Duel*, SMITHSONIAN

Some states had lengthy lists of excludable offenses, and Southern states were fond of including "wife-beating and rape…," Porter noted.[71] Others included election-related offenses. Porter rejected their specific mentioning as he considered them an aspect of the "purity of the ballot box" that should be addressed legislatively.[72] Yet, even today state constitutions list election-related offenses specifically as worthy of disenfranchisement.[73] Some limit them to "intentional" election crimes, others retain old descriptions of bribing or receiving bribes in conjunction with voting. In some state constitutions those offenses are listed separately, in others they appear in conjunction with other crimes that impact the existence or the foundations of government, such as treason.[74] Even though some states still retain specific offenses as a basis for disenfranchisement in their constitutions, many reference "crimes" or "felonies," sometimes implying that all offenses in that category should result in disenfranchisement.

Porter bemoaned logical inconsistencies in these listings. One pertained to the explicit listing of offenses that were already included in a broader category such as "penitentiary offenses."[75] Yet, a reclassification of offenses at a later point may assure that the specific crimes listed continue to trigger disenfranchisement. Porter also flagged his concern about the

---

MAGAZINE (March 2004), at https://www.smithsonianmag.com/history/duel-104161025/. Ultimately a change in public opinion, not disenfranchisement, put an end to dueling.

[71] Porter, *supra* note 65, at 586.

[72] *See* Porter, *supra* note 65, at 589.

[73] *See, e.g.*, PA. CONST., art VII, § 7 (anyone bribing a voter and any voter receiving a bribe "shall thereby forfeit the right to vote at such election").

[74] *See, e.g.*, N.H. CONST. PT. FIRST, art. XI ("No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery or any willful violation of the election laws of this state or of the United States; but the supreme court may, on notice to the attorney general, restore the privilege to vote to any person who may have forfeited it by conviction of such offenses."). New Hampshire added that constitutional provision in 1912.

[75] *See* Porter, *supra* note 65, at 586.

enumeration of less serious offenses, which implicitly excluded more serious but unlisted crimes. If he realized that these decisions were animated by racial animus, he did not mention it.

State constitutions vary in the way in which they frame disenfranchisement as mandatory or optional. A few states explicitly note that state legislators *shall* pass legislation to disenfranchise individuals based on criminal convictions. Porter critiqued those provisions as superfluous if the constitutional clause operates independently of legislative action. Alternatively, they cannot force legislative actions, making "the clause in the constitution [] nothing but a wish, a mere piece of advice to the legislature."[76] Those concerns remain and will require legislative change at least in states in which constitutional provisions are framed as orders. Porter seemed to fear that articles that require legislative action may be subject to abuse and regular policy changes.[77] Those concerns seem to have been misplaced as change has been slow in individual jurisdictions.

In the end, Porter suggested omitting references to legislative actions or choosing broad and generic categories of offenses for disenfranchisement.[78] Largely states seemed to have followed his latter advice by adoption the term "felony." On the other hand, there are currently fourteen states whose constitutions grant legislators the power to disenfranchise based on a criminal conviction.[79] California's Constitution, when it recently ended disenfranchisement

[76] Porter, *supra* note 65, at 586.
[77] Porter, *supra* note 65, at 586-87.
[78] Porter, *supra* note 65, at 587.
[79] California, Oklahoma, and Pennsylvania grant the legislature the power to delineate qualifications for electors. The other eleven—Arkansas, Connecticut, Indiana, Maryland, Michigan, New Jersey, New Mexico, Ohio, South Dakota, Tennessee, and Wisconsin—explicitly mention legislative power to bar individuals convicted of crimes from voting. *See, e.g.*, CONN. CONST., art. VI, § 3 ("The general assembly shall by law prescribe the offenses of

throughout a criminal justice sentence through a referendum, continued to mandate legislators disenfranchise those convicted of felonies while imprisoned.[80]

In addition to the types and numbers of offenses that could lead to disenfranchisement and the mandatory or hortatory character of provision, the length of disenfranchisement and ways to cut it short were mentioned in state constitutions. A hundred years ago most states chose life-time disenfranchisement unless governors pardoned the individual.[81] That practice, however, was inherently disproportionate, a fixed penalty without relationship to the seriousness of the offense.[82] Yet, with a substantially more vibrant pardon practice than today, many offenders did regain voting rights.[83] Yet, a few states opted to disenfranchise offenders only during their time of imprisonment.[84] Today's limitations are more varied and more ambiguous. Disenfranchisement may end with release from confinement or extend into parole.

---

conviction of which the right to be an elector and the privileges of an elector shall be forfeited and the conditions on which and methods of which such rights may be restored.").

[80] *See* CAL. CONST., art. II Voting, Initiative and Referendum, and Recall

Sec. 2

(a) An elector disqualified from voting while serving a state or federal prison term, as described in Section 4, shall have their right to vote restored upon the completion of their prison term. [effective Dec 16, 2020]

Sec. 4

The Legislature …. shall provide for the disqualification of electors while mentally incompetent or serving a state or federal prison term for the conviction of a felony.

[81] Porter, *supra* note 65, at 586.

[82] Porter, *supra* note 65, at 587.

[83] While governors' use of the pardon power is not as well documented as presidential pardons, select examples highlight the frequent use of pardons in the states in the past. Between 1893 and 1894, Oregon's governor granted 97 full pardons, commuted 46 sentences, and restored to full citizenship 48 individuals who had served their sentences. Those figures may not seem unremarkable but for the fact that the state prison population during those years was below 400. *See* Aliza B. Kaplan & Venetia Mayhew, *The Governor's Clemency Power: An Underused Tool to Mitigate the Impact of Measure 11 in* Oregon, 23 LEWIS & CLARK L. REV. 1285, 1296 (2020).

[84] Porter, *supra* note 65, at 586.

It may include those with a probationary sentence or take the franchise from anyone with post-sentence obligations.[85]

Racial disparities that accumulate with lifetime disenfranchisement may not have raised eyebrows a hundred years ago because of the panoply of extralegal and legal measures of exclusion that played a more decisive, and visible role. Yet even Porter noted the curious impact of lifetime disenfranchisement on young offenders. Even if they had completed their sentence before the age of twenty-one, which was then the voting age, they would never be able to vote.[86] Eighty years later, reformers echoed that concern but added the disproportionate racial impact of lifetime disenfranchisement on young African American men.[87]

Porter weighed in on the side of abolishing lifetime disenfranchisement, a reflection of the Progressive movement and its belief in human improvement. He wanted to allow for individual change and highlight the government's role in bringing about such change. Even though he recognized that reality might be different, he advocated for a presumption that release implied that the person "is once more fit to resume normal civic relationships. If he is not fit he ought not to be released; if he is fit he ought not to be deprived of the franchise."[88] Porter believed both that the person had the right to a fresh start without being reminded of his past failings and that lifetime disenfranchisement amounted to "unscientific lawmaking,"[89] a

---

[85] *See* Jean Chung, The Sentencing Project, *Felony Disenfranchisement: A Primer,* tbl. 1 (June 27, 2019), at https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/; National Conference of State Legislators, *Felon Voting Rights,* tbl. 1(April 12, 2021), at https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.
[86] Porter, *supra* note 65, at 586.
[87] Andrew L. Shapiro, *The Disenfranchised*, 35 THE AMERICAN PROSPECT 60 (Nov.-Dec. 1997).
[88] Porter, *supra* note 65, at 587.
[89] Porter, *supra* note 65, at 587.

charge reflective of the Progressives' emphasis on science. Those considerations led him to recommend, in 1919, to exclude from the franchise only those imprisoned.[90] It has taken Virginia and Florida one hundred years to follow that recommendation. It remains the progressive default. Yet, reformers and the District of Columbia challenge that orthodoxy.[91]

Porter also found a practical problem with post-sentence disenfranchisement. After all, citizens with criminal records could move across state lines and vote in a different jurisdiction.[92] Today national criminal records databases have essentially erased that concern. The focus is not on those with a criminal record who move to a less exclusionary jurisdiction but on those enfranchised who lose their voting right with a move across state lines.[93]

Florida's recent constitutional amendment exemplifies many of the problems Porter noted and introduces additional shortcomings. Before the passage of Amendment 4, the state disenfranchised all felony offenders for life unless the governor pardoned them. With the rise in felony convictions over the last three decades and restrictive pardon policies,[94] the number of disenfranchised in the state climbed to 1.8 million. The new constitutional provision was designed to end lifetime disenfranchisement except for those convicted of murder and sex offenses. The exemption was devoid of a persuasive rationale but had been included to facilitate passage of the amendment. As Porter flagged "wife-beating" as a curious addition to the list of offenses that merited disenfranchisement, future historians may wonder about today's carve-outs.

---

[90] Porter, *supra* note 65, at 588.
[91] *See supra* notes __-__ and accompanying text.
[92] Porter, *supra* note 65, at 587.
[93]
[94] *See infra* notes __-__ and accompanying text.

All other offenders, including anyone convicted of treason or election offenses, are to regain the franchise with the end of their criminal justice sentence, which explicitly included parole or probation.[95] Even though the focus was on stages during which the offender was under the state's supervision—still a more extensive period of time than incarceration alone—subsequently Florida's governor and state legislators interpreted the provision also to require fulfillment of all other sentence conditions, including payment of all financial sanctions before regaining the vote. With the proliferation of modern, non-incarcerative punishments, Florida has found another way to extend the period of disenfranchisement.

Even Porter questioned whether state constitutions should address felon disenfranchisement at all or rather leave the issue to the legislature. A hundred years later the answer should be obvious.

IV. THE NEED FOR STATE CONSTITUTIONAL REFORM: FROM CRIMINAL JUSTICE REFORM TO PROTECTION OF CITIZENSHIP RIGHTS

Despite a vast array of literature on felon disenfranchisement, there has been little discussion about both the signaling effect and the impact of state constitutional language on criminal disenfranchisement. Some governors have employed broad constitutional language of pardons and restoration of civil rights to re-enfranchise, or in some cases refuse to do so. Yet,

[95] *See* FLA. CONST., Art. VI, § 4 Disqualifications:

> (a) No person convicted of a felony… shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.
> (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

the fundamentally exclusionary language present in most state constitutions has been left either undisturbed or merely trimmed back rather than excised. Reasons may be found both in the difficulty of changing state constitutions and the emphasis on practical impact, which could be achieved through executive or legislative action. Yet, as discussions about the scope of voting rights and of the meaning of equity and inclusion in the law dominate public discourse, the time for constitutional change is ripe.

Most state constitutions note the length of disenfranchisement, the types of offenses that lead to disenfranchisement, and ways to re-enfranchise. Eleven states either explicitly discuss restoration of civil rights or imply them. Florida's new constitutional provision allows those convicted of sex offenses or murder to regain voting rights "upon restoration of their civil rights."[96] Some states similarly reference being "pardoned or otherwise restored by law to the right of suffrage…." [97] These provisions have allowed the executive branch to control reinstatement of the franchise.

Before the 2018 constitutional change, all those with a felony record needed a gubernatorial pardon in Florida to have their voting rights reinstated. Governor Scott made anyone who was not at least five years past the expiration of their criminal justice sentence ineligible for consideration. The Clemency Board, of which the Governor and his cabinet were

[96] FLA. CONST. art. VI, § 4 (b). *See also* IDAHO CONST., art. VI, § 3 ("No person is permitted to vote….who has…been convicted of a felony, and how has not been restored to the rights of citizenship…."); NEB. CONST., art. VI, § 2 ("…. unless restored to civil rights.").

[97] N.J. CONST., art II, § 1, para. 11. But see N.H. CONST. PT. FIRST, art. XI ("but the supreme court may, on notice to the attorney general, restore the privilege to vote to any person who may have forfeited it by conviction of such offense.").

members, then demanded a personal appearance, and rarely granted petitions for restoration of rights.[98]

In contrast, Virginia Governors McAuliffe and Northam pursued dramatically different paths. Governor McAuliffe initially tried to use the pardon power to automatically reinfranchise anyone with a criminal record upon the end of their sentence. When the Virginia Supreme Court declared the practice unconstitutional, he reinfranchised people individually but also without requiring them to petition. Governor Northam recently took the practice a step further by reinstating voting rights to individuals once they leave prison. His practice now resembles Porter's 1919 recommendation as well as the constitutional amendment pending before Virginia's legislature.

As Progressives believed in the state's ability to help humans change for the better, in recent years at least some jurisdictions, including Virginia, have come to re-embrace rehabilitation. Governor Northam's practice partially reflects that. Curiously criminal disenfranchisement is apparently so deeply ingrained in U.S. law and society that it has survived even as the purpose of punishment and its manifestations have morphed over time.

Additional motivations for the Governor's expanded rights restoration can be found in the racial disparity in Virginia's criminal justice system and in pandemic efforts to facilitate voting. Still, currently in Virginia reinfranchisement hinges solely on the governor's willingness to

[98] For an extensive discussion of Governor Scott's pardon scheme, see, e.g., Matthew S. Schwartz, *Old Florida Clemency System Was Unconstitutional, Racially Biased*, NPR Radio (Jan. 8, 2019), at https://www.npr.org/2019/01/08/683141728/old-florida-clemency-system-was-unconstitutional-racially-biased, Later reviews of the petitions granted indicated that compared to the make-up of the applicant group, white applicants fared substantially better as did those who indicated a Republican party affiliation. *See* Lulu Ramadan, Mike Stucka & Wayne Washington, *Florida felon voting rights: Who got theirs back under Scott?*, The Palm Beach Post (updated Oct. 26, 2018)(investigatory report into pardon grants), at https://www.palmbeachpost.com/news/20181025/florida-felon-voting-rights-who-got-theirs-back-under-scott.

restore an individual's civil rights. The state constitution provides that power. The immense discretion placed in a governor appears questionable when the denial of a core characteristic of citizenship is at issue.[99] Yet, so far there has been no broad-based movement for constitutional change.

Comparative studies may provide some insight why state constitutions in the United States limit the franchise based on criminal convictions. A broad analysis of disenfranchisement in fifty-four European countries details the level of variation in exclusions from the franchise based on a criminal conviction.[100] Criminal disenfranchisement is not unprecedented in other highly industrialized Western democracies. Yet, the extent to which the United States has taken it, in conjunction with the unprecedented size of its penal system, remains singular. Several European countries allow for disenfranchisement based on a criminal conviction in their constitutions. Italy's Constitution, for example, states that the franchise can "be restricted [only] for civil incapacity or as a consequence of an irrevocable penal sentence or in cases of moral unworthiness as laid down by law."[101] The Polish Constitution disenfranchises those "who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights…."[102] Incarceration or explicit judicial denial lead to the loss of voting rights in a substantial number of European countries. The European Court of Human Rights has weighed in on the compatibility of criminal disenfranchisement with European human rights

[99] For further examples of gubernatorial decisions restricting or expanding criminal disenfranchisement, see Colgan, *supra* note 54, at 129-130 (discussing New York).
[100] *See* TRIPKOVIC, *supra* note 10.
[101] ITALIAN CONST., art. 48.
[102] POLISH CONST., art. 62(2).

values. Despite judicial attempts to narrow such disenfranchisement, many European governments have insisted on keeping that option, many explicitly in their constitutions.[103]

Two arguments most frequently advanced to rationalize these exclusions pertain to a country's level of democracy and the harshness of its penal system. The European study found little support for the argument that stronger democracies disenfranchise less though in a global review of the loss of the vote by those incarcerated, another study found a "country's internal political and civil freedoms" relevant in predicting the voting rights of the incarcerated specifically.[104] In Europe there is some validity to the claim that countries with more punitive systems are more likely to disenfranchise. In fact, the public's beliefs about crime and the portrayal of offenders may be a driving force behind disenfranchisement. Yet, a more comprehensive argument that may help explain the broad exclusionary provisions in state constitutions centers around the "value of citizenship."[105]

The value of one's citizenship remains uncertain and easily denied under state constitutions that allow for the deprivation of the franchise based on criminal convictions.[106] Contrast the Canadian Supreme Court, which in striking down disenfranchisement during imprisonment, declared a citizen's right to vote the basis of democracy and the legitimacy of a government.[107] Most citizens, including those with a criminal record, would agree as they consider the

---

[103] *See, e.g.,* Hirst v. UK ___.
[104] *See* Brandon Rottinghaus & Gina Baldwin, *Voting behind bars: Explaining variation in international enfranchisement practices*, 26 ELECTORAL STUDIES 688 (2007). Former English colonies are more likely to disenfranchise their citizens during incarceration. *Id*. at __.
[105] This paragraph is based on TRIPKOVIC's analysis of European regimes, *see supra* note 10, at *43-96. Others have focused on dignity as a distinguishing factor between the United States and select other common law countries. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 NYU L. Rev. 457, 519-27 (2010).
[106] *Cf.* TRIPKOVIC, *supra* note 10, at *71-72.
[107] Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68, [2002] 3 SCR 519.

franchise an essential component of citizenship.[108] Excluded from it, the offender becomes a "temporary outcast[]" from citizenship,[109] which increases the social distance between those convicted of crimes and other citizens.[110] When one applies the "value of citizenship" scheme to U.S. states, it becomes obvious that only a few states provide a broad inclusionary sense of citizenship as they do not restrict the franchise in its definition of voters. Yet even those states have potential exclusions based on criminal convictions for select crimes in other parts of their constitutions.[111] Maine's Constitution, for example, permits for disenfranchisement for two distinct election-related offenses, for a maximum period of ten years.[112] Yet, both Maine and Vermont are the only two U.S. states that have been steadfast in their refusal to disenfranchise anyone based on a criminal conviction. For those reasons they should be categorized as different from the states that limit the franchise in the same provisions that defines voters. Those continue the tradition of "civic death," even if they limit it now to the time of incarceration.[113]

---

[108] *See* Christopher Uggen & Jeff Manza, *Disenfranchisement and the Civic Reintegration of Convicted Felons, in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 67, 76 (Christopher Mele & Teresa A. Miller eds., 2005) (surveying individuals with criminal records who note how disenfranchisement regularly reminds them of their past offense and furthers a sense of exclusion).

[109] *Sauvé,* 2002 SCC 68 at para. 40.

[110] *See* TRIPKOVIC, *supra* note 10, at *72.

[111] Both Maine and Vermont's constitutions allow for disenfranchisement upon conviction of select election-related offenses. Both provisions are tugged away in less prominent places of the state constitutions and have not been implemented.

[112] MAINE CONST. Art. IX, sec. 13 ("The Legislature may enact laws excluding from the right of suffrage, for a term not exceeding 10 years, all persons convicted of bribery at any election, or of voting at any election, under the influence of a bribe."). Vermont's Constitution includes broad election provisions, VT Const. arts. 8 & 42 though a requirement of "quiet and peaceable behavior," *id*. at art. 42, appears to allow for felon disenfranchisement if the legislature so chose. Article 55 mirrors Maine's provision regarding election-related bribery but mandates exclusion from the franchise only for the election at issue for the person bribed and excludes the person providing the person benefting from the bribe to "be rendered incapable to serve for the ensuing year." VT Const. 55. This provision explicitly allows for further punishment as outlined in law.

[113] *See also* Susan Easton, *Electing the Electorate: The Problem of Prisoner Disenfranchisement*, 69 MODERN L. REV. 443, 451 (2006) (rejecting the notion of prisoners as second-class citizens, which disenfranchisement implies).

An offender's sense of being outcast and being denied citizenship rights and protections during incarceration may be shared by the public and explain public apathy toward widespread abuses during incarceration. Disenfranchisement based on a criminal conviction implies a test of moral worthiness. With constitutional grants of disenfranchisement during incarceration, an incarcerative sentence implies even more strongly an absence of moral worth and ultimately denies citizenship. In a criminal justice system that is beset with racial and class inequities and a legal system imbued with the vestiges of systemic racism, exclusions from citizenship reinscribe the meaning of citizenship. Voting is a privilege, not a right, reflective of a society that easily excludes its own members. State constitutions powerfully convey that message.

Thirty-four state constitutions explicitly disenfranchise individuals who are convicted of at least some felonies. Most of these state constitutions include all felonies to trigger exclusion. Alabama's and Arkansas's constitutions disenfranchise those convicted of "crimes involving moral turpitude."[114] For decades Alabama left it to the election officials in its sixty-seven counties to determine which crimes were included in that definition.[115] Following litigation, in 2017 Alabama legislatively defined moral turpitude to include over forty felonies. They include offenses as disparate as fraud, rape, burglary, treason, and theft of trademarks or trade secrets.[116] Only two states provide a narrow list of specific crimes in their constitutions. One is New Hampshire which limits its exclusions to treason, bribery, and election law violations.[117]

[114] *See* ALA. CONST. art. VIII, § 177.
[115] *See* Colgan, *supra* note 54, at 103.
[116] *See* ALA. CODE §17-3-30.1 (2018).
[117] *See* N.H. CONST. PT. FIRST, art. XI.

Mississippi's constitution, by contrast, includes a long list of crimes that trigger disenfranchisement.[118]

Disenfranchisement during incarceration has long been taken for granted and even in the reform movement of the last two decades has rarely been questioned. If release from imprisonment implies reform, that means during incarceration at best offenders are in a limbo state with respect to their moral qualification for citizenship. Some political theorists, however, assert that the right to vote is an inherent right of citizenship that should not be lost automatically upon a term of imprisonment. In addition, in light of the racial inequality prevalent in the criminal justice system, the state's denial of the franchise during imprisonment treats African Americans in particular as "unworthy outcast[s]," a point the Canadian Supreme Court made about the denial of the franchise to Aboriginal inmates.[119]

Abolishing all mention of criminal disenfranchisement in a state constitution may raise concern with respect to offenses that do not target individual victims but the state itself. Treason and some intentional election offenses may fall into that category.

Even though state criminal codes include the crime of treason, states have not prosecuted anyone for treason since before the Civil War. Virginia then executed John Brown and his compatriots after the raid on Harper's Ferry for treason against the state. Since then, the U.S. government has taken over treason cases. Even federal courts have heard fewer than

[118] *See* MISS. CONST. art. XII, § 241 (prohibiting those "convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy" from being a qualified elector).
[119] *See* Efrat Arbel, *Contesting Unmodulated Deprivation:* Sauvé v Canada *and the Normative Limits of Punishment*, 4 CAN. J. HUM. RTS. 121, 126 (2015) (quoting *Sauvé,* 2002 SCC 68 at para. 40).

one hundred such cases since the inception of the country. A merely performative exclusion in a state constitution may be symbolic but ultimately pointless.

A second group of offenses noted specifically in many state constitutions are election related. Despite claims of rampant voter fraud in the United States, even extensive investigations have not found a shred of evidence for such claims.[120] In recent years prosecutions for voting or election-related offenses ran barely in the double digits. When Georgia's state Elections Board referred thirty-five cases of alleged election law violation for criminal prosecution to state officials, they covered a span of five years. None of them presented a serious threat to the integrity of elections. Ironically, four of the cases involved illegally registering or voting while serving a felony sentence.[121]

It may seem defensible, or even advisable, to include crimes that attack the foundation of government as disenfranchising in a state constitution. Yet, since the time the original state constitutions were drafted, the number of election-related offenses has multiplied, many with different mens rea requirements and punishment exposures. Mandating disenfranchisement may be overinclusive.

If a state were concerned about the level of threat a crime constitutes to the foundation of its government, the criminal code could provide the court with disenfranchisement as a

---

[120] *See, e.g.*, Lorraine C. Minnite, DEMOS, *An Analysis of Voter Fraud in The United States* (2003) (discussing history and definition of voter fraud and analyzing existing data on voter fraud, including some high-profile cases). In its extensive database, the Heritage Foundation lists 1,133 criminal convictions for election-related offenses over the last forty years. *See* Heritage Foundation, *A Sampling of Recent Election Fraud Cases from Across the United States*, at https://www.heritage.org/voterfraud (the database includes felony and misdemeanor cases as well as non-criminal judicial actions). *See also* Brennan Center for Justice, *Project: The Myth of Voter Fraud* (arguing that election fraud is very rare as alleged fraud is often due to error), at https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud.

[121] *Secretary of State refers 35 cases of election law violations for criminal prosecution*, WSB-TV Channel 2 (Feb. 11, 2021), at https://www.wsbtv.com/news/local/atlanta/secretary-state-refers-35-cases-election-law-violations-criminal-prosecution/5EJ3PYEPWJGQ7D23AYEOVBXC2Y/.

sentence option, either as the primary, sole, or an additional sanction. It may allow the state to disenfranchise those who pose a "direct threat to the democratic process" with a narrowly and proportionately tailored the sanction.[122]

Florida's new constitutional provision, which ends disenfranchisement once the criminal justice sentence has been lifted, imposes lifetime disenfranchisement for two categories of offenders, those convicted of murder and felony sexual offenses. These offender groups, chosen to prevent opposition to the passage of the amendment, reflect the ongoing public hysteria about sex offenders. In many respects, the inclusion of sex offenses reflects the ethos of our times as did dueling throughout the 19th century and wife-beating in the South during the Jim Crow era. The exclusion belies criminal justice data and increasing knowledge about the types of treatment that work for different groups of sex offenders. They are visceral rejections of certain types of offenders, and essentially declare these offenders as unworthy of citizenship.

If Constitutions are more than mere reflections of their time but instead of transcending permanent values, such exclusions are misplaced. They may find expression in lower levels of laws that are more easily altered. Yet, their judicious use is crucial as disenfranchisement may be the most devastating sanction the criminal justice system could impose.

Most of the public do not support permanent disenfranchisement though the current patchwork of laws reflects public uncertainty about the appropriate regime. Only a small minority appears to support enfranchisement during incarceration.[123] With the increasing focus

[122] Dirk van Zyl Smit, *Civil Disabilities of Former Prisoners in a Constitutional Democracy: Building on the South African Experience*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 50, at 255, 262.
[123] *See* Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275 (2004); Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URBAN L.J. 1519 (2003).

on reinfranchising those released from imprisonment, however, those incarcerated, if not granted voting rights, may be subjected to even greater losses of rights.[124] Goals of inclusion and the expansion of citizenship counsel in favor of broad voting rights provisions without exclusions, especially in state constitutions. Examples abound.

The German Constitution grants the right to vote to anyone who has reached the age of eighteen.[125] It leaves all further details to a federal law.[126] German criminal law allows for the loss of the franchise as part of a criminal sentence but only for up to five years and for a small select group of offenses that involve either election violations or serious attacks on the foundations of government.[127] In more guarded language, the French Constitution grants voting rights to all French citizens over 18 who "are in possession of their civil and political rights…."[128] This provision implies that some French citizens may not possess civil and political rights but without providing any details. Canada's declaration of the "[d]emocratic rights of citizens" is yet more inclusive as it declares plainly "[e]very citizen of Canada has the right to vote…."[129] At the time the Canadian Constitution was adopted the incarcerated were not allowed to vote. In 1993 the legislature granted voting rights to those with incarcerative sentences below two years, and in 2002 the Canadian Supreme Court declared loss of the vote behind bars violative

[124] *See* Debra Parkes, *Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts, in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 50, 237, 247-49.
[125] GERMAN CONST., art. 38(2).
[126] GERMAN CONST., art. 38(3).
[127] *See, e.g.,* Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753 (2000).
[128] FRENCH CONST. of 1958 (amendments through 2008), art. 3, at https://www.constituteproject.org/constitution/France_2008.pdf?lang=en.
[129] CANADIAN CONST. ACT, 1982, art. 3.

of the Canadian Charter of Human Rights.[130] Because criminal disenfranchisement was not constitutionally enshrined, its abolition did not require a constitutional change.

South Africa's Supreme Court, in a much-hailed opinion on felon disenfranchisement, highlighted the importance of the franchise in post-Apartheid South Africa. Universal voting rights, the court held, are important "for nationhood and democracy." The franchise is a "badge of dignity and of personhood. Quite literally, it says that everyone counts."[131] Justice Sachs highlights the equalizing nature of the franchise and the meaning it carries in a democracy ripe with division and a long history of legalized racism. For those reasons, South Africa's broad enfranchisement approach may be instructive.[132] As divided as the United States is by race and class but also by party and geography, the franchise has become a powerful tool in the struggle for political power. Broad constitutional suffrage provisions would send the message that "everyone counts."

Even though the U.S. Supreme Court upheld the states' rights to disenfranchise based on a criminal conviction under the Fourteenth Amendment, it cannot mandate the states to do so. State constitutions can roll back this practice and signal the inclusion of all resident citizens above the age of majority. Such a change would remove vestiges of Jim Crow and earlier views of citizenship and symbolize the inclusive nature of American democracy.

Some have argued that because those convicted of an offense and especially those serving time would not vote, the scope of the constitutional provision, and even the

---

[130] For more background on criminal disenfranchisement around the globe, see CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE (Alec Ewald & Brandon Rottinghaus eds., 2009).
[131] August v. Electoral Commission 1999 [3] SA 1 [CC] para. 17.
[132] *See also* Brock A. Johnson, *Voting Rights and the History of Institutionalized Racism: Criminal Disenfranchisement in the United States and South Africa*, 44 GA. J. INT'L & COMP. L. 401 (2016).

implementing laws, is irrelevant. Despite disagreement over the percentage of convicted individuals who vote,[133] a substantial percentage wants to—and will—participate in the political process, as should be their right. But the practical impact of a change in criminal disenfranchisement is merely a small aspect of the debate about voting rights. Constitutional provisions have broader symbolic meaning and an impact on all of us. In this case, change would reflect a broadly inclusive conception of citizenship that no longer threatens exclusion for a failing.

Practically, broader post-pandemic absentee voting and generally greater accessibility of the franchise open the doors to in-prison voting. Vermont and Maine have long provided absentee balloting options. With the change in D.C. law, no longer are state legislators able to belittle the two New England states as outliers whose small prison populations did not mandate disenfranchisement. With D.C. prisoners located in federal prisons around the country, providing them with the practical ability to cast their ballot, presented greater hurdles than other states would face.

After D.C.'s decision other states need to confront the question whether to dispense with disenfranchisement during incarceration. The answer will depend on attitudes toward both voting rights and the criminal justice system. States have the opportunity—and the obligation—to treat all citizens as worthy of the markers of citizenship. And that change should start at the top, with constitutional amendments.

---

[133] *See, e.g.*, Randi Hjalmarsson & Mark Lopez, *The Voting Behavior of Young Disenfranchised Felons: Would They Vote if They Could?*, 12 AM L. & ECON. REV. 356 (2010) (disagreeing with Uggen and Manza's predictions of the level of ex-felon voting, see Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 782 Figure 1 (2002)).

V. CONCLUSION: ALL EYES ON VIRGINIA

As a federal constitutional voting rights amendment is difficult to imagine in the current political climate, some states may be better targets for such a drive. National pay-off from state constitutional change is slow but change in a single state may change the discourse.

Even though quantitative research provides only limited indication of what factors have moved states to change their disenfranchisement provisions, the severity of the existing policy and a liberal citizen ideology matter.[134] Virginia has both. It must excise lifetime disenfranchisement from its constitution as it cannot leave the restoration of civil rights in the governor's hands in perpetuity.[135] It now faces the choice between re-inscribing felon disenfranchisement in the constitution or adopting inclusive voting rights. As the first state in the South and one of the most prolific users of the death penalty to abolish capital punishment, it could next become the first state in the nation to enshrine in its constitution the right to vote, independent of status, including during incarceration.

*Nora Demleitner is the Roy L. Steinheimer Jr. Professor of Law at Washington and Lee University in Virginia. I am grateful for the excellent research assistance of W&L's Reference Librarian Franklin Runge and my research assistant Ryan D'Ercole, W&L L'22. Over the years the leading scholars and researchers on felon disenfranchisement have advanced my thinking on the issue. Among them are Alessandro Corda, Albin Eser, Alec Ewald, Jeff Manza, Marc Mauer, Chris Uggen, Peter Wagner, and Dirk van Zyl Smit.

[134] *See* Ewald, *supra* note 48

[135] The changing policies of Florida's governors on the restoration of civil rights tell a cautionary tale. *Cf.* Ewald, *supra* note 48, at 533 *with supra* notes __ and accompanying text.