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Reginald Thedford Jr.  
thedford@wisc.edu

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# Ex-Felon Disenfranchisement and the Fifteenth Amendment: A Constitutional Challenge to Post-Sentence Disenfranchisement

Reginald Thedford Jr.\*

## INTRODUCTION

Over six million American citizens were denied their right to vote in the 2016 election due to felony convictions.<sup>1</sup> Notably, scholars, educators, and politicians regardless of party affiliation have agreed that voting is one of the most important rights a citizen has in a democratic nation.<sup>2</sup> Felon disenfranchisement denies this right to persons otherwise eligible to vote simply due to felony convictions, even after they have served their sentences.<sup>3</sup> This policy is extremely problematic for a country that has a ninety-three percent conviction rate,<sup>4</sup> during a time that has been labeled the “Era of Mass Incarceration.”<sup>5</sup> Additionally, according to the Department of

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\* A third-year law student at the University of Wisconsin-Madison, originally from St. Louis, Missouri. Thanks to Asifa Quraishi-Landes, Professor of Law at the University of Wisconsin, for the inspiration and for thought provoking discussions on this issue, specifically with regard to Constitutional Law. Also, thanks to Adam Stevenson, Clinical Associate Professor, for his insight on the operations of the American criminal justice system.

1 CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, *THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT, 2016*, at 3 (2016), <http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016>.

2 *See, e.g.*, David Herbert Donald, *PROTEST AT SELMA: MARTIN LUTHER KING, JR. & THE VOTING RIGHTS ACT OF 1965*, *NEW REPUBLIC* (1978), <https://newrepublic.com/article/72530/protest-selma-martin-luther-king-jr-the-voting-rights-act-1965-0> (last visited Dec 31, 2017) (“The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men, declared President Lyndon B. Johnson when he signed the Voting Rights Act of 1965.”); Joshua A. Douglas, *The Foundational Importance of Voting: A Response to Professor Flanders*, 66 *Okla. L. Rev.* 81 (2013); Melody Wilkinson, *Getting an Early Start-on Getting Out the Vote*, 63 *Tex. B.J.* 883 (2000) (“Officials including State Rep. Jerry Madden, Court of Appeals Judge John Roach, Texas Supreme Court Justices Craig Enoch and Greg Abbott, and Court of Criminal Appeals Judge Sharon Keller have all agreed to talk to students about the importance of exercising their right to vote and the importance that responsibility plays in maintaining a strong democracy.”).

3 JEFF MANZA & CHRISTOPHER UGGEN, *Chapter Three: The Disenfranchised Population, in LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 70–71 (2006) (“What types of crimes result in a felony conviction? In 2002, U.S. state and federal courts convicted over 1.1 million adults of felonies. . . . Drug offenses make up almost one-third of the total. The next most common offenses are the property crimes of larceny-theft, burglary, and fraud, each of which accounts for more than 9 percent of all felony convictions. Finally, violent offenses make up about one in five felony convictions, with aggravated assaults accounting for about half of all violent crimes. In many cases, the latter are simply fights that get out of hand. The crimes of greatest public concern—murder, rape, and robbery—together made up just 8 percent of all felony convictions.”).

4 U.S. DEP’T OF JUSTICE, *UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT FOR FISCAL YEAR 2012*, at 8 (2012), <https://www.justice.gov/sites/default/files/usao/legacy/2013/10/28/12statrpt.pdf>.

5 *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, at 13 (2011) (“The term *mass incarceration* refers not only to the criminal justice system but also to the larger web of laws, rules, policies, and customs that control those labeled criminals both in and out of prison”).

Justice, eighty percent of felony defendants in the seventy-five largest United States counties were represented by public defenders or assigned counsel, and about three-fourths of inmates in state prisons received publicly provided legal counsel,<sup>6</sup> who are overworked, underpaid, and under-resourced.<sup>7</sup> Effectively, a system has been created where primarily the impoverished are convicted ninety-three percent of the time.<sup>8</sup> Moreover, these convictions are either through plea or trial, under advice from an attorney that does not have the appropriate time and resources to effectively fight for justice for their clients. What's more startling is the fact that over fifty percent of the people disenfranchised have completed their sentence and are no longer incarcerated, on probation, or on parole.<sup>9</sup> Currently, there are twelve states that restrict voting rights to people who have completed their sentences;<sup>10</sup> these individuals are considered to be ex-felons. Former confederate states like Florida, Kentucky, and

6 STEVEN K. SMITH & CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE 1–3 (1996).

7 Alexa Van Brunt, PUBLIC DEFENDERS ARE OVERWORKED AND UNDERFUNDED. THAT MEANS MORE PEOPLE GO TO JAIL THE GUARDIAN (2015), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked> (last visited Dec 28, 2017) (“Too often, those who are poor receive lower quality defense than those who have the means to pay”); See also, Joy, Peter A. Unequal Assistance of Counsel.” *Kansas Journal of Law & Public Policy*; Matt Ford, A 'CONSTITUTIONAL CRISIS' IN MISSOURI THE ATLANTIC (2017), <https://www.theatlantic.com/politics/archive/2017/03/missouri-public-defender-crisis/519444/> (last visited Dec 29, 2017).

8 Barnadette Rabuy & Daniel Kopf, PRISONS OF POVERTY: UNCOVERING THE PRE-INCARCERATION INCOMES OF THE IMPRISONED PRISON POLICY INITIATIVE (2015), <https://www.prisonpolicy.org/reports/income.html> (last visited Dec 28, 2016)

9 UGGEN ET AL., *supra* note 1, at 6 (showing that, of the six million people that are disenfranchised, 26.5% of those individuals are on probation or parole, while only 22.9% of those disenfranchised are in jail or prison).

10 *Id.* at 4, nn.1–2, 4–5, 6–9 & 12–13.

**Alabama** – In 2016, legislation eased the rights restoration process after completion of sentence for persons not convicted of a crime of “moral turpitude.”

**Arizona** – Permanently disenfranchises persons with two or more felony convictions. . . .

**Delaware** – The 2013 Hazel D. Plant Voter Restoration Act removed the five-year waiting period. People convicted of a felony, with some exceptions, are now eligible to vote upon completion of sentence and supervision. People who are convicted of certain disqualifying felonies – including murder, bribery, and sexual offenses – are permanently disenfranchised.

**Iowa** – Governor Tom Vilsack restored voting rights to individuals who had completed their sentences via executive order on July 4, 2005. Governor Terry Branstad reversed this executive order on January 14, 2011 returning to permanent disenfranchisement for persons released from supervision after that date. . . .

**Nebraska** – Reduced its indefinite ban on post-sentence voting to a two-year waiting period in 2005.

**Nevada** – Disenfranchises people convicted of one or more violent felonies and people convicted of two or more felonies of any type.

**Tennessee** – Disenfranchises those convicted of certain felonies since 1981, in addition to those convicted of select crimes prior to 1973. Others must apply to Board of Probation and Parole for restoration. . . .

**Virginia** – When the Virginia Supreme Court overturned Governor Terry McAuliffe’s blanket restoration of voting rights for people who had completed their sentences, he individually approved voting rights for 12,832 individuals in August, 2016.

**Wyoming** – Voting rights restored after five years to people who complete sentences for first-time, non-violent felony convictions in 2016 or after.

Tennessee have the highest rates of disenfranchisement in the United States.<sup>11</sup> Specifically, Florida accounts for nearly 1.5 million individuals disenfranchised post-sentence, which accounts for about half of the national total.<sup>12</sup>

Race is also an important factor with regard to felon disenfranchisement. Historically, confederate states created various schemes to keep black people politically silent.<sup>13</sup> Although courts have rejected the claim that felon disenfranchisement is a racially discriminatory practice, African Americans continue to be negatively impacted disproportionately compared to other races.<sup>14</sup> According to the Sentencing Project, one in thirteen African Americans of voting age is disenfranchised, which is a rate four times greater than that of non-African Americans.<sup>15</sup>

Many litigators have challenged the constitutionality of ex-felon disenfranchisement under several theories. Primarily, ex-felon disenfranchisement has been challenged under the Fourteenth Amendment<sup>16</sup> as well as the Voting Rights Act.<sup>17</sup> Unfortunately, these challenges have not been successful.

In this Article, I will assert that ex-felon disenfranchisement is unconstitutional under the Fifteenth Amendment, as well as aspects of the Thirteenth Amendment and the Voting Rights Act. Specifically, the Fifteenth Amendment states, “[T]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or *previous condition of servitude*.”<sup>18</sup> I assert that the Fifteenth Amendment, by explicitly prohibiting the denial of a citizen’s right to vote based on a “previous condition of servitude,” read in tandem with the Thirteenth Amendment and the Voting Rights Act, prohibits states from disenfranchising felons after they have served their sentences.

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11 *Id.* at 16.

12 *Id.* at 3.

13 See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059 (2002).

14 See Deborah Periman, *Felon Disenfranchisement and the Voting Rights Act—Farrakhan v. Gregoire: “A Crowd of One,”* ALASKA JUST. F., Winter 2010, at 1–2.

15 UGGEN ET AL., *supra* note 1, at 12 (stating that over 7% of the African American population is disenfranchised compared to 1.8% of the non-African American population).

16 See *Richardson v. Ramirez*, 418 U.S. 24 (1974) (holding that respondents were not entitled to register as voters under the Equal Protection Clause, since language in section 2 of the Fourteenth Amendment suggested that the practice of depriving felons of voting rights was acceptable, and because the practice was historically viewed as valid).

17 See *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (holding that plaintiffs bringing a section 2 Voting Rights Act challenge to felon disenfranchisement law based on the operation of a state’s criminal justice system must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement was enacted with such intent).

18 U.S. CONST. amend. XV, § 1 (emphasis added).

## I. HISTORY OF DISENFRANCHISEMENT

### A. *Criminal Disenfranchisement Laws*

Disenfranchisement is not unique to the United States, nor did it originate in this country. It was created by the Greeks and Romans, and was adopted in the United States in the mid-eighteenth century.<sup>19</sup> Historically, this medieval tradition was referred to as a “civil death” because it entailed a deprivation of all rights. Although ex-felons are not deprived of all their rights, permanent and post-sentence disenfranchisement in a democratic nation runs akin to the idea of a “civil death” because voting is the only way to ensure one’s voice is heard. A federal judge wrote that:

[D]isenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family.<sup>20</sup>

As authors Jeff Manza and Christopher Uggen highlighted in their book, *Locked Out: Felon Disenfranchisement and American Democracy*, felon disenfranchisement has a familial impact.<sup>21</sup> Parents with felony convictions cannot vote on school referendums that may potentially improve the neighborhood school district, nor do they get to vote on taxes or how they are spent.<sup>22</sup> We must understand that felon disenfranchisement impacts more than the individual deprived of the right.

When criminal disenfranchisement became adopted by colonial America, there was a visible purpose.<sup>23</sup> If a person committed a crime that was subject to the penalty of disenfranchisement, that crime was “linked to voting itself” or was “defined as an egregious violation of the moral code.”<sup>24</sup> Nowadays, disenfranchisement laws are applied, as collateral consequences, to broad categories of crimes with little or no consistency in character.

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19 Ewald, *supra* note 13, at 1059–60, 1063.

20 *Id.* at 1059 (quoting *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995)).

21 MANZA & UGGEN, *supra* note 3, at 137.

22 *Id.*

23 Ewald, *supra* note 13, at 1062 (“Originally, the removal of criminals from the suffrage had a visible, public dimension.”).

24 *Id.*

### B. Racial Motivation

Prior to the Civil War, blacks were not allowed to vote because, by law, they were slaves. However, after the passage of the Thirteenth and Fifteenth Amendment, black men were emancipated and allowed to vote for the first time. As Professor Wang of Indiana University of Pennsylvania stated, “By conferring on Black Americans the right to vote, an essential right enabling a citizen to be politically accountable in a democracy, the amendment redefined the meaning of American freedom and democracy.”<sup>25</sup> Unfortunately, this did not last long; whites wanted to maintain supremacy. “After Reconstruction, several former confederate states carefully rewrote their criminal disenfranchisement provisions with the express intent of excluding blacks from the suffrage.”<sup>26</sup> For example, some southern states barred from voting anyone convicted of petty larceny, wife-beating, and similar offenses peculiar to the low economic and social status of blacks at the time.<sup>27</sup> Moreover, crimes such as bigamy and vagrancy became offenses that led to disenfranchisement.<sup>28</sup> Bigamy and vagrancy were common among blacks, because many freed slaves became dislocated after Reconstruction.<sup>29</sup> In addition to racially discriminatory disenfranchisement laws, a dominant group known as the Ku Klux Klan took many actions to prevent blacks from voting. Former Senator and proud klansman, Theodore Bilbo, once stated, “You and I know the best way to keep the nigger from voting. You do it the night before the election.”<sup>30</sup> It was apparent that white southerners did not want blacks to have any political power; it is also important to note that this shows how powerful voting was and remains in a democratic nation. Otherwise, why go through such measures to restrict a specific group from exercising their citizenship rights? Although the explicit racism of the Reconstruction Era doesn’t exist today, African Americans are still disproportionately impacted by disenfranchisement over any other race.<sup>31</sup> Felon disenfranchisement is a big part of that. In other words, felon disenfranchisement effectively operates in a racist manner.

### C. Ex-Felon Disenfranchisement Justifications

Common reasons for disenfranchising felons include promoting civic responsibility and respect for the law (felons have violated the social contract), controlling crime, and keeping the ballot box pure, as well as reacting to fears of voter

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25 Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 CARDOZO L. REV. 2153, 2153 (1995).

26 Ewald, *supra* note 13, at 1065.

27 *Id.* at 1092.

28 *Id.*

29 *Id.* at 1092 n.197 (noting that the sale of slaves had broken up many marriages, and that blacks often remarried without obtaining a divorce or confirming the death of a former spouse).

30 Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 2014, at 56 (quoting Theodore Bilbo), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631>.

31 Ewald, *supra* note 13.

fraud and subversive voting.<sup>32</sup> Subversive voting is the idea that convicts will presumably vote in a way that is “subversive of the interests of an orderly society,” which is derived from the liberal idea that voters only vote to protect their own interests.<sup>33</sup> It has been noted that prominent supporters of indefinite disenfranchisement today place heavy emphasis on subversive voting hypotheses.<sup>34</sup>

In 1999, the Civic Participation and Rehabilitation Act was introduced in Congress.<sup>35</sup> The primary goal of this bill was to secure the federal voting rights of persons who have been released from prison. Unfortunately, this bill was not enacted, but it is important to note the rationales for why it did not receive full support. During the hearing, Roger Clegg, Vice President and General Counsel for the Center for Equal Opportunity, stated his concern with allowing ex-felons to vote. He stated, “We want people to vote only if they are trustworthy and only if they are loyal.”<sup>36</sup> He went on to assert that “[i]t is not unreasonable to suppose that people who have committed serious crimes are lacking in trustworthiness and are not going to be good citizens.”<sup>37</sup> Clegg even then dismissed the disproportionate racial impact of these laws:

The fact that criminals are “overrepresented” in some groups and “underrepresented” in other groups is no reason for the federal government to intervene, absent some evidence of discriminatory intent by the states. If a lot of young people, black people, or male people are committing crimes, then our efforts should be focused on solving *that* problem. It is bizarre instead to increase their political power.<sup>38</sup>

Additionally, Todd F. Gaziano of the Heritage Foundation told Congress during this hearing that allowing ex-convicts to vote “could have a perverse effect on the ability of law abiding citizens to reduce the deadly and debilitating crime in their communities.”<sup>39</sup>

Also, a notable case for supporters of ex-felon disenfranchisement is U.S. Supreme Court case, *Richardson v. Ramirez*.<sup>40</sup> In this case, three ex-felons who completed their prison and parole sentences challenged provisions of the California State Constitution that permanently disenfranchised convicted felons, claiming that

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32 Mandeep K. Dhami & Paula A. Cruise, *Prisoner Disenfranchisement: Prisoner and Public Views of an Invisible Punishment*, 13 ANALYSES SOC. ISSUES & PUB. POL’Y 211, 213 (2013).

33 Ewald, *supra* note 13, at 1079.

34 *Id.* at 1080.

35 Civic Participation and Rehabilitation Act of 1999, H.R. 906, 106th Cong. (1999), <https://www.govtrack.us/congress/bills/106/hr906>.

36 *Civic Participation and Rehabilitation Act of 1999: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary House of Representatives*, 106th Cong. 15 (1999) (statement of Roger Clegg, Vice President and General Counsel, Center for Equal Opportunity).

37 *Id.* at 15.

38 *Id.* at 17.

39 *Id.* at 44.

40 418 U.S. 24 (1974).

it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>41</sup> The California Supreme Court agreed with the plaintiffs and ordered the County Clerk to register them as voters. However, the U.S. Supreme Court overturned this decision, based on another section of the Fourteenth Amendment.<sup>42</sup> Section 2 of the Fourteenth Amendment provides that:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.<sup>43</sup>

The Court concluded that a citizen's right to vote may be taken away as a result of "participat[ing] in rebellion, or other crime,"<sup>44</sup> reasoning that this applied to all felonies.<sup>45</sup> Specifically, Chief Justice Rehnquist stated that this section provided "an affirmative sanction" for felon disenfranchisement laws.<sup>46</sup>

I, along with other scholars, believe that Rehnquist erred in his interpretation of the Fourteenth Amendment in this case.<sup>47</sup> The Fourteenth Amendment was passed during the Reconstruction Era, a time when many aggressive amendments were made to the U.S. Constitution in order to restructure the remnants of slavery in the legal, political, and economic systems in the states that attempted to secede from the Union. Understanding this historical context is very important to understanding section 2 of the Fourteenth Amendment. Legal scholar, Jason Morgan-Foster explains:

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41 *Id.* at 26–27.

42 *Id.* at 54, 56.

43 U.S. CONST. amend. XIV § 2 (emphasis added).

44 *Id.*

45 *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

46 *Id.*

47 See, e.g., Richard W. Bourne, *Richardson v. Ramirez: A Motion to Reconsider*, 42 VAL. U.L. REV. 1, 1 (2007); William J. Lee, *Book Review*, 54 VIRGINIA L. REV. 1064, 1068 (1968) (reviewing THE VA. COMM'N ON CONSTITUTIONAL GOV'T, THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS (Alfred Avins, ed., 1967)); William W. Liles, Comment, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615 (2007).

[W]hile the *Ramirez* Court believed that the words “or other crime” emerged mysteriously from the black box of congressional committee, a review of the legislative history shows they were actually contemplated in open session before entering committee. This is significant, because the whole text of the plenary discussions has been preserved, whereas the Committee discussions have not. Examining these plenary discussions, it is clear that the words “or other crime,” when taken in their proper context, were meant to refer to crimes of rebellion and disloyalty, particularly treason.<sup>48</sup>

Morgan-Foster argues that the Republicans were focused on disenfranchising Confederate leaders rather than felons of all kinds.<sup>49</sup>

On the other hand, if we do accept that the Fourteenth Amendment is an affirmative sanction for felon disenfranchisement, we must still consider the text of the Fifteenth Amendment. The text protects the voting rights of people that were previously in a condition of servitude. Therefore, with regard to post-sentence disenfranchisement, we must defer to the text of the Fifteenth Amendment.

#### *D. Counter-Arguments to Felon Disenfranchisement Justifications*

There are three things wrong with Clegg’s and Gaziano’s argument. First, neither Clegg nor Gaziano offer any evidence to show that ex-felons are more likely to commit voter fraud than any other person.<sup>50</sup> The assumption seems misplaced, given that almost all offenders “incapacitated” at the ballot box are convicted of non-electoral crimes.<sup>51</sup> Second, one of the purposes of incarceration is rehabilitation. Specifically, the Federal Bureau of Prisons has declared that its vision has been realized when inmates successfully reenter society.<sup>52</sup> So, if one of the purposes of our

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48 Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-Examining Richardson v. Ramirez*, 13 TULSA J. COMP. & INT’L L. 279, 285, 288 (2006).

49 *See id.* at 291.

50 *Richardson*, 418 U.S. at 79–81 (Marshall, J., dissenting) (“In contrast, many of those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all. . . . Moreover, there are means available for the State to prevent voting fraud which are far less burdensome on the constitutionally protected right to vote. As we said in *Dunn*, *supra*, at 353, the State ‘has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared.’ . . . Given the panoply of criminal offenses available to deter and to punish electoral misconduct, as well as the statutory reforms and technological changes which have transformed the electoral process in the last century, election fraud may no longer be a serious danger.”).

51 Ewald, *supra* note 13, at 1106.

52 Federal Bureau of Prisons, BOP: AGENCY PILLARS, [https://www.bop.gov/about/agency/agency\\_pillars.jsp](https://www.bop.gov/about/agency/agency_pillars.jsp) (last visited Dec 31, 2017).

criminal justice system is to rehabilitate,<sup>53</sup> then why is there an assumption that upon finishing their sentence, felons will not be law-abiding citizens? Either our justice system is failing at this purpose, or there is an underlying political agenda in disenfranchising ex-felons. Although some may observe our prison system as a mechanism to punish criminals rather than rehabilitate them, there are many studies and scholars that suggest rehabilitation should be the primary focus of our criminal justice system.<sup>54</sup> Third, to acknowledge that black people are overrepresented in the criminal justice system, and then conclude that it's "bizarre" to increase black political power is the backwards political thinking that perpetuates racial inequality. Also, to say that black people, young people, or male people commit more crimes than any other group, completely disregards how the criminal justice system operates. There are numerous studies to show that black criminality does not explain their disproportionately high numbers in the criminal justice system.<sup>55</sup> Rather, the disparate targeting by law enforcement and disparate treatment in the system are the significant causes.<sup>56</sup> Studies have repeatedly shown that blacks are more likely than others to be arrested for nearly every crime. As the FBI reported, "Nationwide, black people are arrested at higher rates for crimes as serious as murder and assault, and as minor as loitering and marijuana possession."<sup>57</sup> This is startling

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53 *Rehabilitation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. *Criminal law*. The process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes <rehabilitation is a traditional theory of criminal punishment, along with deterrence and retribution>.").

54 Etienne Benson, *Rehabilitate or Punish?*, 34 AM. PSYCHOL. ASS'N 46 (2003), [www.apa.org/monitor/julaug03/rehab.aspx](http://www.apa.org/monitor/julaug03/rehab.aspx) (citing Craig Haney, PhD, psychologist at the University of California, Santa Cruz) ("Until the mid-1970s, rehabilitation was a key part of U.S. prison policy. Prisoners were encouraged to develop occupational skills and to resolve psychological problems—such as substance abuse or aggression—that might interfere with their reintegration into society. Indeed, many inmates received court sentences that mandated treatment for such problems. Since then, however, rehabilitation has taken a back seat to a 'get tough on crime' approach that sees punishment as prison's main function, says Haney. The approach has created explosive growth in the prison population, while having at most a modest effect on crime rates. . . . In the 1970s, when major changes were being made to the U.S. prison system, psychologists had little hard data to contribute. But in the past 25 years, says Haney, they have generated a massive literature documenting the importance of child abuse, poverty, early exposure to substance abuse and other risk factors for criminal behavior. The findings suggest that individual-centered approaches to crime prevention need to be complemented by community-based approaches. Researchers have also found that the pessimistic 'nothing works' attitude toward rehabilitation that helped justify punitive prison policies in the 1970s was overstated. When properly implemented, work programs, education and psychotherapy can ease prisoners' transitions to the free world.").

55 Ewald, *supra* note 13, at 1125.

56 *Id.* at 1126. ("The U.S. Government 'estimates that 14% of illegal drug users are black, yet blacks make up 55% of those convicted and 74% of those sentenced for drug possession.' The U.S. Sentencing Commission estimates that 65% of crack cocaine users are white, but 90% of those prosecuted for crack crimes in federal court are black—and are subject to greater penalties than are those convicted of crimes involving cocaine in the powder form.").

57 Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'* USA TODAY (Nov. 18, 2014 5:13 PM), <https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207> ("To measure the breadth of arrest disparities, USA TODAY examined data that police departments report to the FBI each year. For each agency, USA TODAY compared the number of black people arrested during 2011 and 2012 with the number who lived in the area the department protects. (The FBI tracks arrests by race; it does not track arrests of Hispanics.)").

information, but according to American history, these effects are parallel to custom and tradition. American history shows us that African Americans have always been subject to an unreasonable amount of policing. In the legendary *Dred Scott* case, Judge Taney unapologetically declared that blacks are an inferior race; Taney's holding sheds light on how blacks were viewed at the time, and how they should be viewed in the future.<sup>58</sup> Taney ultimately held that Dred Scott could not obtain citizenship, not only because he was a slave, but because he was black.<sup>59</sup> He used state legislation to justify his decision; primarily leaning on racist state laws to justify his opinion that blacks are inferior. For slave states, he stated that:

They have continued to treat them as an inferior class, and to subject them to strict police regulations, drawing a broad line of distinction between the citizens and the slave races . . . . [I]t is too plain for argument, that they have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure.<sup>60</sup>

Additionally, he discusses the racist treatment of blacks who were freemen. Judge Taney stated, “And if we turn to the legislation of the States where slavery had worn out, or measures taken for its speedy abolition, we shall find the same opinions and principles equally fixed and equally acted upon.”<sup>61</sup> Although this case was overturned by the ratification of the Fourteenth Amendment, it did not overturn the opinions and attitudes towards blacks. Unfortunately, these opinions towards black people have not been eliminated in this country, which is a big reason why the black community continues to suffer. However, it is more alarming to see that this attitude continues to be adopted by many liberals and moderates over one-hundred years later, whether subconsciously or consciously. Dr. Martin Luther King Jr. warned us of this type of political thought in his *Letter from Birmingham Jail*:

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58 *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1857).

59 *Dred Scott*, 60 U.S. at 403 (“The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all rights, and privileges, and immunities, guaranteed by that instrument to the citizen?”), *see also* PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 268–84 (6th ed. 2015).

60 *Dred Scott*, 60 U.S. at 412.

61 *Id.* at 413 (“[W]e find that in the same statute passed in 1774, which prohibited the further importation of slaves into the State, there is also a provision by which any negro, Indian, or mulatto servant, who was found wandering out of the town or place to which he belonged, without a written pass such as is therein described, was made liable to be seized by any one, and taken before the next authority to be examined and delivered up to his master—who was required to pay the charge which had accrued thereby. And a subsequent section of the same law provides, that if any free negro shall travel without such pass, and shall be stopped, seized, or taken up, he shall pay all charges arising thereby. . . . So that up to that time free negroes and mulattoes were associated with *servants* and slaves in the police regulations established by the laws of the State.”) (emphasis added); *see also* PAUL BREST ET AL., *supra* note 59, at 275–76.

I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Council or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action;" who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will.<sup>62</sup>

Dr. King first addressed the terrorism blacks faced from groups like the KKK, but he was more disappointed in the "white silence," which is primarily from a shallow understanding of the black community.<sup>63</sup> It cannot be ignored that from the onset of this country, the black community has always been subject to political control. As stated earlier, a democratic nation prides itself on being a government for the people—a government where each individual voice is heard through a vote. Post-sentence disenfranchisement guts that democratic concept.

Additionally, the idea that states will decide whether someone will obtain their right to vote, post-sentence, is completely paternalistic. As Coretta Scott King stated, "[F]reedom and justice cannot be parceled out in pieces to suit political convenience. . . . I don't believe you can stand for freedom for one group of people and deny it to others."<sup>64</sup> Voting is that mechanism towards freedom, and to deny it is to halt freedom. We are basking in ignorance if we agree with Clegg and think that the right to vote will not help resolve the crime in certain areas. As we know, our right to vote is powerful. We vote on school referendums that impact neighborhood schools, which can be used to improve school districts; we vote on state representatives that write legislation and advocate on behalf of their constituents; and we vote on state officials that directly impact their constituents' way of life. As Martin Luther King said:

So long as I do not firmly and irrevocably possess the right to vote I do not possess myself. I cannot make up my mind—it is made up for me. I cannot live as a democratic

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62 MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM JAIL 3 (1963).

63 *See id.*

64 Press Conference on the Employment Non-Discrimination Act of 1994, Washington D.C. (June 23, 1994).

citizen, observing the laws I have helped to enact—I can only submit to the edict of others.<sup>65</sup>

Clegg’s suggestion that giving an oppressed group political power is “bizarre,” is to continue the oppression. The denial of political power in a democratic society is counterproductive to a good democracy.

It is important to address and acknowledge that there are people who do not align with this type of thought. Judge Friendly, the well-known Judge, wrote:

[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.<sup>66</sup>

However, this logic seems judgmental and oppressive. People that have been under the control of the criminal justice system have a good understanding as to how it operates. They see firsthand how judges and prosecutors conduct themselves in the courtroom, they see how the laws impact their life post sentence (such as collateral consequences), but most importantly, they see the fallacies of the system. Essentially, the individuals that understand how government operates are the people that need to be at the polls.

### *E. Importance of Legal History*

Understanding our history is key to developing a better future. Edmund Burke stated, “[T]hose who don’t know history are destined to repeat it.” Unfortunately, our understanding of race relations in America is miniscule. It is undisputed that historically, the black community has been the target of domestic terrorism,<sup>67</sup> political exploitation, and social exclusion. However, even looking at our current society, much of the black community continues to be confronted with the same systematic obstacles more than any other group: poor education systems, overrepresentation in the criminal justice system, and the inability to participate in the political process. This is why it is important to not only understand history but legal history. Professor Phillips<sup>68</sup> delivered the Salmond Lecture in 2010 at the Victoria University of Wellington Law, where he presented on the importance of legal history.<sup>69</sup> In his lecture he stated:

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65 Martin Luther King, Jr., Speech Before Lincoln Memorial at March on Washington, Give Us the Ballot, We Will Transform the South (May 17, 1957).

66 Ewald, *supra* note 13, at 1080.

67 EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 3–4, 18 (2d ed. 2015), <https://eji.org/sites/default/files/lynching-in-america-second-edition-summary.pdf>.

68 Professor, Faculty of Law, Department of History, and Centre of Criminology, University of Toronto; Editor-in-Chief, Osgoode Society for Canadian Legal History.

69 Jim Phillips, *Why Legal History Matters*, 41 VICTORIA U. WELLINGTON L. REV. 293 (2010).

I will organise my remarks around what I see as four principal reasons why *legal* history especially matters: that legal history teaches us about the contingency of law, about its fundamental shaping by other historical forces; that legal history shows us that the while law is shaped by other forces, it can be at the same time relatively autonomous, not always the handmaiden of dominant interests; that legal history, perhaps paradoxically, frees us from the past, allows us to make our own decisions by seeing that there is nothing inevitable or preordained in what we currently have; and that legal history exposes the presence of many variants of legal pluralism in both the past and the present.<sup>70</sup>

This lecture elaborated on one of Phillips' principles, legal history can paradoxically free us from the past. It must be noted that the words of judges, such as Judge Taney and Judge Friendly, remain influential today. These were prestigious judges and their opinions have impacted the modern legal society more than we think. People of color, especially Black Americans, are over-policed, overrepresented in jails and prisons, and underrepresented in the political process. We must reconcile our legal history to understand the current status of people of color in America, and to move in a more liberating direction.

## II. THE THIRTEENTH AND FIFTEENTH AMENDMENTS & VOTING RIGHTS ACT

### A. *Felon Status as Servitude*

In 1965 a former inmate, Sam DeStefano, challenged the Illinois state law that governed the restoration of rights to citizens who were convicted of certain crimes.<sup>71</sup> DeStefano primarily argued under the Fourteenth Amendment, but he also argued that the Fifteenth Amendment protected his right to vote because he had previously been in a condition of servitude since he was incarcerated.<sup>72</sup> However, the court used case law to indicate that they may use various factors, such as a criminal record, to determine the qualification of voters.<sup>73</sup> The court also stated that "The Fourteenth and Fifteenth Amendments were written into the Constitution to insure to the Negro, who had recently been liberated from slavery, the equal protection of the laws and the right to full participation in the process of government."<sup>74</sup> The court quickly addressed DeStefano's Fifteenth Amendment argument, thus not going into an in-

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70 *Id.* at 294–95.

71 *People v. DeStefano*, 212 N.E.2d 357 (Ill. App. Ct. 1965).

72 *Id.*

73 *Id.*

74 *Id.* at 362 (quoting *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948)).

depth analysis. Ultimately, the court dismissed DeStefano’s Fifteenth Amendment argument.<sup>75</sup> DeStefano and I have similar arguments; however, I distinguish mine by only including ex-felons who have finished their sentence as a protected class under the Fifteenth Amendment. Therefore, we must address and acknowledge the condition of servitude all felons are in, and not just the felons incarcerated.

Felons are individuals that have been convicted of a felony.<sup>76</sup> When someone is convicted of a felony they are sentenced to either imprisonment or probation and then possibly put on probation and/or parole after being released from prison. These are all conditions subject to the state’s control, which is important to note because this ultimately means that these individuals are in a condition of servitude.

In 2014, it was estimated that over four million adults were under community supervision, which includes people on probation, parole, or any other post-prison supervision.<sup>77</sup> Felons on parole or probation are effectively slaves to the state. Parolees and probationers are restricted from leaving certain geographical locations; they are required to meet with their designated officer whenever the state says so; their house, car, and body is subject to being searched, without a warrant, at any given moment; and they are required to pay supervision fees.<sup>78</sup> Essentially, felons lack the liberty to determine their way of life, which is consistent with the definition of servitude. Servitude is defined as “[a] condition in which a person lacks liberty especially to determine one’s course of action or way of life – slavery – the state of being subject to a master.”<sup>79</sup>

Moreover, the way felons are controlled runs akin to how pre-Civil War slaves were controlled. Historically, slaves were not allowed to leave the plantation without the permission of the master;<sup>80</sup> they were required to answer to the demands of the

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75 *Id.*

76 *Felon*, BLACK’S LAW DICTIONARY (10th ed. 2014).

77 DANIELLE KAEBLE, LAURA MARUSCHAK & THOMAS BONCZAR, U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2014, at 1 (Lynne McConnell & Jill Thomas eds., 2015).

78 *See e.g.*, REBEKAH DILLER, JUDITH GREENE & MICHELLE JACOBS, MARYLAND’S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY MARYLAND’S PAROLE SUPERVISION FEE: A BARRIER TO REENTRY1–42 (2009); DOC COMMUNITY CORRECTIONS - GENERAL INFORMATION, <https://doc.wi.gov/Pages/AboutDOC/CommunityCorrections/GeneralInformation.aspx#supervisionfees> (last visited Dec 31, 2017); Community Corrections Fees, ARIZONA DEPARTMENT OF CORRECTIONS, <https://corrections.az.gov/community-corrections-fees> (last visited Dec 31, 2017); ARKANSAS COMMUNITY CORRECTION, <https://www.ark.org/dcc/pmt/index.php> (last visited Dec 31, 2017); Missouri Missouri Department of Corrections, INTERVENTION FEES PAYMENT CENTER INTERVENTION FEES, <https://web.mo.gov/doc/MODOCFee/overview.do> (last visited Dec 31, 2017).

79 *United States v. Kozminski*, 487 U.S. 931, 972 (1998); *see also* 2-47A MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 47A.01, Instruction 47A-3 (LEONARD SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN, STEVEN A. REISS & NANCY BATTERMAN 2017) (citing *Kozminski*, 487 U.S. at 968–69).

80 *Slavery in the American South*, CONSTITUTIONAL RIGHTS FOUND., <http://www.crf-usa.org/black-history-month/slavery-in-the-american-south> (last visited Aug. 18, 2017) (“Slaves had no constitutional rights; they could not testify in court against a white person; they could not leave the plantation without permission. Slaves often found themselves rented out, used as prizes in lotteries, or as wagers in card games and horse races.”).

master or overseer,<sup>81</sup> and the slave quarters<sup>82</sup> were subject to searches at any time.<sup>83</sup> Essentially, the designation of “felon” is the new designation of a slave.

### B. *Fifteenth Amendment and Servitude*

The Fifteenth Amendment states that, “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or *previous condition of servitude*.”<sup>84</sup> Unfortunately, there is no Supreme Court interpretation on what “previous condition of servitude” means; however, the U.S. Supreme Court has defined the term involuntary servitude as it relates to the Thirteenth Amendment,<sup>85</sup> which was ratified only five years before the Fifteenth Amendment. This is important to note for intertextuality purposes. In *United States v. Kozmiski*, the Court defined the term “involuntary servitude.”<sup>86</sup> Notably, in doing so, the *Kozmiski* Court’s jury instructions separate both words, “involuntary” and “servitude,” and define each one separately.<sup>87</sup> Accordingly, the Court defined *servitude* as, “[a] condition in which a person lacks liberty, especially to determine one’s course of action or way of life’ – ‘slavery’ – ‘the state of being subject to a master.’”<sup>88</sup> Similarly, *Black’s Law Dictionary* defines servitude as “the condition of being a servant or slave.”<sup>89</sup> As a result of these definitions, I assert that felons are in a condition of servitude for the reasons in section A. So, if we read the Fifteenth Amendment, in light of the Court’s definition of servitude, it could be understood that the U.S. Constitution prohibits disenfranchising ex-felons.

### C. *The Voting Rights Act*

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- 81 *See id.* (“By law, slaves were the personal property of their owners in all Southern states except Louisiana. The slave master held absolute authority over his human property as the Louisiana law made clear: ‘The master may sell him, dispose of his person, his industry, and his labor; [the slave] can do nothing, possess nothing, nor acquire anything but what must belong to his master.’”).
- 82 *See id.* (“Slave families lived in crowded cabins called ‘the quarters.’ Usually bare and simple, these shelters were cold in winter, hot in summer, and leaky when it rained.”).
- 83 *Id.* (“The lives of black people under slavery in the South were controlled by a web of customs, rules, and laws known as ‘slave codes.’ Slaves could not travel without a written pass. They were forbidden to learn how to read and write. They could be searched at any time. They could not buy or sell things without a permit. They could not own livestock. They were subject to a curfew every night.”).
- 84 U.S. CONST. amend. XV, § 1 (emphasis added).
- 85 U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the person shall be duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).
- 86 *Kozmiski*, 487 U.S. at 971–72.
- 87 *Id.*
- 88 *Id.* at 937; *see also* 2-47A MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL, *supra* note 79, at ¶ 47A.01, Instruction 47A-3.
- 89 *Servitude*, *Black’s Law Dictionary* (10th ed. 2014).

Section 2 of the Fifteenth Amendment gives Congress the power to enforce this Amendment.<sup>90</sup> The Voting Rights Act of 1965 (VRA) became that mechanism for enforcement, and its primary purpose was to eliminate the state and local barriers preventing African Americans from exercising their right to vote under the Fifteenth Amendment. Effectively, the VRA banned literacy tests, provided federal oversight of state and local registration areas, and authorized the U.S. Attorney General to bring suit to bar the use of poll taxes in state and local elections.<sup>91</sup> This was a powerful victory for African Americans because they would finally get a chance to exercise their right to vote without being intimidated. Although this was a huge step toward civil rights, the VRA only provided relief from voting restrictions when they were enacted with discriminatory intent, which is a high standard to meet.<sup>92</sup> “But in 1982, Congress amended the VRA to relieve plaintiffs of the burden of proving discriminatory intent.”<sup>93</sup> Subsequently, the requirement to prove discrimination in voter restricting laws for a protected class of citizens was based on the “totality of circumstances.”<sup>94</sup>

*Farrakhan I*<sup>95</sup> and *Farrakhan II*<sup>96</sup> are two notable cases that discuss the “totality of circumstances” amendment, with regard to felon disenfranchisement. In *Farrakhan I*, incarcerated individuals in the state of Washington sued state officials under the VRA, claiming the state’s felon disenfranchisement scheme was racially motivated, which violates the VRA.<sup>97</sup> The plaintiffs argued that the state’s criminal justice system disproportionately impacted African Americans, Hispanics, and Native Americans, which hindered their ability to participate in the political process.<sup>98</sup> In part, *Farrakhan I* held that in order to bring a section 2 VRA challenge to felon disenfranchisement, the plaintiff must show that, based on the totality of circumstances, the challenged voting practice results in discrimination on account of race.<sup>99</sup> Subsequently, the court considered evidence of racial discrimination in

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90 U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).

91 Richard A. Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 62 WASH. U. L. Q. 1, 2–3 (1984).

92 Ewald, *supra* note 13, at 1123.

93 *Id.* at 1123.

94 52 U.S.C. § 10301(b) (2012).

95 *Farrakhan v. Washington*, 338 F.3d 1009, 1022 (9th Cir. 2003).

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

97 *Farrakhan I*, 338 F.3d at 1011.

98 *Id.* at 1011.

99 *Id.* at 1014–16 (“The Senate Report accompanying the 1982 amendments identified ‘typical factors’ that may be relevant in analyzing whether Section 2 has been violated:

- (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or other-wise to participate in the democratic process;
- (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
- (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
- (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

Washington's criminal justice system.<sup>100</sup> The *Farrakhan I* decision isolated the Ninth Circuit on this issue.<sup>101</sup> Effectively, it produced a circuit split on the particular issue of whether evidence of a criminal justice system engaged in discriminatory practices may be used to challenge felony disenfranchisement under section 2 of the VRA.<sup>102</sup> However, the court in *Farrakhan II* reasoned that felon disenfranchisement takes place after conviction, which is determined by the criminal justice system that has its own safeguards and procedures.<sup>103</sup> Therefore, *Farrakhan II* ultimately held "that plaintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law based on the operation of a state's criminal justice system must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent."<sup>104</sup> Basically, the court distinguished intent to discriminate with regard to felon disenfranchisement, from intent to discriminate within the criminal justice system.

Although the VRA and the courts in *Farrakhan I & II* center their discussion and analysis on race, it was based on the fact that race is a constitutionally protected class under the Fifteenth Amendment, with regard to voter discrimination. As stated earlier, the spirit of the VRA was to ensure voters within the protected classes, under the Fifteenth Amendment, were able to vote. Those protected classes include not just race and color but also "*previous condition of servitude*."<sup>105</sup>

Notably, in *Mobile v. Bolden*, the Supreme Court states that, according to legislative history, section 2 of VRA "makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment."<sup>106</sup> Even though these cases specifically discuss racially discriminatory acts, they make it clear that the VRA works in tandem with the Fifteenth Amendment, which protects people from being discriminated against based on their race, color, or *previous condition of servitude*. As asserted above, felons are subject to the control of the state. Permanent and post-sentence disenfranchisement based on someone's designation as a "felon" discriminates against a class of people protected by the Fifteenth Amendment,

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(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

(8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

(9) whether the policy underlying the state or political sub-division's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.").

100 *Farrakhan II*, 623 F.3d at 993.

101 *See id.* at 993 ("Three circuits—two sitting en banc—have disagreed with *Farrakhan I* and concluded that felon disenfranchisement laws are categorically exempt from challenges brought under section 2 of the VRA. . . . In light of those opinions, we conclude that the rule announced in *Farrakhan I* sweeps too broadly.").

102 *Id.*

103 *Id.*

104 *Id.*

105 U.S. CONST. amend. XV, § 1 (emphasis added).

106 *Mobile v. Bolden*, 446 U.S. 55, 61 (1980).

especially when there's no justification for the disenfranchisement other than the fact they have been convicted of a felony.

### III. CONCLUSION

The text of the Fifteenth Amendment makes it clear that a citizen's right to vote cannot be denied for previously being in a condition of servitude. Conclusively, I have asserted that felons are in a condition of servitude; and ex-felons, who have finished their term(s) of 'servitude', are protected under the Fifteenth Amendment. Under this theory, a little over half of the disenfranchised population will be eligible to vote.<sup>107</sup> Enfranchising ex-felons would be a great step toward improving our democracy because currently, not only are these perspectives silenced, but those that are disenfranchised do not even have a say in the laws that govern their families. They do not have the right to vote on school referendums that will affect their children, nor do they have a say in how their taxes will be used, which are not optional to pay.<sup>108</sup>

Additionally, criminal disenfranchisement exists at the intersection of two systems; electoral politics and criminal justice, which have been explicitly discriminatory for much of American history.<sup>109</sup> The 1982 VRA amendments declared that discriminatory challenges under this act be proven under the totality of circumstances test. Thus, we must not ignore the disparate impact of arrest rates and disenfranchisement on African Americans. We must also not ignore the historical fact that many states used various schemes to disenfranchise blacks, post Reconstruction. The spirit of the Fifteenth Amendment was to give newly freed slaves the right to vote. Although there's no Supreme Court interpretation on what "previous condition of servitude" means, we do know that prior to the Civil War free blacks were sold into terms of "servitude" for petty crimes.<sup>110</sup> Basically, the effects of disenfranchisement and the criminal justice system reflect the racist practices against blacks that have been present for much of American history.

Furthermore, although felons on probation or parole live in society, they are subject to the control of the government. They cannot leave a certain geographical area without the permission of the government; they must report to their parole or probation officer whenever the government requires them to; and they are subject to

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107 See UGGEN ET AL., *supra* note 1, at 6 (about 51% of disenfranchised are post-sentence).

108 See MANZA & UGGEN, *supra* note 3, at 137 (quoting Paul Ferguson) ("I have no right to vote on the school referendums that . . . will affect my children. I have no right to vote on how my taxes is [sic] going to be spent or used, which I have to pay anyway whether I'm a felon or not, you know? So basically I've lost all voice or control over my government.").

109 See Ewald, *supra* note 13, at 1121 ("Awareness of that record ought to make Americans of varying ideological persuasions deeply skeptical of the policy.").

110 See *id.* at 1131 ("Before the Civil War, white officials sold free blacks into terms of servitude—sometimes at auction—for petty crimes and unpaid jail fees. In 1822, Virginia state legislators found the penitentiary overcrowded and the treasury low, and solved both problems by 'order[ing] fee [black] felons' to be 'whipped and sold into slavery.' Maryland and Delaware temporarily adopted the policy, often selling black convicts into years of service out of the state; Maryland later 'ordered criminal freemen banished upon pain of enslavement when their confinement was complete.'").

searches at any time, whether it is the home, car, or person. This is the type of control consistent with the definition of servitude, and the Constitution prohibits disenfranchisement as a result of previous servitude.

The text of the Fifteenth Amendment is clear; no state shall deprive any citizen of their right to vote based on previously being in a condition of servitude. Originalists may argue that the word “servitude” means chattel slavery, but history and the text counter this interpretation.<sup>111</sup> During the Reconstruction Era, there was much debate on black suffrage.<sup>112</sup> Subsequently, this led to the Fifteenth Amendment, but there were many proposals before the final draft was approved. George S. Boutwell submitted one of those proposals and it stated that, “[t]he right of any citizen of the United States to vote . . . shall not be denied or abridged by the United States or any State by reason of race, color, or previous condition of slavery.”<sup>113</sup> The language, “slavery,” was proposed but was not used for the final version. Therefore, we must look at the actual text, which uses “servitude.” Felons are in a condition of servitude; thus, ex-felons, who have completed their term(s) of servitude, are protected by the Fifteenth Amendment.

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111 PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991) (“[c]onstitutional modalities [are] the ways in which legal propositions are characterized as true from a constitutional point of view. . . . The[] six modalities of constitutional argument are: the *historical* (relying on the intentions of the framers and ratifiers of the Constitution); *textual* (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary ‘man on the street’); *structural* (inferring rules from the relationships that the Constitution mandates among the structures it sets up); *doctrinal* (applying rules generated by precedent); *ethical* (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and *prudential* (seeking to balance the costs and benefits of a particular rule).”) (emphasis added).

112 Wang, *supra* note 26, at 2216.

113 *Id.* at 2217.