

UNLOCKING THE VOTE: *HOPKINS V. HOSEMANN* AS A CATALYST FOR RESTORING VOTING RIGHTS TO NONVIOLENT FELONS

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INTRODUCTION

Each midterm and presidential election year, millions of eligible voters across the United States turn out to vote at the polls.¹ For Herman Parker, Jr., and his siblings, the ritual of accompanying their mother and grandmother to the polling station every Election Day during their childhood was a cherished family tradition.² Today, though their mother and grandmother are no longer alive, Parker's siblings honor this legacy by traveling together to cast their votes as adults.³ However, fifty-year-old Parker cannot join them by casting his own ballot.⁴ Convicted of grand larceny in Mississippi state court more than two decades ago, Parker faces a lifetime voting ban.⁵ Mississippi law imposes a lifetime voting ban on individuals convicted of certain offenses, including murder, rape, and theft.⁶ Despite completing his probation sentence back in 2012, Parker remains disqualified from voting, unable to join his siblings at the polls, and unable to pass down his family's tradition to his two children.⁷

Similarly, sixty-six-year-old Rosemary McCoy finds herself excluded from the democratic process.⁸ Even after serving a seven-month prison term for theft and racketeering in Florida in 2016, McCoy continues to struggle with the challenges of reintegration into society and the burden of court-ordered financial obligations resulting from her conviction.⁹ Owing over \$7,800 in restitution, McCoy was barred from voting in the 2020 presidential election due to Florida's law, which mandates the full payment of all legal financial obligations before restoring voting rights to felons.¹⁰

¹ *Voter Turnout*, FAIRVOTE, <https://fairvote.org/resources/voter-turnout> (last visited Sept. 6, 2024) [<https://perma.cc/4QJ3-SDB2>].

² Brad Bennett, *SPLC Lawsuit Seeks to Restore Mississippi Citizens' Right to Vote*, S. POVERTY L. CTR. (Dec. 4, 2019), <https://www.splcenter.org/news/2019/12/04/splc-lawsuit-seeks-restore-mississippi-citizens-right-vote> [<https://perma.cc/8TPE-SAVN>].

³ *Id.*

⁴ *Id.*; see also S. POVERTY L. CTR., *THE FACES OF MISSISSIPPI'S LIFETIME VOTING BAN*, https://www.splcenter.org/sites/default/files/com_cjr_ms_voter_disenfranchisement_faces_v2.pdf (last visited Sept. 6, 2024) [<https://perma.cc/66AK-LGAT>].

⁵ Bennett, *supra* note 2.

⁶ *Id.*; see also MISS. CONST. art. XII, § 241.

⁷ Bennett, *supra* note 2.

⁸ Lawrence Mower & Langston Taylor, *In Florida, the Gutting of a Landmark Law Leaves Few Felons Likely to Vote*, PROPUBLICA (Oct. 7, 2020, 5:00 AM), <https://www.propublica.org/article/in-florida-the-gutting-of-a-landmark-law-leaves-few-felons-likely-to-vote> [<https://perma.cc/93ED-FWRR>].

⁹ *Id.*

¹⁰ *Id.*; *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida> (last updated Aug. 7, 2023) [<https://perma.cc/CUP2-XTJX>]; see also S.B. 7066, 121st Reg. Sess. (Fla. 2019) (codified as Fla. Stat. § 98.0751).

By 2021, with an interest-accruing debt of \$7,000 still remaining, McCoy remained disenfranchised and unable to participate in Florida's elections.¹¹ Her current situation is further exacerbated by economic challenges, such as relying on unemployment benefits and struggling to find steady work—common issues that many formerly incarcerated individuals face.¹² Her repeated job application rejections from employers, such as Walmart, insurance companies, and communications firms, underscore the systemic barriers that prevent ex-felons from fully reintegrating into society.¹³ On top of these challenges, McCoy also faces difficulties in keeping up with her mortgage payments and maintaining her car, adding to the financial burdens that directly impede her ability to meet her legal financial obligations and restore her voting rights.¹⁴

Herman Parker, Jr., and Rosemary McCoy's experiences highlight the broader issue of felon disenfranchisement in the United States, where individuals convicted of a felony are stripped of their voting rights.¹⁵ Parker and McCoy are just two of the approximately 4.6 million Americans who were disenfranchised in 2022 because of their past felony convictions.¹⁶ In 2022, some states disenfranchised over eight percent of their adult populations.¹⁷ About two percent of the national voting-eligible population, or roughly one in every fifty adults, was disenfranchised due to a current or past felony conviction.¹⁸ Notably, this figure has dropped from 6.1 million in 2016 to 5.2 million in 2020, partly due to reform efforts in various states.¹⁹

This Note argues that the disenfranchisement of nonviolent felons, including both those currently incarcerated and those who have completed their court-mandated sentences, violates the Eighth Amendment's

¹¹ Esther Schrader, *Battle for the Ballot: Two Black Women Fight Back Against Voter Suppression in Florida*, S. POVERTY L. CTR. (Mar. 16, 2021), <https://www.splcenter.org/news/2021/03/16/battle-ballot-two-black-women-fight-back-against-voter-suppression-florida> [https://perma.cc/PVV6-7CZD].

¹² *Id.*; see generally U.S. COMM'N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES (June 2019), <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf> [https://perma.cc/3F4F-EFF6].

¹³ Schrader, *supra* note 11.

¹⁴ *Id.*

¹⁵ Michelle Inderbitzin, *Felon Disenfranchisement*, OXFORD BIBLIOGRAPHIES (Jan. 30, 2014), <https://www.oxfordbibliographies.com/display/document/obo-9780195396607/obo-9780195396607-0152.xml> [https://perma.cc/7V9G-B79R].

¹⁶ Christopher Uggen, Ryan Larson, Sarah Shannon & Robert Stewart, *Locked Out 2022: Estimates of People Denied Voting Rights*, THE SENT'G PROJECT (Oct. 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights> (highlighting the number of individuals ineligible to vote due to felon disenfranchisement in the United States in 2022) [https://perma.cc/5BPW-7E4H].

¹⁷ *Id.* (referencing Alabama, Mississippi, and Tennessee).

¹⁸ *Id.*

¹⁹ *Id.*

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prohibition on cruel and unusual punishments, as outlined in the United States Constitution.²⁰ Part I offers a historical overview of felon disenfranchisement laws in the United States, focusing on policy rationales and the significant impact that these laws have on communities of color and detailing the current voting restrictions at the state level. Part II examines the efforts by various states to reform these laws, highlighting the legislative and advocacy movements aimed at changing these policies. Part III analyzes the legal challenges to these practices. Part IV argues that applying these laws to nonviolent incarcerated felons and ex-felons violates the Eighth Amendment, paying particular attention to *Hopkins v. Hosemann*, a federal class action lawsuit that challenged the felon disenfranchisement provision in Mississippi's Constitution.²¹ Finally, Part V delves into the broader implications of declaring these laws unconstitutional in America, examining potential societal and political ramifications. This Note concludes that denying nonviolent felons the right to vote undermines the principles of American democracy, which assert that the right to vote must be granted to all citizens, regardless of their conviction status.

I. BACKGROUND

A. History of Felon Disenfranchisement

Felon disenfranchisement, a practice that significantly impacts the lives of many in modern America, has deep historical roots that can be traced back to ancient Greek and Roman traditions.²² In those societies, certain crimes upon conviction led to a severe form of punishment known as “civil death.”²³ This meant that individuals convicted of specific offenses were effectively “deemed civilly dead and thus lacking in all civil rights.”²⁴ In ancient Greece, this form of disability was referred to as “infamy.”²⁵ It served as a retributive

²⁰ See U.S. CONST. amend. VIII (establishing the infliction of cruel and unusual punishments as unconstitutional).

²¹ *Hopkins v. Hosemann*, 76 F.4th 378 (5th Cir. 2023), *vacated, reh'g en banc granted by Hopkins v. Hosemann*, 83 F.4th 312 (5th Cir. 2023), *affirmed Hopkins v. Watson*, 108 F.4th 371 (5th Cir. 2024). This Note was completed prior to July 18, 2024, when the United States Court of Appeals for the Fifth Circuit reversed its prior August 2023 opinion in *Hopkins v. Hosemann*, leaving Mississippi's felony disenfranchisement provision intact. *Watson*, 108 F.4th 371. The subsequent impact of the court's decision is outside the scope of this Note.

²² JAMIE FELLNER & MARC MAUER, HUM. RTS. WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS (Oct. 1998), <https://www.hrw.org/reports/pdfs/u/us/usvot98o.pdf> [<https://perma.cc/38YX-LZ5E>]; see also Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059-61 (2002).

²³ Fellner & Mauer, *supra* note 22, at 3.

²⁴ Richard L. Lippke, *The Disenfranchisement of Felons*, 20 L. & PHIL. 553, 559 (2001).

²⁵ Thomas R. McCoy, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941 (1970).

measure, branding and punishing individuals for their transgressions against Greek society, where prohibitions included “appearing in court, voting, making speeches, attending assemblies, and serving in the army.”²⁶ Following in Greece’s footsteps, the Roman Empire adopted the practice of “infamy,” utilizing various forms of civil disabilities as a penal mechanism to deter crime.²⁷ Those who committed “infamous” crimes were committed to “civil death,” labeled as “*infamia*,” and could be denied the “ability to hold office and to vote in the public assembly.”²⁸

These ancient Greek and Roman practices laid the foundational concepts for contemporary practices of felon disenfranchisement. Following the fall of the Roman Empire, the concept of “civil death” penalties spread throughout continental Europe, taking various forms among Germanic tribes and in England.²⁹ The Germanic tribes practiced “outlawry,” a form of civil disability that would label a criminal offender as a “‘bando’ or wolf, for if he did not flee to another country he was forced to dwell in the forest like a wild beast.”³⁰ In England, the “civil death” concept evolved into a process known as “attainder,” wherein those convicted of treason or other felonies were considered to be “attainted.”³¹ The punishment of “attainder” encompassed various penalties, such as forfeiture of property, “corruption of the blood” (which prevented convicted individuals from inheriting, retaining, or passing on estates), and the loss of various other civil rights.³²

These historical practices laid the groundwork for the introduction of disenfranchisement laws in the American colonies.³³ During the settlement of North America, English colonists brought with them much of their common-law heritage, including the imposition of civil disabilities and property forfeiture resulting from attainder.³⁴ The colonists included suffrage statutes in their own laws.³⁵ In the Massachusetts Bay Colony, for example, convictions for “fornication or any shameful and vitious crime” carried the additional penalty of disenfranchisement.³⁶ Similarly, for settlers in

²⁶ *Id.* at 941; Ewald, *supra* note 22, at 1059-60.

²⁷ *Id.* at 942.

²⁸ *Id.* at 941; Ewald, *supra* note 22, at 1060; ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 16 (2006).

²⁹ HULL, *supra* note 28, at 16.

³⁰ *Id.*

³¹ McCoy, *supra* note 25, at 942-43.

³² HULL, *supra* note 28, at 16.

³³ *Id.*

³⁴ HULL, *supra* note 28, at 17; Ewald, *supra* note 22, at 1061.

³⁵ Ewald, *supra* note 22, at 1061.

³⁶ *Id.* at 1061 (internal quotations removed).

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Maryland, repeated convictions for drunkenness could result in disenfranchisement.³⁷

After the American Revolution, new American states began to “reject some of their English common-law heritage” and reform some severe aspects of “civil death” statutes for criminal offenders.³⁸ The Framers of the Constitution “prohibited bills of attainder, forfeiture for treason, and ‘Corruption of Blood.’”³⁹ Then, in the latter half of the twentieth century, this movement away from these historical practices continued, with the newly formed states abolishing prohibitions on inheriting property and entering into contracts for those convicted of felonies.⁴⁰

However, despite these progressive reforms, one vestige of the ancient concept of “civil death” remains deeply entrenched in the American legal system: felon disenfranchisement.⁴¹ This was seen as early as 1776, when Virginia enacted legislation that barred ex-felons from voting.⁴² By the time of the Civil War, the notion of disenfranchising felons had gained considerable traction, with nineteen of the thirty-four Union states following suit.⁴³ The trend continued unabated, and by 1869, the twenty-nine other states had implemented such restrictions on felon voting.⁴⁴

Felon disenfranchisement remained a stark exception to progress made during the Reconstruction Era.⁴⁵ Passed in the aftermath of the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were transformative in their intent to redefine citizenship and expand voting rights, particularly for formerly enslaved Black Americans.⁴⁶ In spite of these laws, many states began navigating around the spirit of these amendments, using felon disenfranchisement laws as an effective tool to continue restricting voting rights to Black men.⁴⁷ While other historical measures designed to obstruct and suppress voting were eliminated by the mid-twentieth century, felon

³⁷ *Id.* at 1062.

³⁸ *Id.* at 1062-63.

³⁹ *Id.* at 1063; *see also* HULL, *supra* note 28, at 17.

⁴⁰ HULL, *supra* note 28, at 17.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Neely Baugh-Dash, *Criminal Disenfranchisement: Deconstructing Its Justifications and Crafting State-Centered Solutions*, 7 BELMONT L. REV. 123, 128-29 (2019) (highlighting how twenty-nine of the thirty-seven states in existence in 1869 began passing criminal disenfranchisement laws).

⁴⁶ Eric Foner, *The Reconstruction Amendments: Official Documents as Social History*, GILDER LEHRMAN INST. AM. HIST. (2004), <https://www.gilderlehrman.org/history-resources/essays/reconstruction-amendments-official-documents-social-history> [<https://perma.cc/FDM5-6LY3>]; *see also* U.S. CONST. amend. XIII, XIV, XV (respectively outlawing slavery, establishing the due process and equal protections clauses, and granting suffrage to Black Americans).

⁴⁷ Baugh-Dash, *supra* note 45, at 129-30.

disenfranchisement laws demonstrated remarkable resilience.⁴⁸ By 2004, an overwhelming majority of states had implemented laws that restricted the voting rights of ex-felons.⁴⁹

Today, within the global context of democratic nations, the United States stands as an outlier in its approach to revoking voting rights from citizens with criminal convictions.⁵⁰ Countries like South Africa, Canada, Ireland, and Spain all permit their imprisoned citizens to vote.⁵¹ In total, there are at least twenty-one countries that allow their incarcerated felons to vote in elections.⁵² It is important to note that not all of these countries employ a blanket policy granting enfranchisement to all felons.⁵³ Nonetheless, these global examples stand in stark contrast to the practice of disenfranchisement in the United States.⁵⁴ As of 2022, forty-eight states impose voting restrictions on felons, with significant variation from state to state.⁵⁵ In the same year, an estimated 4.6 million Americans, comprising two percent of the nation's voting-age population, were disenfranchised due to felony convictions.⁵⁶ Only Maine, Vermont, the District of Columbia, and Puerto Rico stand as exceptions, granting all incarcerated individuals the right to vote in their jurisdictions, irrespective of their convictions.⁵⁷

⁴⁸ *Id.* at 129. The Voting Rights Act of 1965 prohibited the use of poll taxes, literacy tests, grandfather clauses, and other methods aimed at excluding Black Americans from voting. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10101); *see also* *50th Anniversary of Voting Rights Act and Felony Disenfranchisement*, EQUAL JUST. INITIATIVE (Aug. 5, 2015), <https://eji.org/news/50-years-voting-rights-act-and-felony-disenfranchisement> [<https://perma.cc/3ATJ-EHCX>].

⁴⁹ HULL, *supra* note 28, at 17 (specifying that forty-eight states had felon disenfranchisement laws on the books).

⁵⁰ Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUST. (May 9, 2017), <https://www.brennancenter.org/our-work/research-reports/racism-felony-disenfranchisement-intertwined-history> [<https://perma.cc/C26T-U7FS>].

⁵¹ Jeffery Robinson, *The Racist Roots of Denying Incarcerated People Their Right to Vote*, ACLU (May 3, 2019), <https://www.aclu.org/news/voting-rights/racist-roots-denying-incarcerated-people-their-right-vote> [<https://perma.cc/JRU3-94L6>].

⁵² Darcy Palder, *America's Unique Kind of Disenfranchisement*, FOREIGN POL'Y MAG. (Nov. 5, 2020, 3:19 PM), <https://foreignpolicy.com/2020/11/05/america-ex-felon-disenfranchisement-democracies> [<https://perma.cc/VW74-49DC>].

⁵³ *See* Robinson, *supra* note 51 (“Germany disenfranchises for certain offenses like treason, but only for a maximum of five years. Finland and New Zealand disenfranchise only for election offenses and only for a few years beyond completion of a sentence. In France, only election offenses and abuse of public power warrant disenfranchisement.”).

⁵⁴ Fellner & Mauer, *supra* note 22, at 25; *see also* Nancy D. Porter, Alison Parker, Trey Walk, Jonathan Topaz, Jennifer Turner, Casey Smith, Makayla LaRonde-King, Sabrina Pearce & Julie Ebenstein, *Out of Step: U.S. Policy on Voting Rights in Global Perspective*, SENT'G PROJECT (June 27, 2024) <https://www.sentencingproject.org/publications/out-of-step-u-s-policy-on-voting-rights-in-global-perspective/> [<https://perma.cc/XND5-3LCW>].

⁵⁵ Uggen, Larson, Shannon & Stewart, *supra* note 16.

⁵⁶ *Id.* at 4-6.

⁵⁷ *Id.*

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However, over half of the states—twenty-six in total—enforce voting restrictions that apply to individuals beyond their incarceration period, encompassing those on probation or parole for felony convictions.⁵⁸ The most stringent policies are observed in eleven states, where convicted felons are deprived of their voting rights even after completing their prison, parole, and probation terms.⁵⁹ These policies represent the most extreme form of disenfranchisement, imposing a lifetime penalty that severs an individual’s ties to democratic participation indefinitely.⁶⁰ Collectively, these varied state-level policies underscore the absence of a unified national approach to the voting rights of convicted felons.

B. Public Policy Justifications

Proponents of felon disenfranchisement laws typically base their justification on three primary public policy grounds: criminal punishment, social contract, and election integrity.⁶¹ Each of these justifications presents a distinct perspective on the role of felon disenfranchisement within the American criminal justice system and its connection to wider societal values.

The first basis is criminal punishment, which views felon disenfranchisement laws as an extension of the penal system, serving as a means for “measuring out justice to those who have violated the rules of social order.”⁶² Recall how this approach is deeply ingrained in the tradition of imposing civil disabilities as a form of retribution and deterrence, a practice originating from English legal history.⁶³ Under a retributivist theory, denying felons the right to vote serves as a “collateral sanction” that is “proportionate to the seriousness of [their] offense and to the degree of the offender’s culpability.”⁶⁴ The retributivist theory adheres to the principle that “those who have committed crimes should suffer for the harm they caused others,” such that the “denial of voting rights exacts some degree of

⁵⁸ *Id.* at 4 (referencing the following twenty-six states: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin, and Wyoming).

⁵⁹ Uggen, Larson, Shannon & Stewart, *supra* note 16.

⁶⁰ *Id.* (referencing the following eleven states: Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming); *see also* Kira Lerner, *The States Where It’s Impossible to Vote if You Have a Felony Conviction*, *GUARDIAN* (Sept. 7, 2023, 6:00 EDT), <https://www.theguardian.com/us-news/2023/sep/07/states-felony-conviction-voting-rights> [<https://perma.cc/XU88-L7R3>].

⁶¹ Baugh-Dash, *supra* note 45, at 132.

⁶² *Id.*

⁶³ McCoy, *supra* note 25, at 944.

⁶⁴ Christopher Uggen, Angela Behrens & Jeff Manza, *Criminal Disenfranchisement*, *ANN. REV. OF L. & SOC. SCI.*, 307, 310 (2005).

vengeance from felons.”⁶⁵ In terms of deterrence, the high significance of the right to vote suggests that the loss of this right might “deter the individual offender from committing another crime” (known as specific deterrence).⁶⁶ Such laws are also viewed as serving the purpose of “dissuad[ing] the general public from engaging in crime” (known as general deterrence).⁶⁷

The second rationale for felon disenfranchisement is rooted in John Locke’s “social contract” theory.⁶⁸ According to Locke, individuals who participate in society implicitly agree to a contract that provides security, structure, and liberty.⁶⁹ When an individual commits a crime, they are viewed as breaching this social contract, thereby forfeiting their right to participate in the society’s political processes.⁷⁰ In other words, by “disrupt[ing] the balance of rights and responsibilities” within the society, the offender has “threatened to destroy the very compact which makes civilized life possible.”⁷¹ Consequently, social contract theory asserts that such behavior warrants “a punitive response according to pre-determined rules,” which may include the removal of the offender’s civil rights, such as voting.⁷² This perspective portrays disenfranchisement as a necessary consequence of violating the societal agreement, reinforcing the Lockean concept of mutual obligations between the individual and society.⁷³

The third primary justification for felon disenfranchisement laws is concerns for election integrity. This rationale is grounded in the belief that the participation of individuals with felony convictions in the electoral process could potentially compromise its “purity” and fairness.⁷⁴ Advocates of this perspective maintain that enabling felons to vote, particularly those convicted of electoral fraud or crimes against democracy, might erode public

⁶⁵ *Id.* at 310.

⁶⁶ *Id.* at 310-11.

⁶⁷ *Id.* at 310.

⁶⁸ Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 *FORDHAM URB. L.J.* 1519, 1526 (2003); see Ewald, *supra* note 22, at 1073-75.

⁶⁹ Pinaire, Heumann & Bilotta, *supra* note 68, at 1526.

⁷⁰ *Id.* at 1525-1526.

⁷¹ *Id.* at 1526.

⁷² *Id.* at 1526.

⁷³ Baugh-Dash, *supra* note 45, at 132.

⁷⁴ *Id.* at 133; see also *Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “the Purity of the Ballot Box,”* 102 *HARV. L. REV.* 1300, 1301 (1989). See also *Washington v. State*, 75 Ala. 582, 585 (1884) (arguing that disenfranchisement’s purpose is “to preserve the purity of the ballot box . . . which needs protection against the invasion of corruption”); *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972) (observing that states have an “interest in preventing persons who have been convicted of serious crimes from participating in the electoral process or a quasi-metaphysical invocation that the interest is preservation of the ‘purity of the ballot box’”).

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trust in the electoral system.⁷⁵ Additionally, there is concern that felons could form a voting bloc with significant influence, potentially skewing election outcomes based on their collective experiences with the criminal justice system.⁷⁶ Thus, proponents believe that when elections, which are intended to gauge public sentiment on crime and punishment, are affected in this way, it undermines their intended purpose.⁷⁷

Beyond concerns of criminal punishment, breaches of social contracts, and election integrity, felon disenfranchisement laws are justified by a host of bases not covered in this Note.⁷⁸

C. *The Intersection of Race and Felon Disenfranchisement*

Opponents of felon disenfranchisement point to the disproportionate impact these laws have on racial minorities within the criminal justice system, particularly Black and Latinx communities.⁷⁹ This perspective is deeply rooted in a broader critique of systemic inequalities within the criminal justice system, particularly in the areas of policing, prosecution, and sentencing.⁸⁰ These systemic issues contribute to higher conviction rates and, consequently, higher rates of disenfranchisement among communities of color.⁸¹

⁷⁵ Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 77 *FORDHAM L. REV.* 1875, 1882 (2005). For offenses against the democratic process, the belief is that “those who act in ways inimical to the operation of democratic governments should be denied the opportunity to participate in determining who occupy official roles in such governments or the policies enacted and enforced.” Lippke, *supra* note 24, at 562.

⁷⁶ Baugh-Dash, *supra* note 45, at 133. The concern is that felons may skew the democratic process by favoring candidates or policies perceived to be more lenient on criminal justice issues. In other words, “those who have been punished by the criminal justice system will resent it more” and vote accordingly. *Id.*

⁷⁷ Baugh-Dash, *supra* note 45, at 133; *see generally* Roger Clegg, George T. Conway III & Kenneth K. Lee, *The Case Against Felon Voting*, 2 *U. ST. THOMAS J.L. & PUB. POL’Y* 1, 18 (2008).

⁷⁸ Other rationales include: the role of race and perceived racial threat driving policy determinations; felons lacking civic virtue, religious doctrine, citizenship theory, and democratic self-determination theory. *See generally* Christopher Uggen, Jeff Manza & Angela Behrens, *Felony Voting Rights and the Disenfranchisement of African Americans*, 5 *SOULS* 3, 48-57 (2003); 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. SOCIO.* 3 (2003); Mary Fainsod Katzenstein, Leila Mohsen Ibrahim & Katherine D. Rubin, *The Dark Side of American Liberalism and Felon Disenfranchisement*, 8 *PERSP. ON POL.* 1035, 1039 (2010); Matt S. Whitt, *Felon Disenfranchisement and Democratic Legitimacy*, 43 *SOC. THEORY & PRAC.* 2 (2017).

⁷⁹ Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 53 *HOWARD L.J.* 549, 552 (2011); Sam McCann, *Elections are Warped by Prison Gerrymandering Year After Year*, *VERA INST. JUST.* (Nov. 6, 2023), <https://www.vera.org/news/elections-are-warped-by-prison-gerrymandering-year-after-year> [<https://perma.cc/H2E3-FM9Q>].

⁸⁰ *Felony Disenfranchisement, Explained*, *DEMOCRACY DOCKET* (Oct. 19, 2021), <https://www.democracymocket.com/analysis/felony-disenfranchisement-explained> [<https://perma.cc/XLA5-TKAU>].

⁸¹ *Id.*

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Statistics from 2022 provide a stark illustration of this racial disparity.⁸² Approximately one in every nineteen Black voting-age persons in the United States is disenfranchised due to felony convictions.⁸³ In seventeen states, at least five percent of the Black adult population is affected by felon disenfranchisement.⁸⁴ Similarly, in 2020, approximately 560,000 Latinx Americans were disenfranchised, representing over two percent of the voting-eligible Latinx population in the United States.⁸⁵ The rate of disenfranchisement among Latinx individuals surpasses that of the general population.⁸⁶ These numbers are particularly alarming considering the underreporting and limitations in ethnicity data, suggesting that the actual impact on Latinx communities might be even greater.⁸⁷

These statistics are not mere numbers; they represent a substantial segment of the population systematically excluded from the political process, even after rejoining their communities.⁸⁸ This exclusion is particularly alarming when considering the broader demographic picture: Black and Latinx people constitute thirty-two percent of the United States population but account for fifty-six percent of its prison population.⁸⁹ This overrepresentation in the prison system directly translates into a disproportionate impact of disenfranchisement laws on these communities.⁹⁰

The continuation of these trends in felon disenfranchisement is viewed by many critics as a modern manifestation of historical efforts to suppress the voting power of racial minorities.⁹¹ These efforts can be traced back to post-Civil War racism and the Jim Crow era, during which a variety of strategies were employed to limit the political influence of Black Americans.⁹² Today's

⁸² Uggen, Larson, Shannon & Stewart, *supra* note 16.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Ashley Lopez, *In the U.S., Some 4.6 Million People are Disenfranchised Due to a Felony Conviction*, NPR (Oct. 25, 2022, 7:00 AM), <https://www.npr.org/2022/10/25/1130622918/felon-voting-state-laws-disenfranchisement-rates> [<https://perma.cc/S9X5-DQZ8>].

⁸⁷ Lopez, *supra* note 86; see also MARISA J. DEMEO & STEVEN A. OCHOA, MALDEF, DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES (Dec. 2003), <https://static.prisonpolicy.org/scans/diminishedpower.pdf> (last visited Jan. 1, 2024) [<https://perma.cc/56YB-CNW4>].

⁸⁸ *Felony Disenfranchisement, Explained*, *supra* note 80.

⁸⁹ McCann, *supra* note 79.

⁹⁰ *Id.*

⁹¹ Kelley, *supra* note 50.

⁹² *Id.*; see also *ACLU History: Felon Disenfranchisement: A Relic of Jim Crow*, ACLU (Sept. 1, 2010), <https://www.aclu.org/documents/aclu-history-felon-disfranchisement-relic-jim-crow> [<https://perma.cc/CJ9T-RGX8>].

felon disenfranchisement laws, in the eyes of these critics, perpetuate this legacy of racial exclusion and inequality.⁹³

In turn, the disproportionate impact of these laws on Black and Latinx communities raises significant concerns about the equitable application of voting rights in the United States.⁹⁴ These disparities reflect not only the ongoing issues of racial inequality within the criminal justice system, but also the role these laws play in perpetuating systemic barriers to political participation for minority groups.⁹⁵ Moreover, the exclusion of these demographics from the voting process undermines the principles of representative democracy and equal participation, raising critical questions about the commitment to equitable and inclusive democratic practices.⁹⁶

II. EFFORTS TO REFORM FELON DISENFRANCHISEMENT LAWS

Recent years have witnessed a notable shift in the landscape of felon disenfranchisement in the United States, marked by a decreasing trend in the number of disenfranchised Americans.⁹⁷ Historical data since the 1970s reveals gradual but significant shifts in state policies, with many states scaling back their disenfranchisement provisions.⁹⁸ This decline in disenfranchisement has been particularly pronounced since 1997.⁹⁹ During this period, twenty-six states and the District of Columbia have enacted various measures to expand voting access for individuals with felony convictions.¹⁰⁰ These measures, achieved through “legislative reform, executive action, and ballot measures,” indicate a national trend to restore

⁹³ Kelley, *supra* note 50.

⁹⁴ Danyelle Solomon, Connor Maxwell & Abril Castro, *Systematic Inequality and American Democracy*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), <https://www.americanprogress.org/article/systematic-inequality-american-democracy> [https://perma.cc/5993-HDQD].

⁹⁵ See generally Fellner & Mauer, *supra* note 22, at 2-3; see also Demeo & Ochoa, *supra* note 87.

⁹⁶ See generally LAWYERS’ COMM. FOR CIV. RTS. UNDER L. & SENT’G PROJECT, *THE DISCRIMINATORY EFFECTS OF FELONY DISENFRANCHISEMENT LAWS, POLICIES AND PRACTICES ON MINORITY CIVIC PARTICIPATION IN THE UNITED STATES*, (Nov. 2009), https://www.prisonpolicy.org/scans/sp/fd_UNMinorityForum-1.pdf (last visited Jan. 1, 2024) [https://perma.cc/4DUV-S2FZ].

⁹⁷ Uggen, Larson, Shannon & Stewart, *supra* note 16.

⁹⁸ *Id.*

⁹⁹ Nicole D. Porter & Morgan McLeod, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2023*, SENT’G PROJECT (Oct. 18, 2023), <https://www.sentencingproject.org/reports/expanding-the-vote-state-felony-disenfranchisement-reform-1997-2023> [https://perma.cc/8WTE-VYAB]; see also Caroline Sullivan, *Nearly 70 Bills Introduced To Restore Voting Rights After Felony Conviction*, DEMOCRACY DOCKET (Feb. 23, 2023), <https://www.democracymarket.com/analysis/nearly-70-bills-introduced-to-restore-voting-rights-after-felony-conviction> [https://perma.cc/67V7-ZAQ6].

¹⁰⁰ Porter & McLeod, *supra* note 99.

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voting rights.¹⁰¹ Furthermore, since January 1, 2020, eight states have implemented laws or policy changes that extend voting rights to non-incarcerated individuals with felony convictions.¹⁰²

Despite a general trend toward expanding voting rights, the issue of felon disenfranchisement remains a divisive topic in American politics, largely drawn along partisan lines.¹⁰³ In 2023, over twenty states introduced approximately seventy-three bills related to this issue.¹⁰⁴ Out of these, sixty-eight proposals aimed to expand voting rights for individuals with felony convictions.¹⁰⁵ These proposals included measures for restoring rights after sentence completion, waiving legal fees and fines, streamlining the voter registration process for former convicts, and facilitating jail-based voting for those eligible.¹⁰⁶ On the other hand, recent actions in states like North Carolina, Tennessee, and Virginia have introduced hurdles for felons seeking to reclaim their voting rights.¹⁰⁷ North Carolina has upheld its disenfranchisement law, Tennessee now requires either a judicial or gubernatorial restoration, and Virginia has adopted an individualized assessment for re-enfranchisement.¹⁰⁸

These legislative movements reflect the ongoing debate and highlight the complex nature of felon disenfranchisement in the United States. While there is a clear movement toward more inclusive voting policies for individuals with felony convictions in some states, the issue continues to generate disparate opinions and legislative responses across the country.¹⁰⁹

III. CONSTITUTIONAL CHALLENGES TO FELON DISENFRANCHISEMENT LAWS

Three common constitutional challenges to felon disenfranchisement laws in the United States involve the Fourteenth Amendment, the Voting

¹⁰¹ *Id.* It is further estimated that over two million Americans regained the right to vote since 1997. *Id.*

¹⁰² Uggen, Larson, Shannon & Stewart, *supra* note 16 (identifying the following legislative changes, granting votes to the following non-incarcerated offenders holding these statuses: “California (parole), Connecticut (parole), Iowa (post-sentence, with exception for homicide), New Jersey (probation and parole), New York (parole), North Carolina (probation and parole), Virginia (post-prison), and Washington (post-prison)”).

¹⁰³ *See generally* Lerner, *supra* note 60.

¹⁰⁴ Sullivan, *supra* note 99.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Matt Vasilogambros, *In Reversal, Some States Make It Harder for People with Felony Convictions To Vote*, STATELINE (Aug. 6, 2023, 5:00 AM), <https://stateline.org/2023/08/07/in-reversal-some-states-make-it-harder-for-people-with-felony-convictions-to-vote> [<https://perma.cc/3JULY-CNLW>].

¹⁰⁸ *Id.*

¹⁰⁹ *See generally* *Felony Disenfranchisement, Explained*, *supra* note 80.

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Rights Act of 1965, and the Eighth Amendment.¹¹⁰ The Fourteenth Amendment is invoked for its Equal Protection and Due Process Clauses, the Voting Rights Act of 1965 for its stance against discriminatory voting practices, and the Eighth Amendment for its prohibition of cruel and unusual punishment.¹¹¹

A. The Equal Protection Clause of the Fourteenth Amendment

Legal challenges to felon disenfranchisement under the Fourteenth Amendment have largely been unsuccessful, primarily because the right to vote is not recognized as absolute.¹¹² The landmark case in this area is *Richardson v. Ramirez* (1974), where the Court interpreted the Equal Protection Clause and its application to the disenfranchisement of felons.¹¹³

The Equal Protection Clause, articulated in Section 1 of the Fourteenth Amendment, asserts that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁴ The plaintiffs in *Richardson*, three felons who had completed their sentences, argued that California’s Constitution and other related statutes violated the Equal Protection Clause by stripping them of their voting rights.¹¹⁵ They specifically contested Article II, section 1, of the California Constitution, which states that no individual “convicted of any infamous crime . . . embezzlement or misappropriation of public money . . . shall ever exercise the privileges of an elector in this State.”¹¹⁶

However, the Supreme Court’s decision emphasized the connection between Sections 1 and 2 of the Fourteenth Amendment.¹¹⁷ While Section 1 establishes the principle of equal protection, Section 2 recognizes the states’ authority to disenfranchise individuals for “participation in rebellion, or other crime.”¹¹⁸ The majority concluded that this provision explicitly allows states to disenfranchise individuals due to criminal participation, indicating that such disenfranchisement does not necessarily conflict with the equal protection principles seen in Section 1.¹¹⁹ The Court acknowledged the traditional imposition of various eligibility criteria by states, such as

¹¹⁰ Amy Heath, *Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote After Serving Their Sentences*, 25 AM. U.J. GENDER SOC. POL’Y & L. 327, 334-37 (2017).

¹¹¹ *Id.* at 334-37.

¹¹² *Id.* at 334.

¹¹³ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

¹¹⁴ U.S. CONST. amend. XIV, § 1.

¹¹⁵ *Richardson*, 418 U.S. at 26-32.

¹¹⁶ *Id.* at 27-28.

¹¹⁷ *Id.* at 42.

¹¹⁸ U.S. CONST. amend. XIV, §§ 1-2.

¹¹⁹ *Richardson*, 418 U.S. at 54.

residency and age requirements, and concluded that disenfranchisement for felony convictions is within the scope of state authority.¹²⁰ Ultimately, the Court ruled that revoking voting rights to convicted felons, even post-sentence and parole, does not violate the Equal Protection Clause.¹²¹

Subsequent Court rulings have adhered to *Richardson*'s precedent that states can lawfully exclude felons from voting.¹²² One notable example is the 1985 decision in *Hunter v. Underwood*, where the Court refined the legal understanding established by *Richardson*.¹²³ In *Hunter*, the plaintiffs—one Black and one white—challenged an Alabama Constitution provision that disenfranchised individuals convicted of offenses deemed to involve “moral turpitude.”¹²⁴ Both plaintiffs had been convicted of a misdemeanor for issuing worthless checks, considered by Alabama’s Attorney General to involve moral turpitude.¹²⁵ They argued that this disenfranchisement violated the Equal Protection Clause, asserting that Alabama’s provision was specifically designed to discriminate against Black Americans.¹²⁶

Diverging from *Richardson*, the Supreme Court in *Hunter* scrutinized the specific intent behind Alabama’s law, specifically its application to crimes involving moral turpitude.¹²⁷ Upon examining the historical context and legislative intent present at the time of its adoption,¹²⁸ this ruling clarified that while the Fourteenth Amendment allows for disenfranchisement for crimes, it does not permit racial discrimination within those laws.¹²⁹ The *Hunter* decision established that disenfranchisement laws, if proven to have been enacted with a “substantial” or “motivating factor” of racial bias, could be unconstitutional.¹³⁰

Together, *Richardson* and *Hunter* suggest that, although the Fourteenth Amendment does not outright prohibit felon disenfranchisement, it offers a limited avenue for challenging such laws under specific circumstances, such as evidence of racial discrimination.¹³¹ This nuanced legal standard indicates that while states have considerable leeway in disenfranchising felons, their

¹²⁰ *Id.* at 53.

¹²¹ *Id.* at 56.

¹²² *See generally* *Davis v. Beason*, 133 U.S. 333 (1890); *Estep v. United States*, 327 U.S. 114, 122 (1946); *Trop v. Dulles*, 356 U.S. 86 (1958).

¹²³ *Hunter v. Underwood*, 471 U.S. 222 (1985).

¹²⁴ *Id.* at 223.

¹²⁵ *Id.* at 224.

¹²⁶ *Id.* at 227.

¹²⁷ *Id.* at 229-33.

¹²⁸ *Id.*

¹²⁹ *Id.* at 233 (“[W]e are confident that § 2 was not designed to permit . . . purposeful racial discrimination . . . which otherwise violates § 1 of the Fourteenth Amendment”).

¹³⁰ *Id.* at 225 (1985).

¹³¹ *Richardson v. Ramirez*, 418 U.S. 24 (1974); *Hunter*, 471 U.S. 222 (1985).

power is not absolute and must be exercised without discriminatory intent or effect.

B. The Voting Rights Act of 1965

Felon disenfranchisement laws have also been subject to scrutiny under the framework of the Voting Rights Act of 1965 (“VRA”).¹³² This pivotal piece of civil rights legislation, originally enacted to eradicate racial discrimination in voting, has been amended by Congress numerous times to strengthen protections for minority voting rights.¹³³ The 1982 amendment was particularly significant as it broadened the VRA’s scope to address not only practices with discriminatory intent but also those yielding racially discriminatory outcomes.¹³⁴

Legal challenges to felon disenfranchisement laws under the VRA frequently argue that these laws disproportionately affect Black Americans, thus potentially violating the VRA’s safeguards.¹³⁵ These challenges are bolstered by statistical evidence and historical context, highlighting the laws’ disparate impact on minority communities, particularly in states with a history of racial discrimination in voting.¹³⁶

Section 2 of the VRA, often the focus of litigation,¹³⁷ provides critical protections, stating:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*.¹³⁸

The Supreme Court has construed section 2 of the VRA to prohibit “any standards, practices, or procedures which result in the denial or abridgment of the right to vote of any citizen who is a member of a protected class of

¹³² Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10101).

¹³³ *Why Access to Voting is Key to Systemic Equality*, ACLU (Oct. 6, 2023), <https://www.aclu.org/news/voting-rights/why-access-to-voting-is-key-to-systemic-equality> [<https://perma.cc/7LHB-7QLM>]; CONG. RSCH. SERV., *THE VOTING RIGHTS ACT: HISTORICAL DEVELOPMENT AND POLICY BACKGROUND* (Apr. 25, 2023), <https://crsreports.congress.gov/product/pdf/R/R47520> [<https://perma.cc/PHP8-UEDR>]; *see also History of Federal Voting Rights Laws*, CIV. RTS. DIV. U.S. DEPT. OF JUST., <https://www.justice.gov/crt/history-federal-voting-rights-laws> (last updated July 28, 2017) [<https://perma.cc/RQL5-GKBR>].

¹³⁴ Handelsman, *supra* note 75, at 1876.

¹³⁵ *Id.* at 1876.

¹³⁶ *Felony Disenfranchisement, Explained*, *supra* note 80; *see also 50th Anniversary of Voting Rights Act and Felony Disenfranchisement*, *supra* note 28.

¹³⁷ *Section 2 of the Voting Rights Act*, DEMOCRACY DOCKET, <https://www.democracydocket.com/section-2> (last visited Jan. 1, 2024) [<https://perma.cc/Y2Y4-D3EF>].

¹³⁸ 52 U.S.C. § 10301 (reclassified, formerly 42 U.S.C. § 1973(a)) (emphasis added).

racial and language minorities.”¹³⁹ However, the Court has not provided a definitive ruling on whether the VRA can be invoked to declare felon disenfranchisement laws unconstitutional.¹⁴⁰ This hesitancy to adjudicate key cases has contributed to a landscape of legal uncertainty, with federal circuit courts offering divergent interpretations.¹⁴¹ The Second and Eleventh Circuits have concluded that the VRA does not prevent states from enforcing felon disenfranchisement, implying that such laws are permissible under the VRA unless explicitly racially discriminatory.¹⁴² Conversely, the Ninth Circuit has posited that if felon disenfranchisement laws are proven to have been enacted with racial discrimination as a motive, they may indeed contravene the VRA.¹⁴³ In sum, the varied lower circuit court decisions shed light on the complex legal terrain of felon disenfranchisement and the continuing debate over the significance of intent versus impact in the legality of voting restrictions.

C. *The Cruel and Unusual Punishments Clause of the Eighth Amendment*

The Eighth Amendment of the Constitution, which prohibits “cruel and unusual punishment,” has significantly influenced the legal landscape of penal law and its implementation within the country.¹⁴⁴ This amendment has sparked extensive legal debates and analyses, significantly impacting how punishment is administered in the United States.¹⁴⁵ To date, the Supreme

¹³⁹ *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

¹⁴⁰ *Handelsman*, *supra* note 75, at 1876.

¹⁴¹ *Id.* at 1877; *see also* *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 477 (2004); *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006), *cert. denied*, 125 S. Ct. 480 (2004).

¹⁴² *See* *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003), *vacated* 377 F.3d 1163 (11th Cir. 2004), *aff’d sub nom.* by 405 F.3d 1214, 1217-27 (11th Cir. 2005) (upholding Florida’s 1968 constitutional provision that disenfranchised not only current felons but all ex-felons, citing a lack of racial animus in the provision’s enactment); *see* *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (upholding New York’s felon disenfranchisement statute, finding that the VRA does not apply to such laws); *see also* *Muntaqim*, 449 F.3d (upholding New York’s felon disenfranchisement statute for felons in prison and on parole, in accordance with *Baker*’s precedent).

¹⁴³ *See* *Farrakhan*, 338 F.3d at 1016 (holding that felon disenfranchisement provision could be a cognizable violation of the VRA if there is sufficient evidence to show that the impact of such laws had a discriminatory effect on minorities); *see also* *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (narrowing Section 2 VRA challenges to state’s felon disenfranchisement law enacted with “intentional discrimination”).

¹⁴⁴ U.S. CONST. amend. VIII; *see generally* Bryan A. Stevenson & John Stinneford, *Interpretation & Debate- The Eighth Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103> (last visited Jan. 1, 2024) [<https://perma.cc/2BBH-MDWZ>].

¹⁴⁵ *See generally* *Cases – Cruel and unusual punishment*, OYEZ, <https://www.oyez.org/issues/203> (last visited Feb. 1, 2024) [<https://perma.cc/E2TT-FNBT>] (listing all Supreme Court decisions on the Eighth Amendment’s cruel and usual punishment clause).

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Court has explicitly identified only three specific punishments as falling within the ambit of the Eighth Amendment's prohibition.¹⁴⁶

The first of these was articulated in the case of *Weems v. United States* (1910), where the Court struck down a sentence of twelve years of “*cadena temporal*,” which included hard and painful labor in chains, as a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁴⁷ This decision underscored the Court's readiness to evaluate not just the nature of the punishment but also its severity and the conditions under which it was to be served.¹⁴⁸ Subsequently, in *Trop v. Dulles* (1958), the Court extended the Eighth Amendment's reach to include expatriation as a prohibited form of punishment, marking a significant expansion of the Amendment's protective scope.¹⁴⁹ This case highlighted the Court's concern with punishments that strip individuals of their citizenship and, by extension, their identity and rights, viewing such penalties as antithetical to the fundamental principles of a just and humane society.¹⁵⁰ Finally, the third notable ruling came with *Robinson v. California* (1962), wherein the Supreme Court ruled that imprisoning someone for the status of narcotics addiction constituted cruel and unusual punishment.¹⁵¹ This decision introduced the notion that the state must not punish an individual for a condition deemed to be an illness, thereby emphasizing the importance of treatment over incarceration for certain types of offenses.¹⁵²

The Supreme Court has not directly addressed whether the provisions for felon disenfranchisement contravene the Eighth Amendment's ban on cruel and unusual punishment.¹⁵³ Nevertheless, various lower courts have tackled challenges to these provisions, finding that felon disenfranchisement is not a form of “punishment” or by reading the Supreme Court's decision in

¹⁴⁶ See *Weems v. United States*, 217 U.S. 349 (1910); *Trop v. Dulles*, 356 U.S. 86 (1958); *Robinson v. California*, 370 U.S. 660 (1962). See also Robin Miller, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R. 6th 31 §§ 7 (2006) (indicating that a narrow Eighth Amendment application generally applies to punishments involving death penalty procedures or excessive physical punishment).

¹⁴⁷ *Weems*, 217 U.S. at 382. The Court explained “*cadena temporal*” as a specific form of this punishment, which required the prisoner to serve a fixed term of 12 to 20 years under harsh conditions, including labor for the state, being chained, and enduring significant restrictions even after release. *Id.* at 382.

¹⁴⁸ *Id.* at 380-81.

¹⁴⁹ *Dulles*, 356 U.S. at 102-03.

¹⁵⁰ *Id.* at 101-02.

¹⁵¹ *Robinson*, 370 U.S. at 667.

¹⁵² *Id.* at 666-68.

¹⁵³ See Miller, *supra* note 146 (listing the challenges brought on Eighth Amendment grounds). In fact, the Supreme Court declined to review a case posing such a question in 2023. *Harness v. Watson*, 143 S. Ct. 2426 (2023).

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Richardson as implicitly affirming the constitutional validity of such laws.¹⁵⁴ For instance, the Second Circuit in *Green v. Board of Elections of City of New York* (1967) held that disenfranchisement is not punitive but rather a regulatory exercise of electoral power and, even if viewed as punitive, it would not be considered cruel and unusual by the Framers' standards.¹⁵⁵ The rationale in *Green* was later adopted by the Washington Court of Appeals in *Fernandez v. Kiner* (1983).¹⁵⁶ That court found that laws disenfranchising felons were deemed to serve a legitimate regulatory purpose in determining voting eligibility, a measure widely adopted by numerous states and therefore not considered "cruel and unusual."¹⁵⁷

Similarly, the District Court of Maryland in *Thiess v. State Administrative Board of Election Laws* (1974) concluded that disenfranchising individuals for "infamous crimes" does not constitute cruel and unusual punishment.¹⁵⁸ Furthermore, the United States District Court for the Southern District of Texas in *Texas Supporters of Workers World Party Presidential Candidates v. Strake* (1981) and the Supreme Court of California in *Otsuka v. Hite* (1965) have both affirmed the constitutionality of felon disenfranchisement, emphasizing its non-penal nature.¹⁵⁹

Despite consensus among lower courts, clear tension and notable lack of guidance from the Supreme Court remains on this matter.¹⁶⁰ Absent a definitive Court ruling on felon disenfranchisement laws and their alignment with the Eighth Amendment, ambiguity and varying interpretations across jurisdictions will arguably persist.

IV. DISCUSSION

The Eighth Amendment presents the most viable, direct avenue for challenging felon disenfranchisement laws, despite the prevailing case law that upholds the laws under the Fourteenth Amendment and the Voting Rights Act of 1965.¹⁶¹ The discrepancy between lower court rulings and the

¹⁵⁴ Mark E. Thompson, *Don't Do the Crime If You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 170-71 (2002); see *Richardson v. Ramirez*, 418 U.S. at 26-27.

¹⁵⁵ *Green v. Bd. of Elections of New York*, 380 F.2d 445, 450 (2d Cir. 1967).

¹⁵⁶ *Fernandez v. Kiner*, 673 P.2d 191 (Wash. Ct. App. 1983).

¹⁵⁷ *Id.* at 212-13.

¹⁵⁸ *Tex. Supporters of Workers World Party Presidential Candidates v. Strake*, 511 F. Supp. 149 (S.D. Tex. 1981).

¹⁵⁹ *Thiess v. State Admin. Bd. of Election Laws*, 387 F. Supp. 1038, 1041-42 (D. Md. 1974); *Otsuka v. Hite*, 44 Cal. Rptr. 2d 251, 254-56 (Cal. Dist. Ct. App. 1965), *vacated by Otsuka v. Hite*, 414 P.2d 412 (Cal. 1966) (opinion vacated on other grounds).

¹⁶⁰ See *Miller*, *supra* note 146; see *Thompson*, *supra* note 154 at 170.

¹⁶¹ See *Richardson v. Ramirez*, 418 U.S. 24 (1974); *Hunter v. Underwood*, 471 U.S. 222 (1985); *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003); *Baker*, 85 F.3d; *Muntaqim*, 449 F.3d at 141.

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Supreme Court's silence on the matter of felon disenfranchisement signifies a pressing need for the Court's intervention. The absence of a definitive judgment on this issue underscores the need for the Supreme Court to review *Hopkins v. Hosemann* if certiorari is eventually sought, or to address this critical constitutional question in a future case challenging disenfranchisement under the Eighth Amendment.

In the class action lawsuit *Hopkins v. Hosemann* (2023), plaintiffs challenged section 241 of the Mississippi Constitution, which imposes a lifetime voting ban for individuals convicted of one of twenty-two specific felonies.¹⁶² They argued that this section contravenes the Eighth Amendment.¹⁶³ On August 4, 2023, the Fifth Circuit Court of Appeals ruled that section 241 breached the Eighth Amendment, adopting a proportionality principle that suggests punishment should match the severity of the offense.¹⁶⁴ The court viewed lifetime disenfranchisement as disproportionate and not in line with modern standards of decency,¹⁶⁵ identifying a legislative trend towards reinstating voting rights post-sentence and recognizing a societal shift against such disenfranchisement practices.¹⁶⁶

The court's ruling that section 241 violates the Eighth Amendment was a significant judicial stance on the issue of voting rights for convicted felons.¹⁶⁷ However, a mere fifty-five days later, on September 28, 2023, the Fifth Circuit vacated its earlier judgment and called for a rehearing, leaving the matter unresolved.¹⁶⁸ The choice to hold an en banc rehearing in *Hopkins* is part of a broader trend in the Circuit's handling of voting cases.¹⁶⁹ Although en banc rehearsals are traditionally rare, their occurrence in the Circuit has seen a noticeable increase.¹⁷⁰ Despite this, the impact of *Hopkins*

¹⁶² Bennett, *supra* note 2; *see Hopkins*, 76 F.4th at 387; *see* MISS. CONST. art. XII, § 241.

¹⁶³ *Denis Hopkins, et al. v. Secretary of State Delbert Hosemann*, S. POVERTY L. CTR., <https://www.splcenter.org/seeking-justice/case-docket/dennis-hopkins-et-al-v-secretary-state-michael-watson> (last visited Jan. 1, 2024) [<https://perma.cc/7EY5-2B5V>].

¹⁶⁴ *Hopkins*, 76 F.4th at 409-10.

¹⁶⁵ *Id.* at 391.

¹⁶⁶ *Id.* at 387-88.

¹⁶⁷ *See* Patrick Berry, *Court Strikes Down Mississippi's Lifetime Felony Voting Ban*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/analysis-opinion/court-strikes-down-mississippi-lifetime-felony-voting-ban> (last updated July 18, 2024) [<https://perma.cc/N3XF-CC84>].

¹⁶⁸ *Hopkins v. Hosemann*, 83 F.4th 312, 313 (5th Cir. 2023); *see also* Jacqueline Thomsen, *Conservative Appeals Judges Question Felon Voting Ban Claims (3)*, BLOOMBERG LAW, <https://news.bloomberglaw.com/us-law-week/conservative-appeals-judges-question-felon-claims-on-voting-ban> (last updated Jan. 23, 2024, 3:43 PM) (indicating skepticism by the full *en banc* Fifth Circuit during oral arguments on Jan. 23, 2024) [<https://perma.cc/3S6X-CM7W>].

¹⁶⁹ Madeleine Greenberg, *The 5th Circuit Is Rehearing Voting Decisions at an Alarming Rate*, DEMOCRACY DOCKET (Mar. 22, 2024), <https://www.democracydocket.com/analysis/the-5th-circuit-is-rehearing-voting-decisions-at-an-alarming-rate> [<https://perma.cc/RER7-3GJN>].

¹⁷⁰ *Id.* In its 2021-2022 term, the Fifth Circuit granted a rehearing for only 2% of petitions, with a singular case relating to voting rights. *Id.* Its 2022-2023 term witnessed a rise to nearly 4%, although

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could be profound, potentially restoring voting rights to tens of thousands in Mississippi.¹⁷¹

A. The Hopkins Framework: A Blueprint for Restoring Voting Rights

Regardless of the Fifth Circuit’s decision, a compelling case can be made that it is time for the Supreme Court to finally take up the issue of felon disenfranchisement. The legal framework presented in the *Hopkins* complaint¹⁷² and brief¹⁷³ has immediate implications for its potential applicability to a broader spectrum of disenfranchisement cases.¹⁷⁴ Specifically, its principles could extend to nonviolent felons, whether they are currently incarcerated, on probation, or have already completed their sentences. *Hopkins* could be a potential turning point in how felon disenfranchisement laws are challenged in court.

First, by centering the argument on the Eighth Amendment’s prohibition against cruel and unusual punishment, the *Hopkins* case presents a path for challenging disenfranchisement laws on the grounds of disproportionality and unfairness.¹⁷⁵ The plaintiffs in *Hopkins* emphasize the severity of the sanction of disenfranchisement, describing it as one of the most severe forms of civil punishment—a complete and permanent exclusion from the democratic process.¹⁷⁶ This is juxtaposed with the principle that punishments should not be cruel or unusual,¹⁷⁷ suggesting that the permanent denial of a fundamental civil right for a past criminal conviction is both.¹⁷⁸

Further, the plaintiffs in *Hopkins* highlight the disproportionality and the permanent nature of Mississippi’s felon disenfranchisement, arguing that section 241’s application is both cruel, in its disregard for individual

none of these rehearing’s pertained to voting or democracy issues. *Id.* Then, in 2023-2024 term, the court reheard one voting rights case and scheduled two additional rehearings for redistricting cases. *Id.* This escalation to three democracy-related cases marks a threefold increase from the prior two terms. *Id.*

¹⁷¹ *Hopkins*, *supra* note 163; see also Jack Karp, ‘Remarkable’ 5th Circ. Ruling May Help End Felon Voting Bans, LAW360 (Sept. 9, 2023, 8:27 PM), <https://www.law360.com/pulse/articles/1707989> [<https://perma.cc/SJZ4-G486>].

¹⁷² Class Action Complaint for Declaratory and Injunctive Relief, *Hopkins v. Hosemann*, No. 3:18-cv-00188-CWR-LRA (S.D. Miss. Mar. 18, 2018).

¹⁷³ Brief of the Plaintiffs-Appellees, *Hopkins v. Hosemann*, No. 19-60662 (5th Cir. Oct. 30, 2019).

¹⁷⁴ Class Action Complaint for Declaratory and Injunctive Relief *supra* note 172; Brief of the Plaintiffs-Appellees, *supra* note 173; see generally William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615 (2007).

¹⁷⁵ Class Action Complaint for Declaratory and Injunctive Relief *supra* note 172 at 67-69, 96-101.

¹⁷⁶ *Id.* at 50-79; Brief of the Plaintiffs-Appellees, *supra* note 173, at 34-40.

¹⁷⁷ U.S. CONST. amend. VIII; see generally, *Cruel and Unusual Punishment*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/cruel_and_unusual_punishment (last visited Jan. 1, 2024) [<https://perma.cc/JH9P-UVW9>].

¹⁷⁸ Brief of the Plaintiffs-Appellees, *supra* note 173 at 34-40.

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circumstances and rehabilitation, and unusual, in its deviation from the national trend towards restoring voting rights after sentence completion.¹⁷⁹ In so doing, future litigants should also be encouraged to urge courts to reevaluate the punitive nature of disenfranchisement in relation to modern penal theories.¹⁸⁰

Second, the *Hopkins* argument framework uses the concept of “evolving standards of decency,” a principle that has been instrumental in various landmark Supreme Court decisions.¹⁸¹ This strategy involved submitting to the court that there has been a societal shift in perceptions about the fairness and appropriateness of disenfranchising nonviolent felons, supported by public opinion trends and legislative reforms.¹⁸² More specifically, the *Hopkins* plaintiffs pointed out that the understanding and application of the Eighth Amendment are not static but evolve based on contemporary standards of decency.¹⁸³ They asserted that the national consensus has shifted significantly against the practice of permanently disenfranchising individuals based on felony convictions, with most states not imposing such harsh restrictions.¹⁸⁴ This evolving standard is used to argue that Mississippi’s law is out of step with current views on appropriate punishment.¹⁸⁵

Ultimately, the nuanced nature of felon disenfranchisement laws across the country, especially those concerning nonviolent felons—whether incarcerated, on probation, or having completed their sentence—demands an assessment by the Supreme Court to ascertain its compatibility with the Eighth Amendment. Intervention by the Court is essential to determine whether disenfranchisement of nonviolent felons amounts to cruel and unusual punishment. A decision in this vein would potentially mark a significant shift in how the rights of nonviolent felons are perceived and protected, ensuring that the spirit of the Eighth Amendment is fully realized in today’s criminal justice system. Until then, *Hopkins* offers a viable framework for future litigants to challenge felon disenfranchisement laws applicable to nonviolent felons.

¹⁷⁹ *Id.* at 40-42.

¹⁸⁰ See generally Kiley Staufeneil, *With Liberty and Justice for Some: How Felony Disenfranchisement Undermines American Democracy*, 8 *THEMIS: RSCH. J. JUST. STUD. FORENSIC SCI.* 6 (2020) (discussing the punitiveness of disenfranchisement policies for felons in the United States).

¹⁸¹ Brief of the Plaintiffs-Appellees, *supra* note 173 at 32-33; see also *Dulles*, 356 U.S. at 87-114; *Estelle v. Gamble*, 429 U.S. 97, 102; *Graham v. Florida*, 560 U.S. 48, 58 (2010).

¹⁸² Class Action Complaint for Declaratory and Injunctive Relief, *supra* note 172, at 22-33; see also Brief of the Plaintiffs-Appellees, *supra* note 173 at 32-34.

¹⁸³ Class Action Complaint for Declaratory and Injunctive Relief, *supra* note 172, at 77-79.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

V. SOCIETAL IMPLICATIONS

As discussed previously in this Note, there have been several legislative efforts to reform or tighten felon disenfranchisement laws in the past decades.¹⁸⁶ Notably, twenty-six states and the District of Columbia have revised their policies since 1997 to broaden voting rights, with two million Americans' voting rights reinstated.¹⁸⁷ A clear movement towards abolishing these laws is gaining momentum.¹⁸⁸ Granting nonviolent felons the right to vote carries profound societal implications.¹⁸⁹ Such action would signal a shift towards a more inclusive and equitable democratic process.¹⁹⁰

A. Reintegration Through Democratic Engagement

Considering *Hopkins* and potential future legal challenges, it is crucial to recognize the broader implications of felony disenfranchisement laws, especially for nonviolent felons. Such laws act as a barrier to political participation, fundamentally contradicting the democratic values upon which the United States prides itself.¹⁹¹ Granting nonviolent felons the right to vote could genuinely support re-entry and successful rehabilitation.¹⁹² Moreover, future litigants could argue that permitting nonviolent felons to vote would look beyond an individual's past, ensuring that prior mistakes do not permanently mar their identity or their civic rights.¹⁹³

Restoring voting rights is a vital step towards reintegrating individuals as valued, responsible, and law-abiding members of the community.¹⁹⁴ This action would not only aid in the personal transformation of disenfranchised individuals but also enrich our democracy by including voices that have been

¹⁸⁶ See discussion *supra* Part II; see generally Porter & McLeod, *supra* note 99; Uggen, Larson, Shannon & Stewart, *supra* note 16.

¹⁸⁷ Porter & McLeod, *supra* note 99.

¹⁸⁸ See Uggen, Larson, Shannon & Stewart, *supra* note 16.

¹⁸⁹ See generally U.S. COMM'N ON CIV. RTS., *supra* note 12; see generally HULL, *supra* note 28 at 30-42.

¹⁹⁰ See generally ERIKA WOOD, BRENNAN CTR. FOR JUST., RESTORING THE RIGHT TO VOTE (2009), https://www.brennancenter.org/sites/default/files/2019-08/Report_Restoring-the-Right-to-Vote.pdf (last visited Jan. 1, 2024) [<https://perma.cc/2JS9-XC3H>].

¹⁹¹ Whitt, *supra* note 78, at 303-07; see also Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994).

¹⁹² Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193 (2002) [hereinafter *Voting and Subsequent Crime and Arrest*].

¹⁹³ *Voting and Subsequent Crime and Arrest*, *supra* note 191; see generally Tamar Sarai, *Felon re-enfranchisement restores more than civil rights*, PRISM (Nov. 3, 2022), <https://prismreports.org/2022/11/03/felon-disenfranchisement-civil-rights> [<https://perma.cc/5SKS-VC97>].

¹⁹⁴ See Fellner & Mauer, *supra* note 22 at 20-24, 32-33.

systematically silenced.¹⁹⁵ By doing so, the United States would become a more equitable society, where the governance reflects the concerns and aspirations of a wider, more diverse voting population, including those who have been historically marginalized.¹⁹⁶

B. Promoting Public Safety by Restoring Felon Voting Rights

Proponents of restoring voting rights for felons also argue that such a grant would reflect a societal commitment to public safety and democratic participation.¹⁹⁷ Research suggests that allowing justice-impacted individuals to vote can significantly reduce recidivism, as voting is linked to a range of prosocial behaviors that contribute to an individual's reintegration into society.¹⁹⁸ This act of civic participation provides a sense of inclusion and representation within the democratic process, reinforcing their identity as contributing, responsible citizens.¹⁹⁹ Studies also indicate that individuals whose voting rights were restored post-incarceration were less likely to be re-arrested, and those who participated in voting exhibited lower levels of criminal involvement.²⁰⁰ These findings challenge the notion that disenfranchisement enhances public safety, instead suggesting that voting is a crucial element of effective reintegration strategies.²⁰¹

Furthermore, the practice of excluding justice-impacted individuals from voting is increasingly recognized as detrimental to both public safety and the integrity of democratic values.²⁰² States that maintain disenfranchisement policies for individuals with specific conviction offenses do not advance public safety but rather impede the democratic process and hinder reintegration efforts.²⁰³ The evidence indicates that disenfranchisement not only fails to correlate with improved public safety

¹⁹⁵ See Kelley, *supra* note 50; see also Kristen M. Budd & Niki Monazzam, *Increasing Public Safety by Restoring Voting Rights*, SENT'G PROJECT (Apr. 25, 2023), <https://www.sentencingproject.org/policy-brief/increasing-public-safety-by-restoring-voting-rights> [<https://perma.cc/P5BS-ZWHT>].

¹⁹⁶ See generally U.S. COMM'N ON CIV. RTS., *supra* note 12; see also Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 6 (2002) [hereinafter *Democratic Contraction*].

¹⁹⁷ Budd & Monazzam, *supra* note 195.

¹⁹⁸ Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L. J. 407 (2012).

¹⁹⁹ *Democratic Contraction*, *supra* note 196, at 196-97.

²⁰⁰ *Id.* at 200-15; see also Hamilton-Smith & Vogel, *supra* note 186 at 423-24.

²⁰¹ Christopher Uggen, Jeff Manza & Angela Behrens, 'Less Than the Average Citizen': Stigma, Role Transition and the Civic Reintegration of Convicted Felons, in AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION, 261-293 (Shadd Maruna & Russ Immarigeon, eds., 2004) [hereinafter *Less Than the Average Citizen*].

²⁰² Budd & Monazzam, *supra* note 195.

²⁰³ *Id.* See generally Bryan Lee Miller & Joseph F. Spillane, *Civil death: An examination of ex-felon disenfranchisement and reintegration*, 14 PUNISHMENT & SOC. 4 (2012).

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outcomes but also undermines efforts to build a more inclusive society.²⁰⁴ Thus, policies that ensure full voting rights for all citizens would truly enhance public safety and promote democratic participation, thereby fostering safer communities.²⁰⁵

CONCLUSION

While the Fourteenth Amendment and the Voting Rights Act of 1965 have provided substantial grounds for contesting felon disenfranchisement, it is the Eighth Amendment that offers the most promising avenue for current and future legal challenges. This amendment's ban on cruel and unusual punishments offers a vital argument against felon disenfranchisement laws, positing them as extensions of punishment that burden individuals long after their formal sentences have ended. As states enact varying policies on the re-enfranchisement of those with felony convictions, the view of felon disenfranchisement as an undue and persistent penalty is gaining traction.²⁰⁶ This is especially pertinent considering legislative initiatives aimed either at removing barriers to felon voting or, alternatively, at reinforcing them.²⁰⁷

Reflecting on the disenfranchisement's historical roots and the moving stories of individuals such as Herman Parker, Jr., and Rosemary McCoy, it becomes apparent that the moment for reform has arrived. Their stories not only give a face to the abstract principles involved but also highlight the significant effects of disenfranchisement laws on millions, mirroring the enduring fight for equality and justice in the United States. Disenfranchisement emerges not just as a remnant of outdated punitive ideologies but also as a modern hurdle to achieving a fully inclusive democracy.

The Eighth Amendment could serve as a critical foundation for future litigants who aim to redefine the permissible scope of punishment and reintegrate disenfranchised individuals into the nation's democratic process.²⁰⁸ This perspective both aligns with evolving standards of decency and fairness and reflects a broader societal shift towards recognizing the dignity and potential for rehabilitation of those who have served their

²⁰⁴ *Less Than the Average Citizen*, supra note 201.

²⁰⁵ Budd & Monazzam, supra note 195.

²⁰⁶ See Fellner & Mauer, supra note 22; see also Blair Bowie, *It's Time to Abolish Felony Disenfranchisement. Here's Why*, CAMPAIGN LEGAL CTR. (June 28, 2023), <https://campaignlegal.org/update/its-time-abolish-felony-disenfranchisement-heres-why> [<https://perma.cc/U9AN-2RKN>].

²⁰⁷ Sullivan, supra note 99.

²⁰⁸ See generally Sean Morales-Doyle, *Voter Restoration as a Blueprint for Fighting Disenfranchisement*, BRENNAN CTR. FOR JUST. (Apr. 18, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/voter-restoration-blueprint-fighting-disenfranchisement> [<https://perma.cc/FMP9-BLA7>].

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sentences. Most critically, it is the case of *Hopkins v. Hosemann*, with its emphasis on the disproportionate and undemocratic nature of lifetime voting bans for nonviolent felons, that could be a blueprint for future litigants challenging such laws. In light of this, *Hopkins* and the Eighth Amendment could be a strategic avenue for litigants, marking a pivotal moment to dismantle the antiquated barriers of disenfranchisement in pursuit of a more inclusive and equitable democracy.