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Symposium on Felon Disenfranchisement

The Uncertain Future of Felon Disenfranchisement

Bruce E. Cain and Brett Parker[*]

ABSTRACT

Felons represent a large majority of disenfranchised adult Americans, with a significant proportion remaining unable to vote even after completing the entirety of their sentences. As voter eligibility requirements become an increasingly contested partisan battlefield, the fate of these disenfranchised individuals has become increasingly unclear. With this backdrop in mind, we consider recent developments in felon disenfranchisement, the prospects for future legislative action, and the legal arguments that litigants might employ to challenge the practice. In so doing, we exploit newly collected polling data to determine (1) whether Americans are ready to end felon disenfranchisement, and (2) under what circumstances they believe felon disenfranchisement constitutes excessive punishment. Examining these results, we conclude that the prospects for an immediate end to felon disenfranchisement are limited and that a categorical challenge to disenfranchisement under the Eighth Amendment would be doomed to fail. However, our results do suggest that a limited set of "gross disproportionality" challenges could plausibly succeed in states with lifetime disenfranchisement laws. We finish by discussing the disparate impact of disenfranchisement laws on African-Americans and consider the prospects for challenging these laws under the Voting Rights Act.

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INTRODUCTION

In 2018, Floridians voted to eliminate lifetime disenfranchisement for all felons, leaving Iowa and Kentucky as the only states to continue the practice.[1] Florida's most popular newspapers all endorsed the campaign, with several publishing lengthy discussions of the subject.[2] These editorials focused much of their criticism on two characteristics of Florida's existing law: its excessively punitive nature and its disparate racial impact. The *Tampa Bay Times* opened its piece by discussing the lives of former felons convicted of minor crimes before concluding that Florida's disenfranchisement rules "serve[] no purpose but to perpetually punish them."[3] *The Palm Beach Post* focused instead on the racial implications of disenfranchisement, observing, "[T]he outrageous reality is that more than one in five voting-age blacks can't vote in Florida, compared with about one in 10 voters in the state's general population."[4] The *Miami Herald* bluntly summarized both sentiments in four words: "It's unfair, it's racist."[5]

These two arguments – that felon disenfranchisement constitutes disproportionate punishment and discriminates against racial minorities – are among the most frequently cited in public debates over the practice.[6] They also map

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1. *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST. (May 30, 2019), https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states [perma.cc/CK62-AM35].

2. Editorial, *Time to Restore Voting Rights to 1.5 Million Floridians; 'Yes' on Amendment 3*, PALM BEACH POST (Oct. 23, 2018), https://www.mypalmbeachpost.com/news/opinion/editorial-time-restore-voting-rights-million-floridians/idec3l9Z18nSRxtXrukA9O/ [perma.cc/WL6Y-UWZB]; Editorial, *Florida's Election 2018: Our Endorsements for Governor, U.S. Senate, U.S. House and the Amendments*, ORLANDO SENTINEL (Oct. 19, 2018), https://www.orlandosentinel.com/opinion/editorials/os-op-orlando-sentinel-endorsements-20181018-html-story.html#amend1 [perma.cc/87NS-HN7Q]; Editorial, *Learn How 12 Florida Amendments Affect your Life, and Your Wallet, Before You Vote*, MIAMI HERALD (Oct. 7, 2018), https://www.miamiherald.com/opinion/editorials/article219635000.html; Editorial, *Five Good — Seven Bad — Amendments for Florida's Constitution*, SUN SENTINEL (Oct. 5, 2018), https://www.sun-sentinel.com/opinion/endorsements/fl-op-end-good-bad-constitutional-amendments-20181005-story.html [perma.cc/R55K-3V9T]; Editorial, *Times Recommends: Yes on Amendment 4*, TAMPA BAY TIMES (Oct. 3, 2018), http://www.tampabay.com/opinion/editorials/times-recommends-yes-on-amendment-4-20180928/ [perma.cc/ULS6-KTYT].

3. Editorial, TAMPA BAY TIMES, *supra* note 2.

4. Editorial, PALM BEACH POST, *supra* note 2.

5. Editorial, MIAMI HERALD, *supra* note 2.

6. *See, e.g.*, Luke Darby, *Pete Buttigieg Says Incarcerated People Shouldn't Get to Vote***,** GQ (Apr. 23, 2019), https://www.gq.com/story/pete-buttigieg-voting-rights [perma.cc/FP2A-JEFR] (quoting Mayor of South Bend, Indiana Pete Buttigieg: "Frankly, I think the motivations for preventing that kind of reenfranchisement, in some cases, have to do with one side of the aisle noticing that they politically benefit from

neatly onto prominent legal and legislative challenges to felon disenfranchisement. Both scholars and litigants have asserted that felon disenfranchisement constitutes an "excessive" sanction in violation of the Eighth Amendment;[7] similarly, they have claimed that these laws violate Section 2 of the Voting Rights Act of 1965 ("VRA") and the Equal Protection Clause of the Fourteenth Amendment.[8]

Felon disenfranchisement is not a monolith, however. States vary tremendously in what felonies they punish with disenfranchisement;[9] how long disenfranchisement lasts;[10] and what process ex-cons must go through to seek

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that. And that's got some racial layers too."); Brianne Pfannenstiel, *Gov. Kim Reynolds to Propose Constitutional Amendment Lifting Felon Voting Ban in Condition of the State*, DES MOINES REGISTER (Jan. 15, 2019), https://www.desmoinesregister.com/story/news/politics/2019/01/15/kim-reynolds-felon-voting-rights-constitutional-amendment-lift-ban-iowa-legislature-proposal-2019/2572308002/ [perma.cc/Z9EZ-YDN2] (quoting Iowa's Republican Governor Kim Reynolds on her support for softening Iowa's disenfranchisement law: "I believe that people make mistakes and there's opportunities to change, and that needs to be recognized. So it's something that I'm passionate about."). A third argument against disenfranchisement – that the right to vote can never be denied under any circumstances – has been floated by some. *See, e.g.*, Sydney Ember & Matt Stevens**,** *Sanders Backs Voting Rights for All Prisoners*, N.Y. TIMES, Apr. 27, 2019, at A25 (describing Democratic presidential candidate Bernie Sanders' opinion that "the right to vote is inherent to our democracy . . . Yes, even for terrible people"). However, it has almost no traction among the general population; only 17% of Americans believe that all individuals should be able to vote under all circumstances. Kathy Frankovic, *Should Felons Be Allowed to Vote in America?*, YOUGOV (May 07, 2019, 10:30 AM), https://today.yougov.com/topics/politics/articles-reports/2019/05/07/should-felons-be-allowed-vote-america [perma.cc/2ZJ2-MHKG].

7. *See, e.g.*, Thompson v. Alabama, 293 F. Supp. 3d 1313, 1328 (M.D. Ala. 2017); Thiess v. State Admin. Bd. of Elections Laws, 387 F. Supp. 1038, 1041–42 (D. Md. 1974); Pamala S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1165–69 (2004) (suggesting that punitive disenfranchisement violates the Eighth Amendment).

8. Richardson v. Ramirez, 418 U.S. 24, 55–56 (1974) (holding that felon disenfranchisement does not violate Section 1 of the Fourteenth Amendment); Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010) (concluding that only evidence of intentional discrimination in the criminal justice system could give rise to a Section 2 VRA claim); Simmons v. Galvin, 575 F.3d 24, 35–36 (1st Cir. 2009) (determining that challenges to felon disenfranchisement are not cognizable under the VRA); Hayden v. Pataki, 449 F.3d 305, 329 (2d Cir. 2006) (en banc); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (en banc).

9. *Compare* ALA. CODE § 17-3-30.1(c) (2019) (providing an extensive list "crimes of moral turpitude" warranting permanent disenfranchisement) *with* MD. CODE ANN., ELEC. LAW § 2-103(b)(3) (West 2019) (permanently disenfranchising only those convicted of buying and selling votes).

10. *Compare* MASS. CONST. art. III (disenfranchising only those currently in prison) *with* KY. CONST. § 145.1 (permanently disenfranchising all felons).

restoration of their voting rights.[11] At one extreme, Iowa and Kentucky permanently disenfranchise all felons unless their rights are individually restored by the governor.[12] On the other end of the spectrum, felons in Maine and Vermont are never disenfranchised and are permitted to vote while in prison.[13]

Disenfranchisement practice has also changed with some frequency, often in the direction of greater ballot access. Twenty-three states since 1997 have moved towards restoring the voting rights of individuals who have been convicted of felonies.[14] But as restrictive voting laws generally have become a weapon of electoral advantage on a partisan battleground, the trend toward easing existing felon voting restrictions may be losing momentum and could even reverse direction in the future. We have already seen one prominent example of recession. Six months after eliminating its permanent felon disenfranchisement law, Florida's House passed HB 7089, a bill that would delay the restoration of voting rights until an ex-felon's outstanding financial obligations are resolved.[15]

It is against this backdrop that we evaluate the political and legal prospects of restoring felon voting rights. Is there sufficient public support for removing more of the existing restrictions, and if so, which ones? Are Eighth Amendment challenges likely to succeed against the practice of permanently disenfranchising felons, and if so, to what degree? And in the wake of recent Court decisions concerning the VRA, does that statute provide adequate protection against politically motivated efforts to roll back felon voting rights?

In examining these questions, we draw extensively on a new survey of public attitudes on this topic conducted in conjunction with YouGov (hereinafter "the May Survey").[16] We find that most of the public is still resistant

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11. *Compare* NEV. REV. STAT. § 213.157 (West 2019) (providing for automatic reenfranchisement of those released from prison) *with* KY. § 431.073(2)(b), (10), (11) (2019) (allowing those convicted of certain minor crimes to escape the state constitution's permanent disenfranchisement provision, but only upon making a formal request in court and paying $300 in filing fees).

12. *See* BRENNAN CTR. FOR JUST., *supra* note 1; *but see* KY. § 431.073(2)(b), (10), (11) (2019) (providing that Kentucky felons can sometimes expunge minor convictions and accordingly regain their voting rights).

13. BRENNAN CTR. FOR JUST., *supra* at note 1.

14. *See* Morgan McLeod, *Expanding the Vote*, THE SENT'G PROJECT 4 (2018).

15. *See* Patricia Mazzei, *Ex-Felons in Florida Have the Right to Vote, but It's Not That Simple*, N.Y. TIMES, May 3, 2019, at A11 (detailing the new restrictions).

16. YouGov administered our survey questions to 2,000 nationally representative respondents between May 3 and 6, 2019. It then weighted the responses by various demographic criteria – including gender, race, and age – to improve precision. YouGov is an internationally recognized public opinion and data company frequently commended for its accuracy. *See, e.g.*, Courtney Kennedy et al., *Evaluating Online Nonprobability Surveys*, PEW RES. CTR. (May 2, 2016) https://www.pewresearch.org/methods/2016/05/02/evaluating-online-nonprobability-surveys/ [perma.cc/7BPU-Z3KF] (comparing various online polling firms and finding that YouGov consistently outperforms its competitors). Respondents were 48% male, 52%

towards ending felon voting restrictions entirely and that a majority is still hesitant to allow those on probation and parole to vote. Moreover, we observe that perceptions of party advantage may be polarizing – and therefore hardening – views about felon voting rights, which will greatly complicate the chances of forging a bipartisan consensus on this matter. With respect to change via the legal system, we conclude that "excessive punishment" claims under the Eighth Amendment can be powerful but only when presented on behalf of low-level ex-offenders facing extensive periods of disenfranchisement. The disproportionate effect that these laws have on minority communities shows there is room for discrimination-based claims in felon disenfranchisement cases, but the recent neutering of Section 5 of the VRA has removed a powerful line of defense against any future attempts to roll back felon voting rights.

With these topics in mind, we have organized the remainder of this piece into three parts. In Part I, we focus on the likelihood of legislative action given the viewpoints on this issue that our survey respondents revealed. In Part II, we consider the viability of legal claims based on the "excessive punishment" paradigm, particularly with regard to the lifetime disenfranchisement laws all felons face in Kentucky and Iowa. However, given the limited scope of Eighth Amendment legal challenges, we devote Part III to discussing the broader disparate impact problem inherent in this country's felon disenfranchisement practices.

PART I: PUBLIC ATTITUDES AND THE CHANGING CONTEXT OF FELON DISENFRANCHISEMENT

Changes in U.S. politics over the last few decades have framed and shaped the felon disenfranchisement issue in crucial ways. Specifically, U.S. electoral politics has become more professionalized, polarized, and closely contested.[17] Professionalization refers to the rising importance of paid, full-time political consultants. While campaigns for office at the federal, state, and city level still recruit and mobilize volunteers to contact voters and perform

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female; 70% White, 13% Black, 12% Hispanic, 6% other; and 22% under age 30, 24% age 30-44, 34% age 45-64, and 21% aged 65 or above. The maximum margin of error for our poll was 1.1 percentage points, and the results on commonly-asked questioned paralleled those obtained by other surveys. *See infra* note 36.

17. *See, e.g.*, Morris Fiorina, *Divided Government in the American States: A By-product of Legislative Professionalism?*, 88 AM. POL. SCI. REV. 304, 306 (1994) (noting an increase in the number of full-time state legislators and a drop in voluntary seat turnover in state legislatures); Shanto Iyengar & Sean Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. OF POL. SCI. 690, 691–92 (2015) (discussing the strength of affective political polarization in the United States); Jonathan Wand, *Private Interests Financing Public Elections: Transforming Economic Battles into Partisan Politics*, 10–11 (2013), https://www.jonathan-wand.org/pdf/campaign-finance-1.pdf [perma.cc/CMY5-T8AT] (describing the increase in competition for majority control in the U.S. House of Representatives).

various administrative functions in campaign offices, candidates rely on professionals to do the polling, fundraising, media-buying, event-planning, higher-level management, and campaign strategy formulation. This has driven up the costs of campaigning and put more pressure on candidates to fundraise. More to the point (at least in the context of felon voting restrictions), it has also contributed to a winning-above-all mindset that embraces gaming election rules for political advantage.[18]

Grassroots activists and volunteers tend to prioritize issues and value personal ties to the candidate.[19] For professional consultants, however, campaigns are a business. Consultants take a more instrumental approach to elections – they emphasize winning, staying in business, and building a reputation for being successful above pursuing losing ideological causes. As the campaign consultant class has grown, the instrumental ethos has become more pervasive, contributing to a disturbing trend in recent politics: namely, manipulating voter qualification and election administration rules to favor client candidates and party organizations.[20] In some idealized world, all eligible citizens would engage with campaigns and candidates would try to persuade them to vote for them. In the U.S., however, this vision remains unrealized. Electoral participation is far from universal and can be raised or lowered by changing voting rules and qualifications.[21] As such, while candidates will go out of their way to encourage likely supporters to register and vote, they are also inclined to discourage their opponents from participating. One way to achieve the latter is to tighten eligibility rules in targeted ways.

The political professionalization trend coincides with another: the increasing partisan polarization of American politics. Starting in the 1960s but

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18. *See, e.g.*, Patricia Mazzei, *Florida Limits Ex-Felon Voting, Prompting a Lawsuit and Cries of 'Poll Tax'*, N.Y. TIMES, June 28, 2019, at A16 (detailing Florida Republicans' efforts to limit the effect of Amendment 4, which restored voting rights to predominantly Democratic ex-felons); N.C. Conference of NAACP v. McCrory, 831 F.3d 204, 227–29 (4th Cir. 2016) (describing Republican efforts to limit black turnout in North Carolina in the aftermath of Shelby County v. Holder, 570 U.S. 529 (2013)); Rucho v. Common Cause, 139 S. Ct. 2484, 2491 (2019) (recounting Republican efforts to gerrymander North Carolina congressional districts).

19. *See* EMILLIE VAN HAUTE & ANKIA GAUJA, PARTY MEMBERS AND ACTIVISTS 7–8 (2008); Henry Brady et al., *Prospecting for Participants: Rational Expectations and the Recruitment of Political Activists*, 93 AM. POL. SCI. REV. 153, 155 (1999); Edmond Costantini & Joel King, *The Motives of Political Party Activists: A Factor-Analytic Exploration*, 6 POL. BEHAV. 79, 80–81 (1984).

20. *See* Mazzei, *supra* note 18, at A16.

21. *See, e.g.*, Anthony Fowler, *Electoral and Policy Consequences of Voter Turnout: Evidence from Compulsory Voting in Australia*, 8 QUARTERLY J. POL. SCI. 159, 171 (2013) (estimating the impact of mandatory voting laws in Australia); Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 POL. SCI. & POLS. 127, 128 (2009) (finding that African Americans and Hispanic voters are disproportionately likely to be asked for voter ID when showing up to vote).

accelerating through the Reagan Administration, the two major parties have sorted along racial and ideological lines.[22] Divergence between the median Democratic and Republican policy positions has widened substantially in both Congress and state legislatures, and political elites tend to cluster at opposite ends of the ideological spectrum.[23] This trend has two important effects. First, it has raised the policy stakes of being in power – or at least being in position to block the other party's policy in a divided government situation. Second, by racializing the divide between the parties, partisan polarization has conflated party and racial interests.[24] As a result, tactics that expand or restrict voter eligibility along partisan lines implicitly serve divergent policy and racial interests. Expanding voter eligibility tends to help the increasingly nonwhite Democratic Party and restricting it tends to help the predominantly white Republican Party.[25]

The last distinctive element of contemporary U.S. politics is the close contestation between the two major parties. Control of the House of Representatives has changed hands four times since 1992, and no presidential election during that period has been decided by more than ten percentage points.[26] These circumstances enhance the urgency to find every possible electoral advantage. When one party is in a dominant position, small differences in the vote matter less. But in highly competitive situations like the one that prevails today, winning a few seats with a small tactical shift can alter the party control of state and Congressional chambers. The aforementioned polarization can result in large swings in policy and incentivize further electoral rule changes that

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22. *See generally* MORRIS FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE (2017) (discussing party sorting at length); *see also* Morris Fiorina et al., *Polarization in the American Public: Misconceptions and Misreadings*, 70 J. OF POL. 556, 558 (2008) (discussing party sorting along ideological lines).

23. *See* Morris Fiorina, *Has the American Public Polarized*, HOOVER INST. 2–3, fig. 1 (2016) (illustrating the extent of elite polarization in the U.S. House of Representatives and discussing elite polarization in state legislatures).

24. *See* N.C. Conference of NAACP v. McCrory, 831 F.3d 204, 227–29 (4th Cir. 2016) (discussing the substantial correlation between limiting African American votes and Republican political advantage).

25. *State-by-State Data*, THE SENT'G PROJECT, https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=0 [perma.cc/KX8A-MWEF] (last visited July 1, 2019) (African American disenfranchisement rates exceed general disenfranchisement rates in all states with felon disenfranchisement); *see also infra* Figure 5.

26. *United States Presidential Election Results*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863 [perma.cc/S62V-W86T] (last visited July 1, 2019); *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ [perma.cc/GVA9-L8SS] (last visited July 1, 2019).

enhance the prospects of building or maintaining single party control – a double bottom political line of policy and political interest.

Viewed historically, of course, election laws have been manipulated since the earliest days of electoral politics. At times, the U.S. has made progress in limiting this kind of gamesmanship. Progressive era reforms, the civil rights movement, and post-World War II bipartisanship combined to create a super-majoritarian commitment to eliminate many of the more blatant and often racialized forms of suffrage denial such as literacy tests, poll taxes, and district malapportionment.[27] What distinguishes the new election administration battles is the stronger pretextual cover that protecting electoral integrity and preventing voter fraud has provided. These seemingly neutral goals have served as justifications for imposing stricter voter identification requirements, more aggressive voter caging, more difficult registration procedures, and the like.[28] In addition, because party and racial interests align more perfectly than in the immediate post-war period, it is harder to disentangle racial and political motives and effects than it was in the past.[29] This shift matters because it has undermined any bipartisan Congressional commitment to amend the VRA to deal with these problems.[30]

Recent trends in felon disenfranchisement laws must be considered in light of this context. If one is committed to the goal of full political participation, the arc of the law over recent decades seems facially encouraging. Since 1997, twenty-three states have made policy changes that have restored voting rights to some degree for those convicted of crimes.[31] Only two states still have permanent disenfranchisement laws for all felons and only two do not restrict felon voting rights in some manner.[32] Most state policies fall somewhere between the extremes, either only permanently disenfranchising some felons for certain crimes or restoring voting rights at various stages in the rehabilitation

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27. U.S. CONST. amend. XXIV, § 1 (banning the federal poll tax); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (banning literacy tests and other devices aimed at disenfranchising African Americans); Harper v. Virginia St. Bd. of Elections, 383 U.S. 663, 683 (1966) (ruling the state poll tax unconstitutional); Lucas v. Forty-Fourth General Assemb., 377 U.S. 713, 738 (1964) (requiring all state legislative districts – including state senates – to be apportioned primarily on the basis of population).

28. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191, 194–97, 203–204 (2008) (opinion of Stevens, J.) (discussing Indiana's interest in enacting a voter ID law and the partisan dimensions of the dispute and holding that the state's interest was "sufficiently strong" to justify the law); *N.C. Conference of NAACP*, 831 F.3d at 217–18; Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 196–201 (3d Cir. 2012) (describing voter caging efforts by the Republican National Committee).

29. *See N.C. Conference of NAACP*, 831 F.3d at 217–18.

30. *See* Jennifer Steinhauer, *Mitch McConnell's Commitment to Civil Rights Sets Him Apart*, N.Y. TIMES, July 11, 2015, at A11 (discussing Republican opposition to reauthorizing the VRA).

31. *See generally* McLeod, *supra* note 14.

32. BRENNAN CTR. FOR JUST., *supra* note 1.

process (parole, probation, and completed sentence).[33] But the broader recent trend in voting rights is less encouraging. Twenty-five states have imposed various kinds of voting restrictions since 2010, including three states that retreated on felon disenfranchisement (Iowa, Kentucky, and Florida).[34]

So, what are the prospects for a broad restoration of felon voting rights going forward? Based on the May Survey of voter attitudes on this topic, prospects for broad restoration seem limited at best and potentially ripe for retrogression at worst. As previous studies have found, our survey respondents did not favor letting felons vote while they are incarcerated – 56% were opposed to it and 27% were in favor. There also was no majority support for restoring felon voting rights before they completed their sentences: only 33% favored letting convicted felons vote at some point during the parole or probation stages of their sentences (as compared to 50% who thought otherwise).[35]

Our results also suggest that any effort to remove felon voting restrictions will likely hinge on the nature of the crime. In the May Survey, we asked respondents whether they thought various forms of disenfranchisement were "too harsh" or "appropriate." The aim of these questions was not to determine whether a respondent *favored* a particular disenfranchisement law but merely to assess whether they considered it to be a permissible punishment given the circumstances. We inquired specifically about three representative crimes – drug possession, illegal stock trading, and sexual assault – and about three types of disenfranchisement: (a) a lifetime voting ban, (b) a bar on voting while on probation and parole, and (c) a bar on voting while in prison. Figures 1(a), (b), and (c) below summarize the results of these inquiries.

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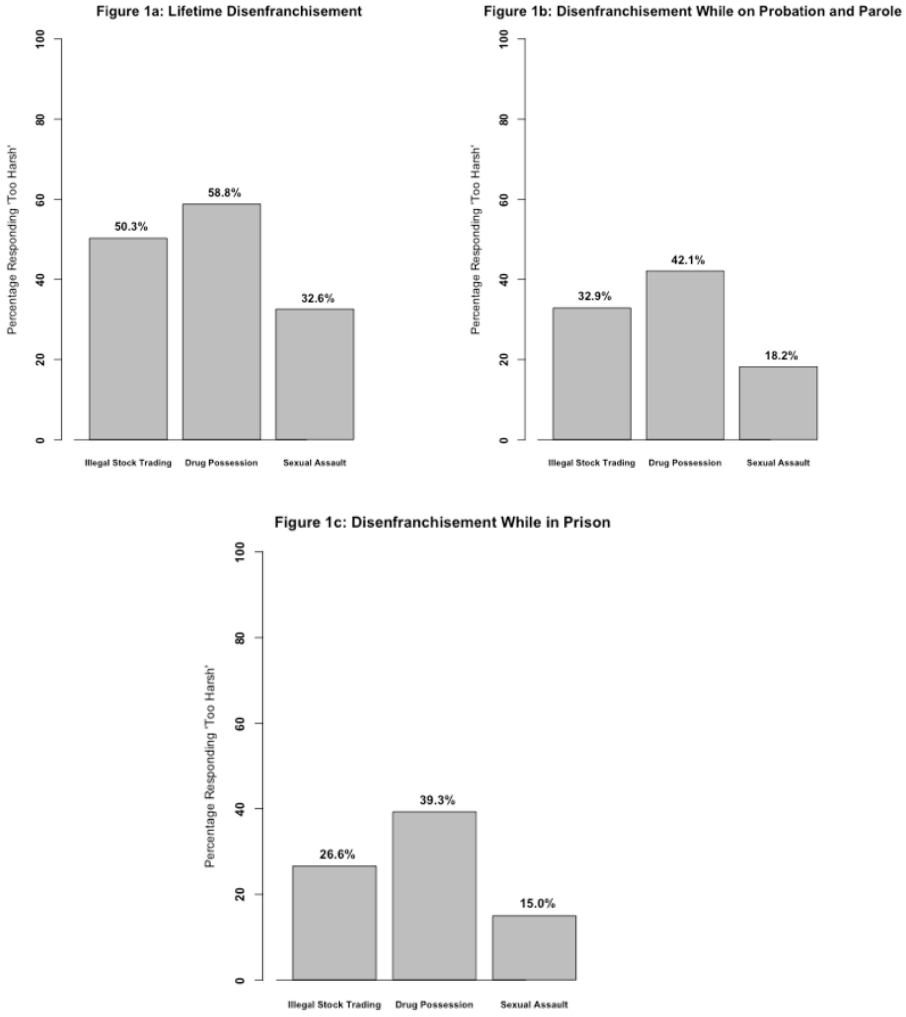
33. *Id.*

34. *See New Voting Restrictions in America*, BRENNAN CTR. FOR JUST., (Oct. 1, 2019) https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america [perma.cc/ES9S-V5Q4]; *see also* Ky. Exec. Order No. 2015-052 (Dec. 22, 2015).

35. *See supra* note 16 (figures come from our own polling). For comparable figures from other surveys, see *infra* note 36.



As this graphic implies, Americans generally do not consider disenfranchisement to be "too harsh" under most circumstances. A majority of Americans only consider permanent voting bans for drug possession and illegal stock trading to be excessively punitive. To be clear, these statistics *do not* suggest that Americans support these forms of disenfranchisement as a matter of policy. Our polling indicates that only 20% of respondents believe that ex-felons should be permanently barred from voting, which is directly in line with what older surveys have found.[36] The numbers do indicate, however, that there is

36. LEAGUE OF WOMEN VOTERS OF KENTUCKY, FELONY DISENFRANCHISEMENT IN THE COMMONWEALTH OF KENTUCKY 2 (2019); Barbara Rodriguez and Stephen Gruber-Miller, *Iowa Poll: Nearly Two-Thirds of Iowans Say Felons Should Regain Voting Rights After Completing Sentences*, DES MOINES REG. (Feb. 16, 2019, 6:00 PM),

no national consensus about the disproportionality of disenfranchisement as a general matter. Taken together with the aforementioned polling on non-permanent disenfranchisement, they further imply that the public is relatively content with laws disenfranchising felons while they serve their sentence.

In addition to some resistance to further loosening restrictions on felon voting, our polling provides evidence of partisan polarization among citizens on this issue that might give license to politicians and consultants who see potential tactical advantages in restricting felon voting rights. We asked several questions regarding this topic. One inquired about which party stood to benefit more from restoring voting rights to felons. As Table 1 below shows, our respondents selected the Democrats by a 4 to 1 margin.

TABLE 1

The Democratic Party	The Republican Party	Not Sure
47.6%	11.7%	40.7%

N = 1990

[a] Question: Some states have recently passed laws restoring voting rights to those convicted of felonies. Which party do you think has more to gain from these laws?

TABLE 2
SUPPORT FOR PERMANENT DISENFRANCHISEMENT AMONG REPUBLICANS

Support Among Those Believing Democrats Have More to Gain	Support Among Those Believing Republicans Have More to Gain	Support Among Those Who Aren't Sure Who Has More to Gain
38.5%	17.9%	24.9%

N = 525

The perception that Democrats have more to gain appears to increase Republican support for permanent disenfranchisement. As Table 2 indicates, Republicans who think that Democrats are more likely to benefit from restoring felon voting rights are 20% more likely to favor permanent disenfranchisement. In addition, when we rank-ordered policies ranging from permanent disenfranchisement to restoration of voting rights upon release, we find that party correlates significantly with the harshness of the options (see Table 3). Republicans

https://www.desmoinesregister.com/story/news/politics/iowa-poll/2019/02/17/iowa-poll-felon-voting-rights-restore-prison-crime-vote-election-2020-kim-reynolds-ia-constitution/2875580002/ [perma.cc/Z9EZ-YDN2]; Jeff Manza et al., *Public Attitudes Toward Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 281 (2004).

tended to favor options on the restriction end of the continuum while Democrats preferred the restoration end.[37]

TABLE 3
RELATIONSHIP BETWEEN PARTY, ATTITUDE, AND DISENFRANCHISEMENT OPINION

Variable	% Increase in Probability of Favoring Permanent FD	% Increase in Probability Favoring FD Until Completed Probation and Parole	% Increase in Probability Favoring FD Until Completed Parole	% Increase in Probability of Favoring FD Until Released from Incarceration
Punishment = 1	-12.242%	-4.18%	3.79%	12.63%
Ind. = 1	4.94%	5.73%	-1.27%	-9.40%
Rep. = 1	13.99%	4.62%	-4.67%	-13.94%
Punishment x Ind. = 1	-.74%	-.23%	.21%	.77%
Punishment x Rep. = 1	9.28%	1.44%	-2.76%	-7.96%
FD = Felon Disenfranchisement, Ind. = Independent, Rep. = Republican				

In sum, efforts to expand felon voting rights face serious public opinion obstacles that could prevent more than marginal changes. The prospects for legislative advances will ultimately vary by state partisanship. It will be easier to take further steps in states that lean strongly towards the Democrats and

37. Table 3 summarizes the results of an ordered logit regression of disenfranchisement policy on party and attitude towards disenfranchisement. The respondent's partisan identification (Democrat, Independent, or Republican) and opinion towards the purpose (either punishment or character) served as the independent variables, while the four policy options listed below served as the dependent variables. Since the regression coefficients from an ordered logit are difficult to interpret, we have translated them into percentages in the Table below. The reference categories (that is, what the percentages represent increases over) are "Democrat" and belief that disenfranchisement is about character, not punishment. As the statistics in row (3) suggest, Republicans were substantially more likely than other respondents to favor restrictive disenfranchisement policies. Being a Republican (as opposed to a Democrat) increased by about 14% the probability of favoring permanent disenfranchisement and lowered by nearly 14% the probability of favoring voting rights restoration upon release from prison. Another interesting relationship this Table betrays is that between opinions about the *purpose* of disenfranchisement and support for various policies. Those who considered the purpose of disenfranchisement to be punishment generally favored more liberal voting rights policies – by contrast, those who thought the purpose of disenfranchisement was to keep low character individuals away from the ballot box were much more likely to support restrictive laws. We discuss this phenomenon further in Part II.

much more difficult in solidly Republican states. The sharp partisan divide on this issue also suggests that, while some states may move forward on restoring felon voting rights, others will either stay with the status quo or could even impose more rigid restrictions. There may be more regressions in battleground states like Florida and Iowa depending on who controls the state legislature or the whims of governors with the power to take unilateral executive actions.[38] We will return to the implications of these partisan dynamics in Part III. First, however, we examine the prospects of prominent legal – rather than political – challenges to disenfranchisement practices.

PART II: THE LIMITED PROTECTION OF EIGHTH AMENDMENT CHALLENGES

In light of the recent political trends we discussed in Part I, it seems that political momentum towards restoring felon voting rights might soon stall out. The unreliability of legislative change increases the salience of potential legal avenues for relief. In this Section, we consider Eighth Amendment challenges; in the next, we discuss claims based on the VRA. Part A discusses the initial obstacle to Eight Amendment challenges: the claim that disenfranchisement does not constitute punishment and is, therefore, beyond the reach of the Eighth Amendment. Part B turns to the substance of the Eighth Amendment challenge. There, we argue that a categorical challenge to felon disenfranchisement laws would almost positively fail but that certain "gross disproportionality" claims could be tenable under the right circumstances.

A. The Threshold Question: Is Disenfranchisement Punishment?

The idea that the Eighth Amendment prohibits certain forms of felon disenfranchisement is not new. For decades, the Supreme Court of the United States has explicitly recognized that the Eighth Amendment "contains a 'narrow proportionality principle' that 'applies to noncapital sentences,'"[39] and scholars and litigants alike have sought to utilize this tool against felon disenfranchisement.[40] However, only two courts we are aware of have seriously

38. *See, e.g.*, Ky. Exec. Order No. 2015-052 (Dec. 22, 2015).

39. Ewing v. California, 538 U.S. 11, 20 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in judgment)) (plurality opinion).

40. For scholarly efforts, *see, e.g.*, Sarah Grady, *Civil Death is Different: An Examination of a Post-Graham Challenge to Felon Disenfranchisement Under the Eighth Amendment*, 102 J. CRIM. L. & CRIMINOLOGY 441 (2012); Carl N. Frazier, Note, *Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them*, 95 KY. L.J. 481, 492 (2007); Karlan, *supra* note 7, at 22. For court cases, *see, e.g.*, Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967); Thompson v. Alabama, 293 F. Supp. 3d 1313, 1329 (M.D. Ala. 2017); Thiess v. State

analyzed the substance of this claim;[41] the rest have concluded that the Eighth Amendment is not applicable to these laws because felon disenfranchisement is not punitive in nature.[42]

Crucially, however, the courts reaching this latter conclusion have rarely given this question serious consideration. Instead, most have relied on cursory citations to ambiguous statements by appellate courts, particularly the Supreme Court's dicta in *Trop v. Dulles*.[43] In that case, Chief Justice Warren suggested that if the legislative purpose of disenfranchisement "is to designate a reasonable ground of eligibility for voting" a law disenfranchising felons could stand.[44] Often ignored, however, is that in the immediately preceding sentence, he affirmed that if disenfranchisement was "imposed for the purpose of punishing [felons], the statutes authorizing [it] . . . would be penal," and by implication subject to Eighth Amendment scrutiny.[45] To the extent that courts place any reliance on this non-binding language – a potentially dubious proposition in light of contemporary understandings of voting rights[46] – the clear path forward is to examine the legislative intent behind disenfranchisement laws to determine whether they are meant to punish. The modern "intent-effects" doctrine – which establishes that a legislatively imposed penalty must be considered punishment if punishment was the legislative intent – confirms the necessity of this endeavor.[47]

Yet courts have almost uniformly ignored this task when presented with Eighth Amendment claims. In its influential treatment of the subject in *Green v. Board of Elections*,[48] the U.S. Court of Appeals for the Second Circuit misstated Chief Justice Warren's assessment of felon disenfranchisement. Citing *Trop*, the Second Circuit concluded that "[d]epriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to

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Admin. Bd. of Elections Laws, 387 F. Supp. 1038, 1041–42 (D. Md. 1974); Kronlund v. Honstein, 327 F. Supp. 71, 74 (N.D. Ga. 1971).

41. *Green*, 380 F.2d at 450 (in dicta); *Thiess*, 387 F. Supp. at 1041–42.

42. *Kronlund*, 327 F. Supp. at 74; *Green*, 380 F.2d at 450; Fernandez v. Kiner, 673 P.2d 191, 193 (Wash. Ct. App. 1983). In *Thompson*, the court deferred discussion of this question to a later stage of the case. 293 F. Supp. 3d at 1329.

43. 356 U.S. 86, 96–97 (1958).

44. *Id*.

45. *Id.* at 96.

46. Karlan, *supra* note 7 at 1152–55.

47. *Smith v. Doe*, 538 U.S. 84, 92 (2003). As *Smith* makes clear, legislative intent is not the only means by which a law might be deemed punishment – if the statutory scheme is "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)) (internal quotation marks omitted). However, since the legislative purpose was demonstrably punishment in many of the cases discussed here, we focus primarily on intent.

48. 380 F.2d 445 (2d Cir. 1967)

regulate the franchise.'"[49] Subsequent decisions have either cited *Green's* misreading or repeated the mistake. For example, in *Kronlund v. Honstein*,[50] the court rejected the Eighth Amendment claim with a single inaccurate sentence: "the Supreme Court has held that disenfranchisement is a non-penal exercise of a State's power to regulate the vote and is not cruel and unusual punishment."[51] Likewise, the courts in *El-Amin v. McDonnell*[52] and *King v. City of Boston*[53] considered the issue unworthy of a published opinion and declined to engage in the careful analysis of legislative intent necessary to decide the issue.[54] It is impossible to know why these courts eschewed more comprehensive inquiries. Given that the defendants in both cases served lengthy prison terms, perhaps the courts thought the Eighth Amendment claims would be substantively weak and preferred to dismiss the claim via a less labor-intensive route.[55] Whatever the underlying reason for these abbreviated discussions, the result is that little judicial analysis considers whether particular state disenfranchisement laws were meant to punish.[56]

This confusion about the purpose of disenfranchisement laws has trickled down to the general population. As part of the May Survey, we asked respondents the following question: "Some states have laws that prevent individuals convicted of felonies from voting. Which of the following do you think better describes the purpose of these laws?" The available answers were "To punish individuals for committing crimes" and "To ensure that only individuals with appropriate moral and cognitive abilities decide the outcome of elections." Of the 1,970 respondents, 49% selected the former and 51% the latter, indicating that, on the whole, Americans are unsure of the goals of disenfranchisement. Those who paid the most attention to politics were more convinced of the penal purpose of disenfranchisement (Figure 2) but only marginally more so.

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49. *Id.* at 450 (quoting Trop v. Dulles, 356 U.S. 86, 97 (1958)).

50. 327 F. Supp. 71 (N.D. Ga. 1971).

51. *Id.* at 74.

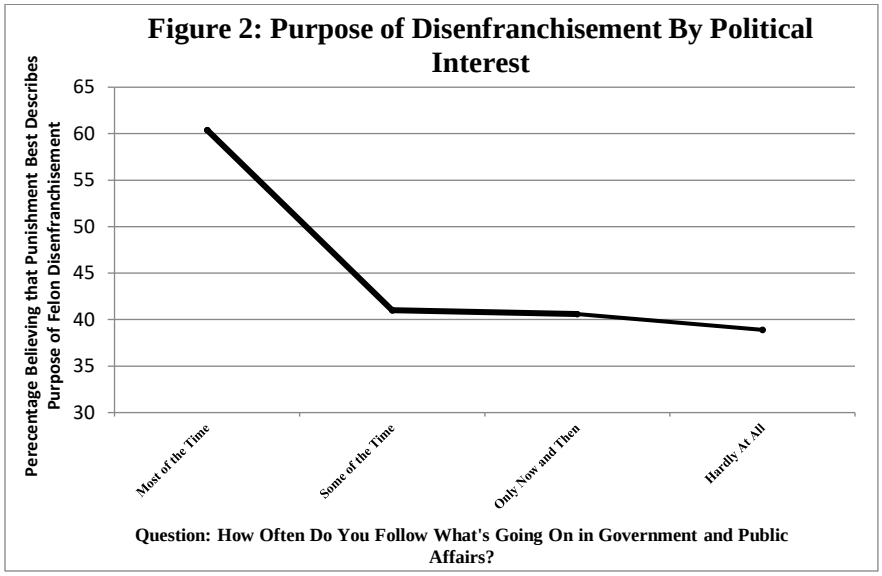
52. El-Amin v. McDonnell, No. 3:12–cv–00538–JAG, 2013 WL 1193357 (E.D. Va. 2013).

53. King v. Boston, No. Civ. A.04–10156–RWZ, 2004 WL 1070573 (D. Mass 2004).

54. *El-Amin*, 2013 WL 1193357, at *6 (citing *Green*, 380 F.2d at 450); *King*, 2004 WL 1070573, at *1; *see also Fernandez*, 673 P.2d at 212–13.

55. *El-Amin*, 2013 WL 1193357 at *1; *King*, 2004 WL 1070573 at *1.

56. *But see* Simmons v. Galvin, 575 F.3d 24, 42–45 (1st Cir. 2009) (holding that a newly imposed law barring incarcerated felons from voting was not punitive for the purposes of the Ex Post Facto clause of the Constitution); *King*, 2004 WL 1070573 at *3–4 (briefly considering whether a Massachusetts law prohibiting voting by incarcerated felons was penal for the purpose of Bill of Attainder analysis). It is also worth mentioning, however, that courts have extensively considered potentially discriminatory purpose of felon disenfranchisement laws in the context of the Fourteenth Amendment. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 224 (1985).



Despite this lack of clarity among jurists and the public regarding the purpose of disenfranchisement laws, the history of these provisions in some states provides clear evidence of their punitive nature. Consider Kentucky, which imposes lifetime disenfranchisement on all felons. Kentucky originally enacted Section 145 – a state constitutional provision denying felons the vote – as part of its 1891 constitution.[57] Section 145's adoption came after a lengthy debate during Kentucky's 1890 constitutional convention. Delegates were split as to whether *all* crimes should result in disenfranchisement or merely those that traditionally go under the heading of crimen falsi.[58] Throughout the discussion, speakers on both sides of the divide repeatedly affirmed that disenfranchisement was a form of punishment. Considering whether disenfranchising those who committed manslaughter would serve as an obstacle to convictions, Delegate Bullitt worried:

> If you augment the punishment to that extent, do you not decrease the chances of conviction? Say that a man was endeavoring to cowhide me, and I should shoot him; you give me the punishment, and say that that

57. KY. CONST. § 145.1

58. KY., OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND, OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 1733, 1866–67 (E.P. JOHNSON ed., 1891), https://babel.hathitrust.org/cgi/pt?id=njp.32101065310581;view=1up;seq=572 [perma.cc/C7SA-PZVE] [hereinafter KY. OFFICIAL REPORT]. "Crimen falsi" refers to "crime[s] of falsehood or deceit" and includes offenses like perjury, fraud, and embezzlement. Stuart Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(A)(2) and the Origins of* Crimen Falsi, 90 J. CRIM. L. & CRIMINOLOGY 1087, 1090–91 (2000).

> I should be disenfranchised, if I should be found guilty; do you not decrease the chances of convicting me?[59]

Similarly, arguing that only crimes against society (rather than those against individuals) should result in disenfranchisement, Delegate Brontson declared,

> [A] person should not be disqualified in the exercise of the right of suffrage, solely because some great wrong that he has done to an individual . . . but if a crime be of such character as to affect society itself . . . we might say, that a particular punishment for that crime shall be a disqualification to exercise the right as a member of society.[60]

Opposing Bronston and advocating for blanket disenfranchisement of felons, Delegate Sachs nevertheless indicated that he thought of disenfranchisement as punishment: "They say we could not obtain enforcement of the law if you had this additional penalty [disenfranchisement]. That is another fallacy. The same argument might be applied to punishment for every crime in the category."

Later in the deliberation, the convention again expressed its conviction that disenfranchisement was punishment. Some members of the convention wished to extend disenfranchisement and to implement a prohibition on holding office to all those already convicted of a felony as of 1890;[61] the existing state constitution only imposed these disabilities on those convicted of crimen falsi.[62] Delegate Carroll objected to this proposition, arguing that it constituted an unconstitutional ex post facto law.[63] One proponent of the measure, Delegate Straus, responded "The gentleman is mistaken about that being an *ex post facto* law. We do not impose any penalty upon anybody."[64] Carroll's position carried the day, however, and the convention defeated the retroactive measure.[65] Notably, the ex post facto argument was the only one publicly offered against the provision, providing a strong indication that the convention viewed disenfranchisement as a penalty.[66]

In other states with stringent disenfranchisement laws, the punitive nature of the provision is explicit. For example, in Virginia, the state constitutional

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59. KY. OFFICIAL REPORT, *supra* note 58, at 1866–67.

60. *Id.* at 1866.

61. *Id.* at 2073.

62. KY. CONST. OF 1850, art. VIII § 4 (1850).

63. KY. OFFICIAL REPORT, *supra* note 58, at 2073. Asked, "[y]our position is, then, that it [disqualification from holding office and the franchise] is a penalty?" Carroll replied "Undoubtedly." *Id.* at 2074. The convention adopted Carroll's stance moments later. *Id.*

64. *Id.* at 2073.

65. *Id.* at 2074.

66. *Id.* at 2073–74.

provision permanently disenfranchising felons can only be punitive;[67] after all, the 1870 federal legislation readmitting Virginia to representation in Congress prohibits it from disenfranchising voters for reasons *other than* punishment for felonies.[68] Disenfranchisement provisions in the state constitutions of other former members of the Confederacy have the same purpose because those states were readmitted to Congress on the same terms as Virginia.[69]

The foregoing considerations suggest that disenfranchisement is punitive under at least some state regimes. The question still remains, however, as to whether it is an "excessive sanction" within the meaning of the Eighth Amendment.

B. The Substantive Question: Is Lifetime Disenfranchisement "Excessive"?

The contemporary Supreme Court has generally divided Eighth Amendment claims into two types: (1) "categorical" challenges and (2) "gross disproportionality" challenges.[70] The former asks the Court to impose a categorical rule against a sentencing practice while the latter claims that a particular sentence is "excessive" in the context of a specific crime.[71] Previous commentators have sought to fit attacks on felon disenfranchisement into both frameworks;[72] however, as we will discuss below, only the second route seems promising.

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67. VA. CONST. art. II, § 1. The two most recent Governors of Virginia have abrogated the effect of this provision by individually restoring the voting rights of all felons who have completed probation and parole. Vann Newkirk, *How Letting Felons Vote Is Changing Virginia*, THE ATLANTIC (Jan 8, 2018), https://www.theatlantic.com/politics/archive/2018/01/virginia-clemency-restoration-of-rights-campaigns/549830/ [perma.cc/2KK8-HE2F].

68. Act to Admit Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62, 41st Cong. (2d Sess. 1870).

69. *See* Act Relating to Georgia, ch. 299, 16 Stat. 363, 41st Cong. (2d Sess. 1870); Act to Admit Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80, 41st Cong. (2d Sess. 1870); Act to Admit Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67, 41st Cong. (2d Sess. 1870); Act to Admit North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to Representation in the Congress of the United States, ch. 70, 15 Stat. 73, 40th Cong. (2d Sess. 1868); Act to Admit Arkansas to Representation in the Congress of the United States, ch. 70, 15 Stat. 72, 40th Cong. (2d Sess. 1868).

70. Graham v. Florida, 560 U.S. 48, 59–60 (2010).

71. *Id.*

72. *See, e.g.*, John Ghaelian, *Restoring the Vote: Former Felons, International Law, and the Eighth Amendment*, 40 HASTINGS CONST. L.Q. 757, 801 (2013); Grady, *supra* note 40, at 452–58; 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, 204 (2002).

i. The Categorical Challenge

Categorical challenges under the Eighth Amendment are probably more familiar to most Americans than gross disproportionality claims. According to the taxonomy established by Justice Kennedy in *Graham v. Florida*, categorical challenges tend to come in two varieties: the first concerns "the nature of the offense," while the second concerns "characteristics of the offenders."[73] *Kennedy v. Louisiana*[74] and its predecessors exemplify "nature of the offense"-type rules; they prohibit capital punishment for certain non-homicide offenses.[75] Meanwhile, classic "characteristics of the offender" cases include *Atkins v. Virginia*,[76] *Roper v. Simmons*,[77] and *Ford v. Wainwright*[78] – those rulings categorically barred execution of those with serious intellectual disabilities, those who were under eighteen when the crime was committed, and the insane. Categorical challenges might also seek to impose rules against particular types of punishment. For instance, the Supreme Court has indicated that the U.S. government generally cannot impose torture or denaturalization as punishment for crimes.[79]

The claim that states can *never* authorize disenfranchisement as punishment would fall squarely in the realm of a categorical challenge. A few commentators have gone down this path, arguing that the Eighth Amendment categorically prohibits at least ex-felon disenfranchisement.[80] However, these claims are, frankly, untenable. In cases where it is asked to impose a categorical Eighth Amendment rule, the Supreme Court generally demands at least some evidence of a "national consensus" against the challenged practice.[81] Here, our surveys make clear that no such consensus exists.

The "objective indicia" the Court typically looks to in the case of categorical challenges further suggest that such a tactic would be futile.[82] While only two states permanently disenfranchise all felons, forty-eight prevent them from voting at least while incarcerated and nine continue to impose lifetime voting

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73. *Graham*, 560 U.S. at 60.

74. 554 U.S. 407 (2008).

75. *Id.* at 446–47 (prohibiting capital punishment for the non-homicide rape of a child); Enmund v. Florida, 458 U.S. 782, 797 (1981) (overturning a capital sentence for felony murder when the defendant did not kill anyone, attempt to kill anyone, or intend for lethal force to be used); Coker v. Georgia, 433 U.S. 584, 597 (1977) (eliminating the death penalty for the non-homicide rape of an adult woman).

76. 536 U.S. 304, 321 (2002) (exempting individuals with severe intellectual disabilities from execution).

77. 543 U.S. 551, 568 (2005) (ruling that capital punishment for minors violates the Eighth Amendment).

78. 477 U.S. 399, 401 (1986) (forbidding the execution of the insane).

79. Baze v. Rees, 553 U.S. 35, 48–49 (2008).

80. *See* Ghaelian, *supra* note 72, at 801; Thompson, *supra* note 72, at 204.

81. Graham v. Florida, 560 U.S. 48, 61 (2010).

82. *Id.* at 62.

bans on those convicted of certain violent crimes.[83] While undoubtedly "[t]here are measures of consensus other than legislation,"[84] the May Survey further suggests that an Eighth Amendment assault on felon disenfranchisement "as it applies to an entire class of offenders who have committed a range of crimes" would be unavailing.[85]

ii. The Gross Disproportionality Challenge

In contrast to a categorical challenge, a gross disproportionality claim could potentially prevail under the right circumstances. In considering whether a particular sentence is grossly disproportionate to a crime, the Supreme Court employs a two-step test.[86] First, it compares the gravity of the offense and the severity of the sentence.[87] If this initial comparison leads the Justices to believe that the sentence is grossly disproportionate to the crime, they proceed to compare it to "the sentences imposed on other criminals in the same jurisdiction" and "the sentences imposed for commission of the same crime in other jurisdictions."[88]

The disenfranchisement laws in Kentucky and Iowa – which permanently bar all felons from voting[89] – seem particularly vulnerable to challenge by a first-time offender convicted of a relatively minor, non-violent felony. Examples of minor, non-violent felonies in Kentucky include cultivation of marijuana,[90] possession of coca leaves,[91] lying to obtain a medical prescription,[92] and passing a "no-account" check for $500.[93] As we discuss below, revoking the franchise for life could potentially be grossly disproportionate to the seriousness of these offenses under the Supreme Court's test.

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83. BRENNAN CTR. FOR JUST., *supra* note 1.

84. Kennedy v. Louisiana, 554 U.S. 407, 433 (2008).

85. *Graham*, 560 U.S. at 61–62.

86. Ewing v. California, 538 U.S. 11, 22 (2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 1004–05 (1991) (Kennedy, J., concurring in part and in judgment).

87. *See, e.g.*, *Ewing*, 538 U.S. at 22; *Harmelin*, 501 U.S. at 1005.

88. *Ewing*, 538 U.S. at 22 (quoting Solem v. Helm, 463 U.S. 277, 279 (1983)). When Justice Powell first applied this form of analysis it was considered a three-factor test rather than a two-step process. Solem v. Helm, 463 U.S. 277, 290–92 (1983). However, Justice Kennedy's controlling opinion in *Harmelin* altered the procedure such that the Court only reaches the second step if it makes the initial inference of gross disproportionality. *Harmelin*, 501 U.S. at 1004–05 (Kennedy, J. concurring in part and in judgment); United States v. Rivera-Ruperto, 852 F.3d 1, 16 (1st Cir. 2017).

89. KY. CONST. § 145.1; Griffin v. Pate, 884 N.W.2d 182, 205 (Iowa 2016).

90. KY. REV. STAT. ANN. § 218A.1423(2) (West 2018).

91. § 218A.1415(1).

92. § 218A.140(1).

93. KY. REV. STAT. ANN. §§ 514.040(1)(e); 514.040(8)(a) (West 2018).

a. Step One: Comparing the Gravity of the Offense and the Severity of the Sentence

In cases applying the aforementioned two-step approach, the Supreme Court ostensibly takes into account "all the circumstances in a particular case."[94] However, in practice it has consistently focused on the following factors: (1) the offender's actual behavior;[95] (2) the offender's criminal history;[96] (3) the state's penological purpose in imposing the punishment;[97] and (4) the length and severity of the punishment imposed.[98] In the hypothetical case of a first-time, non-violent offender in Kentucky, considerations (1) and (2) would point towards a finding of disproportionality. The Supreme Court has been unequivocal that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence."[99] It has described passing a bad check – a Class D felony in Kentucky[100] – as "one of the most passive felonies a person could commit."[101] Should such a crime be a person's only felony conviction, the Court's precedents dictate that the punishment would have to be limited.

The Supreme Court's most recent discussion of the relationship between the Eighth Amendment and penological purpose (outside the categorical context)[102] was *Ewing v. California*, a challenge to California's three-strikes law.[103] In the controlling opinion for the Court, Justice O'Connor devoted notable attention to the state's deterrence and incapacitation interests in imposing a mandatory sentence of twenty-five years to life on certain recidivists.[104] The decision was careful to emphasize the relationship between these justifications and the sentence imposed:

94. Graham v. Florida, 560 U.S. 48, 59 (2010).

95. Ewing v. California, 538 U.S. 11, 28 (2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 1001–04 (1991) (Kennedy, J. concurring in part and in judgment); Solem v. Helm, 463 U.S. 277, 296 (1983); Rummel v. Estelle, 445 U.S. 263, 265–66, 269, 276, 280–81 (1980).

96. *Ewing*, 538 U.S. at 29–30; *Harmelin*, 501 U.S. at 1002 (Kennedy, J. concurring in part and in judgment); *Solem*, 463 U.S. at 287, 292–93; *Rummel*, 445 U.S. at 276, 278.

97. *Ewing*, 538 U.S. at 25–28; *Harmelin*, 501 U.S. at 998–99 (Kennedy, J. concurring in part and in judgment); *Solem*, U.S. 277 at 296–97; *Rummel*, 445 U.S. at 276.

98. *Ewing*, 538 U.S. at 24, 30; *Harmelin*, 501 U.S. at 1005 (Kennedy, J. concurring in part and in judgment); *Solem*, 463 U.S. at 297; *Rummel*, 445 U.S. at 278, 280–81.

99. *Solem*, 463 U.S. at 292–93.

100. KY. REV. STAT. ANN. §§ 514.040(1)(e); 514.040(8)(a) (West 2018).

101. *Solem*, 463 U.S. at 296 (internal quotation marks omitted).

102. The Court has, of course, discussed penological purpose in Eighth Amendment cases involving categorical rules. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 472–474 (2012); Graham v. Florida, 560 U.S. 48, 71–75 (2010).

103. *Ewing*, 538 U.S. at 25–28.

104. *Id.* at 26–27.

> When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime . . . [t]o be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.[105]

In the same breath, however, Justice O'Connor seemed to acknowledge the necessity of *some* connection between crime and punishment if a state law is to survive Eighth Amendment scrutiny.[106] The state must have a "reasonable basis for believing that [the specified punishment] 'advance[s] the goals of [its] criminal justice system in any *substantial* way.'"[107] The use of the word "substantial" here is significant given its common use across different areas of constitutional law. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[108] the Court (and Justice O'Connor in particular) deliberately used "substantial" to describe the sort of obstacle to abortion access that would violate the Fourteenth Amendment.[109] Similarly, in the process of creating intermediate scrutiny in *Craig v. Boren*,[110] the Court used "substantial" to characterize the required relationship between gender-based classification and the state's interest.[111] Across these areas of constitutional law and others,[112] "substantial" stands in contrast to more minimalist words like "rational."[113] Accordingly, Justice O'Connor's decision to describe as "substantial" the amount that a seemingly harsh punishment must advance the state's penological goal suggests that the state needs more than a nominal interest in enforcing the challenged sentence.

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105. *Id.* at 25, 30.

106. *Id.* at 25.

107. *Id.* at 28 (quoting Solem v. Helm, 463 U.S. 277, 297 n.22 (1983)) (emphasis added) (plurality opinion). The Court's initial use this language in *Solem* referred *only* to the degree to which a particular sentence must advance the state's interest, *not* to the amount of deference a state receives in impose certain punishments. *Solem*, 463 U.S. at 297 n.22.

108. 505 U.S. 833 (1992).

109. *Id.* at 877.

110. 429 U.S. 190 (1976).

111. *Id.* at 197.

112. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic class of activities that have a *substantial* effect on interstate commerce.") (emphasis added) (internal quotation marks omitted).

113. *See, e.g.*, Turner v. Fouche, 396 U.S. 346, 363 (1970) (no "rational" state interest in a requirement that members of board of education be freeholders).

Of course, as commentators have repeatedly pointed out,[114] it is hard to identify *any* interest the state has in lifetime disenfranchisement of first-time offenders. Courts have traditionally identified four rationales for punishment: incapacitation, deterrence, rehabilitation, and retribution.[115] Among these, rehabilitation can be dismissed out-of-hand. Permanently barring an ex-felon from voting does nothing to make her a "better person" – indeed, it reinforces her sense that she is unwelcome in civil society. Consequently, the prevailing scholarly consensus, acknowledged by at least one court,[116] is that disenfranchisement is associated with an *increase* in recidivism.[117] The deterrence argument is similarly fanciful. The federal courts to consider the issue have uniformly concluded that disenfranchisement laws serve no deterrent purpose.[118] Moreover, the group of adults most likely to be convicted of crimes in this country – young men[119] – is precisely the group least likely to exercise the franchise.[120] Politicians would be hard-pressed to imagine a less effective means of deterring potential offenders.

Incapacitation, meanwhile, was the actual justification propounded by politicians in Kentucky for disenfranchisement. Advocates for permanent disenfranchisement of all felons at the 1890 convention repeatedly referred to this

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114. *See, e.g.*, Karlan, *supra* note 7, at 1166–67; Alec Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United State*s, 2002 WIS. L. REV. 1045, 1105–08 (2002).

115. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 472–74 (2012); Graham v. Florida, 560 U.S. 48, 71–75 (2010); Ewing v. California, 538 U.S. 11, 25–28 (2003).

116. *See* Griffin v. Pate, 884 N.W.2d 182, 202–03 (Iowa 2016); *see also id.* at 209–10 (Hecht, J., dissenting).

117. *See* Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 414–16 (2012); Regina Austin, *The Shame of It All: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 182–84 (2004); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 214–15 (2004); Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 123 (2003); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 307 (2000).

118. Simmons v. Galvin, 575 F.3d 24, 45 (1st Cir. 2009) (evaluating disenfranchisement under the *Mendoza-Martinez* factors and making no mention of any deterrence value); King v. Boston, No. Civ.A.04–10156–RWZ, 2004 WL 1070573, at *1 (D. Mass. May 13, 2004) (disenfranchisement "certainly does not further the traditional aims of punishment; namely, deterrence and rehabilitation.").

119. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUST., AGING OF THE STATE PRISON POPULATION, 1993–2013 10 (2016).

120. Hannah Hartig, *In Year of Record Midterm Turnout, Women Continued to Vote at Higher Rates Than Men*, PEW RESEARCH CTR. (May 3, 2019) https://www.pewresearch.org/fact-tank/2019/05/03/in-year-of-record-midterm-turnout-women-continued-to-vote-at-higher-rates-than-men/ [perma.cc/52DV-AEPR].

punishment as necessary to safeguard the "purity of the ballot."[121] The prevailing notion seems to have been that allowing tainted individuals like felons to vote would somehow injure the body-politic by corrupting the collective judgement rendered.[122] Disenfranchisement was thus the only means of protecting virtuous citizens. Common though that idea may have once been, it has since been roundly rejected by contemporary jurists. Starting as early as *Carrington v. Rash*,[123] the Supreme Court has maintained that "'[t]he exercise of rights so vital to the maintenance of democratic institutions,' cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents"[124] and that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[125] Put plainly, states cannot keep felons from the ballot because of the political choices they might make.

Finally, the state's retributive interest in punishment is directly tied to the moral culpability of the crime and the satisfaction the public receives from seeing the offender suffer.[126] It is "an attempt to express the community's moral outrage or [] an attempt to right the balance for the wrong to the victim."[127] When the public does not perceive the defendant's punishment as deserved, the state's retributive justification for imposing it evaporates.[128] In the hypothetical case at hand, our polling makes abundantly clear that society does not believe low-level offenders deserve permanent disenfranchisement. As mentioned above, less than one-fifth of Americans believe that felons should be permanently disenfranchised, and nearly 60% believe that a lifetime voting ban is "too harsh" a consequence for drug possession. The figures are more extreme among those who consider disenfranchisement to be punishment; less than 15% favor permanent disenfranchisement, and 70% believe that it is an

121. KY. OFFICIAL REPORT, *supra* note 58, at 1864.

122. *Id.*

123. 380 U.S. 89 (1965).

124. *Id.* at 94.

125. *Id.*; *see also* Dunn v. Blumstein, 405 U.S. 330, 355 (1972); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

126. *See, e.g.*, Hall v. Florida, 572 U.S. 701, 709 (2014) ("[t]he diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment."); Kennedy v. Louisiana, 554 U.S. 407, 442 (2008) ("goal of retribution . . . reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused"); Tison v. Arizona, 481 U.S. 137, 149 (1987) ("[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.").

127. Roper v. Simmons, 543 U.S. 551, 571 (2005).

128. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) (explaining that the state's retributive interest stems from the necessity of "channeling" the vengeful instincts of citizens in the face of "particularly offensive conduct"); *cf.* Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring in judgment) (justifying retribution as an aim of punishment by describing the societal instability that might result without it).

excessive punishment for drug possession. Limiting the sample to just those from Iowa and Kentucky – the two states that impose lifetime voting bans for all felonies – does not significantly alter the results. A mere 24% of residents in those states favor permanent disenfranchisement (which accords with numbers from state-specific polls),[129] and 65% believe it is "too harsh" when imposed for drug possession. Collectively, these figures make clear that there is no retributive case for permanent disenfranchisement of small-time offenders.

Thus far in our comparison of the gravity of the crime to the severity of the sentence, we have focused on the first half of the equation with particular emphasis on the offender's actual behavior, her criminal history, and the state's penological purpose in imposing the punishment. However, it is important to keep in mind the harshness of a lifetime ban on voting. Suffrage is a fundamental right guaranteed by the Constitution.[130] It is all the more zealously guarded because it is "preservative of all other basic civil liberties and political rights."[131] Justices have variously described voting as an "extraordinary right,"[132] "of the most fundamental significance,"[133] and as "the essence of a democratic society."[134] These paeans to the franchise imply that restrictions on voting impose a greater constitutional burden than other restrictions associated with felony convictions.[135]

Social science research affirms the toll that voting bans take on ex-offenders. Disenfranchisement contributes to the stigmatization of these individuals by reducing their ability to participate in civic affairs.[136] In some areas, individuals who do not vote are subject to scorn.[137] Indeed, political scientists have convincingly demonstrated that social pressure has an outsized impact on voter turnout,[138] and shaming non-voters has become an explicit campaign tactic on

129. *See supra* note 36 and accompanying text.

130. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. at 210 (Souter, J., dissenting); Harper v. Virginia State Bd. of Elections, 83 U.S. 663, 670 (1966).

131. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

132. Plyler v. Doe, 457 U.S. 202, 234 (1982) (Stewart, J., concurring).

133. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979).

134. Rosario v. Rockefeller, 410 U.S. 752, 764 (1973) (Stewart, J., dissenting).

135. These disabilities often include ineligibility for public housing and other benefits, disbarment from various professional occupations, and prohibitions on firearm ownership, among others. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW 57, 144–54, 189–90 (2010) (discussing the civil disabilities that apply to felons in the United States); Austin, *supra* note 117, at 176.

136. *See, e.g.*, Austin, *supra* note 117, at 176–77.

137. *See* Alan S. Gerber et al., *Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment*, 102 AM. POL. SCI. REV. 33, 38–39 (2008) (demonstrating that the threat of revealing an individual's failure to vote to neighbors increases turnout); Austin, *supra* note 117, at 177.

138. Gerber et al., *supra* note 137, at 39.

the part of some politicians.[139] Lifetime bans on voting ensure that ex-felons in Kentucky and Iowa are perpetually subject to this civil death.

That the governors of these states are empowered to restore the voting rights of disenfranchised individuals does not diminish the severity of this punishment.[140] As discussed in *Solem*, the possibility of executive clemency does not redeem an otherwise unconstitutional sentence.[141] Moreover, relatively few disenfranchised individuals in Kentucky and Iowa ever have their rights restored by the states' chief executives. In Kentucky, about 312,000 adults were barred from voting as of 2016.[142] Incumbent Governor Matt Bevin has restored the voting rights of 981 of those individuals during his three years in office.[143] Another 1,663 have had minor felony convictions expunged via a 2016 law;[144] however, the process takes several months, costs $540, and only

139. David Weigel, *Cruz Campaign Accuses Rubio of Hypocrisy on 'Social Pressure' Voter Mail*, WASH. POST (Jan. 31, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/01/31/cruz-campaign-accuses-rubio-of-hypocrisy-on-social-pressure-voter-mail/?utm_term=.956f53e7bef5 [perma.cc/94LX-MRNC.].

140. KY. CONST. § 145(1); IOWA CONST. art. IV, §16.

141. Solem v. Helm, 463 U.S. 277, 301–03 (1983).

142. THE SENT'G PROJECT, *supra* note 25.

143. Adam Beam, *Report: More Than 312,000 Felons Can't Vote Kentucky*, WCPO.COM (Jan 29, 2019, 5:43 PM), https://www.wcpo.com/news/government/elections-local/report-more-than-312-000-felons-cant-vote-kentucky [perma.cc/VH4Z-274T].

144. Michael Wines, *Why So Many Kentuckians Are Barred from Voting on Tuesday, and for Life*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2018/11/04/us/felony-vote-disenfranchisement-kentucky-florida.html [perma.cc/L5X7-PMGU].

applies to a subset of Class D offenses.[145] In Iowa, the disenfranchised population was about 52,000 in 2016;[146] only seventeen people even bothered applying for a gubernatorial restoration of voting rights in 2015.[147] In short, disenfranchisement is effectively permanent in these states.

The foregoing considerations strongly suggest that for a first-time offender convicted of a relatively minor felony in Kentucky, lifetime disenfranchisement would constitute "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[148] The circumstances the Supreme Court often takes into account when making this comparison – (1) the offender's actual behavior; (2) the offender's criminal history; (3) the state's penological purpose in imposing the punishment; and (4) the length and severity of the punishment imposed – uniformly point towards that conclusion.[149] Accordingly, we now compare "the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions" in order to confirm this initial judgment.[150]

b. Step Two: Comparative Analysis

The first component of the Court's comparative analysis examines the relationship between the sentence imposed for the crime at issue and the sentences imposed for more serious offenses in the same state.[151] According to the Court in *Solem*, "If more serious crimes are subject to the same penalty, or

145. *House Bill 40: Felony Expungement*, KY. CT. OF JUST., https://courts.ky.gov/felonyexpungement/Pages/default.aspx [perma.cc/S4BM-7HWZ] (last visited July 6, 2019). Numerous non-violent, relatively minor offenses – including selling nine ounces of marijuana, KY. REV. STAT. ANN. § 218A.1421 (West 2019), trafficking in cold medicine, KY. REV. STAT. ANN. § 218A.1414 (West 2019), making a false statement to obtain a credit card, KY. REV. STAT. ANN. § 434.570 (West 2019), second-degree burglary, KY. REV. STAT. ANN. § 511.030 (West 2019), tampering with public records, KY. REV. STAT. ANN. § 519.060 (West 2019), first-degree bail jumping, KY. REV. STAT. ANN. § 520.070 (West 2019), fleeing the police, KY. REV. STAT. ANN. § 520.095 (West 2019), making a false statement in an official proceeding, KY. REV. STAT. ANN. § 523.020 (West 2019), promoting prostitution, KY. REV. STAT. ANN. § 529.040 (West 2019), and incest, KY. REV. STAT. ANN. § 530.020 (West 2019) – are not eligible for expungement.

146. THE SENT'G PROJECT, *supra* note 25.

147. David Pitt, *Iowa Simplifies Voting Rights Restoration Form for Felons*, AP NEWS (Apr. 27, 2016) https://apnews.com/887edea415284232b6ab12e074e233d4 [perma.cc/6NNJ-55NK].

148. Harmelin v. Michigan, 501 U.S. 957, 960 (1991) (Kennedy, J., concurring in judgment).

149. *See, e.g.*, *id.* at 998–99; Solem v. Helm, 463 U.S. 277, 290–91 (1983).

150. Graham v. Florida, 560 U.S. 48, 60 (2010) (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991)).

151. *Solem*, 463 U.S. at 291.

to less serious penalties, that is some indication that the punishment at issue may be excessive."[152]

In Kentucky, lifetime disenfranchisement is imposed on *all* felons, regardless of severity.[153] An individual convicted of selling nine grams of marijuana is disenfranchised to exactly the same extent as one convicted of murder, sexual assault, or armed robbery.[154] As the Court has often reiterated, the fact that a far less morally culpable crime receives the same punishment in Kentucky as heinous offenses indicates that the former sentence is excessive.[155]

The second component of the comparative analysis is more involved and helps the Court to determine whether "evolving standards of decency" render a particular sentence excessive.[156] At this stage in the inquiry, the Court traditionally compares the number of states that engage in a particular sentencing practice to the number that have rejected it. In recent years, however, the Court has considered two additional factors when making its assessment. In *Graham*, Justice Kennedy's majority opinion acknowledged that "actual sentencing practices are an important part of the Court's inquiry into consensus," and took into account "how rare" the challenged sentence (life-without-parole for juveniles guilty of non-homicide crimes) was in practice.[157] Accordingly, the *Graham* Court ruled that life-without-parole was an excessive punishment for juveniles not convicted of murder, even though thirty-seven states theoretically allowed it.[158] More controversially, the Court has recognized the relevance of sentencing practices in similarly situated *countries*, though this sort of evidence is generally entitled to less weight.[159]

Here, all three considerations militate in favor of finding an Eighth Amendment violation. The first factor does so dramatically. Figure 3 tracks the number of states permitting lifetime disenfranchisement for a first drug offense in the years since the Court turned away an Equal Protection challenge to the practice in *Richardson v. Ramirez*. In 1974, the year that case was decided, twenty-four states had such laws on the books; today, that number is two.[160]

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152. *Id.*

153. KY. CONST. § 145(1).

154. *Id.* Sale of marijuana is not among the crimes eligible for expungement under H.B. 40 in Kentucky. *Class D Felony Offenses Eligible for Expungement*, KY. CT. OF JUST., https://kycourts.gov/felonyexpungement/Pages/eligibleoffenses.aspx [perma.cc/D7N8-LJRD] (last visited Aug. 31, 2019). As such, the only way for someone convicted of that crime to regain their voting rights is to receive clemency from the governor. KY. CONST. § 145(1).

155. *See, e.g.*, *Solem*, 463 U.S. at 290–92.

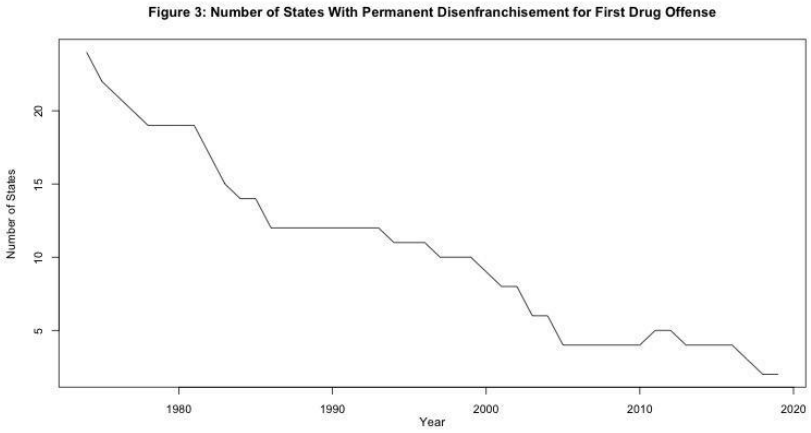
156. Graham v. Florida, 560 U.S. 48, 61 (2010).

157. *Id.* at 62–65.

158. *Id.* at 62.

159. *See id.* at 80; Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

160. To obtain the data for this claim and the subsequent graph, *see* Richardson v. Ramirez, 418 U.S. 24, 48 n.14 (1974); Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in*



Even in the states (Kentucky and Iowa) that still permanently disenfranchise felons, the governors – both Republicans[161] – have expressed opposition to the practice, and the legislatures have recently debated bills to soften the policy.[162] State legislation thus exhibits a strong consensus against permanent disenfranchisement for non-violent, first-time offenders.

As one might suspect, the fraction of non-violent ex-felons actually subject to lifetime disenfranchisement is similarly small. It is difficult to arrive at a precise estimate of this statistic, but a conservative calculation will be sufficient for our purposes here. A 2017 study by University of Georgia Sociology Professor Sarah Shannon and others estimated that the former felon population – that is, individuals once convicted of a felony but no longer in prison, on

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the United States, 1850–2002, 109 AM. J. OF SOC. 559, 565 (2003); Christopher Uggen & Jeff Manze, *Summary of Changes to State Felon Disfranchisement Law 1865-2003*, THE SENT'G PROJECT 1–2 (Apr. 1, 2003), https://www.sentencingproject.org/wp-content/uploads/2016/01/Summary-of-Changes-to-State-Felon-Disfranchisement-Law-1865-2003.pdf [perma.cc/62NW-Z76B]; Note, *The Need for Reform of Ex-Felon Disenfranchisement Laws*, 83 YALE L.J. 580, 583 n.18 (1974).

161. *Governors Roster 2019*, NAT'L GOVERNORS ASS'N 1 (2019), https://www.nga.org/wp-content/uploads/2019/07/Governors-Roster.pdf [perma.cc/W66C-KBNR].

162. Stephen Gruber-Miller, *Iowa House Overwhelmingly Passes Felon Voting Rights Constitutional Amendment***,** DES MOINES REG. (Mar. 28, 2019, 12:51 PM), https://www.desmoinesregister.com/story/news/politics/2019/03/28/iowa-felon-voting-rights-constitutional-amendment-house-votes-governor-kim-reynolds-proposal/3298419002/ [perma.cc/67Q5-QMFQ]; Chris Kenning, *Most Kentucky Felons Would Have Voting Rights Restored Under New Bill*, COURIER J. (Feb. 15, 2019, 2:25 PM), https://www.courier-journal.com/story/news/local/2019/02/15/felon-voting-rights-would-be-restored-under-kentucky-bill/2881080002/ [perma.cc/E3SS-3VR7].

probation, or on parole – was about 14,474,204 in 2010.[163] Meanwhile, the U.S. Department of Justice reported in 2004 that about 32.6% of individuals exiting state prisons were incarcerated for drug offenses.[164] Given that a large number of individuals convicted of drug-related felonies never go to prison, 32.6% is likely an underestimate of the fraction of the ex-felon population composed of drug criminals. Nevertheless, combining these two statistics indicates that there are at least 4,718,500 individuals convicted of drug-related felonies living in the United States today outside the control of the prison system.[165] Only in Arizona, Nevada, Wyoming, Kentucky, and Iowa can an individual be permanently disenfranchised for a drug-crime, and only Kentucky and Iowa impose that punishment on first-time offenders.[166] In 2016, the Sentencing Project estimated the number of disenfranchised ex-felons by state – in those five, the total was 463,174.[167] As such, if *every* ex-felon in those states was permanently disenfranchised – and all for drug crimes – the probability of lifetime disenfranchisement conditional on a felony drug conviction would be about 9.8%.[168] Of course, most individuals in those five states *were not* disenfranchised for drug crimes.[169] Accordingly, a conservative estimate of the actual likelihood of receiving a lifetime voting ban – conditional on conviction for a drug crime – would be less than 5%, and lower still for individuals with only a single offense on their record.

These statistics confirm that the overwhelming consensus among the states – as expressed both in legislation and practice – is against lifetime disenfranchisement for first-time, non-violent offenders. If anything, the international consensus points even more strongly in that direction. It appears that the only other democracy to impose lifetime disenfranchisement under *any* circumstances is Belgium.[170] Yet even there, lifetime disenfranchisement only

163. Sarah Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States*, 1948–2010, 54 DEMOGRAPHY 1795, 1805, 1808 (2017).

164. Matthew Durose & Christopher Mumola, *Profile of Nonviolent Offenders Exiting State* Prisons, U.S. DEP'T OF JUST. 1, 2 (Oct. 2004), https://www.bjs.gov/content/pub/pdf/pnoesp.pdf [perma.cc/2DW4-H28V].

165. *See* Shannon et al., *supra* note 163; *see also* Durose & Mumola, *supra* note 164.

166. BRENNAN CTR. FOR JUST., *supra* note 1.

167. THE SENT'G PROJECT, *supra* note 25.

168. *See* BRENNAN CTR. FOR JUST., *supra* note 1; *see also* SENT'G PROJECT, *supra* note 25.

169. *See* Durose & Mumola, *supra* note 164, at 2.

170. Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 90 (2005); BRANDON ROTTINGHAUS, INCARCERATION AND ENFRANCHISEMENT: INTERNATIONAL PRACTICES, IMPACT AND RECOMMENDATIONS FOR REFORM 24–26 (2003), http://www.prisonpolicy.org/scans/08_18_03_Manatt_Brandon_Rottinghaus.pdf [perma.cc/8FSL-56EF].

accompanies prison sentences of more than seven years.[171] Kentucky and Iowa's practice of disenfranchising all felons for life thus has no international counterpart.

Every aspect of the comparative analysis we have examined affirms the conclusion from previous section: for first-time offenders convicted of relatively minor felonies (such as drug crimes), lifetime disenfranchisement is a grossly disproportionate punishment. Individuals fitting that description in a state like Kentucky would accordingly have a strong Eighth Amendment claim to make.

It is important to acknowledge, however, that this sort of legal argument would only be available to a subset of the permanently disenfranchised. A lifetime voting ban is an undeniably severe sanction. Nevertheless, the foregoing analysis makes clear that, when applying the proportionality principle, the Supreme Court is as concerned with the culpability of the offender as it is with the harshness of the punishment.[172] Outside the capital context, it typically takes an uncommonly sympathetic defendant to win relief under the Eighth Amendment.[173] For those convicted of non-violent offenses the Justices still see as highly blameworthy – for example, those convicted of distributing large amounts of cocaine[174] – the Eighth Amendment holds little promise.

It would be a mistake, though, to think that the excessive punishment argument is only useful in the context of legal action. As the next section discusses, the frame could be potent in the context of legislative debates and potentially benefit a much larger swath of the disenfranchised.

C. Excessive Punishment and Legislation

The restrictive nature of their disenfranchisement laws has not escaped the notice of politicians in Kentucky and Iowa. In the aftermath of Florida's 2018 referendum on the subject, lawmakers in both states immediately introduced amendments to the state constitution that would parallel the change made

171. Ali Rickart, *Disenfranchisement: A Comparative Look at the Right of the Prisoner to Vote*, IUS GENTIUM (Feb. 15, 2015), https://ubaltciclfellows.wordpress.com/2015/02/06/disenfranchisement-a-comparative-look-at-the-right-of-the-prisoner-to-vote/ [perma.cc/R8Z7-5KM4].

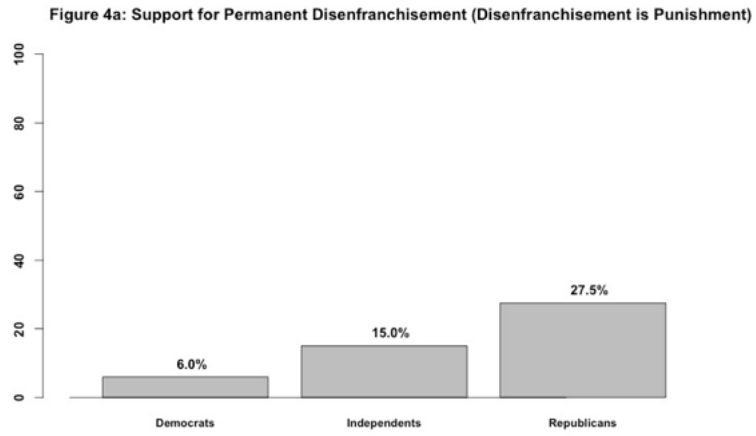
172. Graham v. Florida, 560 U.S. 48, 67 (2010).

173. *See, e.g.*, *id.* at 52–58 (overturning a life sentence without parole for a minor with an armed robbery conviction); Solem v. Helm, 463 U.S. 277, 280–81 (1983) (invalidating a life sentence without parole for a man with multiple minor offenses but had never committed a crime while sober); *but cf.* Kennedy v. Louisiana, 554 U.S. 407, 412–15 (2008) (prohibiting the death penalty for the rape of a child).

174. Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and in judgment) ("Petitioner was convicted of possession of more than 650 grams (over 1.5 pounds) of cocaine . . . [p]etitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society") (internal citations omitted).

in Florida.[175] In Iowa, the state House of Representatives actually passed a measure to restore voting rights to individuals who had completed their entire sentences in March of 2019;[176] however, the state Senate killed the proposal days later.[177] Around the same time, a member of the Kentucky Senate introduced a similar constitutional amendment,[178] and the current governor ostensibly supported changing the state's law.[179] Nevertheless, reform in either state remains several legislative votes and a statewide referendum away.[180]

In light of the stalled momentum towards change in these states, it is worth studying the advantages of using the excessive punishment argument instead of other rhetorical tactics. First, and perhaps most importantly, individuals who see disenfranchisement as punishment are generally much more likely to oppose the practice. This trend holds across both party and ideology (Figure 4). Accordingly, highlighting the extremely punitive nature of lifetime voting bans might help galvanize support for reform.



175. Gruber-Miller, *supra* note 162; Kenning, *supra* note 162.

176. Gruber-Miller, *supra* at 162.

177. Stephen Gruber-Miller & Barabara Rodriguez, *Felon Voting Rights Constitutional Amendment Won't Advance This Year*, DES MOINES REG. (Apr. 4, 2019 2:34 PM), https://www.desmoinesregister.com/story/news/politics/2019/04/04/felon-voting-rights-constitutional-amendment-setback-iowa-senate-gov-kim-reynolds-funnel-statehouse/3364741002/ [perma.cc/H9DV-GV5M].

178. Kenning, *supra* note 162.

179. David Weigel, *Kentucky's New Governor Reverses Executive Order That Restored Voting Rights for Felons*, WASH. POST (Dec. 23, 2015) https://www.washingtonpost.com/news/post-politics/wp/2015/12/23/kentuckys-new-governor-reverses-executive-order-that-restored-voting-rights-for-felons/?utm_term=.cadd351fd373 [perma.cc/ZBD4-B3DM].

180. *See* IOWA CONST. art. 10, § 1 (describing the process for amending the Iowa state constitution); KY. CONST. § 256.

Figure 4b: Support for Permanent Disenfranchisement (Disenfranchisement is About Character)

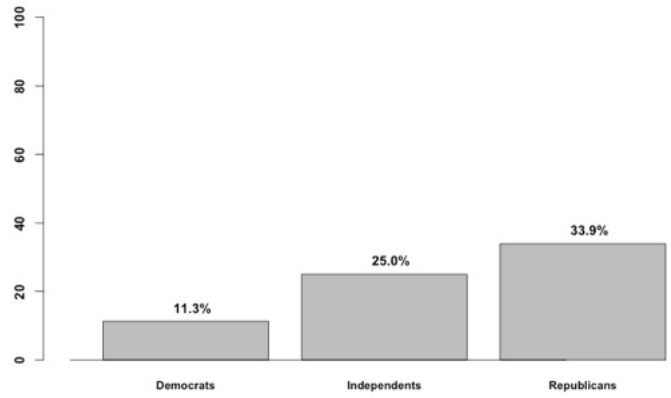


Figure 4c: Support for Permanent Disenfranchisement (Disenfranchisement is Punishment)

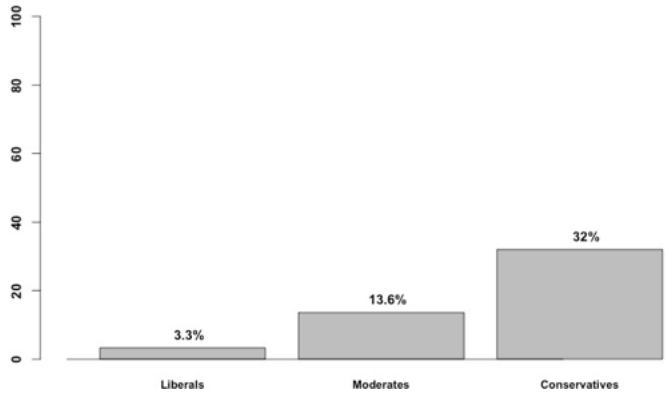
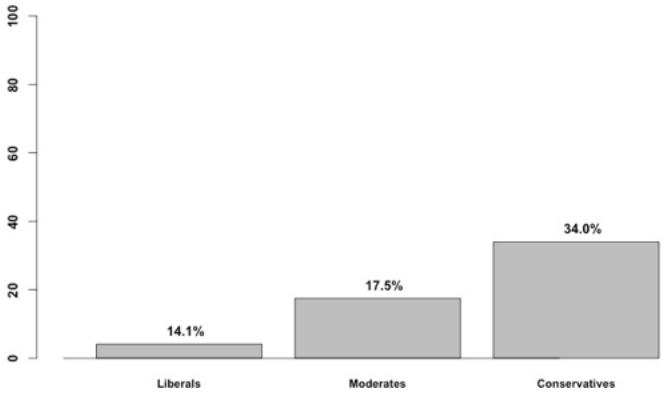


Figure 4d: Support for Permanent Disenfranchisement (Disenfranchisement is About Character)



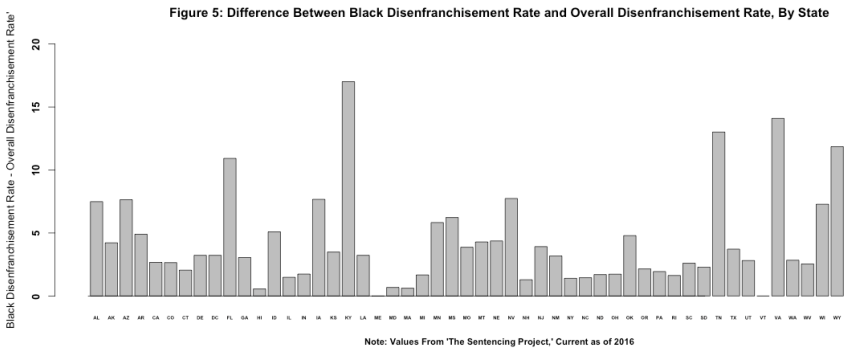
Second, focusing on disenfranchisement as excessive punishment would help maintain the bipartisan opposition to Iowa and Kentucky's existing practices.[181] As Part II.B.ii illustrates, characterizing a punishment as "excessive" draws attention to individualized assessments of desert, rather than society-level analyses of the impact of eliminating that punishment. In states where supermajorities already support changing disenfranchisement laws, this individualized focus is precisely what advocates for reform should want. Emphasizing the disparate impact of disenfranchisement risks arousing unnecessary Republican opposition by highlighting the widely held notion that diminishing the scope of the practice would benefit Democrats (see Table 1 and Table 2).

Just as in the Eighth Amendment context, though, the utility of the excessive punishment argument in the legislative arena is limited to specific situations. So long as the focus remains on the most draconian restrictions and the least culpable offenders, it has substantial persuasive authority. However, when the subject becomes voting rights for those in prison and those convicted of serious crimes, its efficacy fades. Even survey respondents who identified as Democrats – the partisan group most supportive of restoring voting rights – slightly favored disenfranchising the incarcerated (44% to 43%, with 13% unsure) and thought lifetime disenfranchisement was "appropriate" for those convicted of sexual assault (57%). To chip away at these more popular policies, activists need to adopt a different framework, one that highlights the broader negative consequences of disenfranchisement.

PART III: FELON DISENFRANCHISEMENT AND THE VRA

A second argument against felon disenfranchisement focuses on its discriminatory impact. It is an undeniable fact that these laws have a differential negative effect on the political voice of minority communities – as Figure 5 indicates, rates of disenfranchisement among African Americans exceed rates of disenfranchisement among the general population in every state outside of Maine and Vermont (which do not practice disenfranchisement). This situation obviously raises immediate concerns and highlights the potential for even greater problems in this regard in the future.

181. *See* Weigel, *supra* note 179; Gruber-Miller, *supra* note 162; LEAGUE OF WOMEN VOTERS OF KENTUCKY, *supra* note 36, at 7; Gruber-Miller & Rodriguez, *supra* note 177.



The number of individuals who have lost their right to vote due to felony convictions is large and has grown substantially over time – by one estimate from 1.17 million in 1976 to 6.1 million in 2016.[182] The vast majority of them (77%) are individuals who are no longer incarcerated and have either completed their sentence or are in the parole or probation stage of transition.[183] Six states – Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia – have felon disenfranchisement rates exceeding 7% of age-eligible voters, which is more than double the national average.[184] Notably, three of these states – Alabama, Mississippi, and Virginia – were covered by the Section 5 preclearance formula prior to *Shelby County v. Holder*.[185]

The disparate impact of felon disenfranchisement on African-Americans is stark: 7.4% of age-eligible African-Americans are denied the ballot as the result of a felony conviction, compared to only 1.8% of non-African-Americans nationwide. Prior to the passage of Amendment 4, more than one in five African-Americans were disenfranchised in Florida, a situation that continues in Kentucky, Tennessee, and Virginia.[186]

These disturbing trends lend themselves to an argument against disenfranchisement that might be particularly effective in the case of less sympathetic felons. In a country where a plurality still supports capital punishment, the claim that denying violent criminals the franchise is an "excessive" sanction would likely strike some as implausible. By instead focusing on the collective impact disenfranchisement has on minority communities, opponents of disenfranchisement can take the spotlight off more culpable offenders and tie felon disenfranchisement to larger (and more popular) campaigns for voting rights access. This strategy carries substantial risks, however. In drawing attention

182. Christopher Uggen et al., *State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENT'G PROJECT 3 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/01/Summary-of-Changes-to-State-Felon-Disfranchisement-Law-1865-2003.pdf [perma.cc/CU2Z-TBUW].

183. *Id.* at 6.

184. *Id.* at 15.

185. *See* Shelby Cty. v. Holder, 570 U.S. 529, 537–39 (2013).

186. PALM BEACH POST, *supra* note 2.

to their disparate racial impact, those seeking to challenge disenfranchisement laws might inadvertently highlight an opportunity for those who seek to manipulate electoral rules for political advantage.

As we discussed earlier, prevailing political conditions make felon disenfranchisement a potentially dangerous weapon in a closely contested and increasingly partisan era. While the trend to date has been predominantly towards restoring rights, it is by no means uniform. In Kentucky and Iowa, Republican governors overturned earlier executive actions that had restored felon voting rights.[187] Likewise, the felon voting rights victory in Florida that came with the passage of Amendment 4 was subsequently compromised in 2019 by a bill that required felons to pay off all court-related debts before individuals could be restored to suffrage.[188] In Virginia, Governor Terry McAuliffe's executive action allowing felons to vote before they completed their sentence was initially overturned by the state supreme court at the request of the state legislature.[189] In short, given the larger political context – in which voting restrictions are seen as an acceptable political strategy – there is a serious possibility of future retrogressive actions with respect to felon voting rights.

Moreover, this possibility arises at a time when the primary tool for stopping retrogression – Section 5 of the VRA – has been gutted. Before the Court ruled that the old coverage formula violated the Tenth Amendment, Section 5 entirely covered nine states and partially covered four.[190] "Covered" status meant that those jurisdictions had to "preclear" any changes they made to their election rules through the Justice Department or the D.C. District Court.[191] To receive preclearance, the jurisdiction bore the burden of showing that the new rule did not have the "purpose or with the effect of denying or abridging the right to vote on account of race or color."[192] Of the nine that were wholly covered, two states – Alabama and Mississippi – permanently disenfranchise some felons, and the other five – Alaska, Georgia, Louisiana, South Carolina, and Virginia – all require that a person's sentence be completed in its entirety (including parole and probation) before her voting rights are reinstated.[193] As the new Florida law after the passage of Amendment 4 demonstrates, there are parallels between the felon disenfranchisement problem and earlier efforts to limit the African-American vote (which ultimately resulted in the creation of

187. *See* Iowa Exec. Order No. 70 (Jan. 14, 2011); Weigel, *supra* note 179.

188. *See* Mazzei, *supra* note 18.

189. Howell v. McAuliffe, 788 S.E.2d 706, 710 (Va. 2016). Governor McAuliffe would later side-step the court's action by signing (via autopen) individual commutations for all the individuals that would have been covered by his executive order. *See* Newkirk, *supra* note 67.

190. *See Shelby Cty.*, 570 U.S. at 537–39, 544.

191. *See* South Carolina v. Katzenbach, 383 U.S. 301, 334–35, 338–39, 353 (1966).

192. *Id.* at 338.

193. *See* BRENNAN CTR. FOR JUST., *supra* note 1.

the VRA Section 5 solution).[194] In the 1960s, racist politicians could deploy multiple means of evading efforts to give voting rights to African-Americans, including poll taxes, unfairly administered literacy tests, and dubious moral character requirements.[195] Similarly, jurisdictions that want to limit felon participation today can do so in ways other than adopting more explicitly restrictive policies. They can elevate certain misdemeanors to felonies, increase probation and parole supervision periods, or mandate that all court fees and fines be paid off before rights are restored. Covering a jurisdiction and requiring a justification for voting-related changes might have made some of these evasions more difficult prior to *Shelby County*.[196]

Still, even before the Court negated Section 5, it was clear the VRA would have to be adjusted to deal with new forms of restrictions that had disparate racial effects. Many of the states that passed stricter voting laws prior to *Shelby County* did not fall under Section 5 coverage.[197] Some litigants made efforts to bring these restrictions – including felon disenfranchisement laws – under the umbrella of Section 2 of the VRA. Section 2 of the VRA provides that

> [n]o 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.[198]

Courts have long held that Section 2 authorizes certain disparate impact claims.[199] Given the uniformly disproportionate effect of felon disenfranchisement laws, these regulations would thus seem ripe for challenge under Section 2. However, four federal appellate courts have already rejected these efforts. Three – the First, Second, and Eleventh Circuits – have held that Section 2 of the VRA was not meant to apply to statutes that restrict felon voting.[200] The other court to address the issue, the Ninth Circuit, ruled that felon disenfranchisement claims were potentially cognizable under Section 2, but only if there was some evidence of intentional discrimination in the administration of criminal justice.[201] With the Supreme Court seemingly uninterested in aggressively

194. *See Shelby County*, 570 U.S. at 536–37 (describing early efforts by Southern states to limit the African-American vote).

195. *See generally Katzenbach*, 383 U.S. at 309–13 (describing at length the elaborate efforts by Southern states to deny African Americans the franchise).

196. Fannie Lou Hamer, Rosa Parks & Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, § 5, 120 Stat. 577, 580–81 (2006).

197. *See, e.g.*, Crawford v. Marion Cty. Election, 553 U.S. 181, 185–86 (2008).

198. 52 U.S.C § 10301(a) (2018).

199. *See, e.g.*, Simmons v. Galvin, 575 F.3d 24, 26 (1st Cir. 2009).

200. *Id.*; Hayden v. Pataki, 449 F.3d 305, 310 (2d Cir. 2006); Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005).

201. *Farrakhan*, 623 F.3d at. 993–94.

supporting voting rights[202] and no current circuit split on the issue, Section 2 claims have little plausibility at this moment.

With Section 2 likely unavailing, a more realistic attack on racialized efforts to restrict felon voting rights would presumably need to resuscitate and apply Section 5. However, the layering of racial and political polarization has created new complications to devising tests that pinpoint the racial motives behind actions and behind vote restrictions. In Table 4, we assess the relationship between a state's racial composition, its political leanings, and its disenfranchisement policies.[203] As the data show, a 10% increase in black population and a 10% increase in support for Trump are associated with similar increases in the probability that a state adopts a severe felon disenfranchisement law. In other words, it is difficult to distinguish between racial and partisan motives when it comes to disenfranchisement. This confusion could easily provide federal courts with an excuse to avoid intervening. If gaming voter qualifications for political advantage is simply part of the rough and tumble of partisan politics, then some might regard the discriminatory impact of disenfranchisement laws as a mere political question better dealt with by the legislative and executive branches than by the courts.[204]

202. *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (holding that political gerrymandering claims are not justiciable under Section 1 of the Fourteenth Amendment).

203. To arrive at these figures, we ran ordered logit models with state disenfranchisement policy as the dependent variable and "state percentage black" and "percentage voted for Trump" as independent variables, respectively. We then calculated the mean increase in the probability of adopting a particular disenfranchisement policy if each of the independent variables rose by ten percentage points. For details on ordered logit models, *see* Max Lu, *Determinants of Residential Satisfaction: Ordered Logit vs. Regression Models*, 30 GROWTH & CHANGE 264, 271–73 (1999).

204. *Rucho*, 139 S. Ct. at 2507.

TABLE 4
RELATIONSHIP BETWEEN STATE BLACK POPULATION, SUPPORT FOR TRUMP, AND STATE DISENFRANCHISEMENT POLICY

Variable	% Increase in Prob. of No FD	% Increase in Prob. of FD Until Release from Prison	% Increase in Prob. of FD Until Completed Parole	% Increase in Prob. of FD Until Completed Probation and Parole	% Increase in Prob. of Permanent FD for Some Felons	% Increase in Prob. of FD for All Felons
10 Point Increase in % Black	-1.41%	-7.71%	-.6%	2.61%	5.00%	2.12%
10 Point Increase in % Voting Trump	-1.47%	-17.43%	-2.13%	6.30%	10.84%	3.90%

N = 51, FD = Felon Disenfranchisement, Prob. = Probability

CONCLUSION

The harsh reality of felon voting rights is that progress may stall out in some states even as there are gains in others. It is not out of the question that states completely controlled by the Democrats could end some forms of disenfranchisement, while those controlled by Republicans might retain draconian laws or even extend them. And even when neither party completely controls the state government, a governor can act unilaterally by taking executive actions. While permanent disenfranchisement may be curbed to some degree by Eighth Amendment challenges, this is undoubtedly a limited tool in the face of a substantially larger problem. Moreover, the breakdown in the bipartisan consensus over voting rights – combined with increased partisan motivation to gain advantage by gaming the eligibility rules – could potentially exacerbate the situation. It would not be surprising to see politicians increasingly wield felon disenfranchisement laws as a cudgel against opposing partisans. Without stronger tools to protect voting rights, ex-felons and the disadvantaged communities from which they are often drawn could become collateral damage in election battles.