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The Right to Vote: Felony Disenfranchisement and Making Restoration a Reality

Montana Birringer

INTRODUCTION

Felony disenfranchisement laws affect over five million Americans as of 2020.¹ There is a patchwork of different policies across the United States when it comes to returning citizens' right to vote: four states have no restrictions; twenty-one states restrict voting in prison; sixteen states restrict voting while in prison, on parole, or on probation; and, eleven states include restrictions even after one's sentence has been served in its entirety.² Restricting voting rights for some or all individuals even after they have served their prison sentence and are no longer on probation or parole, as these eleven states do, constitute the most extreme restrictions on voting rights.³ Felony disenfranchisement is one of the civil rights crises of our time and must be addressed.

This article will examine the various means by which the different components of our federalist system can restore voting rights to detained, incarcerated, and formerly incarcerated Americans. Additionally, it will compare actions taken at both the federal and state level to restore voting rights. With little to no progress being made in Congress, it appears that states are the best avenue for restoring voting rights. By comparing state legislative, executive, and judicial actions across the United States, I recommend which methods are least likely to be overturned.

ORIGIN OF FELONY DISENFRANCHISEMENT

In the 1974 decision *Richardson v. Ramirez*, the Supreme Court interpreted Section 2 of the Fourteenth Amendment as permitting states to disenfranchise convicted defendants from voting.⁴ This decision allowed states to decide which crimes led to disenfranchisement, including felony convictions.⁵ In *Richardson*, three men incarcerated for felony convictions sued for their

¹ Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, 1 (July 2021), <https://www.sentencingproject.org/wp-content/uploads/2015/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf>.

² *Id.*

³ *Id.*

⁴ *Richardson v. Ramirez*, 418 U.S. 24, 26 (1974).

⁵ *Id.* at 56.

right to vote, arguing that California's felony disenfranchisement policies denied them their right to Equal Protection.⁶ Under Section 1 of the Fourteenth Amendment, a state cannot restrict voting rights unless it shows a compelling state interest.⁷ The Supreme Court, however, held that the state's felony disenfranchisement policies were constitutional pursuant to Section 2 of the Fourteenth Amendment, which allows the denial of voting rights "for participation in rebellion, or other crime."⁸

THE CURRENT STATE OF FELON DISENFRANCHISEMENT IN AMERICA

Amongst the United States and its territories, only Maine, Vermont, Washington D.C., and the Commonwealth of Puerto Rico abstain from restricting the voting rights of anyone with a felony conviction, including those currently incarcerated.⁹ Recall that, outside of these four, twenty-one states restrict voting in prison, sixteen states restrict voting while in prison and on parole or probation, and eleven states include restrictions even after the completion of one's sentence.¹⁰ The vast majority of disenfranchised citizens have completed their prison term.¹¹ An estimated 5.2 million American adults are barred from voting and only twenty-five percent of that population are in prison, meaning that seventy-five percent of disenfranchised individuals reside in their communities while on probation or parole, or after having completed their sentences.¹² An estimated 2.2 million people are disenfranchised due to state laws that restrict voting rights even after completion of sentences.¹³

Felony disenfranchisement disproportionately impacts people of color. An estimated 1.8 million Black Americans are banned from voting in the United States due to a prior felony conviction.¹⁴ Black Americans are nearly four times as likely to lose their voting rights than the rest of the voting age population.¹⁵

⁶ *Id.* at 26.

⁷ U.S. Const. amend. XIV, § 1.

⁸ U.S. Const. amend. XIV, § 2.

⁹ Jean Chung, *supra* note 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Chris Uggen et al., *Locked out 2020: Estimates of people denied voting rights due to a felony conviction*, 4 (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

¹⁴ *Id.* at 17.

¹⁵ *Id.* at 4.

One in sixteen Black adults are disenfranchised nationally.¹⁶ Rates of disenfranchisement are higher in certain states; in 2020, more than one in seven Black adults were disenfranchised by Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming.¹⁷ Felony disenfranchisement also disproportionately impacts the Latinx community. In thirty-four states, the Latinx population is disenfranchised at a higher rate than the rest of the voting age population.¹⁸ That said, some states disenfranchise their citizens with contingencies.

Florida, Alabama, Arizona, and Tennessee condition the restoration of voting rights on the repayment of legal financial obligations.¹⁹ For example, Tennessee requires that people be up to date on all child support payments in order to have their voting rights restored.²⁰ Florida, however, exemplifies the difficulty some states face in attempting to restore voting rights. In 2018, Florida voters passed a constitutional amendment that restored the voting rights of most people who had completed their sentences, but in 2019, Florida's state legislature passed a law that conditioned restoration of voting rights on payment of all legal restitution, fees, and fines.²¹ A legal battle ensued over the constitutionality of Florida's law demanding legal financial obligations be paid off before voting rights are restored.²² In *Jones v. Desantis*, the district court held that Florida's law prohibiting felons from voting due to their inability to pay legal financial obligations violated the First Amendment and the Equal Protection Clause.²³ However, in September 2020, the Eleventh Circuit Court of Appeals reversed and vacated that decision, holding that the statute did not violate the constitution.²⁴ The Sentencing Project estimates that nearly 900,000 Floridians who have completed their sentences remain disenfranchised because they cannot afford to pay court-ordered monetary sanctions.²⁵

In recent years, state voter restoration reforms have led to a nearly fifteen percent decline in the number of disenfranchised people.²⁶ Between 1997 and

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Jean Chung, *supra* note 1, at 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Jones v. DeSantis*, 410 F. Supp. 3d 1284 (N.D. Fla. 2019).

²⁴ *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020).

²⁵ Chris Uggen, *supra* note 13.

²⁶ *Id.*

2021, twenty-five states and Washington, D.C. expanded voter eligibility and informed those with felony convictions of their voting rights, either through legislative or executive action.²⁷ In 2020, Washington, D.C. became the first jurisdiction in the country to restore voting rights for people in prison.²⁸ Lawmakers in Oregon are currently considering similar legislation.²⁹ Thus, in the past twenty-five years, ten states either repealed or amended lifetime disenfranchisement laws, and another ten states expanded voting rights to some or all persons on probation or parole.³⁰ Each of these reforms took place either through legislation or executive action.³¹

EFFORTS TO RESTORE FELONY VOTING RIGHTS AT THE FEDERAL LEVEL

There has been little movement on restoring the right to vote at the federal level. Out of the three branches of government, the judiciary has been the most hostile to voting rights in recent years.³² As long as the Fourteenth Amendment is interpreted to inoculate felony disenfranchisement from constitutional challenge, reform efforts rely on congressional, executive, and state-by-state reform strategies. The executive branch has varied in its stance on felony enfranchisement over the years, but recently President Biden issued Executive Order 14019, “Promoting Access to Voting,” (“EO”) wherein Section 9 requires the Attorney General to take important actions to ensure access to voter registration for people in federal custody or under federal supervision.³³ According to the Federal Bureau of Prisons (BOP) data, there are 151,819 total federal inmates in the United States and 12,679 federal inmates in BOP custody.³⁴ Moreover, EO 14019 requires the Attorney General to take four important actions to ensure access for people in federal custody or under federal supervision to voter registration materials and educational materials about voting.³⁵ This Executive Order thus provides an opportunity for registration and

²⁷ Jean Chung, *supra* note 1, at 4.

²⁸ *Id.* (That were previously denied. *See also* Maine, Puerto Rico, Vermont).

²⁹ Legis. 2366, 81st Legis. Assemb. (Or.2021).

³⁰ Jean Chung, *supra* note 1, at 4.

³¹ *Id.* at 5-6.

³² *See Shelby County, Ala. v. Holder*, 570 U.S. 529, 534 (2013); *Abbott v. Perez*, 138 S. Ct. 2305, 2313 (2018); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2330 (2021).

³³ Exec. Order No. 14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021).

³⁴ *Id.*

³⁵ Biden Administration, *supra* note 33.

information on voting, but does not change whether people are eligible to vote in the first place.³⁶

More specifically, under the EO, the Attorney General must provide educational materials on voter registration and facilitate voter registration for all individuals in the custody of BOP and contract facilities.³⁷ Said educational materials must notify individuals leaving federal custody of any restrictions on their right to vote where applicable and at what point their right to vote will be restored under the relevant state law.³⁸ The Attorney General must also coordinate with the Office of Probation and Pretrial Services in the Administrative Office of U.S. Courts to provide voter educational materials to all eligible individuals under supervision, and to facilitate their voter registration and subsequent voting.³⁹ Finally, the Attorney General needs to take appropriate steps to support formerly incarcerated individuals in obtaining personal identification materials that satisfy the voter identification laws in their state of residence.⁴⁰ While far from restoring the right to vote, this executive action is a step in the right direction. However, one small step is not nearly enough action by the Executive in the face of such an overwhelming injustice.

Similar to the lack of substantial movement from the Executive branch, Congress has spent the last fourteen years attempting, but failing, to pass a law that would restore federal voting rights to all those not incarcerated.⁴¹ The Democracy Restoration Act (“DRA”) was first introduced in 2008 in the 110th Congress by Senator Russel Feingold (D-WI), and has since been incorporated into H.R. 1 (“For the People Act”), as commenced by Representative John Sarbanes (D-MD), and introduced as a standalone bill by Senator Ben Cardin (D-MD).⁴² The DRA seeks to restore federal voting rights to the millions of disenfranchised Americans who, although they have been released from prison and are living peacefully in their respective communities, are nonetheless denied their right to vote.⁴³ In particular, the legislation would permit all individuals who are not incarcerated to vote in federal elections re-

³⁶ Mary Ellen Cagnassola and Lauren Giella, *Fact Check: Did Biden Sign an Executive Order Allowing Incarcerated Felons to Vote?*, (Mar. 8, 2021, 6:18 PM) <https://www.newsweek.com/fact-check-did-biden-sign-executive-order-allowing-incarcerated-felons-vote-1574644>.

³⁷ Exec. Order No. 14,019, 86 Fed. Reg. 13623 (Mar. 7, 2021).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Brennan Ctr. for Just., *Democracy Restoration Act*, (Aug. 8, 2019; last updated Jan. 1, 2022), <https://www.brennancenter.org/our-work/policy-solutions/democracy-restoration-act>.

⁴² *Id.*

⁴³ *Id.*

ardless of whether they have a criminal record that makes them ineligible to vote in state elections; in doing so, the DRA would effectively operate to remedy past and present racial discrimination stemming from the over-incarceration of people of color, which resulted in their being denied the right to vote more frequently than white Americans.⁴⁴ Unfortunately, whether the bill has a chance of passing in the future is indeterminable given the modern adversarial political climate and the needlessly controversial nature of the topic.

As it pertains to the powers possessed by Congress, federal courts have embraced voting rights rather coldly. Congress has two sources of authority from which to enact the DRA: the Election Clause of Article 1 Section 4 of the Constitution and the congressional enforcement powers granted under the Fourteenth and Fifteenth Amendments.⁴⁵ In *Oregon v. Mitchell*, the Supreme Court, which has historically been hostile to voting rights, held that Congress has the ability to lower the voting age in federal elections.⁴⁶ In doing so, the Supreme Court endorsed Congress' "ultimate supervisory power" over federal elections, including setting the requisite qualifications for voters.⁴⁷ Even in the rare case where the federal legislation would conflict with a state constitution, the legislation could nevertheless be implemented pursuant to the Supremacy Clause in Article VI of the Constitution, which provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.⁴⁸

Congress' enforcement powers under the Fourteenth and Fifteenth Amendments also bestow authority to enact the DRA, and thus to permit all individuals who are not incarcerated to participate in federal elections, even if some are disenfranchised under state laws.⁴⁹

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment both grant Congress the power to enforce constitutional amend-

⁴⁴ Brennan Ctr. for Just., *Legal Analysis of Congress' Constitutional Authority to Restore Voting Rights to People with Criminal Histories*, <https://www.brennancenter.org/sites/default/files/legal-work/DRA%20Constitutionality%20Analysis.pdf> (last visited Nov. 15, 2021).

⁴⁵ *Id.* (see U.S. Const. art. I, § 4; U.S. Const. amend. XIV, § 2; U.S. Const. amend. XV).

⁴⁶ *Oregon v. Mitchell*, 400 U.S. 112, 121, 124 (1970).

⁴⁷ *Id.* at 124.

⁴⁸ U.S. Const. art. 5.

⁴⁹ Brennan Ctr. for Just., *supra* note 41.

ments “by appropriate legislation.”⁵⁰ In *Tennessee v. Lane*, the Supreme Court described this enforcement power as “a broad power indeed” that gives Congress “a wide berth” with which to devise appropriate preventative and remedial measures for unconstitutional actions.⁵¹ Such permitted legislation must exhibit “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁵² The Supreme Court has established a two-part analysis for determining whether legislation falls within Congress’ Fourteenth Amendment enforcement powers, otherwise known as the *Boerne-Lane* standard. The first part of the analysis requires identifying the constitutional right that Congress seeks to enforce.⁵³ In order for Congress to properly utilize its enforcement powers, its legislation must be clearly remedial in nature rather than expanding constitutional rights.⁵⁴ The second part of the analysis determines whether the legislation is “an appropriate response” to a “history and pattern of unequal treatment.”⁵⁵

Because the DRA protects the fundamental constitutional right to vote and attempts to remedy past and present racial discrimination, it meets the *Boerne-Lane* standard as laid out above. Furthermore, Congress’s enforcement power under the Fifteenth Amendment is triggered by the DRA because it involves both the fundamental right to vote and race, which necessarily involves a suspect class.⁵⁶ Indeed, the Court has “compared Congress’ Fifteenth Amendment enforcement power to its broad authority under the Necessary and Proper Clause.”⁵⁷ Therefore, the Supreme Court should afford the DRA deferential review because it inherently seeks to demolish that ever-present political intersection of racial discrimination and deprivation of the fundamental right to vote.⁵⁸

Across the Executive, Legislative, and Judicial branches of the federal government, there has been little, if any, substantial movement in restoring voting rights to incarcerated and formerly incarcerated Americans. The Biden Administration’s recent EO is the only concrete action that has occurred at the federal

⁵⁰ See U.S. Const. amend. XIV, § 5., U.S. Const. amend. XV, § 2.

⁵¹ *Tennessee v. Lane*, 541 U.S. 509, 518, 520 (2004).

⁵² *Boerne v. Flores*, 521 U.S. 507, 520 (1997).

⁵³ *Lane*, 541 U.S. at 520.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Brennan Ctr. for Just., *supra* note 41.

⁵⁷ See *Lopez v. Monterey County*, 525 U.S. 266, 294 (1999) (citing *City of Rome v. United States*, 446 U.S. 156, 175 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

⁵⁸ See *Johnson v. California*, 543 U.S. 499, 505 (2005); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

level in recent years, but even so, it remains nothing more than a small step in the right direction. As such, the best path forward to address and ultimately dismantle felony disenfranchisement leads us to the states.

EFFORTS TO RESTORE FELONY VOTING RIGHTS AT THE STATE LEVEL

Recall that the efforts to restore voting rights to incarcerated and formerly incarcerated Americans varies widely amongst the fifty states. These efforts are often sensitive to changes in the political climate and leadership, which has led some states to vacillate between reform and regression.⁵⁹ Those changes that have occurred were manifested through various mechanisms, including legislative reforms, executive actions, and ballot initiatives. That said, the majority of felony disenfranchisement reform at the state level has been accomplished by state legislatures. Although some state legislatures have undermined the intent of their citizens with regard to felony voter laws (as seen in Florida), others have been more successful. For example, between 1997 and 2021, 25 states and Washington, D.C. expanded voter eligibility or informed persons with felony convictions of their voting rights either through legislative or executive action.⁶⁰ In addition, currently in Illinois the General Assembly is considering restoring voting rights to all citizens, including those presently in prison; as of October 2021, SB 828 has passed the House and awaits passage in the Senate.⁶¹

In addition to executive orders on voter restoration, voting rights may be restored in any state by executive clemency, whereby the governor of a given state holds the power to pardon or grant commutation to any citizen of their state that has been convicted or accused of a crime.⁶² While governors' executive orders do not permanently reform state disenfranchisement, governors have restored voting rights to thousands of people, notwithstanding the vulnerability an executive action may face pursuant to the whims of a given governor's particular political agenda. For example, between 2007 and 2011, Florida

⁵⁹ Jean Chung, *supra* note 1.

⁶⁰ *Id.*

⁶¹ Interview with Alexandria Boutros, Chicago Votes (October 23, 2021) [hereinafter Boutros interview].

⁶² David, Schlusel, *President Biden orders DOJ to facilitate voting for people in federal custody or under supervision*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION AND RESTORATION FO RIGHTS (Mar. 12, 2021), <https://ccresourcecenter.org/2021/03/12/president-biden-orders-doj-to-facilitate-voting-for-people-in-federal-custody-or-under-supervision/>; *Executive Clemency*, (July 2021), https://www.law.cornell.edu/wex/executive_clemency.

Governor Charlie Crist restored voting rights to more than 150,000 people during his four years in office by automatically restoring rights to individuals convicted of predominantly nonviolent offenses.⁶³ Unfortunately, the executive action was revoked in 2011 by Governor Rick Scott, though not retroactively.⁶⁴ Additionally, Iowa Governor Tom Vilsack issued an executive order in 2005 automatically restoring the voting rights of all persons who had completed their sentences, but this order was rescinded in 2011 by Governor Terry Branstad.⁶⁵ Then in 2018, New York Governor Andrew Cuomo issued conditional pardons to people on parole, restoring voting rights to 35,000 people under parole supervision.⁶⁶

Holistic solutions may also be a viable path to reform, specifically in the context of voter contact, which is the number one factor that impacts overall voter turnout.⁶⁷ Outreach and support are both particularly crucial in jails, where voters have little access to outside resources to help them determine if they are eligible to vote and how to cast a ballot.⁶⁸ Illinois is the only state at this time to address this lack of voter education for individuals when they are released from prison via the “Reentering Citizens Civic Education Act” of 2019.⁶⁹ This legislation requires county prisons to notify incarcerated persons that their voting rights are automatically restored in Illinois and guide them through broader civic trainings before they are released.⁷⁰

Kentucky serves as a case example of both the instability executive orders offer in restoring voting rights and the need for such voting rights education as is provided in Illinois.⁷¹ In November 2015, Governor Steve Beshear issued an executive order to automatically restore voting rights to over 100,000 people with nonviolent felony convictions who had completed their sentences.⁷² A

⁶³ Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, 7 (Oct. 17, 2018), <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms/>.

⁶⁴ *Id.*

⁶⁵ Jean Chung, *supra* note 1.

⁶⁶ McLeod, *supra* note 64 at 10.

⁶⁷ Campaign Legal Ctr., *Challenging Jail-Based Disenfranchisement: A Resource Guide for Advocates*, <https://campaignlegal.org/sites/default/files/2019-12/Jail%20Voting%20Advocacy%20Manual.pdf> (last visited Nov. 18, 2021).

⁶⁸ *Id.*

⁶⁹ Boutros interview.

⁷⁰ *Id.*

⁷¹ Interview with Keturah Herron, ACLU & JustLeadershipUSA (September 22, 2021) [hereinafter Herron interview].

⁷² Brennan Ctr. for Just., *Voting Rights Restoration Efforts in Kentucky* (Aug. 5, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-kentucky>.

month later, the same was revoked by Governor Matt Bevin.⁷³ Under Governor Bevin's order, thousands of citizens were barred from voting unless they applied for individual clemency from the governor.⁷⁴ Then in 2019, Governor Andy Beshear ran on a platform emphasizing the restoration of felony voting rights.⁷⁵ After winning the election, Governor Andy Beshear signed an executive order automatically restoring voting rights to over 100,000 citizens.⁷⁶ But out of the 170,000 citizens whose voting rights were restored, only 14,255 were registered to vote for the 2020 elections.⁷⁷ Even worse, less than half of those registered to vote actually voted in the 2020 election.⁷⁸

As a result of this process, and the clearly documented political whims inherent in these executive orders to which voters find themselves vulnerable, there has been momentum in Kentucky's state legislature to change the state's constitution, accompanied by pending legislation to be considered in the upcoming session which would permanently restore voting rights.⁷⁹ These numbers also highlight the need for further education and outreach for citizens who have had their right to vote restored. Hopefully the legislation in Kentucky has more success than what we have seen from the federal legislature.

CALL TO ACTION

Currently, felony voter restrictions range widely state by state and there is no comprehensive policy at the federal level addressing the same, leaving only a patchwork of protection for one of, if not the most, fundamental right in our country: the right to vote. The federal judiciary has historically been hostile towards voting rights, a trend which will likely continue for years to come. At the state level, the judiciary will vary in its enforcement due to unfavorable case law towards voting rights, but since federal and state executive orders are easily overturned by subsequent administrations, advancing reform through the various state legislatures provides the most stable and long-lasting solutions. As such, state action presents the best path forward.

Addressing a complex problem such as this requires interdisciplinary and holistic solutions with a focus on voter contact and voter turnout, especially given the differing agendas between those trying to protect and ensure the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Herron interview.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

fundamental right to vote and those trying to suppress it. Despite the remedial movement in recent years, felony disenfranchisement still plagues the United States. Denying the right to vote to an entire class of citizens is deeply problematic and undemocratic, and as such the issue of felony disenfranchisement must be thrust to the forefront of the political battles we face today.