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INTRODUCTION

More than one million convicted ex-felons who have completed their sentences are permanently prohibited from voting in the United States.[1] Felony disenfranchisement laws have existed since the colonial age and increased in importance and effect in the post-Civil War era.[2] This practice effectively and disproportionately prohibited many African Americans from participating in the electoral process, and it continues to have the same effect today.[3] As a result, many affected individuals as well

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[1] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2001) [hereinafter THE SENTENCING PROJECT]. THE SENTENCING PROJECT estimates, "1.4 million disenfranchised persons are ex-offenders who have completed their sentences." *Id.*

[2] Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 538 (1993). Some Southern states altered the criminal disenfranchisement laws so that they would have a greater impact on black voters. *Id.* These states included Mississippi, South Carolina, Louisiana, Alabama, and Virginia. *Id.* at 541.

[3] *See* THE SENTENCING PROJECT, *supra* note 1, at 1. According to The Sentencing Project, thirteen percent of black men in the U.S. are disenfranchised. *Id.*

as public interest organizations have attempted to modify felony disenfranchisement laws to ameliorate the distinction created by the impact of the laws on minority groups.[4]

Disenfranchisement laws began in the United States as an outgrowth of the English practice of imposing collateral civil consequences to felony convictions.[5] Traditionally, this practice was justified by the belief that convicted felons were more susceptible to voter corruption and fraud.[6] Disenfranchisement

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[4] JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT AND HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (1998). Groups such as The Sentencing Project and Human Rights Watch frequently monitor legislative and judicial activity with regard to disenfranchisement and conduct research that may be used in lawsuits brought by ex-felons. *Id.* In 2000, The Sentencing Project reported that legislators in Alabama, Florida, Pennsylvania, Nevada and Connecticut have proposed legislation lessening restrictions on ex-felons' voting rights. PATRICIA ALLARD & MARC MAUER, THE SENTENCING PROJECT, REGAINING THE VOTE: AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS 4-9 (2000). Additionally, lawsuits were filed in the past several years in states such as New Hampshire, Washington and Pennsylvania in which challenges to the existing disenfranchisement statutes have been made. *Id.*; *see also infra* Part I.C (discussing disenfranchisement litigation occurring in state courts).

[5] FELLNER & MAUER, *supra* note 4, at 2-3. The medieval English government would pass bills of attainder to restrict convicted felons' rights by subjecting their property to forfeiture, prohibiting them from inheriting or bequeathing property and forbidding them from bringing suit in the court system. *Id.*

[6] *See* Washington v. State, 75 Ala. 582 (Ala. 1884). Courts traditionally argued that denying the right to vote to convicted ex-felons preserved the "purity of the ballot box" by protecting the foundation of democracy from ex-felons who are unfit to vote. *Id.* at 585. In *Kronlund v. Honstein*, the court stated that the state's interest in preserving the electoral process justifies the exclusion of those whose "behavior can be said to be destructive of society's aims." 327 F. Supp. 71, 73 (N.D. Ga. 1971). Courts rationalized that permitting ex-felons to vote could possibly disrupt the true intentions of upstanding citizens. FELLNER & MAUER, *supra* note 4, at 15. A California Supreme court decision reflects this.

> The fact that such person committed a crime is evidence that he was morally "corrupt" at the time he did so; if still morally corrupt when given the opportunity to vote in an election, he might defile "the purity of the ballot box" by selling or bartering his vote or otherwise

also served to protect the sanctity of the voting system and ensure that convicts could not influence the lawmaking process.[7] After the Civil War, Southern legislatures attempted to limit the number of eligible black voters by altering felony disenfranchisement laws to include crimes that leaders believed were committed more frequently by blacks.[8] Mississippi provided an ideal example for other Southern legislatures in 1890 when it narrowed the disenfranchisement statute's application to "black" crimes such as bribery, burglary, theft and arson.[9]

Today, felony disenfranchisement continues in varying forms throughout the United States.[10] While two states allow ex-felons

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> engaging in election fraud; and such activity might affect the outcome of the election and thus frustrate the freely expressed will of the remainder of the voters.

Otsuka v. Hite, 414 P.2d 412, 417 (Cal. 1966); *see also* FELLNER & MAUER, *supra* note 4, at 15; Note, *The Disenfranchisement of Ex-felons: Citizenship, Criminality, and 'The Purity of the Ballot Box*,' 102 HARV. L. REV. 1300, 1308 (1989) [hereinafter *Citizenship*]; Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1173 (1970).

[7] FELLNER & MAUER, *supra* note 4, at 15. By disenfranchising ex-felons, their influence on the political process is eliminated, ensuring that elections were decided exclusively by "responsible" citizens. *Id.*; *see also Citizenship*, *supra* note 6, at 1309.

[8] Shapiro, *supra* note 2.

[9] *Id.* at 538 n.20. The relevant portion of the Mississippi Constitution stated "[e]very male inhabitant of the state . . . who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, forgery, embezzlement or bigamy . . . is declared to be a qualified elector." MISS. CONST. art. VII § 241 (1890). *See also* Ratliff v. Beale, 20 So. 865, 867 (Miss. 1896) (stating that the amended Mississippi Constitution contained an increased number of restrictions on the franchise).

[10] Nicholas Thompson, *Locking Up the Vote; Former Prisoners Barred From Voting Under Florida Law*, WASH. MONTHLY, Jan. 1, 2001, at 17. Thompson suggests that contemporary politicians continue to keep disenfranchisement statutes in place because without such laws they never would have been elected. *Id.* Thompson cites a sociological study that asserts that politicians such as John Warner, Mitch McConnell, Connie Mack, Phil Gramm and Craig Thomas may never have been elected if the felony disenfranchisement statutes in their respective states did not exist at the time of their elections. *Id.* Such data indicates that many politicians are unwilling to do anything to substantially alter the disenfranchisement statutes, fearing the

to vote while in prison,[11] others permit ex-felons to vote only after completing parole.[12] Twelve states permanently

loss of their own power. *Id.* Disenfranchisement constitutional provisions and statutes enacted several decades ago with the purpose of discrimination, therefore, continue to exist. *Id.* Virginia's 1901 convention, for example, expanded the disenfranchisement laws in order to eliminate "every Negro voter who can be gotten rid of legally, without materially impairing the numerical strength of the white electorate," *id.*; *see also* VA. CONST. art. II, § 23 (1902). Alabama's 1901 constitution was designed to "ensure white supremacy." ALA. CONST. art. VIII, § 182 (1901). Florida's 1868 constitution included a disenfranchisement provision that was contested by African Americans and radical Republicans. FLA. CONST. art. XIV, §§ 2, 4 (1868); *see* Thompson, *supra*. Furthermore, case law indicates that many states continue to justify disenfranchisement based on the beliefs of social contract theorist John Locke. *See, e.g.*, Baker v. Cuomo, 58 F.3d 814 (2d Cir. 1995). The social contract theory centers upon the idea that "morality is founded solely on uniform social agreements that serve the best interests of those who make the agreement." James Fieser & Bradley Dowden, eds., *Internet Encyclopedia of Philosophy, Social Contract*, *at* http://www.utm.edu/research/iep/s/soc-cont.htm (last visited Oct. 17, 2002). Expanding on this theory, Locke proposed that a government derives its authority from the consent of its citizens. *See* Garth Kemerling, *Locke: Social Order*, *at* http://www.philosophypages.com/hy/4n.htm#gov (last visited Oct. 17, 2002). This relationship creates a contract that imposes obligations on both the political entity and its citizenry. *Id.* While the contract allows citizens to overthrow their government when it fails to meet the needs of society, it also authorizes society to take away privileges such as voting when a citizen has "abandoned the right to participate" by breaking the social contract. *Baker*, 58 F.3d at 821 (indicating that the state's articulated justification for disenfranchisement was based on the social contract theory set out in *Green v. Board of Elections*, 380 F.2d 445 (2d Cir. 1967)). A social contract is made between an individual and society when an individual enters society, authorizing the legislature to make laws to protect his own well being. *Green*, 380 F.2d at 451. *See also* Farrakhan v. Locke, 987 F. Supp. 1304, 1312 (E.D. Wash. 1997) (relying on *Green* as support for the state's position that disenfranchisement is justified); Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986) (relying on *Green*).

[11] *See* THE SENTENCING PROJECT, *supra* note 1. These states are Maine and Vermont. *Id.*; *see also* ME. REV. STAT. ANN. 21, § 111 (2001) (listing the general qualifications in order to vote); ME. STAT. ANN. 21, § 115 (2001) (listing the restrictions on voter eligibility); VT. STAT. ANN. 17, § 2121 (2002) (listing criteria for voter registration).

[12] *See* THE SENTENCING PROJECT, *supra* note 1, at 3; *see also* ALASKA

disenfranchise at least some ex-felons, even after sentence and parole completion.[13] Sixteen states and the District of Columbia disenfranchise ex-felons only while they are in prison.[14] While pardoning procedures exist in some states to restore voting

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STAT. § 15.05.030 (Michie 2002); ARK. CONST. art. III, § 2 (Michie 2002); CAL. CONST. art. XX, § 11 (2001); CAL. STAT. § 14240 (West 2001); COLO. REV. STAT. § 1-2-606(1) (2002); CONN. GEN. STAT. § 9-46(a) (2001); D.C. CODE ANN. § 1-1001.02(7) (2002); GA. CODE ANN. § 21-2-216(b) (2002); MINN. STAT. § 201.014 (2001); MO. CONST. art. VIII, § 2 (2001); NEB. REV. STAT. § 32-313 (2002); N.J. REV. STAT. § 19:4-1 (2002); N.M. STAT. ANN. § 31-13-1 (Michie 2002); N.Y. ELEC. LAW § 5-106 (McKinney 2002); N.C. CONST. art. VI, § 2 (2002); OKLA. STAT. tit. 26, § 4-101 (2002); R.I. CONST. art. II, § 1 (2002); S.C. CONST. art. III, § 7 (2001); TEX. ELEC. CODE ANN. § 11.002 (Vernon 2002); W. VA. CODE § 3-1-3 (2002); WIS. STAT. § 6.03 (2001). Delaware imposes a five-year waiting period after completion of sentence and parole before voting rights may be restored. THE SENTENCING PROJECT, *supra* note 1, at 3; *see also* DEL. CODE ANN. tit 15, § 1701 (2001).

[13] THE SENTENCING PROJECT, *supra* note 1, at 3. Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, Virginia and Wyoming permanently disenfranchise all ex-felons. *See* ALA. CONST. art. VIII, § 182 (2002); ALA. CONST. amend. 579 (2002); FLA. STAT. ch. 97.041(2)(b) (2001); IOWA CODE § 48A.6 (2002); KY. REV. STAT. ANN. § 116.0452(2)(b) (Banks-Baldwin 2002); MISS. CODE ANN. § 23-15-19 (2001); NEV. CONST. art. 2, § 1 (2002); VA. CONST. art. II, § 1 (2002); VA. CODE ANN. §§ 24.2-101, 418 (2002); WYO. STAT. ANN. § 22-3-102 (Michie 2002). Arizona and Maryland permanently disenfranchise felons after conviction of a second felony. *See* ARIZ. CONST. art. 7, § 2(c) (2002); MD. ELEC. CODE ANN. § 3-102 (2002). Tennessee and Washington permanently disenfranchise felons convicted before 1986 and 1984, respectively. *See* TENN. CODE ANN. § 2-19-143 (1981); WASH. CONST. art. VI, § 3 (2002).

[14] THE SENTENCING PROJECT, *supra* note 1, at 3; *see also* D.C. CODE ANN. § 1-1001.02(7) (2002); HAW. CONST. art. II, § 2 (2002); IDAHO CONST. art. VI, § 3 (2002); 10 ILL. COMP. STAT. 5/3-5 (2002); IND. CODE ANN. § 3-7-13-4 (West 2002); KAN. CONST. art. V, § 2 (2001); LA. REV. STAT. ANN. § 18:102 (West 2002); MASS. GEN. LAWS ch. § 1 (2002); MICH. COMP. LAWS § 168.492a (2002); MONT. CODE ANN. § 13-1-111(2) (2002); N.H. REV. STAT. ANN. §§ 607-A:2, 654:5 (1986); N.D. CONST. art. 2, § 2 (2002); N.D. CENT. CODE § 161-04-04 (2002); OHIO REV. CODE ANN. § 2961.01 (West 2002); OR. CONST. art. II, § 3 (2001); 25 PA. CONS. STAT. § 1301 (2002); S.D. CONST. art. VIII, § 1 (2002); UTAH CODE ANN. § 20 A-2-101 (2002).

rights,[15] they are nonetheless difficult to obtain.[16]

The disproportionate impact on African Americans and other minorities of many of these state statutes is undeniable.[17] African-

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[15] *Restore Voting Rights After Prison Time*, ATL. CONST., June 4, 2001, at A10, *available at* 2001 WL 3676390. These include Virginia, Florida, Kentucky and North Carolina. *Id.*

[16] ALLARD & MAUER, *supra* note 4, at 10. In Virginia, a felon must wait five years after completion of sentence and parole and have paid all fines and court fees. *Id.* If those conditions are satisfied, the felon must request a packet detailing the requirements from the Virginia Secretary of the Commonwealth's Office and then can apply to the Governor for restoration of the right to vote. *Id.* The Governor has final authority over whether the felon's voting rights are restored. VA. CONST. art. V, § 12. Only about one hundred people complete the process each year. Frank Green, *Panel to Study Ex-felons' Rights; Va. Restoration Process Difficult,* RICHMOND TIMES-DISPATCH, June 20, 2001, at B1, *available at* 2001 WL 5326577. In Florida, a felon must obtain executive clemency in order to restore his voting rights. ALLARD & MAUER, *supra* note 4, at 6. The Florida Parole Commission determines whether a felon is eligible for restoration, and refers a candidate to the Executive Board of Clemency. *Id.* If no members of the Clemency Board object, the Clemency Coordinator may restore the felon's civil rights. *Id.* Recently, this process has been streamlined for some nonviolent, habitual offender ex-felons who no longer must attend a Clemency Board hearing. Julie Hauserman, *Cabinet Eases Rules for Restoring Ex-felons' Rights*, ST. PETERSBURG TIMES, June 15, 2001, at 4B (stating that nonviolent offenses include drug-related crimes). New rules enacted by the Florida Cabinet also increase the maximum amount of a felon's outstanding court fines from two hundred and fifty dollars to one thousand dollars. Scott Hiaasen, *Cabinet Expands Clemency Eligibility*, PALM BEACH POST, June 15, 2001, at 7B, *available at* 2001 WL 21884875.

[17] Andrew Shapiro, *The Disenfranchised*, AM. PROSPECT, Nov. 1, 1997, at 60, *available at* 1997 WL 21293207. Because blacks and other minorities such as Latinos are disproportionately represented within the criminal justice system, minority ex-felons make up a disproportionate share of the disenfranchised convicts within the United States. *Id.* For example, the New York Division of Criminal Justice Services issued a report in 1995 stating that black defendants were more likely to receive prison sentences than white defendants who had been convicted of similar crimes. *Id.* In several states, blacks comprise a larger portion of the prison population than whites even though blacks represent a smaller portion of the state's total population. Alice E. Harvey, *Ex-felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1151-52 (1994). For example, as of 1990, 0.9% of Alabama's black population is incarcerated while 0.2% of whites are imprisoned. *Id.* In Delaware, 2% of the black

American men account for an estimated thirty-six percent of all disenfranchised ex-felons.[18] As a result, these statutes restrict the voting rights of thirteen percent of all adult African-American males.[19] Furthermore, the impact is more extreme in certain individual states. For example, in both Alabama and Florida, thirty-one percent of all black men are permanently disenfranchised.[20] In Iowa, Mississippi, New Mexico, Virginia and Wyoming, one in four black men is permanently disenfranchised.[21] In Delaware, one in five black men are permanently disenfranchised.[22] These statistics indicate that the current felony disenfranchisement laws have a significantly higher effect on minorities than on other groups within the country.

Many of these statutes have been challenged in the twentieth century through the court system, as well as by state and federal legislatures, and each of these methods has had varying degrees of success.[23] This note explains the approaches taken through litigation and legislation in both federal and state arenas. The strengths and weaknesses of each approach are evaluated, and this note ultimately concludes that state legislation has the most potential for success. Part I provides an overview of the litigation strategies employed to attack disenfranchisement laws. This includes a discussion of frequently utilized arguments involving the Equal Protection clause of the United States Constitution,[24] the Voting Rights Act[25] and state constitutional litigation. Part II

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population is imprisoned as compared to only 0.2% of the white population. *Id.* Similar statistics exist for other states, including Florida, Maryland, Mississippi, Tennessee, and Virginia. *Id. See also* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV 5 (1970) (evaluating the impact of felony disenfranchisement on minority populations).

[18] ALLARD & MAUER, *supra* note 4, at 1.

[19] FELLNER & MAUER, *supra* note 4, at 8.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See infra* Part I (discussing judicial decisions); *see infra* Part II (discussing legislation).

[24] U.S. CONST. amend. XIV, § 1.

[25] 42 U.S.C. § 1973 (2001).

analyzes attempts by federal and state legislatures to address this issue, including a federal congressional bill proposal.[26] It also provides an overview of recent state legislation addressing this issue. Finally, this note identifies the most effective approach to achieve the goal of ending disenfranchisement and proposes a workable method to address the disparate impact on minorities.

I. APPROACHES TO DISENFRANCHISEMENT LITIGATION

Litigation is one of the most frequently used methods to address concerns about felony disenfranchisement.[27] Lawsuits have typically focused on the Fourteenth Amendment's Equal Protection clause or the Voting Rights Act to challenge disenfranchisement laws.[28] In state courts, litigants also derive arguments from state constitutional provisions.[29]

A. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[30] The original purpose of the clause was to assure equal treatment for former slaves in the post-Civil War period.[31] Eventually, the clause was interpreted to require that governmental classifications be

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[26] *See* H.R. 906, 106th Cong. (1999) (granting ex-felons the right to vote in federal elections).

[27] *See infra* Part I.A.C (analyzing the different approaches to felony disenfranchisement litigation).

[28] *See infra* Part I.A (discussing how the Equal Protection Clause is used to attack felony disenfranchisement laws); *see also* Part I.B (discussing how the Voting Rights Act is used to attack felony disenfranchisement laws).

[29] *See infra* Part I.C (explaining how felony disenfranchisement laws are challenged in state courts).

[30] U.S. CONST. amend. XIV, § 1.

[31] *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 986, 628 (13th ed. 1997) (stating that the 14th Amendment's most obvious and fundamental purpose was to address governmental racial discrimination).

reasonably related to the purpose of the legislation.[32] The evolution of the Supreme Court's interpretation of the clause created different levels of scrutiny to determine whether a state action, law or classification has violated the clause.[33] The most lenient type of review uses a "rational basis" standard to uphold the governmental classification as long as it bears a rational relationship to a legitimate objective.[34] The middle level standard requires that the means chosen by the government must be substantially related to an important objective.[35] Finally, the

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[32] *Id.*

[33] *Id.* at 629-30. The levels are rational review, middle level review and strict scrutiny. *Id.*

[34] *Id.* at 635. This standard requires only that a rational connection exist between a statute's classification and the governmental purpose. *Id.* In other words, the means must "reasonably relate" to the ends. *Id.* at 629. The rational basis standard permits legislatures to act broadly and only minimally requires that the means "fit" the ends. *Id.* at 635. Its use is typified by the Supreme Court's decision in *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (upholding a statute that prohibited advertising on the sides of vehicles because the classification was rationally related to the purpose of the statute to increase public safety). In *Railway Express*, the agency argued that the classification had no relation to the safety issue because some distracting advertisements are outlawed while others that may be damaging to public safety are not. *Id.* at 110. Nevertheless, the Court concluded that the Equal Protection Clause does not require that "all evils of the same genus be eradicated." *Id.*; *see also* McGowan v. Maryland, 366 U.S. 420 (1961) (finding that a state could reasonably require certain businesses to remain closed on Sundays in order to protect the general public's interest in health and encourage the "recreational atmosphere of the day"). In *McGowan,* the Court stated that "[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 425.

[35] GUNTHER, *supra* note 31, at 631-32. This standard, while not explicitly acknowledged by a majority of the Court, has nonetheless been utilized in cases. *Id.* The intermediate standard is more intensive than the rational basis review as it requires that the classifications are "important" and the means have a "persuasive justification." *Id.* at 632. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (declaring invalid a statute prohibiting the sale of beer to males under 21 and females under 18 for traffic safety purposes because the gender distinction did not "serve important governmental objectives" and was not "substantially related" to the achievement of traffic safety).

strictest level of review upholds a classification only if the law is necessary to advance a compelling governmental interest.[36] Strict scrutiny is applied to any law that is based on a suspect classification or affects a fundamental right.[37]

The Supreme Court first addressed the constitutionality of

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[36] GUNTHER, *supra* note 31, at 630. In the 1960s the Court articulated a new approach to the Equal Protection Clause that required the presence of either a suspect class or an impact on a fundamental right. *Id.*; *see infra* note 37 (explaining the categories that require application of strict scrutiny review). The means must be necessary to achieve the ends and justified by a compelling state interest. *Id.* In equal protection cases that involve suspect classes, the Court has rarely found compelling state interests because classifications involving suspect classes are rigidly scrutinized. *Id.* at 664. In order to justify such a classification, the state must demonstrate that the law is essential for a public need. *Id.* For example, in *Korematsu v. United States*, the Court found that a law excluding Japanese people from certain areas on the West Coast constituted a "pressing public necessity" in light of the "real military dangers" that existed during World War II. 323 U.S. 214, 216, 223 (1944). While this decision has been extensively criticized, it is a noticeable example of the Court upholding a law that directly impacts a suspect class. *Id.* More commonly, however, equal protection cases involve the Court striking down legislation that impermissibly affects a suspect class. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (invalidating a Virginia statute that prohibited inter-racial marriages because the law had no legitimate purpose that necessarily justified its existence).

[37] GUNTHER, *supra* note 31, at 630. Race is the principal suspect class that always requires strict scrutiny. *See* Palmore v. Sidoti, 466 U.S. 429 (1984) (reversing a state court custody decision that took away custody rights from a mother after she married an African American); McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating a Florida statute that proscribed the cohabitation of interracial married couples); Yick Wo. v. Hopkins, 118 U.S. 356 (1886) (reversing the decision to imprison a Chinese alien who was refused a permit for operating his laundry because the administration of the law was purposely directed at a class of people). The right to vote has been referred to as a fundamental right requiring strict scrutiny. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (invalidating a law that required voters in a school district election to own real property in the district or have children enrolled in the district because the statute did not promote a compelling state interest); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (establishing that a poll tax is unconstitutional because it infringes upon the fundamental right to vote).

felony disenfranchisement in *Richardson v. Ramirez*.[38] In *Ramirez*, California ex-felons challenged a state law that denied them the right to vote.[39] The plaintiffs claimed that the statute violated the Equal Protection clause of the Fourteenth Amendment.[40] Although this argument was accepted by the California Supreme Court,[41] the United States Supreme Court rejected it, determining that the strict scrutiny required by section one of the Fourteenth Amendment did not apply to ex-felons because section two permits states to restrict convicted criminals' right to vote.[42] Section two provides that a state's representation may be reduced if the vote is denied to qualified individuals, excluding those who have participated in "rebellion, or other crime."[43] The Court interpreted this section as permitting the state to deny ex-felons the right to vote.[44] Therefore, equal protection did not apply to ex-felons because section two is an "affirmative sanction" of criminal behavior.[45] This decision

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[38] 418 U.S. 24 (1974).

[39] *Id.* at 26. The ex-felons challenged both Article XX, section 11 of the California Constitution, which required the adoption of laws that exclude convicted persons from voting, and sections 310, 321, 383, 389, 390, 14240, and 14246 of the California Elections Code as the sections that enforce the mandate of the constitution. *Id.*

[40] *Id.* at 33. Ramirez claimed that California must articulate a compelling state interest in order to justify the denial of the right to vote by the class of ex-felons. *Id.* According to Ramirez, because the state could not find such an interest, the statutory and constitutional provisions authorizing disenfranchisement violated the Equal Protection clause. *Id.*

[41] Ramirez v. Brown, 507 P.2d 1345 (1973). The California court examined whether the statutory scheme disenfranchising ex-felons was the least burdensome way the state could regulate the electoral system, and concluded that it was not. *Id.* at 212. Instead, the court determined that disenfranchisement was not necessary for the state to effectively regulate the voting process. *Id.* at 216.

[42] "[W]hen the vote at any election . . . is denied . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced." U.S. CONST. amend. XIV, § 2 (emphasis added); *Ramirez*, 418 U.S. at 54.

[43] U.S. CONST. amend. XIV, § 2.

[44] *Ramirez*, 418 U.S. at 54.

[45] *Id.*

drastically limited the ability to challenge disenfranchisement laws on the basis of the Equal Protection Clause, and subsequent circuit court cases reflect this futility.[46]

Although the Supreme Court ruled that denying the right to vote to ex-felons is permissible under section two of the Fourteenth Amendment,[47] the Court thereafter invalidated a disenfranchisement law in *Hunter v. Underwood*.[48] In *Hunter*, the Court found that two factors must be met to establish that a disenfranchisement law violates the Equal Protection clause.[49] First, the plaintiff must prove that the disputed law was conceived and written with racially discriminatory intent.[50]

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[46] *See, e.g.*, Howard v. Gilmore, 205 F.3d 1333 (4th Cir. 2000) (holding that the plaintiff did not establish that the state's act intended to or had the effect of denying the right to vote based on race); Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998) (dismissing felon's claim that Mississippi's Constitution unfairly denied him the right to vote because the constitution was amended since its original enactment, removing any discriminatory intent); Baker v. Pataki, 85 F.3d 919 (2d Cir. 1995) (affirming lower court's decision to dismiss ex-felons' complaint that the New York election law disproportionately deprived blacks of their right to vote); Buckner v. Schaefer, 36 F.3d 1091 (4th Cir. 1994) (stating that there was no evidence that a Maryland statute disenfranchising ex-felons was intended to or is being applied in a discriminatory manner); Owens v. Barnes, 711 F.2d 25 (3d Cir. 1983) (declaring that a state may rationally decide to disenfranchise ex-felons); Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1979) (holding that the state classifications disenfranchising ex-felons bear a rational relationship to the state's interest in limiting the franchise to responsible voters).

[47] *Ramirez*, 418 U.S. at 55.

[48] 471 U.S. 222 (1985).

[49] *Id.* at 225.

[50] *Id.* Discriminatory intent exists when a court finds that discrimination is a substantial or motivating factor in the adoption of the statute. Underwood v. Hunter, 730 F.2d. 614, 617 (11th Cir. 1984). To determine whether discrimination was a motivating factor, a court must look at a variety of factors, including the historical background of the decision, legislative history and the impact of the decision on the affected group. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 525, 566-68 (1977); *see also* City of Mobile v. Bolden, 446 U.S. 55 (1980). The Supreme Court agreed with the lower court that the provision in Alabama's 1901 Constitution that permitted disenfranchisement of any person who was convicted of any crime involving "moral turpitude" constituted an impermissibly broad category that included

Second, the plaintiff must demonstrate that such a law has a disproportionate impact on a protected class.[51] If both of these factors are established, the Fourteenth Amendment's Equal Protection clause is violated.[52]

Ultimately in *Hunter* the Supreme Court found that a provision of the Alabama Constitution that disenfranchised those convicted of misdemeanors of "moral turpitude" was originally adopted with intent to discriminate and had the intended impact on a protected class.[53] The Court further stipulated that in order to violate the Equal Protection clause, disenfranchisement statutes must have been adopted solely to discriminate and would not have been adopted but for that intent.[54] Therefore, the Court held that the provision violated the Equal Protection clause.[55]

Hunter is significant in that it provides an Equal Protection

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within its scope both felonies and misdemeanors. *Hunter*, 471 U.S. at 226. The framers believed these selected crimes were committed more frequently by blacks. *Id.* at 227.

[51] *Id.* A law has a disproportionate impact when it is demonstrated that one group in society is affected more than another. *Id.* For example, in *Hunter* the lower court found that section 182 of the Alabama Constitution disenfranchised ten times as many blacks as whites. *Id.* at 228. Laws that affect a protected or suspect class are always analyzed using the strict scrutiny standard. *See supra* note 37 (elaborating on protected and suspect classes). The Supreme Court indicated that the racial impact of the provision was not contested. *Hunter*, 471 U.S. at 228.

[52] *Id.* at 233.

[53] *Id.*; ALA. CONST. art. VIII, § 182 (1901). The Alabama Constitution denied the vote to those convicted of "any . . . crime involving moral turpitude," which was later defined by the Alabama Supreme Court to mean an act that is "immoral in itself, regardless of the fact whether it is punishable by law." Pippin v. State, 73 So. 340, 342 (1916) (quoting Fort v. Brinkley, 112 S.W. 1084 (1908)); *Hunter*, 471 U.S. at 226.

[54] *Hunter*, 471 U.S. at 227. Using the standard articulated in *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 525 (1977), the Court required that proof is necessary to indicate that the questioned statute was enacted with the intent to discriminate and did not serve any other purpose than to discriminate. *Hunter*, 471 U.S. at 227. The Court also reiterated that once a plaintiff demonstrates that racial discrimination was a substantial factor in the creation of the law, the defense must then prove that the law would have been enacted even without this factor. *Id.* at 228.

[55] *Id.* at 224.

avenue to attack disenfranchisement laws.[56] This case lessens the impact of *Ramirez* by demonstrating that disenfranchisement lawsuits can still be successful.[57] Given the extensive discriminatory purpose in many of the states that continue to deny ex-felons access to the ballot box, the first factor in *Hunter* requiring proof of racially discriminatory intent should not be a difficult obstacle to face.[58]

Few lawsuits, however, have been successful in applying the *Hunter* rule to similar statutes because the presence of discriminatory intent was ambiguous.[59] In *Cotton v. Fordice*, the Fifth Circuit recognized that section 241 of the Mississippi Constitution was enacted in 1890 with discriminatory intent.[60] The court reasoned, however, that because the disenfranchisement provision was amended several times since 1890 to remove sections that may have been intentionally discriminatory, the provision was not unconstitutional since the

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[56] Shapiro, *supra* note 2, at 548.

[57] *Ramirez*, 418 U.S. at 33.

[58] Shapiro, *supra* note 2, at 548. Shapiro notes that the history of disenfranchisement in the Southern states is especially apparent. *Id.* This is demonstrated by the results of constitutional conventions that took place after the Civil War. *Id.* at 541. Mississippi's 1890 constitution is an example of intentional discrimination using disenfranchisement. *See* MISS. CONST. art. VII, § 241 (1890); *supra* note 9 (discussing section 241). Mississippi's approach was mirrored at the constitutional conventions of other states, including South Carolina, Louisiana, Alabama, and Virginia. Shapiro, *supra* note 2, at 541.

[59] *See, e.g.*, McLaughlin v. City of Canton, 947 F. Supp. 954 (S.D. Miss. 1995). In *McLaughlin*, the District Court for the Southern District of Mississippi declined to decide whether Section 241 of the Mississippi Constitution was enacted with racially discriminatory intent. *Id.* at 978. While the court conceded that this was possible, the issue was not fully addressed because the court had already decided that the plaintiff's conviction of false pretenses was a misdemeanor, not a felony. *Id.* at 976. Because misdemeanors are not included among the class of crimes for which punishment may include disenfranchisement, *Ramirez* did not apply in this case and the issue of intent was irrelevant. *Id.* at 976-78.

[60] 157 F.3d 388, 391 (5th Cir. 1998); *see* supra note 9 (discussing section 241).

amendments were not adopted with the intent to discriminate.[61] Recently, in *Howard v. Gilmore*, the Fourth Circuit dismissed the possibility of discriminatory intent because the constitutional provision disenfranchising ex-felons existed before the enactment of the Fourteenth and Fifteenth Amendments and the extension of the right to vote to blacks.[62] Other cases reflect the tendency among courts to dismiss disenfranchisement cases with little or no discussion regarding discriminatory intent.[63]

The outcomes of these cases reflect that while *Hunter* permits Equal Protection dialogue in some disenfranchisement cases, its scope is narrow and thus limited in utility. In conjunction with *Ramirez*, the standard set by *Hunter* significantly restricts constitutional argumentation.[64] Therefore, litigation challenging disenfranchisement laws must focus on theories not confined by U.S. Constitutional claims.[65] The ability to change such laws

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[61] *Cotton*, 157 F.3d at 391-92. Section 241 was amended in 1950 to remove "burglary" from the list of eligible crimes. *Id.* It was also amended in 1968 to include "murder" and "rape," crimes that historically were not considered "black crimes." *Id.* Because the plaintiff did not offer any evidence that the amendments were enacted with discriminatory intent, the court assumed that they were not enacted with discriminatory intent. *Id.*

[62] 205 F.3d 1333 (4th Cir. 2000). The court also based its decision on the Supreme Court's interpretation of section 2 of the Fourteenth Amendment giving express permission to the states to deny the right to vote to convicted criminals. *Id.*; *see also supra* note 41 and accompanying text (describing the Supreme Court's rationale in *Ramirez*).

[63] *See* Buckner v. Schaefer, 36 F.3d 1091 (4th Cir. 1994) (explaining that plaintiffs provided no evidence that the statute in question was intended to discriminate); s*ee also* Owens v. Barnes, 711 F.2d 25 (3d Cir. 1983) (noting that a state could rationally decide to exclude convicted ex-felons from voting); Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1979) (declaring that the classifications of ex-felons bore a rational relation to the state's interest in limiting access to the franchise to responsible voters).

[64] Because *Ramirez* holds that the strict scrutiny required by section 1 does not apply to ex-felons, the possibility of invalidating a law under the Fourteenth Amendment is limited to section 2. *Ramirez*, 418 U.S. at 54. This avenue is further restricted by the *Hunter* standard, however, and thus makes it more difficult to pursue disenfranchisement claims using the Constitution. *See Hunter,* 471 U.S. at 224.

[65] *See infra* Part I.C. (discussing state court litigation focusing on state

without a favorable Supreme Court ruling is a fundamental problem facing litigants.

B. The Voting Rights Act

Disenfranchised litigants have also attempted to use the Voting Rights Act in conjunction with the Equal Protection clause.[66] Congress adopted the Voting Rights Act ("the Act") in 1965 to combat continuing racial discrimination in the South by enabling black voters to challenge existing voting barriers.[67] The Southern states were targeted specifically because state and local governmental officials evaded the provisions of the Fifteenth Amendment by utilizing discriminatory devices such as literacy tests to prevent blacks from voting.[68]

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constitutional claims).

[66] 42 U.S.C. § 1973 (2001).

[67] GUNTHER, *supra* note 31, at 985-86. The Act prohibits voting qualifications that "result in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(2)(a). *See* Robert Barnes, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1209 (1985) (stating that the main purpose of the Voting Rights Act was to provide a remedy for racially motivated obstruction of voting rights).

[68] GUNTHER, *supra* note 31, at 986. In particular, Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and North Carolina were singled out because of the continued existence of literacy tests or similar devices throughout the spring of 1965. Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 18-19 (Bernard Groffman & Chandler Davidson, eds., 1992). In addition to literacy tests, Southern states also created barriers such as grandfather clauses, property qualifications and character tests in order to prevent illiterate whites from being denied the right to vote. Charlotte Marx Harper, Lopez v. Monterey County*: A Remedy Gone Too Far?*, 52 BAYLOR L. REV. 435, 438 (2000). For example, a grandfather clause entitled anyone who was a descendant of someone who was historically entitled to vote to be excused from taking the literacy test. Gregory A. Caldiera, *Litigation, Lobbying, and the Voting Rights Bar*, *in* CONTROVERSIES IN MINORITY VOTING 230, 232 (Bernard Groffman & Chandler Davidson, eds., 1992). In addition, because less than two-thirds of blacks in many Southern states in 1890 knew how to read, requiring the completion of a registration form effectively prevented

The Supreme Court effectively limited the Act's impact in *City of Mobile v. Bolden*, however, when it decided that discriminatory intent must be shown in order to establish a violation of the Fourteenth Amendment or section two of the Voting Rights Act.[69] *Bolden* was a class action initiated on behalf of the black residents of the city of Mobile, Alabama.[70] The plaintiffs alleged that the town's practice of electing the city commissioners at large by the city's entire voting population unfairly diluted the strength of their vote in such elections and thus violated section two of the Act.[71] The Court focused on prior cases that required plaintiffs to show that the disputed plan was "conceived or operated as [a] purposeful [device] to further racial . . . discrimination."[72] Because this standard was particularly difficult to prove, many pending lawsuits at the time of *Bolden* based on section two faced stiffer resistance from the local governments and were dropped.[73]

In response to *Bolden*, Congress amended the Act in 1982 to create a "results" test that would specifically apply to voting

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most blacks from voting. South Carolina v. Katzenbach, 383 U.S. 301, 311 (1966).

[69] 446 U.S. 55, 65 (1980). Section 2 of the Voting Rights Act states 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 . . . ." 42 U.S.C. § 1973(2)(a) (2001).

[70] *Bolden*, 446 U.S. at 58.

[71] *Id.* at 58-60.

[72] Whitcomb v. Chavis, 403 U.S. 124, 149 (1970); *see also* Kilgarlin v. Hill, 386 U.S. 120 (1967); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1964).

[73] Frank R. Parker, *The Impact of* City of Mobile v. Bolden *and Strategies and Legal Arguments for Voting Rights Cases in its Wake*, *in* THE RIGHT TO VOTE: A ROCKEFELLER FOUNDATION REPORT 98, 111-12. (Rockefeller Foundation, ed., 1981). After *Bolden,* lawsuits on behalf of residents in other Alabama towns such as Jackson, Hattiesburg, Greenwood and Greenville were unsuccessful. *Id.*; *see also* Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, *in* CONTROVERSIES IN MINORITY VOTING 66, 67 (Bernard Groffman & Chandler Davidson, eds., 1992).

rights litigation.[74] The amendment establishes that a reviewing court must look to the "totality of circumstances" present when considering a voting discrimination claim.[75] By enacting a results test, Congress directed the courts to consider several "typical" factors listed in the Senate Judiciary Committee report addressing the 1982 amendment.[76] The amendment's supporters attempted to restore the moderate legal standard that existed prior to *Bolden*.[77]

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[74] Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox, in* CONTROVERSIES IN MINORITY VOTING 85, 98 (Bernard Groffman & Chandler Davidson, eds., 1992). A results test requires that a challenge based on the Voting Rights Act must prove discriminatory results only without requiring proof of intent. Davidson, *supra* note 68, at 39.

[75] 42 U.S.C. § 1973(2)(b).

> A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id.; s*ee also* GUNTHER, *supra* note 31, at 990 (discussing the totality of the circumstances standard in section 2 of the Act).

[76] *Voting Rights Act Extension Report of the S. Comm. on the J.*, 97th Cong. 28-9 (1982); O'Rourke, *supra* note 74, at 99. The report listed several factors.

> [A] history of official racial discrimination in voting; racially polarized voting; practices such as majority-vote rules that may enhance the opportunity for discrimination; a discriminatory slating process; socioeconomic disparities that impede minority political participation; racial appeals in campaigns; and the lack of minority electoral success. Two additional factors included the absence of official responsiveness to minority group interests and a tenuous policy in support of the challenged voting practice.

Id. (internal quotations omitted). Congress derived these factors from *White v. Regester*, 412 U.S. 755 (1973), in which the Supreme Court declared that minority groups must be given equal opportunity to vote and declared unlawful practices that had the effect of creating unequal opportunities based on race. McDonald, *supra* note 73, at 66. This effect could be shown by the presence of any of the factors; evidence of intent was not necessary. *Id.*; *see supra* note 75 for the text of the Act.

[77] McDonald, *supra* note 73, at 66. Before *Bolden*, the Court held in

Although the amendment was intended to ease a plaintiff's difficulties in meeting the intent standard, few disenfranchisement cases have been successful since it was passed.[78] Even when ex-felons refer to the Act to claim that disenfranchisement denies them the right to vote based on race, state and federal courts still require them to prove both specific discriminatory intent and impact in order to invalidate the law.[79] Therefore, because courts have disregarded congressional reasoning behind the amendment, the changes have virtually no impact on the legal standard.[80]

Wesley v. Collins was the first federal case to address the 1982 amendment.[81] In *Wesley*, the Sixth Circuit rejected a disenfranchised felon's claim that the Tennessee Voting Rights Act unfairly denied him the right to vote.[82] While the *Wesley* court conceded that the 1982 amendment was designed so that "the challenging party need not prove discriminatory intent to establish a violation," it held that the plaintiff failed to demonstrate that the "totality of the circumstances" resulted in a violation of the Act.[83] Tennessee's history of racial discrimination

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White v. Regester that states may not deny minorities an equal opportunity to vote. 412 U.S. 755 (1973). Unequal opportunity may be proven by any of a number of factors, *see supra* note 76, and specific proof of intent was not necessary. *Id.* at 67. Therefore, the standard in place pre-*Bolden* was easier for Voting Rights Act litigants to prove. *Id.*

[78] *See supra* note 63 and accompanying text (providing examples of cases with ineffective Voting Rights Act claims).

[79] Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986). *See infra* Part I.B (discussing federal cases that evaluated the application of the 1982 amendment to felony disenfranchisement claims).

[80] *See supra* note 63 (providing examples of cases where the legal standard has remained the same).

[81] 791 F.2d 1255 (6th Cir. 1986).

[82] TENN. CODE ANN. § 2-19-143 (1981). The Tennessee Voting Rights Act of 1981 provides that "any person who has been convicted of an infamous crime in Tennessee . . . shall not be permitted to register to vote or to vote in any election." *Id.*; *see also Wesley*, 791 F.2d at 1257.

[83] *Wesley*, 791 F.2d at 1260. The court reasoned that the lower court's emphasis on the evidence of the effects of past discrimination was misplaced because this factor alone is not sufficient to constitute a violation of the Voting Rights Act. *Id.*

was not sufficient to establish a violation despite evidence that the state's Voting Rights Act disproportionately affected blacks.[84] Instead, the court declared that the rationale behind the law was both legitimate and compelling, based on the holding in *Ramirez* that criminal disenfranchisement is constitutionally permissible.[85] Therefore, even though *Wesley* contains an acknowledgment of Congress' attempt to make the standard more lenient, its outcome demonstrates that the Sixth Circuit continues to adhere to the heightened intent standard set by *Bolden*.[86]

Courts in other circuits have also refused to utilize the results standard.[87] This indicates that congressional directives supportive of modifying disenfranchisement laws may ultimately have little value when faced with court decisions that reflect the current Supreme Court's tendency to limit congressional power.[88]

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[84] *Id.* The court refers to the district court's finding that the historical presence of racial discrimination in Tennessee continues to have effects in the present day, including the resulting disproportionate impact on blacks who are convicted of felonies at a significantly higher rate than whites. *Id.* at 1260.

[85] *Id.* at 1261. To justify the state's rationale, the court cited the Lockean theory that one who breaks society's laws is authorizing the government to take away certain rights, including voting rights. *Id.*; *see supra* note 10 (discussing the social contract theory of John Locke). The court also emphasized that it is reasonable for a state to decide to take away the voting privilege from those who commit serious crimes. *Id.* at 1261-62. The act of disenfranchisement is taken against an individual as a result of their participation in a preascertained, proscribed criminal act, rather than against a group of citizens as a whole and thus does not violate equal protection, according to the court. *Id.* at 1262.

[86] 446 U.S. 55 (1980); 791 F.2d 1255 (6th Cir. 1986). Some believe the plaintiff's fulfillment of both disparate racial impact and historical discrimination should have been sufficient to constitute a Voting Rights Act violation. Shapiro, *supra* note 2, at 550; *see also* Harvey, *supra* note 17, at 1186 (questioning the *Wesley* court's claim that plaintiffs suing under section 2 of the Voting Rights Act must demonstrate that discriminatory intent was present in the enactment of the disputed statute, which contradicts the purpose of the 1982 amendments to the Voting Rights Act).

[87] Jones v. Edgar, 3 F.Supp.2d 979 (C.D. Ill. 1998); Farrakhan v. Locke, 987 F. Supp. 1304 (E.D. Wa 1997).

[88] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997). In *City of Boerne*, the Court held that Congress does not have the power to define substantive aspects of the Constitution. *Id.* at 519. This case restricts federal

Nevertheless, potential for reform on the federal circuit level is still a possibility. In the Second Circuit, felons brought a lawsuit challenging New York's election law that denied inmates and paroled felons the vote based on the results test.[89] The inmates' original claim was dismissed by the district court of the Southern District of New York.[90] On appeal, five judges voted to allow felons to pursue Voting Rights Act claims, stating that "[w]hile a State may choose to disenfranchise some, all or none of its ex-felons based on legitimate concerns, it may not do so based upon distinctions that have the effect, *whether intentional or not*, of disenfranchising felons because of their race."[91] Furthermore, the judges in support of the plaintiffs' claims minimized the need to demonstrate specific past discrimination in the state in order to establish a Voting Rights Act claim.[92] Instead, the judges classified it as one of several factors to be considered.[93] A split among the judges resulted in the lawsuit's

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statutes that may have the effect of granting or lessening rights granted by the Bill of Rights. *Id.* "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* Because the 1982 Voting Rights Act amendment lessens the standard required by section 1 of the Fourteenth Amendment in voting rights cases, it is possible that the Court may hold that utilization of the results-oriented standard is unconstitutional. *Id.* at 525. *See also* GUNTHER, *supra* note 31, at 525 (13th ed. Supp. 2000) (noting that *Boerne* is the first in a line of cases that suggest "that Congress must demonstrate a clear justification for the exercise of its civil rights enforcement power against the states"). Thus, congressional attempts to remedy disenfranchisement may not be useful in changing laws. *Id.*

[89] Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996). The felons brought suit to challenge N.Y. ELEC. LAW § 5-106(2)-(5) (2002). *Baker*, 85 F.3d at 920. The case was originally filed as *Baker v. Cuomo*, 58 F.3d 814 (S.D.N.Y. 1995).

[90] Baker v. Cuomo, 58 F.3d 814 (S.D.N.Y. 1995). At trial, the felons' action was dismissed for failure to state a claim upon which relief could be granted. *Id.* A panel of the trial court reversed this decision. *Id.* The defendants sought review in the Court of Appeals. *Id.*

[91] *Baker,* 85 F.3d at 937 (emphasis added).

[92] *Id.* at 937-38.

[93] *Id.* at 938. Judge Feinberg used literacy tests as a comparative example. *Id.* at 937. When the Court upheld the ban on literacy tests in

dismissal without precedential effect.[94] Nevertheless, this split demonstrates that results-test arguments can be influential.[95]

The reasoning in *Baker* favoring the results-test rationale indicates that the 1982 Amendment to the Voting Rights Act does not unacceptably push the limits of Congress' enforcement power of the Equal Protection Clause into unconstitutional boundaries.[96] Despite the lack of a clear victory, *Baker* demonstrates that the results test of the Act will be influential in changing felon disenfranchisement laws.[97] While several constitutional issues remain in question,[98] this method is not completely devoid of

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Oregon v. Mitchell, 400 U.S. 112 (1970), it did so without proof of congressional violations in every state. *Baker*, 85 F.3d at 937.

[94] *Baker*, 85 F.3d at 921; *see also* Shapiro, *supra* note 17, at 3. Ten judges on the Second Circuit sat en banc and were evenly divided as to the merits of the case. *Id.* Because there was no majority opinion, the lower court's order to dismiss the ex-felons' claims was affirmed. *Id.*

[95] *See Baker*, 85 F.3d at 934 (Feinberg, J., separate opinion). Judge Feinberg's alternative view represented the concerns of the five judges who voted to allow plaintiffs to argue that the results test set out in section 2 of the 1982 Amendment negated the necessity of demonstrating discriminatory intent. *Id.* These judges constitute half of the panel that heard the case. *Id.*

[96] *Baker*, 85 F.3d at 937. Judge Feinberg wrote, "I see no persuasive reason, in view of *Hunter*, why Congress may not use its enforcing power under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment to bar racially discriminatory results, as it did in the Voting Rights Act." *Id.*

[97] *Id.* The fact that half of the judges sitting to hear *Baker* on the Second Circuit agreed that such a claim may be made indicates a possibility that like-minded judges exist in other circuits, or that judges are gradually becoming more favorable toward disenfranchisement cases based on the 1982 amendments to the Voting Rights Act. *Id.*

[98] *Id.* Aside from issues of the scope of congressional power referenced by *City of Boerne*, the Voting Rights Act is also tainted by the applicability of the plain statement rule, which requires an explicit statement of intent from Congress when altering its usual balance with the states. *Id.* at 938. The question remains whether this rule applies to the Voting Rights Act. *Id.* Judge Feinberg argued that application of the Voting Rights Amendment to state disenfranchisement does not upset the balance because the Act follows in the path of the Fourteenth and Fifteenth Amendments, which were specific expansions of federal power. *Id.* Furthermore, the Court declined to apply the plain statement rule to section 2 of the Voting Rights Act in *Chisom v. Roemer*, 501 U.S. 380 (1991). *Baker*, 85 F.3d at 937.

promise.[99]

C. State Court Litigation

Chances for success in felony disenfranchisement lawsuits may be greater within the state court system. State court lawsuits attacking disenfranchisement laws have taken various approaches.[100] Some claims have focused on the irregular application of laws to particular segments of the felony population.[101] Other lawsuits have made broader arguments based on the unconstitutionality of specific provisions of state constitutions.[102]

Mixon v. Commonwealth is a key example of a successful disenfranchisement lawsuit focusing on specific groups within the disenfranchised population.[103] In *Mixon*, ex-felons who had completed their sentences challenged provisions of

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[99] *See* Johnson v. Bush, 214 F. Supp. 2d 1333 (S.D. Fl. 2002). A Florida federal appeals court will have a chance to create positive change when they review a recent decision made by the Southern District of Florida. *Id. Johnson* is an action brought by a group of ex-felons on behalf of all convicted ex-felons in Florida contending that the state's disenfranchisement laws violate the First, Fourteenth, Fifteenth and Twenty-Fourth Amendments as well as section 2 of the Voting Rights Act and 42 U.S.C. § 1983. *Johnson*, 214 F. Supp. 2d at 4, 5. On July 18, 2002, the Florida District Court granted summary judgment to the defendants on all counts. *Id.* at 31. The Brennan Center for Justice, the organization representing the plaintiffs, is planning to appeal. *See* Press Release, Brennan Center for Justice, Brennan Center Statement on Decision in *Johnson v. Bush* (July 17, 2002), *available at* http://www.brennancenter.org/presscenter/ pressrelease-2002-0618.html.

[100] *See, e.g.*, Mixon v. Commonwealth, 759 A.2d 442 (Pa. Commw. Ct. 2000); Fischer v. Governor, 749 A.2d 321 (N.H. 2000).

[101] *See Mixon*, 759 A.2d at 453 (declaring that the state unlawfully denied ex-felons who were imprisoned within the past five years the right to register to vote).

[102] Fischer v. Governor, 749 A.2d 321 (N.H. 2000) (holding that New Hampshire's felon disenfranchisement statutes did not violate plaintiff's right to vote under the New Hampshire Constitution); Emery v. State, 580 P.2d 445 (Mont. 1978) (declaring that the Montana Constitution and state statutes do not unconstitutionally deny convicted ex-felons the right to vote).

[103] 759 A.2d 442 (Pa. Commw. Ct. 2000).

Pennsylvania's Voter Registration Act, which prohibited ex-felons released from prison for less than five years from registering to vote.[104] The court found no rational basis existed to distinguish ex-felons who had not registered to vote before serving prison sentences from those who had registered prior to their prison terms and were, therefore, permitted to vote upon release.[105]

The *Mixon* decision has both negative and positive implications for felony disenfranchisement.[106] The court reaffirmed the principle set forth in *Ramirez* that felony disenfranchisement does not violate the Constitution.[107] The decision to invalidate the unconstitutional provision of Pennsylvania's Voter Registration Act, however, resulted in the restoration of voting rights for thousands of ex-felons.[108] The fact that the Pennsylvania Supreme Court was willing to declare some voting restrictions invalid is encouraging, and this case is a helpful model for ex-felons in other states. Because this decision focuses on a narrow group of individuals, however, it has limited applicability to general disenfranchisement claims.[109]

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[104] *Id.* at 451; Pennsylvania Voter Registration Act, 25 PA. CONS. STAT. § 961.101-.5109 (1995).

[105] *Mixon*, 759 A.2d at 451. *See supra* Part I.A (explaining the rational basis test).

[106] *Mixon*, 759 A.2d at 451. The court stated, "[A]lthough a state may not only disenfranchise all convicted ex-felons it may also distinguish among them, but the distinction must be such that it is rationally related to a legitimate state interest." *Id.* This illustrates that, while the court's use of *Ramirez* limits the number of ex-felons who are affected by the decision, the fact that the court decides that the Voter Registration Act provision was not rationally related to a legitimate state interest improves the status of many formerly disenfranchised ex-felons. *Id.*

[107] 759 A.2d at 449.

[108] THE SENTENCING PROJECT, *supra* note 1, at 2.

[109] The result in this case was based on the lack of a rational basis to justify denying the vote to ex-felons who had not registered before their sentence while permitting those who had already registered to vote. *Mixon*, 759 A.2d at 451. The court relied upon the Third Circuit decision in *Owens v. Barnes* that prohibits distinguishing among disenfranchised convicted felons if the distinction is not rationally related to a legitimate state interest. 711 F.2d 25 (3d Cir. 1983); *see also Mixon*, 759 A.2d at 451. This rationale is

The second, broader approach to disenfranchisement lawsuits focuses on violations of state constitutional provisions.[110] This approach would be more fruitful when attacking a disenfranchisement statute in its entirety.[111] The use of state constitutional analysis to confront disenfranchisement laws has been infrequently utilized, and, therefore, this approach has the potential to restore voting rights to millions.[112] This is especially true in states that continue to disenfranchise ex-felons after completion of parole.[113] The most prominent, albeit unsuccessful,

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important for specific groups of future ex-felons who are denied the vote while other similarly situated ex-felons are not because of a particular factor that occurs in some ex-felons but not in others and does not meet the rational basis test. *Id.* An example would be disenfranchising blue-eyed ex-felons but not their brown-eyed counterparts. *Id.* In order to use this case in other disenfranchisement lawsuits, a specific factor must be present that would apply only to a certain percentage of ex-felons who are affected by the arbitrary distinction. *Id.* This type of argument may or may not result in ending disenfranchisement for a significant number of ex-felons, depending on the size of the particular group affected and the frequency with which the irrational distinction is made. Therefore, *Mixon* may not be useful in broader disenfranchisement claims.

[110] *See infra* note 116 and accompanying text (discussing a New Hampshire case that asserted that the state's felon disenfranchisement statutes violated the state constitution); *see also* Fischer v. Governor, 749 A.2d 321 (N.H. 2000).

[111] *See Mixon*, 759 A.2d at 451. In contrast with the result in *Mixon*, where only the voting rights of those ex-felons who had not registered to vote before committing a felony were restored, a successful attack on a disenfranchisement statute or constitutional provision using a constitutional argument would restore voting rights to a larger percentage of ex-felons because the result would apply to all ex-felons. *Id.*

[112] *See* Fischer v. Governor, 749 A.2d 321, 323 (N.H. 2000) (overruling the lower court's declaration that New Hampshire's felon disenfranchisement statutes violated the state's constitution). State constitutional analysis can be applied to the felon population as a whole, rather than specific groups who have particular grievances that do not apply to all ex-felons. Thus, this type of lawsuit would have the most impact on the greatest number of ex-felons.

[113] FELLNER & MAUER, *supra* note 4, at 7. In Alabama, Florida, Mississippi, Virginia and Wyoming, more than four percent of their respective adult populations are disenfranchised even after completion of parole. *Id.* A repeal of disenfranchisement laws in these states would drastically increase the nation's population eligible to vote. *Id.*

attempt to achieve such a result occurred in New Hampshire.[114]

In *Fischer v. Governor*, the New Hampshire Supreme Court examined whether the state felon disenfranchisement statutes violated the state constitution.[115] The court used a reasonableness standard to evaluate the state's interest in limiting the franchise in relation to the plaintiff's interest in obtaining voting rights.[116] The court evaluated the state's argument that by committing a crime, the felon violated "the social contract" that creates the foundation of a democracy.[117] In determining this rationale to be valid, the court declared that it is not unreasonable to expect society to exclude such individuals from "voting for those who create and enforce the laws."[118]

Although the plaintiff in *Fischer* was not successful in re-enfranchising felons, this result should not completely dissuade other plaintiffs from utilizing state constitutions in disenfranchisement challenges.[119] The reasonableness standard used by *Fischer* is subjective, and the same application in another state's court may lead to a different result.[120] This method's utility has not been fully explored, and it may be particularly

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[114] *See* Fischer v. Governor, 749 A.2d 321 (N.H. 2000).

[115] 749 A.2d 321; N.H. REV. STAT. ANN. § 607-A:2 (1986) (prohibiting ex-felons from voting in elections); RSA 654:5 (1996) (stating that ex-felons' civil rights as listed in the New Hampshire Code section 607-A:2 are forfeited as a result of the conviction); N.H. CONST. part I art. 11 (amended 1984).

[116] 749 A.2d at 329.

[117] *Id.*; *see supra* note 10 (discussing the Lockean theory of the social contract).

[118] *Id.* According to the court, the legislature acted properly given that disenfranchisement is a reasonable reaction to the commission of a felony. *Id.* at 330. The court attempts to provide additional examples of the legislature's erudite discretion by stating that only criminals convicted of the "most serious offenses" are disenfranchised. *Id.*

[119] *See* Fischer v. Governor, No. 98 E402 (N.H. Super. Ct. Oct. 27, 1998). The ruling by the lower court that the disenfranchisement statutes violated the New Hampshire Constitution is an indication that there are some judges who are willing to consider state constitutional challenges to disenfranchisement. *Id.* Because a state court decision is not binding on another state's judicial system, the result in *Fischer* is merely persuasive.

[120] *Fischer*, 749 A.2d at 329.

successful in states where ex-felons do not have the right to vote.[121] When using the state constitution, litigants have more latitude in arguing constitutional violations if the focus is on the reasonableness of preventing ex-felons from voting rather than on the reasonableness of preventing felons currently in prison from voting.[122] This argument would be favored by a court willing to expand the rights of individuals who have completed their sentence and are subsequently contributing to society in a positive manner.[123]

II. LEGISLATIVE APPROACHES TO DISENFRANCHISEMENT

Recently, legislative proposals have addressed disenfranchisement more substantially than the court system.[124] On the federal level, legislators have begun to address the issue by introducing legislation in Congress.[125] State legislatures have been active in establishing task forces to contemplate changes to disenfranchisement statutes.[126] Additionally, several state

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[121] *See* THE SENTENCING PROJECT, *supra* note 1, at 3. These include Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Maryland, Mississippi, Nevada and Wyoming. *Id.*

[122] *See, e.g.*, Mixon v. Commonwealth, 759 A.2d 442 (Pa. Commw. Ct. 2000) (declaring invalid a denial of voting rights to certain ex-felons while establishing that no violation occurred in the disenfranchisement of currently incarcerated ex-felons). Courts seem to be more willing to find violations of state constitutions in cases involving ex-felons who have completed their sentences rather than in cases involving current prisoners. *Id.* at 448.

[123] *See, e.g.*, Thompson, *supra* note 10, at 17 (describing the story of Rosetta Meeks, convicted of a drug felony in 1993 and permanently barred from voting in Florida despite her efforts to contribute to her community, including teaching computer skills to low-income people).

[124] *See, e.g.*, H.R. 906, 106th Cong. (1999); H.R. 495, 2001 (Md. 2001); S.B. 208, 1999 (Fla. 1999); A.J.R 6, 70th Sess. (Nev. 1999).

[125] H.R. 906. Representative Conyers introduced this bill "[t]o secure the Federal voting rights of persons who have been released from incarceration." *Id.* Representatives Martin Frost of Texas, Charles Rangel of New York and Sheila Jackson-Lee of Texas were among those who also supported this bill. *Id.*

[126] Green, *supra* note 16, at B1. The Virginia State Crime Commission created a task force in June 2001 to study the restoration of civil rights for ex-

legislators have proposed state constitutional amendments.[127]

A. Federal Legislation

The most recent federal legislation dealing with felony disenfranchisement is H.R. 906, presented to the House of Representatives in 1999 by Michigan Representative John Conyers.[128] The primary objective of this bill, referred to as the Civic Participation and Rehabilitation Act of 1999, is to restore the federal voting rights of ex-felons.[129] The Act authorizes the Attorney General to initiate declaratory or injunctive relief against states that violate its provisions.[130] It also entitles those who would be affected by a violation of the Act to provide notice to the chief election official of the state.[131] Although this Act died in the Judiciary Committee, the issues raised in a congressional subcommittee hearing on the Act provide insight into future difficulties similar bills might face.[132]

One of these issues addresses whether Congress' supervisory power over federal elections is sufficient to justify federal

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felons. *Id.* In Maryland, the state legislature formed the Task Force to Study Repealing the Disenfranchisement of Convicted Ex-felons. H.R. 495, 2001 (Md. 2001).

[127] ALLARD & MAUER, *supra* note 4, at 6. In 1999, Florida Senator James Hargrett introduced a bill that would lift a constitutional requirement that ex-felons initiate the restoration of their civil rights in order to vote or hold office. S.B. 208, 1999 (Fla. 1999); *see also* ALLARD & MAUER, *supra* note 4, at 6. Also in 1999, Nevada Assemblyman Wendell Williams proposed a constitutional amendment that would automatically restore the right to vote to ex-felons. A.J.R 6, 70th Sess. (Nev. 1999); *see also* ALLARD & MAUER, *supra* note 4, at 8.

[128] H.R. 906, 106th Cong. (1999).

[129] *Id.* Shortly after its introduction, the bill was referred to the House Judiciary Committee and then to the Subcommittee on the Constitution. ALLARD & MAUER, *supra* note 4, at 12.

[130] H.R. 906; ALLARD & MAUER, *supra* note 4, at 12.

[131] H.R. 906; ALLARD & MAUER, *supra* note 4, at 12.

[132] *Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 106th Cong. (1999) [hereinafter *Hearing*]; *see also* ALLARD & MAUER, *supra* note 4, at 12.

interference in an area traditionally left to the states.[133] Gillian Metzger, a staff attorney at the Brennan Center for Justice at New York University School of Law, argued at the subcommittee hearing that such questions should not prevent the passage of the 1999 Act.[134] Metzger asserted that the Elections Clause of Article I, Section 4 of the Constitution gives Congress very broad power to regulate federal elections.[135] She also maintained that the Act represents a congressional policy judgment regarding felony disenfranchisement.[136] These policy considerations are validly enforced through the Elections Clause, which requires states to defer to Congress regarding the conduct of federal elections.[137]

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[133] U.S. CONST. art. I., § 4. The Elections Clause gives power to the state legislatures to prescribe "the times, places and manner of holding elections for Senators and Representatives," but it also permits Congress to "make or alter such regulations." *Id.* Some disenfranchisement activists have indicated that this clause may give Congress the authority to establish qualifications for federal elections; however, it has never been directly addressed by the Supreme Court. *See* ALLARD & MAUER, *supra* note 4, at 12 (outlining the comments made by Gillian Metzger, a staff attorney for the Brennan Center, at a Subcommittee on the Constitution hearing held on October 21, 1999).

[134] *Hearing, supra* note 132, at 47 (testimony of Gillian Metzger, Brennan Center staff attorney).

[135] *Id.* at 56. According to Metzger, the Elections Clause was used as the rationale giving Congress the authority to enact the Federal Election Campaign Act. *Id.* Additionally, the Supreme Court affirmed that Congress has a broad power to "safeguard the legitimacy of federal elections" when the Court upheld the Corrupt Practices Act, which regulates contributions and expenditures made to influence the selection of presidential electors. *Id.*

[136] *Id.* at 48. Metzger stated that H.R. 906 addresses existing disparities between the states regarding felon participation in federal elections, and represents a judgment that "such disparities in citizens' fundamental rights based on the happenstance of geography are unwarranted, and threaten the integrity and legitimacy of federal government." *Id.*

[137] *Id.* at 47-49. Metzger dismissed an opposing argument that the Qualifications Clause of Article I, Section 2 (requiring that the qualifications of the voters in Senate and House elections be the same as qualifications for voters in the most numerous branch of the state legislature) negates any implication that Congress has the power to set qualifications for voters in federal elections. *Id.* Metzger stated that the intent of the Founders in writing the Qualifications Clause was to prevent states from enacting laws that result

Additionally, Metzger argued that Congress' enforcement powers under the Fourteenth and Fifteenth Amendments provide the authority to adopt the Act since the existence of discriminatory intent and impact in disenfranchisement laws violate both amendments.[138]

In light of the holding in *City of Boerne v. Flores,* however, the Court likely would have invalidated the 1999 Act.[139] Because this bill would require states to permit ex-felons to vote in all federal elections, some states would be required to change their voting procedures and qualifications.[140] This would raise issues regarding the scope of Congress' power to enforce federal laws in the states.[141]

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in some citizens being eligible to vote in state elections but not in congressional elections. *Id.*

[138] *Id.* at 49, 55. The right to vote is a fundamental right that is protected by the Fourteenth and Fifteenth Amendments, giving Congress the authority to address state laws that impede protected groups' ability to vote. *Id.*; *see supra* Part I.A (discussing the Fourteenth Amendment's Equal Protection Clause and its impact on felony disenfranchisement lawsuits); *see also supra* note 36 and accompanying text (discussing "fundamental rights"). Metzger states that criminal disenfranchisement provisions have been enacted to exclude black voters and continue to have a "substantially greater impact on minorities, particularly African-American men." *Hearing, supra* note 132, at 55; *see supra* note 51 and accompanying text (discussing the meaning of "disproportionate impact"). Metzger states that Congress has the power to adopt remedial legislation even if it prohibits some conduct that is not unconstitutional. *Hearing*, *supra* note 132, at 55. She points to Congress' power to ban literacy tests, even though such tests may not by themselves violate the Constitution. *Id.*; *see supra* Part I.B (discussing the historical factors leading up to the Voting Rights Act and the subsequent use of the Act in felony disenfranchisement legislation); *see also supra* note 68 (discussing literacy tests and other restrictions on voting).

[139] 521 U.S. 507 (1997); *see supra* note 88 and accompanying text (describing the current Court's reluctance to endorse congressional actions that expand the federal government's power).

[140] H.R. 906, 106th Cong. § 3 (1999). States that do not permit ex-felons to vote in any election would have to implement procedures so that the ex-felons have access to federal elections even if they are still prohibited from voting in the state elections. *See* Shapiro, *supra* note 17, at 4; s*ee supra* notes 12-14 (listing the potentially affected states).

[141] GUNTHER, *supra* note 31, at 984-85. The scope of the federal

Additionally, a federal disenfranchisement act faces practical concerns of implementation. If a law were enacted to prohibit the disenfranchisement of ex-felons in federal elections, state election officials would be faced with the logistical problem of separating state and federal ballots.[142] Moreover, experts doubt that sponsors of the act would be able to create a broad coalition sufficient to pass the bill, given the limited amount of national public awareness and support for re-enfranchisement.[143] Nevertheless, while disenfranchisement may not be a favored political issue, the involvement of prominent legislators to modify the laws on a federal level may create a more receptive atmosphere.[144] While

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government's power to create laws that declare certain practices unlawful even if the Court has not found them to be unconstitutional depends upon whether such laws are determined by the Court to be "remedial." *Id.* Remedial laws are those that "provide enforcement mechanisms to implement judicially declared rights." *Id.* at 984. The remedial nature of the 1999 Act may be assessed by the standard set by *City of Boerne,* which requires a high level of justification for congressional action taken against the states. *Id.* at 99. *City of Boerne* stated that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" 521 U.S. at 518 (internal citations omitted). Justice Kennedy further stated that congressional legislation prohibiting literacy tests and similar requirements enacted to address racial discrimination in voting was upheld under the Fifteenth Amendment's enforcement clause. *Id.* Because *City of Boerne* also stressed that the enforcement power is remedial and does not permit Congress to decide what is an impermissible constitutional violation, however, the question whether Congress has the power to force states to re-enfranchise ex-felons for federal elections depends upon whether that power is considered merely remedial in nature or constitutes a substantive determination of constitutional violations. *Id.* at 519.

[142] Shapiro, *supra* note 17, at 4.

[143] Symposium, *Constitutional Lawyering in the 21st Century*, *Enfranchising the Disenfranchised*, 9 J.L. & POL'Y 249, 283 (2000). Melissa Saunders, professor at the University of North Carolina and Senior Counsel to the North Carolina Attorney General, points out that the issue was raised in the 2000 Democratic Presidential Primary debate and that neither candidate seemed to think that the disenfranchisement of ex-felons was a problem. *Id.*

[144] H.R. 906, 106th Cong. (1999). The 1999 congressional bill was introduced by Rep. Conyers and supported by other well-known

federal efforts are not particularly promising, local legislators may be more likely to change state disenfranchisement laws because they operate on a smaller, more flexible scale and are less likely to be scrutinized by the media and the public.[145]

B. State Legislation

Several states have passed constitutional amendments and bills repealing sections of disenfranchisement laws or easing restrictions on ex-felons.[146] Additionally, some states have recognized the importance of this issue by creating task forces and committees to gather evidence to support modifying the existing laws.[147] The increase in efforts made in states throughout the country as well as the presence of bi-partisan cooperation indicate that state legislation may be the most effective way to influence disenfranchisement laws.[148] Given the increased

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representatives, including Charles Rangel of New York, Maxine Waters of California and Jesse Jackson, Jr. of Illinois. *Id.*

[145] *See infra* Part II.B (outlining efforts made by state legislatures and governors to modify existing felony disenfranchisement laws).

[146] H.R. 5042, 2001 Gen. Assem., Reg. Sess. (Conn. 2001) (restoring the voting rights of convicted ex-felons who are on probation); H.R. 126, 140th Gen. Assem. (Del. 2000) (amending the Delaware Constitution to permit persons convicted of certain felonies, excluding murder, sexual offenses, manslaughter and offenses against public administration including bribery, to vote after being pardoned or five years after the completion of their sentences); S.B. 204, 45th Leg., Reg. Sess. 2001 (N.M. 2001) (restoring the right to vote to convicted ex-felons who have satisfied all sentence conditions). *See also* Steve Miller, *Rights Advocates and Democrats Seek Vote for Ex-felons*, WASH. TIMES, Apr. 9, 2001, at A3 (reporting that ten states have considered measures that would loosen felony voting restrictions during the end of 2000 through the first several months of 2001).

[147] *See* Green, *supra* note 16, at B1. In 2001, task forces were created in Maryland and Virginia to contemplate the voting rights of ex-felons. *Id.* In June 2001, the Virginia State Crime Commission created a task force to study the restoration of ex-felons' civil rights. *Id.* The Maryland state legislature formed its own task force focusing on repealing the disenfranchisement of convicted ex-felons. H.B. 495, 415th Gen. Assem., Reg. Sess. 2001 (Md. 2001).

[148] *See supra* Part II.A (discussing federal disenfranchisement action).

political viability of anti-disenfranchisement rationale in the states, this approach is likely to create a significant amount of change in a relatively short time period.

Connecticut, Delaware and New Mexico have made significant changes to their disenfranchisement laws in recent years.[149] In May 2000, Connecticut Governor John Rowland signed into law a bill restoring voting rights to ex-felons on probation.[150] The bill was supported by several Republican leaders in the state legislature and was moved along by the lobbying efforts of a voting rights coalition that included civil rights groups as well as governmental agencies such as the Department of Corrections.[151] Because this bill has only been in effect for less than a year, it is unknown exactly how much impact it has had on the status of felony disenfranchisement.[152] Nevertheless, because there are an estimated 37,000 ex-felons currently on probation in the state, the bill is likely to have a significant impact in Connecticut.[153]

In June 2000, the Delaware General Assembly amended the state's constitution to restore voting rights to certain convicted ex-felons five years after the completion of their sentence.[154] The restoration does not apply to ex-felons convicted of murder, manslaughter, offenses against public administration involving bribery or improper influence, sexual offenses or abuse of office.[155]

Efforts underway on a state level have been vastly more successful than on the federal level. *See supra* Part II.A.

[149] ALLARD & MAUER, *supra* note 4, at 5 (describing restoration efforts in Connecticut and Delaware); Miles A. Rapoport, *Restoring the Vote*, AM. PROSPECT, Aug. 13, 2001, at 1314 (describing efforts in Connecticut and New Mexico).

[150] H.R. 5042, Gen. Assem., Reg. Sess. 2001 (Conn. 2001); Rapoport, *supra* note 149.

[151] Rapoport, *supra* note 149.

[152] H.R. 5042, 2001 Leg. Jan. Sess. (Conn. 2001).

[153] Editorial, *Ballot Box Blunder*, CONN. L. TRIB., Apr. 23, 2001, at 22 [hereinafter *Ballot Box Blunder*].

[154] H.R. 126, 140th Gen. Assem. (Del. 2000); ALLARD & MAUER, *supra* note 4, at 5.

[155] H.R. 126, 140th Gen. Assem. (Del. 2000).

In New Mexico, a bill passed in 2001 repealed the state's lifetime ban on ex-felon voting.[156] The bill eliminated the obstacle of obtaining a pardon in order to vote.[157] Instead, voting rights are automatically restored once the ex-felon "has satisfactorily completed the terms of a suspended or deferred sentence," or is "unconditionally discharged."[158] Supporters focused on the ban's impact on the lower economic classes.[159]

States such as Maryland, Virginia and Florida have also established special committees and task forces in order to address the problem of disenfranchisement.[160] In Maryland, the state legislature passed a bill in May 2001 creating a task force to determine what modifications should be made to the state's current statute, which permanently disenfranchises all ex-felons.[161] The measure was enacted after a similar bill passed by the House was unsuccessful in the Senate.[162] The task force released a report on its findings in January 2002.[163] This report

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[156] S.B. 204, 2001 45th Leg., 1st Sess. (N.M. 2001).

[157] S.B. 204 § 2.

[158] S.B. 204 § 2(A)(1)-(3); Rapoport, *supra* note 149. Ex-felons must obtain a certificate of discharge from the state Parole Board that demonstrates that they have met all of the terms of their sentence. S.U. Mahesh & David Miles, *N.M. Legal Clashes Loom As Hidden-Gun Law Starts*, ALBUQUERQUE J., July 1, 2001, at A1. This bill affects the voting status of 7,000 in New Mexico. *Id.*

[159] S.U. Mahesh, *2 Options Would Let Some Ex-felons Vote*, ALBUQUERQUE J., Feb. 2, 2001, at A10. Senate President Pro Tem Richard Romero and Senator Manny Aragon, chairman of the Senate Rules Committee were the major forces behind the bill's passage. *Id.*

[160] *See* H.R. 495, 2001 Leg., 415th Sess. (Md. 2001); Green, *supra* note 16; Holly A. Heyser, *Crime Panel to Study Voting Rights of Ex-felons*, VIRGINIAN-PILOT, June 19, 2001, at B1; Hiaasen, *supra* note 16, at 7B.

[161] H.R. 495, 2001 Leg., 415th Sess. (Md. 2001). The act created a "Task Force to Study Repealing the Disenfranchisement of Convicted Ex-felons in Maryland." *Id.*; Rapoport, *supra* note 149.

[162] Matthew Mosk & Lori Montgomery, *House Backs Restoring Criminals' Voting Rights; Similar Measure Struck Down by Md. Senate*, WASH. POST, Mar. 23, 2001, at B8.

[163] TASK FORCE TO STUDY REPEALING THE DISENFRANCHISEMENT OF CONVICTED FELONS IN MARYLAND, TASK FORCE REPORT (2002); *Maryland: Progress on Ex-Felon Voting Rights*, DEMOCRACY DISPATCHES (Demos: A

led to the creation of H.B.535, which the Assembly passed in the spring of 2002.[164] The bill permits ex-felons to vote after they have completed "the court-ordered sentence."[165] The enactment of this bill demonstrates the significant influence task forces such as the one in Maryland can have on changing disenfranchisement laws.

In Virginia, the State Crime Commission formed a task force to address the process of restoring voting rights to ex-felons.[166] Currently ex-felons must meet several requirements and ultimately gain a pardon from the governor.[167] In June 2002, task force members announced their intention to amend the state constitution in order to implement an easier voting restoration process for ex-felons.[168] The Commission's proposal would create an alternate track established and monitored by the legislature, which would operate alongside the Governor's independent power to restore voting rights.[169] Virginia's current governor, Mark R. Warner, is also developing his own proposal to make voting restoration more efficient.[170] Once the change

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Network for Ideas and Action, New York, N.Y), Feb. 15, 2002, *available at* http://www.demos-usa.org/Democracy_Reform/Dispatches16/. The task force found that about 135,700 citizens are denied the right to vote. *Id.*; *see also* Elaine Shen, *Maryland's Disenfranchisement of Ex-felons May be Easing*, BALT. CHRON., Feb. 6, 2002, *available at* http://baltimorechronicle.com/disenfranchisement_feb02.html.

[164] H.B. 535, 2002 Leg. 416th Sess. (Md. 2002).

[165] *Id.* The bill took effect on January 1, 2003. *Id.* Before this law was enacted, ex-felons could not qualify to vote until after the probation period had ended. *Id.*

[166] Green, *supra* note 16. The idea to form the task force was inspired by a 1996 study by the *Richmond Times-Dispatch* that revealed that almost 270,000 felons had lost the right to vote in Virginia, as well as the national study completed by the Sentencing Project in 1998. *Id.*; *see also* FELLNER & MAUER, *supra* note 4, at 2; ALLARD & MAUER, *supra* note 4, at 2.

[167] Green, *supra* note 16.

[168] Christina Nuckols, *State May Simplify Voting Rights Law*, VIRGINIAN-PILOT, June 19, 2002, at B3. This additional process would most likely apply to non-violent offenders. Mary Shaffrey, *Voting Rights Eyed for Ex-felons*, WASH. TIMES, June 25, 2002, at B01.

[169] Green, *supra* note 16; Shaffrey, *supra* note 168.

[170] Green, *supra* note 16; *see also* Nuckols, *supra* note 168.

passes in the General Assembly, it would be voted upon in a statewide referendum.[171] Kenneth W. Stolle, Chairman of the Virginia State Crime Commission and a Republican state senator, initiated the creation of the task force.[172] His participation in the task force is an illustration of the increased viability of disenfranchisement as a political issue. In the past, Stolle has stalled the passage of voting rights statutes that attempted to ease restrictions on ex-felons.[173]

In Florida, Governor Jeb Bush and his cabinet passed rules that eased restrictions on ex-felons' voting rights as of June 2001.[174] Ex-felons who are nonviolent and not classified as habitual offenders will be able to get their voting rights restored without a hearing by the Executive Board of Clemency.[175] The new rules also reduce required paperwork and permit ex-felons who have not paid all of their court fees to vote.[176] Additionally, the Florida Office of Executive Clemency recently shortened and

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[171] Shaffrey, *supra* note 168. Before the state's constitution can be amended, however, the final plan must first be successful in separate referendums in two different legislative sessions. *Id.* at 180. In July 2000, Virginia's restoration process was modified to permit ex-felons to petition circuit court judges in order to speed up the process. Roger Chesley, *Efforts to Restore Voting Rights to Ex-felons Grind Along*, VIRGINIAN-PILOT, Nov. 17, 2001, at B9. Since its inception, this measure has resulted in judicial approval of 27 requests, of which all but one were granted by the Governor. *Id.*

[172] *See* Heyser, *supra* note 160, at B1.

[173] *Id.*

[174] Florida Rules of Executive Clemency [hereinafter *Florida Rules*], *available at* http://www.state.fl.us/fpc/RULES-6-14-01.pdf; *see also* Julie Hauserman, *supra* note 16, at 4B. The changes were made after a bill in the House that would automatically restore voting rights to ex-felons failed to garner support throughout the state legislature. Mary Ellen Klas, *House Panel: Ex-Inmates Should Have Right to Vote*, PALM BEACH POST, Mar. 22, 2001, at 11A; *see also* Editorial, *Constructive Clemency*, ST. PETERSBURG TIMES, June 17, 2001, at 2D.

[175] *Florida Rules*, *supra* note 174. Under the old rules, felons who had completed their sentences but still owed court fees and those who had been convicted of more than two felonies would be required to appear before a hearing of the Clemency Board. Maya Bell & Mark Silva, *Felons Can Regain Rights More Easily*, ORLANDO SENTINEL, June 15, 2001, at A1.

[176] Hauserman, *supra* note 16, at 4B.

simplified the form used by ex-felons to apply for restoration.[177] Before the form was changed, ex-felons were required to obtain certified copies of court records and notify the presiding or chief judge and prosecuting attorney of the application.[178]

All of these state-initiated efforts reflect a changing societal view of criminal justice issues.[179] The failure of harsh criminal punishments to adequately improve crime statistics as well as the prevalence of the disproportionate racial impact of such programs are factors that influence the way lawmakers view disenfranchisement.[180] Disenfranchisement's political viability is also enhanced by the participation of individuals who are affiliated with parties traditionally opposed to the relaxation of criminal justice standards.[181] Given the current activity in state governments, therefore, the primary focus of felon disenfranchisement activists should be on developing legislation and courting political leaders who would be willing to alter such laws at the state level. This approach has the advantage of

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[177] Press Release, American Civil Liberties Union, ACLU Applauds Changes to Aid Restoration of Voting Rights in Florida, Urges Governor to Make Process Automatic (Apr. 24, 2002) [hereinafter Press Release], *available at* http://www.aclu.org/news/2002/n042402c.html. The state has reduced the size of the questionnaire used by felons to apply for the restoration of their voting rights from twelve pages to four. Bell & Silva, *supra* note 175, at A1.

[178] Press Release, *supra* note 177.

[179] Rapoport, *supra* note 149.

[180] *Id.* These factors have helped ex-felony disenfranchisement opponents gain bi-partisan support on the local government level. *Id.*

[181] *Id.* Connecticut Governor John Rowland and Virginia Chairman Kenneth Stolle are examples. *Id.*; *see also* Heyser, *supra* note 160. With support from politicians who traditionally have not been in favor of disenfranchisement efforts, there is a greater likelihood that cooperation will increase and modifications of disenfranchisement laws will be introduced more frequently and passed more rapidly. *See* Rapoport, *supra* note 149; *see also* Heyser, *supra* note 160. Furthermore, the presence of such politicians in the process helps to legitimize the movement by demonstrating that disenfranchisement is an issue that must and can be addressed on a broad scale. *See id.* (discussing Chairman Stolle's reasons for being involved in the task force).

achieving results quickly and effectively.[182] Moreover, it provides a direct way to change the laws instead of initiating a court proceeding that is lengthy and subject to appeals.

CONCLUSION

Efforts to change outdated felony disenfranchisement laws have had varying degrees of success.[183] The court system has traditionally been the main focus in disenfranchisement activism, and many ex-felons have utilized different theories in order to attack the laws.[184] In federal court, lawsuits have used constitutional arguments, centering on the Equal Protection clause as well as the 1965 Voting Rights Act.[185] While these efforts provided initial promise, successes are few.[186] In state courts, litigation has focused not only on federal constitutional provisions and laws, but also on the application of state statutes and constitutional provisions.[187] While such lawsuits have more promise because of greater potential for flexibility in state laws, disenfranchisement laws have yet to be significantly changed

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[182] *See* Shapiro, *supra* note 17, at 4. Shapiro believes that "[t]ruly effective legislative reform must occur at the state level." *Id.*

[183] *See supra* Part I (discussing disenfranchisement litigation); Part II (discussing legislative approaches).

[184] *See supra* Part I (analyzing the use of the Equal Protection Clause, the Voting Rights Act and state law theories in disenfranchisement lawsuits).

[185] *See* Hunter v. Underwood, 471 U.S. 222, 225-28 (1985).

[186] *Id.* Those that do succeed are limited to cases where both the intent to discriminate and the impact of discrimination on a suspect class are obvious and egregious. *Id.*; *see also supra* Part I.B (explaining the implications of the decisions in *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986), and *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996), in which litigants focused on Voting Rights Act claims). While the Act was specifically enacted to target voting qualifications that limit the rights of protected classes, the Supreme Court has interpreted the Act as requiring evidence of discriminatory intent in order to declare a state action invalid. *See Bolden*, 446 U.S. 55, 65 (1980). Despite Congress' efforts to lessen that burden, federal courts consistently continue to apply the standard. *See supra* Part I.B (discussing cases in which the federal courts have declined to utilize the higher intent standard).

[187] *See supra* Part I.C (analyzing the approaches taken in state court litigation).

using this method.[188]

In recent years, proposed legislation addressing the problem of felony disenfranchisement has increased on both the federal and state levels. The most significant federal bill, the Civic Participation and Rehabilitation Act of 1999, would guarantee all ex-felons the right to vote in federal elections.[189] Because the bill was not enacted, however, its actual impact was minimal.[190]

Efforts to attack disenfranchisement laws should be concentrated on the state and local legislatures. Bills and constitutional amendments in state legislatures have been frequently proposed and enacted throughout the country in recent years.[191] These types of changes have had the most significant

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[188] *See supra* Part I.C (outlining the possible state court options in felony disenfranchisement lawsuits). While this approach has not yet been fully explored, litigants in state court have the option of using both federal constitutional rationales as well as any provided by the state's own constitution, which may provide more constitutional leeway than the federal Constitution does. *Id.*

[189] H.R. 906, 106th Cong. (1999). This bill represents a significant achievement because it furthers political discussion of felony disenfranchisement in Congress. *See supra* note 144 (listing prominent legislators involved in the creation of H.R. 906). Because felony disenfranchisement has typically not attracted nationally known politicians to champion the issue, the fact that legislation was introduced and considered in a U.S. House committee demonstrates that the political atmosphere may be shifting, if only slightly, to create a more favorable environment to raise such issues. *Id.*

[190] *Hearing, supra* note 132. The bill died in the Judiciary committee after the October 21, 1999 hearing. *Id.*; *see also* ALLARD & MAUER, *supra* note 4, at 12; Miller, *supra* note 146.

[191] *See supra* Part II.B (giving examples of states in which constitutional amendments and bills have been debated and/or passed). Local legislators have been influential in amending state constitutions to ease voting restrictions on both felons and ex-felons. *See, e.g.*, H.R. 126, 140th Gen. Assem. (Del. 2000) (amending the Delaware constitution to permit persons convicted of certain felonies excluding murder, manslaughter, offenses against public administration including bribery, and sexual offenses to vote after being pardoned or five years after the completion of their sentences). Legislators have also created task forces to streamline the pardon process. *See, e.g.*, Green, *supra* note 16 (describing the task force set up by the Virginia State Crime Commission to address the restoration of voting rights for ex-felons).

and influential impact on improving access to the ballot box, and the changes have occurred throughout the country, including in several Southern states.[192] Such modifications have the most potential to reinstate voting rights to the greatest number of people.[193] Therefore, in states that continue to enforce restrictive disenfranchisement laws, the best avenue to combat these laws lies in the local legislature.

Finally, they have restored the right to vote to thousands in the felony population. FELLNER & MAUER, *supra* note 4, at 8. In Delaware, twenty percent of black men were permanently disenfranchised under the old felony disenfranchisement statute. *Id.* Connecticut disenfranchised over 42,000 ex-felons under the previous statute. *Id.* at 9. In New Mexico, four percent, or almost 50,000 ex-felons were disenfranchised before the passage of the 2001 bill. *Id. See supra* Part II.B (outlining additional material regarding the new legislation in these states).

[192] ALLARD & MAUER, *supra* note 4, at 4. For example, efforts were taken in 1999 in Alabama's House to pass legislation requiring that the Board of Pardons and Parole automatically restore voting rights upon completion of a felon's sentence. *Id.*; *see supra* Part II.B (providing information regarding the efforts underway in Florida and Virginia).

[193] *See* ALLARD & MAUER, *supra* note 4, at 2 (noting enhanced voting activity in seven states). The range and scope of actions being taken throughout the country to change disenfranchisement laws is illustrative of the potential significant impact state legislation can have on this issue. *Id.* Furthermore, the political climate in the states has become more favorable to changes, which makes lobbying local legislators the most productive avenue. *See supra* Part II.B (illustrating that politicians in several states are working together in a bi-partisan effort to modify the existing disenfranchisement laws).