

University at Buffalo School of Law

Digital Commons @ University at Buffalo School of Law

Journal Articles

Faculty Scholarship

1-1-2022

Felony Disenfranchisement and Voting Rights Restoration in the States

Manoj Mate

University at Buffalo School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/journal_articles



Part of the [Civil Rights and Discrimination Commons](#), [Election Law Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Manoj Mate, *Felony Disenfranchisement and Voting Rights Restoration in the States*, 22 Nev. L.J. 967 (2022).

Available at: https://digitalcommons.law.buffalo.edu/journal_articles/1236



This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

FELONY DISENFRANCHISEMENT AND VOTING RIGHTS RESTORATION IN THE STATES

Manoj Mate*

TABLE OF CONTENTS

INTRODUCTION.....	968
I. THE CONSTITUTIONAL AND LEGAL CONTEXT: THE ENTRENCHMENT OF FELONY DISENFRANCHISEMENT	973
A. <i>The Reconstruction Amendments, Federalism, and State Oppression of Voting Rights</i>	973
B. <i>Legal Terrain: The Post-Ramirez Context</i>	975
C. <i>The Next Generation of Felony Disenfranchisement Restrictions</i>	978
II. PATHWAYS FOR RESTORING VOTING RIGHTS IN THE STATES: RECENT TRENDS	979
A. <i>The Political Path</i>	980
1. <i>State Legislation</i>	982
2. <i>Executive Orders</i>	986
3. <i>State Constitutional Amendment</i>	988
B. <i>The Legal Path</i>	989
1. <i>Recent Federal Court Decisions</i>	990
2. <i>Recent State Court Litigation</i>	996
C. <i>Critiquing Federal Court Deference to State Felony Disenfranchisement Policies</i>	998
III. THE PATH FORWARD: NEAR-TERM AND LONG-TERM STRATEGIES FOR VOTING RIGHTS RESTORATION	999
A. <i>Assessing the Political Terrain for Voting Restoration at the State Level</i>	999
B. <i>Near Term Approaches: Focusing on Administrative Processes and Structural Governance</i>	1000
C. <i>Longer Term Strategies</i>	1002
CONCLUSION	1003

* Associate Professor of Law and Faculty Director, Racial Justice Initiative, DePaul University College of Law. For excellent research assistance, I thank Mitchell Hajnal. Thank you to the editors of the Nevada Law Journal for their excellent work and editing of the Article.

INTRODUCTION

The United States has the ignominious distinction of leading the world not only in its rate of incarceration, but also in terms of having the most restrictive felony disenfranchisement laws in the world.¹ As of 2018, the US made up roughly 4 percent of the world's population, but had 20 percent of the world's prisoners.² Forty-eight states in the US continue to deny felons voting rights, and a significant number of states impose restrictions on felons even after their release from prison.³ According to the Sentencing Project, over 5 million voters in the United States could not vote in the 2020 election because they were convicted of felonies, and a significant percentage of these voters were minorities.⁴ Over 6 percent of the African American population in the US is disenfranchised because of felony convictions, and one in seven African American voters are disenfranchised because of felony convictions in seven states: Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming.⁵

At its core, felony disenfranchisement in the United States is a manifestation of deep-seated structural discrimination within the US criminal justice system, and the utilization of that discrimination perpetuates exclusionary discrimination in voting and political systems.⁶

¹ HEATHER SCHOENFELD, *BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION* 2, 6 (2018); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 4 (2006); John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> (noting that U.S. still has highest incarceration rate in the world); Jamie Fellner & Marc Mauer, *Losing the Vote, The Impact of Felony Disenfranchisement Laws in the United States*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/reports98/vote/usvot98o-04.htm> (noting that US has most restrictive felony disenfranchisement laws in world). Although existing scholarship continues to use the term "felon disenfranchisement" to describe disenfranchisement of persons with felony convictions, I use the term "felony disenfranchisement" in this article, as use of the term felon continues to stigmatize individuals with felony convictions for actions in their past.

² Roy Walmsley, *World Prison Population List (12th Edition)*, WORLD PRISON BRIEF 6 tbl.2 (June 11, 2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf.

³ At present, only Maine, Vermont, the District of Columbia, and Puerto Rico do not restrict persons with felony convictions from voting. See Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENT'G PROJECT, <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer>.

⁴ Christopher Uggen et al., *Locked out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT (Oct. 15, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

⁵ *Id.*

⁶ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 40–64, 93–96, 190–99 (2010); Chung, *supra* note 3; Daniel S. Goldman,

Although the Reconstruction Amendments sought to end slavery and entrench equality and voting rights, the promise of those Amendments was not immediately realized. Because the amendments did not fundamentally displace the autonomy and power of states over regulation of elections and voting qualifications, states were able to undermine the promise of progress in the years following Reconstruction.⁷ While Congress' enactment of the Voting Rights of 1965 ushered in rapid progress in finally enforcing the Fifteenth Amendment by increasing black voter registration in the US, mass incarceration policies and state felony disenfranchisement laws led to the disenfranchisement of millions of voters, with a disproportionate impact on minority voters.

Since the US Supreme Court upheld the constitutionality of felony disenfranchisement laws in *Richardson v. Ramirez*, both federal and state courts have generally upheld the constitutionality of state laws that restrict the voting rights of individuals with felonies, though some state courts have issued decisions that have limited the scope of disenfranchisement.⁸ Since the late 1990s, a growing number of states have sought to end disenfranchisement of individuals who have been released from prison.⁹ From 1997 to 2021, states enacted laws restoring voting rights upon release from prison, and this movement accelerated prior to and following the 2020 elections.¹⁰ Although Maine, Vermont, and the District of Columbia are the only jurisdictions that have abolished felony disenfranchisement, recent reforms in several states restored voting rights to incarcerated individuals upon their release from prison.¹¹ From 1997 to 2021, sixteen states enacted reforms via legislation or executive action to expand voting rights for individuals with felony convictions, and since 2017, several states, including California, New York, New Jersey, Connecticut, Washington, Colorado, and

The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination, 57 STAN. L. REV. 611, 612–13 (2004); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, STAN. L. SCH. RSCH. PAPER NO. 75, 1, 3–4, accessible at <https://images.procon.org/wp-content/uploads/sites/48/convictionsanddoubts.pdf>; Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 262 (2008); Atiba R. Ellis, *Race, Class, and Structural Discrimination: On Vulnerability Within the Political Process*, 28 J. C.R. & ECON. DEV. 33, 34 (2015).

⁷ See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION XXV–IX* (2019); Kurt T. Lash, *Federalism and the Original Fourteenth Amendment*, 42 HARV. J. L. & PUB. POL'Y 69, 69, 71 (2019).

⁸ *Richardson v. Ramirez*, 418 U.S. 24, 24 (1974). See *infra* discussion at notes ___; Joshua Douglas, *State Judges and the Right to Vote*, 77 OH. ST. L.J. 1, 24 (2016) (discussing state court decisions limiting the scope of felon disenfranchisement and expanding felon voting rights).

⁹ Matt Vasilogambros, *More States Expand the Ballot to Previously Incarcerated*, PEW (June 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2021/06/01/more-states-expand-the-ballot-to-previously-incarcerated>; *Voting Laws Roundup: December 2021*, BRENNAN CTR. JUST. (Dec. 21, 2021), <https://www.brennan-center.org/our-work/research-reports/voting-laws-roundup-december-2021>.

¹⁰ *Id.*

¹¹ *Id.*

Nevada, have restored the franchise to individuals with felony convictions upon release from prison.¹² While there has been some progress on this front, structural barriers to felon voting rights still remain. A large number of states continue to restrict access to the franchise to individuals with felony convictions even after their release from prison, including requiring the fulfillment of onerous legal and financial obligations (LFOs).¹³ As documented in this article, some states have sought to enact new laws that entrench LFO requirements for restoration of voting rights of individuals with felony convictions.¹⁴

The perpetuation of felony disenfranchisement regimes in the US is a product of several factors related to constitutional structure, judicial interpretation and legal precedent, and political and partisan dynamics at the state level. First, the structure of U.S. federalism guarantees that state governments have autonomy and control over regulation of elections and voter eligibility.¹⁵ Second, the Supreme Court's decision in *Ramirez* effectively entrenched the constitutionality of felony disenfranchisement by effectively locking in an interpretation of Section 2 of the Fourteenth Amendment, concluding that Congress constitutionally sanctioned the practice of felony disenfranchisement.¹⁶ Third, the nature of current political and partisan dynamics in the United States continues to drive the maintenance and defense of felony disenfranchisement laws, particularly in states in which Republican majorities depend on voter suppression and disenfranchisement to gain electoral advantage and win elections.¹⁷

At its core, felony disenfranchisement raises key questions about the relationship between federalism, race and criminal justice, and state regulation of voting qualifications. It is frequently argued that federalism is beneficial to rights advocacy by creating alternate political and legal pathways to advancing rights and equality reforms. For example, federalism has provided a vehicle for advancing LGBTQ rights, marijuana legalization, as well as other positive rights, and

¹² Chung, *supra* note 3; Stuart Baum, *Unlocking the Vote in Connecticut*, BRENNAN CTR. JUST., (June 23, 2021) <https://www.brennancenter.org/our-work/analysis-opinion/unlocking-vote-connecticut>; see *Felon Voting Rights*, NAT'L CONF. STATE LEGISLATURES (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

¹³ See Alana Semuels, *The Fines and Fees that Keep Former Prisoners Poor*, THE ATLANTIC (July 5, 2016), <https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026/>; Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL. STUD. 309, 309 (2017); *Can't Pay, Can't Vote: A National Survey on the Modern Poll Tax*, C.R. CLINIC GEO. L. 4, 4 https://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf.

¹⁴ See discussion *infra* Part II.B.

¹⁵ See Lash, *supra* note 7, at 78.

¹⁶ See Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 584, 1584, 1587 (2012).

¹⁷ See Austin Sarat, *Stripping Voting Rights from Felons is About Politics, Not Punishment*, THE CONVERSATION (June 4, 2020, 8:27 AM), <https://theconversation.com/stripping-voting-rights-from-felons-is-about-politics-not-punishment-139651>; Jason Belmont Conn, *Felon Disenfranchisement Laws: Partisan Politics in the Legislatures*, 10 MICH. J. RACE & L. 495, 496, 498 (2005); Michael Morse, *The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida*, 109 CAL. L. REV. 1143, 1145 (2021).

has allowed states to recognize expansive rights above the “floor” of federal rights in certain domains.¹⁸ However, federalism has arguably not created or allowed similar pathways for ending structural racism, racial subordination, and systemic race-based inequality. In fact, the history of civil rights in the US confirms that federalism has been an obstacle to the achievement of racial equality, as illustrated by the history of slavery, segregation, and ongoing structural discrimination in state criminal justice systems.

Contemporary felony disenfranchisement regimes illustrate how federalism interacts with state criminal justice systems and state regulation of voting to perpetuate and reinforce racial oppression and subordination. In addition, Section 2 of the Fourteenth Amendment, as interpreted in *Ramirez*, along with other precedents in the area of equal protection and voting rights, create significant obstacles to challenging structural discrimination in these domains through legal pathways. In this article, I argue that these constitutional and legal realities differentially impact the relative efficacy of political and legal pathways to voting rights restoration for individuals with felony convictions. Because the US constitutional structure grants states power and autonomy in the regulation of voting qualifications, including restricting felon voting rights, the political pathway provides the only meaningful pathway at the present moment for reform.

By contrast, existing precedents have created significant obstacles for success via the legal pathway, and recent federal court decisions highlight the limits of conventional rights-based litigation strategies in the felony disenfranchisement context. As this article illustrates, federal court litigation has proven to be ineffective in challenging state level felony disenfranchisement laws, though there have been some recent initial victories in lower federal courts before ultimately being overturned by later appellate panels.¹⁹ Recent federal court decisions upholding state felony disenfranchisement laws highlight a core problem with existing legal frameworks governing felon disenfranchisement—these frameworks prevent federal courts from serving as a check on state policies that disenfranchise millions of voters, including a significant percentage of minority and poor voters.

In addition, these legal frameworks also prevent courts from addressing key failures of state constitutional governance in the form of systemic discrimination in state criminal justice systems, vague and arbitrary felony disenfranchisement laws, laws that prevent poorer voters from gaining access to the vote, and

¹⁸ See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 4 (2013) (discussing how state constitutions codify protections for positive rights); Roger G. Noll & Bruce E. Cain, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1531 (2009) (discussing how federalism allows for states to recognize rights above the federal “floor” of minimum rights under the US Constitution); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489, 491 (1977) (suggesting a federalism-based approach and arguing that litigants should consider state constitutional litigation as a vehicle for advancing rights and equality).

¹⁹ See discussion *infra* Part II.

dysfunctional administrative and procedural processes for tracking data and information on voter eligibility.²⁰ In light of the current obstacles facing federal court challenges to felon disenfranchisement laws, advocates for felony voting rights restoration must complement litigation-based strategies with a broad range of tactics and approaches that also focus on national and state level political mobilization, and reforms and transparency initiatives aimed at optimizing and reforming administrative processes related to legal and financial obligations (LFOs) and voter eligibility.

This Article analyzes the legal, political, and policy dimensions of state level efforts to restore voting rights for persons with felony convictions through popular initiatives and state legislation, and civil rights litigation. The article analyzes recent progress on felon voting rights restoration across several states, highlighting the variety of strategies and institutional mechanisms that have been utilized by voting rights and civil rights groups and other organizations through legislative and executive processes. It also analyzes recent federal court litigation challenging felon disenfranchisement in Florida, Mississippi, and Alabama—states that continue to disenfranchise large numbers of persons with felony convictions even after their release from prison. Recent federal court litigation in Florida, Mississippi, and Alabama illustrates the latest litigation strategies and approaches for challenging existing felon disenfranchisement regimes, including wealth-based equal protection, Twenty-Fourth Amendment poll tax claims, procedural due process claims, and structural race-based equal protection claims.²¹

This Article makes several contributions. First, the Article analyzes the latest wave of state restrictions on voting rights of persons with felony convictions within a broader historical context and suggests these recent restrictions, like earlier iterations of felon disenfranchisement, are yet another form of circumvention of constitutional commitments to fundamental rights and equality. Many states continue to use new forms of restrictions in the form of legal financial obligation (LFO) requirements, vague and arbitrary laws and categorization of crimes, dysfunctional administrative processes including slow and inefficient review boards, and poorly administered data and information practices that make it difficult to ascertain voter eligibility.²²

Second, the Article analyzes how recent state level reforms restoring voting rights of persons with felony convictions illustrate the need to look beyond conventional partisan or blue-red state divisions, as some progress has been made in conservative states with Republican majorities.²³ By analyzing state political

²⁰ *Id.*

²¹ *Id.*

²² See discussion *infra* Part II.B. & Part III.B.

²³ See Stephen Gruber-Miller & Ian Richardson, *Iowa Gov. Kim Reynolds Signs Executive Order Restoring Felon Voting Rights, Removing Iowa's Last-in-the-Nation Status*, DES MOINES REG. (Aug. 5, 2020, 11:08 AM), <https://www.desmoinesregister.com/story/news/politics/2020/08/05/iowa-governor-kim-reynolds-signs-felon-voting-rights-executive-order->

dynamics and particular institutional structures of governance in the regulation of voter qualifications, the Article reveals that some progress on voting rights restoration is possible, even in states with Republican majorities or Republican leadership.²⁴ Third, the Article traces recent litigation strategies for challenging the latest wave of voting rights restrictions on persons with felony convictions in federal court and critically examines federal court decisions rejecting claims and arguments based on race and wealth-based discrimination under equal protection, and procedural due process claims challenging state administrative processes.²⁵ Based on this analysis, the Article highlights the significant challenges and obstacles facing voting rights litigation, and the need for broader strategies related to administrative reform and transparency initiatives, and political mobilization at the federal and state level.

Part I provides an overview of the jurisprudence of the Supreme Court and federal courts on felony disenfranchisement. Part II analyzes recent efforts in states to restore felon voting rights through legislation, executive orders, and state constitutional amendments, and analyzes recent litigation and federal court decisions in challenges to state felony disenfranchisement laws in Florida, Alabama, and Mississippi. Part III considers how the constitutional, political, and legal context should inform and guide future reform proposals, strategies, and initiatives at the national and state level, and suggests specific national and state strategies and approaches for felon voting rights restoration.

I. THE CONSTITUTIONAL AND LEGAL CONTEXT: THE ENTRENCHMENT OF FELON DISENFRANCHISEMENT

Since the Supreme Court's decision in *Richardson v. Ramirez* in 1973, federal courts have upheld most state constitutional provisions and laws providing for felony disenfranchisement, including recent decisions in Florida, Alabama, and Mississippi.²⁶ In order to understand the broader constitutional context of felony disenfranchisement, this section briefly examines the broader context and implications of the adoption of the Reconstruction Amendments, and then discusses the Court's decision in *Ramirez* and other leading precedents.

A. *The Reconstruction Amendments, Federalism, and State Oppression of Voting Rights*

Following the end of the Civil War, Republicans in Congress sought to end slavery and restore civil and political rights to African-Americans through the

before-november-election/5573994002/; German Lopez, *Kentucky's New Governor is Giving the Right to Vote Back to 140,000 Ex-Felons*, VOX (Dec. 12, 2019, 4:38 PM), <https://www.vox.com/policy-and-politics/2019/12/12/21011099/kentucky-governor-felon-voting-rights-andy-beshear>.

²⁴ See discussion *infra* Part II.

²⁵ *Id.*

²⁶ See discussion *infra* Part III.

enactment of the Thirteenth, Fourteenth, and Fifteenth amendments.²⁷ These amendments ended slavery, granted equal citizenship to formerly enslaved persons, and extended the right to vote to African American males by barring racial discrimination in voting.²⁸ However, key provisions of the amendments and subsequent post-Reconstruction state policies undermined the promise of full equality and voting rights by privileging federalism and state power in the regulation of voting qualifications and elections.²⁹

First, contestation and opposition among moderate Republicans limited the scope of potential equality and Congress' enforcement power in the Fourteenth Amendment, and effectively reaffirmed state power over defining voting qualifications and regulating elections.³⁰ Section 1 of the Fourteenth Amendment did greatly expand the scope of national citizenship rights and equality, but Section 2 weakened the promise of equality by allowing states to retain control over the regulation of voting requirements, including disenfranchising voters who had committed crimes.³¹ Second, following the 1876 election, Congress ended Reconstruction, enabling white-dominated southern governments to enact Jim Crow laws that abrogated the civil and political rights of blacks that had been conferred by the amendments.³² These new regimes sought to perpetuate white supremacy through the enactment of laws mandating segregation, laws restricting voting rights, as well as violence against African Americans.³³

States adopted a two-prong strategy for abrogating the voting rights of blacks. First, following the end of Reconstruction, a large number of states, including Southern states, utilized criminal disenfranchisement laws to disenfranchise black voters.³⁴ From 1865 to 1900, 19 states enacted felon disenfranchisement laws, and by 1900, 38 states had adopted criminal voting restrictions, and many of these laws disenfranchised persons with felony convictions for long periods even after release from prison unless individuals received a pardon from the governor.³⁵ Many states, including Southern states like Alabama, adopted laws disenfranchising residents convicted of felonies involving moral turpitude.³⁶

²⁷ See FONER, *supra* note 7, at 7–20.

²⁸ See *id.* at 28–115.

²⁹ ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 259–61, 587–97 (2014).

³⁰ See FONER, *supra* note 7, at 99–101.

³¹ *Id.* at 77–81 (discussing the Fourteenth Amendment's drafting history).

³² *Id.* at 126.

³³ See ALEXANDER, *supra* note 6, at 30–31, 34–35; FONER, *supra* note 7, at 160.

³⁴ See MANZA & UGGEN, *supra* note 1, at 55.

³⁵ Erika Wood et al., *Jim Crow in New York*, BRENNAN CENTER FOR JUSTICE (Feb. 10, 2010), <https://www.brennancenter.org/our-work/research-reports/jim-crow-new-york>.

³⁶ Jennifer Rae Taylor, *Jim Crow's Lasting Legacy at the Ballot Box*, THE MARSHALL PROJECT (Aug. 20, 2018), <https://www.themarshallproject.org/2018/08/20/jim-crow-s-lasting-legacy-at-the-ballot-box>.

Even northern states including New York utilized criminal disenfranchisement to deny African Americans the vote. For example, New York responded to the Fourteenth and Fifteenth Amendments' condition that states eliminate property requirements by mandating disenfranchisement for those convicted of "infamous crimes."³⁷ Second, states also made changes to their criminal codes to criminalize offenses they believed formerly enslaved persons were likely to commit, and law enforcement utilized these codes to disproportionately target African Americans.³⁸

Because the Thirteenth Amendment's provisions effectively sanctioned involuntary servitude as a form of punishment, states began to use punishment and incarceration in order to oppress and restrict the rights of African-Americans as part of a new regime of mass incarceration.³⁹ Consequently, states utilized the combination of criminal disenfranchisement and targeted criminalization to evade the Fifteenth Amendment and deny African Americans voting rights.⁴⁰

B. *Legal Terrain: The Post-Ramirez Context*

During the 1960s, the Warren Court signaled a new approach to the review of state restrictions on voting rights. In *Harper v. Virginia Board of Elections*, the Supreme Court invalidated Virginia's poll tax requirement for voting as violative of the equal protection clause of the Fourteenth Amendment, suggesting that voting is a fundamental right and that heightened scrutiny should apply to voting qualifications based on wealth.⁴¹

However, in *Richardson v. Ramirez*, the Supreme Court held that felon disenfranchisement by states does not violate the equal protection clause of the Fourteenth Amendment.⁴² In *Ramirez*, plaintiffs challenged California's felony disenfranchisement laws under the equal protection clause of the Fourteenth Amendment.⁴³ The California Supreme Court ruled that these laws as applied to individuals who had completed terms of incarceration and parole violated the equal protection clause.⁴⁴ However, on appeal, the US Supreme Court overturned the California Supreme Court and upheld the constitutionality of state felony disenfranchisement laws based on its interpretation of Section 2 of the Fourteenth Amendment.⁴⁵ Section 2 provided that Congress could reduce the representation of states that denied the right to vote to adult male inhabitants for any reason other than "participation in rebellion, or other crime."⁴⁶ In its decision, the

³⁷ Wood et al., *supra* note 35.

³⁸ *Id.*

³⁹ ALEXANDER, *supra* note 6, at 29, 31.

⁴⁰ *See id.*

⁴¹ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666–67, 670 (1966).

⁴² *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

⁴³ *Id.* at 33.

⁴⁴ *Id.* at 27.

⁴⁵ *Id.* at 56.

⁴⁶ U.S. CONST. amend. XIV, § 2; *see FONER, supra* note 7, at 80–81 (discussing drafting and

majority interpreted Section 2 as authorizing felon disenfranchisement by states. Writing for the majority, Justice William Rehnquist found support for the constitutionality of felony disenfranchisement based on the intent of the framers of the Fourteenth Amendment, as well as existing historical practice, finding that a significant number of states had felony disenfranchisement laws at the time of the enactment of the Fourteenth Amendment.⁴⁷

In *San Antonio v. Rodriguez*, the Supreme Court restricted the possibility of wealth-based equal protection challenges to felony disenfranchisement laws.⁴⁸ In *Rodriguez*, the Court upheld the constitutionality of Texas' system of school financing under rational basis review based on its holding that education is not a fundamental right, and that wealth-based classifications were not suspect classifications and therefore do not trigger heightened scrutiny.⁴⁹ As discussed in Part II.B., federal courts have relied on *Rodriguez* in rejecting wealth-based equal protection challenges to legal and financial obligations (LFOs) as requirements for restoration of voting rights for persons with felony convictions.⁵⁰

In a subsequent decision, *Hunter v. Underwood*, the Supreme Court considered a challenge to a provision of the Alabama Constitution that provided for lifetime felony disenfranchisement for crimes involving "moral turpitude."⁵¹ The Court invalidated the provision as violative of Section 2 of the Fourteenth Amendment because the provision was motivated by a racially discriminatory purpose and had disparate racial impact.⁵² However, since the Court's decision in *Hunter v. Underwood*, plaintiffs have not been successful in challenging felony disenfranchisement based on race-based discriminatory purpose arguments. Federal courts have continued to apply *Ramirez*'s interpretation of Section 2 of the Fourteenth Amendment in upholding state felony disenfranchisement laws and have rejected challenges to state felony disenfranchisement laws based on claims of discriminatory intent.⁵³ In addition, as discussed in Part II.B., federal courts have rejected challenges to state felony disenfranchisement laws including

final approval of Section 2 and noting that the provision introduced a gender distinction into the US Constitution for the first time).

⁴⁷ *Ramirez*, 418 U.S. at 54–55. There is a rich body of scholarship that has been highly critical of the Court's decision in *Ramirez*. See Gabriel J. Chin, *Felon Disenfranchisement and Democracy in the Late Jim Crow Era*, 5 OHIO ST. J. CRIM. L. 329, 335–36 (2007); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 260, 313–15 (2004); Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 111–12 (2004); John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 168–69 (2004); MANZA & UGGEN, *supra* note 1, at 3.

⁴⁸ See *San Antonio Ind. Sch. District v. Rodriguez*, 411 U.S. 1, 39–40 (1973).

⁴⁹ *Id.* at 25, 28, 35–39.

⁵⁰ See discussion *infra* Part II.B.

⁵¹ *Hunter v. Underwood*, 471 U.S. 222, 223 (1985).

⁵² *Id.* at 233.

⁵³ See *Re & Re*, *supra* note 16, at 1587–88.

laws requiring the payment and fulfillment of legal and financial obligations as a condition of eligibility to vote based on wealth-based discrimination, poll tax, and procedural due process claims.⁵⁴

Litigants have also challenged felony disenfranchisement laws based on claims that these laws constitute cruel and unusual punishment in violation of the Eighth Amendment.⁵⁵ Although the Supreme Court in *Trop v. Dulles* avoided deciding this issue, scholars and advocates have argued that given that felony disenfranchisement must be classified as a form of punishment, it must be open to challenge on Eighth Amendment grounds.⁵⁶ Recently, Alabama's felony disenfranchisement law was challenged on these grounds in *Thompson v. Merrill*, but the federal district court upheld the law.⁵⁷

Courts have also rejected challenges to state felony disenfranchisement laws based on Section 2 of the Voting Rights Act.⁵⁸ Unlike constitutional equal protection claims that require proving intent, Section 2 of the Voting Rights Act only requires plaintiffs to establish disparate impact, and litigants in Section 2 cases challenging felon disenfranchisement laws have sought to draw on evidence of systemic and structural discrimination in state criminal justice systems, and data on the percentage of minorities who are actually disenfranchised, but have had little success.⁵⁹ Over the past two decades, federal courts of appeals across the country have upheld felony disenfranchisement laws in a number of key cases, including challenges to laws in Massachusetts (First Circuit), New York (Second Circuit), Tennessee (Sixth Circuit), Alabama and Florida (Eleventh Circuit), Arizona and Washington (Ninth Circuit), and Mississippi (5th Circuit).⁶⁰

Most federal circuits have held that state felony disenfranchisement laws may not be challenged under Section 2 of the Voting Rights Act (VRA) because

⁵⁴ See discussion *infra* Part II.B.

⁵⁵ See Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1367–68 (2003).

⁵⁶ See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); Karlan, *supra* note 55, at 1368–69 (arguing that Atkins' framework for assessing whether a punishment violates contemporary standards provides strong support for Eighth Amendment-based challenges to felony disenfranchisement laws); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1164–65 (2004); cf. Mark E. Thompson, *Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 169 (2002).

⁵⁷ See discussion *infra* Part II.B, (discussing *Thompson v. Merrill*).

⁵⁸ See *Re & Re*, *supra* note 16, at 1588.

⁵⁹ *Id.* at 1663–64.

⁶⁰ See *Jones v. Governor of Fla.*, 950 F.3d 795, 832–33 (11th Cir. 2020); *Harness v. Hosemann*, 988 F.3d 818, 821–23 (5th Cir. 2021) (Mississippi); *Thompson v. Merrill*, 505 F.Supp.3d 1239, 1267 (M.D. Ala. 2020); *Farrakhan v. Gregoire*, 623 F.3d 990, 993–94 (9th Cir. 2010) (en banc) (Washington); *Simmons v. Galvin*, 575 F.3d 24, 32 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305, 329 (2d Cir. 2006) (en banc) (New York); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc); *Johnson v. Bredesen*, 624 F.3d 742, 754 (6th Cir. 2010) (Tennessee).

Congress did not intend to cover or include felon disenfranchisement as part of the qualifications covered by the provision.⁶¹ However, an *en banc* panel of the Ninth Circuit in *Farrakhan v. Gregoire*, while rejecting a Section 2 claim challenging Washington's felony disenfranchisement laws, did hold that plaintiffs can challenge felon disenfranchisement laws under Section 2 of the VRA.⁶² However, the Ninth Circuit in *Farrakhan* ruled that plaintiffs bringing Section 2 challenges that are based on claims of racial discrimination in a state's criminal justice system are required to demonstrate that "the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent."⁶³ Federal courts in other circuits have effectively undermined an expansive understanding of the Section 2 VRA factors that were relied on in *Farrakhan*.⁶⁴

C. *The Next Generation of Felony Disenfranchisement Restrictions*

Following the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments and the end of Reconstruction, states deployed criminal disenfranchisement and targeted criminalization to circumvent the Fifteenth Amendment.⁶⁵ Race replaced property as the basis for disenfranchisement as states sought to deny African Americans access to the franchise and political power.⁶⁶

The Supreme Court's rulings in *Ramirez* and *Rodriguez* effectively opened the door to a new generation of state laws aimed at circumventing the Fifteenth Amendment, creating deferential jurisprudential frameworks that would ultimately lead lower federal courts to uphold felony disenfranchisement laws.⁶⁷ As illustrated in Part II of this article, states have deployed a variety of measures and mechanisms for continuing felony disenfranchisement, including wealth-based disenfranchisement measures, vague and arbitrary laws, and administrative processes that make it difficult for formerly incarcerated persons to ascertain their voting eligibility.⁶⁸ These measures perpetuate disenfranchisement of persons

⁶¹ See *Re & Re*, *supra* note 16, at 1588.

⁶² See *Farrakhan*, 623 F.3d at 992–94 (rejecting Section 2 claim because of lack of evidence of intentional racial discrimination in Washington's criminal justice system). The *en banc* panel in *Farrakhan* overturned an earlier Ninth Circuit panel that invalidated Washington's felony disenfranchisement law under Section 2 of the Voting Rights Act, based on evidence of racial discrimination in the state's criminal justice system, and based on the disparate impact of felon disenfranchisement on minorities' ability to vote and participate in the political process.

⁶³ *Id.* at 993.

⁶⁴ See *Re & Re*, *supra* note 16, at 1664; *Simmons*, 575 F.3d at 42; *Hayden*, 449 F.3d at 329; *Johnson*, 405 F.3d at 1215.

⁶⁵ See FONER, *supra* note 7, at 160.

⁶⁶ See Cheryl D. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993).

⁶⁷ *Cf. Farrakhan*, 623 F.3d at 993.

⁶⁸ See Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 59–61 (2019); Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. F. 112, 141–42 (2020).

with felony convictions with a focus on racial minorities and the poor by building on existing structural inequality in the criminal justice system, as well as economic inequality and poverty.

This Article highlights the multifaceted nature of different constitutional challenges involving the voting rights of persons with felony convictions and argues that they reveal three key structural failures of US constitutional governance: first, an inability to address systemic racial discrimination in the criminal justice system itself through equal protection and Section 2 of the Voting Rights Act; second, a failure to address the systemic denial of the vote to individuals with felony convictions through restrictive re-enfranchisement, wealth-based equal protection and poll tax challenges; and third, a failure to address the administrative failures of state constitutional governance through robust procedural due process-based review of state felony disenfranchisement regimes. In the next section, I analyze recent efforts and strategies employed by voting rights advocates and nonprofit groups to restore voting rights on two fronts: political mobilization through the legislative and executive branches, and litigation challenging state laws that continue to restrict voting rights of persons with felony convictions.

II. PATHWAYS FOR RESTORING VOTING RIGHTS IN THE STATES: RECENT TRENDS

By upholding the constitutionality of felony disenfranchisement in *Ramirez*, the US Supreme Court entrenched felony disenfranchisement within the US constitutional structure, leading federal courts to apply a highly deferential approach to the review of state felony disenfranchisement laws. Although the Court in *Hunter v. Underwood* did hold that felony disenfranchisement laws motivated by racial animus or discriminatory purpose violate equal protection, this pathway has proved to be a difficult one as states have subsequently replaced or amended earlier constitutional provisions or state laws.⁶⁹ In addition, as noted earlier, federal courts have rejected claims based on structural race-based discrimination.⁷⁰

Ramirez and subsequent Supreme Court and federal court decisions have entrenched a highly deferential framework for the review of felony disenfranchisement laws, affirming the strong power of states over regulation of voting qualifications and elections. At the same time, these decisions also confirm that felony disenfranchisement is within the discretionary power of states, and it is ultimately up to state governments as to whether they choose to continue such policies. The *Ramirez* decision has effectively created a two-tier landscape for the restoration of the voting rights of persons with felony convictions which has allowed for voting rights restoration in more progressive states with Democratic majorities, while making it difficult to challenge felony voting rights restrictions

⁶⁹ See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

⁷⁰ *Farrakhan*, 623 F.3d at 993–94.

in other states, including more conservative states with Republican majorities or swing states with divided electorates.

In this section, I analyze the two major pathways for restoring the voting rights of persons with felony convictions at the state level in the US: the political process path, and the legal path. I begin by examining the political path to voting rights restoration by reviewing recent progress, as an increasing number of states have moved toward restoring voting rights for individuals with felony convictions who complete their sentences and are released from prison.⁷¹ I then examine current litigation challenging recent state laws and policies restricting the voting rights of persons with felony convictions in Florida, Mississippi, and Alabama.

A. *The Political Path*

At present, there are only three states—Maine, Vermont, and Washington, D.C.—that do not bar persons with felony convictions from voting and even allow persons with felony convictions to vote from prison.⁷² A second group of states comprising of California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, and Washington restore the voting rights of persons with felony convictions upon release from prison.⁷³ A third group of states comprising of Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana Minnesota, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin restore voting rights to persons with felony convictions after prison, parole, and probation, subject to the completion of unpaid LFOs in certain states.⁷⁴ Finally, a fourth and most restrictive category of states consisting of Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Tennessee, and Wyoming permanently disenfranchise some persons with felony convictions, though as discussed below, some of these states have recently taken actions to restore the vote to some of these persons.⁷⁵ Among states providing for permanent felony disenfranchisement, many states permanently disenfranchise individuals who commit certain felonies including murder

⁷¹ Will Wilder, *Progress on Restoring Voting Rights*, BRENNAN CTR. FOR JUST. (Feb. 25, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/progress-restoring-voting-rights>.

⁷² *Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATORS (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

⁷³ *Id.*; SEE ALSO *STATE VOTING LAWS & POLICIES FOR PEOPLE WITH FELONY CONVICTIONS*, BRITANNICA PROCON.ORG, [HTTPS://FELONVOTING.PROCON.ORG/STATE-FELON-VOTING-LAWS/](https://felonvoting.procon.org/state-felon-voting-laws/) (LAST UPDATED, AUG. 24, 2021).

⁷⁴ *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST. (May 30, 2019), <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states>.

⁷⁵ *Id.*

and rape.⁷⁶ In addition, individuals seeking restoration of voting rights in many states must often complete complex and burdensome application and other procedural processes.⁷⁷

In addition, a majority of US states deny voting rights to individuals with felony convictions based on unpaid LFOs including criminal debts, fees, fines, restitution and other obligations, either through direct or de facto regimes.⁷⁸ Nine US states provide for direct disenfranchisement based on unpaid LFOs in their state laws: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Iowa, and Tennessee.⁷⁹ A larger group of states disenfranchise persons with felony convictions based on unpaid LFOs although these states do not directly provide for LFO disenfranchisement in the text of their state laws.⁸⁰ According to Fredericksen and Lassiter, de facto LFO disenfranchisement mainly occurs in states requiring the completion of probation and/or parole prior to reenfranchisement.⁸¹

Coalitions of voting rights and civil rights groups have been successful in lobbying legislatures and Governors in some states to enact legislation or constitutional amendments to restore voting rights of persons with felony convictions.⁸² In certain states where Governors have been receptive, these efforts have resulted in executive orders that have restored the right to vote to hundreds of thousands of voters.⁸³ Over the last decade, there has been significant progress in many states in restoring the voting rights of persons with felony convictions

⁷⁶ See Allyson Fredericksen & Linnea Lassiter, *Disenfranchised by Debt: Millions Impoverished By Prison, Blocked from Voting* 13–14. (Mar. 2016), <http://allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt-FINAL-3.8.pdf> (noting that 9 states provide for direct LFO disenfranchisement while an additional 21 states provide for de facto LFO disenfranchisement).

⁷⁷ *Id.* at 13.

⁷⁸ *Id.*

⁷⁹ *Id.* at 13–14.

⁸⁰ *Id.* According to Fredericksen and Lassiter, the list of states with de facto LFO disenfranchisement regimes includes Alabama, Alaska, Arizona, Colorado, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 14. It should be noted here that there is some variation in the estimates of the range and scope of LFO disenfranchisement in US states. While Fredericksen and Lassiter reported that there are 30 states with direct or de facto LFO disenfranchisement regimes, Beth Colgan found that 48 states plus the District of Columbia had some form of LFO disenfranchisement. See Colgan, *supra* note 68, at 59–65 (describing state systems of felony disenfranchisement based on LFOs, and arguing for application of the *Bearden* equal justice principle by courts to scrutinize these policies).

⁸¹ FREDERICKSEN & LASSITER, *supra* note 78, at 15 (observing that de facto LFO disenfranchisement mainly occurs in states requiring the completion of probation and/or parole prior to reenfranchisement).

⁸² Zach Montellaro, *States Moving Fast After Congress Failed to Expand Felon Voting rights*, POLITICO (Feb. 2, 2022, 4:30 AM), <https://www.politico.com/news/2022/02/02/felon-voting-rights-states-00004372>.

⁸³ *Id.*

upon completion of their sentence.⁸⁴ In this section, I provide an overview of three primary mechanisms by which states have expanded or restored voting rights of persons with felony convictions over the past five years: state legislation, executive orders, and state constitutional amendments.

1. *State Legislation*

Within the past five years, several states have enacted legislation to restore voting rights of persons with felony convictions upon release from prison or upon completion of parole.⁸⁵ Many of these laws were enacted as part of broader criminal justice and police reform legislation.⁸⁶

a. *Washington, D.C.*

In July 2020, the Council of Washington D.C. enacted the Restore the Vote Amendment to end felony disenfranchisement as part of broader emergency policing and justice reform legislation.⁸⁷ The new law authorized voting by residents with felony convictions who are currently in jail or prison, and the Council plans to enact a permanent law in the future ending felony disenfranchisement.⁸⁸ However, the implementation of the new law may face challenges, including securing compliance from federal prison officials.⁸⁹ While the new law required that absentee ballots be sent to residents incarcerated in the D.C. Jail in advance of the 2020 election, it also required that the D.C. Board of Elections begin sending ballots to more than 4,500 D.C. residents convicted of felonies who are serving time in federal prisons across the country beginning in January 2021.⁹⁰

b. *Colorado*

In 2019, Colorado joined 16 other states in restoring voting rights to residents with felony conviction upon release from prison and while on parole, enacting legislation that restored the right to vote to nearly 11,500 parolees convicted of felonies.⁹¹ This law was enacted as part of a broader criminal justice

⁸⁴ See Nat'l Conf. of State Legislators, *supra* note 72; See *Criminal Disenfranchisement Laws Across the United States*, *supra* note 74.

⁸⁵ *Id.*

⁸⁶ *DC Council Approves Voting in Prison Ahead of November Election*, SENT'G PROJECT (July 8, 2020), <https://www.sentencingproject.org/news/dc-council-approves-voting-prison-ahead-november-election/>; See *Criminal Disenfranchisement Laws Across the United States*, *supra* note 74.

⁸⁷ *DC Council Approves Voting in Prison Ahead of November Election*, *supra* note 86.

⁸⁸ *Id.*

⁸⁹ Martin Auster Muhle, *D.C. Clears the Way for Incarcerated Felons to Vote, Joining Only Two States that Allow It*, DCIST (July 9, 2020, 10:02 AM), <https://dcist.com/story/20/07/09/dc-incarcerated-felons-vote-voting-rights/>.

⁹⁰ *Id.*

⁹¹ JESSE PAUL, *11,467 COLORADO PAROLEES CAN NOW VOTE AFTER NEW LAW GOES INTO EFFECT*, COLO. SUN (JULY 1, 2019, 9:05 AM), <https://coloradosun.com/2019/07/01/parole-felon-voting->

reform package that included bail reform and drug defelonization provisions.⁹² The law did face some opposition from Republicans in the state legislature.⁹³

c. Connecticut

In June 2021, Connecticut governor Ned Lamont signed legislation restoring voting rights for persons with felony convictions after release from prison while on parole, restoring voting rights to nearly 4,000 residents.⁹⁴ Prior to the law, only persons with felony convictions who had completed parole and were on probation were permitted to vote, following an earlier law restoring voting rights to individuals on probation in 2001.⁹⁵

d. Nevada

On May 29, 2019, Nevada Governor Steve Sisolak signed AB 431 into law, ending felon disenfranchisement for persons with felony convictions upon release from prison effective July 1, 2019.⁹⁶ The law also eliminated an earlier requirement that individuals convicted of certain felonies were required to wait two years for restoration.⁹⁷ The law faced some opposition with all eight Senate Republicans voting against it, but in the Assembly, three Republicans joined twenty-nine Democrats in approving the measure.⁹⁸ The Washington, D.C. non-profit Campaign Legal Center estimated that the law would restore voting rights to more than 77,000 residents in Nevada.⁹⁹ Significantly, the enactment of AB 431 followed after a year of pressure from Campaign Legal Center, which had threatened to bring litigation challenging Nevada's misleading voter forms,

COLORADO-LAWS/; EVAN OCHSNER, *COLORADO PAROLEES ARE NOW ALLOWED TO VOTE. AND ADVOCATES ARE RUSHING TO REGISTER THEM*, COLO. SUN (SEPT. 29, 2020, 1:54 AM), [HTTPS://COLORADOSUN.COM/2020/09/29/FELON-VOTING-COLORADO/](https://coloradosun.com/2020/09/29/felon-voting-colorado/).

⁹² See JESSE PAUL, *FROM BAIL REFORM TO RESTORING VOTING RIGHTS AND SEALING RECORDS, COLORADO'S CRIMINAL JUSTICE SYSTEM IS GETTING A MAKEOVER*, COLO. SUN (APR. 15, 2019, 5:00 AM), [HTTPS://COLORADOSUN.COM/2019/04/15/COLORADO-CRIMINAL-JUSTICE-BILLS-2019/](https://coloradosun.com/2019/04/15/colorado-criminal-justice-bills-2019/).

⁹³ *Id.*

⁹⁴ Matt Vasilogambros, *Connecticut Restores Voting Rights to People with Felony Convictions on Parole*, PEW (June 25, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/25/connecticut-restores-voting-rights-to-people-with-felony-convictions-on-parole>.

⁹⁵ *Voting Rights Restoration Efforts in Connecticut*, BRENNAN CTR. FOR JUST. (May 25, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-connecticut>.

⁹⁶ *Voting Rights Restoration Efforts in Nevada*, BRENNAN CTR. FOR JUST. (May 30, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-nevada>.

⁹⁷ *Id.*

⁹⁸ James DeHaven, *Nevada Passes Bill to Automatically Restore Felons' Voting Rights Upon Release from Prison*, RENO GAZETTE J. (May 23, 2019, 1:03 PM), <https://www.rgj.com/story/news/politics/2019/05/23/nevada-moves-restore-ex-felon-voting-rights/1207840001/>.

⁹⁹ *Id.*

which required applicants to state that they are “not laboring under any felony conviction or other loss of civil rights that would make it unlawful for me to vote.”¹⁰⁰ The forms were misleading as Nevada allows first-time non-violent felony offenders to automatically register to vote at the end of their sentence.¹⁰¹ AB 431 followed an earlier law, AB 181, that was signed into law by Governor Brian Sandoval in June 2017, and restored voting rights to residents with “dishonorable discharge” from probation or parole, and also restored the right to vote to residents with category B convictions two years after completion of their sentence.¹⁰²

e. New Jersey

In December 2019, New Jersey Governor Phil Murphy signed legislation restoring voting rights to more than 80,000 people who were on probation or parole, restoring voting rights to persons with felony convictions upon release from prison.¹⁰³ Prior to the enactment of the legislation, New Jersey’s earlier law disproportionately impacted black residents, as over half of the voters disenfranchised by the earlier felony disenfranchisement law were African American.¹⁰⁴

f. New York

Between 2018 and 2021, New York took measures to restore the voting rights of persons with felony convictions through both executive action and by legislation.¹⁰⁵ In April 2018, then-Governor Andrew Cuomo utilized his pardon power to restore voting rights to residents on parole.¹⁰⁶ As of May 2021, over 67,000 New Yorkers released on parole had their voting rights restored.¹⁰⁷ In May 2021, Governor Cuomo signed Senate Bill 830 into law, automatically restoring the right to vote to individuals on parole.¹⁰⁸ The law also provided notice

¹⁰⁰ James DeHaven, *Attorneys Suspect Tens of Thousands of Nevadans Wrongly Stripped of Right to Vote*, RENO GAZETTE J. (Mar. 8, 2018, 10:10 AM), <https://www.rgj.com/story/news/politics/2018/03/08/attorneys-suspect-tens-thousands-nevadans-wrongly-stripped-right-vote/405258002>.

¹⁰¹ *Id.*

¹⁰² *Voting Rights Restoration Efforts in Nevada*, *supra* note 96.

¹⁰³ *Voting Rights Restoration Efforts in New Jersey*, BRENNAN CTR. FOR JUST. (Dec. 18, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-new-jersey>.

¹⁰⁴ *Id.*

¹⁰⁵ *See Voting Rights Restoration Efforts in New York*, BRENNAN CTR. FOR JUST. (May 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-new-york>.

¹⁰⁶ Vivian Wang, *Cuomo Plans to Restore Voting Rights to Paroled Felons*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/nyregion/felons-pardon-voting-rights-cuomo.html>; *Voting Rights Restoration Efforts in New York*, *supra* note 105.

¹⁰⁷ Adam Brewster, *Cuomo Signs Law to Restore Voting Rights to Parolees Immediately After Prison Release*, CBS NEWS (May 5, 2021, 8:08 PM), <https://www.cbsnews.com/news/cuomo-new-york-voting-rights-parole>.

¹⁰⁸ *Voting Rights Restoration Efforts in New York*, *supra* note 105.

to eligible residents of their voting rights and set forth a process for voter registration upon release from prison.¹⁰⁹ The legislation was the product of years of work by the Brennan Center for Justice and a coalition of New York-based civil rights and voting rights advocacy groups.¹¹⁰ Like so many other states, New York's earlier felony disenfranchisement laws disproportionately impacted racial minorities, as nearly 75 percent of residents who were disenfranchised because they were on parole were African American or Latinx.¹¹¹

g. Washington

Since 2009, the state of Washington has gradually restored the voting rights of persons with felony convictions.¹¹² In 2009, Governor Christine Gregoire signed H.B. 1517 into law, which eliminated legal and financial obligations (LFOs) as a condition of restoring civil rights.¹¹³ In 2019 and 2020, the legislature failed to pass proposed legislation that would restore voting rights of persons with felony convictions upon release from prison.¹¹⁴ However, in April 2021, the legislature finally passed and Governor Jay Inslee signed into law H.B. 1078, which will restore voting rights to persons with felony convictions upon release from prison effective January 2022.¹¹⁵ The new law is estimated to restore voting rights to approximately 20,000 people.¹¹⁶

Voting rights groups including the NAACP, ACLU, and Brennan Center challenged earlier felony disenfranchisement laws in Washington.¹¹⁷ In *Madison v. Washington*, plaintiffs challenged the law conditioning restoration of voting rights upon payment of all LFOs.¹¹⁸ A lower state court invalidated the provision, but on appeal the Washington Supreme Court upheld the law in 2006.¹¹⁹ In *Farrakhan v. Gregoire*, plaintiffs challenged felony disenfranchisement under Section 2 of the Voting Rights Act, arguing that Washington's law discriminated on the basis of race.¹²⁰ Although the Ninth Circuit initially invalidated the law under Section 2 of the Voting Rights Act, an en banc panel of the Ninth Circuit

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Voting Rights Restoration Efforts in Washington*, BRENNAN CTR. FOR JUST. (Jan. 1, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-washington>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*; *Madison v. Washington*, 163 P.3d 757, 761 (2007).

¹¹⁹ *Voting Rights Restoration Efforts in Washington*, *supra* note 112; *Madison*, 163 P.3d at 761.

¹²⁰ *Voting Rights Restoration Efforts in Washington*, *supra* note 112; *Farrakhan v. Gregoire*, 623 F.3d 990, 992 (9th Cir. 2010).

overruled the earlier panel and upheld the law, finding that there was insufficient evidence of discrimination in the Washington state criminal justice system.¹²¹

2. *Executive Orders*

A second path to voting rights restoration for persons with felony convictions has been through executive orders. Since 2016, governors in three states that disenfranchise residents who have committed felonies post-sentence—Iowa, Kentucky, and Virginia—have issued executive orders that have restored felon voting rights.¹²² Significantly, this path has proven to be an effective one in terms of total restorations among states that disenfranchise residents after they have completed prison sentences.¹²³

a. *Iowa*

Up until 2020, Iowa was the only state in the US that permanently deprived residents with prior felony convictions of the right to vote unless the state government approved restoration.¹²⁴ However, in August 2020, Republican Governor Kim Reynolds issued an executive order that ended permanent felony disenfranchisement in Iowa for tens of thousands of Iowan citizens, restoring the right to vote to Iowans who completed incarceration, probation, parole, or special sentence.¹²⁵ However, the order did not apply to certain felonies including felony homicide offenses.¹²⁶ In addition, following the executive order, Governor Reynolds requested that the state legislature amend the Iowa constitution to end permanent disenfranchisement of persons with felony convictions, but no action has been taken to date.¹²⁷

¹²¹ *Voting Rights Restoration Efforts in Washington*, *supra* note 112; *Farrakhan*, 623 F.3d at 992–94.

¹²² CHRIS UGGENET AL., *LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION*, SENT'G PROJECT (OCT. 30, 2020), [HTTPS://WWW.SENTENCINGPROJECT.ORG/PUBLICATIONS/LOCKED-OUT-2020-ESTIMATES-OF-PEOPLE-DENIED-VOTING-RIGHTS-DUE-TO-A-FELONY-CONVICTION/](https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/).

¹²³ *See generally id.*

¹²⁴ *Voting rights Restoration in Iowa*, BRENNAN CTR. FOR JUST. (Aug. 5, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-iowa>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Stephen Gruber-Miller, *Gov. Kim Reynolds Gives Her Annual Condition of the State Address*, THE HAWK EYE (Jan. 14, 2020, 1:20 PM), <https://web.archive.org/web/20200115112017/https://www.thehawkeye.com/news/20200114/gov-kim-reynolds-gives-her-annual-condition-of-state-address>.

b. Kentucky

Like Iowa, Kentucky has also restored the voting rights of persons with felony convictions through executive order.¹²⁸ Recent events in Kentucky illustrate how partisan differences in control of the position of Governor can impact voting rights restoration. In November 2015, Democratic Governor Steve Beshear issued an executive order that restored the right to vote to Kentucky citizens who had been convicted of non-violent offenses and had completed their sentences and also met certain other criteria, in addition to establishing a process through which individuals serving sentences could seek to have their right to vote restored.¹²⁹ However, in December 2015, newly elected Republican Governor Mark Bevin issued a new executive order that immediately reversed Governor Beshear's policy.¹³⁰ As a result, Kentucky returned to one of the most restrictive felony disenfranchisement regimes in the country that disenfranchised residents with prior felony convictions.¹³¹ However, following his victory in the 2019 elections, Democratic Governor Andy Beshear (son of Governor Steve Beshear) issued an executive order that ended the state's ban on voting rights for individuals with past felony convictions, and immediately restored the right to vote for more than 100,000 Kentucky citizens with prior convictions who completed their sentence, probation, and parole.¹³²

c. Virginia

Virginia is another state that has gradually restored the voting rights of persons with felony convictions through executive action.¹³³ Like Iowa and Kentucky, Virginia is one of three states that permanently disenfranchises all citizens with past felony convictions, but also confers on the governor the authority to restore voting rights.¹³⁴ In May 2013, Republican Governor Bob McDonnell issued an executive order that ended permanent felony disenfranchisement, restoring the right to vote for individuals who completed sentences, including paying any fines, fees, or restitution, for non-violent offenses, and also eliminated a two-year waiting period prior to gaining the right to vote.¹³⁵ Between 2014 and 2015, Democratic Governor Terry McAuliffe accelerated restoration of the voting rights of persons with felony convictions through executive orders that

¹²⁸ *Voting Rights Restoration in Kentucky*, BRENNAN CTR. FOR JUST. (Aug. 5, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-kentucky>.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Voting Rights Restoration in Virginia*, BRENNAN CTR. FOR JUST. (Mar. 16, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia>.

¹³⁴ *Id.*

¹³⁵ *Id.*

streamlined the restoration process and removed a requirement that persons with felony convictions pay court costs and fees to have their right to vote restored.¹³⁶

In April, May, and June 2016, Governor McAuliffe issued a series of executive orders that restored the right to vote to persons with felony convictions who completed their sentence and probation or parole, but these orders were ultimately struck down by the Virginia Supreme Court in *Howell v. McAuliffe* in July 2016 as violative of the state constitution on the grounds that the governor was required to make clemency determinations on a case-by-case basis.¹³⁷ As a result of the decision, the state cancelled the voter registration of roughly 13,000 Virginians.¹³⁸ In response, Governor McAuliffe issued orders of restoration to individuals whose registration had been cancelled on an individual basis, beginning with the 13,000 individuals whose registrations had been cancelled following *Howell*.¹³⁹ In addition, Governor McAuliffe also announced a new process in which the Secretary of the Commonwealth would review individuals with completed sentences and begin recommending restoration to the Governor on a rolling basis.¹⁴⁰

Finally, on March 16, 2021, Governor Ralph Northam took executive action to restore voting rights to all individuals convicted of felonies upon completion of their prison sentence, restoring the right to vote to over 69,000 Virginians.¹⁴¹ Northam's executive action adopted new eligibility criteria that mirror those that are part of a proposed constitutional amendment that was recently enacted by the Virginia General Assembly in March 2021.¹⁴²

3. *State Constitutional Amendment*

A third path to felon voting rights restoration has been the enactment of state constitutional amendments. Recently, several states have enacted state constitutional amendments restoring and expanding the voting rights of persons with felony convictions, including California, Virginia, and Florida.¹⁴³

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Governor Northam Restores Civil Rights to Over 69,000 Virginians, Reforms Restoration of Rights Process*, OFFICE OF GOVERNOR (Mar. 6, 2021), <https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-893864-en.html>.

¹⁴² *Id.*

¹⁴³ *Voting Rights Restoration Efforts in California*, BRENNAN CTR. FOR JUST. (Nov. 4, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-california>; *Voting Rights Restoration in Virginia*, *supra* note 133; *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (Sept. 11, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida>.

a. California

In 2020, the California State Senate voted to approve Assembly Constitutional Amendment 6 (ACA 6), a state constitutional amendment ending disenfranchisement of individuals with felony convictions upon release from prison, and submitted it to voters for approval as Proposition 17 via the initiative process.¹⁴⁴ On November 3, 2020 California voters approved Proposition 17.¹⁴⁵ Following Proposition 17, the state constitution only bars individuals with felony convictions from voting while they are serving a prison sentence.¹⁴⁶ Proposition 17 restored voting rights to approximately 50,000 Californians.¹⁴⁷

b. Virginia

As noted above, in March 2021, the General Assembly of Virginia enacted a constitutional amendment that automatically restores voting rights to all prisoners upon release from prison.¹⁴⁸ Under the Virginia Constitution, the General Assembly must also re-approve this amendment in the next legislative session, and then send it to voters for ratification.¹⁴⁹

c. Florida

In 2019, the voters of the state of Florida enacted Amendment 4 to restore voting rights to individuals with felony convictions upon completion of their prison sentence.¹⁵⁰ As noted below in Part II.B., the state government enacted S.B. 7066 to effectively undermine Amendment 4 through the imposition of LFO requirements as a condition of voting rights restoration, and in 2020, the 11th Circuit upheld this law.¹⁵¹

B. The Legal Path

Although voting rights advocates and reformers have secured some victories for fe voting rights through the enactment of laws aiming to limit the scope of felon disenfranchisement, states have found ways to perpetuate disenfranchisement through the reimposition of legal financial obligations (LFOs), as well as

¹⁴⁴ *Voting Rights Restoration Efforts in California*, *supra* note 143.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; *Weekly Report of Population as of Midnight*, CAL. DEP'T OF CORRECTIONS AND REHAB., DIVISION OF CORR. POL'Y RSCH. AND INTERNAL OVERSIGHT, OFFICE OF RSCH. (June 24, 2020), <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2020/06/Tpop1d200617.pdf>.

¹⁴⁸ *Voting Rights Restoration in Virginia*, *supra* note 143.

¹⁴⁹ *Id.*

¹⁵⁰ PATRICIA MAZZEL, *FLORIDIANS GAVE EX-FELONS THE RIGHT TO VOTE. LAWMAKERS JUST PUT A BIG OBSTACLE IN THEIR WAY*, N.Y. TIMES (MAY 3, 2019), [HTTPS://WWW.NYTIMES.COM/2019/05/03/US/FLORIDA-FELON-VOTING-AMENDMENT-4.HTML](https://www.nytimes.com/2019/05/03/us/florida-felon-voting-amendment-4.html).

¹⁵¹ *Voting Rights Restoration Efforts in Florida*, *supra* note 143.

defending or modifying state constitutional provisions that maintain or expand the categories of felonies that trigger disenfranchisement.¹⁵² In this section, I analyze case studies of recent litigation challenging ongoing felony disenfranchisement in key states including Florida, Mississippi, and Alabama that continue to disenfranchise felons, including even after their release from prison.¹⁵³ These cases illustrate the different types of legal claims and strategies that advocates, lawyers, and civil rights groups have been deploying to challenge the most recent forms of felony disenfranchisement in these states, including wealth-based and race-based equal protection claims, poll tax claims, and procedural due process claims.¹⁵⁴

1. *Recent Federal Court Decisions*

a. *Florida*

Florida has long had one of the most restrictive felony disenfranchisement regimes in the country and its felony disenfranchisement laws disenfranchise the most voters of any state in the US.¹⁵⁵ Until 2018, Florida permanently disenfranchised all citizens with felony convictions unless the state Clemency Board restored their right to vote.¹⁵⁶ From 2010 to 2016, the total number of Floridians disenfranchised by Florida law rose from 1,536,000 to approximately 1,686,000 voters, and in 2016, more than 20 percent of black voters in Florida were disenfranchised.¹⁵⁷ In 2018, the voters of Florida approved Amendment 4, a constitutional amendment that would have allowed most individuals with felony convictions to vote upon completion of all terms of their sentence including parole or probation.¹⁵⁸ If fully implemented, Amendment 4 was projected to restore voting rights to more than 1 million Floridians.¹⁵⁹

However, following the enactment of Amendment 4, the state legislature enacted S.B. 7066, and in June 2019, Republican Governor Ron DeSantis signed S.B. 7066 into law.¹⁶⁰ The new law sought to undermine Amendment 4 by introducing a “pay to vote” regime prohibiting voting rights restoration for more than 1 million Floridians who had been released from prison until they paid off all

¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; Lawrence Mower, *Florida Leads Nation in Voter Disenfranchisement, Criminal Justice Group Says*, TAMPA BAY TIMES (Oct. 14, 2020), <https://www.tampabay.com/news/florida-politics/elections/2020/10/14/florida-leads-nation-in-voter-disenfranchisement-criminal-justice-group-says/>.

¹⁵⁶ *Voting Rights Restoration Efforts in Florida*, *supra* note 143.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

legal financial obligations (LFOs) as imposed by courts as part of a felony conviction, even where individuals could not afford to pay them.¹⁶¹

The Brennan Center and a coalition of voting rights and civil rights groups filed suit in federal district court in the Northern District of Florida on behalf of a group of seventeen plaintiffs who had been disenfranchised by the pay to vote regime in federal court, challenging S.B. 7066 on numerous grounds, claiming that the law violated the Equal Protection Clause and Due Process Clause, and the Twenty-Fourth Amendment prohibition on poll taxes.¹⁶² The district court initially enjoined the law,¹⁶³ and the state of Florida appealed.¹⁶⁴ While the appeal was pending, Governor DeSantis requested an advisory opinion from the Supreme Court of Florida as to whether the language “all terms of sentence including probation and parole” in Amendment 4 included financial obligations.¹⁶⁵ In its advisory opinion, the Florida Supreme Court held that the language did include financial obligations.¹⁶⁶

On appeal, the Eleventh Circuit Court of Appeals affirmed the injunction, and held that S.B. 7066’s LFO system was unconstitutional.¹⁶⁷ The Eleventh Circuit applied heightened scrutiny based on equal protection analysis to S.B. 7066’s “pay to vote” system on the grounds that the LFO requirement conditioned access to the vote based on wealth classification.¹⁶⁸ In applying heightened scrutiny, the Eleventh Circuit panel drew on a set of precedents including *Harper v. Virginia Board of Elections*, *Bearden v. Georgia* and *Griffin v. Illinois*.¹⁶⁹ These precedents held that heightened scrutiny should apply to laws that restrict voting, access to criminal justice, or condition the exercise of fundamental rights on the basis of wealth classifications.¹⁷⁰

Following a trial, Judge Robert Hinkle ruled that SB 7066 was unconstitutional, granting a permanent injunction against the law.¹⁷¹ Judge Hinkle ruled

¹⁶¹ See Michael Morse, *The Future of Felon Disenfranchisement Reform: How Partisanship and Poverty Shape the Restoration of Voting Rights in Florida*, 109 CALIF. L. REV. 1143, 1192–94. (2021).

¹⁶² *Jones v. Governor of Fla.*, 950 F.3d 795, 799–804 (11th Cir. 2020).

¹⁶³ See *id.* at 800.

¹⁶⁴ *Id.*

¹⁶⁵ See Advisory Op. to the Governor Re: Implementation of Amendment 4, the Voting Restoration Amendment, 288 So.3d 1070, 1072 (Fla. 2020).

¹⁶⁶ *Id.*

¹⁶⁷ *Jones*, 950 F.3d at 800.

¹⁶⁸ *Id.* at 809 (holding that heightened scrutiny applies because the system creates “a wealth classification

that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to pay—that is, it punishes more harshly solely on account of wealth—by withholding access to the ballot box.”).

¹⁶⁹ *Id.* at 818–23.

¹⁷⁰ *Id.* at 822–26.

¹⁷¹ *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1203, 1230–31, 1250, 1252 (N.D. Fla.), hearing en banc ordered sub nom. *McCoy v. Governor of Fla.*, No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020), and rev’d and vacated sub nom. *Jones v. Governor of Fla.*, 975 F.3d

that S.B. 7066's "pay to vote" system violated the Equal Protection Clause as it was based on an impermissible wealth classification in applying heightened scrutiny to the LFO requirement, and also held that the pay to vote system violated the Twenty-Fourth Amendment's prohibition on poll taxes.¹⁷² In addition, the district court further held that Florida's system for administering and keeping track of LFOs was poorly administered because it made it very difficult for individuals to ascertain what their outstanding LFOs were, and held that such a system failed rational basis scrutiny, and also suggested that this system also violated procedural due process requirements.¹⁷³

On appeal, the Eleventh Circuit reversed the district court and vacated the injunction in a 6-4 ruling.¹⁷⁴ The majority upheld Senate Bill 7066's "pay-to-vote" system of restoring the vote only after individuals satisfy LFOs, regardless of individuals' ability to pay.¹⁷⁵ In overruling the district court and earlier circuit court panel, the Court held that the earlier Eleventh Circuit Panel erred in applying heightened scrutiny to Senate Bill 7066 because persons with felony convictions had no fundamental right to vote, and that Senate Bill 7066 did not invidiously discriminate on the basis of a suspect classification by ruling that indigency or lack of wealth was not a suspect class.¹⁷⁶ The Eleventh Circuit noted that following *Ramirez*, states are permitted to "require felons to complete their terms of imprisonment and parole before regaining the right to vote."¹⁷⁷ The Court further held that states could restrict voting for felons in ways that they could not do for other citizens, because "requiring felons to complete their sentences is directly related to voting qualifications because imprisonment and parole are imposed as punishment for the crimes by which persons with felony convictions forfeited their right to vote."¹⁷⁸

The Eleventh Circuit also held that the earlier Eleventh Circuit Panel erred in applying heightened scrutiny to Senate Bill 7066 on the ground that it invidiously discriminated on the basis of wealth.¹⁷⁹ Instead, the Eleventh Circuit held that Senate Bill 7066 applied equally to both rich and poor persons with felony convictions, and that even if SB 7066 was based on a wealth-based classification, wealth is not a suspect classification and therefore would only trigger rational basis review.¹⁸⁰ Applying rational basis review, the Eleventh Circuit upheld Senate Bill 7066's pay-to-vote system based on the grounds that it served two

1016 (11th Cir. 2020), and *aff'd sub nom. Jones v. Governor of Fla.*, 15 F.4th 1062 (11th Cir. 2021).

¹⁷² *Id.* at 1220, 1234.

¹⁷³ *Id.* at 1220, 1240-41.

¹⁷⁴ *Jones v. Governor of Fla.*, 975 F.3d 1016, 1017 (11th Cir. 2020).

¹⁷⁵ *Id.* at 1028.

¹⁷⁶ *Id.* at 1029-30.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1030.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

legitimate government interests: “[t]he twin interests in disenfranchising those who disregard the law and restoring those who satisfy the demands of justice.”¹⁸¹

In addition, the Eleventh Circuit also held that Senate Bill 7066 did not violate the Twenty-Fourth Amendment’s prohibition on poll taxes, because the LFOs were not taxes but actually penalties because they were not enacted only to raise revenue, but also as punishment.¹⁸² Furthermore, the majority also rejected the plaintiffs’ argument that Amendment 4 and SB 7066 were vague given that many felons were unable to locate their criminal judgments and could not determine which financial obligations were imposed for felony as opposed to misdemeanor offenses, or did not know the exact amount of financial obligations they were required to pay.¹⁸³ The majority held that “these concerns arise not from a vague law but from factual circumstances that sometimes make it difficult to determine whether an incriminating fact exists.”¹⁸⁴ Finally, in rejecting plaintiffs’ argument that Amendment 4 and SB 7066 made it difficult to ascertain whether voters had fulfilled their LFOs and were eligible to vote, the majority held that Senate Bill 7066 did not violate procedural due process, ruling that the deprivation of voting rights was the product of legislative, not adjudicative action and that Florida provides voters with adequate procedures to challenge ineligibility determinations.¹⁸⁵

b. Mississippi

Like Florida, Mississippi also has some of the most restrictive felony disenfranchisement laws in the nation. In 1890, Mississippi amended its constitution to add a provision permanently disenfranchising voters convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, or bigamy.¹⁸⁶ In addition, the state attorney general has also issued opinions stating that eleven other crimes are also covered under the foregoing list.¹⁸⁷ This provision was amended in the 1950s and 1960s.¹⁸⁸ In 1950, burglary was removed from the list, and in 1968 rape and murder were

¹⁸¹ *Id.* at 1034.

¹⁸² *Id.* at 1037–38.

¹⁸³ *Id.* at 1047.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1048–49.

¹⁸⁶ Sabrina Canfield, *Full Fifth Circuit Hears Challenge to Mississippi Felony Voting Ban*, COURTHOUSE NEWS SER. (Sept. 22, 2021), <https://www.courthousenews.com/full-fifth-circuit-hears-challenge-to-mississippi-felony-voting-ban/>; *Voting Rights Restoration in Mississippi*, BRENNAN CTR. FOR JUST. (Mar. 27, 2014), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-mississippi>.

¹⁸⁷ *Voting Rights Restoration in Mississippi*, BRENNAN CTR. FOR JUST. (Mar. 27, 2014), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-mississippi>.

¹⁸⁸ *Mississippi Felony Disenfranchisement Law (Harness)*, DEMOCRACY DOCKET (Sept. 28, 2017), <https://www.democracymarket.com/cases/mississippi-felony-disenfranchisement-law-harness/>.

added to the list.¹⁸⁹ As a result of its felony disenfranchisement provisions, Mississippi has disenfranchised 218,181 people, equal to 9.63 percent of the state's voting population, including 127,130 blacks, equivalent to nearly 16 percent of the black voting age population in the state.¹⁹⁰ Mississippi has the ignominious distinction of disenfranchising a higher percentage of its residents based on felony convictions than any other state in the US.¹⁹¹

Outside of litigation, there are three primary ways that Mississippi citizens with felony convictions can attempt to regain their right to vote: applying for a pardon from the Governor; applying for an executive order restoring civil rights from the Governor; or seeking to have the legislature pass a Bill of Suffrage restoring their right to vote (requiring a 2-3 majority vote).¹⁹² However, these methods have not been an effective vehicle for voting rights restoration, as only 335 out of 166,494 persons (roughly 0.002 percent) who completed their sentence had their right to vote restored between 2000 and 2015.¹⁹³

The primary approach of litigants challenging Mississippi's felony disenfranchisement laws has focused on challenging state constitutional provisions. In a recent case, *Harness v. Hosemann*, plaintiffs who lost their voting rights after they were convicted of crimes listed in Section 241 of the Mississippi Constitution brought a challenge to the constitutionality of that provision, arguing that the enactment of the provision was motivated by a racially discriminatory purpose in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁴ A federal district court granted summary judgment for the state, holding that per a prior decision, *Cotton v. Fordice*,¹⁹⁵ amendment processes in 1950s and 1960s that changed the list of crimes that felons could be disenfranchised for effectively removed the discriminatory taint of the original 1890 provision.¹⁹⁶

A three judge panel of the Court of Appeals for the Fifth Circuit affirmed the district court decision and upheld Section 241, again relying on the earlier decision in *Cotton*, which held that the 1950 and 1968 amendments "superseded the [1890] provision and removed the discriminatory taint associated with the original version."¹⁹⁷ The Fifth Circuit observed that the 1950 amendment removing burglary from the list of disenfranchising crimes, and the 1968 provision

¹⁸⁹ *Id.*

¹⁹⁰ *Felony Disenfranchisement in Mississippi*, THE SENTENCING PROJECT (Feb. 2018), <https://www.sentencingproject.org/wp-content/uploads/2018/02/Felony-Disenfranchisement-in-Mississippi.pdf>.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Harness v. Hosemann*, 988 F.3d 818, 820 (5th Cir. 2021) (upholding constitutionality of Section 241 of Alabama Constitution listing crimes for which felons can be disenfranchised, on ground that subsequent amendments to provision cured original provision of discriminatory taint).

¹⁹⁵ *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998).

¹⁹⁶ *Id.* at 389.

¹⁹⁷ *Harness*, 988 F.3d at 822 (citing *Cotton v. Fordice*, 157 F.3d 388 at 391 (5th Cir. 1998)).

adding murder and rape—two crimes that were historically excluded from the original 1890 list because they were not considered “black” crimes—demonstrated that these amendments removed the discriminatory taint of the 1890 provision.¹⁹⁸ In support of its reasoning, the Fifth Circuit observed that amending Section 241 was a deliberative process requiring two-thirds majorities in both houses of the state legislature, followed by approval by a majority of voters in the state.¹⁹⁹ As a result, the Fifth Circuit held that the amendment procedures followed in 1950 and 1968 constituted re-enactments of Section 241, which removed the discriminatory taint of the original provision.²⁰⁰

In September 2021, the Fifth Circuit agreed to rehear oral arguments in the case in an en banc panel.²⁰¹ During oral arguments, lawyers for the plaintiffs argued that the original offenses included in the 1890 provision were added “with the express purpose of disenfranchising African Americans” and that race discrimination was a motivating factor behind the original provision.²⁰² In addition, lawyer Donald B. Verilli, a former solicitor general in the Obama Administration representing the plaintiff, observed “that citizens were never given the opportunity to vote for or against the original eight disenfranchising crimes, which also include bribery, obtaining money or goods under a false pretext, perjury, embezzlement and burglary.”²⁰³

c. *Alabama*

Alabama is another state that has one of the most restrictive felony disenfranchisement laws in the nation, and restricts felon voting rights even after individuals complete their prison sentence and are no longer on probation or parole.²⁰⁴ According to recent data, Alabama’s law disenfranchises more than 286,000 people statewide, amounting to 7.6 percent of the statewide voting age population and over 15 percent of the black male voting age population.²⁰⁵ Originally, the moral turpitude provision dealing with felony disenfranchisement was added to the Alabama Constitution during a state constitutional convention that was held as part of a broader effort to “establish white supremacy.”²⁰⁶ In 1996, Alabama amended its constitution to limit disenfranchisement of persons with felony convictions to those convicted of felonies involving “moral turpitude:”

¹⁹⁸ *Id.* at 820; see Canfield, *supra* note 186 (noting that “[u]nder the original language of the Mississippi Constitution, a person convicted of stealing cattle could lose the right to vote, while those who were convicted of murder or rape could still cast a ballot—even from prison”).

¹⁹⁹ *Harness*, 988 F.3d at 820.

²⁰⁰ *Id.*

²⁰¹ See Canfield, *supra* note 186.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Thompson v. Alabama*, CAMPAIGN LEGAL CTR. (Apr. 12, 2021), <https://campaignlegal.org/cases-actions/thompson-v-alabama>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

“No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability.”²⁰⁷

Prior to 2017, there was no comprehensive list of felonies that involve moral turpitude which would disqualify a person from voting.²⁰⁸ In 2017, the legislature enacted HB 282 which defined which crimes fit this category, and in the process narrowed the range of crimes eligible for disenfranchisement.²⁰⁹ Significantly, the new law had the potential to re-enfranchise tens of thousands of individuals who were disenfranchised but were not convicted of a crime that was eligible for disenfranchisement.²¹⁰ However, the state has not allocated any resources to informing these citizens that they are eligible to vote.²¹¹ This is especially problematic given that recent poll data showed that almost 72 percent of Alabamians with felony convictions who are not registered to vote did not know that the law changed or whether it had restored their voting rights.²¹²

Recently, several individuals and groups including Campaign Legal Center and the Greater Birmingham Ministries filed suit in a federal district court challenging Alabama’s felony disenfranchisement laws in *Thompson v. Merrill*.²¹³ Plaintiffs challenged Alabama’s constitutional provision on several grounds, including that the moral turpitude standard used by Alabama to determine voter eligibility is racially discriminatory, imposed cruel and unusual punishment, and was unconstitutionally vague and arbitrary prior to 2017.²¹⁴ In addition, like the *Jones* case in Florida, plaintiffs in this case also challenged Alabama’s LFO requirements (requiring that felons pay certain court costs to gain eligibility) as wealth discrimination under the Equal Protection Clause and as a violation of the Twenty-Fourth Amendment’s prohibition on poll taxes.²¹⁵ On December 3, 2020, the federal district court granted summary judgment for the Secretary of State, rejecting the plaintiffs’ claims.²¹⁶

2. Recent State Court Litigation

Following the Supreme Court’s decision in *Richardson v. Ramirez*, felony disenfranchisement laws have also been challenged in state courts. In some cases,

²⁰⁷ Ala. Const. Art. VIII, § 177(b); In *Hunter v Underwood*, the Supreme Court invalidated the provision as violative of Section 2 of the Fourteenth Amendment on the grounds that it was motivated by a racially discriminatory purpose and had disparate racial impact. 471 U.S. 222, 222 (1985).

²⁰⁸ *Felony Voting Rights Restoration in Alabama*, CAMPAIGN LEGAL CTR, <https://campaignlegal.org/cases-actions/felony-voting-rights-restoration-alabama> (last visited, April 27, 2022).

²⁰⁹ Ala. Code § 17-3-30.1.

²¹⁰ See *Felony Voting Rights*, *supra* note 208.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Thompson v. Merrill*, 505 F. Supp. 3d 1239, (M.D. Ala. 2020).

²¹⁴ *Id.* at 1245.

²¹⁵ *Id.* at 1267.

²¹⁶ *Id.* at 1273.

state courts have ruled in favor of plaintiffs in challenging the scope and application of state felony disenfranchisement laws.²¹⁷ For example, a state court in California and state supreme courts in Iowa and Tennessee have limited the scope of these laws based on canons of interpretation favoring broader voting rights.²¹⁸ However, since *Ramirez*, state supreme courts have generally upheld the constitutionality of state felony disenfranchisement laws.²¹⁹

Recent litigation challenging felon disenfranchisement laws in state courts has also had mixed results. In a breakthrough for voting rights, litigants brought a lawsuit challenging North Carolina's LFO disenfranchisement laws as violative of state constitutional provisions on equal protection and prohibiting property qualifications on the right to vote, and a state superior court entered a preliminary injunction in September 2020 ruling that there was a substantial likelihood that plaintiffs would prevail on the merits on their claims that N.C.G.S. §13-1 violated both the prohibition on property qualifications affecting the right to vote and the equal protection provisions of the state constitution.²²⁰ Following a trial in August 2021, the state trial court issued an injunction restoring the right to vote to more than 55,000 residents with felony convictions on probation, parole and post-release supervision, but this injunction was stayed by the North Carolina Court of Appeals preventing voting rights restoration in advance of the May and July primary elections, and the North Carolina Supreme Court affirmed the stay.²²¹ However, the Court of Appeals also ruled that after the primary elections, the State Board of Elections must implement the trial court's judgment and order restoring the vote to the 55,000 residents with felony convictions on probation, parole and post-release supervision, restoring the vote for these residents in time for the November general election in North Carolina. By contrast, recent litigation challenging Minnesota's felony disenfranchisement laws as violating the right to vote, equal protection, and due process under the

²¹⁷ Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L. J. 1, 21–22 (2016) (discussing state court decisions in California, Indiana, and Tennessee).

²¹⁸ *Id.* at 23, citing to *League of Women Voters of Cal. v. McPherson*, 52 Cal. Rptr. 3d 585, 588 (Ct. App. 2006), *May v. Carlton*, 245 S.W.3d 340, 345–48 (Tenn. 2008), and *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 847, 857 (Iowa 2014).

²¹⁹ *Id.* at 23–24 (discussing state supreme court decisions upholding the constitutionality of state felon disenfranchisement laws).

²²⁰ *Cnty. Success Initiative v. Moore*, No. 19 CVS 15941, 2020 WL 10540950, at *4 (N.C. Super. Sep. 04, 2020); see also *Fighting for Rights Restoration*, PROJECT DEMOCRACY, <https://protectdemocracy.org/project/fighting-for-rights-restoration/#section-0> (last accessed, February 18, 2021).

²²¹ See *Cnty. Success Initiative* No. 19 CVS 15941 at *4; NCSBOE, Numbered Memo 2021-06 (Aug. 23, 2021), <https://www.ncsbe.gov/about-elections/legal-resources/numbered-memos> (emphasis in original); see also NCSBOE, Statement of Ruling in *Community Success Initiative v. Moore* Case (Aug. 23, 2021), <https://www.ncsbe.gov/news/press-releases/2021/08/23/statement-ruling-community-success-initiative-v-moore-case>.

state constitution has thus far been unsuccessful and the state court of appeals ruled against the plaintiffs and upheld the constitutionality of the laws.²²²

C. *Critiquing Federal Court Deference to State Felon Disenfranchisement Policies*

In the wake of *Ramirez*, federal courts continue to uphold state felony disenfranchisement policies, including the latest generation of policies. In doing so, I argue that the federal judiciary has abdicated its role as a counter-majoritarian check on state political majorities in the area of criminal justice and felon disenfranchisement in several ways.

First, courts have effectively abdicated their role as constitutional guardians in the review of structural race-based discrimination in the criminal justice system through their adoption of highly deferential approaches in cases involving Eighth Amendment cruel and unusual punishment and Voting Rights Act Section 2 claims. By classifying felon disenfranchisement measures as punishment, these laws could be challenged as violating the Eighth Amendment's prohibition on cruel and unusual punishment. As Pamela Karlan observes, *Atkins* provided guidance on two types of evidence that can be used by courts in assessing whether a given punishment offends community standards: "recent legislative decisions and trends" and approaches "within the world community."²²³ Karlan suggests that based on recent state trends toward restoring the voting right of persons with felony convictions, such evidence could be marshalled in support of Eighth Amendment challenges to felony disenfranchisement laws.²²⁴

Second, courts have also failed to serve as a check on wealth-based discrimination by states with the imposition of LFOs. As Beth Colgan has found in her research on wealth-based penal disenfranchisement, states' imposition of economic sanctions, including fines, fees, surcharges, and restitution results in the disproportionate disenfranchisement of poorer individuals with felony convictions.²²⁵ Colgan argues that courts could rely on *Bearden*'s equal justice principle to apply heightened scrutiny to LFOs and other requirements that disproportionately disenfranchise poorer voters.²²⁶

²²² *Schroeder v. Simon*, 962 N.W.2d 471 (Minn. Ct. App. 2021), *rev. granted* (Aug. 10, 2021) (The case was appealed to the Minnesota Supreme Court and that court heard oral arguments in November 2021).

²²³ See Karlan, *supra* note 55 at 27–28, citing *Atkins v. Virginia*, 122 S. Ct. 2242, 2246 (2002) (holding that the execution of mentally retarded individuals violated the Eighth Amendment's prohibition on cruel and unusual punishment).

²²⁴ *Id.*

²²⁵ See Beth Colgan, *Wealth Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (2019) (describing how state systems of economic sanctions in criminal justice leads to the disenfranchisement of former felons who are poor, and arguing for application of the *Bearden* equal justice principle by courts to scrutinize these policies).

²²⁶ *Id.*; see also Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. 112, 141 (2020) (arguing for application of both the substantive and procedural aspects of *Bearden*'s equal justice principle to laws that condition voting rights

Third, as the Eleventh Circuit en banc panel's decision in *Jones v. Governor of Florida* illustrates, courts have failed to address state administrative and governance failures in state data tracking on LFOs and transparency mechanisms for informing persons with felony convictions of their eligibility to vote, especially in states like Alabama where the state government changes the list of crimes for which felons can be disenfranchised. As Louis Fisher notes, the procedural aspect of *Bearden's* equal justice principle could be used by courts as a tool to challenge the constitutionality of states' application of ability to pay procedures that are used to determine whether persons with felony convictions are eligible to vote.²²⁷

III. THE PATH FORWARD: NEAR-TERM AND LONG-TERM STRATEGIES FOR VOTING RIGHTS RESTORATION

The persistence of felony disenfranchisement at the state level highlights two key dimensions of US federalism. First, *Ramirez* and subsequent Supreme Court and federal court decisions have entrenched a highly deferential framework for the review of felony disenfranchisement laws, affirming the strong power of states over regulation of voting qualifications and elections. Second, these decisions also confirm that felony disenfranchisement is within the discretionary power of states, and it is ultimately up to state governments as to whether they choose to continue such policies. In light of these realities, I argue that the broader movement for felon voting rights restoration must strategically assess state level political partisan dynamics, explore the possibilities of state level administrative and transparency initiatives aimed at addressing state governance failures, and understand the need for long-term political mobilization efforts through national legislation and the appointment of progressive federal judges.

In this section, I analyze and assess the political terrain for reforms restoring felon voting rights. Second, I argue for the need to consider near term strategies that focus on administrative governance and transparency aimed at restoring felon voting rights. Third, I consider longer-term strategies for ending felony disenfranchisement for persons who complete their prison sentences.²²⁸

A. *Assessing the Political Terrain for Felon Voting Restoration at the State Level*

The foregoing section illustrates the need to assess how variation in state political and governance structures can better inform future campaigns to restore felon voting rights. Beyond the conventional divide between more progressive

laws that condition voting rights on repayment of legal financial obligations).

²²⁷ *Id.* at 141–42.

²²⁸ Although the ideal goal of most felon voting rights restoration advocates would be to end felon disenfranchisement even for those who are currently incarcerated, given current political realities, this is unlikely in the near term, though a more realistic goal may be for complete abolition of felon disenfranchisement in certain states with Democratic majorities.

states with Democratic majorities, and more conservative states with Republican majorities, recent developments at the state level illustrate that the opportunity structure for success in felon voting rights restoration is also impacted by other factors including political dynamics and institutional structure.

The analysis in Part II.A. suggests a typology of state governance with respect to felon disenfranchisement: progressive restoration states, executive restoration states, and conservative retrenchment states. In progressive restoration states, democratic majorities in the electorate and in state government provide for favorable conditions for the enactment of legislation and state constitutional amendments restoring felon voting rights upon completion of prison sentences. Executive restoration states include states with both Republican majorities (such as Iowa and Kentucky), and swing states such as Virginia. In these states, although there is significant opposition to restoring felon voting rights, individual Governors (including Republican Governor Reynolds in Iowa and Democratic Governor Beshear in Kentucky) who support re-enfranchisement can invoke their strong executive powers to restore the franchise to a large number of individuals with felony convictions who completed their prison sentences.

A third category is conservative retrenchment states including Florida, Alabama, and Mississippi. This category encompasses a range of retrenchment of felon disenfranchisement. Florida is an example of state where felon voting rights restoration has been contested, in which a majority of voters enacted legislation or amendments to restore felon voting rights, but state government leaders pushed back on such efforts through the enactment of legislation imposing LFOs as a condition of voting rights eligibility, and failure to improve administrative procedures for ascertaining voter eligibility. In addition, in Alabama and Mississippi, state governments continue to defend felony disenfranchisement laws in federal courts and make the restoration of felon voting rights extremely difficult through the imposition of vague and arbitrary laws on crimes that qualify for disenfranchisement, the imposition of LFOs, and failure to provide for transparency and notice mechanisms that apprise persons with felony convictions of potential eligibility after the state modifies its list of eligible crimes that trigger disenfranchisement.

Voting rights reformers need to calibrate strategies aimed at ending felony disenfranchisement by taking advantage of states in which favorable political conditions or institutional structures allow for paths to voting rights restoration. As Part II.A illustrates, some progress is possible even in Republican states like Iowa and Kentucky, where governors have utilized their powers to restore voting rights to a large number of residents.

B. Near Term Approaches: Focusing on Administrative Processes and Structural Governance

Federalism and the nature of limited rights frameworks governing felony disenfranchisement continue to present obstacles to challenging felony

disenfranchisement laws at the state level. Given the hostile legal terrain facing federal court challenges to LFO disenfranchisement, advocates, reformers, and grassroots coalitions must continue to pursue interim reforms through alternative pathways that do not fully rely on litigation alone. I argue that reformers must also focus on initiatives and strategies aimed at addressing state-level administrative and governance failures highlighted by the federal litigation challenging LFO disenfranchisement in Florida, Alabama, and Mississippi.

In the federal court litigation challenging Florida's LFO disenfranchisement policies, the district court in its ruling following trial highlighted the administrative irrationality of Florida's "pay to vote" system of legal and financial obligations. Judge Hinkle held that Florida's " . . . inability to reasonably administer the pay-to-vote system, including its inability in many instances even to determine who is eligible to vote and who is not, renders the pay-to-vote system even more irrational than it otherwise would be."²²⁹ In *Jones v. DeSantis*, the dissenting judges also highlighted Florida's inability to administer SB 7066's pay-to-vote system, highlighting how many persons were unable to locate their criminal judgments and could not determine the exact amount of financial obligations they were required to pay.²³⁰ In addition, the challenges to Alabama's felony disenfranchisement laws also highlight another problem—namely, that the state has not done enough to provide felons and the public with information about which crimes are eligible for disenfranchisement.²³¹ This suggests the need for robust initiatives aimed at addressing state failures in two key areas: (1) administrative governance and transparency initiatives that are designed to ascertain and provide those with felony convictions complete and accurate information about the exact amount of LFOs owed to the state,²³² and (2) reform initiatives aimed at providing the public and those with felony convictions complete and accurate information about what crimes qualify for disenfranchisement.

²²⁹ *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1230 (N.D. Fla.), *hearing en banc ordered sub nom*; *see also McCoy v. Governor of Fla.*, No. 20-12003-AA, 2020 WL 4012843 (11th Cir. July 1, 2020), and *rev'd and vacated sub nom*; *see also Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020), and *aff'd sub nom*; *see also Jones v. Governor of Fla.*, 15 F.4th 1062 (11th Cir. 2021).

²³⁰ *See, e.g., Jones*, 975 F.3d at 1066 (Jordan, J., dissenting) (observing that "Florida cannot tell felons—the great majority of whom are indigent—how much they owe, has not completed screening a single felon registrant for unpaid LFOs, has processed 0 out of 85,000 pending registrations of felons (that's not a misprint—it really is 0), and has come up with conflicting (and uncodified) methods for determining how LFO payments by felons should be credited").

²³¹ *See supra* part II.B for discussion of Alabama case.

²³² One example of such an initiative is Free Our Vote, an initiative co-founded by Neel Sukhatme and Alexandeer Billy that seeks to provide a database of information collected from Florida counties in order to assist felons in ascertaining outstanding fees and fines they owe to the state. *See Free Our Vote*, <https://freeourvote.com>.

C. Longer Term Strategies

While the typology presented in Part III.A. does suggest the possibility of reform in some Republican majority states, the reality is that the post-*Ramirez* framework has for the most part created a two-tier landscape for the restoration of felon voting rights which has allowed for felon voting rights restoration in more progressive states with Democratic majorities, while making it difficult to challenge felon voting rights restrictions in other states, including states with Republican majorities. In light of the two-tier landscape for voting restoration, what longer-term strategies should voting rights advocates and reformers adopt to advance the cause of voting rights restoration for persons with felony convictions?

Given the Supreme Court's and federal courts' deference to and upholding of state felony disenfranchisement regimes, reformers must focus on three primary strategies that focus on both near-term and longer-term horizons. First, voting rights and civil rights groups and progressives must mobilize support pressuring state legislatures and Congress to enact voting rights legislation that includes provisions that end felony disenfranchisement at least upon release from prison. However, in the current political landscape and current Congress, enacting such legislative reforms seems unlikely. In March 2021, Democrats introduced legislation—H.R. 1, the “For the People Act”—that included provisions that would end felon disenfranchisement for those who had completed prison sentences, but the bill stalled due to a lack of support for it in the Senate.²³³ More recently, the Senate considered and voted on election reform and voting rights legislation entitled the Freedom to Vote Act that included provisions to end felony disenfranchisement for those who complete their prison sentences.²³⁴ However, Democrats were unable to muster the 60 votes necessary to overcome the Republican filibuster of the legislation.²³⁵

Second, political mobilization to elect Democratic Presidents in successive national elections will also be necessary in order to reshape the federal judiciary as part of a long-term strategy aimed at overturning the *Ramirez* decision and appointing judges who will adopt a new approach that applies heightened scrutiny to felon disenfranchisement laws based on wealth and race, based on the Supreme Court's earlier precedents in cases including *Bearden* and *Griffin*. In addition, progressive judges would be more likely to be receptive to Voting Rights Act claims targeting structural discrimination in state criminal justice systems, as well as procedural due process claims that focus on deficient

²³³ *Senate Democrats Fail to Advance Voting and Elections Bill in Senate*, CBS NEWS (Oct. 21, 2021, 8:18 AM), <https://www.cbsnews.com/news/freedom-to-vote-act-voting-rights-fails-senate/>.

²³⁴ *Id.*; However, there are many commentators that have suggested that there may be limitations on Congress' ability to enact legislation banning felony disenfranchisement. See e.g., Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws*, 49 HOW. L.J. 767 (2006).

²³⁵ *Senate Democrats Fail to Advance Voting and Elections Bill in Senate*, *supra* note 233.

administrative governance systems for determining the exact amount of LFOs and voter eligibility.

Third, the most effective (albeit highly difficult) way to reverse *Ramirez* and federal courts' deferential approach to the review of state felony disenfranchisement laws would be to enact a constitutional amendment guaranteeing a fundamental right to vote for all voting age Americans. Many scholars have advanced support for such an amendment, and in 2020, Senators Elizabeth Warren and Richard Durbin introduced a resolution in support of such an amendment in the US Senate.²³⁶

CONCLUSION

Felony disenfranchisement practices across a large number of states continue to deprive millions of Americans of the right to vote, with a disproportionate impact on minority voters.²³⁷ Although some progress has been made with respect to voting rights restoration of persons with felony convictions, especially in states with Democratic majorities, many states continue to disenfranchise persons with felony convictions through a variety of institutional mechanisms and practices. This includes maintenance of LFO requirements, antiquated institutional mechanisms for granting and restoring voter eligibility, resistance to changing constitutional or statutory felony disenfranchisement laws, legislative undercutting of statewide initiative amendments that restore voting rights like Florida's Amendment 4, or through ineffective administrative mechanisms for maintaining records on voting eligibility.²³⁸

As this Article demonstrates, recent felony disenfranchisement measures have relied on the imposition of LFOs and other measures to block persons with felony convictions from gaining voting eligibility through policies that disproportionately target poor and minority voters.²³⁹ Federal court litigation challenging these policies has been unsuccessful in large part due to existing legal precedents that insulate felony disenfranchisement policies and failure to review wealth-based classifications under heightened scrutiny.²⁴⁰ Given the existing reality of strong conservative judicial majorities on the Supreme Court and in many federal circuits, federal courts are unlikely to change course in the near future.

Because of the nature of federalism and existing precedent interpreting the Fourteenth Amendment as authorizing state felony disenfranchisement policies, states continue to have significant autonomy and control when it comes to felony

²³⁶ See Richard L. Hasen, *Bring on the 28th Amendment*, N.Y. TIMES (June 29, 2020) (discussing the need for a constitutional amendment guaranteeing a fundamental right to vote), <https://www.nytimes.com/2020/06/29/opinion/sunday/voting-rights.html>; see also *Enshrining a Right to Vote in the US Constitution*, THE ADVANCEMENT PROJECT (Aug. 4, 2020), <https://advancementproject.org/enshrining-a-righttovote-in-the-u-s-constitution/>.

²³⁷ Hasen, *supra* note 236.

²³⁸ See *supra* discussion, Part II.B, and Part III.B.

²³⁹ See *supra* discussion at Part II.B.

²⁴⁰ See *supra* discussion at Part II.B.

disenfranchisement policies. In addition, current political dynamics also continue to drive felony disenfranchisement policies in conservative states with Republican majorities and in “swing” states such as Florida, where Republican control of state governance depends in part on voter suppression and disenfranchisement policies.

Consequently, any long term national strategy aimed at meaningful and systemic restoration of felon voting rights will require a combination of several approaches on the political front including: national political mobilization targeted at Congress and electing Democratic presidents; state level mobilization particularly in swing states with large disenfranchised populations including Florida; and state level campaigns aimed at addressing administrative and governance processes governing data collection on LFOs, recordkeeping, and notice processes for informing individuals of voter eligibility. At the same time, scholars and voting rights advocates must continue to produce scholarship, commentary and other support for alternative doctrinal approaches based on the *Bearden-Griffin* line of cases that recognize wealth-based discrimination claims triggering heightened scrutiny of LFO disenfranchisement, and vagueness and procedural due process frameworks that apply close scrutiny to the deficiencies and failures of state administration of LFO regimes.