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CONCEALED MOTIVES: RETHINKING FOURTEENTH AMENDMENT AND VOTING RIGHTS CHALLENGES TO FELON DISENFRANCHISEMENT

Lauren Latterell Powell★

Felon disenfranchisement provisions are justified by many Americans under the principle that voting is a privilege to be enjoyed only by upstanding citizens. The provisions are intimately tied, however, to the country's legacy of racism and systemic disenfranchisement and are at odds with the values of American democracy. In virtually every state, felon disenfranchisement provisions affect the poor and communities of color on a grossly disproportionate scale. Yet to date, most challenges to the provisions under the Equal Protection Clause and Voting Rights Act have been unsuccessful, frustrating proponents of re-enfranchisement and the disenfranchised alike.

In light of those failures, is felon disenfranchisement here to stay? This Note contemplates that question, beginning with a comprehensive analysis of the history of felon disenfranchisement provisions in America, tracing their roots to the large-scale effort to disenfranchise African Americans during Reconstruction, and identifying ways in which the racism of the past reverberates through practices of disenfranchisement in the present day. Applying this knowledge to understandings of prior case law and recent voting rights litigation, a path forward begins to emerge.

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INTRODUCTION

The right to vote has long been regarded as one of the major cornerstones of democracy. Perhaps more than any other act of civic engagement, voting represents inclusion in society and has the potential to inform an individual's views about membership in his or her community.[1] As such, over the course of American history, the literal and symbolic power of the vote has compelled countless groups to fight for their right to the franchise. Most of these groups have been successful,[2] allowing them greater ability to shape their communities and enhanced civic inclusion.

Despite the significance of the vote, one group—felons and ex-felons—has been systematically denied this right on a massive scale. Section 2 of the Fourteenth Amendment permits disenfranchisement "for participation in rebellion or other crime."[3] Forty-eight states have felon disenfranchisement laws, of which twelve states ban voting for ex-felons indefinitely or for a specific number of years after sentence completion.[4] As a result, approximately six million Americans are disenfranchised due to felon voting bans today.[5] These laws disproportionately affect African Americans and Latinos.[6] In 2016, African Americans were four times more likely to be disenfranchised than Whites, with one in thirteen otherwise eligible African Americans of voting age denied the right to vote.[7] While the number of disenfranchised includes violent offenders, it also includes those convicted of non-violent offenses.[8] In 2012, at least 51% of inmates in state and federal prisons had been convicted of non-violent

1. *See* Jeff Manza & Christopher Uggen, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 195–97 (2004).

2. "Successful" is of course a relative term, and is used here only to describe the formal expansion of the franchise to previously disenfranchised groups, such as African Americans and women.

3. U.S. CONST. amend. XIV, § 2; see also II(A), *infra*.

4. JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (updated May 2016).

5. Id.

6. *Id*. at 2.

7. *Id*.

8. *See Criminal Disenfranchisement Laws Across the United* States, BRENNAN CTR. FOR JUST. (Aug. 24, 2016), http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states.

crimes.[9] In twelve states, depending on the nature of the offense, individuals are disenfranchised even after successfully completing probation and parole.[10]

Far from being fully reintegrated into their communities, disenfranchised individuals are denied both the capacity to influence policies in their communities and the dignity of political voice. Indeed, they are kept on the social and political margins of society, unable to influence even those policies that directly impact them—such as laws determining felons' and ex-felons' eligibility for public benefits—potentially increasing their likelihood of recidivism.[11] In fact, research suggests that ex-felons who are allowed the vote and use it are less likely to face re-arrest and re-incarceration.[12]

Along with affecting individuals' abilities to reintegrate into their communities, felon disenfranchisement provisions have had a significant and tangible impact on American politics and electoral outcomes.[13] Experts estimate that since 1970, at least seven senate elections and one presidential election would have turned out differently had felons and ex-felons been allowed to vote.[14] In fact, in the notoriously contentious presidential election of 2000, ultimately influenced by the outcome of the equally contentious Supreme Court case *Bush v. Gore*,[15] research shows Gore likely would have won had ex-felons in Florida alone been granted the franchise.[16] And although we do not yet know the full implications of felon disenfranchisement on the 2016 presidential election—the second in just two decades where the winner of the popular vote did not win the electoral vote—we can conjecture that the votes of felons and ex-felons could have changed the election's outcome.[17]

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9. *Incarcerated Felon Population by Type of Crime Committed, 1974-2012*, PROCON.ORG (last visited April 11, 2017, 2:15 PM), http://felonvoting.procon.org/view.resource.php?resourceID=004339.

10. CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 4 (2016). Note that the laws in each of the 12 states referred to vary. Some disenfranchise only those convicted of multiple non-violent felonies beyond completion of their sentence, while others disenfranchise first-time offenders. *Id*.

11. *See* Manza, *supra* note 1 (describing results of a study regarding the correlation between voting and recidivism).

12. *Id*. at 213.

13. *See generally* Jeff Manza & Christopher Uggen, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002) (analyzing the effect of felon disenfranchisement provisions on major U.S. elections from 1970–2000).

14. *Id*. at 789–92.

15. Bush v. Gore, 531 U.S. 98 (2000).

16. Manza, *supra* note 13, at 792.

17. *See id*., for a discussion of the implications of felon disenfranchisement for U.S. election results. *See also* Hannah Kozlowska, *What Would Happen if Felons Could Vote in the US?*

While insights about the negative effects of felon disenfranchisement on democratic elections are relatively recent, the practice is certainly not new to the United States.[18] Early Americans endorsed and adopted the European custom of Civil Death, disenfranchising men convicted of specific crimes—typically those believed to be particularly offensive or violent.[19] By the Civil War, a majority of states had ratified some form of felon disenfranchisement into their constitutions or state laws.[20]

When African Americans were recognized as citizens and granted the right to vote, felon disenfranchisement provisions became tools not only for penalizing criminals, but for disenfranchising Americans of color on a massive scale.[21] While most voting restrictions enacted for the purpose of disenfranchisement, such as literacy tests or poll taxes, were eliminated with the passage of the Voting Rights Act ("VRA") and its amendments,[22] felon disenfranchisement provisions have been virtually unaffected by the Act. In some cases, in fact, they have expanded since the VRA's passage.[23]

This Note contends that felon disenfranchisement in the U.S. remains a racist and politically-motivated practice at odds with the values of democracy. Drawing on examples of successful voting rights litigation, it presents solutions to some of the challenges proponents of re-enfranchisement have faced. Part I analyzes the history of felon disenfranchisement provisions in the U.S. to reveal how the laws have contributed to the systemic disenfranchisement of African Americans. Part II analyzes successes and failures in the movement to re-enfranchise felons up to the present day. Part III more closely examines how changing social and political conditions have presented barriers to proving that felon disenfranchisement provisions are motivated by racism, while Part IV explores how the racist and political motives behind the laws present themselves today. Finally, Part V first provides ideas about how to apply this knowledge and analysis

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QUARTZ MEDIA (Oct. 6, 2016), https://qz.com/784503/what-would-happen-if-felons-could-vote (discussing the potential implications of felon disenfranchisement on the 2016 election).

18. *See* Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States*, 109 AM. J. SOC. 559, 562–63 (2003); CHUNG, *supra* note 4, at 2.

19. *See* Behrens, *supra* note 18, at 563; Pippa Holloway, *"A Chicken Stealer Shall Lose His Vote": Disenfranchisement for Larceny in the South, 1874-1890*, 75 J. S. HIST. 931, 933 (2009).

20. *See* Behrens, *supra* note 18, at 567. Figure 1 shows the percentage of states that disenfranchised felons and ex-felons for each decade from 1788–2002. At the outset of the Civil War in the early 1860s, over 70% of states had a felon disenfranchisement provision. *Id.*

21. *See* Behrens, *supra* note 18, at 563. *See also* CHUNG, *supra* note 3, at 3.

22. 42 U.S.C. § 1973 (2012).

23. *See* Behrens, *supra* note 18, at 565 (showing recent adoption of or changes in felon disenfranchisement provisions in a table). *See also* Brief for Griffin—League of Women Voters as Amicus Curiae Supporting Petitioner at 8–9, Griffin v. Pate, 884 N.W.2d 182 (Iowa 2016) (No. 15-1661) (arguing that Iowa's policy of permanently disenfranchising felons, enacted in 2011, is too restrictive); CHUNG, *supra* note 4, at 4 (showing changes in felon disenfranchisement laws from 1997–2016, including more restrictive changes in Iowa, Kentucky, and South Dakota).

to the appropriate constitutional test. It then explains why current political and social conditions make this a critical moment in history to call attention to felon disenfranchisement.

I. A FORGOTTEN HISTORY ROOTED IN RACISM

Understanding what has led to the disenfranchisement of American citizens on such a massive scale requires understanding the historical context surrounding the disenfranchisement of felons in the United States. This section analyzes the history of felon disenfranchisement laws to show their ties to racist objectives, namely the systemic disenfranchisement of people of color in the United States.

While felon disenfranchisement laws were adopted by most states before the Civil War, the earliest forms of felony disenfranchisement laws were typically reserved for the most violent criminals.[24] Not until the Civil War and the Reconstruction period did states begin to revise their felon disenfranchisement laws on a substantial scale to make them more restrictive.[25] In the decades following the passage of the Fourteenth and Fifteenth Amendments, nearly every Southern state (with the exception of Texas) amended its laws to disenfranchise those convicted of petty larceny and related crimes.[26] Therefore, for the first time in many states, those convicted of non-violent crimes (previously labeled as misdemeanors) could be disenfranchised.[27] Some states achieved this by elevating the crime of larceny from misdemeanor to felony status, while others expanded the definition of felony larceny to include theft of livestock and items of increasingly low monetary value.[28]

This wide-scale expansion of disenfranchisement to include those convicted of petty larceny reflects the first major attempt by Whites to disenfranchise Blacks in response to the new social and political power they gained under the Reconstruction Amendments.[29] Indeed, many Black citizens and White Republicans of the time acknowledged the movement as such, openly opposing felon disenfranchisement in front of Congress and in the media.[30] In 1880, larceny convictions became more frequent in the months leading up to an election.[31] And in behavior foretelling the inauguration of the Jim Crow era, some officials and poll workers successfully

24. Holloway, *supra* note 19, at 933.

25. Behrens, *supra* note 18, at 563.

26. Holloway, *supra* note 19, at 931.

27. *See id.* at 937–39.

28. *See id.*

29. *See* Behrens, *supra* note 18, at 564; Holloway, *supra* note 19, at 935.

30. *See* Holloway, *supra* note 19, at 942–43.

31. *Id.* at 932.

incited false allegations of larceny or other criminal charges to keep Black men out of the polls.[32]

The next wave of increasingly restrictive felon disenfranchisement laws arrived during the Jim Crow Era.[33] From 1889 through the early 1900s, changes to disenfranchisement provisions were characterized by restrictions placed on those convicted of crimes typically believed to be committed more by Blacks than by Whites.[34] These crimes were usually those considered "furtive" offenses, including "thievery, adultery, arson, wife-beating, housebreaking, and attempted rape."[35] Alabama—the only state whose felon disenfranchisement law would later be struck down by the Supreme Court due to Fourteenth Amendment violations[36]—explicitly acknowledged at its 1901 constitutional convention that the aim of the state's new disenfranchisement provisions was to perpetuate White supremacy.[37] And only a few years after Mississippi's adoption of new felon disenfranchisement laws, its Supreme Court explicitly recognized that they were enacted with the intent of targeting African Americans: "Restrained by the federal Constitution from discriminating against the negro race, the [Mississippi] convention discriminated against its characteristics and the offenses to which its weaker members were prone."[38]

As later sections of this Note will elaborate on,[39] while we do not immediately view felon disenfranchisement laws as racially motivated, the felon disenfranchisement provisions of today are not divorced from the racist motivations that gave rise to these laws in the first place. Politicians continue to propagate notions of Black criminality to justify the marginalization of felons and ex-felons from society, through both mass incarceration and disenfranchisement.[40] Furthermore, despite the expansion of the right to vote during the mid-to-late twentieth century for African Americans and other groups, the War on Drugs and other "tough on crime" policies implemented over the last 40 years have resulted in a drastic increase in the number of disenfranchised individuals, from 1.17 million in 1976 to 6.1 million in 2016.[41]

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32. *See id.* at 932, 951.

33. Behrens, *supra* note 18, at 564.

34. *See* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 540–41 (1993).

35. *Id.* at 541.

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

37. *See* Shapiro, *supra* note 34, at 542.

38. *Id.* at 541.

39. *See* discussion *infra* Part IV.

40. *See* Part IV(D), *infra*, for a discussion on this topic.

41. *See* CHUNG, *supra* note 4, at 3.

II. CONSTITUTIONAL AND STATUTORY CHALLENGES TO FELON DISENFRANCHISEMENT

Since the Jim Crow Era, changes in felon disenfranchisement provisions have been mixed.[42] Although skeptics and opponents of felon disenfranchisement have been fighting for change since the late 19th century,[43] few of their court battles have been won. This section analyzes the legal defeats and victories in the movement to re-enfranchise felons, which can inform potential strategies moving forward.[44]

A. *Equal Protection Challenges to Felon Disenfranchisement*

> Representatives shall be apportioned among the several states according to their respective numbers . . . But when the right to vote . . . is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein shall be reduced.[45]

Most claims attacking the constitutionality of felon disenfranchisement provisions have done so on the basis that the provisions violate the Fourteenth Amendment's Equal Protection Clause. In 1974, the Supreme Court in *Richardson v. Ramirez*[46] first confronted whether felon disenfranchisement laws violate the Equal Protection Clause.[47] Although just a decade earlier the Court had established the right to vote as a fundamental right and held that restrictions on the franchise affecting any class of citizens must be subject to strict scrutiny,[48] it nevertheless held in *Richardson* that California's felon disenfranchisement provision did not violate the Equal Protection Clause.[49]

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42. *Id.* at 4.

43. *See* Holloway, *supra* note 19, at 933, 941–42 (describing Reconstruction Era Republicans' resistance to the expansion of disenfranchisement to include those convicted of petty crimes, which were believed by Southern Democrats to be committed more often by Blacks than Whites).

44. *See* discussion *infra* Part V.

45. U.S. CONST. amend. XIV, § 2.

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

47. *Id.*

48. *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964). *Reynolds* established the right to vote as "a fundamental matter in a free and democratic society" and held that any infringement on the right must be subject to careful and meticulous scrutiny. *Id.* For cases implementing the *Reynolds* holding, see e.g., Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) (holding that a poll tax which restricted the right to vote based on wealth violated the Equal Protection Clause); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) (striking down restrictions on the right to vote in school board elections as both over- and under-inclusive).

49. *Richardson*, 418 U.S at 56

The *Richardson* Court relied heavily on the text of Section 2 of the Fourteenth Amendment, which states, "representatives shall be apportioned among the states in proportion to each state's population, minus any male who has been disenfranchised, with the exception of those disenfranchised "for participation in rebellion or other crime."[50] According to the Court, this language "distinguish[es] [felon disenfranchisement] laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by the Court."[51] Put more simply, the Court found that Section 2 of the Fourteenth Amendment positively affirms the constitutionality of felon disenfranchisement and therefore felons, as a class, have no constitutionally protected right to vote.

Because *Richardson* precluded any finding that disenfranchising felons as a class violates the Equal Protection Clause, opponents of these laws began to challenge disenfranchisement provisions instead on racial grounds. In *Johnson v. Governor of Florida*, a group of ex-felons challenged Florida's constitutional amendment disenfranchising ex-felons under the Equal Protection Clause, arguing that, although the provision was facially neutral, racial animus motivated its passage.[52] The 11th Circuit first reiterated the Supreme Court's finding in *Richardson* that "a state's decision to permanently disenfranchise convicted felons does not, in itself, constitute an equal protection violation,"[53] because Section 2 of the Fourteenth Amendment explicitly allows for it.[54] Regarding the allegations of racial animus and citing *Washington v. Davis*,[55] the court acknowledged that a facially neutral felon disenfranchisement provision enacted with racially discriminatory intent would violate the Equal Protection Clause.[56] Nonetheless, the court ultimately determined that although Florida's original 1885 constitutional amendment may have been motivated by racial animus, without a showing that the *current* and amended law was adopted with racially discriminatory intent, there would be no Equal Protection violation.[57] Based on a finding that the state's 1968 amendment to the relevant 1885 provision was enacted without racially discriminatory intent, the court upheld the statute.[58]

While *Johnson* does not make clear to what extent, or in what manner, a state must amend its felon disenfranchisement provisions to legally

50. U.S. CONST. amend. XIV, § 2.

51. *Richardson*, 418 U.S. at 54.

52. Johnson v. Governor of Florida, 405 F.3d 1214, 1216–17 (2005).

53. *Id.* at 1217 (quoting *Richardson*, 418 U.S. at 53-55).

54. U.S. CONST. amend. XIV, § 2.

55. Washington v. Davis, 426 U.S. 229 (1976) (holding that a facially neutral law with a racially disparate impact does not violate the Equal Protection Clause without a showing of racially discriminatory intent).

56. *Johnson*, 405 F.3d at 1215.

57. *Id.* at 1225.

58. *Id.*

override the racial animus with which it was originally enacted, other precedent is more illuminating. In *Cotton v. Fordice*,[59] the 5th Circuit applied reasoning similar to that in *Johnson* to uphold Mississippi's felon disenfranchisement law; although the court acknowledged that the state's 1890 provision was enacted for the purpose of disenfranchising Blacks, it held that the 1968 amendment "superseded the previous provision and removed the discriminatory taint associated with the original version."[60] According to the court, this was apparent because, while the original version of the law had excluded murder and rape—which were not considered "Black" crimes—the 1968 law included those crimes and excluded robbery.[61] This exemplifies how the courts have looked to relatively minor amendments to state felon disenfranchisement laws as a means of dissociating current laws from the racial motivations of the original laws they are based on.

In *Hunter v. Underwood*, plaintiffs successfully challenged a state's felon disenfranchisement provision under the Fourteenth Amendment for the first time.[62] There, two men argued that Article 8 §182 of the Alabama Constitution was adopted to intentionally disenfranchise Blacks.[63] Because the state's 1901 Constitutional Convention (where the provision was adopted) was widely accepted to be "part of a movement that swept the post-Reconstruction South to disenfranchise Blacks,"[64] the state was forced to concede that part of the intent behind the provision was racially discriminatory.[65] Applying the test laid out in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*,[66] the Court asked whether the same provisions would have been adopted without the discriminatory purpose of disenfranchising Blacks.[67] The state argued that an additional motivation behind the provision was to disenfranchise poor Whites, and that this alternative purpose provided a permissible basis from which to uphold the law.[68] The Court rejected this argument, finding that the law was enacted to discriminate against Blacks on account of race and that it would not have been adopted absent this purpose.[69] When considering whether Article 2 of the Fourteenth Amendment nonetheless exempted §182 from the possibility of an Equal Protection violation, the Court remarked, "we are

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

60. *Id.* at 391.

61. *Id.*

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

63. *Id.* at 224.

64. *See id.*; Shapiro, *supra* note 34, at 542.

65. *Hunter*, 471 U.S. at 229.

66. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (outlining how to determine whether a facially neutral law was motivated by racially discriminatory intent).

67. *Hunter*, 471 U.S. at 225.

68. *Id.* at 230–31.

69. *Id.* at 231.

confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* suggests the contrary."[70] Thus, while reaffirming the protection granted to felon disenfranchisement provisions generally under § 2 of the Fourteenth Amendment, the *Hunter* Court confirmed that that protection does not shield provisions that violate the Equal Protection Clause on the basis of racially discriminatory intent.[71] In effect, this holding means that opponents of the laws can still hang onto the possibility that disenfranchisement provisions enacted with racially discriminatory intent will be deemed unconstitutional under the Equal Protection Clause.

B. *Statutory Challenges to Felon Disenfranchisement*

With the passage of the Voting Rights Act (VRA) and the Section 2 amendment expanding the Act's scope to cover voting practices that are discriminatory in effect,[72] some re-enfranchisement proponents saw a new and more flexible angle from which to attack felon disenfranchisement laws.[73] Given the highly visible disparate impact of these provisions on racial minorities, there was hope that the VRA could finally provide a path to striking facially neutral laws down when discriminatory intent would be difficult to prove.[74]

To the chagrin of voting rights activists, however, most VRA claims against felon disenfranchisement laws have been unsuccessful in federal courts.[75] A common theme among these holdings is that the Fourteenth Amendment protection of felon disenfranchisement laws described in *Richardson* precludes them from falling under the authority of § 2 of the VRA.[76] The 11th Circuit described one facet of this argument in *Johnson*.[77] There, the court determined that while § 2 of the VRA typically extends to facially neutrally laws that have a racially disparate impact, because the Fourteenth Amendment explicitly protects a state's right to disenfranchise felons, applying § 2 of the VRA to felon disenfranchisement laws would "allow a congressional statute to override the text of the Constitution."[78] In order to avoid this constitutional conflict, the *Johnson* court

70. *Id.* at 233.

71. *Id.*

72. 42 U.S.C. § 1973 (2012).

73. *See, e.g.*, Shapiro, *supra* note 34.

74. *Id.*

75. *See, e.g.*, Farrakhan v. Gregoire, 623 F.3d 990, 994 (9th Cir. 2010); Hayden v. Pataki, 449 F.3d 305, 310 (2d Cir. 2006); Johnson v. Governor of Florida, 405 F.3d 1214, 1227-34 (11th Cir. 2005).

76. *See Farrakhan*, 623 F.3d at 993; *Johnson,* 405 F.3d at 1228.

77. *Johnson*, 405 F.3d at 1230.

78. *Id.*

held that a facially neutral felon disenfranchisement provision cannot be challenged on the basis of racially disparate impact under the VRA, but can be challenged under the Equal Protection Clause on the basis of racially discriminatory intent.[79]

A year later, the 2nd Circuit provided additional reasoning as to why the Voting Rights Act's application to felon disenfranchisement laws presents a constitutional conflict.[80] In *Hayden v. Pataki*,[81] plaintiffs alleged that New York's law disenfranchising felons had a discriminatory effect on African Americans and Latinos and therefore violated Section 2 of the Voting Rights Act.[82] Significantly, the *Hayden* plaintiffs did *not* bring an Equal Protection Claim or allege that the law was adopted with discriminatory intent, but instead focused solely on the VRA's disparate impact provision.[83] In a line of reasoning similar to the 11th Circuit's in *Johnson*, the *Hayden* court emphasized, "Section 2 of the Fourteenth Amendment explicitly leaves the federal balance intact with regard to felon disenfranchisement laws specifically."[84] Therefore, the court continued, to apply Section 2 to felon disenfranchisement laws would be to disrupt the states' constitutionally protected right to adopt them.[85] Given the sensitive nature of this conflict, the court determined that the VRA should only be held to apply to felon disenfranchisement provisions if Congress clearly specified that it was intended to do so.[86] Citing a lack of such specification, the court declined to extend the statute to felon disenfranchisement provisions.[87]

Similarly, in *Farrakhan v. Gregoire*, the 9th Circuit denied plaintiffs' claim that Washington's felon disenfranchisement provision violated Section 2 of the Voting Rights Act because of its racially disparate impact.[88] There, plaintiffs argued that the discriminatory effect on voting rights was the result of a racially discriminatory criminal justice system.[89] Citing the Fourteenth Amendment's affirmative sanction of criminal disenfranchisement and a lack of evidence regarding Congress's intent to extend the application of the VRA felon disenfranchisement provisions, the court declined to extend the VRA to Washington's law.[90]

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79. *Id.*

80. *See* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006).

81. *Id.*

82. *Id.* at 311.

83. *See id.*

84. *Id.* at 326.

85. *See id.*

86. *Id.* at 325–26.

87. *Id.* at 324–28.

88. Farrakhan v. Gregoire, 623 F.3d 990, 993–94 (9th Cir. 2010).

89. *Id.* at 992–93.

90. *Id.* at 993.

Unlike the 11th and 2nd Circuits, however, the *Farrakhan* court emphasized that, for a VRA claim to be successful, "plaintiffs . . . must at least show that the criminal justice system is infected by *intentional* discrimination or that the felon disenfranchisement law was enacted with such intent."[91] This suggests that if plaintiffs had been able to show intentional discrimination within Washington's criminal justice system, the court may have been more willing to apply the VRA to the state's felon voting ban.

Collectively, these cases demonstrate that to successfully challenge a felon disenfranchisement provision under either the Fourteenth Amendment or the Voting Rights Act, plaintiffs must go beyond showing discriminatory effect and show that the state acted with discriminatory intent when adopting its current provision or, potentially, show intentional discrimination in the state's criminal justice system itself.[92] Although Supreme Court precedent on felon disenfranchisement provisions is minimal, *Hunter* shows that despite the apparent protection offered to them under § 2 of the Fourteenth Amendment, the Court is willing to strike down states' provisions if plaintiffs make a showing of discriminatory intent.[93]

III. CHALLENGES TO PROVING DISCRIMINATORY INTENT

Although the *Hunter* decision affirmed that the Supreme Court is willing to recognize racially discriminatory motivations behind felon disenfranchisement laws, proving this discrimination in a modern context presents lawyers and disenfranchised felons with several difficulties. This section examines those challenges, with a specific focus on the law's response to changing social norms regarding race and class.

Although it is widely acknowledged that many—if not most—felon disenfranchisement laws were adopted in their original form at least in part to disenfranchise poor and minority voters,[94] the discriminatory intent behind the felon disenfranchisement provisions of today does not show itself as obviously as it did in the past.[95] Indeed, based on the litigation to date, the Alabama constitutional provision examined in *Hunter* is an outlier; it is the only modern felon disenfranchisement provision that has been recognized by a court as motivated by racial animus.[96] One reason for Alabama's outlier status is simply that most states have at some point amended their provisions, often broadening their scope to include felonies that are per-

91. *Id*. (emphasis in original).

92. *See* Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998); Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010); Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005); Richardson v. Ramirez, 418 U.S. 24 (1974).

93. *See Hunter*, 471 U.S. 222.

94. *See* Holloway, *supra* note 19, at 934–35; Shapiro, *supra* note 34, at 542

95. *See* Behrens, *supra* note 18, at 568–69.

96. *See Hunter*, 471 U.S. 222. *But see Cotton*, 157 F.3d 388; *Farrakhan*, 623 F.3d 990; *Farrakhan*, 338 F.3d 1009; *Hayden*, 449 F.3d 305; *Johnson*, 405 F.3d 1214; *Richardson*, 418 U.S. 24.

ceived as traditionally "White" crimes.[97] These amendments have allowed states—even those with a tradition of discriminatory practices, such as Mississippi in *Cotton v. Fordice*—to defend their current provisions on the basis that the amendments eradicated any racially discriminatory intent that may have motivated their passage originally.[98]

The amendment of felon disenfranchisement provisions to include "White" crimes is at least in part responsive to changing social norms and the threat of litigation against the provisions in their original forms.[99] In the 21st century, it is widely understood that enforcing a law based on explicit racial bias like that exhibited in many state provisions a hundred years ago is both socially unacceptable and unconstitutional.[100] As such, states, whether they are motivated by simply masking the racism present in their laws or eliminating it, have been forced to change the language and scope of their disenfranchisement provisions in response to these norms.[101]

Politicians of the late 19th and early 20th centuries manipulated the polity by arguing that felon-voting bans were necessary because "a race with a propensity for theft lacked self-control and was unsuited for full citizenship."[102] At the height of the Jim Crow era, this portrayal of Blacks as criminals supported the perpetuation of White supremacy.[103] Because these and other Jim Crow laws were typically upheld in courts through the middle of the 20th century, the legislators who passed the original provisions were free to be explicit in their desire to disenfranchise Blacks.[104]

Changing social norms and the rejection of overt racism in much of the country have led to an evolution of the rhetoric used to justify felon disenfranchisement provisions.[105] In contrast to the explicit racial appeals of the past, today, supporters of felon disenfranchisement laws are more likely to justify them on the basis that those who have committed crimes have forfeited their right to be trusted with the vote, without acknowledging the racial implications of felon voting bans.[106] The importance of the states' right to disenfranchise felons also appears frequently in this discourse.[107] For instance, in response to a proposal to restore the right to

97. *See, e.g.*, *Cotton*, 157 F.3d at 391 (explaining the evolution of Mississippi's felon disenfranchisement provision from a law that included only crimes thought to be "Black crimes" to a law that included crimes not previously associated with African Americans).

98. *Id.* at 391; *see also Johnson*, 353 F.3d at 1225.

99. *See* Behrens, *supra* note 18, at 568–72.

100. *Id.*

101. *See, e.g., Hunter*, 471 U.S. 222 (wherein Alabama was forced to change its felon disenfranchisement provision after its original provision was struck down).

102. Holloway, *supra* note 19, at 956.

103. *Id.*

104. *See* Behrens, *supra* note 18, at 568.

105. *Id.* at 570–73.

106. *Id.* at 572–73.

107. *See id.* at 570–71.

vote to ex-felons, Senator Mitch McConnell defended states' interest in "reserving the right to vote for those who have abided by the social contract," also reminding his colleagues that they were "talking about rapists, murderers, robbers, and even terrorists or spies."[108] Then Senator and current Attorney General Jeff Sessions employed similar reasoning to oppose the bill, emphasizing states' interest in setting their own moral and public standards.[109]

The problem for opponents of disenfranchisement rests not only on the fact that these justifications ignore the racialized foundations of felon disenfranchisement provisions, but also on the reality that persisting racial discrimination behind the laws is either not explicitly expressed or is expressed in a racially coded way.[110] When this is the case, plaintiffs are often left with only statistical evidence of the disproportionate impact of the provisions on people of color, which courts have determined is not sufficient to show discriminatory intent.[111] And significantly, despite ample evidence of implicit bias against people of color in the criminal justice system broadly, courts have so far been unwilling to consider that evidence alone as sufficient proof of racial discrimination.[112]

IV. THE POLITICAL AND RACIAL MOTIVATIONS DRIVING FELON DISENFRANCHISEMENT TODAY

Because the main barrier challengers of felon disenfranchisement laws face is proving discriminatory intent, to overcome this barrier, it is necessary to have a thorough understanding of how racism expresses itself through these provisions in a modern context. In this section, I explore various ways racism and racially-charged politics influence and are exacerbated by the felon disenfranchisement laws of today, with the hope of providing knowledge that can be applied to the appropriate constitutional test in the courts.[113]

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108. 107 CONG. REC. 1494–95 (2002).

109. *Id*. at 1496.

110. *See* Behrens, *supra* note 18, at 572–73. See also Part IV(D), *infra*, for a discussion on the forms of expression used by modern politicians to communicate racist ideals.

111. *See, e.g.,* Farrakhan v. Gregoire, 623 F.3d 990, 992–93 (9th Cir. 2010).

112. *See* Erik J. Girvan, *On Using The Psychological Science of Implicit Bias To Advance Anti-Discrimination Law*, 26 GEO. MASON C.R. L.J. 1, 4 (2015) ("To the extent that our goal is to use the legal system, instrumentally, to remedy inequity illuminated by insights from work on implicit bias, the resulting gap in legal protection from discriminatory actions that are perpetuated accidentally, negligently, recklessly, or knowingly rather than purposefully, is inconsistent with that goal . . . Judges must simply have failed at some point to recognize that discrimination can occur without purpose.").

113. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

A. *Implicit Bias*

While the racism prevalent today tends to be more subtle or implicit than it was before the Civil Rights Movement, it is still possible to recognize. Current psychological research shows that a majority of Americans maintain some degree of implicit racial bias.[114] Professor Erik Girvan defines implicit bias as the unconscious inferences people make about others as a result of our stereotypes, beliefs, and attitudes towards various groups.[115] Recent implicit bias research suggests that around 68% of American adults implicitly favor Whites over Blacks.[116]

These inferences, although made unconsciously, can influence behaviors and perceptions in a tangible way.[117] Experts on implicit racial bias believe that it results in discrimination against people of color in a variety of contexts.[118] Studies have shown that it affects everything from school discipline to employment and police practices.[119]

B. *Racial Threat*

Looking beyond how implicit bias affects individuals' decision-making and behavior, some scholars have examined how racial biases and fear lead to increased support for racialized policies on the community or state level.[120] A growing body of research known as racial threat theory shows that Whites respond to growing populations of non-Whites by using their disproportionate power to implement state-sanctioned control mechanisms.[121] For example, various studies show that communities tend to spend more funds on their police practices as the percentage of residents who are Black increases.[122] The same is true in towns near the U.S.-Mexico border as the percentage of Hispanic residents increases.[123]

Scholars Behrens, Uggen, and Manza use the concept of racial threat to support the idea that the felon disenfranchisement provisions in place today remain motivated by racist ideals.[124] While Whites and Democrats in the post-Civil War era explicitly used the law to keep Blacks away from the

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114. Girvan, *supra* note 112, at 13.

115. *Id*.

116. *Id*. at 34 (citing Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PYSCH. 1, 13–17 (2007)).

117. *Id*.

118. *Id*.

119. *Id*. at 13–14.

120. *See, e.g.*, Behrens, *supra* note 18; Ted Chiricos et al., *Racial Threat and Opposition to the Re-Enfranchisement of Ex-Felons*, INT'L J. CRIMINOLOGY & SOC., Mar. 2012, at 13.

121. Cindy Brooks Dollar, *Racial Threat Theory: Assessing the Evidence, Requesting Redesign*, J. CRIMINOLOGY, July 2014, at 1.

122. *Id*. at 2.

123. *Id*.

124. Behrens, *supra* note 18.

polls, and thus from political or economic power, Whites in power today may be influenced by perceived threats from minority groups, and may in turn react by disenfranchising those groups.[125] Their 2002 study found that the percentage of non-White prisoners in a region is directly related to restrictive changes in felon disenfranchisement laws.[126] Additionally, for each 1% increase in the percentage of non-White prisoners, a state is 10% more likely to pass its first felon disenfranchisement law.[127] The study also found that states with proportionally fewer African American prisoners but relatively more African American residents have seen the fastest restoration of voting rights to ex-felons.[128]

More recent research on racial threat has shown that the association of African Americans with crime directly relates to attitudes about felon disenfranchisement.[129] One group of scholars found that the more strongly Whites equate African Americans with crime, the more they oppose re-enfranchisement of ex-felons, particularly those convicted of violent crimes, which are most disproportionately associated with Blacks.[130] They also found that political conservatives are more likely to oppose re-enfranchisement of ex-felons, *except* those convicted of illegally trading stocks, a traditionally "White" crime.[131]

C. *Political Threat and Implications of Expanding the Franchise*

Pointing out that felon disenfranchisement provisions have always been beneficial to political conservatives, experts have also shown how political motives may continue to incentivize more restrictive disenfranchisement laws.[132] In their research, Uggens and Manza show how felon disenfranchisement provisions play a key role in suppressing the votes and political power of marginalized groups.[133] Using data on voter turnout and voter intention from 1972-2000, they estimate that felon disenfranchisement has resulted in significant losses for the Democratic party nationwide.[134] In some cases, the voting power of felons and ex-felons would have reversed the outcome of major elections.[135] For instance, the researchers estimate that during the presidential election of 2000, if felons and ex-felons in Florida had been granted the franchise, Al Gore would

125. *See id.* at 574.

126. *Id.* at 583.

127. *Id.* at 586.

128. *Id.* at 594.

129. Chiricos et al., *supra* note 120.

130. *Id.* at 25.

131. *Id.* at 21.

132. *See, e.g.*, Behrens, *supra* note 18, at 572–75.

133. *See* Manza, *supra* note 13, at 794–96.

134. *Id.* at 786–87.

135. *Id.* at 787–93.

have won the state by over 80,000 votes and would have therefore received the number of electoral votes required to win the presidency.[136] Moreover, felons and ex-felons are excluded from political participation in ways that extend beyond the voting booths. For instance, those who are disenfranchised may also be less likely to participate in other civic activities due to increasingly negative perceptions about their relationship with the government and political process.[137]

In light of the political implications of restoring the vote to felons and ex-felons, it is important to consider how the provisions differ depending on the political balance at stake in each state. An overview of felon disenfranchisement provisions nationwide shows that states identified as "swing states" in the 2016 elections were more likely to have a more restrictive disenfranchisement provision when compared to all states.[138] 27% of swing states have the most restrictive felon disenfranchisement provisions,[139] compared to 8% of states overall.[140] In those states, the barriers to re-enfranchisement have been strong. For instance, in 2016, the Governor of Virginia signed an executive order restoring voting rights to ex-felons, yet the Virginia Supreme Court ruled that his order violated the state constitution.[141]

This research and the massive number of Americans affected by felon disenfranchisement in 2016 suggest that the effect of these provisions on our most recent presidential election may be have been considerable. And although today's felon disenfranchisement provisions are facially neutral, these and other studies show how perceived racial threat or threats to the political status quo may play a role in bringing about harsher punishments for convicted felons and opposition to felon re-enfranchisement.[142] In this

136. *Id*. at 792.

137. *See generally* Amy E. Lerman Vesla M. Weaver, *Political Consequences of the Carceral State*, AM. POL. SCI. REV. 817, 817 (Nov. 2010) (discussing the overall impact of contact with the criminal justice system on attitudes about government and civic engagement).

138. *See* Louis Nelson, *Politico's Battleground States Polling Average*, POLITICO, http://www.politico.com/2016-election/swing-states (last visited Feb. 19, 2017) (displaying fall polling results from the eleven states considered to be swing states in the 2016 election: Colorado, Florida, Iowa, Michigan, Nevada, New Hampshire, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin). *See also State Felon Voting Laws*, PRO CON.ORG (Oct. 5, 2016, 10:26 AM), http://felonvoting.procon.org/view.resource.php?resourceID=000286 (giving a description of current felon voting provisions by state).

139. *See* PROCON.ORG, *supra* note 138 (describing the provisions of Iowa, Virginia, and Florida, which automatically disenfranchise first-time offenders permanently, but grant the governor authority to restore voting rights on an individual basis after an ex-felon completes an application for voting restoration).

140. *Id*. (this statistic includes the four states out of fifty (Iowa, Virginia, Florida, and Kentucky) which permanently disenfranchise all ex-felons without an application to the governor).

141. *Voting Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUST. (Jan. 6, 2017), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-virginia.

142. *See, e.g.*, Girvan, *supra* note 112, at 12.

way, these data harken back to the Reconstruction and Jim Crow eras, when "Black" crimes were punished more harshly than "White" crimes and felon disenfranchisement was introduced as a tool to suppress and dilute the votes of African Americans and the poor.[143]

D. *Symbolic Racism*

Beliefs about the cultural inferiority of Blacks may also influence efforts to reform institutional racism and the way politicians interact with their constituents.[144] While implicit biases and perceived racial or political threat are rampant in the U.S., explicit expressions of racism also continue to influence public policy.[145] Some scholars describe explicit modern racism as "symbolic" rather than overt.[146] This type of racism is based on notions of cultural inferiority and the belief that some racial groups are more likely to reject what they perceive as traditional American values, such as work ethic and self-reliance.[147] As recently as 2008, a representative majority of White Americans surveyed agreed with statements that reflect a symbolically racist ideology, including the idea that "if Blacks would only try harder, they would be as well off as Whites."[148] At the same time, a majority of White Americans stated that they preferred a neighborhood where Whites were the clear majority.[149]

In her work on politics and racism, Tali Mendelberg shows how many politicians and lawmakers use the racial fears and stereotypes harbored by White voters to their advantage.[150] According to Mendelberg, because of social norms of racial equality, politicians are driven to appear racially neutral while at the same time appealing to racially resentful White voters.[151] A powerful example of this type of appeal is the image of Willie Horton, an African American man convicted of raping a White woman, used by George Bush in the 1988 presidential campaign.[152] On the surface, the ads incorporating Horton's criminal history seemed to be about being "tough on crime" rather than about race. However, the ads also very clearly appealed to racial stereotypes representing Black men as dangerous criminals.[153]

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143. *See* Holloway, *supra* note 19.

144. *See* Behrens, *supra* note 18, at 569.

145. *See* Girvan, *supra* note 112, at 29–31.

146. *See, e.g.*, Girvan, *supra* note 112, at 30.

147. *Id.*, *see also* Behrens, *supra* note 18, at 569.

148. Girvan, *supra* note 112, at 31.

149. *Id.* at 30.

150. *See* TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY (2001).

151. *Id.* at 4.

152. *Id.* at 1–4.

153. *Id.*

The Willie Horton story is part of a political rhetoric focusing on crime and punishment that prevailed in the 1980s and 1990s.[154] The "War on Drugs," which resulted in the almost constant portrayal of Black men as drug dealers and "super-predators" in the media, may characterize that era more than anything else.[155] The "tough on crime" movement has led to a 500% increase in incarceration rates in the U.S., with disproportionate rates of arrest, conviction, and strict sentencing for people of color.[156]

As the elections of 2016 and the first weeks of the Trump presidency demonstrate, this type of rhetoric is far from behind us. Donald Trump's promises to build a wall to keep out "illegals," his pledge to patrol Muslim neighborhoods during the election and his subsequent banning of Muslims from entering the country, and his description of Chicago as an "inner-city hell," among many other comments, reek of racist undertones. These messages have appealed to a largely White and working class who many argue feel threatened by the changing demographics of the United States. And while the full impact of the Trump Administration on racialized policies in the U.S. remains to be seen, the political events of 2016 and early 2017 have demonstrated that racial resentment remains strong in America.

This type of racialized rhetoric can also be found in politicians' defenses of felon disenfranchisement laws.[157] When asked in 2001 about the disproportionate effect his state's laws had on African Americans, South Carolina Senator Thad Altman responded, "If it's Blacks losing the right to vote, then they have to quit committing crimes."[158] And when defending the disenfranchisement of ex-felons, Senator Jeff Sessions argued in part that felon disenfranchisement is a reflection of states' moral standards and is in the public interest, stating "each State has different standards based on their moral evaluation, their legal evaluation, their public interest."[159] Although some of these statements are race-neutral, they are all reminiscent of an era when White politicians explicitly defended felon disenfranchisement on the basis of the "peculiarities of habit, of temperament, and of character" they believed to be innate in African Americans.[160]

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154. Netflix, *13th Official Trailer*, YOUTUBE (Sept. 26, 2016) at 0:55-1:30, https://www.youtube.com/watch?v=V66F3WU2CKk.

155. *See id.* (showing media clips of politicians of the 1980s and 90s discussing tough-on-crime policies, as well as footage of Black men being arrested and criminalized).

156. *See Criminal Justice Facts*, SENTENCING PROJECT, http://www.sentencingproject.org/criminal-justice-facts/ (last visited Jan. 14, 2017). *See also* Chung, *supra* note 4, at 3.

157. *See* Behrens, *supra* note 18, at 572–73.

158. *Id.* at 572.

159. *Id.* at 573.

160. *Id.* at 569.

V. OPPORTUNITIES IN LITIGATION AND LEGISLATION

Although a modern understanding of racism shows an association between racism and felon disenfranchisement laws, the courts have recognized a racially discriminatory motivation only once, frustrating efforts to rectify the racially disparate impact of the laws.[161] This section provides ideas about how approach barriers to expanding the franchise. Part A analyzes recent voting rights litigation to provide ideas about how to apply knowledge of the association between modern racism and felon disenfranchisement laws to a constitutional test in the courts. Drawing on the implications of recent increases in civic engagement and changing public opinion on criminal justice reform, Part B suggests that these conditions provide a critical opportunity to draw attention to the problematic principles behind felon disenfranchisement, which in turn can lead to legislative change.

A. *Opportunities in Litigation*

The Court's evaluation of Alabama's provision in *Hunter* provides the basis from which to understand what a test to determine discriminatory motive would look like today.[162] There, the Court determined that the proper approach to determining whether a facially neutral law which produces disproportionate effects along racial lines was outlined in *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[163] In 2016, the Fourth Circuit applied the same test in *NAACP v. McCrory*, where it held that North Carolina's 2013 voter ID statute violated the Fourteenth Amendment.[164]

The *Arlington Heights* test directs courts to "undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[165] The test specifies that discriminatory intent does not need to be the sole or even primary motivation behind the law in question.[166] However, the test also requires that the law is passed *because of*, and not in spite of, racially discriminatory motivations.[167] In other words, the test requires a showing that racially discriminatory intent was a substantial motivating factor behind the passage of the provision in question.

The Court in *Arlington Heights* laid out a non-exhaustive list of factors that can be considered to determine whether a law was motivated by

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

162. *Id*. at 227–28.

163. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–67 (1977).

164. *See* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 238 (2016).

165. *Arlington Heights*, 429 U.S. at 266.

166. *Id*. at 265–66.

167. *NAACP*, 831 F.3d at 220.

racial discrimination[168]: 1) The historical background surrounding the challenged decision; 2) The sequence of events leading up to the decision; 3) Departures from normal procedural sequence; 4) Legislative history; and 5) Disproportionate impact of the decision on one race.[169] Because discrimination today often takes on subtle forms, the court in *NAACP* emphasized that a holistic approach to examining these factors is important.[170] Once discriminatory intent has been shown, the burden shifts to the defense to show that the law would have been passed without any racially discriminatory motivation.[171]

While *Hunter* shows how the Court may approach a successful challenge to a felon disenfranchisement provision, *NAACP* reveals what courts may consider relevant to the *Arlington Heights* factors in the present day and in the context of evolving notions of racism.[172] For that reason, a careful look at the courts' approaches in both of those cases is useful in determining what an effective discrimination challenge to a felon disenfranchisement provision might look like today.

1. Historical Background

In *Hunter*, the historical background of Alabama's felon disenfranchisement provision undisputedly pointed at racial animus as the primary purpose its enactment.[173] Unlike most other felon disenfranchisement provisions of the 1980s, Alabama's provision had not been amended since the height of the Jim Crow era.[174] Even proponents of the provision conceded that the disenfranchisement of Blacks motivated its passage.[175] Thus, it was clear to the Court that the provision was indeed "part of a movement that swept the post-Reconstruction South to disenfranchise Blacks."[176]

In 2016, the Fourth Circuit in *NAACP v. McCrory* undertook a more comprehensive investigation into the historical background surrounding the enactment of the North Carolina voter ID statute.[177] There, the court deemed it appropriate to look not only at North Carolina's legacy of discrimination in the voting context, but also of discrimination

168. *Id.* at 220.

169. *Id.* at 220–21 (citing *Arlington Heights*, 429 U.S. at 266–67).

170. *Id.*

171. *See id.* at 221.

172. *Id.*

173. *See Hunter,* 471 U.S. at 233.

174. *See id.* at 223 (stating that Alabama's felon disenfranchisement provision was enacted in 1901).

175. *Id.* at 230.

176. *Id.* at 229.

177. See N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 223–27 (2016).

against African Americans in general.[178] The court noted that, beginning with the "reign of Jim Crow" in the state, attempts to dilute the Black vote had been consistent.[179] It also found significant the various instances since the 1980s in which the state had attempted—albeit unsuccessfully—to enact laws that would likely dilute the Black vote. This showed that any legislative actions, whether successful or not, to influence the vote based on race are historically significant.[180] Next, the court remarked that a "pattern of laws producing discriminatory results provides important context for determining whether the same decision-making body has also enacted a law with discriminatory purpose,"[181] indicating that racially discriminatory results in a state's body of law as a whole may be relevant. Finally, the court noted that the fact that the historical link between race and party in North Carolina was a relevant factor when considering whether the law in question was motivated by racial discrimination.[182] Because African Americans, who were voting in record high numbers at the time the voter ID law was passed, had historically voted almost exclusively for the Democratic Party, there may have been a stronger incentive for Republicans to try to dilute the Black vote.[183]

As *Hunter* and *NAACP* reveal, various aspects of the history behind a facially neutral voting law matter when determining whether it was enacted with discriminatory intent.[184] When applied to felon disenfranchisement provisions, the courts' historical analyses in these cases show that a state's history of racially discriminatory policies *overall* is relevant, both in and outside of the voting context.[185] Therefore, any attack on a current felon disenfranchisement law would likely require a comprehensive overview of the state's discriminatory legislation, including any legislation that appears facially neutral but disproportionately affects non-Whites,[186] such as legislation that has led to the rise in incarceration of people of color.[187] As *Hunter* shows, to the greatest extent possible, this should also include a showing that felon disenfranchisement provisions have been used historically in the state to prevent African Americans and other oppressed groups

178. *Id.*

179. *Id.* at 223–25 (noting the disenfranchisement of the state's African Americans during the Jim Crow Era and then discussing various instances since the 1980s wherein the North Carolina legislature "attempted to suppress and dilute the voting rights of African Americans.").

180. *See id.* at 224–25.

181. *Id.* at 223–24.

182. *Id.* at 225.

183. *Id.* at 225–26.

184. *See id.* at 223–27.

185. *Id.* at 223–24.

186. *See id.*

187. *See Incarceration*, SENTENCING PROJECT, http://www.sentencingproject.org/issues/incarceration (last visited Jan. 14,2017) (containing resources on trends in U.S. incarceration, including information on legislation and racial disparities).

from voting.[188] And as *NAACP* demonstrates, courts might also consider attempts to dilute the non-White vote in the decades surrounding the passage of the state's current felon disenfranchisement provision.[189]

Next, although the *NAACP* court did not use the term "racial threat," its analysis suggests that some notion of racial threat theory may be relevant in uncovering racially discriminatory intent behind a voting provision.[190] By emphasizing the importance of the historical link between race and party, the court indicates that the threat of waning political power posed by an increased number of non-White voters to a particular party is a relevant consideration under *Arlington Heights*.[191] It follows that a successful attack on a felon disenfranchisement provision, particularly one that is *more* restrictive than its predecessor, may involve a claim that the provision was enacted at least partially in response to perceived political threat from an increasing number of minority voters. Other indications of perceived racial threat, such as the restrictiveness of the state's law as related to its proportion of non-White inmates, may also be relevant.[192]

2. Sequence of Events and Departures from Normal Procedure

In addition to the general history surrounding a facially neutral law, the specific sequence of events leading up to its passage is relevant in determining whether it was enacted with racially discriminatory intent.[193] In *NAACP*, the court emphasized that any "departures from the normal procedural sequence" should be particularly closely scrutinized.[194] There, the state legislature's actions leading up to the passage of SL 2013-381 were a clear departure from the norm.[195] The law had been proposed immediately following the Supreme Court's holding in *Shelby County v. Holder* that states which had historically used voting legislation in a discriminatory way no longer needed to seek federal approval under § 5 of the VRA before passing new voting-related legislation, because the coverage formula prescribed by § 4(b) of the VRA, which determined which states were

188. *See* Hunter v. Underwood, 471 U.S. 222, 226 (1985) (discussing the Alabama delegates' decision to amend their state's felon disenfranchisement provision to target African Americans and the persisting effect of that law).

189. *See* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 223 (2016).

190. *See id.* at 225–26 (acknowledging the fact that the recent success Democratic candidates in North Carolina was related to unprecedented African American voter participation, and suggesting that this may have motivated Republican efforts to dilute the Black vote).

191. *Id.*

192. See Behrens, *supra* note 18, at 596–99 for a discussion of findings showing that racial compositions of prison inmates by state relate to the restrictiveness of states' felon disenfranchisement provisions.

193. *See NAACP*, 831 F.3d at 227–29 (applying one facet of the test laid out Arlington Heights v. Metro. Hous. Dev. Corp., 249 U.S. 252, 267 (1977)).

194. *Id.* at 227.

195. *Id.* at 227–29.

subject to preclearance under 5, was unconstitutional.[196] For the North Carolina legislature, this meant that they had the ability to determine what their voter ID laws would look like without federal approval for the first time since 1965.[197] Within days of the *Shelby County* decision, the state's Republicans proposed its most restrictive voter ID law since the enactment of the VRA and rushed it through the legislature.[198] The restrictions were extensive and had a hugely disproportionate impact on African Americans.[199] The court held that the timing and sequence of events, although not dispositive by itself, was highly suggestive of the legislature's discriminatory purpose.[200]

Given the long history of felon disenfranchisement laws in the U.S., it is unlikely that the sequence of events leading up to the passage of any specific provision or amendment would appear as obviously unusual as the voter ID provision did in *NAACP*.[201] Other barriers stem from the fact that, while many of the country's earlier felon disenfranchisement provisions were enacted in response to the Reconstruction Amendments, most of those provisions have been amended[202]; thus, the sequence of events that must be examined is the sequence of events leading up to the passage of the amendment rather than the original provision.[203]

Even so, an examination of the sequence of events leading up to a state's current felon disenfranchisement law may be telling, particularly if the newest version of the law is more restrictive than its predecessor.[204] Relevant events may include a change in party control in the state, a recent liberalization of voting laws, or some other factor suggestive of an incentive to dilute the non-White vote.[205] Additionally, a court should consider whether the provision could be viewed as responsive to a larger movement to criminalize and marginalize African Americans in the state at the time of its passage.[206]

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196. *See* Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013).

197. *See NAACP*, 831 F.3d at 229 (discussing the significance of the abolishment of the pre-clearance requirement).

198. *Id.* at 227–28.

199. *Id.* at 227 (discussing the expansion of the bill post-*Shelby County*).

200. *Id.* at 229.

201. *See id.* at 227–29 (discussing the highly unusual nature of the events leading up to the passage of SL 2013-381).

202. *See* discussion in Part III, *infra*. *See* also Behrens, *supra* note 18, at 565.

203. *See* Cotton v. Fordice, 157 F.3d 388, 391 (1998).

204. *See* CHUNG, *supra* note 4, at 4 (listing each state's most recent changes in felon disenfranchisement provisions and describing the nature of those changes).

205. *See* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 227–29 (2016).

206. *See* Mendelberg, *supra* note 150, for a discussion of the criminalization of African Americans via politics.

3. Legislative History

Hunter and *NAACP* reaffirmed the Court's assertion in *Arlington Heights* that while legislative history can be difficult to maintain and may not always be an accurate indicator of legislative intent, it nonetheless can be an important consideration in determining whether racial discrimination motivated the passage of a facially neutral law.[207]

In *Hunter,* the legislative history behind Alabama's felon disenfranchisement provision was unusually straightforward.[208] In fact, the president of the convention where the provision was enacted stated that the purpose of the convention was "to establish White supremacy in [the] state."[209] Unsurprisingly, over one hundred years later, the North Carolina legislature in question in *NAACP* did not so clearly state a discriminatory purpose during the legislation process.[210] The court in that case also noted that statements made after the passage of the legislation in question are "of limited value."[211] However, the court did find it significant that the North Carolina General Assembly requested and used race data in connection with the drafting of the law, which supported the contention that race was a consideration of the legislature.[212]

Additionally, while the court asserted that statements by only a few legislators had limited significance, it also discussed certain statements made my lawmakers at multiple points in the opinion.[213] For instance, the court found it notable that a stated purpose of the bill was "to move the law back to the way it was."[214] The court also noted that after the *Shelby County* decision, one of the bill's drafters remarked that it was time to "move ahead with the full bill."[215] Finally, the court mentioned that multiple Democrats characterized the bill as "voter suppression of minorities" or as "partisan."[216]

While fairly explicit, these statements are characteristic of the type of "symbolic" or "modern" racism described by scholars like Girvin, Meldelberg, and Behrens.[217] The court's consideration of these statements implies that an attack on felon disenfranchisement provisions should include an examination of any statements that subtly connect the current law

207. *See* Hunter v. Underwood, 371 U.S. 222, 229 (1985); *NAACP*, 831 F.3d at 229–230.

208. *Hunter*, 371 U.S. at 228–29.

209. *Id*. at 229.

210. *See NAACP,* 831 F.3d at 229.

211. *Id*.

212. *Id*. at 230.

213. *See id*. at 226–28.

214. *Id*. at 226.

215. *Id*. at 216.

216. *Id*. at 228.

217. Behrens, *supra* note 18, at 569; Girvan, *supra* note 112, at 12; Mendelberg, *supra* note 150, at 1–12.

with past social conditions that allowed for greater disenfranchisement of non-Whites.[218] It might also include statements, like those made by Senators Altman and Sessions,[219] that suggest an appeal to the fears of White voters of African American criminality.[220] In turn, this may require a showing that a "tough on crime" stance is connected to race and has a racial effect.[221] Finally, the Fourth Circuit's attention to the General Assembly's use of race data in connection with SL 2013-381 shows that any use of data related to race and crime during the legislative process would be important in determining whether a felon disenfranchisement provision was motivated by racial considerations.[222]

4. Disparate Impact

The final factor considered in the *Arlington Heights* test is whether the provision in question has disproportionately burdened members of one race over another.[223] In *Hunter*, the Court noted that Alabama's felon disenfranchisement provision had always had and continued to have a significantly disproportionate impact on African Americans in the state.[224] Similarly, in *NAACP*, the Fourth Circuit found "abundant support" for the claim that SL 2013-21 disproportionately burdened Blacks, and found this fact to be of great import.[225]

Like the plaintiffs in *Hunter* and *NAACP*, those attacking virtually any felon disenfranchisement provision today would have ample evidence to support the assertion that the provision disproportionately affects non-Whites, particularly African Americans.[226] The overall effect of the laws is that Blacks in the U.S. remain thirteen times as likely as Whites to be disenfranchised.[227] Also relevant is the fact that African Americans are more likely to be arrested, charged, and convicted of felonies than Whites,[228] which makes them more likely to be affected by felon disenfranchisement laws. And in states like Iowa and Florida, where ex-felons can only be re-enfranchised by writing a personal appeal to the governor,

218. *See* Behrens, *supra* note 18, at 668–73 (discussing the link between statements indicative of modern racism today and the explicitly racist rhetoric of the past).

219. *Id*. at 572–73.

220. *See* Mendelberg, *supra* note 150, at 1–12.

221. *See id*.

222. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 230 (2016).

223. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

224. *Hunter*, 371 U.S. at 227 (1985).

225. *NAACP*, 831 F.3d at 231.

226. *See, e.g.*, CHUNG, *supra* note 4, at 2.

227. *Id*.

228. *See generally* NAZGOL GHANDNOOSH, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM (May 2015), http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system. *See also* Girvan, *supra* note 113, at 1–2, 7.

these appeals are less likely to be granted for African Americans than Whites.[229] In some cases, especially where race is closely tied to political party association, the large-scale effect of felon disenfranchisement may be that Black voters and those with liberal views are prevented from electing the candidate of their choice.[230]

B. *Political and Legislative Opportunity*

While it is important to learn from recent legal precedent, the current political climate and changing public opinion may also provide an opportunity for expansive legislative reform. A growing body of evidence reveals that most Americans support criminal justice reform measures, including shifting investments from incarceration to more effective rehabilitation and re-entry measures.[231] This research suggests that public opinion on effective re-entry aligns with increased efforts to expand the franchise to felons and ex-felons, which has resulted in the liberalization of felon disenfranchisement laws in over 30 states since the 1990s.[232]

Nonetheless, as the Trump Administration's keen attention to "law and order"[233] shows, opportunities for politicians to effectively capitalize on racialized fears and resentment persist. Indeed, although recent years have seen bipartisan support for criminal justice reform at the federal level, Attorney General Jeff Sessions has a long history of opposing reforms. He has been vocal about his support of felon disenfranchisement.[234] The implications of his leadership for reform proponents should therefore be taken seriously.

Still, the juxtaposition of changing public opinion on felon reintegration and the backward-looking views of the current administration may provide the right political momentum from which to call attention to felon disenfranchisement. Those who support common sense reforms need only look at data about the benefits of voting, including reduced

229. Brief for League of Women Voters as Amicus Curiae Supporting Petitioner at 19, Griffin v. Pate, 884 N.W.2d 182 (Iowa 2016) (No. 15-1661).

230. *See generally* Manza, *supra* note 1.

231. *See, e.g.*, *ACLU Nationwide Poll on Criminal Justice Reform*, AM. C.L. UNION (last visited May 23, 2017), https://www.aclu.org/other/aclu-nationwide-poll-criminal-justice-reform; JILL MIZELL & LOREN SIEGEL, THE OPPORTUNITY AGENDA, AN OVERVIEW OF PUBLIC OPINION AND DISCOURSE ON CRIMINAL JUSTICE ISSUES (Julie Fisher-Rowe & Juhu Thukral eds., 2014); MELLMAN GROUP & PUBLIC OPINION STRATEGIES, NATIONAL KEY SURVEY FINDINGS – FEDERAL SENTENCING & PRISONS (Feb. 10, 2016), http://www.pewtrusts.org/~/media/assets/2016/02/national_survey_key_findings_federal_sentencing_prisons.pdf.

232. *See Felon Voting Rights*, NAT'L CONF. STATE LEGISLATURES (Sept. 29, 2016), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx; Myrna Perez et al., *The Sustained Momentum and Growing Bipartisan Consensus for Voting Rights Restoration*, BRENNAN CTR. FOR JUST. (July 6. 2015), https://www.brennancenter.org/analysis/sustained-momentum-and-growing-bipartisan-consensus-voting-rights-restoration.

233. *See* discussion *supra* Part IV.

234. *See* 107th Cong. 2d Session s802-s803.

recidivism rates, to understand that communities benefit from expanding the franchise to felons and ex-felons.[235]

Moreover, recent increases in civic engagement among those who are dissatisfied with the current state of American democracy, reflected by a growing number of town halls and record-breaking protests in 2017,[236] provide an opportunity to call attention to those who are unable to fully exercise the rights of citizenship, especially the disenfranchised.

CONCLUSION

The United States has a long and complicated history with felon disenfranchisement provisions. First used as a tool for disenfranchising poor and Black voters during Reconstruction, the laws continue to disproportionately affect people of color, and to date have kept millions of Americans out of the polls. They have proven to be a major barrier to democracy, at times altering the course of major U.S. elections. Research suggests that rather than reducing crime, this barrier to civic engagement only has negative repercussions for individuals and communities. Although many felon disenfranchisement provisions remain connected to racist objectives, the facially neutral language of the provisions has made proving an Equal Protection or Voting Rights Act violation particularly difficult. Still, recent litigation shows that with the right set of knowledge and analyses, successfully challenging the constitutionality of these provisions in court may remain a possibility. Moreover, changing attitudes about the importance of civic engagement, criminal justice reforms, and the reintegration of incarcerated people into society suggest that Americans are more ready than ever for legislative changes to restore the franchise.

235. *See* Manza, *supra* note 1.

236. *See* Sean McMinn, *More Democrats Holding Town Halls this Presidents Day Recess*, ROLL-CALL.COM (Feb. 17, 2017, 12:53 PM), http://www.rollcall.com/news/politics/amid-liberal-protests-more-democrats-holding-town-halls-this-presidentsday-recess (describing an increase in town halls held by both Democratic and Republican members of Congress over the Presidents Day recess in 2017 compared to previous years).