# HOW CONGRESS CAN CRAFT A FELON ENFRANCHISEMENT LAW THAT WILL SURVIVE SUPREME COURT REVIEW

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## INTRODUCTION

The political moment in 2019 is ripe for a law ending felon disenfranchisement. The topic recently received extended media attention when, in a Presidential Democratic primary debate, Senator Bernie Sanders suggested that even those in prison should be allowed to vote.[1] While Senator Sanders did not suggest federal legislation, other Representatives and Senators have begun proposing enfranchisement laws in the last few congressional cycles, notably liberal Congressman Jerrold Nadler, and conservative Senator Rand Paul.[2] Thus, there appears to be support across the political spectrum for reforming felon disenfranchisement laws. Even without congressional action,

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[1] Ayesha Rascoe, *Debate Over Voting Rights For Prisoners Divides 2020 Candidates*, NPR (May 9, 2019, 5:22 AM), npr.org/2019/05/09/720751326/debate-over-voting-rights-for-prisoners-divides-2020-candidates.

[2] *See* Democracy Restoration Act of 2018, H.R. 6612, 115th Cong. § 2 (2018) (describing, among other things, trends in and harms of felon disenfranchisement in the United States); Civil Rights Voting Restoration Act of 2015, S. 457, 114th Cong. § 3 (2015) (asserting that, subject to certain limitations, right to vote in Federal elections "shall not be denied or abridged" based on prior non-violent criminal conviction). Similar proposals were almost added to the original Voting Rights Act, as well. *See* Hayden v. Pataki, 449 F.3d 305, 319 (2d Cir. 2006) (describing failed attempts to amend Voting Rights Act to prohibit states from disenfranchising ex-felons).

many states have taken the path of re-enfranchisement, most recently Florida, whose voters voted in November 2018 to re-enfranchise more than one million people disenfranchised in spite of finishing prison sentences.[3] Still, some five million people remain disenfranchised by state laws—two million of them in spite of completing sentences of incarceration.[4] This has staggering impacts on racial minorities in places such as Florida, Kentucky, Virginia, and Tennessee, each of which disenfranchise twenty percent of voting age Black Americans.[5] Even where laws change for the better, in the absence of a national policy they may revert.[6] In Florida, for example, legislators began working on bills to restrict the scope of the constitutional amendment immediately after the referendum's passage.[7] The need for a national law remains pressing.

Seldom asked in the course of holding debates and drafting bills is whether Congress has the constitutional power to end the practice of felon disenfranchisement. In developed nation states, policy-makers would likely choose to disenfranchise few, if any, convicted people.[8] Their decision might even be a simple one. In a modern democracy, after all, the right to vote is usually considered a fundamental right, rather than a political privilege, not removable at the whim of the polity.[9] But reforming the law of felon disenfranchisement in the United States would require more than the wisdom of national policy-makers. Because each state retains the constitutional authority to establish voter qualifications for both state and federal elections, it would also

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[3] German Lopez, *Florida votes to restore ex-felon voting rights with Amendment 4*, VOX (Nov. 8. 2018) https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results.

[4] *See id.* (reporting that one million felons in Florida received the right to vote in November 2018); Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, THE SENTENCING PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/ (noting that six million total Americans are disenfranchised as felons).

[5] Uggen, Larson & Shannon, *supra* note 4.

[6] For example, in Kentucky, there was a tug of war over a felon voting policy when outgoing governor Steve Beshear issued an order enfranchising all of those who had completed sentences of incarceration, only to have incoming Governor Matt Bevin overturn the order. *See* Lopez, *supra* note 3.

[7] Makeda Yohannes, Florida Lawmakers Attempt to Weaken Voter Rights Restoration, BRENNAN CENTER FOR JUSTICE, (Mar. 20, 2019), https://www.brennancenter.org/blog/florida-lawmakers-attempt-weaken-voter-rights-restoration.

[8] *See* Laleh Ispahani, *Out of Step with the World: An Analysis of Felony Disfranchisement in the U.S. and other Democracies*, ACLU (May 2006), https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep_20060525.pdf (demonstrating that felon disenfranchisement is narrowly circumscribed in most European nations, even for those currently serving sentences).

[9] *See* KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 37–78 (2d ed. 2013).

require a source of constitutional authority sufficient to overcome the prerogative of the states in this area.[10]

If Congress attempts to end felon disenfranchisement, litigation over the law might become the next battleground for the Supreme Court's federalist doctrine, contested in recent years in such cases as Shelby County v. Holder.[11] In the past, Congress has changed voting laws through its power to enforce the Fourteenth Amendment's Equal Protection Clause and its power to ensure a suffrage free of race discrimination under the Fifteenth Amendment.[12] While Congress's path may have been straightforward, had it passed a felon enfranchisement law when the Supreme Court afforded near-total deference to the enforcement powers in 1965 or 1970,[13] the path is winding and pitted after three decades of federalist testing and paring back of those powers.[14]

No solution to the federalism challenge offers clear promise. Traditionally, Congress might have sought to premise a felon enfranchisement law on remedying the effects of racist state policies under the Fifteenth Amendment, as it did with the Voting Rights Act (VRA). After Shelby County v. Holder, which struck down the VRA's preclearance procedures as exceeding Congress's authority, it is doubtful that such a law would pass muster with the Supreme Court.[15] Meanwhile, Congress's Equal Protection enforcement powers may not be used to overturn Supreme Court holdings, under the standard set in City of Boerne v. Flores.[16] Yet any use of its enforcement power would challenge, if not overturn, the holding of Richardson v. Ramirez, in which the Court found that states may permanently remove the franchise from convicted people,[17] unlike all other U.S. citizens.[18]

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[10] *See* U.S. CONST. art. I, § 2, cl. 1 (providing that congressional electors the shall have qualifications requisite for electors of the "most numerous branch" of the state legislature); U.S. CONST. amend. XVII (introducing the same electoral participation rule as U.S. CONST. art. I, § 2, cl. 1, but for election of senators).

[11] *See* Shelby Cty. v. Holder, 570 U.S. 529, 542–45 (2013).

[12] *E.g.*, Voting Rights Act Amendments, Pub. L. No. 94-73 § 203, 89 Stat. 400, 401-402 (1975) (current version at 52 U.S.C. § 10303 (2014) (banning literacy tests).

[13] *See* discussion *infra* Section I.B.

[14] *See* discussions *infra* Part II, and Sections III.A.1 and III.B.1.

[15] *See Shelby Cty.*, 570 U.S. at 557 (holding that coverage formula under §4(b) of the Voting Rights Act can no longer be used to subject jurisdictions to the preclearance requirements of §5).

[16] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("When the political branches of the Government act against the background of a *judicial* interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due to them . . . and contrary expectations will be disappointed.").

[17] *See infra* notes 99–117 and accompanying text.

[18] *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (asserting that citizens have constitutionally protected right to vote and policies abrogating that right must survive strict scrutiny).

Nevertheless, with some cleverness and close attention to the Court's precedents, Congress may overcome these obstacles to its enforcement powers. This article posits that the overbreadth, severity, and lack of legitimate government interest makes permanent disenfranchisement, still practiced in several states, an instance of unconstitutional animus against the class of convicted people. Permanent disenfranchisement is therefore an appropriate target for Congress's Equal Protection enforcement powers. Congress should be able to mandate universal re-enfranchisement at the end of a felon's prison and parole term. As for the Fifteenth Amendment, it is doubtful that the Court would accept findings that all felon disenfranchisement is racist. Congress should focus instead on barring disenfranchisement for crimes with proven racial disparities in enforcement, such as drug possession or burglary. Once focused on these targets, Congress could either ban disenfranchisement for certain crimes outright, or create a cause of action, akin to section two of the Voting Rights Act, that would permit plaintiffs to prevail by showing proof of racial impacts (rather than the racist intent of state actors).[19]

Part I of this article will outline the right to vote in general, beginning at the historical level, and then zooming in on the Court's permissive interpretation of Congress's enforcement powers during the 1960's and 70's, an interpretation which permitted Congress to use the Equal Protection Clause to define voter qualifications. This section also establishes two premises used throughout the article: (1) Congress does not have a power under Article I of the Constitution (at least as currently understood) to set the qualifications of voters; and (2) the Equal Protection enforcement power may not do much work for Congress in the context of voting rights in light of the holding of Richardson.[20]

With the range of solutions narrowed to the Fourteenth and Fifteenth Amendment Powers, Part II analyzes how the modern Court is likely to view congressional use of these powers to overturn state-level felon disenfranchisement laws. This section fits the hypothetical law into the current Court's federalism jurisprudence, and shows that any attempt to regulate voter qualifications will come up against legal and ideological obstacles. In particular, the Court will likely place a high burden on Congress to justify overriding the states' sovereignty over voter qualifications.[21]

Those obstacles understood, Part III analyzes what might be done in spite of them. To begin, it draws a distinction that is otherwise artificial, by bifurcating the Fourteenth and Fifteenth Amendment rights to vote. The section goes on to frame the normative arguments in favor of this bifurcation. First, the Court still uses distinct tests when analyzing the amendments' separate enforcement powers. Second, there is a strong case to be made that the Fifteenth Amendment's enforcement power has a broader scope than the Fourteenth Amendment's. Under the Fourteenth Amendment, Congress may end the

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[19] 52 U.S.C. § 10301(a) (2014).

[20] *See* Richardson v. Ramirez, 418 U.S. 24 (1974).

[21] *See* discussion *infra* Section III.A.

practice of permanent felon disenfranchisement by enforcing part of the "core promise" of the Equal Protection Clause: that the government must always act for a legitimate purpose, and may not legislate out of mere animus against a particular group.[22] Under the Fifteenth Amendment, Congress may have two options for ending or curbing felon disenfranchisement: (1) creating a cause of action, akin to the cause of action under section two of the Voting Rights Act, that would permit plaintiffs to prove unconstitutional discrimination in felon disenfranchisement laws by showing a disparate racial impact, rather than the usually-required proof of intent to violate the Constitution on the part of state actors;[23] and (2) restricting disenfranchisement for certain categories of crimes, similar to the way Congress ended literacy testing under the Voting Rights Act.[24]

Finally, Part IV brings the two amendments together. Not only do their enforcement powers overlap, but it is probable that society's ideas about race and crime (previously addressed in this article under the rubric of the Fifteenth Amendment) also threaten the "core promise" of the Equal Protection Clause. That is because the paucity of legitimate government motives for permanently disenfranchisement is probably explained, in part by ingrained prejudices that Black Americans and other racial groups as more likely to commit crime.[25] In other words, even where there is no clear nexus between race and felon disenfranchisement, prevailing stereotypes about race and criminality result in unconstitutional animus against convicted people of all races. The section then describes two additional doctrinal obstacles to crafting a solution to felon disenfranchisement: (1) the novelty of some of the Equal Protection theory suggested below; (2) ambiguity surrounding how the Court will weigh state sovereignty interests.[26] When these obstacles are summed, it appears that the Supreme Court would likely give Congress little latitude to craft such a law.

When Richard L. Hasen studied this exact topic in 2006, he concluded that, given the Court's federalist turn, a "nationwide felon disenfranchisement law would be on shaky constitutional grounds."[27] This article asks whether there may be spots of firm ground amidst the doctrine, and ways for Congress to regulate short of purporting to overturn Richardson.

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[22] *See* WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 142–47 (2015).

[23] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (1965) (codified as amended in scattered sections of 52 U.S.C.).

[24] *See* Voting Rights Act Amendments, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401-402 (1975) (current version at 52 U.S.C. § 10303 (2014)).

[25] *See* discussion *infra* Section V.A.

[26] *See* discussion *infra* Section V.B.

[27] Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws*, 49 HOW. L.J. 767, 783 (2006).

## I. THE RIGHT TO VOTE AND CONGRESS'S POWER TO SET THE QUALIFICATIONS OF VOTERS

This section will trace the right to vote from its constitutional origins, through the "second reconstruction" of the 1950's, 60's, and 70's. During this latter period, Congress and the Courts became equal partners in expanding the suffrage, with the Court continually upholding a broad vision of Congress's powers to define voter qualifications.[28] However, it is clear under current case law that one leg of this asserted power, Article I of the Constitution, is no longer valid.[29] The other leg of this power, the Equal Protection Clause, does not give Congress any power to enfranchise felons because of the Supreme Court's holding in Richardson v. Ramirez, which held that convicted people do not enjoy the Equal Protection right to vote.[30] Therefore, any solution to the problem of felon disenfranchisement under the enforcement powers of the Fourteenth or Fifteenth Amendment will have to skirt the holding of Richardson.

### A. *The Emergence of a Constitutional Right to Vote*

The Constitution as originally framed did not establish an individual right to vote. Indeed, many members of the founding generation were skeptical of a democratic suffrage.[31] To ensure that states could not use their control of voter qualifications to stymie federal elections, the Constitution included a compromise with state sovereignty:[32] all of those to whom a state accorded the privilege of voting for the "most numerous" branch of the state's legislature would also receive the right to vote for Congressional Representatives.[33] Under this rule, no state could avoid enfranchising some class of people for congressional elections. When the Seventeenth Amendment moved the power to elect Senators from the state legislatures to the people in 1913, it did so on the basis of the same compromise.[34] Meanwhile, the years leading up to the Civil War saw the gradual relaxation of property and taxpaying requirements on the

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[28] *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding an array of congressional regulations governing the right to vote).

[29] *See* discussion *infra* Section II.B.1.

[30] *See* discussion *infra* Section II.B.2.

[31] *Id.*; ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 19 (Basic Books rev. ed. 2009); *see* discussion *infra* Section II.B.2.

[32] KEYSSAR, *supra* note 31, at 18.

[33] U.S. CONST. art. I, § 2, cl. 1. Thus, when it was still common for states to disenfranchise large swathes of the adult population, only voters qualified to vote under state law would have a right to sue under the Constitution for abridgment of their voting rights in federal elections. *See* United States v. Classic, 313 U.S. 299, 314 (1941) ("The right of the people to choose . . . *where in other respects it is defined, and the mode of its exercise is prescribed by state action* in conformity with the Constitution is a right established and guaranteed by the Constitution . . . ") (emphasis added).

[34] U.S. CONST. amend. XVII.

state level, until the suffrage in most states approximated free, white male suffrage.[35] This trend towards inclusion, however, slowed, and often even reversed itself (with the exception of women's suffrage), from the end of the Civil War until the end of the Second World War.[36]

Most Americans now do enjoy the right to vote, but the right has come in pieces and has never achieved universality. In the wake of the Civil War, the Fourteenth Amendment's framers excluded voting rights, seeking instead a compromise that would guarantee the civil liberties of the freed slaves without putting northern states in the vexing political position of enfranchising their own free black populations or dropping literacy and educational requirements for voting.[37] Not until the Fifteenth Amendment's bar on racial discrimination in voting did the Constitution set a substantive franchise requirement on state governments, and neither the Fourteenth nor the Fifteenth Amendment was seen at the time of its passage as limiting literacy, educational or other requirements to vote.[38] In the twentieth century came amendments securing women's suffrage,[39] a prohibition on the poll tax for electors in federal elections,[40] and a lowering of the voting age to eighteen.[41]

Without more, however, these amendments could have left a multitude of other qualifications, including limitations on pauper suffrage;[42] property qualifications; literacy tests; and harsh residency requirements.[43] During the 1960's, a series of Supreme Court cases and congressional enactments—and Supreme Court decisions upholding those enactments—filled in these gaps, and left a nearly universal suffrage grounded in the Constitution and statutes.[44]

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[35] KEYSSAR, *supra* note 31, at 306–64 (showing state laws liberalizing suffrage throughout the nineteenth century). *See generally*, SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY (2005) (describing relaxation of suffrage rules up until the Civil War as part of a movement away from a rule by elites and towards a popular government).

[36] KEYSSAR, *supra* note 31, at 94–138 (documenting various state policies restricting the suffrage of racial minorities, immigrants, and the poor).

[37] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 251–61 (2d ed. 2014) (describing political climate surrounding the drafting and ratification of the Fourteenth Amendment).

[38] *See* Earl Maltz, *The Coming of the Fifteenth Amendment: The Republican Party and the Right to Vote in the Early Reconstruction Era*, 69 CATH. U. L. REV. (forthcoming Jan. 2019), http://dx.doi.org/10.2139/ssrn.3317813.

[39] U.S. CONST. amend. XIX.

[40] U.S. CONST. amend. XXIV.

[41] U.S. CONST. amend. XXVI.

[42] Laws could have allowed local governments to disenfranchise those receiving public relief money, as opposed to a poll tax, which is a flat tax that must be paid before a person can vote. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, VOL. 1 240 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) ("In the United States, except for slaves, servants, and paupers fed by the township, no one is without a vote.").

[43] KEYSSAR, *supra* note 31, at 217–25.

[44] *Id.*

Literacy tests, though initially upheld by the Supreme Court,[45] were permanently banned by the Voting Rights Act in 1975.[46] Meanwhile, property qualifications, limitations on pauper suffrage, and residency requirements all came under attack in the Supreme Court, which reduced these qualifications to a rump of their former scope, and eliminated wealth qualifications entirely.[47] Finally, in the 1971 case of Dunn v. Blumstein, the Supreme Court held that all adult citizens possess the right to vote under the Equal Protection Clause, and that all qualifications of that right would be subject to strict scrutiny.[48] However, just three years later a more conservative Court would find reason to exclude convicted felons from this holding.

### B. *Two Theories of Congress's Power to Define the Qualifications of Electors Both Fail as Bases for a Federal Law Enfranchising Felons*

#### 1. Article I is not a viable basis for such a law.

At the high ebb of the second Reconstruction in the 1970's, the Court came close to establishing that Congress possesses the power to set the qualifications of voters in federal elections. Some reformers and politicians have cited a case from this era to argue that Congress does have such a power, but it is unlikely that the case has the legal force it is sometimes thought to have.[49]

In 1966, the Supreme Court, in *Katzenbach v. Morgan,* upheld Congress's power claimed in the 1965 Voting Rights Act (VRA)[50] to ban literacy tests for

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[45] Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 50–54 (1959) (upholding North Carolina requirement that voters "be able to read and write any section of the Constitution of North Carolina in the English language").

[46] Voting Rights Act Amendments, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401-402 (1975) (current version at 52 U.S.C. § 10303 (2014)).

[47] KEYSSAR, *supra* note 31, at 218–24.

[48] *See* 405 U.S. 330, 336 (1972). There are niceties to this holding beyond the scope of this article, but worth noting for clarity's sake. For instance, a fundamental right under the Equal Protection Clause of the Fourteenth Amendment arguably should extend "to any person within [the state's] jurisdiction," not just to citizens and those of a certain age. U.S. CONST. amend. XIV, § 1. Perhaps the Court could have conceived of compelling government interests to exclude non-citizens and children from the vote, but the results would be messy. Instead, the Court has simply maintained silence about its reasoning as to the voting rights of those underage or not possessing American citizenship. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969) ("[I]f a challenged state statute grants the right to vote to some bona fide residents of *requisite age and citizenship* and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.") (emphasis added).

[49] Oregon v. Mitchell, 400 U.S. 112 (1970).

[50] Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (1965) (codified as amended in scattered sections of 52 U.S.C.).

people graduating from Spanish-language schools in Puerto Rico,[51] even though the Court had found literacy tests constitutional seven years earlier in *Lassiter v. Northampton*.[52] *Katzenbach* therefore implied, momentously, a congressional power to interpret the Constitution, one independent of Supreme Court doctrine.[53] Nevertheless, the Court found that, because the Act removed disabilities burdening only one segment of the population, it appropriately implemented the antidiscrimination purpose of the Equal Protection Clause.[54] Putting aside for now the inter-branch tension, the 1965 VRA was perfectly within the wheelhouse of the Equal Protection Clause in that it removed a legal disability on a group previously singled out for discriminatory legal burdens.[55]

With the 1970 Voting Rights Act,[56] however, Congress attempted to press past the frontier of its traditional anti-discrimination enforcement powers. In the 1970 Act, Congress attempted to extend the franchise to eighteen-year-olds in all state, local, and national elections.[57] This use of the Fourteenth Amendment enforcement power implied that Congress could act not only to relieve certain groups of unfair burdens on their right to vote, as it had in the 1965 Voting Rights Act upheld in *Katzenbach,* but could affirmatively establish and define the qualifications of voters.[58]

In *Oregon v. Mitchell*, the Court upheld several aspects of the 1970 Amendments, including the expansion of voting rights in federal elections to

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[51] Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (noting that, as applied, § 4(e) of Voting Rights Act was "appropriate legislation to enforce the Equal Protection Clause").

[52] Lassiter v. Northampton Cty. Bd. of Elections, 360 U.S. 45, 53 (asserting that North Carolina literacy test at issue was not "employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot.").

[53] *See* William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 465 (2010) (noting the Court's blessing of Congress's exchanging its own constitutional interpretation for the Court's).

[54] *Katzenbach*, 384 U.S. at 652 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370) (1886)).

[55] *Cf.* City of Boerne v. Flores, 521 U.S. 507, 528 (1997) (finding that the bar on literacy tests targeting the Puerto Rican population could be understood as an enforcement measure to curb invidious discrimination); ARAIZA, *supra* note 22, 23–26 (arguing that the Fourteenth Amendment was seen from the earliest days of its interpretation as barring legislation that, without public purpose, singled out portions of the population for special burdens).

[56] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314.

[57] *Id.* §301.

[58] *See id.* In his signing statement, President Nixon stated that he believed the Supreme Court would find expansion of the suffrage to eighteen-year olds unconstitutional, but he signed because he did not want to veto the entire bill. *See* Harmony Barker, *6.22.1970: RN Signs the Voting Rights Act Amendments of 1970*, RICHARD NIXON FOUNDATION (June 24, 2011), https://www.nixonfoundation.org/2011/06/6-22-1970-rn-signs-the-voting-rights-act-amendments-of-1970/.

eighteen-year-olds.[59] At the same time, it blocked Congress's attempt to expand voting rights to eighteen-year-olds in state and local elections.[60] The Court was divided between Justice Black writing only for himself, and Justices Douglas, Brennan, White and Marshall concurring.[61] These latter Justices would have also upheld Congress's power to enfranchise eighteen-year-olds in state and local elections.[62]

While the Justices in *Mitchell* disagreed on the basis of Congress's power to enfranchise eighteen-year-olds in federal elections, a majority of the Court agreed that Congress possessed near-plenary power to set the qualifications of voters in federal elections. Justice Black would have upheld Congress's power to enfranchise eighteen-year-olds in federal elections based on Article I, Section 4 of the Constitution,[63] which grants Congress the right to regulate the "time, place and manner" of congressional elections (hereinafter, the Election Clause),[64] while the concurring Justices situated Congress's power to enfranchise eighteen-year-olds in the Fourteenth Amendment's Equal Protection Clause.[65] Though Justice Brennan, in his concurrence, denied that the decision would grant Congress the power to set voter qualifications, the rule of deference he announced would do just that in all cases short of a irrational or arbitrary congressional enactment.[66] Justice Douglas' concurrence on this point was more reasoned.[67] He found the enfranchisement of eighteen-year-olds a proper enforcement of the Equal Protection Clause because eighteen-year olds participated in the military without being able to vote, but his opinion would also appear to place no practical restriction on Congress's power to set voter qualifications.[68] The concurrences implied, without expressly stating, a near-plenary congressional power to set voter qualifications at all levels of

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[59] Oregon v. Mitchell, 400 U.S. 112, 117–18 (1970) (Black, J., writing for himself and summarizing the opinions of the Justices). In addition, the Court upheld a nationwide literacy test ban, restrictions on states' ability to enact residency requirements for presidential elections, and regulations for provisioning absentee ballots for presidential elections. *Id.* at 132–34.

[60] *Id.* at 130 (Black, J., writing for himself and giving the holding of the Court).

[61] *Id.* at 118 (Black, J., summarizing the opinions of the Justices).

[62] *Id.* (Black, J., summarizing the opinions of the Justices).

[63] *Id.* at 122–23 (Black, J., writing for himself).

[64] U.S. CONST. art. I, § 4, cl. 1.

[65] Oregon v. Mitchell, 400 U.S. 112, 118 (1970) (Black, J., summarizing the opinions of the Justices). The concurring Justices would have also upheld Congress's power to set voter qualifications in both state and local elections, so long as Congress found the qualification a valid use of the enforcement power. *See id.* at 141–42 (Douglas, J., concurring); *id.* at 240 (Brennan, J., concurring).

[66] *See id.* at 240 (Brennan, J., concurring).

[67] *See id.* at 141–42 (Douglas, J., concurring).

[68] *See id.*

government, reversing the usual order of the Constitution endorsed by Justice Brennan as recently as *Katzenbach*.[69]

Between Justice Black and the concurrences, *Mitchell* had the effect of enfranchising eighteen-year-olds in federal elections only, because Justice Black's vote, giving the majority its fifth vote, had found that Congress's Elections Clause power extended only to federal elections. Due to this effect, *Mitchell* appears to have given rise to the belief that Congress may bifurcate state and federal voting rights, and change the qualifications for voting in federal elections. For instance, a bill to restore voting rights in federal elections to those who have finished their sentences, most recently introduced by Representative Jerold Nadler, is predicated solely on the Elections Clause.[70] One think tank, named after Justice Brennan—who disagreed with Justice Black's view of the Elections Clause,[71]—found that a federal-level felon enfranchisement law could rest on Article I, as well as on the Fourteenth and Fifteenth Amendments.[72] Some lawyers, too, have cited the Elections Clause, in addition to Fourteenth and Fifteenth Amendment powers, for the proposition that Congress may end felon disenfranchisement at the federal level.[73]

Others do not even offer a theory for Congress's power to set the qualification of voters in federal elections, but seem to presume its existence.[74] Rand Paul's 2015 proposal to restore voting rights in federal elections, to nonviolent offenders who completed their sentences, does not even state the basis for Congress's power.[75] The view is common amongst scholars, too, who often write that felon enfranchisement has stalled in Congress only for want of popular, political impetus.[76]

This Elections Clause theory is inaccurate and likely wrong. Justice Black's opinion as to the Elections Clause is an anomaly, and probably of no precedential

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[69] Katzenbach v. Morgan, 384 U.S. 641, 647 (1966).

[70] Democracy Restoration Act, H.R. 6612, 115th Cong. § 2 (2018) ("Article I, section 4, of the Constitution grants Congress ultimate supervisory power over Federal elections, an authority which has repeatedly been upheld by the United States Supreme Court.").

[71] *See* Oregon v. Mitchell, 400 U.S. 112, 240 (1970) (Brennan, J., concurring).

[72] *See* BRENNAN CENTER FOR JUSTICE, LEGAL ANALYSIS OF CONGRESS' CONSTITUTIONAL AUTHORITY TO RESTORE VOTING RIGHTS TO PEOPLE WITH CRIMINAL HISTORIES 1 (2009), https://www.brennancenter.org/sites/default/files/legacy/Democracy/Brennan%20Center%20analysis%20of%20DRA%20federal%20authority%208-10-09.pdf.

[73] *See* Otis H. King & Jonathan A. Weiss, *The Courts' Failure to Re-Enfranchise "Felons" Requires Congressional Remediation*, 27 PACE L. REV. 407, 427–28 (2007).

[74] *See* Civil Rights Voting Restoration Act of 2015, S. 457, 114th Cong. (2015).

[75] *Id.*

[76] *See, e.g.*, PETTUS, *supra* note 9, at 146 ("[The Supreme Court and Congress] both have the right to disaggregate national from local and state elections and restore voting rights to exfelons in their capacity as members of the American electorate."). *But see* Martine J. Price, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL'Y 369, 398 (2002) (acknowledging that *Boerne v. Flores* poses a constitutional barrier to congressional felon enfranchisement).

value given that no other Justice joined the opinion.[77] It misunderstood the history of the Elections Clause, too.[78] Most crucially, it does not express the current view of the Court. In the 2013 case of *Arizona v. Inter Tribal Council of Arizona, Inc.*, (*ITCA*) the Court held that Congress does not have the power to set voter qualifications under the Elections Clause,[79] citing Justice Harlan's dissent in *Oregon v. Mitchell*, in which he had argued for a relatively strict vision of voter qualifications federalism.[80]

In *ITCA*, the state of Arizona challenged a provision of the National Voter Registration Act (NVRA), enacted under the Elections Clauses of Article I.[81] Congress passed the NVRA in order to impose upon the states a uniform registration procedure for federal elections.[82] At issue in *ITCA* was a provision that would have required states "to accept and use" a federal voter registration form for registering voters in federal elections.[83] Arizona law would have required documentary proof of citizenship, which could be satisfied by several documents including a passport or birth certificate, but the agency implementing NVRA instead required Arizona to accept an affidavit affirming citizenship.[84] Justice Scalia, writing for the Court, found that the NVRA was a valid exercise of congressional power under the Elections Clause, and that its affidavit procedure preempted Arizona's proof-of-citizenship law.[85]

However, the state of Arizona argued in the alternative that preemption would lead to an unconstitutional result: it would prevent the state of Arizona from exercising its sovereign right to establish and define the qualifications of its voters by rendering it impossible for Arizona election officials to assess who was and was not a citizen and, therefore, unable to enforce Arizona's definition of a qualified voter.[86] The Court agreed that the federal government does not have power under the time, place, and manner clause to override an otherwise valid state-law voter qualification, such as a bar on non-citizen voting.[87] By extension, the federal government could not create voter registration rules that

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[77] *See* Oregon v. Mitchell, 400 U.S. 112, 134–35 (1970).

[78] *See* Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Noncitizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447, 486–90 (2017) (arguing that Justice Black misunderstood the intent behind the Election Clause because none of its framers understood it to affect voter qualifications).

[79] Arizona v. Inter Tribal Council of Ariz. Inc., 570 U.S. 1, 16–17 (2013).

[80] *Mitchell*, 400 U.S. at 152–229 (Harlan, J., concurring) (documenting the founders' intent to preserve to the states the power to set voter qualifications).

[81] *See Inter Tribal Council of Ariz.*, 570 U.S. at 7–8.

[82] *See id.* at 5–6.

[83] *Id.* at 6–7.

[84] *Id.*

[85] *Id.* at 20.

[86] *See id.* at 15–16. Arizona argued that the Court should, therefore, not read the NVRA in a way that would render it unconstitutional. *Id.*

[87] *See id.* at 16.

would make it impossible for state election officials to discover who was and was not eligible to vote under state law.[88] The NVRA, however, had created a procedure whereby states could challenge the NVRA-imposed requirements.[89] The state, then, had a forum to bring any proof it might have that the NVRA's procedures made it impossible for the state to enforce its definition of a qualified voter.[90] The Court found that this procedure guarded against congressional intrusion into the state's power to establish and define its voter qualifications.[91]

For the purposes of this discussion, the Court in *ITCA* held that the federal government cannot use the Elections Clause to override state laws defining the qualifications of voters. The issue was necessarily decided and is binding law because the majority found, first, that voter registration procedures might impinge upon the state sovereign right to define voter qualifications and, in resolution of that issue, that the affidavit procedure before the Court did not so impinge.[92] Given the holding of *ITCA*, the Elections Clause would not permit Congress to enfranchise felons otherwise disenfranchised under state law.[93]

2. The Equal Protection Clause provides, at best, a limited basis for enfranchising felons.

*ITCA* dealt only with a challenge to Congress's power under the Elections Clause,[94] and may have no bearing on the concurrences in *Mitchell*, which adopted an expansive vision of Congress's power to change voter qualifications

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[88] *See id.* at 17.

[89] *See id.* at 19.

[90] *See id.*

[91] *See id.* This procedure for challenging the NVRA' has been used, though, so far, the affidavit rule at issue in *ITCA* has been upheld. *See* Kobach v. U.S. Election Assistance Comm'n, 6 F. Supp. 3d 1252, 1256–58 (D. Kan.), *rev'd*, 772 F.3d 1183 (10th Cir. 2014); *see also* Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317, 382–83 (2019) (describing the various state challenges to the NVRA's requirements in the years following *ITCA*).

[92] Stephen E. Mortellaro finds that the passage about the power of states to establish the qualifications of its voters is dicta. Mortellaro, *supra* note 78, 496–97. But the respondents in *ITCA* did raise a constitutional issue, which the Court saw fit to rebut. In that sense, the question certainly was before the Court. The Court in *ITCA* went so far as to say that the statute's procedures were sufficient to guard against the constitutional infirmity. Arizona v. Inter Tribal Council v. Ariz. 570 U.S. 1, 20 (2013). Most crucially, the Court has continued to cite *ITCA* for this holding about voter qualifications. *See* discussion *infra* Section II.A.

[93] But Franita Tolson argues that the Elections Clause should be (and has often been) read in conjunction with the Fourteenth and Fifteenth Amendments as justifying a robust congressional power to override state sovereignty in order to protect voting rights, including, in some cases, to make regulations that could interfere with or even abrogate states' power over voter qualifications. Tolson, *supra* note 91, at 321. This argument is more convincing in areas that blur the boundary between pure voter qualifications and proof-of-eligibility requirements. Felon disenfranchisement, by contrast, involves an area of pure qualifications.

[94] *Inter Tribal Council of Ariz.*, 570 U.S. at 17.

under its Fourteenth Amendment enforcement powers.[95] If we credit the concurrences in *Mitchell*, Congress may yet be able to enfranchise felons by finding that felons may not be discriminated against under the Equal Protection Clause, and by passing enforcement legislation to end such discrimination. Assuming *arguendo*, without yet fleshing out the problem, that Supreme Court decisions since the 90's have narrowed Congress's enforcement powers under the Fourteenth and Fifteenth Amendments[96] and that Congress must now tailor its enforcement legislation to Supreme Court holdings,[97] it remains true even under these standards that there is a constitutional right to vote that Congress may enforce.[98]

However, felons remain outside of the protections of the Fourteenth Amendment because of *Richardson v. Ramirez*, in which the Court found that felon disenfranchisement enjoys an "affirmative sanction" under the Fourteenth Amendment.[99] In *Richardson*, the plaintiffs, convicted people who had finished their sentences, came armed with recent Supreme Court cases establishing the Equal Protection right to vote.[100] Instead of performing the usual strict scrutiny test that these cases would demand, Justice Rehnquist searched the historical record for the intent of the Fourteenth Amendment's framers.[101]

The formula that emerges from *Richardson v. Ramirez* likely owes something to the politics of the era. Justice Rehnquist's appointment by President Nixon in 1971 had marked the beginning of the Court's turn towards the rhetoric of originalism.[102] In historical context, "originalism" signaled not only a turn away from the liberal civil rights jurisprudence of the Warren Court, but a repudiation of leftist policies perceived by many Americans as having destabilized the nation.[103] American voters might even have blamed the Warren Court's pro-

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[95] *See supra* notes 56–69 and accompanying text.

[96] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (striking Congress's attempt to restore a prior judicial test for challenges to state laws burdening religious conduct, as contrary to Supreme Court doctrine); *see also* discussion *infra* Section III.A.

[97] Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2060–61 (2018).

[98] *See* discussion *supra* Section I.A.

[99] Richardson v. Ramirez, 418 U.S. 24, 56 (1974); *see also* Lauren Latterell Powell, *Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement*, 22 MICH. J. RACE & L. 383, 390 (2017) ("[T]he [*Richardson v. Ramirez*] 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.").

[100] *See Richardson*, 418 U.S. at 54.

[101] *See id.* at 41–56.

[102] *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 56–57 (2018).

[103] *See id.*

defendant decisions such as *Mapp v. Ohio* and *Miranda v. Arizona* for contributing to the explosive growth in crime the nation was experiencing.[104]

Though replete with originalist analysis, *Richardson* is probably better understood as an endorsement of this law and order politics rather than an endorsement of the ideology of originalism. A pure originalist view of the Fourteenth Amendment right to vote would have resembled Justice Harlan's dissents in the voting rights cases of *Reynolds v. Sims* and *Carrington v. Rash*, where he had made a convincing case that the framers of the Fourteenth Amendment had not intended to protect voting rights under the Equal Protection Clause.[105] Adopting Harlan's view would have entailed an abrupt reversal of precedent in 1974, with the "second Reconstruction" in full swing in Congress and universal suffrage marching across the states behind the banner of Supreme Court doctrine.[106]

Instead, Rehnquist repudiated Harlan's view that the Equal Protection Clause does not protect voting rights.[107] Rather than holding either that there is no Equal Protection right to vote, or that states have a compelling interest in felon disenfranchisement under the strict scrutiny test the Court had devised, Rehnquist read section two of the Fourteenth Amendment as granting an "affirmative sanction" to the disenfranchisement of convicted people, basing this reading on an overview of the legislative history of the Amendment.[108] Section Two stopped states from counting for redistricting purposes anyone disenfranchised under state law, while allowing them to count anyone disenfranchised for "participation in rebellion, or other crime."[109] The majority found that the "other crimes" language incorporated an understanding at the time of passage that states could disenfranchise felons.[110] Rehnquist's analysis of the legislative record, however, adduced quotes tending to show that the Fourteenth Amendment's framers would have permitted disenfranchisement by race[111] and through the use of educational tests and that the purpose of the Fourteenth Amendment's formula in section two was merely to disincentivize such laws, not ban them.[112] In other words, much of Rehnquist's own evidence tended to support Harlan's view that the Equal Protection Clause was not intended to

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[104] *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 252–53 (2011).

[105] *See* Carrington v. Rash, 380 U.S. 89, 97–101 (1965) (Harlan, J., dissenting); Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting); *see also infra* notes 152–59 and accompanying text.

[106] *See* KEYSSAR, *supra* note 31, at 216–43.

[107] *See* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974).

[108] *See id.* at 41–56.

[109] *See id.* (quoting U.S. CONST. amend. XIV, § 2). This clause in the Fourteenth Amendment overturned the Three Fifths Compromise.

[110] *See id.*

[111] *See id.* at 45.

[112] *See id.* at 47–48.

protect voting rights at all. It was an odd sidestep to apply such evidence only to a single class of voters, though the special language of Section Two makes Rehnquist's a narrow and convincing argument. But, given the lawyerly narrowness of Rehnquist's holding, *Richardson* has the tone of a compromise with the more liberal view of the Equal Protection right to vote. *Richardson*, for instance, won the vote of Justice White, who had been a dependable vote in favor of the Equal Protection right to vote.[113] The decision allowed a new generation of justices to repudiate the liberalism of the Warren era without any troubling changes to precedent.

The result for Congress's power to enfranchise felons is clear. It would be question begging to argue that Congress may address felon disenfranchisement through its power to enforce the Fourteenth Amendment when *Richardson* holds that the Fourteenth Amendment blesses felon disenfranchisement.[114] Whether Congress could argue that its Equal Protection enforcement powers are not limited by *Richardson*, and whether the Fifteenth Amendment contains a distinct enforcement power by which Congress might circumvent the holding of *Richardson*, remain to be explored.[115] It is certain, however, that if Congress attempted to categorically end felon disenfranchisement, the Court would rebuff the legislative branch, probably with a brusque citation to *Marbury v. Madison* to the effect that mere legislation may not overturn the Constitution as interpreted in *Richardson*.[116] If Congress is able to use the enforcement power at all, it must hone in on a specific anti-discrimination justification for wielding its power and cannot depend on judicial deference or any conception of congressional authority to define federal voter qualifications.

## II. WHY THE SUPREME COURT WILL LIKELY REMAIN COMMITTED TO FELON DISENFRANCHISEMENT

Thus, given recent case law and the Court's view of felon disenfranchisement, there is no unencumbered path forward for Congress, no simple toggle by which Congress can turn off state-level felon disenfranchisement. Article I is off the table, but the enforcement powers may be useful, albeit in a form short of eradicating the practice. This section, then, will begin to describe how the Court would view any congressional use of its enforcement powers to enfranchise felons, without considering the specific doctrinal hooks that Congress may seek to use. No matter the enforcement power claimed, Congress may need to

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[113] Justice White had signed on to the majority opinions in favor of a strict scrutiny test in both Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) and Dunn v. Blumstein, 405 U.S. 330 (1972).

[114] Richardson v. Ramirez, 418 U.S. 24, 56 (1974). *see also* Hasen, *supra* note 27, at 779–80 (describing how any congressional action in this area would put Congress at odds with the holding of *Richardson*).

[115] *See* discussion *infra* Section III.

[116] *See* City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).

account for two valences of the Court's view of state sovereignty over voter qualifications—one legal, the other ideological. Legally, the Court may find that Congress's attempt to legislate in the state-sovereign sphere of voter qualifications triggers the heightened scrutiny it has applied in both the Fourteenth[117] and Fifteenth Amendment[118] contexts.[119] Ideologically, since felon disenfranchisement is the most important remaining area of the states' sovereign power to set voter qualifications, protecting it equates to protecting a federalist view of the constitution.[120]

### A. *Legal Reasons for the Court's Likely Commitment to Felon Disenfranchisement*

Legally, the Court will probably hold that felon enfranchisement incurs significant "federalism costs."[121] The Court is likely to weigh the burden on state sovereignty when analyzing a congressional regulation of state voter qualifications housed in the enforcement clauses.[122] That would be consistent with its approach in Fourteenth Amendment cases as well, where the Court justifies the laying of fact-finding demands upon Congress by claiming to protect a function of state sovereignty, commonly the sovereign immunity to lawsuits.[123] Put another way, the Court charges Congress with proving a pattern of discrimination by relevant and direct evidence once the Court finds that Congress has impaired a function of state sovereignty using the enforcement powers. The Court's holding in *Shelby County v. Holder*, and in particular *Shelby*'s careful curation of voting-rights cases, suggest that the Court sees the power to set voter qualifications as a privileged sphere of state sovereignty to be protected against intrusion by the national government.

The Court's opinion in *Shelby* may establish state sovereignty over voter qualifications as a matter of law by itself. According to the Court in *Shelby*, the

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[117] *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 79–80 (2000).

[118] *See* Shelby Cty. v. Holder, 570 U.S. 529, 543–44 (2013) (explaining that, when wielding its enforcement powers, Congress must consider the states' sovereign right to regulate elections, as well as their right to equal sovereignty with other states).

[119] Derek T. Muller has found that this close scrutiny of Congress's record is a primary feature of all judicial reviews of the enforcement powers. *See Judicial Review of Congressional Power Before and After Shelby County v. Holder*, 8 CHARLESTON L. REV. 287, 307–12 (2013-14).

[120] *See* Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2222–29 (2018).

[121] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202 (2009) (quoting Lopez v. Monterey Cty., 525 U.S. 266, 282 (1999)); *see also City of Boerne*, 521 U.S. at 534 (1997) (analyzing a congressional use of the enforcement power in light of the significant burdens it placed on the states' "traditional general regulatory power").

[122] *See Shelby Cty.*, 570 U.S. at 544.

[123] *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 79–80 (2000).

Voting Rights Act overstepped state sovereignty to regulate elections. The Court subdivided the sphere of state electoral sovereignty into three powers: (1) to set the qualifications of voters; (2) to set the qualifications of officers;[124] and (3) to draw districts, which was "likewise 'primarily the duty and responsibility of the State.'"[125] Because the Voting Rights Act impinged upon state electoral sovereignty, otherwise preserved by the Tenth Amendment,[126] and violated the principle of equal sovereignty between the states by requiring only some of them to preclear changes to their election laws with the federal government,[127] the Court undertook a thorough scrutiny of the Act.[128] The Court held the preclearance regime of the VRA unconstitutional because Congress had based it on outdated data about voter exclusion in the states selected for preclearance.[129] Though not central to the Court's ruling, the states' sovereignty over voter qualifications appears to have legal and precedential force. It was one of three areas of state electoral sovereignty that warranted Tenth Amendment protections in the Court's opinion.[130] The state sovereign interest was in turn one of two reasons the Court gave—along with equal sovereignty—to justify its close scrutiny of Congress's fact-finding.[131] In the Court's framing of the issue, it appears that congressional impingement upon the states' power to set voter qualifications should prompt some level of review, as Congress's impingement upon the states' power to regulate elections prompted the review of *Shelby*.[132]

Though the sovereign interest in voter qualifications is mixed in with other sovereign electoral interests, and therefore difficult to separate out and weigh on its own, the Court's citations signal that it views the sovereign interest in voter qualifications as worthy of judicial protection in its own right. First, the Court cites *ITCA* in a "*see also*" about the states' powers over voter qualifications.[133] Recall that *ITCA* held, in pertinent part, that Congress could not use Article I powers to change voter qualifications.[134] The citation is odd because *ITCA*, on

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[124] Shelby Cty. v. Holder, 570 U.S. 529, 543 (2013).

[125] *Id.* (quoting Perry v. Perez, 565 U.S. 392 (2012)). The distinction stems from Congress's power to override state decisions about electoral districts and generally to regulate the process of redistricting. It does not make sense, then, to designate this third power as one belonging purely to the states. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 548–52 (1954).

[126] *See Shelby Cty.*, 570 U.S. at 543.

[127] *See id.* at 543–45.

[128] *See id.* at 545–46.

[129] *See id.* at 556–57.

[130] *See id.* at 543.

[131] *See id.* at 545–46.

[132] *Id.*

[133] *Id.* at 543.

[134] *See supra* notes 77–93 and accompanying text.

its face, was a holding about the Elections Clause and did not mention the enforcement powers.[135] Justice Scalia's opinion, however, conveys a broader view of state sovereignty: *ITCA* cites Justice Harlan's vehemently stated originalist dissent/concurrence to *Oregon v. Mitchell*,[136] where Harlan agreed only with Congress's five-year ban on literacy testing and dissented to the Court's permitting Congress to change the minimum voting age and regulate state residency requirements.[137] Contrast Scalia's approach with that of Rehnquist who, in preserving state sovereignty over the disenfranchisement of felons in *Richardson*, refused to endorse Justice Harlan's Fourteenth Amendment originalism.[138] The opinion in *Mitchell* depended in part upon the Elections Clause, so Justice Scalia may have had good reason to draw on Justice Harlan's dissent in a discussion of the same clause. Still, *Shelby* was not a case about the Elections Clause. Pointing to Justice Scalia and Justice Harlan for a proposition about state sovereignty signals (and appears intended to signal) an originalist interpretation of congressional powers over voter qualifications. Such an originalist interpretation implies a limited congressional role in deciding who can vote.

The *Shelby* opinion provides another significant clue about the Court's view of state sovereignty over voter qualifications. The Court in *Shelby* cites *ITCA* in a "*see also*" behind *Carrington v. Rash*, which is the primary source for the Court's statement of the law.[139] The Court quotes *Carrington v. Rash* to establish that the states have "broad powers to determine the conditions under which the right of suffrage may be exercised."[140] *Carrington*, an early equal protection voting rights case, drew a harsh dissent from Justice Harlan[141] and, at first glance, does not imply the same sort of originalism as *ITCA*. But a closer look at *Carrington* yields more clues about the Court's view of voter qualification sovereignty. *Carrington* was one of the earliest cases in the voting rights line,[142] pre-dating the tentative strict scrutiny test that emerged the year following *Harper*,[143] and the strict scrutiny that emerged by 1969 in *Kramer v.*

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[135] *See* Arizona v. Inter Tribal Council of Ariz., 570 U.S. 1, 16–17 (2013).

[136] *Id.* at 16 (citing Oregon v. Mitchell, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part).

[137] *Mitchell*, 400 U.S. at 216–17 (Harlan, J. concurring).

[138] *See* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974).

[139] Shelby Cty. v. Holder, 570 U.S. 529, 543 (2013).

[140] *Id.*

[141] Carrington v. Rash, 380 U.S. 89, 97–101 (1965) (Harlan, J., dissenting) (citing Reynolds v. Sims, 377 U.S. 533, 589 (1964)).

[142] See KEYSSAR, *supra* note 31, at 216–33.

[143] In Harper v. Virginia State Bd. of Elections, the Court waited until the final paragraph of its opinion before finally stating: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." 383 U.S. 663, 670 (1966).

*Union Free School District.*[144] By contrast to these (even though they both depended in part upon *Carrington* for the test),[145] *Carrington* on its face proposed a much more modest standard of judicial review, "that States *may not casually deprive* a class of individuals of the vote *because of some remote administrative benefit to the State.*"[146] As Justice Harlan would point out in a later dissent, "*Carrington* applied the traditional equal protection standard," unlike the more "subjective" approach of later voting rights cases, by which Justice Harlan meant the strict scrutiny standard.[147]

Given the choices the Court had for cases supporting these propositions about state sovereignty, the Court's omissions appear significant. The *Shelby* Court could have, for instance, quoted Justice Brennan's opinion in *Katzenbach*, a case explicitly dealing with Congress's enforcement powers, to establish that states have the power to set voter qualifications as a matter of plain constitutional interpretation.[148] The Court could have quoted the Constitution, for that matter. As for *Carrington*, the *Shelby* Court had myriad voting rights cases to choose from for the proposition about state power[149] and instead chose the case that espoused the greatest deference to state sovereignty of any case in the voting rights line.[150]

Though it may not be possible to say exactly what legal force the statement in *Shelby* has, these curated citations to *Carrington* and *ITCA* appear to signal that the states' sovereignty to decide voter qualifications will receive a high level of judicial protection.

### B. *Mixed Legal-Ideological Reasons for the Court's Likely Commitment to Felon Disenfranchisement*

If the Court's view in *Shelby* echoed the originalism of Justice Harlan, the originalist analysis of the Fourteenth Amendment has extra traction in the context of felon voting rights. So long as one is comfortable with the idea that the Constitution can incorporate historical understandings to any degree, Justice Rehnquist was no doubt correct about what the Framers thought of the

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[144] *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969) ("Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.").

[145] *See id.* at 621 (citing *Carrington*, 380 U.S. 89); *Harper*, 383 U.S. at 670 (citing *Carrington*, 380 U.S. 89).

[146] *Carrington*, 380 U.S. at 96 (emphasis added).

[147] *Harper*, 383 U.S. at 683 (1966) (Harlan, J., dissenting).

[148] *See* Katzenbach v. Morgan, 384 U.S. 641, 647 (1966).

[149] *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (collecting cases to support the proposition that "the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways").

[150] *See supra* notes 140–48 and accompanying discussion.

disqualification of felons.[151] Not only did the Fourteenth Amendment originally eschew voting rights, but, as Richard M. Re has described, all of the Reconstruction Amendments evidence their Framers' vision of a formal equality universal to those citizens who would abide by the social contract.[152] According to this vision, those who broke the law violated the contract and deserved to lose the vote, making it franchise based on vice and virtue in conscious contrast to a franchise based on the immutable trait of race.[153] The Thirteenth Amendment ends slavery except for those who commit crimes,[154] while the Fourteenth Amendment provides that the states may disenfranchise felons without penalty to their representation in Congress.[155] Likewise, the Framers of the Fifteenth Amendment considered several possible manhood suffrage bills before settling on a formula that would leave voter qualifications with the states, barring only race-discriminating qualifications.[156] Even the most liberal manhood suffrage bills considered, however, would have barred felons from the franchise,[157] and Congress at the time understood that the Fifteenth Amendment left intact states' rights to disenfranchise criminals.[158] The Framers of the Reconstruction Amendments, in other words, intended to preserve voter qualification federalism when it came to convicted criminals.

Little remains, in fact, of the voter qualification federalism envisioned by Justice Harlan and the Framers of the Reconstruction amendments. Given that the Supreme Court has found substantive voting rights in the Fourteenth Amendment,[159] one scholar has observed that the only bars to adult suffrage still accepted in some form are "felon disenfranchisement . . . and voting rights [limitations] o[n] U.S. citizens living in the District of Columbia, U.S. territories and possessions, and foreign nations."[160] Add to this list provisions in state statutes and constitutions disenfranchising mentally incapable people and those under guardianship,[161] which are construed narrowly by interpreting courts.[162] Moreover, though they could be categorized as "eligibility bars" rather than

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[151] Richard M. Res & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1595 (2012).

[152] *Id.*

[153] *Id.*

[154] *Id.* at 1598–1603.

[155] *Id.* at 1603–24.

[156] *Id.* at 1630–41.

[157] *Id.* at 1630–41.

[158] *Id.* at 1659–60.

[159] *See supra* notes 44–48 and accompanying text.

[160] *See* Morley, *supra* note 97, at 2065.

[161] KEYSSAR, *supra* note 31, at 287–91.

[162] *See* Doe v. Rowe, 156 F. Supp. 2d 35, 51–56 (D. Me. 2001) (finding that there is a compelling state interest in the mental competence of voters, but that procedures must actually test such competence on an individual basis).

qualification bars,[163] residency requirements are treated the same way as other qualification bars and subjected to strict scrutiny.[164] There are also small loopholes for voting in utility districts where use of the utility, such as water, is tied to land ownership, as in an agricultural community.[165] One could include in this list, at a stretch, bars on non-citizen voting. In the nineteenth century, frontier states commonly granted the franchise to aliens who pledged their intent to become citizens, and the same should be possible today.[166]

Of the qualification bars that remain constitutionally valid in some form, felon disenfranchisement is by far the largest category, and it is the only category which may be designated almost at the pure pleasure of lawmakers[167] because of the holding of *Richardson*.[168] The other most common qualification bar, for mental incapacity, affects far fewer people than laws disenfranchising felons.[169] Additionally, the only court to examine the disqualification of mentally incapacitated people in the modern era has made clear that all such qualifications must satisfy strict scrutiny under the Equal Protection clause.[170] While both qualification bars are residues of the system that prevailed in the nineteenth century, state felon disenfranchisement is the sole direct descendent of an otherwise lapsed dual citizenship regime that once gave states the power to decide which of its citizens deserved the vote as a matter of pure internal politics.[171] If the Court is committed to the idea that states have a privileged power to set voter qualifications,[172] this power has almost no reach after decades of expanding rights—that is, no reach apart from the states' disenfranchisement of felons. Felon disenfranchisement occupies the inner keep of voter qualifications federalism—protecting it equates to protecting the federalist idea.

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[163] *See, e.g.*, Morley, *supra* note 97, at 2065 (categorizing the two separately as such).

[164] *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (collecting cases in the voting rights line to establish that residency requirements would be subject to strict scrutiny, and ultimately holding that the state's interests in such requirements could all be satisfied by a thirty-day residency requirement).

[165] *See, e.g.*, Ball v. James, 451 U.S. 355 (1981) (permitting Arizona to apportion votes in a water collection district to landowners only and to weight each vote by the amount of land owned).

[166] KEYSSAR, *supra* note 31, at 27–28.

[167] This excludes non-citizens.

[168] *See* Richardson v. Ramirez, 418 U.S. 24, 45–56 (1974).

[169] *Compare* Matt Vasilogambros, *Thousands Lose Right to Vote Under 'Incompetence' Laws*, PEW CHARITABLE TRUSTS (Mar. 21, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws (conjecturing that up to 1.5 million people may be disenfranchised under such laws) *with* Uggen, Larson & Shannon, *supra* note 4 (noting that six million total disenfranchised as felons) *and* Lopez, *supra* note 3 (reporting that one million felons in Florida received the right to vote in November 2018).

[170] *See* Doe v. Rowe, 156 F. Supp. 2d 35, 51–56 (D. Me. 2001).

[171] PETTUS, *supra* note 9, at 37–78 (2013).

[172] *See* discussion *supra* Section II.

For these legal-ideological reasons, the Court may endeavor to defend the practice of felon disenfranchisement against congressional encroachment.

### C. *The Court Will Likely Subject Any Use of the Enforcement Powers to a Close Scrutiny*

It is now possible to offer a conjecture about the Court's initial response to a congressional enactment enfranchising felons. *ITCA* and the *Shelby* Court's citation of *Carrington* both evince a tendency to find that the states, rather than the federal government, possess the power to define voter qualifications.[173] On the added assumption that the Court will find the history of voter qualification federalism compelling,[174] it would likely hold that a federal felon disenfranchisement law encroaches upon the states' sovereign powers. Any congressional attempt to regulate in this field will thus have to clear a close evidentiary scrutiny. Such an approach would be consistent, too, with the Court's turn towards federalism in other contexts.[175]

Congress, then, does not have the power—as the Constitution is currently interpreted—to end state felon disenfranchisement. On the contrary, any attempt to regulate the practice will likely face a heightened fact-finding burden.[176] It remains to be determined what Congress may do within these bounds, that is, pursuant to its limited powers to enforce the Fourteenth and Fifteenth Amendments in the field of voter qualifications.

## III. FRAMING A FELON DISENFRANCHISEMENT LAW USING THE FOURTEENTH AND FIFTEENTH AMENDMENT ENFORCEMENT POWERS

The challenges understood, this article now asks how a congressional use of the enforcement powers could overcome them. Congress would seek to house a regulation of felon disenfranchisement in either the Fourteenth or the Fifteenth Amendment, the homes of voter Equal Protection doctrine[177] and the right to exercise the vote free of race discrimination, respectively.[178] Congress's powers under these amendments derive from the Amendments' respective enforcement clauses.[179] Though Congress will most likely have to clear a high evidentiary burden no matter which amendment it chooses, distinct case law and different

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[173] *See* discussion *infra* Section III.A.

[174] This is an assumption well-warranted in the enforcement power context. See, for example, the Supreme Court's foundational enforcement power case of City of Boerne v. Flores, 521 U.S. 507, 520 (1997), which depended upon an originalist analysis of the Fourteenth Amendment.

[175] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 309 (5th ed. 2015).

[176] *See* discussion *infra* Section III.

[177] *See* Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

[178] U.S. CONST. amend. XV.

[179] U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

standards of review attach to each amendment. Moreover, the Amendments may provide independent legal bases for congressional action. If so, then these independent strands can be combined into a more potent argument for asserting the enforcement powers of Congress. Therefore, this article analyzes the Amendments in turn, fleshing out the normative and legal reasons for treating them separately.

### A. *The Fourteenth Amendment*

#### 1. The Fourteenth Amendment enforcement power.

This section considers the Supreme Court cases that define Congress's power to enforce the Equal Protection clause. This power depends upon the Courts' interpretation of the underlying right that Congress seeks to protect.[180] As the Court considers the voting rights of felons to be limited at most, Congress's powers in this area will also be limited.[181]

Under the Fourteenth Amendment, according to the 1997 case of *City of Boerne v. Flores,* Congress may bar some constitutional behavior as a prophylaxis for unconstitutional behavior,[182] but the prophylaxis must be "congruent and proportional" to a well-documented constitutional violation.[183] Congress's prophylactic net can catch some unintended fish, but not too many.[184] The Court measures congruence and proportionality relative to the standard of review it imposes on the underlying discrimination.[185] Congress has less leeway to use its prophylactic enforcement powers to secure the Equal Protection rights of non-suspect classes,[186] and more leeway to use its prophylactic enforcement powers to secure the rights of suspect classes.[187] In practice, the Court will grant more deference to congressional findings of fact when Congress legislates to protect classes subject to strict scrutiny, somewhat less to classes subject to intermediate scrutiny, and very little to classes subject

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[180] *See infra* notes 184–86 and accompanying text.

[181] *See infra* notes 210–16 and accompanying text.

[182] *See* City of Boerne v. Flores, 521 U.S. 507, 531 (1997).

[183] *See id.* at 531.

[184] *See City of Boerne*, 521 U.S. at 518 ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.")

[185] *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000).

[186] *See, e.g., id.* (finding state abrogation of sovereign immunity for claims of age discrimination an invalid use of the enforcement power, in part because the Supreme Court had not found age to be a suspect class).

[187] *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) (allowing Congress to pierce the state sovereign immunity for plaintiffs suing over violations of FMLA's leave time provisions, because the leave time provisions remedied gender discrimination).

to rational basis scrutiny.[188] This jurisprudence focuses the enforcement power around Supreme Court precedent regarding the right at issue.[189]

Following this rule, the Court has struck down two congressional attempts to protect non-suspect classes. In both cases, Congress attempted to use its Fourteenth Amendment enforcement power to abrogate state sovereign immunity, to allow members of the non-suspect class to sue the state for money damages for discrimination. In 2000, it invalidated such a provision in the Age Discrimination in Employment Act in *Kimel v. Florida Board of Regents.*[190] Since the Supreme Court had found that age is not a suspect class, and that state governments may distinguish citizens by age without triggering heightened judicial scrutiny, the Court found Congress's use of the enforcement power neither congruent nor proportional.[191] For similar reasons, the Court invalidated a parallel abrogation of state sovereign immunity for disabled people under the Americans with Disabilities Act in *Board of Trustees of University of Alabama v. Garrett.*[192] In both cases the Court subjected Congress's factual record to a close scrutiny,[193] and, in *Garrett*, even rejected extensive congressional fact-findings about societal discrimination against disabled people because the findings did not prove that the *states* were discriminating (as would justify abrogating their sovereign immunity).[194]

By contrast, the Court overlooked a similar problem in Congress's record in *Nevada Department of Human Resources v. Hibbs.*[195] In *Hibbs*, the Court allowed Congress to pierce state sovereign immunity for plaintiffs suing states that failed to grant family medical leave to all employees equally, as required under the Family and Medical Leave Act.[196] The purpose of this law was to equalize provision of paternity and maternity leave, which employers granted disproportionally to women over men because of outdated gender stereotypes.[197] The Court found the family medical leave requirement a valid measure to enforce gender equality, even though, as in *Garrett*, the record did not indicate that *states* were committing such violations.[198] The contrast between *Kimel-Garrett* on the one hand and *Hibbs* on the other hand demonstrates the primacy of the Supreme Court's suspect class doctrine in determining the scope of Congress's enforcement power.[199]

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[188] *See* ARAIZA, *supra* note 22, 120 (2015).

[189] *See id.*

[190] Kimel, 528 U.S. 62.

[191] *See id.* at 85–86 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

[192] Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

[193] *See id.* at 369–70; Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000).

[194] *See Garrett*, 531 U.S. at 372.

[195] *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003).

[196] *Id.* at 724–25.

[197] *Id.* at 730–31.

[198] *Id.* at 737.

[199] *See* ARAIZA, *supra* note 22, 118.

Even this understanding of the enforcement power, however, has come into some doubt since 2010. In recent years, the Court has turned towards a more open-ended analysis of Congress's enforcement power, even when Congress uses that power to aid a suspect class.[200] In *Coleman v. Court of Appeals*, the Court struck down Congress's attempt to pierce state sovereign immunity to allow plaintiffs to sue for violation of the self-care provisions of the Family and Medical Leave Act (FMLA),[201] which would have required state employers to give all employees a certain amount of personal sick leave.[202] Congress added this provision to a law premised on gender equality, partially on the reasoning that equality in self-care would remove a reason for employers to perceive women as relatively more likely to take time off under the core family- and child-care leave provisions of FMLA.[203] Unlike the family leave provision upheld in *Hibbs*, this law sought to ameliorate gender discrimination indirectly and to anticipate and head-off unintended consequences of the law's other provisions.[204] But the Court dismissed Congress's indirect approach as "overly-complicated" and "unconvincing,"[205] tacking on that the law "d[id] not comply with the clear requirements of City of Boerne."[206] Such wave-of-the-hand reasoning threatens the possibility that "no objective guideposts [will] guide the Court's review of such matters."[207] Open-ended reasoning about the adequacy of Congress's fact-finding burdens also marked the holding of *Shelby* and, together, these cases have "shattered the template" of *Boerne*, making it difficult, if not impossible, to say what Congress may do with its enforcement powers.[208]

The Supreme Court's underlying case law about felon disenfranchisement, then, should anchor the inquiry about the scope of Congress's power, but it is possible, too, that a more open-ended analysis of Congress's fact-finding will guide the analysis. Nevertheless, the precedent suggests that underlying doctrine is a focal point of the Court's enforcement power analysis.

As has already been discussed above, the Court views felon disenfranchisement as enjoying an "affirmative sanction."[209] The holding of *Richardson* may appear to imply that convicted felons have no equal protection right to vote, saying as it does that the Constitution gives such restrictions

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[200] William D. Araiza, *The Enforcement Power in Crisis*, 18 U. PA. J. CONST. L. ONLINE 1, 8–9 (2015) (discussing the difficulty of using recent cases to calibrate Congress's enforcement power).

[201] Coleman v. Ct. App. of Md., 566 U.S. 30, 43 (2012).

[202] *Id.* at 33–35.

[203] *Id.* at 39–44.

[204] *See id.*

[205] *Id.* at 40.

[206] *Id.*

[207] *See* Araiza, *supra* note 200, at 4.

[208] *Id.* at 3.

[209] *See* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974).

"affirmative sanction."[210] As one author has put it, "[t]he Court [in Richardson] found that the Equal Protection Clause did not apply to ex-felons."[211] But multiple courts have subjected such laws to at least deferential rational basis review.[212] By analogy, even the Thirteenth Amendment, which contains a similar "affirmative sanction" in its allowance for involuntary servitude via imprisonment,[213] is not construed to mean that imprisoned people have no rights whatsoever during their term of imprisonment.[214] Finally, even an anachronistic holdout against equal protection voting rights like Justice Harlan, from whom, recall, Justice Rehnquist was at pains to distance himself when he ruled against felon voting rights in *Richardson*, believed that distinctions in voting classes must still be supported by a rational basis.[215] Therefore, the use of the enforcement power is not foreclosed; felons have residual rights that may be enforced in some form. But it is clear, under *Boerne*, that Congress's power in this area will be narrow.

There is one important exception to the *Richardson* "affirmative sanction" that requires study, as it raises questions that clarify the special and independent scope of the equal protection enforcement power. In *Hunter v. Underwood*, decided eleven years after *Richardson*, the Court held that felon disenfranchisement laws passed with racially discriminatory intent are unconstitutional.[216] There, the Court struck down Alabama's disenfranchisement law upon evidence that its framers intended to disenfranchise the state's black citizens and uphold white supremacy.[217] But "[t]he *Underwood* limitation is narrow, and subsequent interpretations have left it almost toothless."[218] Proving disparate impact in the operation of the law will not suffice and legislators may even act with knowledge of such impacts so long

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[210] *Id.* at 54.

[211] Geneva Brown, *White Man's Justice, Black Man's Grief: Voting Disenfranchisement and the Failure of the Social Contract*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 287, 294 (2008).

[212] *See, e.g.*, Green v. Bd. of Elections of City of New York, 380 F.2d 445, 452 (2d Cir. 1967) (subjecting New York's felon disenfranchisement law to rational basis and finding a legitimate government interest in excluding criminals from the process of creating laws). *Accord* Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978).

[213] *See* U.S. Const. amend. XIII, § 1.

[214] *See* Turner v. Safley, 482 U.S. 78, 87 (1987) (explaining that impingement of fundamental rights must be justified by legitimate penological motives).

[215] *See* Carrington v. Rash, 380 U.S. 89, 99–101 (1965) (Harlan, J., dissenting) (arguing that only rational basis testing applied to a Texas law limiting the voting rights of soldiers on military bases, and that the law could be justified by the need to efficiently exclude non-domiciliaries as well as a rational desire to limit the influence of the military on the electoral process).

[216] Hunter v. Underwood, 471 U.S. 222, 233 (1985).

[217] *Id.*

[218] David Zetlin-Jones, Note, *Right to Remain Silent?: What the Voting Rights Act Can and Should Say About Felony Disenfranchisement*, 47 B.C. L. REV. 411, 421 (2006).

as this knowledge does not motivate the law.[219] One court even interpreted *Underwood* to allow cleansing of a law originally motivated by racial animus, when reenacted without animus.[220]

2. The Fourteenth Amendment enforcement power is worth distinguishing from the Fifteenth Amendment enforcement power when it comes to felon disenfranchisement.

*Underwood* established a rule that most students of the Constitution would be familiar with: states may not restrict the franchise on the basis of racial animus.[221] The *Underwood* case raises a spate of questions whose answers are key to understanding what voting rights Congress may confer upon felons. Must such a law rest on evidence of racism? Are there other constitutional values at stake? If there are, how do these values interact with the challenge of racism? In the context of the Court's federalism doctrine, the question then becomes whether any of these values warrant Congress's use of the enforcement powers. If they do, some anchor for them will need to be found in the Supreme Court's equal protection jurisprudence.[222]

The very structure of the Constitution urges that these questions be asked, at the very least for the sake of clarity of analysis. It is clear that both the Fourteenth Amendment and Fifteenth Amendment would each standing alone bar the sort of law at issue in *Underwood*. *Underwood* clearly involved an abridgment of the right to vote on account of race in violation of the Fifteenth Amendment and also clearly involved a violation of the Equal Protection right to vote under the Fourteenth Amendment, yet the Court in *Underwood* addressed only the Fourteenth Amendment.[223] It appears, however, that the Fourteenth Amendment reflects concerns separate from race discrimination—justifications best addressed independently of Fifteenth Amendment justifications in the first instance. Lest this sound like a whitewash, that is, an attempt to sidestep the problem of race, this article will return to the idea that the two amendments' enforcement powers dovetail in the problem of racial animus.[224] For now, this section offers a reason to treat the Amendments separately, in spite of their convergence on the problem of racial animus in voting: the Equal Protection Clause contains a "core promise" that could, on its own, justify a law enfranchising felons. If this use of the Fourteenth Amendment enforcement power stands on its own, it may lend force to any other arguments that may exist.

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[219] *Id.* (citing United States v. LULAC, 793 F.2d 636, 646 (5th Cir. 1986)).

[220] Cotton v. Fordice, 157 F.3d 388, 391–92 (5th Cir. 1998); *see also One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1951 (2002) (discussing the history of litigation under the *Hunter* standard).

[221] *See Underwood*, 471 U.S. at 233.

[222] *See* discussion *infra* Section IV.A.1.

[223] *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985).

[224] *See* discussion *infra* Section IV.

Returning to *Richardson* and *Underwood,* the Court in *Richardson* found that the Equal Protection right to vote does not apply to convicted people and the Court in *Underwood* found that state felon disenfranchisement laws motivated by racism violate the Equal Protection Clause.[225] The Court has three paths open to it in harmonizing *Richardson* and *Underwood.* First, the Court could say that *Underwood* defines the sole exception to the broad rule of *Richardson* and that the only valid facts for Congress to find are those showing that certain states have passed felon disenfranchisement laws motivated by racial animus.[226] Congress may negate such laws, but any prophylaxis added on top of this would bring Congress into conflict with *Richardson.* Indeed, Congress may not even need to find any facts, so long as the cause of action restricts itself to unconstitutional conduct.[227]

But the Court should find instead that *Underwood* is merely a data point tending to prove that many felon disenfranchisement laws are motivated by racial animus. Perhaps, when added to other evidence of societal racism, Congress could justify passing a law with a broader prophylactic scope. That is, a scope beyond addressing only those state voting regulations that can be found by a preponderance of the evidence to have been motivated by racist thought. A prophylactic law based on race would also address those state voting regulations that are under suspicion of racism because of their historical context and racial impact. For reasons of both substantive law and conceptual organization, this article will treat such evidence as relevant to the Fifteenth Amendment inquiry only, rather than to the Fourteenth Amendment inquiry.

Certainly, given the expansion of the Equal Protection right to vote throughout the 60's and 70's, the distinction between the Fourteenth and Fifteenth Amendments' enforcement powers may appear artificial when Congress addresses race discrimination in voting. After all, denying an individual the right to vote on account of their race violates both the Fourteenth and Fifteenth Amendments, at least in the modern era of Equal Protection voting rights.[228] For instance, though the original Voting Rights Act was "an Act to enforce the Fifteenth Amendment,"[229] by its second revision, its section two cause of action referred to both the Fourteenth and Fifteenth Amendments without distinguishing between the two.[230] However, if Congress is pursuing

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[225] *See Underwood,* 471 U.S. at 233.

[226] This is the path Richard Hasen thought most likely when he studied the topic in 2006. *See* Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws,* 49 How. L.J. 767, 779–80 (2006).

[227] *See* United States v. Georgia, 546 U.S. 151, 158 (2006).

[228] For the Fourteenth Amendment, under the Equal Protection doctrine of Hunter v. Underwood, 471 U.S. 222, 233 (1985) and for the Fifteenth Amendment by its plain text forbidding race discrimination in defining voting right, *see* U.S. Const. amend. XV.

[229] Voting Rights Act of 1965, Pub. L. No., PL 89-110, August 6, 1965, 79 Stat. 437.

[230] Voting Rights Act of 1975 Revisions, Pub. L. No., PL 94-73 (HR 6219), PL 94-73, August 6, 1975, 89 Stat. 400.

remediation on the basis of race, its Fifteenth Amendment powers to pursue such remediation are, arguably, broader.[231] Moreover, because the plain text of the Fifteenth Amendment addresses race discrimination in voting rights, it is the logical choice for a source of Congressional authority to combat race discrimination in suffrage laws.

Apart from allowing Congress to strike down laws because they were tainted by racial animus at the time of their passage, or granting Congress a broader power to address racism latent in the disenfranchisement of felons, the Court may entertain a third path: the Equal Protection doctrine of animus. Under the animus doctrine, the Court has held that lawmakers may not enact laws out of a "bare desire to harm," even if the class targeted is not suspect.[232] If rational basis testing entails no more than a deferential check for any non-arbitrary, non-invidious legislative purpose,[233] the Court undertakes a more thorough search of the legislative record when it suspects animus.[234] When the Court suspects animus it checks for proof of a legitimate government purpose beyond the desire to harm a class of citizens, and a rational relationship between the legislation and that purpose.[235] Embedded in the animus inquiry is the Court's ancient prohibition of "class legislation," or a law that draws distinctions between citizens without a discernible and legitimate government purpose in doing so.[236] Thus, where objective criteria indicate that a law might be rooted in animus, and where the government cannot demonstrate that its asserted interests are related to its stated goals, it may be possible to infer that a state law violates the Equal Protection clause. While the animus analysis is usually not complete without some evidence of an affirmative desire to harm the group targeted,[237] courts have also commonly inferred such an affirmative desire from the combination of (1) overbreadth, (2) severity, and (3) lack of legitimate government purpose.[238] State felon disenfranchisement laws fit this doctrinal mold, and Congress might be able to justify a prophylactic law on findings of overbreadth, severity, and lack of legitimate government purpose.

Again if this independent interpretation of the Fourteenth Amendment furnishes a justification for ending felon disenfranchisement, it adds force to any other justification that may exist, thus warranting an independent analysis.

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[231] *See* discussion *infra* Section III.B.1.

[232] *See* U. S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[233] *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176–77 (1980).

[234] *See* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW 125–27, (Clara Platter ed., New York University Press (2017)).

[235] *Id.*

[236] *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

[237] *See* ARAIZA, *supra* note 234, at 85–104.

[238] *See* discussion *infra* Section III.A.3.

3. Examples of animus because of overbreadth, severity, and lack of legitimate government interests.

Three example cases will serve to illustrate the theory of animus discussed here and demonstrate the scope of the right that Congress may seek to enforce through a felon enfranchisement law. These cases refocus the *Boerne* congruence and proportionality test, suggesting that, if animus is forbidden by the equal protection clause, then Congress should have a power, too, to root out laws based on animus.[239]

In *Romer v. Evans*, the Court held that a state constitutional amendment that would prevent municipalities from legislating against discrimination on the basis of sexual orientation failed the rational basis test and therefore violated the Equal Protection Clause.[240] Finding that the law prescribed an unusually broad and severe disability on lesbian, gay, and bisexual people by barring them from seeking the protection of public accommodations laws, otherwise common in the states,[241] the Court undertook to analyze the government's stated interests in the law: conserving resources to fight other kinds of discrimination, and protecting the associational freedom of Coloradans.[242] Since the law's breadth was so great in comparison to these ends, however, the Court would not credit them.[243] Absent a legitimate government purpose, the law could serve no purpose apart from singling out and burdening a specific group.[244] The Court reasoned: "It is, a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[245]

The Court followed the same rubric in the case of *United States v. Windsor*, where it struck down the Defense of Marriage Act (DOMA).[246] In *Windsor*, the surviving spouse in a same-sex marriage under New York laws, attempted to

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[239] *See* WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 142–47 (2015).

[240] *See* Romer, 517 U.S. at 635–36.

[241] *See id.* at 632 (describing such public accommodations laws as common in American jurisprudence and rooted in the common law).

[242] *Id.* at 635.

[243] *Id.*

[244] *Id.*

[245] *Id.* It should be noted that the *Romer* court made a statement which poses a challenge to this article in distinguishing the 19th century case of *Davis v. Beason* from *Romer's* main holding. Justice Scalia had depended upon *Davis v. Beason* in dissent. *Beason* involved a law banning polygamists from voting in the then-Territory of Utah, about which ban the Court wrote: "To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable. . . ." Romer v. Evans, 517 U.S. 620, 634 (1996) (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974)). The statement shows that the Court has not given any critical attention to *Richardson* in some time and that it has simply kept the case in a black box, ignoring its rationales and reasoning while leaning on its narrow holding. But even convicted felons retain residual voting rights.

[245] United States v. Windsor, 570 U.S. 744 (2013).

[246] *Id.*

claim the federal estate tax deduction, but, because DOMA had redefined marriage for all federal purposes to mean only a heterosexual union, the surviving spouse could not do so.[247] The Court found that the law had an unusual breadth, cutting across thousands of federal laws, it impinged upon the state-sovereign sphere of marriage, breaking with the traditional allowance of power to the states in this field, and it removed protections from a class that the states sought to protect.[248] Due to its unusual qualities, the Court analyzed the law's enactment for evidence of animus, as it had in *Romer*.[249] Unable to discern from the record any motive apart from a desire to harm same-sex couples, the Court found that the law could not stand, "for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[250]

There is precedent for animus analysis in the voting rights field, too, though it predates modern voting rights jurisprudence. As discussed above, before the Supreme Court articulated a strict scrutiny/fundamental rights test for state voter qualifications, it used a test resembling rational basis, as in *Carrington v. Rash*.[251] In *Carrington*, the Court tested the validity of a Texas law disqualifying for the duration of their service all U.S. military service-members who moved to Texas from out of state.[252] The Court found the provision "unique" in its permanent disenfranchisement of the class of soldiers,[253] and therefore questioned what legitimate government motives the state could have for such a law.[254] The state asserted interests in preventing local communities from being drowned out by voters on military bases, and preventing transients from infiltrating the franchise.[255] As for the first, it was not a legitimate government purpose to bar voters based on how they might vote.[256] As for the second, the State of Texas had established procedures to determine the bona fide residence of other transient classes such as students at university and patients in hospitals, without establishing any per se exclusions as the State had done for soldiers.[257] Lacking any legitimate government purpose, the Court found the restriction to be "invidious discrimination" in violation of the Equal Protection clause.[258]

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[247] *Id.* at 752.

[248] *Id.* at 764–66.

[249] *Id.* at 768–74.

[250] *Id.* at 775.

[251] *See supra* notes 140–48 and accompanying text; Carrington v. Rash, 380 U.S. 89 (1965).

[252] *Id.* at 91–93.

[253] *Id.*

[254] *Id.* at 93.

[255] *Id.*

[256] *Id.* at 94.

[257] *Id.* at 94–96,

[258] *Id.* at 96.

These cases demonstrate that the Equal Protection Clause contains a core promise to citizens, to act with a public purpose rather than out of a desire to harm.[259] This promise is not captured by the judge-made law of tiered classes, which is a rule of judicial restraint never intended to be applied to Congress,[260] and so Congress should have a broader power to enforce this core promise no matter the *Boerne-Garrett-Kimel* line of cases.[261] Given the holdings of *Romer* and *Windsor*, and following the example of *Carrington,* Congress could find that laws disenfranchising felons are rooted in animus against convicted people, justifying use of the enforcement power to strike such laws, or at least limit their scope.

4. Felon disenfranchisement laws are rooted in unconstitutional animus against convicted people.

When the animus approach of *Romer*, *Windsor*, and *Carrington* is applied to felon disenfranchisement laws, it is apparent that those requiring the permanent, irrevocable disenfranchisement of all convicted people run afoul to the constitution. The unusual breadth and severity of some of these laws suggests, as it did in *Romer,* that lawmakers are acting out of impermissible animus.[262] Such laws are severe, as they exclude people from the polity, sometimes on a permanent basis and without any chance for readmittance. That severity has prompted ongoing reforms: permanent disenfranchisement is less and less seen as a valid regulation of state electorates, with nine states lifting permanent bans, and twenty-four liberalizing policies in some way, since 1997.[263] These laws are also broad as they disenfranchise regardless of the individual's claim to rehabilitation or restored civic virtue.[264] To take just one example, Kentucky, one of three states to permanently disenfranchise all of those convicted of felonies, provides an individualized assessment of mental incompetence for

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[259] *See* ARAIZA, *supra* note 239.

[260] *See* Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 383 (2001) (Breyer, J., dissenting).

[261] *See* ARAIZA, *supra* note 239.

[262] Romer v. Evans, 517 U.S. 620, 635 (1996).

[263] Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT (July 27, 2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer.

[264] Congress could also plausibly find that the absence of legitimate government purpose means that law fails on the rational basis standard. *See, e.g.*, Garrett, 531 U.S. at 367 (explaining that plaintiffs can prevail on a rational basis challenge when they are able to negative every conceivable legitimate purpose for a law). This is not clearly the wrong approach. The problem is that there are probably some legitimate reasons for felon disenfranchisement. In contrast, the animus doctrine of cases like *Romer*, *Carrington*, and *Windsor* addresses the problem of fit between asserted interests and government action. This lack of fit is really the problem for permanent felon disenfranchisement.

those denied the vote for that reason.[265] As in *Carrington*, automatic and permanent disenfranchisement deals per se with a large class, rather than testing individual members of the class for fitness to vote, even though such tests are performed for other categories of citizens facing disenfranchisement.[266]

It is appropriate, then, for Congress to scrutinize the justifications states have offered for these laws. In the spirit of *Boerne's* "congruence and proportionality," Congress should look first to the court cases that analyzed disenfranchisement laws at a rational basis level to see what government interests have been asserted.[267] If unable to find any interests besides a bare desire to harm, or if the interests asserted are such an obvious mismatch to the stated goals, Congress could assert the broad power implied by the Equal Protection Clause's core promise, following on the precedents of *Romer, Windsor* and *Carrington.*[268]

5. Finding and testing the legitimate government purposes behind felon disenfranchisement.

To begin, it is unlikely that Congress could assert its powers to reach the voting rights of those serving sentences within prison. In *Owen v. Barnes*, plaintiffs, serving sentences in prison, brought an Equal Protection suit alleging that the government must satisfy strict scrutiny to justify granting the right to vote to those who had completed sentences while denying it to those still in prison.[269] But, the court stated that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlining our penal system."[270] Thus the state could rationally distinguish between those still serving sentences and those who had finished sentences.[271] It is difficult to imagine the Supreme Court deviating from this principle for those currently incarcerated. Or, to put it in the terms of the Equal Protection Clause's "core promise," society permits a degree of animus against those who commit crimes and go to prison. Such rules cannot be arbitrary, [272] and they must bear a reasonable relationship to a legitimate penological interest. In general, however, it is accepted that the government may single out those in prison for special burdens, up to the absolute deprivation of all comforts and pastimes a free person might enjoy, save only conditions

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[265] Michele J. Feinstein & David K. Webber, *Voting Under Guardianship: Individual Rights Require Individual Review*, 10 NAELA J. 125, 137–39 (2014).

[266] Carrington v. Rash, 380 U.S. 89, 94–96 (1965).

[267] *See* discussion *infra* Section IV.A.1.

[268] *See* discussion *infra* Section IV.A.3.

[269] Owens v. Barnes, 711 F.2d 25, 26 (3d Cir. 1983).

[270] *Id.* at 27–28 (*citing* Hewitt v. Helms, 459 U.S. 460 (1983) (*quoting* Price v. Johnston, 334 U.S. 266, 285 (1948))).

[271] *Id.* at 28.

[272] *Id.* at 27.

necessary to maintain life and sanity.[273] If Congress has any power under the theory proposed here, the reasonable focus of that power is the class of people who have already completed prison sentences, including parole.[274] The "core promise" of Equal Protection applies clearly only to those who are not under a sentence of prison or parole.

For any person who has completed a sentence of prison and parole, the state should not be able to assert an interest in punishment. Though not a well-developed jurisprudence, courts have rejected that felon disenfranchisement is "punishment" for purposes of the Eighth Amendment.[275] Were the Court to accept that such laws do constitute punishment, it would come up against serious problems justifying the permanent removal of the right to vote, given, especially, its prior holding that the government may not strip citizenship as punishment for a crime.[276] Further, asserting a retribution interest against those who have completed sentences starts to sound like the state is acting out of a "bare desire to harm."[277] If the purpose of such a law is instead to regulate the franchise, as the Supreme Court has said at least in dicta,[278] the state should have to articulate a legitimate regulatory interest.[279]

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[273] *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (holding that the Eighth Amendment ensures minimum prison conditions only for the maintenance of life and health, such as food, clothing and sanitation). Where a state authority regulates in a way that curtails the constitutional rights of prisoners, it must prove that the regulation is reasonably related to a legitimate penological interest. Turner v. Safley, 482 U.S. 78, 87 (1987). It is difficult to imagine what legitimate penological interest felon disenfranchisement serves. Still, incarceration limits the reach of animus doctrine. Animus doctrine protects any given class of citizens from unfair treatment simply because the governing majority dislikes that group. But those in prison have warranted society's disapprobation, at least in some cases.

[274] Supreme Court doctrine supports this framework because there is no inherent constitutional liberty interest in a parole determination. Parole is granted at the pleasure of state government, usually by an executive authority. *See* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981).

[275] *See* Trop v. Dulles, 356 U.S. 86, 95–96 (1958), *accord* Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967) (*citing Trop*, 356 U.S. at 97). *But see* Pamela Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 99–109 (2005) (criticizing *Trop* and its use by later courts).

[276] *Trop*, 356 U.S. at 101; *see also* Wilkins, *supra* note 275, at 102–08 (arguing that it is inconsistent and philosophically unsound to find stripping citizenship to be punitive while finding that disenfranchising felons is regulatory).

[277] U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

[278] *Trop*, 356 U.S. at 86, 96–97 ("A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.").

[279] Part of the six-factor test for determining whether a purportedly civil regulation is in fact punitive is to show a regulatory, non-punitive purpose. *See, e.g.*, Simmons v. Galvin, 575

There is a small but robust record addressing the rational basis for felon disenfranchisement. Even given the many reasons proffered in these cases, it is still difficult to find a bona fide government interest in disenfranchisement. For example, in *Green v. Board of Elections of New York City*, the Second Circuit struck down a challenge to disenfranchisement after applying a rational basis review.[280] The plaintiff, a person recently released from a federal prison, challenged a New York law permanently disenfranchising all of those convicted of a federal felony.[281] The Court found two legitimate state purposes behind the law.[282] First, citing the philosophy of John Locke, the court held that the state could assert an interest in excluding from the social contract those who had violated it.[283] Second, fancifully conjuring the image of mafiosi voting for the district attorney, lawbreakers could not be trusted to elect the officials who make and enforce criminal law.[284]

To the extent this case espouses a viewpoint-based interest in disenfranchisement, that is, that convicted people should not be allowed to vote because their viewpoint may incline them to vote in favor of lax law enforcement, this justification can no longer stand. Denying the right to vote to someone because of their viewpoint appears to defy modern voter-Equal Protection doctrine, under which voters may not be excluded from the electorate based on their viewpoint.[285] It is most likely impermissible under the viewpoint discrimination doctrine of the First Amendment as well.[286] To the extent this

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F.3d 24, 44 (1st Cir. 2009) (applying the six-factor test to disenfranchisement of those in prison). Note that other common disabilities on felons are also regulatory rather than punitive. For instance, bans on jury service are said to be valid regulations of juror character. *See* Carter v. Jury Comm'n of Greene Cty., 396 U.S. 320, 332 (1970).

[280] *See Green*, 380 F.2d at 451–52.

[281] *Id.* at 447–48.

[282] *Id.* at 451.

[283] *Id.*; *accord* Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978); Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971) (finding it permissible to disenfranchise those with proven antisocial tendencies).

[284] Green v. Bd. of Elections, 380 F.2d 445, 451–52 (2d Cir. 1967); *accord Shepherd*, 575 F.2d at 1110, 1115 (finding that the state had a legitimate interest in disenfranchising those who cannot be trusted to follow the law).

[285] *See* Dunn v. Blumstein, 405 U.S. 330, 335 (1972) ("Tennessee's hopes for voters with a 'common interest in all matters pertaining to (the community's) government' is impermissible.").

[286] Though the idea has never been explicitly couched in First Amendment terms, it appears to dovetail with the anti-viewpoint discrimination doctrine of the First Amendment. *See* Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 135 (2013) (arguing that discrimination based on a voter's viewpoint would call forth strict scrutiny review, because violating First Amendment rights). *Cf.* Hand v. Scott, 888 F.3d 1206, 1211–12 (11th Cir. 2018) ("While a discretionary felon-reenfranchisement scheme that was facially or intentionally designed to discriminate based on viewpoint—say, for example, by barring Democrats, Republicans, or socialists from

case asserts a moral interest in maintaining the social contract, that interest may need to be credited, as will be discussed below.[287]

On a separate tack, the Second Circuit has asserted a basis in tradition and custom, though whether this is a formal "government interest" for rational basis purposes is uncertain.[288] The Second Circuit outlined that such practices have been present since the ancient world, persisted through medieval times, and were present in all of the colonies at the founding.[289] While the Second Circuit was discussing the "affirmative sanction" of the Fourteenth Amendment and its potential application to the Voting Rights Act, the court quoted *Green v. Board of Ed.* and implied that the holding in *Green* was partially based on a similar historical proposition.[290] But, note that the Second Circuit in *Hayden* was discussing the disenfranchisement only of those currently imprisoned,[291] while the *Green* court was concerned with permanent felon disenfranchisement.[292] The court in *Green* even noted, at least in dicta, that disenfranchisement for a minor offense rather than for a felony could raise a constitutional issue.[293]

In sum, the case law since the 1960's has established three legitimate government interests, that would still be acceptable as a matter of law, for disenfranchising convicted people after their terms end: (1) excluding social contract-violators and the anti-social from the electorate; (2) preventing election offenses;[294] and (3) adhering to tradition.

6. The government interests that exist do not adequately justify the practice of permanent felon disenfranchisement.

Since the interests that survive legal analysis do not match the moral goals of permanent felon disenfranchisement, Congress is entitled to find that such laws are rooted in unconstitutional animus against convicted people.

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reenfranchisement on account of their political affiliation—might violate the First Amendment, no such showing has been made in this case.") (citations omitted).

[287] *See* discussion *infra* notes 302–06 and accompanying discussion.

[288] *See* Hayden v. Pataki, 449 F.3d 305, 316–17 (2d Cir. 2006) (asserting that "the practice of disenfranchising those convicted of crimes is of ancient origin" and discussing the relevant history of criminal dienfranchisement).

[289] *See id.*; *see also* United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (arguing that courts should preserve, not revise, traditionally protected rights).

[290] *Hayden*, 449 F.3d at 316–17 (citing Green v. Bd. of Elections of City of New York, 380 F.2d 445, 450 (2d Cir. 1967)) (explaining the historical analysis of disenfranchisement previously taken on by the court).

[291] *Id.* at 309.

[292] *Green*, 380 F.2d at 447–48.

[293] *Id.* at 452. (stating "there may, of course, be crimes . . . which are of such minor significance that exclusion for their commission might raise not only a question of wisdom . . . but even a substantial constitutional question").

[294] Not discussed above, but examined by Justice Marshall in his dissent to *Richardson*. *See* Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting).

First of all, the small number of justifications offered for such laws may alone suggest that there is an impermissible motive because broad and severe laws should have nameable justifications.[295] The only justification that would clearly survive as a matter of law is the state's interest in preventing election offenses.[296] Whatever one's personal view of the policy, it is likely true that states have a rational basis for finding that election law violators, at least, should be excluded from elections because of the risk they pose to the electoral process. However, permanent felon disenfranchisement for all felony convictions could not possibly stand on this one leg alone. From the point of view of animus doctrine, Congress would be able to enter facts into the record that such a motivation cannot be credited because of the mismatch between this state interest and the breadth and unusual severity of disenfranchisement laws ,[297] the vanishingly few instances of electoral offenses in general, even taking the most generous possible definition of "electoral offense,"[298] and the fact that such offenses are already separately punished by criminal law.[299] If the policy of felon disenfranchisement stands (and it probably does), the social contract and tradition arguments must be valid.

Tradition, by itself, would be a dubious basis for such a law. A "tradition" is not a reason or a rationale. A tradition, as evidenced in a historical record, might serve as evidence of a state interest, but it must be a tradition *of something*, and that something ought to be a legitimate area of state legislation.[300]

In some low scrutiny contexts, it is most likely still acceptable for the state to legislate on the basis of morality,[301] even though mere morality is most likely not a compelling state interest when it comes to applying a higher level of

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[295] *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

[296] *See Richardson*, 418 U.S. at 79 (Marshall, J., dissenting).

[297] *See Romer*, 517 U.S. at 635 (finding that the given state interests could not be credited because they were "so far removed" from the breadth of the amendment at bar).

[298] Even the highly partisan Heritage Foundation could document only 1,177 proven instances of voter fraud across all levels of local, state and federal government, since 1982, and this list includes "crimes" such as inadvertent "fraud" committed by those unaware that they could not vote. *Election Fraud Cases from Across the United States*, THE HERITAGE FOUNDATION, https://www.heritage.org/voterfraud (last visited Nov. 23, 2019).

[299] Richardson, 418 U.S. at 80–81 (Marshall, J., dissenting) (arguing that, because voter fraud laws are extensive enough and adequate enough to prevent voter fraud and because disenfranchisement is much more "burdensome on the constitutionally protected right to vote," preventing voter fraud should not be a permissible state interest for felon disenfranchisement).

[300] For instance, in McGowan v. Maryland, 366 U.S. 420, 514 (1961), the Court found a legitimate state interest in Sunday closing laws, to grant citizens a day of rest and recuperation, even though the history of such laws demonstrated a nexus with religion that might by itself be an unacceptable basis for legislation. But it was the reasons found within the tradition, rather than the mere existence of a tradition, that justified the law.

[301] *See id.* at 450.

scrutiny.[302] Yet it is clear based on precedents, such as *Romer v. Evans*, that morality legislation tends to shade off into unconstitutional animus.[303] That Justice Scalia found himself in a series of cases fighting a losing rearguard in favor of morality legislation shows that the moral motive is, at best, open to question.[304] Still, the holding of *Richardson* compels the outcome that felon disenfranchisement may be upheld in some form as valid morality legislation, especially given that the decision was rooted[305] in the social-contractarian ideology of the framers of the Fourteenth Amendment.[306]

For purposes of determining the scope of society's moral interest in disenfranchisement, social-contractarian reasoning cannot be discounted as outside of mainstream morality. Likely many Americans believe that the social contract is important, and that felons deserve to lose some of their protections for committing crimes. Whatever the number of Americans who may still believe this, *Richardson* lends their point of view legal legitimacy. However, likely few Americans in 2019 believe that those who go to prison for a year or two are such serious offenders against the social contract as to warrant forever excluding them from the electorate.[307] To illustrate, take two petty criminals: Ted, who forged a prescription because he is addicted to opioids, and Greg, who stole his friend's camera so that he would have enough money to pay rent.[308] It strains credulity to say that the mainstream of American morality considers Ted and Greg such severe violators of the social contract that they should be forever barred from voting.[309] Indeed, only Kentucky, Iowa, Alabama, and Mississippi

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[302] *See* Lawrence v. Texas, 539 U.S. 558, 572 (2003) (stating that a history of moral disapprobation of sodomy could not justify sodomy laws in light of the individual's deep liberty interest in the privacy of sexual relations).

[303] *See* Romer v. Evans, 517 U.S. 620, 635 (1996) (finding that personal and religious opposition to homosexuality is not an "identifiable legitimate purpose or discrete objective" for the purposes of refusing to protect homosexual citizens from discrimination).

[304] *See id.* at 636–53 (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 586–605 (Scalia, J., dissenting) ("This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws [such as those prohibiting sodomy, incest and bestiality] can survive rational-basis review.").

[305] *See* discussion *supra* Section II.B.2.I

[306] *See supra* notes 152–59 and accompanying text.

[307] *See infra* note 313.

[308] The State of Alabama would consider both of these crimes to be "Crimes of Moral Turpitude" warranting permanent disenfranchisement. ALABAMA SECRETARY OF STATE, UPDATED VERSION OF MORAL TURPITUDE CRIMES, https://www.sos.alabama.gov/sites/default/files/voter.pdfs/Updated%20Version%20of%20Moral%20Turpitude%20Crimes.pdf (last visited Nov. 23, 2019).

[309] A 2016 poll found 63% of Americans in favor of restoring voting rights to felons who had completed sentences. Nathanial Rakich, *How Americans — And Democratic Candidates — Feel About Letting Felons Vote*, FIVETHIRTYEIGHT (May 6, 2019, 5:59 AM),

still permanently disenfranchise all or many minor felony offenders.[310] Based on all of this, the morality interest in permanently disenfranchising convicted people appears threadbare and likely does not deserve to be credited.[311] The severity of these laws and the grave mismatch between them and their stated moral goals entitle Congress to infer animus, given such precedents as *Romer*.[312]

Proof of affirmative animus by lawmakers abounds. Lawmakers sometimes speak with candor about their hatred of criminals and, while such statements do not place them under suspicion of violating the constitution, they do furnish many clear examples of a hatred that oversteps the social contract theory. For instance, in one speech against felon voting rights, Kentucky Senator Mitch McConnell, citing the need to defend the "social contract," attacked the idea of giving voting rights to "rapists, murderers, robbers, and even terrorists or spies."[313] But, of course, the Senator was haranguing a straw man by lumping Ted and Greg in with such heinous offenders. A statement that lumps Ted and Greg in with "rapists, murderers, robbers," "terrorists" and "spies," implies a hatred of Ted and Greg out of all proportion to the reality of their situation. Voters do not expect, and likely will not hear, similar diatribes against minor offenders caught up in desperate or pitiful circumstances. The moral justification only stretches so far and, when it comes to minor offenders, shades off into mere, unwarranted dislike. The moral justification perhaps covers Ted and Greg in some degree, but it does not appear to allow them to be excluded from the political process for the rest of their lives.

Having established that Congress is so entitled to act in the face of *permanent* disenfranchisement, it remains to ask what level of *non-permanent* disenfranchisement is constitutional. This question is related to the problem, framed above, of distinguishing the more from the less reprehensible social contract violator. Though Congress would be wise to build a record on this question, common sense suggests a formula for drawing a line between morality and animus. Society punishes criminals for several reasons—to prevent them from causing further harm, to discipline and reform them, and also, in some

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https://fivethirtyeight.com/features/how-americans-and-democratic-candidates-feel-about-letting-felons-vote/.

[310] *See State Felon Voting Laws*, PRO-CON, (July 2, 2019), https://felonvoting.procon.org/view.resource.php?resourceID=000286. Note that the practice has ended in Virginia only because of executive action, which could be reversed by the next governor. Additionally, several more states impose severe restrictions on vote restoration and that many bar probationers from voting. The approach suggested here would end both practices.

[311] *See* Romer v. Evans, 517 U.S. 620, 635 (1996).

[312] *Cf. Romer*, 517 U.S. at 635; *Cf.* ARAIZA, *supra* note 239, at 175–77 (arguing that determinations about certain Fourteenth Amendment rights will always require an inquiry into society's values, and that Congress is better positioned than the Courts to make such judgments about such value-laden "facts").

[313] 107 CONG. REC. 1494–95 (2002).

degree, for retribution.[314] Retribution states the moral reason for punishment. But the interest in retribution ends at the prison gates.[315] Assuming that every moment of a prison sentence is for the purpose of retribution,[316] it appears unlikely, then, that states should be entitled to disenfranchise people after their term of incarceration and for longer than the term of incarceration served. Otherwise, the moral interest in restricting the franchise after freedom would eclipse and overwhelm the moral interest in retribution during incarceration, especially in the case of, say, a petty offender who serves two years but cannot vote for 60 more. After a long enough period of disenfranchisement, it becomes more plausible that lawmakers are acting out of a mere desire to harm the convicted person than that they are acting out of a legitimate moral interest in excluding the social contract violator.

Therefore, after an offender's term of prison and parole ends, states should be restricted to disenfranchising felons for no longer than the individual's sentence of prison and parole served, with a cap, of 3-5 years after the end of parole. For instance, a felon serving two years could not vote for two years after the end of parole. This rule adjusts for a state's actual view of the individual's moral infirmity, again assuming that the sentence of prison expresses society's disapprobation of the criminal in some degree. An offender who spends twenty years in prison is disenfranchised for 23-25 years, a severe offender who never leaves prison also never votes, and Ted and Greg are not disenfranchised if they only receive probation, or are disenfranchised at a maximum of 2 years if they receive a typical term of 1 year. But the formula is not so strict as to involve a Congressional determination that felon disenfranchisement is subject to strict scrutiny, a determination which would entail overturning *Richardson*.[317] It permits the moral legislation that likely would be barred under a higher level of scrutiny and, within wide latitude, continues to permit some kinds of disenfranchisement. It ends only disenfranchisement to the extent that it has no actual moral sanction under state law, or where that moral sanction is almost certainly pretextual to a mere dislike of convicted people.

### B. *The Fifteenth Amendment*

Having determined the scope of an enforcement law that does not rest on evidence of societal racism, but rather on evidence of animus against the class of convicted people, this article now turns to the Fifteenth Amendment and asks whether even more may be possible once Congress's power to enforce a

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[314] *See, e.g.*, Mike J. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BR. J. AM. LEG. STUDIES 265 (2013) (describing incapacitation, deterrence, rehabilitation, and retribution as typical justifications for punishment).

[315] *See supra* notes 280–84 and accompanying text.

[316] In the United States, for better or worse, retribution is likely the primary purpose of incarceration. *See* ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT (2014).

[317] *See* Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

franchise free of race discrimination is accounted for. This section will first lay out the Fifteenth Amendment enforcement power and make a further argument for distinguishing it from the Fourteenth Amendment's. It will then consider two possible exercises of the power: first, creation of a cause of action that would allow plaintiffs to satisfy most of their burden of proof by showing racial impacts (as opposed to racial intent, the default standard); second, outright banning disenfranchisement for certain categories of crime.

1. The Fifteenth Amendment enforcement power.

As with the foregoing analysis of the Fourteenth Amendment, the first question is what powers the Fifteenth Amendment confers upon Congress. Many scholars assume the enforcement powers of the Fourteenth and Fifteenth Amendments have "collapsed together," and, therefore, that the Court's analysis of the Fifteenth Amendment power will mirror its analysis of the Fourteenth Amendment power.[318] If so, the Court will seek congruence and proportionality between Congress's chosen prophylaxis and a documented pattern of constitutional violations.[319] For the Fifteenth Amendment, prophylaxis would have to be congruent and proportional to denial or abridgment of the right to vote on account of color or race.[320] Given how often the Court has used the *Boerne* test to strike down Congressional enactments,[321] it would aid Congress in the exercise of its enforcement powers if, instead, the Fifteenth Amendment's enforcement power was greater than the narrow test of *Boerne*.

The Supreme Court has not been much help in clarifying the difference in standards between the Fourteenth and Fifteenth Amendments, if it does exist. The Court's discussion in *Boerne* suggests that it applies the same standard to both Amendments.[322] Confronted with this exact question in 2009, the Court declined to decide it, and said that the outcome under either test would have been the same.[323] However, in the Court's earliest review of the Voting Rights Act for the 1966 case of *South Carolina v. Katzenbach*, it tested Congress's

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[318] *See* Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1499 (2014); *see, e.g.*, Morley, *supra* note 97, at 2072 (treating the standards as indistinguishable).

[319] *See* City of Boerne v. Flores, 521 U.S. 507, 531–32 (1997).

[320] U.S. Const. amend. XV, § 1.

[321] *See, e.g.*, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (ruling unconstitutional congressional enactment abrogating state sovereign immunity for claims of disability discrimination); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (ruling unconstitutional congressional enactment abrogating state sovereign immunity for claims of age discrimination); *City of Boerne*, 521 U.S. at 507 (finding unconstitutional congressional enactment requiring that any law burdening religious practice be subject to strict scrutiny).

[322] *See City of Boerne*, 521 U.S. at 518.

[323] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 204 (2009).

prophylactic use of the Fifteenth Amendment enforcement power on a deferential rational basis standard, distinct from the test of *Boerne*.[324]

Examining some details of the enforcement measures the Court approved in *Katzenbach* will help to illustrate the evolution of the Court's Fifteenth Amendment enforcement powers doctrine. This, in turn, will help to define the power as it now stands.

Under the Voting Rights Act of 1965, Congress had required certain states and counties to seek clearance from the Department of Justice before changing their voting procedures.[325] Congress chose which jurisdictions would be subject to preclearance based on a formula that accounted for instances of actual discrimination against voters, the use of discriminatory devices like literacy tests, and low voter turnout rates.[326] In approving the formula and the accompanying preclearance procedure, the Court announced that Congress's power under the Fifteenth Amendment was equivalent to its power under the "necessary and proper" clause of Article I,[327] signaling to many observers that the Court would grant Congress a broad power to prescribe constitutional prophylaxis under the Fifteenth Amendment.[328] In striking down this same preclearance formula in 2013's *Shelby County v. Holder*, the Court ostensibly deployed the same rational basis standard of *Katzenbach*.[329] It heightened the standard of review from *Katzenbach*, however, by weighing two federalism costs: (1) Congress's violation of the principle of equal state sovereignty; and (2) Congress's burdening of the sovereign governmental functions of individual states.[330] The Court held that, given these federalism costs, Congress could not use a coverage formula "based on decades-old data and eradicated practices."[331]

Thus, the Court's appeal to the "rational basis" standard in *Shelby*, ostensibly the same standard as used in *Katzenbach,* disguised a more searching approach that cannot be called "rational basis."[332] Whatever label it may choose to describe the standard, the Court has signaled that it will reject historical evidence of discrimination, even though such evidence may be probative of

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[324] *Compare* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (applying a rational basis standard to Congressional use of the Fifteenth Amendment power) *with City of Boerne*, 521 U.S. at 519–21 (applying a stringent "congruence and proportionality" standard to Congressional use of the Fourteenth Amendment enforcement power).

[325] *Id.* at 329–30.

[326] *Id.*

[327] *Id.* at 327.

[328] *See* ARAIZA, *supra* note 239, at 93–94.

[329] Shelby Cty. v. Holder, 570 U.S. 529, 550 (2013) (*citing Katzenbach*, 383 U.S. at 330).

[330] *Id.* at 542–43.

[331] *Id.* at 551.

[332] *See* Jon Greenbaum, Alan Martinson & Sonia Gill, *Shelby County v. Holder: When the Rational Becomes Irrational*, 57 HOW. L.J. 811, 837–40 (2014) (arguing that the "rational basis" of *Shelby Cty.* departed from precedent by placing the burden of proof on Congress, narrowing the scope of valid evidence, and substituting its own judgment for that of Congress).

discrimination in the present, and instead place heavy emphasis on current trends.[333] The Court will also engage in an open-ended federalism-costs analysis with the most dubious basis in case law.[334] It is even possible that, given its exacting approach, *Shelby* is best understood as an application of the congruence and proportionality standard of *Boerne*, rather than application of the rational basis test of *Katzenbach*.[335]

But it is both logical and consistent with the structure of the constitution to treat the Fourteenth and Fifteenth Amendment enforcement powers as distinct.[336] The Fourteenth and Fifteenth Amendments protect distinct rights in spite of the similar wording of their enforcement powers.[337] Moreover, if part of the purpose of the holding in *Boerne* was to ensure that Congress could not overturn the Court's interpretation of the Equal Protection and Due Process clauses, that purpose is inapplicable to the Fifteenth Amendment, the plain wording of which requires little or no interpretation.[338] Moreover, the Fifteenth Amendment has always been understood to have its own scope.[339] Daniel Tokaji concurs that the Court's standard in *Shelby* is slightly more deferential than the *Boerne* standard, given the Court's explicit avoidance of the *Boerne* standard, and its explicit use of a separate "rationality" standard.[340]

Given the logical need for the distinction, and given the legitimacy conferred by its use in *Shelby*, this section will test a hypothetical disenfranchisement ban on this more lenient rational basis standard, accounting for the two state interests the Court balanced against Congress's enactment: (1) burdens on state sovereignty; (2) burdens on the principle of equal sovereignty between the states.[341] However, while this latter factor will be considered, it most likely does not weigh heavily in the analysis, because the equal sovereignty concerns raised in *Shelby* appear to stem from the extraordinary procedure at issue there, which

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[333] *Id.* at 837–38.

[334] *See id.* at 854.

[335] *See* Calvin Massey, *The Effect of Shelby County on Enforcement of the Reconstruction Amendments*, 29 J.L. & POL. 397, 404–05 (2014) (arguing that the *Shelby Cty.* court's requirement of a close fit to a proven pattern of constitutional violations makes its analysis indistinguishable from what would have been required under *City of Boerne*).

[336] Jeremy Amar-Dolan, *The Voting Rights Act and the Fifteenth Amendment Standard of Review*, 16 U. PA. J. CONST. L. 1477, 1490–91 (2014).

[337] *Id.* at 1491.

[338] *Id.* at 1494–95.

[339] *Id.* at 1495–1501 (describing the history of rational basis testing in the Fifteenth Amendment context, the structure of the Reconstruction amendments and the narrow, self-interpreting scope of the Fifteenth Amendment, to argue that the Fifteenth Amendment enforcement power has been and ought to be seen as distinct from the Fourteenth Amendment's).

[340] *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 466 (2015).

[341] *See* Shelby Cty. v. Holder, 570 U.S. 529, 544–45 (2013).

required states passing *the same law* to use different procedures.[342] Still, out of caution and with an eye towards crafting legislation that would stand the best chance of surviving review, this factor will be considered where it appears relevant.

2. The First Possibility: create a cause of action that would allow plaintiffs to prevail on proof of disparate racial impacts.

The Voting Rights Act provides a blueprint to any Congress wishing to re-enfranchise felons. Section two of the VRA authorizes a cause of action "to enforce the voting guarantees of the Fourteenth[343] or Fifteenth Amendment."[344] Congress could create a parallel cause of action for felon disenfranchisement and create special procedures to ensure the cause of action is effective. The blueprint of section two of the Voting Rights Act makes it straightforward to at least identify the constitutional framework that applies. A brief overview of section two's history, as well as plaintiffs' attempts to use it to attack felon disenfranchisement laws, will help to answer the question of what Congress might be able to accomplish with a similar cause of action for felon disenfranchisement.

Unlike suits brought under the Fourteenth Amendment, where plaintiffs must prove not just discriminatory impact but the discriminatory intent of state actors,[345] a plaintiff challenging a voting law under section two need only prove the less burdensome argument that a given law "*results* in a denial or abridgement" of the right to vote "on account of race."[346] Plaintiffs can establish such a denial or abridgement if, under the totality of circumstances, members of the affected racial group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[347]

Congress amended the language of the statute in 1982 to ensure that the standard would continue to provide a remedy for laws with racially discriminatory results,[348] repudiating a plurality of the Supreme Court in *City*

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[342] *See id.*

[343] The phrasing of section two raises the possibility that a Fourteenth Amendment standard of review would be more appropriate. The language of section one, which defines the right enforceable in section two, continues, however, to use the language of the Fifteenth Amendment "on account of race or color," 52 U.S.C. § 10301 (2018). For the reasons already given, this section will continue to apply a Fifteenth Amendment standard.

[344] 52 U.S.C. § 10302 (2018).

[345] *See* McCleskey v. Kemp, 481 U.S. 279, 291–99 (1987).

[346] 52 U.S.C. § 10301(a) (emphasis added).

[347] 52 U.S.C. § 10301(b).

[348] *See* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 386–87 (2012); Joshua S. Sellers, *The Irony of Intent: Statutory Interpretation and the Constitutionality of Section 2 of the Voting Rights Act*, 76 L.A. REV. 43, 48 (2015).

*of Mobile v. Bolden*, which had found that a section two plaintiff must prove discriminatory intent.[349] A framework for addressing claims of vote dilution has emerged under the rubric of section two, based on the 1986 Supreme Court case *Thornburg v. Gingles*.[350] Courts first determine that the racial community in question could have formed a majority district on its own, that the community is politically cohesive, and that the racial majority votes as a bloc against minority candidates.[351] Once plaintiffs satisfy these preliminary factors, courts will address the totality of circumstances,[352] guided (but not limited) by the Senate's report on the 1982 legislation, which listed factors relevant to the totality of circumstances including (i) the history of official discrimination within a locality, (ii) racial polarization in elections, and (iii) the use of voting practices and procedures that tend to discriminate against minority racial groups, amongst many other factors.[353] While this impacts-based test does apply to vote denial—the relevant inquiry for felon disenfranchisement—its application remains underdeveloped in comparison to vote dilution.[354]

Nevertheless, plaintiffs have mounted several attacks on felon disenfranchisement under section two, and at least two circuits—the Ninth and the Sixth—have found that plaintiffs may state a claim for race-based vote denial against state disenfranchisement laws.[355] The Sixth Circuit decision, however, is under-analyzed,[356] and, in spite of being decided thirty-three years ago, does not appear to have opened the door to section two challenges to felon disenfranchisement in that circuit.[357] Meanwhile the First, Second and Eleventh Circuits have all found that challenges to felon disenfranchisement are not actionable *at all* under section two.[358] Since the Supreme Court has not yet

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[349] City of Mobile v. Bolden, 446 U.S. 55, 63–65 (1980).

[350] 478 U.S. 30 (1986). Tokaji explains that, while *Gingles* addressed only multimember districts, its framework has been used in general by lower courts to decide all voter dilution cases. *See id.* at 445 n.43.

[351] *See Gingles*, 478 U.S. at 50–51.

[352] Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 596 (2013).

[353] *Id.* at 593–94.

[354] *Id.* at 595.

[355] *See* Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010); Wesley v. Collins, 791 F.2d 1255, 1259 (6th Cir. 1986).

[356] *See Wesley*, 791 F.2d at 1259 (analyzing plaintiffs' claim without any preliminary analysis of why section two should apply to a felon disenfranchisement statute).

[357] *See, e.g.*, Johnson v. Bredesen, 579 F. Supp. 2d 1044, 1050 (M.D. Tenn. 2008), *aff'd*, 624 F.3d 742 (6th Cir. 2010) (convicted felons challenged Tennessee's process for restoring the right to vote, bringing a voting rights claim only in order to challenge the state's required fees as a "poll tax").

[358] Simmons v. Galvin, 575 F.3d 24, 42 (1st Cir. 2009) (overturning the lower court's judgment on the pleadings in favor of plaintiffs, which had found felon disenfranchisement actionable under the VRA); Hayden v. Pataki, 449 F.3d 305, 336 (2d Cir. 2006) (upholding dismissal on the grounds that the VRA does not apply to felon disenfranchisement); Johnson

considered the issue,[359] Congress could pass a law that would, in essence, override the circuit split, establishing that felon disenfranchisement is actionable, and opening to plaintiffs a more generous impacts-totality test, perhaps modeled on *Gingles* and its progeny.[360] At first glance, such a law would not appear to overturn *Richardson*,[361] and would give plaintiffs more leeway than the narrow standard of *Hunter*, which requires litigants to prove racist intent in the passage of disenfranchisement laws.[362]

a. *Federalism problems with finding felon disenfranchisement actionable under Section Two.*

Three circuits have found federalism problems in applying section two of the Voting Rights Act to felon disenfranchisement.[363] For the purposes of this article, they have run a useful simulation. Since section two is, as discussed, an impacts-based test, permitting a cause of action for felon disenfranchisement would have incurred the same federalism costs as a brand-new impacts-based cause of action for felon disenfranchisement. Therefore, these courts' analyses are on all fours with the argument of this section of the article. The considerations of at least two of these courts suggest that the famous "affirmative sanction" of *Richardson* raises special federalism concerns with creating a cause of action for felon disenfranchisement.[364] Their discussions, moreover, track *Shelby's* suggestion that Congressional use of the enforcement powers to alter state voter qualifications would incur federalism costs.[365] The circuit courts looked for Congress to build an extensive record and exercise its powers with a light touch, just as the Supreme Court would probably require under the rule of *Shelby*.[366]

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v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc) (granting summary judgment against plaintiffs, on the finding that VRA does not apply to felon disenfranchisement). As *Galvin* follows *Johnson* and *Hayden* with relatively little discussion, it will not be discussed below.

[359] Matthew Feinberg, *Suffering Without Suffrage: Why Felon Disenfranchisement Constitutes Vote Denial Under Section Two of the Voting Rights Act*, 8 HASTINGS RACE & POVERTY L. J. 61, 67–68 (2011).

[360] *See* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 737 (1998).

[361] Because, as discussed above, *Richardson* does not shield or otherwise bless race discrimination in the administration of a felon disenfranchisement policy. *See supra* notes 217–21 and accompanying discussion.

[362] *See* Hunter v. Underwood, 471 U.S. 222, 231–32 (1985).

[363] *See Johnson*, 405 F.3d at 1232 n.35; *Hayden*, 449 F.3d at 323; *Galvin*, 575 F.3d at 31. The discussion in *Simmons* merely endorsed the reasoning of the other circuits and will not be addressed at length here.

[364] *See infra* notes 369–387 and accompanying discussion.

[365] *See* Shelby Cty. v. Holder, 570 U.S. 529, 543 (2013).

[366] *See supra* notes 337–40 and accompanying discussion.

In *Johnson v. Governor of the State of Florida,* the Eleventh Circuit considered a race-based section two challenge to Florida's felon disenfranchisement laws.[367] The court found that, if section two were applicable to felon disenfranchisement, it would challenge the holding of *Richardson* and therefore allow a congressional statute to override the text of the Constitution."[368] The court proved the existence of a constitutional problem by applying *Boerne*: felon disenfranchisement was a constitutionally "protected" practice, and so banning it could not be congruent and proportional to any constitutional violation.[369] Congress would have needed to develop a substantial record to justify such a use of its enforcement power, which it had not done.[370] Since the court would not presume such an unconstitutional outcome, it looked for evidence of Congress's intent in passing the Voting Rights Act.[371] Finding, first, that Congress in 1965 had expressly excluded the practice of felon disenfranchisement from its ban on discriminatory devices,[372] and had taken no further steps to address the practice in its 1982 amendments,[373] the court held that Congress could not have intended to add felon disenfranchisement to the cause of action under section two.[374]

The Second Circuit in *Hayden v. Pataki*, hearing a challenge to New York's felon disenfranchisement laws, further elaborated on the federalism themes of the *Johnson* opinion.[375] Quoting Justice Holmes for the proposition that judges determine statutory intent not just by reading text but by applying "experience,"[376] the court recited a near litany of reasons why Congress could not have intended for section two to apply to felon disenfranchisement in spite of its open-ended language.[377]

But, more to the point of the federalism analysis here, the *Hayden* court found its reasoning about the intent of Congress "confirmed and supported" by the canon of the "clear statement rule,"[378] by which the Court, whenever a law impacts the state-federal balance of power, seeks from Congress a clear statement of intent to override state sovereignty.[379] Echoing Justice Scalia in his opinion in *ITCA*,[380] the court found such a rule would encroach upon states'

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[367] *See* Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005).

[368] *Id.* at 1229.

[369] *Id.* at 1230.

[370] *Id.* at 1231.

[371] *Id.* at 1232.

[372] *Id.* at 1233.

[373] *Id.* at 1234.

[374] *Id.*

[375] Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006).

[376] *Id.* at 315 (*quoting* Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928)).

[377] *Hayden*, 449 F.3d. at 315–16.

[378] *Id.* at 323.

[379] *Id.* at 326.

[380] *See* Arizona v. Inter Tribal Council of Ariz., 570 U.S. 1, 16–17 (2013).

sovereign right to define voter qualifications, and that it would encroach upon state sovereignty over criminal law and correctional institutions as well.[381] While four judges voted in favor of the "clear statement" holding,[382] two judges further argued in a concurring opinion that there was a constitutional problem with applying section two to felon disenfranchisement, much as the majority in *Johnson* thought.[383] The concurring judges found that, because Congress had not developed a record on the matter, and did not intend to reach felon disenfranchisement, plaintiffs' interpretation of section two would render it incongruent and disproportional.[384]

The reasoning in these cases is suspect, because a search of Congressional intent was likely improper given the plain, open-ended language of section two.[385] Nevertheless, these three circuits agree that any prophylactic application of section two to felon disenfranchisement raises federalism concerns.[386] Their reasoning tracks the Supreme Court's likely protectiveness of the states' sovereignty over voter qualifications, expressed in *Shelby*.[387] The circuits' judgments likely reflect the truth that the Supreme Court would not allow section two to become an end-run around its federalism doctrine, which fits the scholarly consensus that *Boerne* and *Shelby* spell trouble for section two's results test in general.[388]

b. *Solving the sovereignty issues with a cause of action for felon disenfranchisement.*

Recall that, under *Shelby,* Congress will have to satisfy two prongs of review in applying the hypothetical Fifteenth Amendment review. It will have to prove that (i) impacts on state sovereign functions are justified by a current evidentiary record proving racial discrimination in voting and (ii) that any violations of the rule of equal sovereignty are likewise justified by the record.[389] The holdings of

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[381] Hayden v. Pataki, 449 F.3d 305, 326–28 (2d Cir. 2006).

[382] *Id.* at 309.

[383] *Id.* at 329–47 (Walker, J., concurring).

[384] *Id.* at 336 (Walker, J., concurring).

[385] Matthew E. Feinberg, *Suffering Without Suffrage: Why Felon Disenfranchisement Constitutes Vote Denial Under Section Two of the Voting Rights Act*, 8 HASTINGS RACE & POVERTY L. J. 61, 80–90 (2011).

[386] *See supra* notes 378–401 and accompanying discussion.

[387] *See* Shelby Cty. v. Holder, 570 U.S. 529, 543 (2013).

[388] *See, e.g.*, Sellers, *supra* note 348, at 53–61 (finding that holdings like *Boerne* and *Shelby Cty.* call into question the constitutionality of section two's results test); Tokaji, *supra* note 340, at 446, 473 ("[A]pplications of § 2 that reach far beyond unconstitutional voting practices are in greater jeopardy than those which go only slightly beyond that line. That is true whether the standard for judging the exercise of Congress's enforcement powers is *Boerne*'s 'congruence and proportionality' test, or the more deferential standard that the Court applied in *McCulloch*, *Katzenbach*, and (possibly) *Shelby County*.").

[389] *See Shelby Cty.*, 570 U.S. at 542–45.

*Hayden* and *Johnson* seem to speak to *Shelby's* first prong, as they describe felon enfranchisement as impacting state sovereignty, and require Congress to build an evidentiary record in order to justify placing this burden on states.[390] But do these cases provide valid rules for interpreting the constitutionality of section two?

The *Hayden* court addressed Congress's fact-finding burden, putting the problem into relief. As the concurrence to *Hayden* found, Congress did enter facts into the record about certain practices, such as at-large voting districts, in order to justify the results test of the 1982 amendment, suggesting that it should also fact-find if it intends to bring felon disenfranchisement into the section two cause of action.[391] But a reader may just as reasonably side with Congress's report on the legislation, in which it questioned the need to justify section two with data regarding discrimination from the country as a whole.[392] Congress found that, unlike section five, which requires certain jurisdictions to preclear changes to their voting rules, "by definition, no such issue arises in the case of provisions with literally nationwide application, such as section 2 of the act."[393] Moreover, the intrusion on state functions is minimal because section two does not outright ban any practice, but only those which "can be proven in a court of law to have discriminatory results."[394]

Of course, Congress wrote before the federalist turn in enforcement power jurisprudence that began with *City of Boerne*. Still, the *Kimel-Garrett* line of cases, which address the state-sovereignty problem with abrogating sovereign immunity, embrace a paradox. Why does Congress need to fact find to create a cause of action, where litigants are the fact-finders? The nature of a Court action seems to foreclose the possibility of improperly overstepping state sovereignty. Consider a hypothetical state, Shangri-la, whose felon disenfranchisement policies evidence no unconstitutionality of any kind. If there is no evidence of wrongdoing in Shangri-la, then Congress has not in fact impinged upon state sovereignty in Shangri-la, because plaintiffs cannot prevail where there is no evidence.[395] Where plaintiffs can prevail, the only cost (or at least the main cost) is unconstitutional conduct, which state sovereignty cannot shield.

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[390] *See* Hayden v. Pataki, 449 F.3d 305, 326–47 (2d Cir. 2006); Johnson v. Governor of Fla., 405 F.3d 1214, 1229–34 (11th Cir. 2005).

[391] *Hayden*, 449 F.3d at 333 (*citing* S. REP. No. 97–417, at 19–24 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 196–201)).

[392] *See* S. REP. NO. 97-417, at 41-42 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 219-20.

[393] *See* S. REP. NO. 97-417, at 41-42 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 220. S. REP. 97-417, 42, *reprinted in* 1982 U.S.C.C.A.N. 177, 220.

[394] *See* S. REP. NO. 97-417, at 41-42 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 220 S. REP. 97-417, 42, reprinted *in* 1982 U.S.C.C.A.N. 177, 220 (*quoting* Norman Dorsen, Prepared Statement, P. 5).

[395] *Cf.* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 662–63 (1999) (Stevens, J. concurring) ("That congruence is equally precise whether infringement of patents by state actors is rare or frequent. If they are indeed unusual, the

The Court, however, likely will view the felon disenfranchisement cause of action as creating a sovereignty burden commensurate or at least comparable to, if not as great as, the piercing of sovereign immunity. In theory, the felon disenfranchisement cause of action would reach into some constitutional conduct otherwise protected by state sovereignty, at least sometimes, because its cause of action measures *impacts* rather than *intent.* Because it measures impacts, the evidence in a given case will not necessarily correspond only to unconstitutional state action.[396] Given enough litigation, a certain subset of cases will likely result in injunctions against constitutional state action, because such a prophylaxis is necessarily imperfect.[397] That is likely to be viewed as a high burden on state sovereignty. Even if such an injunction is not as severe as breaching the sovereign immunity—the issue with which most enforcement powers cases have been concerned—it is doubtful that Congress would be relieved of its evidentiary burden on that basis alone, given the Court's likely protectiveness of state sovereignty over voter qualifications.[398]

*Shelby County* itself provides another point of comparison in determining the fact-finding burden Congress may have to carry, this time suggesting that Congress may be able to justify and overcome any sovereignty impacts. Language in this case suggests that an impacts test does not impose the same sort of burden as policies that interfere with the administration of state laws. Indeed, the Court was careful to distinguish the section five procedure, which required the states to seek permission from the Attorney General before changing voting laws, with the cause of action under section two, pointing out that "[s]tates must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own, subject of course to any injunction in a § 2 action."[399] The Court, in this formulation, treated the section two cause of action as feather-light compared to the burdensome procedures of section five.

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statute will operate only in those rare cases. But if such infringements are common, or should become common as state activities in the commercial arena increase, the impact of the statute will likewise expand in precise harmony with the growth of the problem that Congress anticipated and sought to prevent.").

[396] That is why an impacts-based test is more generous to plaintiffs and favored by policy-makers as a prophylactic: it permits the admission of evidence with no direct bearing on unconstitutional state action, effectively allowing evidence of racially disparate impacts to stand in the stead (at least in part) of evidence of intent. *See* discussion *infra* section IV.B.2.

[397] In the terminology of *City of Boerne*, it is congruent and proportional, but not precise—nor does the plain text of the *Boerne* holding require such precision, but allows that prophylaxis is necessarily imperfect. *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.").

[398] *See* Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 50 (2007).

[399] Shelby Cty. v. Holder, 570 U.S. 529, 544 (2013).

Moreover, the Court has found that the impacts-based test for employment discrimination under the Civil Rights Act validly breaches state sovereign immunity.[400] That outcome is in harmony with case law holding that Congress has more leeway to legislate in areas where the Court applies higher scrutiny (for Title VII, the areas of race and gender).[401] Here, likewise, Congress would be working under the more permissive scope of the Fifteenth Amendment and, so, perhaps the Court would require less fact-finding than it otherwise might have.

In sum, it appears that an impacts-based cause of action should not receive the same level of scrutiny as section five did in *Shelby*, and it appears to be more like the kinds of constitutional prophylaxis the Court has permitted in the past. If so, then perhaps Congress can establish the cause of action with evidence from only a few states, mixed with evidence from society more broadly, rather than canvassing each and every state for discrimination in felon disenfranchisement. It is possible, then, that the existence of the *Hunter* case, mixed in with statistical data and evidence about unconstitutional discrimination in law enforcement, would suffice. If so, the felon disenfranchisement cause of action begins to look like a potent tool.

Moreover, under *Shelby's second* prong the felon disenfranchisement cause of action would not give rise to any equal sovereignty problem because it creates a cause of action applicable to all of the states. It is possible to argue that there is an equal sovereignty problem, as two states impose no restrictions on felon voting, and so the cause of action impacts only forty-eight states.[402] That, however, would be like arguing that section 1983 would create an equal sovereignty problem if there were a state like our Shangri-la with no history of its state actors ever discriminating against its citizens. That would be an absurd outcome. Indeed, the plaintiffs in *Shelby* contrasted the nationwide reach of section two with the narrow geographic coverage of section five,[403] and the

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[400] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976).

[401] Note, too, that the Court approved of the use of impacts testing in the preclearance procedures of the Voting Rights Act in City of Rome v. United States, 446 U.S. 156, 177–78 (1980). Of course, the Court struck these preclearance procedures in *Shelby Cty.*, while at the same time making clear that it passed no judgment as to the impacts test of section two. The Court, moreover, expressed approval of impact testing in *City of Boerne v. Flores*, 521 U.S. at 532.

[402] *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CENTER FOR JUSTICE (Dec. 7, 2018), https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states (last visited Nov. 23, 2019).

[403] For instance, the plaintiff's complaint reads: "Section 2 of the VRA enforced the substantive guarantee of the Fifteenth Amendment by outlawing any "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." Complaint at 2, Shelby County. Ala. v. Holder, 811 F. Supp. 2d 424, 437 (D. D.C. (2011) (No. 1-1:10-cv-00651) (citing Voting Rights Act, 42 U.S.C. § 1973). This prohibition applied nationwide. *Id.*

Court followed suit.[404] Thus, the section two solution certainly possesses the virtue of avoiding the equal sovereignty problem.

However, even if Congress could find adequate facts and address any state sovereignty impacts, courts might not respond by striking down felon disenfranchisement laws. For instance, in the sole circuit to find a cause of action under section two for felon disenfranchisement,[405] the court first admitted evidence of racial bias in the criminal justice system as probative of the totality of the circumstances.[406] However in the wake of the *Johnson* and *Hayden* decisions, the court found in a later rehearing that such evidence would have to prove *intentional* discrimination in the criminal justice system.[407] Meanwhile, in general, lower courts have drifted away from allowing plaintiffs to prevail on "impacts-plus" claims, i.e. claims based on showings of racially disparate impact plus one or two of the *Gingles* factors.[408] Many courts outright require a showing of intentional vote denial.[409] Given these trends, even creating an explicit cause of action does not guarantee that courts will strike down any state laws.

Congress could respond to both the state-sovereignty impacts flagged by the *Hayden* and *Johnson* decisions and the evidentiary problems raised here by manipulating the relevant evidentiary standards.[410] In this way, Congress could ensure a minimum of false positives, while still giving plaintiffs the benefit of the totality of circumstances test. Congress could limit the cause of action to enumerated sections of states' penal laws, or at least require that plaintiffs state their claims in terms of specific violations of the state's penal code, for instance drug possession.[411] This limitation would limit potential sovereignty impacts,

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Other provisions of the statute applied only to certain jurisdictions pursuant to a geographic "coverage" formula established by the VRA." Complaint at 2, *Shelby Cty.*, 811 F. Supp. 2d at 427.

[404] *See* Shelby Cty. v. Holder, 570 U.S. 529, 537 (2013) ("Section 2 is permanent, applies nationwide, and is not at issue in this case.").

[405] *See* Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010).

[406] *See id.* at 996–97.

[407] *Id.* at 993–94.

[408] *See* Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L.L. REV. 93, 145–146 (2018).

[409] *See* Sellers, *supra* note 348, at 63–70.

[410] *Cf.* Christopher S. Elmendorf, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2167 (2015) (proposing a standard that would allow plaintiffs to prevail in section two suits by proving a significant likelihood of racially-motivated voting patterns, which would be provable by certain kinds of statistical showings about racial bias in society generally).

[411] But note that the court could subject a law of this sort to strict scrutiny, because it tends to treat all classifications based on race as constitutionally suspect, even when those classifications are meant to benefit disadvantaged communities. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725–26 (2007) (finding that there is no

as courts would be invalidating disenfranchisement only as to certain crimes. Rather than requiring that plaintiffs show that racial bias in the criminal justice system proximately caused the vote denial, Congress can require plaintiffs to produce evidence of a "causal context" of vote denial through the history of racial disparity in the criminal justice system, coupled with circumstantial evidence of racism and bias in the jurisdiction.[412] In this way, Congress would eliminate the intent test of the Ninth Circuit.[413] To counterbalance the sovereignty intrusion caused by eliminating that test, the state, in turn, would have the chance to show by a preponderance of evidence that the penal policy in question was either (1) a policy necessary and indispensable to public safety and (2) unrelated to race. In fact, for the most part, states should be able to carry this burden. It should only be in cases where a certain crime has a clear racial impact, and the plaintiff shows that other explanations cannot be credited, that the disenfranchisement will be struck down.

Because the cause of action can be tailored to the situation in individual states so as to minimize sovereignty impacts and because it resembles laws the Court has upheld in the past, this solution appears to be a strong one.

3. The Second Possibility: banning felon disenfranchisement as a racist device akin to literacy tests.

History offers some hope that Congress may be able to take even bolder steps to re-enfranchise at least some felons, though the current state of the law makes this path more doubtful than creating a cause of action. Analogous to the literacy tests Congress has struck down under its Fifteenth Amendment powers,[414] felon

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compelling interest in diverse public schools, and that affirmative discrimination to foster school diversity was unconstitutional state action). The Court applies the doctrine even to districts meant to respond to Section 2 problems. *See* Shaw v. Reno, 509 U.S. 630, 654–55 (1993); *see also* Morley, *supra* note 97, at 2105–06 (2018) (arguing that Section 2 may be threatened by the Court's tendency in recent years to require strict equality of treatment between all voters, because Section 2 extends special protections to certain groups based on their racial identity). Congress might therefore consider requiring Courts to craft injunctions in a race neutral fashion, for instance, ending disenfranchisement for all of those imprisoned for less than a certain term.

[412] *See* Nelson, *supra* note 352, at 626–28 (arguing that courts should account for the "causal context" of racism in section two cases, rather than asking Plaintiffs to overcome to considerable burden of proving actual intent).

[413] Farrakhan v. Gregoire, 623 F.3d 990, 993–94 (9th Cir. 2010); *see also* Nelson *supra* note 352, at 626–28.

[414] Voting Rights Act Amendments of 1970 § 6, Pub. L. No. 91-285, 84 Stat. 314, 315 (1970) (codified as amended at 52 U.S.C.A. § 10303 (2014)). While secondary sources sometimes fail to differentiate between Fourteenth and Fifteenth Amendment powers in the Voting Rights context, Congress chose language from the Fifteenth Amendment to introduce the literacy test ban: "To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color." 52 U.S.C.A. § 10303.

disenfranchisement can be seen as a racist device and regulated as such.[415] Many felon disenfranchisement laws were passed, as in *Hunter*, with demonstrable racist intent, much like the literacy tests whose ban the Court upheld in 1975.[416] Moreover, just as racism in the educational system made it more likely that Black Americans would fail literacy tests, racism in the criminal justice system makes it more likely that Black Americans will be disenfranchised for crimes for which a white person is unlikely to be arrested or tried.[417] Finally, much like literacy tests in the south, processes for enforcing and granting relief from these laws are prone to racial bias.[418] It appears that Congress can make the case that felon disenfranchisement is a racist device tending to deny or abridge the right to vote on account of race. Perhaps, then, it could ban the practice under its Fifteenth Amendment powers. Indeed, it has twice in the past considered adding such a ban to the Voting Rights Act.[419] Under *Richardson*, it cannot do so wholesale, but could it do so in some part?

Again, Congress will have to satisfy two prongs of review in applying the hypothetical Fifteenth Amendment review standard of *Shelby*. It will have to prove that (i) impacts on state sovereign functions are justified by a current evidentiary record proving racial discrimination in voting and (ii) that any violations of the rule of equal sovereignty are likewise justified by the record.[420]

First, felon enfranchisement imposes federalism costs on individual states because it invades the states' sovereignty over voter qualifications. That much can be surmised from the hints of *Shelby* and by analogy to the federalism analyses of the circuit courts that have reviewed challenges to felon disenfranchisement laws under section two of the Voting Rights Act. Whatever impacts exist might be offset by synergy with the anti-animus justification Congress may claim under the Fourteenth Amendment enforcement power.[421] After all, many of those receiving voting rights from Congress's use of its Fifteenth Amendment power may have been able to receive it independently from Congress's use of its Fourteenth Amendment power.[422] That possibility will be examined below.[423] For now, in the absence of empirical evidence on point, the best this article can do is offer a conjecture by analogy. If creating an

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[415] The argument is fully developed by Daniel S. Goldman in T*he Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611 (2004).

[416] Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 625–27 (2004). *Id.* at 616, 625–627.

[417] *Id.* at 628–632.

[418] *Id.* at 640.

[419] *See* Hayden v. Pataki, 449 F.3d 305, 319 (2d Cir. 2006).

[420] *See* Shelby Cty. v. Holder, 570 U.S. 529, 543 (2013).

[421] *See* discussion *supra* Sections II.A.2-4.

[422] *See* discussion *supra* Sections II.A.2-4 (finding that Congress's Fourteenth Amendment enforcement power may be used to give the vote to those who have completed a sentence of prison).

[423] *See* discussion *infra* Section IV.

impacts-based cause of action imposes federalism costs, reaching directly in to state sovereignty and overriding state laws must impose a comparatively greater cost. A law of this sort appears to be closer to the burdensome procedures of section five that the Court struck down in *Shelby* than the impacts-based cause of action the Court appeared to bless in the same case.[424] Moreover, it is impossible in this case to craft narrowing evidentiary procedures to account for the sovereignty problems, as would be possible in creating a cause of action.

Second, any such enfranchisement could raise an equal-sovereignty issue because each state treats convicted felons differently, from permanently disenfranchising all felons, to disenfranchising for a term, until the completion of their sentence, or not at all (even when in prison).[425] For instance, if Congress wanted to end disenfranchisement in a certain category of crime for all of those currently imprisoned, its enactment would reach all forty-eight states except Vermont and Maine, which do not disenfranchise the currently incarcerated.[426] But would a law crafted in this way be treating states differently? More precisely, does a universal rule that affects only certain states raise an equal sovereignty problem? It did in *Shelby*, though that case also involved general rules clearly intended to target certain states, namely, those in the south.[427]

The equal sovereignty standard is thus ambivalent. A law could be crafted to apply prospectively to all states, with the effect of preventing states without felon disenfranchisement laws from instituting them.[428] Structured in this way, structured in this way, the law would apply to all of the states evenly. Apparently, though, given its fact-finding burden, Congress could not legislate in this way. Instead, Congress is probably limited either to regulating in jurisdictions where it can prove racism, or trying to find evidence of a nationwide racist trend. Six years before *Shelby,* Richard Hasen pointed out that any Congressional enactment directly enfranchising currently disenfranchised felons may well need both geographical and temporal limits to survive Supreme

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[424] *See* discussion *supra* Section III.B.1. Yet this reasoning would appear to threaten the literacy-test ban of the 1975 Voting Rights Act, 52 U.S.C. § 10303(c), a road the Court may be reluctant to embark upon. Yet again, it is likely that the test ban would fail under modern voter Equal Protection doctrine in any case, and so the Court may not view it as problematic to lay down such a precedent.

[425] *Criminal Disenfranchisement Laws Across the United States*, *supra* note 402.

[426] *Id.*

[427] Shelby Cty. v. Holder, 570 U.S. 529, 544–45 (2013) ("While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.")

[428] It is one of the lessons of the history of the franchise in the United States that states do backslide. Voting rights a state grants one day are sometimes removed the next, often because one political party or the other wants to exclude or include a class of voters. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 117–71 (2009).

Court review.[429] Post-*Shelby*, it is unclear whether a geographical limit helps or hurts. A temporal limit before Congress must re-enact the law, however, should help.

Could Congress clear these hurdles? For one thing, it would have to raise a mountain of current fact findings to the effect that felon disenfranchisement is a racist device of a racist criminal justice system. Though the original literacy ban was nationwide, sweeping national action is likely impossible under current case law.[430] The most prudent move for Congress would be to focus fact-finding on crimes with statistically clear racial correlations and publicly mooted connections to societal racism, such as drug crimes, and especially drug possession.[431] Because qualitative and narrative elements will be so important to proving the racist grounds of these laws, it would be even more prudent to address a narrow subset of such crimes, such as marijuana or crack possession.,[432] where Congress could pinpoint discrete legislative actions on the part of particular state legislatures and narrate the contemporary race relations in society and the political system. Similar to the cause of action explained above, this would be limited to certain chapters of the penal law. Moreover, Congress can target crimes like burglary, where racist tendencies in law enforcement are likely aggravated by police and prosecutorial discretion.[433]

Still, because it appears to impose greater sovereignty burdens, and because Congress will struggle to justify such burdens under an anti-discrimination framework as required by *Shelby*, the outright ban solution appears to be more doubtful than the solution creating a cause of action.

4. Either solution faces problems with proving race discrimination via indirect evidence.

For either of the solutions proposed here, the Court might well reject indirect evidence of race discrimination. In *Coleman v. Maryland Court of Appeals,* for instance, the Court rejected as "unconvincing" the idea that providing self-care leave to both men and women would lead to more equal treatment of the

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[429] *See* Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws*, 49 HOW. L.J. 767, 782 (2006).

[430] *See id.* at 780.

[431] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 97–139 (2d ed. 2012).

[432] *Cf.* FAIR SENTENCING ACT OF 2010, Pub. L. No. 111-220, August 3, 2010, 124 Stat 2372, in which Congress reduced the disparity between sentences for trafficking in cocaine as against crack. This law was widely seen as reforming a sentencing regime that unfairly targeted Black and Latino people. *See* Erick Eckhol, Congress Moves to Narrow Cocaine Sentencing Disparities, N.Y. TIMES (July 28, 2010), *https://www.nytimes.com/2010/07/29/us/politics/29crack.html.*

[433] *See* MARIE GOTTSCHALK, CAUGHT: THE PRISON PRISON STATE AND THE LLOCKDOWN OF AMERICAN POLITICS 126 (2015).

genders.[434] The Court's reasoning in *Coleman* appears similar to the reasoning it used in *McCutcheon v. Federal Election Commission,* where it struck down aggregate limits on individual campaign giving in part because these limits were "prophylaxis upon prophylaxis," addressing corruption not by targeting it directly but by limiting the opportunities for otherwise permissible contributions to be used for impermissible ends.[435] Along similar lines, the above-proposed enfranchisement law will depend upon arguments about racism in society and in the criminal justice system, rather than arguments about the disenfranchisement laws themselves. But Courts have been squeezing these sorts of indirect arguments in the section-two context.[436] In the context of felon disenfranchisement in particular, concurrences in both *Hayden* and *Farrkhan* questioned the wisdom of using the VRA to attack racism in the criminal justice system.[437]

When it comes to race and crime in the United States, there are added complexities that may be impossible to untangle to the liking of a skeptical Court. For instance, decades of statistical studies have left, at best, a muddied picture of the relation between race discrimination and crime. The relationships are crystal clear for certain offenses, but not apparent at all for others.[438] Proving racially disparate impacts in policing and prosecution will be difficult and the scope of valid evidence will be contested. Moreover, it is always possible for the Court to find an absence of *intent to deny the vote*, depending on how it interprets the Fifteenth Amendment. Such an interpretation would be damning. Despite racially biased policing in some jurisdictions, it is doubtful that any police department or police officer acts with an intent *to disenfranchise* the person arrested.

These evidentiary problems are especially pronounced when it comes to an outright ban. Such a ban does not allow for a state-by-state process and proof of race discrimination, as a cause of action would. By imposing a greater burden on state sovereignty, an outright ban would also be subject to a higher scrutiny. However, as has been shown, the evidentiary problems can be anticipated and worked-around in the case of the cause of action solution.

5. A final note on the burdens imposed by Fifteenth Amendment prophylaxis.

The use of Fifteenth Amendment prophylaxis, whether by a cause of action, or by directly overriding state voter qualifications, appears to entail granting the franchise even to those currently imprisoned. That is because, unlike the animus solution proposed above, which depends upon the idea that there is no legitimate

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[434] Coleman v. Ct. App. of Md., 566 U.S. 30, 40–41 (2012).

[435] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 221 (2014).

[436] *See* Jamelia N. Morgan, *supra* note 408, at 129–130.

[437] *See* Farrakhan v. Gregoire, 623 F.3d 990, 995–96 (9th Cir. 2010) (Thomas, J., concurring); *see* Hayden v. Pataki, 449 F.3d 305, 340 (2d Cir. 2006) (Walker, J., concurring).

[438] *See* GOTTSCHALK, *supra* note 433, at 119–38.

government interest in permanent post-incarceration disenfranchisement,[439] Fifteenth Amendment prophylaxis depends upon the idea that the criminal justice system is biased against Black Americans and other groups. In other words, in the case of an individual incarcerated under a biased criminal justice system, the constitutional affront to voting rights begins at the moment of unjust imprisonment. The circuit court cases to consider felon disenfranchisement under section two of the Voting Rights Act support this idea. Three out of four[440] of these cases were brought by incarcerated people in states where they would not have been permanently disenfranchised, or where there existed procedures for restoring voting rights.[441]

## IV. A POSSIBLE SOLUTION UNITING THE TWO ENFORCEMENT POWERS OF THE TWO AMENDMENTS

Felon disenfranchisement may offer Congress a new opportunity for asserting its enforcement powers if it takes care in crafting its law. Rather than premising the law only on race discrimination, Congress could, instead, premise the law on animus against convicted people and then prove that such animus is probably related in part to race discrimination. The animus solution would permit Congress to end the practice of permanent felon disenfranchisement, while the cause of action would give litigants a chance to end all disenfranchisement, including in prison, where it appears that a category of crime is enforced with racial bias.[442] Crafting the law in this way would present an overdue challenge to the Supreme Court's federalism review and it would allow Congress to avoid logical and legal problems in the Court's usual discrimination analysis.

Nevertheless, the Supreme Court's enforcement power doctrine is ambiguous and the particular question of Congress's enforcement power to end felon disenfranchisement is untested. After proposing a solution, this paper will discuss the two major obstacles that remain: (1) the novelty of the animus approach; and (2) the difficulty of weighing the sovereign interests of the states.

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[439] *See* discussion *supra* Sections II–III; Section II.A.2-4.

[440] Simmons v. Galvin, 575 F.3d 24, 26 (1st Cir. 2009); Hayden v. Pataki, 449 F.3d at 309. The State of Washington, however, required felons to undergo a procedure to restore their voting rights. Farrakhan v. Washington, 338 F.3d 1009, 1012 (9th Cir. 2003).

[441] Florida at the time permanently disenfranchised all felons. Johnson v. Governor of State of Fla., 405 F.3d 1214, 1217 (11th Cir. 2005).

[442] It can be argued that this solution opens the door to simply enjoining state law enforcement in these categories. But the special place of voting rights in the Fifteenth Amendment entitles Congress to address vote denial without addressing its causes. No one would argue, for instance, that invalidating a poll tax or a literacy test means that the states are required to ensure that citizens must have a certain amount of wealth or be able to read at a certain level.

A. *Reuniting the Fourteenth and Fifteenth Amendment Justifications*

This section will suggest a way to harmonize the Fourteenth Amendment and Fifteenth Amendment solutions this article has proposed. Because it appears unlikely that the Court would permit an outright ban, given its heavy sovereignty impacts, Congress may incorporate the evidence it would have used to justify an outright ban under the Fifteenth Amendment to justify a race-neutral solution under the Fourteenth Amendment.

This approach would make sense because irrational animus against the class of convicted people, the basis suggested here for a Congressional power to strike down permanent disenfranchisement, can probably be explained in part by ingrained racial stereotypes about the criminality of Black Americans and other groups.[443] Since early in the 20th century, criminality and blackness have been linked in the nation's academic and political discourses, with statistics tracking black criminality in order to justify law enforcement interventions in black neighborhoods.[444] Racial assumptions have, in turn, made it a simple matter for suburban whites to vote in favor of harsh law enforcement measures directed against Black Americans, racially-otherized and living in distant neighborhoods.[445] Even though the disparity in incarceration is falling in many jurisdictions,[446] and the overall number of black and white prisoners nationwide is reaching parity,[447] crime and blackness remain united in the American imagination.[448] Thus, it is likely that racism against Black Americans in the criminal justice system harms the prospects of prisoners of all races because it is so natural for Americans to racially otherize criminals in general.

These observations about American society fit and reinforce a race-neutral animus inquiry, even though they would be difficult to pose to the Court as evidence of unconstitutional race discrimination.[449] While these observations are likely too qualitative to prove direct racial discrimination, they most likely

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[443] Which, recall, this article has limited to those who have completed their sentence. *See* discussion *supra* Sections II.A.2–4.

[444] *See* KHALIL GHIBRAN MUHAMMED, THE CONDEMNTATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 271 (2010).

[445] *See* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 171–72 (2017).

[446] *See* GOTTSCHALK, *supra* note 433, at 126–30.

[447] *See* John Gramlich, *The gap between the number of blacks and whites in prison is shrinking*, PEW RESEARCH CENTER (Apr. 30, 2019Jan. 12, 2018), http://www.pewresearch.org/fact-tank/2018/01/12/shrinking-gap-between-number-of-blacks-and-whites-in-prison/. It is important to note, however, that because the Black American population of the United States is so much smaller than the Caucasian population, even parity would mean a large proportional disparity. Parity in this area only indicates that the heavily racialized incarceration trend of the 70's, 80's, 90's, and 00's has shown some signs of change.

[448] *See supra* notes 461–64 and accompanying text.

[449] *See supra* notes 201–09 and accompanying text.

tend to explain why permanent felon disenfranchisement remains a popular policy in some states.[450] Recall that anti-animus enforcement legislation would be premised on the idea that a broad and severe law, even one not targeting a suspect class, requires more than a threadbare rationale and that the reasons given for permanent felon disenfranchisement appear threadbare in comparison to the severity of the laws, especially insofar as they target minor offenders.[451] A paucity of legitimate government interests[452] in permanent disenfranchisement can probably be explained, at least in part, by ongoing racial animus, even for categories of crime and in jurisdictions where racial impacts are less pronounced.[453] And conscious and unconscious bias in police and prosecutor actions appear to have the greatest impact on just such low-level crimes.[454] The Fifteenth Amendment solution that would directly enfranchise certain convicted people, then, should be incorporated into the animus solution.[455] Thus, the animus framework described above will have four elements as applied to permanent felon disenfranchisement: (1) such laws are overbroad; (2) such laws are severe; (3) such laws have no legitimate purpose, or the purposes proposed appear pretextual to animus; (4) such laws have disparate racial impacts and, in the context of American history, are likely reinforced by racial animus.[456] Though race-neutral in results, the animus solution therefore draws strength from Congress's Fifteenth Amendment powers to ameliorate race discrimination in the regulation of voting rights.

This way of framing the animus idea harmonizes the law with reality in a way that ought to strengthen Congressional power: racism is necessary, but not sufficient, to explain disenfranchisement policies. Felon disenfranchisement dates to an era where racial discrimination in voting rights was legal,[457] and so

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[450] *See generally supra* notes 201–09 and accompanying text.

[451] *See, e.g.*, Green v. Bd. of Elections of City of New York, 380 F.2d 445, 452 (2d Cir. 1967) (noting that there may be greater constitutional protections for the voting rights of felons who only committed minor offenses); *see also supra* notes 201–09 and accompanying text (discussing how the Supreme Court usually demands direct factual support for congressional assertions of discrimination).

[452] Which, recall, this article has narrowed as a matter of law to preventing voter fraud and excluding violators of the social contract for moral reasons. *See* discussion *infra* Section IV.A.4.a.

[453] Indeed, many of the states with the harshest felon disenfranchisement laws that appear to be descendants of Jim Crow, such as Kentucky, Alabama, and Tennessee, actually have some of the lower rates of racial disparity in incarceration. *See State-by-State Data, Black/White Disaprity*, THE SENTENCING PROJECT (2016), https://www.sentencingproject.org/the-facts/#rankings?dataset-option=BWR (last visited Nov. 23, 2019).

[454] *See* GOTTSCHALK, *supra* note 433, at 126..

[455] *See* discussion *supra* Sections II.A.2–4.

[456] *See* discussion *supra* Section III.A.3.

[457] As Justice Rehnquist pointed out in *Richardson*, twenty-nine of thirty-six states permitted felon disenfranchisement at the time of the Fourteenth Amendment's signing, though it should also be noted that three of them were Southern states that passed felon

cannot fairly be said to have purely racial motivations. An animus framework addresses the reality of race discrimination, while also addressing Americans' longstanding legal discrimination against criminals of all races.[458] Thus, banning the practice of permanent felon disenfranchisement would incorporate the findings that would have been relevant to an outright ban on disenfranchisement under the Fifteenth Amendment.

Separately, Congress can create a cause of action, perhaps by amending section two of the VRA, that would permit incarcerated people to sue to have voting rights restored *even while they are incarcerated*, upon showing impact-based proof of racial discrimination in the enforcement of the law.[459] This cause-of-action solution seems to be less fraught with federalism problems than outright enfranchisement based on Congressional fact-finding about societal racism and less likely, too, to run afoul of the Court's race discrimination doctrine.[460]

Thus, Congress can end the practice of permanent felon disenfranchisement outright, while creating an impacts-based test that could enfranchise those held in prison for certain categories of crime.

### B. *The Remaining Problems*

This article has endeavored to find a solution, rather than just point out a problem. This section will acknowledge the two greatest obstacles to the solution posed: (1) the novelty of the Fourteenth Amendment idea that has been proposed; (2) the difficulty of determining how important a given sovereign interest is.

#### 1. The Fourteenth Amendment idea expressed here is untested.

To be sure, the animus argument is novel and, at points, attenuated. While Congress could prove such an argument, it is not clear that the Court would grant any deference to such complex reasoning, however deserved deference may be.[461] So far, the obvious pattern of Supreme Court rulings about Congress's power to enforce the Equal Protection Clause has been to strike down enactments that attempt to protect a class the Court has not recognized as suspect.[462] While it makes sense for Congress to have the power to enforce the Equal Protection Clause's "core promise," this is not a clearly established

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disenfranchisement laws after the end of the Civil War. Richardson v. Ramirez, 418 U.S. 24, 48 n.14. (1974).

[458] *See, e.g., supra* notes 132–38 and accompanying text.

[459] *See generally* discussion *infra* Section IV.B.2 (discussing section two of the Voting Rights Act).

[460] *See* discussion *infra* Section IV.B.2.

[461] *See* ARAIZA, *supra* note 239, at 176–77 (arguing that congressional fact finding in areas of mixed values and ideology deserves deference because of Congress's status as a political branch channeling, in some capacity, the values of Americans in general).

[462] *See* discussion *supra* Section II.A.1.

power.[463] To the extent Congress has attempted similar legislation in recent years, it has failed to overcome Supreme Court review.[464] Thus, if the Court wants to reach the result of protecting state sovereignty over voter qualifications, it could simply find that convicted felons do not enjoy any Fourteenth Amendment rights that would warrant Congressional action.

2. The fuzziness of sovereign interests and whether it is meaningful to bifurcate state from federal voting rights.

Of the problems assessed in this section, perhaps the most knotted and unpredictable is the role of state sovereignty in the Court's enforcement powers analysis. In *Kimel*, the Court affirmed that state sovereign immunity was part of the "constitutional design,"[465] and, in both *Kimel* and *Garrett*, the Court required Congress to make an extraordinary factual showing to warrant piercing of the states' sovereign immunity.[466] In this way, sovereign immunity in *Kimel* and *Garrett* functioned like the state sovereign interests the Court found in *Shelby*.[467] In both cases, a finding of sovereign interests appeared to shift the burden onto Congress to justify its use of enforcement powers.[468] Yet there is no way to tell when one kind of sovereignty impact is greater than another kind—for instance, in the Fifteenth Amendment context, it is impossible to say whether an outright ban on felon disenfranchisement entails a greater sovereignty impact than creating a cause of action based on proof of impacts. This article has depended upon a rough-justice analogical approach: An impacts-based cause of action looks like the sort of prophylaxis the Court has accepted in the past, while a direct enfranchisement under the Fifteenth Amendment looks more like the sort

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[463] Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 376–82 (2001) (Breyer J., dissenting) (arguing that Congress should have the authority to enforce anti-discrimination legislation as it relates to disabled individuals despite what the majority opinion states).

[464] *E.g.*, *id.* at 366–67 (2001) (finding that state action which "rationally furthers the purpose identified by the state" is constitutional under the Fourteenth Amendment even if the action was partially motivated by fear or negative attitudes about a group).

[465] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 79–80 (2000) (quoting Alden v. Maine, 527 U.S. 706, 733 (1999)).

[466] *See id.* at 79–80 (2000); *Garrett*, 531 U.S. at 370.

[467] *See* Shelby Cty. v. Holder, 570 U.S. 529, 544 (2013). *Compare Kimel*, 528 U.S. at 83–84 (asserting that Congress can only prevent states from discriminating by age if there is no rational relation to a legitimate state interest) *and Bd. of Trustees of Univ. of Alabama*, 531 U.S. at 370 (finding that even if the state violated the requirements of the Americans with Disabilities Act it could still "fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based") *with Shelby Cty.*, 570 U.S. at 544–45 (explaining that the Voting Rights Act is an intrusion on state sovereignty that was only allowed because of the extraordinary factual showing of voting discrimination).

[468] *Garrett*, 531 U.S. at 367 (quoting Heller v. Doe 509 U.S. 312, 320 (1992)); *Kimel*, 528 U.S. at 78.

of prophylaxis it has recently called into doubt.[469] It is impossible to say with certainty that this approach can predict the Supreme Court's holding.

Moreover, it is difficult to know whether geographical limitations help or hurt. On the one hand, they should help Congress focus its fact-finding. On the other hand, such limitations could break the equal sovereignty rule of *Shelby*.[470] If the Court wants to reach the result of protecting felon disenfranchisement, it can most likely find an equal sovereignty problem in any law that burdens one state more than others.[471]

Finally, though this article has discounted the idea that Congress has a power to separate federal from state voting rights and regulate the federal right separately from the state right, it may be argued that limiting the enactment to federal elections lessens the state sovereignty impacts with which the Supreme Court would probably be concerned under its review of either the Fourteenth or Fifteenth Amendment enactments.[472] *Shelby* and its curated citations appear to signal that the Court would not take such a view,[473] but would probably proceed from the plain text of the constitution under which the power to establish all voter qualifications resides in the states.[474] Nothing in the text of the constitution nor in any Supreme Court holding, save Justice Black's lonely vote in *Oregon v. Mitchell,* supports the idea that Congress is more privileged to change federal voter qualifications than to change state voter qualifications.[475] Still, it is not unreasonable to believe that, by changing only federal qualifications, Congress interferes less with state sovereignty. Nevertheless, as discussed, there is no perfect scale for measuring how the Court weighs sovereignty impacts. (There is not even a good scale.) The Court's reasoning on this matter tends towards the ad hoc, and there may be something to the idea that changing only the qualifications for federal election lessens sovereignty impacts. The wisest course may be to pass a law that provides separately for federal and state elections and leave it to the Court to decide if there is a difference between the two.

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[469] *E.g. Shelby Cty.*, 570 U.S. at 544 (describing the procedures by which the federal government could overturn state-level voting laws as burdensome in comparison with the impacts-based cause of action to challenge those laws).

[470] *See Shelby Cty.*, 570 U.S. at 543–45 (2013).

[471] *See id.* at 544 (reiterating that equal sovereignty does not bar federal legislation in this context but still "remains highly pertinent in assessing . . . disparate treatment of States").

[472] *See* discussion *supra* Section II.

[473] *See* discussion *supra* Section II.A.

[474] *See* U.S. Const. art. I, § 2, cl. 1 (congressional electors the same as electors for the "more numerous branch" of the state legislature); U.S. Const. amend. XVII (the same rule, but for senators).

[475] Even the holding of *Mitchell* can be seen as weighing against the logic of bifurcation under the enforcement clauses, because the four concurrences that formed the majority would have permitted congressional enfranchisement of 18-year olds to reach all levels of government. *See* discussion *supra* Section II.B.1.

## CONCLUSION

There is a strong case that the Court owes Congress more deference to decide when it will regulate voting rights. If it did defer more to Congress, the glaring racial impacts and history of discrimination behind felon disenfranchisement policies would merit a full ban akin to the original VRA's ban on literacy testing. Unfortunately, the Court will likely be skeptical of any Congressional attempt to enfranchise disenfranchised felons.[476] Assuming that this article has identified the legal issues within a reasonable margin of error, it is fitting to end by noting that the exigencies of politics further limit what Congress may accomplish. A law that merely created a special cause of action (especially one with a complex procedure designed to minimize sovereignty impacts) would struggle for political acceptance. Those who are hostile to the underlying policy of expanding the franchise will hate the law for its substance; those who are friendly to the policy will hate the law for its weakness. Politically, a universal enfranchisement of all those who have been released from prison and finished parole not only has the virtue of simplicity but is also likely immune to a "race-entitlement" attack.[477] A universal enfranchisement, coupled with an impacts-based cause of action for challenging felon disenfranchisement for racial infirmity penal-code-section-by-penal-code-section, could lead to a law that would eliminate the most dire and deleterious consequences of felon disenfranchisement, satisfy an array of voters across the political spectrum, and still survive Supreme Court review.

In this law, Congress may have a chance, too, to reassert its enforcement powers. It is clear that permanent disenfranchisement laws break with the core promise of Equal Protection *as a matter of law*.[478] It just so happens that the Supreme Court has not heard such a challenge. Under these circumstances, can it really be the case that Congress may pass no section-five law until the Supreme Court has spoken? Is it really true that Congress could not have passed a law legalizing same-sex marriage on the day before the Court decided *Obergefell v. Hodges*, requiring all states to grant same-sex marriages? That is the implication of *City of Boerne's* brand of judicial supremacy. In an era of diminishing legitimacy and even diminishing relevance, Congress must push back on this stilted understanding of the constitution. Felon enfranchisement, a simple policy with support across the political spectrum, offers a chance for Congress to reassert itself.

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[476] *See* discussion *supra* Section III.

[477] Of the sort the late Justice Scalia leveled against the Voting Rights Act in the oral arguments to *Shelby Cty.* *See* Amy Davidson Sorkin, *In Voting Rights, Scalia Sees a "Racial Entitlement,"* THE NEW YORKER (Feb. 28, 2013), *https*://www.newyorker.com/news/amy-davidson/in-voting-rights-scalia-sees-a-racial-entitlement.

[478] *See* discussion *supra* Section III.A.3.