Comments

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Felon-in-Chief: Rethinking Candidate Disqualification and Voter Disenfranchisement

INTRODUCTION

In November 2024, over fifty percent of United States voters reelected President Donald Trump to the presidency. Trump had previously served as the 45th President of the United States before losing to former President Biden in the widely contested 2020 election. Following Trump's loss, his supporters staged a political insurrection on January 6, interrupting a joint session of Congress in the process of affirming the presidential election results.[1] This, along with other

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[1] *The Jan. 6 Attack: The Cases Behind the Biggest Criminal Investigation in U.S. History*, NPR (Mar. 14, 2025, at 17:26 ET) [hereinafter *The Jan. 6 Attack*], https://www.npr

criminal actions Trump has taken, resulted in various indictments against him.[2] Trump was ultimately convicted of thirty-four felony counts in May 2024, making him the first felon to assume the presidency.[3]

While Trump is making history as the first convicted felon in the Oval Office, four million Americans are unable to vote due to felony convictions.[4] If Trump had been convicted in one of the various states that permanently disenfranchise felons pending a governor's pardon,[5] he would not have been able to vote for himself in the 2024 election, but could still assume the presidential office. Despite the fundamental nature of the right to vote,[6] the Supreme Court has interpreted language in the Fourteenth Amendment to permit the disenfranchisement of convicted felons.[7] Disenfranchisement laws increased following the enactment of the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—targeting Black Americans who had just gained the right to vote.[8] Modern-day disenfranchisement laws continue to have a disproportionate effect on the Black population.[9] Felon disenfranchisement laws vary from state to state in both applicability and content. A vast majority of states remove the

.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories (on file with the Oregon Law Review).

2 Gareth Evans, *A Guide to Donald Trump's Four Criminal Cases*, BBC (Aug. 28, 2024), https://www.bbc.com/news/world-us-canada-61084161 [https://perma.cc/XWV4-V3A3].

3 Ximena Bustillo & Hilary Fung, *Trump Is Found Guilty on 34 Felony Counts*, NPR (May 30, 2024, at 17:39 ET), https://www.npr.org/2024/05/30/g-s1-1848/trump-hush-money-trial-34-counts [https://perma.cc/FA59-5MR6].

4 Christopher Uggen et al., *Locked Out 2024: Four Million Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT (Oct. 10, 2024), https://www.sentencingproject.org/reports/locked-out-2024-four-million-denied-voting-rights-due-to-a-felony-conviction/ [https://perma.cc/7VK8-EH4P].

5 *See infra* note 82 (listing the states that permanently disenfranchise felons pending a governor's pardon).

6 Bertrall L. Ross II, *Fundamental: How the Vote Became a Constitutional Right*, 109 IOWA L. REV. 1703, 1706 (2024).

7 Richardson v. Ramirez, 418 U.S. 24, 54 (1974) ("[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment . . . .").

8 Amelia Jacobs, *Decentralized Disenfranchisement: State Solutions for a State Issue*, 19 LAW J. SOC. JUST. 106, 108 (2024) (noting the corresponding increases in state felon disenfranchisement laws and the population of incarcerated Black Americans).

9 Uggen et al., *supra* note 4.

right to vote from incarcerated persons, regardless of the nature of their conviction.[10]

Disqualification from federal political office is predicated on the Disqualification Clause, also contained within the Fourteenth Amendment.[11] This again stems from the Reconstruction era, following the end of the Civil War.[12] The Disqualification Clause was initially used to address the threat of insurrection from pro-slavery advocates,[13] but it contains language that remains applicable in the present. The Clause is not self-executing, unlike felon disenfranchisement laws, and requires an act of Congress.[14] The Disqualification Clause applies to congresspeople, presidential and vice-presidential electors, and officers of the United States.[15] In expanding on both Fourteenth Amendment rules, I will show that candidate disqualification is significantly more difficult than felon disenfranchisement.

In this Comment, I will compare voting rights, requirements, and disenfranchisement with political candidacy requirements and disqualification, making the argument that the same standard should apply for disenfranchisement as for candidate disqualification. Part I will examine the history of voting rights and their constitutional basis. This includes the Reconstruction Amendments and their modern-day implications, as well as the Voting Rights Act of 1965. Part II will discuss the widespread practice of felon disenfranchisement in the United States. I will delve into the historical roots of felon disenfranchisement following the Reconstruction Amendments and the lasting effects on the Black population. I will further explore the kinds of felon disenfranchisement laws in existence across the United States and how states vary in their disenfranchisement of current and formerly incarcerated persons. I will then look at efforts being made to re-enfranchise felons in certain states. Part III will review the requirements for federal political candidacy found in Article II of the

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10 *Disenfranchisement Laws*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-rights-restoration/disenfranchisement-laws [https://perma.cc/ZU9N-HNWW] (last visited Sept. 10, 2025).

11 U.S. CONST. amend. XIV, § 3.

12 Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1398–400 (2002).

13 Alan B. Sternstein, *Revitalizing Executive Branch Disqualification: Heeding an Imperfectly Learned Watergate Lesson*, 100 DENV. L. REV., May 2023, at 1, 8.

14 Griffin's Case, 11 F. Cas. 7, 26 (C.C.D. Va. 1869); Trump v. Anderson, 601 U.S. 100, 109 (2024).

15 U.S. CONST. amend. XIV, § 3.

Constitution. I will establish that no fundamental right exists to political candidacy, in contrast to the practice of voting. Part IV will explore the Disqualification Clause of the Fourteenth Amendment as applied to federal political candidates. This will include a historical overview as well as a modern-day application, looking at the case of President Donald Trump. Finally, Part V will propose a legislative solution for the existing discrepancies between disenfranchisement and disqualification.

I argue that the same standard should apply for voter disenfranchisement as for candidate disqualification. If a political candidate can be disqualified only for committing a crime of treason or insurrection, a voter should be subject to the same requirements. Voting is a fundamental right, crucial to the successful operation of a democratic government. Having harsher regulations for disenfranchisement as compared to candidacy is inconsistent with the constitutional premise the Reconstruction Amendments embody. Further, the excessively broad nature of felon disenfranchisement disproportionately affects Black citizens.[16] Accordingly, the legislature has the power under the Equal Protection Clause to make the necessary changes to felon disenfranchisement law to eliminate racial discrimination in the application of voting rights.[17]

I
VOTING RIGHTS

Voting rights are implicit within the Constitution,[18] and the Supreme Court has affirmed them as fundamental in numerous cases.[19] The Reconstruction Amendments expanded these rights to include formerly enslaved Black citizens.[20] States, however, enacted roadblocks to dilute the power of the Black vote, many of which remain in place today.[21] In response to state attempts to disenfranchise Black citizens,

16 Uggen et al., *supra* note 4 ("One in 22 African Americans of voting age is disenfranchised, a rate more than triple that of non-African Americans. Among the adult African American population, 4.5% is disenfranchised compared to 1.3% of the adult non-African American population.").

17 *See* U.S. CONST. amend. XV, § 2.

18 U.S. CONST. art. I, § 4.

19 Ross II, *supra* note 6, at 1706 (explaining that "courts have declared the right to vote to be fundamental since the late nineteenth century.").

20 Chambers, *supra* note 12, at 1419.

21 *See Voting Rights: A Short History*, CARNEGIE CORP. OF N.Y. (Mar. 2025), https://www.carnegie.org/our-work/article/voting-rights-timeline/ [https://perma.cc/8MN5-3XKX].

Congress passed the Voting Rights Act of 1965, prohibiting voting restrictions with racially discriminatory intent.[22]

Federal elections and the political franchise of voting in the United States date back to the creation of the Constitution.[23] Article I implies a right to vote by providing states with the responsibility of overseeing federal elections.[24] Despite the lack of a constitutional article explicitly protecting the political franchise of voting, the federal judiciary has affirmed the fundamental nature of voting for over a century.[25] The Supreme Court's recognition of voting as a fundamental right was established in the 1886 decision of *Yick Wo v. Hopkins*, in which the Court considered the fundamentality of certain rights in assessing a claim of equal protection.[26] The Court listed as an example the political franchise of voting—a right that cannot be infringed in "any country where freedom prevails" given its fundamental character as "preservative of all rights."[27] The Supreme Court reaffirmed its recognition of the fundamentality of voting in the 1964 decision of *Reynolds v. Sims*, in which the Court held that improperly apportioned legislative seats violated the Equal Protection Clause.[28] The Court admonished against attempts to deny or restrict enfranchisement, describing the right to vote as "the essence of a democratic society."[29] Both of these cases are in line with the most recent Supreme Court case to interpret what constitutes a "fundamental" right. In *Dobbs v. Jackson Women's Health Organization*, the Court identified fundamental rights as those "'deeply rooted in [our] history and tradition' and . . . essential to our Nation's 'scheme of ordered liberty.'"[30] Voting is recognized as a fundamental right, a crucial component in a healthy democracy.

Since the 1960s, various Supreme Court rulings have protected the right to vote through the review of voting regulations with potential for

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22 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301).

23 *Voting Rights Laws and Constitutional Amendments*, USAGOV, https://www.usa.gov/voting-rights [https://perma.cc/ANE5-F9P3] (last updated Aug. 22, 2024).

24 U.S. CONST. art. I, § 4.

25 Ross II, *supra* note 6, at 1706.

26 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

27 *Id.*

28 Reynolds v. Sims, 377 U.S. 533, 566 (1964).

29 *Id.* at 555.

30 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022) (alteration in original) (quoting Timbs v. Indiana, 586 U.S. 146, 149 (2019)).

infringement.[31] Race-conscious and colorblind voting regulations "motivated by discriminatory intent are subject to strict scrutiny," given their potential for violating the Fifteenth Amendment and the Equal Protection Clause.[32] A race-conscious case in which the Supreme Court applied this level of review is *Rice v. Cayetano*, in which the petitioner was denied the right to vote in a state election because of his ancestry.[33] The Court noted that the design of the Fifteenth Amendment "is to reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise."[34] The Court then held that the Fifteenth Amendment invalidates electoral qualifications based on ancestry, given the Fifteenth Amendment's explicit protection of voting rights regardless of race.[35]

Likewise, a colorblind case in which the Supreme Court applied strict scrutiny is *Gomillion v. Lightfoot*, in which a city redefined its boundaries, removing almost all the Black voters from the city.[36] This measure caused racial discrimination, preventing the Black citizens from being able to exercise their right to vote, and thus the Court held that the city's actions were invalid under the Fifteenth Amendment.[37] Despite their disproportionate effect on the Black community, however, the Supreme Court has declined to apply strict scrutiny broadly to felon disenfranchisement laws.[38] The Equal Protection Clause may be used to challenge felon disenfranchisement laws, but only with direct evidence of racially discriminatory intent.[39]

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31 Ross II, *supra* note 6 (explaining that the Supreme Court engages in "rigorous review of regulations that infringe on the right, even when those infringements do not discriminate on the basis of race, sex, or age or establish a poll tax for federal elections.").

32 Chambers, *supra* note 12, at 1428.

33 Rice v. Cayetano, 528 U.S. 495, 499 (2000).

34 *Id.* at 512.

35 *Id.* at 523–24.

36 Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).

37 *Id.* at 346.

38 Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (noting that "the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment" and this understanding "is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause . . . .").

39 Hunter v. Underwood, 471 U.S. 222, 227–28 (1985) ("'[Official] action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.'" (alteration in original) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977))).

The original constitutional conceptualization of voting rights applied only to white male landowners.[40] Later amendments to the Constitution extended enfranchisement to specific minority groups, including people of color and women.[41] The Reconstruction Amendments eliminated states' power to deny the right to vote on the basis of race, enfranchising all male citizens of the United States. This expanded to include Native Americans upon the enactment of the Indian Citizenship Act of 1924, which granted U.S. citizenship and thus voting rights to the Native American community.[42] These legislative measures emphasize the fundamental nature of voting rights and the importance of their protection. The three amendments addressing the equal protection of legal and political rights on the basis of race are the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments.

The government enacted the Reconstruction Amendments in the wake of the Civil War, as a way of equalizing the rights of former slaves following their emancipation.[43] The Thirteenth Amendment does not mention voting, but "extend[s] basic constitutional principles of freedom to . . . former slaves,"[44] prohibiting all incidents and badges of slavery. Given the fundamental nature of voting, the denial of voting rights to racial minorities may be interpreted as an incident or badge of slavery.[45] Accordingly, disenfranchisement on racial grounds may be sufficiently inconsistent with Thirteenth Amendment protections as to be deemed unconstitutional.[46] The Thirteenth Amendment's constitutional protections establish a basis for the Fourteenth Amendment,[47] which creates equal protection on the basis

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40 *Voting Rights: A Short History*, *supra* note 21.

41 U.S. CONST. amends. XIV, XV, XIX. The enfranchisement of women under the Nineteenth Amendment will not be discussed in this paper, as I am limiting my exploration of felon disenfranchisement to its connection with race, not gender.

42 Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2016)).

43 Chambers, *supra* note 12, at 1400.

44 *Id.* at 1401.

45 *Id.* at 1402–03 ("[I]f slavery is the absence of freedom, being provided the legal rights of a free citizen is the measure of whether one is or is not a slave. Thus, any legal right afforded to white citizens that was systematically denied to slaves could be viewed as a badge or incident of slavery . . . ." (footnote omitted)).

46 *Id.* at 1403.

47 *Id.* at 1405 ("The Fourteenth Amendment was a recapitulation and extension of the Thirteenth Amendment.").

of race,[48] and the Fifteenth Amendment, which provides an explicit right to vote for people of color.[49]

The Fourteenth Amendment, although not explicitly establishing a right to vote, prevents the government from infringing on the legal and political rights of citizens,[50] including the right to vote.[51] The Amendment further prohibits the deprivation of due process of law on the basis of equal protection for citizens, requiring the racially equal distribution of voting rights.[52] The Supreme Court has repeatedly interpreted the Equal Protection Clause as the source of the fundamental right to vote.[53]

The Fifteenth Amendment makes voting protections more explicit, directly prohibiting the abridgment of the right to vote on the basis of "race, color, or previous condition of servitude."[54] The Fifteenth Amendment provides a functional ability to vote, operationalizing the legal and political equality of Black citizens.[55] The passage of the Fifteenth Amendment suggests voting rights are more than just the symbolic casting of a ballot; these fundamental rights function as an instrument of empowerment.[56] Further, the Fifteenth Amendment allows Congress the "power to enforce this article by appropriate legislation."[57] The allowance for congressional legislation enforcing the Fifteenth Amendment may provide a powerful tool for voter re-enfranchisement following felony convictions.

Despite the adoption of the Reconstruction Amendments to equalize the rights of Black citizens, state measures, such as poll taxes and literacy tests, often impeded the implementation of voting rights.[58] Southern states that opposed the enfranchisement of Black Americans acted to the extent possible, without violating the constitutional amendments, to limit Black citizens' ability to exercise their right to

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48 U.S. CONST. amend. XIV, § 1.

49 U.S. CONST. amend. XV, § 1.

50 U.S. CONST. amend. XIV, § 1.

51 Chambers, *supra* note 12, at 1400 (noting that the Reconstruction Amendments "ensure[] that all citizens enjoy the same legal and political rights, including voting rights.").

52 *Id.* at 1398.

53 Ross II, *supra* note 6, at 1707 (explaining that "[s]ince the 1960s, the Court has settled on the Fourteenth Amendment's Equal Protection Clause as the source of the fundamental right to vote without a clear explanation for why the right should be derived from there.").

54 U.S. CONST. amend. XV, § 1.

55 Chambers, *supra* note 12, at 1419.

56 *Id.* at 1422.

57 U.S. CONST. amend. XV, § 2.

58 *Voting Rights: A Short History*, *supra* note 21.

vote.[59] In response to this continuing discrimination against minorities in the franchise of voting, Congress enacted the Voting Rights Act of 1965 (VRA).[60] The VRA explicitly prohibits voting restrictions with a racially discriminatory effect.[61] Notably, the VRA does not require racially discriminatory intent, only that political processes "are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[62] The VRA demonstrates the federal government's commitment to the codification of voting protections, overriding states' ability to make decisions about this component of voting rights in the interest of equal protection.

II
VOTER DISENFRANCHISEMENT

The basis for felon disenfranchisement stems from Section 2 of the Fourteenth Amendment, which prevents the abridgement of the right to vote with the exception of "participation in rebellion, or other crime."[63] The Supreme Court has interpreted this language to allow for the blanket disenfranchisement of convicted felons.[64] States use this broad rule as the legal foundation for their own individualized felon disenfranchisement laws. State laws vary substantially in applicability and nature, from no removal of voting rights to permanent disenfranchisement following felony conviction. In the past few decades, the VRA has prompted some states to take steps toward felon re-enfranchisement.

While felon disenfranchisement laws have existed throughout the history of the country, the percentage of states with such laws increased significantly in response to Reconstruction. Prior to the Reconstruction Amendments, more than half of states had felon disenfranchisement laws.[65] This number increased to nearly eighty-seven percent by the

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59 *Id.*

60 Caroline A. Newman, Note, *Constitutional Problems with Challenging State Felon Disenfranchisement Laws Under the Voting Rights Act of 1965*, 38 CONN. L. REV. 525, 532 (2006) ("The VRA was a targeted response to continuing discrimination against minorities in the political process.").

61 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301).

62 52 U.S.C. § 10301(b).

63 U.S. CONST. amend. XIV, § 2.

64 Jacobs, *supra* note 8, at 109–10.

65 *Id.* at 107.

end of Reconstruction in 1876.[66] Notably, the increase in disenfranchisement laws corresponded with the increase of incarcerated Black Americans.[67] Felon disenfranchisement laws functioned as a tool for legislators to quietly rescind the equal voting rights the Fifteenth Amendment granted.[68]

Prior to the Civil War, felon disenfranchisement laws were narrowly applied to violent criminals.[69] Disenfranchisement was intended to protect against undue corruption within the electorate, and thus applicable only for crimes indicating a lack of the moral virtue required to be a participating member in society.[70] When states originally adopted felon disenfranchisement laws in their constitutions, voting was seen as a selective privilege, not yet extended to anyone other than white male landowners.[71] Given the already limited nature of suffrage, racial discrimination did not yet factor into criminal disenfranchisement.[72] It was not until Black citizens received the right to vote that states began to weaponize their felon disenfranchisement laws against non-white voters.

Reconstruction prompted many states to expand their felon disenfranchisement criteria beyond violent crime, disenfranchising those convicted of nonviolent crimes such as petty larceny.[73] States went so far as rewriting criminal statutes, elevating the crime of larceny from a misdemeanor to a felony, or expanding the definition of "felony" to encompass lower-level theft.[74] Larceny convictions would then increase in the months leading up to an election, systematically diminishing the effect of Black voters.[75] Changes to

66 *Id.* at 107–08.

67 *Id.* at 108 ("In Alabama, for example, 2% of the prison population was nonwhite in 1850, yet by 1870, 74% of the prison population was nonwhite.").

68 *Id.*

69 Lauren Latterell Powell, Note, *Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement*, 22 MICH. J. RACE & L. 383, 387 (2017).

70 Brock A. Johnson, Note, *Voting Rights and the History of Institutionalized Racism: Criminal Disenfranchisement in the United States and South Africa*, 44 GA. J. INT'L & COMPAR. L. 401, 415 (2016).

71 *Id.* at 414 ("[W]omen, men without property, blacks, and other marginalized groups were commonly excluded from participation in the political process.").

72 *Id.* at 415 ("The practice of selective suffrage indicates that racial discrimination was not at the core of pre-Civil War criminal disenfranchisement.").

73 Powell, *supra* note 69, at 387 ("In the decades following the passage of the Fourteenth and Fifteenth Amendments, nearly every Southern state . . . amended its laws to disenfranchise those convicted of petty larceny and related crimes.").

74 *Id.*

75 *Id.* at 387–88.

disenfranchisement provisions continued into the early 1900s, characterized by state laws tailoring disenfranchising felonies to those believed to be more commonly committed by Black people.[76] While other tactics employed by the Southern governing structure, such as poll taxes and literacy tests, have since been declared unconstitutional, criminal disenfranchisement has survived such scrutiny.[77]

States vary widely in their modern-day application of felon disenfranchisement laws. Maine and Vermont take the most liberal approach to felon disenfranchisement, with no restrictions on voting regardless of criminal convictions.[78] Twenty-three states, including Oregon, restore voting rights automatically upon release from prison.[79] Louisiana restores voting rights for those on probation or parole who have not been incarcerated for at least five years.[80] Fourteen states restore voting rights upon an individual's completion of their sentence, including prison, parole, and probation.[81] Nine states enforce permanent disenfranchisement for some individuals with criminal convictions, pending government approval of restoration.[82] Finally, Virginia takes the most extreme approach, enforcing permanent disenfranchisement for all individuals with criminal convictions, pending individual rights restoration by the government.[83]

States also vary in the nature of their felon disenfranchisement laws. Some disenfranchisement policies are extremely broad, removing voting rights simply based on any felony conviction. One example is Nebraska's felon disenfranchisement statute, prohibiting voting in all felony cases prior to completion of the sentence, including parole.[84]

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76 Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 541 (1993).

77 Johnson, *supra* note 70, at 416.

78 *Disenfranchisement Laws*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-rights-restoration/disenfranchisement-laws [perma.cc/R3TR-KJHV] (last visited Nov. 3, 2024).

79 *Id.* These states are California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, and Washington.

80 *Id.*

81 *Id.* These states are Alaska, Arkansas, Georgia, Idaho, Kansas, Missouri, Nebraska, North Carolina, South Carolina, Oklahoma, South Dakota, Texas, West Virginia, and Wisconsin.

82 *Id.* These states are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Tennessee, and Wyoming.

83 *Id.*

84 NEB. REV. STAT. § 29-112 (1964).

Likewise, Virginia's constitution provides that convicted felons are not qualified to vote unless their civil rights are restored by the government.[85] Tennessee's constitutional provision denies the right to vote to persons convicted of an "infamous crime," and supporting legislation specifies that any felony is considered an "infamous crime."[86] Oregon's felony disenfranchisement statute provides that defendants in felony cases are deprived of specified civil rights, including the right to vote, until either the defendant is released from incarceration or the conviction is set aside.[87] These kinds of disenfranchisement laws do not specify which felony convictions qualify for disenfranchisement.

In contrast, other state disenfranchisement laws list specific felonies that result in the removal of voting rights. For example, the Delaware Constitution provides that certain disqualifying felonies—including murder, bribery, and sexual offenses—permanently disenfranchise an individual, while nondisqualifying felonies result in re-enfranchisement following an official pardon or the expiration of the sentence.[88] Mississippi specifies that a felony conviction for murder, rape, bribery, theft, arson, perjury, forgery, embezzlement, or bigamy results in permanent disenfranchisement, with the exception of governmental pardon.[89] Kentucky specifies crimes related to treason and election bribery as worthy of disenfranchisement, in addition to general felonies and high misdemeanors.[90] Various other jurisdictions take this narrower approach to disenfranchisement, using provisions highlighting specific felonies that qualify for disenfranchisement on the basis of their nature, rather than a blanket rule including any and all felonies.

Despite the extensive nature of existing felon disenfranchisement laws, some states have begun taking action toward restoring rights to felons. States have used a variety of methods, including legislative acts, constitutional amendments, and executive orders. In 2018, Florida voters adopted an initiative to amend the state constitution, automatically restoring the right to vote to those with prior felony convictions, excluding murder or felony sexual offenses.[91] In 2019,

85 VA. CONST. art. II, § 1.

86 TENN. CONST. art. I, § 5; TENN. CODE. ANN. § 40-20-112 (West 2024).

87 OR. REV. STAT. § 137.281 (2023).

88 DEL. CONST. art. V, § 2.

89 MISS. CONST. art. XII, § 241.

90 KY. CONST. § 145.

91 FLA. CONST. art. VI § 4.

the Louisiana legislature passed a house bill restoring voting rights for felons serving probation or parole sentences who had not been incarcerated within the past five years.[92] In 2020, the Governor of Iowa issued an executive order restoring voting rights to all offenders with completed felony sentences, excluding homicide and related crimes.[93] In 2022, Oregon attempted to re-enfranchise felons through the introduction of House Bill 4147, allowing persons with felony convictions to register to vote and vote in elections while incarcerated.[94] The bill was introduced in committee with the sponsorship of fourteen representatives and five senators but failed to pass shortly after.[95] Regardless, these state-level actions indicate some level of support in the country for felon re-enfranchisement.

The VRA has served as a vehicle for states to challenge felon disenfranchisement laws, with mixed results. Circuits are divided on whether the VRA even applies to state felon disenfranchisement laws. Plaintiffs challenging the validity of felon disenfranchisement laws under the VRA argue that analysis of "all the relevant evidence" should be construed to include evidence of the racial bias that leads to an increased number of felony convictions for Black people as compared to white people.[96] The Ninth Circuit agreed with this premise in *Farrakhan v. Washington*, holding that evidence of racial bias in the state's criminal justice system should be considered as part of the totality of the circumstances test in establishing a VRA violation.[97]

Oregon, in particular, has significant racial disparity in felon disenfranchisement, with a higher disenfranchisement rate of Black citizens than the U.S. national average and neighboring states Washington and California.[98] Only 2.3% of Oregon's population is Black, but 9.2% of Oregon disenfranchised voters are Black.[99] Discriminatory police practices in the Oregon criminal system

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92 H.B. 265, 2018 Reg. Sess. (La. 2019).

93 Iowa Exec. Order. No. 7 (Aug. 5, 2020).

94 H.B. 4147, 81st Or. Legis. Assemb., § 10 (2022), https://olis.oregonlegislature.gov/liz/2022R1/Measures/Overview/HB4147 [https://perma.cc/QU3U-JUYH].

95 *Id.*

96 Newman, *supra* note 60, at 536.

97 Farrakhan v. Washington, 338 F.3d 1009, 1016, 1020 (9th Cir. 2003).

98 Kristen M. Budd, *Oregon Should Restore Voting Rights to Over 13,000 Citizens*, SENT'G PROJECT (Jan. 5, 2023), https://www.sentencingproject.org/app/uploads/2023/01/Oregon-Voting-Rights-for-People-with-Felony-Convictions.pdf [https://perma.cc/KJZ7-KQ9L].

99 *Id.*

contribute to the racial disparities in incarceration.[100] One example is the Portland Police Bureau's Gun Violence Reduction Team that disproportionately stopped Black residents.[101] Fifty-two percent of stops were Black residents, despite only a six percent Black population in Portland.[102] However, white residents had contraband in a higher proportion of consent searches.[103] The resulting convictions thus disproportionately incarcerated Black citizens, reducing their voting impact. This may be sufficient under the Ninth Circuit's holding in *Farrakhan* to bring a potential VRA violation.

Felon disenfranchisement laws result in the exclusion of four million Americans, almost two percent of the voting-age population, from the fundamental practice of voting.[104] Seventy percent of disenfranchised voters are no longer incarcerated, either having fully completed their sentences or still on felony probation or parole.[105] Disenfranchised voters return to their communities, but are unable to participate in the decision-making that affects their communities. Black Americans are disenfranchised at triple the rate of non-Black citizens, and 4.5% of the Black adult population cannot vote due to felon disenfranchisement.[106]

Aside from the racial disparities apparent in the application of felon disenfranchisement, removing voting rights from felons presents several practical consequences. First, disenfranchisement as a collateral consequence of convictions does not serve any of the traditional theories of punishment. Second, restoring voting rights improves reintegration and public safety. Finally, felon re-enfranchisement has the potential to shift presidential election outcomes, especially with the slim vote margins in battleground states where felon disenfranchisement is most prevalent.

Felon disenfranchisement is a redundant and excessive punishment given its arbitrary application and negative effect on rehabilitation. Incarceration is fundamentally punitive, depriving a person's freedom

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100 *Id.*

101 *E.g.*, Maxine Bernstein, *In 2019, the Portland Police Gun Violence Team Made 1,600 Stops, More than Half Were Black People*, OR. LIVE (Nov. 19, 2020, at 20:09 PT), https://www.oregonlive.com/crime/2020/11/in-2019-the-portland-police-gun-violence-team-made-1600-stops-more-than-half-were-black-people.html [https://perma.cc/ESM4-68TV].

102 *Id.*

103 *Id.* ("Of the team's consent searches, Black people were found with contraband in 46% of the searches, less frequently than when white people were searched with their consent, at 56.4%.").

104 Uggen et al., *supra* note 4.

105 *Id.*

106 *Id.*

to pay a debt owed to society. When felons complete their period of incarceration, they are understood to have paid this debt and fulfilled the purpose of their punishment.[107] Failure to restore the fundamental right to vote, even upon termination of this punishment, goes against the possibility of rehabilitation.[108] The initial and continued removal of voting rights from felons constitutes an intent to punish them outside the scope of their original punishment, violating the notion of just severity.[109] Disenfranchisement is applied in such an arbitrary manner as to render any retributive purposes void, and it does not further other punishment intentions such as rehabilitation or deterrence.

Further, felon reintegration into society after incarceration is hindered by their inability to exercise one of their fundamental rights. Felons are marginalized through their exclusion from civic participation, impeding their efforts to rejoin their communities.[110] Disenfranchisement decreases felons' sense of civic consciousness and does nothing to convince them of the value of being a law-abiding community member.[111] In contrast, the restoration of voting rights after incarceration reduces recidivism rates and improves the reentry process by allowing felons to have a voice in the laws that affect their lives.[112]

A final practical consequence to consider is the effect felons' votes could have on federal elections. For example, Trump won the 2024 presidential election by approximately 2.2 million votes.[113] Disenfranchised felons make up almost twice that margin.[114] If these citizens had their fundamental right to vote restored prior to the 2024 election, this country could be under entirely different leadership.

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107 *See* Amy Heath, Comment, *Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote After Serving Their Sentences*, 25 AM. U.J. GENDER SOC. POL'Y & L. 327, 350 (2017) (explaining that incarceration fulfills the purpose of a felon's punishment and represses his crime by penalties of just severity, discouraging recidivism).

108 *Id.*

109 *Id.*

110 Cherish M. Keller, Note, *Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-Enfranchisement and the Fourteenth Amendment*, 81 CHI.-KENT L. REV. 199, 205 (2006).

111 *Id.*

112 Kristen M. Budd & Niki Monazzam, *Increasing Public Safety by Restoring Voting Rights*, SENT'G PROJECT (Apr. 25, 2023), https://www.sentencingproject.org/policy-brief/increasing-public-safety-by-restoring-voting-rights/ [https://perma.cc/R3FE-Z8TB].

113 *2024 Presidential Election Results*, AP NEWS, https://apnews.com/projects/election-results-2024/?office=P [perma.cc/5LZS-CJDH] (last visited Mar. 3, 2025) (showing that Trump received 77,304,184 votes while Harris received 75,019,617 votes).

114 Uggen et al., *supra* note 4.

III
CANDIDATE QUALIFICATIONS

The first two Articles of the Constitution lay out federal candidate qualifications, with the four primary offices being representative, senator, vice president, and president. While the positions of representative and senator vary in terms of minimum age and length of time as a citizen, they share several key requirements.[115] A federal candidate must (1) be an inhabitant of the state they are running to represent, (2) not hold another civil office simultaneously, (3) not have been disqualified from federal office after impeachment, (4) not have engaged in insurrection or rebellion, and, perhaps most importantly, (5) be elected to office.[116]

Article II, Section 1 of the Constitution establishes the basic requirements for presidential candidacy.[117] To hold executive office, a candidate must be (1) a "natural born" citizen of the United States, (2) at least thirty-five years old, and (3) a resident of the United States for at least fourteen years.[118] Candidates are limited to a maximum of two four-year terms as President.[119] A candidate who has previously been impeached is disqualified from holding office at the discretion of Congress.[120] A candidate who has engaged in insurrection or rebellion is also ineligible for office, again at the discretion of Congress.[121] Article II, Section 4 addresses removal from office via impeachment, which is allowable upon conviction of treason, bribery, or other high crimes and misdemeanors.[122]

Notably, this section of the Constitution does not address felony convictions or their effect on a candidate's eligibility for office.[123] Aside from a conviction of "Treason, Bribery, or other high Crimes and Misdemeanors,"[124] a candidate's status as a felon does not seem to disqualify that candidate. This issue has been explored recently with the candidacy of Donald Trump in the 2024 election. Further, while

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115 U.S. CONST. art. I, § 2.

116 U.S. CONST. art. I; Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 563–68 (2015).

117 U.S. CONST. art. II, § 1.

118 *Id.*

119 U.S. CONST. amend. XXII.

120 Muller, *supra* note 116, at 568.

121 *Id.*

122 U.S. CONST. art. II, § 4.

123 *Id.* § 1.

124 *Id.* § 4.

qualifications for the presidency are embedded in the Constitution, no fundamental right is established for candidates to run for office.[125] In *Clements v. Fashing*, the Supreme Court determined that the Equal Protection Clause did not apply to state restrictions on candidacy.[126] The Court restated a holding from a previous case, that "[f]ar from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'"[127] Qualifications for office do not imply a fundamental right, and restrictions on holding office are essential for representative government.[128] Despite the lack of a fundamental right to seek office, the requirements are relatively nominal, and it is difficult to be disqualified.

IV
DISQUALIFICATION CLAUSE

The primary source of disqualification from political office is found within the Fourteenth Amendment of the Constitution.[129] The Fourteenth Amendment was enacted following the Civil War in an effort to remedy the inequality caused by slavery.[130] Section 3, the Disqualification Clause, was included within this Amendment to address the continued threat of insurrection and rebellion mounted by pro-slavery advocates.[131] The Clause applies to a variety of political candidates, including broadly "officer[s] of the United States."[132] The language of Section 3 is not framed in such a way as to limit its application to Civil War insurrection, as the adopters of the Clause did not use express terms applying only to officials of the Confederacy.[133] Theoretically, the Disqualification Clause should be applicable to insurrections occurring in the present-day. Enforcement, however, is not self-executing and requires an act of Congress.[134] The Clause has

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125 Clements v. Fashing, 457 U.S. 957, 963 (1982).

126 *Id.*

127 *Id.*

128 Kowall v. Benson, 18 F.4th 542, 548 (6th Cir. 2021).

129 U.S. CONST. amend. XIV, § 3.

130 Chambers, *supra* note 12, at 1398.

131 Sternstein, *supra* note 13, at 8.

132 U.S. CONST. amend. XIV, § 3.

133 Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 WM. & MARY BILL OF RTS. J. 153, 168 (2021).

134 Griffin's Case, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) ("[P]ersons in office by lawful appointment or election before the promulgation of the fourteenth amendment, are not removed therefrom by the direct and immediate effect of the prohibition to hold office

been effectively used only once since the post-Civil War era, by a state court against a state official.[135] The Supreme Court's 2024 decision in *Trump v. Anderson* narrows the application of the Clause, holding that states cannot enforce Section 3 against federal candidates.[136] Accordingly, candidate disqualification is significantly more difficult than felon disenfranchisement.

Section 3 of the Fourteenth Amendment details who may be disqualified from office and for what reasons. The Disqualification Clause provides in full:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[137]

Simply put, the Disqualification Clause applies to (1) federal and state-level congresspeople, (2) presidential and vice-presidential electors, and (3) persons holding office under the United States who have taken an oath to support the U.S. Constitution.[138] The term "officer[] of the United States" can be interpreted to include the president, given the president's election to office in accordance with the constitutional process established in the Appointments Clause, as well as the president's continuous exercise of sovereign powers of the United States.[139] Candidates are disqualified from holding office under this Clause if they "have engaged in insurrection or rebellion" against the United States or "given aid or comfort to the enemies" of the

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contained in the third section; but that legislation by congress is necessary to give effect to the prohibition, by providing for such removal.").

135 *See* New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 114653, at *45 (Sept. 6, 2022).

136 Trump v. Anderson, 601 U.S. 100, 110 (2024) ("States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency.").

137 U.S. CONST. amend. XIV, § 3.

138 *Id.*

139 Lynch, *supra* note 133, at 162.

country.[140] The only exception to disqualification is through a two-thirds vote by Congress.[141]

Following Reconstruction and the creation of the Disqualification Clause, the Enforcement Act of 1870 was enacted to supplement and enforce the Disqualification Clause.[142] The Enforcement Act was widely used after its enactment, barring many Confederate officials from political office.[143] The Enforcement Act required U.S. district attorneys to prosecute and remove any disqualified person from attempting to take office.[144] It also criminalized violations of the Disqualification Clause, charging any violators with a misdemeanor.[145] One case prosecuted shortly after the creation of the Disqualification Clause was *Worthy v. Barrett*, in which a sheriff was denied qualification for office because he had been in his position prior to the Civil War, and holding the office during the rebellion constituted participation in the rebellion.[146] The court held that his actions disqualified him from holding office under the Disqualification Clause.[147] The Enforcement Act was short-lived. The Amnesty Act of 1872 repealed the Enforcement Act, removing political disabilities imposed by the Disqualification Clause and granting amnesty to all those who had been barred—except for legislators from the thirty-sixth and thirty-seventh Congresses, military officers, department heads, and foreign ministers.[148]

Despite the initial targeted use of the Disqualification Clause for political candidates actively engaged in the Confederacy, the Clause should not be so narrowly construed as to apply only to Civil War-era insurrectionists. Early drafts of the Clause were limited to the Civil War, referencing the "late insurrection" and setting an expiration date for the disqualification penalty to be imposed.[149] The ratified clause, however, was amended to cover insurrection and rebellion

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140 U.S. CONST. amend. XIV, § 3.

141 *Id.*

142 Sternstein, *supra* note 13, at 8.

143 *Id.*

144 Act of May 31, 1870, ch. 114, § 14, 16 Stat. 140, 143–44.

145 *Id.* § 15.

146 Worthy v. Barrett, 63 N.C. 199, 203 (N.C. 1869).

147 *Id.* at 204.

148 Act of May 22, 1872, ch. 193, 17 Stat. 142.

149 Cong. Globe, 39th Cong., 1st Sess. 2460 (1866) ("Until the 4th day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice President of the United States.").

generally,[150] rather than applying only to involvement in the Civil War. Insurrection and rebellion as defined by acts in the late 1700s and early 1800s broadly refer to (1) the uprising and threatening of a government, to the point where federal intervention is necessary, or (2) the opposition and obstruction of the execution of federal laws through nonpeaceful means, including the use of arms, in a manner too powerful for the justice system to suppress.[151] The modern test for insurrection and rebellion is largely the same, established by the amended Insurrection Act and codified in Title 10 of the U.S. Code.[152] The statute allows the President to take the necessary measures to suppress an insurrection if it (1) hinders the execution of law to deprive the people of a right, privilege, or immunity protected by the Constitution or (2) opposes or obstructs the execution of law or course of justice.[153]

The first case to interpret the Disqualification Clause was *Griffin's Case*, decided by the Circuit Court of Virginia in 1869. In *Griffin's Case*, the defendant was tried and convicted in a bench trial for shooting with intent to kill.[154] On appeal, the defendant's attorney raised the issue of disqualification regarding the judge presiding over the case.[155] The judge was a member of the legislature of Virginia during the Civil War, and voted affirmatively on measures to sustain the Confederate states in their war against the United States.[156] Because the judge had served as both a congressperson and taken an oath to support the Constitution, he met the criteria required for the Disqualification Clause to apply.[157] The court evaluated the defendant's appeal to determine if the judge should be disqualified and the defendant's conviction should be overturned. The key question considered was whether the Disqualification Clause applies automatically, removing and barring all those covered by the Clause from office and annulling all official acts performed by these officers.[158] The court determined that expelling and prohibiting all persons included in the description from holding office would be

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150 U.S. CONST. amend. XIV, § 3.

151 *See* Lynch, *supra* note 133, at 167–68.

152 10 U.S.C. § 253.

153 *Id.*

154 Griffin's Case, 11 F. Cas. 7, 22 (C.C.D. Va. 1869).

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.* at 23.

"obviously impossible," and application of the Clause instead required Congressional legislation to ascertain whether the definition intentionally covered particular individuals.[159] According to the court's ruling, the Disqualification Clause requires an act of Congress to be applied, and is not self-executing.

A more recent case applying the Disqualification Clause was *New Mexico v. Griffin*, in which a New Mexico district court used the Clause to remove a county commissioner from office following his participation in the January 6 attack. The court determined the defendant qualified under the Clause as he performs executive functions in his role and took an oath to support the Constitution before assuming office.[160] The court then held that the January 6 attack constituted an "insurrection" within the meaning of the Disqualification Clause, and the defendant's participation in this event disqualified him from holding any state or federal office.[161] This case is the first modern-day application of the Disqualification Clause, and demonstrates the permissibility of Section 3 usage by state judiciaries in relation to state candidates.

Both state district courts and the Supreme Court, however, have limited the use of the Disqualification Clause on federal candidates, allowing only the federal government to bring such claims. This came about after Trump's involvement in the events of January 6 and subsequent criminal indictments. Following Trump's loss in the 2020 presidential election, a political insurrection was staged by his supporters on January 6, 2021, interrupting the Senate's certification of the Electoral College results.[162] Thousands of protesters stormed the U.S. Capitol, causing millions of dollars in property damage, injuring 140 police officers, and resulting in five deaths.[163] The Justice Department charged 1,575 defendants with federal crimes in response to the insurrection, and hundreds of protesters served prison terms.[164] One of these defendants was Trump himself, who was investigated for eighteen months by a special House committee and found to be "[t]he central cause" of January 6.[165]

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159 *Id.* at 26.

160 New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, 2022 N.M. Dist. LEXIS 1, at *44–45 (1st Dist. Santa Fe Co. N.M. Sept. 6, 2022).

161 *Id.* at *49.

162 *The Jan. 6 Attack*, *supra* note 1.

163 *Id.*

164 *Id.*

165 *Trump 'Lit That Fire' of Capitol Insurrection, Jan 6 Committee Report Says*, PBS NEWS (Dec. 23, 2022, at 11:34 ET), https://www.pbs.org/newshour/politics/trump-lit

Trump was then indicted on four federal criminal counts—conspiracy to defraud the United States, conspiracy to obstruct an official proceeding, obstruction of and attempt to obstruct an official proceeding, and conspiracy against rights.[166] Notably, the Justice Department did not charge Trump with insurrection or aiding insurrection, despite the nature of the events on January 6. In July 2024, the Supreme Court granted Trump partial immunity from these charges, under the premise that presidents have broad immunity from criminal prosecution for acts done in their official capacity as president.[167] In November 2024, the Justice Department special counsel moved to dismiss all federal charges against Trump for the January 6–related indictment.[168] The presidential immunity ruling and Trump's reelection to office posed too daunting of a challenge for these criminal charges.

Despite the Justice Department's inability to move forward with the federal conspiracy charges, Trump still managed to become a convicted felon prior to his reelection, as a result of one of the other three criminal cases brought against him. In May 2024, Trump made history as the first former U.S. president to be convicted of criminal charges, when he was convicted of thirty-four felony counts of falsified business records in a New York district court.[169] Trump had the business records falsified to conceal a hush money payment made to influence the outcome of the 2016 election.[170] On January 10, 2025, just ten days before his inauguration, Trump received an unconditional discharge as the sentence for his thirty-four felony counts.[171] The sentence is a lenient alternative to prison time or even probation, but still cements Trump's status as a felon.[172]

-that-fire-of-capitol-insurrection-jan-6-committee-report-says (on file with the Oregon Law Review).

166 Jaclyn Diaz, *The Charges Facing Trump in the Jan. 6 Investigation, Explained*, NPR (Aug. 2, 2023, at 12:37 ET), https://www.npr.org/2023/08/01/1191493880/trump-january-6-charges-indictment-counts [https://perma.cc/X4F4-62M9].

167 Evans, *supra* note 2. *See generally* Trump v. United States, 603 U.S. 593 (2024).

168 Ryan J. Reilly & Ken Dilanian, *Judge Agrees to Dismiss Donald Trump's 2020 Election Interference Case*, NBC NEWS (Nov. 25, 2024, at 14:00 PT), https://www.nbcnews.com/politics/justice-department/jack-smith-files-drop-jan-6-charges-donald-trump-rcna181667 [perma.cc/D8DM-5X85].

169 Bustillo & Fung, *supra* note 3.

170 *Id.*

171 Ben Protess et al., *The President-Elect Is a Felon, but His Sentence Carries No Penalty*, N.Y. TIMES (Jan. 10, 2025), https://www.nytimes.com/2025/01/10/nyregion/trump-hush-money-sentencing-convicted-felon.html [perma.cc/6DGA-DRHZ].

172 *Id.*

Trump may still receive additional convictions as a result of his charges for criminal conspiracy to overturn his defeat in Georgia in the 2020 election.[173] As of January 2025, ten criminal counts remain pending, including an alleged violation of Georgia's Racketeer Influenced and Corrupt Organizations Act (RICO).[174] It is uncertain if this case will continue through the criminal justice system following Trump's reelection. Ultimately, Trump has been convicted of thirty-four felony counts, and has the potential for an additional ten counts.

State officials and individual voters attempted to use Section 3 to keep Trump off the ballot for the 2024 presidential election. Formal challenges to Trump's candidacy were brought in thirty-six states, via individual voters' lawsuits, state officials' direct disqualifications, and state legislators' requests.[175] Some state district courts immediately dismissed the individual voters' motions for a lack of standing under Article III of the Constitution, without delving into the substance of the Disqualification Clause claims.[176] Other states analyzed the claims under the Disqualification Clause and ruled to disqualify Trump and remove his name from the ballot,[177] as discussed below. For example, a state judge in Illinois ruled that Trump had engaged in insurrection and was thus ineligible per the Disqualification Clause to appear on the state's primary ballot.[178] Trump appealed this decision to the Illinois Appellate Court, and the order was stayed pending resolution of the appeal.

The most notable case involving Trump's eligibility originated in Colorado, when a group of Republican presidential primary electors filed a petition with the Denver District Court, requesting Trump be excluded from the Colorado Republican primary ballot.[179] The electors brought their claim under the Colorado Election Code, challenging Trump's status as a qualified candidate per Section 3.[180] The district court found that Trump had engaged in insurrection per

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173 Evans, *supra* note 2.

174 *Id.*

175 Gamio et al., *Tracking Efforts to Remove Trump from the 2024 Ballot*, N.Y. TIMES, https://www.nytimes.com/interactive/2024/01/02/us/politics/trump-ballot-removal-map.html [perma.cc/3UDH-WJZY] (last updated Mar. 4, 2024).

176 *See* Perry-Bey v. Trump, No. 1:23-cv-1165, 2023 U.S. Dist. LEXIS 231092, at *14–16 (E.D. Va. Dec. 29, 2023); Caplan v. Trump, No. 23-CV-61628-ROSENBERG, 2023 U.S. Dist. LEXIS 199051, at *8 (S.D. Fla. Aug. 31, 2023).

177 Gamio et al., *supra* note 175.

178 Anderson v. Trump, 2024 LEXIS 1, at *36 (Ill. Cir. Ct. Feb. 28, 2024).

179 Anderson v. Griswold, 543 P.3d 283, 296 (Colo. 2023).

180 *Id.*

the Disqualification Clause, but concluded that the Clause did not apply to the president, and thus denied the petition.[181] The decision was appealed to the Colorado Supreme Court, which reviewed and affirmed the electors' ability to challenge Trump's candidacy using the Election Code. The Colorado Supreme Court reversed the district court's ruling on the applicability of the Clause to the president, holding that Section 3 encompasses the office of the presidency.[182] After reviewing the evidence from the district court proceedings and analyzing Section 3, the Colorado Supreme Court deemed that (1) the events of January 6 constituted an insurrection, (2) Trump engaged in the insurrection, and (3) his engagement disqualified him from holding the office of the president per the Disqualification Clause.[183]

Trump filed a petition for certiorari, requesting the Supreme Court review the Colorado ruling.[184] In its opinion, the Supreme Court first referenced *Griffin's Case*, reiterating the need for specific congressional legislation to enforce the Disqualification Clause.[185] The Court used this background to establish that only Congress has the power under the Constitution to enforce Section 3 with respect to federal offices.[186] The Court pointed to the language in Section 5 permitting Congress to enforce the provisions of the Fourteenth Amendment, noting that this language does not convey enforcement power upon the states.[187] Further, the opinion noted the potential for a lack of uniformity in voter representation should Section 3 challenges be resolved on a state-by-state basis.[188] Interestingly, the Court did not address the question of whether the Disqualification Clause can even be applied to the office of the presidency, referring only broadly to "federal officeholders and candidates."[189]

The Supreme Court's decision in the Trump case sets significant precedent as to the limited applicability and usage of the Disqualification Clause in the modern day. Despite multiple state courts coming to the legal conclusion that the events of January 6

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181 *Id.*

182 *Id.* at 297.

183 *Id.*

184 Trump v. Anderson, 601 U.S. 100, 108 (2024).

185 *Id.* at 109 (describing how the Clause imposes a specific penalty on certain individuals, making it necessary "to 'ascertain[] what particular individuals are embraced' by the provision." (quoting Griffin's Case, 11 F. Cas. 7, 26 (C.C.D. Va. 1869))).

186 *Id.* at 110.

187 *Id.* at 112.

188 *Id.* at 116.

189 *Id.* at 115.

constituted an insurrection, in which Trump was a key player, he has not been held accountable for his actions. Trump is now holding the highest office in the country, with no further recourse available to terminate his candidacy. The Disqualification Clause provides a mechanism for candidate disqualification in theory but is clearly limited in its ability to actually affect removal from office. Federal officeholders can participate in insurrection and treason without losing their ability to hold office, despite the lack of a right to candidacy. Ultimately, candidacy is more easily accessible than the fundamental right to vote—a startling discrepancy in a supposedly democratic country.

V
PROPOSED LEGISLATION

Given the racial disparity in sentencing and the discriminatory history of felon disenfranchisement, current felon disenfranchisement legislation presents a clear race-based barrier to voting. Accordingly, Congress has the power under the Fifteenth Amendment to enact legislation to enforce equal voting rights protections.[190] Such legislation should be multifaceted, addressing both felon disenfranchisement and candidate disqualification. The current criteria for candidate disqualification need to be refined, with clear standards created for treason and insurrection. The refined criteria will then apply to disenfranchisement and disqualification equally. Further, the legislature can take this opportunity to establish the procedure for disqualifying candidates from office, settle the question of whether the president is an "officer of the United States," and clarify whether states can exclude federal candidates from their ballots. This comprehensive legislation will provide a uniform approach to the issues of disenfranchisement and disqualification, restoring balance to the protection of rights over privileges.

First, Congress must establish legal definitions to apply uniformly for treason and insurrection. Once a clear standard has been created for these offenses, both candidate disqualification and felon disenfranchisement can be automatically imposed upon conviction. Judicial review will be required only for complex cases that do not fit neatly into the categorical definitions. The creation of these standards will uniformly apply felon disenfranchisement at a national level,

190 U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

removing voting rights exclusively from those convicted of a felony for treason or insurrection. Any other felony conviction will not carry a penalty of disenfranchisement, and those convicted of felonies will be able to vote even while incarcerated. This policy will apply retroactively, restoring voting rights nationwide.

Second, Congress may take this opportunity to make the Disqualification Clause a more powerful tool for regulating politicians and sanctioning violations of their oath to uphold the Constitution. The Disqualification Clause can be empowered through a clear and unambiguous procedure of enforcement, an affirmative resolution to the categorization of the president as an officer of the United States, and a mandate excluding disqualified candidates from all state ballots. As I mentioned above, any person convicted of a qualifying offense will be automatically disqualified and disenfranchised, without the need for judicial review. For candidates already in office, this will result in immediate termination from their position. If a candidate has not yet been elected, their name will be removed from ballots and any votes for that candidate will be disregarded. This procedure will apply equally to all federal officials, including the president. Based on the textual analysis, sufficient evidence exists to determine that the president is intended to be included within the category of "officer[] of the United States."[191] Congress can make this categorization official through the proposed legislation, resolving lingering confusion and eliminating the need for further Supreme Court deliberations on the matter. This legislation will standardize the application of candidate disqualification nationwide, relieving states of the burden of challenging disqualified candidates on an individual basis.

An issue to address is the reluctance of courts to convict political candidates, as seen through the failed indictments brought against Trump for his involvement on January 6. While the Trump case did not inspire much confidence in the judiciary's willingness to disregard political influence in the interest of justice, the passage of this legislation will help empower courts to act when necessary. The three branches of government function effectively through a system of checks and balances. Increased enforcement of the Disqualification Clause will serve to keep all three branches accountable.

The proposed legislation may face backlash from proponents of felon disenfranchisement, who present several policy justifications for removing voting rights from those convicted of crimes. One argument

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191 Lynch, *supra* note 133, at 162.

is based on the notion of the social contract, that felons have broken the law and thus abandoned their right to participate in lawmaking.[192] This argument, however, fails to consider the already punitive intent of incarceration. Permanently removing voting rights coupled with taking away a person's freedom for a specified period of time is an excessive punishment. Disenfranchisement serves no retributive purpose, as it is a collateral consequence that affects offenders regardless of the severity of their offense.[193] Further, not allowing a felon to participate in the decision-making process for their community discourages both effective rehabilitation and reintegration upon release.

A second policy argument alleges that convicted citizens are less trustworthy than nonconvicted citizens, and thus should not be entrusted with the ability to vote.[194] This argument falls short in the face of research on felon perceptions of law, which demonstrates that felons generally support and believe in the importance of existing criminal laws, even agreeing that punishment is appropriate for the crimes they have committed.[195] Further, the proposed legislation above addresses this qualm in part by excluding those convicted of treason and insurrection. This serves to eliminate those from the voting pool who have acted to betray their own country and who cannot be trusted to vote for the common good.

A final issue that may arise in response to this legislation is resistance from the states to abide by a federally mandated felon disenfranchisement scheme, when this has previously been a state-regulated issue. The passage of the VRA, however, indicates nationwide recognition of the need for federal codification of voting rights. Where an issue arises involving equal protection and inclusion of voters, it falls under the control of the federal government. States will still maintain the ability to set the manner and means of voting so long as no undue exclusion exists in their elections.

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192 Roger Clegg et al., *The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 AM. U.J. GENDER SOC. POL'Y & L. 1, 23 (2006).

193 Keller, *supra* note 110, at 205 (explaining that disenfranchisement runs contrary to the retributivist theory of criminal law because it is a response to the perceived dangers of the offender rather than a response to the severity of the offense).

194 Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001) ("[W]e do not want people voting who are not trustworthy and loyal to our republic. . . . Criminals are, in the aggregate, less likely to be trustworthy, good citizens.").

195 Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1100 (2002).

CONCLUSION

The time has come to promote symmetry in the rights of convicted felons. The ideals of justice cannot be achieved in a country where the right to vote is more easily rescinded than the opportunity to be a political candidate. To create a more just democracy, this imbalance must be corrected through legislation equalizing the processes of voter disenfranchisement and candidate disqualification.

The political franchise of voting was established as a key component of American democracy when the Constitution was written, and was further affirmed as fundamental by various Supreme Court decisions over the centuries that followed.[196] Voting regulations with potential for infringement are subject to strict scrutiny, a standard that emphasizes the importance of the fundamental right to vote.[197] Enfranchisement was extended to former slaves following the Civil War through the Reconstruction Amendments.[198] The ability to vote functioned as an instrument of empowerment for Black citizens, operationalizing their legal and political equality.[199] This expansion of Black civil rights faced significant backlash from Southern states, leading to the creation of the Voting Rights Act of 1965.[200]

Despite the federal government's codification of voting protections, states were able to quietly rescind equal voting rights through strategic usage of felon disenfranchisement laws.[201] Felon disenfranchisement finds its legal foundation in Section 2 of the Fourteenth Amendment,[202] but was not a widespread concept until after Black citizens were granted the right to vote.[203] Felon disenfranchisement criteria were expanded after Reconstruction, targeting felonies believed to be more common to Black people in an effort to systematically diminish the effect of the Black vote.[204] Felon disenfranchisement laws remain in effect to this day, despite challenges brought under the Voting Rights Act and the Equal Protection Clause. Various states have begun taking legislative action toward restoring felon voting rights, indicating some level of support for felon re-enfranchisement.

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196 Ross II, *supra* note 6, at 1706.

197 *See* Chambers, *supra* note 12, at 1428.

198 U.S. CONST. amends. XIII, XIV, XV.

199 Chambers, *supra* note 12, at 1419.

200 Newman, *supra* note 60, at 531–33.

201 Jacobs, *supra* note 8, at 108.

202 U.S. CONST. amend. XIV, § 2.

203 Jacobs, *supra* note 8, at 109.

204 *See* Shapiro, *supra* note 76, at 541.

In contrast to the fundamental nature of voting, political candidacy is merely an opportunity for leadership in the democratic process. The Constitution provides specific qualifications for who may run for federal office, requiring a minimum age, term of citizenship, and residency status.[205] These qualifications do not imply a fundamental right to candidacy,[206] and no such right has been recognized or protected by either the legislature or the judiciary in the history of this country. Despite the lack of a fundamental right to seek office, disqualification is more narrowly applied than felon disenfranchisement. A candidate is disqualified from office only through the process of impeachment or under the Disqualification Clause.

The Disqualification Clause, which again comes from the Fourteenth Amendment, limits its application to officers of the United States who have engaged in insurrection or rebellion against their country.[207] This Clause was created within the Reconstruction Amendments to target Confederate officials after the Civil War.[208] Its use, however, was short-lived, as courts soon decided that automatic application of the Clause was excessive, and an act of Congress would instead be required to disqualify federal candidates.[209] At present, despite numerous attempts by state prosecutors and courts, the Clause has not been used successfully against a federal candidate. The only modern-day application of the Disqualification Clause was at the state level.[210] Millions of Americans have been disenfranchised in the past few decades, in contrast to the singular political candidate removed from office. This violates basic notions of justice.

As it exists currently, felon disenfranchisement is an overly broad restriction on a fundamental right. Felon disenfranchisement is rooted in a history of racism and retaliation against the expansion of Black civil rights. It was not until Black people were enfranchised that felon disenfranchisement laws emerged with a vengeance, intentionally targeting a specific demographic solely on the basis of race. This pattern has continued until the present day, with significant racial disparity in sentencing and incarceration rates. The Black community

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205 U.S. CONST. art. I, § 2.

206 Kowall v. Benson, 18 F.4th 542, 547 (6th Cir. 2021).

207 U.S. CONST. amend. XIV, § 3.

208 Sternstein, *supra* note 13, at 8.

209 Griffin's Case, 11 F. Cas. 7, 26 (C.C.D. Va. 1869).

210 *See* New Mexico *ex rel.* White v. Griffin, No. D-101-CV-2022-00473, 2022 LEXIS 114653, at *30–31 (N.M. Dist. Sept. 6, 2022).

is systematically stripped of its fundamental right to vote through seemingly colorblind felon disenfranchisement laws.

Enfranchisement provides the basis for a government to effectively represent all its citizens. Restricted voting rights threaten the legitimacy of representative democracy. Race plays a key role in both historical and modern felon disenfranchisement laws, which disproportionately affect Black Americans. Even without express and intentional discrimination, any law with such an effect must be questioned. To preserve the democratic principles upon which this country was founded, significant legislative changes need to be made to both felon disenfranchisement and candidate disqualification.