One can only speculate how a victory for Al Gore in the 2000 presidential election may have affected American life. What would his reaction have been to the terrorist attacks of September 11, 2001? Would the United States be engaged in a war with Iraq? Would the American people still be able to boast their nation’s first African American president? The close 2000 election with its infamous “hanging chads” sparked renewed interest in election law, and some scholars pointed to the disenfranchise of felons in Florida as a determinative issue. A new wave of scholarship emerged as academics began to reevaluate this longstand-
ing practice. Like their predecessors, recent scholars address the philosophical, political, and racial implications of felon disenfranchisement, and in most cases, they struggle to find justification for this widespread practice.\(^1\) In light of the manipulations of disenfranchisement law for political advantage that mar America’s history, this scholarship represents a salient reevaluation of current disenfranchisement law and the ideologies behind it.

The disenfranchisement of criminals for retribution and deterrence is well established in Western legal tradition.\(^2\) Ancient Greek society, which prohibited certain types of convicts from appearing in court, delivering public speeches, and voting, set the precedent of disenfranchisement.\(^3\) Medieval England also deprived felons of many of their political rights, deeming them “civilly dead,” and as a consequence of this loss of legal protection, offenders became vulnerable to assaults on their person or property.\(^4\) The United States has continued in the Western tradition of disenfranchisement, but the history of disenfranchisement in the United States suggests that the laws depend less on traditional philosophies such as retribution and deterrence, which are themselves vulnerable to challenge, than on the pursuit of political advantage, which often involves racial discrimination.

Excluding criminals from political participation has been an accepted practice in the United States from its beginning, though the prevalence and scope of felon disenfranchisement laws rose significantly in the 1840s and then again during the Reconstruction period, continuing to rise through the twentieth century.\(^5\) Several of the original colonies disenfranchised their felons, and some state constitutions of the eighteenth century explicitly prohibited felons from voting. Most state constitutions, however, simply permitted legislatures to disenfranchise felons, and a review of disenfranchisement history shows that an increasing number of state legislatures have taken advantage of this authorization.\(^6\)

Prior to 1840, only four of the twenty-six states disenfranchised felons, but by 1850, over one-third of states prohibited even ex-felons from voting.\(^7\) This period saw an expansion not only of the quantity but also of the scope of voting restrictions, which included a wider range of offences and thus a greater number of

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\(^6\) Behrens, supra note 2, at 563.
\(^7\) Id. at 564.
to maintain social and political order versus the desire to extend civil rights and liberties to all citizens” (“Public Attitudes”). Americans have sought to reconcile these competing interests by drawing greater distinctions between felons serving time and ex-felons who have completed their sentences. As a result of another wave of restrictions beginning in 1889, three-fourths of states had disenfranchised ex-felons by 1920, with Hawaii (upon statehood in 1959) being the last state to do so.12 This trend reversed in the 1960s and 1970s, the height of the civil rights movement, as seventeen states repealed voting restrictions on ex-felons.13 By 2002 five more states had followed in liberalization, though nation-wide suffrage was denied to ex-felons that same year with the defeat of a U.S. Senate measure that would have guaranteed their right to vote in federal elections.14 In contrast to the ballot rights afforded ex-felons in the twentieth century and as a result of efforts by politicians on both sides of the aisle to gain votes by keeping up a punitive image, every state except for Maine and Vermont had a broad felon disenfranchisement law in 2002, representing the highest percentage of states in United States history.15

9 Id.
10 Behrens, supra note 2, at 597.
11 Id. at 585-86.
12 Id. at 564.
13 Manza, supra note 8, at 493.
Disenfranchisement of felons can be approached from several perspectives, including philosophical, political, and racial. The philosophical rationale rests on conceptions of justice derived from the liberal legal model and on perceived beneficial social consequences. These arguments rely heavily on the Lockean social contract and tend to lend stronger support for the disenfranchisement of current inmates than for those who have completed their sentences.

The argument from justice, or desert, is represented by the intuitive view that because criminals have broken a community’s laws, they no longer deserve to help shape the laws through voting. This intuition is theoretically justified through retributivism and forfeiture. According to retributivism, breaking laws is a political act and therefore demands a political consequence. Further, such retribution is seen as proportional since it is applied only to felonies, the most serious acts. To counter these claims of retributivism, opponents of felon disenfranchisement argue that though criminal behavior breaks laws, the offence may not be political in nature and that proportionality can be, and in fact is, achieved by other means (variable severity of punishments) apart from disenfranchisement.

The concept of forfeiture is supported by arguments that contend that the moral status of criminals is altered by their criminal behavior such that they forfeit their standing as right holders. As a consequence of this forfeiture, society may permissibly treat criminals in a way that would otherwise be unjust. To counter this claim, many appeal to the need for appropriate punishment, insisting that criminal behavior does not eradicate all rights and not all crimes specifically deserve the repeal of ballot rights. Some scholars, considering the facts that criminals are obviously not deprived of the right to due process and that disenfranchisement is independent of the judge-imposed sentence, conclude that “it is very possible that the due process clause prevents a state from taking away the right to vote solely by legislative and administrative action, without an opportunity for a hearing.”

Emphasizing that permissibility does not equate with desirability, opponents of disenfranchisement insist that, according to Lockean social contract theory, of which criminal behavior constitutes a breach, to be justly implemented, disenfranchisement must serve some positive purpose in society, such as making crime “an ill bargain to the offender, [giving] him cause to repent, and

\[\text{Id. at 546-48.}\]
\[\text{Id. at 550.}\]
\[\text{Id. at 553.}\]
significant deterrent effect on crime and skeptical that the threat of disenfranchisement would provide a stronger deterrent to potential criminals than harsh prison terms, many opponents of felon disenfranchisement deny deterrence as a reasonable justification for disenfranchisement.32 Perhaps the most convincing evidence of the ineffectiveness of disenfranchisement as a deterrent is the fact that the general public, including most potential criminals, is unaware of disenfranchisement as a potential consequence of conviction.33

Proponents raising rehabilitation as a social good that justifies felon disenfranchisement may frame their argument as follows: “Perhaps by being disenfranchised, felons are reminded of their past criminal acts. Thus, they are more likely to commit themselves to being reformed and rehabilitated.”34 Opponents argue that the benefit of this potential good is outweighed by the potential, and more likely, negative effects of disenfranchisement on felon rehabilitation. To them, reintegration into the community is essential to rehabilitation since alienation, a sense of helplessness, and disregard for authority are at the root of criminal behavior. Disenfranchisement only serves to confirm these destructive attitudes.35 Research on the process of transitioning criminals from prison back into society has demonstrated the importance of successful reintegration to avoiding recidivism, and politi-

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26 Cholbi, supra note 16, at 454.
27 Id. at 555.
28 Id. and The Need for Reform, supra note 25, at 590.
29 Cholbi, supra note 16, at 556.
31 Cholbi, supra note 16, at 557.
32 Harvey, supra note 30, at 1172.
33 Id. at 1172, and Cholbi, supra note 16, at 557.
34 Cholbi, supra note 16, at 558.
35 Id.
the impact would have been. According to these models, enfran-
chised felon populations would have had determinative impact
on both presidential and senatorial elections. Because felons
are likely to be poor and racial minorities and individuals of this
demographic profile are more likely to vote for the Democratic
Party, most people expect that, overall, enfranchisement would be
a political gain for Democratic candidates.41 For instance, a sur-
vey published in 2002 found that in fourteen out of the previous
fifteen senatorial elections, approximately seven out of ten ballots
cast by felons would have been for a Democrat.42 Several studies
confirm that two presidential elections and seven senatorial elec-
tions may have been altered if felons had had the right to vote,
and Democrats may even have maintained control of the Senate
throughout the 1990s.43

The presidential election of 2000 is the most dramatic
example of the potential impact of disenfranchisement, for schol-
ars believe that approximately 60,000 members of Florida’s ex-
felon population would have voted Democratic. Thus, even if
only ex-felons had been allowed to vote in Florida, the additional
votes for Gore would easily have provided the necessary votes to
reverse Bush’s victory.44 The importance of felon disenfran-
chisement is recognized by politicians, as evidenced by an Alabama
Republican Party Chairman’s reaction to a bill that would restore
some ex-felons’ voting rights: “…we’re opposed to it because felons don’t tend to vote Republican”. 45

The 2000 presidential election brought attention to the burdensome and potentially politically-driven restoration process that accompanies a system of permanent disenfranchisement. Permanent disenfranchisement denotes a “regime [where] convicted felons may not vote unless they obtain a pardon or other type of restoration order from the state’s governor or from the state’s parole or pardons board.”46 The Florida Department of Corrections drew criticism as word spread that it had granted approximately 50% fewer restorations in 2000 than it had a decade earlier.47

In addition to permanent disenfranchisement, state policies on the disenfranchisement of felons in the United States can be categorized as modified permanent disenfranchisement or restoring disenfranchisement and may shift from one category to another with a single legislative act.48 Modified permanent disenfranchisement states have limits on their disenfranchisement, such as Arizona and Maryland, which only disenfranchise felons after their second offence, and restoring states, such as New Mexico and Texas, have ceased to disenfranchise ex-felons.49 Whether motivated by political self-interest or pressure from the continued civil rights movement, several state legislatures operating within each of these systems have recently expanded felon ballot rights.50 Kentucky and Nevada, for instance, which, like Florida, practice permanent disenfranchisement, have significantly simplified their restoration processes in recent years.51 Not all recent state legislation has been liberalizing, however. Between 1975 and 2004, 11 states have adopted more restrictive disenfranchisement laws, while 13 have eased up on their limitations, and three have passed both kinds of legislation.52

Reacting to state-imposed voting procedures and prerequisites that, in effect, undermined the intent of the 15th Amendment, the Voting Rights Act of 1965 officially ensured genuine equal suffrage to all United States citizens. Yet, many scholars who take a racial approach to the discussion of felon disenfranchisement are concerned that the largely ignored racial disparities in the prison system jeopardize the democratic rights of racial minorities.53 Of particular concern are the possibilities of discriminatory intent in disenfranchisement legislation and unfair convictions. Where discrimination is found, the matter is often addressed through litigation in state courts.

Evidence of the discriminatory nature of current felon disenfranchisement laws includes the finding that changes to disenfran-
chisement laws that increase restrictions on felon voting are correlated to the percentage of non-white prisoners within a state, or “racial threat.” Racial threat’s influence on disenfranchisement law is not new in American practice and is still observable today. Recognition of the large Mexican and Asian populations in the Western territories during the nineteenth century, when considering the passage of felon disenfranchisement legislation by every Western state besides Utah and Montana within a decade of statehood, has lead contemporary scholars to propose that the actions of these states amount to “attempts to limit suffrage of the non-white population.” Such racially motivated efforts were more blatant in the Reconstruction era, for many of the state laws adopted during this time appeared to target crimes for which African Americans were especially likely to be convicted. Under these laws, Alabama’s non-white prison population swelled from 2% in 1850, to 74% in 1870, rendering the impact of disenfranchisement laws disproportionately heavy on the black population.

Racial disparity is prevalent in the disenfranchised felon population to this day, with blacks being disproportionally represented. Approximately one out of every six African-American men is presently disenfranchised because of a felony conviction. Though no racial injustice is incurred by disenfranchisement if criminal justice is administered fairly across races, many scholars contend that the law, especially drug law, has been applied disproportionately and thus the disenfranchisement of felons constitutes an unlawful dilution of the black vote. The huge disparity between the percentage of drug users that are black and the percentage of people arrested on drug charges that are black indicates that the drug law has been unfairly applied at the expense of blacks. The greater likelihood of drug sweeps to be conducted in urban neighborhoods and harsher sentences associated with crack rather than powder cocaine do little to waylay concerns about injustice.

While racist intent must be drawn through inference in the above examples, the history of many felon disenfranchisement laws is much more explicit. In 1901, for instance, Alabama’s Constitutional Convention added crimes of “moral turpitude” to felonies meriting disenfranchisement, the convention’s president arguing for the “manipulation of the ballot” to ward off “the menace of negro domination.” The Supreme Court struck down this measure in Hunter v. Underwood, 471 U.S. 222 (1985) as a violation of the Equal Protection Clause.

Although the Court defended citizens from this flagrant attack on their voting rights, it has not opposed felon disenfranchisement
universally. While the Court has upheld the legal permissibility of disenfranchisement, lawmakers, questioning the social good of such laws, are liberalizing voting rights. The Supreme Court’s ruling in Richardson v. Ramirez, 418 U.S. 24 (1974) is considered to be the controlling case in felon disenfranchisement cases because of its strong ruling that Section 2 of the Fourteenth Amendment allows states to disenfranchise ex-felons.65 Because of this definitive legal precedent, state legislation has been more successful than litigation in reforming felon disenfranchisement policy.66 Legislative changes may be sweeping, extending voting rights to large categories of criminals (as was the case in Connecticut, where felons on probation regained voting privileges due to the influence a coalition of community groups had on the Department of Corrections) or more narrow in scope.67 Strategic litigation that focuses on specific aspects of policy and implementation, such as choice of disqualifying crimes and restoration conditions, has been modestly implemented in several states.68

The disenfranchisement of felons threatens to impinge the very foundation of democracy, the right of citizens to voice their views through the ballot box. Contemporary academics challenge the widely accepted philosophical arguments of justice and social benefits that underpin disenfranchisement, skeptical that these arguments can rationally justify the practice in light of political and racial abuses. Spurred by the potential political impact of felon disenfranchisement policy evident in competitive elections and charged with the burden of ensuring the equal protection of the rights of citizens of all races, lawyers and policymakers must continue to wrestle through the difficult questions and implications of disenfranchisement. Laws that protect each citizen’s right to vote, restricting it only, if at all, when honest philosophical analysis renders the restriction appropriate and proportional, must be developed and defended in state and federal legislatures and courts. For the good of society and the preservation of justice, disenfranchisement laws must be liberalized across America.

65 Harvey, supra note 30, at 1160.
66 Shaw, supra note 1, at 1444, and Developments, supra note 46, at 1955.
67 Developments, supra note 46, at 1958.
68 Id. at 1959.