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Felon Voting and Unconstitutional Congressional Overreach

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Abstract

Both the original Constitution and the Fourteenth Amendment specifically delegate to the states the right to determine the qualifications of voters and to disqualify anyone who participates "in rebellion, or other crime." Congress cannot override the Constitution through legislation and has no authority to restore the voting rights of felons for federal elections. The American people and their freely elected state representatives must make their own decisions in their own states about when felons should have their civil rights restored, including the right to vote. Requiring a waiting period and an application process is fair and reasonable given the high recidivism rate among felons. Any legislation passed by Congress taking away that power is both unconstitutional and unwise public policy.

Whether—or when—felons should have their voting rights restored is a public policy issue that is open to debate, but there is no question that the authority to decide this issue lies with the states, not with Congress.

A federal bill such as S. 2550, sponsored by Senator Rand Paul (R–KY)—which would restore the right to vote to nonviolent felons after they have served their term of imprisonment and no more than one-year of probation[1]—is a blatant example of congressional overreach that invades power specifically reserved to the states by the Constitution.

The Consequences of Felony Convictions

Various consequences attach to a criminal felony conviction.

- There may be (and usually are) prison or jail sentences.

This paper, in its entirety, can be found at **http://report.heritage.org/lm145**

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Key Points

- There is no question that the authority to decide whether (or when) felons should have their voting rights restored lies with the states, not with Congress.
- A federal bill such as S. 2550, which would restore the right to vote to nonviolent felons after they have served their term of imprisonment and no more than one year of probation, invades power specifically reserved to the states by the Constitution.
- Automatic felon re-enfranchisement is unwise public policy. It sends the message that Americans do not consider criminal behavior so serious that the right to vote should be denied because of it. Those who are unwilling to follow the law cannot demand a right to make it. Not allowing them to vote tells criminals that committing a serious crime puts them outside the circle of responsible citizens until they show they have turned over a new leaf. Being readmitted to the circle should not be automatic.

- There are other direct penalties such as fines, court costs, restitution, and possible probation and parole requirements.

- In addition to losing the right to vote in 48 states,[2] felons face additional penalties imposed by states, such as the inability to work as a police officer, to hold certain elected offices, or to serve on a jury.[3]

- Under both federal and most state laws, felons also cannot possess a gun.[4]

In short, the initial time in prison is not and has never been the only way a felon "pays his debt to society."[5]

Of the 48 states that disenfranchise individuals upon conviction for a felony offense, most do not return the right to vote until any term of probation or parole has been fully completed. Furthermore, some states, such as Florida, Iowa, Kentucky, and Virginia, require felons to apply for restoration of their civil rights, including voting, through the pardon process.[6]

The Proposed Federal Legislation

S. 2550 provides that the right of an individual to vote in any federal election:

> shall not be denied or abridged because that individual has been convicted of a non-violent criminal offense, unless, at the time of the election, the individual
>
> (1) is serving a sentence in a correctional institution or facility; or
>
> (2) ... is serving a term of probation.

Accordingly, under this proposal, nonviolent felons must be allowed to vote once they are no longer in prison unless they are on probation, in which case they still get their right to vote restored:

> (1) on the date on which the term of probation ends, if the term of probation is less than 1 year; or
>
> (2) on the date that is 1 year after the date on which the individual begins serving the term of probation, if the term of probation is 1 year or longer.

The bill gives both the U.S. attorney general and private parties the ability to enforce this requirement through civil litigation.

Bills proposed in prior Congresses have gone even further. For example, in 2009, Representative John Conyers (D–MI) sponsored H.R. 3335, which would have restored the right of all felons to vote in federal elections the moment their prison sentence was completed.[7] Just as in H.R. 3335, the definition of "correctional institution or facility" contained in Senator Paul's bill does not include "any residential community treatment center (or similar public or private facility)."

Under S. 2550, if the felon is in a halfway house or other type of "residential community treatment center" but not under probation, or if he is past the one-year probation time limit but still has not completed other requirements of his sentence such as paying restitution to victims or criminal fines, he would still get to vote. In other words, states would be forced to allow individuals who intentionally broke the law to vote for those who make the laws—and in some cases enforce the laws—even though they have not completed all of the terms and conditions of their sentences.

1. S. 2550, Civil Rights Voting Restoration Act of 2014, 113th Cong. (2013–2014) (this bill is cosponsored by Sen. Harry Reid (D–NV); *see also* H.R. 5719, sponsored by Rep. Frederica S. Wilson (D–FL).
2. In Vermont and Maine, felons are allowed to vote from prison.
3. *See* U.S. Dept. of Justice, Office of the Pardon Attorney, Civil Disabilities of Convicted Felons: A State-by-State Survey (Oct. 1992), *available at* https://www.ncjrs.gov/pdffiles1/Digitization/171656NCJRS.pdf.
4. 18 U.S.C. § 922(g); *see, e.g.*, Tex. Pe. Code Ann. § 46.04 ("A person who has been convicted of a felony commits an offense if he possesses a firearm"); Va. Code § 18.2-308.2; and Fl. Statutes § 790.23.
5. One of the authors explains why this metaphor is a misleading one. *See* Roger Clegg, *The Fox Is Guarding the Henhouse*, Center for Equal Opportunity (May 6, 2013), http://www.ceousa.org/issues/693-the-fox-is-guarding-the-henhouse.
6. *See* National Conference of State Legislatures, *Felon Voting Rights*, http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx (last visited Jan. 13, 2015).
7. H.R. 3335, Democracy Restoration Act of 2009, 111th Cong. (2009–2010).

The Fourteenth Amendment and the (Non-Racist) History of Felon Disenfranchisement

S. 2550 represents an unconstitutional intrusion into the rights of the states. Congress does not have the authority to force states to restore the voting rights of convicted felons—even in federal elections. Section 2 of the Fourteenth Amendment specifically provides that states may abridge the right to vote of citizens "for participation in rebellion, or other crime." The Fourteenth Amendment recognized a process that goes back to ancient Greece and Rome, as even opponents of felon disenfranchisement have recognized.[8] The claim that state laws that take away the right of felons to vote are all rooted in racial discrimination is simply historically inaccurate: Even before the Civil War, when many black Americans were slaves and could not vote, most states took away the rights of voters who were convicted of crimes.[9]

It should be kept in mind that the Fourteenth Amendment, like the Fifteenth Amendment, was one of the key post–Civil War amendments sponsored and passed by Republicans, the party of Abraham Lincoln and abolition, to help secure the rights of black Americans. Those same Members of Congress deliberately protected the right of states to withhold the right to vote from citizens who were convicted of serious crimes against their fellow citizens, because "the framers of the Civil War Amendments saw nothing racially discriminatory about felon disenfranchisement. To the contrary, they recognized the power of the states to prohibit felons from voting."[10]

A key source for proponents of felon voting, a 2002 article by University of Minnesota Professor Christopher Uggen and Northwestern University Professor Jeff Manza, concedes that "[r]estrictions [on felon voting] were first adopted by some states in the post-Revolutionary era, and by the eve of the Civil War some two dozen states had statutes barring felons from voting or had felon disenfranchisement provisions in their state constitutions."[11] That means that over 70 percent of the states had these laws by 1861—when most blacks could not vote because either they were still enslaved or they lived in northern states that denied them the franchise based on their race. In 1855, only five states, all in New England, did not exclude blacks from voting because of their race.[12]

While it is true that during the period from 1890 to 1910, five Southern states passed race-targeted felon-disenfranchisement laws, a graphic in the article by Uggen and Manza demonstrates that over 80 percent of the states in the United States (which was increasing in size as western territories became states) already had felon-disenfranchisement laws.[13]

Alexander Keyssar's book *The Right to Vote*—cited in the Uggen and Manza article (Keyssar also supports felon enfranchisement)—notes that outside the South, the disenfranchisement laws "lacked socially distinct targets and generally were passed in a matter-of-fact fashion."[14] Even for the post–Civil War South, Keyssar admits that in some states, "felon disfranchisement provisions were first enacted [by] Republican governments that supported black voting rights."[15] To quote Uggen and Manza, "In general, some type of restriction on felons' voting rights gradually came to be adopted by almost every state, and at present 48 of the 50 states bar felons—in most cases including those on probation or parole—from voting."[16]

8. Human Rights Watch & The Sentencing Project, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States (1998).
9. Roger Clegg, George T. Conway III, & Kenneth K. Lee, *The Case Against Felon Voting*, 2 U. St. Thomas J.L. & Pub. Pol'y 1, 4 (2008); for an exposition of this faulty claim, see Brentin Mock, *The Racist History Behind Felony Disenfranchisement Laws*, Demos (Feb. 13, 2014), http://www.demos.org/blog/2/13/14/racist-history-behind-felony-disenfranchisement-laws.
10. *Id.*
11. Christopher Uggen and Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 American Sociological Rev. 777, 781 (2002).
12. Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 55 (2000).
13. Uggen & Manza, *supra* note 11, at 795.
14. Keyssar, *supra* note 12, at 162.
15. Alexander Keyssar, *Did States Restrict the Voting Rights of Felons on Account of Racism?* Hist. News Network (Oct. 4, 2004), http://hnn.us/articles/7635.html.
16. Uggen & Manza, *supra* note 11, at 781.

As for the five Southern states that tried to use these laws during Reconstruction and afterward specifically in order to disenfranchise black voters, those laws have all been amended[17]—as indeed they had to be since they otherwise would have been struck down, as the Supreme Court of the United States struck down Alabama's law in *Hunter v. Underwood*.[18]

If there were evidence that such discriminatory laws were still on the books, there are many well-funded civil rights advocacy organizations, as well as the U.S. Department of Justice, that would be eager to challenge them. The fact that no such challenges are being brought indicates that such evidence likely does not exist.

One other important note: In the *Hunter* case, the Supreme Court specifically noted that "[p]roof of racially discriminatory intent is required to show a violation of the Equal Protection Clause." No such showing of intentional discrimination can be made with regard to such state laws today, and it would not be sufficient for challengers to prove that such laws only have a "racially disproportionate impact."[19]

For this reason, Congress also lacks authority to ban state felony disenfranchisement laws under either Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment.[20] Under existing state laws, criminals lose their right to vote because of their own actions in violating the law, not because of their race.

Article I of the Constitution and Felon Voting

Under the U.S. Constitution, if Congress is not acting pursuant to a specific grant of power given to it in Article I or some other constitutional provision, it is acting unconstitutionally. The federal government does not have the inherent power to do whatever it wants: It is a government of limited and enumerated powers,[21] and there is no authority in the Constitution for Congress to force states to allow felons to vote, particularly in light of the language and limitations of the Fourteenth Amendment.

In fact, the Constitution gives the states authority to determine the qualifications of voters in those states. Article I, Section 2, Clause 1 provides that voters for Members of the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment provides the same state qualification for voters for Members of the Senate. In other words, the qualifications or eligibility requirements that states apply to their residents voting for state legislators must be applied to those same residents voting for Members of Congress, thereby explicitly giving states the ability to determine the qualifications for individuals voting in federal elections.

Congress is given the authority under the Elections Clause in Section 4 of Article I to alter the "Times, Places and Manner of holding Elections for Senators and Representatives," but that power does

17. *See* Roger Clegg, *Who Should Vote?* 6 Tex. Rev. L. & Pol. 159, 171 n.4 (2001). For more on the non-racist history of felon disenfranchisement in the United States—from the Founding, up to the Civil War, after the Civil War (with the limited exceptions noted), including the Reconstruction Congress, on to the present day—*see* Roger Clegg, George T. Conway III, & Kenneth K. Lee, *The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 J. Gender Soc. Pol'y & L. 1, 5–8 (2006); John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates*, 9 J. Pol'y Hist. 282 (2007); Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 Yale L.J. 1584 (2012); Michael B. Mukasey, *What Holder Isn't Saying About Letting Felons Vote*, The Wall Street Journal, Feb. 14, 2014; George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 Fordham Urban L.J. 101 (2004). Much of this was presented to Congress in *Hearing on H.R. 3335, the Democracy Restoration Act of 2009 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2010) (testimonies of Roger Clegg and Hans von Spakovsky), *available at* http://www.brennancenter.org/legislation/testimony-prof-burt-neuborne-support-hr-3335-democracy-restoration-act; *see also* Debating Reform: Conflicting Perspectives on How to Fix the American Political System 70–77 (Richard Ellis & Michael Nelson eds., 2013).

18. 471 U.S. 222 (1985). This case involved Alabama's 1901 Constitution, which disenfranchised persons convicted not just of felonies, but of misdemeanors "involving moral turpitude," a catch-all phrase that was used by state officials specifically to target black Alabamians.

19. A law may be entirely neutral in intention and yet affect some classes or groups of individuals more than others; thus, it may unintentionally have a racially disproportionate effect.

20. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

21. *See* U.S. v. Lopez, 514 U.S. 549 (1995).

not extend to the "qualifications" of voters. James Madison and Alexander Hamilton in *The Federalist Papers* support this view, which is the most natural reading of the text. For example, in *Federalist* No. 52, Madison stated that to have left such qualifications open to "the regulation of the Congress" would be improper. Likewise, in *Federalist* No. 60, Hamilton argues that prescribing voting qualifications "forms no part of the power to be conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the times, the places, and the manner of elections."

Contrary to the claim made by some,[22] the Supreme Court's 1970 decision in *Oregon v. Mitchell* does not provide any support for a federal felon voting law.[23] In a fractured series of opinions, five Justices voted to uphold legislation that required states to allow 18-year-olds to vote in federal elections, but eight Justices rejected—four "specifically" and four "implicitly"—the argument that Congress had the authority under Article I, Section 4 to make such changes.[24] Only Justice Hugo Black thought Congress had that authority. Justice Black wrote one opinion, Justice William Douglas another, and Justice William Brennan a third, in which he was joined by Justices Byron White and Thurgood Marshall. None of those writing or joining one of these opinions joined any of the others, and four other Justices—John Marshall Harlan, Potter Stewart, Harry Blackmun, and Chief Justice Warren Burger—dissented.

Other than Justice Black, the remaining four non-dissenting Justices relied on interpretations of Congress's enforcement authority under the Fourteenth and Fifteenth Amendments that are inconsistent with the Supreme Court's subsequent rulings in *Richardson v. Ramirez* and *City of Boerne v. Flores*.[25]

- In *Richardson v. Ramirez*, the Court specifically rejected a challenge under the Equal Protection Clause to a state's felon disenfranchisement law.
- In *City of Boerne v. Flores*, the Court ruled that since the Fourteenth Amendment bans only laws that are deliberately discriminatory, Congress cannot pass legislation under the Amendment's enforcement clause aimed at laws that have only a disproportionate effect on a religious minority group: Congress's exercise of power under the Amendment's enforcement clause must have "congruence and proportionality" with the underlying constitutional guarantee.

In any event, the issue was superseded six months later with the ratification of the Twenty-Sixth Amendment, which provided that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Misguided claims by a few proponents of felony enfranchisement notwithstanding, Congress cannot rely on Article I, Section 4 for any authority on felon voting. Any doubt on this point was laid to rest in 2013, when the Supreme Court confirmed in *Arizona v. Inter Tribal Council of Arizona* that only states, not Congress, have the authority to determine the qualifications of federal voters.[26] The majority opinion by Justice Antonin Scalia, which was joined by the Court's four liberal justices as well as Chief Justice John Roberts and Justice Anthony Kennedy, stated:

> Arizona is correct that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them. The Constitution prescribes a straightforward rule for the composition of the federal electorate. Article I, § 2, cl. 1, provides that electors in each State for the House of Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," and the Seventeenth Amendment adopts the same criterion for senatorial elections. Cf. also Art. II, § 1, cl. 2 ("Each State shall appoint,

22. *See, e.g.*, *Hearing on H.R. 3335, the Democracy Restoration Act of 2009 Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2010) (testimony of Burt Neuborne).
23. Oregon v. Mitchell, 400 U.S. 112 (1970).
24. Congressional Research Service, Annotated Constitution (discussion of Article I, Section 4, at n.346), http://www.law.cornell.edu/anncon/html/art1frag18_user.html (last visited Jan. 13, 2015).
25. Richardson v. Ramirez, 418 U.S. 24 (1974); City of Boerne v. Flores, 521 U.S. 507 (1997).
26. 133 S. Ct. 2247 (2013).

> in such Manner as the Legislature thereof may direct," presidential electors). One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly. "It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress."
>
> Prescribing voting qualifications, therefore, "forms no part of the power to be conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." This allocation of authority sprang from the Framers' aversion to concentrated power. A Congress empowered to regulate the qualifications of its own electorate, Madison warned, could "by degrees subvert the Constitution." At the same time, by tying the federal franchise to the state franchise instead of simply placing it within the unfettered discretion of state legislatures, the Framers avoided "render[ing] too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone."[27]

Moreover, although Justices Samuel Alito and Clarence Thomas dissented from the judgment on other grounds, they agreed with the majority that the Constitution gives states, not Congress, the authority to determine the qualifications of voters. Justice Thomas stated, "I think that both the plain text and the history of the Voter Qualifications Clause ... and the Seventeenth Amendment authorize States to determine the qualifications of voters in federal elections."[28] Justice Alito added that "[u]nder the Constitution, the States, not Congress, have the authority to establish the qualifications of voters in elections for Members of Congress."[29]

Other Arguments Against Felon Voting

States cannot limit voting qualifications based on race or sex because of the explicit prohibitions of the Fifteenth and Nineteenth Amendments; however, the Fourteenth Amendment specifically allows them to limit those qualifications based on criminal convictions.

As suggested in the *Arizona* case, when it comes to presidential elections, Congress has even less authority. Article II, Section 1 provides that states "shall appoint, in such Manner as the Legislature thereof may direct," the electors of the Electoral College. Congress can determine only "the Time of chusing the Electors, and the Day on which they shall give their Votes." Thus, under these provisions, Congress has no authority to tell the states that they must allow felons to vote in presidential elections.

The Equal Protection Clause of Section 1 of the Fourteenth Amendment likewise provides Congress with no authority on this issue. The Supreme Court threw out an equal protection challenge to California's felon disenfranchisement law in 1974, concluding, "Those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment."[30]

Finally, claims that state felon disenfranchisement laws violate the Voting Rights Act also have been dismissed in the courts. What is more, as the Eleventh Circuit said when it concluded that Section 2 of the Voting Rights Act did not apply to Florida's voting rules for felons, any contrary view would raise "serious constitutional problems because such an interpretation allows a congressional statute to override the text of the Constitution."[31]

The bottom line is that S. 2550 is unconstitutional and invades power specifically reserved to the states by the Fourteenth Amendment and by Article I and other sections of the Constitution. It is a telling point that Attorney General Eric Holder, who

27. Arizona, 133 S. Ct. at 2257–2258 (citations omitted).
28. *Id.* at 2262.
29. *Id.* at 2271 (citations omitted).
30. Richardson v. Ramirez, 418 U.S. 24, 43 (1974).
31. Johnson v. Florida, 405 F.3d 1214, 1229 (2005) ("Congress has expressed its intent to *exclude* felon disenfranchisement provisions from Voting Rights Act scrutiny." *Id.* at 1234). *See also* Hayden v. Pataki, 449 F.3d 305 (2nd Cir. 2006); Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009); Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010).

wants the voting rights of felons restored, has called on the states to act, not Congress.[32] Apparently, even Holder recognizes that Congress clearly lacks this authority because, despite his own policy views, "the Obama administration has not advocated" for such congressional legislation.[33]

It also must be noted that it makes good sense to leave the issue of felon disenfranchisement—and felon re-enfranchisement—to the states as a matter of federalism. As even S. 2550 recognizes, not all crimes are equal, even among felony offenses. Just as one cannot presume that all felons are to be mistrusted with the ballot, it would be wrong to assume that all convicted felons can be trusted to vote in a responsible manner and therefore should be allowed to vote. Rather, it would be more prudent to distinguish among various crimes, between crimes recently committed and crimes committed in the distant past, and among those who have committed many crimes and those who have committed only one.

Such line-drawing is precisely why the matter should be left to the states and why it should be addressed on a case-by-case or even a category-by-category basis. It would be impossible for Congress to undertake this effort even if it had the authority to do so, which it does not: Every state has its own array of criminal offenses with wide ranges of punishment, and these offenses are constantly changing. It would also be difficult for Congress to draft a statute that drew intelligent distinctions based on how recently a crime was committed or the number of crimes committed. Accordingly, it is prudent for Congress to leave such determinations to the states.

S. 2550's crude attempt at line-drawing, allowing disenfranchisement only for a "crime of violence," illustrates the problem. It would not allow disenfranchisement for treason, espionage, bribing public officials, or voter fraud and other election crimes—crimes that go to the heart of the democratic process—let alone, say, selling heroin or methamphetamine to minors.

Policy Arguments in Favor of Felon Disenfranchisement

Those who are not willing to follow the law cannot claim a right to make the law for everyone else. And when an individual votes, he or she is indeed either making the law—either directly in a ballot initiative or referendum or indirectly by choosing lawmakers—or deciding who will enforce the law by choosing local prosecutors, sheriffs, and judges.

Not everyone in the United States may vote: Thus, children, noncitizens, and those who are adjudicated to be mentally incompetent are not allowed to vote. This nation maintains certain minimum, objective standards of responsibility, trustworthiness, and commitment to our laws for those who are allowed to participate in the solemn enterprise of self-government. It is not unreasonable to suppose that those who, regardless of their race, have committed serious crimes against their fellow citizens may also be presumed to lack this responsibility, trustworthiness, and commitment to America's laws.

Is it too much to demand that those who would make the laws for others—who would participate in self-government—be willing to follow those laws themselves? While some may think it is, it is certainly not unreasonable for others to disagree.

In November 2000, for example, a ballot initiative removed Massachusetts from the list of states allowing felons in prison to vote, leaving only Vermont and Maine. Francis Marini, Republican leader of the state house at the time, criticized the state's repealed practice because it made "no sense." As Marini questioned, "We incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run our lives?"[34]

Thus, even if Congress had the constitutional authority to pass this legislation, there are sound public policy reasons why it should not do so. The loss of civil rights is part of the sanction that our society has determined should be applied to criminals. While some states automatically restore the right to vote after a felon has completed all of the terms of his sentence, others require individual applications. States are and should be entitled to make their own decisions on this issue—a prerogative that includes implementing procedures to ensure that those who injure or murder their fellow citizens, steal, or damage our democracy by committing election crimes or engaging in public corruption like bribery have dem-

32. Matt Apuzzo, *Holder Urges States to Lift Bans on Felons' Voting*, The New York Times (Feb. 11, 2014).

33. *Id.*

34. "Jailhouse Vote," The Wall Street Journal (Dec. 7, 1999), http://www.ncpa.org/sub/dpd/index.php?Article_ID=10780.

onstrated that they can now be trusted again to exercise all of the rights of full citizenship.

Virginia, for example, has set up an application process for certain felons to apply for the restoration of their civil rights, including the right to vote. The process applies to felons convicted of a violent crime, a crime against a minor, or an election law offense, and application cannot be made until three years after the sentence and any applicable probation or parole have ended.[35] Thus, Virginia's process allows for an individualized review in which the state can determine whether such felons have fully served their sentences and presented some evidence to demonstrate that they have changed their ways.

Such requirements are perfectly reasonable, particularly since a large percentage of felons are rearrested and reincarcerated within a short time after they are released from prison. According to the U.S. Department of Justice, a study of felons in 30 states revealed that two-thirds (67.8 percent) were arrested for a new crime within three years, and three-quarters (76.6 percent) were rearrested within five years.[36] In fact, more than a third of all prisoners who were rearrested within five years of release were arrested within the first six months after release, with more than half arrested by the end of the first year—within the very time that S. 2550 wants to automatically restore their right to vote. The high recidivism rate of felons provides strong support for states such as Virginia that require both a waiting period and an individualized application process.

In Virginia, felons applying for restoration of their voting rights must also show that they have paid "all court costs, fines, penalties and restitution." S. 2550 would ignore and override this process, particularly at the expense of victims who are still owed restitution, and grant relief on a wholesale basis without considering whether someone deserves a restoration of his rights.

Finally, it is particularly odd that this proposed legislation is limited only to the restoration of convicted criminals' right to vote. Senator Paul has stated that the effort to restore felon voting rights is "about helping people get their lives back on track, about enabling them to provide for their families, about breaking the cycle of violence and poverty."[37] Similarly, the findings in H.R. 3335 state that this legislation would reintegrate "offenders into free society, helping to enhance public safety." The findings also say that felon disenfranchisement laws serve "no compelling State interest" for felons "who are living and working in the community."

If that is correct, then why does neither H.R. 3335 nor S. 2550 propose to restore all of the other civil rights that a convicted criminal loses in many states? A whole host of "collateral consequences" imposed by states and the federal government, such as limitations on types of employment, access to financial aid, and housing restrictions, arguably pose far greater impediments to reintegration into society than are imposed by felony disenfranchisement laws.

For instance, if convicted criminals can be trusted to exercise the right to vote, and if restoring that ability will help to integrate such criminals back into society, then why are their rights to public employment not restored? Many states prohibit felons from working as police officers or school teachers; if they can be trusted with the right to vote, why do the sponsors of these bills not trust them to work in law enforcement or as teachers in our public schools?

State and federal laws also prohibit felons from owning or even possessing a gun. If restoring the right of felons to vote helps to reintegrate them into society, why does Senator Paul's bill not also amend federal law to allow them once again to own a gun? In fact, Senator Paul has specifically said that it is "Absolutely, untrue" that his goal is also to restore Second Amendment rights for felons.[38]

This proposed legislation assumes that felons can be trusted enough to require the automatic restoration of their right to vote but not enough to automatically restore their right to own a gun or all of the other rights that were taken away when they were convicted of a "nonviolent" crime. While plausible

35. See Commonwealth of Virginia, *Restoration of Rights*, https://commonwealth.virginia.gov/judicial-system/restoration-of-rights/ (last visited Jan. 13, 2015).

36. Alexis D. Cooper, Matthew R. Durose, & Howard N. Snyder, Recidivism of Prisoners Released in 30 states in 2005: Patterns from 2005 to 2010, 1.

37. Sen. Rand Paul Homepage, *Courier Journal Response: Rand Paul Explains His Views on Restoring Felon Rights* (Sept. 23, 2014), http://www.paul.senate.gov/?p=news&id=969.

38. *Id.*

arguments could possibly be made for this differential, proponents of the restoration of voting rights for felons are silent on this issue and do not explain why felons can be trusted to exercise their right to vote properly but not to sit on a jury or work as a police officer or public school teacher.

Answering the Policy Arguments Against Felon Disenfranchisement

The policy arguments in favor of automatically restoring the rights of all felons to vote are unpersuasive.

"We let everyone else vote." Again, this is simply not true. America also denies the vote to children, noncitizens, and the mentally incompetent because they, like felons, fail to meet the objective, minimal standards of responsibility, trustworthiness, and commitment to our laws that we require of those who want to participate in the government not only of themselves, but also of their fellow Americans.

"Once released from prison, a felon has paid his debt to society and is entitled to the full rights of citizenship." This rationale would apply only to felons who are no longer in prison, of course, and might not apply with respect to felons on parole or probation, but even for these "former" felons, the argument is not persuasive. While serving a sentence discharges a felon's "debt to society" in the sense that his basic right to live in society is restored, serving a sentence does not require society to forget what he has done or bar society from making reasonable judgments based on his past crimes.

For example, as noted, federal law prohibits felons from possessing firearms or serving on juries, which does not seem unreasonable. In fact, as also previously noted, there is a whole range of "civil disabilities" (known as collateral consequences) for felons after their release from prison that apply as a result of federal and state law, listed in a 144-page binder (plus two appendices) published by the U.S. Justice Department's Office of the Pardon Attorney.[39] Society is not required—nor should it be required—to ignore someone's criminal record once he gets out of prison.

Finally, it should be noted that many of those who want felons re-enfranchised believe that even those who are still in prison should have the right to vote. For example, Marc Mauer, executive director of the Sentencing Project, the leading advocacy organization against disenfranchisement, believes that "people in prison should have the right to vote"—not just felons who have completed their sentences and been released.[40]

This suggests that even those who favor felon re-enfranchisement do not believe that serving one's time in prison automatically "earns" the restoration of one's right to vote. They believe, as we do, that serving one's sentence and being allowed to vote are separate issues. If they felt that one necessarily followed from the other, then they presumably would agree that if an individual has not paid his debt to society, then he should not be able to vote.

"These laws have a disproportionate racial impact." Undoubtedly, the reason that there is heightened interest in this subject is that a large percentage of felons are African Americans, although in absolute numbers, more whites are affected by felon disenfranchisement than blacks. That is because whites represent a majority of the individuals in state and federal prisons, according to the U.S. Justice Department, and have held that majority since Justice began keeping such records in 1926.[41]

The racial impact of these laws is irrelevant as a constitutional matter. It should also be irrelevant as a matter of policy. Legislators should determine, based on non-racial considerations, what the qualifications or disqualifications for voting are and then let the chips fall where they may. In *The Souls of Black Folk*, W.E.B. Du Bois wrote: "Draw lines of crime, of incompetency, of vice, as tightly and uncompromisingly as you will, for these things must be proscribed; but a color-line not only does not accomplish this

39. U.S. Dept. of Justice, Office of the Pardon Attorney, *supra* note 3. The American Bar Association has a useful map listing all collateral consequences imposed by the federal government and the states. *See* American Bar Association, Collateral Consequences Map, http://www.abacollateralconsequences.org/map/ (last visited Jan. 13, 2015).

40. *See Should Ex-Felons Be Allowed to Vote? Debate Club*, Legal Affairs (Nov. 3, 2004), http://www.legalaffairs.org/webexclusive/debateclub_disenfranchisement1104.msp.

41. Patrick A. Langan, Race of Prisoners Admitted to State and Federal Institutions, 1926–86, *available at* http://www.bjs.gov/content/pub/pdf/rpasfi2686.pdf.

purpose, but thwarts it."[42] As a federal court said in an unsuccessful lawsuit against Florida's felon voting law:

> [Black ex-felons had] not been denied the right to vote because of an immutable characteristic but because of their own criminal acts. This is also true of the non-African American class members. Thus, it is not racial discrimination that deprives felons, black or white, of their right to vote but their own decision to commit an act for which they assume the risks of detection and punishment.[43]

The fact that these statutes disproportionately disenfranchise men and young people is not cited as a reason for changing them—as "sexist" or "ageist"—nor does it matter that some racial or ethnic groups may be more affected than others. That criminals are "overrepresented" in some groups at some point in time and "underrepresented" in others is no reason to change the laws. This will probably always be the case, with the groups changing over time and with the country's demography. If large numbers of young people, black people, or males are committing crimes, then our efforts should be focused on solving those problems. The answer to that problem is not to increase the political power of criminals.

Much has been made of the high percentage of criminals—and, thus, disenfranchised people—in some communities, but the fact that the effects of disenfranchisement may be concentrated in particular neighborhoods is actually an argument in the laws' favor. If these laws did not exist, there would be a real danger of creating an anti–law enforcement voting bloc in local municipal elections, for example, which is hardly in the interests of a neighborhood's law-abiding citizens who are victimized by such felons.

Indeed, the people whose votes will be diluted the most if criminals are allowed to vote will be law-abiding people in high-crime areas—people who are themselves often disproportionately poor and minority. Liberal civil-rights groups lobbying against felon disenfranchisement seem to have less concern for those victims.

"We should welcome felons back into the community." Because the racial and other arguments are so unpersuasive, it is more and more frequently argued that re-enfranchising felons is a good way to reintegrate them into society. Attorney General Eric Holder has even claimed that felon disenfranchisement laws promote recidivism. As former Attorney General Michael Mukasey has pointed out, however, that claim, which derives from a study in Florida, is flawed:

> Florida has had, and indeed has broadened, a system that requires felons to go through an application process before their voting rights are restored. Obviously, those who are motivated to navigate such a process self-select as a group less likely to repeat their crimes. Suggesting that the automatic restoration of voting rights to all felons would lower recidivism is rather like suggesting that we can raise the incomes of all college students if we automatically grant them a college degree—because statistics show that people with college degrees have higher incomes than those without them.[44]

Reintegration of felons into the community is an important goal, and this paper recognizes that restoration of voting rights can be a part of that process. Conversely, it is also important not to suggest to felons that it is hopeless for them to want to rejoin that community.

But restoration of voting rights should be done carefully and on a case-by-case basis once the felon can establish in fact that he has turned over a new leaf. When that has been shown, then holding a ceremony—rather like a naturalization ceremony—in which the felon's voting rights are fully restored would be moving and meaningful. Restoration, however, should not be automatic, because the change of heart cannot be presumed. After all, the unfortunate truth is that most people who walk out of prison will be walking back in eventually.

Automatic felon re-enfranchisement sends a bad message: It says that Americans do not consider criminal behavior so serious that the right to vote should be denied because of it. Not allowing crimi-

42. W.E.B. Du Bois, *The Souls of Black Folk* 113 (Dover Publications 1994).

43. Johnson v. Bush, 214 F.Supp.2d 1333, 1341 (S.D. FL. 2002), *affirmed* 405 F.3d 1214 (11th Cir. 2005).

44. Mukasey, *supra* note 17.

nals to vote is also a form of punishment and a method of stigmatization that tells criminals that committing a serious crime puts them outside the circle of responsible citizens. Being readmitted to the circle should not be automatic.

While it is true that a disproportionate number of African Americans are being disenfranchised for committing serious crimes, their victims also are disproportionately black. The logical focus of an organization like the NAACP should be on discouraging the commission of such crimes rather than minimizing their consequences.

Conclusion

Congress does not have the power to force states to allow felons to vote in federal elections. The Constitution, including the Fourteenth Amendment, specifically delegates to the states the right to determine the qualifications of voters and to disqualify anyone who participates "in rebellion, or other crime." Congress cannot override the Constitution through legislation and has no authority to restore the voting rights of felons for federal elections.

Thus, the American people and their freely elected state representatives must make their own decisions in their own states on when felons should have their civil rights restored. This includes the right to vote. Requiring a waiting period and an application process is fair and reasonable given the high recidivism rate found among felons. Any legislation passed by Congress to take away that power is both unconstitutional and unwise public policy.

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