

Right of Way: Extending “Universal” Suffrage to Convicted Felons

Jess Zalph '16

The narrative of voting rights in the United States is generally taught as one of triumph and glory, as though teachers say, “We saw a problem and we, as a people, fixed it.” Although issues of voting rights have recently resurfaced, especially in response to voter identification laws and the nullification of a piece of the Voting Rights Act (VRA) in the 2013 Supreme Court decision *Shelby County v. Holder*,¹ people today discuss disfranchisement more as an issue of the past rather than as an ongoing issue. This is accurate to an extent—there are far fewer people legally disqualified from voting today than there were during the first 150 years after the United States was founded, and most forms of discrimination in voting are no longer legal.² However, the path towards universal suffrage has not been the unmitigated success often portrayed. It is instead a story of racism and sexism, sometimes even among the “good guys.” It is a story of leaders consistently trying to exclude voters who might hurt them or their party politically. It is a story of the need for the federal government to expand its power over voting to keep states from denying people, particularly African American citizens, the right to vote.³ And while the state of voting rights has certainly progressed, as we pass the 50th anniversary of the passage of the VRA there are still barriers to voting for many people, such as the poor, and those convicted of felonies; the widespread disfranchisement of felons, including beyond the duration of incarceration is one of the last remaining vestiges of disfranchisement codified in law.

This paper assumes that fundamental “rights” are universal in nature within the United States, and should not be subject to limitations based on demographic group or geographic borders. The purpose of this approach is to guarantee equal protection to the citizens of the United States, especially from encroachment on the “Lockean” values of life, liberty, and property, to which voting and the democratic process as a whole are essential.

¹ *Shelby County v. Holder*, [570 U.S. ____](#) (2013).

² Voting Rights Act of 1965, Public Law 89-110, 79 Stat. 437.

³ *Ibid.*

In most respects, voting has come to be accepted throughout society and within all three branches of government as a fundamental right of citizenship. While language of “the right to vote” was absent from the Constitution as it was originally ratified, society has evolved and the concept of this right has evolved with it. In 2006, Congress described suffrage as a universal right in its reauthorization of the VRA. Section 2a of this Act reads, “The purpose of this Act is to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution.”⁴ This echoes the sentiment found in many Supreme Court cases, including *Reynolds v. Sims* and *Wesberry v. Sanders*, both decided in 1964, before the VRA had even been passed; both decisions incorporate reference to a “right to vote” that should not be abridged. The White House website refers not only to the right of suffrage, but also to voting’s exalted position in the United States, saying, “One of the most important rights of American citizens is the franchise—the right to vote.”⁵ Although the right to vote was not established in the early years of the United States, voting and citizenship have, in practice, come to be legally linked and woven deep into the fabric of society. To the extent that voting as a right of citizenship remains under debate, it is because calling it a right of citizenship does not fully answer the question (raised in the *Slaughterhouse* cases⁶) of whether it is a right of federal or state citizenship.

Operating on the premise that the United States intends to be a democratic republic, this tie between voting and citizenship is a positive development. Chief Justice Warren attested to this in *Reynolds v. Sims* (1964), saying, “The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of

⁴ H.R. 246, 109 Cong. (enacted).

⁵ “Elections & Voting.” *The White House*. The White House.

⁶ *The Slaughter-House Cases*, 83 [U.S. 36](#) (1873).

representative government.”⁷ Voting rights are essential not only for the purpose of staying true to the core premises of the United States, but also because allowing all citizens the right to vote is necessary for safeguarding other rights guaranteed to citizens as well. In *Wesberry v. Sanders* (1964), Justice Black wrote in his majority decision, “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”⁸ In this regard, voting ought to be treated as a fundamental right of citizenship because of the ways in which it differs from other rights. Other rights we consider important to society, most of which are found in the Bill of Rights, are each considered a piece of the system in which we live. The voting process, however, is not just part of the system—it is the system. To not grant suffrage to a person or group, or to deprive them of it, is not just to deny them a right within society, but is also in many ways to kick them out of the political system altogether, the system which they could otherwise use to try to defend their other civil and political rights. This is supported by Footnote 4 in *United States v. Carolene Products Company* (1938), in which Justice Stone singled out laws altering “political processes which can ordinarily be expected to bring about repeal of undesirable legislation” as requiring a higher level of scrutiny.⁹ Those without voting rights are not only hindered but they are without political recourse. Moreover, as being a citizen of a democracy demands a voice in the government, disfranchisement strikes at the heart of citizenship itself.

Given the unique position of felon disfranchisement laws in today’s society, as one of the only remaining legally established forms of disfranchisement, this issue serves as a lens through which to analyze the history of voting law and the meaning of voting in the United States. The

⁷ *Reynolds v. Sims*, [377 U.S. 533](#) (1964).

⁸ *Wesberry v. Sanders*, [376 U.S. 1](#) (1964).

⁹ *United States v. Carolene Products Company*, [304 U.S. 144](#) (1938).

idea of voting as a “right” has shifted and expanded over time, and the role of the federal government in enforcing voting rights has shifted and expanded alongside it. This centralization of power came about out of necessity, for once the United States began to understand suffrage as a right of citizenship it became no longer acceptable to let any of the states abridge this right. This expansion enables Congress to reform criminal disenfranchisement laws if there is the political will to do so. Congress should reform disenfranchisement laws not only to defend the fundamental rights of felons (which would certainly be a more-than-good-enough reason) but even more pressingly to prevent the racially discriminatory effect that is a byproduct of disenfranchisement laws, even if these laws are ostensibly race-blind. On its face, felon disenfranchisement can serve a purpose that does not implicate race, serving as a type of retribution or as a way of keeping those who are “corrupted” out of the political system. However, looking at historical context and at practical effects, not only does disenfranchisement of citizens convicted of felonies potentially violate the Equal Protection Clause and the VRA, but also it ignores the path of history and its compelling arguments for not abridging the right to vote. When the vote is not guaranteed to all, political parties can try to maintain their power by keeping certain groups from voting. This undermines the idea of elections as policy referenda, and holds the electorate accountable to the politicians, rather than vice versa. Limitations on voting also fly in the face of the principle of governance by the people and endanger voting as the cornerstone of democracy.

This paper will first look at the history of suffrage in the United States, focusing on the simultaneous expansion of voting rights and of federal control of voting. This will be followed by a discussion of what it means for voting to be a “right” and the changing understanding of this right over the past 200 years. Next, the paper will discuss the need for uniformity in voting practices as a means to guarantee equity and to act in accordance with the way the nation treats

other fundamental rights. Finally, the paper will conclude by applying the lessons of the previous sections to the issue of voting rights for those convicted of crimes.¹⁰

HISTORY OF VOTING RIGHTS AND FEDERAL EXPANSION

History Introduction

The evolution of suffrage in the United States traces a path parallel to the expansion of rights and the protection of oppressed groups in society. To an extent, these phenomena were mutually dependent: a larger government was needed to protect the right to vote, and the call for the right to vote to be protected in turn justified government expansion. While the founders originally gave voting limited treatment, the process of enfranchisement remained a near-constant source of tension for almost 200 years after the United States declared independence from England. Once limited mostly to white Protestant males, the right to vote has since become near-universal. However, those convicted of a felony remain one of the only groups of citizens to be, in most of the country, systematically barred from voting. The expansion of the right to vote has been a strategic political process even more than one grounded in ideology, and while it has been shaped by political maneuvering, the expansion has also done a great deal to legitimize the political system. Alongside the development of voting as a fundamental right has been the evolution of control over voting from the state to the national level.

This paper's historical account of voting rights in the United States will show two things: first that the removal of limitations on voting rights has consistently been bitterly opposed by those with power trying to shape the electorate for their own benefit, and second that, as the

¹⁰ It is important to stress that this paper is focusing particularly on the disfranchisement of felons after they have been released from incarceration. While most of the arguments apply to people currently in prison, in addition to those who have been released, it is hard to deny that many fundamental rights are abridged during the period of incarceration, so claims that voting rights must be retained during this period would require a different analysis. When this paper refers to felon disfranchisement, it is focusing on disfranchisement after the term of incarceration.

scope of the federal government has been expanded to safeguard the natural, civil, and political liberties of minorities, the relationship between the states and the federal government has evolved to the point where the federal government could remove restrictions on felon voting if it so desired. Voting (which will later be discussed further as a civil right) has become a near-universal political right that requires federal supervision to be realized.

Colonies/Voting and Founders' Intent

In 1776, at the time of the signing of the Declaration of Independence, the right to vote within the Colonies was extremely limited. At the beginning of the American Revolution, all of the colonies set property ownership as a prerequisite for enfranchisement, on the theory that those with property were more committed members of society and independent enough to play a role in governance of the nation. Other than property requirements, suffrage varied from colony to colony, with women and those of various ethnicities treated differently in different locations.¹¹ The regional control of voting came out of a colonial commitment to assemblies representing local views. This was the origin of residency requirements and was part of a broader social push toward representation in government.¹² In spite of the nationwide push for representation, the issue of voting was mostly ignored in the Constitution itself. Keyssar says:

The Constitution adopted in 1787 left the federal government without any clear power or mechanism, other than through constitutional amendment, to institute a national conception of voting rights, to express a national vision of democracy. Although the Constitution was promulgated in the name of 'We, the people of the United States,' the individual states retained the power to define just who 'the people' were.¹³

He continues by arguing that the lack of national suffrage laws stemmed from a need for political pragmatism in the Constitutional Convention. Any such law would have generated opposition,

¹¹ Keyssar, Alexander. 2000. *The Right to Vote: The Contested History of Democracy in the United States*. New York: Basic Books, 4-5.

¹² Rogers, Donald W. 1992. "Introduction" In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 8.

¹³ Keyssar, 19-20.

and could have tipped a delicate power balance in a way that impeded ratification of the Constitution. The separation of citizenship from suffrage and the lack of direction on the subject created political turmoil for nearly 200 years, turmoil that was only partially reduced after the passage of the Voting Rights Act in 1965.

The Constitution as originally ratified gave far more power to the states than we see today, both in general and with respect to voting in particular, as the limitations of the Bill of Rights applied only to the federal government.¹⁴ Authority over voting remained in the hands of state and local governments, which could control the “times, places and manner” of elections according to Article 1, Section 4 of the Constitution (though, still subject to congressional check)¹⁵. However, the idea of nationalization of the most critical laws was not completely absent from the minds of the founders. Madison won concessions in the Constitutional Convention against “the most egregious state injustices,” such as the passage of *ex post facto* laws.¹⁶ Obviously these prohibitions were limited, but if we expand and update the list of infractions considered to be “egregious,” this principle can be applied more broadly, except in ways that would otherwise undermine the Constitution, for example Article 1 Section 4 itself.

Early Voting (Property Restrictions)

During the first decade after the United States was founded, the “stake in society” principle of voting rights,¹⁷ and the corresponding property requirements, continued. During the following decades, suffrage expanded for white men but contracted for most other groups. As property requirements for voting were eliminated (largely in response to political pressure from

¹⁴ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

¹⁵ “The Constitution of the United States,” art. I, § 4.

¹⁶ Zuckert, Michael P. 1996. “Toward a Theory of Corrective Federalism: The United States Constitution, Federalism, and Rights.” In *Federalism and Rights*. Eds. Ellis Katz and G. Allen Tarr. Maryland: Rowman and Littlefield Publishers, Inc, 78.

¹⁷ Keyssar, 4-5.

white males disfranchised due to economic hardship after 1819¹⁸), a citizenship requirement for voting grew in its place, and by 1860 citizenship was a requirement for voting in all states except South Carolina and Georgia.¹⁹ Citizenship, however, was restricted to “free white persons,”²⁰ so this amounted to a substitution of race and ethnicity for class as the standard for limiting voting.²¹ The desire to keep immigrants from voting is a good example of groups in power trying to restrict voting freedom in order to retain that power. In the early nineteenth century, “nativist” parties formed purely for the purpose of keeping the vote away from immigrants, believing they were corrupt and voted “in a bloc.”²²

Reconstruction Amendments

After the Civil War, federal legislation was passed to try to safeguard the rights of African Americans;²³ this culminated in the Reconstruction Amendments, which banned slavery, outlined the rights of citizenship, and outlawed restrictions on the right to vote based on race. Although there were obviously moral and ideological elements to their passage, these amendments were also fundamentally political.

The Civil Rights Act of 1866 was a precursor to the Fourteenth Amendment and a response to the “Black Codes” established in the South after emancipation, which enforced a labor system that required blacks to sign contracts and work, under threat of arrest for failure to comply. This Civil Rights Act defined as citizens all people born in the United States (with the exception of Native Americans) and guaranteed basic rights to these citizens, such as the right to

¹⁸ Mintz, S., & McNeil, S. 2013. “Rise of Democratic Politics.” *Digital History*.

¹⁹ Kleppner, Paul. 1992. “Defining Citizenship.” In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 45.

²⁰ Naturalization Act of 1790, Session II, Chap. 3; 1 stat 103. 1st Congress; March 26, 1790.; Naturalization Act of 1798, Session II; Chapter 54; 1 stat 566. 5th Congress; June 17, 1798.

²¹ Foner, Eric. 1992. “From Slavery to Citizenship.” In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 58.

²² Kleppner, 48.

²³ Civil Rights Act of 1866, 14 Stat. 27 (1866).

make contracts, own property, and be treated equally in the courts.²⁴ The Act represented an expansion of federal power, as alleged violations by state officials would be considered in federal court. Foner says, “The underlying assumption—that the federal government possessed the power to define and protect citizens’ rights—was a striking departure in American law.”²⁵

The Fourteenth Amendment made this shift more permanent and represented an expansion of federal power, creating a national definition of citizenship and prohibiting states from denying the privileges and immunities of citizens, violating individuals’ rights without due process, and failing to provide equal protection to people in the states. However, while this amendment made the shift more permanent, it took time to truly take hold. Opponents of such an “intrusion” on the states by the federal government protested it vehemently, and these same state government defenders often condoned violent campaigns against black citizens.²⁶ The *Slaughterhouse Cases* also represented this reluctance, with the Court rejecting the natural, broad reading of new federal power.

The Fourteenth Amendment also represented a turning point in the interpretation of the protections of the Bill of Rights, as it dictated the actions of state governments and produced the incorporation doctrine, the principle that slowly but ultimately led to the application of most parts of the Bill of Rights to state and local governments. It allowed Congress to protect the fundamental rights of United States citizens, letting Congress intervene in the case of state failure to protect these rights.²⁷ DuBois notes that although “traditional understandings regarded the national government as the potential enemy of rights . . . the Fourteenth Amendment reversed

²⁴ Foner, 60.

²⁵ Ibid.

²⁶ Keyssar, 71-72.

²⁷ Zuckert, 93.

that order; it relied on federal power to protect citizens against the actions of the states.”²⁸

Although many interpret the Reconstruction amendments as revolutionizing the relationship between the national government and the states and, as Zuckert describes the argument, overturning federalism in favor of what could be considered “unitary constitutional order,” other scholars argue for a conservative reading of these amendments, saying they reaffirmed federalism and simply expanded protection within certain limited boundaries.²⁹ The conclusions of this argument are relevant when determining the legitimacy of federal involvement in regulating voting.

The Fifteenth Amendment dealt explicitly with the issue of voting. Section 1 reads, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” and Section 2 adds, “The Congress shall have power to enforce this article by appropriate legislation.”³⁰ The timing of this amendment is no coincidence. In addition to the pressure to protect former slaves, the Civil War itself set the stage for the expansion of voting rights. As Foner commented, “The ‘logical result’ of black military service [in the Union Army], one senator observed in 1864, was that ‘the black man is henceforth to assume a new status among us.’”³¹ The original interpretation of the Fifteenth Amendment was that while it forbade the explicit denial of the right to vote on the basis of race, it did not outlaw voting policies with unequal racial impact. As a result, literacy tests and poll taxes remained common,³² including questions such as “At what

²⁸ DuBois, Ellen Carol. 1992. “Taking Law Into Their Own Hands: Voting Women During Reconstruction.” In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 76.

²⁹ Zuckert, 86-87.

³⁰ “The Constitution of the United States,” Amendment 15.

³¹ Klarman, Michael J. 2006. “The Supreme Court and Black Disenfranchisement.” In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 39.

³² Keyssar, 83.

time of day on January 20 each four years does the term of President of the United States end?”³³ However, the amendment did open the door to challenges of racial “stand-ins” such as the grandfather clause, and of other policies with clear discriminatory motives.”³⁴ Accordingly, Keyssar argues that the Fourteenth and Fifteenth Amendments signified the first time that a suggestion of the right to vote was written into the Constitution, “announcing a new, active role for the federal government in defining democracy.”³⁵

The political side of suffrage was quite tangible during this period, not just with respect to Democratic actions—with politicians trying to retain power and keep out black voters—but also on the Republican side. Starting during the Reconstruction period and continuing to the end of the nineteenth century, a time when elections were often extremely close, the Republican Party fought to protect voting rights for blacks, as this group tended to vote Republican. This has been seen as the impetus for the passage of the Fifteenth Amendment³⁶ (and for the Enforcement Acts that followed³⁷) reflecting the need to not only firmly establish black suffrage in the South as had been mandated by the Reconstruction Acts, but also to guarantee suffrage to black citizens in the Northern states, not all of which had guaranteed black citizens the right to vote. (Until the close 1868 election, the Republicans had prioritized not antagonizing Northern states over granting suffrage to blacks in the North.)³⁸ When the elections ceased to be as competitive at the turn of the century, the party stopped its efforts to secure the enfranchisement outlined in the Fifteenth Amendment.³⁹

³³ Civil Rights Movement Veterans. “Alabama Literacy Test, circa mid-1960s.”

³⁴ Klarman, 39.

³⁵ Keyssar, 83.

³⁶ Constitutional Rights Foundation. 2015. “African Americans and the 15th Amendment.” *Constitutional Rights Foundation*.

³⁷ Lieberman, 25.

³⁸ Constitutional Rights Foundation. 2015. “African Americans and the 15th Amendment.” *Constitutional Rights Foundation*.

³⁹ Lieberman, 25.

Post-Reconstruction

Although the Reconstruction amendments were a step in the right direction, they proved difficult to enforce given the limited power of the federal government at the time, along with judicial intransigence, and Congress struggled to follow up with legislation that would make these amendments meaningful. The Enforcement Acts passed in the following decade classified interference with voting as an offense justiciable in federal court, on the (plausible) theory that this would lead to more reliable application than would trials in state courts.⁴⁰ However, even these acts were mostly inadequate to protect the right to vote (the legal ability to enforce and the practical ability turned out to be very different beasts) and the Federal Elections Bill, sponsored by Senator Henry Cabot Lodge, which would have enacted a procedure to appoint supervisors of certain congressional elections, was defeated in the wake of cries that it was simply a scheme to “rob” people of citizenship (a fairly incomprehensible claim). Notably, the defeat was a product of political maneuvering by both parties.⁴¹ The bill was opposed by Democrats who feared expanded suffrage would lead to “the negro as the ruler,” in politics, and ultimately was defeated as a result of eight Republican senators voting against it in exchange for Democratic support of the free coinage of silver.⁴²

In addition, many then-constitutional tools were used to disfranchise black voters at the end of the nineteenth century. Literacy tests and residency requirements had a discriminatory impact and, particularly relevant, “disenfranchisement for crimes was gerrymandered to reflect

⁴⁰ Keyssar., 84.

⁴¹ *Id.*, 86-88.

⁴² Jane Daily. 2004. “White Supremacy.” In *The American Congress: The Building of Democracy*, ed. Julian E. Zelizer. New York: Houghton Mifflin Company, 257-258.

white perceptions of black criminal propensities.”⁴³ There is also a self-perpetuating nature of disfranchisement, for at the turn of the twentieth century, blacks held very few local offices. Given the discrimination blacks faced at the local level, there was little or no way for them to defend themselves, for in order to succeed, they would have needed to already have the political power they were trying to gain. Local officials controlled law enforcement, schools, and the justice system, and in the absence of representation, white officials kept black citizens off of juries and without adequate school funding, and failed to protect them against the rising number of lynchings in the South.⁴⁴

Although the federal government struggled with enforcement, its powers increased over the years in a way that served to protect voting rights. The federal government was beginning to realize that passing laws addressing voting was not enough, and that an unfortunate product of federalism in the nation as it then existed was that there was little de facto federal ability to govern states’ voting practices and defend citizens’ rights. Accordingly, it began to try to adopt new strategies and increase its reach. For example, when Colorado and Nebraska were being admitted to the United States, Congress insisted that enacting “impartial suffrage” was a prerequisite, defensible on the grounds of Article 4 of the Constitution as an exercise of the federal government’s power to “guarantee to every state in this union a republican form of government.”⁴⁵

Women’s Right to Vote

While the movement for expanding voting rights in the mid-nineteenth century had grown strong, women were not included in this push. As a result of the Enforcement Acts, women began to sue for voting rights. However, the women’s lawsuits were unsuccessful at that

⁴³ Klarman, 37.

⁴⁴ Klarman, 38.

⁴⁵ Keyssar, 73.

time, with the courts contesting the “natural rights theory” (that suffrage was a natural right, because it protected other natural rights) on which the argument for women’s inherent right to vote was based. In 1871, Judge Carter in Washington D.C. ruled against D.C. women seeking the vote, saying, “The right of all men to vote is as fully recognized in the population of our large centers and cities as can well be done.”⁴⁶ There was far less political agitation about gender rights in voting, and leaders of the movement for a racial expansion of voting rights prior to the Fifteenth Amendment feared that combining the two issues would cause both of them to fail.⁴⁷ Mary Otley Brown, pioneer in women’s voting, said, “Many women wished to vote . . . they knew it was the only way to secure their rights and yet they had not the courage to go to the polls in defiance of custom.”⁴⁸ When they did, they were frequently, though not consistently, turned away.

Many Southerners opposed a constitutional amendment mandating women’s suffrage, for they feared it would open the door to increased enforcement of the Fifteenth Amendment as well.⁴⁹ Southern opposition to the expansion of voting rights, grounded historically in racism and sexism more than in principled defense of federalism, suggests that opposition to more centralized control of voting rights should be viewed with skepticism.

Just as participation in the Civil War was a considerable precipitating factor in getting voting rights for African Americans, participation by women in World War I helped raise political support for women’s voting rights by those who may have previously underestimated their role in society. After a long campaign, women earned the right to vote with the passage of the Nineteenth Amendment, ratified in 1920. Although this was a victory, the extent of the

⁴⁶ DuBois, 76-77.

⁴⁷ Foner, 61.

⁴⁸ DuBois, 73.

⁴⁹ Keyssar, 170.

struggle is symptomatic of a systemic issue in the expansion of voting rights. It should not take a war for society to realize that a group “deserves” the right to participate in government. Winning expansion of voting rights is difficult because those in power generally have no desire to expand the constituency, given that the more limited constituency that already exists is the one that got them into power. Parties tend to push for expansion of suffrage when it would benefit them and oppose it when it would be politically harmful.⁵⁰ The reliance on war and on political strategy shows once again that the realization of the right to vote is generally dependent on political manipulation or on extreme social conditions, rather than on some principled argument about the relationship between voting and citizenship or on meaningful substantive criteria about the voters themselves or on democratic or constitutional theory (which are only used—though effectively—for mobilization purposes).

The Civil Rights Movement, The Voting Rights Act, and Beyond

The decades after women were granted suffrage saw a lull in the debate over voting rights, which resurfaced again after World War II, when the service of black men in the army highlighted the injustice of the Jim Crow laws that kept them from voting. As seen after the Civil War and World War I, war once again played a critical role in catalyzing voting rights. The new tension culminated in the Civil Rights Act of 1964 and the VRA of 1965, representing the first great shift in power from the states to the federal government on issues of race and voting since the Reconstruction amendments. The Civil Rights Act of 1964, while it did not address the issue

⁵⁰ Bonnie Meguid and Gretchen Helmke, 2007, "Endogenous Institutions: The Origins of Compulsory Voting Laws" *Paper presented at the annual meeting of the American Political Science Association, Hyatt Regency Chicago and the Sheraton Chicago Hotel and Towers, Chicago, IL*, 6.

of voting rights, did ban segregation in schools and expanded federal enforcement power by letting the attorney general sue states that violated this ban.⁵¹

The VRA allowed voting rights to be directly enforced by the federal government, as had proven to be necessary for decades. On February 5th, 1965, Martin Luther King Jr. met with 15 delegates from Congress who had come to Selma to assess the extent of the voting rights problem. Fourteen of them reported to President Johnson, “Local authorities will not act in good faith to protect the rights of the franchise. Further legislation is necessary to insure the right to vote.”⁵² Litigating on a case-by-case basis was unrealistic and ineffective, and there was a need for a more centralized system. Attorney General Nicholas Katzenbach described the hitherto incremental enforcement as painfully inadequate, citing the “torturous, often ineffective pace of litigation.”⁵³ The Commission on Civil Rights (CCR), created in 1957, not only reported on the rampant violations of black voting rights, but also declared that county-by-county litigation was overly “time consuming, expensive, and difficult” to be effective.⁵⁴

The limitations of the federal government’s power to enforce voting rights were made apparent by states’ ready disregard of federal authority. For example, in 1961, Dallas County took two years to grant the federal government access to its registrar’s files in response to a lawsuit. In the same county, the Board of Registrars registered only 30 new voters each time it opened, which was twice a month and which had the effect of dramatically slowing the process of voting equality between whites, who were mostly already registered, and non-whites, who were frequently rejected.⁵⁵

⁵¹ Tuck, Stephen, 2006, “Making the Voting Rights Act.” In *The Voting Rights Act: Securing the Ballot*, Ed. Richard M. Valelly, Washington, D.C.: CQ Press, 80.

⁵² Tuck, 82.

⁵³ *Id.*, 89.

⁵⁴ 1961 U.S. Commission on Civil Rights Report Book 1: Voting, 136.

⁵⁵ Tuck, 81.

Section 2 of the 1965 version of the VRA reads, “No voting qualification or prerequisite to voting shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”⁵⁶ Sections 4 through 9 of the VRA, called the “special provisions,” which dealt with enforcement of the VRA, were up for renewal only five years later, in 1970. Section 4 outlined the formula for determining which districts would be subject to preclearance requirements for changing voting practices, and Section 5 outlined the need for preclearance itself. Sections 6, 7, and 8 gave the federal government the power to order election observers and examiners in the jurisdictions specified by the formula.⁵⁷

Six states sued, saying that the VRA was an unconstitutional overstep by Congress because it legislated in an area reserved to the states.⁵⁸ Several sections of the VRA were challenged in *South Carolina v. Katzenbach* (1966), but these challenges were rejected, with the Supreme Court holding that the VRA was a legitimate tool for enforcing the Fifteenth Amendment. The decision cited the “unremitting and ingenious defiance in certain parts of the country of the Fifteenth Amendment” as evidence of the necessity for increased Congressional oversight of the election process in certain areas.⁵⁹

Section 2 of the Act caused a great deal of controversy over the distinction between overt discriminatory intent and incidental (or “incidental”) discriminatory effect. In *Allen v. State Board of Elections* (1968), Chief Justice Warren’s majority opinion concluded, “The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying

⁵⁶ Moore, Colin D, 2006, “Extensions of the Voting Rights Act,” In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly, Washington, D.C.: CQ Press, 95.

⁵⁷ Moore, 95-96.

⁵⁸ Tuck, 91-92.

⁵⁹ *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

citizens the right to vote because of their race.”⁶⁰ This represents an expansive reading of the VRA, one by which ostensibly racially neutral laws could be found unconstitutional because of discriminatory effect, not just obvious discriminatory intent. However, *Mobile v. Borden* (1980) found that discriminatory intent was necessary for voting restrictions to be unconstitutional. This decision spurred the 1982 amendment to the VRA, updating Section 2 to include practices with discriminatory effect.⁶¹ The 1982 extension replaced the phrase “to deny or abridge the right of any citizen” with “in a manner which results in the denial or abridgement of the right of any citizen.”⁶²

In the wake of the VRA, the scope of the “time, place, and manner” clause of Article 1 shrunk, as the federal government saw more need for oversight of these areas. The laws challenged in *Allen v. State Board of Elections* (1969) included a Virginia law changing the criteria for write-in voting, and a Mississippi law changing election boards of supervisor’s elections from districted elections to at-large ones. The Court decided that both of these laws fell within the scope of Section 5 of the VRA.⁶³ In *Oregon v. Mitchell* (1970), the Court concluded that Congress could ban devices such as literacy tests that discriminated in state and federal elections.⁶⁴ These cases, among others, reinforced the new relationship between the federal government and the states with regard to voting. As a product of the history of discriminatory practices and the recognition by the Supreme Court of the need for federal expansion in this area, the power to control election requirements came to rest more squarely, if not entirely, within the jurisdiction of the federal government.

⁶⁰ Moore, 97.

⁶¹ Williams, Linda Faye, 1992, “The Constitution and The Civil Rights Movement,” In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*, Ed. Donald W. Rogers, Urbana: University of Illinois Press, 101.

⁶² Moore, 106.

⁶³ Rush, Mark, 2006, “The Voting Rights Act and Its Discontents,” In *The Voting Rights Act: Securing the Ballot*, Ed. Richard M. Valelly, Washington, D.C.: CQ Press, 149.

⁶⁴ Keyssar, 216-217.

The 2013 case *Shelby County v. Holder* reduced the power of the VRA, as a majority found Section 4, which outlined the preclearance formula for voting practices, to be unconstitutional, on the basis that the conditions that produced it have changed. Chief Justice Roberts said, “The conditions that originally justified these measures no longer characterize voting in the covered jurisdictions,” concluding that the “extraordinary” measures of the VRA were no longer relevant to “current need.”⁶⁵ The decision did not overrule Section 5, which outlined the need for preclearance, though the dissenting opinion said that the removal of Section 4 made Section 5 unenforceable in practice. Justice Ginsburg, in her dissent, cited and critiqued Chief Justice Roberts’s majority opinion: “[V]oting discrimination still exists; no one doubts that.” Ante, at 2. But the Court today terminates the remedy that proved to be best suited to block that discrimination.”⁶⁶

Present and Historical Conclusion

Federal control over voting has slowly become an established part of our society, in spite of setbacks and a great deal of resistance. The National Voter Registration Act of 1993 is an example, as it superseded the states’ voter registration programs and required that states make registration more accessible, letting people vote by mail or at certain state offices such as motor vehicles bureaus.⁶⁷ The Help America Vote Act (2002) is another such example, requiring states to implement the training of poll workers, a procedure for filing complaints, and a uniform system within the state for voter registration, among others items.⁶⁸ *Shelby* is a more recent setback for federal control but it is not the first time that a more centralized system has been

⁶⁵ *Shelby County v. Holder*, 570 U.S. ____ (2013).

⁶⁶ Ibid.

⁶⁷ McDonald, Laughlin. 2006 “Federal Oversight of Elections and Partisan Realignment.” In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 165.

⁶⁸ McDonald, 166.

challenged, most obviously in reaction to the 14th Amendment, and it is too soon to tell whether *Shelby* represents the beginning of more dramatic decentralization.

Over the decades, not only has federal control over voting expanded for the purpose of defending minorities' voting rights, but voting has come to be seen by the American people as a right that belongs to everyone, a point that will later be discussed further. Many see this expansion of voting rights as a gradual but inevitable process over time. In "Democracy in America," de Tocqueville said:

Once a people begin to interfere with the voting qualification, one can be sure that sooner or later it will abolish it altogether. That is one of the most invariable rules of social behavior. The further the limit of voting rights is extended, the stronger is the need felt to still spread them wider; for after each new concession the forces of democracy are strengthened, and its demands increase with its augmented power. The ambition of those left below the qualifying limit increases in proportion to the number of those above it. Finally, the exception becomes the rule; concessions follow one another without interruption, and there is no halting place until universal suffrage has been attained.⁶⁹

Limitations on suffrage eroded, as de Tocqueville predicted, and the acceptance of voting as a national concern and a right that belonged to everyone became widespread. Even Nixon's Attorney General John Mitchell declared, "Voting rights is not a regional issue. It is a nationwide concern for every American."⁷⁰ (That said, this was asserted in the process of nationalizing the ban on literacy tests in 1970, a tactical move to appease Southerners—to whom the ban had previously exclusively applied—potentially weakening the VRA by spreading thin the national implementation resources, but the principle remains.)

However, in spite of the advances made toward minority voting rights, Williams argues that plenty of barriers remain, including vote dilution, poverty, lack of education, and difficulty voting or registering to vote.⁷¹ This "inevitable" process also does not necessarily occur for the

⁶⁹ Keyssar, xxi.

⁷⁰ Id., 222.

⁷¹ Williams, 100.

“right” reasons, based on morality or political theory. The partisan nature of voting guidelines and restrictions has been present from the beginning, when laws requiring that ballots appear uniform were subject to political wrangling.⁷² Once people have the right to vote, they are often less inclined to favor diluting the power of their votes by expanding voting rights to others. An example of this type of exclusion came during the protest of property requirements for suffrage, when nonfreeholders said, “For obvious reasons, almost by universal consent, women and children, aliens and slaves, are excluded.”⁷³ These groups became enfranchised generally when it was politically advantageous to a group in power. Suffrage often expanded alongside the incidence of wars, as a result of political pressure. When people had to be recruited to fight or to work, it became politically untenable to argue that these people could fight and die for the United States but could not participate in electing its leaders.⁷⁴ The history of the expansion of voting rights, while representing a positive trajectory, does not necessarily reflect growing enlightenment. Rather, it shows the way that the right to vote has been subjugated to the political aims of the elite.

VOTING AS A RIGHT

Evolution of the “Right” to Vote

Underlying the historical discussion of voting is a conversation about whether or not voting is a right, and if so, of what type. The conception of the right to vote has developed over time. In the American colonies, voting was considered a civic duty performed by the elite on behalf of everyone else.⁷⁵ However, as the colonies evolved, so too did the meaning of voting. Rogers says, “Under Liberal tradition, Americans still considered voting as a civic duty, but they

⁷² Keyssar, 24.

⁷³ *Id.*, 30.

⁷⁴ *Id.*, xxiv.

⁷⁵ Rogers, 8.

came to see voting more as a political right to ‘protect their interests.’⁷⁶ Slowly, the idea of voting as a right worked its way into American rhetoric. This idea was widespread in society in the 1800s, but it was qualified. Even among proponents of expanding this “natural right” in society, most did not actually expect it to be expanded to everyone, such as women and minorities. John Adams expressed such a concern, stating that if suffrage were deemed a natural right, there would be “no end of it,” and that natural rights did not imply universal rights.⁷⁷

The Fourteenth Amendment coined suffrage as a “right,” although one restricted to male citizens over the age of 21. The Fifteenth Amendment also references “the right of citizens of the United States to vote,” saying it cannot be abridged on the basis of race. This lends itself to conflicting messages. The amendment does define voting as a right, but suggests that it can be denied to whole groups as long as those lines are not drawn racially. At the same time, the idea of suffrage as a right that may be qualified does seem to imply that it inherently applies to everyone but can be removed as long as the qualifications are not racial.

In the years after the amendments were passed, the Supreme Court decided that voting was not a right guaranteed by the Constitution. In 1875, the Court heard *Minor v. Happersett*, and concluded that Missouri's denial of the right to vote to women was not a violation of the Fourteenth Amendment, because “the Constitution of the United States does not confer the right of suffrage upon anyone.”⁷⁸ The idea of voting as a right became more pronounced during the women’s campaign for suffrage. Susan B. Anthony argued for linking citizenship and suffrage:

If we once establish the false principle, that United States citizenship does not carry with it the right to vote in every State in this Union, there is no end to the petty freaks and the cunning devices that will be resorted to, to exclude one and another class of citizens from the right of suffrage . . . Establish this principle, admit the right of the States to deny

⁷⁶ Id., 9.

⁷⁷ Keyssar, 10-11.

⁷⁸ McDonald, 161.

suffrage, and there is no power to foresee the confusion, discord, and disruption that may await us. There is, and can be, one safe principle of governance—equal rights to all.⁷⁹

Slowly, this principle became more established, and in 1920 the Nineteenth Amendment declared, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”⁸⁰

The idea of voting as a right began to find its way into court decisions. Chief Justice Udall of the Arizona Supreme Court declared in *Porter v. Hall* (1928), “Suffrage is the most basic civil right, since its exercise is the chief means whereby other rights may be safeguarded. To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality.”⁸¹ *United States v. Classic et al.* (1941) held that the Article 1, Sections 2 and 4 of the Constitution included an implicit right to vote for “qualified” voters.⁸² The VRA also called voting a “right,” and it expanded the definition of what it meant to have the right to vote, ultimately introducing the idea that the legal right to vote was not enough, but rather the vote had to be meaningful as well. This represents a change from classifying voting as a “negative right” to treating it as a “positive one.” With a negative right, there are only certain basic standards that must be protected: government officials or other private citizens should not directly interfere with potential voters. With a positive right, however, the government must “take affirmative steps to guarantee the right’s meaning,” which entails minorities having their vote be meaningful rather than diluted, such as by gerrymandering, and having the ability to elect representatives that reflect their interests.⁸³ Currently, voting and citizenship are inextricably linked, to the point that the National Voter Registration Act of 1993 declared, “The

⁷⁹ Keyssar, 146.

⁸⁰ “The Constitution of the United States,” Amendment 19.

⁸¹ Keyssar, 203.

⁸² *United States v. Classic*, 313 U.S. 299 (1941).

⁸³ Rush, 145-146.

right of citizens of the United States to vote is a fundamental right,” in addition to recognizing a duty of all levels of government to protect that right and avoid discriminatory voter laws.⁸⁴

What type of right?

Even among those who agree that voting is a right, the specific classification of the right has remained under contention. Zuckert draws a distinction between natural rights, civil rights, and political rights, defining the last as the least universal. He says that the Fifteenth Amendment, which deals with the right to vote—a political right of “great importance” as he puts it—is process-oriented, attempting to protect the rights of minorities by letting them protect their own rights through voting.⁸⁵ In Zuckert’s analysis of the Fourteenth Amendment, he concludes that “life, liberty, and property” are the natural rights that no state can encroach upon, as natural rights belong to all people⁸⁶; this is consistent with the Lockean principles that are at the heart of American society. The different types of rights are interrelated, however. As Lieberman argues, citing English sociologist T. H. Marshall, the granting of civil rights is dependent on political rights, which are necessary for claiming protection from society and avoiding the growth of an inequality of rights that could result from some being “systematically excluded from the democratic process.”⁸⁷

The Women’s Suffrage Movement saw the height of the conception of voting as a natural right. DuBois says:

Underlying women’s confidence and sense of entitlement was a radical ideology about equal rights and political power that they shared with other visionaries of the Reconstruction era. Three important elements of this radicalism were: a popular sovereignty theory of the sources of political power, which treated voting as a natural right; an egalitarian belief in the absolute universality of individual rights; and, a new,

⁸⁴ National Voter Registration Act of 1993, (42 U.S.C. §§ 1973gg–1973gg-10).

⁸⁵ Zuckert, 86-87.

⁸⁶ *Id.*, 89.

⁸⁷ Lieberman, Robert C., 2006, “Disenfranchisement and Its Impact on the Political System,” In *The Voting Rights Act: Securing the Ballot*, Ed. Richard M. Valelly, Washington, D.C.: CQ Press, 22.

more positive sense of the federal government, which regarded it as the friend, not the enemy, of rights.⁸⁸

As Elizabeth Cady Stanton, pioneer in the Women's Suffrage Movement, said, "suffrage is a natural right—as necessary to man under government, for the protection of person and property, as are air and motion to life."⁸⁹ She also called "untenable and anti-republican" the idea that suffrage was a non-guaranteed privilege. This interpretation of natural rights is consistent with Marshall's conception of the entwined relationship between different types of rights, and indicates that voting is a natural right because it is a necessity for protecting all other natural rights, such as life, liberty, and property. This logic implies a right to be part of society and to have natural rights protected. Applying this logic to felon disenfranchisement, we conclude that disenfranchisement is the veritable equivalent of ejecting from society those convicted of felonies.

Abridging Voting Rights

All rights can, in practice, be abridged under certain conditions, regardless of the level of scrutiny applied. Individuals lose rights with some regularity, for example, when they are arrested for crimes. There is a difference, however, between restricting an individual's rights under specific circumstances and making a blanket rule that restricts a right based on the demographic group a person belongs to; the latter has come to be seen as generally illegitimate, as have become laws based on classifications of race, class, and gender. The rationale for the abridgment of voting rights is no different: there may occasionally be compelling reasons for restricting an individual's right, but broader restriction is inherently suspect.

And even though most rights can be abridged under certain conditions, voting is so important, so fundamental to democracy and society, that this right should be taken away only in the most critical circumstance—if a person is unable to make a choice. The United States does

⁸⁸ DuBois, 75.

⁸⁹ Ibid.

not let children vote because they are generally deemed incapable of making an informed decision, and except at the margins—older teenagers, for example—this is generally not questioned. Fear of the person making bad decisions is not enough for disqualification, for in that scenario half of the country would always think the other half should be disfranchised.

Why care about the right to vote?

To many, voting is just a tedious chore that they feel obligated to complete once a year, if at all; it is, however, the cornerstone of American democracy. Not only is it the tool by which people are able to check their government or advance their interests, but it is beneficial for the voter and for society as a whole in ways that go beyond affecting the outcome of elections. In her essay “Constitution and Feminism,” Katzenstein argues that the constitutional guarantee of voting rights for citizens is important because the vote not only empowers people electorally but also teaches groups that they can and should act in the social and political public sphere. It helps groups organize and mobilize, making them even more “citizens” of society than they were before.⁹⁰ De Tocqueville’s argument for civic participation in lawmaking is similar, saying in part that it is educational for the citizen to be involved in the shaping of governance, and that having a voice in decision-making is an essential part of citizenship.⁹¹ In his Voting Rights Act address, President Lyndon B. Johnson referenced the need for “government by the consent of the governed,” which he cites as one of the founding principles of the nation. On this theory, voting is necessary for both practical and symbolic reasons, as it checks government power and

⁹⁰ Katzenstein, Mary Fainsod, 1992, “Constitutional Politics and the Feminist Movement,” In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*, Ed. Donald W. Rogers. Urbana: University of Illinois Press, 91-92.

⁹¹ Howard, A. E. Dick, 1996, “Does Federalism Secure or Undermine Rights?” *Federalism and Rights*, Eds. Ellis Katz and G. Allen Tarr, Maryland: Rowman and Littlefield Publishers, Inc, 13.

demonstrates one of the fundamental tenets of citizenship in the United States that has always existed in theory, if not in practice.⁹²

It follows from the importance of voting to society that there should be a presumption that voting rights are universal. One reason is that there is no other way to guarantee representativeness in the government. Anti-Federalist Richard Henry Lee wrote,

A full and equal representation is, that which possesses the same interests, feelings, opinions, and views as the people themselves would were they all assembled . . . in order to allow professional men, merchants, traders, farmers, mechanics, etc. to bring a just proportion of their best informed men respectively into the legislature.⁹³

Enfranchisement is a crucial part of the democratic process, as citizens use their electoral influence to check the power of those in office and give voice to their interests. Without the ability to vote, groups must rely on the good will of elected officials, which is in no way guaranteed, especially for groups that suffer discrimination.⁹⁴ Without universal suffrage, the expansion of suffrage is hostage to the political interests of those who already have power. (Take, for example, the previously mentioned case of the Republican Party fighting to defend black suffrage during the Reconstruction period of closely contested elections, but ceasing to do so when black votes were not as “important” to Republican victories.) The only way to protect fairness in the voting process and to protect the right to vote from the whims of party politics is to extend voting rights to all citizens. Fortunately, this is the trend of history thus far, but certain roadblocks remain. In 2001, in response to the 2000 election, Representative Jesse Jackson, Jr. proposed an amendment to the Constitution to guarantee the right to vote to all citizens on the theory, “If every American had had an individual constitutional right to vote, every vote would have had to be counted.” He further described voting as a human right, and demanded national

⁹² Johnson, Lyndon B., “Voting Rights Act Address.” March 15, 1965.

⁹³ Yarbrough, Jean, 1996, “Federalism and Rights in the American Founding,” In *Federalism and Rights*. Eds. Ellis Katz and G. Allen Tarr, Maryland: Rowman and Littlefield Publishers, Inc, 59.

⁹⁴ Lieberman, 23.

uniformity to overcome the inequality produced by differing election laws. Although these sentiments were met with reluctance from both sides of the aisle,⁹⁵ they are logically sound, and it follows that a constitutional right to vote would do the best job of safeguarding against categorical exclusions from the voting process.

UNIFORMITY

Uniformity of voting laws, between states as well as within states, is crucial for guaranteeing equal protection to voters and reducing the likelihood of discriminatory impact; what is now treated as a fundamental right in the nation should not be subject to disparate treatment by the states. If voting is accepted as a fundamental right of democracy, it is an argument against variability in treatment, in light of the probability that differences in treatment will lead, in practice, to different levels of protection of voting rights. Of course, this is not necessarily an argument for perfect uniformity—a narrow interpretation of “time, place, and manner” makes differences between states perfectly acceptable if they exist to address, for example, issues of climate or travel. Therefore, another way to frame the idea of uniformity of voting is to have uniform, very high minimum standards that remove issues of substance from the realm of the states, such as which categories of people get to vote, and limit state discretion to the purely (although finding this purity will be a challenge) ministerial elements of voting. Procedural matters must be included in these minimum standards, simply to guard against the ease with which procedure (such as early voting laws, or literacy tests) can be used to effect substantive decisions.

Precedent for Uniformity

The idea of uniformity of voting rights is not without precedent. In 1934, the Supreme Court upheld a decision by the Indiana Supreme Court holding that laws governing registration,

⁹⁵ Keyssar, 291-292.

frequently problematic from a discrimination perspective, were acceptable as long as they were “reasonable and uniform.”⁹⁶ Regardless of the potential threat posed by registration schemes to the right to vote, this decision was important because it began to cement the importance of uniformity across election procedures. Uniformity is inimical to discrimination (if not perfectly so), and it should exist between states, not just within them; time and again the United States has decided that equal protection is worth weightier consideration than the values of federalism, and voting practices should be no exception. The principle of uniformity has long been recognized to be at least a small part of the concept of rights. An example of this idea in local rhetoric came at the Ohio Constitutional Convention in 1874, when a member declared, “Each individual on entering a state of society surrenders a portion of natural rights, and in return therefore receives, among others, the political right of the elective franchise.”⁹⁷ At the California Constitutional Convention of 1878, one member declared, “Whatever rights are given to one citizen ought to be given . . . to every other citizen.”⁹⁸

The importance of uniformity as a principle worthy of consideration was reestablished during the legal grappling with the idea of “vote dilution” through redistricting or other means of affording unequal representation. The decisions in *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964) both held that vote dilution was unconstitutional, which had the additional effect of expanding federal control to this new, uncharted territory.⁹⁹ These decisions suggest that political processes need to be uniform to guarantee equality under the law. Of course, over the years, the Court has struggled to determine what practices qualify as dilution. Frankfurter’s dissent in *Baker* suggests that there is no right to equal power per vote, as long as each vote is counted, and that the

⁹⁶ *Id.*, 184.

⁹⁷ “Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio,” Volume 2, Issue 2, 1873.

⁹⁸ Keyssar, 152.

⁹⁹ *Id.*, 231-232.

remedy should be legislative, not judicial.¹⁰⁰ However, though not all cases were decided in favor of federal involvement, there is some fundamental uniformity that the courts have ruled to be necessary.

More recently, *Bush v. Gore*, heard in the wake of the 2000 presidential election, held that the “unequal evaluation of ballots” from county to county within a state was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Although the Court said this finding was limited to the specific circumstances of the case, and qualified that some variability of election systems was still acceptable, it opened the door to a number of other suits filed on the same grounds (that “minimal procedural safeguards” must be in place),¹⁰¹ most of which were settled or judged to be moot once the inequities were resolved.¹⁰² In this regard, there was some local level impact in favor of uniformity as a result of the *Bush v. Gore* decision.

Practical Reasons for Uniformity

There is a practical advantage to uniformity of laws, especially uniformity of voting laws. One such arguable advantage is that uniform laws are much simpler to enforce. Moreover, not only is enforcement simpler, but uniformity means there will be fewer contradictions between one jurisdiction and another, or between federal and state standards.¹⁰³ A lack of in-state uniformity was a major factor in the chaos of the 2000 election, and in *Bush v. Gore* the Supreme Court expressed as much.¹⁰⁴ Further, with voting as well as with other rights, there is a discriminatory element to the often-heard response that if a person does not like the laws under which they are living, they can move somewhere else. Theoretically, in this manner, federalism would bring a free-market approach to the world of political rights, and people could attempt to

¹⁰⁰ *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁰¹ *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁰² McDonald, 166-7.

¹⁰³ Howard, 24.

¹⁰⁴ *Bush v. Gore*, 531 U.S. 98 (2000).

live in the places that align with their needs and beliefs in a manner reminiscent of purported economic choice.¹⁰⁵ Epstein espouses this view and uses it as an argument against government “monopoly” of rights. However, not everybody has the financial means to move to another state, and individuals’ ability to determine the system under which they are living, where the laws are notably different, should not be dependent on wealth.

The practical argument against uniformity was addressed in Justice Brandeis’s opinion in *New State Ice Co. v. Liebmann* (1932), which discussed the need for states as “laboratories” of democracy, where different practices could be tested for the rest of the nation by single states. It is hard to argue that there is no value to this, but the argument fails to apply to the question of voting rights for two reasons. Unlike with issues like abortion and the legalization of marijuana, voting is not largely a practice isolated within states; again, as seen in Florida in the 2000 election, the effect of one state’s voting laws can ripple through the entire nation. Second, voting is not something that can be readily tested in a laboratory of democracy, because it is the cornerstone of democracy. While voting on an issue can lead to practical results, voting on voting itself lends itself to paradoxical situations, and voting for leaders to choose voting practices sets up society for the problems that have been seen through history, as previously discussed.

Theoretical Reasons for Uniformity

There are theoretical reasons for uniformity as well. Dworkin’s “theory of integrity” demands that government must act in a “coherent manner towards all of its citizens.” Rawls argues that “citizens of a just society ought to have the same basic rights.”¹⁰⁶ Though neither of these scholars believes this means laws must be identical, they believe that departures must be based on a coherent theory. However, once again, as voting is in fact fundamental to the political

¹⁰⁵ Jacobsohn, Gary, 1996, “Contemporary Constitutional Theory, Federalism, and the Protection of Rights,” In *Federalism and Rights*, Eds. Ellis Katz and G. Allen Tarr, Maryland: Rowman and Littlefield Publishers, Inc, 38.

¹⁰⁶ Howard, 22.

system of the United States, lack of uniformity in this fundamental system would be contradictory to both of these philosophers' beliefs. Katz and Tarr, in their introduction to *Federalism and Rights*, say, "Put simply, in a federal system many of the laws one must obey, the benefits one receives, and the rights one enjoys depend on the political jurisdiction in which one resides."¹⁰⁷ Here, they ruminate on the notion that people's rights change as they travel around the country, and they find a contradiction between this reality and the statement in the Declaration of Independence that "All men are created equal." They say, "In principle, these inalienable rights, the human rights, know no borders . . . if a right deserves protection, then it should be equally protected for all people, regardless of where they happen to live."¹⁰⁸ Jacobsohn makes a similar argument: "Since fundamental rights, rightly conceived, possess a universal dimension, it is basically incoherent to hold them applicable to one government but not another."¹⁰⁹ However, Jacobsohn also points out the obvious limitation of this argument, that fundamental rights may not be so easily defined. He says, "What counts as fundamental rights may differ, and what is deemed the appropriate agent for enforcement of rights may also differ."¹¹⁰ However, this is not the death of the argument for uniformity. Jacobsohn continues, "But to the extent that our rights are portrayed in transcendent, universal terms, they demand a consistency that can only be satisfied by constitutional nationalism."¹¹¹ As Kant argues in "Theory and Practice," the fact that something works in theory but not in practice is not a reason to dispose of the theory. Society is in constant progression, and what does not seem realistic now may someday in the future, but

¹⁰⁷ Katz, Ellen and G. Allen Tarr, 1996, "Introduction," *Federalism and Rights*, Eds. Ellis Katz and G. Allen Tarr, Maryland: Rowman and Littlefield Publishers, Inc, x.

¹⁰⁸ Katz and Tarr, x.

¹⁰⁹ Jacobsohn, 32.

¹¹⁰ Id., 36.

¹¹¹ Ibid.

there is no chance of achieving something difficult if society gives up in the face of such difficulty.¹¹²

FELON DISFRANCHISEMENT

Our discussion of the history of voting rights, the role of the federal government in safeguarding voting practices from discrimination, voting as a fundamental right, and the need for uniformity of voting practices brings us to the application of these considerations to voting rights for those convicted of felonies. The other issues surrounding voting all come to a head in the debate over voting rights for felons. Voting is undisputedly the cornerstone of democracy, and within a democracy citizenship and voting are inexorably linked. At least some uniformity is crucial to equal protection, and reducing restrictions on those convicted of felonies is critical to overcoming discriminatory intent and impact in voting regulations.

History of Felon Disfranchisement

Across the world, there has been a long history of disfranchisement of felons, and United States history is no different.

By 1920, most states had some sort of provision in place that disfranchised felons, and these provisions were routinely upheld by the Supreme Court.¹¹³ In Southern states, even minor crimes often lead to loss of suffrage, which, Keyssar says, meant such laws could be used to intentionally disfranchise black citizens.¹¹⁴ Felon disfranchisement laws were largely relaxed in the 1970s through 1990s as a result of efforts to rehabilitate former convicts, and in the wake of arguments concerning the logical fallacies of disfranchisement. It did not serve any of the “four conventional purposes of punishment,” as it did not deter crimes, did not fit the crime, did not

¹¹² Kant, Immanuel, 1793, “On Theory and Practice,” *Political Writings*, 1970, ed. H. Reiss, Cambridge University Press, 61-92.

¹¹³ Keyssar, 131.

¹¹⁴ *Ibid.*

limit ability to commit more crimes, and did not help rehabilitate criminals.¹¹⁵ The rationale that remains is that former felons are “not fit” to be making political decisions.

Current disfranchisement laws have varying levels of severity. In two states, Maine and Vermont, convicted felons at no point lose their voting rights and can vote via absentee ballot while incarcerated. In 13 states and in Washington D.C., the right to vote is restricted only during the term of the prison sentence; in four states the vote is restricted during incarceration and parole; in 20 states it is restricted during incarceration, parole, and probation; and in the remaining 11 states former convicts may possibly never be re-enfranchised, depending on the crime committed and often on the state review of an application.¹¹⁶ In the wake of the trauma of the 2000 election and growing awareness of the statistics about the extent of disfranchisement after the spotlight was put on Florida, states have begun to reform their felon-exclusion laws, and one estimate suggests that between 1997 and 2008, 760,000 citizens regained the right to vote.¹¹⁷ Although there is a general trend toward easing disfranchisement laws, some states, such as South Carolina and Florida, have made them stricter in the last 10 years.¹¹⁸ Florida Governor Rick Scott defended the reinstated waiting period for those convicted of nonviolent crimes before application for reenfranchisement with the justification, “seemed reasonable,” and by saying that the regulation would require former felons to demonstrate that they were willing to be law abiding.¹¹⁹

Felon Disfranchisement: Racist Intent?

¹¹⁵ *Id.*, 246.

¹¹⁶ ProCon.Org, “State Felon Voting Laws,” 2015.

¹¹⁷ Keyssar, 275.

¹¹⁸ National Conference of State Legislatures, “Felon Voting Rights,” July 15, 2014.

¹¹⁹ Tam, Dara, March 10, 2011, “Scott, Cabinet make felons wait for return of rights; critics call it return to Jim Crow era.” *TC Palm*.

Criminal disfranchisement laws across the world were traditionally thought to be based on retributive and deterrent grounds.¹²⁰ The argument that those convicted of a crime were unfit to vote developed more recently; the idea of the “purity of the ballot box” started appearing in courts’ rationale for disfranchisement in the nineteenth century.¹²¹ In the United States, especially during Reconstruction, these laws were frequently adopted as a constitutional mechanism of disfranchisement, as discussed below.

While limited research has been done, some studies have suggested a racially-based intent in the implementation of felon and ex-felon disfranchisement laws. A study published in the *American Journal of Sociology* concluded, “Our key finding can be summarized concisely and forcefully: the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws.”¹²² This conclusion was evidenced in part by their findings, consistent with previous work, that states with larger populations of incarcerated non-whites were more likely to pass disfranchisement laws,¹²³ and their determination that states were more likely to restrict felon suffrage during Reconstruction, led by Democratic governors during a time of close elections and racial, political turmoil.

There is a host of anecdotal evidence supporting the idea of racist intentions in felon disfranchisement, especially in the wake of Reconstruction. An 1896 Mississippi Supreme Court case, *Ratliff v. Beale*, upheld the disfranchisement law passed by the state’s constitutional convention that had explicit racist intent, defending the attempt to disfranchise a race that had “acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites.” The court concluded, “Restrained by

¹²⁰ Behrens, A., Christopher Uggen, and Jeff Manza, November, 2003, “Ballot Manipulation and the ‘Menace of Negro Domination’: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002.” *American Journal of Sociology*, 109(3): 562.

¹²¹ Behrens, 563.

¹²² *Id.*, 596.

¹²³ Behrens, 596.

the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.”¹²⁴ The Supreme Court upheld this decision in *Williams v. Mississippi* (1898) in a unanimous vote.¹²⁵ Even more explicit, John B. Knox, president of the 1901 Alabama Constitutional Convention, declared in his opening address:

Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State. . . . The justification for whatever manipulation of the ballot that has occurred in this State has been the menace of negro domination . . . These provisions are justified in law and in morals, because it is said that the negro is not discriminated against on account of his race, but on account of his intellectual and moral condition.¹²⁶

The “manipulation of the ballot” in question involved expanding the application of disfranchisement laws to crimes of “moral turpitude,” which included acts that were not even necessarily punishable by law.¹²⁷

Of course, this type of justification for felon disfranchisement has dropped out of the spotlight. Opponents of relaxing disfranchisement laws cite the “purity of the ballot box” principle referenced earlier—for example, Senator Mitch McConnell declared in 2002, “Those who break our laws should not dilute the vote of law-abiding citizens.”¹²⁸ Nevertheless, the *American Journal of Sociology* study also found trends in re-enfranchisement that reflected the trends in disfranchisement laws: states with larger non-white prison populations were less likely to repeal restrictions on suffrage.¹²⁹ While it could be hard to prove “racist intent” as the sole justification for the current state of disfranchisement laws, there is considerable evidence that this is part of the reason the laws became so prevalent in the United States, and the remnants of racially motivated suffrage laws seem to remain entrenched in society.

¹²⁴ Behrens, 569-570.

¹²⁵ *Williams v. Mississippi*, [170 U.S. 213](#) (1898).

¹²⁶ Behrens, 571.

¹²⁷ *Id.*, 569.

¹²⁸ *Id.*, 571.

¹²⁹ *Id.*, 594.

Racial Implications of Felon Disfranchisement

Although not explicitly an issue of race (but rather one of criminal justice or the election system), the disfranchisement of felons has serious racial implications. David Bositis, a senior research associate at the Joint Center for Political and Economic Studies, wrote:

Probably a more important method used by southern Republicans to diminish the voting rights of African Americans is felony disenfranchisement—that is, barring ex-felons from voting . . . these laws, both in the South and elsewhere in the country, are not new. However, changes in the criminal justice system and the changing politics of the south have made them a major issue for the supporters of voting rights.¹³⁰

The historical analysis of disfranchisement suggests that this cynical take is probably the correct one. While it could seem far-fetched that felon disfranchisement has a major impact on elections, the data suggest otherwise. In discussing the history of manipulation of voting regulations, Keyssar cites how even minute changes could have a radical impact on voters' choices and the weight of their votes. Most notable of these laws were ones that affected the make-up of the electorate, such as qualifications for eligibility, procedures for voting, and redistricting.¹³¹ Undoubtedly, restrictions on felon voting fall within these categories and have an impact on elections and the meaning of the vote for African Americans as a group.

In 2011, seven million people in the United States were incarcerated, on probation, or on parole. Between 1980 and 2011, this population rose about 350%, and the total disfranchised population, as a product of felon disfranchisement laws, about 500%.¹³² While these numbers are staggering, they only reflect an average. In Florida the statistics are even more dramatic. A report submitted to the UN Human Rights Committee found:

As of 2010, Florida has disenfranchised 1,541,602 citizens due to a felony conviction.

¹³⁰ Bositis, David A., 2006, "Impact of the 'Core' Voting Rights Act on Voting and Officeholding," In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 120-121.

¹³¹ Keyssar, 103.

¹³² The Sentencing Project, "Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States," September 2013. 1.

This amounts to the disenfranchisement of 10.42% of the state's voting age population and 23.3% of Florida's African-American voting age population. Compare that to the U.S. rates of 2.4% of the 238 million voting age Americans disenfranchised, and 7.7% of the nation's 29 million voting age African Americans, disenfranchised.¹³³

These statistics provide two pieces of information. For one, the effect of felon disenfranchisement has a disparate racial impact, as a result of disparate felony conviction rates between races. Second, the disparity between states' disenfranchisement laws ultimately leads to an unequal treatment of black citizens' voting rights, depending on their state of residence.

Constitutionality of Disfranchisement

If the disparate racial impact of felon disenfranchisement were not so stark, an argument could be made for the constitutionality of disfranchising felons, under Section 2 of the Fourteenth Amendment. This clause says that representation in Congress would be reduced if voting rights were denied to adult male citizens except in the case of "participation in rebellion, or other crime."¹³⁴ Justice Rehnquist cited this in *Richardson v. Ramirez* (1974), saying it implicitly permits disenfranchisement of criminals, but recognizing that in light of a "more modern view" of rehabilitation, Congress could consider putting new laws in place.¹³⁵ However, the modern understanding that disparate impact in the context of voting is a violation of the Fourteenth and Fifteenth Amendments ought to trump the almost off-hand provision in the Fourteenth Amendment that disenfranchisement of criminals shall not serve as a criterion for limiting states' representation in Congress, the significance of which is not immediately clear.

More compellingly, there is some precedent for an "evolution of constitutionality" idea that would consider felon disenfranchisement to be in violation of equal protection laws. In *Dillenburg v. Kramer* (1972), the U.S. Ninth Circuit Court of Appeals found that "[C]onstitutional

¹³³ Sentencing Project, 6.

¹³⁴ Keyssar, 249.

¹³⁵ *Ibid.*

concepts of equal protection are not immutably frozen like insects trapped in Devonian amber,” and the court used this argument to question the legitimacy of felon disenfranchisement.¹³⁶ The concept of evolving standards for equal protection was cited in *Harper v. Virginia State Board of Elections* (1966), which said, as it outlawed poll taxes, “Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.”¹³⁷ Given the disparate effect of disenfranchisement laws on minorities, I conclude that disenfranchising felons, especially once they have completed their sentence in prison, should be deemed a violation of the Equal Protection Clause and the VRA. At its core, there are two problems with felon disenfranchisement: one political and one racial. The case should be reviewed under strict scrutiny on the basis of both racial discrimination and the abridgement of a fundamental right, and using this standard felon disenfranchisement would fail.¹³⁸ First, continuing to disenfranchise felons after they leave prison does not serve any compelling state interest. As is explained further in the next section, it is not a reasonable or an effective punishment. Moreover, it is not legitimate for the government to attempt to purify the electorate of “immoral” voters (a category that is hotly debatable and nearly limitless). Even if it were, long-term disenfranchisement would not satisfy the “least restrictive means” test, which would probably call for rehabilitation rather than a ban from the voting process once a felon is released from prison.

Non-Constitutional Arguments for Enfranchisement

Although the constitutionality of felon disenfranchisement remains undecided, there are many other reasons why those convicted of crimes should retain the right to vote. While the question of whether convicts should lose the right to vote during incarceration cannot be fully

¹³⁶ *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972).

¹³⁷ *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

¹³⁸ *United States v. Carolene Products Company*, [304 U.S. 144](#) (1938).

addressed in this paper, I would argue that at the very least the right to vote should be returned after incarceration. The period during which people are in prison is a time in which many fundamental rights are lost, so arguments for the illegitimacy of disfranchisement during this time are not completely compelling. However, society does not strip felons of their citizenship, nor does it continue to limit fundamental rights after a prison sentence has been served. By this logic, the right to vote, which is an inherent part of citizenship, should not continue to be withheld after incarceration has been completed, and certainly not after parole has been completed as well. To an extent, there are theoretical and practical differences between never having the right to vote and having it removed; the latter could arguably be punishment but also might instill a more traumatic feeling of exclusion. Regardless of the differences between the two, the end result is the same: removal from participation in society.

Two additional reasons for a national mandate to return suffrage to felons, already discussed at length, are maintaining uniformity among states to guarantee equal protection of voters' right to have their votes counted, and avoiding the racial disparity of disfranchisement laws.

Disfranchising felons raises the same problem as disfranchising any other group of people—without the right to vote, they have no access to the political process that could change the laws governing them. People convicted of felonies, in some ways, have a more difficult time of achieving suffrage than more recognizable groups, such as ones based exclusively on race. For example, between 1920 and the beginning of World War II, there was little pressure to expand suffrage, for those disfranchised were not necessarily visible groups, nor were they necessarily capable of organizing on their own behalf. Keyssar says, “Those who remained outside the polity were numerous, but they were scattered, socially marginal, transient or (in theory at least) only

temporarily disenfranchised.”¹³⁹ With convicted felons, it is easy to see how this could be a problem. Many have their political power reduced as a result of disfranchisement and they are a socially stigmatized group with little means of organization.

Disfranchisement can even have a negative impact on the rest of society, beyond those denied suffrage themselves. Henry Ward Beecher, a Protestant minister, made an argument in the 1860s for the suffrage of black men, whom many claimed it would be dangerous to enfranchise due to their alleged ignorance. He said, compellingly, in spite of a vaguely racist edge:

It is far more dangerous to have a large under-class of ignorant and disenfranchised men who are neither stimulated, educated, nor emboldened by the exercise of the right to vote . . . the remedy for the unquestionable dangers of having ignorant voters lies in educating them by all means in our power, and not in excluding them from their rights . . . Nothing so much prepares men for intelligent suffrage as the exercise of the right of suffrage.¹⁴⁰

The idea that voting could be beneficial to other members of society is potentially persuasive, and it is certainly persuasive that the harm of disfranchisement would outweigh any benefits. Not only that, but disfranchisement strikes at the heart of democracy itself. As a 1779 Western Massachusetts citizens committee declared, “No man can be bound by a law that he has not given his consent to, either by his person, or legal representative.”¹⁴¹ Would not a disfranchised person fall into this category, of living in a system they do not consent to? There are limitations to this argument—children cannot vote, and this is taken without question. Nevertheless, it is a point worthy of consideration, especially given the millions of citizens that it affects.

The arguments in favor of felon disfranchisement have also been undermined. The legitimacy of these laws has come under question by legal scholars, who say that when the laws originated, long before the United States put them into practice, they were primarily retributive,

¹³⁹ Keyssar, 188.

¹⁴⁰ *Id.*, 70.

¹⁴¹ *Id.*, 11-12.

yet now their value as punishment is seen as limited. It does not necessarily seem like a plausible way to reduce crime, nor does it seem like a relevant type of punishment that fits the crime committed (with the exception, perhaps, of voter fraud).¹⁴² As a result, new arguments have been formulated, such as that felons would corrupt elections by means of their votes, or that they would join forces to repeal criminal laws.¹⁴³ Both arguments seem unrealistic. Just as the “aftermath” of hard-fought women’s suffrage was hardly notable, the enfranchisement of felons would be as well. Many states extend voting rights (with some qualifications) to people who have been convicted of felonies, and there is no indication of any negative impact. Even if banishment from the political process is simply a symbolic act, the symbolism should be overridden by the practical impact of such a policy. The rationale for denying voting rights to criminals was that they were “deemed to be unfit to govern themselves (and therefore others) and unworthy to enjoy the privilege of voting.”¹⁴⁴ However, the argument for trying to keep all but “qualified” people from voting has long been eviscerated; this was the argument used for literacy tests. In discussing the arguments posited for literacy and education tests, Keyssar said, “It would reduce the ‘ignorance’ of the electorate . . . moreover, it would do so in a way that was more ideologically palatable . . . Literacy tests did not overtly discriminate against particular classes or ethnic groups, and illiteracy itself was a remediable shortcoming.” This analysis shows how despite the reasonable-sounding rationales for literacy tests, the tests in practice proved to be discriminatory. The arguments for literacy tests could be readily applied to the disfranchisement of felons, with the exception that felon status is not remediable (though disfranchisement exclusively during the period of incarceration could be considered under this criterion).¹⁴⁵ The parallels between the

¹⁴² Id., 131.

¹⁴³ Id., 131-132.

¹⁴⁴ Id., 50.

¹⁴⁵ Id., 115.

two practices run deep, and the de-legitimation of literacy tests should serve as an indication of the illegitimacy of felon exclusion from voting.

By the end of the twentieth century, voting rights belonged to nearly every citizen, which is why denying the right to vote to people convicted of felonies is particularly notable. Although society removes some rights, such as freedom of speech and liberty of body when a person is incarcerated, it does not deny these people citizenship, and the punishment generally does not extend beyond the prison sentence. The punishment of disfranchisement falls not only on the individual, but on the fabric of society itself. A Women's Trade Union League resolution declared, "the disfranchised worker is always the lowest paid,"¹⁴⁶ implying that the racial disparity in voting rights could serve to increase inequality, suggesting a contributing factor to the inequality present outside of the electoral sphere. What's more, disfranchisement calls into question the idea of government by the consent of the governed, which is one of the founding principles of our democracy, even if it has never been fully applied or realized.

CONCLUSION

The Problem with Federalism and Rights

Federalism is often touted as one of the best systems for protecting rights from violation by a central power. In some respects, federalism serves to define and protect rights; federalism and structural protections such as separation of powers serve to disperse control and guard against the abuse of centralized power.¹⁴⁷ Zuckert outlines some of the advantages of "dual protections" of rights, and says that the federal standard acts as "a country-wide minimum, a national constitutional standard, crafted to affect diverse and far-flung peoples," and should stay

¹⁴⁶ Id., 165.

¹⁴⁷ Howard, 12.

minimal.¹⁴⁸ However, many also question the ability of federalism to protect rights. For example, D'Alemberte argues, when addressing Justice Brennan's concept of federalism, that the problem with relying on states' courts and constitutions is that they "are more subject to majoritarian forces than are federal judges and the United States Constitution."¹⁴⁹

These concerns appear in practice. The obvious examples are the product of anti-black racism, with restrictive disfranchisement laws enacted in certain states during the Jim Crow era, but many minorities of all sorts, not just racial minorities, have felt the impact at one point or another in United States history. Since the ratification of the Fourteenth Amendment, many minorities have relied on the national system to defend their rights, such as free speech for Jehovah's Witnesses.¹⁵⁰ Decentralization in New Deal legislation also often led to discriminatory results, as eligibility requirements and benefit levels could be set by the states, and the federal money was ultimately spent unequally.¹⁵¹ Even those staunchly in favor of states' rights would probably agree that there are certain rights that should be protected for all people regardless of region (people's protection from random slaughter by their state governments, to give a hyperbolic example), and I hope many would argue that voting is one of those rights. The primary reason for this hope is that voting is necessary for protecting other fundamental rights and is the essence of citizenship in a democracy.

Making "Universal" Mean Universal

Although the United States has seen a great deal of progress in its treatment of voting over the past 250 years, many of the nagging issues of discrimination remain. Felon disfranchisement ultimately looks like one such discriminatory practice, given its overwhelmingly

¹⁴⁸ Zuckert, 111.

¹⁴⁹ D'Alemberte, Talbot, 1996, "Rights and Federalism: An Agenda to Advance the Vision of Justice Brennan," In *Federalism and Rights*, Eds. Ellis Katz and G. Allen Tarr, Maryland: Rowman and Littlefield Publishers, Inc, 131.

¹⁵⁰ Howard, 21.

¹⁵¹ Lieberman, 29.

disparate impact on black citizens. While this racial inequality may be a problem inherent to the criminal justice system in this country and it would be worth tackling this problem at its root as well, voting has been inexorably and wrongly tied to the criminal justice system. Felon disenfranchisement laws as they stand are inappropriate for a variety of reasons in addition to the discriminatory effect: they do not serve a compelling retributive purpose, they reduce the chance of rehabilitation, and they represent a symbolic taking of citizenship even after the sentence for the crime has been completed.

Universal voting rights can be protected only if the federal government is strong enough to defend them. The history of suffrage is also a history of discrimination in the United States, and one of political manipulation. Over the past two centuries, federal control over voting practices has centralized, and it is crucial that society continue on this path.

As idealistic as it sounds, it is important that society reach a place where voting itself is no longer a right subject to the political process, and this requires universal voting rights to truly be universal and uniform. Voting is a unique right because it is necessary to secure other rights, and because those who do not already possess the political right to vote cannot obtain suffrage without support from others. Moreover, such support is in no way guaranteed and in fact is usually predicated on political strategy rather than on the substantive value of expanding suffrage. Manza and Uggen highlight in *Locked Out: Felon Disenfranchisement and American Democracy* the idea that although there might be harm or benefit to certain political parties as a result of expanding voting rights, specifically the rights of felons, this is not the appropriate way to make decisions about suffrage; suffrage should be divorced from politics altogether. They cite Sean Hannity's comment, "the evidence shows this [reenfranchising ex-felons] clearly favors the Democrats. So isn't this simply a political move to help in close races?" In response, they argue:

Such arguments, however, are problematic for democratic polity, where the right to vote is not premised on *how* one plans to vote. Pushed to its logical conclusion, this position implies that governments should be free to pick and choose which citizens to enfranchise and which to keep out of the ballot box. Such a policy has no basis in modern conceptions of democracy.¹⁵²

In other words, while voting rights are crucial to democracy, their protection has to remain somewhat external to the democratic process itself, with a constitutional guarantee protected by the courts. The only way to avoid the discriminatory pitfalls demonstrated time and again over the past 250 years is to strive toward universal voting, one step of which, going forward, is re-enfranchising felons across the nation.

¹⁵² Manza, Jeff, and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy*, Oxford: Oxford UP, 2006, 4.

Bibliography

"Elections & Voting." *The White House*. The White House.

<https://www.whitehouse.gov/1600/elections-and-voting>.

"Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio."
Volume 2, Issue 2, 1873.

[https://books.google.com/books?id=N2kdAQAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false]

"1961 U.S. Commission on Civil Rights Report Book 1: Voting." United States Commission on Civil Rights. Washington, DC. 1961.

<https://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf>

"The Constitution of the United States," art. I, § 4.

"The Constitution of the United States," art. 4, § 3.

"The Constitution of the United States," Amendment 13.

"The Constitution of the United States," Amendment 14.

"The Constitution of the United States," Amendment 15.

"The Constitution of the United States," Amendment 19.

Baker v. Carr, 369 U.S. 186 (1962).

Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

Behrens, A., Christopher Uggen, and Jeff Manza. November, 2003. "Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850-2002." *American Journal of Sociology*, 109(3): 559-605.

http://www.socsci.umn.edu/~uggen/Behrens_Uggen_Manza_ajs.pdf

Bositis, David A. 2006. "Impact of the 'Core' Voting Rights Act on Voting and Officeholding." In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 129-144.

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

Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

Civil Rights Movement Veterans. "Alabama Literacy Test, circa mid-1960s."

<http://www.crmvet.org/info/litques.pdf>

Constitutional Rights Foundation. 2015. "African Americans and the 15th Amendment." *Constitutional Rights Foundation*. <http://www.crf-usa.org/black-history-month/african-americans-and-the-15th-amendment>

- Daily, Jane. 2004. "White Supremacy." In *The American Congress: The Building of Democracy*, ed. Julian E. Zelizer. New York: Houghton Mifflin Company, 250-268.
- D'Alemberte, Talbot. 1996. "Rights and Federalism: An Agenda to Advance the Vision of Justice Brennan." In *Federalism and Rights*. Eds. Ellis Katz and G. Allen Tarr. Maryland: Rowman and Littlefield Publishers, Inc, 123-138.
- Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972).
- DuBois, Ellen Carol. 1992. "Taking Law Into Their Own Hands: Voting Women During Reconstruction." In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 67-79.
- Foner, Eric. 1992. "From Slavery to Citizenship." In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 55-65.
- Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).
- Howard, A. E. Dick. 1996. "Does Federalism Secure or Undermine Rights?" *Federalism and Rights*. Eds. Ellis Katz and G. Allen Tarr. Maryland: Rowman and Littlefield Publishers, Inc, 11-28.
- H.R. 246, 109 Cong. (enacted).
<https://www.congress.gov/bill/109th-congress/house-bill/9/text>.
- Jacobsohn, Gary. 1996. "Contemporary Constitutional Theory, Federalism, and the Protection of Rights." In *Federalism and Rights*. Eds. Ellis Katz and G. Allen Tarr. Maryland: Rowman and Littlefield Publishers, Inc, 29-55.
- Johnson, Lyndon B. "Voting Rights Act Address. March 15, 1965."
(<http://www.greatamericandocuments.com/speeches/lbj-voting-rights.html>)
- Kant, Immanuel. 1793. "On Theory and Practice." *Political Writings*. 1970. ed. H. Reiss, Cambridge University Press, 61-92.
- Katz, Ellen and G. Allen Tarr. 1996. "Introduction." *Federalism and Rights*. Eds. Ellis Katz and G. Allen Tarr. Maryland: Rowman and Littlefield Publishers, Inc, ix-xxiii.
- Katzenstein, Mary Fainsod. 1992. "Constitutional Politics and the Feminist Movement." In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 83-93.
- Keyssar, Alexander. 2000. *The Right to Vote: The Contested History of Democracy in the United States*. New York: Basic Books.
- Klarman, Michael J. 2006. "The Supreme Court and Black Disenfranchisement." In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 37-56.
- Kleppner, Paul. 1992. "Defining Citizenship." In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 43-53.

- Lieberman, Robert C. 2006. "Disenfranchisement and Its Impact on the Political System." In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 21-36.
- Manza, Jeff, and Christopher Uggen. *Locked Out: Felon Disenfranchisement and American Democracy*. Oxford: Oxford UP, 2006.
- Mintz, S., & McNeil, S. 2013. "Rise of Democratic Politics." *Digital History*.
http://www.digitalhistory.uh.edu/dispatch_textbook.cfm?smtid=2&psid=3541
- McDonald, Laughlin. 2006 "Federal Oversight of Elections and Partisan Realignment." In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 161-176.
- Meguid, Bonnie. and Gretchen Helmke. 2007. "Endogenous Institutions: The Origins of Compulsory Voting Laws" *Paper presented at the annual meeting of the American Political Science Association, Hyatt Regency Chicago and the Sheraton Chicago Hotel and Towers, Chicago, IL*. [http://www.rochester.edu/college/faculty/bmeguid/Helmke_Meguid_CVpaper_Sept2008.pdf]
- Moore, Colin D. 2006. "Extensions of the Voting Rights Act." In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 95-112.
- National Conference of State Legislatures. "Felon Voting Rights." July 15, 2014.
[\[http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx\]](http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx)
- National Voter Registration Act of 1993, (42 U.S.C. §§ 1973gg–1973gg-10); From: US Department of Justice. "About the National Voter Registration Act." The United States Department of Justice.
[\[http://www.justice.gov/crt/about/vot/nvra/activ_nvra.php\]](http://www.justice.gov/crt/about/vot/nvra/activ_nvra.php)
- Naturalization Act of 1790, Session II, Chap. 3; 1 stat 103. 1st Congress; March 26, 1790.
- Naturalization Act of 1798, Session II; Chapter 54; 1 stat 566. 5th Congress; June 17, 1798.
- ProCon.Org. "State Felon Voting Laws." 2015.
[\[http://felonvoting.procon.org/view.resource.php?resourceID=000286#florida\]](http://felonvoting.procon.org/view.resource.php?resourceID=000286#florida)
- Reynolds v. Sims*, [377 U.S. 533](#) (1964).
- Rogers, Donald W. 1992. "Introduction" In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 3-18.
- Rush, Mark. 2006. "The Voting Rights Act and Its Discontents." In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 145-161.
- Shelby County v. Holder*, 570 U.S. ____ (2013).
- Slaughter-House Cases*, 83 [U.S. 36](#) (1873)
- South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Tam, Dara. March 10, 2011. "Scott, Cabinet make felons wait for return of rights; critics call it return to Jim Crow era." *TC Palm*.
[<http://www.tcpalm.com/news/scott-cabinet-make-felons-wait-return-rights-criti>]

The Sentencing Project. "Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States." September 2013.
[http://sentencingproject.org/doc/publications/fd_ICCPR%20Felony%20Disenfranchisement%20Shadow%20Report.pdf]

Tuck, Stephen. 2006. "Making the Voting Rights Act." In *The Voting Rights Act: Securing the Ballot*. Ed. Richard M. Valelly. Washington, D.C.: CQ Press, 77-94.

United States v. Carolene Products Company, [304 U.S. 144](#) (1938).

United States v. Classic [313 U.S. 299](#) (1941).

Voting Rights Act of 1965, Public Law 89-110, 79 Stat. 437.

Wesberry v. Sanders, [376 U.S. 1](#) (1964).

Williams, Linda Faye. 1992. "The Constitution and The Civil Rights Movement." In *Voting and the Spirit of American Democracy: Essays on the History of Voting and Voting Rights in America*. Ed. Donald W. Rogers. Urbana: University of Illinois Press, 97-107.

Williams v. Mississippi, [170 U.S. 213](#) (1898).

Yarbrough, Jean. 1996. "Federalism and Rights in the American Founding." In *Federalism and Rights*. Eds. Ellis Katz and G. Allen Tarr. Maryland: Rowman and Littlefield Publishers, Inc, 57-73.

Zuckert, Michael P. 1996. "Toward a Theory of Corrective Federalism: The United States Constitution, Federalism, and Rights." In *Federalism and Rights*. Eds. Ellis Katz and G. Allen Tarr. Maryland: Rowman and Littlefield Publishers, Inc, 75-100.