
FROM DISENFRANCHISEMENT TO CITIZENSHIP: THE ONE-
PERSON ONE-VOTE RULE ISSUE AND RACIAL
DISCRIMINATION IN THE TRUMP ERA

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I. INTRODUCTION

Racial inequality through slavery is intrinsically linked to the formation of the United States as an independent nation and its historical evolution; it is in its essence and is its corollary. However, various United States Supreme Court decisions rooted in the civil rights movement, such as *Brown v. Board of Education*,¹ *Loving v. Virginia*,² and *Reynolds v. Sims*,³ characterize a shift in the treatment of inequality. The right to vote allows citizens to express their will.

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¹ 347 U.S. 483 (1954).

² 388 U.S. 1 (1967).

³ 377 U.S. 533 (1964).

It provides electoral accountability via the prism of popular sovereignty, which is the core of a democratic republic. It was not until the end of the Civil War and the expansion of suffrage to black men that felony disenfranchisement became a significant barrier to U.S. ballot boxes. This felon disenfranchisement, used as a form of punishment, places a dual penalty on felons in the United States; not only are felons subject to incarceration, but they are also denied the right to vote.

The overrepresentation of disenfranchised African Americans brings forth the question of how these laws continue to exist. The objective of this Article is to demonstrate how over the last decades, with the advent of neoliberalism that has moved the debate from societal inequalities to individuals' autonomy, many disenfranchisement laws have been passed. Many of these laws coincide with the expansion of the penal state reinforcing discrimination and perpetuating inequalities, thus pushing aside the shift to equality in voting rights. The "One-Person One-Vote Rule" refers to the rule that one person's voting power ought to be roughly equivalent to that of another person within the same state. This is not the case as shown by the control of the states over the vote of the disenfranchised citizens on the one hand, and on the other hand, the fact that representation in federal institutions in the United States is not correlated to the number of citizens but the number of residents. The latter is an issue indirectly raised by the census citizenship question Supreme Court case.⁴

This last point causes a great disparity in the weight of the vote of certain states' citizens and an overrepresentation in federal elections, giving such citizens greater electoral power than other citizens. This issue is fundamental because even if the states have appropriated this perimeter and this prerogative, the inequality generated at the level of federal representation, in Congress or even during the presidential election, requires a rereading of these elements to consolidate an equal basis for the treatment of the vote. This Article will thus tackle this issue through the prisms of a constitutional focus on these inequalities. Therefore, the first part aims to examine the impact and legacy of slavery on different state policies and to analyze their constitutional anchor. The interference of politics in the judiciary first through the advent of Liberalism and since the 1970s, its progeny

⁴Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019).

Neoliberalism, has led to disparities in the judicial system deleterious to African-Americans. By raising issues of constitutionality, these issues and controversies will be probed. The second part of this Article aims to shed contemporary light on the various leverage tools from an egalitarian perspective of the right to vote.

II. POLITICAL PERSPECTIVE ON FELON DISENFRANCHISEMENT THROUGH HISTORICAL DEVELOPMENT

Until quite recently, in the citizenship test operated by the U.S. Department of Justice Immigration and Naturalization Service, the question was asked: "What is the most important right granted to U.S. citizens?"⁵ The correct answer, according to the United States government, was "[t]he right to vote."⁶ Yet, there has never been a formal recognition of a right to vote as a concomitant of U.S. citizenship.⁷ Indeed, the right to vote is the cornerstone of a democratic republic and it is central and fundamental in the functioning of a democratic society. However, the Constitution does not contain an express right to vote; therefore, it does not guarantee such a right.⁸ The absence of a constitutional guarantee of the right to vote has been characterized as the founders' greatest error; that is to say, leaving the franchise to the discretion of individual states.⁹ This will be further discussed in Part A. This political mechanism has generated a foundation for systemic racism.¹⁰ Part B will illustrate how the echoes of the period described in Part A, which were felt through a perception and a feeling of injustice during the advent of the mass incarceration approach driven by Neoliberalism, have led to political disempowerment.

⁵ *US Citizenship Test*, THEUSGOV.COM, <http://www.theusgov.com/citizenshippreptest.htm> (last visited Nov. 16, 2020).

⁶ *Id.*

⁷ Winston A. Bowman, *Life After Civil Death: Felony and Mormon Disenfranchisement in the U.S. West (1880-1890)*, 2 *PSI SIGMA SIREN* 1, 2 (2004).

⁸ Jonathan Soros, *The Missing Right: A Constitutional Right to Vote*, DEMOCRACY: J. IDEAS, <https://democracyjournal.org/magazine/28/the-missing-right-a-constitutional-right-to-vote/> (last visited Nov. 16, 2020).

⁹ See ALLAN J. LIGHTMAN, *THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT* 2-3 (2018) (ebook).

¹⁰ *Id.* at 4.

A. *The Right to Vote and Disenfranchisement*

The battle between federalists and anti-federalists concluded with the enactment of Article I, Section 4, Clause 1, of the U.S. Constitution, which states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."¹¹ The right to vote is thus clearly apparent at the level of the constitutions of the states.¹² Thus, the allowance of the right to vote is part of the states' prerogatives. However, the absence of a universal definition for determining the eligible voters in federal elections has inevitably resulted in inequality from varying local determinants.¹³

Several constitutional amendments list, in negative terms, conditions that cannot be used by the states to prohibit people from voting; i.e. what the government cannot do to deny or abridge the right to vote.¹⁴ However, the right to vote is revealed through the prism of an invisible reading of the Constitution,¹⁵ defined by the jurisprudence of the Supreme Court as "[t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless . . . it is regarded as a fundamental political right, because [the right to vote is] preservative of all rights."¹⁶ Therefore, "[t]he 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 representative government."¹⁷ Describing the right to vote as "fundamental,"¹⁸ and the "essence of a democratic society,"¹⁹ the Supreme Court has consistently

¹¹ U.S. CONST. art. I, § 4, cl. 1.

¹² See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 91 (2019).

¹³ *Id.* at 142.

¹⁴ *Id.* at 93.

¹⁵ See LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008).

¹⁶ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

¹⁷ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

¹⁸ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

¹⁹ *Reynolds*, 377 U.S. at 555.

affirmed such right as vital to civil rights, as the most basic civil rights²⁰ are "illusory if the right to vote is undermined."²¹

American constitutional history has been characterized by an inclusive and progressive widening of access to voting along the lines of the Fifteenth Amendment, adopted in 1870, which prohibits the deprivation of rights based on race, then widening in terms of gender, class, social, or even age.²² However, concomitantly with this inclusive process, exclusion has been continuously present and used as a political tool, it concerns the deprivation of the voting rights of the imprisoned or condemned population.²³ The problem, therefore, did not lie in the legal impossibility of gaining access to the ballot boxes, but in the fact that authorities, at local or state levels, could exclude the right to vote from black people by using their discretionary power over this right.

Deprivation of the right to vote has its roots in the concept of active civil death in different legal traditions.²⁴ In ancient Greece, the concept of civil death through *atimi* was applied to certain offenders who were deprived of various rights, including the right to vote.²⁵ Under Roman law, an individual could be categorized as infamous "*infamia*" following an act of a criminal or immoral nature and thus lose the right to vote.²⁶ The importation of this punishment on North American soil emanates through the prism of a bill of attainder in English law.²⁷ In England, Blackstone stated that a subject was deemed *civiliter mortuus*, or dead in law, as a consequence of banishment, abjuration (swearing an oath to leave the country), or

²⁰ Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL'Y 143, 149 (2008) (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 842 (Aspen Law & Business 2002) (1997)).

²¹ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

²² See U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XIX, § 1; U.S. CONST. amend. XXIV § 1; U.S. CONST. amend. XXVI, § 1.

²³ See Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here's Why Few Do.*, MOTHER JONES (June 11, 2019), <https://www.motherjones.com/politics/2019/06/prisoners-in-just-two-states-can-vote-heres-why-few-do/>.

²⁴ See Howard Itzkowitz & Lauren Oldak, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 721-23 (1973).

²⁵ *Id.* at 721.

²⁶ *Id.* at 721-22.

²⁷ *Id.* at 724-25.

when a man entered a monastery.²⁸ Disenfranchisement also applied to the offense of perjury.²⁹ A bill of attainder (also known as an act of attainder, a writ of attainder, or a bill of penalties) declared an individual guilty without a trial and resulted in the loss of civil rights.³⁰ The convicted person was declared "attainted" and deprived of such rights. Bills of attainder were used through the 18th century in England and were also applied to British colonies.³¹

Nora V. Demleitner, the Roy L. Steinheimer Jr. Professor of Law at Washington and Lee University School of Law, noted that "the United States rejected some of this common law heritage" by "adher[ing] to a lesser form of 'civil death' than England"³² She further explained that "[t]he Constitution . . . abolished forfeiture for treason and corruption of blood. In the second half of the twentieth century, many of the surviving consequences of 'civil death' statutes, such as the inability to enter into contracts or to inherit property, were abolished in American states."³³

In the American constitutional development, the Supreme Court addressed for the first time the general question of disenfranchisement with two cases: *Davis v. Beason*³⁴ and *Murphy v. Ramsey*.³⁵ Often referred to as the "Mormon Cases," these cases challenged state statutes excluding polygamists from the franchise. In 1882, Congress had passed the Edmunds Anti-Polygamy Act,³⁶ which was aimed directly at the Mormons in Utah and outlawed bigamy in the territories.³⁷ Polygamy was made a felony and voters were required to swear they were neither bigamists nor polygamists.³⁸ The Idaho Territory required a

²⁸ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 132 (George Sharswood eds., Liberty Fund Inc. 2011) (1753).

²⁹ *Id.* at 173.

³⁰ See *Cummings v. Missouri*, 71 U.S. 277, 320, 323 (1866).

³¹ Itzkowitz & Oldak, *supra* note 24, at 724–25.

³² Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 766 (2000).

³³ *Id.*

³⁴ 133 U.S. 333 (1890).

³⁵ 114 U.S. 15 (1885).

³⁶ Edmunds Act of 1882, available at https://archive.org/stream/edmundsactreport00unitrich/edmundsactreport00unitrich_djvu.txt. 47 Cong. Ch. 47, March 22, 1882, 22 Stat. 30.

³⁷ 1882 Cong. Rec. 1195–96 (statement of Senator Morgan).

³⁸ *Id.*

similar oath as a condition of registering to vote.³⁹ In *Murphy v. Ramsey*, the Supreme Court upheld the 1882 federal law that denied polygamists the right to vote.⁴⁰ Justice Stanley Matthews wrote the Court's unanimous decision upholding the law against charges that it was an *ex post facto* provision.⁴¹ In *Davis v. Beason*, Samuel Davis appealed his conviction of falsely swearing the oath before the 1888 election stating that this was a violation of his first amendment right of freedom of religion.⁴² The Court, in a unanimous decision authored by Justice Stephen J. Field, rejected the argument.⁴³

The first and only Supreme Court ruling directly addressing felon disenfranchisement in the modern era is *Richardson v. Ramirez*.⁴⁴ In this case, three convicted felons from California, who had served time, sued for their right to vote.⁴⁵ The plaintiffs argued that the state's felony disenfranchisement policies denied them the right to equal protection of the laws, as guaranteed by the Fourteenth Amendment.⁴⁶ The plaintiffs further argued that these protections are guaranteed under Section 1 of the Fourteenth Amendment, which prohibits a state from restricting voting rights unless it shows a compelling state interest; and under Section 2 of the Fourteenth Amendment (the Penalty Clause), which allows states to disenfranchise people.⁴⁷ Indeed Section 2 states:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.⁴⁸

³⁹ *Id.*

⁴⁰ 114 U.S. at 47.

⁴¹ *Id.*

⁴² 133 U.S. 333, 348 (1890).

⁴³ *Id.*

⁴⁴ 418 U.S. 24, 26 (1974).

⁴⁵ *Id.* at 26–27.

⁴⁶ *Id.* at 27.

⁴⁷ See generally U.S. CONST. amend. XIV §§ 1–2.

⁴⁸ U.S. CONST. amend. XIV § 2.

Abigail M. Hinchcliff points out that "the Court's command [was] that 'language [in the Penalty Clause] was intended . . . to mean what it says."⁴⁹ Moreover, she explains that "[t]he Clause's 'other crime' construction follows a syntactical pattern found in three other constitutional clauses" and that "the repeated use of this construction reveals that the scope and meaning of 'crime' is framed by the leading examples or categories that precede it."⁵⁰ Therefore, she argues that "[t]he constitutionality of disenfranchisement is limited by this relationship and should be reexamined."⁵¹

The social order in the United States is built on the postulate of race, not that of class distinctions, thereby playing a fundamental role in the exercise of citizenship.⁵² The color argument, therefore, plays a fundamental role:

It will probably be asked, why not retain and incorporate the blacks into the state, and thus save the expense of supplying, by the importation of white settlers, the vacancies they will leave? Deep-rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race. -- To these objections, which are political, may be added others, which are physical and moral. The first difference which strikes us is that of colour. Whether the black of the negro resides in the reticular membrane between the skin and scarf-skin, or in the scarf-skin itself; whether it proceeds from the colour of the blood, the colour of the bile, or from that of some other secretion, the difference is fixed in nature, and is as real as if its seat and cause were better known to us. And is this difference of no importance?⁵³

This color element constitutes a common thread and sets up a barrier, employed politically, so that freed blacks do not blend into

⁴⁹ Abigail M. Hinchcliff, *The "Other" Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement*, 121 YALE L.J. 194, 194 (2011).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² The definition of citizenship can be found in the Declaration of Independence. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[T]hat all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. . . . That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it"); see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 12–16, 20–22 (rev. ed. 2012) (expanding on the racial caste system in America).

⁵³ THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 145 (Frank Shuffelton ed., Penguin Books 1999) (1785).

the free population.⁵⁴ Borrowing from naturalism, we can nevertheless detect a great paradoxical characteristic of the deep complexities inherent in American society. The idea of human nature is found in the intersection of sometimes antagonistic doctrines, but which Jefferson has gathered.⁵⁵ On the one hand, the doctrine of natural rights inherited from Locke⁵⁶ represents a common thread. On the other hand is the doctrine of natural moral sense inherited from Hutcheson⁵⁷ in his *Inquiry into the Original of Our Ideas of Beauty and Virtue*.⁵⁸ An internal sense called the moral sense and its corollary, moral perception, is absent from Locke's writings.

Once slavery was constitutionally buried by the Thirteenth, Fourteenth, and Fifteenth Amendments, a barrier was once again built against access to the exercise of citizenship through mechanisms connecting the phenomenon of political exclusion of civil death, whose origins were not racist, to racist Jim Crow laws.⁵⁹ This interweaving nowadays informs the deprivation of the epidermal vote during the period of reconstruction and the feeling of instrumentalization and injustice generated by the phenomenon of mass incarceration.⁶⁰

Felony disenfranchisement laws are connected to discriminatory practices implemented in the reconstruction era.⁶¹ During this period, Jim Crow discriminatory policies aimed at using felony disenfranchisement as a coercive method to keep previously enslaved black people away from political power.⁶² J.C Powell, a former Captain, observed at that time: "It was possible to send a negro to prison on almost

⁵⁴ See generally *id.* at 145–51.

⁵⁵ See generally *id.* at 151.

⁵⁶ See, e.g., CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 62–73 (1922).

⁵⁷ See, e.g., GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (Vintage Books 1979) (1978).

⁵⁸ FRANCIS HUTCHESON, *AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE* (Wolfgang Leidhold & Knud Haakonssen eds., Liberty Fund 2008) (1729).

⁵⁹ See ERIKA WOOD ET AL., *JIM CROW IN NEW YORK* 4 (2009), https://www.brennan-center.org/sites/default/files/2019-08/Report_JIMCROWNY_2010.pdf.

⁶⁰ See *id.* at 4–5.

⁶¹ See ERIN KELLEY, *BRENNAN CTR. FOR JUSTICE, RACISM, & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY* 1–3 (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Disenfranchisement_History.pdf.

⁶² *Id.* at 2.

any pretext, but difficult to get a white man there.⁶³ In Florida, in 1865, the Black Codes were enacted by the legislature, expanding the criminal justice system to include minor offenses that legislators considered former slaves more likely to commit.⁶⁴ In the meantime, as the number of freed black citizens was roughly equivalent to the white citizens, the 1868 Constitution was drafted.⁶⁵ This Constitution utilized disenfranchisement as a political tool to suppress new voices.⁶⁶ The 1868 Constitution extended the right to vote to all males, regardless of race, but provided for the automatic disenfranchisement of felons convicted of bribery, perjury, larceny, or infamous crimes.⁶⁷ Thus, petty larceny crimes, including stealing a gold button, a case of oranges, hogs, oats, six fish worth 12 cents, or a cow hide, could result in the denial of the right to vote, leading to the increase in larceny charges before elections to keep potential black voters away.⁶⁸

In 1884, the Alabama Supreme Court in the case *Washington v. State* held that:

The 'manifest purpose' of disenfranchisement of ex-convicts was to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny. The evil infection of the one is not more fatal than that of the other. The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship.⁶⁹

The same argument was used regularly in disenfranchisement cases founded on political exclusion as a method to preserve society's

⁶³ J.C. POWELL, THE AMERICAN SIBERIA; OR, FOURTEEN YEARS' EXPERIENCE IN A SOUTHERN CONVICT CAMP 332 (Chicago, H.J. Smith & Co. 1891).

⁶⁴ *History of Florida's Felony Disenfranchisement Provision*, BRENNAN CTR. FOR JUST. (Mar. 2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_38222.pdf.

⁶⁵ *Id.*

⁶⁶ *See, e.g., id.*

⁶⁷ PIPPA HOLLOWAY, LIVING IN INFAMY: FELONY DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 44 (2014).

⁶⁸ *Id.* at 54.

⁶⁹ 75 Ala. 582, 585 (1884).

morality and prevent corruption, an argument presented in Plato's Trial and Death of Socrates.⁷⁰

This political mechanism has generated a feeling of systemic racism. This feeling emanates from its origins, and this interweaving places an emphasis on this subject of political exclusion and the related dispute. This question is not an epidermal one in countries that are not as deeply imbued in their historical construction of the postulate of race, as is the case in the United States. American history has connected these two concomitant elements in the failure of the egalitarian constitutional ideal which could not transcend the difficulties of the cognitive paradigm of societies imbued with ambient racism during the reconstruction period. The echoes of this period were felt through a perception and a feeling of injustice during the advent of the mass incarceration approach driven by Neoliberalism.

B. Neoliberalism and Mass Incarceration: A Racial Political Disempowerment

During the 1960s and early 1970s, the U.S. prison population was declining; it even dropped to 216,000 in 1974.⁷¹ The correlation between crime and punishment obeys the mechanisms of political production and ideological construction.⁷² Rather than reacting to real insecurity, mass incarceration responded to a wave of social insecurity.⁷³

President Nixon initiated a new approach to law and order, declaring a "war on drugs" and widely referring to the necessity of being "tough on crime" in his speeches.⁷⁴ Yet the carceral population really exploded under the Reagan Administration with the advent of Neoliberalism.⁷⁵ This phenomenon is not unique to the United States,

⁷⁰ See, e.g., PLATO, *THE TRIAL AND DEATH OF SOCRATES* (G.M.A. Grube trans., John M. Cooper rev., 3d ed. 2000).

⁷¹ THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS: PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 (2003), <https://www.bjs.gov/content/pub/pdf/pius01.pdf>.

⁷² See, e.g., LOIC WACQUANT, *PRISONS OF POVERTY* (Univ. of Minn. Press, expanded ed. 2009) (1999).

⁷³ LOIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 3–4 (Duke Univ. Press, English Language ed. 2009) (2004).

⁷⁴ James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

⁷⁵ See *id.*; see also Kelsey Clark, *Prisons for Profit: Neoliberal Rationality's Transformation of America's Prisons*, C. WOOSTER LIBR.: OPEN WORKS 17, 18, 77 (2016), <https://open-works.wooster.edu/cgi/viewcontent.cgi?article=8040&context=independentstudy> (discussing

but it has very distinct characteristics there. Within a few decades, we find in many Western societies, and the United States in particular, a paradigm based on punishment by confinement: The use of prison as a one-size-fits-all solution to crime.⁷⁶ The United States is the world's leader in terms of incarceration, amounting to 2.2 million inmates currently serving time in the country's prisons and jails.⁷⁷ There has been a 500% incarceration increase over the last forty years,⁷⁸ which illustrates the importance of this mass incarceration phenomenon. In fact, the exponential incarceration of the black population in the United States incites concern as it has served as a mechanism for the reproduction of racial hierarchy in the states by producing a lower caste through the deprivation of civil rights.⁷⁹

The abovementioned tool for reproducing racial hierarchy in American society is further enhanced by politicians and political influence. A number of governments—notably the Nixon, Reagan, and Clinton Administrations—have favored mass incarceration.⁸⁰ The paradox is that this doctrine, which supposedly focused on the primordial importance given to individual freedom, produces precisely and systematically what it claims to fight: it establishes a vast bureaucratic system which deprives whole swathes of the population of their individual freedom and, indeed, of the right to vote that varies across the states.⁸¹ Although reform efforts have been substantial in recent years, the overall disenfranchisement rate has increased dramatically due to the growing U.S. prison population, rising from 1.17 million in

President Reagan's adoption of Neoliberalism and how that led to the privatization of the prison industry and subsequent increase in incarceration in America for economic purposes).

⁷⁶ Cullen, *supra* note 74.

⁷⁷ *Criminal Justice Facts*, SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Nov. 16, 2020).

⁷⁸ *Id.*

⁷⁹ See, e.g., Clark, *supra* note 75, at 54, 55, 109–10.

⁸⁰ See *id.* at 18, 54, 92; see also *Too Little Too Late: President Clinton's Prison Legacy*, JUST. POL'Y INST. 2–4, 6–8 (2001), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> (comparing the rate of incarceration during President Clinton's administration to that of President Reagan and President Nixon's).

⁸¹ See, e.g., Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J. L. & SOC. CHANGE 125, 159–62 (2017) (discussing the carceral state within the context of American forces seeking to disenfranchise populations and organizations condemning mass incarceration—citing individual liberties as their reason—while reaping the economic benefits of the private prison system in America).

1976 to 6.1 million by 2016.⁸² Mass incarceration is the result of different pressures exerted with an economic objective.⁸³ It also reveals a consensus between economic and political interests.⁸⁴ The electoral impact of the deprivation of civil rights of incarcerated people varies considerably from one end of the country to the other, posing the fundamental question of the "one person, one vote" implementation since the calculation of the prison population in the electoral distribution generates abysmal inequalities with the inclusion of non-US residents in a legal or illegal situation.⁸⁵

The Constitution includes multiple theories of representation at the federal level.⁸⁶ Presidential election outcomes result from different mechanisms provided by the state legislatures' sole appreciation.⁸⁷ Indeed, the decision as to which citizens will be classified as "eligible voters" is left to the states.⁸⁸ This situation generates inequalities in terms of the proper representation of the people's will since the system lacks uniformity, as it is based on each state's attribution of electors according to their number of Congressman; that is to say, a state's two senators and representatives whose number is determined according to the state's population.⁸⁹ The apportionment for the House of Representatives is made after the census enumerates the number

⁸² Jean Chung, *Felony Disenfranchisement: A Primer*, SENT'G PROJECT 1, 3, 6 (June 27, 2019) <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/#:~:text=As%20of%202016%2C%206.1%20million,wide%20range%20of%20disenfranchisement%20policies>.

⁸³ See Clark, *supra* note 75, at 56, 72, 77–78.

⁸⁴ Peter Temin, *The Political Economy of Mass Incarceration and Crime: An Analytic Model*, 47 INT'L J. POL. ECON. 317 (2018).

⁸⁵ See Dana Liebelson, *In Prison, and Fighting to Vote*, ATLANTIC (Sept. 6, 2019), <https://www.theatlantic.com/politics/archive/2019/09/when-prisoners-demand-voting-rights/597190/>; ONE PERSON, ONE VOTE (The Documentary Group 2017).

⁸⁶ See *Branches of the U.S. Government*, USA.GOV, <https://www.usa.gov/branches-of-government> (last updated Oct. 18, 2019).

⁸⁷ See U.S. CONST. art. II, § 1, cl. 2.

⁸⁸ Lyle Denniston, *Constitution Check: Who Decides Who Gets to Vote?*, NAT'L CONST. CTR. (Aug. 28, 2014), <https://constitutioncenter.org/blog/constitution-check-who-decides-who-gets-to-vote/>.

⁸⁹ U.S. CONST. art. I, § 2, cl. 3.

of "persons" in each state: voters and non-voters alike.⁹⁰ The way voters are divided within a state is decided by the state's legislature.⁹¹

This system is regulated by the standard principle "one person, one vote" rule.⁹² The standard was first pronounced in a series of cases beginning with *Gray v. Sanders*.⁹³ In 1963, in *Gray v. Sanders*, the Supreme Court demanded that Georgia comply with the standard of "one person, one vote."⁹⁴ In the majority opinion, Justice Douglas wrote that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing— one person, one vote."⁹⁵

In *Reynolds v. Sims*, the Supreme Court, in an 8-to-1 decision authored by Justice Earl Warren, held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."⁹⁶ The Court determined that the Constitution imposed a fundamental requirement inherent to population equality in districts drawing.⁹⁷ The Court in *Reynolds* examined the standard for redistricting congressional districts outlined in *Wesberry v. Sanders*,⁹⁸ which held that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."⁹⁹

The Civil Rights Act of 1964¹⁰⁰ and the Voting Rights Act of 1965¹⁰¹ began the process of reforming the vote to provide a more

⁹⁰ *Id.*

⁹¹ *Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUST. (Jan. 30, 2019), <https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting>.

⁹² *One-Person, One-Vote Rule*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/one-person_one-vote_rule (last visited Nov. 16, 2020).

⁹³ 372 U.S. 368 (1963).

⁹⁴ *Id.* at 381.

⁹⁵ *Id.*

⁹⁶ 377 U.S. 533, 577 (1964).

⁹⁷ *Id.*

⁹⁸ *Id.* at 559–62 (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964)).

⁹⁹ *Wesberry*, 376 U.S. at 7–8.

¹⁰⁰ 42 U.S.C. § 2000d *et seq.*

¹⁰¹ 52 U.S.C. § 10301 (2018).

inclusive democratic process and representation. Yet a myriad of unanswered questions has remained, especially relating to practical ways to achieve "one person, one vote," which has never been clarified by the Supreme Court.¹⁰²

The "one person, one vote" principle implies both the universality of suffrage and its emphasis on "voting equality."¹⁰³ Robert Dahl highlighted the significance of the decisive stage of making collective decisions.¹⁰⁴ He suggested that at this stage, "each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen. In determining outcomes at the decisive stage, these choices, and only these choices, must be taken into account."¹⁰⁵

The concept of "one man, one vote" has two different and complementary meanings which have infused the development of American constitutionalism and are subject to the question of democracy and representativeness: on the one hand, the notion of universal suffrage towards which the system has evolved over the decades, and on the other, the concept of equality of vote counting. However, one element prevails: suffrage is a political function in the United States but not a constitutional right.¹⁰⁶ Thus, the principle of "one man, one vote," corresponding to its dual meanings, does not find a perfect illustration in practice. The vote described in the United States Constitution is inherent in the representative principle of a democratic society.¹⁰⁷ The overlapping of the representativeness and sovereignty is a source of ambiguity: the principle of representativeness is subject to dogmatic opposition by the concept of national sovereignty and that of popular sovereignty.¹⁰⁸

¹⁰² Derek T. Muller, *Perpetuating "One Person, One Vote" Errors*, 39 HARV. J. L. & PUB. POL'Y 371, 371–73 (2013).

¹⁰³ Jack Young, *American Democracy and the Rule of Law*, AM. B. ASS'N (July 15, 2020), https://www.americanbar.org/groups/public_interest/election_law/pastprogramming/law-day2014/.

¹⁰⁴ ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 109 (1989).

¹⁰⁵ *Id.*

¹⁰⁶ Soros, *supra* note 8.

¹⁰⁷ *See* TRIBE, *supra* note 15.

¹⁰⁸ *See* Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, CARDOZO L. REV. 2051, 2053–56 (2018).

The triptych, composed of the concept of "one man, one vote," the democratic principle, and the principle of representativeness, generate a double quandary: that of the interweaving of each principle with the concept of equality correlated with the relationship between the three components.¹⁰⁹ The universality of suffrage does not mean that it is granted to all. Suffrage is, indeed, subject to certain conditions provided that they are the same for all.¹¹⁰ Section 2 of the Voting Rights Act of 1965 provides that electoral district lines cannot be drawn to improperly dilute minorities' voting power, stating:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .
 . . .
 . . .¹¹¹

However, due to the political practices that generate inequalities, this special inequality that the post-Civil War constitutional amendments aimed at curbing must be amended to include more uniformity to achieve greater equality in the presidential race. The presidential election is the greatest symbol of democracy.¹¹² The resolution would be to provide a narrow constitutional definition of the term "population" in presidential elections to avoid the discriminatory aspects, especially regarding the current climate of racial discrimination. A convention gathering all the states to discuss the issue and to provide unanimously a standard for presidential elections that would be enacted by each state in its own constitution would maintain states' sovereignty in conformity with the Constitution. This would create the necessary equality in presidential elections.

Prisoners and ex-convicts are excluded from voting, yet are counted for purposes of voting.¹¹³ Six million, one hundred thousand Americans are prohibited from voting due to laws that disenfranchise

¹⁰⁹ See KATHARINE INGLIS BUTLER ET AL., *FREEDOM AND THE RULE OF LAW* 262–65 (Anthony A. Peacock ed. 2010).

¹¹⁰ Ludvig Beckman, *Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy*, 15 *DEMOCRATIZATION* 29 (2008).

¹¹¹ 52 U.S.C. § 10301(a) (2018).

¹¹² AM. CIVIL LIBERTIES UNION, *THE CASE FOR RESTORING AND UPDATING THE VOTING RIGHTS ACT* 31–35 (2019).

¹¹³ Hansi Lo Wang & Kumari Devarajan, *'Your Body Being Used': Where Prisoners Who Can't Vote Fill Voting Districts*, NPR: CODE SWITCH (Dec. 31, 2019, 5:00 AM), <https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts>.

citizens convicted of felony offenses.¹¹⁴ Felony disenfranchisement policies have a disproportionate impact on communities of color.¹¹⁵ According to the Sentencing Project, Black Americans of voting age are over four times more likely to lose their voting rights than the rest of the adult population, with one in every thirteen black adults disenfranchised nationally.¹¹⁶

Prisoners have always been included in the federal census, which counts them as residents of the town where they are behind bars.¹¹⁷ Minorities are disproportionately incarcerated as a result of decades of mass incarceration and targeting of minority communities.¹¹⁸ Counting incarcerated people as residents of the town in which the facility sits reduces the accuracy of census data about communities of color.¹¹⁹ In many cases, rural, predominantly white towns see their population numbers boosted by population counts from prisons that are disproportionately made up of black and Latinx people.¹²⁰

It is evident that representatives do not only represent voters.¹²¹ The total population approach has been used by all states and many local jurisdictions, but other approaches are possible to meet the requirement of "one person, one vote" in the 2020 presidential race and subsequent U.S. presidential elections. In Hawaii, courts have ruled to opt for the use of registered voters as a population base for redistricting.¹²² In addition, Maryland and New York have framed

¹¹⁴ Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, SENT'G PROJECT (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

¹¹⁵ Karina Schroeder, *How Systemic Racism Keeps Millions of Black People from Voting*, VERA INST. JUST: THINK JUST. BLOG (Feb. 16, 2018), <https://www.vera.org/blog/how-systemic-racism-keeps-millions-of-black-people-from-voting>.

¹¹⁶ Uggen et al., *supra* note 114, at 3.

¹¹⁷ Wang & Devarajan, *supra* note 113.

¹¹⁸ SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 3 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

¹¹⁹ See, e.g., Wang & Devarajan, *supra* note 113.

¹²⁰ Brianna Remster & Rory Kramer, *Shifting Power: The Impact of Incarceration on Political Representation*, 15 DU BOIS REV. 417 (2018).

¹²¹ See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (stating that "representatives serve all residents, not just those eligible or registered to vote").

¹²² *Burns v. Richardson*, 384 U.S. 73, 97 (1966) (holding that the interim use of registered voters as a basis for legislative reapportionment does not run afoul of the Equal Protection

ways to correct the problem of prison gerrymandering by the practice of "prisoner adjustment."¹²³ Prisoner adjustment means counting the inmates in their place of residence prior to their imprisonment rather than counting them in the state where they are housed.¹²⁴ Although the Census Bureau keeps its practice, these states have upheld their responsibility to correct injustice and stop distortions due to prison gerrymandering. "In doing so, [Maryland and New York] not only conducted an important experiment in policy innovation, but also demonstrated how various state and local agencies can work together to successfully implement new and important policy reforms to alleviate the problem of prison gerrymandering."¹²⁵ The distortion resulting from a deprivation of the right to vote could also be corrected in line with these different practices.

The only theoretical objection today against the criterion of the resident population revolves around foreigners who find themselves included in the population, specifically those who have been housed in correctional institutions that are not within their county of residence.¹²⁶ This raises the detrimental issue of national sovereignty: the lack of a federal rational basis for using total eligible voters for the federal elections to tackle discrimination, including racial discrimination. Uniformity is a requirement for a democratic representation at the federal level.¹²⁷ States' sovereignty is not prejudiced; the states remain free to articulate their system for their local elections and to discuss the standard.¹²⁸ It is a necessity for a better representation of "one

Clause). Hawaii now uses a "permanent resident population base." *See* *Solomon v. Abercrombie*, 270 P.3d 1013 (Haw. 2012). This method successfully survived a constitutional challenge. *Kostick v. Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013), *aff'd*, 571 U.S. 1161 (2014).

¹²³ ERIKA L. WOOD, IMPLEMENTING REFORM: HOW MARYLAND & NEW YORK ENDED PRISON GERRYMANDERING 7, 12–13, 22 (2014), <https://www.demos.org/sites/default/files/publications/implementingreform.pdf>.

¹²⁴ *See id.*

¹²⁵ *Id.* at 1.

¹²⁶ *See* *Reallocating Incarcerated Persons for Redistricting*, NAT'L CONF. ST. LEGISLATORS (Mar. 23, 2020), <https://www.ncsl.org/research/redistricting/reallocating-incarcerated-persons-for-redistricting.aspx>.

¹²⁷ *See, e.g.*, Richard L. Hasen, *Op-Ed: When it Comes to Election Law, Red America and Blue America Are Not at All Alike*, L.A. TIMES (Oct. 20, 2015, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-1020-hasen-red-blue-election-law-20151020-story.html>.

¹²⁸ *See generally* *Election Administration at State and Local Levels*, NAT'L CONF. ST. LEGISLATORS (Feb. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election->

person, one vote" and for preventing the tyranny of the majority in the dilution of votes.

When a country has only one constituency (that is to say, its entire territory in matters of election), the votes also count in accordance with the principle of "one person, one vote."¹²⁹ On the other hand, it is not possible to distribute the voters (or the population) in a rigorously equal manner between several constituencies. It is all the more difficult that their number is high so that the gap increases proportionally with the number.¹³⁰ If we add to this the disparities of a system operating with different logics in the access to the right to vote, the distance from the principle of "one person, one vote" is even more vast and important.

C. *Disenfranchisement in the United States*¹³¹

STATE	Total Population	Total Citizen Population	Difference	Disenfranchised Population	Total Non-eligible Voters Disenfranchised and Non-citizens
UNITED STATES	249,748,000	228,832,000	20,916,000	6,106,327	26,975,327
ALABAMA	3,753,000	3,609,000	144,000	286,266	430,266
ALASKA	523,000	497,000	26,000	14,439	40,439
ARIZONA	5,361,000	4,757,000	604,000	221,170	825,170
ARKANSAS	2,261,000	2,158,000	103,000	66,705	169,705
CALIFORNIA	30,243,000	25,525,000	4718,000	222,557	4,940,557

administration-at-state-and-local-levels.aspx (discussing variances in election administration at state and local levels).

¹²⁹ DOUGLAS RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* (1967).

¹³⁰ *Id.*

¹³¹ Population over 18, adapted from *Voting and Registration in the Election of November 2018*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html> (Table 4a, reproduced below, reports the voting and registration for States in November 2018). The first part of the table is published in Cynthia Boyer, *The Supreme Court and Politics in the Trump Era*, 12 ELON L. REV. 215, 223–24 (2020). This part of the table is adapted with Estimates of Disenfranchised Individuals from Uggen et al., *supra* note 114, at 15–16.

COLORADO	4,353,000	4,029,000	324,000	30,946	354,946
CONNECTICUT	2,834,000	2,539,000	295,000	17,345	312,345
DELAWARE	756,000	713,000	43,000	15,716	58,716
DISTRICT OF COLUMBIA	567,000	512,000	55,000	N/A	55,000
FLORIDA	16,845,000	15,047,000	1,798,000	1,686,318	3,484,318
GEORGIA	7,850,000	7,311,000	539,000	248,751	787,751
HAWAII	1,057,000	971,000	86,000	6,364	92,364
IDAHO	1,299,000	1,226,000	73,000	23,106	96,106
ILLINOIS	9,732,000	8,947,000	785,000	49,625	834,625
INDIANA	5,006,000	4,792,000	214,000	29,658	243,658
IOWA	2,376,000	2,239,000	137,000	52,012	189,012
KANSAS	2,149,000	2,026,000	123,000	17,594	140,594
KENTUCKY	3,370,000	3,249,000	121,000	312,046	433,046
LOUISIANA	3,458,000	3,326,000	132,000	108,035	240,035
MAINE	1,074,000	1,056,000	18,000	0	18,000
MARYLAND	4,666,000	4,281,000	385,000	21,465	406,465
MASSACHUSETTS	5,460,000	4,919,000	541,000	11,176	552,176
MICHIGAN	7,657,000	7,430,000	227,000	44,221	271,221
MINNESOTA	4,238,000	4,006,000	232,000	63,340	295,340
MISSISSIPPI	2,194,000	2,178,000	16,000	218,181	234,181
MISSOURI	4,676,000	4,564,000	112,000	89,665	201,665
MONTANA	822,000	812,000	10,000	4,146	14,146
NEBRASKA	1,428,000	1,332,000	96,000	17,564	113,564
NEVADA	2,324,000	2,067,000	257,000	89,267	346,267
NEW HAMPSHIRE	1,080,000	1,025,000	55,000	3,031	58,031
NEW JERSEY	7,009,000	6,267,000	742,000	94,315	836,315
NEW MEXICO	1,576,000	1,485,000	91,000	24,286	115,286
NEW YORK	15,478,000	13,684,000	1,794,000	97,581	1,891,581
NORTH CAROLINA	7,911,000	7,444,000	467,000	91,179	558,179
NORTH DAKOTA	560,000	541,000	19,000	2,178	21,178
OHIO	8,873,000	8,640,000	233,000	52,837	285,837
OKLAHOMA	2,868,000	2,732,000	136,000	58,302	194,302
OREGON	3,293,000	3,138,000	155,000	14,748	169,748
PENNSYLVANIA	9,928,000	9,475,000	453,000	52,974	505,974
RHODE ISLAND	828,000	782,000	46,000	3,355	49,355

SOUTH CAROLINA	3,914,000	3,769,000	145,000	47,238	192,238
SOUTH DAKOTA	648,000	637,000	11,000	10,392	21,392
TENNESSEE	5,202,000	5,016,000	186,000	421,227	607,227
TEXAS	21,064,000	18,374,000	2,690,000	495,928	3,185,928
UTAH	2,247,000	2,109,000	138,000	7,669	145,669
VERMONT	503,000	497,000	6,000	0	6,000
VIRGINIA	6,386,000	5,773,000	613,000	508,680	1,121,680
WASHINGTON	5,775,000	5,228,000	547,000	48,552	595,552
WEST VIRGINIA	1,406,000	1,384,000	22,000	14,727	36,727
WISCONSIN	4,436,000	4,296,000	14,000	65,606	205,606
WYOMING	430,000	422,000	8,000	23,847	31,847

In his concurring opinion in *Evenwel v. Abbott*, Justice Clarence Thomas reiterated the importance of choice at the state level of its own legislature:

[T]he choice is best left for the people of the States to decide for themselves how they should apportion their legislature. There is no single "correct" method of apportioning state legislatures. And the Constitution did not make this Court "a centralized politburo appointed for life to dictate to the provinces the 'correct' theories of democratic representation, [or] the 'best' electoral systems for securing truly 'representative' government."¹³²

Election at the federal level requires a separate approach. Indeed, the current principle of a citizen vote is not respected in federal elections. Some voices are more important in states where there are non-citizen residents and those who exclude convicts from voting.¹³³ In Florida and California, voters have considerable weight compared to states like New Hampshire, whose voters have an unequal and less important vote.¹³⁴ However, the 2000 election in Florida raises questions as to the political significance of Floridian voters.¹³⁵ The resentment expressed by certain populations at the origin of the current divisions of American society is perfectly understandable. Even if a part of

¹³² 136 S. Ct. 1120, 1142 (2016) (Thomas, J., concurring) (quoting *Holder v. Hall*, 512 U.S. 874 (1994)).

¹³³ See Uggen et al., *supra* note 114.

¹³⁴ *Id.*

¹³⁵ See, e.g., Ron Elving, *The Florida Recount of 2020: A Nightmare that Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting>.

the population ignores this mechanism, the feeling of not being taken into account, or not counting, is palpable and present.¹³⁶ This feeling is evident among the prison population, the rural population, as well as the population of those ideologically opposed in the political spectrum, which has ultimately led to a polarization of the electorate.¹³⁷

III. FROM PUBLIC DISEMPOWERMENT TO COLLECTIVE EMPOWERMENT IN THE TRUMP ERA

Some incremental progress has been made in reducing mass incarceration as a result of a bipartisan consensus "that mass incarceration is a mistake".¹³⁸ Indeed, legislators from both sides of the political spectrum have acknowledged lack of efficiency in incarceration as a deterrent and its negative collateral effects.¹³⁹ A new orientation in public policy has led to a decline in the prison population over the last decade.¹⁴⁰ The approach once characterized as "tough on crime" now seems to give way to the desire to become "smart on crime." In recent years, many states have shown redemptive openness toward defendants, despite *Shelby County v. Holder* putting an end to a radical approach to the denial of the right to vote.¹⁴¹ A few months before the 2020 presidential elections, we were witnessing the adoption of mitigation measures or the elimination of measures deemed too repressive; in particular, the restoration of the right to vote to defendants, which is driven by the various movements against systemic racism.¹⁴²

¹³⁶ See, e.g., *On the Sidelines of Democracy: Exploring Why So Many Americans Don't Vote*, NPR (Sept. 10, 2018, 5:07 AM), <https://www.npr.org/2018/09/10/645223716/on-the-sidelines-of-democracy-exploring-why-so-many-americans-dont-vote>.

¹³⁷ *Id.*

¹³⁸ Cullen, *supra* note 74.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ 570 U.S. 529 (2013).

¹⁴² Trip Gabriel, *Iowa Governor Will Restore Voting Rights to Paroled Felons*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/us/politics/iowa-felons-voting-rights.html>.

A. *Between Shelby County, Alabama v. Holder's Impact to Contemporary Restoration*

Many voter suppression tactics have resurged since *Shelby County v. Holder*.¹⁴³ Indeed, in 2013, the Supreme Court invalidated a key provision of the Voting Rights Act (VRA).¹⁴⁴ The 5-4 majority opinion was written by Chief Justice Roberts, who was joined by Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Samuel A. Alito Jr. Justice Ginsburg was joined in dissent by Justices Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan.¹⁴⁵ In *Shelby County v. Holder*, the Court ruled that the formula of Section 4 of the VRA, originally passed in 1965 and updated by Congress in 1975, which determined which states and localities would be designated "special coverage areas" was unconstitutional.¹⁴⁶

The rationale used was based on the postulate that since the situation regarding discrimination had improved, it was no longer necessary to demand states to get federal permission before changing their election laws.¹⁴⁷ The *Shelby County* decision deemed the Section 4 coverage formula invalid, but it did not strike down Section 5.¹⁴⁸

"Th[e] Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . [are] the supreme Law of the Land . . ."¹⁴⁹ Therefore, state legislation may not contravene federal law.¹⁵⁰ "The Federal Government does not, however, have a general right to review and veto state enactments before they go into effect."¹⁵¹ Section 4 of the VRA required states to obtain federal approval before making changes to election laws and provisions and thus was considered outdated by the Court.¹⁵² "Section 5, which sets

¹⁴³ See *Block the Vote: Voter Suppression in 2020*, AM. CIV. LIBERTIES UNION (Feb. 3, 2020), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/>.

¹⁴⁴ Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), <https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html>.

¹⁴⁵ *Id.*

¹⁴⁶ 570 U.S. 529, 557 (2013).

¹⁴⁷ *Id.* at 550–51.

¹⁴⁸ *Id.* at 557.

¹⁴⁹ U.S. CONST. art. VI, cl. 2.

¹⁵⁰ *Id.*; see *Holder*, 570 U.S. at 542.

¹⁵¹ *Holder*, 570 U.S. at 542.

¹⁵² *A Brief History of Civil Rights in the United States*, GEO. L. LIBR., <https://guides.llgeorgetown.edu/c.php?g=592919&p=4172704> (last updated Nov 12, 2020, 1:36 PM).

out the preclearance requirement, was originally scheduled to expire in five years [but was extended by Congress] for five years in 1970, seven years in 1975, and 25 years in 1982."¹⁵³ Recently in 2006, it was extended again for 25 years.¹⁵⁴ "The [*Shelby County*] decision did not strike down Section 5," but Section 5's viability originates from Section 4.¹⁵⁵ Congress would have to pass a new bill for determining the states to be covered. The majority opinion in *Shelby County* stated:

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. We issue no holding on § 5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an "extraordinary departure from the traditional course of relations between the States and the Federal Government." Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.¹⁵⁶

Over the years, the Supreme Court had considered the preclearance requirement as an effective tool to combat racial discrimination in access to the ballot.¹⁵⁷ The "more pressing worry [of the Court] is that the regime today does more harm than the discrimination it presently addresses, even when that discrimination is indisputably unconstitutional or otherwise invidious in nature."¹⁵⁸ In *Shelby County*, Justice Ginsburg wrote a strong dissent, stating that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."¹⁵⁹

In its working paper issued in July 2020, the National Bureau of Economic Research found that following the 1965 VRA, black arrest rates fell in counties that were both covered by the legislation and had a large number of newly enfranchised black voters.¹⁶⁰ Taken

¹⁵³ Liptak, *supra* note 144.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ 570 U.S. at 557 (quoting *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 500–01 (1992)).

¹⁵⁷ See Liptak, *supra* note 144.

¹⁵⁸ Ellen D. Katz, *Justice Ginsburg's Umbrella, in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT FIFTY* 264, (Ellen D. Katz & Samuel R. Bagenstos eds., 2015).

¹⁵⁹ *Holder*, 570 U.S. at 590 (Ginsburg, J., dissenting).

¹⁶⁰ Giovanni Facchini et al., *The Franchise, Policing, and Race: Evidence from Arrests Data and the Voting Rights Act*, NAT'L BUREAU ECON. RES. (July 2020), <https://www.nber.org/papers/w27463>.

together, these results document that voting rights, when combined with elected, rather than appointed, chief law enforcement officers, can lead to improved treatment of minority groups by police.¹⁶¹

The *Shelby County* decision had a direct impact on the restrictions on the right to vote.¹⁶² Immediately, some states such as Texas, Mississippi, and Alabama enacted laws that included restrictions like the production of valid photo ID, which federal preclearance did not allow.¹⁶³ Other restrictions applied, such as removing voters from the electoral register or blocking their registration in Georgia.¹⁶⁴ According to the National Conference of State Legislatures, as of July 2020, "[a] total of 36 states ha[d] laws requesting or requiring voters to show some form of identification at the polls, 35 of which are in force in 2020."¹⁶⁵

Civil and political rights are traditionally those which seek to protect individuals from the state and impose on the state a duty of non-interference with these freedoms. The right to vote, which is purely political in nature, guarantees that individuals can participate in the management of public affairs.¹⁶⁶ "Democratic governance theory is based upon the full and active participation of society's membership."¹⁶⁷

Alexis de Tocqueville remarked on his American 1831–32 travels that "[i]n the United States, apart from slaves, servants, and paupers whose upkeep is paid for by the towns, there is no one who is excluded from voting and who does not, as a voter, contribute indirectly to the law."¹⁶⁸

¹⁶¹ *Id.*

¹⁶² See *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

¹⁶³ *Id.*

¹⁶⁴ See *Democracy Diminished: State and Local Threats to Voting Post-Shelby County*, ALABAMA v. HOLDER, LDF (Jan. 6, 2020), <https://www.naacpldf.org/wp-content/uploads/State-local-responses-post-Shelby-1.6.20.pdf>.

¹⁶⁵ *Voter Identification Requirements / Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>. North Carolina's law has a temporary injunction on it, as of December 31, 2019. *Id.*

¹⁶⁶ See Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JURIS. REV. 193, 193 (2009).

¹⁶⁷ *Id.* at 195.

¹⁶⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275–76 (Arthur Goldhammer trans., Library of Am. 2004) (1988).

In 2020, felony disenfranchisement echoing servitude from a political perspective is still present.¹⁶⁹ Felony disenfranchisement contributes to the class and race bias in the electorate.¹⁷⁰ This perception of bias is currently widespread throughout the country with demonstrations and movements pressing hard for the end of this system, anchored in a servitude concept with regard to America's history, coupled with the nationwide push for police reform and racial equality in the wake of George Floyd's death.¹⁷¹

Convicts, rehabilitated for decades, are still deprived of the right to vote in some places, while in others, prisoners can place a vote in the ballot box, as the restoration of voting rights to former felons has become a fast-moving aspect of criminal justice reform in many states.¹⁷² Maine and Vermont are currently the only two states where a convict never loses their electoral rights.¹⁷³ Iowa was the only state where the right to vote was lost forever, but it is in the process of ending this under increasing pressure from activists.¹⁷⁴ Iowa's Constitution currently states that anyone convicted of a felony permanently loses the right to vote or hold public office.¹⁷⁵ As stated in the Iowa Constitution, Article II, Section 5, "[a] person adjudged mentally incompetent to vote or a person convicted of any infamous crime shall not be entitled to the privilege of an elector."¹⁷⁶ Thus, persons convicted of felony classified as "infamous crime" permanently lose the right to vote in elections. According to the Iowa Supreme Court in *Griffin v. Pate*, all felonies constitute infamous crimes.¹⁷⁷

¹⁶⁹ See Sean McElwee, *Voter Suppression in 2014*, DEMOS (Nov. 6, 2014), <https://www.demos.org/blog/voter-suppression-2014>.

¹⁷⁰ *Id.*

¹⁷¹ See David Litt, *Before Telling Protesters for George Floyd to Vote, Remember Not All of Them Are Allowed to*, NBC NEWS (June 4, 2020, 4:30 AM), <https://www.nbcnews.com/think/opinion/telling-protesters-george-floyd-vote-remember-not-all-them-are-ncn1224011>.

¹⁷² See *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Oct. 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

¹⁷³ *Id.*

¹⁷⁴ *Voting Rights Restoration Efforts in Iowa*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-iowa> (last updated Aug. 5, 2020).

¹⁷⁵ IOWA CONST. art II, § 5, *amended by* IOWA CONST. amend. XLVII; see *Griffin v. Pate*, 884 N.W.2d 182 (Iowa 2016).

¹⁷⁶ IOWA CONST. art II, § 5, *amended by* IOWA CONST. amend. XLVII.

¹⁷⁷ 884 N.W.2d at 205.

Iowa Governor Reynolds has proposed an amendment to the Iowa Constitution to bring to an end felony disenfranchisement in the state.¹⁷⁸ Prior to Governor Reynolds's proposal, former Iowa Governor Thomas Vilsack¹⁷⁹ issued an executive order that, for the nearly six years it was in effect, had restored voting rights to an estimated 115,000 citizens according to the Brennan Center for Justice.¹⁸⁰ The executive order was rescinded in 2011 by Governor Branstad.¹⁸¹ Accordingly, Governor Reynolds has made felon voting rights one of her priorities while under intense activists' presence and pressure.¹⁸² Indeed, the State Governor wants to go further following Des Moines Black Lives Matter activists' involvement, who have urged her to use her executive authority to restore voting rights.¹⁸³ Governor Reynolds signed a Republican-backed bill that excludes former felons who have committed certain crimes, including homicide and sex offenses, from automatically regaining voting rights, and that requires released felons to pay restitution before they can vote.¹⁸⁴ With the House's passage of that bill, the intention is to forward the constitutional amendment to the Senate.

On June 16, 2020, Governor Reynolds announced a forthcoming executive order to restore voting rights following her 2019 proposition for a constitutional amendment to be put to voters on the matter.¹⁸⁵ Black Lives Matter activists have put forward executive order language to intensify the pressure on the Governor to take action.¹⁸⁶ The proposal, posted on the Des Moines Black Lives Matter Twitter account (@DesMoinesBLM) would automatically restore felons their right to

¹⁷⁸ Previously with Executive Order 42, an individual who discharged his or her sentence on or before July 4, 2005, had their voting rights automatically restored. *See Voting Rights Restoration Efforts in Iowa*, *supra* note 174.

¹⁷⁹ Governor Vilsack served as governor of Iowa from 1999 to 2007. *Gov. Thomas J. Vilsack*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governor/thomas-j-vilsack/> (last visited Nov. 16, 2020).

¹⁸⁰ *Voting Rights Restoration Efforts in Iowa*, *supra* note 174.

¹⁸¹ *Id.*

¹⁸² *See* Eliza Sweren-Becker, *One State Still Permanently Bars Everyone with Convictions from Voting. That's About to End*, BRENNAN CTR. FOR JUST. (June 18, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/one-state-still-permanently-bars-everyone-convictions-voting-thats-about>.

¹⁸³ *Id.*

¹⁸⁴ Gabriel, *supra* note 142.

¹⁸⁵ Sweren-Becker, *supra* note 182.

¹⁸⁶ *See id.*

vote as soon as their sentence is over.¹⁸⁷ It also would ban the state from restricting voting rights to felons on parole or who still need to pay restitution, fines, or fees. It would not renew their right to own a firearm.¹⁸⁸

*B. Dual Penalty and a Renewed Perception of Discrimination
at a Crucial Contemporary Juncture*

Felon disenfranchisement laws have the effect of stigmatizing the felon as a second-class citizen. By disenfranchising those who have been convicted of felonies, the voting power of the nation's most needy and crime-ridden communities is substantially diluted due to the loss of some of their eligible voting members.¹⁸⁹ Yet, there are other detrimental issues related to these types of laws: the dual penalty and the collateral effects.¹⁹⁰

Like forty-seven other states, Texas denies people the right to vote when they are convicted of a felony.¹⁹¹ Felons have to finish their sentences completely before regaining their right to vote.¹⁹² As Texas Law specifically states:

A person who is finally convicted of a felony is not eligible to register to vote . . . Pursuant to Section 11.002 of the Texas Election Code (the "Code"), once a felon has successfully completed his or her punishment, including any term of incarceration, parole, supervision, period of probation, or has been pardoned, then that person is immediately eligible to register to vote.¹⁹³

In the absence of a federal standard, the situation of whether a felon can vote widely varies across the country, which makes it

¹⁸⁷ *Des Moines Black Lives Matter Drafts Felon Voting Rights Proposal for Governor Reynolds*, NEWS 7 KWWL (July 13, 2020, 10:41 AM), <https://kwwl.com/2020/07/13/des-moines-black-lives-matter-drafts-felon-voting-rights-proposal-for-governor-reynolds/>.

¹⁸⁸ *Id.*; Des Moines BLM (@DesMoinesBLM), TWITTER (July 11, 2020, 5:21 PM), <https://twitter.com/DesMoinesBLM/status/1282062477715550213>.

¹⁸⁹ Christopher Haner, *Felon Disenfranchisement: An Inherent Injustice*, 26 J. C.R. & ECON. DEV. 911, 912 (2013).

¹⁹⁰ *See id.* at 916–17.

¹⁹¹ *See Felon Voting Rights*, *supra* note 172.

¹⁹² *See id.*

¹⁹³ Ann McGeehan, *Effect of Felony Conviction on Voter Registration*, TEX. SECRETARY ST. (Aug. 3, 2004), <https://www.sos.state.tx.us/elections/laws/effects.shtml>.

particularly difficult for released prisoners to know if they can vote.¹⁹⁴ The maxim *nemo censetur ignorare lege*, meaning ignorance of the law is no excuse, is a fictional frame, accessibility and intelligibility are its core elements.¹⁹⁵ Alabama, for example, had prohibited people convicted of crimes of "moral turpitude" from voting from the early Twentieth Century to 2017.¹⁹⁶ That year, with the enactment of AL HB282, the State finally defined the concept of "moral turpitude."¹⁹⁷ Without a clear definition, local election officials were previously left with interpreting the meaning behind "moral turpitude," which ultimately allowed them arbitrary discretion to deny some convicts from voting.¹⁹⁸

In Tarrant County, Texas, Crystal Mason, an African American, has become the face of voter suppression in America, inequality in federal elections, the urge for change.¹⁹⁹ Mason, who was on federal probation for tax fraud, went to her local church to vote in the 2016 presidential election.²⁰⁰ As her name was not found on the electoral roll, she used a provisional ballot to vote for Hillary Clinton, under her own name, which was not counted.²⁰¹ Tarrant County District Attorney Sharen Wilson chose to prosecute the case.²⁰² Mason was sentenced to five years in prison for voter fraud.²⁰³ "Her home

¹⁹⁴ See Jacey Fortin, *Can Felons Vote? It Depends on the State*, N.Y. TIMES (Apr. 21, 2018), <https://www.nytimes.com/2018/04/21/us/felony-voting-rights-law.html>.

¹⁹⁵ See Patricia Rrapi, *La Mauvaise Qualite de la Loi: Vagueness Doctrine at the French Constitutional Council*, 37 HASTINGS CONST. L.Q. 243, 243–44 (2010); *Nemo Censetur Ignorare Legem*, GLOSBE, <https://glosbe.com/la/en/nemo%20censetur%20ignorare%20legem> (last visited Nov. 16, 2020).

¹⁹⁶ ALA. CODE § 17-3-30.1 (2019).

¹⁹⁷ Definition of Moral Turpitude Act, H.R. 282, 2017 Leg., Reg. Sess. (Ala. 2017).

¹⁹⁸ See Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reforms*, SENT'G PROJECT (Oct. 17, 2018), <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms/>.

¹⁹⁹ See Amrit Cheng, *Crystal Mason Thought She Had the Right to Vote. Texas Sentences Her to Five Years in Prison for Trying.*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/voting-rights/fighting-voter-suppression/crystal-mason-thought-she-had-right-vote-texas> (last visited Nov. 16, 2020).

²⁰⁰ See Sue Halpern, *How Crystal Mason Became the Face of Voter Suppression in America*, NEW YORKER (Dec. 18, 2019), <https://www.newyorker.com/news/news-desk/how-crystal-mason-became-the-face-of-voter-suppression-in-america>.

²⁰¹ *Id.*

²⁰² Cheng, *supra* note 199.

²⁰³ Halpern, *supra* note 200.

state of Texas has been called ‘ground zero for voter suppression.’²⁰⁴ Texas Secretary of State David Whitley issued a release on January 25, 2019, titled "Secretary Whitley Issues Advisory On Voter Registration List Maintenance Activity" stating that "approximately 95,000 individuals identified by DPS as non-U.S. citizens have a matching voter registration record in Texas, approximately 58,000 of whom have voted in one or more Texas elections."²⁰⁵ In the State of Texas, this type of illegal voting is a second-degree felony.²⁰⁶ Fort Worth judges have denied Mason's appeal of her sentence.

IV. CONCLUSION

The felon disenfranchisement system is reaching its limits: perpetual deprivation of voting rights during presidential elections is a problem that highlights the societal issue beyond voting. "Scaring away potentially eligible voters or jailing them is un-American[; it] defies fundamental fairness,"²⁰⁷ and it provides grounds for ambiguity, racial bias, and discrimination. As a white woman from Iowa, Terri Lynn Rote was convicted of voter fraud for twice intentionally trying to cast a ballot for President Donald Trump, but was fined \$750 with one year of probation.²⁰⁸ double standards for the same offense committed by Crystal Mason.

The states' election laws, by the diversity of their practices in presidential elections, are reminiscent of the Jim Crow discriminatory provisions.²⁰⁹ The felon disenfranchisement laws that apply today may

²⁰⁴ *Id.*

²⁰⁵ *Secretary Whitley Issues Advisory on Voter Registration List Maintenance Activity*, TEX. SECRETARY ST. (Jan. 25, 2019), <https://www.sos.state.tx.us/about/news-releases/2019/012519.shtml>.

²⁰⁶ *Id.*

²⁰⁷ Jonathan P. Baird, *My Turn: Republicans, Voting Rights and the Story of Crystal Mason*, CONCORD MONITOR (May 9, 2020, 6:30 AM), <https://www.concordmonitor.com/Voter-suppression-34084118>.

²⁰⁸ Maya Oppenheim, *Iowa Woman Who Tried to Vote for Donald Trump Twice Gets Two Years Probation and \$750 Fine*, INDEPENDENT (Aug. 18, 2017, 4:20 PM), <https://www.independent.co.uk/news/world/americas/terri-lynn-rote-iowa-vote-donald-trump-twice-two-years-probation-750-fine-a7900886.html>.

²⁰⁹ *Jim Crow Laws*, FINDLAW, <https://www.findlaw.com/voting/how-do-i-protect-my-right-to-vote-/jim-crow-laws.html> (last updated July 30, 2020); see also *Voting Rights Litigation 2020*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020> (last updated Nov. 16, 2020) (providing that Georgia's election laws

not have been motivated by racial animus, but their impact is similar to intolerable practices with racial bias. The racial element reveals a system that impacts all Americans; that is to say, the limits of access to the ballot due to state sovereignty. "Targeted litigating and politicking seem more likely to bring about the desired results The amendment process might produce a robust shift in how we view the right to vote, and an amendment might produce a welcome improvement in the Court's doctrine."²¹⁰ This may enshrine the right to vote in the United States.²¹¹ "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State."²¹²

The United States was founded as a result of great compromise regarding the balance between federal and state power.²¹³ Beyond the concept of sovereignty, there is one sovereignty embodied in the American construction: the people who are sovereign.

Originalism is at the heart of this fundamental sovereignty, enriched by the constitutional equality acquired over the course of American history and the democratic and representative greatness that the country has developed by overcoming its own initial contradictions to emerge from it.²¹⁴ Incarnated by the notion of a vote, a person who bravely and proudly foiled past oscillations, where the vote was reserved for only a small handful of individuals, America rose and knew how to guide other countries towards a fairer path through

have been challenged because "plaintiffs allege [the laws] resulted in voter suppression and discrimination 'reminiscent of the Jim Crow era'").

²¹⁰ Heather K. Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 WM. & MARY BILL RTS. J. II, 25 (2014).

²¹¹ *Id.*

²¹² Heather Gerken, *The Missing Right to Vote: What We'd Get from Amending the Constitution to Guarantee It*, SLATE (June 13, 2012, 10:48 PM), <https://slate.com/news-and-politics/2012/06/amending-the-constitution-to-guarantee-the-right-to-vote.html>.

²¹³ *Ratification of the US Constitution: Lesson Overview*, KHAN ACAD., <https://www.khan-academy.org/humanities/us-government-and-civics/us-gov-foundations/us-gov-ratification-of-the-us-constitution/a/ratification-of-the-us-constitution-lesson-overview> (last visited Nov. 16, 2020).

²¹⁴ See Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, GEO. L. II (2011); Alan Taylor Davis, *The New Nation, 1783–1815*, GILDER LEHRMAN, <https://ap.gilderlehrman.org/essay/new-nation-1783%C3%A2%E2%82%AC%E2%80%9C1815> (last visited Nov. 16, 2020).

the ability to face the vestiges of the past, face-to-face, without compromise and to reap the best out of itself. The current turning point in history should not mean a reversal to the past. The feeling of exclusion of a part of the population, which feels discriminated against, must allow everyone to move forward by removing the obstacles to national harmony and access to the voting booth. It has been stated that "no one can be perfectly free till all are free; no one can be perfectly moral till all are moral; no one can be perfectly happy till all are happy."²¹⁵ This triumvirate, "Life, Liberty and the pursuit of Happiness," infuses American democracy.²¹⁶ The path is made through the institutions and the vote of each American citizen. There must now be significant progress toward more equity with fair and reasonable practices and, in particular, for the American presidential election: a great symbol of the nation's unity.

²¹⁵ HERBERT SPENCER, *SOCIAL STATICS: OR, THE CONDITIONS ESSENTIAL TO HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED* 456 (1851).

²¹⁶ THE COMM'N ON UNALIENABLE RIGHTS, *REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS* 10 (2020).