



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY



Issue Brief

The Democracy Restoration Act: Addressing A Centuries-Old Injustice

By Deborah J. Vagins and Erika Wood

March 2010

All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.

American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

The Democracy Restoration Act: Addressing A Centuries-Old Injustice

Deborah J. Vagins* and Erika Wood**

“Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship.”¹

I. Introduction

The right to vote forms the core of American democracy. Indeed, the Supreme Court has said the right to vote is “preservative of all rights.”² Our history is marked by successful struggles to expand the franchise to include those previously barred from the electorate because of race, class, or gender. There remains, however, a significant barrier to this progress: 5.3 million American citizens are denied the right to vote because of criminal convictions. Nearly 4 million of those who are disfranchised are out of prison,³ working, paying taxes, and raising families, yet they are without a voice.⁴ In addition, countless individuals with past convictions who are eligible to vote have been misinformed by election and criminal justice officials that they cannot vote, making the number of Americans impacted by criminal disfranchisement far greater.⁵

State laws vary widely on when voting rights are restored. Some states permanently disfranchise some, but not all, citizens with felony convictions, while others allow voting after a sentence is completed or after release from prison.⁶ Two states, Virginia and Kentucky, permanently disfranchise citizens with felony convictions unless the state approves individual

* Deborah J. Vagins is Legislative Counsel for the Washington Legislative Office of the American Civil Liberties Union. The author gratefully acknowledges the invaluable assistance and excellent research work of Georgeanne Usova and Lucas Anderson.

** Erika Wood is Deputy Director of the Democracy Program at the Brennan Center for Justice at NYU School of Law. The author gratefully acknowledges the superb research and editing talents of Garima Malhotra.

¹ *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

² *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

³ The terms “disfranchisement” and “disenfranchisement” both refer to the revocation of the right to vote.

⁴ See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 76 (2006); ERIKA WOOD, *RESTORING THE RIGHT TO VOTE 2* (2009), available at http://www.brennancenter.org/content/resource/restoring_the_right_to_vote; Deborah J. Vagins, *The Democracy Restoration Act – Restoring a Civil Right Denied*, DAILY KOS, Aug. 4, 2009, <http://www.dailykos.com/storyonly/2009/8/4/761828/-The-Democracy-Restoration-ActRestoring-a-Civil-Right-Denied>.

⁵ See ERIKA WOOD & RACHEL BLOOM, *DE FACTO DISENFRANCHISEMENT 1* (2008), available at <http://www.aclu.org/votingrights/exoffenders/36992pub20081001.html>.

⁶ See WOOD, *supra* note 4, at 3; AMERICAN CIVIL LIBERTIES UNION, *VOTING RIGHTS FOR PEOPLE WITH CRIMINAL RECORDS: 2008 STATE LEGISLATIVE AND POLICY CHANGES*, <http://www.aclu.org/state-legislative-and-policy-reform-advance-voting-rights-formerly-incarcerated-persons-2008> (last visited Mar. 11, 2010) [hereinafter *Voting Rights Policy Changes*].

rights restoration. Maine and Vermont allow all persons with felony convictions to vote, even while incarcerated. The rest of the states fall somewhere in between: 13 states and the District of Columbia grant voting rights to persons on probation or parole;⁷ five states allow individuals sentenced probation, but not parole, to vote;⁸ 20 states restore the right to vote once an individual has completed his entire criminal sentence, including probation and parole;⁹ and eight states permanently disfranchise at least some people with criminal convictions, depending on the type or number of convictions, unless the state approves individual rights restoration.¹⁰

Within these categories, several states deny the right to vote to people convicted of certain *misdemeanors*.¹¹ Nine states require people to pay off legal financial obligations – such as fees, fines and restitution – before being allowed to vote.¹²

Many of these criminal disfranchisement laws are rooted in the Jim Crow era, and were created with the purpose of barring African Americans from voting. The impact of these laws continues today. Nationwide, 13% of African American men have lost the right to vote as a result of a criminal conviction – a rate seven times the national average.¹³ Most recently, in *Farrakhan v. Gregoire*, the U.S. Court of Appeals for the Ninth Circuit held that Washington

⁷ Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, and the District of Columbia grant voting rights to persons on probation or parole. See WOOD, *supra* note 4, at 3; *Voting Rights Policy Changes*, *supra* note 6.

⁸ California, Colorado, Connecticut, New York, and South Dakota grant voting rights to persons on probation, but not those on parole. See WOOD, *supra* note 4, at 3; *Voting Rights Policy Changes*, *supra* note 6.

⁹ Alaska, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska (after a two-year waiting period), New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Washington, West Virginia, and Wisconsin. See WOOD, *supra* note 4, at 3; *Voting Rights Policy Changes*, *supra* note 6.

¹⁰ Alabama, Arizona, Delaware, Florida, Mississippi, Nevada, Tennessee, and Wyoming. See WOOD, *supra* note 4, at 3; *Voting Rights Policy Changes*, *supra* note 6.

¹¹ See, e.g., KY. CONST. § 145(2) (denying voting rights to persons convicted of “such high misdemeanor[s] as the General Assembly may declare” and also “to persons who, at the time of the election, are in confinement under the judgment of a court for some penal offense”); MICH. COMP. LAWS §§ 168.758b, 168.492a (2010), *U.S. v. Wegrzyn*, 305 F.3d 593 (6th Cir. 2002) (“impact of [Michigan’s voter disfranchisement law] strips from *misdemeanants* their core civil right to vote” (emphasis in original)); S.C. CODE ANN. §§ 7-5-120(B)(2), 16-3-410 (2010) (a person convicted of challenging or accepting a challenge to fight with a deadly weapon shall be guilty of a misdemeanor and shall be permanently deprived the right of suffrage).

¹² These states are Arizona (restitution only), Arkansas, Alabama, Connecticut (out-of-state or federal convictions only), Delaware, Florida, Kentucky (restitution only), Tennessee (restitution and child support arrears), and Virginia. See Erika Wood & Neema Trivedi, *The Modern Day Poll Tax: How Economic Sanctions Block Access to the Polls*, 41 CLEARINGHOUSE REV. J. POVERTY L. AND POL’Y 30 (2007), available at <http://www.brennancenter.org/page/-/Modern%20Day%20Poll%20Tax.pdf>. This list used to be longer. In 2006, Maryland eliminated its legal financial obligations requirement and Washington State eliminated its requirement in 2009. See Maryland Voter Registration Protection Act of 2007, Md. Laws 159 (codified as amended in scattered sections of MD. ANN. CODE ELEC. LAW § 1, 3, and 16 (2007)), and 2009 Wash. Ch. 325 (codified as amended in WASH. REV. CODE § 29A.08.520 (2009), § 9.92.066 (2009), § 9.94A.637 (2009), § 10.64.140 (2009), § 9.94A.885 (2009), and § 9.96.050(2009)). Arizona’s and Tennessee’s laws have been challenged as unconstitutional. As of this writing, these cases are currently pending before the Ninth and Sixth Circuits, respectively.

¹³ See WOOD, *supra* note 4, at 7; Vagins, *supra* note 4.

State's law resulted in the denial of the right to vote on account of race, in violation of Section 2 of the Voting Rights Act.¹⁴

A democracy's strength is derived from broad civic engagement and election participation. Yet, the United States is one of the few western democratic nations to exclude such large numbers of people from the democratic process.¹⁵ By continuing to deny citizens the right to vote based on past criminal convictions, the government endorses a system that expects these citizens to contribute to the community, but denies them participation in our democracy. Not only is disfranchising millions of citizens undemocratic and discriminatory, it is counterproductive to the rehabilitation and reintegration into society of those released from prison. Moreover, losing the right to vote is not just the loss of a singular right; it means losing the ability to participate in a whole range of decisions affecting oneself, one's family, and one's community.

This Issue Brief will discuss the history of criminal disfranchisement laws in our country; recent reforms in the states; the ongoing compliance problems created by a patchwork of laws; the Democracy Restoration Act of 2009, which is federal legislation that seeks to restore voting rights across the country; the bipartisan and diverse support for reforming these laws; and how the United States compares to other countries.

II. Jim Crow Roots and the Continuing Impact on Communities of Color

Understanding how criminal disfranchisement laws impact communities of color requires an understanding of the origins of these laws in the United States. In the post-Revolutionary era, several states enacted laws that allowed for disfranchisement as a punishment for certain crimes.¹⁶ Although some criminal disfranchisement laws in the United States pre-date the end of slavery, many states enacted or amended their disfranchisement laws following the end of the Civil War.¹⁷

In 1868, Congress adopted Section 2 of the Fourteenth Amendment to the U.S. Constitution to reduce a state's Congressional representation as a penalty for denying the right to

¹⁴ 590 F.3d 989, 1016 (9th Cir. 2010) ("Plaintiffs have demonstrated that the discriminatory impact of Washington's felon disenfranchisement is attributable to racial discrimination in Washington's criminal justice system; thus, that Washington's felon disenfranchisement violates § 2 of the VRA."). It should be noted that the U.S. Courts of Appeals for the First, Second, and Eleventh Circuits have rejected similar claims. *See* *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (rejecting claim under Voting Rights Act); *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010) (rejecting claim under Fourteenth and Fifteenth Amendments of the U.S. Constitution); *Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005).

¹⁵ LALEH ISPAHANI, *OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES* 3 (2006), available at <http://www.aclu.org/votingrights/exoffenders/25663pub20060525.html>.

¹⁶ Jeff Manza & Christopher Uggen, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 781 (2002); Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement in the United States*, 2002 WIS. L. REV. 1045, 1061 (2002).

¹⁷ *See* Manza & Uggen, *supra* note 4, at 238-39 tbl. A2.1 (2006); AMERICAN CIVIL LIBERTIES UNION, *VOTING RIGHTS OF MINORITY AND INDIGENOUS COMMUNITIES: ACLU SUBMISSION TO THE U.N. FORUM ON MINORITY ISSUES* 15 (2009), available at http://www.aclu.org/files/assets/ACLU.Submission.UN_Minority.Forum_November2009.pdf [hereinafter ACLU U.N. Submission].

vote to “any male inhabitant” of the state, including African Americans. In 1870, Congress passed the Fifteenth Amendment to prohibit the denial of voting rights to anyone “on account of race, color, or previous condition of servitude.”

In the late 1800s, Jim Crow laws spread as part of a backlash against the Reconstruction Amendments. Despite their newfound eligibility to vote, many freed slaves remained effectively disfranchised as a result of organized efforts to prevent them from voting. Violence and intimidation were rampant. Over time, Southern Democrats sought to solidify their hold on the region by modifying voting laws in ways that would exclude African Americans from the polls without overtly violating the Fourteenth and Fifteenth Amendments. The legal barriers employed, while race neutral on their face, were intentional barriers to African American voting. Along with poll taxes, literacy tests, and grandfather clauses, criminal disfranchisement laws became a targeted method of disfranchising African Americans in the Reconstruction Era.¹⁸

Between 1865 and 1900, 18 states adopted laws restricting the voting rights of people convicted of crimes. By 1900, 38 states had some type of criminal voting restriction, most of which disfranchised convicted individuals until they received a pardon.¹⁹ At the same time, states expanded the criminal code to punish those offenses with which they believed freedmen were likely to be charged, including vagrancy, petty theft, bigamy, miscegenation, and burglary.²⁰ Aggressive arrest and conviction efforts followed, motivated by the practice of “convict leasing,” whereby former slaves were convicted of crimes and leased out to work the very plantations and factories from which they had ostensibly been freed.²¹ These targeted criminalization efforts and criminal disfranchisement laws combined to produce the legal loss of voting rights for African Americans, usually for life, effectively suppressing African American political power for decades.²²

These tactics were not confined to the South. Jim Crow impacted northern states as well, perhaps most notably in New York. Starting in the 18th century, New York’s criminal disfranchisement provisions were part of a concerted effort to exclude African Americans from participating in the political process. As African Americans gained freedom with the gradual end of slavery, New York’s voting qualifications – including criminal disfranchisement laws – became increasingly restrictive. A careful reading of New York’s constitutional history reveals that at the very time that the Fourteenth and Fifteenth Amendments forced New York to remove its nefarious property requirements for African American voters, the state changed its law from allowing to *requiring* the disfranchisement of those convicted of “infamous crimes.”²³ The

¹⁸ See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 111-12 (2009); Ewald, *supra* note 16, at 1087.

¹⁹ MANZA & UGGEN, *supra* note 4, app. at 251-253 tbl. A3.4.

²⁰ ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at 593 (1988); see Ewald, *supra* note 16, at 1090-95.

²¹ FONER, *supra* note 20, at 205; see also Ewald, *supra* note 16, at 1031-32 (“Authorities would be especially tough on black crime ‘when a busy season was approaching’ and labor was needed, and some states clearly adjusted their penal codes with the intent of building up convict-labor pools) (quoting W. KLOOSTERBOER, *INVOLUNTARY LABOUR SINCE THE ABOLITION OF SLAVERY* 62 (1960)).

²² See Ewald, *supra* note 16, at 1090-91.

²³ See ERIKA WOOD & LIZ BUDNITZ, *JIM CROW IN NEW YORK* 12-13 (2010), available at <http://www.brennancenter.org/content/resource/jimcrowny>.

effects of this policy continue: currently, 80% of those disfranchised under New York law are black or Latino.²⁴

Nationwide, the disproportionate impact of felony disfranchisement laws on people of color continues to this day.²⁵ While 2.5% of the total U.S. voting age population is disfranchised, over 13% of African American men are denied the right to vote,²⁶ a rate that is seven times the national average.²⁷ Through 2004, 14 states disfranchised more than 10% of their African American population.²⁸ Of these states, 11 disfranchised at least 15% of African Americans, and five of those states disfranchised more than 20% of the African American voting age population.²⁹

The disproportionate incarceration rate of African Americans, frequently the result of discriminatory criminal policies, makes it far more likely that they will be disfranchised.³⁰ For example, because of targeted sweeps and prosecutions, African Americans are over ten times more likely than white defendants to be incarcerated for drug offenses.³¹ In 2008, the incarceration rate for all crimes was six-and-a-half times higher for black males than for white males.³² If the current rates of incarceration continue, approximately three in ten of the next generation of black men will be disfranchised at some point during their lifetime.³³ Restoring voting rights to people who are living and working in society is one important step in the battle to correct centuries of organized efforts to disfranchise African American voters.

III. Recent State Reforms and the Continuing Need for a National Standard

As noted, criminal disfranchisement laws vary widely throughout the United States. While a federal uniform standard is needed to re-enfranchise all citizens in federal elections, there has, however, been substantial reform on the state level in recent years. Since 1997, 21

²⁴ *Id.* at 5.

²⁵ See Vagins, *supra* note 4; see also *ACLU Statement Before the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Hearing on the Democracy Restoration Act (H.R. 1355)* 111th Cong. 3-4 (Mar. 26, 2010) (statement of Laura W. Murphy & Deborah J. Vagins). For further information on the continuing impact of felony disfranchisement laws, visit the ACLU at <http://www.aclu.org/racial-justice/felon-enfranchisement>.

²⁶ AMERICAN CIVIL LIBERTIES UNION, *OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES* 3 (2006), available at http://www.aclu.org/images/asset_upload_file825_25663.pdf.

²⁷ THE SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 1 (2007), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf.

²⁸ As of December 31, 2004, over 10% of the African American populations of Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Rhode Island, Virginia, Washington, Wisconsin, and Wyoming were disfranchised due to felon voting restrictions. MANZA & UGGEN, *supra* note 17, app. at 251-253 tbl. A3.4. A few states have amended their laws since 2004. See section III, *infra*.

²⁹ Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Nebraska, Rhode Island, Virginia, Washington, and Wyoming. Arizona, Iowa, Kentucky, Nebraska, and Wyoming disfranchise more than 20% of the African American voting age population. *Id.*

³⁰ Ewald, *supra* note 16, at 1046.

³¹ HUMAN RIGHTS WATCH, *TARGETING BLACKS – DRUG LAW ENFORCEMENT IN THE UNITED STATES* 2 (2008).

³² BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2008*, 2 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

³³ See THE SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT IN THE UNITED STATES* 1 (2008), available at http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf.

states have restored voting rights or eased the restoration process, to varying degrees.³⁴ Some recent changes include:

- **Nebraska:** In 2005, the Nebraska legislature overrode the governor's veto and repealed a lifetime disenfranchisement law and implemented a two-year waiting period between completion of sentence and restoration of voting rights. This law restored the right to vote to 50,000 Nebraskans.³⁵
- **Iowa:** In 2005, Governor Tom Vilsack signed an executive order restoring voting rights to 80,000 Iowa citizens who had completed their sentence.³⁶ Before 2005, Iowa had placed a lifetime voting restriction on anyone convicted of an "infamous crime." Governor Vilsack's order continues to be implemented in the state today.³⁷
- **Rhode Island:** On Election Day 2006, Rhode Island voters were the first in the country to approve a state constitutional amendment authorizing automatic restoration of voting rights to people as soon as they are released from prison.³⁸ This restored voting rights to more than 15,000 people on probation and parole.
- **Maryland:** In April 2007, Governor Martin O'Malley signed a law streamlining Maryland's complicated restoration system that disenfranchised individuals based on offense type and criminal history. The new law also eliminated the requirement that people pay fees, fines, and restitution before being allowed to vote. Now, individuals' voting rights are automatically restored upon completion of their criminal sentence. This reform resulted in the restoration of voting rights to more than 52,000 people.³⁹
- **Washington:** In 2009, Governor Christine Gregoire signed a law that automatically restored voting rights to people as soon as they completed prison, probation, and parole. In doing so, she eliminated the requirement that

³⁴ See Ryan S. King, *Expanding the Vote, State Felony Disenfranchisement Reform, 1997-2008*, THE SENTENCING PROJECT, at 1 (2008), available at http://www.sentencingproject.org/doc/publications/fd_statedisenfranchisement.pdf. See also Fair Release and Reentry Act of 2009, 2009 N.J. Laws ch. 329 (to be codified as amending Pub. L. 1969, ch.22 and supplementing Titles 30 and 52); 2009 Wash. Ch. 325 (codified as amended in WASH. REV. CODE § 29A.08.520 (2009), § 9.92.066 (2009), § 9.94A.637 (2009), § 10.64.140 (2009), § 9.94A.885 (2009), and § 9.96.050(2009)).

³⁵ See 2005 Neb. Laws 53 (codified as amended in NEB. REV. STAT. § 32-312 (2004), § 32-313 (2004), and § 32-1530 (2004)).

³⁶ State of Iowa Exec. Order No. 42 (Jul. 4, 2005), available at http://publications.iowa.gov/3762/1/EO_42.pdf.

³⁷ See King, *supra* note 34.

³⁸ See R.I. CONST. art. II, § 1; see also Rhode Island Restoration of Voting Rights Act, 2006 R.I. Pub. Laws 366 and 2006 R.I. Pub. Laws 476 (codified at R.I. GEN. LAWS § 17-9.2-3 (2006)).

³⁹ See Voter Registration Protection Act of 2007, Md. Laws 159 (codified as amended in scattered sections of MD. ANN. CODE ELEC. LAW §1, 3, and 16 (2007)).

individuals pay all fees, fines, and restitution, including surcharges and accrued interest, before being eligible to vote.⁴⁰

While these reforms indicate a positive trend toward reforming felon disenfranchisement laws, the patchwork of varying state requirements across the country continues to cause widespread and persistent confusion among election officials, criminal justice professionals, and the public.⁴¹ This confusion has resulted in eligible voters, sometimes even those with no disqualifying criminal conviction, being purged from the rolls or denied the ability to register to vote or cast their ballots. Research indicates that many election officials misrepresent or do not understand their state's own voter eligibility laws and registration procedures for people with criminal convictions.⁴² This confusion may be further compounded where persons with out-of-state convictions wish to register to vote.⁴³ These problems have resulted in the *de facto* disenfranchisement of many eligible voters across the country.

Interviews with election officials around the country confirm the difficulty in applying voter eligibility rules on the ground. For example:

- In Colorado, half of local election officials surveyed erroneously believed that people on probation were ineligible to vote, when in fact they *are* eligible.⁴⁴
- In New York, which also allows people on probation to vote, 38% of local election boards made the same mistake, incorrectly stating that people on probation were prohibited from voting.⁴⁵
- In Tennessee, 63% of local election officials interviewed were unaware of the types of offenses and other criteria for which people could be permanently disenfranchised.⁴⁶
- Over half of election officials interviewed in Arizona could not explain the eligibility rules under that state's law, which differentiates between people convicted of one offense from those convicted of repeat offenses.⁴⁷

The effects of such widespread confusion among local officials reach further than the misinformed individuals turned away from the registrars' office or the polls. Rumors and falsehoods can quickly pervade entire communities. When a person seeking to register is erroneously told he is ineligible to vote, he is likely to accept the election official's word as fact

⁴⁰ See 2009 Wash. Ch. 325 (codified as amended in WASH. REV. CODE § 29A.08.520 (2009), § 9.92.066 (2009), § 9.94A.637 (2009), § 10.64.140 (2009), § 9.94A.885 (2009), and § 9.96.050(2009)).

⁴¹ See Vagins, *supra* note 4.

⁴² See WOOD & BLOOM, *supra* note 5.

⁴³ See *id.* at 6-7.

⁴⁴ COLO. REV. STAT. §§ 1-2-103, 1-2-606 (2007). See also WOOD & BLOOM, *supra* note 5, at 3.

⁴⁵ See WOOD & BLOOM, *supra* note 5, at 3.

⁴⁶ See *id.*

⁴⁷ See *id.*

and never follow up. This false information may then be passed on to friends and family, and may eventually result in large segments of communities who never even attempt to vote because they have been misinformed about their rights.⁴⁸

A federal standard, such as the Democracy Restoration Act of 2009 described below, would largely resolve the problem of *de facto* disfranchisement by putting in place a uniform, federal law restoring voting rights in federal elections to anyone who is out of prison, living in the community.⁴⁹ Simplifying the law with regard to federal elections will ease the process of educating election and criminal justice officials, allow state administrative processes to run more smoothly, and highlight mistakes quickly before rights are wrongly abridged. Taking these steps is necessary to ensure that those who have been released from prison for an offense are able to successfully rejoin their communities and exercise their rights as citizens.

IV. The Need for Federal Congressional Action

A. Overview of the Democracy Restoration Act of 2009

Congressional action is needed to establish a federal standard that restores voting rights in federal elections to the millions of Americans who are living in the community, but continue to be denied the ability to fully participate in civic life. In July 2009, Senator Russell Feingold and Representative John Conyers introduced the Democracy Restoration Act of 2009.⁵⁰ This Act would restore voting rights in federal elections to nearly 4 million Americans who have been released from prison; ensure that probationers never lose their right to vote in federal elections; and notify people about their right to vote in federal elections when they are leaving prison, sentenced to probation, or convicted of a misdemeanor.

If enacted, the Democracy Restoration Act would strengthen our democracy by creating a broader and more just base of voter participation. It would also aid law enforcement by encouraging participation in civic life, assisting reintegration, and rebuilding ties to the community. The uniform federal standard in the bill would eliminate the confusion that leads to *de facto* disfranchisement by providing a bright line for election administration. This would streamline voter registration, and significantly reduce the opportunity for erroneous purges of eligible voters.⁵¹

B. Congressional Authority

Congress's constitutional authority to enact the Democracy Restoration Act is twofold: (1) the Election Clause of Article I, Section 4; and (2) Congress's enforcement powers under the Fourteenth and Fifteenth Amendments.

⁴⁸ *See id.*

⁴⁹ *See* H.R. 3335, 111th Cong. (2009); S. 1516, 111th Cong. (2009). On March 16, the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties held a hearing on H.R. 3335. Links to the written testimony of the witnesses and a video of the proceedings is available at http://judiciary.house.gov/hearings/hear_100316_1.html (last visited Mar. 19, 2010).

⁵⁰ *See id.*

⁵¹ *See* Vagins, *supra* note 4.

1. The Election Clause

Under Article I, Section 4, Congress has the broad authority to regulate federal elections: “The 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 the Place of chusing Senators.”⁵²

Although the text of the Election Clause references regulating the time, place, and manner of congressional elections, it has consistently been read more expansively to include Congress’s authority to regulate presidential elections, as well as its authority to regulate other voting requirements for federal elections, including voter eligibility.⁵³

In *Oregon v. Mitchell*, the Supreme Court upheld Congress’s ability to lower the voting age in federal elections, although not in state or local elections. In doing so, the Court clearly endorsed Congress’s “ultimate supervisory power” over federal elections, including setting the qualification for voters.⁵⁴ Justice Black’s plurality opinion pointed to the Elections Clause and its legislative history as giving the authority to Congress to change the qualifications of voters in federal elections.⁵⁵ Although a majority of Justices did not agree on the basis for Congress’s power to set voter qualifications – some based the power on the Election Clause, others on Congress’s enforcement powers – the Court itself has not viewed this disagreement as undercutting *Mitchell*’s holding.⁵⁶ Because the Democracy Restoration Act only changes voter qualifications in federal elections, Congress has authority to make such changes.⁵⁷

Opponents of the Congress’s ability to exercise such authority may argue that Congress lacks the power to directly set qualifications for voters in federal elections by virtue of the Qualifications Clauses of Article I and the Seventeenth Amendment. These clauses provide that the qualifications of voters in congressional elections must be the same as the qualifications for voters in elections to the most populous branch of the state legislature.

This argument, however, does not square with Supreme Court precedent regarding the scope of the Qualifications Clause. As the Supreme Court’s decision in *Tashjian v. Republican Party*⁵⁸ makes clear, the Qualifications Clause of Article I, which the Seventeenth Amendment adopted verbatim, was not intended to limit congressional power, or to require that qualifications for voting in federal elections be the same as those for voting in state elections. Instead, as the Court explained, “[f]ar from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections.”⁵⁹ The Court explained

⁵² U.S. CONST. art I, § 4 (emphasis added).

⁵³ See, e.g., *Kusper v. Pontikes*, 414 U.S. 51, 57 n.11 (1973); *Oregon v. Mitchell*, 400 U.S. 112, 121, 124 (1970).

⁵⁴ *Mitchell*, 400 U.S. at 124.

⁵⁵ *Id.* at 123-24.

⁵⁶ See *Kusper*, 414 U.S. at 57.

⁵⁷ Even in those few instances where federal legislation would conflict with a state constitution, the legislation could nevertheless be implemented pursuant to the Supremacy Clause in Article VI of the Constitution. See U.S. CONST. art. VI, cl. 2.

⁵⁸ 479 U.S. 208 (1986).

⁵⁹ *Id.* at 229.

that the clause merely requires that “anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote” in federal legislative elections.”⁶⁰ The Court looked to the legislative history and found that the Founders added the Qualifications Clause to ensure that voters would be enfranchised in federal elections – not to require that federal election qualifications be the same as state qualifications.⁶¹

Because the Democracy Restoration Act would allow more citizens to vote in federal elections than in the state elections of 35 states, Congress would not be running afoul of the Qualifications Clause or the Seventeenth Amendment.

2. The Fourteenth and Fifteenth Amendments

Congress’s enforcement powers under the Fourteenth and Fifteenth Amendments provide an additional basis for congressional authority to permit all individuals who are not incarcerated to participate in federal elections. Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment both grant Congress the power to enforce the Amendments “by appropriate legislation.” The Supreme Court has described this enforcement power as “a broad power indeed” – one that gives Congress a “wide berth” to devise appropriate remedial and preventative measures for unconstitutional actions.⁶²

The right to vote, and the right to do so free of racial discrimination, is a fundamental right. Laws that are enacted out of racially discriminatory intent violate the Fourteenth Amendment generally, and violate the Fifteenth Amendment when they restrict voting. It is long settled by the Supreme Court that Congress’s enforcement powers are a grant of broad authority to eradicate any racial discrimination in voting.

The Court has held that legislation falls within the Congress’s Fourteenth Amendment enforcement powers if there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁶³ The first part of this analysis requires that legislation must be clearly remedial in nature – that is, aimed at remedying past constitutional violations – rather than expanding constitutional rights.⁶⁴ The second part requires that the legislation be limited to “an appropriate response” to a “history and pattern of unequal treatment.”⁶⁵ Congress’s enforcement authority is at its most expansive when it seeks to protect fundamental rights⁶⁶ or to counter discrimination based on suspect classifications.⁶⁷ Because the Democracy Restoration Act protects the right to vote, arguably the most fundamental constitutional right, and attempts to remedy past and present racial discrimination, it meets the necessary standard.

⁶⁰ *Id.* at 226 (quoting *Republican Party of Conn. v. Tashjian*, 770 F.2d 265, 274 (2d Cir. 1985) (Oakes, J., concurring)).

⁶¹ *Id.* at 228-29.

⁶² *Tennessee v. Lane*, 541 U.S. 509, 518, 520 (2004).

⁶³ *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

⁶⁴ *Id.* at 520; *see also Lane*, 541 U.S. at 522.

⁶⁵ *Lane*, 541 U.S. at 520.

⁶⁶ *See id.* at 523.

⁶⁷ *See e.g., Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

When acting pursuant to the Fifteenth Amendment, Congress's enforcement powers are at their pinnacle because such legislation involves both the fundamental right to vote and the suspect category of race. Legislation enforcing the Fifteenth Amendment is afforded deferential review from the courts because it necessarily protects against racial discrimination and deprivations of the fundamental right to vote.⁶⁸

Under this basis of its authority to enact the Democracy Restoration Act, Congress should create a record of evidence that criminal disfranchisement provisions have resulted in a "history and pattern of unequal treatment."⁶⁹ It can do so by demonstrating that racial discrimination was a substantial or motivating factor in the adoption of specific felony disfranchisement laws, and that racially neutral laws have been implemented or enforced in a discriminatory manner.⁷⁰

V. Diverse and Growing Support for Restoring the Right to Vote

Support for restoring voting rights to people who are released from prison is growing among a diverse group of organizations, leaders, and politicians. Several law enforcement and criminal justice officials,⁷¹ members of the faith community,⁷² and social justice, civil rights, and legal professionals⁷³ have spoken out against criminal disfranchisement. There is also growing recognition among conservatives that criminal disfranchisement laws run contrary to our democratic ideals.

⁶⁸ See *Johnson v. California*, 543 U.S. 499, 505 (2005); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

⁶⁹ *Lane*, 541 U.S. at 520. After the Civil War and enactment of the Fifteenth Amendment, numerous southern states adopted criminal disfranchisement provisions, along with literacy tests and poll taxes, to exclude newly enfranchised African American voters. See notes 14-21 *supra* and accompanying text.

⁷⁰ See *Hibbs*, 538 U.S. at 731-32 (finding evidence that state medical leave laws discriminated on the basis of gender both intentionally and in the way in which they were applied). Opponents of the Democracy Restoration Act may argue that Section 2 of the Fourteenth Amendment limits Congress's enforcement authority. That section provides, "when the right to vote at any election for the choice of electors . . . is denied to any of the male inhabitants of such State . . . or in any way abridged, *except for participation in rebellion, or other crime . . .*" U.S. CONST. amend. XIV, § 2 (emphasis added). Relying on this language, the Supreme Court rejected a nonracial equal protection challenge to California's felony disfranchisement law in *Richardson v. Ramirez*, 118 U.S. 24 (1974). However, as long as the Democracy Restoration Act is securely framed as legislation aimed at remedying past and current racial discrimination in the voting system, reliance on *Richardson* is misguided. In a subsequent decision, the Court clarified that Section 2 of the Fourteenth Amendment does not limit the Equal Protection Clause's prohibition on felony disfranchisement laws that deny voting rights *on account of race*.

⁷⁰ See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

⁷¹ See Law Enforcement Sign-On Letter in Support of the Democracy Restoration Act (S. 1516/H.R. 3335), <http://www.brennancenter.org/page/-/Democracy/DRA%20-%20Law%20Enforcement%20CJ%20Sign%20on%20Letter%20FINAL.pdf> (last visited Mar. 5, 2010).

⁷² See Religious Leaders Sign-On Letter in Support of the Democracy Restoration Act (S. 1516/H.R. 3335), <http://www.brennancenter.org/page/-/Democracy/DRA%20-%20Faith%20Group%20Letter%20FINAL.pdf> (last visited Mar. 5, 2010).

⁷³ See Civil Rights and Legal Advocacy Group Sign On-Letter Support of the Democracy Restoration Act (S. 1516/H.R. 3335), <https://www.aclu.org/voting-rights/civil-rights-and-legal-advocacy-group-sign-letter-support-democracy-restoration-act-s1> (last visited Mar. 5, 2010).

A. Law Enforcement Support

Justice Thurgood Marshall once noted that “the denial of a right to vote to such persons is hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.”⁷⁴ Law enforcement and criminal justice professionals recognize that restoring voting rights is important for protecting public safety, and for our democracy. They believe that bringing people into the political process makes them stakeholders, thereby discouraging recidivism.⁷⁵ Branding people as political outsiders by barring them from the polls disrupts re-entry into the community. Many law enforcement professionals believe that restoring the right to vote invests individuals in our democracy and sends the message that people are welcomed back as integral members of their home communities.⁷⁶ As Ron Stalling, a member of the National Black Police Association, described it, restoring voting rights to people coming out of prison “promotes the successful reintegration of formerly incarcerated people, preventing further crime and making our neighborhoods safer.”⁷⁷

Many individuals in law enforcement have written articles and opinion pieces on the issue, and belong to professional organizations that have done outreach to elected officials or have passed resolutions in favor of restoration of voting rights.⁷⁸ Resolutions in favor of restoring voting rights have been passed by the American Correctional Association, the American Probation and Parole Association, the National Black Police Association, and the Association of Paroling Authorities International. Additionally, law enforcement professionals in Florida, Kentucky, Maryland, New York, Rhode Island, Washington, and Wisconsin have all spoken out in favor of restoring voting rights in their states.

B. Faith and Religious Community Support

Members of the faith community who believe that the principles of inclusion and forgiveness are critical for strong communities have also begun to join the movement to restore voting rights to people with prior convictions. Their beliefs rest squarely on the obligation to be merciful and forgiving, a commitment to treat others with the respect and dignity, and a steadfast belief in the human capacity for redemption. Organizations that support restoring voting rights include the National Hispanic Christian Leadership Conference, U.S. Conference of Catholic

⁷⁴ *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (Marshall, J., dissenting) (quoting Memorandum of the Secretary of State of California in Opposition to Certiorari) (citations omitted).

⁷⁵ See WOOD, *supra* note 4, at 10-12; *see, e.g.*, Association of Paroling Authorities International, Resolution on Restoring Voting Rights, available at http://www.apaintl.org/en/aw_resolutions_voting.html (last visited Mar. 5, 2010); *Testimony Before the House of Representatives Judiciary Committee, Constitution, Civil Rights, and Civil Liberties Subcommittee* 3, 111th Cong. (Mar. 16, 2010) (statement of Carl Wicklund, Executive Director American Probation and Parole Association).

⁷⁶ See Wicklund, *supra* note 75, at 3.

⁷⁷ *Voter Registration Protection Act: Hearing on S. 488 Before the S. Comm. on Educ., Health & Envtl. Affairs*, 2007 Leg., 423d Sess. (Md. 2007) (written testimony of Ron Stalling, National Black Police Assoc.), http://www.brennancenter.org/dynamic/subpages/download_file_48135.pdf.

⁷⁸ For more information about the law enforcement and criminal justice coalition or to see copies of articles and resolution, visit the Brennan Center: http://www.brennancenter.org/content/pages/law_enforcement_criminal_justice_advisory_council.

Bishops, Evangelical Lutheran Church of America, Prison Fellowship, Protestants for the Common Good, Sojourners, United Church of Christ, and United Methodist Church.⁷⁹

C. Bipartisan Support

Republicans and Democrats alike have supported important voting rights restoration laws. Many political leaders and spokespeople from both parties have recognized that restoring the right to vote is an issue of democracy, not politics. These state and local officials have seen that felony disenfranchisement impedes the rehabilitation of persons with criminal convictions, and have worked to reform their laws accordingly.⁸⁰ While at the federal level, voting rights reforms are often cast as partisan, evidence at the state level tells a different story. From 1997 to 2009, 16 Republican governors in 12 states signed legislation or approved easing the restoration process.⁸¹

Some important examples of these reforms include:

- **Texas:** In 1997, then-Governor George W. Bush, signed legislation that eliminated the two-year waiting period after completion of sentence before individuals could regain their right to vote.⁸²
- **New Mexico:** In 2001, then-Governor Gary Johnson, signed legislation repealing the lifetime ban on voting for people with felony convictions, restoring the right to people upon completion of sentence.⁸³
- **Connecticut:** In 2001, then-Governor John Rowland signed legislation extending voting rights to people on probation.⁸⁴

⁷⁹ For more information about support for voting rights restoration among the faith and religious community, visit the Brennan Center: http://www.brennancenter.org/content/pages/communities_of_faith_initiative.

⁸⁰ See Part III *infra*.

⁸¹ See AMERICAN CIVIL LIBERTIES UNION, BREAKING BARRIERS TO THE BALLOT BOX: FELON ENFRANCHISEMENT TOOLKIT 33-56 (2008), http://www.aclu.org/pdfs/votingrights/righttovote_20080125.pdf (detailing actions in states with Republican governors: Gov. George W. Bush (Texas 1997), Gov. John Rowland (Connecticut 2001), Gov. Gary Johnson (New Mexico 2001), Gov. Kenny Guinn (Nevada 2001 & 2003), Gov. Charlie Crist (Florida 2007)); King, *supra* note 34 (detailing actions in states with Republican governors: Gov. Jim Gilmore (Virginia 2000), Gov. Jeb Bush (Florida 2004 & 2006), Gov. M. Jodi Rell (Connecticut 2005), Gov. Linda Lingle (Hawaii 2006), Gov. John Huntsman (Utah 2006), and Gov. Bobby Jindal (Louisiana 2008); see also 2002 Neb. Laws, L.B. 1054 (signed by Gov. Mike Johanns); La. Acts 2003, Act 856 (signed by Gov. Murphy J. Foster); 2004 Idaho Sess. Laws, Chap. 166 (signed by Gov. Dirk Kempthorne); 2005 S.D. Laws, Chap. 89 (signed by Gov. M. Michael Rounds); 2009 Nev. Stats., Chap. 211 (signed by Gov. Jim Gibbons).

⁸² Governor George W. Bush signed Texas HB 1011, “An Act Relating to Eligibility Requirements for Voting by Persons Convicted of a Felony,” on June 18, 1997. See <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=75R&Bill=HB1001>.

⁸³ Governor Johnson signed New Mexico SB 204, “An Act Relating to Elections: Restoring the Right to Vote to a Person Convicted of a Felony Who Has Satisfied All Conditions of a Sentence,” on March 15, 2001. See http://legis.state.nm.us/lcs/_session.aspx?Chamber=S&LegType=B&LegNo=204&year=01.

- **Nevada:** In 2001, then-Governor Kenny Guinn signed legislation that eliminated the waiting period requirements before individuals could apply to have their voting rights restored. In 2003, Governor Guinn also signed legislation approving a provision to automatically restore voting rights for people convicted for first time, non-violent felonies immediately after completion of sentence.⁸⁵
- **Florida:** In 2004, then-Governor Jeb Bush amended the Rules of Executive Clemency to expedite the voting restoration process. In 2006, Governor Bush signed a bill requiring that individuals in prison be provided with rights restoration application information at least two weeks before their release dates. In 2007, Governor Charlie Crist simplified the rights restoration process for persons convicted of certain offenses who are no longer required to submit to hearings before the Clemency Board.⁸⁶ Governor Crist noted: “If we believe people have paid their debt to society, then that debt should be considered paid in full, and their civil rights should in fact be restored. By granting ex-offenders the opportunity to participate in the democratic process, we restore their ability to be gainfully employed, as well as their dignity.”⁸⁷
- **Louisiana:** In 2008, Governor Bobby Jindal signed legislation requiring the Department of Public Safety and Corrections to notify people leaving its supervision about how to regain their voting rights and to provide these individuals with voter registration applications.⁸⁸

⁸⁴Governor Rowland signed Connecticut HB No. 5042, “An Act Restoring Voting Rights of Convicted Felons Who Are on Probation,” on May 4, 2001. See http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=5042&which_year=2001&SUBMIT1.x=16&SUBMIT1.y=11&SUBMIT1=Normal.

⁸⁵ Governor Guinn signed Nevada AB 328, “An Act Relating to Criminal Records, Requiring Information Concerning the Sealing of Records and Restoration of Civil Rights to be Provided to Certain Persons,” on June 5, 2001. See <http://www.leg.state.nv.us/71st/Reports/history.cfm?ID=4077>.

⁸⁶ Governor Jeb Bush signed HB 55, “An Act Relating to the Restoration of Civil Rights,” on June 12, 2006. See http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2006&billnum=55; Florida State Rules of Executive Clemency, revised Apr. 4, 2007, <https://fpc.state.fl.us/Policies/ExecClemency/ROEC04052007.pdf>.

⁸⁷ Press Release from Florida Governor Charlie Crist (Apr. 5, 2007) available at <http://www.flgov.com/release/8776>.

⁸⁸ Governor Jindal signed HB 1011, “Requires the Department of Public Safety and Corrections to provide certain information concerning registration and reinstatement and voter registration applications to certain persons,” on June 30, 2008. See <http://www.legis.state.la.us/> (search HB 1011 in 2008 Regular Session).

Other important political figures have gone on record with their support of felony disfranchisement reforms. For example, the late Jack Kemp, former Member of Congress, Secretary of HUD, and Republican Vice-Presidential candidate stated:

It is a matter of simple fairness that once a person has completed the entire sentence, his or her voting rights should be restored I am further convinced that the ability to fully participate as a productive citizen – including becoming a full voting member of society – reduces the rate of recidivism and is an incentive for those in prison to change their behavior for the good.⁸⁹

Similarly, Chuck Colson, founder of Prison Fellowship and former Chief Counsel for President Nixon, stated:

The unfortunate thing in American life is that the offender never stops getting punished. He's labeled "ex-con" with a scarlet "X" on his forehead. And we continue to penalize him – it's harder getting jobs, it's harder being accepted into the community What we ought to think about is what we must do both culturally and politically in order to reintegrate people into society.⁹⁰

These statements, along with the recent state-level bipartisan support for reform, indicate a general recognition that restoration of voting rights is not a partisan issue, but one that is of special importance to our democracy and to successful rehabilitation and reintegration. However, progress at the state and local levels alone will not ensure that people who have rejoined the community are not relegated to a second-class citizenship status. In order to achieve suffrage for all American citizens, which is among the core of American values,⁹¹ action at the federal level, through passage of the Democracy Restoration Act, is necessary.

VI. International Perspective

In 2005, the *New York Times* opined that "[t]he United States has the worst record in the world when it comes to stripping convicted felons of the right to vote."⁹² The United States is an outlier in its approach to restricting the voting rights of the convicted.⁹³ While there is no single prevailing approach to criminal disfranchisement in other nations, the trend is clear: the

⁸⁹ Editorial, *Opportunity to Expand Civil Rights*, WASH. TIMES, Apr. 12, 2007, available at <http://www.restoreourvote.org/media/KempWashTimesOpEdApr122007.pdf>.

⁹⁰ ACLU documentary on criminal disfranchisement, *Democracy's Ghosts*, at <http://www.democracysghosts.org/>.

⁹¹ "Once a people begins to interfere with the voting qualification, one can be sure that sooner or later it will abolish it altogether . . . there is no halting place until universal suffrage has been attained." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 59-60 (J.P. Mayer ed., George Lawrence trans., HarperCollins Perennial Classics 2000) (1835).

⁹² See Editorial, *Voting Rights, Human Rights*, N.Y. TIMES, Oct. 14, 2005, available at <http://www.nytimes.com/2005/10/14/opinion/14fri4.html>.

⁹³ See Brandon Rottinghaus, *Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform* June-July 2003 NW. INT'L FOUND. ELECTION SYSTEMS 25 (2003).

United States is far more restrictive than the vast majority of nations, particularly other democracies.⁹⁴

In a 2003 survey of 109 countries' laws governing the voting rights of prisoners and former prisoners, it was found that only eight countries had constitutional provisions, electoral laws, or regulations disfranchising persons who have completed their sentences.⁹⁵ The United States is in this group.⁹⁶

European nations provide a number of inclusive models of voting rights, and demonstrate several ways that such systems can promote both democratic principles and sound criminal justice policy. In Europe, disfranchisement is treated as the exception rather than the norm; 17 European nations allow all prisoners to vote, 11 allow some prisoners to vote, and 12 disfranchise all prisoners, but permit voting upon release from incarceration.⁹⁷ Likewise, many nations in the Western Hemisphere provide voting rights for persons who have served prison sentences. Sixteen countries in the Americas allow at least some prisoners to vote and 14 countries specifically forbid permanent disfranchisement of people with criminal convictions.⁹⁸

The idea that automatic disfranchisement is contrary to democratic principles and international human rights law has been reinforced in several international and domestic court decisions around the world. In 2005, the European Court of Human Rights found, in *Hirst v. United Kingdom (No. 2)*,⁹⁹ that the United Kingdom's blanket disfranchisement of all serving prisoners violated Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe.¹⁰⁰ Likewise, the Constitutional Court of South Africa has found that all citizens, including currently or formerly incarcerated persons, have a right to vote because "the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood."¹⁰¹ The Supreme Court of Canada has found that "Denying prisoners the right to vote . . . removes a route to social development and rehabilitation . . . and it undermines the correctional law and policy directed towards rehabilitation and integration."¹⁰²

International human rights law has long recognized the fundamental right to vote as an essential prerequisite for full and equal enjoyment of rights. The Universal Declaration of

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See ACLU U.N. Submission, *supra* note 17, at 18.

⁹⁸ LAWYERS COMMITTEE FOR CIVIL RIGHTS, THE SENTENCING PROJECT & ACLU, REQUEST FOR A THEMATIC HEARING ON THE DISCRIMINATORY EFFECTS OF FELONY DISENFRANCHISEMENT LAWS, POLICIES AND PRACTICES IN THE AMERICAS (2009), http://aclu.org/files/pdfs/humanrights/iachr_request_thematic_hrg_disenfranchisement.pdf.

⁹⁹ Jordan Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-Examining Richardson v. Ramirez*, 13 TULSA J. COMP. & INT'L L. 279, 305 (2006) (citing *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01, Eur. Ct. H.R., Fourth Section (Mar. 30, 2004)), available at http://www.sentencingproject.org/doc/publications/fd_transnatjudicialdiscourse.pdf.

¹⁰⁰ *Id.* at 307.

¹⁰¹ Minister of Home Affairs v. NICRO, 2005 (3) SA 280 (CC) at ¶ 28 (S. Afr.).

¹⁰² *Sauvé v. Canada*, [2002] 3 S.C.R. 519 (Can.).

Human Rights (UDHR) acknowledges the vital role that free, fair, and transparent elections have in guaranteeing this essential right of citizen engagement.¹⁰³ Article 21(1) of the UDHR states that “[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives.”¹⁰⁴ Similarly, Article 25 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, prohibits unreasonable restrictions on the right to vote.¹⁰⁵ In 1994, the United States also ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹⁰⁶ Article 5 of which protects the “political rights, in particular the right to participate in elections” of “everyone without distinction as to race, color, or national or ethnic origin.”¹⁰⁷

Criminal disenfranchisement laws, with their on-going disparate impact on minorities, offend the human rights treaties by which the United States has agreed to abide. Disfranchising individuals with felony convictions at far greater rates than other nations puts the United States at a disadvantage by failing to meet world human rights standards and discouraging the rehabilitation and reintegration of former prisoners back into society.

VII. Conclusion

As the Supreme Court has said, “[n]o 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.”¹⁰⁸ It is time to restore the most precious of civil rights that has been denied far too long to far too many of our citizens. The Democracy Restoration Act must be enacted in order to restore voting rights to millions of American citizens in federal elections and to finally redress a centuries-old injustice.

¹⁰³ ACLU U.N. Submission, *supra* note 17, at 3.

¹⁰⁴ Universal Declaration of Human Rights, G.A. Res. 217A, art. 21, at 75, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

¹⁰⁵ See ACLU U.N. Submission, *supra* note 17, at 4; THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 24 (1998), http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf.

¹⁰⁶ International Covenant on Civil and Political Rights (ICCPR), art. 25(b), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966) (ratified by the United States on June 8, 1992).

¹⁰⁷ See ACLU U.N. Submission, *supra* note 17, at 4; United Nations International Convention on the Elimination of Racial Discrimination (ICERD), Art 5(c), Sept. 28, 1966 (ratified by the United States on Oct. 21, 1994).

¹⁰⁸ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).