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Felony Disenfranchisement & the Nineteenth Amendment

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FELONY DISENFRANCHISEMENT & THE NINETEENTH AMENDMENT

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I. INTRODUCTION

For the last decade, voting rights across America have contracted.[1] Using new legislation that "range[s] from strict photo ID requirements to early voting cutbacks to registration restrictions," fully half of the states have implemented restrictions on the franchise since 2010.[2] The trend was

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1. In the 2018 election, "voters in at least eight states [faced] more stringent voting laws than they did in the last federal election cycle in 2016. Voters in 23 states [faced] tougher restrictions than they did in 2010. The most common restrictions involve[d] voter ID laws, but they also include[d] additional burdens on registration, cutbacks to early voting and absentee voting, and reduced voting access for people with past criminal convictions." Wendy Weiser & Max Feldman, *The State of Voting 2018*, BRENNAN CTR. FOR JUST., June 5, 2018, at 5, https://www.brennancenter.org/sites/default/files/2019-08/Report_State_of_Voting_2018.pdf [https://perma.cc/6VGC-NF63].

2. BRENNAN CTR. FOR JUST., *New Voting Restrictions in America*, July 3, 2019, at 1, https://www.brennancenter.org/sites/default/files/legal-work/New%20Voting%20Restrictions.pdf [https://perma.cc/3UQ8-A7K6] ("Overall, 25 states have put in place new restrictions since then — 15 states have more restrictive voter ID laws in place (including six states with strict photo ID requirements), 12 have laws making it harder for citizens to register (and stay registered), ten made it

exacerbated when, in *Shelby County v. Holder*, the Supreme Court found the Voting Rights Act's coverage formula unconstitutional, thereby gutting the preclearance system that required states with a history of discriminatory voting laws to seek preapproval for voting rule changes that could affect minorities.[3] In *Shelby*'s aftermath, several states previously subject to preclearance began aggressively purging names from their voter rolls.[4] Add in the Supreme Court's recent finding that extreme partisan gerrymandering—which has been tied to legislative stagnation, political dysfunction, and vast underrepresentation for citizens living within voting districts that legislators have packed and cracked[5]—is a non-justiciable political question,[6] and the picture of voting rights in America seems quite bleak.

On the 100th anniversary of the Nineteenth Amendment's passage, and with the 2020 election looming, trends that contract voting rights must be combated wherever possible. This Article considers one particularly ripe opportunity: felony disenfranchisement laws. The Nineteenth Amendment and the history of the women's suffrage movement can offer a compelling argument against such laws. The exposure of flaws in the logic behind efforts to preclude classes of citizens from choosing our next political leaders can offer persuasive reasons to end felony disenfranchisement in America today.

Across the country, felony disenfranchisement laws leave some six million citizens unable to vote.[7] They do not simply restrict voting for those currently imprisoned; as of 2018, 4.7 million citizens could not vote because they lived in one of 34 states that prohibited the franchise for a mix of those on probation, parole, or even those who completed their

more difficult to vote early or absentee, and three took action to make it harder to restore voting rights for people with past criminal convictions.").

3. Shelby Cty., Ala. v. Holder, 570 U.S. 529, 550–57 (2013).

4. "For the two election cycles between 2012 and 2016, jurisdictions no longer subject to federal preclearance had purge rates significantly higher than jurisdictions that did not have it in 2013. The Brennan Center calculates that 2 million fewer voters would have been purged over those four years if jurisdictions previously subject to federal preclearance had purged at the same rate as those jurisdictions not subject to that provision in 2013." Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CTR. FOR JUST., July 20, 2018, at 1, https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf [https://perma.cc/7ZHY-59TP].

5. *See* Michael Gentithes, *Gobbledygook: Political Questions, Manageability, & Partisan Gerrymandering*, 105 IOWA L. REV. (forthcoming).

6. Rucho v. Common Cause, 139 S.Ct. 2484, 2506–07 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.").

7. Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, SENTENCING PROJECT, Oct. 17, 2018, at 3, https://www.sentencingproject.org/wp-content/uploads/2018/10/Expanding-the-Vote-1997-2018.pdf [https://perma.cc/WAD5-S37G].

sentence.[8] In twelve states that restrict voting rights for the latter category, citizens who were convicted but already served their time "make up over 50 percent of the entire disenfranchised population."[9] And because most felony disenfranchisement laws apply irrespective of offense type,[10] many of these citizens lose the vote for committing crimes wholly unrelated to the political process—a sanction that can follow them for a lifetime outside the prison's walls.

Though felony disenfranchisement laws have an outsized effect on young minority men, they increasingly threaten a century of gains in female enfranchisement. In the last quarter-century, rates of female incarceration have exploded. Since 1980, the growth rate for female imprisonment has more than doubled that of men, leading to a total increase of more than 750% by 2017.[11] Today, more than 225,000 women are behind bars in prisons and jails, representing approximately one-tenth of the total number of incarcerated Americans.[12] When those on probation or parole are included, women constitute nearly one-fifth of the total corrections population in the United States.[13]

This growth in the female incarceration rate has caused rapid disenfranchisement for female felons under state law. Research suggests that approximately one million women are disenfranchised under current felon disenfranchisement legislation,[14] a number poised to grow as the proportion of women in the nation's corrections population increases over time.[15] Furthermore, women are more likely than men to be imprisoned

8. *Id.*

9. Jean Chung, *Felony Disenfranchisement: A Primer*, SENTENCING PROJECT, June 27, 2019, at 2, https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf [https://perma.cc/Y7UU-EMVX].

10. *See, e.g.*, O.R.C. § 2961.01(A)(1).

11. SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS, June 6, 2019, at 1, https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf [https://perma.cc/KV6J-3NNE].

12. By the end of 2017, federal and state correctional authorities held approximately 1,378,000 male prisoners and 111,000 female prisoners. Jennifer Bronson & E. Ann Carson, *Prisoners in 2017*, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, April 2019, at 3, tbl. 1, https://www.bjs.gov/content/pub/pdf/p17.pdf [https://perma.cc/3JYQ-4Z2W]. Additionally, county and city jails held roughly 632,000 male inmates and 114,000 female inmates. Zhen Zeng, *Jail Inmates in 2017*, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, April 2019, at 5, tbl. 3, https://www.bjs.gov/content/pub/pdf/ji17.pdf [https://perma.cc/3E9L-Y8DE]; *see also* SENTENCING PROJECT, *supra* note 11.

13. E-mail from Morgan McLeod, Communications Director, Sentencing Project, to Michael Gentithes, Assistant Professor, University of Akron School of Law (March 29, 2019 11:56 AM) (copy on file with Professor Gentithes).

14. *Id.*

15. "If these trends continue, we will see more and more women who lose the right to vote in addition to other rights/privileges that are lost with a felony conviction. . . . The tendency is to put a

for drug or property offenses.[16] Thus, an increasing number of women are losing their ability to vote based upon non-violent offenses with no relationship whatsoever to politics or government.

Today's arguments in support of felony disenfranchisement laws bear striking similarities to the arguments of anti-suffragists more than a century earlier. Both suggest that a traditionally subordinated class of citizens is inherently incapable of bearing the responsibility that the right to vote entails.[17] Both argue that some potential votes are somehow less worthy than others, and thus the authors of those votes ought to be excluded from the marketplace of political ideas. And both assert a distinction between the votes of some citizens thought to be of higher political value, and those thought unworthy of having their voices counted in the political arena.

This Article examines the historical response to those arguments and suggests that they can be applied forcefully in the contemporary debate over felony disenfranchisement. Suffragists raised two arguments in response to coverture-based contentions against women enfranchisement: first, that men simply did not represent women's interests in politics, instead subordinating them ever further both in family structures and the public sphere; and second, that women had something important to add to the political conversation that would be missing as long as they were excluded from the debate. Similarly, felony disenfranchisement laws are based upon the fiction that there is a distinction between good votes of most citizens and bad votes of criminals, and therefore excluding former felons' voices from the political arena is acceptable because their interests will be sufficiently served by the good votes of others. But the voices of former felons should be heard, both because of the perspective those voices will bring to modern problems caused by growing incarceration rates, and because those voices may add important and worthy ideas to the political marketplace that would be absent if their contributions are excluded.

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male face on the issue, but it impacts women and children at alarmingly high rates." Melanie Mignucci, *Why Felon Disenfranchisement is a Feminist Issue*, BUSTLE, Aug. 18, 2017, https://www.bustle.com/p/why-felon-disenfranchisement-is-a-feminist-issue-77456 [https://perma.cc/S423-AZ2L].

16. "Twenty-five percent of women in prison have been convicted of a drug offense, compared to 14% of men in prison; 26% of incarcerated women have been convicted of a property crime, compared to 17% among incarcerated men" SENTENCING PROJECT, *supra* note 11, at 4.

17. *See* Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 979 (2002) (citations omitted); *see also infra* notes 19–24 and accompanying text.

The Article begins with a brief introduction to anti-suffragist rhetoric and the common arguments suffragists raised in response. It then turns to the modern felony disenfranchisement debate, noting the parallels between coverture-based anti-suffragist rhetoric and modern support for the civil death of felons. The Article then concludes by suggesting that historical suffragist arguments can be tapped to forcefully respond to felony disenfranchisement proposals.

II. ANTI-SUFFRAGIST RHETORIC & SUFFRAGIST RESPONSES

The trends in female felon disenfranchisement are especially incongruous with the Nineteenth Amendment's history. The Amendment was the culmination of an historical shift in the way our nation understood the importance of voting rights in representative democracy. The response of suffragists to anti-suffragist rhetoric dramatically illustrates this evolution in modern American thinking.

Arguments to disenfranchise subsets of the population sound in paternalism: some citizens simply cannot be trusted to exercise the vote responsibly. Frederick Douglas quipped that depriving some citizens of suffrage "affirm[s their] incapacity to form intelligent judgments respecting public measures," thereby "brand[ing them] with the stigma of inferiority."[18] In opposition to the Nineteenth Amendment, anti-suffragists "routinely emphasized that women were especially suited and exclusively destined for the work of family maintenance."[19] Anti-suffragists contended that "women lacked the capacity for managing public affairs, and the very effort would distract them from their obligations as wives and mothers."[20] This view reflected the views attributed to many of the founding fathers of the Constitution, who believed that "only citizens who had the requisite degree of independence to vote their own judgment, rather than the interests of those to whom they might be beholden, had the capacity to exercise the franchise responsibly."[21]

The Nineteenth Amendment, and the suffragist movement supporting it, represented a profound reaction against such thinking. Suffragists challenged the idea that male voters in the household could sufficiently protect the interests of the women in their homes. That idea

18. Frederick Douglass, *What Negroes Want*, *in* 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 159–60 (Phillip S. Foner ed., 1955) (quoted in Eli L. Levine, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 195 (2009)).

19. Siegel, *supra* note 17 (citations omitted).

20. *Id.*

21. *Id.* at 980.

grew from the legal tradition of coverture, under which a married women's rights were subsumed by her husband's, making them a single person in the eyes of the law.[22] Suffragists rejected the fiction of coverture, arguing instead that "women had a right to direct relations with the state, independent of their mate or brood."[23] According to suffragists, "men could not and did not represent women. Suffragists drove this point home by pointing to women's subordination in the family and the market and asserting that the record uniformly demonstrated men's incapacity to represent fully and fairly women's interests."[24]

Suffragists, especially in the movement's early years, also emphasized the fundamentality of the right to vote for all citizens. Elizabeth Cady Stanton's 1848 "Declaration of Sentiments and Resolutions" expressed "as its central idea protest against the denial to women of 'this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, . . . oppressed on all sides.'"[25] Some twenty years later, Stanton elaborated that "suffrage is a natural right—as necessary to man under government, for the protection of person and property, as are air and motion to life," and thus suffragists would "point out the tyranny of every qualification to the free exercise of this sacred right."[26] In her 1872 trial for attempting to vote, Susan B. Anthony testified that "'[y]our denial of my citizen's right to vote is the denial of my consent as one of the governed, the denial of my right of representation as one of the taxed . . . therefore the denial of my sacred right to life, liberty, and property.'"[27] Suffragists thus exposed the factual inaccuracy and moral incoherence of anti-suffragist's paternalistic arguments.[28]

22. As Justice Black quipped, the rule of coverture "worked out in reality to mean that though the husband and wife are one, the one is the husband." United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).

23. Siegel, *supra* note 17, at 987 (citations omitted).

24. *Id.* at 991.

25. ELLEN CARROL DUBOIS, WOMAN SUFFRAGE AND WOMEN'S RIGHTS 85 (1988).

26. *Id.* at 91 (citing HISTORY OF WOMAN SUFFRAGE, vol. II: 1861–1878, 185 (Elizabeth Cady Stanton, Susan B. Anthony, and Matilda Joslyn Gage, eds., 1881)).

27. Levine, *supra* note 18, at 194 (quoting JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 3 (2006) (quoting The Trial of Susan B. Anthony, *in* THE STRUGGLE FOR WOMEN'S RIGHTS: THEORETICAL AND HISTORICAL SOURCES 133 (George Klosko & Margaret G. Klosko eds., 1999))).

28. Not all suffragist arguments emphasized the commonality of men and woman and the universality of the right to vote. For instance, as Ellen Carol DuBois has noted, in the wake of the Fifteenth Amendment's passage suffragists began to argue that women should have to vote to ensure that a distinctly female perspective on morality and politics entered the public sphere. *See* DUBOIS, *supra* note 25, at 94–98.

III. THE FELONY DISENFRANCHISEMENT DEBATE

The history of felony disenfranchisement has many parallels to the history of female disenfranchisement. Felony disenfranchisement has its roots in ancient Greek and Roman society, where criminals were denied the right to vote, along with many other civil rights and privileges.[29] Felony disenfranchisement took hold in colonial America as well, where colonists precluded former criminals from voting,[30] though often only for "certain offenses related to voting or considered egregious violations of the moral code."[31] In the first 50 years after independence, "eleven states eliminated voting rights for specified crimes thought to have some relationship to the electoral process."[32] Over time, however, more and more states passed disenfranchisement laws applicable to all felons, irrespective of the nature of the underlying crime. "By 1868, twenty-nine states enshrined some language into their constitution depriving felons of voting rights."[33] Southern states in particular "tailored their disenfranchisement laws in order to bar black male voters, targeting those offenses believed to be committed most frequently by the black population."[34]

Modern arguments in favor of felony disenfranchisement also take on a paternalistic tone. They offer an added avenue, aside from incarceration itself, through which lawmakers can prevent a selected group of individuals from harming society—though the alleged harm, the election of undesirable political leaders, is not itself an illegal result.[35] For example, such arguments featured prominently in the opposition to a 2002 Senate bill that would have secured federal voting rights for ex-felons. Senator Mitch McConnell "warned of terrorists, rapists, and murderers voting, and of jailhouse blocs banding together to oust sheriffs and tough-on-crime government officials."[36] Then-Senator Jeff Sessions argued "that a person who violates serious laws of a State or the Federal

29. Levine, *supra* note 18, at 196–97.

30. *Id.* at 197 (summarizing criminal disenfranchisement laws in the colonies of Virginia, Maryland, Plymouth, Connecticut, and Rhode Island).

31. Chung, *supra* note 9, at 3.

32. Levine, *supra* note 18, at 197–98. However, Levine also notes that "many states also disenfranchised for other crimes not related to the electoral process."

33. *Id.* at 198.

34. Chung, *supra* note 9, at 3.

35. "Outside of incarceration, disenfranchisement can be seen as a supplementary form of incapacitation; by preventing criminals from participating in the democratic process disenfranchisement laws stopped criminals from further harming society." Levine, *supra* note 18, at 215.

36. *Id.* at 212.

Government forfeits their right to participate in those activities of that government [because] their judgement and character is such that they ought not to be making decisions on the most important issues facing our country."[37] Senator George Allen also took to the floor to argue against the amendment, which would allow a former felon to "feel like a full-fledged citizen again," on State's rights grounds.[38]

Similar arguments arose regarding Florida's recent ballot proposal, Amendment 4, which was to restore the right to vote for most Floridians with prior felony convictions. Under Amendment 4, those convicted of a felony other than murder or a sexual offense would have their voting rights "restored upon completion of all terms of sentence including parole or probation."[39] In the public debate about Amendment 4, critics again suggesting that former felons could not, in general, be trusted to responsibly exercise their voting rights. Some argued that felons should only be permitted the right to vote once they have proved to be a "valuable member of society" worthy of the public's trust to exercise that right responsibly.[40]

In making such claims, critics of Amendment 4 contended that a specific group of citizens—in this case, convicted felons—cannot responsibly exercise the franchise. But because voting poorly is not itself illegal, the argument also requires an accusation that convicted felons are, in some sense, lesser. Supporters of felony disenfranchisement thus suggest that until proven otherwise, felons are not full-fledged citizens permitted to exercise their full panoply of civil rights. While society might be prepared to tolerate the poor political choices of such full-fledged citizens, it cannot (and should not) withstand the political mistakes likely to be made by convicted felons.

In November of 2018, Florida's Amendment 4 by referendum passed with a 63% majority vote.[41] Proponents hailed the Amendment's passage as a landmark moment for voting rights; the estimated 1.4 million Floridians set to gain renewed access to the ballot box under the Amendment would represent the largest expansion in the franchise since

37. 148 CONG. REC. S 802 (daily ed. Feb. 14, 2002).

38. Levine, *supra* note 18, at 212 (citing 148 CONG. REC. S 802 (daily ed. Feb. 14, 2002)).

39. FLA. CONST. amend. 4.

40. James Call, *Amendment 4: Restoring felons' voting rights is hardball politics or the right thing to do*, TALLAHASSEE DEMOCRAT (Oct. 30, 2018), https://www.tallahassee.com/story/news/2018/10/30/amendment-4-florida-2018-debate-hardball-politics-versus-right-do/1822919002/ [https://perma.cc/SZ99-VYLL] (quoting lobbyist Barney Bishop).

41. Alejandro De La Garza, *"Our Voice Will Count." Former Felon Praises Florida Passing Amendment 4, Which Will Restore Voting Rights to 1.4 Million People*, TIME (Nov. 7, 2018), https://time.com/5447051/florida-amendment-4-felon-voting/ [https://perma.cc/M2QM-RUPD].

the passage of the Voting Rights Act.[42] More than 400,000 of those whose voting rights the Amendment would restore are African American.[43] Howard Simon, the executive director of the ACLU of Florida, remarked that Amendment 4's passage meant "[w]e will no longer have second class citizens" in the state of Florida.[44]

Despite the optimism at the time of its passage, Amendment 4's future today is clouded. After Amendment 4 passed by referendum, Republican lawmakers in both houses of the Florida Legislature passed a bill which "specified that a felony sentence is not complete, and therefore a felon not eligible to vote, until all fines, fees and restitution are paid in full."[45] Because many former felons struggle to find stable employment and steady income after their release, the legislation would prevent a substantial portion of them from claiming the renewed voting rights that Amendment 4 appeared to promise.[46] Some estimates suggest the new legislation may preclude as many as half of those potentially granted voting rights under Amendment 4 from regaining the franchise.[47]

Supporters of the legislation claimed that it was a necessary clarification to Amendment 4, which did not define what, if any, financial obligations felons must meet to "complet[e] all terms of sentence" and trigger the restoration of voting rights.[48] But in ongoing litigation in several Florida courts, Amendment 4's proponents claim that this

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42. *Id.*

43. German Lopez, *Florida Votes to Restore Ex-Felon Voting Rights with Amendment 4*, VOX (Nov. 7, 2018), https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results [https://perma.cc/D38F-SV2X].

44. Garza, *supra* note 41.

45. Sue Carlton, *The Florida governor's bold move on Amendment 4. Or is that against Amendment 4?*, TAMPA BAY TIMES (Aug. 13, 2019), https://www.tampabay.com/opinion/columns/the-florida-governors-bold-move-on-amendment-4-or-is-that-against-amendment-4-20190814/ [https://perma.cc/U789-LXAM].

46. *Id.*

47. "Estimates have suggested that more than half a million people will be affected by the new financial obligation-paying requirement, and many will need to wait years to finish payments before they can vote. Others may never be able to clear their debts, meaning that they will be permanently disenfranchised." P.R. Lockhart, *Florida faces an intense legal battle over restoring former felons' voting rights*, VOX (July 2, 2019), https://www.vox.com/policy-and-politics/2019/7/2/20677955/amendment-4-florida-felon-voting-rights-lawsuits-fines-fees [https://perma.cc/7L8A-4JB5].

48. "'If it's not defined, we leave it to the judge, the government to discriminate on a case-by-case basis and I think that's a recipe for rampant discrimination,' said Rep. James Grant, a Tampa Republican, who championed the bill and is the chairman of the House Criminal Justice Committee." Tyler Kendall, *Felons in Florida Won Back Their Right to Vote. Now a New Bill Might Limit Who Can Cast a Ballot*, CBS NEWS (May 23, 2019), https://www.cbsnews.com/news/florida-felons-won-back-right-to-vote-new-bill-might-limit-who-can-cast-ballot-2019-05-23/ [https://perma.cc/7WNE-Y9MV].

additional legislation is merely an effort to put another roadblock in front of felons seeking rehabilitation and reassimilation in society. According to the lawsuits, the Florida Legislature has unconstitutionally disenfranchised poor and minority citizens with felony records, denying them the rights restored by Amendment 4.[49] One lawsuit filed by the ACLU, the NAACP Legal Defense and Educational Fund, and the Brennan Center for Justice argues that the new law will create two classes of former felons, allowing only those deemed worthy by their financial wherewithal to exercise their right to vote.[50] These lawsuits thus equate the new legislation to a modern poll tax, under which citizens of lower socio-economic classes are prohibited from exercising their voting rights.[51]

IV. PARALLEL RETORTS

If these arguments sound familiar, they should. The debate over legislation to limit Amendment 4's reach is yet another modern echo of the debates around women's suffrage. Politicians acting to limit felon voting rights use a familiar divide-and-conquer strategy, suggesting that a traditionally subordinate group of citizens is not entitled to automatic trust to exercise their voting rights responsibly. In contrast, those in favor of restoring felon's voting rights note that former felons stand ready and willing to participate in the public political debate, where they might exercise that power to ensure that under-represented groups have their voices heard in the modern political discourse.

The same strands of argument arose when opponents of the Nineteenth Amendment subtly denigrated female voters as incapable of voting responsibly, or when anti-suffragists suggested that female citizens belong to a subordinate social class whose poor political choices would be an unnecessary headwind for society at large. These arguments similarly proceeded in two parts. First, they distinguished a group of citizens as lesser and likely to exercise the vote in irresponsible ways. Second, they maintained that those "poor" voting choices can and should

49. Lockhart, *supra* note 47 ("This law will disproportionately impact black Floridians with a felony conviction, who face the intersecting barriers of accessing jobs in a state with long-standing wealth and employment disparities," Leah Aden, deputy director of litigation for the NAACP Legal Defense and Educational Fund, one of several groups involved in the ACLU lawsuit, explained in a statement).

50. "The law 'will have a massive disenfranchising effect, and result in sustained, and likely permanent, disenfranchisement for individuals without means,' the lawsuit notes. It adds that the Florida law 'creates two classes of returning citizens: those who are wealthy enough to vote and those who cannot afford to.'" *Id.*

51. *Id.*

be disregarded by the rest of society. Just as Anthony predicted during her trial, "'if we once establish the false principle, that United States citizenship does not carry with it the right to vote in every state in this Union, there is no end to the petty freaks and cunning devices that will be resorted to, to exclude one and another class of citizens from the right of suffrage.'"[52]

I do not claim that felony disenfranchisement laws are unconstitutional. Indeed, the Supreme Court has rejected arguments that the denial of the franchise to felons is an Equal Protection violation, relying in part upon language in Section 2 of the 14th Amendment that seems to permit disenfranchisement "for participation in rebellion, or other crime."[53] But the history of debate over women's suffrage sheds light upon the flaws in felony disenfranchisement legislation, both as a matter of public policy and constitutional rhetoric. Many of the same retorts used to defeat paternalistic anti-suffragist arguments and usher in the 19th Amendment can be similarly deployed to undermine paternalistic arguments to disenfranchise felons. Put another way, the 19th Amendment's history can be read synthetically, as part of a dynamic history that helps ground voting rights claims filed on behalf of the disenfranchised. Potential voting rights claimants, both in the felony disenfranchisement space and others, can make their arguments more forceful and add the weight of history to their claims. What follows is a demonstration of how that argument might function in cases like those proceeding against the Florida Legislature's reaction to Amendment 4, with a focus on two particularly powerful retorts against those who suggest felons should not be trusted with the franchise.

A. Adding Valuable Voices to Our Political Discourse

First, the history of the 19th Amendment explains why higher-class citizens cannot paternalistically suggest that some groups are inherently incapable of bearing the responsibility that the fundamental right to vote entails. That divisive strategy is premised upon a claimed distinction between the responsible votes of some groups and the irresponsible (and likely incorrect) votes of others. But American history shows that distinction to be false.

Our constitutional tradition, informed by the suffragist movement, demonstrates that there is no cognizable difference between "good" and

52. DUBOIS, *supra* note 25, at 105 (quoting United States v. Anthony, 24 F. Cas. (C.C.N.D.N.Y. 1873) (No. 14, 459)).

53. U.S. CONST. amend. XIV, § 2.; Richardson v. Ramirez, 418 U.S. 24, 41–56 (1974).

"bad" votes, or "good" and "bad" voters. Suggestions that some potential new votes will be misguided, both in the past and present, are a thinly-veiled attempt to ensure the status quo by those who gain the most by it through their political positions and influence.[54] Their expressed concern that these new votes may undermine mainstream beliefs is based upon their fear that a change in such beliefs will mean changes to their current position of political power. But our constitutional tradition often requires such changes, first expressed and defended in our political discourse and then definitively established at the ballot box. Our constitutional tradition, of which the Nineteenth Amendment is a vibrant component, established that the right to vote is a fundamental one for all citizens,[55] irrespective of how they might exercise it, for the very reason that different citizens might vote in valuably different ways.

The Nineteenth Amendment's history also illustrates how the supposedly "bad" votes readily discredited by the politically powerful are often the product of important and distinct views that are otherwise absent from our political discourse. Suffragists rightly contended that women could add ideas to the public debate that men themselves might not, simply by virtue of their unique, and uniquely powerful, experiences and abilities. So too might former felons be able to add to present-day political discussion, bringing ideas and perspectives that the political powerful seem otherwise likely to overlook.

This is especially true at a moment when the criminal justice reform movement holds some bipartisan appeal, either as a purely moral matter or as an economic concern for the efficient use of public resources to achieve just and equitable results. Though some agreements have been possible—such as alterations to disparate sentencing laws for drug offenses involving crack cocaine[56] or sentencing reforms aimed to reduce recidivism rates amongst former inmates[57]—the political will to find additional areas of agreement for further reform is dwindling. Allowing felons to participate in that debate holds great promise for breaking the logjam. No group would be in a better position to highlight the criminal justice system's discriminatory flaws and immoral chokepoints than those who have found themselves inside that system for significant portions of their lives.

54. 148 CONG. REC. S 802 (daily ed. Feb. 14, 2002).

55. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Reynolds v. Sims, 377 U.S. 533, 562 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

56. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220 (2010).

57. *See* First Step Act of 2018, Pub. L. No. 115-319 (2018).

B. Rejecting Efforts to Hinder Expansion of Voting Rights to Traditionally Subordinated Groups

Second, our history culminating in the Nineteenth Amendment itself forcefully rejects any legal regime that unnecessarily hinders the expansion of voting rights to traditionally subordinated groups. Those groups include the very citizens most in need of a political voice to protect their civil rights and pursuit of happiness. And just as that need was clear for female voters during the suffragist movement, it is clear today for former felons disenfranchised across the country.

Felony disenfranchisement laws are particularly alarming, in light of the Nineteenth Amendment's history, given their potential deleterious effect upon female voting rights. Felony disenfranchisement laws are a rapidly-growing challenge facing low-income, minority women through the United States. Thus, these laws create widespread disenfranchisement of female felons that is offensive to the tradition the Nineteenth Amendment represents. That is especially true given the reality that, in most cases of female felon disenfranchisement, the loss of voting rights is a consequence suffered for a past indiscretion which was entirely unrelated to politics or the electoral process. Such an unnecessary reduction in female voting rights is a result that stands as an offense against the historical struggle that preceded the Nineteenth Amendment's enactment.

V. CONCLUSION

Though courts have not traditionally read the Nineteenth Amendment to have normative implications for areas of law outside of voting,[58] its implications for voting rights itself can still be tapped, especially in today's political debate about contractions in voting rights. In Reva Seigal's words, "[w]e invoke the aspirations, values, choices, commitments, obligations, struggles, errors, injuries, wrongs, and wisdom of past generations of Americans as we make claims about the Constitution, and this appeal to the experience and concerns of past generations of Americans shapes the claims we make on each other about the Constitution's meaning in the present."[59] Today, the Nineteenth

58. "[J]udicial acknowledgment of women's enfranchisement as a break with traditional understandings of the family was short-lived. Soon after ratification, the judiciary moved to repress the structural significance of women's enfranchisement, by reading the Nineteenth Amendment as a rule concerning voting that had no normative significance for matters other than the franchise." Siegel, *supra* note 17, at 1012.

59. *Id.* at 1032.

Amendment's significance should be celebrated, not downplayed. And in the course of that celebration, we should recognize the value that the history of the movement for women's suffrage has for legal regimes that restrict voting rights for disfavored groups, including the millions of former felons across the country who have been wrongfully disenfranchised.