

# The Modern Suffrage Movement: Why Iowa Needs to Grant Felons the Right to Vote

Taylor A. Herr\*

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\* Graduating from the University of Iowa College of Law in May 2020. Graduated from the University of Northern Iowa in 2017 with a Bachelor's Degree in Criminology and Psychology. I want to thank my mom for her support. I also want to thank my fellow board members for their edits and Dean Emily Hughes for her help in developing the note topic.

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## I. INTRODUCTION

Felon voting rights has become a “major civil rights struggle” in the twenty-first century.<sup>1</sup> In our democracy, voting is “a basic and fundamental right of citizenship,” and those who have served their time and paid their dues to the state and to society should not be barred from the polls.<sup>2</sup> Iowa operates under one of the strictest felony disenfranchisement policies in the United States.<sup>3</sup> Iowa is one of only two states that permanently bars all felons from voting.<sup>4</sup> There are only two ways that a felon in Iowa can have his or her voting rights restored.<sup>5</sup> The first method requires the Governor to use his or her executive clemency power to grant an individual pardon specifically for restoring voting rights.<sup>6</sup> The second method is if the Governor signs

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<sup>1</sup> ELIZABETH A. HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* 55 (2006).

<sup>2</sup> *Griffin v. Pate*, 884 N.W.2d 182, 184 (Iowa 2016) (citing *Chiodo v. Schultz*, 846 N.W.2d 845, 848 (Iowa 2014)).

<sup>3</sup> See *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/sites/default/files/2019-11/Criminal%20Disenfranchisement%20Laws%20Map%2011.18.19.pdf> [https://perma.cc/EFA4-D83E] (last updated Nov. 18, 2019) [hereinafter *Criminal Disenfranchisement Laws*] (depicting a graph of the United States, categorized by state felony disenfranchisement policies).

<sup>4</sup> See *id.*

<sup>5</sup> *Voting Rights Restoration Efforts in Iowa*, BRENNAN CTR. FOR JUST. (Nov. 7, 2018), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-iowa> [https://perma.cc/2HBC-TUTB].

<sup>6</sup> *Id.*

an executive order granting some or all felons in the state their voting rights.<sup>7</sup> Other states operate more lenient policies, which impose restrictions for only some felons, have some form of automatic restoration of voting rights for felons at some point after the felons are released from prison, or do not have any restrictions of voting rights for felons.<sup>8</sup> Iowa denies felons a basic and fundamental right of citizenship by requiring felons to affirmatively ask for their voting rights after paying their dues and being subject to the Governor's leniency.

In *Griffin v. Pate*, the Iowa Supreme Court interpreted article 2, section 5 of the Iowa Constitution, which explores voting rights, as upholding the constitutionality of Iowa's felony disenfranchisement under the state Constitution.<sup>9</sup> The Iowa General Assembly should adopt a constitutional amendment in line with the Brennan Center for Justice's recommendations to change "convicted of" to "serving a prison sentence for" in article 2, section 5 of the Iowa Constitution,<sup>10</sup> or should adopt a constitutional amendment eliminating the words "convicted of an infamous felony" from article 2, section 5 of the Iowa Constitution.<sup>11</sup> This would impact felons by no longer depriving them of his or her voting rights due to a felony conviction. Additionally, by allowing the Governor, a political official, to have control over the enfranchisement or disenfranchisement of felons, Iowa suffers from inconsistent laws, and felons cannot properly predict what their rights will be upon completion of their sentence. Amending the Iowa Constitution would remove the necessity of relying on the executive branch to determine felons' rights.

## II. BACKGROUND

Felony disenfranchisement has a long history around the world and in the United States.<sup>12</sup> Felony disenfranchisement has roots in Athens and Rome, and later continued to grow in the United States, particularly after the Civil War, until it began to lose momentum during the move towards

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<sup>7</sup> *Id.*

<sup>8</sup> See *Criminal Disenfranchisement Laws*, *supra* note 3 (depicting a graph of the United States, categorized by state felony disenfranchisement policies, with an explanation of the policy for each state).

<sup>9</sup> *Griffin v. Pate*, 884 N.W.2d 182, 205 (Iowa 2016).

<sup>10</sup> Memorandum from Catherine Weiss & Jennifer Weiser, Brennan Ctr. for Justice, to the Comm'n on Presidential Nomination Timing and Scheduling 2 (May 11, 2005) [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_9493.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_9493.pdf) [<https://perma.cc/GG5N-ANZT>] [hereinafter Brennan Center Memorandum].

<sup>11</sup> IOWA CONST. art. II, § 5.

<sup>12</sup> HULL, *supra* note 1, at 16–23.

rehabilitation in the 1950s.<sup>13</sup> Iowa itself has a long, everchanging history of felony disenfranchisement.<sup>14</sup> Between the state Constitution, executive orders, court cases, and proposed legislation, Iowa felony disenfranchisement law has undergone substantial change, yet the change has not resulted in the same progressive voting policies as the rest of the country.<sup>15</sup> This has led Iowa to currently have some of the country's strictest laws that disenfranchise felons.

#### A. *Felony Disenfranchisement in Early World History*

Felony disenfranchisement stems from the ideas of citizenship and “status honor,” which both include voting rights.<sup>16</sup> Those who wish to belong to a status group must maintain a specific lifestyle.<sup>17</sup> A status group, unlike an economic class, is determined by a “social estimation of honor,” positive or negative.<sup>18</sup> In early Republican governments, such as Rome and Athens, citizenship was not the same as citizenship today; it was not granted upon birth by the country, but was more of a social status through descent.<sup>19</sup> “The *practice* of citizenship as political participation reflected collective agreement among the select few who enjoyed the status of citizenship as defined by the laws of their particular polity about a particular set of values.”<sup>20</sup> For example, in ancient Greece, the concept of *atimia* was the loss of citizenship rights due to the commission of a crime and voting was considered a citizenship right.<sup>21</sup> One way to become an *atimos* (one who had *atimia* imposed upon them) was to violate the laws that citizens were held to.<sup>22</sup> After the fall of the Roman empire, using disenfranchisement as a penalty spread throughout Europe.<sup>23</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> *Voting Rights Restoration Efforts in Iowa*, *supra* note 5.

<sup>15</sup> *Id.* See also H.R.J. Res. 2007, 87th Gen. Assemb., 2018 Sess. (Iowa 2018) (proposing a Constitutional amendment regarding felon voting rights).

<sup>16</sup> KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 11–12 (2d ed. 2013).

<sup>17</sup> *Id.* at 13.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 15.

<sup>20</sup> *Id.* at 14.

<sup>21</sup> *Id.* at 23.

<sup>22</sup> PETTUS, *supra* note 16, at 23.

<sup>23</sup> HULL, *supra* note 1, at 16.

## B. History of Felony Disenfranchisement in the United States

The Founding Fathers relied heavily on English law and customs when creating the American judicial system.<sup>24</sup> At the time of the United States' founding, English law called for "civil death" after the commission of a crime—i.e. "imposition of civil disabilities and forfeiture of property."<sup>25</sup> However, after the American Revolution and throughout the second half of the twentieth century, all laws regarding civil death were abandoned in the United States, except disenfranchisement.<sup>26</sup> In 1792, Kentucky became the first state to impose felony disenfranchisement laws through its state constitution.<sup>27</sup> By 1821, eleven states had disenfranchised those convicted of infamous crimes, and by the beginning of the Civil War, more than two dozen states had disenfranchised individuals convicted of serious crimes.<sup>28</sup> However, because only wealthy white men were allowed to vote in the United States at the country's founding, only a small number of those individuals who were convicted of a crime were affected by the disenfranchisement.<sup>29</sup>

After the Civil War, state legislatures began enacting voting laws based on racial motivation, since Congress ratified the Fifteenth Amendment in 1870 that gave African American men the right to vote.<sup>30</sup> Constitutional conventions in southern states created voting requirements, such as literacy tests, aimed at discriminating against African American voters.<sup>31</sup> These state conventions also drafted disenfranchisement laws in a manner to get around the Fourteenth Amendment, which "permits states to withdraw suffrage rights from anyone engaged in 'rebellion or other crimes . . .'"<sup>32</sup> The Fourteenth Amendment of the United States Constitution is the reason the Supreme Court has upheld felony disenfranchisement laws.<sup>33</sup>

Southern states abided by the Fourteenth Amendment by creating facially non-discriminatory laws, criminalizing a variety of behaviors that

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<sup>24</sup> See PETTUS, *supra* note 16, at 191–92 n.41.

<sup>25</sup> HULL, *supra* note 1, at 17.

<sup>26</sup> *Id.*

<sup>27</sup> KY. CONST. art. 8, § 2 (1792).

<sup>28</sup> ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 63 (2000).

<sup>29</sup> HULL, *supra* note 1, at 17.

<sup>30</sup> *Id.* at 18.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 18–19.

<sup>33</sup> Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

African Americans reportedly engaged in more than whites, and then permanently depriving those convicted of these crimes from voting.<sup>34</sup> For example, whites were reportedly more likely to commit rape or murder, while African Americans were more likely to engage in miscegenation (interracial marriage), bribery, or domestic violence.<sup>35</sup> In Mississippi, one could retain his rights after a rape conviction, but not after marrying someone of the opposite race.<sup>36</sup> In South Carolina, one could have his rights restored after a murder conviction, but not after thievery or adultery.<sup>37</sup> In the southern states, “blacks could also be denied access to the polls if they were jobless, ‘vagrant,’ if they used ‘insulting gestures or language,’ or ‘preach[ed] the Gospel without a license.’”<sup>38</sup>

Northern states also imposed disenfranchisement laws on African Americans.<sup>39</sup> Originally, states would extend “the vote only to free men and property holders,” such as in New York’s first constitution enacted in 1777.<sup>40</sup> By 1821, after some African American men had become property owners, New York amended their constitution to strip anyone convicted of an “infamous crime” of their voting rights.<sup>41</sup> The “infamous crime” language was “periodically renewed by legislators [who were] well aware that blacks were thirteen times more likely than whites to be convicted of offenses under this rubric.”<sup>42</sup> Iowa has this exact language of “infamous crime” in the state constitution.<sup>43</sup> Most states outside the South enacted some form of disenfranchisement laws for crimes that were motivated by keeping individuals without moral integrity away from the election process, rather than intentionally selecting crimes with racial distinction.<sup>44</sup>

### *C. Movement to End Felony Disenfranchisement*

By the 1950s, criminal justice scholars and practitioners began emphasizing the importance of rehabilitation to reduce recidivism rates of felons,

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<sup>34</sup> HULL, *supra* note 1, at 19.

<sup>35</sup> *Id.* at 19–20.

<sup>36</sup> *Id.* at 19.

<sup>37</sup> *Id.* at 20.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 21–22.

<sup>40</sup> HULL, *supra* note 1, at 21.

<sup>41</sup> *Id.* at 19.

<sup>42</sup> *Id.* at 21.

<sup>43</sup> IOWA CONST. art. II, § 5.

<sup>44</sup> HULL, *supra* note 1, at 21.

and they argued that felony disenfranchisement was harmful to this goal.<sup>45</sup> Rehabilitation is one of four goals of the criminal justice system, along with deterrence, retribution, and incapacitation.<sup>46</sup> Criminal justice reform began to take hold in the states in the 1950s and 60s, with legislation focusing on rehabilitation, changing mandatory sentencing, adding alternatives to incarceration, and eliminating felon disenfranchisement.<sup>47</sup> Studies have shown that rehabilitation, compared to other goals of the criminal justice system, is an important influencer on recidivism rates.<sup>48</sup> Felony disenfranchisement is a form of rehabilitation that influences recidivism rates<sup>49</sup> by increasing civic engagement and reducing barriers to reentry into society.<sup>50</sup>

However, this reform was short-lived, due to the “get-tough-on-crime” mentality that took shape in the 1970s.<sup>51</sup> Conservatism once again became popular in the criminal justice system, replacing the desire for rehabilitation with policies more directed at “deterrence, retribution, and collateral penalties such as disenfranchisement.”<sup>52</sup> The idea of ending felony disenfranchisement came back into the spotlight after the controversial 2000 Presidential election, where George W. Bush won Florida’s electoral votes, a state with a permanent ban on felon voting at the time, based on a slim popular vote in the state.<sup>53</sup> Florida’s electoral votes eventually catapulted Bush into the White House in a very tight race.<sup>54</sup>

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<sup>45</sup> *Id.* at 22.

<sup>46</sup> Doris Layton Mackenzie, *Sentencing and Corrections in the 21st Century: Setting the Stage for the Future*, NAT’L CRIM. JUST. REFERENCE Ctr. 1 (2001) (unpublished report), <https://www.ncjrs.gov/pdffiles1/nij/grants/189089.pdf> [<https://perma.cc/3F4K-867G>].

<sup>47</sup> HULL, *supra* note 1, at 22.

<sup>48</sup> Mackenzie, *supra* note 46, at 25. See also Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 204–05 (2004) [hereinafter *Voting and Subsequent Crime and Arrest*] (explaining the results of a study showing that rehabilitation influences recidivism rates).

<sup>49</sup> See *Voting and Subsequent Crime and Arrest*, *supra* note 48; Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L. J. 407, 422 (2012).

<sup>50</sup> See JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 155–57 (2006) [hereinafter LOCKED OUT].

<sup>51</sup> HULL, *supra* note 1, at 22.

<sup>52</sup> *Id.*

<sup>53</sup> See *id.* at 55. Florida disenfranchises about 887,000 felons. *Id.* at 130. The margin in *Bush v. Gore* was 1784 votes. *Bush v. Gore*, 531 U.S. 98, 101–02 (2000). The election of *Bush v. Gore* was so close that ultimately the Supreme Court had to weigh in on the process of recounting votes in Florida. *Id.* at 103. The Court held that the recount ordered by the Florida Supreme Court was unconstitutional because it violated equal protection and due process. *Id.* at 110–11.

<sup>54</sup> HULL, *supra* note 1, at 1, 130.

At the time of the 2000 election, “more than 2 percent of the voting-age population [in the country was] barred from the polls.”<sup>55</sup> As of 2016, 2.5 percent of the voting-age population in the country, about 6.1 million people, are barred from the polls, although the amount in each state varies.<sup>56</sup> This number has increased, despite the change that began after the 2000 election, because, since 2010, “some states have significantly curtailed restoration efforts.”<sup>57</sup> The total number of disenfranchised individuals has significantly increased over past decades, as only 1.17 million people were disenfranchised in 1976 while 3.34 million were disenfranchised in 1996.<sup>58</sup> Today, with New York’s recent executive order granting around 35,000 people voting rights and Florida’s constitutional amendment granting around 1.5 million people voting rights, the number of disenfranchised individuals will be smaller.<sup>59</sup> Of the more than six million people disenfranchised in 2016, 4.7 million of them were either on probation, parole, or had completed their sentence, but lived in one of thirty-four states at the time that did not let felons vote while on probation, parole, or even after completion of their sentence.<sup>60</sup> In recent years, states have faced lawsuits regarding their felony disenfranchisement laws,<sup>61</sup> many non-profits and other organizations are

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<sup>55</sup> *Id.* at 1.

<sup>56</sup> CHRISTOPHER UGGEN ET AL., SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 3 (2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/#II.%20Disenfranchisement%20in%202016> [<https://perma.cc/6N8L-6TKC>].

<sup>57</sup> *Id.* at 13.

<sup>58</sup> *Id.* at 3.

<sup>59</sup> Vivian Wang, *Cuomo Plans to Restore Voting Rights to Paroled Felons*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/nyregion/felons-pardon-voting-rights-cuomo.html> [<https://perma.cc/3HSR-4BH4>]; Nicole Chavez, *Florida Restores Voting Rights to More than 1 Million Felons*, CNNPOLITICS (Nov. 7, 2018, 4:07 AM), <https://www.cnn.com/2018/11/07/politics/florida-felons-voting-rights/index.html> [<https://perma.cc/7YAE-T6PS>].

<sup>60</sup> MORGAN MCLEOD, SENTENCING PROJECT, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORMS 3 (2018), <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms/> [<https://perma.cc/RJ4D-TSHY>].

<sup>61</sup> *See, e.g.*, *Griffin v. Pate*, 884 N.W.2d 182, 183 (Iowa 2016); *Fischer v. Governor*, 749 A.2d 321, 323 (N.H. 2000); *N.J. State Conference-NAACP v. Harvey*, 885 A.2d 445, 446 (N.J. 2005); *Madison v. State*, 163 P.3d 757, 761 (Wash. 2007) (en banc).



dedicated to the issue,<sup>62</sup> and legislation has been proposed in various states.<sup>63</sup> Felony disenfranchisement has become “*the* ‘major civil rights struggle’ of the new millennium.”<sup>64</sup>

#### D. Felony Disenfranchisement in the Modern United States

Felony disenfranchisement laws differ from state to state.<sup>65</sup> Some states, such as Vermont and Maine, provide complete voting rights to felons, even to felons who are currently incarcerated.<sup>66</sup> Iowa is the only state that does not allow for any felon voting, unless the felon goes through some sort of restoration process.<sup>67</sup> This restoration process differs by state, varying in scope and eligibility requirements.<sup>68</sup> In Iowa, a felon who wishes to restore their voting rights must request an individual rights restoration through the Governor’s Office and the Governor chooses to grant the restoration.<sup>69</sup> The states also all vary in how their felony disenfranchisement laws have developed.<sup>70</sup>

The United States Supreme Court has also taken the position that state felony disenfranchisement laws do not violate the Equal Protections Clause

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<sup>62</sup> HULL, *supra* note 1, at 58–62. However, Kentucky’s newly elected Governor Beshear restored voting rights to over 100,000 felons on December 12, 2019, through Executive Order. Dareh Gregorian, *Kentucky Gov. Beshear to Restore Voting Rights to Over 100,000 Former Felons*, NBC NEWS (Dec. 10, 2019), [https://www.nbcnews.com/politics/politics-news/kentucky-gov-beshear-restore-voting-rights-over-100-000-former-n1099356?cid=sm\\_npd\\_nn\\_tw\\_np&fbclid=IwAR20L3RAKCCQ0kcJMOorc-DTefFOpTa9gDBX-RS-vovJxRXLCA6TyCNiagTM](https://www.nbcnews.com/politics/politics-news/kentucky-gov-beshear-restore-voting-rights-over-100-000-former-n1099356?cid=sm_npd_nn_tw_np&fbclid=IwAR20L3RAKCCQ0kcJMOorc-DTefFOpTa9gDBX-RS-vovJxRXLCA6TyCNiagTM) [https://perma.cc/9CVV-XBLP].

<sup>63</sup> See, e.g., S.B. 3052, 29th Leg., Reg. Sess. (Haw. 2018); H.J. Res. 2007, 87th Gen. Assemb., 2018 Sess. (Iowa 2018).

<sup>64</sup> HULL, *supra* note 1, at 55.

<sup>65</sup> *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>66</sup> *Id.*

<sup>67</sup> UGGEN ET AL., *supra* note 56, at 13. See also Chris Kenning & Jonathan Bullington, *Gov. Andy Beshear Restores Voting Rights to More Than 140,000 Nonviolent Kentucky Felons*, COURIER J. (Dec. 12, 2019), <https://www.courier-journal.com/story/news/politics/ky-governor/2019/12/12/felons-right-vote-kentucky-restores-voting-rights-more-than-100000/4397887002/> [https://perma.cc/8746-U29H] (noting that on December 12, 2019, newly elected Kentucky Governor Andy Beshear signed an executive order granting voting rights to more than 140,000 nonviolent felons in Kentucky. This leaves Iowa as the only state that permanently disenfranchises all felons.).

<sup>68</sup> UGGEN ET AL., *supra* note 56, at 13.

<sup>69</sup> *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>70</sup> JEAN CHUNG, FELONY DISENFRANCHISEMENT: A PRIMER, SENTENCING PROJECT 5 (2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [https://perma.cc/W5QM-YKPC].

of the United States Constitution.<sup>71</sup> As a result, states have been able to adopt a variety of policies concerning voting rights without violating the Constitution. Felony disenfranchisement is a complex area of the law because it is a patchwork across the states, which makes understanding how other states implement their felony disenfranchisement laws important to understanding Iowa's felony disenfranchisement laws.<sup>72</sup>

### 1. Felony Disenfranchisement Across the States

Since states greatly differ in their criminal laws and rates of criminal punishment, felony disenfranchisement laws vary greatly across the country and are constantly evolving.<sup>73</sup> “Since 1997, twenty-three states have amended their felony disenfranchisement policies” to be less restrictive, in an effort to expand voter eligibility.<sup>74</sup> Two states have no restrictions placed on felon voting.<sup>75</sup> Maine and Vermont do not restrict the voting rights of felons in any way, even allowing them to vote while incarcerated.<sup>76</sup> Sixteen states, plus the District of Columbia, only restrict felons from voting while they are incarcerated and felons have full voting rights restored after release from incarceration.<sup>77</sup> Three states do not allow felons to vote while they are in prison or on parole.<sup>78</sup> Eighteen states do not allow felons to vote while they are in prison as well as on either probation or parole.<sup>79</sup> Eleven states restrict felon voting while the felon is in prison, on probation or parole for some felons, while permanently disenfranchising other felons.<sup>80</sup> Only one state—Iowa—permanently takes away a felon's right to vote after conviction of a felony,

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<sup>71</sup> *Richardson v. Ramirez*, 418 U.S. 24, 54–56 (1974).

<sup>72</sup> See *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>73</sup> UGGEN ET AL., *supra* note 56, at 4.

<sup>74</sup> MCLEOD, *supra* note 60, at 3. These twenty-three states are Alabama, California, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* at 4.

<sup>75</sup> *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>76</sup> CHUNG, *supra* note 70, at 1.

<sup>77</sup> *Id.* These sixteen states are Colorado, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. *Id.*

<sup>78</sup> *Id.* These three states are California, Connecticut, and New York. *Id.*

<sup>79</sup> *Id.* These eighteen states are Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Washington, West Virginia, and Wisconsin. *Id.*

<sup>80</sup> *Id.* These eleven states are Alabama, Arizona, Delaware, Florida, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming. *Id.*

even after completion of the felon's sentence, unless the felon seeks, and is granted, an individual rights restoration through the Governor.<sup>81</sup>

Each state has taken a different approach to regulating felon voting: some states have done so through constitutional amendment and legislative reform, and others through executive order.<sup>82</sup> Amending the state constitution through amendment is a common method of legalizing felon voting rights.<sup>83</sup> Florida, Nebraska, Virginia, and California are all examples of states amending their state constitution to enable reinstatement of felon voting rights.<sup>84</sup> Florida's state constitution originally stated that felons were not allowed to vote without a civil rights restoration.<sup>85</sup> However, on November 6, 2018, Florida citizens voted on a ballot referendum to amend their state constitution to allow felons to vote unless an individual has been convicted of murder or a felony sexual offense.<sup>86</sup> Nebraska's constitution required permanent felony disenfranchisement, but in 2005 the Nebraska legislature passed a bill restoring the voting rights of all felons after they complete their entire sentence.<sup>87</sup> Virginia's constitution also barred felons from voting unless provided a civil rights restoration.<sup>88</sup> The Governor's attempt to make an executive order granting all felons the right to vote was struck down in court.<sup>89</sup> The Governor of Virginia now provides a civil rights restoration to each individual felon after they complete their sentence, without requiring individual applications from felons.<sup>90</sup> California's state constitution originally

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<sup>81</sup> See *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>82</sup> See *Felon Voting Rights*, NAT'L CONF. OF ST. LEGISLATURES (Oct. 14, 2019), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/Y23X-QW3B>]; *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>83</sup> See McLEOD, *supra* note 60, at 4–13; Chavez, *supra* note 59.

<sup>84</sup> See, e.g., CAL. CONST. art. 2, § 4; *Voting Rights Restoration Efforts in Nebraska*, BRENNAN CTR. FOR JUST. (May 10, 2017), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-nebraska> [<https://perma.cc/K9ES-6NPE>]; *Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUST. (Apr. 20, 2018), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-virginia> [<https://perma.cc/J4C8-HE2U>]; Chavez, *supra* note 59.

<sup>85</sup> FLA. CONST. art. 6, § 4(a) (“no person convicted of a felony . . . shall be qualified to vote . . . until restoration of civil rights”).

<sup>86</sup> Chavez, *supra* note 59.

<sup>87</sup> NEB. CONST. art. 6, § 2 (“No person shall be qualified to vote . . . who has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights.”). See *Voting Rights Restoration Efforts in Nebraska*, *supra* note 84.

<sup>88</sup> VA. CONST. art. 2, § 1 (“No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.”).

<sup>89</sup> *Voting Rights Restoration Efforts in Virginia*, *supra* note 84.

<sup>90</sup> *Id.*

barred those convicted of an “infamous crime” from voting, but the state amended its constitution to allow felon voting in 1974.<sup>91</sup>

A second method of restoring felon voting rights is through legislative reform (passing legislation), or, in some states, by *failing to pass* legislation.<sup>92</sup> In 2007, Maryland passed legislation eliminating lifetime disenfranchisement for felons, and further legislation in 2016 removed the requirement that the felon complete each portion of their sentence, including fines and fees.<sup>93</sup> Some states have phrases in their constitution saying that the legislature can choose to enact laws prohibiting those convicted of an “infamous crime” from voting.<sup>94</sup> States with this constitutional language include Indiana and New York, and Tennessee allows such language to be implemented through legislation.<sup>95</sup> By failing to enact such legislation, Indiana and New York allow for automatic voting rights restoration to felons after release from prison.<sup>96</sup>

The third approach states have taken is the Governor implementing executive orders to end felon disenfranchisement, but this has not been the most effective method due to how easy it is to overturn an executive order.<sup>97</sup> In 2005, Iowa Governor, Tom Vilsack, passed an executive order restoring voting rights to felons, but in 2011, Iowa Governor, Terry Branstad, repealed the executive order.<sup>98</sup> In 2016, Virginia Governor, Terry McAuliffe, signed an executive order restoring felon voting rights.<sup>99</sup> However, this order was

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<sup>91</sup> See Michael C. Campbell, *Criminal Disenfranchisement Reform in California: A Deviant Case Study*, 9 PUNISHMENT & SOCIETY 177, 177–78 (2007) (stating that California’s state Constitution deprived those convicted of “infamous crimes” from voting until from its creation in 1849 until an amendment in 1974). See also CAL. CONST. art. 2, § 4 (stating that the law “shall provide for the disqualification of electors while . . . imprisoned or on parole for the conviction of a felony”).

<sup>92</sup> *Voting Rights Restoration Efforts in Maryland*, BRENNAN CTR. FOR JUST. (Mar. 10, 2016), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-maryland> [<https://perma.cc/AF4R-6Z6D>]. See also Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 992–1008 (2007) (describing the various ways that states have implemented felon voting rights reform, including legislative reform).

<sup>93</sup> *Voting Rights Restoration Efforts in Maryland*, *supra* note 92.

<sup>94</sup> IND. CONST. art. 2, § 8 (“The General Assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime.”); N.Y. CONST. art. 2, § 3 (“The legislature shall enact laws excluding from the right of suffrage all persons convicted . . . of any infamous crime.”).

<sup>95</sup> Hurme & Appelbaum, *supra* note 92, at 992, 1003, 1008.

<sup>96</sup> *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>97</sup> See *Felon Voting Rights*, *supra* note 82.

<sup>98</sup> *Id.*

<sup>99</sup> *Voting Rights Restoration Efforts in Virginia*, *supra* note 84.

overtaken by a subsequent Virginia Supreme Court case the same year, which held that the executive order violated the state constitution and the Governor's clemency powers must be exercised on a case-by-case basis.<sup>100</sup> In 2018, New York Governor Andrew Cuomo signed an executive order restoring voting rights to felons on parole.<sup>101</sup> In 2015, Kentucky Governor, Steve Beshear, signed an executive order right before leaving office that ended felon disenfranchisement for select offenders, but the next Governor repealed that order one month later.<sup>102</sup> On December 12, 2019, newly-elected Kentucky Governor Andy Beshear signed an executive order ending felon disenfranchisement for nonviolent felons.<sup>103</sup>

Iowa is the only state that provides for complete felony disenfranchisement without executive clemency.<sup>104</sup> A restoration of citizenship is an individual pardon made by the Governor using the Governor's clemency powers.<sup>105</sup> Some states have eliminated or reduced felon disenfranchisement through constitutional amendment, others through legislative reform or lack of passing legislation, and some through executive order.<sup>106</sup> Since felon disenfranchisement is a state-level issue, each state varies in which, if any, felons are allowed to vote and how the felon voting law was created.<sup>107</sup>

## 2. The United States Supreme Court and Felony Disenfranchisement

Voting rights are a state issue, not a federal issue, because voting is rarely mentioned in the Federal Constitution, other than in a handful of amendments.<sup>108</sup> Therefore, the Tenth Amendment applies, which provides states with the power over anything not reserved to the federal government in the

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<sup>100</sup> Howell v. McAuliffe, 788 S.E.2d 706, 723–25 (Va. 2016). *See also id.*

<sup>101</sup> *See Voting Rights Restoration Efforts in New York*, BRENNAN CTR. FOR JUST. <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-new-york> [<https://perma.cc/G627-7S9N>], (last updated Oct. 8, 2019).

<sup>102</sup> *Voting Rights Restoration Efforts in Kentucky*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-kentucky> [<https://perma.cc/7GKL-G9SS>].

<sup>103</sup> *See* Kenning & Bullington, *supra* note 67.

<sup>104</sup> *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>105</sup> *Streamlined Application for Restoration of Citizenship Rights (Right to Vote and Hold Public Office)*, OFFICE OF THE GOVERNOR OF IOWA 1, [https://governor.iowa.gov/sites/default/files/documents/Voting%20Application\\_0.pdf](https://governor.iowa.gov/sites/default/files/documents/Voting%20Application_0.pdf) [<https://perma.cc/PM85-J4WL>] [hereinafter *Streamlined Application*].

<sup>106</sup> *See Felon Voting Rights*, *supra* note 82. *See also* Hurme & Appelbaum, *supra* note 92, at 992–1008 (describing the various ways that states have implemented felon voting rights reform).

<sup>107</sup> *See Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>108</sup> U.S. CONST. amend. XIV, § 2; *id.* amend. XV; *id.* amend. XIX.

Constitution.<sup>109</sup> The Fourteenth, Fifteenth, and Nineteenth Amendments do, however, place restrictions on state voting laws.<sup>110</sup> The voting rights of felons are only covered in one vague exemption in section two of the Fourteenth Amendment, which states that the voting rights cannot be abridged “except for participation in rebellion, or other crime.”<sup>111</sup> The United States Supreme Court has ruled on felon voting rights when state laws possibly violate the federal Constitution, specifically in regards to the Equal Protection Clause in Section 1 of the Fourteenth Amendment.<sup>112</sup> However, the Supreme Court has ruled that the Equal Protection Clause does not protect the right to vote of every individual; it only protects the right to vote of qualified individuals.<sup>113</sup>

The United States Supreme Court made its most decisive opinion on felony disenfranchisement in *Richardson v. Ramirez*. Three defendants in this case had been convicted of felonies, and as a result, were denied the right to vote under California law.<sup>114</sup> They filed suit on behalf of themselves and other felons similarly situated, arguing that California’s felony disenfranchisement law, applying the “infamous crimes” language of the California constitution to felony convictions, violated the Equal Protection Clause of the United States Constitution.<sup>115</sup> The California Supreme Court had held the California felony disenfranchisement law was unconstitutional under the Equal Protection Clause, but the United States Supreme Court disagreed.<sup>116</sup>

The United States Supreme Court held that the law was constitutional because of the express language in section two of the Fourteenth Amendment, which exempted those who “participat[ed] in rebellion, or other crime.”<sup>117</sup> The Court analyzed the legislative history of the Fourteenth

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<sup>109</sup> U.S. CONST. amend. X.

<sup>110</sup> U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”); *id.* amend. XV, § 1 (protecting the right to vote based on race or color), XIX (protecting the right to vote based on sex); *id.* amend. XXVI, § 1 (protecting the right to vote based on age).

<sup>111</sup> U.S. CONST. amend. XIV, § 2.

<sup>112</sup> *Richardson v. Ramirez*, 418 U.S. 24, 41 (1974). *See also* HULL, *supra* note 1, at 96–109 (discussing the history of felony disenfranchisement-related ruling in the United States Supreme Court); PETTUS, *supra* note 16, at 114–19 (discussing early felony voting rights jurisprudence).

<sup>113</sup> HULL, *supra* note 1, at 81.

<sup>114</sup> *Id.* at 26–27.

<sup>115</sup> *Id.* at 27.

<sup>116</sup> *Id.* at 56.

<sup>117</sup> *Id.* at 44–45. *See also* HULL, *supra* note 1, at 99 (discussing the holding of *Richardson*).

Amendment and the drafters' understanding of the words "other crime."<sup>118</sup> The Court concluded that "other crimes" covered "persons convicted of felonies or infamous crimes."<sup>119</sup>

Justice Marshall dissented in *Richardson*, arguing that section 2 of the Fourteenth Amendment should not be interpreted to include all felonies and infamous crimes.<sup>120</sup> Justice Marshall argued that the purpose of section 2 of the Fourteenth Amendment was to make the South choose between congressional representation (the issue in section 2) or enfranchisement of African Americans under the Equal Protection Clause.<sup>121</sup> Additionally, Justice Marshall asserted that Congress included the provision exempting those convicted of crimes because it was common in the States at the time.<sup>122</sup> "[B]ecause Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by [section] 2 does not necessarily imply congressional approval of this disenfranchisement."<sup>123</sup> Therefore, Justice Marshall stated that "*such discrimination[s] thus are not forever immunized from evolving standards of equal protection scrutiny.*"<sup>124</sup>

After *Richardson*, very few individuals successfully argued that felony disenfranchisement posed an Equal Protection violation.<sup>125</sup> However, in the 1985 case *Hunter v. Underwood*, the United States Supreme Court did rule in favor of a plaintiff challenging a disenfranchisement law on Equal Protection grounds.<sup>126</sup> The Alabama disenfranchisement law at issue stated that a person who committed "any crime . . . involving moral turpitude" was disqualified from voting.<sup>127</sup> The plaintiffs at issue had committed misdemeanors, and the county Registrars considered them crimes of moral turpitude, which barred the plaintiffs from their ability to vote.<sup>128</sup> While *Hunter* involved a misdemeanor and not a felony, the case was handled exactly how felony

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<sup>118</sup> *Richardson*, 418 U.S. at 43–48.

<sup>119</sup> *Id.* at 48.

<sup>120</sup> *Id.* at 78–79 (Marshall, J., dissenting).

<sup>121</sup> *Id.* at 73–74.

<sup>122</sup> *Id.* at 76.

<sup>123</sup> *Id.* at 75.

<sup>124</sup> *Richardson*, 418 U.S. at 76 (emphasis added).

<sup>125</sup> HULL, *supra* note 1, at 102.

<sup>126</sup> *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

<sup>127</sup> *Id.* at 223 (quoting ALA. CONST. art. VIII, § 182 (1901)).

<sup>128</sup> *Id.* at 224.

disenfranchisement law challenges have been handled, and the Court did not rule on whether a misdemeanor could be grounds for disenfranchisement.<sup>129</sup>

In *Hunter*, the United States Supreme Court ruled that abundant historical evidence showed the purpose of passing the statute in 1901 to be racially discriminatory in nature.<sup>130</sup> This racially discriminatory purpose was to prevent African Americans from exercising their newly-acquired voting rights, and therefore a violation of the Equal Protection Clause.<sup>131</sup> As a result, it is not impossible to challenge a disenfranchisement law on Equal Protection grounds, but the threshold is very difficult to meet because there is typically not an overwhelming paper trail of evidence as there was in *Hunter*.<sup>132</sup>

Not only have there been constitutional challenges to felon disenfranchisement, but there have also been challenges arguing that felon disenfranchisement violates legislation enacted by Congress, namely the Voting Rights Act (VRA).<sup>133</sup> The VRA was enacted to help combat the pervasive “racial discrimination in [the] country’s electoral system.”<sup>134</sup> These challenges have not reached the United States Supreme Court, but they have reached several federal district and circuit courts.<sup>135</sup> One of these challenges was in the 1986 case of *Wesley v. Collins*, in the Sixth Circuit Court of Appeals. There, a plaintiff argued that the felony disenfranchisement law in Tennessee “progressively dilute the black vote thereby impeding the equal opportunity of blacks to participate in the political process.”<sup>136</sup> While assuming *arguendo* that the law affected African Americans disproportionately, the Court dismissed the case for “fail[ure] to establish ‘a causal connection’ between the indicators of historically rooted discrimination and the disenfranchisement law.”<sup>137</sup> *Wesley* made it very difficult to successfully challenge a felony disenfranchisement law based on the disproportionate effect on African Americans.<sup>138</sup>

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<sup>129</sup> *Id.* at 224, 233.

<sup>130</sup> *Id.* at 231.

<sup>131</sup> *Id.* at 231–33.

<sup>132</sup> HULL, *supra* note 1, at 103.

<sup>133</sup> *Id.* at 105–13.

<sup>134</sup> *Id.* at 105.

<sup>135</sup> See generally *id.* at 105–13 (explaining the various important federal district and circuit court cases challenging felony disenfranchisement on VRA grounds, but not talking about any United States Supreme Court cases doing so).

<sup>136</sup> *Wesley v. Collins*, 605 F. Supp. 802, 804–814 (M.D. Tenn. 1985), *aff’d* 791 F.2d 1255 (6th Cir. 1986).

<sup>137</sup> HULL, *supra* note 1, at 108.

<sup>138</sup> See *id.* at 108–13.



## 2. The Impact of Felony Disenfranchisement Laws on African Americans

Evidence shows that felony disenfranchisement has a large disproportionate effect on African Americans,<sup>139</sup> which is due to the history of racially motivated laws intended to curb the voting rights of African Americans after the Civil War.<sup>140</sup> The modern race discrepancy in felony convictions is largely due to drug-related crimes and the racist enforcement of drug laws.<sup>141</sup> Although “African Americans and whites use drugs at similar rates . . . the imprisonment rate of African Americans for drug charges is almost 6 times that of whites.”<sup>142</sup> Starting in the 1980s, the War on Drugs enlarged the population of individuals with felony convictions.<sup>143</sup> The policies enacted under the War on Drugs had a focus of penalizing racial minorities.<sup>144</sup> Due to the War on Drugs, incarceration rates for nonviolent drug offenses skyrocketed between 1980 and 1997.<sup>145</sup>

As of 2016, “[o]ne in [thirteen] African Americans of voting age [are] disenfranchised,” which is over 7.4% of the African American population.<sup>146</sup> However, only 1.8% of the non-African American population is disenfranchised—four times less than the number of disenfranchised African Americans.<sup>147</sup> Further, as felony disenfranchisement laws vary by state, so do the rates of disenfranchised African Americans.<sup>148</sup> In Kentucky, Tennessee, and Virginia, more than one in five African Americans are disenfranchised, compared to only two percent in New York and one percent in Maryland.<sup>149</sup>

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<sup>139</sup> UGGEN ET AL., *supra* note 56, at 3.

<sup>140</sup> *See supra* Section II.B.

<sup>141</sup> HULL, *supra* note 1, at 25–26.

<sup>142</sup> *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> [<https://perma.cc/576Z-B9PC>] (last visited Jan. 2, 2020).

<sup>143</sup> HULL, *supra* note 1, at 25.

<sup>144</sup> *Id.*

<sup>145</sup> *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> [<https://perma.cc/2DBW-B5D9>] (last visited Jan. 2, 2020).

<sup>146</sup> UGGEN ET AL., *supra* note 56, at 3.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* (This source lists Florida, but on November 6, 2018, Florida voted to amend its constitution to only disenfranchise felons after completion of their sentences if the felon is convicted of murder or a felony sexual offense, thereby decreasing Florida’s percentage of disenfranchised African Americans and making the current percentage unknown.) *See Chavez, supra* note 59.

The disparities in disenfranchisement between African Americans and non-African Americans also vary by state.<sup>150</sup> In Kentucky, Tennessee, and Virginia, less than one in ten non-African Americans are disenfranchised.<sup>151</sup> These statistics exhibit that the original intent from after the Civil War—to disenfranchise African Americans through felony disenfranchisement laws—has been successful.<sup>152</sup>

### E. *Felony Disenfranchisement in Iowa*

Iowa is the only state in the United States with a permanent bar on felon voting unless the state grants an individual rights restoration.<sup>153</sup> The restoration of felony rights is determined on a case-by-case basis.<sup>154</sup> The disenfranchisement of criminals and the allowance for executive clemency are directly written into the Iowa Constitution.<sup>155</sup> Further, Iowa courts have had to interpret the language of the Iowa Constitution to determine the voting rights of criminals within the state.<sup>156</sup>

#### 1. The Iowa Constitution and Felony Disenfranchisement

The Iowa Constitution mentions criminal's voting rights, however, only vaguely.<sup>157</sup> Article 2, section 5 of the Iowa Constitution states that “a person convicted of any infamous crime shall not be entitled to the privilege of an elector.”<sup>158</sup> However, because the Constitution does not state what an

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<sup>150</sup> *See id.* at 5–13.

<sup>151</sup> *See id.* at 7, 11.

<sup>152</sup> *See supra* Section II.B. *See also* UGGEN ET AL., *supra* note 56, at 3 (discussing statistics of African American disenfranchisement in the United States).

<sup>153</sup> *Criminal Disenfranchisement Laws*, *supra* note 3; *Voting Rights Restoration Efforts in Iowa*, *supra* note 5. Throughout this Note, Iowa's felony disenfranchisement policy will be called “permanent,” as that is the language used by various sources (such as the Brennan Center for Justice), as well as the policy being permanent unless the felon takes an affirmative step and the Governor decides to grant clemency.

<sup>154</sup> *See id.*

<sup>155</sup> *See* IOWA CONST. art. II, § 5; *id.* art. IV, § 16.

<sup>156</sup> *See generally* Chiodo v. Schultz, 846 N.W.2d 845 (Iowa 2014) (holding that “infamous crimes” did not apply to misdemeanors of any kind); Griffin v. Pate, 884 N.W.2d 182 (Iowa 2016) (determining that “infamous crimes” applied to all felonies because that is what an Iowa statute dictated).

<sup>157</sup> IOWA CONST. art. II, § 5.

<sup>158</sup> *Id.*

“infamous crime” is, the lack of clarity has led to statutory enactment and judicial intervention.<sup>159</sup>

The Iowa Supreme Court has heard two cases regarding the interpretation of an “infamous crime” under the State Constitution. The first case to interpret the language was *Chiodo v. Schultz*.<sup>160</sup> In *Chiodo*, the Iowa Supreme Court had to decide whether a second offense OWI, an aggravated misdemeanor, was considered an “infamous crime” according to the Iowa Constitution.<sup>161</sup> While this case dealt with an individual’s right to run for public office, article 2, section 5 of the Iowa Constitution was at issue because Iowa law requires an individual to be eligible to vote in order to hold public office.<sup>162</sup> While the court noted that the Iowa legislature has defined “infamous crimes” as felonies, the court pointed out that legislative inaction is not dispositive and the definition is still constitutional.<sup>163</sup> The court ruled that no misdemeanor constitutes an “infamous crime” and, therefore, does not disqualify anyone convicted of a misdemeanor from holding an elected position.<sup>164</sup> The court noted, however, that it has not defined which felonies constitutionally fall within the meaning of “infamous crime” and left that to be decided at a later date.<sup>165</sup>

The Iowa Supreme Court had the opportunity to revisit the issue of which specific felonies constitute an “infamous crime” two years later in *Griffin v. Pate*.<sup>166</sup> The plaintiff in *Griffin* was convicted of a Class C felony for delivery of a controlled substance.<sup>167</sup> After the plaintiff completed both her prison sentence and parole, she registered to vote.<sup>168</sup> Her ballot was subsequently rejected due to her felony conviction, and the plaintiff filed suit against the Iowa Secretary of State.<sup>169</sup> To analyze what constituted “infamy,”

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<sup>159</sup> *Id.* See also IOWA CODE ANN. § 39.3(8) (West 2019) (defining “infamous crime” for purposes of the Iowa Code); *Griffin*, 884 N.W.2d at 205 (holding that “infamous crimes” includes all felonies); *Chiodo*, 846 N.W.2d at 856 (concluding that a misdemeanor is not an “infamous crime”).

<sup>160</sup> *Chiodo*, 846 N.W.2d at 851.

<sup>161</sup> *Id.* at 849.

<sup>162</sup> *Id.* at 848.

<sup>163</sup> *Id.* at 852 (citing IOWA CODE ANN. § 39.3(8)).

<sup>164</sup> *Id.* at 857.

<sup>165</sup> *Id.*

<sup>166</sup> *Griffin v. Pate*, 884 N.W.2d 182 (Iowa 2016).

<sup>167</sup> *Id.* at 185.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

the court analyzed the English common law interpretation, Iowa's specific interpretation, and "infamy" in contexts other than voting rights.<sup>170</sup>

In *Griffin*, the Iowa Supreme Court discussed the importance of evolving community standards when determining the meaning of "infamous crimes" and how the Iowa statute defining "infamous crimes" can be a useful aid in determining community standards.<sup>171</sup> Iowa Code Section 39.3 defines an infamous crime as "a felony as defined [under Iowa law], or an offense classified as a felony under federal law."<sup>172</sup> To justify using this statute as a community standard, the Iowa Supreme Court looked at the use of "infamous crimes" regarding felony disenfranchisement in other states and whether those states interpreted "infamous crimes" to include all felonies or only specific felonies.<sup>173</sup> The court noted that social science research shows problems associated with disenfranchisement, such as inequality among citizens, the disproportionate effect on minorities, and people's changing opinions toward the enfranchisement of felons.<sup>174</sup> Lastly, the court observed that not all states have interpreted "infamous crimes" to include all felonies.<sup>175</sup> The Iowa Supreme Court stated that the statute in particular, as well as a lack of "public sign or movement to redefine infamy as the disqualifying standard," outweighed any social science research provided in amicus briefs by non-profit organizations.<sup>176</sup>

The Iowa Supreme Court in *Griffin* held that the term "infamous crimes" as used in the Iowa Constitution means all felonies.<sup>177</sup> However, the Court left open the possibility of the meaning of "infamous crimes" being overruled if the community standards are shown through legislation to have evolved.<sup>178</sup> The Court stated that "[i]n this case, there is insufficient evidence to overcome the 1994 legislative judgment, and we must accept it today as the standard for infamous crime. It will be up to our future democracy to give the necessary voice to the issue and engage in the debate that advances democracy."<sup>179</sup>

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<sup>170</sup> *Id.* at 185–98.

<sup>171</sup> *Id.* at 186–205.

<sup>172</sup> IOWA CODE ANN. § 39.3(8) (West 2019).

<sup>173</sup> *Griffin v. Pate*, 884 N.W.2d 182, 199–202 (Iowa 2016).

<sup>174</sup> *Id.* at 202–03.

<sup>175</sup> *Id.* at 201.

<sup>176</sup> *Id.* at 202–03.

<sup>177</sup> *Id.* at 202, 205.

<sup>178</sup> *Id.* at 205.

<sup>179</sup> *Griffin*, 884 N.W.2d at 205.

### 3. Executive Power and Felony Disenfranchisement in Iowa

The Iowa Executive branch exercises a great amount of control over the disenfranchisement of felons.<sup>180</sup> Article 4, Section 16 of the Iowa Constitution provides that “[t]he governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offences except treason and cases of impeachment, subject to such regulations as may be provided by law.”<sup>181</sup> The executive clemency power allowed under the Iowa Constitution is used for four specific types of executive clemency.<sup>182</sup> The four types are: restoration of citizenship (right to vote and hold public office), special restoration of citizenship (firearm rights), pardon, and commutation of a life sentence.<sup>183</sup> This Note will focus on the restoration of citizenship (right to vote and hold public office).<sup>184</sup>

As a result of the Iowa Supreme Court’s interpretation of the Iowa Constitution, the Governor also has the power to sign an executive order to automatically restore the voting rights of all felons after the completion of their sentence, in addition to the power of individual rights restoration.<sup>185</sup> There is no constitutional or statutory bar to the Governor’s power, and Iowa precedent, in *Allison v. Vilsack*, recognizes that it is within the Governor’s clemency powers to grant wholesale restoration of voting rights through executive order.<sup>186</sup> The executive control of felon voting rights through executive clemency and executive order has greatly impacted Iowa felons and their voting rights.<sup>187</sup>

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<sup>180</sup> See *Voting Rights Restoration Efforts in Iowa*, *supra* note 5.

<sup>181</sup> IOWA CONST. art. IV, § 16.

<sup>182</sup> *Executive Clemency*, IOWA BOARD OF PAROLE, <https://bop.iowa.gov/executive-clemency> [<https://perma.cc/4ZV2-F84Y>] (last visited Jan. 3, 2020).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Ruling on Motions for Summary Judgment at 6, *Allison v. Vilsack*, No. EQCV016165 (Iowa Dist. Ct. Oct. 27, 2005), [https://www.brennancenter.org/sites/default/files/legal-work/IowaVilsack\\_Ruling%20on%20Motions%20for%20Summary%20Judgment%20-%20Allison%20v.%20Vilsack.pdf](https://www.brennancenter.org/sites/default/files/legal-work/IowaVilsack_Ruling%20on%20Motions%20for%20Summary%20Judgment%20-%20Allison%20v.%20Vilsack.pdf) [<https://perma.cc/8TEZ-2W6P>].

<sup>186</sup> *Id.* See also Brennan Ctr. for Just., *Executive Clemency Under the Iowa Constitution*, N.Y.U. SCH. OF L. 1 (June 7, 2005), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_9495.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_9495.pdf) [<https://perma.cc/K39B-368L>] (explaining governor’s clemency powers).

<sup>187</sup> See also *Griffin v. Pate*, 884 N.W.2d 182, 184 (Iowa 2016) (holding plaintiff was convicted of a felony while Vilsack’s Executive Order granting felon’s voting rights was in effect, but completed her sentence after Governor Branstad had revoked Governor Vilsack’s Executive Order). See generally *Voting Rights Restoration Efforts in Iowa*, *supra* note 5 (showing the recurring changes in right to vote restoration for felons based on which Executive Order is in effect).

Before 2005, convicted felons were permanently barred from voting due to the “infamous crimes” prohibition in the Iowa Constitution, making Iowa one of five states at the time with the country’s strictest felony disenfranchisement laws.<sup>188</sup> The other four states were Florida, Kentucky, Alabama, and Virginia.<sup>189</sup> Alabama eased its felony disenfranchisement policies in 2017 by passing a law defining a list of specific felonies that resulted in disenfranchisement.<sup>190</sup> Virginia’s felony disenfranchisement laws are similar to Iowa, except they do not require the individual to apply for executive clemency unless a new Governor is elected.<sup>191</sup> Instead, the Governor of Virginia provides the executive clemency on his own volition to each individual who has completed his or her sentence, including probation and parole.<sup>192</sup> In November 2018, Florida voters elected to amend its state constitution to allow felons (except those with certain felony convictions) to vote after completing their sentence, including probation and parole.<sup>193</sup>

In 2005, then Iowa Governor Vilsack signed Executive Order 42, which automatically granted felons restoration of voting rights after felons have completed their entire criminal sentence, including any probation, parole, or supervised release.<sup>194</sup> This Order restored voting rights to an estimated 115,000 Iowans who had felony convictions.<sup>195</sup> States who have had similar

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<sup>188</sup> Press Release, Brennan Ctr. for Just., Brennan Ctr. Applauds Iowa Governor’s Restoration of Voting Rights (June 17, 2005), <https://www.brennancenter.org/press-release/brennancenter-applauds-iowa-governors-restoration-voting-rights> [<https://perma.cc/84TL-4PKZ>].

<sup>189</sup> Brief for Brennan Ctr. for Just. at N.Y.U. as Amici Curiae Supporting Respondent, Allison v. Vilsack, No. EQCV016165 1 (Iowa Dist. Ct. Aug. 26, 2005), [https://www.brennancenter.org/sites/default/files/legal-work/IowaVilsack\\_BrennanAmicusFinal.pdf](https://www.brennancenter.org/sites/default/files/legal-work/IowaVilsack_BrennanAmicusFinal.pdf) [<https://perma.cc/RP2Z-2NY8>].

<sup>190</sup> *Voting Rights Restoration*, AM. CIV. LIBERTIES UNION OF ALA. (May 1, 2018), <https://www.aclualabama.org/en/voting-rights-restoration> [<https://perma.cc/RM78-JCDY>].

<sup>191</sup> *Voting Rights Restoration Efforts in Virginia*, *supra* note 84.

<sup>192</sup> *Id.*

<sup>193</sup> Chavez, *supra* note 59. However, the Florida amendment has not come without its problems. The State is refusing to directly implement the amendment, with Florida Governor, Ron DeSantis, signing into law on June 28, 2019 a poll tax, reducing the effectiveness of the amendment. Patricia Mazzei, *Florida Limits Ex-Felon Voting, Prompting a Lawsuit and Cries of Poll Tax*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/florida-felons-voting-rights.html> [<https://perma.cc/JY2F-YU92>].

<sup>194</sup> Iowa Exec. Order No. 42 (July 4, 2005), [http://publications.iowa.gov/3762/1/EO\\_42.pdf](http://publications.iowa.gov/3762/1/EO_42.pdf) [<https://perma.cc/BA2Z-7SC7>].

<sup>195</sup> See CHRISTOPHER UGGEN ET AL., STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES 2010, at 14 (2012 ed.), <http://sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf> [<https://perma.cc/M3JJ-HXVH>] [hereinafter STATE-LEVEL ESTIMATES].

executive orders over the years are New York, Virginia, and Kentucky.<sup>196</sup> Kentucky's executive order restoring felon voting rights was rescinded by a subsequent Governor,<sup>197</sup> while Virginia's was held unconstitutional by the Virginia Supreme Court. However, the Governor of Virginia continues to grant individual clemency to each individual who has completed his or her sentence, including probation and parole, without requiring an application, although an applicant may apply to the Secretary's Office for expedited rights restoration.<sup>198</sup>

Governor Vilsack's Executive Order 42 remained the law until 2011, when Governor Branstad took office and immediately rescinded it, although not retroactively.<sup>199</sup> Because it was not rescinded retroactively, the voting rights of those felons who were restored their voting rights under Vilsack retained their voting rights.<sup>200</sup> Felons who completed their sentences after July 4, 2005, but before January 14, 2011, could also vote for the same reasons.<sup>201</sup> However, any felon who completed their sentence after January 14, 2011, does not have the right to vote and must request an individual rights restoration through the Governor's office.<sup>202</sup> As a result, felons in Iowa today are permanently disenfranchised unless the Governor grants them an individual restoration of citizenship.<sup>203</sup>

In 2016, five years after rescinding Governor Vilsack's Executive Order, Governor Branstad simplified the process of applying for individual voting rights restoration.<sup>204</sup> Originally, on the required form, individuals requesting voting rights restoration had to answer twenty-nine questions; since 2016, it

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<sup>196</sup> See *Voting Rights Restoration Efforts in New York*, *supra* note 101; *Voting Rights Restoration Efforts in Virginia*, *supra* note 84; *Voting Rights Restoration Efforts in Kentucky*, *supra* note 102.

<sup>197</sup> *Voting Rights Restoration Efforts in Kentucky*, *supra* note 102.

<sup>198</sup> *Voting Rights Restoration Efforts in Virginia*, *supra* note 84.

<sup>199</sup> Iowa Exec. Order No. 70 (Jan. 14, 2011), <http://publications.iowa.gov/10194/1/BranstadEO70.pdf> [<https://perma.cc/CZ85-NVNQ>]. See also MCLEOD, *supra* note 60, at 13 (explaining that Governor Branstad revoked Governor Vilsack's Executive Order, but did not do so retroactively).

<sup>200</sup> See *How to Get Your Right to Vote Back After a Felony Conviction in Iowa*, AM. CIV. LIBERTIES UNION OF IOWA, 1 (Mar. 2019), [https://www.aclu-ia.org/sites/default/files/3.28.19\\_voting\\_restoration\\_guide.pdf](https://www.aclu-ia.org/sites/default/files/3.28.19_voting_restoration_guide.pdf) [<https://perma.cc/U728-BL2U>] [hereinafter *How to Get Your Right to Vote Back*].

<sup>201</sup> See *id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>204</sup> David Pitt, *Iowa Simplifies Voting Rights Restoration Form for Felons*, ASSOCIATED PRESS (Apr. 27, 2016), <https://apnews.com/887edea415284232b6ab12e074e233d4> [<https://perma.cc/GH9D-HAA4>].

is only thirteen questions.<sup>205</sup> These questions include: “Amount of restitution, court costs, and fines ordered and amount paid,” “Sentence received,” “Date of crime,” “Date of Conviction,” and six other similar questions.<sup>206</sup> However, other requirements for the process, such as requiring people to “spend money and time acquiring a criminal history check and other information,” remained the same after Governor Branstad’s changes in 2011.<sup>207</sup>

To qualify for restoration, in addition to filling out the questions on the form, the applicant must provide proof that their court costs, fines, and restitution are all paid or that the felon is up to date on these payments and continue to pay them in good faith.<sup>208</sup> Additionally, the applicant must request a current Iowa Criminal History Record from the Iowa Division of Criminal Investigation, which costs fifteen dollars, and submit that record along with the form for restoration of citizenship.<sup>209</sup> The applicant must then mail the form, enclosed Criminal History Record, and enclosed proof of payment for court costs, fines, and restitution, and mail it to the Governor’s Office.<sup>210</sup> It can take the State up to six months to review the rights restoration application.<sup>211</sup>

In December 2019, Iowa created a more simplified process for individuals applying for restoration of voting rights.<sup>212</sup> The Iowa Department of Corrections will autocomplete twelve of the fourteen questions on the form, and then as part of the release process, an officer will aid the felon in filling

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<sup>205</sup> *Id.*

<sup>206</sup> *Streamlined Application*, *supra* note 105, at 2.

<sup>207</sup> Pitt, *supra* note 204.

<sup>208</sup> *Streamlined Application*, *supra* note 105, at 1.

<sup>209</sup> *Id.*; Iowa Division of Criminal Investigation, *Request an Iowa Criminal History Record Check*, IOWA DEP’T OF PUB. SAFETY, <https://dps.iowa.gov/divisions/criminal-investigation/criminal-history/record-check-forms> [<https://perma.cc/2D7G-MVTN>] (last visited Jan. 3, 2020). *See also State of Iowa Criminal History Record Check Request Form*, IOWA DEP’T OF PUB. SAFETY 1, <https://dps.iowa.gov/sites/default/files/criminal-investigation/support-operations/RequestForm.pdf> [<https://perma.cc/UX7T-QZA3>] (last updated June 26, 2018) (showing the required criminal history record check form that must be completed along with the restoration of citizenship application).

<sup>210</sup> *Streamlined Application*, *supra* note 105, at 1.

<sup>211</sup> Bonnie Pitz, *Permanent Disenfranchisements Hurts Families and Communities*, DES MOINES REG. (Sept. 23, 2016, 2:56 PM), <https://www.desmoinesregister.com/story/opinion/abetter-iowa/2016/09/23/permanent-disenfranchisement-hurts-families-and-communities/90848580/> [<https://perma.cc/SUC6-Z5FE>].

<sup>212</sup> Stephen Gruber-Miller, *Iowa Will Automate Part of Felony Voting Rights Restoration Process Starting Thursday*, DES MOINES REG., <https://www.desmoinesregister.com/story/news/politics/2019/12/11/iowa-simplifying-felon-voting-rights-application-process-kim-reynolds/4402835002/> [<https://perma.cc/TY96-U68A>] (last updated Dec. 12, 2019, 6:28 PM).



out the remaining two questions.<sup>213</sup> The felon will then be responsible for filing the form with the Governor's Office themselves after release.<sup>214</sup>

The Iowa Governor's Office states that an individual applying for restoration of voting rights must have completed probation and parole, and must have set up a payment plan for payment of court costs, although it is not required that court costs have been paid in full.<sup>215</sup> In 2015, seventeen individuals completed applications for restoration of citizenship.<sup>216</sup> In 2016, 106 felons met the requirements and had their voting rights restored.<sup>217</sup> In 2017, twenty-eight felons met the requirements and had their voting rights restored.<sup>218</sup> Governor Branstad's deputy legal counsel stated in 2016 that most applications for voting rights restoration are filed during election years, which explains the disparity in the amount of rights restoration in 2015, 2016, and 2017, as 2016 was an election year.<sup>219</sup> Between 2005, when Governor Vilsack signed his Executive Order, and 2011, when Governor Branstad rescinded the Executive Order, approximately about 115,210 individuals had their voting rights automatically restored.<sup>220</sup> This is in sharp contrast to the otherwise small number of felons that annually restore their voting rights since the Executive Order was repealed.<sup>221</sup> "Between 2011 and 2014, an estimated 14,500 people completed a felony sentence, but only 64 had voting rights restored."<sup>222</sup> The number of felons denied voting rights in Iowa

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *How to Get Your Right to Vote Back*, *supra* note 200, at 2.

<sup>216</sup> Pitt, *supra* note 204.

<sup>217</sup> Letter from Terry E. Branstad, Governor of Iowa, to Charlie Smithson, Secretary of the Senate, Iowa General Assembly, and Carmine Boal, Chief Clerk of the House, Iowa General Assembly (Jan. 23, 2017) [hereinafter Letter from Terry Branstad] (on file with the Governor's Office).

<sup>218</sup> Letter from Kim Reynolds, Governor of Iowa, to Charlie Smithson, Secretary of the Senate, Iowa General Assembly, and Carmine Boal, Chief Clerk of the House, Iowa General Assembly (Jan. 8, 2018) [hereinafter Letter from Kim Reynolds] (on file with the Governor's Office).

<sup>219</sup> Pitt, *supra* note 204.

<sup>220</sup> STATE-LEVEL ESTIMATES, *supra* note 195, at 14.

<sup>221</sup> See Pitt, *supra* note 204. See also Letter from Terry Branstad, *supra* note 217; Letter from Kim Reynolds, *supra* note 218.

<sup>222</sup> Pitz, *supra* note 211.

since the repeal of Vilsack's Executive Order has been quickly growing, from 52,012 in 2016,<sup>223</sup> to an estimated 69,000 in 2019.<sup>224</sup>

#### 4. Proposed Legislative Reform in Iowa Regarding Felony Disenfranchisement

Iowa legislators proposed two bills in response to the Iowa Supreme Court's holding in *Griffin*. In January 2018, the House proposed a bill to change the definition of "infamous crime" under Iowa Code section 39.3, intending to define "infamous crime" "as election misconduct in the first degree that is vote fraud for the purposes of disqualifying a person from registering to vote and voting."<sup>225</sup> In February 2018, the House proposed a joint resolution that would amend article 2, section 5 of the state Constitution.<sup>226</sup> The proposed new section would completely eliminate the "infamous crimes" portion of the section, leaving only the language regarding mental incompetency as a means of being disqualified from voting.<sup>227</sup> Neither of these pieces of legislation were enacted.<sup>228</sup> Neither bill made it out of committee in the House, and as a result, neither was submitted to the Senate.<sup>229</sup> As shown by other states that have successfully altered their voter disenfranchisements, changes of this type in the Iowa legislature (or of a similar type in a state constitutional amendment) could lead to better reintegration of felons back into society and reduce recidivism because it is one less hurdle that an ex-felon must accommodate.<sup>230</sup>

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<sup>223</sup> MCLEOD, *supra* note 60, at 15.

<sup>224</sup> Jason Clayworth, *This is Wrong: Iowa's Flawed Felon List Has Been Disqualifying Legitimate Voters for Years*, DES MOINES REG., <https://www.desmoinesregister.com/story/news/investigations/2019/01/13/iowa-election-felon-voting-rights-ban-voters-polling-place-how-register-vote-state-rejected-votes-ia/2359082002/> [<https://perma.cc/H22L-DFBK>] (last updated Jan. 14, 2019, 4:39 PM).

<sup>225</sup> *Id.*; H.F. 2025, 87th Gen. Assemb., 2018 Sess. (Iowa 2018).

<sup>226</sup> H.R.J. Res. 2007, 87th Gen. Assemb., 2018 Sess. (Iowa 2018).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*; Iowa H.F. 2025.

<sup>229</sup> H. JOURNAL, 87 Gen. Assembly, 2d Sess. 104 (Iowa 2018), <https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/January%2016,%202018.pdf#page=4> [<https://perma.cc/5QAP-2MEU>]; H. JOURNAL, 87 Gen. Assembly, 1st Sess. 227 (Iowa 2017), <https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/February%2007,%202018.pdf#page=7> [<https://perma.cc/8MWF-4M2X>]; H. JOURNAL, 87th Gen. Assemb., 2d Sess. 104 (Iowa 2018), <https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/February%2007,%202018.pdf#page=7> [<https://perma.cc/3BK9-6VM9>].

<sup>230</sup> Hamilton-Smith & Vogel, *supra* note 49, at 413–14.

## 5. Is Iowa Headed in the Right Direction?

On January 15, 2019, Iowa Governor Reynolds announced in her Condition of the State address her plan amend the Iowa constitution to grant felons the right to vote.<sup>231</sup> This announcement came amidst the news that Florida had voted to eliminate permanent felony disenfranchisement<sup>232</sup> and that felony disenfranchisement was having an effect on the voting rights of non-felons' as well.<sup>233</sup> A House Joint Resolution was introduced on January 17, 2019, to formally begin Governor Reynolds' plan.<sup>234</sup> The bill proposes an Iowa constitutional amendment to article 2, section 5 that would continue to prevent voting rights to those convicted of an "infamous crime" unless the individuals voting rights have been restored by executive or legislative action.<sup>235</sup> This constitutional amendment would set the stage for the Iowa General Assembly to pass legislation granting all or some felons the right to vote, without eliminating the ability of the Governor to grant individual rights restorations.<sup>236</sup> The bill was withdrawn from further consideration by the Iowa House of Representatives on March 28, 2019, meaning that the bill was no longer being considered when the 2019 legislative session ended in May 2019.<sup>237</sup>

## III. ANALYSIS

The Iowa General Assembly needs to take the lead from the Executive and Judicial Branches by defining "infamous crimes" in a manner more aligned with evolving community standards or amending the state Constitution to remove the language regarding "infamous crimes" from the section on suffrage. Other states, such as Nebraska and Maryland, have all taken these steps and have not experienced the relapse that Iowa has when

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<sup>231</sup> Kim Reynolds, Governor, Iowa, *Condition of the State Address at the Iowa General Assembly* (Jan. 15, 2019) <https://www.thegazette.com/subject/news/government/iowa-governor-kim-reynolds-condition-of-the-state-speech-des-moines-watch-20190114> [<https://perma.cc/H6KH-ALK6>].

<sup>232</sup> Chavez, *supra* note 59.

<sup>233</sup> See, e.g., Jason Clayworth, *supra* note 224; *Errors in Iowa's Felon List Keep Some People from Voting*, ASSOCIATED PRESS (Jan. 13, 2019), <https://www.apnews.com/69b24e2e451e4040a3d2ff3afdeabcf2> [<https://perma.cc/4H7G-WG9T>] [hereinafter *Errors in Iowa's Felon List*].

<sup>234</sup> H.J. Res. 1, 88th Gen. Assemb., 2019 Sess. (Iowa 2019).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> H. JOURNAL, 88 Gen. Assembly, 1st Sess. 688 (2019), <https://www.legis.iowa.gov/docs/pubs/hjweb/pdf/March%2028,%202019.pdf#page=18> [<https://perma.cc/QCY4-HDYG>].

attempting to change its law.<sup>238</sup> The Iowa General Assembly also needs to eliminate the Governor's power over felony disenfranchisement in the legislation or constitutional amendment to increase felon voter eligibility and follow the trend exhibited by almost every other state in the country. The current constitutional amendment proposed by Governor Reynolds is inadequate to reach this goal.

A. *Changing Iowa's Felony Disenfranchisement Laws is Critically Important*

Iowa law needs to be changed to eliminate permanent felony disenfranchisement. Past attempts to change the law in Iowa have been unsuccessful and the time is now to solidify felons' right to vote. This change in Iowa law is necessary for five important reasons: (1) allowing the Governor such broad executive power creates inconsistency and unreliability; (2) felony voting laws across the country exhibit a community standard against felony disenfranchisement and the United States Supreme Court's decision in *Richardson* creates a floor, not a ceiling; (3) felony disenfranchisement laws are inherently racist; (4) felony disenfranchisement laws disenfranchise legitimate voters as well as felons; and (5) rehabilitation is a goal of the criminal justice system.

1. Allowing the Governor Such Broad Executive Power Creates Inconsistency Through Policy Changes Between Administrations

The constitutional amendment should prohibit the Governor from having power over felon voting rights. Iowa grants the Governor with broad pardon power and power to enact executive orders regarding felon voting rights; however, such a fundamental right should not be left to the sole discretion of a politically elected individual.<sup>239</sup> The Governor's unbridled power creates inconsistency and unpredictability on whether an individual will enjoy a fundamental right, such as voting after completing their sentence.<sup>240</sup> Therefore, the legislative or constitutional amendment that the Iowa General Assembly enacts should eliminate the power of the Governor in felony disenfranchisement.

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<sup>238</sup> *Voting Rights Restoration Efforts in Nebraska*, *supra* note 84 (the Nebraska legislature passed a bill that "repeal[ed] lifetime disenfranchisement and provide[d] for automatic voting rights restoration two-years after completion of sentence."); *Voting Rights Efforts Restoration Efforts in Maryland*, *supra* note 92 (the Maryland legislature passed a bill that authorized automatic voting rights restoration after release from prison, and allowing voting rights for those on probation); *Legislative Service Agency*, 2019 Iowa Legislative Session Timetable, 88TH IOWA GEN. ASSEMB., 2019 SESS. at 1 (2018), <https://www.legis.iowa.gov/docs/publications/SESTT/970044.pdf> [<https://perma.cc/58LM-S39D>].

<sup>239</sup> *Reynolds v. Sim*, 377 U.S. 533, 561 (1964) (declaring suffrage "undoubtedly" a fundamental right).

<sup>240</sup> See *supra* Section II.E.2.

The sole discretion left to the Governor has resulted in extreme changes to the fundamental right depending on which party holds the Governor's mansion.<sup>241</sup> Governor Vilsack granted felons the right to vote in 2005, yet it was repealed six years later by Governor Branstad in 2011.<sup>242</sup> This is what created the problematic situation in *Griffin*.<sup>243</sup> In *Griffin*, the plaintiff went to prison in 2008, when an executive order stated she would have her rights restored upon completion of her sentence.<sup>244</sup> However, when her sentence was completed in 2013, that was no longer her right due to the repeal of Executive Order Forty-Two.<sup>245</sup> Due to the broad power of the Governor over felony disenfranchisement, that policy could change very quickly, either by the will of the current Governor, or upon the election of a new Governor.<sup>246</sup>

## 2. Felony Voting Laws Across the Country Exhibit a Community Standard and *Richardson* Creates a Floor, Not a Ceiling

A community standard regarding felony disenfranchisement has been exhibited by the laws of other states, which almost all grant some form of voting rights to felons.<sup>247</sup> Forty-eight states do not have permanent felony disenfranchisement laws.<sup>248</sup> In *Griffin*, the Iowa Supreme Court discussed the ideas of community standards as seen through legislation as important for defining “infamous crimes,” but focused on the Iowa legislature’s definition labeling it a felony.<sup>249</sup> In *Griffin*, the Iowa Supreme Court stated that the issue of restoring voting rights to felons is different from defining the term “infamous crime” as used in the state constitution.<sup>250</sup> The court spent its time analyzing how “infamy” had been used in Iowa over the years, failing to properly consider that other states have the term “infamous crime” in their

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<sup>241</sup> *Griffin v. Pate*, 884 N.W.2d 182, 184 (Iowa 2016).

<sup>242</sup> *Voting Rights Restoration Efforts in Iowa*, *supra* note 5.

<sup>243</sup> *See generally Griffin*, 884 N.W.2d at 184 n.1 (noting that at the time the plaintiff was convicted, Governor Vilsack’s Executive Order stated that she would regain her right to vote upon completion of her sentence. By the time she completed her sentence, Governor Branstad had revoked that Executive Order.)

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *See supra* Section II.E.2.

<sup>247</sup> *See Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>248</sup> *See id.* *See also supra* Section II.D.1 (discussing felony disenfranchisement laws across the United States).

<sup>249</sup> *Griffin v. Pate*, 884 N.W.2d 182, 203 (Iowa 2016).

<sup>250</sup> *Id.*

constitution or legislatures, or even the term “felony,” and yet still do not have a permanent ban on felon voting.<sup>251</sup>

Justice Wiggins, in his *Griffin* dissent, points out this fact, stating “the majority’s analysis is flawed in that it does not truly consider the consensus among other states, most of which allow at least certain felons to vote.”<sup>252</sup> Justice Wiggins argued that the majority was failing to apply the Iowa Supreme Court’s traditionally broad analysis of individual rights under the Iowa Constitution by only looking at Iowa’s laws and community standards regarding felony disenfranchisement.<sup>253</sup> Justice Wiggins is correct in the importance he placed on the felony disenfranchisement laws of other states in determining community standards. The Iowa General Assembly should take the felony disenfranchisement laws of other states into account as they draft and enact new legislation or an amendment to the Iowa Constitution to end permanent felon disenfranchisement.

Additionally, under United States constitutional law, states have the ability to grant their citizens more individual rights than the federal Constitution says is mandatory, but the states cannot provide *fewer* individual rights to their citizens than the federal Constitution requires.<sup>254</sup> In this way, the federal Constitution is a floor and not a ceiling. Therefore, the holding in *Richardson*, which was an interpretation of the federal Constitution, provides a minimum level of protection and does not bind states on the amount of voting rights that may be restored to felons.<sup>255</sup> This means that Iowa can provide more voting rights for their citizens than federal law provides.

The United States Supreme Court cases of *Loving v. Virginia* and *Pace v. Alabama* are perfect examples. In *Pace*, the Court held antimiscegenation laws, laws outlawing interracial marriage, were constitutional, but overruled this holding in *Loving*.<sup>256</sup> In doing so, the Court noted that many states had changed their laws to eliminate antimiscegenation laws in recent years and that only sixteen states, at the time of the litigation, still have antimiscegenation laws.<sup>257</sup> While these cases did not address voting rights, they dealt with

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 206 (Wiggins, J., dissenting).

<sup>253</sup> *Id.*

<sup>254</sup> Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in Danforth v. Minnesota*, 102 NW. U. L. REV. 365, 365 (2008).

<sup>255</sup> *Richardson v. Ramirez*, 418 U.S. 24, 5–56 (1974).

<sup>256</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Pace v. Alabama*, 106 U.S. 583, 585 (1883).

<sup>257</sup> *Loving*, 388 U.S. at 6 n.5.

a state issue that changed as times changed. Therefore, it should be extended to felony disenfranchisement laws.

The same principles should be used in Iowa. Many states have changed their laws to eliminate or reduce felony disenfranchisement and, therefore, a community standard disfavoring permanent felony disenfranchisement exists. Furthermore, just because the United States Supreme Court in *Richardson* said that felony disenfranchisement does not violate the federal Constitution, the states can still choose (and some have) to grant all or some felons the right to vote.

### 3. Felony Disenfranchisement Laws are Inherently Racist

Felony disenfranchisement is an inherently racist legal policy.<sup>258</sup> The policy of felony disenfranchisement stems from the goal of disenfranchising African Americans which, since its implementation after the Civil War, has had a strikingly disproportionate impact on the African American community.<sup>259</sup> In 2016, about ten percent of the entire African American adult population in Iowa was disenfranchised.<sup>260</sup> The percentage of disenfranchised African Americans is about five times higher than the total percentage of disenfranchised individuals in Iowa, which is about two percent.<sup>261</sup>

Disenfranchisement affects the African American community as a whole, not just the disenfranchised. As Judge Hecht stated in his *Griffin* dissent, “[w]hen disproportionate numbers of citizens in the same community are denied the right to vote, the political power of the community’s residents—including those who [are not disenfranchised]—is weakened.”<sup>262</sup> By continuing to allow a law with such a disproportionate effect on African Americans, the Iowa legislature is not only taking away the felons’ right to vote, but weakens the political power of the entire African American community in the state. Additionally, the weakened political engagement lasts generations.

Furthermore, the impact of reducing African American voter turnout can be consequential. Felony disenfranchisement has been estimated to have affected at least seven United States Senate elections nationwide, as well as

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<sup>258</sup> See *supra* Section II.B and Section II.D.3.

<sup>259</sup> *Id.*

<sup>260</sup> McLEOD, *supra* note 60, at 7.

<sup>261</sup> *Id.*

<sup>262</sup> *Griffin v. Pate*, 884 N.W.2d 182, 210 (Iowa 2016) (Hecht, J., dissenting).

the 2000 Bush versus Gore presidential election.<sup>263</sup> It can be inferred that there are likely statewide election consequences as well resulting from this reduced African American voter turnout, in addition to influencing Iowa's federal elections. Moreover, Iowa hosts the first primaries in the country during presidential elections.<sup>264</sup> The disproportionate effect on the African American community "creates an electorate that is even less representative of our nation as a whole" and therefore influences the entire country's elections through the primaries.<sup>265</sup> The Iowa General Assembly should undertake a constitutional amendment to end permanent felony disenfranchisement in Iowa because of the racial history of felony disenfranchisement, as well as the disproportionate affect the current disenfranchisement law has on African Americans.

#### 4. Felony Disenfranchisement Laws Disenfranchise Legitimate Voters as well as Felons

Iowa's felon list, which is circulated to county officials, is flawed and has led to disenfranchisement of those constitutionally guaranteed the right to vote: non-felons.<sup>266</sup> In six Iowa counties, it was discovered "that the ballots of more than two-dozen voters have been wrongly rejected since 2017—including 20 in November [2018]'s midterm elections—because their names mistakenly appeared on the felon list . . . ."<sup>267</sup> Citizens may find themselves inaccurately included on Iowa's felon list if they were charged with, but not convicted of, a felony, or if they had a deferred judgment.<sup>268</sup> The language of article 2, section 5 only disqualifies individuals "*convicted* of any infamous crime."<sup>269</sup> Conviction is defined by *Black's Law Dictionary* as "[t]he judgment . . . that a person is guilty of a crime," or "[t]he act or process of judicially finding someone guilty of a crime."<sup>270</sup> A charge alone does not satisfy this definition, and neither does a deferred judgment. Therefore, these citizens have a constitutional right to vote that Iowa is denying them.

This faulty system denies citizens their constitutional right to vote, a right which the Iowa Supreme Court has characterized as a "fundamental

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<sup>263</sup> CHUNG, *supra* note 70, at 4.

<sup>264</sup> Brennan Center Memorandum, *supra* note 10, at 1.

<sup>265</sup> *Id.*

<sup>266</sup> Clayworth, *supra* note 224.

<sup>267</sup> *Id.*

<sup>268</sup> See generally *Errors in Iowa's Felon List*, *supra* note 233 (discussing how Iowans are finding themselves on Iowa's felon list despite not being a felon).

<sup>269</sup> IOWA CONST. art. II, § 5 (emphasis added).

<sup>270</sup> *Conviction*, BLACK'S LAW DICTIONARY (10th ed. 2014).



right” that is at “the heart of representative government.”<sup>271</sup> According to the Iowa Supreme Court, “voting exists as a fundamental right for people who meet the constitutional qualifications of an elector and are not disqualified by” the Iowa constitution.<sup>272</sup> These eligible voters who find themselves on the felon list would regain their fundamental right to vote if the felony disenfranchisement laws in the state were abolished.

##### 5. Rehabilitation is a Goal of the Criminal Justice System

Ending permanent felony disenfranchisement in Iowa will lead to easier reintegration into society for felons, and possibly reduce recidivism rates. The criminal justice system has four major goals: rehabilitation, retribution, incapacitation, and deterrence.<sup>273</sup> Each criminal sentence takes one or more of these goals into account.<sup>274</sup> The importance of each goal has changed over the decades, but it is important that Iowa work towards a goal of rehabilitation.<sup>275</sup>

Research shows that successful reintegration of felons back into society reduces recidivism rates.<sup>276</sup> Disenfranchisement is one of the many hurdles, including issues with familial relationships, negative stigmatization, and trouble finding a job, that felons face when they are convicted of a felony offense.<sup>277</sup> One reason that disenfranchisement is a hurdle to reintegration is because it reduces civic participation.<sup>278</sup> Sociology professors Jeff Manza and Christopher Uggen point out that, “[i]t is awkward to admit that one does not vote, as it represents a failure to fulfill basic citizenship duties.”<sup>279</sup> Not having the right to vote also reduces political participation, which is an important part of civic engagement.<sup>280</sup>

A study by Jeff Manza and Christopher Uggen showed that sixteen percent of their subjects who were disenfranchised were rearrested between 1997 and 2000, while only five percent of those who could vote were

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<sup>271</sup> *Chiodo v. Schultz*, 846 N.W.2d 845, 848 (Iowa 2014).

<sup>272</sup> *Griffin v. Pate*, 884 N.W.2d 182, 185 (2016).

<sup>273</sup> Mackenzie, *supra* note 46, at 1.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Hamilton-Smith & Vogel, *supra* note 49, at 414.

<sup>277</sup> *Id.*

<sup>278</sup> LOCKED OUT, *supra* note 50, at 155.

<sup>279</sup> *Id.* at 156.

<sup>280</sup> *Id.* at 157.

rearrested during that time.<sup>281</sup> Similarly, about twelve percent of their disenfranchised subjects were reincarcerated in prison or jail, while only five percent of their subjects who could vote were reincarcerated.<sup>282</sup> The same study, in another research group, showed that twenty-seven percent of disenfranchised felons were rearrested, while only twelve percent of felons with the right to vote were rearrested.<sup>283</sup> These results suggest a correlation between disenfranchisement and recidivism, with voting acting as a pro-social behavior that leads to more successful reintegration into society.<sup>284</sup>

By removing the obstacle of disenfranchisement, felons are one step closer to successful reintegration into society. Successful reintegration and reduced recidivism rates result in lower prison populations, decreasing state and federal spending, thereby benefitting the government as well as the felon. By passing legislation or a constitutional amendment ending permanent felon disenfranchisement in Iowa, the Iowa General Assembly can reduce felon recidivism rates, lower prison populations, and decrease government spending, as well as increase the probability of successful reintegration of felons into society.

#### B. *Iowa's Proposed Solution is Helpful, but Inadequate*

The bill proposed during the 2019 session to implement Governor Reynolds' plan of restoring voting rights to felons is a helpful step in the right direction, but overall it is inadequate. A provision in the Iowa constitution that provides the Iowa legislature with control over the voting rights of felons is an inadequate solution because it is easier to overturn legislation than a constitutional amendment, and the legislature could fail to implement such legislation if they so choose.<sup>285</sup> Additionally, this proposed constitutional amendment is less protective of felons' voting rights compared to the constitutional amendments related to felon disenfranchisement in other states because it requires the legislature to affirmatively pass additional legislation and does not have the rights written directly into the constitution. The Iowa General Assembly needs to propose a constitutional amendment similar to that recommended by the Brennan Center for Justice—changing “convicted of any” to “serving a prison sentence upon conviction of an” in

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<sup>281</sup> *Voting and Subsequent Crime and Arrest*, *supra* note 48, at 204–05.

<sup>282</sup> *Id.* at 205.

<sup>283</sup> *Id.*

<sup>284</sup> *See id.* at 214–15.

<sup>285</sup> *See* Brennan Center Memorandum, *supra* note 10, at 2 (outlining how voting rights can be restored by constitutional amendment or a legislative change).

article 2, section 5 of the Iowa Constitution<sup>286</sup>—or by eliminating the disqualifier of “convicted of any infamous crime” completely.<sup>287</sup>

1. Requiring the Legislature to Affirmatively Pass Additional Legislation is Inadequate

The proposed constitutional amendment allows the Iowa General Assembly to affirmatively enact additional legislation to provide felons the right to vote, or else felons have to continue relying on the Governor’s clemency powers to regain their voting rights.<sup>288</sup> All the proposed legislation does is add language to the Iowa Constitution that allows the legislature to enact such legislation. As a result, two negative results could happen. First, the Iowa General Assembly could fail to pass such legislation. Second, the legislature could pass the legislation, but it could be repealed at a later date similar to any other piece of legislation. If the legislature fails to pass a law granting felons the right to vote, there is no benefit of the proposed constitutional amendment. Further, the legislature could enact legislation granting felons the right to vote, but a later legislature could decide to repeal the legislation. All the constitutional amendment does is give the General Assembly the power to pass such legislation.<sup>289</sup>

However, if the Iowa Constitution expressly mentioned felony enfranchisement, or, on the other hand, contained no language prohibiting it, then the legislature would have to go through the constitutional amendment procedure to repeal the law. This procedure is more difficult than simply passing legislation to repeal a bill. In order to amend the Iowa Constitution, the Iowa General Assembly must pass the proposed amendment by a majority of both houses, and then have it ratified by a majority of Iowa voters.<sup>290</sup> Therefore, by passing the Brennan Center for Justice’s recommended amendment, or an amendment deleting the language “convicted of any infamous crime” from the Iowa Constitution, there would be more protection for felon voting rights compared to the current proposed amendment.<sup>291</sup>

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<sup>286</sup> IOWA CONST. art. II, § 5; Brennan Center Memorandum, *supra* note 10, at 2.

<sup>287</sup> IOWA CONST. art. II, § 5.

<sup>288</sup> H.J. Res. 1, 88th Gen. Assemb., 2019 Sess. (Iowa 2019).

<sup>289</sup> The Iowa legislature could not pass legislation granting felons the right to vote without the constitutional amendment because it would violate the Iowa Constitution. *See* IOWA CONST. art II, § 5.

<sup>290</sup> IOWA CONST. art. X, § 1.

<sup>291</sup> IOWA CONST. art. II, § 5; Brennan Center Memorandum, *supra* note 10, at 2.

## 2. Iowa's Proposed Amendment is Inferior Compared to Florida's Amendment

Florida has passed a constitutional amendment for felon enfranchisement, and this amendment has more protection for felons' voting rights than Iowa's proposed amendment. Prior to January 2019, Florida was similar to Iowa and Kentucky in that the Florida Constitution banned felons from voting.<sup>292</sup> In November 2018, Floridians voted to amend the Florida Constitution to grant most felons the right to vote, excluding those convicted of murder or sexual offenses.<sup>293</sup> The Florida Constitution now reads: "No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights."<sup>294</sup>

By passing this amendment, Florida explicitly granted most felons the right to vote, unlike Iowa's amendment that required the legislature to affirmatively pass felon enfranchisement legislation. Iowa should take Florida's lead and pass a constitutional amendment that explicitly grants felons the right to vote in the Iowa Constitution. However, Iowa should go one step further than Florida by protecting the voting rights of felons who have served their time and paid their dues to society. Iowa should eliminate the words "convicted of an infamous crime" or apply the Brennan Center for Justice's recommended amendment changing the words "convicted of" to "serving a prison sentence for" in article 2, section 5 of the Iowa Constitution.<sup>295</sup>

## IV. CONCLUSION

Iowa currently has one of the strictest felony disenfranchisement laws in the country.<sup>296</sup> This is because the Iowa Constitution prohibits those "convicted of an infamous crime" from voting.<sup>297</sup> Additionally both the Iowa legislature and Iowa Supreme Court have interpreted the term "infamous crime" in a manner that prohibits all felons from voting.<sup>298</sup> The Iowa

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<sup>292</sup> *Voting Rights Restoration in Florida*, BRENNAN CTR. FOR JUST. (May 31, 2019), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida> [<https://perma.cc/AGB5-JSMH>].

<sup>293</sup> Chavez, *supra* note 59.

<sup>294</sup> FLA. CONST. art 6, § 4(b).

<sup>295</sup> IOWA CONST. art. 2, § 5; Brennan Center Memorandum, *supra* note 10, at 2.

<sup>296</sup> *Criminal Disenfranchisement Laws*, *supra* note 3.

<sup>297</sup> IOWA CONST. art. 2, § 5.

<sup>298</sup> See IOWA CODE ANN. § 39.3(8) (West 2019); Griffin v. Pate, 884 N.W.2d 182, 205 (Iowa 2016).

Supreme Court's interpretation in *Griffin* relied heavily on an Iowa statute defining "infamous crime" as a felony.<sup>299</sup>

The politically-held office of the Governor exercises a significant amount of control over the state's felony disenfranchisement law, causing inconsistency and unpredictability.<sup>300</sup> Additionally, history shows that felony disenfranchisement laws grew out of racist ideals and currently have a largely disproportionate effect on African Americans, which Justice Marshall addressed in his dissent in *Richardson*.<sup>301</sup> Furthermore, a permanent ban on felony disenfranchisement is a bar to successful reintegration into society for felons and thereby increases recidivism rates.<sup>302</sup> The United States Supreme Court's holding in *Richardson* stating that felony disenfranchisement is constitutional and does not violate the Equal Protection Clause is not binding on the states, because Iowa is allowed to provide more protections for its citizens than federal law provides.<sup>303</sup> Therefore, Iowa has a choice about whether it wants to continue the practice of permanent felony disenfranchisement or instead grant more voting rights protection to its citizens. Also, Iowa's felony disenfranchisement laws disenfranchise legitimate voters as well as felons, denying the right to vote those guaranteed the right to vote by the Iowa Constitution.<sup>304</sup>

The Iowa General Assembly has proposed legislation for felon enfranchisement before, but these proposed pieces of legislation were killed in the legislature and were never passed and signed into law.<sup>305</sup> The Iowa General Assembly's current proposed constitutional amendment to grant felons the right to vote is inadequate because it does not explicitly grant felons the right to vote in the constitution and leaves it up to the legislature to pass a bill or the Governor to grant clemency. These options provide insufficient security to felons in their voting rights by allowing for inconsistency and unreliability.

The Iowa General Assembly should adopt a constitutional amendment in line with the Brennan Center for Justice's recommendations to change "convicted of" to "serving a prison sentence for" in article 2, section 5 of the Iowa Constitution,<sup>306</sup> or should adopt a constitutional amendment

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<sup>299</sup> *Griffin*, 884 N.W.2d at 205.

<sup>300</sup> *See supra* Section III.A.1.

<sup>301</sup> *Richardson v. Ramirez*, 418 U.S. 24, 73–75 (1974) (Marshall, J., dissenting).

<sup>302</sup> Hamilton-Smith & Vogel, *supra* note 49, at 414–15.

<sup>303</sup> *Richardson*, 418 U.S. at 54–56.

<sup>304</sup> *See supra* Section III.A.4.

<sup>305</sup> *See supra* Section II.D.3.

<sup>306</sup> Brennan Center Memorandum, *supra* note 10, at 2.

eliminating the words “convicted of an infamous felony” from article 2, section 5 of the Iowa Constitution.<sup>307</sup> Enacting one of these constitutional amendments would allow Iowa to be in step with the majority of the United States and ensure that felons are awarded individual rights similar to the rest of the community, without the need for executive clemency that varies based on who holds the executive power.

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<sup>307</sup> IOWA CONST. art. II, § 5.

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University of Iowa College of Law  
190 Boyd Law Building  
Iowa City, Iowa 52242-1113

Phone: (319) 335-9054  
Fax: (319) 335-9019  
Email: [ilr@uiowa.edu](mailto:ilr@uiowa.edu)



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Boyd Law Building, Room 185

Iowa City, Iowa 52242-1113

Phone: (319) 355-9736