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Revisiting the Origins of Felony Disenfranchisement in the United States

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Research Article

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Abstract

We trace the origin of felony disenfranchisement from the colonial period through Reconstruction. On the eve of the Civil War, three-quarters of states had criminal disenfranchisement statutes. These laws were based on "legal moralism" principles, which limited the franchise to those in good standing with the community. Efforts at disenfranchisement grew as access to the ballot increased and criminal justice reforms replaced capital and corporal punishment for imprisonment. We highlight important transformations in felony disenfranchisement during Reconstruction, specifically in new state constitutions and the Thirteenth and Fourteenth Amendments. All but one Southern state included felon disenfranchisement in their new constitutions that the Republican-controlled Congress ratified for readmission to the United States. Radical Republicans in Congress and state legislatures were in most cases advocates of felony disenfranchisement to exclude former Confederates from political participation.

1. Introduction

Over the past quarter of a century, there has been a substantial amount of academic research focused on the disparate racial impact of state laws that prohibit felons or ex-felons from voting.[1] While acknowledging that the origins of such laws stretch back to antiquity, researchers typically argue these laws did not significantly impinge on voting until after the Civil War when Southern states passed harsh felony disenfranchisement laws, along with a wide range of other laws—Black Codes and Jim Crow laws—aimed at restricting the economic, political, and civil rights of Black freedmen. We argue that pre–Civil War criminal disenfranchisement laws have not garnered sufficient attention. By 1860, three-quarters of states had criminal disenfranchisement laws; most of which had language prohibiting some people convicted of crimes from voting. According to Ewald, only a small number of crimes resulted in disenfranchisement, but as we show, these laws in the postcolonial era were applied to far more crimes than previously identified.[2]

We argue early criminal disenfranchisement laws were part of a broader legal system that sought to bolster public morality by sharply distinguishing between "virtue and vice."[3] Initially, the system of legal moralism was quite sweeping, including personal behaviors such as drunkenness as reasons for disenfranchisement, but over time the definition of moral behavior became narrower, limited to being a law-abiding person. Pre–Civil War laws were not aimed at disenfranchising African Americans because very few had the right to vote in this period. Criminal disenfranchisement grew in importance as universal white male suffrage expanded and other restrictions meant to ensure commitment to the community, such as property or wealth standards, were eliminated. Also, we show that criminal disenfranchisement provisions adopted during Reconstruction were not aimed at disenfranchising African Americans. Radical Republicans in Congress viewed these provisions as highlighting the moral superiority of freedmen, particularly veterans, in contrast to those who fought for the Confederacy. The felon

[1]Lynn Adelman, "The Persistence of Penal Disenfranchisement: Suppressing Votes the Old-Fashioned Way," *SSRN* 3848083 (2021); Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010); Angela Behrens, Christopher Uggen, and Jeff Manza, "Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850-2002," *American Journal of Sociology* 109, no. 3 (2003): 559–605; George Fletcher, "Disenfranchisement as Punishment: Reflections on the Racial Uses of *Infamia*," *UCLA Law Review* 46 (1999): 1895–908; Erin Kelley, "Racism & Felony Disenfranchisement: An Intertwined History," *Brennan Center for Justice* May 9, 2017; Sarah Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sarah Wakefield, and Michael Massoglia, "The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010," *Demography* 54, no. 5 (2017): 1795–818.

[2]Alec C. Ewald, "Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States," *University of Wisconsin Law Review*, March, 2002, 1045–132. 1059–63.

[3]Richard Re and Christopher Re, "Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments," *The Yale Law Journal* 121 (2012): 1584–670.

disenfranchisement language in new Southern constitutions was adopted by state conventions that included freedmen and excluded many white Confederates. Felon disenfranchisement was standard practice, and consistent with principles of legal moralism that prevailed at the time. While these laws later became part of the Jim Crow disenfranchisement of Blacks, the pre–Civil War laws and the Southern constitutions adopted during Reconstruction did not have this aim.

Extant research conflates the origin of felon disenfranchisement laws, which predate African American suffrage or were put in place with Radical Republican and Black freeman support to restrict ballot access to former Confederates, with the subsequent discriminatory application of those constitutional and statutory provisions. Tracing the development of these laws through American history shows they were codifications of long-standing practice to restrict the ballot, as the 1776 Pennsylvania constitution describes, to "free men having a sufficient evident common interest with and attachment to the community," which excluded those deemed unlawful. Reconstruction-Era laws included in Southern state constitutions were extensions of this logic, as former Confederates were considered harmful to the community for their efforts to forcefully disband the Union and retain slavery.

Our argument has four parts. In the first section, we consider the origins of criminal disenfranchisement and how justifications for the practice can be found in the different philosophical traditions that shaped the country's founding. Second, we show how the disenfranchisement of felons was part of the legal moralism system in colonial America. Third, we trace how criminal disenfranchisement laws became increasingly important in the pre–Civil War era as states expanded the franchise and gradually eliminated other ways to ensure the high moral standing of voters. Finally, we examine the inclusion of criminal disenfranchisement in the Thirteenth and Fourteenth Amendments and Reconstruction-Era Southern state constitutions, paying particular attention to the involvement of freedmen and Radical Republicans in the drafting of the constitutions.

We draw upon a broad mix of primary source materials, such as legal treatises, colonial statutes, state constitutions and statutes, and congressional debates, along with well-documented secondary sources. An important part of our examination of nineteenth-century criminal disenfranchisement laws is an understanding of what key terms meant in that period. We provide definitions of terms, which may have been widely employed in the sixteenth to nineteenth centuries, but which subsequently have fallen out of usage or taken on different meanings.

2. The historical roots and philosophical underpinnings of felon disenfranchisement

The earliest versions of felony disenfranchisement were among the ancient Greeks and Romans, who punished criminals by taking away their rights to attend and vote in assemblies. The practice of imposing "civil death" on criminals spread throughout Europe after the fall of the Roman Empire.[4] Under common law in England, a person convicted of a "heinous crime" was subject to penalties including the forfeiture of property, the loss of inheritance rights for self and children, and the loss of all civil rights.[5] Although English common law traditions underwent some shifts after being brought to the New World, the imposition of a form of "civil death" remained intact.[6]

In the following sections we argue that felon disenfranchisement was inherent in the system of "legal moralism" that restricted the franchise to people in good standing in the community. Laws restricting access to criminals were only formalized when voting was considered a right, rather than a privilege with conditions.[7] These laws were also not aimed at Black residents, who were disenfranchised through multiple other means.

2.1. Lockean liberalism

Despite colonial America having a more egalitarian ethos than existed in Europe, that egalitarianism did not extend to the restoration of voting rights to those subjected to "civil death," even if only for minor offenses. This can best be viewed as a reflection of the political cultures within the colonies. For Louis Hartz, the boundaries of political conflicts were set by Lockean liberalism.[8] He viewed American political development as a "fragment" of seventeenth-century England, as embodied in the writings of John Locke. In *The Second Treatise of Government*, Locke describes men as being "all equal and independent" in the state of nature, but their life and property are constantly at risk.

According to Locke, government is established when men in the state of nature voluntarily agree to a contract, where they agree to give up some of their natural rights, including the power to punish offenders and allow government to establish rules and punish transgressors.[9] The legitimacy of government is based on its ability to provide for "the mutual preservation of the lives, liberties and estates" of contracting parties. Subsequent generations are bound by the contract when they give "tacit consent" by choosing to live under its dominion and enjoy the benefits of being part of the community. By giving "tacit consent," they are "obliged to obedience to the laws of that government."[10] Contract theorists, such as Locke, were deeply influential in the adoption of criminal disenfranchisement statutes after the Revolutionary War.[11]

In contractual relationships, each of the parties is bound by the agreement if the other upholds their responsibilities. Lockean contract theory, with its endorsement of popular sovereignty, can be found in early colonial documents, where the male members of a

[4]In Roman law, the term applied to "civil death" was *infamia*, which meant the person was dead to the law. See Fletcher, "Disenfranchisement as Punishment" (1899).

[5]Ewald, "Civil Death," p. 1059. William Walton Liles, "Challenges to Felony Disenfranchisement Laws: Past, Present, and Future," *Alabama Law Review* 58 (2007): 615–29. 615–17. See also Blackstone's, *Commentaries on the Laws of England, Book IV: Of Public Wrongs* (1765–1769), where he discusses the range of punishments meted out in common law. A key element in determining whether to put a convicted felon to death is if the person can "discern between good and evil." People deemed to be suffering from "madness, idiocy or insanity" should not be executed, but children who can understand right and wrong could be executed.

[6]Liles, "Challenges to Felony Disenfranchisement Laws," 217. It is worth noting that the common law prohibition on felons passing property to heir, referred to as "corruption of the blood" practices, was never enforced in colonial America (Liles 2007: 616–17).

[7]The earliest Supreme Court decision to suggest voting was a fundament right was *Yick Wo v. Hopkins* (1886) which described it as "preservative of all other rights." While important, the ruling had little effect until much later, but it was cited as a precedent in *Smiley v. Holm* (1932) that emphasized voting as a fundamental right. Even in the contemporary period, the Court often applies a lower level of scrutiny in voting rights cases than in litigation involving other fundamental rights (Douglas Greenberg, "Crime, Law Enforcement, and Social Control in Colonial America," *American Journal of Legal History* 26 (1982): 293–325).

[8]Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt Brace, 1955).

[9]John Locke, *The Second Treatise of Government*, ed. Thomas P. Peardon (Indianapolis: Bobbs-Merrill Educational Publishing, 1952), 49.

[10]Locke, *The Second Treatise of Government*, p. 68.

[11]Ewald, "Civil Death," 1071.

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settlement signed compacts and covenants committing themselves to pursuing the common good and to be governed by the decisions of the majority.[12] The Founders repeatedly cited failures of the British crown to protect colonists as justifications for the American Revolution, often using language similar to what can be found in *The Second Treatise of Government.*

2.2. The "multiple traditions thesis"

Although Lockean liberal theory was central to the American founding, it was not the only philosophical influence. Smith developed the "multiple traditions thesis," which holds that American political development has been shaped by three ideological strands: liberalism, republicanism, and a type of ethno-cultural Americanism based on ascriptive characteristics.[13] Beginning in the 1960s, scholars began to counter the view that the American founding was wholly a reflection of Enlightenment liberal thought.[14] Instead, they presented evidence that much of the Revolutionary era political discourse stressed the need for "civic virtue" and sacrificing for the "common good," ideas that were not reflective of the individualism in Lockean liberalism. Civic republicanism, which is a communal tradition emphasizing civic virtue, meshed well with the Christian piety prevalent in many of the colonies.[15] Later studies paid more attention to the ways that these beliefs became embedded in political, social, and cultural life.[16] Ewald suggests that civic republican thinkers also shaped support for criminal disenfranchisement laws.[17]

At the same time, another group of scholars argued most Anglo-Americans believed there were inherent differences among people, which were immutable and resulted in people occupying different social positions based on those ascriptive characteristics.[18] Shklar writes, "From the first the most radical claims for freedom and equality were played out in counterpoint the chattel slavery, the most extreme form of servitude."[19] The enslavement of Africans, while opposed on religious grounds by some political leaders in colonial America, was embraced by others who posited that the different racial groups—not just Africans but also the Indigenous peoples of North America—had different origins and capabilities.[20] Women also were not accorded civic status equal to men. Under common law, an unmarried woman could gain limited civic status as a *feme sole*, but a married woman was a *feme covert*, which meant she was entirely subordinate to her husband and had no legal status separate from him.[21]

3. Legal moralism in Colonial America

These disparate strands came together during the colonial era to create a system of legal moralism, a term we borrow from Metzger, with a range of restrictions on voting that conformed to the precepts of all three philosophical traditions. Lockean theory holds that some people (women, children, slaves) have ascriptive characteristics that render them ineligible for participation in governance.[22] Contract theory holds that parties to the contract (e.g. both government and citizen) must uphold their legal obligations. Hence, a citizen who does not follow laws is subject to punishment, and if the offense is egregious enough can lose his life, freedom, or be banished. Republican philosophy strongly supported the view that only citizens committed to furthering civic virtue can participate in governance. Finally, many Anglo-Americans believed that the capacities needed for self-governance were present only in certain subsets of the population. Thus, each of these traditions provided rationales for restricting the franchise.

Contract theory, as well as civic republican ideology, influenced the structuring of elector requirements. According to Dinkin, colonial voting qualifications embodied two interconnected principles: (1) freemen in a community had a basic right to vote, and (2) voting was contingent upon one's commitment to the common good of the community.[23] The first of these appears to be a direct reflection of liberal political thought, while the second seems more reflective of civic republicanism. The key lies in the meaning of the term "freeman," which varied across states, as well as the other legal restrictions upon eligibility for voting and/or freeman status. It also is worth noting the definitions and qualifications did not remain constant across time, encompassing more than 150 years.

3.1. Defining the electors

This summary draws heavily upon Bishop's meticulously referred comprehensive record of voting practices in colonial America.[24] Initially, the different colonies did not have clearly defined criteria laying out who was entitled to vote. Instead, the governor issued a summons for "freeholders" or "freemen" to either attend or elect delegates to a colony assembly, but requirements for electors were established within a few years.[25] The principle that all freemen

[12]Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 81.

[13]Rogers M. Smith, "Beyond Tocqueville, Myrdahl, and Hartz: The Multiple Traditions in America," *American Political Science Review* 87, no. 3 (1993): 549–66; Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in US History* (New Haven: Yale University Press, 1997).

[14]Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967); Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* (Ithaca: Cornell University Press, 1978); Drew McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (Chapel Hill: University of North Carolina Press, 1980); John G. A. Pocock, *Barbarism and Religion, Vol. 1* (Cambridge: Cambridge University Press, 1999); Thomas Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1988). Pocock (1999, I: 121) disputes the tendency to view Enlightenment political philosophy as wholly liberal; instead marshaling evidence suggesting that classical republican thought with concern for morality was prevalent.

[15]The heavy influence of Christian moralism can be seen in many of the founding documents. For example, the Fundamental Agreement of the Colony of New Haven (1639) specifies that burgesses had to be chosen out of church members and that in the "making and repealing of laws" they should be "ordered by those rules, which the scripture holds forth."

[16]Daniel Rogers, "Republicanism: The Career of a Concept," *Journal of American History* 79, no. 1 (1992): 11–37; Ewald, "Civil Death," 50–51 suggests that early American law had elements reflective of both liberal contract theory and communalism of republican thought.

[17]Ewald, "Civil Death," 1080–81.

[18]Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (Cambridge: Harvard University Press, 1981); Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge: Harvard University Press, 1991); Smith, "Beyond Tocqueville, Myrdahl, and Hartz".

[19]Shklar, *American Citizenship*, 1.

[20]Horsman, *Race and Manifest Destiny*, 50–51.

[21]Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1989).

[22]Julia Metzger, "The Persistence of Felon Disenfranchisement through the Perpetuation of Legal Moralism," *Washington University Jurisprudence Review* 14 (2021): 251–78.

[23]Robert Dinken, *Voting in Provincial America: A Study of Elections in the Thirteen Colonies, 1689-1776* (Westport: Greenwood Press, 1977), 28–29.

[24]Cortlandt F. Bishop, *History of Elections in American Colonies* (Cornell University Library Digital version, 1893).

[25]Bishop, *History of Elections in American Colonies*, 45.

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should have a political voice receded and the view that one's relationship to the community determined those rights came to the fore.[26]

By far, the most common term used to identify those qualified to be electors was "freeman" which was used in Delaware, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, and South Carolina. Freeholder was the second most common term—used in Maryland and New Hampshire, as well as Massachusetts and Virginia at different points. Virginia law also used the very inclusive term "all inhabitants." Connecticut described electors as free planters.[27]

While one might think the term freeman was equally applicable to men who were neither slaves nor indentured servants, that was only true when used as a generic descriptor.[28] In many states, however, freeman was a legal term that applied only to those with full civic rights, including the right to vote. A man seeking to gain the designation had to satisfy other qualifications that dealt with the man's moral character. The strictest qualifications in the New England states, where a man had to gain the approval of authorities in his town and take the freeman's oath. The application, along with testimony about his fitness would then be forwarded to the colonial authorities, where approval had to be given by the courts. This process could take a year—and only after approval could a man claim freeman status and be added to the voter rolls.[29] In contrast, the freeholder requirement in Maryland and New Hampshire could only be attained by those with property/wealth; it was usually applied to male owners of a freehold with a worth of 40 shillings. While it was typically easier for men in colonial America to gain this level of wealth than those in England, it still excluded most non-indentured white men.[30] This apparent distinction between states with the freeman and freeholder designations was not nearly as clear-cut as it might appear because of additional property/wealth requirements for voters.

3.2. Legal moralism and voting qualifications

Voting eligibility in colonial America largely depended upon a person's standing within the community.[31] What evolved was a system of legal moralism where those with desirable social attributes were encouraged to participate, while those without such attributes were excluded—and criminal disenfranchisement was only a small part of that system. However, the fact that elections occurred in all states reflected Lockean contract theory, which held that government legitimacy rested on the consent of the governed.

Before the American Revolution, every state had laws that required men to meet property/wealth requirements before being added to the roll of electors.[32] Some states provided only one way of satisfying the requirement, while in others there were diverse ways that it could be met. Connecticut, Massachusetts, New York, and Rhode Island followed the 40-shilling threshold that existed in England, which held that prospective voters had to show ownership of a property (freehold) with a rental value of 40 shillings per year. Connecticut, Delaware, Maryland, New Hampshire, and South Carolina required ownership of a property with a specific valuation (30–50 pounds). Georgia, Maryland, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia allowed voting if the man owned properties of a specific size—typically 50 acres.[33]

The rationale for limiting the vote to propertied men was to ensure that the electorate was comprised of people with a stake in the well-being of the community. But the effect of such laws varied across states, and within states. In many communities, sheriffs and magistrates could add freemen who were unable to meet the property requirement to the voter rolls if they believed the men had demonstrated good character and civic virtue through actions such as military service.[34] Ratcliffe also notes that exceptions were common, especially for those who participated in military service, labor on behalf of the states (e.g. road work), as well as those with means but not property, such as male children born after the first son who would inherit an estate.[35]

Importantly, access to the ballot was frequently adjudicated on moral and religious grounds, and the adjudicators were many, including clergy, local elites, and judges. The strictest of these provisions were in New England. In Connecticut, a man needed to provide testimony from neighbors of his "sober and peaceable conversation," as well as a supporting certificate from a local selectman. If later the man demonstrated low moral character, he would lose freeman status and the selectman would have to pay a 5 pound fine. "Civil conversation" was one of the requirements for freemen in Rhode Island.[36] In the early New England colonies, freeman status could be revoked for minor offenses, such as "scandalous walking" in Plymouth Colony, and for more serious offenses, such as failing to be "obedient to the civil magistrate" in Rhode Island.[37]

During the seventeenth and early eighteenth centuries, religious orthodoxy was often cited in evaluations of moral fitness for voting. Massachusetts Bay Colony initially required freemen to be church members, but later allowed men to present a certificate of orthodoxy from their Puritan ministers. The 1691 Massachusetts Charter instituted the 40-shilling freehold as an alternative way to show moral fitness.[38] Massachusetts did not allow Quakers or Catholics

[26] Dinken, *Voting in Provincial America*, 29.

[27] Bishop, *History of Elections in American Colonies*, 5–44. Copies of colonial era founding documents and laws can be accessed via the Avalon Project at Yale Law School, Lillian Goldman Law Library.

[28] For example, Menard (1973), while writing about social mobility in seventeenth-century Maryland uses the term "freeman" to describe all men who had completed their period of indentureship, before distinguishing between freemen and those whose acquisition of property allowed them to become electors. Russell Menard, "From Servants to Freeholders: Status Mobility and Property Accumulation in Seventeenth-Century Maryland," *The William and Mary Quarterly*, 37–64, January 1973.

[29] Bishop, *History of Elections in American Colonies*, 92. In many places, there were different voter rolls for local elections and for choosing delegates for state assembly and other officials (Dinkins 1977, 40).

[30] According to Lutz, *The Origins of American Constitutionalism*, 51, the portion of white men with a net worth that allowed them to be considered freeholders was much lower in the Southern states than in the North. Also, Menard, "From Servants to Freeholders," in his study of Maryland found evidence that it become more difficult over time.

[31] This position was articulated in the preamble to the 1716 South Carolina election law: "It is necessary and reasonable, that none such person who have an interest in this Province should be capable to elect … members of the Commons House of Assembly (*Statutes of Large of South Carolina* reprinted in Dinkin 1977, 29).

[32] Avalon Project at Yale Law School, Lillian Goldman Law Library.

[33] In Virginia, for example, the law provided different acreage requirements, depending upon whether the land was settled or not. A man with 25 acres of unsettled land had to also have built a 12-foot square house on the property, but there was no requirement for a house if the man owned a 50-acre plot of settled land (Bishop, *History of Elections in American Colonies*, 77).

[34] Lutz, *The Origins of American Constitutionalism*, 75–76; Shklar, *American Citizenship*, 36–37.

[35] Daniel Ratcliffe, "The Right to Vote and the Rise of Democracy: 1878-1828," *Journal of the Early Republic* 33, no. 2 (2013): 219–54.

[36] Bishop, *History of Elections in American Colonies*, 54–55.

[37] Ibid.

[38] Ibid., 58, 72.

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to become freeman. New York, Maryland, and Rhode Island prohibited Catholics from voting. Jews could not vote in New York and South Carolina. Professions of Christian faith were required in Rhode Island, North Carolina, and South Carolina.[39] Also, freemen could lose the vote if convicted of violating the laws.[40]

Most states did not have laws that explicitly excluded voters based on race or biological sex because those were assumed. Only Virginia, North Carolina, South Carolina, and Georgia explicitly limited the right to vote on racial grounds. Virginia law excluded Blacks, mulattos, and Indians from voting. North Carolina excluded those groups, as well as "mustees," who were people of mixed white and quadroon descent. Georgia and South Carolina limited the franchise to white men, but there are records showing "free Negroes" voted in a Berkeley County, South Carolina election.[41] Virginia was the only state that statutorily barred women, even those meeting the property threshold, from voting, but the use of "freeman" as a descriptor of electors could be taken as excluding women.[42] Dinkin describes the exclusion of women as the "most universal restriction" in colonial America, although a few propertied widows voted in Massachusetts.[43]

3.3. Criminal justice in Colonial America

In colonial America there were many different legally permissible grounds for disenfranchisement. As such, the disenfranchisement due to criminal actions was only a small piece in the legal moralist systems that underwent significant changes over the 150 years of European settlement and differed across the thirteen colonies.[44] During this period, criminal actions often resulted in censure, death, or severe corporal punishment that excluded those punished from political life.

According to Chapin, the colonies initially applied common law principles, but by 1660 the Northern colonies had shifted to a statutory system of criminal law, but Southern colonies had continued to use a discretionary system loosely based on common law.[45] This translated into southern colonies punishing crimes committed by Blacks much more harshly than those committed by whites.[46] In general, the legal systems were less harsh in punishment for criminal offenses than what was practiced in England, where death sentences for even trivial offenses were common.[47]

Violations of public morality, such as fornication, adultery, bastardy, and drunkenness were criminal offenses, along with crimes, such as treason, murder, rape, and robbery. The range of punishments for offenses included "death, whippings, brandings, pillory, stocks, public cages, the wearing of symbols, cutting of ears, fines, and banishment."[48] These punishments were also meted out by churches in several colonies.[49] In Virginia, a conviction for immorality often resulted in whippings of up to forty lashes while insubordinate behavior could result in 100 lashes.[50] Beatings were less common and limited to forty strokes in Massachusetts, where the well-off usually were assessed fines.[51] Over time, prosecutions for immoral behavior receded in importance, replaced by more attention to the growing numbers of property crimes.[52]

In the colonies, the death penalty primarily was imposed for murder and treason, but the number of offenses potentially subject to capital punishment was significantly longer.[53] The Massachusetts "Body of Liberties" from 1641 in a section labeled "Capital Laws" listed the following twelve offenses: worshiping a non-Christian god, witchcraft, blasphemy or cursing God, willful murder, slaying in anger, slaying by poison or "devilish practice," bestiality, male homosexuality, adultery, kidnapping, false witness to cause the death of another, and rebellion against the government or forts. While the legal code specified that punishments could only be enforced against those convicted of crimes listed in the "express law of the County," the framers gave themselves more flexibility by stating actions that violated "the word of God" were also prosecutable.[54]

None of the colonies, however, had statutes that disenfranchised felons as currently exist. Instead, felons were disenfranchised by the web of laws and practices that limited voting to those viewed as making positive contributions to society, whether through property holding or wealth, or expressions of moral virtue. Physical marks on the bodies of those convicted of crimes ensured that if they moved to new communities they would be identified as troublemakers.

Incarceration was not a central feature in any of the states until the nineteenth century when the self-policing measures were no longer sufficient, and use of capital punishment declined.[55]

[39] Ibid., 56–64.

[40] Ibid., 55.

[41] Ibid., 51–52.

[42] Ibid., 65–66.

[43] Dinkin 1977, 29–30.

[44] Bradley Chapin, *Criminal Justice in Colonia America* (Athens: University of Georgia Press, 1983); Bradley Chapin, "Felony Law Reform in the Early Republic," *The Pennsylvania Magazine of History and Biography* 113, no. 2 (1989): 163–83; Kathryn Preyer, "Penal Measures in the American Colonies: An Overview," *The American Journal of Legal History* 26, no. 4 (1982): 326–53.

[45] Chapin, *Criminal Justice in Colonia America*, 15–23. Although Chapin argues that English common law was the biggest influence on criminal justice practices, he also cites evidence that Biblical precepts and indigenous sources had effects.

[46] Davis Young Paschall, "Crime and Punishment in Colonial Virginia, 1607-1776" (1937); Stuart Banner, *The Death Penalty: An American History* (Cambridge, MA: Harvard University Press, 2002), 8–9 points out that there were a large number of capital offenses in the 1700s that only applied to Blacks, particularly but not exclusively in the southern colonies. In later periods, Fleury-Steiner (2004) documents juries' role in the discriminatory application of the death penalty toward racial minorities. Benjamin Fleury-Steiner, *Jurors Stories of Death* (Ann Arbor: University of Michigan Press, 2002).

[47] Banner, *The Death Penalty*. In 1723, England passed the Waltham Black Act, commonly referred to as the "Bloody Code," which imposed the death penalty for minor offenses, such as damaging gardens, cutting down trees, or being out at night with a blackened face. These laws standardized, and made harsher, justice practices across the colonies. Throughout the eighteenth century, Parliament increased the number capital offenses to more than 250, with lesser offenses resulting in the convicted person being shipped to the colonies, Harry Elmer Barnes, "Historical Origins of the Prison System in America," *Journal of Criminal Law and Criminology* 12, no. 1 (1921): 35–60. See Banner, *The Death Penalty* for a detailed account of the death penalty and its social and legal underpinnings during this period.

[48] Preyer, "Penal Measures in the American Colonies," 329–30.

[49] Greenberg, "Crime, Law Enforcement, and Social Control".

[50] Preyer, "Penal Measures in the American Colonies," 330–31.

[51] Massachusetts "Body of Liberties" 1641. Preyer, "Penal Measures in the American Colonies," 334–36.

[52] Preyer, "Penal Measures in the American Colonies," 352. Much of the growth in property crimes was attributed to increasing numbers of criminals being sent from England to the colonies. Following the passage of the 1718 Transportation Act, the English government adopted a policy of transporting large numbers of convicted felons to the colonies where they would be sold as laborers.

[53] Chapin, *Criminal Justice in Colonia America*. 55–58. In Rhode Island, the 1663 charter did not list crimes and punishments; instead, it gave the General Assembly the authority to establish "punishments pecuniary and corporate" according to English law (Charter of Rhode Island and Providence Plantations 1663), but there only were forty-one executions between 1670 and 1777, thirty-two of those were for piracy, others for murder, arson, and burglary (Carlson no date).

[54] Massachusetts "Body of Liberties" 1641.

[55] Preyer, "Penal Measures in the American Colonies," 329; Banner, *The Death Penalty*.

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Colonial America did not have a penitentiary system. Instead, there were local jails where offenders could be held for short periods along with debtor prisons and workhouses.[56] Pennsylvania's "Great Law" was unusual in that it allowed for those convicted of non-capital offenses to pay off fines by laboring in workhouses. What this meant is that the disenfranchisement of felons following periods of incarceration was not a concern of government officials during the colonial era. This, however, changed in the years following the American Revolution.

4. The early republic: Continuity and change

Among the most significant developments of the Revolutionary War period was the "growing politicization of the common man," with thousands taking part in protests and boycotts against British rule and joining the armed insurrection; all of which undermined the traditional politics of deference.[57] Following the Revolution, the mass extension of suffrage to men came alongside efforts to codify disenfranchisement into law. Formal disenfranchisement for criminal behavior became common during this period, and barriers based on gender and race solidified. What had been in practice exclusion of women from voting became explicit as states passed laws limiting the franchise to men[58]—and in many cases to white men.[59]

4.1. Building a white man's republic

Starting in the late 1770s, working-class men, soldiers, and militiamen launched a suffrage movement. The movement in urban areas lasted into the 1780s and 1790s and mainly was directed at abolishing property/wealth requirements for voting.[60] Most of the early opposition came from Federalists, who worried about the lower classes gaining too much power.[61]

Although most of the original thirteen states kept property/wealth requirements in the laws in place during the war years and immediate aftermath (1776–1790), the movement for male suffrage rights slowly gained strength over the next several decades.[62] Of the twenty new states admitted to the Union between 1791 and 1859, only five of the earliest ones had property/wealth requirements in their constitutions, but those did not last long. Delaware eliminated the requirement in 1792 and Maryland did so in 1802. Massachusetts and New York abolished property requirements in 1821. Virginia and North Carolina were laggards, keeping property requirements until 1850.[63]

By the 1830s, the United States had largely become a white man's republic where the colonial era restrictions that tried to ensure that voting was limited to those with high moral character and commitment to the common good had largely disappeared, but that does not mean that support for Lockean contract theory also had disappeared. There still was a strong belief in its importance, but the old tools of social approbation, shaming, and physically marking deviants through branding, whipping, and cutting off ears were no longer part of the criminal justice system; the population was simply too big and geographically mobile.

At the same time, there had been a growing movement, starting in the 1770s, to restructure criminal law to make it conform to European legal reforms, based on the writings of Cesare Beccaria that called for abolishing most capital punishment. Beccaria, whose treatise *On Crime and* Punishment was translated into English in 1767, argued that punishment should be proportional, and hence vary according to the seriousness of the crime.[64] Beccaria's treatise had an enormous impact on Enlightenment thinking about criminal justice. In the American context, his views gained adherents. Numerous early presidents—George Washington, John Adams, John Quincy Adams, Thomas Jefferson, and James Madison—read and referred to *On Crimes and Punishments* in advocating for reform.[65] Another important influence was Blackstone's *Commentaries on the Laws of England*, which includes many references to Beccaria and proportionality, especially in Chapter IV.[66] American reformers sought to distinguish between felony offenses, treating theft and forgery more leniently than murder and treason. William Bradford and other Quakers in Pennsylvania endorsed incarceration as an appropriate penalty for lesser (and far more common) felonies, a position that was adopted in a 1786 Pennsylvania criminal justice reform law that combined Enlightenment rationalism with religious morality—and led to the

[56]Barnes, "Historical Origins of the Prison System"; Greg Miller, "The Invention of Incarceration," *JSTOR Daily*, March 18, 2022.

[57]Dinkin 1982, 4–5. Several states, such as New York and New Jersey, disenfranchised loyalists who supported the British cause. Pennsylvania and South Carolina required loyalists to swear allegiance to the Revolution to regain voting rights. Ratcliffe, "The Right to Vote and the Rise of Democracy," says that tens of thousands were disenfranchised by these "test oaths."

[58]The initial state constitutions in New Hampshire, Delaware, Massachusetts, and New Jersey did not include language limiting the franchise to men. Within a few years, all except for New Jersey had revised their constitutions to eliminate the possibility of women voting. New Jersey was an outlier, continuing to allow female, as well as Black voting, until 1807 (Gertzog 1990; Lewis 2011). Irwin N. Gertzog, "Female Suffrage in New Jersey, 1790-1807," in *Women, Politics, and the Constitution*, ed. Naomi Lynn (New York: Harrington Park Press, 1990); Jan Ellen Lewis, "Rethinking Women's Suffrage in New Jersey, 1776-1807," *Rutgers Law Review* 63, no. 3 (2011): 1017–35.

[59]The original state constitutions in South Carolina and Georgia limited voting to white men, while the Virginia constitution stated that voting qualifications would not be changed from what had been in place prior to the adoption of the constitution, and those excluded Blacks. But states such as New Jersey, Maryland, and Connecticut that had originally allowed Black voting changed their laws to exclude non-white voting by 1820. North Carolina did the same in 1835 and Pennsylvania inserted the requirement in 1838. Also, every new state admitted to the Union after 1819 had constitutions that limited the franchise to white men. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States, Revised Edition* (New York: Basic Books, 2009), 44.

[60]Dinkin 1982, 30–31.

[61]In a 1774 letter, Gouverneur Morris, who wrote the Preamble to the Constitution and spoke extensively against slavery at the Constitutional Convention, expressed fears of empowering the lower classes: "The mob begins to think, and reason. Poor reptiles! It is with them a vernal morning; they are struggling to cast off their winter's slough, they bask in the sunshine, and ere noon they will bite, depend upon it" (Clarke and Force 1837–1846: 46).

[62]Georgia, New Hampshire, and Pennsylvania had tax paying requirements instead of property/wealth requirements. Only Vermont had no wealth related requirement for voters (Keyssar, *The Right to Vote*, 306–07). Ratcliffe argues that suffrage was much broader, earlier, than Keyssar (2009) claims. Ratcliffe, "The Right to Vote and the Rise of Democracy".

[63]Keyssar, *The Right to Vote*, 24–25.

[64]Beccaria's views on punishment are summarized in the following excerpt, "In order that punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by law" (Beccaria 1995: 113).

[65]John D. Bessler, *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment* (Boston: Northeastern University Press, 2012).

[66]Thomas Jefferson, in his criminal justice reforms, endorsed proportionality and advocated for three categories of criminal offenses based on the severity of the crime with homicides in the most serious category followed by non-homicide felonies (rape and sodomy) in the second category and crimes against property (burglary, robbery, simple larceny and counterfeiting) comprising the least serious category (Chapin, "Felony Law Reform," 169).

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creation of the first prisons solely for the incarceration of those convicted of criminal offenses as opposed to debtor prisons.[67]

From the colonial period through the early republic, the criminal justice system became more systematic and enforced by local authorities, rather than churches, local elites, or citizen groups. Part of these reforms was to substitute imprisonment for capital or corporal punishment, which created a class of former incarcerated people thought by many to have squandered their right to vote.

5. Felon disenfranchisement in Antebellum America

In the Antebellum era, nearly all states adopted felony law reforms that mandated incarceration for at least some types of felonies, but that raised the question of whether men released from prison upon the completion of their sentences would have their civic status restored.[68] This is the point at which states began to take up laws dealing with the disenfranchisement of former felons. A key takeaway, however, is that having released felons was a sign that states had adopted reforms that reduced the number of capital offenses and were thus more reformist in nature.

5.1. The earliest laws: 1792–1821

In 1792 Kentucky state constitution included language requiring the state legislature to pass laws disenfranchising felons who had committed bribery, perjury, forgery, and high crimes and misdemeanors. One year later, Vermont's original constitution included a provision disenfranchising anyone involved in election bribery. The state legislature then adopted a much broader felony disenfranchisement statute excluding from voting those convicted of bribery, corruption, or other crimes. In 1802, the first Ohio constitution gave the state legislature the authority to disenfranchise those convicted of bribery, perjury, and infamous crimes. As can be seen in Table 1, the Ohio state legislature, like most of the state legislatures that were given the authority to pass such laws, did so.[69] Over the next 9 years, eight additional states (Louisiana, Indiana, Mississippi, Illinois, Connecticut, Alabama, Missouri, and New York) enacted felony disenfranchisement laws using the same terminology (e.g. bribery, perjury, forgery, and infamous crimes), with high crimes and misdemeanors appearing for the first time. Government corruption was the main reason for the bribery and perjury punishments. Forgery also figured prominently because it was a high percentage of early felony arrests.

5.2. Defining terms

The term "infamous crimes" was common in criminal justice statutes in the nineteenth and early twentieth centuries.[70] Although most states did not define which offenses were considered "infamous," there were a handful of states that provided lists of offenses considered to be infamous. For example, Article II, Section 30 of the 1818 Illinois Constitution states, "The general assembly shall have full powers to exclude from the privilege of electing or being elected any person convicted of bribery, perjury or any other infamous crime." The state's 1827 criminal justice statute defined infamous crimes as including the following: "rape, kidnapping, willful and corrupt perjury or subordination of perjury, arson, burglary, robbery, sodomy, or other crimes against nature, forgery, counterfeiting, bigamy and larceny."[71] This list includes most felonies, aside from murder, which was still largely a capital crime.[72] The Arkansas state legislature did not use the term "infamous crimes" in its criminal disenfranchisement law but did so in a statute governing whether a person could serve in political office. The law excluded from office anyone convicted of the following list of infamous crimes: felonies, misdemeanor property theft, abuse of office, and misdemeanor offenses involving deceit, fraud, or falsehood.[73]

Additional insights into the legal meaning of infamous crimes can be found in court rulings, both at the state and federal level. An 1884 Maryland court ruled that an infamous crime is "such a crime as involved moral turpitude, or such as rendered the offender incompetent as a witness in court," a position derived from Blackstone's writing on infamous crimes.[74] A later Maryland court held that treason, felony, and forgery were infamous crimes.[75] The Supreme Court issued several rulings in the late nineteenth and early twentieth centuries that included definitions of "infamous crimes." In the first ruling, *Mackin v. United States* (1886), the Court held that "a crime punishable by imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous crime within the provisions of the Fifth Amendment."[76] While a modern reader might think that infamous crime was a term that only applied to the most heinous offenses, the nineteenth-century meaning was much broader.

The phrase "high crimes and misdemeanors" is another ambiguous term. While typically discussed with respect to Article II, Section 4 of the United States Constitution, the terminology was widely used in felony disenfranchisement language in state constitutions adopted in the nineteenth century, but the two terms—high crimes and misdemeanors[77]—do not seem to fit together since one is a serious felony offense, often punishable by death, while the second is a minor infraction. When used within state constitutions, the common element is that the offense occurred while

[67] Chapin, "Felony Law Reform," 177–78. See Barnes, "Historical Origins of the Prison System," for a history of the origins of prisons and criminal incarceration in the United States. It is worth noting that debtor prisons were common in colonial America during the 1700s but had gone out of favor by the Jacksonian era. Nino C. Monea, "A Constitutional History of Debtors' Prisons," *Drexel Law Review* 14 (2022): 1–67.

[68] Chapin, "Felony Law Reform," 181.

[69] According to Keyssar, *The Right to Vote*, 327, only the state legislatures in New Jersey, Texas and Wisconsin did not follow up by enacting the permitted felony disenfranchisement legislation.

[70] The term "infamous crimes" is not the same as the designation "infamous crimes against nature," which refers to sexual activities deemed as unnatural.

[71] Dallas Ingermuson, "Criminal Law—Infamous Crimes in Illinois Today," *DuPaul Law Review* 14, no. 1 (1964): 138–45. 139–40.

[72] Illinois added incest in 1945, murder in 1874, and sale of narcotics in 1953 (Ingermuson 1964, p. 140).

[73] Michael Goswami, "High Crimes, Treason, and Chicken Theft: 'Infamous Crimes' in Arkansas and Disqualification from Political Office," *Arkansas Law Review* 67, no. 3 (2014): 653–86.

[74] *State v. Bixler*. 1884. 62 Md. 354, 360.

[75] *Garitee v. Bond*. 1905. 102 Md. 379, 383,62A. 2d. 631.

[76] *Mackin v. United States. 1886. 117 U.S. 348.* The Court used the same definition in subsequent decisions. See *United States v. DeWalt* (1888) and *United States v. Moreland* (1922).

[77] There is a very large literature on the meaning and application of high crimes and misdemeanors in the legal literature, particularly as applies to presidential impeachment. Raoul Berger, "Impeachment for High Crimes and Misdemeanors," *Southern California Law Review* 44 (1970): 395; Gary McDowell, "High Crimes and Misdemeanors: Recovering the Intentions of the Founders," *George Washington Law Review* 67 (1998): 626; Laurence H. Tribe, "Defining High Crimes and Misdemeanors: Basic Principles," *George Washington Law Review* 67 (1998): 712; Mark Hamm, "High Crimes and Misdemeanors: George W. Bush and the Sins of Abu Ghraib," *Crime, Media, and Culture* 3, no. 3 (2007): 259–84.

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Table 1. Criminal Disenfranchisement in State Constitutions & Law 1790–1860

State	Date	Constitutional exclusions	Constitution required state exclusions	Constitution permitted state exclusions	State only action
AL	1819		Bribery, perjury, forgery, high crimes & misdemeanors.		
AR	1837				Felony by state law.
CA	1849	Infamous crime.	Bribery, perjury, forgery, other high crime.		
CT	1818		Bribery, forgery, perjury, dueling, fraudulent bankruptcy, theft, infamous punishment crimes.		
DE	1831	Felony.		Punishment for crime.	
FL	1838		Bribery, perjury, forgery, high crimes & misdemeanors, infamous crime.		
GA					
IL	1818			Bribery, perjury, & infamous crime.	
IN	1816			Infamous crime.	
IA	1846	Infamous crime.			
KY	1792		Bribery, perjury, forgery, high crimes & misdemeanors.		
LA	1812	Duel with deadly weapon.		Bribery, perjury, forgery, high crimes & misdemeanors, infamous crime.	
	1845	Under interdiction or crime punishable by hard labor.			
ME					
MD	1851	Larceny, infamous crimes unless pardoned & permanent exclusion for election bribery.			
MA					
MI					
MN	1857	Treason or felony until restored.			
MS	1817		Bribery, perjury, forgery, high crimes & misdemeanors.		
MO	1820	Election bribery for 10 years.		Bribery, perjury, & infamous crime.	
NH					
NJ	1844	Felonies unless pardoned or restored by law.		Bribery.	
NY	1821			Infamous crimes.	
	1846			Bribery, larceny, infamous crimes, & election wagering.	

(*Continued*)

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Table 1. (*Continued.*)

State	Date	Constitutional exclusions	Constitution required state exclusions	Constitution permitted state exclusions	State only action
NC					
OH	1802 1851			Bribery, perjury, & infamous crime.	
OR	1857	Punishable by imprisonment.			
PA					
RI	1842	Bribery or infamous crime unless restored by General Assembly.			
SC					
TN	1834			Infamous crimes.	
TX	1845			Bribery, perjury, forgery, & high crimes.	
VT	1793	Gift or reward for vote.			Bribery, corruption, or other crimes by state supreme court until 1830s.
VA	1830	Infamous offense			
	1850	Election bribery or infamous offense.			
WI	1848	Treason or felony unless restored. Permanent for dueling.		Bribery, larceny or infamous crime, betting on elections.	
Total	25/33	13	6	11	2

Notes: The table summarizes state-level constitutional provisions and laws dealing with criminal disenfranchisement in the pre–Civil War era. With the exceptions of Arkansas and Vermont as noted, the enactment dates are when the states passed constitutional provisions dealing with criminal disenfranchisement.[78]

the accused was acting within his/her capacity as a governmental official.

5.3. Criminal disenfranchisement before the civil war

Starting in 1830, there was another upsurge in enactments, with fifteen states adopting new felony disenfranchisement laws before the Civil War. These laws coincided with the expansion of male voting rights. The first use of the term "felony" was in 1831, but "infamous crime" was still the preferred broad descriptor. Louisiana in 1845 was the first state to associate disenfranchisement with incarceration (crimes punishable by hard labor). Oregon's first constitution excluded those convicted of crimes punishable by imprisonment. Rhode Island, in its revised 1842 state constitution, was the first to include language about the restoration of voting rights. New Jersey, Wisconsin, and Minnesota subsequently revised their constitutions to include language allowing for the restoration of voting rights.

Three-quarters of states had criminal disenfranchisement statutes before the Civil War. Only eight states did not have constitutional or statutory language disenfranchising people for criminal convictions. Maine, Massachusetts, New Hampshire, and Pennsylvania were reform-minded states with few restrictions on voting. Massachusetts and New Hampshire did not have racial restrictions and the only racial restriction in Maine was the exclusion of "Indians not taxed." Pennsylvania, however, like Georgia, North Carolina, South Carolina, and Michigan, limited the vote to white men. Michigan stands out as the only late admitted state to not have included criminal disenfranchisement language in its initial state constitution.

Disenfranchising offenses can be divided into three groups: those involving public officials, serious crimes outside of government, and election-related offenses. Within the first group are offenses related to bribery or high crimes. Eleven states had government malfeasance language.[79] Twenty states disenfranchised individuals convicted of serious crimes unrelated to government service (thirteen for infamous crimes, five for felony offenses, and two used incarceration as the marker for distinguishing the severity of offense).[80] Finally, Maryland, Virginia, and Vermont had

[78]The information in table was compiled by Keyssar, *The Right to Vote*, 324–27, but it also can be accessed through the Avalon Project at Yale Law School, Lillian Goldman Law Library.

[79]Alabama, California, Connecticut, Florida, Kentucky, Louisiana, Mississippi, Missouri, New York, Ohio, and Rhode Island had laws disenfranchising those convicted of bad behavior while serving in government position.

[80]The thirteen states with laws disenfranchising those convicted of infamous crimes were California, Connecticut, Illinois, Indiana, Iowa, Louisiana, Maryland, Missouri, New York, Ohio, Rhode Island, Tennessee, and Virginia. Arkansas, Delaware, Minnesota, New Jersey, and Wisconsin had laws disenfranchising people convicted of felonies and Louisiana and Oregon disenfranchised those whose sentences included hard labor and imprisonment.

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laws disenfranchising individuals who undermined the integrity of elections.

As Table 1 shows, criminal disenfranchisement laws became an increasingly important restriction on electoral access during the years leading up to the Civil War. Most of the other moral legalistic restrictions, such as religious and property requirements, had been eliminated, leaving gender, race, and unlawful behavior, as the main ways of limiting access to the ballot box. Women were completely excluded and nearly all states had explicit race-based restrictions on voting. Massachusetts, New Hampshire, and Vermont—all states with very small minority populations—did not have laws with racial restrictions on voting. Georgia restricted non-white men from voting by imposing a state citizenship requirement.[81] Maine and Rhode Island did not disenfranchise Black men but excluded some Native groups.[82] New York made it harder for non-white men to vote by imposing a "man of color" property requirement that had to be met before voting.[83]

Not only does our research show that felony disenfranchisement was well established before the Civil War, it also makes clear that the adoption of these laws was not motivated by a desire to ensure that only white men could vote. There were other state constitutional provisions barred voting by women and racial minorities. Felony disenfranchisement laws only became significant after the legal moralism system that relied on a combination of social sanctions and heavy use of capital punishment was no longer in place. Criminal justice reforms that established penitentiaries as a humane alternative to executions meant society had to grapple with whether to restore civic rights to criminals after their release from prison.

This new criminal justice system embodied liberal contract theory, with its reciprocal relationship between citizens and the state where each party has rights and obligations. Felons lost their rights to participate in governance because they had failed to fulfill their most basic duty of citizenship (e.g. obey the laws). Most states had felony disenfranchisement laws that prohibited voting by those convicted of a broad mix of offenses—but these laws were not aimed at excluding racial minorities. Instead, the laws were aimed at excluding individuals convicted of serious criminal offenses (e.g. infamous crimes, felonies, and those punished by incarceration) from participating in elections. Three-quarters of Antebellum states had laws that disenfranchised what we would now refer to as felons.

6. Radical Republican support for felony disenfranchisement

Throughout the Reconstruction Era, Congress repeatedly passed laws that framed citizenship rights in Lockean terms. The first of these acts was the Federal Deserter Act, which framed citizenship as being part of a contractual relationship in which the citizen owed obedience to the government in exchange for the privileges associated with citizenship. Then on March 11, 1865, President Lincoln issued Executive Proclamation 124, which stated that military deserters had "voluntarily relinquished and forfeited their rights of citizenship," and could no longer vote or serve in political office.[84]

Re and Re, in their analysis of why criminal disenfranchisement was a key element of Reconstruction Amendments, argue that the "egalitarian enfranchisement" of Black men had a "flip side" whereby disenfranchisement was the punishment for "immoral actions, such as crimes."[85] The Republican-controlled Congress embraced the philosophy of "formal equality" in which one's civic status is determined by actions rather than station.[86] The civic inclusion of former slaves, nearly 200,000 of whom had fought for the Union, was juxtaposed against the exclusion of those committing transgressions—rebels, insurrectionists, and criminals.

6.1. The Thirteenth Amendment and the 1866 Civil Rights Act

Even before the fighting ended, Radical Republicans led by Senator Charles Sumner (R-MA) sought to build support for a constitutional amendment that would abolish slavery and provide former slaves with citizenship rights, including the franchise.[87] Instead, Congress passed a more narrowly tailored version of the Thirteenth Amendment that abolished slavery while allowing involuntary servitude "as a punishment for a crime where the party shall have been duly convicted."[88] The involuntary servitude exception in the Amendment serves as a stark reminder that Radical Republicans viewed civic status in contractual terms—violate the precepts of citizenship and be excluded from the rights and protections accorded citizens.[89]

Following the assassination of President Lincoln, the executive branch under President Andrew Johnson took a series of steps aimed at returning political and economic power in the South to the former Confederates.[90] State governments, dominated by white Southerners, adopted Black Codes that restricted the basic civil rights of Blacks through selective enforcement of statutes that used race "neutral" language.[91] An additional issue was the question of whether the Thirteenth Amendment implicitly gave citizenship to African Americans. Democrats, with support from President Andrew Johnson, argued that the Thirteenth Amendment did not

[81]The 1853 *Bryan v. Walton* ruling explicitly excluded free Blacks from voting in Georgia. Judge Joseph Lumpkin cited Biblical texts and classical political theorists in making the contract-based argument that only whites had been involved in the adopting of the Constitution, and therefore only whites were citizens. *Bryan v. Walton*. 1853. 14 Ga. 185, 198.

[82]Maine excluded "Indians not taxed," while Rhode Island excluded Narragansett tribal members from voting Keyssar, *The Right to Vote*, 316–17.

[83]Keyssar, *The Right to Vote*, 315–19.

[84]Abraham Lincoln, "Executive Proclamation 124: Offering Pardon to Deserters," March 11, 1865.

[85]Re and Re, "Voting and Vice," 1584.

[86]According to Re and Re, "Voting and Vice," 1590, Radical Republicans were particularly strong proponents of what James Q. Whitman (2003) labeled as "formal equality."

[87]Xi Wang, *The Trial of Democracy: Black Suffrage and Northern Republicans, 1860-1910* (Athens: University of Georgia Press, 1997), 15–18.

[88]The Thirteenth Amendment borrowed this language from the Northwest Ordinance, which banned slavery in the new territories, but allowed for involuntary service "as punishment for a crime whereof the party shall be duly convicted." The 1866 Civil Rights act, quoted below, uses the same language, allowing exclusion of convicted criminals from citizenship rights.

[89]Re and Re, "Voting and Vice," 1598 and Richards (1992: 1194–95) in their analyses of the rhetoric employed by Radical Republicans in advocating for the Reconstruction amendments highlight the use of Lockean liberal/contract theory language. They also note the juxtaposition of freedmen, who had not violated the contractual relationship between citizens and the state and therefore "involuntary servitude" for them is a violation of natural rights, versus criminals, whose actions have resulted in their justifiable punishment.

[90]Gregory E. Maggs, "A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning," *Connecticut Law Review* 49, no. 4 (2017): 1069–135, 1088–89.

[91]Smith, *Civic Ideals*, 302–03. The Joint Committee on Reconstruction heard testimony from more than 125 witnesses, who described abuses against Blacks in the former Confederate states, including being forced to work on plantations in Mississippi and vigilante murders in Georgia (Maggs 2017: 1084).

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confer citizenship, referring to the 1857 *Dred Scott v. Sandford* decision.[92] Congress responded by passing the 1866 Civil Rights Act that aimed to protect civil rights, while allowing involuntary servitude for those convicted of crimes. It says:

> That all persons born in the United States and not subject any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, *except as a punishment for a crime where of the party shall have been duly convicted* shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens and shall be subject like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

The text does not mention political rights, such as the right to vote or hold political office. Even though the contemporary understanding of civil rights includes these political rights, the terms did not have that meaning in the 1860s and 1870s.[93] The Act, which became law after Congress overturned a veto by President Johnson, made state violations of civil rights a federal offense. This did not, however, eliminate the possibility that Supreme Court rulings could limit the meaning of the text, allowing states to deny civil rights.

Both the Thirteenth Amendment and the 1866 Civil Rights Act have language that juxtaposes racial egalitarianism with the approval of "involuntary servitude" for criminals. Re and Re labels this as "the irony of egalitarian disenfranchisement."[94] While some Republicans subsequently recognized that Southern states might try to subvert justice through the selective enforcement of the ostensibly race "neutral" laws, this was not raised as an issue in 1865 and early 1866.[95]

6.2. The Fourteenth and Fifteenth Amendment

The challenges raised by Democrats to the 1866 Civil Rights Act triggered Republican efforts to enshrine Black citizenship and civil rights in the Constitution, and not leave it open to the possibility that the Court would cite *Dred Scott v. Sanford* as a precedent for their denial. The Fourteenth Amendment, passed by Congress on June 13, 1866, and ratified on July 9, 1868, was an attempt to protect Black citizenship rights by giving it constitutional protection. Section 1, which focused on citizenship and civil rights protections, got little attention during congressional deliberations.[96] Citizenship was guaranteed to all persons "born or naturalized in the United States and subject to the jurisdiction thereof" in the Citizenship Clause of Section 1, while the three remaining clauses (Equal Protection Clause, Privileges or Immunities Clause, and Due Process Clause) in Section 1 dealt with civil rights. The Equal Protection Clause was expected to be the most important protector of the basic civil rights specified in the 1866 Civil Rights Act, while Sections 2 and 3 addressed political rights.[97]

While the clear aim of Sections 2 and 3 of the Fourteenth Amendment was to provide freedmen with political rights equal to those held by white men, the insistence on racial equality stands in stark contrast with language denying political rights to those who have failed to uphold their responsibilities as citizens. With the end of the 3/5 clause, Republicans were worried that Southern whites would find ways to keep freedmen from voting while using their population numbers to gain greater representation in Congress. Section 2 addressed this possibility by including language that would reduce a state's representation in the House if the right to vote:

> … is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation thereon shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The "rebellion, or other crime" language in Section 2 was supported by Radical Republicans, who argued that disenfranchising based on race, color, or previous enslavement was illegitimate because those were "permanent" characteristics but that criminal disenfranchisement was the result of freely chosen bad actions and therefore legitimate (Re and Re 2012: 1606–1607).[98] The inclusion of "crime" along with rebellion is what distinguishes Section 2 from Section 3, where only those who engaged in "insurrection or rebellion" against the United States or "given aid or comfort to the enemies thereof" are barred from political office if they previously had taken an oath to support federal or state government.

The Fifteenth Amendment, which Congress passed on February 26, 1869, and was ratified on February 3, 1870, stated that the right to vote could not be "denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." By only prohibiting the use of race as a qualification for voting, the text left open the possibility of governments enacting other qualifications that could have deleterious effects on Black enfranchisement. A few Radicals proposed alternative language that would have stated that citizens had an affirmative right to vote but it failed to get support. Even the staunch proponents of the more expansive language wanted the text to include language allowing criminal disenfranchisement. Most Republicans endorsed denying the vote to criminals. Representative Thomas D. Eliot (D-MA) argued that people convicted of "murder, robbery, etc." should not vote and Representative Samuel Shellabarger (R-OH) spoke in favor of disenfranchising those "duly convicted of treason, felony, or other infamous crimes."[99]

[92] *Dred Scott v. Sanford* 1857. 60 U.S. (19 How) 393.

[93] Re and Re, "Voting and Vice," 1603.

[94] Re and Re, "Voting and Vice," 1592.

[95] The possibility of southern whites using laws with "race neutral" language to punish and disenfranchise Blacks was included in the Report of the Joint Committee on Reconstruction (December 1866) that included testimony about the use of these laws to inflict brutal punishments on Blacks for minor offenses. Representative Thaddeus Stevens (R-PA) also cited similar reports and expressed fears that criminal disenfranchisement provisions would be used against freedmen and that such provisions should be limited in their application to only those engaged in rebellion during debates over the Fourteenth Amendment (Re and Re, "Voting and Vice," 1626).

[96] Mark A. Graber, "Teaching the Fourteenth Amendment and the Constitution of Memory," *Saint Louis University Law Review* 62, no. 3 (2018): 639–54.

[97] Re and Re, "Voting and Vice," 1603–04. See Harrison (1992: 1435–1436) for a discussion of how Section 1 reflects the nineteenth-century view of contract theory between citizens and government.

[98] Re and Re, "Voting and Vice," 1606–11, 1621–22) provided evidence showing that criminal disenfranchisement was widely supported by Radical Republicans, including Representative John Bingham (R-OH), the author of the Section 1 text in the Fourteenth Amendment, Representative John Farnsworth (R-IL), Senator Charles Sumner (R-MA), Representative Thaddeus Stevens (R-PA), and Senator George Williams (R-OR). The first Black Congressman John Rainey of South Carolina, close friend of Charles Sumner, also supported poll taxes to fund education initiatives and property requirements for voting (Smithsonian Magazine January 2021).

[99] Re and Re, "Voting and Vice," 1626, 1632.

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7. Felony disenfranchisement and Southern reconstruction

In the late 1860s through mid-1870s, Congress passed significant laws aimed at protecting the rights of southern Blacks and laying out the conditions for the readmission of the former Confederate states to the Union.[100] There was an upsurge in extralegal violence against former slaves in the period immediately after the South's defeat. Thousands of freemen were "whipped, shot, and killed for arguing over crop settlement, wages, labor contracts, or simply failing to show sufficient deference.[101] President Johnson contributed to the violence by quickly approving the readmittance of former Confederate states and approving their Confederate-dominated state governments that refused to act against the violence.

7.1. The Reconstruction Act of 1867

Congress responded to President Johnson by passing the Reconstruction Act of 1867, which reversed the readmissions, rescinded the recognition of state governments, and reinstituted military rule. The Act required each Southern state to hold elections for delegates to a constitutional convention that would be responsible for drafting state constitutions. The convention delegates were authorized to craft and then ratify proposed constitutions, which then had to be submitted to Congress for approval. Following approval, the states would hold elections in accordance with the provisions laid out in their constitutions, and the newly established state legislatures were required to approve the Fourteenth Amendment. Only after completing these steps could states gain readmittance to the Union.[102]

Only male residents not disqualified from voting due to their participation in rebellion or convicted of "felony at common law" could vote for convention delegates. It is worth noting that there was a heated debate over whether the Act should include the prohibition of felony voting. Representative Thaddeus Stevens (R-PA) proposed amending the Act so that only treason convictions could result in disenfranchisement. He raised the possibility of Southern states using the "felony common law" provision as a means of limiting the vote to only white men. Other Radical Republicans defended excluding criminals, such as murderers and robbers, from voting.[103] By using the term "felony at common law," the legislators sought to keep Southern whites from using convictions for trumped-up misdemeanor offenses, such as vagrancy, as a mechanism for disenfranchising Black men.[104]

These elections and the subsequent constitutional conventions were historic. For the first time in the country's history, large numbers of African Americans voted in the elections. Equally important, all the constitutional conventions included Black delegates, who had the same opportunity to influence the final documents as did white delegates. For example, 37 percent of the delegates to Florida's 1868 constitutional convention were Black and a

Table 2. Felony Disenfranchisement Provisions in Former Confederate State Constitutions and Laws, 1867–1877

State	Date	Constitutional provisions	State laws
Alabama	1867c	Treason, embezzlement of public funds, malfeasance in public office, bribery, & crimes punishable by imprisonment in penitentiary.	
Arkansas	1868c	Treason, embezzlement of public funds, malfeasance in public office, bribery, & crimes punishable by imprisonment in penitentiary.	
	1873c	Convicted in any court in any state of crime punishable by death or imprisonment in penitentiary.	
	1874c	Felony.	
Florida	1868c	Felony, election bribery, bribery, larceny, & infamous crime.	
	1868s		Felony, bribery, perjury, infamous crimes, & election betting
Georgia	1868c	Treason, embezzlement of public funds, malfeasance in public office, bribery, & crimes punishable by imprisonment in penitentiary.	
	1877c	Treason against the state, embezzlement of public funds, malfeasance in public office, bribery, larceny, & moral turpitude punishable by imprisonment.	
Louisiana	1870c	Indicted or convicted by treason, perjury, forgery, bribery, & crimes punishable by imprisonment.	
Mississippi	1868c	Bribery, perjury, forgery, infamous crimes, high crimes & misdemeanors.	
	1876s		Bribery, perjury, forgery, & infamous crimes.
North Carolina	1868c	No exclusions.	
	1876c	Crime punishable by imprisonment.	
South Carolina	1868c	Those confined to public prison, but "no person shall be disenfranchised" for crime committed while a slave. Right to suffrage can only be denied for treason, murder, robbery, or dueling.	
Tennessee	1870c	May pass laws disenfranchising those convicted of infamous crimes.	

(*Continued*)

[100] Although the Reconstruction Act of 1867 is the only one of the acts that is relevant to research on criminal disenfranchisement, three other acts should be noted: The Civil Rights Acts of 1870, 1871, and 1875. The Supreme Court in a series of rulings—*United States v. Cruikshank* (1876) and *United States v. Reese* (1876) drastically undercut the ability of these acts to protect the civil and political rights of African Americans.

[101] W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia, 1880-1930* (Urbana: University of Illinois Press, 1993), 6.

[102] Wang, *The Trial of Democracy*, 35–40.

[103] Re and Re, "Voting and Vice," 1625–26.

[104] Re and Re, "Voting and Vice," 1629.

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Table 2. (*Continued.*)

State	Date	Constitutional provisions	State laws
	1871s		Bribery, larceny, & felony.
Texas	1869c	Felony or confined to prison.	
	1876c	Felony.	
Virginia	1870c	Election bribery, embezzlement of public funds, treason, & felony.	
Total		11	3

Note: The dates of enactments are followed by the letter "c" for those that were constitutional provisions while those marked with "s" are those enacted by statute.[105]

quarter of the delegates to Virginia's 1870 conventionwere Black.[106] The laws enacted, and new constitutions drafted during this period thus passed under the leadership of Radical Republicans and Black delegates committed to the extension and protection of African American suffrage.

7.2. Felony disenfranchisement in the readmitted state laws

Between 1867 and 1870, the eleven former Confederate states met the requirements for readmission to the Union. Aside from North Carolina, the newly approved state constitutions included criminal disenfranchisement language. The 1870 Tennessee constitution did not require disenfranchisement but stated that the state legislature may pass laws disenfranchising those convicted of "infamous crimes." In 1871, the legislature followed up by disenfranchising people convicted of bribery, larceny, and felony offenses. The 1868 South Carolina state constitution protected former slaves by stating "no person shall be disenfranchised" for a crime while a slave. The initial state constitution stipulated that only those convicted of treason, murder, robbery, or dueling could be disenfranchised. See Table 2 for a summary of the constitutional provisions and state laws adopted in the former Confederate states during the Reconstruction Era (1867–1877).

Aside from the initial North Carolina constitution, the new state constitutions, as voted upon by the constitutional conventions and approved by the Republican-led Congress, had criminal disenfranchisement provisions. All of the states, aside from Mississippi, had disenfranchisement for treason, but the inclusion of "high crimes and misdemeanors" as disenfranchising would have covered treason in Mississippi. Ten states also had language that would disenfranchise men convicted of serious crimes, although the descriptors of the disqualifying offenses varied. Alabama, Arkansas, Georgia, Louisiana, and Texas disenfranchised individuals convicted of crimes that resulted in imprisonment.[107] Florida, Mississippi, and Tennessee, Texas, and Virginia had provisions disenfranchising those convicted of infamous crimes. South Carolina only mandated disenfranchisement for those convicted of murder, robbery, or dueling.

The most important change in the former Confederate states following their readmission to the Union was North Carolina's 1876 addition of criminal disenfranchisement language in their constitution: crime punishable by imprisonment. That meant that every one of the former Confederate states had constitutional language requiring disenfranchisement for some criminal offenses before the removal of federal troops that marked the end of Reconstruction. Another six states revised their constitutions or adopted new disenfranchising laws in the 1868–1877 period.[108] With one notable exception, the constitutional amendments and new statutes enacted in these states were not notably different from the pattern of enactments in the Antebellum constitutions. Georgia in 1877, right at the point marking the end of Reconstruction, substantially altered the criminal disenfranchisement provision in their constitution. The state legislature added treason against the state and moral turpitude punishable by imprisonment—two crimes that could be interpreted in a variety of ways and foreshadow attempts in other Southern states to expand and use criminal disenfranchisement provisions to prevent freemen from voting.[109]

8. Discussion

Although there is a large body of scholarship on felony disenfranchisement, there has been surprisingly little research on the spread of these laws before the Civil War. During the colonial era there was a robust system of legal moralism that only allowed a limited number of morally upright (white) men to vote. Prisons and criminal disenfranchisement laws gained in popularity as other means of ensuring that only men of moral character had access to the vote—for example, the marking of miscreants through widespread capital punishment, branding, whippings, and the pillory—came to be viewed as inhumane in the early years of the republic. The spread of these laws in the first half of the nineteenth was part of liberal contract theory, where both citizens and government must uphold their responsibilities to the other. Government protects the life, liberty, and property of citizens, who are then expected to obey laws. By their actions, criminals placed themselves outside of the body politic and no longer have the rights and protections accorded citizens. This logic resonates with criminal disenfranchisement laws that extend across the nation to this day, many of which emerged in the pre–Civil War era.

By 1860, three-quarters of states had adopted criminal disenfranchisement laws. Only eight states did not have constitutional or statutory provisions prohibiting people convicted of criminal offenses from voting. While the types of offenses resulting in disenfranchisement differed across the states, most were either crimes related to malfeasance in government office or those convicted of serious criminal offenses unrelated to public service.

[105]The information was compiled by Keyssar, *The Right to Vote*, 356–62, but it also can be accessed through the Avalon Project at Yale Law School, Lillian Goldman Law Library.

[106]Richard Hume, "Membership of the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South," *Florida Historical Quarterly* 51, no. 1 (1972): 1–21; Richard Hume, "The Membership of the Virginia Constitutional Convention of 1867-1868: A Study of the Beginning of Congressional Reconstruction in the Upper South," *The Virginia Magazine of History and Biography* 86, no. 4 (1978): 461–84.

[107]Louisiana also included disenfranchisement for those indicted for crimes punishable by imprisonment.

[108]Non-Confederate states (Colorado, Illinois, Maryland, Missouri, Ohio, Nebraska, and Pennsylvania) also passed constitutional amendments and new statutes on criminal disenfranchisement during the 1867–1877 era Keyssar, *The Right to Vote*, 356–62. Also notable is the Edmunds Act of 1882 and the Edmunds-Tucker Act of 1887 which took away the right to vote, run for office, or serve on juries for those who practiced polygamy.

[109]Alabama added convictions of "moral turpitude" as a disenfranchising offense in 1901 (Ewald, "Civil Death," 1091). See Behrens, Uggen, and Manza 2002 for details on post-Reconstruction felon disenfranchisement constitutional provisions and statutes.

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Eleven states had laws dealing with the first category of offenses, while twenty had broader disenfranchisement: thirteen states for infamous crimes, five states for felony offenses, and two states for crimes resulting in incarceration. These states had the equivalent of felony disenfranchisement before the Civil War, when most Black Americans did not have access to the ballot. Crucially, this pattern extended during Reconstruction, when Radical Republicans and Black freemen supported the inclusion of language allowing criminal disenfranchisement in the Reconstruction amendments to the Constitution and approved the readmission of Southern states whose new constitutions included criminal disenfranchisement.

Prominent existing research on felon disenfranchisement laws suggests that these were racially motivated enactments adopted during the Jim Crow period and following the Voting Rights Act.[110] As evidence, Behrens, Uggen, and Manza show that harsh felon disenfranchisement laws were enacted in states with larger Black populations, and larger Black prison populations.[111] The states with large Black populations were also in most cases former Confederate states that had their constitutions written and approved by Radical Republicans in the Reconstruction Era. This research also notes that these race-neutral laws have been enforced in racially biased ways, alongside other ostensibly race-neutral franchise-restricting laws such as poll taxes and literacy requirements, resulting in disproportionate disenfranchisement of African Americans.[112] The Jim Crow era and later periods contrast with the colonial and Antebellum eras when African Americans could not vote and thus were not subject to disenfranchisement, and Reconstruction, when vehemently antislavery Radical Republicans targeted felony disenfranchisement efforts at former Confederates.

Importantly, felon disenfranchisement remains law, with significant variation, in most states. These laws are in many cases popular, whether that support emerges from contract-theory or civic republican motivations, or due to racial animus.[113] This research offers a long historical view, which provides a broad perspective on the conditions under which these laws were adopted, showing that for many states this took place in the first half of the nineteenth century, or during Reconstruction. Our analysis suggests that the genealogy of these laws in the period we cover is distinct from their (malign) application in later periods. Arguably, this argument suggests the intellectual and legal approaches to consider the legitimacy of these laws may differ depending on whether we evaluate their legal origins or their enforcement and reform in later periods.[114]

Our analysis might also provide insight as to why these statutes were also adopted in the Midwest, Mountain West, and Southwest, parts of the country with very small Black populations at the time of adoption. These laws may have been perceived as standard legal practice leading back to the time of the early republic. At the same time, these laws were in most cases applied outside the South in similar ways that they were applied inside it—to disproportionately disenfranchise non-white Americans, whether Black, Hispanic, Native American, Chinese, or others, depending on the state demographic composition. But the language of contract theory is still utilized to justify the laws, as was done in *Wesley v. Collins* (1986), where the majority opinion stated, "Felons [are not] disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment."[115]

[110]C.f., Adelman, "The Persistence of Penal Disenfranchisement"; Alexander, *The New Jim Crow*; Behrens, Uggen, and Manza, "Ballot Manipulation and the 'Menace of Negro Domination'"; Fletcher, "Disenfranchisement as Punishment"; Kelley, "Racism & Felony Disenfranchisement"; Shannon et. al., "The Growth, Scope, and Spatial Distribution of People".

[111]Behrens, Uggen, and Manza 2002.

[112]Alexander, *The New Jim Crow*; Nicholas Eubank and Adriane Fresh, "Enfranchisement and incarceration after the 1965 Voting Rights Act," *American Political Science Review* 116, no. 3 (2022): 791–806.

[113]Brian Pinaire, Milton Heumann, and Laura Bilotta, "Barred from the vote: Public attitudes toward the disenfranchisement of felons," *Fordham Urb. LJ* 30 (2002): 1519.

[114]James Forman Jr, "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow," *New York University Law Review* 87 (2012): 21.

[115]*Wesley v. Collins*. 1986. 791 F. 2d 1255, 1262 (6th Cir.).

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