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## 2 The Racial Origins of Felon Disenfranchisement

*with Angela Behrens*

Felon disenfranchisement laws in United States are unique in the democratic world. Nowhere else are millions of offenders who are not in prison denied the right to vote. How did we get to this point? Because individual states establish eligibility for criminal offenders, there are 50 different, often zigzagging stories to be told. Still, some common dynamics may hold across the states. Some of the earliest felon disenfranchisement measures were holdovers from medieval legal systems. The sequencing of the adoption of felon disenfranchisement laws in many states *after* property and other restrictions were eliminated provides an important clue. However, one factor—race—seems to recur again and again.

Consider the following three moments in the history of felon disenfranchisement. The earliest campaigns to disenfranchise African Americans frequently invoked racial disparities in criminality as evidence that blacks were unworthy of assuming the full rights and duties of citizenship. Colonel Samuel Young, one of a group of leading Jeffersonians in New York who

had campaigned on the slogan “Federalists with Blacks United,” declared in an 1821 New York state legislative debate that

The minds of blacks are not competent to vote. They are too degraded to estimate the value, or exercise with fidelity and discretion this important right. . . . Look to your jails and penitentiaries. By whom are they filled? By the very race it is now proposed to clothe with the power of deciding upon your political rights.<sup>1</sup>

New York eventually established a law requiring blacks to own at least \$300 of property, effectively disenfranchising almost all African Americans in the state, while abolishing property restrictions for whites.<sup>2</sup>

In 1896, the Mississippi Supreme Court considered a challenge to the state’s 1890 constitutional convention, which had explicitly barred individuals convicted of certain petty offenses from participating in elections. The selected offenses were almost exclusively applied against African Americans, while crimes of which whites were regularly convicted (including rape and even murder) did not affect voting rights. In endorsing this seemingly bizarre duality, the court declared that race affects the type of crime to which one is prone:

The [constitutional] convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, *this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites*—a patient docile people, but careless, landless, and migratory within narrow limits, without aforethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, *the convention discriminated against its characteristics and the offenses to which its weaker members were prone.*<sup>3</sup>

Remarkably, Mississippi continued to allow many violent offenders to vote while disenfranchising many minor offenses until the late 1960s, when all ex-felons were excluded from voting.

Finally, a more recent example. In 2001, South Carolina legislators had several heated exchanges over a bill to further tighten the state's disenfranchisement law. Responding to assertions that he was using race to push the bill through, one of the bill's sponsors rejected any racial motivation by asserting: "If it's blacks losing the right to vote, then they have to quit committing crimes. We are not punishing the criminal. We are punishing conduct."<sup>4</sup> The South Carolina legislature did not, in the end, pass the proposed measure.

While these three anecdotes span a nearly 200-year period, the racial thread connecting them is clear. And in view of the historical connections among race, criminal justice, and disenfranchisement, it should hardly be surprising to find other such traces in the historical record.<sup>5</sup> Indeed, a number of commentators have hypothesized that racial politics provides the hidden glue to understanding the historical origins and persistence of felon disenfranchisement laws.<sup>6</sup> Many scholars have noted in particular that states in the post-Reconstruction era, particularly those in the South, changed their disenfranchisement laws to exclude African American voters by "tying the loss of voting rights to crimes alleged to be committed primarily by blacks while excluding offenses held to be committed by whites."<sup>7</sup>

Most of this previous scholarship and popular commentary, however, has been rooted in either legal and doctrinal analyses of court decisions, or anecdotal historical evidence. Most of the historical work has also focused on the relatively brief period from Reconstruction and its aftermath through the 1890s, when the southern states adopted numerous racially explicit disenfranchising measures which rendered felon disenfranchisement less important for reducing racial threat. But the history of felon disenfranchisement is a national story, and it is not limited to the post-Reconstruction era. Yet we lack detailed historical narratives of the development of felon disenfranchisement laws across the states and over time, as well as a systematic examination of the role of race.<sup>8</sup>

In this chapter, we develop a broad historical overview, subjecting race-based theories about the adoption and development of felon disenfranchisement laws to scrutiny. We developed a systematic quantitative analysis that uses detailed information on the social and political makeup of individual states over a long historical period to examine how various factors

affect the adoption and extension of state disenfranchisement laws. Although this approach does not provide a rich, textured set of case studies, it does guard against overinterpreting race-based anecdotes from a handful of states. It also controls for potentially confounding factors such as region, partisan control of government, the punitiveness of a state's criminal justice system, and other institutional factors.

Why is race a logical culprit in the search to explain the development of felon disenfranchisement laws? In recent years, there has been an explosion of scholarship by social scientists and historians fingering race, and racial politics, as principal sources of the peculiar development of American political and legal culture. This scholarship includes three distinct types of argument: (1) arguments about the interaction between race and the development of U.S. political institutions; (2) arguments focusing on the impact of racial attitudes and racism; and (3) arguments that stress the nexus between race (and class) in the political economy of the American South.<sup>9</sup>

### *Race and American Political Institutions*

Racial factors played key roles in the construction and development of American political institutions. These institutional outcomes have in turn shaped policymaking in general, and voting rights and criminal justice in particular. The most distinctive features of American political institutions are a system of federalism in which significant powers are vested below the national level, procedural rules that require supermajorities to pass new legislation, weak political parties, and an array of institutional "veto points" that are available for opponents of reform proposals.

How is race implicated in the construction of American political institutions? The most important set of enduring institutional innovations can be traced to the compromises at the founding of the republic to ensure support from the slave states when drafting the United States Constitution. The slave states wanted to protect their racial order against northern incursion. A series of safeguards were added to prevent northern interests from challenging or undermining the slave economy. The most famous of these

was the “three-fifths” compromise, in which slaves would be counted toward the apportionment of House seats even though they could not vote. Other safeguards included the adoption of the Electoral College system, equal representation in the Senate irrespective of state population (both of which helped give the South disproportionate regional influence on national politics), and the creation of a strong judiciary capable of overturning national policy initiatives that threatened regional interests or “states’ rights.”<sup>10</sup>

Race has also played a critical role at all of the major institutional turning points in American history. The Civil War was fought over slavery, and the postwar Reconstruction era was largely a battle over whether and to what extent the former slaves would be granted full citizenship. The extraordinary Reconstruction amendments—the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution—promised to remake the political order by nationalizing male citizenship rights (with the equal protection clause of the Fourteenth having numerous consequences unknowable at the time it was drafted). The efforts of the Radical Republicans to establish political equality for African Americans and bring multiparty democracy to the South foundered, however, on political divisions among northern Republicans with respect to race and constitutional rules that hindered reform efforts.<sup>11</sup>

Important challenges to the dominant political order from below—notably the Knights of Labor, populism, and the industrial labor movement—also ran headlong into a racialized political order. These movements mounted strong challenges, in part by attempting to organize across racial lines. Indeed, much of their potency lay precisely in the prospect of overcoming embedded racial antagonisms. In each case, however, virulent race-baiting by opponents and internal conflicts over race undermined the potential of these movements.<sup>12</sup>

At the national level, the crucial twentieth-century moment of institutional reconstruction was the New Deal. Although racial politics operated somewhat behind the scenes of front-stage New Deal policymaking, the political and racial conservatism of the southern Democrats was crucial. Elected by essentially all-white electorates, southern Democrats supported relief initiatives but had little use for the broader reform initiatives of the New Deal. They resisted the social insurance programs included in the

Social Security Act of 1935, rejected national health insurance (which would have potentially brought whites and blacks into the same system), and ultimately deflated the pro-labor momentum of the 1933–37 period.<sup>13</sup>

It was not until the civil rights era that the combination of pressures from civil rights organizations and growing racial liberalism among northern Democrats in Congress overwhelmed the opposition of southern Democrats, leading to enduring political reforms. The innovative antipoverty and antisegregationist policies of the period had a lasting and profound impact. But even here, implementation of Great Society programs at the local level frequently stalled in the face of racial antagonisms and the reluctance of local officials to challenge existing social arrangements.<sup>14</sup> Political momentum was lost after the late 1960s, and reform initiatives declined markedly.

The existing literature is very clear about the importance of these institutional arrangements and political developments, perhaps nowhere more so than in discussions of the underdeveloped American welfare state.<sup>15</sup> Federal courts hindered certain kinds of policy initiatives, especially before the New Deal. The fragmented system of social benefit administration precluded national standards with equal application for all groups. The longstanding dominance of southern interests inside the Democratic Party precluded that party from evolving into a pro-welfare social democratic party along western European lines. As a consequence, political actors and social movements were forced to adapt to this institutional terrain and promote different kinds of reforms.

### *Racial Attitudes and Political Outcomes*

A second aspect explored extensively in recent scholarship is how the racial attitudes of white Americans have influenced policy and political processes. In the past 15 years, the link between racial attitudes and the policy preferences of citizens and elites has become one of the most widely studied topics among analysts of political psychology and public opinion. These studies agree that, to the extent public policies come to be seen as benefiting African Americans, their popularity plummets; “race-neutral” social policies, by contrast, tend to retain much higher levels of popular support.<sup>16</sup>

The role of racial attitudes and race-based stereotypes has been particularly important in relation to crime (and criminal justice policies). Racial stereotyping about criminality has been pervasive. Theodore Roosevelt, expressing widely held views in the Progressive era, called for “relentless and unceasing warfare against lawbreaking black men” on the grounds that “laziness and shiftlessness . . . and above all, vice and criminality of every kind, are evils more potent for harm to the black race than all acts of oppression of white men put together.”<sup>17</sup> Lynching was frequently justified by black criminality. The first woman to hold a Senate seat, Rebecca Latimer Felton of Georgia, told her supporters in 1897 that rapes of white women “will grow and increase with every election where white men equalized themselves at the polls with an inferior race and controlled their votes by bribery and whiskey. . . . If it takes a lynching to protect woman’s dearest possession from drunken, ravening human beasts, then I say lynch a thousand a week if it becomes necessary.”<sup>18</sup> Similar stereotypes—if not remedies—were applied to waves of newer immigrant groups from Europe, including the Irish, Italians, Greeks, Hungarians, and Slavs, to name just a few.<sup>19</sup>

The ascription of criminal traits to subordinate racial and ethnic groups also defined the early history of criminology. For example, Cesare Lombroso and other early criminologists made reference to “criminal races.”<sup>20</sup> By the 1930s, however, the work of Clifford Shaw and Henry McKay had largely dispelled such ideas in academic criminology, showing geographic stability in delinquency rates despite dramatic changes in their racial and ethnic composition.<sup>21</sup> During this long interim, however, scholarly ideas associating criminal propensities with racial characteristics proliferated and had wide popular and scientific influence.

Racism and racial threat, of course, are not static concepts, and they manifest themselves in different forms over time. The history of the nineteenth century and the first half of the twentieth century is replete with examples of open and explicit advocacy of racial segregation and white supremacy. By the time of the civil rights era, however, blatant racism no longer held any scholarly respectability and popular support for the idea was rapidly declining as well. Despite the changes established during the “second reconstruction” of the 1960s, a number of scholars have argued

that racial influence on policymaking persists. While structural and economic changes have reduced social acceptance of explicit racial bias, current race-neutral language and policies remain socially and culturally embedded in the discriminatory actions of the past.<sup>22</sup> In contrast to earlier forms of racism based on biological superiority, a “modern” racism rooted in notions of cultural inferiority has come to replace the explicit racism of the Jim Crow era.<sup>23</sup>

### *Race and the Political Influence of the South*

The final angle on the political impact of race highlights how the former Confederate states used their disproportionate influence to shape American political development in ways that served narrow regional interests.<sup>24</sup> After Reconstruction, the one-party “solid South” routinely elected and reelected conservative southern Democrats who—under the institutional rules of Congress—were able to acquire enormous leverage through seniority in the congressional committee system. These legislators were rigid in their defense of states’ rights and the social order of the southern plantation economy.<sup>25</sup> In the 1960s and 1970s, that power would finally break down, as the South became more electorally competitive and seniority rules in Congress were ended after the 1974 (post-Watergate) election.

But the legacies of Southern political influence endure to the present. It is often thought that the Democratic Party cannot capture the White House with a non-Southern candidate, and until very recently the remaining southern Democrats continued to have disproportionate influence in the party leadership.<sup>26</sup> The South has now become the primary bastion of Republican control in the country as a whole, switching from nearly complete Democratic control before the 1960s to almost as thorough Republican domination today. The region may eventually become as important inside the Republican Party as it once was for the Democrats in the heyday of the “solid South.”

Especially striking for our purposes is the February 2002 U.S. Senate vote on an amendment to the federal voting reform legislation that proposed to restore voting rights to ex-felons in federal elections. Senators from the 11 former confederate states voted 18 to 4 against enfranchisement

(the measure went down by 63–31 floor vote), and the most passionate speeches against it were made by southerners (Jeff Sessions of Alabama, Mitch McConnell of Kentucky, and George Allen of Virginia).

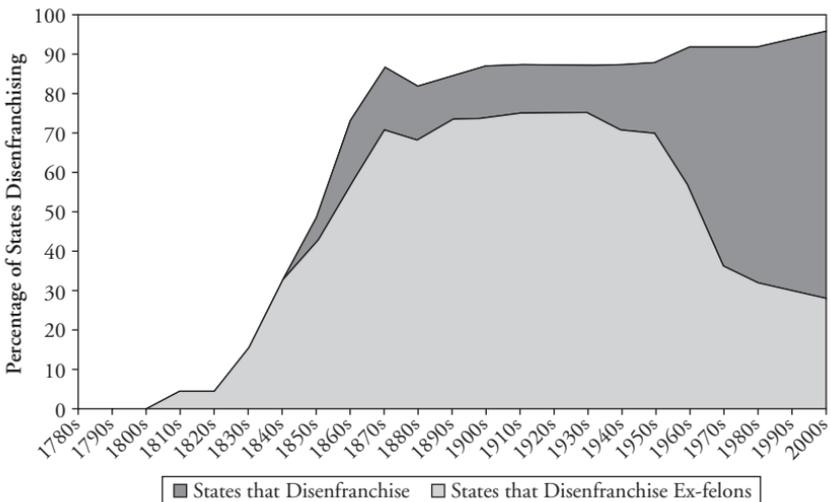
### *The Influence of Race*

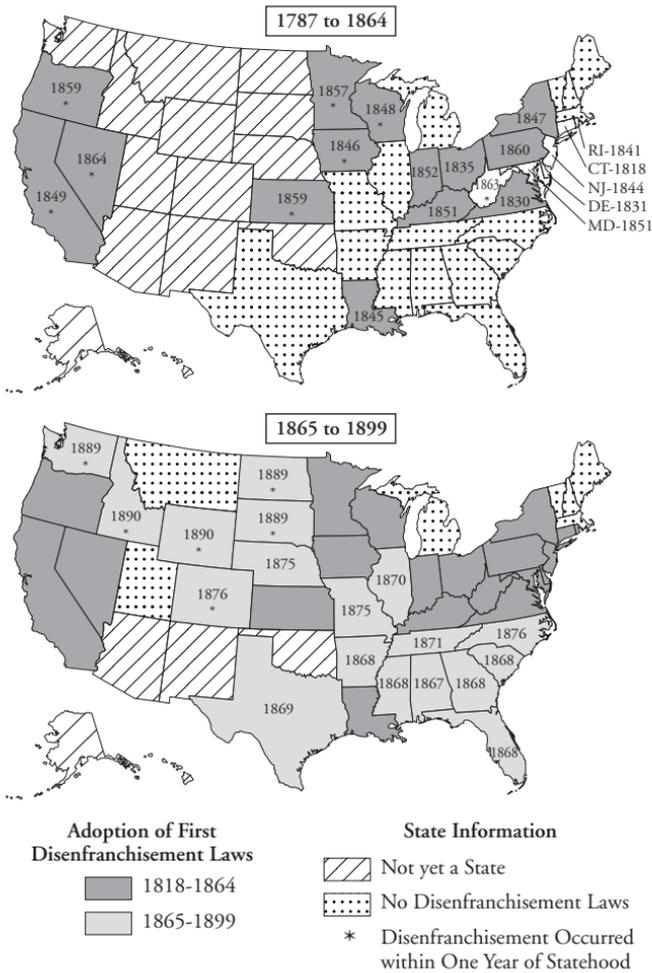
The three prongs identified here—race and institution-building, racial attitudes and stereotypes, and race and region—provide ample grounds for developing hypotheses about the political power of racial factors. When we add to the mix the evident racial disparities in the criminal justice system and race-based stereotypes surrounding crime, the prima facie case for the racial origins of felon disenfranchisement appears to be a strong one. But we still need concrete proof.

### *State Felon Disenfranchisement Laws: An Overview*

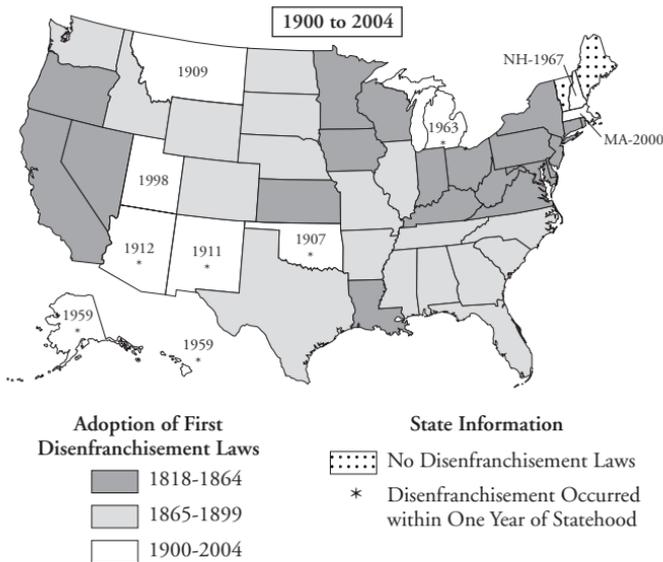
We begin our investigation of the sources of state disenfranchisement laws by documenting the timing of the adoption of those laws. Figure 2.1 charts

**Figure 2.1.**  
Percentage of states disenfranchising felons and ex-felons, 1788–2004.





the development of state laws since 1840. It shows the percentage of states that held a broad measure disenfranchising felons, and the percentage of states that additionally disenfranchise ex-felons after they have completed their sentences. (More details about individual states' laws are shown in appendix table A2.1.) While 11 states had established felon disenfranchisement laws by 1850, 38 states had such laws by the end of the century. That number stayed relatively stable throughout the first half of the twentieth century, with only four more states adding laws in this period. By the year



**Figure 2.2.**  
Timeline of statehood and disenfranchisement, 1787–1864, 1865–1899,  
and 1900–2000.

2000, however, 48 states had some type of law restricting voting rights on the basis of a felony conviction; Maine and Vermont were the only two states with no restrictions.<sup>27</sup> The percentage disenfranchising ex-felons, however, declined sharply after the late 1950s.

Figure 2.2 highlights the geographic clustering of franchise restrictions. It shows two noticeable waves of disenfranchisement laws in the nineteenth century. The first wave begins in the 1840s in the Northeast, following on the heels of the decline of property and other restrictions on white male suffrage. Unlike the northern states, several midwestern and western states adopted many of these laws with statehood. The second wave of restrictions occurred in the South after the Civil War, in some cases following passage of the Fifteenth Amendment and extension of voting rights to African American men.

*Felon Disenfranchisement between 1840 and 1861*

Prior to 1840, four states (Connecticut, Delaware, Ohio, and Virginia) had established broad felon disenfranchisement measures. The first significant wave of disenfranchisement for criminal offenders spans the two decades before the Civil War. Expansive changes in state suffrage rules occurred shortly before and during this period. The first half of the nineteenth century saw the beginnings of the world's first mass democracy, albeit one in which in most states only white men had the right to vote.<sup>28</sup>

Before 1800, most states had established restrictions on the franchise for white men, such as property ownership or payment of certain taxes. In 1790, for example, 10 of the original 13 states had property requirements.<sup>29</sup> States generally required ownership of a certain amount of land (often 50 acres) or of land worth a minimum value. Many states, in addition, enforced durational residency requirements. In Virginia, for example, voters had to own their property for at least one year prior to the election. New Hampshire enforced a poll tax, and Georgia and Pennsylvania both required all taxes to have been paid in the year preceding the election. New Hampshire excluded all "paupers," although the prevalence of property requirements in the other states effectively produced the same exclusion without the formal restriction.

In his authoritative history of voting rights in the United States, Alexander Keyssar argues that the expansion of the franchise in this period resulted from a range of social pressures, including the growth of the propertyless masses, wars, interparty competition for votes, and pressure to increase the population of remote states. The process was uneven, halting, and subject to reversal. In both theory and practice, however, the classical justifications for restricting the voting rights of white men were losing influence during this period.<sup>30</sup> By the middle of the nineteenth century, most states had responded to these various pressures by easing or eliminating voting restrictions. Many states abolished requirements of taxpaying and property ownership through constitutional revisions, while newer states never imposed the restrictions. New York dropped its property requirement in 1821 and its taxpaying requirement in 1826, although in both cases the

change only affected whites (as the state's 1826 and 1846 constitutions continued to apply the requirements to "men of color").<sup>31</sup> By 1855, only three of the 31 states had property requirements in effect.<sup>32</sup> Nine states, however, had added or retained pauper exclusions,<sup>33</sup> and Connecticut enforced a literacy requirement.<sup>34</sup>

Having allowed the growth of a mass democracy, elites' concerns about its implications—particularly, the consequences of allowing "undesirables" to participate—were widespread. The most notable of these concerns was a fear of fraud, as well as more obscure fears on the part of some that the integrity of the ballot box would be tainted by the participation of unworthy electors. This included, most obviously, all women, African Americans in most states, and, increasingly, immigrants. For example, in 1790, only 3 of the 13 states excluded nonwhites from voting, but by 1840 20 of the then 26 states had removed nonwhites from the rolls, either by directly specifying that African Americans could not vote or by indirectly disenfranchising them through the implementation of onerous property requirements applicable only to African Americans (as in New York).<sup>35</sup>

Criminal offenders constituted another category of undesirable voters, but unincarcerated former offenders also presented a more complicated enforcement problem than women or voters of color. A comparison with the types of criminal disenfranchisement practiced in the colonial era, described in chapter 1, highlights this problem. In the town hall meeting, the disenfranchisement of offenders was enforceable through direct personal means: the offender was known to the community, and easily barred from attempting to participate. The transition to a modern democratic regime, in which masses of white men could vote in the anonymous environs of the urban polling booth, made direct (and systematic) enforcement more difficult because offenders could not necessarily be identified by sight.

What was the connection between the extension of the franchise and felon disenfranchisement? We have very few traces of information, beyond what can be gleaned from the statutory and constitutional histories of the states. One pattern, however, is strikingly clear. Between 1840 and 1865, all 16 states adopting felon disenfranchisement measures did so *after* establish-

ing full white male suffrage by eliminating property tests (see appendix table A2.2).<sup>36</sup> To be sure, some of the new states in this period adopted restrictive voting laws from the outset. For example, when Nevada became a state in 1864, its constitution gave its state legislature the power to condition voting on payment of a poll tax, and in 1865, the legislature enacted such a statute.<sup>37</sup> West Virginia had no property or taxpaying requirement, but still banned all paupers from voting when it became a state in 1863. The majority of new states, however, had constitutional provisions specifically banning property requirements or limiting taxpaying requirements to special elections, such as those authorizing a city or town to incur debt.<sup>38</sup> It is striking, however, that almost all of the 19 states established after 1850 included *both* near-universal white male suffrage and a law authorizing felon disenfranchisement in their founding constitutions. Of the 19 new states in the post-1850 period, 17 had felon disenfranchisement provisions in place at the time of statehood.

While class-based factors were important, felon disenfranchisement laws before the Civil War are not plausibly tied to race for the simple reason that most states did not permit African Americans to vote at all. On the eve of the Civil War, only six states allowed African Americans to vote, and these states (clustered in the Northeast) generally had very small African American populations.<sup>39</sup> Since most free African Americans were already legally disenfranchised, further targeting of the black vote through disenfranchising measures directed at felons would have been largely superfluous.

It is also important to note that in this early period, the criminal justice system was still quite underdeveloped, although entering a phase of rapid development. There were virtually no professional police forces before 1840, and few jurisdictions had criminal courts to deal with routine offenses. For example, Boston did not establish regular police officers until 1838, with New York City and Philadelphia following in 1845. Most states maintained a single state penitentiary, and incarcerated only a small number of offenders (many of whom had simply failed to pay their debts or taxes). The modern criminal justice system, including the widespread use of prison, formalized probation and parole, and indeterminate sentencing, developed in waves between 1830 and 1920. Nonetheless, the growth of felon disen-

franchisement in this period was symbolically, if not substantively, important.

The takeoff period for criminal disenfranchisement laws thus appears to have corresponded with two major developments: primarily, and most important, the spread of suffrage rights to the (white male) masses, and secondarily, the expansion and growth of the criminal justice system. Our evidence here is not as strong as we would like, and later investigators will surely provide a more complete portrait. But already we are beginning to see how the adoptions of disenfranchisement laws were not free-floating events. Rather, they were tied to social dynamics, in this case the spread of voting rights to propertyless white men.

### *Felon Disenfranchisement after the Civil War*

The second major growth period of disenfranchisement laws occurred after the Civil War. Between 1865 and 1900, 19 states adopted or amended laws restricting the voting rights of criminal offenders (as shown in appendix table A2.1). In the South, during and after Reconstruction, many states expanded their restrictions on the felon population, which began to contain large proportions of African Americans for the first time. These measures included the extension of disenfranchisement to cover a wide range of crimes not previously included among the common-law felonies.<sup>40</sup> For example, South Carolina crafted a law to disenfranchise for crimes of “thievery, adultery, arson, wife-beating, housebreaking, and attempted rape,” while excluding murder.<sup>41</sup>

The last half of the decade in particular saw a large number of restrictions put into place. Three states that had not disenfranchised added laws. Nebraska became the 36th state in 1875, disenfranchising felons until the completion of their sentences. By the end of the decade, 28 states had some type of felon voting restriction, most of which disenfranchised convicted felons until they received a pardon. In the 1870s, disenfranchisement laws spread further as four states added laws and two (Arkansas and Texas) expanded their list of disqualifying crimes. In the 1890s, a number of additional southern states also expanded the list of offenses that would trigger disenfranchisement. Four new states added laws that, to varying degrees,

restricted felons' right to vote. Wyoming and Montana disenfranchised felons until they received a pardon, whereas Idaho disenfranchised only for the duration of sentence, and Utah disenfranchised only those convicted of election offenses (Utah would not change its law to disenfranchise all prison inmates until 1998).

The beginning of the twentieth century brought fewer, but generally more restrictive, changes. Beginning in 1901, Alabama disenfranchised for crimes of "moral turpitude." Several years later Oklahoma became the 46th state and disenfranchised felons for the duration of their sentence. In 1909, New York disenfranchised felons convicted of a federal offense. In the 1910s, Iowa disenfranchised federal offenders in addition to all other convicted felons, and when Arizona and New Mexico became states in 1912, each disenfranchised felons permanently unless pardoned. At the same time, New Hampshire, which previously had not restricted the voting rights of felons, disenfranchised those convicted of treason, bribery, and election offenses.

What drove the post-Civil War changes? They were substantively as well as symbolically important. It appears likely that felon disenfranchisement laws were poorly enforced prior to the Civil War, and perhaps for some time thereafter as well.<sup>42</sup> In the aftermath of the Civil War, a new and complex dynamic developed around racial politics that appears at first glance to bear a significant relationship to the changing pattern of disenfranchisement laws. In 1868, the Fourteenth Amendment was added to the Constitution, mandating equal protection of the races, and giving states a strong incentive to grant all men the right to vote—a threat of reduced congressional representation.<sup>43</sup> The amendment further redefined citizenship by deeming all persons born in the United States to be American citizens, thereby superseding the Supreme Court's declaration to the contrary a decade earlier in the infamous *Dred Scott* case.<sup>44</sup> (As we discussed in the previous chapter, section 2 of the amendment also contained the clause permitting the states to disenfranchise those convicted of "rebellion or other crimes.") Two years later, in 1870, the Fifteenth Amendment enfranchised African American males, expressly declaring that states could no longer deny the right to vote based on race.

Despite their legal enfranchisement as a result of the Reconstruction

amendments, many African Americans remained practically disenfranchised as a result of concerted efforts to prevent their exercise of these rights. The general process of disenfranchising all blacks following the end of Reconstruction would, however, take some time to unfold. The mechanisms through which this was achieved are widely known. Violence and intimidation were widespread, especially until legal measures took hold. Most southern states, as well as some nonsouthern states, implemented some combination of poll taxes, literacy tests, “grandfather clauses,” white-only primaries, and discriminatory registration requirements.<sup>45</sup> Such limitations on the right to vote were extremely effective, especially after 1900, relegating most African Americans in the South to the status of nonvoters.<sup>46</sup> It was not until the combination of a series of Supreme Court decisions in the 1960s and the passage of the VRA that these barriers began to fall.<sup>47</sup>

Restrictions targeting immigrants, the poor, and the urban working class also began to appear in this period. These included such measures as preregistration and long residency requirements.<sup>48</sup> More than half the states adopted literacy tests in this period. Further, between the 1880s and the early 1900s, almost all of the states that had previously allowed immigrant voting did away with those provisions.<sup>49</sup> This was a period in which elites stepped back from the universalizing innovations of the first half of the nineteenth century, in the North as well as the South.

Although it was far less widely applied than such general measures, the explicit use of felon disenfranchisement contributed to preventing African Americans and other “undesirable” groups from voting. Disenfranchisement based on criminal conviction provided a useful, and potentially permanent, way to eliminate voters, particularly in light of corresponding changes to the criminal justice system (which became both more expansive and more formalized during the mid- to late nineteenth century).<sup>50</sup> Although this type of voting ban inevitably disenfranchised potential white voters as well, changes in prison populations during this period suggest that the burden fell mainly on nonwhites. In Alabama, for example, nonwhites made up just 2 percent of the prison population in 1850, but 74 percent by 1870.<sup>51</sup> Felon disenfranchisement, therefore, cannot be separated from the larger dynamics of criminal justice and racial politics in this same period.

The case of Alabama is a particularly interesting exemplar. Alabama

has formally banned voting for all felons and ex-felons since 1868. The original state constitution of 1819, however, gave the legislature the authority to disenfranchise those convicted of “bribery, perjury, forgery, or other high crimes or misdemeanors” (art. 6, sec. 5). The provision was amended in the 1868 constitution, which disenfranchised for any crime “punishable by law with imprisonment in the penitentiary” (art. 7, sec. 3). Although most felons and ex-felons were disenfranchised by 1868, the state continued to further restrict voting rights with subsequent amendments. In 1875, larceny was added to the list of crimes resulting in disenfranchisement (art. 8, sec. 3), regardless of whether the larceny was a felony or a misdemeanor. The state’s supreme court held that the law could be applied retroactively to include people convicted of larceny before 1875, citing the state’s need to “preserve the purity of the ballot box.”<sup>52</sup> More substantial changes were adopted during the state’s 1901 constitutional convention, when the vague phrase “crime involving moral turpitude” was added. Participants at the all-white convention openly sought to “establish white supremacy,” using suffrage as a key mechanism to achieve the goal. John Fielding Burns, sponsor of the new disfranchisement bill, boasted that “the crime of wife-beating alone would disqualify sixty percent of the Negroes.”<sup>53</sup>

The Alabama case provides an example of how subtle changes in a state’s law may be driven by a clear racial purpose. The moral turpitude clause lasted nearly 85 years, and permitted the state to target African Americans for acts beyond the reach of other disenfranchising measures. Indeed, historical evidence presented to the Supreme Court in 1985 suggested a sufficiently clear racial bias to warrant a conservative Court to strike it down.<sup>54</sup> But whether we can finger race in other states, or for the overall national pattern, remains unclear.

*The Great Liberalization: Felon Disenfranchisement  
during the Civil Rights Era*

Between 1920 and the late 1950s, relatively few changes in felon disenfranchisement laws were enacted, or indeed laws regulating the right to vote

more generally.<sup>55</sup> The final key period visible in figure 2.1 begins in the late 1950s and runs more or less to the present, though reaching high tide in the early 1970s. During this period, a large number of states (23 in all) amended or did away with laws barring some or all of the ex-felon population from access to the ballot box. To be sure, even in the midst of this general period of liberalization, two states (Michigan and New Hampshire) became more restrictive, but the clear direction of change was toward liberalization. Some states reduced the scope of their laws by allowing probationers to vote and by automatically restoring voting rights upon completion of sentence. During the peak of this liberalization phase, voting was increasingly extended not only to ex-felons but also to those nonincarcerated felons on probation and, in some cases, parole. Five states changed their laws to automatically restore voting rights upon completion of sentence and five more to disenfranchise only inmates between 1970 and 1975.

Since the mid-1970s, the pattern of change has slowed, but of those states changing their laws far more have liberalized (see chapter 10). These liberalizing measures have also affected far more individuals than the restrictive measures. We will discuss the sources and implications of liberalization more extensively in chapter 10.

### *Did Racial Politics Drive Felon Disenfranchisement?*

On the eve of the Civil War, only a handful of states allowed African Americans to vote. But in the period after 1865, anecdotal evidence suggests race might have played a critical role. In this section we consider that possibility more systematically. Variation across the states affords the opportunity to compare contexts where racial factors are likely to matter a great deal to those where they are unlikely to have played a significant role in explaining felon disenfranchisement. We can use state-level variation to compare racial *and* nonracial factors, and can also examine the broad national pattern by looking at all states rather than focusing on a few noto-

rious cases. (For further descriptions of the methods employed in this analysis, see the chapter's methodological appendix at pp. 236–38.)

### *Varieties of Racial Threat*

Our starting point is sociological theories of racial (or ethnic) threat.<sup>56</sup> Racial group threat theories assert that dominant groups perceive subordinate groups as a threat when subordinate groups gain power to the detriment of the dominant group. When the dominant group perceives that a subordinate group is gaining power in a sphere previously under the control of the dominant group, such as the political realm, that perception may spark actions to diminish the perceived threat.<sup>57</sup> Legal barriers may be erected, such as Jim Crow laws, and other forms of racial discrimination. Whites, for example, may fight for political restrictions if they perceive that minority groups can mobilize and gain political power. A dominant group may therefore decrease the size of the minority's potential electorate, thereby sapping the political strength of subordinate groups and sustaining the established social structure.

Racial threat theories can take many forms, emphasizing factors such as economic competition, relative group size, and political power to varying degrees. The most common formulation of racial threat is based upon economic relationships in which groups compete over scarce resources. Members of the dominant group may feel that their livelihoods are threatened by the growth of a subordinate group, particularly when the dominant group has a marginal economic status.

Using theories of economic threat to explain the rise of felon disenfranchisement may present a few problems, because disenfranchisement is situated within the *political* realm rather than the market. Models of racial antagonism in general have tended to give less attention to the political sphere in the area of group threat, but those that do underscore a political power threat highlight the size of subordinate groups within specific geographic contexts.<sup>58</sup> Growth in the relative size of a subordinate group increases that group's ability to use democratic political institutions for their benefit and to the detriment of the dominant group. With universal suf-

frage, in which each person's vote counts the same as any other's, the potential to disrupt existing power relations in a race-based social order is ever present. The use of formal and informal measures to bar or inhibit members of subordinate groups from voting creates an opening to neutralize racial threats and preserve the status quo.<sup>59</sup>

Many previous studies have shown that the size of the racial minority population in a region intensifies concerns among whites. For example, sociologists Lincoln Quillian and Devah Pager have found a link between the perceived racial composition of the neighborhood and perceptions of criminality in the neighborhood.<sup>60</sup> Higher proportions of African Americans in a region appears to increase both traditional white prejudice and white opposition to public policies designed to promote racial equality.<sup>61</sup> And when former Ku Klux Klan leader David Duke ran a close race for a U.S. Senate seat in Louisiana in 1990, his support among whites was strongest in those parishes with the largest African American populations.<sup>62</sup>

Such research focuses on theories of racial threat based on either economic competition or relative group size. However, there is a third, and perhaps more direct, measure of racial threat to apply to the specific case of felon disenfranchisement: the racial composition of the convicted felon population. Imprisoning racial minorities reduces economic threat to whites, but not necessarily the political threat, unless formal disenfranchisement attaches to a criminal conviction.<sup>63</sup> Because felon disenfranchisement laws affect only persons convicted of a felony, the racial composition of a state's prison population is more closely related to felon disenfranchisement than is the racial makeup of a state's population.<sup>64</sup> In other words, the racial composition of state prisons may reveal a direct link to voting restrictions that is less apparent when looking only at the relative size of the nonwhite population within a state.

The analysis we develop considers all three types of racial threat, within the limits of the available data. We tested whether economic competition affects adoption of felon disenfranchisement laws by including a measure of the rate of white male idleness and unemployment in each state. Using historical data from the U.S. Census Bureau, we calculated this rate by dividing the number of white males aged 15 to 39 who were either un-

employed or “idle” (defined as neither attending school nor participating in the labor force) by the total white male population aged 15 to 39.<sup>65</sup> To account for more general economic conditions, we included an indicator of national economic contraction or recession.<sup>66</sup> The latter measure supports the literature on ethnic competition because it captures economic fluctuations, which may trigger feelings of economic threat.<sup>67</sup>

To test whether political threat in the general population drives disenfranchisement laws, we evaluated the effect of the African American and non-African American populations across the states and years. We also consider a measure of the percentage of nonwhite males in a state’s total population, in light of some research suggesting that nonwhite male populations pose a larger threat than the total nonwhite population.<sup>68</sup>

Finally, we consider the racial composition of state prisons by including a measure of the percentage of nonwhite inmates in state prisons.<sup>69</sup> While we would prefer broader information about the racial composition of *all* convicted felons (not just those in prison), a prison-based indicator is the only available information over the long historical period of our investigation. Fortunately, data in recent years show a high correlation between the two measures (all felons and incarcerated felons) across time and space.<sup>70</sup>

### *Alternative Explanations*

To conclude that one or more racial threat explanations provide the best available theory of how disenfranchisement laws developed across the states, we need to test them against plausible alternatives. Other factors we suspect could influence legal change include region, partisan control over state government, and the level of criminal justice punitiveness in a state. Region may play a particularly important role in this context. Following the Civil War, most states imposed various restrictions on suffrage, but states in the South typically adopted laws that were more comprehensive and detailed.<sup>71</sup> A statistical control for region allows us to examine whether our conclusions about the national patterns were driven by developments in the South.

A measure of partisan control of government is another key factor to

consider. Political actors must formally introduce, propose, and vote on the creation of, or amendments to, disenfranchisement laws.<sup>72</sup> Throughout the post-Civil War era, and until at least the New Deal, Republicans generally supported African American suffrage, while southern Democrats (and frequently their northern allies) opposed it. (Later, of course, this pattern reversed, as northern Democrats became increasingly reliant on African American votes and shifted toward a pro-civil rights position.)<sup>73</sup>

Key historical turning points, in addition to data limitations, complicate our analysis of partisan effects on the passage of felon disenfranchisement laws. For example, data on the political party compositions of state legislatures are not available for the entire period. We are therefore only able to represent political power in our analyses with gubernatorial partisanship (a clearly imperfect measure of state partisan control). To account for partisan racial dynamics across the years of our study, as well as for potential interactions between region and partisanship, we tested whether political effects varied over time, using three time periods to represent gubernatorial leadership: prior to 1870, 1870–1960, and 1960–present.<sup>74</sup> These time periods capture the effects of Reconstruction in the first and second periods, while the third period captures the shift of racially conservative southern Democrats to the Republican Party beginning in the early 1960s.<sup>75</sup>

To isolate the effects of racial threat from the effects of overall state punitiveness, we also considered state incarceration rates.<sup>76</sup> It may be that some states are simply more punitive and, as a result, more readily adopt or extend disenfranchising measures alongside other forms of punishment. Finally, to account for the likelihood that new states would adopt disenfranchisement provisions as part of their initial constitutions, we included a measure tracking the number of years since statehood. (A summary of the key variables we used for this analysis, and a brief description of their measurement, is provided in appendix table A2.3.)<sup>77</sup>

### *Changes in State Felon Disenfranchisement Laws*

The dependent variable—the variation we are attempting to account for in the statistical analyses we will discuss shortly—is passage or extension

of disenfranchising measures. States impose disenfranchisement for varying periods, generally following one of four schemes: (1) disenfranchisement only while incarcerated; (2) disenfranchisement while incarcerated and while on parole; (3) disenfranchisement for the length of sentence (until completion of probation, parole, and incarceration); and (4) disenfranchisement after completion of sentence (ex-felons). We examined changes within state disenfranchisement laws and considered a new law to be a more restrictive change if it disenfranchised a new category of felons.<sup>78</sup> (The exact timing of these changes in each state is shown in appendix table A2.1.)

## *Results*

### *Bivariate and Multivariate Statistical Analyses*

We first examine state-level predictors of when a state adopts its first felon disenfranchisement law in simple bivariate models, which consider the impact of one factor at a time (see appendix table A2.4, middle column). We label these “bivariate” because they show the effects of one variable on another variable, passage of a strict felon voting law, without statistically controlling for anything other than time. The statistically significant predictors of felon disenfranchisement laws in these models are the racial composition of state prisons, southern and western regions (relative to the Northeast), the time since statehood, and the decades of the 1860s, 1870s, and 1880s (relative to the 1850s).<sup>79</sup>

Racial threat, as measured by the percentage of nonwhites in state prisons, is clearly associated with adoption of state felon disenfranchisement laws.<sup>80</sup> Regionally, relative to states in the Northeast, southern and western states were more likely to pass a felon disenfranchisement law. Perhaps surprisingly, we found little effect of political partisanship. States were most likely to adopt felon voting bans at the time of statehood or in the years immediately thereafter.<sup>81</sup> Finally, when time is modeled by decade (as dummy variables), we find that states were especially likely to adopt a first

law in the late 1860s through the 1880s, during the post–Civil War and post-Reconstruction eras.<sup>82</sup>

We next introduced systematic controls to test whether some of these factors are in fact explained by others (and thus there is no underlying causal relationship). We do so by estimating a series of multivariate models that introduce variables corresponding to the alternative explanations for disenfranchisement laws discussed earlier (see the righthand column of appendix table A2.4, which shows the multivariate results for the final model, which statistically controls for the estimated effects for the presence of all other factors).

Although the bivariate results showed strong regional effects, these were diminished once we accounted for the effects of the racial composition of prisons and economic and political forces. Restrictive changes are less likely to occur during times of Democratic political control.<sup>83</sup> Finally, time since statehood remains a strong negative predictor in the full model, suggesting that the likelihood of states adopting felon disenfranchisement provisions declines precipitously with time. We should note that adding the indicator of time since statehood diminishes the effects of the individual decades, region, and recession (and inflates their standard errors) because of their mutual association. The key racial threat effect, by contrast, is somewhat larger in magnitude in models that also include a measure of time.

### *Laws Disenfranchising Former Felons*

We repeated our analyses to test the effects of the same independent variables on adoption of a state's first *ex-felon* disenfranchisement law, the most severe ballot restriction. We again found a positive and significant effect of the nonwhite prison population.<sup>84</sup> Taken together, these analyses show a strong and consistent relationship between racial threat, as measured by the percentage of nonwhite state prisoners, and laws restricting the voting rights of people with a felony conviction. States in the Midwest, South, and West are also more likely to pass *ex-felon* disenfranchisement laws than states in the Northeast. The effect of the South, however, again diminishes

when controlling for the nonwhite prison population, indicating that race is particularly important in the South.

### *Are There Differences across Historical Periods?*

Our results thus far have considered the effects of selected racial threat indicators and other characteristics measured over a long undifferentiated historical period. How robust are they? In particular, what happens if we allow those effects to vary across historical periods? Because states had unchecked power to restrict suffrage before the Fourteenth and Fifteenth amendments, many nonwhite citizens were disenfranchised throughout most of the nineteenth century, regardless of whether they had a felony conviction in their past.<sup>85</sup> We therefore expect the effects of racial threat on felon disenfranchisement to *increase* after adoption of the Fifteenth Amendment in 1870, which prohibited states from denying suffrage based on race.<sup>86</sup> We explored this possibility by allowing the effects of racial threat to vary across historical periods (see appendix table A2.5, which uses 1870 as a historical cut-point to consider the influence of several indicators of racial threat across these periods, including the nonwhite population, the nonwhite male population, the nonwhite prison population, and the idle white male population).

Our primary interest is in comparing the pre-1870 period in panel A with the 1870–2002 period (see appendix table A2.5). For each period we identified the predictors that had a significant effect on passage of a first felon disenfranchisement law. All models controlled for decade, region, gubernatorial partisanship, idle white males, population, incarceration rate, and time since statehood. In the earlier period, only the nonwhite prison population is a significant predictor of passage of a felon disenfranchisement law. As expected, however, each racial threat predictor becomes much stronger (in magnitude as well as statistical significance) after passage of the Fifteenth Amendment. The nonwhite population, the nonwhite male population, and the nonwhite prison population are all significant positive predictors of passing a felon disenfranchisement law after 1870.

As expected, racial threat has more pronounced and consistent effects in the post-1870 period. That the nonwhite prison population remains a

strong predictor in the earlier period is perhaps not surprising in models predicting *felon* disenfranchisement, because the racial composition of state prisons likely represents the most proximal measure of racial threat. Racial challenges to political power were much more visible during and after Reconstruction, but it is important to note that they predated 1870. Recall that several states allowed nonwhites to vote before the constitutional amendments of the Reconstruction era. When Rhode Island passed its first felon disenfranchisement law, for example, it had no race requirement for voting. Similarly, Indiana and Texas excluded African Americans from voting but not other nonwhites. While an 1870 cut-point seems justified based on the historical record, racial threat was also likely to be salient in the 1868–70 period between adoption of the Fourteenth and Fifteenth Amendments. During this time, six states adopted their first felon disenfranchisement law.

### *Conclusion*

When African Americans make up a larger proportion of a state's prison population, that state is significantly more likely to adopt or extend felon disenfranchisement. To be sure, many states adopted an initial felon disenfranchisement measure after property and other restrictions on lower-class white men were lifted (and before blacks could vote). Individual state histories may be more complex than our race thesis implies. But the overall evidence we have presented supports a strong conclusion about the political significance of race in driving the adoption of felon disenfranchisement laws.

This finding, along with other evidence presented in this chapter, clearly fits the broader patterning of race and voting rights in America. The right to vote for African Americans has moved in waves throughout the course of U.S. history.<sup>87</sup> Free blacks were often permitted to vote in the early years of the new republic, even in some of the slave states, until the states began taking explicit measures to block them from voting in the early nineteenth century. By the onset of the Civil War, only a handful of states (all with small black populations) allowed African Americans to vote.

Following the war, the adoption of the Fourteenth and Fifteenth amendments established formal racial equality in terms of access to the ballot box. The spirit of these amendments was simultaneously undermined in various ways across the country. In the South, methods included the implementation of grandfather clauses, poll taxes, and literacy tests. These devices were coupled with aggressive gerrymandering to ensure that even African Americans who managed to vote did so in legislative districts where they did not constitute a majority of the electorate. In the North, blatant discrimination was less overt, but states periodically employed subtle means to hinder participation by African Americans and newer immigrant groups, most notably through the institution of literacy tests and voter registration requirements. Throughout the country, felon disenfranchisement constituted another means through which the African American vote was restricted.

Felon disenfranchisement thus has to be viewed as one of the many side effects of the peculiar history of racial politics in the United States. In the abstract, felon disenfranchisement can be separated from race: state laws are literally race neutral, in that all who are convicted of felonies are subject to the same sanction. Moreover, modern defenders of the practice certainly draw upon nonracial reasons for their position, and we do not intend by this analysis to imply anything to the contrary. This does not, however, mean that there is no connection between race and felon disenfranchisement. Indeed, when we ask the question of how we got to the point where American practice can be so out of line with the rest of the democratic world, the most plausible answer we can supply is that of race.