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Life After Civil Death:  
Felony and Mormon Disenfranchisement in the U.S. West (1880-1890)  
by  
Winston A. Bowman  

_The voter possesses a mere privilege; ... the States have supreme control over this privilege; ... taking it away, or what is the same thing, refusing to confer it, does not impair a right, and can not be regarded as a penalty or punishment._

John Norton Pomeroy, 1873.

Introduction:  

Pomeroy’s understanding of the nature of the franchise may seem foreign to many present-day Americans, but this vision is the one to which most nineteenth-century jurists, scholars, and politicians subscribed. It is worth noting that Pomeroy wrote these words in the aftermath of the post-Civil War rights revolution and half a century after the expansion of the franchise under the auspices of Jacksonian democracy. This attitude toward voting rights was not abandoned following the passage of the reconstruction amendments. Instead, the idea of a limited franchise was affirmed time and again in the post-bellum era. Pomeroy’s franchise (one in which “the voter possesses a mere privilege,” and the states control the exercise of that privilege) remains an important component of the American electoral system.

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3 Ibid.
During the nineteenth and twentieth centuries a larger portion of the population was vouchedsafed voting privileges than the nation’s founders might have imagined or thought desirable. But there has never been a formal recognition of a right to vote as a concomitant of U.S. citizenship.\(^4\) Voting remains a revocable privilege. To many this legal distinction may seem unimportant provided the vast majority of adult citizens are able to cast ballots, should they so desire, on Election Day.

This study seeks to demonstrate the weaknesses of this inclination, and stresses ways in which the persistence of the original structure of voter regulation in America could potentially lead, and perhaps already has led, to undesirable consequences. Specifically, this examination demonstrates how the inchoate series of restrictions on state’s power to limit the franchise has facilitated the continued disenfranchisement of at least one segment of the nation’s potential electorate: felons and ex-convicts.

Convicted felons and ex-convicts comprise the largest group of disenfranchised adult citizens in the United States today.\(^5\) Laws removing voting privileges from felons bar more than 4 million otherwise eligible voters from the nation’s poll-booths.\(^6\) While the contested 2000 Presidential Election has focused some media attention on current legislation prohibiting felons and ex-felons from voting, relatively little has been written about the historical development of


\(^5\) The Impact of Felony Disenfranchisement Laws in the United States; The Sentencing Project of Human Rights Watch, \(www.hrw.org/reports98/vote/us98o-1.htm\)


\(^7\) Ibid.
such laws. According to historian Alexander Keyssar, “the history of laws disenfranchising felons is long, complex, and… not well understood.”  

While few studies treat the historical development of this remarkable phenomenon exclusively, much research has focused on broader issues involving the history of voting rights. Many of these inquiries have yielded important findings, but most have focused on the late nineteenth-century South at the expense of other regions. By emphasizing the importance of conflicts in the U.S. West during the 1880s, this examination seeks to add to the important legal-historical research on the evolution of voting rights in America.

At common law, felons suffered a “civil death.” This label entailed, among other consequences, the permanent loss of political rights. While laws stripping convicted felons of their voting privileges trace their roots back to these English legal traditions, many disenfranchisement laws changed in both character and intent from 1880 to 1910. “In the South,” for example, “laws were generally rewritten to target ‘black crimes’ and exclude as many African-Americans as possible.” In 1901 the newly adopted State Constitution of Alabama excluded a laundry list of criminals from the franchise:

> Those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another.

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11 *Constitution of the State of Alabama (1901)*, Article VIII, Sect. 182.
Alabama’s attempts to disenfranchise African-Americans through laws ostensibly designed to disenfranchise criminals regardless of race were so effective that the state’s election registrars estimated that by 1903 this provision had stripped approximately ten times as many blacks of their voting privileges as it had whites.\textsuperscript{12} The Supreme Court eventually ruled this provision unconstitutional on the basis that it violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{13}

Evidently, racial minorities were not the only groups affected by what shall be referred to throughout this study as “targeted” felony disenfranchisement, nor did the South hold a monopoly on such tactics. Determined to limit the efficacy of the Church of Jesus Christ of Latter-day Saints and remove the potential for Mormons to repeal anti-polygamy laws through bloc-voting, Congress and the legislatures of several western states and territories created a series of laws in the 1880s designed to remove voting privileges from anyone convicted of polygamy. As the title of this study suggests, these laws and the debates over their validity have exerted a lasting influence over the jurisprudence of felony disenfranchisement. An examination of felony and Mormon disenfranchisement legislation in the late-nineteenth-century U.S. West provides a vantage point from which to view and evaluate laws, many of which remain unchanged since those years, that currently deny felons the vote.

\textsuperscript{13} It should be noted that a significant percentage, perhaps even as many as 40\%, of the original Mormon population did not participate in this relocation and stayed primarily in the Midwest. See Dean L. May, “A Demographic Portrait of the Mormons, 1830-1890,” Thomas G. Alexander and Jessie L. Embry eds., After 150 Years: The Latter-day Saints in Sesquicentennial Perspective (Midvale, Utah: Signature Books, 1983), 37-70.
Murphy v. Ramsey (1885) and the National Response to Polygamy in the West:

One might expect, following the Church’s mid-nineteenth-century migration to Utah, that conflicts over Mormon polygamy were primarily regional affairs. But the persistence of the “twin relic of barbarism” more than twenty years after the abolition of slavery (polygamy’s twin) and Mormon claims of laws, based primarily on religious principles, superior to the U.S. Constitution inflamed the nation’s religious and political passions and led to a concerted effort to deal definitively with “the Mormon question.” Often equating plural marriage with slavery, post-Civil War Republicans were the fiercest crusaders in the campaign against polygamy. Mormons generally gravitated to the rhetoric of state and local sovereignty pronounced by conservative Democrats, many of whom were wary of federal intervention in local affairs, even when directed at the much-maligned Saints.

While attempts to disenfranchise Mormons during the late nineteenth century were driven primarily by concerns about the perceived immoral and undemocratic components of the Saints’ lifestyle and ideology, some scholars have also pointed out parallels between opposition to Mormonism and attitudes toward race and ethnicity following Reconstruction. Although conceptions of race were often bound to some brand of pseudo-science during this period, many westerners drew close connections between the Mormon, Indian, and Chinese “questions.”

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15 Ibid.
16 Ibid.
17 As Gordon notes, Southern conservatives dashed several antebellum attempts at anti-polygamy efforts, sensing the possibility of the erosion of legal protection for their own “peculiar domestic institution.” See Gordon, *The Mormon Question*, 57.
was the case with Native and Asian Americans, many westerners considered Mormons’ perceived oddities irreconcilable with notions of what a proper U.S. citizen should be.20

There were, of course, real and important differences between the Mormons and other maligned minorities in the West during the late nineteenth century that made the Saints less susceptible to various modes of discrimination that proved effective against other groups. Population estimates, for example, indicate that the vast majority of Utah Mormons were of Northern or Western European heritage, or recent immigrants from those areas, and literacy rates were generally high among Mormon populations.21 But the linkage between Mormons and polygamy left them vulnerable to felony disenfranchisement laws.

Since the Saints were so strongly associated with an illegal act in the public consciousness, legislators were able to form a legal connection between felony disenfranchisement and anti-Mormon legislation. Although state and territorial legislatures typically promulgated laws disenfranchising felons, pressure to act against Mormon polygamy in the West and the poor prospects for a voluntary set of restrictions on polygamists’ voting privileges in Utah, prompted Congressional leaders to act on Mormon polygamy.22

Congress’ initial answer to the Mormon question was the Edmunds Act (1882).23 The act not only outlawed bigamy and polygamy in U.S. territories, but also provided for the disenfranchisement of all those convicted of such crimes. Section 8 stated, “No polygamist [or

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23 *An Act to Amend Section 5352 of the Revised Statutes of the United States, In Reference to Bigamy and for other Purposes* (1882), commonly referred to as The Edmunds Act.
bigamist … and no woman\textsuperscript{24} cohabiting with any [bigamist or polygamist], in any Territory … shall be entitled to vote at any election held in any such Territory or other place.\textsuperscript{25} The act also prohibited polygamists from holding office in the U.S. or its territories.\textsuperscript{26}

Vacating all voting official positions held in the Utah Territory at the time of its enactment, the Edmunds Act created a five-man board of commissioners, to be selected by the President of the United States.\textsuperscript{27} These commissioners were to appoint a series of “loyal” (non-Mormon) election officials in the territory who would, in turn, see to it that no polygamists slipped through the broad net cast by the act. To ensure the efficiency of disenfranchisement policy in the territory, the new board of election officials created a “test oath” intended to weed-out, and allow for the prosecution of, polygamists.\textsuperscript{28} The oath required would-be voters to swear that they were neither bigamists nor polygamists as defined by the act.

Although some anti-polygamy crusaders criticized it as ineffective, the impact of the Edmunds Act was forcefully evident within a few years of its passage. An 1885 article in the \textit{New York Times} stated that the law had, in the space of three years, stripped some 15,000 Mormons of their voting privileges in the Utah territory alone.\textsuperscript{29} Indeed, several prominent Mormon leaders, including George Cannon, one of the foremost proponents of polygamy and a

\begin{footnotes}{
\item[24]Interestingly, women were granted voting privileges in Utah in 1870, long before female citizens of most other states and territories. In an unprecedented move, Congress later completely removed these privileges from women in the territory. See Gordon, \textit{The Mormon Question}, 97, 164-172.
\item[25]Edmunds Act, section 8.
\item[26]Ibid.
\item[27]Ibid, Section 9.
\item[28]\textit{Murphy v. Ramsey}, 114 U.S. 15 (1885).
\item[29]“The Law is Not a Failure,” \textit{New York Times}, May 4, 1885, 4-3. This statistic, if accurate, seems particularly startling when one considers that, according to the 1890 U.S. Census, approximately 112,000 persons, 21 or older, resided in Utah. See \textit{U.S. Historical Census Database}.}
prospective congressional delegate, were imprisoned and disenfranchised under the auspices of the act.30

While the Edmunds Act effectively ensured the destabilization of a potentially powerful Mormon voting bloc in the West, it proved vulnerable to constitutional assault. The legislation’s opponents charged that it imposed an *ex post facto* punishment on those who had been practicing bigamists or polygamists before the bill’s passage, but who had, by 1882, abstained from living with more than one wife. Taking their pleas to the U.S. Supreme Court, a group of Utah Mormons in this predicament brought forward the first major challenge to disenfranchisement in the West.31 *Murphy v. Ramsey* (1885), the case precipitated by these challenges, was to prove a crucial case in the history of felony and Mormon disenfranchisement.

Writing on behalf of a unanimous U.S. Supreme Court, Justice Stanley Matthews ruled the Edmunds Act, and the test oath created under its auspices, constitutional. Matthews held that cohabitation was not a necessary or sufficient state for polygamy and that disenfranchisement was simply an alteration to the qualifications for voting, and as such not a retroactive punishment or, for that matter, a punishment at all.32 The *Murphy* demonstrated that the Court would offer no refuge to Mormons, who were seemingly under attack from every other angle and gave legal sanction to the practice of tailoring felony disenfranchisement laws to target Mormons.

For opponents of Mormonism in the West, the Edmunds Act was an important check against the potential power of a Latter-day Saint voting bloc, but for most it did not do enough to curtail Mormon influence in the West. Specifically, the act denied the vote only to polygamous Mormons. Indeed, “Edmunds” explicitly stated, in order to avoid other potential constitutional

31 *Murphy v. Ramsey* (1885).
32 Ibid.
objections, that election officials could not, “refuse to count any… vote on account of the opinion of the person casting it on the subject of bigamy or polygamy.” Over the next few years, the legislatures of several western states and territories attempted to create a more extensive brand of felony disenfranchisement that would cover their entire Mormon populations.

The Mormon Question in Nevada and Idaho:

During the late 1880s, Nevada legislators, led by U.S. Senator William M. Stewart, pushed to annex territory from the southern tip of the Idaho Territory. Although the plan had its political and economic benefits, southern Idaho had more than its share of potential problems. For more than a decade, the area had been home to some of the nation’s most ferocious anti-Mormon conflict. Fears that the Latter-day Saints might expand their control beyond Utah’s territorial borders seemed to have been partially realized in Idaho in the early 1880s, as Mormons exercised political rights and continued to gain strength throughout the decade. With the Territory’s Mormon population at its strongest near the Idaho-Nevada border, the proposed annexation (along with the possibility of further annexations from Utah) brought with it calls for effective Mormon disenfranchisement laws that would avoid a replication of the widespread political conflict experienced in Idaho. Politicians in both Nevada and Idaho saw the Mormon question as a possible roadblock to annexation. “In joining a portion of [Idaho’s] territory with ours,” Stewart claimed, “[Idaho’s non-Mormons] ask perfect security against Mormon rule and aggressions, and we must give it to them.”

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33 An Act to Amend Section 5352 of the Revised Statutes of the United States, In Reference to Bigamy and for other Purposes (1882).
34 Stewart pushed for annexation claiming that the move would ease economic hardships by doubling the State’s taxable property and increasing the population to levels comparable to other states. See Elliott, Servant of Power, 101-110.
35 See Wells, Anti-Mormonism in Idaho.
In 1887, Nevada legislators sought to ease these anxieties by attempting to disenfranchise all of the state’s sizable LDS population. The state’s lawmakers passed two pieces of legislation designed to severely restrict the political power of Mormons. In January 1887, the state senate passed a proposal to amend the state’s constitution to provide for the disenfranchisement of all members of the Church of Latter-day Saints. On February 7, 1887, after a number of minor inter-cameral scuffles over revisions and amendments in joint committees, the assembly approved the proposal unanimously (38-0, with 2 absences). The revised version of the amendment then went back to the Senate for approval.

On February 9, 1887, the Senate passed the measure to amend the Constitution 16-3. Although the Nevada Constitution called for both houses to approve amendments in two consecutive legislative sessions, the initial majorities in both the assembly and the senate suggested that attaining such approval would not prove onerous for the amendment’s supporters.

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37 While reliable population statistics for Mormons living in nineteenth-century Nevada are hard to come by, evidence would suggest a fairly large Mormon presence in the state, particularly in the northern and eastern counties, during this period. See Eric N. Moody, “Nevada’s Anti-Mormon Legislation of 1887 and Southern Idaho Annexation,” *Nevada Historical Society Quarterly* (Reno: Nevada Historical Society, 1979), 21-32. Moody cites estimates that place the Mormon population of Nevada somewhere between 150 and 2,000. The Church of Latter-day Saints Institute of Religion in Las Vegas, NV estimates a Mormon population approximately 10% that of the state’s total population during the 1880s, while 1890 census records suggest that 525 Mormons lived in Nevada (about 4.4% of the total census population) but even census numbers are questionable because Mormons were notoriously under-reported. See May, “A Demographic Portrait of the Mormons.” Although Mormons did not hold a majority in any Nevada county, Moody notes that Lincoln County’s Mormon population might have been as high as 17% of the total population. See Moody, “Nevada’s Anti-Mormon Legislation,” 23. The significance of any of these numbers is difficult to gauge when one considers the dramatic swings in population and demographics in Nevada during the period. From 1880 to 1890, for example, the state’s total census population fell precipitously, from 62,266 to 45,761 (a 26.5% drop brought on by hard economic times and an attendant exodus of miners). See *U.S. Historical Database*.

38 As we shall see, a third piece of legislation was proposed, but little came of that effort. See Moody, “Nevada’s Anti-Mormon Legislation.”


40 Journal of the Thirteenth Session of the Assembly of the State of Nevada, 1887, 133-4. The Senate initially refused to concur with these amendments, but eventually acquiesced following a unanimous Assembly vote in which the House chose not to recede (ibid, 148, 154).


42 Ibid.

43 Constitution of the State of Nevada, Article XVI, section 1.
The final version of the amendment combined felony disenfranchisement in the mold of the Edmunds Act with blanket religious disenfranchisement.44

Concerned with the lengthy process of state constitutional amendment ratification,45 and wishing to prevent Mormons from voting in the upcoming 1888 election, the State Assembly also sought to disenfranchise Nevada’s Latter-day Saint population via statute.46 On February 18, 1887, the lower house passed unanimously, “An Act Prescribing the Qualifications and Modifying the Oath for the Registration of Voters in Conformity therewith.”47 The act stated simply that, “no person shall be allowed to vote at an election in this state… who is a member of or belongs to the Church of Jesus Christ of Latter-day Saints, commonly called the Mormon Church.”48 The bill also established a test oath, which required those wishing to register to vote to swear that they were not members of the Mormon Church.49 Although the bill, commonly known as the “Anti-Mormon Bill” or “Anti-Mormon Oath,”50 glided easily through the state assembly, its passage through the senate was a more difficult one.51

44 Proposed Amendment to the Constitution of the State of Nevada No. XII – Senate and Concurrent Resolution, relative to amending the Constitution of the State of Nevada. The proposed amendment was apparently inexplicably reprinted in The Daily territorial Enterprise, September 28, 1888, pg. 4 and several editions of various other Nevada newspapers before the 1888 elections as Proposed Amendment to the Constitution of the State of Nevada No. XIV, but as far as the author is able to determine, the proposal was officially referred to as cited.

45 See Elliot, Servant of Power, 104-5.


49 Ibid; State ex rel Whitney v. Findlay, 20 Nev. 198 (1888).

50 The Esmeralda News, October 13, 1888, pg. 2.

51 Henry L. Fish, a senator from Washoe County, disapproved of the voting ban on all Mormons because he felt it ignored important distinctions between “old Mormons” and Josephites. Fish, who did eventually vote for the bill’s passage, claimed that the Josephites, “neither practice nor recognize polygamy or bigamy, but are good, true citizens of the Republic, while the old Mormon Church is not.” See “Anti-Mormon Bill Passes Senate.” The day after the assembly passed its statutory ban on Mormon voting, Fish proposed a similar, but more nuanced, law that passed the Senate by a slender 11 to 8 majority but was narrowly defeated in the State Assembly. See Moody, “Nevada’s Anti-Mormon Legislation,” 29-30.
Several senators appear to have been concerned from the outset that the assembly’s Anti-Mormon Bill would not pass constitutional muster. Senator Henry Harris from Douglas County objected to the legislation on constitutional grounds. “If a man commits a crime he should be punished, regardless of any religious belief he may or may not have,” Harris claimed - apparently concerned by the legislature’s departure from the principle of removing voting privileges only from those Mormons convicted of polygamy.\(^{52}\) According to Harris, the new legislation, which disenfranchised all members of the religious group, rather than convicted polygamists only, was, “in direct conflict with the State Constitution, which gives the franchise to all, regardless of religious belief.”\(^{53}\)

Harris’ misgivings about the bill’s constitutionality are echoic of broader legal and political debates over the limits constitutions imposed upon the legislative will and may have been based on the principle, best articulated by the prominent jurist and legal scholar Thomas M. Cooley, that although no constitutionally protected right to vote existed, restrictions upon the franchise could be made only via state constitutional provisions.\(^{54}\) Certainly, Cooley-esque notions of the limits of legislative power influenced changing conceptions of the franchise during

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\(^{52}\) “Anti-Mormon Bill Passes Senate.”

\(^{53}\) Ibid. See “Anti-Mormon Bill passes Senate.”

\(^{54}\) Thomas M. Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* (Boston: Little, Brown, and Company, 1890), 758. Cooley’s standing as one of the most influential legal minds of the nineteenth century and one of the leading figures in the immerge and early development of American Constitutional law is widely accepted. Legal historian William J. Novak notes that Cooley’s treatises “moved constitutionalism from the periphery to the center of American jurisprudence as the definitive oracle on governmental power and individual liberty, public aspirations and private freedoms.” William J. Novak, *The People’s Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill, NC: University of North Carolina Press, 1996), 246.
this period.\textsuperscript{55} The post-Reconstruction jurisprudence of voting rights was shaped in equal parts by political exigency and the timely ascendance of constitutional law.\textsuperscript{56}

Many legal historians point to the period from the 1870s to the turn of the century as the era in which constitutional law took hold in America’s institutions of legal learning, the bar, and the bench.\textsuperscript{57} Drawing upon the earlier works of legal thinkers and treatise writers like Cooley and Joseph Story, many scholars, lawyers, and judges during the last third of the nineteenth century placed an increasing emphasis on constitutional interpretation.\textsuperscript{58} This sweeping legal movement had major implications for the franchise.

According to Keyssar, during the latter part of the nineteenth century jurists and legal scholars “drew increasingly numerous, if sometimes jagged, lines between state constitutional

\textsuperscript{55} For examples of these uses see Nancy Cohen, \textit{The Reconstruction of American Liberty, 1865-1914} (Chapel Hill: University of North Carolina Press, 2002), 137-40.

\textsuperscript{56} See Novak, \textit{The People’s Welfare}. Certainly, the ways in which the general tenets classical legal thought were adapted to legal theories regarding voting privileges appear to have been shaped by the desire for less federal interference in state and local elections but a dedication to the avoidance of legislative interference in that arena led to increased restrictions upon state legislators as well. See Keyssar, \textit{The Right to Vote}, 166-8; Wiecek, \textit{The Lost World of Classical Thought}, 79-80, 95-97; Cohen, \textit{The Reconstruction of American Liberalism}, 137-40.


\textsuperscript{58} Novak, \textit{The People’s Welfare}. These authors should not be confused with those who later expropriated their work for their own purposes. Although many historians have portrayed Cooley, for example, as a proto-laissez faire conservative, he was actually a Jacksonian Democrat who, as an early member of the Interstate Commerce Commission, was often involved with regulatory legislation not entirely dissimilar to laws progressive reformers and historians often blamed his modes of legal thought for obstructing. For such critical accounts of Cooley’s influence see Benjamin R. Twiss, \textit{Lawyers and the Constitution: How Laissez Faire came to the Supreme Court} (Princeton: Princeton University Press, 1924); Clyde E. Jacobs, \textit{Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman and John F. Dillon upon American Constitutional Law} (Berkeley: University of California Press, 1954). Novak, among others, has done much to explode the progressive mythology surrounding mid-nineteenth-century treatise writers like Cooley, Tiedeman and Dillon. See Novak, “The Legal Origins of the Modern American State” in Bryant Garth, Robert Kagan, and Austin Sarat, eds., \textit{Looking Back at Law’s Century
authority and the power of the state legislatures.”59 Although the U.S. Constitution granted states the power to regulate elections, adherents of the new constitutionalism held that states could only create major substantive suffrage restrictions or qualifications through their constitutions. As Keyssar notes, franchise qualifications were considered “matters of fundamental or constitutional, rather than statute, law: legislatures… were permitted to enact laws that concretized or carried out constitutional provisions, but they did not possess the power to alter suffrage qualifications.”60

After its introduction to the Senate on February 18, 1887, the Anti-Mormon Bill was referred to the Standing Committee on the Judiciary.61 On February 24, John Foley, the committee chair and senator from Esmeralda County, issued an unfavorable report on the bill and recommended that it not be passed.62 At Foley’s request the bill was then tabled.63 After its removal from the table on March 1, 1887, the bill came up for vote before a closely divided Senate. During the final debate and vote, it survived numerous attempts to be tabled again, postponed indefinitely, and drastically revised (Senator Harris moved to strike out the words “the Church of Latter-day Saints,” and “Mormon Church” from the Bill in a last-ditch effort to shore up its constitutionality), and passed by a final vote of 12-8.64 Within just over a year of the passage of the bill’s passage, however, the Nevada Supreme Court, wielding Cooley’s treatise on constitutional limitations as its weapon of choice, ruled it unconstitutional.

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60 Ibid.
61 13th Session Nev. Senate Journal, 217, 218, 236.
62 Ibid, 236.
63 Ibid, 239.
64 13th Session Nev. Senate Journal, 296.
The Lessons of Failure in Nevada:

In 1888, George B. Whitney, a Mormon resident of Panaca township in Lincoln County, attempted to register to vote for the election that was to be held later that year. Whitney offered to take the state’s original oath for electors, but refused to take the new oath established by the Anti-Mormon Bill because of his affiliation with the LDS Church. After being turned away, Whitney petitioned the Nevada Supreme Court to grant a writ of mandamus compelling the local registry agent, A.M. Findlay, to add his name to the list of qualified voters. Whitney argued that the statute was invalid on two counts. First, he claimed, the Anti-Mormon Bill should have been ruled unconstitutional because the state legislature lacked the constitutional authority to so aggressively limit the franchise. Whitney also averred that the bill abridged the free exercise of religion guaranteed by the Nevada Constitution.

Pundits and politicians awaited the Court’s decision in *State v. Findlay* (1888) eagerly, even though attempts to annex southern Idaho had been thwarted before the case came to the Court. Despite several efforts to gain the support of the U.S. Congress and Democratic President Grover Cleveland, Senator Stewart’s bid for annexation was thoroughly defeated by the time the Court handed down its decision. Cleveland ended the Republican Stewart’s initial proposal for the partition of Idaho with a pocket veto and Idaho residents, many of whom had mixed or negative reactions to Stewart’s territorial ambitions in any event, focused their energies on gaining statehood.

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65 Ibid.
66 Ibid.
67 Ibid.
68 While it is impossible to know whether the Court’s rejection of the legislature’s Article XI claims would have been affected if the annexation would of transpired, nothing in the opinion itself suggests that the decision would have been reversed in that instance.
While faint hopes of annexing of part of western Utah may have perpetuated the desire of some to keep the bill alive, it seems clear that anti-Mormon sentiments played a significant role in efforts to sustain the legislation with a victory in the courts. Any legal protection or recognition of the Mormon Church could have thrown up obstacles that might impede future efforts in the broader campaign against the Latter-day Saints in the western states and territories. Stewart’s words to one of Findlay’s attorneys emphasized the potential dangers of a verdict in favor of Whitney:

> It would be very dangerous to allow the Mormons to vote in our State. The proposition to colonize and take possession of our State Government is seriously considered by the Mormon Church... I hope the Supreme Court will not by a strained construction of the Constitution make a decision that will place Nevada at the mercy of the Mormons.70

Thus admonished, Findlay’s counsel answered claims that the legislature had exceeded its constitutional authority by creating an argument based on Article II, section 6 of the Nevada Constitution. The section stated that “provisions shall be made by law for the registration of... electors... to preserve the purity of elections, and... the legislature shall have power to prescribe by law any other or further rules or oaths as may be deemed necessary, as a test of electoral qualifications.”71 This contention relied on the preamble to the Anti-Mormon Bill, which claimed the voter regulations it enforced fell within the parameters of the legislative duty to promote the purity of elections in Nevada. In an attempt to reconcile the bill with Article II, section 6, the preamble stated, “[i]t is deemed necessary for the peace and safety of the people of this state to exclude from participation in the electoral franchise all persons belonging to the self styled ‘Church of Jesus Christ of Latter-day Saints.’”72

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71 Constitution of the State of Nevada, Article II, section 6.
72 See State v. Findlay (1888).
The goals of maintaining the integrity of the electoral system and disenfranchising large numbers of voters may seem mutually exclusive today, but not in the late nineteenth century. The great historian of the South, C. Vann Woodward, phrased his account of the disenfranchisement of African-Americans in the region in terms of a tacit agreement between warring conservative and radical factions not to injure the purity of the electoral process through attempts to manipulate, or curry favor with, blacks.73 And while efforts to introduce the widespread use of the silent, or Australian, ballot were due in large part to an urge to purge the electoral system of corruption, the primary benefit many southern legislators saw in the system was that, “the need to read and mark the ballot would require a degree of literacy that might well disqualify a large number of blacks.”74

Unlike parallel arguments made by southern politicians, however, the Nevada legislature’s claim that the disenfranchisement of Mormons was necessary to “protect the peace and safety” of Nevada did not survive constitutional challenge. Responding to Findlay’s argument with a unanimous opinion, the Nevada Supreme Court held that the state legislature alone had no authority to so dramatically restrict the franchise.75 In his opinion for the Court, Justice Thomas P. Hawley, Stewart’s friend and fellow Republican,76 ruled that the Anti-Mormon Bill violated Article II, section 177 of the Constitution of the State of Nevada:

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75 Cooley’s decision in *People v. Maynard*, 15 Mich. 463 (1867), made during his tenure as a Michigan State Supreme Court Justice, is perhaps the best example of this jurisprudence in practice.
77 Article II, section 1 read (as of 1888):

Every male citizen of the United States (not laboring under the disabilities named in this constitution) of the age of twenty-one years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that are now or hereafter may be elected by the people, and upon all questions submitted to the election; provided, that no person who has been or may be convicted of treason or felony in any state or territory of the United States, unless restored to civil rights, and no person who, after arriving at the age of eighteen years, shall have voluntarily borne arms against the United States, or held civil or military office under the so-called Confederate States, or either of them...
It is not within the power of the legislature to deny, abridge, extend, or change the qualifications of a voter as prescribed by the constitution of the state… The right of suffrage, as conferred by the Constitution, is beyond the reach of any such legislative interference [;] it cannot be changed except by the… power that established it, viz., the people, in their direct sovereign capacity.”

The Court granted Whitney’s request for a writ of mandamus and threw out the bill, but it declined to rule on Whitney’s free exercise claims. Article I, section 4 of the Constitution created a broad, but not boundless, protection of religious freedom. The provision enjoined that, “liberty of [conscience]… shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State.”

Although the U.S. Supreme Court had already ruled that anti-polygamy laws did not violate the free exercise of religion as protected by the U.S. Constitution, the Nevada court was unwilling to rule on Whitney’s Article I claims and stated that the acceptance of Whitney’s understanding of Article II, section 1 obviated any need for further exploration of the issue. The Court’s ruling that the disenfranchisement of Mormons did not significantly contribute to the state’s “peace and safety” would seemingly have led to the logical affirmation of Whitney’s free exercise claims, but the Court would not go so far as to offer an endorsement of the Mormon Church that might impede later attempts to deal definitively with the Latter-day Saints. By choosing not to rule on these claims, the Court managed to adhere both to the doctrine of limited legislative interference and to the U.S. Supreme Court’s religious jurisprudence, as outlined in several rulings against the Mormons. In this sense, then, the Court’s rejection of the Anti-

78 State v. Findlay (1888). Unfortunately, whether the Court’s ruling actually called an immediate halt to the practice of Mormon disenfranchisement in Nevada is unclear. While the Court approved Whitney’s petition for a writ of mandamus, the statute was not officially repealed until 1909. See Dana R. Bennett, Nevada State Library and Archives Information Political History of Nevada, available online at: http://dmla.clan.lib.ny.us/docs/nsla/archives/political/interest.htm.
79 Nevada Constitution, Article I, section 4.
80 See Reynolds v. United States (1878), 98 U.S. 145, 162.
81 State v. Findlay (1888).
Mormon Bill is best seen as an affirmation of notions of restricted legislative powers – insofar as they remained loosely congruent with national and regional sentiments toward Mormons – delivered in a period when such a legal and constitutional vision was quickly becoming a dominant worldview.82

The Court’s decision in State v. Findlay (1888) combined with the failure of Nevada’s efforts to annex southern Idaho to take the wind out of Nevada anti-Mormon’s sails. With the principal pragmatic rationale for disenfranchisement gone and the Court’s decision producing a sense of constitutional impropriety, the proposed amendment proved unviable. The election of 1888 decimated the once solid anti-Mormon bloc in the state senate. Eleven of the twenty senators in office during the 1889 term had not been members of the upper house when the Anti-Mormon Bill and Proposed Amendment XII passed.83 At least nine of the eleven senatorial newcomers opposed the amendment.84 After three postponed votes, the Senate defeated the amendment by a 12-6 vote on February 5, 1889.85

The crushing defeat of Proposed Amendment XII in the same house that had created it, along with the state Supreme Court’s verdict in State v. Findlay (1888), effectively ended the prospects for de jure Mormon disenfranchisement in Nevada. The defeats of the Silver State’s anti-Mormons were unusual in the broader campaign against Mormon polygamy in the West, however. Nevada’s ill-fated adventures in Mormon disenfranchisement proved instructive for other western legislatures in their attempts to remove voting privileges from Mormons in their own states and territories. Specifically, lawmakers learned that well-crafted felony

82 See Wiecek, The Lost World of Classical Legal Thought, 78-80, 123-174; Grey, “Langdell’s Orthodoxy.”
83 Senators Foley, Forbes, Harris, Hardesty, Kaiser, Nicholls, Noteware, Osborn, and Sharon were the nine remaining members of the upper house. See Journal of the Fourteenth Session of the Senate of the State of Nevada, 1889, 5.
84 Senators Comins, Dunlop, Emmet, La grave, Millet, Sawyer, Sproule, Torre, and Williams would eventually vote against the Amendment; among the newly-elected senators only Sen. Gallagher supported it passage. Ibid, 107.
disenfranchisement provisions remained the most constitutionally sound means of disenfranchising Mormons. Two years after the Nevada Court’s decision in *State v. Findlay* (1888), the U.S. Supreme Court’s acceptance of modified felony disenfranchisement laws elsewhere in the West sounded one of the last and loudest death knells for Mormon polygamy.

**Idaho’s Answer to the Mormon Question:**

Seeking to allay fears that Mormons would overrun southern Idaho, and concerned that, “a simple proscription against Mormons,” such as the one overturned in Nevada, “would [not] get by the Supreme Court,” Idaho’s legislature created a novel set of test oaths and disenfranchisement laws that culminated with the passage of § 501, *Revised Statutes of Idaho*, popularly known as the Idaho Test Oath Bill. This law attempted to strip all Mormons – polygamous and non – of their voting privileges through a combination of felony disenfranchisement and guilt by association. The test oath law targeted Mormons by denying the vote, not only to those who committed bigamy and polygamy, but also to those who encouraged, or belonged to an organization that encouraged, such practices.

Without specifically outlawing Mormonism and without directly ordering the disenfranchisement of all Latter Days Saints (a policy sure to resurrect *State v. Findlay* [1888]), Idaho anti-Mormons created a law that could effectively disenfranchise the territory’s entire Mormon population as long as the Mormon Church subscribed to a pro-polygamy doctrine. Completing the pattern established by Nevada’s adventures in disenfranchisement and the Edmunds Act, however, § 501 came under fire almost immediately. Mormons in the territory launched an all-out campaign against the bill, eventually finding themselves in the U.S. Supreme

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85 Ibid.
86 Ibid, 59; *Revised Statutes of Idaho Territory*, § 501.
87 Ibid (emphasis added).
Court. *Davis v. Beason* (1890), the case spawned by the bill, was argued before the Court as Idaho was preparing its Constitution in an attempt to join the union as a state.

Large portions of the Idaho State Constitutional Convention were devoted to the issue of Mormon voting rights, as the delegates debated whether to include a provision similar to § 501 in their new Constitution with the impending *Davis* decision hanging over their heads. 88 In the end, however, most of the delegates remained confident that the bill would be upheld, and that felony disenfranchisement, aimed at the territory’s Mormon population was the most effective means of making sure that no Mormons would be able to participate in the new state’s political system. The final version of the constitutional provision was all but identical to the territorial statute.

Still, many remained unconvinced of the validity of Idaho’s disenfranchisement provision. A *New York Times* article on Idaho’s prospects for admission ran in February, 1890 with the headline “Idaho’s Unstable Claims,” and Congress, while eager to admit a new state with precious metal and valuable mineral deposits, was wary of doing so should Idaho’s test oath fail to pass constitutional muster. 89 “If the test oath is declared to be unconstitutional,” the article stated, “there will be no effort in the direction of statehood.” 90 As it turned out, however, the Idaho legislature’s confidence in the U.S. Supreme Court was well placed. Writing on behalf of a unanimous court in the *Davis* case Justice Field presented the nation with an unequivocal sanction of the Idaho test oath, and a booming condemnation of polygamy.” 91 Field’s opinion eviscerated the campaign for national acceptance on the part of western Mormons (at least on

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88 Idaho State Constitutional Convention, Commissions and Amendments (1890).
90 Ibid.
their terms) and represented one of the final deathblows for the practice of (and concurrence with) polygamy within the Mormon Church.92

*Davis v. Beason (1890):*

Samuel B. Davis renounced the Mormon faith just prior to the 1888 election, took the Idaho test oath, voted a Democratic ticket, and then promptly rejoined the Church following the election. Davis was then arrested and indicted, along with several other erstwhile Mormons who had voted in the election. Davis, however, was the only defendant to have officially rejoined the Church, and was convicted of “conspiracy to unlawfully pervert and obstruct the due administration of the laws of the Territory.”93 From the perspective of those attempting to challenge the territory’s anti-Mormon voting policies there was a major problem with the peculiarities of Davis’ case. One of the main objections to the Idaho statute was that it represented a bill of pains and penalties. That is to say, the oath’s opponents felt the bill punished citizens without a trial. Davis had been tried and convicted of a crime. Pressed by the imminent acceptance of Idaho into the union and an upcoming election in 1890, however, opponents to the Idaho test oath were left with few, if any, alternatives.

Davis’ attorneys laid out their case in four stages. They claimed their client had been deprived of the privileges and immunities of citizenship without due process of law. Davis’ lawyers also asserted that the test oath prohibited free exercise of religion in the territory (a somewhat wobbly claim given the precedent established by *Reynolds v. United States* [1878]). They also argued that the “Idaho statute violate[d] the provision in article 6 of the Constitution of the United States, that ‘No religious test shall ever be required as a qualification to any office or

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public trust under the United States." Davis’ fourth claim was founded along Supremacy Clause lines. Since Congress had, through the Edmunds Act, protected those who simply agreed with legitimacy of the practice of plural marriage from the same prohibitions and punishments leveled at polygamists themselves, Davis averred, the Idaho provision should have been overridden by its federal counterpart.

Seizing on Davis’ flimsy 1st Amendment claims, Justice Field almost completely ignored the more cogent Due Process Clause and Article 6 components of the anti-test oath argument and dismissed its Supremacy Clause reasoning with a few terse lines. Most of Field’s decision was either a reaffirmation of Reynolds v. U.S. (1878) and Murphy v. Ramsey (1885), or an authoritative condemnation of Mormonism and polygamy:

Bigamy and polygamy are crimes of all civilized and Christian countries... They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind.

Davis v. Beason (1890) was essentially a case, not about the legality of polygamy, but one testing the validity of test oaths as a means of disenfranchisement. Yet an intelligent person, ignorant of the case’s background, would probably not be able to discern this basic underlying fact by reading the decision alone. Only very briefly and dismissively did Field even touch upon the validity of the test oath in question. The oath, according to a seemingly nonchalant Field, was “not open to any valid legal objection.” Field neglected to use the phrases “due process,” “Article 6,” and “bill of attainder” at any point in his decision.

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94 Davis v. Beason (1890), brief from appellant’s counsel; see also Reynolds v. United States (1878), 98 U.S. 145, 162.
95 Ibid.
96 Ibid.
97 Ibid.
At the time it was handed down, Field’s opinion was, for the most part, celebrated as having simultaneously settled the issue of polygamy in the West and cleared the way for the introduction of a new state into the union. While Field’s legal reasoning, or lack thereof, in *Davis* has since become the source of harsh scrutiny, the opinion certainly would seem to have had the effect its author desired. On October 6, 1890, acting on a “revelation” received by Wilford Woodruff, the President of the Church of Latter Day Saints, the Church Body voted to end its sanction of the practice of polygamy. And Idaho was, of course, admitted as a state, though not without continued conflict over the legitimacy of the test oath and corresponding state constitutional provision.

Five members of the U.S. Congress (C.H. Mansur, William M. Springer, George T. Barnes, J.E. Washington, O.B. Kilgore) issued a minority report to Congress’ recommendation that Idaho become a state. The minority report was stridently critical of the *Davis* decision, claiming that it represented a total departure from all precedent with regard to felony disenfranchisement laws. After reprinting every state constitutional provision ever to disenfranchise felons (each requiring conviction for disenfranchisement), the report claimed:

> It is thus that for the first time in American history, save one, the effort is made to depart from this principle [conviction before disenfranchisement] for which the minority is now contending. The exception referred to is in the case of the Constitution of the State of Missouri… but in the case of Cummings the Supreme Court… held that provision to be unconstitutional.  

The minority report’s reference to *Cummings v. Missouri* (1866) bears elaboration. In the aftermath of the Civil War, Field had authored an opinion that ruled unconstitutional a Missouri State Constitutional provision barring former Confederate sympathizers from poll-booths and public offices that had required a test oath similar in tone to the Idaho oath. The Missouri oath,

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according to Field and the rest of a slender 5-4 majority in the case, was both an *ex post facto* law and a bill of attainder.99

The precedent established by *Cummings* seems, at first glance, troublesome for a Court united in their desire to resolve the “Mormon Question” and eliminate the largest potential hurdle on Idaho’s road to statehood. In *Cummings*, Field had made a series of claims that seemed consistent with those of disenfranchised Mormons. “We do not agree,” wrote Field in 1866, claiming that the removal of voting and office-holding privileges was a form of punishment, “that ‘to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.’”100 This statement seemed inconsistent with the Court’s position that felony disenfranchisement was not a punishment, but rather a voting regulation and a legitimate use of state power. It should be noted, however, that the passage of the Fourteenth Amendment separated the *Cummings* and *Davis* opinions and complicates the connection between the two cases. It seems relatively clear that most commonly accepted constructions of the Fourteenth Amendment would have insulated the Missouri Constitutional provision from such attacks.101

The admonitions of the congressional minority may have gone unheeded, but they were not without significance. As the minority report suggested, the *Davis* opinion, coupled with the earlier *Murphy* decision, represented the Court’s wholesale acceptance of a new brand of felony disenfranchisement. That is to say, that through their conviction to eliminate polygamy and settle the long-running debate over Mormonism, the Supreme Court gave their tacit, and perhaps inadvertent, approval to targeted felony disenfranchisement in the West and elsewhere.

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99 *Cummings v. Missouri* 71 U.S. 277 (1866)
100 Ibid.
101 See *Richardson v. Ramirez*, 418 U.S. 24 (1974) for contrasting opinions as to whether such a construction is valid.
Conclusion:

The legacy of *Murphy v. Ramsey* (1885) and *Davis v. Beason* (1890) has been one of surprising endurance and importance. While the modern-day Supreme Court has generally recognized the flawed reasoning behind the extension of felony disenfranchisement to those who merely assent to a criminal act, much of Field’s opinion remains good law and has been relied upon as precedent in a number of high profile cases in the twentieth century.¹⁰²

In *Minersville School District v. Gobitis* (1940), U.S. Supreme Court Justice Felix Frankfurter denied the validity of claims that laws forcing Jehovah’s Witnesses to swear allegiance to the flag, violated the First and Fourteenth Amendments, citing *Davis* as precedent.¹⁰³ More recently conservative members of the Rehnquist court have claimed that the logic of denying voting privileges to polygamists should extend to state laws that discriminate against homosexuals. Large portions of Justice Antonin Scalia’s acerbic dissent in the landmark gay-rights case *Romer v. Evans* (1996) dealt with the legacy of *Murphy* and *Davis* (with the latter featuring most prominently).

In *Romer*, the Court overturned Amendment 2 to the Colorado Constitution, which forbade any attempt to protect the legal or political status of individuals on the basis of their sexual orientation. The 6-3 majority opinion, written by Justice Anthony Kennedy, claimed that the Colorado amendment violated the Equal Protection Clause of the Fourteenth Amendment. Scalia argued that the case was analogous to *Davis* insofar as both cased involved, “the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a

¹⁰² This portion of the *Davis* opinion was largely abrogated by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In a unanimous *per curiam* decision, the Court held that speech or action that advocated illegal behavior was protected by the First Amendment. The Court has since recognized that this decision effectively defeated the logic of upholding the Idaho test oath, but that the other elements of *Davis* remain good law. See *Romer v. Evans*, 517 U.S. 620 (1996).
geographically concentrated and politically powerful minority to undermine it.”

Scalia went even further in drawing his analogy between the struggles of Mormons and anti-polygamists in the late nineteenth-century West and gay-rights activists and Christian conservative groups in the 1990s:

The Court labors mightily to get around Beason… but cannot escape the central fact that this Case found the statute at issue – which went much further than [the Colorado Amendment], denying polygamists not merely special treatment but the right to vote – “not open to any constitutional or legal objection.”… The Court’s disposition today suggests that… polygamy must be permitted in the States… unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.

The Romer Court’s majority rejected Scalia’s application of the Davis precedent and the Gobitis decision was overturned in West Virginia Board of Education v. Barnette (1943). But the Supreme Court has thus far refused to discontinue its adherence to the anti-Mormon cases when considering felony disenfranchisement laws. Writing for a 6-3 majority in Richardson v. Ramirez, Justice William Rehnquist relied upon the precedent established by the Mormon disenfranchisement cases in deciding that felony disenfranchisement laws were a valid exercise of state power. Although the Court had never before ruled on the validity of felony disenfranchisement, Rehnquist found analogies drawn between the anti-Mormon cases and the California law in question in Ramirez persuasive.

In dissent, Justice Thurgood Marshall offered a very different account of the proper place for these cases. Marshall critiqued the majority’s logic by claiming that modern-day conceptions of the franchise were at odds with Rehnquist’s reliance upon Davis and Murphy:

The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society… This Court’s holding in Davis… [and] Murphy… that a State may disenfranchise a class of voters to “withdraw all political influence from those who are practically hostile” to the existing order strikes at the very heart of the democratic

104 Romer v. Evans.
105 Ibid.
process… The ballot is the democratic system’s coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition. Rather than resurrect Davis and Murphy, I would expressly disavow any continued adherence to the dangerous notions therein expressed.¹⁰⁸

For all their power and prescience, Marshall’s words have gone largely unheeded. The effects of felony disenfranchisement are being felt with a greater force than ever before in our nation.¹⁰⁹ Consider, for example, that in a presidential election decided by a few hundred votes or less in Florida, that state prohibited approximately 650,000 felons and ex-felons from casting ballots in Election 2000.¹¹⁰

Even more disturbing, and evocative of the spirit in which many current felony disenfranchisement laws were created, these laws continue to disproportionately punish minorities. Approximately 13.1% of all African-American men in America are disenfranchised by such laws (as opposed to approximately 2.1% of the nation as a whole), and ten states (Alabama, Delaware, Florida, Iowa, Mississippi, New Mexico, Texas, Virginia, Washington, and Wyoming) disenfranchise at least 20% of their black male population.¹¹¹ An equally significant statistic emblematic of the historical progression of these laws in the U.S. comes from Utah, the state with the nation’s largest Mormon population, and one seldom thought of as a center of progressive political thought and policy, which disenfranchises no felons at all.¹¹²

¹⁰⁸ Ibid.
¹⁰⁹ See Impact of Felony Disenfranchisement Laws.
¹¹⁰ Ibid. Since the Election 2000 debacle in Florida, there have been important signs that the Sunshine State may be changing its stance on felony disenfranchisement. Recently, through the effective lobbying of civil rights groups and black legislators in the state, tens of thousands of Florida ex-felons who were never informed of steps they could have taken to reinstate their voting privileges were once again allowed to vote. See Andrea Robinson, “Ex-Felons May See Vote Rights Restored,” The Miami Herald, July 25, 2003, p. 1. Even more positively, it would appear that Florida is not alone. Several states are currently re-evaluating their felony disenfranchisement laws in light of questions raised by the 2000 Election. See Robert Tanner, “More States Reestablish Rights For Felons,” The Miami Herald, September 24, 2003, p. 10. But see also Keyssar, “The Right to Vote and Election 2000,” for an account of Massachusetts’s recent successful bid to establish felony disenfranchisement for the first time in the Bay State’s history as a response to prison inmate activism.
¹¹¹ Impact of Felony Disenfranchisement.
¹¹² Ibid.