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"The Only Thing We Have to Fear Is Fear Itself": The Constitutional Infirmities with Felon Disenfranchisement and Citing Fear as the Rationale for Depriving Felons of Their Right to Vote

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"THE ONLY THING WE HAVE TO FEAR IS FEAR ITSELF": THE CONSTITUTIONAL INFIRMITIES WITH FELON DISENFRANCHISEMENT AND CITING FEAR AS THE RATIONALE FOR DEPRIVING FELONS OF THEIR RIGHT TO VOTE

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Felon disenfranchisement, a mechanism by which felons and former felons are deprived of their right to vote, is a widespread practice that has been challenged on many grounds. However, felon disenfranchisement has not yet been properly challenged under the First Amendment. This Article argues that states implicate felons' First Amendment rights through felon disenfranchisement without citing adequate or compelling rationales to justify this severe intrusion. In fact, at least one rationale, a rationale based on the fear of the way felons might vote, is itself inconsistent with First Amendment principles. Disenfranchising felons based on a fear of the way that felons might vote is contrary to the First Amendment, which partially sought to protect unpopular speech. Because courts in other voting rights cases have deemed similar rationales unconstitutional, this Article suggests that courts should reach the same result in felon disenfranchisement cases. Once courts recognize that this distrust-based rationale is inconsistent with First Amendment principles, states should critically consider whether other rationales are compelling enough to justify a complete denial of felons' right to vote.

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I. INTRODUCTION

At President Roosevelt's inaugural speech in 1933, he stated: "[T]he only thing we have to fear is fear itself . . . ."[1] While Roosevelt was referring to economic hardship,[2] his quotation is fitting when used to analyze felon disenfranchisement, including the constitutional inconsistencies with citing fear of how felons might vote as a rationale for felon disenfranchisement. Taking the advice of President Roosevelt, state and federal legislatures should not fear felons and the way they might vote, but should instead be afraid of "fear itself." It is fear itself that makes state and federal legislatures overlook the constitutional problems with citing fear as a reason for silencing felons' votes.[3] It is fear itself that has contributed to the disenfranchisement of 5.85 million Americans in the November 2012 presidential election for no constitutionally sound reason.[4]

Felon disenfranchisement is a mechanism through which states deny individuals their right to vote purely because of prior felony convictions.[5] The term "disenfranchised felon" encompasses all individuals who have been disqualified from voting on the basis of a felony conviction. This characterization has the potential to include those who have served their sentences and those who are still incarcerated, individuals who have committed only one offense and those who have committed multiple offenses,[6] and finally, those who have committed election-related offenses and those whose crimes are unrelated to elections.[7] Yet, despite their differences, these individuals are, at least temporarily, almost universally denied what most courts have deemed a basic and fundamental right—the right to vote.[8]

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1. President Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), *in Text of the Inaugural Address; President for Vigorous Action*, N.Y. TIMES, Mar. 5, 1933, at 1.

2. *See id.*

3. *See infra* Part IV.

4. *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT (Nov. 2012), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Nov2012.pdf [hereinafter *Felony Disenfranchisement Laws*].

5. Farrakhan v. Washington, 338 F.3d 1009, 1012 (9th Cir. 2003).

6. *See id.*

7. Scott M. Bennett, *Giving Ex-Felons the Right to Vote*, 6 CAL. CRIM. L. REV. 1, ¶ 20 (2004).

8. *See* Burdick v. Takushi, 504 U.S. 428, 433 (1992).

Currently, Maine and Vermont are the only two states that never disenfranchise individuals because of a felony conviction.[9] The forty-eight states that do disenfranchise felons[10] implement differing restrictions on felons' right to vote.[11] Some states only temporarily disenfranchise felons, while others never allow felons to regain their right to vote.[12] Interestingly, "ex-felons in the eleven states that disenfranchise people after they have completed their sentences make up about 45 percent of the entire disenfranchised population, totaling over 2.6 million people."[13]

Many state and federal representatives support felon disenfranchisement measures because felons' interests conflict with states' interests in maintaining an orderly and crime-free environment.[14] State courts have further concluded that felons and ex-felons, if able to vote, might vote in a way that makes it easier for them to commit more crimes with fewer consequences.[15] States fear that if felons can vote, an orderly state will become a lawless society.[16] Wishing to maintain what courts have termed the "purity of the ballot box,"[17] states claim that felon disenfranchisement is justified.

The rationale that states and the federal government give for disenfranchising felons is similar to the rationale legislators gave for disenfranchising women, minority groups, and individuals with low socioeconomic statuses.[18] In implementing these restrictions, legislators considered these groups unworthy of obtaining the right to vote[19] and feared that these individuals would vote in an unfavorable

9. *Felony Disenfranchisement Laws*, *supra* note 4.

10. Hereinafter, the term *felon* will encompass felons and former felons.

11. *Felony Disenfranchisement Laws*, *supra* note 4.

12. *Id.*

13. CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 1 (2012).

14. Richardson v. Ramirez, 418 U.S. 24, 81 (1974).

15. *See* Green v. Bd. of Elections of New York, 380 F.2d 445, 451 (2d Cir. 1967).

16. *See id.*

17. Dillenburg v. Kramer, 469 F.2d 1222, 1224 (9th Cir. 1972) (quoting Washington v. State, 75 Ala. 582, 585 (1884)).

18. *See infra* Part IV.A.

19. *See, e.g.*, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981–87 (observing that women did not need an individual right to vote because women were represented by their husbands).

way.[20] Although constitutional amendments have eliminated most discriminatory tactics that regulate an individual's right to vote, felon disenfranchisement is still a way in which states can discriminate against particular individuals for fear of their unfavorable votes.[21] This discrimination is inconsistent with the First Amendment, which was created in part to protect unpopular speech and to allow an unpopular minority to speak out against a majority.[22]

Because felon disenfranchisement is a long-standing and widespread practice,[23] one might anticipate that the rationale for denying felons this fundamental right is well thought-out, adequately supported, non-discriminatory, and within the spirit of the U.S. Constitution.[24] Troublingly, most of the rationales cited by courts suggest that felon disenfranchisement is just another mechanism through which states can discriminate against certain individuals whom they do not trust.[25]

Ultimately, this Article concludes that the forty-eight states that disenfranchise felons should follow Vermont and Maine in recognizing that there is no justifiable reason to deny felons their right to vote.[26] If for no other purpose, those forty-eight states should at least give felons the right to vote to see if there really is any reason to distrust felons' votes, because no study yet has found that felons vote differently than non-felons.[27] The states should realize also that

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20. *See, e.g.*, J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 70 (1974) (explaining voting restrictions targeting poor whites and African Americans).

21. *See* Richardson v. Ramirez, 418 U.S. 24, 81 (1974).

22. Tom Donnelly, *A Popular Approach to Popular Constitutionalism: The First Civic Education, and Constitutional Change*, 28 QUINNIPIAC L. REV. 321, 328–30 (2010).

23. *Felony Disenfranchisement Laws*, *supra* note 4.

24. *See infra* Part IV (suggesting that this is not the case).

25. *See* Richardson v. Ramirez, 418 U.S. 24, 81 (1974) (Marshall, J., dissenting); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1341 (2011) (citing ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 105–71 (2000)).

26. *See Felony Disenfranchisement Laws*, *supra* note 4.

27. *See* Alec C. Ewald, *An "Agenda For Demolition": The Fallacy and the Danger of The "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 125 (2004) (citing Vanessa Gezari, *Go to Jail, Get to Vote—in Maine or Vermont*, ST. PETERSBURG TIMES, Aug. 6, 2004, at 1A) (explaining that inmates often have the same political concerns as other American citizens and would vote similarly); *see also id.* (citing Pam Belluck, *When the Voting Bloc Lives Inside a Cellblock*, N.Y. TIMES, Nov. 1, 2004, at A12) (noting that a considerable number of inmates would vote conservatively if given the opportunity to do so, despite the general assumption that inmates would vote liberally); *id.* (citing JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 146, 146–51 (1972)

denying felons the right to vote for fear that they will vote differently than non-felons is comparable to a republican trying to silence a democrat's vote or vice versa. Because holding otherwise would violate felons' First Amendment rights, the United States must give felons an outlet to express their opinions on important issues instead of following the historical trend of searching for ways to silence individuals' opinions without adequate justification.[28]

Part II discusses the background and rationale legislators cite for felon-disenfranchisement statutes and prior voting restrictions. Part III explores First Amendment values and proposes that a First Amendment analysis of felon disenfranchisement statutes is appropriate because courts have used the First Amendment to analyze other voting restrictions. Part IV examines the states' rationale that felons cannot be trusted to vote and demonstrates that, because courts have deemed this rationale to be problematic in other contexts, it is not sufficient to justify the severe sanction of felon disenfranchisement. Part V examines Maine and Vermont's approach to felon disenfranchisement and proposes that other states should follow Maine and Vermont's lead, or at least recognize the constitutional problems with felon disenfranchisement and its rationale. Part VI concludes by recognizing that if felon disenfranchisement and the states' rationale that felons cannot be trusted to vote are deemed inconsistent with First Amendment principles, there are few other justifications for denying felons the right to vote. This leaves courts with the question of whether there really is any valid rationale for disenfranchising felons.

II. BACKGROUND: FELON DISENFRANCHISEMENT AND PRIOR VOTING RESTRICTIONS

This part traces the history of felon disenfranchisement and prior voting restrictions. It discusses different rationales for disenfranchising felons and examines the root of the fear associated

(explaining that criminals often acknowledge that they have done something wrong and believe the crimes that they have committed deserve to be punished, demonstrating that criminals' interest might in fact mirror the interests of law-abiding citizens).

28. While Ewald, in his article, *"An Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, has already (1) discussed the prevalence of the rationale that this Article criticizes, (2) demonstrated the inconsistencies of this rationale with universal suffrage, and (3) suggested that this rationale is flawed; this Article differs in that it analyzes this rationale under the first amendment. Ewald, *supra* note 27.

with felons' votes, which was once cited as the rationale for prior voting restrictions. It demonstrates how courts, legislatures, and scholars attribute this fear to generalizations regarding felons' voting behavior.

A. Felon Disenfranchisement: From the Beginning

Felon disenfranchisement can be traced to ancient Greece, ancient Rome, and Medieval Europe, where individuals lost numerous rights as a result of their involvement in criminal activities.[29] Individuals who committed crimes could not obtain property and were subject to banishment from their communities.[30] In addition, criminals lost their right to vote and were denied the opportunity to make public speeches.[31] When felon disenfranchisement was first implemented in these civilizations, the judge would disenfranchise individuals only if he decided that the particular crime was serious enough to warrant this severe punishment.[32]

Colonists implemented a similar version of felon disenfranchisement in the United States.[33] Initially, the United States, like Europe, limited the scope of felon disenfranchisement by only disenfranchising individuals who had committed serious crimes.[34] By the late nineteenth century, more than half of the states disenfranchised individuals who had committed serious offenses.[35] The scope of felon disenfranchisement continued to expand immensely over a short period of time[36] to encompass crimes including minor drug offenses;[37] today some individuals are disenfranchised for first-time offenses[38] or misdemeanors.[39]

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29. Lauren Handelsman, *Giving the Barking Dog A Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875, 1879 (2005).

30. *Id.*

31. Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–60 (2002).

32. Handelsman, *supra* note 29, at 1879.

33. *Id.*

34. *Id.*

35. *Id.*

36. Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 633 (2004).

37. *Id.* at 634.

38. Handelsman, *supra* note 29, at 1879–80.

Today, forty-eight states disenfranchise felons, making Maine and Vermont the only two states that allow felons to vote, even while they are incarcerated.[40] Maine withholds the right to vote only from felons who are mentally ill and has no other laws restricting felons from voting.[41] Although Maine's voting rights statute does not expressly give felons the right to vote, it can be gleaned from the statute's silence that felons are not prohibited from voting.[42] Vermont's voting rights statute, on the other hand, expressly permits felons to vote.[43] It does, however, disenfranchise individuals who have committed voting fraud or other related offenses.[44]

In other states, many individuals are now disenfranchised for what the law considers "lesser" crimes, with very little explanation of why this disenfranchisement is necessary.[45] The largest scope of such expansion has been disenfranchisement for drug-related crimes,[46] which is largely a result of the war on drugs.[47] The number of drug-related offenses has increased in the past thirty years, resulting in increased incarceration rates and increased disenfranchisement rates for these offenses.[48] Yet, felon disenfranchisement was not initially used to disenfranchise individuals for drug-related offenses, but instead only to disenfranchise individuals who committed "serious offenses."[49]

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39. *See* Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 283, 288 n.16 (2007) (citing Ewald, *supra* note 31, at 1057 n.31) ("The phrase 'felon disenfranchisement' is actually a bit of a misnomer because some states bar individuals convicted of certain misdemeanors."). *But see* McLaughlin v. City of Canton, 947 F. Supp. 954, 974–75 (S.D. Miss. 1995) (explaining that disenfranchising an individual for a misdemeanor violates the equal protection clause).

40. *See Felony Disenfranchisement Laws*, *supra* note 4.

41. *Developments in the Law—One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1942 n.21 (2002) [hereinafter *One Person, No Vote*] (citing ME. REV. STAT. tit. 21-A, § 115 (2008)).

42. *See* White v. Edgar, 320 A.2d 668, 685 (Me. 1974).

43. *One Person, No Vote*, *supra* note 41, at 1942 n.21 (citing VT. STAT. ANN. tit. 28, § 807(a) (2008)).

44. Brian J. Hancock, *The Voting Rights of Convicted Felons*, 17 J. ELECTION ADMIN. 35, 36 (1996).

45. Handelsman, *supra* note 29, at 1879–80.

46. *See* Goldman, *supra* note 36, at 628.

47. *Id.*

48. *Id.* (citing Marc Mauer, *Disenfranchisement of Felons: The Modern-Day Voting Rights Challenge*, 2002 C.R. J. 40, 41 (2002)).

49. Handelsman, *supra* note 29, at 1879.

While the large number of disenfranchised felons speaks for itself in terms of the lingering effect that felon disenfranchisement statutes have on felons, the statistics do not expressly speak to the effect that these statutes have on minority groups and individuals with low socioeconomic status. However, these statutes often have racially and economically discriminatory effects.[50] For example, 7.7 percent of African American adults are disenfranchised, compared to 1.8 percent of the non-African American population.[51] African Americans represent over one third (36 percent) of all disenfranchised felons.[52] Additionally, nearly one million disenfranchised individuals are African American ex-felons who have already completed their sentences.[53] Regardless of whether the disparate effect of felon disenfranchisement statutes results from discrimination in the criminal justice system[54] or directly from the state felon disenfranchisement statutes,[55] statistics demonstrate that felon disenfranchisement disproportionately affects minority groups.[56]

B. Examination of Past Voting Restrictions

An understanding of previous voting rights cases will lead to a better understanding of felon disenfranchisement and the rationale cited to support this restriction. The rationale that the state and federal governments cite to support felon disenfranchisement is the same rationale cited to support previous voting restrictions: that the disenfranchised group cannot be trusted.[57] This rationale was abandoned when such restrictions were deemed unconstitutional.

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50. *Felony Disenfranchisement Laws*, *supra* note 4.

51. *Id.*

52. JAMIE FELLNER & MARC MAUER, THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (1998).

53. *See Felony Disenfranchisement Laws*, *supra* note 4.

54. *See* Farrakhan v. Washington, 338 F.3d 1009, 1013–14 (9th Cir. 2003) (holding that the district court erred by not considering racial bias in Washington's criminal justice system in its consideration of whether the state's disenfranchisement laws violated the Voting Rights Act).

55. *See* Hunter v. Underwood, 471 U.S. 222, 224 (1985) (describing a statute designed by state legislatures with the intent to disenfranchise African Americans that disenfranchised individuals who had committed crimes of "moral turpitude").

56. *See Felony Disenfranchisement Laws*, *supra* note 4.

57. *See infra* Part II.B.

1. Discrimination Against Non-Property Owners, African Americans, and Women

Property qualifications were an early mechanism used to limit the right to vote for certain individuals because many people did not trust non-property owners with the vote.[58] While some feared that non-property owners would vote to advance only the interests of non-property owners,[59] others feared that they lacked the ability to make their own independent decisions and accordingly should be represented by those who owned property.[60]

Like non-property owners, African Americans were also denied the right to vote because state and federal legislatures did not trust them with such a right.[61] Even the Fifteenth Amendment, which textually gave African Americans the right to vote in 1868, fell short of accomplishing its objective.[62] Many southern states circumvented the Fifteenth Amendment's intent by implementing restrictions and processes that effectively denied African Americans the right to vote because they feared the prospect of enfranchising African Americans.[63] In particular, Southern Democrats feared the political weight of the African American vote during Reconstruction, as they feared that African Americans would take power away from rich white landowners.[64]

Similarly, women struggled to obtain the right to vote for over seventy-five years.[65] State legislatures feared the advancement of women's political interests,[66] arguing that the female vote would

58. John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 HASTINGS CONST. L.Q. 115, 151 & n.135 (2002) (citing Morton White, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 261–65 (1978)). Federalists, like Adams and Hamilton, along with legal scholars, like Blackstone, accepted this rationale. *Id.*

59. Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1509–10 (2002) (citing KEYSSAR, *supra* note 25, at 11).

60. *Id.*

61. *See* DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW CASES AND MATERIALS 29–32 (2004).

62. *Id.* at 32–33.

63. *Id.* at 33–34.

64. Briffault, *supra* note 59, at 1515 ("Southern Democrats us[ed] gerrymandering, complicated ballot configurations, administrative devices, and occasional violence and fraudulent vote counts to curtail black voting . . . .").

65. LOWENSTEIN & HASEN, *supra* note 61, at 36.

66. *See id.*

destroy the family unit.[67] Also, state legislatures felt that women did not need the right to vote because their husbands adequately represented them in the political process.[68] Southern white males also opposed female suffrage because they were afraid to give African American women the right to vote, thereby enfranchising even more African Americans than had previously been enfranchised through the Fifteenth Amendment.[69] In 1874, even after the Fourteenth Amendment was implemented, the Court in *Minor v. Happersett*[70] held that denying women the right to vote was not inconsistent with the Privileges or Immunities Clause,[71] seemingly deeming fear an appropriate basis for restricting voting rights. However, Congress ratified the Nineteenth Amendment in 1920, and consequently women gained the right to vote.[72]

2. Mechanisms for Discrimination

Voting restrictions were used to create what some considered "a more 'qualified' and more conservative electorate, and to weaken the political power of white Populists, small farmers, industrial workers, Republicans and other groups."[73] For example, secret ballots, a voting method adopted in the United States between 1884 and 1891, allowed anonymous voting, but adversely affected the African American vote.[74] Although secret ballots are still used universally and are now commended for preventing corruption and coercion,[75] initially African Americans were given no assistance with the newly

67. Sarah B. Lawsky, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783, 790–91 (2000).

68. *Id.* at 791 (explaining that "anti-suffragists" wanted to silence women and believed that if women voted, their individual rather than familial interests would be expressed).

69. Gregory S. Parks & Quinetta M. Roberson, *"Eighteen Million Cracks": Gender's Role in the 2008 Presidential Campaign*, 17 WM. & MARY J. WOMEN & L. 321, 340 (2011) (citing DONALD GRIER STEPHENSON, JR., THE RIGHT TO VOTE: RIGHTS AND LIBERTIES UNDER THE LAW 120 (2004)).

70. 88 U.S. 162 (1874).

71. The Privileges or Immunities Clause prevents states from implementing restrictions that deny individuals the "privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1. These privileges or immunities are rights that are essential and fundamental to being a citizen of the United States. Slaughter-House Cases, 83 U.S. 36, 55 (1872). The Court in *Minor v. Happersett* concluded that voting was not one of those rights fundamentally characteristic of the rights guaranteed to United States citizens. *See Minor*, 88 U.S. at 175.

72. LOWENSTEIN & HASEN, *supra* note 61, at 36.

73. Briffault, *supra* note 59, at 1516.

74. LOWENSTEIN & HASEN, *supra* note 61, at 34.

75. *See, e.g.*, McLaughlin v. Bennett, 238 P.3d 619, 622 (Ariz. 2010) (en banc) (describing secret ballots as tools implemented during elections to prevent voter coercion).

implemented secret-ballot voting process[76] which required voters to place particular ballots in particular boxes in order for their vote to count.[77] Because African Americans were denied educational opportunities and were inexperienced voters, this complex process, compounded with their inability to receive assistance, created a de facto restriction on African Americans' right to vote.[78]

Poll taxes—which discouraged and, in some cases, prevented poor individuals from voting—were another way in which southern state governments attempted to disenfranchise African American and poor White voters.[79] Poll taxes were implemented in part to disenfranchise poor voters who "formed the backbone of the Populist party"—in other words, to disenfranchise individuals who might vote radically.[80] In 1964, the Twenty-Fourth Amendment deemed poll taxes unconstitutional for federal elections.[81] Additionally, in 1966, the Court in *Harper v. Virginia State Board of Elections*[82] held that poll taxes for state elections were inconsistent with the Equal Protection Clause of the Fourteenth Amendment.[83]

To preserve their political interests, dominant groups also supported literacy tests to deny certain groups the ability to obtain political power.[84] These tests were especially used to discriminate against African Americans, who were previously denied the opportunity to obtain an education because of their status as slaves.[85] Grandfather clauses, which waived literacy requirements for those whose ancestors could vote, also disfavored African Americans, because their ancestors did not have the opportunity to vote.[86] The

76. *Id.*
77. *Id.*
78. *See id.*
79. *See id.* at 31.
80. *See, e.g.*, United States v. Texas, 252 F. Supp. 234, 242 (W.D. Tex. 1966), *aff'd* 384 U.S. 155 (1966).
81. *Id.* at 247.
82. 383 U.S. 663 (1966).
83. *Id.* at 666.
84. Castro v. State, 466 P.2d 244, 249 n.13 (Cal. 1970) (citing Helen Sullivan, *Literacy and Illiteracy*, *in* 5 ENCYCLOPEDIA SOC. SCI. 511, 520 (Edwin R.A. Seligman & Alvin Johnson eds., 1937)).
85. Michael C. Dorf, *Federal Governmental Power: The Voting Rights Act*, 26 TOURO L. REV. 505, 506 (2010) (citing Nw. Austin Mun. Util. No. One v. Holder, 557 U.S. 193, 219 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part)); Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 624 (2004).
86. LOWENSTEIN & HASEN, *supra* note 61, at 35.

Court deemed grandfather clauses unconstitutional in 1915 in *Guinn v. United States*.[87] Further, in 1966 the Court in *South Carolina v. Katzenbach*[88] held that even though literacy tests were not facially unconstitutional, a ban on literacy tests was an appropriate way to enforce the Fifteenth Amendment.[89] In 1970, the Court extended the ban on literacy tests to the entire country, and this ban was made permanent by 1975.[90]

Yet another tactic that states used to prevent certain "undesirable" groups from voting was the white primary. White primaries, which prohibited non-white voters from voting, were also used through the 1930s to disenfranchise African Americans because state legislatures did not want African Americans to be involved in the political process.[91] In an attempt to escape the emerging restrictions on white primaries, state legislatures sought to allow political parties' executive committees to implement a restriction during the pre-primary stage.[92] Such tactics were based on the long-standing belief that these groups were unqualified to vote because of lack of education, as well as fear of the way that these groups would vote.[93] Accordingly, despite the different mechanisms states implemented, these voting restrictions all had the same effect—to disenfranchise a particular group of individuals.

C. Current Rationale for Felon Disenfranchisement

Proponents of felon disenfranchisement have offered multiple rationales for its practice. First, proponents are afraid of how felons will vote on substantive issues and the candidates that they might support. They fear that felons will somehow vote in a way that might make it easier for them to make their previous illegal activity now legal.[94] Many states believe that criminals are less likely to be trustworthy, and as a result, these states support felon disenfranchisement.[95] They often assert an "interest in preserving the

87. 238 U.S. 347, 365 (1915).
88. 383 U.S. 301 (1966).
89. *Id.* at 333–34.
90. LOWENSTEIN & HASEN, *supra* note 61, at 35.
91. *Id.* at 462.
92. Morse v. Republican Party of Va., 517 U.S. 186, 236–37 (1996) (Breyer, J., concurring).
93. Briffault, *supra* note 59, at 1510.
94. Eric J. Miller, *Foundering Democracy: Felon Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT'L BLACK L.J. 32, 36 (2005).
95. *Id.*

integrity of [their] electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims."[96] In citing this interest, states have equated felons to "idiots" and "the insane," and courts have accepted this comparison.[97] In sum, states believe that "[c]riminal disenfranchisement allows citizens to decide law enforcement issues without the dilution of voters who are deemed . . . to be less trustworthy."[98]

The states' rationale that felons cannot be trusted with the right to vote dates back to the implementation of section 2 of the Fourteenth Amendment in 1868.[99] Justice Marshall argued that Congress had this rationale in mind while drafting section 2, which addresses how states should apportion electoral votes when they disenfranchise felons.[100] Justice Marshall asserted that Congress's intention was not to disenfranchise felons but to reduce representation of the southern states.[101] Ultimately, Justice Marshall believed that Congress was afraid that voters in southern states, and particularly African Americans, would overwhelm the voting population and vote in a way that would weaken Congress's own political interests.[102]

Second, proponents of felon disenfranchisement fear that felons will violate voting procedures and commit voter fraud if given the opportunity to vote.[103] Third, many states rely on John Locke's concept of the social contract, a theory that discusses how when individuals enter society, they authorize the legislature to make laws and have the ability to contribute to the law-making process through

96. Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971).

97. *Id.*; *see also* Goldman, *supra* note 36, at 642 (quoting Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978)).

98. Bennett, *supra* note 7, at ¶ 21 (quoting *Civil Participation and Rehabilitation Act of 1999: Hearing on H.R. Res. 906 Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 106th Cong. 90 (1999) [hereinafter *Civil Participation and Rehabilitation Act*] (testimony of Todd F. Gaziano)).

99. U.S. CONST. amend. XIV, § 2.

100. Handelsman, *supra* note 29, at 1895 (citing Richardson v. Ramirez, 418 U.S. 24, 54 (1973) (Marshall, J., dissenting)).

101. *Id.*

102. *Id.* (citing *Richardson*, 418 U.S. at 73–74).

103. Carlos M. Portugal, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 U. MIAMI L. REV. 1317, 1319 (2003) (citing Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971)).

their right to vote.[104] Like Locke, states believe that once individuals break the laws, which they authorized their legislatures to make, they abandon the social contract that they have created and, accordingly, abandon their right to participate in the democratic process.[105] Proponents believe that felons should be penalized for breaching the social contract through felon disenfranchisement.[106] Fourth, proponents of felon disenfranchisement rely on a morality-based rationale and assert that felons have "demonstrated an inherent lack of virtue on which the survival of society depends."[107] In essence, they fear that felons will not vote in "accordance with the common good" or with society's best interest in mind.[108]

III. THE ACCEPTANCE OF A FIRST AMENDMENT APPROACH IN OTHER VOTING RIGHTS CASES SUGGESTS THAT THIS APPROACH SHOULD BE EMBRACED IN FELON DISENFRANCHISEMENT CASES

Voting restrictions are inconsistent with First Amendment values.[109] Although interpretations of the First Amendment have not yet been expanded to encompass felon disenfranchisement,[110] there is room to expand the current interpretations.[111] Because other voting restrictions have been deemed inconsistent with First Amendment principles,[112] felon disenfranchisement, a more severe voting restriction, should also be considered inconsistent with First Amendment principles.

A. First Amendment Values

Political speech is the type of expression that should be protected by the First Amendment.[113] As the Court discussed in

104. Green v. Bd. of Elections of New York, 380 F.2d 445, 451 (2d Cir. 1967) (quoting JOHN LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government*, *in* THE SECOND TREATISE OF GOVERNMENT 45 (J.W. Gough ed., Barnes & Noble 1966) (1690)).

105. *Id.* (quoting LOCKE, *supra* note 104, at 44).

106. Portugal, *supra* note 103, at 1321. This Article does not thoroughly analyze this rationale.

107. *Id.* at 1322.

108. *Id.*

109. *See infra* Part III.A.

110. *See infra* Part III.B.

111. *See infra* Part III.C.

112. *See infra* Part III.E.

113. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) (explaining that political expression is subject to First Amendment protection).

McIntyre v. Ohio Elections Commission,[114] "The First Amendment affords the broadest protection to . . . political expression in order to 'assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[115] This point was also articulated in *Mills v. State of Alabama*,[116] where the majority agreed that one of the primary purposes of the First Amendment was to encourage free discussion about political affairs.[117] Justice Thomas reiterated this point in a dissent, where he emphasized that "[p]olitical speech is the primary object of First Amendment protection."[118]

Although political expression is not limited to voting, one of the primary ways in which voters express their political views is through their right to vote.[119] Even though felons are able to express their political opinions through petitions and public forums,[120] they often have an "utter lack of political leverage" because they lack the necessary resources to voice their opinion and because of baseless stereotypes that make other voters apprehensive of their political opinions.[121] This is problematic because "competition in ideas and governmental policies" is at the heart of what the First Amendment was created to protect.[122] Moreover, one important function of the First Amendment is to protect unpopular speech and to allow an unpopular minority to speak out against a majority.[123] Leonard W. Levy, discussing the values emphasized in the First Amendment, explained that "freedom of thought and expression means equal freedom for the other fellow, especially the one with hated ideas."[124]

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114. 514 U.S. 334 (1995).

115. *Id.* at 346 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

116. 384 U.S. 214 (1966).

117. *Id.* at 218.

118. Stewart Jay, *The First Amendment: The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 777 (2008) (quoting Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 465 (2001) (Thomas, J., dissenting)). Although Justice Thomas made this point in a dissenting opinion, Justices Scalia and Kennedy joined the dissent. 533 U.S. at 465.

119. Lynn Eisenberg, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 539, 554 (2012).

120. *Id.* at 554 n.89 (citing KEYSSAR, *supra* note 25, at 308) (explaining that the ability to influence elections will be "significantly limited by resources and public opinions").

121. *Id.* (citing KEYSSAR, *supra* note 25, at 308).

122. Williams v. Rhodes, 393 U.S. 23, 32 (1968).

123. Donnelly, *supra* note 22, at 328–30.

124. James G. McLaren, *The "Primacy" of the First Amendment: Does It Have a Justification in Natural Law, History, and Democracy?*, 5 U.S. A.F. ACAD. J. LEG. STUD. 45, 49

However, when states deny felons the opportunity to vote because they fear that felons might express ideas that states disfavor, they do exactly what the First Amendment sought to prevent—they silence the individuals with "hated ideas."[125]

B. Reliance on Other Judicial Approaches to Felon Disenfranchisement Does Not Make a First Amendment Approach Inappropriate

Because courts have steadfastly analyzed challenges to felon disenfranchisement under section 2 of the Voting Rights Act[126] and the Equal Protection Clause of the Fourteenth Amendment,[127] courts have not fully considered a First Amendment analysis of felon disenfranchisement. For example, many courts have overlooked the argument that this Article advances—that felon disenfranchisement violates the First Amendment.[128] However, this does not preclude courts from using a First Amendment approach. In fact, in many cases where a First Amendment approach was suggested, courts have not deemed such approaches inappropriate but have instead resolved the cases based on other theories.

For example, in *Farrakhan v. Locke*,[129] the district court relied upon the holding in *Richardson v. Ramirez* and never reached the First Amendment claim.[130] In *Richardson*, the Court held that the felon-disenfranchisement statute was not inconsistent with the Equal Protection Clause because the Constitution "affirmative[ly] sanction[s]" felon disenfranchisement statutes by discussing how to apportion electoral votes in the event of disenfranchisement.[131] Citing *Richardson*, the court in *Farrakhan* held that it would be contradictory for a felon-disenfranchisement statute to be considered unconstitutional under the First Amendment when it is affirmatively

(1994/1995) (quoting LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 7, 18 (1963)).

125. *Id.*

126. *See* Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

127. Richardson v. Ramirez, 418 U.S. 24, 54 (1974). Because this Article focuses on the First Amendment, it does not thoroughly discuss the arguments under section 2 of the Voting Rights Act and the Equal Protection Clause, nor does it examine court holdings under such approaches.

128. Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 TENN. L. REV. 549, 550–51 (1985).

129. 987 F. Supp. 1304 (E.D. Wash. 1997).

130. *Richardson*, 418 U.S. at 54.

131. *Id.*

sanctioned in section 2 of the Fourteenth Amendment.[132] Although the court in *Farrakhan* correctly cited the holding in *Richardson*,[133] it overlooked the fact that not all felon-disenfranchisement statutes can be considered "affirmatively sanctioned" by section 2 of the Fourteenth Amendment.[134] Accordingly, by relying on what other courts have deemed an overgeneralization—that all felon disenfranchisement statutes are affirmatively sanctioned in section 2 and are therefore constitutional[135]—the *Farrakhan* court failed to examine a First Amendment approach to felon disenfranchisement.[136] The court did not determine whether the felon-disenfranchisement statute was inconsistent with the First Amendment.[137]

Similarly, in *Harper v. Virginia State Board of Elections*,[138] the Court stopped short of analyzing freedom of speech in relation to the right to vote. The plaintiffs argued that the imposition of poll taxes interfered with their First Amendment rights because the taxes discouraged, or effectively prevented, certain Virginia residents from expressing political opinions through their votes.[139] However, the Court adjudicated the matter without reaching the First Amendment claim.[140] The Court did not dismiss the First Amendment claim as meritless, but instead explained that the matter could more easily be analyzed under the Equal Protection Clause of the Fourteenth Amendment.[141] This does not preclude the possibility that a First Amendment analysis might have been appropriate.

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132. *Farrakhan*, 987 F. Supp. at 1314 (citing *Richardson*, 418 U.S. at 54).

133. *Richardson*, 418 U.S. at 54–56.

134. Simmons v. Galvin, 575 F.3d 24, 32 (2009) (explaining that *Richardson* "does not hold that a state felon disenfranchisement law may never raise equal protection concerns"); *see also* Johnson v. Governor of Fla., 405 F.3d 1214, 1248 (11th Cir. 2005) (Barkett, J., dissenting) (citing Hunter v. Underwood, 471 U.S. 222, 233 (1985)) ("Nothing in Section 2 of the Fourteenth Amendment grants states unfettered discretion to disenfranchise felons, much less permits felon disenfranchisement on the basis of race."). Notably, section 2 of the Fourteenth Amendment does not expressly declare that states can abridge this right, but instead gives states instructions about limiting representation if they choose to abridge individuals' rights. *Id.*

135. Owens v. Barnes, 711 F.2d 25, 26–27 (3d. Cir. 1983) ("It has not been seriously contended that *Richardson* precludes any equal protection analysis when the state legislates regarding the voting rights of felons.").

136. *Farrakhan*, 987 F. Supp. at 1314.

137. *Id.*

138. 383 U.S. 663 (1996).

139. *Id.* at 665.

140. *Id.*

141. *Id.*

C. Evolving Interpretations: Room for Growth

Interpretations of the rights guaranteed by the First Amendment have evolved since its adoption in 1791.[142] For example, the First Amendment now protects blasphemy, profanity, and commercial advertising, which were all traditionally unprotected forms of speech.[143] Accordingly, even where something historically is not seen as a violation of the First Amendment, such as felon disenfranchisement,[144] this does not serve as a complete bar to the possibility that it is unconstitutional.[145] As interpretations of the First Amendment continuously evolve,[146] courts are not precluded from revisiting how to interpret the First Amendment's applicability to felon disenfranchisement.[147] Additionally, a First Amendment approach to felon disenfranchisement does not require significant divergence from established interpretations of the First Amendment because this approach has been utilized in other voting rights cases.[148]

D. A Vote Can Be Considered Expression in Some Instances

Because of precedent, especially the Court's decision in *Burdick v. Takushi*,[149] it has become challenging to equate the right to vote with the type of speech protected by the First Amendment. In

142. *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1717–18 (1991) (explaining that courts did not really "recognize a constitutional prohibition on censorship" until the 1930s); *see also* J. Matthew Miller III, Comment, *The Trouble with Traditions: The Split over Eldred's Traditional Contours Guidelines, How They Might Be Applied, and Why They Ultimately Fail*, 11 TUL. J. TECH. & INTELL. PROP. 91, 108 (2008) ("[T]radition has not historically restricted application of the First Amendment.").

143. Miller, *supra* note 142, at 108.

144. *See* Calhoun, *supra* note 128, at 550–51 (asking why "courts in general, and the Supreme Court in particular, [have] failed to develop a sophisticated first amendment analysis of individual rights in distributional voting rights controversies"); *see also* George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 861–73 (2005) (emphasizing that challenges to felon disenfranchisement statutes have traditionally been argued under the Equal Protection Clause of the Fourteenth Amendment and section 2 of the Voting Rights Act).

145. *Cf.* Miller, *supra* note 142, at 108–09 (explaining that because the First Amendment has evolved to protect previously unprotected types of speech, copyright should not be excluded from the First Amendment's purview).

146. *Id.* at 108.

147. Just as Miller explained that copyright should not be excluded from First Amendment review on the basis of tradition, felon disenfranchisement statutes should not be excluded either. *See id.* at 108–09.

148. *See infra* Part III.D.

149. 504 U.S. 428 (1992).

Burdick, the Court held that a prohibition on write-in voting did not violate the petitioner's First Amendment rights.[150] As Justice Kennedy explained in his dissenting opinion, the majority reasoned that "the purpose of casting, counting, and recording votes [was] to elect public officials, not to serve as a general forum for political expression."[151] The Court added that the ballot's intended purpose was to "winnow out and finally reject all but the chosen candidates," and declared that the ballot was not a place to express "short-range political goals, pique, or personal quarrel[s]."[152] The *Burdick* Court did not discuss the right to select a specific candidate listed on a ballot, but instead discussed the right to write down the names of candidates that were not present on the ballot after being given the opportunity to nominate them earlier in the election process.[153]

However, the *Burdick* Court overlooked the fact that the right to vote, in the abstract, is not the type of political speech exempted from First Amendment protection.[154] Although no cases directly support this contention, an analysis of *Burdick*'s facts and the factors that led to the Court's decision, as well as an examination of other voting rights cases analyzed under the First Amendment, demonstrate that a vote can be considered speech protected by the First Amendment in some instances.[155]

First, *Burdick* does not support the assertion that a vote is not expression in felon disenfranchisement cases. The circumstances in *Burdick* are distinguishable from those in felon disenfranchisement cases because the state prohibited all voters from writing in the names of candidates.[156] In contrast, felons are seeking the right to use the ballot in a manner that the state authorizes for other qualified voters. Because a state cannot fear that a ballot will turn into a forum for political expression when voters are just selecting a candidate or following the state's voting instructions, there is no reason why a vote in this sense cannot be considered protected expression. A ballot can turn into a forum for political expression only when voters can

150. *Id.* at 430.

151. *Id.* at 445 (Kennedy, J., dissenting).

152. *Id.* at 438 (majority opinion) (quoting Storer v. Brown, 415 U.S. 724, 735 (1974)) (internal quotation marks omitted).

153. *See id.* at 436.

154. *See* discussion *infra* Parts III.D, III.E.

155. *See* discussion *infra* Parts III.D, III.E.

156. *Burdick*, 504 U.S. at 443–44 (Kennedy, J., dissenting).

write whatever they choose on a ballot.[157] A ballot cannot turn into a forum for general expression when voters are restricted to choosing between listed candidates. Furthermore, by selecting candidates in a manner that the state authorizes for all other qualified voters, felons would be using the ballot for its intended purpose—to select candidates—and not as a general forum of political expression.

Second, courts have the power to recognize that voting is a form of expression that should be protected by the First Amendment. According to *Burdick*, the asserted purposes of the election process include the ability to contribute to the process of electing officials[158] and the ability to winnow out other candidates from the election race.[159] These activities should be protected by the First Amendment freedom of speech. It is the ability to express political opinions and ideals through a regulated voting process that should be recognized as a right consistent with the First Amendment, not the ability to use the ballot in whichever way a person deems appropriate. When courts analyze situations in which voters are unable to vote in a way that the state endorses under the First Amendment, they are not suggesting that the ballot should turn into a forum to express general concerns with the political process. Instead, proposing that the right to vote in a way that the state endorses should be examined under the First Amendment suggests that individuals should be able to use the ballot for its intended purpose—to vote for a candidate that is present on the ballot. When the ballot is used for this purpose, the ballot will not turn into a forum for general expression. Voting for a candidate on a ballot, unlike writing down the name of a candidate at the last minute when given the opportunity to do so earlier in the political process, does not threaten the integrity of a state's democratic system.[160] Because states have the right to regulate their voting processes,[161] they can restrict write-in voting. But, once a state denies the right to vote to felons who are otherwise qualified to vote and would comply with state voting regulations, such a denial severely interferes with felons' right to freedom of speech.

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157. *See id.* at 445. Because Hawaii banned write-in voting, the Court could not have reasonably been concerned with voters using the ballot to express general political beliefs and concerns. *Id.* at 446–47.

158. *Id.* at 445.

159. *Id.* at 438 (majority opinion) (quoting Storer v. Brown, 415 U.S. 724, 735 (1973)).

160. *Id.* at 441.

161. *Id.* at 433.

Third, denying felons the opportunity to vote goes far beyond what the Court in *Burdick* tried to prevent. In *Burdick*, the Court held that the ballot was not a place to express "short-range political goals, pique, or personal quarrel[s]."[162] However, many felons are not trying to express such short-range political goals, but rather goals that they have wished to voice in numerous previous elections and goals that many of them will never have the opportunity to voice.[163] Unlike other cases in which voters will have an opportunity to vote in other elections within the next four years, most felons are prevented from voting on a long-term basis.[164] In such cases, in which speech is often "chilled or prevented altogether," courts have held that a First Amendment analysis is appropriate.[165]

Additionally, other courts have left open the possibility that an inability to write in the name of a candidate when voting can be a violation of the First Amendment if the state usually provides "space on the ballot for write-in voting in contested primary elections when a petition for opportunity to ballot has not been filed."[166] In *Gelb v. Board of Elections of New York*,[167] the court held that if New York typically allowed for write-in votes despite the fact that no petition for opportunity to ballot had been filed, then it is likely that denying this right to a certain individual violated that individual's First Amendment rights.[168] The court certified this question for a determination of whether New York typically afforded voters this right.[169] *Gelb* supports the proposition that if some voters are able to vote in a certain way, then the state must allow other voters to vote in this way, instead of arbitrarily drawing distinctions.[170] According to that line of reasoning, if other voters are able to express their political opinions through their votes, felons should be able to do so as well. If it might be considered unconstitutional to deny the opportunity to effectively write in a

162. *Id.* at 438 (quoting *Storer*, 415 U.S. at 735).

163. *See Felony Disenfranchisement Laws*, *supra* note 4 (noting that because many felons are permanently disenfranchised, most felons are unable to vote in consecutive elections and are therefore unable to express long-term goals in addition to their short term goals).

164. *See id.*

165. Siegel v. LePore, 234 F.3d 1163, 1178 (11th Cir. 2000).

166. Gelb v. Bd. of Elections of New York, 224 F.3d 149, 150 (2d Cir. 2000).

167. 224 F.3d 149 (2d Cir. 2000).

168. *See id.* at 157.

169. *Id.* at 150.

170. *See id.*

candidate on a ballot,[171] and the court is willing to consider a vote as a type of expression protected by the First Amendment,[172] then courts should be able to consider a vote as a form of constitutionally protected expression if the right to vote is prevented altogether. Thus, *Burdick* does not stand for the proposition that a vote cannot be considered a form of constitutionally protected expression in all instances.

E. Examination of First Amendment Analysis Applied to Other Voting Restrictions: A Starting Point to Suggest a First Amendment Analysis for Felon Disenfranchisement Cases

Although felon disenfranchisement has not explicitly or successfully been connected to First Amendment principles, other voting rights cases have demonstrated that interferences with the right to vote can violate an individual's First Amendment rights.[173] The similarities between felon disenfranchisement and other voting rights cases suggest that these First Amendment arguments should be applicable in felon disenfranchisement cases.

For example, First Amendment approaches have been suggested to analyze the constitutionality of poll taxes. Poll taxes can be considered similar to felon disenfranchisement because both restrictions deny individuals the right to vote due to personal characteristics.[174] A First Amendment approach was suggested—yet never applied—in *Harper v. Virginia State Board of Elections*, a 1966 case in which the U.S. Supreme Court deemed poll taxes unconstitutional under the Fourteenth Amendment.[175] However, in *United States v. Alabama*,[176] a 1966 district court case decided three weeks after *Harper* and also concerning the constitutionality of poll taxes, the concurrence contextualized the right to vote under the First

171. *Id.* at 157.

172. *Id.* at 157–58. In order to reach the conclusion that petitioner's First Amendment rights might have been abridged, the *Gelb* court had to overcome the *Burdick* court's contention that a vote is not expression. If the *Gelb* court agreed that a vote is not expression, its analysis could have ended there. Note that *Gelb* was decided after *Burdick*.

173. *See* discussion *infra* Part III.E.

174. Poll taxes take away a right because of the personal characteristic of lack of wealth, whereas felon disenfranchisement takes away a right because of the personal characteristic of their status as felons. *See* J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435, 436–41 (2001) (equating felon disenfranchisement to a "21st century version of the poll tax").

175. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665 (1966).

176. 252 F. Supp. 95 (M.D. Ala. 1966).

Amendment.[177] Judge Johnson explained that "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint."[178] Additionally, courts have held that other voting restrictions abridge individuals' First Amendment rights and specifically interfere with their freedom of speech and association.[179]

The following subparts explore judicial approaches to freedom of expression and freedom of association claims in voting rights cases. Further, these subparts analyze how courts have determined whether prior voting restrictions interfered with an individual's First Amendment rights. Ultimately, because courts have held that less burdensome voting restrictions interfere with First Amendment rights, courts should hold that felon disenfranchisement, a much more severe voting restriction, abridges core First Amendment values and principles.

1. Freedom of Speech Approach: Suggesting That the Vote Can Be Analyzed Under the First Amendment

In analyzing the right to vote in relation to the First Amendment in voting rights cases, courts have implied that a vote can be considered a form of expression in some circumstances.[180] In doing so, courts have limited the implications of *Burdick*'s holding.[181]

For example, in *Nader v. Brewer*,[182] the Ninth Circuit held that a residency restriction that prevented non-residents from circulating petitions created a severe burden on presidential candidate Ralph Nader and his out-of-state supporters' speech.[183] These nominating petitions were used only to name and nominate the candidate and ten individuals who would serve as electors for that candidate.[184] Petitions might sometimes be considered a better outlet for political

177. *Id.* at 108 n.7 (Johnson, J., concurring).

178. *Id.* (quoting Follett v. McCormick, 321 U.S. 573, 577 (1944)) (internal quotation marks omitted) (internal citations omitted).

179. *See infra* Parts III.E.1, III.E.2.

180. *See supra* Part III.D.

181. *See* Burdick v. Takushi, 504 U.S. 428, 445 (1992). *Burdick* held that a ballot's intended purpose is not to serve as a general forum of expression. However, in other cases where courts analyze the right to vote under the First Amendment, they are implicitly recognizing that a vote is a form of constitutionally protected expression.

182. 531 F.3d 1028 (9th Cir. 2008).

183. *Id.* at 1030–31.

184. *Id.* at 1031.

expression than a vote in an election because voters are not limited in the type of speech that they can express through petitions.[185] However, the petition in *Nader* could not be used to express whatever idea happened to cross supporters' minds.[186] Instead, these petitions were used only for nominations.[187] Accordingly, these petitions for nomination in *Nader* were very similar to write-in voting in *Burdick*, where voters fought for a right to be able to write down the name of a candidate.[188] Nothing adequately distinguishes what was considered expression protected by the First Amendment in *Nader*[189] from what the Court in *Burdick* adamantly deemed unprotected by the First Amendment.[190] If the regulations on nominating petitions in *Nader*, which were considered inconsistent with First Amendment principles,[191] cannot be distinguished from the regulation of write-in voting in *Burdick*,[192] there is no support for the argument that a vote cannot be equated with expression.

Similarly, in *Chandler v. City of Arvada*,[193] the court held that a city ordinance that limited the ability to circulate petitions to residents and qualified voters[194] interfered with nonresidents' rights to freedom of speech.[195] The ordinance regulated *who* could circulate a petition, not what individuals could express in a petition.[196] Accordingly, because it is difficult to distinguish a restriction on who can circulate petitions from a restriction on who can vote for certain candidates, the two should not be treated differently. If a regulation on who can circulate a petition is subject to First Amendment analysis,[197] a regulation on who can vote should certainly be subject to a First Amendment analysis.

Additionally, in his concurrence in *Vieth v. Jubelirer*,[198] Justice Kennedy suggested that a First Amendment analysis was proper to

185. *See* Meyer v. Grant, 486 U.S. 414, 424 (1988).
186. *Nader*, 531 F.3d at 1031.
187. *Id.*
188. Burdick v. Takushi, 504 U.S. 428, 430–31 (1992).
189. *Nader*, 531 F.3d at 1036.
190. *Burdick*, 504 U.S. at 438.
191. *Nader*, 531 F.3d at 1036.
192. *Burdick*, 504 U.S. at 430.
193. 292 F.3d 1236 (10th Cir. 2002).
194. *Id.* at 1239.
195. *Id.* at 1244.
196. *Id.* at 1239.
197. *Id.* at 1241.
198. 541 U.S. 267 (2004).

determine whether a redistricting scheme was constitutional.[199] *Vieth* involved a claim by Democratic plaintiffs that the Republican-controlled Pennsylvania General Assembly unconstitutionally created "meandering and irregular" districts by gerrymandering the districts for the election to favor Republican candidates.[200] The plurality criticized a First Amendment approach that would require courts to determine whether a burden on political speech is narrowly tailored to advance a compelling state interest.[201] The plurality feared that this would invalidate any considerations of political affiliation when redistricting.[202] Justice Kennedy explained that a First Amendment analysis would only be employed where a group's representational rights were burdened.[203] He did not reach a final conclusion on this matter, but he did recognize that burdens on individuals' rights of expression implicated First Amendment values and principles.[204] Although Justice Kennedy concluded that there were no standards to determine the effect of the redistricting and the resulting burden on voters' rights,[205] he recognized that minimizing the political power of the Democratic Party through redistricting was burdensome.[206] If analyzed under a First Amendment perspective, this redistricting scheme interfered with the voters' abilities to express their political preferences by choosing a particular candidate because redistricting would result in "chang[ing] the candidates the voter [could] choose from."[207] This is comparable to felon disenfranchisement, which interferes with felons' abilities to express their political preferences through their votes.

First Amendment concerns have also recently been raised in response to restrictions on individuals' abilities to discuss and swap their votes through online mediums.[208] During the 2000 election, a coalition of Ralph Nader supporters agreed to vote for Al Gore in

199. *Id.* at 314–15 (Kennedy, J., concurring).
200. *Id.* at 272–73 (plurality opinion).
201. *Id.* at 294.
202. *See id.*
203. *Id.* at 315 (Kennedy, J., concurring).
204. *Id.*
205. *Id.* at 317.
206. *See id.* at 316.
207. Timothy D. Caum II, *Partisan Gerrymandering Challenges in Light of* Vieth v. Jubelirer*: A First Amendment Alternative*, 15 TEMP. POL. & CIV. RTS. L. REV. 287, 319 (2005).
208. *See* Marc John Randazza, *The Other Election Controversy of Y2k: Core First Amendment Values and High-Tech Political Coalitions*, 82 WASH. U. L. Q. 143, 146–53 (2004).

contested states if voters in uncontested states would vote for Nader.[209] This would accomplish two mutually beneficial goals. First, the vote-swapping practice would help Nader receive 5 percent of the popular vote so that he would receive federal matching funds in the 2004 election.[210] Next, Gore would receive more votes, preventing George W. Bush from being elected.[211] In response, California and Oregon penalized vote-swapping.[212] The ACLU filed suit in federal court seeking an injunction against these penalties because of the "First Amendment implications" of California Secretary of State Bill Jones' decision to implement them.[213] The judge twice denied the injunction,[214] but the denials were later ruled an abuse of discretion.[215] Although the First Amendment issue in this particular case was not reached before the election, articles written on this case discussed the clear infringements on voters' core First Amendment rights when voters' political opinions were silenced because of the penalties they would face when voicing these opinions.[216] Political expression deserves the utmost First Amendment protection regardless of whether the political expression is through an online medium or through an individual's vote.

The effects of the statutes discussed in the aforementioned voting rights cases are nearly identical to the effect of felon-disenfranchisement statutes. Restrictions on the amount of people that can circulate petitions and on the ability to vote for particular candidates[217] are analogous to the restrictions on felons' right to vote. Additionally, restrictions on individuals' abilities to express their political opinions and swap votes through an online medium[218] are analogous to restrictions on felons' abilities to express their political opinions through their votes. Because of these

209. *Id.* at 147–48.

210. *Id.* at 206–07.

211. *See id.* at 149 (explaining that Nader supporters would have preferred a Gore presidency).

212. *Id.* at 154.

213. *Id.* at 174.

214. *Id.* (citing Porter v. Jones (D. Cal. 2000) (No. 00-11700)).

215. *Id.* at 175 (citing Porter v. Jones, 319 F.3d 483, 492 (9th Cir. 2003)).

216. *See, e.g.*, *id.* at 212–13.

217. *See* Vieth v. Jubelirer, 541 U.S. 267, 272–73 (2004); Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 212 (1999); Nader v. Brewer, 531 F.3d 1028, 1028 (9th Cir. 2008); Chandler v. City of Arvada, 292 F.3d 1236, 1236 (10th Cir. 2002).

218. *Vieth*, 541 U.S. at 272–73.

restrictions, individuals are prevented from expressing their political ideals in some way, whether through petition circulation, online communication, or voting. The primary difference is that an absolute restriction on felons' abilities to vote in the election is more burdensome than the conditional restrictions or partial interferences that these other voting restrictions impose.[219] Thus, courts should be more inclined to recognize that felon disenfranchisement is inconsistent with First Amendment values and principles. Further, because these cases have conducted First Amendment analyses, they have overcome the contention that a vote cannot be analyzed as a constitutionally protected form of expression.[220]

2. Freedom of Association Approach

A different First Amendment problem with felon disenfranchisement is that it deprives individuals of their freedom to associate. Taking away this right, which is related to freedom of speech[221] and freedom of assembly,[222] prevents felons from associating with candidates and political parties of their choosing.[223] Although freedom of association is not expressly discussed in the First Amendment, courts have held that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[224] Other courts have discussed freedom of association as a right derived from freedom of assembly, another right guaranteed under the First Amendment.[225] Specifically, the right to associate with and be a part of a political party has been considered a right inextricably related to freedom of assembly.[226] The Court has referred to this right as a First Amendment right to freedom of political association,[227]

219. *See* Farrakhan v. Washington, 338 F.3d 1009, 1012 (9th Cir. 2003) (explaining that felon disenfranchisement completely deprives felons' of their right to vote).

220. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

221. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

222. Cousins v. Wigoda, 419 U.S. 477, 487 (1975).

223. *Cf.* Clingman v. Beaver, 544 U.S. 581, 585 (2005).

224. *Patterson*, 357 U.S. at 460.

225. *E.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963); Eccles v. Nelson, 919 So. 2d 658, 661 (Fla. Dist. Ct. App. 2006).

226. *Cousins*, 419 U.S. at 491 (Rehnquist, J., concurring).

227. *Clingman*, 544 U.S. at 585.

establishing that this right is necessarily encompassed within the First Amendment.

Regardless of whether courts consider the freedom of association to be a right tied to the freedom of speech or a right tied to the freedom of assembly, courts under both approaches have recognized that individuals should have the right to "engage in political expression and association."[228] Because courts have used freedom-of-association approaches to analyze other voting rights restrictions, precedent suggests that there is some room for courts to analyze voting-related restrictions under the First Amendment.

In *Williams v. Rhodes*,[229] Ohio's stringent procedures for candidates to get on the ballot were deemed unconstitutional because they deprived individuals of their right to associate with particular political beliefs and candidates.[230] In order for new political parties to obtain ballot access in presidential elections under the Ohio statute, they needed to obtain "petitions signed by qualified electors totaling 15 percent of the number of ballots cast in the last preceding gubernatorial election."[231] This, combined with other restrictions, made it extremely burdensome for new political parties to appear on the ballot.[232] The Court explained that "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."[233] Accordingly, the State's burdensome restrictions infringed upon individuals' rights to associate with the parties that were unable to gain access to the ballot.[234]

Interferences with the freedom to associate have also been recognized in voting rights cases. In *Tashjian v. Republican Party of Connecticut*,[235] the Court held that a closed primary system, which mandated that voters in a political party primary be registered as members of that political party in order to vote,[236] was

228. *Button*, 371 U.S. at 431 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250–51 (1957) (plurality opinion)).

229. 393 U.S. 23 (1968).

230. *Id.* at 31–34.

231. *Id.* at 24–25.

232. *Id.* at 25 n.1 (quoting Socialist Labor Party v. Rhodes, 209 F. Supp. 983, 994 (E.D. Ohio 1968)).

233. *Id.* at 31.

234. *Id.*

235. 479 U.S. 208 (1986).

236. *Id.* at 210–11 (citing CONN. GEN. STAT. § 9-431 (1985)).

unconstitutional because it violated the petitioner's right to freedom of association.[237] The Republican Party wanted independent voters to have the opportunity to vote in the Republican primary, but because these independent voters were not affiliated with any party, they were unable to vote.[238] The Court recognized that freedom of association encompassed "partisan political organization."[239] Here, because unaffiliated persons were not able to vote for particular candidates, they were denied the opportunity to affiliate and join together with any party "in furtherance of common political beliefs."[240]

Similarly, in *Kusper v. Pontikes*,[241] the plaintiff was denied her right to associate with particular candidates when she was prevented from voting in a 1972 Democratic primary because she had voted in a 1971 Republican primary.[242] The Illinois statute at issue required a twenty-three-month waiting period during which individuals could not vote in the primary of any political party if they had voted in a prior primary of a different political party.[243] Accordingly, the plaintiff was locked into a political party for a certain period of time.[244] Because the state's law regulated "an area so closely touching our most precious freedoms," the court held that impeding the freedom to associate with a particular political party was unconstitutional.[245]

Similarly, in *Democratic Party of the United States v. Wisconsin ex rel LaFollette*,[246] the Court held that a rule that provided that "only those who [were] willing to affiliate publicly with the Democratic Party may participate in the process of selecting delegates to the Party's National Convention"[247] violated voters' rights of freedom of association.[248] The law required individuals who

237. *Id.* at 211.
238. *See id.* at 212–13.
239. *Id.* at 214 (quoting Elrod v. Burns, 427 U.S. 1, 15 (1976)) (internal quotation marks omitted).
240. *Id.* (citing Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981)).
241. 414 U.S. 51 (1973).
242. *Id.* at 52–53.
243. *Id.* at 52.
244. *Id.* at 57.
245. *Id.* at 58–59.
246. 450 U.S. 107 (1981).
247. *Id.* at 109.
248. *Id.* at 125–26.

"ha[d] stated their affiliation with the [Democratic] Party" to vote in accordance with the results of the open primary election.[249] Accordingly, at the National Convention, representatives would be chosen through a process in which only those previously associated with the Democratic Party could participate.[250] Because the rule limited the ability of voters to associate with certain candidates if they failed to previously and publicly associate with the Democratic Party, the rule violated their freedom of association.[251]

Ultimately, the Court has recognized that voting restrictions often interfere with voters' rights to freely associate with a political party. Like other voting restrictions, felon disenfranchisement restricts felons' opportunities to affiliate themselves with a particular political party through their votes. However, felons' rights to freedom of association are not just restricted—their rights are completely denied. Whereas other voting restrictions present an obstacle to individuals' abilities to associate with a particular party by requiring prior political affiliation or imposing other requirements, felon disenfranchisement creates a complete barrier by denying felons their right to vote altogether. Felon disenfranchisement gives felons absolutely no opportunity to meaningfully associate with any political party. Such restrictions unquestionably interfere with the values of the First Amendment, which include giving individuals the right to associate with political parties of their choosing.

F. Test for a Constitutional Challenge to a State Election Law Burdening the Right to Vote

Courts recognize that states must enact some voting restrictions to help the voting process run smoothly,[252] but they also realize that these restrictions cannot overwhelmingly burden voters' constitutional rights.[253] Because of these competing interests, courts conduct a balancing test by "weigh[ing] 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . .' against 'the precise interests put

249. *Id.* at 112.
250. *Id.* at 109.
251. *Id.* at 125–26.
252. Storer v. Brown, 415 U.S. 724, 730 (1974).
253. *Id.* at 738 (citing Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

forward by the State as justifications for the burden imposed by its rule.'"[254] In doing so, the courts take "into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'"[255] If a voting restriction severely burdens an individual's constitutional rights, the restriction is subject to strict scrutiny, and the regulation must be "narrowly drawn to advance a state interest of compelling importance."[256] Because the First Amendment is a fundamental right, a First Amendment intrusion can typically only be justified by a compelling state interest.[257]

The Court in *Buckley v. American Constitutional Law Foundation*[258] suggested that a restriction on "core political speech" will generally be considered a sufficiently severe burden that requires the Court to conduct a strict scrutiny analysis.[259] However, if the restriction does not severely burden First Amendment rights and instead interferes only slightly with these rights, the state does not need to demonstrate a compelling interest and instead needs only to cite a legitimate interest.[260] For example, despite the fact that the right to freedom of association is a fundamental right,[261] the Court does not always examine voting restrictions that burden associational rights under a strict scrutiny analysis.[262] In *Clingman v. Beaver*,[263] the Court held that a law that only minimally burdened voters' rights did not need to be analyzed with strict scrutiny.[264] Under Oklahoma law, a political party could only invite "registered members" of a particular political party and voters registered as Independents to vote in its primary.[265] Because the law did not require Independents to affiliate with a party, the Court held that this restriction was only

254. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

255. *Id.* (quoting *Anderson*, 460 U.S. at 789).

256. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)).

257. *Cf.* Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

258. 525 U.S. 182 (1999).

259. *Id.* at 206 (Thomas, J., concurring) (stating the principle that state interferences with a fundamental right must be narrowly tailored to serve important state interests).

260. *See* Clingman v. Beaver, 544 U.S. 581, 587 (2005); Bullock v. Carter, 405 U.S. 134, 143 (1972).

261. Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986).

262. *Clingman*, 544 U.S. at 586–87.

263. 544 U.S. 581 (2005).

264. *Id.* at 593.

265. *Id.* at 584–85.

minimally burdensome.[266] Further, since the state had an interest in maintaining political parties as "viable and identifiable interest groups" and in "insuring that the results of a primary election . . . accurately reflect[ed] the voting of the party members," the Court held that this interest was sufficient to justify the minimal burden.[267]

Similarly, in *Burdick*, the Court held that the voting restriction was not subject to a strict scrutiny analysis[268] because the infringement on the petitioner's rights was minimal—the petitioner had the opportunity to vote for the candidate earlier in the election process.[269] When considering state interests, the Court gave "little weight to 'the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status.'"[270] Hence, although the conclusion in *Burdick* is acceptable, it was reached for the wrong reason. The conclusion that the voting regulation in *Burdick* was constitutional should have been reached purely because the regulation was minimally burdensome, not because of the Court's overgeneralization that casting a vote is not the type of expression protected by the First Amendment.[271]

However, when the burden on First Amendment rights is direct and substantial, courts do employ a strict-scrutiny analysis to make sure that the law or regulation is narrowly tailored to a compelling state interest.[272] For example, in *Nader* and *Chandler*, the Court considered the challenged restrictions sufficiently burdensome to subject them to a strict-scrutiny analysis.[273] Accordingly, because felon disenfranchisement qualifies as a severe burden on felons' First Amendment rights, courts will have to determine whether it is justified by a compelling state interest. The burden on felons' freedom of expression, where felons have no opportunity to express their political opinions through voting, is far more severe than the burden on freedom of expression in *Nader*, *Vieth*, *Chandler*, and *Buckley*, where individuals could still express their opinions through

266. *Id.* at 592.

267. *Id.* at 594–95 (quoting Nader v. Schaffer, 417 F. Supp. 837, 845 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976)).

268. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

269. *Id.* at 437, 440.

270. *Id.* at 437 (quoting Storer v. Brown, 415 U.S. 724, 736 (1974)).

271. *See supra* Part III.D.

272. Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

273. Nader v. Brewer, 531 F.3d 1028, 1036 (9th Cir. 2008); Chandler v. City of Arvada, 292 F.3d 1236, 1242 (10th Cir. 2002).

voting, despite burdensome restrictions.[274] Additionally, a disenfranchised felon's right to associate with a particular political party is impeded far more than an individual's right to associate in *Tashjian* or *Democratic Party of the United States*, where individuals could still associate with a party as long as they registered or previously and publicly associated with a particular party.[275] Felons, on the other hand, are not given any opportunity to associate with a particular party through their vote during the period of their disenfranchisement.[276]

Unlike *Kusper*, where an individual could not vote in the primary election of a political party if she voted in the primary election of a different political party within the preceding twenty-three months,[277] felons have no opportunity to associate with any political party regardless of which party they previously associated with. Disenfranchised felons' associational rights and freedom of expression are even further infringed upon than in other cases where courts applied strict scrutiny to determine whether such a regulation was justified.[278] Accordingly, courts, if adopting a First Amendment approach, should apply strict scrutiny to felon disenfranchisement statutes.

Because the burden on felons' freedom of speech or association is severe, the restriction must be narrowly tailored to a compelling state interest in order to justify such a substantial intrusion on felons' rights.[279] However, as demonstrated in Part IV, the interest often cited by state and federal governments—that they do not trust how felons may vote—cannot justify this significant interference and falls far short of this exacting standard.[280]

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274. *See* Nader v. Brewer, 531 F.3d 1028 (9th Cir. 2008); Vieth v. Jubelirer, 541 U.S. 267 (2004); Chandler v. City of Arvada, 292 F.3d 1236 (10th Cir. 2002); Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).

275. Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986); Democratic Party of the U.S. v. Wisconsin, 450 U.S. 107, 109 (1981).

276. Farrakhan v. Washington, 338 F.3d 1009, 1012 (9th Cir. 2003). Denying felons their right to vote altogether implicitly denies them their right to associate. *Id.*

277. Kusper v. Pontikes, 414 U.S. 51, 52 (1973).

278. *See supra* Part III.E.1–2.

279. Norman v. Reed, 502 U.S. 279, 288–89 (1992).

280. *See infra* Part IV.

IV. "WE DO NOT TRUST FELONS": A RATIONALE INCONSISTENT WITH THE VALUES AND PRINCIPLES OF THE FIRST AMENDMENT

Because of the lack of explicit precedent supporting the argument that felon disenfranchisement is inconsistent with First Amendment principles, this Article does not end with that analysis. Rather, this Article goes on to discuss how First Amendment values suggest that the rationale cited for disenfranchising felons—that states do not trust felons—is inconsistent with the rationale originally cited in support of implementing the First Amendment. This part compares the rationale cited for felon disenfranchisement with the rationales once cited for previous voting restrictions. It criticizes the underlying justification for distrusting felons: that felons will vote unfavorably. To support this criticism, this part demonstrates that similar rationales have been considered unconstitutional in other voting rights cases. Further, this part explains that the states' fear-based rationale is not legitimate and is in no sense a compelling interest to justify the extreme burden on felons' freedom of speech and freedom of association.

A. Comparing the Rationale Cited to Support Early Voting Restrictions with the Rationale Cited to Support Felon Disenfranchisement

Felon disenfranchisement is comparable to the voting restrictions used in the late nineteenth century to circumvent the intention of the Fifteenth Amendment because it continues to disenfranchise individuals that legislatures do not trust. Historian Alexander Keyssar explained that "by blocking laws that disenfranchised blacks on the basis of race . . . the Fifteenth Amendment had the indirect effect of encouraging election 'reformers' intent on disenfranchising blacks to build up restrictions of other kinds."[281] Examples of these state-created restrictions were poll taxes and literacy tests. Similarly, felon disenfranchisement is a mechanism that denies allegedly untrustworthy[282] individuals the right to vote. More specifically, some have argued that felon disenfranchisement is a mechanism used to abrogate the intention of the Fifteenth Amendment by indirectly disenfranchising minority

281. Fishkin, *supra* note 25, at 1341 (citing KEYSSAR, *supra* note 25, at 105–71).
282. *See* Ewald, *supra* note 27, at 110.

groups.[283] Representative James G. Blaine believed that felon disenfranchisement statutes were an attempt to disguise the true intention of the states: to prevent African Americans from voting.[284] He elaborated that the goal was to "depriv[e] the South of the representation which is based on the colored population."[285] This rationale is consistent with previous concerns that African Americans might vote in an unfavorable way, which were cited to support prior voting restrictions.[286] Because the United States has removed these prior voting restrictions,[287] it should also discard this flawed rationale as a basis for disenfranchising felons.

In another example that demonstrates this disenfranchisement based on distrust, the Alabama legislature passed a broad felon disenfranchisement statute in 1901 with the intent to discriminate against African Americans.[288] At the convention where the Alabama constitution was adopted, delegates repeatedly admitted that they were "interested in disfranchising blacks and not interested in disfranchising whites."[289] Although the statute, which disenfranchised individuals who had committed crimes of "moral turpitude,"[290] was not facially discriminatory, it had a discriminatory effect because it resulted in the disenfranchisement of a disproportionate number of African Americans.[291] In *Hunter v. Underwood*,[292] the U.S. Supreme Court struck down the statute as unconstitutional.[293] Nevertheless, the statute's wording,[294] and the legislative history,[295] establishes that felon disenfranchisement

283. George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 FORDHAM L. REV. 93, 125–26 (1961).

284. *Id.* at 95.

285. *Id.* This statement from a Maine legislator is particularly important considering that Maine is one of the only two states that allow incarcerated individuals to vote.

286. *See supra* Part II.B.

287. *See supra* Part II.B (examining how African Americans and women obtained the right to vote and demonstrating that particular voting restrictions, like poll taxes and literacy requirements, have been deemed unconstitutional).

288. Hunter v. Underwood, 471 U.S. 222, 223 (1985).

289. *Id.* at 231.

290. *Id.* at 223.

291. *Id.* at 227.

292. 471 U.S. 222 (1985).

293. *Id.* at 233.

294. *Id.* at 223 (citing ALA. CONST. art. VIII, § 182) (disenfranchising individuals who committed crimes of "moral turpitude").

295. *Id.* at 229 (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, May 21st, 1901 to September 3rd, 1901, p. 8 (1940)) (demonstrating

statutes can be, and often are, created to discriminate against certain minority groups.

Even where no discriminatory intent exists, racial bias in the criminal justice system contributes to the racially discriminatory effect of felon disenfranchisement statutes.[296] The disproportionate amount of affected minority groups indicates that state legislatures' fear of the way that felons vote might be better characterized as a fear of the way that certain minority groups will vote.[297] The discriminatory effect, often coupled with the discriminatory intent of state legislators, indicates that there is good reason to question the rationale for disenfranchising felons. Moreover, this rationale is oddly reminiscent of the rationale cited for denying African Americans, women, and non-property owners the right to vote—a rationale already deemed insufficient to uphold these restrictions.[298] While it is problematic to deny felons the right to vote because states do not trust felons, it is even more problematic to deny felons the right to vote because states do not trust African Americans and other minority groups or individuals with low socioeconomic status. Such discrimination has already been deemed unconstitutional[299] and is especially problematic because minority groups are already less likely to be represented in the political process.[300]

Even without any indication that state legislatures intend to disenfranchise minority groups through felon disenfranchisement statutes, it is still problematic to disenfranchise felons because state legislatures fear that they will vote for a particular political party or platform or that they will vote in a manner inconsistent with the goals of an orderly society. While state legislatures never explicitly state this fear, they do express the fear that felons might vote for candidates or platforms that penalize crimes more leniently or

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that testimony indicated that the delegates' purpose at the all-white convention was to "establish white supremacy in [the] [s]tate" of Alabama).

296. Farrakhan v. Washington, 338 F.3d 1009, 1013 (9th Cir. 2003).

297. *See, e.g.*, *id.* (considering racial biases in the criminal justice system as one factor in determining whether felon disenfranchisement statutes violated the Equal Protection Clause, which demonstrates that this factor is indicative of whether these statutes are discriminatory).

298. *See supra* Part II.B.

299. *See supra* Part II.B.

300. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (explaining that legislation affecting minority groups might be more suspect because minorities are less likely to be represented in the political process).

legalize those criminal activities altogether.[301] This mirrors silencing individuals' votes because they might vote for a particular party or platform. It is the underlying fear of the way that people will vote and the desire to silence these votes because of that fear that is problematic and inconsistent with the Constitution.

B. Criticism of the Distrust-Based Rationale

The concern that felons will vote in an unfavorable way has been referenced in U.S. Supreme Court opinions and has been expressed by state and federal legislators.[302] For example, when faced with House Bill 906 during the Civil Participation and Rehabilitation Act of 1999—legislation that would have given ex-felons the right to vote in federal elections—legislators voiced concerns that felons would vote in a problematic way.[303] Todd Gaziano, a member of the Heritage Foundation, feared that felons' interests conflicted with the interests of law-abiding citizens.[304] Even the President of the Center for Equal Opportunity, an organization that strives to obtain equality, agreed with this rationale and has characterized felons as untrustworthy, disloyal, and incapable of voting in a way that mirrors the goals of the United States.[305]

This rationale based on fear of felons' viewpoints is both unsupported by and inconsistent with constitutional principles. States enforcing this rationale either believe that: (1) felons will vote to "make legal those illegal acts they wish to commit, or have been convicted of committing"[306] or that (2) felons do not have a genuine interest in the community.[307] The first belief that felons will try to

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301. Green v. Bd. of Elections of New York, 380 F.2d 445, 451 (2d Cir. 1967); *see also infra* Part IV.B (describing fear as a rationale cited for disenfranchising felons and discussing two theories that legislatures cite to support their apprehension with allowing felons to vote).

302. *See* discussion *infra* Part IV.B.

303. Bennett, *supra* note 7, at ¶ 2 n.4 (citing Civil Participation and Rehabilitation Act of 1999, *supra* note 98).

304. *See id.* at ¶ 21 n.37 (citing *Civil Participation and Rehabilitation Act*, *supra* note 98 (testimony of Todd F. Gaziano)).

305. *Id.* at ¶ 21 (citing *Civil Participation and Rehabilitation Act*, *supra* note 98, at 1335 (testimony of Roger Clegg)).

306. *See, e.g.*, *id.* at ¶ 4 (citing Jennifer Peter & Holly A. Heyser, *Minority Lawmakers Unveil Several Reform Bills*, THE VIRGINIAN-PILOT, Feb. 2, 2000, at B4) (explaining that a Virginia state senator believed that felons do not alter their judgments after spending time in jail and might therefore vote with the same judgments that caused them to commit their respective crimes); *see also* Miller, *supra* note 94, at 36.

307. *See, e.g.*, Angela Behrens, *Voting-Not Quite A Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 242 (2004)

vote to make illegal acts legal is unsupported.[308] One study demonstrates that incarcerated individuals vote comparably to and share political concerns with other American citizens.[309] Many prisoners understand the wrongfulness of their prior conduct and support continued punishment for comparable crimes.[310] In fact, studies indicate that "[p]eople convicted of crime[s] . . . are far more likely to endorse the laws they've broken—to 'accept them as desirable guides for life' than to join together and lobby for abolition of the criminal code."[311] Even if "convicts decide[d] to support candidates who advocate a more lenient approach to criminal justice, such candidates still have to garner enough support among the general population in order to prevail, as convicts represent a relatively small percentage of the eligible voting population."[312] This assumes that there is a candidate advocating a more lenient approach to the criminal justice system.

The generalization that all felons will vote in a certain unfavorable way because they lack a substantial interest in the community suggests that all felons "share a common political viewpoint."[313] This assumption overlooks the fact that not all felons will vote in the same way.[314] In fact, these stereotypical classifications are often not reflective of individuals' true political preferences.[315] For example, although most people believe that prisoners will vote liberally, studies have demonstrated that many prisoners vote conservatively or would vote in this way if given the opportunity to vote.[316]

(citing Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001)) (concluding that felons can no longer "be trusted to vote responsibly or to promote the interests of the state").

308. Ewald, *supra* note 27, at 125 (citing Gezari, *supra* note 27, at 1A).

309. *Id.*

310. *Id.* (citing CASPER, *supra* note 27); *see also id.* at 126 (quoting GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 121 (Francis Lieber trans., 1964) (1833)) (explaining after touring the prisons that, "[t]here [was] a spirit of obedience to the law, so generally diffused in the United States . . . even in the prisons").

311. *Id.* at 125–26.

312. Reuven Ziegler, *Legal Outlier, Again?: U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 206 (2011).

313. *Miller*, *supra* note 94, at 36.

314. *See Ewald*, *supra* note 27, at 125 (discussing the varying political affiliations of prisoners and the improbability of felons voting a specific way on a single issue).

315. *Id.*

316. *Id.*

Second, and more importantly, even if society truly fears that felons have the capacity to overwhelm the voting process, "that fear does not justify the practice of felon disenfranchisement because denying citizens the right to vote in order to prevent them from voting for certain candidates is repugnant to the Constitution."[317] Disenfranchised felons have comparable interests to non-felons in obtaining the right to vote and participating in the democratic process.[318] Because felons' lives are deeply impacted by governmental decisions, felons have an interest in voting for candidates who will either change or maintain these policies.[319] Accordingly, this substantial interest should not be impeded just because felons might vote differently. Such a rationale is misguided because voting inherently involves the expression of "biases, loyalties, commitments, and personal values."[320] It is because individuals want to express their personal opinions that the right to vote is extremely coveted.[321]

Denying felons the right to vote because they may not vote "responsibly" or in a way that promotes state interests is analogous to denying felons the right to vote because they might vote for a particular candidate. Fear that felons might vote for unpopular ideas is not a proper basis for withholding their right to vote. The First Amendment was created, in part, to have the opposite effect—namely, to prevent the silencing of unpopular speech.[322] The United States' system of "political liberty does not deprive people of the vote because incumbents fear how people will vote."[323] The right to vote should not be limited to people who "vote right."[324] Because

317. Portugal, *supra* note 103, at 1319–20.

318. *See* Ewald, *supra*, note 27, at 132 n.93.

319. Richardson v. Ramirez, 418 U.S. 24, 78–79 (1974) (Marshall, J., dissenting) (quoting Memorandum of the Secretary of State of California in Opposition to Certiorari, Class of Cnty., Clerks and Registrars of Voters of Cal. v. Ramirez, 418 U.S. 904 (1974) (No. 73-324)).

320. Symposium, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1906 (1999); *see* Miller, *supra* note 94, at 35–36.

321. Eisenberg, *supra* note 119, at 554 (describing the right to vote as "the most basic form of political expression").

322. Donnelly, *supra* note 22, at 329.

323. Ewald, *supra* note 27, at 131 (quoting Stephen Holmes & Cass R. Sunstein, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 105 (1999)).

324. R. Gregory Jerald, Comment, *Modern Day Discrimination or a Valid Exercise of States' Rights?: The Circuits Split as to Whether the Federal Voting Rights Act Applies to State Felon Disenfranchisement Statutes*, 7 FLA. COASTAL L. REV. 141, 179 (2005) (quoting FELLNER & MAUER, *supra* note 52, at 15–16).

numerous U.S. Supreme Court cases have recognized the flaws with this distrust-based rationale when cited to support other voting regulations,[325] courts should similarly recognize that this rationale is flawed when cited to support felon disenfranchisement.

C. "We Do Not Trust Felons": A Rationale Inconsistent with the Values and Principles of the First Amendment

This part discusses voting rights precedent where courts abandoned distrust-based rationales as unconstitutional. It demonstrates that courts and legal scholars have recognized the First Amendment implications of such a rationale and suggests that this rationale is insufficient to justify an extreme infringement on felons' voting rights.

1. A Departure from the Distrust-Based Rationale in Other Voting Rights Cases

The fact that courts have rejected distrust of individuals as a basis for denying voting rights suggests that this rationale must be disregarded in felon disenfranchisement cases as well. In *Carrington v. Rash*,[326] a Texas law prevented an active member of the Armed Forces who "move[d] his home to Texas during the course of his military duty from ever voting in any election in that State."[327] The State feared that the concentration of military votes in one area would influence the majority vote in an unfavorable way.[328] Additionally, the State feared that military personnel did not share the same state interests as other citizens because of the "transient nature of service in the Armed Forces."[329] The Court held that it was "constitutionally impermissible" for states to "fenc[e] out from the franchise a sector of the population because of the way they may vote."[330] Such a rationale was deemed inconsistent with the fundamental notion of a democracy.[331]

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325. *See, e.g.*, Carrington v. Rash, 380 U.S. 89, 93–94 (1965) (striking down a voting restriction because it prevented individuals from voting on the basis that they may have voted in a different or unfavorable way).

326. 380 U.S. 89 (1965).

327. *Id.* at 89 (citing TEX. CONST. art. VI, § 2).

328. *Id.* at 93.

329. *Id.* at 94.

330. *Id.*

331. *Id.*

Similarly, in *Evans v. Cornman*,[332] the Court held that a restriction preventing voting by individuals who lived on the grounds of the National Institutes of Health—a federal enclave within the Montgomery County, Maryland—was unconstitutional.[333] The State feared that these individuals lacked a substantial interest regarding electoral decisions.[334] The Court explained that denying individuals the right to vote because of a lack of a "substantial interest" might be another way of expressing that a state is denying individuals the right to vote because they have a "different interest."[335]

The Court in *Kramer v. Union Free School District*[336]—where a New York statute implemented restrictions on eligible voters in an attempt to "limit the franchise to those 'primarily interested' in school affairs"—reached a similar conclusion.[337] Although not expressly stated in the opinion, the Court essentially equated denying the right to vote to individuals who were not "primarily interested" with denying the right to vote to individuals who had different interests.[338] Applying strict scrutiny, the Court struck down the restrictions as unconstitutional because such restrictions severely burdened appellant's right to vote.[339] The Court held that the state's rationale was insufficient to justify the burdensome restriction.[340]

Again, in *Dunn v. Blumstein*,[341] the Court held that a different voting restriction, a durational residence requirement for Tennessee voters, was unconstitutional.[342] Tennessee explained that one of its interests in implementing this restriction was to garner a constituency that would vote intelligibly and with a "common interest in all

332. 398 U.S. 419 (1970).
333. *Id.* at 419–20.
334. *See id.* at 422–23.
335. *Id.* at 423.
336. 395 U.S. 621 (1969).
337. *Id.* at 631.
338. Although the Court in *Kramer* focused more closely on the tailoring of the restriction to the asserted state interest than on whether this interest was compelling, the Court also suggested that the interest was not compelling by explaining that the appellees failed to offer much justification for the burdensome restrictions. *Id.* at 633. While the Court did not definitively decide whether the state's interest was compelling, *id.* at 632 n.14, the Court's holding in *Evans*, decided one year after *Kramer*, suggests that this interest is not compelling, *Evans*, 398 U.S. at 419.
339. *Kramer*, 395 U.S. at 632.
340. *Id.* at 632–33.
341. 405 U.S. 330 (1972).
342. *Id.* at 359–60.

matters pertaining to (the community's) government."[343] Just as the Court in *Evans* held that Maryland's asserted fear that individuals did not have a "substantial interest" was actually a fear of differing political interests,[344] the Court here concluded that Tennessee's fear that certain individuals lacked "common interests" was likewise a fear of differing political interests.[345] Since "'[d]ifferences of opinion' may not be the basis for excluding any group or person from the franchise,"[346] the Court held that the restriction was unconstitutional.[347]

Felon disenfranchisement cases have also critiqued the recurring state and federal government rationale that certain individuals cannot be trusted to vote.[348] Despite the holding in *Carrington* and other cases that have abided by its holding, *Green v. Board of Elections of New York*[349] cited this same rationale two years later to support New York's felon disenfranchisement statutes.[350] While the majority of justices in *Richardson v. Ramirez*[351] partially relied on *Green* to uphold a California felon disenfranchisement statute,[352] Justice Marshall voiced opposition to the use of a rationale based on fear and distrust.[353] He recognized that the fear that felons might vote unfavorably in *Green*, just like the fear that individuals might lack a "substantial interest" in *Evans*, was just another way of saying that felons might have differing political opinions.[354] In a vigorous dissent, Justice Marshall explained that this rationale did not support disenfranchising ex-felons who had already served their sentences and parole.[355] Citing *Carrington*, *Evans*, and *Dunn*, Justice Marshall concluded that a potential for differing opinions was not an adequate basis for disenfranchisement and that the use of such a rationale was undemocratic.[356] He explained that this rationale could have also

343. *Id.* at 354.
344. Evans v. Cornman, 398 U.S 419, 423 (1970).
345. *Dunn*, 405 U.S. at 355 (quoting *Evans*, 398 U.S. at 423).
346. *Id.* (quoting Cipriano v. City of Houma, 395 U.S. 701, 705–06 (1969)).
347. *Id.* at 360.
348. *See* Richardson v. Ramirez, 418 U.S. 24, 82 (1974) (Marshall, J., dissenting).
349. 380 F.2d 445 (2d Cir. 1967).
350. *Id.* at 451.
351. 418 U.S. 24 (1974).
352. *See id.* at 53–54.
353. *Id.* at 82–83 (Marshall, J., dissenting).
354. *Id.* at 81–82.
355. *Id.* at 82–83.
356. *Id.* at 81–82.

been cited to disenfranchise marijuana smokers or individuals that opposed the repeal of prohibition.[357] He believed that targeting a certain group and disenfranchising them because they may vote unfavorably did not constitute a legitimate government interest in a democratic society.[358]

Accordingly, precedent in other voting rights cases suggests a departure from the distrust-based rationale in the felon disenfranchisement context.

2. Application of First Amendment Principles to a Distrust-Based Rationale

While *Carrington*, *Evans*, *Kramer*, and *Dunn* based their outcomes on inconsistencies with certain constitutional provisions and democracy,[359] the Court did not explicitly mention the inconsistencies of the distrust-based rationale with the principles of the First Amendment. However, the First Amendment is inextricably intertwined with the notion of democracy that the Court in *Carrington* held was jeopardized when states disenfranchised individuals because they may have voted differently.[360] *Carrington* and its progeny suggest that it is undemocratic for states to cite fear of the way that individuals might vote as a rationale for restricting voting rights.[361] The First Amendment supports the same principle. It seeks to protect individuals' freedom to voice unpopular opinions, not to restrict these opinions just because they are unpopular.[362]

Further, other federal and state courts have held that restrictions based on the fear that certain individuals will vote differently are inconsistent with First Amendment principles.[363] For example, in *Sloane v. Smith*,[364] the court discussed a stringent Pennsylvania voting registration procedure allowing applicants to vote only if they could produce either a "Pennsylvania driver's license containing a

357. *Id.* at 82–83.

358. *Id.* at 78–83.

359. *See, e.g.*, Carrington v. Rash, 380 U.S. 89, 94 (1965).

360. *Carrington* and its progeny sought to protect the right to express unpopular views, deeming the obliteration of such rights undemocratic. *Id.* Similarly, the First Amendment seeks to protect the right to express unpopular views, deeming the obliteration of such rights inconsistent with the First Amendment. Donnelly, *supra* note 22, at 329.

361. *Carrington*, 380 U.S. at 94.

362. Donnelly, *supra* note 22, at 329.

363. *See, e.g.*, Sloane v. Smith, 351 F. Supp. 1299, 1304 (M.D. Pa. 1972).

364. 351 F. Supp. 1299 (M.D. Pa. 1972).

Centre County address" or two or more credit cards, bank accounts, leases, or other "indicia of business or commercial activity within the County."[365] Because the court concluded that the only possible rationale of such stringent requirements was to "discourag[e] and depriv[e] the students at Pennsylvania State University from exercising their right to vote,"[366] it held that the requirements had a "chilling effect on First Amendment rights."[367] This fear of students overwhelming the political process[368] likely stemmed from the county's belief that the students would vote in a different and potentially "unfavorable" way. The court recognized that silencing individuals' votes because of differences of opinions was inconsistent with First Amendment principles.[369]

Similarly, in a law review article briefly discussing the rationale for felon disenfranchisement as analyzed by the court in *Green*, the author explained that "Judge Friendly surely understood the First Amendment effects of basing his opinion on the rationale that certain political parties could be excluded from the political process."[370] Judge Friendly concluded that felon disenfranchisement was appropriate for Green because Green was involved in a conspiracy to "overthrow" the government.[371] He argued that "felon disenfranchisement was necessary to prohibit organized crime from participating in the election of New York district attorneys and judges empowered with hearing the felons' cases."[372] But even Judge

365. *Id.* at 1301.
366. *Id.* at 1304–05.
367. *Id.* at 1305.
368. *Id.* at 1304–05.
369. *See id.* at 1305.
370. Portugal, *supra* note 103, at 1320.
371. Green v. Bd. of Elections of New York, 380 F.2d 445, 447 (2d Cir. 1967).
372. Portugal, *supra* note 103, at 1320. Judge Friendly seems to be disguising the state's true intention, which was to prevent a member of organized crime from voting in a way in which the state deemed unfavorable. *See Green*, 380 F.2d at 447. Despite the state's disguised intentions, this seems contrary to the principles elaborated in *Carrington v. Rash*, 380 U.S. 89, 94 (1965). The state is attempting to silence Green's vote based on the fear that Green might vote in a way to facilitate organized crime, *Green*, 380 F.2d at 447, just as Texas was trying to silence individuals' votes based on a fear that they might vote in an unfavorable way, *Carrington*, 380 U.S. at 93. Perhaps Judge Friendly purposely wrote the opinion in a way that would not clearly abrogate the intentions of the First Amendment. As Portugal mentioned, it is possible that Judge Friendly did not explicitly discuss the state's intention to silence particular political opinions because he understood the effect that such a rationale would have on the First Amendment. Portugal, *supra* note 103, at 1320. This is especially convincing because this case was decided just two years after *Carrington*. It is also possible that Judge Friendly thought felon disenfranchisement was

Green did not suggest that individuals should be denied their right to vote purely because they might vote differently or for a particular party.[373] The analysis of First Amendment implications of the distrust-based rationale, while not yet widely accepted, is indicative of why this rationale is so problematic and should be critically challenged.

3. No Compelling Interest to Justify the Severe Burden of Felon Disenfranchisement

The rationale cited for disenfranchising felons—that state and federal governments do not trust felons to vote—is not only inconsistent with the First Amendment and democracy, but is also not a compelling interest because of such problematic inconsistencies. The Court has repeatedly held that where a "challenged statute grants the right to vote to some citizens and denies the franchise to others, [it] 'must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'"[374] Additionally, because the voting restrictions directly and substantially interfere with fundamental First Amendment rights, courts should apply a strict scrutiny analysis to determine whether the state has a compelling interest to justify this severe burden.[375]

Even if these restrictions were absolutely necessary to accomplish the goal of silencing individuals' opinions that might cause them to vote differently, these restrictions do not promote any legitimate state interest, let alone a compelling state interest. It seems absurd to think that judges, when formulating the strict scrutiny test, intended for a rationale that is inconsistent with the principles of the First Amendment and democracy to qualify as a compelling state interest. This interest should not even be considered a permissible or legitimate state interest[376] because it undermines critical First

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appropriate to prevent the organized crime of voting fraud, but not necessarily an appropriate punishment for all crimes. *Green*, 380 F.2d at 447.

373. Portugal, *supra* note 103, at 1320 (mentioning that Judge Friendly would have understood the First Amendment implications of making such an argument).

374. Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (quoting Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969)).

375. *See supra* Part III.F.

376. Rational basis review, the least stringent level of review, only requires a rational relationship to a legitimate state interest. City of New Orleans v. Duke, 427 U.S. 297, 304 (1976). This is an extremely deferential standard. *Id.* However, as discussed in Rehnquist's dissenting opinion in *Zablocki*, the interest must be "constitutionally permissible." Zablocki v. Redhail, 434

Amendment and democratic values. Accordingly, when courts are confronted with only this rationale, the severe infringement that felon disenfranchisement places on felons' right to vote is not narrowly tailored to a compelling governmental interest. This is largely because the desire to prevent certain individuals from voting is not a compelling interest. Even if it were a compelling interest, felon disenfranchisement statutes would not be narrowly tailored to this interest because the statutes are oftentimes extremely over- and under-inclusive.[377]

V. PROPOSAL: AN ANALYSIS OF MAINE AND VERMONT'S APPROACH DEMONSTRATES THE CONSTITUTIONAL PROBLEMS WITH A DISTRUST-BASED RATIONALE

Because Maine and Vermont do not disenfranchise felons unless conditioned on a prior voting offense, these states have implicitly rejected the constitutionally infirm rationale adopted by other states—that felons are untrustworthy and might vote in an unfavorable way.[378] Maine's lack of a felon disenfranchisement statute and Vermont's limitation of felon disenfranchisement to individuals who have committed election-related offenses[379] suggest that there is no rationale to support the severe punishment of felon disenfranchisement. Maine and Vermont's lack of blanket felon disenfranchisement statutes also indirectly supports the proposition that felon disenfranchisement and the states' rationale that felons cannot be trusted to vote are inconsistent with the principles of the First Amendment.[380]

As discussed in Part II.C, in 1858, 1859, and 1860, James G. Blaine, a House of Representatives member in Maine, struggled to

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U.S. 374, 407 (1978) (Rehnquist, J., dissenting). An interest contrary to First Amendment principles cannot even meet rational basis review because it is not "constitutionally permissible." *Id.*

377. *See supra* Part IV.B.

378. *See* ME. CONST. art. II, § 1; VT. STAT. ANN. tit. 28, § 807(a) (2008).

379. Tit. 28, § 807(a).

380. ME. CONST. art. II, § 1; tit. 28, § 807(a). Maine and Vermont did not clearly reject felon disenfranchisement statutes because the rationale for implementing such statutes was inconsistent with the First Amendment. *See* ME. CONST. art. II, § 1; tit. 28, § 807(a). However, by eliminating the statutes, Maine and Vermont implicitly recognized some problems with blanket disenfranchisement statutes and the rationales that other states cite to support such statutes. ME. CONST. art. II, § 1; tit. 28, § 807(a). Because both states rejected blanket felon disenfranchisement statutes, they implicitly discarded all potential rationales as insufficient justifications for the severe burden on felons' rights. ME. CONST. art. II, § 1; tit. 28, § 807(a).

find a rationale to support felon disenfranchisement beyond what he believed was an attempt to deny individuals in the South representation in the election.[381] It was during this period that poll taxes, literacy tests, and other restrictions were implemented because of the concern that African Americans' interests would align with Republican interests.[382] Accordingly, the goal that Blaine was citing was a goal to silence the voters who would vote in an unfavorable way.[383] By recognizing that this rationale was problematic and declining to implement a voting restriction based on such a rationale, Blaine was not expressly asserting that this rationale was inconsistent with First Amendment principles.[384] However, by disposing of this rationale that undermines First Amendment values, Blaine and other representatives of Maine rejected the necessity of felon disenfranchisement statutes, suggesting that the rationale was insufficient to support the implementation of felon disenfranchisement statutes.[385]

Additionally, Vermont replaced its original felon disenfranchisement statute with a statute disenfranchising only those who had committed election-related offenses, because the legislature believed that its original statute was of "vague and uncertain meaning."[386] In doing so, the Vermont legislature implicitly rejected the rationale that it does not trust felons with their right to vote.[387] Presumably, the legislature thought that only those individuals who had previously committed voter fraud threatened the integrity of the election process.[388] Therefore, the legislature abstained from broadly disenfranchising people that it felt might vote in an unfavorable

381. *See* Katherine Shaw, *Invoking the Penalty: How Florida's Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality, in Congressional Representation, and What to Do About It*, 100 NW. U. L. REV. 1439, 1464 (2006) (quoting Zuckerman, *supra* note 283, at 95).

382. Briffault, *supra* note 59, at 1515–16.

383. Blaine believed that the goal of felon disenfranchisement was to decrease representation in the South. *See* Shaw, *supra* note 381, at 1464 (citing Zuckerman, *supra* note 283, at 95). This is analogous to decreasing representation for fear that individuals in the south might vote in a particular way.

384. Blaine asserted that there was no rationale for disenfranchisement instead of explicitly considering and rejecting the rationale based on fear because it conflicted with First Amendment principles. *See id.*

385. *See id.*

386. *See* Ewald, *supra* note 31, at 1063 (quoting Hancock, *supra* note 44, at 36).

387. *See id.*

388. *Id.* (citing Hancock, *supra* note 44, at 36).

way.[389] The fact that Vermont once had such a broad felon disenfranchisement statute and now has an extremely limited statute indicates that the legislature recognized that the prior statute lacked any sound rationale.[390] Both Maine and Vermont likely recognized the constitutional problems with disenfranchising felons because they might vote unfavorably, and they still do—recent attempts to pass felon disenfranchisement legislation have failed.[391] Ultimately, Maine and Vermont recognize that the current rationale supporting other states' felon disenfranchisement statutes is constitutionally infirm and insufficient to justify a severe intrusion on felons' rights to vote.

While Maine and Vermont are only two states and represent a minority approach to felon disenfranchisement, they demonstrate that obliterating, or at least narrowing, felon disenfranchisement statutes, while somewhat far-fetched, is still attainable.[392] Until then, courts should take small steps in recognizing the constitutional infirmities with felon disenfranchisement and the rationale cited for felon disenfranchisement in order to challenge states to really consider whether there truly is a reason to disenfranchise felons.

VI. CONCLUSION: NO RATIONALE SHOULD MEAN NO DISENFRANCHISEMENT

Felon disenfranchisement is a severe intrusion on felons' freedom of speech and expression. Yet, state and federal governments have failed to cite legitimate and compelling justifications in order to overcome the constitutional infirmities of the states' rationale that felons cannot be trusted to vote.[393] Because state and federal governments have not stated a proper rationale, they have not established a proper basis for disenfranchising felons.[394]

Felons at least deserve a constitutionally sound rationale for the severe restriction imposed on their right to vote. Because the effect

389. VT. STAT. ANN. tit. 28, § 807(a) (2008).

390. *See* Ewald, *supra* note 31, at 1063.

391. *One Person, No Vote*, *supra* note 41, at 1942 n.21 (citing S.P. 311, 120th Leg., 1st Reg. Sess. (Me. 2001), *available at* http://janus.state.me.us/legis/bills; H. 286, 2001–2002 Leg. (Vt. 2001), *available at* http://www.leg.state.vt.us/docs/2002/bills/intro/H-286.htm).

392. *Felony Disenfranchisement Laws*, *supra* note 4.

393. *See* Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENT'G REP. 248, 248 (2000).

394. *Id.*

of felon disenfranchisement is to deny a discrete and insular minority the ability to participate in the political process, the rationale supporting this restriction should be legitimate and well supported—not unclear, impermissible, and essentially nonexistent.[395] This is especially true because when states disenfranchise felons, they are depriving two discrete and insular groups of their right to vote: felons (who are a minority group unto themselves)[396] and racial minorities (who comprise a significant percentage of disenfranchised felons).[397] These discrete and insular minorities are unable to rely on the political processes to fix their problems.[398] Courts should afford special protection to these groups of individuals, rather than prevent them from expressing what might be considered an unfavorable viewpoint through their votes.[399]

Ultimately states and courts have two choices: (1) reconsider felon disenfranchisement statutes and question whether the burden that states are placing on felons is well-justified when considering state interests, or (2) determine whether there is a constitutionally sound and well-supported rationale that can take the place of the distrust-based rationale, which is inconsistent with constitutional principles.

When courts fail to recognize that felon disenfranchisement and the rationale cited for felon disenfranchisement are completely inconsistent with First Amendment values and principles and continue to disenfranchise felons, they are not affording these suspect groups the protection that they deserve. This backwards step away from universal suffrage is extremely problematic and hints at the historical trend of denying different groups of individuals their right to vote because state legislatures feared the way in which these individuals would vote. Accordingly, "the only thing we have to fear is fear itself."[400] Legislatures, courts, and voters should not be concerned with the way that voters might vote, but instead should be concerned with the fact that 5.85 million Americans were unable to

395. Note, *Voter and Officeholder Qualifications*, 119 HARV. L. REV. 2230, 2250 (2006).

396. *See* Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 726 (2006).

397. *Felony Disenfranchisement Laws*, *supra* note 4.

398. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

399. *See id.*

400. Roosevelt, *supra* note 1, at 1.

vote in November 2012 because of a rationale based on fear—a rationale inconsistent with the First Amendment.