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Janai S. Nelson

THE FIRST AMENDMENT, EQUAL PROTECTION, AND FELON DISENFRANCHISEMENT: A NEW VIEWPOINT

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Abstract

This Article engages the equality principles of the First Amendment and the Equal Protection Clause to reconsider the constitutionality of one of the last and most entrenched barriers to universal suffrage—felon disenfranchisement. A deeply racialized problem, felon disenfranchisement is additionally and independently a legislative judgment as to which citizen's ideas are worthy of inclusion in the electorate. Relying on a series of cases involving state interests in protecting the ballot and promoting its intelligent use, this Article demonstrates that felon disenfranchisement is open to attack under the Supreme Court's fundamental rights jurisprudence when it is motivated by a desire to limit political expression based on its perceived content; in other words, when felon disenfranchisement is motivated by viewpoint discrimination.

The justifications for felon disenfranchisement laws reflect a misguided perception of how a voter's identity, status, or behavior will affect how he votes. This Article confronts these justifications and examines the linkages between the right to vote and First Amendment protections of freedom of speech. Recognizing the difficulty in proving legislative motive in electoral decisions, this Article draws upon the underexplored theory of First Amendment Equal Protection, as well as the Court's jurisprudence in the area of partisan gerrymandering to formulate the claim of viewpoint discrimination and demonstrate increasing judicial intolerance for legislative tampering in the electoral process with suspect motives. Through its viewpoint discrimination analysis, this Article also lays bare the multidimensional impact of felon disenfranchisement in terms of race, class, and partisanship, thereby highlighting the particular segments of society whose political participation and freedom of expression are most directly infringed by

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* Associate Professor and Associate Director of the Ronald H. Brown Center for Civil Rights and Economic Development, St. John's University School of Law. I thank Michelle Adams, John Barrett, Leonard Baynes, Guy-Uriel Charles, Elaine Chiu, Michael Dorf, Rosemary Salomone, Catherine Ross, Daniel P. Tokaji, and Cheryl Wade for their helpful comments on earlier drafts, as well as the organizers of the Challenges to Democracy in Divided Societies Roundtable at Duke University School of Law, Class Crit IV at American University School of Law, and the 5th Annual Critical Race Studies Symposium at UCLA School of Law. I also thank the faculties of Pace University School of Law and St. John's University School of Law for allowing me to present the ideas in this Article at various stages of development. Finally, a special thanks to my research assistants Aaron Barham and Jacob Binder.

felon disenfranchisement—and, perhaps, the underlying motivations for the practice.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . ."—Justice Robert H. Jackson[1]

INTRODUCTION

Along the arc of right to vote challenges, felon disenfranchisement has proved an especially intractable form of vote denial. Despite robust academic and popular skepticism concerning the constitutionality of felon disenfranchisement laws,[2] they persistently evade successful legal challenge. This is, in part, because courts routinely interpret the legal precedent establishing the constitutionality of felon disenfranchisement broadly to the exclusion of other claims. In *Richardson v. Ramirez*,[3] the Supreme Court held that Section 2 of the Fourteenth Amendment implicitly authorizes states to deny voting rights based on a felony conviction.[4] Courts have generally relied on *Ramirez* to bar equal protection challenges to felon disenfranchisement's disparate impact and its unequal treatment of citizens with felony convictions and other citizens.[5]

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1. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (majority opinion).

2. *See, e.g.*, JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 20–40 (2006); Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 572 (2003); *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT (2011), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Aug2012.pdf. More recent scholarship in this area examines the United States' disenfranchisement laws in comparative and international contexts. *See, e.g.*, Janai S. Nelson, *Fair Measure of the Right to Vote: A Comparative Perspective on Voting Rights Enforcement in a Maturing Democracy*, 18 CARDOZO J. INT'L LAW & COMP. L. 425, 448–53 (2010); Robin L. Nunn, *Lock Them Up and Throw Away the Vote*, 5 CHI. J. INT'L L. 763, 765–781 (2005); Reuven (Ruvi) Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 210–38 (2011).

3. 418 U.S. 24 (1974).

4. *Id.* at 56.

5. The validity of this holding has been roundly contested in dissenting opinions, including the dissenting opinions in *Ramirez* itself. *See id.* at 72–86 (Marshall, J., dissenting); *see also* Hayden v. Pataki, 449 F.3d 305, 359 (2d Cir. 2006) (Parker, J., dissenting) ("[I]t is clear that the scope of Congress's enforcement authority is at its zenith when protecting against

However, two important developments since *Ramirez* challenge the seemingly unfettered discretion that legislatures exercise to enact and maintain felon disenfranchisement statutes. The first development is a subtle doctrinal shift that has linked the First and Fourteenth Amendments in the realm of political participation outside the areas of campaign finance and ballot access.[6] First Amendment principles have increasingly surfaced in voting qualification and political restructuring cases since the Supreme Court decided the one person, one vote cases of the 1960s. More recently, the Court's partisan gerrymandering opinions—majority, concurring, and dissenting—have acknowledged the First Amendment's relevance to contemplating fairness and equality in the electoral process.[7] The First Amendment, although not applied directly, seems to be influencing the scrutiny in such cases (some more than others), resulting in heightened constitutional protection in the electoral arena.[8]

The second development since *Ramirez* is one that predates the Court's partisan gerrymandering claims and directly limits *Ramirez*. Although *Ramirez* held that state felon disenfranchisement laws do not violate the Equal Protection Clause per se,[9] in *Hunter v. Underwood*,[10]

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discrimination based on suspect classifications (such as race), or when protecting fundamental rights (such as voting."); Johnson v. Governor of Fla., 405 F.3d 1214, 1240–41 (11th Cir. 2005) (en banc) (Wilson, J., concurring in part and dissenting in part) (arguing that states have no affirmative grant of power to disenfranchise criminals under Section 2 of the Fourteenth Amendment); *id.* at 1244–45, 1247, 1251 (Barkett, J., dissenting) (dissenting from the summary judgment grant on both the Equal Protection and the Voting Rights Act claims). Challenges to felon disenfranchisement laws brought under the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)), have also proved unsuccessful.

6. *See, e.g.*, John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1120 (2005) (noting the Court's "shift in emphasis" in modern speech cases toward content-based discrimination and an antidiscrimination principle away from the inherent value of speech); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414, 428–32 (1996); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 768, 776 (2001) (arguing that First Amendment cases should be decided exclusively on the question of motive).

7. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 461–62 (2006) (Stevens, J., concurring in part).

8. This is less the case in the area of partisan gerrymandering than campaign finance and ballot access. *See generally* Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 87 (2010) ("In the campaign context . . . the very point of many contributions is to provide a 'gift[] from citizens who simply wish to express their ideological commitment to a candidate's causes . . . ' [a]nd the First Amendment grants individuals the right to advance and support their political views in this way." (quoting BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 7 (2002))).

9. *Ramirez*, 418 U.S. at 56.

the Court held that the Equal Protection Clause prohibits states from disenfranchising citizens with felony convictions if the disenfranchisement is motivated by race.[11] Put another way, if the motive to deny the right to vote is based on race, the regulation violates the Equal Protection Clause despite *Ramirez*'s sanction of felon disenfranchisement. This Article applies the *Hunter* rationale prohibiting race discrimination to a theory of viewpoint discrimination in the enactment and maintenance of felon disenfranchisement laws. The principal claim is straightforward: If a state's motive or interest in denying voting rights to citizens with felony convictions is based on how those persons might vote, then the regulation denies those citizens equal protection of the laws and fails strict scrutiny. In short, an impermissible motive that constrains a fundamental right is constitutionally suspect.

But how can the Equal Protection Clause apply to viewpoint discrimination, which falls squarely and traditionally within the domain of the First Amendment? This Article advances the under-explored theory of "First Amendment Equal Protection"[12] to address the equality concerns in the electoral sphere that engage both the First and Fourteenth Amendments. First Amendment Equal Protection is a unique species of equal protection that is informed by First Amendment protections of free speech and expression in the political realm. By applying First Amendment principles, First Amendment Equal Protection fortifies the equal protection inquiry by (1) requiring clear government standards, (2) broadening justiciability of claims, (3) providing leniency toward facial challenges, and (4) increasing judicial fact-finding.[13] These four factors distinguish First Amendment Equal Protection from conventional equal protection and counteract, in part, the Court's disregard of disparate impact.

This Article proceeds as follows. Part I lays the groundwork for the viewpoint discrimination claim against felon disenfranchisement laws. In addition to defining viewpoint discrimination, Part I analyzes the Court's jurisprudence in a series of cases concerning residency

10. 471 U.S. 222 (1985).

11. *See infra* note 178. In *Hunter v. Underwood*, the Court held that *Ramirez*'s permit to disenfranchise did not include disenfranchisement based on intentional racial discrimination. 471 U.S. at 233 ("[W]e are confident that [Section] 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination . . . which otherwise violates §[Section] 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* . . . suggests the contrary.").

12. Daniel P. Tokaji coined the phrase "First Amendment Equal Protection" in his article, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2410 (2003) [hereinafter Tokaji, *First Amendment Equal Protection*].

13. *Id.* at 2430.

requirements and other voting qualifications that reveal a judicial theory of viewpoint discrimination in voting regulations. It then examines the justifications for felon disenfranchisement that form the basis of a viewpoint discrimination claim, identifying both the perceived viewpoint that legislatures intend to exclude and the viewpoint that is ultimately excised from the electoral process. Part II introduces First Amendment Equal Protection as a viable theory in which to couch a viewpoint discrimination claim. In light of the lack of precedent applying the First Amendment directly to voting cases and the strength of the Equal Protection Clause in this area, First Amendment Equal Protection maximizes the equality protections for the right to vote through the combined force of both doctrines.

Part III considers three challenges to applying First Amendment Equal Protection to a viewpoint discrimination claim against felon disenfranchisement. First, it briefly explores the omission of First Amendment jurisprudence from election law and the question of whether voting is speech. Second, it recognizes the formidable impact of *Ramirez* in the Equal Protection context as a shield against challenges to felon disenfranchisement laws. Finally, using the Court's partisan-gerrymandering cases starting with *Vieth v. Jubilierer*, this Part unpacks the opinions to demonstrate that, as in excessively partisan redistricting, viewpoint discrimination in felon disenfranchisement poses a danger of excessive legislative manipulation of the political process. As evidenced in its political-gerrymandering jurisprudence, the Court is concerned about the boundaries of state influence in the electoral process. The concerns raised by felon disenfranchisement are not materially different.

The Article concludes that a viewpoint discrimination-based challenge to felon disenfranchisement laws would not necessarily lead to the undoing of these pervasive regulations. Rather, such a challenge reveals the unconstitutionality of certain justifications for these laws and, in some cases, may provide a sufficient basis for repealing state statutes that are based on these motives.

I. VIEWPOINT DISCRIMINATION AND VOTING

Despite the substantive overlap between freedom of expression and voting, the Court has been loath to treat voting as a right protected under the First Amendment. In *Harper v. Virginia Board of Elections*,[14] while deciding whether a poll tax was a constitutionally-permissible prerequisite to voting, the Court confronted whether the First Amendment applies to vote-denial claims.[15] The Court's opinion

14. 383 U.S. 663 (1966).

15. *Id.* at 664–65.

acknowledged petitioners' argument that the First Amendment implicitly guarantees a right to vote in state elections that may not be conditioned upon payment of a tax or fee.[16] However, the Court ultimately avoided deciding the matter on First Amendment grounds and instead relied on the Equal Protection Clause to strike down the practice.[17]

By evading the question of whether the First Amendment also applies to restrictions on voting, the *Harper* Court set a judicial course that limited vote denial claims to the Fourteenth Amendment—a course from which the Court has strayed very little. The Court's failure to either accept or reject a relationship between the First Amendment and the right to vote has resulted in a less than coherent application of the First Amendment in the electoral arena.[18] Nonetheless, First Amendment principles have continued to percolate within voting rights jurisprudence. Notably, concerns of viewpoint discrimination, although

16. *Id.* at 665 ("It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee.").

17. *Id.* ("We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."). For a compelling discussion of the associational interests and, particularly, how they relate to race and partisanship, see Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1239–60 (2003) (arguing that the First Amendment protects the right of voters of color to associate as voters of color where race and political identity are correlated).

18. *See, e.g.*, Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 39 (2004) (noting that "[g]errymandering was cubbyholed as an equal protection problem; campaign finance, as a First Amendment problem," creating "little sense of an organizing principle to 'the law of politics'"); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1819 (1999) (arguing "that First Amendment public discourse has drifted toward too high a level of abstraction and generality—a level that cannot make sense of the actual cases themselves"); Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2496 ("*Harper*'s avoidance of this question has hindered the recognition of the links between the First Amendment and the principle of equal participation. Had the Court addressed the question, it might have avoided the confusion evident in such cases over the proper relationship between First Amendment equality and equality in other areas of political participation ever since.").

Indeed, even in the initial development of campaign-finance and ballot-access cases where the First Amendment figures prominently, the Court was reluctant to acknowledge its application. *See* Burdick v. Takushi, 504 U.S. 428, 445 (1992) (Kennedy, J., dissenting) (agreeing with the majority's finding that a ban on write-in voting did not implicate the First Amendment right to expression because, "[a]s the majority points out, the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression"); *see also* Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 TENN. L. REV. 549, 550–51 (1985) (discussing the relevance of First Amendment principles to voting-rights controversies).

not labeled as such, have informed voting rights jurisprudence since the 1800s.[19] As explained more fully below, the viewpoint discrimination in these early cases involved voting qualifications based on a potential voter's suspected outlook in light of their presumed or actual beliefs.[20] Until relatively recently, restrictions that embodied such viewpoint discrimination were unchallenged.

A. *Defining Viewpoint Discrimination*

Viewpoint discrimination is widely considered the most pernicious incursion on First Amendment rights.[21] When Justice Robert Jackson announced the limits of government speech regulation in *West Virginia State Board of Education v. Barnette*,[22] he situated the concept of viewpoint discrimination at the apex of the hierarchy of constitutional protections. The Court has continued to advance this vision of the First Amendment by routinely castigating government regulations that "cast a pall of orthodoxy"[23] or are "aimed at the suppression of dangerous ideas."[24] Other concerns involve the potential distortion viewpoint-based restrictions can cause in the "marketplace of ideas" and their impact on the "thinking process of the community" for purposes of abetting democratic government.[25]

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19. *See* Murphy v. Ramsey, 114 U.S. 15, 35 (1885); *see also* Davis v. Beason, 133 U.S. 333, 346–48 (1890).

20. *Murphy*, 114 U.S at 46–47; *Davis*, 113 U.S. at 341, 346–47.

21. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994); Cox v. Louisiana, 379 U.S. 559, 581 (1965) (Black, J., concurring) ("[Viewpoint-based regulation is] censorship in a most odious form . . . ."); *see also* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 56 (2000) ("[V]iewpoint restrictions have never been upheld."); *id.* at 59 ("Nothing is more inconsistent with freedom of speech than for the government to use its awesome power to advance some views and suppress or disfavor others."); Fee, *supra* note 6, at 1104 ("Under current law, content-based speech regulations are highly disfavored and are presumptively unconstitutional."); Kagan, *supra* note 6, at 443–44 ("Content-based restrictions on speech—restrictions that by their terms limit expression on the basis of what is said—usually are subject to far more rigorous scrutiny.").

22. 319 U.S. 624, 625, 642 (1943) (invalidating a public school compulsory flag salute because it impermissibly "prescribe[d] what shall be orthodox" in the realm of politics, conscience, and ideas in violation of the First Amendment).

23. Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) (invalidating as vague and overbroad a New York law that mandated termination of public school and university teachers for any "treasonable or seditious utterance").

24. Speiser v. Randall, 357 U.S. 513, 519 (1958) (quoting Am. Commc'n Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

25. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948); *see also* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) ("There

The concept of viewpoint discrimination is not grounded in the text of the First Amendment itself. Rather, it was created by the Court as a tool for distinguishing those regulations of speech or expression that seek to advance "legitimate regulatory goal[s]"[26] from those that seek "to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."[27] Although the Court has never delimited precisely what constitutes viewpoint discrimination,[28] certain basic principles pervade the common understanding of the term. At its core, the viewpoint discrimination test reflects the broad concept that government cannot regulate speech based on its content,[29] and regulations must be neutral as to both viewpoint and subject matter.[30] Viewpoint neutrality forbids the government from basing regulations on the ideology of the message or by extension, the

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is an 'equality of status in the field of ideas' . . . ." (citing MEIKLEJOHN, *supra*)). There is also an element of self-determination coupled with broader collective democracy ideals that undergirds the Court's intolerance of viewpoint discrimination. In writing for the Court in *Turner*, Justice Anthony Kennedy explained:

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.

Turner, 512 U.S. at 641 (citations omitted).

26. *Turner*, 512 U.S. at 641.

27. *Id.*; *see* Murphy v. Ramsey, 114 U.S. 15, 47 (1885); *see also* Davis v. Beason, 133 U.S. 333, 348 (1890).

28. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 683 (1998) (concluding that preventing an independent candidate from participating in a debate is facially neutral); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 590 (1998) (finding that a federal law that allowed the National Endowment for the Arts to consider "decency" and "respect for values" was viewpoint-neutral); Chemerinsky, *supra* note 21, at 58.

29. *See Mosley*, 408 U.S. at 95 ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

30. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983); Carey v. Brown, 447 U.S. 455, 463 (1980); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980). Subject-matter neutrality refers to the unconstitutionality of the government regulating speech based on the topic of the speech. *See Consol. Edison*, 447 U.S. at 537. "Content" and "viewpoint" are often used interchangeably by courts, thereby muddling the doctrinal development of these distinct claims. *See, e.g.*, Rosenberger v. Rector, 515 U.S. 819, 829–31 (1995) (noting the imprecise "distinction between, on the one hand, content discrimination, which may be permissible . . . and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations").

messenger.[31]

The consensus among the ideologies underlying the prohibition of viewpoint discrimination is the fear of government regulation for impermissible ends.[32] Indeed, the overarching concern with viewpoint

31. *See, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (asking whether a law was "designed to suppress certain ideas that the City finds distasteful"); Kagan, *supra* note 6; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227–28 (1983). In her article *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, Associate Justice Elena Kagan, then a law professor at the University of Chicago Law School, defined impermissible government motive under the First Amendment as a form of viewpoint discrimination:

> First, the government may not restrict expressive activities because it disagrees with or disapproves of the ideas espoused by the speaker; it may not act on the basis of a view of what is a true (or false) belief or a right (or wrong) opinion. Or, to say this in a slightly different way, the government cannot count as a harm, which it has a legitimate interest in preventing, that ideas it considers faulty or abhorrent enter the public dialogue and challenge the official understanding of acceptability or correctness. Second, though relatedly, the government may not restrict speech because the ideas espoused threaten officials' own self-interest—more particularly, their tenure in office. The government, to use the same construction as above, cannot count as a harm, which it has a legitimate interest in preventing, that speech may promote the removal of incumbent officeholders through the political process. Third, and as a corollary to these proscriptions, the government may not privilege either ideas it favors or ideas advancing its self-interest—for example, by exempting certain ideas from a general prohibition. Justice Scalia summarized these tenets in *R.A.V.*: "The government may not regulate (speech) based on hostility—or favoritism—towards the underlying message expressed." To this statement of illicit motive, one further gloss must be added: the government may not limit speech because other citizens deem the ideas offered to be wrong or offensive—or for that matter, because they see the ideas as threatening to incumbent officials. This ban echoes those just stated, except for the identity of the party (above the government, now the public) that disapproves the ideas; the theory is that this substitution of party name should make no constitutional difference. . . . *The key principle with respect to motive is that the government may not limit speech on grounds of mere disapproval, no matter whose or how widely shared.*

Kagan, *supra* note 6, at 428–30 (emphasis added) (footnotes omitted). Justice Kagan's definition is particularly relevant to the consideration of felon disenfranchisement laws because of the political nature of the act of voting, its potential impact on electoral outcomes, and the unpopular status that citizens with felony convictions hold.

32. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("[T]he 'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))); R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.").

discrimination is its deleterious effect on democratic legitimacy. Professor James Weinstein describes the right to participate in self-governance as a core speech norm that can be eroded by viewpoint discrimination's effect on both actual governance and individual perceptions of legitimacy:

> If an individual is excluded from participating in public discourse because the government disagrees with the speaker's views or because it finds the ideas expressed too disturbing or offensive, any decision taken as a result of that discussion would, as to such an excluded citizen, lack legitimacy. . . . This explains free speech doctrine's fierce opposition to viewpoint-discriminatory restrictions on public discourse. This concern for legitimacy also explains why the right to participate in public discourse free of government-imposed content restriction is not just a collective interest inherent in popular sovereignty, but also a fundamental individual right that government may legitimately infringe, if at all, only in truly extraordinary circumstances.[33]

Democratic legitimacy is rooted in the Court's concern that legislative "coercion" through the manipulation of public debate will characterize our democratic structures, replacing "persuasion" through an unfiltered exchange of ideas.[34] The work of the viewpoint discrimination claim is to ensure that the legislative motive behind enacting or maintaining regulations does not amount to manipulation of the democratic process. As Professor Weinstein points out, viewpoint discrimination threatens both "a collective interest inherent in popular sovereignty" and "a fundamental individual right."[35] The collective interest inherent in popular sovereignty recognizes viewpoint discrimination as a structural harm. Instead of limiting its impact to the infringement of an individual right, viewpoint discrimination is a broader threat to governance, legitimacy, and checks and balances. Indeed, viewpoint discrimination permits an evasion of the democratic process by permitting the state to excise unwanted voices from the body politic.

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33. James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 498 (2011) [hereinafter Weinstein, *Participatory Democracy*] (footnote omitted); *see also* James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361, 363–64 (2011).

34. *Turner*, 512 U.S. at 641.

35. Weinstein, *Participatory Democracy*, *supra* note 33, at 498.

Admittedly, the distinction between "status" or "speaker," on the one hand, and "viewpoint," on the other, can be blurry at times. To the extent that the government denies a speaker freedom of speech or expression because of her identity, depending on the motive, the government may also be basing its denial on the suspected viewpoint of that speaker based on the speaker's identity. For example, one could argue that felon disenfranchisement is only a status-based restriction and does not involve anyone's viewpoint. This form of "speaker discrimination," however, is indistinguishable from other forms of content discrimination.[36] Indeed, "[w]hether speaker discrimination is treated as content discrimination might be framed as a question of governmental motive, whereby the more closely a speaker is identified with a particular viewpoint the more likely a decision promoting or disabling that speaker will be seen as an exercise of content discrimination."[37] In the case of felon disenfranchisement, speaker and speech discrimination are two sides of the same coin. As this Article demonstrates, citizens with felony convictions are denied the right to vote because of the perceived viewpoint they would express at the polls.

The broad exclusion of certain groups from the electoral process based on their perceived ideology potentially affects electoral outcomes and distorts the function of the democratic process. A clear example of this is the matter of partisan gerrymandering. Partisan gerrymandering is characterized by excessive manipulation of the redistricting process to achieve electoral advantages for a political party.[38] When this occurs, the right to vote remains intact, but the voter's will is compromised for partisan gain. Although voters can cast a ballot, their will to have their votes aggregated in a manner that gives them a fair shot at achieving a desired electoral outcome is sacrificed to self-dealing legislatures. The result is a governance system that does not reflect the will of the people and thus lacks legitimacy.

Felon disenfranchisement, when motivated by concerns about how voters will cast their ballots, undermines the electoral process. As Section I.C describes, much of the rhetoric justifying the exclusion of citizens with felony convictions from the electorate describes concerns about electoral outcomes—mafiosi electing judges—and the advancement of a pro-crime agenda by a menacing voting bloc. This outlook, ascribed to citizens with felony convictions, might be termed the "criminal viewpoint." Lacking empirical grounding, the criminal

36. Fee, *supra* note 6, at 1130 ("[T]here appears to be no singular First Amendment approach to speaker discrimination in relation to content discrimination."); *see also* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 480–82 (2011).

37. Fee, *supra* note 6, at 1130.

38. Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring).

viewpoint is a judicial fiction based on a narrative of fear and reprisal that results in electoral exclusion. More importantly, even if some citizens with criminal convictions shared a criminal viewpoint, for reasons explained below, it would be unlawful to exclude them from the electoral process on this basis.

B. *A Judicial Theory of Viewpoint Discrimination in Voting Regulations*

Evidence of the Court's ambivalence toward applying the First Amendment to voting-rights cases may be found in a body of cases that employs tenets of the viewpoint discrimination doctrine without expressly relying on the First Amendment. The Court's peculiar doctrinal evolution began with *Murphy v. Ramsey*[39] in 1885. There, the Court upheld a congressional Act[40] disqualifying bigamists and polygamists from voting in the Utah territory based on an expansive conception of a sovereign's right to regulate voting.[41] Specifically, the Court held that conditioning voting qualifications on whether a potential voter is a polygamist "is . . . for the sole purpose of determining, as in [the] case of every other condition attached to the right of suffrage, the qualification of one who alleges his right to vote."[42] It reasoned that interrogating a voter's status as a polygamist "is precisely similar to an inquiry into the fact of nativity, of age, or of any other status made necessary by law as a condition of the elective franchise."[43] The Court further held that voting qualifications can serve as a means to "withdraw all political influence from those who are practically hostile" to prevailing social values.[44] In this way, the Court expressly permitted states to enact voter qualifications that were motivated by a desire to exclude voters deemed hostile to the status quo. In other words, the Court sanctioned viewpoint discrimination in voting.

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39. 114 U.S. 15 (1885).

40. In 1882, Congress passed the Edmunds Anti-Polygamy Act. The Act provided that polygamy was a felony punishable by five years of imprisonment and a $500 fine, and that convicted polygamists were disenfranchised and were ineligible to hold political office. 48 U.S.C. § 1461 (1882) (repealed 1983).

41. *Murphy*, 114 U.S. at 45, 47 (justifying the restriction based on the notion that it protected the institution of marriage between one man and one woman as "the sure foundation of all that is stable and noble in our civilization[and] the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement").

42. *Id.* at 43.

43. *Id.*

44. *Id.* at 45.

Likewise, in *Davis v. Beason*,[45] the Court upheld an Idaho statute that required prospective voters to take an oath that they were not, among other things, "a bigamist or polygamist . . . [or] a member of any order, organization or association which teaches, advises, counsels or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law."[46] This time analyzing the First Amendment's Free Exercise Clause, the Court held that state legislatures have the power to prescribe any reasonable voter qualifications so long as those qualifications do not contravene enfranchising amendments to the Constitution.[47] Here, the Court applied the First Amendment to a voting qualification but not as a matter of free expression or speech. In addition, although the practice of polygamy constituted a felony under both Idaho and Utah laws,[48] neither *Davis* nor *Murphy* involved felon disenfranchisement per se because the plaintiffs had not been convicted of polygamy but, rather, were deprived of the right to vote because of their suspected commission or advocacy of that crime.[49]

Roughly half a century later, the Court rejected the reasoning in *Murphy* and *Davis* that permitted viewpoint discrimination.[50] As the Court was entering the political thicket in one person, one vote cases and affirming voting as a fundamental right, the Court considered another set of cases involving restrictions on the right to vote based on how that right might be exercised. In particular, these cases centered on durational residency requirements and states' interest in shaping their electorates. In *Carrington v. Rash*, [51] for example, the Warren Court considered the State of Texas's argument that military personnel who were new residents to the state might not have sufficient local interests

45. 133 U.S. 333 (1890). Together, *Murphy* and *Davis* have been termed "the Mormon cases." Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 710, 716–17 (2001).

46. *Davis*, 133 U.S. at 333 (quoting REV. ST. IDAHO §§ 501, 504).

47. *Id.* at 346. For example, the Court noted that suffrage was restricted to citizens of the United States above the age of twenty-one, or persons above that age who had declared their intention to become such citizens, and suffrage could not be denied to any citizen on account of race, color, or previous condition of servitude. *Id.*

48. *Davis*, 133 U.S. at 333; *Murphy*, 114 U.S. at 26–30.

49. *Davis*, 133 U.S. at 334–37; *Murphy*, 114 U.S. at 42–44. In *Murphy*, the Court held that the plaintiffs, suspected of past practices of polygamy that were not ongoing when they sought to register to vote, were wrongfully and maliciously denied the right to vote. *Id.* at 47.

50. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1152 (2004) ("[A]t least since *Carrington v. Rash*, what we might call 'viewpoint discrimination' is also no longer a legitimate basis for disqualifying voters . . . .").

51. 380 U.S. 89 (1965).

to qualify them as voters in state elections.[52] Rejecting this argument, the Court held that a state's "'[f]encing out' from the franchise a sector of the population *because of the way they may vote* is constitutionally impermissible."[53] The Court's reasoning in *Carrington* reflects the basic underpinnings of viewpoint discrimination; however, the Court makes no mention of the First Amendment.

Kramer v. Union School District,[54] *Cipriano v. City of Houma*,[55] and *Dunn v. Blumstein*[56] further expanded this line of reasoning. *Kramer* held that voting restrictions that require residents to have a discernible interest in the subject matter of the election are unconstitutional.[57] *Kramer* challenged section 2012 of the New York Education Law that required that all voters in school district elections either own or lease taxable real property in the district or be parents or custodians of one or more children enrolled in a public school within the district.[58] The plaintiff, a childless bachelor who resided, but did not own property, in the Union School District, challenged the voter qualification under the Fourteenth Amendment.[59] Applying strict scrutiny, the Court held that the state's justification of limiting the franchise to persons primarily affected by education was unconstitutional.[60] Likewise, in *Cipriano*, decided the same day as *Kramer*, the Court held that provisions of Louisiana law restricting voting rights to property taxpayers in elections concerning the issuance of revenue bonds by a municipal utility were an

52. *Id.* at 91–94.

53. *Id.* at 94 (emphasis added); *see also* Crawford v. Marion Cnty. Election Bd., 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissenting) (denial of rehearing en banc) ("[W]hen there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny.").

54. 395 U.S. 621 (1969).

55. 395 U.S. 701 (1969) (per curiam).

56. 405 U.S. 330 (1972).

57. *Kramer*, 395 U.S. at 632–33. *Kramer* and like cases are distinguishable from cases such as *Sayler Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), in which the Court upheld a statute that limited voting for the board of directors of a water district to landowners, specifically apportioning votes in the elections according to the assessed valuation of the land. *Id.* at 734–35; *see also* Burdick v. Takushi, 504 U.S. 428, 441–42 (1992) (holding that Hawaii's prohibition of write-in voting does not unreasonably infringe upon its citizens' rights under the First and Fourteenth Amendments). These cases are further distinguishable from felon disenfranchisement laws on the ground that felon disenfranchisement disallows voting in all elections based on felon or ex-felon status.

58. *Kramer*, 395 U.S. at 622.

59. *Id.* at 624–25.

60. *Id.* at 630–33. *But see id.* at 636 (Stewart, J., dissenting) (reasoning that legislation violates the Equal Protection Clause "only 'if it rest[s] on grounds wholly irrelevant to achievement of the regulation's objectives'" (quoting Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947))).

unconstitutional denial of equal protection.[61] The Court expressly admonished that "differences of opinion cannot justify excluding" any group or person from the franchise.[62]

Three years later, in *Dunn v. Blumstein*,[63] the same Court also rejected the argument that states have a valid interest in ensuring that potential voters have a "common interest" in local government matters.[64] In that case, the Tennessee legislature required residents to have lived in the state for a year and in the county for three months in order to be eligible to vote on the grounds that this durational residency requirement furthered the goal of creating a "knowledgeable" electorate and ensuring ballot integrity.[65] Specifically, the Tennessee legislature's stated interests were to:

> (1) INSURE PURITY OF BALLOT BOX—Protection against fraud through colonization and inability to identify persons offering to vote, and [ensure voting by a]
>
> (2) KNOWLEDGEABLE VOTER—Afford some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his right more intelligently.[66]

The "purity of the ballot box" rationale generally refers to combating fraudulent voting through voter impersonation, dual residency, or other forms of voter fraud.[67] "Promoting intelligent use of the ballot" or "a knowledgeable electorate" in this context embodies the notion that newly domiciled voters can be denied the franchise because they might have opinions or viewpoints that differ from long-term residents.[68]

Although the Court previously held in *Lassiter v. Northampton County Board of Elections*[69] that states may impose rules on voting that

61. Cipriano v. City of Houma, 395 U.S. 701, 705–06 (1969) (per curiam).
62. *Id.* at 705.
63. 405 U.S. 330 (1972).
64. *Id.* at 354–57.
65. *Id.* at 334, 345.
66. *Id.* at 345 (citing appellants' brief).
67. *Id.* at 345–46.
68. *Id.* at 354–56.
69. 360 U.S. 45 (1959). Despite the Supreme Court sanction of literacy tests in *Lassiter*, such tests have been subject to a legislative prohibition since 1970 in acknowledgment of their past and potential discriminatory use. *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 315 (codified as amended at 42 U.S.C. § 1973aa (2006)) ("No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election . . . ."). The term "test or device" was defined to include, in part, "any requirement that a person as a prerequisite for voting or registration for voting

are reasonably designed to promote intelligent use of the ballot,[70] the *Dunn* Court rejected the durational residency requirement as a means of achieving this goal because the state's common interest rationale referred to how and what voters thought as opposed to their aptitude.[71] Writing for a unanimous Court, Justice Thurgood Marshall explained that, while the state could legitimately require that voters reside in the geographic divisions in which they sought to vote, the durational residency requirement violated the Equal Protection Clause because it was not necessary to achieve this goal.[72] Instead, the state's purported interest in creating a knowledgeable electorate through this method was a thinly veiled attempt to condition the right to vote on the viewpoints and opinions that might be expressed through the exercise of that right.[73] Justice Marshall further warned that "the criterion of 'intelligent' voting is an elusive one, and susceptible of abuse."[74] Justice Marshall's concerns were shared by the 89th Congress, which enacted the Voting Rights Act of 1965.[75] In the congressional hearings that led to the Act's passage, Congress recognized that "in some instances [durational residency requirements have] the impermissible purpose or effect of denying citizens the right to vote . . . because of the way they may vote . . . ."[76]

Carrington, *Kramer*, *Cipriano*, and *Dunn* all limited states' ability to exclude a segment of the population from the franchise based on how they might vote. Although none of these cases formally overturned

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(1) demonstrate the ability to read, write, understand, or interpret any matter, [or] (2) demonstrate any educational achievement or his knowledge of any particular subject . . . ." *Id.*; *see also Dunn*, 405 U.S. at 357 n.29 ("By prohibiting various "'test[s]'" and "'device[s]'" that would clearly assure knowledgeability on the part of voters in local elections, Congress declared federal policy that people should be allowed to vote even if they were not well informed about the issues." (alterations in original)).

70. *Lassiter*, 360 U.S. at 53–54.

71. *Dunn*, 405 U.S. at 355 (citing Cipriano v. City of Houma, 395 U.S. 701, 705–06 (1969) (per curiam)).

72. *Id.* at 343–54; *see also* Voting Rights Act of 1965, et seq., 84 Stat. 316, 42 U.S.C. § 1973aa-1(a)(2) (2006) (citing a congressional finding that a durational residence requirement "'denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines'"). Justice Marshall further suggested that in order for the state to rationally promote intelligent use of the ballot through restrictive-voter qualifications, there must be evidence of the state's universal efforts to further this interest through less restrictive means. In the case of Tennessee, he counseled that efforts had never been made to advance this interest through less constricting ways. *Dunn*, 405 U.S. at 358–59. See *infra* notes 124–27 and accompanying text for further discussion.

73. *Dunn*, 405 U.S. at 355 (citing Carrington v. Rash, 380 U.S. 89, 94 (1965)).

74. *Id.* at 356.

75. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (1970).

76. 42 U.S.C. § 1973aa-1(a)(4) (1970).

Murphy and *Davis*, the Court's subsequent opinion in *Romer v. Evans*[77] effectively eviscerated any precedential value they might have on this question, and it repudiated the notion that voting can be permissibly restricted based on viewpoint:

> To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome.[78]

In separately considering discrimination based on status, the *Romer* Court exempted the practice of felon disenfranchisement, citing *Richardson v. Ramirez*.[79] Importantly, however, the Court did not foreclose a viewpoint challenge to felon disenfranchisement and, in fact, created an opening for a viewpoint discrimination claim in this context by citing *Brandenburg v. Ohio*[80] to support its holding that the viewpoint discrimination once sanctioned in *Davis* was no longer good law.[81] Accordingly, to the extent that felon disenfranchisement laws are motivated by impermissible viewpoint discrimination, an equal protection challenge that is not based on felon status but rather on viewpoint discrimination is viable. Indeed, as *Hunter v. Underwood* permits challenges to felon disenfranchisement laws when motivated by intentional discrimination,[82] so do *Romer* and the line of cases extending from *Carrington* permit challenges to felon

77. 517 U.S. 620, 635–36 (1996) (holding that legislation that denied anti-discrimination protection to homosexuals is unconstitutional under the Equal Protection Clause).

78. *Id.* at 634 (citation omitted); *see also id.* at 650 n.3 (Scalia, J., dissenting) ("[I]nsofar as *Beason* permits the imposition of adverse consequences based upon mere advocacy, it has been overruled by subsequent cases . . . ."); Karlan, *supra* note 50, at 1152 ("The repudiation of *Davis* means that denying individuals the right to vote either because they endorse criminal behavior or because they would vote to change existing criminal laws is constitutionally impermissible." (footnote omitted)); Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 105 (2005) ("[T]he majority in *Romer v. Evans* specifically repudiated *Beason* (and, by implication, *Murphy*) . . . .").

79. *Romer*, 517 U.S. at 634 (stating that the practice of felon disenfranchisement "is not implicated by our decision and is unexceptionable" (citing Richardson v. Ramirez, 418 U.S. 24 (1974))); *see also id.* at 650 n.3 (Scalia, J., dissenting) ("[I]nsofar as *Beason* holds that convicted felons may be denied the right to vote, it remains good law.").

80. 395 U.S. 444, 447 (1969) (holding that the First Amendment protects inflammatory speech, including the advocacy of violence, unless it is directed to inciting and likely to incite "imminent lawless action").

81. *Romer*, 517 U.S. at 634.

82. 471 U.S. 222, 232–33 (1985).

disenfranchisement laws that are motivated by viewpoint discrimination.[83] Although the Court has not expressly applied the First Amendment in voting rights cases, these cases demonstrate that the Court has employed the doctrine of viewpoint discrimination under the Fourteenth Amendment.

C. *Viewpoint Discrimination Justifications for Felon Disenfranchisement*

Out of all the justifications for felon disenfranchisement laws, the justifications that are generally proffered in legislative history, historical accounts of their enactment, and judicial opinions reveal three prominent themes: (1) purity of the ballot box or "ballot integrity," (2) intelligent use of the ballot, and (3) social contract theory. Each of these justifications rests on viewpoint discrimination to varying degrees and represents legislative justifications that do not comport with the judicial theory of viewpoint discrimination outlined above. In addition, as described further in Section III.C, these justifications abet a structural harm that the Court has been increasingly unwilling to countenance in other electoral contexts—namely, partisan gerrymandering.

1. Ballot integrity, Purity of the Ballot Box, Subversive Voting, and Other Viewpoint-Laced Morality Arguments

The most prevalent justifications for felon disenfranchisement laws assume that citizens with felony convictions have an unfavorable viewpoint that will be expressed through the ballot. These theories are framed in terms such as purity of the ballot box, ballot integrity, and "subversive voting." They each share the premise that citizens with felony convictions "lack the moral judgment to vote responsibly."[84] Also termed the "internal instrumental reason,"[85] this judgment concerns the potential corruption of the electoral process by the presumed transgressive views of citizens convicted of a felony.[86] The

83. *See infra* Section III.B.

84. Bailey Figler, Note, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 736 (2006) ("The 'purity of the ballot box' theory relies on the outdated and illegal policy of state exclusion from voting rights for citizens who lack certain qualities of mind or character." (citing Karlan, *supra* note 50, at 1158–60)).

85. PERCEY LEHNING & ALBERT WEALE, CITIZENSHIP, DEMOCRACY AND JUSTICE IN THE NEW EUROPE 19 (1997).

86. *See* Green v. Bd. of Elections of N.Y., 380 F.2d 445, 451–52 (2d. Cir. 1967) (pointing out that the "contention that the [E]qual [P]rotection [C]lause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be").

internal instrumental reason also embodies a judgment of the moral capacity of persons with criminal convictions to vote. Followed to its logical conclusion, this argument supports the most extreme strand of these rationales—subversive voting.

The theory of subversive voting perceives citizens with felony convictions as having the intention and ability to form a political lobby that will seek to enforce a pro-crime, anti-law enforcement agenda, ultimately threatening public safety.[87] The concern of preventing subversive voting and the related concerns of ballot integrity and purity of the ballot box have been expressed most forcefully by the judiciary in scrutinizing the constitutionality of these laws. Beginning with the earliest felon disenfranchisement case, *Washington v. State*,[88] courts reinforced theories of viewpoint discrimination as permissible motivations for the enactment and maintenance of felon disenfranchisement laws. In 1884, the Alabama Supreme Court in *Washington* stated:

> The manifest purpose [of felon disenfranchisement laws] is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny. . . . The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests.[89]

By highlighting the potential impact of felon disenfranchisement on electoral outcomes, the court revealed its intent to permit these laws for the purpose of denying the franchise to citizens because of how their viewpoints may inform the exercise of that right and how, in turn, the exercise of that right might affect governance. Nearly a century later, and eight years before *Ramirez*, in *Otsuka v. Hite*,[90] the state appellate

87. *See* Susan E. Marquardt, Comment, *Deprivation of a Felon's Right to Vote: Constitutional Concerns, Policy Issues and Suggested Reform for Felony Disenfranchisement Law*, 82 U. DET. MERCY L. REV. 279, 285–86 (2005).

88. 75 Ala. 582 (1884).

89. *Id.* at 585.

90. 414 P.2d 412 (Cal. 1966).

court in California commented on the above-quoted reasoning in *Washington* and concluded that felon voting would lead to voter fraud and potentially dilute the voting power of other citizens.[91] Specifically, the court stated of *Washington*:

> In this passage lies a frank recognition of at least one tenable ground for depriving a former criminal of the vote: i.e., the fact that such person committed a crime is evidence that he was morally 'corrupt' at the time he did so; if still morally corrupt when given the opportunity to vote in an election, he might defile 'the purity of the ballot box' by selling or bartering his vote or otherwise engaging in election fraud; and such activity might affect the outcome of the election and thus frustrate the freely expressed will of the remainder of the voters, 'at least in close political contests.' . . . Avoidance of such a danger, when present, is an adequately compelling state interest to justify an appropriate restriction on the right to vote.[92]

The *Otsuka* plaintiffs were denied the right to vote under California's felon disenfranchisement statute because they had pled guilty to a violation of the Selective Service and Training Act of 1940 as conscientious objectors to World War II.[93] The court held that this crime was not "infamous" per the statute and thus could not provide a basis for disenfranchisement.[94] Rejecting plaintiffs' argument that California's felon disenfranchisement scheme was premised on a punishment rationale, the court found that "[c]oupled as it is with an exclusion in cases of minors, idiots, insane persons, and those unable to read the Constitution and write their names, the category of persons convicted of an 'infamous crime' appears rather to be an attempt to describe a nonpenal qualification of *Fitness* for voting."[95] The court

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91. *Id.* at 417. To the extent that felon disenfranchisement laws are concerned with limiting the relative voice of citizens with criminal convictions vis-à-vis other citizens, they run curiously afoul of the Court's longstanding campaign-finance jurisprudence that eschews an equalization approach. In passages central to *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court famously held that "equalizing the relative ability of individuals and groups to influence the outcome of elections" was not a constitutionally permissible purpose and that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48–49.

92. *Otsuka*, 414 P.2d at 417.

93. *Id.* at 414–15.

94. *Id.* at 425 ("[I]t cannot reasonably be said that plaintiffs' violation of the Selective Service Act branded them as morally corrupt and dishonest men convicted of an 'infamous crime' as that phrase is used in article II, section 1, of the California Constitution.").

95. *Id.* at 417 (emphasis added).

distinguished felon disenfranchisement further, however, by reasoning that:

> [M]inors, mental defectives, and illiterates are deemed unfit to vote because they are lacking in the minimal understanding and judgment necessary to exercise the franchise. A different rationale must be invoked for excluding without distinction all persons who have ever been convicted of 'infamous crimes,' including those who possess the requisite mental and educational qualifications."[96]

To preserve the constitutionality of the statute, though, the court concluded that disenfranchisement "must be limited to conviction of crimes involving moral corruption and dishonesty, thereby branding their perpetrator as a threat to the integrity of the elective process."[97]

Likewise, the U.S. Court of Appeals for the Fifth Circuit upheld Texas's felon disenfranchisement scheme on the grounds that citizens with felony convictions, "like insane persons, have raised questions about their ability to vote responsibly."[98] Those ideas also surfaced in *Ramirez* and its doctrinal precursor, *Green v. Board of Elections of New York*. The challenge in *Green* was brought by one of the defendants convicted of conspiring "to organize the Communist Party as a group to teach and advocate the overthrow and destruction of the [United States] government by force and violence, and to advocate and teach the duty and necessity of" the same in the well-known case of *United States v. Dennis*.[99] Gilbert Green unsuccessfully challenged the constitutionality of New York's felon disenfranchisement laws as applied to him.[100] In defending the laws as a general matter, the Second Circuit forcefully articulated a subversive-voting rationale:

> [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and prevalence

96. *Id.*

97. *Id.* at 414.

98. Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978).

99. Green v. Bd. of Elections of N.Y., 380 F.2d 445, 447 (2d. Cir. 1967) (citing United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

100. *Id.* at 452.

> of organized crime. A contention that the [Constitution] requires [a state] to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.[101]

Furthermore, Justice Marshall's dissent in *Ramirez* further exposes the fear of subversive voting that underlies the justifications for felon disenfranchisement statutes. Justice Marshall surmised that the California statute at issue resulted from a concern that the "likely voting pattern [of citizens with criminal convictions who had completed their sentences] might be *subversive* of the interests of an orderly society."[102]

Although claims of subversive voting, purity of the ballot box, and ballot integrity may have intuitive appeal as a matter of civic republicanism, the censorial nature of these justifications is evident. Under the civic republican rationale, "former criminals lose the right to participate because they have shown themselves to lack the virtue on which the survival of the *polis* depends. 'Fitness' and 'capability' are central to this justification [because] political competence, according to republican theory, has a moral dimension."[103] Because voting is a right as well as a public duty, citizens may forfeit the right to vote if they become unfit in the eyes of society to perform this civic function. Citizens with criminal convictions are excluded because they are deemed unable to cast their ballots in accordance with the common good.[104] This rationale is, in effect, a judgment of the propriety of the voter's thoughts and character based on the criminal conviction.[105] At bottom, the felony conviction serves as a proxy for unpopular or counter-majoritarian viewpoints, which in turn operate as the basis for denying the franchise. The theoretical justification for disenfranchisement, thus, is that "only the virtuous are morally competent to participate in governing society."[106]

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101. *Id.* at 451–52 (citation omitted).

102. Richardson v. Ramirez, 418 U.S. 24, 81 (1974) (Marshall, J., dissenting) (emphasis added) (citing *Green*, 380 F.2d at 451).

103. Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1307 (1989).

104. *See id.* at 1301 (arguing that "disenfranchisement is driven . . . by an atavistic and deep-rooted social need to define the boundaries of the community by stigmatizing some persons as outsiders").

105. *Id.* at 1307 ("[I]n contrast to the liberal justification, which emphasizes an ex-offender's voluntary violation of the social contract, the republican justification for disenfranchisement rests not upon what a criminal has done, but upon whom he has shown himself to be.").

106. *See id.* at 1304.

Voting restrictions based on character or competence not only run afoul of the Voting Rights Act's ban on "literacy" and "character" tests and similar devices—they are a direct affront to First Amendment principles surrounding equality of ideas and equality of speakers.[107] Although the *Otsuka* court protested that the arguments underlying the theory of subversive voting "are not fanciful fears,"[108] the available empirical data suggest that these concerns are indeed illusory. As Justice Marshall instructed in his dissent in *Ramirez*, "[t]here is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decisions of government."[109] Moreover, to the extent that citizens with felony convictions vote differently than other citizens, that distinctive viewpoint counsels toward their inclusion.[110]

The rhetorical counterargument conjures images of rapists, murderers, and robbers corrupting the ballot box. Underlying these fears, however, are many facts that cut against blanket disenfranchisement for felony convictions. If the underlying purpose of a felon disenfranchisement statute is purity of the ballot box, then "the inquiry must focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it may reasonably be deemed to constitute a threat to the integrity of the elective process."[111] If ballot integrity means the prevention of election fraud, a more rational proposal is to prohibit the one percent of inmates incarcerated for election fraud from voting for fear of their propensity to repeat the offense.[112] Indeed, felon

107. The Court has also called into question the propriety of relying on morality as a legislative motive. *See* Lawrence v. Texas, 539 U.S. 558, 577–78 (2003) (explicitly rejecting determinations of morality as a legitimate state interest in supporting legislation).

108. Otsuka v. Hite, 414 P.2d 412, 417 (Cal. 1966).

109. Richardson v. Ramirez, 418 U.S. 24, 78 (Marshall, J., dissenting); *see also* Alec Ewald, *Punishing at the Polls: The Case Against Disenfranchising Citizens with Felony Convictions*, DEMOS 33 (Sept. 2003), http://www.prisonpolicy.org/scans/demos/punishing_at_the_polls.pdf (citing research that found that the overwhelming number of persons with felony convictions "believed that they had done something 'wrong,' that the law they violated represented a norm that was worthy of respect and that ought to be followed," and that striking down the laws under which they were convicted would be "a bad thing" because the illegal behavior the laws prevented would proliferate); Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT 15 (Oct. 1998), http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf ("There is no reason to believe that all or even most ex-offenders would vote to weaken the content or administration of criminal laws.").

110. *See infra* notes 138–40 and accompanying text.

111. *Otsuka*, 414 P.2d at 422.

112. *See Ramirez*, 418 U.S. at 79 (Marshall, J., dissenting); Mark E. Thompson, Comment,

disenfranchisement laws are not sufficiently narrowly tailored to pass constitutional scrutiny based on these rationales. As one scholar has noted, "[i]f felon disenfranchisement laws are meant to prevent electoral fraud, then they are overinclusive [because] they apply across the board though the vast majority of crimes leading to disenfranchisement are not related to elections."[113]

Finally, like other assumptions that underlie felon disenfranchisement practices, the theory of subversive voting lacks empirical support and defies common understanding of electoral behavior. The notion that, if permitted to vote, citizens with felony convictions might form a criminal-minded faction and influence criminal justice policies is not only logically unsound and factually misplaced; it is an impermissible and wholly undemocratic basis for vote denial because it excludes citizens from the electorate because of their unpopular views.[114] The First Amendment Equal Protection approach regards these censorial justifications with suspicion and requires heightened scrutiny because of the First Amendment equality norms involved. That approach ensures that the animus for denying the franchise to citizens with felony convictions is not how their vote might affect and inform broader public policy because of its content.[115]

Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment, 33 SETON HALL. L. REV. 167, 191–92 (2002) (commenting on the illogical nexus between the commission of a felony and the propensity to commit an election offense); *see also* Lori Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud*, MICHIGAN ELECTION REFORM ALLIANCE 4, 17 (2003), http://www.michiganelectionreformalliance.org/EDR_Securing_the_Vote.pdf (finding that no significant threat of voting fraud exists).

113. Figler, *supra* note 84, at 736 (noting that felon disenfranchisement laws are "also, ironically, underinclusive, as some states classify election fraud as a misdemeanor and thus do not disenfranchise the people who do break voting laws"); *see also* Tanya Dugree-Pearson, *Disenfranchisement—A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL'Y 359, 386 (2002); Eric J. Miller, *Foundering Democracy: Felony Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT'L BLACK L.J. 32, 37 (2005) ("It bucks common sense, however, to argue that the ballots of felons or former felons have a different electoral significance than those of misdemeanant[s] or citizens with no criminal record."); Ewald, *supra* note 109, at 36.

114. *See* Michael Dorf, *Should Felons Vote?*, DORF ON LAW (Jan. 18, 2012, 1:00 AM) http://www.dorfonlaw.org/2012/01/should-felons-vote.html ("[I]f people who want to eliminate the criminal law so that they can commit violent crimes form a near-majority of the population, then civilized society is already a lost cause.").

115. Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 358 (1993) ("[I]t appears that denying ex-felons the right to vote might indeed be based on mistrust of how they may vote, thus a retreat from the Court's quasi-content neutrality.").

2. Intelligent Use of the Ballot

The justification of intelligent use of the ballot relates closely to many of the assumptions underlying subversive voting, purity of the ballot box, and ballot integrity. However, this theory is distinct from these other concepts both conceptually and in terms of the judicial treatment it has received. Conceptually, intelligent use of the ballot is distinguishable from morality-based arguments because it relates to ability and capacity rather than judgment and moral fitness. In terms of its judicial treatment, intelligent use of the ballot has historically faced challenges before the courts and legislature because it often disguises less lawful motives.[116]

In *Lassiter v. Northampton County Board of Elections*,[117] the Court first established that competence measures were a legitimate means of ensuring intelligent use of the ballot and determining entitlement to the constitutionally protected right to vote.[118] The State of North Carolina asserted its interest in ensuring that all voters are intelligent and informed about current political issues by requiring a literacy test.[119] On this basis, the Court held that literacy tests were a constitutionally permissible means of achieving the end of an informed electorate.[120]

Literacy tests admittedly bear a rational relationship to the interest in intelligent use of the ballot. The *Harper* Court explained the rationale behind restrictions based on this interest as follows: "[U]nlike a poll tax, the 'ability to read and write . . . has some relation to standards designed to promote *intelligent use of the ballot*.'"[121] By contrast, the commission of (or failure to commit) a crime does not rationally relate to intelligent use of the ballot, unless the underlying concern is the perspective that such voters will bring to the ballot. Unlike mental capacity and age qualifications, felon disenfranchisement laws are not about ability or competence, but rather are premised on concerns about the qualitative

116. As noted above, Congress imposed a nationwide ban on literacy tests and similar devices because they were misused as a tool of racial discrimination. *See supra* note 69 and accompanying text.

117. 360 U.S. 45 (1959).

118. *Id.* at 51–53.

119. *Id.* at 46–47, 51–52.

120. *Id.* at 53–54. The notion of intelligent use of the ballot raises concerns independent of its justification for felon disenfranchisement. As a general matter, it views voting and the function of voting as highly contested and devoid of expressive value. *See* Winkler, *supra* note 115, at 347–48 (arguing that the Court's acceptance of literacy tests reflects "an instrumental power approach to the right to vote: if voting is valuable only to the extent that one can use it to further one's narrow, informed policy choices, then governments might reasonably limit the franchise to people with sufficient ability to inform themselves of the issues").

121. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (emphasis added) (quoting *Lassiter*, 360 U.S. at 51).

use of the ballot based on the identity of the potential voter. The identity of citizens with felony convictions is a proxy to limit exercise of the franchise on grounds that they cannot make intelligent use of the ballot absent any correlation between their status as felons and the ability to use the ballot intelligently.[122] Indeed, in *Dunn v. Blumstein*, the Court carefully deconstructed the rationale behind intelligent use of the ballot and noted its potential for abuse in this way.[123]

Dunn involved a Tennessee law that required a one-year residence in the state and a three-month residence in the county as a precondition for voting.[124] In determining that there was no practical reason for limiting the franchise to longer-term residents, the Court noted that recent migrants to the state who take the time to register and vote shortly after moving are likely to be citizens "who make it a point to be informed and knowledgeable about the issues."[125] Moreover, the Court noted that modern communications technology and increased campaign activity immediately before elections provided ample opportunities for voter education.[126] The Court's fact-finding into the context of Tennessee's residency requirement revealed that it was not narrowly tailored:

> Tennessee has never made an attempt to further its alleged interest in an informed electorate in a universally applicable way. Knowledge or competence has never been a criterion for participation in Tennessee's electoral process for longtime residents. Indeed, the State specifically provides for voting by various types of absentee persons. These provisions permit many longtime residents who leave the county or State to participate in a constituency in which they have only the slightest political interest, and from whose political debates they are likely to be cut off. That the State specifically permits such voting is not consistent with its claimed compelling interest in intelligent, informed use of the ballot. If the State seeks to assure intelligent use of the ballot, it may not try to serve this interest only with

122. *See* Hunter v. Underwood, 471 U.S. 222, 231–32 (1985) (noting the state's intention to exclude poor whites from the franchise).

123. 405 U.S. 330, 35460 (1972).

124. *Id.* at 331, 334.

125. *Id.* at 358.

126. *Id.* The Court further dismissed the state's rationale in stating that "the State cannot seriously maintain that it is 'necessary' to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections." *Id.*

respect to new arrivals.[127]

Similarly, if intelligent use of the ballot is the justification for felon disenfranchisement laws, there are better ways of serving that interest. Currently, no state employs any tests to determine voters' ability to use the ballot intelligently. Moreover, the felony convictions that provide the basis for disenfranchisement do not reveal any information about individual capacity to use the ballot intelligently. Nearly all citizens with felony convictions, including those who are incarcerated, have access to communications and information that would allow them to form part of an informed electorate. As the Court stated in *Dunn*, if the state seeks to assure intelligent use of the ballot, it may not try to serve this interest only with respect to a certain group of citizens.[128] Moreover, to justify such broad exclusion—especially as it concerns the protected sphere of elections—states must offer a better rationale to comport with First Amendment principles than *Ramirez*'s implicit authorization to disenfranchise.

3. Social Contract Theory

Like purity of the ballot box and intelligent use justifications, social contract theory is a popular rationale for felon disenfranchisement.[129] Originated by Thomas Hobbes, social contract theory presupposes that "a man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the [social] compact."[130] In

127. *Id.* at 358–59 (footnote omitted).

128. *Id.* at 359.

129. In *Green v. Board of Elections of New York*, 380 F.2d 445 (1967), Judge Henry Friendly cited John Locke's social contract theory as a justification for felon disenfranchisement. *Id.* at 451.

130. *Id. See generally* THOMAS HOBBES, LEVIATHAN 109 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651) ("The only way to erect such a common power as may be able to defend them from the invasion of foreigners and the injuries of one another . . . is to confer all their power and strength upon one man, or upon one assembly of men, which is as much to say, to appoint one man or assembly of men to be their person, and every one to acknowledge himself to the be the author of whatsoever he that so beareth their person shall act . . . ."); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 52–53 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) ("And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation, to everyone of that society, to submit to the determination of the *majority* . . . or else this *original compact*, whereby he with others incorporates into *one society*, would . . . be no compact, if he be left free, and under no other ties than . . . in the state of nature."); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 60–61 (Maurice Cranston trans., Penguin Books 1968) (1762) (describing the social contract as consisting of the "unconditional" and "total alienation" of each individual's rights to the "whole community") ("Immediately, in place of the individual person of each contracting party, [the]

other words, each citizen has a tacit agreement with her government to be governed in exchange for the protections of government and the rule of law. John Locke later expanded the theory to include notions of deterrence, explaining that "each transgression may be *punished* to that *degree*, and with so much *severity*, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."[131]

The social contract justification for felon disenfranchisement can be termed the "expressive function of exclusion."[132] This theory casts laws that deny voting rights based on criminal conviction as a form of punishment and stigma against those who have transgressed the laws of society.[133] This punitive notion of "just deserts" undermines the democratic enterprise, however, by failing to engage those citizens who are unable or unwilling to abide by the social contract that binds them to their government and reinforces the government's legitimacy. As a matter of viewpoint discrimination, social contract theory shuns from the electorate those individuals who may not subscribe to the compact with government that social contract theory assumes. For example, citizens with felony convictions are effectively denied the right to vote because of their "dissent" from established laws. While this may not be an outlook that many believe society should value, it should not form the basis of political exclusion because it is a judgment on the viewpoint of the potential voter. Moreover, through the enactment and maintenance of felon disenfranchisement laws intended to exclude a criminal viewpoint, legislatures intentionally construct an electorate that it believes is more likely to align with state interests.

Admittedly, of the justifications proffered in defense of felon disenfranchisement, social contract theory is the most ambiguous and difficult to link to viewpoint discrimination. Perhaps the most powerful critique of social contract theory (and the related, historically rooted concepts of *infamia* and civil death by which criminals were deemed dead and stripped of citizenship for purposes of civil rights) is that it is

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act of association creates an artificial and corporate body composed of as many members as there are voters in the assembly, and by this same act that body acquires its unity, its common *ego*, its life and its will.").

131. LOCKE, *supra* note 130, at 12.

132. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, TEACHER'S MANUAL FOR THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 23 (3d ed. 2003); *see also* Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 426 n. 141 (2011); Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 91–92 (2006).

133. John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* (1690), *in* SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 89 (Ernest Barker ed., Oxford Univ. Press 1962) (1690).

outmoded and inconsonant with modern concepts of democracy. Indeed, these theories have never been reconciled with equally fundamental and constitutionally based norms of freedom of expression[134] or with modern notions of citizenship.[135]

As noted above, this coerced construction of the electorate delegitimizes the government that results.[136] Moreover, in the effort to exclude a criminal viewpoint, another potential viewpoint, which I term the "canary viewpoint," is excised from the body politic. The canary viewpoint refers to the miner's canary whose death signals atmospheric dangers in the mine.[137] In the context of felon disenfranchisement, the canary viewpoint results from the intersectionality of race, crime, and low socioeconomic status that combine to create the disenfranchised population.[138] Random and disparate breaches of the social contract would suggest individual choice rather than systemic group-based causes produce this phenomenon.[139] However, if certain discrete and concentrated segments of society persistently fail to meet the terms of the social contract, as the high incarceration rates in the United States and underlying demographics suggest, this is a signal that there may be a systemic flaw contributing to this skewed result. If, by contrast, these failures occurred nearly equally across all segments of society, there would be less cause for concern.

The canary viewpoint expressed through the electoral process could signal these atmospheric dangers in our democracy. Instead, however,

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134. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 225, 233 (Geoffrey R. Stone et al. eds., 1992) (summarizing this theory's underlying premise) ("Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others."); Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2427.

135. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 92 (1958) ("Citizenship is not a license that expires upon misbehavior.").

136. *See supra* notes 26–38 and accompanying text.

137. *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 12 (2002) ("One might say that the canary is diagnostic, signaling the need for more systemic critique.").

138. *See* Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisonser Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 76 (2003) ("The reality that prisoners may have an impact on the outcome of elections is an argument *in favour* of allowing them to vote rather than against it."); *see also infra* Subsection II.D.2.

139. *See* Wesley v. Collins, 605 F. Supp. 802, 813 (M.D. Tenn. 1985) ("Felons are not disenfranchised based on any immutable characteristic, such as race, but on their conscious decision to commit an act for which they assume the risks of detection and punishment."). *But see* Note, *supra* note 103, at 1311 ("To drape disenfranchisement in the language of the social contract, for example, suggests that the criminal has deliberately chosen to reject and remove himself from the community. This understanding has two components: first, that criminality is the product of free choice, and second, that the criminal does not wish to be one of us.").

these potential voters are denied the right to vote in order to suppress a supposed criminal viewpoint. Without the benefit of the political participation of those citizens who have failed to uphold the social contract, it is more difficult to understand or attract sustained attention to the root causes of its breach. As a result, democracy functions by silencing those who might signal its failure. Democratic deliberation is sanitized and truncated because evidence of societal failure is excluded from the ballot box. While the collateral exclusion of the canary viewpoint may not be justiciable, the intentional exclusion of the perceived criminal viewpoint offends First Amendment and equal protection principles and can be addressed.

II. FIRST AMENDMENT EQUAL PROTECTION AND FELON DISENFRANCHISEMENT

Having set forth the theory of viewpoint discrimination in voting and with respect to felon disenfranchisement laws in particular, this Part considers how courts might engage a legal claim on this basis. This Section introduces the theory of First Amendment Equal Protection as a way to frame and adjudicate a viewpoint discrimination claim under the Equal Protection Clause. First Amendment Equal Protection examines the exercise of discretion by official and quasi-official decision makers in areas where equal protection and freedom of expression may be compromised. To date, the skepticism that the Court has had toward excessive discretion in the area of political expression has not informed courts' analysis of felon disenfranchisement laws or other vote denial mechanisms. The logic behind First Amendment Equal Protection, however, should influence the legislatures' discretion in enacting and enforcing felon disenfranchisement laws and the freedom of expression that is consequently burdened. Moreover, the growing palatability of free speech protection in the political arena invites renewed consideration of felon disenfranchisement laws, and other vote denial mechanisms, within this context.

A. *What Is First Amendment Equal Protection?*

First Amendment Equal Protection addresses discretionary incursions on freedom of expression that violate both clauses' norms of equality.[140] At its core, First Amendment Equal Protection enforces the ideal "that all citizens should have an equal opportunity to participate in

140. As Professor Kenneth Karst has observed, "the principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the content of speech." Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) [hereinafter Karst, *Equality in the First Amendment*].

public discourse."[141] First Amendment Equal Protection is largely concerned with abuse of discretion by official and unofficial decision makers that results in a violation of equality norms.[142] In practice, First Amendment Equal Protection requires courts to be equally intolerant of discretion in the realm of political participation as they are in the realm of freedom of expression, based upon the suspicion that discretion can mask intentional discrimination. In this regard, First Amendment Equal Protection allows courts to undertake a more robust analysis to determine whether discriminatory motives are at play.[143]

Rather than treat constitutional doctrines as hermetically sealed from one another, the Supreme Court has invited—and in some instances unwittingly instigated—the cross-pollination of legal theories and doctrines. First Amendment Equal Protection is one such example. First Amendment Equal Protection is a theory founded on the First Amendment and equal protection doctrines' coherence in protecting against discretionary incursions on freedom of expression that violate norms of equality. To be clear, First Amendment Equal Protection is not a First Amendment claim. Rather, rooted in the Fourteenth Amendment, First Amendment Equal Protection is a discrete dimension of equal protection jurisprudence informed by First Amendment principles.[144] It describes the Court's treatment of official discretion under the Equal Protection Clause on matters involving speech or expression. First Amendment Equal Protection does not expand the First Amendment's scope; instead, it enlarges the qualitative considerations for enforcing equal protection of the laws under the Fourteenth Amendment.

The phrase "First Amendment Equal Protection", coined by Professor Daniel Tokaji, echoes Professor Henry Monaghan's theory of "First Amendment Due Process."[145] First Amendment Due Process refers to the Supreme Court's development of distinct procedural safeguards to protect freedom of expression and is distinguishable from First Amendment Equal Protection by the latter's focus on the

141. Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2410.

142. *See id.* at 2414–21.

143. Notably, First Amendment Equal Protection as it applies to felon disenfranchisement is not predicated upon including the right to vote within the ambit of First Amendment protections. *See id.* at 2498 ("Acceptance of the First Amendment Equal Protection approach to political equality does not require belief that the vote itself falls within the scope of the First Amendment.").

144. Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 OHIO ST. L.J. 925, 960 n.85 (2007).

145. *See* Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2410 n.7 ("The use of [First Amendment Equal Protection] is meant to recall Professor Monaghan's use of the term First Amendment 'Due Process' in his article of the same title." (citing Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970))).

substantive equality principle of the First Amendment. First Amendment Due Process differs further because it involves actual First Amendment claims, whereas First Amendment Equal Protection operates as a dimension of equal protection under the Fourteenth Amendment. The theories share, however, the overarching principle that political speech or expression requires heightened judicial protection.[146] Importantly, neither theory has been accepted (or rejected) by the Supreme Court. Instead, First Amendment Equal Protection represents a typology of the Court's analyses in a distinct body of cases.[147]

The heart of First Amendment Equal Protection executes the value that every citizen should have an equal chance to participate in public dialogue.[148] In doing so, "[i]t takes up Kenneth Karst's insight that 'the principle of equal liberty lies at the heart of the first amendment's protections against government regulation of the content of speech.'"[149] It also furthers Dean Robert Post's instruction that "[e]quality of speech derives from an equality of speakers."[150] As a substantive matter, the theory of First Amendment Equal Protection derives from civil rights era cases where the Equal Protection Clause was used to protect and secure First Amendment rights to unpopular expression.[151] It also derives from certain First Amendment cases in which vague and incoherent standards permitted officials to deny access to public fora "based on [officials'] hostility [toward] particular viewpoints."[152] Like the Equal Protection Clause, the First Amendment is foremost

146. *See* Monaghan, *supra* note 145, at 524 ("[W]hen the subject matter of speech is political in character . . . , the need for a disinterested judicial judgment is even greater.").

147. *See infra* Section I.B.

148. *See* Tokaji, *First Amendment Equal Protection*, *supra* note 12.

149. *Id.* at 2410 n.7 (citing Karst, *Equality in the First Amendment*, *supra* note 140, at 21). This is consistent with Professor Karst's definition of equal citizenship, whereby the Fourteenth Amendment confers a right to every citizen "to be treated as a respected and responsible participant in community public life." Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102 (2007).

150. Post, *supra* note 36, at 484–85 ("The equality of status of ideas within public discourse follows directly from the equality of political status of citizens who attempt to make government responsive to their views.").

151. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 101 (1972) ("The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." (citing Williams v. Rhodes, 393 U.S. 23 (1968), and Dunn v. Blumstein, 405 U.S. 330, 342–43 (1972))).

152. *See* Foley, *supra* note 144, at 960–61. The abuse of discretion is often aided by vague legal standards that camouflage discriminatory intentions. Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2441. As a result, "[a]bsent clearly defined rules that limit official decisionmakers' discretion, discrimination against unpopular speech may escape detection." *Id.* at 2430.

concerned with improper government motive.[153] The synthesis of these interests, along with both clauses' pursuit of equality, gives rise to the theory of First Amendment Equal Protection.[154]

Because discretion can conceal intentional discrimination, under the theory of First Amendment Equal Protection, courts must be as wary of discretion in the sphere of political participation as they are in the sphere of freedom of expression. Importantly, First Amendment Equal Protection does not rely exclusively on discretion as a trigger for the conjoined application of First Amendment and equal protection principles; rather, it is the core nature of expressive activity itself that commands the dual protection of these muscular constitutional provisions.

Thus, First Amendment Equal Protection leads to a more robust undertaking of equality claims under the Fourteenth Amendment that is informed by the First Amendment to determine whether discriminatory motives are at play. To that end, First Amendment Equal Protection embodies four ideals: (1) the requirement of clear standards, (2) broadened justiciability, (3) leniency toward facial challenges, and (4) increased judicial fact-finding.[155] These ideals comprise both procedural and substantive variations from conventional equal protection. Clear standards limit the exercise of discretion that can mask discrimination.[156] Broad justiciability allows courts to entertain cases by relaxing standing requirements in order to increase enforcement against rights violations.[157] Leniency toward facial challenges permits litigants to challenge suspect laws directly before harm or injury occurs.[158] Finally, increased judicial fact-finding enables courts to consider context in investigating specific constitutional violations and their underlying motivations.[159]

Without identifying it as such, the Court has employed First Amendment Equal Protection in certain categories of cases involving freedom of expression. For example, the Court's inherent distrust of official discretion in the speech context "animates [many] public fora, censorship, and civil rights era cases."[160] In these cases, the Court

153. Kagan, *supra* note 6, at 414 ("[T]he application of First Amendment law is best understood and most readily explained as a kind of motive-hunting.").

154. Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2441.

155. *Id.* at 2430.

156. *Id.* at 2442.

157. *Id.* at 2447.

158. *Id.* at 2446–47.

159. *Id.* at 2447.

160. The Court was animated in these cases by a suspicion of racial bias or viewpoint discrimination. *See id.* at 2441 ("For the most part, these cases arise in contexts where the Court smelled a rat—that is, where circumstances suggested that discrimination against disfavored

employs an especially searching mode of analysis that involves relaxed standards of justiciability, facial challenges, and increased judicial fact-finding when faced with official discretion that potentially masks discrimination in the realm of expression.[161]

B. *First Amendment Equal Protection at Work*

First Amendment Equal Protection reveals itself in particular categories of equal protection cases whose outcomes cannot be explained by traditional equal protection analysis. These are cases in which the Court departed from the norm of requiring evidence of facial or intentional discrimination to substantiate an equal protection violation.[162] Importantly, many of these cases involve rights of political participation. The cases are grouped into the following categories: jury selection; political restructuring; and one person, one vote.[163] Despite the Court's silence regarding its rationale, however, the collective narrative of the cases situates them comfortably within First Amendment Equal Protection theory and provides a guidepost for other challenges in the realm of political participation, especially where racial disparities loom.[164] Moreover, while each grouping of cases is instructive concerning the potential application of First Amendment

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viewpoints or certain speakers was at play, but where that discrimination was difficult to substantiate.").

161. First Amendment Equal Protection may also be characterized as a version of what Frederick Schauer and Richard Pildes termed "electoral exceptionalism." Schauer & Pildes, *supra* note 18, at 1805. Electoral exceptionalism defines elections as bounded domains for purposes of constitutional scrutiny. This theoretical circumscription of elections for regulation purposes enables a distinct application of First Amendment principles that is particular to the electoral context and the highly protected speech within that domain, whether or not that application falls squarely within the First Amendment's scope. *See id.* ("According to electoral exceptionalism, elections should be constitutionally understood as (relatively) bounded domains of communicative activity. Because of the defined scope of this activity, it would be possible to prescribe or apply First Amendment principles to electoral processes that do not necessarily apply through the full reach of the First Amendment.").

162. *See, e.g.*, Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1127 (1989) ("[T]he voting cases appear to require only a showing of disparate impact plus a showing that the jurisdiction has engaged in other types of discrimination in the past."); *see also* Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2467–86 (categorizing this grouping of cases under the heading "Unconventional Equal Protection" and suggesting that these decisions "share a willingness to find an equal protection violation on something less than the ordinary showing of discriminatory intent").

163. Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2412 (categorizing three areas of equal protection jurisprudence in which the Court has been willing to find an equal protection violation based on unequality of democratic participation).

164. *Id.* at 2467 ("[T]he approach that the Court has taken in each of these areas can be understood as motivated by concerns similar to those which underlie the First Amendment Equal Protection cases.").

Equal Protection to future vote denial challenges such as felon disenfranchisement, the one person, one vote and political restructuring cases are most pertinent.

1. One Person, One Vote Cases

One person, one vote cases are premised on a principle of equality. In short, they hold that the value of each citizen's vote should be equal to that of any other citizen's. While one person, one vote cases were not race-based challenges per se, they arose out of a context of wholesale discrimination against African-Americans in which states refused to participate in congressional reapportionment because it would potentially strengthen African-American political power in light of substantial population changes.[165] Although the Court was at first loath to "enter this political thicket,"[166] over time it pruned from the American electoral system a host of practices designed to discriminate against African-Americans in the electoral arena, including vintage vote-denial practices such as grandfather clauses,[167] literacy and character tests,[168] the poll tax,[169] the all-white primary,[170] and discriminatory failure to reapportion.[171] These practices were struck down largely because the

165. *See, e.g.*, Giles v. Harris, 189 U.S. 475, 486 (1903) (affirming the denial of equitable relief to black citizens who were unlawfully denied the right to vote).

166. Colegrove v. Green, 328 U.S. 549, 556 (1946) (holding that courts should not "enter this political thicket" of malapportionment under the "political question" doctrine); *see also* Gray v. Sanders, 372 U.S. 368, 379–80 (1963) (holding that a "county unit" vote count system that weighted votes cast in rural counties more heavily than those cast in urban counties was unconstitutional).

167. Guinn v. United States, 238 U.S. 347, 354 (1915) (holding that the grandfather clause in question "unlawfully, willfully and fraudulently [deprived] certain negro citizens, on account of their race and color, of a right to vote at a general election").

168. Louisiana v. United States, 380 U.S. 145, 149–50 (1965) (describing how Louisiana's "interpretation test" required voters to interpret a section of the state or federal Constitution to the satisfaction of the registrar prior to voting). Literacy tests were not banned by the Court, but are prohibited statutorily under the Voting Rights Act of 1965 if applied "to deny or abridge the right . . . to vote on account of race or color." *See* 42 U.S.C. §§ 1973–1973aa-6 (1965).

169. Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.").

170. Terry v. Adams, 345 U.S. 461, 470 (1953) (plurality opinion) (holding that the white-only primary restricted the right to vote on the basis of race and color); *id.* at 484 (Clark, J., concurring) ("[B]ecause the [white]-indorsed nominee meets no opposition in the Democratic primary, the Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count."); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (overturning a Texas statute that discriminated "by the distinction of color alone").

171. Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that state legislative seats "must be apportioned on a population basis").

vast discretion that officials possessed in administering elections served to hide racial discrimination and bias. In this way, the one person, one vote cases "serve as a prophylactic against decisionmakers acting based on venal motives,"[172] and they share concerns of excessive discretion and unclear standards with First Amendment Equal Protection theory.[173]

2. Political Restructuring Cases

Another body of cases that illustrates First Amendment Equal Protection and its application in the electoral arena involves political-structural issues such as at-large voting systems and racial gerrymandering, the latter of which submerges minority interests. Political-restructuring cases concern political systems that burden the ability of certain groups to achieve greater political equality through participating in the political process. Like one person, one vote cases, in political-restructuring cases the Court does not require the traditional or conventional showing of intentional or facial discrimination to find an equal protection violation. Instead, in cases such as *Hunter v. Erickson*,[174] *Washington v. Seattle School District No. 1*,[175] and *Romer v. Evans*, [176] the Court held that laws imposing unequal burdens on certain groups to participate in the political process are unconstitutional.

3. Vote-Denial Cases

First Amendment Equal Protection can also be traced to vote-denial contexts. In *Hunter v. Underwood*,[177] the Court rejected the argument that a nondiscriminatory justification for felon disenfranchisement laws

172. Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2483–84.

173. *Id.* at 2483 ("[One person, one vote cases] arise from a concern that without clear rules by which to cabin official discretion over the electoral process, discrimination against politically disfavored groups might otherwise escape detection."). The abuse of discretion surrounding these practices is well-known and does not bear repeating here. It is sufficient to state that officials vested with the discretion to determine whether prospective voters have adequately interpreted a provision of the Constitution, are sufficiently literate, or should pay a poll tax in order to vote have virtually unchecked authority to exercise that discretion discriminatorily. See *id.*, at 2483–87, for an analysis of one person, one vote cases. The Court's imposition of the one person, one vote standard, as well as its ban of specific vote-denial practices, eliminated the vast majority of this sort of discretion in the electoral arena. *See, e.g.*, *id.* at 2485 ("The one-person, one-vote rule promotes uniformity, consistency, fairness, and neutrality in decisions about apportionment by limiting judicial discretion to one simple question: Do all districts have the same number of residents?" (quoting Spencer Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65, 79 (2002))).

174. 393 U.S. 385, 392 (1969).

175. 458 U.S. 457, 486–87 (1982).

176. 517 U.S. 620, 635 (1996).

177. 471 U.S. 222 (1985).

could outweigh evidence of discriminatory intent.[178] Most important, however, is *Hunter*'s reliance on the seminal First Amendment case *United States v. O'Brien* to underscore the difficulty in determining legislative motive.[179] The Court ultimately determined that the difficulties in *O'Brien* did not matter in *Hunter* because of the strong evidence of discriminatory intent.

In addition, some scholars have argued different variations of the theory that *Bush v. Gore* extended the First Amendment Equal Protection precedent to the voting process.[180] They suggest that the Court surreptitiously and, perhaps, unintentionally relied on First Amendment doctrine in holding that, for want of clear standards, the Florida ballot recount during the 2000 presidential election violated equal protection.[181] *Bush v. Gore* does indeed appear to incorporate the four constituent principles of First Amendment Equal Protection: (1) the precision requirement, (2) liberal rules of justiciability, (3) receptivity to facial challenges, and (4) independent examination of the evidence.

However, in the aforementioned cases, the Court did not expressly rely on First Amendment principles as a legal rationale for the remedies it imposed, but instead, the Court's "recognition of the dangers to expressive equality posed by official and quasi-official racial bias is implicit in these decisions."[182] The cases are unconventional within equal protection jurisprudence because they join seemingly divergent doctrines of discretion under the First and Fourteenth Amendments, respectively. Indeed, First Amendment Equal Protection resolves "the discordant doctrines of discretion that predominate under the First Amendment and the Equal Protection Clause,"[183] whereby official discretion in the realm of speech is suspect and official discretion in the realm of equal protection is presumptively benign.

C. *First Amendment Equal Protection and Viewpoint Discrimination*

The synergy between the First Amendment and the Equal Protection Clause is firmly rooted in the early development of viewpoint

178. *Id.* at 232–33 ("[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks . . . .").

179. *Id.* at 228 ("'Inquiries into congressional motives or purposes are a hazardous matter.'" (quoting United States v. O'Brien, 391 U.S. 367, 383–84 (1968))).

180. *See* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help American Vote Act*, 73 GEO. WASH. L. REV. 1206, 1249 (2005) [hereinafter Tokaji, *Early Returns on Election Reform*]; Tokaji, *First Amendment Equal Protection*, *supra* note 9, at 2487.

181. *See* Tokaji, *Early Returns on Election Reform*, *supra* note 180.

182. Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2441.

183. *See id.* at 2496.

discrimination jurisprudence.[184] Beginning with its decision in *Police Department of Chicago v. Mosley*, the Court treated content-based restrictions as discrimination in the mode of equal protection analyses.[185] In *Mosley*, the Court considered Chicago's restriction on picketing near a school during school hours under the First and Fourteenth Amendments and held that the statute's exemption of labor picketing was impermissible viewpoint discrimination.[186] For seven months prior to the enactment of the statute, the plaintiff in *Mosley* peacefully occupied a public sidewalk adjoining the school, carrying a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota."[187]

In invalidating the statute, Justice Thurgood Marshall wrote for a unanimous Court and acknowledged that the equal protection and First Amendment claims in the case were "closely intertwined" because the regulation involved expressive conduct and classifications based on subject matter.[188] Drawing upon the equal protection doctrine, he reasoned that "[a]s in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."[189] Further, the Court expressly referenced the intersectionality of the First and Fourteenth Amendments and acknowledged the relevance of both constitutional provisions to a healthy democratic sphere and individual liberty:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[190]

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184. *See* John A. Humbach, *Teens, Porn, and Video Games: Is It Time to Rethink* Ginsberg*?*, AMICUS–ONLINE COMPANION TO HARV. C. R.-C.L. L. REV. 1, 8 n.48 (2010) (citing Carey v. Brown, 447 U.S. 455, 461–62 (1980) and Sable Commc'ns of Cal. v. FCC, 492 U.S. 119, 126 (1989)), http://harvardcrcl.org/2010/10/30/teens-porn-and-video-games-is-it-time-to-rethink-ginsberg/.

185. *See id.*

186. *See* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

187. *Id.* at 93.

188. *Id.* at 95.

189. *Id.*

190. *Id.* at 95–96 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

Post-*Mosley*, the Court adopted a heightened scrutiny approach to content-based restrictions on expressive activity, requiring that "the legislation be finely tailored to serve substantial state interests," and stating that "the justifications offered for any distinctions it draws must be carefully scrutinized."[191] *Mosley* demonstrates that the Court has already recognized the intersectionality of equal protection doctrine and First Amendment protections.[192] Vote-denial claims simply require that the heightened scrutiny and judicial vigilance achieved in viewpoint discrimination be applied as forcefully as when they concern infringements on expression in the political arena.

The question then becomes why conventional equal protection doctrine is not enough. The answer is not that First Amendment Equal Protection will always yield a different result. Rather, "[t]he critical distinction between First Amendment Equal Protection and Conventional Equal Protection lies not so much in how they answer the theoretical question of *what* constitutes a violation. The difference lies instead in their answer to the question of *how* to prevent and remedy such violations."[193] Setting aside the propriety of the Court's decision that the Equal Protection Clause applies only to intentional racial discrimination and such discrimination cannot be proved solely by evidence of disparate impact,[194] a question remains as to how intentional discrimination can be proved when there is no proverbial smoking gun but the disparate results are palpable.[195]

On the equal protection side, the Court has not taken up a rigorous qualitative assessment of official conduct in the area of political expression to identify intentional discrimination that may occur below the radar.[196] Although *Arlington Heights v. Metropolitan Housing Development Corp.*[197] articulated certain factors that can give rise to a finding of intentional racial discrimination, it provided little guidance on the qualitative assessment courts should perform when both First Amendment and equal protection interests are at stake or when the

191. *See* Carey v. Brown, 447 U.S. 455, 461–62 (1980).

192. *See also infra* Section II.B.

193. Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2412.

194. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976); Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring).

195. *See* Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2455 ("Stating that the Equal Protection Clause's prohibition extends only to intentional discrimination . . . raises as many questions as it answers.").

196. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); *see also The Supreme Court, 1976 Term—Proof of Discriminatory Intent*, 91 HARV. L. REV. 163, 168 (1977) (suggesting the limited applicability of *Arlington Heights* beyond limited, routine contexts).

197. *Arlington Heights*, 429 U.S. at 267–68.

allegation of discrimination is not primarily racial in nature.[198] First Amendment Equal Protection, however, calls into doubt discretion applied to expressive conduct, particularly where there are racially disparate results. The constitutionality of felon disenfranchisement laws is more appropriately evaluated through First Amendment Equal Protection than through traditional Equal Protection analysis because of the expressive conduct involved.[199]

D. *The First Amendment Equal Protection Claim for Felon Disenfranchisement*

Historically, states often crafted felon disenfranchisement laws with a racially discriminatory motive.[200] Today, on the other hand, most felon disenfranchisement statutes have no evidence of racial animus in their enactment. However, by foregrounding First Amendment equality concerns about viewpoint neutrality and Equal Protection Clause concerns about fundamental rights, First Amendment Equal Protection introduces an alternative theory for challenging these race-neutral laws.

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198. *See id.*; *see also* Julia Kobick, Note, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 561 (2010) (discussing the stagnant nature of equal protection jurisprudence). *Arlington Heights* established a burden-shifting scheme in cases where a state action or policy is challenged as racially discriminatory. 429 U.S. at 266. It held that a plaintiff seeking to establish a prima facie case of an equal protection violation must first show—through use of disproportionate impact, legislative history, a pattern of events, or departures from usual procedures—that discrimination was a motivating factor in the decision. *Id.* The burden then shifts to the government to show that the same decision would have resulted even if the discriminatory motive did not exist. *Id.* at 268. This standard requires a palpable showing of discriminatory intent or motive that will not be intuited from statistical evidence alone, no matter how compelling. *Id.* at 269–70.

199. *See* Tokaji, *First Amendment Equal Protection*, *supra* note 12, at 2411 (comparing *Washington v. Davis* and *McCleskey v. Kemp* with viewpoint discrimination cases such as *Shuttlesworth v. Birmingham* for the proposition that the Court presumes decision makers will generally exercise discretion in a non-racially discriminatory manner despite evidence of a statistically significant disparate impact on particular racial or ethnic groups but does not presume non-discrimination in the context of viewpoint restrictions). The apparent difference between the cases involving political expression and ones such as *Washington* and *McCleskey* is that "the Court exhibits a much greater willingness to trust government decisionmakers—to assume that they will exercise their discretion in a fair and unbiased manner—where race is concerned, than where speech is concerned." *Id.*

200. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 62–63, 162 (2000).

1. Felon Disenfranchisement as Viewpoint Discrimination: The General Claim

In lieu of taking up the felon disenfranchisement laws of a specific state, this Section sets forth a generalized First Amendment Equal Protection claim for viewpoint discrimination. First Amendment Equal Protection theory requires the Court to approach states' discretion in enacting felon disenfranchisement laws with suspicion in light of the dual nature of the rights implicated—the fundamental right to vote and the right to freedom of expression absent viewpoint discrimination. To trigger First Amendment Equal Protection, the regulation at issue must affect a speech interest and yield a disparate impact. In the case of felon disenfranchisement, the speech is political expression in the form of voting and the disparate impact is based on the suspect classification of race. Once this threshold is met, First Amendment Equal Protection imposes a burden-shifting scheme and heightened scrutiny. The suspicion of state action inherent in First Amendment Equal Protection requires that the burden shift to the state to defend the constitutionality of the regulation under strict scrutiny. That is, the state must show that the voting regulation is narrowly tailored to serve a compelling government interest. Unlike conventional equal protection jurisprudence, where the plaintiff must show that discrimination was a motivating factor in the government's decision to enact, enforce, or maintain the laws, First Amendment Equal Protection asks the state to defend those laws that facially infringe on equality principles.

First Amendment Equal Protection would prohibit a government interest rooted in viewpoint discrimination because it contravenes the equality principles of the First and Fourteenth Amendments.[201] States would have to identify, on viewpoint neutral grounds, a constitutional basis for denying the franchise to citizens with felony convictions. Although the hallmarks of First Amendment Equal Protection are (1) clear standards, (2) broadened justiciability, (3) leniency toward facial challenges, and (4) increased judicial fact-finding, felon disenfranchisement laws are generally characterized by clear standards and do not involve discretion in enforcement by election officials and administrators. Judicial suspicion of these laws must, therefore, derive from other indicia of improper motive such as disproportionate impact. Further, First Amendment Equal Protection does not question whether the authority to exercise discretion exists. Instead, it accepts for purposes of argument that states' authority to disenfranchise citizens

201. A determination of motive in this context recognizes that "[t]he key principle with respect to motive is that the government may not limit speech on grounds of mere disapproval, no matter whose or how widely shared." Kagan, *supra* note 6, at 430.

with felony convictions is constitutionally sanctioned. However, the broad justiciability afforded such claims under First Amendment Equal Protection allows courts to adjudicate these claims because of the exigency of the speech interests at stake.

2. Meeting the Threshold: Speech Interests and Disparate Impact

As noted above, the threshold showing to trigger First Amendment Equal Protection in the vote denial context is a speech interest and disparate impact. The speech interest in voting is set forth in Section III.A of this Article. The disparate impact of felon disenfranchisement, by definition, falls upon citizens with felony convictions as a class that does not have constitutionally protected status. However, there are other aspects of the disparate impact of felon disenfranchisement that underscore the equality rights at stake. The racially disparate impact of felon disenfranchisement is well-documented; certain data, however, bear repeating here to illustrate its multidimensional impact not only in terms of race, but also in terms of class and partisanship.

Lying at the intersection of two historically discriminatory systems—penal and electoral—felon disenfranchisement excludes approximately 5.85 million citizens from the electorate. United States prisons and jails currently hold 2.4 million inmates, or one in every 100 adults.[202] As a result of these combined factors, the United States boasts the highest incarceration rate of any modern democratic nation.[203] The

202. The criminal profile of the prison population reveals that 20% of all state inmates are incarcerated for drug offenses. *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT (2011), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Aug2012.pdf) [hereinafter THE SENTENCING PROJECT]; *see* Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUB. ECON. 2043, 2051 (2004). Moreover, nearly half of all convictions (federal and state) are for nonviolent offenses. THE SENTENCING PROJECT; *see* THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1, 3 (2000), *available at* http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf (indicating that 1,169,118 of the 2,042,479 Americans incarcerated in 2001 were convicted of non-violent offenses).

203. KING'S COLLEGE, LONDON, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON BRIEF, http://www.prisonstudies.org/info/worldbrief/ (last visited Sept. 5, 2012). The United States leads the world in the gross number of people incarcerated and the number of inmates per capita. The United States is the only country that imprisons more than one percent of its adult population. *See* PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008). Indeed, overcrowding is a chronic issue in U.S. prisons, with certain cases warranting court intervention. Recently, pursuant to the Prison Reform Act, 18 U.S.C. § 3626, a three-judge panel ordered the release of thousands of prisoners from California's overcrowded prison system. *See* Coleman v. Schwarzenegger, United States District Court Composed Of Three Judges Pursuant To 28 U.S.C. 2284, No. C01-1351 TEH (Aug. 4, 2009). The Supreme Court affirmed the three-judge district court's decision. Brown v. Plata, 131 S. Ct. 1910 (2011) (5-4 decision).

racial disparities in the penal system are just as stark. Of the 7.3 million persons in correctional facilities,[204] or one in thirty-two adults, a staggering 46% are African-American males, who make up only 7% percent of the general population. Twenty percent are Latinos (male and female combined) who comprise 16% of the general population.[205] Of the prison population itself, blacks total approximately 38%, while making up only 13% of the general population.[206] Latinos are now the majority of all sentenced federal felony offenders, comprising 50.4% of this population, while blacks comprise 19.8% and whites 26.3%.[207]

Disproportionate disenfranchisement occurs when these skewed prison statistics confront race- and class-neutral felon disenfranchisement laws. The general impact of these laws disenfranchises one in forty Americans.[208] Most of the 5.85 million disenfranchised are not in prison and are either on parole, on probation, or permanently banned from voting because of a felony conviction. Like the racially skewed imprisonment numbers, felon disenfranchisement also has a disparate impact in terms of race, class, and partisanship, creating a disenfranchised population that is overwhelmingly minority, poor, and Democrat.[209] Although state justifications may be based on a suspicion of an immoral, criminal viewpoint, First Amendment Equal Protection instructs that courts should be suspicious of such rationales if they potentially mask motivations such as racial discrimination. Motivations of class or partisanship may not compel the same scrutiny but help to further contextualize felon disenfranchisement's impact.

a. Race

In addition to the disparate racial impact set forth above, "in 14 states, more than 1 in 10 African Americans have lost the right to vote by virtue of a felony conviction, and 5 of these states disqualify over 20

204. BUREAU OF JUSTICE STATISTICS, KEY FACTS AT A GLANCE: CORRECTIONAL POPULATIONS (Mar. 9, 2012), http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm.

205. *Id.*

206. THE SENTENCING PROJECT, *supra* note 202.

207. U.S. SENTENCING COMMISSION, FINAL QUARTERLY DATA REPORT 44 (2011) (reflecting statistics for the first nine fiscal years. Increased immigration prosecutions explain most of the increase in the number of Latinos sent to prison over the last decade).

208. THE SENTENCING PROJECT, *supra* note 202.

209. Of that 5.85 million, almost 1.5 million are African-American men, while African-American men comprise only 13% of the overall population. Over 2 million white Americans are disenfranchised. Over 560,000 of the disenfranchised are veterans. One million are persons who have completed their sentences and are living largely in poor, densely populated, urban communities in various pockets of the country. *See* The *Voting Rights*, THE SENTENCING PROJECT, http://www.sentencingproject.org/template/page.cfm?id=133 (last visited March 9, 2012).

percent of the African American voting age population."[210] The impact in local communities is even more acute. For example, one in eight males in Georgia (one in seven in Atlanta) are disenfranchised because of a felony conviction.[211] Not readily quantifiable is the effect of disenfranchisement as a community contagion—that is, the culture of political disenfranchisement and exclusion that occurs by virtue of living in households or communities with a large, concentrated population of disenfranchised persons.[212] Like the one person, one vote cases, felon disenfranchisement is compelling as a First Amendment Equal Protection issue because it also functions as a group-based harm.[213] By internalizing and importing societal divisions into the democratic process of voting, felon disenfranchisement laws exacerbate and perpetuate these divisions and contribute to a cycle of community or group disenfranchisement.[214]

As a result, individuals who have no affiliation with the penal system pay the costs of felon disenfranchisement in the currency of political power. In short, Jim Crow laws and overt, racially discriminatory vote-denial practices have been replaced with mass incarceration; deepening class divisions; and race neutral felon disenfranchisement and other voting qualification laws. In the end, the complexion of the disenfranchised has changed little since the era of Jim Crow.

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210. MANZA & UGGEN, *supra* note 2, at 79.

211. Ryan S. King & Marc Mauer, *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia*, The Sentencing Project 3 (2004) http://www.sentencingproject.org/doc/publications/fd_vanishingblackelectorate.pdf.

212. TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 5–6, 113–14 (2007); *see also* Daniel Horn, *Felon Disenfranchisement as an Economic Threat: Class Warfare Revisited*, 49–50 (on file with author).

213. As Professor Owen Fiss has long espoused, the central concern of the Equal Protection Clause is group subordination. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 123–24 (1976); *see also* Symposium, *The Origins and Fate of Antisubordination Theory: A Symposium on Owen Fiss's Groups and the Equal Protection Clause*, ISSUES IN LEGAL SCHOLARSHIP (2002) (symposia of articles analyzing Professor Fiss's article).

214. *See, e.g.*, Dugree-Pearson, *supra* note 113, at 371–77. Professor Michelle Alexander's twenty first century descriptive account of the intergenerational effects of both race based and race neutral disfranchisement illuminates this point: "Jarvious Cotton cannot vote. Like his father, grandfather, great-grandfather, and great-great-grandfather, he has been denied the right to participate in our electoral democracy. Cotton's family tree tells the story of several generations of black men who were born in the United States but who were denied the most basic freedom that democracy promises—the freedom to vote for those who will make the rules and laws that govern one's life." MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 1 (2010).

b. Class

The disparate impact of felon disenfranchisement is not just based on race; there are palpable class dimensions to the American carceral state. The prison population does not represent a socioeconomic cross section of the general population. Studies conducted in the 1990s at the University of Georgia showed that the majority of Georgia's state prisoners had incomes under the poverty level at the time of incarceration.[215] Moreover, the data showed that income had a significant correlation with sentence length.[216] Offenders with incomes of less than $5,000 were sentenced most harshly.[217] That group received sentences 6.2 months longer than people who had incomes between $25,000 and $35,000.[218] More recent data show that, in terms of educational attainment, roughly two-thirds of all inmates do not have a high school diploma or have only a GED.[219] Having no high school diploma correlated with an additional sentence of 1.2 months.[220]

The intersection of race and class makes the class implications of felon disenfranchisement increasingly relevant. There is high correlation between being black and being poorly educated and in prison. In 2008, 37% of black males aged twenty to thirty-four with no high school diploma or GED were incarcerated, compared to 12% of whites and 7% of Hispanics of the same age and educational status.[221]

To the extent that society relies on the political process and not the judiciary to regulate economic inequality, it is imperative that all stakeholders be permitted to participate in the political process.[222]

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215. *See generally* David B. Mustard, *Racial, Ethnic and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. L. & ECON. 285 (2001).

216. *Id*. at 301.

217. *Id*.

218. *Id*.

219. *Id*. at 295. GED stands for General Education Development. One can obtain a GED after passing a qualifying examination and without completing the high school curriculum. http://cms.oregon.gov/ccwd/GED/PDF/GEDFAQ.pdf. GED can also stand for "general equivalency diploma." THE MERRIAM-WEBSTER DICTIONARY 301 (11th ed. 2004).

220. *Id.* at 301.

221. THE PEW CHARITABLE TRUST, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 8 (2010), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf?n=5996prod/2010pubs/p60-238.pdf. In addition, black male unemployment rates are twice that of white males'. CHRISTIAN E. WELLER & JARYN FIELDS, CTR. FOR AM. PROGRESS, THE BLACK AND WHITE LABOR GAP IN AMERICA: WHY AFRICAN AMERICANS STRUGGLE TO FIND JOBS AND REMAIN EMPLOYED COMPARED TO WHITES AM. 3 (2011), http://www.americanprogress.org/issues/2011/07/pdf/black_unemployment.pdf.

222. Martha T. McCluskey, *Constitutionalizing Class Inequality: Due Process in State Farm*, 56 BUFF. L. REV. 1035, 1035–36 (2008) ("In the standard theory, the quintessential function of the political process is to balance or reconcile competing economic interests.").

Indeed, "[t]he prevailing assumption is that economic interests are highly amenable to pluralistic bargaining and majority rule, since economic losers in one deal can readily regroup and re-negotiate to defend their interests another day or in another deal."[223] However, when "economic losers" are denied the right to vote, this theory is troubled and the political process cannot be relied upon to address economic inequalities.

c. Partisanship

Finally, in examining the impact of felon disenfranchisement, the interconnection of race, poverty, and partisanship must also be taken into account. The demographics of the disenfranchised population correlate highly with Democratic Party affiliation. Studies of the impact of re-enfranchisement on electoral outcomes demonstrate that the Democratic Party's successes (and failures) can hinge on the degree of felon disenfranchisement in a given election. For example, Professors Christopher Uggen and Jeff Manza predicted that the Democrats would have gained parity in the U.S. Senate in 1984 and would have maintained control of the Senate from 1986 to 2002, when their study concluded.[224] In addition, they predicted that current felon disenfranchisement rates would have jeopardized John F. Kennedy's election in 1960.[225] Moreover, in the 2000 presidential election, President George W. Bush won by 536 Floridian votes. Absent Florida's strict felon disenfranchisement laws, Vice President Al Gore would have won the presidency with roughly 60,000 additional votes in Florida. Although a majority of the Court has maintained that excessive partisanship in gerrymandering is justiciable,[226] it has yet to adjudicate a case where partisan influence rose to the level of unconstitutionality. Nonetheless, here—where the law at issue is a voting qualification—the disparate partisan impact should also be justiciable.

3. Compelling Government Interest

Once a plaintiff asserts a speech interest and demonstrates disparate impact with respect to the voting qualification, First Amendment Equal Protection requires the court to apply strict scrutiny to determine the

223. *Id.*

224. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792, 794 (2002) ("[W]e estimate that the Democratic Party would have gained parity in 1984 and held majority control of the U.S. Senate from 1986 to the present.").

225. *Id.* at 792; *see also* Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1520 (2003).

226. Vieth v. Jubelirer, 541 U.S. 267, 281, 305 (2004).

law's constitutionality. Accordingly, the state must provide a compelling government interest in the law that is viewpoint neutral and it must demonstrate that the law is narrowly tailored. As set forth in Section I.C, the common justifications are insufficient, as they constitute impermissible viewpoint discrimination. However, this Article does not purport to exhaust all justifications for felon disenfranchisement or deal with the issue of narrow tailoring. Nor does it need to.[227] To the extent that a felon disenfranchisement statute is

227. Although rationales for felon disenfranchisement that are unrelated to how citizens with criminal convictions will exercise the right to vote are beyond the general scope of this Article, three prevailing alternative rationales merit brief discussion: (1) punishment and retribution, (2) deterrence, and (3) the regulation of prisons. As noted earlier, theories of punishment and retributive justice as rationales for vote denial may be challengeable on independent constitutional grounds. For example, a punitive rationale for felon disenfranchisement laws may also be constitutionally suspect. *See, e.g.*, Karlan, *supra* note 50, at 1150; Thompson, *supra* note 112, at 171, 173. Moreover, these goals are inconsistent with broader democratic interests of inclusion and participation, especially in light of felon disenfranchisement's impact on both individuals and communities.

The rationale of deterrence is easily dismissed for its fecklessness. There is no empirical support for the notion that prospective criminals are deterred by the potential of vote denial. Indeed, the consequence of vote denial is rarely disclosed at sentencing or in negotiating plea bargains. As for the regulation of prisons, it is true that prisons are restrictive environments. As such, prisons have been exempted from the full force of the First Amendment in instances where penological interests supersede freedom of expression (or association). *See, e.g.*, Shaw v. Murphy, 532 U.S. 223, 225 (2001) (holding that the First Amendment does provide inmates a right to provide legal advice to other inmates so long as restrictions on such communications are "reasonably related to legitimate penological interests" (quoting Turner v. Safley, 482 U.S. 78, 89 (1987))); Thornburgh v. Abbott, 490 U.S. 401, 409 (1989) (upholding restrictions on publications in prisons if the restrictions are "reasonably related to legitimate penological interests"); *Turner*, 482 U.S. 78 (upholding general prohibition on inmate correspondence between institutions); Jones v. N.C. Prisoners' Union, 433 U.S. 119, 127 (1977) (upholding under the First Amendment restrictions on union organizing by inmates on the grounds that "[t]he creation of an inmate union will naturally result in increasing the existing friction between inmates and prison personnel. It can also create friction between union inmates and non-union inmates"). *But see Jones*, 433 U.S. at 141 (Marshall, J., dissenting) (criticizing the majority's deference to the "rational" exercise of discretion by prison officials in prohibiting union organizing by inmates).

However, this rationale fails on at least two accounts. Exercising the right to vote does not threaten a penological interest in the safety, order, or administration of prisons. In fact, two states, Maine and Vermont, have successfully permitted inmate voting for 180 years without incident. *Vermont, Maine Allow Felon Votes*, THE WASHINGTON TIMES (Jan. 28, 2006) http://www.washingtontimes.com/news/2006/jan/28/20060128-104343-6528r/ (stating that Vermont and Maine have allowed felons to vote since their founding 180 years ago) Moreover, this rationale provides little to no justification for the continued disenfranchisement of citizens with criminal convictions who are either on parole or have completed their sentences. Second, and more importantly, if a state's felon disfranchisement laws were motivated by multiple factors, the "but-for" predominance of impermissible viewpoint discrimination is sufficient to render the regulation unconstitutional. *See* Hunter v. Underwood, 471 U.S. 220, 228, 232

based on viewpoint content, it is unconstitutional despite the existence of other constitutional justifications. Moreover, if there is no legitimate, compelling government interest, narrow tailoring is moot.

Accordingly, absent a finding that a state's felon disenfranchisement scheme is motivated solely by viewpoint-neutral interests, the laws cannot survive strict scrutiny. Even with this heightened scrutiny, however, First Amendment Equal Protection analysis would not likely eradicate all felon disenfranchisement schemes. It would, though, lead to courts taking a more careful look at their justifications, impact, and constitutionality.

III. LEGAL AND CONCEPTUAL BARRIERS TO APPLYING FIRST AMENDMENT EQUAL PROTECTION TO THE VIEWPOINT DISCRIMINATION CLAIM AGAINST FELON DISENFRANCHISEMENT

Linking felon disenfranchisement to the concept of viewpoint discrimination may not be enough to convince courts to apply the nuanced equal protection treatment to these laws that First Amendment Equal Protection envisions. There are a number of legal and conceptual barriers that must be addressed, namely whether (1) voting can be considered speech or expression to trigger First Amendment principles in the equal protection context; (2) *Ramirez* is a legal bar to equal protection claims against felon disenfranchisement; and (3) there are any further indicia of the Court's view toward First Amendment application in contexts other than campaign finance and ballot access. While the judicial theory of viewpoint discrimination set forth in Section I.B of this Article provides important insight into this last issue, the Court's partisan gerrymandering jurisprudence illuminates, perhaps even more explicitly, how the Court conceives of the role of the First Amendment in voting rights cases. In addition, *Ramirez* has proved a formidable barrier to both statutory and constitutional claims against felon disenfranchisement claims. Accordingly, this Part analyzes *Ramirez* and the Court's last pronouncement on felon disenfranchisement, *Hunter v. Underwood*, to determine whether an equal protection claim is legally viable. It starts, however, with a brief exploration of the linkages between voting and speech or expressive conduct. This Part ultimately concludes that the potential legal and conceptual obstacles to First Amendment Equal Protection's application

(1985). As part of the judicial fact-finding consistent with First Amendment Equal Protection, the Court would have to determine whether a state's viewpoint rationale predominates its reasons for enacting or maintaining a felon disenfranchisement scheme. To the extent that any regulation is motivated by impermissible viewpoint discrimination, however, it is subject to constitutional challenge. *See also* Figler, *supra* note 84, at 733–35 ("[D]isenfranchisement excluded offenders from society and thus increased the likelihood of recidivism.").

in this context are surmountable.

A. *Is Voting Speech?*

Historically, the Court has found speech interests in the electoral arena, specifically in the domains of campaign finance and ballot access.[228] Although rooted in the doctrinal framework of the First Amendment, both ballot access and campaign finance cases provide the doctrinal and ideological moorings in which the Court can anchor a First Amendment Equal Protection approach to voting rights cases. Inasmuch as expenditures are a form of expression under the First Amendment, so is the act of voting.[229] Moreover, "'[j]ust as excluding candidates from the ballot 'burdens voters' freedom of association,' so too does the exclusion of actual voters for a candidate."[230] Coupled with the powerful concerns of viewpoint discrimination that have animated First Amendment jurisprudence for two centuries, new vote-denial issues—such as felon disenfranchisement—are ripe for constitutional treatment that explores the nexus of First Amendment and equal protection concerns when viewpoint discrimination is suspected. Moreover, because the right to vote is itself a legal construct and is not expressly granted in the Constitution, the "Court is forced to formulate its own conception of the values served by the right to vote."[231] The concept of voting as speech or expressive conduct is nonetheless surprisingly underdeveloped.[232]

Of the existing constitutional constructs of expressive conduct, voting fits most squarely within the concept of political speech.[233] If

228. *See* Elora Mukherjee, *Abolishing the Time Tax on Voting*, 85 NOTRE DAME L. REV. 177, 213–14 (2009) ("Perhaps the connection between the right to vote and the First Amendment is strongest in the context of ballot access cases.").

229. Justice John Paul Stevens made this point in his dissent in Citizens United v. FEC, 130 S. Ct. 876, 948 n.52 (2010) (Stevens, J., dissenting) ("Of course, voting is not speech in a pure or formal sense, but then again neither is a campaign expenditure; both are nevertheless communicative acts aimed at influencing electoral outcomes.").

230. Mukherjee, *supra* note 228, at 213 (citing Anderson v. Celebrezze, 460 U.S. 780, 78–88 (1983)).

231. Winkler, *supra* note 115, at 334.

232. Professor Pamela Karlan has done the most work to advance the discussion of the purpose and function of voting. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–19 (1993) (describing three distinct conceptions of voting within the broad right to vote); *see also* Winkler, *supra* note 115, at 333 ("[V]oting, like other forms of expression, may be understood to have two roles: it may be used as a vehicle or tool for communicating ideas (an 'instrumental' role), and it may be used to exert and shape one's identity without any corresponding desire to convey messages (a 'constitutive' role).").

233. Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 301, 304, 306 (1992) ("[T]he First Amendment is principally about political deliberation. . . . [We should] treat speech as political *when it is both intended and received as a contribution to public deliberation*

speech is to inform the vote, it follows that the right to vote—the culmination of listening and expression—is itself speech or expression. In fact, voting reifies these inputs; it is through the act of voting that citizens manifest their opinions, ideas, and hopes for governance.[234] Meiklejohn is again instructive on this point:

> The First Amendment . . . protects the freedom of those activities of thought and communication by which we "govern." . . . . But . . . voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them. . . . Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.[235]

Moreover, where speech is part of "public discourse"—that is, when it is "deemed necessary to forge a common democratic will"—First Amendment protection serves the broader goal of democratic legitimacy.[236]

Regardless of whether one accepts the assertion that voting constitutes speech and expression as defined within First Amendment jurisprudence,[237] there are sufficient similarities between (1) voting and

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about some issue. . . . Restrictions on political speech have the distinctive feature of impairing the ordinary channels for political change . . . . [G]overnment should be under a special burden of justification when it seeks to control speech intended and received as a contribution to public deliberation."); Winkler, *supra* note 115, at 334 ("[C]onceptualized under the constitutional doctrine of free speech, voting would be paradigmatic of political speech . . . ."); *see also* Cass R. Sunstein, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

234. Winkler, *supra* note 115, at 334. *But see* Winkler, *supra* note 115, at 338 ("[E]ven understood to have expressive components, voting is but a muted and limited form of speech with a confined range of expressions available to the voter.").

235. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57 (1961).

236. Robert C. Post, *Viewpoint Discrimination and Commercial Speech*, 41 LOY. L.A. L. REV. 169, 176 (2007); *see also* Post, *supra* note 36, at 483, 484 ("Public discourse is presumptively within the scope of the First Amendment. . . . All citizens within public discourse, and their audiences within public discourse, have equal autonomy [to engage in the formation of public opinion], which reflects the political equality that all citizens enjoy within a democracy.").

237. Arguments abound as to why voting should or should not be considered speech or expression. For a thorough disquisition of voting's traits as expressive activity, see, for example, Winkler, *supra* note 115, at 333, 338–49 ("Voting is essentially an expressive exercise. By voting, the individual shows something of herself, displaying desires, beliefs, judgments, and perceptions. The voter gives voice to her sentiments and views, concretizes them, and asserts them, though anonymously, through the marking of a candidate's name or the 'yes' or 'no' of a

(2) traditional speech and expressive activities to warrant application of First Amendment Equal Protection. Furthermore, under the theory of "electoral exceptionalism," activity in the electoral context—especially voting—deserves special protection and differentiated regulation.[238]

B. *Confronting Precedent: The Importance of* Ramirez *and* Hunter

Despite the racially disparate impact of felon disenfranchisement laws, as well as the Voting Rights Act's broad prohibition on *all* voting practices that result in denial or abridgement of voting rights on account of race,[239] most challenges to felon disenfranchisement under the Act have failed. To date, *Ramirez*'s sanction of felon disenfranchisement has made it statutorily unassailable. In addition, direct constitutional attacks on felon disenfranchisement laws based on the unequal treatment of citizens with criminal convictions are directly precluded by *Ramirez*.

A handful of felon disenfranchisement cases have raised First Amendment challenges, which courts have routinely dismissed with virtually no analysis on the ground that the First Amendment does not provide a right to vote for citizens with felony convictions.[240] The

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referendum. This may be a communicative effort, one that creates a link between the voter and someone else—for example, government officials, political parties, or the general public—and passes a message from one to the other.").

238. *See* Reynolds v. Sims, 377 U.S. 583, 560 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." (quoting Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964))). Voting is also a dimension of citizenship. *See* Kenneth L. Karst, *Citizenship, Law, and the American Nation*, 7 IND. J. GLOB. L. STUD. 595, 597–98 (2000) ("Voting, of course, is not primarily the power to affect choices of the public officeholders and public policies; it is the preeminent expression of citizenship, of identity as an equal member of the national community.") (citation omitted); *see also supra* note 45.

239. *See* 42 U.S.C. § 1973(a) (2000) (prohibiting any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color").

240. *See* Howard v. Gilmore, 205 F.3d 1333, 2000 WL 203984, at *1 (4th Cir. 2000) (unpublished) (per curiam) ("The First Amendment creates no private right of action for seeking reinstatement of previously canceled voting rights. Therefore, the district court correctly dismissed Howard's claim to the extent it was founded upon the First Amendment."); Lawrie v. Harris, 2011 WL 3501000, at *3 (E.D. Cal. Aug. 9, 2011) ("The First Amendment does not guarantee felons the right to vote."); Hayden v. Pataki, No. 00 CIV. 8586 (LMM), 2004 WL 1335921, at *6 (S.D.N.Y. June 14, 2004), *aff'd and remanded*, 449 F.3d 305 (2d Cir. 2006), *and aff'd and remanded sub nom.* Hayden v. Paterson, 594 F.3d 150 (2d Cir. 2010) ("[T]he case law is clear that the First Amendment does not guarantee felons the right to vote."); Johnson v. Bush, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002) ("[I]t is clear that the First Amendment does not guarantee felons the right to vote."); Farrakhan v. Locke, 987 F. Supp. 1304, 1314 (E.D.

district court in *Farrakhan v. Locke* gave this issue the most detailed treatment in its single-sentence holding: "[T]o uphold these claims against Defendants' motion to dismiss, the Court would have to conclude that the same Constitution that recognizes felon disenfranchisement under § 2 of the Fourteenth Amendment also prohibits disenfranchisement under other amendments."[241] However, the *Farrakhan* court's invocation of the *Ramirez* rationale for jettisoning the First Amendment challenge to Washington State's felon disenfranchisement laws was misplaced. As *Hunter* demonstrated, *Ramirez* did not foreclose all constitutional challenges to felon disenfranchisement laws. Indeed, *Ramirez* does not preclude constitutional claims that do not challenge states' general authority to enact felon disenfranchisement pursuant to the Court's reading of Section 2 of the Fourteenth Amendment. *Carrington* and its progeny provide the basis for such a claim in the form of viewpoint discrimination. To consider how viewpoint discrimination can inform an equal protection challenge to felon disenfranchisement laws, it is helpful to understand the speech implications of voting, as well as how and the extent to which the *Ramirez* decision informs new constitutional challenges.

In applying *Ramirez*, courts have repeatedly held that, absent proof of intentional racial discrimination in the enactment of the statute, states enjoy a blanket sanction to disenfranchise persons with criminal convictions because Section 2 of the Fourteenth Amendment contains text acknowledging the extant practice.[242] Indeed, felon disenfranchisement laws have enjoyed special protection from constitutional scrutiny under *Ramirez* based on the Court's textual reading of Sections 1 and 2 of the Fourteenth Amendment.[243] This

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Wash. 1997) (finding that to hold the same Constitution that specifically recognizes felon disenfranchisement under Section 2 of the Fourteenth Amendment also prohibits disenfranchisement under another amendment would be to interpret the Constitution in an inconsistent manner). *But see* Otsuka v. Hite, 414 P.2d 412, 416 (Cal. 1966) *abrogated by* Ramirez v. Brown, 9 Cal. 3d 199 (1973) ("While the right to vote is not among the specifically enumerated rights of the First Amendment, it is nevertheless one which 'this (Supreme) Court has been so zealous to protect.'") (citing *Carrington*, 380 U.S. at 96).

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

242. *See supra* Section III.A; *see also* Richardson v. Ramirez, 418 U.S. 24, 55–56 (1974); *Johnson*, 214 F. Supp. 2d at 1338; *Farrakhan*, 987 F. Supp. at 1314.

243. *See Ramirez*, 418 U.S. at 54–55 ("We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court. . . . [T]hat § 1, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less

rationale suggests that the constitutional recognition of a practice confers impermeable constitutional protection. Alternatively, courts have used the justification that the framers did not expressly ban states from disenfranchising felons.[244] While the Court has recognized intentional racial discrimination as one impermissible justification for such laws,[245] viewpoint discrimination has not yet been asserted as a basis for challenging felon disenfranchisement statutes despite some scholarly recognition of this claim.[246]

As noted above, *Ramirez* held that denying citizens with felony convictions voting rights is not an equal protection violation because Section 2 of the Fourteenth Amendment references and, therefore, permits this practice.[247] However, as *Hunter v. Underwood* instructs, *Ramirez* does not control the interpretation of Section 2 when that clause competes with other constitutional rights.

Eleven years after deciding *Ramirez*, in *Hunter*, the Court applied strict scrutiny to Alabama's felon disenfranchisement scheme and held it unconstitutional under the Equal Protection Clause.[248] Without disturbing its earlier holding that Section 2 implicitly authorizes states to deny the vote to citizens with felony convictions, the Court stated, "We are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [Alabama's felon disenfranchisement law] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in [*Ramirez*]

drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.").

244. *See id.* at 43; *Johnson*, 214 F. Supp. 2d. at 1338; *Farrakhan*, 987 F. Supp. at 1314.

245. Hunter v. Underwood, 471 U.S. 220, 225 (1985). *Hunter* relied on both the Fourteenth and Fifteenth Amendments for its holding, which allowed the Court to avoid the argument that the acknowledgment of the practice contained in Section 2 of the Fourteenth Amendment could not have been outlawed by Section 1. Accepting this interpretation, arguendo, still leaves other constitutional provisions to be tested against Section 2 of the Fourteenth Amendment to the extent that they are in tension.

246. Indeed, the assertion that felon disenfranchisement laws operate as a form of viewpoint discrimination does not originate with this Article. Pamela Karlan and others have drawn the connection between the group of cases that prohibit vote denial that is based on how one might vote and the justifications for felon disenfranchisement. *See* Karlan, *Convictions and Doubts*, *supra* note 50 (discussing causes and consequences of various approaches to felon disenfranchisement); *see also* Figler, *supra* note 84, at 733–35; Wilkins, *supra* note 78, at 108–09.

247. Karlan, *Convictions and Doubts*, *supra* note 50, at 1153–54.

248. *Hunter*, 471 U.S. at 225, 233 (applying Arlington Heights v. Metro. Hous. Dev., 429 U.S. 252, 265 (1977); *see also* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626–30 (1969) (detailing the reasons for applying strict scrutiny to restrictions on the right to vote); Otsuka v. Hite, 414 P.2d 412, 416–18 (applying strict scrutiny to vote denial claim).

suggests the contrary."[249] *Hunter*'s challenge to discrimination in the enactment of felon disenfranchisement laws thus demonstrates that, where specific constitutional protections are threatened, felon disenfranchisement statutes are not immune to challenge.

Accordingly, a viewpoint-based First Amendment Equal Protection challenge does not contravene the Court's holding in *Ramirez*. Such a challenge is consistent with *Hunter*'s application of strict scrutiny to these laws when the equality protections of Section 1 of the Fourteenth Amendment are threatened. Certainly, nothing in a First Amendment viewpoint discrimination challenge upsets the precedent in *Ramirez* or earlier vote denial cases that "[r]esidence requirements, age, [and] previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters."[250] Rather, a viewpoint discrimination challenge pits the First Amendment's freedom of expression protection and the Equal Protection Clause's fundamental rights jurisprudence against *Ramirez*'s license to lawfully disenfranchise citizens with felony convictions.[251]

In determining the constitutionality of the statute, the *Hunter* Court took account of the legislative record that demonstrated discriminatory intent,[252] as well as the racially disproportionate impact of Alabama's racially neutral disenfranchising provisions. Specifically, the Court noted that, as of 1903, the statute had disenfranchised approximately ten times as many blacks as whites, and that at the time of the decision a disparate effect persisted to such an extent that in Jefferson and Montgomery Counties, African-Americans were at least 1.7 times as likely as whites to be disenfranchised by the statute.[253] Significantly, *Hunter* was also a mixed-motive case. The state proffered a defense that the intent of the law was not only to disenfranchise blacks, but also to disenfranchise poor whites.[254] Without deciding "[w]hether or not

249. *Hunter*, 471 U.S. at 233; *see also* Ortiz, *supra* note 162, at 1131 ("Even though the state argued that the fourteenth amendment itself expressly contemplated such exclusions, the inference of intent proved unrebuttable.").

250. Richardson v. Ramirez, 418 U.S. 24, 53 (1974) (quoting Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 51 (1959)) (internal citations omitted).

251. Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); Baxstrom v. Herold, 383 U.S. 107, 115 (1966); Carrington v. Rash, 380 U.S. 89, 91 (1965); Cox v. Louisiana, 379 U.S. 559, 580–81 (1965) (Black, J., concurring)); Reynolds v. Sims, 377 U.S. 583, 561–62 (1964).

252. The Court found undisputed evidence that a "zeal for white supremacy ran rampant at the convention" at which Alabama's felon disfranchisement laws were enacted. *Hunter*, 471 U.S. at 229.

253. *Id.* at 227.

254. *Id.* at 232.

intentional disenfranchisement of poor whites would qualify as a 'permissible motive' . . . [the Court held that] an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks" where racial discrimination was a "but-for" motivation.[255]

While *Ramirez* is a formidable barrier to general equal protection claims, it does not bar equal protection or other constitutional challenges that are based on suspect classifications or, as this Article suggests, independent constitutional principles such as viewpoint discrimination.

C. *First Amendment Lessons from Partisan Gerrymandering*

The judicial theory of viewpoint discrimination set forth above indicates that the Court has applied First Amendment principles in vote denial cases. These cases do not, however, reflect the Court's thinking on applying the First Amendment in such cases. On the other hand, in the realm of partisan redistricting, certain members of the Court have beckoned the First Amendment to settle what has proved to be a theoretically justiciable but practically impossible legal claim.

The Equal Protection Clause has long defined the jurisprudence surrounding constitutional challenges in the area of redistricting. Indeed, the one person, one vote cases, grounded in the Equal Protection Clause, spurred a reapportionment revolution and subsequent redistricting phenomenon.[256] However, there is some acknowledgement by the Court that it may not be the only constitutional provision that addresses these concerns, especially in the realm of partisan gerrymandering. Partisan gerrymandering, the act of redistricting with excessive emphasis on voters' party affiliation, invokes viewpoint discrimination theory because the motive for manipulating electoral lines in the challenged configuration is based on the ideological viewpoint of the voters as expressed by their party affiliation.[257] In

255. *Id.*

256. *See* Joseph C. Coates, III, Comment, *The Court Confronts the Gerrymander*, 15 FLA. ST. U. L. REV. 351, 352 (1987) ("The apportionment revolution began with the United States Supreme Court's decision in *Baker* v. *Carr*, holding that malapportionment was a justiciable issue.") (footnote omitted, discussing Baker v. Carr, 369 U.S. 186 (1962)); *see also Reynolds*, 377 U.S. at 568 ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

257. *See* Vieth v. Jubelirer, 541 U.S. 267, 287–88, 314 (2004) ("The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.").

Vieth v. Jubelier[258] and *League of United Latin American Citizens* (*LULAC*) *v. Perry*,[259] the Court briefly explored the First Amendment's application in partisan gerrymandering cases. *Vieth* established that voters affiliated with a political party can sue to block implementation of a congressional redistricting plan on the grounds that it was manipulated for purely political reasons, but the Court found no violation on these grounds based on the case's facts. Instead, the Court held that the Pennsylvania congressional plan created by the Republican-led legislature violated the principle of one person, one vote.

Among *Vieth*'s highly fractured opinions, Justice Anthony Kennedy wrote that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by *reason of their views*."[260] In such cases, he argued, strict scrutiny must be applied because of the burden the state places on representational rights and the state's consideration of political views.[261] Absent a narrowly tailored compelling government interest, these laws would fail.[262]

Justice Kennedy further noted that "[t]he First Amendment may be the more relevant constitutional provision"[263] in gerrymandering cases because of the limitations of the Equal Protection Clause's classification-focused approach in contexts beyond race: The Equal Protection Clause analysis "presents a more complicated question when the inquiry is whether a generally permissible classification has been used for an impermissible purpose. That question can only be answered in the affirmative by the subsidiary showing that the classification as applied imposes unlawful burdens."[264] To be sure, rather than focusing on the permissibility of the voter classification according to equal protection jurisprudence, Justice Kennedy's First Amendment approach would consider the extent of the burden on representational rights.[265] Justice Kennedy's opinion in *Vieth*, which provided the fifth vote for the judgment, therefore marks an important development in recognizing

258. *Id.*

259. 548 U.S. 399, 461–62 (2006).

260. *Vieth*, 541 U.S. at 314 (emphasis added).

261. *See id.*

262. *See id.*

263. *Id.*

264. *Id.* at 315 (Kennedy, J., concurring in judgment).

265. *Id.* Justice Kennedy did not define representational rights for these purposes. *See, e.g.*, ISSACHAROFF & KARLAN, *supra* note 132, at 564 (critiquing Justice Stevens's hybrid approach on, among other the grounds, the ground that "'representational rights' are as yet undefined"); *see also* Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1200 (2007).

the interrelation of First Amendment principles and equal protection claims in election law.

Justice John Paul Stevens joined Justice Kennedy's endorsement of a First Amendment approach to partisan gerrymandering in *Vieth* and continued developing this idea in the vein of political neutrality in *League of United Latin American Citizens* (*LULAC*) *v. Perry*.[266] *LULAC* involved the infamous mid-decade redistricting of Texas congressional seats at the behest of Representative Tom Delay, which sent Democratic legislators fleeing from the state to prevent quorum. There the Court held 7–2 that the resulting plan (for the entire state and the Dallas area) was not an unconstitutional partisan gerrymander, and that states could redistrict mid-decade as appropriate.[267] In addition, however, the Court held 5–4 that the state's dismantling of one majority-minority district (District 23), as it was positioned to oust an incumbent, denied those voters an opportunity to elect a candidate of their choice in violation of the Voting Rights Act.[268] Justice Stevens's concurrence and dissent in *LULAC* briefly developed Justice Kennedy's First Amendment overture from *Vieth*, but took it one step further by joining the Equal Protection Clause and First Amendment analyses:

> The requirements of the Federal Constitution that limit the State's power to rely exclusively on partisan preferences in drawing district lines are the Fourteenth Amendment's prohibition against invidious discrimination, and the First Amendment's protection of citizens from official retaliation based on their political affiliation. The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest. Similarly, the freedom of political belief and association guaranteed by the First Amendment prevents the State, absent a compelling interest, from 'penalizing citizens because of their participation in the electoral process, . . . their association with a political party, or their expression of political views.'[269]

266. 548 U.S. 399, 447 (2006).

267. *Id.*

268. *Id.* at 427. The Court, though, failed to hold that an African-American plurality district and another potential Latino district were protected under the Voting Rights Act. *Id.* at 425.

269. *Id.* at 462 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

Justice Stevens's approach broadens the analysis to include the state's motivations in burdening voters' rights.[270] Among the impermissible motivations or justifications are exclusionary reasons—reasons that "are simply excluded from being acceptable bases for action."[271] Writing for the majority in *LULAC*, Justice Kennedy also echoed these sentiments. He noted that "even if . . . the State's action was taken primarily for political, not racial, reasons,"[272] that does not change the constitutional analysis. Indeed, one possible reading of Justice Kennedy's First Amendment Equal Protection approach to partisan gerrymandering is that it is a limitation on a state's ability to infringe voting rights for a constitutionally impermissible reason.[273] These reasons do not need to be based on a racial classification and, importantly, can be based on a lawful classification. Rather, the inquiry is "whether a generally permissible classification has been used for an impermissible purpose."[274] Justice Kennedy's conclusion that the Texas legislature's dismantling of a majority Latino district because Latinos were poised to avail themselves of the opportunity to elect a candidate of their choice "bears the mark of intentional discrimination that could give rise to an equal protection violation" underscores this point.[275] The Latino voters in LULAC were denied certain rights of representation based on how they intended to exercise the right to vote—that is, based on who they intended to vote for.

It is true that Justice Kennedy's approach in *Vieth* was roundly rebuffed by a plurality of the Court in *Vieth*,[276] and Justice Stevens's suggested hybrid equal protection–First Amendment analysis has not been developed further. Still, *Vieth* and *LULAC* demonstrate that the connection between the First Amendment and the Equal Protection Clause in the realm of election law has not been lost on all members of the Court. Some election law scholars have taken up the mantle of pursuing the First Amendment's applicability to partisan

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270. *See* Charles, *supra* note 265, at 1201 ("LULAC adds an additional element into the inquiry: the justification for the classification. The inquiry is not only whether a permissible political classification was used that burdened a group of voters; the inquiry also includes whether the State had an impermissible reason for imposing this burden.").

271. Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 714 (1994).

272. *LULAC*, 548 U.S. at 440.

273. Charles, *supra* note 265, at 1196–202.

274. Vieth v. Jubelirer, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring in the judgment).

275. *LULAC*, 548 U.S. at 440 ("In essence, the state took away the Latinos' opportunity because Latinos were about to exercise it.").

276. *Vieth*, 541 U.S. at 301–04.

gerrymandering[277] amid broad criticism of applying the First Amendment to such claims.[278] However, the principal critique of Justice Kennedy's approach, in most instances, is directly linked to the vagaries of redistricting and the difficulty in discerning motive among all the other factors that contribute to redistricting.[279] This problem is less pronounced concerning felon disenfranchisement and far more remediable. When enacting felon disenfranchisement laws, legislatures are certainly considering many factors; however, the universe of justifications is much smaller. If potential voters are denied the franchise because of the viewpoint they are expected to express at the polls, then the law is suspect even though the legislature's motive may be mixed with other rationales.[280] Whether any consideration—or the extent of consideration—of viewpoint in the context of redistricting is sufficient to establish a constitutional violation is still a perplexing matter for the Court; one that is beyond the scope of this analysis. Suffice it to say, however, that viewing First Amendment principles as applicable to gerrymandering (as Justices Kennedy and Stevens do) makes it easier to view First Amendment principles as applicable to vote denial cases such as felon disenfranchisement.

Moreover, finding a viewpoint discrimination connection to felon disenfranchisement laws would not upend legislative practices as it would with those in the context of partisan redistricting. Unlike the

277. *See* David A. Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. U. L. REV. 1, 26 (2007) (arguing that liberalism provides the theoretical basis for applying the First Amendment to partisan gerrymandering cases); 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, 289 (2005) (arguing that the First Amendment provides a more "plausible" basis for challenges to partisan gerrymandering than the Equal Protection Clause).

278. *See, e.g.*, Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 401–10 (2005); Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after* Vieth, 3 ELECTION L.J. 626 (2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=561243, 28–29 (criticizing Justice Kennedy's suggestion in *Vieth* of a possibly emergent First Amendment test) ("Justice Kennedy's First Amendment 'burden:' [test] . . . inevitably would lead courts to develop multipart tests for separating permissible from impermissible use of partisan information in districting . . . .").

279. *Vieth*, 541 U.S. at 286 ("[T]he fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering.").

280. Hunter v. Underwood, 471 U.S. 220, 232 (1985) ("Whether or not intentional disenfranchisement of poor whites would qualify as a 'permissible motive' . . . it is clear that where both impermissible racial motivation and racially discriminatory impact are demonstrated . . . an additional [permissible] purpose . . . would not render nugatory the purpose to discriminate against all blacks . . . .").

enactment of felon disenfranchisement laws, in the course of redistricting, legislatures must balance numerous interests and concerns while abiding by traditional redistricting criteria, including incumbency protection, which naturally invites consideration of voters' party affiliation.[281] By contrast, the perceived viewpoint of the voter is entirely irrelevant to the right to vote and should never play a role in determining voter eligibility.

With respect to partisan gerrymandering, one scholar has noted that "[t]he question for the Court's gerrymandering jurisprudence is whether there are limitations on a State's ability to alter electoral structures when voter preferences are inimical to the state's preferences. What is the purpose of elections if a state will repeatedly seek to impose its preferences on the electoral process?"[282] Similar questions remain for felon disenfranchisement. Will the Court permit states to alter the composition of their electorates when that action is motivated by a desire to exclude a group of citizens based on how they may vote? Will this unlawfully diminish the purpose and integrity of elections?

CONCLUSION

Of the U.S. Constitution's twenty-seven amendments, five expand the right to vote to include groups of citizens that were once denied that right for what would now be considered discriminatory purposes.[283] Some groups once considered "unpopular" under the law were denied the right to vote based on the same moralistic and functional justifications that are today used to defend felon disenfranchisement. It is well-established that *Ramirez* permits intentional discrimination against citizens with felony convictions, in the form of vote denial, because of their status as felons. It stretches *Ramirez*'s holding beyond constitutional limits, though, to interpret it to permit intentional discrimination in the form of vote denial because of how felons may

281. As long as incumbency protection is a legitimate redistricting criterion, party affiliation will factor in to the districting equation. Nevertheless, Justice Kennedy has questioned the propriety of this criterion precisely for the potential conflict it poses to constituent interests and its potential exclusionary harm. *See* United Latin American Citizens (LULAC) v. Perry, 548 U.S. 399, 441 (2006) ("If . . . incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters.").

282. Charles, *supra* note 265, at 1198.

283. Indeed, the right to vote has been shaped by amendments to the Constitution rather than an affirmative grant. *See, e.g.*, Michael C. Dorf & Samuel Issachoroff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 923 (2001) ("The Constitution is supposed to enable democratic politics and establish its outer bounds. Yet the original Constitution performed this task only inferentially, leaving most of the details to either subsequent amendments or, more centrally, to judicial interpretation.").

vote.

As the development of election law directs us toward more nuanced conceptions of equality in the political arena, the justifications for felon disenfranchisement laws—especially when viewed in the context of their impact on racial minorities and poor populations—weaken significantly. Because there is no "organizing principle to 'the law of politics,'"[284] cross-pollination between substantively related doctrines like the First Amendment and Equal Protection can inform the protection of the right to vote against various forms of discrimination, even those society is not yet willing to recognize. Indeed, if we take seriously Justice William O. Douglas's trenchant pronouncement that "the Equal Protection Clause is not shackled to the political theory of a particular era,"[285] then expanding current conceptions of the Clause's interaction with other fundamental rights is appropriate.[286] The opinion in *Harper v. Virginia Board of Elections*, from which this observation originates, further counsels that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change," especially concerning the protection of fundamental rights.[287] This is particularly true concerning groups that have been disfavored or discriminated against historically. Undeniably, the central lesson of the century-plus struggle toward universal suffrage, and the expansion of constitutional protections more generally, is that "an understanding of our Constitution, for our Constitution will be tested again and again by unpopular people and unpopular causes."[288] Applying First Amendment Equal Protection to felon disenfranchisement laws that are grounded in viewpoint discrimination meets this challenge by safeguarding and connecting the principles of equality in the constitutional provisions where they are valued most.

284. Pildes, *supra* note 271, at 18.

285. Harper v. Va. Bd. of Elections, 383 U.S. 663, 669 (1966).

286. The Court in *Harper* stated that "[i]n determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights." *Id.*

287. *Id.* (noting that in 1896, seven of the eight then sitting Justices upheld under the Equal Protection Clause laws providing for separate public facilities based on race, which were later held to constitute "unequal and discriminatory treatment that sound strange to a contemporary ear" (citing Plessy v. Ferguson, 163 U.S. 537, 551 (1896))).

288. FRANK H. ARMANI, PRIVILEGED INFORMATION 1 (1984).