ARTICLES

"CIVIL DEATH": THE IDEOLOGICAL PARADOX OF CRIMINAL DISENFRANCHISEMENT LAW IN THE UNITED STATES

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INTRODUCTION

American political thought has always been characterized by paradoxes of inclusion and exclusion. Similar inconsistencies have existed in every democratic state. Popular governments since classical Athens have based their legitimacy on inclusive and universalist premises, while simultaneously barring significant minorities and even majorities of their adult populations from self-rule. Religion, sex, property ownership, race, literacy, political affiliation, and slave or servant status have—in different lands at different times—served to define the boundaries of the body politic, especially in regard to participation in the electoral franchise. Though easily condemned in the cool light of history, such restrictions have appeared eminently reasonable to those who enacted them.

In the United States, only one major restriction of the voting rights of adult citizens survives—the disenfranchisement of criminal offenders. However, despite new interest in criminal disenfranchisement generated by the presidential election of 2000,[1] many Americans remain unaware of

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1. Some of this increased attention has come as a result of Florida's role in that election. While only 537 votes decided the presidential election in the state, hundreds of thousands of non-incarcerated Floridians are prohibited from voting because of a felony conviction. *See infra* note 25 and accompanying text. Moreover, a flawed attempt to correct voter rolls prior to the election apparently led the state to bar many non-felons from the polls in November of 2000. *See* Terry Carter, *Cell Block to Voting Bloc?*, ABA J., Oct. 2002, at 16; Sasha Abramsky, *A Growing Gap in American Democracy*, N.Y. TIMES, July 27, 2002, at A11; Bob Herbert, *Keep Them Out!*, N.Y. TIMES, Dec. 7, 2000, at A39; *Alpharetta Firm Accused in Florida Voting Rights Suit*, ATLANTA CONST., Jan. 11, 2001, at A3; *Black Voters in Florida Deserve Some Real Answers*, USA TODAY, Jan. 11, 2001, at 14A; *see also* John Mark Hansen, *Task Force on the Federal Election System: Disfranchisement of Felons*, *in* TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS: TASK FORCE REPORTS TO ACCOMPANY THE REPORT OF THE NATIONAL COMMISSION ON ELECTION REFORM ch. 8 (2001) (discussing the repeal of laws

the policy's extensive effects on the electorate. About four million U.S. adults are now barred from voting because of a criminal conviction, the majority of whom are not incarcerated, and more than one million of whom have completed their sentences.[2] In thirteen states, many criminal offenders are denied the right to vote even after they have completed their terms of incarceration, probation, and parole.[3] The United States is the only democracy that indefinitely bars so many offenders from voting, and it may be the only country with such sweeping disenfranchisement policies.[4]

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disenfranchising ex-felons); *Felons Lose Bid to Alter Vote Ban*, MIAMI HERALD, July 19, 2002, at 1B (noting that despite the ban on voting by ex-felons, "more than 1,200 felons cast ballots in that election, according to a Herald analysis"). A muckraking journalist's account of how Florida "fixed the vote" is in GREG PALAST, THE BEST DEMOCRACY MONEY CAN BUY 6-43 (2002). For a critical response to Palast by former Florida Secretary of State Katherine Harris, see Katherine Harris, *A Florida Makeover*, HARPER'S MAG., July 2002, at 4. A suit by Florida ex-felons and civil-rights groups challenging the state's felon-disenfranchisement law has not succeeded to date. *See* Johnson v. Bush, 214 F. Supp. 2d 1333 (S.D. Fla. 2002).

After years of silence on the issue, President Clinton used a farewell op-ed to argue that "it is long past time to give back the right to vote to ex-offenders who have paid their debts to society." William Jefferson Clinton, *Erasing America's Color Lines*, N.Y. TIMES, Jan. 14, 2001, at 17.

2. *See* JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (1998). The Human Rights Watch and The Sentencing Project (HRW/TSP) study is the most comprehensive survey of U.S. criminal disenfranchisement law to date. The HRW/TSP study estimated that about 3.9 million people are temporarily or permanently disenfranchised, of whom "over one million" have completed their sentences. *Id.*; *see also* Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993). Shapiro estimated in 1993 that counting both those currently under sentence and those who have served their time, about 4.1 million Americans were denied the right to vote either temporarily or permanently because of their status as criminal offenders or ex-offenders. *Id.* at 540 n.17. Shapiro estimated that, in addition to those who completed all aspects of their sentences, approximately two million were denied the vote who were not incarcerated, but remained on probation or parole in states which deny the vote to those in that condition. *Id.* The British magazine *The Economist* recently reported a new study finding that "4.7[million] Americans or 2.3 percent of the voting population have lost their rights." *Prison and Beyond: A Stigma That Never Fades*, THE ECONOMIST, Aug. 10, 2002, at 26.

3. *See infra* note 23 (listing states which disenfranchise incarcerated convicts and ex-offenders).

4. FELLNER & MAUER, *supra* note 2, at 18. We do not have a comprehensive comparative study of offender disenfranchisement laws, but evidence strongly suggests that no other democracy disenfranchises indefinitely criminals who have not committed voting-specific infractions. In a 1999 decision protecting South African inmates' right to vote, the South African Constitutional Court noted that "in Denmark, Ireland, Israel, Sweden, and Switzerland, all prisoners can vote." August v. Electoral Comm'n, 1999 (3) SALR 1, 15 n.30 (CC) (S. Afr.). An Israeli elections website notes that forty-two polling stations were set up in "prisons and detention centers" for the 1999 parliamentary elections. *See* Elections for the 15th Knesset, *at* http://www.knesset.gov.il/elections/eindex.html (last visited Dec. 12, 2002). South Africa's

Previous scholarship on criminal disenfranchisement has faulted the practice on equal-protection or other constitutional grounds,[5] focused on its racial dimension,[6] analyzed it in comparative perspective,[7] attacked its

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legislature restricted prisoners' voting rights in the following year. *See* § 93 of Local Government: Municipal Electoral Act 27 of 2000 (JSRSA) (S. Afr.); e-mail from Luyanda Tyibilika, Department of Correctional Services, South Africa (Aug. 16, 2002) (on file with author). Tyibilika wrote that "it is our interpretation that all detained prisoners . . . will effectively in future be prevented from voting (since 11 July 2000 when the amendment came into operation.)" *Id*; *see also* Glenda Flick, *Constitutional Law*, *in* ANNUAL SURVEY OF SOUTH AFRICAN LAW 2000, at 2 (JUTA Law ed., 2000).

Countries such as France, Germany, and Greece, meanwhile, disqualify only some classes of incarcerated offenders from voting, and countries including Australia, Canada, New Zealand, and Sri Lanka, limit the voting rights only of those serving sentences of a specified length. *See August*, 1999 (3) SALR at 15 n.30. Another authority shows that in Germany, post-sentence disenfranchisement is never automatic, may only be applied by the sentencing judge for certain serious infractions, and can last only two to five years following incarceration. Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 760-61 (2000). Moreover, German law requires the government to facilitate voting by eligible inmates. *See* FELLNER & MAUER, *supra* note 2, at 18. Canadian courts have struck down laws disenfranchising incarcerated offenders despite the legislature's revision of the laws to cover only certain serious crimes. Canadian prisoner-voting law currently varies among provinces, but the Canadian Supreme Court in October 2002 ruled that federal law disenfranchising prisoners violates the Canadian Charter of Rights and Freedoms and must be struck down. *See* Sauvé v. Canada, 2002 SCC 68 (Oct. 31, 2002), *available at* http://www.lexum.umontreal.ca/csc-scc/ en/rec/html/sauve2.en.html. This ruling is the latest in a decade-long struggle. *See* Sauvé v. Canada (Attorney Gen.), [1992] 7 O.R.3d 481 (Can.); Belczowski v. Canada, [1992] 2 F.C. 440 (Can.); *see also* Christopher P. Manfredi, *Judicial Review and Criminal Disenfranchisement in the United States and Canada*, 60 REV. POL. 277, 281-84 (summarizing Canadian decisions). Not all prisoner voting can be interpreted as a sign of a democratic or rights-protecting regime. Prisoners in Pakistan were permitted to vote in a 2002 referendum, but human-rights groups accuse the government of coercing inmates to vote for General Musharraf in order to inflate turnout rates. *See* Editorial, *Eyewash in Pakistan*, BALT. SUN, May 2, 2002, at 18A (arguing that prisoners were "rounded up to vote"); *Rights Body Casts Doubts on Credibility of Result*, GULF NEWS, May 2, 2002, *available at* LEXIS, Asia Africa Intelligence Wire (quoting a report by the Human Rights Commission of Pakistan referring to "captive voters like . . . state employees and prisoners who were obliged to participate").

5. *See, e.g.*, Elizabeth Du Fresne & William Du Fresne, *The Case for Allowing "Convicted Mafiosi to Vote for Judges": Beyond* Green v. Board of Elections of New York City, 19 DEPAUL L. REV. 112 (1969); Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721 (1972); Gary L. Reback, Note, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 STAN. L. REV. 845 (1973); Note, *The Equal Protection Clause as a Limitation on the States' Power to Disenfranchise Those Convicted of a Crime*, 21 RUTGERS L. REV. 297 (1967); Douglas R. Tims, Comment, *The Disenfranchisement of Ex-Felons: A Cruelly Excessive Punishment*, 7 SW. U. L. REV. 124 (1975).

6. *See, e.g.*, George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895 (1999); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727 (1998); Alice E. Harvey, Comment, *Ex-Felon*

symbolic character,[8] or evaluated prospects for change in light of recent developments in U.S. legislatures and courts.[9] Very few authors, meanwhile, have developed principled defenses of the policy.[10]

This Article holds that the most powerful critique of criminal disenfranchisement begins by appreciating the policy's deep roots in American political ideology. First, this Article argues that only a combination of contractarian liberal, civic-virtue republican, and racially discriminatory ideologies explains the persistence of criminal disenfranchisement in the United States.[11] Second, this Article shows that while liberal and republican ideas about self-government have long provided solid foundations for criminal disenfranchisement in American political thought, the goals and principles of both ideologies also

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Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look, 142 U. PA. L. REV. 1145 (1994); Shapiro, *supra* note 2.

7. *See generally* Demleitner, *supra* note 4 (comparing U.S. and German criminal disenfranchisement policies).

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

9. *See generally One Person, No Vote: The Laws of Felon Disenfranchisement*, *in Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1939 (2002).

10. *See* Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001) (grounding the case for indefinite disenfranchisement on the belief that voting is a "privilege" reserved for "trustworthy, good citizens"); Manfredi, *supra* note 4, at 277 (resting a "principled defense" of criminal disenfranchisement on "the relationship among citizenship, civic virtue, and punishment"); *see also* Jesse Furman, Note, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L.J. 1197 (1997). Furman condemns criminal disenfranchisement, but offers a theoretically-rich connection of the practice to the work of philosopher John Rawls. *See infra* text accompanying note 148.

11. This Article seeks to apply the "multiple traditions" approach developed by political scientist Rogers M. Smith. Rather than drawing bright lines between republican and liberal influences and depicting them as mutually exclusive political paradigms, Smith finds that American citizenship laws are best understood as "none too coherent compromises" and combinations of "rival views of civic identity that are themselves filled with understandable internal tensions." ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 6, 30 (1997) [hereinafter CIVIC IDEALS]. Meanwhile, Smith argues that while liberal and republican ideologies have played crucial roles in American political thought, what he calls "inegalitarian ascriptive Americanist traditions"—hierarchies discriminating on the basis of immutable characteristics such as gender, race, ethnicity, and sexual orientation—have also shaped American views of citizenship and political identity. *Id.* at 508 n.5. As Smith writes, "[t]hese liberal, republican, and inegalitarian ascriptive traditions are analytically distinguishable and in some respects logically inconsistent, but . . . most American political actors have nonetheless advanced outlooks combining elements of all three." *Id.* This is the case with criminal disenfranchisement law.

Smith employs the term "traditions" in order to examine not only ideas but "whole political cultures," the "institutions and practices embodying and reproducing" those ideas. *Id.* at 30, 507 n.5; *see also* Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 549 (1993).

undergird powerful challenges to the practice.[12] At the heart of this argument lies a paradox: although all three ideological traditions have contributed to the development of criminal disenfranchisement law in the United States, the modern commitments of both liberalism and republicanism should lead Americans to abandon the practice. By analyzing the liberal, republican, and racially discriminatory approaches to criminal disenfranchisement, this Article explains both the durability and the incoherence of the policy. This Article finds indefinite disenfranchisement—also called "ex-offender," "ex-felon," or permanent disenfranchisement—to be the most egregious form of the practice, as it imposes on criminal offenders something akin to the medieval condition of "civil death."[13] But to a greater degree than many authors have recognized, temporary and indefinite disenfranchisement policies rest on fundamentally similar premises, and are equally vulnerable to principled challenge.[14]

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12. The liberal and republican approaches to self-government are not exclusive. Most Americans blend the two in their political thought, and many authorities draw freely from both traditions in their discussions of disenfranchisement. Distinguishing the two, however, enables us to perceive discrete claims for and against the policy most clearly.

Other critics have pointed out the weaknesses in the liberal and republican defenses of lifetime disenfranchisement laws. *See, e.g.*, Harvey, *supra* note 6, at 1169-73; Note, *supra* note 8, at 1304-09. A *Harvard Law Review* note concludes that these traditions merely "accompan[y]" the practice and ultimately cannot "account for the origin or the persistence" of lifetime criminal disenfranchisement in the United States. *See* Note, *supra* note 8, at 1310. This Article does not contend, of course, that political philosophy alone explains political behavior. But this Article finds that criminal disenfranchisement in the United States is deeply embedded in the liberal, republican, and racially discriminatory traditions, which have long structured the way in which Americans understand the practice. *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 207 (1981) (arguing that "the history of a practice in our time is generally and characteristically embedded in and made intelligible in terms of the larger and longer history of the tradition through which the practice in its present form was conveyed to us"). Critics of disenfranchisement, this Article argues, should not minimize the effects of these ideological roots, since they may gain more by attending to the liberal and republican cases for disenfranchisement and refuting them on their own terms.

13. The term "civil death" refers to the condition in which a convicted offender loses all political, civil, and legal rights. See *infra* notes 44-46 and accompanying text for an account of the medieval origins of the penalty. Civil death provisions have survived in American law. *See* Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 13, 16 n.1 (1996) (showing that as late as 1996, four American states imposed civil death on some serious offenders).

14. Theorists contest the content of every ideological tradition. *See* MACINTYRE, *supra* note 12, at 207 (referring to a "living tradition" as "an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition"). Another authority has described a legal tradition as "a vital, dynamic, ongoing system." MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 17 (2d ed., 1994). This Article's premise is that ideological traditions are dynamic as well. Older elements of political ideologies may remain available and influential long after the scales within those traditions have tilted against them, and important policies ought to be consistent with the modern principles of those ideologies.

This Article uses the term "liberalism" to refer to an individualistic and rights-oriented view of politics, in which the central purpose of the state is to preserve as much latitude as possible for individuals to choose their own ends. While there is great variation within the liberal tradition, liberal ideology tends to depict the rules of society as a neutral "contract" to which rational individuals agree; political activity is regarded as instrumental, a way of pursuing one's private interests.[15] By contrast, republicans tend to view democratic citizens not as atomistic, isolated individuals, but as a body held together by common interest—as "a single organic piece . . . with a unitary concern that [is] the only legitimate

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Scholars in various disciplines have engaged in a rich debate over how to understand the concept of "ideology." As political scientist Stuart Scheingold argues, ideology can portray how people *do* think about political problems, but can also be used to argue what we *ought* to do; it "combines normative, descriptive, and hortatory elements." STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 14 n.2 (1974). Scheingold, like others, notes the influence of anthropologist Clifford Geertz. *See id.* Geertz holds that ideologies are "symbolic framework[s] in terms of which to formulate, think about, and react to political problems," and "maps of problematic social reality and matrices for the creation of collective conscience." Clifford Geertz, *Ideology as a Cultural System*, *in* IDEOLOGY AND DISCONTENT 47, 64-65 (David E. Apter ed., 1964). Similarly, Charles W. Mills argues that ideology can become "a normative tool, a conceptual device to elicit our intuitions about justice." CHARLES W. MILLS, THE RACIAL CONTRACT 5 (1997). Historian Joyce Appleby notes that republican accounts of the American founding have conceived ideology as "the dynamic interplay of belief and behavior," a concept which could effectively tap "that structuring of consciousness which shapes identity and channels emotions." JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 19-20, 279 (1992).

Others, however, contend that ideologies are derived from our practices: "political activity comes first and a political ideology follows after," as Michael Oakeshott puts it. MICHAEL OAKESHOTT, POLITICAL EDUCATION 14 (1951). Oakeshott writes that instead of being "the quasi-divine parent of political activity, [ideology] turns out to be its earthly stepchild." *Id.* Douglas Hay argues that an ideological system "combine[s] imagery and force, ideals and practice," and draws its strength from our mistaken belief that it is a "product of [our] own minds and [our] own experience." Douglas Hay, *Property, Authority, and the Criminal Law*, *in* DOUGLAS HAY ET AL., ALBION'S FATAL TREE 26, 55 (1975). Barbara Jeanne Fields has written that ideology is the "interpretation in thought of the social relations through which [people] constantly create and re-create their collective being." Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 110 (1990).

15. *See* CIVIC IDEALS, *supra* note 11, at 37, 507 n.5. The Anglo-American line of theory which runs from John Locke through John Stuart Mill and on to contemporary thinkers such as John Rawls and Robert Nozick is commonly identified as "liberal." *See generally* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (C.B. Macpherson ed., Hackett Publ'g Co., Inc. 1980) (1690); JOHN STUART MILL, UTILITARIANISM : ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, REMARKS ON BENTHAM'S PHILOSOPHY 324 (Geraint Williams ed., Everyman, 1993) (1861); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JOHN RAWLS, A THEORY OF JUSTICE (1971). This Article does not use the term "liberal," then, as it is commonly used in popular American politics today, to mean the opposite of "conservative." For analysis of the power of liberalism in American political thought, see LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 3, 5-12 (1955). For further discussion of liberal ideology, see *infra* Part II.A.

objective of government[] policy."[16] Political activity, from this perspective, is understood as public conduct aimed at the good of the whole. Republican thought emphasizes the need for particular civic virtues, political activity's formative effects on the citizen, and the delicacy of the democratic polity: its dependence on the people is the source of a republic's greatness, but also makes it "a fragile beauty indeed."[17]

If these "contractual" and "communal" strains in American political thought are well-known, it is less common to view racial discrimination as possessing the attributes of a central political tradition in the United States. However, a number of scholars argue that ascriptive discrimination has long been rationally, overtly articulated and embodied in American law—indeed, "that intellectual and political traditions conceiving of America in inegalitarian racial, patriarchal, and religious terms [have] long been as much a part of American life as the liberal and republican doctrines that scholars stressed."[18] Inegalitarian ascriptive

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16. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 55, 58 (1969).

17. *Id.* at 66; *see also* CIVIC IDEALS, *supra* note 11, at 507-08 n.5; WOOD, *supra* note 16, at 92, 123. For republican accounts of the American founding, see generally WOOD, *supra* note 16, and BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967). Some modern republican theorists prefer the term "communitarian." *See, e.g.*, AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 2 (1993) (outlining the "Communitarian Thesis"). Influential contemporary republican texts include: BENJAMIN R. BARBER, THE DEATH OF COMMUNAL LIBERTY: A HISTORY OF FREEDOM IN A SWISS MOUNTAIN CANTON (1974); MACINTYRE, *supra* note 12; J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996) [hereinafter DEMOCRACY'S DISCONTENT]; and MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). In law, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993) [hereinafter THE PARTIAL CONSTITUTION]; Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 23 (1986) [hereinafter *Traces of Self-Government*] (arguing that, while it has become somewhat "disguised and twisted," the republican tradition "retains a strong . . . hold on American constitutional imagination"); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV 29, 31 (1985) [hereinafter *Interest Groups*] (arguing that the republican conception of politics "has both powerful historical roots and considerable contemporary appeal"). For one thorough listing of contemporary republican texts in history, social and political theory, and American constitutionalism, see Frank Michelman, *Law's Republic*, 97 YALE L.J 1493, 1494 nn.3-5 (1988) [hereinafter *Law's Republic*]. For insightful samples of the rich debate among historians over how to understand the republican "revival," see APPLEBY, *supra* note 14, and Daniel T. Rodgers, *Republicanism: the Career of a Concept*, 79 J. AM. HIST. 11 (1992). For further discussion of republican ideology, see *infra* Part II.B.

18. CIVIC IDEALS, *supra* note 11, at 3. Smith further writes,

> [a]dherents of what I term inegalitarian ascriptive Americanist traditions believe that 'true' Americans are 'chosen' by God, history, or nature to

ideologies, Rogers M. Smith writes, "always have the potential to support exclusionary . . . citizenship policies."[19] Criminal disenfranchisement is one such policy, and the history of such laws shows clearly that racially discriminatory ideas have been integral to their development in the United States.

Part I of this Article outlines current state laws barring criminal offenders from voting and offers a brief history of criminal disenfranchisement in ancient and medieval Europe and the United States. Part II explains the ideological foundations of criminal disenfranchisement, drawing on the work of jurists and political theorists to illuminate the liberal, republican, and racially discriminatory arguments for such policies. For liberals, serious crimes are violations of the social contract, infractions which merit the forced removal of offenders from participation in self-government. Some liberal commentators today contend that criminals, like others, will act instrumentally in the voting booth, and may use the ballot to advance the interests of lawbreakers. For their part, republican thinkers view convicts as lacking the political virtue required to participate in lawmaking. Offenders' flawed character constitutes a real threat, in the republican view, to the health of the body politic; barring them from the franchise will protect the public good and express our reverence for politics. Overtly racist ideology, which was deployed directly in support of criminal disenfranchisement law at the end of the nineteenth century, sought to tailor such provisions to remove black offenders, more than whites, from the franchise. Today, meanwhile, the penalty of disenfranchisement is falling most heavily on the African American population: nationwide, approximately thirteen percent of the

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> possess superior moral and intellectual traits associated with their race, ethnicity, religion, gender, and sexual orientation. Hence many ascriptive Americanists have believed that nonwhites, women, and various others should be governed as subjects or second-class citizens, not as equals, denied full individual rights, including many property rights, and sometimes excluded from the nation altogether.

Id. at 508. Smith rejects the conventional view, which is that America's "universalist ideological character" has meant that membership in the American civic community has not been limited by "national, linguistic, religious, or ethnic background," and has been "open to anyone who willed to become an American." Philip Gleason, *American Identity and Americanization*, *in* CONCEPTS OF ETHNICITY 57, 62 (William Petersen et al. eds., 1982). Acknowledging early ethnic biases, Gleason writes that such exclusiveness "ran contrary to the logic of the defining principles." *Id.* at 63.

Influential recent texts placing racial thought at the center of American political development include ERIC FONER, THE STORY OF AMERICAN FREEDOM (1998); GARY GERSTLE, AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY (2001); DESMOND KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE U.S. FEDERAL GOVERNMENT (1995); PHILIP A. KLINKNER with ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999); and MICHAEL LIND, THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION (1995).

19. CIVIC IDEALS, *supra* note 11, at 508 n.5.

black male population is disenfranchised because of a criminal conviction—a rate seven times the national average.[20]

Part III explains the reasons why both liberals and republicans should move to abolish criminal disenfranchisement.[21] Liberals should only choose to deprive citizens of a fundamental right when a practical, essential government purpose compels them to do so, and their belief in neutrality in politics and proportionality in punishment should also spur liberals to reject disenfranchisement. Republicans' trust in the formative nature of political activity, meanwhile, should make them profoundly skeptical of disenfranchisement's efficacy, and the silent, automatic way in which the policy is applied today renders it incapable of "expressing" what republicans may want it to. Meanwhile, adherents of both ideologies should be troubled by the racially discriminatory dimensions of such laws, embodied in both their history and their ongoing effects. Criminal disenfranchisement policy in the United States is located squarely at the intersection of voting rights and criminal justice—and it is tainted by the racial history of both policy areas in the United States. Despite its roots in liberal and republican ideologies, this Article concludes, criminal disenfranchisement runs contrary to the essential commitments of modern American political thought.

I. CRIMINAL DISENFRANCHISEMENT LAW PAST AND PRESENT

A. The State of Current Law

State disenfranchisement policies vary so widely that the Department of Justice has described current law as "a national crazy-quilt of disqualifications and restoration procedures."[22] Thirteen states disenfranchise some offenders during every stage of their sentence and indefinitely thereafter; fifteen disenfranchise during incarceration,

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20. FELLNER & MAUER, *supra* note 2, at 8. In Florida and Alabama, almost one-third of black men are now indefinitely disenfranchised. *Id.*; *see also Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 5-6 (1999). For further statistics on criminal disenfranchisement's racial impacts, see *infra* note 186 and accompanying text.

21. While this Article does not develop a new strategy for challenging criminal disenfranchisement in court, judicial evaluation of such laws should consider the kinds of arguments advanced here. *See* Harvey, *supra* note 6, at 1159 n.85 (arguing that "general arguments against felon disenfranchisement should play a persuasive role" in court challenges, because courts have occasionally given "great deference to broad-based persuasive arguments").

22. MARGARET COLGATE LOVE & SUSAN M. KUZMA, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 1 (1996). As another authority puts it, state laws disenfranchising criminals "are so diverse that they are difficult to categorize." Walter Matthews Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 975 (1970).

probation, and parole; four bar the vote during incarceration and parole, but not probation; sixteen states and the District of Columbia bar offenders from voting only during incarceration; and two states do not strip voting rights from convicts.[23] Approximately three-fourths of

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23. Eight states provide for automatic, indefinite disenfranchisement of first-time felons: Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, Virginia, and Wyoming. *See* The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, *at* http://www.sentencingproject.org/brief/pub1046.pdf (Apr. 2002). Those convicted of a second felony in Arizona and Maryland are subject to indefinite disenfranchisement. *Id*. As of January 1, 2003, Maryland will automatically restore voting rights to non-violent offenders three years after completion of sentence. *See* John Biemer, *Bill to Give Repeat Felons the Right to Vote Passes Senate Hurdle*, March 29, 2000, LEXIS, AP State & Local Wire. Tennessee and Washington remove voting rights indefinitely from those convicted prior to 1986 and 1984, respectively. *See supra* The Sentencing Project. Delaware does not permit ex-felons to vote for five years after the completion of their sentences; those convicted of certain enumerated offenses, including murder, manslaughter, and sexual crimes, are not eligible for restoration. *Id.* The states which bar voting during incarceration, probation, and parole are Alaska, Arkansas, Georgia, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin. *Id.* Those which remove voting rights from offenders in prison and on parole, but not on probation, are California, Colorado, Connecticut, and New York. Those barring voting only during incarceration are California, the District of Columbia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, and Utah. *Id.* Convicts do not automatically lose their right to vote in Maine and Vermont, though the latter does remove voting rights from those convicted of election-related offenses. VT. CONST. Ch. II, § 51. Some state constitutions merely allow legislative restriction of offenders' voting rights, and actual practices do not necessarily align with statutory declarations. Indeed, the U.S. Department of Justice found in 1992 that "in a number of jurisdictions there was no general agreement as to how the law [regarding civil disabilities of convicted felons] should be interpreted and applied, and that the law in any event was continually being amended and/or reinterpreted." MARGARET C. LOVE ET AL., U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY, at Disclaimer (1992). Two decades earlier, the California Supreme Court found that former felons' voting rights effectively depended on which county they lived in and on the decisions of county registrars, who alone chose whether or not to register them. *See* Ramirez v. Brown, 507 P.2d 1345, 1347 n.2 (Cal. 1973) (finding that "[o]nly those who wish to vote and who live in counties which refuse to register them" were relevant to a challenge to the permanent disenfranchisement of criminals then before the court). Current data from The Sentencing Project are supported by scholarly summaries of state constitutional provisions and statutes disenfranchising criminal offenders. *See, e.g.*, LOVE & KUZMA, *supra* note 22 (describing state law as of 1996); Du Fresne & Du Fresne, *supra* note 5, at 115 nn.14-16, 116 n.17 (listing states disenfranchising no offenders, disqualifying felons only, disqualifying those convicted of "infamous crime," disqualifying those convicted of specified crimes, and disqualifying those convicted of a combination of general and specific offenses, respectively, as of 1967); Hench, *supra* note 6, at 790-98 (listing constitutional and statutory disenfranchisement provisions as of 1998); Harvey, *supra* note 6, at 1146 n.6 (listing constitutional disenfranchising provisions as of 1994); Itzkowitz & Oldak, *supra* note 5, at 758-765 (listing duration of disenfranchisement and crimes which resulted in the sanction in each state as of 1973); *Id.* at 766-70 (listing constitutional and statutory provisions of each state as of 1973); Shapiro, *supra* note 2, at 538-40 nn.14-16 (listing constitutional and statutory provisions of states which did not disenfranchise

disqualified voters are no longer in prison, but are on probation or parole or have completed their sentences entirely.[24] Several states disenfranchise over one-hundred-thousand ex-offenders. For example, as of 1998, over six-hundred-thousand Floridians had lost their voting rights as the result of a criminal conviction—more than four-hundred-thousand of whom had completed their sentences.[25] Each indefinite-disenfranchisement state establishes some procedure by which ex-convicts may petition to regain the right to vote, but restoration procedures often make regaining the vote "extremely difficult,"[26] in some cases purposely so.[27] Relatively few

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offenders, disenfranchised only those under sentence, and disenfranchised many ex-offenders, respectively, as of 1993); *see also* Patricia Allard & Marc Mauer, The Sentencing Project, *Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws*, *at* http://www.sentencingproject.com/pubs/regainvote.pdf (Jan. 2002) (summarizing significant state and federal legal activity regarding criminal disenfranchisement law in 1999 and 2000). For a more comprehensive analysis of recent activity concerning criminal disenfranchisement in state legislatures and federal courts, see *One Person, No Vote*, *supra* note 9, at 1942-1957.

24. *See* FELLNER & MAUER, *supra* note 2, at 8.

25. *Id*. at 7-8. Other states disenfranchising over 100,000 ex-offenders as of 1998 were Alabama, Mississippi, Texas, and Virginia. *Id*. at 8. Florida Governor Jeb Bush has questioned the results of the HRW/TSP study. *See* Jeb Bush, *In Florida, Ex-Felons Can Regain the Right to Vote*, SARASOTA HERALD TRIB., Jan. 12, 2001, at A14. However, a second comprehensive analysis estimated that 524,816 ex-felons are disenfranchised in Florida—a higher number than that found by the HRW/TSP study. *See* Christopher Uggen & Jeff Manza, *The Political Consequences of Felon Disfranchisement Laws in the United States*, Paper Presented at the Annual Meetings of the American Sociological Association (Aug. 16, 2000), at 36 (on file with author).

26. Brian J. Hancock, *The Voting Rights of Convicted Felons*, 17 J. ELECTION ADMIN. 35, 39 (1996).

27. In Alabama, convicts must submit blood or saliva containing DNA to obtain the restoration of voting rights. Jesse Katz, *For Many Ex-cons, Voting Ban Can Be For Life*, L.A. TIMES, Apr. 2, 2000, at A1. Just four laboratories in the state participate in the program; DNA testing at one of the labs is conducted just one day a month, for one hour. *Id.* Asked about this burdensome procedure, Alabama state representative Bob McKee said, "[w]hy not put that criminal through a little more grief and make him jump through a hoop or two? . . . If he's really serious and wants to get back into society, then I'd like to see him show a little initiative." *Id.* In Mississippi, restoration of voting rights occurs only after two-thirds votes in both houses of the legislature or full pardon by the governor. LOVE & KUZMA, *supra* note 22, at 81. Nevada convicts need to wait five years to regain voting rights, but a letter sent to them about the waiting period instructs them to wait ten years. *See* Allard & Mauer, *supra* note 23, at 8. Felons who move to Virginia from one of the two states where felons retain the right to vote must wait five or seven years to vote, while those barred from voting while incarcerated may register immediately. *See* Allard & Mauer, *supra* note 23, at 10. Virginia drug offenders must wait at least seven years after completion of their sentences before petitioning to regain the vote, while others need wait only five. *See* http://www.commonwealth.state.va.us/Restore.doc (explaining the Virginia Governor's clemency policy and noting that prior to restoration of civil rights, "[t]he petitioner must be free of any suspended sentence, probation, and parole for a minimum of five (5) years; seven (7) years for drug convictions") (last visited Nov. 23, 2002). For a comprehensive summary of state restoration procedures, see U.S. DEP'T OF JUSTICE, RESTORING YOUR RIGHT TO VOTE, *at* http://www.usdoj.gov/crt/

former felons take the necessary steps—which range from administrative procedures to a full pardon—and successfully regain the right to vote.[28]

The diversity among state laws has confusing effects. An ex-felon may vote in one state, but his former cellmate may not in a neighboring state; an ex-convict who moves across state lines may gain or lose the right to vote. The federal voting rights of former felons, therefore, depend "solely on where a person lives,"[29] as a recent bill before the U.S. Congress put it. Moreover, most crimes punished by disenfranchisement are not related to voting or to the electoral process.[30] Meanwhile, even the commonly-used term "felon disenfranchisement" is not entirely

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restorevote/restorevote.htm (last visited Sept. 30, 2002) (listing restoration procedures in each state).

Nevada and Kentucky—both of which indefinitely disenfranchise felons—have recently made it easier for ex-offenders to restore their voting rights. Nevada law does not automatically restore voting rights to convicts, but requires that any former felon who applies for such restoration will receive it. NEV. REV. STAT. ANN. § 213.157 (Michie Supp. 2001). Kentucky retains gubernatorial discretion in the restoration process, but has simplified its standards. KY. REV. STAT. ANN. § 196.045 (Michie Supp. 2001).

Critics point out that restoration procedures may violate equal protection standards, since most allow great discretion to state or county officials in deciding whether ex-offenders will possess fundamental rights. *See* Du Fresne & Du Fresne, *supra* note 5, at 133; *One Person, No Vote*, *supra* note 9, at 1962.

28. For example, Virginia—with over two hundred thousand disenfranchised ex-offenders—restored voting rights to 404 ex-offenders in a recent two-year period. *See* Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENTENCING REP. 248 (2000). This may be a high number relative to other indefinite-disenfranchisement states, since Virginia offers an administrative procedure for the "removal of political disabilities" separate from an official pardon, which is generally much more difficult to obtain. LOVE & KUZMA, *supra* note 22, at 133. *But see* Bush, *supra* note 25, (arguing that "156,325 [Florida] felons had their rights restored from 1964 to 1996" and that 1,893 felons had their rights restored in 1999).

Persons convicted of a federal felony usually fall under the disenfranchisement policies of the state in which they live. This practice has a long history: a federal circuit court held in 1876 that a person convicted in federal courts of a federal crime was not disenfranchised under New York law. *See* United States v. Barnabo, 24 F. Cas. 1007, 1008-09 (C.C.S.D.N.Y. 1876). However, in at least sixteen states, federal convicts now cannot take advantage of state restoration procedures, and must win a presidential pardon if they wish to regain the vote. *See* Mauer, *supra*, at 248.

This Article does not examine the empirical questions of how many incarcerated criminals and ex-offenders *do* vote—in states where they are permitted to—and *would* vote if allowed to do so elsewhere. These are important questions, but whether or not a person will choose to exercise a right of citizenship is largely immaterial in considering whether that right should be recognized.

29. H.R. 906, 106th Cong. 2 (1999). Many ex-felons therefore are effectively forced to choose between the right to interstate travel and the right to vote. *See* Du Fresne & Du Fresne, *supra* note 5, at 132.

30. *Ex-Offenders' Voting Rights: Hearings on H.R. 9020 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 93rd Cong. 11 (1974) [hereinafter *Ex-Offenders' Voting Rights Act Hearings*] (testimony of John A. Buggs, Staff Dir., U.S. Comm'n on Civil Rights).

accurate, because not all the state constitutions that permanently bar some offenders from voting use felony conviction as the cut-off point.[31]

Disenfranchisement is not part of the offender's sentence, and is therefore considered a "collateral consequence"[32] of conviction. In the language of the U.S. Supreme Court, because its purpose is not to punish but to "designate a reasonable ground of eligibility for voting,"[33] courts have held that disenfranchisement "is not a punishment but rather a non penal exercise of the power to regulate the franchise."[34] The reality, however, is that U.S. criminal disenfranchisement policies are punitive, both in their design and in their results. The Missouri Supreme Court, surveying the history of criminal disenfranchisement in that state, determined that the legislature clearly treated disenfranchisement as a "part of the punishment" for specified crimes throughout the nineteenth century.[35] Today, another authority writes that "the most straightforward explanation of [criminal disenfranchisement] provisions . . . is that they are penal in nature and that the deprivation of the franchise is yet another form of punishment that is imposed upon persons convicted of felonies."[36]

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31. In Alaska, Georgia, Indiana, Iowa, Maryland, Mississippi, New Mexico, Tennessee, and Washington, "infamous crimes," crimes involving "moral turpitude," or offenses from a specific list bring about loss of the vote. *See* Hench, *supra* note 6, at 795-97.

32. Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION 52, 52 (1987); *see also* BARBARA B. KNIGHT & STEPHEN T. EARLY, JR., PRISONERS' RIGHTS IN AMERICA 289 (1986) (noting that "imposed deprivations rarely are part of an inmate's sentence but are statutorily defined collateral consequences of conviction and/or incarceration").

33. Trop v. Dulles, 356 U.S. 86, 96-97 (1958). The Court in *Trop* denied Congress the power to withdraw an individual's citizenship because of wartime desertion. *See id.*

34. Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967) (quoting *Trop*, 356 U.S. at 97); *see also* Washington v. State, 75 Ala. 582, 585 (1884) (holding that disenfranchisement is "imposed for protection [of the ballot box], and not for punishment").

35. State *ex rel.* Barrett v. Sartorious, 175 S.W.2d 787, 788 (Mo. 1943); *see also* Note, *supra* note 5, at 309-10 (arguing that historically "[t]he original purpose in depriving the criminal of certain civil rights appears to have been to ostracize and degrade him in the eyes of the community—a form of further punishment"). Historian Alexander Keyssar writes of criminal disenfranchisement law that "the punitive thrust clearly was present for much of the nineteenth century." ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 162-63 (2000).

36. BURT NEUBORNE & ARTHUR EISENBERG, THE RIGHTS OF CANDIDATES AND VOTERS 32-33 (1976); *see also* Richard G. Singer, *Conviction: Civil Disabilities*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE 243 (Stanford H. Kadish ed., 1983) (arguing that collateral consequences of conviction are sometimes "the most persistent punishments that are inflicted for crime"); Itzkowitz & Oldak, *supra* note 5, at 730 (arguing that, because the sanction "occurs as a direct consequence of criminal conviction, and is not a mere qualification such as age or residency which may be met with the passage of time," "disenfranchisement must be considered punitive"). Another authority writes that despite legal and theoretical arguments to the contrary, "disenfranchisement is treated as a form of punishment." Jeffrey L. Harrison, *Repentance, Redemption, and Transformation in the*

Indeed, contemporary advocates of the policy argue frankly that "not allowing criminals to vote is one form of punishment."[37] When the Massachusetts legislature voted recently to amend the state constitution and deprive incarcerated felons of the ballot, one prominent state legislator said the loss of the vote "is part of the penalty—you are in jail, you don't pass go, you don't collect the $200, you don't vote until you get out."[38]

Certainly, disenfranchisement has severe punitive effects. As a federal judge recently wrote,

> Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family. Such a shadowy form of citizenship must not be imposed lightly.[39]

In assessing arguments for and against criminal disenfranchisement, then, it is important to examine the policy as a form of punishment, as well as a regulation of the franchise.

B. Ancient and Medieval Roots

Context of Economic and Civil Rights, *in* CIVIC REPENTANCE 39 (Amitai Etzioni ed., 1999).

37. Clegg, *supra* note 10, at 177. In congressional testimony, Todd F. Gaziano of the Heritage Foundation described disenfranchisement as "part of the sanction for a specified . . . crime." *See Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 41 (1999) [hereinafter *Civic Participation Act Hearing*] (statement of Todd F. Gaziano, Senior Fellow in Legal Studies, Heritage Foundation). Gaziano has also said of disenfranchisement, "[i]t's part of the original punishment." Siobhan McDonough, *Group for Felons Seeking Changes in Voting Policy*, BOSTON GLOBE, Oct. 1, 2002, at 2.

38. Frank Phillips, *Lawmakers Push to Ban Inmate Votes: Amendment Would Target Those Convicted of Felonies*, BOSTON GLOBE, June 28, 2000, at B1 (quoting Massachusetts House Minority Leader Francis Marini). Massachusetts Governor Paul Cellucci said the new policy "has to do with punishing people for their crimes." John McElhenny, *Legislature Votes to Bar Jailed Felons from Voting*, BOSTON GLOBE, June 28, 2000, at B1, *available at* LEXIS, AP State & Local Wire; *see also* Olivares et al., *supra* note 13, at 11 (arguing that a modest increase in laws disenfranchising ex-offenders between 1986 and 1996 was partially attributable to the popularity of "get tough" criminal justice policies in that period).

39. McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

Most ideas about voting in the United States are indirect products of European history,[40] and the practice of barring criminals from politics is no exception. In ancient Greece, those criminals "pronounced infamous" were unable to appear in court or vote in the assembly, to make public speeches, or serve in the army.[41] In Rome, the ability to hold office and to vote in the public assembly could be denied to those tagged with *infamia*.[42] During the Renaissance, peoples across Europe used the condition of "outlawry" to punish some criminals; "outlaws" could be killed with impunity, since they were literally considered to be outside the law.[43] European lawmakers later developed the concept of "civil death, which put an end to the person by destroying the basis of legal capacity, as did natural death by destroying physical existence."[44] In England, "a person pronounced attainted after conviction for a felony or . . . treason [faced] forfeiture corruption of the blood [meaning that land owned by the criminal would pass not to heirs but to king or lord], and loss of civil rights."[45] As on the continent, these practices were known in England as "civil death," and the attainted criminal was said to be "dead in law" because he could not perform any legal function—including, of course, voting.[46]

Such penalties were extreme, but modern critics of indefinite disenfranchisement have noted theoretical similarities between medieval

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40. *See* CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860, at viii (1960).

41. *See* Note, *supra* note 8, at 1301. This step stopped short of ostracism, which was physical banishment. However, ostracism was normally temporary and was not necessarily a criminal sanction. *See also* Hancock, *supra* note 26, at 35 (arguing that because Greek and Roman societies included so many people who lacked citizen status and its rights and privileges, "the social and civic degradation accompanying a criminal conviction served not only as a penal measure, but also as a deterrent to crime").

42. *See* CARL LUDWIG VON BAR ET AL., A HISTORY OF CONTINENTAL CRIMINAL LAW 37-38 (1916).

43. Itzkowitz & Oldak, *supra* note 5, at 722-23. Outlawry was an extreme condition, as one contemporary explanation makes clear:

> [he] who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him; for a wild beast he is; not merely is he a "friendless man," he is a wolf.

Note, *supra* note 8, at 1301 n.6 (alteration in original); *see also* VON BAR ET AL., *supra* note 42, at 504 (showing that in some countries, only the injured party received an "unlimited right to revenge").

44. CARLO CALISSE, A HISTORY OF ITALIAN LAW 511 (Layton B. Register trans., 1928). Civil death went beyond outlawry, as it imposed dishonor and legal incapacity on the offender's descendants. *See* Itzkowitz & Oldak, *supra* note 5, at 724; *see also* VON BAR ET AL., *supra* note 42, at 272 (quoting a medieval French author who wrote of civil death: "it sunders completely every bond between society and the man who has incurred it; he has ceased to be a citizen . . . he is without a country; he does not exist save as a human being, and this, by a sort of commiseration which has no source in the law").

45. Itzkowitz & Oldak, *supra* note 5, at 724 (citations omitted).

46. *Id.*

punishments and the collateral consequences of conviction in the United States today.[47] Unlike lifetime disenfranchisement in the United States today, however, early European penalties seem to have been limited to very serious crimes, and were implemented only upon judicial pronouncement in individual cases. Certainly, they help to demonstrate the deep roots of policies placing some lawbreakers outside of political society.

C. Early American Law

English colonists in North America transplanted much of the mother country's common law regarding the civil disabilities of convicts, and supplemented it with statutes regarding suffrage. As towns were settled and incorporated, new citizens required approval by town meetings, usually based on religious conformity and property ownership.[48] In seventeenth- and eighteenth-century New England, "moral qualifications" were broadly used to limit the franchise.[49] "Plymouth refused to admit as a freeman 'any opposer of the good and wholsome laws of this colonie,'" and in one town "a would-be freeman needed the testimony of his neighbors that he was of 'sober and peaceable conversation.'"[50] One could lose freeman status by behavior which was "'grossly scandalouse, or notoriously vitious.'"[51] Plymouth Colony in 1658 "barred Quakers from being freemen," and also "provided that any person judged to be 'grosly scandalouse as lyers drunkards Swearers & C. shall lose theire freedome of this Corporation.'"[52] The reasoning behind Plymouth's statute was classically republican in spirit: "some corrupt members may creep into the best and purest societies."[53] In Massachusetts Bay Colony, disenfranchisement was authorized as an additional penalty for conviction of "fornication or any 'shamefull and vitious crime.'"[54] Further south, Maryland declared that a third conviction for drunkenness incurred loss of suffrage.[55]

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47. *See, e.g.*, *Civil Death*, GOVERNING, Dec. 1998, at 15 (reporting the HRW/TSP study); Demleitner, *supra* note 4, at 775 (calling disenfranchisement a "modern day remnant" of "civil death statutes").

48. *See* ALBERT EDWARD MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 384-85 (1905).

49. Cortlandt F. Bishop, *History of Elections in the American Colonies*, *in* 3 STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW 1, 53 (Univ. Faculty of Pol. Sci. of Columbia Coll. ed., 1893.)

50. *Id.* at 54.

51. *Id.* at 55.

52. BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA 1606-1660, at 54 (1983).

53. Bishop, *supra* note 49, at 55.

54. *Id*. at 55-56.

55. CHAPIN, *supra* note 52, at 161 n.150.

Early colonial law confronted directly the question of how long the loss of freeman status and the ballot was to last. In Plymouth the diminishment seems to have been permanent, but Connecticut law stated that "good behaviour shall cause restoration of the privilege."[56] In both Massachusetts and Connecticut, the decision to restore voting rights was left to the court, but in pre-Revolutionary Rhode Island, anyone convicted of bribing an election official was "forever thereafter . . . excluded from being a Freeman, or voting, or bearing an public Office, whatsoever, in this Colony."[57] And because the property test was then fundamental to inclusion in the franchise, those convicted of possessing a fraudulent deed were "forever" disenfranchised.[58]

If these examples indicate that disenfranchisement has a long history in the United States, then they also illuminate important differences between colonial and contemporary criminal disenfranchisement. Originally, the removal of criminals from the suffrage had a visible, public dimension; its purposes were articulated in the law; and it was a discrete element in punishment which required the deliberation of courts to implement. Moreover, crimes subject to the penalty of disenfranchisement were either linked to voting itself, as in Rhode Island, or defined as egregious violations of the moral code. Modern disenfranchisement laws—automatic, invisible in the criminal justice process, considered "collateral" rather than explicitly punitive, and applied to broad categories of crimes with little or no common character—do not share any of these characteristics.[59]

After achieving independence from Great Britain, the American states rejected some of their English common-law heritage.[60] Some states did adopt "civil death" statutes for criminal offenders,[61] but the Constitution prohibited bills of attainder, forfeiture for treason, and "Corruption of Blood."[62] Meanwhile, a slow but profound shift began in how Americans thought about suffrage, as increasing numbers of citizens

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56. Bishop, *supra* note 49, at 55. This 1650 statute merits quoting in full:

> It is ordered by this Courte and decreed, that if any person within these Libberties have been or shall be fyned or whipped for any scandalous offence, hee shall not bee admitted after such time to have any voate in Towne or Commonwealth, nor to serue in the Jury, untill the Courte shall manifest theire satisfaction.

Id.

57. MCKINLEY, *supra* note 48, at 459.

58. *See id*. at 461.

59. By contrast, modern German disenfranchisement law appears quite similar to the American colonial model. *See* Demleitner, *supra* note 4, at 755-56 (showing that in Germany "deprivation of voting rights is limited to serious, legislatively enumerated offenses, must be assessed directly by the sentencing judge at the time of sentencing, and can be imposed only for a limited and relatively short period of time").

60. Itzkowitz & Oldak, *supra* note 5, at 725.

61. *Id.*

62. U.S. CONST. art. III, § 3, cl. 2.

gained access to the polls. As the U.S. Commission on Civil Rights would write almost two centuries later:

> The new nation began with a prevailing attitude that the right to vote should be limited to the few who proved themselves *qualified* . . . . Gradually the nation shifted to the modern concept that voting is a right which belongs to every citizen except the few who are specifically *disqualified* by the qualification requirements of their States.[63]

Early state constitutions often required evidence of good character for balloting privileges, a test used to exclude those with criminal records.[64] Many constitutions disqualified felons explicitly, or directed their legislatures to do so: between 1776 and 1821, eleven state constitutions disqualified criminals from voting.[65] Vermont's legislature initially empowered the state supreme court to disenfranchise any freeman convicted of a "notoriously scandalous" offense, but a legislative council formed in 1800 to review the constitutionality of statutes determined the law to be of "vague and uncertain meaning," and thereafter Vermont disenfranchised only those convicted of election offenses.[66] Vermont's decision was unusual, however, and by 1868 eighteen more states excluded serious offenders from the franchise.[67] Some of the increase may be attributable to class bias in a time of declining property tests, as elites sought to limit the political strength of

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63. U.S. COMM'N ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL 23 (1959).

64. CIVIC IDEALS, *supra* note 11, at 529 n.18.

65. The eleven states which barred criminals from voting by 1821 were Alabama, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, New York, Ohio, and Virginia. *See Green*, 380 F.2d at 450 n.4 (listing state constitutional provisions); *see also* KEYSSAR, *supra* note 35, at tbl.A.7 ("Suffrage Exclusions for Criminal Offenses: 1790-1857"); *id*. at tbl.A.9 ("Summary of Suffrage Requirements in Force: 1855").

66. *See* Hancock, *supra* note 26, at 36. The Council suggested that broad disenfranchisement ran "against the letter and spirit of the eighth article of the bill of rights," and argued that "the framers and adopters of the constitution, contemplated to preserve inviolate the right of suffrage to every freeman, unless he should in fact forfeit the right, by acting wickedly and corruptly, *relating only to that estimable privilege*." *Id.*

67. State constitutions disenfranchising criminals between 1831 and 1868 were those of California, Delaware, Florida, Georgia, Iowa, Kansas, Maryland, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin. *See Green*, 380 F.2d at 450 n.5 (listing state constitutional provisions); *see also* KIRK HAROLD PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 148 (Greenwood Press 1971) (photo. reprint 1969) (1918); KEYSSAR, *supra* note 35, at tbl.A.15 ("Disenfranchisement of Felons and Others Convicted of Crimes: 1870-1920").

lower-class groups.[68] As Kirk Harold Porter notes, there was "great diversity of practice," but "infamous crimes" and penitentiary offenses usually brought permanent loss of suffrage.[69] In addition, perjury, forgery, bribery, and larceny were frequently cause for permanent disenfranchisement, as was dueling. It is instructive that these crimes were so often enumerated in disenfranchisement statutes, because as infractions punishable by time in the penitentiary they would have earned the sanction anyway.[70] Such prohibitions indicate that early U.S. disenfranchisement law continued to target those crimes manifesting a particularly immoral character.[71]

Two more aspects of voting law as of 1860 are important. First, of those commonly disqualified on the eve of the Civil War—women, men without extended residency, blacks, soldiers, students, the institutionalized mentally ill, and criminals—only the last two groups are still broadly disenfranchised today.[72] This is a striking indication of how much American attitudes toward voting have changed. Second, it is important to recall that in 1860, blacks were only permitted to vote in six states.[73] In almost every state where criminal offenders were disenfranchised, blacks were also denied the ballot by law.[74] Since blacks were already barred from voting because of their race, discriminatory intent could not have been at the heart of antebellum criminal disenfranchisement.

That would soon change. After Reconstruction, several Southern states carefully re-wrote their criminal disenfranchisement provisions

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68. *See* WARD E. Y. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY 43 (1974) (arguing that criminal disenfranchisement may have been implemented in response to the elimination of the property test, since "abolishing property tests revealed that they had served a number of indispensable functions, such as holding down the voting strength of free blacks, women, infants, criminals, mental incompetents, unpropertied immigrants, and transients").

69. PORTER, *supra* note 67, at 147; *see also* Stephens v. Yeomans, 327 F. Supp. 1182, 1187-88 (D.N.J. 1970) (finding that "[d]isenfranchisement of felons in New Jersey has had a curious history" characterized by "haphazard development").

70. *See* PORTER, *supra* note 67, at 147.

71. *See* KEYSSAR, *supra* note 35, at 163 (arguing that nineteenth-century criminal disenfranchisement law grew from the belief "that a voter ought to be a moral person").

72. The ballot access of non-institutionalized mentally-ill adults continues to improve. *See, e.g.*, Erica Goode, *Gentle Drive to Make Voters of Those with Mental Illness*, N.Y. TIMES, Oct. 13, 1999, at A1 (showing that state and national advocacy groups are working successfully to educate, register, and motivate the mentally ill to vote, with funding from mental health professionals, pharmaceutical companies, and federal grants).

73. The six states which allowed blacks to vote in 1860 were Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. PORTER, *supra* note 67, at 148. Of these, only New York and Rhode Island also disenfranchised criminals. *See id.*

74. *Id.*

with the express intent of excluding blacks from the suffrage.[75] Our history of the law encounters a long silence following those revisions, however, as scholars know very little about criminal disenfranchisement policies in the century after Reconstruction.[76] State constitutions offer some hints of change, but most policies appear to have remained largely unaltered.[77]

One major development in criminal disenfranchisement law did occur in the immediate aftermath of the Civil War: in 1868, the Fourteenth Amendment was added to the Constitution.[78] Despite the liberating intent of the Amendment and the powerful language of the Equal Protection Clause, the Fourteenth Amendment has had the perverse effect of strengthening modern disenfranchisement law. That this would be the case, however, did not become clear until the Supreme Court evaluated criminal disenfranchisement's constitutionality more than a century after the Amendment's enactment.

D. The Fourteenth Amendment and Richardson v. Ramirez

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75. For explanation of these changes, see *infra* Part II.C.1.

76. As one authority writes, "[t]here were remarkably few court cases dealing with [criminal disenfranchisement] prior to the 1960s." KEYSSAR, *supra* note 35, at 303. There is virtually no scholarship on the practice in the late nineteenth and early twentieth centuries. *But see* DUDLEY O. MCGOVNEY, THE AMERICAN SUFFRAGE MEDLEY 54-57 (1949) (summarizing criminal disenfranchisement laws as of 1949.)

77. For example, Congress did not disenfranchise criminals in the Territory of Wyoming in 1868, but the state in 1889 added a provisions barring from the suffrage those "convicted of infamous crimes." *Compare* ORGANIC ACT OF WYOMING § 5 (1868), *with* WYO. CONST. of 1889, art. VI, §6. Louisiana's Constitution of 1921 prohibited anyone convicted of a crime punishable by incarceration in the state penitentiary from voting, but dropped that provision in 1974. LA. CONST. of 1921, art. VII, §6; LA. CONST. of 1974, art. XI, §1. State constitutions are not sufficient indicators of convicts' voting rights, however, because many merely allow legislative action, and some constitutional language does not clearly indicate whether criminals will lose the vote temporarily or permanently. Legislative history, meanwhile, is also poorly understood. One authority notes simply that "studies of state legislatures' reform and/or repeal of criminal disenfranchisement laws do not exist." Shapiro, *supra* note 2, at 564 n.146.

78. The first two sections of the Amendment are most relevant to criminal disenfranchisement law. Section 1 reads in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1. Section 2 reads in part, "[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . . But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. CONST. amend. XIV, § 2 (emphasis added). For an explanation of the history of Section 2, see *infra* note 90.

One authority has argued that "[t]here are so many constitutional arguments against the disenfranchisement of felons that one can only wonder at the survival of the practice."[79] But in 1974, the U.S. Supreme Court in *Richardson v. Ramirez*[80] upheld state laws disenfranchising ex-offenders,[81] and did so in a way that placed a significant hurdle in front of subsequent legal challenges.[82] *Richardson* frustrates attempts to understand the ideological principles behind American criminal disenfranchisement, because the Court made a quintessentially "textual" decision in eschewing serious attention to political theory, broad Constitutional principles, or social norms.[83] However, the majority's decision in the case, the constitutional and historical grounds which the Court offered in support of its position, and the flaws which critics have noted in the opinion all make understanding *Richardson* crucial.

In 1972, three California men who had been convicted of felonies and served their sentences attempted to vote in three different counties, and were denied by the respective county clerks because of their criminal records.[84] The California Constitution and statutes then in force denied persons "convicted of infamous crimes" or any felony from voting.[85] The men argued that under the Equal Protection Clause and the strict scrutiny to which the Supreme Court has subjected suffrage restrictions, only a

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79. Fletcher, *supra* note 6, at 1903.

80. 418 U.S. 24 (1974).

81. *Id.* at 56. The Court had indirectly endorsed criminal disenfranchisement before. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 672, 675 n.4 (1966) (Black, J., dissenting) (finding provisions barring "convicted felons or the insane" from voting are example of restrictions which may "result[] in treating some groups differently from others" without offending the Equal Protection Clause of the Fourteenth Amendment, and noting that "states have from the beginning and do now qualify the right to vote because of age, prior felony conviction, illiteracy, and various other reasons."); Lassiter v. Northampton Bd. of Elections, 360 U.S. 45, 51 (1959) ("Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." (citation omitted)); Davis v. Beason, 133 U.S. 333, 346-47 (1889) (holding that Idaho Territory statute which provided that "no person . . . convicted of treason, felony, or bribery . . . unless restored to civil rights . . . is permitted to vote at any election" "is not open to any constitutional or legal objection"); *see also Green*, 380 F.2d at 451 (listing Supreme Court opinions which "recognized" states' power to deprive felons of the ballot).

82. One lower court interpreted *Richardson* "as having closed the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime." Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1981).

83. *See* Manfredi, *supra* note 4, at 283-284 (arguing that *Richardson* "is an almost perfect illustration of interpretivist constitutional adjudication at work," since it relies entirely on the text of the Constitution with no consideration either of norms implicit in the document or widely held in society). Writing for the Court, Justice Rehnquist argued that the history of Section 2 of the Fourteenth Amendment was not essential to its interpretation, because "how it became part of the Amendment is less important than what it says and what it means." *Richardson*, 418 U.S. at 55.

84. *Ramirez*, 507 P.2d at 1346.

85. *Id.* at 1347-48.

compelling state interest can justify limitation of the franchise; any proposed restriction must be necessary and narrowly tailored to achieve that interest.[86] The California Supreme Court agreed, and struck down California's permanent-disenfranchisement law.[87]

The U.S. Supreme Court overturned the California ruling in an unexpected way.[88] Examining disenfranchisement "[i]n the light of [the] evolution of the law of equal protection,"[89] the California Supreme Court had made no mention of Section 2 of the Fourteenth Amendment, which declares that any state which disenfranchises adult males—"except for participation in rebellion, or other crime," in the words of the Amendment—will face proportionate reduction in its congressional

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86. *See id.* at 1357. The Supreme Court has repeatedly declared the right to vote to be fundamental and applied strict scrutiny to legislation restricting suffrage. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 337, 343 (1972) (holding that durational residence laws are unconstitutional unless a state can demonstrate not only that a "compelling state interest" exists for a "a challenged statute [which] grants the right to vote to some citizens and denies the franchise to others," but also that such laws are drawn with "precision," "tailored" to achieve legitimate objectives); Kramer v. Union Free School District No. 15, 395 U.S. 621, 626-627, 632 (1969) (holding that statutes distributing the franchise "constitute the foundation of our representative society" and therefore in any review of a state law restricting suffrage "the Court must determine whether the exclusions are necessary to promote a compelling state interest"); *Harper*, 383 U.S. at 670 (calling the right to vote "precious" and "fundamental"); Carrington v. Rash 380 U.S. 89, 96 (1965) (noting that "this [Supreme] Court has been so zealous to protect" the right to vote); Lucas v. Forty-Fourth Gen. Assemb. of Colo., 377 U.S. 713, 736 (1964) (holding that the "individual's constitutionally protected right to cast an equally weighted vote" is among the list of "fundamental rights" which cannot be limited); Reynolds v. Sims 377 U.S. 533, 555, 561-62 (1964) (noting that the right to vote is "the essence of a democratic society," "a fundamental matter in a free and democratic society," and that because the right to vote is "a fundamental right . . . preservative of all rights," any "alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized"). In *O'Brien v. Skinner*, the Court applied equal protection analysis in striking down those provisions of New York state law, which denied absentee ballots to incarcerated misdemeanants and pre-trial detainees. 414 U.S. 524, 531 (1974). However, the Court in *O'Brien* made clear that "the New York election laws here in question do not raise any question of disenfranchisement of a person because of conviction for criminal conduct." *Id.* at 528.

87. *Ramirez*, 507 P.2d at 1357. The California court examined disenfranchisement in light of the state's need to "deter election fraud." *Id*. at 1349. The men also claimed that the variation in county election officials' enforcement of ex-felon disenfranchisement provisions constituted a denial of due process. *Id.* at 1346. Since the California Supreme Court agreed with their first claim, it did not reach the second. *Id.* at 1357. Meanwhile, the California Secretary of State asked the court to affirm the constitutionality of statutes denying suffrage to incarcerated convicts, but the court refused to do so since the question was "not presented in the case at bar." *Id.* at 1357 n.18. Federal courts had previously applied equal protection analysis to laws disenfranchising former felons. *See Stephens*, 327 F. Supp. at 1187-88; Dillenburg v. Kramer, 469 F. 2d. 1222, 1224 (9th Cir. 1972).

88. DAVID RUDENSTINE, THE RIGHTS OF EX-OFFENDERS 44 (1979).

89. *Ramirez*, 507 P.2d at 1353.

representation.[90] But Section 2 was central to the U.S. Supreme Court's analysis of permanent disenfranchisement's constitutionality. Writing for the majority, Chief Justice Rehnquist argued that because the "express language" of Section 2 apparently permits states to bar convicts from voting, the Equal Protection Clause in Section 1 "could not have been meant to bar outright a form of disenfranchisement which was expressly" allowed by the following section.[91] In essence, the Court held that the reference to criminal disenfranchisement in Section 2 "obviated any need to justify it with a compelling state interest."[92]

Critics have articulated several challenges to the logic of the Court's opinion in *Richardson*. In dissent, Justice Thurgood Marshall argued simply that criminal disenfranchisement "must be measured against the requirements of the Equal Protection Clause of Section 1 of the Fourteenth Amendment."[93] Laurence Tribe notes that in important voting-rights cases, the Court has found that "the reach of the equal protection clause . . . is not bound to the political theories of a particular era but draws much of its substance from changing social norms and evolving conceptions of equality."[94] Therefore, that the framers of the

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90. Congress was not ready to ban racial discrimination in voting, and enacted Section 2 in an attempt to discourage Southern states from disenfranchising blacks, while permitting them to do so. *See* ELLIOTT, *supra* note 68, at 57. For a partial text of Section 2, see *supra* note 78. Many constitutional scholars today consider Section 2 to be effectively obsolete. *See infra*, notes 101-105 and accompanying text. For further discussion of the racial dimension of Section 2, see *infra* Part III.C.4.

91. *Richardson*, 418 U.S. at 54-55. The second section of the Fourteenth Amendment refers to voters disenfranchised for "participation in rebellion, or other crime." U.S. CONST. amend. XIV, § 2. In *Green*, Judge Friendly had similarly employed Section 2 to defend criminal disenfranchisement against the equal protection standard of Section 1. 380 F.2d at 452.

92. Note, *supra* note 8, at 1302 n.8.

93. *Richardson*, 418 U.S. at 77 (Marshall, J., dissenting). Such analysis, Marshall wrote, "properly begins with the observation that because the right to vote 'is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,' voting is a fundamental right." *Id.* (quoting *Reynolds*, 377 U.S. at 555). For an explanation of the equal protection challenges to criminal disenfranchisement, see also Note, *supra* note 5, and Du Fresne & Du Fresne, *supra* note 5. Both essays conclude that only laws temporarily disenfranchising those who break election law would survive equal protection scrutiny. *See* Du Fresne & Du Fresne, *supra* note 5, at 138; Note, *supra* note 5, at 319-20.

94. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 13-16, at 1094 (2d ed. 1988) (footnote omitted); *see Harper*, 383 U.S. at 669 (observing 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"); *see also* David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303 (1976). As Shapiro points out, the Court had held in *Dunn* that durational residency requirements popular at the adoption of the Fourteenth Amendment—and specifically authorized by Congress—were nevertheless invalid under equal protection analysis. *Id.* (discussing *Dunn*, 405 U.S. at 335). Shapiro contends that "there is not a word in the fourteenth amendment suggesting that the exemptions in Section 2's formula are in any

Fourteenth Amendment apparently accepted criminal disenfranchisement[95] should not turn us away from skeptical scrutiny of any government practice which results in denial of the franchise.[96] As the Ninth Circuit put it in a previous test of criminal disenfranchisement law, "constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber."[97] But the Court in *Richardson* failed to reconcile criminal disenfranchisement law with its previous decisions on voting and citizenship.[98]

The Court's previous disregard for Section 2,[99] together with subsequent Amendments and the Court's interpretation of those

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way a barrier to the judicial application of Section 1 in voting rights cases." Shapiro, *supra*, at 335. Moreover, the Court observed in *Harper* that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." *Harper*, 383 U.S. at 669.

95. In *Richardson*, the Court pointed as evidence of this claim to the mention of felon disenfranchisement in the readmission acts which allowed Southern states to return to the Union. 418 U.S. at 48-52.

96. *See* TRIBE, *supra* note 94, § 13-16, at 1094. In rejecting several state interests commonly offered for disenfranchising criminals, Tribe makes two particularly original points. First, the state's interest in an informed electorate would fail to justify the practice, since some convicts are better informed about policy than many law-abiding citizens. *Id.* Second, while deterring crime and punishing criminals are surely compelling interests, disenfranchisement is not necessary to those interests given the availability of other sanctions. *Id.* Meanwhile, even if subjected to the lowest level of constitutional scrutiny, criminal disenfranchisement might very well be adjudged as "arbitrary and irrational" and overturned on those grounds. Fletcher, *supra* note 6, at 1903.

97. Dillenburg v. Kramer, 469 F.2d 1222, 1226 (9th Cir. 1972).

98. The Court had previously observed that voting is equivalent to citizenship, and that citizenship may not be revoked as punishment. *See* Afroyim v. Rusk, 387 U.S. 253, 267-68 (1967); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (voting is essentially equivalent to citizenship); *Trop*, 356 U.S. at 101-02 (finding that citizenship cannot be taken away as a form of punishment). But in *Richardson*, as one critic puts it, the Court "failed to close the syllogistic circle." Furman, *supra* note 10, at 1198.

99. Historically, the Court has cast few glances at Section 2. *See, e.g.*, Elk v. Wilkins, 112 U.S. 94, 102 (1884) (citing the phrase "excluding Indians not taxed" in Section 2 of the Fourteenth Amendment in holding that Native Americans born in the United States are not automatically citizens); United States v. Reese, 92 U.S. 214, 247 (1875) (Hunt, J., dissenting) (arguing that "[b]y the second section of the Fourteenth Amendment, each state had the power to refuse the right of voting at its elections to any class of persons; the only consequence being a reduction of its representation in Congress").

Justice Harlan's dissent in *Reynolds* contains a lengthy analysis of the Fourteenth Amendment's history and purpose, focusing on whether the first section applies to voting rights. 377 U.S. at 595-611 (Harlan, J., dissenting). Harlan denounced the Warren Court for having wrongly interpreted the Fourteenth Amendment and having "relegated the Fifteenth and Nineteenth Amendments to the same limbo of constitutional anachronisms to which the second section of the Fourteenth Amendment has been assigned." *Id.* at 612. *See also* Oregon v. Mitchell, 400 U.S. 112, 162, 164 (Harlan, J., dissenting) (interpreting Section 2 to mean Section 1 "could hardly have been understood as affecting the provisions of the Constitution placing voting qualifications in the hands of the states," and writing of Section 2 that "[s]ince that section did not provide for enfranchisement, but simply removed representation for disfranchisement, any doubts about the effect of the

Amendments, have effectively made Section 2 a dead letter.[100] Scholars today refer to Section 2 as "an obsolete and never enforced provision,"[101] and a "never-exercised tool;"[102] it is a "Reconstruction-era measure[] of no lasting significance,"[103] which is "no longer operative"[104] and "has never had a practical impact."[105]

But by relying on Section 2 in its interpretation of Section 1 of the Fourteenth Amendment, *Richardson* may have "call[ed] into question the entire right-to-vote jurisprudence."[106] In essentially using Section 2 as a legislative history of Section 1, the *Richardson* Court focused narrowly on what the Fourteenth Amendment meant in the nineteenth century, rather than the twentieth. But if the application of equal protection analysis to voting rights were trapped in the "Devonian amber" of Section 2 in *all* cases, states could conceivably disenfranchise *anyone*—for any reason except those prohibited by subsequent Amendments—and merely face proportionate reduction in their congressional delegation.[107]

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broad language of § 1 were removed"). For a reply to many of Harlan's claims, see William W. Van Alstyne, *The Fourteenth Amendment, the Right to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 85 (1965) (arguing that because the legislative history of the Fourteenth Amendment is "inconclusive," the application of equal protection scrutiny to voting-rights cases is defensible). Recent literature on this question is summarized in MICHAEL J. PERRY, WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT 217 n.69 (1999).

100. The Court has previously used even literally defunct passages of the Constitution to help it interpret other sections. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 14 (1824) (considering, in exploring whether states possess "a general right over the subject of commerce," the meaning for that question of the ban in Art. I, § 9 of the U.S. Constitution of any law by Congress prior to 1808 prohibiting the importation of slaves, as well as states' power to regulate the slave trade prior to that date).

101. MCGOVNEY, *supra* note 76, at 52.

102. CIVIC IDEALS, *supra* note 11, at 310.

103. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 297 (1990).

104. PERRY, *supra* note 99, at 212 n.18.

105. LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 675 (2001). Of the five texts cited *supra* notes 101-105, only the first was written before the Court handed down its decision in *Richardson.*

106. Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 356 n.119 (1993). Writing just before *Richardson* came to the Court, even an authority who supported felon disenfranchisement acknowledged that the Court's silence on the issue was "logically out of line with its other decisions on voting qualifications." ELLIOTT, *supra* note 68, at 348-49 n.61.

107. Because it "merely ascribes a price to the action without preventing it from continuing," Section 2 permits discrimination rather than forbidding it. Winkler, *supra* note 106, at 357 n.119. The Court's respect for Section 2 in *Richardson* leaves other important questions unanswered as well. Dissenting in *Richardson*, Justice Marshall observed that disenfranchisement for a jaywalking or traffic infraction would be fully constitutional under the Court's approach, since Section 2 refers only to "crime." *See Richardson*, 418 U.S. at 75 n.24 (Marshall, J., dissenting). David L. Shapiro notes that Section 2 permits the vote to be "denied" to those who are not male citizens over age twenty-one, but merely "abridged" for rebels and other criminals, suggesting that lifetime

In *Richardson*, the Court plucked a phrase from a long-slumbering sentence and breathed new life into it, reading the Fourteenth Amendment in isolation from subsequent Amendments and constitutional jurisprudence.[108] The result was a ruling which cannot be coherently reconciled with a generation of Supreme Court decisions protecting voting rights.

II. THE IDEOLOGICAL FOUNDATIONS OF CRIMINAL DISENFRANCHISEMENT LAW

The textual nature of the Court's decision in *Richardson* precluded investigation of principled arguments for and against laws removing suffrage rights from offenders. Parts II and III of this Article examine such arguments. This Part shows that the liberal, republican, and racially discriminatory traditions in American political thought have each provided important support for criminal disenfranchisement.

A. *The Liberal Case for Criminal Disenfranchisement*

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disenfranchisement was not endorsed by its authors. *See* Shapiro, *supra* note 94, at 303 n.34. George Fletcher points out that by the logic of *Richardson*, and in the absence of the Nineteenth Amendment, women would be deprived of the vote and of any equal-protection claim, because Section 2 clearly refers to "male" voters. *See* Fletcher, *supra* note 6, at 1903-04. "Citizens," "persons," and "electors" are all identified as "male" in the second section of the Amendment. *See* U.S. CONST. amend. XIV, § 2. Indeed, early leaders of the women's suffrage movement felt "betrayed" by the Amendment, because for the first time the word "male" was introduced into the Constitution. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 255 (1988).

108. Instead of explaining Section 2's implications for voting rights, the Court focused on the lack of controversy surrounding the reference to criminal disenfranchisement in Section 2. The Court noted that "[t]he legislative history bearing on the meaning of the relevant language of section 2 is scant indeed." *Richardson*, 418 U.S. at 43. The Court was probably correct to interpret history's relative silence surrounding the phrase "or other crime" to mean that permitting the disenfranchisement of criminals to proceed without penalty did not change the political status quo in 1868. *Cf. id.* at 45. Five Congressmen and Senators spoke in favor of the criminal disenfranchisement phrase during the drafting of the Amendment, most of them indirectly. *See id.* at 45-48.

Richardson was handed down even as a subcommittee of the House Judiciary Committee held hearings on a bill that would have prohibited the disenfranchisement of ex-offenders. *See Ex-Offenders' Voting Rights Act Hearings*, *supra* note 30. The *Richardson* ruling may have made further congressional action difficult politically, if not constitutionally. Subsequent bills aimed at ending lifetime criminal disenfranchisement include: Constitutional Protection of the Right to Vote Act, H.R. 1228, 107th Cong. (2001); Civic Participation and Rehabilitation Act of 1999, H.R. 906, 106th Cong. (1999); Voting Rights of Former Offenders Act, H.R. 568, 105th Cong. (1997); Voting Rights of Former Offenders Act, H.R. 3028, 104th Cong. (1996).

Whether or not one agrees that "America is predominantly a Liberal society with its intellectual origins in England,"[109] it is clear that contractarian liberalism has had immense influence on the nation's political thought. The modern contractarian argument for the disenfranchisement of criminals assumes that no particular attribute or action by the citizen is required to gain voting rights: passive, tacit consent is sufficient for inclusion in the polity. Active, rational violation of the contract, however, is grounds for disqualification. For liberals, the ideal state is a neutral compact designed to allow individuals to define their own "goods," and political activity is instrumental and self-interested. But having violated the rules, the criminal forfeits the right to participate in such activity: if you break the law, you don't get to make the law. The origins of this argument lie in some of the best-known works of Western political thought.

1. FOUNDATIONS

In John Locke's famous analysis of the origins and purpose of government, we find a straightforward and familiar justification for the disenfranchisement of criminals. Locke imagines that before uniting into political commonwealths, men possessed freedoms and rights in a "state of nature."[110] The core of the "law of nature" which governed that condition, in Locke's account, was that "no one ought to harm another in his life, health, liberty, or possessions."[111] That law would be sufficient, "were it not for the corruption and vitiousness of degenerate men,"[112] who transgress the bounds of right, "invading others' rights and . . . doing hurt to one another."[113] In order to remedy that insecurity, and with the "great and chief end"[114] of preserving their property and persons, men unite into commonwealths; they give to the state their power to punish transgressors, in exchange for greater security and greater impartiality in the administration of justice.[115]

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109. DAVID M. RICCI, COMMUNITY POWER & DEMOCRATIC THEORY: THE LOGIC OF POLITICAL ANALYSIS 10 (1971); *see also* Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, *in* LIBERALISM AND THE MORAL LIFE 159, 164 (Nancy L. Rosenblum ed., 1989) (describing "a family of theories of liberalism that is now very popular, not to say dominant, in the English-speaking world"); *see also* HARTZ, *supra* note 15. For explanation of how the term "liberal" is used in this Article, see *supra* note 15 and accompanying text.

110. LOCKE, *supra* note 15, § 6, at 9.

111. *Id.*

112. *Id.* § 128, at 67.

113. *Id.* § 7, at 9.

114. *Id.* § 124, at 66.

115. *See id.* § 130, at 67. Thomas Hobbes articulated a contract theory of government half a century before Locke. THOMAS HOBBES, LEVIATHAN 79-88 (Edwin Curley ed., Hackett Publ'g 1994) (1668). Locke's more optimistic view of human nature

Locke waxes metaphorical in describing rule breakers, and his symbolism is instructive. The criminal, Locke writes, has "renounced reason, the common rule and measure God hath given to mankind . . . declared war against all mankind, and therefore may be destroyed as a *lion* or *tyger*, one of those wild savage beasts, with whom men can have no society nor security."[116] Criminals follow not the law of reason, "but that of force and violence, and so may be treated as beasts of prey."[117] In Locke's view, one who commits a crime forfeits his right to participate in the political process—if not his rights to property and person. By acting against the property or person of others, the criminal has failed to grasp the need for security, and threatened to destroy the very compact which makes civilized life possible.

Locke was not alone among seventeenth-century English political theorists in arguing that criminals forfeit their political rights. Even the most radical democrats in the Anglo-American tradition, the English "Levellers" of the 1640s, believed criminals should not be allowed to vote.[118] Locke's contemporary Algernon Sidney, who like Locke was influential in America,[119] also emphasized law-abiding behavior as the basis of the contract.[120] Two later authors, meanwhile, also provided support for the social-contract theory of criminal disenfranchisement. In *On the Social Contract*, Jean-Jacques Rousseau echoes Locke's call for the expulsion of wrongdoers from political society:

> [E]very malefactor who attacks the social right becomes through his transgressions a rebel and a traitor to the homeland; in violating its laws, he ceases to be a member, and he even

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and his conclusions of limited government and the right to rebel have shaped American political thought much more than have the ideas of Hobbes.

116. LOCKE, *supra* note 15, § 11, at 11. Locke writes, "[i]n transgressing the law . . . the offender declares himself to live by another rule than that of reason and common equity . . . and so he becomes dangerous to mankind." *Id*. § 8, at 10.

117. *Id.* § 16, at 14. Locke's view has clear connections with the older concept of "civil death." As one authority writes, the principle behind medieval outlawry in Scandinavia was that "whoever would not recognize the rights of others, should not himself enjoy any." VON BAR ET AL., *supra* note 42, at 134.

118. *See* LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION 226-28 (Don M. Wolfe ed., 1944). The Leveller position is notable because the Levellers opposed the property test and advocated universal suffrage; *cf.* THE ENGLISH LEVELLERS (Andrew Sharp ed., 1998).

119. On Sidney's influence among Americans such as Thomas Jefferson, Samuel Adams, and Benjamin Franklin, see SCOTT A. NELSON, THE DISCOURSES OF ALGERNON SIDNEY 146 (1993).

120. In his *Discourses Concerning Government* (1698), Sidney wrote that "no man will suffer his natural liberty to be abridged, except others do the like." Nelson, supra note 119, at 43. Sidney also argued that "truth, faithful dealing, [and] due performance of Contracts are bonds of Union, and helps to good." ALAN CRAIG HOUSTON, ALGERNON SIDNEY AND THE REPUBLICAN HERITAGE IN ENGLAND AND AMERICA 169 (1991) (alteration in original) (citation omitted).

> wages war with it. . . . Thus one of the two must perish; and when the guilty party is put to death, it is less as a citizen than as an enemy. . . . [H]e has broken the social treaty, and consequently . . . he is no longer a member of the state.[121]

For his part, the utilitarian liberal John Stuart Mill calls the suffrage a "trust," not a "right."[122] Mill writes of the citizen, "[t]he suffrage is indeed due to him, among other reasons, as a means to his own protection, but only against treatment from which he is equally bound . . . to protect every one of his fellow-citizens."[123] The suffrage enabled citizens to protect themselves against misrule, but also symbolized each citizen's duty not to harm his fellows.

It should not surprise us that in times when women, servants, soldiers, and men without property were generally barred from politics, criminals were precluded from voting. What is important here is the reasoning behind the exclusion: political power was understood as a privilege of full membership in the compact, and the criminal forfeited all liberties and protections made possible by the social contract. That reasoning would be adopted by important American thinkers.

2. THE CONTRACT IN AMERICA

Early American suffrage law reflected a blend of ideological principles.[124] Historians and political scientists continue to explore the

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121. JEAN-JACQUES ROUSSEAU, BASIC POLITICAL WRITINGS 159 (Donald A. Cress ed. & trans., Hackett Publ'g. 1987) (1762). As against Locke, Rousseau is often identified as a republican thinker, because of his exaltation of the public sphere, his emphasis on the power and pre-eminence of the "general will," and his belief that the "alienation" of rights and goods by individuals to the public increases the well-being of those individuals. *See id*. at 152, 162, 198. This Article is interested here in Rousseau as contract theorist. Rousseau did have some influence on political thought in the young United States, though not as much as Locke, Montesquieu, and Sidney. *See* Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 71-72 (1987).

122. *See* MILL, *supra* note 15, at 324. Mill explicitly links the social capacity for self-rule with a willingness to punish those who break the law: he argues that "a people must be considered unfit for more than a limited and qualified freedom, who will not cooperate actively with the law and the public authorities in the repression of evil-doers." *Id.* at 192. Contemporary American democracy as a whole might fail Mill's test: "representative institutions are of little value and may be a mere instrument of tyranny . . . when the generality of electors are not sufficiently interested . . . to give their vote." *Id.*

123. *Id.* at 324. Here Mill, like Locke, argues that in each man lies the power and the duty to punish transgressors. Similarly, Rousseau argues for the "total alienation of each associate, together with all of his rights, to the entire community," and claims that each man gains by this "a greater amount of force to preserve what he has." ROUSSEAU, *supra* note 121, at 148.

124. Contract theory mixed early with the republican emphasis on virtue, as one account of morally-loaded seventeenth-century New England criminal disenfranchisement law makes clear: the colonists "regarded those who lived in their communities as having

liberal and republican character of the American founding[125] and to ascertain the influence of Locke and other European theorists.[126] Thomas Jefferson, like others, drew on social-contract notions of consent in his view of the suffrage,[127] and Chief Justice John Jay wrote in 1793 that "[h]e is not a good citizen who violates his contract with society."[128] Thomas Paine, the highly democratic pamphleteer, illustrated the power

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made a free choice to do so and thus obligated to obey the rules. A man who qualified as a freeman held rights that could be forfeited if he violated the obligation." CHAPIN, *supra* note 52, at 54. See *supra* notes 48-55 and accompanying text for discussion of colonial American disenfranchisement law.

125. Representative works include BAILYN, *supra* note 17; CIVIC IDEALS, *supra* note 11; JOHN PATRICK DIGGINS, THE LOST SOUL OF AMERICAN POLITICS (1984); and JAMES A. MORONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMIT OF AMERICAN GOVERNMENT (1998); and WOOD, *supra* note 16. Scholars have moved away from what historian Daniel T. Rodgers has described as the notion that liberalism and republicanism were incompatible paradigms. *See* DANIEL T. RODGERS, CONTESTED TRUTHS 9 (1998).

126. Locke's influence on Jefferson in particular has drawn a good deal of attention. Late in life, Jefferson wrote that the Declaration of Independence merely "place[d] before mankind the common sense of the subject," and was not "copied from any particular and previous writing." Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 656 (Adrienne Koch & William Peden eds., 1993) [hereinafter SELECTED WRITINGS]. But in the same letter, he claimed the authority of several "elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc." *Id.* at 657. In a 1790 letter to a student, Jefferson wrote "Locke's little book on Government, is perfect as far as it goes." Letter from Thomas Jefferson to Thomas Mann Randolph (May 30, 1790), *in* SELECTED WRITINGS, *supra*, 456; *see also* DIGGINS, *supra* note 125, at 32 (outlining the "controversy" over Locke's influence on Jefferson and others); GARRETT WARD SHELDON, THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON 46-49 (1991) (offering tables listing textual similarities between Locke's *Second Treatise* and the Declaration of Independence).

127. One authority writes of early American suffrage theory that "[f]or society to function smoothly, for the social contract to operate, people had to be given the opportunity . . . to consent to or oppose laws." KEYSSAR, *supra* note 35, at 13-14. Jefferson argued that every man who paid his due to society, whether he "fights or pays," should "exercise his just and equal right in . . . election." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* THOMAS JEFFERSON, POLITICAL WRITINGS 212 (Joyce Appleby & Terence Ball eds., 1999). This reasoning would seem to exclude the incarcerated, who neither "fight nor pay," but not former offenders who either served in the army or paid taxes. When Jefferson named specifically those ineligible for the franchise, he singled out "infants," "women," and "slaves," and did not see fit to name criminals. *See* Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), *in* SELECTED WRITINGS, *supra* note 126, at 218. The full passage aptly illustrates the danger of treating Jefferson as an authority on the principles modern suffrage law should follow. Jefferson would prohibit from voting and from participation in the "deliberations" of government:

> 1. Infants, until arrived at years of discretion. 2. Women, who to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men. 3. Slaves, from whom the unfortunate state of things with us takes away the rights of will and of property. Those then who have no will could be permitted to exercise none in the popular assembly.

Id.

128. Henfield's Case, 11 F. Cas. 1099, 1105 (C.C.D. Pa. 1793).

of contract thinking in early American suffrage theory—couched in a denunciation of the property test. Paine wrote:

> The only ground upon which exclusion from the right of voting is consistent with justice, would be to inflict it as a punishment for a certain time upon those who should propose to take away that right from others. . . . The proposal therefore to disfranchise any class of men is as criminal as the proposal to take away property. . . . The right which I enjoy becomes my duty to guarantee it to another, and he to me; and those who violate the duty justly incur a forfeiture of the right.[129]

Paine would disenfranchise those who try to deprive others of the right to vote—by which he means advocates of the property test. His point may have been satirical, but Paine did argue that those who failed to "guarantee" the rights of others should temporarily forfeit the vote.

A generation after Paine, Alexis de Tocqueville found that Americans not only employed Lockean ideas in their view of crime and criminals, but took those principles more seriously than did Europeans. Compared to Europe, Tocqueville observed, America had relatively few police and a small criminal justice infrastructure, but "in no country does crime more rarely elude punishment."[130] He found an answer to this paradox in the public view of criminals:

> The reason is that everyone conceives himself to be interested in furnishing evidence of the crime and in seizing the delinquent. . . . In Europe a criminal is an unhappy man who is struggling for his life against the agents of power, while the people are merely a spectator of the conflict; in America he is looked upon as an enemy of the human race, and the whole of mankind is against him.[131]

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129. THOMAS PAINE, *Dissertation on the First Principles of Government*, *in* 3 THE WRITINGS OF THOMAS PAINE 267 (Moncure Daniel Conway ed. 1996) (1795). Rogers M. Smith has pointed out that Paine merely "dramatize[d]" Locke's views when he urged his readers "to imagine sturdy free and equal men in a state of nature sitting around a tree to create a state." *See* CIVIC IDEALS, *supra* note 11, at 79.

130. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 95 (Phillips Bradley ed., Vintage Books 1990) (1835).

131. *Id.* Thomas L. Dumm argues that Tocqueville's story helps us understand the profound relationship between American ideas of punishment and democracy. Dumm writes, "Tocqueville came to the United States to study the prison, and left to write *Democracy in America*. No irony need be made of that coincidence, nor should anyone be surprised. After all, the penitentiary was the ideal liberal democratic institution." THOMAS L. DUMM, DEMOCRACY AND PUNISHMENT 140 (1987); *see also id.* at 112 (arguing of the penitentiary that "[t]he proposition that all are fundamentally alone is the most extremely liberal aspect of what was designed as a liberal institution").

If such an approach to crime was evident in the attitudes of the nineteenth-century American public, the influence of Locke on twentieth-century jurists' views of criminal disenfranchisement law has been still more clear. In one influential decision, *Green v. Board of Elections*, Judge Friendly upheld the disenfranchisement of ex-felons in familiar liberal terms.[132] Friendly wrote, "[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 of the compact."[133] Friendly noted:

> The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or . . . the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due."[134]

In another well-known case, *Shepherd v. Trevino*,[135] the Fifth Circuit observed that felons "have breached the social contract and, like insane persons, have raised questions about their ability to vote responsibly."[136] Despite *Shepherd*'s reference to "insane persons," the belief that the criminal "breach" is simply a voluntary, self-interested action is implicit in the contractarian case for disenfranchisement. As a federal court ruled in *Wesley v. Collins*,[137] "[f]elons 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."[138]

3. LIBERALISM APPLIED: THE FEAR OF "SUBVERSIVE" VOTING

Dumm is not the first to point out that despite its purported aim of limiting the exercise of coercive power, contract theory's relocation of the right to punish from sovereign to society—"every man hath a right to punish the offender," as Locke put it—effected instead an *expansion* of such power. *See* LOCKE, *supra* note 15, § 8, at 10; *see, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH 90 (Alan Sheridan trans., Vintage Ed. 1995) (1978) (arguing that under the contract, the right to punish "finds itself recombined with elements so strong that it becomes almost more to be feared . . . it [becomes] a terrible 'super power'").

132. *See* 380 F.2d at 451-52.
133. *Id.* at 451.
134. *Id*. (quoting LOCKE, *supra* note 15, § 89, at 48).
135. 575 F.2d 1110 (5th Cir. 1978).
136. *Id.* at 1115.
137. Wesley v. Collins, 605 F. Supp. 802, 813 (M.D. Tenn. 1985).
138. *Id.*

In addition to these theoretical points, some prominent defenders of criminal disenfranchisement today offer a complementary practical reason to support the automatic removal of all felons from the franchise. This is the fear that criminals will vote, presumably in concert, to weaken the criminal law and law enforcement—that is, they will vote in a way "subversive of the interests of an orderly society."[139] This concern with "subversive voting" by offenders rests on a liberal understanding of voting: the convict, like everyone else, is rational, self-interested, and instrumental in his political behavior.[140] Liberals often portray the ballot as a tool citizens use to "protect their interests,"[141] but also may depict voting as an instrumental act through which citizens control each other. "[T]he exercise of the vote," as one supporter of felon disenfranchisement wrote, "is understood not merely as conferring the right to govern oneself, but a right to share in the governing of others."[142] Felons, this author continues, have "reject[ed] the right of others to govern them," and therefore are properly denied "the right to govern others."[143] A sharp statement of this point comes in *Green*, where Judge Friendly wrote,

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139. *Richardson*, 418 U.S. at 81 (Marshall, J., dissenting). For explanations of this hypothesis, see also Harrison, *supra* note 36, at 37, and Note, *supra* note 8, at 1302-03. I explain a second policy argument, the fear that ex-convicts will be more likely than others to commit vote fraud, *infra* Part II.B.2. Its emphasis on the character of the criminal and its non-specific concern with unlawful behavior makes the vote-fraud claim more republican than liberal, as those terms are used here.

140. For detailed analysis of instrumental theories of voting in American law, see Winkler, *supra* note 106, at 341-46. As Winkler notes, the instrumental understanding depicts the vote "as a societal tool for exerting political power" and "a means of pursuing informed political choices in an effort to direct governmental institutions." *Id*. at 331; *see also* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 36-39 (1957) (explaining "the basic logic of voting" by hypothesizing the utility-maximizing decisions of individual voters, who make voting choices by calculating their "utility income" from different government activities).

141. Donald W. Rogers, *The Right to Vote in American History*, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 3, 9 (Donald W. Rogers ed., 1992).

142. John Silber, *Mass. Inmates Shouldn't Vote*, BOSTON HERALD, Oct. 24, 2000, at 33; *see also* Clegg, *supra* note 10, at 172 (arguing that "those who would make the laws for others . . . [must] be willing to follow those laws themselves"). Elsewhere, Clegg has framed this argument in a way which depicts the ballot not only as a tool of control, but also as a dangerous weapon. See Carter, *supra* note 1, at 18 (quoting Clegg arguing that "[w]e don't let ex-felons have guns, and we don't want child molesters teaching in elementary schools," "[a]nd we don't want people who are not willing to follow the law to be able to make the law, through referenda or electing lawmakers").

143. Silber, *supra* note 142, at 33. Massachusetts lawmaker Francis Marini put this point succinctly when he argued that prisoners "are incapable of running their own lives," and "should not be allowed to run ours." Michael Crowley, *Lawmakers Favor Ban of Felons' Voting Rights*, BOSTON GLOBE, June 29, 2000, at B3; *see also* SANFORD LEVINSON, CONSTITUTIONAL FAITH 134 (1988) (suggesting as rationale for felon disenfranchisement that "we might . . . expect at least fidelity to law from those who demand a role in making political decisions"). Levinson does not indicate support for the policy, but merely explains a possible 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. . . . A contention that the equal protection clause 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.[144]

Prominent contemporary supporters of indefinite disenfranchisement emphasize the subversive-voting hypothesis quite heavily. Todd F. Gaziano of the Heritage Foundation told Congress in 1999 that allowing ex-convicts to vote "could have a perverse effect on the ability of law abiding citizens to reduce the deadly and debilitating crime in their communities."[145] Roger Clegg, counsel for the Center for Equal Opportunity, seconded Gaziano's concern. Observing that "[m]uch has been made of the high percentage of criminals . . . and . . . disenfranchised people in some communities,"[146] Clegg testified that "this is an argument against reenfranchisement, because there accordingly exists a voting bloc that could create real problems by skewing election results."[147]

Western political theorists and American authors alike have long believed that the social-contract view of society's origins and character, coupled with an understanding of crime as reasoned and voluntary, legitimate the exclusion of convicts from the franchise. Contemporary scholars, meanwhile, disagree over how deeply Rawlsian liberalism is committed to criminal disenfranchisement.[148] But the social-contract

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144. 380 F.2d at 451-52 (citation omitted).

145. *See Civic Participation Act Hearing*, *supra* note 37, at 44 (prepared statement of Todd F. Gaziano, Senior Fellow in Legal Studies, the Heritage Foundation). Gaziano argued, "[c]riminal disenfranchisement allows citizens to decide law enforcement issues without the dilution of voters who are deemed either to be less trustworthy or to have waived their right to participate in those decisions." *Id.*

146. *See Civic Participation Act Hearing*, *supra* note 37, at 17 (prepared statement of Roger Clegg, Vice President and General Counsel, Center for Equal Opportunity).

147. *Id.* Elsewhere, Clegg argues that if indefinite disenfranchisement laws did not exist, "there would be a real danger of creating an anti-law enforcement voting bloc in municipal elections." Clegg, *supra* note 10, at 177. Neither Clegg nor Guziano offered evidence to support this theory. *Green* is a very influential criminal-disenfranchisement decision, and commentators such as Silber, Gaziano, and Clegg occupy positions of considerable influence in American democracy. However, the Author has not found other authors in liberal constitutional or political theory advancing the "subversive voting" rationale for criminal disenfranchisement.

148. Two assessments of American criminal disenfranchisement have focused on the liberalism of John Rawls. *See* Manfredi, *supra* note 4, at 296-98 (arguing that criminal disenfranchisement is fully defensible on Rawlsian terms so long as the right to vote is presumptive and criminal disenfranchisement is applied universally and not solely to

approach continues to supply the language in which many Americans—including some civil libertarians—defend the practice today.[149]

B. The Republican Case for Criminal Disenfranchisement

Republicanism, like liberalism, offers a defense of criminal disenfranchisement built on its understandings of the nature of political society. The republican case begins with a belief in the literal "body" formed by society—the *res publica*, or "public thing"—and a demand for virtue in the citizens who constitute that entity through their political activity. While republican and liberal principles are not exclusive, quintessentially republican concepts have long played a vital part in American criminal-disenfranchisement law.

Early American disenfranchisement laws, as discussed above, exhibited a fundamentally republican character.[150] Returning to their example helps clarify the important differences in reasoning which exist

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members of any ascriptive class); Furman, *supra* note 10, at 1198, 1214, 1229 (arguing that criminal disenfranchisement represents "an ambivalence deep within modern liberalism's normative ideals," and that Rawlsian liberalism must halt its "consensual drift" and increase its toleration of "dissonance"). Manfredi's essay is important because so few contemporary scholars have developed careful theoretical arguments for criminal disenfranchisement. Manfredi acknowledges, however, that lifetime loss of the vote is "at least partially consistent" with liberal principles. Manfredi, *supra* note 4, at 297. Meanwhile, his use of Rawlsian definitions of justice to support disenfranchisement seems to neglect other important attributes of Rawls' ideal liberal polity. For example, Rawls writes of criminal sanctions, "[t]hese mechanisms will seldom be invoked and will comprise but a minor part of the social scheme," and "in a well-ordered society sanctions are not severe and may never need to be imposed." RAWLS, *supra* note 15, at 240, 577. Finally, Manfredi's claim that liberal regimes can properly "require that their citizens be other-regarding and future-oriented" might offend those liberals who believe voters may act as selfishly as they wish, and who are not eager to begin testing the character of other citizens. Manfredi, *supra* note 4, at 299.

149. Arguing in the fall of 2000 for an amendment to the Massachusetts state constitution barring incarcerated felons from voting, one prominent commentator wrote that felons have "broken the social contract that binds citizens together." Silber, *supra* note 142. In 1998, when a New Hampshire inmate successfully challenged as unconstitutional a state law that disenfranchised incarcerated criminals, the state argued on appeal that it had a legitimate interest in restricting the vote to those who have abided by "the social contract that forms the foundation of a representative democracy." Katharine Webster, *State Supreme Court Says Imprisoned Felons Cannot Vote* (Mar. 24, 2000), *available at* Westlaw, Associated Press Newswires.

For a civil libertarian's defense of criminal disenfranchisement on social-contract grounds, see JAY A. SIGLER, CIVIL RIGHTS IN AMERICA 1500 TO THE PRESENT 383-84 (1998) (arguing that "[w]hen felons choose to violate societal laws, they break the social contract that guarantees their fundamental rights and freedoms"). Sigler's example is striking because this statement follows a concise, committed explanation of how all proposed suffrage restrictions must be measured against the "strict scrutiny" standard—a standard which Sigler abandons, a few pages later, in endorsing criminal disenfranchisement. *Id.* at 380, 383-84.

150. *See supra* notes 48-55 and accompanying text.

between the liberal and republican approaches to the practice. Colonial communities were intensely "corporate" in character: they understood the polity not simply as an agreement among self-interested, isolated individuals but as a very real entity, whose health and character were vital matters of concern, requiring constant vigilance.[151] It was a fragile, delicate body which sickened easily;[152] virtue was its "animating principle,"[153] and criminals were barred from politics to prevent illness from creeping in. Those who had committed "shamefull and vitious"[154] offenses, transgressions which revealed corrupt moral character, were judged most politically dangerous. Two complementary values emerge: a strong definition of the public good, and a firm belief in the importance of specific virtues in the individual. Republicans, then as now, believe that the health of the polity depends on the character of those who comprise it.

1. PUBLIC VIRTUES, PRIVATE MORALS

The republican belief that participation in political life demands civic virtue draws on the work of the eighteenth-century French philosopher Montesquieu, whose ideas heavily influenced the American founders.[155] Popular government, Montesquieu wrote, requires more virtue than does monarchy,[156] and the "division of those who have a right to suffrage" and

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151. *See* PHILIP ABBOTT, POLITICAL THOUGHT IN AMERICA 21 (2d ed. 1999). As Robert N. Bellah and his colleagues point out, this approach offers a particular answer to the question of what fundamentally *exists* in a state. The biblical and republican traditions in American thought, Bellah and his colleagues write, have shared what they call "social realism," or "the view that society is as real as individuals." ROBERT N. BELLAH ET AL., HABITS OF THE HEART 334 (1986). The "social realist" view is contrasted with liberal "ontological individualism," which is "a belief that the individual has a primary reality whereas society is a second-order, derived or artificial construct." *Id.* Political scientist James A. Morone writes that the republican ideal is "not simply the sum of individual private interests, but a distinct public interest with an objective existence of its own." MORONE, *supra* note 125, at 41. Another authority writes that republicanism historically has "proceeded from an objective conception of the public interest and a state that could legitimately promote virtue." Horwitz, *supra* note 121, at 67.

152. *See* BAILYN, *supra* note 17, at 344 (noting that republics were "necessarily delicate structures"); APPLEBY, *supra* note 14, at 278 (observing that republican historians emphasize "the fragility of civil order and the ferocity of uncivil passions"); and MORONE, *supra* note 125, at 43 (noting that republics were understood as the "most fragile form of government").

153. BAILYN, *supra* note 17, at 344; *see also Interest Groups*, *supra* note 17, at 31 (arguing that the "animating principle" of republicanism in the founding period "was civic virtue").

154. *See supra* note 54 and accompanying text.

155. Bernard Bailyn finds that Montesquieu was the "chief authority" cited by the American founders, and that his name "recurs far more often than that of any other authority in all of the vast literature on the Constitution." BAILYN, *supra* note 17, at 344-45.

156. *See* 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 20 (Thomas Nugent trans., Hafner Press 1949) (1748). Montesquieu writes, "[f]or it is clear that in a

the "manner of giving this suffrage" are both "fundamental."[157] The core of virtue lies in "the identification of one's own good with the common good,"[158] as one authority interprets Montesquieu, and the insistence that citizens "put aside private interest for public good."[159]

The case for criminal disenfranchisement operating from this strong, compulsory understanding of virtue and the common good is developed most clearly in *Washington v. State*, an 1884 Alabama case which declares:

> The manifest purpose [of denying suffrage to ex-convicts] 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 evil infection of the one is not more fatal than that of the other. 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 . . . 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. The exclusion [is] imposed for protection, and not for punishment.[160]

There are important differences between this logic and that of, for example, Judge Friendly's decision in *Green*. *Green* concentrated on the individual's infraction and the proper sanction which that misconduct brings to him: he forfeits the "right to participate in . . . administering the compact."[161] But *Washington* focused on "protection" of a *public entity*—the "ballot box," the "communities," the "State."[162] This public body must be kept pure, free from "evil infection" or "the invasion of corruption" by the "unfit."[163] For republicans, disenfranchisement is a kind of political quarantine, a way of preserving the health of the body

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monarchy . . . there is less need of virtue than in a popular government, where the person intrusted with the execution of the laws is sensible of his being subject to their direction." *Id.*

157. *Id.* at 11.

158. BELLAH ET AL., *supra* note 151, at 254.

159. MORONE, *supra* note 125, at 42.

160. *Washington*, 75 Ala. at 585. This is the best-known of several cases from this period. *See also* Boyd v. Mills, 37 P. 16 (Kan. 1894); Shepherd v. Grimmet, 31 P. 793 (Idaho 1892).

161. *Green*, 380 F.2d at 451.

162. 75 Ala. at 585.

163. *Id.*

which is the political community.[164] The U.S. Supreme Court employed such an analogy in *New York v. Miln* when it observed that it is as "necessary" for states to protect themselves with "precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence."[165] Both *Washington* and *Miln* are creatures of nineteenth-century law, which one authority has found to be "replete with morals restrictions."[166] The targets of such restrictions were often people whom the Illinois Supreme Court called an "inferior class . . . those degraded by crime or other vicious indulgences of the passions."[167] Meanwhile, crimes such as perjury, forgery, bribery, larceny, and dueling were frequently singled out for the sanction of disenfranchisement in the nineteenth century.[168]

But twentieth-century jurists have continued to emphasize both public morality and the criminal character in evaluating criminal disenfranchisement law. As the Supreme Court of Missouri put it, the "hight [sic] privilege" of voting must be available to "only those who have lived up to certain minimum moral and legal standards."[169] A 1971

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164. Lawrence M. Friedman writes in another context of prisons as a way to "quarantine" the "criminal class." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW, 601 (2d ed. 1985). The belief that a tainted individual can stain the entire body politic seems to find a great deal of support among Americans today. The General Social Survey asked over one-thousand Americans between 1988 and 1991 whether they agreed or disagreed that "[i]mmoral actions by one person can corrupt society in general." Over half of those surveyed that expressed any opinion agreed or strongly agreed. *See* Inter-University Consortium for Political and Soc. Research, *General Social Survey*, *at* http://www.icpsr.umich.edu:8080/GSS/homepage.htm (last visited Nov. 4, 2002). About 51% of respondents checked either "agree strongly" or "agree somewhat;" about 46% answered either "disagree strongly" or "disagree somewhat." *Id*.

165. 36 U.S. (11 Pet.) 357, 369 (1837), *overruled by* Edwards v. California, 314 U.S. 160 (1941).

166. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 151-152, 155 (1996); *see also id.* at 154 (arguing that in nineteenth-century America "morality . . . was not a private, individual, or discretionary matter" but rather "a responsibility of government and a quid pro quo of community membership"). A famous pair of visiting French aristocrats remarked that "many offenses against religion and morals, such as blasphemy, incest, fornication, drunkenness, etc., are in the United States repressed by severe punishments; [in France] they are unpunished." GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 100 (Francis Lieber trans., Southern Ill. Univ. Press 1964) (1833). The perceived need to protect society against moral infection may help explain why when Congress wrote the Immigration Act of 1875, it precluded overseas felons and prostitutes from immigration. *See* E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 65-66 (1981).

167. Frorer v. People, 141 Ill. 171, 186-87 (1892); *see also* Anderson v. Winfree, 4 S.W. 351, 353 (Ky. 1887) (disqualifying from voting those convicted of offenses "which are inconsistent with the common principles of honesty and humanity, and convict the perpetrator of degradation, depravity, and moral turpitude").

168. See *supra* notes 69-71 and accompanying text.

169. *Barrett*, 175 S.W.2d at 788.

decision, *Kronlund v. Honstein*,[170] upheld specifically the disenfranchisement of those "convicted of crimes of moral turpitude."[171] And in 1966, the Supreme Court of California ruled that *only* "crimes involving moral corruption and dishonesty" warranted permanent disenfranchisement.[172] "The [judicial] inquiry," the court ruled, "must focus more precisely on the nature of the crime itself."[173]

These rulings demonstrate that procedural, contractarian liberalism alone is not sufficient to explain criminal disenfranchisement in the United States. For these opinions reflect a judicial concern with character, and with particular forms of sickness[174] which are held to be more dangerous than others to the body politic. Common to the earliest American laws barring convicts from voting, this idea continues to shape discussions of disenfranchisement today.[175]

Despite *Washington*'s view that voting rights are stripped from offenders "for protection, and not for punishment," criminal disenfranchisement must be understood both as a regulation of the franchise and as a form of punishment.[176] Republicans may make an argument for lifetime disenfranchisement which unites the two by drawing on theories of "expressive punishment." Any form of

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170. 327 F. Supp. 71, 73 (N.D. Ga. 1971).

171. *Id.*

172. Otsuka v. Hite, 414 P.2d 412, 414 (Cal. 1966). *Otsuka* involved the voting rights of plaintiffs convicted twenty years earlier of refusing to serve in the armed forces because of conscientious objections. *Id*.

173. *Id*. As one critic of disenfranchisement law has put it, this leg of the case for barring convicts from the polls "rests not upon what a criminal has done, but upon whom he has shown himself to be." Note, *supra* note 8, at 1307.

174. *See generally* Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473 (1997). Cogan argues that American theories of suffrage underwent a "change in the normative perspective" in the nineteenth century, one which turned away from "external" qualifications such as the property test and paid more attention to "the structure of the mind and in the qualities of the heart." *Id.* at 474, 482, 484.

175. For example, Delaware permits most ex-convicts to win restoration of voting rights five years after they conclude their sentence, but sex offenders—as well as those convicted of murder and manslaughter—are not eligible for restoration. DEL. CONST. art. V, § 2, *amended by* 72 Del. Laws 356 (1999). Similarly, a proposed 1998 amendment to the Massachusetts state constitution eschewed felony conviction as the disenfranchisement cutoff point, instead singling out those incarcerated for "murder[], rape, other sex related offenses or the possession or sale of controlled substances." 1998 J. HOUSE REPS. COMMONWEALTH MASS. 2161 (July 28, 1998). The proposal was defeated in favor of an amendment barring all incarcerated felons from voting. *Id.* But in the proposal, as in the new law of Delaware, we can hear an echo of the earliest American criminal-disenfranchisement laws: the content of the crime matters a great deal, with sex offenders and those convicted of drug crimes depicted as politically dangerous, while many other felons are not. The felon-disenfranchisement amendment was ratified by the electorate in November of 2000. *See* MASS. CONST. art. III (stating that "persons who are incarcerated in a correctional facility due to felony conviction" are ineligible to vote); *see also* MASS. GEN. LAWS ch. 51, § 1 (2001).

176. See *supra* notes 35-38 and accompanying text.

punishment, advocates of "expressive" or "shaming" penalties point out, is a "special social convention" that reflects "deeply rooted public understandings" and signifies society's "moral condemnation."[177] Bar criminals from voting, republicans may argue, and express our great esteem for political participation. Allowing criminals to vote, conversely, only further demeans the electoral process—and the polity itself.

The republican understanding of voting is crucial to this argument. For republicans, casting a ballot is not merely instrumental, self-interested conduct, but is a vital act of civic participation; the decline in turnout and in public esteem for elections today marks the low value of politics in American public life.[178] Lifetime disenfranchisement as punishment, republicans may argue, reminds us to cherish our freedom and to take

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177. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996). Kahan argues that "[s]haming penalties unambiguously express condemnation and are a feasible alternative to imprisonment for many offenses." *Id.* at 594. *But see* Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1764, 1789 (1999) (arguing that only a "continuous moral panic" in the United States today explains inhumane criminal justice policies, and that shaming penalties wrongly direct punishment "primarily at the community and not at the offender"); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions*, 107 YALE L.J. 1055, 1059, 1089 (1998) (arguing that the damage caused by shaming sanctions is not their effect on the offender but on society, and that shaming sanctions are "a species of official lynch justice"). This Article finds expressive punishment's emphasis on public expressions of "moral condemnation" to reflect a republican sensibility, but republicanism has no monopoly on the "expressive element" of sentencing. *See* Manfredi, *supra* note 4, at 291 (arguing that the "expressive element" of criminal disenfranchisement makes it compatible with the principles of Rawlsian liberal justice).

Of course, public shaming in criminal justice is not new. Cesare Beccaria wrote in 1764:

> Personal injuries which damage honour, that is, that proper esteem that a citizen can rightly expect from others, ought to be punished with public disgrace. This disgrace is a sign of public disapproval, which deprives the malefactor of public goodwill, of the nation's confidence, and of that sense almost of brotherhood which society inspires.

CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 54-55 (Richard Bellamy, ed., Richard Devies, trans., Cambridge Univ. Press, 1995) (1764).

178. *See* GLENDON *supra* note 17, at 128. Glendon laments that in a recent poll, only twelve percent of young people mentioned voting as part of what makes a "good citizen." Glendon discusses these problems in a chapter entitled "The Missing Dimension of Sociality." Political theorist Benjamin R. Barber writes that voting should be "a rite as well as a right," but in America it has "been stripped of almost all pomp and ritual." BENJAMIN R. BARBER, STRONG DEMOCRACY 187-88 (1984). Barber describes voting today as being:

> Rather like using a public toilet: we wait in line with a crowd in order to close ourselves up in a small compartment where we can relieve ourselves in solitude and in privacy of our burden, pull a lever, and then, yielding to the next in line, go silently home.

Id. at 188; *see also* RON HIRSCHBEIN, VOTING RITES: THE DEVOLUTION OF AMERICAN POLITICS 3 (1999) (arguing that voting ought to provide "ritualistic gratification by enabling [voters] to experience transcendence, atonement, and redemption by enacting sacred myths").

voting seriously. "In countries where liberty is most esteemed," Montesquieu writes, "there are laws by which a single person is deprived of it, in order to preserve it for the whole community."[179] Endorsing English bills of attainder, Montesquieu argues that "there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods."[180] Political participation should be our secular religion, says the republican, and we ought to use our criminal penalties to convey our deep respect for the power of the ballot.

2. REPUBLICANISM APPLIED: THE FEAR OF VOTE FRAUD

The liberal is likely to understand both crime and voting as rational, self-interested behavior, and may therefore predict that ex-offenders will vote in a subversive way.[181] Republican sensibilities, however, emphasize the flawed character of the convict, and worry that offenders will pollute the polity by committing vote fraud. Indeed, the California Supreme Court has interpreted "purity of the ballot box" reasoning to be largely about preventing fraud, since the convict 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."[182] In some ways, this hypothesis is similar to the subversive-voting concern: both allege that criminals in the voting booth "might sometimes hazard the welfare of communities," as the Supreme Court of Alabama in *Washington* put it.[183] But arguments about fraud emphasize trust and the "honesty of the [electoral] process"[184] as a whole, rather than self-interested individual behavior. Where the subversive-voting theory predicts that criminals will exercise the right to vote in a lawful but destructive way, the vote-fraud concern says they can't be trusted not to break the law again when they vote. Roger Clegg, testifying before

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179. 1 MONTESQUIEU, *supra* note 156, at 199.

180. *Id.*

181. *See supra* note 139 and accompanying text.

182. *Otsuka*, 414 P.2d at 417. The same court would later overturn California's lifetime felon-disenfranchisement law after finding that "the enforcement of modern statutes regulating the voting process and penalizing its misuse—rather than outright disfranchisement of persons convicted of crime—is today the method of preventing election fraud which is least burdensome on the right to suffrage." *Ramirez*, 507 P.2d at 1357. In another context, the U.S. Supreme Court also interpreted a state's interest in preserving the "purity of the ballot box" to refer to preventing fraudulent elections. *Dunn*, 405 U.S. at 345. In an apparent spasm of sarcasm, the Court called preserving the purity of the ballot box "a formidable-sounding state interest," but held that durational residence requirements were not necessary to prevent fraud. *Id.*

183. *Washington*, 75 Ala. at 585.

184. Fletcher, *supra* note 6, at 1899. Fletcher condemns the vote-fraud allegation as a "fanciful claim," but acknowledges that it is "a little more down-to-earth" than "mystical" arguments about the "purity of the ballot box." *Id.*

Congress in favor of indefinite disenfranchisement, argued that "[c]riminals are, in the aggregate, less likely to be trustworthy, good citizens," less "loyal to our republic."[185]

There is a particularly republican sensibility behind this argument—in its emphasis on trust and the criminal character, but also in its assumption that the virtue of the polity is a fragile thing. It rests fundamentally on the belief that the ballot box does not merely collect individual preferences, but represents the body politic itself. If that body is to be healthy, it must be protected from corruption, immorality, and untrustworthy behavior. Citizens, meanwhile, must possess the capacity to identify their own good with the good of others, and must be taught to revere political activity. Punishing serious criminals with "political quarantine," the republican says, achieves each of these goals.

C. Racial Discrimination and Criminal Disenfranchisement

Liberal and republican ideologies have played central roles in the history of American criminal disenfranchisement, but they cannot deliver a full understanding of the practice. American proponents of overtly racist political ideology have also used criminal disenfranchisement to pursue their vision of a healthy polity. This Section addresses only a discrete historical period when explicit white supremacy shaped the practice, what we might call the "causal nexus" between racism and criminal disenfranchisement. This Article later argues that much broader connections exist between racially discriminatory thought and criminal disenfranchisement in the United States.[186]

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185. *Civic Participation Act Hearing*, *supra* note 37, at 16 (prepared statement of Roger Clegg, Vice President and General Counsel, Center for Equal Opportunity).

186. See *infra* Part III.C. When public attention has turned to criminal disenfranchisement in recent years, the practice's disproportionate racial impacts have drawn the most attention. *See* Sasha Abramsky, *How They Played It*, COLUM. JOURNALISM REV., Mar.-Apr. 1999, at 14 (summarizing media coverage of 1998 HRW/TSP study); Fox Butterfield, *Many Black Men Barred from Voting*, N.Y. TIMES, Jan. 30, 1997, at A12; David Cole, *Denying Felons Vote Hurts Them, Society*, USA TODAY, Feb. 3, 2000, at 17A; Bob Davis, *Bradley Calls on Gore to Push for Order from Clinton Banning Racial-Profiling*, WALL ST. J., Jan. 18, 2000, at A4 (reporting that Democratic Presidential candidates Al Gore and Bill Bradley briefly discussed ex-offender disenfranchisement at Martin Luther King Day debate); Katz, *supra* note 27; *Disenfranchised for Life*, ECONOMIST, Oct. 24, 1998, at 30; Interview with Marc Mauer, *in All Things Considered* (National Public Radio broadcast, Jan. 18, 2000). But see Ken Hamblin, *Should Criminals Vote?*, DENVER POST, Oct. 27, 1998, which blames the HRW/TSP study for "perpetuating racial mistrust" by clouding the real issue, which is criminals' "bad deeds." The *New York Post* called the report's authors "featherbrained ex-hippies." Abramsky, *supra*, at 14.

Startling statistics are one reason for such attention. In six states—Alabama, Florida, Iowa, Mississippi, Virginia, and Wyoming—at least one in four black men is now indefinitely disenfranchised; in Alabama and Florida, approximately thirty-one percent of black men are barred from voting for life. FELLNER & MAUER, *supra* note 2, at 8; *see also*

1. THE "FURTIVE OFFENSES" OF BLACKS: CRIMINAL DISENFRANCHISEMENT AFTER RECONSTRUCTION

The Fifteenth Amendment[187] and military Reconstruction together forced Southern states to permit blacks to vote, but only temporarily. Southern whites used a variety of schemes to take voting rights away from blacks after the end of military Reconstruction—grandfather clauses, literacy tests, poll taxes, white primaries—restrictions which "effectively gutted the Fifteenth Amendment."[188] This list is familiar to most Americans. What is less well known is that racially-motivated changes to laws disenfranchising criminals were prominent features of the post-Reconstruction white backlash in the South.

As Southern whites rewrote their state constitutions to remove blacks from the franchise in the decades after 1877, they made their goals clear. "[W]hat is it we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State," said John B. Knox, president of the Alabama constitutional convention of 1901.[189] "This plan of popular suffrage will eliminate the darkey as a political factor in this State in less than five years, so that in no single

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Civic Participation Hearing, *supra* note 38, at 5-6 (statement of U.S. Rep. Danny K. Davis of Illinois). Human Rights Watch and The Sentencing Project estimate that in Maryland and Mississippi, black men comprise over half of the disenfranchised population. Overall, 1.4 million black men, or about thirteen percent of the black adult male population, are either temporarily or permanently disenfranchised—a rate seven times the national average. FELLNER & MAUER, *supra* note 2, at 8. Given current rates of incarceration, three in ten of the next generation of black men may be disenfranchised at some point in their lifetimes; forty percent may be disenfranchised in some states. *Id.* at 13. The causes of the practice's disparate impacts are controversial, and the future of American criminal disenfranchisement law may well depend on how they are identified. *See infra* Part III.C.

187. The Fifteenth Amendment reads in part, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

188. MORONE, *supra* note 125, at 189. Another authority writes that "cross-fertilization and coordination between . . . Southern states amounted to a public conspiracy." J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS 39 (1974). Southern "lawmakers frequently admitted, indeed boasted, that such measures as complex registration rules, literacy and property tests, poll taxes, white primaries, and grandfather clauses were designed to produce an electorate confined to a white race that declared itself supreme." CIVIC IDEALS, *supra* note 11, at 383.

Such measures also reduced white turnout, and in general the late nineteenth century saw "a recrudescence of antidemocratic theorizing on the question of who was entitled to vote." KOUSSER, *supra*, at 250-251; *see also* FONER, *supra* note 18, at 119 (showing that "[a]mong elite thinkers, a retreat from the previous consensus in favor of manhood suffrage was among the most remarkable developments of the late nineteenth century"). These ideas contributed to some of the same policies as racism, but there is no disputing the clarity and centrality of racial motives in many states.

189. Hunter v. Underwood, 471 U.S. 222, 229 (1985) (citation omitted).

county of the Commonwealth will there be the least concern felt for the complete supremacy of the white race in the affairs of government," said Carter Glass, delegate to the Virginia convention of 1906.[190] As part of that "plan," between 1890 and 1910, several Southern states altered their criminal disenfranchisement laws with the express intent of removing blacks from the rolls.[191] Indeed, laws disenfranchising criminals were among the first tools employed by whites to remove blacks from politics after Reconstruction. Describing the addition of petty larceny to one state's list of disqualifying offenses, historian Paul Lewinson finds that this was the first time that the white majority aimed discriminatory legislation at what whites perceived to be the "peculiar characteristics" of blacks.[192]

Mississippi's 1890 constitutional convention was the first to take aim at those alleged "peculiar characteristics." The 1869 constitutional provision disenfranchising those guilty of "any crime" was narrowed to exclude only those convicted of certain offenses[193]—crimes of which blacks were more often convicted than whites. The Mississippi Supreme Court in 1896 enumerated these crimes, confirming that the new constitution targeted those "convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery,

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190. *See* PAUL LEWINSON, RACE, CLASS, AND PARTY: A HISTORY OF NEGRO SUFFRAGE AND WHITE POLITICS IN THE SOUTH 86 (1932). Glass told the delegates, "Discrimination! Why, that is precisely what we propose; that exactly, is what this convention was elected for." KOUSSER, *supra* note 188, at 59. Describing the evolution of white methods of disenfranchising blacks, Ben Tillman of South Carolina stated to the Senate, "[w]e took the government away. We stuffed ballot boxes. We shot them. . . . With that system . . . we got tired ourselves. So we called a constitutional convention, and we eliminated . . . all of the colored people whom we could." *See* FRIEDMAN, *supra* note 164, at 507. "Give me a convention, and I will fix it so that the people shall rule and the Negro shall never be heard from," said Robert Toombs of the new Georgia constitution in 1890. Jack Bass, *Election Laws and Their Manipulation to Exclude Minority Votes*, *in* THE ROCKEFELLER FOUNDATION, THE RIGHT TO VOTE: A ROCKEFELLER FOUNDATION CONFERENCE, APRIL 22-23, 1981, at 1, 9 (1981). A Tennessee newspaper editorialized in 1889, "[i]t is certain that many years will elapse before the bulk of the Negroes will awaken to an interest in elections, if relegated to their proper sphere, the corn and cotton fields, by some election law." *Id.* at 15.

191. *See* Shapiro, *supra* note 2, at 540, 542.

192. LEWINSON, *supra* note 190, at 66 (quoting Richard L. Morton, The Negro in Virginia Politics, 1865-1902, at 92-93 (1918) (Ph.D. dissertation, University of Virginia)).

193. Ratliff v. Beale, 20 So. 865, 867-68 (Miss. 1896). In *Ratliff*, the Mississippi Supreme Court reviewed the purposes of the 1890 constitution as it addressed whether personal property could be confiscated to cover payment of the poll tax. *Id.* at 866. The court held that nontaxable property was not liable to forced sale for payment of the tax, largely because it found that the poll tax was "one of many devices for excluding from the franchise a large number of persons, which class it was impracticable wholly to exclude"—that is, blacks—and therefore was a device "intended by the framers of the constitution as a clog upon the franchise, and secondarily and incidentally only as a means of revenue." *Id.* at 865, 869.

embezzlement or bigamy."[194] Other Southern states barred from voting anyone convicted of "petty larceny, wife-beating, and similar offenses peculiar to the Negro's low economic and social status."[195] At the 1895 South Carolina convention, delegates added to the list of disfranchising crimes housebreaking, receiving stolen goods, fornication, sodomy, miscegenation, and larceny—but struck out theft and embezzlement and allowed murderers to vote.[196] Many newly disenfranchisable offenses, such as bigamy and vagrancy, were common among blacks because of the dislocations of slavery and Reconstruction.[197] John Fielding Burns, an

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194. *Id.* at 867.

195. LEWINSON, *supra* note 190, at 81.

196. J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, *in* MINORITY VOTE DILUTION 27, 35 (Chandler Davidson ed., 1984).

197. The sale of slaves had broken up many marriages, and blacks often remarried without obtaining a divorce or confirming the death of a former spouse. *See* Demleitner, *supra* note 4, at 777 n.124. Vagrancy was also a disenfranchisable crime of "moral turpitude." *See* KEYSSAR, *supra* note 35, at 306. Karen Orren has shown that the practice of severely punishing vagrants has deep roots in liberal theory, and was absorbed from English into American law and upheld by the Supreme Court until the twentieth century. *See* KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES 76-77 (1991). This should not obscure the patently racist purposes of laws disenfranchising vagrants in the post-Reconstruction period, however.

Despite the clear social causes of infractions such as bigamy and vagrancy, the changed criminal disenfranchisement laws reflected the increasingly popular conviction among whites that blacks were innately inferior and predisposed to crime. In the late nineteenth century, many scholars believed that "the tendency toward crime was an inherited trait, that the criminal was a definite physical or mental type." FRIEDMAN, *supra* note 164, at 601. The belief in a criminal physical type joined easily with racism. One Pennsylvania lawmaker offered as proof of blacks' incapacity the fact that they composed "[o]ne half of the tenants of our jails and penitentiaries." Cogan, *supra* note 174, at 490-91. Historian Joel Williamson points out that economic conditions facing free blacks likely generated any increase in black crime after Reconstruction, but many influential whites sought to prove "that the New Negro was innately bad and any increase in his talents or capacities by education only heightened his potential for evil." JOEL WILLIAMSON, A RAGE FOR ORDER: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 83 (1986). Such ideas were advanced by respectable members of the intelligentsia, such as Frederick L. Hoffman, a statistician for the Prudential Insurance Company of America. In 1896 the American Economic Association published his *Race Traits and Tendencies of the American Negro*, in which Hoffman argued that "the root of evil lies in the fact of an immense amount of immorality, which is a race trait, and of which scrofula, syphilis, and even consumption are the inevitable consequences." WILLIAMSON, *supra*, at 294 (citing FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO 95, Publications of the American Economic Association (New York: Macmillan, 1896)). A Virginia historian, studying the rape of white women by black men, wrote that these blacks showed "a diabolical persistence and a malignant atrocity of detail that have no reflection in the whole extent of the natural history of the most bestial and ferocious animals." *Id.* (citing PHILLIP ALEXANDER BRUCE, THE PLANTATION NEGRO AS FREEMAN 84 (New York: Putnam, 1889). University of Pennsylvania Professor Edward Drinker Cope studied the development of skull sutures and found that "blacks were perpetually arrested in early adolescence." *Id.* at 89-90. In an 1899 address to the American Social Science Association, Walter F. Willcox demonstrated statistically "that the liability of an American Negro to commit crime is

Alabama judge with decades of experience in a predominantly black district, wrote the new Alabama constitutional provision disenfranchising criminals; Burns estimated that the wife-beating provision alone would disqualify two-thirds of black voters.[198] Writing in 1918, Kirk Harold Porter criticized biases built into the new criminal disenfranchisement laws, arguing that

> [d]isenfranchisement for crime seems to be a perfectly legitimate rule to apply and has been used throughout our history. But when a negro could be disenfranchised because of a trifling physical conflict with his wife—interpreted as wife-beating—the principle involved is utterly subverted.[199]

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several times as great as the liability of the whites." GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND 281 (1971).

Such ideas would fuse naturally with provisions punishing with permanent disenfranchisement crimes thought "peculiar" to blacks. To some extent, however, the post-Reconstruction debate over race and crime remained divided as to the environmental and innate causes of crime. The *Raleigh News & Observer* claimed that certain offenses were "peculiar to the Negro's low economic and social status." LEWINSON, *supra* note 190, at 81. In *Ratliff*, the Mississippi Supreme Court held in 1896 that the "[negro] race had acquired or accentuated" its criminal character "by reason of its previous condition of servitude and dependence." 20 So. at 868; *see also supra* text accompanying note 193.

198. *See* Kousser, *supra* note 196, at 35, 45. A federal court in 1977 struck down Alabama's constitutional provision disenfranchising those convicted of wife-beating. It did so, however, not because of the racist intent of the provision, but because the law unconstitutionally classified offenders based on their gender. *See* Hobson v. Pow, 434 F. Supp. 362, 366 (N.D. Ala. 1977).

199. PORTER, *supra* note 67, at 219. Porter's apparent lack of concern about violence against women should not distract us from his central point here, which is that the white-controlled criminal justice system would aggressively seek to prosecute blacks more than whites for such offenses. At the same time, Porter's use of "subverted" is an appropriate reminder that many Americans at this time believed criminals were rightly barred from the suffrage. Evidence of this fact showed up even as disenfranchisement law was twisted for racial purposes. In Alabama, for example, county registrars were charged with carrying out "the spirit of the Constitution, which looks to the registration of all white men not convicted of crime, and only a few Negroes." KOUSSER, *supra* note 188, at 59. Even proponents of universal suffrage in this period, Kousser found, "defended the voting rights of all white men except criminals." KOUSSER, *supra* note 188, at 257. In 1906, an essay in the inaugural issue of the *American Political Science Review* acknowledged that:

> It is possible that the enumeration of such offenses as fornication, adultery, bigamy, and wife-beating among the crimes which work a forfeiture of citizenship may have been inspired, in part at least, by the belief that they were offenses to the commission of which negroes were prone, and for which negroes could be much more readily convicted than white men.

John C. Rose, *Negro Suffrage: The Constitutional Point of View*, 1 AM. POL. SCI. REV. 17, 25 (1906). However, Rose notes that criminal disenfranchisement was also practiced "in many, if not most, Northern States," and argues that "[n]o court could be asked to say that a State had not the right to add disfranchisement to the other punishments entailed by conviction for such offenses." *Id.* at 25-26.

In Georgia in 1877 and in Alabama in 1901, state constitutions barred the vote forever to anyone convicted of a crime of "moral turpitude," whether or not conviction for that crime carried any prison sentence at all.[200] In Alabama, many misdemeanors were effectively included under the "moral turpitude" catchall phrase,[201] because between the lines was the intent and expectation that the phrase would be used in a discriminatory manner. As a Virginia delegate said of the literacy test in that state's convention in 1902, "I do not expect an impartial administration of this clause."[202] The Alabama provision soon "had the intended effect":[203] an historian hired by the Alabama state registrars found that by January 1903, the revised constitution "had disfranchised approximately ten times as many blacks as whites," many for non-prison offenses.[204]

Such schemes would soon be approved by the highest courts in the land. In 1896, the Mississippi Supreme Court articulated with approval and devastating clarity the discriminatory intent of disenfranchisement laws after Reconstruction:

> [T]he convention [of 1890] swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain particularities of habit, of temperament and of character, which clearly distinguished it as a race from that of the whites,—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and *its criminal members given rather to furtive offenses than to the robust crimes of the whites.* Restrained by the federal constitution from discriminating against the negro race, the convention *discriminated against its characteristics and the offenses to which its weaker members were prone*. . . . Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder, and other crimes in which violence was the principal ingredient, were not.[205]

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200. PORTER, *supra* note 67, at 205, 214.

201. *Hunter*, 471 U.S. at 226.

202. PORTER, *supra* note 67, at 218.

203. *Hunter*, 471 U.S. at 224.

204. *Id.* at 227. In determining whether a misdemeanor was a "crime of moral turpitude," Alabama registrars had relied on opinions of the state Attorney General. *Id.* at 224. In Virginia, a newspaper declared that the petty-crimes disenfranchisement provision combined with the poll tax to effect "almost . . . a political revolution" in cutting down the black vote. Kousser, *supra* note 196, at 35.

205. *Ratliff*, 20 So. at 868 (emphasis added). Mississippi has permanently disenfranchised those convicted of many petty crimes since 1890; it did not bar rapists or

This understanding was not confined to the South. In evaluating Mississippi's all-white jury law, the U.S. Supreme Court considered *Ratliff* in 1897. Quoting extensively from the opinion, the Court explicitly endorsed Mississippi's discrimination against "the alleged characteristics of the negro race."[206] Arguments about the need to preserve the social contract and protect the body politic from corruption were superseded, and the desire to punish the "furtive offenses" of blacks now became an explicit purpose of criminal disenfranchisement in several of the United States.[207]

III. THE CHALLENGE TO CRIMINAL DISENFRANCHISEMENT

The overtly racist ideology on display in the post-Reconstruction backlash is no longer acceptable in American politics, but appeals to liberal and republican principles are common in American political discourse. Understanding the liberal and republican cases for criminal disenfranchisement compels us to examine whether those ideologies today truly do support laws barring criminals from voting. This Part argues that the practice is not consistent with important liberal and republican principles in modern American political thought, and that disenfranchisement's broad and close connections to the racially discriminatory tradition in American politics further undercut the policy's wisdom and efficacy today.

A. The Liberal Case Against Criminal Disenfranchisement

Despite its deep history and clear modern influence, the liberal case for criminal disenfranchisement today suffers from serious flaws. Two liberal challenges to the policy confront disenfranchisement as a regulation of the suffrage, while a third addresses the punitive nature of the practice. First, contractarian defenses of disenfranchisement fail to meet the tough standards modern liberals proudly apply when fundamental rights are threatened. Second, the claim that convicts must

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murderers from voting until the state constitution was amended in 1968, when burglary was also removed from the list of disenfranchising offenses. *See* MISS. CONST. art. XII, § 241; *Ex-Offenders' Voting Rights Act Hearings*, *supra* note 30, at 7.

206. Williams v. Mississippi, 170 U.S. 213, 222 (1898). "There is an allegation," the Court acknowledged, "of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the constitution or laws or by those who administer them." *Id.* at 223. *Williams* was effectively superseded by the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

207. In 1985, the U.S. Supreme Court would revisit this period and hand down a different ruling. *See Hunter*, 471 U.S. 222 (striking down the "moral turpitude" clause in Alabama's constitutional disenfranchisement provision because it was adopted with discriminatory intent). For further discussion of *Hunter*, see *infra* Part III.C.1.

be prevented from engaging in socially-subversive voting is empirically unfounded and violates the liberal belief in neutrality. Third, the application of disenfranchisement as penalty flouts the liberal concern for proportionality in punishment, and conventional punitive theories cannot easily justify the practice. Many Americans today may support disenfranchising only the incarcerated and oppose the indefinite loss of voting rights, but liberal principles do not justify that position.

1. "STRICT SCRUTINY" AND THE LIBERAL DEFENSE OF FUNDAMENTAL RIGHTS

"Strict scrutiny"—the standard of review used by federal courts to assess governmental actions which impinge on fundamental rights—has a complex constitutional history[208] and draws on republican as well as liberal theory.[209] This Article does not argue that the standard has an essentially liberal character, nor does it endeavor to prove anew that the Supreme Court ought to apply strict scrutiny review to criminal disenfranchisement.[210] But strict scrutiny's emphasis on protecting

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208. Strict scrutiny is the most demanding standard under which federal courts review governmental action, and is applied to classifications based on race as well as those affecting fundamental rights. To satisfy the strict scrutiny standard of review, the government must prove that "the state interest served is compelling, that the means employed to achieve the state's goals are appropriately narrow, and that the state's purposes cannot be achieved by an alternative method." Reback, *supra* note 5, at 854.

The history of strict scrutiny in twentieth-century constitutional interpretation begins with Justice Harlan F. Stone's footnote four in *United States v. Carolene Products Co.* 304 U.S. 144, 152 n.4 (1938). Justice Stone suggested there that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" could be "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." *Id*. While the phrases "fundamental rights," "strict scrutiny," and "suspect classifications" did not appear in footnote four, those concepts have been central to the subsequent development of strict scrutiny or "preferred freedoms" analysis. All are intensely contested in the massive literature on the Fourteenth Amendment. *See* TRIBE, *supra* note 94, § 16-6, at 1451-54 (analyzing strict scrutiny's place in what Tribe calls the "model of equal protection"). *See generally* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988).

209. See *infra* note 271 for a brief description of republican constitutional theory's defense of fundamental political rights.

210. Tribe is among those who argue that "[b]ecause the restriction infringes upon the right to vote, it would be sustained only if it were necessary to secure a compelling state interest." TRIBE, *supra* note 94, § 13-16, 1094. Tribe writes that "denial of the franchise to convicted criminals would appear unconstitutional" under strict scrutiny. *Id*. Another authority writes that a disenfranchised felon should qualify for "unusually stringent constitutional protections because in the past there has been a pattern of discrimination against him from the very legislators for whom he is not allowed to vote." Du Fresne & Du Fresne, *supra* note 5, at 112. As noted above, however, the Supreme Court has declared that criminal disenfranchisement does not need to withstand strict scrutiny because it is explicitly authorized by Section 2 of the Fourteenth Amendment. *See supra* note 91 and accompanying text. For list of cases holding the right

fundamental rights by limiting state power does have an important liberal element. Its contribution to the debate over criminal disenfranchisement is crucial: defenses of disenfranchisement based on the claim that offenders have violated the social contract simply answer the wrong question. The heart of liberal theory today is not the terms of an imaginary contract, but the commitment to protecting essential individual rights, and the insistence that only a specific, important governmental objective justifies their infringement. In virtually every political context, modern liberal discourse is "rights talk."[211] Liberals, legal theorist Ronald Dworkin points out, distrust the "ghostly entities" sometimes invoked by liberty-restricting republicans.[212] Compared to the rigors of the strict scrutiny standard, the idea of a violated contract is itself a spectral abstraction with which to justify restricting rights.

Rights, American Revolutionary leader John Dickinson wrote in 1764, are not "favors granted by charters from the crown," but are "born with us; exist with us; and cannot be taken from us by any human power without taking our lives."[213] Modern liberals, meanwhile, proudly defend individual rights not against the crown, but against the depredations of democratic majorities and pandering politicians. Though it has not always been so, the right to vote is today understood across the American political spectrum to be a fundamental right.[214] In defending that right,

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to vote to be fundamental and subject to strict scrutiny, see *supra* note 86 and accompanying text.

211. *See generally* GLENDON, *supra* note 17.

212. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977). Dworkin points to concepts like the "collective wills" or the "national spirits" as examples of such entities. *Id*. As early as the 1780s, historian Daniel T. Rodgers found American legal theorists were already abandoning the concepts of the "state of nature" and the social contract for "more tangible, material ways" of talking about rights and liberties. RODGERS, *supra* note 125, at 52, 66.

Dworkin argues that "[i]t makes sense to say that a man has a fundamental right against the Government . . . if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence." DWORKIN, *supra*, at 199. In response to this language, proponents of criminal disenfranchisement might argue that convicts have violated the dignity of others. Doubtless many of them have. But surely American citizens who are vocal admirers of the Nazi Party, or who recruit young people to join the Ku Klux Klan, violate the dignity of others as well. They too break the social contract. Most liberals would reject a proposal to bar Nazis or Klansmen from speaking or voting, however, in the absence of a compelling state interest rendering such restrictions necessary.

213. BAILYN, *supra* note 17, at 187. Bailyn points out that Dickinson was one of the best-trained lawyers among Revolutionary leaders. *Id.* By this reasoning, fundamental rights exist *prior* to the contract, and cannot be bargained away. *See* Note, *supra* note 8, at 1306.

214. As one Representative reminded Congress in 1968, "[i]n the beginning, the only person uniformly assured of the right to vote was the white, 21-year-old male, propertied, literate, a fixed resident, and with means to pay any tax. Gradually these restrictions have fallen by the wayside, as custom and prejudice gave way to reason, or the coercion of law." 114 CONG. REC. H8077 (daily ed. Aug. 1, 1968) (statement of Rep.

liberals ought to ask what essential objectives government cannot accomplish without depriving offenders of the ballot. Advocates of both temporary and indefinite disenfranchisement fail to answer.[215]

2. "SUBVERSIVE VOTING"

When defenders of criminal disenfranchisement offer policy-oriented explanations for the policy, they sometimes allege that convicts will vote in concert to weaken the criminal law.[216] As argued above, the "subversive voting" claim, with its assumption of rational, instrumental, self-interested voting by criminal offenders, qualifies as a liberal claim for the purposes of this Article. This defense of disenfranchisement—both temporary and indefinite—suffers from serious faults. First, if offenders were to pool their votes and effectively weaken criminal law, they would need a politician—indeed, several—to openly seek to win the inmate vote and advance convicts' supposed "interests." This is an implausible scenario, to say the least.[217] The concern that inmates might make

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Schwengel). As an indicator of how much our understanding of voting rights has changed, consider a federal court decision from 1873 which ruled that if they wished, states could declare "that no person should vote until he had reached the age of thirty years, or after he had reached the age of fifty, or that no person having gray hair, or who had not the use of all his limbs, should be entitled to vote." United States v. Anthony, 24 F. Cas. 829, 830 (C.C.N.D.N.Y. 1873). In the nineteenth century, it was possible to argue that the right to vote was a "political" right created by government, and therefore not as protected as some civil rights. But the right to vote now holds a much stronger position in American political and legal culture.

Early in the legal battle over Florida's 2000 presidential election, then-Governor George W. Bush and others argued in federal court that the right to vote is fundamental and protected by the First Amendment. *See* Complaint for Declaratory and Injunctive Relief at 15, Siegel v. LePore, 120 F. Supp. 2d. 1041 (S.D. Fla. 2000) (No. 00-9009). The fourth claim for relief in the complaint reads, in part: "The right to vote in a democracy is among the most precious of all individual rights, and is the crux of the democratic system. The right to vote is clearly established under the First Amendment of the Constitution of the United States." *Id.*

215. *See supra* note 96; *infra* note 291 (noting that disenfranchisement is not necessary to prevent crime, guarantee an informed electorate, or prevent electoral fraud, given the availability of numerous other measures designed to achieve those ends).

American liberals who support criminal disenfranchisement, whether temporary or indefinite, ought to consider the recent words of South Africa's Constitutional Court. In holding that prisoners retain the right to vote, the South African court declared that "[r]ights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement." *See August*, 1999 (3) SALR at 10. Many Americans would endorse these principles, as they would the court's holding that "[u]niversal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race." *Id.*

216. *See supra* notes 144-147 and accompanying text.

217. *See Civic Participation Act Hearing, supra* note 37, at 11 (statement of Marc Mauer, Assistant Director, The Sentencing Project) (noting that politically-minded

mischief in local politics, meanwhile, is easily met by permitting them to vote by absentee ballot only in their town of previous residence.[218] Moreover, the hypothesis that offenders would vote subversively is unsupported by empirical work on how voters choose and how convicts perceive the law. Very few voters cast ballots based on a single issue, be it criminal justice policy or anything else; it is a myth that voters make decisions based solely on narrow financial self-interest,[219] and no evidence suggests that offenders as a class are any different. Furthermore, research shows that offenders are not out to wreck the criminal law. Political scientist Jonathan D. Casper found through interviews with criminal defendants that, with few exceptions, all "believed that they had done something 'wrong,' that the law they

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burglars "would first have to find a candidate running on a platform that calls for lowering the penalties for burglary, then find 51 percent of the electorate that wanted to vote for that candidate, and then have that candidate convince his or her fellow legislators to also lower the penalties for burglary").

218. This is the policy employed by the state of Vermont, as well as by those Canadian provinces which permit incarcerated offenders to vote. *See* VT. STAT. ANN. tit. 28, § 807(a)-(b) (2000); Canada Elections Act, C.R.C., ch. 9, §§ 244, 245(3) (2000) (Can.) (specifying that an "incarcerated elector" "is entitled to vote under this Division only for a candidate in the electoral district in which his or her place of ordinary residence is situated as shown on the application for registration and special balloting made by the elector").

219. The behavioral literature on how citizens choose shows that individual economic self-interest alone does not determine votes. Citizens tend to vote not egoistically but "sociotropically," favoring the candidate or party they think likeliest to benefit the economy or society as a whole. *See generally* Donald R. Kinder & D. Roderick Kiewiet, *Sociotropic Politics: The American Case*, 11 BRIT. J. POL. SCI. 129 (1981); Gregory B. Markus, *The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross Sectional Analysis*, 32 AM. J. POL. SCI. 137 (1988) (finding that broad macroeconomic conditions are more important than personal finances in individuals' voting decisions). Meanwhile, there is no evidence that criminals are "so overwhelmed by criminality" that they will "prioritize criminal ends over every other political, economic, and social issue." Winkler, *supra* note 106, at 387 n.242.

Even if all convicts were to vote in concert, they would be far too few in number to carry a candidate to victory without the support of other "interest groups." One prominent recent study has shown that criminal disenfranchisement has helped Republican Senate candidates in several recent elections. *See* Uggen & Manza, *supra* note 25, at 4, 17-22. This does not demonstrate, however, that offenders successfully vote in a "subversive" manner. Consider, for example, the 2000 Presidential election in Florida. If Florida automatically restored the right to vote to ex-felons, some would have voted in that election; because offenders come disproportionately from lower-income and minority groups, it is very likely that they would have tipped the election to the Democratic candidate, Vice President Gore. *See supra* note 25 (estimating that as many as 524,000 non-incarcerated Floridians are barred from voting because of a felony conviction). But Gore supported the death penalty and other "tough on crime" measures. *See The 2000 Campaign: Other Issues; From Social Security to Environment, the Candidates' Positions*, N.Y. TIMES, Nov. 5, 2000, at 45 (noting Gore's support for the death penalty); John Wildermuth, *Bush, Gore Trade Fire Over Gun Control*, S.F. CHRONICLE, Oct. 10, 2000, at A1 (reporting that the two candidates "have been playing 'can you top this' when it comes to being tough on crime," and noting Gore's support for the 1994 crime bill, which expanded federal death penalty statutes).

violated represented a norm that was worthy of respect and that ought to be followed."[220] Virtually all interviewees charged with property crimes "felt that laws against taking property from others were 'good' laws and that such behavior should not be tolerated but merited punishment."[221] Casper's subjects believed that laws against stealing were justified, and understood "the idea of reciprocity upon which the law is based."[222] When asked what they thought would happen without laws against the crime they were accused of committing, all of Casper's subjects answered that everyone would begin doing it, that the behavior would become rampant, and that this would be a bad thing.[223]

Far from seeking to join together and lobby candidates to abolish the criminal code, then, convicts likely *support* the existence of the laws they've broken, and "accept them as desirable guides to life."[224] Advocates of criminal disenfranchisement offer no evidence to support the subversive-voting hypothesis, but Casper's observations were preceded by those of Tocqueville. Touring American penitentiaries, Tocqueville marveled that "[t]here is a spirit of obedience to the law, so generally diffused in the United States, that we meet with this characteristic trait even in the prisons."[225]

What if inmates and ex-offenders *did* plan to vote in what some might consider a subversive manner? Could liberals legitimately prevent individuals from voting because of the choices they might make? Thurgood Marshall has argued that denying criminals the ballot on this basis "condition[s] [voting rights] on support of the established order."[226] As another authority points out, "if the disenfranchisement of [criminals] is . . . guided by the fear of subversive voting, then it clearly violates the principle of neutrality toward competing conceptions of the political

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220. JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 146 (1972).

221. *Id*. at 147.

222. *Id*. at 148.

223. *Id*. at 149-51.

224. *Id*. at 151. Casper concludes that offenders accept the norms of laws and can articulate their purposes, but they have not internalized those norms at a psychological level sufficient to regulate their own conduct consistently. *Id.*

225. BEAUMONT & TOCQUEVILLE, *supra* note 166, at 121. The Frenchmen continued, "[w]ithout being obliged to indicate here the political reasons of this fact, we only state it as such; but this spirit of submission to the established order does not exist in the same degree with us." *Id.* Elsewhere, after South Africa's Constitutional Court held that inmates retain voting rights, one inmate serving time for armed robbery told a reporter "[i]t may be strange coming from me, but I'm looking for a government that will cut down on crime." Daniel J. Wakin, *Prisoners Register to Vote*, MONTREAL GAZETTE, Apr. 17, 1999, at A25.

226. *Richardson*, 418 U.S. at 83 (Marshall, J., dissenting). Marshall argued that restricting the vote because of fear of how a person would use it "is to debase [voting rights] beyond recognition." *Id.*

good."[227] This is not only a fundamental liberal principle, but also an essential constitutional one. In striking down restrictions on voting by members of the military, the Supreme Court ruled that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[228] The Court held that people who may vote instrumentally in their own interest may not be excluded from the franchise for that reason, and that "[t]he exercise of rights so vital to the maintenance of democratic institutions . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group."[229] In another case, the Supreme Court held that "'[d]ifferences of opinion' may not be the basis for excluding any group or person from the franchise."[230] Rejecting the argument that voters ought to share a "common interest in all matters," the Court noted that "all too often, lack of a ['common interest'] might mean no more than a different interest."[231] To the extent that criminal disenfranchisement is based on disagreement with offenders' voting choices, then, it is both illiberal and unconstitutional—*even if* convicts might vote for changes in the criminal law.

Finally, it is telling that proponents of disenfranchisement do not spell out precisely what it is they fear inmates or ex-convicts might vote for, because doing so lays bare the weakness of their position. Surely no liberal would argue that it ought to be illegal to vote against "three-strikes" laws, mandatory minimum sentences, or the death penalty, for example, if a person believes those laws to be counterproductive. Holding such views is hardly subversive.

3. PROPORTIONALITY AND PUNISHMENT

Liberal theory also offers powerful challenges to criminal disenfranchisement when the policy is understood as punishment. Concerned with limiting state power, liberals have long demanded proportionality between the infraction and the sanction in criminal justice. Even in the state of nature, Locke argued, a man who has been wronged may harm the offender only "so far as calm reason and conscience dictate,

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227. Winkler, *supra* note 106, at 358; *see also* DEMOCRACY'S DISCONTENT, *supra* note 17, at 4 (arguing that liberalism pursues the ideal "that government should be neutral toward the . . . views its citizens espouse").

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

229. *Id.* (quoting Schneider v. State, 308 U.S. 147, 161 (1939)).

230. *Dunn*, 405 U.S. at 355 (quoting Cipriano v. City of Houma, 395 U.S. 701, 705-06 (1969)).

231. *Id.* (quoting Evans v. Cornman, 398 U.S. 419, 423 (1970)) (alteration in original).

what is proportionate to his transgression."[232] The principle is also evident in the Magna Carta and the English Bill of Rights of 1689, both of which prohibited excessive fines.[233] These documents do not establish what is proportional punishment for a given crime, and it would not matter much to us if they did, since proportionality is a normative concept which depends on social standards. Criticizing modern ex-offender disenfranchisement, George P. Fletcher makes this point well:

> [A]t the time when all felons were in principle subject to capital punishment, it probably did not do much harm to treat felons who were not executed as civilly dead. After all, they were still alive, gratuitously, and therefore if they enjoyed fewer civil rights than others, they had little ground to complain. This rationale obviously has little basis for application in a time when the concept of felony implies simply that the offense is subject to punishment by a year or more in prison.[234]

The idea that a single criminal transgression constitutes a repudiation of the entire social contract conjures up raw Hobbesian ideas of the compact, in which one is either fully inside the body or completely outside it.[235] This view might have made sense in the walled cities of the Renaissance, but today it is an anachronism.

When the punitive elements of a sentence are premised on proportionality, the collateral consequences of conviction should be held to the same standard. Lifetime disenfranchisement—which continues to punish the offender long after she has served her sentence—clearly fails that test. By imposing the sanction only during the offender's sentence, temporary disenfranchisement may seem intuitively to meet standards of

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232. LOCKE, *supra* note 15, § 8, at 10. Locke argues that "reparation and restraint" are "the only reasons, why one man may lawfully do harm to another, which is what we call *punishment*." *Id.*

233. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM 21 (1985). The language of the Magna Carta is worth noting: "A free man shall not be amerced [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise." 1 MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY 26 (Kermit L. Hall ed., 1992).

Liberals, of course, do not have a monopoly on the belief that punishment must be proportionate and linked to the nature of the infraction. The republican theorist Montesquieu writes that "[l]iberty is in perfection when criminal laws derive each punishment from the particular nature of the crime." 1 MONTESQUIEU, *supra* note 156, at 185.

234. Fletcher, *supra* note 6, at 1899.

235. As the United States Court of Appeals for the District of Columbia ruled in 1965, "it is hardly likely" that "free and informed individuals would enter into a contract in which a single failure to execute payment by one party would constitute a forfeiture of all goods previously obtained under the contract." Note, *supra* note 8, at 1305 n.28 (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)).

proportionality. But temporary disenfranchisement of broad classes of offenders, while certainly a milder form of the penalty, is vulnerable to challenge on this ground as well. It is not logically clear why the loss of voting rights is a proportional penalty for a first-time drug offender sentenced to probation, for example, as well as a murderer incarcerated for life, while the sanction is rarely imposed at all on those who violate the social contract and endanger the public by driving intoxicated.[236] Furthermore, the great variation among state laws regarding the duration of the sanction suggests a deep lack of consensus.

Another perspective on the proportionality of disenfranchisement comes from Section 2 of the Fourteenth Amendment, as interpreted in *Richardson*: states may without penalty deny the vote to those who participate in "rebellion, or other crime."[237] Of course, the word "rebellion" was included to allow states to disenfranchise former Confederates, after Congress decided not to do so itself.[238] An earlier draft of the Amendment had barred all former Confederates from voting in federal elections—but only *temporarily*, until 1870.[239] One radical Republican wrote to a Texas colleague early in Reconstruction, "[i]t is expected that you will temporarily disfranchise a number of those who participated in the rebellion sufficient to place the State in the hands of those who are loyal to the United States."[240] However, many Republicans considered disenfranchisement "vindictive [and] undemocratic,"[241] and some states disenfranchised few Confederates or none, even for a limited time.[242] It is a striking fact in the history of American criminal

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236. No state classifies a first offense for driving while intoxicated as a felony. In most states, a person must be convicted of driving under the influence three or more times in order to be charged with a felony. The laws of only four states—Indiana, New York, Oklahoma, and Utah—permit a second-time drunk driver to be charged with a felony. *See* HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DIGEST OF STATE ALCOHOL-HIGHWAY SAFETY-RELATED LEGISLATION (19th ed. 2001).

237. *Richardson*, 418 U.S. at 43.

238. *See* FONER, *supra* note 107, at 254.

239. *Id.* at 253.

240. LEWINSON, *supra* note 190, at 44. Some states did bar former Confederates from voting, but the Amnesty Act of 1872 removed most civil disabilities that had otherwise survived. CIVIC IDEALS, *supra* note 11, at 275. Smith notes that some early Reconstruction plans required loyalty oaths and temporarily disenfranchised those former Confederates who had taken an oath to another government; new state constitutions did away with the oath requirement. *Id.*

241. FONER, *supra* note 107, at 254. Foner writes, "a majority of [Congressional] Republicans considered disenfranchisement vindictive, undemocratic, and likely to arouse opposition in the North." *Id.*

242. *Id.* at 324. The states were Georgia, Florida, North Carolina, South Carolina, and Texas. Other states limited disenfranchisement to specific individuals, or to those who had committed atrocities. *See id.* Intriguingly, the debate among Republicans divided along racial lines: "disenfranchisement [of former Confederates] generated less interest among black delegates," Foner writes, "many of whom seemed uncomfortable with a policy that appeared to undermine the party's commitment to manhood suffrage."

disenfranchisement: few former Confederates—those who had truly made war on the compact—were deprived of the vote, and all soon regained it.

In the context in which the controlling constitutional language of American disenfranchisement was written, then, the notion that indefinite disenfranchisement is a "proportional" consequence for crime is difficult to defend.[243] Those who engaged in organized, sustained, violent rebellion against the American government, bringing its very survival into doubt, suffered at most temporary removal from the franchise. Former Confederates, of course, quickly regained political influence, while felons today are politically powerless.[244] This explanation merely underscores the failure of disenfranchisement to meet consistent standards of proportionality. Surely contractarian liberals would classify treasonous combination as a more serious crime than, say, larceny. But where American voting rights are concerned, the class of felonious thieves has been punished more severely than rebels.

The disproportionate nature of disenfranchisement is only one element of the critique of the practice based on theories of punishment. Liberals as diverse as John Stuart Mill, John Rawls, and Robert Nozick have argued that government's power to penalize must be carefully restrained by the ends which punishment serves.[245] And punishment, as adherents of varying political ideologies agree, should achieve four goals, in some combination: retribution, incapacitation, deterrence, and rehabilitation. Disenfranchising criminals fails to serve any of these purposes.

Id. One former slave said, "I have no desire to take away the rights of the white man. All I want is equal rights in the court house and equal rights when I vote." *Id.*

243. *But see Richardson*, 418 U.S. at 48-53 (noting that several of the Readmission Acts which allowed Southern states to return to the Union endorsed disenfranchisement of felons).

244. As Alexander Keyssar has argued, convicted felons today "possess negative political leverage," in that endorsing their cause would likely hurt any candidate. KEYSSAR, *supra* note 35, at 308; *see also* FRIEDMAN, *supra* note 164, at 601 (linking the brutal conditions in nineteenth-century American prisons to the fact that "convicts, like paupers and blacks, were at the very bottom of American society; powerless, their wants and needs had no American priority"); Harrison, *supra* note 36, at 39 (arguing that "the relative political powerlessness of those who are convicted of crimes" has helped ex-felon disenfranchisement survive).

245. Mill distinguishes the "preventive" and "punitory" functions of criminal justice, and argues that "[t]he preventive function . . . is far more liable to be abused, to the prejudice of liberty, than the punitory function." MILL, *supra* note 15, at 164. John Rawls' "constitutional convention" participants weigh carefully how to define precisely the powers and limits of the state's coercive power. *See* RAWLS, *supra* note 15, at 240. Robert Nozick examines carefully such questions as precisely how persons know that the dominant "protective agency" has the legitimacy to punish infractions, the importance of establishing sufficiently reliable procedures for punishing wrongdoing, and how victims can authorize the protective agency to punish on their behalf. *See* NOZICK, *supra* note 15, at 56, 106-07, 134-35.

Obviously, if one emphasized rehabilitative goals, indefinite disenfranchisement would clearly be counterproductive, and temporary disenfranchisement would likely be rejected as well.[246] The argument from deterrence is also quite weak. It is difficult to imagine that a man not deterred from crime by the prospect of a long prison sentence would stay his hand for fear of losing the vote.[247] Moreover, as "collateral consequences" found in state constitutions or suffrage law, disenfranchising provisions are even more unknown to would-be offenders than are the details of the penal code. Given the conditions in which crime often occurs, the political alienation of many offenders, and the existence of serious criminal sanctions, it is extremely unlikely that the loss of voting rights forms a substantive, necessary deterrent against crime.[248] Incapacitation—preventing an offender from repeating his transgression—is a plausible purpose for disenfranchisement laws covering only those who break election law. But almost all offenders "incapacitated" at the ballot box are convicted of non-electoral crimes.[249]

The theory of retribution, meanwhile, is commonly linked to the notion that the offender should "pay [a] debt . . . to society."[250] Lifelong disenfranchisement flouts this understanding, because it means one is "treated as a debtor . . . forever."[251] In the current political climate, however, many Americans perceive any policy which further restricts, burdens, or stigmatizes offenders as simply another form of just retribution, and advocates of temporary disenfranchisement may assume that retributive purposes support the policy. But it is dangerous to use

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246. This Article addresses rehabilitation further in its discussion of republican principles. *See infra* Part III.B.2. This is, of course, a matter of emphasis and not absolutes. These four purposes are widely shared. But theories of rehabilitative punishment emphasize the development of character and virtue through the exercise of public authority in a way that is more republican than liberal. *See id.*

247. *See* Demleitner, *supra* note 4, at 788 (arguing that "[i]f the primary sentences threatening the offender . . . do not act as sufficient deterrents, disenfranchisement will not either"); *see also* Itzkowitz & Oldak, *supra* note 5, at 734-35 (analyzing "possible explanations for disenfranchisement's failure as a deterrent").

248. Kirk Porter makes this argument in colorful fashion. Observing the preponderance of dueling in nineteenth-century disenfranchisement laws, Porter writes, "[i]t seems a little ridiculous to assume that fear of losing suffrage would deter a man from fighting a duel . . . These laws are somewhat stultifying." PORTER, *supra* note 67, at 149.

249. *See* Demleitner, *supra* note 4, at 793 (arguing that U.S. disenfranchisement provisions are too broad to suit incapacitative goals, since "they include large numbers of offenses which cannot be construed as attacks on the democratic system").

250. Fletcher, *supra* note 6, at 1896.

251. *Id.* at 1907. This was the reasoning employed by the Rhode Island legislature's Committee on Ethics when it recommended in 1986 that the state disenfranchise felons only during their sentence. The Committee "believed that the right of felons to vote should be restored automatically . . . after the person has paid his debt to society by serving the sentence imposed by the court." 4 CONSTITUTIONS OF THE UNITED STATES 10 (Legislative Drafting Research Fund of Colum. Univ. ed., 1997) (quoted passage written by the editors).

retribution as a catch-all category which legitimates any form of punishment.[252] Society punishes prisoners by depriving them of various rights and privileges: to assemble, enjoy privacy, and read whatever they wish, among others. But for the most part, such restrictions are necessary to incarceration, and disenfranchising them is not. Finally, it is likely that taking away the vote in an automatic, invisible way—as all current disenfranchisement law does—will have no retributive effect at all on the many members of the offender population already estranged from political life.

Being "tough on crime" means taking steps which one believes will reduce crime. But glaringly absent from the historical and legal literature on disenfranchising offenders—whether temporarily or permanently—is the claim that imposing the sanction reduces crime.[253]

4. SUMMARY

Some writers who understand the sanction from the social-contract perspective maintain that temporary disenfranchisement, but not indefinite loss of the vote, is consistent with liberal principles. Incarcerated felons have violated the compact and should lose the right to vote, this argument holds, but "[i]t is in the interest of society . . . that released prisoners embrace the social contract by recognizing their obligation to respect the rights of others. They are not as likely to respect their obligations under the contract if they are denied the correlative rights."[254] This is a persuasive liberal point against lifetime

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252. *See* Demleitner, *supra* note 4, at 788-92 (analyzing retributive arguments for disenfranchisement and contending that such arguments must survive "a stringent proportionality analysis"); Itzkowitz & Oldak, *supra* note 5, at 736 (arguing that disenfranchisement as retribution "can only exacerbate such hostility as exists between the criminal and society," and contending that disenfranchisement fails as retribution because it cannot "correct the original injury").

253. If any authority has made this claim in print, the author has not encountered it.

254. Silber, *supra* note 142. Silber writes, "[w]ithout the vote, [ex-felons] return to society still prisoners to a degree." *Id.* Felons, of course, return to society stripped of the right to own guns and serve on juries. These prohibitions are similarly based on the belief that felons are untrustworthy, but there are clear differences between barring ex-offenders from voting and preventing them from owning guns. Obviously, the two require radically different calculations of risk: not even the most committed republican would seriously argue that a ballot is a lethal weapon. Despite public opinion to the contrary, the right to own a gun is not as protected by the Constitution as the right to vote. *See* United States v. Miller, 307 U.S. 174 (1939) (allowing congressional firearms controls not shown to interfere with the preservation of state militia); Presser v. Illinois, 116 U.S. 252, 265 (1886) (holding the second amendment inapplicable to state action). And while some gun advocates might disagree, most Americans probably do not believe owning a gun will develop the former offender's sense of connection and commitment to the polity.

George P. Fletcher argues, meanwhile, that disqualifying felons from jury service differs from depriving them of the ballot. *See* Fletcher, *supra* note 6, at 1906. In deciding

disenfranchisement. But such authors fail to note that their case for temporary deprivation of the vote is actually quite similar to the liberal defense of indefinite disenfranchisement. Both ignore modern liberalism's commitment to rights, as neither offers a compelling governmental purpose which can only be achieved by disenfranchising offenders. Both neglect the liberal commitment to neutrality, and both fail to offer a penal justification for the denial of voting rights. Today, American liberalism proudly holds us to high standards in protecting the rights of unpleasant, unpopular, politically-weak minority groups, and supporters of criminal disenfranchisement disregard that duty.

Liberals who advocate barring convicts from voting today paraphrase Locke, but they do not share Locke's assumptions about political society. The modern contractarian argument for disenfranchisement—active rejection of the compact means you are out, while doing nothing means you are in—differs radically from the terms of original contract theory.[255] The statement that a homeless, property-less, non-taxpaying, illiterate person possesses a right to vote—which American liberal thinkers today would naturally endorse—would be gibberish not only to early contract theorists, but to the generations of American lawmakers who believed that one could not sign the contract, as it were, without a certain type of reason and a certain amount of property.[256] American liberal ideology has left behind these elements of

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whether or not someone will be labeled a felon, juries do far more particularized work than elections; someone who already is a felon can be understood as "biased," in the same way that one who is a relative of the accused would be biased. *See id.* By contrast, Fletcher argues, "voting is precisely about expressing biases, loyalties, commitments, and personal values." *Id.* Moreover, in a huge representative democracy, a single vote has virtually no chance of deciding policy, while each vote has tremendous power on a jury. Jury service, however, has a rich and vital history in American politics, is a fundamental constitutional right, and probably has at least as much constitutive force as casting a ballot. Meanwhile, the "bias" argument does not indicate whether former felons would be *more* or *less* likely to vote to convict than those who had not served time. This Article does not argue that Americans who oppose ex-felon disenfranchisement must also oppose their disqualification from juries, but these points do make its justifications less clear.

255. Locke, for example, did articulate a theory of tacit consent, but he argued that tacit consent brings the obligation to *follow* the law, not the right to participate in *making* it. LOCKE, *supra* note 15, § 119, at 63-64.

Returning to the terms of theorists such as Locke, meanwhile, raises the question of whether disenfranchisement goes far enough. If they forfeit the right to participate in the "administrati[on of] the compact," as Judge Friendly wrote in *Green*, should not convicts lose *all* rights with potential effects on that compact? 380 F.2d at 451. A well-placed op-ed essay—which either an inmate or an ex-offender may write—will influence an election far more than a single vote, and former felons presumably use speech and assembly rights to sway public opinion in any number of ways. Depriving the incarcerated of *all* rights and liberties would be more consistent with the serious, literal understanding of the contract which supporters of criminal disenfranchisement purport to endorse. This fact underscores the lack of theoretical clarity behind the social-contract case for the policy.

256. In England and the early United States, several reasons were offered for restricting the vote only to men with property. First, the poor lacked the "stake in society"

its past, and instead of trying to resurrect them, those who wish to strengthen the liberal tradition today should renew their commitment to defending individual rights.

B. The Republican Case Against Criminal Disenfranchisement

The practice of barring convicts from voting has long drawn support from the republican tradition. However, this Part shows that republican principles stand behind some of the most potent arguments against both temporary and indefinite criminal disenfranchisement. As with liberalism, republican theory challenges the policy whether understood as regulation of the franchise or as form of punishment. At the center of the republican case is a belief in the formative, constitutive nature of political activity, coupled with the goal of using public power to shape convicts' character in constructive ways. Meanwhile, disenfranchisement as punishment does not "express" at all what republicans today may believe it does, and the argument that criminals must be prevented from committing vote fraud suffers from numerous flaws.

1. THE CONSTITUTIVE NATURE OF POLITICAL ACTIVITY

Republicanism's "exclusionary tendency"[257] is closely linked to its understanding of the constitutive nature of political activity. Republicans

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presumed to be necessary for responsible, custodial exercise of the franchise, and for voting in the true public interest. *See* KEYSSAR, *supra* note 35, at 9. Second, the great eighteenth-century English common-law scholar Sir William Blackstone argued that because the poor "are in so mean a situation that they are esteemed to have no will of their own," they are vulnerable to the influence of others. MCDONALD, *supra* note 233, at 26. John Adams reiterated this view, writing that "[s]uch is the Frailty of the human Heart, that very few Men, who have no Property, have any judgment of their own." Cogan, *supra* note 174, at 477 (quoting Letter from John Adams to James Sullivan (May 26, 1776), *in* 4 PAPERS OF JOHN ADAMS 208, 210 (Robert J. Taylor ed., 1979) (alteration in original)). Early American elites, meanwhile, openly warned of the "leveling" legislation that the enfranchised poor would enact. *See* KEYSSAR, *supra* note 35, at 11. The history of property, residency, and literacy suffrage restrictions in the United States is complex, its debates not confined to the terms of liberalism. *See, e.g.*, KEYSSAR, *supra* note 35, at 8-9, 46, 63-64 (summarizing nineteenth-century arguments against allowing vagrants to vote); *id*. at 133 (explaining arguments for property qualifications in the eighteenth, nineteenth, and twentieth centuries); *id.* at 142 (explaining the rise of literacy tests to reduce the "ignorance" of the electorate and connecting the use of the secret ballot to the literacy requirement); *id.* at 227 (showing that into the 1940s, eighteen states "exclude[d] voters who could not demonstrate their literacy in English").

As Edmund Morgan has demonstrated, the concept of popular sovereignty itself took centuries to gain hold, and only a long process of fictionalization, invention, and myth-making embedded the idea in American ideology. The same is true of universal suffrage, long derided as an even more lunatic notion than popular sovereignty itself. *See generally* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988).

257. Note, *supra* note 8, at 1308.

want to protect politics from corruption because they believe we form a real body when we engage in politics; their commitment to protecting the polity's virtue comes largely from republican's sense that their own character is influenced and even defined by the character of the *res publica*. It may be because they feel this constitutive, communal dimension of politics so intensely that some Americans believe allowing convicts into the voting booths taints the polity.

In short, republicans may believe that politics *requires* virtue, but they also hold that politics can *make* virtue. The paradoxical nature of this approach is well illustrated by political theorist Michael Sandel, who writes that republican democracy "requires that citizens *possess, or come to acquire*, certain qualities of character, or civic virtues."[258] If the republic simply requires the possession of certain characteristics, however, it risks becoming rigidly exclusive and ossified; if it fosters participation in the interest of helping its citizens come to acquire virtue, it retains a dynamic character while still emphasizing the communal, constitutive ideal.

Republicans who oppose disenfranchisement today draw on a deep tradition when they argue that political participation is the best means of building character, virtue, and even morality.[259] Republican civic humanism, as J.G.A. Pocock puts it, envisions "the personality . . . perfected in citizenship."[260] For the American founders, Gordon S. Wood writes, "[c]lassical virtue had flowed from the citizen's participation in politics; government had been the source of his civic consciousness and public spiritedness."[261] Constitutional theorist Cass Sunstein argues, "civil society should operate as an educator, and not merely as a regulator of private conduct."[262] Casting a ballot may not "perfect" the offender's personality, but surely it is likely to educate him towards a greater civic consciousness.

A specific conception of voting supports this argument. Where liberal theory depicts elections in instrumental terms, republicans are more likely to view voting as "participation in a ritual act,"[263] and to

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258. DEMOCRACY'S DISCONTENT, *supra* note 17, at 5-6 (emphasis added).

259. As one critic of ex-felon disenfranchisement argues, "political participation is the path to moral growth." Note, *supra* note 8, at 1309.

260. POCOCK, *supra* note 17, at 507. Historian Joyce Appleby writes of Pocock's vision that "[i]n the life of the polis men realized their full humanity." APPLEBY, *supra* note 14, at 21.

261. Gordon S. Wood, *Thomas Jefferson, Equality, and the Creation of Civil Society*, 64 FORDHAM L. REV. 2133, 2146 (1996).

262. *Interest Groups*, *supra* note 17, at 36. The republican conception, Sunstein argues, "assumes that through discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good." *Id.* at 31. Frank Michelman, like Sunstein, an influential proponent of republican constitutionalism, writes, "republicanism favors . . . participatory forms of politics . . . partly for the sake of nourishing civic virtue." *Traces of Self-Government*, *supra* note 17, at 19.

263. MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 3 (1964).

believe that "elections draw attention to common social ties."[264] A healthy election, another authority writes, "offers ritualistic gratification by enabling [citizens] to experience transcendence, atonement, and redemption by enacting sacred myths."[265] As Adam Winkler argues, we ought to understand voting not merely as an instrumental act, but also as an "expressive" one.[266] Voting, writes Winkler, is "a meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity."[267] This constitutive understanding of voting emphasizes that while voting is used to pursue instrumental goals, it also can open the citizen "to an exalted patriotism and the obligation of public duty"[268] and is "the type of activity that builds ties to and respect for the American society."[269] Electoral participation, therefore, "may help to incorporate criminal offenders into the collective self-consciousness."[270]

Republicans defend voting rights in order to strengthen the deliberative process and ensure that citizens may engage in formative,

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264. *Id.* As Edelman points out, elections also "draw attention to . . . the importance and apparent reasonableness of accepting the public policies that are adopted." *Id.*; *see also* NELSON W. POLSBY & AARON WILDAVSKY, PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES OF AMERICAN POLITICS 9 (10th ed. 2000) (arguing that political science finds that voting is not best understood as a mere act of rational calculation but rather "an act of social participation or civic involvement").

265. HIRSCHBEIN, *supra* note 178, at 3.

266. *See* Winkler, *supra* note 106, at 331. The constitutional case for voting as expression holds that the right to vote is protected by the First Amendment. As one authority writes, "since disenfranchisement essentially silences offenders, and voting is one of the most fundamental means by which a citizen can speak or express herself politically, disenfranchising laws may trigger strict scrutiny under the First Amendment." Shapiro, *supra* note 2, at 548 n.60. This claim was rejected in a 1997 motion hearing in *Farrakhan v. Locke*, when a federal judge found that the Constitution could not simultaneously endorse criminal disenfranchisement in the Fourteenth Amendment and prohibit it in the First. *See* 987 F. Supp. 1304, 1314 (E.D. Wash. 1997); *see also* Howard v. Gilmore, No. 99-2285, 2000 U.S. App. LEXIS 2680, at *2 (4th Cir. Feb. 23, 2000) (holding that "[t]he First Amendment creates no private right of action for seeking reinstatement of previously canceled voting rights"). However, as noted above, the First Amendment claim received an unexpected endorsement in the legal battle over Florida votes after the 2000 Presidential election, when then-Governor George W. Bush and others argued in federal court that "[t]he right to vote is clearly established under the First Amendment of the Constitution of the United States." Complaint for Declaratory and Injunctive Relief at 15, *Siegel*, 120 F. Supp. 2d. 1041.

267. Winkler, *supra* note 106, at 331. Voting, therefore, plays a role in "identity formation." *Id*. at 384.

268. MILL, *supra* note 15, at 324-25.

269. Winkler, *supra* note 106, at 387. Winkler describes elections as quasi-religious events, "the liturgies of the American civil religion; [elections] provide the rituals of public worship through which the essential tenets of the political ethos are expressed and absorbed." *Id*. at 374.

270. *Id*. at 387-88.

virtue-building political activity.[271] Those who oppose voting by convicts, whether incarcerated or released, hold that we take voting seriously by protecting the ballot box from the unfit. But modern republicans no longer believe that only exclusion makes the polity strong, and a policy which declares that voting holds the power to awaken, transform, and even redeem wrongdoers better honors the constitutive force of politics.

2. PUNISHMENT AS REHABILITATION

A belief in the rehabilitative purposes of criminal justice joins naturally with the constitutive-politics argument against criminal disenfranchisement. Americans of varying political perspectives believe that effective punishment helps make criminals into "law-abiding and productive citizens," as the California Attorney General wrote in his memo to the Supreme Court in *Richardson v. Ramirez*.[272] While republican ideology does not require an emphasis on rehabilitation, there is a natural affinity between the two, in part because the republican is more willing than the liberal to use public power to foster specific virtues. Government, as one republican legal theorist writes, bears "the responsibility of inculcating attitudes that would incline the citizenry away from the pursuit of self-interest, at least in the political realm."[273] In the realm of criminal justice, when government directs and controls completely the lives of citizens, it ought to seek to inculcate such values. The good legislator, wrote Montesquieu, "is more attentive to inspire good morals than to inflict penalties."[274] Making the case for rehabilitation, republican theorist William A. Galston writes,

> [w]hen we consider the justice of punishment, it is at least relevant to wonder whether a proposed penalty will improve the offender's character or rather transform him into a hopeless criminal. We cease to worry about this only when we are

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271. *See Law's Republic*, *supra* note 17, at 1535 (arguing that republicans view important rights as "a matter of constitutive political concern as underpinning the independence and authenticity of the citizen's contribution to the collective determinations of public life"). Sunstein makes a similar point when he argues that equal protection analysis and "reasoned analysis" can be understood as "classically republican," since "[t]he role of the representative is to deliberate on the public good, not to respond mechanically to existing social conceptions," and that courts properly "apply the deliberative task to social practices that had previously been accepted as natural and inviolate." *Interest Groups*, *supra* note 17, at 57.

272. *Richardson*, 418 U.S. at 79 (Marshall, J., dissenting).

273. *Interest Groups*, *supra* note 17, at 36.

274. 1 MONTESQUIEU, *supra* note 156, at 81.

convinced that someone is already "hopeless," unchangeable in fundamental respects.[275]

Of course, reforming convicts aims to serve the public good by preventing recidivism, not just by building the offender's character.[276] By whatever emphasis, rehabilitative purposes push strongly against criminal disenfranchisement; we can identify two levels of argument. The "weak" challenge attacks lifetime disenfranchisement, and holds that denying ex-offenders the vote impedes their reintegration into society by stigmatizing them as second-class citizens.[277] Continued deprivation of the vote can only further corrode what one author has called "the sense of belonging that encourages compliance with the criminal law."[278] Depriving free citizens of political rights renders them "internally exiled,"[279] a condition exacerbated by the increasing number of civil disabilities suffered by ex-convicts.[280] Meanwhile, disenfranchising released prisoners says that we

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275. WILLIAM A. GALSTON, JUSTICE AND THE HUMAN GOOD 103-04 (1980).

276. Arguing against ex-felon disenfranchisement, one commentator asserts that "the best way to prevent repeat offenses is to plug ex-cons into workaday life." Tom Teepen, *Denying Ex-Cons the Vote No Way to Rehabilitate*, ATLANTA CONST., Nov. 1, 1998, at G5. In his translator's preface to BEAUMONT & TOCQUEVILLE, *supra* note 166, Francis Lieber wrote, "is it not in the interest of society to try all means at its disposal to reclaim a criminal?" *Id.* at 15. For their part, Beaumont and Tocqueville wrote that if incarceration "should only tend to corrupt [the convict] still more this would not be any longer a penitentiary system, but only a bad system of imprisonment." *Id.* at 38. Blackstone pointed out that the public gains security when "the offender himself [is] amended by wholesome correction." J. W. EHRLICH, EHRLICH'S BLACKSTONE 735 (1959).

277. This claim was the central premise of one recent effort to enfranchise ex-offenders through federal law. *See* H.R. 906, 106th Cong. (1st Sess. 1999). It is also often featured in popular-press essays against lifetime disenfranchisement. *See, e.g.*, Editorial, *America's Political Outcasts*, ST. PETERSBURG TIMES, Nov. 16, 1998, at 10A; Norma Shapiro & Jamie Suarez-Potts, *Disenfranchisement: A Harsh Civil Punishment*, BOSTON GLOBE, Aug. 3, 1998, at A10.

278. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 13 (1999). Jeffrey L. Harrison argues that ex-offender disenfranchisement makes impossible the kind of meaningful "repentance" which some communitarian writers have emphasized. *See* Harrison, *supra* note 36, at 39.

279. Demleitner, *supra* note 4, at 775; *see also* Fletcher, *supra* note 6, at 1897-98 (arguing that disenfranchisement renders felons "a permanent undercaste," "banished from the political community," and that disenfranchisement is "a technique for reinforcing the branding of felons as the untouchable class of American society.") One prominent contemporary advocate of lifetime disenfranchisement, however, argues that we should *support* ex-felon disenfranchisement as "a method of stigmatization that tells criminals that committing a serious crime puts them outside the circle of responsible citizens." Clegg, *supra* note 10, at 177. Clegg does not use the terms "ex-felon" or "former felon," instead referring to offenders who have served their time as "felons." *See, e.g.*, *id*. at 164, 173. Indeed, Clegg argues that it is proper for former inmates to be socially stigmatized even after they have ostensibly re-entered society, claiming that "serving a sentence does not require society to forget what he has done or bar society from making judgments regarding his trustworthiness." *Id*. at 174.

280. Recent changes in law and business practices have made it increasingly difficult for ex-offenders to obtain employment, "creating an unemployable class of

do not believe our "correctional" institutions have successfully prepared them to re-enter society, and barring those on probation and parole from voting runs counter to the rehabilitative assumptions behind these penalties.[281]

The "strong" challenge to disenfranchisement from rehabilitative principles joins with the belief in the transformative nature of politics, and holds that voting *constitutes* precisely the kind of activity which can help criminals become law-abiding members of the polity. The formation of civic virtue, one author writes, "requires the context of practices in which the coincidence of personal concern and the common welfare can be experienced."[282] Because voting is one such practice, allowing inmates to

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individuals," which may effectively become "a permanent outlaw class." Patricia M. Harris & Steve Russell, *Beyond Moral Turpitude: Expanding the Collateral Consequences of Criminal Behavior*, Paper Presented at the Annual Meeting of the Law and Society Association (May 27, 1999), at 2, 5. The combination of economic alienation with the political separation of disenfranchisement will only further distance ex-offenders from political society. As Professor Nora Demleitner points out, while the difficulty of finding employment may have a more direct effect on an ex-offender's daily life, "denial of voting rights is crucial because of its symbolic meaning and its impact on democratic rights of participation." Demleitner, *supra* note 4, at 775.

281. As Lawrence M. Friedman explains, parole and probation arose in the middle of the nineteenth century as alternatives to the penitentiary for criminals "who might be saved." FRIEDMAN, *supra* note 164, at 596. Friedman writes of the probation and parole approach, noting that

> [i]ts success depended on sifting through the facts about a man or woman convicted of crime and deciding that some were sound enough human material to deserve another chance. It focused, in short, on the offender, rather than solely on the offense. Punishment fit the criminal, not only the crime.

Id. Probation and parole, then, targeted for a rehabilitative penalty offenders in whom authorities trusted.

282. BELLAH ET AL., *supra* note 151, at 254. As Adam Winkler writes, allowing convicts to vote "may be the quintessential example of using law as a positive force in the lives of members of the community." Winkler, *supra* note 106, at 388. An authority on prisoners' rights holds that allowing criminals to vote "could increase their sense of inclusion within the community and foster rehabilitation." JAMES J. GOBERT & NEIL P. COHEN, RIGHTS OF PRISONERS 307 (1981). Another argues that "[p]ermitting an inmate to take an active role in community affairs by means of the ballot can be viewed as one positive act in the rehabilitative process." Richard C. Pierce, Note, *Prisoners' Voting Rights in Massachusetts*, 3 NEW ENG. J. PRISON L. 251, 259 (1976). And political parties in prisons, another text on the rights of prisoners points out, might qualify as "organization[s] having legitimating rehabilitative effects upon inmates." KNIGHT & EARLY, *supra* note 32, at 289. The Boy Scouts and Alcoholics Anonymous are noted as organizations recognized as having such effects. *Id.* This point reminds us that literacy programs, job training, counseling, high school equivalency programs, and even college courses are available to incarcerated offenders in many states. *See, e.g.*, Fla. Dep't of Corrections, http://www.dc.state.fl.us/pub/recidivismprog/index.html (describing "Academic, Vocational, and Substance Abuse Programs" in Florida state prisons) (Jan. 2001); Ky. Dep't of Corrections, http://www.cor.state.ky.us/ AdultInst.htm (describing "literacy, adult basic education, and GED preparatory classes and testing" in "all 12 correctional institutions" of the Kentucky state prisons (last modified Dec. 11, 2002); Miss. Dep't of Corrections, http://www.mdoc.state.ms.us/ inmate_programs.htm

vote—indeed, encouraging and even forcing them to do so—is most consistent with the public's interest in reforming offenders.[283]

As republicans consider these arguments, they should recall rehabilitation's roots. In contemporary American political discourse, rehabilitation seems to have somehow become a "soft" goal of punishment, not as "tough on crime" as the simple infliction of discomfort and pain. In fact, rehabilitation began as a more aggressive, even invasive approach; after all, society exerts far more control over a person by re-making his character and values than by simply hurting him. One observer of nineteenth century penal institutions found that wrongdoers feared the new penitentiary more than the old prison, despite the great discomfort of the latter.[284] As Thomas L. Dumm writes, it was in the American penitentiary that "[p]unishment of the body was for the first time displaced by a punishment of the soul."[285] This Article does not take the position that Americans today ought to aim for the souls of inmates, but the public should not feel it is "weak" to strive to build the civic consciousness of the incarcerated, and should not be afraid to push offenders toward activities which develop that consciousness.

(describing educational, vocational, and therapeutic programs of the Mississippi state prisons) (last modified Oct. 11, 2002); Nev. Dep't of Corrections, http://www.ndoc.state.nv.us/programs/ (describing educational and literacy programs in Nevada state prisons) (last modified Aug. 8, 2002); Va. Dep't of Corrections, http://www.dce.state.va.us (describing educational and vocational training programs in Virginia prisons) (last visited Nov. 26, 2002). Many states that disenfranchise felons—temporarily or for life—are simultaneously spending time and money trying to rehabilitate those offenders.

283. Compelling prisoners to vote, or offering them some incentive to do so, is not far-fetched and would be consistent with republican principles. As J.G.A. Pocock writes, "[i]n the final analysis, the ideal of virtue is highly compulsive; it demands of the individual, under threat to his moral being, that he participate in the *res publica* . . . ." POCOCK, *supra* note 17, at 551. Republicans should not shy away from using incentives and even compulsion to induce prisoners to engage in an activity which will certainly not harm them and which might well develop their sense of social responsibility.

Visiting the nineteenth-century "houses of refuge" for young offenders, Beaumont and Tocqueville observed a system in which the privilege of voting was used for formative purposes. The young people housed in the "houses of refuge" were classed by their conduct, and those in the top rank enjoyed "great privileges," of which the first was that "they alone participate in the elections." BEAUMONT & TOCQUEVILLE, *supra* note 166, at 146-47. "Bad children," meanwhile, suffered "privation of the electoral right, and the right of being elected." *Id.* at 147. Clearly, the system's use of deprivation of the vote was intended to punish those who misbehaved. But its punitive force came from the fact that other institutionalized children were visibly enjoying the right to participate in elections—certainly, in the context, an activity that was expected to help develop their character.

284. BEAUMONT & TOCQUEVILLE, *supra* note 166, at 14.

285. DUMM, *supra* note 131, at 98. The penitentiary aimed to remake the inmate completely. As Dumm writes, it would be "a machine that would regulate life and thus liberate the subject from the discomforts of imagination gone amuck." *Id.* at 141.

3. FLAWS IN THE VOTE-FRAUD THEORY

In its emphasis on trust and the convict's character, the allegation that offenders and ex-offenders must be disenfranchised lest they commit vote fraud possesses a republican sensibility.[286] But this justification has numerous weaknesses. First, indefinite disenfranchisement on this basis implies that the propensity to sin is *permanent* in millions of criminals—that, in Galston's words, they are already "'hopeless,' unchangeable in fundamental respects."[287] Second, any voter disqualification should only take place after "a particularized determination of incompetence,"[288] and there is "no empirical basis for assuming that all offenders are more likely to engage in election fraud than the rest of the population."[289] In the absence of such evidence, the sanction is severely overinclusive, because so many of the crimes which cost the vote have nothing to do with elections, fraud, or conspiracy. Ironically, by the logic of the vote-fraud argument, felon disenfranchisement is also *under*inclusive, because in some states election crimes and other public frauds are misdemeanors.[290] Finally, voting fraud is itself criminalized, and measures are in place to prevent and punish it.[291] We denigrate those mechanisms when we argue that the only way to prevent fraud is to bar people from voting altogether.

4. A FAILED FORM OF "EXPRESSION"

Some republicans may argue that disenfranchisement as punishment expresses not only our condemnation of crime, but also our deep respect for politics. But criminal disenfranchisement does not express what republicans want it to. The silent, automatic nature of this collateral consequence means that it fails to "inflict[] disgrace . . . in a dramatic and

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286. *See supra* notes 181-85 and accompanying text.

287. GALSTON, *supra* note 275, at 104.

288. Fletcher, *supra* note 6, at 1905. Ronald Dworkin argues that it is wrong to punish a person "on the basis of a judgment about a class, however accurate, because that denies his claim to equal respect as an individual." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 13 (1978). Dworkin is a liberal and not a republican, as this Article uses those terms, but liberals have no monopoly on fairness and respect for individuals.

289. Demleitner, *supra* note 4, at 773. John A. Buggs testified in 1974 that "[r]ehabilitated ex-offenders . . . have not been demonstrated . . . to be unworthy of the ballot." *Ex-Offenders' Voting Rights Hearings*, *supra* note 30, at 11.

290. *Richardson*, 418 U.S. at 79 (Marshall, J., dissenting). A New Jersey federal court found in 1970 that under state law, embezzlers and defrauders, including those convicted of income tax fraud, remained eligible to vote. The court concluded, "[h]ow the purity of the electoral process is enhanced by the totally irrational and inconsistent classification . . . is nowhere explained." *Stephens*, 327 F. Supp. at 1188.

291. As Tribe writes, criminal disenfranchisement "is not needed to prevent voter fraud since registration provisions and criminal sanctions constitute less oppressive means of realizing that end even if convicted criminals are unusually prone to indulge in such fraud." TRIBE, *supra* note 94, § 13-16, at 1094.

spectacular manner,"[292] as one supporter of shaming punishments describes their appeal. Lacking any significant public dimension, legal text disenfranchising criminals is no "speaking penalty."[293] To be sure, the policy conveys a message to the politically-aware offender, and may effect private alienation. But expressive punishment theory emphasizes how penalties speak to the *public*.[294]

American criminal disenfranchisement might once have qualified as an effective shaming penalty—in the colonial period. Two important historical conditions, neither of which applies today, made this possible. First, while precise numbers are impossible to come by, historians agree that only a small fraction of adults had voting privileges in early America.[295] Second, offenders were stripped of that privilege in a highly public way, since the penalty was part of the sentence pronounced in

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292. Kahan, *supra* note 177, at 635 (quoting Goldschmitt v. State, 490 So. 2d 123, 125 (Fla. Dist. Ct. App. 1986) (citing United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1983))) (first alteration in original). The theory of "reintegrative shaming" suggests one way that temporary disenfranchisement might achieve the public goals of expressive punishment. The reintegrative shaming approach holds that punishments ought to express the importance of the violated norm or rule, but simultaneously communicate respect for the offender. *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 12 (1989). This approach might lead to a unique policy of criminal disenfranchisement. The sanction would be publicly declared as part of the sentence itself for certain infractions, and offenders would be barred from voting while incarcerated. However, incarcerated offenders would receive instruction in politics and voting, and would be automatically—perhaps publicly—registered to vote upon release. This Article does not argue for such a system, which arguably would continue to violate republican, liberal, and constitutional principles, but suggests it here to illustrate how far current procedures are from meeting expressive and reintegrative goals.

293. As the legal anthropologist Sally Engle Merry writes, "the texts of the law must be made socially real: enacted, implemented, imposed." SALLY ENGLE MERRY, COLONIZING HAWAI'I: THE CULTURAL POWER OF LAW 218 (2000).

294. *See supra* note 177.

295. The U.S. Commission on Civil Rights estimates that of the approximately two million Americans who were free at the time of the Revolution—not counting over a million slaves and indentured servants, and excluding Native Americans—"perhaps no more than 120,000 could meet the voting qualifications of their states." U.S. COMM'N ON CIVIL RIGHTS, *supra* note 63, at 24. Walter Lippmann estimated that voters were "less than 5 per cent [of the population] when the Constitution was ordained." WALTER LIPPMANN, THE PUBLIC PHILOSOPHY 33 (Atlantic Monthly Press Book 1989) (1955). Lippmann quotes historian Allan Nevins, who wrote, "[a]nyone who writes about election figures in our early national history treads upon very unsafe ground. Trustworthy data . . . are too scanty for any explicit statement of detailed conclusions for the country as a whole. . . . *What we can say with absolute certainty, I think, is that in these early elections the vote was under 5 per cent of the whole population*." *Id.* at 33 n.3. More recent research has suggested slightly higher figures, while focusing on the white male population. James Morone estimates that in "the [eighteenth-century] colonies, between 50 percent and 70 percent of the white, adult males qualified" to vote. MORONE, *supra* note 125, at 36. Another authority estimates that in the 1770s fifty to eighty percent of white adult males could vote. Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, *in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 19, 20 (Donald W. Rogers ed., 1992).

court.[296] Professor Nora V. Demleitner explains this point well. Demleitner notes that, in the eighteenth century, the criminal violations of property-holding men:

> may have been viewed as a more serious infringement against the state since they were the primary political and economic beneficiaries of the existing regime. The additional penalty [of disenfranchisement] fit into the framework of just deserts but also constituted a warning to others in equally elevated social positions. Denial of voting rights denounced the offender and his actions in a particularly stigmatizing and deterrent manner.[297]

When voting was a closely-guarded privilege, the public removal of that privilege would have signified a great deal to the townspeople. But when half of eligible Americans do not care to vote, the silent disenfranchisement of felons does not send much of a public message.[298]

Comparative perspective deals a final blow to the expressive claim. When no other democracy feels so threatened by ex-offenders, and many permit and even encourage the incarcerated to vote, what does this sanction truly say about the health of the American *res publica*?[299] As one critic points out, the prominent fear of sickness in "purity of the ballot box" reasoning "betrays a certain frailty or insecurity of the social body."[300] Depicting ballot-wielding convicts as a grave threat to the body politic expresses weakness and doubt, not confidence.

4. SUMMARY

Uninhibited by the liberal commitment to neutral procedures as the end of political activity, republicans see self-government as a deeply formative, meaningful communal activity directed towards particular definitions of the good life and individual fulfillment. These beliefs should lead modern republicans not to separate offenders still further from the polity, but to use the power of politics to help reform them. Some

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296. *See supra* note 56.

297. Demleitner, *supra* note 4, at 787.

298. The editors of the BOSTON GLOBE made this point in criticizing then-Acting Governor Paul Cellucci's 1997 crackdown on political activity by incarcerated convicts. *See* Editorial, *Cellucci's Crackdown*, BOSTON GLOBE, Aug. 16, 1997, at A8. The GLOBE's editors recalled a time "when voting was a sacred trust," when barrooms and schools alike were closed on election day, and when "forfeiting the franchise after committing a crime was seen as a real punishment." *Id.* Today, the editors lamented, "you can't pay some people to vote." *Id.*

299. *See supra* note 4 (listing examples of the voting rights of criminal offenders in other countries).

300. Furman, *supra* note 10, at 1225-26.

republicans may find this an uncomfortable position, and feel that we do not express firmly enough our esteem for elections if we permit the incarcerated to participate. But permitting and even encouraging offenders to vote is neither weak nor inconsistent with republican principles. On the contrary, it declares not only that the American republic is strong enough to withstand the presence of wrongdoers in the voting booth, but also that our election rituals can hold transformative, even redemptive force. Many republicans wish that were so, and long for Americans to take voting more seriously. Disenfranchisement has done nothing to elevate the American public's belief and participation in elections; advocating the formative power of politics in this context might well contribute to the cause.[301] Finally, the commitment to a unified polity ought to turn republicans away from a policy which formally alienates a large and growing number of citizens from the political community—particularly one which reinforces the great class and racial fractures in American society.

C. Racial Challenges To Criminal Disenfranchisement

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301. Alasdair MacIntyre laments that "[t]he notion of the political community as common project is alien to the modern liberal individualist world." MACINTYRE, *supra* note 12, at 146. At a theoretical level, supporting offenders' voting rights on republican premises would emphasize elections not only as a "common project," but as a powerful one. On a more practical level, permitting convicts to vote could increase turnout among the non-incarcerated population. An intriguing local election in Concord, Massachusetts in 1976 suggests this possibility. Carl Velleca, who was serving time at the Massachusetts Correctional Institute at Concord for a massive silverware theft, campaigned for the office of town selectman. Pierce, *supra* note 282, at 257. Velleca's two campaign managers were serving terms for murder; presumably, their job was to win for Velleca the votes of the 302 Concord inmates then registered to vote. *See id.* at 257-58. The inmates were not a large portion of the 9,105 registered voters in Concord at that time, but two selectmen had been elected with "just 481 and 677 votes, respectively," in the previous election. *Id.* at 257. After a Superior Court judge allowed the inmates to vote in the election pending a higher court ruling on where inmates could legally cast their ballots, the election went forward amidst considerable publicity. *See id.* at 257-58. Velleca was soundly defeated, finishing last out of four candidates. *Id.* at 258. But voter turnout in the election set a record. *Id.* Where 481 votes won a seat on the board two years before, in Velleca's election the winner tallied over four *thousand*. *Id.* at 257-58, 258 n.29. Interestingly, Velleca received 599 votes, meaning more than half his support came from non-incarcerated voters. *See id.* at 258 n.29.

We cannot be sure whether it was fear of criminal influence, a new awareness of the fundamental nature of the right to vote, or some other political issue that increased turnout in Concord that year. But Richard C. Pierce argues that the Concord story undercuts the theory that inmates will corrupt the politics of the communities in which they are imprisoned. Instead, "the inmates at Concord had provided a public service by inspiring many more citizens to participate in their democratic form of government." *Id.* at 260. Given American voter apathy today, many republicans will conclude that any stimulus to increased participation in elections will do.

Prominent defenders of criminal disenfranchisement today are quick to dismiss challenges based on race, and either ignore or treat as "irrelevant"[302] the policy's disparate impacts and the overtly racist chapter in its past. It is true that only a few Southern states made racially-targeted changes in their disenfranchisement laws after Reconstruction. But that straight-line connection between the American discriminatory tradition and criminal disenfranchisement law is only part of the practice's racial dimension. Criminal disenfranchisement exists at the intersection of two systems—electoral politics and criminal justice—which have been explicitly discriminatory for much of American history.[303] Awareness of that record ought to make Americans of varying ideological persuasions deeply skeptical of the policy. The standards employed in contemporary legal challenges to the practice supply critical perspective.[304]

1. INTENT, DILUTION, AND DENIAL

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302. *See* Clegg, *supra* note 10, at 176 (arguing that "the racial impact of these laws" is "irrelevant as a legal matter" and "should also be irrelevant as a matter of policy"). Florida Governor Jeb Bush has written, "there's not a single felon in Florida who is disenfranchised because he is African-American. Any person, black or white, who could not legally vote in the last election due to his or her status as a felon could have retained the right to vote by simply not committing a felony in the first place." Bush, *supra* note 25. Arguing in favor of a felon-disenfranchisement amendment to the state constitution, Massachusetts lawmaker Francis Marini told the BOSTON GLOBE, "[i]t is not about race. It's about crime and people who serve felony sentences. We ought to be less colorblind, not more [sic]." Phillips, *supra* note 38. Columnist Ken Hamblin called Marc Mauer, co-author of the 1998 HRW/TSP study of disenfranchisement law, "a ruthless propagandist who is consciously attempting to mislead my people into believing it is racist to punish black crooks." *See* Hamblin, *supra* note 186. In dismissing the relevance of the racist use of disenfranchisement after Reconstruction, Roger Clegg observes that few of the states which permanently disenfranchise ex-offenders today were members of the Confederacy, and that most former Confederate states currently allow ex-felons to vote. *See* Clegg, *supra* note 10, at 170-71. This is true, but it is also irrelevant and misleading: the issue is racism, not the Confederacy. The racist alterations in disenfranchisement law, moreover, came two decades after the Confederacy ceased to exist.

303. On racial discrimination in the criminal justice system, see *infra* Part III.C.2. For summaries of racial exclusions in voting laws, see KEYSSAR, *supra* note 35, at tbl.A.1 ("Suffrage Requirements: 1776-1790"); *id.* at tbl.A.4 ("Race and Citizenship Requirements for Suffrage: 1790-1855"); *id.* at tbl.A.5 ("Chronology of Race Exclusions: 1790-1855"); and *id.* at tbl. A.9 ("Summary of Suffrage Requirements in Force: 1855").

Audrey Smedley argues that early bans on black voting were crucial to the *creation* of racial ideology in colonial America. Virginia's 1723 act barring any "free negro, mulatto, or indian whatsoever" from voting, Smedley writes, "was the [first] political elevation of notions of separateness and difference that formed the substratum out of which were formed the social categories that came to be designated as 'races' in North America." AUDREY SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW 109 (2d ed. 1999).

304. This Part does not offer a new strategy for challenging criminal disenfranchisement in court. Several such strategies are promising, and previous authors have developed them with great skill. But because this Article examines criminal disenfranchisement's place in American ideological traditions more broadly, this part does not confine its analysis only to those challenges which may satisfy legal standards.

Where its origins have shown clear racist intent, the U.S. Supreme Court has held that criminal disenfranchisement violates the Equal Protection Clause of the Fourteenth Amendment.[305] In *Hunter v. Underwood*, a case involving two men permanently disenfranchised under section 182 of the Alabama Constitution for writing bad checks—a crime of "moral turpitude"[306]—the Court found that section 182 was "motivated by a desire to discriminate against blacks on account of race,"[307] would not have been adopted without that discriminatory purpose, and was achieving its intended effect.[308] *Hunter* struck down only that section of the Alabama constitution which disenfranchised those convicted of crimes of "moral turpitude," but the decision demonstrates that despite *Richardson v. Ramirez*, not all criminal disenfranchisement law is Constitutional.[309]

What of cases where proof of racist intent is "not accessible,"[310] as a federal judge recently put it? Here, legal challenges to criminal disenfranchisement turn to the Fifteenth Amendment and the Voting Rights Act (VRA).[311] Enacted in 1965 for the purpose of "rid[ding] the

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305. *See Hunter*, 471 U.S. at 233; *see also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

306. *Hunter*, 471 U.S. at 223-24.

307. *Id.* at 233.

308. *Id.* at 231.

309. The Court in *Hunter* did not reconsider its decision in *Richardson*. *See id.* at 233. By striking down only that narrow portion of Alabama's disenfranchisement law which it could trace to express racist intent, the Court allowed more broadly-phrased provisions to stand; indeed, "at least one state [apparently] responded to *Hunter* by initiating an effort to *expand* [its list of disenfranchisable crimes], to prevent [the] invalidation" of the practice as racially discriminatory. *See* Note, *supra* note 8, at 1302 n.8. However, *Hunter* may offer a way out from *Richardson*. As one authority interprets the decision, the Court held that while Section 2 of the Fourteenth Amendment allows states to disenfranchise felons without penalty, "it does not permit states to pick and choose among felons in a way that violates statutory protections of the right to vote." Hancock, *supra* note 26, at 38. As a federal judge recently observed, the Court in *Richardson* found that disenfranchisement is not *per se* unconstitutional, but it ruled in *Hunter* that "states cannot use felon disenfranchisement as a tool to discriminate on the basis of race." *See Farrakhan*, 987 F. Supp. at 1310 (citing *Hunter*, 471 U.S. at 105). In other words, disenfranchisement is facially valid, but it may be used in ways which are unconstitutional, and Congress therefore "has the power to protect against discriminatory uses of felon disenfranchisement statutes through the [Voting Rights Act]." *Id.* However, another authority has pointed out that since *Hunter*'s legacy is that "a showing of intentional discrimination is the *sine qua non* of an equal protection claim," it will serve to *limit* other challenges to discriminatory election laws "for which evidence of intent is not so readily available." Hench, *supra* note 6, at 763-64.

310. *Farrakhan*, 987 F. Supp. at 1311.

311. The Fifteenth Amendment reads:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.

country of racial discrimination in voting"[312] and ending Southern states' "unremitting and ingenious defiance of the Constitution,"[313] the law initially provided for challenges to facially-neutral vote restrictions only when they were enacted with discriminatory intent.[314] But in 1982, Congress amended the Act to relieve plaintiffs of the burden of proving discriminatory intent.[315] Under the "results test," plaintiffs must demonstrate "a causal relationship between the challenged voting procedure and the discriminatory effect, based upon the totality of the circumstances."[316] Generally, two types of claims are made under the second section of the VRA: "vote denial" and "vote dilution." Vote denial—in the form of literacy tests, for example—was the initial target of the Act, but vote dilution has increasingly been subjected to challenge

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U.S. CONST. amend. XV, § 1. A lack of political will to enforce the Reconstruction Amendments in the white North, combined with the Supreme Court's reluctance to effect the transformation of federal-state relations which the Reconstruction Amendments implied, quickly drained the Fifteenth Amendment in particular of all force. A century passed before Congress, attempting finally to implement the Amendment against Southern resistance, passed the VRA, "one of the most important and successful pieces of legislation of this century." BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 137 (1992).

312. South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

313. *Id.* at 309.

314. This made possible challenges to procedures such as literacy tests and poll taxes, which were facially neutral but had been written and enforced with discriminatory intent and effects. *See* Shapiro, *supra* note 2, at 554.

315. S. REP. NO. 97-417, 193 (1982). Section 2 now reads, in relevant part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner 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.

Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (emphasis added). Under the "results test," if "the totality of the circumstances" show that political and electoral processes "are not equally open to participation" by members of a protected class, a violation has occurred. 42 U.S.C. § 1973 (1994). As the Supreme Court has explained the results test, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure *interacts with social and historical conditions to cause an inequality*" in the voting rights of various racial groups. Thornburg v. Gingles, 478 U.S. 30, 47 (1986) (emphasis added).

316. *Farrakhan*, 987 F. Supp. at 1313.

under the VRA.[317] Critics of disenfranchisement law have alleged both vote dilution and vote denial.[318]

2. "THE TOTALITY OF THE CIRCUMSTANCES": RACE AND AMERICAN CRIMINAL JUSTICE

The argument that disproportionate disenfranchisement of black convicts is unconstitutional under the standards of the VRA "has yet to enjoy much success" in the federal courts.[319] But examining

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317. *See generally* GROFMAN ET AL., *supra* note 311, at 127-28 (showing that focus of dilution claims under the VRA has been drawing of district boundaries). Successful vote-dilution challenges to electoral districts include Allen v. State Bd. of Elections, 393 U.S. 544 (1969) and *Thornburg*, 478 U.S. 30 (1986). Districting dilution claims show that a black person who may vote has her vote's effect "diluted" by a rule or procedure which makes that vote count less than that of a voting white person. *See* Howard A. Scarrow, *Vote Dilution, Party Dilution, and the Voting Rights Act: The Search for "Fair and Effective Representation*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 40, 46 (David K. Ryden ed., 2000).

318. *See* Hench, *supra* note 6, at 730, 765 (exploring the premise that the Supreme Court's "color-blind" jurisprudence has interacted with systematic problems such as the disproportionate criminalization of minorities and the last remaining Jim Crow laws "to all but nullify the Voting Rights Act's mission" and arguing that racial disparities in incarceration means that criminal disenfranchisement laws "effectively block[ ] access to the polls for minority groups"); Harvey, *supra* note 6 at 1149 (arguing that statistical evidence of discrimination in the criminal justice system "should be presumed to work in conjunction with the particular ex-felon disenfranchising statute to impermissibly dilute the black vote under the Voting Rights Act"); Shapiro, *supra* note 2, at 544 (arguing that "plaintiffs can rely on the results test . . . to establish that criminal disenfranchisement laws are illegal for two reasons: first, because these laws deny the vote to a class of individuals who are disproportionately nonwhite; and second, because these laws dilute the voting strength of minority communities").

Unconstitutional vote denial and vote dilution may both be proven without clear evidence of impermissible intent. To succeed in proving vote denial, a convict need merely show that he was denied the vote in an unconstitutional manner. As one authority writes, the vote denial claim seeks to demonstrate that "on account of their race," nonwhite offenders "are more likely than other citizens to be disenfranchised." Shapiro, *supra* note 2, at 556. As Shapiro notes, the Act prohibits any "voting qualification . . . which results in a denial . . . of the right . . . to vote on account of race or color." *See* Shapiro, *supra* note 2, at 556 n.105 (quoting 42 U.S.C. § 1973(a) (1988)). Shapiro further points out that the Senate in 1982 declared that "it is patently clear[] that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." *Id.* (quoting S. REP. NO. 97-417, at 206 n.109 (1982)).

In *Wesley v. Collins*, a federal court found that felon disenfranchisement was not motivated by racial intent, and rejected vote-denial and vote-dilution challenges to the practice. 605 F. Supp. at 812-14. One critic argues that by sustaining the policy in the absence of discriminatory intent, the court "grafted onto the statutory language [of the Voting Rights Act] a new burden of proof of intentional discrimination not present in the statute or relevant precedents." Hench, *supra* note 6, at 750.

319. *One Person, No Vote*, *supra* note 9, at 1954. The strategy failed in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996). In *Baker*, the Second Circuit split five-to-five, effectively denying the challenge. *Id.* at 921-22. However, the decision did not reach the

disenfranchisement in the context of "the totality of the circumstances,"[320] as the Act suggests we do, should force Americans to consider racism in the criminal justice system. Such discrimination, one historian wrote recently, is now a matter of "well-documented empirical findings."[321] Numerous studies show that black criminality does not explain the disproportionate number of racial minorities under criminal supervision, and that disparate targeting by law enforcement and disparate treatment in the criminal justice system are its significant causes.[322] As Randall

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core of the VRA claim, because it turned on what is known as the "plain statement" rule: if a law would have the effect of altering the fundamental constitutional balance between federal and state governments, then Congress needs to have made a "plain statement" of its intent in that regard. *See id.* at 931-32. In *Baker*, the court found no such statement. *See id.* at 932. In a 1997 motion hearing, a federal judge refused a defense motion by the state of Washington to dismiss a vote-denial claim. *See Farrakhan*, 987 F. Supp. at 1312. However, the judge subsequently ruled that even if disproportionate incarceration and disenfranchisement were the result of "discriminatory animus on the part of prosecutors and judicial officials," Washington's felon-disenfranchisement law would not violate the VRA "because it is discrimination in the criminal justice system, not the disenfranchisement provision itself, that causes the denial." Farrakhan v. Locke, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212, at *15 (E.D. Wash. Dec. 1, 2000).

320. The "totality of the circumstances" is not the only phrase in the VRA which shines critical light on the practice of criminal disenfranchisement. In amending the VRA in 1982, the Senate Judiciary Committee described some of the factors that courts may take into account when determining whether "the totality of the circumstances" shows a causal relationship between a voting restriction and discriminatory impacts. A few of these factors loom large in the context of criminal disenfranchisement: "the extent of any history of official discrimination in the state;" "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process;" "whether political campaigns have been characterized by overt or subtle racial appeals;" and "whether the policy underlying the state['s] use of such voting qualification . . . is tenuous." S. REP. NO. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. (96 Stat.) 206-07.

321. KEYSSAR, *supra* note 35, at 307 (noting figures showing wide disparities in arrest rates and sentencing); *see also* Shapiro, *supra* note 2, at 556-57 (summarizing state and national figures indicating that "minorities make up an inordinately large percentage of all convicted offenders and, consequently, of those who are denied the right to vote"); *Id.* at 558 n.118 (noting study showing that as of 1990, "7.9% of the black adult population and 1.7% of the white adult population were on probation, in jail, in prison, or on parole"). In almost every state, most of these people will lose the right to vote, so this figure means that blacks are up to five times as likely as whites to be disenfranchised because of a criminal conviction. *See* COLE, *supra* note 278, at 10 (linking race- and class-based discrimination in criminal justice to "constitutional rules governing police practices, the provision of legal representation to those who cannot afford it, jury discrimination, disparities in sentencing, and legal challenges to discrimination in the criminal justice system"); FRIEDMAN, *supra* note 164, at 378 (summarizing figures showing increasingly disproportionate incarceration rates in the twentieth century); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988) (documenting racial bias in the criminal justice system).

322. For evidence of disparate targeting, see Harvey, *supra* note 6, at 1155-57; on disparate treatment, see *id*. at 1157-59. The Leadership Conference on Civil Rights (LCCR), a coalition of 180 civil rights groups, found that although blacks and whites have

Kennedy points out, the war on drugs largely explains why "the incarceration rate among blacks has exponentially superseded the rate among whites."[323] The U.S. Government "estimates that 14% of illegal drug users are black, yet blacks make up 55% of those convicted and 74% of those sentenced for drug possession."[324] The U.S. Sentencing Commission estimates that 65% of crack cocaine users are white, but 90% of those prosecuted for crack crimes in federal court are black—and are subject to greater penalties than are those convicted of crimes involving cocaine in the powder form.[325] One authority calculates that one-half of young black men in some cities are under the supervision of the criminal justice system at any one time, two-thirds will be arrested by age thirty, and more are in prison than in college.[326] In light of such statistics, David

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approximately the same rate of drug use, blacks constitute more than a third of those arrested for drug offenses and fifty-nine percent of those convicted of drug offenses. *See* Leadership Conference on Civil Rights, *Justice on Trial: Racial Disparities in the American Criminal Justice System*, at 7, *available at* http://www.civilrights.org/images/justice.pdf (last visited Oct. 29, 2002); *see also* Michael A. Fletcher, *Criminal Justice Disparities Cited*, WASH. POST, May 4, 2000, at A2 (summarizing LCCR report). Over a recent three-year period, the federal government charged 2,400 persons with federal crack cocaine violations—*none* of whom were white. COLE, *supra* note 278, at 160. Another recent study found that when white and black youths commit similar offenses, "minority youngsters are more likely to be arrested; when arrested, more likely to be jailed or sent to court; more likely to be convicted; and when convicted, more likely to be given longer prison terms." William Raspberry, *In a Troubled System*, WASH. POST, Apr. 28, 2000, at A31. Such systemic bias should trigger deep concern among Americans of various ideological persuasions. As Lincoln Caplan argues, because American law "embodies the country's ideals about even-handedness, tolerance, and inclusiveness, bias associated with [legal] institutions is especially telling." LINCOLN CAPLAN, UP AGAINST THE LAW: AFFIRMATIVE ACTION AND THE SUPREME COURT 39 (1997).

323. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 351 (1997). Conservative economist Milton Friedman argues that U.S. drug laws have "racist" effects because of their disproportionate impacts on blacks. *See* Milton Friedman, *There's No Justice in the War on Drugs*, N.Y. TIMES, Jan. 11, 1998, Op-Ed at 19.

324. Cole, *supra* note 186.

325. *See* COLE, *supra* note 278, at 142. The crack/powder cocaine sentencing disparity highlights the importance to criminal disenfranchisement of the mundane, all-but-invisible statutory activity of classifying crimes. Felony conviction triggers disenfranchisement in most states, but the list of crimes classified as felonious varies considerably among states and is poorly understood by the public. In the twentieth century, many new offenses have been classified as felonies, dramatically broadening the effects of disenfranchisement provisions. Many of these crimes are not particularly "infamous," especially in comparison with the offenses that were felonies at common law when the Fourteenth Amendment was added to the Constitution. *See* Demleitner, *supra* note 4, at 780 n.139. Typical nineteenth-century common-law felonies were "murder, manslaughter, mayhem, rape, arson, robbery, burglary, and larceny." *Id.* (quoting *Otsuka*, 414 P.2d at 421 n.10).

326. Paul Butler, *Racially-Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 690-91 (1995). Many black Americans may feel that they live not in a democracy but in a "police state." *Id.* at 691. Elsewhere, Butler cites criminologist Jerome Miller's calculation that "if the incarceration of black men continues

Cole contends that "[t]aken together, the drug war and felony disenfranchisement have done more to turn away black voters than anything since the poll tax."[327]

The public is increasingly aware of bias in the criminal justice system, and today Americans of all races believe that whites and blacks are treated differently by the police.[328] What is less well understood is that the drug war's disparities are only the latest chapter in a long history. Free black convicts received more severe punishments than whites as early as the colonial period;[329] differential treatment for similar infractions continued up to the Civil War, with the most degrading punishments reserved for blacks.[330] Arguing for the Equal Protection Clause of the Fourteenth Amendment, Republican Thaddeus Stevens declared that it would ensure that "[w]hatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree."[331] The infamous postwar "Black Codes," however, assured that the Amendment would have no such effect in the South. The Codes

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to increase at the current rate, the majority of African American men between the ages of 18 and 40 will be incarcerated by the year 2010." Paul Butler, *Retribution, for Liberals* 46 UCLA L. REV. 1873, 1874 n.1 (1999). In a few cities, "the percentage of young black men under criminal supervision [already] exceeds 50%." *Id.*

The incarceration of urban citizens often hurts those very cities politically in an indirect but important way. Even as they are barred from voting, inmates are counted by the census as residents of the towns in which they are incarcerated. The rural areas where prisons are predominantly located, therefore, are often eligible to receive increased federal funds—particularly under programs which means-test, since inmates have very low incomes. Those increases often come at the expense of urban areas. *See* Lani Guinier, *Locking Up the Vote*, AM. PROSPECT, Mar. 12-26, 2001, at 30. Researcher Peter Wagner finds that counting inmates this way tilts political power in New York State towards Republican legislators from rural, northern districts. *See* Jonathan Tilove, *Minority Prison Inmates Skew Local Populations as States Redistrict*, NEWHOUSE NEWS SERVICE, Mar. 11, 2002, *available at* LEXIS, Newhouse News Service.

327. Cole, *supra* note 186. One study finds that those arrested for drug offenses "were five times as likely to be sent to prison in 1992 as in 1980." *See* FELLNER & MAUER, *supra* note 2, at 11.

328. *See* Leadership Conference on Civil Rights, *supra* note 322, at 10 (arguing that "both profiling and police misconduct contribute to the belief—shared to one degree or another by Americans of all races and ethnicities—that the police do not treat black and Hispanic Americans in the same manner as they do white Americans").

329. KLINKNER & SMITH, *supra* note 18, at 12 (finding that colonial [f]ree blacks . . . had to endure higher taxes and more severe criminal punishments than whites"); *see also* MICHAEL GOLDFIELD, THE COLOR OF POLITICS 351 (1997).

330. By the 1850s, one authority observed, "the whipping post became the Negro's exclusive preserve." IRA BERLIN, SLAVES WITHOUT MASTERS 334 (1974). Indeed, it was seen as so improper for whites to be whipped—"a white man's nature revolts at such degrading punishment," one newspaper opined—"that a Kentucky jury awarded six hundred dollars to a white thief who had been so punished." *Id.*

331. FARBER & SHERRY, *supra* note 103, at 310. Another speaker, Jacob Howard, reinforces the point, arguing of the Amendment that "it prohibits the hanging of a black man for a crime for which the white man is not to be hanged." *Id.* at 314.

declared in some states that all previous penal laws specifying crimes for slaves were now in force for free blacks.[332]

Such bias has not been confined to the penal system itself. In examining criminal disenfranchisement's survival in the United States, we must consider the possibility that the policy draws part of its support from white Americans' assumptions about race and crime. To put it bluntly, some white Americans may be less protective of the rights of criminals in part because they imagine those criminals to be black. As numerous authors have pointed out, crime is a key "racial codeword"[333] in American politics, one which elicits racially-charged responses from the public. Opinion polls repeatedly find that many Americans believe blacks are more prone to commit violent and criminal acts than whites,[334] and the

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332. FONER, *supra* note 107, at 200. Many crimes were specific to the "free negro" alone, such as "mischief" and "insulting gestures." *Id.* at 200; *see also* DAVID M. OSHINSKY, WORSE THAN SLAVERY 21 (1996).

333. DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS 227 (1996). "Crime," writes Angela Y. Davis, is "one of the masquerades behind which 'race,' with all its menacing ideological complexity, mobilizes old public fears *and* creates new ones." Angela Y. Davis, *Race and Criminalization: Black Americans and the Punishment Industry*, *in* THE HOUSE THAT RACE BUILT 264, 266 (Wahneema Lubiano ed., 1997). "[T]he racialized figure of the criminal," Davis writes, "has come to represent the most menacing enemy of 'American society.'" *Id*. at 270. Whether its origins are economic or sexual, Davis contends, whites' fear of blacks "is rapidly gravitating toward and being grounded in a fear of crime." *Id*. at 269. Thomas Byrne Edsall and Mary Edsall find that in American politics "crime" has become a "shorthand signal, to a crucial group of white voters . . . evoking powerful ideas about authority, status, morality, self-control, and race." Thomas Byrne Edsall & Mary D. Edsall, *Race*, ATLANTIC MONTHLY, May 1991, at 53, 77. Political psychologists studying modern or "symbolic" racism, meanwhile, have documented links between white males and more punitive attitudes toward crime. *See, e.g*., David O. Sears et al., *Self-Interest vs. Symbolic Politics in Policy Attitudes and Presidential Voting*, 74 AM. POL. SCI. REV. 670, 674, 677. For an introduction to the "symbolic racism" theory, see David O. Sears, *Symbolic Racism*, *in* ELIMINATING RACISM 53-84 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988).

In his *Second Treastise*, Locke defended slavery by arguing that a man is justly enslaved who has "forfeited his own life" by committing "some act that deserves death". *See* LOCKE, *supra* note 15, at § 23, 17. While Locke did not use racial terms here, we can safely assume that Locke understood slavery's racial dimension. At least two decades before he wrote the *Second Treastise*, Locke held "substantial investments in such things as the raw silk trade, the Royal Africa Company (the slave trade), and the Bahama Adventures." C.B. Macpherson, *Editor's Introduction* to LOCKE, *supra* note 15, at *x*. To some degree race and crime were linked in the white imagination as early as the seventeenth century. Whether or not Locke intended such a connection, his defense of slavery as punishment for crime was quickly adopted in early America, where debates over slavery occurred in a fully racialized context. *See* BAILYN, *supra* note 17, at 235 (finding that some early American defenders of slavery did "appeal to the Lockean justification" for enslaving Africans, but that "[t]he reality of plantation life was too harsh for such fictions").

334. Polling over 1300 Americans between 1988 and 1991, the General Social Survey asked respondents if they believed whites and blacks, respectively, "tend to be

"Willie Horton" political advertisements[335] were only the most recent successful exploitation of that connection by twentieth-century politicians.[336] In examining voting restrictions in the "totality of the

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violence-prone." *See* Inter-University Consortium for Political and Soc. Research, *General Social Survey*, *at* http://www.icpsr.umich.edu/GSS/rnd1998/merged/cdbk/violblks.htm (last modified May 1, 2002) [hereinafter *GSS Survey, Black Violence*]. Respondents answered on a seven-point scale: if they strongly agreed that blacks, for example, are "violence-prone," they checked one; if they thought blacks are "not violence prone," they checked seven. *See id.* Not surprisingly, four was the most common response given in regard to both races: about 31% of respondents, who gave numerical responses, checked the middle value when asked about blacks, and about forty-four percent did so when asked about whites. *See id.*; Inter-University Consortium for Political and Soc. Research, *General Social Survey*, *at* http://www.icpsr.umich.edu/GSS/rnd1998/merged/cdbk/violwhts.htm (last modified May 1, 2002) [hereinafter *GSS Survey, White Violence*]. But the responses at the ends of the scale are striking. When asked about blacks, over half of respondents—about fifty-three percent—checked one, two, or three—the "violent" end of the scale—while only about sixteen checked five, six, or seven—the "not violent" end of the scale. *See GSS Survey*, *Black Violence.* At the extremes, the numbers one and two tallied about twenty-six percent of responses, while six and seven received only seven percent. *See id.* When asked about whites, however, only about nineteen percent checked the three numbers on the "violent" half of the scale, and thirty-eight percent chose the three highest numbers, at the "not violent" end. *See GSS Survey, White Violence*. This time, the numbers one and two tallied about six percent of responses, while six and seven received twenty-one percent. *Id.*; *see also* CARL T. ROWAN, THE COMING RACE WAR IN AMERICA 187 (1996) (referring to a 1993 poll which found that one-third of Americans agreed with the statement that blacks "were more likely to commit crime and violence"); Sam Vincent Meddis, *In a Dark Alley, Most Feared Face is a Teen's*, USA TODAY, Oct. 29, 1993, at 6A (reporting a USA TODAY/CNN/Gallup poll finding that when asked "which group is more likely to commit crimes than others in society," thirty-seven percent answered "blacks" while only six percent answered "whites").

335. The ads, which attacked the criminal justice policies of Massachusetts Governor and 1988 Democratic Presidential nominee Michael Dukakis, included images of convicts leaving prison through a revolving turnstile, as well as mug shots of a young black man who had committed rape and assault while on furlough. As Kathleen Hall Jamieson reports, studies showed clearly that the advertisements "elicit[ed] racially based fear." KATHLEEN HALL JAMIESON, DIRTY POLITICS 34 (1992). In focus groups, subjects were asked to remember the race or ethnicity of prisoners depicted in the ad. *Id.* "[O]nly two of the 'prisoners' [in the ad] are identifiably black," but 59.9% of the subjects reported remembering that most of them were black. *Id.* "When asked to write out "everything 'you know about William Horton,'" almost every respondent included the fact that Horton was black in their description; almost all also noted that the woman he raped was white. *Id.* Linking the Willie Horton episode to the history of the many "devils" in American political history, historian Garry Wills argues that the "Black Rapist" Willie Horton came to symbolize the "criminal devil" for voters. *See* GARRY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 73-75 (1990).

336. In the early twentieth century, leaders such as Theodore Roosevelt argued that blacks were more susceptible to "vice and criminality of every kind," and called for "relentless and unceasing warfare against lawbreaking black men." Theodore Roosevelt, The Negro Problem, Address Before the Republican Club of the City of New York (Feb. 13, 1905), *in* 18 THE WORKS OF THEODORE ROOSEVELT 460, 465 (1925). Many prominent Southern white politicians of this period argued that black literacy and black criminality were "linked together like Siamese twins," as one put it. I. A. NEWBY, JIM CROW'S

circumstances," the U.S. Senate has suggested that courts may inquire into "whether political campaigns have been characterized by overt or subtle racial appeals."[337] Similarly, Americans need to ask whether felon disenfranchisement has endured in part because of whites' racialized perceptions of criminals.

Today's discrimination in criminal justice may be de facto rather than de jure, its causes "systemic and organic," rather than "the crude race-hate of older days."[338] But by adding a political prohibition to the other consequences of a felony conviction, disenfranchisement compounds and magnifies the effects of such systemic bias. In a time when even politically conservative white American politicians acknowledge that racial profiling is a serious problem,[339] it requires a certain capacity for denial to argue that criminal disenfranchisement is simply "not about race."[340]

3. INCARCERATION AND "INVOLUNTARY SERVITUDE"

The Thirteenth Amendment bars "slavery [and] involuntary servitude," but adds a caveat: "except as a punishment for crime whereof

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DEFENSE 178 (1965). More recently, Alabama governor and Presidential candidate George Wallace learned not to use "explicitly racist language of any kind" but to use discussions of "law and order" as "a kind of shorthand, a kind of code" for appealing to the racial resentment of whites. KINDER & SANDERS, *supra* note 333, at 227.

337. S. REP. NO. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. (96 Stat.) 177, 206.

338. FRIEDMAN, *supra* note 164, at 378-79; *see also* COLE, *supra* note 278, at 9. Cole does not find "that the disproportionate results of the criminal justice system are wholly attributable to racism, nor that the double standards are intentionally designed to harm members of minority groups and the poor." *Id.* Cole writes, "I think it more likely that the double standards have developed because they are convenient mechanisms for avoiding hard questions about competing interests, and it is human nature to avoid hard questions." *Id*. Another study finds that "a 'self-fulfilling' set of assumptions about the criminality of blacks and Hispanics influences the decisions of police, prosecutors, and judges in a way that accounts for" disparities in criminal justice statistics. *See* Fletcher, *supra* note 322.

339. *See 2nd Presidential Debate Between Gov. Bush and Vice President Gore*, N.Y. TIMES, Oct. 12, 2000, at A22. In the debate, then-Texas Governor George W. Bush declared "we ought to do everything we can to end racial profiling." Bush also said "there is [sic] other forms of racial profiling that goes on in America. Arab Americans are racially profiled on what's called secret evidence. People are stopped. And we got to do something about that." *Id. See also Attorney General Seeks End to Racial Profiling*, N.Y. TIMES, Mar. 2, 2001, at A20 (reporting that Bush administration Attorney General John Ashcroft "urged Congress . . . to take up legislation that would end racial profiling"); *Excerpts from Senate Hearing on Ashcroft Nomination for Attorney General*, N.Y. TIMES, Jan. 17, 2001, at A18 (noting Republican Senator Orrin Hatch of Utah praised Republican candidate John Ashcroft of Missouri for holding "the first hearings ever on the issue of racial profiling").

340. *See* Phillips, *supra* note 38 (quoting Massachusetts lawmaker Francis Marini).

the party shall have been duly convicted."[341] The Fifteenth Amendment, meanwhile, declares that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[342] If incarceration is equivalent to the "servitude" described in the Thirteenth Amendment—an unconventional but not implausible reading, since the Amendment clearly makes this exception so that convicts could be forced to work—can states continue to deny the vote to those who have left that "previous condition?"[343]

This claim probably has a very dim future in the courtroom,[344] but it highlights an important point: even for free blacks, incarceration and slavery were virtually indistinguishable for much of American history. Before the Civil War, white officials sold free blacks into terms of servitude—sometimes at auction—for petty crimes and unpaid jail fees.[345] In 1822, Virginia state legislators found the penitentiary overcrowded and the treasury low, and solved both problems by "order[ing] free [black] felons" to be "whipped and sold into slavery."[346] Maryland and Delaware temporarily adopted the policy, often selling black convicts into years of service out of the state; Maryland later "ordered criminal freemen banished upon pain of enslavement when their confinement was complete."[347] On the eve of the Civil War, Virginia began leasing black convicts to canal and railroad companies by the year.[348]

The connection between slavery and black inmate labor only became closer as the convict leasing system spread after the war. One historian describes the system as "part of a continuum of forced labor in the New South."[349] Another writes that "taking a leaf from the slave hiring system, [these programs] permitted the lease of prisoners for unsupervised use

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341. U.S. CONST. amend. XIII, § 1.

342. U.S. CONST. amend. XV, § 1.

343. "Joining the two phrases," one authority writes, "generates a plausible reading that the Fifteenth Amendment, on its face, prohibits depriving felons of their voting rights simply because they were subject to 'involuntary servitude' as punishment for their crime." Fletcher, *supra* note 6, at 1904.

344. Ex-offender disenfranchisement has been unsuccessfully challenged on this ground at least once. *See* People v. DeStefano, 212 N.E.2d 357, 361-62 (Ill. App. Ct. 1965). On its face, this does seem a difficult case. Ex-offenders, after all, are not deprived of the vote because they were forced to labor while incarcerated, but because of the conduct which led to their incarceration. One critic of disenfranchisement calls this argument for a "creative, literal reading" of the Fifteenth Amendment "radical," but argues that *Richardson*'s "'plain reading' of section 2 of the Fourteenth Amendment" offers a precedent for the approach. *See* Shapiro, *supra* note 2, at 565 n.149.

345. *See* BERLIN, *supra* note 330, at 334.

346. *Id*. at 183. Berlin writes, "[s]egregation, black codes, the convict-lease system, and the various forms of peonage usually associated with the post bellum South all victimized the antebellum free Negro caste." *Id*. at xiv.

347. *Id.* at 183.

348. *Id.* at 323-24.

349. EDWARD L. AYERS, VENGEANCE AND JUSTICE 191 (1984).

outside the prison walls."[350] An Alabama warden used well-known terms from the slave economy when he advertised "three grades of prisoners" for lease: "full-hands," "medium-hands," and "dead-hands."[351] Authorities would be especially tough on black crime "when a busy season was approaching" and labor was needed,[352] and some states clearly adjusted their penal codes with the intent of building up convict-labor pools.[353] W.E.B. DuBois wrote that the system made blacks "slaves in everything but name,"[354] since those who left their old plantations to seek better work could be arrested for vagrancy, "whipped, and sold into slavery."[355] Sir George Campbell, traveling the South in 1879, wrote of the convict-leasing system, "[t]his does seem simply a return to another form of slavery."[356] Indeed, one authority writes that before convict leasing ended, "a generation of black prisoners would suffer and die under conditions far worse than anything they had ever experienced as slaves."[357] Modern penal conditions, of course, are far more humane. But sensitivity to this history should spur Americans towards abolishing a policy which evokes memories of the connections between slavery and punishment, and which condemns a disproportionate number of blacks to second-class citizenship.

4. RETURN TO *RICHARDSON*: RACE AND SECTION 2 OF THE FOURTEENTH AMENDMENT

The Supreme Court has held that the constitutionality of criminal disenfranchisement in the United States effectively rests on a phrase

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350. WILLIAM COHEN, AT FREEDOM'S EDGE 221 (1991).

351. BLAKE MCKELVEY, AMERICAN PRISONS 202-03 (1977). McKelvey writes that "in place of the religious and educational ideals that were inspiring the development of the adult reformatories to the North, the old slave system was supplying traditions and customs to the penology of the South." *Id.* at 181. Arkansas, Florida, Georgia, Louisiana, Mississippi, and Tennessee all relied heavily on leasing systems. *Id.* at 199-202.

352. W. KLOOSTERBOER, INVOLUNTARY LABOUR SINCE THE ABOLITION OF SLAVERY 62 (1960). ("The authorities involved would more often than not be related in some way or other to the big planters, and their salaries were paid out from the fines.")

353. COHEN, *supra* note 350, at 225. Mississippi's "pig law," for example, converted most petty thefts of property or livestock into grand larceny, effectively quintupling the number of convicts in just three years. *Id.* at 225-26.

354. W.E.B. DUBOIS, BLACK RECONSTRUCTION 167 (The Free Press 1998) (1935). DuBois notes that the horrible conditions under which black prisoners worked explains why many black Congressmen worked on bills to ameliorate prison conditions during Reconstruction. *Id.* at 506.

355. *Id.* at 167.

356. *Id.* at 227. In 1871, a Virginia judge held that "during his term of service in the penitentiary, [a prisoner] is in a state of penal servitude to the State. . . . He is for the time being the slave of the State." Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (Va. 1871).

357. *See* OSHINSKY, *supra* note 332, at 35. Oshinsky calls the system the "American Siberia." *Id*. at 55.

extracted from Section 2 of the Fourteenth Amendment.[358] It is important to remember here that Section 2 was enacted with a clear racial purpose: to assess a penalty should resurgent Southern whites disenfranchise black men, while permitting them to do so. The "original understanding" of Section 2, one authority writes, was to confront Southern states "with a choice between enfranchising the blacks and losing almost half their votes in the House of Representatives and the electoral college."[359] Another writes that Section 2 was designed "indirectly to help Negroes in the South without antagonizing whites in the North,"[360] many of whom were unwilling to confront racial discrimination directly at the national level. Abolitionist Wendell Phillips denounced the entire amendment as a "fatal and total surrender" because "it implicitly acknowledged the right of states to limit voting because of race."[361]

The Supreme Court declared implicitly in *Richardson* that this "original understanding" of Section 2 is constitutionally irrelevant. For legal challenges, that is a significant obstacle. But outside the courtroom, the knowledge that a voting restriction which has racially discriminatory effects today is permissible only because of a passage in our Constitution

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358. *See Richardson*, 418 U.S. at 54; *supra* note 91 and accompanying text.

359. ELLIOTT, *supra* note 68, at 57. Eric Foner writes that because compelling all states to enfranchise blacks "did not command majority support, the search began for alternatives." FONER, *supra* note 107, at 252. Section 2 emerged from that search as a way to leave voting requirements to the states, "while indirectly promoting black suffrage." *Id.*

360. WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 25 (1965); *see also* MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH 116 (2001) (arguing that the second section of the Fourteenth Amendment "offered greater representation if the states acted with foresight and opted to enfranchise all or a large part of their male African American population"). In *Reese*, the Supreme Court observed that "the Fifteenth Amendment [did] not confer the right of suffrage," but merely prohibited exclusion on racial grounds. 92 U.S. at 217. In his dissent, Justice Hunt argued that the second section of the Fourteenth Amendment did not guarantee the franchise to "the colored race . . . its exclusion was permitted." *Id.* at 247 (Hunt, J., dissenting).

361. FONER, *supra* note 107, at 255. Charles Sumner calls Section 2 a "compromise with wrong" for permitting racial limits on the suffrage. *Id*. at 253. The radical Republican Thaddeus Stevens, however, argued hopefully that "[t]he representation clause . . . would either compel the South to enfranchise blacks or 'keep [it] forever in a hopeless minority in the national Government.'" *Id.* at 254 (alteration in original). Indeed, one Southern newspaper "calculated [that] the region would sacrifice one third of its House membership." *Id*. at 259. White Southerners, however, quickly saw that Section 2 was not a difficult obstacle to overcome. As a Virginia legislator told Congress, Southern whites would simply employ the "obvious policy" of using nonracial literacy or property qualifications, under which states would get "the benefit of the negro race in counting our population, and under which white people would do all the voting." *Id*. at 252.

which was written to allow states to bar blacks from voting ought to give us pause.[362]

At every turn, it seems, American criminal disenfranchisement law is marked by its association with the nation's discriminatory tradition. The most direct link, of course, is the manipulation of this facially-neutral voting restriction to prevent blacks from voting in the post-Reconstruction South. That episode alone would likely lead most Americans to reject a literacy test or poll tax were one proposed today, and awareness of it may induce many to abandon criminal disenfranchisement as well. But the policy's racial character has numerous other dimensions: in the language of the VRA, criminal disenfranchisement "interacts" with the long history of discrimination in American elections and criminal justice. Americans across the political spectrum now understand that while its causes may be murky, systemic discrimination exists in law enforcement and the administration of justice. One result is that blacks are far more likely than whites to lose the right to vote.

IV. CONCLUSION

The most effective challenge to criminal disenfranchisement begins by appreciating its foundations in the American liberal and republican traditions. A critical understanding of those traditions and their evolution over time should lead Americans today to conclude that the policy is incompatible with modern understandings of citizenship, voting, and criminal justice. The racist use of the practice in some states, combined with its links to discrimination in criminal justice and its racially-disproportionate impacts today, provoke and strengthen such a challenge.

The majority of Americans appear to support disenfranchising the incarcerated, but oppose barring convicts from voting indefinitely.[363]

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362. *But cf.* Harvey, *supra* note 6, at 1165 (arguing that because Section 2 was intended to *protect* black voting rights, it can be used to challenge criminal disenfranchisement where it "adversely affect[s] the black vote"). *Hunter*, meanwhile, reminds us that the Court is willing to strike down disenfranchisement law where it finds overwhelming proof that racial animus motivated the specific disenfranchisement provision. *See* 471 U.S. at 233.

363. Four recent polls revealed such opinions. A 1999 survey by the Joint Center for Political and Economic studies found that while majorities of all races supported disenfranchising those under sentence, seventy percent of whites and eighty-five percent of blacks opposed permanent disenfranshisement. *See* Mauer, *supra* note 28, at 251. A second national survey, conducted in 2001 by the Center for Survey Research and Analysis at the University of Connecticut, found that only about fifteen percent of respondents supported lifetime disenfranchisement of felons. *See* Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. (forthcoming Spring 2003). Poll results in a report published by the Open Society Institute indicate that sixty-eight percent of respondents either "strongly favor" or "somewhat favor" "restoring the right to vote and a driver's license to people with felony convictions after they have served their time and been released from prison."

Abolishing ex-offender disenfranchisement where it survives would be a step in the right direction. As this Article has demonstrated, however, the argument for temporary disenfranchisement shares far more common ground than is commonly acknowledged with the case for indefinite disenfranchisement, so challenges to lifetime restrictions should undercut the case for barring inmates from voting as well. Still, the apparent popularity of temporary disenfranchisement indicates that change will not be easy, whether through litigation[364] or legislation.[365] Perhaps many Americans feel that the nation's long history of disenfranchising criminals justifies the practice today. But that history alone is no reason to

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Fifteen percent were strongly opposed. *See* PETER D. HART RESEARCH ASSOCIATES, INC. FOR THE OPEN SOCIETY INSTITUTE, CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM: SUMMARY OF FINDINGS 14 (February 2002). And a telephone survey of 1000 adult Americans conducted by Harris Interactive in July 2002 found that eighty percent of respondents believe that all ex-felons should have the right to vote. When asked about particular categories of offenders, sixty-six percent supported allowing ex-felons convicted of violent crimes to vote, sixty-three percent supported allowing former inmates convicted of illegal trading of stocks to vote, and fifty-two percent supported allowing former inmates convicted of sex crimes to vote. *See* JEFF MANZA ET AL., SUMMARY: PUBLIC ATTITUDES TOWARDS FELON DISENFRANCHISEMENT IN THE UNITED STATES, prepared for The National Symposium on Felony Disenfranchisement, Sept. 30-Oct. 1, 2002, Washington, D.C. (on file with author).

Advocates for inmates' voting rights appear to be in the minority today, then, but they can take solace from the words of conservative economist Milton Friedman. In denouncing the Social Security program, Friedman writes "[t]rue, the number of citizens who regard compulsory old age insurance as a deprivation may be few, but the believer in freedom has never counted noses." MILTON FRIEDMAN, CAPITALISM AND FREEDOM 9 (Univ. of Chicago 1962).

364. One critic of criminal disenfranchisement calls for "vigorous litigation" to bring about a "judicial solution" to the problem of disenfranchisement. Shapiro, *supra* note 2, at 564-65. Shapiro observes that legislation protecting offenders' right to vote will be difficult "to enact in America's current climate of retributive zeal against convicted criminals." *Id.* at 564. Another authority comments that "[t]he outlook for pro-prisoner litigation appears inauspicious when set against the backdrop of a judiciary largely convinced that felon disenfranchisement is rational, permissible, and socially desirable." *One Person, No Vote*, *supra* note 9, at 1957. Meanwhile, those who pursue litigation should note that even in countries where this strategy for challenging criminal disenfranchisement has succeeded, public backlash has followed. *See* Dean E. Murphy, *S. African Court Unlocks Ballot Box to Prisoners*, L.A. TIMES, Apr. 9, 1999, at A5 (quoting South African Department of Corrections official calling South Africa's Constitutional Court decision that inmates retain voting rights "an April Fools' joke," as well as a politician who said "[i]t is just madness to suggest that somebody in a maximum security prison should be accorded the right to vote"); *Peres Criticizes Ruling that Allows Rabin's Assassin to Vote in Election*, WASH. POST, May 29, 1996, at A14 (then-Prime Minister of Israel Shimon Peres calls Israeli Supreme Court decision allowing incarcerated to vote "stupid law" and "scandalous"); *Striking Two Blows for the Good Guys*, TORONTO SUN, Apr. 29, 1998, at 15 (praising lower court decision limiting the number of prisoners who would be permitted to vote, and calling previous pro-inmate voting rights decisions "inane" and "judicial activism").

365. One survey of recent developments in criminal-disenfranchisement law concludes that campaigns to expand ex-felon voting rights in state legislatures have been "far more successful than litigation." *One Person, No Vote*, *supra* note 9, at 1958.

perpetuate the policy. As Tocqueville famously observed, the "philosophical method of the Americans" is "to accept tradition only as a means of information, and existing facts only as a lesson to be used in doing otherwise and doing better."[366] Meeting the promise of democratic politics, as the Progressive Herbert Croly argued almost two centuries later, means that we "must be prepared to sacrifice to that traditional vision even the traditional American ways of realizing it."[367]

Meanwhile, Americans with a genuine desire to protect and sustain their preferred "vision," whether liberal or republican, have more to fear from stasis than from change. That Locke or Montesquieu had kind words for a policy does not make it attractive today, and fidelity to their standards invites stagnation. "The art of free society," as philosopher Alfred North Whitehead eloquently wrote,

> consists in the maintenance of the symbolic code; and secondly in fearlessness of revision, to secure that the code serves those purposes which satisfy an enlightened reason. Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows.[368]

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366. 2 TOCQUEVILLE, *supra* note 130, at 3. Tocqueville also remarked, however, that "once the Americans have taken up an idea, whether it be well or ill founded, nothing is more difficult than to eradicate it from their minds." 1 TOCQUEVILLE, *supra* note 130, at 188.

367. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 5 (Arthur M. Schlesinger ed., 1965) (1909). Echoing Croly, Alexander Keyssar urges us to understand democracy as "a project, a goal . . . an ideal that cannot be fully realized but always can be pursued." KEYSSAR, *supra* note 35, at 323.

368. MERRILL PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND 332 (1960). In another context, George Sabine and Thomas Thorson observe that when the principles of a political philosophy become so influential as to be taken for granted, those principles "become retarded in their speculative development." GEORGE H. SABINE & THOMAS L. THORSON, A HISTORY OF POLITICAL THEORY 608 (4th ed. 1973).

Similarly, veneration for the Constitution and respect for the Supreme Court are not reasons to maintain the practice. Even if the Court was correct to hold in *Richardson* that the Constitution *permits* criminal disenfranchisement, the document does not *require* the policy. Furthermore, as Sanford Levinson argues, "it is crucial to the maintenance of a constitutional order that [citizens feel] obligated to be conscientious adjudicators" of constitutional meaning, rather than mechanically deferring to courts. LEVINSON, *supra* note 143, at 50. Cass Sunstein calls the American constitutional tradition's "remarkable lack of complacency and . . . extraordinary capacity for self-revision" its most distinctive features, and urges citizens to reject "status quo neutrality" and "help give content to constitutional guarantees." THE PARTIAL CONSTITUTION, *supra* note 17, at 354, 355.

Finally, political scientist Wayne D. Moore reminds us that essential questions of citizenship "must remain radically open-ended if the concept of popular sovereignty is not to be entirely a fiction. For it to be made real in practice, those composing the polity must be capable of being authors of constitutional norms, not only subjects." WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE 286 (1996).

A profound revision of American criminal disenfranchisement law would constitute a renewal, not an abandonment, of our ideological symbolic code. Confirming that offenders remain members of the polity would reinforce our commitment to protecting fundamental rights—the rights of any person, no matter how much contempt they may inspire in the majority—and simultaneously express our confidence in the robust, transformative power of the American civic ritual.